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[OLD SERIES.]

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Appeal—Security Bond.

The Court exercises right to examine Security Bond, approving of same; directs leave to appeal after having approved of Bond; grants authority to Registrar to deliver to the parties copies of all documents and vouchers belonging to or appertaining to the matter, and orders the grosse of the Bond to be lodged with the Registrar until final issue of petition.

CASES
DETERMINED BY THE
SUPREME COURT OF CIVIL JUSTICE.

INSOLVENCY MATTERS.

8 April, 1859.

Practice in discharging Insolvents.

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

No. 2,660. The petition of Francisco Gonsalves, an applicant for relief under Ordinance No. 29, anno 1846.

The Court dismisses this petition and discharges the provisional order of adjudication of Insolvency made thereon by His Honour ROBERT CROSBY BEETE, First Puisne Judge of British Guiana, dated the 29th of October 1858, and orders the Petitioner to pay all costs.

(Twenty-three of these orders made as above.)

INSOLVENCY—DIVIDENDS—ACCOUNTS.

9 April, 1859.

The practice from the Records:—

1. Registrar lays over a statement prepared by the

SUPREME COURT

1859 Administrator General (s. 232, Ord. 26 of 1855) of claims filed
INSOLVENCY against the estate, and also evidence that notices of the state-
MATTERS. ment and of the division of the first dividend had been pub-
lished.

2. Court examines statement and documents and vouchers.
3. Orders what is to be divided between the creditors.
4. Declares dividend of—per. cent.
5. Debars all non-appearing creditors from any right to or claim on the sums then divided.
6. Confirms rejection of claims.

(The same practice prevailed with regard to estates of deceased persons.)

With respect to account of minors, the Accountant of Court reported on the account current and vouchers of the Administrator General and if approved, the following order was made: —

The Court approves of this report and the account herein is passed accordingly.

SUPREME COURT

12, 13 April,
1859.

PEQUENO v. RODRIGUES.

Libel.

Law of Libel in this colony is governed by that of England.

Semble.—Special damages must be alleged and proved.

Secus.—Damages for libel does not lie where offence alleged is not criminal *per se* and entails corporal punishment.

Action for damages for libel.

Plaintiff's case (*Mr. Roney*):—Plaintiff and Defendant kept retail spirit shops. Defendant in the presence of a number of Portuguese on the Ferry steamer told Plaintiff in Portuguese that if he was to tell the Governor what Plaintiff did he would not hold a licence in the town or in the country because he smuggled: that Plaintiff had paid a Policeman to help him in smuggling, and he Defendant could prove it.

Defendant's case (*Mr. Lucie Smith.*):—Partial justification.

15 April,
1859

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—The Court considers:—First: That according to Ordinance 22 of 1846 this case must be governed by English law.

Secondly: That by English law to impute any crime,

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a misdemeanour for which corporal punishment may be inflicted in a temporal Court, is actionable without proof of special damages, but where the penalty for an offence is merely pecuniary, it does not appear that an action will lie for charging it, even though in default of payment imprisonment should be prescribed by the Statute, imprisonment not being the primary and immediate punishment for the offence; see *Starkie Law on Libel*, 2 Ed. Vol. 1, p. 43.

Thirdly: That by the law of the colony the penalty for smuggling is the seizure of the goods smuggled, or at most pecuniary, and as special damage has not been averred in the Claim and Demand, and the Plaintiff has not a right of action for the words set forth in the Claim and Demand, and alleged to be defamatory; Fourthly: The Court has rejected the Claim and Demand with costs.

SUPREME COURT

DAVIS v. SHORT.

10 & 11
 March
 1863.

Arrest suspectus de fuga. Insolvency—Amendment—Malice—Costs.

Personal actions do not rest in Assignees in Bankruptcy.

Action amended by inserting word “maliciously.”

Dutch law does not govern civil arrests.

Party arresting not liable for malicious arrest if he acts *bonâ fide* on Counsel's advice.

Defendant not to be presumed to have acted maliciously if he obtained arrest *bonâ fide* and was not guilty of *suppressio veri* or *suggestio falsi*:

Plaintiff's case (*Mr. Trounseil Gilbert*):—On 22nd May 1862 we were arrested under Ordinance 13 of 1847 and kept in custody for nine days, when we were released on an order of Mr. Justice BEETE. We claim \$5,000 for the arrest, including by way of special damage \$232 amount of costs incurred by us in obtaining release. Although insolvent the action for personal injury continues for the benefit of our creditors. *Voet de cessione bonorum, lib. 42 tit. 3 s.10.*

Evidence led for Plaintiff:—Plaintiff never intended to leave the Colony. Defendant told one Jacobs, “this is a nasty “business. Davis is up a spout and owing me money.” Jacobs replied, “I heard Davis was going to leave the Colony.” Defendant asked if he was sure. Jacobs said, “Yes, I am sure. I “heard it at Abraham's.” Next day in answer to Defendant, Jacobs

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thought that Plaintiff should be arrested. Defendant mentioned to the Trustee of Davis that Davis was running away, and the Trustee, John Drysdale, said that there was as much truth in the statement as that Davis had remitted a large amount of money. Davis was under deed of arrangement with his creditors which was not completed in consequence of Short and another creditor not having signed same and of arrest. Money was deposited to the Plaintiff's account before, and on the day of arrest he and his partner went to Defendant to get him to sign the trust deed. Another creditor, Taggart, (just before Davis's other partner had left the Colony) tried to induce Defendant to sign the Trust Deed, but he refused, saying "he knew how to get paid in full, and he would get paid in full. "Davis is still selling off his goods. How do I know but that he may take all the money and be off in the next Mail."

Defendant's case (*Mr. Norton*):—On 11th June 1862 Plaintiff was adjudged insolvent and such adjudication is still in force, therefore he is not entitled to carry on this action. We plead *tibi adversus me non competit actio*. Plaintiff knowing that he had no *locus* moved unsuccessfully to substitute the Administrator General as Plaintiff, thus maintaining that action passed to the Assignee for his creditors. No averment of malice.

Evidence led for Defendant:—Common rumour that Davis was leaving the Colony and that his father was coming out to manage the business. Abraham had told us that he had heard from Van Kinschot that Davis was leaving. Kauffmann told us that he had heard it from Abraham and from Van Kinschot, who had had it from Davis himself. "I laid all the facts fully and fairly before my Counsel just as I had heard them, and I acted upon his advice. I had no other object in taking proceedings than to obtain possession of my money. I had not the slightest ill-feeling against Mr. Davis. I had it from more than a dozen persons before the arrest; it was a matter of common rumour down the Street. I also heard that Plaintiff had told Mr. Bland that he had remitted a large sum, £2,500. to England. I went with Findlay to Bland to enquire. Mr. Bland stated that

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“Mr. Davis had told him so, and he referred to a memorandum he had made and said it was on 23rd January same year. I was perfectly satisfied that Plaintiff intended to leave “the Colony.” (Evidence was given in cross-examination as to the facts told to Counsel by Defendant). “When I said that I “told and laid before my Counsel all the facts of the case I “meant that I told him all I knew at the time and that I thought “pertinent to the case.”

12 March,
1863.

LUCIE SMITH, C.J., BEETE and ALEXANDER, J.J.:—The Court fully admits the reading of the passage in *Voet* as given to it by the learned Counsel on both sides, but we are of opinion that it has no bearing upon the present case. *Voet* is there referring exclusively to the law of *cessione bonorum*, which has been wholly repealed in this Colony (19 of 1844, sec. 1), Ordinance 23 August 1833, 29 of 1846. Defendant's Counsel proceeded to argue that the wording of the 6th section of Ordinance 29 of 1846, which vests an insolvent's property and rights of action in the Administrator General, must be taken to include all actions whatsoever. This is a mistake. The words are, “shall by force of such adjudication be vested in the Administrator General as Assignee of the said Court *in like manner* and to all intents and purposes as if such insolvent had “assigned the same under the directions of the said Court,” and the effect of the clause is simply to make provisional adjudication operate as an assignment and no further. Only such rights of actions can pass under a vesting order as would have been assigned by a formal instrument of transfer regularly executed. It was not disputed at the Bar that under the English statute actions founded on personal injury to a bankrupt do not vest in the Assignee, nor is it necessary to cite authorities in support of so plain a proposition.

It is equally certain that under the law of cession of actions in force in this Colony an action of injury like the present is not assignable, and we have no hesitation in holding that Plaintiff's right to sue did not pass by virtue of the provisional adjudication, but still continued in him and that he was entitled to maintain and carry on the action in his own name. Some stress was laid on the

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fact that the Plaintiff entered the claim on his schedule as an asset for the benefit of his creditors, but this in no way affects the legal question. Whether in the event Of the insolvent having recovered damages in this action the Administrator General as Official Assignee would have been entitled to demand the money from him for distribution among his creditors, is a point which it is unnecessary for us now to determine.

Having disposed of the question of law raised by the Defendant's pleadings, the statements and allegations of fact in the claim and demand being met by a general denial in the answer, we approach the merits of the case, and it may be convenient for us here to notice a point strenuously contended for at the hearing by Defendant's Counsel. He relied upon the absence of any averment of malice in the claim and demand, and argued that the words "wrongfully, unlawfully and injuriously" were not equivalent to "maliciously", which he submitted was a material allegation, and that without it the action was not maintainable. Whether under the strict rules of English pleading the words "wrongfully, unlawfully and injuriously" do or do not amount to a sufficient averment of malice (and there is not wanting high authority in support of the affirmative of the proposition) we are not called upon to determine, inasmuch as we allowed the Plaintiff to amend by adding the word "maliciously" under the wholesome provisions of the 173 sec. of the New Procedure Ordinance.

