el unable to say how the jury, unassisted by the Occurrence Book, would have A
egarded such conflict as there was between the evidence of the two police
onstables or to what extent such conflict considered in the light of the appel-
ant's unsworn statement might or might not have made a verdict of not guilty
murder possible.

We think that in the circumstances the conviction should not stand and the
ppeal is therefore allowed, the conviction and sentence set aside and a new B
ial is ordered.

In view of the course we have taken, it is unnecessary and, indeed, un-
esirable to deal with the other grounds of appeal.

Appeal allowed; new trial ordered.

A

ABRAMS *v.* THE MEMBERS OF THE GOVERNING BODY OF ANGLICAN SCHOOLS IN BRITISH GUIANA AND OTHERS

B [SUPREME COURT OF BRITISH GUIANA (Luckhoo, Ag. C.J.), January 12, 15, 21, February 3, April 23, 1960]

Crown servant—Claim against Director of Education in his official capacity—Whether maintainable.

Education—Aided primary school—Employment of teachers—Dismissal—Act done in execution of office under Education Ordinance [B.G.]—Justices
C *Protection Ordinance, Cap. 18 [B.G.], s. 8 (1), (2), s. 14.*

Education—Certificated teacher—Dismissal by employers after conviction on criminal charge—Whether dismissal a nullity or wrongful—Education Ordinance, Cap. 91 [B.G.], and Education Code [B.G.], regs. 51, 52, 55, 59.

On May 1, 1954, the plaintiff was employed by the Members of the Governing Body of Anglican Schools in British Guiana, the first-named defendants, as an
D assistant teacher of their school at Cane Grove, in the county of Demerara. The employment of the plaintiff was subject to the provisions of the Education Code [B.G.], regulations made under the provisions of the Education Ordinance, Cap. 91 [B.G.]. Under the Education Code the appointment, terms of employment, payment, promotion, transfer and termination of employment of teachers rest directly with the first-named defendants subject to the
E prior approval of the Director of Education, the second-named defendant. On July 21, 1954, the plaintiff was convicted on a summary charge of being in possession of prohibited publications, contrary to s. 4 of the Undesirable Publications (Prohibition of Importation) Ordinance, 1952 [B.G.], and was fined $25 or one month's imprisonment in default of payment of that fine. The plaintiff subsequently appealed against his conviction but later abandoned his
F appeal and paid the fine. Shortly thereafter the plaintiff was dismissed by the first-named defendants with the approval of the second-named defendant, the ground of the plaintiff's dismissal being given as his conviction on the abovementioned charge. Notification of his dismissal was given the plaintiff on January 10, 1955, by the third-named defendant, the manager of the school. The plaintiff brought this action against the defendants claiming *inter alia* a
G declaration that his dismissal was null and void, an injunction in the usual terms and in the alternative damages for wrongful dismissal. The writ of summons in the action was filed more than six months after the plaintiff was dismissed. At the hearing of the action the plaintiff did not pursue his claim against the third-named defendant.

Held: (i) the second-named defendant, the Director of Education, is a Crown
H servant and no action lies against a Crown servant in his official capacity whether for a declaration or for any other remedy. The claim against the second-named defendant therefore failed.

(ii) the employment and dismissal of teachers was a necessary incident in the performance by the first-named defendants of a statutory duty in the control and management of their school. The dismissal of the plaintiff was, therefore,
I an act done in the execution of their office under and by virtue of the Education Ordinance, Cap. 91 [B.G.], and the defendants were therefore entitled to the protection of the Justices Protection Ordinance, Cap. 18 [B.G.]. As no notice of intended action as required by s. 8 (2) of the latter Ordinance was given the defendants and, further, as the action was not commenced within six calendar months next after the dismissal of the plaintiff as required by s. 8 (1) of that Ordinance, the action against the defendants failed.

(iii) although the second-named defendant's contract with the plaintiff was

not one merely of master and servant, the plaintiff was validly dismissed and his claim for the declarations and injunctions and his alternative claim for damages must therefore fail.

Vine v. *National Dock Labour Board* (18) and *Barber* v. *Manchester Regional Hospital Board* (19) considered.

Judgment for the defendants.

Cases referred to:

(1) *Raleigh* v. *Goschen*, [1898] 1 Ch. 73; 67 L.J.Ch. 59; 77 L.T. 429; 46 W.R. 90; 14 T.L.R. 36; 42 Sol. Jo. 46; 38 Digest 63, *379*.

(2) *Hutton* v. *Secretary of State for War* (1926), 43 T.L.R. 106; 38 Digest 63, *381*.

(3) *Hosier Brothers* v. *Derby (Earl)*, [1918] 2 K.B. 671; 87 L.J.K.B. 1009; 119 L.T. 351; 34 T.L.R. 477, C.A.; 16 Digest 237, *324*.

(4) *Bombay & Persia Steam Navigation Co.* v. *Maclay*, [1920] 3 K.B. 402; 90 L.J.K.B. 152; 124 L.T. 602; 15 Asp.M.L.C. 283; 38 Digest 63, *385*.

(5) *Carltona, Ltd.* v. *Works Comrs.*, [1943] 2 All E.R. 560, C.A.; 2nd Digest Supp.

(6) *Master Ladies Tailors Organisation* v. *Minister of Labour & National Service*, [1950] 2 All E.R. 525; 66 (Pt. 2) T.L.R. 728; 94 Sol. Jo. 552; 2nd Digest Supp.

(7) *McManus* v. *Bowes*, [1937] 3 All E.R. 227; [1938] 1 K.B. 98; 107 L.J.K.B. 51; 157 L.T. 385; 101 J.P. 455; 53 T.L.R. 844; 81 Sol. Jo. 497; 35 L.G.R., C.A.; Digest Supp.

(8) *Bradford Corpn.* v. *Myers*, [1916] 1 A.C. 242; 85 L.J.K.B. 146; 114 L.T. 83; 80 J.P. 121; 32 T.L.R. 113; 60 Sol. Jo. 74; 14 L.G.R. 130, H.L.; *affg.* S.C. *sub nom. Myers* v. *Bradford Corpn.*, [1915] 1 K.B. 417, C.A.; 38 Digest 110, *784*.

(9) *Davies* v. *Swansea Corpn.* (1853), 8 Exch. 808; 22 L.J.Ex. 297; 17 J.P. 649; 155 E.R. 1579; 38 Digest 108, *779*.

(10) *Clarke* v. *Lewisham Borough Council* (1902), 67 J.P. 195; 19 T.L.R. 62; 1 L.G.R. 63; 38 Digest 109, *781*.

