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36, 1954

British Guiana

33 1963

IN THE PRIVY COUNCIL

Number 1950.

On Appeal

From the West Indian Court of Appeal.

BETWEEN

Johan Josef Francois Hutt,

Appellant (Defendant),

And,

**Booker Brothers McConnell & Company,
Limited,**

**whose duly constituted attorney in this colony is HENRY
GEORGE SEAFORD, and LEON SCHULER,**

Respondents (Plaintiffs)

Record of Proceedings.

THE RECORD.

No. 4 of 1950.

IN THE PRIVY COUNCIL.

ON APPEAL FROM THE WEST INDIAN COURT OF APPEAL.

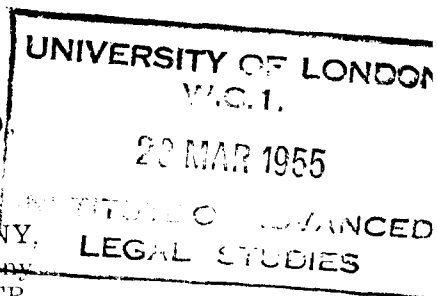
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Between:

JOHAN JOSEF FRANCOIS HUTT,
Appellant (Defendant).

And,

BOOKER BROTHERS McCONNELL AND COMPANY,
LIMITED, whose duly constituted attorney in this colony
is HENRY GEORGE SEAFORD, and LEON SCHULER.
Respondents (Plaintiffs).



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SPECIALLY INDORSED WRIT OF SUMMONS.

1950 — No. 307 Demerara.

In the
Supreme
Court.

IN THE SUPREME COURT OF BRITISH GUIANA.
CIVIL JURISDICTION

BETWEEN:

10 Specially Indorsed Writ.
 BOOKER BROTHERS McCONNELL AND COMPANY LIMITED whose duly constituted attorney in this colony is HENRY GEORGE SEAFORD; and LEON SCHULER,
 Plaintiffs
 and
 JOHAN JOSEF FRANCOIS HUTT,
 Defendant.

No. 1.
Specially
Indorsed
Writ of
Summons.

GEORGE THE SIXTH, by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith.

20 To JOHAN JOSEF FRANCOIS HUTT
 of 57, Chalmers Place, Stabroek,
 Georgetown in the County of Demerara.

WE COMMAND YOU, that at 9.30 o'clock in the forenoon on Monday the 15th day of May, 1950, you do appear before the Supreme Court of British Guiana, at the Victoria Law Courts, Georgetown in an action at the suit of BOOKER BROTHERS McCONNELL AND COMPANY, LIMITED and LEON SCHULER. And take notice that in default of your so doing, the plaintiffs may proceed therein, and judgment may be given against you in your absence.

30 Witness the Honourable Frederick Malcolm Boland, Acting Chief Justice of British Guiana, the 4th day of May in the year of Our Lord one thousand nine hundred and fifty.

N.B.—If the defendant desires to show cause against an application by the plaintiff at the time fixed for appearance for final judgment he shall, not later than noon of the day (not being a Sunday or public holiday) immediately preceding that fixed for his appearance, file an affidavit at the Registry at Georgetown setting forth his defence and serve a copy of such affidavit, forthwith after filing the same, on the plaintiff.

STATEMENT OF CLAIM

No. 2.
Statement
of Claim.

1. On or about the 12th day of February, 1949 the plaintiff Schuler bargained and sold to the defendant 3,400 fully paid shares of \$5:— each in Bel Air Hotel Limited for the sum of \$17,000:—and the defendant agreed to pay interest thereon at the rate of 5 per cent. per annum from the 12th February, 1949, the terms of the said sale being set out in an agreement in writing made between Bel Air Hotel Limited, the defendant, the plaintiff Schuler and the plaintiff company and dated 12th February, 1949, and in a transfer of the said shares signed by the plaintiff Schuler. 10

2. On the 12th February, 1949, the plaintiff Schuler assigned to the plaintiff company the said debt of \$17,000:— due to him from the defendant and all interest to become due thereon by an assignment in writing and notice in writing of the said assignment was by the said agreement dated 12th February, 1949, given by the plaintiffs to the defendant.

3. Under the said agreement dated 12th February, 1949, the defendant agreed to advertise forthwith and pass a Fifth Mortgage to the plaintiff company on certain property of his (which he had agreed to sell to one J. A. Sue-A-Quan) as security for the payment of the said sum of \$17,000:— and interest thereon at the rate aforesaid within six months from the 3rd January, 1949, or the passing of the said mortgage. 20

4. By the said agreement it was also provided that the defendant should deposit with the plaintiff company the Grosse Transport for the said property No. 523 of 23rd April, 1946, and that the defendant assigned to the plaintiff company the balance of the purchase price of the said property payable to him by the said J. A. Sue-A-Quan. 30

5. It was also provided by the said agreement that on payment of the said sum of \$17,000:— and interest or on the passing of the said mortgage whichever should first happen the transfer of the said shares which had been signed by the plaintiff Schuler should be handed to the defendant.

6. The defendant failed to advertise and pass the said mortgage as provided in the said agreement and has refused to do so or to pay for the said shares although he has been given control of the Bel Air Hotel Limited. Furthermore, the said sale to J. A. Sue-A-Quan has fallen through. 40

7. The plaintiffs therefore claim from the defendant the sum of \$18,038.63.

PARTICULARS

		In the Supreme Court.
1949		
Feb. 12	To agreed purchase price of the said shares	\$17,000.00
1950		
May 4	To interest on \$17,000:— at the rate of 5% per annum from the 12th February, 1949 to date	1,038.63
		<u>\$18,038.63</u>

No. 2.
Statement
of Claim.

- 10** **8.** The plaintiffs also claim further interest on the said sum of \$17,000:—at the rate of 5 per cent per annum from the 4th May, 1950, until judgment or payment, and the sum of \$53.00 (or such sum as may be allowed on taxation) for costs. If the amount claimed is paid to the plaintiffs or their solicitor or agent within four days from the service hereof, further proceedings will be stayed.

J. Edward de Freitas,
Solicitor.

- 20** The firstnamed plaintiffs are a limited liability Company incorporated in England and sue by one of their duly constituted attorneys in this Colony, Henry George Seaford.

Power of Attorney by the within-named plaintiffs in favour of the said Henry George Seaford is dated 12th September, 1947 and recorded in the Deeds Registry of British Guiana on the 7th November, 1947.

- 30** This Writ was issued by JOSEPH EDWARD de FREITAS of and whose Address for Service is at the office of CAMERON AND SHEPHERD, 2, High Street, Newtown, Georgetown, Demerara, Solicitor for the said first-named Plaintiffs whose registered office is situate at 37/41 Gracechurch Street, London, E.C. 3, England and who carry on business at lot 52 and elsewhere in Water Street, Georgetown, and for the second-named plaintiff who resides at 313, East Street, Georgetown.

Power ad lites by the first-named plaintiffs in favour of Joseph Edward de Freitas was executed in the Office of the Deeds Registry of British Guiana on the 18th day of September, 1946.

- 40** I HEREBY AUTHORISE JOSEPH EDWARD de FREITAS and/or HUGH CECIL BENJAMIN HUMPHRYS and/or HERMAN WILLIAM de FREITAS to act as my solicitor in the above matter and to receive all moneys on my behalf and give receipts therefor.

Leon Schuler,
Second-named Plaintiff.

AFFIDAVIT VERIFYING CLAIM

WE, CARLOS FERNANDES, of lot 43 Croal Street, Stabroek, Georgetown, Mercantile Clerk, and LEON SCHULER, of lot 313 East Street, Georgetown, Business Executive, being duly sworn make oath and say as follows :—

No. 3.

Affidavit
Verifying
Claim.

1. That the abovenamed defendant the said Johan Josef Francois Hutt is justly and truly indebted to the Plaintiffs in the sum of \$18,038.63 being \$17,000.00 the purchase price of 3,400 fully paid shares of \$5.00 each in Bel Air Hotel Limited bargained and sold by the plaintiff Schuler to the defendant and \$1,038.63 interest thereon at the rate of five per cent per annum due by the defendant to the plaintiffs which said debt and interest were on the 12th February, 1949 by an assignment in writing duly assigned by the plaintiff Schuler to the plaintiff company of which due notice in writing was on the said date given to the defendant in an agreement dated 12th February, 1949 and made between the plaintiffs, the defendant and Bel Air Hotel Limited, all as alleged in the Statement of Claim indorsed on the Writ of Summons herein and the defendant was so indebted at the commencement of this action. **10**

2. The particulars of the said claim appear by the indorsement on the said Writ

AND I, CARLOS FERNANDES, for myself say :—

3. That I am Clerk to the plaintiff company and I am duly authorised to make this affidavit and the facts herein deposed to are of my own knowledge.

AND I, LEON SCHULER, for myself say :—

4. That I am the second-named plaintiff and the facts herein deposed to are of my own knowledge.

AND WE BOTH say :—

5. That in our belief there is no defence to this action. **30**

Sworn to at Georgetown
Demerara, this 12th day
of May, 1950.

Carlos I Fernandes

Leon Schuler

BEFORE ME,

H. V. V B. Gunning
COMMISSIONER FOR OATHS.

AFFIDAVIT OF DEFENCE

In the
Supreme
Court.

I, JOHAN JOSEF FRANCOIS HUTT, of lot 57 Chalmers Place, Stabroek, Georgetown, Demerara, being duly sworn make oath and say as follows :—

No. 4.

Affidavit
of Defence.

1. I am the defendant in this action.
2. On the 12th February, 1949, I signed the written agreement of that date which is referred to in the Statement of Claim.
- 10 3. I was due to leave British Guiana the next day for a period of about 3 months; the agreement had to be prepared hurriedly for execution before I left and it was executed by me hurriedly under a misapprehension that I was to pay one sum of \$17,000:— and not two such sums.
4. I signed it around mid-day which was the hour of closing for businesses, as the 12th February, 1949, was a Saturday. It was the last business day available to me before my departure from the Colony.
- 20 5. Clause 4 of the Agreement which sums up and sets out in itemised form the sums which I was to pay, sets out only 3 amounts numerically, namely \$19,000.00, \$8,500.00 and \$17,000.00. A true copy of the said agreement is hereto annexed and marked "A".
6. English is not my native language.
7. Moreover, I also felt protected by reason of my having set out in writing in a letter of the 8th February, 1949, to the plaintiff company, the terms of the transaction which the agreement of the 12th February, 1949, was intended to embody. The agreement is inconsistent with the terms of my said letter.
8. I then left British Guiana on the 13th February, 1949, without receiving a copy of the agreement.
- 30 9. I returned to British Guiana at the end of April, 1949, and on the 1st May, 1949, Bel Air Hotel Limited purported to ratify the said agreement at a meeting of directors including myself. Up to then I had not received or seen a copy of the agreement since the aforesaid Saturday, 12th February, 1949.
- 10 10. Late in May, 1949, I received a copy and as a result I promptly pointed out that the Agreement appeared to be ambiguous and misleading as it seemed to deal with two sums of \$17,000 :— instead of one such sum.
- 40 11. I did so among other occasions at a meeting of directors of Bel Air Hotel Limited, to the plaintiff Schuler, since the 30th May, 1949, and about the same time Joseph Edward de Freitas, Esquire, solicitor for the 2 plaintiffs and to William Stanley Jones, Esquire, attorney of the plaintiff company, and again through my

In the
Supreme
Court.

counsel Lloyd M. F. Cabral, Esquire, by letter of the 18th July, 1949, a true copy of which is hereto attached and marked "B"

No. 4.

12. The said agreement does not correctly represent what I agreed to on behalf of Bel Air Hotel Limited or myself. It ought not to have stated that I was liable to pay 2 sums of \$17,000 :— and the said agreement requires rectification.

Affidavit
of Defence.

13. I have never signed or received or seen any transfer of the 3,400 shares or any of them by the plaintiff Schuler to me.

14. Moreover, J. A. Sue-A-Quan failed through no fault of mine, to carry out his agreement of the 3rd January, 1949, to purchase my other property as set out in the agreement of the 12th February, 1949. **10**

15. His fulfilment of his said agreement was a basic condition of the agreement of the 12th February, 1949, and I am advised by my said counsel and believe that the non-fulfilment of this condition releases me from liability to make payment under the agreement of the 12th February, 1949.