The next question before us was not a nice point of pleading, but the broad issue as to the Plaintiff's right to receive damages upon the evidence adduced, and even if the word "maliciously" had been material (which we do not decide) the case was precisely one of those in which the Legislature intended that the discretionary power of amendment should be exercised for the purpose of enabling the Court to dispense substantial justice. It may not be out of place here to refer to the practice in England even when technical objections are expressly pleaded, and the case of *Bryant v. Bobbett*, 11 *Jurist* 1020, 10 L.T. 208 Ex. is a sufficient illustration. That was an action for a malicious arrest under a Judge's order

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which the Plaintiff alleged to have been falsely procured by the Defendant, and the latter on the authority of *Daniels v. Fielding* to be presently mentioned, demurred especially on the ground that the declaration did not set out in what the falsehood consisted and in what manner Defendant falsely induced the Judge to grant the order. This demurrer was after argument held to be good, but the following was the Court's order: "Plaintiff to amend within a month, otherwise judgment for the Defendant."

It now becomes natural to determine what proof is necessary to sustain an action of the present description according to the law in force in the Colony. The well-known passage in *Voet, lib. 47 tit 10 s. 7* is in these words:—"Si vexationis causa ad tribunal abignus alium interpellaverit aut secundum mores modierinos dolo malo injurice causa sistat alium sen ar-resto detineat," and with respect to their meaning and import there was no real contention at the Bar. Without entering upon a disquisition on the subject, it is enough for us to say that for all practical purposes the words "*dolo malo injurice causa*" in the Dutch law may in our opinion be taken as substantially equivalent to the words "maliciously and without reasonable and probable cause" in the English law, and that the action rests upon the same principle in both systems of jurisprudence. We fully adopt the judgment of the Exchequer Chamber in England in *De Medina v. Grove*, 10 Q.B. 152, which affirms that "the law allows every person to employ its powers for the purpose of trying his rights without subjecting him to any liability unless he acts maliciously and without probable cause," and further on that "there is no authority to show that the employment of either *mesne* or final process will furnish ground of action against the person employing it, unless he has acted maliciously and without probable cause." What we have therefore to determine is this: Did the Defendant when he sued out the writ of arrest against the Plaintiff act maliciously and without reasonable or probable cause?

With respect to the latter part of this enquiry we are of opinion that no reasonable or probable cause for the arrest has been established, and that the learned Judge

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was perfectly right in ordering the Plaintiff's discharge from custody. Upon this point the Defendant's Counsel referred to *Calvini Lexicon* and laid great stress upon *Van der Linden's* supplement to *Voet desin jus vocando, lib. 2 tit 4 s. 18*, in which he treats of what amounts to a suspicion of flight under the law of arrest in *securitatem debiti*. It seems to us that the passage relied on, which we have carefully examined, bears little or no application to the present case. The Plaintiff was arrested by virtue of the special provisions of Ordinance 15 of 1847, the preamble of which recites that the law then in force for arresting in *securitatem debiti* persons about to leave the Colony is unnecessarily severe and ought to be relaxed, and it is of importance to refer to the previous Ordinance for the purpose of seeing in what respect this severity has been mitigated. Ordinance 23 of 1844 merely simplified the process of arrest in *securitatem debiti*, and permitted the creditor to make his affidavit according to the form in the schedule against any one, his debtor, who shall be about to leave "*shall be suspected of leaving the colony*" and all that was required in the affidavit was a bare averment that the creditor "hath been informed and "verily believes" that the debtor is about to leave. But the Ordinance of 1847, which repealed this enactment, imposes upon the creditor the necessity of showing to the satisfaction of a Judge that there is probable cause for believing that the debtor is about to leave the Colony unless forthwith apprehended, and he is bound in his affidavit to state the facts which show the grounds or reasons for believing that the debtor is about to leave. The latter has also a right to call upon the creditor to disclose the grounds and reasons of his belief and to show cause why he should not be discharged from custody. In point of fact the provisions of the English statute have been substantially embodied, the Ordinance as a remedial one moderating the rigours of the ancient British law, and the question before us is not whether Mr. Davis is to be considered *suspectus de fugæ* according to *Voet, Van der Linden* and the *Lexicon of Calvinis*, but whether within the meaning of the Ordinance of 1847 there was probable cause for believing that he was about to leave

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the Colony unless forthwith apprehended. Now all that was proved with respect to Mr. Davis, amounted to vague suspicions merely, which on being investigated turns out to rest upon no reasonable foundation. Undoubtedly this is not sufficient.

It only remains for us to consider the question of malice, and we have approached this subject with the most anxious desire to do proper justice to both parties. *Daniels v. Fielding, 4 Dowling & Lowndes, 329, 16 M. & W. 200*, establishes that an action like the present cannot be supported by the mere fact that the Defendant when he procured the Judge's order for the arrest had no reasonable or probable cause for believing that the Plaintiff was going to leave, but it lies only where the party obtaining the order has imposed upon the Judge by some false statement, some *suggestio falsi* or *suppressio veri*. It has been urged with great force and ability by the Counsel for the Plaintiff that the Defendant's affidavit was not *bona fide*, and that his conversation with Mr. Taggart showed that he meditated getting his money by arresting the Plaintiff *per fas aut nefas*. We think that the Defendant's language on that occasion is susceptible of a more innocent interpretation and we allow due regard to his sworn statement that he communicated the facts to his Counsel and acted on his advice. That evidence was given in the presence and hearing of the learned gentleman, who if he did not believe the affidavit, at all events adopted it, and upon this subject we quite concur in the view expressed by BAYLEY, J., in *Ravenga v. Mackintosh, 2 Barnwell and C. 697*. "I assent," said the learned Judge, "to the doctrine that if a party lays all the facts of his case fairly before Counsel and acts *bonâ fide* upon the opinion given by that Counsel (however erroneous that opinion may be) he is not liable to an action of this description." Having carefully considered all that has been said upon this subject on both sides, the result of our deliberation is that while thinking the affidavit open to comment, the evidence is not sufficient to impel us to the painful conclusion that the Defendant wilfully imposed upon the Judge. We have therefore imposed a sentence absolving the Defendant

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of the instance, but having regard to all the circumstances, it seems to us that we shall best satisfy the justice of the case by awarding compensation of costs.

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LOPES v. D'OLIVEIRA.

13 March,
1863.*Contract—Evidence.*

Contracting parties are bound by contract as between themselves, whether such contract be valid or not as against third parties.

Uncontradicted evidence to be taken as true.

Action for breach of contract.

Plaintiff's case (*Mr. Trounsell Gilbert*):—On 13th August 1860 Plaintiff and Defendant entered into contracts with other parties for delivery of charcoal to Plaintiff and Defendant for one year. On 3rd November 1860 Plaintiff and Defendant signed the following document:—"I the undersigned do hereby "and by these presents make over all my right title and interest "and capital possessed in the coal-burning business that is now "carried on between myself and him as per contract, for the "sum of \$300, and in case if he succeeds in the suit now pending between Manoel De Cambra and ourselves then and in "that case he pays \$50.

his
"ANTONIO D'OLIVEIRA, X
mark.

"Witness: J. H. FORBES.

"Agreed to,
"M. J. LOPES.

"Demerary, 3 November 1860."

On the same day Plaintiff gave Defendant a note for \$350, payable in six months. Plaintiff has prevented us from carrying out the contract.

Defendant's case (*Mr. Norton*):—We paid the \$50 mentioned in agreement of 3rd November 1860. (No evidence led.)

BEETE and ALEXANDER, J.J.:—The document of 3rd November 1860 being set out in the claim and demand,

17 March,
1863,

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and its execution admitted in the answer, both parties are held by it, and we are bound to give effect to what in our judgment was the intention of the Plaintiff and Defendant in executing it, and this appears to us to have been the sale by the Defendant to the Plaintiff of all the right, title, and interest of the Defendant in the several contracts made on 13th August 1860.

By the receipt of the consideration the Defendant became clearly bound to put the Plaintiff in a position to realize the profits arising from the several contracts, and to give him every assistance in the enforcing the fulfilment of them against any of the contractors in default.

On the other hand the Plaintiff became bound to save the Defendant harmless for any loss or damage to which he might be liable under any of the provisions of the contracts of 1860.

Such being our view of the mutual obligations of the parties, we have now to consider the facts brought out in evidence.

The Plaintiff subsequently to the 3rd November 1860 received the coals delivered by the several contracting parties up to 7th January 1861, when being advised that the document of 3rd November was not a good and valid contract he called upon the Defendant to execute a proper one, which according to the Plaintiff's testimony he not only refused to do, but told Jose Rodrigues, one of the contractors, that his (the Defendant's) name was still in the contract and that he would make him and the other contractors pay half-a-bit on every barrel of coals they delivered. From that time no more coals were delivered to the Plaintiff by any of the contractors except Francisco Jose Matthias, who continued to abide by his contract up to its expiration.

Again, in January 1861 one Francis Gomes brought coals and wished to deliver them to the Plaintiff and Defendant, and Defendant refused, saying, "I have nothing to do with it." The consequence of this act was that Gomes refused to deliver the coals to the Plaintiff, saying he had contracted with both. Again, on 14th January, when Manoel Nunes, another contractor, was discharging coals and was asked by Plaintiff why he

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was discharging coals without delivering them to him (Plaintiff) the Defendant came up and said “he was the contractor “and he had authorised Nunes to sell the coals.”

Here then we find the Defendant on three different occasions in January 1861 not merely not assisting the Plaintiff to realize the profits to which he was entitled, but putting obstacles in the way of his doing so, playing fast and loose, at one time holding himself out as still interested in the contract and at another declaring that he had nothing to do with it. It is not to be wondered at, that under such circumstances, the contractors, with one exception, refused to deliver coals to the Plaintiff, to his great loss and detriment.

