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CASES

DETERMINED BY THE

SUPREME COURT OF CIVIL JUSTICE

FORTE v. RECEIVER GENERAL.

5 January, 1855

Transcript of judgment of Privy Council laid over. From this it appears that the Court exercises a right to refuse the granting of Letters of Decree, and that appeal lies against an order refusing relief, and that the purchaser of property at execution sale can set off monies or profits received by him while matters are *sub judice,* and that the Court has power to cancel a sale at execution.

In 1842 the Colonial Receiver General proceeded on summary summation against the proprietors of Plantations *Best & Waller's Delight.* On 2nd September 1842 sequestrators were appointed, and on 27th September a levy was made for arrears of taxes alleged to amount to $1,391.90. On 27th September an order for sale was made. On 23rd November 1843 the estates were sold as Plns. *Best, Phoenix & Waller's Delight.* By the conditions of sale the Provost Marshal agreed to knock the properties down to the highest bidder. The sale was advertised in the local and European papers, the Plantations therein being described as *Best & Waller's Delight.* One of the conditions was that the estates *Best & Waller's Delight* were to be sold in the first place separately, and secondly together, the first sale separately to be binding only in case the said properties did not realise at the second sale (together) a greater sum than at the first sale. Plns. *Best & Phoenix* were knocked down to John Forte for $41,000, and W. B. Pollard and Sarah Gilgeous became sureties. On the 20th February 1845 the Registrar called on Forte to pay the purchase money into Court. On 12th March 1845 the Registrar reported to the Court that such purchase money had not been paid, and on 5th April 1845 an order was made to retake and resell Plns. *Best, Phoenix & Waller's Delight.* On

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19th January 1844 Forte had deposited in the Registry $41,000 as the purchase money of *Best Phoenix & Waller's Delight.* He presented five petitions as regards the purchase money: 1st, on 15th January 1846 praying for Letters of Decree for *Best, Phoenix & Waller's Delight.* This was refused by the Court. 2nd, on 28th February 1846 praying for revocation of order on first petition, and again praying for Letters of Decree; refused. 3rd, on 6th February 1846 praying for repayment of $39,457, balance of purchase money after deducting legal charges. The Court refused the order, and referred the petitioner to his ordinary remedy. 4th, on 7th April 1847, praying for Letters of Decree. The Court referred the petitioner to the orders already made. 5th, on 7th January 1848, praying the Court to declare null and void, and of no effect, on the ground of manifest error, the sale at execution described in the conditions of sale and inventories as *Best, Phoenix & Waller's Delight,* but described in the advertisement of sale as *Best & Waller's Delight.* The Court refused the petition. On 7th February 1846, Forte brought an action for damages against the Provost Marshal. The Court held that the Provost Marshal was not liable for damages to Forte, holding that by such action the claim against the Provost Marshal as an officer of the Court was substantially tried as regards his acting under an order of the Court in the matter of the sale and his responsibilities to Forte for his official acts. The trial did not turn upon technical point of pleading or practice, nor upon any suggestion that Forte had or could have Letters of Decree or title to the plantations, or in fact Letters of Decree or title to the plantations could not be lawfully made. On 22nd June, Forte and his sureties prayed for relief to surrender the estates, and prayed for direction to the Registrar to pay to them the amount so deposited as purchase money. The Court refused to grant the order and appeal was lodged. The Court refused the petition for appeal. The petitioners applied to the Queen in Council, and leave to appeal was granted against the orders of 3rd and 5th July 1849. The Privy Council held:—1. That the sale of *Best, Phoenix & Waller's Delight* ought to be annulled;

2. That the Appellants should deliver up the estates to the Provost Marshal; 3. The Registrar should pay the Appellants the purchase money so deposited; 4. That the rents and profits received by the Appellants should be taken as a set-off against interest of money deposited in the Registry, and against the costs incurred by the Appellants, and against costs of appeal, and of $1,543 paid by Forte in bringing a sale, and against monies expended by Appellants in permanent improvements or substantial or necessary repairs.

On 9th February 1855 the Plantation *Waller's Delight* was, at the instance of the Receiver General, after an opposition suit by Forte, which was declared unfounded, sold.

On 12th February the Court directed the Appellant to deliver up the portions of the estates not delivered to the Provost Marshal, and directed the Registrar to pay out the monies as directed by the order of the Privy Council.

5 *February*, 1855

PETITION OF A. *v*. B.

Power of the Court to interfere between Attorney and Client.

Petition complaining of an Attorney-at-Law for not paying money received on the behalf of a Client.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

The Court having read the Petition with the Report and the counter Report, now orders _____, Attorney-at-Law, to appear before the Court after the list of pleading cases have been disposed of, to show cause why he should not be suspended from practising as an Attorney-at-Law before the Courts of Justice of this colony. The Petitioner is ordered to intimate this order to the said___.

4 *June*, 1855.

The Court having read the Report of _______ in this matter dated 7th May 1855, suspends any further order until the termination of the suit at the instance of the Petitioner mentioned as commenced.

21 *June*, 1855.

The order of the 5th February is hereby renewed and the said _______ is ordered to appear on 28th November to show cause.

28 *June*, 1855.

Postponed to next Session.

11 *February*, 1856.

The Court having read this Petition and the Report, and the counter Report and all the documents submitted with the Petition, Report, and counter Report respectively, and noticing that the sum claimed by the Petitioner was not paid until after suit and sentence against the Reporter, now making a final order herein, declares the conduct of the Reporter throughout to have been highly improper and reprehensible. The Court warns the Reporter not to allow any similar complaint against him to be brought before the Court again, as in such case if the complaint be well founded, he will assuredly be debarred from practising as an Attorney-at-Law before this and any other Court in this colony. The Court orders the Reporter to pay all the costs of these proceedings.

In re SESSIONS.

11 *February*, 1856.

The February Sessions were closed and the Chief Justice authorised to resume and sign the minutes.

In re OPPOSITION SUITS.

In opposition suits up to the end of 1855 there was no co-Defendant entered on the Minutes of the Court.

In re SESSIONS.

The Sessions were held in January, May and November.

In re POSTPONEMENT OF SESSION.

2 *May,* 1856.

The Court does not seem to have been opened, but the following Minute appears:—

Supreme Court of Civil Justice,—His Honour the Chief Justice and His Honour the First Puisne Judge made the following order: —

"In consequence of the continued sittings of the Supreme Criminal Court for the County of Demerary, the Supreme Court of Civil Justice appointed to be held this day and following days, is hereby postponed, adjourned, and appointed to be held on Friday, 6th June 1856, and following days.

"Guiana Public Buildings, Georgetown, Demerary, this 2nd day of May, 1856."

14 December, 1858.

POWER OF COURT.

The Court requests His Honour the Chief Justice and the First Puisne Judge or either of them to pronounce the sentences in the several Minutes of this Court tomorrow or any other convenient day.

ADMINISTRATOR GENERAL *q.q.* DE FREITAS *v.* LANDRY.

14 *December,* 1858

Representative capacity.

Administrator General must in rubric show his representative capacity whether he is *q.q.* "insolvent," "deceased," &c.

From 25th July 1855 to 25 October 1856, Defendant was acting Administrator General. On 7th March 1856 De Freitas was adjudged insolvent and his estate as by inventory came up to $1,090. On 19th March creditors were called up, and on 2nd April, Harvey & Co., filed for $594.67 on which day, 2nd April, De Freitas petitioned for discharge of order which was granted on 3rd April and order of discharge advertised 12th April. There was no order for re-delivery of assets to De Freitas, and it was contended therefore by Plaintiff that they were never reinvested in him. On 14th April, Defendant as Acting Administrator General paid over to De Freitas the balance in his hand nearly $1,040.03. On 20th May 1856, De Freitas was again adjudged insolvent. The order was advertised on 21st May. No inventory was made and the creditors were not called up. It was contended for Plaintiff that Defendant should have had the sum so paid to De Freitas, $1,040.03, in his hands when he ceased to Act on 25th October 1856. The rubric was as follows, "the Administrator General of Demerary and "Essequebo as representing the estate of Manoel Carlos "De Freitas," and there was an averment in Claim and Demand "that such last-mentioned adjudication still re- "mains in force, &c." The Plaintiff represented the estate of the said Manoel Carlos De Freitas at the time of suit. The Defendant denied "that, the Administrator General "was entitled to sue as representing De Freitas, or that he "has such representative capacity, or that he does repre- "sent the said estate in manner and form as alleged in the "Claim and Demand."

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— The Court is of opinion that the Defendant's averment is correct.

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ADMINISTRATOR GENERAL *v.* LANDRY.

1stly: Because the Administrator General may represent solvent as well as insolvent estates as will be seen by reference to Ordinance 7 anno 1851.

2ndly: Because by stating himself to represent simply the estate of "Manoel Carlos de Freitas," he does not declare whether he represents a solvent or insolvent estate.

3rdly: Because the Plaintiff avers that by virtue of the order of adjudication of 20th May 1856 he represents "the estate of the said Manoel Carlos de Frietas."

4thly: Because if said last statement be correct then the Plaintiff by virtue of such representation has no right to the sum in question inasmuch as that sum was obtained by the Acting Administrator General under the order of adjudication of 7th March 1856, and by the Plaintiff's averment, this sum was never re-invested in the said Manoel Carlos de Frietas. If then this sum was never re-invested in Manoel Carlos de Frietas, how would it ever be part and parcel of his property so as to form any part of his estate which ought to be taken possession of in virtue of the order of 20th May 1856.

5thly: As the Plaintiff therefore has left the character or capacity in which he sues doubtful, inasmuch as he does not state whether he represents a solvent or insolvent estate and it is not the duty of the Court to clear up that doubt, and by his averments he maintains that he represents an estate of which the sum sought to be received, can, in the opinion of the Court, form no part, the Court has granted an absolution of the instance with costs.

Ex parte SPOONER.

13 *June*, 1856

Leave to Appeal.

ARRINDELL, C.J., and BEETE, J.:—The Court having read the Petition with the Report and the counter Report thereon, and the matter in litigation herein not embracing the sum of £500 sterling, rejects the prayer of the Petition with costs.

LANDRY *v.* MILNE.

10 *June*, 1856.

Amendment.—Costs.

In this case the Court, after hearing the parties, reserved decision as to the advisability of allowing the Defendant relief to amend his answer.

14 *June*, 1856.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— The Court allows the Defendant to materially amend his answer by inserting an exception *tibi adversus me non competit haec actio.* Defendant is ordered to pay all costs from filing of conclusion of exception and answer up to date and costs of the motion.

14 *June,* 1856

JUPITER *v.* COMACHO*

Evidence.—Credibility of Witnesses.

Action for maliciously turning adrift a bateau.

Where the Defendant does not deny the allegations of the Plaintiff, it must be taken that the charges laid and proved by the Plaintiff are correct.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— In this case Plaintiff states that on the night of the 31st December 1854, the Defendant wrongfully and maliciously loosed and turned adrift his bateau of the value of $30 from a place on the Demerary River where it was lawfully fastened, and the said bateau was entirely lost to the Plaintiff.

The Plaintiff states that theretofore he was accustomed to make great gains and profits from the hiring out of his bateau and by carrying freight for hire, and he demands from the Defendant for the loss of the bateau, and for the gains and profits which he alleges he would have made had he not been deprived of his bateau by Defendant as aforesaid, the sum of $240 with costs of suit.

The Defendant denies the statement of the Plaintiff, proposes the innominate exception of an absolution of the

* This is the first case in which written reasons were given and recorded.

instance, concludes to an admission of the same, and for the benefit thereof to an absolution of the instance with costs, and subordinately answering, rejects the Plaintiff's claim with costs.

The evidence on the part of the Plaintiff consists of—

Firstly: that of the Plaintiff himself. He swears that the bateau was fastened near the East Bank of the River Demerary between high and low water mark, on the last day of the year 1854, and that on Monday morning, New Year's day 1855, he missed it. That he searched for it and could not then find it. That some short time after the loss of the bateau, the Defendant said to him among other things in allusion to the loss, "he (Defendant) did "not care a damn whether he (Plaintiff) found the bateau "or not, that the water side was his (Defendant's) and he "had loosed it" (the bateau).

Secondly: That of Augustus Gonsalves. This witness says: "I know a bateau that Plaintiff kept at *Craig*. I was "at the water-side on Sunday night, the last of December "1854, I think between 10 and 11 o'clock at night. I saw "Defendant go into the bateau and sit in it for a while: he "then came out of it, loosened it and shoved it away." This testimony has been a good deal shaken by the cross-examination of this witness, who there says: "The "land adjoining Camacho's water-side (the next water-"side where he says he was) belongs to Bella Williams. I "was not in her house; I was outside. I have not meas-"ured the distance I was from Camacho. I was not as far "as the end of the buildings (about 200 feet); it was a "little further than the middle of the buildings (about 100 "feet). The moon was just down; it was dark. I could see "Camacho; he could not see me. I cannot say why "Camacho could not see me." This statement is highly improbable, and unworthy of credit.

Thirdly: That of Kit Will, who says: "After it (the "bateau) was lost, one day I and Plaintiff were standing "on the road speaking. Defendant sent to call Plaintiff. "Plaintiff went, and I went with him. Defendant said to "Plaintiff, 'I hear you accuse me of having loosed 'the "craft.' Plaintiff said, 'no, I do not.' Defendant

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"said, 'if you hear so, I don't care a damn about it. I "'loosed it aye; it was on my own land, and I could do "'whatever I like, and you can go to your God (meaning "his lawyer) I don't care about it."

This witness in his cross-examination says that the foregoing conversation was on a morning at 8 o'clock in January this year, 1856. Considering that the Claim and Demand was filed on 28th December 1855, that the conclusion of exception and answer was filed on 15th December 1855, and that on the 8th January 1856, the Defendant must have known that the Plaintiff had not only accused him of loosing the bateau, but had instituted an action against him for the value of the same, it would appear an absurdity that Defendant should on the 8th January 1856, have accosted the Plaintiff in the manner described. Such an appearance of absurdity, however, is dispelled by knowing that negroes, generally speaking, cannot associate with any tolerated accuracy, time and circumstances. In the recollection of facts, they are as correct as others, but they are truly bewildered and lost when they are called upon to speak of time. Taking for granted that the testimony of the second and third witnesses cannot be relied upon, we still have the testimony of the Plaintiff himself. The Defendant was stated to be in attendance, and had a right to go into the witness box and deny on oath that he did loose the bateau, if such had been consistent with the truth, and yet he did not avail himself of this his undoubted right.

The Court, under these circumstances, feel bound to believe the statement of the Plaintiff that the Defendant told him that he, the Defendant, had loosed the bateau.

The Court does not mean that a Plaintiff or Defendant giving evidence in his own favour is to be always believed.

Admitting a party to a suit to give evidence on his own behalf has been very recently introduced into the English law, Sec. 14 & 15, Vic, c. 99, S. 2.

In the Dutch law it has long been the practice to allow a party to support his cause by oath in certain cases; see *Voet, ad pand,* b. 2, tit. 8.

The principle in the British law is, that a person who is admitted to purge himself by oath and does not, must be held guilty of the charge against him; see *Voet ad pand,* b., 12, tit. 8; *Grotius, Herbert,* trans., p. 446, note 22.

There exists this difference between the English law arid the Dutch law. By the English law the right is given absolutely by Statute. By the Dutch law the oath is tendered by a Judge at his discretion.

As therefore, the Plaintiff has sworn to a fact which the Defendant might have denied on oath and would not, the Court have arrived at the conclusion, that the Defendant committed the act complained of; that the bateau, the loss of which he occasioned, was worth $30, and that the Defendant must pay this sum to the Plaintiff with costs.

With respect to the consequential damages said to have been suffered by the loss of the bateau, the Court, without entering into the question whether such a claim coupled with the claim for the entire value of the bateau, is maintainable or not, considers the Plaintiff's evidence in support of this part of his claim so vague and unsatisfactory as not to entitle him to a sentence for a larger amount than has been awarded. Costs granted.

(There is no evidence taken by the Registrar on record.)

PIRES, ET AL, *v.* DE FARIA.

17 *June*, 1856

Costs of defending suit—Deposit of lease as security—Misjoinder.

A party who defends a suit is liable for costs, and cannot recover such costs against a third party as damages for breach of contract.

Depositing a lease as security does not divest the lessee of his rights of ownership.

Claim for damages for differences of value of articles seized and sold at execution cannot be joined with claim for breach of contract.

The Plaintiffs state in their Claim and Demand that on 17th February 1855; they were indebted to Antonio Coelho in the sum of $280, balance of an account. That Antonio Coelho threatened to sue him, and that they the

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Plaintiffs being unable to pay the debt, it was agreed by and between the Plaintiffs and Defendant that the Plaintiffs should give to the Defendant their joint promissory note bearing date 7th February 1855, for $280, payable to the Defendant or his order 8 months after date, and should moreover deposit in security with Defendant the lease of a piece of land part of Pln. *Vetrouwen* in the island of Leguan in favour of the second-named Plaintiff dated 2nd March 1854, and that in consideration thereof he the Defendant should forthwith pay the said Antonio Coelho for and on account of the Plaintiffs the sum of $280 due by the Plaintiffs to Antonio Coelho.

The Plaintiffs allege that thereupon they gave to Defendant a promissory note of the date and in the terms before-mentioned, and also deposited in security with him the lease mentioned.

The Plaintiffs state that the Defendant having so received the promissory note and lease thereupon in consideration thereof and of the said agreement, undertook and agreed with the Plaintiffs that he would forthwith pay to Antonio Coelho for and on account of the Plaintiffs, the said sum of $280 in satisfaction of the debt so owing by Plaintiffs to Coelho, but the Defendant did not pay to Antonio Coelho (who was then ready and willing to receive the same) the said sum.

The Plaintiffs further state that by reason of the unjust, wrongful and injurious conduct of the Defendant, the said Antonio Coelho on 14th February 1855, instituted a suit against them for the recovery of the said $280: that the Defendant caused a defence to be entered to said suit in the names of the Plaintiffs; that on 4th June 1855, the Court pronounced a sentence in said suit dated 29th May 1855, condemning the Plaintiffs to pay to Antonio Coelho the amount of said debt, with costs; and that thereafter, Coelho by virtue of said sentence levied on, and on the 8th October 1855, caused to be sold in execution the dwelling house of the Plaintiffs, the same then being the sole remaining property of the Plaintiffs, to wit, a building situate on Pln. *Vetrouwen,* in the island of Leguan.

The Plaintiffs aver that they had expended on the

house and premises upwards of $700: that the same was worth $700, but having being forced to execution sale realized only $150.

The Plaintiffs aver that they have not only been greatly injured in their good name and credit, but they have been exposed to heavy expenses, to wit, to the amount of $290.82, in and about the suit of the said Antonio Coelho; and they have also been deprived of their afore-said property, to wit, the building at Pln. *Vertrouwen* at a loss of $550, and they have been otherwise by means of the premises, seriously injured.

The Plaintiffs aver that they are entitled to demand and have of and from the Defendant, damages to the extent of $1,000 as pecuniary compensation for the costs, losses, damages and injuries by them suffered and sustained by reason of the aforesaid wrongful, unjust and injurious conduct of the Defendant in the premises.

The Plaintiffs then aver demand of payment of $1,000 and a refusal by the Defendant to pay, and then conclude to a condemnation of the Defendant in the sum of $1,000 with costs.

The Defendant after denying all and singular the allegations and averments in the Plaintiffs' Claim and Demand, excepting, concludes to an absolution of the instances and subordinately answering declares to reject the said Claim and Demand with costs.

Upon these proceedings issues have been joined. It appears in evidence that there were two sums of money due by John Pires to Antonio de Faria, one of $385.40 and of long standing, the other for $200, and that Pires and Maria de Jesus further owed $280 to Antonio Coelho. Unable to pay their debts, and being pressed for payment, Pires gave up to Faria in payment of the debt of $388 40, a retail spirit and provision shop in the Island of Leguan, and thereupon obtained a receipt in full for the $388.40. Pires then prevailed on Maria de Jesus otherwise Maria Fernandes to join him in giving to Faria a promissory note for the payment twelve months after date, of $200, being the money secondly due by him to Faria, also a note in the following words and figures :—
"Demerara, 7 February 1855. Eight months after date we
"promise

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"to pay to Antonio Faria or order the sum of two hun- "dred and eighty dollars, being an amount due by us to "Antonio Coelho, which amount is to be paid by the said "Antonio Faria.

his
"JOE x PIRES.
mark,
"MARIA x FERNANDES.

