JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1947.

NEWNHAM ARTHUR WORLEY	—	Chief Justice.
JOSEPH ALEXANDER LUCKHOO	—	First Puisne Judge. Acted as Chief Justice until the arrival of the Chief Justice in the Colony.
FREDERICK MALCOLM BOLAND	—	Second Puisne Judge. Acted as First Puisne Judge until the arrival of the Chief Justice in the Colony.
DONALD EDWARD JACKSON	—	Acted as Second Puisne Judge until the arrival of the Chief Justice in the Colony and during the absence on leave of the Second Puisne Judge.
		Acted as additional Judge.

WEST INDIAN COURT OF APPEAL.

As at present, no reports of decisions of the West Indian Court of Appeal are published separately, the decisions in that Court are, so far as they are available, included in the British Guiana Law Reports.

METHOD OF CITATION.

These Reports will be cited as (1947) L.R.B.G.

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CASES

DETERMINED IN THE

Supreme Court of British Guiana.

CALEB GLASGOW,

Plaintiff,

v.

RICHARD EMANUEL,

Defendant.

1945. No. 376.—DEMERARA.

BEFORE LUCKHOO, C.J. (ACTING):

1946. DECEMBER 18, 19, 23; 1947. JANUARY 3.

Specific performance—Contract for lease of land—Not in writing—Action to enforce contract—Defence—Civil Law of British Guiana Ordinance, cap. 7,s.3. *proviso (d)—Contract enforceable if part performance proved—Part performance—What constitutes.*

Statute of Frauds—Lease of land—Contract for—Not in writing—Action to enforce contract—Defence—Civil Law of British Guiana Ordinance, cap. 7.s.3 *proviso (d)—Part performance—Injustice if contract not performed—Contract enforced.*

In order to withdraw a contract from the operation of proviso (d) to section 3 of the Civil Law of British Guiana Ordinance, Chapter 7, the following circumstances must occur:

(a) the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title:
(b) they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing:
(c) the contract to which they refer must be such as in its own nature is enforceable by the court; and
(d) there must be proper parol evidence of the contract which is let in by the acts of that performance.

A.D. was in possession of a certain half lot of land in the city of Georgetown, but had no legal title therefor. The plaintiff was the owner of two buildings which were on two portions of the half lot which portions he had leased from A.D. It was a term of the leases that the plaintiff was, in addition to the rent reserved thereby, to pay his proportionate part of the taxes and rates levied on the buildings on the half lot. A.D. desired to make a gift of the land to the defendant, and the defendant intended to get title for the half-lot by way of a sale at execution for non-payment of taxes or rates due to the Mayor and Town Council of Georgetown. The half-lot of land was advertised in the Gazette for sale at execution on the 12th September 1944 for non-payment of the first moiety of taxes for the year 1944. The plaintiff had already paid to The Mayor and Town Council his proper proportion of the first moiety of tax payable in respect of the year 1944. The plaintiff, by his agents, attended

the sale at execution but did nothing to prevent the defendant from becoming the purchaser of the half-lot of land with the buildings thereon.

The plaintiff claimed that he allowed the defendant to purchase the half-lot of land with the buildings thereon (including the plaintiff's two buildings) on the faith of a verbal promise by the defendant that he would acknowledge the ownership by the plaintiff of his two buildings, and lease to the plaintiff, for a term of 5 years from the date of such purchase, the two portions of land occupied by the plaintiff, at the same rent as was charged prior to the purchase by the defendant.

Such a verbal promise was in fact made, but the defendant pleaded that as the promise was not in writing it was not enforceable by action.

Held that the act of the plaintiff in allowing his two buildings to be seized in execution and to be sold and purchased by the defendant after due advertisement in the Gazette for non-payment of taxes, the proportionate part for which he was responsible having already been paid by him, was an act which was not only referable to a contract such as that alleged but to no other title.

United States of America v. *Motor Trucks Limited* (1924) A.C. 196, applied.

The requirements of proviso (d) to section 3 of the Civil Law of British Guiana Ordinance, Chapter 7, are satisfied if the contract can be proved by some writing signed by the defendant, and the date of the writing is immaterial provided it was in existence before the commencement of the action to enforce the contract.

Rochefoucauld v. Bowstead (1897) 1 Ch.206, applied.

Question of frustration of contract considered.

Action by the plaintiff Caleb Glasgow against the defendant Richard Emanuel for an order compelling him to execute an agreement of lease in his favour in relation to the west half of lot 44 Alberttown, Georgetown. The facts and arguments sufficiently appear from the judgment.

A. J. Parkes, for the plaintiff.

J. L. Wills, for the defendant.

Cur. adv. vult.

LUCKHOO, C.J. (ACTING):

Several issues have been raised in this action and consequent on certain findings of fact, many interesting points of law have arisen for determination.

The plaintiff's claim is for an order compelling the defendant to execute an agreement of lease in the terms contained in a written document dated the 6th day of May, 1944, and identified herein as Exhibit A.

The events leading up to the execution of that document are not in dispute and may briefly be recorded as follows: —

Angelina Douglas, the mother-in-law of the defendant, inherited through her late husband Richard Douglas the west half of lot number 44 (forty-four) Fourth Street in Alberttown district, in the city of Georgetown. Prior to the death of Richard Douglas six years ago, the plaintiff had a yearly lease of two pieces of land for two buildings situate on the said lot one of which buildings he owned for the past 22 years. The period of one of the leases was from the 1st day of January to the 31st day of December, and the other from the 11th day of March to the 10th day of March following in each year.

One Alice Harris was the lessee of a third piece of land on which her building is situate. There is a fourth building on the lot belonging to the defendant, erected in the year 1942 after the death of Richard Douglas. The lessees apart from the actual amount of the rent to be paid to their lessor, agreed to pay their respective proportionate part of the taxes and rates levied on their ownership of the buildings. Some years after the death of the said Richard Douglas, Angelina Douglas being desirous of benefitting her son-in-law, the defendant, and of having title vested in him of her interest in the said lot, agreed in the month of December, 1943, to make him a gift of the same, as well as to succeed her as the lessors of the leases in favour of the plaintiff and Alice Harris. Thereafter learned Counsel who now appears for the defendant was entrusted with the preparation of an agreement to give effectuation to the desire of Angelina Douglas and at the same time to safeguard the interest of the lessees. Consequently a memorandum of agreement was drawn up and executed on the 6th day of May, 1944 by and between Angelina Douglas called "the vendor", Richard Emanuel (the defendant) called "the purchaser", Caleb Glasgow (the plaintiff) and Alice Harris called "the lessees", in which the lessees agreed to permit their three buildings on the lot to be seized in execution by the local authority (Mayor and Town Council) for non-payment of the taxes and rates payable for the year ending December, 1943, and to be sold at execution so that the defendant might acquire the whole of the west half of lot number 44 (forty-four) Fourth Street with all the buildings and erections thereon and receive title therefor, the defendant however undertaking in consideration of the lessees refraining from frustrating the said sale at execution in any of the manners set out in the said agreement to acknowledge their ownership of the three buildings, to divest himself of the ownership thereof and to transfer the said buildings to the lessees. The defendant also agreed on the acquisition of the said lot to enter immediately into a contract of lease with each of the lessees at such lessee's request in respect of such lessee's particular house spot or spots of land for a term of five years from *the date* of *such acquisition* with a right of renewal for a similar period at the same rent which the lessees were paying at the time of the said agreement.

The said lot and buildings were not sold on the day mentioned in the said agreement but the unpaid rates and taxes were paid and the property released and withdrawn from such sale, in accordance with the terms contained in paragraph 2 of the said agreement. The sale was not withdrawn by reason of any default or breach of the conditions by any one of the parties to the agreement.

In one of the recitals of the agreement it was there clearly stated that the lessees had previously paid to the vendor their proportionate share of the rates and taxes for non-payment of which by the vendor to the local authority the lands and buildings were seized in execution.

On the 4th day of July, 1944, the plaintiff paid to the Mayor and Town Council the sum of $10.22 on account of the first moiety of the Tax payable on the said lot.

The lot with all the buildings thereon was again seized in execution and advertised for sale on the 12th day of September, 1944, and it could be fairly presumed from the circumstances that the balance due for taxes and rates for the 1st moiety for 1944, was left unpaid for the purpose of giving the defendant another opportunity to obtain title in his own name of the said lot. At the sale on the 12th September, the defendant became the purchaser and transport No. 1232 of the 16th day of October, 1944, of the west half of lot number 44 Fourth Street, Alberttown, with the buildings and erections thereon was passed to and in his favour. Briefly put, what should have been effectuated on the 9th day of May was accomplished on the 12th day of September, all the parties to the agreement in the meantime retaining their status quo.

On the 11th day of January, 1945, the defendant served on the plaintiff a notice requesting vacant possession, by the 31st day of December, 1945, of the portions of land on which the two buildings are situate. Apparently the plaintiff did not think fit to reply to the notice, but instead filed a Writ of Summons claiming the relief above stated. These are the undisputed facts.

It is, however, alleged by the plaintiff that in the month of August 1944, the defendant verbally proposed to him that they should carry out and perform all the terms and conditions contained in the written agreement of the 6th day of May to which he the plaintiff agreed, by reason thereof he refrained from taking steps to pay the balance of the 1st moiety of the Taxes for 1944 and so prevent the sale from taking place, and allowed his two buildings to be sold at execution and to be purchased by the defendant on the 12th day of September. That on the afternoon of the said day the defendant informed him that his lease would begin from that time, and he (the defendant) in pursuance of such arrangement took measurements of that part of the lot which the plaintiff's buildings occupy. In those circumstances he alleges that it will be a fraud on part of the defendant to refuse to execute in his favour a lease on the terms contained in the agreement of the 6th May, 1944.

The defendant on the other hand alleged that there was never any such verbal agreement in the month of August, nor did he ever agree to any such proposal. That the alleged conversation on the afternoon of the 12th September never took place nor were any measurements taken by him. He asserts that the property (lot and buildings) having been advertised for sale at execution for town taxes, he attended and purchased the same, such purchase not being with the permission of the plaintiff or any one else, save that he has always admitted to be the property of the plaintiff two of the buildings.

Upon the undisputed facts set out above and the evidence led by the plaintiff and the defendant in support of their respective

allegations the following issues emerge the determination of which depends upon my findings on the allegations and counter allegations set out above.

The plaintiff contends that he is entitled to specific performance of the oral agreement entered into in the month of August 1944 on the ground (a) notwithstanding the fact that it is not in writing, it is still enforceable at it is evidenced in writing and refers to the written agreement of the 6th day of May, 1944; (b) assuming but not admitting that there is no evidence of it, there has been a part performance referable to the contract which takes it out of the provisions of section 3 D (d) of the Civil Law of British Guiana Ordinance, Chapter 7; (c) it would be a fraud on part of the defendant to rely on the said section in view of all the circumstances of the case. In other words the defendant is estopped from relying on the provisions of the said section.

The defendant resists those contentions on the following grounds (a) the agreement of the 6th May, 1944**,** became dead and no longer had any legal effect after the sale was withdrawn on the 9th day of May, 1944 and incapable of being revived; (b) the verbal agreement, if any, which has been denied, is unenforceable by reason of the provisions of the section pleaded in the defence; (c) there has been no part performance of a kind recognised as proper to exclude the defence of the section of the Ordinance; (d) there was an abandonment by the plaintiff of his intention to obtain a lease and (e) the request of the plaintiff for a lease was a condition precedent to his cause of action, and there is no evidence of such a request.

In the discussion of the evidence in support of the respective issues raised, both Counsels presented their arguments in a very attractive manner, making gallant attempts to convince me of his particular way of reasoning. After a careful examination of the evidence and viewing the circumstances reasonably, I have come to the following conclusions on the facts of the case —

(a) That in the month of August, 1944, the defendant and Angelina Douglas saw the plaintiff at his home when the defendant requested him not to pay the balance of the 1st moiety of the taxes as he wanted the property (meaning the west half of lot 44 Fourth Street, Alberttown) seized and put up again for sale at execution, and informed the plaintiff that both Douglas and Harris had agreed that the terms of the written agreement which was entered into on the 6th day of May, 1944 should be operative in the event of the property being again put up for sale at execution and purchased by the defendant, to which arrangement the plaintiff agreed.

(b) That in consequence of such arrangement the plaintiff did not pay the balance of the 1st moiety of taxes due on the said property, and allowed his two buildings to be seized in execution and to be sold on the 12th day of September, 1944.

(c) That plaintiff's wife and the witness Marcus Peters attended the sale at execution held at the Victoria Law Courts,

Georgetown, on the 12th day of September, 1944, on plaintiff's behalf, and in accordance with the terms of the agreement of the 6th day of May, 1944, refrained from frustrating the sale at execution of the said property.

(d) That on the afternoon of the said day the defendant informed the plaintiff that his lease as promised in the agreement of the 6th day of May, 1944, began on the said 12th day of September, 1944, to which the plaintiff assented.

I do not accept the defendant's story nor that of Angelina Douglas of the alleged visit by them to the plaintiff on the 3rd day of July 1944, for the purported collection by Douglas of rates, taxes and rent either for the year 1943 or 1944. The documentary exhibits convince me in addition that there was no need to do so. 1 do not believe the evidence of either the defendant or his witness Samaroo that the defendant was at work at Jaikaran & Sons Ltd., at Water Street, Georgetown, between the hours of 5 and 6 p.m. on the 12th day of September, 1944. Samaroo in my opinion was a witness of convenience. Many of the answers of the defendant given in cross-examination and his unsatisfactory demeanour in the witness box warrant me in finding that his conduct in refusing to execute a lease in favour of the plaintiff in terms of the agreement of the 6th May, 1944, was influenced by some ulterior motive on his part, and the reason he gave why he would not do so is poor and palpably false.

It therefore becomes necessary to examine the legal principles which must be applied to the conclusions at which I have arrived.

There is nothing immoral or improper in an oral contract for a lease for years concerning land, and if there is an oral contract relating, to an interest in land and one party chooses to have if specifically performed, it is enforceable unless the other party pleads the Civil Law of British Guiana Ordinance. It is unnecessary for a defendant, if he does not choose so to do, to plead the Ordinance, and the Court is not bound to take notice of it. In the absence of a plea of the section an oral contract is enforceable. Here the defendant has relied upon the section. *Prima facie* that is a good answer to the claim, and it is for the plaintiff to satisfy the Court that he is entitled to succeed notwithstanding that plea. If the plaintiff can show that he has done acts which can have been done only with reference to the oral contract, and which would render it a fraud upon him to allow the defendant to set up the Ordinance as an answer to the claim for specific performance, then, in those circumstances, if the facts are established, it may give a sufficient escape to the plaintiff, from the seeming difficulty in which he is placed by reason of such plea.

What is necessary to be put forward in a plea of part performance is to be found in *Fry* on Specific Performance, 6th edition at pp. 276 and 277. “In order thus to withdraw a contract from the operation of the statute, “several circumstances must occur: (i) the acts of part performance must be “such as not only to be referable to a contract such as that alleged, but to be “referable to no other title; (ii) they must be

"such as to render it a fraud in the defendant to take advantage of the "contract not being in writing; (iii) the contract to which they refer must be "such as in its own nature is enforceable by the Court; and (iv) there must "be proper parol evidence of the "contract which is let in by the acts of that "performance."

The act of the plaintiff in allowing his two buildings to be seized in execution and to be sold and purchased by the defendant after due advertisement in the Gazette for taxes, the proportionate part for which he was responsible having already been paid by him on the 4th day of July, is in my opinion, not only referable to a contract such as that alleged but to no other title. In coming to this decision I am entitled to look at all the circumstances of this case in order to determine whether the acts can be said to be necessarily and unequivocally referable to the contract. The contract is in its own nature enforceable by the Court and as I have already found there is proper parol evidence of the contract.

I have dealt with this particular aspect of the case first as it is fully raised in the reply of the plaintiff and one of the ways which gives him a sufficient escape from the plea set up in paragraph 9 of the Defence.

There is another aspect of the matter, apart from the plea of part performance raised in the reply, and it is this, that the section 3 D (d) of the Civil Law of British Guiana Ordinance does not defeat the plaintiff's claim if the contract itself is not in writing.

The Ordinance requires that an agreement may either be written or *else evidenced* in writing — the words in the instant case would be "no action shall be brought whereby to charge any one upon any lease of immovable property for a period exceeding one year unless the agreement or some memorandum or note thereof is in writing. — note the words used "the agreement or some note or memorandum thereof is in writing" — for a contractual writing includes the evidence of the contract. If a verbal contract is wholly evidenced by a properly signed writing, it will satisfy the section — inasmuch as the section merely regulates the kind of evidence which may be admitted in proof of certain kinds of contract, provided the writing was in existence before the commencement of the action. As was said in the case of *Rochefoucauld v. Bowstead* (1897) 1 Ch. 206 "It is sufficient if the contract can be proved by some writing signed by the defendant and the date of the writing is immaterial." And be it noted the verbal agreement of August 1944, not only made reference to but indicated the memorandum then in existence, signed by the defendant, which was to evidence the agreement.

Learned Counsel for the defendant in one of his contentions against the enforceability of the verbal agreement submitted that the agreement of the 6th May, 1944 became dead and no longer had any legal effect after the sale of the property was withdrawn on the 9th day of May, 1944, and incapable of being

revived. Whilst this may be so in certain circumstances yet the plaintiff does not rely upon it qua agreement but treats it as a document in existence signed by the defendant and agreed to by him as evidencing the agreement. For where a parol agreement for a lease is made on the terms of a previous offer in writing, such offer is admissible in evidence. In the strict sense it is neither a renewal nor a revival of the written agreement, save that the subsequent verbal agreement revived its operative effect, and upon the happening of the event therein specified the defendant became bound to carry out the terms contained in the said written agreement

It is true that after the formation of a contract circumstances may arise which, owing to the fault of neither party, render fulfilment of the contract by one or both impossible in any sense or mode contemplated by them. These sets of circumstances have been more or less defined by the Courts and are held by them to release both parties from any further obligation to fulfil the contract. It could be described as a substantive and particular rule which the common law has evolved. Where it applies neither party could succeed in an action on the agreement. The law, however, has examined a great variety of cases in which it has held or refused to hold that a contract is nullified as to its future by the impact of the frustrating event. The application of the general principle must depend on the circumstances of the particular case. No detailed absolute rules can be stated. A certain elasticity is essential. As was said by Lord Sumner in the case of *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.* (1926) A.C. 2497 "that when frustration occurs, it is automatic, and that its legal effect depends not on the intention of the parties or even on their knowledge as to the event, but on its occurrence in such circumstances *as to show it to be inconsistent with the further prosecution of the venture.* The event is something which happens in the world of fact, and has to be found as a fact by the Judge. Its effect on the contract depends on the meaning of the contract, which is a matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract."

What the event was in the present case was never in controversy. The interruption of the sale of the property on the 9th day of May, 1944, did not destroy the identity of the performance contracted for. There was no indefinite suspense. As a matter of fact within four months thereafter the property was sold at execution and purchased by the defendant. Both the plaintiff and the defendant intended to make a final bargain the terms of which had been reduced into writing. In this connection the defendant amply demonstrated by his evidence that had the interview, alleged by him on the 3rd" day of July, 1944, not taken place, he would have carried out the terms of the agreement of the 6th day of May, 1944.

The last mentioned observations might well be hitched to the third contention of the plaintiff that it would be a fraud on

part of the defendant to rely on the section of the Civil Law of British Guiana Ordinance pleaded by him. The defendant in his evidence before me said that the object of the agreement Ex. A was to obtain title for the property. Angelina Douglas had none in her name. He had erected a new building on the lot in 1942 or 1943, and was anxious to obtain transport for the lot. He undertook to execute at the request of the lessees leases in their respective favours, as specified in the agreement. When the property together with all the buildings thereon were again seized in execution, he did not speak to either the plaintiff or Mrs. Harris. All he wanted was to get title. He had no desire to take their buildings. Even when he purchased the lot on the 12th day of September, 1944, he considered he had a right to the two leases, and regarded himself in the relation of a landlord to the lessees. If the sale had gone through on the first occasion he stated he would have been under an obligation to execute a lease in terms of Ex. A in favour of the plaintiff. He did not notify the plaintiff when the property was put up on the second occasion for them to take steps to safeguard their interest. There was no need he said for protection because of what he had told them previous to the execution of the agreement. The plaintiff says that the object which the defendant had in view having been attained, with his assistance and that of Mrs. Harris, the defendant now seeks to deprive him of his rights to a written lease by using the Civil Law of British Guiana Ordinance as a shield to protect him from his contractual obligation and submits that the Court will not countenance such behaviour, and relies on the authority of the *United States of America* & *anor.* vs. *Motor Trucks Ltd.* (1924) A.C. 196 where the late *Lord Birkenhead* then L.C. said "It is well settled by a series of familiar authorities that the statute of Frauds (Civil Law of British Guiana Ordinance) is not allowed by any Court administering the doctrine of equity to become an instrument for enabling sharp practice to be committed."

I agree with the submission of Mr. Parkes that the statute Ordinance) was never intended to be used in any Court of Law as an engine of injustice. In my view the acts and conduct of the defendant amount to, or at least have the common attribute of an estoppel. The promise which he made to the plaintiff in August 1944 was intended to create a legal relation and which to the knowledge of the defendant was going to be acted upon by the plaintiff and has in fact been so acted upon. It is not a case of estoppel in the strict sense but the promise the defendant made was intended to be binding. It was made to a party who has acted upon it and which the party making it must have known the other party would act upon. Courts have not gone so far as to give a cause of action in damages for breach of such promises, but they have refused to allow the party making them to act inconsistently with them. There was no notice given by the defendant to the plaintiff that the agreement Ex. A had come to an end, but to the contrary the verbal agreement stimulated the operation of the terms of the agreement of the 6th May,

1944, intended to be binding, intending to be acted upon and so acted upon, and in my opinion binding so far as its terms properly apply.

Two other points raised by Mr. Wills still remain for consideration. Was there an abandonment by the plaintiff of his intention to obtain a lease, and was a request by the plaintiff for a lease a condition precedent to his cause of action?

The evidence discloses that in the month of December 1944, the plaintiff employed an agent to negotiate for the sale of his buildings, but that no sale was effected. He also inspected two properties with the intention of purchasing the same, and it is contended from those acts of the plaintiff that he had no intention if he had any right, to request any lease, and abandoned any such right. I cannot find any evidence which in law would warrant me in coming to such a conclusion. A person should not easily be presumed to abandon rights which belong to him. The intention of the obligee, in whatever manner expressed should be so evident as not to admit of doubt. The evidence of the plaintiff makes it clear that he had no intention of abandoning his right under the agreement. He would hardly have done so when he had two substantial buildings on the land. In addition there are circumstances which are inconsistent with the position taken up by the defendant, they afford intrinsic evidence in support of the plaintiff's assertion that he had not abandoned his right to a lease under the agreement but in fact it was revived on the same terms as between himself and the defendant as evidenced by the written consent.

Great stress was laid by learned Counsel on the words "at such lessee's request" appearing in the written agreement, and he submitted that the defendant was not bound to enter into a lease unless requested by the plaintiff. It must be asked for. He supported his arguments by reference to cases on interpretation of words used in a document, and two cases which dealt with the right to have a share transferred and a promise to deliver a deed upon request, and that unlike the case of the payment of money, a request must be alleged in the pleadings and proved to have been made by a plaintiff before he could succeed in the action. I have examined those cases but they do not enunciate any general rule to be applied in every circumstance The very wording of the paragraph of the agreement negatives the strict or any such application, besides which the- evidence of the plaintiff which I believe that the defendant on the 12th day of September 1944 told him the lease would begin from that day avoided the necessity for any formal request.

In all the circumstances of this case to refuse to grant specific performance would result in an unjust enrichment of the defendant.

The plaintiff is therefore entitled to an order compelling; the defendant to execute an agreement of lease in his favour upon the terms contained in the written agreement dated the 6th day

of May, 1944, such terms having been translated into the agreement of August 1944 and evidencing the same.

Having already held that on the 12th day of September 1944 the defendant informed the plaintiff the lease would commence as from that date synchronous with the acquisition by the defendant of the land at execution sale, the contract of lease became enforceable notwithstanding that when the agreement of August was made the commencement of the term was expressed by reference to the happening of a contingency, provided that at the time the contract is sought to be enforced the contingency had occurred — see *Brilliant v. Michaels* (1945) 1 A.E.R. 121.

I do not find that there has been any delay on part of the plaintiff in bringing these proceedings. He has claimed his remedy for specific performance as promptly as all the circumstances of the case admit. There must be judgment in his favour in the terms above stated, with costs which I certify, if necessary, as fit for Counsel.

Judgment for plaintiff.

Solicitors: *W. D. Dinally; H. B. Fraser.*

D'AGUIAR BROTHERS LIMITED,

Plaintiffs,

v.

HIS MAJESTY'S ATTORNEY-GENERAL FOR THE COLONY OF BRITISH GUIANA,

Defendant.

1946. No. 131.—DEMERARA

Before Luckhoo, J.: 1947, APRIL 24; SEPTEMBER 2, 15.

Practice and procedure—Claim against Government—"Claimant shall not issue a writ of summons"—Supreme Court of Judicature Ordinance, cap. 10, s. 46 (3)*—Not mandatory but directory only—Writ of summons issued—Not an illegality but an irregularity only—Waiver—Fresh step taken by defendant after knowledge of irregularity.*

Customs duties—Pepsi Cola bottle caps—Duty payable on—Customs Duties Ordinance. 1935, *Second and Third Schedules, as enacted by Ord. No.* 25 *of* 1944.

Section 46(2) of the Supreme Court of Judicature Ordinance, cap. 10, provides that all claims against the Government of the Colony which are of the same nature as claims which may be preferred against the Crown in England by petition, manifestation, or plea of right, may, with the consent of the Governor, be brought in the Court, in a suit instituted by the claimant as plaintiff against the Attorney-General as defendant.

Section 46(3) provides that the claimant *shall not* issue a writ of summons, but the action shall be commenced by the filing of a statement of claim.

Held that the provisions of section 46(3) were directory only and not mandatory, and were not enacted for reasons of public policy.

An action was commenced against the Attorney-General by writ of summons. The plaintiff thereafter filed a statement of claim, and the Governor indorsed his fiat thereon. The defendant filed a defence, not under protest, and he did not plead in his defence that the action should not have been commenced by writ of summons. The plaintiff requested hearing. About 8 months later, shortly before the action came on for hearing, the defendant gave notice that he proposed to submit at the trial of the action that the statement of claim should be struck out, and that the writ of summons be set aside, on the ground that the proceedings were not commenced by the filing of a statement of claim as prescribed by section 46(3) of the Supreme Court of Judicature Ordinance, Chapter 10, and that the issue by the plaintiffs of the writ of summons was an illegality.

Held (1) that the non-observance by the plaintiffs of the procedure laid down for commencing the action against the Attorney-General was

not in the nature of an illegality which would render the proceedings void, but merely an irregularity which could be waived by the party for whose benefit the condition was imposed, in the absence of any express provision preventing such waiver;

(2) that the defendant, by filing a defence, had taken a fresh step which precluded him from moving the Court to set aside the writ on the ground of the alleged irregularity;

(3) that the application, in any event, could not be entertained as it was not made within a reasonable time after knowledge of the irregularity.

Pepsi-Cola bottle caps are capsules, packing material, and articles used solely in the making of containers, within the meaning of item 3 in the Third Schedule to the Customs Duties Ordinance, 1935, as enacted by Ordinance No. 25 of 1944. They do not fall within item 2 in the Second Schedule, as enacted by Ordinance No. 25 of 1944.

Action by D'Aguiar Brothers Limited against His Majesty's Attorney-General for the Colony of British Guiana claiming the sum of $213.88 being the difference between the amount of duty demanded by the Comptroller of Customs and the amount of duty the plaintiffs alleged was payable.

H. C. Humphrys, K.C., for plaintiffs.

E. M. Duke, Solicitor-General, for defendant.

A preliminary objection was taken by the Solicitor-General, and the judgment thereon was as follows:

LUCKHOO, J. : Asserting a right to have granted by the Court a declaration that the proper duty payable by them in respect of 152 Cartons of Bottle Capsules is at the rate of 5 per centum under item 3 of the Third Schedule of the Customs Duties (Amendment No. 2) (Consolidation of Schedules) Ordinance, 1944, and that no Bill of Entry Tax in respect of the said Capsules is payable thereon, the plaintiffs on the 12th day of March, 1946, filed a writ of summons against His Majesty's Attorney-General for the colony of British Guiana. The indorsement on the said writ also claimed a refund of the sum of $213.88 being the difference between the amount of duty demanded by the Comptroller of Customs and the amount of duty the plaintiffs allege is payable on the said goods at the aforesaid rate, and the amount of the Bill of Entry Tax, which sum of $213.88 was included in the amounts deposited by them on the 3rd and 30th days of January, 1946, pursuant to section 22 of the Customs Ordinance, Chapter 33.

On the 24th day of April, 1946, the plaintiffs filed a statement of claim, endorsing thereon their address for service, and on the said date served a copy on the Attorney-General — by leaving the same at his Chambers.

In accordance with the provisions of section 47 (1) of the Supreme Court of Judicature Ordinance, Chapter 10, the Registrar of the Supreme Court forwarded the statement of claim to the Colonial Secretary for the fiat of His Excellency the Governor. On the 4th day of May, 1946, His Excellency granted his fiat in the usual form "Let right be done."

Thereafter a Defence dated the 1st day of June, 1946, signed

by counsel and solicitor acting on behalf of the defendant was served on the solicitor for the plaintiffs and filed in the Deeds Registry. That Defence is not filed under protest nor is any ground of illegality of the procedure adopted by the plaintiffs raised therein. On the 29th June, 1946 the plaintiffs requested hearing.

Ten months after the fiat of the Governor was granted the defendant for the first time gave notice that he proposed to submit at the trial of the action that the statement of claim should be struck out, and that the Writ of Summons be set aside, on the ground that the proceedings were not commenced by the filing of a statement of claim as prescribed by section 46 (3) of the last mentioned Ordinance, and that the issue by the plaintiffs of the Writ of Summons was an illegality.

Section 22(1) of the Customs Ordinance, Chapter 33, gives an importer of goods, in the event of a dispute arising between himself and the Comptroller of Customs as to the proper rate of duty payable in respect of any goods imported into the colony and admissible for consumption therein, the right to deposit in the hands of the Colonial Treasurer the amount of duty demanded by the Comptroller and to commence an action against the Attorney-General within three months from the time of the making of the deposit for the purpose of ascertaining whether any and what amount of duty is due and payable upon the goods. Upon that being ascertained, and if the deposit made by the importer is in excess of the duty payable on the goods, it follows that the amount of the excess will be returned to the importer. In other words he would be receiving back his own money, the Colonial Treasurer being the person designated by the section to be the depositary of the amount demanded by the Comptroller pending a declaration by the court of the proper rate of duty of the goods so imported. In filing their action, there is no doubt that the plaintiffs purported to act under the provisions contained in section 46(2) and (3) of the Supreme Court of Judicature Ordinance, Chapter 10, treating the ascertainment of the proper rate of duty payable on the goods imported and the refund of the excess they allege as a claim against the Government of the colony of the same nature as claims which may be preferred against the Crown in England by petition, in which case with the consent of the Governor a suit could be instituted by a claimant as plaintiffs against the Attorney-General as defendant.

Sub-section 3 lays down the procedure to be followed in such a case. It reads "The claimant *shall not* issue a writ of summons, but the action shall be commenced by the filing of a statement of claim (with an address for service thereon) in the Court, and the delivery of a copy thereof at the Chambers of the Attorney-General or other officer authorised or designated as aforesaid."

This sub-section in effect lays down a statutory procedure to be followed by a claimant in his claim against Government.

The learned Solicitor-General for the defendant contended that the plaintiffs have contravened the provisions of that subsection; consequently the action has not been properly instituted

against the defendant and must fail at its very threshold on the ground of illegality. In the course of his argument he submitted that the filing of a Defence, to the statement of claim a pleading served and filed in the action begun by the illegal issue of a Writ of Summons, cannot be taken as a fresh step in the action which ab initio was not properly commenced, nor as a waiver of the illegality.

Learned counsel for the plaintiffs while not admitting that the proceedings have been wrongly commenced submitted that the defendant has taken a fresh step in as much as the issue of the Writ must be treated as a mere irregularity and not an illegality which would vitiate the proceedings and render it a nullity.

In order to deal with this preliminary objection it is necessary to determine the nature of the statutory requirement contained in the sub-section—Is it a procedure laid down by statute which if not followed must inevitably be fatal to the proceedings or can it be waived by a fresh step being taken by the opposite party or even by the implied consent of such party.

It will be well to examine this sub-section in the light of the succeeding section of the Ordinance, and the authorities dealing with statutory prohibitions in order to ascertain the effect of a non-compliance with its provisions.

Let me first refer to the terms of section 47 of the Ordinance and to enquire for whose benefit the provisions of sub-section 3 of section 46 were enacted. It reads:

"(1) The Registrar shall forthwith transmit the statement of claim to "the Colonial Secretary and it shall be laid down before the Governor; and "if the Governor grants his consent, the statement of claim shall be "returned to the Court, with the fiat of the Governor indorsed thereon, and "*the claim shall be prosecuted in the Court.*"

It is clear that the Governor is given the controlling power to permit such a claim to be prosecuted in the Court. He may withhold his consent if he cares to do so, and when, as in this case, with knowledge of the fact through his officer (the defendant) on whom the Writ was served on the 12th day of March, 1946, he granted his consent and indorsed his fiat on the statement of claim, the question of waiver of the benefit of the provisions of the sub-sections is bound to arise.

It might be contended that being a statutory condition it cannot be waived. The success of this contention will depend upon whether or not the condition is mandatory or only directory.

Broadly speaking it may be said that powers conferred on courts of law to effectuate legal rights in regard to procedure, and generally in public statutes, where the thing to be done is for the public benefit or in advancement of public justice, enacting words must be taken to have a compulsory force. On the other hand, statutes conferring private rights or prescribing that certain things are to be done in a certain manner are usually directory only. The courts lean against construing words as mandatory when the result would be that the common law rights of indivi-

duals would be infringed. It is sometimes said that judicial interpretation should be directed to avoiding consequences which are inconvenient and unjust, if this can be done without violence to the spirit or the language of a statute, moreso in cases in my opinion of remedial statutes where as in this action, a statement of claim was filed and acted upon with full knowledge of the irregular issue of the Writ.

On account of the great importance of this case to the commercial interest in this country, I have given some amount of consideration to and examined the relevant provisions of the Ordinance.

No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only, or obligatory with an implied nullification for disobedience.

It is the duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

In Maxwell on the Interpretation of Statutes 9th Edition, page 198, it is there stated that "where the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity, hardship or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence."

In my view the mere literal procedure as contained in the section of the Ordinance ought not to prevail if what was done by the plaintiffs is more than what was required by it, and not opposed to the intention of the legislature as apparent by, and somewhat implicit in. the act of the Governor, and where the words are sufficiently flexible to admit of what had been done. Legislative enactments which are to be construed as mandatory are to prevent great public injustice, as affecting all society. The claim of the plaintiffs is not in respect of a public matter. It is to recover part of a deposit they were compelled to make in order to obtain delivery of the goods which they had imported.

The following authorities illustrate the principle by which a Court is guided in determining whether or not a statutory prohibition is mandatory or directory, and in the latter case circumstances in which it could be waived by the party for whose benefit the same was enacted.

In *Soho Square Syndicate Ltd.* & *anor. v. E. Pollard* & Co. *Ltd.* & *anor.* (1940) 2 A.E.R. 601, it was held that under the Courts (Emergency Powers) Act, 1939, designated to protect the public, the opposite party could not contract out of its provisions, and the appointment of a Receiver agreed to was void, notwithstanding the consent of that party. In a part of his judgment *Farwell J.* at page 607 said "This Act is an Act passed not merely for the purpose of dealing with the individual rights of private persons. It has a more far-reaching scope than that, and it was intended as

a matter of public policy to deprive the mortgagee of the powers which he otherwise could have exercised, and to impose upon him, as a condition of the exercise of those powers, that he should first obtain the leave of the Court."

In *Bowmaker Ltd v. Tabor* (1941) 2 K.B. 1, at page 6. *Goddard L.J.*, (as he then was) said "The maxim which sanctions the non-observance of a statutory provision is cuilibet licet renuntiare juri pro se introducto. Everyone may waive the advantage of a law made solely for the benefit or protection of him as an individual in his private capacity, but this cannot be done if the waiver would infringe a public right or a public policy."

The above mentioned cases decide that where an Act was promulgated by reason of public policy, no agreement between the parties concerned can frustrate its provisions, or bring about any dispensation.

On a careful reading and interpretation of the provisions of the sub-section under consideration I have come to the conclusion that they are only directory, and not enacted for reason of public policy, in which case the non-observance by the plaintiffs of the procedure laid down for commencing the action against the Attorney-General is not in the nature of an illegality which would render the proceedings void, but merely an irregularity which can be waived by the party for whose benefit the condition was imposed, in the absence of any express provision preventing such waiver.

There has been, apart from the act of the Governor in granting his fiat to the plaintiffs to prosecute these proceedings, a fresh step taken by the defendant under the rules of Court which would preclude him from moving the Court to set aside the Writ on the ground of the alleged illegality.

Generally, whenever any statute is relied on as a bar to the action it should be specially pleaded. Order 17 rule 15 of the Rules of the Supreme Court 1900 makes provisions for such a plea. There is no such plea in the Defence filed; besides which no application to set aside any proceeding for irregularity will be allowed, unless it is made within a reasonable time, not ten months after as in this case, nor after the party applying has taken any fresh step (the filing of the Defence) after knowledge of the irregularity.

In the circumstances, the preliminary objection is not sustainable.

Evidence was led, and judgment in the action was delivered as hereunder:

LUCKHOO, J.: For the plaintiffs to succeed in this action, they must establish as a matter of fact that the 152 cartons bottle caps, imported by them during the months of December 1945, and January 1946, are goods which should have been admitted to the payment of duty under item 3 of the Third Schedule to the Customs Duties (Amendment No. 2) (Consolidation of Schedules) Ordinance, 1944.

That item reads as follows: —

> "3. Cartons, boxes, tins, drums and similar containers; bottles suitable and intended for bottling preserves, honey or milk; paper bags whereon is printed the name of the article to be packed therein; wood, tin, and iron sheets and plates, and other materials intended to be used solely in the manufacture of containers; capsules, labels, tinfoil, and other packing material, not including wrapping paper; all when imported solely for the purpose of packing, or of making containers for goods of local manufacture or production, on proof to the satisfaction of the Comptroller that they will be used solely for those purposes."

The plaintiffs who carry on business in this Colony claim that for many years past they have placed in the market a drink or beverage called "Pepsi-Cola" which is locally manufactured by them, and for that purpose they have had to import from the United States of America bottle caps for the purpose of capping bottles into which "Pepsi Cola" is filled, and allege are capsules within the meaning of item 3 of the Third Schedule, the duty on which is at the rate of 5%. These bottle caps, as the Bill of Entry for each importation shows, bear an advertising device. Several of these caps were produced at the hearing and they bear on them the following inscription — "Pepsi-Cola" Trade Mark.

The defendant contends that these bottle caps are in reality Crown corks used as bottle stoppers, are merchantable articles bearing an advertising device relating to "Pepsi-Cola" bottled and sold by the plaintiffs, imported from a country other than a British country and therefore come under item 3 of the Second Schedule to the said Ordinance liable to the payment of duty at the rate of 161%, and in addition a Bill of Entry tax at the rate of 3%.

Item 3 of the Second Schedule reads as follows:—

> "Articles, ordinarily merchantable other than paper and paper bags, bearing an advertising device, not enumerated in the First Schedule and not exempt in the Fourth Schedule."

The question I have to determine is under which of the two Schedules do the articles produced at the hearing and the subject matter of the two importations come.

To give the article a neutral name for the present, to wit: — "cover" used for securing the contents of the bottle. I find upon examination that it is composed of a metallic substance with an under layer of cork, and for it to be securely fixed over the lip and the upper neck of the bottle it has to be done by means of a machine, which in the words of Mr. J. A. Adamson called on behalf of the defendant "crimps" it on, thereby preventing the escape of gas, or the letting in of air. In other words it caps as well as closes the bottle at the same time, the under layer of cork keeping the contents of the bottle air-tight.

I have to ask myself what is the scheme or purpose for the admission of goods mentioned in item 3 of the Third Schedule at a lower rate of duty and with no bill of entry tax than many of them coming under the Second Schedule. It is evident from wording of that item that to encourage the manufacture and/

or production of goods locally, containers for those goods and materials for packing which have to be imported are to be given a preference subject to proof to the satisfaction of the Comptroller that they will be used solely for those purposes.

I have already set out the item in extenso and the object to be gathered is almost self-explanatory. Note the words used "all when imported solely for the purpose of packing, or of making containers for goods of local manufacture or production." This sentence governs or regulates all the foregoing parts of that item.

What therefore is the general meaning to be given to the word "capsule." In the Shorter Oxford English Dictionary it is given as "a metallic cap or cover for a bottle"; and in Webster's "a metallic seal or cover *for closing a bottle."*

It seems to me that the duty of the Court is, primarily, to give the natural meaning to the language of the item unless it involves some manifest absurdity or would be inconsistent with some other intention therein expressed. If therefore I was to adopt any of the two meanings given in those well-known and well-accepted dictionaries, the article produced composed of a metallic substance and cork used not only as a cover but also for closing a bottle by crimping it on, will come under the head "capsule" in the ordinary acceptation of the word in which case the plaintiffs should succeed. If that meaning is clear, no other question arises. But if or in case that meaning is open to doubt or ambiguity, I have to consider whether any clear policy can be discerned underlying the Ordinance in the light of which the obscurity or ambiguity might be resolved and a different meaning possibly attached to the disputed meaning of the word from that which on the surface it bears. In some cases it is possible to deduce the policy of the legislation from its provisions alone and if it is as I have already said to encourage the manufacture and production of goods locally, it is helpful to consider the substratum of law and fact, relating to the manufacture of the beverage "Pepsi Cola."

But the first step is to construe the particular word in abstraction from this back-ground, to construe it, as it were in vacuo. So regarded, its true meaning appears to me to be that propounded by the plaintiffs, construed by them in abstraction from any legislative or factual context.

In my opinion, therefore, there is no real doubt or ambiguity as to the meaning of the word "capsule," but let me assume that there is room for such doubt or ambiguity and proceed to the consideration of matters extrinsic to the meaning but possibly affecting its interpretation.

Mr. Adamson, the manager of Booker Bros. Drug Store for the past 25 years, upon examination of exhibits "A", "EI" and "E2" describe them all as Crown corks. He has, he stated, seen Crown corks for years and at one time his firm was agent for Crown corks for the Crown cork and Seal Co. He describes "Capsules" as being primarily used for two purposes, the first

to protect the packet so that no one should tamper with its contents, and the second to give the packet a finished appearance and that they are made from lead, plastic material, gelatine, viscose and paper. On this evidence I have been asked by the learned Solicitor General to hold that what was imported by the plaintiff were Crown corks and not capsules and that they were properly subject to the higher rate of duty provided for under item 3 of the second schedule, and in addition the Bill of Entry tax of 3%. "Capsule" in the light of Mr. Adamson's evidence he further, in effect, contended, must be construed in a business fashion, and not everything that might be said to come within a possible dictionary use of the word. It must be interpreted in the way in which business men would interpret it when used in relation to a. business matter of this description. Whilst Mr. Adamson's evidence is entitled to the highest respect from this Court, I cannot lightly set aside the testimony of Mr. Charles Edward Brassington, Secretary of the plaintiffs' company whose experience in the actual manufacture of carbonic beverages — Pepsi-Cola, Vimto and other locally manufactured aerated drinks, extends over a number of years when apart from the ordinary and natural meaning of the word "capsule" he states it is called in the trade "bottle capsule" or "crown cork".

Mr. Adamson, however, admitted that the outer metallic cap or cover of the article shown to him is a capsule, and it would appear from his evidence when lined with cork is known as a Crown cork used *to close a bottle* which is the intrinsic nature of the meaning given in Webster. The last answer he made in his examination-in-chief — Crown cork is a specie of capsule — amply demonstrates the fact that he was not construing the article in any particular business fashion. Either capsule, definitive of what the defendant contends it means, or Crown cork possesses the same common attribute, and in my view admits of no differentiation.

Assuming, however, that the article "Crown cork" cannot possibly mean an article to which the word "capsule" applies, is it included under "other packing material?" "capsules, labels, tinfoil, and other packing material, not including wrapping paper."

One of the meanings given to the word "pack" is "prepare and put (meat, fruit etc.) in tins etc. for preservation." If "Pepsi Cola" a beverage is to be packed, it must be filled into a container, e.g. a bottle. Is the container complete without a cover at the top of the bottle? Does it not require something to close the bottle? If so is not that something, in this case, Crown cork used in the packing of the contents of the bottle — to wit — Pepsi Cola, which the plaintiffs allege of local manufacture or production? Applying the Ejusdem generis rule, both capsule fend Crown cork have the same common attribute. If it is not part of the packing of the contents of the bottle, then in my view It must form part of the container in which the contents are put. The container would be incomplete without the Crown cork affixed to it so as to secure the contents of the bottle, the controll-

ing words of the item being "all when imported solely for the purpose of packing, or of *making containers* for goods of local manufacture or production."

It seems unlikely that the legislature would allow articles like tins, iron sheets and plates to be admitted on a lower duty when used for the manufacture of containers, and subject Crown cork used in the make-up of a container to a higher rate of duty. Aliter where an article, ordinarily merchantable and bearing an advertising device not enumerated in the First Schedule and not exempt in the Fourth Schedule.

A second line of argument advanced by Mr. Humphrys was, assuming the subject matter is not "capsule" as contemplated under item 3 of the Third Schedule, nor part of the packing of the contents of the bottle, or the container, it is not ordinarily merchantable because the advertising device it bears cannot be used by any other person or firm by reason of the provisions contained in the Aerated Waters Manufactory Conditions, 1932, which reads :

> "All aerated waters made at any manufactory must be contained in bottles labelled with the name of the manufactory or the registered owner of such manufactory, and with the place of manufacture. Crown Corks used for closing bottles must also bear the name of the manufactory or the registered owner and the place of manufacture; or some mark registered with the Government Analyst which distinguishes the corks as those of the owner. Bottles must not be corked with any other Crown Corks or with previously used Crown Corks"

The advertising device on each of the Crown corks Exhibits "A", "El" and "E2" shows the following: — Pepsi-Cola, Trade Mark; D'Aguiar Bros. Ltd. DIH Phone 82; D'Aguiar Bros. Ltd. Club Soda DIH.

To be merchantable goods should be saleable in the market, for goods may be fit for the particular purpose and yet unmerchantable or may not be of merchantable yet fit for the particular purpose for which they are bought. Giving the above-mentioned conditions the most liberal construction I cannot find that those Crown corks would fall within the description given in item 3 of the Second Schedule to the Customs Duties (Amendment No. 2) (Consolidation of Schedules) Ordinance, 1944, under which the Comptroller of Customs purported to act when he rejected the entry submitted by the plaintiffs and imposed the rate of duty item 3 of the said Schedule.

Even had there been any doubt in my mind as to which one of the two Schedules under which the term "capsule" came, I would have been constrained in all the circumstances to adopt a benevolent view of the use of the word.

If, however, the article "capsule" could appropriately have come under both of the Schedules the provisions contained in Section 7 (2) of Ordinance 23 of 1935 would have been applicable and the imposition of the higher rate of duty sustainable.

In his defence the defendant raised the issue that "Pepsi Cola" is not an article of local manufacture or production, being

manufactured in the United States of America, although bottled in this Colony. The label on each bottle has the following inscription — "Pepsi Cola" Bottled by D'Aguiar Bros. Ltd. Georgetown, British Guiana, under special authorization." Mr. Brassington in his evidence said that apart from concentrate-essence and gas for carbonating the water which are imported, the beverage known as "Pepsi Cola" is produced from other material obtained locally, and by a process which he described in minute detail. A bottle of pepsi cola contains 12 fluid ozs. made up of 1/20 of an oz. of imported material, the labelled container in which it is filled and kept closed, to wit bottles, labels and bottle caps being also imported from abroad. The cost of the manufacture of the drink, comprising the value of local materials, and labour Mr. Brassington told the Court works cut at 65 3/4%.

In considering whether an article is of local manufacture it must not only comprehend production, but also the means of producing it. Here the elaborate process spoken of by Mr. Brassington shows that the beverage "Pepsi Cola" is only produced where a certain amount of skill is employed; and in my opinion sufficient to satisfy the meaning of the term manufacture.

I am not unmindful of the fact that on each label there appear the words "bottled by" but the use of those words does not exclude the fact, as I find it to be, that the concentrated essence of pepsi cola must be subjected to a process requiring skill and the use of local materials before the beverage or drink could be produced and then bottled.

For the several reasons which I have given I hold that the imposition of duty was wrongly made by the Comptroller of Customs under item 3 of the Second Schedule, and that the plaintiffs are entitled to a declaration that the proper duty payable by them in respect of the said 152 cartons of bottle capsules is at the rate of 5 per centum, and that no Bill of Entry tax is payable thereon.

I order a refund to the plaintiffs of the sum of $213.38 as claimed by them in paragraph 6 (b) of the Statement of Claim. The plaintiffs are entitled to their costs, certified fit for counsel.

Judgment for plaintiff.

Solicitors: *H. C. B. Humphrys; Vivian C. Dias,* acting Crown Solicitor.

HANUMANDAS (HANOOMAN), JURAKHAN, and OUTAR on behalf of themselves and all other proprietors of the District of Clonbrook,

Plaintiffs,

v.

THE COUNTRY AUTHORITY OF CLONBROOK and THE CANADIAN MISSION COUNCIL IN BRITISH GUIANA.

Defendants.

1945. No. 248.—DEMERARA.

BEFORE BOLAND, J.: 1946. DECEMBER 12. 16; 1947. JANUARY 6.

Practice and procedure—Injunction—Interlocutory injunction—Strong arguable case made out for an injunction being granted at trial—Interlocutory injunction granted.

An interlocutory injunction was granted where the plaintiffs had made out a strong arguable case for an injunction being granted at the trial.

Summons by the plaintiffs Hanumandas. Jurakhan and Outar on behalf of themselves and all other proprietors of the District of Clonbrook, East Coast of the County of Demerara and Colony of British Guiana, for an order continuing, until the hearing and determination of the action, the interim injunction granted in June 1945 against the defendants The Country Authority of Clonbrook and The Canadian Mission Council in British Guiana.

HANUMANDAS & OTHERS *v.* THE COUNTRY AUTHORITY OF CLONBROOK & ANR.

S. L. vanB. Stafford, K.C. (*J. A. Luckhoo* with him), for plaintiffs.

E. M. Duke, acting Attorney-General, for first-named defendant.

E. G. Woolford., K.C., for second-named defendant.

Cur. adv. vult.

BOLAND, C.J. (ACTING):

Plaintiffs in these proceedings, purporting to be suing on behalf of themselves and all other proprietors of the District of Clonbrook, East Coast, Demerara, whose Writ of Summons contains in the endorsement a claim for an injunction against the two defendants, and who had obtained herein en their *ex parte* application an interim order for the injunction, now by this Summons apply in the usual way further to restrain the defendants, their servants and agents until the final decision of the case from doing the acts claimed to be in violation of their rights.

By consent the hearing of this Summons was transferred from Chambers into Court. It is unfortunate, I think, that it was not agreed that the entire issue between the parties should be decided finally at this hearing in open Court. There would then have been a much speedier way of settling the matter in dispute than by resorting to the procedure of formal pleadings since the issues appear quite clearly to be set out in the affidavits filed by one side and by the other. As it has transpired, the plaintiffs have had for a considerable period the benefit of the interim order owing to adjournments granted with the consent of parties when their counsel found it inconvenient to appear at dates fixed by the Court for the hearing of the Summons.

In accordance with the principles which appear to be enunciated in the many decisions published in the reported cases on this subject, it is incumbent on the plaintiffs if they are to succeed in obtaining an interlocutory injunction, to establish.

(1) There is a serious question to be decided at the trial of the action;
(2) A. probability that they will succeed in getting at the trial of the action the injunction claimed—in other words they must make out something in the nature of a *prima facie* case for an injunction;
(3) That if the interlocutory injunction is not granted the plaintiffs will suffer damage for which payment of compensation would not afford adequate relief.

On the other hand if the defendants can show that although the claim for the plaintiffs may here satisfy the conditions above specified, yet there has been laches on the plaintiffs' part in challenging the alleged violation of their rights — that is to say, if the plaintiffs have slept on their rights and induced a reasonable belief in the defendants that there would be no protest or complaint with the result that the defendants have expended money or otherwise incurred loss by the pursuance or continuance of the acts now complained of, then an interlocutory injunction should be denied to the plaintiffs.