As to whether or not the Plaintiff was entitled to call upon the Defendant to execute a more formal transfer and cession of action we do not feel called on to express any opinion, as we consider there is quite enough before us in the pleadings to show what was the intention of the parties.

No evidence was offered on the part of the Defendant to contradict the testimony of the Plaintiff, who must therefore be held to have given a true account of the circumstances detailed by him.

It is no doubt true that the Plaintiff made handsome profits from the coal business up to 6th January 1861 and from his subsequent dealings with P. J. Martins, but there is also no doubt that he would have made much greater profits if he had been in a position to enforce the defaulting contractors to carry out their engagements.

Under all the circumstances we consider the Plaintiff clearly entitled to the very moderate sum claimed by him as damages, and have accordingly given sentence for that amount (\$600) with costs.

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OF CIVIL JUSTICE.

RODRIGUES QQ. RODRIGUES, v. MENDONCA, ORIGINAL DEFENDANT, AND QUALE, CO-DEFENDANT.

27 March,
1863.

Decided on merits.

OF CIVIL JUSTICE.

CORNETTE v. CROAL.

13 April,
1859.*Servitude.*

Servitude is only recognized when reserved or set forth in Transport or Letters of Decree.

Action to compel removal of stop-off.

Plaintiff's case (*Mr. Roney*):— Plaintiff obtained transport in 1845, of lot 58 Klien Pouderoyen 3 roods extending from middle walk to S. draining trench. He cultivated the lot which was drained through the side line draining trench into the river. He dug his small drains right down to the border of the trench until 1859. Defendant blocked up the draining trench by a stop-off 100 roods from the river on 5th November 1857, to enable him to reap and pass his canes to buildings, making the trench a navigation canal, and thus preventing drainage to Plaintiff and in wet weather swamping Plaintiff. That Plaintiff agreed with the original owner who had transported to Defendant that he should have drainage.

Defendant's case (*Mr. Lucie Smith*):— Defendant admits Plaintiff's transport of 1st May 1857, but he holds transport of the trench in question and could lawfully put

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1859 stop off. That there is no reservation or mention of any servi-
 CORNETTE tude in Defendant's transport.
 v. ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—Upon the
 CROAL. facts it is clear to the Court that no matter what understanding
 15 April existed between the original proprietor of lot 58 and of the
 1859. trench, and the Plaintiff as to the right of drainage of the lot
 into the trench, the Defendant having at a subsequent period
 received a free and unconditional transport of the trench
 amongst other things, is not bound by any such understanding,
 if any such understanding ever did exist; see *Voet ad Pandec-*
tus, B. 1 tit 8 s. 20; *Voet de rev mob et immob*, cap. 23 s. 3; see
J. Voet, lib 8 tit 4, s. 1; *Grotius*, 1. 2 c. 36 s. 4; *J. Voet, l. 8 t. 6*
 s. 14; *Holl, colxt 2 decl*, fol. 145.

The Court has therefore rejected the Plaintiff's claim and
 demand with costs.

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20 *May*,
1863.

PLEADINGS.

General Rules of Pleadings laid over.

Duplicate forwarded to Government Secretary to be laid before the Governor and Court of Policy for approval in terms of 249th Section of Amended Manner of Proceeding Ordinance 26 of 1855.

“Whereas it is provided by ‘the Amended Manner of Proceeding Ordinance, 1855,’ that the Judges of the Supreme Court of Civil Justice may repeal, alter, make, and establish from time to time such rules, orders, and regulations as to them shall seem meet, for carrying into effect the true intent and meaning of that Ordinance, and for regulating, extending, and improving the Manner of Proceeding of the Supreme Court of Civil Justice; but that no such rules, orders, and regulations shall have any force or effect until they shall have been laid before the Governor and Court of Policy and approved of by resolution:

“And whereas it is expedient that rules, orders, and regulations should be framed as to Pleadings in the said Supreme Court;

“It is therefore ordered, subject to the approval of the Governor and Court of Policy, that on and after the First day of July, in this present year of our Lord One Thousand Eight Hundred and Sixty-three, the following rules, orders, and regulations as to pleadings shall be in force in the Supreme Court of Civil Justice of British Guiana, that is to say:—

“1. Where the Conclusion of Exception and Answer, or Answer alone, contains nothing more than a denial, or that which amounts to a denial only of the statements and averments in the Claim and Demand, issue shall be joined by such pleading (hereinafter termed the general issue) and there shall be no Answer in Exception or Replication; and the same evidence and no other shall be admissible under such pleading of the general issue

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in this Colony as would be admissible under a plea of the general issue in England to a declaration in respect of the like cause of action.

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“2. In all actions of Contract, except as hereinafter excepted, the general issue shall operate only as a denial in fact of the express contract, promise or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law.

“*Exempli gratia*, in actions for goods sold and delivered, the general issue will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received it will operate as a denial both of the receipt of money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

“3. In actions upon Bills of Exchange and Promissory Notes, the general issue shall be inadmissible. In such actions, therefore, the Defendant's Pleading must traverse some matter of fact; *exempli gratia*, the drawing, or making, or accepting, or presenting, or notice of dishonour of the bill or note.

“4. In actions on Mortgages, Bonds and Covenants, the general issue shall operate as a denial of the execution of the instrument in point of fact only, and all other denials shall be specially pleaded, including matters which make the instrument absolutely void, as well as those which make it voidable.

“5. In all actions on Contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *exempli gratia*, infancy, coverture, release, payment, performance, illegality of consideration, drawing, indorsing, accepting, &c, bills or notes by way of accommodation, set off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded.

“6. Payment shall not in any case be allowed to be given in evidence in reduction of debt or damages, but shall be pleaded in bar.

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“7. In actions for detaining goods, the general issue shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff’s property therein; and no other defence than such denial shall be admissible under that pleading.

“8. In all actions of Injury, the general issue shall operate in a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that pleading; any particular matter of fact alleged in the Claim and Demand on which issue is intended to be taken, must be specially denied.

“*Exempli gratia*, in an action for a nuisance to the occupation of a house by carrying on an offensive trade, the general issue will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff’s occupation of the house.

“In an action for obstructing a right of way, such pleading will operate as a denial of the obstruction only, and not of the plaintiff’s right of way.

“In an action for slander of the plaintiff in his office, profession or trade, the general issue will operate in denial of speaking the words, of speaking them maliciously and in the defamatory sense imputed, and with reference to the plaintiff’s office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

“In an action for an escape it will operate as a denial of the neglect or default of the Officer sued or his servants, but not of the debt, judgment or preliminary proceedings.

“In an action against a carrier, the general issue will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

“9. All matters in confession and avoidance shall be pleaded specially, in actions of injury and in all others, as in actions on contract.

“10. In actions for trespass to land, the general issue

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shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if included to be denied, must be traversed specially.

"11. In actions for taking, damaging, or converting the plaintiff's goods, the general issue shall operate as a denial of the defendant having committed the wrong alleged by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein.

"12. In every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of an Ordinance, he shall insert in the margin of the pleading the words 'by Ordinance,' together with the number, year, and title of such Ordinance, otherwise such plea shall be taken not to have been pleaded by virtue of any Ordinance.

"13. A pleading containing a defence arising after the commencement of the action may be pleaded, together with pleadings of defences arising before the commencement of the action : Provided that the Plaintiff may admit such pleading, and thereupon shall be entitled to the costs of the case up to the time of the pleading of such first-mentioned defence.

"14. When a pleading is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to admit such pleading, and shall be entitled to the costs of the case up to the time of such pleading: Providing that this and the preceding rule shall not apply to the case of such pleading pleaded by one or more only of several defendants."

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VERFENSTEIN v. CAMERON AND OTHERS.

1 April,
1863.*Costs.*

Action to garnish monies of Defendant Cameron in the hands of Booker Bros., and the Demerary Railway Company. The Railway Company admitted the debt. Booker Brothers did not.

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The Court confirms the arrest of both debts, and as regards the Railway Company orders the deposit in the Registry of the amount admitted to be due, and as regards Booker Brothers the Court defers further order until the issue of the suit between the parties, with liberty to either party to apply in the meantime on just cause shewn—the costs of these proceedings to be costs in the cause.*

For Plaintiff, *Mr. Norton*.

For Defendants and Booker Brothers, *Mr. Trounsell Gilbert*.

6 June,
 1863.

LUCIE SMITH, C.J., BEETE and ALEXANDER, J.J.:—Court discharges arrestment of both debts; orders Registrar to pay all debts admitted to be due to Administrator General as representing estate of Defendant.

No order for costs made.

* The practice as to costs being costs in the Cause was not followed in *Pistano v. DeFreitas*, L. R. B. G. N. S., Vol. 1 p. 28, when costs were granted by SHERIFF, J., to the garnishee

SUPREME COURT

17 *March*,
1863.
15 *May*,
1863.

PEROT & CO. v. CHAPMAN.

Contract.

Requisite of valid Contract.

Action to enforce agreement.

Plaintiff's case (*Mr. Trounsell Gilbert*):—A. J. Smith traded as A. J. Smith & Co. He was unable to pay his liabilities and he called a meeting of his creditors on 30th June 1862. It was agreed by those present (Plaintiffs and Defendant being present) that 50 per cent., paid in 3 months, should be taken in full on promissory notes to order of Defendant, to be endorsed by him and handed to each creditor, and on payment thereof Smith was to see him exonerated. Defendant refused to carry out agreement.

Defendant's case (*Mr. Norton*):—Nothing settled at meeting; all done at meeting was provisional and in-cohate and not binding.