(11) *Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449; 73 L.J.Ch. 777; 91 L.T. 739; 68 J.P. 510; 52 W.R. 617; 20 T.L.R. 643; 48 Sol. Jo. 620; 2 L.G.R. 1229; 38 Digest 109, *783*.

(12) *Lyles* v. *Southend-on-Sea Corpn.*, [1905] 2 K.B. 1; 74 L.J.K.B. 484; 92 L.T. 568; 69 J.P. 193; 21 T.L.R. 389; 3 L.G.R. 691, C.A.; 38 Digest 102, *733*.

(13) *Griffiths* v. *Smith*, [1941] 1 All E.R. 66; [1941] A.C. 170; 110 L.J.K.B. 156; 164 L.T. 386; 105 J.P. 63; 57 T.L.R. 185; 85 Sol. Jo. 176; 39 L.G.R. 1, H.L.; 2nd Digest Supp.

(14) *Turburville* v. *West Ham Corpn.*, [1950] 2 All E.R. 54; [1950] 2 K.B. 208; 114 J.P. 320; 66 (pt. 1) T.L.R. 1155; 94 Sol. Jo. 337; 48 L.G.R. 594, C.A.; 2nd Digest Supp.

(15) *Clayton* v. *Pontypridd Urban Council*, [1918] 1 K.B. 219; 87 L.J.K.B. 645; 118 L.T. 219; 82 J.P. 246; 16 L.G.R. 141; 38 Digest 108, *777*.

(16) *Graigola Merthyr Co., Ltd.* v. *Swansea Corpn.*, [1928] Ch. 31; 97 L.J.Ch. 129; 43 T.L.R. 600; 71 Sol. Jo. 681; *affd.*, [1928] Ch. 235, C.A.; [1929] A.C. 344, H.L.; Digest Supp.

(17) *White* v. *Georgetown Town Clerk*, [1939] L.R.B.G. 144.

(18) *Vine* v. *National Dock Labour Board*, [1956] 3 All E.R. 939; [1957] A.C. 488; 101 Sol. Jo. 86; [1956] 2 Lloyd's Rep. 567, H.L.; 3rd Digest Supp.

(19) *Barber* v. *Manchester Regional Hospital Board*, [1958] 1 All E.R. 322; 122 J.P. 124; 102 Sol. Jo. 140; 3rd Digest Supp.

Action arising out of the dismissal of the plaintiff from employment as a

certificated assistant teacher in a government-aided primary school by the governing body of that school. The plaintiff claimed that his dismissal was unlawful, null and void and that the action of the second-named defendant, the Director of Education, in approving the dismissal of the plaintiff was unlawful, *ultra vires*, null and void. The plaintiff also sought an injunction restraining the defendants from preventing the plaintiff from exercising his duties as a certificated assistant teacher at the school and an injunction restraining the defendants from dismissing him or interdicting him from his post as a certificated assistant teacher at that school or at any other suitable primary school within British Guiana. In the alternative the plaintiff claimed damages for wrongful dismissal.

L. F. S. Burnham and *Dr. F. H. W. Ramsahoye* for the plaintiff.

J. H. S. Elliott for the first- and third-named defendants.

S. S. Ramphal, Solicitor-General, for the second-named defendant.

LUCKHOO, Ag. C.J.: This is a claim by the plaintiff against the defendants jointly and severally for—

(a) a declaration that the dismissal of the plaintiff by the third-named defendant Jones from his employment as a second-class certificated assistant teacher at the Cane Grove Anglican School was unlawful, null and void;

(b) an injunction restraining the defendants from preventing the plaintiff from exercising his duties as such second-class certificated assistant teacher at the Cane Grove Anglican School;

(c) $10,000 as damages for wrongful dismissal;

(d) a declaration that the action of the first-named defendants the members of the Governing Body of Anglican Schools in British Guiana and/or the second-named defendant the Director of Education in adopting and/or ratifying and/or acquiescing in the third-named defendant's dismissal of the plaintiff was unlawful, *ultra vires*, null and void;

(e) an injunction restraining the defendants and every of them from dismissing or interdicting the plaintiff from his post as a second-class certificated teacher at Cane Grove Anglican School or any other suitable primary school within the Colony.

A statement of agreed facts was filed in the action on March 5, 1957, and at the hearing before me it was agreed by counsel for all parties that this statement would take the place of and be in substitution for evidence on oath and the hearing of the action proceeded on that basis.

Counsel for the plaintiff at the hearing abandoned all claim to an award of special damages.

The statement of agreed facts filed is as follows:

AGREED FACTS

1. The first-named defendants are and were at all material times the governing body, and in control, of the Anglican Schools, including the Cane Grove Anglican School, in the colony of British Guiana.

2. The third-named defendant was nominated manager of the said Cane Grove Anglican School by the first-named defendants and was at all material times so acting, the first-named defendants having delegated to him all their powers in regard to the said school except the appointment or termination of appointment of head teachers and first assistant teachers of which delegation the first-named defendants informed the second-named defendant in writing.

3. The plaintiff was by letter of appointment dated March 22, 1954, and signed by the third-named defendant appointed as from May 1, 1954, a Class II assistant teacher at Cane Grove Anglican School, an aided school in the county of Demerara. The said appointment was approved by the second-named defendant, and was not an appointment of a head or first assistant teacher.

4. The said letter of appointment was in the following terms: A

"*ASSISTANTS*

Address: St. Mark's Vicarage
Enmore
22nd March, 1954

Circular letter
No.

Cane Grove Anglican School

Sir, B

You are hereby appointed Class II Assistant of the above-named school with effect from 1st May 1954 at a salary of $95.00 a month.

2. You will be liable to be transferred from time to time, subject to the approval of the Director of Education, for duty as Assistant Teacher in any School under the control of the Governing Body of the Anglican Schools provided that no loss of salary is thereby incurred. C

3. Your employment is subject to the provisions of the Education Code, as amended from time to time, and may be terminated by one month's notice in writing on either side.

4. Your duties will be to undertake such teaching and supervisory duties as may reasonably be assigned to you by the Head Teacher, and to give religious instruction to the pupils as follows:— as directed by the Head Teacher. D

5. A copy of a letter from the Director approving of your appointment is attached.

Yours faithfully,
Joseph H. Jones
(Manager)
Cane Grove Anglican School E

Mr. Bertrand Abrams
Address: Golden Grove
E.C. Demerara

Read and Noted
Bertrand Abrams
Class II Asst. Teacher
Date: 24.3.54." F

St. Andrew's Anglican School

5. Pursuant to the said letter the plaintiff took up his said appointment and acted and was paid as such teacher until January 11, 1955.