In exercising its discretion as to whether an interlocutory injunction should issue the Court is bound to consider whether it would best serve the ends of justice to preserve the *status quo* whilst the cause is *sub judice,* and in this light would give weight to the question of the balance of convenience as between both parties to the suit. It cannot be overlooked that whilst it may be true that plaintiffs might sustain irreparable loss if the defendants are not restrained pending the final decision of the case, the defendants, on their part, should they be ultimately successful at the trial, may find that the usual undertaking given by the plaintiffs to pay damages, for any loss sustained by the defendants as a result of the interlocutory injunction, has accorded them very inadequate relief.

It is with the above factors kept constantly in mind as being necessary for a proper adjudication that I have approached the consideration of the various issues raised on the hearing of this Summons.

The affidavit by Hanumandas, one of the plaintiffs, filed in support of the application alleges a prescriptive right in the proprietors of the Clonbrook district to the use of a certain area of land situate immediately to the South of the Mahaica canal in the Clonbrook district. The proprietors, it is alleged, have used for an uninterrupted period of 35 years *nec vi nec clam, nec precario* this portion of land described as a dam in this affidavit and also in a certain plan annexed to the transport from the Colony of British Guiana to the defendant, The Country Authority. They have always depastured their cattle and they claim too the right by prescription to have the protection which this dam, they allege, affords to their lands in respect of drainage and irrigation.

Because of a declaration by the defendant, the Country Authority, of an intention to lay out this dam for building purposes, the proprietors, it is alleged, fear that their rights over the dam both for depasturing their cattle and as a protection for drainage and irrigation would be seriously prejudiced. Moreover the commencement of actual building operations on the dam by the second-named defendant, the Canadian Mission, to whom in pursuance of the scheme, the Country Authority have allotted a portion of the dam for the building of a church, has, it is claimed, already impaired the efficiency of the dam as a protection, because of the levelling or reduction of its height. A continuance of the building operations would, it was anticipated, aggravate the impairment of the dam.

Whilst both defendants deny that the building operations are causing or will bring about any damage to the plaintiffs and that they will in any way prejudice the proprietors of Clonbrook in the enjoyment of their lands, and whilst they repudiate the plaintiffs' claim to the use of the so called dam for any purpose whatsoever, the Country Authority affirm their rights to control these lands and to make such allotments thereof as they think fit subject only to the provisions of the Public Health Ordinance. It is therefore obvious that the issue raised is a question of serious import.

and the plaintiffs have fulfilled the first condition mentioned above as necessary for an interlocutory injunction.

On the point whether plaintiffs have made out a *prima facie* case for an injunction, Mr. Duke, the Acting Attorney-General, who appeared for the Country Authority, submitted that *ab initio* the plaintiffs would have no right to bring these proceedings against the Country Authority. He contended that the notice of intended action served on the Country Authority did not comply with the provisions of Section 336 of Chapter 84 (The Local Government Ordinance) then in force, but now re-enacted in the Local Government Ordinance of 1945, which section was specially introduced in the Ordinance to afford protection to Local Authorities by giving them an opportunity to make any necessary adjustments in reparation of any violation of rights belonging to members of the public. The notice, it was pointed out, had specified the intending plaintiff as being Hanumandas alone, and the wrong he Hanumandas had complained about was limited to the alleged trespass involved in the leasing of a portion of the dam to the Canadian Mission and the damage already done and expected was the result of the building operations being carried on over that portion of the dam by the Canadian Mission.

I cannot agree with this contention. Hanumandas had made it clear in the notice which admittedly was served within the prescribed time, that the wrong of which he was complaining was an infringement of the rights of all the proprietors of the Clonbrook district, and it is on behalf of all the proprietors that the three named plaintiffs including Hanumandas himself, have filed the Writ seeking a declaration of their rights and an injunction to restrain any further violation thereof. Besides, it has been laid down that the necessity for prior notice to Public Authorities before action brought cannot be insisted upon where the aggrieved person is seeking the remedy of an interim or interlocutory injunction. It would frustrate the effective vindication of his rights if a plaintiff had to await the lapse of the statutory period after notice given before he could obtain this remedy which equity grants because of the necessity for urgent and immediate relief.

Attorney-General v. *Hackney Local Board* (1875) L.R. 20 Equity, 626.

It was further submitted that so far as the plaintiff Hanumandas was concerned he was debarred from bringing these proceedings for the injunction, because in January 1944 he had entered opposition to the transport from the Colony of British Guiana to the Country Authority of Clonbrook in respect of the same lands, filing then as grounds for opposition the same alleged right of him and his predecessors in title to depasture cattle there, which he claimed should be expressly reserved in the proposed transport. Hanumandas had withdrawn his opposition, and the transport was subsequently passed without any such reservation. Apart from the fact that any act of Hanumandas cannot prejudice the rights of the other proprietors, it seems obvious that this action seeks to enforce an alleged right over and beyond what was adum-

brated in Hanumandas' notice of opposition to transport. For the enforcement of this right it was not imperative that there should be an opposition to the transport. If Hanumandas had specified in his grounds of opposition to transport a claim identical with what he claims in the present Writ the Court would refuse the remedy of an injunction for the reasons set out in my judgment in *Seerpaul* v. *Dennison* (1946) L.R.B.G. 319. I may add that I agree with the submissions of Counsel for plaintiffs that an order in favour of Hanumandas m any action brought to enforce that opposition to transport, implemented as it would have been by an order that the right to the dam be reserved thereon to the Proprietors would have been ineffective to prevent such future acts as are complained of in this action, and I appreciate the reason why Hanumandas acting, as it is stated on legal advice, withdrew his opposition.

Another ground urged as a disqualification against this action is involved in the submission, as I understood it that by virtue of the Drainage and Irrigation Ordinance, No. 25 of 1940 all drainage and irrigation requirements throughout the Colony have been placed under the sole control of the Drainage and Irrigation Board set up thereunder, This Board alone, it is urged, determines what is and what is not required for drainage and irrigation purposes and this so called dam to the South of the Mahaica Canal forms no part of the works of the Board, which has specified what works, including dams, are necessary for drainage and irrigation in the area, which comprises the Clonbrook district. I am very doubtful whether it can be the correct interpretation of the Drainage and Irrigation Ordinance that in effect it has taken away or curtailed the rights of the general public to the use of dams as drainage and irrigation protection after enjoyment of same as of right for the period of prescription, and I should hardly think it proper to decide this point on the hearing of this Summons. It would be more fitting I think, to leave the determination of this question to the trial judge, who would still be called upon to decide whether the manner in which the levelling process on the dam is being carried out would or would not constitute a negligent or unauthorised exercise of Statutory powers by the Country Authority and the Canadian Mission their lessees. Apart from drainage and irrigation requirements, section 82 of Chapter 84 (Local Government Ordinance) since repealed but re-enacted in Section 89 of the Local Government Ordinance No. 14 of 1945, places all dams belonging to any Village or Country District under the Control or management of the Country Authority. Whether or not the Country Authority had the power to rent or lease portion of dams because of the omission of the word "dam", in Sections 85 and 86 of the Local Government Ordinance Chapter 84, as pointed out by Mr. Stafford, Counsel for the plaintiffs, it is indisputable that neither the Drainage and Irrigation Board nor the Country Authority, though vested with certain Statutory powers, could escape liability for any infringement of rights unless the Statute giving them such powers unequivocally by express language authorises the infringement of the rights; or the nature of the Statutory duty

imposed was such that it would be impracticable to discharge the duty without this infringement of rights, and certainly any damage caused by the negligent performance of a statutory duty would give a right of action and an injunction to the person damnified or threatened thereby with damage. It is to be noted that the plaintiffs claim alternatively by the affidavit that the defendants the Country Authority have exceeded their Statutory powers.

It's hardly necessary to refer to the point sought to be made by the Acting Attorney-General that as it is an offence under a certain bye law to allow cattle to be on the dam, there can be no valid claim of right by prescription to have cattle depasturing on this dam, except to point out that the claim to a right to depasture cattle on the dam is the least important part of the plaintiffs' claim which substantively insists upon the right of the continued use of the dam as a drainage and irrigation protection.

Nor do I think that the fact, as admitted by plaintiffs that Hanumandas had himself applied to the Country Authority for an allottment on the said dam should estop them all from impeaching the right of the Country Authority to rent or lease the dam in portions. As has been stated before, no act of Hanumandas for himself personally and not as the avowed agent of the other proprietors can be treated as creating an estoppel against the other plaintiffs in an action brought to enforce their alleged common rights. Perhaps the reason given by Hanumandas for making the application for the allotment does not appear sound. On the other hand had all the plaintiffs secured allotments it might have been an effective way of controlling the dam in a manner that would have preserved it as a protection for their lands.

I hold that the defendants have not succeeded in showing that the plaintiffs would have no cause of action for an injunction. Had the defendants applied by summons to strike out from the Writ the claim for the injunction on the ground urged at this hearing, certainly no Court would have made the order to strike out the claim. That seems to me to be the real test.

At the trial each side will be entitled to supplement the affidavits filed herein and the evidence of the deponents given under cross-examination by oral testimony before the judge, who will finally decide upon the merits of the plaintiffs' claim for the award of an order of an injunction. I am satisfied that the plaintiffs have made out at any rate a strong arguable case for an injunction at the trial, and that is sufficient for the purpose of the interlocutory order.

As to condition (3) stated by me earlier it, is indisputable that if the Canadian Mission were allowed to continue to level or reduce the height of the dam in places for the purpose of erecting their building, there would ensue to the plaintiffs, if the rights they claim to the dam are finally upheld at the trial of the action, such damage for which compensation would hardly be a sufficient remedy — and this would be a result also in the case of any other letting of portions of the dam by the Country Authority under their scheme.

It may be conceded that the Canadian Mission would be seriously inconvenienced and perhaps suffer loss by the interlocutory injunction, should the plaintiffs fail at the trial of the action, but I have given due consideration to the balance of convenience as affecting the parties by a grant or refusal of the interlocutory injunction, and I cannot see such a degree of hardship on either of the defendants as would overbalance the right of plaintiffs to the interlocutory injunction.

It cannot be said that the plaintiffs have been guilty of laches such as should deprive them of an interlocutory injunction. Long before the transaction between the Country Authority and the Canadian Mission, the Country Authority were made aware that the proprietors of Clonbrook were protesting against this scheme of letting out the dam.

For the above reasons I am of opinion that an order for an interlocutory injunction should issue, and accordingly I make the order as applied for. The costs will be costs in the cause, and I certify this hearing as fit for Counsel.

By consent of parties, I extend the time of plaintiffs for filing a Statement of Claim to 21days from the date hereof — 21 days thereafter for Statement of Defence, and. 10 days thereafter for any subsequent pleadings if necessary.

Order for Interlocutory injunction.

Solicitors: *D. P. Debidin; V. C. Dias* (acting Crown Solicitor);
N. C. Janki.

DEMERARA BAUXITE COMPANY, LIMITED,
Appellants.

v.

ALBERT CAINES,
Respondent.

1946, No. 550.—DEMERARA.

Before Full Court: WORLEY, C.J., LUCKHOO, J. and JACKSON, J. (Acting). 1947, July 17; September 30.

Workmen's compensation—Workman going home on weekend—On employer's train—Only available route—Obligation on employer to supply train service—Obligation on workman to use such service—Accident on train—Arose out of and in course of employment.

The place of employment of a workman was at Ituni. He resided at McKenzie. The employer operated a train service, which was the only route between Ituni and McKenzie. The workman's journeys from Ituni to McKenzie at weekends and back to Ituni, by the employer's train, were part of the workman's contract of service. Further, it was part of the workman's contract of service that the employer was to convey the workman from Ituni to McKenzie and back at each weekend in discharge of his contractual liability to serve the employer. Whilst so travelling, the workman was acting under the directions of the employer, and he was under an obligation or necessity to use the train. The workman suffered injuries as the result of an accident to a train on which the workman was travelling from Ituni to McKenzie on a Saturday.

Held that the accident arose out of and in course of the workman's employment.

Appeal by Demerara Bauxite Company, Limited against an order of the West Demerara Judicial District awarding compensation to Albert Caines under the Workmen's Compensation Ordinance, 1934.

H. C. Humphrys, K.C., for appellants.

J. O. F. Haynes, for respondent.

Cur. adv. vult.

WORLEY, C.J.:

This is an appeal against an order of the Magistrate of the West Demerara Judicial District, made under the Workmen's Compensation Ordinance, 1934, awarding compensation to the respondent for injuries suffered as the result of an accident to a train belonging to the appellants in which the respondent was travelling on the 25th November, 1944. At that date, the respondent was a workman employed by the appellants and the only issue raised is that of the employer's liability, involving the oft debated issue whether the accident arose out of and in the course of the employment.

The appellants, a mining company, conduct their operations at McKenzie City on the Demerara River and at Ituni, a place in the bush thirty-six miles from McKenzie. The bauxite ore

mined at Ituni is brought down to McKenzie for processing and for this purpose, as well as for sending supplies up to Ituni, the appellants have construed a railway between these two places. The two termini of the railway are situated on land comprised in the appellant's leases or concessions, and the portion of the railway which lies outside these areas runs over Crown land under a way leave or licence granted by the Crown. There is also a rough track or jungle road connecting the two places, but it is not passable for vehicles and the railway may be regarded as the only practicable means of communication.

The appellants also run on this railway a passenger train or trains daily and on these trains they convey, not only employees of the Company travelling on the Company's business, but also and free of charge any of their workmen who wish to travel from Ituni to McKenzie on their own business, and the families and relatives of workmen who wish to visit their menfolk at Ituni.

Prior to 1943 the respondent was employed as a mason by the appellants at McKenzie: in 1942 the appellants began to open up Ituni and to construct roads and buildings there, and for this work, in May 1943, they transferred respondent and about two hundred other men to Ituni. Permanent accommodation was not available for all the workmen employed at Ituni, nor did the appellants undertake to provide such accommodation for all. Those for whom no other accommodation was provided lived in what are described in the evidence as "tents" or "camps" but were in fact "troolie" or palm leaf huts.

The respondent continued to work for the appellants at Ituni until Saturday, 25th November, 1944. During all this time he continued to rent a room from the appellants at McKenzie where he kept his clothes and for which he paid rent. From time to time, once a week or once a fortnight, he would travel down to McKenzie by the appellants' train on Saturday afternoons and return to Ituni on Monday mornings. He was so travelling to McKenzie in one of these trains on the afternoon of the 25th November, 1944 when, as the result of a collision between the train in which he was travelling and another of the appellants' trains on the same line, he received injuries which have resulted in this present claim. The accident occurred at a point about eighteen miles from Ituni and approximately half-way between McKenzie and Ituni. Other passengers on the train were workmen travelling to McKenzie for the week-end, and wives and families of workmen returning from visiting their menfolk at Ituni.

On the evidence adduced the Magistrate found the following facts:—

(i) that on the 25th November, 1944, the respondent who was a workman then employed by the appellants suffered injuries as a result of an accident at 18 miles Ituni whilst he was travelling after actual working hours on the appellants' train from Ituni to McKenzie City,

(ii) that the appellants are the owners of McKenzie and Ituni and the land adjoining these two places and that they operate a train service between McKenzie and Ituni,

(iii) that at the time of the accident, the appellants' train was on their premises on its way from Ituni to McKenzie,

(iv) that the only means of conveyance for all workmen including the respondent between Ituni and McKenzie was by the appellants' trains which run on their premises,

(v) that workmen including the respondent with the full knowledge and acquiescence of the appellants travelled free of charge on the appellants' train from Ituni to McKenzie on Saturday afternoons after work and returned to Ituni on Monday mornings in time for work and that the respondent had so used the train for about eighteen months before the accident.

(vi) that workmen on construction works including the respondent were given temporary accommodation in tents at Ituni and that between eight and ten of them slept in one tent. These tents were not suitable as living quarters and the workmen who occupied them travelled down to McKenzie by the appellants' train every week and/or at least every fortnight,

(vii) that before the respondent's transfer from McKenzie to Ituni, Mr. Henry, the Construction Superintendent of the appellants, informed the respondent that a train would be available for him to travel from Ituni to McKenzie every Saturday after work and that the said train would take him back to Ituni on the following Monday morning in time for work and that the respondent agreed thereto and that these" terms formed part of his contract of service,

(viii) that the appellants continued to rent the respondent a room at McKenzie after his transfer to Ituni and that the said room was continuously occupied by the respondent up to the time of the accident and that the respondent's home was at McKenzie.

The only part of these findings on which it is necessary to comment at this stage is the statement that the tents were not suitable as living quarters. This is not so much a finding of fact as an opinion or inference based on the facts proved in evidence. The respondents' evidence on this point was "The tent was not enclosed and about eight to ten of us slept in one tent. Many of us slept in tents at Ituni. On the 25th November, 1944, there were a cinema and dance hall at Ituni. The men who lived permanently at Ituni were employed in the mines and not on construction works." Mr. Cleaver, Field Investigator and Personnel Officer at Ituni said: "In February 1944 about 250 men employed by the (appellants) were living in troolie camps in the Camp Ground at Ituni. I was also living in a troolie camp under the same conditions as the (respondent). In February 1944, all the members of the staff of the (appellants) resided in troolie camps. Buildings were constructed and employees of the (appellants) moved from the camps to the buildings as soon as they were completed. There was a kitchen on the Camp Ground which was run by the (appellants). This kitchen supplied meals to workmen and the members of the staff thrice daily. Meals were

also supplied to workmen and members of the staff on Sundays, later a Ration store was built." "The camps were enclosed on three sides. All the troolie camps were enclosed on three sides." "Some of the workmen lived in the "troolie camps" at Ituni for many months before going down to McKenzie. Lights were provided in the Camps. Sanitation Officers supervised the sanitary conveniences in the Camps. Most of the Camps had flooring."

In my opinion the reasonableness of the conclusion which the Magistrate drew from this evidence is open to question having regard to the undoubted fact that the respondent and others were temporarily employed in construction work in a mining camp in the interior of an undeveloped country. It appears to me that this conclusion in conjunction with the finding that the respondent's home was at McKenzie led the Magistrate to think that there was some necessity for the respondent to travel down to McKenzie every week or every fortnight and that this has caused him to misdirect himself on the real issues in this case. But even if such necessity existed, it will not avail the respondent unless he can show that the necessity arose out of and in the course of his employment; that is to say, out of a contractual duty to his employers: a "moral necessity" is not enough (See Parker v. Owners of S.S. "Beach Rock" 1915 A.C. 725: 8 B.W.C.C. 327; and Gilbert v. Owners of the Nizam 1910, 2 K.B. 555).

In Alderman v. Great Western Railway Co. (1937 30 B.W.C.C. 64 at p. 71) Lord Russell of Killowen said: "It is said that the fact that the workman's home is at Oxford and that his contract of employment takes him away from his home makes all the difference. I am unable to appreciate how this can be. The cases in which men are employed to work at a distance from their homes and have to find lodgings for themselves must be innumerable. Yet there is no case in the books, or at all events none was cited, in which such an one when merely on the way to or from his work has been held entitled to compensation. In order to entitle him to compensation in such a case some other element must be present (involving the discharge of a contractual duty to the employer) which in law extends the course of his employment so as to include the moment of time when the accident happened." I think Lord Russell had in mind a workman going from his lodgings to his work or vice versa; but the argument applies a fortiori to one who is going from his lodgings to his home or vice versa.

After setting out these findings the Magistrate then says "Apart from my finding of facts set out in paragraph (vii) above, I am of the opinion that the accident arose out of and in the course of his employment as he was still on the (employers') premises and travelling by a permitted route at the time of the accident." He cites in support the cases of Howells v. Powell Duffryn Steam Coal Co. 1928 1 K.B. 472 and Anderson v. Hickman and Co. Ltd. 1928 21 B.W.C.C. 369 C.A.).

The finding of fact in paragraph (vii) will not of itself establish the respondent's claim. It may be that the appellants were bound by the terms of their agreement with the respondent to

provide this train, but it is not disputed that the respondent was under no obligation to use it. He himself said "I was not compelled to go to McKenzie" and, in fact, he went when he felt so disposed, and not otherwise. In L.N.E.R. Co. v. Brantnall (1933 A.C. 489 at p. 493) Lord Buckmaster says that in St. Helen's Colliery Co. Ltd. v. Hewitson (1924 A.C. 59) "Lord Wrenbury made quite clear that there was all the difference between the thing which a man by virtue of his contract of service had the right to do and that which by virtue of his contract of service he was compelled to do." It is not enough for a workman to show that he was making use of a facility afforded him under his contract of service: he has also to show that he was doing so in the course of his employment. Brantnall's case referred to above is a clear illustration of this principle.

Nor is it enough for the workman to show that, at the time of the accident, he was on his employer's premises because of his employment: he has to show that he was there at the material time in the course of his employment. (See Hoskins v. J. Lancaster 3 B.W.C.C. 476 at pp. 477, 480: Williams v. Smith 6 B.W.C.C. 102: St. Helen's Colliery Co. v. Hewitson per Ld. Buckmaster at p. 67).

Even where a workman is employed on land or premises belonging to the employer, the area within which he is "in the course of his employment" is not necessarily co-extensive with the employer's premises: it may be larger or it may be smaller (see Halsbury's Laws of England 2nd Edition Volume 34 p. 824 note (p). Cases such as Howells v. Powell Duffryn and the many other "access and egress" cases only serve to establish and illustrate the principle that "if, on his way to *or from his work* the workman proceeds by a permitted route over his employer's premises, or over other premises, which he would have no right to traverse but for his employment, the employment continues while he is so doing" (Halsbury op. cit. p. 825) and, as Lord Atkin said in Weaver v. Tredegar Iron Company (1940 A.E.R. Volume 3, 157 at p. 166) "when all the cases have been looked at and considered, one is finally brought back to the words of the Act 'the course of the employment.' The course of the employment begins when the workman enters the employment and it ceases when he leaves the employment, it being his duty to do both." Now when the workman enters or when he leaves, is a question of fact to be decided on the evidence and circumstances of the particular case. Authorities are of little assistance except in so far as they lay down principles which are of general application.

It is on this very point that I think the learned Magistrate has misdirected himself, and it is necessary to look more closely at the evidence to see whether his conclusion that the accident arose out of and in the course of the employment is correct.

The first point to consider is where the workman was employed to work. I think the learned Magistrate has been confused here by the use of the term "employers' premises." In Weaver's case, Lord Atkin (at p. 166) says "to avoid controversy

as to "employers premises," the difficult application of which term I have already mentioned, I should myself prefer some such phrase as the area (or the immediate area) of the employment.' “If this phrase is used it is at once obvious that the area of the employment was not co-extensive with the employers’ premises: the respondent was not employed to work at McKenzie nor on the railway. Nor was the area co-extensive with the appellants' land at Ituni; the respondent was not employed in the mines there, but only to work at the place or places where construction work, i.e. road-making and building, was being done on November 25th, 1944. When he left the immediate area of his employment at the end of each day's work, although he remained on the employers premises, he was not there in the course of his employment and, indeed, Mr. Haynes admitted that the respondent would not be in the course of his employment while attending a performance at the cinema provided by the appellants at Ituni. Similarly, if the respondent were injured in an accident in the appellants' mines at Ituni, he could not recover compensation unless he could show that he was in the mine in pursuance of a contractual duty owed to his employers.

The Magistrate has found as a fact that the accident in this case occurred out of working hours, and the evidence on this was quite clear. Mr. Cleaver said "Workmen were employed from Monday to Saturday. Workmen were paid by the hour. They were not paid between 3 p.m. on Saturday and 7 a.m. on Monday morning. Workmen could do as they pleased between Saturday at 3 p.m. and Monday at 7 a.m. During the week-end some workmen remained at Ituni and others travelled down to McKenzie.... (We) paid the workmen for actual work done and not during the period they might travel between Ituni and McKenzie."

There is no evidence that the respondent was ever employed to travel by the train and on the facts, the ineluctable conclusion is, to my mind, that the respondent was not in his employment when the accident occurred. It cannot be gainsaid that if he had decided to remain at Ituni for that week-end, his employment would have been interrupted at three o'clock on that Saturday when he left the immediate area of his employment and that the interruption would nave continued until he again reached his actual working place on the following Monday, and 1 cannot see -any reason why, because he chose for his own purposes to go to McKenzie instead of remaining at Ituni, the employment must be deemed to have continued until he stepped out of the train at McKenzie. "If the facility is something which does not come into operation until after the course of the employment has otherwise ceased, the fact that the employer supplies it does not make the workman's use of it a use in the course of his employment" (per Lord Porter in Weaver's case at p. 180).

I can best sum up my opinion in this case in the language used by Lord Russell of Killowen in Alderman v. Great Western Railway Co. 1937, "This is, upon its facts, a plain case of an employment interrupted on each signing off…….and resumed at each signing on……. the workman, during the intervals between every interruption and resumption, being free and his own master,

in all respects .....; with the result that nothing which happened during those intervals can be said to have happened in the course of his employment."

The only difficulty I have felt in this case arose out of the apparent analogy with the case of Richards v. Morris (1915, 1 K.B. 221). No one who reads the reports of the innumerable cases in this branch of the law can fail to notice how the appellate Courts, and particularly the House of Lords, have emphasized that every case must depend on its own facts and, above all, that the language of the statute must be allowed to speak for itself and when one is considering the authorities one must not, in the language of Lord Shaw in Hewitson's case (p. 81), violate the canon that, "when cases depend upon fact, then a variation in fact deprives the alleged precedent of value." In Richards v. Morris a workman was employed as a farm labourer on an island at yearly wages and board and lodging from 1911. In 1912 he got married and thereafter from time to time came to his home on the mainland to see his wife. It was in his employer's boat that he was taken backwards and forwards and there were no other means of transit. He met with an accident whilst in the boat on his way home from the effects of which he died. It was held that it must be assumed that it was an implied term of his contract of service that at all reasonable times he should be allowed to leave the island and go home, and that on the "peculiar facts" of this case, the accident arose out of as well as in the course of the employment and therefore his widow was entitled to compensation. It should be noted that the workman in this case was in continuous employment and his position appears to me to have been analogous to that of a domestic servant who lives in and who is injured while leaving or entering the employer's premises on her optional night out (see Weaver's case at p. 176) In Hewitson's case Lord Atkinson cites Richards v. Morris as an illustration of the principle that "if the physical features of the locality be such that the means of transit offered by the employer are the only means of transit available to transport the workman to his work, there may, in the workman's contract of service, be implied a term that there was an obligation on the employer to provide such means and a reciprocal obligation on the workman to avail himself of them." See also Lord Wright, in Weaver's case at p. 171 Speaking for myself, I cannot see that this principle has any application to the instant case where on the facts, it is clear that the workman had left the scene of his labours and "the means of access thereto," within the meaning attributed to those words in the cases to which I have previously referred, (in other words that the employment had been interrupted) before ever he stepped on the train. Further, obligation here must mean a contractual obligation and the evidence is clear that in this case there was no contractual obligation, express or implied, on the workman to avail himself of the train service provided. For these reasons I think that the award should be set aside and the appeal allowed but as the other members of the Court are of a different opinion the appeal must be dismissed with costs and the award be confirmed.

LUCKHOO, J.: For the appellants to succeed in this appeal it must be shown as a matter of law on the facts as found by the Magistrate that the injuries sustained by the respondent were not the result of an accident arising out of and in the course of his employment.

The appellants are the owners and/or occupiers of a large extent of land extending from Mc Kenzie City on the right bank of the Demerara River across terrain to a place called Ituni, 36 miles distant, and which is reached by means of a railway owned and operated by them. Bauxite mining is carried on by the appellants at Mc Kenzie, and for some time prior to the month of November, 1944, construction works were being carried out by them at Ituni where the respondent was employed as a mason. Previously the respondent worked at Mc Kenzie and resided in a room rented to him by the appellants for which he paid 75 cents a fortnight.

The evidence on the record in this appeal which the Magistrate accepted is to the effect that while the respondent resided at Mc Kenzie he was employed by the appellants to work as a mason at their construction works at Ituni. He would leave Mc Kenzie by the train of the appellants for Ituni every Monday morning, and return to his home at Mc Kenzie every Saturday by the same means of transit, there being no other. The road between Mc Kenzie and Ituni was considered a "jungle road" and was not used for transport. The respondent and other workmen of the appellants were conveyed from Mc Kenzie to Ituni and back free of charge. During the time he remained at Ituni the respondent and other workmen for whom no houses or rooms were provided slept in tents which were unsuitable as living quarters and unenclosed, eight or ten men being accommodated in one tent. The respondent kept all his clothing at Mc Kenzie as there was no place to keep them at Ituni. He was one of about two hundred persons employed on construction works at Ituni. The appellants did not undertake to provide houses except for some of them, and the employees of the appellants who slept in tents travelled to Mc Kenzie every weekend or at least every fortnight. Those who were given accommodation did not travel. The respondent was not paid for the period spent in travelling to and from Ituni.

Before the respondent's engagement at Ituni he was informed by the appellants that a train would be available for him to travel from Ituni to Mc Kenzie every Saturday after work and that the same means of conveyance would take him back to Ituni on the Monday following in time for work to which the respondent agreed. Such agreement the Magistrate found formed part of the respondent's contract of service. On that understanding the appellants continued to rent the respondent a room at Mc Kenzie which he continuously occupied at weekends for eighteen months when the accident occurred.

It was on Saturday, the 25th day of November, 1944, after completing his day's work, that the respondent and several other workmen joined the train at Ituni for Mc Kenzie. At a point 19

or 20 miles from Ituni that train collided with another of the appellants coming from the opposite direction. In the collision the respondent sustained a fractured neck and fractured right shoulder for which in due course he filed a claim for compensation under the provisions of the Workmen's Compensation Ord. 1934, and in whose favour an award was made by the Magistrate and judgment entered.

The main ground in this appeal is that the respondent was not at the time of the accident "in the course of his employment" and that the Magistrate misdirected himself when he held that the accident to the respondent arose out of and in the course of his employment as he was still on the appellants' premises and travelling by a permitted route at the time of the accident.

In support of his argument Counsel for the appellants called attention to the fact that at the time of the accident the respondent was not proceeding to or from his work, and that the train was not being used by the appellants for the purpose of conveying the respondent to and/or from his work; Counsel relied principally on the very important judgment in the case of *Hewitson v. St. Helens Colliery Co. Ltd.* 16 B.W.C.C. 230. where the House of Lords held "that although the workman was on the train in consequence of his employment, he was under no obligation or duty to be there, and the accident, therefore, did not arise in the course of his employment within the meaning of the Act,"

As a general rule a man's employment is said not to begin until he has reached the compound or premises where he has to perform his work, and it does not continue after he has left it, the periods of going to and coming from being generally excluded: but by express agreement or due to special considerations those periods may be included in his contract of service so as to afford him a right to maintain a claim if injury arose to him during those periods. It is obvious said *Lord Dunedin* in *John Stewart & Son (1912) Ltd. v. Longhurst* (1917) 86 L.J. K.B. 729 at p. 733 "that the word 'employment' does not postulate that the workman must be actually working. No general rule can be laid down as to when employment begins and ceases, for the simple reason that each case arises in accordance with its own circumstances." And as Lord *Atkinson* remarked in the said case at p. 734 "To answer that question, one must find out from his contract of employment what he was employed to do, what rights his contract conferred upon him, and what obligations it imposed."

The issues involved in determining whether an accident "arose out of and in the course of the employment" are mainly issues of fact but upon which certain fixed and well known principles must be applied in order to construe those words.

In one of their grounds of appeal the appellants have subjected the test of employment to the fact and the inference to be drawn therefrom that the respondent was travelling on his own business by a gratuitous means of conveyance provided by them.

Hewitson's case has laid down a test that two conditions must be fulfilled before an accident can be said to have occurred "in

the course of the employment." It must have occurred during the employment of the workman, and it must have occurred while he was doing something which his employer could and did, expressly or by implication, employ him to do, or order him to do.

If as the Magistrate found that the respondent's contract of service expressly included his journeys to and from Ituni then the first of the two conditions would be satisfied.

If, however, such an inference cannot be properly drawn from the proved facts, but it is found that these constituted an independent contract of carriage by the appellants and not part of the respondent's contract of service then the respondent must inevitably fail in his claim for in such a case the accident to him could not be said to have occurred in the course of and arising out of his employment.

The challenge which the appellants have made in this appeal is that the award in favour of the respondent cannot be sustained unless his case satisfied the two conditions stated above.

We have already stated the general rule, but there may be cases, however, in which the workman's employment may exist before the commencement, or continue after the termination of his actual work, and even before he has arrived at, or after he has left, the scene of his labours. Such cases may arise from the express or implied terms of his contract with his employers, or from the necessities and circumstances of the case. (see Willis's Workmen's Compensation, 37th Edition at page 27).

We are satisfied from the proved facts that the Magistrate could have found, as he did, the journeys to Mackenzie at weekends and back to Ituni were part of the respondent's contract of service; but for him to maintain an action against his employers he must, at the time of the accident, have been in the course of his employment.

The respondent's case seems to have fallen for consideration under the first exception set out in Willis's work at page 27 where "the period of employment will include the time taken by a workman in getting to and from his work by means of transport provided by his employer when the workman is using the means of transport in discharge of some contractual duty owed to his employer, either by reason of express or implied directions given by the employer, or by reason of his being at the time subject to the control of his employers, or by reason of some proved necessity: to use the provided means of transport as being the only means for passing to and from his place of work."

If the contract of service with the respondent has been correctly interpreted to include a term that the appellants were to convey the respondent from Ituni to Mackenzie and back at each weekend in discharge of his contractual liability to serve the appellants at Ituni, then the respondent would be in the course of his employment when making those journeys, if he can show that whilst so travelling he was acting under the directions of the appellants, or that he was under obligation or some proved necessity to use the train.

The respondent's evidence is that the appellants agreed that he should have the right to return home every weekend, but that he was not compellable to do so. This in our view would be insufficient to warrant a finding that there was an express direction to travel.

Can we read into the respondent's contract of service an implied term that the train as a means of transit between Ituni and Mackenzie should be provided by the appellants? Counsel for the appellants as we understood him has put his contention on a double track leading to the same terminus.

(i) That the agreement to carry the respondent from Ituni to McKenzie at week-ends was a general facility afforded to all workmen at Ituni, and was a concession outside their contract of service.

(ii) That even if there could be implied a term in the Contract of Service that the train should be provided by the appellants to be used by the respondent as a means of transit to and from Ituni, it was not in discharge of any contractual duty which the respondent owed to the appellants either by reason of express or implied directions given by the appellants.

Counsel's first contention cannot be sustained in view of the findings of fact by the Magistrate with which we have already expressed agreement. It is with respect to the second contention that a careful analysis of the terms of the contract of service express and implied have to be made.

This point at issue is not easy to decide; although decisions of the highest courts are good illustrations of the way in which Judges are to look at cases coming before them, yet the facts in each case have to be examined with the utmost care, as the Ordinance lends itself to infinite refinement.

The case principally relied on by Counsel was *Hewitson v. St. Helens Colliery Co. Ltd* (supra). The Company in that case agreed to provide special trains for the conveyance of their workmen to and from the colliery at Maryport. The workman who was desirous of availing himself of this means of transport (there were other means for him to get to and from the colliery) signed an agreement with the railway company releasing them from all claims in case of accident. Hewitson while travelling by virtue of a pass thus obtained as a workman was injured through a railway accident. The *House of Lords* agreed with the County Court Judge's finding that it was an implied term of the contract of service that the train should be provided by the employers.

Lord Buckmaster said it was an inseparable part of the contract of employment. This he observed did not however determine the case in favour of Hewitson. He had undoubtedly the right to travel by the train—the right enjoyed by him as a miner in the service of the Colliery Co., but he was not directed to travel by such a train, *had he found it convenient or desirable he could have travelled by other means.*

In the instant case, there are these important differences. The means of conveyance was expressly designated, and it was the only means by which the respondent could have travelled, the road between Ituni and McKenzie being a "jungle road" and not passable.

Lord Atkinson in Hewitson's case referred to *Davis v. Rhymney & Sons Co. Ltd.* (1900) 16 T.L.R. 329 where in that case it was quite optional with the workmen whether they travelled in the train or not, and if they did travel in it they were not charged anything for the service. The Company were not in any way bound to carry the colliers upon the train. There the County Court Judge found that it was not a condition of the Workman's employment that he should be carried to and from his work upon the train; that the Company provided this train as a convenience for the workmen, and were not under any duty or obligation to provide it. *Collins* M.R. in the Court of Appeal said—the workman availed himself of the facilities given by the Company. He went home by a route he was not bound to take.

In the present case the Magistrate found as a fact that it was a condition of respondent's employment to use the train. On the express terms of the contract the appellants were under an obligation to provide it, and the railway was the only route.

"In *Weaver v. Tredegar Iron and Coal Co. Ltd.* (1940) A.C. 955, the appellant was a miner in the employment of the respondent. The pit in which he was employed was near a road by which the workmen could walk or bicycle to their homes, but it also abutted on a branch of the London, Midland and Scottish Railway running between Newport and Tredegar. There was no regular station, but for the accommodation of the employers and their men the railway company had made platforms on either side of the line, and ran a train each way at the time of the change of shifts, to bring in the new workmen and take away those going off duty. Access to this platform was only permitted to the respondent company's employees, on whose premises it abutted. Practically all the workmen travelled by the trains, the respondents having made arrangements with the railway company for the provision of and payment for the train, and the respondents issued to each workman a ticket in respect of which one penny per day was deducted from his wages.

On March 3, 1938, the appellant, having finished his day's work, went to the above-mentioned platform to enter the train, when, in the crush of his fellow workmen on the crowded platform, he was pushed off on to the line while a train was coming in, and lost his arm, which was caught between two of the coaches. In respect of his injury he claimed compensation under the Workmen's Compensation Act.

The county court judge and the Court of Appeal dismissed the claim, holding that they were precluded from deciding otherwise by reason of the decisions in *St. Helen's Colliery Co. v. Hewitson* (1924) A.C. 59 and *Newton* v. *Guest, Keen* & *Nettlefolds, Ld.* (1926) 19 B.W.C.C 119; 135 L.T. 386.

The workman appealed."

"Held (Viscount Maugham dissenting), that as the appellant was making use of the platform which the respondent had arranged to be provided for their workmen coming to and leaving the colliery, and as he was upon premises which the respondents, for the purposes of the employment, had obtained for him a licence to use, and on which he had no right to be except by the conditions of his employment, the accident arose out of and in the course of his employment, and he was therefore entitled to compensation under the Act"

From the facts stated the accident occurred at a place where the appellant was by virtue of his contract of service. *Lord Atkin* at p. 966 said "There can be no doubt that the course of employment cannot be limited to the time or place of the specific work which the workman is employed to do. It does not necessarily end when the down tools signal is given, or when the actual workshop where he is working is left. In other words the employment may run on its course by its own momentum beyond the actual stopping place. There may be some reasonable extension in both time and place."

The respondent in the present appeal was on the train from Ituni to Mc Kenzie. His presence on the train was within the contemplation of the contract between him and the appellants as necessarily incidental to it. He had no right to be and no reason for being on the train, except by the conditions of his employment. Although he had finished his work for the week, and had left the place where he was working, yet he would not have sustained the accident but for the fact that his presence on the train was a risk he encountered under his contract of service.

As *Lord Macmillan* in giving an opinion in which all the other Lords concurred in the case of *Northumbrian Shipping Co.* v. *McCullum* (1932) 48 T.L.R. 568 at p. 572 said "The seaman who on his way back to the ship has left the public highway with its risks common to all way-farers and has entered the private premises of the harbour in which the ship lies with its special risks to which only those who have business at the harbour are exposed seems to me to have come within the protection of the Act: for if he sustains an accident while using this access he sustains it by reason of risks incidental to his employment which he would not have encountered but for his employment."

In *Weaver's* case, the workman had finished his time, had left the place where he was working, and was at a place which did not belong to and was not controlled by his employers, over which they had a mere licence for themselves and their- workmen, but he was at the place where the accident occurred in virtue of his status as a workman, not in virtue of his status as a member of the public. But the County Court Judge and the Court of Appeal considered themselves bound by the decisions in *St. Helen's Colliery Co. Ltd.* v. *Hewitson*, and *Newton* v. *Guest, Keen and Nettlefolds Ltd.* "Those cases, with great respect," said Lord Atkin, "are cases of a different kind from this. In the former case a workman was travelling in a special train provided by the railway company by arrangement with the colliery com-

pany. He was travelling from his work, and the train ran off the line after it had proceeded some distance from the colliery station. It was plain that the course of his employment at the colliery had ceased: the man was on his way home. The journey on the train could only be brought back into the employment by showing that it was part of the contract of employment that the workman should travel by the train so that his employment would continue until he left the train. It was held that as there was no such term of the employment, inasmuch as the workman could travel by the train or not, the course of employment did not continue during the train's journey. In that case the man had clearly left the employment when he started on the train: in the present case as clearly he had not: he was on the platform with the intention of leaving but was prevented by the accident. *Newton's case* is still clearer. The workman was crossing the railway line in order to catch a special train proceeding to the colliery, and was knocked over by a light engine before he got to the train. The spot was about three miles from the colliery. Though it had to be admitted that there was no express term of the contract of employment requiring the applicant to use the train, he relied upon a finding of the county court judge that the only practicable and reasonable means of access to the colliery was the train. This finding was rejected by this House on the ground that there was ho evidence to support it: and with its disappearance disappeared any foundation for making the train journey part of the contract of employment. The conception of duty is rightly emphasized there, for unless there was a duty to use the train it was plain that the ordinary course of employment had in the one case ceased and in the other never begun. In the present case the duty to leave the employment in a permitted manner had not been completed If the accident arose in the course of the employment, it was not and could not have been disputed that it arose out of the employment. The crowd of fellow workmen hustling into the train created a peril which appears to have been certainly caused by the employment."

And Lord Wright at p. 977 said "The fact that the colliery had arranged with the railway company to provide a special train for the men did not extend the course of the employment, as it would have done if the men were bound by their contract of employment to use the train, or, it may be, if there was no other possible way for the men to get to and from their home or from or to the colliery, as was the case in *Richards* v. *Morris* (1915) 1 K.B. 221.

In *Cremins* v. *Guest, Keen and Nettlefold* (1908) 1 B.W.C.C. 160, where it was held that the railway journey was in the course of the workman's employment, but which since the judgment of the House of Lords in *Hewitson's* case must be considered as over-ruled, it was established that the employer said to the collier "I will provide a train to carry you to my works; you may avail yourself of it or not just as you like" *and that other means of transit were available,* while the collier was in the train he would have a right to be transported as against every one but the employer, who might any day revoke the permission and discontinue the service.

Here the respondent's contract of service expressly included the means of transport to and from Ituni, and the only means for him to reach his workplace to perform services under his contract. As *Lord Atkinson* said in the Hewitson case "If each collier was bound by his contract to travel to his employer's colliery by this provided train, then *cadit questio.* The collier would be in the course of his employment when he was doing a thing he was bound by his contract of service to do. But the conferring upon a collier of a privilege which he is free to avail himself of or not, would, *prima facie*, impose no duty whatever upon him to use it. It must, however, be borne in mind" proceeded Lord Atkinson, "that if the physical features of the locality be such that the means of transit offered by the employer *are the only means of transit available* to transport the workman to his work, there may, in the workman's contract of service, be implied a term that there was an obligation on the employer to provide such means and a reciprocal obligation on the workman to avail himself of them."

Apart from the finding of the Magistrate that the means of transit by appellants' railway were an inseparable part of the respondent's contract of service, the physical features of the locality made it only possible to travel by the appellants' railway to and from Ituni. This cast, in our opinion, an obligation or duty on the appellants to provide the means of transit called for in the respondent's contract of service.

The case of *Richards* v. *Morris* (1915) 1 K.B. 221 and 7 B.W.C.C. 130 referred to by *Lord Atkinson* in the Hewitson case serves as a good illustration of the principle enunciated by him and can be aptly applied to the facts in this appeal. The facts in Richards' case may be briefly stated as follows:—This man was employed as a farm servant on the Island of Ramsey, which is separated from the mainland of Pembrokeshire by a channel of the Sea, about a mile wide. He got married on 31st August, 1912, and remained on the mainland until the 22nd October. From that time he was transferred to his employer's farm on the Island, and it was in his employer's boat that he was taken back to the mainland. It must be assumed that there was an implied term in his contract of service, which was one by the year, that, at all reasonable times, he should be allowed to go home. On this particular occasion when he was being taken over by the only boat available he was injured after crossing, but before he actually reached the mainland in trying to get ashore out of the boat, and subsequently died from the injuries he received.

The County Court Judge found "That the deceased was injured getting out of the boat, and that the injury resulted in his death; that the deceased left the Island by leave of his employer, the respondent; *that there was no other way to get* to *the mainland* except by the respondent's boat; that the deceased was going to the mainland solely for purposes of his own, and had no message to deliver for the respondent." He, however, held on those facts that the accident did not arise out of and in the course of his employment.

The Court of Appeal composed of Evans, P., Cozens-Hardy M.R. and Eve J. held in those circumstances "that it was part of

the contract, between the man and his employer, that reasonable facilities should be given him, by means of the boat, for reaching the mainland in order that he might go home and visit his wife" and allowed the appeal of the widow from the judgment of the County Court Judge.

Evans, P. in his judgment said "Now there has been a very large number of cases where the workman has been injured, not at his work, but while he is going home, in which the question as to the point at which a person leaves his employment has been discussed. The line is a very fine one, and the Judge has here found that the deceased, at the time he met with his accident, was not engaged in his employment, and that the accident did not arise out of and in the course of his employment. It is a very difficult point, and the question we have to decide is whether, on the admitted facts, the County Court Judge's decision is right".

It cannot properly be urged that there was no necessity for the respondent in this appeal to travel to McKenzie at week-ends or at least once a fortnight. It is true he was not compelled to do so by the appellants, but McKenzie was the home he had even prior to his contract of service which took him to Ituni. Because no proper accommodation was provided for him at Ituni, he still retained with the Company's knowledge and approval a room at McKenzie for which be paid a monthly rental and travelled thereto and therefrom by the means of transit offered by the appellants, and the only means available to take him home from his work. And as *Lord Wrenbury* said in the Hewitson case there are cases which would be within what are called the "incidents" of the employment, *because by implication,* but not by express words, *the employer has indicated that route,* and *the man owes the duty to* obey. But the mere fact that the man is going to or coming from his work, although it is a necessary incident of his employment is not enough.

The word "duty" is not to be taken in a narrow sense. If the accident occurs to a workman in a place in which he would not be entitled to be, except in order to perform his contract of service the test is satisfied, because he is there in pursuance of his duty.

Hewitson's case can be further distinguished from the instant one for it was optional on the part of Hewitson to avail himself of the facilities offered by the railway company, and although it was something which his contract of service with the -colliery Company entitled him to claim if he was minded so to do, it was not the only means of getting to his work-place.

After giving this matter the most careful consideration we have come to the conclusion that the two conditions laid down by the House of Lords were fulfilled in the presentation of the respondent's case before the Magistrate.

The accident must also arise out of the employment. That expression "arising out of" as *Viscount Haldane* said in the case of *Upton* v. *Great Central Railway Co.* 16 B.W.C.C. 269 at p. 272 "no doubt imports some kind of causal relation with the employment; but it does not logically necessitate direct or physical causation. The Legislature appears to have provided that he is

to be insured against certain injuries by accident which may happen to him provided they arise out of the conditions under which he is employed. That the accident should have arisen out of his fulfilment of these conditions seems to be all that is required to establish the only kind of causation that is demanded.

The expression is not confined to the mere "nature of the employment" but it "applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears that the broad words of the statute 'arising out of the employment' apply: per *Lord Shaw* of Dunfermline in *Simpson* v. *Sinclair* 10 B.W.C.C. 220 at p. 235.

It was not contested by the appellants that if it was held that the respondent was in the course of his employment when the accident occurred that it did not arise out of it, and it is not necessary for us to make any detailed examination for the application of the above principle, suffice it to say that his presence on board the train was a place where he was entitled to be in the performance of his contract of service.

The appellants having failed in their only ground of appeal, (he appeal must be dismissed with costs.

Jackson, J. (Acting) concurred in the judgment of Luckhoo. J.

Appeal dismissed.

Solicitor for appellants: *A. G. King.*

NICHOLAS GEORGE,
Appellant (Defendant).
v.
Police Constable No. 4760 JAISANKAR,
Respondent (Complainant).

1947. No. 374—DEMERARA.

BEFORE FULL COURT: WORLEY, C.J., LUCKHOO, J. and JACKSON, J. Acting): 1947. OCTOBER 1, 3.

Evidence—Price control order—Police agents—Honesty should be *free from doubt.*

Those entrusted with the detection of offences under the Defence Regulations (Control of Prices) should be careful in not employing as police agents persons whose credibility might be attacked on the ground that they have been convicted of offences involving dishonesty.

Appeal by Nicholas George from the decision of the Magistrate of the Berbice Judicial District convicting him of selling

a price-controlled article at a price in excess of that permitted by a price control order:

C. Lloyd Luckhoo, for appellant.

E. M. Duke, acting Attorney-General, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by Jackson, J. (Acting) as follows:

When judgment was reserved in this appeal to be given in writing we did so not because we entertained any doubt as to the correctness of the learned Magistrate's decision but to place on record our view that those entrusted with the detection of offences under the Defence Regulations (Control of Prices) should be careful in not employing as police agents persons whose credibility might be attacked on the ground that they have been convicted of offences involving dishonesty as has happened in the present appeal where the case for the respondent was founded almost solely on the evidence of the witness James Bicarrie who admitted convictions for the larceny of wood in 1932, and false pretences in 1935. Breaches of these regulations for selling above the fixed prices are rightly considered by Courts as serious and should be established by evidence of persons whose probity is beyond challenge.

In this case, however, the learned Magistrate himself expressed the view that the police should have secured some better person than the witness Johnnie Bicarrie to play the part assigned to him in the trap.

In accepting and relying on his evidence the Magistrate seemed to have directed himself as was laid down in the case of *Benest v. Rex* (1918) 39 Natal Law Reports page 344 that the greatest caution should be exercised by him before accepting Bicarrie's evidence, and that it should be free from doubt, for in his memorandum of reasons he stated that as the case proceeded, he was satisfied beyond doubt as to two things, that is to say (1) that whatever was the character of Bicarrie, he had spoken the truth, and that no promise of gain or reward whatever had been held out to him by P.C. Jaisankar (respondent) or by any other member of the constabulary and (2) he was satisfied also that Bicarrie was a witness of truth. The sole point which was worthy of consideration in the appeal was the price at which the appellant sold Bicarrie 13/8 yards of cotton suiting.

Bicarrie stated that he was charged for and paid the sum of $3: per yard a price exceeding that fixed by the Control of Prices (No. 2) Order 1946, and received as change from the $5 note he tendered the sum of 87 cents whilst the appellant who gave evidence said he sold the suiting at $1.83 per yard and returned the sum of $2.48 as change.

Immediately after the purchase the respondent met Bicarrie about fourteen rods away from the appellant's store and together they returned to the store where Bicarrie in the presence of the appellant told the respondent that he was charged $3 per yard

for the cloth and produced the sum of 87 cents which he had received as change from the $5 note which the respondent had handed to him for the purpose of making the purchase.

The appellant was then asked by the respondent if he had sold the cloth and at what price to which query the appellant admitted he did but that he had sold it at 31.83 per yard. This statement Bicarrie refuted and maintained that the appellant had sold him at $3 per yard.

When asked by the respondent what change he had given to Bicarrie, the appellant made no answer. It was only when he gave his evidence at the trial of the complaint that the appellant said he had given $2.48 in change.

There was at most before the learned Magistrate a conflict of evidence and even if it were more or less evenly balanced, the learned Magistrate had to make up his mind which he would accept.

After applying the safeguards he did as above stated, he came to the conclusion that Bicarrie's evidence was trustworthy, and it is impossible for this Court to say he was wrong, for he has had the advantage of seeing the witnesses and hearing their testimony at first hand.

We are of opinion that the appellant was properly convicted and his appeal is dismissed with costs.

Appeal dismissed.

ELIZABETH FRANK, *et al*,

Plaintiffs,

v.

HIRALALL,

Defendant.

1946. No. 223. DEMERARA.

BEFORE WORLEY, C.J.: 1947. JUNE 23. 24. 25, 30; OCTOBER 7.

Immovable property—Possessory rights acquired under Civil Law of British Guiana Ordinance, cap. 7*—Not affected by Deeds Registry Ordinance, cap.* 177*—Except where holder of possessory rights is estopped from asserting such rights.*

Immovable property—Possessory rights acquired under Civil Law of British Guiana Ordinance, cap. 7*—Not affected by sale in execution under the District Lands Partition and Re-allotment Ordinance, cap.* 169, s. 20*—Where the sale is fraudulent, and the partition officer, the person to whom the immovable property is allotted, and the purchaser at the execution sale are parties to the fraud.*

Res judicata—Plea—Ingredients to be proved.

Trespass—Holder of negative right conferred by Civil Law of British Guiana Ordinance, cap 7, *s.* 4(2)*—May maintain action for trespass and an injunction—Against rightful owner of land.*

The provisions of the Deeds Registry Ordinance, chapter 177, do not affect possessory rights acquired under the provisions of the Civil Law of British Guiana Ordinance, cap, 7.