BEETE and ALEXANDER, J.J.: —The requisites of a legally binding and valid agreement are: 1. Reciprocal or mutual assent of two or more parties. 2. A good and

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valid consideration. 3. Something to be done or omitted which is the object of the contract.

In this case the final requisite is wanting, as will clearly appear from the evidence of the principal witnesses, Smith, Perot, and Drysdale.

The offer made by the Defendant had reference to all the creditors of A. J. Smith, and until all such creditors had signified their acceptance of such offer it appears to us that the Defendant could not be bound by it—"Until both parties are agreed, either has a right to withdraw from the negotiation, so that a party is not only not bound by a mere offer not accepted, but may retract such offer before it is accepted, by a communication to the person to whom the offer was made." *Chitty on Contracts*, 8 ed. p. 11, on the strength of the decision in the case of *Routledge v. Grant*, 4 Bing, 653, and at page 9 of the same author note "R" per TYNDALL, C.J., in *Jackson v. Galloway* 6 Scott 786. "A contract says *Pothier*, "includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise. A pollicitation is a promise not yet accepted by the person to whom it is made. *Pollicitatio est solius offerentis promissum*. A pollicitation, according to the rules of mere natural law, does not produce what can properly be called an obligation, and the person who has made the promise may retract it at any time before it is accepted, for there cannot be any obligation without a right being acquired by the person in whose favour it is contracted against the party bound." I. *Pothier on obligations*, pt. 1 c. 1 s. 1 art 2. Applying these principles to the case before us we find that the Defendant made an offer which was to be accepted by all the creditors of A. J. Smith (for it is not and could not be contended that there was any separate contract with Mr. Perot on behalf of his firm), and there is not only no proof of all the creditors having accepted the offer, but it is perfectly clear that some had not accepted at the time when the Defendant refused to abide by his offer, and in fact retracted it as he was legally entitled to do.

Absolution with costs pronounced.

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PEROT & CO.
v.
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8 June,
1863.

THE ATTORNEY GENERAL OF OUR LADY THE
QUEEN, IN AND FOR THE COLONY OF BRITISH
GUIANA, v. JOHN THOMAS LYNCH.

For Plaintiff. *The Attorney General.*

For Defendant, *Mr. Landry.*

Sentence by consent for \$100 in lieu of \$555, amount of fine incurred by Defendant for selling wholesale a puncheon of rum containing 45 gallons to Francis Viera, a licensed retail spirit dealer, before the same was deposited in the Colonial Bonded Warehouse, and before duty was paid or permit obtained.

SUPREME COURT

10 *June*,
1863.

McWATT *v.* BRITTON.

Judgment on merits. Suit on promissory note. Defence,
short credit.

SUPREME COURT

6 *March*,
1863.

DEMERARY RAILWAY COMPANY v. MANIFOLD.

*Appeal—Reference back to Court—Construction of Ordinance—
Reversal of Sentence—Mortgage.*

Court held Opposition to Mortgage good. On appeal Privy Council referred case to Supreme Court to consider the question whether and how far the ease is affected by the Ordinance No. 14 of 1858.

The Court reverses its own decision.

A Mortgage sought to be passed under statute cannot be opposed by a creditor.

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The Court directs the Registrar to notify to the Demerary Railway Company and to the Assignee of the estate of John Thompson Manifold, an insolvent, and to the Attorneys of the said John T. Manifold respectively, that the Court desires to hear Counsel at its present Session upon the point raised in the Order in Council, with liberty to the parties to take copies of the said order in Council.

The facts appear in the judgment.

Mr. Trounsell Gilbert for Demerary Railway Company.

Mr. Campbell (Solicitor) states that the two notices on the Administrator General and the Attorney of Manifold had been handed to him, and he was authorised to mention that they did not wish to appear.

Court pronounced decision varying its own sentence, and declaring the opposition held good by its former sentence to be unjust and illegal.

LUCIE SMITH, C.J., BEETE and ALEXANDER, J.J.:—In this case the Court is required by Her Majesty's Order in Council to reconsider its decision pronounced some three or four years ago, the Chief Justice who presided at the original hearing being now dead.

Upon that occasion no reference was made on either side to Ordinance 14 of 1858, nor were its provisions taken into consideration by the Court then arriving at the sentence appealed from, but it becomes our duty, in obedience to the Order in Council, to have regard to the question whether and how far the case is affected by that enactment. This we have done most fully, and it appears to us that the Ordinance has a very material bearing on the case.

By Section 1 the Demerary Railway Company were authorised within 12 months from the taking effect of the Ordinance to raise by the issue of bonds or the creation of stock, or by both modes, the sum of £175,000 in order therewith to pay off and discharge certain mortgage and other claims due to the Colony; “to provide such further and additional plant and “rolling stock as may be required for the efficient working of “the Railway, and to put the whole premises into complete repair and order; to enable the said Company to

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14 March,
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“extend the Railway to Mahaica; and, lastly, to satisfy and liquidate all bonds and preferential stock which had been issued or created by the said Company, *and to discharge all other debts and liabilities of the said Company.*” By Section 10 the money to be raised under the Ordinance was specifically directed to be appropriated as follows :—“The money to arise from the issue of bonds and creation of stock under the provisions of this Ordinance shall be applied for the purposes and objects, and to the order following, that is to say: 1stly in liquidation and satisfaction of all principal and interest owing under the aforesaid mortgage passed in favour of the Colony on the 11th December 1850, and the same shall be paid into the Bank of Messrs. Prescott, Grote & Co. in London, on account of the Colony. 2nd. In repairing and renewing the railway plant, rolling stock, and premises, including the payment to the Colony of the actual costs and expenses of the locomotives, engines and goods waggons, the property of the colony which had been ordered by the Colony for the said Railway, and the repayment to the Colony of all sums of money which had been advanced by the Colonial Government for the repairs of the line and the improvement of the premises, for which purposes the sum of £17,000 and such further sum as may be required, as soon as raised, to be deposited in the Bank, to be applied by the Governor in the joint names of the Chairman of the Company and of some other person nominated by the Governor. 3rdly. After the objects and purposes firstly and secondly mentioned shall be accomplished and completed, then in the extension and completion of the Railway to Mahaica, and the purchase of the additional plant and railway stock thereby rendered necessary, for which purpose a sum of £30,000 and such additional sum as shall be required, shall as soon as raised be deposited in the same way as the sums secondly mentioned. 4thly. After all the objects firstly, secondly, and thirdly mentioned are fulfilled and completed, and not before, then *in the payment and discharge of all remaining debts and liabilities of the Company.* 5thly. The surplus, if any,

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“after all the aforesaid objects and purposes are fulfilled and completed, and not before, shall be applied for the benefit of proprietors of the railway stock of the said Company, in such manner as may be determined by the General Committee, with the approval of His Excellency the Governor and the Court of Policy.”

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So much for the objects and purposes to which the money authorised to be raised under the Ordinance was intended to be applied. Let us now see what were the legislative obligations imposed upon the Colony, and the security granted to it, in order to carry out an arrangement obviously designed for the benefit of all concerned in the Railway. By Section 2 the interest on the bonds and stock to be issued or created under the Ordinance (such interest amounting to £10,500 per annum) was on certain terms secured and made chargeable on the general revenue of the Colony for the period of 45 years, and it was enacted that “the Colony of British Guiana shall and doth hereby undertake and guarantee on default being made by the said Company during the aforesaid period of 45 years in the payment of interest on any such bonds or stock as aforesaid, to pay during the aforesaid period of, 45 years such interest within one month after the same shall have become due.” Sections 6 and 7 are in the words and figures following:—“6. The Colony shall have, *and is hereby declared to have*, a preferential lien over the whole undertaking of the Railway, including all present and future plant, rolling stock, and premises, for indemnification and repayment of all and every sum and sums of money which the Colony may have to pay under and by virtue of the guarantee before mentioned, with interest thereon. 7. The said preferential lien and the due payment of the salary of the Government member of the local Committee hereinafter mentioned, *shall be secured by a mortgage in favour of the Colony on the said undertaking of the Railway*, including all present and future plant, railway stock, and premises, and such mortgage shall be the first charge on the said undertaking and preferential to all others, and *shall be passed within six months from the taking effect hereof by the local Committee here-*

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*“inafter mentioned, who, or any two of them, are hereby
“authorised and required to pass and execute the same in fa-
“vour of the Colonial Receiver General, for and on " behalf of
“the Colony, and such mortgage shall be in the same form of
“mortgages passed and executed in this Colony, and in the
“event of the undertaking or property mortgaged being pro-
“ceeded against under or by virtue of said mortgage or other
“wise, the said undertaking and property mortgaged shall be
“subject to such process in execution, to such sequestration,
“and to such sale at execution as an estate in cultivation is at
“present, except that the mortgage to the Colony on the under-
“taking and property mortgaged shall not be cancelled and an-
“nulled by such or any execution sale unless the Colony shall
“be the purchaser at such sale, but shall remain in full force
“and effect notwithstanding such execution sale, so as to con-
“tinue to the Colony the lien and preferential right to be repaid
“and reimbursed whatever sum and sums of money the said
“Colony may have to pay in liquidation of the said annual sum
“of £10,500 and interest thereon.”* This was the mortgage
which the Plaintiff Manifold opposed upon the strength of a
claim against the Company for an adjustment and settlement
of his account as having acted as Manager and Superintendent
of the Railway prior to and up to 18th July 1857, the outside
extent of which was \$7,700.40, and upon the simple ground
that he held this claim he sought that the Demerary Railway
Company should be interdicted from passing and the Colony
from receiving a mortgage which the Legislature had specially
directed to be passed by an Ordinance approved and confirmed
by the Crown.

