JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1945.

SIR JOHN VERITY, KNT.	—Chief Justice.
WILMOT THEODORE STUART FRETZ	—First Puisne Judge (From January 1 to May 2).
JOSEPH ALEXANDER LUCKHOO, K.C.	—First Puisne Judge (From October 1). Acted as Chief Justice from November 3.
FREDERICK MALCOLM BOLAND —	—Second Puisne Judge. Acted as First Puisne Judge from January 8 to September 30, and from November 3.
DONALD EDWARD JACKSON	— Acting Second Puisne Judge (From January 8 to September 30, and from November 13 to December 31).

WEST INDIAN COURT OF APPEAL.

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

METHOD OF CITATION.

These Reports will be cited as (1945) L.R.B.G.

LIST OF CASES REPORTED

A

B

C

D

E

S

T

W

CASES

DETERMINED IN THE

SUPREME COURT OF BRITISH GUIANA.

CHRISTMAS HOOKUMCHAND, Applicant,

v.

PEER BACCHUS, Opposite Party.

[W.I.C.A. No. 6 of 1944.—BRITISH GUIANA.]

BEFORE VERITY, C.J.

1945. JANUARY 8, 15.

Appeal—To Judicial Committee of the Privy Council—From West Indian Court of Appeal—Leave to admit appeal—Notice of intended application for—To be given to opposite party—Before application for leave is filed—Rules governing appeals from the West Indian Court of Appeal to His Majesty in Council under the Order of His Majesty in Council of the 7th *February*, 1921, *Rules* 2, 3.

Appeal—To Judicial Committee of the Privy Council—From West Indian Court of Appeal—Leave to admit appeal—Notice of intended application for—Specific notice thereof to be given—Application for leave to appeal not such notice—Rules governing appeals from the West Indian Court of Appeal to His Majesty in Council under the Order of His Majesty in Council of the 7th *February*, 1921, *Rule* 3; *Judicial Committee Rules*, 1925, *rule* 2.

Appeal—To Judicial Committee of the Privy Council—From West Indian Court of Appeal—Application for leave to admit appeal—Rules regulating—Non-compliance with—Right of appeal lost.

Rule 3 of the Rules governing appeals from the West Indian Court of Appeal to His Majesty in Council under the Order of His Majesty in Council of the 7thFebruary, 1921, provides that "applications to admit an appeal shall be made by motion or petition within 21 days from the date of the judgment to be appealed from, and the Applicant shall give the opposite party notice of his intended application."

Held (1) that notice under the Rule must be given to the opposite party before the application is filed;

Camacho v. Pimento et al (1918) L.R.B.G. 45, followed.

(2) that specific notice of the particular application intended to be made under the Rule shall be given;

(3) that an application for leave to appeal under Rule 2 of the Judicial Committee Rules 1925, cannot be taken as notice of an intention to make an application to admit an appeal under Rule 3 of the Rules of 1921; and

(4) That the right of appeal is lost where there is non-compliance with Rule 3 of the Rules of 1921.

Duke of Atholl v. Read (1934) 150 L.T. 499, and *Retemeyer v. Obermuller* (1847) 2 Moore's Privy Council Cases 98, applied.

APPLICATION by Christmas Hookumchand to admit an appeal from the West Indian Court of Appeal to His Majesty

in Council. Notice of the intended application was not given to Peer Bacchus, the opposite party, before the application was filed.

H. C. Humphrys, K.C., for the opposite party.

J. A. Luckhoo, K.C., for the applicant.

Cur. adv. vult.

VERITY, C.J.: This is an application by way of petition under Rule 3 of the Rules governing appeals from the West Indian Court of Appeal to His Majesty in Council under the Order in Council of the 7th February, 1921. A judgment was delivered by the West Indian Court of Appeal on the 11th day of November, 1944 and at the time of the delivery of such judgment leave was granted by that Court to appeal to His Majesty in Council as required by Rule 2 of the Rules under the Order in Council of 2nd May, 1925, as appears from the Order of Court entered on the 6th January, 1945. On the 2nd December, 1944 this petition was filed in the Registry of the Court and a date, the 11th December, 1944, was obtained for the hearing of the petition. This date was entered on a footnote to the petition and a copy thereof was then served upon the respondent to the intended appeal, for whom counsel appeared under protest on the day so fixed. The hearing of the petition was then adjourned to the 8th January, 1945 when counsel for the respondent took objection to the hearing on the ground that the petitioner had given no notice of his intended application as required by Rule 3 of the Rules of 1921. Counsel referred to the case of *Camacho* v. *Pimento and anor.* (1918) L.R.B.G. p. 45, in which it was held by the Full Court of the Supreme Court of British Guiana that where by Rule 4 of the Rules made by the Order in Council of 10th January, 1910 it was prescribed that notice shall be given to the opposite party of an intended application for leave to appeal such notice must be given before the application is made. Counsel also cited the case of *The Duke of Atholl* v. *Read* (1934) 150 L.T., 499, as authority for the proposition that where the right of appeal is conditioned by the observance of a certain method of procedure failure to comply therewith even in regard to the order in which documents are filed and served puts an end to the right of appeal by depriving the Court of jurisdiction. He submitted that not only was the same principle applicable to rules governing appeals to His Majesty in Council but that where there has been non-compliance with the Rules laid down by Order in Council the Court below is precluded from giving the leave to proceed and if given such permission is a nullity, as is observed by the learned author of Bentwich ,on Privy Council Practice, 3rd Edn., p. 124, in relation to the case of *Retemeyer* v. *Obermuller* (1837) 2 Moore's Privy Co. Cases, at p. 98.

On behalf of the petitioner counsel has submitted that the decision of the Full Court in *Camacho* v. *Pimento and anor.* is not binding upon the Chief Justice of this Colony in hearing such a petition as this by virtue of powers vested in him by the Order in Council 1921, Rule 27, and further that it is based upon a Rule

distinguishable from that under which the present application is made. He sought to distinguish the case further by the submission that in that case the notice to the respondent had been given out of time. On the general merit of the objection, however, counsel submitted that the decision in the *Duke of Atholl's* case was based upon a specific requirement that notice should be served on the opposite party before it was transmitted to the Court whereas there is no such specific provision in the Rule under consideration.

In regard to these submissions while it may be that the Chief Justice of this Colony in the exercise of the powers conferred upon the West Indian Court of Appeal by the Order in Council of 1921 is not strictly speaking bound by a decision of the Full Court of this Colony yet I am in no doubt that I should pay the greatest respect to the decision of that Court and should only differ therefrom if I am of the opinion that a decision thereof is clearly wrong or was delivered *per incuriam.* As regards the distinction between Rule 4 of the Rules under the Order in Council of 1910 and the present Rule 3, it is true that in the former case the Rule refers to applications for leave to appeal while in the present case the Rule refers to applications to admit an appeal. The two Rules are, however, identical in the steps required to be taken in order to make the application, whatever may be the nature of the application to be made, and I do not think that the purpose of the application in any way affects the procedure to be adopted. In each rule it is required that the application shall be made within a prescribed time and that notice shall be given to the opposite party of the intended application. While it is true also that the notice in the case of Camacho *v. Pimento and anor.* was given after the expiration of the time prescribed by the rule, yet reading the judgments therein of the learned Chief Justice (the late Sir Charles Major) and Mr. Justice Hill I have formed the opinion that this fact was not the main factor in their conclusion but that the decision lays down quite clearly that in order to comply with the rule notice must first be given to the opposite party of the intention to make application and that the petition should then be filed in pursuance of the notice previously given. The applicability of the decision in the *Duke of Atholl's* case will more conveniently be considered in dealing with the merits of the objection put forward on behalf of the respondent.

It is clear that in the Rule at present under consideration, as in that dealt with in *Camacho v. Pimento,* two things are required: first that application shall be made within a prescribed time and secondly that notice shall be given to the opposite party of "the intended application". It is equally clear, I think that both Judges in that case attached considerable weight to the use of the word "intended" and I am of the opinion rightly so. Had the rule required notice of the application, without the use of the word "intended" then it might rightly have been contended that all that was required was that the opposite party should have notice before the hearing of the application. By the use of the word "intended" however it would appear to be implied that notice must be given before the application is in fact made, for it appears

to me that an "intended application" is a future application presently in contemplation and not an application in regard to which the intention has already been carried out. I find myself in agreement, therefore, with the views expressed by the Full Court in the case to which I have last referred, that the notice should be given before the application is made. The next point to be considered is whether in fact such notice was given in the present case. It appears to be admitted for the purpose of this aspect of the matter that the notice was delivered to the clerk of the respondent's solicitor, after the filing of the petition and the fixing of a date for its hearing If the application is to be held to have been made at the time when the petition was filed, as was held by the Full Court in the same case, then it is clear that notice was given after and not before the making of the application. I find myself in complete agreement with the Full Court also upon this point, for I know of no other time which can be fixed as that at which the application has been made. Clearly it cannot be the date of hearing, for the business of the Court may, as in the present instance, require that the petition be heard long after the expiration of the prescribed time within which the application is to be made. I am of the opinion therefore that in this case the notice to the opposite party was given after the application had been made and that this is not notice of an *intended* application as required by the Rule, but is notice only of an application already made.

As regards the submission that the right of appeal is lost only where there is non-compliance with a specific requirement of the Act or Order in Council prescribing the necessary procedure for its exercise, I am unable to agree with counsel that there is any distinction between a specific requirement and one of necessary implication from the words used. If, as I have held, following the Full Court, the use of the word "intended" necessarily implies that notice must be given while the application is still in contemplation and not yet made, then it is a requirement of the Rule that the notice should be given before the petition is filed even though the Rule does not say so in so many words, and in the present case there has been, in so far as any written notice is concerned, no compliance with the Rule.

It was further submitted on behalf of the petitioner, however, that inasmuch as at the time of the delivery of the judgment in the West Indian Court of Appeal the petitioner made application for leave to appeal to the Privy Council and leave was then granted by that Court the respondent had ample notice in fact of the present application before it was made. I am unable to accept the view that an application for leave to appeal as required by Rule 2 under the Order in Council of 1925 can be taken as notice of an intention to make application to admit an appeal under Rule 3 of the Rules under the Order in Council of 1921, the latter Rule, in my view, requiring specific notice of the particular application intended to be made thereunder.

I feel impelled to hold, therefore, that the objection raised by counsel for the respondent must succeed. The petitioner having failed to comply with the requirement of Rule 3 in that he did

not give notice to the opposite party of his intended application I have no jurisdiction to proceed with the hearing of the petition which must accordingly be struck out with costs.

Petition struck out.

Solicitors: E. A. LUCKHOO, O.B.E., for applicant;
J. EDWARD DE FREITAS, for opposite party.

MABEL CLEMENTINA BRAITHWAITE, widow, Plaintiff,

v.

WALTER ARNOT BRAITHWAITE in his capacity as executor of the estate of NATHANIEL BRAITHWAITE, deceased, Defendant,

RUTH ANN VERSCHUER, Intervener.

[1943. No. 5.—DEMERARA]

BEFORE BOLAND, J.

1944. JUNE 2; DECEMBER 14; 1945. JANUARY 2, 15.

Will—Probate—Earlier will—Revoked by subsequent will—Later will destroyed—With intention of reviving earlier will—Earlier will not revived.

Will—Probate—Revocation of will—Intention to revive earlier will—Earlier will not revived—Intention to revoke later will—Conditional—Dependent relative revocation—Later will not revoked.

Costs—Probate actions—Where unsuccessful party ordered to pay costs personally—Where costs of all parties to be paid out of estate.

To constitute revocation of a will by destruction thereof, the act of destruction must be accompanied by an intention to revoke, that is to say, there must be an *animus* to revoke, as well as the act.

Unless the *animus revocandi* is certain and unequivocal, there is no revocation. However, in the absence of anything to the contrary at the time of destruction, the mere act of a testator destroying his will would establish *prima facie* an unequivocal intention on his part to revoke the same.

On the 2nd May 1942 a testator made a will which was revoked by another will made on the 4th August 1942. On the 27th September 1942 he destroyed the second will with the intention of reviving the will of the 2nd May 1942.

Held (1) that the will of the 2nd May 1942 was not revived; and

(2) that, in relation to the will of the 4th August, 1942, the *animus revocandi* had only a conditional existence, the condition being the validity of the paper intended to be substituted for the said will,

that the doctrine of dependent relative revocation therefore applied. and that the will of the 4th August 1942 was not revoked.

Powell v. Powell (1366) L.R.1 P. & D. 212, *per* Sir J. P. Wilde, applied.

The Court ordered the plaintiff's costs on the issue as to revocation of probate of the will of the 2nd May 1942 to be paid personally by the executor who had obtained probate thereof.

The Court ordered the costs of the plaintiff and the defendant on the issue as to whether the will of the 4th August 1942 was revoked on the 27th September, 1942, to be taxed as between solicitor and client and to be paid out of the estate of the deceased.

ACTION by the plaintiff Mabel Clementina Braithwaite against Walter Arnot Braithwaite in his capacity as executor of the estate of Nathaniel Braithwaite claiming (a) the revocation of a grant of probate in common form, issued on the 31st December 1942, to the defendant, of a will of the deceased dated the 2nd May, 1942; and (b) that the will of the 2nd May, 1942 was revoked by a will made on the 4th August, 1942, that the latter will was destroyed on the 27th September, 1942 with the intention of revoking the same, and that the deceased died intestate. By an order of the Court, Ruth Ann Verschuer executor under the will of the 4th August, 1942 was permitted to intervene in the action.

H. C. Humphrys, K.C., for plaintiff.

A. J. Parkes, for defendant and intervener.

Cur. adv. vult.

BOLAND, J.: The Plaintiff who is the widow of one Nathaniel Augustus Braithwaite has claimed in this action an order for the revocation of the grant of Probate of a certain alleged will of her deceased husband, dated the 2nd May, 1942, which was on 31st December, 1942 issued in common form to the defendant, Walter Arnot Braithwaite the executor named therein.

The plaintiff claims that her husband died intestate, and that, as his widow, she is entitled to a grant of Letters of Administration of his estate, because this will of the 2nd May, 1942 was revoked by a subsequent will dated the 4th August, 1942, which was the last will of the deceased, and which last will the testator afterwards on the 27th September, 1942 destroyed, as she alleges, with the *animus revocandi.*

At the trial it was established by evidence not challenged by the defence that on the 4th August, 1942 the testator did properly execute in due form of law a will which did revoke the will of the 2nd May, 1942, but it is submitted that the destruction by the testator of this later will was with the sole intention, as expressed by the testator at the time of its destruction, of reviving the earlier will, which was still in existence.

In law, as the defence admits, there can be no automatic revival of an earlier will by the mere destruction of a later will even if a declaration of such intention by the testator accompanies the act of destruction. Consequently, the defence was at the very opening of the trial forced to concede that the will of 2nd May, 1942 was wrongly admitted to probate and that

the grant of probate of same to the defendant should be revoked.

But it was submitted on behalf of the defence that in view of the circumstances of its destruction — that is to say, the destruction being for the sole purpose of reviving the earlier wills which was not legally possible the testator would be deemed not to have revoked same. Accordingly, defendant who is a beneficiary under both wills, the will of 4th August, 1942 as well as the will of 2nd May, 1942, claims that this later will should be admitted to probate and that a grant of probate of same should issue to Ruth Ann Verschuer, the executrix named therein, who as such executrix had obtained leave from the Court to intervene in these proceedings for the purpose of supporting the defendant's claim in this behalf.

The law as to the effect of a destruction of a will by a testator has long been settled by an abundance of authority. To constitute revocation the act of destruction must be accompanied by an intention to revoke — that is to say, there must be an animus to revoke as well as the act.

It is also well established by numerous judicial decisions that unless the *animus revocandi* is certain and unequivocal, there is no revocation, although, of course, in the absence of anything to the contrary at the time of destruction the mere act of a testator destroying his will would establish *prima facie* an unequivocal intention on his part to revoke same.

There may be instances, however, where an intention to revoke is because of an erroneous belief that a certain result would thereby ensue and where the sole design of the testator is to achieve that result. In such circumstances the *animus revocandi* is to be deemed not existent based as it is on a misconception, which may be either of law or fact.

In *Powell* v. *Powell* (1866) 1 P. & D. at p. 212 which was a case where the testator destroyed a will with the intention, expressed at the time, that he wished to substitute for it an earlier will, Sir J. P. Wilde said: "It is clear that the *animus revocandi* has only a conditional existence, the condition being the validity of the paper intended to be substituted. The act is referable not to any abstract intention to revoke, but to an intention to validate the other paper, and if the sole condition upon which revocation was intended was not fulfilled the *animus revocandi* is not present".

This doctrine is often referred to as the doctrine of "dependent relative revocation".

Since the later will was in fact destroyed, as the defendant admits, to successfully resist the plaintiff's claim that *prima facie* there was the *animus revocandi* and a resultant intestacy, the onus would be on the defendant and the intervening executrix to establish that the destruction of that will comes within the doctrine of dependent relative revocation — that is to say that the testator's sole intention and design, when he destroyed it, was, as was unequivocally indicated by him at the time of its destruction, to restore the earlier will.

In order to determine whether the defendant and the intervening executrix have discharged that onus, it is necessary to

consider the evidence as to what took place at the time of. the destruction of the will, and in weighing the evidence of those present at the time as to what were the expressions of intention uttered by the testator much help is afforded by a comparison. of the contents of the two wills, by consideration of the differences in the dispositions of the property made in each, and the nature of the relations subsisting at the material times of the execution and alleged revocation of the two wills between the testator and those whose names appear in each respective document.

Nathaniel Augustus Braithwaite, the testator, was twice married. By his first wife who died in January, 1918, the testator had six children. He married the plaintiff in November, 1918 and by her he had no children. It would appear that the: children of the deceased from an early date did not live amicably with their step-mother, and feeling that in the strained relations their father seemed inclined to lean on the side of his second wife against them, each child in course of time left the parental home and set up in residence elsewhere.

The testator, however, far from being estranged from his children never lost his affection for them so much so that in several wills which he executed before the two made in 1942, he made dispositions intended to give them or their children large benefits, and his youngest son, the defendant Walter Arnot Braithwaite, it is stated, was always appointed an executor. The deceased was a commercial clerk, but owned real estate and it was his son, the defendant Walter Arnot Braithwaite, who managed his father's property collecting rents and seeing after his father's affairs generally. The son being a chemist and druggist owning and managing his own drug business was considered by his father as being able to give more time to the collection of rents and management of the properties than he himself could spare from his employment as a commercial clerk.

It was stated in evidence that the testator had made many gifts of property in his lifetime both to his wife and children, but in 1942 his assets consisted only of three properties:—namely lots 271 and 275 Forshaw Street, Queenstown, and West half of lot 33 David Street, Kitty Village.

In both wills — the will of 2nd May, 1942 and the will of 4th August, 1942 he disposes of these properties in the same way — that is Lot 271 Forshaw Street he gives to his son Walter Braithwaite, Lot 273 Forshaw Street he gives to his grandson Courtney Lloyd Braithwaite, the son of Walter Braithwaite, and the West half lot 33 David Street, Kitty Village he gives to his grandchildren Wallace Allan Mitchell and Clifford Frederick Mitchell, the sons of John Mitchell and his wife Margaret Mitchell.

To his wife, the plaintiff he gives the monthly sum of $40.00 from the rents from the foregoing properties during her life time providing she does not remarry. In other words the wife would seem to have a charge over the income of these properties for the payment of $40.00 per month during her lifetime and widowhood. However the will of 2nd May, 1942 differs from the will

of 4th August, 1942 in this respect. In the former will there is besides the above devises a specific bequest of the sum of $50.00 to the Trustees of the Christian Brethren Church of Kitty Village; also he mentions specifically that on the death or re-marriage of his widow the properties and accumulations of rent should go to the respective devisees already named. He also makes provision for surviving devisees taking the shares of any devisee predeceasing the testator—and there is a gift of his residuary estate, if any, to his six children.

These two wills being substantially the same both as to gifts and beneficiaries except as to the inclusion of the small money bequest to the Kitty Church, it might at first sight appear strange that the testator should destroy the later will for the purpose of restoring the earlier will.

But there is a difference between the two in the nomination of executors and it was particularly for the purpose of having his son the executor named in his first will to function rather than who is mentioned in the latter that, according to the evidence led by the defence, determined the testator to destroy the later will.

In the earlier will the executor appointed his son Walter Arnot Braithwaite to be his executor and trustee, and in default of him, his daughter, Ruth Ann Verschuer. In the later will Ann Verschuer, the Rev. Charles Gordon Smith and testator's nephew Colin Coleridge King are the joint executors, but in his evidence Rev. Mr. Smith stated that it was understood that he was to be a mere formal executor leaving the virtual administration of the estate in the hands of Ann Verschuer. The earlier will, according to the evidence of defendant Walter Braithwaite, remained as was done with previous wills in defendant's possession to be acted upon on the death of the testator. He had not been aware that his father had made a later will until the 27th day of September 1942, when his father sent for him and told him that he felt that morning that he was going to die, and further said to the defendant that in fairness to him he should tell him that he had made another will but had not mentioned him as executor. This he said he had done on the persuasion of his wife who, according to defendant's evidence, had previously told the testator in his presence that he had better make other arrangements in his will as she preferred to have nothing to do with the son. The defendant states in his evidence that he said to the testator that while he could not question his decision he felt that as he had always transacted his father's business the public would think that the father had found him unworthy of the trust.

It was on this complaint that testator sent for Rev. Gordon Smith who had possession of the later will in a sealed envelope since immediately after its execution. Rev. Smith says in his evidence that on arrival with the sealed envelope at testator's home as a result of the message he received he found the defendant there alone with his father. As to what occurred after Mr. Smith's arrival, the evidence of Mr. Smith, whilst in no way in contradiction of defendant's evidence, is not fully corroborative of the latter's. Both witnesses speak of the testator handing the will to the defendant with directions to destroy it which were carried out. But

whilst the defendant says that his father before handing the will to him for destruction used these words addressing Mr. Smith "the will Walter has will stand" and then repeated to the defendant himself whilst actually handing him the will "the other will which you have will stand", Mr. Smith does not in his evidence make any reference to any such observation made by the testator. But Mr. Smith remembers testator saying immediately after the tearing up of the will "Now I know that the Kitty Church will receive what I want them to have". That Mr. Smith said was all that was said by the testator.

Counsel for the plaintiff has emphasized that the defendant being an interested person his evidence alone should not be considered as having such weight as to satisfy the burden placed upon the defence in seeking to rebut the presumption of the *animus revocandi* accompanying the destruction of a will. It is submitted also that there is a difference between the purpose for which the will may be destroyed and the result following on destruction — and it is contended that Mr. Smith's evidence of the remark of the testator does not disclose an expressed purpose for destroying the will — to benefit the Kitty Church — but merely a belief as to what would follow upon its destruction, whatever may have been the purpose.

I have had regard to these submissions of plaintiff's counsel which certainly are deserving of full consideration.

Whilst, however, defendant does stand to benefit more under the will than he would as one of six children under an intestacy subject to the widow's rights, I do not think his interest so great as would warrant the Court in eliminating his evidence altogether. The Court is entitled to look at the surrounding circumstances and the probabilities to see whether these provide any corroboration of defendant's testimony as to the words used by the testator at the time of the destruction. It seems to me that the summoning of Mr. Smith to bring the will at the interview between the testator and the defendant, who the testator, knew had the previous will in his possession—the handing over of this later will to the defendant with the direction that he should tear it up with his own hands — the leaving with the defendant the torn fragments which the defendant put in his pocket and which have been put together again and produced in Court— he non-recall of the earlier will still left outstanding in the defendant's possession, all these facts combined to show the testator's mind as desiring to have the former will restored in the place of the destroyed one and are in corroboration of the defendant's testimony that the testator did in fact say so in express terms.

It is perhaps curious that Mr. Smith does not mention this. It may be that the matter was not so vitally affecting him as the defendant who had the previous will. It would appear too that Mr. Smith although he knew of a previous will did not know that that was still in existence, nor that defendant was the executor thereunder. But it is natural that the reference to the revived legacy to a Church in which Mr. Smith was interested would impress itself on Mr. Smith's memory and this is corroborative of

defendant that at any rate at the time of the destruction allusion was made to another will which the defendant thought would become operative in the place of the destroyed will.

Evidence was also led by the defendant of a remark made by the testator some days after the destruction of the will as to what he said to Walter Braithwaite when he destroyed the will. Counsel for the plaintiff objected to the admission of this evidence contending that the expressions of intention at the time of destruction only are admissible and not subsequent declarations. I reserved the question of the admissibility of this evidence until the termination of the case.

In my view that evidence of Ann Verschuer was admissible. It was not a statement as to what was his intention at the time—but what he had said at the time of the destruction—The witness stated that the testator "told her that he had told Walter then to act under the will that he had".. That evidence was admissible as corroborative of defendant's evidence as to what the testator had said then. But apart from this corroborative evidence there was sufficient evidence before the Court to satisfy me that the testator destroyed the will of 4th August 1942 for the sole purpose, as he thought he was thereby doing, of resuscitating the will of 2nd May 1942, and that this intention was clearly and unequivocally indicated by the expressions he used at the time.

In those circumstances the *animus revocandi* was only a "dependent relative revocation" and the will of 2nd May not being thus revivable in law, there was no true *animus revocandi*.

Being satisfied with the due execution and due attestation of this will of 4th August 1942, whose fragments have been put together and exhibited in Court, the Court decrees Probate thereof to the executor Ann Verscheur in solemn form of law, and the claim of the plaintiff for Letters of Administration is hereby dismissed.

There will be an order for the revocation of the grant of Probate of the Will of 2nd May, 1942.

As to costs, Plaintiff having succeeded in her claim for revocation of Probate, the defendant personally must pay plaintiff's costs on this issue to the date of admission in Court of plaintiff's claim for revocation.

Regarding the issue as to the validity of the will of the 4th August, 1942, Plaintiff in the Court's view was justified in seeking to challenge the validity of the will in view of its destruction by the testator in the circumstances given in evidence and induced as she was by the grant of probate of the earlier will which must presumably have been based on the revocation of the earlier will. Therefore on this issue Plaintiff and the defendant will have their costs, to be taxed as between solicitor and client, paid out of the testator's estate.

Solicitors: M. S. Fitzpatrick, W. D. Dinally.

A. CHAN *v.* S. A. AUSTIN

AMANDA CHAN, Plaintiff,

v.

SAMUEL A. AUSTIN, Defendant.

[1943. No. 448. — DEMERARA.]

SAMUEL A. AUSTIN, Plaintiff,

v.

AMANDA CHAN, Defendant.

[1943. No. 450, 1944. No. 140, and 1944 No. 177. — DEMERARA.]

BEFORE SIR JOHN VERITY, C.J.: 1945. OCTOBER 9, 10, 11, 12, 15, 29.

Principal and Agent—Agreement between—Shocking piece of knavery on part of agent—Principal did not have independent legal advice—Agreement set aside.

An agreement between a principal and an agent was set aside where the principal had no independent legal advice, and where the Court was satisfied that the agreement was a shocking piece of knavery on the part of the agent.

Amanda Chan claimed relief against Samuel A Austin in respect of a certain agreement and promissory note signed by her, and Samuel A. Austin opposed the passing by Amanda Chan of transport of certain properties on the ground of certain moneys alleged by him to be due by Amanda Chan to him under the agreement and promissory note. The facts appear from the judgment.

H. C. Humphrys, K.C., for Amanda Chan.

C. Lloyd Luckhoo (*J. A. Luckhoo,* junior, with him), for Samuel Austin.

Cur. adv. vult.

VERITY, C.J.: In these consolidated actions Mrs. Chan claims relief in respect of a certain agreement and promissory note signed by her, while Samuel Austin opposes the transport by Mrs. Chan of certain properties on the ground of certain moneys alleged by him to be due under the agreement and promissory note.

It appears that Mrs. Chan and Austin, who is a property agent, engaged in certain transactions for the purchase and re-sale of immovable property in Georgetown. In the course of a few months these transactions involved the raising of money by way of certain mortgages, the purchase of certain properties, the collection of rents, payments on account of mortgage interest, insurance and repairs, the cancellation of mortgages, execution of various agreements and passing of transports. Certain advances appear to have been made by Austin from time to time on behalf of Mrs. Chan who had no capital other than that which she raised, on Austin's advice, by mortgage on her own home. At his request she signed more than one promissory note, the amounts of which were determined by the alleged state of the account between them, although it would appear that no books of account were kept by

Austin in relation to these transactions until an advanced state of the proceedings.

No written agreement was entered into between the parties m the first instance, though at a later date Mrs. Chan signed a document of which she has no recollection but which purports to set out certain terms. Later still a more formal document was drawn up by Austin and signed by Mrs. Chan and this forms the agreement from which the latter seeks relief and which the former seeks to enforce.

The terms of this agreement purport to secure to Austin the benefits of a sole agency in relation to properties already bought and any which might subsequently be bought by Mrs. Chan, preclude her from refusing to sell any of those properties to purchasers introduced by Austin, and fix the terms of his remuneration, that is to say, commission at the rate of 3% on the price realised by 'any sales, plus 30% of the net proceeds thereof, together with 8% on all rents collected from the properties. On his part Austin undertook to collect the rents, keep proper accounts and to manage and supervise the property business and do all necessary acts for finding purchasers for the properties.

In addition to the remuneration fixed by the agreement Austin not only charged commission at the rate of 3% on all funds raised by mortgage for the purchase of the properties, but also received from the vendors, for whom he also acted as agent certain commission and in one case, I am satisfied, though this he untruthfully denies, a further sum by way of bonus.

If effect were to be given to the terms of the agreement it appears that in so far as relates to capital turn-over Mrs. Chan would receive a little over $400 on the transactions while Austin would receive over $2,000 by way of remuneration. Austin contends however that Mrs. Chan should also be credited with the net rental profits accruing to her while in possession of the properties. This would certainly increase the sum of her gains, but as the interpretation placed by Austin upon the phase "proceeds of sale" includes rental profits also upon which he is to receive 30% Mrs. Chan's gain therefrom would be decreased by that amount and his own correspondingly increased.

Mrs. Chan, although described by Austin as a "business woman" has, I am satisfied, no business experience other than that of assisting her husband in the running of a small restaurant or cook-shop and she does not strike me as a woman of any particular acumen. Austin, on the other hand appears to have had considerable experience and is without doubt an acute person with any eye to his own advancement above all else. While he was aware that he was acting as agent for both parties in all these transactions and receiving commission from both sides, a fact which I am satisfied he did not expressly disclose to Mrs. Chan, he at no time suggested to her that she should seek other advice in relation to any of their dealings, nor take any steps in her protection. On the contrary, while he took the precaution to have all agreements for sale executed in the presence of a solicitor, though the documents were of the simplest, the agreement upon which the terms

of agency were based was secured by him in the absence of such protection as might have been afforded by the presence of a solicitor from whom she could have sought advice. It was indeed presented for her signature under circumstances wherein she could not examine or give due consideration to its terms and at a time when she felt herself already so deeply committed that she was unable to withdraw. Even so he failed to furnish her with a copy thereof until her insistence weeks later, — a course he appears to have followed also in relation to a third party to one of the transactions, an elderly lady to whom he promised fabulous profits if she committed her business to his hands. At no time in the course of their transactions did Austin produce to Mrs. Chan any proper accounts, while bills for repairs and even rental returns were retained by him without her being given due opportunity for perusal and on the occasions when he purported to strike a balance, which appears on each occasion to have resulted in her giving him a promissory note for sums alleged to be due, he presented no accounts in writing, the course of their dealings being calculated by word of mouth.

The whole affair is, in my view, a shocking piece of knavery and the mere fact, urged by counsel, that in the event Mrs. Chan would appear to stand to profit to the extent of a few hundred dollars does not at the best justify a course of dealing in which Austin as her agent sought always his own advantage and secured to himself the lion's share of the profits arising from speculations in regard to which he incurred no liability.

Such a course of dealing on the part of an agent will not be upheld by a court of equity. No benefit can be allowed to accrue to an agent as the result of dealings in which he sought to secure unconscionable profit at the expense of the principal whose interest it was his duty to advance. In these circumstances the agreement upon which he relies will be set aside and the promissory note arising from dealings thereunder will be cancelled. While Austin would be entitled to recover amounts advanced by him either in cash or for repairs to the buildings or in connection with the collection of rents, he is not entitled to any sums whatever by way of commission in relation to any of these transactions in the course of which he sought to acquire double commission without full and proper disclosure to his principal. It would appear to be clear from such figures as have been supplied that for his out-of-pocket expenses and advances Austin has already received full re-imbursement either especially of by way of commission wrongfully retained.

Mrs. Chan has asked for an order for accounts to be taken. This is an equitable relief which this court would only grant if it were satisfied that the result thereof would justify the labour and expense entailed. I am not so satisfied in the present case but rather am of the opinion that the position of neither party would be substantially altered by any more detailed investigation. The prayer for accounts and for damages therefore must be denied.

There will be judgment entered for the plaintiff Amanda Chan

in her suit against Samuel Austin, with costs, with an order that the promissory note for $233 dated 1st February 1943 made by her in his favour be delivered up and cancelled, that the agreement dated 14th April 1943 made between the parties be set aside, and that Austin deliver up to Mrs. Chan all documents in his possession relating to the properties the subject matter of these actions. There will be judgment also for the defendant Amanda Chan with costs in the opposition suits brought against her by Samuel Austin in which in view of my findings I am unable to make the declaration prayed, the substantive claims upon which the opposition is based being dismissed.

Judgment in favour of Amanda Chan in all the actions.

Solicitors: *J. Edward de Freitas,* for Amanda Chan; *E. D. Clarke,* for Samuel A. Austin.

JOSEPH ANTHONY DeSILVA, Plaintiff,

v.

CASIM ODE, Defendant.

CHARLES VICTOR LAMPKIN, Plaintiff,

v.

CASIM ODE, Defendant.

[1945. No. 480 and No. 484. — DEMERARA.]

BEFORE LUCKHOO, C.J. (Acting): 1945. NOVEMBER, 26; DECEMBER 3.

Construction—Statutes—Do not operate retrospectively—unless clear and express words to that effect, or object subject matter or context shows such to be their effect.

Construction—Statutes—Defence (*Georgetown Rent Control) (Amendment*) *Regulations* 1944 (No. 16)*—Do not operate retrospectively. Rent restriction—Excess rent—Recovery of—Premises not within Rent Restriction Ordinance*, 1941 (No. 23)*—Within Ordinance as extended by Defence (Georgetown Rent Control) (Amendment) Regulations*, 1944 (No. 16)*—Recovery of rent paid in excess of maximum rent fixed by Rent Assessor—Only as from date on which Regulations came into force.*

Statutes are not to be interpreted so as to have a retrospective operation, unless they contain clear and express words to that effect, or the object subject matter or context shows that such is to be their effect. The language of a statute is *prima facie* to be construed to be prospective only.

Where the words of a statute admit of two interpretations, the statute is not to be interpreted so as to produce a retrospective effect or to impose liabilities not existing at the time the statute was passed.

Young v. *Hughes* (1859) 28 L.J. Ex. 161, and *Young v. Adams* (1898) A.C. 476, applied.

The Defence (Georgetown Rent Control) (Amendment) Regulations, 1944 (No. 16), do not operate retrospectively.

The right of a tenant of premises to which the provisions of the Rent Restriction Ordinance; 1941 (No. 23) were extended by the Defence (Georgetown Rent Control) (Amendment) Regulations, 1944 (No. 16), to claim a refund of excess rent paid over the maximum rent fixed by the Rent Assessor, dates from the 1st September, 1944, the date on which those Regulations came into force.

Actions by Joseph Anthony deSilva and Charles Victor Lamp-kin against their landlord Casim Ode claiming to have the rent paid by them from the month of February 1943 in excess of the maximum rent fixed by the Rent Assessor in respect of business premises let by the defendant to them, refunded. The provisions of the Rent Restriction Ordinance, 1941 (No. 23) were extended to business premises by the Defence (Georgetown Rent Control) (Amendment) Regulations, 1944 (No. 16) which came into force on the 1st September, 1944.

M. S. Fitzpatrick, solicitor, for the plaintiffs deSilva and Lampkin.

R. G. Sharples, solicitor, for the defendant.

Cur. adv. vult.

LUCKHOO, C.J. (Acting): A pure point of law, important, and not obscure as it may at first sight appear, is necessary to be determined in these two actions which came before me on Monday last in order to ascertain from what period the difference of the rent paid in each case by the plaintiffs and that contained in the certificates of the Assessor with respect to premises occupied by them should be calculated.

Solicitor for the plaintiffs and solicitor for the defendant agree that the figures given in the particulars of the Statement of claim in each action are correct, but they seek a decision as to whether the refund of the excess rent to be made should be calculated from the 1st day of September, 1944, or from an earlier date.

They both referred me to section 5 (2) of the Rent Restriction Ordinance, No. 23 of 1941 and Regulation 2 of the Defence (Georgetown Rent Control) (Amendment) Regulations, 1944.

The claim of the plaintiff Joseph Anthony de Silva against the defendant Casim Ode in action No. 480 of 1945 is in respect of business premises situate at the corner of Regent and King Streets, Georgetown, and the period for which he claims to have the excess rent paid by him refunded is from the month of February, 1943, to the month of August, 1945, and that of the plaintiff Charles Vincent Lampkin, in action No. 484 of 1945, is in respect of business premises situate at the corner of the said streets and for a like period.

In the affidavit of defence in each case which by leave of the Court was filed when the two actions came before the Court and the matters dealt with summarily, the defendant contends that his liability to refund began as from the month of September, 1944.

When Ordinance No. 23 of 1941 was passed restricting in specified cases the increase of rent of certain classes of dwelling

houses, provision was only made by Section 3 thereof for its application to those premises fully described in the first three subsections of that section. Business premises were not included.