KHAN v. BOODHAN MARAJ (1930) L.R.B.G. 9, followed.

Where, however, a person claims to have acquired possessory rights under the provisions of the Civil Law of British Guiana Ordinance, and by reason of his conduct in failing to oppose an intended sale of which he had actual notice, has induced the purchaser to assume that no such adverse right exists, such person will not thereafter be allowed, as against the purchaser, to assert his rights,

GONDCHI v. HURRILL (1931-1937) L.R.B.G. 509, 511, followed.

Where immovable property is taken and sold in execution under section 20 of the District Lands Partition and Re-allotment Ordinance, Chapter 169, at the instance of a partition officer for the recovery of expenses of the partition, the sale does not affect possessory rights acquired under the provisions of the Civil Law of British Guiana Ordinance, in any case where the sale is part of a fraudulent conspiracy between the partition officer, the person to whom he allotted the immovable property, and the purchaser at execution to deprive the real owners of the immovable property of their rights therein.

In order that a defence of res judicata may succeed, it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second: that is to say, that it was open to him so to recover on the pleadings. It is not enough that the matter alleged to have been concluded might have been put in issue or that the relief sought might have been claimed: it is necessary to show that it actually was so put in issue and claimed.

When a person in possession has acquired the "negative right" conferred by section 4(2) of the Civil Law of British Guiana Ordinance, Chapter 7, he cannot be disturbed even by the rightful owner and a subsequent entry by the owner will not remit him to his legal rights as owner or clothe him with legal possession.

The person in such possession can therefore maintain an action for trespass and an injunction against the rightful owner of the land.

Action by Elizabeth Frank, Lavinia Stewart, Lena Bovell and Nathaniel Moore against the defendant Hiralall for damages for trespass to land, and for an injunction.

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

M. A. Charles, solicitor, for defendant.

Cur. adv. vult.

WORLEY, C.J.:

In this case the plaintiffs' claim is for damages for wrongfully entering the plaintiffs' land at lot 8 Section H portion of the North half of Plantation D'Edward, West Coast, Berbice, and there cutting down and destroying their coconut trees and other cultivation, and for an injunction restraining the defendant from making any further entry upon the said land or repeating the said tortious acts.

The defendant claims that the land referred to is his freehold and that he has entered thereon of his own right and he counterclaims for damages for trespass by the plaintiffs thereon and seeks a declaration by this Court that he is the owner of the said land and entitled to remain in possession thereof and he also claims an injunction restraining the plaintiffs from further trespassing upon the land or in any way interfering with his enjoyment of the use and possession thereof.

The plaintiffs' reply to this is that for over twenty years prior to the filing of the Writ they have been and are still continuously in possession of the said land and have thereon coconut trees, banana plants and other cultivation which they reap and sow for their own use and benefit, that the defendant has never entered on or cultivated the land save in pursuance of the acts of trespass complained of and that defendant wrongfully claims possession.

The history of this case reveals a sorry tale of how what should have been a simple and inexpensive matter of land settlement has through delay, incompetence and perhaps chicanery grown into a prolonged and costly legal battle. It is convenient to begin the recital of the facts in this case with the year 1926 when, by an Order-in-Council made under the District Lands Partition and Re-allotment Ordinance (now Chapter 169 of the Laws) Mr. S. S. M. Insanally, a Sworn Land Surveyor, was appointed Partitioning Officer for the North half of Plantation D'Edward, Under section 7 of this Ordinance one of the duties of the partitioning officer, was to inquire into and determine any claim made by anyone to be an owner of any part of the land or into any dispute between any claimants with respect to the boundaries of any part of the land. It would seem that at that time a good deal of the land especially the low-lying parts, had been abandoned but the more valuable parts were still occupied and under cultivation and included among them was an area of reef land planted with coconuts and other fruit trees which for convenience at this stage I will call the coconut walk. It is situated in Section H of the North half of the plantation, East of the railway line from which it is separated by land belonging to one Nedd. The plaintiffs and Nedd are descended from a common ancestor, Edward Nedd and the land adjoining the railway has at all material times been occupied by a Nedd. It is this coconut walk which is in dispute. The plaintiffs says that at this date i.e. 1926, they (or as to the fourth plaintiff, his father Daly Nathaniel Moore) were and, through their predecessors in title, had been for many years in possession of this coconut walk. In support of this, they produce the will of their mother, Minerva Moore, born Nedd, (Ex. K), dated 21st June, 1921, a certified copy of a transport of certain lands to, inter alia, Edward Nedd, the father of Minerva Moore (Ex. Q); and a certified copy of a plan made by one Duncan Fraser, a Sworn Land Surveyor and dated 2nd March 1852 (Ex. R). The coconut walk and the land occupied by Nedd lie outside and to the West of the boundary of the lots referred to in these documents as delineated in the plan of 1852, but the documents are of importance as supporting the plaintiffs' con-

tention that the present Nedd lot and the coconut walk were originally the property of the common ancestor, Edward Nedd, which was subsequently separated into two holdings, one of which they inherited through their mother. The plaintiffs' case was supported by two disinterested witnesses, one Alfred Vyphuis who swore "I have known plaintiffs to occupy the coconut grove for 40 years: the old people used to have a house there: they are still occupying the land," and Albert Lilley who said he had known the plaintiffs' coconut walk since he went to D'Edward in 1924 and, apart from the Moore family, had never known anyone else cultivate round the walk.

The plaintiffs further say that at the inquiry made by the partitioning officer the will and transport were produced to him as evidence of their title and of Nedd's and that they were assured by him that he would not interfere with their occupation.

The only evidence by the defendant on the question of possession in 1926 was that of the Partitioning Officer, Insanally. His method in partitioning was to try to make each lot correspond as far as possible to the land actually occupied by the claimants and for this purpose he examined the titles, if any, and caused the claimants to point out to him the lands actually occupied. He admitted having been shown the transport, plan and will referred to above and as having accepted them as proof of title in respect of the claims of Nedd and the Moores to land in section H and on the strength of this and the evidence of actual occupancy he allotted Nedd an area of 3.76 acres adjoining the railway line and numbered it lot 9 on his plan (Ex. C). He admitted reluctantly in cross-examination that he had assured plaintiffs that they would not be disturbed. He said however that the land adjoining Nedd's lot to the East i.e. the coconut walk, was claimed by one Alexander Schultz as joint owner with one Jemina Hercules nee Schultz, that this claim was made in the presence of Daly Nathaniel Moore (father of the last plaintiff) who was acting as spokesman for the Moore family and who not only made no objection but pointed out the land adjoining the coconut walk to the East as their land. Accordingly he allotted the coconut walk or the greater part of it to Alexander Schultz and Jemina Hercules and marked it on his plan as lot 8. The adjoining area of 3.76 acres he allotted to the plaintiffs and marked it as lot 7. The Nedd who was in occupation of lot 9 at this time, D. N. Moore and Alexander Schultz are all dead. These lots were marked on the ground by wooden paals marked SSMI. Insanally said that the lot numbers were also marked with paint on the paals. The plaintiffs deny that the numbers were so marked and another surveyor whom they employed in 1939 found these paals, or some of them, still in position and marked them on his plan (Ex. B) but found no numbers on them. Insanally's evidence on this point was very unsatisfactory and I have no hesitation in rejecting it and finding that the paals were in fact not numbered.

Nor have I any hesitation in rejecting Insanally's evidence as to the occupancy of lot 8 in 1926 and in finding that the plaintiffs were in fact in actual occupation of the coconut walk. They

and their witnesses appeared to me to be telling the simple truth in this matter whereas Insanally made a most unfavourable impression on me. In the witness box he was talkative and bursting with long winded explanations of his actions in this matter. He seemed to me more anxious to exculpate and defend himself than to present the true facts and when he had to admit any part of the plaintiffs' case did so with obvious reluctance. After he had given his evidence he sat himself next to defendant's solicitor and appeared to be taking an active part in the conduct of defendant's case. I regard him as being neither disinterested nor truthful.

In due course the Partitioning Officer's Report was approved by the Board and the list of owners with section and lot numbers gazetted. The plaintiffs duly paid to Insanally the sum charged on their lot as expenses of allotment and received their transport for lot No. 7. They say, and I accept their evidence that they remained in sole and undisputed possession of the coconut walk and were under the impression relying on Insanally's assurance, that the transport they held was their title for it. Not all the owners were so satisfied and a crop of appeals and litigation followed such as appear to have been a frequent sequel to partitions made by Insanally. It will be necessary to refer to this in more detail later.

Moreover a number of the owners failed to pay the expenses of allotment assessed upon them and their lots were levied upon as provided for in section 21 of the Ordinance and sold at execution. Among the lots so sold was No. 8 which had been allotted to Schultz and which corresponded to the coconut walk: this lot was bought at auction by one Ali Buksh, about whom I shall have more to say later. It is clear however that Ali Buksh made no entry on the land and that the plaintiffs remained in undisturbed possession, still relying on their transport for lot 7.

The plaintiffs owned more than one lot in the plantation and in 1939, as there was still uncertainty and dispute as to some holdings, they engaged a Mr. Parker, a surveyor, to survey and mark clearly the boundaries of their lots, including the lot shewn on their transport as lot 7 section H. The prescribed notices were served by Mr. Parker on the adjoining owners as shewn by the plans: these were Ali Buksh in respect of lot 8 and two other East Indians in respect of lot 6. Mr. Parker was shewn the coconut walk by the plaintiffs but when he started his survey he found some paals missing and no lot numbers on those that were left. So working on Insanally's plan and starting from the railway line he measured off the breadth of lot 9 and lot 8 and then found that the coconut walk fell almost entirely in lot 8, and that lot 7 contained only a few coconut trees. Ali Buksh was present at the time and told Mr. Parker that the land he was surveying as lot 7 was in reality lot 6. This evidence cannot be doubted for Mr. Parker made a note of it as he was bound to do, on his plan (Ex. B). This incident occurred between the 19th and 21st December 1939. It was a most important admission because Ali Buksh, though the owner by transport of lot 8, was in fact disclaiming ownership by identifying the land which the plaintiffs

held by transport with the coconut walk in their actual occupation, and I see no reason to doubt the evidence of the plaintiff Bovell that when Parker pointed out to Ali Buksh that the coconut walk was in his lot Ali Buksh replied that Insanally had made a mistake. Accepting as I do this evidence I entirely reject allegations by Insanally and the defendant that Ali Buksh entered on the land in dispute.

The next step in the story was taken on 13th August 1941, when Ali Buksh transported lot 8 to Hirallal the present defendant for $95. It is convenient here to note that the value of this lot is estimated at from $250 to $500 according to the number of coconut palms on it and their age. After getting his transport the defendant in November 1941 entered on the land in question or a portion of it, cut down some bush and, according to his own story, planted ground provisions and fruit trees there. The present plaintiffs and two others thereupon brought an action (1941 No. 233 Demerara) against Ali Buksh and Hirallal in which- they claimed a declaration that they, jointly with one Thomas Moore were and had been in possession of lot No, 8 for a continuous period of more than 12 years immediately preceding the suit and were entitled to the protection of section 4 (2) of the Civil Law Ordinance, and a perpetual injunction restraining the defendants from entering on the said land. The defendants entered an appearance and filed a defence but were not present or represented at the hearing before the then Chief Justice, Sir John Verity, who dismissed the claim in March, 1943 on the ground that the plaintiffs' statement of claim disclosed no cause of action (1943 L.R.B.G. 78).

In the same or the next month, Hirallal the present defendant, again entered on the land and chopped down bush and, according to the plaintiffs, also cut down some banana plants, and planted crops. The plaintiffs thereupon brought action against him and one Charles Barrow for trespass and claimed damages and an injunction (1943 No. 152 Demerara). By this time Ali Buksh was dead. The defendants entered appearance, and filed a defence and issue was joined in January 1945, but, unfortunately, and owing to oversight on the part of the plaintiffs' legal advisers, the action was not entered on the hearing list within one year after the close of pleadings and thereby became abandoned.

Meanwhile in April 1945 the defendant had again entered on the land and by his agent picked five hundred coconuts: the police were called in and the coconuts taken to the station where at the instance of the defendant a charge of larceny of the coconuts was entered against the third plaintiff. No further proceedings were taken on this as it was realised that the claim to the land was at the root of the matter. In October 1945 there was another entry by the defendant who appears about this time to have cultivated a low-lying portion of the land with ground provisions.

The plaintiffs thereupon brought this present action in April 5946.

Such being the history and principal facts of this unfortunate matter, I can now proceed to consider the allegations and arguments of the parties.

For the defendant, Mr. Charles' first contention was that the effect of section 21(1) of the Deeds Registry Ordinance is that transport extinguishes all rights by long possession and that the plaintiffs could not succeed unless and until they got an order declaring that the transport to the defendant was void on the ground of fraud and that they could not do so as it was not pleaded nor was there any evidence that the defendant had been a party to any fraud. Mr. Charles appears to have overlooked the decision of Savary J. in Abdool Rohoman Khan v. Boodhan Maraj (1930 L.R.B.G. 9) that the provisions of the Deeds Registry Ordinance do not affect possessory rights acquired under the provisions of the Civil Law Ordinance. See also Gondchi v. Hurrill 1931— 37 L.R.B.G. 509.

Mr. Charles next contended that the plaintiffs were estopped by their failure to oppose the transport from All Buksh to the defendant, and relied upon the cases of McKaley v. Goopiah 1911 L.R.B.G. 42 and Abdul Rohoman Khan v. Boodhan Maraj 1930 L.R.B.G. 9. In Gondchi v. Hurrill (1931—37 L.R.B.G. 509 at p. 511) Verity J., as he then was defines the principle upon which this argument rests in the following terms.

> "The principle upon which these cases were decided is akin to estoppel. To invoke the aid of such a principle it must be shewn that by reason of his conduct in failing to oppose such an intended sale of which he had actual notice, the person claiming by prescription or limitation has induced the purchaser to assume that no such adverse rights exists, Having led the purchaser into this position, he will not be allowed thereafter to assert his rights, for this would be contrary to equity and fair dealing."

The next step therefore is to examine the evidence to ascertain whether this principle should be applied to this present case. In the suit No. 233 of 1941 the plaintiffs pleaded that the land was sold by Ali Buksh to Hirallal in or about the month of July 1941 but that they had no notice of the said sale and were at the time unaware of it until subsequently the then defendants informed them thereof. The present defendant (then second defendant) pleaded that he was in possession of the land without any knowledge of any adverse claim previous to the commencement of the action when, as a result of the larceny charge already referred to, Lena Bovell pleaded colour of right and the Magistrate declined jurisdiction. In suit No. 152 of 1943 the plaintiffs' statement of claim merely pleaded possession in the plaintiffs and trespass by the defendants, making no reference to the sale but defendant's defence repeated the allegation already set out. The pleadings in the present case are silent on this point, but the defendant swore that about two months before he advertised the transport, the second-named plaintiff, Lavinia Stewart had said

to him "the land which I bought from Ali Buksh, I must get my money back. I would lose the land. I said I advertised transport and if she thought the land was hers she could oppose.'" Further examined he said this conversation took place the day after he instructed his solicitor to advertise transport for the first time and in cross-examination he admitted that from what she told him he knew the land was "in dispute" before his advertisement came out but that he never went back to his solicitor to instruct him to make further enquiries. According to defendant's witness Charles London, Lavinia Stewart warned the defendant that the land he was buying didn't belong to the vendor and that he'd better get his money back to which defendant replied "I have advertised transport already. If you have money you can stop it." Lavinia Stewart denied that defendant told her he was advertising transport for lot 8 but admitted she had said to him "Don't waste your money buying D'Edward land, it's always a bone of contention." The defendant said to her "Who has more money will win," though she professed not to understand what he meant. Whatever may have been the actual details of the conversation there can be no doubt that the defendant was warned by one of the plaintiffs of the existence of a dispute over the land and that if he completed his purchase he would "be buying a lawsuit." In spite of that the defendant, who was getting a valuable piece of land at an exaggeratedly low figure, persisted. In face of this evidence how can it be contended that the plaintiffs "induced the purchaser to assume that no adverse right existed." The very contrary is the case on the defendant's own evidence and 1 can therefore see no ground for the application of the principle contended for. I understood Mr. Stafford to question whether undisturbed possession for the requisite length of time would ground an opposition, but Archer v. Rodrigues 1912 L.R.B.G. 28 would seem to be authority for such a proceeding.

Mr. Charles also referred to In re Downer (1919 L.R.B.G. 165) and Petition by Samuel Benjamin and ors (1931-37 L.R.B.G. 168), which deal with the circumstances in which a title by prescription may be acquired in respect of an undivided interest in land. These decisions appear to me to have no relevance to the present case where the plaintiffs are not asking for title but merely seeking to restrain a trespasser.

Next to be considered is the defendant's contention that the sale at execution on 20th March 1930, being a process in rem, extinguished any rights which might have accrued to the plaintiffs by reason of long possession at that date. Mr. Charles relied upon Trustees, Diocese of Guiana v. I. E. McLean (1939 L.R. B.G. 182) in which Langley J. in a carefully reasoned judgment held that in the case of parate or summary execution the sale in execution of the land levied upon extinguishes any negative rights which any person, by the force of possession, may have acquired in the land or to any part thereof. That was a case of a sale in execution for non-payment of rates due under the Drainage & Irrigation Ordinance Chapter 165. On the other side, Mr. Stafford referred to Gondchi v. Hurrill (1931-37 L.R.B.G. 509) in which

Verity J. (as he then was) held that rights acquired by adverse possession were not interrupted by a judicial sale. The judgment does not set out the circumstances in which this judicial sale took place but I think it must have been an execution sale on parate execution. It is significant that Verity J. states that the purchaser at the judicial sale undertook to transport to the defendant, who continued in possession, the land which was the subject matter of the sale but instead of carrying out his undertaking proceeded to transport the land to another person. In fact the whole conduct of the plaintiff in that case and his predecessors in title was tainted with mala fides and, though the learned judge does not expressly so state, it would seem probable that this consideration may have largely influenced his decision on this point.

At this stage therefore I am led to consider the allegations of fraud in the instant case. In reply to the defence that the defendant is the lawful owner by transport of lot 8, the plaintiffs allege that when the lands of D'Edward were partitioned, several portions including the parcel now known as lot 8 section H were fraudulently awarded by Insanally the Partitioning Officer to persons who were either non-existent or who had no legal or equitable interest therein with the object that the said lands should thereafter be sold at parate execution for partition expenses to Ali Buksh and acquired by him for the use and benefit of himself or the said Insanally, and that the facts of the said fraud only became known to the plaintiffs long, after the execution sale and transport. They further allege as follows:

> "4. Further in pursuance of the said fraudulent intention the respective parcels of the said plantation were not numbered on the ground by the said Insanally so that no means existed whereby the plaintiffs or any other interested parties could identify the parcels awarded them in the list of awards with any particular parcels on the ground.
>
> 5. The plaintiffs, believing a statement made by the said Insanally to them that the land now known as lot 8 Section 'H' formed part of his award to them under the designation lot 7, Section 'H', took transport for the parcel awarded them under the said description lot 7, Section H, and only learnt after the first act of trespass of Ali Buksh and the defendant complained of that the coconut reef and provision lands which were and had always been in sole possession of the plaintiffs had been designated lot 8. Section 'H' by the said Insanally."

In cross-examination, Insanally admitted that the scheme for partitioning the North half of D'Edward started when Ali Buksh bought an undivided share from one Rose and consulted him (Insanally) as to a partition in order that he (Ali Buksh) could get a title. Ali Buksh was accompanied by the man Schultz to whom lot 8 was subsequently awarded. These two persons appear to have taken the lead in getting the requisite signatures to the petition which I think was probably drawn up by Insanally in spite of his half-hearted denial. During the partition Insanally stayed with Ali Buksh and was evidently working hand in glove with him and it is a very significant fact that when lot 8 and a number

of other lots were sold for non-payment of the fees of the Partitioning Officer, about thirty of the lots were bought in by Ali Buksh who thus acquired a large holding in the plantation at little cost to himself. However suspicious as these circumstances are, the evidence is not sufficiently precise to prove the allegation of fraud or conspiracy generally, bur with regard to lot 8 it is in my opinion conclusive. Insanally alleged that Schultz claimed and pointed out to him the coconut walk (subsequently called lot 8) as the land of which he was in actual occupation, that Daly Nathaniel Moore was present at the time and pointed out as his family's land the portion subsequently called lot 7. Insanally admitted that this reef land was the most valuable land on the estate and not such as any owner would readily abandon. He admitted that the share of partitioning expenses chargeable on lot 8 would be less than S10 and could give no explanation or reason why Schultz let this valuable lot go at execution sale. Both Schultz and Daly Nathaniel Moore are now dead. It is quite impossible to reconcile Insanally's evidence with the evidence (which I have accepted) of the plaintiffs and their witnesses that they were in possession of the coconut walk and were assured by Insanally that they would not be disturbed. I find it proved therefore that Insanallv fraudulently awarded lot 8 to Schultz, who made no entry on the land and was never in possession but was merely a nominee to permit of Ali Buksh's buying, this lot for a mere, song at the subsequent execution sale. This conclusion is strongly fortified by the subsequent conduct of Ali Buksh who though then the owner by transport of lot 8 never attempted to enter on it and, in fact, disclaimed and admitted the rights of the plaintiffs at the time of Mr. Parker's resurvey. I find it proved also that the plaintiffs had no knowledge or notice of the sale, since there was nothing on the ground to connect lot 8 with the land they occupied and they, relying on the assurance of Insanally, in good faith believed that their transport for lot 7 gave them title to that land. In these circumstances it would be contrary to equity and fair dealing to apply the rule *in* McLean's case and, in my view, therefore, the possessory rights which the plaintiffs had acquired as at the date of the sale in execution were not extinguished by it.

It remains to refer briefly to Mr. Charles' argument that the claim was res judicata, reiving upon the iudgment of Verity C.J. in Frank v. Ali Buksh (1943 L.R.B.G. 78). In my view there *is* no substance in this contention. As Mr. Stafford pointed out, the order in action No. 233/41 has never been perfected and, in any event, there was no adjudication on the merits, the action being struck out as misconceived: See Rackham v. Tabrum 1923 (129 L.T. 25).

> Further in order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second: that is to say that it was open to him so to recover on the pleadings. It is not enough that the matter alleged to have

been concluded might have been put in issue or that the relief sought might have been claimed: it is necessary to show that it actually was so put in issue and claimed. (See Halsbury Laws of England 2nd Ed. Vol. 13 para. 466 p. 411).

I should perhaps also refer to Mr. Charles' contention that the plaintiffs were seeking to use section 4(2) of the Civil Law Ordinance as a sword and not as a shield. If I understood him aright his argument was that a person claiming by adverse possession could never bring an action of the nature of the present claim against a person holding title by transport. The short answer to this is to refer to the last paragraph of the judgment in Frank v. Ali Buksh and to the case already cited of Abdool Rohoman Khan v. Boodhan Maraj. It was also argued that the plaintiffs' claim was in some way barred by their failure to appeal from the decision of the partitioning officer in respect of lot 3 as provided in section 16 of Chapter 169. There was of course no reason why the plaintiffs should appeal since they were satisfied with the award to them of lot 7 which they believed gave them title to the coconut walk but, apart from this, the argument reveals a misunderstanding of the nature of the plaintiffs' claim which is not an attack on the defendant's title but an assertion of their own "negative rights" accrued by long possession.

I turn now to consider the submissions put forward on behalf of the plaintiffs. Although the plaintiffs allege that they and their ancestors were in possession long before the partition in 1926 and have remained in possession undisturbed except for the acts of trespass complained of (and I find that this has been proved) Mr. Stafford was content to rest his case upon twelve years adverse possession subsequent to 12th January, 1929, the date of the publication of the Partitioning Officer's award, and therefore the date on which a right of entry became vested in Schultz. If the period of limitation began to run then and was not interrupted then twelve years had elapsed before the first trespass complained of in November 1941. The defendant's title derives from Schultz through Ali Buksh and, in my view as already stated, there has been no interruption of the plaintiffs' adverse possession which had therefore endured for twelve years prior to the first entry made by the defendant in November 1941. It is clear from the authorities that when a person in possession has acquired the "negative right" conferred by section 4(2) of the Civil Law Ordinance, he cannot be disturbed even by the rightful owner and a subsequent entry by the owner will not remit him to his legal rights as owner or clothe him with legal possession see Abdool Rohoman Khan v. Boodhan Maraj: and also Norton v. L.N.W. Railway Co. 1879 (C.A. Ch.D. 268) and Marshall v. Taylor (1895 1 Ch. C.A. 641).

For the foregoing reasons I hold that the plaintiffs succeed in their claim for trespass and I award them damages fixed at $150 and there will be an injunction restraining the defendant from further trespasses. The defendant must pay the plaintiffs' costs. Certified fit for Counsel on higher scale.

Judgment for plaintiffs.

Solicitors: *R. G. Sharples; M. A. Charles.*

L. LYNCH *v.* S. LYNCH

LEONARD LYNCH,
Appellant,
v.
STELLA LYNCH,
Respondent.

1947. No. 520.—DEMERARA

BEFORE FULL COURT: WORLEY, C.J. LUCKHOO, J. and JACKSON, J. (Acting). 1947. NOVEMBER 19, 27.

Husband and wife—Matrimonial offence—Adultery—Proof of—Standard required—As in criminal cases.

In a matrimonial case the same strict proof is required of adultery as is required in criminal cases in connection with criminal offences properly so called.

CHURCHMAN v. CHURCHMAN (1945) 2 A.E.R, 190, 195, and GINESI v. GINESI (1947) 2 A.E.R. 438, applied.

Appeal by Leonard Lynch from a decision of the Magistrate of the Berbice Judicial District dismissing an application by him for discharge of a maintenance order made in favour of his wife Stella Lynch on the 8th September, 1942. Leonard Lynch alleged that his wife had, in and between July and August 1945, committed adultery.

Sir Eustace G. Woolford, K.C., for appellant.

M. A. Charles, solicitor, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by Luckhoo J. as follows:

The respondent in this appeal on the 8th day of September, 1942, obtained on the ground of desertion an order for the payment, by the appellant to her, of the sum of $3.50 per week for her use, and was awarded the custody of the four children of the marriage by the then Magistrate of the East Demerara Judicial District. The payment of $3.50 per week was being regularly made by the appellant when on the 30th day of October, 1945. he filed an application claiming to have the order discharged on the ground that since the date of the order, namely in and between July and August 1945, the respondent had committed adultery with one Alonza Harris, at Helena No. 2 Mahaica, where she was then living.

This allegation was denied on oath by the respondent at the hearing of the application.

It has been laid down in language quite explicit and unambiguous in the resent case of Ginesi v. Ginesi (1947) 2 A.E.R. 438 that in a matrimonial case the same strict proof is required of adultery as is required in Criminal cases in connection with criminal offences properly so called, approving of the dictum of *Lord Merriman,* P. in *Churchman v. Churchman* (1945) 2 A.E.R. 190, 195.

The evidence in the instant appeal which the learned Magistrate accepted disclosed that in the months of June, July and August, 1945, Harris lived in the same cottage, which is described as a small one, with the respondent and her four children, whose ages ranged between 11 and 5 years, and was there seen both during the day and night, by persons, whose evidence the Magistrate also accepted. The respondent in her defence, which the Magistrate disbelieved, denied that Harris ever visited or slept in her cottage. Harris did not give evidence. After the conclusion of the evidence on the 16th September, 1946 the Magistrate posed the question whether, assuming he accepted the evidence for the appellant was that evidence such that he could hold that adultery was in fact committed. It seems to us that what the Magistrate had in mind at this stage was whether as a matter of law he could on the evidence before him draw the inference that adultery had been committed. Having reserved judgment he dismissed the application on the 30th September. 1946 on the ground that the said application was not proved.

In his reasons for decision the Magistrate states that he accepted the evidence for the applicant (save as to certain conversations alleged to have taken place) and disbelieved the respondent but could find no evidence upon which he could arrive at the conclusion, that adultery had taken place. He refers to his request to counsel for authorities to guide him, which were not forthcoming, and adds that although there was evidence that Harris was seen in the house at all times of the night and day "there was no evidence of a single act of familiarity or that the parties slept in the same room, or exchanged endearing words" .....and states "I could not see how I could properly find as a fact that adultery had taken place between the respondent and Harris as he might have been a boarder or a servant."

Was the learned Magistrate justified in coming to this conclusion having regard to the standard of proof which is required in a matrimonial offence as laid down by the above authority?

Whilst it is vital to a correct approach to the determination of the question of adultery that the burden of proof on one who alleges it is the criminal proceeding, yet it is most important to bear in mind that the issue is whether, on the accepted facts of this case, adultery by the respondent can be safely inferred.

In the *fourth edition* of *Rayden* on Divorce at page 90, it is there stated that direct evidence of adultery is not requisite. To succeed on such an issue it is not necessary to prove the direct fact or even a fact of adultery in time and place. It is rarely that parties are surprised in the direct act of adultery. In nearly every case the fact is inferred from circumstances, which lead to it, by fair inference, as a necessary conclusion. The Court must be satisfied that there was something more than opportunity before it will affix guilt.

In *Ginesi v. Ginesi* the justices decided the issue on a balance of probability dealing with the proof as in a civil case which did

not square with the standard of proof required. None of those probabilities amounted in law to proof by such standard — the standard for establishing a quasi criminal offence. *Hodson J.* said in that case at p. 439 "If the justices had directed themselves, as I feel they ought to have directed themselves, to the very high standard of proof, required in this class of case, I feel certain that the only conclusion to which they could have come would have been that this allegation must fail on the shadowy material which was before them."

Could it be said that the material as found by the learned Magistrate in this appeal is so shadowy or uncertain in its character as not to exceed the bounds of probability when the facts and circumstances lead to a definite conclusion by a fair inference?

It is of the utmost importance that a Court should not allow its judgment to be affected by importing as a guide, pronouncements made with regard to wholly different circumstances which in our opinion differentiate the present case from that of Ginesi.

Having made certain findings of fact the learned Magistrate had then to determine as a matter of law whether or not those facts constituted proof of adultery in accordance with the test laid down by the above mentioned authority.

In our opinion he misdirected himself in law and made a wrong approach to the question he had to determine when he stated he could not properly find as a fact that adultery had taken place between the respondent and the man Harris, as he might have been a boarder or a servant, there being not a title of evidence for such a supposititious statement. The learned Magistrate seemed to have required a standard of proof much greater than what is necessary to satisfy a jury beyond reasonable doubt in a criminal case.

Instead of sending the case back to the Magistrate with directions on the law we feel that we are in just as good a position as he would be to make that finding as nothing turns upon the demeanour of the witnesses or the drift or conduct of the case.

The issue is whether, on the accepted facts of this case adultery by the respondent can be safely inferred, applying the standard of proof required in such cases.

We have to ask ourselves if the burden which lay on the appellant has been discharged. He may do so on proof of relevant facts or rely on presumptions from which he could ask the court to infer the fact in issue which he had to establish in order to succeed — to prove a prima facie case.

In our view, the appellant having proved certain facts from which we could draw an inference that adultery has been committed, that inference could only be repelled by argument or by submitting that the facts proved only raise a suspicion as distinct from a legitimate inference.

The solicitor for the respondent has not in. our opinion advanced any arguments to destroy such inference.

We have also examined the record very closely but cannot

find any evidence of other facts to explain why the fact in issue should not be inferred; or which raise any suspicion or reasonable doubt to counterbalance the inference of adultery.

In the circumstances the evidence accepted by the Magistrate being sufficient to establish adultery by the respondent the appeal must succeed and the order made on the 8th day of September, 1942, discharged.

Appeal allowed.

ABDOOL KADEER and RUPNARAYAN PERSAUD
Plaintiffs,
v.
RAGOBEER SHARMA,
Defendant.

1945 No. 159 and No. 180—DEMERARA.

BEFORE JACKSON, J. (ACTING): 1947. SEPTEMBER 8. 9. 10: DECEMBER 1.

Common carrier—Meaning of—

Carriage of goods by sea—Carrier liable for his own mischief or default—Master, mariner, pilot, or servant liable for his own negligence—Rules relating to Bills of Lading—Carriage of Goods by Sea Ordinance, cap. 123, *Schedule—Perils of the sea—Meaning of.*

Negligence—Evidence consistent with negligence and with no negligence—Negligence not established.

A common carrier is he who undertakes or holds himself out as being ready to carry for hire as a business, goods for any person who may choose to employ him from place to place, or to carry passengers no matter who they may be.

Article IV of the Rules relating to Bills of Lading contained in the Schedule to the Carriage of Goods by Sea Ordinance, Chapter 123, does not absolve the carrier from blame for his own mischief or default; nor does it excuse a master mariner, pilot, or servant, for his own negligence.

Where the evidence is equally consistent with the existence, as well as with the non-existence, of negligence, the party who alleges the negligence has failed in his suit.

Question of "perils of the sea" discussed.

Actions by Abdool Kadeer and Rupnarayan Persaud against Ragobeer Sharma for damages for loss of goods on board a sloop captained by the defendant. The plaintiffs alleged that the defendant was a common carrier, and that he was negligent.

R. H. Luckhoo, for plaintiffs.

L. F. M. Cabral, for defendant.

Cur. adv. vult.

JACKSON, J. (Acting): On the application of counsel for the defendant with the acquiescence of counsel for the plaintiffs the two actions were consolidated.

Plaintiffs claim damages for loss of goods on board The Hansa, a sloop captained and said to be owned by the defendant. Plaintiffs are shopkeepers who live at Zeelandia a village on the island of Wakenaam situate in the mouth of the River Essequibo. Defendant also lives at Zeelandia, and had been the owner of a sloop, The Mohni, which he got rid of in 1943; he acquired The Hansa in December 1944. Defendant worked as a sailor on sloops in the coastal waters of the colony since 1932 and became a captain in 1943.

From time to time several owners of sloops lived at Zeelandia, and Zeelandia became a recognised place of call for sloops for the purpose of taking up and depositing cargo; the sloops plied for trade between Zeelandia and Georgetown and in the course of their journeys had to travel by way of the Atlantic Ocean. On the route between the termini the vessels navigate in the Essequibo River through what is known as the Dauntless passage between Dauntless Island on one hand and a sandbank on the other. On the 3rd January, 1945, The Hansa, then lying at a wharf in Georgetown was sold by defendant to one C. B. Dyal for $1,225, the cheque for which sum was cleared at the Bank the next day 4th January 1945.

The case for the plaintiffs is that the defendant was at the material date a common carrier and that as such they delivered or caused to be delivered to him certain goods set out in the particulars of the claim for safe conduct to Zeelandia; that the defendant by negligent navigation of his vessel in the Dauntless passage caused the vessel to run aground and as a result the goods perished. Defendant denied that he was a common carrier or the owner of the vessel, all acts of negligence, and urged that the loss or damage was due to perils of the sea and|or Act of God. In an amended defence defendant pleaded that the plaintiffs had been given permission to travel on the Hansa by Dyal, and to take with them a quantity of goods for which no charge was made; defendant also gave notice that he would rely on the Carriage of Goods by Sea Ordinance Chapter 123.

It was proved or admitted during the trial that other sloop owners at Zeelandia received goods in their sloops for transport to Georgetown at regular rates and took shop goods from Georgetown to Zeelandia; that the plaintiffs who are the only shopkeepers at Zeelandia never engaged the defendant to carry shop goods in The Mohni or in The Hansa; nor was any satisfactory evidence adduced that defendant ever took shop goods for freight or at all. Defendant had on occasions in the Mohini taken cargoes of rice to Georgetown but took no freight on the return journey; he was principally engaged in taking sand from Wakenaam to Georgetown under a special contract to De Freitas Ltd., did no sloop work between the sale of The Mohini and the acquisition of The Hansa and on the first trip of The Hansa took sand only. Defend-

ant since he became the owner of The Hansa never took any cargo tor anyone save that alleged to be taken in this case; indeed The Hansa had only made one trip previously.

There is conflict of evidence in many respects and it would be more convenient to deal with the issues as they affect the findings of fact. Abdool Khadeer first named plaintiff alleged he had arranged with the defendant on the 4th January in Georgetown to take his shop goods to Zeelandia and in pursuance of that agreement he and defendant checked the goods when they were delivered at the Holmes Stelling wharf where The Hansa was berthed; the other plaintiff Rupnarayan Persaud said he had previously spoken with defendant on the 31st December 1944 and as a result of the conversation took his goods to the sloop; this latter plaintiff travelled with the sloop. Defendant denied all this, his version being that on the afternoon of the 3rd January he was approached by Khadeer; he told Khadeer he had sold the sloop to Dyal; that on the next day 4th January in defendant's presence Khadeer asked Dyal to permit him and his friend the other plaintiff to travel in The Hansa and take with them their goods; Dyal agreed; this version is supported by Dyal. Both Dyal and defendant say there was to be no charge for the goods. According to defendant and Dyal, the latter took possession of the sloop at the wharf of the Georgetown Town Council at Georgetown on the 3rd January; the sailors contracted in Georgetown with Dyal to take the sloop to Glenhurst, Pomeroon, which is two to four hours' journey beyond Zeelandia; defendant's responsibility to the sailors ceased in Georgetown; defendant gave his services free as captain to take the sloop to Glenhurst. It was not disputed that the sloop was sold on the 3rd January to Dyal but it was in issue as to where delivery was to be taken. Albert Arthur Bell who is an engineer, in the employ of Messrs. Booker Bros, for the past 29 years, and at whose desk the sale of the sloop was completed said

"Defendant had arranged to take the sloop to Pomeroon for Dyal; Dyal took delivery right away immediately after the sale. Defendant said he would take the boat up to Pomeroon."

On the 4th January the sloop proceeded on its way to Glenhurst by way of Zeelandia; save for giving the defendant and the crew an opportunity to call at their homes and/or for taking plaintiff Rupnarayan Persaud and the goods there appeared no reason why The Hansa should have called at Zeelandia. The salvage expenses were paid by Dyal. On these facts the question arises as to where, if at all, delivery was indeed effected and who was at the material time the owner of the ship. I find the evidence of the defence more acceptable and that Dyal took delivery in Georgetown, that Khadeer whatever the conversation he may have had with defendant was informed as to the change of ownership and requested Dyal to give him and his goods convenient transport to Zeelandia; Rupnarayan Persaud was also fully seised: it would be a strange solicitude for the welfare of the defendant for Dyal to pay the salvage expenses if the defendant's obligation under the contract of sale would only be discharged on the delivery of the vessel at Glenhurst.

It falls to be considered whether the defendant was a common carrier even assuming that the defendant was the person who arranged to take or did take the goods of the plaintiff on the ship. I do not accept the contention of the defendant that he had nothing at all to do with the goods; he did receive them into the ship and check them. I find it uniformly laid down in the books of authority that a common carrier is he who undertakes or holds himself out as being ready to carry for hire as a business, goods for any person who may choose to employ him from place to place or to carry passengers no matter who they may be. In Nugent v. Smith 1876 1 C.P.D. 423 at p. 428 Cockburn C.J. quoted with approval from Story on Bailments and Angell on Carriers as follows: "When it is said that the owners and masters of ships are deemed common carriers, it is to be understood of such ships as are employed as general ships, or for the transportation of merchandise for persons in general, such as vessels employed in the coasting trade, or in the foreign trade or on general freighting business, for all persons offering goods on freight for the port of destination" ' But if the owner of a ship employs it on his account generally, or if he lets tonnage, with a small exception, to a single person, and then, for the accommodation of a particular individual, he takes goods on freight, not receiving them for persons in general, he will not be deemed a common carrier, but a mere private carrier." So Angell speaking of shipowners as common carriers said: "When it is said that the owners and masters of ships are treated as common carriers, it is to be understood of such ships as are employed for the transportation of merchandise for all persons indifferently. Should the owner of a ship employ it on his own account, and for the special accommodation of a particular individual, take goods on board for freight, not receiving them from all persons indifferently, he does not come within the definition of common carrier, he not holding himself out as engaged in a public employment." Proof here is lacking that the goods were taken for hire but it was urged for the plaintiffs that that should be implied as sloop-owners who had hitherto taken shop goods for them from Georgetown collected freight at the destination Zeelandia. Such a view is unacceptable; it was established that this voyage was only the sloop's second after defendant re-started his business and that the defendant on the first voyage did not take any shop goods from Georgetown as freight or any goods whatsoever; plaintiffs on this occasion whether from defendant or Dyal did seek accommodation and was afforded it as a favour and without any request for remuneration. From whatever angle the evidence is viewed there can be found no support for the view that defendant was a common carrier; he falls within the category of a private carrier without reward and is only a gratuitous bailee. Whether or not the ownership of the vessel on the 4th January was in Dyal or in the defendant if is established that defendant was master or captain in charge of the sloop; that being so he was *prima facie* responsible for the proper navigation of the ship; he owed a duty to take care, to use such skill in navigating his ship as is required by an ordinary skilful captain; if it be found that by his negligence in navigating the vessel it foundered

resulting in loss of the cargo then he would be blameworthy and liable to be condemned in damages.

The defendant pleaded he was exempt from liability under the Carriage of Goods by Sea Ordinance Chapter 123, and his counsel relied on Article IV rule 2 (a) and (c) of the Schedule.

The relevant parts of the rule are as follows:

2. "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from —

(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

(c) perils, dangers and accidents of the sea or other navigable waters."

Upon a close reading of the rule I find it affords immunity to the carrier or the ship only for the neglect or default of the master and other persons named therein and for perils, dangers etc. but does not absolve the carrier from blame for his own mischief or default; nor does it seek to excuse a master, mariner, pilot or servant for his own negligence. In the strictly legal sense having regard to my finding hereinbefore mentioned Dyal is the carrier and the defendant the master or mariner; Dyal is not joined; even if defendant be styled the carrier he cannot secure the protection of the rule as it does not purport to provide him with a place of refuge. In my view the submission is without pith and substance and the rule is inapplicable to this case.

It was submitted for the defence that the accident was due to perils of the sea and/or Act of God. It was conceded that the weather was bad on the afternoon in question, that there was a terrible storm which lasted in the vicinity of Dauntless passage for over half an hour. The testimony of the master of *The Shira* a sloop larger than *The Hansa* was that he was ahead of *The Hansa* by about 25 minutes, that the tide was washing the water in the passage was shallow; that he anchored about half a mile from the southern entry into the passage and waited until the tide rose before he entered; he admits that his vessel required a greater depth of water to permit it to enter and go through without hindrance, than would *The Hansa;* it was advanced by the defence that there was more than enough water to afford *The* Hansa a free and easy passage and that unlike *The Shira* which was loaded with stone, she was empty; it was pressed by the plaintiffs that the storm was raging fiercely and that the defendant with reckless abandon took a grave risk. On the contrary it was contended for the defence that The Hansa had already done about a quarter of the passage when a violent and unprecedented storm burst upon the ship; the defendant successfully made two or three tacks, when suddenly the direction of the wind changed; one of the sailors in an effort to change the jib was struck by the jib sail and cut on the head as a result; he fell and before he could regain his feet, the wind had taken control of the vessel and was drifting it towards the bank, defendant dropped anchor but it could not hold as it was barely touching the mud; the defendant

swam ashore with a rope some 25 yards ahead and made it fast on a tree, he swam back to the ship but the violence of the storm caused the rope to shear and burst and the sloop drifted to the sandbank; meanwhile in its drift the bottom of the vessel was damaged by a submerged tacuba, the vessel thereafter sprang a leak; much of the perishable goods was damaged.

He who sets up Act of God and perils of the sea as a defence must prove it but not until the plaintiffs have first relieved themselves of the burden of establishing a prima facie case of negligence. It must be made clear that this defence is not to be sustained merely because the primary cause of the wreck of the sloop was due to the storm that blew across and about Dauntless passage; this type of defence was never intended to cover all perils of the sea or occurrences over which one has no control. The real test is expressed by Lord Herschell in his speech in The Xantho (1887) 12 Appeal Cases 503, at page 509; when referring to "perils of the sea" he said: "I think it clear that the term "perils of the sea" does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril "of" the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against the natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea."

Although there might have been a violent storm yet if the defendant unskilfully navigated the ship he would have to answer for his negligence. Let it not be forgotten that he who alleges negligence must prove it. In Cotton v. Wood (1860) 8 C.B. (N.S.) at page 571 Erle C.J. said "The plaintiff is not entitled to succeed unless there be affirmative proof of negligence on the part of the defendant"....."Where it is a perfectly even balance upon the evidence whether the injury complained of has resulted from want of proper care on the one side or on the other, the party who founds his claim on the imputation of negligence fails to establish his case."

I accept the evidence of the defence as to state of weather at the time of entry into and in the course of the passage, the depth of the water and as to how the accident to the vessel occurred; indeed only those who were on board the sloop could have given any proper account as to the circumstances which caused the accident. I do not find that testimony unreliable; the

plaintiff Rupnarayan Persaud was on board but he gave little or no assistance. Resaul Bacchus the captain of The Shira could not tell from his position whether anchor was being dropped from The Hansa nor could he tell what was happening when The Hansa ran aground.

In the words of Mr. Justice Williams at p. 572 in Cotton v. Wood (supra) "there is a rule of the law of evidence which is of first importance, and is fully established in all the courts viz. that, where the evidence is equally consistent with either view, — with the existence and non-existence, of negligence — it is not competent to the judge to leave the matter to the jury. The party who affirms the negligence has altogether failed to establish it. That is a rule which ought never to be lost sight of." In this case the plaintiffs have so failed and moreover the defendant has established that the misfortune to the ship was not due to his negligence and that he fully discharged his duty to take care.

The claims are therefore dismissed and there shall be judgment for the defendant in each case with costs.

Fit for Counsel

Solicitors : JOSEPH GONSALVES, O.B.E.; M. A. CHARLES.

ROBERT B. O. HART represented therein by his duly constituted attorney Philipina Olive Hart,

Plaintiff,

v.

A. R. KHAN,

Defendant.

1947. No. 547.—DEMERARA.

BEFORE LUCKHOO, J.: 1947. DECEMBER 8, 15.

Construction—Power of Attorney—Authority thereunder—May be conferred—In express terms or by necessary implication.

Construction—Power of Attorney—To commence action for recovery of a right—Action of slander—Not such an action.

Powers of attorney are to be construed strictly, that is to say, where an act purporting to be done under a power is challenged as being in excess of, or not in accordance with, the authority conferred by the power, it becomes incumbent on him who asserts such authority to show that on a fair construction of the whole instrument, either in express terms or by necessary implication, he possesses such authority.

A power of attorney "to commence any action or other proceedings in any court of justice for the recovery of any debt sum of money right title interest property matter or thing whatsoever now due or payable or to become due and payable or in anywise belonging to him (the principal) by any means or on any account whatsoever" does not authorise the attorney to commence an action of slander.

R. B. O. HART *v.* A. R. KHAN

Summons by the defendant A. R. Khan to set aside the writ of summons and all subsequent proceedings in an action of slander brought against him by Philipina Olive Hart purporting to act as the attorney of Robert B. O. Hart.

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

John Carter, for respondent.

Cur. adv. vult.

LUCKHOO, J.:

This is an application by way of summons to set aside the Writ of Summons and all subsequent proceedings in the above action instituted by ROBERT B. O. HART represented by his duly constituted attorney, in this Colony, Philipina Olive Hart against the defendant A. R. Khan claiming from him the sum of $5,000: — as damages for slander on the 22nd day of September, 1947. The writ in the action was filed on the 31st day of October, 1.947, served on the defendant on the 14th day of November, 1947, and conditional appearance entered on his behalf on the 22nd day of November, 1947.

In the Affidavit sworn by his Solicitor the defendant challenges the right of the plaintiff's attorney to commence the action on the ground that the Power of Attorney which was executed by the plaintiff and registered in the Deeds Registry on the 23rd day of August, 1946, does not confer upon such attorney power and/or authority to commence the action.

A copy of the Power of Attorney is attached to these proceedings and by Clause 4 thereof on which the attorney relies for her status to institute the action she is empowered "to accept service of any writ of summons or other legal process and to appear and to represent the appearer in any Court and before all Magistrates or Judicial or other officers whatsoever as by the Attorney shall be thought advisable and for the appearer and in his name or otherwise to commence any action or other proceedings in any court of justice for the recovery of any debt sum of money *right* title interest property matter or thing whatsoever now due or payable or to become due or payable or in anywise belonging to him by any means or on any account whatsoever, and the same action or proceeding to prosecute or discontinue or become nonsuit wherein or consent to judgment if he the attorney shall see cause."

Save and except the formal part of the power and in one instance in Clause 10 where a comma occurs no stops are used between the beginning and end of each clause. It becomes very necessary to read very closely the provisions contained in the instrument so as to give them their true meaning.

It has long been judicially established that Powers of Attorney are to be construed strictly, that is to say, where an act purporting to be done under a power is challenged as being in excess of, or not in accordance with the authority conferred by the power, it becomes incumbent on him who asserts such authority to show that on a fair construction of the whole instrument, either in

express terms or by necessary implication he possesses such authority.

It was submitted by Counsel for the plaintiff that the word "right" in the context in which it is used means or corresponds to "injuria" which gives right to a cause of action; and that 'right" is a cause of action; and must be given its real meaning in view of the other words contained in the said clause, and should not be regarded as surplusage.

He further submitted that the word "recovery" must be given a wide meaning and related to the word "remedy". He reads the latter part of Clause 4 as follows: — 'for the appearer and in his name or otherwise to commence any action or other proceedings in any court of justice for the recovery of any right" and that such right is "injuria" which gives rise to a cause of action hence "right" is a cause of action and therefore when the attorney instituted the action on behalf of her constituent she was acting within her authority.

Counsel for the defendant contended that there is no provision in the power whether expressly or by implication for the attorney to initiate an action in tort as slander undoubtedly is, or for the recovery of unliquidated damages, and that whilst the earlier part of the Clause gives the attorney full power to accept service of any legal process and to defend all kinds of proceedings, the latter portion limits her right when proceedings are to be taken by her by reason of the specific words used. Further there is a material difference between a "right" and a "remedy".

It would therefore seem that the argument was reduced to a consideration of the true construction and effect of the power of attorney. It is necessary to make an analysis of the material part of that clause — "for the recovery of any debt sum of money……now due or payable or to become due or payable; "for the recovery of any right title interest property matter or thing whatsoever……in anywise belonging to him"; to recover a right belonging to him.

Could such a "right" mean a cause of action, something in the abstract? Or must it not mean a right which has a coercive power. "Right" I apprehend means or connote something which is the subject of individual or class enjoyment. The action of slander is open to all whose character may be wrongly attacked.

Let us examine the whole tenor of the instrument and see if one can deduce from it anything to support the contention of counsel for the plaintiff.

It begins by reciting that he (the constituent) has appointed his attorney to represent him in his presence and during his intended absence and any future absences from the Colony for purposes among others —

Clause 1 —

> "To ask demand sue for recover and receive from every person and
> "every body politic or corporate or statutory in the Colony of British
> "Guiana whom it shall or may concern all

"sums of money debts due effects and things of what nature or "description soever which now are or which at any time or times during "the subsistence of these presents shall or may be or become due owing "payable or belonging to the Appearer in or by any right title ways or "means howsoever and also every gift and bequest which may at any "time hereafter be given or bequeathed to him by any person "whomsoever or otherwise become due or be payable to him and upon "receipt thereof or of any part thereof in the name of the Appearer or in "the name of the attorney or otherwise as the case may require to make "sign execute and deliver such receipts releases or other discharges for "the same "respectively as he shall think fit or be advised."

Clause 2 —

"To settle any account or reckoning whatsoever wherein the "Appearer now is or at any rime hereafter shall be in anywise interested "or concerned with any person whomsoever and to pay or receive the "balance thereof as the case may require."

Clause 3 —

"To compound with or make allowances to any person for or in "respect of the aforesaid debts or any other debt or demand whatsoever "which now is or shall or may at any time hereafter become due or "payable to the Appearer to take or receive any composition or dividend "thereof or thereupon and give receipts releases or other discharges for "the whole of the same debts sums or demands or to settle compromise "or submit to arbitration every such debt or demand and every other "claim right matter and thing due to or concerning the Appearer as the "Attorney shall think most advisable for the benefit of the Appearer and "for that purpose in his name to enter into make sign execute and deliver "such bonds of Arbitration or other "deeds or instruments as are usual in "like cases."

Clause 4 —

"To accept service of any writ of Summons or other legal process "and to appear and to represent the Appearer in any Court and before all "Magistrates or Judicial or other Officers whatsoever as by the Attorney "shall be thought advisable and for the Appearer and in his name or "otherwise to commence any action or other proceedings in any court of "justice for the recovery of any debt sum of money right title interest "property matter or thing whatsoever now due or payable or to become "due or payable or inanywise belonging to him by any means or on any "account whatsoever and the same action or proceeding to prosecute or "discontinue or become nonsuit wherein or consent to judgment if he the "Attorney shall see cause."

Clause 13 —

"In general to do all other acts deeds matters and things whatsoever "in or about the estates property and affairs of the Appearer therein in "doing all acts deeds matters and things

"herein either particularly or generally described as amply and "effectually to all intents and purposes as the Appearer could do in his "own proper person if these presents had not been made."