"$280.

"Witness—
"R. J. SMALL.
"MANOEL J. GONSALVES.
"JOSE LUIZ FARIA."

At the foot of each of these notes Maria Fernandes binds herself to pay to Faria the sums stated in these two last mentioned notes in default of Pires not paying them, and she declared to have given to him Faria as security a two-storey building situate in front of Pln. *Vertrouwen* in the island of Leguan, together with the contract of the land leased from Dr. E. G.. Boughton, dated 2nd March 1854. It appears that Coelho was not present when these notes were made but he called in at the shop in which they were made, but he took no part in the transaction, that he was not heard to say anything, and went away.

Coelho not getting his money from Pires and Maria de Jesus and Fernandes, brought an action against them and it appears that they defended the action, and in so defending it pleaded not that Faria had undertaken to pay Coelho and that Coelho had agreed to receive payment from him, but that Coelho had undertaken to give two months' indulgence for the payment of the $280, and that therefore the action was premature. The Court nevertheless condemned Jose Pires and Maria de Jesus to pay to Antonio Coelho the sum of $250 with costs.

Coelho proceeded in execution against Jose Pires and Maria de Jesus.

From the act of levy it appears that these parties surrendered in execution in satisfaction of the sentence against them, the very house, the difference in the value

of which, between the value they set upon it, and the price it sold for at execution, they now seek to recover.

The sums they aver to have lost are, firstly, the costs in the said suit of Coelho *versus* themselves, amounting as they allege to $290.82.

Secondly, the sum of $550, being the difference between $700 the value put by them upon the house and the sum of $150 for which it was sold at execution sale,—and they aver that they are entitled to have from the Defendant damages to the extent of $1,000 as pecuniary compensation for the costs, losses, damages and injuries suffered and sustained by them by reason of the aforesaid wrongful, unjust and injurious conduct of the Defendant on the premises.

With respect to the loss occasioned by payment of the costs in the suit of Coelho *versus* Pires and Maria de Jesus it appears to the Court that the Plaintiffs are not entitled to recover.

Firstly,—Because they took upon themselves the defence of that suit, whereas had they intended to hold Faria liable, they should have given him notice of the suit, and that they would hold him responsible for all taxes, costs, and damages thereby incurred and to be incurred.

Secondly,—Because it appears by the evidence that Faria, after the suit was issued against Maria de Jesus and Pires, carried the amount due to Coelho to Coelho's Attorney-at-Law, who refused it, without the costs of suit.

Thirdly,—Because Faria was not bound to pay the costs of a suit against Pires and Maria de Jesus, and had they chosen to pay the small amount of costs then due, they would have prevented the injurious consequences of which they now complain.

With reference to the loss of the sale of the property at execution it is quite clear from the documents produced, that whatever might have been thought by themselves and others with respect to the depositing of the lease in security, yet that such deposit did not divest them of their right, title, and interest in and to the house which still remained their property, and that over that property they exercised ownership subsequently to the

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deposit of the lease to Faria, by surrendering the house in execution upon a sentence against themselves.

With respect to the difference between the sums of $840.82 and $1,000, being $159.18, the Court cannot see how such a claim for injuries said to have been suffered can be coupled with a claim for damages alleged to have arisen from a breach of contract.

It is not necessary however to say any more on this subject, inasmuch as the rejection by the Court of the two sums firstly and secondly mentioned, namely, $290.52 and $550, will naturally carry with them a rejection of this part of the claim.

27 *June*, 1856

DE COVERDEN *et al v.* HAREL.

Practice—Cause List.

On calling of case partly heard yesterday, Mr. *Smith* stated that the Court has no power to proceed further with this case, this being the first day of the new Session the Court being bound to proceed with the trial of causes of this Session as is set down in the calendar, and further that at the last hearing of the cause there was no adjournment to the next Session of the Supreme Court.

Mr. *Gilbert* replied and stated that the Counsel should have proved that the Session lasted only for a certain time, and that the Court has the power to adjourn its Sessions from time to time, and from day to day.

The Court was then adjourned for 10 minutes.

Their Honours the Judges (ARRINDELL, C. J., and BEETE and ALEXANDER, J.J.,) made the following order:—The Session of the Supreme Court of Civil Justice appointed to be held this day, 12th of June 1856, is hereby postponed until Tuesday the 1st of July 1856 and following days.

The Court was then re-opened and the parties in the last case were again called and ordered further to proceed with the said case.

Re SAFFON—*Ex parte* KING.

28 *June,* 1856

Petition to get minor child into Saffon institution.

The Court (ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.,) cannot entertain this petition, the benefit of the Saffon's estate fund not extending to the County of Berbice.

Re SAFFON.

28 *June*, 1856

Rights of Court over trust.

The Administrators of the Saffon trust can do no acts of importance without consulting the Court.

His Honour the Chief Justice (ARRINDELL) stated that the schoolmistress of the Saffon's estate trust having died, the Administrators to that institution had appointed another mistress without any reference to or authority of the Court: that he was not aware under what advice the Administrators had acted: that as a matter of choice, he would wish to have nothing to do with this or any other appointment, but at the same time if the right to appoint belonged to the Court and not to the Administrators, he felt it would be a dereliction of duty to pass over the conduct of the Administrators: he therefore wished their Honours the other Judges to assist him in ascertaining to whom the right of appointing a mistress to the Saffon establishment belongs.

The Court having deliberated on the same now directs the acting Registrar to call upon the Administrators of the estate of P. L. de Saffon, deceased, to know by what authority they have appointed a schoolmistress to the establishment without any reference to this Court, and the said Administrators are ordered to send in their report within four days from the date of this minute.

On 30th June, the Administrators, A. Vyfhuis and J. Obermuller, wrote to the Court stating that they had

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"not taken advice in the matter but have solely acted on "the tenor of the Will of the late P. L. de Saffon, by "which full power has been given to the Administrators "with the exception of the appointment of orphans in "cases of vacancies, which was exclusively left to your "Honourable Court."

The Court having read this report, refers the Administrators of the estate of P. L. de Saffon, deceased, to the minutes of this Honourable Court, which the Registrar is hereby authorised to exhibit to them, from the year 1822 to the present time, when it will be seen that the Court has exercised the right of appointing every mistress to this institution from the first appointment of Mrs. Trotman from 1823 to the last appointment of Mrs. Hinds in 1842. The Court further refers the said Administrators to the said minutes in which the Administrators will further find that the Administrators for the time being from 1822 to the present time have not taken upon themselves to perform one important material act without the sanction of this Court. After such repeated acts of superior authority by this Court submitted to and acquiesced in by the respective Administrators, the Court cannot concur with the Administrators in their opinion of their powers. The Court declares the appointment of Mrs. Backer by the Administrators null and void, and directs the Administrators to forward within forty-eight hours from the date of this minute to the Court the several applications to the Administrators in virtue of their advertisement of the 17th June 1856, in order that the Court may make the required selection if the Court thinks fit.

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Applications as directed by the Court submitted, and Mrs. Backer was appointed.

4 *July*, 1856

GHAFT *v.* TASCHEIRA.

Mandament of spolie.

An action for *mandament of spolie* does not lie for restitution of property long since consumed.

ARRINDELL, C.J., and ALEXANDER, J.

The Plaintiff avers that on 20th February 1856, he

purchased from the Defendant the stock-in-trade of his the Defendant, together with a licence which he the Defendant held for the shop situate on Lot 28, Freeburg, for $350. That he the Plaintiff paid the sum of $80 cash down, agreeing to pay a further sum of $150 on 23rd February 1856, and the balance of $120 in eight days from the said last-mentioned date.

The Plaintiff further avers that in virtue of said purchase and sale, he took possession of said shop, with the goods therein, laid in a further stock of goods of the value of $88.33, and between the 19th and 24th of February made large sales to the extent of $160.

The Plaintiff avers that on 23rd February, the Defendant unlawfully and surreptitiously took possession of said shop with the goods then remaining therein, together with the amount of 3 days' sale, to wit, the sum of $160, and certain articles of wearing apparel of the Plaintiff's to the value of $7.56, and has kept possession and has refused to deliver up possession of the same although often requested so to do.

The Plaintiff then avers that by reason of the premises an action hath accrued to him to demand and have from the Defendant on delivery by him the Plaintiff to the Defendant of said shop licence, the sum of $333.89, being the amount, 1stly, of the sum of $80 paid by the Plaintiff to the Defendant as aforesaid; 2ndly, of the sum of $83.33, the value of the goods, wares and merchandise so as aforesaid put in said shop by the Plaintiff; 3rdly, of the sum of $160, being the amount of the sales so made as aforesaid; and 4thly, of the sum of $7.56 being the value of the wearing apparel so as aforesaid detained by the Defendant; and the Plaintiff concludes that the Defendant be condemned to pay him the several sums.

The Defendant after objecting to the form of the action and averring that the Plaintiff ought to have proceeded by *mandament of spolie,* and concluding to an absolution from the instance with costs, subordinately answering, rejects the Plaintiff's claim with costs.

As to the form of action, the Court is of opinion that the action is correct in form. It does not see how a *mandament of spolie* could have been supported. How

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could the Court have ordered restitution of property long since consumed,—and if the Court could have ordered restitution, the circuitry and expenses attending the assessing and reducing into liquidated sum a sentence of this kind would have been an evil so great, as to render it imperative of the Court not to lend itself to such desperate litigation.

12 *July*, 1856

GIBSON *v.* GONSALVES.

Rubric—Non-qualificate—Misjoinder.

An assumed Executor cannot sue alone while the party assuming him is alive and has acted.

Suit by John Gibson as duly assumed joint and several Executor and Trustee to and of the last Will and Testament of William Afflech, deceased.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.

To this rubric the Defendant has proposed the exception of non-qualification, and for the benefit thereof concludes to an absolution of the instance, and consequently that the interdict in this matter shall by sentence of this Hon. Court, be declared unjust, illegal and unfounded, and that the Plaintiff shall be ordered and directed to withdraw and cancel the same free of costs to the Defendant with interdiction on the Plaintiff the like proceedings again to attempt or institute with condemnation moreover on the Plaintiff to make good satisfaction to the Defendant all costs losses, and damages by him the Defendant already sustained, or which hereafter by him may be sustained by reason of the proceedings in &c.

This exception the Plaintiff has rejected with costs.

Proceedings in exception have been closed, and the issue between the parties is whether the Plaintiff alone is qualified to bring action or not. By the last Will and Testament of William Afflech, he, amongst other things, nominated and appointed as Executors to his last Will and Testament James Glen, and during his absence from the colony, his brother Alexander Glen, Bruce Ferguson, and George Wight, jointly and severally with full power

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to each and every of them to surrogate, substitute and assume another Executor or Executrix in his or their room, given and granting to them and each of them by and under that last Will, and with like powers of surrogation, substitution, and assumption, to each and every Executor so surrogated, substituted or assumed.

It is said that all the Executors except George Wight are dead or have renounced; and it is proved that he, on 6th December 1854, passed an act in the Registrar's Office of Demerary and Essequebo, whereby having special reference to said Will, and in pursuance of the powers thereby given and granted unto him, he declared to nominate, constitute and appoint and assume John Gibson (the Plaintiff in these proceedings) as Executor and Trustee to and of the said last Will and Testament of said William Afflech, deceased, jointly and severally with him the said George Wight, he the said George Wight declared to surrogate and appoint the said John Gibson as surrogated Executor and Trustee after his death with the like powers.

At the time George Wight passed this act, he was alive; there is no evidence of his having died since. The presumption is that he is alive,—if alive, as he has acted he must continue to act, and ought to be joined in this action with John Gibson, whom he Wight had assumed.

The action is by John Gibson as the duly assumed joint and several Executor and Trustee.

The words assumption, substitution and surrogation, are derived from the Latin.

Assumo—to take to one's self, assume, derive, adopt, use, *sibi collequam in consulater;* see also *Lybrecht's Red Vatooq Notaris ampt.,* 1 Vol. p. 479, p. 15, and page 498.

Substitute—to put or place under. *Item, sufficii in locum alterius poss.,*—put or choose in place of another.

Subrago—Vel suriogo—to substitute, put in the place of, *subrogate, substitute, alterim in dematin locum sufficis;* see also *Lybrecht's Red Vatooq,* 1 Vol., page 498, p. 54.

As George Wight is alive and ought to have been joined in the action and has not joined, the Court has absolved the Defendant of the instance with costs.

24 *July,* 1856

LOUIS ET AL *v.* CAMACHO, ET AL.

Right of purchasers in immobilia.

Where several purchasers buy landed property and transport is taken in the name of a few of them, the holders by transport can be compelled to transport to those not named in the title.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.

The Plaintiffs aver that in the month of March 1854, they being illiterate persons and ignorant of business, employed the Defendant David Adolphus as their agent in their behalf to purchase on behalf of them the Plaintiffs, jointly with the Defendant Camacho from Thomas Forrester all those parts of the abandoned plantations *Craig & Success,* which had not been sold out and transported to other parties, save and except certain lots particularly described in certain Letters of Decree bearing date 20th September 1848, recited in the claim and demand.

The Plaintiffs aver that the amount of the purchase money of the said properties demanded by Thomas Forrester, was a sum of $200, half of which they gave to the said Defendant David Adolphus for the purpose aforesaid, and that the Defendant Camacho promised, to pay the Plaintiffs the other half of the said purchase money amounting to a like sum of $100.

The Plaintiffs further aver that they paid Adolphus a further sum of $9.64 as their portion of the expenses for advertising and passing transport of the said properties.

The Plaintiffs aver that the Defendants fraudulently agreed amongst themselves that the transport of the said properties should be passed in their names, although the Defendant Scipio had in fact paid no portion of the purchase money, and the said Adolphus was only the agent in the behalf of the Plaintiffs, and that the Defendants thereafter, to wit, on 13th December 1854, fraudulently passed the transport of the said properties to be passed by Forrester in the names of the Defendants.

The Plaintiffs further aver that by reason of the premises, the Defendants are bound to pass to and in their favour valid transports of the undivided halves of said properties, but that altho' they have frequently promised to pass said transports, yet in fact, they have never passed the same and the Plaintiffs thus conclude that the Defendants be condemned to pass transports in terms of their claim and demand.

The Defendants after some trifling objections which were ultimately waived, and are not necessary to be noticed, propose the exception of *vobis adversus nos non competit haec actio;* and the innominate exception of an absolution of the instance with costs, and declares to reject the claim and demand with costs.

It appears by the evidence of Louis, that he and the other Plaintiff paid to Adolphus $106 to enable him to purchase from Mr. Forrester on their behalf, the properties in question. The testimony of this witness is corroborated by the testimony of Charles Hunt. Adolphus corroborated the evidence of Louis, and adds that being unable to purchase the property with the money given to him by the Plaintiffs, the purchase money being $200, he called upon Camacho to lend him $100, and that he told Camacho for whom he was acting, and that Camacho refused to lend the $200, but said he would become purchaser of the undivided half, to which he Adolphus agreed.

It further appears that altho' the property was purchased by Adolphus, acting as agent of the Plaintiffs, and by Camacho on his own account, Scipio has not provided any portion of the money so paid, and that he has got his name smuggled into the transport as one of the purchasers in consequence of the ignorance and stupidity of the other two parties.

It is quite clear that the Plaintiffs are entitled to transports of the undivided halves of the property in question, and the Court has consequently condemned the Defendants to pass such transports. The sentence of the Court carried into effect will place Camacho in an awkward position, the extrication from which must be left to himself.

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JOHN *v*. RANKIN.

Malicious prosecution—Joinder of actions—Damages.

Plaintiff can join several actions for malicious prosecution by the same Defendant, and also in trover for goods taken in dispute of rights *in re* suit *nol pros:*

Where a warrant is taken for arrest of a person, the law presumes malice.

The restraint of a person's liberty by warrant carries its consequences, and the Plaintiff need not prove special damages.

Plaintiff leased from the Defendant certain lands and was given notice to quit, and after such notice he went and cut plantains from the lands.

On 7th April 1855, Defendant charged Plaintiff with the theft of a bunch of plantains from *Bladen Hall,* Defendant's property, and he on appearance before a J.P. on summons, was discharged. For this Plaintiff claimed $300.

On 17th April 1855, Defendant procured a warrant against Defendant for stealing 5 bunches of plantains from *Bladen Hall,* and Plaintiff's house was searched under the warrant, and the Plaintiff arrested and locked up for 6 hours and bailed. Plaintiff was acquitted, and he claimed $400 for this arrest.

On 18th June 1855, Plaintiff was summoned by Defendant for stealing 2 bunches of plantains from *Bladen Hall.* Defendant withdrew the charge, and the Justice acquitted Plaintiff. He claimed $300.

On 8th June 1855, Plaintiff averred that he was in possession of certain parts of *Bladen Hall* with the provisions thereon, all of the value of $100, and Defendant well knowing the premises but intending to injure the Plaintiff, took and carried away 5 bunches of plantains. For this the Plaintiff claimed $100.

Plaintiff averred that being in such possession as aforesaid of other lands on 13th June, Defendant did the same overt acts, for which he claims $300.

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Defendant objected to the form of action, proposed the exception of *tibi adversus me non competit haec actio,* and the innominate exception of an absolution of the instance, denied the statements in the Plaintiff's claim and demand, and declared to reject the same with costs.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

It further appears from the evidence that the charge arose out of a dispute between the Plaintiff and Defendant respecting the occupancy of a piece of land in plantain cultivation, let by the Plaintiff to the Defendant on a monthly hiring.

The defence set up, is that the Plaintiff has not proved both malice and probable cause which he is bound to do according to the authority laid down in *Roscoe's Nisi Prius,* ed. 1849, p. 407. The Court is of opinion that malice may in the present case be presumed.

In a very recent case *Darbey* v. *Ousley,* Jurist. N. S., Vol. 2, p. 500, *Alderson,* Baron, said, "if you call a man "a traitor as was done here, the law implies malice from "the very act." So in the present instance, charging deliberately in writing, the Plaintiff with having stolen a bunch of plantains of the value of forty cents, does in law imply malice from the very act.

It was also urged by the Defendant's Counsel that at the time the Defendant made the charge he believed it to be true. An answer to this will be found in the same case in the words of *Bramwell,* Baron: "However honestly a "man believes what he writes of another to be true, if it "is untrue in fact, the law attributes malice."

The Court therefore see no reason to acquit the Defendant of the *animus* attributed to him, but taking into consideration the relative position of the parties, and the circumstances attending this affair, the Court has awarded $24 to be paid by the Defendant to the Plaintiff in satisfaction of the injuries firstly complained of.

Secondly: It is clearly proved that the Defendant did charge the Plaintiff in manner and form, secondly stated in the claim and demand, and as this was a second charge arising out of a continuance of the same differences, the Court has doubled the amount of damages to be paid by the Defendant to the Plaintiff for this second injury.

The same defence was set up to this part of the claim and demand which was set up to the first, but the reasons which induced the Court to over-rule such defence, have actuated it in over-ruling the defence secondly set up.

Thirdly: The charge made by the Defendant against the Plaintiff and thirdly complained of, namely, that the Plaintiff had on the 6th June 1855, stolen from Pln. *Bladen Hall, two* bunches of plantains, has also been fully proved.

The defence set up to this third claim is the same as that urged against the other two, and the same reasons already assigned prevailed against this defence, and the Court has awarded in this case damages to the amount of $24. The reason why the Court has given this sum only is, that although the charge was made by the Defendant, it was not persisted in, but subsequently withdrawn.

It has been urged by the Defendant that the Plaintiff ought to have proved damages to entitle him to support the three last-mentioned claims.

The Court is not of this opinion; "the peril and jeop-"ardy in which a man's life and liberty are placed by ma-"licious prosecution, or the prejudice to his fame and "reputation, constitutes a sufficient ground of action." See 2. *Starkie on Evidence,* 3rd Ed., p 685.