6. On July 21, 1954, the plaintiff was convicted by the Magistrate of the East Demerara Judicial District for being on June 10, 1954, in possession of prohibited publications contrary to s. 4 of the Undesirable Publications (Prohibition of Importation) Ordinance, and fined $25 or one month's imprisonment in default. The complaint was filed on June 30, 1954, and made returnable for July 7, 1954. G

7. On July 31, 1954, the plaintiff filed notice of appeal against the said conviction, and on August 3, 1954, lodged with the clerk of the Court for the East Demerara Judicial District the sum of $25 to abide the costs of the said appeal, but took no further step in connection therewith, save that he paid the said fine of $25. H

8. On January 8, 1955, the second-named defendant wrote to the third-named defendant as follows:

"No. 364/46 I

Education Department,
P.O. Box 41,
British Guiana.
8th January, 1955.

Dear Sir,

Mr. Bertrand Abrams—Appeal

I desire to acknowledge receipt of your letter dated 6th January, 1955, on the above-named subject along with the enclosure.

A As the Superintendent of Police has now informed you that Mr. Abra has abandoned the appeal and paid the fine, he may now be dismissed accordance with the ruling of the Law Officers for a breach of the emerge regulations.

Yours faithfully,
(Sgd.) R. C. G. Potter.
Director of Education (Ag.)

B

Rev. J. H. Jones,
St. Mark's Vicarage
Enmore, E.C. Demerara."

9. On January 10, 1955, the third-named defendant acting in accorda with the second-named defendant's instructions, wrote to the plaintiff follows: C

"St. Mark's Vicarage,
Enmore, E.C. Demer
10th January, 1

Mr. Bertrand Abrams,
Cane Grove Anglican School
East Coast, Demerara.
Dear Sir, D

As the appeal against your conviction has been abandoned and the paid, I have to inform you that, in accordance with the ruling of the I Officers for the breach of the emergency regulations, you are dismi from your post as a Cl. II Assistant Teacher in Cane Grove Anglican Sc as from 11th January, 1955. E

Yours faithfully,
(Sgd.) Joseph H. Jones,
Manager."

10. Since January, 1955, the plaintiff has not carried out any dutie such Class II assistant teacher at the said Cane Grove Anglican School has not received any salary. F

11. On April 27, 1955, the plaintiff wrote to the second-named defen as follows:

"Nabaclis,
E.C. Demer
27th April, 1

G

The Director of Education,
Education Dept.
Dear Sir,

I hereby request that the full reasons be supplied to me which ca my dismissal from the post of Cert. Asst. Class II which I held on staff of Cane Grove Anglican School until the date of my dismissal, 11th January, 1955. H

I was dismissed by a note received on the same day from the Mana Rev. J. H. Jones, and the clearest indication of the reasons for dism given by the note was that it accorded 'with the advice of the law officer

This request is made in the interests of establishing clearer basis of present position in keeping with the terms of Regulation 5 (1) (a) of Education Code. I

Thanking you,

I am,
Yours respectfully,
(Sgd.) Bertrand Abrams."

This action had come on for hearing on September 11 and 22, 1958, b STOBY, J., who on the latter date reserved decision in the matter. Unf nately it was not possible for STOBY, J., to prepare and deliver judgment b

proceeding in December, 1958, to take up his appointment as Chief Justice of Barbados. Thereafter, for various reasons the re-hearing of the matter could not proceed until January 12, 1960.

It was submitted by the Solicitor-General on behalf of the second-named defendant, the Director of Education, that the Director is not as such a legal *persona* and accordingly cannot be made a defendant in any proceeding before the court.

Section 3 of the Education Ordinance, Cap. 91 [B.G.], provides that the Governor, with the approval of the Secretary of State, may appoint a Director of Education for the Colony who shall receive the salary or emoluments from time to time provided for that purpose by the Legislative Council, and who shall hold office during pleasure. The Director is a Crown servant and is not a corporate body.

The Solicitor-General cited the case of *Raleigh* v. *Goschen* (1) as authority for the proposition that actions will not lie against Crown servants in their official capacity. In that case the plaintiffs brought a claim against the defendants in their official capacity as Lords of the Admiralty with a view to establishing as against them that they were not entitled to enter upon, or acquire by way of compulsory purchase, certain land, the property of the plaintiffs, and claiming damages for trespass and an injunction to restrain further trespass. It was held by ROMER, J., that though the plaintiffs could sue any of the defendants individually for trespass committed by them, they could not sue them in their official capacity. Leave to amend by suing the defendants in their individual capacity was not granted the plaintiffs on the ground that to do so would be to change one action into another of a substantially different character.

In the present case it is to be observed that the action has been brought against the Director of Education as such without naming him. There is no enactment in British Guiana similar to the Crown Proceedings Act, 1947 [U.K.].

In *Hutton* v. *Secretary of State for War* (2) it was held that it was not competent for the plaintiff to bring a motion for an injunction against the Secretary of State for War as such.

In *Hosier Bros.* v. *Derby (Earl)* (3) an action was brought by the plaintiffs Hosier Brothers against the defendant, the Earl of Derby, who was described as His Majesty's Principal Secretary of State for War, upon a contract entered into with them by the Secretary of State for War. The plaintiffs alleged that the defendant had improperly used a steam engine and hay press for other than the purposes specified in the contract and claimed a declaration that the plaintiffs were entitled to compensation for the improper use of the engine and certain other declarations as to the construction and meaning of the contract. The defendant objected that the action was not maintainable on the ground that where a contract is made on behalf of the Crown, by a servant of the Crown, the remedy of the subject is by petition of right and not by action and no action would lie. It was held by the Court of Appeal that it was a general principle that a servant of the Crown who contracts on behalf of the Crown cannot be sued on the contract, and that an action can no more be brought against a servant of the Crown for a declaration as to what a contract means than it can be brought for a substantive remedy on the contract itself.

The Solicitor-General also cited the case of *Bombay & Persia Steam Navigation Co.* v. *Maclay* (4) in support of the proposition that procedural difficulties in the way of a plaintiff cannot be overcome by claiming a declaration against a public officer in his individual capacity. In that case the plaintiffs brought an action against His Majesty's Shipping Controller appointed under the Defence of the Realm Regulations [U.K.], who gave a direction under those regulations whereby the plaintiffs' ship was diverted from her voyage. The plaintiffs thereby lost the use of their vessel for some days and incurred certain expenses.

The plaintiffs sued the defendant claiming a declaration that they were entitl to compensation for the loss and expenses so incurred by them. It was n sought to sue the defendant for money payable by statute, but the question w whether, when a person had a demand of that kind, he could get a declaratic of his rights against the Treasury by suing an official in his own name becau he could not sue him in any other way. It was held by ROWLATT, J., that l could not.