Note the words of Clause 13 —

"In general to do all other acts deeds matters and things whatsoever in or about the estates property and affairs of the Appearer therein……."

So read, the words do not confer upon the agent powers at large but only such powers as may be necessary, in addition to those previously specified, to carry into effect the declared purposes of the power of attorney. This must necessarily be so in order to be binding on the constituent. The apparent authority is the real authority for where the act of the agent is authorised by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is itself warranted by the terms used and all persons dealing with the agent the constituent will not be permitted to invoke in his favour any facts aliunde.

As the learned author Alcock in his book on Powers of Attorney at page 27 puts it "It is, however, not uncommon to find instruments in which after the enumeration of a number of express powers a final clause confers what are apparently wide and additional general powers. Such clauses also are strictly interpreted, being, in fact, confined to what is necessary to the performance of the particular acts set out before. This is not to say that they are necessarily mere idle surplusage; some meaning must be given to them, but they only enlarge the special powers when, in order to give effect to the general purpose of the authority, it is necessary that they should do so."

They are not to be interpreted to include additional facts which may authorise acts not ejusdem generis with the acts authorised by the specific powers.

In short, where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts.

In the abstract, general words, like all others, receive their full and natural meaning though they should not be extended so as to confine matters to which they are obviously not germane.

But general words which follow particular and specific words of the same nature as itself take their meaning from them and are presumed to be restricted to the same genus as those words: per *Willes J.* in *Fenwick* v. *Schmalz* L.R.3. C.P. 313.

It is not my function to ascertain an intention otherwise than from the words used in the instrument. I am to construe the meaning of the word "right" and however benevolently I may have been inclined, and I have set out with the intentions if possible of saving these proceedings being set aside, I am not entitled either to remake the instrument or to ignore the plain

meaning of the word having regard to the context in which it is used, scrutinising as I have done the language of the whole instrument and the object of the power.

I cannot interpret the word "right" as Counsel for the plaintiff has asked me to do. "Right" as used in the Power cannot mean something in the abstract. It must be something subsisting and capable of immediate enforcement, not injuria which gives rise to a cause of action which may or may not crystallise in an award in damages.

It is a wholesome rule that when a well known instrument such as a power of attorney has been in constant use for a number of years, the Court in construing it should not break away from previous judicial interpretations of words used therein.

The omission by Robert Hart to provide for his Attorney instituting an action of this nature may have been deliberate. I cannot therefore interpret the instrument by my own devising. If I step beyond the plain meaning of the word I would no longer be interpreting the instrument but will be creating, a power which the constituent never intended to give in order to meet the exigency which has arisen by the unauthorised act of the Attorney. The application must succeed. The order of the Court is that the Writ of Summons and all subsequent proceedings are set aside. The defendant is entitled to his Costs which I certify fit for Counsel.

Solicitors: *R. G. Sharples,* for the applicant (defendant); *M. A. Charles,* for the respondent.

JOSEPH EZECHIEL CLARKE,

Plaintiff,

v.

CAESAR AUGUSTUS DANIEL,

Defendant.

[1947. No. 1.—DEMERARA.]

BEFORE LUCKHOO, J.: 1947. DECEMBER 4, 5, 9, 10, 31.

Sale of land—Contract for—Pre-existing contract to give third person first right of purchase—No steps taken by vendor to ascertain whether third person willing to purchase—Breach of contract—Damages.

Damages—Sale of land—Contract for—Breach—General damages.

The defendant agreed to sell certain immovable property to the plaintiff. There was a pre-existing contract between the defendant and a third person under which the defendant had agreed that he would not sell or dispose of the immovable property without giving that third person the first right of purchase.

The defendant took no steps to find out whether the third person was willing to purchase.

HELD that the defendant had broken his contract with the plaintiff.

TAYLOR v. LANDAUER (1940) 4 A.E.R. 335. and LEAVEY *v.* HIRST (1943) 2 A.E.R. 581, applied.

General damages awarded for breach of contract of sale of land.

Action by the plaintiff Joseph Ezechiel Clarke against Caesar Augustus Daniels claiming specific performance of a contract for the sale of immovable property, and, in the alternative, damages The defendant counterclaimed a declaration that the contract of sale was determined, and that he be at liberty to return to the plaintiff the moneys paid thereunder by the plaintiff.

S. I. Cyrus, for plaintiff.

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

Cur. adv. vult.

LUCKHOO: J.:

This dispute arises out of a contract between the parties, and dated the 25th September, 1946. Under that contract, the vendor agreed to sell to the purchaser the south half of lot number 39 (thirty-nine), Princes and Norton Streets,Wortmanville, in the City of Georgetown, with the building thereon, subject to leases in favour of Shirley Garraway, Wilchrist Aloysius Waldron, and Lawrence Fredericks. The purchase price was fixed at $1,700: —towards which there was an acknowledgement by the vendor of the payment of $477.20, the balance being payable on the passing of transport.

Two important clauses in the agreement are as follows: —

"The vendor hereby undertakes and agrees to return to the Purchaser the earnest money of $477.20 (four hundred and seventy-seven dollars and twenty cents) should the vendor be unable to pass transport and to complete the sale."

and

"The vendor hereby undertakes and agrees to indemnify and keep indemnified the purchaser or his nominee from all claims, actions or pretension of actions in respect of the said hereinbefore described property."

The transport of the said property was duly advertised in the Gazette of the 26th October, 2nd and 9th days of November, 1946, when on the 7th and 9th November the abovenamed lessees of the vendor Lawrence Fredericks and Wilchrist Aloysius Waldron respectively entered opposition to the passing of transport of the property to the purchaser. In Frederick's opposition, the reasons given were that on the 29th day of September, 1943,the owner of the property (the vendor) had entered into an agreement of lease with him for a period of twelve years from that date with a right of renewal for a further period of twelve years in respect of a portion of land on the southern part of the south half of the lot; and in effect it was not competent for the vendor to pass the said transport without it being subject to the said lease, whereas in the said advertisement only the opponent's building was excepted therefrom.

Waldron's opposition related to his lease which was one for ten years from the 16th day of April, 1943, with a right of renewal for a further period of ten years and was in respect of a piece of land 30 feet in length by 28 feet in width which straddled the

centre of the south half of the lot. The reason given by him for opposing the transport was not because it was not advertised subject to the lease, but by paragraph 10 thereof the Lessor (vendor) agreed that he will not during the term of the agreement of lease sell or dispose of the land leased or any part thereof without giving him (the Lessee) the first right of purchase, and that it was only in the event of the Lessee failing to exercise such option, he the Lessor could sell the land, but subject to the agreement.

He complained that the first right to purchase was not offered to him, nor was he informed by the vendor or aware of the sale to the purchaser (the plaintiff) or of any intended "sale. He concluded the material part of his reasons in these words —

"That it is not competent for the proponent to seek to pass the said transport without giving to the opponent the first option to purchase the land aforesaid as per his agreement of lease aforesaid, or *alternatively*, without excepting the building thereon belonging to the opponent."

It will be well to set down at this stage the several transactions and incidents which culminated in the agreement of the 25th September, 1946, between the plaintiff and the defendant.

On the 3rd day of July, 1946 the plaintiff and the defendant entered into an agreement of purchase and sale of a lease for a period of 999 years with respect to the south half of the south half of lot 39 Norton Street without the building thereon whereby the defendant agreed for a consideration of the sum of Four hundred and fifty dollars to be paid forthwith by the plaintiff he would execute in his favour as soon as possible in due form of law a lease for the said period, and fixed twenty-five cents per annum as the rental.

This agreement provided for immediate possession to be given to the plaintiff. One of its terms provided for a conveyance by transport of the land leased in case legislation in the future permitted it when a new agreement without any additional consideration would be entered into for that purpose. This provision was apparently inserted to meet the previous intention of the parties for a sale and purchase outright of the quarter lot when it was intimated to them by counsel advising at the time, that a transport could not be passed for a quarter of a lot, and that a lease for 999 years should instead be entered into and executed. This lease was in due course advertised in the Gazette when both Waldron and Fredericks opposed the execution of the same for the reasons that it included the lands or portions thereof, under agreements of lease which they had with the defendant and then subsisting. It would appear that before the plaintiff entered into the agreement of the 3rd July, 1946; he had approached Waldron who owned a building on the land, on the information of the defendant that Waldron was selling, with the object of purchasing the building. Plaintiff stated that Waldron agreed to sell but wanted $900:—at which price he was not prepared to buy. Plaintiff admitted that he saw and read the grounds of opposition which Waldron had filed to the lease for 999 years and was aware of the terms of his (Waldron's) lease with the defendant.

The defendant on the 24th day of September, 1946, gave instructions to the Registrar for the withdrawal of the advertisement to which not only oppositions were filed but proceedings by writs of summons taken by both Waldron and Fredericks.

In that state of things, the defendant and his wife and plaintiff and his wife consulted Mr. C. V. Wight, Barrister-at-Law, who suggested that the plaintiff might purchase the whole half lot, that is the property the subject matter of this action, as there was opposition to the 999 years lease, Mr. Wight stating that although Waldron's lease was in order, that of Fredericks was not, being a lease for a period exceeding twenty-one years and not passed according to law.

It was in those circumstances that the agreement of the 25th September, 1946 was entered into. The sum of $477.20 was acknowledged to have been received, and plaintiff who in order to carry out the term for payment of the balance of the purchase price, applied for and was granted a mortgage for the sum of $1,000: - with the New Building Society Limited. The said mortgage was advertised concurrently with the transport.

In pursuance of the oppositions by Fredericks and Waldron on the 7th and 9th days of November, 1946, respectively, writs of summons were filed on. the 16th and 19th days of November. Fredericks claimed an order restraining the passing of the transport unless his rights in his lease were reserved. Waldron claimed an injunction restraining the defendant from passing transport of the property advertised, an order that the opposition he entered should be declared just, legal and well founded, the sum of $250:- damages and such further order as the court may seem just.

On the 9th day of December, 1946, Mr. Cyrus sent on behalf of the plaintiff to the defendant, a letter calling upon him to vest title of the property sold, and indicating that the plaintiff would as soon as transport is passed to him, grant a valid lease to Fredericks of the land referred to in the agreement between the defendant and Fredericks of the 29th day of September, 1943. In that letter the plaintiff's willingness to pay the balance of the purchase price was made clear, and defendant was informed that he would be held responsible for any further delay in the implementations of the contract and that proceedings for specific performance will be taken in case of default.

In a letter dated the 11th December sent by Mr. Solicitor Clarke, on behalf of the defendant, and addressed to the plaintiff (not to Mr. Cyrus), he referred to the contract of sale of the south half of lot 39 Princes and Norton Streets, Georgetown, which was subject to the three leases, and made a statement, which was never supported by evidence at the trial, that the plaintiff had without defendant's knowledge or consent instructed in writing, Kings, Solicitors requesting them not to include Fredericks' lease in the conveyance and that as a result an opposition suit had been filed against his client. He stated that transport cannot be passed; nor could his client legally resist the suit brought against him for restraining the passing) of the transport or could he complete the sale.

The statement in Solicitor Clarke's letter with reference to the note alleged to have been sent by the plaintiff to Kings, was denied by the plaintiff and was not pursued by Counsel for the defendant when the wife of the plaintiff gave her evidence.

To this letter a prompt reply was made by Mr. Cyrus in which he mentioned the apparent cause for the Registrar not permitting the advertisement for registration of the encumbrance—a long term lease not judicially executed. But he informed Solicitor Clarke that his client (the plaintiff) would allow such registration upon the lease being properly executed.

In his previous letter he had referred to the willingness on the part of the plaintiff to execute in favour of Fredericks a lease on the same terms as those contained in that of the 29th September, 1943.

In the meantime, however, the defendant wrote the Registrar the following letter, no doubt on the advice of his solicitor.

31, High Street,
Georgetown,
11th December, 1946.

Dear Sir,

I have cancelled the sale of S1/2 lot 39 Princes Street and Norton, Wortmanville to Joseph Eziekel Clarke transport of which was advertised in the *Official Gazette* in his favour and *do not desire or intend to pass* transport to him.

I have also to inform you that Kings Lawyers are no longer my Solicitors.

Yours truly,
Caesar A. Daniel.

The Registrar.

On the 30th December, Waldron withdrew his opposition, but not before entering into an agreement with defendant on the 28th December, in which the defendant purported to sell to him for the price of Four hundred and fifty dollars, "all that piece or parcel of land known as the South half of the south half of lot number 39 Princes and Norton Streets, Wortmanville, subject to a lease in favour of Lawrence Fredericks."

In one of the recitals to that agreement the defendant having claimed that he had cancelled the sale of the said south half of the lot to the plaintiff and in keeping with the terms of his lease with Waldron offered for sale to him the south half of the south half of the lot, the said Waldron being ready and willing to purchase the same.

On the 31st day of December, 1946, Fredericks gave notice to the Registrar withdrawing his opposition to the transport in favour of the plaintiff.

On the 2nd day of January, 1947, the plaintiff filed these proceedings claiming specific performance of the contract, the amount of rent which would have accrued to him from the property if transport in the ordinary course had been passed to him, alternatively mesne profits. He also claims damages as an alternative to specific performance.

The main grounds of defence to the claim could be summarised as follows: —

(i) That the plaintiff with full knowledge of the terms of Waldron's lease and more especially Clause 10 thereof entered into the agreement sued on.

(ii) That Waldron refuses to surrender any of his rights under his lease and has exercised his option to purchase as contained in Clause 10.

(iii) That the clause in the agreement between the plaintiff and the defendant, in consequence, became operative, and that the plaintiff was only entitled to the return of the earnest money of $477.50 which was offered him on the 11th of November, and again on the 11th December, 1946, but refused by him.

The defendant counter-claims for a declaration that the agreement has been determined, and that he be at liberty to return to the plaintiff the sum of $477.50 paid thereunder.

Eliza Alexandrina Daniel the wife of the defendant who is now an inmate of the Alms House and was present throughout the negotiations between the plaintiff and the defendant and the various stages of the transaction set out above admitted that on account of his illness and lack of funds the defendant was desirous of selling at first the south half of the south half of the lot, and that after Waldron and Fredericks had entered their first oppositions the defendant at no time endeavoured to get Waldron to surrender his lease or to get Waldron to sell his house, although the opposition by Waldron recited Clause 10 of his agreement; nor does it appear that the defendant made any attempt to carry out the provisions of that Clause at any time prior, or at all, to the agreement of the 25th day of September, 1946, with the plaintiff.

I do not accept the evidence of defendant's wife that the defendant and she spoke to Waldron about his lease and that he said he had a lease and did not agree to the sale of the land.

I cannot conceive that counsel of Mr. Wight's standing and experience would have advised the entering, of the agreement of the 25th September if he had been told that Waldron was objecting by reason of the provisions of Clause 10 of his lease.

Waldron who was called as a witness for the defence denied that the defendant and/or his wife ever approached him before either the advertisement with respect to the lease for 999 years or that of the sale of the South half of the lot. At no time said Waldron did the defendant or his wife ask if he was willing to surrender his lease, but it was only in the month of December, 1946, after his writ of summons had been filed and served, that the defendant and his wife came to him and took him to solicitor Clarke where he was asked if he intended to exercise his option to purchase the S1/2 of the S1/2 of the lot, which he said he did, agreeing to pay the sum of $450:—resulting in the execution of the agreement of the 28th December, 1946.

This case raises an important question whether upon the true construction of the agreement of the 25th September, 1946, and in the events which have happened, the inability to perform the contract was due to the default of the vendor in not taking the

steps provided for under the agreement of lease with Waldron; and whether on the facts as disclosed by the evidence he could rely on the clause already referred to as a defence to the action by the purchaser for specific performance, alternatively for damages for breach of contract.

The basic rule of the law of contract is that contractual obligations must be fulfilled, and it is no excuse that contracts with third parties prevent the fulfilment. However, it is possible by an exception clause in the contract to give the promisor the option in certain circumstances to avoid the agreement, when it would resolve itself as to the true construction of the exception clause.

As *Lord Atkinson* said in the case of *New Zealand Shipping Co. Ltd.* v. *Societe Des Ateliers Et Chantiers De France* (1919) A.C.1 at p.9. "It is undoubtedly competent for two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard…. But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation itself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract."

The question to be determined is whether, in view of the nature of the contract entered into between the parties and the circumstances surrounding the agreement of the 25th September, the parties having, contracted with knowledge of and in contemplation of the terms contained in the lease between the defendant and Waldron, it can be implied from the language of the contract that there was some obligation on the defendant to convey the property to the plaintiff, and if he could not do so to pay damages.

I shall set out the relevant parts of the said contract and lease side by side so that the conclusions at which I have arrived hereafter might be readily perceived.

> In the contract of the 25th September this term appears— ' The vendor hereby undertakes and agrees to return to the Purchaser the earnest money of $477.20(four hundred and seventy-seven dollars and twenty-cents) should the vendor be unable to pass transport to the Purchaser or his nominee and to complete this sale." In the agreement of lease of the 16th April 1943, this conditional restraint appears —
>
> 'The Lessor hereby agrees that he will not during the term of this agreement, sell or dispose of the land hereby leased or any part thereof without giving the Lessee the first right of purchase; and in the event of the Lessee failing to exercise such option, then the Lessor shall only sell the said land subject to this agreement."
>
> What therefore was the defendant's obligation under the con-

tract? What then was his duty? His duty was to take the steps necessary to enable him to perform his contract, and to take the steps envisaged by that clause in the lease. It cannot be disputed that some obligation must be implied in the contract. The defendant was to take all such steps under Waldron's lease to find out if Waldron was willing to buy. This is a term which is necessary in the words of *Bowen L. J.* in The Moorcock 4 P.D. 68 "to give to the contract such business efficacy as both parties must have intended, when they entered into the contract."

The plaintiff was entitled to rely upon the defendant's undertaking to use his best endeavours to carry out the contract. In his defence the defendant pleaded that Waldron refused to surrender any of his rights under his lease and has exercised his option to purchase. In effect it became impossible for him to carry out his contract with the plaintiff. If inability to perform his contract was the result of causes beyond his control the defendant would not be held to ,be liable under the terms thereof but he must use appropriate language in his contract to effect such absolution.

As *Bailhache J.* remarked in the case of *Comptoir Commercial Anversois and Power Son & Co.* (1920) 1 K.B. 868 "Nothing, in my opinion, is more dangerous in commercial contracts than to allow an easy escape from obligations undertaken; and I desire to reiterate what the older judges have so often said, that parties must be held strictly to their contracts; it is their own fault if they have not adequately protected themselves by suitable language."

If, however, the inability of the defendant arose as the result of failure or default on his part to take steps whereby he might be in a position to complete the performance of his contract, in that case he cannot be allowed to claim a release from such performance. The good faith of agreements requires that, so long as anything remains to be done, each party should do what is reasonably necessary for carrying out the intention.

The clause in Waldron's lease was not in the nature of an absolute prohibition to sell the land. It was only a conditional restraint, and the question whether the defendant was unable to perform the contract involves a determination of a question of fact.

The stipulation in the contract between the plaintiff and the defendant in my view is one in favour of the defendant to avoid the contract, but subject to this that the conduct or situation of the defendant (vendor) who has elected to offer the return to the plaintiff of the sum paid by him and to determine the contract has to be examined in order to ascertain whether such conduct or situation has been the means whereby the event which gives rise to the inability to perform the contract has been brought about.

It might be said that Waldron's opposition to the conveyance filed on the 9th day of November, 1946 made it impossible for the defendant to carry out his contract, this apart from any default on his part which has been urged by counsel for the plaintiff to

take the necessary steps under the provisions in Waldron's lease already mentioned. Is this really so? As between the plaintiff and the defendant what was the real position on the 11th December, 1946? When Solicitor Clarke wrote on behalf of the defendant on that day he made no reference to the opposition by Waldron, but only to that of Fredericks and stated that as a result of an opposition suit which had been filed against the defendant (clearly meaning suit by Fredericks) transport cannot now be passed nor can he legally resist the suit brought against him for restraining the passing of the transport nor can he complete the sale. On the 31st day of December, Fredericks withdrew his opposition.

Was Waldron's opposition a genuine one in the sense that he was really desirous of exercising his option to purchase under his agreement of lease, or did he oppose in order that Fredericks might have an opportunity to purchase the S1/2 of the S1/2 of the said lot subject to his (Waldron's) Lease? I believe the evidence of Samueline Clarke who said "When we left Mr. Wight's Chambers, myself, the defendant and his wife were on our way home. We met Waldron and Mrs. Daniel asked him why he had opposed the sale of the property. He (Waldron) said he was only assisting Fredericks."

I can understand the first opposition filed by Waldron to the advertisement of the 999 years lease in favour of the plaintiff as it was not advertised subject to the lease. I do not say that he had no grounds for filing, the second opposition if he was desirous of exercising his option to purchase but I doubt very much if he did so to enforce that right, for the omission in Solicitor Clarke's letter to his opposition is significant.

On that 11th day of December, the defendant wrote the Registrar stating that he had cancelled the sale to the plaintiff and did not intend to pass transport to him; and then on the 28th December he purported to have sold the S1/2 of the S1/2 of the lot to Waldron subject to the lease with Fredericks. The evidence lends much suspicion as to the genuineness of the transaction and the submission of counsel for the plaintiff that defendant has not shown he is unable to pass transport of the land sold to the plaintiff is full of merit, but the evidence is insufficient for me to make a finding of fact on that point.

I am in agreement with Mr. Cyrus when he said that Waldron's opposition contained a mere statement of his rights under his lease with the defendant, but no intimation whatever that he was willing to exercise his option to purchase. However being entitled to exercise those rights under his agreement of the 16th April 1943, I cannot compel the defendant to specifically perform the contract with the plaintiff if it would bring about an infraction of those rights. In this case, there can be no doubt; it has been admitted by Mr. Stafford, that the contract was perfectly legal and good, and it has been well proved; but, in the above circumstances. I hold that the plaintiff is not entitled to specific performance. But although specific performance may not be decreed yet if the plaintiff could prove a breach of contract at law, he

would be entitled to damages for in the instant case his claim for specific performance has not failed through any act or omission on his part.

The plaintiff as an alternative to specific performance has claimed the sum of $2000:—as damages. Damages are payable for breach of contract not because the contract is to pay damages, but by reason of a breach of contract in respect of which the Court awards damages.

Has the defendant omitted to do something which it was his duty to have done, having regard to the positive nature of the contract he undertook to perform? Was there a breach of some duty towards the plaintiff? What one man may reasonably be expected to do or not to do, having regard to the relations subsisting between him and another, is always an important element in determining his duty towards that other. Having entered into the contract to sell and transport the south half of the lot to the plaintiff and with full knowledge of the clause in the agreement with Waldron relating to the sale of the land there was when one considers the nature of the contract and all the circumstances of the case a duty cast upon the defendant to endeavour to clear the title in the fulfilment of the contract. It seems to me that I have first to find if there was any circumstance beyond the control of the defendant in carrying out the agreement. In order to construe the contract one has to look at the evidence and see what, in normal circumstances people do when they have a contract of this nature to perform, and then to ascertain if there was any failure which might have affected such performance. The defendant's wife admitted that neither she nor her husband although coming into daily contact with Waldron for they lived on the said premises made no attempt whatever to approach Waldron on the matter, until late in December after he had opposed and filed Writs of Summons on two occasions.

The plaintiff in my opinion has sufficiently proved that the defendant failed to discharge the responsibility which according to the terms of the agreement lay upon him to put himself in a position to carry out his contract. According to the evidence of Waldron, on repeated occasions before, at and after the contract of the 25th September 1946 was entered into between the plaintiff and the defendant, they, 'Waldron and the defendant saw each other daily and yet the defendant made no effort to qualify himself to carry out the terms of his agreement. A failure to exercise reasonable care is a neglect whether the duty to exercise such care is the result of a tort or arises from contract.

The words "should the vendor be unable to pass transport to the purchaser or his nominee and to complete this sale" can only mean in my view, unable after exercising the means open to him which resulted in failure.

The defendant in his agreement of lease with Waldron covenanted as follows: — "that he will not during the team of this agreement, sell or dispose of the land hereby leased or any part thereof without giving the lessee the first right of purchase; and *in the event of the lessee failing to exercise such option*, then the lessor shall only sell the land subject to this agreement."

The defendant took no steps to put himself into a legal position to carry out the contract with the plaintiff by first offering the said property to Waldron.

This indeed is not a contract which is voidable by both or either where the impossibility to complete or deliver was something for which neither was responsible. In that case each party is innocent, neither is in default. The contract is to be interpreted with even and equal justice to both sides.

It might be said that Waldron having on the 28th December 1946, purchased from the defendant the South half of the south half of the lot, the contract has become impossible of performance. That may be a good answer to the claim for specific performance but not in my opinion on the alternative claim for damages.

I have been able to find two recent cases which bear some resemblance to this one in so far as the legal features are concerned. The first is that of *J. W. Taylor* & *Co.* v. *Landauer* & *Co.* (1940) 4 A.E.R. 335 the head-note of which is as follows: "Before the outbreak of war, the sellers entered into a contract of sale with the buyers for the sale of 25 tons of Madagascar butter beans to be shipped from Madagascar to London Oct./Nov. 1939. The contract was an ordinary c.i.f. contract under which the sellers were bound, in due course, to give notice of appropriation and to tender documents. Before the due date for notice and tender, war broke out, and the Cereals Products (Requisition and Control) Order, 1939, was made forbidding, the buying or selling of cereals outside the United Kingdom without a licence, and also forbidding any person to have any dealings with any other person without such a licence. The sellers did not at any time apply for a licence, but on Feb. 14, 1940, long after the due date for notice and tender, they wrote to the Cereal Control Board asking whether licences to permit sellers to cover their pre-war sales of butter beans were granted, and, if so, the earliest date on which they were obtainable. The Board replied that, as far as it was aware, import licences had not been granted to permit sellers to cover their pre-war sales of butter beans, that on the outbreak of war private trading ceased, and that nobody except the Ministry of Food was then allowed to import food into the country. The sellers contended that an application for a licence would have been refused, and that the terms of the order excused them from performance of the contract: —

HELD: the order did not have the effect of defeating, or putting an end to, the contract. The duty of the sellers was to apply for a licence to enable them to perform the contract. There was no reason to suppose that the licence, if applied for, would not have been granted and the sellers were not, therefore, excused from performance of the contract.

The sellers in that case contended that the Order having come into force on Sept. 4, 1939, they were freed from performing their contract, and that they were not responsible to the buyers in damages for the failure to deliver, or for the failure to carry out their duty under the contract into which they had entered. They relied upon paragraph 6 of the Order which provided "No person

shall except under the authority of a licence granted by the Board of Trade buy or sell or agree or offer or invite an offer to buy or sell any cereal or cereal product situate outside the United Kingdom, and no person shall except as aforesaid have any dealings with any other person in any cereal or cereal product so situate or agree or offer or invite an offer to have any such dealings."

That paragraph is very wide in its terms and counsel for the appellants (sellers) argued before *Singleton J.* that they were freed from their obligations under the contract by reason of the prohibition. He submitted that they were not at liberty to deal with the buyers in this matter without a licence granted by the Board of Trade, and, further, that they could not get a licence from the Board, and that, therefore, they were absolved from any obligation which they might otherwise have under the contract. It was admitted that the onus was upon the appellants to show that they could not get a licence.

Counsel for the respondents (buyers) contended that it was not enough" for the sellers to say "We have not got a licence." They must show, either that they applied for a licence and could not get one, or that, if they had applied for one, they would not have got one;" a contention with which *Singleton J.* by reason of his judgment agreed.

The second case is that of *Leavey* & *Co. Ltd.* v. *George H. Hirst* & *Co. Ltd.* (1943) 2 A.E.R. 581. In that case the appellants claimed damages for breach of contract to supply certain goods to which the Limitation of Supplies Order, 1941, applied, delivery as ready after June, 1941. The respondents, by their defence, set up one defence only, namely, that the Order had the effect of making it illegal, and therefore impossible, for them to fulfil their contract with the appellants. No attempt was made at the trial to support that proposition. At the hearing the respondents set up two new defences, first relying upon a term in the contract "strikes breakdowns, or other unforeseen circumstances excepted." They said unforeseen circumstances had arisen which excused them from the performance of the contract, and secondly they maintained that, as soon as the order came into operation, the contract was at an end and by reason of the doctrine of frustration. It was held in the case that as the Limitation of Supplies Order. 1941, on the face of it, did not make it impossible for the contract to be performed after Sept. 30, 1941, there had been no frustration.

As Lord Greene M. R. said at page 584 "Indeed, when I asked counsel for the respondents what would be the implied term in this contract imported by the doctrine of frustration, he admitted, and very fairly admitted, and, in my opinion, correctly admitted, that it would not be that the contract between the parties should be at an end when the Order came into operation, but that it could only be at an end when the application had been made for a licence and it had been refused within a reasonable time." And after dealing with certain correspondence in the case the Master of the Rolls said "It seems to me that the defendants (respondents) entirely fail to establish on the facts that events had happened which made this contract impossible of performance."

I find as a fact that the defendant did not fulfil his obligations under the contract with the plaintiff. He is bound by his contract as every vendor is bound by his contract to do all that he could to convey the property sold, whenever it is a matter of conveyancing and not a matter of a defect in title. It is his duty to do everything he is entitled to do by force of his own interest; otherwise he would be liable for damages upon the contract.

To put the proposition of law in another form—if a vendor could have placed himself in a position to pass title to a purchaser but refrains from taking the steps necessary to enable him to do so, a purchaser may recover damages from him in addition to securing the return of his deposit.

In *Day* v. *Singleton* (1899) 2 Ch. 320 where the question of the vendor's conduct was material for his default was not due to inability to make title, but to a deliberate abstention from doing so, the purchaser recovered damages for loss of bargain.

In a more recent case *Wallington* v. *Townsend* (1939) 1 Ch. 588 *Morton J.* held that where a vendor failed to complete for reasons other than a defect in title, general damages were at large, and the Court could give such damages as it thought fit.

Somewhat similar for computing damages in the present case is that of *Thomas v. Kensington* (1942) 2 K.B. 181. There the vendor failed to complete a contract for the sale of real property owing to the fact that there was a mortgage on that and on other properties of the vendor. It was not a case where the failure was due to a defect in the vendor's title. The Court held that liability to the purchaser was not limited to the Costs of investigating the title, but he was entitled to damages for loss of bargain, although the purchaser knew when he entered into the contract that the land was mortgaged. The fact that the property was mortgaged with other property and that the vendor could not induce the Mortgagees to release it and was unable to pay off the whole mortgage was not a defect in title but a mere matter of conveyancing.

Although general damages are at large the plaintiff must not only allege but prove them. This he has not done. At any rate he has not given me any foundation to work upon, and I am not entitled to make a shot in the dark and award him some arbitrary sum. But he will be entitled, in the ordinary course, to recover back his deposit of $477.20 with interest thereon, and the costs he incurred in the performance of his part of the contract. Adopting the principle laid down in, such a case the plaintiff would be entitled to recover approximately the sum of $600:—for which sum I enter judgment in his favour. The counter-claim of the defendant must in the circumstances fail and be dismissed.

The plaintiff is entitled to the general costs of the suit.

Judgment for plaintiff

Solicitors: H. A. BRUTON; D. P. DEBIDIN.

CLEMENT ARTHUR VIGILANCE,

Petitioner,

v.

LUCILLE SELENA VIGILANCE,

Respondent.

1946. No. 104.—DEMERARA.

BEFORE JACKSON, J. (ACTING): 1946. SEPTEMBER 24, 25, 26;

DECEMBER 4, 5; 1947. JANUARY 13.

Husband and wife—Dissolution of marriage—Where whole conduct of wife showed that she wilfully absented herself from society of husband in spite of his wish—Malicious desertion.

A decree nisi of dissolution of marriage was granted to a husband on the ground of the malicious desertion of his wife, where the whole conduct of the wife showed that she wilfully absented herself from the society of her husband in spite of his wish.

Petition by Clement A. Vigilance for a dissolution of marriage on the ground of malicious desertion on the part of his wife Lucille Selena Vigilance. The wife cross-petitioned for a judicial separation on the ground that her husband had maliciously deserted her,

C. A. VIGILANCE *v.* L. S. VIGILANCE.

S. L. vanB. Stafford, K.C., and *John Carter,* for petitioner.

A. T. Peters, for respondent.

Cur. adv. vult.

JACKSON, J. (Acting): This is a petition by Clement Arthur Vigilance for dissolution of his marriage with Lucille Selena Vigilance born Solomon on the ground of malicious desertion. The parties were married on the 23rd January, 1943 and have had three children, Maurice, Colin and Joy. They were happy in each other's society for only a few months after marriage, for from July 1943 onwards there were intermittent quarrels and rights which unfortunately impaired the matrimonial relationship. The petitioner alleged that respondent was abusive and quarrelsome and on frequent occasions assaulted him; that she climaxed her assaults on the 11th May, 1945 when she threw on him a quantity of boiling water severely burning him arms, chest and back and causing him to suffer permanent disfigurement. He further alleged that he was nevertheless quite prepared to live with her, but she refused to do so and made it unmistakably manifest that she did not wish him any more; the petitioner swore that he repeated his efforts and enlisted the aid of others in this regard but respondent was adamant; he therefore filed his petition.

The respondent in her answer denied the allegations, replied that petitioner was mean and indifferent to her, that he frequently beat her and his acts of cruelty culminated on the 11th May when kicked, cruelly beat and drove her away from the matrimonial home; that immediately before that he had removed the light fittings and the water closet from the house in order to embarrass and cause her inconvenience. She therefore prayed for an order for judicial separation.

The events of the 11th May, 1945 must be examined closely although the antecedent happenings will assist in enabling an impartial investigator to ascertain where the truth does incline. The petitioner's case is that on that day he went home for his midday meal when he complained about the manner in which the meal was prepared; respondent became rude and he slapped her; as he was about to return to work she went into the kitchen, took a pot of boiling water and threw it on him. Respondent did not reply to this latter allegation in her answer to the petition but in this court she stated that they were discussing the question of the removal of the lavatory bowl when she made a remark about his family, whereupon he kicked her; she said he chased her with a knife "round and round" in the kitchen and when she could avoid him no longer she threw a cup of hot water on him; she had the water in her hand as she was preparing the porridge for the baby. The narrative of each of these parties is not reconcilable and assistance must be sought from those who arrived on the scene shortly after and who were sufficiently disinterested to give a true account of what was related to them by the parties in the presence of each other so soon after the occurrence.

It is admitted by both petitioner and respondent that four persons who are unconnected with either of them except by ties

of friendship or as neighbours were early on the scene, Mrs. de Freitas, a neighbour who has since died, Mr. E. F. Archer, an assistant Inspector of Schools who is living in Georgetown, Mr. Claude Merriman, a senior Sanitary Inspector in the employ of the Mayor & Town Council of Georgetown, and Mr. Carthy, a House Agent. Mr. Carthy at the time of the trial was out of the Colony. Mr. Archer is the godfather of one of the children; the respondent referred to Mr. Archer several times in her evidence, and according to her Mr. Archer took a major hand on that day, 11th May to get the parties reconciled; she called him in soon after the incident; she endeavoured to impress the court that the petitioner had closed the doors of the house to her and that Mr. Archer compelled him to open them; this was contested by the petitioner. Despite the fact that Archer was at all times available, he was not summoned nor was he called by respondent to give evidence although her attention was called to the fact that if her testimony was in doubt, Archer's evidence might strengthen it considerably. The petitioner called Merriman who said he went to the house at 7 p.m.; he found respondent packing up some of her belongings preparatory to leaving the house; he asked her not to go away and told her husband had said she must not go away; she replied she did not wish to hear anything, she had made up her mind. Merriman said Archer and others spoke to her in the same strain but all to no avail. In answer to Alwyn Evelyn's request to stay respondent replied that she knew what she had done, that petitioner's family could have him then, that she was determined to go. Evelyn's evidence as to what petitioner and respondent in the presence of each other related to him in respect of the occurrence bears a closer resemblance to truth and is in accord with the account of the petitioner rather than that of the respondent. I am satisfied that on the evening or night of the 11th May the respondent had made her mind to put an end to the existing state of cohabitation. Was the conduct of the petitioner such as to make it inevitable that the respondent should leave the home? If the answer be in the affirmative then he would be guilty of desertion although respondent withdrew from the home. The most that could be satisfactorily gathered from the evidence is that these parties were frequently having bickering and that their hearts did not for many a long day beat as one; perhaps they were both at fault and their minds were not sufficiently attuned to the welfare of the home or to what was best for their children; it could hardly, however, be disputed that the petitioner was not tardy in using his hands nor did the respondent lack readiness in employing her tongue as an organ for the issue of sharp invectives.

The burns from which the petitioner suffered were very extensive. Dr. Bayley who examined him on the 11th May and under whose care he was placed said that when he first saw the petitioner there was danger to life; at the trial the Doctor, after examining the result of the injury, said "There is permanent disfigurement……..the hand has got worse; it has more growing flesh on it; it would increase and cause stiffness, it would later affect his movement," The respondent suffered from a swelling of the upper

and lower eyelids, a swelling on the region of the right temple, a small wound on the upper right eyelid, subcutaneous bleeding below the right lower eyelid and. bloodshot in the right eye. Dr. Tjon-Aman said the injuries could have been caused by one blow, that they were consistent with a blow from the hand and with her hitting her head against a door. The versions of the parties as how these were caused conflicted.

The respondent insisted that she left the home on that night because of the presence in the home of petitioner's mother and sisters with whom there was no harmonious relationship. Respondent rejected the suggestion that because of what happened she might have been afraid to live with the petitioner again. She said in answer to counsel for petitioner "Before I filed my answer I told my legal advisers that I wanted my husband back and that I wanted to go back to him. No one ever told me I could ask to go back to my husband ..... I was never afraid to go home with petitioner; I knew that despite the burning he was not going to wreak vengeance on me; all the talk about cruelty is all moon shine." Respondent admitted that the statement made in her answer to the effect that the petitioner had at a date antecedent to the 11th May dismantled the electric light fittings and removed the water closet was not true; that indeed and in fact they were not removed. Respondent had prayed for judicial separation but it seems clear that in the light of her own evidence her prayer cannot be granted.

Between the 11th May, 1945 and January, 1946 petitioner and respondent met on numerous occasions by appointment with a view to reconciliation; on every occasion the appointment was made by or at the instance of the petitioner. Petitioner said his requests were always met with a refusal but he did not give up hope until January 1946 when he met her a Sunday morning at the corner of Light and Regent Streets; he was in company with one Alleyne who supported his story in the witness-box; he said she refused to make up with him; she asserted she was satisfied that they could never live well again. Respondent admitted the meeting but denied the conversation; she said she was in company with two other ladies and did not speak; here again respondent leaves her version unsupported by the testimony of anyone present.

Respondent's counsel urged that the offers of reconciliation by the petitioner even though they were accompanied by several practical demonstrations of his desire to resume cohabitation were not made in good faith; he instanced the fact that respondent had rented the house in which they lived to one Mrs. Bellamy on the 15th May, 1945 four days after the incident and referred to an occasion in 1943 when petitioner wanted to sell the house and counsel submitted that that gave "the clue to the situation." I do not accept the submission. Sir Henry Duke in *Pulford v. Pulford* (1923) Probate at p. 21 said "It has been a commonplace in this Court to hold that in order to ascertain whether there has been desertion, you must look at the conduct of the parties. There may be no matrimonial home, and yet no forfeiture of the rights of the spouses. Desertion is not a withdrawal from a place but from a

state of things." The circumstances of the whole case must be examined; one or two instances may not be taken in isolation in order to found an argument for presentation. Respondent did remove all her household goods from the matrimonial home on the 11th May and on subsequent days; she spurned the solicitations of her husband, rejected the appeals of Archer, Carthy and Merriman and even remarked that she had burned her husband already and his relatives could then have him. I cannot find from the evidence adduced, as to incidents anterior to as well as of the 11th May and subsequently, that the actions of the petitioner, though in some respects may be justly condemned, were of such a nature as would justify the respondent in severing the matrimonial relationship. I do find that the petitioner was at all material times ready and willing to live with the respondent and his efforts made to that effect were sincere and genuine. The whole conduct of the respondent shows that she wilfully absented herself from the society of her husband in spite of his wish.

The prayer of the petitioner for a dissolution of the marriage on the ground of malicious desertion is granted and there will be a decree nisi but the prayer of the respondent for a judicial separation is refused.

Decree nisi.

Solicitors: *H. A. Bruton; E. D. Clarke.*

K. NISA & M. S. H. RAHAMAN *v.* B. A. KHAN

IN THE WEST INDIAN COURT OF APPEAL

On appeal from the Supreme Court of British Guiana

KUDRATUN NISA and MUHAMUD SHARIEF HASSAN RAHAMAN
Appellants (Defendants),

v.

BIBI ASIYAH KHAN,
Respondent (Plaintiff).

1946. No. 1—DEMERARA

BEFORE COLLYMORE, C.J, Barbados; MALONE, C.J, Windward Islands and Leeward Islands; and BOLAND, J. Judge specially appointed, British Guiana.

1947. FEBRUARY 17, 18, 21.

Appeal—From order as *to costs—Leave to appeal necessary—Supreme Court of Judicature Ordinance, cap.* 10, *s.* 91 (*a*).

Trust—Testator refrains from altering will—Relying upon wader-taking given to him by legatee—Fraud if legatee takes benefits under will and repudiates undertaking—Undertaking will be enforced by Court—Even though it does not relate to testator's property but relates to immovable property of legatee.

The plaintiff brought a claim against two defendants. A. and B. Judgment was given in favour of the defendant B. but without costs. B. appealed to the West Indian Court of Appeal. He however, did not obtain the leave of the Court of Appeal or of the trial judge.

HELD that, by virtue of section 91 (a) of the Supreme Court of Judicature Ordinance, cap. 10, he was not entitled to appeal.

Where a testator, replying upon an undertaking given to him by a legatee under his will, refrains from altering his will, the legatee is guilty of fraud in accepting the benefits given to him under the will while at the same time repudiating her obligation to carry out the undertaking.

The Court will enforce the performance by the legatee of the undertaking, and it is immaterial that the act required to be done by the legatee thereunder, was in relation to immovable property acquired by her otherwise than under the will of the deceased.

Appeal by the defendants Kudratun Nisa and Muhamud Sharief Hassan Rahaman from a judgment of Duke, J. (Acting) in action No. 337 of 1942. in the Supreme Court of British Guiana in favour of the plaintiff Bibi Asiyah Khan, the wife of Mohamed Zainool Khan, to whom she was married subsequent to the 20th August 1904.

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

H. C. Humphrys, K.C. (J. A. Luckhoo with him), for respondents.

Cur. adv. vult.

The judgment of the Court was delivered by BOLAND, J., the Judge specially appointed, British Guiana, as follows:

This is an appeal against a judgment by which the appellant Kudratun Nisa is declared to be a trustee of a certain property known as Lot 21 Peters Hall, East Bank Demerara with directions for the passing of transport of the same to the respondent.

The appellant Muhamud Hassan Rahaman who filed a joint notice of appeal with his mother the appellant Kudratun Nisa, and against whom, jointly with the appellant Kudratun Nisa, the respondent had brought the action, obtained judgement in his favour but without costs.

It is clear from the grounds of appeal set out in the joint notice of appeal that Muhamud Sharief Hassan Rahaman's appeal is limited to the order of refusing him his costs. It is not easy to see the reason for this refusal of costs, but, as he did not in compliance with the provisions of section 91 of the Supreme Court of Judicature Ordinance (Chapter 10) obtain leave to appeal either by an order from the Court or from the trial judge who made the order as to costs, he is not entitled to appeal. We accordingly dismiss Muhamud Sharief Hassan Rahaman's appeal.

The learned trial judge based his order declaring Kudratun Nisa a trustee for the respondent upon certain findings of fact. These findings were not challenged by Counsel for the appellant.

The facts found by the trial judge are as follows: —

Meer Abdool Rahaman was the father of two sons and two daughters, the appellant Kudratun Nisa being the elder and the respondent Bibi Asiyah Khan the younger. He was the owner of several properties some of which at various times he had transferred to one or other of his children by way of gifts inter vivos. Sometime in February 1939, after he had made a will dated the 19th September 1938 by which he disposed of all his remaining assets, he was approached by the respondent who complained that she had learnt that he had made a will leaving her only a small legacy of $500.00 The father, apparently touched by this complaint, at once determined that the respondent should receive a larger benefit at his death than was provided for under the will, With this object he obtained from Kudratun Nisa a promise that the property known as Lot 21 Peters Hall, once belonging to him but since transferred to Kudratun Nisa under an arrangement for its purchase at an execution sale should be transported by her to the respondent. He emphasised to Kudratun Nisa that if she did not agree to do this he would change his will, the clear inference being that he desired to make additional provision for the respondent on his death. Relying on Kudratun Nisa to carry out this promise Meer Abdool Rahaman did not make a new will or codicil. He died about one month after on the 17th March, 1939, leaving the will of 19th September, 1938 as his last will and testament. In due course this will was admitted to probate, and for estate duty purposes the testator's assets were valued at $31,706.69.

In the will Kudratun Nisa is named as a devisee of a life interest in an undivided half of one of the testator's plantations known as Hamburg, the remainder over being devised to her son the second appellant, whilst it was to her other son Syad Mohammed Abdul Hamid that the other undivided half of Ham-

burg was devised. Kudratun Nisa and her son Abdul Hamid are also given jointly in equal shares one half of the testator's residuary estate. The legacy of 3500.00 bequeathed to the respondent — the respondent's sole gift — is made payable out of the Hamburg plantation by Kudratun Nisa and her two sons, and so is a legacy of $500.00 bequeathed to Muntaz Ali, one of the testator's sons. In the inventory of the estate of the deceased Plantation Hamburg is valued at $12,000.00, and the value of the joint interests for life of Kudratun Nisa and her son Muhamud Sharief Hassan Rahaman is fixed at $6,350.00 and her half share of half of the residuary estate at $1,307.00.

Whether or not at the time when she gave her undertaking to the testator to transfer Peters Hall, Kudratun Nisa knew the exact extent of her own benefits or those of her children under the will is not stated definitely in the findings of the learned trial judge. She certainly knew that she was a beneficiary, and she knew also that it was the desire of the testator to give the respondent some benefit in addition to the legacy of $500.00. She must have appreciated that it was for this reason that the testator asked her to make the promise, which she gave, to transfer Peters Hall to the respondent.

On the above facts the learned trial judge held, and in our view rightly held, that Kudratun Nisa was guilty of fraud in accepting the benefits given her under the will while at the same time repudiating her obligation to carry out the undertaking which she had given to the testator, and in reliance on which the will giving her those benefits was allowed to remain unaltered.

Kudratun Nisa, it should be remarked, in due course received her share of the Hamburg plantation accepting, the transport passed in her favour by the executor by way of assent to the devise. She had already denied and at that time she was still denying that there had been any understanding or bargain between her and the testator that she would transfer Peters Hall to the respondent. This acceptance by her of the benefits under the will cannot be construed as an act of election such as equity would recognise, as indicating her choice to take under the will and her approval of the desires and intentions of the testator as to Peters Hall.

The learned trial judge held that the facts found by him brought the case within the rule in equity relating to the enforcement of secret trusts. It is of the essence of this rule, and indeed the very foundation of it, that equity will not permit a statute, such as the Statute of Frauds or the Wills Act, whose provisions were designed for the purpose of preventing fraud, to be itself used as an instrument of fraud. Accordingly, when a testator makes a will or leaves a will unrevoked, in which he gives property to another who has undertaken dehors the will to act as a trustee thereof for certain purposes not illegal, equity will not allow such a person to retain the beneficial interest in the property for himself and to ignore the trust by putting forward successfully the fraudulent plea that the testator's directions in this regard were void because they were not set out in writing or in the form prescribed by the Statute. It has been held also in ac-

cordance with the same principle that the heir at law who takes realty in his own right by devolution under an intestacy, is bound by a declaration of trust though not in writing if the deceased, relying on his promise to discharge the trust, refrained from making his will by which he could have provided for the objects of the trust.

Usually the property which, on the face of the instrument—it may be a deed or a will—is given without the trusts being expressed therein is property belonging, to the donor which he is free to dispose of as he thinks fit. The relief granted by equity in such cases, at the instance of the person intended to be benefited takes the form of a declaration of trust in his favour. Equity acts on the conscience of the donee named in the instrument and will not allow him to take the donor's property free from the trust and so benefit by his own fraud.

It was contended by Counsel for the appellant that this rule cannot be invoked in a case like the present, where, as the trial judge found, the appellant made a promise in regard to her own realty and not in regard to property belonging to the testator. Counsel for the appellant conceded that it may be possible to enforce such a trust as affecting funds or other personal property of the donee by the creation by way of security for the due performance of the trust of a controlling charge over land granted by the instrument to the owner of the funds or personally sought to be given in trust. This would seem to be the view of Vice-Chancellor Bacon as expressed in his judgment in *Norris v. Fraser* (1873) L.R. 15 Equity 318 at page 330 where the learned Vice-Chancellor said in respect to promises to the testator made by the donee to pay an annuity of £300 a year to a third party, — "The fund out of which it is to be paid is a matter of indifference. If he had said 'I will give you my estate on condition that you will pay £300 a year out of another estate,' supposing she was a *feme sole,* that would not give her a right to retain the estate so given to her without performing the condition of paying the £300 a year out of some other estate; nor would it deprive the donee of the annuity of the right to say 'You shall not enjoy the estate without satisfying out of it my demand.' But Counsel for the appellant characterising these remarks as obiter, argued that in any event funds are fluid and a trust thereon can be satisfied by payment from any other fund.

We appreciate that difficulties may arise when a secret trust is impressed upon realty not owned by the donor inasmuch as such a trust cannot be satisfied otherwise than from the same land. It might be inequitable in some instances to enforce such a trust. For example during the period between the date of the declaration of trust and the death of a testator changes may take place both in respect of the donee's property as well as the property given under the will. This might conceivably happen when the death of the testator occurs long after the promise or undertaking of the donee. We are clearly of the opinion, however, that a court of equity is not powerless to prevent the perpetration of a fraud by a donee under a will although the trust he undertook relates to real property of which he is himself the owner. The nature

of the remedy to be accorded by equity must depend upon the facts in each particular case.

In the case now before us the testator died just a month after the undertaking by Kudratun Nisa to carry out his wishes. It is unlikely, in the circumstances that the value of the properties changed before his death.

The learned trial judge has found that the value of Peters Hall with the buildings thereon is S3.000.

In this case the Court takes the view that the first named appellant cannot be permitted to benefit from her own fraud, and that the respondent is entitled to relief. In the special circumstances of the case there will be judgment for the respondent as follows. IT IS ORDERED that the first named appellant, Kudratun Nisa shall either (a) as ordered by the trial judge advertise within 2 weeks after the date of this judgment transport of the lot 21 Peters Hall to and in favour of the respondent and pass transport of the same in favour of the respondent within 2 weeks after the transport is certified by the Registrar of Deeds, and also pay to "the respondent the net amount of the rents and profits from the said lot 21 Peters Hall as from 17th March. 1939, the date of the death of Meer Abdool Rahaman, to the date of the completion of the said transport as certified by the Registrar on the taking of an account; or alternatively (b) the said first named appellant Kudratun Nisa shall pay to the respondent the sum of $3,000, the value of lot 21 Peters Hall as found by the trial judge, together with interest at the rate of 3% per annum from the said 17th March to the date hereof.

The appeal will be dismissed but the judgment and order of the learned trial judge will be varied as indicated above. In the special circumstances the costs of the appeal will be paid by the first named appellant, and no costs will be payable by the second named appellant.

Appeal dismissed.

Solicitors: *R. G. Sharples; D. P. Debidin.*

F. & A. DAVID *v.* V. HERCULES

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of Trinidad and Tobago.

FLORENCE DAVID AND ALDRIC DAVID,
Appellants (Defendants),
v.
VICTOR HERCULES,
Respondent (Plaintiff).

[1945. No. 6.—TRINIDAD.]

BEFORE COLLYMORE, C.J., BARBADOS; MALONE, C.J., WINDWARD ISLANDS AND LEEWARD ISLANDS; AND LUCKHOO, Acting, C.J., BRITISH GUIANA.

1947. MARCH 3.

Appeal—Judgment of court of first instance—Will not be reversed—Unless Court of Appeal is convinced that it is wrong.

Joint tortfeasors—Meaning of.

In order to reverse the judgment of a court of first instance, a Court of Appeal must not only entertain doubts that the judgment is wrong, it must be satisfied that it is wrong.

All persons in trespass who aid or counsel, direct or join, are joint trespassers.

The judgement of the Court was delivered by the Acting Chief Justice of British Guiana, as follows:

Three questions have been raised in this appeal by Mr. Ellis Clarke, Counsel for Florence David, the first-named appellant.

They relate —

(1) To the sufficiency of the evidence connecting the said appellant with the acts of trespass by Aldric David, the second-named appellant, to a bakery rented by the respondent and situate at 65 Moody-Stuart Street in the Town of San Fernando;
(2) To the ownership of the said bakery; and
(3) If the appellant, Florence David, was the owner whether she incurred any liability for such acts of trespass.