16. I am also advised by my said counsel and believe that in any event, the plaintiff Schuler cannot be and is not entitled in law or equity to specific performance of an alleged agreement to purchase shares in a company, and that the plaintiff company as an assignee of Schuler, is also not entitled to recover from me the said sum of \$17,000 :— or any portion thereof or any interest thereon. **20**

17. I am also advised by my said counsel and believe that the agreement of the 12th February, 1949, was not duly executed by or binding on Bel Air Hotel Limited, who was a necessary party thereto and that it is consequently not binding on me.

18. I have a good defence to this action on the merits and this defence goes to the whole of the plaintiff's case herein. **30**

19. My address for service and place of business is at the office of Henry Britton Fraser, solicitor, at lot 7 Croal Street, in the city of Georgetown and County of Demerara.

20. The abovenamed Henry Britton Fraser is hereby authorised by me to act as my solicitor in this matter and to receive all sums of money payable to me and to give.

Johan J. Hutt

Sworn to at Georgetown, Demerara.

This 13th day of May, 1950

Before me

40

W. D. Dinally

A Commissioner of Oaths

Stamps Can-
celled 36c.

"A"

Stamp 24c.
affixed and
cancelled.

In the
Supreme
Court.

AN AGREEMENT made the 12th day of February, 1949,
Between :— BEL AIR HOTEL LIMITED, (hereinafter called "the
Debtor Company") of the first part, JOHAN JOSEF FRANCOIS
HUTT, (hereinafter called "the Purchaser") of the second part,
LEON SCHULER, (hereinafter called ~~the~~ "the Vendor") of the
10 third part, and BOOKER BROTHERS McCONNELL AND COM-
PANY LIMITED, (hereinafter called "the Creditor Company")
of the fourth part.

Annexure
to Affidavit
of Defence.

"A"

Agreement
between
Bel Air
Hotel Ltd.,
J. J. Hutt,
L. Schuler
and Booker
Bros., Ltd.

WHEREAS the Debtor Company is indebted to the Creditor
Company in the sum of approximately \$19,000 :— under a First
Mortgage, and in the sum of approximately \$8,500 :— in respect
of supplies, and is also indebted to the Vendor in the sum of
\$17,000 :—.

AND WHEREAS the Vendor, who has the controlling interest
in the Debtor Company, has agreed to sell to the Purchaser his
20 shares in the Debtor Company for the sum of \$17,000 :—

12 Feb.,
1949.

AND WHEREAS the Purchaser is the owner of the following
property, viz:—

"Firstly,

the immovable property known as — "E½ of lot
A9; W½ of lot A9 and W½ of lot A10; SE part
of lot A10; South Cummingsburg, Georgetown,
with all the buildings and erections thereon"; as
held under Transport No. 523 of 23rd day of April,
1946;

30

"Secondly,

the goodwill of the hotel business (including all
Licences) carried on upon the property;

"Thirdly,

all the fixtures, fittings, furniture, trade utensils
and other chattels in or about the hotel premises
and used in or in connection with the said business
and in and upon the property, save and except
such furniture, personal belongings and chattels
of hotel guests; and

40

"Fourthly,

all stock-in-trade in and upon the property":
but has agreed to sell and has delivered possession of the same
under an Agreement dated 3rd January, 1949, to J. A. Sue-a-Quan
for the sum of \$120,000 :— of which \$11,000 :— has been already,
or will shortly be, received by the Purchaser and \$45,000 :— is to
be paid to the Demerara Mutual Life Assurance Society Limited.
in satisfaction of the First, Second, Third and Fourth Mortgages
on the said property, leaving a balance of \$64,000 :— to be paid
to the Purchaser on the passing of Transport:

50 AND WHEREAS the Vendor has assigned to the Creditor
Company the sum of \$17,000 :— owing to him by the Debtor
Company and the sum of \$17,000 :— owing to him by the Pur-
chaser in respect of the sale of the said shares :

In the
Supreme
Court.

Annexure
to Affidavit
of Defence.

“A”
Agreement
between
Bel Air
Hotel Ltd.,
J. J. Hutt,
L. Schuler
and Booker
Bros., Ltd.

12 Feb.,
1949.

AND WHEREAS the Debtor Company has agreed to pass a First and Second Mortgage on its property to the Creditor Company as security for the payment of the said sum of \$17,000:— with interest at the rate of FIVE per cent. per annum from the date hereof within six months from the 3rd day of January, 1949, or the passing of the Mortgage and the Purchaser has agreed to pass a Fifth Mortgage on the said property to the Creditor Company as security for the payment of the said sum of \$17,000:— with interest at the rate of FIVE per cent. per annum from the date hereof within six months from the 3rd day of January, 1949, or the passing of the Mortgage as the case may be: **10**

NOW IT IS HEREBY AGREED as follows:—

1. The Purchaser shall forthwith deposit with the Creditor Company the Grosse Transport No. 523 of 23rd April, 1946, for the said property and hereby assigns to the Creditor Company the said balance of \$64,000:— payable to him under the said Agreement dated 3rd January, 1949, and the full benefit and advantage thereof. **20**

2. The Debtor Company and the Purchaser shall forthwith advertise the aforesaid Mortgages to the Creditor Company, and shall pass the same whenever requested by the Creditor Company. **20**

3. On payment of the said sum of \$17,000:— with interest as aforesaid, or on the passing of the said Mortgages, whichever shall first happen, the transfer of the said shares which has been signed by the Vendor, shall be handed to the Purchaser.

4. On receipt of the said balance payable under the said Agreement dated 3rd January, 1949, the Creditor Company shall apply the same to the payment of —

- (a) the capital and interest of the said First Mortgage of \$19,000:—; **30**
- (b) the said sum of \$8,500:— in respect of supplies; and
- (c) the said sums of \$17,000:— with interest as aforesaid.

5. All costs and expenses of and incidental to this agreement shall be paid by the Debtor Company.

AS WITNESS the hands of the parties the day and year first above written in the presence of the subscribing witnesses.

WITNESSES:—

- 1. J. Edward de Freitas.
- 2. Claudia Bond. **40**

BEL AIR HOTEL Ltd.,
Leon Schuler — Chairman.
Jocelyn Bostock — Secretary.
Joh. J. Hutt.
Leon Schuler.
Booker Bros., McConnell & Co.,
Ltd.,

by their attorney

W. S. Jones. **50**

Seal of Bel Air Hotel,
Limited.

Seal Affixed:

Jocelyn Bostock,
Secretary.

This is the document marked “A” referred to in the foregoing affidavit by Johan Josef Francois Hutt, Sworn before me this 13th day of May, 1950.

W. D. DINALLY,
Commissioner of Oaths to Affidavits.

"B"

In the
Supreme
Court.L. M. F. CABRAL, M.A., B.C.L. (Oxon).
Barrister-at-Law.

COPY

"SOMERSET HOUSE"

5, Croal Street,

Georgetown,

British Guiana.

18th July, 1949.

Annexure
to Affidavit
of Defence.

10 Messrs. Cameron & Shepherd,
Solicitors,
High Street, Georgetown.

Dear Sirs.

"B"

BEL AIR HOTEL, LTD.

In reply to your letter to Messrs. Bel Air Hotel Ltd. of the 14th instant on behalf of Messrs. Booker Bros., McConnell & Co., Ltd., I am instructed by Bel Air Hotel, Ltd., to call for a clarification of the Agreement of the 12th February, 1949.

Letter by
L. M. F.
Cabral to
Messrs.
Cameron &
Shepherd,
Solicitors.

20 2. I am told by Mr. J. J. Hutt that he or Bel Air Hotel, Ltd., did not intend to agree and did not agree to bear any alleged liability of \$17,000:— to Mr. Leon Schuler apart from the price of Mr. Schuler's shares.

18th July,
1949.

3. Mr. Hutt says that he told Mr. J. Edward de Freitas who prepared the Agreement that he had agreed to buy the assets of Bel Air Hotel, Ltd. for \$70,000:— which sum was arrived at by adding all the liabilities which Mr. Hutt was to take over, to the price he was to pay for the shares to be transferred to him, as set out in his letter of the 8th February, 1949, by Mr. Hutt to Booker Bros., McConnell & Co., Ltd.

30 4. Mr. Hutt signed the Agreement in a hurry on the 12th February, 1949 — a Saturday — on the eve of his departure early next morning from British Guiana to the U.S.A.

5. He did not receive a copy of it until the end of May after his return to British Guiana. This Agreement was considered on the 30th May, 1949, at a Director's Meeting of Bel Air Hotel, Ltd., and when this second sum of \$17,000:— mentioned in it was queried, Mr. Schuler said he could not read the Agreement as he did not then have his spectacles with him.

40 6. Mr. Hutt says he then spoke to Mr. J. Edward de Freitas in the Supreme Court and later at your Office, querying this alleged liability of \$17,000:— by Bel Air Hotel, Ltd., to Mr. Schuler, payment of which appeared to be called for in the Agreement.

7. On the advice of Mr. de Freitas, Mr. Hutt tried to get Mr. Schuler to meet Mr. de Freitas and Mr. Hutt together, but without success.

8. In these circumstances, Mr. Hutt and Messrs. Bel Air Hotel, Ltd., require a rectification of the Agreement because it appears to me to call for payment of two sums of \$17,000:— instead of one.

50

Yours truly,
(Sgd.) L. CABRAL.

This is the document marked "B" referred to in the foregoing affidavit by Johan Josef Francois Hutt.

Sworn before me this 13th May, 1950.

W. D. DINALLY,
Commissioner of Oaths to Affidavits.

In the
Supreme
Court.

No. 5

ORDER OF COURT.

No. 5.
Order of
Court.

BEFORE THE HONOURABLE THE CHIEF JUSTICE (ACTING).
MONDAY THE 15TH DAY OF MAY 1950.
ENTERED THE 19TH DAY OF MAY 1950.

UPON READING the affidavit of the defendant filed herein on the 13th day of May, 1950, AND UPON HEARING Counsel for the plaintiffs and the defendant IT IS ORDERED that the plaintiffs be at liberty to file an affidavit in reply on or before Saturday the 20th day of May, 1950, AND THAT the further consideration of **10** the defendant's application for leave to defend this action be adjourned to Monday the 22nd day of May 1950 before the said Chief Justice.

BY THE COURT

H. Bacchus
Sworn Clerk & Notary Public
for REGISTRAR.

AFFIDAVIT IN REPLY

WE, *CARLOS FERNANDES* of lot 43 Croal Street, Stabroek, Georgetown, Mercantile Clerk, and *LEON SCHULER* of lot 313 East Street, Georgetown, Business Executive, being duly sworn make oath and say as follows:—

No. 6.

Affidavit
in Reply.

1. We have read what purports to be a copy of an affidavit sworn herein by the defendant on the 13th day of May, 1950.

2. The defendant has not in his said affidavit disclosed that
10 on the 14th day of July, 1949, Messrs. Cameron & Shepherd wrote him a letter, a true copy of which is hereto annexed and marked "B B¹" nor that his Counsel replied thereto by letter dated the 18th July, 1949, a true copy of which is hereto annexed and marked "B B²", from which it will be seen that he did not at that time allege that J. A. Sue-A-Quan's fulfilment of the agreement of the 3rd January, 1949, was a basic condition of the agreement of the 12th February, 1949.

3. The defendant has also not disclosed in his said affidavit
20 that Messrs. Cameron & Shepherd replied to his counsel by letter dated 13th August, 1949, a true copy of which is hereto annexed and marked "B B³". The facts therein stated which relate to our own acts are true and correct and those which relate to the acts of the defendant are to the best of our knowledge, information and belief, true and correct.

4. A true copy of the instructions taken down by Joseph Edward de Freitas, solicitor, on the 8th February, 1949, and referred to in the said letter dated 13th August, 1949, is hereto annexed and marked "B B⁴".

5. The defendant has also not disclosed in his said affidavit
30 that on the 17th day of April, 1950, Messrs. Cameron & Shepherd wrote him a letter, a true copy of which is hereto annexed and marked "B B⁵" nor that his counsel replied thereto by letters dated 20th and 29th April, 1950, true copies of which are hereto annexed and marked "B B⁶" and "B B⁷".

6. The defendant has also not disclosed in his said affidavit that he has lived in this Colony for more than 30 years and that he speaks and writes the English language quite well.

7. The plaintiff company has been unable to find amongst
40 its records any letter as alleged in paragraph 7 of the said affidavit. At the time Messrs. Cameron & Shepherd's letter of the 13th August, 1949, was written Mr. W. S. Jones was out of the Colony. On his return, he informed me the second-named deponent and I verily believe that he had received no such letter.