Fourthly: The Court is of opinion that the Plaintiff had by the letter of 25th April 1855, served on him by the Defendant, and which he, the Plaintiff, produced in Court, notice to quit on the first June 1855, the half acre lot of plantains, and has therefore rejected this part of the claim and demand.

The Court is aware that for the unfounded charge for stealing plantains on 6th June the Court has awarded damages, and it may be said that the Court ought not to have awarded such damages if the Plaintiff had notice to quit on 1st June.

The Court, however, considers that although the Plaintiff had notice to quit, yet the circumstances under which the plantains were taken did not warrant the Defendant in preferring the charge of theft against the Plaintiff.

Fifthly: The Court believes that the Plaintiff did

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unlawfully take possession of the back grounds, of the dispossession of which he complains, but the Court is of opinion that as the Defendant promised to pay the Plaintiff the value of the growing crop in the ground which the Defendant subsequently sold for $30, he, the Plaintiff is entitled to $30, and the Court has accordingly condemned the Defendant to pay the same.

In Re STRAKER.

Re-Sale—Right of Purchaser.

Quarae.—A purchaser at Execution Sale has a right to oppose a re-sale of the same Property.

Petition by the Provost Marshal for re-sale, property having been purchased by DeWindt and default made of the payment of the first and second instalments of the purchase money. DeWindt reported that on going to take possession he found some one removing the house on the land at the time of sale, on the ground that such house was the property of the person so moving, and that such removal lessened the value of the property. That at the time he purchased at the sale at execution there was no reservation in the conditions of sale. The Provost Marshal reported that although the building was put in the inventory of the property for better security and as a matter of precaution as the property of the owner or person who took it away, it was not put up for sale nor sold

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ARRINDELL. C. J., BEETE, J., and ALEXANDER, J.:—The Court having read this petition with the report and counter report, now orders *fiat* as prayed without prejudice however to the reporter DeWindt's right to prevent the re-sale prayed for should he be so advised to adopt the proper remedy and to run the risk thereof.

JOHN *v.* RANKIN.—(Two cases.)

24 *July,* 1856

Opposition Suit—Right to oppose.

A person who is arrested for theft and has commenced an action for malicious prosecution, has a right to oppose transport of property owned by the Defendant in such suit.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—Both Plaintiff's and Defendant's Counsel have declared that a sentence in this case must follow such sentence as ought to be given in case No. 6 (John v. Rankin for malicious prosecution) the sentence in No. 6 being in favour of the Plaintiff, is sufficient ground for the sentence being in his favour, and no other reason need be assigned. Sentence was given for Plaintiff declaring the opposition good, with costs.

GONSALVES *v*. GIBSON.

3 *December*, 1856

Revision of taxation.

Costs of witnesses in a case where exceptions are proposed and decision reserved thereon disallowed on the ground that party should have first ascertained whether the case would be heard on merits.

Costs of affidavits of service and default disallowed if made before time for report has elapsed.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—The

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Court has rejected the revision, firstly, because the notice to a party upon whom a copy of a petition, report or other document upon which there is an order made to report is unnecessary, and therefore the expenses attending such notice ought not to be allowed; secondly, because the affidavit ought not to be made until the time allowed for report has expired, and even then, not unless no report has been sent in; thirdly, because although a charge for the copy of a document served is legitimate, yet in the present case the charge for the copy was mixed up with an illegal charge which led the disallowance of what was legitimate, had the items been separately set forth. The fault originated with the framer of the Bill of Costs, who has no right to complain of the consequences of his own error; fourthly, because the other items disallowed were unnecessary. The case went off upon an exception, and the charges disallowed were for evidence never produced in Court.

Because, moreover, after the exception had been pleaded and the Court had reserved its decision the Defendant before incurring the costs of summoning witnesses should have applied to the Court for information as to whether the cause would be proceeded with on the main question or not, and the Court would have readily given the information.

POWERS OF COURT.—SIGNING OF MINUTES.

24 *July*, 1856

The Court authorises and deputes His Honour the Chief Justice to pronounce the sentences of the last and present Sessions, on Saturday 26th instant, or on such other day as His Honour may think proper, and further authorises His Honour the Chief Justice to resume this day's minutes.

5 *December,* 1856

REPORT OF ADMINISTRATOR GENERAL Minor KOERT.

A Minor under Guardianship of Court cannot marry without leave of Court.

The Court calls on the co-guardian for report why the minor Agnes Amelia was married without the sanction of the Court.

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Ex parte OUDKERK.

Power of Court in re Saffon Trust.

The Court having read the Petition and the Report of the Administrators of the estate of P. L. de Saffon, deceased, cannot grant the prayer thereof, and the Court is

surprised that the said Administrators should still be ignorant of their powers under the will of P. L. de Saffon, deceased, which does not authorise them to sell or lease the land in question without the leave of the Court.

ROSE, ET AL, *v.* BUCHANAN. *

5 December, 1856

Contract of purchase and sale—Delivery.

Circumstances under which contract has been held not complete.

Buchanan, a timber cutter, died, and an inventory of his estate was taken. It was agreed that some timber purchased by Plaintiffs then lying at Buchanan's waterside should be sold and Plaintiffs should claim on net proceeds. Plaintiffs had shipped part of timber and had sent one Crockwell to measure what had been shipped. The balance was not measured.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—We have discussed this Appeal fully because the purchase and sale relied upon by the Appellants was never completed.

2ndly. Because it is quite evident from the evidence that although there was a verbal agreement for the purchase or sale of about 15,000 c.f. of timber, yet the timber claimed by Appellant as part of that quantity was never delivered.

3rdly. Because from the evidence of Crockwell the agent of the Appellants the timber in question was never removed, marked, or in any way designated or pointed out as the timber purchased by them.

4thly. Because the place where the timber lay at the decease of Buchanan was his place of deposit where other timber after the loading of the "Monarch" was deposited and added to the timber claimed by Appellants.

5thly. Because from the foregoing provisoes it follows that the purchase or sale to Appellants was never completed by delivery of the timber in question either actual or symbolical, and consequently Appellants could not legally claim such timber as theirs.

* This is the first case where evidence taken by the Clerk or Registrar of Court is on record.

11 *December*, 1856

MARRIAT, *q.q.*, YATES *v.* ATKINSON.

Agency—Right of Agent to Purchase—Fraud.

A person who sells goods to ascertain price cannot purchase goods of his principal.

Fraud may be accomplished with honest intention.

The facts appear in the Judgment.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— The Court has given a sentence for the Plaintiff for the balance of amount claimed by him, with costs.

1stly. Because it appeared by the admission of the Defendant himself when under examination, that the timber which was sold at auction by his order to ascertain its value for the purpose of claiming the difference between the sum which it cost him at the time of its being loaded, and the sum which it was really worth, was bought in by order of the Defendant, in some other names than his own, but on his account and on his benefit.

2ndly. Because by selling for the purposes above stated the Defendant constituted himself the Agent of the Plaintiff *quo ad hoc* and being so constituted he became bound by the principle that an Agent cannot be seller and buyer at one and the same time.

3rdly. Because such being the fact the Defendant cannot be allowed to show by any other mode the diminished value of the timber as alleged by him and he has therefore no legal defence to the action.

4thly. Because to determine otherwise than the Court has done would be to encourage fraud upon absent parties, whereas the Court is bound in support of law and justice to discourage fraud by every means in its power.

5thly. The Court in using the word fraud does so in a legal sense and does not thereby intend to cast any imputation upon the Defendant who appears to have acted with an honest intention, though ignorantly.

GRANT *v.* SAYLE.

11 *December,* 1856.

Arrest—Reasonable or Probable Cause.

Circumstances under which plea of justification was allowed.

Defendant was manager of Pln. *Bath.* On 2nd August 1855 in presence of Plaintiff he paid out $115 out of a canister and the same night the canister with the balance of $1,249.64 was stolen. After missing the money he made enquiries and found out that Plaintiff was in the yard a few steps from his door. Defendant immediately wrote to the Inspector of Police and it transpired that Plaintiff was seen the same evening going to Berbice with a dark bag on his shoulder. Soon after, Defendant gave the police a charge on suspicion and Plaintiff was arrested. Defendant gave evidence on the charge which was dismissed by the Magistrate for want of sufficient evidence. Plaintiff was asked "at the time you made "the charge did you really in heart suspect Henry "Grant to be guilty of the charge." He replied, "I "had no malicious feeling against Henry Grant "when I made the charge, and had no other motive "than the information received."

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— The Court has rejected the claim of the Plaintiff in this instance.

1stly. Because the Defendant under all the circumstances detailed in evidence was justified in his suspicion and in imparting that suspicion to the Sergeant of Police.

2ndly. Because the Sergeant of Police who arrested the Plaintiff and took him to the Police station appears to have acted upon the order of the Inspector of Police and not upon the order or at the instance or request of the Defendant.

13 *December*, 1856.

REIS *v.* ARRIAS.

Arrest—Trespass—Joint Owners—Partnership.

A partner cannot arrest his co-partner for trespassing on the partnership property while the rights to the property and accounts have not been determined.

Plaintiff and Defendant were partners and owing to a dispute over the accounts and because Plaintiff could not carry on a drug business as he promised, he was warned off the premises, and on going on the premises after such warning, was arrested for trespass.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— The Court has given sentence against the Defendant and ordered him to pay to the Plaintiff $200 with costs.

1stly. Because let" the Defendant attempt to disguise or explain his conduct as he will, it is clear to our minds that he did cause the Plaintiff to be arrested.

2ndly. Because that arrest was illegal.

3rdly. Because let the Plaintiff twist and turn as he will, there was a partnership existing between him and the Defendant from 17th or 18th December 1855 to 25th February 1856, and for anything that Defendant knew to the contrary up to the time Plaintiff was arrested.

4thly. Because the place in which the Plaintiff was arrested was the place in which the partnership business was conducted.

5thly. Because to such place each of the partners had a right of access.

6thly. Because even had the partnership ceased on 2nd February yet the joint property had not been disposed of, its accounts had not been settled and adjusted and the right of each party to be with the joint property in the premises which were on joint account had not been determined.

7thly. Because the premises leased by one in his own name, with the privity and consent of the other, did not

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alter the position of either of the partners as partner to the other.

8thly. Because although the Defendant had acted illegally, yet the Plaintiff acted provokingly towards the Defendant and deceptively, inasmuch as he undertook to join in carrying on a business of which he knew nothing, and to keep books which he did not keep, and to render assistance, which it appears he never did render.

Ex parte SMITH, *in re* MINORS DE WEVER.

15 *December,*
1856.

Power of Court—Letters of Decree—Trust Property.

The Court has power to cancel Letters of Decree already granted.

The Court will not allow minors' property to be sold for taxes.

ARRINDELL, C.J., and BEETE and ALEXANDER. J.J.:— His Honour the Chief Justice laid over two petitions for Letters of Decree from Harriett McLean for N 1/2 and S 1/2 lot 291 S. Cumingsburg sold at the instance of Receiver of Town Taxes on 1st September 1856 with orders dated 5th November 1856, granting the prayers thereof. His Honour had granted such petitions in ignorance of the fact and brought to their notice of a petition having been presented to the Court on 24th November 1855 by M. Smith as guardian of the said Henrietta DeWever sole child and heiress of her deceased parents George David DeWever and Winifred DeWever born Smith and as such guardian having adiated in the name and on behalf of the minor to the said estate of the said G. D. DeWever and W. DeWever born Smith both deceased praying that this Court would be pleased to authorise and permit him the petitioner as guardian of the minor D. DeWever to sell and dispose of the aforesaid Lot 291 for the benefit of said minor and which petition was referred to the Administrator General of Demerara and Essequebo for report to His Honour the Chief Justice during non-session but that no such report was ever sent in by the Administrator General.

The Court now orders the said William Smith as such

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guardian as aforesaid to report to this Court as a proper guardian of the minor D. DeWever why he has consented to allow the property in question to be sold at Execution sale for Taxes.

15 *December*, 1856

RE ADMINISTRATOR GENERAL *q.q.*, HICK.

Costs.

The Court refers back this report to the Administrator General to report why he paid the Bills of costs of Messrs. Gilbert and Watson, Attorneys-at-Law without the same having been previously taxed.

25 *January,* 1857

DE COVERDEN, *et al, v.* HAREL.

Proof of Documentary Evidence—Lease.

Trounsel Gilbert for Plaintiffs.

Lucie Smith for Defendant.

Gilbert, tendered lease dated 15th November 1821.

Smith objected on the ground that execution ought to be proved.

Gilbert.—Lease being 30 years old proves itself, *Roscoe's Dig. Law of Evidence,* 8 ed., p. 109.

Smith.—Nothing to show it is connected with the Defendant.

Document 30 years old proves itself.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— The Court admits the document because, 1stly, it was 35 years old and upwards. 2ndly it was set out in the pleadings as a document relied upon by the Plaintiffs.

Gilbert tendered authentic copy of Will.

Smith.—Although it appears to have been signed upwards of 30 years ago, it does not appear to have been legally executed.

Gilbert.—The Will is certified to have been opened, it is a sealed Will and the superscription is that it was duly deposited and duly signed.

Idem.

* *Curia.*—The Court having examined the document and finding that it was a copy duly authenticated of an

* See Gollard *v.* Administrator General, May 1893, on the points here decided.

original document, that is to say, of the original Will, of the act of deposit, and of the act of opening all duly deposited in the Office of the Registrar formerly Secretary of Demerary and Essequebo admitted the document.

1stly. Because it appeared from the authentic copy that the original Will was dated 6th June 1792, upwards of 30 years ago.

2ndly. That the act of the deposit dated 23rd June 1792 was not only upwards of 30 years old, but was passed before the Secretary's, now Registrar's Office before a Sworn Clerk and Notary Public and two witnesses and therefore was receivable in evidence without further proof.

3rdly. That the act of opening dated 20th July 1798 was not only upwards of 30 years but was proved in the Secretary's now Registrar's Office before a Sworn Clerk and Notary Public and two witnesses, and therefore was receivable in evidence.

4thly. Because Ordinances 49 of 1834 sec. 3, and 20 of 1844 sec. 24, rendered these authentic copies as admissible as if the originals were produced.

5thly. Because if the originals' were produced they being 30 years old would not require to be proved and therefore the authentic copies of them were sufficient.

Plaintiffs tender authentic copy of Will of R. Daly.

Objections. No proof of Daly's death, previous Will not accounted for, no proof that Daly's wife was alive, the ante nuptial contract mentioned in Will, not produced.

The Court admitted the documents partly on grounds stated above, and on the following additional grounds:—

1. With respect to the death of R. Daly the Will was admitted in the lease which the Defendant as deriving right from the Lessee could not dispute.

2. With respect to the previous Will not being accounted for, that was of no consequence as the Testator had a right under the Dutch Law at any time during the lifetime of himself and his wife to revoke wholly or partially his joint last Will and Testament.

3. That as the Will was produced merely to prove that V. A. Heyliger was the guardian of the children of R. Daly as he professed himself by the lease to be, the Court

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saw no necessity at that stage of the case for proof of the death of R. Daly's wife or the production of the former Will.

Plaintiffs tendered extract Register of Burial Objected—no memorandum of it endorsed on back of Claim and Demand.

Endorsement of qualification on claim and demand.

Court admits document because. 1. Rule requiring memorandum of documents to be endorsed on the back of Claim and Demand, related to the documents showing qualification such as powers of Attorney, Wills, Letters of Administration, &c, and not to documentary evidence in support of the qualification. 2. Because the rule alluded to was only applicable to exceptions of non-qualification and not to general allegations in a claim and demand.

Declarations of Pica Broque, *et al,* tendered.

Legalisation by British Consul makes document *ex facie* admissible.

Objection.—That British Consul in Paris has no authority to receive or legalise a declaration to be produced in a case tried in an English Colony. 2—If he had such authority, document must be legalised under his hand and seal. 3—Declarations by Foreigners cannot be received in evidence here.

Admitted, on the grounds:—

1.—That they were duly made before British Consul. 2—That they were certified under his hand and seal. 3— That the Court was not aware of any law which precluded a foreigner from giving evidence in a case in any manner in which a British subject could legally give evidence. Exemplification of Will of R. Joseph John E. Daly with declaration of William Neve tendered.

Exemplification of Will admissible.

Objections.—1. Same as to Will of J. B. Daly. 2. Will purports to be of John Daly, suit is by Johann. 3. Proof of exemplification was by affidavit of Neve, whereas it ought to be by declaration under 5 and 6 W. 4 c.62 s. 75.

Held:—“The Court finding the exemplification to “be under the seal of the prerogative Court of the Arch-“bishop of Canterbury” and that the affidavit alluded to was superfluous and unnecessary, admitted the document.

Power of Attorney of J. B. Wright as Executor to

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Will of R. J. J. E. Daly, to H. B. Bascom, tendered. Objected to, erasure in material point.

Erasures if not material admissible.

Admitted:—The Court, looking at the document, said that the name originally Johann throughout turned into John, there being eventually no intention of concealment; that the word "other" was crossed with marks of a "pen" and immediately over it written the words "of the"; that the words "in the Colony against me" had been interlined and that the word "they" evidently surplusage was marked out, none of which erasures and connections altering or varying the sense, or in any way material, but the Court moreover was of opinion that the presumption of these corrections having been made at the time of execution, was so strong as to enable them to believe such was the fact; see *Starkie Ev.,* 8 ed., p. 500, note f.

Declaration before British Consul admissible.

Evidence of foreigners admissible in Court of this Colony if taken legally.

Declaration tendered.

Objection:—1. That Consul had no authority under Act of Parliament as British Consul in Paris to receive or legalise a declaration. 2. If he had such authority, document must be legalised under hand and seal. 3. Not purporting to be so legalised. 4. Declarations by Foreigners not admissible in this Colony. 5. Erasures in material parts of declaration.

Held. The Court upon examining the declarations found. 1. That they were duly made before T. Rieckford, H. M. Consul at Paris, 2. That they were duly certified under hand and seal. 3. That the Court was not aware of any law which prevented a Foreigner from giving evidence in a cause in any manner which a British Subject could legally give evidence.

Foreign Certificate of marriage admissible.

Document proving marriage of Howel and Boode.

Objections. 1. If statement of W 4 applied to Foreigners, an absurd use would be made of it. 2. Not evidence of a marriage previous to Act. 3. Not authenticated by seal of the Judge. 4. Legalisation of the signatures did not come within 14 and 15 Vic, 5. 5. That a certificate of this description was not admissible in evidence, to prove the validity of a foreign marriage. 6. That such validity could only be determined by the evidence of persons conversant with the law of the

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country in which the marriage was celebrated; *Starkie* Ev. 175. *Dalrymple* v. *Dalrymple,* 2, *Haggard's Rep.* 8. 1.

The Court admitted the document. 1. Because if the declaration was legally made and certified and transmitted under 5 and 6, W. 4, c. 62, s. 15, it mattered not whether the person who made the declaration was a Foreigner or not. 2. That in the declaration of A. Montemort already admitted was the following passage "and I "declare that I know and was well acquainted with "Sophie Eulalie Howel now deceased, late the wife of "James V. Howel, Esquire, at the city of Paris, and that "the said Sophie Eulalie Howel is or was another of the "daughters of the said Guston Boode and Catherine his "wife and is or was the identical person which is named "and referred to as Sophia Eulalie Boode in the paper "writing hereunto annexed marked B" (document tendered) and that the contents of this was proved by the declaration. 3. That such document being an extract from the Register of marriages of the community of Dussuldorf deposited in the Secretary's Office of the Registrar district Court at Dussuldorf and legalised under the hand and seal of the President (the Chief Judge) of that Court was within the provisions where legal proof of marriage is by certificate admissible under 14 and 15, Vic. c. 99, s. 7.

Certificate of Marriage tendered.

Objections. 1. *Taylor on Evidence,* 1051. No British Ambassador could solemnize marriages in his own residence in Paris. 2. Although marriage might be legal under Act of Parliament, the question was, was certificate evidence of marriage, it having been solemnized before passing of the Act. 3. If marriage took place after publication of Act, certificate might be admissible. 4. It would be proved there was authority to keep Register in Paris.

Document withdrawn.