Section. 5 (2) of the said Ordinance provides for the recovery by the tenant of any excess rent over and above the standard rent by more than the amount permitted under the Ordinance in respect of any period subsequent to the 8th day of March, 1941. This date was fixed as the time from which such excess was recoverable although the Ordinance was published and became law on the 8th day of November, 1941.

Because of subsequent legislation, it is important to note that the Ordinance also did not apply to a house let together with land other than the site of the house nor did it apply to a dwelling house erected after, or in course of erection, on the 8th day of March, 1941.

Section 16 provided for the duration of the Ordinance. It was for a period of one year from the date of the commencement of the Ordinance.

The Legislature by resolution from time to time, in accordance with certain provisions in the said section, gave legal sanction to its continued operation.

In the year 1944, under the Emergency Powers (Defence) Acts, 1939 and 1940, the Defence (Georgetown Rent Control) Regulations No. 6 of 1944 were made and on the 28th day of August, 1944, there was an amendment — the Defence (Georgetown Rent Control) (Amendment) Regulations, No. 16 of 1944 — when for the first time business premises the standard rent of which did not exceed $720 per annum, dwelling houses and business premises erected after or in course of erection on the 8th day of March, 1941, and business premises let at a rent which includes payment in respect of furniture, fittings, electric light, water or any appliances supplied by the landlord (but not in respect of board and attendance) were brought within the application of the Rent Restriction Ordinance, 1941. In other words these premises became subject to the provisions of the Ordinance by reference.

In dealing with cases of legislation by reference, the primary consideration to be kept in mind is the *general scope* and *object* of the amending legislation, as this affords some guide as to whether a wide or narrow interpretation is to be put upon general words or expressions capable of a wider or narrower meaning. But the crux of the matter is when should such legislation be deemed to be retrospective in its operation.

All that Regulation 2 means is that section 3 of the Ordinance should *in future* apply to certain premises and that by reference Regulation 2 should be read into that section. If that is not so paragraphs (b) and (c) of Regulation 2 would work untold hardship to landlords. Note the words in section 3 (4) and (5) of the Ordinance — "This Ordinance shall not apply to premises mentioned therein and when these subsections are read in conjunction with section 16 then, but for the fact that the Legislative

Council have had each year by resolution to give further life to the Ordinance, it will readily be seen and appreciated that the new provisions could not have a retrospective effect.

Statutes are not to be interpreted so as to have a retrospective operation, unless they contain clear and express words to that effect, or the object, subject matter or context shows that such is to be their effect, and where the words of a Statute admit of two interpretations you are not to interpret them so as to produce a retrospective effect or impose liabilities not existing at the passing of the Statute. To interpret the new enactment relating to business premises as having a retrospective effect would upset all business transactions already completed and re-open transactions and create liabilities which the parties could never, when they entered into the agreement, have contemplated. There is a clear rule of law that the language of a Statute is *prima facie* to be construed to be prospective only and according to the case of *Young* v. *Hughes* (1859) 28 L.J. Ex. 161, at p. 164: "Nothing but clear and express words will give a retrospective effect to a Statute. It would be a most dangerous construction to give a retrospective effect to a Statute by implication." Vested rights lawfully acquired would be wiped away without giving those so entitled an opportunity to be heard in opposition.

It was quite legal until the passing of the amending Regulations for those interested in the letting of business premises to enter into a contract of tenancy on terms mutually agreed upon and not in any way contrary to public policy. In my view it would be most unfair and not in accordance with natural justice to deprive a person of his rights so legitimately acquired, by legislation, so that an act, legal at the time of doing it, should be made unlawful and create liabilities to his detriment.

Modern legislation has almost entirely removed that blemish from the law and Lord Watson, delivering the judgment of the Judicial Committee in the case of *Young* v. Adams (1898) A.C. at p. 476, said: "I think it is a broad principle of construction that, unless the Court sees a clear indication of intention in an Act of Parliament to legislate *ex post facto* and to give to the Act the effect of depriving a man of a right which belonged to him at time of the passing of the Act, the Court will not give to the Act a retrospective operation."

One has to consider what was the previous state of the law. There was no restriction until the Regulations of the 28th of August, 1944, were made in so far as business and some other premises were concerned. To construe those Regulations retroactively might cause a re-opening of many commercial transactions already completed and the Legislature by clear and unequivocal language must so express that intention. There is nothing, however, in the language of the Regulations to lead me to that conclusion or that they should be construed otherwise than prospectively.

It therefore follows that the right to claim a refund of the excess of rent paid by the respective plaintiffs over the maximum rent fixed by the Rent Assessor dated from the 1st day of September, 1944.

Plaintiff in action No. 480 is only entitled to a refund of $71.76 for which sum I give judgment. Plaintiff in action No. 484 is only entitled to a refund of $77.64 for which sum judgment will also be entered.

Judgment for plaintiffs for part of sum claimed.

JOHN De FREITAS *et al*, Plaintiffs,

v.

MARY MARTINS, Defendant.

[1945. No. 418. — DEMERARA.]

BEFORE LUCKHOO, C.J. (Acting) in Chambers:

1945. DECEMBER 7.

Practice and Procedure—Originating summons—Affidavit in support —Filed without leave—Expunged from record—Rules of Court, 1900, *Order* 40 (C), *rule* 7; *Order* 34, *rule* 2.

Practice and Procedure—Administration of estates—Application for direction of Court—Under Supreme Court of Judicature Ordinance, cap. 10, *section* 45—*Whether particular section of Ordinance* to be *mentioned in body of application—Rules of Court,* 1900, *Order* 40 (C), *rules* 2, 13 (1), (2); *Order* 51.

*Practice and Procedure—Administration of estates—Application for direction of Court—Notice of application—*Service *in the first instance of—*

Meaning of—Not before application is filed—Service of copy of originating summons—Supreme Court of Judicature Ordinance, cap. 10, *section* 45 (4), (5), (6); *Rules of Court,* 1900, *Order* 40 (c), *rules* 2, 5.

No affidavit shall be filed in an originating summons except with the leave of the Court. Where an affidavit was filed without such leave, an order was made expunging it from the record of the proceedings.

There is nothing in the Rules dealing with administration and trusts to indicate that the particular section of the Supreme Court of Judicature Ordinance, cap. 10, must be mentioned in the body of an application under section 45 of that Ordinance.

The words "notice in the first instance' in section 45 (5) of the Supreme Court of Judicature Ordinance, cap. 10, do not mean that notice of an intended application under section 45 (4) shall be served on the persons mentioned in section 45 (5): they merely mean that notice of the application, made by way of originating summons, by virtue of section 45 (4) and Order 40 (C), rule 2 of the Rules of Court, 1900, shall in the first instance be served after the application is filed, on the persons mentioned in section 45 (5), the Court having power, under section 45 (6) to direct that any other persons it thinks fit be served with notice of the application.

Originating summons taken out by the plaintiffs under section 45 of the Supreme Court of Judicature Ordinance, Cap. 10.

J. L. Wills, for the defendant.

N. C. Janki, solicitor, for the plaintiffs.

Cur. adv. vult.

LUCKHOO, C.J. (Acting): At the hearing of this application brought at the instance of the plaintiffs under the provisions of section 45 of the Supreme Court of Judicature Ordinance, Cap. 10, by way of originating summons under Order XL (C), rule 2 of the Rules of Court, 1900, Mr. Wills, counsel for the defendant, raised three preliminary objections to the right of the plaintiffs to be heard on the grounds — *firstly*, of non-compliance with the provisions of section 45 (5) (b) of the said Ordinance; secondly, that there is no reference to any particular section, which must be specified in the body of the application; and *thirdly*, that the filing of the affidavit of John De Freitas, one of the plaintiffs, sworn to on and attached to the application of the 10th day of October, is irregular and in contravention of the rules regulating the filing and issuing of such a process.

Mr. Janki, solicitor for the plaintiffs, in the absence of Mr. Jacob was permitted to deal with the objections raised by learned counsel for the defendant and questioned the right of Mr. Wills to be heard and in answer to the said objections advanced the following reasons —

(a) that the defendant through her solicitor having entered unconditional appearance to the summons on the 17th October. 1945. cannot now question the validity of the proceedings, that is so say any irregularity or otherwise in the issue or service of the originating summons.

(b) that all that was necessary to comply with section 45 of the Ordinance in making the application was done:

(c) that assuming but not admitting that there was a noncompliance, the defendant, by entering unconditional appearance had waived any right which she might have had to question the irregularity of the proceedings; and

(d) that the non-compliance with a rule of procedure was not only waived by the defendant but that the Court under the provisions of Order LI, rule 1 of the Rules of the Supreme-Court, 1900, may deal with the proceeding in such manner and upon such terms as it may think fit.

The foundation of Mr. Wills' argument on the first point raised by him is on the interpretation to be given to the words appearing in subsection (5) of section 45 of the Ordinance: "Notice in the first instance shall be served……" He contends that it is a condition precedent to the making of the application which, it is agreed by both parties, is by way of originating summons; that notice of the intended application must be served on the defendant who comes under one of the classes referred to in sub-clause (a) of the said subsection before the actual filing and service of the summons on her and that it is a statutory provision which must be complied with and cannot be waived and strikes at the root of the matter. It is, he stated, not a mere non-compliance with a rule of court but is a *sine qua non* in order to give validity to the proceedings.

The question I have to ask myself is: do those words of the subsection have the meaning assigned to them by counsel and if so. is it a statutory requirement non-compliance with which invalidates all subsequent proceedings, or is it one which is only

procedural and can be waived? What then do the words "Notice in the first instance" mean?

In my view the words "in the first instance" mark only the order in which the notice of the application, equivalent to the copy of the summons, is to be served. Subsection (4) deals with the mode of application. That application in this case takes the form of an originating summons, hence "notice of application" must mean notice of the originating summons filed and that is effected by service of a copy of the same in the first instance on the appropriate person or persons mentioned in sub-clause (a). I am fortified in that view by the words appearing in subsection (6) "The Court may direct any other persons it thinks fit to be served with notice of the application." To paraphrase those words they mean that the Court has discretion to cause service to be made at another instance or time on some other person or persons not mentioned in either sub-clause (a) or (b) of the subsection.

Order XL (C), rule 2, clearly sets out that applications under section 45 of the Ordinance shall be by originating summons and the provisions contained in the rules dealing with administration and trusts are almost identical with those in the Ordinance. By Rule 5 of the Order the persons to be served with the summons *in the first instance* shall be in the appropriate case those mentioned in the two preceding rules of that Order. There we find the words "in the first instance" occurring — "to be served with *the summons."* Rule 6 provides for service on such other persons as the Court or a Judge may direct. "Notice of the application", therefore, in both subsections should bear the same meaning. "It is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament or other document" :*Courtauld* v. *Legh* (1869) L.R. 4 Exch. 126, 130.

The difficulty which confronts one in interpreting those words otherwise is the practical effect to be given to subsection (6). How could persons be served with notice of the application if those words mean notice of intended application when the application is already filed and the Court or Judge is seised of the matter for it is only then the Court can direct any other persons it thinks fit to be served with notice of the application.

The word "application" has been judicially construed. "Application" is defined in Stroud's Judicial Dictionary as a request or motion to a court or judge.

In *Camacho* v. *Pimento et anor*. (1918) L.R.B.G. 45, an application for leave to appeal to the Privy Council was made under Clause 4 of the Order-in-Council for 1910 to the Full Court composed of Sir Charles Major and Hill, J. who held that an application for leave to appeal to the Privy Council pursuant to rule 4 of the rules for regulating appeals to His Majesty-in-Council is made when the applicant files a copy of his notice of motion or presents his petition to the Court, the rule providing that the applicant shall give to the opposite party notice of his intended application, in which case the opposite party must be served with the notice of motion before filing a copy of it or with notice of

intention to present a petition before it is lodged in the Registry. There the rule clearly provides that the party appealing shall give notice to the opposite party of his intention to make it. How the application shall be made is also provided, namely, by motion or petition and compliance with the rule is secured when the applicant has served the opposite party with a notice of motion for a day within the period of 14 days and filed a copy of the same in the Registry, or when he has presented a petition to the Court by lodging it in the Registry on a day within the same period, having previously given notice to the opposite party, either separately or by indorsement on a copy of the petition, of his intention to present it on that day.

One finds a similar kind of provision in the Road Traffic Act, 1930, section 21 (c), that a person shall not be convicted upon a prosecution for reckless or dangerous driving unless within fourteen days a "notice of the intended prosecution" specifying the nature of the alleged offence is served on him.

I therefore find, on the interpretation to be placed on the words of subsection (5) of the Ordinance, that there was no pre-requisite to be carried out by the plaintiffs. The first objection raised by Mr. Wills is unsustainable and it is not necessary to consider the question of waiver by reason of the unconditional appearance of the defendant, nor is there any necessity to decide whether, had such a condition as that urged by learned counsel for the defendant existed, a statutory requirement could be waived.

As to the second objection I do not agree with Mr. Wills that the particular section of the Ordinance should have been specified in the body of the application as required by Order XL (C), rule 13 (2) of the Rules. This application is made under the authority of an Ordinance and section 45 (4) states that it may be made in the manner provided by rules of court and in the absence of any special provision they may be made by petition. Order XL (C) rule 2 specifically provides for applications under section 45 to be made by way of originating summons and there is nothing in the rules dealing with administration and trusts to indicate that the particular section must be mentioned in the body of the application. Rule 13 (1) of that Order sets out the several applications which may be made by summons, and under (h) "any other application under the authority of an Ordinance where no procedure is provided by the Ordinance."

In those cases coming under sub-clauses (a) to (h) every such summons shall be intituled in the matter of the will, settlement, trust, property or process, as the case may be, to which the summons relates, and in the matter of the Act or Ordinance, if any, under which the application is made and shall in the body thereof specify the particular section of the Act or Ordinance under which relief is sought. Can it be said that under section 45 (4) no procedure is provided? Does not the subsection indicate that the applications should be made in the manner provided by the rules of court? And are there not special rules dealing with applications of this nature? Order XL (C) 2 provides that applications

under section 45 shall be by originating summons. Rule 13 (2) of the said Order which states "Every such summons.....shall in the body thereof specify the particular section or sections...." must refer to those summonses falling within the ambit of sub-clauses (a) to (h).

If I am wrong in the construction of these rules then I shall, under Order LI, give leave to amend the application by inserting the section in the body of the application.

The third point or ground of objection raised by learned counsel for the defendant is in my opinion sound. Rule 7 of Order XL (C) makes it clear that the Court or Judge, when the application comes before it or him, shall decide as to what evidence is required to support the application. By Order, XXXIV, r.2 of the Rules of Court, 1900, evidence in support of an application shall ordinarily be given by affidavit. The corresponding English rule to rule 7 of Order XL (C) is rule 7 of Order 55 which is couched in the same language. Under that rule the Master fixes the time for the filing of evidence. In this application I shall fix a time within which evidence is to be filed by the plaintiffs and an opportunity will be given to defendant to answer the same.

Affidavits must not be sworn before an originating summons is issued or a petition presented, i.e. before the proceedings are commenced. See *Francome* v. *Francome* (1865) 13 W.R. 355, and the party intending to use any affidavit in support of an application made by him in Chambers must give notice to the other party of his intention in that behalf. The affidavit sworn to by John de Freitas on the 10th October, 1945, and filed with the application must have been sworn before the summons was issued and therefore not in accordance with the provisions of rule 7 above. The filing of the affidavit without leave of the Judge was irregular and the affidavit should be expunged from the record and I so order, but leave is given to the plaintiffs to file a fresh affidavit setting out the facts necessary to support the application within fourteen days from this date and notice shall be given to the defendant of plaintiffs' intention to use such affidavit. The defendant shall be at liberty to answer the said affidavit within fourteen days thereafter.

Mr. Wills having succeeded in his argument on this point which, with the order now made, will regularise the proceedings, the plaintiffs must pay the costs occasioned to the defendant, fixed at the sum of $15.

Application to be set down for hearing on Monday 14th January, 1946.

Solicitor for defendant: W. *D. Dinally,*

RAJKUMAR, Plaintiff,

v.

BHUGWANIA, Defendant.

[1944. No. 5.—DEMERARA.]

Before JACKSON, J. (Acting).

1945. December 6, 7, 11.

Will—Fraud practised on testator—Will affected thereby—Will pronounced against.

Will—Where Court not satisfied—That document propounded represents the true will of deceased—Will pronounced against.

The Court pronounced against a will where fraud was practised on the testator in the making of the will and where the will was affected by the fraud.

Craig v. *Lamoureux* (1920) A.C. 349, and *Boyse* v. *Rossborough* (1857) 6 H.L.C. 2, applied.

Where the Court is not satisfied that a document propounded as a will represents the true will of the deceased, the Court will pronounce against the document.

ACTION by the plaintiff RAJKUMAR against the defendant BHUGWANIA for probate in solemn form of a will of the deceased KHUSIAL dated the 14th June, 1944. The defendant counterclaimed for probate in solemn form of a will, of the deceased dated the 9th February, 1944 or of a will dated the 26th July, 1943. The necessary facts and arguments appear from the judgment.

Lionel A. Luckhoo, for the plaintiff.

A. J. Parkes, (*R. H. Luckhoo* with him), for the defendant.

Cur. adv. vult.

JACKSON, J. (Acting): The plaintiff in this action is the executor and sole beneficiary under the last will and testament of one Khusial deceased, who died on the 28th June, 1944. The will was executed on the 14th June, 1944 and the plaintiff seeks to prove the will in solemn form and a decree of the Court pronouncing for its validity.

The defendant Bhugwania who is the widow of the testator, Khusial resists the plaintiff's claim on three grounds, viz, that

(a) the instrument was not duly executed in accordance with the Wills Ordinance;

(b) the deceased did not know or approve of its contents, and in the alternative;

(c) the alleged will was obtained by the fraud of the plaintiff.

Defendant counterclaimed and asked that the will of the deceased bearing date 9th February, 1944 or that of the 26th July, 1943 be admitted to probate, and in the alternative for a declaration that the deceased died intestate.

The events which have led up to and have given rise to the controversy are as follows:—the testator and the defendant lived together as man and wife for about six months after which they

got married on the 13th May, 1943. They lived at L'Esperance, Canal No. 1, West Bank, Demerara, next door to the plaintiff; the testator had known the plaintiff for a period of 12 years, and long before the testator first knew defendant. Testator and defendant lived well together but differences arose about 3 months before the former's death; they along with plaintiff went to the District Commissioner's Office at Pouderoyen, West Bank, Demerara where a clerk one Mohamed Omar having listened to them concluded that it was better for them to live apart. They however went back to the matrimonial home; defendant left a week later after having received three cows from the testator; defendant said her husband told her that as she was not liked by the neighbours it might be better if they did not continue to live together at L'Esperance, that she should go and get a place at Pouderoyen or La Grange and he would go and live there with her. She then left; that was about the end of May, 1944 or early in June, 1944; her husband never followed her. On the 19th June defendant visited her husband and she alleged he had sent for her and on that visit told her he wanted to make a will in her favour leaving everything for her as he had done on two occasions previously; that at his request she called one Sarrab; that before Sarrab arrived and while she was attending her husband, plaintiff came in used her badly and told her she should leave as Khusial had already given him a will in his favour. She also alleged that when Sarrab arrived plaintiff chucked her out. As a result defendant went directly to La Grange Police Station and made a report leaving the plaintiff alone with the testator. Some hours after the police arrived. In answer to questions by P.C. Van Rossum the testator said he had not sent for defendant and that he had made a will in favour of plaintiff who was then in close attendance.

Defendant had also alleged that between the 9th February, 1944 and the end of May, 1944 or early in June when she left the home the plaintiff had been continually poisoning her husband's mind against her, that he had told him that she was too young for him, and he must put her out; further that when defendant went to Versailles to sell she slept with a man for whom she had previously borne a child, and that generally she was unfaithful; that she stole testator's oranges to give to this man, that she was a liar and wanted to poison the testator, her husband. This went on time and again and plaintiff pressed her husband to put her out. Defendant's husband was an old man and there was a great disparity between their ages. Defendant testified that the allegations made by plaintiff were all untrue, that she loved her husband and cared very much to stay with him.

In spite of her assurances to her husband defendant said plaintiff insisted that she should be put out and impressed on her husband that she only wanted his property. Thus, defendant asserted, began the unhappy differences between the defendant and her husband and they continued on to the time of the making of the will of the 14th June and thereafter. These stories her husband who could not resist the domination of the plaintiff, believed. The plaintiff denied the several allegations, admitted

the estrangement between the testator and the defendant but disclaimed any responsibility for it. Plaintiff however acknowledged that from the time defendant left the home the testator was under his sole care and he was his guide, philosopher and friend; he looked after his affairs; he however denied the incident of the 19th June as deposed to by defendant but said she was there but that he did not allow her to see the testator; instead he went to the testator, got the kitchen key and gave her some kitchen utensils she had left there.

It is curious that although according to the plaintiff's version defendant did not see the testator, plaintiff said he was called on the next day 20th June by the testator who told him that he was not leaving his property to him by will any more, but that he had made up his mind to sell it and would give him the chance to buy first; plaintiff said he had no money but if he gave him a chance to raise the money he would buy; the price offered to plaintiff was $500 though plaintiff said it was worth $700 to $800. According to plaintiff, the testator told him his reason for selling was that defendant would give plaintiff "plenty worry". Plaintiff averred that on the 23rd June he paid $150 on account of the purchase of the property "the “western two-thirds of lot number 2 (two) being part of plantation “L'Esperance *cum annexis,* situate in the Canal No. 1 Polder on the west “bank of the river Demerara in the county of Demerara in the Colony of “British Guiana said lot "number 2 (two) being shown and defined on a “plan made by the Sworn Land Surveyor, H. Ormonde Durham, bearing “date the 24th day of July, 1918, which said plan was duly deposited in “the Deeds Registry of British Guiana on the 2nd day of June, 1920, with “the building and erections thereon,” which was all the testator had and which was left for plaintiff under the will of the 14th June ,1944.

It is admitted that at the time of the making of the will of the 14th June, 1944 and before, the testator was old and feeble, his health was very much impaired and he was very ill in bed. I am satisfied on the evidence adduced that though he was sick in body there was not present that infirmity of mind as could in contemplation of law be characterised unsound nor could it be contended that he lacked the capacity to make a will. Plaintiff had on the 14th June fetched one Mr. Frederick Somwaru a School Teacher to Khusial for the purpose of making the will; Somwaru asked Khusial in plaintiff's presence why he wanted him and on being told asked him in whose favour the will was to be made and was told plaintiff's. Somwaru made the will which was duly witnessed by Somwaru and one Ramjit, plaintiff being present all the time. Somwaru said he asked those questions because he wanted to know from Khusial himself what he should do.

Counsel for defendant submitted that the immediate circumstances under which this will was made viz, the fact that —

(i) plaintiff went for Somwaru and took him for the purpose of making the will (ii) the will being made wholly in plaintiff's favour

(iii) instructions such as they were, were given in answer to questions by Somwaru

(iv) one of the witnesses Ramjit was the brother of a woman with whom plaintiff had previously lived as man and wife,—

amounted to circumstances of suspicion and the onus *probandi* was then shifted to the plaintiff who should satisfy the conscience of the Court that the will was the free and voluntary act of the testator, and that such conscience was not satisfied. He cited in support *Baker* v. *Batt* (1838) 2 Moore P.C. 317, *Barry* v. *Butlin* 1838) 2 Moore P.C. 481. I do not find favour with this submission and I do not think a close reading of the cited cases a principle as far reaching as that contended for could be extracted from them.

Baron Parkes at p. 483 in *Barry* v. *Butlin* said *inter alia*

> "It is said that where the party benefited prepares the Will, "the presumption and *onus probandi* is against the instrument, and the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper:" and that "where the capacity is doubtful, there must be proof of instructions or reading over." If, by these expressions, the learned Judge meant merely to say, that there are cases of Wills prepared by a Legatee, so pregnant with suspicion, that they ought to be pronounced against in the absence of evidence in support of them, and that extending to clear proof of the actual knowledge of the contents, by the supposed Testator, and that instructions proceeding from him, or the reading over the instrument by or to him, are the most satisfactory evidence of such knowledge; we fully concur in the proposition so understood; in all probability the learned Judge intended no more than this. But if the words used are to be construed strictly; if it is intended to be stated as a rule of law, that in every case in which the party preparing a Will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure but a particular species of proof is thereupon required from the party propounding the Will,— we feel bound to say that we assume the doctrine to be incorrect.
>
> The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases the onus is imposed on the party propounding a Will, it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed, and it cannot be that the simple fact of the party who prepared the Will being himself a Legatee, is in every case, and under all circumstances, to create a contrary presumption, and to call upon the Court to pronounce against the Will, unless additional evidence is produced to prove the knowledge of its contents by the deceased."

I am aware that the doctrine is not limited to one who prepares the will but extends to one who procures it to be prepared. *Tyrell* v. *Painton* (1894) Probate, 151.

Now I proceed to deal with the question of fraud as raised. Though I find the testator prima facie was of a sufficient disposing mind on the 14th June and that he had knowledge of the contents of the instrument he executed on that date recourse must be made to the whole of the evidence in the case before a conclusion could be reached as to whether any fraud had been practised on the testator and how far if at all the will was affected by it. The burden of proof is here on the defendant. (*Craig* v. *Lamoureux,* 1920, A.C. 349; *Boyse* v. *Rossborough,* 1857, 6 H.L.C. 2).

Many witnesses have testified and there are discrepancies here and there but after a careful consideration of the evidence and of the behaviour of the witnesses I am not left in doubt as to the truthfulness of the story of the defence; it was proved on a balance of testimony that the plaintiff at all times between February and June 1944 falsely impressed the testator with accusations of unfaithfulness by the defendant, urged him to put her away, harped upon the disparity between their ages, untruthfully alleged that she would poison him in order to get his property and caused the testator to put her away. Plaintiff kept constant vigil over the testator and made every effort to keep the defendant from him and did so succeed, raised prejudices in his mind so as to prevent her from receiving any benefit under his will and employed every device to stop her from disabusing his mind. This state of affairs commenced after 9th February, 1944, continued on to the 14th June and thereafter to the testator's death. Moreover on the 19th June when the testator procured someone and expressed his intention to make a will in favour of the defendant, the plaintiff chucked defendant out of the house. Plaintiff though he denied the defendant's version admitted that he prevented defendant from seeing her husband and that he was the medium by which she received some articles of kitchen furniture she had left behind two or three weeks before.

The incidents of the morning of the 20th June must not be ignored; plaintiff narrates them as having occurred between him and the sick old man whose life was fast ebbing away. Why should this testator offer to sell the property in which he lived to plaintiff after he had bequeathed it to him by will? Why should he fear that defendant would give trouble or express an intention not to dispose of the property by will any more? The events of the day before were too fresh in the defendant's mind, matters had reached an advanced stage, the police had been requisitioned; I doubt very much that this new step emanated from Khusial, the probability is that it came from the plaintiff; he said he had made up his mind to buy the property; the greatest single obstacle to the accomplishment of his aim was the defendant. Although she had been successfully excluded from the intimacy of her husband a week or two before yet she approached once more; there was the likelihood of her making further attempts therefore a purchase or pretended purchase of the property might settle the matter once and for all. Plaintiff in course of his cross examination said "When Khusial spoke to me he meant that the will he had made was not to have effect any more and I accepted it as such. I made up my mind to buy it; he told me he was going to sell, I actually bought and paid down $150: I kept the will although he told me that; I did not give it to him. This conversation took place when he was in bed; he and I were alone."

The testator was influenced by the plaintiff to give his assent to the will sought to be propounded; it was not however an influence of attachment or affection such as moves a testator out of gratitude to reward one who had been kind to him nor was it such as would urge a testator to gratify the wishes of another;

but on the contrary one which amounted to coercion tending to alienate or destroy the free agency of the testator; I have no doubt that the free play of the testator's judgment and discretion was at all material times unduly overborne by the plaintiff. The fraud as set out in the defence is proved; its influence continued and the testator was under it at the time he made the will in favour of the plaintiff. Plaintiff forced him into the belief that defendant was against him and by his several acts lured the testator into the execution of the will in his favour. The testator had executed two wills previously the latter on the 9th February 1944 at the Immigration Department, Georgetown, both leaving defendant as sole beneficiary. What had occurred, between the date of the will of the 9th February 1944 and that of the 14th June 1944 to effect such a radical change in the testator's mind and in his disposition? The evidence in my view leaves no other rational hypothesis on which the conduct of the testator can be accounted for save that which I found.

Quite apart from any question of fraud it is settled law that a will may be made under certain circumstances which would excite the suspicion of the Court and would call for the utmost vigilance and for exercise of the greatest scrutiny, before a pronouncement for its validity may be made; in view of the false representations, the assumption of the control of the testator's affairs, the exclusion of the defendant from her husband, the fact that testator was hardly more than a passive instrument in plaintiff's hands and the rest of the evidence adduced I cannot but find that I am not satisfied as to the righteousness of the transaction or that the paper writing dated 14th June 1944 did express the true will of the deceased.

The will dated 9th February 1944 was duly proved. I therefore decree probate of the will of the 9th February 1944 in solemn form and there shall be judgment for the defendant Bhugwania on the claim and on the counterclaim with costs.

Judgment for defendant on claim and counterclaim.

Solicitors: *N. C. Janki; W. D. Dinally.*

IN THE WEST INDIAN COURT OF APPEAL.

On appeal from the Supreme Court of the Windward Islands and Leeward Islands, Dominica Circuit.

FRANCIS POTTER, Appellant,

v.

THOMAS DENIS SHILLINGFORD, Respondent.

BEFORE BLACKALL, C.J., Trinidad and Tobago (President); VERITY, C.J., British Guiana; and MALONE, C.J., Windward Islands and Leeward Islands.

1945. JANUARY 29.

Evidence—Draft conveyance prepared—Memorandum, of objections in handwriting of alleged vendor—Draft conveyance admissible—To prove that negotiations for sale took place.

Evidence—Judgment—Not evidence of facts which came collaterally in question.

Sale of land—Contract of—Beneficial interest of vendor in land—Transferred to purchase money.

Sale of land—Contract of—Purchase money paid and purchaser put into possession—No beneficial proprietary interest in vendor.

Partition—Dominica—Partition Act (*Chapter* 94)*—Right to claim partition thereunder—Not in a vendor who has no beneficial proprietary interest in land sold.*

On an application for the sale or partition of certain lands the respondent contended that the person through whom he claimed title to the lands had purchased them from the applicant. A draft conveyance was produced by the respondent as evidence that the sale of the applicant's interest in the lands was in course of negotiation. The draft was unsigned, and recollection of its existence was denied by the applicant. The applicant was, however, shown a memorandum of objections which he admitted to be in his own handwriting, and there was no possibility for doubt that the objections related to the draft conveyance produced. The draft conveyance was, notwithstanding the objection of counsel for the applicant, admitted in evidence.

Held that the draft conveyance was admissible, not in proof of a completed sale or of its terms but as evidence that there had in fact been negotiations for the sale.

No judgment is evidence of the truth of any matter not directly decided or a necessary ground of the decision: it is never evidence of facts which merely came collaterally in question.

In the course of the judgment of the Supreme Court in a suit brought by G. against F.P. and B.E.P. as co-defendants for. the recovery of certain sums alleged by G. to be due to him in respect of his attorneyship of certain properties forming part of the estate of A.C.P., it was stated that "in July 1930 the whole of the estate was purchased by the second named defendant" B.E.P. This statement of fact was taken into consideration by the Court in determining an application brought by F.P. in which the issue was whether or not F.P. had sold to B.E.P. his interest in certain lands forming part of the estate of A.C.P.

Held (1) that in the earlier suit the purchase of the property by B.E.P. was a fact which merely came collaterally in question, and was net an issue directly to be decided, nor was it a necessary ground of decision; and

(2) that the trial judge therefore erred when he took the

findings therein to be evidence of the truth of the purchase by B.E.P.

An agreement for the sale of land, of which specific performance can be ordered, operates as an alienation by the vendor of his beneficial proprietary interest in the property. As from the date of the contract. his beneficial interest is transferred from the land to the purchase money.

Where the purchase money for the sale of land is in fact paid, and the purchaser put into possession of the land purchased, the vendor has no beneficial proprietary interest therein.

A vendor who has no beneficial proprietary interest in the land sold does not fall within the class of those who, by virtue of Partition Act (Chapter 94) in force in Dominica, may claim partition in that Colony.

The judgment of the West Indian Court of Appeal was as follows: —

THIS is an appeal from an Order of the Supreme Court of the Windward Islands and Leeward Islands in the Dominica Circuit dismissing an application for the sale or partition of certain lands.

It appears that the lands in question, known as Hartington Cottage, formed part of the Estate of A. C. Potter who died in 1888. This part of the Estate devolved in due course upon Francis Potter, the applicant, the children of William Ernest Potter (of whom Bertha Elma Potter is one) and the children of Henry Donald Potter.

It was contended on behalf of the Respondent that *the* Applicant sold his interest to Bertha Elma Potter in 1930 and that at or about the same time she paid to the other interested parties the value of their interests in cash or in kind. Bertha Elma Potter subsequently conveyed this property to Sir Hugo Fitzherbert (Bart.) reserving a life interest for herself and in 1941 she conveyed her life interest and the executors of Sir Hugo Fitzherbert conveyed the fee simple to T. D. Shillingford (the present respondent.)

The learned trial judge found as a fact that Bertha Elma Potter had bought and paid for the interest of Francis Potter and others in the estate of A. C. Potter and therefore dismissed the application with costs in favour of the respondent.

The Applicant has appealed on the grounds firstly that the decision of the learned Trial Judge is contrary to the evidence and the weight of the evidence and secondly that it is contrary to law.

One reason put forward in support of the first of these two grounds was that the trial Judge having referred to the fact that in certain proceedings in bankruptcy relating to this property it was held to be the subject of a gift in tail, it was unreasonable to conclude that the Appellant had sold his interest to Bertha Elma Potter. There appears to us little substance in this submission, for, as was submitted on behalf of the Respondent, even if at any time the parties interested felt themselves to be precluded from selling this property by reason of the view that it was the subject of a gift in tail, the weight of the evidence goes to show that the Appellant subsequently changed his mind and reached the conclusion, rightly so as it is submitted, that the

property was not held in fee tail, and that it might therefore be sold.

Counsel for the Appellant further contended that the evidence of Bertha Elma Potter was not to be regarded as trustworthy, and that certain of the documentary evidence produced in support of her testimony was inadmissible and ought not to have been taken into consideration by the trial Judge.

We think it convenient to deal firstly with the admissibility of this evidence although the question falls rather under the second ground of the appeal, for only after this has been determined will it be possible to conclude whether or not there was sufficient evidence to justify the findings of the learned Judge as to the facts of the case.

Objection was taken both at the trial and at the hearing of the appeal to the admission of a draft conveyance produced by the Respondent as evidence that the sale of the Appellant's interest in Hartington Cottage was in course of negotiation. The draft is unsigned and recollection of its existence was denied by the Appellant. He was shown, however, a memorandum of objections which he admitted to be in his own handwriting and there appears no possibility for doubt that these objections related to the draft conveyance produced. In these circumstances we are of the opinion that the draft conveyance is admissible, not in proof of a completed sale or of its terms but as evidence that there had in fact been negotiations for the sale.

In the second place objection was taken to the admission of a certain document purporting to be a carbon copy of a receipt given to Bertha Elma Potter by the Appellant for the purchase price of certain properties of A. C. Potter's estate including Hartington Cottage, therein referred to as Hartington Estate. It was submitted by the Appellant that there is no proof that this receipt is a copy of the original receipt (if any) given by him. The copy was not in fact signed by the Appellant, nor does it appear to have been seen by Bertha Elma Potter before it was produced at the hearing, and there is nothing to show from whose custody it was produced. It was contended therefore that the testimony of Bertha Elma Potter that she firmly believed it to be a copy of the receipt signed by the Appellant in her presence twelve years before is insufficient proof of its accuracy. But the learned judge, who saw the witnesses, formed the conclusion that the evidence of Bertha Elma Potter could be relied upon, while that of the Appellant, an old man of admittedly failing memory, was unreliable. He found as a fact that a receipt had been signed by the Appellant, that the original thereof had been lost and that secondary evidence thereof was therefore admissible. In these circumstances he was entitled, in our view, to take into consideration the testimony of Bertha Elma Potter, who had seen the original receipt, and the appearance of the document which she identified as a copy thereof. We are of the opinion that there was sufficient evidence to justify his conclusion that the document produced was in fact a copy of that signed by the Appellant.

There was also produced in evidence the record of a judgment of the Supreme Court of the Leeward Islands in a suit brought by

one Green against the Appellant and Bertha Elma Potter as co-defendants for the recovery of certain sums alleged by Green to be due to him in respect of his attorneyship of certain properties forming part of the estate of A.C. Potter. In the course of this judgment it was stated that "in July 1930 the whole of the estate was purchased by the second defendant, Miss Bertha Elma Potter." It is not clear for what purpose the record of this judgment was produced, but in the course of his written decision in the present case the learned Judge states that in the judgment so produced "the trial judge was able to say that this estate (Hartington) had been purchased by Bertha Elma Potter," and as he then refers to the "cumulative effect of all this documentary and oral evidence" we must assume that he considered the statement in the earlier judgment to be evidence of the sale of this property to Bertha Elma Potter. The rule in this regard is, as stated by the learned author of Phipson on Evidence (7th Edition p. 394), that "no judgment is evidence of the truth of any matter not directly decided or a necessary ground of the decision…….it is never evidence of facts which merely came collaterally in question....." In the earlier suit in this instance the purchase of this property by Bertha Elma Potter was not an issue directly to be decided, nor was it a necessary ground of the decision but was a fact which merely came collaterally in question, and the learned trial Judge therefore erred when he took the findings therein to be evidence of the truth of the purchase by Bertha Elma Potter.

It remains to be determined, however, whether irrespective of this particular matter relied upon erroneously by the trial Judge, there was sufficient evidence to justify his conclusion that Bertha Elma Potter bought and paid for the interest of the Appellant and others in this property.