8. The transfer of shares referred to in paragraph 5 of the Agreement of the 12th February, 1950, was signed by me the second-named deponent in the presence of the defendant at the same time as the said agreement and was thereupon handed to Mr. J. Edward de Freitas with the relevant share certificates. A true copy of the said transfer is hereto annexed and marked "B B⁸".

In the
Supreme
Court.

No. 6.
Affidavit
in Reply.

9. A true copy of the agreement made between the defendant and J. A. Sue-A-Quan and dated 3rd January, 1949, is hereto annexed and marked "BB⁹". A true copy of the supplemental agreement made between the defendant and J. A. Sue-A-Quan and dated 12th February, 1949, is hereto annexed and marked "BB¹⁰". The said supplemental agreement was drawn on the advice of Mr. de Freitas in order, inter alia, to protect the defendant in case Mr. Sue-A-Quan failed to complete the purchase.

10. The Agreement of the 12th February, 1950, as appears from the copy thereof exhibited to the said affidavit was and purports to be executed by and on behalf of Bel Air Hotel Limited and the seal of the Company was affixed thereto. A true copy of Article 97 of the Articles of Association of the said Company is as follows:—

"A common seal shall be provided bearing the name of the Company in full and such device (if any) as the directors may determine and any document requiring to be formally executed by or on behalf of the Company shall be deemed to be sufficiently executed if such seal is affixed thereto and the document is signed by any two directors or in such other manner as the directors may determine"

I, the second-named deponent, and JOCELYN BOSTOCK, the Secretary, were authorised to sign the said agreement on behalf of the said Company.

AND I, *CARLOS FERNANDES*, for myself say:—

11. I am clerk to the plaintiff company and I am duly authorised to make this affidavit on its behalf. The facts herein deposed to relating to my own acts and deeds are true and correct and those relating to the acts and deeds of the other person or persons mentioned are to the best of my knowledge, information and belief true.

AND I, *LEON SCHULER*, for myself say:—

12. I am the second-named plaintiff and the facts herein deposed are within my own knowledge true and correct.

Sworn to at Georgetown,
Demerara, this 19th day of
May, 1950.

CARLOS I. FERNANDES.
LEON SCHULER

Before me,

40

H. V. V. B. GUNNING.
Commissioner for Oaths to Affidavits.

"BB1"

In the
Supreme
Court.

14th July, 1949

J. J. Hutt, Esq.,
57, Chalmers Place,
Georgetown.

Annexure
to Affidavit
in Reply.

Dear Sir,

We are instructed by our clients — Messrs. Bookers Brothers
McConnell & Co. Ltd., to call your attention to the Agreement
executed by you on the 12th February, 1949.

"BB 1"

Letter to
Messrs.
Cameron &
Shepherd
to J. J.
Hutt.

- 10** Under this Agreement you assigned to our clients the sum of \$64,000 :—payable to you by Mr. J. A. Sue-A-Quan and undertook in the meantime to pass a Fifth Mortgage on the property therein described.

14th July,
1949.

The above amount was to have been paid by the 3rd July, 1949, and as it has not been paid, we have to call upon you to pay it or to advertise and pass forthwith the said Mortgage.

Will you please call as soon as possible to swear to your affidavit of title and to pay the costs of the mortgage, viz :—\$135.20.

Yours faithfully.

20

(Sgd.) Cameron & Shepherd.

This is the letter marked "B B1" referred to in the foregoing affidavit by Carlos Fernandes and Leon Schuler sworn before me this 19th day of May, 1950.

H. V. V. B. GUNNING,
Commissioner of Oaths.

In the
Supreme
Court.

"B B2"

Annexure
to Affidavit
in Reply.

L. M. F. CABRAL, M.A., B.C.L. (Oxon.)
Barrister-at-Law.

SOMERSET HOUSE,
5, Croal Street,
Georgetown,
British Guiana
18th July, 1949.

"BB 2"

Letter
from
L. M. F.
Cabral to
Cameron &
Shepherd,
with copy
of letter
from
L. M. F.
Cabral to
Cameron &
Shepherd.

Messrs. Cameron & Shepherd,
Solicitors,
High Street,
Georgetown.

10

18th July. Dear Sirs,
1949.

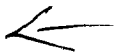
Mr. J. J. HUTT

In reply to your letter of the 14th instant to Mr. J. J. Hutt on behalf of Messrs. Booker Bros. McConnell and Co., Ltd., I am instructed by Mr. Hutt to send you a copy, as I do herewith, of a letter of today's date from me on behalf of Messrs. Bel Air Hotel, Ltd., to you.

2. Mr. Hutt relies on the circumstances set out in that letter and asks whether your clients agree to rectify the Agreement as called for by him. 20

3. He also wishes to inform you that Mr. Sue-A-Quan apparently does not intend to complete the purchase of the Holmes Street property under which the \$64,000.00 was payable.

Yours truly,
(Sgd.) L. CABRAL.



L. M. F. CABRAL. M.A., B.C.L. (Oxon.)
Barrister-at-Law.

In the
Supreme
Court.

SOMERSET HOUSE,
5, Croal Street,
Georgetown,
British Guiana.
18th July, 1949.

Annexure
to Affidavit
in Reply.

Messrs. Cameron & Shepherd,
Solicitors,
10 High Street, Georgetown.

Dear Sirs,

BEL AIR HOTEL, LTD.

"BB 2"

In reply to your letter to Messrs. Bel Air Hotel Ltd., of the 14th instant on behalf of Messrs. Booker Bros. McConnell & Co., Ltd., I am instructed by Bel Air Hotel, Ltd., to call for a clarification of the Agreement of the 12th February, 1949.

Letter
from
L. M. F.
Cabral to
Cameron &
Shepherd,
with copy
of letter
from
L. M. F.
Cabral to
Cameron &
Shepherd.

2. I am told by Mr. J. J. Hutt that he or Bel Air Hotel Ltd., did not intend to agree and did not agree to bear any alleged liability of \$17,000.00 to Mr. Leon Schuler apart from the price of
20 Mr. Schuler's shares.

3. Mr. Hutt says that he told Mr. J. Edward de Freitas who prepared the Agreement that he had agreed to buy the assets of Bel Air Hotel, Ltd. for \$70,000.00 which sum was arrived at by adding all the liabilities which Mr. Hutt was to take over, to the price he was to pay for the shares to be transferred to him, as set out in his letter of the 8th February, 1949, by Mr. Hutt to Booker Bros. McConnell & Co., Ltd.

18th July.
1949.

4. Mr. Hutt signed the Agreement in a hurry on the 12th February, 1949, — a Saturday — on the eve of his departure early
30 next morning from British Guiana to the U.S.A.

5. He did not receive a copy of it until the end of May after his return to British Guiana. This Agreement was considered on the 30th May, 1949, at a Directors' Meeting of Bel Air Hotel Ltd. and when this second sum of \$17,000.00 mentioned in it was queried, Mr. Schuler said he could not read the Agreement as he did not then have his spectacles with him.

6. Mr. Hutt says he then spoke to Mr. J. Edward de Freitas in the Supreme Court and later at your office, querying this alleged liability of \$17,000.00 by Bel Air Hotel Ltd. to Mr. Schuler,
40 payment of which appeared to be called for in the Agreement.

7. On the advice of Mr. de Freitas, Mr. Hutt tried to get Mr. Schuler to meet Mr. de Freitas and Mr. Hutt together, but without success.

8. In these circumstances, Mr. Hutt and Messrs. Bel Air Hotel Ltd. require a rectification of the Agreement because it appears to me to call for payment of two sums of \$17,000.00 instead of one.

Yours truly,

(Sgd.) L. CABRAL.

50 { This is the Letter marked "B B2" referred to in the foregoing affidavit by Carlos Fernandes and Leon Schuler sworn before me this 19th day of May, 1950.

H. V. V. B. GUNNING,
Commissioner of Oaths.

In the
Supreme
Court.

13th August, 1949.

"B B3"

L. M. F. CABRAL, Esq.,
Barrister-at-Law,

Annexure
to Affidavit
in Reply.

5, Croal Street,
Georgetown.

Dear Sir,

Re: BEL AIR HOTEL LIMITED AND Mr. J. J. HUTT.

"BB 3"

Letter
from
Cameron &
Shepherd
to L. M. F.
Cabral.

With reference to your letters of the 18th ult. Our clients Messrs. Booker Bros. McConnell & Co., Ltd., have instructed us to institute proceedings against the above Company and Mr. Hutt to enforce the agreement of the 12th February, 1949. 10

It would appear from your letters under reply that Mr. Hutt has forgotten what happened.

In the first place, our Mr. J. Edward de Freitas has no recollection of Mr. Hutt informing him that he had agreed to buy the assets of the Bel Air Hotel Limited for \$70,000.00.

13th Aug.,
1949.

Mr. de Freitas received his instructions from Mr. Hutt and Mr. Schuler on the 8th February and took them down in writing. There is no mention in these instructions of the sum of \$70,000.00 but there is a reference to two sums of \$17,000.00 the total of which namely \$34,000.00 was to be lent by Bookers on mortgages of the Bel Air and Eldorado Hotels. 20

Mr. Hutt also instructed us to draft a supplemental Agreement between himself and Mr. Sue-A-Quan.

On the 10th February, Mr. Hutt and Mr. Carlos Fernandes called to see us and the latter produced a statement showing exactly what was due to Bookers by Mr. Schuler and Bel Air Hotel Limited.

On the 11th February, 1949, Messrs. Hutt, Schuler and Fernandes called and the draft agreements were gone through and explained. 30

On the 12th February, Messrs. W. S. Jones, Hutt, Schuler and Sue-A-Quan all attended at our office and the two agreements, the assignment by Schuler to Bookers of the debt owing by Bel Air to him, and the transfer of the shares, were signed, Mr. Hutt being in our office from 9.10 a.m. to 10 a.m.

It seems to be clear from the above that two sums of \$17,000.00 were mentioned right from the beginning and that the Agreement in question does not require any rectification. 40

It may be that Mr. Hutt is under a misapprehension as to the exact nature of the transaction and has overlooked the fact that on its completion, he will become a creditor of Bel Air Hotel Limited in the place of Mr. Schuler. May we suggest that you ask Mr. Hutt to give you particulars of the liabilities mentioned in paragraph 3 of your letter re Bel Air Hotel Limited. It may prove enlightening.

Yours faithfully,
(Sgd.) Cameron & Shepherd.

This is the Letter marked "B B3" referred to in the foregoing affidavit by Carlos Fernandes and Leon Schuler sworn before me this 19th day of May, 1950. 50

H. V. V. B. GUNNING,
Notary Public,
Commissioner for Oaths

"B B4"

In the
Supreme
Court.

BEL AIR HOTEL LTD.

- (1) First Mtg. to Bookers \$19,000 :— Annexure
to Affidavit
(2) Owes Leon Schuler 17,000 :— in Reply.
(3) L. Schuler has \$17,000 in shares which he is
selling to J. J. Hutt, Bookers will lend
\$34,000:—in respect of (2) & (3) on

MORTGAGE OR MORTGAGES OF
Bel Air Hotel & Eldorado Hotel

"BB 4"

- 10** 1st & 2nd Mtg. on Bel Air for \$17,000 :
" " " Eldorado " \$17,000 :
— \$17,000: not to be paid to Schuler until money actually received.
— All expenses to be payable by Bel Air Hotel Ltd. —
2 Bel Air Transpts.
Eldorado ,,
,, Agreement
of Sale.

Instruc-
tions
referred
to in letter
d/d 13th
August,
1949.

- This is the Document marked "B B4" referred to in the foregoing
affidavit by Carlos Fernandes and Leon Schuler sworn before me
20 this 19th day of May, 1950.

H. V. V B. GUNNING,
Notary Public,
Commissioner of Oaths.

In the
Supreme
Court.

17th April, 1950.

REGISTERED POST A.R.

Annexure
to Affidavit "B B⁵"
in Reply.

"BB 5" J. J. HUTT, Esq.,
57, Chalmers Place,
Georgetown.

Letter
from
Cameron &
Shepherd
to J. J.
Hutt:

Sir,
We are instructed by Messrs. Booker Bros. McConnell & Co.,
Ltd., and Leon Schuler, to demand from you, as we hereby do,
immediate payment of the sum of \$17,000:—being the purchase **10**
price of the shares in Bel Air Hotel Ltd. sold by Mr. Schuler to
you on the 12th February, 1949, which said sum was assigned on
the same day to Messrs. Booker Bros. McConnell & Co., Ltd.