Counsel for the plaintiff in this action has conceded that in so far as tl claims for an injunction and for damages are concerned they would not l applicable to the Director of Education. He submitted, however, that tl provisions of the Education Ordinance, Cap. 91 [B.G.], and of the Educatic Code [B.G.] support the view that the Director of Education is a corpora body. He cited the case of *Carltona, Ltd.* v. *Commissioners of Works* (5) show that where a government department or minister is incorporated it or l can be sued even though it or he may be acting as an agent of the Crown. is to be observed, however, that in that case the point as to whether it w competent for the plaintiffs to sue the Commissioners of Works was not take I do not, however, agree with the contention of counsel for the plaintiff that tl Director is an incorporated body. Counsel for the plaintiff referred to the ca of *Master Ladies Tailors Organisation* v. *Minister of Labour & National Servi* (6), a case decided after the enactment of the Crown Proceedings Act, 19 [U.K.], where an incorporated minister was sued and not an authorised depa ment, but apparently no question was raised as to whether the proper defenda was before the court. I hold that the submission *in limine* of the Solicitc General is well founded and that the claims against the second-named defenda the Director of Education are misconceived and must be dismissed with cos to be taxed to January 12, 1960.

It is now necessary to deal with the contention of counsel for the first- a third-named defendants that the provisions of s. 8 of the Justices Protecti Ordinance, Cap. 18 [B.G.], are applicable to actions of this nature. Und the provisions of s. 8 (1) of that Ordinance, no action shall be brought agair a justice for anything done by him in the execution of his office unless t action is commenced within six calendar months next after the act complain of has been committed. It is conceded by the plaintiff that this action w commenced some eight months after the act complained of had been co mitted. Section 8 (2) of the Ordinance provides that the action shall not commenced against the justice until one calendar month at least after noti in writing of the intended action has been delivered to him, or left for him his usual place of abode, by the party intending to commence the action, or that party's attorney or agent, wherein the cause of action and the court which the action is to be brought shall be clearly and explicitly stated. It conceded by counsel for the plaintiff that no notice of action was given any the defendants.

Counsel for the defendants contended that by virtue of the provisions of s. of the Ordinance the defendants are entitled to the protection of the provisio of s. 8 of the Ordinance. Section 14 provides that the Ordinance shall ap for the protection of all members of the police force, all constables, all distr commissioners, and all other persons for anything done in the execution of th office under and by virtue of any Ordinance.

The provisions of the Justices Protection Ordinance, Cap. 18 [B.G.], w enacted in 1850 and are based on the provisions of the Justices' Protection A 1848 [U.K.]. The provisions of s. 2 of the Ordinance are identical with th of s. 1 of the Act save that instead of the words "shall be an action on the ca as for a tort" in s. 1 of the Act, the words "shall be an action as for a tort" used in s. 2 of the Ordinance. Those latter words were not introduced in t section, as junior counsel for the plaintiff suggested, because of the fact tl

under the Roman Dutch law which prevailed in the Colony in 1850 when the Ordinance was enacted there was nothing known to Roman Dutch law as a tort. If I have understood the Solicitor-General's contention in this respect he is of the view that those words were introduced because it was intended that claims for breaches of contracts should be treated under the Ordinance just as if they were claims in tort. But it seems to me that the words "shall be an action as for a tort" were introduced because the provisions of the Act related to the protection of justices only for acts done by them in the execution of their office and such acts had nothing to do with breaches of contract. The case cited by the Solicitor-General in support of his contention that the provisions of the Ordinance apply to actions for wrongful dismissal is *McManus* v. *Bowes* (7). That case arose under the provisions of the Public Authorities Protection Act, 1893 [U.K.]. Section 1 of that Act provides:

> "Where . . . any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority, the following provisions shall have effect:
>
> (a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of."

In *McManus*' case (7) the provisions of s. 1 of the Public Authorities Protection Act [U.K.] were held to apply and SLESSER, L.J. ([1937] 3 All E.R. at p. 238), quoted the following passage from the judgment of Lord BUCKMASTER, L.C., in *Bradford Corpn.* v. *Myers* (8):

> "In other words, it is not because the act out of which an action arises is within their power that a public authority enjoys the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority."

SLESSER, L.J. (*ibid.*, at p. 238) then went on to say:

> "In other words, if the only connection between the employment of Dr. McManus and the statute had been that the local authority would have to point to the statute as an enabling statute to give it power to make contracts with doctors on such terms as it thought fit, then I think it might well be argued that, this being an act which is not only within its power, but also an act in which it is free to make such contracts as it thinks fit, the case would be like the sale of the coal products in *Bradford Corpn.* v. *Myers* (8) and the Public Authorities Protection Act [U.K.] would not apply. . . . If the true view be that this appointment and removal are directly statutory, not by reason of any contract, but by reason of the operative language of the section itself, as I think is the case with such an office as this, where the officer holds office during pleasure, then I think that it follows that such a case is not a contract of the voluntary nature suggested in *Bradford Corpn.* v. *Myers* (8) . . . but is a direct execution of the statute itself."

The material words in s. 14 of the Justices Protection Ordinance, Cap. 18 [B.G.], in so far as they relate to the defendants are:

> "This Ordinance shall apply for the protection of . . . all other persons for any thing done in the execution of their office under and by virtue of any Ordinance;"

and are in terms somewhat narrower than the provisions of s. 1 of the Public Authorities Protection Act, 1893 [U.K.].

It was contended by counsel for the plaintiff that the provisions of the Justices Protection Ordinance [B.G.] do not apply to breaches of c Counsel did not cite any authority in support of this contention. H support for his view may be found in the older cases. For example, in v. *Swansea Corpn.* (9) it was contended by counsel for the plaintiff a ceded by counsel for the defendants that the Public Health Act, 1848 which required a notice of action to be given, did not apply to actions specific contract and only applied to torts or quasi-torts. In *Clarke* v. *Le Borough Council* (10), where the action was one for wrongful dismissal held by BIGHAM, J., that the Public Authorities Protection Act, 1893 was not intended to apply to breaches of contract. In *Sharpington* v. *Guardians* (11), where the action was for breach of contract, the def employing the plaintiff as an independent contractor to do works requ their public duties, FARWELL, J., held that the Public Authorities Pr Act, 1893 [U.K.], did not apply to a private contract of the defendant in *Lyles* v. *Southend-on-Sea Corpn.* (12), where a municipal corporatio tramway under statutory authority, a passenger sued the corporat damages for negligence. Though arising out of a contract the action substance one for a tort. It was held that the Act applied but the C Appeal did not determine what the position would have been if the ticket to the passenger had contained special conditions.