In considering the Plaintiff's right to do this, we may lay
down the following propositions as perfectly clear upon the
legal construction of the Ordinance:—

1st. That the passing of the mortgage was not a condition
precedent to the raising of the money and the attaching of the
guarantee under the Ordinance.

2nd. That irrespective of the mortgage the Colony pos-
sessed by virtue of the Ordinance an indefeasible preferential
lien on the property in question.

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3rd. That the mortgage required by the Ordinance was something very different in its nature and incidents from an ordinary mortgage, as witness the proviso that it should not be cancelled or annulled by any execution sale unless the Colony should be the purchaser, but should continue in full force and effect notwithstanding such execution sale.

Proceeding now to apply these propositions, it may be taken as undoubted law that to sustain an opposition to the passing of a mortgage in this Colony the opposing creditor must have some right which would be prejudiced by the passing of such mortgage, and which he has therefore an interest in opposing. In the case before us any right which Mr. Manifold possessed could not possibly be prejudiced by the passing of the mortgage, because the preferential lien of the Colony had already been created by the Ordinance, and he had no interest in point of law to support by opposing the mortgage.

In the next place the mortgage was authorised and required to be passed by the Ordinance, and the case appears to us to fall within the well-known principle of which *Wynn v. Shropshire Union Railway and Canal Company*, 5 Ex. R. p. 420 is a sufficient illustration. In that case POLLOCK, C.B., in delivering the judgment of the Court, remarked:—"It would be absurd "to suppose that an action would lie against parties for doing "that which the Legislature has said they shall be obliged to "do, and upon the question of damages he pointed out that it "must be taken for granted that due provision has been made "by the Statute for compensating the Plaintiff for the loss "which this intervention of the Legislature may have occasioned." See also the recent case of *Wedmore v. Corporation of Bristol*, 1 N. R. 120.

In the case before us it is perfectly clear that any loss which the intervention of the Legislature with respect to the mortgage may by any possibility have occasioned Mr. Manifold, has been substantially compensated by the provisions of the Ordinance with respect to the appropriation of the money to be raised under its authority. If his claim against the Company was good and valid, it was one of those that were to be liquidated

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and discharged by means of the Ordinance, and he therefore can have no ground for complaint. But it may be argued that Mr. Manifold was not bound by the Ordinance. In answer to that, we have no hesitation in holding that he was bound, and that for all the purposes of the case it is our duty to give full and legal effect to the Ordinance as part of the Statute law of the Colony. Even in the case of private Bills in the Mother Country it has been decided by the highest Court of Appeal, the House of Lords, that the fact of notice or insufficient notice of application for a private act being given to an individual affected by it is no ground for holding that the act, when passed, does not apply to such individual. (*Edinburgh and Dalkeith Railway Company v. Wandrope*, 8 C. & F. 710.) In the present case no such objection can arise; and the Ordinance having been passed with a suspending clause Mr. Manifold had ample opportunity for submitting in the proper quarter his objections thereto, if he had any, before the measure became law by the approval and confirmation of the Crown.

It only remains for us to mention that even if Mr. Manifold could have obtained any special advantage for himself over the other creditors of the Company by preventing the passing of the mortgage, such a course would have been contrary to the manifest intention and equity of the Ordinance. In the case of *Kennett v. Westminster Improvement Commissioners*, 11 Ex. B. 349, one of the principal grounds on which the Court refused to allow the garnishment of a debt was that the effect would be to give a particular bond-holder a preference over all the others, which would be a violation of the statutory agreement by which all were bound, and in like manner if Mr. Manifold could have secured a preference over the other creditors of the Company by opposing the passing of the mortgage such a preference would have been in violation of the arrangement embodied in the Ordinance. But we have already pointed out that the Plaintiff had in reality no advantage to gain by opposing the mortgage.

From the foregoing it follows that having had full regard to the question referred to us by Her Majesty's

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Order in Council, we are of opinion that according to the true construction and meaning of Ordinance 14 of 1858 the Plaintiff's opposition is unjust, illegal, and unfounded. The view which we have taken of this point renders it unnecessary for us to enter upon the other questions raised in the case. We have paid careful attention to the form in which the result of our reconsideration should be announced, The point is a novel one, there being no precedent in this Colony so far as we are aware, but having duly weighed the provisions of the Statute 3 & 4 Will. IV., C. 41, and especially Sec. 8, it seems to us that the proper course is to vary the original sentence in accordance with our re-considered opinion. With regard to the question of costs, looking at the very peculiar circumstances of the case we think we cannot do otherwise than grant compensation of costs.

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10 June,
1863.

Re GORDON.

Minor's interest.

Petition of Administrator General *qq.* minors Margaret Woods Gordon and Thomas McCreath Gordon, to send children to England for education.

The Court directs the Administrator General to report the ages of the minors and what sum it is proposed to expend annually upon, their maintenance and education in England.

SUPREME COURT

14 April,
1859.

VESTRY OF ST. MARK'S v. ACTING COLONIAL RE-
CEIVER, GENERAL, ORIGINAL DEFENDANT, AND
ROBERT DUFF, CO-DEFENDANT.

Immobilia—Pleadings—Opposition.

A person seeking to oppose on the ground that the property in dispute belongs to him must show a right or title to such property either by Transport, Letters of Decree or one of the ways of acquiring properly in the Colony.

Semble.—The fact that the party transporting has no title or right therein gives no better right to oppose if the opposer himself has no title or right therein.

Secus.—Remedy sought from the Court must be specifically prayed for.

Right of selling consecrated property discussed.

Action in opposition.

Plaintiff's case (*Mr. Roney*):—Robert Duff was Minister of St. Mark's, from November 1345 to September 1855, and resided in the Manse which was divided from the Kirk lands by a small trench, and which had been bought by the Government from the proprietors of La Retraite but no transport was obtained for same. He as

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Minister was given possession of all the land which previously to his taking over had been held by his predecessor in office from 1840. The land had been purchased from the Colony by Duff. On Duff's retirement he offered for sale the land and Manse to his successor and then to the Colony as a Police Station. Both offers were refused but the Colony hired them, and subsequently Duff sold the land and Manse to Butts.

Duff's case (*Lucie Smith* for original Defendant *Mr. Best* for co-Defendant.)

Property was brought from the Colony by co-Defendant and he was entitled to transport although Defendant had no title.

ARRINDELL, C. J., ALEXANDER and BEETE, J. J.:— Having considered the grounds of opposition laid over with and referred to in the Plaintiff's Claim and Demand, the Court has rejected the Claim and Demand for the following reasons:—

First: That it appeared from the evidence that by virtue of a warrant under the hand and seal of Sir Benjamin D'Urban, the Governor of the Colony, under seal the 2nd of May 1827, five acres of land part of plantation La Retraite in the Parish of St. Mark's, were taken possession of by the Crown for the declared purpose of erecting a Church and residence for the Minister of the parish, and that the land in question, that is, the land the transport of which is opposed, is a piece or parcel of these five acres.

Secondly : That being the case, the Crown has never since divested itself of its title or right, whatever that may be, to this land, at all events no title to this land has ever been vested or could have been vested in the Plaintiffs, inasmuch as their creation, existence, and powers as a vestry are to be found in the three Ordinances, two of them respectively entitled, "An Act to establish and regulate Vestries in the United Colonies of Demerary and Essequibo" "An Act to amend an Act entitled an Act to establish and regulate Vestries in the United Colonies of Demerary and Essequibo," both of which are repealed, and the third the only one in force, being number six of the year 1849, and in not one of which

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is, nor was there any authority given to a vestry to hold lands.

Thirdly : With respect to the house, it is clear that although originally built entirely by subscription, yet the Colony contributed a large proportion of the funds to build and complete it, and that its repairs were provided for by the Colony, until the fifth of May 1847 when the Combined Court ordered "That the Manse of S. Mark's be appraised and sold, under the authority of a Committee of the Court, consisting of the Honorable Messrs. Croal and Sturge, and Mr. Financial Representative Butts, with authority to said committee to offer the Manse to the Minister of the Parish at its appraised value." It was further ordered "that the customary allowance of \$500 for house rent be added to the estimate, to be drawn for by the minister from the time the Manse is sold."

Fourthly: The Court finds from the documentary evidence laid over that the order was carried into execution by the sale of the house and land in question to the Reverend Robert Duff, and the transport advertised to be passed for the purpose of giving a title to Mr. Duff, by the Colony.

Fifthly: It has been urged that this house and land having been dedicated to GOD could not be sold by the Colony, and in support of this argument *Voet lib 1 tit 8 s. 5* and *Grotius* have been cited. The Court considers that the law contained in these authorities in regard to property dedicated to GOD not being allowed to be sold, can only be applicable to such edifices as were according to the Laws of Holland, consecrated. There is no proof that this Church has been consecrated, and as it belongs to the established Church of Scotland, the presumption is that it has not been consecrated, but whether or not, the land and buildings in question, are perfectly separate and distinct from the Church, and the law quoted does not apply. The law respecting these is as quoted by the Defendants' Counsel in *Voet 1 tit 4 s. 7* the words being "*Vel postulante necessitatis aut utilitatis publico favore.*"

Sixthly: The Court finds that the Combined Court,

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the only authority in this case to exercise such a right, took possession of, and sold the house and land in question to the Rev. Mr. Duff, and provided at the same time for the support of the Minister and the Parish; see *Grotius* b. 2 cap. 1 s. 30.

Seventhly: The Court as will appear from the foregoing has simply decided that the Plaintiffs have no right to oppose, and reference to the conclusions of the Claim and Demand and the exceptions will show that the only issue before the Court was whether the Plaintiffs had a right to oppose or not. Had the Defendant wished the Court to enter into the question of his right to pass the transport, the conclusion of exception and answer should have the request to the Court that the Original Defendant should be allowed to pass and the co-defendant to receive the transport in question.