17th April,
1950.

Unless you comply with this demand on or before the 22nd
instant, our instructions are to sue you for the recovery of the
same without further notice.

Yours faithfully,
(sgd.) CAMERON & SHEPHERD.

This is the Letter marked "B B⁵" referred to in the foregoing
affidavit by Carlos Fernandes and Leon Schuler sworn before me **20**
this 19th day of May, 1950.

H. V. V. B. GUNNING.
Notary Public.
Commissioner of Oaths.

' B B⁶'In the
Supreme
Court.L. M. F. CABRAL, M.A., B.C.L. (Oxon.)
Barrister-At-Law.Annexure
to Affidavit
in Reply.SOMERSET HOUSE,
5, Croal Street,
Georgetown,
British Guiana.

20th April, 1950.

"BB 6"

10 MESSRS. CAMERON & SHEPHERD,
Solicitors,
Georgetown.Letter
from
L. M. F.
Cabral to
Cameron &
Shepherd.

Dear Sirs,

20 I have been requested by and on behalf of Mr. J. J. Hutt and Messrs. Bel Air Hotel, Ltd., to reply to your letters of the 17th instant to them. But owing to the volume of negotiations and other facts involved in these matters with which I have been out of touch for many months now, and owing to pressure of work from the current Criminal Sessions, I shall be unable to reply specifically to your letters before the 27th instant. Moreover, I understand that only one director of Bel Air Hotel, Ltd., is now in British Guiana.20th April,
1950.

I therefore ask that you may kindly wait on me until the 27th instant.

Yours, truly,
(sgd.) L. CABRAL.This is the Document marked "B B⁶" referred to in the foregoing affidavit by Carlos Fernandes and Leon Schuler sworn before me this 19th day of May, 1950.**30**H. V. V. B. GUNNING,
Notary Public,
Commissioner for Oaths

In the
Supreme
Court.

"B B7"

Annexure
to Affidavit
in Reply.

L. M. F. CABRAL, M.A., B.C.L. (Oxon.)
Barrister-At-Law.

SOMERSET HOUSE,
5, Croal Street,
Georgetown,
British Guiana.

"BB 7"

29th April, 1950.

Letter
from
L. M. F
Cabral to
Cameron &
Shepherd.

MESSERS. CAMERON & SHEPHERD,
Solicitors,
Georgetown.

10

Dear Sirs,

29th April,
1950.

In further reply to yours of the 17th instant to Mr. J. J. Hutt, I am instructed by Mr. Hutt to refer you to my two letters to you of the 18th July, 1949, on behalf of Mr. Hutt and Messrs. Bel Air Hotel, Ltd., and to his letter of the 8th February, 1949, to your clients, and to inform you that he adheres to what is said in those letters.

Yours faithfully,
(sgd.) L. CABRAL.

20

This is the Letter marked "BB7" referred to in the foregoing affidavit by Carlos Fernandes and Leon Schuler sworn before me this 19th day of May, 1950.

H. V. V. B. GUNNING,
Notary Public,
Commissioner for Oaths.

"B B8"

Stamp Cancelled
24c.In the
Supreme
Court.

I, LEON SCHULER of 313 East Street, Georgetown in consideration of the sum of \$5. paid to me by

Annexure
to Affidavit
in Reply.

of

(hereinafter called "the said transferee") do hereby transfer to the said transferee the shares numbered 1 (one) to 200 (two hundred); 601 to 3050; 6051 to 6750 and 551 to 600 all inclusive in the undertaking called BEL AIR HOTEL LIMITED, to hold **10** unto the said transferee, his executors, administrators and assigns, subject to the several conditions on which I held the same at the time of the execution thereof; And I the said transferee, do hereby agree to take the said shares subject to the conditions aforesaid.

"BB 8"

Transfer
of shares
by Leon
Schuler.

AS WITNESS our hands the 12th day of February, 1949.

12th Feb..
1949.

(sgd) Leon Schuler.

Witness to the signature
of the Transferor:

(sgd) J. Edward de Freitas.

20 Witness to the signature
of the Transferee.

This is the Transfer Marked "B B8" referred to in the foregoing affidavit by Carlos Fernandes and Leon Schuler sworn before me this 19th day of May, 1950.

H. V V B. Gunning
Notary Public,
Commissioner for Oaths

In the
Supreme
Court.

“BB⁹”

Annexure
to Affidavit
in Reply.

AN AGREEMENT made the 3rd day of January, 1949, between JOHAN JOSEF FRANCOIS HUTT of lot 57 Chalmers Place, Georgetown, Demerara (hereinafter called “the vendor”) of the one part and J. A. SUE-A-QUAN of 52 Robb Street, Georgetown, Demerara, (hereinafter called “the Purchaser”), of the other part.

“BB 9”

WHEREAS the Vendor has for some time past carried on business as Hotel Proprietor and owns the Hotel known as the “Hotel Eldorado” at lots 9 and 10 Holmes Street, Georgetown. 10

Agreement
between
J. J. Hutt
and J. A.
Sue-A-
Quan.

AND WHEREAS the Purchaser has agreed to purchase the said Hotel on the terms and conditions hereinafter set out, also all the Buildings and erections; *Firstly* East half of Lot A9, *secondly* West half of lot A9 and West half of lot A10, *thirdly* South East part of lot A10, South Cummingsburg.

.NOW IT IS HEREBY AGREED as follows:—

3rd Jan.,
1949.

1. The Vendor will sell and the Purchaser will buy upon the terms and conditions hereinafter mentioned —

First:—The immovable property known as “E½ of lot A9, W½ of lot A9 and W½ of lot A10, SE part of lot A10, South Cummingsburg, Georgetown with all the Buildings and erections thereon as held under Transport No. 1329 of 23rd day of April, 1946, and as now occupied (hereinafter referred to as “the property”): 20

Secondly:—The goodwill of the said hotel business (including all licences) carried on by the Vendor upon the property;

Thirdly:—All the fixtures, fittings, furniture, trade utensils and other chattels in or about the hotel premises and used in or in connection with the said business and in and upon the property, save and except such furniture, personal belongings and chattels of hotel guests; and 30

Fourthly:—All stock-in-trade in and upon the property.

2. The purchase of all the abovementioned premises, shall take effect as from the 3rd day of January, 1949, and possession shall be given to the purchaser.

3. The price to be paid by the Purchaser to the Vendor in respect of such sale shall be as follows:—

- (1) For the property the sum of \$90,000: — (Ninety thousand dollars).
- (2) For the goodwill aforesaid the sum of \$15,000:— 40 (Fifteen thousand dollars).
- (3) For the furniture etc. as described above, the sum of \$10,000:— (Ten thousand dollars).
- (4) For the stock-in-trade the sum of \$5,000:— (Five thousand dollars).

4. The purchaser having paid the sum of \$6,000:— (Six thousand dollars) as a deposit on the purchase price of One hundred and Twenty Thousand dollars, said purchase price, the balance of the said purchase price shall be paid as follows:—

A further sum of \$5,000: — (Five thousand dollars) by way of deposit and in part payment on or before the lodging of instructions to advertise transport, and the balance in cash on the passing of Transport. In the Supreme Court.

5. The Vendor will, on payment of the further deposit of \$5,000, forthwith proceed to transfer the licences relating to the said business and advertise transport of the property to the Purchaser. Annexure to Affidavit in Reply.

10 6. Transport shall be passed within six months or as soon as possible.

7. Upon the passing of transport, the Purchaser shall also pay to the Vendor in respect of subsisting insurance policies a sum proportionate to the unexpired portion of the period covered thereby and the Vendor will thereupon transfer such policies to the Purchaser. 'BB 9'

8. Subject to the preceding provision, the Vendor will hold the existing policies of Insurance in trust for the Purchaser until the purchase shall be completed. Agreement between J. J. Hutt and J. A. Sue-A-Quan.

20 9. The Purchaser shall collect on behalf of the Vendor all Rents as shown on a list thereof which shall be prepared by the Vendor and handed to the Purchaser on the taking of possession. All amounts so collected shall forthwith be deposited on a special property account, from which account all Rates and Taxes shall be paid. 3rd Jan., 1949.

10. Should the Purchaser fail to complete the purchase within 6 (six) months from the date hereof his deposit shall be forfeited to the Vendor and this Agreement shall become null and void.

30 11. The costs and expenses of transport shall be borne as to fifty per cent thereof by the Vendor and as to fifty per cent by the Purchaser.

AS WITNESS the hands of the parties the day and year first above written.

J. J. F. Hutt
J. A. Sue-A-Quan

WITNESSES

- 1. K. Sue-A-Quan
- 2.

Stamp cancelled
24 cents.

40 This is the Agreement marked "BB9" referred to in the foregoing affidavit by Carlos Fernandes and Leon Schuler sworn before me this 19th day of May, 1950.

H. V. V. B. Gunning
Notary Public,
Commissioner for Oaths.

In the
Supreme
Court.

"B B10"

\$5.00 Stamps cancelled.

Annexure
to Affidavit
in Reply.

THIS AGREEMENT made the 12th day of February, 1949, Between :— JOHAN JOSEF FRANCOIS HUTT (hereinafter called "the Vendor") of the one part, and JAMES ALEXANDER SUE-A-QUAN (hereinafter called "the Purchaser" which term shall include his heirs, executors, administrators and assigns) of the other part:

"BB 10"

SUPPLEMENTAL to an Agreement made between the parties hereto and dated 3rd January, 1949, (hereinafter called "the Principal Agreement") which shall be read and construed here- 10
with:

Agreement
between
J. J. Hutt
and J. A.
Sue-A-
Quan.

WHEREAS under the Principal Agreement the Purchaser is required to deposit a further \$5,000:— before the hotel and other licences are transferred to the Purchaser:

AND WHEREAS subject to the modification of the Principal Agreement the Vendor is willing to transfer the said licences to the Purchaser forthwith without payment of the said sum:

12th Feb.,
1949.

AND WHEREAS it has been agreed to modify the Principal Agreement as hereinafter provided:

NOW IT IS HEREBY AGREED as follows: — 20

1. The said sum of \$5,000:—shall be paid by the Purchaser to the Vendor on or before the Registrar of Deeds is instructed to advertise Transport.

2. The Purchaser hereby nominates, constitutes and appoints the Vendor, his heirs, executors, administrators and assigns to be the true and lawful attorney or attorneys of the Purchaser and in the name and on behalf of the Purchaser and as the act and deed or otherwise of the Purchaser to do all or any of the following acts, deeds and things, that is to say:—

- (i) To apply for, take out, renew, transfer and accept 30
transfers of hotel, retail spirit and other licences and to oppose the granting of any such licences and to appear before any Court or tribunal or officer in relation thereto;
- (ii) To sign, execute and complete all applications, notices or other instruments or writings that may be required in the premises;
- (iii) In particular but without prejudice to the gen- 40
erality of the foregoing powers to transfer to the Vendor the Hotel Licence in respect of the premises known as "the Eldorado Hotel" at lots 9 and 10 Holmes Street, Georgetown.

3. The Purchaser hereby ratifies and confirms whatsoever his said attorney or attorneys shall or may lawfully do or cause to be done in and about the premises under and by virtue of these presents.

4. The Purchaser declares that the Power hereby granted shall be irrevocable for one year from the date hereof provided always that on the passing of Transport of the property this Power shall be revoked. 50

5. The Vendor having assigned the benefit of the Principal Agreement to Booker Brothers Mc Connell and Company Limited shall be at liberty notwithstanding the said Agreement to advertise and pass a Fifth Mortgage to the said Company for the sum of \$17,000:—

In the
Supreme
Court.

6. On the passing of Transport the Purchaser shall pay to the Demerara Mutual Life Assurance Society Limited the sum of \$45,000:— in respect of the First, Second, Third and Fourth Mortgages on the property sold, and to Booker Brothers Mc
10 Connell and Company Limited the balance of the purchase price, namely:— \$64,000:—

Annexure
to Affidavit
in Reply.

7. If the Principal Agreement shall become null and void as therein provided the purchaser shall forthwith re-deliver possession of the said property to the Vendor and shall forthwith pay to the Vendor all rents collected by the Purchaser less the amounts of rates and taxes paid thereout.