Tendered afresh. For Plaintiff. 3 Jurist, 103; *Clarke* v. *Connelly,* as. published in 1842 or 1843, s. 20 of 12 and 13 Vic. c. 68 gives validity to register. If register is valid, copy must be valid; *Athlone Peerage* case not applicable. For Defendant: Statute does not make cer-

tificate evidence of marriage. 2. *Taylor on Evidence,* 1051, not applicable. 3. Statute made marriages abroad valid. 4. Question is, whether certificate is evidence of marriage. *Starkie* 4 Ed. 293.

Court held:—That the marriage having been made legal by the 12 and 13 Vic, c. 68., s. 20, it was competent to the Plaintiffs to give the best evidence of it that the nature of the case admitted. That the declarations laid over referred to that certificate.

Certificate of death of E. Ely.

Foreign Certificate of death admissible.

Objection. A copy of a Foreign register of death is no proof that register is required to be kept by the law of the country.

The Court admitted the document. 1. Because declaration of A. Montemort refers to it and was the real gist of the document which was the death of E. Ely and his identity with the late husband of Mrs. Ely. 2. Because the document purported to be and was an authentic copy of a legal document filed or deposited in a Court of Justice in a Foreign State, and purported to be sealed with the Seal of a foreign Court 14 and 15 Vic. c. 99, s. 7.

Copy Register of death of S. J. Howel.

Objected. 1. Not legalised by competent authority. 2. Not proved Register was required to be kept by French law. 3. Certificate of death not a legal document under meaning of 14 and 15 Vic. c. 99. 4. No proof of identity. 5. Certificate relates to wife of V. J. Howel.

Admitted. 1. Because declaration of A. Montemort explained apparent discrepancy by proving the identity of the party. 2. Because certificate was annexed to declaration and therein referred to, and its contents proved to be correct. 3. Because it purported to be a copy of a legal document filed or deposited in a Foreign Court and authenticated by the Act of that Court: 14 and 15 Vic. c. 99, s. 7.

Power of Attorney tendered.

Objection. 1. By several parties. 2. No proof of legalization. 3. No proof of marriage of signers of Power. 4. Legalization of British Consul insufficient. 5. Executed by Foreigners in Paris and should have been executed according to the laws of France and not of England.

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6. Act of 5 and 6 W. IV does not apply to Foreigners. 7. Not endorsed on claim and demand, although he claims as notarial guardian. *Taylor, Vol.* 2. *Burge Vol.* 3.1003. *Story conf. laws,* 449 *et seq., Grotius Herbert trans.* 35.

Admitted. Because execution was duly proved by declaration already referred to. Ord. 21 of year 1845, s. 5 and 114. With respect to the guardianship of M. Howel, the Court considered that it was not the proper time to urge an objection on that point.

Antenuptial Contract tendered.

Certified copy of Ant. Contract admissible.

Objected to. 1. Before receipt, the law of the place where the same was executed must be proved. 2. Not properly legalized, it was a copy by an *attache.* 3. Not notarial copy.

Admitted. The Court finds that it was a notarial copy of a contract or agreement passed before the same Notary and witnesses and that his signature and seal were certified and legalized

The Court therefore held the document admissible under Ord. 21 of 1845 s.s. 5 and 11.

Foreign Certificate of death admissible.

Certificate of death tendered.

Objection, no proof of Register was kept &c.

The Court admitted the document because it was certified by the President of the Tribunal of the first nature at the Hague and under the seal of said Tribunal, that the signature was that of Mr. Van de Uypeise, Doctor of Laws, Magistrate charged with the Functions of the Civil administration of that city, and that therefore credit ought to be given to the same as well in judicature as thereout, which showed that the Register from which the extract was taken was kept under and by virtue of the Laws of Holland.

*Judgement on case.
Lessee cannot dispute his landlord's title except landlord adduces evidence to rebut his own title.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— The Court having examined all the evidence feels obliged to grant an absolution with compensation of costs for the following amongst other reasons.

1. Because although the Court admitted the doctrine laid down by the Plaintiffs that it is not open to the Defendant who denied his title, for the original Lessee to dispute the title of the Lessees, see *Addison on the Law of Contracts* 392, *and Voet ad Pand l* 19 *p* 2 s. 32, yet that

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doctrine could not prevail, whereas in this instance as it should presently show, the Plaintiffs themselves adduced evidence to defeat their own title and subvert their own claim.

2. Because the documents filed by the Plaintiffs in support of the validity of the lease have had a contrary effect.

Effect of words "as representing."

3. Because admitting that the letters annexed to the signatures of 1st 2nd and 3rd parties to the lease had been sufficiently explained by the evidence in the cause (and which evidence was admissible) see *Starkie on evidence* 4 ed. 701 709 710 to mean "as representing" or "as Attorney of," yet the document filed to prove that the parties who signed were duly authorized did not prove a due authority.

4. Because if it be urged that at the date of the lease the Act of donation of 8 Sept 1812 was in force, that document was not produced and the Court was therefore ignorant of its contents.

5. Because the act of donation of 7 May 1823 filed in support of the lease of 15 Nov. 1821 was passed and executed long after the lease and does not recognize nor even mention the lease and cannot therefore be held as affecting it in any way whatever.

Attorney must bind his principal according to mandate.

6. Because the document bearing date 1st May 1818 filed as a power of Attorney was only a copy of a Power of Attorney purporting to have been passed in London and not agreeable to the forms of English Law of the Colony then (say 1813) in force (*Voet ad Pand., L.* 22, *tit.* 4, s. 8), was not receivable in evidence.

7. Because even admitting that the document was valid as a Power of Attorney, then the lease ought to have been executed by the Attorney P. C. Ouckama on the behalf of Mr. and Mrs. Rouysches or of Mr. Rouysches, *nomine expieas* and not as was the case on behalf of Mr. Rouysches alone in his own right.

Power of Attorney to be admissible must be in form.

Because the document bearing date 22nd June 1821 filed as a Power of Attorney from Mr. and Mrs. Boode purports to have been made and executed in Paris, yet its form was not agreeable to English Law, although there appears to have been two witnesses, yet the execution was not

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proved by either of those witnesses, nor was the attestation by the Consul General of the due execution of the Power in the manner and form made sufficient.

If power of Attorney be joint, both mandatories must act.

9. Because admitting that the Power was duly executed yet it was a power upon two parties, viz. P. C. Ouckama and E. G. Boode the younger "jointly and together" to represent Mr. and Mrs. Boode, and because that such was the intention and meaning of the parties granting the power was evident from the following passage in the Power viz "and we do hereby expressly de-"clare our will and meaning to be, that our said son and "Attorney E. G. Boode the younger shall not be deemed "by the present Power of Attorney as authorised or em-"powered under any circumstances to act in our said "affairs without the special advice and approbation of "the said P. C. Ouckama but that the proceedings and "directions of our said Attornies shall as far as possible "be joint and coincident upon allowances", yet the lease was signed by P. C. Ouckama for self and E. G. Boode and in *q.q.* E. G. Boode, and there was no reason shown or assigned for the absence of E. G. Boode from the other Attorney nor was there any evidence to show that P. C. Ouckama was authorised to sign for him as one of the Attorneys of Mr. and Mrs. Boode.

Non-joinder.

10. Because from the Will of Joseph Bourda it was clear that the interest in the Vlissingen was the property of Mrs. Boode born Bourda, and from the Power of Attorney that it was treated as such both by her husband and herself and yet the lease was executed by P. C. Ouckama as the Attorney of E. G. Boode in his own right and not as it ought to have been in the name of both Mr. and Mrs. Boode, or at least his named *nomine exoris.*

11. Because from the following reasons it appears to the Court that there never had been a duly executed lease, and that therefore the Plaintiffs were not entitled to receive from the Defendant under and by virtue of the document produced as a lease the rent of the year ending the 15th Nov. 1842, nor could the Defendant be liable for rent for the subsequent year on the ground that he was holding over and under the terms of that lease.

12. Because if it be said that the Defendant had paid

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rent from 1830 to 1841 and that his doing so was an acquiescence and homologation of the lease and a recognition of its validity, the evidence showed that the Defendant never had a copy of the lease (unless it would be inferred from the evidence that once a copy of it was served upon him with a claim and demand in a suit which terminated in his favour) that he had asked for a sight of the original which was refused, that the lease was not recorded, as it had been agreed to be, and although the original lessee bound himself to record it, the lessors should have seen that it was so recorded; and that although he the Defendant had paid rent yet he always paid it to a person styling himself *q.q.* the heirs of Bourda, and not to any one holding himself out as representing the lessors, their heirs, Executors and Assignees, and which could be seen by reference to the bundle of receipts filed.

Where payment of rent does not debar tenant from disputing landlord's title.

13. Because the reason lastly assigned would be strengthened by reference to documents filed, all of which admitted and recognized the heirs of Bourda to be the proprietors of the lots in question, but who those heirs were or whom N. A. Boode represented when he signed himself *q.q.* Heirs of Bourda, did not appear.

Non-joinder.

14. Because, moreover, it appeared to the Court that Maria Daly ought to have been a party to the document of the 15th Dec. 1821 termed a lease, for she was clearly entitled at that time under her father's Will, to one third of the Vlissingen, its rents and profits, during her life. That she had never at any time parted with that interest by transport, the only mode of divesting herself of her interest, and that even had such been the case, yet as the provisional agreement of the 16th July 1521 recognized and gave the rents issues and profits of her third share of Vlissingen to her seven children, the whole of them ought to have been parties to the lease, whereas two only were parties, inasmuch as at the time of the execution of the lease Stephen Craven who signed for them, represented only the two eldest, and neither her nor any one represented the five others.

15. Because the signature of Stephen Craven to the lease was irregular in this, that he signed himself as *q.q.* V.A. Heyliger *q.q.* the heirs of R. B. Daly, whereas Heyliger

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at the time evidently believed himself to be representing only two of the heirs of R. B. Daly, and no more, and because the parties whom Heyliger believed himself to be representing at that time had no right or any interest in the Vlissingen as heirs of R. B. Daly, their right, if any, being derived from their mother then living under the Act of donation of the 18th September 1812 not produced and the provisional agreement of the 16th July 1821.

Illegitimacy must be specifically proved.

16. Because if it be urged that three of the children were illegitimate and therefore could not take under the Grandfather's Will, yet there was no proof of their illegitimacy, the declaration of the mother by her Attorney in the provisional agreement of the 16th July 1821 and in the *Act* of donation of the 7th May 1823 not being sufficient to bastardize her off-spring.

17. Because if the declarations of the mother were sufficient yet the declarations were made by her Attorney and there was no evidence produced to show that the Attorney had been specially authorized by her to make such declarations.

18. Because even though such declarations were made by her expressed authority, yet they would not be received in evidence to bastardize her off-spring the strong presumption being, as non-access was not proved, that the three children were the children of the husband of the *man quem emptia demonstrant,* he not having died as is stated in the very documents until the 1st Feb. 1818.

19. Because even admitting that the three children were illegitimate yet there can be no doubt that there were two, other than the two who were parties to the lease whose legitimacy was admitted by all, and whose interests ought to have been protected by their being made parties to the lease.

20. Because even admitting that Rouysches and Bourda and the guardian of the two eldest children of Maria Daly were duly authorized to execute a lease of the property in question yet it was quite clear that the two first persons could only have executed the lease for the term of their lives, and that the third could only have executed it for the term of Mary Daly's life (admitting for argument sake that she had permitted the execution of it by

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the Guardian of two of her children) and that none of those persons had any power or authority to bind their heirs as they attempted to do by that lease, inasmuch as the heirs of Rouysches and Boode as such, would never have any right to the property, the right to two-thirds of which was limited by the Will of J. Boode to the heirs of E. Rouysches born Bourda, and the remaining one-third to the heirs of Maria Daly born Bourda, who had more children than the two who were parties by their Guardian to the lease.

21. Because admitting that the lease did not labour under the defects heretofore pointed out, yet Mrs Rouysches born Bourda, and both the children of Mrs. Maria Daly, parties to the lease being dead, their respective interests did not descend to their heirs but became vested in the persons entitled to the property under the Will of Joseph Bourda deceased.

22. Because it was clear that at the time of the institution of the suit Mr. Rouysches, Mr. and Mrs. Boode, Maria Daly and the two of her children who were parties to the lease were all dead, and that all the parties to the action including Mrs. Rouysches de Coverden herself had no right to sue as representing the lessors nor any of them being heirs to any of the lessors in respect to the persons in question and therefore not deriving or intending any right of action from the lessors against the lessee under the lease upon which the action is founded.

23. Because it appeared to the Court that if as against the Defendant the Plaintiffs had any right at all, it could only be as heirs under the last Will and Testament of Joseph Boode deceased.

24. Because it appeared to the Court that all parties interested were not proved in the suit, and that there was therefore a non-joinder of parties.

25. Because although the Court may not intrude into or take any knowledge of its own, of facts not proved, yet when facts are thrown or tendered to it by either party, the Court cannot repulse the evidence of such facts, when in doing so the Court would be acting to the injury of parties absent.

26. Because the Court following out the principle

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enunciated in the last paragraph, found by the document already mentioned and also by the Will of R. J. C. E. Daly that there were two persons, viz., Maria or Marie Mariasine Daly and Jane E. D. Daly interested in the sums sought to be recovered by the action and who were not parties thereto.

27. Because were it to be urged that the interest of the two parties lastly named were represented by the Executor of R. J. and E. Daly who decreed and bequeathed to them all his share in and to Pln. Vlissingen inherited by Maria Daly from her father Joseph Bourda, the Court would have been still of opinion that the quantity of R. J. C. E. Daly's interest in and to that third was not shown by the evidence adduced, and that he was not at the time of his death entitled to the whole of the rents proceeding from his deceased mother's one-third share or part of Vlissingen.

Transfer and cession of action to be specially pleaded.

28. Because by an indenture dated 13th Dec. 1847 between the same E. D. Daly and R. J. C. V. Daly, and which was not formerly filed but duly executed and legalized and fastened up with a number of other documents, and handed into Court, it was shown that V. E. Daly had assigned his share of the rents sued for to R. J. V. E. Daly for a valuable consideration, and yet no mention was made in the Rubric of the case or elsewhere, as there ought to have been of such assignment, transfer and cession of action. *Voet l.* 4, *tit.* 13, *s.* 4.

Non-joinder.

29. Because by a Power of Attorney it appeared that M. M. Daly not only claimed to be interested in the rents in question, but that by the said Power of Attorney she appointed H. S. Bascom named in the Rubric of the cause to be her Attorney and to represent and protect her interests and that therefore she ought to have been made a patty to the action, and which was not done.

30. Because even could it be urged that Maria M. Daly had in her power of Attorney to H. S. Bascom acquiesced in or homologated the Act of donation of 7th May 1823 and thereby admitted her illegitimacy which would in terms of the Will of Joseph Bourda prevent her inheriting from her grandfather through her mother any portion of the third of Pln. Vlissingen devised to her mother for

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life, yet she was clearly entitled under the last mentioned Act of donation to a portion of the rents of the said one third of Vlissingen during the life-time of her mother who did not die till April 1849 and that consequently she was entitled to a portion of the rents sued for which had accrued from the 15th November 1841 to some day in April 1849.

31. Because even could it be urged that M. M. Daly by Act of donation was to have had a mere allowance out of the rents, issues, and profits of her mother's third during her mother's life, and that therefore she (M. M. Daly) had no right to the administration of the property, yet as the Court saw that as there was no representative of M. M. Daly and no administration of her share in the property appointed by any one, the said M. M. Daly would here have a right under the Act of Donation to receive her portion of the rents and to join in the action for the recovery of the same.

Compensation of costs.

The Court has given compensation of costs because the Plaintiffs not having succeeded in their action were clearly not entitled to costs from the Defendant.

1. Because the Plaintiffs had shown a great want of diligence in asserting their rights and had thereby allowed the Defendant to act as he had done.

2. Because the Defendant although he had been fortunate in being absolved of this instance had very little merit on his side.

3. Because the Defendant had been in possession of the property since 1827, 1828 and 1829 according to his own statement, during a part of which time he had sublet the premises and received rent, and during the rest of the time had enjoyed the use and occupation of the premises.

4. Because the Defendant has since 1841 been in the possession of property acknowledged by him to belong to other persons, without paying rent and without consigning it to the Registry of Court and saying to each person who had attempted to demand rent or lay a claim to the premises " you are not entitled," and yet not showing the slightest disposition to discover who were the parties entitled.

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5. Because the Defendant had in his defence evinced a determination to keep possession of the property in question as long as he could without acknowledging any one as the owner, and without paying rent to any one although he admitted that he got possession of the property as leasehold.

6. Because as the Defendant keeps possession of another's property without paying anything for the use of the same, he has no right to expect costs to be paid to him by some of the rightful owners who have miscarried upon legal points in their attempt to establish their rights.

9 *February,* 1855

SHURY, *q.q.,* SHURY *v.* CANSIUS.

Pleading—Mandament of Immisse.

Answer must contain prayer for rejecting the Plaintiff's case.

ARRINDELL, C. J., BEETE, J. and ALEXANDER, J.:—The Court having heard the parties and having read and examined the documents and vouchers filed and produced in this matter, and observing that the answer filed does not include anything on which the Court can found a rejection of the mandament of *immisse,* quashes the proceedings from answer filed, including the same with compensation of costs.

12 *February,*
1855

Re ELDER.

Absolution—Appeal from rejection of evidence.

No appeal allowed for rejecting evidence.

ARRINDELL, C.J., and BEETE and ALEXANDER. J.J.:— The Court considering that the sentence sought to be appealed from is an absolution of the instance not having the effect of a final or definite sentence, and that the ground assigned for appeal, namely a rejection of evidence by the Court, can be remedied by the institution of another suit in which suit a claim and demand can be framed so as to render admissible the evidence rejected, cannot grant the prayer of this petition

.

13 *February,*
1855

Re MINUTES.

Powers of the Court—Minutes.

The February Session of the Court was then declared terminated and closed, and the Court authorized His Honour the Chief Justice to resume and sign these minutes. On 14th February the Chief Justice alone signed the minutes, the Registrar countersigning the same. Idem, May Session (4th May 1855).

A ______ *v*. B ________. (The parties being alive the real names are not given).

7 May, 1855

Crim Con.

Order of the Privy Council laid over upholding a decision of the Court here granting damages against C __________ for having debauched, and carnally known and had adulterous connection with the wife of A____________. A suit for separation was afterwards instituted, and sentence in favour of the husband pronounced 7th May 1856.

REPORT OF THE AUDITOR GENERAL ON THE BOOKS OF THE ADMINISTRATOR GENERAL.

7 *May,* 1855

Sale of Produce.

Produce of an estate to be sold in the colony unless bound by mortgage.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— The Court observing that in the report of the Auditor General it is stated that 68 hogsheads of sugar have been delivered to Rose & Duff for shipment, and valued at $60 a hogshead until sale appears ($4,080), disapproves of this transaction, and will not sanction or pass the accounts until the $4,080 are made good by the Administrator General. The Court further states that it will not allow or sanction any similar transaction. The Administrator General is bound to sell all produce for cash and cash only

REPORT OF AUDITOR GENERAL ON THE BOOKS OF THE ADMINISTRATOR GENERAL *in re* HICKS.

7 *May,* 1855

Minors' interests—Adiation by the Administrator General.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— The Court refers this matter to the Administrator General

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of Berbice to state why he has not adiated the estate of Edward Hicks on behalf of the minors, and taken over the estate from the Executors by virtue of such adiation.

22 *January*, 1857.

DE COVERDEN *et al v.* HAREL.

Lease—light of Renewal—Determination of Contract—Pleading—Non-joinder—Pronounciation of Judgment.

Plaintiff cannot give evidence of representative co-party unless averred in pleadings.

All parties to the lease or their heirs &c. must join for recovery under the lease.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— The Plaintiffs and Defendant in this case are the same as the Plaintiffs and Defendant in case 7. In that cause they sought to recover arrears of rent of certain premises in Columbia district in the city of Georgetown, known on Hadfield's chart as "Marshall's Hotel," but in fact known as lots 5 and 13.