See *Colonial Receiver General v. Vestry of S. Mark's on Petition. Supra.*

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GOMES QQ. DE SOUZA, AND ADMINISTRATOR
GENERAL QQ. MINORS DE SOUZA.16 June,
1863.*Joint case—Construction of Will—Election—Disposition of property not owned by Testator.*

Where Testator deals with whole of the property held in community widow must elect to take under Will or repudiate. Heir is bound to compensate legatees or renounce from benefits under Will.

Issue submitted for trial under section 84 of Manner of Procedure 1855.

The following facts are admitted:—Manoel De Souza, a native of Madeira, long an inhabitant of this Colony, residing at the time of his death at Mahaica, died 1st March 1862. Before his marriage to Amelia de Souza he had had two illegitimate children, named in Will, under the guardianship of the Administrator General, but he had no issue with Amelia. By Will dated 24th January 1861 testator bequeaths as follows:—
“I give and bequeath to my wife Amelia de Souza and to my children Maria de Souza and Manoel de Souza, and to any other children that may be born to me, all my personal property and all lands, tenements, buildings,

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“and whatsoever I now possess or may hereafter possess, to be
“equally divided among them, share and share alike.”

For Executors, *Mr. Norton* (*Mr. Watson*, Solicitor.)

The widow claims in her own right by virtue of the community the half of the whole property of the community, and also to share *pro rata* with the children in the remaining half. In the event of the Court not agreeing with this proposition, she claims in her own right aforesaid the half and also one third of the remaining half, the children named in the Will taking the other two thirds of the half.

For Minors, *Mr. Trounseil Gilbert* (*Mr. Campbell*, Solicitor.)

The Administrator General, for the Minors, contends that the Minors are entitled to the clear half, and that the widow is only entitled to the half of the whole property by virtue of the community, and no more.

LUCIE SMITH, C.J., BEETE and ALEXANDER, J.J.:—In this case two questions were raised. 1st- What was the property the testator meant to dispose of ? and 2ndly. What was the effect of the disposition?

With respect to the question of intention we can have no doubt upon a careful perusal of the Will that the testator meant to dispose of the whole of the property possessed by him in his lifetime in community with his wife, now widow, Amelia de Souza, and it is our opinion after a review of the authorities bearing upon the point that it remains for the widow either to take under the Will, or else to repudiate the Will and claim her right as having been married in community of property. Upon the general question of the power of the testator under the Roman Dutch law in force in this Colony to dispose of property which does not belong to them, it is laid down in the clearest terms that if a testator bequeathed property which he knew belonged to another, the legatee was entitled to recover from his heir either the property itself or its value if the real owner would not part with it at a reasonable price, the heir being at liberty to accept or renounce the inheritance thus burdened. *Voet de legatis—Cen. For.*, pt. 1 *lib.* 3 *cap.* 8 s. 24; *Commenta-*

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rius Arnoldi Vennii, 418, *et seq.* In all these writers the subject of bequests of common property is fully treated, and they may be referred to with advantage. Upon this particular subject of bequests by husbands married in community we can find nothing to prohibit a husband from disposing of the common property, leaving the widow to exercise her election; on the contrary, the authorities appear to us in favour of the proposition.

With respect to the division contemplated by the testator, we think that he intended the entire property to be divided into three equal shares among the three instituted heirs, namely, his widow and his two illegitimate children. We have consulted the authority in *Sarde*, quoted by *Mr. Gilbert*, but we consider that the decision there proceeded upon the “*jus representationis*,” the distribution accordingly being *per stirpes* and not *per capita*, but the principle does not apply to the present case, which as it seems to us must be governed by the ordinary rules of construction.

In pronouncing our opinion we do so without prejudice to the rights of the widow as having been married in community of property, and the passage in *Voet, lib. 29 lit. 2 s. 33*, commencing “*plane si mulier vidua,*” &c, shows how indulgently the law regards the rights of widows. We have also reserved any question of *legitimes* that may possibly arise.

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DA SILVA *v.* JACOBS, ET AL.*4 December,*
1863.

Practice as to when attendance of Civil prisoner is required as witness.

On the motion of *Mr. Gilbert*, Counsel for the original Defendant, the Court directs the Keeper of Her Majesty's Gaol in Georgetown to bring the person of Francisco

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DA SILVA following days, to attend the Court as a witness on behalf of
v. the original Defendant.
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DIES NON.

20 June,
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The Court assembles at 11 a.m., and this day being the anniversary of the accession of Her Majesty the Queen and a holiday of the Court, the Court is further adjourned to Monday, 22nd inst., at 12 o'clock noon.

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4 December,
1863.

PETITIONS 2319 M. GARDNER
3238

26106 M. DE LECIA.

Petitioners, who are married women, pray for appointment of a Curator *ad litem*.

Mr. Gilbert, Barrister-at-Law, moves that the Court may be pleased to make an order that according to the practice heretofore' obtained in similar cases, and in terms of the 25th Sec. of Ordinance 7 of 1851, the Administrator General of Demerary and Essequibo is the proper person to be appointed Curator *ad litem* on petitions being presented for that purpose to His Honour the Chief Justice.

The Court orders accordingly, His Honour the Chief Justice dissenting.

December,
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Petitions 3238 and 3239 presented by the Petitioners for appointment of the Administrator General as Curator *ad litem* for the purpose prayed, *i.e.*, bringing suits for *separatio a mensa et thoro*.

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11 *December*,
1863.

EX PARTE DE FREITAS.

Contempt—Release.

For release from custody on an order committing petitioner for contempt for interference with ward of Court.

The Petitioner was brought in Court in custody of the Gaoler to attend the Court.

Mr. Lucie Smith on behalf of the Petitioner applies that the said Manoel Fernandes De Freitas be discharged from custody, on the ground of illegality and irregularity in his commitment.

The Court (BEAUMONT, C.J., BEETE and NORTON, J.J.) declines to allow these objections to be taken, inasmuch

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as they were wholly inconsistent with the petition of Manoel Fernandes De Freitas in this matter.

Mr. Smith then applies for leave to withdraw the petition, The Court rejects the application.

Mr. Smith moves that the said Manoel Fernandes De Freitas be now brought up by the Keeper of the Gaol of Georgetown, and that such Keeper might show cause by what authority he was detained in custody.

Robert Massiah (representing Keeper) being in attendance with prisoner by order of the Court produces the warrant issued from this Court on 30th October 1863, in pursuance of the order of the Court of the same date.

Mr. Smith moves that the said M. F. De Freitas be now brought up in order that the Court may now enquire under what authority he is detained in custody, and if that authority is insufficient that he be discharged from custody.

The Court rules that as the warrant already produced shows that he was detained from the same cause mentioned in the above petition, no application for the discharge of the said M. F. De Freitas from custody could be regular except upon the petition for his discharge now before the Court, and therefore refuses the application.

Mr. Smith applies for Petitioner's discharge, and on being asked states that he does not make the application upon the petition, but that the petition was nevertheless before the Court.

The Court thereupon reserves consideration of the petition, and orders the Petitioner to be taken back to the Georgetown Gaol.

It is ordered that the Petitioner be discharged from custody, and that he be interdicted and enjoined from holding or sending any communication with or to the minor Maria D'Ornellas, either directly or by any other person without authority of this Court and of the Administrator General first given thereto.

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1863

Re PEREIRA.

Power of Court over Advocate—fees—Lien.

The Court having read the petition with the report of A. (Advocate), directs the Reporter to give up to the Petitioner the paper in question upon the Petitioner paying him the amount (if any) due to him for professional services, to be ascertained by delivery and taxation of his bill of costs.

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12&13
December,
1863.

TOWN CLERK OF GEORGETOWN v. M. G.
PEQUENO.

Servitude—Prescription—Proof.

Where servitude is not held under transport by either party proof must be given *aliunde*.

Locus in quo visited by Court and decision based on evidence of sight.

Where public body seeks to restrain a private individual from exercise of a servitude it must be shown that public rights are infringed and that public would be damnified.

Circumstances where servitude by prescription allowed.

Plaintiff's case (*Mr. Trounsell Gilbert*):—There is a piece of ground used up to a short time ago as a burial ground. Since 1794 there were no houses on the land. A canal draining the estate adjacent to the town and the town ran alongside. Where burial ground now is was in cotton and coffee. There was a sluice on E. from Smyth Street belonging to estate. The drainage of the town did not go through the sluice. There were small drains and tunnel through draining trench. There was a tunnel at the bridge in Main Street. The dam from the bridge on W. of canal was open all the way from Main Street to New Water Street. There was a dam to support the sides of the canal, and this was a continuation of the dam

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running along the burial ground to keep the river water out of the town. Up to the time the building in dispute was put up it was an open thoroughfare for foot passengers, the carriage road being the other side of the canal. From 1827 to 1841 the dam and trench were kept up by the town. Defendant, who owns lot 46, has put up paalings and other obstructions. We made the dam and threw out the trench on several occasions. Trench being a public trench, it follows that dam is a public dam. Under Sec. 92 of Ordinance 25 of 1860, in case any house, or tenement, or other erection shall be at the taking effect of this Ordinance placed or built upon or hanging or encroaching beyond the line or boundary of any of the streets, public places, dams, parapets, or thoroughfares of Georgetown, the Town Superintendent shall direct the same, by an order in writing to be served by him on the proprietor of the said building, or on some conspicuous part of the said building, to be removed within any time to be fixed by him in such order, and in case the said proprietor shall not within the time so fixed remove the said building within the line or boundary, the Mayor and Town Council may forthwith institute legal process to enforce the removal of such building at the expense of the proprietor thereof.