The trial Judge considered Bertha Elma Potter's evidence to be straightforward and reliable; there is evidence that she was in occupation of this property for many years immediately following the alleged sale without interference by the other parties now claiming interest therein and without being called upon to account for her collection of rents and profits therefrom. The draft conveyance is evidence of negotiations for the conveyance to her of the title to the property and the receipt is evidence of the payment by her of £ 2,850 for certain properties including Hartington Cottage. There is in all this ample evidence to justify the learned Judge in his findings, and we cannot say that he erred in his conclusion.

It was finally submitted on behalf of the Appellant that the learned trial Judge erred in law when he dismissed the application for sale or partition in that, even if there was evidence to support his findings of a contract for sale, the legal title to the property remained, nevertheless, in the Applicant, there being no need of conveyance to evidence a completed sale. It was argued that while there might be a valid claim for specific performance of the contract for sale, yet until the legal estate passed from the Appellant he was entitled to an order for sale or partition. We are unable to agree with this contention. The well established rule is clearly stated in Halsbury's Laws of England (1st Edition Vol.

XXV p. 364) in the following terms "An agreement for the sale of land, of which specific performance can be ordered operates as an alienation by the vendor of his beneficial proprietary interest in the property. As from the date of the contract, his beneficial interest is transferred from the land to the purchase money, and if his interest was of the nature of real estate, it is, as from that date, converted into personality."

In the present case not only was there a contract for the sale of land, but the purchase money was in fact paid, and the purchaser put in possession of the property, in which thereafter the vendor had no beneficial proprietary interest. In these circumstances the Appellant does not fall within the class of those who, by virtue of the Partition Act (Chapter 94), may claim partition of lands in the Colony, for his interest was by reason of the sale transferred from the land to the purchase money.

Notwithstanding the fact, therefore, that the legal title had not passed from the Appellant to Bertha Elma Potter or her successors in occupation of the land, including the Respondent to this appeal, and without reference to the interests of any other of the original co-tenants, the Appellant having divested himself of his beneficial proprietary interest, cannot claim partition and the learned trial Judge rightly dismissed his application.

This appeal is therefore dismissed with costs.

Appeal dismissed

IN THE WEST INDIAN COURT OF APPEAL.

ON APPEAL from the Supreme Court of the Windward Islands and Leeward Islands, Dominica Circuit.

THOMAS DENIS SHILLINGFORD, Appellant,

v.

EDWARD REDVERS IAN SHILLINGFORD, Respondent.

Before BLACKALL, C.J., Trinidad and Tobago, (President); VERITY, C.J., British Guiana; and MALONE, C.J., Windward Islands and Leeward Islands.

1945. January 31.

Partnership—Declaration of—Action for—Real meaning of parties as expressed in agreement to be ascertained—Where agreement not in writing—Evidence to be considered—Conduct of parties, mode of dealing with each other, and, with the knowledge of each other, with other persons—Sharing profits, and profits and losses—How far evidence of partnership.

Whether an agreement creates a partnership or not, depends upon the real meaning of the parties as expressed in the agreement itself.

Where no written agreement is forthcoming, the evidence usually relied upon is the conduct of the parties, the mode in which they have

dealt with each other, and the mode in which each has, with the knowledge of the other, dealt with other people.

Sharing profits, standing by itself, raises a presumption that a partnership exists, but where there are other circumstances for consideration, it is not to be treated as a *prima facie* presumption which has to be rebutted by something else: the question must be decided on the stipulation of the contract taken as a whole.

Badeley v. *Consolidated Bank* (1888) 57 L.J.N.S. 468 applied.

Where it is shown that the parties engaged in a business or adventure upon the terms of sharing both profits and losses the presumption is much stronger, though even here it is not conclusive.

The judgment of the West Indian Court of Appeal was as follows: —

This is an appeal from a decision of Richards, J., in which he found that a partnership existed between E. R. I. Shillingford (respondent) and T. D. Shillingford (appellant) and ordered that accounts be taken.

Whether an agreement creates a partnership or not, depends upon the real meaning of the parties to it as expressed in. the agreement itself. Where, as in the present case, no written agreement is forthcoming, the evidence usually relied upon is the conduct of the parties, the mode in which they have dealt with each other and the mode in which each has, with the knowledge of the other, dealt with other people. Sharing profits, standing by itself, raises a presumption that a partnership exists, but where there are other circumstances for consideration, it is not to be treated as a prima-facie presumption which has to be rebutted by something else: the question must be decided on the stipulations of the contract taken as a whole (Badeley v. Consolidated Bank (1888) 57 L.J. (N.S.) 468). Where it is shown that the parties engaged in a business or adventure upon the terms of sharing both profits and losses the presumption is much stronger, though even here it is not conclusive.

In the present case the appellant, in the Court below, flatly denied that there was any agreement to share either profits or losses, and maintained that he had merely hired the respondent at a salary of 25|- per week. This evidence was however uncorroborated and since the appellant was unable or unwilling to produce any books or documents in support, (he professed not even to know if his books for 1942 could be found) it is not surprising that the learned trial Judge regarded his testimony as entirely unworthy of credit. At the hearing of this appeal Counsel for the appellant did not attempt to argue against the Judge's findings as to this. We think he was well advised not to do so, but it placed him in a somewhat unenviable position for in contending that the arrangement was not a partnership but merely a contract for the remuneration of an employee by a share of the profits, he had perforce to rely wholly upon the evidence of the respondent and his witnesses, and to jettison that of his own client.

Now the evidence of the respondent was to the effect that the appellant, being minded to deal in vanillas, but having no knowledge about their curing and no place wherein to store them,

approached the respondent in 1938 with an offer to pay him 25% of the profits that might accrue from their export, as remuneration for his services and compensation for the use of his premises. He further stated that if there were a loss it would hang over to the next year when he would have to pay 25% of the loss plus interest.

With regard to the provision of funds for the venture, the respondent stated that the appellant agreed to pay for labour, equipment and other expenses, and that he in fact did so, but it would seem he was to reimburse himself out of the gross taking's.

In pursuance of the foregoing agreement vanillas were purchased, cured and exported, and the respondent stated that in 1939 the appellant paid him a sum of $445 representing 25% of the profits. This payment (which is the one and only he received) is not denied by the appellant although in his evidence in the Court below he endeavoured to camouflage it as a bonus.

In dealing with the sharing of losses the trial Judge in his Reasons for Decision said "it was contemplated that if there were loss it would hang over to the next year". It was argued by Mr. Alleyne that the use of the word "contemplated" indicated that the learned Judge had merely concluded that the respondent envisaged the possibility of his having to share losses, and not that there had been a definite agreement between the parties to that effect. This Court is unable to adopt that construction. The word "contemplated" when used in this connection is in our view analogous to "intended" and the use of the expression "it was contemplated and not "he contemplated", indicates that the Judge was satisfied that the intention to share losses was mutual.

In view of the finding of the trial Judge as to credibility of the witnesses (which as already mentioned, appellant's counsel has not felt able to question) the only evidence as to the actual terms of the contract which this Court has to consider is that of the respondent himself, which must be taken as uncontradicted. Now that evidence is sufficient to raise a presumption that the parties are partners, and this being so, the acts of each of them are admissible as against the other for the purpose of strengthing the *prima facie* case already established.

In this connection what transpired at a meeting convened for the purpose of stabilising the price of vanillas is relevant. At that meeting Howell Shillingford made it clear at the outset that he would not enter into any agreement with the appellant (who seems to be mistrusted even by his own relations) but that he had more confidence in the respondent. As the meeting proceeded to business and the witness stated that the general trend of the conversation excluded any impression of employer and employee as between the appellant and respondent, it may be assumed that both parties satisfied Howell Shillingford that he was dealing with partners.

In addition to this there was the evidence of John Andrew who stated that when the time came for the appellant to pay

him his commission he told him that he had to see respondent first. Also that of John Osborne who testified that when he went to discuss local prices with appellant the latter said he would have to see respondent first. This witness further stated that he got the impression that the parties were working together and that the respondent was not the appellant's paid employee.

To sum up. While the task of the trial Judge in this case was not facilitated by the obstructive attitude of the appellant, the person who took the principal part in the transaction, we consider that, taking the evidence as a whole, the learned Judge was justified in reaching the conclusion that a partnership exists.

The appeal is therefore dismissed with costs.

Appeal dismissed.

BALLA and RAMCHARRAN, Appellants (Defendants),

v.

EDMUND THOMAS, P.C. 4417, Respondent (Complainant).

[1944. No. 454.—DEMERARA.]

BEFORE FULL COURT: SIR JOHN VERITY, C.J. and BOLAND, J.

1944. DECEMBER 29; 1945. JANUARY 19.

Criminal law and procedure—Evidence—Proof of probability—Not same as proof beyond reasonable doubt.

Criminal law and procedure—Larceny—Recent possession of goods stolen only evidence against accused—Identity of goods stolen with goods found in possession of accused to be strictly proved—Mere probability of such identity not sufficient.

Appeal—Against conviction—Evidence of a witness not considered by magistrate—If believed, might have raised a reasonable doubt—Conviction and sentence set aside.

Proof of probability is not the same as proof beyond reasonable doubt.

Where the guilt of a person charged with larceny is sought to be inferred from his possession of goods shortly after they have been stolen there being no other evidence to connect him with the offence, there should be strict proof of the identity of the goods, and mere probability, however high its degree, is not sufficient basis from which such an inference may be safely drawn.

R v. *Dredge* (1845) 1 Cox C. C. 235 considered.

Where it did not appear from the reasons of decision as stated by the Magistrate that he gave any consideration to certain evidence which, if believed, might have had the effect of raising a reasonable doubt as to the guilt of the person charged, the conviction and sentence was set aside.

APPEAL by the defendants Balla and Ramcharran from a decision of the Magistrate of the Georgetown Judicial District, convicting them respectively of larceny and of receiving. The necessary facts and arguments appear from the judgment.

Lionel A. Luckhoo, for the appellant Ball.

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

Frank W. Holder, Solicitor-General, for the respondent.

Cur. adv. vult.

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

This is an appeal by the appellant Balla from his conviction for larceny and by the appellant Ramcharran from his conviction for receiving, in the Magistrate's Court for the Georgetown Judicial District. Both convictions relate to a number of crabwood boards alleged to have been stolen from the Charlestown Saw Mills.

It is submitted on behalf of the appellant Balla that the only evidence against him is that of the witness Lewis who stated that he saw Balla "at about 1.50 p.m. on the 15th July discharging some crabwood boards on the parapet outside a house

"opposite the post office", and further that "he was discharging crabwood boards looking like" those exhibited as the stolen boards. This, it is submitted, is insufficient to identify the boards seen in the possession of the appellant with those alleged to have been stolen. It is to be observed that there is other evidence in the case to the effect that the appellant Ramcharran found certain boards outside his house, which is opposite to the post office, between 8 and 9 p.m. on the same day and that these were the boards alleged to have been stolen. There is also evidence that Balla was seen at the Saw Mills with Ramcharran and Roopie Naraine (who was also convicted of the theft) at about 12.30 p.m. on that day, but the significance of this meeting is somewhat depreciated by the admission of the witness who testified thereto that the men meet and drink together at that place every Friday and Saturday.

The question which we are called upon to determine is whether there is evidence upon which the learned Magistrate could reasonably base his conclusion that the boards seen in the possession of Balla were the boards stolen from the Saw Mills. The witness Lewis having stated that he saw Balla discharging certain boards outside a house opposite the post office at 1.50 p.m., the learned Magistrate drew the inference.that that house was Ramcharran's house, though there is no evidence that Ramcharran's house is the only house which might be so described, and that the boards discharged at 1.50 p.m. were the same boards found there 6 or 7 hours later. We think it beyond doubt that the natural conclusion to be drawn from the facts proved is that in all probability the boards were the same, and this probability is no doubt strengthened by the denial of Balla that he discharged any boards outside any house on that day, a denial which the Magistrate did not accept. Proof of probability, however, is not the same as proof beyond reasonable doubt, and we do not think that, although in certain cases the particular circumstances may aid in the establishment of identity when direct evidence is not available, in this case there is sufficient evidence either direct or circumstantial upon which the Magistrate was justified in finding that the prosecution had proved beyond reasonable doubt the identity of the boards seen in Balla's possession. Such proof was essential to the learned Magistrate's finding that "Balla delivered the boards in question outside Ramcharran's house" and this finding was essential to the proper conviction of the appellant Balla, for without it there is no evidence to connect him with the larceny or from which his guilt may be inferred. The importance of strict proof of the identity of goods found cannot be too much stressed in cases in which the guilt of the accused person is to be inferred from his possession of them shortly after they have been stolen, there being no other evidence to connect him with the crime, and mere probability, however high its degree, is not sufficient basis from which such an inference may be safely drawn. In this connection we would refer to what we consider to be the extreme case of *R.* v. *Dredge* (1845) 1 Cox C.C. p. 235, as an example of the measure of importance which should be attached to this question.

The appeal of Balla is therefore allowed with costs and his conviction and sentence are set aside.

As regards the appellant Ramcharran, the main ground of his appeal is that on the full consideration of all the evidence the learned Magistrate could not reasonably have come to the conclusion that at the time of receiving these boards he knew that they were stolen. It is submitted by counsel that the reasons of the learned Magistrate for his decision disclose that he did not in fact consider the whole of the evidence in that he gave no consideration to the testimony of Benjamin Phillips, a witness for the defence.

The defence of this appellant was that he had asked Roopie Naraine to buy certain boards for him and had given him $25 for this purpose in the presence of William Chung; that on Sun- day, 16th July in the presence of Phillips Naraine mentioned the delivery of the boards on the previous day and Ramcharran thereupon asked him for the bill and for his change, believing that Naraine had bought the boards as arranged.

There is nothing inherently unreasonable in this story which might be true, and we would point out in such case that in order to rebut any presumption of guilt it is not necessary for the accused person to convince the Court that the explanation is in fact true. If the explanation may reasonably be true then the Crown has failed to discharge the onus of proving guilt beyond reasonable doubt. It is only where upon a consideration of the whole of the evidence there is to be found justification for the conclusion that the explanation, though *prima facie* reasonable, is nevertheless false that effect can be given to the presumption or the accused be held to have failed in its rebuttal. The learned Magistrate states in his reasons for his decision that he did not accept the explanation of Ramcharran's possession of the boards and did not believe that he had given $25 to Naraine to buy the boards. He states specifically, moreover, that he did not believe the evidence of William Chung who testified to the payment of this sum in his presence, and the learned Magistrate gives the reasons for his disbelief.

Nowhere in the reasons for his decision however does the learned Magistrate make any reference to the incident of the 16th July nor does he make any comment whatever upon the evidence of Phillips who supported Ramcharran in his account thereof.

If there had been anything in his reasons which would lead us to believe that the Magistrate had this incident and the testimony of the witness Phillips in his mind when he reached the conclusion that Ramcharran's story was unacceptable and Chung's evidence not to be believed we should have concluded that he had rejected Phillips' evidence also even though he did not say so specifically nor give reasons for its rejection. There is, however, nothing to assure us that the learned Magistrate gave any consideration to Phillips' evidence; indeed his reasons would rather lead us to believe that he had entirely overlooked all the evidence relating to that particular incident, and so important a measure of support would it give, if it were believed, to Ramcharran's version of the whole affair that we are unable to say

how far its consideration might have affected the Magistrate's mind of the reasonableness of Ramcharran's explanation even if it did not go so far as to convince him of its truth. If it had been sufficient to raise a doubt in the learned Magistrate's mind then Ramcharran would have been entitled to acquittal. That it does not appear that the learned Magistrate gave any consideration to evidence which might have had this effect is fatal to the conviction and the appeal must be allowed with costs, the conviction and sentence being set aside.

Appeals allowed.

JOHN EDGAR DYER, Plaintiff,

v.

JONAS HONIWOOD DYER, Defendant.

[1943. No. 145.—DEMERARA.]

GLADYS AGATHA JOSEPH, ROBERT EMANUEL FRANK and MIRIAM PRISCILLA JACKMAN, Plaintiffs,

v.

JONAS HONIWOOD DYER, Defendant.

[1943. No. 212—DEMERARA.]

BEFORE SIR JOHN VERITY, C.J.

1945. JANUARY 16, 17, 18; MARCH 12.

Executor and administrator—Part of estate of deceased vested in beneficiaries under will—Executor no longer trustee in respect of such part of the estate—Even if he is one of the co-owners thereof.

Executor and administrator—Administrator' of estate of deceased person—Upon death intestate of such administrator—His administrator does not become administrator of the estate of the first deceased person.

Executor and administrator—Property owned in common by estate of deceased person and by other persons—Entire property mortgaged—Sale at execution in pursuance of order of Court foreclosing mortgage—Administrator of estate of deceased person purchases entire property at sale—Purchase deemed to have been made on behalf of all the co-owners.

Philip Henry Dyer died in 1911 possessed, *inter alia*, of the property in dispute, referred to as the High Street property, leaving as his executors his widow Catherine Dyer and the defendant Jonas Honiwood Dyer, one of his six children. In 1915 one of the children John Edgar Dyer, the plaintiff in action No. 145 of 1943, requested to be paid his share of his father's estate. Funds were raised on mortgage on the property of the estate, and his claims were settled. In 1925 it was decided to pay off the existing mortgage and to enter into a fresh mortgage at a lower rate of interest. The parties concerned appear to have been advised that before this could be done, it would be necessary to acquire fresh title, and in pursuance of this advice the High Street property was allowed to be sold at execution for the recovery of rates, and was bought in the names of all interested parties, that is to say Catherine Dyer, the defendant and the remaining children of

Philip Henry Dyer saves and except John Edgar Dyer who was no longer interested. The property was then mortgaged by these parties in whom the legal title was vested as co-owners to The Demerara Mutual Life Assurance Society Limited. In 1934 Philip Dyer one of the children of Philip Dyer died and Catherine Dyer became the administratrix of his estate. In 1939 Catherine Dyer died, and the defendant obtained Letters of Administration of her estate. In 1941 The Demerara Mutual Life Assurance Society Limited foreclosed the mortgage and brought the High Street property to sale at execution. The defendant attended the sale and bought for $2,000, a sum which would appear from the evidence to be substantially less than its market value although sufficient to cover the amount of the mortgage debt and costs of execution.

Held (1) that after the sale at execution of the High Street property the defendant no longer stood in the position of executor or trustee in relation to that property but solely as a co-owner with those who had joined with him in the purchase and who had accepted title jointly with him ;

(2) that the administrator of an intestate estate does not become the administrator also of any estates of which the deceased person whose estate he is administering may have been the administrator ;

(3) that the defendant stood in a fiduciary position in relation to the share of his deceased mother in the High Street property of which he was the administrator ;

(4) that the defendant, in bidding for the property, placed himself in a position in which his duty and his interest were in conflict, for his duty was to endeavour to secure the best price for the property in order that there might be a balance over after payment of the mortgage debt for the benefit of the estate of which he was the administrator, while it was to his interest to acquire the property at the lowest possible price above the amount of the mortgage debt ; and

(5) that, on the authority of *Nugent* v. *Nugent* (1907) 2 Ch. 292, the defendant must be treated as having purchased the High Street property on behalf of all the co-owners thereof.

Consolidated actions by John Edgar Dyer, Gladys Joseph and Miriam Jackman against Jonas Honiwood Dyer claiming a declaration that the defendant is trustee of certain property; an order that he sell the same by public auction and distribute the proceeds to those entitled beneficially; and order for the administration of certain estates; and an order for accounts.

A. J. Parkes, for the plaintiffs.

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

Cur. adv. vult.

VERITY, C.J.: In these cases which were consolidated by consent the plaintiffs claim a declaration that the defendant is trustee of certain property; an order that he sell the same by public auction and distribute the proceeds to those entitled beneficially; an order for the administration of certain estates and an order for accounts.

The facts, except as to certain misrepresentations alleged to have been made by the defendant, are undisputed in most material particulars and would appear to be as follows:

Phillip Henry Dyer died in 1911 possessed (*inter alia*) of

the property in dispute, referred to as to the High Street property, leaving as his executors his widow Catherine Dyer and the defendant, one of his six children. In 1915 one of the children John Edgar Dyer, plaintiff in one of these actions, requested to be paid his share of his father's estate. Funds were raised on mortgage on the property of the estate and his claims were settled. In 1925 it was decided to pay off the existing mortgage and to enter into a fresh mortgage at a lower rate of interest. The parties concerned appear to have been advised that before this could be done it would be necessary to acquire fresh title and in pursuance of this advice the High Street property was allowed to be sold at execution for the recovery of rates and was bought in the names of all interested parties, that is to say, Catherine Dyer, the defendant and the, remaining children of Philip Henry Dyer, save John Edgar Dyer who was no longer interested. The property was then mortgaged by these parties in whom the legal title was vested as co-owners to the Demerara Mutual Life Assurance Society Limited. In 1934 Philip Dyer one of the children of Philip Henry Dyer died and Catherine Dyer became the administratrix of his estate. In 1939 Catherine Dyer died and the defendant obtained letters of administration of her estate. In 1941 the Demerara Mutual Life Assurance Society foreclosed the mortgage and brought the High Street property to sale at execution. The defendant attended the sale and bought for $2,000, a sum which would appear from the evidence to be substantially less than its market value although sufficient to cover the amount of the mortgage debt and costs of execution.

It is in these circumstances that the plaintiffs claim against the defendant on the ground that as executor of his father's estate and administrator of that of his mother, who was herself administratrix of the estate of his brother Philip he is precluded from purchasing property to which he stood in relation as trustee. They also charged fraud in relation to the sale, the particulars being that he failed to pay off the mortgage debt or interest thereon although he had funds in his hands sufficient for this purpose, and that he assured the plaintiffs or certain of them at the time of and subsequent to the execution sale that he was purchasing for the benefit of the estates and not for himself subsequently asserting beneficial ownership and giving the plaintiffs notice to quit the premises.

These allegations of fraud the defendant denies and it will be convenient firstly to deal therewith. The allegations as to the sufficiency of funds is not supported by the evidence, such as it is, of the accounts produced by the plaintiffs as received from the defendant for at no time does he appear to have had in his hands sufficient moneys to make regular payments of interest as it fell due and certainly at no time sufficient funds to redeem the mortgage on the High Street property. The suggestion that he could have done so by selling other property of the estate cannot be taken as a basis for fraudulent conduct or even mal-administration. I am of the opinion, therefore, that it has not been established that any misconduct on the part of the defendant brought about the foreclosure of the mortgage on

the High Street property. On the other hand it appears from the evidence, both oral and documentary, that the defendant made substantial effort to avert the same of the High Street property by the mortgagees, an effort in which he received but little support from any of the plaintiffs who appear to have been willing, indeed anxious, to leave the full burden upon him. As to the alleged misrepresentations these depend upon the evidence of the plaintiffs Gladys Joseph, Miriam Jackman and John Edgar Dyer and the witnesses Irving Greaves and Jane Sinclair. I cannot say that I was favourably impressed with anyone of them. Joseph was a difficult witness owing to the fact that she was very deaf but the impression her demeanour and testimony made upon my mind was that of a witness who had prepared herself carefully for most eventualities and at times found her deafness of great convenience in evading direct or immediate answers to embarrassing questions. Miriam Jackman made no better impression upon me, while John Edgar Dyer struck me as a very untrustworthy person averse either to honest testimony or honest work. The witnesses were no better. Quite obviously Greaves was attempting to conceal his personal interest in the fortunes of Mrs. Jackman and Jane Sinclair struck me as one who had come to give support to an otherwise uncorroborated account of an isolated conversation and impressed me no more favourably than does the usual type of witness brought for such a purpose. The defendant, on the other hand, while fully awake to his own interests, appeared to me to be a franker and more reliable witness and in certain material particulars where his evidence conflicted with that of the plaintiffs was supported in his own version by the testimony of Mr. Bobb, a Solicitor, who was engaged in some of the transactions relating to this property and by correspondence thence passing between himself and the Insurance Company. Where therefore there was a direct conflict of evidence I felt that I could rely upon the defendant rather than upon the plaintiffs or any one of them. While it is quite possible that the plaintiffs may have fancied that the defendant would buy on their behalf they have not satisfied me that he so represented to them but rather do I conclude that they stood by in pursuance of their usual policy of doing as little as possible. On the other hand I am satisfied that the defendant did all he could to avert the foreclosure and sale and that these things having become inevitable he attended the sale with no very clearly defined intention but with the object of bidding and perhaps with the hope that if the property were knocked down to him at a reasonable price he would be able to raise the money on mortgage and so acquire the property for himself, as in the result he believed himself to have done.

Cleared of this question of deliberate fraud the issue still remains for determination as to whether or not the defendant can be allowed to take advantage of his purchase or whether it should be set aside.

In. the first place it is submitted that the defendant as executor of his father's estate stood in a fiduciary relation to the whole of the High Street property, there having been no final distri-

bution of the estate. Examination of the transactions of 1925, however, leads in my view to the conclusion that the interest of the estate in the High Street property was determined by the sale at execution and the legal and beneficial interest in that property became then vested in the purchasers. The defendant thereafter no longer stood in the position of executor or trustee in relation to this property but solely as a co-owner with those who had joined with him in the purchase and who had accepted title jointly with him. It was further submitted that the defendant, as administrator of the estate of his mother became also administrator of the unadministered estate of his brother Philip of which his mother had been administratrix. Whatever may be the precise position in this Colony of the executor of an executor I know of no principle of law by which an administrator of an intestate estate becomes the administrator also of any estates of which the deceased person whose estate he is administering may have been the administrator. There can be no doubt however that in relation to the estate of his mother the defendant was at that time of the sale the administrator of her interest in the High Street property of which he had as such made no distribution to those entitled on intestacy.

On behalf of the defendant it was submitted by counsel who was unable, however, to cite any authority in his support, that a distinction should be drawn between a trustee who either himself sold trust property or brought about its sale and one who, having to submit to a forced sale after having taken every step to avert the same, purchased at such a sale. It was also urged that as to the major part of the property involved the defendant stood in no fiduciary relation and that of a substantial portion he was himself co-owner with the plaintiffs.

Although no decided case was cited by either side on this aspect of the question I have referred to the decision in *Nugent v. Nugent* (1907) 2 Ch. 292, which while by no means on all fours as to the facts nevertheless appears to lay down a principle which is applicable to this issue. In that case the question involved was that of a receiver, appointed by the Court, who appears also to have been a co-owner of certain of the property of which she was appointed receiver. The mortgagee of certain of this property received the leave of the Court to foreclose and sell in spite of the receivership, and at the sale the receiver bought the property so brought to sale.

In holding that in these circumstances the receiver must be treated as having purchased the property on behalf of the beneficiaries, Swinfen Eady, J. referred with approval to the judgment in *Alven* v. *Bond* (Fl. & K. 186) and said "It is based on general principles and applies equally to a case where the sale is not under a decree in the action but is a sale by a mortgagee under a power of sale. It would be exceedingly dangerous to allow a receiver, who has a position of advantage in obtaining full particulars of the property and its value, who manages let-tings, and whose business it is to protect the property for the benefit of all parties concerned, to go without their knowledge and bid for the property at an auction and acquire it for him-

self." In upholding the judgment of Swinfen Eady, J. on appeal, Cozens Hardy, M.R. (1908, 1 Ch. 548) observed: "Now what is the position of the receiver towards the beneficiaries in this case? Plainly a fiduciary one. That cannot be disputed. It makes no difference whatever that the receiver was one of the tenants in common. In that character alone she would not have filled a fiduciary position, but a receiver must be in a fiduciary position to all the tenants in common and it makes not a farthing difference whether the receiver was herself one of the owners. The receiver being in this fiduciary position having full knowledge and special opportunities of knowing the rental of the property and the other circumstances, was just in that position which brings the case within the rule of the Court that a person in a fiduciary position, having special means of knowledge ought not to be allowed to buy or bid for the property without the leave of the Court……once we arrive at this point that the doctrine of the Court does not depend upon the fact of undue knowledge but merely upon the probability of it and that the man is in a position where his duty and interest are in conflict, we ought not to consider whether under the special circumstances of the particular property there is any great probability of fraud." In the same case Fletcher Moulton, L.J. said: "There is no doubt as to the general principle which actuates the Court in deciding its procedure in matters of this kind. It is that nobody must allow himself to get into a position where his interest conflicts with his duty. The Court carries out this principle, not by examining each particular case and weighing the details of the conflict between interest and duty but by certain prohibitions with regard to persons who hold positions in which such a conflict might arise." Buckley, L.J. was equally emphatic: "A person standing in a fiduciary relation cannot be allowed to put himself in a position in which his interest and his duty may conflict. If he does so it is not necessary to show that he acted contrary to his duty. The Court will not allow him to buy if the position is such that he might be guilty of a breach of duty."

In the present case it is plain that the defendant stood in a fiduciary position in relation to the share of the estate of his deceased mother in the High Street property of which he was the administrator and I think it makes no difference to the application of the principles laid down by the Court of Appeal that this relationship existed in regard to an undivided portion of the property and not towards the whole any more than in the words of Cozens Hardy, M.R. "It makes not a farthing difference" that he was a co-owner with the other beneficiaries. There can be no doubt that in bidding for the property he placed himself in a position in which his duty and his interest were in conflict, for his duty was to endeavour to secure the best price for the property in order that there might be a balance over after payment of the mortgage debt for the benefit of the estate of which he was the administrator while it was to his interest to acquire the property at the lowest possible price above the amount of the mortgage debt. It would appear from the judg-

ment of the Court of Appeal, moreover, that it makes no such difference as was contended for by counsel for the defendant, that the sale was a forced sale by the mortgagees, for the general principles are not dependent upon any contrary consideration but apply equally no matter by what means the sale is brought about.

It was further contended on behalf of the defendant that the plaintiffs are precluded from the relief they seek by reason of undue delay in bringing these proceedings. While it is true that application for relief must be made within a reasonable time, the period which will disentitle a plaintiff to relief will vary according to the circumstances in each case. In the present case I have found that the defendant did not by any deliberate act or statement represent falsely to the plaintiffs that he was buying on their behalf, but I am not satisfied that he indicated to them that he was buying on his own behalf until he gave them notice to quit. Indeed he allowed them to remain upon the premises and their some-what ill-defined position therein appears to have continued without overt change until such notice was given. In the circumstances their delay in seeking relief is excusable and does not in my view preclude the Court from granting the relief to which in equity they may be entitled.

I feel impelled therefore to the conclusion that the defendant cannot be allowed to acquire for himself the benefit of the property which he purchased at auction in the circumstances of this case, and it remains to be considered what order I. should make.

In the first place the plaintiffs pray a declaration that the defendant holds the property as trustee for the parties entitled and it follows from my finding that they are entitled to this declaration. In the second place they pray that the property be put up for sale and the proceeds divided between those entitled. That course also seems desirable in the circumstances. The amount of the purchase price so obtained will be divisible between the parties respectively entitled thereto in due proportion to their shares as co-owners and beneficiaries in this property under the estates of Catherine Dyer and Philip Dyer, her deceased son, but subject to a charge in respect of the purchase price paid by the defendant or the amount thereof remaining on mortgage as the case may be.

The plaintiffs also pray for an administration order in respect of the estates of the deceased persons Philip Henry Dyer, Philip Dyer and Catherine Dyer. As to this it appears that the only substantial ground of complaint against the defendant relates to the High Street property. This, as I have indicated, now forms no part of the estate of Philip Henry Dyer, the defendant is not and has not at any time been administrator of the estate of his brother Philip, and when the order for sale indicated above has been carried out he will no longer be concerned as administrator of the estate of Catherine Dyer in any further dealings with this particular property. I see no reason therefore for burdening the estates of any of these deceased persons with the expense of administration by the Court, and in this respect the prayer of the plaintiffs will be refused.

With the question of accounts is bound up the prayer for a

declaration in regard to what is described as the hotel business carried on by the defendant on the High Street property. The plaintiffs appear to think that they possess some sort of a vested interest in this business as a going concern, goodwill and the like I am unable to agree. The business appears to have been carried on by the defendant unaided, and with his own moneys in so far as boarding of visitors to the hotel was concerned, and in this the plaintiffs who had nothing whatever to do with the work or with the financing of this part of the venture can expect to get no share of the profits. In so far as he used the premises for the lodging of his visitors and obtained profit therefrom he is bound to account for such profits or rentals. There will be, therefore, no declaration as prayed as to the hotel business but there will be an order for accounts as from the date upon which he purchased the premises in order that it may be ascertained what sums are due to the persons entitled in respect of rentals received by the defendant during that period, after deduction of all proper charges in respect of maintenance of the property. As to other accounts in relation to the estates of Philip Henry Dyer and Catherine Dyer the defendant is under obligation as executor and administrator respectively and no specific order will be made in this action for such accounts.

The plaintiffs will be entitled in the ordinary course to their costs of these actions but as they have failed to establish their allegations of fraud, which they attempted to support by evidence which I have found to be false, I order that the defendant shall pay to them no more than one half of their taxed costs.

The formal order will be settled by the Registrar and in the event of any difficulty arising in the settlement or working out of this order there will be liberty to apply.

Judgment for plaintiffs.

Solicitors: *D. P. Debidin,* for plaintiffs; J. *Edward de Freitas,* for defendant.

EDITOR'S NOTE.—The defendant appealed to the West Indian Court of appeal, and in February, 1946 that Court held that the defendant was a trustee only in respect of seven thirty-sixth shares of the High Street property, being the interest therein of the estate of Catherine Dyer, deceased, of which the defendant was administrator, immediately before the execution sale in 1941.

JOSEPH DREPAUL, Appellant (Defendant),
v.
GEORGE HARRIS, Lance Corporal No. 4333,
Respondent (Complainant).

[1944. No. 329. — DEMERARA.]

BEFORE FULL COURT: SIR JOHN VERITY, C.J. and JACKSON, J. (Acting):

1945. MARCH 9, 16.

Defence Regulations—Whether sale is by wholesale or by retail—Sale to retailer for purpose of re-sale by retailer—Quantity sold whole of vendor's quota—Sale by wholesale.

The appellant was a wholesaler as well as a retailer, and he sold to H. C, another retailer, a case containing 48 tins of corned beef in order that H. C. might sell the same by retail. The total quantity of corned beef comprised in the appellant's quota was a case containing 48 tins. The magistrate held that the sale was a sale by wholesale.

Held that the magistrate was right.

Appeal by the defendant Joseph Drepaul who was convicted by the Magistrate of the Berbice Judicial District.

C. Lloyd Luckhoo, for the appellant.

A. C. Brazao, Crown Counsel, for the respondent.

Cur. adv. vult.

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

This is an appeal from a conviction in the Magistrate's Court for the Berbice Judicial District for the offence of selling a certain commodity without a Delivery Order contrary to an Order made under the Defence Regulations, 1939.

Counsel submitted in the first place that there was no sufficient evidence upon which the learned Magistrate could reasonably have found that there was in fact a sale, for it was contended that the witness Ho Chan who is alleged to have bought the article was an accomplice whose evidence should not have been accepted without corroboration. It was also contended that this witness' evidence is in itself unreliable and contradictory. Whether or not the witness is to be deemed to be an accomplice there is ample corroboration to be found in the testimony of the police officer Harris, and although the witness Ho Chan did undoubtedly contradict himself in a material particular he tendered explanation of the reason for this and his evidence as a whole made a favourable impression on the learned Magistrate. We see no reason to differ from him in his acceptance thereof. We are of the opinion therefore that it was open to the Magistrate to believe this witness and that having done so he was justified in his finding that there had been a sale.

The second point relied upon by counsel for the appellant was that there was no proof that the sale was by wholesale but that rather did the evidence indicate that the sale was by retail. It was submitted that the parties to the sale themselves regarded it

as a retail transaction, that the price was a retail price and the quantity not so large as to indicate a wholesale transaction. In the first place we should hesitate to conclude that the parties may, by calling a transaction a sale by retail or by fixing the price at the prescribed retail price thereby determine the nature of the transaction. We would look rather to the whole of the circumstances. In general terms to sell by retail is to sell in small quantities, but what constitutes a small or a large quantity depends largely upon the nature of the commodity. There are other factors which may reasonably be taken into consideration in determining the real nature of the transaction and these we think the learned Magistrate rightly took into account.

In this case the sale was that of a case containing 48 tins of corned beef; this was the total quantity of corned beef comprised in the quota of the appellant; the appellant is a wholesaler as well as a retailer and he sold to Ho Chan another retailer in order that Ho Chan might sell by retail. Taking all these factors into consideration we think that the learned Magistrate was right in holding that this was a sale by wholesale.

The third point raised by the appellant was that Order No. 17b" under which the appellant was prosecuted should be read in conjunction with Order No. 946, an order controlling prices, that by reading those two orders in conjunction the Magistrate should have held that the delivery of corned beef was only controlled within the same area in which its price was controlled, and that as there was no evidence that the sale in this case was within that area the charge should have been dismissed. We do not agree that these orders should be read together in any such way: one controls distribution and the other controls prices and between the one and the other we see no essential connection. Counsel did not, however, press this point. The appeal was also against sentence but no adequate reasons were put forward by counsel nor do we see any such reason why the sentence of the Magistrate should be varied.

The appeal having failed on all the grounds it must be dismissed with costs.

Appeal dismissed.

THAKOORDEEN and CHARRAN, Appellants (Defendants),

v.

BACHNIE, Respondent (Plaintiff).

[1944. No. 445. — DEMERARA]

BEFORE FULL COURT: SIR JOHN VERITY, C.J. and BOLAND, J.

1944. DECEMBER 29; 1945. APRIL 27.

Magistrate's court—Action in—On behalf of infant—Next friend—Undertaking by—To be responsible for costs of action—Given at office of clerk—Plaint not filed at same time—Undertaking of no effect—Subsequent proceedings a nullity—Summary Jurisdiction (*Civil Procedure*) *Rules,* 1939, *Part* IV, *rules* 6 and 7.