In *Bradford Corpn.* v. *Myers* (8) the Corporation were under a d statute to make gas and they also had the power to sell coke, a by-pro making gas. They sold coke to Myers but by the negligence of their s part of the coke was precipitated through Myers' window. Myers brou action against the Corporation, but not within six months, and the Corp sought to rely on the Public Authorities Protection Act, 1893 [U.K.] House of Lords, affirming the Court of Appeal, held that the Act applie the course of his speech Lord BUCKMASTER, L.C., said that, in respect contention that the Act did not apply to actions for breaches of contra question could not be resolved by a simple distinction between questi tort arising out of contract and questions of tort arising independently tract, but the fact that actions on contracts made by local authorities ha held to be outside of the statute showed that the courts had considered t words of the statute needed careful and strict scrutiny.

McManus v. *Bowes* (7) is an authority against the contention of coun the plaintiff. By the Lunacy Act, 1890 [U.K.], s. 276 (1): "The v committee of every asylum shall appoint . . . (b) a medical officer . . . (other officers and servants as they think fit"; and by s. 276 (3) of that "The committee may remove any person appointed under this section. . . ."

It was held that both claims were out of time, being founded in each c an alleged neglect or default in the intended execution of an Act of Parli within the meaning of the Public Authorities Protection Act, 1893 [U SLESSER, L.J., said ([1937] 3 All E.R. at p. 238):

> "If the true view be that this appointment and removal are di statutory, not by reason of any contract, but by reason of the ope language of the section itself, as I think is the case with such an off this, where the officer holds office during pleasure, then I think that it f that such a case is not a contract of the voluntary nature suggest *Bradford Corpn.* v. *Myers* (8) or in *Sharpington* v. *Fulham Guardian* or in several cases which are there discussed, but is a direct execution statute itself."

In that case, as the headnote states, an assistant medical officer at a n hospital, who was employed under a contract containing no express refe to notice, was dismissed and paid three months' salary in lieu of notice.

applied for superannuation allowance, but his application was refused by the Ministry of Health. Nearly six years after his dismissal he issued a writ against his late medical superintendent, various members of the hospital committee and the clerk of the hospital, alleging a number of causes of action including a claim against the committee for wrongful dismissal and insufficiency of notice and a claim for return of superannuation contributions.

In *Griffiths* v. *Smith* (13) the plaintiff, the mother of one of the pupils of a non-provided public elementary school, was invited by the headmaster with the authority of the managers (who derived their powers under statute) to attend an exhibition of work held in one of the school buildings. She received injuries through a collapse of the floor and brought an action against the managers for damages outside of the time limited by the Public Authorities Protection Act, 1893 [U.K.]. It was held by the House of Lords that the Act applied. In the course of his speech the Lord Chancellor, Viscount SIMON, said ([1941] 1 All E.R. at p. 72):

> "Lastly was the action of the managers in authorising the invitations to this school display an act done in the execution of their statutory duty or authority? It was strenuously contended for the appellants that this action was 'voluntary' in the sense in which the sale of coke in *Bradford Corpn.* v. *Myers* (8) was voluntary. It is true that St. Clement's school could have been carried on without arranging to hold this display, but that is not the true test. The real question is whether the managers, in authorising the issue of invitations to the display on the school premises after school hours, should be regarded as exercising their function of managing the school."

Lord PORTER (*ibid.*, at p. 91) expressed the view that in order that the act done should be held to be done in the exercise of a public duty, there must be a correlative public right.

In *Turburville* v. *West Ham Corpn.* (14) an education authority was authorised by statute, the Local Government Staffs (War Service) Act, 1939 [U.K.], to pay teachers employed by them and absent on war service such sum as would make up their remuneration in respect of war service to the amount of the salary received by them at the date of their being called up with such increments, if any, of their grades which they would have received but for such war service. The teachers had been employed on a scale of salaries laid down under statutory provisions. The terms of these provisions formed part of the contracts of service of the plaintiffs. By the Remuneration of Teachers Order, 1945 (No. 1317 of 1945), the scale of school teachers' salaries was increased as from April 1, 1945. The authority later informed the plaintiffs that they could not receive the benefits of the scale of 1945 as between April 1, 1945, and the date of their demobilisation, November, 1945. The plaintiffs sued the authority claiming that they were entitled to the benefit of the new scale. For the authority it was contended that the action was barred by the provisions of s. 21 of the Limitation Act, 1939 [U.K.] (a limitation provision similar to s. 1 of the Public Authorities Protection Act, 1893 [U.K.]). It was held by the Court of Appeal that the provisions of s. 21 of the Limitation Act, 1939 [U.K.], did not apply to the action, as the Local Government Staffs (War Service) Act, 1939 [U.K.], permitted but did not make it obligatory on the authority to augment the teachers' remuneration for war service, and the payments of war service increments were not made for the benefit of the public but for the benefit of the employees and the failure to pay on the new scale of 1945 did not therefore fall within s. 21 of the Limitation Act, 1939 [U.K.]. Lord OAKSEY in the course of his judgment, after referring with agreement to the view expressed by Lord PORTER in *Griffith* v. *Smith* (1) that in order that the act should be held to be done in the exercise of a public duty, there must be a correlative public right, said that the teachers had no correlative right to the augmented

payments which were entirely in the discretion of the appellants and that was no finding that the payments were made in the interests of the s SINGLETON, L.J., applied the test suggested by Lord BUCKMASTER, L.(*Bradford Corpn.* v. *Myers* (8) and WYNN PARRY, J., in his judgment said ([2 All E.R. at p. 64):

> "As regards the applicability of s. 21 (1) of the Limitation Act, 1939 [U I agree that the original contracts between the defendants and the resp plaintiffs were made by the defendants in the direct execution of their] duty under the Education Act, 1921 [U.K.], s. 148 (1), and that s. 21 the Act of 1939 would apply to those contracts. I further agree tha effect of the resolution was to add to the contractual terms betwee defendants and the respective plaintiffs. I do not agree, however, counsel for the defendants that the result follows for which he contends, that those terms are to be read into, or with, the original contracts sc it can be said of them that, just as s. 21 (1) of the Limitation Act, 1939 [U applies to the original contracts, so it must apply to the added terms. a result would be plainly contrary to the facts. Unlike the original cont the added terms were not brought into existence under or pursuant t Education Act, 1921 [U.K.]. Indeed they could not be justified unde Act. They were brought into existence by virtue of the Local Govern Staffs (War Service) Act, 1939 [U.K.], s. 1, and the applicability or othe of s. 21 (1) of the Limitation Act, 1939 [U.K.], must be tested by refe to that Act. The effect of the Local Government Staffs (War Service) 1939 [U.K.], s. 1, was to do no more than authorise the defendants, if should think fit, to arrange with the plaintiffs, either as a voluntary act a contract, to make the payments mentioned in the section. If and s as the defendants exercised that authority in any case, they did not d in my view, in pursuance or execution of any Act of Parliament or o public duty or authority. All they did was to enter into a private arr ment with the plaintiffs, which, but for the statutory authority in que they could not have done."