These questions were argued under the first and fourth grounds of appeal, namely —

(1) that the findings and the judgment of the learned judge are against the weight of evidence and
(4) that the decision of the learned judge was against the weight of evidence and/or unreasonable having regard to the evidence and should be set aside.

It has not been disputed that at all material times Florence David was the owner of and resided on premises situate at No. 65 Moody-Stuart Street on which premises sometime in the year 1943 a bakery had been built consisting of a brick oven with con-

crete foundations covered by a structure of timber and galvanized iron sheets.

The respondent who is a baker and resides in the Town of San Fernando alleged in his Statement of Claim that the appellant Florence David during the month of May, 1943, let this bakery to him for a term of three years at a monthly rental of S18.00 and impliedly covenanted with him that he should peaceably and quietly hold use and occupy it during the said term. He further alleged that on the 29th May, 1943, the appellant Florence David put him in possession thereof and whilst in such possession on the 17th day of August, the defendants entered the said bakery and evicted him by at first removing the hinges of the door of the bakery and the door, taking off two sheets of galvanized iron from the roof, and on the 20th day of August, by closing and tieing with wire the gates at the entrances to the premises, and threatening to injure the plaintiff with a piece of iron if he re-entered the bakery.

The appellants severally denied the acts of trespass. The first-named appellant also denied any contract of tenancy between herself and the respondent.

The learned trial judge found as a fact that both appellants having failed to obtain possession of the bakery from the respondent unhinged the doors and uncovered the roof, and that they also refused him access to the bakery subsequent to the commission of those acts.

The first question to be considered by this Court is as to the sufficiency of the evidence adduced at the trial legally to connect the appellant, Florence David, with the physical acts of trespass undoubtedly committed by the appellant, Aldric David, as the learned trial judge on the evidence was warranted in finding, thus making her a joint tortfeasor. Mr. Clarke conceded that if there is such evidence, then the appeal in so far as his client is concerned must inevitably fail. He does not represent the second-named appellant who appeared in person and conducted his own appeal.

In the case of *Petrie* v. *Lamont* (1842) Carrington & Marsh-man's Reports at p. 96 an apt and terse definition is given of joint trespassers: "All persons in trespass who aid or counsel, direct, or join are joint trespassers."

The gravamen of the complaint by learned Counsel for the appellant, Florence David, is with regard to the language used by the learned trial judge in paragraph 4 of his findings in which he said:

> "The Davids, having failed in their efforts to get possession from Hercules, unhinged the doors and uncovered the roof. They also refused him access to the bakery subsequently."

He contended that there is no evidence on the record to justify such a finding of fact in so far as his client is concerned.

This Court being a Court of re-hearing is not bound by the particularity of the language used by the trial judge but must examine the whole of the evidence and see if the judgment can be reconciled with it.

As was pointed out in the speech of Lord Wright in *Flower* v. *Ebbw Vale Steel Iron and Coal Co.* (1936) A.C. at p. 220 "every appeal from a judge trying a case without a jury is a retrial, so that the appellate Court is bound to exerise a judgement of its own because the Appellate Court is in its turn a judge of fact". If this Court exercising that judgment comes to the same conclusion as the trial judge then, whatever was the language used by him in framing his findings, it should affirm the judgment he has pronounced.

Learned Junior Counsel for the respondent has carefully and forcefully drawn our attention to the evidence which he submitted showed a concerted action by both appellants towards a common end to prevent the respondent from resuming possession of the bakery of which he was still a tenant in law and of which he had not surrendered possession. Apart from the evidence of the respondent supporting the contract entered into with Florence David, he directed attention to the following facts which may be summarised as follows: —

Florence David was the owner of the premises on which the bakery was erected. Aldric David is her son. She used to assist the respondent by selling his bread when he was out making deliveries. He (respondent) was not satisfied with what he received from her on his return in relation to the bread left in the bakery. Subsequently he locked the door of the bakery whenever he went out. Aldric David wanted him to leave the door open on Saturdays for his mother to bake her bread. He said if his mother was not allowed to bake bread he would shut the whole thing down.

On the 2nd August, the respondent received from Aldric David a notice to quit the bakery. After the expiration of the notice Aldric David came to him and requested possession.

Returning to the bakery on the 17th of August he discovered that the doors were unhinged and leaning on a partition outside. Two sheets of galvanized iron had been removed from the roof. In the bakery he found both the appellants. During an altercation which ensued Florence David said to the respondent "Did you ever bring oven from St. Vincent with you?"

On the 20th August, the gates of the premises in her ownership and occupation which gave access to the bakery were tied with wire. The door of the bakery was padlocked, having been replaced. The respondent tried to undo the wire but Aldric David armed with a bar of iron prevented him from so doing and said "you have no entrance here". Aldric David then warned him not to come inside. Florence David joined in and said "Don't come inside".

Mr. Butt urged that the whole of this episode was the result of the respondent's refusal to permit Florence David to sell in the bakery in respondent's absence and to bake bread on Saturdays, and that the appellant, Florence David aided and joined her son in the common design to recover possession of the bakery in an illegal manner. That she permitted her son to wire the gates of her premises in order to keep out the respondent. Counsel submitted that with those facts together with all the surrounding circumstances the learned judge had ample material on which to

conclude that the acts of the appellant, Florence David, were not those of a peacemaker, as her learned Counsel stated, but were evidence of her participation with her son in a common design to exclude the respondent from the bakery.

We cannot say that the learned trial judge had not sufficient evidence before him to connect Florence David with the acts of trespass by her son. The judge saw and heard the witnesses and was able to assess at its true value the evidence they gave. He was impressed with the manner and demeanour of the respondent and his witnesses and he did not accept the evidence of the witnesses for the defence. If his judgment can be supported by the evidence and surrounding circumstances we ought not to disturb it.

Lord Atkin in his speech in the case of *Powell and wife-v-Streatham Manor Nursing Home* (1935) A.C. at p. 255 said :

> "I wish to express my concurrence in the view that on appeals from "the decision of a judge sitting without a jury the jurisdiction of the "Court of Appeal is free and unrestricted. The Court has to rehear, in "other words has the same right to come to decisions on the issues of "fact as well as law as the trial judge. But the Court is still a Court of "Appeal, and in exercising its functions is subject to the inevitable "qualifications of that position. It must recognize the onus upon the "appellant to satisfy it that the decision below is wrong; it must "recognize the essential advantage of the trial judge in seeing the "witnesses and watching their demeanour. In cases which turn on the "conflicting testimony of witnesses and the belief to be reposed in "them an appellate Court can never recapture the initial advantage of "the judge who saw and believed. And in no cases should this "advantage be more readily recognized than in cases which involve "character and reputation."

To make one other quotation, this from the speech of Lord Loreburn, L.C. in the case of *Kinloch v. Young* (1911) S.C. (H.L.) 1, 4:

> "Now, your Lordships have very frequently drawn attention to the "exceptional value of the opinion of the judge of first instance, where "the decision rests upon oral evidence. It is absolutely necessary no "doubt not to admit finality for any decision of a judge of first instance, "and it is impossible to define or even to outline the circumstances in "which his opinion on such matters ought to be overruled, but there is "such infinite variety of circumstances for consideration which must or "may arise, and it may be that there has been misapprehension or that "there has been miscarriage at the trial. But this House and other "Courts of appeal have always to remember that the judge of first "instance has had the opportunity of watching the demeanour of "witnesses — that he observes, as we cannot observe, the drift and "conduct of the case; and also that he has impressed upon him by "hearing every word the scope and nature of the evidence in a way that "is denied to any Court of appeal. Even the most minute study by a "Court of appeal fails to

"produce the said vivid appreciation of what the witnesses say or what "they omit to say."

A Court of Appeal in order to reverse must not only entertain doubts that the decision below is right; it must be convinced it is wrong.

Apart, however, from the summary of the evidence set out above, Counsel urged that the conclusion of the learned trial judge is buttressed and reinforced by the evidence of the respondent that it was the appellant, Florence David, with whom he entered into the contract of tenancy of the bakery. It must be assumed unless the learned trial judge had specifically said he did not believe the respondent in that respect that he accepted his testimony. This contract of tenancy was the *fons et origo* of the respondent's case, and it is clear that the appellant, Florence David, having acquiesced in the tortuous acts of her son, cannot hope to shelter herself from liability.

The question of the ownership of the bakery would only become material for consideration by us had there been no finding by the learned trial judge that both the appellants had jointly committed the acts of trespass set out in the Statement of Claim. Even if, as contended by Mr. Clarke, the weight of evidence showed that it was Aldric David's bakery, yet for the purpose of the respondent's case the appellant, Florence David, was ostensibly the owner having so held herself out to the respondent, besides which the bakery was attached to and formed an integral part of the premises in her ownership. Moreover, she would be liable for the acts of her agent, committed in her presence and with her approbation.

The appellant, Aldric David, was heard in person by the Court and in view of the findings of fact by the learned trial judge amply supported by evidence, it cannot be said that he has suffered in any respect by not being represented in this appeal.

For the reasons given the appeal of both appellants must be dismissed with costs.

Appeal dismissed

D. GORDON *v.* K. L. GORDON

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of Trinidad and Tobago.

DOROTHY GORDON,
Appellant,
v.
KEITH LYNDELL GORDON,
Respondent.

1946. No. 4.—TRINIDAD.

BEFORE COLLYMORE, C.J., Barbados; MALONE, C.J., Windward Islands and Leeward Islands; and LUCKHOO, Acting C.J., British Guiana.

1947 MARCH 10.

Husband and wife—Dissolution of marriage—Domicil of husband—Domicil of origin—Change of domicil—How established.

Where a person has abandoned his domicil of origin and intends to reside permanently in another country, a change of domicil is established.....The judgment of the Court was delivered by the Acting Chief Justice of British Guiana, as follows:

We have already allowed this appeal and now put our judgment in writing in the petition filed by the Appellant against the Respondent on the 2nd day of January, 1946, praying for a dissolution of her marriage on the ground of adultery.

The petitioner at the time of her marriage in London was a resident of Seacroft, near Leeds, in the County of Yorkshire, England, and the Respondent was born in the Island of St. Lucia, British West Indies, and lived there continuously until 1930 when he left for England to qualify for the Bar. He married the petitioner on the 11th day of February, 1935. Shortly after he returned to St. Lucia where he held an acting appointment as a Magistrate for a brief period.

In 1938 he was appointed a Magistrate of the Eastern District in Grenada which place he left in 1941 to assume duty as Crown Attorney in Dominica.

It would appear from his evidence given at the hearing of the petition on the 13th day of November, 1946, that he had made several visits to the Colony of Trinidad between Christmas 1938 and Christmas 1939 and being impressed with the conditions there he felt he would like to settle in that Colony.

With that end in view he applied for a post in the Civil Service in Trinidad to which place he obtained a transfer as Magistrate in the year 1942 and is at present the holder of such post. After residing in Trinidad for a year he informed his mother that he had definitely decided to settle in that Colony. Since making that decision he has evidenced his intention by disposing of all of his real property of some considerable value in St. Lucia

which he owned both by purchase and inheritance. His mother who lived in St. Lucia is now dead and he stated that he had no more interest in St. Lucia and intends to acquire a place in the Maracas Valley in Trinidad.

In January, 1946, when the petition was filed he was living here and it was then and still is his intention to make Trinidad his permanent home.

He stated that he is attached to a lady resident here and contemplates marrying her.

From the record it would appear that sometime in 1941 when in the Island of Grenada he had asked the petitioner "to give him a divorce". It is not clear whether that meant that she or he would take proceedings.

The learned trial judge found that the allegations of adultery laid in the petition were proved, but refused to grant a dissolution of the marriage on the ground of insufficiency of evidence that the respondent was domiciled in the Colony of Trinidad. He therefore dismissed the petition for want of jurisdiction. It is from that judgment the appellant has appealed and by her Counsel has urged before us that the learned trial judge was wrong in law and drew a wrong inference of fact in holding that the respondent was not at the date of the presentation of the petition domiciled in Trinidad.

"Now the law is plain, that where a domicil of origin is proved it lies upon the person who asserts a change of domicil to establish it, as it is necessary to prove that the person who is alleged to have changed his domicil had a fixed and determined purpose to make the place of his domicil his permanent home". *Winans -v- The Attorney General* (1904) A.C. 287 at page 288.

The respondent was born in the year 1907 in St. Lucia. His domicil of origin is therefore St. Lucia. Unless he can show by evidence that he had abandoned it and acquired a domicil of choice his domicil of origin would adhere and cling to him. There is a two-fold duty cast upon him. He must prove an abandonment of his domicil of origin and the acquisition of a domicil of choice. The domicil of origin is never destroyed, but only remains in abeyance during the continuance of a domicil of choice and revives when the domicil of choice is lost by abandonment.

A domicil of choice is acquired by the fact of residence in a country other than that of a person's domicil of origin with the intention of continuing to reside there indefinitely. The state of mind, or *animus manendi*, which is required demands that the person whose domicil is the object of inquiry should have proved a fixed and settled purpose of making his principal or more permanent home in the country of residence, in effect a deliberate intention to reside there. Two things therefore must co-exist— the fact of residence and the intention of continuing to reside indefinitely in a certain place. If the physical fact of residence is accompanied by the required state of mind, neither its character nor its quality is in any way material. Upon marriage a wife acquires the domicil of her husband.

It is important to keep these principles in mind in their application to the particular facts of each case.

At the very threshold of his judgment the learned trial judge seemed to have regarded with suspicion the value though not the credibility of the evidence given by the respondent with respect to the question of domicil, which is not at all times an easy one to decide, when he stated "The divorce proceedings are obviously taken by the petitioner at the request of the respondent." His decision appears to have been influenced by the circumstance that the suggestion of divorce proceedings came from the respondent. It is true that on the 6th day of January, 1941. respondent writing to the petitioner from Grenada said: "Let me know if you would be willing to give me a divorce", and in a letter of the 30th January, 1945 he gave her the address of solicitors in Trinidad and informed her that the legal costs would be borne by the husband, but these matters though perhaps pertinent to a question of collusion have no bearing on the question of domicil.

The learned trial judge regarded the sale by the respondent of his property in St. Lucia as evidence only of his intention to abandon his domicil of origin. Having come to that conclusion it appears to us that the evidence necessary to satisfy the requirement of intention to reside permanently in some place other than the respondent's domicil of origin would not be as great as if this finding had not been made. That intention we find was proved in the evidence given by the respondent at the trial.

Referring to the case of *Wilson v* Wilson 2 L.R. P & D 435 the learned trial judge said : "That case has very nearly induced me to accept the respondent's evidence as sufficient proof of his domicil in Trinidad; but there are two favourable circumstances in Wilson's case which are absent in the present case. First, Wilson's residence with his mother in England for five years was in the nature of a return home — the home which his mother had made in England, whereas the respondent's coming to Trinidad was more a step in his career than a choice of a home." This latter observation by the learned trial judge appears to be inconsistent with his finding that respondent had the intention to abandon his domicil of origin.

In Halsbury's Laws of England, (Hailsham's edition) Volume 6 at page 203 para. 246 there appears an important passage dealing with the weight of evidence "any act, event, or circumstances in the life of an individual may be evidence from which the state of mind may be inferred with more or less precision; it is impossible to formulate any general rule by which the weight of evidence due to any particular piece of evidence may be determined. Not only does the strength of the evidence from which the intention may be inferred vary according to the inherent probability or improbability of an alleged change of domicil but the importance of similar facts may differ absolutely in different cases. The age, character and general circumstances of the man himself…….are considerations which may cause the value of a particular fact to vary almost indefinitely."

The respondent in this case is a man of forty summers. His marriage to the petitioner took place 12 years ago. They lived together for three weeks. He has sold all his property in the

Island of his birth something which in the ordinary course of a man's life one would hardly expect him to do. He himself asked to be transferred to a larger Colony where his opportunities for advancement in his profession would be greater and has now formed an attachment which he hopes will lead to marriage. These are, in our opinion, acts, events and circumstances in his life from which his state of mind may be inferred with more or less precision and while it is difficult to determine at what stage of his residence in Trinidad he formed the *animus manendi,* the crucial point is the time of filing of the petition. See *Goulder-v-Goulder* (1892) Probate p. 240.

Heavy as the onus is, the respondent here has discharged that burden by Droving that he intends to remain in the Colony of Trinidad.

The intention must be a present intention (at the time of filing the petition) to reside permanently, but it does not mean that such intention must necessarily be irrevocable. It must be an intention unlimited in period, but not irrevocable in character.

As was said in *Udny v. Udny* (1869) L.R. 1 Ex. Div. 441 "It is true that residence originally temporary or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or *animus manendi* can be inferred the fact of domicil is established.

In the case now before us the respondent himself applied to be transferred to Trinidad and after a year formed the intention of making that place his home and from his acts and declarations in the year 1944 he converted what might at first be temporary or limited to be general and unlimited.

The formal order of the Court will be—this appeal is allowed—a *decree nisi* is granted as from the 14th day of November, 1946. The appellant is entitled to her costs here and in the Court below.

Appeal allowed

L. HUSBANDS *v.* J. LEWIS & J. PAYNE

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of Trinidad and Tobago.

LEONARD HUSBANDS.
Appellant (Plaintiff).

v.

JONATHAN LEWIS and JAMES PAYNE,
Respondents (Defendants).

1946 No. 2—TRINIDAD.

BEFORE COLLYMORE. C.J.. Barbados: MALONE. C.J., Windward Islands and Leeward Islands; and VINCENT BROWN, Acting C.J., Trinidad and Tobago.

1947 MARCH 10.

Contract—Quantum meruit—Claim on—For work done or services rendered—Contract to do the work or render the services—Proof of—Necessary.

In order to establish a claim on a quantum meruit for work done or services rendered, there must be proof of a contract, either express or implied in law, a term of which is to do the work or render the services in respect of which the claim is made.

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

The action out of which this appeal arises was brought by the Appellant, Leonard Husbands, against the Respondents. Jonathan Lewis and James Payne, as trustees of the Bon Accord Lodge, a society duly registered under the Friendly Societies Ordinance. Ch. 38 No. 2.

The original claim was for the sum of $1,700.24; made up of $1,200.00 for cash advanced to the Bon Accord Lodge at its request, $500.00 for work done at its request in supervising the erection of premises, and 24 cents for money paid to Messrs. Geo. F. Huggins & Co. Ltd.

This claim was specially indorsed on the Writ.

In the opening stages of the trial, on an objection taken by Counsel for the Respondents, leave was sought and obtained from the Court to amend the Statement of Claim, placing the claim for $500.00 on a "quantum meruit" basis in request of work done and services rendered in the erection of premises at No. 62, Duke Street and No. 79, Charlotte Street, Port-of-Spain in supervising the operations, purchasing materials and doing other necessary things during the construction of the buildings.

In their Defence the Respondents admitted the claim for money lent and they paid into Court the sum of $1,200.00 together with $72.00 for interest in satisfaction of that part of the claim. They denied that the Appellant did the work as he alleged or any of it, and pleaded that if he did render any services or did any work on behalf of the Lodge he did so as a member of it and/or

gratuitously and/or without any agreement for or expectation of reward.

Included in the Defence was also a denial of the value of the work, if any, done or services, if any, rendered.

At the conclusion of the hearing judgment was entered for the Appellant against the Respondents, as trustees of the Lodge, in the sum of $1,272.00 and costs up to the 6th February, 1945, the day before the payment into Court, but the judge rejected the claim in respect of the $500.00 and allowed the Respondents their costs of suit as from the 7th February. Against this latter part of the decision the Appellant has lodged this appeal.

The events leading up to a regrettable dispute between car-tain members of the society, which culminated in the present case, may be summarized briefly.

On the 17th May, 1940 a fire destroyed the premises of the Bon Accord Lodge. A select committee of five members was appointed to investigate the possibility of erecting new buildings, to obtain the necessary permits from the appropriate controlling authorities and to report to the Lodge. The efforts of this committee proved fruitless and it would appear that largely due to war conditions and the difficulties thereby occasioned no start was made in building operations.

On the 23rd September, 1942, there being some dissatisfaction with the work of the select committee, the Lodge empowered the Secretary to act, apparently in conjunction with the select committee, in the various matters relating to the building and gave him the necessary authority.

In due course a plan was prepared, the Secretary enlisted the assistance of the Appellant, then President of the Lodge, and on the 25th January, 1943 a preliminary building agreement was signed by A. Acosta, the contractor, and on behalf of the Lodge by F. R. Corbin, Secretary and L. Husbands, President (Appellant). It is pertinent to observe that in this letter of agreement the contractor undertook to employ and pay a time keeper to check the workmen's time, receipt of materials and generally to assist in carrying out the work.

Operations started with the demolition of the old buildings. The Appellant, it seems, assisted in this but makes no claim for remuneration in this connection. The building was begun and learned Counsel for the Appellant has described in vivid terms the work performed by his client during its course — as "fight for materials," "scouring the countryside," "the search for and engaging of workmen", "their supervision on the job" and so forth.

Now it is essential for success in a claim on a "quantum meruit" for work done or services rendered that there should be a contract, either express or implied by law, a term of which is to do the work or render the services in respect of which the claim is made.

Counsel for the Appellant has sought to invoke the existence of a contract express or implied entered into by the Appellant with the Secretary of the Lodge at a time when the former was President of the Lodge and had recently signed along with the latter

the building contract on behalf of the Lodge. But in our view the complete answer to this contention, as it is to the claim on a "quantum meruit" is to be seen in the findings of the trial judge, to the effect that there was no contract express or implied by law between the Appellant and the Respondent (or put in another way between the Appellant and the Lodge); and that even had there been any contract it would have been a contract between the Appellant and Acosta, the building contractor.

Indeed the trial judge could not, in our opinion, have found otherwise if due regard be paid to the Appellant's own evidence:—

> "There was no verbal contract with the Lodge for me to do any work for the Lodge. I began to do the work in question of my own free will…….I was not offered any money for my services, no money has been tendered to me for my services…….As President I had an interest in the welfare of the Lodge, and in the re-erecting of the building. That was how I started looking after the affairs of the building. It was about six months after the building was completed that I made a claim for remuneration for services rendered to the Lodge……..I did not take any note of anything I did in this matter."

It is clear to us that the Appellant as President of the Lodge gratuitously undertook and did certain work in connection with the building and continued to do it as a member after his term of office came to an end. In this he was not singular, for, as is to be expected in like circumstances when a Lodge, a Club or similar Society is in difficulties, other members having at heart the welfare of the Bon Accord Lodge also rendered assistance.

Counsel for the Appellant referred the Court to the minutes of various meetings of the Lodge which he contended went to show that there was a contract between the Appellant and the Lodge and that under it the Appellant was entitled to remuneration.

We do not agree with this contention, indeed, a perusal of the minutes leads to the opposite conclusion.

After the completion of the new buildings, although not before considerable disputation, the Lodge voted "honoraria" to certain of its members, including the Appellant, who had rendered voluntary services in the construction of the building.

It well may be that the Appellant was ill-advised in refusing the sum of $250.00 granted *ex gratia* as we find, for his voluntary services, but with this the Court is not concerned.

We see no merits in the appeal which is dismissed with costs. The order as to costs in the Court below will stand.

Appeal dismissed.

E. B. STRAKER *v.* S. LUKE

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of Trinidad and Tobago.

ELEASAR BENJAMIN STRAKER,
Appellant,
v.
STELLA LUKE
Respondent.

1946. No. 3—TRINIDAD

BEFORE COLLYMORE. C.J., Barbados; MALONE, C.J., Windward Islands and Leeward Islands; and LUCKHOO, Acting C.J., British Guiana.

1947. March 13.

Will—Action to establish—Circumstances of suspicion—Onus on person propounding the will—To remove suspicion—To affirmatively prove that testator knew and approved of contents of the will.

Where in an action to establish a will, circumstances arise which excite the suspicion of the court, the burden is cast upon the person propounding the will to remove such suspicion and to affirmatively prove that the testator knew and approved of the contents of the will.

The judgment of the Court was delivered by the Chief Justice of the Windward Islands and the Leeward Islands, as follows:

The respondent in this case claims to be the sole executrix of the last will, dated the 21st day of December, 1943, of Beatrice If Scott (also called Augusta Clarice Scott) late of 71,Ariapita Avenue Woodbrook, in the City of Port-of-Spain, who died on the 4th day of January, 1944, and to have this will established.

By a judgment dated the 8th day of July, 1946, the Supreme Court of Trinidad and Tobago pronounced for the force and validity of this will and ordered that the counter-claim in respect of a will of the testatrix dated the 13th day of October, 1943, propounded by the appellant, be dismissed. From this judgment the appellant has appealed.

The main issues raised on the appeal are concerned with —

(1) The failure of the trial judge to give due or any consideration to the evidence adduced on behalf of the appellant.
(2) The admission of inadmissible evidence.
(3) The failure to examine sufficiently the circumstances surrounding the making of three wills by the testatrix.
(4) The improper approach by the trial judge to the issues raised on the pleadings and to the determination of those issues

and relate to the testamentary capacity of the testatrix and to the question of undue influence.

Beatrice Scott (the testatrix) was unmarried and like most of the beneficiaries under her will, of Chinese descent. The Appellant, who is married but has lived apart from his wife for over 10 years, is of African parentage.

It would appear from the appellant's evidence that Beatrice Scott and he were on very intimate terms, their relationship from 1937 to 1943 being that of man and wife. In 1938 she bought a house, No. 24 Edward Street. This house was demolished and three buildings erected upon the site. The appellant was a tenant of one of these buildings, paying rent to Beatrice Scott, and collecting on her behalf the rents from the tenants of the other buildings. In 1942 Beatrice Scott began to realize that she was suffering from some complaint for which a surgical operation was necessary, and she endeavoured with the appellant's assistance to obtain admission to the Colonial Hospital. On the 13th October. 1943, thinking that she would be admitted to the Hospital on that day she went with the appellant to Mr. Corbin, a solicitor, and gave him instructions for the preparation of her will. He prepared the will and later the same day took it to 24, Edward Street, where he met the testatrix and the appellant, read the will over to the testatrix in the presence of the appellant. She signed her approval and duly executed it, Mr. Corbin and his clerk being the witnesses. This will has not been impugned. Under this will George Luke, a nephew of the testatrix, and Fanny dos Santos, her close friend, were appointed executors. Its most important provisions are: a devise of the property at 24, Edward Street to the appellant absolutely; a legacy of $2,000.00 in cash to the mother of the testatrix together with an annuity at the rate of S30.00 a month, and a life interest in 71, Ariapita Avenue; a legacy of $80.00 to Lillian Roudett, an old servant; to Edith Irvine, a cousin of the appellant, the mother of three children, their father being Vernon Scott, a brother of the testatrix, the sum of $200.00. Certain small legacies are given to relatives of the testatrix, and the respondent (a niece of the testatrix), Ida Wan Tong (a sister of the testatrix) and George Luke shared the residue equally.

The testatrix did not succeed in obtaining admission to the Colonial Hospital, but apparently as a result of the efforts of the respondent she was admitted to the Park Nursing Home as a patient on the 1st December, 1943, and there she was operated on by Dr. Parker on the 4th December, 1943. She was suffering from cancer of the uterus and her case was regarded as hopeless. While she was at the Nursing Home and until the date of her death the respondent was in close contact with her. The appellant, with whom the testatrix appeared to be on the best of terms up to the time she entered the Nursing Home, seems to have made attempts to see her there, and also on her return to her home at Ariapita Avenue on the 20th December, 1943, but for some reason he failed to do so.

On the 18th December, 1943, Lennox Arthur Wong, a solicitor of the Supreme Court in practice since 1936, and upon whose professional conduct no aspersions can be cast, received a telephone message in consequence of which he went to the Park Nursing

Home between 8 and 9 p.m. There he saw Beatrice Scott and took her instructions for making a will. The respondent and others were present when these instructions were given by Beatrice Scott herself. On these instructions Mr. Wong prepared a will which was executed the same day by the testatrix and witnessed by him and by Nurse Senhouse. It is significant that this will was a departure from the previous testamentary dispositions made by the testatrix on the 13th October, 1943, and of which Mr. Wong knew nothing. The more important differences are these: —

The respondent is substituted as sole executrix in the place of George Luke and Fanny dos Santos and she is also made residuary legatee subject to the life interest of the mother of the testatrix (Alice Carter) in the residue; Ida Wan Tong receives no benefit whatever under this will nor do Lillian Roudett and Edith Irvine; George Luke instead of taking a share of the residuary estate is given a legacy of S300 only and Fanny dos Santos a legacy of $200.00 instead of one of $300.00. For the devise of 24, Edward Street to the appellant is substituted a legacy of $4,000.00 from the sum realised from the sale of this property, in satisfaction of a debt of $1,400.00 owing to the appellant by the testatrix and for his assistance in erecting the buildings on the property. Wilhelmina Luke and Ralph Luke, a sister and brother of the respondent, are given legacies of $500.00 and $100.00 respectively. Their names were not mentioned in the will of the 13th October.

Mr. Wong was again sent for at about 4 p.m. on the 21st December, 1943. The testatrix had at that time left the Nursing Home and returned to 71, Ariapita Avenue. She there gave him instructions for another will. The testatrix was in bed, and the respondent, George Luke, Alice Carter and a nurse were present. The will was prepared in accordance with the instructions and read over to the testatrix in the presence of the parties above-named. She signified her approval and executed the will which was witnessed by Mr. Wong and one Hector Knox.

This will shows another departure from the will of the 13th October in that the legacy to the appellant is further reduced to $2,000.00 ($1,400.00 of this being in satisfaction of the debt already referred to), and the legacy to George Luke is increased from $300.00 to $500.00

It seems to us that upon a consideration of the substantial changes of testamentary dispositions made within a very short period and bearing in mind that these wills were changed when the testatrix was in a very poor state of health and in close contact with the respondent, the fact that the respondent was to derive increased benefits under these wills and had been made sole executrix; that her brother and sister also were to benefit, that the sister of the testatrix and a faithful servant were excluded from a share in her bounty, and that the appellant with whom she was not at variance and whom she desired to benefit under her will of the 13th October is to receive a much smaller legacy would give rise to suspicions requiring explanation and if not dissipated might lead to the belief that the sudden changes were not the result of the free volition of the testatrix.

Now, although the wills of the 18th and 21st December. 1943 were not prepared by the respondent, who took large benefits under them, yet certain circumstances existed in connection with their preparations which were bound to excite the suspicion of the Court. It was therefore incumbent upon the respondent to remove those suspicions and to prove affirmatively that the testatrix knew and approved of the contents of these documents. The principles of law by which the Court of first instance should have been guided are stated with lucidity by Baron Parke in *Barry—v* — Butlin, 2 Moo. P.C. 480 at p. 482 —

> "The rules of law according to which cases of this nature are to be decided do not admit of any dispute, so far as they are necessary to the determination of the present appeal; and they have been acquiesced in on both sides. These rules are two: The first that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

These same principles were again laid down and acted upon in *Fulton* v. *Andrew L.R. 7 H.L.* 448 and in Brown v. Fisher 63. L.T. 465, and in *Tyrell* v. *Painton* 1894 P. 151 Lord Lindley pointed out that the rule referred to was not "confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court."

It is quite apparent from the judgment of the trial judge that he approached the consideration of this case as if it were solely a contest between the respondent on the one hand and the appellant on the other, and dealt with it on that basis While this contest does exist it is not only issue, as the interests of other persons who were to receive benefits under the will of the testatrix of the 13th October, 1943, and whose names have been omitted from the later wills, are also involved. It is true that the learned trial judge has made definite findings "that the testatrix knew and approved of the contents of the will, and that the testatrix was of sound understanding when she made this will' and also "that there is no evidence of coercion having been practised on the testatrix in relation to the will which the plaintiff seeks to have established." But before making any of these findings the trial judge should have directed his mind to a consideration of the whole of the evidence and to the vital issues of the case, namely, "Has the respondent affirmatively discharged the burden placed upon her of removing the suspicions and has she satisfied the conscience of the Court that the testatrix at the time of the execution of the will of the 21st December, 1943 was possessed of a sound disposing mind? It

seems to us that he did not apply his mind to these issues and nowhere in his judgment has he made any observation which would lead to the conclusion that he had done so.

The conclusion at which we have eventually arrived renders a detailed and critical examination of the oral evidence unnecessary and undesirable.

This Court has full power under its rules and otherwise to draw inferences from the facts proved and to make any order which ought to have been made. But the unsatisfactory nature of the judgment which contains findings of fact not warranted by the evidence, and based as it would seem in some instances upon inadmissible evidence, and in others upon suggestions made to a witness in cross-examination, makes it almost impossible for us to determine with any degree of accuracy the facts from which it would be proper to draw inferences. It must be borne in mind, too, that although this Court has read the evidence taken at the hearing it has not had the opportunity of watching the demeanour of witnesses or observing "the drift and conduct of the case."

As we are satisfied that the learned trial judge did not direct his mind to the whole of the facts of this case or to the real question for determination, namely, the testamentary capacity of the testatrix in the light of the circumstances of suspicion, we have come to the conclusion that a substantial wrong has resulted and that a new trial should be granted.

The appeal is allowed. The judgment of the trial judge is set aside, and a new trial is ordered. The costs of both parties in this appeal will be paid out of the estate of the deceased. The costs in the Court below and of the new trial will be dealt with by the judge at the new trial.

Appeal allowed.

H. B. GAJRAJ LIMITED. H. B. GAJRAJ, and MOHAMED RAYMAN,

Appellants (Defendants),

v.

LESLIE SLATER, C.S.P.,

Respondent (Complainant).

[1946. No. 575 —DEMERARA.]

Before Full Court: LUCKHOO. C.J. (Acting), LUCKHOO, J. and JACKSON, J. (Acting):

1947. March 21.

Criminal law and procedure—Price control order—Convictions for breach-Two convictions founded on same facts—Second conviction not invalidated.

Constitution—Power of His Majesty in Council to legislate for Colony — British Guiana Act, 1928.

Emergency Powers (Colonial Defence) Order in Council, 1939*—Effective—During operation of Emergency Powers (Defence) Act,* 1939.

Appeal—Criminal law and procedure—Defendant giving evidence on oath—Question asked in cross-examination suggesting commission of another criminal offence—Contrary to Evidence Ordinance, cap. 25. s.52 *proviso* (*f*)*—Before question answered, question and suggestion ruled irrele-*

vant—Magistrate's mind not in any way affected by question—Conviction not vitiated.
Appeal—Sentence—Not unduly severe—Not disturbed.

A conviction on a charge of entering, contrary to the provisions of a price control order, into an artificial or fictitious transaction in respect of the sale of a price-controlled article, does not invalidate a conviction on a charge of selling the price-controlled article at a price in excess of that permitted by the price control order.

The Emergency Powers (Colonial Defence) Order in Council, 1939 which is expressed to have been made by His Majesty in Council in pursuance of section 4 (1) of the Emergency Powers (Defence) Act, 1939, "and of all powers enabling Him in that behalf"—

(a) continued to have effect in the Colony during the periods in respect of which the Emergency Powers (Defence) Act 1939 was continued in force from time to time by various enactments ending with the Emergency Powers (Defence) Act, 1945; and

(b) had effect in this Colony, irrespective of the Emergency Powers (Defence) Act, 1939, by virtue of the reservation in Article 54 of the British Guiana (Constitution) Order in Council 1928 of the power of His Majesty in Council to make laws for the peace, order and good government of the Colony, which Article was enacted in pursuance of section 1 (1) of the British Guiana Act. 1928.

A defendant charged with the commission of the offences of entering into an artificial or fictitious transaction in respect of the sale of a price-controlled article, and of selling a price-controlled article at a price in excess of that permitted by a price control order, was cross-examined while giving evidence on his own behalf. In the course of the cross-examination, a question was put to him by the complainant in which it was suggested that he had, prior to the commission of the offences with which he was charged, committed the offence of imposing a condition in connection with the sale of a price-controlled article. Before any answer was given by the defendant, the Magistrate, who was a barrister-at-law, ruled that the question and suggestion were irrelevant. The Magistrate, in his reasons for decision, analysed and specifically referred to the relevant and admissible evidence on which he based his decision. Nowhere in his reasons was there any trace that his mind was affected by the irrelevant question. The Magistrate did not, at the time he pronounced his decision or in his reasons for decision, say in express terms that the question put by the complainant had not affected his mind or influenced his decision.

Held: that it was proper to conclude that the decision of the Magistrate was not in any way affected by the question which was put to the defendant and deemed by the Magistrate to be irrelevant.

Barker v. Arnold (1911) 2 K.B. 120, considered.

The Court, by a majority, considered that a peremptory sentence of imprisonment imposed on the managing director of a leading firm in Water Street on a first conviction of the offence of selling a price-controlled article at a price in excess of that permitted by a price control order, was not unduly severe, and refused to substitute a fine therefor.

Appeal by H. B. Gajraj Limited, H. B. Gajraj and Mohamed Rayman from the decision of a Magistrate of the Georgetown Judicial District convicting them of the offence of selling a price-controlled article at a price exceeding that permitted by a price control order.

E. G. Woolford, K.C. and *H. C. Humphrys,* K.C., for appellants.

A. C. Brazao, Legal Draftsman, for respondent.

Cur. adv., vult.

The judgment of the Court, in so far as it related to the appeal against the convictions, was delivered by Luckhoo, C.J. (Acting) as follows:

At the hearing of this appeal several questions not without interest were raised by Counsel on behalf of the appellants. They refer to the effect of the violation of the provisions contained in section 52 proviso (f) of the Evidence Ordinance, Chapter 25; to the validity of the Order made by the Controller of Prices on which the prosecution was based; and to an alleged irregularity in law in convicting the appellants of two offences laid against them when, as Counsel contended, the facts on which the prosecution relied for a conviction on each charge were identically the same.

The appellants were charged (1) with selling to one Hardeen by wholesale above the price fixed by Order No. 72 made on the 24th day of January, 1946, 11.000 lbs of potatoes for the sum of $880: — (or at the rate of 8 cents per lb. instead of at the rate of 7 cents per lb. as set out at item 27 in List A of the First Schedule to the said Order), and (2) with entering into an artificial or fictitious transaction in respect of the said sale, both offences being contrary to clause 12(1) of the Control of Prices Order No. 72 made under regulation 44 of the Defence Regulation 1939. The two charges were taken together by consent.

We shall deal first with the last of the three questions set out above. Counsel for the appellants advanced the submission that both charges related to the same facts and formed one entire transaction and that therefore the appellants could not in law be convicted on both. He contended that, as the charge for entering into an artificial or fictitious transaction was the first entered in the Magistrate's record of proceedings, when the learned Magistrate said "Defendants found guilty on all charges," he must be taken to have convicted on that charge in the first instance, in which case he could not subsequently convict the appellants on the other charge. The learned Magistrate on the charge of selling above the price fixed by the Order imposed a fine of $500:— on the first named appellants, sentenced the second named appellant to one month's imprisonment, and reprimanded and discharged the third named appellant. All the appellants were reprimanded and discharged on the other charge. According to this submission, if this Court should decide to uphold the conviction of the appellants, it should for the above reasons allow only the conviction with the reprimand and discharge to stand.

In our view the convictions on both charges have been properly founded in whatever sequence they were pronounced by the learned Magistrate. Clause 12 (1) makes provision for several offences arising out of a single transaction and on the same facts. The test whether the convictions or, as Counsel submitted, the one secondly pronounced were or was bad in law, does not depend on whether the same evidence was required to establish both offences, but whether a successful plea of *res judicata* could have raised. The two offences charged are quite distinct and separate. All the decided cases go to show that, to support that

plea, it is not enough that the set of facts relating to each charge are the same. The offence prohibited by the law and for which the defendant is charged must be also the same in each case. In other words the person charged must be in peril for a second time for substantially the same offence. Moreover, in our view all the evidence necessary to support the conviction on one charge was not necessary for the other charge. The learned Magistrate very properly, as appears from his reasons, considered separately the evidence as affecting each charge.

While it is permissible for a Magistrate to impose a penalty in respect of each conviction yet it is true that it is the policy of the law not to favour more than one punishment for offences involving more or less the same set of facts. In the instant case, the learned Magistrate convicted each of the appellants on the charge for entering into an artificial or fictitious transaction, but, in merely reprimanding and discharging them, did not thereby impose any punishment. Section 12 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13, enumerates the various forms of punishment within the power of a magistrate, namely penalty, payment of compensation for injury done, whipping, flogging and imprisonment. A reprimand, not being included in this list, is therefore not in the nature of punishment.

We therefore hold that the conviction by the learned Magistrate on one charge did not invalidate the conviction on the other and that having imposed substantial punishment after conviction on one charge the learned Magistrate very properly merely reprimanded and discharged the defendants, whom he also convicted on the other charge.

On the question as to the validity of Order 72 made by the Controller of Prices, it was contended by Counsel for the appellants that this Order was made in pursuance of Defence Regulations authorised to be made in British Guiana by virtue of the extension to this colony of the provisions of the Emergency Powers (Defence) Act 1939 (2 & 3 Geo. VI). In accordance with the directions contained in section 4(1) of this Act of Parliament an Order in Council namely the Emergency Powers (Colonial Defence) Order in Council 1939 was proclaimed so as to extend the provisions of the said Act to certain named territories or classes of territories subject to the control of the Crown, amongst which was included the colony of British Guiana. In that Order in Council it is stated that His Majesty in pursuance of subsection 1 of section 4 of the said Act of Parliament *"and of all powers enabling Him on that behalf,"* by and with the advice of His Privy Council, is pleased to order that some of the sections of the Act (those to be excluded being specially enumerated) shall extend, but subject to certain modifications and adaptations appearing in the schedule to the Order in Council, to certain territories therein named and to any colony. It was by virtue of this Order in Council that the Controller of Prices in British Guiana derived the power to make Order 72 under Defence Regulations.

A very interesting argument was advanced by Counsel for

the appellants by which he contended that as the English Act, by the provision made in section 11 thereof, was limited in duration for one year, the Order in Council made in pursuance of it, though expressly excluding the provisions of section 11 from its operation as it was empowered to do by the Act, was itself spent and of no force and effect so soon as the Act from which it derived its powers ceased to be law by efflux of time. But the Emergency Powers (Defence) Act 1940 was passed amending section 11 of the Act of 1939 so as to extend the duration of that Act for one year more; and subsequently by Orders in Council the provisions of the 1939 Act were kept alive in Great Britain until the month of August 1945 when the Emergency Powers (Defence) Act 1945 further extended the provisions of the 1939 Act in Great Britain for a further period of six months. It would seem therefore that Defence Regulations made to affect British Guiana under and in pursuance of the 1939 Order in Council, or the 1940 Order in Council proclaimed in substitution therefor, were not *ultra vires* in view of the continued operation of the 1939 Act through the Orders — in — Council extending the time, and finally by the re-enactment of its provisions by the Act passed in August 1945.

Be that as it may, it should not be overlooked that His Majesty always possessed by right of His prerogative, the power to legislate by Orders in Council for the Crown Colonies. That prerogative power to legislate by Order in Council was expressly reserved to or conferred on the Crown by the Act of Parliament which established the legislature and constitution of British Guiana—that is the British Guiana Act 1928 reproduced as Chapter I in the revised edition of the Laws of British Guiana 1930. Accordingly the Emergency Powers (Colonial Defence) Order in Council 1939 was purported, as quoted above, to be made not only in pursuance of subsection 1 of section 4 of Emergency Powers (Defence) Act 1939 but of all other powers Him (that is His Majesty) thereunto enabling. These other powers would include the power to legislate by Order in Council for such colonies like British Guiana.

It is obvious therefore that the Orders in Council 1939 and 1940 as applying to British Guiana and all Regulations and control price orders made in pursuance thereof do not depend for validity on the continual operation of the Emergency Powers (Defence) Act 1939, which merely gave directions and suggestions for the exercise of powers already possessed by the Crown. This is an additional reason for our holding that the submission of Counsel that Order 72 was *ultra vires* must fail.

The remaining ground advanced by Counsel and stated above was that there was a violation of the provisions contained in proviso (f) of section 52 of the Evidence Ordinance, Chapter 25—a proviso which was introduced into the section to afford protection to an accused person who elects to give testimony on oath. The proviso which is identical in language with proviso (f) (ii) to section 1 of the Criminal Evidence Act of 1898 reads as follows: "A person charged and called as a witness in pursuance of this

Ordinance, *shall not be asked,* and if asked, shall not be required to answer, any *question tending to show that he has committed,* or been convicted of, or been charged with, any offence other than that wherewith he is then charged, or is of bad character, unless(i)……..(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution……"

The alleged violation of the enactment in this case was as follows. The respondent in cross-examining the appellant H. B. Gajraj who had not in any way fulfilled the condition on which his past character could be impugned suggested to him that it was alleged by one or two more members of the public that one of the clerks in the store of the first named appellants refused to sell slates unless the customer at the time purchased also slate pencils — meaning thereby that the firm of which appellant Gajraj was a Director had previously committed the offence of imposing a condition in connection with the sale of a price controlled article. Counsel cited the authority of *Barker v. Arnold* (1911) 2 K.B. 120, in support of the contention that although the learned Magistrate did rule the question or suggestion by the respondent as irrelevant before any answer was given by the witness, yet that the mere asking of the question in breach of the proviso to section 52 (f) was sufficient to vitiate all the convictions unless the Magistrate had stated at the time of the convictions or in giving his reasons for decision that the suggestion implied by the question was entirely ignored by him. In *Barker v. Arnold* the appellant in that case was charged before a bench of justices sitting as a Court of Summary Jurisdiction. He had taken advantage of the provisions of the Criminal Evidence Act of 1898 and gave evidence on his own behalf. He had at no time put his character in issue and was asked by the Solicitor who appeared for the respondent whether he had been convicted of an offence similar to that with which he was then charged. Before any answer was given the justices disallowed the question as being contrary to section 1 (f) of the Act of 1898. However, the Solicitor who put the question remarked that he had a certified copy of the conviction — clearly a most improper and highly prejudicial observation to make. The justices convicted the appellant, stating that the above mentioned incident was entirely ignored by them in arriving at their decision. On appeal it was held by the Divisional Court that, though the question ought not to have been asked or the observation made, yet inasmuch as the decision of the justices, as they had stated, was not affected thereby the conviction was not invalid. It is contended that this case is an authority for saying that in the absence of a declaration by the Court that it was not influenced in its decision by the improper question the conviction should be set aside. It was emphasised by Counsel for appellant that in the present case the learned Magistrate in his reasons for decision nowhere in express terms

mentioned that the question put by the respondent had not affected his mind or influenced his decision; nor does it appear that at the time of pronouncing the convictions did he say he was not so affected.

However, nearly all the authorities relating to the provisions of Section f (1) of the Act of 1898 are cases which were tried by a jury. A jury is never called upon to give reasons for the verdict which is returned; and consequently it is impossible to say that some, if not all, of the jury were not prejudiced by a question which was improperly asked in breach of the section. Accordingly when such a prohibited question is asked, the conviction will be set aside although the judge in his summing up may have carefully directed the jury to ignore the question altogether. The position is practically the same when a decision is given in a matter tried by a bench of lay justices as in the cited case of *Barker v. Arnold.* But for the fact that the justices in their decision stated expressly that they were not prejudiced by the improper question, it would have been impossible to say that one or some of them had not been prejudicially affected thereby in giving the decision.

But as was pointed out by Lord Alverstone in *Barker* v. *Arnold,* the Act does not provide that the asking of the question shall in all cases render the conviction bad. While it may be difficult to determine the factors operating upon the several minds of the persons comprising a jury so as to be able to say what influenced each in his decision as reflected in the verdict of the panel, there is not the same difficulty in the case of a magistrate who unlike a jury is required to furnish the Court of Appeal with his reasons for decision.

The Magistrate in this case is not a layman, but is a trained lawyer sitting alone; nor is he even like a Bench of lay Justices who may put forward joint reasons for decision which might conceivably not embody all the reasons influencing each member of the Bench. In this case in his reasons the Magistrate analysed and specifically referred to the relevant and admissible evidence on which he based his decision in each charge. Nowhere in his reasons can be found any trace that his mind was affected by the irrelevant question asked. Seeing that he promptly ruled that the question was irrelevant and since he gives specific reasons for his decision which bear no reference directly or indirectly to the ruled-out question, we feel that we can properly conclude that the learned Magistrate's decision was not in any way affected by that question.

Accordingly we are also of opinion that the convictions are not vitiated on this ground as was submitted by Counsel for appellants.

For the above reasons we hold that the convictions against all the appellants must be affirmed with costs to the respondent.

As the Court is divided on the question of punishment, we append our respective views on this ground of appeal.

On the question of sentence. Boland, J. delivered the following judgment as the judgment of Jackson, J. (Acting) and himself.

There remains to be considered only the question of punishment. The appellant H. B. Gajraj Limited appeals against the penalty of $500. imposed on the firm whilst the appellant H. B. Gajraj appeals against his sentence of one month's imprisonment with hard labour. Any person convicted by a magistrate for this offence is liable to a fine not exceeding $500.00, or to imprisonment with hard labour for a term not exceeding three months, or to both fine and imprisonment. A mere legal person like a company by its very nature cannot suffer imprisonment; and accordingly the fine of $500.00, which is recoverable only by distress, imposed by the Magistrate on the firm is the maximum punishment to which the appellant company was liable. On the other hand, the appellant H. B. Gajraj did not receive the maximum sentence provided for a breach of the Order. In his Reasons the learned Magistrate has made it quite clear that he did not take into consideration in assessing punishment a previous conviction which was only brought to his notice by the Police subsequent to his award of punishment, when an application was being made by the appellants for reduction of the sentences. Gajraj Limited and many other Water Street firms convicted at the time had acted under some genuine mistake as to their rights under the existing law. This explanation for the conviction given to the Magistrate on the hearing of the application for reduction of the sentences, and also to us in the hearing of this appeal, was accepted by Counsel for the respondent. Accordingly, we can regard the appellants virtually as without previous convictions, and we agree that the position is not the same as in the case of *Choo Kang v. Kilkenny* where this Court in June 1945 affirmed the sentence of imprisonment imposed on a wholesale dealer for selling a food commodity above the fixed maximum wholesale price after previous convictions for the same offence.

It may be observed that the appellants, in appealing against sentence, do not in their filed grounds of appeal impeach the sentence because of an alleged violation of the principles governing the assessment of punishment. We ourselves, after careful consideration of the reasons given by the learned Magistrate for his sentences, agree that the sentences cannot be challenged on any such ground. The appellants have contented themselves to rely upon the ground that the sentences imposed are unduly severe. On this plea we consider that we are entitled ourselves—and this is what the appellants thereby are asking us to do—to examine the nature of the offence, the circumstances, as disclosed by the evidence, associated with its perpetration, to consider the individuals themselves convicted, and then to decide whether, with all these factors considered and given due weight, the sentences are unduly severe. We may say at once that unless the reasons given by the Magistrate disclose a wrong principle having been applied by him —and we have already stated that they do not—we are not concerned with the Magistrate's remarks at the time of sentence on the nature of the case before him. We are to substitute ourselves for the Magistrate who was called upon to inflict punishment for an offence which was committed as disclosed by the evidence.

Such comments by the Magistrate which describe the offence as the worst type of profiteering case conceivable are not now relevant for our consideration of the matter. We may incidentally remark that we do not agree that this is the worst conceivable case of this type, otherwise the Magistrate, we could have considered, failed to impose an adequate sentence on the appellant Gajraj, and we would have been constrained to increase the sentence. If in substituting ourselves for the Magistrate we should find that the sentences are what we ourselves would have imposed, then of course, we would unhesitatingly dismiss the appeal against sentence But it is not necessary that we should be in absolute agreement with the sentence, it is sufficient if we find that the sentence is not unduly severe, even though we ourselves may not have passed quite so severe a sentence. We may say at the outset that it is our view that the sale of a price controlled food commodity beyond the fixed maximum price is a serious offence meriting severe punishment at this period even on a first conviction. Besides, in this particular case the food commodity was potatoes, and according to the evidence there were no potatoes in stock in the colony except those possessed by the appellant firm of Gajraj Limited. It was at this time that the appellant H. B. Gajraj—a Director of the appellant firm—negotiated and carried through this wholesale transaction of a large quantity of potatoes at a huge profit in breach of the Order. One cannot overlook the fact that it is such offences like this that lie at the root of most blackmarketing offences by retailers, who after purchasing at a prohibited price feel constrained themselves to sell at a prohibited price in order to make adequate profit. One can appreciate how such offences by wholesalers can be carried out in a manner to elude detection as was attempted in this case. It is true that evidence was given by appellants that other portions of this stock of potatoes had been previously disposed of in accordance with the Order, but as a result of the sale which is the subject of the conviction there can be no doubt that the general community desiring to obtain potatoes stood prejudiced at this time by appellants' offence.

In the circumstances we do not think that the maximum penalty imposed on the appellant company described as "a leading firm in Water Street" was too severe even on a first conviction, nor are we of opinion that peremptory imprisonment with hard labour for the period of one month too severe as sentence on the active offending Director H. B. Gajraj as regards whom perhaps a monetary penalty would hardly have been adequate punishment.