"BB 10"

Agreement
between
J. J. Hutt
and J. A.
Sue-A-
Quan.

8. The Vendor on the signing of this Agreement shall complete the transfer of the said licences to the Purchaser.

20 IN WITNESS WHEREOF the parties have hereunto set their hands the day and year first above written in the presence of the subscribing witnesses.

12th Feb.,
1949.

WITNESSES:—

1. L. Schuler.
2. Jocelyn Bostock.

Joh. J. F. Hutt.
J. A. Sue-a-Quan.

AND IN MY PRESENCE
QUAD ATTESTOR

J EDWARD de FRIETAS
NOTARY PUBLIC

30

L.S.

This is the supplemental Agreement Marked "BB¹⁰" referred to in the foregoing affidavit by Carlos Fernandes and Leon Schuler sworn before me the 19th day of May, 1950.

H. V. V B. GUNNING,
Notary Public,
Commissioner for Oaths.

JUDGE'S NOTES.

No. 7.

Monday 22nd May, 1950, at 9.45 a.m.

BOOKER BROS. McCONNELL & Co.

Judge's
Notes.

— and —

LEON SCHULER

Plaintiffs.

— and —

JOHAN JOSEF HUTT,

Defendant.

10*Mr. Humphrys*, K.C. for both plaintiffs.*Mr. Cabral* for defendant.*Mr. Cabral* asks leave to defend.

Three issues to be tried —

- (1) Whether the defendant agreed that 2 sums of \$17,000:— instead of one sum; and
- (2) Whether basic condition was not whether the completion of sale of lot A9 South Cummingsburg.
- (3) The plaintiff cannot have specific performance --- if there is breach of contract.

20*Re Schwabacher* 98 L.T. 127.

Hutt did not sign the transfer in acceptance of assignment of shares — to enable the transfer to be registered by the Company.

- (4) The agreement was signed by only one director of Bel Air Company and the Directors never directed any other method.

In reply to para: 17 of affidavit of defence.

Mr. Humphrys, K.C. opposes leave to defend. The defendant merely endeavours to gain time. Defendant admits he bought the shares. The agreement directs the \$17,000 to be paid for shares. **30**

In the writ only the sum of \$17,000 is claimed. (As provided for in the agreement). Judgment for plaintiff for \$18,038.63 with interest at 5% per annum on \$17,000 from 4th May, 1950 to the 22nd of May, 1950.

Leave to defendant to file counter-claim within 10 days — Defence to counter-claim to be filed within 10 days thereafter. Liberty to apply for further pleadings.

Stay of execution till filing of counter-claim. On counter-claim being filed stay of execution till determination of action. **40**

REASONS FOR DECISION.

In this matter I was not satisfied that the affidavit filed in support of the application for leave to defend to which the plaintiffs had filed an affidavit in reply disclosed a triable issue in relation to the claim in the endorsement of the writ.

No. 8.

10 The plaintiff's claim as appearing in the endorsement on the writ is for the price of ~~\$3,400.00~~ fully paid shares in Bel Air Hotel Limited bargained and sold to the defendant under an agreement in writing dated the 12th day of February, 1949, made between the Bel Air Hotel Limited, the defendant, the plaintiff Schuler and the plaintiff Company. The sum \$18,038.63 sued for, represents the sum of \$17,000.00 the price of the said shares as agreed to in the said written agreement with interest thereon at five per cent per annum as therein also set out.

Reasons
for
Decision.

20 The Defence does not impeach that portion of the agreement which relates to defendant's liability to pay the sum of \$17,000 and interest for the shares. On the contrary while protesting against the agreement on the ground as alleged that it purports to impose on him an additional liability of \$17,000.00, the defendant admitted in his affidavit that the agreement correctly embodied his intention to pay \$17,000.00 for the shares with interest thereon. That this was clearly his attitude with regard to this agreement is shown in the letter dated 18th July, 1949, written by Mr. Cabral, his Counsel, on his behalf in reply to the letter of 14th July from Messrs. Cameron & Shepherd, the solicitors of the plaintiff, in which defendant was requested to implement the agreement by payment or pass the fifth mortgage on the property referred therein. The letter of Messrs. Cameron & Shepherd and the reply of Mr. Cabral is annexed as exhibits to the affidavit of the plaintiff in reply. Mr. Cabral in a subsequent letter dated 29th April, 1950, in reply to a letter of Messrs. Cameron & Shepherd dated 17th April, threatening legal proceedings for the recovery of the sum due as the purchase price of the shares, stated that his client adhered to what was stated in his previous correspondence.

to

40 From the above it was clear to me as plaintiff's counsel had submitted, that the defence was impeaching not his liability to pay the \$17,000.00 and interest thereon for the sale of the shares, but was repudiating only the liability to pay any other sum of \$17,000.00 on the ground that he signed the agreement under a misapprehension as to any additional liability being imposed on him by the agreement.

In alleging mistake as to the contents of the agreement, the defendant in paragraph 12 of his affidavit states:

50 "The said agreement does not correctly represent what
"I agreed to on behalf of Bel Air Hotel Limited and
"myself. It ought not to have stated that I was liable
"for two sums of \$17,000.00 and the said agreement
"requires rectification."

What is the nature of the rectification the Defence states is required? It is such rectification as would make his sole liability that which he contends throughout he understood as his sole liability — namely his liability to pay \$17,000.00 and interest for the shares he bought.

Accordingly I was of the opinion that the plaintiffs were entitled to judgment forthwith for the sum claimed for the price of the shares, but I gave leave to the Defence to file a counter-claim in respect of the contention that Defendant was not liable

In the
Supreme
Court

No. 8.

Reasons
for
Decision.

for any other sum beyond the purchase price of the shares; in which counter-claim the Defence could, if so desired, pray for the remedy of rectification of the agreement so that it would conform with their contention as to the non-liability of the defendant for the payment of any other sum beyond the purchase price of the shares. In order not to embarrass the defendant in the prosecution of such a counter-claim, I ordered that there shall be a stay of execution of the judgment until the counter-claim was filed giving defendant until 1st June, 1950, for so doing, upon the filing of which there was to be a further stay of execution until the final adjudication on the counter-claim. 10

I may add that I saw no substance in another ground of defence set out in the defendant's affidavit, at paragraph 13 of his affidavit, namely that the defendant "never signed or received or seen any transfer of the 3,400 shares." This, too, involved no triable issue. The defendant cannot avail himself of his own failure to sign the transfer as a good defence to the claim for payment of the purchase price of the shares, although the transfer may not have been recognised by the Company as legally effectuated without the signature of the transferee. The transfer was signed by the transferor and was thereupon handed to the solicitor, Mr. J. E. de Freitas, who prepared the agreement for both parties and that is sufficient for the purposes of the claim. 20

Another ground of defence is set out in paragraph 13 and 14 of the affidavit of the defendant. It is there alleged that the fulfilment of the agreement with J. A. Sue-A-Quan was a basic condition of the agreement of the 24th February, 1949 and that in consequence of Sue-A-Quan's not completing the purchase of the premises at 9 & 10, Holmes Street, Georgetown, with the hotel business known as Hotel El Dorado carried on therein, that condition was unfulfilled and that the defendant was accordingly released from his obligations under his agreement with the plaintiffs. I cannot see that there is any substance in this ground of defence such as could possibly succeed at the trial. I consider it has not even the merit of an arguable defence. Clearly the assignment by the defendant to the plaintiff Company of the \$64,000.00 payable by Sue-A-Quan under his agreement was merely by way of security. This defence seems to be an afterthought as it was not raised in Mr. Cabral's letter of the 18th July, in which the attitude of the defendant towards the agreement is fully set out. It would appear to have been raised for the first time in these proceedings. 30 40

I ought to mention, as can be seen by the record, that the defence did not avail itself of the opportunity given it by the Court to file the counter-claim which gives foundation to the view that I entertained that all the allegations made in the defendant's affidavit in support of his application for leave to defend were made for the sole purpose of delaying the recovery of judgment by the plaintiff in a cause of action in which he was clearly entitled summarily to final judgment by virtue of Order XII (Local Rules of Court). 50

FRED M. BOLAND,
Chief Justice (ag.).

Dated the 21st day of June, 1950.

FORMAL JUDGMENT.

BEFORE THE HONOURABLE THE CHIEF JUSTICE (ACTING).

MONDAY THE 22ND DAY OF MAY, 1950.

No. 9.

ENTERED THE 27TH DAY OF MAY, 1950.

UPON HEARING counsel for the plaintiffs and the defendant AND UPON READING the affidavits filed herein on behalf of the plaintiffs and the defendant IT IS THIS DAY ADJUDGED that the plaintiffs do recover against the defendant the sum of **10** \$18,038.63 together with interest on \$17,000.00 at the rate of five per centum per annum from the 4th day of May, 1950, until the date hereof, AND IT IS ORDERED that no steps be taken to enforce this judgment until after the 1st day of June, 1950, and if the defendant's counter-claim has been delivered and filed, until after the said counter-claim as hereinafter mentioned has been adjudicated. Formal Judgment.

AND IT IS ORDERED that the defendant do deliver and file his counter-claim on or before the 1st. day of June, 1950, and that the plaintiffs do deliver and file their defence to counter-claim within ten days after the delivery of the counter-claim with liberty to the parties to file such further pleadings as may be necessary. **20**

AND IT IS ORDERED that if no counter-claim is delivered and filed as aforesaid the plaintiffs' costs be taxed and paid by the defendant to the plaintiffs but otherwise such costs shall be reserved to the Judge at the trial of the said counter-claim.

BY THE COURT,

H. BACCHUS,

Sworn Clerk and Notary Public

For Registrar.

No. 10.

1950 No. 4 British Guiana

In the
West
Indian
Court of
Appeal.

IN THE WEST INDIAN COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF BRITISH
GUIANA.

BETWEEN:—

JOHAN JOSEF FRANCOIS HUTT,

(Defendant) APPELLANT,

And,

BOOKER BROTHERS MC CONNELL AND COMPANY **10**
LIMITED, whose duly constituted attorney in the colony
of British Guiana is HENRY GEORGE SEAFORD, and
LEON SCHULER,

(Plaintiffs) RESPONDENTS.

Action No. 307 of 1950, Demerara.

NOTICE OF APPEAL MOTION

and TAKE NOTICE that this Court will be moved at the expira-
tion of twenty-eight days after this appeal has been set down
for hearing on a day at an hour of which you shall be informed
by the Registrar by Mr. L. M. F. Cabral, of counsel on the part
of the Appellant (Defendant) THAT the whole of the judgment
given in this action (No. 307 of 1950 Demerara) by His Honour
Frederick Malcolm Boland, Esquire, Chief Justice (acting) of
British Guiana, dated the 22nd. day of May, 1950, and entered on
the 27th. day of May, 1950, except the granting of leave to the
Appellant (Defendant) to file a counter-claim and the granting
of leave to the Respondents (Plaintiffs) to file a defence thereto,
with liberty to the appellant to apply for leave to file further
pleadings, may be reversed. **20**

AND THAT leave may be granted by this Court to the
Appellant to defend the said action and to file his Defence
and counter-claim if so desired by him, within such time as appears
just to this Court. **30**

AND THAT the Respondents be ordered to pay to the
Appellant his costs of this appeal.

AND FURTHER TAKE NOTICE that the following are the
grounds of the appeal:—

The learned trial judge erred in law and fact in not granting
to the Appellant leave to defend the said action and in giving
judgment for the Respondents for the sum claimed by them
(\$18,038.63) and costs, because: **40**

1. A proper triable issue was raised by the Appellant's
affidavit of defence, namely whether the Respondents were not
entitled to judgment against the appellant for the sum of
\$17,000.00, interest thereon and costs as claimed in the said action.
Inasmuch as the Respondents had sued the Appellant under a
written Agreement of the 12th February, 1949, by which Agree-
ment the Appellant had assigned to the Respondents a debt of
\$64,000.00 then owed to the Appellant by one J. A. Sue-A-Quan
under a different contract, and the aforesaid Agreement provided
that the said sum of \$17,000.00 and interest thereon should be
paid out of this sum of \$64,000.00 but the said J. A. Sue-A-Quan
subsequently failed through no fault of the Appellant to pay the **50**

No. 10.
Notice of
Appeal
Motion.

said sum of \$64,000.00 or any part thereof. Alternatively, this issue was wrongly decided.

In the
West
Indian
Court of
Appeal.