Rule 6 of Part IV of the Summary Jurisdiction (Civil Procedure) Rules, 1939. contemplates alternative remedies of procedure. The next friend of an infant who desires to commence an action in the magistrate's court may, at the time of entering the plaint, attend at the office of the clerk and sign in that officer's presence the undertaking to be responsible for the costs of the action; or alternatively, he may, at the time of entering the plaint, transmit the undertaking to the clerk but in such case the undertaking must be attested by a notary public or other person specified in the Rule.

The next friend of an infant attended at the office of the clerk on the 27th July, 1943 and signed an undertaking to be responsible for the costs of the action which it was proposed to commence on behalf of the infant. The plaint was, however, not filed until the 14th September. 1943.

Held that the undertaking was not given as required by rule 6 of Part IV of the Summary Jurisdiction (Civil Procedure) Rules, 1939. and that, in accordance with rule 7, the proceedings following on the filing of the plaint were a nullity.

APPEAL by the defendants Thakoordeen and Charran from a decision of the Magistrate of the West Demerara Judicial District. The necessary facts and arguments appear from the judgment.

J. L. Wills, for the appellant.

L. A. Luckhoo, for the respondent.

Cur. adv. vult.

The judgment of the Court was as follows: —

In this appeal several grounds were set out in the notice but it was agreed that in the first instance the Court should hear argument on those grounds which related to the validity of the form of proceedings in an action brought by an infant plaintiff.

It was submitted on behalf of the appellants that the respondent did not fulfil a condition precedent to the filing of the plaint herein as provided by rules 6 and 7 of Part IV of the Summary Jurisdiction (Civil Procedure) Rules, 1939.

Rule 6 requires that when an infant desires to commence an action such as the present he shall sue by a next friend who shall "at the time of entering the plaint either attend at the office of the clerk and in his presence give an undertaking to be responsible for costs, or transmit such an undertaking to the clerk," and the rule further provides that "if such undertaking

is not given at the office of the clerk it shall be attested by a notary public, a commissioner for oaths to affidavits, or a justice of the peace ...."

In the present case an undertaking was given by the next friend of the infant plaintiff and this undertaking purports to have been given and attested before one "M. Gaznabbi, for clerk of the Court." On the copy of the record supplied to the Judges of this Court it appears that the document purported to have been attested "at Stewartville" but reference to the original record shows that it in fact purported to have been attested at "the Magistrate's Court at Stewartville." It is dated the 27th July 1943 and the plaint was filed on 14th September 1943.

When the action came on for hearing the appellants' solicitor contended that the undertaking by the next friend was not in order as not having been attested before the Clerk. Counsel for the respondent referred to the definition of "Clerk of the Court" and submitted that the person who attested the undertaking came within that definition. The learned Magistrate while he considered that the undertaking was in order, as he states in his reasons for his decision, nevertheless in order to safeguard the appellants, appointed a next friend and ordered that she sign an undertaking before the clerk of the Court. This order he purported to make under rule 8 of Part IV of the Rules referred to. In his reasons the learned Magistrate refers also to Part XXVII Rule 16.

In apparent pursuance of this order a document was filed which by its terms purports to have been an undertaking by the respondent therein wrongly described as the next friend of the person who had hitherto been described as the next friend but who in this document is wrongly described as the infant and it purports to be an undertaking by the infant to pay the costs of the appellants if the person originally described as the next friend fails to do so. Moreover while the order of the Court required this document to be signed before the clerk of the Court it purports to have been attested by a person described as a commissioner of oaths to affidavits. It is quite plain that this document is not worth the paper it is written on.

At the hearing of the appeal further objection was taken to the original undertaking in that it did not purport either to have been given in the presence of the clerk of the court at his office or to have been attested before a notary or other prescribed person and transmitted to the clerk. It was contended on behalf of the respondent that having been signed before a person who falls within the definition of a clerk of the court and having been given at the Magistrate's Court at Stewartville, which may properly be deemed to be an office of the clerk of that court when the clerk is in attendance there, the undertaking has been given in compliance with the rules.

Whether or not a magistrate's court may properly be held to be an office of the clerk for such a purpose it has still to be considered whether this undertaking was given in compliance with the rules, for it is to be observed that rule 6 requires that the next friend shall, *at the time of entering the plaint*, either attend at the office of the clerk and give the undertaking in his presence or

transmit the undertaking to the clerk. In our view this rule contemplates alternative methods of procedure. In the first place the next friend may, at the time of entering the plaint, attend at the office of the clerk and sign the undertaking in that officer's presence, or he may at the time of entering the plaint, transmit the undertaking to the clerk but in such case the undertaking must be attested by a notary public or other prescribed person. In the present case the next friend followed neither of the prescribed methods, but having in July signed the undertaking before a clerk of the court at a magistrate's court she transmitted the same in September to the clerk at the time of entering the plaint. In our view, therefore, there was non-compliance with the rules and it became necessary under Part XXVII rule 16 for the magistrate to deal therewith. His order, however, does not purport to have been made under that rule but under rule 8 of Part IV which refers to where an infant commences as an adult without a next friend, a course which does not appear to have been adopted in this case by the respondent whose plaint set out that she is an infant suing by her mother and natural guardian. It may nevertheless have been within the competence of the court to make the order which it did, thus requiring to be done that which should have been done in the first place, and in so far as this order gave opportunity for the respondent to correct her non-compliance with the rule it may properly have fallen within the intention of Part XXVII rule 16. Of this opportunity, however, the respondent did not successfully avail himself, for the next friend not only executed a document before a person not authorised by the Court's order to attest the same but also one which is entirely meaningless. There has therefore not been only non-compliance with the rules but also non-compliance with the order of the court allowing her to cure the original irregularity in the procedure. It can hardly be argued that the powers of the Court under Part XXVII rule 16 can be exercised a second time by this Court and another opportunity given for the respondent to put herself right for such a process might be never-ending or at least only brought to an end by exhaustion of the Court's patience.

The respondent is therefore in the position of having given no such undertaking as is required by Part IV rule 6 and by rule 7 it is prescribed that a plaint shall not be filed until such undertaking has been given. The plaint was, therefore, wrongly filed and the proceedings following thereon must be treated as a nullity.

In these circumstances it is unnecessary to consider any further grounds for this appeal which must be allowed with costs, the judgment of the Court below being set aside and the plaint struck out with costs.

The appellants having successfully established that there is no undertaking of a next friend it may perhaps be difficult for them to recover any of these costs, but with their recovery this Court is not concerned.

Appeal allowed.

ABDOOL SAMAD and AZEEZ,
Appellants (Defendants),

v.

J. HARLEQUIN, Police Constable No. 4101,
Respondent (Complainant).

[1944. No. 446.—DEMERARA.]

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

1945. April 27.

Appeal—From conviction by magistrate—Documents admitted in evidence—Necessary for purpose of determining appeal—Documents lost —Copies not available for Full Court—Conviction set aside.

Where documents admitted in evidence in the magistrate's court are necessary for the purpose determining an appeal against a conviction, were lost and copies were not available for the use of the Full Court, the conviction was set aside.

Appeal by the defendants Abdool Samad and Azeez who were convicted by the Magistrate for the Berbice Judicial District.

L. M. F. Cabral, for the appellants.

Frank W. Holder, Solicitor-General, for the respondent.

The judgment of the Court was delivered by Boland, J. as follows: —

In this appeal the appellants have advanced as a ground of appeal that the decision was unreasonable and cannot be supported for the reasons set out in the Notice in the Record.

It is therefore necessary to consider the reasons given by the Magistrate for his decision and the evidence upon which that decision is based.

The learned Magistrate in his reasons states that he accepted in its entirety the evidence of the witness Elizabeth Victor, holding that on her evidence a *prima facie* case was made out against both appellants, and that after hearing the whole of the evidence he had no doubt about the guilt of both appellants.

Unfortunately this Court is not in. a position to review the whole of the evidence that was led before the Magistrate. For the prosecution certain statements alleged to have been given by the appellants to the Police were put in, but unfortunately owing to their loss before the record was transmitted to this Court, they are not included in the record. The Court therefore is unable to say what exactly these statements contained, and whether they contained anything of an incriminatory character which the Magistrate would have been justified in taking into consideration.

At the request of this Court for an explanation of the omission of these statements from the record, the learned Magistrate has forwarded a report in which he says that he remembers only in part the contents of these statements and he gives the substance of what he remembers in the statements.

The Magistrate does not seem to recollect in the statement anything inconsistent with the evidence given by the appellants in Court; and yet it is apparent that from the cross-examination of the appellant Azeez that the prosecution was suggesting that the statement of Azeez did contain features inconsistent with his evidence, because Azeez was endeavouring to explain that that statement was not voluntary.

This Court cannot therefore say that the learned Magistrate was uninfluenced by these statements in the conclusion he arrived at, and this Court is not in a position to review this evidence, as the appellants are entitled to. On this ground the conviction must be set aside and it will be unnecessary to consider the other ground of appeal.

Conviction set aside.

LOUISA LALL,
Appellant (Defendant),
v.
ARNOLD ROSS, Constable No. 4765,
Respondent (Complainant)

[1945. No. 61.—DEMERARA.]

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

1945. April 30.

Criminal law and procedure—Motor vehicle—Taking and driving away without consent of owner—Complaint for—Bona fide belief of defendant that he is entitled so to do—Defence to complaint—Motor Vehicles and Road Traffic Ordinance. 1940 (No. 22), *section* 82 (1).

The defendant took and drove away a motor vehicle without the consent of the owner, but she so acted in the bona fide belief that she was entitled so to do.

Held that she was not guilty of an offence against section 82 (1) of the Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22).

APPEAL by the defendant Louisa Lall from a decision of a Magistrate of the Georgetown Judicial District convicting her of the offence of taking and driving a motor car without the consent of the owner contrary to section 82 (1) of the Motor Vehicles and Road Traffic Ordinance, 1940 (No. 22).

E. W. Adams, for the appellant.

Frank W. Holder, Solicitor-General, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by Boland, J. as follows: —

The Appellant was convicted of the offence of taking and driving a certain motor car without the consent of the owner in breach of section 82 (1) of Ordinance No. 22 of 1940 (The Motor Vehicles and Road Traffic Ordinance 1940)

There is a proviso to section 82, which reads as follows: — "Provided "that if, in summary proceedings under this section, the Court is satisfied "that the accused acted in the reasonable belief that he had lawful "authority, or in the reasonable belief that the owner would, in the "circumstances of the case, have given his consent if he had been asked "therefor, the accused shall not be liable to be convicted of the offence." We are of opinion that this proviso makes it abundantly clear that *mens rea* is a necessary ingredient of the offence the burden however of proving that in taking the car away from the owner she had no *mens rea* being upon the defendant.

The evidence in this case discloses that the appellant, who previously was the owner of the motor car, had on the 15th May, 1944 agreed to sell it to one Richardson at the price of $300.00—payment of which sum was to be effected by Richardson transferring his motor cycle valued at $250.00 to the appellant and the balance of $50.00 was to be paid in cash. In pursuance of this agreement the vehicles were each handed over in exchange and the cash payment made. Richardson denies that there was an agreement that, if after trial of the vehicles for a week or so the parties were not satisfied, there was to be a return of the vehicles and a refund. But there was evidence admitted by both sides that subsequent to the alleged sale both parties had agreed to rescind the contract, and it appears that the motor cycle was tendered back to Richardson. Appellant claims also that the $50.00 was re-paid to Richardson which, however, Richardson denies.

It was in these circumstances that appellant directed the re-taking of the car, obviously in the exercise of what she *bona fide* believed to be her right.

It is unnecessary for us to decide whether her act of re-taking possession of the car was legally justifiable. The learned Magistrate would seem to have thought that she had no right to do so. What the Court had to decide was whether she acted in the reasonable belief that she had a lawful right or authority to re-take the car.

We are satisfied that she acted in the *bona fide* belief that she was entitled to do so, and accordingly there being an absence of *mens rea* she ought not to have been convicted. We shall therefore allow the appeal and we set aside the conviction and sentence with costs to appellant.

Appeal allowed.

ERIC HEWITT *v.* SPROSTONS, LTD.

ERIC HEWITT, Plaintiff,

v.

SPROSTONS, LIMITED, Defendants.

[1944. No. 368—DEMERARA.]

Before BOLAND, J.

1945. April 10, 11, 12, 13, 17, 30.

Master and servant—Labour Ordinance, 1942 (No. 2), *section* 17*—Whether electrical worker an employee within meaning of.*

Master and servant—Electrician in receipt of salary of $100 *a month—Employment of—Termination of—At any time—Upon payment of one month's salary in lieu of notice.*

An electrical worker is not an employee within the meaning of the Labour Ordinance, 1942 (No. 2), section 17.

The employment of an electrician receiving a salary of $100 a month may be determined at any time by his employer upon the latter paying him one month's salary in lieu of notice.

ACTION by the plaintiff Eric Hewitt against the defendants Sprostons, Limited, for damages for wrongful dismissal. The facts appear from the judgment.

D. P. Debidin, Solicitor, for the plaintiff.

A. G. King, Solicitor, for the defendant.

Cur. adv.vult

BOLAND, J.: In this action the plaintiff claims damages fixed by him at $214.77 for wrongful dismissal.

The Plaintiff was on the 15th April, 1944 taken on in the Defendant's employ at a monthly salary, payable half monthly, of $100.00 per month, to work as a switch-board operator on the dredge Turret Cape, which was to commence dredging operations in the Demerara River. In addition he was to receive an allowance of 40 cents per day or $12.00 per month for his rations. There was no reference to the giving of notice in the terms of employment.

On the 2nd May, 1944, he was summarily dismissed as the Defence admits, receiving payment for his services up to the date of his dismissal only. Plaintiff contends that he was entitled to one calendar month's notice to terminate at the end of the next calendar month, that is to say on the 30th June, 1944 or in lieu thereof full salary to that date, which by calculation amounts to the sum of $214.77 as claimed by him.

By the Common Law, in the absence of an agreement to the contrary, a person engaged in employment for an indefinite period is entitled to reasonable notice, that the employment will be terminated, unless the employer can establish proper jus-

tification for summary dismissal. The Courts have from the earliest days declared certain circumstances involving defaulting conduct on the part of the employee to be in justification of dismissal without notice, but the burden of establishing such special circumstances is always on the employer. It is settled that wilful or persistent disobedience of the orders of the employer in relation to some duty coming within the scope of the employment is good ground for summary dismissal; gross incompetence or negligence, causing serious loss to the employer or likely to endanger life or property, is also well recognised as justifying instant dismissal without notice.

In this case the evidence disclosed that plaintiff has been the holder since 1929 of an electrical contractor's licence of this Colony, and prior to his employment by the defendants he had some years' experience of electrical work at the Demerara Electric Company, at the Hyde Park U.S.A. Base, at Curacao, and at French Guiana.

He was first employed on the Turret Cape from the 3rd March in connection with the electrical installation on the ship which was being carried out under the supervision of Mr. Lee, the head of the electrical department of Messrs. Sprostons Ltd.

On the recommendation of Mr. Lee he was taken on as one of three switchboard operators under a Chief Operator, Mr. Jackson, for service during the dredging operation of the Turret Cape.

(His Honour reviewed the evidence and found that the defendant was not justified in dismissing the plaintiff without notice and continued :)

There remains the question of the length of the notice to which the plaintiff was entitled. By the common law, an employee not being an independent contractor is in the absence of special agreement or some usage or custom as to the giving of notice in the particular occupation, entitled to what is termed *reasonable* notice.

The Court in determining what is reasonable notice would have regard to the time it would take a person with reasonable diligence to secure fresh employment of a similar nature.

According to the evidence electricians in this Colony are rarely employed by the calendar month — in most cases they are engaged under contract as independent contractors. In the circumstances I do not see how plaintiff can justify his claim for a notice to determine at the end of a calendar month, as any fresh employment as an electrician he might secure would hardly commence at the beginning of a month.

The Solicitor for the defendants referred to the provisions of section 17 of the. Labour Ordinance, No. 2 of 1942, which provides for 14 days notice, in the absence of mutual consent or agreement to the contrary, before the termination of those contracts of service within the meaning of the Ordinance. After careful consideration of the definition of employee in that Ordin-

ance, I hold that an electrical worker does not come within that definition. The omission from this definition of "mechanics", who were included amongst the classes of persons defined as "servants" in the Employers and Servants Ordinance, Chapter 261, which this Ordinance repeals and replaces as the enactment governing all disputes between masters and servants, shows that the new Ordinance intends to restrict the application of its provisions to a lower grade of manual worker.

In my view one month's notice terminating at any date would be reasonable notice to plaintiff and he is therefore entitled to the sum of $100.00 plus $12.00 for rations which I agree must be considered as part of his month's wages for this purpose. There will be judgment for plaintiff for $112.00 with costs.

Judgment for plaintiff.

BARRY MASSAY, Appellant,
v.
LOUISE DAVSON, Respondent.

[1944. No. 224.—DEMERARA.]

Before JACKSON, J. (Acting) in Chambers.

1945. February 26; March 26; April 30.

Landlord and tenant—Rent restriction—Maximum rent—Fixing of Application by tenant—Rent Assessor—Power of—To enter and inspect premises —To use knowledge so obtained—In determining reasonable capital cost of improvements and alterations—Defence (*Georgetown Rent Control*) *Regulations,* 1944 (No. 6), *regulations* 8 (5) *and* 9 (1).

Landlord and tenant—Rent restriction—Unable to prove—Meaning of—Defence (Georgetown Rent Control) Regulations, 1944 (No. 6), *regulations* (1) (c).

Words—"Unable to prove"—Defence (*Georgetown Rent Control*) *Regulations,* 1944 (No. 6), *regulation* 9 (1) (c).

Where an application under the Defence (Georgetown Rent Control) Regulations, 1944 (No. 6) is made to the Rent Assessor by a tenant for the fixing of the maximum rent payable by him in respect of premises rented to him, the Rent Assessor may enter and inspect the premises and may use the knowledge obtained on such inspection in determining what is the reasonable capital cost of improvements and alterations to the premises.

The words "unable to prove" in regulation 9 (1) (c) of the Defence (Georgetown Rent Control) Regulations, 1944 (No. 6) mean that it is beyond the power to prove.

APPEAL by Barry Massay, a landlord, from the decision of the Rent Assessor under the Defence (Georgetown Rent Control) Regulations, 1944 (No. 6) fixing the maximum rent payable by the respondent Louise Davson in respect of a cottage

at E1/2 lot 95, First Street, Alberttown, The facts and arguments appear from the judgment.

R. G. Sharples, Solicitor, for the appellant.

A. J. Parkes, for the respondent.

Cur. adv. vult.

JACKSON, J. (Acting): This is an appeal from the decision of the Rent Assessor under the Defence (Georgetown Rent Control) Regulations, 1944.

The respondent, a tenant of the appellant being of the opinion that the appellant was requiring her to pay rent $8.48 a month, a sum in excess of the maximum rent chargeable applied to the Assessor to determine and certify the maximum rent payable in respect of the tenement, a cottage at E1/2 95 First Street, Alberttown. After hearing evidence the Assessor fixed the maximum rent payable at $6.09 made up as follows:

		$. c.
Standard rent per month	..	4.00
Increase for improvements .	..	1.33
Increase for taxation.	..	36
10% of Standard Rent	..	40
Maximum rent per month .	..	6.09

The appeal is based mainly on whether the Assessor as set out in the circumstances of this case is clothed with any right to fix in the manner he did the increase for improvements at $1.33.

The appellant on whom rests the burden of proving the maximum rent payable was given several opportunities to satisfy the Assessor as to the standard rent and as to the amount spent on improvements; he gave evidence, produced bills and stated that he spent $678.49 on the building occupied by the respondent; in the words of the Assessor: —

> "All of this he wanted to be treated as capital expenditure on improvements although he would not, or could not, state what portion had been spent on improvements and alterations as distinct from repairs. Only the former carry the 8% increase permitted under section 6 (1), (a) of Ordinance 23 of 1941 and the onus is on the respondent to justify any increase on the Standard Rent. In the circumstances, the respondent created so much suspicion in my mind that I decided to inspect the premises under Regulation 8 (5) and did so. What I found there I have recorded in my notes. I consider $200:— as a reasonable capital cost for such improvements and alterations as I could find, and I accordingly allowed that sum."

For the appellant it was urged that —

(i) regulation 9 is the only one which gives the Assessor power to fix the maximum rent;

(ii) the relevant part of the regulation is 9 (1) (c) which reads as follows:

> "If any landlord or his agent is for any reason unable to

prove any fact required to be proved for the purpose of determining the maximum rent, the Assessor shall fix a rent which, in his opinion, having in view ail the circumstances of the case and also the maximum rents chargeable in respect of similar premises in the same area, is a maximum rent;"

(iii) there is no evidence that he took into consideration the maximum rent chargeable in respect of any other premises in the same area;

(iv) the power given him in regulation 8 (5) to inspect premises is only exercisable under regulation 9.

It may be appropriate for me first to deal with the points raised in (ii) and (iii) above and determine whether regulation 9 (1) (c) is applicable to the present case; the word "unable" is employed; a distinction must be marked between "unable to prove" and "failure to prove"; unable to prove means that it is beyond the power to prove; it cannot seriously be contended that a landlord who owns a house, personally looks after its renovation, buys the materials, engages the workmen, pays them, and holds the bills is one who will be considered unable to prove before a Rent Assessor what sums he spent on improvements as against repairs; that is the position of the appellant; he is in possession of all the necessary information, gives evidence, produces the bills but nevertheless fails to prove what amounts could properly be allocated to improvements as against repairs; I find the view contended for by the appellant untenable and that regulation 9 (1) does not fit this case as none of the conditions precedent (a) (b) or (c) for its application is present.

It has been pressed upon me that the employment of regulation 8 (5)—

"The Assessor may require any tenant who has applied to him to determine the maximum rent payable in respect of his premises, to permit him at any reasonable hour of the day to enter and inspect the said premises".

may only be regarded as an act done in anticipation of the exercise of the powers given under regulation 9 (1); in effect if the Assessor does not purport to act under regulation 9 (1) he cannot in any circumstance apply the benefit of his inspection under regulation 8 (5) for the purpose of fixing the maximum rent. I do not find this contention sound; all regulation 9 (1) does is to set out what the Assessor should do in certain specific instances e.g., when —

(a) a landlord or his agent fails without reasonable excuse to attend, or

(b) declines to give evidence or declines to give evidence on any point relevant, or

(c) is for any reason unable to prove any fact required to be proved.

The marginal note to regulation 9 is as follows:

"Power to Assessor to fix reasonable rent when necessary evidence is not available;"

although the note forms no part of the regulation it is of some help "inasmuch as it shows the drift" of the regulation (Bushell

v. *Hammond,* 1904, 73 L.J. K.B. 1005); it confirms the view that regulation 9 operates only in the absence of evidence. In the instant case all the material is available and the question of its apportionment only remains to be considered; the conditions therefore for the operation of regulation 9 do not in anyway preclude the Assessor from utilising the benefit of his inspection in any given condition that is not embraced by regulation 9 (1).

Among the meanings given to the word "Assessor" in the recognised dictionaries are the following: One who sits as assistant, adviser, to judge or magistrate with his special knowledge of the subject to be decided; one who assesses taxes or estimates value of property for taxation. Regulation 4 (1) says:

> "The Governor may appoint a fit and proper person under the style of Rent Assessor (hereinafter referred to as "the Assessor") for the purpose of fixing, in the manner hereinafter provided, the maximum rent" etc.

and regulation 4 (2) provides that —

> "The Assessor shall be appointed a Magistrate for such time as he may continue in the office of Assessor under the regulations."

In these regulations the Assessor sits alone with combined powers of both Magistrate and Rent Assessor and one must take it that he has been specially appointed having regard to his peculiar knowledge in relation to properties in the jurisdiction, their value, and of the law; the object of the inspection is to enable him to use his special knowledge and apply it to the evidence adduced; to hold then that the legislative body gave him power to inspect premises without the right to use his assessment save within the narrow limits of regulation 9 (1) would cause that body to look absurd. These regulations introduced under The Emergency Powers (Defence) Acts mainly for the protection of tenants must be read as a whole and must be liberally construed. The Assessor acted clearly within his powers; he has done nothing what the law forbids and I can see no reason to disturb his findings. The maximum rent fixed by the Assessor is confirmed and the Appeal dismissed with costs to the respondent fixed at $30.

Appeal dismissed.

W. CHOO KANG & SONS & ANOR, *v.* L. KILKENNY.

WILLIAM CHOO KANG & SONS, and THEOPHILUS CHOO KANG

Appellants (Defendants).

v.

LOUIS KILKENNY, Police Constable No. 4469,

Respondent (Complainant).

[1944. No. 447.—DEMERARA]

Before Full Court: SIR JOHN VERITY, C.J., BOLAND, J. and JACKSON, J. (Acting).

1945. May 11; June 1.

Criminal law and procedure—Partnership firm—Complaints and convictions against—Cannot be under firm name—Names of partners to be set out—May then be described as trading under firm name—Interpretation Ordinance, Chapter 5, section 5.

Criminal law and procedure—Agents employed for the purpose of causing a crime to be committed—Evidence of—To be received with an extra degree of caution—Retailer who at the request of the police does no more than invite a wholesaler to sell him articles whereupon the wholesaler without any suggestion or inducement sells to the retailer at an illegal price—Retailer not an agent employed for the purpose of causing a crime to be committed.

Defence Regulations—Price control—Deodorised coconut oil—Certificate of analyst not required to prove that an article is—Where article sold is known to grocery trade as deodorised coconut oil, and described by seller as such—Sufficient evidence that it is—Control of Prices (No. 2) *Order,* 1944.

Defence Regulations—Price-controlled article—Sale of—For purposes of re-sale, to a person carrying on a retail provision shop outside George-town and New Amsterdam—Sale by wholesale—Control of Prices (No. 2) *Order,* 1944.

Notwithstanding the definition of the word "person" in section 5 of the Interpretation Ordinance, Chapter 5, a partnership firm is not such a person as can properly be convicted under its trading name.

In order to constitute a proper conviction of a partnership firm for a penal offence it is necessary that in the complaint and conviction the names of the partners should be set out, though they may then be described as trading under the firm name.

The definition of "deodorised coconut oil" in the Control of Prices (No.2) Order, 1944 goes no further than to express in formal terms the ordinary meaning of the words themselves, that is to say, oil made from kernel of the coconut from which the characteristic odour has been removed by some process. An analyst's certificate is not necessary to prove that a substance is "deodorised coconut oil" within the meaning of the Order.

The appellant was convicted of the offence of selling a price-controlled article, to wit, deodorised coconut oil, at a price in excess of the price permitted by the Control of Prices (No. 2) Order, 1944. It was established by the prosecution that the article sold was a substance known to the grocery trade as deodorised coconut oil. The appellant himself described the article as "D.C. oil."

Held that there was sufficient evidence to satisfy the Magistrate

as to the nature of the substance, and that it was by its nature deodorised coconut oil.

Where a price-controlled article is sold to a person for re-sale, and such person carries on a retail provision shop outside Georgetown and New Amsterdam, the sale is a sale by wholesale within the meaning of the Control of Prices (No. 2) Order, 1944.

An extra degree of caution should be exercised in accepting the evidence of witnesses who are "agents employed for the purpose of causing a crime to be committed." There is, however, a distinction between a case in which the agent deliberately causes a crime to be committed and one in which an ordinary retailer, albeit at the request of the Police, does no more than invite a wholesaler to sell him certain articles and the wholesaler without any suggestion or inducement sells them at an illegal price.

R. v. *Benest* (1918) 39 Natal L.R. 344, considered.

APPEAL by William Choo Kang and Sons, and by Theophilus Choo Kang, from decisions of the Magistrate of the Berbice Judicial District, convicting them of selling by wholesale a price-controlled article, to wit, deodorised coconut oil, at a price in excess of that permitted by the Control of Prices (No. 2) Order, 1944.

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

Frank W. Holder, Solicitor-General, for the respondent.

Cur. adv. vult.

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

This is an appeal from the conviction of two defendants on a charge of selling by wholesale a price-controlled article at a price exceeding the maximum price fixed by an Order of the competent authority under the Defence Regulations, 1939.

The firstnamed appellant is described in the complaint and in the conviction as "William Choo Kang and Sons" and it appears from the evidence that this firm is unincorporated and is a partnership consisting of the secondnamed appellant and four other persons who in respect of this offence were also charged but were reprimanded only.

At the opening of the appeal the Solicitor-General, who appeared on behalf of the respondent, intimated that he was unable to support the conviction of the appellant firm under the partnership name. With this view we are in agreement being of the opinion that notwithstanding the definition of the word "person" in section 5 of the Interpretation Ordinance, Ch. 5, a partnership firm is not such a person as can properly be convicted under its trading name, but that in order to constitute a proper conviction of such a person for a penal offence it is necessary that in the complaint and conviction the names of the partners should be set out, though they may be then described as trading under the firm name.

The conviction of "William Choo Kang and Sons" is in our view a nullity and must be set aside. In the circumstances of this case, however, there will be no order as to costs.

In regard to the secondnamed appellant it appears that he

is a member of the firm and the evidence adduced by the prosecution goes to show that it was he personally who conducted the sale in respect of which the charge was laid.

The main grounds of appeal argued before this Court were (1) that there was no evidence to show that the article sold was a price-controlled article as defined by the Order; (2) that there was no evidence to show that the sale was a sale by wholesale; (3) that the learned Magistrate did not apply the right principle to his consideration of the evidence of a witness who made the purchase at the request and under the directions of the police; and (4) that the firm of William Choo Kang and Sons of which the appellant is a member having been convicted of the offence charged, the appellant could not also be convicted in his own person for this would be to convict him twice in respect of the same offence, each member of the firm being liable for the penalty imposed upon the firm.

It will be convenient to deal firstly with the last of these submissions. As we have already held, the conviction of the firm under its trading name was a nullity; there was therefore no double conviction and the appellant was liable to conviction as a member of the firm or personally if the commission of the offence by the firm or by himself personally was established by proper proof.

In regard to the first ground to which we have referred the subject matter of the charge was "two gallons of deodorised coconut oil" and it was submitted that it was not sufficient for the prosecution to establish that the article sold was a substance known to the grocery trade as "deodorised coconut oil" nor that the appellant himself described the article as "D.C. oil", which, in our view, the learned Magistrate rightly inferred in all the circumstances meant "deodorised coconut oil." It was submitted that the prosecution should have tendered the evidence or certificate of an analyst that the substance was "deodorised coconut oil" as defined by the Order under which the appellant was charged. Having perused this definition we are of the opinion that it goes no further than to express in formal terms the ordinary meaning of the words themselves, that is to say, oil made from the kernel of the coconut from which the characteristic odour has been removed by some process. It appears to us that both the purchaser and the appellant must have been aware that the substance purchased under the name of "Fryol" was such an oil and that the evidence of the former and the admission of the latter were sufficient to satisfy the learned Magistrate as to the nature of the substance and that it was by its nature the article the price of which was controlled by the Order.

In the second place counsel for the appellant contended that there was no proof that the transaction was wholesale within the meaning of the Order in that the prosecution failed to produce either the original licence held by the purchaser in respect of the premises whereon he was stated to carry on a retail shop nor an extract from the register of licences in proof of the licensing of such premises. It is to be observed that under earlier Orders

issued by the competent authority reference is made to licensed premises only and under such Orders it might well have been contended that proof of the existence of a licence was necessary. In the Order under which the appellant was charged, however, the definition has been extended to include premises in respect of which licence duty is due and payable. There can be no doubt from the evidence in this case that the purchaser carried on a retail provision shop outside Georgetown and New Amsterdam and that licence duty was therefore due and payable in respect thereof under the provisions of section 18 of the Tax Ordinance, No. 43 of 1939. The sale to this purchaser of articles for re-sale by retail fell therefore within the definition of sales by wholesale set out in the Order.

As to the third ground it was submitted that the circumstance of the sale constituted a "police trap" and while it was admitted by counsel that had the learned Magistrate approached his consideration of the evidence with that- degree of care which it has been held should be exercised in such cases the appellant would have no cause for complaint, it was contended that the Magistrate dismissed this especial consideration from his mind and accepted the evidence of the witnesses without exercising any particular degree of care and notwithstanding the fact that the purchaser had expressed bias against the appellant when he used the words "I wanted the police to catch Choo Kang," the reason for such bias being alleged by the appellant to have been a previous refusal by him to give the witness credit. In his reasons for decision the learned Magistrate refers to the case of *R.* v. *Benest* (1918) 39 Natal Law Reports, p. 344 and distinguished the present case by reason of the fact that the witness here did not invite the appellant to commit an offence but merely, at the request of the police, invited him to do a perfectly legal act. We agree with the learned Magistrate that such a distinction exists and that it should have its effect upon the mind of the Magistrate in his approach to consideration of the evidence. While the case cited may go further than this Court would be prepared to go, in that it might be taken to imply that while such a witness is not an accomplice yet it is necessary that his evidence should be corroborated as if he were, at the same time it follows the established principle that an extra degree of caution should be exercised in accepting the evidence of witnesses who are "agents employed for the purpose of causing a crime to be committed." The degree of caution will vary according to the circumstances and as was said in the case cited "every case of this kind must depend on its own facts." In the present case the learned Magistrate was right to distinguish between a case in which the agent deliberately causes a crime to be committed and one in which an ordinary retailer, albeit at the request of the police, does no more than invite an wholesaler to sell him certain articles and the wholesaler without any suggestion or inducement sells them at an illegal price. It cannot be said that because the learned Magistrate drew this proper distinction he therefore ignored the actual facts of the case, the circumstances in which the tran-

saction took place and the relation of the witnesses to those facts and circumstances. Nor would it be right to assume that he failed to consider the statement made by the witness that he "wanted the police to catch Choo Kang," a statement which might or might not bear the sinister significance counsel would wish to attach thereto. Its precise significance may better be judged by the Magistrate who both heard the question in cross-examination which elicited it and observed the manner in which the witness replied. These are factors the importance of which we are not in a position to evaluate in the absence of the advantages possessed by the Magistrate who heard the case. We are not of the opinion therefore that the learned Magistrate misdirected himself as to the manner in which he should approach the evidence nor that he was unjustified in his conclusions as to its credibility. A considerable amount of argument centred upon the apparent disappearance of certain two-dollar notes handed to the purchaser by the police but there was ample evidence upon which the Magistrate could conclude that the witness entered the shop with $14, that he purchased goods the correct price of which should have been $12.36 and that he left the shop with $1.34 only. Those are material facts which support the witness' story that he was overcharged and inconsistent with the appellant's story that the witness paid him the exact sum of $12.36. On the whole, therefore, we agree with the Magistrate's findings and are of the opinion that the appellant was rightly convicted.

In regard to the sentence imposed by the learned Magistrate we do not consider that the term of imprisonment with hard labour for the space of four weeks was unduly severe taking into consideration the nature of the offence, the fact that this person had previously been convicted of a similar offence and that the substantial fine of $500 then imposed appears to have had no deterrent effect. It may well be that the control of prices may necessarily continue for a considerable period notwithstanding recent events in Europe and it is most desirable that those who are not ashamed to persist in their attempts to make illicit profit should understand that Magistrates are empowered to impose upon them the imprisonment they deserve and that in the exercise of that power in such cases the Magistrates will be upheld by this Court.

The appeal of Theophilus Choo Kang is therefore dismissed with costs and the conviction and sentence are affirmed.

Appeal of William Choo Kang and Sons allowed: appeal of Theophilus Choo Kang dismissed.

Re CAESAR AUGUSTUS PETRIE, decd.

Re AUGUSTUS PETRIE, deceased.

[1945. No. 114.—DEMERARA.]

Before JACKSON, J. (Acting):

1945. May 14; June 4.

Will—Construction—Devise to persons of a class—On death of tenant for life- When members of class to be ascertained—On death of tenant for life.

Will—Construction Devise to illegitimate children of a certain person.—Illegitimate children at date of will—Persons who have the reputation as such—Onus of proof—On those who allege it.

A testator left a will in which he made the following bequest: "I leave devise and bequeath to my son Wilfred Petrie, lot 163 Lacytown, with the buildings and erections thereon for the period of his life only .... and on the death of my son the said Wilfred Petrie, I leave devise and bequeath the said property to the children whether legitimate or illegitimate of my son the said Wilfred Petrie and the children of my son Remington Standford Petrie in equal shares for their sole use and benefit absolutely."

Held (1) that both illegitimate and legitimate (if any) children of Wilfred Petrie may take under the will;

(2) that only such illegitimate children as may have, at the date of the will, acquired the reputation of being the natural children of Wilfred Petrie may share;

(3) that the burden of proving the reputation is on those who allege it;

Burnett v. Tugwell (1862) 31 Beav. 232, and *Occleston* v. *Fullalove.* 9 Ch. 147, applied.

(4) that the period of division or distribution is at the death of Wilfred Petrie;

(5) that legitimate children (if any) of Wilfred Petrie and of Remington Stanford Petrie, by any marriage, born or begotten up to the date of the death of Wilfred Petrie may share and no more.

Ayton v. *Ayton*, 1 Cox 327, and *Re Emmet's Estate* (1880) 13 Ch.D. 484, C.A., applied.

ORIGINATING SUMMONS by Wilfred Petrie and Remington Stanford Petrie, executors of the will of Caesar Augustus Petrie, deceased, for determination of certain questions which arose on the construction of the will.

A. T. Peters, for the applicants.

Cur. adv. vult.

JACKSON, J. (Acting): By his will dated 26th May, 1944, Caesar Augustus Petrie who died on the 8th September, 1944, made among other bequests the following “I leave devise and bequeath to my said son “Wilfred Petrie, abovenamed, lot 163 (one hundred and sixty-three), “Charlotte Street, Lacytown, Georgetown, Demerara, with the buildings “and erections thereon for the period of his life only, subject to the “payment of the sum of ten dollars per month out of the rents from the “buildings

"on the said property to my daughter Victorine S. Petrie from the date of "my death during her lifetime; and also subject 1b the payment of the "pecuniary legacies hereinafter mentioned out of the rents from the said "property but only in the event there is not sufficient money to meet the "said legacies at my death; and on the death of my son the said Wilfred "Petrie, I leave devise and bequeath the said property lot 163 (one "hundred and sixty-three), Charlotte Street, Lacytown, Georgetown, with "the buildings and erections thereon to the children whether legitimate or "Illegitimate of my son the said Wilfred Petrie and the children of my son "Remington Stanford Petrie in equal shares for their sole use and benefit "absolutely."