In this case as in the other the whole of the agreement of lease of 15th Nov. 1821 is set out. The Plaintiffs then as in the other case, state whom they considered the parties to that lease and the manner in which the Plaintiffs derive their title to this property. They next aver that the demised premises with the appurtenances by assignment thereof then legally made came to and vested in the Defendant. That he entered into and upon all and singular the demised premises and that the Defendant under and in virtue of the said lease and of the said assignment continued in the possession of the pro-

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perty so demised until the expiration of the lease on 15th Nov. 1842, and that the Defendant has ever since continued and still continues upon possession of the property so demised and the buildings thereon. The Plaintiffs then aver that ever since the expiration of the said lease they have been ready and willing to enter into and have repeatedly offered to the Defendant a renewal of the same upon the terms and conditions as contained in the said lease but that the Defendant has neglected and refused and still neglects and refuses to accept such renewal.

The Plaintiffs further aver that after such refusal on the part of the Defendant to renew the said lease, to wit, on 15th Nov 1345, they gave the Defendant due notice of and called upon him to proceed with them to an appraisement of the buildings on said land, and that the Defendant took no notice of such notice and call.

The Plaintiffs then aver that on 29th Nov. 1845, they gave Defendant a notice in writing in the words and figures set forth in the claim and demand. It is unnecessary to recite out this notice, but it is necessary to say that the notice is founded in article 4 of the lease which after providing that the building erected or to be erected on the said lot should be the property of the lessee, and that he should have the preference and refusal of a renewal at the expiration of the lease, goes on to say "but in case no "further terms are agreed on or the lessees or his successors should object to renewing this lease, then the lessors at the expiration of the granted term, shall take "over to themselves all such buildings at half their value "or amount thereof, to be ascertained by two persons, "one to be chosen by either party such half value or "amount to be payable by annual instalments at the rate "of 2000 guilders per annum for cash whole lot or less in "proportion if it be only part of a whole lot."

The Plaintiffs aver that their appraiser duly attended at time and place specified in the said notice to act on the part of the Plaintiffs in pursuance of said notice and in accordance with article 4 of the said lease, but that no person was then and there present on the part of the Defendant to act in appraising the said buildings.

The Plaintiffs then aver that the Defendant has hither-

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to wholly refused to deliver to the Plaintiffs possession of the said lot or portion of land and to proceed to the appraisement of the buildings thereon and to deliver the said buildings to the Plaintiffs in pursuance of article 4 of said lease.

The Plaintiffs lastly aver that by reason of the premises they are entitled to demand and conclude as they do thereby demand and conclude that the Defendant by sentence of this Hon. Court be condemned to deliver to them possession of the said premises and also to appoint a person to join another person to be appointed by the Plaintiffs for the purpose of appraising and in such manner to proceed with the Plaintiffs to the appraisement of the buildings now on the said lots or portion of land and immediately on such appraisement to deliver to the Plaintiffs possession of the said buildings, the Plaintiffs binding themselves and being bound to pay to the Defendant half the amount of the value so appraised in annual instalments at the rate of $666. 66f yearly the first payment to be made at the expiration of one year from the date of the delivery of the said buildings.

The Defendant in his conclusion of exceptions and answer specifically denied every allegation in the claim and demand.

When this cause came on for hearing the Counsel of the Plaintiffs prepared to put in all the evidence in cause No. 7 (*ante*) except the Will of George Bourda Daly and proof of the intestancy of R. B. Daly and Kitty Daly. He also proposes that *the viva voce* evidence given in the former case should be admitted in this case.

The Counsel for the Defendant stated that he had no objection to the documentary evidence being put in subject to all objections stated in the case that Mr. Bascom's evidence been also admitted but that he could not go further. He also objected to the declarations respecting the relationship were not of the parties to one another on the ground that the declarants were not connections, and he cited *Roscoe Evidence,* 8. *ed.* 36 and 32, and authorities there cited.

The Defendant and several other persons were examined, but their examinations related principally

to the notices of appraisement and the non-attendance of Defendant in pursuance of such notices.

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The evidence solicited from these witnesses however has had no effect upon the Court in arriving at the sentence given.

The Court gave the sentence of an absolution of the instance with compensation of costs.

1. For the reasons set forth and stated in cause No 7.

2. Because if the reasons assigned for an absolution of the instance in that case were good and sufficient, they would most certainly be good and sufficient for a similar sentence in this case.

3. Because the Plaintiffs in this case claim possession of the land unconditionally, and of the buildings on certain conditions as deriving a right from the lessors mention in the lease of 15th Nov. 1821, yet with the exception of T. B. Wright as Executor of R. J. C. E. Daly, have failed to show that they are the heirs or Executors or Administrators or assignees of the lessors.

4. Because if the Plaintiffs say that they are the heirs of J. Bourda, deceased, they have not so described themselves in the claim and demand.

5. Because if even though they do in their notice of 29th Nov. 1855 designate the lessors as the proprietors of Pln. Vlissingen, yet it is clear from the evidence in both cases and from the reasons of sentence assigned in cause No. 7, that the lessors were not at the date of the lease proprietors of Pin. Vlissingen.

6. Because if they sue as the proprietors of the said plantation, they will at least have to account for the absence of Nancy, Joseph Charles, and Jane Lodewyk, three of the heirs mentioned in the Will of Joseph Bourda, deceased, and to join Marie Mariasine and Eugene Henry Daly in the proceedings.

22 *January,* 1857.

Pronouncing judgment Practice

The Court though it had come to a decision upon each of the numerous points of law and evidence raised on these proceedings, finds that it has been impossible to reduce into writing their reasons for the foregoing sentences, reserves the pronounciation thereof until such reasons are reduced into writing, and as soon as the same shall be so reduced to writing, the Court deputes

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the Chief Justice, and in the event of his absence, the 1st Puisne Judge to pronounce such sentences and record such reasons at such time and place as such Judge shall think proper.

The Court authorised His Honour the Chief Justice to resume and sign the minutes.

27 *March*, 1857.

RE ADMINISTRATOR GENERAL—NEITSCHER.

Power of Court as upper Guardian.

Petitioner, a native of Holland, petitioned for leave to sell some *immobilia* as far as the share or interest of his minor children by his first wife for their legitimate maternal portion is concerned.

Lucie Smith for Petitioner.

Administrator General for minors as Guardian *ad hoc*.

Roney for minors.

Petitioner was sworn. He held a Commission as Lieutenant in the Dutch Navy: retired but with right to wear his uniform. He was wishful of selling out to settle in Holland and superintend the education of the children who will under the fundamental law of Holland, claim their rights as subjects of Holland, they being considered children of Dutch parents born abroad. Some of the children were in Holland. He had no objection to the proceedings been sent home to Guelderland.

Roney for minors:—Advantage of minors that property should be sold. Minors will be sufficiently protected if the proceedings are sent to Court of Holland where minors reside, and leave it to such. Court to adopt in conjunction with the father, such measures as it may consider necessary and proper for securing the interest in the property sold.

ARRINDELL, C. J., and BEETE and ALEXANDER, J. J., made the order and directed the Registrar to forward an authentic extract of these proceedings to the Provincial Court of Guelderland, the Court of the domicile of the said children, for the information of that Court.

DE JONGE *v.* MENDONCA.

8 *April*, 1857.

Custom of Water Street.

Where the custom of the street is a good one the Court will give effect to the same.

A vessel having arrived to Plaintiff with corn meal, Defendant bought 50 barrels and allowed them to remain in Plaintiff's store. Other vessels were coming to Plaintiff and Defendant was told a week after sale to take his meal as room was required for the other cargo. Five months after Defendant sent and took away a couple of barrels which turned out sour and Plaintiff insisted on his paying for the lot whether sour or no. Defendant's flour was in Plaintiff's store at time of suit. There was no entry of sale in Defendant's pass book at the time but there was one in Plaintiff's books. The flour sampled by Defendant was part of the first cargo and the same 50 barrels he bought were kept in the store to be delivered when he sent for them.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

The evidence of the witness Smith (given above) is clear and intelligible and he speaks of a state of things quite consistent with the custom and usages of trade in buying and selling.

Sentence for Plaintiff.

ROBB *v.* CLOUSTON.

8 *April,* 1857.

Entry of satisfaction—Libel—Justification.

Entry of satisfaction made at request of Plaintiff and Defendant both being present together.

Damages awarded for libel.

Plaintiff was a clerk of Defendant and on leaving him he got other work. Defendant wrote to the new employer that "*to my sorrow and great loss* Defendant was

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"sometime in my employ. I now—advise you earnestly "and seriously to be aware of him—do not know what a "clever thief you have to deal with, he was employed in "my retail shop for one month and I assure you during "that time he made me hot. Mr. DeVries and Mrs. "Thompson have also had a taste of his honesty."

Defendant sworn:—I had caught him stealing money that I counted. I did not catch him in the act of stealing the money,—by handing me less money in the morning. He kept the keys, be had charge of the money—I laid a trap for him—I counted $11.18, in the till and the very next morning it was $9.20. I dismissed him and told him the reason. I wrote a letter to warn the employer of the character of Plaintiff as I knew he was thus employed.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

The Defendant has pleaded justification but in the opinion of the Court, the facts found in evidence do not amount to a justification.

The Court however believes, that the Defendant acted under the influence of an impression which if his statements be correct, and the Court has no reason to doubt their correctness, though not amounting to a justification, may be viewed as instigative, and has therefore condemned the Defendant to pay the very small sum of $50 and costs.

15 *April*,
1857.

FRANCA *v*. TACHEIRA.

Slander.—Costs.

To maintain an action for slander the Plaintiff must prove exact words, and that they were spoken in presence of a third party.

The parties were married women, and Defendant accused her husband with adulterous intercourse with Plaintiff. No one heard the words but Plaintiff and Defendant's husband.

ARRINDELL, C.J., and BEETE and ALEXANDER, C.J.:—

We have given an absolution in this case with compensation of costs.

1. Because no one but the Plaintiff herself prove the exact words stated in the claim and demand and she

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does not prove them to have been spoken in the hearing and presence of another person than herself.

2. Because although the witness proves words at another time imputing adultery to the Plaintiff which may be equivalent to the words laid, yet according to English law by which we are governed in this case it appears that it is not sufficient merely to prove equivalent words.

3. We have given compensation of costs because there is no doubt from the whole of the evidence that very gross defamatory words were used to the Plaintiff, and of, and concerning the Plaintiff by the Defendant, and because the defence showed no disposition on the part of the Defendant to accommodate matters.

The Court rules that no stigma whatever attach to the character of the Plaintiff.

MINUTES—POWERS OF COURT.

16 *April*,
1857.

The March Session of the Court was then declared to be closed and terminated, and the Court authorised His Honour the Chief Justice to resume and sign the minutes.

Re BRATHWAITE.

12 *June,* 1857

Letters of Decree.

The Court has power to refuse Letters of Decree until satisfied as to *bona fides.*

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

Previously to granting an order herein the Court requires to be informed whether the petitioner was on the 21 August 1848, the day on which she bought the property in question, married by contract or in community of property if she was married, whether her husband is now dead or alive, and if dead, who are his heirs *ex testamento* or *ab intestato.*

26 *May*, 1855

SMITH *v.* CAMACHO.

Slander.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.

Damages of $100 and costs given against Defendant for telling Plaintiff in the presence of others, "you are

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"a murderer, you are a witchcraft man, you killed "George Sears and Daniel Gibson by witchcraft. You are "a damned obeah fellow, and I can swear that you killed "two men by witchcraft. You killed George Sears and "Daniel Gibson by witchcraft."

8 *May*, 1855

HAYNES *v.* MORRISON.

Jury—Non-suit.

Case heard in the Supreme Civil Court before a Jury and single Judge.

The following special Jurors are drawn and sworn.

* * * * * *

The Plaintiff's case is heard and closed.

Smith for the Defendant addresses the Court and moves for a non-suit on the ground that the notice of action is informal and not sufficiently explicit.

The Judge (ARRINDELL, C.J.) having heard the parties, allows the case to go on, subject to a non-suit being entered in case a verdict should be given against the Defendant, if the Judges on a reference of the point raised by the Defendant should be of opinion that the notice of action is insufficient.

The case is then proceeded with and closed.

The Jury by their foreman delivers a verdict for the Defendant.

GRIFFITH *v.* MACKINTOSH.

Practice as to witnesses.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.

On the consent of both parties, the Court postpones the trial of this cause until the next Session of the Court, and directs the Marshal to notify to the witnesses to attend at such time accordingly.

15 *June,* 1857.

ADJOURNMENT OF COURT.

The Court was adjourned as a matter of respect to Mr. Justice Beete, one of his relatives having died.

12 *June*, 1857.

Re SAFFON.

Accounts.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

The Court orders that in future the accounts of the Administrators under the head of "Fund for defraying "casual expenses" shall be closed at the end of every year before the division of the revenue amongst the orphans so as to confine the transactions of each year to that period only.

16 *June*, 1857.

DE MELLO *v.* TURTON.

Review from Magistrate's decision—Construction of statute.

Matters in review must be decided on strict law and statute and not on equity.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

We are of opinion that the party in this case has no right of review:—1. A review which is in the nature of an appeal must be governed by the same rules by which an appeal is governed, and an appeal from the conviction of Justices to this Court or one of the Judges is not a matter of common right but of special provision. See *Paley on Con.,* 3rd. Ed., 242.

2ndly. A right of appeal (or of review) must be governed by express enactment and cannot be extended by an equitable construction to cases not distinctly connected.

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3rdly. The only Ordinance under which a review can be claimed is 19 of 1856, the only sections in that Ordinance giving a right of review are 5 and 6.

4thly. Sec. 5 of the said Ordinance allowed review of proceedings in cases of summary convictions and orders of the S.J.P. and special J.P. The Justices who sat in the case from which the decision in which a review is sought did not sit as Stipendiary or Special Justices of the Peace, one of them signing himself "P.M." thereby meaning Police Magistrate and each of the two others signing "J.P.," meaning Justice of the Peace.

5thly. It therefore appears under the section that De Mello has no right of review.

6thly. Sec. 46 gives a right of review from a conviction of an offence punishable by one Justice of the Peace other than a S.J.P., by imprisonment with or without hard labour not exceeding 30 days or a penalty not exceeding $24, but it does not include forfeiture.

7thly. It has been decided that where certain clauses of certain Acts of Parliament refer only to forfeitures and offences omitting any mention of penalties a general reference to the powers &c. of those Acts does not give an appeal from a conviction for penalties under an Act containing such reference. Lord ELLENBOURGH there said "if there be "no words of reference to any Act giving such ap- "peal we cannot supply the want of them."

Now the clauses in the statutes of *Car.* 2 and *Geo.* 2 have not the word *penalties* in those parts giving the appeal and when that word occurs in other clauses in other respects *facsimile,* it seems as if the omission was intentional. But if it were not intended, we can only say of the Legislature *quod voluit non dixit.* See *Payley on Con.,* 3rd Ed., 250, 1 and 2.

8thly. We therefore dismiss the review and claim for review with costs.

BLARE *v.* VAMLA.

2 *April*, 1857.

Opening Points of Office—Error of parties.

Where both parties are in error the Court will not decide matter.

The Court judges it expedient to open points of office

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in this cause for the purpose of a survey being made to ascertain the correct boundaries of the Plaintiff's and Defendant's lands, breadth and depth according to the terms of the Plaintiff's and Defendant's grants in question in Mibiri Creek. The Court further orders the survey to be completed and the parties in the cause to be ready to proceed on the 1st day of the next session on pain of the party in default being condemned in the costs.

The parties appointed the surveyor and the lands in dispute were surveyed.

Action for damages in convention and re-convention for trespasses by Defendant and Plaintiff on each other's grants and conversion of timber by both of them.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J:—

It is clear that the Plaintiff in convention founds and rests his claim upon the fact that at the time of the alleged trespass he was in the lawful occupation and possession of the *locus in quo* by virtue of a licence of occupancy thereof granted to him on 7 February 1854.

When however the *locus in quo* is surveyed and measured by two of the Land Surveyors appointed as aforesaid it is found that the *locus in quo* is not within the boundaries of the grant or licence of occupancy held by the Plaintiff in convention and that therefore the Plaintiff in convention was not in possession of the *locus in quo* in virtue of that grant or licence from which it follows that the Plaintiff in convention not having proved his case must go out of Court, and that, under a rejection of the claim and demand as it is proved the Defendant in convention has no legal pretention to possession of the *locus in quo.* The Plaintiff in reconvention founds and rests his claim upon the lawful occupation and possession of the *locus in quo* mentioned in the claim and demand in reconvention by virtue of a licence of occupancy thereof granted to him on 20 November 1854.

By the evidence of the two last mentioned surveyors it is clear that the *locus in quo* mentioned in the claim and demand in reconvention is not within the boundary lines of the land occupied by him the Plaintiff in reconvention as under the last mentioned grant, and the Court cannot see how his claim and demand founded

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on an alleged occupancy and possession, which did hot and do not exist can entitle him to the damages he has claimed.

Both parties in these causes have been deceived and misled by what appears to the Court to have been gross blundering, if nothing more, on the part of the Land Surveyor who professed to lay down the boundary of the grants, and by the description and definition contained in the grants themselves. In this Surveyor they appear to have placed implicit confidence, but the Court cannot say that in thus blindly believing him either of them has committed himself by any admissions made under a total ignorance of the real circumstances of the situation.

As each party has failed in this suit the Court has given compensation of costs.

DE LA MOTA *v.* GOUVIA.

17 *June*, 1857.

Rubric—Amendment—Cession of action.

An action will not lie for goods had by a Defendant from a party other than Plaintiff unless there has been an actual sale and purchase of the debt due, and Plaintiff then must sue as holder by transfer of cession and action.

Suit by De la Mota on his own right and as holder by transfer and cession of action of interest of Manoel Fernandes to assets &c., of late co-partnership of De la Mota and Fernandes.

Smith for Plaintiff, moved to amend the narrative part of the claim and demand by striking out the words "by the said co-partnership firm, and inserting the words "by certain previous co-partnership firm of De la Mota "and Fernandes whereof the said co-partnership firm of "De la Mota and Fernandes were by purchase the sole "representatives and proprietors of all the outstanding "debts due to the said late firm of De la Mota and Faria, "including the said claim due by Defendant," and in the conclusion of said claim and demand, by striking out therefrom the words "goods, wares, &c," down to words "at his request," and inserting the words "more particularly

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"mentioned and referred to in the introductory part of "the claim and demand herein."

Gilbert in opposition.

The Court granted leave to make the amendments moved for, the mover paying all costs thereof if any.

Smith moves to amend rubric of this case by adding the words "and which co-partnership firm of De la Mota "and Fernandes were by purchase the sole representa- "tives and proprietors of all the outstanding book debts "and claims theretofore belonging to a certain previous "co-partnership carried on in the said County of Deme- "rary by the said Raymund De la Mota and one Manoel "de Faria under the name style and firm of De la Mota & "Faria."

Gilbert in objection.

The Court granted leave to amend, the mover to pay the costs thereof.

Suit as by amendment by De la Mota as holder by transfer &c. of rights &c. of Fernandes of book debts &c. of late co-partnership of De la Mota and Fernandes, which said co-partnership was by purchase the sole representatives and proprietors of all the outstanding book debts &c. of a certain previous co-partnership of De la Mota and Faria.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— After the amendment was allowed and made, Manoel Fernandes is called and proves that " he paid Faria " about $9,000, and that he bought the book debts," thus showing that the firm of De la Mota & Fernandes were not by purchase the sole representatives and proprietors of all the outstanding book debts and claims theretofore belonging to De la Mota and Faria. Looking at the transfer and cession of action from Fernandes to De la Mota, there is no mention of, nor allusion to, the book debts of the firm of De la Mota & Faria.

It appears then that the legal title in and to the debts of De la Mota and Faria are still in De la Mota and Fernandes.

Without entering upon the question whether there can be a sale and cession of action without writing, the Court is of opinion that the title of the Plaintiff as alleged

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in the Claim and demand, even after amendment, is not supported by the evidence, and has therefore absolved the Defendant of the instance with costs

McKENZIE *v.* MAGGEE.

27 *June*, 1857.

Venia Agendi.

The obligations of *venia agendi* includes not only blood relations but relations by affinity.