Therefore it is our view that the sentences imposed by the learned Magistrate should be upheld.

On the question of sentence, Luckhoo, C.J. (Acting) delivered the following judgment:

On the question of punishment Mr. Woolford on behalf of the appellant H. B. Gajraj urged that the sentence of one month's imprisonment was unduly severe.

In dealing with this ground of appeal I have to consider before I interfere with a sentence that has been imposed whether a wrong standard or principle has been applied in the particular case.

The imposition of sentence is not rigid and unchanging. The particular regulation under which the charge was laid provides for a range of flexibility.

The principles on which the Court acts are to examine the facts of the particular case and to see whether the sentence was manifestly excessive, having regard to the character of the person convicted and whether or not he is a first offender. It will only vary a sentence pronounced where it can be shown it was oppressive in the sense that it is not properly related to all the circumstances which emerged at the trial.

The learned Magistrate found that the offence was a serious one, as indeed all cases of profiteering can be regarded, and imposed a term of imprisonment on the ground that he considered a fine would not be a sufficient punishment for such a deliberate offence. He did not give consideration to the fact that the appellant was of good character and against whom there was no proof of any previous conviction either with respect to a like or any offence.

Where the law provides for the imposition of punishment as an alternative to the infliction of a fine, it is evident that it has in contemplation cases of extreme aggravation or wilful persistence in defiance of the law, and the heavy penalties so frequently specified in Emergency legislation ought normally to be regarded as the limit set on the powers of the Court when dealing with the gravest type of offence which the legislation contemplated as likely to arise in practice.

I appreciate the fact that in Courts of Summary Jurisdiction, the really difficult question, in a great majority of the cases, arises after a finding of guilt has been arrived at to measure the appropriate sentence.

But the object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be, not the interests of either party; and the spirit of criminal justice, whether in England or elsewhere is to see that the dice is not unfairly loaded even against a person found guilty of a serious offence.

The Court of Appeal while appreciating that it should be slow in interfering with the discretion of a magistrate on matters of sentence is nevertheless charged with an obligation to examine the facts of the case for itself, to find out in what circumstances the offence was committed, and the nature of the evidence which resulted in the conviction of the person where an appeal as to the severity of a sentence is raised.

I do not agree with the learned Magistrate when he stated "I could not conceive of a more serious charge of profiteering." In-

stances can be multiplied of graver cases than the instant one. It is upon that premise that he applied a wrong standard in inflicting punishment.

His mind is reflected in the words which he used later in his reasons for decision "I refused to accede to Mr. Humphrys' request, *on the ground* that I considered that a fine would not be sufficient punishment."

The learned Magistrate imposed imprisonment as an alternative to a fine because he considered the offence of the utmost gravity.

Applying the principles by which I should act, and upon a consideration of all the circumstances properly related to the offence of which the appellant was convicted, I think the interests of justice would be sufficiently served if the sentence of one month's imprisonment be varied by substitution of a fine of $300—instead, the firm of H. B. Gajraj Limited for the self same act of this appellant having been ordered to pay the maximum penalty of $500: —

Failure on part of the appellant to pay the sum of $300:— he will serve one month's imprisonment. Subject to this variation, the appeal in each case stands dismissed with costs.

Appeal dismissed; sentence affirmed.

AMY HINDS,

Appellant (Defendant),

v.

RUFUS GRANT, P.C. No. 4215,

Respondent (Complainant).

1946. No. 521—DEMERARA.

BEFORE FULL COURT: LUCKHOO, C.J. (Acting), BOLAND, J. and JACKSON, J. (Acting): 1947. March 21; May 1.

Criminal law and procedure—Larceny—Ownership of property alleged to *be stolen—Essential element in charge of larceny—To be proved.*

A conviction of larceny was set aside, where the Full Court did not find sufficient evidence and circumstances to justify the Magistrate's finding that there was proof of ownership in the person in whose name the property alleged to be stolen was laid.

Appeal by the defendant Amy Hinds from a decision of a Magistrate of the Georgetown Judicial District convicting her of the larceny of eggs, the property of the inhabitants of the Colony of British Guiana.

C. Lloyd Luckhoo (for *E. W. Adams)*, for appellant.

E. M. Duke, Solicitor-General, for respondent.

Cur. adv. vult.

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

We have examined the evidence on the record in this appeal, and in our view at the close of the case for the prosecution proof of ownership of the two fowl eggs, the subject matter of the charge of larceny against the appellant was left in a very unsatisfactory state. The evidence led on behalf of the appellant did not in any way strengthen such proof. Whilst it was open to the Magistrate on the evidence adduced to disbelieve the appellant and her witnesses as to how the appellant became possessed of eggs marked with the "Livestock Mark," yet the evidence of Edward Jones, the manager of the Livestock Farm, disclosed that such marked eggs are not only sold and delivered to the Public Hospital, Georgetown, but can also be purchased by members of the staff of the Department of Agriculture, and might thereby find their way into the possession of other persons. Again evidence was given by Eugene Percival a store attendant at the Public Hospital, Georgetown, that after the 18th day of May, 1946, only plain (meaning unmarked) eggs were issued to the kitchen of the Hospital where the appellant was employed as one of the cooks. The charge against the appellant was for the larceny of two eggs on the 20th May, 1946, at a time when eggs marked with the marks of the Livestock Farm might or might not have been in the kitchen of the hospital.

The evidence of Aaron John, the porter at the gate of the hospital whose duty, on the instructions of the Medical Superintendent, was to search the baskets of employees passing out of the compound after duty each day, and that of Police Constable Rufus Grant who happened to be at the Casualty Ward nearby late on the afternoon of the 20th May, 1946, was to the effect that the appellant had in a basket which she carried at least four eggs if not more marked in purple "Livestock" and when challenged she took out one of them, broke it and threw the shell by the sentry box. She refused to allow her basket to be searched, walked back to the hospital kitchen and on her way there broke some more of the eggs. Subsequently she went to Dr. Gomes with the basket empty followed by P.C. Grant who showed Dr. Gomes the egg shell which he had picked up near the sentry box.

This conduct on part of the appellant was most suspicious and lent colour to the view that she had not honestly obtained possession of the eggs she was carrying. No evidence was led by the respondent that on the 20th May there were in the kitchen of the hospital eggs with the Livestock mark on them some of which it was possible for the appellant to take. It should not have been difficult to lead this evidence one way or the other. The Magistrate found as a fact that P.C. Grant had proved the property and its value but a scrutiny of the statement of that witness discloses that all he deposed to on that point was "I charged her with larceny of two eggs the property of the inhabitants of the Colony of British Guiana, value 12 cents."

We are not, however, bound by the Magistrate's method of reasoning if we can find sufficient evidence and circumstances to

justify his finding that there was proof of ownership, an essential element in a charge of larceny, in the inhabitants of the Colony of British Guiana. We are not satisfied that we can. The nearest approach to this case if that of *Rex. v. Fuschillo* (1940) 2 A.E.R. 489 where the appellant Fuschillo was convicted of receiving sugar well knowing it to have been stolen. There was no actual proof as to the ownership of the goods, or that they had been stolen. The appellant, who had been granted an allowance of 11/2 cwt. of sugar per week by the food executive officer had upon his premises 26 cwt. of sugar. The appellant upon being cautioned by the police and told that there was reason to suppose that the sugar had been stolen said "I don't know why I took it" and upon being asked it he would say where it came from said "Be satisfied, and take it away, but don't take me." It was there held that the surrounding circumstances provided sufficient evidence to go to the Jury on the charge, and the conviction was amply justified by the evidence.

That case must be distinguished from the instant one in that the charge in the former was one of receiving stolen goods, where although there must be proof that the goods have been stolen, the circumstances in which an accused person has received the goods may of themselves be sufficient proof that they have been stolen. It is not a rule of law that on such a charge that there must be strict evidence of the theft, but the Court may find that there are sufficient circumstances to prove that the goods to the knowledge of the person charged had been stolen.

For the above reasons we are of opinion that the conviction of the appellant on the charge of larceny cannot be sustained and that the sentence must be set aside.

The appeal is therefore allowed with costs.

Appeal allowed.

PERCY CLAUDE WIGHT,
Appellant,
v.
THE DEMERARA STORAGE COMPANY LIMITED,
Respondent.

1942. No. 307—DEMERARA.

BEFORE FULL COURT: BOLAND, J. and JACKSON, J, (Acting):

1946. SEPTEMBER 27; 1947. JANUARY 10; MAY 28.

Practice and procedure—Appeal to Full Court—Lodging documents for use of *Judges—Time limited for—Rules of the Supreme Court (Appeals),* 1924, *rule* 13*—Extension of time—May be granted—Rules of Court,* 1900, *Order* 45, *rule* 4

Judgments and orders—Order appealed against—Whether interlocutory or final.

Appeal—From order—Order not arising out of claim for amount not exceeding $250*—Order not interlocutory—No appeal lies to Full Court—Supreme Court of Judicature Ordinance, cap.* 10, ss. 2, 91, 94 (1) (a).

The time limited by Rule 13 of The Rules of the Supreme Court (Appeals) 1924 may, in a proper case, be extended by the court by virtue of Order 45, rule 4 of the Rules of Court, 1900.

On the 1st April 1942, in action No. 136 of 1941, the Court ordered the Wharf and Storage Company to transport certain immovable property to the Storage Company by way of specific performance of an agreement entered into between the two companies. Subsequent to such order, W. obtained judgment, in action No. 119 of 1942, against the Wharf and Storage Company for the sum of $466 and costs, and under the authority of that judgment he levied execution on the immovable property which was the subject of the order for specific performance.

The Storage Company applied, by way of summons, in action No. 136 of 1941, for an order staying the levy by W. in action No. 119 of 1942 and all further proceedings in relation thereto, and for an order directing the Registrar forthwith to pass transport in favour of the Storage Company of the aforesaid immovable property. On the 14th September 1942 (*vide* 1942, L.R.B.G. 306) the Court made an order in favour of the Storage Company accordingly.

W. appealed against the order to the Full Court.

Held (1) that the order, made as it was, in action No. 136 of 1941, was not an interlocutory order but a final order; and

(2) that as the order did not arise out of a claim for an amount not exceeding $250, the Full Court had no jurisdiction to entertain the appeal.

Appeal by Percy Claude Wight from an order of Verity, C.J. made in Chambers: *vide.* (1942) L.R.B.G. 308. At the hearing of the appeal the respondent took preliminary objections to the hearing thereof.

H. C. Humphrys, K.C. (*W.J. Gilchrist* with him), for respondent.

C. Vibart Wight, for appellant.

Cur. adv. vult.

The judgment of the Court was delivered by Boland, J. as follows:

In limine counsel for the respondents has raised two objections to the competency of this appeal. Firstly, it is submitted that this is an appeal against, not an interlocutory order or judgment, but against a final order purporting finally and conclusively to dispose of the matter which was in issue between the appellant and the respondents, and that consequently this court has no jurisdiction to entertain the appeal. Secondly, counsel has drawn to the court's attention that the appellant failed to leave with the Registrar for the use of the judges of these court copies of certain documents filed in the original proceedings as prescribed by Rule 13 of The Rules of the Supreme Court (Appeals) 1924. These directions, counsel contends, are made imperative by Rule 13 which provides that two copies of the documents specified therein shall be lodged with the Registrar within two days of the appellant's Notice of Appeal. Accordingly, it is

submitted that appellant is not entitled to proceed with his appeal and that the same should be dismissed.

We propose to deal with the latter objection first as we feel that a proper decision on the point as to whether the order is a final or interlocutory order cannot be given unless the court has before it all the documents in the proceedings before the judge which may be material for the determination of this question. Moreover, it is well that there should be a definite ruling with respect to the furnishing of copies of documents as prescribed by Rule 13.

There can be no dispute that, as the Rule directs, copies of the judgment or order itself appealed from must be supplied; and also copies of the pleadings, if any, and copies of the Judge's notes, if available. But as regards all necessary affidavits, copies of which also the Rule requires to be lodged, there may be some uncertainty as to whether a particular affidavit is necessary for the appeal. Similarly, it may be difficult for an appellant to be certain as to whether a particular document, correspondence or otherwise, which was admitted in evidence, would reasonably be required for reference on the hearing of the appeal as this would be dependent sometimes upon the course which the argument may take during the actual hearing of the appeal. Therefore the rule as to the furnishing of copies of such affidavits or documents cannot be so rigid and inflexible that failure to leave these copies with the Registrar within two days of the Notice of Appeal would inevitably vitiate the appeal beyond repair. So far as the time limit of two days is concerned, the court has by virtue of Order XLV Rule 4 the power to extend the time fixed by Rules of Court for the performance of any act in a proceeding. In a proper case, in order to prevent an injustice, the Court would exercise its power to grant an extension of time so that an appellant may put himself in order by filing copies of documents directed to be filed by Rule 13. It should be stated that the exercise of jurisdiction by the court to hear and determine an appeal from a decision of a judge does not depend upon an appellant's compliance with the provisions of Rule 13 (Vide Ex parte Firth, In re Cowburn 19 Ch. Div. 419). By way of contrast it may be pointed out that in regard to appeals from magistrates the statute itself which regulates this court's jurisdiction to hear such appeals namely — the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, prescribes that an intending appellant must fulfil certain conditions therein specified as to filing his Notice of Appeal and Grounds of Appeal and for the service of copies of these on the respondent. Without these conditions being fulfilled, the court would have no jurisdiction to hear an appeal from a magistrate's decision and accordingly it has been repeatedly held by the court in such cases that, being without jurisdiction a priori because of the antecedent non-fulfilment of these conditions by the intending appellant, the court is powerless to allow an extension of time to the appellant so that he should put himself in order.

Turning to the record in this appeal which is supplied to the Court, we observe that in his Notice of Appeal the appellant seeks

to challenge certain findings of the learned Chief Justice against whose order the appeal is brought. These findings no doubt were embodied in a decision upon which the formal order as entered was based. Yet no copy of either the notes taken by the learned Chief Justice or of his decision has been supplied in the record; nor is there any copy of the affidavit by Anthony Marques Bar-cellos which as the formal order states was read and considered by the learned Chief Justice. With omissions from the file such as these, it makes it difficult for the court readily to appreciate the issues that were before the learned Chief Justice or his reasons for his findings. No excuse has been advanced nor can be advanced for the omission to supply copies of these documents, and we are not disposed to extend any indulgence to the appellant by granting him an extension of time so as to put himself in order. We feel that by doing so we might be establishing a precedent by which encouragement would be given to a lack of care in the presentation of appeals to this court.

But in any event from the meagre information supplied by the record there is sufficient before us to enable us to determine the question raised by respondent's first objection — namely whether this is an interlocutory order or a final order. It would appear that the appellant, Percy Claude Wight, had issued a writ of execution against certain immovable property to enforce payment of a judgment for $466 and costs which he had recovered against another company The Demerara Wharf and Storage Company Limited — the defendants in certain proceedings No. 119 of 1942. But prior thereto in another proceeding No. 136 of 1941, the respondents as plaintiffs therein on the 1st day of April, 1942 had obtained a judgment against the said Demerara Wharf and Storage Company Limited the defendants therein whereby it was ordered that The Demerara Wharf and Storage Company Limited do transport the said movable property to the respondents by way of the specific performance of an agreement entered between that company and the respondents. At the time of the writ of execution, the Demerara Wharf and Storage Company Limited were still registered as the owners of the immovable property, not having as yet obeyed the Court's order as to the transport of the same. The appellant, Percy Claude Wight, was at the time of the order for specific performance in the proceedings No. 136 of 1941, and also at the time of the writ of execution in proceedings No. 119 of 1942, the Chairman of the Directors of The Demerara Wharf and Storage Company. The respondent Company was bent, it would seem, on getting a writ of attachment against him for what was considered by them to be a contempt of Court in that he, the Chairman of Directors, by whom the act of transporting in obedience to the Court's order had to be effected, should himself seek to frustrate the Court's order by a levy of execution for a judgment recovered by him personally. With this object the respondents did not adopt the usual course of a third party who intending to impeach an execution makes a claim in the proceedings of the execution itself to be followed probably by an inter-pleader issue in those same proceedings, but respondents applied by way of a summons in proceedings No. 136 of 1941 for a writ of

attachment against the said Percy Claude Wight for his alleged contempt and prayed also in the said summons (1) that the Directors officers servants and agents of The Demerara Wharf and Storage Company Limited be restrained from entering upon and otherwise interfering with the said immovable property; (2) That the levy by the said Percy Claude Wight in action No. 119 of 1942 and all further proceedings thereto in relation to the said levy be stayed and (3) That the Registrar do forthwith pass transport of the said immovable property in favour of the plaintiffs (the respondents in this appeal) as declared by the judgment of the 1st April, 1942. The appellant, Percy Claude Wight was no doubt served with the summons; at any rate he duly appeared at the hearing of the summons.

In his order on this summons — and this is the order appealed against— the learned Chief Justice, it would appear, made no order on the application relating to the alleged contempt but granted the injunctions applied for and ordered immediate transport by the Registrar of the immovable property from The Demerara Wharf and Storage Company Limited to the respondents.

The question now to be decided is, does an appeal against this order of the learned Chief Justice come within the jurisdiction of this Court? The jurisdiction of this Court, the Full Court, to hear appeals is defined and limited by the Supreme Court of Judicature Ordinance, Chapter 10. Section 89 of that Ordinance makes provision for appeals to the Full Court from the decision of a single judge of the Supreme Court, in the exercise of its civil jurisdiction, in all matters in respect of which there is by section 94 no appeal to the West Indian Court of: Appeal; subject however to the provisions of section 91 which mentions certain classes of orders where there is no right of appeal whatsoever, and subject to any Rule of Court governing the right of appeal in any special matters. This is not an order referred to in section 91, nor is there any Rule of Court making special provision for appeals in a cause such as this.

Section 94 subsection (1) (a) expressly excludes from the West Indian Court of Appeal the following matters: (a) any interlocutory judgment or order except interlocutory judgments or orders in certain named classes of matters (the matter in the present appeal admittedly does not belong to any of these classes there excepted), (b) any judgment or order in any action where the amount claimed or the value of the property in respect of which the action is brought does not exceed two hundred and fifty dollars. There are - enumerated in the same subsection appeals in other matters which are also excluded from the West Indian Court of Appeal, but the present appeal is not one of those there mentioned.

Therefore, if the order of the learned Chief Justice is not an interlocutory order but a final order, the appeal would lie not to this Court but to the West Indian Court of Appeal. Clearly if it is a final order, this Court would in this matter have no jurisdiction in appeal because it is shown by the record that the "action" in which the order was made is one where the amount which is

the subject of the claim exceeds two hundred and fifty dollars. It was in respect of a dispute arising from a claim to enforce by writ of execution a judgment of $466 and costs and involved an issue as to the ownership of immovable property of much greater value than two hundred and fifty dollars. It may be observed that "action" is defined by section 2 of the same Ordinance as meaning "a civil proceeding commencing by filing a claim or in any other manner prescribed by rules of Court, and includes a suit."

An appropriate test to determine whether a judgment or order is final or interlocutory is afforded by the answer to the question — Would the judgment or order if allowed to stand make a final disposition of the matter in dispute between the parties whichever way the decision was given in the lower court whether for appellant or respondent? If either way it would finally dispose of the matter, the order is a final not an interlocutory order. This is the view expressed in the judgment of the Court of Appeal in *Salaman v. Warner & or* 1891 1 Q.B., 734. The House of Lords in *Cogstad & Co. v. H. Newsam* 1921 A.C. 528 in effect approved of Salaman v. Warner. An exception to the conclusiveness of the above test would appear to be in respect of orders in interpleader issues. These orders do purport finally to dispose of the issue as regards the ownership of property as between the claimant and the execution creditor, who bases his right to levy on the ownership of the judgment-debtor. It has been held that an order in an interpleader issue though purporting finally to dispose of the matter between the claimant and the execution creditor is an interlocutory order an appeal against which must be filed within the shorter time prescribed for filing appeals from interlocutory orders and not the more extensive period within which appeals from final orders must be filed. *McAndrew vs. Barker* (1877) 7 Ch.D. 701, and *McNair* & *Co. vs. Audershaw Paint & Colour Co.* 1891 2 Q.B. 502.

If in this matter the respondents with the object of challenging the appellant's rights to execution against the immovable property had resorted to filing a claim in the proceedings No. 119 of 1942, those very proceedings in which appellant had obtained his judgment and issued his execution, then on the authority of the above decided cases, it could be successfully contended that an order made in the interpleader issue arising therefrom would not be a final order but an interlocutory order, an appeal from which would lie to this Court. But for the reasons given above, the Respondents, as they were entitled, chose the remedy available to them in the other proceeding. No person whose property is taken in execution as being the property of a judgment debtor is restricted to the remedy of filing a claim in the proceeding whereout the execution has issued. He is at liberty to bring an independent suit against the execution creditor to establish his right of ownership, Judgment in favour of or against his claim to ownership delivered in that independent suit would not be deemed interlocutory but final, although if he had made a claim in the execution proceedings, the order on the interpleader arising from his claim would be interlocutory in that proceed-

ing. We hold that the order of the learned Chief Justice made in the proceedings then pending between the respondents and The Demerara Wharf and Storage Company Limited was a final order as it purported to dispose finally of the matter in issue between the respondents and the appellant, Percy Claude Wight who was brought in as a party to the summons under which the respondents applied to the court for the determination of that issue. By ordering the immediate transport of the immovable property in dispute from The Demerara Wharf and Storage Company Limited to the respondents it purported to place that property out of the ownership of The Demerara Wharf and Storage Company Limited and so finally beyond the reach of the execution by the appellant, Percy Claude Wight. Similarly, had the order been against the respondents it would have purported to be a final determination of the issue raised as between respondent and appellant in the proceedings No. 136 of 1941.

Therefore the order not being an interlocutory order nor a final order arising out of a claim for an amount not exceeding two hundred and fifty dollars this Court has no jurisdiction to entertain the appeal.

The appeal will accordingly be dismissed with costs to respondents.

Appeal dismissed.

Solicitors: *A. G. King,* for the appellant;
J. Edward de Freitas, for the respondent.

KORASCHI KHAN,

Appellant (Claimant),

v.

JOHN DALLOO,

Respondent (Defendant).

1946. No. 300—DEMERARA.

BEFORE FULL COURT: WORLEY. C.J., LUCKHOO and BOLAND, JJ. 1947. May 16, 23, 30.

Interpleader—Claim in magistrate's court—Possession in claimant—Not by virtue of right of ownership—Claim properly dismissed.

Interpleader claim in the magistrate's court held to be properly dismissed where, assuming that the claimant was in the exclusive possession of the building claimed by her, that possession, on the whole of the evidence adduced, was not shown to be by virtue of right of ownership.

Appeal by Koraschi Khan from the decision of the Magistrate of the Essequibo Judicial District dismissing an interpleader claim brought by her against John Dalloo.

S. L. vanB. Stafford, K.C. for appellant.

C. Lloyd Luckhoo, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by Luckhoo, J., as follows:

This is an appeal from the judgment of the Magistrate of the Essequibo Judicial District in favour of the defendant (respondent) in an interpleader action in which the claimant (appellant) who was married by Mohammedan rites to one John Bacchus, the judgment-debtor in the original proceedings claimed one board and shingle building situate at lot 2 one mile Bartica-Caburi Road, Essequibo, levied upon at the instance of the defendant on the 15th day of February, 1945, in order to satisfy a judgment he had obtained against the judgment-debtor on the 5th day of October, 1944.

The defendant (respondent) in his defence denied that the building was the property of the claimant, and pleaded that there was collusion and fraud between the judgment-debtor and the claimant.

The appellant in support of her claim to the building relied in the first instance on the fact that she was the holder, under the Crown Lands Regulations of 1919, of a permission to occupy a tract of five acres of crown land as from the 1st day of January, 1940, which she subsequently converted into a lease in the year 1945, and that she had in the month of January, 1941 employed a carpenter by the name of Griffith who completed the erection of the building on the land for which she then held the permission, in the month of June, 1942.

It was not disputed that the judgment-debtor (her husband) dealt in the purchase and sale of timber and owned a saw pit near to tract of crown land aforesaid and jointly with the claimant occupied the building as a residence.

It would seem that in order to remove any suspicion of collusion between her and her husband in respect of the ownership of the building, she tendered at the hearing a receipt for the sum of $65.00 alleged to have been given by the carpenter Griffith in 1943, but bearing date 12th June, 1939.

Griffith who was called as a witness on her behalf stated that he issued the receipt after the appellant had finished paying him the last instalment in 1943 and that he dated the receipt 12.6.39 as he could not then remember either the date or the year or the month when he had finished the house. He also stated that he finished the erection of the building, which took him one year, in 1943 and that he received the last instalment in that year. He, however, could not explain why he dated the receipt 12th June, 1939, which obviously was a fictitious date.

It would be well to set out the terms of that receipt in view of the conclusion arrived at by the learned Magistrate.

"B.P.R.
12.6.39.

Received from Miss Koraschi Khan the sum of sixty-five dollars $65:—for erecting a building size 20 x 12 including kitchen 15 x 8 on a monthly base extallment monthly $16.33 in full payment."

Sign Rufus Griffith
carpenter.

Stamps
4 cents
cancelled
R. G. 12.6.39.

This witness said that he did not know appellant's husband was a dealer in timber. He did not see him when he was building the house, and could not say where the materials came from. When the appellant first gave evidence she deposed to the fact that her husband, although a dealer in timber, never interfered or gave her any material to assist her and had never even gone to see the house in course of erection although it took a year to erect but she admitted when recalled to tender certain receipts issued in her name for logs of timber purchased in 1941 from the Department of Lands and Mines, Bartica, that Griffith was working on the house when she purchased the logs, and that those logs were sawn at her husband's saw pit, and then transported to her place at Bartica Road. The appellant further admitted in cross-examination that when the bailiff levied execution on the building she did not tell him it was her property but instead mentioned that it "concerned her father," and did not produce any of the exhibits which she subsequently tendered at the healing in support of her claim, although she had them in the very house at the time.

Mahadeo, who was called as a witness for the defence and whose evidence the learned Magistrate believed, deposed that the appellant, when asked by the bailiff where the judgment-debtor lived, pointed out the building subsequently levied upon and said "that is the house belonging, to John Bacchus" but after being told that John Dalloo (respondent) had obtained a judgment against her husband and that he was authorised to make a levy, retracted and then declared that the house was not John Bacchus' house but that of her father who would be returning in the afternoon. In cross-examination it was elicited that John Bacchus had told the witness he was the owner of the house.

In his statement of reasons for dismissing the claim and declaring the levy good the learned Magistrate held it was for the claimant to establish her claim to the ownership of the house which she failed to do, putting forward, in his opinion, an utterly fabricated story upon which he could not place the slightest reliance. He also commented on the receipt given by the carpenter which was tendered to support appellant's ownership but which he held to be at variance with the facts on which she relied in establishing her claim. Whilst not commenting on the absence of appellant's husband from the witness box he made certain observations which in our view he was entitled to make as to the husband's apparent lack of interest in the erection of the house.

Learned counsel for the appellant has invited us to hold that all that was necessary for the appellant to establish in support of her claim was her interest in the land and her possession of the building, and that no inconsistencies or improbabilities in the evidence on the record could detract from the value of her possession of the building on land which, undoubtedly, at the time of the levy she occupied under a lease from Government.

We have only to refer to the recent judgment of the Full Court in *Heywood v. Rafeek* (1944) L.R. B.G. 120, in order to dispel the mistaken view that the burden of proof is irrevocably discharged by the fact of possession in the claimant at the time of the levy. That case decides, and we are in entire agreement with it, that upon proof of possession simpliciter of the chattel at the time of the levy, and no evidence given in disproof thereof judgment must inevitably be entered in favour of the claimant, but it does not decide that where such possession is sought to be vindicated by evidence which is untrustworthy and where evidence is tendered to rebut the claim of ownership, possession alone remains sufficient proof.

The distinction drawn in that judgment between proceedings in the Supreme Court and in the Magistrate's Court is confined to the fixing of issues. In the Supreme Court, the fact of possession at the time of the levy only determines who shall be plaintiff and who shall be defendant, and who must succeed in case no evidence is offered, the onus being on the plaintiff to establish his claim. But in interpleader proceedings in the Magistrate's Court the procedure is governed by section 57 of Chapter 15 which provides that in every case the claimant shall be plaintiff and that the matter shall be heard and determined in a summary way as in an ordinary action, such claimant having to prove his claim to the satisfaction of the Court (see section 19 of the same chapter).

The question for this Court to determine is whether upon the whole of the evidence before him the learned Magistrate was justified in his conclusion that the claimant had not made proof of her claim to the satisfaction of the Court. Whilst we do not agree with many observations made by him in his memorandum of reasons for decision, we cannot say there was not in the main amply evidence on which he could have arrived at the same conclusion. If the evidence as a whole can reasonably be regarded as justifying the conclusion reached at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court, which has not had that opportunity, will bear in mind that the view of the Magistrate as to where credibility lies is entitled to great weight and a Court of Appeal should not disturb a judgment of fact unless satisfied that it is unsound.

An appeal, as it has so often been stated, is not from the magistrate's reasons but from his findings, and there is in our opinion sufficient material and a catena of circumstances which would warrant him in arriving at the conclusion he did.

The principles enumerated in *Heywood v. Rafeek* are applicable in this case which contains somewhat similar features to

that case, and, even if the appellant could be said to have been in the exclusive possession of the building, on the whole of the evidence adduced that possession was not shown to the satisfaction of the Magistrate to be by virtue of the right of ownership.

The appeal is therefore dismissed with costs.

Dated the 30th day of May, 1947.

Appeal dismissed.

Re a SOLICITOR

1947. No. 190.—DEMERARA.

BEFORE FULL COURT: WORLEY, C.J. AND BOLAND, J.

1947. May 23, 30.

Legal practitioner—Allegations of professional misconduct against—Inherent jurisdiction of Court to consider—Will not be exercised except for good cause—Name of practitioner not to be specified in rubric of application—Legal Practitioners Ordinance, cap. 26, *Part II and* s.35.

Prior to the coming into force of Part II of the Legal Practitioners Ordinance, Chapter 26, the Court had an inherent jurisdiction to consider allegations of professional misconduct against legal practitioners.

Re Patrick Dargan, 30th May 1907, applied.

This jurisdiction is preserved by section 35 of the Legal Practitioners Ordinance.

However, except for good cause shown, the Court will not exercise this inherent jurisdiction unless the procedure provided by Part II of the Legal Practitioners Ordinance has first been followed.

Good cause is not shown where the affidavit of an applicant does not disclose any matters which would not normally be brought before the Committee under section 28 of the Legal Practitioners Ordinance and which could not more conveniently and cheaply be considered by the Committee.

In a motion to strike the name of a legal practitioner off the Roll, the name of the practitioner must not be specified in the rubric.

Motion by F. O. Richards the duly constituted attorney in the Colony of Clement deFreitas in respect of a solicitor of the Supreme Court.

The applicant appeared in person. *C. Vibart Wight,* for the solicitor.

Cur. adv. vult.

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

This is a motion made under section 20 of the Legal Practitioners Ordinance, Chapter 26 for an order; inter alia, that the solicitor named therein be struck off the Court Roll.

The notice of motion is headed:

IN THE MATTER of the Legal Practitioners Ordinance, Chapter 26, and of Orders XL and XLVI of the Rules of the Supreme Court,

—and—

IN THE MATTER of the Estate of Manoel Gregor De Freitas, deceased,

ACTION No. 219|46:

Clement De Freitas .. .. .. Plaintiff,

— vs.—

Demerara Leather & Boot Coy, Ltd., Defendants.

ACTIONS Nos. 323|46 and 324|46

SYLVIA DE FREITAS — singlewoman.

—and—

CLEMENT DE FREITAS,

Plaintiffs,

—vs. —

Demerara Leather & Boot Coy, Ltd., —Defendants,

the above named Plaintiffs being
Executors under the Last Will of the deceased,
dated 2nd December, 1944.

—AND—

HERE FOLLOW THE NAME AND ADDRESS OF
THE SOLICITOR

Solicitor for the said Plaintiff-Executors.

and it is signed "F. O. Richards, the duly constituted attorney in the Colony of Clement de Freitas". In the supporting affidavit, Mr. Richards describes himself as "the duly constituted attorney in the Colony of Clement de Freitas, now resident in Trinidad, B.W.I., and who is one of the executors of the estate of the deceased, Manoel Gregor de Freitas."

The notice of motion having been duly served was set down for hearing before the Full Court on May 23rd. We may here remark that there appears to be a precedent for this in In re Patrick Dargan, 1907 (1907 Judgments). On May 22nd the Solicitor concerned filed an affidavit in answer under protest. It is only necessary at this stage to refer to the first two paragraphs of this affidavit, which read

> 1. I was the Solicitor on the records in the above actions and I was permitted by Order of Court entered on the 19th day of May 1947, to withdraw from this action.
>
> 2. I am advised by Counsel and verily believe that the process adopted by Francis Othneil Richards herein is wholly irregular and bad in law.

At the hearing of the motion Mr. Richards was not represented and addressed the Court in person. Mr. C. V. Wight appeared for the Solicitor and raised the following objections in limine.

(1) that the rubric of the motion was defective in that

(a) it did not clearly show who was the plaintiff and who the defendant in the motion
(b) it was contrary to practice and etiquette in such matters to name in the rubric the Solicitor concerned.
(c) Mr. Richards had not shewn whether he was acting in person or qua attorney; or, if the latter, that he was authorised by his principal to undertake proceedings of this nature.

(2) that the motion improperly combined allegations of negligence and professional misconduct and that the remedy for negligence lay in a civil action,

(3) that it was not competent for anyone to move the Court under section 20 of the Ordinance in respect of allegations of professional misconduct without first proceeding under Part II which provides a special procedure for inquiry into and action on such allegations.

(4) alternatively, that the Court should not entertain applications in respect of alleged professional misconduct under section 20 unless the applicant shows good reason for not proceeding under Part II.

It will be convenient to consider first these last two points. We may say at once that we do not agree with the contention that the Court cannot consider allegations of professional misconduct unless there has first been an enquiry and report under Part II of the Ordinance. In *"In re Patrick Dargan"* 30th May 1907, the Full Court said "It is we think clear that this Court has always had the power of depriving a Barrister-at-Law who has been admitted by it of his right to practise before the Court of the Colony, such power being incidental to that of admitting to practise and that such power was not for the first time conferred by Ordinance 18 of 1897 section 10" (which was in the same terms as Section 20 of Chapter 26). The inherent power of the Court in this respect applies equally to Solicitors and is preserved by section 35 of Chapter 26. This view accords with the decision of the Court of Appeal in England in the case of *In re Weare*, a Solicitor 1893 2 Q.B. 439.

There is, we think, more substance in the last objection.

Although the Ordinance preserves the powers of the Court to strike the name of a Solicitor off the Court Roll without there having been a preliminary investigation and report under Part II, nevertheless, the occasions for the exercise of its power will be rare, and where the application is grounded upon allegations of professional misconduct the procedure provided in Part II of the Ordinance should usually be followed. In Re a Solicitor 1928 (72 Sol. Jo. 368) Lord Hewart L. C.J. referring to the corresponding English legislation said "The intention was to make solicitors as far as possible masters in their own house." A similar intention is apparent in our Ordinance: The Committee appointed under Part II of the Ordinance is entrusted with the duty of applying a code of professional ethics, and the Court will not assume this duty except for good cause shown.

Is there any such cause shown in this case?

In answer to the Court the applicant gave as his reason for not proceeding under section 28 that in two previous applications of his under that section in respect of other Solicitors "nothing was done" but he admitted that he did not know whether or not reports had been made under that section. It would appear that there is no obligation on the Committee or the Registrar to inform an applicant of the result: the Committee reports are not open to public inspection and if the report is to the effect that there is no prima facie case of misconduct there would normally he no further proceedings. It is therefore not surprising that in such a case an applicant should be under the impression that nothing had been done. It might be better to provide that in every such complaint, there should be a formal notice to the applicant of the result of the investigation.

We are of opinion therefore that there is no substance in the applicant's reason for not proceeding under Part II, Section 28. It remains to see whether the motion itself discloses any sufficient reason.

The terms of the motion are in brief:

(1) that the Solicitor be ordered to appear to answer the charges of negligence and unprofessional conduct, set out in the annexed affidavit.

(2) that the Court, on proof of the allegations, order the Solicitor to deliver a cash account, pay over all moneys properly due, bring in and deliver all documents and papers entrusted to him and in his possession: and that he be no longer Solicitor on the record.

(3) that the Solicitor be punished by imposition of a fine, or by forfeiture of costs to which he might have been entitled, or that his name be struck off the Roll.

(4) for costs of the application.

The acts of negligence and misconduct alleged in the affidavit are: —

(a) the failure of the Solicitor to inform the applicant that he had received from the defendants in Suit 219|46, the sum of $321.96 in satisfaction of a taxed bill of costs in contravention of Order XLVI rule 19 (1).
(b) the failure of the Solicitor to oppose the issue of a debenture secured on the assets of the company which is the defendant in the three suits;
(c) delay on the part of the Solicitor in filing statements of claim in these suits;
(d) refusal of the Solicitor to furnish the applicant with a statement of account in accordance with section 23 of Chapter 26;
(e) insistence of the Solicitor on his responsibility for the conduct of the proceedings and particularly with regard to agreeing, to extensions of time which the defendant might apply for;
(f) failure to pass on to the applicant information and requests from the opposing party.

(g) an allegation of lack of integrity in presenting bills of costs for taxation.

(h) general allegations of negligence and contumacy in the course of his engagement as the legal representative of the plaintiffs in the suits.

Items (a) (d) and (g) and paragraph 2 of the motion all relate to matters of costs, for which the normal remedy is the issue of a summons for delivery of an account under O. X L r. 13.

In Re a Solicitor 1895 (11 T.L.R. 169) it was held that delay on the part of a Solicitor in paying over money collected by him on his client's behalf is not necessarily misconduct. In that case Wills J. said "The Court must have something beyond the mere non-payment to constitute professional misconduct. There must be something amounting to misrepresentation or deceit, and not merely the fact that the money has not been paid over." It does not appear from the report of that case that there was any statutory duty to render an account. In Kendall and Boodhoo *v.* Mangal Singh (L.R. B.G. 1931-37 p. 67) the Full Court held that a legal practitioner who through impecuniosity delayed in repaying money to his client was guilty of professional misconduct. In the present application there is no allegation of an intention to misappropriate and we think that it is premature to allege misconduct in this case before there has been recourse to the normal remedy provided by O X L r. 13.

The remaining items relate to matters arising out of the conduct of the litigation. It is evident from the affidavit that there has been constant friction between the applicant and the Solicitor and misunderstanding as to their relative positions, and that the applicant was not prepared to accept the position as set out by the Solicitor in the following terms: —

> "I have accepted the responsibility for the conduct of the proceedings which I do not share or wish to share with you or any other layman, and any extension of time which the other side may apply for will be granted or withheld by me on my own responsibility compatible with the dictates of my client's interests as I conceive them and the ethics of the profession to which I belong."

A lay client is not always able to appreciate the reasons which lie behind an apparent delay or the omission to take an apparently obvious step or the reasons for making a concession to the opposing party: if the client has no confidence in his Solicitor, he had better make a change and it might have been better had the applicant availed himself of his right to do so under O. VI r. 2.

We are of opinion that the affidavit does not disclose any matters which would not normally be brought before the Committee under Section 28 and could not more conveniently and cheaply be considered by them and that no sufficient reason is shown for departing from the customary procedure. In order not to prejudice any action the applicant may see fit to take under section 28 of the Ordinance, we refrain from expressing any

opinion as to whether the matters alleged, if proved, would amount to professional misconduct.

It remains to refer briefly to the two remaining objections. With regard to the joinder of allegations of negligence and misconduct we are inclined to treat this as a matter of form having regard to the fact that the motion was drafted by the applicant without legal advice, but we agree that in proceedings under the Ordinance this Court would not consider complaints of negligence unless the acts complained of also amounted to professional misconduct.

We agree also that the rubric to the motion is defective and would have had to be amended had the matter gone further. In the circumstances it will, we think, suffice to give a direction that in the Court records there be substituted, the heading "In re a Solicitor" and in re the Legal Practitioners' Ordinance, Chapter 26, omitting therefrom the name of the Solicitor.

The motion is dismissed with costs.

Motion dismissed.

Solicitor for the solicitor: *A. G. King.*

BALWANTIA *v.* BUDHU & GLADYS

BALWANTIA, female, B.R. No. 456 of 1921,
Applicant.

v.

BUDHU, male, B.R. No. 10 of 1911,
Respondent.

and

GLADYS, female East Indian,
Co-Respondent.

1947. No. 225.—DEMERARA.

BEFORE WORLEY, C.J.: 1947. JUNE 7.

Husband and wife—Dissolution of marriage—Valid marriage—Meaning of—Monogamous union—Marriage between Hindus according to personal law and religion—Polygamous union—Registration of marriage—Conversion into monogamous union—Adultery of husband—Dissolution of marriage on application of wife—May be granted—Immigration Ordinance, Chapter 208, ss. 134, 135, 136, 139, 140, 142, 143 *and* 153.

A Hindu marriage is not a monogamous union, but it is converted into such a union where the marriage is contracted under section 142 of the Immigration Ordinance, Chapter 208, and registered under section 143.

Such a marriage may be dissolved, on an application made by the wife under section 153 of the Immigration Ordinance, on the ground that the husband has been guilty of adultery.

Application under section 153 of the Immigration Ordinance, Chapter 208, by a female immigrant for a divorce on the ground of the adultery of her husband. The parties were Hindus, they were married under section 142 of the Ordinance, and the marriage was registered under section 143.

WORLEY, C.J.: This is an application by a wife for the dissolution of her marriage on the ground of the husband's adultery. The facts are not in dispute: husband and wife are East Indian Immigrants and Hindus and were married by a Hindu priest, presumably according to the rites of their religion and their personal law. The marriage having been duly registered under the Ordinance it is to be deemed a valid marriage as from the date when it was contracted. The husband has left the wife and cohabits with another woman with whom he has formed an irregular union, or "bamboo" marriage.

A marriage between Hindus contracted according to Hindu rites, with nothing more, is not a monogamous marriage and therefore adultery on the part of the husband cannot be a ground for the dissolution of a Hindu marriage. Adultery on the part of the wife might amount to misconduct entitling a husband to dissolution of a Hindu marriage and inquiries shew that several husbands' petitions based on such misconduct by the wife have been granted under Section 153. So far as my inquiries go, however, there has been no previous case of a petition brought by a wife

upon this ground, and at first sight I doubted whether this petition could be granted.

The question is what is the meaning of the word "valid" in section 142: in other words whether the provisions of the Ordinance can have the effect of so changing the nature and incidents of the marriage as to convert what would have been a polygamous marriage into a monogamous one. Alternatively, whether a marriage contracted under section 142 retained its polygamous nature but is to be deemed valid for certain purposes e.g. intestacy. To determine this it is necessary to consider the scheme of Part II of the Ordinance as a whole.

Section 135 excludes from the operation of the Ordinance all marriages where one of the parties is a Christian or both are.

Section 136 prohibits the contracting and registration under the Ordinance of any marriage between immigrants where either of the parties has or had at the time of contracting and registration a wife or husband alive.

Sections 139 and 140 provide for the contracting of a marriage between immigrants by notice to a magistrate. The parties must signify their wish to marry and, when the conditions of those sections have been complied with, the magistrate shall declare them to be husband and wife. The marriage is then registered by the Agent General.

Such a marriage may be contracted by any two immigrants who satisfy the conditions (provided neither of them is a Christian) ; there is no religious ceremony, the personal law and religion of the parties is not imported and there are no grounds for suggesting that a marriage contracted under this section is anything other than monogamous: i.e. a "Christian" marriage according to the generally accepted definition in *Hyde* v *Hyde*, the union of one man and one woman for life to the exclusion of all others.

Section 142 provides that immigrants who are of sufficient age and are free from the disability imposed by Section 136 (i.e. have no wife or husband living) and are of the same religion and subject to the same personal law may contract a marriage according to their religion and personal law and further provides that if such marriage is registered as prescribed in section 143, it shall be deemed to be a valid marriage.

Marriages contracted under Section 140 or under Section 142 are all registered in the register required to be kept under Section 134.

Taking all these provisions into consideration, I think it is clear that the intention of the Legislature was that marriages contracted and registered under sections 142 and 143 should have the same nature and incidents and confer the same status as those contracted under the Ordinance before a magistrate and that they are to be deemed valid according to the general laws of the Colony which only recognises monogamous or "Christian" marriages as defined above. The provision permitting the marriage to be contracted according to the religion and personal law of the parties is, I think, merely a concession to custom and religious sus-

ceptibility. Registration under the Ordinance converts what would otherwise be a polygamous union into a monogamous one.

It is the law of the Colony that adultery on the part of either spouse, to a valid marriage, constitutes misconduct entitling the other spouse to a divorce.

I therefore grant the petitioner a decree of dissolution of the marriage.

Marriage dissolved

JOSEPH KNIGHTS,

Plaintiff,

v.

R. GOBIN,

Defendant.

1946. No. 236.—DEMERARA.

BEFORE LUCKHOO, J.: 1947. MAY 19, 20, 21, 22; JUNE 23.

Landlord and tenant—Mere cessation *or refusal to pay rent—Does not operate as determination of tenancy—Refusal to pay rent until rightful owner ascertained—Does not operate* as *disclaimer.*

Landlord and tenant—Estate duty declaration—Statement in—That rents due and owing at time of death of deceased—Admissible in evidence—In support of claim that deceased was a tenant at time of his death.

Limitation of actions—Debt owing by deceased—Statute barred— Contained in list included in executor's affidavit for probate—No acknowledgment of debt to take it out of Statute of Limitations—Otherwise, if made to creditor himself.

Possession—Land—Possessory rights—Right of person who has been in possession for 12 *years to remain in possession—Whether transmissible or inheritable—Civil Law of British Guiana Ordinance, cap.* 7, s. 4(2).

The mere cessation of the payment of rent, or the refusal to pay rent, does not determine a tenancy previously acknowledged and acted upon by the tenant, unless there is clear evidence of a renunciation of the tenancy which would operate as a surrender.

A refusal by a tenant to pay rent until it is ascertained by him who is the rightful owner of the land will not amount to a disclaimer.

JONES v. MILLS, 10 C.B.N: S: 788, applied.

Where in an estate duty declaration it is stated that rents were due and owing at the time of the death of the deceased, such statement is admissible in evidence to prove that the deceased was a tenant at the time of his death.

An executor's affidavit for probate which includes in the list of the testator's debts a statute barred debt does not operate as an acknowledgment of the debt as to take it out of the statute unless it was made to the creditor himself.

RE BEAVEN (1912) 1 Ch. 196, 206, and LLOYD v. COOTE BALL (1915) 1 K.B. 242, applied.

SEMBLE, that the right of a person who has been in possession for 12 years to remain in such possession under section 4(2) of the Civil Law of British Guiana Ordinance, Chapter 7, is neither transmissible nor inheritable.

Action by Joseph Knights on behalf of himself and all other the persons entitled to possession of lot 19 Zorg Front, Essequibo, under the last will of Dorothy Patterson deceased against R. Gobin claiming possession of lot 19 Zorg Front and mesne profits.

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

L. M. F. Cabral, for defendant.

Cur.adv.vult.

LUCKHOO, J.:

The main ground of defence raised in this action is contained in paragraph 5 of the defendant's defence in which he asserts that the right (if any) of the plaintiff, who has instituted these proceedings on behalf of himself and all others the persons entitled to possession of lot 19, Zorg Front, Essequibo, under the last Will of Dorothy Patterson, deceased, did not first accrue to him or anyone of them, or to those through whom he claims, within twelve years before the commencement of this action, and that the alleged claims or rights of action were and are barred by section 4 of the Civil Law of British Guiana Ordinance, Chapter 7. and section 14 of the Limitation Ordinance, Chapter 184.

The success or failure of this plea depends to a great extent upon the principles of law applicable to a certain number of related facts upon which the plaintiff rests his case, some of them not admitted by the defendant.

One Nero Patterson, the grand-father of the plaintiff, was the owner by Transport, dated the 6th day of October, 1848, of a piece of land part of Plantation Zorg-en-Arbeijd, formerly called Orphans Park now called Plantation Zorg, situate in the County of Essequibo. That piece of land is designated on a plan made a little over a hundred years ago, as lot 19 Plantation Zorg and now known as lot 19 Zorg Front. Nero Patterson at the time of his decease in or about the year 1854, intestate, was still the owner of the said lot and another lot nearby known as lot 17 Zorg Front. He was married under the common law of the Colony which then recognised community of property unless such community before the celebration of the marriage was specifically excluded by an ante-nuptial agreement. Dorothy Patterson, his widow, upon the death of her husband, in her own right as having been married in community of goods, and it would appear on behalf of her only issue by the said marriage entered into and remained in possession of the aforesaid lot 19 Zorg until her death on the 6th day of November, 1907, testate. By her will dated 21st September, 1907, duly proved and deposited on the 8th February, 1908, she appointed one Thomas Tanner sole Executor. By the said Will she devised and bequeathed to the plaintiff and eight other persons, many of whom have since died, the said lot 19 Zorg.

Tanner seemed to have administered the estate of Dorothy Patterson on behalf of the heirs thereof until he died in or about the year 1913. Prior to the year 1919, on the death of a person his estate vested immediately in the heirs unlike as at the present time, in his personal representatives.

The evidence discloses that Manoel Gonsalves Jardim (his name is also written Jardine) who was married to Matilda Jardim in the year 1908, leased this lot from Tanner, in the year 1909, for the purpose of carrying on in a two-storied building situate on the lot the business of a retail spirit shop and grocery which building was previously in the ownership of one Ng-a-Fook who had leased the said lot from Tanner. When Tanner died Henry Patterson who inherited an interest in the lot on the death of his father Nero, one Mathews the uncle of the plaintiff and plaintiff's father Joseph Knights Snr. collected the rent from Jardim it is alleged by the plaintiff up to the year 1925 when Henry Patterson died.

Vincent Gonsalves Menezes who married Jardim's daughter in 1916 and was appointed by him his attorney in 1918 was called on behalf of the defendant and stated that Jardim told him he had been paying rent in respect of the lot to Henry Patterson. In cross-examination he admitted that Jardim whose business place he visited at least once a week after he became Jardim's attorney, paid rent to Henry Patterson until the others demanded rent from him and that Jardim told him Henry Patterson used to collect rent from him for the heirs of the Pattersons. He also admitted that the amount of the rent which Jardim paid Tanner and after to Henry Patterson was $30:- per year up to the time Jardim ceased to pay. It will be necessary, for me at a later stage to find as a fact when it was that Jardim ceased or refused to pay rent. To proceed with the narrative. There is no doubt that up to the time Jardim died in 1937, he continued to occupy the said lot and carried on his business. The plaintiff deposed that in 1927 he spoke to Jardim about the rent due but to no effect, and that subsequently Jardim told him all the heirs must gather together. It is clear from the plaintiff's evidence that between 1925 and 1935 when Willie Mathews his cousin, Elizabeth Knights, his sister and he instructed Mr. Parkes, a barrister-at-law, to write a letter to Jardim, no rent for the lot was being, paid by Jardim. In consequence of that letter the three parties came to Georgetown and met Jardim at the office of Mr. Francis Dias, a solicitor, where Jardim did not deny indebtedness in the amount estimated by the plaintiff to be then owing for rent, but promised to settle with them as early as possible and agreed to meet them three days later but failed to do so. The plaintiff admitted that on his visit to Mr. Dias' office he (Mr. Dias) told them that he would see what he could do for them. It was not denied by the plaintiff that between 1925 and 1935 he had consulted at least three legal practitioners but took no proceedings in a Court of law owing to a lack of finance.

Jardim died on the 3rd day of November, 1937, at Henrietta, Essequibo, testate, and by his will he appointed his widow sole

executrix. That will was duly proved and deposited and probate granted her on the 31st day of December, 1937. The executrix who was then sixty years of age and had resided on lot 19 Zorg from 1909 when her husband began his business obtained the assistance of Menezes and one I. G. Ribeiro a former employee of Jardim in ascertaining the assets and liabilities of the estate. Mr. William Sousa, a solicitor of the Supreme Court, her son-in-law, who acted as her solicitor in the preparation of the estate duty papers and the declarations for the purpose of applying for probate, I am satisfied, obtained the necessary information from either Mrs. Jardim or Menezes, or both. Mrs. Jardim in her evidence stated that Menezes accompanied her to Mr. Sousa when the estate duty papers were being prepared and knew what was going on. Menezes admitted he accompanied Mrs. Jardim to Mr. Sousa's office, that he took stock for the estate, and whatever papers Mr. Sousa prepared for estate duty were prepared on the instructions of Mrs. Jardim.

On a scrutiny of the Inventory in Schedule A, under the caption "Other movable property" there is the entry "one building *on leased land* at Zorg, Essequibo, used as a retail spirit and provision business as per sworn valuation by I. G. Ribeiro, herewith laid over $200: —It is clear that the leased land referred to is lot 19 Zorg Front. Mrs. Jardim (executrix) admitted when she declared that the building was on leased land she meant land not belonging to the deceased.