The testator appointed his sons Wilfred Petrie and Remington Stanford Petrie, executors; probate of the said will was granted to the executors on the 4th day of November, 1944.

The executors by originating summons invoke the aid of the Court and submit for determination the following questions: —

1. Whether upon the true construction of the said Will the testator in paragraph 3 of the said Will intended to make a reversionary devise and did make such a devise of lot 163 Charlotte Street, Lacytown, Georgetown, with the buildings and erections thereon: —

(a) Only to such children legitimate or illegitimate of the said Wilfred Petrie and the legitimate children of the said Remington Stanford Petrie as might be alive at the death of the said testator, or

(b) Only to such children legitimate or illegitimate of the said Wilfred Petrie and the legitimate children of the said Remington Stanford Petrie by any marital union as might be alive at the time of the death of the said Wilfred Petrie.

(c) If the death of Wilfred Petrie and not the death of the testator is accepted as the deciding fact by which the children as remaindermen would inherit their devise —

(i) Whether posthumous children (if any) legitimate or illegitimate born to Wilfred Petrie would be entitled as well as those that were in being at the time of the death of the said Wilfred Petrie, or

(ii) Whether legitimate children of Remington Stanford Petrie, born after the death of the said Wilfred Petrie, would also be entitled to inherit the said devise along with those that were in being at Wilfred Petrie's death.

2. Whether the Registrar of Deeds shall have inserted in the Transport now desired to be advertised and passed, the names alone of the present children of the devisees or along with words referring to all future children of the said Wilfred Petrie legitimate or illegitimate and of the said Remington Stanford Petrie by any marital union.

3. Who shall determine the paternity of any illegitimate child or children of the said Wilfred Petrie and what proof of paternity shall the Registrar of Deeds accept?

In an affidavit in support of the application Wilfred Petrie swears that he is a Bachelor and is the father of three children, *viz,*: —

(i) Ann Elizabeth born of the body of Ambrosine Gibson on 8th October, 1927.

(ii) Alfred Petrie born of the body of Beryl Austin on the 31st October, 1934.

(iii) Clerie Rita born of the body of Jane Noel on the 6th October, 1942;

and that these children were alive at the date of the death of the testator.

Questions 1(a) and 1(b) are directed as to what in relation to those who should comprise the class of the remaindermen is the determining factor, the death of the testator or the death of the person taking the life interest. It is well established that a will is only effective from the death of the testator and no doubts can arise if a gift be immediate; in this instance the gifts are future ones and are only distributable after the life interest comes to an end. The Courts have always set their eyes against delaying the distribution of an estate and have long since adopted and followed certain rules of convenience for the construction of wills subject of course to the language employed by the testator. The rule applicable to the question under consideration may be stated as follows:

Where a particular estate or interest is carved out with a gift over to the children of the person taking that interest or the children of any other person such a gift will embrace not only the objects living at the death of the testator but all who may subsequently come into existence before the period of distribution e.g. if the gift be to A for life with remainder to B's children the rule provides that only those children of B shall take who came into existence before A's death. Where the gift is immediate as is the life interest to Wilfred Petrie it takes effect on the testator's decease but where it is contingent on the life interest then the children who will share shall be those born at the testator's decease along with those born or begotten at the decease of the life tenant Wilfred Petrie. I refer only to legitimate children.

Counsel for the applicants submitted in respect of question 1 (c) (i) (ii) that the legitimate children of Remington Stanford Petrie who were not in esse at the death of but born after the death of the life tenant would be entitled to inherit as remaindermen; no authority was cited for this view but it was contended that the plain meaning of the words in the will indicated such a construction. I regret that I can find no support for that submission; on the contrary there is a wealth of authority against it.

In *Ayton* v. *Ayton* (1787) 1 Cox 327 one George Lee by his will gave to his wife Mary Lee, the whole rest residue and remainder of all his stock etc for her life and no longer, and upon her

death to the children of Mr. John Ayton and his wife Jane. At the death of the testator and of his wife Mary Lee, Mr. and Mrs. John Ayton had only two children, John and Susannah; after the death of the widow they had three more children. Held only John and Susannah could take. The Master of the Rolls said at p. 328:

"This certainly is a question of construction, viz whether by the words the testator has made use of, he meant to comprise one class of children or another; but in this as in many other cases, there are technical rules of construction, which are as binding on the Court as rules of law in other cases. The rule of construction applicable to the present case is settled, and settled most convenient for the parties by the case of *Ellison* v. *Airey*, 1 Ves. (Snr.) 111. So many children as come *in esse* before the time when the fund is distributable shall be comprehended and no more, the vesting is not to be suspended till other children are born, to take away from the shares of the former". The three children who were born after the death of Mary Lee the tenant for life did not take.

In re *Emmet's Estate* (1880) 13 Ch.D. (C.A.) 484 a testator gave his estates real and personal to invest and to permit H.E. during his life to receive the rents and income and after his death one undivided part for all the children of H.E. equally the shares to be conveyed and paid to them as they should attain the age of twenty-one, as to sons, and twenty-one or marriage as to daughters; the testator gave another third part in favour of the children of his sister, and the remaining third part for all and every, the children of G. (George Nelson Emmet), the shares to be paid at the ages and times above mentioned. H.E. died a bachelor, at his death G, a widower had two children, he married again and when his eldest child attained twenty-one, he had six children, all of whom lived to attain twenty-one. Another child was born afterwards. It was held by the Court of Appeal that only the six children were entitled. *Jessel M.R.* said inter alia at p. 490:

"Under that will any layman would understand that all the children of George Nelson Emmet at whatever time they were born would become entitled, and in the absence of authority so should I. There has however been established a rule of convenience, not founded on any view of the testator's intention, that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is, that so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased. That rule of convenience being opposed to the intention is not to be applied where it is not necessary there being also a rule that you let in all who are born up to the time the share becomes payable. (*Berkeley* v. *Swinburne* 16 Sim 275) Now, what is the period of division in this will? No son is to take till twenty-one; no daughter till twenty-one one or marriage; the period of division

therefore is when any son attains twenty-one or any daughter attains twenty-one or marriage. That is the period when the fund is to be divided, and according to the rule of convenience to which I have referred, children born after that time are to be excluded."

There can be no doubt that on the proper construction of this will in accordance with the authorities the termination of the tenancy for life is the period for distribution and after which the class cannot be increased nor can the shares be capable of diminution by the inclusion of children not in esse but subsequently born. Wilfred Petrie is a bachelor and Remington Stanford Petrie is married, it follows that the legitimate children born or begotten to the former should he marry and those born or begotten to the latter, by any marriage, before the death of Wilfred Petrie shall take.

There remains to be considered the gift to the illegitimate children of Wilfred Petrie. Is the gift to illegitimate children good? In the case of *Burnett v. Tugwell* (1862) 31 Beav. 232 there was a bequest to A & B for life and afterwards to their surviving children (which gift failed) and in default to the "children legitimate or illegitimate of my brother Henry Burnett. Held the illegitimate children could take. Sir John Romilly M.R. at p. 236 said. "The case mainly relied upon by them is the well known case of *Wilkinson* v. *Adams,* 1 Ves. & Beav. 422 which determined, that a devise by a married man, who had no legitimate children, "to the children which I may have by Ann Lewis and living at my decease, or born within six months after, equally to be divided between such children and their heirs, share and share alike," was a good devise to illegitimate children living at the date of the will. No decision can be more solemn; it was the unanimous opinion of three eminent common law judges who assisted Lord Eldon, and it was confirmed on reflection by Lord Eldon, after taking time to consider. This case, together with the words of the will, undoubtedly present considerable difficulty. *Wilkinson* v. *Adams* determines, that a gift to the illegitimate children of my brother Henry is a sufficient *designatio persona-rum* of the then existing illegitimate children of Henry, and will be executed by this Court." He continues at p. 237. "In this state of the case, it is, in my opinion, impossible for me to determine the question before me, without contravening some authorities of a high order, it being totally impossible for me to reconcile them. *Wilkinson* v. *Adams* however, which is a case of the highest authority, determines that natural children existing at the date of the will may take as a class, and not merely so, but that they may take as a class, under words plainly importing the testator's intention, that afterborn natural children should be included in this class. I consider myself bound to follow this decision, although it must, having regard to the state of the authorities, be a matter of some surprise to understand and trace out the process by which it was arrived at. It is plain that if the words of this bequest had been to the illegitimate children of my brother

Henry, and had stopped there, then the natural children of Henry existing at the date of the will would have taken as a class, and this would not have been invalidated by the words importing future illegitimate children to be admitted into it."

Wilfred Petrie has by affidavit testified that there were 3 illegitimate children of whom he is the father — Anna Elizabeth Alfred and Clerie Rita - alive at the date of the will. No other "illegitimate child of Wilfred Petrie" was born during the lifetime of the testator. The further question is whether any other children horn as a result of future unhallowed and illicit intercourse of Wilfred Petrie and any woman may be admitted; the answer is in the negative; this question is well settled by authority; a gift to the future illegitimate children of a man fails not only because it is contra bonos mores as tending to encourage immorality but also because it refers to the fact rather than to the reputation of paternity; and the law will never undertake an inquiry as to the paternity of an illegitimate child.
(*Loveland v. Loveland* (1906) 1 Ch. 542; *Re Homer* (1917) 86 L.J. Ch. 324, *Occleston* v. *Fullalove,* 1874, 9 Ch. 147; *Medworth* v. Pope (1859) 27 Beav. 71.)

The testator must have been aware when he made his will that his son Wilfred Petrie was a bachelor and he probably knew of children reputed to be those of his son; nor can it be denied that he intended to provide for some unfortunate beings of whose existence his son was reputed to be the author. Shall each and every of these three children share? That will depend upon whether the children had acquired the reputation of paternity. Such reputation must undoubtedly in the case under consideration have been acquired at the date of the will for otherwise it would be a precedent of dangerous example if after the contents of the will be known a reputation should be made to spring up in order to enable some illegitimate child to share who would not ordinarily have been entitled so to do. Applicants ask that directions should be given to the Registrar of Deeds as to what proof of paternity he should accept for the conveyance of title of immovable property to the remaindermen - the illegitimate children. I cannot lay down any definite mode of proof as to reputation; I have already indicated that no Court will endure the introduction of evidence to prove paternity; the Registrar will have to satisfy himself by whatever evidence he can deem adequate that any or all of those three children named above had at the date of the will acquired the reputation of being the children of Wilfred Petrie. It may well be that all of them had in the lifetime of the testator been acknowledged by him with the aquiescence of Wilfred Petrie, as his grandchildren and have been treated as such; there are many other ways whereby such reputation may be established but it is not within my purview to speculate; the evidence is not before me and the proper person or body must be left free to reach his or its own conclusion on what is adduced and not be fettered by any arbitrary pronouncement by me.

In *Occleston* v. *Fullalove* (1874) L.R. 9 Ch. App. 147, 104,

Sir W. M. James L.J. dealing with the question of reputation said at p. 164 "It does not mean, I conceive, that of which the gossip of the neighbourhood may spread a rumour or fame; but that reputation which springs from acknowledgment, conduct and life. The burden of proof no doubt lies in this as in every other case, on the person who alleges that he answers the description, but I can conceive no difficulty in producing in a proper case, sufficient evidence of that reputation. On such an issue I apprehend the admissible evidence would be what has been the continued cohabitation and acknowledgment, or acknowledgment merely, and against which there would not, I apprehend, be admissible evidence of any gossip, true or slanderous, of the neighbourhood, as for instance, that the woman had deceived and hoodwinked the man, and that the real sire was one of the house or farm servants, who was her secret paramour." This may serve as a guide as to what evidence may be submitted for acceptance.

With respect to the words of limitation the Registrar of Deeds should insert in the conveyance, I am of the opinion the necessity to poach upon his functions does not arise; the points of difficulty having been resolved the Registrar as a competent conveyancer will put into language technical and appropriate what the occasion demands.

I am of the opinion that

(i) both illegitimate and legitimate (if any) children of the tenant for life may take under the will;

(ii) only such illegitimate children as may have, at the date of the will acquired the reputation of being the natural children of the tenant for life may share;

(iii) the burden of proving the reputation is on those who allege it;

(iv) the period of division or distribution is at the death of the tenant for life;

(v) legitimate children (if any) of Wilfred Petrie and of Remington Stanford Petrie, by any marriage, born or begotten up to the date of the death of Wilfred Petrie may share and no more.

The costs of and incidental to this application are to be paid out of the estate. I certify for counsel.

Directions given

Solicitor: *A. Mc L. Ogle,*

BABAGEE also known as PUNDIT MARAJ,
Appellant (Defendant),

v.

JAMES CUMMINGS, Respondent (Claimant).

[1944. No. 321. — DEMERARA]

BEFORE FULL COURT: SIR JOHN VERITY, C.J., AND BOLAND, J.

1944. DECEMBER 19;

1945: JANUARY 15.

Workmen's compensation—Independent contractor—Does not include a person who is a workman but merely employs another to assist him in the work—Workmen's Compensation Ordinance, 1934 (No. 7), *section* 2.

Workmen's compensation—Claim for—Workman—Does not include persons employed in forestry—Meaning of forestry—Workmen's Compensation Ordinance, 1934 (No. 7), *section 2.*

Workmen's compensation—Claim for—Issue as to whether person doing work for another is a workman or an independent contractor— Determination of—Test—Nature and degree of control exercisable over him in performance of work.

Workmen's compensation—Claim for—Decision of Magistrate—That a person is or is not a workman—That a person is a workman or an independent contractor—Appeal therefrom—Where no facts in evidence upon such finding could be based—No appeal therefrom—Where sufficient evidence to support finding and nothing in evidence inconsistent therewith.

Words—"Forestry"—Meaning of—Workmen's Compensation Ordinance, 1934 (No. 7), *section 2.*

Paragraph (k) of the proviso to the definition of "workman" in section 2 of the Workmen's Compensation Ordinance. 1934, (No. 7) provides that "persons who contract or sub-contract for the carrying out of work and themselves engage other persons, independently of the employer, to perform such work" shall not be regarded for the purposes in the Ordinance as workmen.

Held that the paragraph is intended to except from the definition of "workman" a person, obviously an independent contractor, who engages others to perform the contracted work in his stead, but not to exclude one who otherwise fulfils the requirements of the definition of "workman" and merely employs another to assist him in the work.

The expression "forestry" in paragraph (f) of the definition of "workman" in section 2 of the Workmen's Compensation Ordinance, 1934 (No. 7) signifies work done in or about a forest and directly relating to the timber growing therein.

The test as to whether a person doing work for another is a work-

man, within the meaning of section 2 of the Workmen's Compensation Ordinance, 1934 (No. 7), in relation to the other person, is what is the nature and degree of the control exercisable over him in the performance of the work The greater the control the more justifiable the conclusion that the relationship is one of employer and workman. If there is little or no control, then the person engaged on the work is an independent contractor. In the former case the contract is a "contract of service" as mentioned in the definition of "workman" in the Ordinance which implies the relationship of master and servant as distinguished from the latter which is a "contract for service."

The Full Court will not disturb the decision on the law made by a Magistrate on the point as to whether or not a person is a workman within the meaning of section 2 of the Workmen's Compensation Ordinance, 1934 (No. 7) unless it is satisfied that there were no facts in evidence upon which such finding could be based.

The question whether a person is a workman or an independent contractor is a question for the Magistrate, on a claim for workmen's compensation, to decide, and if there is some evidence to support his finding, and nothing in the evidence absolutely inconsistent with it, the decision will be affirmed.

Jones v. *Penwyllt Dinas Silica Brick Co.* (1913) 6 B.W.C.C. 497, applied.

Where there was sufficient evidence before a Magistrate upon which he could reasonably find, on a claim by a person for compensation under the Workmen's Compensation Ordinance, 1934 (No. 7), that such person was a "workman" within the meaning of section 2 of the Ordinance, the Full Court will not, on appeal, interfere with such finding of the Magistrate, even if the Full Court would not necessarily have drawn from the facts the same inference as the Magistrate.

Binding v. *Great Yarmouth Port and Haven Commissioners* (1923) 16 B.W.C.C. 28 and *Templeton* v. *Parkin* & *Co., Ltd.* (1927) 22 B.W.C.C. 110, considered.

The appellant was the owner of a sawpit and carried on the trade or business of selling sawn timber in the form of boards and scantlings. He did not himself take part in the sawing operations, but employed men to do the work paying them according to measurement as checked by the appellant or by a person whom he employed to be at the work.

The respondent was one of the sawyers. He himself employed an assistant as he was entitled to do. The saw, which was the appellant's own property, had to be operated by at least two men, and the respondent and his assistant worked under an arrangement between the two under which they shared equally the sum of money earned by the sawing. Whilst neither the appellant nor his foreman would seem to have the right to control the manner in which the sawing is done, the respondent could work only such logs the appellant or his foreman selected for him. It was part of the respondent's duty, if he desired to work, to take the selected log lying amongst others on a parapet and hoist it on a ramp or place where the saw operated; in this work of getting the logs on to the ramp it was the practice of the sawyers present to assist each other without the supervision of a foreman. But the foreman, though not controlling the manner of the work, gave directions as to the type of boards required to fulfil orders and where the boards were to be stowed after being sawn.

The Magistrate held the respondent to be a workman within the meaning of the Workmen's Compensation Ordinance, 1934, (No. 7). In giving his reasons for decision he declared:

(1) that the arrangement to pay the respondent by the foot was merely for the appellant's own protection;

(2) that the term of the agreement included the implied agreement that the respondent would perform his duties daily and diligently to meet the requirements of the appellant's needs;
(3) that the respondent was under an obligation to report to the appellant and furnish reasons for his absence from work or of his ceasing to work;
(4) that the appellant could terminate the respondent's services at any time for unreasonable absence or delay in the performance of his duties or bad work;
(5) that the appellant or his foreman could employ other sawyers to work on the same selected log put on the ramp by the respondent without consulting the respondent.

Held that it could not be said, in the light of the specific findings of fact by the Magistrate, that he had erred in deciding in law that the respondent, being subject to such a measure of control, was a workman under the Workmen's Compensation Ordinance, 1934 (No. 7).

APPEAL by the defendant Babagee also known as Pundit Maraj from an order made by the Magistrate of the West Demerara Judicial District in favour of the claimant James Cummings under the Workmen's Compensation Ordinance, 1934, (No. 7).

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

H. B. S. Bollers, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by BOLAND, J. as follows:—

This is an appeal from an order by the Magistrate of the West Demerara Judicial District made under the provisions of the Workmen's Compensation Ordinance No. 7 of 1934.

The appellant was ordered to pay to the respondent in this appeal a certain sum by way of half monthly payments during the period whilst the latter remained under total or partial incapacity for work as compensation for personal injuries caused to him by accident alleged to have arisen out of and in the course of his employment by the appellant.

In substance the grounds of appeal as set out in the record are founded on the contention that the respondent was not a workman within the meaning of the Ordinance.

By the Ordinance there is no right of appeal except on questions of law. It is submitted on behalf of the appellant that the learned Magistrate erred in law in holding that the respondent was a workman in the employment of the appellant.

The main facts led in evidence before the Magistrate are not in dispute. The appellant is the owner of a sawpit and carried on the trade or business of selling sawn timber in the form of boards and scantlings. He does not himself take part in the sawing operations, but employs men to do this work paying them according to measurement as checked by the appellant of by a person whom he employs to be at the work.

The respondent was one of these sawyers. He himself employed an assistant as he was entitled to do. The saw, which was the respondent's own property, had to be operated by at least two men, and the respondent and his assistant worked under an arrangement between the two under which they shared equally

the sum of money earned by the sawing. Whilst neither the appellant nor his foreman would seem to have had the right to control the manner in which the sawing was done, the respondent could work only such logs that the appellant or his foreman selected for him, and it was part of the respondent's duty, if he desired to work, to take the selected log lying amongst others on a parapet and hoist it on to the ramp or place where the saw operated. In this work of getting the logs on to the ramp it was the practice of the sawyers present to assist each other without the supervision of the foreman. But the foreman, though not controlling the manner of the work, gave directions as to the type of boards required to fulfil orders and where the boards were to be stowed after being sawn.

After sawing operations on a log had commenced the respondent could leave off work but was entitled to payment for what boards or scantlings he had sawn although he may not have exhausted the entire log, while on his side the appellant or his foreman could stop the work if and when he chose. This he might be induced to do for a variety of reasons — such as damage to his log by faulty sawing, delay in the execution of the work or a sufficiency of a supply on hand to meet his needs. In any event the respondent was entitled to be paid for boards already sawn.

It was while engaged in hoisting a selected log on to the ramp that the respondent received his injuries.

Before the Magistrate, and also repeated at the hearing on appeal but not stressed by counsel, an argument was advanced that the respondent was engaged in work in the nature of forestry and so outside the scope of the Ordinance which expressly excludes forestry from its operation.

We are in entire agreement with the decision of the Magistrate on this point. Boards may perhaps be aptly described as a forest product, but a person engaged in sawing logs into boards is no more at work in forestry than the ordinary carpenter. The term "forestry" signifies in our opinion work done in or about a forest and directly relating to the timber growing therein.

The Ordinance, in Section 2 defines the term "workman", and in a proviso excludes certain categories of persons who otherwise might fall within the principle of the general definition. The test as to whether a person doing work for another is a workman in relation to that other within the meaning of the Ordinance is what is the nature and degree of control exercisable over him in the performance of the work? The greater the control the more justifiable the conclusion that the relationship is one of employer and workman. If there is little or no control, then the person engaged on the work is an independent contractor. In the former case as has been often observed the contract is a *contract of service* as mentioned in the definition of "workman" in the Ordinance, which implies the relationship of master and servant as distinguishable from the latter which is a *contract for service.*

Although the point was not taken by appellant's counsel it may perhaps be well to declare, in order to avoid any possible misconception that may arise in the future in interpreting sub-clause (k) in the proviso attached to the definition of "workman"

in Clause 2, that this sub-clause is intended to except from the definition of "workman" a person, obviously an independent contractor, who engages others to perform the contracted work in his stead, but not to exclude one who otherwise fulfilling the requirements of the definition merely employs another to assist him in the work.

On the facts of this case the learned Magistrate held the respondent to be a workman within the meaning of the Ordinance.

It is now well settled in England that the Court of Appeal will not disturb the decision on the law made by a County Court Judge on the point whether a person is or is not a workman unless it is satisfied that there were no facts in evidence upon which such a finding could be based.

"The question whether the. man is a workman or an independent contractor is a question for the arbitrator to decide, and if there was some evidence to support his findings, and nothing in the evidence absolutely inconsistent with it, it is not our duty to reverse his decision, but we are bound to say that his judgment must be affirmed": per Kennedy, L.J. in *Jones* v. *Penwyllt Dinas Silica Brick Co.* (1913) 6 B.W.C.C. at p. 497.

The learned Magistrate in giving his reasons for decision declares —

(1) that the arrangement to pay the respondent by the foot was merely for the appellant's own protection;
(2) that the terms of the agreement included the implied agreement that the respondent would perform his duties daily and diligently to meet the requirements of the appellant's needs;
(3) that the respondent was under an obligation to report to the appellant and furnish reasons for his absence from work or his ceasing to work;
(4) that the appellant could terminate the respondent's services at any time for unreasonable absence or delay in the performance of his duties or bad work; and
(5) that the appellant or his foreman could employ other sawyers to work on the same selected log put on the ramp by the respondent without consulting the respondent.

We cannot say that in the light of these specific findings of fact the learned Magistrate has erred in deciding in law that the respondent, being subject to such a measure of control, was a workman under the Ordinance.

We are satisfied that there was sufficient evidence before him on which the learned Magistrate was entitled to draw the inference of facts that he did, and, that being so, even if this Court would not necessarily have drawn the same inferences, this Court will not interfere.

We have considered the cases of *Binding* v. *Great Yarmouth Port and Haven Commissioners* (1923) 16 B.W.C.C. 28, and *Templeton* v. *Parkin* & *Co., Ltd.*, (1927) 22 B.W.C.C. 110, cited by counsel for the appellant, where the Court of Appeal reversed the decision in law of the County Court Judge based on certain specific findings of fact. But in the first case where the County Court Judge held

that the applicant was an independent contractor, it was held on appeal that the County Court Judge had misdirected himself as the matter turned upon the true construction of a written agreement which, in the view of the Court of Appeal, had clearly established the relationship of master and servant. In the second case the facts before the County Court Judge were held by the Court of Appeal to have features so preponderatingly against the relationship of master and servant that the finding was held to be unwarranted. Although there may be features in this case similar to those of that case we cannot agree, as we have stated, that on the whole the learned Magistrate had no evidence in justification of his findings.

In the circumstances the order of the learned Magistrate will stand and the appeal is dismissed with costs.

Appeal dismissed.

CHEU LEEN EVAN WONG, *v.* ATTORNEY-GENERAL.

CHEU LEEN EVAN WONG, Plaintiff,

v.

ATTORNEY-GENERAL, Defendant.

[1943. No. 134. — DEMERARA.]

BEFORE SIR JOHN VERITY, C.J.

1945. MAY 1, 28, 29; JUNE 15.

Crown lands—Grazing permission—Right in holder thereof to obtain lease—Upon compliance with certain terms and conditions—Terms and conditions complied with—Right of holder to obtain a lease—Enforceable by legal proceedings—No power in Governor to refuse to grant lease-Crown Lands Ordinance, cap. 171, *sections* 3 (b) , 6, 7, 8, 9, 10, 11, 14, 15, 16*—Crown Lands Regulations.* 1919, *regulations* 29, 90.

On the 21st November 1917, the Commissioner of Lands and Mines issued to Raphael Peres a Permission to occupy for cattle grazing purposes a certain tract of Crown land in the Rupununi District of the Colony, comprising 50 square miles. The Permission was extended annually, and the rights and interests thereunder were transferred from one person to another from time to time until the 6th October 1931, when transfer was made by the holder at that time to the plaintiff. The Permission continued to be renewed annually until the 10th December 1942 when the Commissioner of Lands and Mines informed the plaintiff by letter that no further renewals would be granted after the 31st December 1943. On the 14th December 1942, the plaintiff made application to the Commissioner of Lands and Mines for a cattle grazing lease of the tract for 99 years, and transmitted to him the sum of $105 being the prescribed fee together with one year's rental. On the 20th January 1943, the Commissioner of Lands and Mines informed the plaintiff that the Government was not prepared to grant the lease, and on the 12th May 1943, the plaintiff instituted proceeding's in which she claimed a declaration that she is entitled to obtain a cattle-grazing lease for 99 years of the tract of Crown land in question.

Clause 8 of the Permission was as follows:

> "If within five years from the date of first issue of this Permission the holder thereof shall have on the land herein described—
>
> (1) a corral of not less than 2500 square yards in area; and
>
> (2) a habitable house with a resident stockman; and
>
> (3) five hundred head of cattle,—
>
> he shall be entitled to obtain a lease of the land covered by this Permission for a term of 99 years on the terms and conditions on which leases are then being issued for cattle grazing in the hinterland savannahs of the Colony, on payment of the fees payable therefor:
>
> Provided that if the holder of this Permission fails to have the ranch stocked as hereinbefore stipulated within the period of five years herein set out then this Permission shall be liable to be cancelled or the area held thereunder reduced without compensation of any kind whatever in either case".

The terms and conditions specified in clause 8 of the Permission were fulfilled and performed within the time specified therein.

Section 10 of the Crown Lands Ordinance, chapter 171, provides that "in no case whatsoever shall it be compulsory on the Governor to grant, sell or dispose of any portion of the Crown lands or forests of the Colony or to issue any licence or permission under this Ordinance;" and regulation 90 of the Crown Lands Regulations, 1919 provides that

"nothing in these Regulations contained shall in any wise prevent the Governor from in any case at any stage of the proceedings refusing to issue a grant, lease, licence or permission; but if in any case he refuses under circumstances not provided for in these Regulations all moneys previously paid or deposited by an applicant shall be returned to him".

Held that the rights acquired by the first holder of the grazing Permission at the expiration of the first five years, which rights include that of being entitled to obtain a lease on payment of the prescribed fee, were never determined but were vested in him and his successive transferees.

Burslem v. *Attenborough* (1873) 42 L.J.C.P. 102, applied.

Where the Governor has issued a grazing Permission which, by its terms, confers certain rights upon the holder thereof, it is not open to the Governor, under section 10 of the Crown Lands Ordinance, chapter 171 or regulation 90 of the Crown Lands Regulations, 1919, to refuse to grant a lease to which the holder has acquired a right by virtue of compliance with the terms which entitle him to obtain it.

Carter v. *Carter* (1896) 1 Ch. 67 and *Owners of s.s. Magnhild* v. *Mclntyre* (1920) 3 K.B. 321, considered, and *Pitcairn* v. *Hodgson,* General Jurisdiction, 28th June, 1907, distinguished.

The plaintiff Cheu Leen Evan Wong claimed a declaration that she is entitled to obtain a cattle grazing lease for 99 years of a certain area of Crown land in the Rupununi District of the Colony. The facts and arguments appear from the judgment.

H. C. Humphrys, K.C., for the plaintiff.

Frank W. Holder, Solicitor-General, for the defendant.

Cur. adv. vult.

VERITY, C.J.:

In these proceedings the plaintiff claims a declaration that she is entitled to obtain a cattle-grazing lease for 99 years of a certain area of Crown Land in the Rupununi District of this Colony.

The plaintiff's claim arises from certain circumstances in regard to which there is no dispute. On 21st November 1917, the Commissioner of Lands and Mines issued to Raphael Peres a Permission to occupy for cattle grazing purposes the tract of land in question, comprising 50 square miles. The Permission was extended annually and the rights and interests thereunder were transferred from one person to another from time to time until 6th October 1931 when transfer was made by the holder at that time to the plaintiff. The Permission continued to be renewed annually until 10th December 1942 when the Commissioner of Lands and Mines informed the plaintiff by letter that no further renewals would be granted after 31st December 1943.

The plaintiff on 14th December 1942 made application to the Commissioner of Lands and Mines for a cattle grazing lease of the area for 99 years and transmitted to him the sum of $105 being the prescribed fee together with one year's rental.

On 20th January 1943 the Commissioner informed the plaintiff that the Government was not prepared to grant the lease and on 12th May 1943 the plaintiff filed her Statement of Claim in these proceedings.

The plaintiff bases her claim upon Clause 8 of the Permission issued to Peres in 1917 and transferred ultimately to her in 1931
This clause provides that

> "If within five years from the date of first issue of this Permission the holder thereof shall have on the land herein described
>
> (1) a corral of not less than 2500 square yards in area and
> (2) a habitable house with a resident stockman; and
> (3) five hundred head of cattle;
>
> he shall be entitled to obtain a lease of the land covered by this Permission for a term of 99 years on the terms and conditions on which leases are then being issued for cattle grazing in the hinterland savannahs of the Colony, on payment of the fees payable therefor: provided that if the holder of this Permission fails to have the ranch stocked as hereinbefore stipulated within the period of five years herein set out then this Permission shall be liable to be cancelled or the area held thereunder reduced without compensation of and kind whatsoever in either case."

The plaintiff avers that the original holder of the Permission had, within the prescribed period, complied with these stipulations and contends that he therefore became entitled to obtain a lease upon payment of the prescribed fee, and that this right devolved upon each succeeding holder of the Permission and subsisted in the plaintiff at the date of her application for a lease in 1942.

It is contended on behalf of the defendant firstly, that the conditions of Clause 8 were not complied with by the holder within the first five years; secondly, that if the conditions were complied with the right to obtain a lease terminated at the expiration of the first five years or within a reasonable time thereafter; and thirdly, that in any event it is within the power of the Governor nevertheless to refuse to grant the lease by reason of section 10 of the Crown Lands Ordinance, Ch. 171 which provides that

> "In no case whatsoever shall it be compulsory on the Governor to grant, sell or dispose of any portion of the Crown Lands or forests of the Colony or to issue any licence or permission under this Ordinance."

By Regulation 90 of the Crown Lands Regulations. 1919, it is also provided that

> "Nothing in these Regulations contained shall in any wise prevent the Governor from in any case at any stage of the proceedings refusing to issue a grant, lease, licence or permission: but if in any case he refuses under circumstances not provided for in these Regulations all moneys previously paid or deposited by an applicant shall be returned to him."

The first of these contentions on behalf of the defendant raises an issue of fact in regard to which evidence was adduced on either side. That adduced on behalf of the plaintiff is to be found in the testimony of Mr. Haynes who during the years 1921 and 1922 was a District Commissioner and the Officer responsible to the Government for securing due compliance with the conditions of such Permissions or reporting non-compliance. It was upon his reports that the Commissioner of Lands and Mines appears to have relied in determining whether or not the Permissions should be renewed or cancelled, it having been the Commissioner's duty under the

Regulations of 1919 to satisfy himself that the conditions of any Permission had been complied with before he granted any renewal, Mr. Haynes states that he was satisfied both in 192] and 1922 that the holder of this Permission had complied with all three of the relevant stipulations, that he so reported to the Commissioner and that in each case the Permission was renewed.

On the other hand the defendant adduced the evidence of Mr. Hart, a neighbouring ranch owner, who stated that as the result of his observations on the occasion of certain visits made by him to Peres' ranch he 'could not imagine him having more than 200 head" of cattle, that the house was no more than a "small shack 12' x 15' " and the corral about 30 yards square or 900 square yards in area. In regard to the house and corral there was the evidence also of Mr. Turner, an employee of the Rupununi Development Company which owns ranches in the district, who estimated the size of the house in 1920 and 1922 as 20' x 15' and that of the corral at 40 yards square subject to an error of 25%. He admits that the corral might have been 50 yards square of 2500 square yards in area, which is the prescribed minimum. Certain other figures were suggested on behalf of the defendant as to the size of the house, the extreme variants being from 180 to 480 square feet, but it is admitted that Peres, who acted as his own stockman, resided there with his wife, and I do not differ from Mr. Haynes who accepted this house as in compliance with the stipulation which provides no more than that there should be a "habitable house with a resident stockman." In regard to the corral I accept also the evidence of Mr. Haynes as to its adequacy, supported as he is by the admission of Mr. Turner. The question of the number of stock on the ranch is more difficult, for it is agreed that this could only be ascertained with accuracy by driving up all the cattle in the vicinity and examining the brand marks on each animal, it appearing that the stock from a number of adjoining ranches roam together on an open range. None of the witnesses followed this procedure and it would have been quite impossible for Mr. Haynes to have done so on his annual visits to the several ranches under his supervision. Mr. Haynes had therefore to satisfy himself by such means as were practicable. This he did by his own observation of the number of cattle on or about the ranch, by statements made to him by Peres, by the quantity of milk he saw brought to the ranch house and by enquiry from neighbouring ranchers, in the present instance to the best of his recollection from Mr. Hart himself. Of this Mr. Hart has no recollection and cannot accept the possibility that he would have confirmed a statement by Peres that he had 500 head of cattle there. Nevertheless Mr. Haynes as the responsible officer came to his conclusions on the material available to him, these conclusions were accepted by the Commissioner, and the Permission was renewed from year to year accordingly. While it would be difficult for Mr. Haynes to determine positively that Peres had in fact 500 head of cattle it appears to me even more difficult for Mr. Hart or anyone else to say in the circumstances that he had not that number. Each witness judged the number by his own methods; they reached different conclusions, but there is this difference;

Mr.Haynes was acting as agent for the Government which the defendant now represents in these proceedings, his conclusions were accepted and acted upon by that Government and the Per- mission renewed from year to year without complaint, cancellation or reduction of area. I am not prepared to hold that the defendant is now justified in repudiating the conclusions of the responsible officer, reached on the spot at the relevant time, in favour of the testimony of a witness who had no duty in relation thereto, whose observation could hardly have been more than casual and who gives his evidence 23 years later. I should add that upon my giving expression to this view in the course of the hearing, the learned Solicitor-General very properly did not press this aspect of the matter.

I am of the opinion, therefore, that the plaintiff has sufficiently established that within five years from the date of the first issue of this Permission the holder thereof had complied with the conditions set out in Clause 8 thereof.

It was contended, however, that even in such case it was incumbent upon the holder, if he desired to obtain a lease under that clause, that he should make application therefor within the five year period or at any rate within a reasonable time thereafter. The learned Solicitor-General cited no authority for this proposition, but argued in support of it on general grounds of convenience and reasonableness, for he contended that unless some such limit is to be placed upon the time within which an application for a lease is to be made the original holder of the Permission or his successors might continue the occupation of the area on the favourable terms thereof for a period of 50 or even 100 years and still at the expiration of that time demand a lease for a further 99 years should the Government then seek to put an end to the Permission. Such a course, he submitted, would frustrate the objects of the statute and of the regulations made thereunder, and such an interpretation of the terms of the Permission is therefore excluded.

On behalf of the plaintiff it is argued that the terms of the Permission do not in any way limit the time within which an application for a lease should be made and that avoidance of the evils contemplated by the Solicitor-General is entirely within the hands of the Commissioner of Lands and Mines who could at any time have declined to renew the Permission and have insisted on the plaintiff either taking a lease or quitting the area.

Perusal of the terms of the Permission and of the Crown Lands Regulations leaves little doubt in my mind that the original intention of the authorities was that during a preliminary period occupancy of grazing lands should be allowed by means of these Permissions which would enable their holders to establish ranches at a minimum of expense by way of rental, that during the period of five years they would be expected to bring the area under beneficial occupation and, having done so, the easy terms of the Permission should be replaced by the more onerous terms of a lease which no doubt it was felt the development of the ranch would justify. Enforcement of such a policy is open to the authorities by means of the need for annual renewal of the Permission, coupled with the right of cancellation or reduction of area in the event of non-compliance with the conditions imposed.