Plaintiff married the grand-daughter by marriage of the Defendant.

Walker Maggee sworn:—I know the Plaintiff. He married my grand-daughter Caroline Coxall.

Sinclair Valery McKenzie sworn:—I am the Plaintiff in this suit. I know the Defendant. I am married to the daughter of Mrs. Coxall, Mrs. Maggee's daughter.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

In convention the Court has granted an absolution of the instance with costs on the ground that it is bound by the law in force in the Colony, and that the law as laid down in *Voet b.* 2 *tit.* 4, S. 7 & 8, includes not only blood relations but relations by affinity and by marriage, and to bring an action against whom the *venia agendi* must be obtained if the Plaintiff or Defendant be in the category of the parties included.

A rule of law such as the one referred to is not to be construed in a strict and literal, but in an extended sense, and so says *Voet* in the passage quoted: "*dum non omnes* "*in edicto casus facile comprehendi poterant ad similiar* "*judex, edictum pozzigeret, vulgata legum natura.*"

DE COVERDEN *v*. HAREL.

27 *June,* 1857.

Appeal—Absolution.

No Appeal lies from sentence of absolution.

The Court having heard the parties and considering

that the sentence sought to be appealed from is an absolution of the instance, not having the effect of a final or definitive sentence, now finally ordering; cannot grant the prayer of this petition.

23 *January*, 1857.

Re ADMINISTRATOR GENERAL *ex parte* WOLFF.

Verweezing.

The Court has power to call on a person who has been married a second time to execute Act of Verweezing after such second marriage.

The Court (ARRINDELL, C.J., BEETE and ALEXANDER, J.J.,) orders Dulcina Wolff now Dulcina Barton to repair to the Registrar's Office of these Counties and there cause to have prepared a proper Act of Verweezing.

The order herein of the 27th March last having been complied with and a proper Act of Verweezing executed and laid over, this report is now taken for notification.

27 *June*, 1857.

NORTON, ET AL, *v.* EXORS. OF ALBOUY.

Amendment—Construction of Will—Commission.

Plaintiffs not allowed to amend as to matters of law after hearing Defendants' answer.

A will affecting *immobilia* must be governed by the *lex loci rei sita.*

In the absence of express stipulations the commission payable to an Executor is 10 per cent.

Circumstances where a fiduciary heir cannot call upon an Executor to denude.

Smith for Plaintiffs closed his case.

Gilbert for Defendants opened his defence.

Smith then moved the Court to amend the Claim and demand of the Plaintiffs herein by inserting in the conclusion after the words "during the continuance of their "marriage" and between "be admitted and placed," the words "upon granting to the Defendants a full acquit-

"tance and exoneration from their said Executorship, "and upon giving to the Defendants good and sufficient "security, &c."

Gilbert in opposition.

The Court "rejected" the amendment at this stage of the proceedings but opens points of office in order to give the Defendants an opportunity to file answer to the said amendment should they see fit. ("Rejected" is an error of minute—see Judgment.)

Smith withdrew the amendment.

The Court ordered the Defendants to proceed.

Smith in reply: The defence having been concluded and no presentation and offer made by the Defendants previous thereto to give possession of the property and estate of J. H. Albouy, deceased, to the Plaintiffs on receiving security for the payment of the debts claimed and legacies, he moved to reduce the Claim and demand to possession upon granting to the Defendants a full acquittance and exoneration from the said Executorship upon giving to the Defendants good and satisfactory security to bear them harmless from any suit or claim to be made against them by any debtor, creditor or legatee or claimant and security for payment of the debts and legacies.

Gilbert in opposition.

Plaintiffs' case: J. H. Albouy, widower, on 26th November 1827, executed an Act of Verweezing in favour of his sole minor child James Benjamin Hill Albouy for £14,850 payable as therein mentioned. On 28th November 1827, he executed an Act of donation *inter vivos* settling on his intended wife Augusta Sophia Norton an annuity of £500. On 1st December 1827 he made a settlement excluding *communio bonorum.* He married and lived with his wife in the Colony for a time, then they resided in England and on 14th May 1851, he made his Will referring to Act of Verweezing and donation. He left his wife certain legacies, gave his nephew an annuity, and gave demised and bequeathed to his wife, his son already mentioned, James Stuart and others in Demerary, Plns. *La Penitence* and *Liliendaal* and other properties in the Colony and "all other my lands and houses and real

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"estates in the said Colony and all my estate and prop-"erty and effects there, to hold the same unto my said "wife and son, and the said James Stuart—and the survi-"vor and survivors of them, their heirs, Executors and "Administrators, according to the nature and quality of "the same *upon trust,* to pay and disburse all monies due "to my said son in respect to his said proposed claim for "his maternal portion, after deduction of the sum which I "have already paid to him on account of such claim; and "I do hereby declare that my said son shall not be enti-"tled as my heir and devisee under this my Will to take "possession of my estates or receive any other benefit "under this my Will until such his preferent claim shall "be finally discharged and he shall have acknowledged "satisfaction thereof, and shall have made or given such "legal release therefor as shall be reasonably requested "by my said wife and the other Executors to this my "Will in the said Colony, and after payment of all my "just debts in the said Colony, *upon trust to pay* to my "said son 1/2 of the clear profits and produce of my said "estates and property of any description and whereso-"ever situate, in the said Colony for his own use and "benefit, and *upon further trust* to remit the other 1/2 of "such clear profits and produce to my Executors in Eng-"land until they shall have received so much money as "shall be sufficient to purchase £3333. 6. 8, £3 per cent, "consolidated annuities, and when and so soon as my "said son's preferent claim shall be satisfied, and all my "debts in the said Colony shall have been paid and the "said sum of £3,333. 6. 8, shall have been purchased as "aforesaid *upon trust* to convey, assign and transport all "my said Plantations, land, houses, property and effects "in the said Colony or elsewhere unto my said son, his "heirs, Executors, &c., according to the nature thereof, "for his and their own use and benefit, subject only to "the payment of the said annuity of £500 per annum to "my said wife as aforesaid, but if my said son shall de-"part this life in my life-time without issue, and leaving "a widow him surviving, it shall be lawful for him by "last Will and Testament in writing to grant and appoint "unto such widow during her life or widowhood as he "shall think fit, any

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"part not exceeding 2/3 of the clear profits and produce "of my said trust estate, and the residue thereof shall be "paid to my said wife for and during her natural life for "her own use and benefit, *but if my said son shall so de-* "*part this life without making any such appointment and* "*leaving neither lawful issue nor widow, then upon trust* "to pay the whole of the clear profits and produce of my "said estates unto my said wife for and during the term "of her natural life for her own use and benefit, and after "her decease, *upon trust to convey,* assign and transfer "all the said trust estate unto such of my own relations as "she my said wife shall by her last Will and Testament "in writing direct or appoint."

He nominated his wife, son and three others, "Ex- "ecutors jointly, and each of them separately, *without* "powers of assumption, substitution and surrogation to "them and each of them until the final close of my es- "tate," and power to them or any one of them to transport certain portions of *La Penitence* laid out in lots and known as Albouys Town, but no other, and he nominated his wife and son "*joint*" Executors in Great Britain.

Testator died in England on 26th September 1851, and the son accepted the disposition and the Executors also accepted the trust.

On 28th October 1852 the son married Jessie Conell, and he died on 5th November 1852 in England intestate, without issue, posthumous or otherwise, and without executing a power of appointment under his father's Will. The Testator's wife married one Thomas Norton. On 22nd January 1857, Jessie Albouy, late Conell, died in England.

Plaintiffs averred that they are legally entitled to the possession and enjoyment of the estate of the Testator as and from the 5th November 1852, the date of the death of the Testator's son, and had demanded the same and were refused, and concluded to be put into possession as on and from 5th November 1852, and that the Defendants, the Executors, be condemned to give such possession.

Defendants admitted correctness of statements of facts except that the son had not exercised the power of appointment, and that Plaintiffs are not entitled to pos-
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sion but only to the clear profits and produce, but there were in reality no such profits and produce, as estate at death of Testator was indebted and was still indebted in a sum of $60,000.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

The Plaintiffs' Counsel in opening his case stated that the first point to be considered was by what law must the construction of the Will be governed, and he added that it must as the property was immovable be governed by the law of the Colony *lex loci rei sita,* and he quoted 4, *Burge,* 581.

Had this point not been conceded, the Court looking at the extract of the resolutions of their High Mightinesses the States General of the United Netherlands under date 4th October 1774, by which it was enacted "that "*all the Laws of Holland in general,* and more particularly all laws, statutes, resolutions and ordinances of "their High Mightinesses or the Committee of Ten with "the approbation of their High Mightinesses theretofore "transmitted or thereafter to be transmitted to the Director General and the Court of Essequebo or to the Committee and Court of Demerary should be the rule of "their judgments," and also to the authority of *Van der Keesel,* who in 7th *Thesis* says, *in unaquaque regione, municipio paqo ante ommia spectandum est jus ei loco proprinno & a legislatore, vel ab eo qui jus habet statuta convendi, expresse promulgatum sive scriptum,"* would have had no difficulty in arriving at the conclusion that in deciding this case it is to be governed by the laws of the colony and no other. The first point, as it was termed by the Plaintiffs' Counsel, was admitted by the Defendants' Counsel, yet the Court has now referred to the English laws respecting trusts, and the distinction between a legal and an equitable estate according to the law of England, and English cases and authorities have been cited to support the views entertained by the Plaintiffs. The Court has every respect for English law and English authorities, but in the present instance it is quite clear that the Court has nothing whatever to do with them. The *boedel,* that is to say the estate and effects of the deceased, the possession of which is sought

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to be obtained, consists of immovable property in this Colony and by the laws of this Colony only must the Court be guided.

The Plaintiffs' Counsel asserted that Mrs. Norton is a fiduciary heiress and in support of this cited *Van der Linden,* 132 ; *Simon Van Leeuwen* 229. 243: *Censura Forensis*; 1, B., 3. c. 5., s. 1-4; and he insisted that as Mrs. Norton has had the profits and produce of the property left her during her life and is vested with the power to direct and appoint by last Will such of the Testator's own relations as she may think proper to whom the Executors are to transfer and assign the property, she is a fiduciary heiress and is therefore entitled to possession of the *boedel,* that is, the estate and effects of the deceased.

According to *Grotius,* a last Will is a manifestation of what a person wishes should be done concerning his estate after his death; *Herbert's trans,* b. 2. c. 14, s. 4. Last Wills are interpreted in every respect according to the most probable intention of the Testator. Same author, b. 2, c. 18, s. 20.

Such being the law by which the Court is governed it will now just notice the authorities cited by Counsel for Plaintiffs. The first authority cited by Plaintiffs' Counsel was the case of *Harwood* v. *Goodwright, Cowper's Rep.* 87, but it appeared to the Court that the learned Counsel cited this case only to show the distinction which Lord *Mansfield* drew between a Will in the civil law and a Will in the English Law. The case of *Harwood* v. *Goodwright* even if admissible as an authority governing this Court would not be applicable in any way to the matter in dispute.

The passage in *Van der Linden* merely related to the necessity of naming one or more heirs. *Simon Van Leeuwen's* Roman-Dutch Law, p. 229. as cited by the Plaintiffs' Counsel says "the real or essential part of a "testament or full last Will consists in bequeathing an "inheritance without which no Will can exist." This the Court readily admits.

The next passage cited by the Plaintiffs' Counsel also from *Simon Van Leeuwen* 222, is as follows:—

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"The leaving of an inheritance is an institution by "which any person transfers the *management* of his es- "tate to another after his death. For this purpose a clear "declaration is required together with the name or other "certain description of the persons, to whom such inheri- "tance is appointed. But no particular words are limited, "in which the leaving of such inheritance is to be written "*provided it can he made fully to appear from the Will* "*or meaning to which more regard is paid in doubtful* "*cases than to the exact propriety of the words*."

"Hence on account of the circumstantial desire of the "deceased we frequently proceed beyond the propriety of "the words and they are partially understood, especially "as the Notaries of our time are for the most part igno- "rant of the law, who are in the habit of using many "phrases in an improper sense and who often from igno- "rant habit add some words to make the Will (as they "suppose) more effectual, which words they themselves "do not understand, and thus they not unfrequently op- "pose the Testator's circumstantial desire or will."

The sections 1—4 inclusive of *S. Van Leeuwen Gens. For* p. 1, c. 5, are to the same effect as the passages from his Roman-Butch Law just quoted.

In all these authorities the Court cannot see anything militating against the construction which as will presently be seen it has put upon the Will. At all events the Court cannot see that anything contained in these authorities supports the assertion that Mrs. Norton is a fiduciary heiress under the Will of J. H. Albouy, deceased.

These authorities however support the doctrine of construction laid down by the Court and it is quite clear that "more regard must be paid to the meaning (*i. e.* in- "tention of the Testator) than to the exact propriety of "the words."

In *Van Leeuwen's* Rom. D. Law, b. 1 c. 18, s. 17, English trans, 261, it is said:—"When any person has "been instituted heir to the usufruct of any property with "power to specially alienate or dispose of the same, it is "likewise understood that the property is vested in him "notwithstanding he may be directed to cause the

"remainder to be devolved upon a third person after his "death unless the said power has been limited to neces- "sary maintenance only, or otherwise, in which case it is "considered as a mere usufruct and so it was understood "by *Weostas,*" and again in Sec. 18 :—"In like manner if "any one be instituted heir to the usufruct *without any* "other *person being nominated* in whom the property is "to be vested, he is likewise understood to have been "placed to have the full usufruct under which the vesting "of the property is likewise comprehended, notwith- "standing he has been charged to cause the said usufruct "to be devolved upon a third person after his death, be- "cause in the last Will the usufruct is taken as complete "which is not distinguished from the property *unless* "*many special directions had been given with respect to* "*the property, in which cases only, a mere usufruct is* "*understood to be separated from the property.*" The I7th sec. may at first sight appear to be in favor of the Plain- tiffs' claims but when the Court also looks at the 18th sec. and sees the distinction drawn between the property itself and the usufruct of the property—and that in the present case a special direction has been given with re- spect to the property, which brings it within the excep- tion, the Court is of opinion that only a mere usufruct has been given by the Will to Mrs. Albuoy and not the property from which that usufruct proceeds.

Looking next to the Will, especially to all absence of any words which can be construed to vest *dominium* in the late Mrs. Albouy now Mrs. Norton, and looking es- pecially to that part of the Will in which the Testator provided for contingencies which have happened, in the following words, "but if my said son shall depart this life "without making any such appointment leaving neither "lawful issue .... as she my wife shall by her last Will "and Testament in writing direct or appoint," the Court can see no reason why it should treat this provision in the Will as nugatory having no meaning of effect. It is material whether the ultimate heirs of J. Hill Albuoy are named in his Will or not. Persons whether they be dis- tinctly named or otherwise,

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if they be described in such a manner that they can be recognized may take under a last Will, *Grotius,* 2, c. 16, S 2, and although the ultimate heirs are not named in the Will before the Court, yet it is admitted on all sides that there are many relations of the Testator, some of whom Mrs. Albuoy must by her last Will and Testament in writing direct or appoint.

The words inserted in a Testament that the property neither shall or may be alienated beyond blood relations, are in general understood as a contract and *fidei commissium* in favour of the blood relations; *Grotius* 2. c. 20, S. 12.

Vander Linden, (*Henry's trans.*) 138 says an heir thus affected with a trust has a real though burthened right of property, and this differs from him who has a mere usufruct in the subject of which the naked right of property is in the meantime left to another who may leave it to his heirs although he dies before the *usufructarius.* In the meantime it is also incident to a trust that the heir, so long as the trust cannot be executed, enjoys the fruits of the property, and that he retains the whole under his disposition *except when the Testator has appointed a special Administrator.*

Vander Linden on page 148, speaking of Executors says, "their office consists in the sealing of the effects of "the deceased at his house, in providing for his funeral, "in the taking a proper inventory, and in liquidating the "estate, by collecting in the outstanding debts and selling "the goods, and further in carrying into effect the last "Will of the Testator, as well by paying the legacies as "following the other conditions of his Will, in making "out a clear account and statement *and giving over the "clear surplus or residue of the estates to the heir or "those who are entitled to take charge of it who are "termed Administrators."*

With this authority of *Vander Linden* before it, and relying upon another passage from the same author, page 143, which says, "the words of a Will at all times must "be so interpreted that the dispositions in the Will may "stand," the Court can *see* no reason why the appointment of Trustees (in effect Administrators) to carry out the

provisions of the Will should not stand. It has been asserted that one of the duties assigned to the Trustees, viz. "to convey assign and transfer all the said trust estates "unto such of the Testator's own relations as she his said "wife &c," is an absurdity, inasmuch as those who take under a Will do not require a transport; such is the law. But would the persons appointed by Mrs. Norton in manner and form directed by her late husband take under his or her Will in the proper legal sense, in which those take to whom property is devised immediately and directly? There is nothing illegal, impossible or *contra bonos mores* in the condition that the Trustees should convey &c.; see *Van der Linden* 133; as to *condition* see also *Voet ad pandectas, lib.,* 10, *tit.* 2, s. 5.

It appears to the Court that the Testator might have had good reasons for declaring the mode and manner by which, and the persons by whom, the title to his property was to be vested in some of his relations, not heirs *ab intestato,* after his death and the decease of his wife him surviving and so long as the Trustees or Executors (or Administrators) under his Will have to perform the duty assigned them, the provisions of the will directing the performance of that duty by them, must be held to be valid.

In the present case the Court is of opinion that the Testator's leaving the property to certain persons to pay the whole of the clear profits . . . . as she his said "wife . . . shall direct or appoint" &c, and limiting the commissions of the Trustees or Executors to 5% instead of 10% the legal charge, prove that the Testator in fact though not in words has appointed the parties named as Trustees and Executors special Administrators to his property. The Court is further led to this conclusion by that part of the Will where the Testator after directing his Trustees to pay and discharge all monies due to his said son in respect to his said preferent claim declares that his said son shall not be entitled . . . . . subject "only to the payment of the said amounts of £500 per annum to his said "wife" as aforesaid.

If the Testator choose to prohibit his son and who was

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his only heir from taking possession of his *boedel* until certain debts particularly one to that son were paid, and certain monies realized in the funds, there does not appear anything very extraordinary in his intending his Trustees and Executors to remain in possession until his wife at her death should declare by last Will and Testament to which of his relations the Trustees and Executors should convey his estate. The Testator's limiting the commissions of the Trustees and Executors in this Colony to 5% when if not limited 10% could have been legally charged adds additional strength to the Court's construction of the Will. So *Van der Keesell, Thes.* 323 *says Executores testa mentorium, cum sint quasi procuratores a Testatore constituti ad funus curandum, credita exigenda legata & aes alionum solvendum, bonaque administranda, usque dum dividi possint cum que adeo & here-dum negotiagerant, non possunt heredes ad heriditade areere nisi aliund jusserit Testator"* and which *nisi aliun jusserit Testator"* is in keeping with the passage already cited from *S. Van Leeuwen's* Roman Dutch Law, bk. 3, c. 8, s. 18, and *Van der Linden* (Henry's trans.) 138.

As the Claim and demand and sentence in the first action has been specifically pleaded and set forth (suit to render accounts) in the present action it may be right for the Court to state that by that Claim and demand the Plaintiffs, amongst other things, sought condemnation of the Defendants to render true accounts, &c, of the property of the said J. H. Albuoy, deceased, including his said Plns. *La Penitence & Liliendall* . . and *to pay* . . . the "clear profits and produce of the said estates . . . . *with* "*reservation to the Plaintiffs of them and each of their* "*rights for all further accounting for the payment of said* "*clear profits* and produce of the said estates property "and effects during the natural life of the said A. S. Nor- "ton," of accounting and payment then decided, the sentence was in terms of the Claim and demand except the reservation which was not inserted for obvious reasons.

It is impossible to see what bearing that action to account can have upon this action for possession.

If that Claim and demand can be received as affecting this action then it would appear that the reservation in

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the claim just recited shows what rights the Plaintiffs considered they had under the Will when they instituted that action, viz., that they were entitled to the usufruct.