The first- and third-named defendants are a governing body and a ma respectively. They are in control and management of schools provide elementary education by the Anglican Church in this Colony. These sc receive grants in aid from the Government.

The question to be determined in the present case is whether the employ of the plaintiff as a teacher is a necessary incident in the performance statutory duty of the defendants in the control and management of such sch The Education Ordinance, Cap. 91 [B.G.], requires teachers with ce qualifications to be employed by the governing bodies of government schools.

Regulation 51 of the Education Code, Cap. 91 (Subsidiary Legislation) [B provides that the appointment, terms of employment, payment, promo transfer, and termination of employment of teachers shall rest directly the governing bodies subject to the prior approval of the Director of Educa Regulation 52 provides for the terms of appointment of teachers to be emb in a letter of employment from the governing body and paragraph (3) of regulation provides that no letter of appointment shall contain anything trary to the regulations. The qualifications of teachers, their salaries, pens discipline and leave conditions are all prescribed by Ordinance or by regula having statutory effect.

The salaries of teachers in such schools are paid by the Government an numbers and classes of teachers are prescribed by the Education Code.

The employment and dismissal of such teachers would in my opinion necessary incident in the performance of the statutory duties of the first-na

defendants. They are bound to employ teachers to carry on their schools. In this respect see the passage in the judgment of WYNN PARRY, J., in *Turburville* v. *West Ham Corpn.* (14) set out earlier in this judgment [p. 197, *ante*] and see *Clayton* v. *Pontypridd Urban Council* (15).

In my opinion the provisions of the Justices Protection Ordinance, Cap. 18 [B.G.], apply to the present case and the plaintiff having failed to comply with the requirement to give notice of action as well as to bring the action within the period limited by s. 8 (2) of the Ordinance, his action must fail.

It was also argued by counsel for the plaintiff that in view of the fact that equitable remedies were claimed by the plaintiff the provisions of s. 8 of the Ordinance would not apply to the action. It was pointed out by Lord MAUGHAM in his speech in the House of Lords in *Griffiths* v. *Smith* (13) ([1941] 1 All E.R. at p. 76) that it was held in *Graigola Merthyr Co., Ltd.* v. *Swansea Corpn.* (16) that s. 1 of the Act of 1893 [U.K.] applied to *quia timet* actions, although the repeated references in the section to an act done and to neglect or default might well point to another conclusion. The case of *White* v. *The Town Clerk of Georgetown* (17) cited by counsel for the plaintiff in support of his contention really only decides that the requirement of the statute as to notice of action would not apply to summary relief by injunction. If it did, the wrong might be irremediable and this could not be intended. The plaintiff's action is not one of this type and I can find no authority in support of the contention of counsel for the plaintiff, and none was cited, that the requirement as to notice of action does not apply where equitable remedies are claimed.

Much of the argument advanced at the hearing of this action related to whether the dismissal of the plaintiff by the defendants is illegal and if so whether the appropriate remedy is one for a declaration or for damages for wrongful dismissal.

Counsel for the plaintiff submitted that it was necessary before the plaintiff could be legally dismissed for an inquiry to be first held by the governing body at which the plaintiff should be afforded an opportunity of exculpating himself and that as this was not done the purported dismissal of the plaintiff was a nullity, the appropriate remedy for which was an action for a declaration. In the alternative counsel contended that the plaintiff would be entitled to general damages for wrongful dismissal. Counsel for the first- and third-named defendants on the other hand submitted that the plaintiff was legally dismissed and that if he were not, the only appropriate remedy would be one of damages for wrongful dismissal. Counsel for these defendants contended that the relationship between the defendants and the plaintiff was one of master and servant and that if the plaintiff were wrongfully dismissed his only remedy is for damages and not for a declaration.

Both counsel for the plaintiff and counsel for the defendants referred to the cases of *Vine* v. *National Dock Labour Board* (18) and *Barber* v. *Manchester Regional Hospital Board* (19) in support of their submissions. In *Vine's* case (18), the plaintiff, a registered dock labourer employed in the reserve port by the defendants, the National Dock Labour Board, was allocated work but failed to report to do the work. Like all dock workers he was employed under a scheme set up by the Dock Workers (Regulation of Employment) Order, 1947 [U.K.]. A complaint lodged with the Board was heard by a disciplinary committee appointed by the local labour board. The committee also heard the plaintiff's explanation and agreed that he should be given seven days' notice to terminate his employment with the Board. In accordance with the decision of the Committee notice in writing was given to the plaintiff to terminate his employment with the Board and his name was removed from the register. The plaintiff appealed against the Committee's decision and his appeal was disallowed. The plaintiff brought an action against the Board claiming damages for wrongful dismissal and a declaration that his purported dismissal was illegal,

ultra vires and void. It was held by the trial judge, ORMEROD, J., and by House of Lords that the plaintiff's dismissal was invalid as the local labour board had no power under the Scheme to delegate to a discipli committee their disciplinary powers given by the scheme and that the pla was entitled to the declaration he sought. The Court of Appeal had held damages were a sufficient remedy and that a declaration should not be grant

It was the unanimous view of the law lords that the removal of the plair name from the register was a nullity by reason of the fact that the Board no power to delegate its disciplinary duties and that the proper remedy one for a declaration. As was stated by Lord MORTON OF HENRYTON i speech, these duties were of a judicial character and the decision of the board may be of vital importance to the worker, as it may involve dism In illustrating this aspect Lord MORTON said ([1956] 3 All E.R. at p. 945):

> "If, in an ordinary contract of service, a man is dismissed by employer, it is open to him to seek and obtain employment in the san another line of work with another employer; but the result of dismissal employment under this scheme is wholly to remove the man from employ as a dock worker."