2. A second triable issue was duly raised — whether the said written Agreement did not truly represent the transaction agreed to by the parties, liability to the Respondents for two sums of \$17,000.00 being wrongly included in the said Agreement instead of for one sum of \$17,000.00, and counsel for the Appellant having contended that the Agreement was an entire indivisible and inter-dependent transaction. This was a double issue.

No. 10.
Notice of
Appeal
Motion.

10 Alternatively, it was wrongly decided.

3. Another triable issue was duly raised — whether the Respondents could in any event not be entitled in law or equity to specific performance of an agreement by the Appellant to purchase shares from the Respondent Schuler, that is to say, for an order to pay the agreed price of the shares, but only to damages equivalent to the difference between the contract price and the market price. Counsel for the Appellant objected that this would be un-liquidated damages not properly the subject of a specially indorsed writ. Alternatively, this issue was wrongly decided.

20 4. There was no evidence of the market price of the said shares or of the proper amount of the said un-liquidated damages.

5. Another triable issue was duly raised — whether the Respondent Booker Brothers McConnell and Company, Limited, could not be entitled to judgment for such damages or at all as an assignee as given by the learned trial judge. Alternatively, this issue was wrongly decided.

30 6. Another triable issue was duly raised — whether the said Agreement was not duly executed or ratified by Bel Air Hotel, Limited, a company incorporated in British Guiana, which was a very necessary party to the said Agreement in order that it should be binding on the Appellant.

7. The amount claimed was a large one and the Appellant has been wrongly deprived of an opportunity of being heard in his defence by a court of law.

Georgetown, Demerara.

Dated the 6th day of June, 1950.

H. B. FRASER,

Solicitor for the Appellant.

40 To: BOOKER BROTHERS McCONNELL & Co. Ltd.,
by their attorney Henry George Seaford, of Austin
House, 205 Camp Street, North Cummingsburg,
Georgetown, and

To: LEON SCHULER
of 313 East Street, Georgetown, and

To: JOSEPH EDWARD de FREITAS, Esquire, Solicitor
for both Respondents, c/o Messrs. Cameron &
Shepherd, 2 High Street, Newtown, Georgetown,
Demerara.

In the
West
Indian
Court of
Appeal.

BRITISH GUIANA.
IN THE WEST INDIAN COURT OF APPEAL.
No. 4 of 1950.

No. 11.
Reasons
for Judg-
ment.

Between:

JOHAN JOSEF FRANCOIS HUTT,
Appellant (Defendant)

and

C. Furness-
Smith, C.J.

BOOKER BROTHERS McCONNELL AND COMPANY
LIMITED, whose duly constituted attorney in the Colony
of British Guiana is HENRY GEORGE SEAFORD.

10

and

LEON SCHULER,
Respondents (Plaintiffs).

REASONS FOR DECISION:

This appeal was heard in British Guiana on the 19th, 20th and 21st February, 1951, and the judgment of the court was delivered on the 26th February, 1951, in the following terms:—

“We are satisfied that the property in the shares passed to the appellant on the execution of the agreement of the 12th February, 1949, and the signing of the transfer form by the vendor; and that the sale of the shares was thereby effectuated. We are also satisfied that the part of the agreement which imposed upon the appellant the obligation of paying for the shares was correctly regarded by the trial judge as separate and divisible from the remainder of the agreement. It follows that there was no triable issue upon which leave to defend might be granted to the appellant, and that the present appeal must be dismissed with costs.”

An application to admit an appeal from this decision to His Majesty in Council was granted on the 3rd April, 1951, and the then Chief Justice of British Guiana, who was one of the judges of the Court which heard this appeal, gave his reasons for the purposes of the present appeal on the 17th April, 1951. These reasons have now been communicated to me and I am in full agreement with them. I only desire to add this. It is clear both from the admission of the defendant-appellant in paragraph 3 of his affidavit of defence (page 15 of the record) and from the terms of the agreement of 12th February, 1949 (pages 21 to 27) — in particular the second and fourth recitals and paragraph 3 — that the intention of the agreement was, *inter alia*, to evidence the sale of the shares by Schuler to the defendant, and the assignment of the agreed price therefor by Schuler to the plaintiff-respondent. It was common ground that on the date of the agreement the vendor of the shares (Schuler) deposited a signed and stamped transfer of the shares (pages 62 and 63) with Mr. de Freitas who acted as solicitor for both vendor and purchaser. By virtue of paragraph 3 of the agreement this transfer was to be delivered to the purchaser either on the payment by him of two sums mentioned in the agreement (that is to say the purchase price of the shares and the sum of \$17,000 due by the Bel Air Hotel Limited to the vendor and assigned by him to the plaintiff) or on the passing of the mortgages mentioned in paragraph 2 of the agreement whichever should first happen. I appreciate that the effect of the provisions of paragraph 3 of the agreement is to make the sale of the shares a conditional rather than an absolute contract within the meaning of section 3 of the

- Sale of Goods Ordinance (Laws of British Guiana Volume II Chapter 65). The fulfilment of the condition was, however, wholly within the control of the defendant himself. Whether or not he had good grounds for repudiating his obligation under the agreement to pay the additional sum of \$17,000 due by the Bel Air Company to the vendor (Schuler), he had, by virtue of the transfer of the shares in that company by Schuler to himself, a controlling interest in the Bel Air Company, and could at any time fully effectuate the condition mentioned in paragraph 2 of the agreement. It is not, in my opinion, open to the purchaser to repudiate the contract by reason of the non-fulfilment of a condition which was in his own power to fulfil. That contention was not, in my view, a triable issue, nor was it presented as such in the proceedings before the trial judge. The gravamen of the appellant's case has always been that the agreement required him to pay a sum additional to the purchase price, but this sum is not claimed in the present proceedings. The truth appears to be that when he agreed to buy the shares he expected to obtain the money to pay for them from the proceeds of another transaction to which the vendor of the shares was not a party. The failure of that transaction cannot serve to relieve the purchaser of the obligation to pay the purchase price.

In the
West
Indian
Court of
Appeal.

No. 11.
Reasons
for Judgment.

C. Furness-Smith, C.J.

C. Furness-Smith,

(Chief Justice of Trinidad & Tobago),
President.

A TRUE COPY

M. R. Chase
for REGISTRAR (Ag.).

1950 No. 4 British Guiana.

In the
West
Indian
Court of
Appeal.

IN THE WEST INDIAN COURT OF APPEAL.
ON APPEAL FROM THE SUPREME COURT OF BRITISH
GUIANA.

No. 11.
Reasons
for Judgment.

Between:

JOHAN JOSEF FRANCOIS HUTT,
Appellant
(Defendant).

N. A.
Worley,
C.J.

and

BOOKERS BROTHERS McCONNELL **10**
AND COMPANY LIMITED, whose
duly constituted attorney in the
Colony of British Guiana is HENRY
GEORGE SEAFORD,

and

LEON SCHULER,
Respondents
(Plaintiffs).

REASONS FOR DECISION:

In this matter the trial judge, in the exercise of his discretion, refused leave to the appellant to defend on a specially indorsed writ endorsed with a claim for \$18,038.63 and has set out his reasons for so doing in the "Reasons for Decision" at pp. 84 to 93 of the record. I agree with those reasons and am of opinion that the appellant shewed no sufficient cause for this Court to interfere with the decision of the judge of first instance. **20**

It became apparent in the course of the argument before this Court that the appellant's real intention is to dispute the validity of the debt of \$17,000 said to be due to the respondent Schuler from the Bel Air Hotel: that however is a quite different case from the case put forward by the appellant in his affidavit asking for leave to defend and is, as we were informed by counsel for the appellant, the subject of other proceedings in the Supreme Court of the colony. But it is not, in my opinion, a matter of defence to the present claim. **30**

N. A. WORLEY,
Chief Justice
British Guiana.

April 17, 1951.

A TRUE COPY

M. R. Chase
for REGISTRAR (Ag.)

40

BRITISH GUIANA.

IN THE WEST INDIAN COURT OF APPEAL.

No. 4 of 1950.

In the
West
Indian
Court of
Appeal.

Between:

JOHAN JOSEF FRANCOIS HUTT,
Appellant (Defendant)

No. 11.

and

BOOKER BROTHERS McCONNELL AND
COMPANY LIMITED, whose duly constituted
attorney in the Colony of British Guiana is
HENRY GEORGE SEAFORD,

D. E.
Jackson,
C.J.

10

and

LEON SCHULER.
Respondents (Plaintiffs).

REASONS FOR DECISION.

I have had the advantage of reading the reasons for decision given by the President, the Chief Justice of Trinidad and Tobago, and the Chief Justice of British Guiana. I agree with them and there is nothing that I can usefully add.

20

D. E. JACKSON,
Chief Justice
Windward & Leeward Islands.

A TRUE COPY

M. R. Chase
for REGISTRAR (Ag.)

In the
West
Indian
Court of
Appeal.

FORMAL JUDGMENT.

1950, No. 4. British Guiana.

IN THE WEST INDIAN COURT OF APPEAL.

No. 12.
Formal
Judgment.

ON APPEAL FROM THE SUPREME COURT OF
BRITISH GUIANA.

Between:

JOHAN JOSEF FRANCOIS HUTT,
(Defendant) Appellant,

and

10

BOOKER BROTHERS McCONNELL AND COMPANY,
LIMITED, whose duly constituted attorney in the colony
of British Guiana is HENRY GEORGE SEAFORD, and
LEON SCHULER,
(Plaintiffs) Respondents.

Action No. 307 of 1950, Demerara.

BEFORE THEIR HONOURS:

SIR CECIL FURNESS-SMITH. Knight Chief Justice of Trinidad
and Tobago.

SIR NEWNHAM ARTHUR WORLEY, Knight Chief Justice of 20
British Guiana, and

MR. DONALD EDWARD JACKSON, Chief Justice of the
Leeward and Windward Islands.

MONDAY THE 26TH DAY OF FEBRUARY, 1951.

ENTERED THE 8TH DAY OF MARCH, 1951.

UPON READING the Notice of Motion on behalf of the
abovenamed appellant (defendant) dated the 6th day of June,
1950, and the judgment hereinafter mentioned AND UPON
HEARING, Mr. P. A. Cummings of counsel for the appellant and
Mr. H. C. Humphrys, K.C., of counsel for the respondents, IT 30
IS ORDERED that this appeal be dismissed and that the judg-
ment of the Honourable Frederick Malcolm Boland, the acting
Chief Justice of British Guiana, dated the 22nd day of May, 1950,
be affirmed, AND IT IS FURTHER ORDERED that the respon-
dents recover against the appellant the costs of this appeal to
be taxed.

BY THE COURT

Kenneth S. Stoby,
Registrar.

MRC
SC

ORDER ADMITTING APPEAL IN THE FIRST INSTANCE
TO HIS MAJESTY IN COUNCIL.

In the
West
Indian
Court of
Appeal.

1950 No. 4 British Guiana.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF
BRITISH GUIANA.

No. 13.
Order
admitting
in the first
instance
to His
Majesty in
Council.

Between:

10 JOHAN JOSEF FRANCOIS HUTT,
Appellant (Defendant),

and

BOOKER BROTHERS McCONNELL AND COMPANY
LIMITED, whose duly constituted attorney in the colony
of British Guiana is HENRY GEORGE SEAFORD, and
LEON SCHULER,

Defendants (Respondents).

Action No. 307 of 1950 (Demerara).

BEFORE HIS HONOUR THE CHIEF JUSTICE OF
BRITISH GUIANA (In Chambers).

20 TUESDAY THE 3RD. DAY OF APRIL, 1951.

ENTERED THE 28TH. DAY OF APRIL, 1951.

30 UPON the petition of Johan Josef Francois Hutt, preferred
unto this Court on the 14th day of March, 1951, AND UPON
READING the said petition and the affidavit by Henry Britton
Fraser, sworn to the 14th day of March, 1951, and filed herein,
AND UPON HEARING counsel for the petitioner and counsel
and solicitor for the respondents, IT IS ORDERED that the Appeal
herein to His Majesty in His Majesty's Privy Council be admitted
on condition Firstly, that the petitioner Johan Josef Francois
Hutt do give proper and sufficient security by bond with one or
more sureties to the satisfaction of the Registrar in the sum of
three hundred pounds sterling for any costs that may be awarded
to the respondents in any appeal that may be made by the
petitioner to His Majesty in His Majesty's Privy Council, THAT
the petitioner shall be at liberty instead of giving security by bond
to deposit in the Registry of Court the sum of three hundred
pounds sterling to abide any such costs of the respondents herein,
40 SECONDLY, that the petitioner do within one month from the
date of this order make an appointment with the Registrar for the
settlement of the record and give notice of the date of such
appointment to the respondents herein, AND THIRDLY, that the
petitioner shall within two months from the date of the settle-
ment of the record or from the date of the receipt of the reasons
for decision by the West Indian Court of Appeal whichever shall
be the later date complete the preparation of typed copies of the
record. Liberty to all parties generally to apply.