Under the head debts due and owing from the deceased, this entry appears.

Heirs of Archer dec'd. Rent of premises at Zorg (not claimed as heirs cannot be found).

It has not been explained how the name "Archer" came to be recorded but the evidence discloses that Jardim was never a tenant to any other person or persons but only to the heirs of Patterson. There was no other land leased by him except lot 19 Zorg. In her evidence Mrs. Jardim said "I did not claim lot 19 Zorg as belonging to my husband. I did not claim it as I did not know to whom it belonged. I stated that money was due to the heirs of Archer at the time of my husband's death. My solicitor recorded that fact."

What effect the above admissions made by the executrix would have on the main issue will be subsequently dealt with, suffice it to say that Mr. Sousa's evidence, and I shall set down certain portions of the same as to how those entries came to be made and what they mean, cannot be reconciled with the entries in those exhibits. I regret I cannot accept his explanation.

In examination-in-chief he said "I told him (meaning the plaintiff) that within my knowledge I know, for twelve years last past, no rent had been paid. I told him I demanded rent in 1918, and it was refused. I said you have lost your rights rent not having been paid all these years."

"The land at lot 19 Zorg was not valued as an asset by me, because no one told me Jardim was claiming possessory rights to

it, and Jardim had no transport for it." "I had recorded in the Estate duty papers that the building was on leased land; having done so I had to explain why he (Jardirn) was there free of charge, or without paying rent. In making that entry I wanted to make it clear I did not intend to claim any deduction. In making the entry—"One building on leased land at Zorg" I used the words leased land in a colloquial sense."

And in cross-examination

"I have known the late Jardim since 1933. I only knew of his affairs prior to that date from Mr. Menezes. When I prepared the estate duty papers I got the information from Ribeiro. I prepared the affidavit sworn to by him in connection with the estate on the 8th day of December, 1937. (Witness reads paragraph 4 of the affidavit). I have heard of a squatter. I would not describe a person who is a squatter as being on leased land. When I speak of leased land it would connote the relationship of landlord and tenant. When I put down "the heirs of Archer" I meant they were the owners of the land at the time I was preparing that inventory. The Registrar at that time was a trained lawyer. He was Mr. Duke, Barrister-at-Law. In making the entry about the heirs of Archer, I had in mind that if the parties had not been located, the amount would not be paid. I was acting on behalf of the executrix of the estate."

In 1938, the executrix filed a Corrective Declaration which was prepared by the same solicitor in which it was repeated that the building was on leased land.

On the 2nd August, 1940, by an agreement prepared by Mr. Sousa acting for both the executrix and the defendant, the executrix purported to sell for the sum of $200 whatever rights the deceased is alleged to have acquired in lot 19 Zorg Front by reason of his occupation of the lot for a period exceeding twelve years. It is upon this assertion that the defendant, not on his own account but relying on the possession of his predecessors in title challenges the right in law of the plaintiff and those on whose behalf by leave of the Court he brings this action to recover possession of the said lot, and to the other orders asked for in the statement of claim.

The following questions of law in my opinion arise in this action. I shall set them out and deal with them seriatim.

1. What is the effect of the cessation of payment of, or refusal by Manoel Jardim to pay rent to the heirs of Nero and Dorothy Patterson, deceased?

   (a) After the year 1916, or
   (b) after the death of Henry Patterson in 1925.

2. In either case, did the relationship of landlord and tenant continue to the day of the death of Jardim in 1937, or did it cease to exist after 1916, or after 1925?

3. If it did cease to exist after 1925, whether there is sufficient evidence of the period of twelve years having elapsed since such cessation of the death of Jardim.

4. Could the mere cessation of payment of or refusal to pay rent determine such relationship, or must there not be clear and

ample evidence of renunciation by the tenant of his character as tenant?

5. What is the effect of the admission by the executrix in the estate duty papers?

(a) As affecting the estate of the said Manoel Jardim

(b) As against the defendant who claims through that Estate.

6. Whether such admission —

(a) Feeds any estoppel of the pre-existing relationship of landlord and tenant, between the heirs of Patterson, deceased, and the said Manoel Jardim, or

(b) is an acknowledgment that the relationship of landlord and tenant continued to the day of the death of Manoel Jardim.

It has been laid down by many authorities which cannot now be questioned that the more cessation of the payment of or refusal to pay rent does not determine a tenancy previously acknowledged and acted upon by the tenant, unless there is clear evidence, which does not exist in this case, of a renunciation of the tenancy which would operate as a surrender; so that with respect to the first question it does not matter whether the deceased Jardim ceased or refused to pay rent after the year 1916 or after the death of Henry Patterson in 1925. The evidence which I accept satisfies me that such cessation or refusal only occurred after the death of Henry Patterson in 1925.

The second question is partly answered by the foregoing. I can find no or sufficient evidence of a disclaimer on part of Jardim which would amount to a renunciation by him of his character as tenant down to the day of his death. He did not purport to refuse to pay the rent after Henry Patterson's death on the ground that he claimed the land as his own, or that it was the property of some other person.

It has been held that even a refusal to pay by a tenant until it is ascertained by him as to who is the rightful owner of the land will not amount to a disclaimer.

The evidence of the plaintiff who told his story in a very straightforward manner is that in 1927 and subsequently he asked Jardim for rent when he was informed by him that all the heirs of the Pattersons must come together. And later in 1935, at the office of Mr. Francis Dias, Jardim promised to settle with the heirs of Dorothy Patterson and never denied the amount then due for rent.

I do not believe the evidence of Menezes, such non-belief being reinforced by his subsequent conduct, of the alleged conversation in the back store of the shop at Zorg when he stated "Patterson demanded rent. Jardim said he had no right to receive rent. Jardim told Patterson that he and the rest had no right to the land, so he refused to pay the rent." Nor do I believe his statement that Jardim said in Henry Patterson's presence that Mr. Dias had told him "possession is stronger than a bastard's possession." If this evidence was given in order to establish a dis-

claimer on part of Jardim, then in my view it has fallen short of the legal requirements.

Even if the evidence could possibly be interpreted to mean that on the death of Henry Patterson in 1925 the relationship of landlord and tenant came to an end, there is not sufficient evidence that the twelve years period, if applicable to the issue in this case, elapsed between such termination and the death of Jardim in order to render transmissible to his successors in title the defence under section 4 (2) of the Civil Law of British Guiana Ordinance, Chapter 7. The answer to the third question is therefore in the negative.

For the fourth question to be answered in the affirmative there must be clear and ample evidence of renunciation by the tenant of his character as tenant in order to set at large the estoppel which arises from such relationship. The estoppel it is true lasts only so long as the lease is in force and the tenant has not been evicted from the land, but if possession of it be retained after its expiration the estoppel continued, so that even if Jardim had ceased to pay rent at the end of 1916, his continued possession was not necessarily inconsistent with the continuance of the tenancy from year to year, and in my view the admission of his executrix places it beyond all doubt. The principle is that a tenant shall not contest his landlord's title; on the contrary it is his duty to defend it; If he objects to such a title let him go out of possession. Even if I were to accept the evidence of Menezes of what he alleges took place at the back store of the shop of Jardim in 1917 or 1918, such statement on the part of Jardim does not amount to a direct repudiation of the relation of landlord and tenant; or to a distinct claim to hold possession of the lot upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it.

This principle was illustrated in the case of *Jones and wife* v. *Mills* 10 C.B. N.S. p. 788 where the defendant had for several years occupied a cottage as tenant from week to week to one M. After the death of M. the defendant continued to pay his rent weekly to certain persons to whom M. had devised the premises. The devise being discovered to be void by reason of the Mortmain Act, the heir of law of M. by his agent demanded the rent, whereupon the defendant said that he had received notice from the other party, and would not pay any more rent until he knew who was the right owner. It was held that this did not amount to a disclaimer, or repudiation of the title of the heir at law.

I agree with the proposition advanced by Mr. Cabral that an executor's affidavit for probate which includes in the list of the testator's debts a statute barred debt does not operate as an acknowledgement of the debt so as to take it out of the statute unless it was made to the creditor himself. As was said by *Neville J.* in *Re* Beaven (1912) 1 Ch. 196 at p. 205. "The real question is to whom was the acknowledgment made? I think it is clear that the acknowledgment was made to the Court, and not to anybody else. I cannot, therefore, hold this affidavit to be an acknowledgment of the debt, in as much as it was not made to

the creditor" and in *Lloyd v. Coote Ball* (1915) 1 K.B. 242, the Court held that such an acknowledgment had not the effect- of taking the case out of the statute when the debt is sought to be recovered, for an acknowledgment to a stranger is not sufficient. For such an acknowledgment to be effective it must be made to the creditor or his agent.

But those cases do not decide or lay down any principle that such acknowledgment cannot be used to support the testimony of the plaintiff, in the present action and ample corroboration of it, that the relationship of landlord and tenant subsisted down to the day of the death of Jardim. The debt due might be statute-barred but the entries in the Inventory remove any doubt which could possibly have existed of the character of the possession, of Jardim of the said lot. I do not believe that Mr. Sousa got the information for those entries from Ribeiro who has not been called as a witness, but from either Menezes or the executrix, or from both who were well acquainted with the affairs of the deceased over a long period of years. How, therefore, does this admission on part of the executrix affect the defendant?

The agreement of sale of the alleged interest in the deceased in and to the said lot was entered into between the executrix and the defendant. She could only have sold whatever rights her testator possessed, and the estoppel which arose as against Jardim in his lifetime extended to the defendant who purported to obtain possession of the lot from Jardim's executrix.

Having dealt with all of the above questions I will now examine the main contention of the defendant by which he challenges the right of the plaintiff to bring these proceedings on the ground that he is barred by reason of the provisions of section 4 (2) of the Civil Law of British Guiana Ordinance, Chapter 7, and taking the evidence led on defendant's behalf pro veritate I shall deal with the matter as if the whole of the provisions of Section 1 of the Real Property Limitation Act, 1874, and Section 3 of the Act of 1833 were applicable in this Colony. Section 1 of the Act of 1874 which amended Section 2 of the Act of 1833 (3 & 4 William 4, c. 27) by reducing the period of limitation of 20 years to 12 years is as follows:—

> 1. No land or rent to be recovered but within twelve years after the right of action accrued. No person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

This section has the effect of barring the right to land together with the remedy.

Section 3 of the Act of 1833 reads:

> 3. When the right shall be deemed to have accrued in certain cases. In the construction of this Act the right to make an entry or distress or bring an action to recover any land or rent shall be

deemed to have first accrued at such time as herein-after is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of conditions, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

It is important to note the language used "When the person claiming such land ....."

Time begins to run from this point.

It is therefore necessary to determine the meaning of rent in the two sections. It means rent as an incorporeal hereditament, an incumbrance on land, a right to receive something out of it to the detriment of the owner. It is not the thing corporate itself, but something collateral thereto as a rent issuing out of lands. It does not mean rent reserved on a lease for years, which is a mere incident of tenure, or as it is sometimes put rent reserved on a demise. It contemplates *an estate in Tent.*

When rent on a demise is contemplated, other language is used, as in the 42nd Section of the Act of 1833 which refers to arrears of rent.

The case of *Grant v. Ellis* (1341) 9 M.W. 113 aptly illustrates the distinction to be drawn. It was decided under the earlier Act. Rolfe B. at p. 122 said "In order to come to a just conclu-

sion as to the meaning of the word "rent" as used in the two sections to which we have referred, it is important first to consider what is the meaning of the word "recover" as used in the second section. The enactment is, that no person shall make an entry or distress, or bring an action to "recover" any land or rent, but within twenty years.... Now, so far as relates to land, the word "recover" in this passage, clearly means the same thing as "obtain possession or seisin of." The clause assumes one party to be in wrongful seisin or possession of land to which another has the right, and then limits the time within which the right must be asserted."

"If such be the meaning of the word "recover", when used with reference to one of its objects—"land", it is very reasonable to suppose that the legislature intended it to have the same meaning in respect to the other object — "rent".

"Now we are of opinion, that it is to this sort of recovery only that the second section of the statute has reference for such is clearly the meaning of the word "recover," when used with reference to land; and the plain grammatical construction requires us to give it the same meaning when applied to rent, unless, which is not the case here, some manifest absurdity or inconvenience should result from our so doing. It follows from hence, as a matter of course that the word "rent" in the second section, must necessarily be confined to rent which might in its nature have been the object of such a recovery and this certainly does not include the rent reserved on common leases for years."

"In the third and some other sections the Act proceeds to define the time, in most, though (as is noticed by Lord Chief Justice *Tindal* in the case of *James v. Salter)* not in all possible cases, at which the right to make a distress, for the purpose of recovering any rent, shall be deemed to have first accrued to the party making the same. The first case put is that of a party who has himself, in respect of the estate or interest claimed, been in possession of the rent, and who afterwards has been dispossessed, or has discontinued the receipt of the rent. The estate or interest claimed must, according to the context, mean the estate or interest claimed *in the rent,* and not in the lands out of which the rent issues. Now, a person entitled to the rent reserved on a common lease for years has no estate in the rent at all; *Prescott v. Boucher;* he is entitled to the rent, when it from time to time becomes due, as being an incident to his reversion, and not because he has any estate in the rent itself. He is himself the freeholder of the land, and can therefore have no estate in rent issuing out of the land. The word "interest," indeed, is of so large and comprehensive a nature, as perhaps to embrace the right which the reversioner has in the rent as incident to his reversion; still that interest can in no fair sense be described as *the interest claimed.* What is claimed by a landlord, distraining for rent on a common lease for years, is the amount of the arrears, wholly irrespective of the extent of his estate or interest in the reversion, as an incident to which the right to those arrears has accrued: what he "recovers" by his distress is the amount due for arrears of rent, and will be the same whether he is ten-

ant in fee simple, tenant for life, or tenant for years. The statute, in this branch of section 3, clearly looks to the party recovering *the same estate or interest* of which he was previously possessed, and of which he had been dispossessed; and this is altogether inapplicable to a distress for rent incident to a reversion expectant on a common lease for years. Indeed, this very distinction appears to have been contemplated by the legislature "in this Act for by the 42nd section a limit is imposed as to the number of years' arrears for which a party entitled to rent may distrain, and there the subject-matter to be recovered by the distress is described, not as "rent," but as "arrears of rent."

There are other sections in the Acts of 1833 and 1874 relating to payment of rent, and where, as in section 34 of the Act of 1833, after the statutory period the title is extinguished, and where the tenancy would no longer subsist.

In *Nicholson v. England* (1926) 2 K.B. 93, sections 7 and 8 of the Act of 1833 were dealt with by *Sankey J.* and the difference to be drawn between rent as an incorporeal hereditament and rent under a contract of demise, where the owner's right is extinguished in the former case by reason of his having received no acknowledgment thereof by payment of rent or otherwise during the statutory period from the expiration of a year after the commencement of the tenancy. There, even, title once extinguished cannot be revived by a subsequent payment in respect of rent. But in the latter case where the words of Section 8 "the last time when any rent payable in respect of such tenancy shall have been received" occur, they do not apply to a tenancy in respect of which, since the determination of the first year thereof, the statutory period has expired without any acknowledgment of the reversioner's title by payment of rent or otherwise.

Section 34 of the Act of 1833 specifically provides for the extinguishment of title of the party out of possession at the end of any period of limitation. There is no such statutory provision in the Civil Law of British Guiana Ordinance. Not only is the remedy by action, entry or distress barred, but the title is extinguished, so that after the expiration of the statutory period an acknowledgment of title by the former disseissor will be ineffective. The title of the dispossessed owner being extinguished, the occupant obtains a title by virtue of his possession — a possessory title. He has a better right to the land to the exclusion of the former owner whose title is extinguished. Such inchoate right. of a person in possession of land without title form a transmissible and inheritable title.

In the case of rent reserved on a demise, the receipt of the rent from the letting of lands is treated throughout those Acts as being equivalent to possession; therefore, so long as a person receives or is entitled to rent from a lessee, the lessee can never obtain a title to the land against him under the Acts. He can never acquire a possessory title. Time will only begin to run against the owner of the land after the determination of the tenancy.

The case of *Archbold v. Scully* (1861) 9 H.L.C. 375 has set at rest the legal incidents flowing from such a demise. I quote

"It is now clearly established that so long as the relationship of landlord and tenant subsists as a legal relation, the landlord's right to rent is not barred by non-payment for however long a time. The right to the rent is an incident to the reversion. The Statute of Limitations does not apply, except, indeed, that by the 42nd Section it prevents the recovery of arrears for more than six years.

If the parties stood in the relation of landlord and tenant, it could not be in the power of the tenant by an act of his to alter that relation — *save* in cases of surrender and disclaimer which roust be properly evidenced.

Neglect to enforce payment of the rent deprives the lessor, by the express terms of the estate, of all arrears beyond six years; but as to all accruing payments, the legal principle is, that the right is constantly reserved. In such a case, even if pleaded, the doctrine of laches is not sustainable. Bygone arrears are lost, but there can be no neglect in not enforcing what is not due.

The possession of the tenant during the term is the landlord's possession. The tenant cannot be allowed to deal with the possession so as to deprive the landlord of his right. The tenant, by withholding the payment of rent, and keeping it himself, cannot place himself in the situation of a third person. He merely keeps it in his own pocket, and whether he does this wilfully without excuse, or under a claim of title, it is merely the non-payment of rent, so far as the Statute of Limitations is concerned, and no more."

It is only necessary to refer to one other case decided before the Act of 1833 was passed. *Sanders* v. *Lord Annesley* (1804) 2 Sch. & Lef. 97, where it was held "There may be a possession, not accompanied by the freehold, such as chattels interests of various kinds, created either by the compact of the parties or by judgment of law, as in the case of an elegit creditor; these tenants have not the freehold in them.

The possession of the person holding under such title is the possession of the person who has the freehold. He cannot be allowed to deal with the possession so as to deprive the person entitled to the freehold of his right.

This distinction must be exactly observed, or property will be thrown into confusion, especially in cases of long terms or of elegit, where no rent is reserved to keep up the memory of the tenure. Therefore, whoever gets such possession, and whoever takes by assignment from him, can never set up such possession against the person having the freehold out of which such chattel interest was created: and if a person having the mere right obtains possession by contract or agreement with the person thus in possession, he can never be remitted to his mere right, but must hold the possession accordingly: and this is a principle of law established for the purpose of avoiding fraud, and preserving the possession of every man according to its original value.

The rule therefore I take to be that whenever a person comes to the possession either by judgment of law or by his own agree-

ment, and holds that possession he and all who claim under him must hold it according to his right to the possession and cannot qualify it by any other right."

I have dealt with the nature and effect of several sections of the Real Property Limitation Acts of 1833 and 1874 the provisions of which are not all transplanted in the Civil Law of British Guiana Ordinance, for we find that *Section* 4 (2) of that Ordinance limits the restraint to immovable property. That subsection reads —

> "No person shall make any entry or distress, or bring an action or suit to recover any immovable property, but within twelve years next after the time at which the right to make, bring, or recover the same has accrued to him or to some person through whom he claims"
>
> *Provided*..... that "(c) rent arising out of immovable property and any sum secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of immovable property and any legacy payable out of immovable property shall be deemed to be *movable* property for the purpose of the Ordinance aforesaid."

Whilst by section 1 of the Act of 1874 no land or rent is to be recovered but within twelve years after the right of action accrued.

There rent means an incorporeal hereditament.

Holding as I do that up to the time of Jardim's death, the relation of landlord and tenant existed between the heirs of Pattersons and him, it is unnecessary to consider whether in law, even assuming that Jardim was in the continuous possession for the length of time as pleaded in paragraph 6 of the defence, there was transmitted to the defendant, by reason of the agreement entered into between the executrix of Jardim's estate and him, the alleged interest Jardim acquired in his lifetime so as to bar the right of action in the plaintiff to recover the said lot. Under the English Acts, not only is the remedy by action barred but the title is extinguished. With respect to the latter result there is no corresponding provision in the local enactment. The ownership the Pattersons was never extinguished.

The effect of *Section* 4 (2) of the Ordinance was dealt with by *Savary J.* in *Khan* v. *Boodhan Maraj,* et al. (1930) L.R. B.G. 9 at p. 13 where he held that the subsection gave a negative right. as it is termed, to a person in possession for twelve years or more. It prevented a person from disturbing the possession after twelve years have elapsed from the time when the right to make an entry first accrued to that person. That learned Judge then referred to the case of *Taylor* v. *Twinbarrow* (1930) 2 K.B. 16 where *Scrutton* L.J. at p. 23 referring to the provisions of the English Act of 1874 quoted with approval a passage in Darby and Bosanquet's Statutes of Limitations, 2 Edition p. 493 which is as follows: "It has been said that the effect of the Statute is to execute a convey-

ance to the person in possession, and not only to extinguish the right of the former owner, but to transfer the legal fee simple. But the truer view is that the operation of the Statute in giving a title is merely negative: it extinguishes the right and title of the dispossessed owner, and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him."

But there being no corresponding provision to Section 34 of the Act of 1833 in this Colony whereby the right of the person out of possession is extinguished at the end of the Statutory period I agree that the result will be as stated by *Verity* C.J. in the case of *Elizabeth Frank* et al. v. *Ali Buksh* et al (1943) L.R. B.G. 78 "that *Section* 4 (2) of the Ordinance is one of limitation only land as such is negative in its operation.

In my opinion it has not that destructive attribute so as to put an end to the title of the owner out of possession, and is not an inchoate right which is transmissible or inheritable.

The main ground of defence in my view therefore fails, and when the defendant entered into possession of the lot under the agreement above referred to, such possession was that of a trespasser. He is, therefore, liable to the plaintiff and those on whose behalf this action has been instituted for the mesne profits of the lot which I assess at the rate of $30:- per annum from the date of defendant's entry under the agreement to the date when he gives up possession to the plaintiff.

The judgment would therefore be

(a) An order that the defendant do deliver up to the plaintiff possession of lot 19 Plantation Zorg, also called lot 19 Zorg Front, in the county of Essequibo not later than the 31st day of December, 1947;

(b) Mesne profits from the 2nd day of August, 1940, to the date of surrender of possession of the said lot;

(c) Costs certified, if necessary, as fit for Counsel. Liberty to apply.

Solicitors: *R. G. Sharples; F. I. Dias.*

O. MOHAMED *v.* T. NARAINE

OLI MOHAMED,

Plaintiff,

v

TOOLSIE NARAINE,

Defendant.

[1945. No. 198.—DEMERARA.]

BEFORE WORLEY, C.J.: 1947. JUNE 5, 11, 23.

Bailment—Duty of bailee to take care—Degree of care required—What is necessary in the circumstances.

Bailment—Bailee delivers chattel to a person to be repaired—Repairer in express terms not liable for loss or damage by fire—Duty of bailee to insure against fire.

Bailment—Chattel bailed—Damaged or not forthcoming—Onus on bailee—To show absence of negligence.

Bailment Chattel bailed—Not returned at agreed time and place—Liability of bailee—For whatever happens.

In every bailment the bailee is required to take that degree of care of the chattel bailed which may reasonably be looked for having regard to all the circumstances of the case, and if the chattel bailed is damaged or not forthcoming the onus is in the first place upon the bailee to show circumstances negativing negligence on his part.

TRAVERS v. COOPER (1915) 1 KB. 73, C.A., applied.

Where a bailee by reason of his wrongful act fails to return, at the agreed time and place, the thing lent, the bailee is liable for any loss which actually happens whilst his wrongful act was in operation and force.

It is the duty of the bailee of a chattel to insure the chattel against loss or damage due to fire where the bailee takes the chattel to be repaired and the repairer accepts the chattel for such repair on the express condition that he shall not be responsible for loss or damage due to fire.

Action by the plaintiff Oli Mohamed against the defendant Toolsie Naraine for damages for breach of contract, alternatively, for negligence.

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

C. Lloyd Luckhoo and *J. A. Luckhoo,* for defendant.

Cur. adv. vult.

WORLEY, C.J.:

This is a claim for $2,100 damages for breach by the defendant of a contract in writing made between the parties on 6th February, 1945, whereby the defendant undertook to arrange and pay for the repairing of the plaintiff's motor-car; with an alternative claim for damages suffered by the plaintiff as the result of the negligent driving of the defendant whereby the plaintiff's motor car was damaged on the 5th February, 1945.

The defence admits the agreement of the 6th February, 1945 but contends that the motor car having been destroyed by fire, through no default or negligence of the defendant, while undergoing repair in pursuance of the agreement, the defendant is not

in law liable for the loss or destruction of the motor car. In answer to the alternative claim the defendant denies negligence and further contends (a) that if he were negligent, the plaintiff's remedy was merged in the agreement, and (b) that the damage alleged is too remote.

The facts are simple and it is regrettable that defendant saw fit to go into the witness box to relate a highly improbable and unconvincing story as to how he came to be driving the plaintiff's car on the day in question. I did not accept his evidence and find the following facts mainly on the evidence of the plaintiff.

On 12th January, 1945, the plaintiff bought a Ford V8 motor car, 22 h.p. registered number 4987 for $2,100. The price of motor cars was then rising and plaintiff was minded to sell his again if he could do so at a profit and he made this intention known. On the 5th February, 1945, when he was with his car at Vreed-en-Hoop the defendant, who was known to the plaintiff approached him with a suggestion to buy and asked to be allowed to try out the car. The plaintiff agreed that defendant should drive his Ford car to Leonora, 10 miles along the West Coast Road and he himself would drive defendant's small Morris car to the same place where he would take over his own car again. In pursuance of this arrangement defendant and four others entered the plaintiff's car and defendant drove off and naturally was soon out of sight. Plaintiff followed and at Ruimzight, two miles from Vreed-en-Hoop, he saw that his car had met with an accident. It was lying on its side half under water in a ricefield, two rods from the road and plaintiff saw tracks showing that it had gone sideways across the roadside trench and into the field. Plaintiff's car was towed out by a bus and subsequent examination shewed that the doors and fenders on one side were smashed. The defendant was standing on the road in wet clothes: he refused to tell the plaintiff how the accident had happened but said he would buy the car, and his brother drove it away saying he would take care of it as defendant intended to buy it. On his way the brother got into trouble with the police who seized the car and took it to Den Amstel Police Station. The following day the defendant, who lives in Georgetown, went to plaintiff's house at Leonora to talk over the matter and on the same day the parties entered into a written agreement (which I will set out in substance later in this judgement) whereby the defendant undertook to pay $150 to the plaintiff and to have the car repaired at his own cost. The $150, which was to compensate plaintiff for the depreciation to the car, was paid and, in pursuance of the undertaking to repair the car was fetched on the 7th by defendant's agent from the plaintiff's house (the Police having released it at plaintiff's request) to the defendant's house and eventually taken to Messrs. Geddes Grant where the cost of repairs was estimated at $325. Defendant signed the necessary authorization for the work to be done at his charge. The plaintiff denied that he insisted on the car being taken to this particular repair shop but I think it more probable, having regard to the evidence of Mr. Sills and Mr. Emile, that he did so insist and, since the repairs

had to be done to his satisfaction, it would seem only reasonable that he should approve the repairer. The point does not seem to me to affect the question of liability. The repairs were still unfinished and the car still in the shop when on the 23rd February, a fire, which had broken out in neighbouring premises, spread to the premises of Messrs. Geddes Grant and the car was totally destroyed. Defendant having heard of the conflagration went to the repair shop and attempted to rescue the plaintiff's car but was prevented from doing so by the presence of other cars which could not be moved. On March 9th, plaintiff through his solicitor claimed damages for the loss of the car and on the 13th the defendant's solicitors rejected the claim.

The two repair order forms which defendant signed on February 8th bear a notice stamped in red ink, "Notice—Fire. Not responsible for loss or damage due to fire, accident or otherwise." I reject defendant's suggestion that these notices were stamped on the forms after the fire had occurred and find that they were on the forms when defendant signed and that his attention was drawn to them.

It is on the basis of these facts that I propose to examine the relationship of the parties and determine the issues raised in this case. The arrangement made at Vreed-en-Hoop whereby the plaintiff allowed the defendant to drive his car to Leonora created gratuitous bailment of the type known in Roman Law as "commodatum" and in our law as a loan for use. In every bailment the bailee is required to take that degree of care of the chattel bailed which may reasonably be looked for having regard to all the circumstances of the case, and, if the chattel bailed is damaged or not forthcoming, the onus is in the first place upon the bailee to shew circumstances negativing negligence on his part. If authority be required for the latter part of this statement it will be found in Joseph Travers Ltd. v. Cooper (1915 1 K.B.C.A. 73) where Buckley L.J. says at page 38 "The defendant as bailee of the goods is responsible for their return to the owner. If he failed to return them it rested upon him to prove that he did take reasonable and proper care of the goods". That opinion is echoed in the judgments of the other members of the Court of Appeal and is founded upon the speeches of Lord Loreburn and Lord Halsbury in an unreported appeal in the House of Lords.

The degree of care and diligence required of the bailee has been held to vary according to the benefits derived from the bailment by the bailor and bailee respectively. Where a thing is lent by the owner to a bailee and the latter alone receives a benefit from the contract, he is liable for negligence even though slight and is bound to exercise the utmost degree of care; but where the loan is not strictly for the benefit of the borrower alone but is for the mutual benefit of borrower and lender then an ordinary degree of diligence or of care and skill is required (see Halsbury's Laws of England 2nd Ed. Vol. I paragraph 1,198 and Story's Commentaries on the Law of Bailments 3rd Ed. sect. 238). It is with this latter type of loan that I am now concerned. This was not

a case of lending a car to a friend for his use solely for his convenience: there was a possible, though not a certain benefit to the plaintiff, namely, that the trial run might result in the offer of an acceptable price for the chattel lent.

If I am right so far, the position when defendant drove off in plaintiff's car was that he was bound when using the motor car to use an ordinary degree of care and skill and that, if the motor car was damaged or lost while in his possession, the burden was on him t6 how, in the words of Lord Loreburn, "that it occurred from some cause independent of his own wrong doing." The defendant has failed to satisfy me that the accident and consequent damage to the car was occasioned by something beyond his control and indeed I would hold, were it necessary, that his negligence has been positively established. He was driving a powerful fast car, which was new to him, and I see no reason to doubt the substantial truth of plaintiff's statement that defendant went off "at a terrific speed", allowing a little for the natural exaggeration of language. The position and condition of the car after the accident, the marks of the wheel-tracks all suggest that speed was one of the main causes, if not the only cause of the accident. The defendant's subsequent conduct is only explicable on the ground of an admission of negligence: when asked on the spot to give an explanation of the accident, he kept silent: he allowed his brother to take possession of the car as his agent and the following day he approached the plaintiff and eventually accepted liability for payment of the cost of repairs and depreciation. In the witness box, he sought to show that the accident was due to circumstances beyond his control by telling an unconvincing story of swerving while driving at 20 to 25 miles an hour to avoid a cow crossing the road. Even if I were prepared to accept his story of the cow, he failed to show that he could not have avoided the accident if he had been driving with reasonable care and skill. The events which immediately preceded the accident are peculiarly within his knowledge and the knowledge of the four persons who were in the car with him at the time and whose identity is known to him but not necessarily to the plaintiff and I draw an inference unfavourable to the defendant from his failure to call any of these persons as witnesses. However it would seem they are not persons worthy of much credit, even if called, if I am to believe the defendant's evidence that when he was charged in the Criminal Courts in connection with this accident, these persons were so confused in their recollections that the charge was dismissed at the close of the prosecution case.

So then, the position on 6th February, was that the chattel lent was not returned by the defendant to the plaintiff at the time and place agreed upon by reason of the wrong-doing of the defendant and not by causes beyond his control. What effect has such default on the part of a borrower on his responsibilities towards the lender? In the very learned work of Dr. Story above referred to, I find the following statement of the law upon this point:— "para. 259: If the borrower does not return the thing at the proper time, he is deemed to be in default.... and then he is responsible for all losses and injuries and even for all accidents." and again at p. 266 the learned author gives his view of the Com-

mon law as follows : — "delay puts the thing at the risk of the borrower and is deemed such a misfeasance or negligence on his part as will ordinarily make him liable for accidents."

I have not been referred to nor have my own researches discovered any judicial authority exactly in pari materia which goes to support these opinions but that is not surprising because, as Dr. Story remarks (at p. 287) "though the contract of gratuitous loan is of daily occurrence in the actual business of human life, it has furnished very little occasion for the interposition of judicial tribunals for reasons equally honourable to the parties and to the liberal spirit of polished society. If a loss or injury unintentionally occurs an indemnity is either promptly offered by the borrower or compensation is promptly waived by the lender."

However, the converse of Dr. Story's proposition is stated in the judgment of Blackburn J. in the leading case of Taylor v. Caldwell 1863 3 B & S 826, where he says at p. 838 "It may, we think, be safely asserted to be now English law, that in all contracts of loan of chattels or bailments if the performance of the promise of the borrower or bailee to return the things lent or bailed, becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel."

In Halsbury's Laws of England Vol. I p. 742 note (f) the following comparison is made between the position of a hirer and a borrower, "Wherever a hirer is responsible a fortiori a borrower is and he may be responsible where a hirer is not, seeing that greater diligence is required of him."

If it be remembered that the degree of care and diligence required of a bailee depends upon the benefits he derives from the contract, the truth of this proposition will be at once apparent and by the same process of reasoning it will follow that a borrower in a gratuitous bailment will be responsible whenever a bailee under any bailment for valuable consideration would be responsible (and sometimes when the latter is not). This appears to be the view of the learned author of the article on Bailments in Halsbury's Laws of England, as expressed in para. 1209 of the volume cited above and note (t) on the same page.

If that is good law, and I think it is, then it is relevant to consider the authorities on the position of a bailee in default under a bailment for reward. On this Dr. Story says in para. 413 "If the thing is used for a different purpose from that which was intended by the parties or in a different manner or for a longer period, the hirer is not only responsible for all damages but if a loss afterwards occurs, although by inevitable casualty, he will be generally responsible therefor." The converse of this is set out in the passage cited above from the judgment of Blackburn J.

In Davis v. Garrett, (1830 6 Bing, 716) the defendant received on board his barge certain goods of the plaintiff's to be conveyed from the River Medway to London. On the way, the barge, unnecessarily and in breach of the legal duty imposed on the owner

to proceed without unnecessary deviation, deviated from the usual course, and in consequence of a tempest which blew up during the deviation the plaintiff's goods were lost. It was held that the defendant was liable and in his judgment Tindal C. J. said:

> "no wrong doer can he allowed to apportion or qualify his own wrong and as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done." The last part of this passage refers to the contention advanced by the defendant that the same loss might have been occasioned by the same tempest if the barge had proceeded in her direct course.

Davis v. Garrett was approved in Lilley v .Doubleday (1831 7 Q.B.D. 510). In that case the defendant having contracted to warehouse certain goods for the plaintiff at a particular place, warehoused a part of them at another place where without any negligence on his part, they were destroyed. It was held that the defendant by his breach of contract had rendered himself liable for the loss of the goods.

Both these cases were approved and followed by the Court of Appeal in England in James Morrison & Co.. Ltd v. Shaw, Savill and Albion Co., Ltd. (1916 2 KB. 783) which was a case of loss occurring by an act of the King's enemies during a wrongful deviation of a ship. Shaw & Co. v. Symmons & Sons (1917 1 K.B. 799) is another authority in point. In that case the defendant, a book binder, to whom the plaintiff had entrusted certain books for binding, retained them after the proper date in breach of the contract and the books so returned were destroyed by fire through no fault of the defendant. He was held liable on the ground that a loss had "actually happened whilst his wrongful act was in operation and force."

These authorities support the opinions quoted above of the learned Dr. Story and the principle of which they are applications clearly applies to the case now before me. The defendant by reason of his wrongful act failed to return the thing lent at the agreed time and place and was thereafter liable for any loss which actually happened whilst his wrongful act was in operation and force. It is beyond dispute that the plaintiff's motor car was in in the repair shop where it was destroyed in consequence of the defendant's wrongful act. He himself had caused it to be taken there for the purpose of purging his wrongful act by getting it repaired and until that was done his wrongful act was still in operation and force.

But the defendant contends that whatever liability he was under on 5th February was merged in and superseded by his liabilities under the agreement of the 6th.

The agreement after reciting that the plaintiff is the owner of Ford Car number 4987 and that the defendant while in control of the said car and in course of driving it on 5th February, 1945 met with an accident, thus causing the car to be damaged,

then sets out the arrangements agreed between the parties for the purpose of affecting a settlement of the matter as follows : —

(1) That the Party of the Second Part pay over to the party of the First Part the sum of One Hundred and Fifty Dollars (the receipt whereof is hereby acknowledged)

(2) That the Party of the Second Part undertakes to have the said car repaired at his own cost and expense and that such repairs when completed should be approved of by the party of the First Part.

(3) That the Party of the Second Part carrying out the above obligations to the approval and satisfaction of the Party of the First Part shall be relieved of all or any other liability in connection with the said damages sustained by the Party of the First Part and the Party of the First Part agrees to absolve the Party of the Second Part from all further liability whatsoever and terminate this Agreement when all the conditions hereto are faithfully kept and performed.

Mr. Luckhoo argued that the plaintiff cannot go behind this agreement and that the defendant, having done his utmost to carry out his obligations under it to the approval and satisfaction of the plaintiff, cannot be held liable because complete performance on his part has been rendered impossible by the destruction of the motor car through no fault of his.

I do not propose to deal in detail with the cases he relied upon to support this contention because each of them is only an application of an underlying principle and there appear to me to be several reasons why the doctrine of "frustration" is not applicable to the present case. There is first of all the fact that the agreement is not for this purpose a divisible contract: If the doctrine applies the contract as a whole is at an end: Lord Sumner said in Bank Line v. Capel & Co. (1919 A.C. 435, 459) "the doctrine when applicable is applicable equally at the instance of either party to the bargain and the result of its application is to work the instant dissolution of the contract." But in the present case, the defendant is trying to say that only a part of the contract has been frustrated, namely, his promise to get the car repaired, leaving in full force and effect the alleged merger or supersession of the plaintiff's pre-contractual rights.

Secondly, for the doctrine to apply to any contract, it must be possible for the Court to imply a term or condition that if performance becomes impossible, the contract is to be at an end, and, 'in determining whether any such term, or condition can be properly implied the nature of the contract is of considerable importance" (per Lord Parker in F.A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Products Co., Ltd. 1916 2 A.C. H.L. 397, 423). In the same case, which was one of those relied on by Mr. Luckhoo, Lord Loreburn (ibid. 403, 404) stated the principle in the following terms "In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the Court proceeded. It is in my opinion the true principle for no Court has an absolving power but it can infer from the nature of the contract and the surround-

ing circumstances that a condition which was not expressed was a foundation on which the parties contracted." A little further on in the same speech, he propounds the following test to ascertain whether it can be supposed that the parties, as reasonable men, intended the contract to be binding on them in altered circumstances. "Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said "if that happens, of course, it is all over between us?" One has only to apply that test to the circumstances of this contract to see how ridiculous it would be to imply such a term.

I have dealt with these two aspects out of respect for Mr. Luckhoo's argument but I think it is really disposed of by my third reason, which is perhaps self-evident, that the doctrine does not apply where the contract itself contains a clause actually providing for the rights and liabilities of the parties in the event of non-performance. Clause 3 of the agreement of February 6th is to me capable of only one interpretation, namely that if the defendant for any cause fails to perform his part of the contract, then the plaintiff's right to sue for the damage he had sustained remains unimpaired. I am unable to read into it any merger or supersession of that right.

This is not a case where the plaintiff has said "In consideration of your paying me $150 and promising to repair my car, I forego my right to sue for the damages I have suffered." I think the true position, put into everyday language, is that the defendant has said to the plaintiff "I have damaged the car you lent me and if you will let me keep it I will get it repaired and pay you $150" and the plaintiff has replied "Very well, I will accept the $150 and you may keep the car and get it repaired. While this is being done, I will forbear from suing you and when it has been done to my satisfaction, I will release you from all liability. But until then I stand upon my rights." In other words, I think there was an extension of the original bailment with an express saving of the plaintiff's rights as they stood on 5th February in the event of defendant's failure to perform the conditions of the extension I should add that, in my view, nothing turns upon the fact that the motor car was fetched from the plaintiff's house on the 7th since it had only been returned to the plaintiff by the intervention of a third party and not by any act of the defendant.

If I am wrong in this and if the proper inference is that there was a fresh bailment under the agreement (though it is difficult to see what type of bailment it could be) under which the defendant not being in breach of the agreement, was only under a duty to exercise reasonable care, I should still be prepared to hold that, having had his attention drawn to the notice that the repairers would not be responsible for loss, he failed to exercise the degree of care which might reasonably be expected in all the circumstances by omitting to insure the car. Common or ordinary diligence, says Dr.Story is that which men of common prudence generally exercise about their own affairs in the age and country in which they live. No doubt the danger of fire is more present today in the minds of the inhabitants of this city than in Febru-

ary, 1945, but, nevertheless I think that even then, a man of common prudence insured his motor car against the risks of fire and theft and the defendant was bound to take at least as much care of the plaintiff's car as he might reasonably be expected to take of his own.

In Davis v. Garrett and Lilley v. Doubleday it was held that the loss suffered after the defendant's breach of contract and while his wrongdoing was still in operation was sufficiently proximate for the plaintiff to recover the whole value of the goods lost. The authorities therefore do not support the defend-ant's plea that even if he were negligent in the first place, the ultimate damage suffered by the total destruction of the car was not attributable to the negligence and was too remote. It seems to me that whether the plaintiff's claim be grounded in breach of contract or in negligence he is entitled to recover the full amount of his loss. The plaintiff admits $150 received and I therefore give judgment against the defendant for $1,950: and costs.

Judgment for plaintiff

Solicitors : *J. Edward de Freitas; D. P. Debidin.*

MARIA ANTONIETTA de SILVA FERREIRA and MANOEL FERNANDES,

Appellants (Defendants),

v.

CLEOPATRA MANSFIELD,

Respondent (Plaintiff).

1946. No. 385—DEMERARA.

BEFORE FULL COURT: WORLEY, C.J., LUCKHOO and BOLAND, JJ. 1947. May 23, 30; June 28.

Landlord and tenant—Letting of house—Implied undertaking by landlord for quiet enjoyment—Where ordinary and lawful enjoyment of house substantially interfered with by landlord—Breach of undertaking.

Upon the letting of a house, an implied undertaking by the lessor for quiet enjoyment is to be implied from the mere relationship of landlord and tenant.

It is in every case a question of fact whether the quiet enjoyment of house has or has not been interrupted; and where the ordinary and lawful enjoyment of the house is substantially interfered with by the acts of the landlord, or those lawfully claiming under him, the covenant for quiet enjoyment is broken, although neither the title to the house nor the possession thereof may be otherwise affected. There may be a breach of the covenant without direct physical interference.

BUDD SCOTT v. DANIELL (1902) 2 K.B. 351, and SANDERSON v. BEKWICK-UPON-TWEED CORPORATION (1884) 13 Q.B.D. 547, applied.

M. A. FERREIRA & ANR. *v.* C. MANSFIELD

Appeal by Maria Antonietta de Silva Ferreira (absent from the Colony but represented therein by her attorney Manoel Fernandes) and Manoel Fernandes from a decision of the Magistrate of the Georgetown Judicial District awarding judgment to the respondent Cleopatra Mansfield in a claim by her for damages for breach of covenant for quiet enjoyment and for negligence.

J. Edward de Freitas. solicitor, for appellants.

John Carter, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by Luckhoo. J. as follows:

The grounds of appeal necessary to be considered for the determination of this appeal may be limited to two of them, and they involve three questions of law: —

(a) Whether the first-named appellant the owner by title paramount of the premises would be liable upon a breach of an implied covenant for quiet enjoyment arising from a letting of one of the rooms therein by the second-named appellant (landlord) to the respondent (tenant) due to the acts by the said owner in the course of effecting repairs to the said premises?

(b) Whether the second-named appellant as landlord would be liable for such breach if he permits or assents to such repairs being done by the said owner to the premises during the tenancy with the respondent; and

(c) Whether one or both of the appellants would be liable in damages to the respondent for negligence causing loss to her in effecting repairs to the said premises?

The respondent who claimed to be the tenant and occupier of a room in the upper flat of a building owned by the first-named appellant situate at lot 3 Queen and Holmes Streets, in the city of Georgetown, and let to her by the second-named appellant relied on an implied term for quiet enjoyment arising from such letting. She alleged that on the 3rd day of May 1945, while the tenancy was still subsisting the appellants' servants and workmen in effecting repairs at the instance of the appellants negligently and carelessly raised the upper flat of the building and caused the same to fall off the wooden blocks on which it rested and the roof to cave in, resulting in damage to her furniture and household goods and effects then in the said room. She also alleged in her claim that she lost the use of her said room and was otherwise damnified; for all of which she claimed the sum of $100.00 as damages against the appellants.

The first-named appellant was sued by her duly constituted attorney in this colony, Manoel Fernandes, the second-named appellant, who himself was sued in his personal capacity.

In their defence appellants put in issue all the allegations set out in the claim, and as additional grounds of defence stated that the tenancy had been determined by verbal notice, and that the

respondent had left her goods in the room at her own risk after she had been informed that repairs would be effected.

The learned magistrate accepted the respondent's evidence as to the tenancy subsisting throughout the material times, the entry by workmen and the commencement of repairs to the building and the collapse of the roof causing damage to the respondent's goods left in her room. He rejected the appellants' version that the respondent had been given notice to quit, and the plea of volenti non fit injuria raised by them.

We are satisfied that the learned magistrate had sufficient evidence on which he made the foregoing findings of fact.

The evidence disclosed that a shop was carried on in the lower flat of the building, and the rooms on the upper flat were reached by means of two staircases, one at the front and another at the back of the building. In the month of March 1945 it was ascertained that the building was in a bad condition and needed repairs. Early in April 1945, while the respondent was in occupation of her room repairs were begun on the lower flat and the front staircase was removed. Sometime after, on the 25th April 1945, the carpenters employed requested the respondent to pack her goods in a corner of the room and to vacate the upper flat as they were about to remove the back staircase, the only remaining means of entrance to and exit from the room. That staircase having been removed the respondent sought shelter elsewhere but continued to cook her meals in the kitchen in the yard. On the 3rd day of May, 1945, as the building was being raised the floor shifted causing the roof to collapse and fall in thereby damaging, the respondent's goods.

In view of the questions of law to be determined, it is necessary to ascertain at whose instance the tenants of the upper flat, including the respondent, were told to vacate the rooms in order that repairs might be effected.

Walter Alvin Husbands, clerk to appellant Manoel Fernandes, a witness called on behalf of the appellants said, "On the 25th day of April, 1945, I had information from the collector. As a result, Mr. Fernandes, (meaning the second-named appellant), the carpenters, the collector and I went to the premises. We decided that it was necessary as a result of what we saw to have the entire building overhauled. Up to then we were only repairing the bottom flat. It was decided that tenants must leave."

Augustus Ferreira also called on behalf of the appellants said "I am rent collector for premises at 3 Queen and Holmes Streets. Collector for five years".... "Before repairs were started I spoke to tenants about the premises. I told tenants in March to get somewhere else to live. I also told them a month before the repairs started"....."In April I told the tenants we were going to repair the bottom flat. I said we could not do the upper flat as they were still in occupation. On the 25th April when it was obvious that the building would most likely fall I went to tenants with Husbands and others and told them they must remove."

It is evident from the foregoing that either the immediate landlord (second-named appellant) undertook on his own to execute repairs to the building, or that he qua immediate landlord requested himself qua attorney to do so.

Assuming, however, that no such request could be implied from the evidence, then at least he, qua immediate landlord, permitted or assented to the repairs being done by him qua attorney for the owner of the building.

The Solicitor for the appellants admitted in the course of his argument that there was implied in the tenancy a covenant for quiet enjoyment. That that implication cannot now be disputed has been settled in the case of *BUDD-SCOTT v. DANIELL* (1902) 2 K.B. 351 where it was held that upon the letting of a house, an undertaking by the lessor for quiet enjoyment is to be implied from the mere relation of landlord and tenant. But whether there has been a breach depends upon the evidence in each particular case and is a question of fact.

In *SANDERSON v. BERWICK-UPON-TWEED CORP*. (1884) 13 Q.B.D. 547, Fry, L.J. said "It appears to us in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised premises is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of land may be otherwise affected."

It is clear that such an implied covenant in the present case cannot affect the owner of the building, the first-named appellant, but only the immediate landlord, the second-named appellant. The first question of law must therefore be answered in the negative.

Such implied covenant is however governed by the common intention of the parties. When it is a question as to the nature of the quiet enjoyment to be implied, it is proper to ascertain what in fact was the purpose to which both intended the room to be put, and having found that, both should be held to all that is to be implied from this common intention. The respondent rented the room in order to reside therein. There was no evidence that at the time of letting it was in a dilapidated condition or in a state of disrepair, and that both parties contemplated that during the subsistence of the tenancy repairs would have to be effected.

Solicitor for the appellants contended that even if the implied covenant was applicable in this case there was no breach inasmuch as there was no entry into the room the subject matter of the tenancy, and relied in support thereof on the authority of *DAVIS v. TOWN PROPERTY INVESTMENT* (1903) 1 Ch. 805. This argument in our opinion is not sound. What must be proved is a direct interference with the enjoyment of the thing demised. It does not mean necessarily, direct physical interference.

The second-named appellant attempts to avoid liability on

this issue on the ground that the repairs were being effected by the owner of the title paramount albeit acting through him. Indeed his personality was a dual one, but the evidence of both Husbands and Ferreira already alluded to, convinces us that as immediate landlord he desired the building to be repaired and endeavoured to obtain vacant possession from his tenants for that purpose. Even if he could successfully change his character to be that of the owner of the building at the time of the commencement of the repairs it would not avail him. He could not by such act derogate from his grant.

There are instances even where the owner by title paramount independently of the immediate landlord effects repairs to the premises which he can lawfully do, yet such landlord may become liable to his tenant on the implied covenant for quiet enjoyment, if he permits or assents to such repairs being done. That would not be the case of a landlord merely remaining passive. In the instant case the second-named appellant cannot adopt the subterfuge that the entry was by a person with title paramount and without his assent as immediate landlord. The second question of law must accordingly be answered in the affirmative.

The only other question to be dealt with is that of negligence.

An owner doe's not commit a tort by repairing his own property where he is not the immediate landlord, but a duty to take care does arise if when the property of one is in such proximity to the property of another that if due care was not taken, damage might be done by one to the other.

As Lord Esher, M.R. said in the case of *LE LIEVRE v. GOULD* (1893) 1 Q.B. 491. "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owned some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."

But this learned Judge went on to say, that under certain circumstances, one man may owe a duty to another even though there is no contract between them.

The respondent on the 3rd of May, 1945, was lawfully entitled to occupy the room let to her by the second-named appellant. The learned magistrate rejected the appellant's version that the respondent was given notice to quit the premises. When, therefore, the first-named appellant entered upon the premises for the purpose of affecting repairs a duty arose to take reasonable care to avoid injury to the property of the respondent. To quote from the opinion of Lord Atkin in *DONOGHUE v. STEVENSON* (1932) A.C. at page 580 "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly

affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *HEAVEN v. PENDER* 11 Q.B.D. 503, as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *LE LIEVRE v. GOULD."*

In the instant case we cannot say from the very limited evidence given at the trial in support of the claim based on negligence that, in the particular circumstances, there was a breach of duty on part of the first-named appellant towards the respondent.

The failure to strap on the inside the building which was in a bad condition before attempting to raise it, might or might not have caused the roof to collapse. There is no definite evidence on this point. If anything, the evidence showed that the shifting of the floor which caused the roof to collapse was due to a hollow pipe under the centre beam having snapped during the operation.

The claim of the respondent against the first-named appellant cannot be supported on the ground of negligence nor as against the second-named appellant on that ground.

The learned magistrate's judgment against the second-named appellant can only be affirmed on the breach of the implied covenant for quiet enjoyment. The case of *BOVELL v. ALLEN* reported in the "Daily Argosy" of the 15th April, 1946, was decided on different circumstances to this case, but the learned magistrate's reference thereto does not affect the judgment at which he arrived in so far as the second-named appellant is concerned.

We therefore allow the appeal of the first-named appellant and set aside the judgment entered against her. The Appeal of the second-named appellant is dismissed and the judgment entered against him for the sum of $50.00, fee $5.00 and costs $12.80 will stand.

No order as to costs.

Solicitors: *J. Edward de Freitas; M. A. Charles.*

S. DE FLORIMONTE *v.* I. DE FLORIMONTE

STEPHEN DE FLORIMONTE,
Appellant (Defendant),
v.
INEZ DE FLORIMONTE,
Respondent (Complainant).

1946. No. 407—DEMERARA.

BEFORE FULL COURT: WORLEY, C.J., LUCKHOO, J. and JACKSON, J. (Acting). 1947. June 6, 28.

Husband and wife—Constructive desertion—How terminated—By genuine repentance on part of husband and sincere and reasonable attempts to get wife back.

A husband cannot put an end to constructive desertion on his part unless he proves genuine repentance and sincere and reasonable attempts to get his wife back.