It appears, however, that the Government has not in the present case, nor in other cases referred to in the evidence, taken any steps to give effect to what appears to me to have been the policy of the regulations, nor has it by the terms of either the Permission or the Regulations secured the automatic determination by the mere passage of time of any rights acquired by the holders.

Not only are both Permission and Regulation silent as to any period within which the former shall terminate or the rights acquired thereunder be extinguished, but in this particular instance the Permission has been renewed from year to year for many years in identical terms, including the provision as to the holder being entitled to obtain a lease in certain circumstances. Nor is this case singular for it is in evidence that Permissions have been renewed for other holders in like manner for so long as thirty years, that in one instance application for a lease was entertained seven or eight years after the date of the first issue of a Permission, while in other instances leases which had been granted were allowed to be relinquished in favour of a return to the issue of permissions. Considerable weight must be attached to the conduct of the authorities in renewing the Permission in its original terms year after year, not only to the first holder but also to a number of transferees such terms embracing as they do this option for a lease which it is now contended had expired twenty years ago.

Neither the terms of the Permission nor the conduct of the authorities in my view, lends support to the contention now put forward on behalf of the defendant and I am of the opinion that the rights acquired by the first holder of the Permission at the expiration of the first five years were never determined but were vested in him and in his successive transferees. These rights include that of being entitled to obtain a lease on payment of the prescribed fee. In this view I am fortified by the decision in *Burslem* v. *Attenborough* (1873) 42 L.J.C.P., p. 102, where it was held that the use of the word "whereupon" in relation to rights, arising from compliance with certain statutory requirements confers a right without involving the idea of any time within which it is to be claimed or enforced, for there appears to be no distinction between stating requirements *whereupon* rights shall accrue and stalling that *if* certain requirements are complied with the rights shall accrue.

The last point raised by the defendant has yet to be considered, although, in the absence of any indication of the reasons for which the authorities seek to avail themselves of what, if well founded, is an arbitrary power, it may be a matter for regret that such consideration should be necessary. More especially is this so when, as in the present case, not only does the evidence establish that the original holder complied with the terms of the Permission but that each succeeding holder maintained and the present holder now maintains on the area involved a larger number of cattle than would have been required of them by the terms of lease issued in accordance with existing regulations.

It is contended however that notwithstanding the terms of

the Permission and of the regulations made in pursuance of the purposes of the Ordinance and notwithstanding full compliance therewith and the payment of the prescribed fees, it is not compulsory on the Governor on his part to carry out the terms of the Permission or of the regulations, by the grant of a lease the right to which has been secured to the holder by such compliance on his part. It may be that the Ordinance does confer on the Governor this exemption from compulsion to carry out the terms of the Permission, and as the defendant relies thereon it is the duty of the Court to consider the question thus raised no matter what may be the appearance of immorality, in the absence of any declared reason in the public interest.

In the first place it is to be observed that the words of the section are "to grant, sell or dispose of any portion of the Crown lands" and it is questionable whether these words include "to lease" or "to grant leases." It is true that the relative regulation (90) refers specifically to leases but there are two points to be considered in this connection. The regulation does not purport to confer any power of refusal upon the Governor but merely saves existing powers of refusal from restraint by reason of anything contained in the regulations. Secondly, did the regulations purport to confer any power of refusal or exemption from compulsion not conferred by the statute they would, I have no doubt, be *ultra vires,* for such power or exemption could only be conferred by express provision of the statute. It is necessary therefore to consider the terms of the section itself more closely.

The Ordinance clearly distinguishes between grants, leases, licences and permissions and only in section 3 (b) does it make specific reference to leases, while grants, licences and permissions are referred to over and over again. I think it should be concluded that the omission of the word "lease" from such sections as 6, 7, 8, 9, 11, 14, 15 and 16 is intentional. It would be reasonable to conclude that the omission is intentional also, therefore, in section 10 and that the provisions of that section do not therefore apply specifically to leases as such. It is contended on behalf of the defendant, however, that the word "dispose" includes lease and support for this view is indeed to be found in *Carter* v. *Carter* (1896) 1 Ch. at p. 67, where Stirling, J. said "The words "dispose" and "disposition" in the Fines and Recoveries Act are not technical words, but ordinary English words of wide meaning; and where not limited by the context these words are sufficient to extend to all acts by which a new interest (legal or equitable) in the property is effectually created." A lease certainly may be said to create a new interest in the property and may -therefore be held to be a disposition in the absence of any limitation by the context. It may be argued, however, that in the section under consideration the meaning of the word is limited by the *ejusdem generis* rule, in that the preceding words "grant" and "sell" connote an absolute disposition of the property and hot a disposition for a term of years. As has been said by the learned author of Craies on Statute Law, this rule "is one to be applied with caution and not pushed too far" but in *Owners of s.s. Magnbild* v. *Mclntyre* (1920) 3 K.B. 321, McCardie, J. pointed

out that in considering whether a particular unspecified thing is *ejusdem generis* with specified things the questions to be asked are first, what common quality the specified things possess which constitute them a *genus;* then, does the particular unspecified thing possess that quality so that it may be regarded as of the same *genus.* It is, I think, plan that in this Ordinance where the word "grant" is used *simpliciter,* as in section 10, it means a disposition either absolute or conditional of the whole right, title, estate and interest in the land affected thereby, and is in this respect indistinguishable from the word "sell". This then would appear to be the common quality expressed by these two words. A lease is not such a disposition and if the *ejusdem generis* rule is to be applied, then a lease is not a disposition of the same *genus* as a grant or sale. In any event if the word "dispose" is to receive the interpretation placed upon it by the defendant it would indeed seem strange that the legislature having used the word "lease" in section 3 and having refrained in a number of sections from using either the word itself or any other word which could be held to include it, should in section 10 have re-introduced it under the cloak of the word "dispose". In *Larsen* v. *Sylvestre* & *Co.,* (1908) A.C. p. 295, it was held that the use of the words "of what kind soever" in relation to certain unspecified incidents, following upon those specified, excludes the *ejusdem generis* rule. In the present case it would have been easy for the legislature to have used the words "dispose of in any manner whatsoever" or some such term, and it is open to the gravest doubt whether the opening words of the section "in no case whatsoever" are to be given the same effect, for they would appear to relate to the nature of the case rather than the manner of the disposition.

Counsel for the plaintiff submits, moreover, that even should it be held that the words "dispose of" in this section are applicable to such a disposition as arises from the facts in the present case, then the disposition has already been effected, subject to compliance with certain conditions, by the issue and subsequent renewal from year to year of the Permission. There is considerable weight in this argument. The words "dispose of" even if they may be held in their context in this section to include the word "lease" are not synonymous therewith and may equally apply to any other form of disposition. The terms of the Permission confer upon the holder the right to obtain a lease upon payment of certain fees provided he has complied with certain conditions. In this respect the effect of such Permission may be considered analogous to that of a conditional grant where-under upon compliance with the prescribed conditions the grant becomes absolute. In such a case it is provided by Regulation 29 of the Crown Lands Regulations, 1919, that where the conditions have been complied with and the purchase price has been paid the grantee shall be entitled to have his grant made absolute and free from the conditions contained therein. I may be in some doubt as to whether or not the defendant would contend that by virtue of section 10 of the Ordinance or Regulation. 90 it would not be compulsory on the Governor to make absolute

a conditional grant once the conditions have been complied with, but I have no doubt whatever that such a contention would be ill-founded. In regard to the Permission in this case, it is provided as I have said that upon compliance with certain conditions the holder shall be entitled to a lease upon payment of the prescribed fee. If, as I have held, compliance and payment confer upon the holder a right to obtain a lease then the disposition is effected by the issue of the Permission in like manner as it is upon the issue of a conditional grant, and the Governor has no more power of refusal in such case to grant a lease than he would to refuse to make absolute a conditional grant upon compliance with the conditions thereof.

Some doubt might still remain as to whether there are any circumstances in which the provisions of section 10 of the Ordinance may be applied, but I think that this is made clear in *Pitcairn* v. *Hodgson* G.J. 28.6.07. In that case application had been made for a licence to plant rubber; the application was approved by the Governor and the Commissioner of Lands and Mines was authorised to issue the licence, the applicant was so informed and the fees were paid but before the issue of the licence the Governor directed that it be not issued. In such circumstances it was held that it was not compulsory on the Governor to issue the licence, by virtue of section 10 of the Ordinance. It is clear that in that case no licence had been issued and no rights had been acquired by the applicant. It is otherwise when, as in the present case, the Governor has already issued a Permission which by its terms has conferred certain rights upon the holder. In such circumstances it is not, in my view, open to the Governor to refuse to grant a lease to which the holder has acquired a right by virtue of compliance with the terms which entitle him to obtain it.

I am of the opinion, therefore, that the plaintiff is now entitled to obtain a lease in the terms and on the conditions upon which leases are now being issued for cattle grazing on the pasture lands of the interior of the Colony, on payment of the fees payable therefor, and there will be a declaration accordingly as prayed. The plaintiff is also entitled to her costs of these proceedings.

Judgment for plaintiff.

Solicitors: *J. Edward de Freitas; Vivian C. Dias,* acting Crown Solicitor.

M. E. BRANKER *v.* F. WOLFE

MARY ELIZABETH BRANKER,
Plaintiff,

v.

FITZGERALD WOLFE,
Defendant.

1944. No. 81.—DEMERARA.

BEFORE JACKSON, J. (ACTING) : 1945. MAY 23, 30, 31; JUNE 29.

Sale of land—Contract of—Erroneous belief of purchaser that certain results will flow therefrom—Not induced by purchaser—Mistake of purchaser immaterial—Purchaser bound by contract of sale.

Immovable property—Land leased—House on land leased—House purchased by proprietor of land—No presumption that lease surrendered by lessee.

If a purchaser enters into a contract of sale with the belief that certain results will according to law flow therefrom, and the vendor be unaware of the purchaser's conclusions of law or even of fact, and does nothing to induce that belief, the purchaser must suffer for his own mistakes and the vendor can hold him to the transaction.

Smith v. *Hughes* (1871) L.R. 6 Q.B. 587, applied.

Where a lessee of land owns a house on the land and sells the house to the proprietor of the land, there is no presumption that the lessee has surrendered his lease.

ACTION by the plaintiff Mary Elizabeth Branker opposing the passing by the defendant Fitzgerald Wolfe of a transport. The necessary facts and arguments appear from the judgment.

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

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

Cur.adv.vult.

JACKSON, J. (Acting):

This is an action by the plaintiff opposing the passing of the transport of lot 67 also known as lot 69 Werk-en-Rust, Georgetown by defendant to Harry Fung of 133 Wellington Street, Georgetown.

On the 15th June, 1942, the plaintiff entered into an agreement of lease in writing with one Samuel Cyril who owned W1/2 lot 67 or 69 Werk-en-Rust for a parcel of that land measuring 36 feet by 12 feet; on this piece of land the plaintiff had a range of three rooms and engaged to pay and did pay to Cyril the prescribed rental for the parcel of land. On the 30th March, 1943 W1/2 lot 67 or 69 was transported (Transport No. 413 of 1943) to the defendant with a reservation of all plaintiff's rights under the lease. In September 1943 plaintiff purported to sell and defendant to buy the range of rooms on the W1/2 lot aforesaid. In February 1944 the defendant sold the said lot to one Harry Fung and caused transport to be advertised without the reservation of the plaintiff's rights under the lease. The plaintiff opposed and has asked for a declaration that the lease still subsists, an injunction restraining the passing of the transport unless her rights in and to the said

lease are reserved and a declaration that the opposition is just. The defendant however contended that he bought both the range of rooms and the plaintiff's rights under the lease, and that in any event the rights under the lease merged in the purchase of the rooms.

On the 3rd September 1943 plaintiff and defendant along with Mr. Cecil Hubert Scantlebury went to the home of Mr. J. E. Hazlewood to get the receipt written; there plaintiff asked Mr. Hazlewood to write a receipt; it is at least admitted that she told him in defendant's presence she had sold defendant a 3-roomed range for $350 and Mr. Hazlewood wrote the following:

GeorgetownDemerara,
$350.00 3rd September, 1943.

Received from Fitzgerald Wolfe, Esquire, the sum of $350.00 being the amount of purchase price of a house situate on land leased at. W1/2 lot 67 also known as 69 Werk-en-Rust, Georgetown, the same being my bona fide property at time of sale."

This receipt was signed by the plaintiff and handed to the defendant. Defendant received it, read it without comment and then passed it on to Scantlebury. Scantlebury remarked that plaintiff held a lease on the land. Hazlewood remarked that "if it came to anything like selling, "if the lease hasn't, expired Miss "Branker will either have to surrender it or both of you can swear "to an affidavit that she has no longer any interest in the lease;" he also remarked that the affidavit would be a cheaper course. The whole case seems to centre around the question whether the lease was sold along with the house; the contract, is not in writing; no one other than plaintiff and defendant was present at the time it was made and both plaintiff and defendant gave conflicting versions as to what precisely took place; one has therefore to look to the evidence oral and documentary and to the circumstances in order to ascertain what were the terms of the contract. Plaintiff alleged that she expressly told defendant that she was not selling her interest in the lease but only the range, that defendant made an offer of $350 for the range which she accepted. She further testified that in Mr. Hazlewood's presence and. at other times defendant had either stated or accepted the position that he would remove the range in 3 months; defendant and his witness Scantlebury denied that any reference to the removal of the range was made at Mr. Hazlewood's house or at any other time; plaintiff in support of her case went on to show that defendant had after the sale of the range had been effected removed a vat from one portion of the premises to another, and cleared an adjacent path preparatory to putting the range there; the evidence oral and documentary sufficiently disposed of this point; it showed either that the plaintiff had compromised with the truth or that her memory had played her false; whatever was done was effected before the sale. Plaintiff asserted that she owned a house at 84 & 85 Breda Streets, that she intended to remove that house to 67 or 69 Cross St. Werk-en-Rust and urged that as an added reason why she would not have arranged to sell the lease; evidence of a land surveyor and another witness was led to show that if the house in Breda Street was removed it could not be put up in the same form on the spot owned by plaintiff in Cross

Street; nor could it be put up there at all if the plaintiff con-formed with the Municipal By Laws unless it was considerably reduced in size. I cannot find that this evidence helps one way or the other; on the one hand no active steps had been taken by (he plaintiff to implement her desire, maybe the time was not ripe; on the other hand it would be unsafe to conclude that because the alleged cherished desires of the plaintiff would be incapable of fulfilment one must necessarily find they were never in existence.

Plaintiff has not paid defendant any rent for the land since the sale of the range nor has defendant asked for or fixed any. As to what rights if any, they may have against each other there is no necessity to consider, and inquiry as to why none was offered or demanded did not prove profitable.

In the course of his evidence Mr. Hazlewood stated that plaintiff in defendant's presence and before the receipt was made said that she had sold defendant a three-roomed range which he was to remove in 3 months. Counsel for defendant objected to the evidence on the broad ground that it tended to vary or contradict a written document — the receipt. The objection was hardly more than tepidly made so I indicated that I would rule on it later; I think the objection must fail, for surely the events which led up to the writing of the receipt may be given in evidence and I cannot agree that the bit of evidence tends to vary, contradict, add to or subtract from the document. Even if this bit of evidence is excluded it will not affect the ultimate decision to which I have come. The words of Lord Abinger C.B. in the case of *Allen* v. *Pink* (1833) 4 M & W at p. 144 when holding that parol evidence of an oral transaction was not excluded by the fact that a writing was made concerning or relating to it seem germane: "There was no evidence of any agreement by the plaintiff that the whole contract should be reduced into writing by the defendant; the contract is first concluded by parol, and afterwards the paper is drawn up, which appears to have been meant merely as a memorandum of the transaction or an informal receipt for the money, not as containing the terms of the contract itself."

Mr. Hazlewood was a clerk in the Magistrate's Office for nearly 15 years and has been an Assistant Sworn Clerk in the Deeds and the Supreme Court Registry since 1940; he is attached to the Transport Branch. I do not think he can be altogether unaffected by the experience he has had in the offices he filled. He knows what should be embodied in a receipt; he swears positively that he was satisfied with the receipt, that plaintiff never told him she was selling her right, title and -interest in the lease, nor did defendant tell him he was acquiring such interests; moreover he said if at any stage he had been told that he would have included it in the receipt along with the particulars of the lease; I believe him. The defendant on oath lends support to this view; he said he had in mind to pay $150 for the house and $200 for the lease and he wished a document in "black and white" recording those facts; he however had read the receipt but he never at any time told Mr. Hazlewood that he had bought the

right title and interest in the lease nor did he tell him to put in the receipt that he had bought it.

Two significant statements appear in the evidence of the defendant; one in examination in chief and the other in cross-examination. (i) "At the time I bought the range it, was only worth about $150; I paid the $350 to get rid of the lease".

(ii) "I reasoned within myself that if I paid $350 I would get everything under my control."

The following statement in Scantlebury's examination-in-chief is also instructive

> "Branker told Hazlewood she was selling this house for $350 and the receipt was made for $350."

I have very little doubt that at some stage or the other the defendant thought that by buying the house he would acquire the lease but from a careful review of the evidence and a close study of the witnesses and their testimony I am satisfied that he did not at the material times, if at all, communicate these thoughts to the plaintiff nor did he secure her acquiescence in that regard. Moreover I cannot find that the plaintiff induced him into such belief; if a purchaser enters into a contract with the belief that certain results will according to law flow therefrom and the vendor be unaware of the purchaser's conclusions of law or even of fact and does nothing to induce that belief the purchaser must suffer for his own mistakes and the vendor can hold him to the transaction. (*Smith* v. *Hughes,* 1871 ,L.R. 6.Q.B. 597)

Counsel for the defence in the course of his argument asked what could have been the intention of the owner of the freehold, the defendant, to buy the range if it were not to get rid of the lease; this question I think avoids the real point at issue; were I to hold that the motive of acquiring the house is sufficient for me to say that the parties were tacitly agreed that the lease formed part of the transaction then I am constrained to feel that I would be confounding a motive with a plain term of a contract and acknowledging too comprehensive a disregard of the established facts on the main issue. If the purchaser unreasonably believed that he was purchasing the right title and interest to the lease and never at the material times communicated that to the vendor, then the vendor cannot when he does not understand the offer of the purchaser in a different sense from that in which he makes the transaction be made to suffer.

Defendant's Counsel submitted that on the purchase of a house on lease land, the land belonging to the purchaser, the law will presume that the owner of the lease surrendered the lease on the sale of the house i.e. the lease merged. I regret that I am unfortified by any relevant authority in support of such a proposition. That the range in question on lease land is a movable has not been contested; I apprehend the broad and settled principle is when a greater estate and a less coincide and meet in one and the same person without any intermediate estate the less is immediately annihilated or merged. That is not the case here; the land and the range are owned by the defendant but there is an intermediate estate the plaintiff's interest in the lease; in the

face of that principle it would be singularly difficult to find in favour of such a presumption as is claimed.

I find the opposition just legal and well founded. There shall be judgment for the plaintiff with costs. The declarations and injunction invoked by the plaintiff are granted in terms of the statement of claim. I certify for counsel.

Judgment for plaintiff.

Solicitors: *W. D. Dinally; J. Edward de Freitas*

REX
v.
RAMSOOK RAMPERSAUD et al.

BEFORE SIR JOHN VERITY, C.J.: 1945 JULY 30.

Criminal law and procedure—Evidence—Statement made to police—By person then detained at police station for inquiries—Not admissible in evidence—Unless Court satisfied that statement is free and voluntary, and, not induced by promise threat or other pressure held out directly or indirectly by some person in authority—Burden of proof thereof—On Crown.

Where a statement is made to the police by a person who is at the time detained in a police station for inquiries, it will not be admitted in evidence against such person, unless the prosecution satisfies the Court that the statement was free and voluntary, and not induced by any promise threat or other pressure held out directly or indirectly by some person in authority when by reason of hope or fear the prisoner may be induced to incriminate himself falsely. It is for the judge to determine whether there was any such inducement, and whether it was by reason thereof that the accused made the statement, and in doing so, it is his duty to examine all the circumstances.

On the trial of an indictment at the Criminal Session for the county of Berbice, objection was taken by counsel for the accused person to the admissibility of certain statements made by the accused to the police.

VERITY, C.J.: The Crown has tendered in evidence a statement made by one of the accused and it appears that two further statements were made by the same accused which it is proposed to tender. Objection has been taken to the admission of all three statements on the ground that they were not free and voluntary.

The statements were made in. the following circumstances: On Thursday night, the 15th March 1945, three shops were broken and entered and goods stolen therefrom. On the following morning the accused was taken to the local police station for enquiries. He there made a statement, which has been admitted in evidence, exculpating himself, but was nevertheless detained throughout Friday and Saturday and locked in a cell each night. During Saturday his brother and sister-in-law were also brought to the station and. detained. A police officer avers that on the

Sunday morning the accused informed him that he wished to make a further statement and that on his instructions a police corporal took such a statement from the accused after administering the usual caution. The accused avers that he was induced to make this statement by an assurance from the corporal that if he did so he would be used as a police witness. The corporal denies having offered any such inducement. That afternoon the accused was removed to the Central Police Station under continued detention and the corporal of police avers that on the following morning the accused told him that he wished to make a further statement and that he did so after again being cautioned. The accused alleges that he made this third statement a"- the result of being told by the corporal that the statement made by him on the Sunday was not enough to free him but that if he gave information as to the disposal of certain of the stolen goods he would be freed. This the corporal also denies. After making this third statement the accused continued in detention and a sergeant of police avers that between 9 and 10 o'clock that night the accused came to him and said he wished to make another statement, which was taken from him and completed at 10.20 p.m. The accused avers that he was awakened by the sergeant at 11 p.m. and told that his previous statements were conflicting and that if he gave another statement he would be released. He states that he complained that he had already been promised this by the corporal and that the sergeant replied that he was a sergeant and that the accused would go in the morning. He states that he thereupon made the fourth statement which lasted until 2 a.m. The sergeant denies all this. After the taking of this statement the accused continued in detention until the following Wednesday when he was formally charged and taken before a magistrate.

It is submitted in objection to the admission of these statements not only that they were obtained by direct inducement but that the detention of the accused in these circumstances induced him to make false statements from time to time in order to secure his release.

It is well established that the burden of proof lies on the Crown to show that the statements were free and voluntary and not induced by any promise, threat or other pressure held out directly or indirectly by some person in authority, when by reason of hope or fear the prisoner may be induced to incriminate himself falsely. It is for the judge to determine whether there was any such inducement and whether it was by reason thereof that the accused made the statement, and in doing so it is his duty to examine all the circumstances.

In the first place I would express grave doubt as to propriety or even the legality of the detention of one who was obviously a suspected person for so long a period without preferring any charge against, him or taking him before a magistrate for lawful remand; It may perhaps be permissible in certain circumstances for the police to require, such i person to come to the police station for enquiries and to detain him for such time as may be reasonably necessary for such purpose, but while the police may be careful.

to use such phrases as "he accompanied me to the station" and "he was detained for enquiries" yet where the person has no option but to comply and is forcibly deprived of his liberty for many days, there would appear to be nothing to distinguish this course of conduct on the part of the police from the arrest and keeping in custody of the person concerned. Not only may such a course be unlawful unless the police can find ground to justify it, but there can be no doubt that prolonged detention "for enquiries" only, no charge being preferred, may well induce in the person detained a state of mind which would lead him to believe that he may avert being charged by supplying the police with information in furtherance of their enquiries. That he should in such circumstances make a series of statements without any ether apparent cause, each purporting to reveal more than the last, might be thought to lend colour to some such interpretation of his state of mind. If the Court were to be of the opinion after consideration of all the circumstances that it was the intention of the police to induce this state of mind by this course of procedure then, in my view, there would be such sufficient evidence of indirect inducement as would require the rejection of any statements then made by the prisoner.

In the present case the accused alleges that each statement not only was made in such circumstances but was the result ol direct inducement by way of promise of release. The contradictions apparent in his testimony, the absence of any complaint or protest to a police officer as to his continued detention after compliance with the condition offered, all tend to cast doubt upon his veracity and I hesitate to accept his story as true. On the other hand, however, I hesitate to accept the evidence of the corporal and the sergeant when they say that each of these statements was made on the initiative of the accused without request, suggestion, or provocation of any kind or, indeed, any apparent reason. I am satisfied upon observation of these two witnesses and consideration of the nature of their evidence that they have concealed something of the circumstances in which these statements came to be made by the accused. If these policemen for any reason, which may or may not have been a good reason, sought to elicit further information from the accused *hy* any means, which may or may not have been proper means, then it is their duty to reveal the facts frankly and freely in order that the Court may be assured of the precise circumstances in "which the statements were made and thus be enabled to determine whether they were in fact free and voluntary and so admissible in evidence.

In this case I am left in grave doubt, which is aggravated by the position in which the accused was placed by, the police at the time these statements were made. That the accused might have been induced by a strong sense of guilt or by a desire to incriminate others to make a clean breast of it on the Sunday morning might be deemed to furnish a reason for Ms having made the first of these statements voluntarily, but this reason is the less probable when it is borne in mind that at that time no charge had been preferred against him and he might yet have hope of

release if he adhered to his original statement. Or again a man might, as it has been put, "hold out to himself" a hope that by making a statement incriminating others, but not himself beyond chance of evasion, he might secure the privileged position of a police witness or "King's evidence." The reasonableness of this explanation, however, is compromised when it is found that in spite of continued detention he proceeds to make one statement after another each more incriminating than the last. In such circumstances one must look for some further reason for conduct which appears otherwise inexplicable. In the evidence of the police in this case, which I believe to be neither full nor frank, no such explanation is to be found.

The burden is on the Crown to satisfy me that these statements were made freely and voluntarily, and, given as they were at a time when the accused was neither a free agent nor a person who had been charged with an offence, the Crown has failed to remove the serious doubts which this anomalous position in itself is liable to create and has not therefore discharged this burden of proof. I must therefore reject each of the three statements to which the evidence refers.

In so doing I should not wish it to be thought that I have sought to impose by any new rule any fresh restriction upon the conduct of the police in their difficult task in the investigation of crime. I have done no more than apply to the present case principles of law which are well established for the purpose of ensuring as far as may be possible that when an accused or suspected person has made a statement which tends to show his guilt there should be no room for doubt in the circumstances in which the statement has been made as to whether it is true or false. In every case these principles must be applied to the particular facts, and it would be well that the police should be aware of the necessity for disclosing to the Court every material fact. If they have acted with propriety there can be no need for concealment. Failure to disclose the full truth may result in the rejection of evidence which, had the facts been revealed, might have been found to be admissible.

C. P. WIGHT *v.* A. C. MENDES, Exor. M. de F. MENDES, decd.

CYRIL PERCY WIGHT,

Plaintiff,

v.

ANTONIO CAETANO MENDES, in his quality as the sole executor of the estate of MARIA de FREITAS MENDES,deceased.

Defendant.

[1943. No. 382—DEMERARA.]

ANTONIO CAETANO MENDES,

Plaintiff,

v.

PERCY CLAUDE WIGHT,

Defendant.

[1944. No. 10—DEMERARA.]

Before BOLAND, J. (In Chambers)

1945. April 9; August 13.

Practice and Procedure—Consolidation of actions—Application for—Whether convenient or whether time or costs will be saved—Issue in both actions the same—Parties in actions different—Application granted—Rules of Court. 1900, *Order* 37, *rule* 1.

The parties in two actions were different but as the issue in each of them was the same, the Court considered that it would be convenient and that time and costs would be saved if an order were made consolidating the two actions, and made the order accordingly.

SUMMONS by Antonio Caetano Mendes, the plaintiff in Action No. 10 of 1944 and the defendant in Action No. 382 of 1943, for an order consolidating the two actions. The application was opposed by Percy Claude Wight, the defendant in Action No. 10 of 1944, and by Cyril Percy Wight, the plaintiff in Action No. 382 of 1943.

H. C. Humphrys. K.C. and C. *A. Burton,* for the applicant Antonio Caetano Mendes in his own right and as executor of the estate of Maria Amelia de Freitas Mendes, deceased.

C. V. Wight, for the respondents P. C. Wight and C. P. Wight.

Cur. adv. vult.

BOLAND, J.: This is an application made for the consolidation of two actions. Applicant, Antonio Caetano Mendes in his representative capacity as executor of the estate of Maria Amelia de Freitas Mendes, deceased, is in the first action defendant at the suit of Cyril Percy Wight, plaintiff; Mendes in his personal capacity is plaintiff in the second action against Percy Claude Wight, who is the father of Cyril Percy Wight.

In the first action the claim is for a declaration that Maria Amelia de Freitas Mendes at her death held as trustee for plaintiff the licence of a certain spirit shop known as the Guiana Standard Spirit Shop and for an order that defendant Mendes

as her executor do transfer the said spirit shop licence to the plaintiff, the said Cyril Percy Wight.

In the second action the plaintiff Mendes claims in his personal capacity a declaration of partnership between himself and the defendant Percy Claude Wight in a business in which it is alleged he and the defendant Percy Claude Wight were jointly engaged in relation to certain spirit shops including the Guiana Standard Spirit Shop. In the Statement of Defence there is a denial of any partnership whatsoever.

It is obvious from the pleadings in both actions that there is one issue only to be decided and that is whether Maria Amelia de Freitas Mendes who was the wife of Antonio Caetano Mendes and in whose name at the time of purchase the spirit shop licence was issued held the same as trustee for Cyril Percy Wight in his personal capacity or, whether as claimed by her widower and -executor she held it for the partnership a declaration for which is claimed in the second action; which involves as a corollary the question, whether Cyril Percy Wight was or was not only the nominal purchaser of the spirit shop acting as such purchaser for and on behalf of his father Percy Claude Wight as one of the partners of the alleged partnership claimed in the second action.

It is manifest that the issue for decision of the first case cannot be determined without an adjudication on the issue in the second action — at any rate in so far as the Guiana Spirit Shop is concerned.

"The cases as to whom consolidation will be granted or refused seem to disclose no principle, and the decisions depend mainly upon the special circumstances of each case" (The Yearly Practice of the Supreme Court 1940 at page 891).

In England although an order for consolidation is more frequently made in cases between (1) the same plaintiff and the same defendant (2) the same plaintiff and different defendants and (3) different plaintiffs and the same defendants, it has also been granted in cases between different plaintiffs and different defendants. The Yearly Practice (1940) cites in support of the last mentioned instance the case of Teale v. Teale W. N. (1882) p. 83 — which report is unfortunately not available in the law library here.

The local Rule of Court, namely, Order XXXVII Rule 1 would seem to give a wider discretion to the Court or a judge as to the consolidation of actions than is given under the corresponding English Rule (Order LXIX Rule 8).

Our local rule Order XXXVII reads, "If it be established to the satisfaction of the Court or a Judge that it will be convenient or that time or costs will be saved, the Court or a judge may on the application of either party, direct that two or more actions be consolidated or be heard together" — whilst Order XLIX Rule 8 reads "Causes or matters pending in the same division may be consolidated by order of the Court or a judge in the manner in use immediately before the 1st November, 1875 in the Superior Courts of Common Law"; and it has been held

that the principles governing the cases for a joinder of plaintiffs should be applied By the Court or a judge in deciding whether consolidation should be ordered, *Horwood v. Statesman Publishing Co*. (1929) 45 T.L.R. 237 C.A. It has been stated that since the amendment in 1896 to Order XVI Rule 1 — which is the rule providing for the joinder of plaintiffs, the rule would appear to deal with the joinder of causes of actions as well as joinder of parties — which accordingly in England would extend the application of consolidation to such cases. Be that as it may there can be no doubt that our local rule gives a much wider scope to the Court or a judge in ordering consolidation.

It has been urged by the Counsel appearing for the Respondents — both Cyril Percy Wight and Percy Claude Wight appeared by the same Counsel and opposed the application — that a decision in favour of plaintiff in either action might result in an order to file accounts with which the parties in the other action would not be concerned. I do not see how this would work in relation to costs or otherwise any hardship to any party in any such eventuality. It is not at all infrequent to have one defendant in a cause ordered to file accounts in which a co-defendant is not interested.

I am satisfied that it will be convenient and that time and costs will be saved by the consolidation of these two actions, and I give directions accordingly.

As to the conduct of the consolidated action plaintiff in the first action, Cyril Percy Wight, is seeking that the *status quo* of the licence be adjusted in his favour and he therefore should have the conduct of this matter.

Costs of this application shall be costs in the cause and it is certified as fit for Counsel.

Application granted.

Solicitors: *R. G. Sharples*, for applicant;
A. G. King, for respondents.

R. L. KINGHAM *v.* RAMCHAND.

ROBERT L. KINGHAM,

Appellant (Plaintiff),

v.

RAMCHAND,

Respondent (Defendant).

1944. No. 485.—DEMERARA.

BEFORE FULL COURT: SIR JOHN VERITY, C.J., BOLAND. J. AND Jackson, J. (Acting)

1945. JUNE 1; AUGUST 24.

Landlord and Tenant—Tenancy at will—Essence of—Right to occupy defined area—Determinable at *will of grantor.*

Landlord and Tenant—Labourer on plantation let into possession of certain land property of employer—To erect house in which he could reside whilst so *employed on plantation—Not required to reside on plantation—Right in labourer to exclusive possession of land—Labourer* a *tenant at will and not a licensee.*

Landlord and Tenant—Tenancy at will—Condition may be attached thereto—That landlord shall not be excluded at any time from entering or inspecting the place.

The essence of a tenancy at will is the right to occupy a defined area determinable at the will of the grantor.

The respondent was let into possession of a certain parcel of land on Plantation Bath, West Coast, Berbice, the property of the Berbice Development Company, Limited, for the purpose of erecting thereon a house in which he could dwell whilst employed as a labourer on the plantation.

Labourers employed by the company were not required to live on the plantation; but, in many instances, to facilitate their labourers, the company would give them house spots on the plantation so that they could erect houses thereon and live there whilst so employed. The respondent erected a small trash house on the portion of land assigned to him for this purpose, and he lived in it.

In the course of a few years this house got into great disrepair, and the respondent desired to erect a new one in its place, but was refused permission so to do by the appellant, the agent of the company, some time in April or May, 1943. Despite this, the respondent erected the new house and, as a result, the appellant gave the respondent verbal notice to have this house removed by the end of July 1943, but the respondent continued to keep his house there, and had also since the notice planted in the spot a small kitchen garden.

Held that, if during the currency of this occupation, the respondent was to enjoy the right to exclusive possession, he was there not as licensee but as tenant at will, since it was not necessary for him to live there on the plantation for the performance of his work, nor was he so required by his employers.

Smith and another v. *Overseers of Seghill* (1875) L.R. 10 Q.B. 422 applied.

A condition may be attached to a tenancy at will that the landlord shall not be excluded at any time from entering or inspecting the place which is the subject matter of the tenancy.

Doe v. *Cox* (1847) 11 Q.B. 122, considered

Appeal by the plaintiff Robert L. Kingham, agent of the Berbice Development Company, Limited, from a decision of the

Magistrate of the Berbice Judicial District dismissing his claim, made under section 15 of the Rent and Premises Recovery Ordinance, chapter 92, for an order of possession of a piece of land at Plantation Bath, Berbice, the property of the company, alleged to be held by the defendant Ramchand from the company as a tenant at will the tenancy whereof had been duly terminated by notice to quit.

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

F, O. Low (for *T. Lee),* for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by Boland, J. as follows: —

This is an appeal against the decision of the learned Magistrate of the Berbice Judicial District dismissing the claim of the Appellant, as agent of the Berbice Development Company Limited, for an order of possession of a piece of land measuring 35 feet by 12 feet situate on the Company's Estate known as Plantation Bath, Berbice, which in his complaint the appellant alleged was held by_ the Respondent from the Company as a tenant-at-will, and the tenancy whereof had been duly terminated by proper legal notice to quit.

At the close of the case for the complainant the learned Magistrate upholding the submissions of the defence that there was no case to answer dismissed the complaint, giving as his reasons for so doing, as set out in the Reasons for Decision filed in the Record, that there was no relationship of landlord and tenant between the Company and the Respondent in view of a statement in appellant's evidence that the 'Defendant has no right to exclude me from his land at any time." This admission by the Complainant, in the learned Magistrate's view, made it clear that Respondent had no exclusive right of possession of the land which he occupied, and that a right to exclusive possession being an essential feature of every tenancy Respondent was not a tenant but a licensee and was therefore not liable to be ejected in the proceedings before the Magistrate.

The evidence for the complainant (Appellant) was that in the year 1934 the defendant (Respondent) was let into occupation of this piece of land for the purpose of erecting thereon a house in which he could dwell whilst employed as a labourer on the plantation. Labourers employed by the Company were not required to live on the plantation but in many instances, to facilitate their labourers, the Company would give them house spots on the plantation so that they could erect houses thereon and live there whilst so employed. Respondent on the portion of land assigned to him for this purpose erected a small trash house and lived in it.

In the course of a few years this house got into great disrepair and Respondent desired to erect a new one in its place but was refused permission to do so by the Appellant some time in April or May 1943. Despite this Respondent erected the new house and as a result Appellant in June 1943 gave Respondent verbal notice to have this house removed by the end of July 1943, but Respondent continued to keep his house there and had also since the notice planted in the spot a small kitchen garden.

From the above facts there can be no doubt that if during the currency of this occupation Respondent was to enjoy the right to exclusive possession, he was there not as a licensee but as tenant-at-will since it was not necessary for him to live there on the plantation for the performance of his work nor was he so required by his employers. *Smith* & *another* (Appellants) v. *The Overseers* of *Seghill* (Respondents) (1875) L.R. 10 Q.B. p. 422.