The rents issues and profits of the *boedel* if at that time they considered themselves entitled to *possession* of the property they could well have joined with such demand for possession with the demand for an account in one and the same action; *Van der Linden's Form Van procedeeren* 2 Bk. VI. *Hoofdstuk* s. 8, p. 193.

It may not be wholly unnecessary to observe that during the hearing of the case the Plaintiffs moved for time to amend the Claim and demand by inserting therein an offer of security to hold the Defendants harmless against claims upon the estate.

The Court granted leave to amend with liberty to the Defendants to take such reasonable time as might be reasonable to meet such offer. Upon this the Plaintiffs withdrew their amendment. After the case had been finally heard, the Plaintiffs again moved the Court to amend by inserting in their Claim and demand the same offer of security. The Court refused the motion considering that the nature of the security offered was too limited and that the Plaintiffs ought not to be allowed to amend as to matter of law not of fact after they had heard and availed themselves of all the Defendants' arguments.

Supported by the foregoing reasons and authorities the Court cannot come to any other conclusion than that the Plaintiffs are not entitled to possession and that those appointed by the Will to carry into effect its provisions must remain in possession until Mrs. Norton's death, when such of the relations of J. H. Albuoy as she by last Will and Testament may appoint will have the *boedel,* the estate and effects conveyed (transported) to them, or if she should not make any appointment, the heirs *ab intestato* of J. H. Albuoy or of J. B. H. Albuoy, will inherit.

In Re PETITION OF SEQUESTRATORS OF PLN. WISSEB-VALIGHEID IN LEGUAN.

4 *June*, 1855

Petition—Practice.

ARRINDELL, C.J, and BEETE and ALEXANDER, J.J.

The Court requires this petition to be signed by both parties.

Idem, Petition of Sequestrators of Pln. De Kinderen.

REPORT OF THE AUDITOR GENERAL ON THE BOOKS OF THE ADMINISTRATORS OF PIERRE LOUIS DE SAFFON.

4 *June*, 1855

Rate of Commission—Right to Commission—Investing trust money—Children in institution not entitled to share in estate after attaining the age of sixteen.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.

The Court approves of the report and the accounts herein, subject to the orders following, that is to say: — Firstly: The Court observing that the rate of commission charged by the Administrators has been hitherto five per cent on receipts, and nothing on disbursements, sees no reason to alter this rate, it being the rate charged by the predecessors of the present Administrators. The Court therefore orders the Administrators to adhere to this rate.

Secondly: The Court is aware of the investment of the sums of $30,000 and $12,000; but the Court sees no reason for allowing commissions for the trouble of investing these sums, it being the duty of all persons circumstanced as the Administrators are, to invest the funds under their charge on good securities.

Thirdly: The Court observing that there is a loan to Pln. *Herstelling* of $2,200, considers such loan to be wholly unauthorised, and orders the Administrators to obtain re-payment of such loan, and invest the same in British Guiana Bank shares if the same cannot be vested in securities of the colony.

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Fourthly: The Court observing that the lease to Mr. Turton of Pln. *Le Repentir* will expire on the 18th January next, orders the Administrators to advertise for tenders to be sent in to the Court, on or before the first day of its next session, for the lease for such time and upon such conditions as his Honour the Chief Justice may be pleased to direct during non-session.

Fifthly: The Court considers that children placed upon the institution have no right to participate as heirs after they have attained the age of sixteen.

4 *December*, 1857.

ADMISSION OF ATTORNEYS.

Admission of Attorneys and Solicitors of Colonial Courts in Her Majesty's Superior Courts of Law and Equity in England in certain cases; 20 & 21, Victoria Cap., 39. Framed by the Governor.

12 *January*, 1857

Re NIEUWELLER.

Letters of Decree.

The Court has power to enquire into circumstances attendant before granting Letters of Decree.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

This petition is referred to S. M. Wortnan and C. G. H. Davis, Executrix and Executor to the last Will and Testament of Henry Wortnan, deceased, to report *to* this Court within four days after intimation why they have suffered the property of the deceased to be brought to Execution sale for so small a debt as the one covered by the small sum for which it was sold, and why they suffered the plantation to be sold as a whole contrary to the express terms of his Will, and how it happens that so near a connection as A. C. Nieuweller became the purchaser of the property.

27 *June*, 1857.

The Court refers this matter to the Administrator General of Demerary and Essequebo for investigation and report to the Court at its next ordinary session.

4 *Dec.* 1857

The Court observing that the child for the protection

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of whose interest these proceedings were ordered is now dead, sees no necessity to pursue this enquiry further, and having seen the certificates of the *Provost Marshal* that the purchase money has been duly paid, *fiat* as prayed.

4 *December*,
1857.

FIXING OF COURT DAYS.

Supreme Civil Court fixed for Friday 26th March, Friday 11th June, Friday Dec. 3rd, for Demerara. Thursday 13th March, Thursday 14th Oct. for Berbice.

Re ADMINISTRATOR GENERAL—TRUST ESTATE.

4 *December,* 1857

Practice in discharging Administrator General from Trust.

The Petition of the Administrator General of Demerary and Essequebo as Guardian of the heirs of___________.

Fiat as prayed; the Court (ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.) hereby discharging the Petitioners from this Trust accordingly. (14 Petitions)

EX PARTE CHIGNARD.

7 December,
1857.

Insolvency—Discharge on conditions.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.,—

Whereas it has been made to appear to the satisfaction of the Court that the creditors to the amount of more than 1/2 in number and value of the debts which have been established against the said Petitioner, have signified in writing their consent to the making of this order, and the Court having enquired into the conduct of the Petitioner, and it appearing that the said insolvent holds a public office or appointment the receipts whereof amount to $1,500 per annum, the Court orders the said insolvent to pay annually the sum of $500 out of the said annual receipts of $1,500 at such times as he shall receive the same, to the Administrator General of British Guiana, to be by him divided amongst the creditors from time to time until the debts due to the said creditors are paid and discharged. The Court now further orders that the said insolvent shall be for ever hereafter discharged except as to the payment of the said annual sum of $500 ordered to be paid by the said insolvent to the Adminis-

trator General as aforesaid from all liability whatsoever for or in respect of such debts as have been established against him the said petitioner as aforesaid to wit. (Here follows list of creditors 36 in number; debts aggregating over $7000.)

25 *June,* 1855

In re LOXDALE.

Interlocutory sentence—Leave to appeal.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.

The Court being of opinion that the sentence sought to be appealed from is an interlocutory sentence and not of the nature or having the effect of a definitive sentence, cannot grant the prayer of this petition.

25 *June,* 1855

In re BOLLERS, WIDOW.

Right to guardianship.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.

The petitioner being herself natural guardian of her minor son and entitled to act for and on his behalf, the Court sees no reason sufficient to grant the prayer of this petition (petition to appoint a guardian).

1 *February*, 1856

ARNOTT *v*. MILLER.

Postponement—Warning of witnesses.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.

The Court postpones the trial of this case, the Defendant to pay the costs of the day, and directs the Marshal to notify the witnesses to attend at such time.

8 *December,*
1857.

PETITION OF MAYOR OF GEORGETOWN.

Default in counter-reporting.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

The Petitioner having been duly served with a copy of the report herein and order for counter report as appears by the affidavit laid over of G. Forshaw dated 7th December 1857, and not having sent in such report, Court rejects the petition with costs.

8 *December*, 1857.

PEREIRA *v.* ADMINISTRATOR GENERAL, *q.q.*, DA SILVA.

Original Defendant—Provost Marshal Co-Defendant—Records.

A transfer of lease must be recorded to be pleadable.

Plaintiff entered opposition founding right on a title held by lease transferred to him but not recorded.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

In this case the Court has rejected the Claim and demand, 1: Because the lease or agreement of lease is a contract or instrument affecting land and the transfer or assignment of said contract or instrument is not good, valid or effectual in law, not having been deposited in the Registrar's Office or recorded therein.

2: Because such transfer or assignment not being pleadable or allowed to be pleaded in Court, the Plaintiff has no legal evidence of title to the land and buildings in question, and has therefore failed to support his Claim and demand.

Attorney-at-Law for Plaintiff, *O. A. Gilbert.*

Attorney-at-Law for Defendant, *J. L. Hitzler.*

SIMSON *v.* HALEY.

29 *March,* 1858

Agency—Liability to account.

Before an Attorney can sue for his remuneration he must account to his principal.

Plaintiff acted as Attorney for Defendant under a special power from 1837 to 1843 when Defendant returned to the Colony. He was to get as commission £100 a year. He rendered accounts to Defendant in the form usually given. Defendant wanted a regular accounting.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

In this case the Court has granted an absolution of the instance. 1: Because the Plaintiff as admitted by himself was mandatory of the Defendant for he says "Mr. "Vyfhuis and myself administered to the plantation," the property belonging to the Defendant wholly or in part or in which she was interested.

2: Because the Plaintiff as mandatory is under an obligation to duly account to the Defendant and must do so before he can be entitled to claim any remuneration for his services.

STEELE ET AL *v.* PROPRIETOR OF HUIST' DIEREN.

29 *March,* 1858.

Non-qualificate—Non-joinder.

Describing a person as "gentleman" in a Power of Attorney is a sufficient description.

Suit by Matthew Steele and G. H. Loxdale, both of Liverpool, by their Attorney Henry Murray, to foreclose mortgage.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

We have rejected the exception of non-qualification. Firstly, because the objection firstly taken that the execution of the Power of Attorney was not duly legalized was abandoned by the Plaintiff in exception.

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Secondly, that the word "gentleman" in the declaration is not a sufficient description is not well founded. The 17 and 18, Vic. c. 36, has been quoted in support of this objection. We have looked at that Act which is "an "Act for preventing frauds upon creditors by secret bills "of sale of personal chattels," and we are of opinion that this Act and the construction put upon the words "occu-"pation" do not apply to the present case.

We are further of opinion that the declaration is sufficient under the provisions of 5 and 6 W. iv. cap., 2 S. 15.

Thirdly, because we consider the third objection taken by the Plaintiff in exception, viz., that " the power only authorised H. Murray to sue in the names of all the parties to the power jointly and each of them severally and does not authorise him to sue in the names of two of them," cannot be supported by the correct reading of the Power of Attorney.

The Power is by T. Murray, M. Steele & George Henry Loxdale, co-partners, carrying on business in Liverpool with Henry Murray (the Attorney) under the style or firm of Murray Loxdale & Company, and at Georgetown under the style or firm of Steele Loxdale & Company in co-partnership with the said Henry Murray, and as regards the said Thomas Murray in his individual capacity and as one of the surviving Executors of the Will of Edward Murray, deceased, or the estate of the latter, being representative of the late partnership concern of Murray Jones & Company, and these parties appoint Henry Murray the Attorney of them and each of them for them and each of them to ask, demand, sue for, recover and receive all and any sum and sums of money whatsoever which now is, or are, or shall, or may at any time or times hereafter be due, owing, arising or *belonging to them or any of them in the rights and capacities aforesaid,* or *otherwise howsoever,* upon or by *virtue of any mortgage* or mortgages and on receipt thereof or any part thereof, further and in their several and respective names and any of the rights and capacities aforesaid to give good and sufficient discharges.

We are of opinion that the words "or any of us" embrace any two, and the words "or otherwise, howsoever"

and "upon mortgage", cover the sum due to Steele & Loxdale on mortgage, and that the power gives sufficient authority to Henry Murray to bring this action for his two constituents Steele & Loxdale.

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McKEANE *v.* CHAPMAN.

29 *March*,
1858

Accounts—Costs.

A Commission Agent is under obligation to account to his constituent.

Costs are always reserved in interlocutory judgments.

Circumstances where suit against party not bad for misdescription.

A cargo came to Defendant who sold it for export. The purchaser chartered the vessel to go on with the cargo to Madeira, half of the charter money being paid here, half in Madeira. The vessel again returned chartered to another firm and Defendant disbursed her partly with money given by the captain and partly with his own funds. Defendant paid one Thomburn the balance he alleged was due to the owners. Thomburn died leaving Defendant his Executor.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— We have given sentence for the Plaintiff, 1st: Because there is no question but that the cargo of the brig of which an account is demanded was the property of the Plaintiff as admitted by Defendant in his letters and in his evidence. Secondly: Because the passage "by the "next opportunity I will forward to you her disburse- "ment accounts and account current with her," contained a clear and distinct promise to render an account current and which from the transactions between the parties could not mean any other than the account demanded.

Thirdly: Because although the Defendant alleges that if he is to be bound to account at all, he can only do so as Executor of John Thomburn, the Court is of opinion that if the Defendant has rendered an account to the late John Thomburn and paid over the balance to him, he can show the same as Executor in the present proceedings and the Court sees no reason to turn the

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Plaintiff out of Court to bring another action to obtain that which can be as well obtained in the present suit without any disadvantage to any party.

Fourthly: The Court has reserved costs as is usual on all actions to render accounts until the determination of the same.

29 *March*, 1858

DE FREITAS *v.* PROPRIETOR OF PLN. VERSAILLES.

Cords of wood—definition of.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—It is clear from the evidence on both sides that the Plaintiff agreed to sell and the Defendant agreed to purchase "*cords*" of wood that is to say, a quantity of wood to be measured by the cord. A cord of wood is that quantity which can be contained in a space of 8 feet long 4 feet broad and 4 feet deep, and to this quantity the Defendants were entitled.

30 *March,* 1858

MAGENS BY ATTORNEY *v.* EXORS. KIRKWOOD.

Letters of Administration—Documentary evidence.

A document from a foreign Court to be receivable in evidence must have the Seal of that Court affixed.

Plaintiff, an inhabitant of Brooklyn, New York, sued as Administrator of the estate of Hicks, deceased, and as Attorney of Robert Swift of St. Thomas, who carried on business in St. Thomas as Hicks and Swift.

BEETE and ALEXANDER, J.J.:—In this case the Court has absolved the Defendants from the instance because the copy of the letter of Administration relied on as proof of the quality of Christian Magens, Administrator of the estate and effects of J. H. Hicks is inadmissible as evidence under the 14 and 15, Vic. cap. 99, s. 7. It does not purport to be sealed with the Seal of the foreign Court to which its original belongs. That the Court has a Seal is evident from the other documents attached to the copy,

and this being so, the absence of the Seal is a fatal objection to the document.

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v.
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MACAULAY *v.* MARKS.

31 *March,* 1858.

Mortgage—Legal defence.

As a general rule, the only defence to a sentence for foreclosure of a mortgage is payment or fraud.

ARRINDELL, C. J., and BEETE and ALEXANDER, J. J.:—

The Court has rejected the conclusion of the Defendant and given a sentence for the Plaintiff for the following reasons:—

1stly. That as a general rule the only defence to an action for the renewal of a sentence, and a willing and voluntary condemnation is a sentence, is payment.

2ndly. Because the Court cannot see how a married woman assisted by her husband in passing a mortgage can say she was deceived, unless she avers that her husband was also deceived, and this is not averred in the conclusion of exception and answer.

3rdly. Because the grounds of exception and fraud averred do not amount to that specie of fraud which will induce the Court to set aside so solemn an act as a mortgage judicially passed.

HINDS *v.* STRATHERN.

31 *March,* 1858.

Sentence compelling Defendant to do overt acts may be passed.

Sentence condemning Defendant as having in marriage in community the daughter of Plaintiff, to join with Plaintiff in all such acts as may be necessary and requisite for withdrawing from bank, money placed on deposit by Defendant's wife in her own name while *femme sole.*

CALDER *v.* OWNERS OF CHRISTIANIA.

1 *April*, 1858.

Suit for damages for collision against the "owner or "owners, representative or representatives of ship or ves-"sel called Christiania."

31 *March,*
1858

Re ROSE.

Rule granted against witnesses for non-attendance on summons.

7 *April,* 1858

Re KAYS.

Petition for Letters of decree.

The Court previously to granting any final order herein, orders the Petitioner and the Reporters and the Provost Marshal and the Registrar to appear before this Court on the 1st and following days of the next session of the Court (11 June) to be examined on oath touching and concerning the premises and the Petitioner is ordered to intimate this order to the several Reporters.

7 *April,* 1858.

DANIEL *v.* MILLER, GRIFFITH, ET AL.

Contract of sale.

A contract of sale must be unqualified and specific.

Opposition suit. Miller offered Plaintiff an estate *Three Friends,* for sale for which he agreed to pay £1,000 if their Attorney recommended it: Miller wanted more than £1,000. The Attorney after some time had elapsed told Miller that he did not know what Plaintiff was going to do. Miller then sold estate to Griffith.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— The Court has rejected the Claim and demand with costs.

1. Because a contract of sale is held to be complete so soon as both parties are agreed as to the thing to be sold, the terms or conditions, the quantity or price; *Van der Linden* (Hen. trans) 229.

Secondly,—It may on a contract of purchase and sale

be stipulated that the one must be considered bound and that the other may have time for consideration; *Grotius,* Book 3 c. 14 s. 28.

Thirdly,—Had the Plaintiff or his Attornies within the period of three months mentioned in the offer of sale simply accepted the offer, without then or subsequently disclosing the contents of Plaintiff's letter of 9 July the Court would have had no hesitation in declaring the original Defendant bound to pass the transport and would have condemned him to pass it in favour of the Plaintiff.

Fourthly,—The Court cannot constitute the words "on your recommendation we shall not object to purchase the *Three Friends* estates for £1,000" into such an acceptance as completed the contract.

Fifthly,—To test whether the contract was complete or not, let it be supposed that immediately after the letter of 9 July 1857, Messrs. Stuart and Jones had ceased to be the Attorneys of Plaintiff and Robert Miller had brought his action against Plaintiff to pay $5,000 and receive a transport of the *Three Friends* could this Court or any Court have given a sentence for the Plaintiff? Would not the answer to such action have been "I never authorised my Attornies to give more than £1,000 which is less than $5,000 by $200, and I am not bound by any promise of their's beyond the scope of their authority and must not such answer have been held a good defence to the action.

Sixthly,—It may be said that Miller had nothing to do with the contents of the letter of 15 June 1857. The Court admits that had the contents of that letter been withheld, Miller might have been bound, if, in the terms of the letter of 20th May the Attornies, without disclosing their instructions had within three months accepted; they however have not done so and the passage in the letter of 9th July 1857 having been disclosed, the Court must say that that passage was not and did not authorise an acceptance of the terms of the letter of 20 May, and that there was never a contract between the parties for the purchase and sale of the property in question.

7 *April,* 1858.

Re SAFFON.

Leave of absence to Mistress.

The Court granted six months leave of absence to Mrs. Backer the mistress of the institution and appointed Mrs. Jane Rogers to act.

11 *June,* 1858.

ROSE & DUFF *v.* CARTER.

Bill of Lading.—Contract to Deliver.

Where consignee endorses Bill of Lading the holder and no other person is entitled to delivery unless authorised by holder.

Van Praag endorsed a Bill of Lading to Plaintiff for payment of an account, and demand of the part of cargo was made to Defendant who was captain of the vessel bringing such goods (potatoes). The goods, before such demand, were landed at the request of Van Praag at Chapman's store. Chapman was the consignee of the vessel. Chapman had paid duty on goods at the instance of Van Praag.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

We have condemned the Defendant because by his signature to the Bill of Lading he undertook to deliver the goods to the order of the Consignee. The Consignee having endorsed the Bill of Lading to the Plaintiff transferred his right to them, and although it is said that the Defendant delivered the goods to Chapman & Co., on the verbal order of the Consignee, yet he did so without due authority from the parties holding the Bill of Lading and therefore delivered them in his own wrong.

12 *June*, 1858.

ADMINISTRATOR GENERAL *q.q.* GONSALVES *v.* GONSALVES.

Witness summoned for contempt for non-appearance on summons.

BUGLE *v.* PROPRIETORS OF BEST.

14 *June,* 1858.

Action in rem.

An action *in rem* does not lie against an estate.

Suit by Plaintiff against the "proprietor or proprie-
"tors, representative or representatives of Plns. *Best &*
"*Phoenix.*"

Plaintiff rented a mud flat and sent a punt to said flat and the punt was seized by the manager of *Best & Phoenix.* Plaintiff claimed $300 for punt and damages for detention.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

In this case the Court has granted an absolution of the instance because the action is wrongly framed. It is in *rem* and ought to have been in *personam.*

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ADMINISTRATOR GENERAL *q.q.* WHITNEY *v.* McALLISTER.