BOWRON v. BOWRON (1925) Probate 195, and THOMAS v. THOMAS (1923) 129 Law Times 575, applied.

Appeal by Stephen deFlorimonte from the decision of the Magistrate of the East Demerara Judicial District ordering him to pay money for the maintenance of his wife Inez deFlorimonte.

C. Lloyd Luckhoo, for appellant.

There was no appearance by or on behalf of the respondent.

Cur. adv. rult.

The judgment of the Court was delivered by Luckhoo, J. as follows:

When this appeal came on for hearing counsel for the appellant abandoned his contention that the evidence did not establish a case of desertion. This is a case in which the magistrate found that the husband (appellant) by a long course of cruel conduct towards his wife drove her from home.

The appellant in one of his grounds of appeal complained that the magistrate had wrongly admitted evidence of acts of cruelty anterior to those on which the respondent based her complaint on the issue of persistent cruelty as occurring between the 1st day of June, 1945 and the 31st day of December, 1945. The magistrate, however, did not make an order on that issue but based his order on the ground of desertion contained in the complaint.

Desertion is a continuing offence, and a wife can, under section 41 of the Summary Jurisdiction (Magistrates') Ordinance, Chapter 9, obtain relief for desertion based on acts of cruelty which cause her to leave her husband, although those acts of cruelty would not avail her to obtain relief for persistent cruelty under the same section by reason of the fact that none of them took place within six months of the complaint. Desertion is not a single act complete in itself, but is manifested by a course of conduct

on part of the husband terminating with the last act which drives the wife from the matrimonial home.

The magistrate found desertion proved on the material date, namely the 31st day of December, 1945, after estimating the conduct of the appellant on the question of desertion, by reference to his cruelty and general behaviour up to the time he drove her away.

Counsel, however, relied on the evidence of the appellant that he made a genuine effort to bring that desertion to an end on the 24th day of January, 1946, when he (appellant) accompanied by one Belfast a dispenser at Ogle (this person was not called as a witness) went to the respondent who was then at her mother's house and asked her to return home. She did not comply with this request.

In such circumstances, the question to be considered is, was there sufficient evidence led on the part of the deserting spouse on which the magistrate could find as a fact that the desertion was at an end? He had to determine this point not on a mere request by the appellant and a refusal by the respondent, but in view of the circumstances of this case.

The magistrate was not dealing with a case of a mere withdrawal of a wife from cohabitation without any cause where the refusal to accept a genuine offer by the husband to resume cohabitation would turn the wife into a deserter, but with a case of a husband who had driven his wife from home by cruel conduct and where special considerations applied. He had to consider the husband's conduct as a whole in deciding that the wife's refusal to return was not without just cause. He heard both wife and husband and believed the wife who stated that her husband said if she went back to the matrimonial home he would take the gallows for her.

Lord Justice Scrutton in *BOWRON* v. *BOWRON* (1925) Probate at p. 195 said "Where there was original cruelty and expressed intention to force the wife to leave, I do not think that the fact that there is no cruelty or expressed intention after she leaves prevents the desertion from continuing. The intention is presumed to continue, unless the husband proves genuine repentance and sincere and reasonable attempts to get his wife back."

In considering genuine repentance and sincerity on part of the appellant the magistrate had to decide, upon the evidence before him, what weight and emphasis were to be given to and placed upon the appellant's cruelty and his threat in case she returned home.

The magistrate decided upon all those facts before him and must have estimated the quality of appellant's action on the 31st day of December, 1945, when matrimonial relations ceased to exist, by reference to his conduct generally. Appellant's subsequent efforts to get his wife to return home must be measured by the same test.

In *THOMAS* v. *THOMAS* (1923) 129 L.T. 575 the same question arose. That was a case in which the husband had driven his wife from home by cruel conduct and sought to bring that state of what is called constructive desertion to an end by a mere offer to resume cohabitation. The Divisional Court held in those circumstances such an offer was derisory, and was not sufficient to put an end to the state of desertion. This judgment was upheld by the Court of Appeal (1924) Probate 194.

We are of opinion that the magistrate acted on a right principle in holding that there was no genuine offer of reconciliation on part of the appellant, such as would put an end to the desertion.

The appeal is dismissed, and the Order made by the magistrate is affirmed.

We will, however, amend the Order by including in the appropriate place therein, the words "finds the defendant guilty of desertion."

The respondent not having appeared at the hearing of this appeal there will be no order as to costs.

Appeal dismissed

C. R. JACOB AND SONS, LIMITED.

Appellants (Plaintiffs),

v.

JAMES OUDKIRK and KULSUM BOODHOO,

Respondents (Defendants).

1946. No. 503.—DEMERARA

BEFORE FULL COURT: WORLEY, C.J.. LUCKHOO, J. and JACKSON, J. (Acting). 1947. June, 6, 28.

Rent restriction—That premises are reasonably required by landlord —Onus of proof—On landlord.

Rent restriction—That it is reasonable to make order for possession—Onus of proof—On landlord—Position of tenant and questions of hardship to be considered.

Under the Rent Restriction Ordinance, 1941, the onus of proving that the premises, in respect of which the landlord applies to the Court for an order of possession, are reasonably required, is on the landlord.

If the court is satisfied that the landlord has shown a reasonable need for the premises, it can go on to consider whether, in all the circumstances of the case, it would be reasonable to make the order, and it is at that stage that the position of the tenants and questions of hardship fall to be considered.

The landlord's application must fail unless the circumstances taken as a whole are such as to lead the court to the positive conclusion that it is reasonable to make the order.

Appeal by C. R. Jacob and Sons, Limited from a decision of a Magistrate of the Georgetown Judicial District refusing to make

orders of possession against the respondents James Oudkirk and Kulsum Boodhoo in respect of premises subject to the Rent Restriction Ordinance, 1941.

F. R. JACOB, for appellants.

Respondents, in person.

Cur. adv. vult.

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

This is an appeal by the plaintiffs (landlords) against an order of a Magistrate of the Georgetown Judicial District refusing an application for the recovery of possession of premises occupied by the respondents as tenants of the appellants. The application was made in pursuance of section 7 (1) of the Rent Restriction Ordinance (No. 23 of 1941) as amended by the Defence (Georgetown Rent Control) (Amendment) Regulations 1944 (No. 16 of 1944) and the Defence (Georgetown Rent Control) (Amendment No. 2) Regulations, 1945 (No. 44 of 1945). Stated shortly the effect of these amendments, so far as is relevant to this appeal, was (1) to make the provisions of section 7 of the Ordinance applicable to any premises in the city of Georgetown and within three miles thereof used for business or trade purposes as though references to "dwelling" house "house" and "dwelling" included references to such premises (provided the standard rent of such premises did not exceed seven hundred and twenty dollars); and

(2) to introduce into paragraph (d) of section 7 (1) after the word "employment" the words "or for business premises for the landlord."

For the purposes of this appeal, therefore, the relevant words of section 7 (1) are :

> "No order or judgment for the recovery of possession of business premises to which this Ordinance applies, or for the ejectment of a tenant therefrom, shall be made or given unless the business premises are reasonably required by the landlord for business premises for the landlord, and the Court considers it reasonable to make the order or give the judgment."

The appellants are a Company incorporated in the Colony carrying on business as provision dealers and hardware merchants at lots 9 and 10 Holmes Street, Georgetown. They are also the owners of lots 15 and 16 Holmes Street on which stand certain premises which are admittedly within the scope of the Rent Restriction Ordinance. The appellants purchased these premises in December, 1944, with the respondents in possession. The premises are described as a two-storeyed building, the bottom flat, that is the ground floor, comprising two small shops occupying the front portion, and five dwelling rooms at the back, of which only three were occupied at the time when the application was heard in January, 1946. The first respondent has carried on business as a watch and clock repairer in one of these shops for six years: the second respondent has carried on the business of a cook shop in the other shop for three years. They attorned tenants to the appellants when the latter acquired the premises and in February,

1945, were served with notice to quit. Ejectment proceedings were started but withdrawn and further notices to quit on 1st December, 1945, were served in October. The notices stated that the landlords required the premises for their own business. The present application was filed on 12th December, 1945, and was refused on the 4th February, 1946.

The appellants' case was that they required the whole of the bottom flat of lots 15 and 16 for their own business which they wished to move from their present place. The evidence of their managing director (which was not contested) was that their present premises are small, inconvenient and very hot; that the store is not big enough to contain the Company's goods which are kept in other places at great inconvenience and risk. He also stated that his health is affected by the condition of the present premises.

The first respondent's case was that he was willing to leave if he could get other premises but he had tried several places without success. During the hearing of the appeal at which he appeared in person, he added the argument that as he is a contractor to the Municipality and the Government he could not move his business "to any kind of place." He also added that he was well-known at his present premises (implying goodwill) and could not afford to pay an exorbitant rent.

The second respondent's case was that she also was willing to move but had failed to get other premises, but she would accept appellants' offer of alternative accommodation in lots 9 and 10. It is however doubtful if appellants can implement this offer as they are not the owners of those premises. At the hearing of the appeal this respondent who also appeared in person stated that she is a widow with six children and made the fresh objection that the alternative premises would be equally hot and unhealthy for her and her children.

The two questions which the Magistrate had to decide on this evidence were:

(a) are the premises reasonably required by the applicant for his business? And

(b) is it reasonable to make the orders asked for?

In McDoom v. Fung, this Court on 30th August, 1946, laid down the principle which should guide the Court in its approach to the first of these questions, in the following terms : —

> "The correct approach to the first question is not the reasonableness of his claim, which involves a wider issue pertinent only when the Court has to consider whether it is reasonable or not to make the order, but whether the dwelling house is reasonably required by the landlord for occupation."

In other words, in considering the first question the Court has to confine itself to such evidence and circumstances as are relevant to show the reasonableness or otherwise of the land-lord's need of the premises. Considerations of hardship to the tenants do not arise at that stage. If the Court is satisfied that the landlord has shown a reasonable need for the premises, it can go on to consider whether, in all the circumstances of the case, it

would be reasonable to make the order and it is at this stage that the position of the tenants and questions of hardship fall to be considered.

The onus of showing that the premises are reasonably required is on the landlord (Epsom Grand Stand Association Ltd. v. Clarke (1919) 35 T.L.R. 525). As to the second question counsel for the appellants has argued that if the plaintiffs make out a *prima facie* case that it would be reasonable to give them possession (by which we understand him to mean that if the applicant satisfied the Court on the first question), the burden lies on the tenant to prove that greater hardship will be caused by making the order than by not making it. He relied upon the English cases of Sims v. Wilson (1946 2 A.E.R. 261) and Robinson v. Donovan (1946 2 A.E.R. 731). Those cases turn upon the interpretation of Schedule I of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 which provides, *inter alia*, "that an order shall not be made or given.....if the Court is satisfied that having regard to all the circumstances of the case.... greater hardship would be caused by granting the order than by refusing to grant it." We do not think they are of much assistance in the interpretation of the very different provision in the Ordinance. It seems probable that section 7 (1) of the Ordinance was modelled on section 5 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (10 and 11 Geo V Ch. 17) which is in pari materia and confers a similar discretion upon the Court. The relevant words of the Act are: —

> "No order or judgment for the recovery of possession of any dwelling house to which this Act applies, or for the ejectment of any tenant therefrom shall be made or given unless……the Court considers it reasonable to make such an order or give such judgment."

We have been unable to discover any case in which the English Courts have decided the question of the onus of proof under this clause. Bearing in mind that this legislation was passed in the tenant's favour and applying the general principle that the onus falls on the party who would fail if no evidence were led, we are of opinion that the landlord's application must fail unless the circumstances taken as a whole are such as to lead the court to the positive conclusion that it is reasonable to make the order.

We now pass on to consider how the learned Magistrate applied the facts of this case to these propositions of law. In his memorandum of reasons for decision he does not clearly separate the two questions which he had to resolve and it is not easy to see exactly what was his conclusion on the reasonableness of the appellants' requirement of the premises for their own business. On this point he says:

> "It would seem that the plaintiffs like most other landlords are of the opinion that if they purchase premises they are entitled qua purchase to possession. In this case the Plaintiffs purchased in December, 1944, with the defendants in possession. If the Court were to give them possession on that ground alone it would be defeating the object of the Ordinance."

There is nothing inherently unreasonable in the appellants' desire to get possession of premises which they have bought with a view to improving and extending their business and although as the Magistrate says, it may not of itself alone provide a sufficient cause for making the order, nevertheless it does provide a firm foundation for the reasonableness of his requirement: The Magistrate further says:

> "The further fact that the plaintiffs' present premises are inconvenient and unsuitable is also no ground for dispossessing the defendants."

But the inconvenience and unsuitability of the present premises are quite obviously factors to be taken into account in assessing the reasonableness of the appellants desire to move their place of business, and they are also factors to be taken into account again when considering whether it is reasonable to make the order. It is apparent therefore that the learned Magistrate has seriously misdirected himself on the first question.

On the second question the Magistrate says:

> "I had to decide the case on the facts as proved and I could not find that a greater hardship would be incurred by refusing the orders than by granting them. Alternatively I could not find that in all the circumstances it was more reasonable to make the orders than to refuse them."

Where, as here, the Court below is exercising a discretion conferred by Statute, an Appeal Court is reluctant to interfere. In this case we feel that the Magistrate's conclusion was vitiated by his wrong approach to the first part of the issue before him. He also appears to have been influenced by the appellants' failure to implement his suggestion that they should find alternative accommodation for the first respondent. On this point the first respondent merely stated that he had tried several landlords without success. The Ordinance does not cast upon the landlord any duty to find alternative accommodation but the question of alternative accommodation is certainly a circumstance to be taken into consideration in deciding whether it is reasonable to make the order. The onus lies on the tenant to show that he has done his best to secure other accommodation and we think that in this case the first respondent did not discharge that onus. He cannot sit down and do nothing but wait until the landlord has found alternative accommodation for him.

The question we have now to consider in view of our findings is the same as that with which this Court was faced in McDoom v. Fung. The facts are not disputed and we think that we are in as good a position as the Magistrate to make an order which will dispose of the case. In so doing we are putting ourselves into the position of a Court of Trial and should therefore consider the state of facts at the time of the hearing of the appeal (Neville v. Hardy 1921 1 Ch. 404). In our opinion the appellants have established that the premises situate at lots 15 and 16 Holmes Street, are reasonably required by them for the purposes of their business. It remains to consider whether, in all the circumstances of the case it is reasonable to make the orders asked for.

We have to put into the scales on either side every considera-

tion that may affect the interests of the landlord or of the tenant in the premises including (as these are business premises) the financial hardship which might be inflicted upon one party or the other if the order for possession were made (see Williamson v. Pallant 1924 2 K.B. 173). In this connection it is material to consider that the appellants wish to make use of the whole of the ground floor. Counsel stated that since the appeal was lodged more rooms on the ground floor have been vacated and the position is that the appellants are being deprived of the use of the ground floor and put to expense by reason of the respondents' occupation of two small portions of it. It is now over two years since the respondents first received notice to quit and we are not satisfied that they have made sincere efforts to find alternative accommodation. On balance we think that the preponderance of hardship falls on the appellants' side and that in ail the circumstances it would be reasonable to make the orders for possession. We think it would be just to allow the respondent time to find alternative accommodation and that three months should be allowed for this.

The appeal is therefore allowed. The decision of the Magistrate is reversed and directions are hereby given to him to enter judgment on the record in his Court that the respondents do give up possession to the applicants of those parts of the premises situate at lots 15 and 16 Holmes Street, occupied by them respectively on or before the 30th day of September, 1947

No order as to costs.

Solicitor for appellant: N. C. JANKI.

Appeal allowed.

RAMKEDAROOP,
Appellant (Defendant),
v.
CECELIA WONG,
Respondent (Complainant).

[1946. No. 192—DEMERARA.]

BEFORE FULL COURT: WORLEY, C.J. AND LUCKHOO AND BOLAND, JJ. 1947. MAY 16, 30; JUNE 28.

Bastardy—Corroboration—Of complainant's evidence—In a material particular.

Bastardy—Corroboration of complainant's evidence established—Period of gestation less than ordinary period—Effect on complainant's evidence.

The defendant had sexual intercourse with the complainant in the months of November and December 1943: the defendant admitted that there was such intercourse on one occasion only, namely, on the 22nd December, 1943. The complainant gave birth to a child on the 3rd July, 1944. About 10 days after such birth, the defendant, according to

the evidence of the complainant and her witnesses, paid to the complainant the sum of $5 to purchase clothes for the child and a week later, the sum of $1 for the child.

Before the Magistrate, the defendant stated that, on the 22nd December, 1943, the complainant admitted that she was then enceinte for a person who was the father of a bastard child born to her three years before. The complainant denied that she made such statement, and deposed that for three years prior to the date (10th January 1945) on which she was giving evidence, she was not on intimate terms with the father of her previous child.

The Magistrate adjudged the defendant to be the putative father of the complainant's child. The defendant appealed.

Held (1) that there was corroboration in a material particular of the complainant's evidence; and

(2) that, notwithstanding the period of gestation (245 days) was less than the ordinary period of gestation, the Magistrate's decision, Worley, C J. dissenting, would not be disturbed.

Appeal by the defendant Ramkedaroop from the decision of the Magistrate of the Essequibo Judicial District adjudging him to be the putative father of the child of the complainant Cecelia Wong.

John Carter, for appellant.

There was no appearance by or on behalf of the respondent.

The judgment of Luckhoo and Boland, J.J. was delivered by Luckhoo, J. as follows:

In dismissing this appeal on Friday the 30th day of May, we gave the fullest consideration to the two material grounds of appeal urged by counsel for the appellant, that there was no corroboration of the respondent's evidence as required by law, and that the birth of the child occurred in less than the ordinary period of gestation.

The respondent was not present, nor was she represented at the hearing of the appeal.

The learned magistrate found as a fact that the appellant had sexual intercourse with the respondent in the months of November and December, 1943, in the house of one Bissoo and, after the birth of the child on the 3rd day of July following, the appellant gave the respondent the sum of $5.00 to purchase clothes, and paid $1.00 for that child.

The appellant, who gave evidence, admitted that on the 22nd December, 1943, at Bissoo's house he had Sexual intercourse with the respondent, but that it was the first and only time.

The learned magistrate in reviewing the evidence said that the appellant himself provided definite and ample support of the applicant's (respondent's) story. It is in respect of this finding that counsel for the appellant questions the sufficiency of corroboration, as the child was born on the 3rd July, 1944.

The law requires that the evidence of the woman must be corroborated in some material particular by other evidence to the satisfaction of the magistrate.

In *REFFEL v MORTON* 70 J.P. 347, Alverstone, L.C.J, expressed the opinion that the corroborative evidence must have some

relation to the conduct of the putative father, or some relation to the probability of the person summoned being the father; and in *BURBERRY v JACKSON* 80 J.P. 455 the corroboration required is said to involve evidence which tends to show probability.

The evidence which the learned magistrate accepted is indicative of some amount of previous familiarity between the parties, and we cannot hold that there is not a sufficiency of evidence on which he could have come to the conclusion he did on this issue.

The second ground is not without some merit as it refers to the birth of the child only 245 days after respondent's earliest act of sexual intercourse with appellant according to respondent's own evidence.

This point as to the shortness of the period of gestation was not taken before the learned magistrate but we are convinced that it must have been involved in the determination by him of the question of the sufficiency of corroboration, as on the one hand there was the appellant in his evidence insisting that the first and only act of sexual intercourse had taken place on the 22nd day of December, 1943, and also the evidence of an alleged admission by the respondent, but denied by her, that she was enceinte at that time for one Paulo the father of a previous child born to the respondent three years before; On the other hand there was the respondent in her evidence stating that for three years prior to the time that she was giving evidence (10th January, 1945) she never had anything to do with Paulo, also called Surujpaul. It is clear that the learned magistrate accepted the respondent's evidence on this issue.

Therefore as the question of the credibility of the respondent's evidence as to whether some other person might not be the father of the child did arise we cannot say the learned magistrate did not address his mind to the fact that the time was less than that of the ordinary period of gestation. So long as the mind of the learned magistrate carried with it the conviction that no other person at the material time had sexual intercourse with the respondent, the child so born could not be regarded as 'nullius filius'.

In Taylor's work on Medical Jurisprudence Volume 2 at page 39, it is there stated that the question to be answered, if there is no evidence of any other person being involved, is—not what the average period of gestation is, but what is the possible duration of pregnancy?

The general opinion among obstetricians is that an eight months child is not with any certainty to be distinguished from one born at the ninth month. Children of between seven and eight months are at birth frequently the same in appearance and in size as children born at the full period of nine months.

As we have already indicated the order of the magistrate will stand, and the appeal dismissed without costs.

The judgment of the Chief Justice was as follows:

The two points of substance in this appeal were

(a) that the evidence before the Magistrate disclosed no corroboration in any material particular of the applicant's evidence, and

(b) that the period of gestation being according to the applicant's case, only246 days and the normal period of gestation being 270 to 280 days the decision could not be supported in the absence of medical evidence to prove that the bastard child was prematurely born.

On the first point I agree with all that has been said in the judgment just read by the Senior Puisne Judge, and need say nothing further.

In my opinion however there is more substance in the second point taken by the appellant. A question must arise as to the credibility of the mother's evidence when the birth of the child has occurred either much earlier or much later than the ordinary period of gestation. In this connection it is important to remember that the corroborative evidence which will satisfy the statute need not be (and in this case was not) direct confirmation of the alleged act of intercourse which resulted in the birth of the child. It need only be evidence tending to show that the mother's story is true, and the Magistrate having satisfied himself that there is before him sufficient corroborative evidence, has then to pass on to consider the truth or otherwise of the mother's story. In the present case, intercourse between the appellant and respondent in December was admitted; but that admission was clearly not conclusive of the respondent's allegation of earlier acts of intercourse in November.

In assessing the credibility of the mother's evidence, the period of gestation as shewn by her story can never be overlooked. If it is fairly near the normal it will not of itself raise a doubt and will tend to support her. If extraordinarily short or long it may raise such a doubt as to resolve the question without further consideration. In between there will be many cases where the period is sufficiently abnormal as to call for some explanation and in such cases medical evidence as to the condition of the child at birth may or may not assist the Court. I must not be taken as assenting to the appellant's contention that in such cases the Court cannot resolve the question without medical evidence, though I think that the Court has a right to expect such evidence if it is available. What I am saying is that when the mother's story involves an abnormal period of gestation, her evidence ought not to be accepted without due consideration given to that fact.

In the present case, the mother alleged intercourse with the respondent several times at Bissoo's place. She said "We used to go in Bissoo's bedroom. November 1943 was the first time I had intercourse with the defendant and the last time was in December 1943." On 3rd July 1944 she gave birth to a female child. The admitted act of intercourse took place on 22nd December 1943, so that if the conception were related to that incident the period of gestation would be only 193 days, a period so short as to make her story practically incredible. If it is assumed that the first act of intercourse took place on the 1st November 1943, the period was 246 days, sufficiently abnormal to put the Magistrate upon enquiry. It is to be observed however the mother merely said "November 1943" and that no attempt appears to have been made to elicit from her any more precise date, a point to which I shall revert when considering the degree of attention which the Magistrate gave to this factor in her evidence.

It is now necessary to look at the rest of the case sought to be proved by the respondent. She describes herself as a single woman and the mother of a child by another man, and swore that appellant was the father of the child born on 3rd July 1944. She supported this by her evidence of intercourse quoted above and by statements that on the day she returned from hospital appellant gave her $5.00 to buy clothes for the child in the presence of Bissoo and his wife, a week later gave her $1.00 in the presence of Bissoo's wife, and on 3rd August sent $2.00 for the child by one Mohan. These persons were called as witnesses on her behalf but denied the whole of her story except the act of intercourse on 22nd December, which occurred during a "spree" and followed upon an invitation to the appellant from the respondent. The appellant giving evidence on oath admitted only the incident of December 22nd.

The position then at the end of the case was that, except for the incident of December 22nd, the mother's story was not merely uncorroborated but had been expressly denied by her own witnesses. Bissoo and Mohan are brothers who work under the orders of the defendant and the Magistrate, in his reasons for judgment, records that they and Bissoo's wife were hesitant in testifying on behalf of the respondent and were anxious to lean on the side of the appellant. For this reason he accepted only that part of their evidence which tallied with the respondent's.

This conclusion is scarcely open to criticism, as the Magistrate saw and heard the witnesses, though one is tempted to speculate why, if they were so biased towards the appellant, they testified to the incident of December 22nd without which evidence the application must have failed. I should also point out that although the Magistrate rejected their version of the incident of 22nd December because it conflicted with respondents, he accepts the same version when he comes to consider the appellant's evidence.

Of the appellant the Magistrate says that he himself provided definite and ample support for the respondent's story: that is only true as to the incident of December 22nd. The Magistrate adds "To my mind the conversation which the defendant narrated as having passed between himself and applicant indicated clearly that they were on terms of previous intimacy." Appellant's evidence as to this was in substance that the respondent invited him to have connection with her and dragged him into an inner room whereupon he told her he didn't care for such conduct as it created a bad impression and made it seem "as though we were friends before." With all respect to the learned Magistrate I cannot see how his inference is drawn from that conversation but, be that as it may, the learned Magistrate appears to have forgotten that the respondent whose evidence he accepted without hesitation, denied in cross-examination that she had pulled defendant into the bedroom saying "Boy give me my Christmas". That was in effect a denial that the conversation spoken to by the appellant ever took place. It is worth noting that the account of the incident given by the respondent's witnesses tallied with the appellant's account.

Of the respondent the Magistrate says that she gave her evidence in a very straight-forward manner and was very convincing in whatever she said. He accepted her evidence "without hesitation" and describes her as "a simple country girl". He does not refer to the period of gestation.

At this stage I think it well to refer to and respectfully adopt a well-known statement of the proper questions which, in an appeal of this character i.e., from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the appellate Court should propound to itself in considering the conclusions of fact of the trial judge: I refer to the speech of Lord Summer in S. S. Honkstroem v. S. S. Sagaporack (1927 A.C. H.L. 37 at p. 50) which was approved and followed in the speech of Lord Wright in Powell and wife v. Streatham Manor Nursing Home (1935 A.C. H.L. 243 at p. 266). The material questions are

(1) Does it appear from the judgment that he made full judicial use of the opportunity given him by hearing the viva voce evidence?

(2) Was there evidence before him affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation?

(3) Is there any glaring improbability about the story accepted sufficient in itself to constitute "a governing fact, which in relation to others has created a wrong impression" or any specific misunderstanding or disregard of a material fact or any "extreme and overwhelming pressure" that has had the same effect?

On the first question I would observe that the learned Magistrate having reserved his decision for fourteen days, gave judgment on the 24th January, 1945, that notice of appeal was immediately given and that the memorandum of reasons for decision was signed on the 1st March 1946, that is to say after a delay of over thirteen months. I do not know the reason for this delay in what was essentially a short simple case, but to my mind it largely nullifies the value of the Magistrate's conclusions based on the demeanour of the witnesses. It is not in human nature to retain over such a long period "the same vivid appreciation of what the witnesses say or what they omit to say." The initial advantage is largely lost and. as Lord Wright said, sometimes with lapse of time reconstruction takes the place of recollection. Prima facie there seems to be no excuse for such a delay on the part of the Magistrate who cannot have realised the hardship inflicted on the parties thereby. See also Morgan v. Morgan L.R. B.G. 1943 page 85.

As to the second question I would answer that there was evidence before the Magistrate which affected the relative credibility of the witnesses and which therefore made it all the more necessary for him to judge critically their demeanour. I may instance the period of the gestation as affecting the applicant and the relations" of her witnesses with the defendant.

As to the third question, a gestation of 246 days (which is putting the most favourable construction possible upon the mother's evidence) would not amount to a "glaring improbability," but it is a material fact affecting the credibility of her story which appears to have been totally disregarded. It is a fact so material to her case that the Magistrate must address his mind to it, whether or not it was referred to by the defence: he could not safely accept her story without testing it by the material dates and there is nothing to show he did so test it. I do not think it is safe to assume he did so, indeed his omission to question her more precisely on the date when intimacy first took place or to question her as to the appearance of the child at birth suggests otherwise.

The respondent is a woman of loose morals, or. at least, of low moral standards. She had previously had relations with another man by whom she had a child and it was by her invitation that the appellant had connection with her on 22nd December. So much must follow from the Magistrate's acceptance of the appellant's evidence as to the conversation which preceded the act of intercourse. The evidence of a woman of this character ought to be received with great caution in this class of case. Impressions based upon demeanour are not infallible: "the judge may be deceived by an adroit and plausible knave or by apparent innocence" and, as Lord Greene M.R. said in Yuille v. Yuille (1945 A.C. 15 at p. 19) "an impression as to the demeanour of a witness ought not be adopted by a trial judge without testing it against the whole of the evidence of the witness in question." In such an appeal as this it is important that the magistrate's impression on the subject of demeanour should be carefully checked by a critical examination of the whole of the evidence. I have already referred to the contradiction between respondent's account of the incident of December 22nd on the one hand and that given by her witnesses and the appellant on the other, and that the Magistrate appears to have accepted the appellant's account, and I cannot regard as satisfactory a judgment based solely on impression of demeanour which makes no reference to this contradiction or to the very material fact of the abnormal period of gestation.

For these reasons I cannot regard this as a case when it would be wrong to disturb the findings of fact based on the Magistrate's impressions of the demeanour of the witnesses, and would have allowed the appeal, and remit the case for re-hearing before another Magistrate, but as my brothers are of another opinion, the appeal was dismissed.

I have already referred to the long delay in furnishing the statement of reasons for decision in this appeal. In the short time I have been in the Colony, a number of instances have come to my notice where Magistrates have taken as long or longer time to perform the statutory duty of furnishing reasons for a decision appealed against, and I take this opportunity of expressing, my grave disapproval of such procrastination. Section 8(1) of the Summary Jurisdiction (Appeals) Ordinance does not limit the

time within which the reasons are to be supplied but it is clearly the Magistrate's duty to do so with the least possible delay.

Delays in the hearing of appeals inflict great hardship on the parties, encourage frivolous appeals and tend to defect justice, and it is the duty of all concerned, myself included, to ensure that they are heard and determined as early as possible.

Appeal dismissed

JACOB CHEE-YAN-LOONG

Appellant (Defendant),

v.

LANCE CORPORAL No. 4116 RAMCHANDARSINGH

Respondent (Complainant).

1947. No. 212. DEMERARA.

BEFORE FULL COURT: WORLEY, C.J., LUCKHOO, J. and JACKSON, J. (Acting). 1947. July 16; August 15.

Evidence—Proof of charge inextricably connected with proof of another criminal act committed by defendant—Evidence of that act—May be given.

Evidence is necessarily admissible as to acts which are so closely and inextricably mixed up with the history of the act itself with which the defendant is charged as to form part of one chain of relevant circumstances, and so could not be excluded in the presentation of the case against the defendant without the evidence being thereby rendered unintelligible. It is immaterial that the evidence sought to be admitted is evidence which tends to show that the defendant has committed an offence other than the offence with which he is charged.

Appeal by the defendant Jacob Chee-Yan-Loong from the decision of the Magistrate of the Berbice Judicial District convicting him of selling a price-controlled article at a price in excess of that permitted by a price control order.

C. Lloyd Luckhoo, for appellant.

E. M. Duke, Solicitor General, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by Luckhoo J. as follows:

The only real point for consideration in this appeal is whether or not evidence which tended to show the commission by the appellant of other offences not charged and as contended by Counsel for the appellant irrelevant and highly prejudicial in the consideration of the charge was wrongly admitted by the Magistrate.

In his memorandum of reasons for decision the learned Magistrate said "he was satisfied that the evidence was admissible on

the ground that it would have been impossible for the prosecution to have proved their case against the defendant without leading evidence as to the transaction on the 22nd January, 1946, in order to show how Ramanuge came in possession of the $2.75."

The charge on which the appellant was convicted was in respect of an offence committed on the 23rd January, 1946, for selling above the fixed price, in breach of clause 12(1) of the Control of Prices Order No. 845 of 1944, one gallon of split peas for $1.44, or at a price of 18 cents per pint, which price exceeded the maximum retail price of that article which was then 80 cents per gallon.

On the 22nd January, 1946, the appellant who carries on a wholesale and retail provision business in the Strand, New Amsterdam, sold to one Ramanuge goods, including a half drum of B & D Biscuits, to the value of $9.63 as stated in a cash bill but for which Ramanuge said he actually paid the sum of $9.83 tendering therefor a ten-dollar note, and receiving back 17 cents. He said the appellant told him that in respect of the item biscuits he would put down $2.55 on the bill but that he (Ramanuge) would have to pay $2.75, hence the difference of 20 cents less received by him from the appellant. It was arranged that delivery of these goods should be made on the next day. All the articles mentioned in the cash bill, save the biscuits, were delivered to Ramanuge on the 23rd January. After such delivery Ramanuge, who previously that day had been in communication with Corporal Ramchandarsingh, visited the detective office in New Amsterdam where he was searched and whatever money he had on his person was taken from him. The Corporal then handed him six one-shilling pieces after having marked each one of them with the letter "C." Ramanuge then revisited the business premises of the appellant and purchased a gallon of split peas for which he paid with the six marked shillings. Nothing was said about the price but the appellant on the previous day had agreed to sell Ramanuge a gallon of split peas if he was prepared to pay 18 cents per pint. Those six marked shillings Ramanuge alleged were handed by the appellant to his wife who placed them underneath some paper on the counter of the shop. As the appellant was unable to supply him with the particular brand of biscuits he had purchased Ramanuge asked for the return of the money he had paid for biscuits on the day before, 22nd January. The appellant then handed him the sum of $2.75 made up of two dollar bills, two one-shilling pieces, one penny piece and one cent taken from the drawer of the shop, and one shilling from under the paper on the counter where appellant's wife had placed the six marked shillings — Having got delivery of the peas he (Ramanuge) came out of the shop where he met the Corporal and two other policemen to whom he gave certain information. The four of them went into the shop and in the presence of the appellant Ramanuge said he had paid six shillings for the gallon of peas. The appellant replied he had sold it for 80 cents. On a search being made the police discovered five of the marked shillings under some paper on the counter. They

then left for the police station and it was discovered that in the amount of $2.75 which Ramanuge said he had received back from the appellant there was found one of the marked shilling's. On a revisit by the police and Ramanuge to the appellant's business premises the appellant said he had returned to Ramanuge $2.55 and not $2.75.

There then arose at the hearing of the charge an issue whether the appellant had returned $2.55 or $2.75.

The general rule of law is that apart from express statutory enactments, evidence tending to show that an accused person had been guilty of criminal acts other than those covered by the charge against him cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the res gestae.

At the material time the sale of a half drum of B & D biscuits for the sum of $2.75 was in excess of the maximum retail price fixed by the abovementioned Control of Prices Order, and the issuing of a bill shewing the sum of $2.55 as the price paid for the biscuits was in the nature of a fictitious transaction; offences which, if established are punishable by fine and|or imprisonment.

The point which arises for our determination is whether or not it became necessary for the respondent to lead evidence of the transaction on the 22nd January, the appellant having put in issue the amount he had refunded for the biscuits and one of the marked shillings having been found in the amount of $2.75 in Ramanuge's possession and which Ramanuge said he had received from the appellant.

The question is one of great importance as affecting the fair trial of an accused person, and the admission of evidence against him as a rule must be confined to facts which are strictly relevant to the particular charge and have no reference to any conduct of that person unconnected with such charge. However, as was said by *Kennedy J.* in *Rex v. Bond* (1906) 2 K.B. 389 at p. 400 "the general rule cannot be applied where the facts which constitute distinct offences are at the same time part of the transaction which is the subject of the indictment. Evidence is necessarily admissible as to acts which are so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible."

We have carefully examined the circumstances in which the offence for which the appellant was convicted was committed, and we agree with the conclusion arrived at by the learned Magistrate, that it was necessary, although not at the stage of the proceedings when it was tendered and admitted, for the prosecution to lead the evidence to which objection was taken in order not only to render the evidence intelligible in the presentation of the case, but to explain how one of the marked shillings was found in the possession of Ramanuge, and to determine the issue raised by the appellant as to what amount was refunded on the biscuit transac-

tion. For these reasons we hold that the evidence was not inadmissible. That being so, its premature admission cannot be held to have prejudiced the appellant so as to ground an appeal on the footing of a specific illegality committed in the course of the proceedings.

On the facts we are of opinion that the case was rightly decided.

The appeal is therefore dismissed, with costs, and the sentence and conviction affirmed.

Appeal dismissed.

LEWIS ADOLPHUS ROBINSON,

Petitioner,

v.

DENNIS WHITEHEAD,

Respondent.

1947 No. 279.—DEMERARA

BEFORE WORLEY, C.J., 1947. JULY 14, 19; AUGUST 16.

Elections—Georgetown Town Council—Return of member elected—Report of returning officer to the Council—Georgetown Town Council cap. 86, s. 60 (1).

Elections—Returning officer—No jurisdiction to determine whether a candidate is disqualified.

Elections—Two candidates—One found by election court to be disqualified—Fact of disqualification—Not notified to electors—Election void and fresh election ordered—Immaterial that fact of disqualification not known until after election.

The return of the member elected which the Returning Officer is required, by section 60(1) of the Georgetown Town Council Ordinance, Chapter 86, to make to The Mayor and Town Council of Georgetown is the report of the election made by the Returning Officer to the Georgetown Town Council.

The Returning Officer has no jurisdiction, and it is not part of his duty, to determine questions as to the disqualification of a candidate nominated for election to the Georgetown Town Council.

Pritchard v. *Bangor* (1888) 13 A.C. 241, 252; *Hobbs* v. Morey (1904) 1 K.B. 74; and *Eleazar* v. *Abbensetts* (1924) L.R.B.G. 104, applied.

Where there were two candidates for election to the Georgetown Town Council, and one of them was disqualified, the election was declared void and a fresh election ordered where no notice was given to the electors of the disqualification or that any votes cast for the disqualified candidate would be absolutely lost and thrown away. It is immaterial that the fact of the disqualification was not known until after the election had already taken place

Petition by Lewis Adolphus Robinson that it be determined that the respondent Dennis Whitehead was not duly nominated, elected or returned as a Councillor of the Georgetown Town Council and that his

nomination election and return were and are wholly null and void and that Alfred Athiel Thorne, the only other candidate at the election, was duly nominated and elected and ought to have been returned.

H. C. Humphrys, K.C., for petitioner.

L. M. F. Cabral, for respondent.

Cur. adv. wilt.

WORLEY, C.J.:

This is a petition presented under section 75 of the Georgetown Town Council Ordinance (Cap. 86) to question the election of a councillor to represent Ward No. 4 of the city of Georgetown on the Municipal Council at an election held on June 4th, 1947. The petitioner is Mr. Lewis Adolphus Robinson, a person who voted at the election and who proposed Mr. A. A. Thorne at the nomination of the candidates: the respondent is Mr. D. Whitehead whose election is contested. The facts, most of which are not in dispute, are as follows: A general election of councillors for all the wards of the city to take office from the 1st July, 1947 having become necessary according to law, the Town Clerk was on the 19th May, 1947 duly appointed by the Council under section 27 of Chapter 86 to be the returning officer for each of the municipal wards for the forthcoming elections. In pursuance of this appointment he attended at the Town Hall, Georgetown on 2nd June, 1947 for the purpose of receiving nominations of duly qualified candidates for, inter alia, Ward Number 4 and for that Ward received two nominations, namely, Alfred Athiel Thorne and Dennis Whitehead, both of whom were duly proposed and seconded. These nominations were made orally in accordance with the usual practice and no objections were made. Mr. Thorne was then the sitting member for Ward No. 4. The returning officer having ascertained from the certified list of voters that both candidates possessed the qualifications prescribed by section 7 (1) of Chapter 86 as amended by the Georgetown Town Council (Amendment) Ordinance 1946 (No. 29 of 1946) accepted both nominations and appointed Wednesday 4th June, 1947 for holding the election for Ward No. 4.

In fact Mr. Whitehead was at the time of nomination disqualified, under section 8 (1) (c) of Chapter 86 as amended by Ordinance No. 29 of 1946, for being elected a councillor by reason of being in default of payment of taxes and rates assessed, levied and raised under section 28 of the Georgetown (Valuation and Rating) Ordinance 1942 in relation to certain lots in the city belonging to him for a period exceeding six months after the same had become due. He remained so disqualified up till and after the date of the election. This disqualification was not known at the time to Mr. Thorne or his proposer and did not come to their knowledge until the 7th of June; I accept the returning officer's evidence that he had no actual knowledge of it until the 9th of June.

At the election held on June 4th Mr. Whitehead received 140 votes and Mr. Thorne 109 and the returning officer publicly on the same day stated the result of the poll and declared Mr.

Whitehead the person elected. On the same day he entered the result in the Record of Elections Book, which is the property of the Town Council and kept in the possession of the Town Clerk. On the 5th the Town Clerk notified Mr. Whitehead in writing of the fact of his election in accordance with section 26 (4) and on the 6th June Mr. Whitehead made the statutory declaration of his qualification required by section 28. The elections for the other Wards of the city were completed on the 6th of June.

On Saturday, 7th June Mr. Whitehead's disqualification became known by the publication in the Official Gazette of a notice of an Execution Sale by the Registrar in behalf of the Town Clerk of Georgetown in relation to a lot in the city which belonged in part to Mr. Whitehead.

The next ensuing statutory meeting of the Council was held on Monday, June 9th. The Agenda included an item "To fix a date for Councillors to take and subscribe the oath of office." When the item was reached Mr. Thorne, whose seat did not become vacant until 30th June, called attention to Mr. Whitehead's disqualification and the matter was referred to the Council's legal adviser. On June 21st the day fixed for taking the oath Mr. Whitehead did not attend nor take the oath nor has he since done so.

At the next statutory meeting of the Council on June 23rd the Town Clerk in his capacity as Returning Officer presented his Report and Return on the General Elections in accordance with the provisions of section 60 (1), section 62 and section 57 (2) of Chapter 86.

The written report makes no reference to Mr. Whitehead's disqualification but after setting out the details of the nominations and election for Ward No. 4 states that Mr. D. Whitehead was declared elected for Ward No. 4. I find it difficult to reconcile this with Mr. Thome's evidence that the returning officer did not in the Council on the 23rd declare Mr. Whitehead to be the possessor of the seat and made no return of anybody as holding the seat for Ward No. 4. However it seems clear that the Town Clerk announced the receipt of the opinion of the Council's Legal Adviser and that the Mayor ruled the opinion should be considered in camera. This opinion was put in evidence before me and the relevant part of it is the advice that the declaration of the vacancy resulting from Mr. Whitehead's disqualification would be a matter for the consideration of the incoming Council.

The petitioner having heard that a general return of the members elected was made or was to be made at the meeting on the 23rd brought this petition which was filed on 28th June, 1947, wherein he prays that it may be determined that "the said Dennis Whitehead was not duly nominated, elected or returned and that his nomination, election and return were and are wholly null and void and that the said Alfred Athiel Thorne was duly nominated and elected and ought to have been returned."

The respondent having been served with a copy of the petition filed a notice of opposition the effect of which was to put the following points in the petition in issue

(1) that the petitioner was a person who voted at the election
(2) that it was within the knowledge of the Returning Officer as Town Clerk that Mr. Whitehead was not a duly qualified candidate and that he ought therefore to have declared Mr. Thorne as the only duly qualified candidate nominated to have been elected, as required by Section 34(3) of Chapter 86.
(3) that the Returning Officer did not make a return of the member elected forthwith as required by section 60 of Chapter 86 and that no return was made at the next ensuing meeting of the Council on June 9th
(4) that a general return of the members elected was made for the first time at the statutory meeting held on the 23rd of June.

The first point was proved by the petitioner's evidence. As to the third and fourth points it was evident that by putting these in issue the respondent intended to dispute the allegation that no return was made until the 23rd June and to contend that the petition was filed out of time. Indeed at one stage Mr. Cabral stated that he would contend that the entry made in the Record of Elections Book on June 4th was a sufficient return for the purpose of section 60(1) of the Ordinance. If this were correct then, for the purposes of section 75, time would begin to run on 4th June and the petition would have been out of time. This point was later abandoned but I may say in passing that I should not be disposed to agree with it. The return has to be made "to the Council" which is defined as meaning the Mayor and Town Council, that is to say, the eleven elected or nominated members. The Town Clerk's evidence was that the first information which the Council as a body had of the result of the elections was his Report made as Returning Officer presented to them on June 23rd. The evidence shows that it has always been the practice for the Returning Officer to make a formal full and written Report at a statutory meeting and that this has always been regarded (and in my opinion properly so) as the return required by the Statute.

The remaining and real issue in this matter is whether Mr. Whitehead's nomination is to be deemed invalid so as to leave Mr. Thorne the only duly nominated candidate or whether it is to be deemed a valid nomination which might form the basis of an election but liable to be questioned by means of an election petition.

Counsel for the petitioner has contended that, under the provisions of section 34(1) of Chapter 86 the returning officer can only receive nominations of "duly qualified candidates," that it is his duty to ascertain whether the persons nominated are duly qualified and that in this particular case he either knew or ought to have known of Mr. Whitehead's disqualification, and ought to have refused his nomination. It was further contended that, as he had actual knowledge of the disqualification before he made his return to the Council, he ought to have declared Mr. Thorne elected in his return. Mr. Humphrys sought to draw a

distinction between cases where the candidate lacks a qualification prescribed by section 7 and those where he is disqualified under section 8 and contended that as the disqualifications prescribed in the latter section are matters peculiarly within the knowledge of the Returning Officer, in his capacity as Town Clerk, he is under a duty to refuse to accept the nomination of a disqualified person. I have already stated that I am satisfied that the returning officer did not, in fact, know of Mr. Whitehead's disqualification on the nomination day and I am not satisfied on the evidence that even if he had searched the Council's Rate Books he would necessarily have discovered it, but the point is immaterial as, in my view, the law is clear that the only duty of the returning officer is to decide objections to the nomination itself and he has no jurisdiction to determine such a question as the qualification of the candidate which can only be determined by an election petition. If a nomination is valid on its face or, "in statutory shape" to use the words of Lord Watson in Pritchard v. The Mayor, Aldermen and Citizens of the Borough of Bangor 1888 (13 A.C. 241 at 252), it is not the duty of the returning officer to go looking for objections. As Douglass J. said in Eleazar v. Abbensetts and Barclay (1924 L.R. B.G. 104 at p. 105) "The duties of a returning officer are very fully set out in (the Ordinance) but to act as the Town Council or the Supreme Court is not one of them." In that case the learned Judge followed Pritchard's case to which I have just referred and I cannot find anything in the subsequent relevant legislation of this Colony which alters the position of the returning officer in this respect. The same view of the functions of the returning officer was taken in the English case of Hobbs v. Morey (1904 1 K.B. 74) which was a case of disqualification, the respondent being at the time of his nomination a party to a contract to supply goods to the council to which he sought election.

Mr. Humphrys has argued that this view will lead to absurdities and that the returning officer must be able to refuse the nomination of an obviously disqualified candidate for example one who is the holder of any office or place of profit in the gift or disposal of the Council.

In regard to the nomination itself, Wright J. said in Harford v. Linskey (1899 1 Q.B. 852 at p. 862). "If the nomination paper is, on the face of it, a mere abuse of the right of nomination or an obvious unreality, as, for instance, if it purported to nominate a deceased sovereign, there can be no doubt it ought to be rejected". This dictum was quoted with approval in Hobbs v. Morey and I adopt it as correct. For cases which cannot be brought within these classes I cannot do better than respectfully adopt the following passage from the speech of Lord Herschell at p. 259 of the report in Pritchard's case.

"Mr. Douglas has argued that such a conclusion will lead to great inconvenience, and that there are distinct advantages in the returning officer having the power to pronounce and give effect to his opinion upon the qualification of a candidate. I can quite conceive that there may be cases in which it would be advan-

tageous that the returning officer should have such a power where the disqualification is a matter absolutely clear and beyond question; but, if I look at the balance of convenience, it seems to me to be enormously the other way. The question of qualification or disqualification must frequently depend upon nice points of law, and often upon difficult and disputed questions of fact. If the returning officer has the power in one case he has it in every case. It seems to me, that so far from its being expedient to hold that he has this power in every case, if it were a matter of doubt one's inclination would be entirely the other way. I can conceive nothing more disadvantageous than the conclusion, unless one were forced to it, that these questions are in every case committed to the determination of the returning officer, and that he can declare elected a person who has not received the majority of votes because he has come to the conclusion that for some reason or other one of the candidates is disqualified."

The instant case falls exactly within the conditions stated by Lord Watson in Pritchard's case at p. 252. No formal objections arose upon the face of the nomination, no objection was made and the nomination became a valid nomination to this extent that it formed the basis of the election and the nominee was properly treated as a person for whom votes could be given before the returning officer. If I am right in this view it seems to me to follow, from the authorities, that the correct determination in this case is that the election was void.

The principle upon which the Courts generally act in such a case is concisely expressed in the speech of Lord Fitzgerald in Pritchard's case at p. 254.

"The appellant was bound to make out further, in order to bring himself into a majority, that the voters were not only aware of the fact on which the alleged ineligibility arose, but also that they had notice that in consequence the votes given by them (for the ineligible candidate) would be absolutely lost and thrown away."

This principle was applied in the case of Hobbs v. Morey where it was held that the disqualification not being apparent on the face of the nomination paper, the nomination of the respondent was valid and that as the petitioner did not allege any notice to the electorate of the disqualification of the respondent, the votes given for him could not be treated as having been thrown away and the petitioner was not entitled to claim the seat.

It was also applied in this Colony, by Berkeley ag. C.J. in Abdool Azeez Khan v. John Jose da Silva reported at p. 288 of the *Official Gazette* published on February 12th, 1927. I do not think that its application to the instant case is affected by the fact that the absence of knowledge of the disqualification made it impossible to give notice to the electors.

A number of cases were cited by counsel for the petitioner in support of the contention that the seat should be awarded to Mr. Thorne; of these all but one appear to be distinguishable. Humphrys v. McArthur (1926 L.R. B.G. 109) turned upon the special

provisions of a section of the relevant Ordinance and at p. 114 Douglass J. says that had the said section not existed he would seriously have considered the necessity of a fresh election. In Brown v. Benn (1889 53 J.P. 167) there was a manifest defect in the nomination and a relevant provision of law that, in the circumstances which existed in the case, the nomination should be void. In Cutting v. Windsor (1924 40 T.L.R. 395) there was a manifest failure to comply with a mandatory rule and no valid nomination paper had been delivered by the respondent within the prescribed time: the respondent was therefore never duly nominated.

The only case I find difficulty in reconciling with the general principle is In re Wood, Wood v. Fernandes (1925 L.R.B.G. 7). In that case, Berkeley J. found that the respondent did not occupy premises of a sufficient value to satisfy the statute and was not duly qualified for election: the judgment concludes "I find that the respondent (Fernandes) was not duly elected and so far as his election is concerned it is void. There were only two candidates for election and this being so I find that the other candidate (Phillips) being duly qualified was duly elected." The rest of the judgment is concerned with a preliminary objection on procedure and with the findings of fact, and there is nothing in the report to indicate whether or not objection had been taken to the lack of qualification before the election or whether there had been any notice to the electors. I do not think it ought to be inferred from this that Berkeley J. either intended to depart or did actually depart from the principle which he himself applied in Abdool Azeez Khan's case a year or so later.

I therefore certify that Mr. Dennis Whitehead was not duly returned or elected and that the election was void and a new election should be held.

It remains to consider the question of costs. On this Mr. Cabral contended that the only issue before me was whether or not Mr. Thorne was entitled to the seat and that if the petitioner had accepted the respondent's notice there need have been no trial. If however the respondent had wished to limit the trial to this one issue he could not have done better than adopt the form of notice given by the respondent in Hobbs v. Morey (see p. 75) but his notice put in issue other matters which he subsequently abandoned and he must clearly pay the costs incurred in respect of those.

The petitioner has failed on one part of his prayer an incidental part, but succeeded on the other the main part, and in the circumstances I do not think it would be right to deprive him of any of his costs. The respondent has brought this matter upon himself. I do not think it can be gainsaid that a person who takes upon himself to stand for public office ought to take all reasonable steps to assure himself of his eligibility for office: there is no evidence that the respondent did so. There was, I think, at one stage a suggestion that the petition was unnecessary and that the question of the election might have been left to the decision of the incoming Council. In my view however it is to

the public interest that election proceedings should be watched vigilantly and the Court ought not in awarding costs to a petitioner to weigh the pros and cons too nicely. I therefore order the respondent to pay the petitioner's taxed costs of the petition.

Election declared void.

Solicitors: J. EDWARD de FREITAS; CARLOS GOMES.

REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1947

AND IN

THE WEST INDIAN COURT OF APPEAL

[1947].

EDITED BY

E. MORTIMER DUKE, LL.B., (LOND.),

Barrister-at-Law, Solicitor-General, British Guiana.

GEORGETOWN, DEMERARA.

"THE ARGOSY" COMPANY, LIMITED, PRINTERS TO

THE GOVERNMENT OF BRITISH GUIANA.

1954.

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