As to the point of the right to exclusive possession being necessary which induced the learned Magistrate to hold that there was no tenancy in this case, it would seem that the learned Magistrate regarded complainant's statement that Respondent would have no right to exclude him, the Manager, at any time as evidence of a term or condition under which Respondent was let into possession. But it must have been overlooked by the learned Magistrate that Appellant, who had become Manager only in 1936 when he found Respondent already in occupation, could not give firsthand evidence of the terms and conditions, expressed or implied, under which Respondent entered into possession in the year 1934. Clearly such evidence was inadmissible as hearsay. It would appear probable that Appellant in making this statement was expressing only his own view as to the legal rights of the Company and its agents as landlords of such a tenancy — an opinion perhaps wrong *de jure,* but which *de facto,* is not so incorrect seeing that a refusal by the tenant-at-will to allow the landlord or his agent to enter on the premises could be followed immediately by notice terminating the tenancy at once.

Moreover even if there was such a term or condition controlling the occupation of the land by Respondent as the Magistrate would appear to have found, that would not be sufficient to convert into a mere licence a holding of lands which *aliunde* reveals all the essential incidents of a tenancy at will, the essence of which is the right to occupy a defined area determinable at the will of the grantor.

We see no reason why certain conditions cannot be imposed on tenancies at will. For example it has been held that there may be a condition to pay rent or compensation attached to a tenancy at will — a grant of Broadacre "to hold henceforth at the will and pleasure of B at the yearly rent" was held to create a tenancy at will: *Doe* v. *Cox* (1847) 11 Q.B. p. 122. Similarly it would seem permissible to attach a condition to a tenancy at will that the landlord shall not be excluded at any time from entering or inspecting the place.

In our view the evidence for complainant disclosed a *prima facie* case of a tenancy at will. The Respondent having closed his case without adducing evidence and having rested his defence on his submission that there was no case to answer; the learned Magistrate should have made the order for possession.

We shall accordingly allow the appeal. The case will be remitted to the Magistrate with directions to the Magistrate to proceed to enforce delivery of possession to Appellant according to law. There will be costs to Appellant both of the hearing on Appeal and in the Court below.

Appeal allowed.

SANICHARI *v.* ETWAR .& DOOL.

SANICHARI, Plaintiff

v.

ETWAR and DOOL, Defendants.

[1943. No. 257.—DEMERARA.]

Before SIR JOHN VERITY. C.J.

1945. March 19, 20; September 4.

Practice and Procedure—Writ of summons—Issue of—By a barrister—Under Legal Practitioners (*Definition of Functions*) *Ordinance,* 1931 (No. 15), *sections* 3 *and* 5*—If conditions therein specified are not observed—Issue of writ a nullity—Barrister acting as solicitor in contentious matters—Rules of Court,* 1900, *Order* 51.

Practice and, Procedure—Writ of summons not specially indorsed—Issue of—By a barrister—Statement of claim filed—No allegation therein that value of land or thing in dispute does not exceed $500*—Barrister disentitled ab initio to act as solicitor—Issue of writ a nullity—Legal Practitioners* (*Definition of Functions) Ordinance,* 1931 (No. 15). *sections 3,* 5.

Practice and Procedure—Writ of summons not specially indorsed— Issue of—By barrister—Action by owner of land to recover possession from a stranger, and for damages for trespass—Claim for possession not consequential upon, or ancillary to, claim for damages—Value of thing in dispute in action for possession—Value of land itself—Legal Practitioners (*Definition of Functions*) *Ordinance,* 1931 ,No. 15), *sections* 2 (1) B (c).

By the Rules or Court, as by the common rule and custom governing the functions of solicitors and barristers, a barrister is not, entitled to issue a writ of summons, or to practise as a solicitor in any way in the course of contentious matters. His right so to do is a right conferred by sections 3 and 5 of the Legal Practitioners (Definition of Functions) Ordinance, 1931 (No. 15) within the limits of the conditions therein prescribed.

The right of a barrister to practise as a solicitor, in relation to a writ which is not specially indorsed, does not depend upon the actual value of the land or thing in dispute, but upon the value as alleged in the statement of claim. His right so to act depends entirely upon the existence of the statutory conditions on which the right is conferred, and in the absence of an essential condition, namely, the allegation in the statement of claim that the value of the land or thing in dispute does not exceed $500, the right to practise as a solicitor cannot be conferred. In such case, the barrister is disentitled *ab initio* to act as a solicitor, arid this will relate back to the issue of the writ which will become a nullity, having been issued neither by the plaintiff nor by his barrister entitled to act as such.

Amihabibar v. Registrar *of Deeds* (1931—1937) L.R.B.G. 143, followed.

An action in trespass to land is based upon the plaintiff's possession and can only succeed if the plaintiff establishes that at the time of the entry by the defendant the plaintiff was himself in possession of the land. An action to recover the possession of land must obviously be based upon the fact that the plaintiff is out of possession. The two causes of action must therefore be based upon two distinct sets of circumstances, and in no case could the relief claimed in the one be con-sequential upon or ancillary to the right to relief claimed in the other.

By section 3 (1) B (c) of the Legal Practitioners (Definition of Functions) Ordinance, 1931 (No. 15) it is provided that "notwithstanding anything to the contrary in any Ordinance or rule, a barrister shall be

entitled to act alone and have audience in any cause or matter, when the writ is not specially indorsed, in which the sum of money claimed or the value of the thing in dispute as alleged in the statement of claim does not exceed the sum of five hundred dollars. A claim for any additional relief in any such cause or matter by way of a declaration, an injunction, the appointment of a receiver, the taking of an account, or other consequential or ancillary remedy shall not affect the right of audience," and section 5 provides that "a barrister shall be entitled to practise as a solicitor in respect of all proceedings, including the issuing of writs of summons and other proceedings in any of the matters specified in section three."

The plaintiff by his writ, which was not specially indorsed, claimed (a) possession of certain land described therein; (b) $250 damages for trespass and illegal occupation; and. (c) costs. The indorsement of claim on the writ is signed "J. A. Luckhoo" acting as solicitor for the plaintiff", and the writ purports to have been issued by Joseph Alexander Luckhoo, King's Counsel. The defendants entered appearance to the writ.

The statement of claim was signed in like manner as is the indorsement on the writ. In the statement of claim it is pleaded that the plaintiff is the executrix of Raghunandan Singh who was at the time of his death the owner by transport of the land described therein; that the plaintiff took possession thereof after the testator's death; that the defendants thereafter wrongfully trespassed upon and occupied the premises and are still in occupation thereof; and that the plaintiff has demanded possession without effect. The plaintiff claims relief as set out in the writ.

There was no allegation in the statement of claim as to the value of the land described therein, possession of which was claimed by the plaintiff.

The plaintiff consented to an enlargement of time for the defendants to file their defence. Therein, it is pleaded, *inter alia*, that the defendants had purchased the premises, for the sum of $280, from a person alleged to be the agent of the plaintiff, had paid $100 on account, and had been placed in possession of the premises.

The plaintiff filed her reply denying the alleged sale and the alleged agency of the person named by the defendants, and she requested that the action be set down for hearing.

The consent to the enlargement of time to file the defence, the reply and the request for hearing were signed in the same manner as was the indorsement on the writ.

Upon the action coming on for hearing, counsel for the defendants asked that the action should be struck out with costs on the ground that the writ and the statement of claim 'did not disclose the grounds upon which the barrister is entitled to act as a solicitor in the action.

Held (1) that the claim for possession of the land is a separate and distinct cause of action in addition to, and not consequential upon or ancillary to, the claim for damages for trespass to the land;

(2) that where a person claiming to be the, owner of land seeks to recover its possession from another who, he alleges, has wrongfully entered into occupation thereof, the thing in dispute is the land itself;

(3) that there being no allegation in the statement of claim that the value of the land in dispute does not exceed the sum of $500, the barrister by whom the writ was issued and who has purported to act as a solicitor throughout the proceedings was not entitled so to act within the provisions of the Legal Practitioners (Definition of Functions) Ordinance, 1931 (No. 15);

(4) that the writ having been issued, and subsequent proceedings having been taken, by a person wholly disentitled, are a nullity which

cannot be waived by any conduct of the defendants, nor be cured by any order which it is within the competence of the Court to make; and

(5) that the writ and all proceedings subsequent thereto must be set aside.

APPLICATION by the defendants Etwar and Dool that the action brought by the plaintiff Sanichari against them be struck out with costs on the ground that, while the writ, statement of claim and all proceedings on the part of the plaintiff were signed by a barrister purporting to act as solicitor for the plaintiff the grounds upon which the barrister was so entitled to act were not disclosed therein.

W. J. Gilchrist, for the defendants.

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

Cur. adv. vult.

VERITY, C.J.:

In this action the plaintiff by his writ issued on 5th August 1943 claimed (a) possession of certain land described therein; (b) $250 damages for trespass and illegal occupation; and (c) costs. The indorsement of claim on the writ is signed "J. A. Luckhoo, acting as solicitor for the plaintiff", and the writ purports to have been issued by. Joseph Alexander Luckhoo, King's counsel. Appearance was entered by a solicitor on behalf of the defendants who, having consented to an enlargement of time for the filing of the statement of claim and having themselves filed a statement of defence appeared by counsel when the action came on for hearing.

The statement of claim was filed by the plaintiff on 7th September 1943 and is signed in like manner as is the indorsement on the writ. In this statement it is pleaded that the plaintiff is the executrix of Raghunandan Singh who was at the time of his death the owner by transport of the land described therein; that the plaintiff took possession thereof after the testator's death; that the defendants thereafter wrongfully trespassed upon and occupied the premises and are still in occupation thereof; and that the plaintiff has demanded possession without effect. The plaintiff claims relief as set out in the indorsement on the writ.

The defendants filed their statement of defence on 22nd February, 1944, the plaintiff having consented to an enlargement. of time for that purpose. Thereby it was pleaded *inter alia* that the defendants had purchased the premises from a person alleged to be the agent of the plaintiff for the sum of $280, had paid $100 on account and had been placed in possession of the premises.

The plaintiff filed her reply *on* 15th April, 1944 denying the alleged sale or the alleged agency of the person named by the defendants. On 18th April, 1944 the plaintiff requested that the matter be set down for hearing.

The pleadings, consent and request filed on behalf of the plaintiff are signed in the same manner as is the indorsement on the writ.

Upon the matter coming on for hearing counsel for the defendants asked that the action be struck out with costs on the ground that while the writ, statement of claim and all proceedings on the part of the plaintiff were signed by a barrister pur-

porting to act as solicitor for the plaintiff the ground upon which the barrister was so entitled to act are not disclosed therein. Counsel referred to the provisions of sections 3 and 5 of the Legal Practitioners (Definition of Functions) Ordinance, No. 15 of 1931, in support of his contention.

The former section provides that "a barrister.....shall be entitled to act alone and have audience....." in certain matters described in paragraphs (a) and (b) of part B of subsection (1) and "(c) in any other cause or matter when the writ is not specially indorsed in which the sum of money claimed or the value of the land or thing in dispute as alleged in the statement of claim does not exceed the sum of five hundred dollars."

Section 5 provides that "a barrister shall be entitled to practise as a solicitor in respect of all proceedings, including the issuing of writs of summons or other processes in any of the matters specified in section three....."

The first question to be decided is whether it is incumbent upon a barrister purporting to act as solicitor under section 5 to show on the face of the proceedings the grounds upon which he is so entitled to act, or whether it is sufficient that he should purport so to act and be deemed to be properly so acting until the contrary appear.

It is undisputed that by the Rules of this Court, as by the common rule and custom governing the functions of solicitors and barristers, a barrister is not entitled to issue a writ or to practise as a solicitor in any way in the course of contentious matters, and that the right to do so is a right conferred by statute within the limits of certain prescribed conditions. The condition applicable to the present matter is that the sum of money claimed or the value of the land or thing in dispute as alleged in the statement of claim must not exceed the sum of five hundred dollars. It is clear from the words of the statute that the right of the barrister to practise as a solicitor does not depend upon the actual value of the land or thing in dispute but upon the value as alleged in the statement of claim. If, therefore, no value were alleged in the statement of claim and the absence of such an allegation did not determine the matter it would be impossible to determine whether or not the barrister is entitled to practise as a solicitor in relation to the proceedings. But his right so to act depends entirely upon the existence of the statutory conditions on which the right is conferred and, in the absence of an essential condition in this case the allegation in the statement of claim that the value of the land or thing in dispute does not exceed, the right to practise as a solicitor cannot be conferred. It could not be acquired by any subsequent proof of the value as not exceeding $500, nor, it would seem, could it be taken away by subsequent proof that the value in fact exceeded $500 once the right had been acquired by an allegation in the statement of claim that it did not exceed that sum. While therefore it would seem that the value of the claim need not be stated in the indorsement on the writ, yet it appears to me beyond doubt that it is essential that it should be stated in the statement of claim and that it should be alleged not to exceed

$500, if the barrister is to be entitled to act as a solicitor in relation to the proceedings. It would appear also that if the statement of claim alleges a sum exceeding $500 or fails to allege a sum not exceeding $500 then the barrister is disentitled *ab initio* to act as a solicitor and this will relate back to the issue of the writ which will become a nullity, having been issued neither by the plaintiff nor by his solicitor or barrister entitled to act as such. I am fortified in this view by the fact that in *Amihabibar v. Registrar of Deeds* (1931-1937 L.R.B.G. 143) De Freitas, C.J. appears to have reached the same conclusion in slightly different circumstances and from a somewhat different angle of approach, the question there largely turning upon the right of audience uninstructed by solicitor which in this regard, is based upon the existence of the same conditions as those relating to the right to act as solicitor in the issuing of writs of summons and otherwise in the proceedings.

The next point which falls to be determined is whether in the present case the statement of claim does in fact allege that the "sum of money claimed or the value of the land or thing in dispute" "does not exceed $500." It is submitted on behalf of the plaintiff that the sum of money claimed in this action is $250 as alleged in the statement of claim and that the claim, for possession of the land falls within the second part of section 3 (1) B (c) which provides that "a claim for any additional relief in any such cause or matter by way of a declaration, an injunction, the appointment of a receiver, the taking of an account or other consequential or ancillary remedy shall not affect the right of audience."

It is submitted by counsel that the substantive claim in the present action is a simple claim in tort for $250 damages and that the claim for possession is purely ancillary and consequential upon the finding that the defendants have been guilty of a tort in trespassing upon and remaining in occupation of the plaintiff's land. In so far as the claim for damages in this case is founded in trespass I think that the fallacy in this argument may be detected without difficulty. An action in trespass to land is based upon the plaintiff's possession and can only succeed if he establishes that at the time of the entry by the defendant the plaintiff was himself in possession of the land. An action to recover the possession of land must obviously be based upon the fact that the plaintiff is out of possession. The two causes of action must therefore be based upon two distinct sets of circumstances, and in no case could the relief claimed in the one be consequential upon or ancillary to the right to relief claimed in the other. In so far as the sum claimed for damages is ascribed to the alleged "illegal occupation" of the land by the defendants I am unable to distinguish this from a claim for mesne profits, and it would surprise me to learn that a claim to recover the possession of land is either consequential upon or ancillary to a claim for mesne profits. Be that as it may, however, I think there is but little doubt that an action for the recovery of land and an action for damages arise from two separate and distinct causes of action and that the relief claimed in neither can properly be described

as consequential upon or ancillary to that claimed in the other. Formerly indeed they were treated as entirely different forms of action and in England there still remain differences in procedure and restrictions upon the causes of action which may be joined with actions for the recovery of land. The rules of procedure in this Court do not for the most part preserve this distinction. but traces thereof are still to be found in such rules as Order X. rules 16-19. I am unable to agree therefore with this submission of counsel but am of the opinion that the claim for possession is a separate and distinct cause of action in addition to and not consequential upon or ancillary to the claim for damages.

It was further submitted by counsel, however, that the value of the claim for possession is not the value of the land, the ownership of which only came into dispute upon the delivery of. the statement of defence. It may well be, as has indeed been held, that in actions by a landlord to recover possession from a tenant holding over the value of the thing in dispute is not that of the land itself the ownership of which is not in question but merely the right of the tenant to remain in possession. Such a case must, I think, be kept distinct however, from that in which a person claiming to be the owner of land seeks to recover its possession from another who, he alleges, has wrongfully entered into occupation thereof. In such a case the plaintiff is bound to plead, and to prove his right to possession, whether by title or otherwise and must, as has often been said succeed on the strength of his own claim and not the weakness of that of the defendant in possession. In the present case the plaintiff has set up title, that is to say he alleges that although the defendants possession of the land he is entitled to possession by right of ownership. What, in such case, is the thing in dispute? Counsel for the plaintiff contends that it is no more than the right to immediate possession and cannot be distinguished from such a right as claimed by a landlord from a tenant holding over. Counsel for the defendant on the other hand submits that the thing in dispute is the ownership of the land, a thing which can never be in dispute between landlord and tenant. I am unable to see it in the light desired by .the plaintiff. It appears to ma to be beyond doubt that the thing in dispute in this case and upon the plaintiff's own pleadings is the land itself, which he will either regain or lose as the result of the action, and that the value of the thing in dispute is the value of the land itself.

No value having been alleged in the statement of claim as being that of the land which I have held to be the thing in dispute, there is no allegation in the statement of claim that the value of the land in dispute does not exceed $500 and in such case the barrister by whom the writ was issued and who has purported to act as a solicitor throughout the proceedings was not entitled so to act within the provisions of the Ordinance. He would have no right save under the Ordinance, and failing that, the writ was issued and every succeeding step taken by a person disentitled so to do.

It is submitted by counsel for the plaintiff that even if this be so it amounts to no more than an irregularity to which the

defendants cannot at this stage take objection in that since the irregularity complained of they have taken, such steps as amount to a waiver of the irregularity of the plaintiff's proceedings. Counsel for the defendants contends however that the matter goes far beyond the limits of mere irregularity, and that the writ having been issued and subsequent proceedings taken by a person wholely disentitled are a nullity which cannot be waived by any conduct of the defendants nor be cured by any means open to the plaintiff.

It is true that where the defect in the proceedings amounts to no more than an irregularity the other party may by his conduct in taking some further step in the proceedings be held to have waived the irregularity and further that the Court may, under the provisions of Order LI, relating to non-compliance with the Rules of Court, allow the erring party to put himself right. It is also true however that there are such defects, such departures from the right method of procedure or such adoption of methods unknown to the law, that the whole process must be treated as a nullity which no conduct of the other party can be deemed to waive and which it is not within the power of the Court to cure. Into which category any particular defect falls is a matter to be determined in each case. In the present case the Rules of Court require the writ to be issued either by the plaintiff or his solicitor, and there are other rules relating to the signing of pleadings and other matters of procedure which require the signature of the party or of his solicitor or counsel as the case may be. By virtue of section 5 of the Ordinance of 1931, where a barrister is entitled to practise as a solicitor these rules are to be read so that the term "solicitor" shall include also a barrister practising as a solicitor. In the present case I have held that the barrister who issued the writ and signed the various documents was not entitled to do so as if he were the solicitor. He is not entitled to do so, in so far as the writ is concerned, as a: barrister and he does not purport to sign the pleadings as counsel. The position is therefore that the writ is issued and the pleadings signed and other steps taken by a person who can properly be described as a stranger to the action, and I should find it difficult to hold that this is no more than an irregularity. Each step in the action has involved not some irregularity on the part of the plaintiff or his solicitor but an act on the part of a person without any right either under the Ordinance or under the Rules, and in my view each of such acts is a nullity to which the defendant cannot be deemed to have waived objection and which cannot be cured by an order now within the competence of the Court. The writ and all proceedings subsequent thereto must therefore be set aside.

Counsel for the plaintiff at the conclusion of the argument asked to be heard on the question of costs in the event of my holding that the proceedings must be set aside and I therefore reserved the question of costs till I have heard argument thereon.

Writ set aside.

Solicitor for defendants: *R: G. Sharples.*

O. A. FERNANDES *v.* A. St. C. CUMBS,
OVID ALOYSIUS FERNANDES,
Appellant,

v.

AURELIA ST. CLAIR GUMBS,
Respondent.

1943. No. 153.—DEMERARA.

BEFORE FULL COURT: SIR JOHN VERITY. C.J., AND JACKSON, J. (ACTING)

1945. AUGUST 24; SEPTEMBER 14.

Practice and Procedure—Writ of attachment—For contempt of Court.—Nature of contempt to be set *out in order.*

Practice and Procedure—Writ of attachment—For contempt of Court—Distinction between civil and criminal contempts.

Practice and Procedure—Writ of attachment—For civil contempt of court—Order for—Wrongly made—Where contempt cured before making the order—Order which ought to have been made—Order for payment of costs.

Practice and Procedure—Appeal—Stay of execution not granted—Order appealed from not complied with—Writ of attachment—Order for—May be, issued—Notwithstanding appeal.

On the 15th December 1943, and the 8th March 1944, certain orders were made by the Supreme Court whereby the present appellant was directed to deliver to the respondent a certain grosse transport and to render to her certain accounts. These orders were not obeyed by the appellant, and on the 18th April 1944 the respondent made application by notice of motion for the issue of a writ of attachment against the appellant for his contempt in not delivering the transport and not rendering the accounts.

The hearing of the motion was adjourned from time to time, and in May 1944 the hearing was adjourned *sine die* pending decision by the West Indian Court of Appeal on an appeal brought by the present appellant against the order of the 15th December 1943. This appeal was dismissed on the 10th October 1944, the order of the Court of Appeal was entered on the 13th October 1944, the appellant delivered the grosse transport on the 18th October 1944, and he rendered the accounts on the 23rd October 1944.

On the 30th October 1944 a judge in chambers ordered that a writ of attachment be issued directed to the Marshal to seize the person of the present appellant and convey him to a place of lawful detention, there to be kept for 30 days. It was provided by the order that the writ should not issue until after the expiration of 30 days from the date thereof, and further that if the appellant should pay to the respondent the costs of the application fixed at 35 guineas before the expiration of the said. 30 days then the writ should not issue but the application should stand dismissed. The order was silent as to the nature of the contempt in respect of which the writ was ordered to be issued.

Held (1) that the nature of the contempt should have been set out in the order;

R. v. Lambeth County *Court Judge* (1887) 36 W.R. 475, applied.

(2) that the contempt in this case was a civil contempt and not a criminal contempt:

O'Shea v, O'Shea, *ex parte Tuohy* (1890) 15 P.D, 59, C.A. and *Re* Freston (1883) 11 Q.B.D. 553, applied.

(3) that as the appellant had complied with the directions of the

Court before the order of the 30th October 1944 was made, the learned judge erred in directing that a writ of attachment should issue against the appellant;

Gay v. Hancock (1887) 56 Law Times 726, applied.

(4) that the appeal must be allowed and the application for the writ of attachment dismissed, but that the appellant whose conduct in delaying obedience to the order of the 15th December 1943 occasioned the application must pay the costs thereof fixed at 35 guineas, and further, there would be no order as to the costs of the appeal.

Where a party has brought an appeal against any order of the Court and has not succeeded in obtaining a stay of execution of the order against which he has appealed, it is not open to him to acquire for himself any such stay by neglect to obey the order, for the Court may secure obedience by attachment notwithstanding the pending appeal.

Appeal by Ovid Aloysius Fernandes from the order of a single judge made in Chambers directing that a writ of attachment should issue against him. The necessary facts and arguments appear from the judgment.

S. I. Cyrus, for the appellant.

S. L. van B. Stafford, K.C., for the respondent.

Cur. adv. vult.

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

This is an appeal from the order of a single Judge made in Chambers on an application by the respondents whereby it was ordered that a writ of attachment be issued directed to the marshal to seize the person of the appellant and convey him to a place of lawful detention, there to be kept for thirty days. It was provided by the order that the writ should not issue until after the expiration of thirty days from the date thereof and further that if the appellant should pay to the first respondent the costs of the application fixed at thirty-five guineas before the expiration of thirty days then the writ should not issue, but the application should stand dismissed.

The record shows that on the 15th December 1943 and 8th March 1944 certain orders had been made by the Supreme Court in proceedings between the parties whereby the present appellant was directed to deliver to the first respondent a certain grosse transport and to render to her certain accounts. These orders were not obeyed by the appellant and on the 18th April 1944 the first respondent made application by notice of motion for the issue of a writ of attachment against the appellant for his contempt in not delivering the transport and not rendering the accounts.

The hearing of the motion was adjourned from time to time and it was stated before us by counsel for the respondents that in May 1944 the hearing was adjourned *sine die* pending decision by the Court of Appeal on an appeal brought by the present appellant against the order of the 15th December 1943. This appeal was dismissed oil 10th October 1944, the order of the Court of Appeal was entered on 13th October 1944 and the appellant de-

livered the transport on the 18th and rendered the accounts on the 23rd October. On 30th October the order was made against which this present appeal is brought.

It is submitted on behalf of the appellant that, having complied with the directions of the Court before the present order was made the learned Judge erred in directing that a writ of attachment should issue against him. Counsel cited *Gay v. Hancock* (56 L.T. 726) in which it was held that even where a writ had already been issued and thereafter but before its execution the person complied with the previous order the writ should not have been executed.

Counsel for the respondents contended that although the previous order had been complied with at the time when the order was made for the issue of the writ, yet the Court had power to issue the writ by way of punishment for the original contempt and had power also to condition the issue of the writ by requiring the payment of costs upon payment of which the writ should not issue.

We have before us no note or memorandum by the learned Judge as to his reasons for making the order he did, nor have we any copy of the notes or minutes (other than the clerk's minute of order) of the proceedings before the Judge in chambers. The terms of the order itself do not assist us for it is silent as to the nature of the contempt in respect of which the writ is ordered to be issued. In making the submission to which we have referred, however, counsel for the respondents has failed to keep clearly before his mind the distinction which undoubtedly exists between what has been termed "criminal contempt" and "civil contempt". Not only does this distinction form the basis of differences in the procedure to be followed but it also affects the principles which will guide the Court in making its order for the imprisonment of the person in contempt.

The learned author of Fox's History of Contempt of Court (at p.1) states the distinction in these terms:

> "The punishment of contempt is the basis of all legal procedure and implies two distinct functions to be exercised by the Court: (a) enforcement of the process and orders of the Court, disobedience to which may be described as 'civil contempt'; and (b) punishment of other acts which hinder the administration of justice, such as disturbing the proceedings of the Court.....or libelling a judge or printing comments on a pending case.....which are.....distinguished as 'criminal contempt."

The passage proceeds:

> "Civil, as distinguished from criminal contempt, is a wrong for which the law awards reparation to the injured party; though nominally a contempt of court, it is in fact a wrong of a private nature as between subject and subject and the King is not a party to the proceedings to punish it. The punishment is a form of execution for enforcing the right of the suitor."

In somewhat similar terms the learned author of Oswald on Contempt (3rd Ed., p. 8) after reference to the punishment of criminal contempt proceeds;

"If on the other hand the contempt is mere disobedience to an order of the Court in a civil action it is not criminal and in such cases the

punishment is only ordered for, the purpose of enforcing the order in the civil action."

In O'Shea v. O'Shea, ex parte Tuohy (1890) 15 P.D, 59 C.A., Cotton, L.J. said "Where a man does not obey an order of the Court made in some civil proceeding to do or abstain from doing something — as where an injunction is granted in an action and he does not perform that which he is ordered to perform and there is a motion made to commit him for contempt — that is really only a procedure to get something done in the action and has nothing of a criminal nature in it." Similarly it was said by Lord Esher, M.R., in *Re Freston* (1883) 11 Q.B.D. at p. 554, "Attachments are granted for neglect of obedience to the orders of courts of justice, when they are issued merely for the purpose of enforcing judgments in civil disputes."

It would appear therefore that counsel for the respondents is mistaken in his view that where an order has been complied with yet the court may still issue a writ of attachment by way of punishment for a past contempt in the earlier neglect of obedience to the order, for if the purpose of attachment be to secure obedience it cannot issue if obedience has already been made, and this is the principle behind the decision in *Gay* v. *Hancock* where even when the party neglected to obey up to the very last moment so that a writ had in, fact issued yet it was held that once obedience had been secured the writ should not have been executed, its purpose having been achieved and its effect therefore exhausted.

As we have stated we are unable to determine the reasons which impelled the learned Judge to order the issue of a writ in the present case, but while this Court would not interfere with the discretion undoubtedly vested in a judge to punish by attachment a contempt of court yet in the present case we are unable to hold that there existed at the date of his order a state of affairs in which it was open to him to exercise that discretion. The purpose of punishment by attachment for civil contempt had already been effected by prior compliance with the court's order and the contempt was not of that kind which would render the party liable to punishment as though the contempt were in the nature of a criminal offence.

We would also direct the notice of those responsible for the form of order drawn up in such cases to the fact that it is essential that the order should set out the nature of the contempt, for otherwise, following the authority of *R.* v. *Lambeth County Court Judge* (1887) 36 W.R. 475, the order may be set aside on that ground alone.

For the reasons we have given this appeal must be allowed and the order for the issue of a writ of attachment must be set aside, but we would not have it thought that the conduct of the appellant is to be commended or that his failure to comply until the last moment with the order of the court was other than contempt, albeit of a civil nature. Where a party has brought an appeal against any order of the court and has not succeeded in obtaining a stay of execution of the order against which he has appealed it is not open to him to acquire for himself any such

stay by neglect to obey the order , for the court may secure obedience by attachment notwithstanding the pending appeal. While therefore the order of the 30th October 1944 will be set aside and the application for a writ of attachment will be dismissed yet this Court will make the order which the learned Judge would, we have no doubt, have made had his attention been directed to the principles applicable to the particular kind of contempt involved in this case. It will be ordered, therefore, that the appellant, whose conduct in delaying obedience to the order of the 15th December 1943 occasioned the application, shall pay the costs thereof fixed at thirty-five guineas. For a like reason there will be no order as to the costs of, this appeal.

Appeal allowed; order varied

LIONEL LLEWELLYN LANGDEVINE,
Appellant (Defendant).

v.

DYAL SINGH, Corporal No. 3891,
Respondent (Complainant).

1945. No. 267,—DEMERARA.

BEFORE FULL COURT: SIR JOHN VERITY, C.J., BOLAND J. AND JACKSON J. (ACTING) .

1945. AUGUST 31; SEPTEMBER 21.

Criminal Law and Procedure—Unlawful possession—What must be proved—Reasonable suspicion—Relates to the thing itself—Accused does not explain his possession—By denying his possession—Summary Jurisdiction (*Offences*) *Ordinance, cap.* 13, *section* 97 (1).

Appeal—From magistrate's court—Reasons of decision—Form of.

On a complaint for unlawful possession contrary to section 97 (1) of the Summary Jurisdiction (Offences) Ordinance, cap. 13, the only facts which have to be proved are (1) the fact of possession, and (2) that the thing possessed is reasonably suspected of having been stolen or unlawfully obtained. If these two questions can be answered in the affirmative, then the onus is on the accused to explain how he came by the articles, and he certainly cannot do so by denying his possession.

It is in relation to the thing itself that there must attach reasonable suspicion, and not to the conduct of the person found in possession thereof. It is not necessary for the prosecution to establish that the accused himself stole or unlawfully obtained the thing, or even that he may be reasonably suspected of having done so.

Edun v. *Anderson,* Appellate Jurisdiction, 14th September 1906, applied.

Observations on the form which the reasons of decision of a Magistrate should take.

Boston v. *Kamall* (1931—1937) L.R.B.G. 386, considered.

Appeal by the defendant Lionel Llewellyn Langdevine from the decision of a Magistrate of the Georgetown Judicial District

convicting him of the unlawful possession of a quantity of cycle tyres and one cycle tube.

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

Frank W. Holder, acting Attorney-General, for the respondent.

Cur. adv. vult

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

This is an appeal from a conviction under sec. 97 (1) of the Summary Jurisdiction (Offences) Ordinance. Ch. 13, the appellant having been charged with being found in possession of a quantity of cycle tyres and one cycle tube reasonably suspected of having been unlawfully obtained.

The appellant in the Court below denied having been in possession of these articles at any time, but the learned Magistrate accepted the evidence of the prosecution and found that the appellant, who is a police constable, was sent by his superior officer to search for certain tyres and tubes which were missing from a broached bale of these articles on board a certain ship, that he reported to the effect that he had found none, but that he was subsequently seen to throw down the articles the subject of the charge. It further appeared that the sleeve of the greatcoat which he had been carrying at the time he was seen to throw away the articles had been tied at its end with a piece of string thus furnishing a place in which the articles might have been concealed while he was reporting to the police corporal who had sent him to make the search.

In the first place it is submitted by counsel for the appellant that the learned Magistrate erred in rejecting the evidence of certain stevedores called on behalf of the defence in that he wrongly approached the consideration of their evidence having stated in his reasons for his decision that his experience in the practice of the law led him to the conclusion that the stevedores came forward merely because of their sense of loyalty to a good friend: "a policeman who is 'nice' to stevedores and winks at the pilfering that goes on about the wharves and ships." While a Magistrate is entitled to apply his personal experience to the consideration of the facts proved before him and while he may be right in a conclusion that such a policeman is a friend of stevedores there is in this case no evidence whatever that the appellant is a policeman who winks at pilfering" and the learned Magistrate erred in thus arguing from the general to the particular in the absence of any evidential link between the two. In the present case such an error is not fatal to his conclusion that the corporal of police is to be believed, however, for the witnesses for the defence say no more than that they did not see the appellant throw away the bundle, and such evidence would not outweigh that of the corporal whom the Magistrate believed, and who says that he did see him do so. For this reason we are not disposed to differ from the Magistrate in his findings of fact which appear to us to be reasonable in view of the weight and nature of the evidence.

It was further contended on behalf of the appellant that the

facts found by the learned Magistrate do not support the present charge in that the appellant having been sent by the corporal to search for the tyres and tubes the corporal could not reasonably suspect upon finding them in his possession that they had been unlawfully obtained, it being of the essence of the offence that at the time the articles are found in the possession of the accused there must exist reasonable grounds for suspecting, not that he intended to steal them or unlawfully dispose of them, but that they had already been stolen or unlawfully obtained by him. This argument, would, in our view, be well founded were the charge "being found in possession of certain articles which the accused is reasonably suspected of having stolen or obtained unlawfully." But it is not so. As was said by Bovell, C.J. in *Edun* v. *Anderson* (A.J. 14.9.06) "the enactment does not require evidence that possession by the person charged is unlawful, the only facts which have to be proved being (1) the fact of possession and (2) that the thing possessed is reasonably suspected of having been stolen or unlawfully obtained." In other words it is in relation to the thing itself that there must attach reasonable suspicion and not to the conduct of the person found in possession thereof. This distinction cannot be overlooked and may be decisive in certain cases. The questions to be answered are simple: Was the accused found in possession of the thing? Were there reasonable grounds for suspecting that the thing had been stolen or unlawfully obtained? It is not necessary for the prosecution to establish that the accused himself stole or unlawfully obtained the thing or even that he may be reasonably suspected of having done so. If these two questions can be answered in the affirmative then the onus is on the accused to explain how he came by the articles and he certainly cannot do so by denying his possession. In the absence of any explanation it is not for the Magistrate to speculate as to whether he came by them in pursuance of instructions or contrary to instructions or before he received any instructions or even whether he may not have been the person who originally stole them; upon none of which points is there any direct evidence in this case. It has been established to the satisfaction of the Magistrate that the accused was found in possession of these tyres and tubes and there are ample grounds for suspecting that they were tyres and tubes which had been stolen or unlawfully obtained from the ship's cargo; the appellant has made no attempt to explain how he came by them and he was therefore properly convicted.

Should a case arise in which a person charged under this section explains that he came by the things lawfully but the evidence goes to show that he thereafter unlawfully converted them to his own use it will be time enough to decide whether such an explanation should satisfy the Magistrate. In this case that question does not arise. No such explanation has been given by the appellant. It has been left for counsel to suggest that on the evidence such an explanation might have been open to the appellant had he sought to avail himself of it, and that is not enough. The appeal is therefore dismissed with costs.

We desire to add an observation in regard to the reasons given by the Magistrate for his decision in this case. The general form such reasons should take has been stated before by judges of this Court. We would commend to the attention of the Magistrate, for example, the concluding paragraph of the judgment in Boston v. *Kamall* (1931-7, L.R.B.G.at p. 386). The dangers of exuberant language, of speculations as to the functions of a magistrate, of references to personal experience and even of quotations from the classics, are demonstrable in the present case. The introduction of such matters lays the magistrate's reasons, if not his decision, open to criticism. They do not assist this Court but are rather matters of embarrassment to us no less than to the parties and to the magistrate himself, and should be avoided.

Appeal dismissed.

THOMAS SHERWOOD WHEATING, Petitioner,
v.
ALMA CLARICE WHEATING, Respondent,
and
JOHN PATRICK BRUEN, Co-Respondent.

[1945. No. 235.—DEMERARA.]

Before JACKSON, J. (Acting).

1945. September 11, 21.

Husband and. Wife—Dissolution of marriage—Adultery of wife—Damages against co-respondent—Circumstances for award of substantial damages.

Substantial damages awarded against a co-respondent who was the uncle by marriage of the wife, the godfather of one of her children, and the friend of the husband and the wife.

PETITION by Thomas Sherwood Wheating against his wife Alma Clarice Wheating for dissolution of marriage on the ground of adultery. Damages were claimed against John Patrick Bruen who was cited as co-respondent.

H. C. Humphrys, K.C., for petitioner.

The respondent and the co-respondent did not enter appearance to the citations served on them.

Cur. adv. vult.

JACKSON, J. (Acting): At the hearing I intimated at the close of the case that the petitioner will have the *decree nisi* as prayed and the custody of the children of the marriage. I now confirm that intimation. I reserved the question of damages for further consideration.

The petition was not defended by either the respondent or the co-respondent and the only evidence upon which I can rely in respect of damages is that afforded by the petitioner and his witnesses.