BY THE COURT
Kenneth S. Stoby,
Registrar.

50 A TRUE COPY
M. R. Chase
Sworn Clerk and Notary Public.

No. 14.

In the
West
Indian
Court of
Appeal.

RECEIPT FOR \$1,440.00 (£300) DEPOSITED TO ABIDE
COSTS OF RESPONDENTS.

No. 14
Receipt
for \$1,440
(£300)
deposited
to abide
costs of
Respon-
dents.

No. 24260 E

DUPLICATE.

British Guiana.

Registry Department.

22/5/1951. H.B.

Received from J. J. F. Hutt, Esqr., the sum of One thousand, four hundred and forty xx[100 Dollars being amount deposited in the Registry of Court to abide any costs of the respon- **10**
dent in the Appeal to His Majesty's Privy Council by the said J. J. F. Hutt against Booker Brothers McConnell & Co., Ltd. Leon Schuler pursuant to Order of the W. I. Court of Appeal d/d. 3.4.51 in No. 4 of 1950 British Guiana.

H.B.

C.McH.

\$1,440:—

John W. Ramao,
for Colonial Treasurer.

Initials of Officer drawing Receipt.

Stamps

20

Seal.

Certified A True Copy

H. Bacchus
Deputy Registrar (Acting)

19th July, 1951.

No. 15

ORDER FINALLY ADMITTING APPEAL TO HIS
MAJESTY IN COUNCIL.

1950, No. 4. British Guiana

In the
West
Indian
Court of
Appeal.

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL FROM THE SUPREME COURT OF
BRITISH GUIANA.

No. 15.

Order
finally
admitting
Appeal
to His
Majesty in
Council.

Between:

10

JOHAN JOSEF FRANCOIS HUTT,
Appellant (Defendant),

and

BOOKER BROTHERS McCONNELL AND COMPANY,
LIMITED, whose duly constituted attorney in the colony
of British Guiana is HENRY GEORGE SEAFORD, and
LEON SCHULER,

Respondents (Plaintiffs).

BEFORE THE HONOURABLE THE CHIEF JUSTICE OF
BRITISH GUIANA (Acting).

TUESDAY THE 18TH DAY OF SEPTEMBER, 1951.

20 ENTERED THE 20TH DAY OF SEPTEMBER, 1951.

UPON the petition of Johan Josef Francois Hutt, preferred unto this Court on the 7th day of September, 1951, praying for an Order finally admitting his appeal to His Majesty in Council AND UPON READING the said petition and the affidavit of Henry Britton Fraser, Solicitor, sworn to the 6th day of September, 1951, and filed herein, AND UPON HEARING Counsel for the petitioner and Counsel for the respondents, IT IS ORDERED that the said appeal to His Majesty in Council be and the same is hereby finally admitted. Liberty to all parties to apply.

30

BY THE COURT.

A Singh
Registrar (Ag.)

A TRUE COPY.

M. R. Chase
Sworn Clerk & Notary Public.

STATUTORY ENACTMENTS.

BRITISH GUIANA.

RULES OF COURT MADE BY THE CHIEF JUSTICE OF
BRITISH GUIANA AND A PUISNE JUDGE IN PURSU-
ANCE AND EXECUTION OF THE POWERS GIVEN BY
THE SUPREME COURT OF JUDICATURE ORDINANCE
(Ch. 10) AND THE SUPREME COURT ORDINANCE,
1930 (No. 25) AND OF ALL OTHER POWERS AND
AUTHORITIES ENABLING THEM IN THAT BEHALF.

- Short title I. (1) These Rules may be cited as the Rules of Court, 1932, and shall be construed with the Rules of Court, 1900, hereinafter referred to as the Principal Rules, which shall have effect as amended by these Rules. **10**
- Meaning of solicitors. (2) In these Rules a solicitor means a solicitor or a barrister acting as a solicitor.
- Order III. II. Order III. in Part I. of the Principal Rules is hereby amended —
- (a) by deleting Rule 2 thereof;
- (b) by adding the following at the end of Rule 6 thereof;—
 “and shall be tested in the name of the Chief Justice or acting Chief Justice, or, if there be no Chief Justice or Acting Chief Justice in the Colony, in the name of a Puisne Judge”; and **20**
- (c) by substituting the words “left at the Registry” for the word “presented” in the second line of Rule 8 thereof.
- Order IV. III. Order IV. in Part I. of the Principal Rules is hereby amended —
- (a) by substituting the following for Rule 6 thereof:—
6. In actions —
- (1) Where the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant, with or without interest, with or without a claim for a declaration that an opposition is just, legal and well founded and for an injunction restraining the passing of a transport, mortgage or lease or of a surrender, transfer or assignment of a lease, arising **30**
- (i) upon a contract, express or implied (as for instance, on a bill of exchange, promissory note or cheque, or other simple contract debt); or
- (ii) on a bond or contract under seal for payment of a liquidated amount of money; or **40**
- (iii) on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt other than a penalty; or
- (iv) on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand; or
- (v) on a trust; or
- (2) Where a landlord seeks to recover possession of land, or of a building, or part of a building, with or without a claim for rent or mesne profits, against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant; or **50**
- Special Indorsement.

(3) Where the plaintiff seeks to recover possession of a specific chattel or its value with or without a claim (a) for the hire thereof or (b) for damages for its detention; or

(4) Where the plaintiff seeks to recover any money due on a mortgage with or without a claim for the foreclosure of the mortgage in the terms thereof;

the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled. Such special indorsement may be to the effect of such of the forms in Appendix A., Part II. as shall be applicable to the case or in a similar form; and

(b) by adding the following at the end of Rule 7 thereof:—

The amount of costs to be indorsed on a writ of summons under this rule shall not exceed —

(i) where not more than \$250 is claimed \$28

(ii) where more than \$250 but not more than \$500 is claimed .. \$38

(iii) where more than \$500 is claimed \$53 together with such additional allowances, if any, as are provided for in Scale III, in Appendix 1.

IV The following is hereby added as Rule 3 of Order V. in Part I. of the Principal Rules:—

Order V.

3. In all cases where proceedings are commenced otherwise than by writ of summons, the preceding Rules of this Order shall apply to the document by which such proceedings shall be originated as if it were a writ of summons.

Proceedings commenced otherwise than by writ.

V. Rule 3 of Order VI. and Rule 14 of Order X. in Part I. of the Principal Rules are hereby revoked.

Orders VI and X.

VI. Order XII. in Part I. of the Principal Rules is hereby revoked and the following substituted therefor:—

Order XII.

ORDER XII.

PROCEEDINGS WHERE WRIT SPECIALLY INDORSED.

1. Where a writ has been specially indorsed in accordance with the provisions of Order IV., Rule 6, the parties shall appear at the time named in the writ before a Judge of the Court.

Parties to appear before a Judge.

The appearance of the defendant shall be deemed to be an entry of appearance in the action.

2. (a) If both the plaintiff and the defendant appear or the plaintiff appears and the defendant does not appear, the plaintiff may on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to the Judge for final judgment.

Judgment on writ specially indorsed under O IV., r 6.

(1) for the amount so indorsed, together with interest, if any; or

(2) for the amount so indorsed together with interest, if any, and with a declaration that an opposition is just, legal and well-founded and with an injunction restraining the passing of a transport, mortgage or lease or of a surrender, transfer or assignment of a lease, as the case may be; or

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- (3) for the recovery of the land or building or part of a building (with or without rent or mesne profits); or
 - (4) for the delivery up of a specific chattel; or
 - (5) for the amount due under the mortgage with or without an order of foreclosure as the case may be;
- and costs.

The Judge may thereupon, unless the defendant by affidavit, shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, give judgment for the plaintiff accordingly. When the writ is indorsed with a claim for mesne profits or for detention with a claim for pecuniary damages or for the value of the chattel the Judge may assess the amount on affidavit or such other evidence as he may require, and give judgment accordingly. If the Judge is of opinion that the defendant has a good defence or ought to be permitted to defend, he shall give leave to defend. 10

(b) If on any hearing under this Rule it shall appear that any claim which could not have been specially indorsed under Order IV. Rule 6, has been included in the indorsement on the writ, the Judge may, if he shall think fit, forthwith amend the indorsement by striking out such claim, or may deal with the claim specially indorsed as if no other claim had been included in the indorsement, and allow the action to proceed as respects the residue of the claim. 20

(c) Where the plaintiff's claim is for the delivery up of a specific chattel (with or without a claim for the hire thereof or for damages for its detention) the Judge may make an Order for the delivery up of the chattel without giving the defendant any option of retaining the same upon paying the assessed value thereof, and such order, if not obeyed, may be enforced by a writ of attachment or a writ of delivery. 30

3. (a) If the defendant, or any defendant if there be more defendants than one, desire to show cause against the application for final judgment he shall, not later than noon of the day (not being a Sunday or a public holiday) immediately preceding that fixed by the writ of summons for the appearance of the defendant, file an affidavit. Defendant may show cause.

(b) The affidavit shall state whether the defence alleged goes to the whole or to part only, and (if so) to what part of the plaintiff's claim and shall contain a memorandum of the address for service of the defendant, which shall be some proper place within one mile of the office of the Registrar. 40

(c) The defendant shall, forthwith after filing the affidavit, serve a copy thereof, containing such memorandum as aforesaid, on the plaintiff.

(d) The Judge may, if he thinks fit, order the defendant, or in the case of a corporation any officer thereof, to attend and produce any leases, deeds, books, or documents, or copies or extracts therefrom. 50

4. If it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part Judgment for part of claim.

thereof into Court by the Marshal, the taxation of costs, or otherwise, as the Judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim.

5. If it appears to the Judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to final judgment against the latter, and may issue execution upon such judgment without
10 prejudice to his right to proceed with his action against the former.
6. Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the Judge may think fit.
7. Where leave, whether conditional or unconditional, is given to defend, the Judge shall have power to give all such directions as to the further conduct of the action as he may think fit including directions that there be no further pleadings, as to the place and mode of trial, as to the action being tried speedily, and as to interlocutory applications, and may order the action to be forthwith set down for trial.
8. If neither the plaintiff nor the defendant appears at the time named in the writ, the action shall be struck off, and no further proceedings shall be had under the writ unless the Judge shall, on the application of the plaintiff direct that the action be placed again upon the List either for the same or for any subsequent day; but the action shall not be replaced on the List for any subsequent day except with the consent of the defendant.
9. If at the time named in the writ the defendant appears but the plaintiff does not appear, the Judge may on the application of the defendant give judgment dismissing the action.
10. (a) The costs of and incident to all applications under this Order shall be dealt with by the Judge at the hearing, who shall order by and to whom, and when the same shall be paid, or may refer them to the Judge at the trial.
- Provided that in case no trial afterwards takes place, or no order as to costs is made, the costs are to be costs in the cause.
- (b) If the plaintiff applies for final judgment under this
40 Order where the case is not within the Order, the application may be dismissed with costs to be paid forthwith by the plaintiff.
11. Any judgment given in default of appearance of plaintiff or defendant under the provisions of this Order may be set aside or varied by the Court or a Judge on the application of the party against whom the judgment was given on such terms as to the payment of costs or otherwise as may be just.

Where one defendant has good defence and other not,

Leave to defend.

Directions as to trial.

Non-appearance of parties.

Defendant appears but plaintiff does not.

Costs.

Setting aside judgment by default.

CHAPTER 65

SALE OF GOODS.

[No. XXVI of 1913.]

[1st January, 1914.]

PART I.

Short title. 1. This Ordinance may be cited as the *Sale of Goods Ordinance*.