14 *June*, 1858.

Preference.—Insolvency.

Defendant and the insolvent firm of Whitney & McAllister had dealings for a long time: On 9 Feby., 1858, the firm found itself in insolvent circumstances, and at 10 o'clock that day intimated to four of its creditors, including Defendant, the position of affairs. On 16th Feby., the firm petitioned for the Act. On 18th Jany., the firm got an advance of $2,809.96 from Defendant for 70 head of cattle, at $40 a piece, said advance being to work the cattle farm. These cattle were to be sold at auction and if they fetched more than the loan advanced, the balance was to go to the firm, if they sold for less the firm was to pay the difference. One of the partners of the firm gave Defendant an order for the cattle after the meeting of the creditors. The cattle which were at Carlton Hall were delivered on the order on 10th Feby.,

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and 78 head of cattle were removed on the order. The delivery was by the manager of *Carlton Hall* as follows:

"I delivered him the cattle on that day (10th Feby.,) "the cattle were in the pen close to the house. I showed "them to him, they were let out of the pen again. The "same cattle Mr. Jansen (clerk of Defendant) took away "on the 17th were the same cattle I showed Mr. Carter "(clerk to Defendant) but Mr. Carter left them there un- "der my charge. I counted them as they came out of the "pen.—I pointed them out to him as Mr. McAllister's "cattle."

On 24th February one of the clerks of the Administrator General went to *Carlton Hall* and took possession of the same and then proceeded to Powell and demanded the cattle taken away by Defendant's agent. He refused delivery. Defendant was then applied to; he also refused delivery. Defendant swore, "I heard it rumouring on the "9th that Messrs. Whitney were tottering. I went there "and saw them both, they mentioned it to me them- "selves, and I asked them if under the circumstances "they considered themselves justified in giving me an "order for the cattle. Mr. Whitney said yes, because it "was a transaction previous to their stoppage. The ad- "vance for cattle was on 18th; the transaction on 9 Feb- "ruary was not a new transaction."

Suit for recovery of cattle.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

We have granted an absolution of this instance because it is impossible for the Court from the evidence adduced to declare that the transaction between the Insolvents and the Defendant can be held to have been within the provisions of Sec. 12 of Ord. 29 of 1846.

Secondly,—Because although the Court has been unable to give the Plaintiff a sentence under the present claim and demand it does not follow that the transaction constituted a *bona fide* sale of the cattle in question.

Thirdly,—Because without committing itself to the expression of an opinion the Court conceives that the Administrator General as representing the Insolvents may still have a right to the cattle in question and another action for the establishment of that right.

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Fourthly,—The Court has granted compensation of costs because the Defendant has by no means established his right to the cattle in question.

SMITH *v.* DALY.

1 *February*, 1856.

Judgment of Privy Council laid over.

The Court pronounces sentence in terms of such judgment.

BOARD OF ORPHANS *v.* KRAEGELIUS.

1 *February,*
1856.

Judgment of Privy Council laid over

REPORT OF THE AUDITOR GENERAL *in re* ACCOUNTS OF THE ADMINISTRATOR GENERAL *in re* THE ESTATE OF THE MINOR HILBORN.

4 *February,* 1856

Sale of Produce.

The Administrator General is bound to sell produce in the Colony, unless bound by Mortgage.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—

The Court having read the further report of the Administrator General herein in obedience to its order of 26th November 1855, now approves of this report and the account herein is passed accordingly, such approval not to be construed or considered as a precedent of an approval of the Court of the Administrator General consigning to Europe produce of an Estate under his entire or partial administration unless the same be bound by Mortgage or otherwise to be consigned to a party out of the colony, and the Administrator General is ordered to adhere strictly to the Court's order herein of 7th May 1855.

JARDINE *v.* SPOONER.

9 *February*, 1856

Entry of satisfaction written across original sentence by the Registrar at the instance of the Plaintiff and Defendant, both being present, "I hereby certify that this "sentence has been satisfied."

ADMINISTRATOR GENERAL REP. WHITNEY *v.* OWNER & OWNERS, &C. OF THE SCHOONER MIRAGE, and SPROSTON.

16 *June,* 1858.

Bill of Sale—Insolvency—Possession.

Property in the reputed ownership of an insolvent at the time of his insolvency is liable to be discussed for his debts.

Whitney & Co. in 1856 were the registered owners of the schooner *Mirage.* In April 1857 they requested Sproston to allow her to be registered in his name as she was going to the Orinoco, as they were afraid she might get into trouble as she did once before. As it was necessary for some value to be received Sproston gave a note for $2,480, and the vessel was duly registered in his name. The note for $2,480 was retired by money given Sproston by Whitney & Co. The boat remained in Whitney & Co.'s possession and they worked her, and the wages and working expenses were paid by them. In 1857, there were several accommodation notes between Whitney & Co. and Sproston, but there was no express understanding that Sproston was to hold the vessel for subsequent accommodations. In December, Whitney & Co. tried to sell the vessel. There was no mention made in the schedule of the insolvents of any interest in the schooner, but in December they sold the schooner to two Portuguese. On 16 Feb. 1858, they were adjudged insolvents.

The bill of sale being given to Sproston was duly registered in the Custom House, but he did not get possession of the schooner until after adjudication of insolvency.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— The Court has given sentence in favour of the Plaintiff,

1st. Because it is quite clear from the evidence of all the parties in this case that although the late firm of Whitney & Co. granted a bill of sale to Hugh Sproston, and that the vessel was registered in his name, yet that it never was the understanding of any of the parties that

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such Bill of sale and register were to operate in any other way than as a security from the one party to the other though in law it really was no security.

2ndly. Because it is proved by the Insolvents and admitted by the Defendent in his evidence, that although at the time of the bill of sale and register and several times subsequently thereto the vessel was in the Colony, yet that Hugh Sproston never had possession of the vessel, but suffered Whitney & Co. to remain in possession and act as owner of her until they were adjudged Insolvents, several days after which Hugh Sproston took possession, which, however, was then too late, as the property in the vessel must be considered to have been in the Insolvents on the day of the adjudication and therefore must be disposed of for the benefit of their creditors.

16 *June,* 1858.

Re JOSEPH KAYS.

Letters of Decree.

The Court having learned that by the will of William Elliott, deceased, by which David William Elliott derives his authority as Executor, no power to sell or transport immovable property is granted to the said William Elliott, and he having admitted that the sale of the property in question was merely to benefit the estate he represents, and there existing no necessity for such sale, and that it was without the sanction of the Court as upper Guardian of the minor J. J. B. Elliott, cannot grant the prayer of this petition, and orders the said W. D. Elliott, in his own right and as Executor under and to the last Will and Testament of W. Elliott, deceased, to pay all the costs of these proceedings.

17 *June,* 1858.

STEELE, ET AL *v.* THOMPSON.

Servitude.

The only title to land in this Colony is that decreed by the Court by transport or Letters of Decree, and if transport is passed without reserving right of servitude or easement, the holder of such servitude or easement loses his title thereto.

The facts appear from the Judgment.

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ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— We have given sentence in this case for the Defendants, 1stly: Because by the law of Holland a servitude on land (*bona immobile)* partakes of the nature of the property and is classed or considered as immovable property. "*Servitales prediales quod spectal; non* "*dubium, quin rerum immobilium numero veniant cam* "*nihil aliud sint quam rerum immobilium seu prae-* "*diorum jura et qualitates, uno praedia qualiter seze* "*habentia, prediorum accessiores, quas sui principalis* "*naturam sequi, ralio dictal, et ut argumentatur Hugo* "*Grotius, mannduct ad jurisprad. Holl libr* 2 *cap* 33, "*delibationes juris dominii, in quantum ex jure dominii* "*praedii servientis quid diminuitur, dehataturque, et in* "*dominantis praedii dominum transfertur. Voet ad Pand* "*l 1 tit 8 s.* 20."

Being immovable property, it is governed *lege loci ubi sunt sila: Voet de Reb mob et immob. c.* 23 s. 3. By the law of Holland immovable property can be conveyed or effected only by an act or instrument duly executed or passed before the Judge of the place *Voet l.* 8, *tit* 4, *s.* 1. Thus a servitude on land in this Colony can be created only by such a judicial act and by the prescription of the third of a century. *Grotius l.* 2, *c.* 36, *s.* 4.

Secondly,—Because this law of Holland is in force in this Colony and has been acted on as lately as the 14th day of November 1857 when a servitude or right to drain through the land of E. Parnell and H. J. Parnell was granted to the Mayor and Town Council of Georgetown by transport, duly passed before the First Puisne Judge of this Court".

Thirdly,—Because the contract or agreement dated 11th October 1826, between Cramer, and Simson and McKie, relied upon by the Plaintiffs, was *res inter alios acta,* and therefore not binding upon third parties.

Fourthly,—Because although the transport of the 16th November 1826 by Cramer, D. Simson and McKie, does refer to the said contract, yet such reference is merely as descriptive of the land and not as affecting the servitude mentioned in the agreement.

Fifthly,—Because if even a servitude had been created in 1826, yet the same was severed and destroyed by the

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execution sale of *Bremen* or *Cullen* on 6 October 1841 and Letters of Decree of 7 August 1843 there being no reservation or mention of such servitude either in the conditions of sale or the Letters of Decree. See *Voet l.* 8. 6, 14. *Hollandche Consultien,* 2 Dec. 1545.

Sixthly: Because Bremen & Cullen were transported on the 13th July 1849, by the purchaser at execution sale of 6th October 1841 to the Plaintiff without any mention of or reference to such servitude.

Seventhly: Because Pln. Perseverance the other part of the property belonging to Cramer, and which it is contended is burthened with servitude claimed, was sold at execution sale on 21st June 1853, and purchased by the Defendant without any mention of a reference in the conditions of sale to any servitude.

Eighthly: Because Letters of Decree were granted on. 11th April 1854, of Pln. Perseverance to the Defendant in the terms of the conditions of sale of 21st June 1853, and of course without reference to or mention of any servitude.

Ninthly: Because both execution sales of 1841 and 1853 took place without any one appearing to secure the right of servitude, and which was necessary according to *Voet* in the passage last cited, and according to the practice of this Court then and still existing.

Tenthly: Because if it be clear that no servitude was ever created by transport, so it is equally clear that none has been created by prescription of one-third of a century, the date from which the Plaintiffs reckon being the 16th November 1826, and the date of the stop-off being put in being July 1857, consequently thirty years and 9 months only.

Eleventhly: Because although it is contended on the authority of the concluding part of the passage of *Voet* last referred to and other authorities to the like effect, that there was no necessity to oppose as the servitude was *ad oculum patens,* yet it appears to the Court that *Voet* in this passage is speaking of an existing servitude, a servitude *ad oculum patens,* but which in the present case never existed. As in the present case a servitude never existed; it could not have been *ad oculum patens,*

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or openly manifest at the times of the several transports and execution sales mentioned, or any of them.

Twelfthly: Because even by the letters of the Defendant filed and relied upon by the Plaintiffs as containing an admission by the Defendant of a servitude, and by the letters of the Plaintiffs' manager filed by the Defendant, it is clear that so far from a servitude being manifest or *ad oculum patens,* neither party had the least idea of any servitude or of any claim to such a right, each party to that correspondence claiming a right to the land itself in which the fresh water canal was dug.

PETITION W. R. ISKENIUS.

18 *June*, 1858.

Letters of Decree.

The Court cannot grant the prayer of this petition.

Petition Charles Benjamin.

14 *October*, 1858.

Appeal.

Appeal does not lie after satisfaction of sentence.

It appearing from the report of the Attorney General and the affidavit of the Crown Solicitor, that the sum of money for the recovery of which the order of execution sought to be appealed from was granted, has been fully paid and satisfied, and that the original writ of execution has been given up to the Petitioners duly receipted, the Court cannot grant the prayer of this petition.

LUCKIE *v.* STUART.

14 *October,* 1858.

The Court granted a rule on a witness to show cause for non-attendance.

4 *December,*
1858

EXPARTE FOWLER.

Discharge of Insolvent.

Order of adjudication cancelled on grounds stated.

ARRINDELL, C.J., and BEETE, J.:—

The Court has dismissed this petition because it appears by the schedule filed that the petitioner's assets amount to $529.67, of which $456.67 appear to be for law costs, and $70 due to his own father, leaving only $30 due to other persons. From the evidence before the Court it is evident that the Petitioner has acted with unfairness towards the opposing creditor, O. A. Gilbert, and by the admission of the Petitioner the $70 are due to his own father, hence there are only $13 remaining and there is no evidence to show that any of the creditors for this amount are in any way proceeding against the petitioner. Besides, the Petitioner, an able-bodied man, would by honest industry, make in one week sufficient to pay the $13. It is evident therefore that the Petitioner's sole object is to defeat the claim of O. A. Gilbert, an object to the attainment of which the Court will be no party, and therefore dismisses the petition with Costs.

Provisional order of adjudication cancelled.

4 *December,*
1858.

EXPARTE BAGOT.

Discharge—Salary.

Court has no power over Insolvent's salary earned from a private source.

The Petitioner's debts by his schedule, amount to $1,197.89, and there appears due to him from three persons $134.29, leaving a balance of $1,063.60. He states that he is in the receipt of $1,040 per annum, 25% of which for 41/4 years would pay off his debts. The Court has no power over this salary, and we cannot award any

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portion of it to be set apart for the benefit of his creditors.

The Petitioner seeks for a discharge from his debts, which, if the Court granted it, will allow him to enjoy his salary if he continues to hold his situation, without paying his just debts.

To grant the Petitioner a discharge under such circumstances would be a fraud upon the Petitioner's creditors, to which the Court cannot be a party, and it has therefore dismissed the petition with all costs.

Provisional order of adjudication dismissed.

GONSALVES *v.* GONSALVES.

6 *December,* 1858.

Amendment.

Suit for separation *a mensa et thoro.* Plaintiff did not ask for the usual publication. Defendant excepted.

The Court (ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.,) directs the Claim and Demand herein to be amended by inserting in the conclusion thereof, a demand for authority from this Court to order the publication in the *Official Gazette* of this Colony of the sentence to be given herein, and for notice thereof to be affixed *ad valvas Curiae,* with liberty to the Defendant to amend his Conclusion of Exception and Answer if he shall think proper so to do.

DELPH *v*. CONRAD.

11 *December,* 1858

Arrest—Suspicion.

No one has a right to arrest another on suspicion.

Plaintiff, a cabinet maker, was employed by Defendant in July to make glass cases, &c, in his store. Some scissors near the spot Plaintiff was working at were missed, and Defendant got information and proved in the suit that Plaintiff was selling goods like them. He sent for and had Plaintiff identified by the informants,

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and he was then and there arrested on a charge of "larceny by suspicion." The case was not entered into by the Magistrate who declined to entertain a charge on suspicion.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— The evidence in this case supports so much of the averments of the Claim and Demand as are to be found in the sentence. The Court will not say that there was no ground of suspicion, but no person is allowed to treat another upon bare suspicion, as the Defendant has been proved to have treated the Plaintiff.

The Defendant's duty was to have applied to a Magistrate, and not to have taken the law into his own hands. He acted no doubt ignorantly, but he acted illegally and without judgment or discretion. The damages have been reduced to the small sum of $100, because the Court is of opinion that some suspicion under all the circumstances did attach to the Plaintiff, and that he is not therefore entitled to that measure of damages to which he would have been entitled had he been above suspicion.

13 *December,* 1858.

ATKINSON *v.* LANDRY.

Surety.—Time given to Principal.

The granting of time to a principal debtor on a note releases the surety.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— In this case the Court is of opinion that although the Defendant signed the joint and several promissory notes of 13th Jany., 1857, yet he did so merely as surety of R. S. Turton. That the payee of the note having sued the Defendant who is one of the makers, and that as there is a privity of contract between the Plaintiff and Defendant, the Defendant has a right to disclose the consideration or rather the illegality of the consideration, and all of the facts which may defeat the Plaintiff's action.

That it is clear to the Court that the Defendant was merely a surety. The giving time by the surety to the original debtor, and which is evidenced by the retired promissory note of the original debt of 8th Sep. 1857, and

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which granting of time or indulgence was long after 10th May 1857, when the Defendant told the Plaintiff "to re-"member that the note must be paid for he would not "renew it," discharged the Defendant from all further liability.

The Court has, therefore, without entering into any of the other objections to the action, rejected the Claim and Demand with costs.

NORTON BY ATTORNEY *v.* EXECUTORS ALBOUY.

13 *December*, 1858.

Executor—Substitution.

An Executor out of the Colony can appoint some one to represent him in the Colony although the Will gives no right or power of assumption or substitution or appointment.

Suit to immit and place Plaintiff in possession of estate along with other Executor.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— In this case the only questions are 1stly, whether one Executor residing out of the Colony can appoint an Attorney to act for him in this Colony. 2ndly, whether there is anything in the Will of James Hill Albouy produced in these proceedings derogatory of this right.

With respect to the first question, the Court knows of no law which prohibits an Executor from appointing an Agent or Attorney to act for him. The invariable practice for upwards of thirty-five years within the knowledge of this Court has been for the Court to recognize and respect such appointments.

The Counsel for the Defendants stated in his pleading that he did not dispute such right in general. A petition dated 19th December 1851 has been filed, whereby it appears that James Stuart, Alexander McRae, Thomas Henry Mackey, Augusta Sophia Albuoy and James Benjamin Hill Albouy in quality as Executors jointly and each of them separately to the last Will and Testament of James Hill Albouy, deceased, the said Augusta Sophia Albouy and James Benjamin Hill Albouy, appearing there-

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in by their duly constituted Attorneys the said James Stuart, Alexander McRae and Thomas Henry Mackey, petitioned the Chief Justice for leave to call up by edictal citation the creditors of James Hill Albouy, deceased, and that such petition being granted it appears by edictal citation filed that such order was duly acted upon.

After this it is somewhat singular that the Defendant should dispute the right of the Plaintiff as Executrix to appoint an Attorney to act for her.

Secondly: The Court is of opinion that the words of the Will "without the power of assumption, substitution or surrogation" do not destroy the right of Mrs. Norton as Executrix. These words may just as well have been inserted to protect the Testator's wife and son from improper substitution, assumption or surrogation, by either of the three Defendants as to protect them against exercise by Mrs. Norton of the like authority.

With respect to the arguments that the power is invalid because it contains a power to sell, the Court can see no reason to fear the exercise of a right which the Will does not give. With respect to Mrs. Norton not having any right to enter into a joint administration of the estate, nothing has been shown to the Court which divests her of that right which the Testator gave her when he declared in his Will to appoint her devisee in trust and Executrix jointly and severally with four others.

In disposing of the main question, the Court also disposes of the Exceptions which appeared to have been founded on the same reasons upon which the Answer rests.

Petition for leave to appeal granted 9 April, 1859.

THE

LAW REPORTS

OF

BRITISH GUIANA.

Vol. I.,

1855-58.

[OLD SERIES.]

THE "ARGOSY" PRESS, DEMERARA.

1893.

PREFACE.

THE volumes of the old and new series of the Law Reports of British Guiana will be brought out concurrently.

They are very much needed. The former Judges and the older practitioners have all passed away, burying with them the practice; and the decisions and practices of the Courts are now only known to two or three persons.

The work is all the more valuable as the Judges who framed the Manner of Proceeding of 1855, and who were well conversant with the several older Manners of Proceeding, and had had considerable practice at the local Bar for some years previous to the passing of the Procedure of 1855, gave several important decisions, based on the law as framed by them.

The much abused Roman-Dutch Law of the Colony will be found in this and the succeeding volumes of the older reports to have been made a special study by Bench and Bar alike, and the law of the Colony was held up with much pride as the "Roman-Dutch." The Privy Council repeatedly upheld this dictum.

For bringing out this volume no apology from me is

needed, except to say that during the last 20 years of my labour in the Registrar's Office of British Guiana, I felt that law reporting *was very much needed.*

E. A. V. ABKAHAM,

Attorney-at-Law,
Late Sworn Clerk and Notary Public of the Registrar's Office of British Guiana.

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