The petitioner was married in 1938 and is a Director of and the head of Messrs. Wieting & Richter Ltd., a big business

firm in this colony; private entertaining on a large scale is an essential part of his business and the petitioner testifies that in that respect his wife played an important part and was always regarded as a charming and valuable hostess; in short she was a great asset to this business; despite the fact that for two years immediately antecedent to these proceedings she showed too much partiality for alcoholic beverages and imbibed intemperately there was never neglect of duty nor was there any diminution in quality of her entertainments. The character and ability of the respondent as a wife only became apparently affected on the 20th of May, 1944, when the petitioner returned from a visit to Trinidad; on the next day 21st May he received information of the respondent's defection and adultery. The adultery proved occurred in the month of May during the three weeks the petitioner was out of the Colony.

The petitioner appears to be a good husband; his character, conduct and affection have not been assailed, and nothing has been adduced in this court to show that he at any time showed unkindness to the respondent or did anything to sap her matrimonial fidelity. The respondent is a young woman and is related to the co-respondent, his niece by marriage, the co-respondent being married to a sister of the respondent's father. The co-respondent and the petitioner were friendly before the latter's marriage; the former was a welcome visitor to the petitioner's home and enjoyed his hospitality; since the marriage of which the co-respondent was always well aware the tie of friendship became stronger and the co-respondent was always admitted as one of the family. He became the godfather of one of the children. The only rift in this relationship occurred on one occasion in April 1944 when in the opinion of the petitioner the co-respondent was drunk and behaved in a disgusting manner in the presence of women; this happened elsewhere than in the petitioner's home; the petitioner thereafter forbade him going to his home. This warning the co-respondent did hot heed. Such was the relationship, such the setting when this uncle, godfather and friend thought fit to violate the sanctity of the petitioner's home by commencing improper intimacy with his wife; this he continued at all material times in the matrimonial home.

I must now consider whether this case falls within the class of case in which a petitioner is entitled to damages against the co-respondent and if so whether the damages should be nominal or substantial. Damages are never given for the purpose of inflicting punishment on a co-respondent for his sexual immorality; in the words of Sir Francis Jeune in *Evans* v. *Evans and Platts* (1899) Probate at page 202 "This Court does not sit as a court of morality, to inflict punishment against those who offend against the social law," they are awarded as compensation for the loss the petitioner has sustained.

The principles upon which damages are given have been discussed and crystallised in the clear and lucid judgment of Mr. Justice McCardie in *Butterworth* v. *Butterworth and Englefield* L.R. (1920) Probate p. L26 (See also *Ince v.Ince*. 1929, B.G.L.R. p. 7)

I find it sufficient to found myself on the two main grounds set out therein —

(1) The actual value of the wife at the time of the adultery proved;

(2) The injury to the husband's feelings, the blow to his honour and hurt to his family life.

In the former must be included how much the wife was of value in the house and what assistance she lent in the extension of his business and in the improvement of his business relations; moreover her character as a wife and as a mother should receive some notice.

Applying these principles I find that the home of the petitioner has been irretrievably wrecked by the co-respondent, that he has robbed the petitioner of the services of a wife whose value to the improvement and extension of his business had been considerable; has deprived him of enjoying as his peculiar marital rights the society of his wife, and of a mother of his children. The co-respondent in the position of a friend and a near relation with an unscrupulousness which is amazing cast aside all the ordinary prescriptions of honour and decency and despoiled the home of the petitioner when he would least suspect. These circumstances must of necessity accentuate the outrage on his feelings, and increase the blow to his honour.

The petitioner is entitled to substantial damages against the co-respondent and I think in strict law the loss to the petitioner should be assessed in the light of the evidence adduced irrespective of the means of the co-respondent; this notwithstanding I shall adopt the principle underlying the words of Sir Henry Duke, President, in *Burne* v. *Burne and Helvoet* (1920) Probate at p. 19 "Commonsense tells me that I must bear in mind the general position and obligations of the parties and make an award which it will be possible for the co-respondent to meet and which will not defeat its own object".

I therefore assess the damages at $2,400:— and accordingly give judgment for that sum with costs.

I make no order as to costs against the respondent.

Decree nisi made and damages awarded.

Solicitor for petitioner: *R. G. Sharples.*

SOMWARI *v.* M. DE SOUZA.

SOMWARI, Plaintiff,

v.

MAUDLINE De SOUZA, Defendant.

[1944. No. 157.—DEMERARA.]

Before SIR JOHN VERITY, C.J.

1945. June 5, 6, 7; October 1.

Construction—Transport—Land conveyed defined with certainty by reference to facade—Followed by words of mere description relating to a trench—Description inaccurate—Inoperative.

By transport dated the 29th November, 1913, the defendant's predecessor in title became the proprietor of a piece of land "measuring 21/2 rods in facade, and commencing from the eastern boundary of the east half of the west half of the plantation and extending in a westerly direction by the whole depth of the plantation, the said 21/2 rods including one half of the drainage trench which is situated on the western side of the said 21/2 rods of land."

The plaintiff purchased a parcel of land part of the west half of the plantation at execution sale for the recovery of rates, and on the 7th February 1944 he accepted transport thereof in which the piece of land so purchased by her is described as "commencing 83 3/4 rods from the western boundary of the plantation and extending thereon in an easterly direction 18 1|3 rods in facade by the full depth of the plantation, the said piece of land being shown and defined as lot number 19 on a plan by S. S. M. Insanally, Sworn Land Surveyor, dated 1st November 1940, subject to the right of the proprietor or proprietors of lot number 18 to drain through that portion of the trench running through the southern portion of lot number 19." Lot 19 commences 21/2 rods from the eastern boundary of the east half of the west half of the plantation and extends thence in a westerly direction 18 1|3 rods in facade by the full depth of the plantation.

The drainage trench referred to in the transport of the 29th November 1913 runs from north to south, along a line 21/2 rods from the eastern boundary of the land therein described for a distance of 8,500 feet; it then turns to the west for 31 feet and then again to the south for 353 feet until it reaches the southern boundary of the plantation.

The plaintiff claimed that, under her transport of the 7th February 1944, she was entitled to the land to the west of a line 21/2 rods from the eastern boundary of the east half of the west half of the plantation, and to the east of a line drawn 21/2 rods plus 18 1|3 rods from such eastern boundary. The defendant claimed that the drainage trench throughout the whole depth is the western boundary of her parcel of land under the transport of the 29th November 1913.

Held that the words in the transport of the 29th March 1913 relating to the trench are no more than words of description; that they are not words defining the boundary of the parcel of land therein conveyed; and that the said transport vested in the holder thereof no more than a lot with a facade of 2 1/2 rods from the eastern boundary of the east half of the west half of the plantation and extending in that width for the whole depth of the plantation.

Jack v. *Mclntyre* (1845) 12 C1. & F. 151, distinguished, and *Mellor* v. *Walmesley* (1905) 2 Ch. 164, C.A. and *Francis v.Hayward* (1882) 22 Ch. D. 177, C.A., applied,

Action by the plaintiff Somwari against the defendant Maudline de Souza for damages for trespass, and for an injunc-

tion. The facts and arguments appear from the judgment.

J. A. Luckhoo, K.C., (*J. A. Luckhoo* with him), for the plaintiff.

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

Cur. adv. vult.

VERITY, C.J.: In this case the plaintiff seeks to recover damages for alleged trespass to land and claims also an order for the removal of certain erections therefrom and an injunction restraining the defendant from erecting any other structures thereon.

The plaintiff avers that she is the owner by transport of the land in question which is 31 feet wide and 353 feet long and lies to the east of part of a drainage trench on the plantation of which the parties are, amongst others, the owners of certain parts. The defendant on the other hand alleges that her deceased husband Joseph de Souza of whose estate she is the executrix, was the owner of this piece of land by transport and was in possession thereof continuously for over 30 years. She claims therefore that the plaintiff is, in any event, statute barred.

It appears that the plantation was at one time the property of a single owner but that from time to time parts thereof were sold and ownership is now divided between a considerable number of owners of different lots. For purposes of convenience of reference the property is divided into two parts, the East Half and the West Half, and it appears to be agreed that, on the southern side, the dividing line between these halves starts from an iron paal placed there many years ago and marked "GLD".

The plaintiff bought a parcel of land part of the West Half the plantation at execution sale and accepted transport thereof on 7th February, 1944 (Exh. D7), in which the piece of land so purchased by her is described as "commencing 83 3/4 roods from the western boundary of the said plantation and extending thereon in an easterly direction 18 1/3 roods in facade by the full depth of the said plantation as shown on a plan by W. Cunningham, Sworn Land Surveyor, dated 10th March, 1913……..the said piece of land being shown and defined as lot number 19 on a plan by S. S. M. Insanally, Sworn Land Surveyor dated 1st November, 1940, subject to the right of the proprietor or proprietors of lot number 18 to drain through that portion of the trench running through the southern portion of lot number 19."

Reference to Cunningham's plan (Exh.H) reveals that it shows no more than the boundaries of the whole plantation and it is therefore of little assistance in determining the boundaries of any sub-divisions. Insanally's plan was made by him subsequently to the plaintiff's purchase, at her request and at the request of all other proprietors of the lands of the plantation, including de Souza.

It appears that the facade of the West Half of the plantation was 102 rods in length and at the extreme western boundary there was reserved 16 feet for a drainage trench. When he came

to make his survey Mr. Insanally found that 6 feet only had been utilised for this trench and the proprietors of the lots to the east thereof had occupied their lots successively 10 feet to the west of the area which would have been occupied by them had the full 16 feet been utilised for the trench. The most easterly of these lots in the transport (Exh.D4>) in the name of Charles Benjamin, whose land was subsequently sold to the plaintiff was described as "measuring seventeen and a half rods in facade commencing at a point two and a half rods from the eastern boundary line of the east half of the West Half of the said plantation." This point is, as I have indicated marked by the iron paal "GLD". Benjamin appears to have occupied up to the eastern boundary of the lot of his immediate neighbour to the west, and owing to the westerly move of all lots to the west of Benjamin, this gave him a facade of 18 1/3 rods instead of 171/2 rods. It was upon this quantity that he was assessed for rates by the Canals Polder Authority and this was the extent described in the advertisement of the execution sale for nonpayment of rates at the instance of that authority.

Mr. Insanally therefore proceeded to mark off the plaintiff's lot by placing a paal 21/2 rods from the iron paal "GLD" as the southern point of the east boundary thereof as set out in Benjamin's transport, the facade being 181/3 roods and the southern point of the western boundary being 833/4 rods from the western boundary of the plantation as set out in the plaintiff's transport. To this deSouza made objection. The defendant's present claim is that by her husband's transport he was entitled to the land up to the centre of the drainage trench 31 feet to the west of the spot at which Mr. Insanally proposed to plant his paal, and that he had occupied this piece of land from the date of his purchase in 1913.

In deSouza's transport dated 29th November 1913 (Exh.D3) this lot is described as "measuring 21/2 rods in facade and commencing from the eastern boundary of the said east half of the West Half of the said plantation and extending in a westerly direction by the whole depth of the said plantation, the said 21/2 rods of land……..including one half of the drainage trench which is situated on the western side of the said two and a half rods of land."

From this description it might be thought that the trench referred to is situated along the whole of the western side of the land 21/2 rods from its eastern boundary. But this is not so. From the northern boundary of the land this trench extends along the western boundary 21/2 rods from the eastern boundary for some 8,500 feet, until it reaches a point 353 feet from the southern boundary. It there turns to the west for some 31 feet and then again to the south where it reaches the facade of the plantation 31 feet west of a point 21/2 rods from the paal "GLD". If the trench at this point is to be deemed the true boundary of deSouza's lot, then the facade will be 31 feet in excess of that set out in the transport.

In determining the true construction to be placed upon the terms of the transport it has to be considered whether the words

relating to the trench are words defining the boundary of the parcel or whether they are no more than words of description. In the former case there is authority for the proposition that the parcel conveyed must be treated as that contained within the boundary even if the quantity of land ascertainable by reference to the facade may then be exceeded. In the latter case if the description be inaccurate and the land conveyed has been defined with certainty by reference to the facade then the descriptive addition if inaccurate may be rejected.

An instance of the former may be found in *Jack* v. *Mclntyre* (1845) 12 C1. & F., 151, cited in Norton on *Deeds,* 2nd Edn., p. 240, where the demise was of "all that part of the townland of B, containing 509 acres, arable, meadow and pasture, English statute measure....bounded by" certain specified boundaries. It was held that this demise passed 400 acres of bog and land reclaimed from bog lying within the same boundaries in addition to the 509 acres.

The principle to which I have secondly referred above may be exemplified by *Mellor* v. *Walmesley* (1905) 2 Ch. p. 164, in which the exact dimensions of each side of a plot were given as well as its area and it was stated that the plot was, amongst other boundaries, bounded "on the west by the seashore". From a plan attached to the deed it appeared that there was a strip of land lying between the western side of the parcel shown thereon and the seashore, and it was held that the conveyance did not pass this strip of land. Referring to the judgment of Swinfen Eady, J. which was reversed by a majority of the Court of Appeal, Vaughan Williams, L.J. said "I cannot agree with the learned judge that the present case is one within the undoubted rule that, when you have in the words of description a sufficiently certain definition of what is conveyed, inaccuracy of dimensions or of plans as delineated will not vitiate or affect that which is there sufficiently defined, applies, because the description itself is a description of a piece of land situate on the seashore of certain dimensions which are set forth. Those dimensions, in my opinion, are not an addition to something which has already been certainly described, but are part and parcel of the description itself. The words are not an inaccurate statement of a quality of that which had already been certainly described or defined, but are part and parcel of that description or definition. The dimensions in this case are……..an essential part of the description and not a cumulative description in a case in which there is in the first place a sufficient certainty and demonstration." Or again, the converse of the present case is dealt with in Francis v. Hayward (1882) 22 Ch. D., p. 177, in which case Jessel, M.R. said "When after a description of a property it is stated that on one side it is bounded by certain other property and it appears that it is not so bounded; for every inch, there is an inaccuracy in the statement of the boundary, but this is not enough to exclude what is not so bounded if it appears from the evidence to have been part of the property dealt with, and the previous description of that property is sufficient to include it,"

It would appear from this case to which I have lastly referred that had the trench in the present case turned to the east instead of to the west so that it reached the facade at a point less than 21/2 rods from the paal "GLD" the transport would nevertheless have passed the piece of land lying between that portion of the trench and a line drawn northwards from the western extremity of the 21/2 rods facade. But the grantee cannot, I think, have it both ways and take by dimension where it will give him more than an inaccurate description of the boundary, but by the inaccurate boundary where it will give him more than the dimensions set out in the deed. Apart from such a consideration, however, I think that the present case falls rather within the decision in *Mellor* v. *Walmesley*, for the terms of the transport, as in every other transport passed in relation to the division of this plantation in so far as has been exhibited in evidence in this case, point plainly to the fact that "the dimensions are not an addition to something that has already been certainly described but are part and parcel of the description itself." In the present case, indeed, the measurement of the facade from the iron paal is, in my view, the primary and essential part of the description and would be complete and unequivocal had no additional words purported to give a further description by what has proved to be an inaccurate reference to the nature of part of the western boundary. I find therefore that the title held by deSouza vested in him no more that a lot with a facade of 21/2 rods from the eastern boundary of the east half of the west West Half of the plantation and extending in that width for the whole depth as delineated in Mr. Insanally's plan.

In the alternative, however, the defendant sets up that deSouza was in possession of the strip of land in dispute for over thirty years and she has adduced evidence in support of this contention which is denied by the plaintiff.

I was by no means favourably impressed by the defendant and her witnesses, more particularly the witness Manram whose manner was as evasive and confused as is the nature of his evidence which is in itself in conflict on a material point with that of the defendant in relation to the basis of the alleged claim made by deSouza in his lifetime. The evidence of these witnesses is contradicted by that of the plaintiff, her husband and the surveyor, whose testimony, which I believe, negatives the possibility of occupation by deSouza of the nature and extent set up by the defendant. The small area of the land involved and the short distance between the real boundary of deSouza's lot and that now claimed have made easy the attempt by the defendant and her witnesses to place by their evidence cultivation and buildings on the disputed strip which were in reality further to the east and within deSouza's rightful boundary. On the other hand the observations of the surveyor disclose that it is quite impossible that there can have been either cultivation or buildings upon this strip of land during the period alleged by the defendant.

Upon this evidence the defendant has failed to satisfy me that

deSouza was in sole and undisturbed possession of the strip now claimed by the defendant for thirty years or at all. The plaintiff is therefore entitled to the relief claimed. I assess damages at $100 and judgment will be entered for the plaintiff for that amount with costs. There will also be an order that the defendant do forthwith remove the cowpen and latrine erected by her on the plaintiff's land and an injunction restraining her from erecting any other structure on the said land.

Judgment for plaintiff.

Solicitor for defendant: *E. A. W. Sampson.*

HENRY ROACH, Plaintiff,

v.

EWARD VICTOR LUCKHOO, Defendant.

[1944. No. 266. — DEMERARA.]

BEFORE SIR JOHN VERITY, C.J.: 1945. SEPTEMBER 24, 25; OCTOBER 19.

Justices Protection Ordinance—Act done by justice of the peace—In execution of his duty as such with respect to any matter in his jurisdiction as such—Notice of intended action—To allege that act done maliciously and without reasonable or probable cause — Justices Protection Ordinance, cap. 254, *sections* 2, 8 (2).

Magistrate's Court—Excess of jurisdiction—Person guilty of misconduct—Detained without a warrant—Summary Jurisdiction (*Magistrates*) *Ordinance, cap.* 9, *section* 51 (1).

Justices Protection Ordinance—Excess of jurisdiction—Action brought for act done under verbal order of magistrate made in—Order not required to be quashed before institution of action—Justices Protection Ordinance cap. 254, *section* 3; *Summary Jurisdiction (Magistrates) Ordinance, cap.* 9, *sections* 51 *(1), 55.*

Justices Protection Ordinance—Restriction on amount of damages to be awarded against a justice of the peace—Does not apply where justice of peace acts in excess of his jurisdiction—Justices Protection Ordinance, cap. 254, *section* 12.

Damages—Misconduct of plaintiff taken into consideration—In the assessment.

Costs—Plaintiff deprived of—Circumstances in which such an order can be made.

Magistrate's Court—Misconduct before—What is—Powers of magistrate not to be used recklessly or even freely—Summary Jurisdiction (Magistrates) Ordinance, cap. 9, *section* 51 (1).

Where it is proposed to bring an action under section 2 of the Justices Protection Ordinance, Chapter 254, against a justice of the Peace for an act done by him in the execution of his duty as justice with respect to any matter in his jurisdiction as justice, the notice of intended action to be delivered under section 8 (2) must allege that the act was done maliciously and without reasonable or probable cause.

Taylor v. *Nesfield* (1854) 23 L.J.M.C. 171, applied.

By section 51 (1) of the Summary Jurisdiction (Magistrates) Ordinance, Chapter 9, every person who wilfully insults a magistrate, or is guilty of any other grave misconduct during the hearing of any cause or matter, whether civil of criminal, may, on a verbal order of the magistrate, be removed, by force if necessary, from the Court, and

may further be detained, under a warrant for that purpose, in the nearest lock-up or place of detention for any time, not later than the rising of the Court on the same day, the magistrate thinks right.

Held that a magistrate acts in excess of jurisdiction where he purports to order the detention of a person under that sub-section without a warrant for the purpose, and that the position of the magistrate is in no way affected by the fact that the person might have been released before a warrant could have been made out.

Gunning v. *Brumell*, General Jurisdiction, 27th November 1906, *Hutchinson* v. *Lowndes* (1832) 2 L.J.N.S.M.C. 2, and *Mayhew* v. *Locke* (1816) 129 E.R. 25 considered.

By section 3 of the Justices Protection Ordinance, Chapter 254, any person injured by an act done by a justice, or by any act done under any order made by the justice, in a matter of which by law he has no jurisdiction or in which he has exceeded his jurisdiction may maintain an action against the justice in the same form and in the same case as he might have done before the commencement of the Ordinance, provided that the action shall not be brought for anything done under the order until after it has been quashed.

The defendant acted in excess of his jurisdiction as a magistrate in ordering the plaintiff to be detained under section 51 (1) of the Summary Jurisdiction (Magistrates) Ordinance, Chapter 9, under a verbal order and without a warrant.

By section 55 of the Summary Jurisdiction (Magistrates) Ordinance, Chapter 9, all orders, convictions and all other processes, whether criminal or civil, shall be issued or made under the hand of the magistrate.

Nowhere in the records of the magistrate's court did the defendant make any minute or note of the direction given by him for the detention of the plaintiff.

Held that a mere verbal direction for the detention of the plaintiff without warrant, without jurisdiction therefore, and without any minute or note under the hand of the magistrate, was not such an order as is contemplated by section 3 of the Justices Protection Ordinance, Chapter 254, and that the proviso is therefore inapplicable to the present case.

A magistrate being of the opinion that the plaintiff was guilty, under section 51 (1) of the Summary Jurisdiction (Magistrates) Ordinance, Chapter 9, of misconduct before the Court, ordered his detention for five minutes, and, as he acted without a warrant, he acted in excess of his jurisdiction. Under the sub-section the Magistrate could have ordered his detention, with a warrant, until the rising of the court. The plaintiff was in fact guilty of misconduct, and he had undergone no greater penalty than that assigned by law. In an action by the plaintiff against the magistrate for damages for false imprisonment,

Held (1) that the amount of the damages is not restricted to two pence, as the defendant is not entitled to the protection afforded by section 12 of the Justices Protection Ordinance, Chapter 254 in this respect;

Palmer v. *Crone* (1927) 1 K.B. 808, applied.

(2) that the misconduct of the plaintiff cannot be overlooked in the assessment of damages.

Circumstances in which plaintiff is deprived of costs.

The summary powers conferred upon magistrates by the Summary Jurisdiction (Magistrates) Ordinance, Chapter 9, place them in no more privileged position than that enjoyed by any court of record in regard to contempt, and are not powers to be exercised recklessly or even freely.

To slam down the Bible after taking the oath and then, upon being

rebuked, to act with exaggerated pretence at reverence constitutes grave misconduct.

Action by the plaintiff Henry Roach claiming damages against the defendant Edward Victor Luckhoo for false imprisonment. The facts and arguments appear from the judgment.

H. C. Humphrys, K.C., for the plaintiff.

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

Cur. adv. vult.

VERITY, C.J.: In. this case the plaintiff claims damages for false imprisonment and while there is a certain amount of conflict as to the facts I find them to be substantially as follows:

The defendant was at the time the Magistrate of the Essequibo Judicial District and on the day in question he was conducting his Court at Anna Regina in that district, the plaintiff appearing before him as plaintiff in a case concerning the recovery of a sum alleged to have been due upon a promissory note. It appears to me to be beyond doubt, although the plaintiff denies this, that he resented certain questions put to him by the defendant and certain observations made by the defendant in relation to the case, and furthermore that he displayed his resentment in a manner which the defendant found to be rude and offensive. Eventually after entering the witness box and having been sworn the plaintiff replaced the Bible upon the rail of the witness box in a manner described by the defendant and other witnesses as "slamming it down." This the plaintiff also denies saying that the Bible slipped from his hand and fell owing to a periodical disability from which he alleges he suffers as the result of cold experienced in New York some sixteen years ago. Two of his witnesses alleged, however, that he put it down quietly, while the third, a police constable, described his manner of replacing it with the word "rammed." I have no doubt whatever that the plaintiff put down the Bible with unnecessary force. I am also satisfied that upon being told by the defendant to take it up again satisfied that upon being told by the defendant to take it up again and put it down properly he raised it and replaced it with exaggerated care and, as the defendant states, smiling as he did so. It is difficult to judge from the oral testimony of witnesses the precise manner in which words are spoken or acts done but in all the circumstances I have no hesitation in accepting the defendant's statement that the plaintiff's manner was improper and offensive and that his last action in replacing the Bible at the Magistrate's instructions was, as the defendant adjudged, an "attempt to ridicule the court, was insulting and constituted misconduct." The taking of an oath, no matter how lightly this may be treated by many people in these days, is a solemn act: to slam down the Bible after taking the oath and then, upon being rebuked, to act with exaggerated pretence at reverence is not only insulting to the magistrate but does in my view constitute grave misconduct reflecting both upon the solemnity of the oath and the dignity of the court. It is a matter for regret that this was the conduct of

one who attaches weight to his own position as chairman of the Country District Council and churchwarden of the neighbouring parish. It may be that the plaintiff attaches too much weight to his own personal dignity as the holder of these offices, but in any case it would be well for him to remember that when he appears in a court in the capacity of a moneylender who, as would appear from his evasive and ill-mannered answers to the magistrate, is reluctant to disclose the precise rate of interest he has charged in a particular case he should at least attempt to control the resentment he may feel if the magistrate is critical of his conduct. If on the other hand he evinces his resentment in a manner which is insulting he exposes himself to an exercise by the magistrate of the powers vested in him by the law.

In the present case the defendant having formed the opinion that the plaintiff was wilfully insulting in his acts and in his demeanour ordered an attendant constable to take the plaintiff to the lock-up below the court room and detain him there for five minutes. This was done and after five minutes detention the plaintiff was brought back into court and the hearing of the case proceeded to its conclusion without further incident. During his five minutes detention the plaintiff was locked up with another man who was being detained in similar circumstances, having misconducted himself in the court while under the influence of liquor, and possibly, although as this depends upon the word of the plaintiff alone I cannot be sure, of two others who had been convicted of larceny that day.

It is in respect of these facts that the plaintiff seeks to recover damages for false imprisonment.

The learned Solicitor-General, who appeared on behalf of the defendant, raised preliminary objection to the hearing of the action on the ground firstly that in so far as the claim was based malice and the absence of reasonable and probable cause as is required by the provisions of section 2 of the Justices' Protection Ordinance, Ch. 254 where the act complained of is in respect of any matter within the jurisdiction of the justice, there was no notice of action as required by section 8 (2) of the Ordinance, for that which purported to be a notice did not allege that the act was done maliciously and without reasonable and probable cause. On the authority of *Taylor* v. *Nesfield* (23 L.J. M.C. 171) I upheld this objection. Secondly it was objected that in so far as the action was based upon an act done by the justice without or in excess of his jurisdiction there was no allegation in the statement of claim that the conviction or order of the justice had been quashed as required by the proviso to section 3 of the Ordinance. In regard to this objection I held that it would be necessary to hear evidence as to the nature of the act whereby the plaintiff claimed to have been injured.

It appears to be common ground that the defendant purported to act under section 51 of the Summary Jurisdiction (Magistrates) Ordinance, Ch. 9 which provides that “everyone who wilfully insults a magistrate or is “guilty of any other grave misconduct

“during the hearing of any cause or matter, whether civil or criminal, may, “on a verbal order of the magistrate, be removed, by force if necessary, “from the court, and may be further detained, under a warrant for that “purpose, in the nearest lock-up or place of detention for any time, not later “than the rising of the court on the same day, the magistrate thinks right.”

It is clear that the defendant having formed the opinion that the behaviour of the plaintiff was wilfully insulting and constituted grave misconduct acted within his jurisdiction in verbally ordering his removal from the court. It would have been within his jurisdiction also to have ordered his further detention in the nearest lock-up for such time as the defendant thought fit, not being later than the rising of the court on that day, but it is submitted on behalf of the plaintiff that the power to order such further detention can only be exercised by warrant and that in purporting to make such an order verbally the defendant exceeded his jurisdiction and so is not entitled to any protection under the Justices' Protection Ordinance.

On behalf of the defendant it is contended that the magistrate in the exercise of his jurisdiction acts within it if he verbally orders the offending person's removal and that being empowered to order his further detention he may by verbal order direct such detention for as long as may be necessary to make out the warrant. It is further submitted that in the present case the period of detention so ordered would have expired by the time a warrant could have been made out, that the issue of a warrant then was unnecessary and that it cannot be held that the defendant acted without jurisdiction in failing to make out a warrant in such circumstances.

It appears from the local case of *Gunning* v. *Brumell* (G.J. 27.11.06) that the defendant was entitled to order the detention of the plaintiff without warrant, but only for such time as was necessary for the warrant to be made out, and this is supported by *Hutchinson* v. *Lowndes* (2 L.J. (N.S.) Mag. Cas. p. 2). But as was said by Parke, J. in this case the making out of a warrant "would have required only a few minutes" and it would appear that where no warrant is in fact made out or where it is made out after the day upon which the person has been committed the magistrate is not protected, for in such case the plaintiff is not in fact detained under a warrant at all but solely under a verbal direction. Such a direction the magistrate has no power to give and in giving it he acts beyond his jurisdiction, for where as in the case to which I have last referred the power of committal or detention is statutory then, as was said by Patterson, J. "the warrant in writing was an essential to the jurisdiction of the justice." This view was taken also in *Mayhew* v. *Locke* (129 E.R. p. 25) where, the justice having committed the plaintiff without warrant in circumstances in which a warrant was necessary, a rule *nisi* for non-suit was discharged on the ground that a commitment "made by word of mouth only without warrant in writing cannot be supported."

I am of the opinion therefore that in the present case the

defendant acted in excess of his jurisdiction when he purported to order the detention of the plaintiff under section 51 of Ch. 9 but without warrant, and his position is in no way affected by the fact that the plaintiff might have been released before a warrant could have been made out, for it is plain that not only was no warrant issued but that the defendant had at no time any intention of making out a warrant.

It was further contended on behalf of the defendant however in such case the plaintiff is not entitled to succeed in this action having failed to secure the quashing of the order under which the act was done whereby he alleges that he was injured. This contention is based upon the proviso to s. 3 of Ch. 254 which provides that "For any act done by any justice in a matter of which by law he has no jurisdiction or in which he hag exceeded his jurisdiction, anyone injured thereby, or by any act done under any conviction or order made or warrant issued by the justice in the matter, may maintain an action in the same form and in the same case as he might have done before the commencement of this Ordinance Provided that the action shall not be brought for anything done under the conviction or order until after it has been quashed."

Counsel for the plaintiff on the other hand contends that the action is not brought in respect of any act done under a conviction or order within the meaning of section 3 or its proviso, for it is submitted that there was in this case no such conviction or order but merely an arbitrary direction to a constable which the defendant had no authority or jurisdiction to give. He further submitted that there was in the present case no order or conviction within the meaning of section 55 of the Summary Jurisdiction (Magistrates) Ordinance, Ch. 9 which provides that "all . . orders, convictions . . . and all other processes, whether criminal or civil, shall be issued or made under the hand of the magistrate," and. that there being in this case no conviction or order under the hand of the magistrate there is nothing to be quashed.

The defendant admits that nowhere in the record of his court did he make any minute or note of the direction given by him either for the removal or the detention of the plaintiff.

While in view of the specific terms of section 51 of Ch. 9 a mere verbal order for the removal of the offending person may be sufficient "order" within the meaning of section 3 of Ch. 254 notwithstanding the general provision of section 55 of the former enactment, yet it is difficult to see how a mere verbal direction for the detention of the plaintiff without warrant, without jurisdiction therefore, and without any minute or note under the hand of the magistrate can be held to be an order within the meaning of either statute or what steps could be taken by the plaintiff to have such an informal direction set aside.

I am of the opinion therefore that in so far as relates to the detention of the plaintiff in the lock-up there was no such order as is contemplated by section 3 of the Justices Protection Ordinance and that the proviso is therefore inapplicable to the present

case. The injury complained of by the plaintiff flows from an act done by the defendant in a matter in which he exceeded his jurisdiction and the plaintiff having been injured thereby may maintain his action in the same form and case as he might have done before the Ordinance and is entitled to damages.

On this point the learned Solicitor-General submitted that by reason of section 12 of Ch. 254 the amount of damages should be restricted to the sum of two pence, it having been proved as indeed I find, that the plaintiff was guilty of the offence and that he had undergone no greater penalty than that assigned by law.

It does not appear to me, however, that the defendant is entitled to the protection afforded by the statute in this respect. In *Palmer* v. *Crane* (1927) 1 KB. at p. 808, Talbot, J. said: "The principle of the law on this matter is plain. If a judicial officer acts outside his jurisdiction he is not acting as a judicial officer at all, and he is in no better position than anyone else." To apply the statutory limitation to the amount of damages in this case would be to place the defendant in such a position and I am of the opinion therefore that the provisions of section 12 do not apply. It does not follow, however, that this Court is precluded from taking into consideration in assessing damages such circumstances as those referred to in that section, for while the sum fixed by the section is purely arbitrary the reason for the limitation rests upon matters which may in any case be taken into consideration in determining what compensation should be awarded the plaintiff in respect of the injury he has sustained. It is true that the liberty of the subject is to be jealously guarded by the courts so that no person may be imprisoned without due process of law, but it is equally true that no person should be allowed to profit by his own misconduct and all the circumstances of the case must therefore be taken into consideration in determining the amount of the damages the plaintiff is entitled to recover.

In the present case the plaintiff by his own behaviour brought himself within the perils of an enactment designed to secure magistrates from insult and courts from misconduct within their precincts. In respect of such behaviour the defendant was empowered by the statute to cause by verbal order the plaintiff's removal from the court and by warrant his further detention. By purporting to direct such further detention by verbal order and not by warrant the defendant exceeded his jurisdiction and so infringed the plaintiff's rights. Those rights the plaintiff is entitled to have vindicated in this Court. When it comes to be determined what amount will compensate him for the injury sustained by reason of that infringement, however, his own misconduct cannot be overlooked, nor can it be ignored that in point of fact he suffered a penalty far less than that which might lawfully have been imposed by the magistrate had there been compliance with the terms of the statute within which the plaintiff's misconduct fell. In such circumstances I am of the opinion that the plaintiff's rights will be fully vindicated and his injury

adequately compensated by a verdict for damages in the sum of twenty-four dollars.

As to costs, under section 63 of the Supreme Court of Judicature Ordinance, Ch. 10 it is provided that no costs shall be allowed to a successful plaintiff in any action brought by him in this Court which might have been heard in a magistrate's court unless this Court is of the opinion that the action was one which it was expedient to bring here. In view of the peculiar nature of this case I am of the opinion that although it was a matter which might have been heard in a magistrate's Court in view of the amount of the damages to which I found the plaintiff to be entitled, yet it is expedient that it should have been brought in this Court. The question of costs is therefore within my discretion and I have to consider whether I should exercise that discretion in the plaintiff's favour.

There is no doubt whatever in my mind that the whole of this unfortunate incident and its consequences flow from the plaintiff's own misconduct in the magistrate's court. The plaintiff in point of fact well merited that which he suffered and but for the fact that the defendant failed to act in compliance with the provisions of the statute and so exceeded his jurisdiction the plaintiff would have been entitled to no relief whatever. Nevertheless had the plaintiff chosen to stand upon his rights, as he was entitled to do, by bringing a reasonable claim based upon a true statement of the facts he might well have succeeded in recovering both damages and costs. Not content with such a course, however, he has by his pleadings sought to ascribe malice to the defendant although it was admitted by counsel that even if allowed in the present action, he would have been unable to prove this allegation. He has, moreover, falsely denied his own misconduct and by misrepresentation of the facts sought to show that the defendant not only acted in excess of his jurisdiction in point of law but also in an arbitrary and unreasonable manner without any justification in point of fact. Upon this fictitious foundation he has based a claim out of all proportion to the real injury he has suffered. To allow the plaintiff costs in such a case would be, in my view, to encourage conduct in litigation which is to be deplored. I must decline therefore to exercise my discretion as to costs in the plaintiff's favour and as to costs, therefore, there will be no order.

I have been asked by the learned Solicitor-General to suggest in my judgment what he has termed "rules of prudence" for the guidance of magistrates in such circumstances as those which arose in this case, and counsel for the plaintiff concurred that such a course would prove useful to the public as well as to magistrates. I have myself some doubt as to the desirability or usefulness of such an attempt. Prudence is a virtue of temperament rather than the product of rule, as is indeed well illustrated by this case. It should not be necessary to point to the obvious for surely it is apparent that prudence would dictate that a magistrate should only use the summary powers of detention conferred upon him by the statute when all other means of controlling the ill manners of litigants have failed, that should he feel

impelled thereby to the exercise of these powers he should do so only in strict compliance with the terms of the statute which confers them, and that having done so he should record the fact in his notes or minutes of the proceedings. The statutory powers conferred upon a magistrate in this regard are based upon no new principle but upon that which enables every court of law to preserve the decency and due order of its proceedings, and statutory procedure, no matter how summary, for dealing with what is neither more nor less than contempt of court is nevertheless subject to those considerations of caution which have over and over again evoked from superior courts admonitions as to the sparing use which should be made of powers undoubtedly possessed for the punishment of such contempt as to the extreme care which should be exercised by a judicial officer when compelled to act upon his own motion in the committal of any person for this offence against the dignity of his court. It would I think serve no useful purpose for me to repeat the observations of many more learned judges as reported in cases to which every magistrate has ready access. It should suffice for me to direct the attention of magistrates to the fact that the summary powers conferred upon them by the Ordinance place them in no more privileged position that that enjoyed by any court of record in regard to contempt and are not powers to be exercised recklessly or even freely. Due respect for a court of law of no matter what standing will as a rule flow rather from the inherent dignity of its proceedings than from the fear of its powers, and to serve this end should be the aim of every judicial officer.

At the same time it is well that those who frequent the courts whether as parties to litigation or as witnesses therein should bear in mind the obligation which rests upon them to conduct themselves with decency and that they should remember also that the courts possess the necessary power to enforce such conduct upon those who forget the respect due to the processes of justice. Where these powers are exercised within the jurisdiction of the Court they will be upheld and in no case will any person who fancies himself to have been aggrieved be allowed to make profit from his misbehaviour.

Judgment for plaintiff.

Solicitors: *R. G. Sharples; Vivian C. Dias.*

REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1945

AND IN

THE WEST INDIAN COURT OF APPEAL

[1945.]

EDITED BY
E. MORTIMER DUKE, L.L.B., (LOND.),
Barrister-at-Law, Middle Temple;
Acting Second Puisne Judge, British Guiana.

GEORGETOWN, DEMERARA:
THE ARGOSY" COMPANY, LIMITED, PRINTERS' TO THE GOVERNMENT
OF BRITISH GUIANA.
1951.

INDEX