Defendant's case (*Mr. Lucie Smith*):—We are entitled to have the buildings kept where they are. They have been on the same spot and the proprietors thereof have held and used the space and the buildings by title and over the limit by which prescription may be urged.

BEAUMONT, C.J., and BEETE, J.:—The question in this case is whether or not under the 92nd Sec. of Ordinance 25 of 1860 the Plaintiff as representing the Town Council of Georgetown is entitled to have the buildings alleged to be an encroachment on the dam mentioned in the Claim and Demand removed from their present site, and if so, whether the limit of the dam which it is alleged they must be removed from, is that propounded in the Claim and Demand or some other, and what limit within which the buildings at present stand.

We consider that the Section in question was not intended to destroy or restrict any rights already acquired

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by any parties, even if by encroachment upon public places, at the time of the "legal process" authorised thereby being commenced. The whole frame of the Ordinance, adverting expressly to the 91st Section and to the point about legal procedure satisfy us of this, and that the scope and object of the 92nd Section is to authorise the Town Council to represent the public and in their interest to commence legal process where public rights might be disturbed by illegal encroachments, but the legal process must still be such as the public, whether by the Crown or in the Colony (if there be such a legal person) or the Attorney General or any member of the Public in that character, or any persons whose rights have devolved upon the Public or the Town Council for them (whether by the old Board of Police, private proprietors or others) might institute and sustain. The Plaintiffs say that the dam is a public dam and that its boundary is a line 84 feet from and parallel to the central line of the adjacent draining trench which they say is a public draining trench. The first question, therefore, is as to the character of the dam in question and the extent of the rights of the public over it, independent of the question between them and the Defendant.

The Plaintiffs do not claim any proprietary right properly so called in the soil of the dam nor even in the trench which till latterly not only belonged to, but was in the care of the proprietors of Plantation *Werk-en-Rust*, though subject no doubt to many rights which from their extension and duration must be considered public rights.

The Defendant on the other hand expressly claims the dam as forming part of his lot by title properly so-called, and by prescription. Now the decision of those issues raised by him, however clear the result might be, would involve some serious questions of evidence and also of law and construction which we ought not to determine unless they are essential to decide this case. But we think they could not decide it, because even if the soil were in the Defendant's possession, it is argued and might be shown that the Plaintiffs have nevertheless a right to have the dam kept clear of obstructions; and on the other hand we can decide this case on other

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grounds, and therefore we shall do so without expressing any opinion whether the Defendant's title to the dam is clear or doubtful or for what purpose and to what extent the documentary evidence admitted might be used or applied.

Independent of any proprietary right the Plaintiffs put their case thus:—

1st. They say that the trench is a public trench and *therefore* the dam must be a public dam. On the first part of this proposition we say nothing, *i.e.*, as whether or not or to what extent or in what sense it is a public trench, but as to the second part or conclusion we say *non sequitur*. There is no necessity that the bank or dam whether of a natural or an artificial stream should belong to the proprietor of the bed or stream or of the fluvial right. No authority can be cited for such a proposition and common experience is to the contrary. In any case and perhaps in this case the owner of the stream is entitled either to some servitude or easement on the bank or dam, or else to the natural or *quasi* natural right of support or enclosure, analogous to the right of any proprietor of *terra firma* to the extent of the adjacent soil, which by the way is not an easement or servitude properly so-called, but a common right.

As to this right, however, no question has arisen here, for we are told expressly and have at the request of both sides seen with our own eyes that the support is ample and complete, the dam perfectly sound and strong, wider than necessary, and affording no ground for interference or complaint on that score.

But then it may be that the Plaintiffs have either a *quasi* proprietary right by dedication, or a servitude or easement on behalf of the public, and we turn to the evidence as to the site and its history and the dealings with it, to see if either of these claims can be supported.

The result is that we think no such general right from dedication is shown, and that there is no proof of any servitude or easement with which the buildings in question are inconsistent.

Contradictory as the evidence is, we think it is conclusively against any general right established by dedi-

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cation to the public, because it conclusively shows a private, and so far at all events, an exclusive enjoyment on the part of the proprietors of the Defendant's lot back to the time of Hen- eage Williams in 1822, if not earlier.

We must not here discuss the evidence in detail. We consider that all the witnesses are unimpeachable in *credit*. But having to reconcile their contradictory evidence, we cannot hesitate to give the general right to that of the defence. Discrepancies there are, and from the nature of the case would be on both sides, but the broad distinction is this: that the witnesses for the Plaintiffs speak either so vaguely as to deprive their evidence of much weight, or inconsistent with the admitted facts and in some cases with the result of the inspection or view we have ourselves had at the request of the parties, or without express or adequate reasons or motives of knowledge or remembrance.

The witnesses for the defence, equally trustworthy in point of credit, speak specifically, positively, and for the most part as to matters which they had the best means of knowing and the most natural reasons for remembering. And in the result we think it indisputable that (whether or not persons occasionally passed on the dam or some part of it, freely or conditionally, or whether or not the Town Council or Board of Police "threw out the trench" or "made up the dam" some time or often, in the character of Inspectors of Nuisances or otherwise, or rightfully or wrongfully) Mr. Pequeno and his predecessors in title have forty years and more enclosed the site in question with as much strictness as they pleased, and have used it as a sand yard, as a garden, as a landing place, and as the site of various buildings. We think therefore that the right of the public to the soil or the undisturbed enjoyment thereof as the result of dedication to them has not been made out by the Plaintiffs.

Then have they shown the existence of any servitude which entitles them to insist on the removal of the buildings in question? It may be remarked in passing that if they had done so, a question might have immediately arisen, whether such servitude has not been

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destroyed by “sufferance” on the part of the Plaintiffs and the public. The facts necessary to prove that question were abundantly shown by Plaintiffs’ own evidence, and as sufferance of erections which will constitute a permanent interference with a servitude is fatal to the easement itself so far at all events as the obstruction extends, we might perhaps have decided this part of the case on that ground were it not for the fact that, though raised clearly by the Plaintiffs’ evidence, it is not raised specifically upon the pleadings. Therefore as the enquiry into the evidence which has been pursued on the last head of the argument leads also to the determination of the remaining points, we prefer to place our decision on that ground.

The evidence satisfies us that no easement has been shown to belong to the Plaintiffs or any of the classes of persons whom they may represent in this suit, beyond that of “throwing out the trench” and “making up the dam.” It is said, indeed, and with some force, that the evidence on this point even is referable to the functions of the Board of Police and Town Council by which, where such work is neglected by the persons bound to perform it, they may or do enter and perform it in the characters of Inspectors or abaters of nuisances. No doubt also some of the Plaintiffs’ own witnesses place the duty and consequential right or easement on the proprietors of Pln. Werk-en-Rust. But then it is said that the Town Council for the public have by arrangement succeeded to the rights of those owners.

We do not enter upon either of these questions, but we are of opinion that even if the duty of “throwing out the trench” and “making up the dam” belongs to the Town Council, and if a co-relative right or easement on them have been shown by the evidence, no such right has been shown as that the buildings in question obstruct it.

Mr. Haly, indeed, starting from the assumption that the Plaintiffs were entitled in the name of making up the dam to have the whole site of it from base to crown kept clean, gives as his reason that he might want to reconstruct it if the river broke in. But that is purely hypothetical and argumentative. There is no such occasion

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now nor is it a probable event. That is a duty or right far transcending anything which the evidence shows to have been possessed or enjoyed by the public; and if such a right exists, these buildings on the dam can hardly conflict with it, for no doubt whenever such an occasion does arise either the buildings will fall or their existence would not be found to interfere with the reconstruction of the dam, while at the same time the evidence shows that a much narrower dam would suffice for the purposes of defence.

But the acts which appear in evidence as having been done by the Board of Police and Town Council from time to time, and which are adduced to prove the alleged right are of very much minor importance. It is plain that the throwing out and making up spoken of merely refer to the ordinary work of cleaning out the trench by shovelling out the mud on the fence and crown of the dam, or work which these buildings in no way interfere with and which goes on without interruption, as is shown by one of the witnesses, who stated that the Town gang was along it "eight days ago." From the evidence therefore, and fortified in our conclusion by our requested inspection of the place, we are satisfied that the buildings which the Plaintiffs seek to have removed in no way interfere with such an easement. The bed of the trench is clear, the wide sloping outer side of the dam is clean to the edge of the crown, except where some old piles show that the trench might be confined within still narrower limits. The Town Council have got abundant scope for cleaning the trench and making up the dam even before they come to the edge of the crown, and then there are many feet before they come to the buildings in question. On the whole, therefore, we can only come to the conclusion that the Plaintiffs have failed to make out their case, and that their claim and demand must be rejected with costs.

OF CIVIL JUSTICE.

Re HUBBARD.4 *January*,
1864.*Letters of Decree—Proof.*

Where Court is satisfied that purchase money has been paid, Letters of Decree must be given.

Several petitions having been received by His Honour the Chief Justice for the decision of the Court by reason of His Honour being of opinion that he was not justified in granting Letters of Decree in absolute terms, except where the title of the Defendant in execution had been satisfactorily shown, the Court (BEAUMONT, C.J., and BEETE, J.) decided that the evidence of the *Gazette* notice, and of the Provost Marshal's certificate is sufficient to entitle the Petitioners to Letters of Decree in common form, and ordered them to be granted accordingly.

The following orders were made:—The Court having seen the certificate of the Provost Marshal that the purchase money has been duly paid, *Fiat* as prayed.

OF CIVIL JUSTICE.

*Re SAFFON.**5 January,*
1864.

Administrators requested to submit draft lease for approval, and to state what funds there are, applicable to the claims of Emily Margaret Barclay, Kathleen Pollard, and Maria Caroline Ross (Saffon exhibitioners).