Counsel for the plaintiff has contended that this passage means that declaration would be granted where the defendants held a monopoly. Vi in its context this is not the *ratio decidendi* of the decision of Lord Mc nor indeed of any of the other members of the House of Lords. I under Lord MORTON by this passage only to be stating why he was of the opinion the disciplinary duties of the local board were duties of a judicial rather of an administrative character and could not properly be delegated to a mittee of the local board. Lord SOMERVELL (*ibid.*, at p. 951) has pointe that in considering whether a body or person has power to delegate the i tance of the duty and the character of the person who would delegate it be taken into consideration. He also (*ibid.*, at p. 950) makes the point not every failure to observe judicial procedure will vitiate proceedings require judicial inquiry. It depends on the statutory or other provisions which the matter arises. The dissenting judgment in the Court of App JENKINS, L.J., which was approved by the House of Lords clearly expresse ground on which the declaratory order was made ([1956] 1 All E.R. at p. 9):

> "Why should it be wrong, those being the plaintiff's rights, for the to make a declaration to the effect that his purported dismissal was *vires* and invalid if in law he is to be regarded as still in the employme the national board? For my part I can see no reason."

The decision of the disciplinary committee was in effect no decision as i first place they had no right to sit in judgment over the docker. There in effect no decision the purported dismissal of the docker was *ultra vire* invalid and it was as if he had never been dismissed. The obvious remed a declaration to that effect.

In *Barber* v. *Manchester Regional Hospital Board* (19), BARRY, J., hel "despite the strong statutory flavour attaching to the plaintiff's contrac essence it was an ordinary contract between master and servant and the there was no nullity in its termination. Counsel for the defendants has tended that in the present case the plaintiff's contract is very much i same category as was *Barber's* (19)—it has a strong statutory flavour but an ordinary contract between master and servant.

Barber's case (19) is not of much assistance in this matter except t shows that each case must be decided on its own facts.

From *Vine's* case (18) and *Barber's* case (19) may be deduced the foll principles:

(a) where a person whose relationship to his employer is not one of master and servant is dismissed as the result of the action of a person or body to whom or to which were delegated functions which could not validly be delegated to him or it, the purported dismissal is *ultra vires* and invalid and a declaration may properly be made by a court to that effect;

(b) where a person whose relationship to his employer is not one of master and servant is dismissed as the result of the action of a person or body after a judicial or quasi-judicial inquiry required to be made, then the dismissal is valid or invalid depending upon whether there was not or there was failure of such a nature in the observance of the procedure required to be adopted at the inquiry which would vitiate the inquiry. If the dismissal is invalid a declaration may properly be made to that effect;

(c) where the relationship is merely one of master and servant the wrongful dismissal of the servant can only give rise to a claim for damages.

It is necessary first of all to examine the provisions of the Education Ordinance, Cap. 91 [B.G.], and of the Education Code (Subsidiary Legislation) [B.G.] to see whether in the circumstances of this case the plaintiff was legally dismissed.

Counsel for the first- and third-named defendants has conceded that the plaintiff's dismissal was not effected under the provisions contained in any of the sections of the Education Ordinance itself.

Section 6 of the Ordinance provides for the reference to a magistrate for hearing of any charge made to the Director of Education against a teacher in an aided school alleging immoral conduct as a teacher or otherwise, or cruel or improper treatment of any children or pupils attending the school. The procedure for hearing such a charge is specified by s. 6. The magistrate does not proceed to conviction or acquittal but is required to transmit to the Director the evidence taken by him with a report of what in his opinion is the effect and weight thereof. By s. 7 if it is the opinion of the magistrate and the Director that the teacher is guilty of immoral conduct or of cruel or improper treatment of any of the children or pupils under his charge, the Director may cancel the teacher's certificate or suspend its operation for such period as he may determine. Section 8 seeks to prevent a teacher whose certificate is cancelled or suspended from being employed in any school until he has been issued a new certificate or the period of suspension has expired as the case may be. Section 47 of the Ordinance provides for the reference by the Director to a board of inquiry for inquiry into any complaint against a teacher in an aided school where the teacher has in the opinion of the governing body failed to exculpate himself when given an opportunity so to do. Section 48 provides that the Governor in Council may make rules prescribing the procedure to be followed at an inquiry by any board appointed under s. 47. The Board is required to report its findings to the governing body and by s. 50, if after considering the findings of the Board the governing body and the Director, or either of them, is of the opinion that the teacher's certificate shall be cancelled or suspended or any other penalty imposed, the matter shall be referred to the Education Committee appointed under the Ordinance, whose decision shall be final.

It is specifically provided by s. 51 that the provisions of ss. 47 to 50 inclusive shall not affect the exercise in respect of a certificated teacher of the authority and jurisdiction conferred by ss. 6 and 7 of the Ordinance.

The provisions relating to the employment, dismissal and termination of employment of teachers are to be found at regs. 51, 52 and 55 of the Education Code. These regulations provide as follows:

"51. The appointment, terms of employment, payment, promotion, transfer and termination of employment of teachers shall rest directly with

the governing bodies subject to the approval of the Director which shall be previously obtained.

52. (1) The terms of employment of a teacher, either on first appointment, or on transfer, shall be embodied in a letter of appointment from the governing body, or in the case of a teacher whom the manager is authorised to appoint under regulation 6 from such manager.

(2) Every letter of appointment containing a teacher's terms of employment, shall—

(a) state the period of notice in writing which is necessary on either side to terminate the teacher's employment, which in the case of a head teacher, other than a head teacher holding a provisional certificate, shall be three months, and in the case of other teachers one month; and

(b) state any duties in regard to the giving of religious instruction in the school which are to be performed by the teacher in addition to the duties required of him by section 28 of the Ordinance.

(3) No letter of appointment shall contain anything contrary to these regulations."

"55. (1) (a) When a teacher is dismissed under section 46 of the Ordinance, the teacher may obtain from the Director a full statement of the cause of his dismissal;

(b) when the employment of a teacher is terminated otherwise than by dismissal under section 46 of the Ordinance, the governing body shall make a report to the Director, containing a full statement of the reasons for the termination of the employment.

(2) Where the employment of a teacher has been terminated and any governing body or manager who contemplates employing him applies to the Director for information as to the cause of such termination, the Director shall furnish the manager with a copy of the report relating thereto."

The provisions of the Education Code relating to the employment, dismissal and termination of employment of teachers viewed in the light of the provisions of ss. 6 to 9 and 47 to 51 of the Ordinance indicate that the relationship between the governing body and a certificated teacher is not one merely of master and servant.

The procedure to be followed by a board in inquiring into a complaint under s. 47 of the Ordinance is provided by reg. 59 of the Education Code.