Interpreta- 2.—(1) In this Ordinance, unless the context or subject
tion. matter otherwise requires. —

“action” includes counterclaim and set off; 10

“buyer” means a person who buys or agrees to buy goods;

“contract of sale” includes an agreement to sell as well as a sale;

“delivery” means voluntary transfer of possession from one person to another;

“document of title to goods” shall include any bill of lading, dock warrant, warehouse keeper’s certificate, wharf warrant and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possession of the document to transfer or receive goods thereby represented; 20

“fault” means wrongful act or default;

“future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale;

“goods” includes all movables except money, and includes growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale; 30

“lien” includes the right of retention;

“property” means the general property in goods, and not merely a special property;

“quality of goods” includes their state or condition;

“sale” includes a bargain and sale as well as a sale and delivery;

“seller” means a person who sells or agrees to sell goods;

“specific goods” means goods identified and agreed upon at the time a contract of sale is made; 40

“warranty” means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of that contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

(2) A thing is deemed to be done “in good faith” within the meaning of this Ordinance when it is in fact done honestly, whether it be done negligently or not. 50

(3) A person is deemed to be insolvent within the meaning of this Ordinance who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not.

(4) Goods are in "a deliverable state" within the meaning of this Ordinance when they are in such a state that the buyer would under the contract be bound to take delivery of them.

FORMATION OF THE CONTRACT.

Contract of Sale.

- 3.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another. **Sale and agreement to sell.**
- 10 (2) A contract of sale may be absolute or conditional.
- (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.
- (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.
- 20 4.—(1) Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property: **Capacity to buy and sell:**
- Provided that where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. **Proviso.**
- (2) Necessaries in this section mean goods suitable to the condition in life of the infant or other person, and to his actual requirements at the time of the sale and delivery. **Necessaries.**

Formalities of the Contract.

- 30 5. Subject to the provisions of this Ordinance and of any Ordinance in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties, but nothing in this section shall affect the law relating to corporations. **Contract of sale, how made.**
- 40 6.—(1) A contract for the sale of any goods of the value of forty-eight dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive that part, or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf. **Contract of sale for forty-eight dollars and upwards.**
- (2) The provisions of this section apply to every contract aforesaid notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the goods fit for delivery.
- 50 (3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

Subject Matter of Contract.

- 7.—(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the **Existing or future goods.**

seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Ordinance called "future goods."

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods the contract operates as an agreement to sell the goods.

Goods which have perished.

8. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void. 10

Goods perishing before sale but after agreement to sell.

9. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

The Price.

Ascertainment of price.

10.—(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. 20

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price, and what is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Agreement to sell at valuation:

11.—(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and the third party cannot or does not make the valuation, the agreement is avoided:

Proviso.

Provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor. 30

(2) Where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Conditions and Warranties.

Stipulations as to time.

12.—(1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. 40

(2) In a contract of sale "month" prima facie means calendar month.

When condition to be treated as warranty.

13.—(1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of the condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(2) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract. 50

(3) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

10 (4) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

14. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

Implied condition and warranties.

- (a) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell that he will have a right to sell the goods at the time when the property is to pass;
- 20 (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;
- (c) an implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

15. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Sale by description.

16. Subject to the provisions of this Ordinance and of any Ordinance in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

Implied condition as to quality or fitness:

- (a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose, provided, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;
- 40 (b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality.
- 50 Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which the examination ought to have revealed;
- (c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
- (d) an express warranty or condition does not negative a warranty or condition implied by this Ordinance unless inconsistent therewith.

Proviso.

Sale by Sample.

Sale by
sample.

17.—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample, there is an implied condition—

- (a) that the bulk shall correspond with the sample in quality;
- (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
- (c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. 10

PART II.

EFFECTS OF THE CONTRACT.

Transfer of Property as between Seller and Buyer.

Goods
must be
ascertained.

18. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Property
passes
when in-
tended to
pass.

19.—(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at the time at which the parties to the contract intend it to be transferred. 20

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Rules for
ascertain-
ing inten-
tion.

20. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule one.—Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed. 30

Rule two.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until that thing is done and the buyer has notice thereof.

Rule three.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until that act or thing is done, and the buyer has notice thereof. 40

Rule four.—When goods are delivered to the buyer on approval, or “on sale or return,” or other similar terms, the property therein passes to the buyer—

- (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
- (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, and, if no time has been fixed, on the expiration of 50

a reasonable time, and what is a reasonable time is a question of fact.

10 Rule five.—(a) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and that assent may be expressed or implied and may be given either before or after the appropriation is made.

(b) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

20 21.—(1) Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In that case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

Reserva-
tion
of right of
disposal.

30 (2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

40 22. Unless otherwise agreed, the goods remain at the seller's risk, until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not:

Risk prima
facie
passes
with pro-
perty:

Provided that—

(a) where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for that fault; and

(b) nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

Proviso:

Transfer of Title.

50 23.—(1) Subject to the provisions of this Ordinance, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Sale by
person not
the owner.

(2) Nothing in this Ordinance shall affect—

- Chapter 121. (a) the provisions of the Law of Merchant Shipping Ordinance, or any enactment, enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;
- (b) the validity of any contract of sale under any special common law or statutory power of sale, or under the order of a court of competent jurisdiction.
- Goods sold in public market. **24.** Where goods are sold in any public market held under the authority of the Government or otherwise in accordance with the law according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. **10**
- Sale under voidable title. **25.** When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.
- Revesting of property in stolen goods on conviction of offender. **26.—(1)** Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in public market or otherwise. **20**
- (2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in those goods shall not revert in the person who was the owner of the goods or his personal representative by reason only of the conviction of the offender.
- Seller or buyer in possession after sale. **27.—(1)** Where a person having sold goods continues or is in possession of the goods, or of the documents of title thereto, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving them in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make it. **30**
- (2) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving them in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. **40**
- (3) In this section the term "mercantile agent" means a mercantile agent having, in the customary course of his business as that agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods. **50**
- Effect of writs of execution. **28.** A writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the marshal or bailiff to be executed; and, for the better manifestation of that time, it shall be the duty of the marshal or bailiff, without fee, upon the receipt of the writ to indorse upon the back thereof the hour, day, month, and year when he received it:

Provided that the writ shall not prejudice the title to the goods acquired by any person in good faith and for valuable consideration, unless that person had, at the time when he acquired his title, notice that the writ, or any other writ by virtue of which the goods of the execution debtor might be seized or attached, had been delivered to, and remained unexecuted in the hands of, the marshal or bailiff. Proviso.

PART III.

PERFORMANCE OF THE CONTRACT.

- 10** **29.** It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale. Duties of seller and buyer.
- 30.** Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods. Payment and delivery are concurrent conditions.
- 20** **31.—**(1) Whether it is for the buyer to take possession of the goods, or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from the contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Rules as to delivery:
- Provided that, if the contract be for the sale of specific goods, which, to the knowledge of the parties when the contract is made, are in some other place, then that place is the place of delivery. Proviso.
- 30** (2) Where under the contract or sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.
- (3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until the third person acknowledges to the buyer that he holds the goods on the buyer's behalf, but nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.
- 40** (4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour, and what is a reasonable hour is a question of fact.
- (5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.
- 50** **32.—**(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate. Delivery of wrong quantity.
- (2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.
- (3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of different description not included in the contract, the buyer may accept the goods which are in accordance with the contract, and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

Instal-
ment de-
liveries.

33.—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated. 10

Delivery to
carrier.

34.—(1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer. 20

(2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits to do so and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at ~~the~~ risk during that transit. 30

Risk where
goods are
delivered
at distant
place.

35. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

Buyer's
right of
examining
the goods.

36.—(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. 40

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Accept-
ance.

37. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. 50

Buyer not
bound to
return
rejected
goods.

38. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them. 60

39. When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after that request take delivery of the goods he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods:

Liability of buyer for neglecting or refusing delivery of goods:

Provided that nothing in this section shall effect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

Proviso.

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PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

40.—(1) The seller of goods is deemed to be an “unpaid seller” within the meaning of this Ordinance —

Unpaid seller defined.

- (a) when the whole of the price has not been paid or tendered;
- (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

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(2) In this part of this Ordinance the term “seller” includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

41.—(1) Subject to the provisions of this Ordinance, and of any Ordinance in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

Unpaid seller's rights.

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- (a) a lien on the goods or right to retain them for the price while he is in possession of them;
- (b) in case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them;
- (c) a right of re-sale as limited by this Ordinance.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

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UNPAID SELLER'S LIEN.

42.—(1) Subject to the provisions of this Ordinance, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

Seller's lien.

- (a) where the goods have been sold without any stipulation as to credit;
- (b) where the goods have been sold on credit, but the term of credit has expired;
- (c) where the buyer becomes insolvent.

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(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Part delivery.

43. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless the part delivery has been made in circumstances showing an agreement to waive the lien or right of retention.

Termination of lien.

44.—(1) The unpaid seller of goods loses his lien or right of retention thereon—

- (a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods; **10**
- (b) when the buyer or his agent lawfully obtains possession of the goods;
- (c) by waiver thereof.

(2) The unpaid seller of goods having a lien or right of retention thereon does not lose his lien or right of retention by reason only that he has obtained judgement or decree for the price of the goods.

STOPPAGE IN TRANSITU.

Right of stoppage in transitu.

45. Subject to the provisions of this Ordinance, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price. **20**

Duration of transit.

46.—(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from the carrier or other bailee.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end. **30**

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back. **40**

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent to the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless the part delivery has been made in circumstances showing an agreement to give up possession of the whole of the goods. **50**

47.—(1) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. How stoppage in transitu is effected.

(2) That notice may be given either to the person in actual possession of the goods or to his principal; in the latter case the notice, to be effectual, must be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(3) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller, and the expenses of the re-delivery must be borne by the seller.

RE-SALE BY BUYER OR SELLER.

48. Subject to the provisions of this Ordinance, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale or other disposition of the goods which the buyer has made, unless the seller has assented thereto : Effect of sub-sale or pledge by buyer:

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if the last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if the last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien, or retention, or stoppage in transitu, can only be exercised subject to the rights of the transferee. Proviso.

49.—(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien, or retention, or stoppage in transitu. Sale not generally rescinded by lien or stoppage in transitu.

(2) Where an unpaid seller who has exercised his right of lien, or retention, or stoppage in transitu, re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V.

50 ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

50.—(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for them according to the terms of the contract, the seller may maintain an action against him for their price. Action for price.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay it, the seller may maintain an action for it, although the property in the goods has not passed and the goods have not been appropriated to the contract.

Damages
for non-
acceptance.

51.—(1) Where, the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. **10**

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Remedies of the Buyer.

Damages
for non-
delivery.

52.—(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. **20**

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver. **30**

Specific
perform-
ance.

53.—(1) In any action for breach of contract to deliver specific or ascertained goods, the court may if it thinks fit, on the application of the plaintiff, by its judgement or decree direct that the contract shall be performed specifically without giving the defendant the option of retaining the goods on payment of damages.

(2) The judgement or decree may be unconditional, or upon terms and conditions as to damages, payment of the price, and otherwise, to the court seeming just, and the application by the plaintiff may be made at any time before judgement or decree. **40**

Remedy
for breach
of war-
ranty.

54.—(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of that breach of warranty entitled to reject the goods; but he may—

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty. **50**

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from that breach.

(3) In the case of breach of warranty of quality that loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty on diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

55. Nothing in this Ordinance shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages are recoverable, or to recover money paid where the consideration for the payment of it has failed.

Interest and special damages.

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PART VI.

SUPPLEMENTARY.

56. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

Exclusion of implied terms and conditions.

57. Where, by this Ordinance, any reference is made to a reasonable time the question what is a reasonable time is a question of fact.

Reasonable time a question of fact.

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58. Where any right, duty, or liability is declared by this Ordinance, it may, unless otherwise by this Ordinance provided, be enforced by action.

Rights and duties, enforceable by action.

59. In the case of a sale by auction,--

Auction sales.

(a) where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale;

(b) a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner, and until that announcement is made any bidder may retract his bid;

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(c) where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, the seller may not bid himself or employ any person to bid at the sale, nor may the auctioneer knowingly take any bid from the seller or that person, and any sale contravening this rule may be treated as fraudulent by the buyer;

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(d) a sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller;

(e) where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

60.—(1) The rules in insolvency relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Ordinance contained.

Savings.

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(2) The rules of the English law, including the law merchant, except in so far as they are inconsistent with the express provisions of this Ordinance, and in particular the rules relating to the law of principal and agent, warranty, suretyship, and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall apply to contracts for the sale of goods, and the rules of the Roman Dutch law shall not apply.

(3) The provisions of this Ordinance relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.