Regulation 59 provides as follows:

"59. (1) For any breach of these regulations, for improper conduct while in school, for neglect of duty, misconduct, inefficiency, unfitness, irregularity, or conduct unbecoming a teacher, or lack of discipline on the part of any teacher, the governing body of the school in which the teacher is employed may impose a fine not exceeding $24, or other penalty on the defaulting teacher, but not until the teacher has been informed of the charge against him and has been given an opportunity of exculpating himself.

(2) Where such a breach of the regulations, or neglect of duty, misconduct, inefficiency, irregularity or lack of discipline is discovered by the Director or his officers or is otherwise brought to his notice, the Director may inform the governing body of the school in which the teacher is employed, and thereupon it shall be the duty of the governing body to investigate the matter in accordance with paragraph (1) of this regulation and section 46 of the Ordinance.

(3) Any penalty imposed by the governing body shall be subject to confirmation by the Director, who may at his discretion vary the penalty imposed by the governing body.

(4) When in the opinion of the governing body and the Director, or either of them, the penalty to be imposed on a teacher holding a permanent certificate

should not amount to dismissal under section 46 of the Ordinance but should be the termination of his employment after notice or his transfer to another school in any capacity, the Director shall, should the teacher so request, thereupon refer the matter to the Committee for their advice.

(5) In any case under these regulations where the Committee advises that a teacher shall be transferred and the teacher declines to accept such transfer his employment shall thereupon be terminated by the governing body.

(6) All fines imposed under this section shall be paid into a fine fund to be in charge of the Director, and to be disbursed, subject to rules to be made for that purpose by the Director with the approval of the Governor.

(7) If a teacher is interdicted from duty in accordance with section 47 (1) of the Ordinance he shall be allowed to receive one-half of his salary and if the proceedings against the teacher do not result in his dismissal or the termination of his employment or the suspension or cancellation of his certificate he shall be entitled to the full salary he would have received if he had not been interdicted:

Provided that if a teacher is convicted on a criminal charge he shall not receive any salary from the date of conviction pending consideration of his case by the Director."

Paragraphs (1) and (2) of reg. 59 relate to breaches of the regulations, improper conduct in school, neglect of duty, misconduct, inefficiency, unfitness, irregularity, or conduct unbecoming a teacher, or lack of discipline on the part of a teacher. These are all disciplinary offences. The governing body is empowered to act of its own motion under paragraph (1) while the Director acts under paragraph (2) as provided for by s. 47 (1) of the Ordinance. The plaintiff was dismissed because of his conviction on a charge of being in possession of prohibited publications contrary to s. 4 of the Undesirable Publications (Prohibition of Importation) Ordinance, 1952 [B.G.]. This charge does not fall within any of the categories of disciplinary offences set out in paragraphs (1) and (2) of this regulation. Reference has been made to the proviso to paragraph (7) of reg. 59 and it has been contended by counsel for the plaintiff that this indicates that where a teacher is convicted on a criminal charge the provisions of s. 47 and of reg. 55 must be followed if it is sought to discipline the teacher.

Where a teacher has been convicted by a court of competent jurisdiction on a criminal charge and has not appealed against his conviction or if he has appealed against his conviction and he either abandons his appeal or his appeal is dismissed it is not necessary for the procedure set out at s. 47 (1) and at reg. 59 to be followed.

Any finding on an inquiry by a board contrary to that of a court of competent jurisdiction on the same allegation would be nugatory, so where a competent court has pronounced judgment on a criminal charge laid against a teacher it is not necessary for an inquiry to be made by a board in respect of the same charge.

There was in my view no failure on the part of the defendants to comply with any requirement of the Ordinance or Regulations or indeed with any of the rules of natural justice as to procedure in this matter.

The proviso to paragraph (7) of reg. 59 merely indicates that a teacher, after conviction and until the Director has considered his case, shall receive no salary. In the present case the Director did approve of the plaintiff's dismissal by his employers following upon his conviction.

The court cannot interfere with the exercise of the Director's discretion, no question of the *bona fides* of the exercise of that discretion having been raised.

The plaintiff was validly dismissed by the first- and third-named defendants and his claim for the declarations and injunctions and his alternative claim for

damages must fail. In the result the plaintiff fails on all grounds and his cl is dismissed with costs to the defendants to be taxed certified fit for cou In the case of counsel for the second-named defendant the order for costs be limited to the time at which the argument on counsel's submission *in lin* was concluded.

Judgment for the defenda

Solicitors: *O. M. Valz* (for the plaintiff); *H. C. B. Humphrys* (for the first- third-named defendants); *Crown Solicitor* (for the second-named defendant)

JAIGOPAUL *v.* CLEMENT

[SUPREME COURT OF BRITISH GUIANA (Luckhoo, Ag. C.J.), February 18, Marc 10, 29, April 4, 30, 1960]

Immovable property—Transport—Devolution of title—Real servitude—annotated on transport of dominant tenement nor on transport of serv tenement—Roman Dutch law—How right to servitude constituted—Wa necessity—Whether required to be annotated on transport of dominant or tr port of servient tenement.

In 1954 the plaintiff Jaigopaul became the owner by conveyance by wa transport of the west half of lot 6, Pouderoyen, which he purchased from Carter. No reservation of a right of way through the east half of lo Pouderoyen, appeared on Jaigopaul's transport nor on that of the defen Clement, the present owner by transport of the east half of lot 6. It was ceded, however, that Jaigopaul had a way of necessity through the east of lot 6 there being no other means of ingress or egress from or to the pu road to or from the west half of lot 6. No reservation of a right of way thro the east half of lot 6 appeared in Carter's transport. Carter had purchased west half of lot 6 at an execution sale in 1937 and had obtained trans therefor from the Registrar of Deeds in 1948. However, there had existe reservation of a right of way through the east half of lot 6 in the transport the west half of lot 6 passed to one di Luci in 1916 with a correspon annotation of this servitude in the transport of the then owner of the east of lot 6. The east half of lot 6 was later sold at an execution sale in 1936 transport therefor passed to one Ishmael in that year without any annotatio a servitude in favour of the west half of lot 6. In 1939 Ishmael sold and tr ported the east half of lot 6 to the defendant Clement also without any a tation of a servitude in favour of the west half of lot 6. At the time of t respective purchases neither Jaigopaul nor Clement was aware of the prev existence of a servitude in favour of the west half over the east half of lo Jaigopaul sought to obtain an order for the amendment of his transpor include an annotation of a right of way over the east half of lot 6.

Held: (i) A right of way is a real servitude and as such is of the chara of immovable property and except by will or on intestacy can only be tr ferred by transport. The plaintiff Jaigopaul not having contracted with Ca for the sale to him of a servitude no servitude could be transported to him Carter. No order could therefore be made for the annotation of a right of over the east half of lot 6 on the plaintiff's transport.