OF CIVIL JUSTICE.

Re TRUST.*4 January,*
1864.

The Court directs the Administrator General of Demerary and Essequibo from time to time when there is or are occasions to invest funds of any Wards to whom he should be appointed Guardian or Curator, to invest them in Bonds of the Colonial Government or other securities of the Colonial Government bearing interest, except in cases where he shall be expressly authorised to invest in other securities, and to report to the Court

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TRUST. as to the investments at the several times of the monies which have been already invested belonging to Minors to whom he has been appointed Guardian or Curator for the Court's information and adoption in one report.

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5 *March*,
1864.

PETITION IRVING ET AL.

Correction of erroneous Minute.

It appearing upon this petition being opened that the Minute of the Court's order in the matter of Antonio Coelho, an insolvent, made on 21st December 1863, had been finally settled and adopted after an erroneous Minute thereof had been given off to the Attorney-at-Law for the insolvent, and without that fact having been known to the Registrar of the Court at the time of such amendment, the Court declares that the Minute thereof now appearing upon the Records of this Court is a correct Minute of the order pronounced by it in such matter, and that an entry hereof be made in the Minutes of the Court of this day accordingly; but the Court is pleased to make no further order on this petition.

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8 *March*,
1864.

TORRINGTON *v.* PEREIRA ET AL.

Opposition suit. Fraud and collusion between Plaintiff and co-Defendant. Rejection on merits.

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8, 11 & 14
March,
1864.

DIAS v. McWATT.

Negligence.

Plaintiff's case (*Mr. Trounsell Gilbert*):—Plaintiff had provision beds at *Uplands*. On 11th July 1863 a koker was put in by Defendant's manager. This koker was blown out as soon as heavy rains came on through not being laid deep enough, and water got on Plaintiff's bed and damaged his provisions. Defendant had been warned that the koker was too small.

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No evidence led for Defendant. (For Defendant, *Mr. Lucie Smith.*)

BEAUMONT, C.J., BEETE, J., and NORTON, A.J.:—Absolution with costs. Because the Court considers that the evidence adduced by the Plaintiff, even if it discloses any negligence, or consequent injury to the Plaintiff, such as is alleged in the claim and demand, does not show that the Defendant is responsible for such negligence or injury.

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MARTINS v. PROVOST MARSHAL.

11 *March*,
1864.*Resale—Interdict—Amendment.*

Re-sale cannot be opposed by opposition.

Opposition to re-sale.

Plaintiff's case (*Mr. Lucie Smith*):—Plaintiff purchased property at execution sale. Purchase money was offered to Provost Marshal and demand made for transfer of lease of property sold. Marshal offered to take purchase money, and stated that Administrator General would give transfer. Not getting transfer Plaintiff refused to pay purchase money, and property was re-advertised for sale.

Defendant's case (*Mr. Trounsell Gilbert*):—Plaintiff was put in possession on day of sale. We were entitled to re-sale as money for first sale was not paid.

15 *March*,
1864.

BEETE and NORTON, J.J.:—Rejection. Because the process of opposition is not available in cases of re-sale, and the Plaintiff should have proceeded by way of interdict. The right to stay an execution sale or re-sale by order of the Administrator General by way of opposition is exhausted by the sale itself, and nowhere is there any provision in the law for entering or presenting an

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opposition to a re-sale. As no objection has been taken by the Defendant to the form of action, but on the contrary the proceedings have been treated throughout as in opposition, we give compensation with costs.

BEAUMONT, C.J.:—Though this is not a suit proper for opposition, the Defendant has by his pleadings disentitled him to rely on that objection. A very important question as to the propriety of the attempted re-sale has been fully disclosed upon the pleadings and evidence, and has been fully argued at the Bar, that it appears that such re-sale is wrongful and ought to be restrained, and under these circumstances it seems proper and desirable to decide and award the proper sentence either upon the pleadings as they stood or upon amending them, so as to let this suit stand or take effect as and for an interdict.

OF CIVIL JUSTICE.

SHIELLS *v.* MACKINTOSH.15 *March*,
1864.

Action on Pro. Note. Defence: Mules sold on warranty.
Held on merits that warranty was given.

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24 *March*,
1864.

JONES *v.* SANDIFORD.

Opposition suit. Decided on merits that property was co-Defendant's.

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1 July,
1864.

MULLER QQ, MULLER v. ELLIOTT ET AL, ORIGINAL
DEFENDANTS, AND LYNCH ET AL, CO-DEFENDANTS.

Servitude—Right to oppose.

Plaintiffs case (*Mr. Lucie Smith*):—Muller and 50 others bought Plantation *Aberdeen* Essequibo. Transport was taken out in the name of three of the purchasers. Execution against two of the holders by transport was

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levied on two of the shares held under the transport and the two shares sold. Defendants as holders by transport sought to sell the other undivided one third share. Plaintiff seeks to oppose the sale of this third share on the ground that the Defendants and the other two who hold transport are trustees for him and the other co-proprietors not named in transport.

Defendant's case (*Mr. Trounseil Gilbert*):—Plaintiff holds no transport. The alleged trust originally extended over the entirety of the whole property. The shares of the other two trustees have already been sold at execution, and Plaintiff's rights in the remaining third share have been *ipso facto* destroyed.

BEAUMONT, C.J., and BEETE, J:—We see no ground for this argument. Were a case of waiver or laying by, such as would have the effect of an estoppel made out, the result would be different, but though an attempt was made in cross-examination of the Plaintiff to open some such case, not only was it not raised upon the pleadings but the attempt totally failed, and as to the more direct and legitimate object of that cross-examination we think it signally failed to shake the Plaintiff's evidence as to the original transaction, which stands uncontradicted.

The defence then being reduced to the direct and proper effect of the prior sales of two undivided shares and the Plaintiff's interest in the remaining undivided share, we think it quite ineffectual, and that the Plaintiff is entitled to succeed in protecting his own fiftieth share though no further. Each party will bear his own costs.

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25 May,

SPECIAL SESSION.

1864.

Special Session held in compliance with a notice published in the *Official Gazette*, dated 12th May 1864. Business not ripe for hearing ordered to stand over till the ordinary Session of Court on 24th December.

OF CIVIL JUSTICE.

REGISTRAR v. A.

*Fees.*2 July,
1864.For Registrar, *Mr. Haynes Smith.*For Reporter, *Mr. Ross.*

The Court having heard the parties now finally ordering herein orders the Reporter A., Attorney-at-Law, to pay to the Petitioner the sum of \$2.75 amount due to

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Registrar in respect to fees and stamp on sentence of Inferior Court of Civil Justice given and pronounced in *re Da Silva v. White*, and which said amount appears to have been received on 18th May 1861 by Reporter's clerk from the Defendant and not paid to the Petitioner. Costs of proceedings ordered to be paid.

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28 June,
1864.

DEVONISH v. HEWLINGS AND COMACHO.

Pro. Note—Surety—Time—Costs.

The granting of time to the principal releases surety of his obligation.

Costs against one of two Defendants who did not consent to be as if sentence had been given by default.

Suit on pro. note.

Plaintiff's case (*Mr. Trounsett Gilbert*):—We sue on note for \$345, signed by both Defendants.

Sentence against Hewlings by default.

Defendant Comacho's case (*Mr. Lucie Smith*):—Defendant signed the note on 25th August 1863 for \$300 cash lent and \$45 interest, in favour of Plaintiff, to assist Hewlings in his business as a druggist, Comacho receiving no money from the proceeds. Note became due on 28th November, and Plaintiff agreed with Hewlings in Comacho's absence that if he paid the interest he would give 3 months further time. Comacho was not aware of the granting of the time or the payment of the interest. Hewlings paid the interest and got the time. On 15th February Hewlings got notice that note was due and he paid on 27th February \$145 more. On 15th February Plaintiff made out a new note for Defendants to sign, but Comacho refused to sign, alleging that he had only stood surety for three months. All Comacho knew of the transaction was Hewlings telling him that he and Plaintiff had made up the matter. No demand was made for payment until 6 months after note had been signed.

5 July,
1864

BEAUMONT, C.J., BEETE and NORTON, J.J.:—In this case sentence will pass by default against the Defendant Hewlings. As between the Defendant Comacho and the

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Plaintiff there is in effect only one question of law, the facts alleged on each side being either admitted or not contradicted. The point which arises on the proceedings as to whether or not the Defendant Comacho is discharged from the liability which he originally incurred as a security, by reason of the Plaintiff having given time to the Defendant Hewlings, who was the principal debtor, remains however for our decision.

There was a good deal of argument upon the law involved in this question, and the Plaintiff relied upon the hesitation with which the Common Law Courts had accepted the doctrines first propounded on the other side of Westminster Hall as to the discharge of a security by giving time to the principal. It is not necessary to undertake any elaborate enquiry into that matter, inasmuch as in adopting the English law relating to promissory notes we have no doubt that the doctrine of equity as well as those of the Common Law were adopted in the Colonial system, while the constructions which have arisen at home on the application of this part of the law from the different tribunals and procedures of law and equity, and which are now to a great extent removed even there, have no place in this Court.

This case seems to us to fall greatly within the limits of the doctrine by which sureties are discharged from their liabilities by the indulgence of the creditors accorded to the principal debtor.

Passages were quoted in argument from text writers and authorities which would seem to place the law upon a narrower footing than its proper one, but were it necessary it would be easy to show from a review of authorities that they have not gone further in defining uniform limits of the rule than that "mere passiveness" or a "mere giving of time," as it is usually put, will not discharge a contract of securityship, or as put by the learned editors of *White & Tudor* cases, vol. 2 p. 823, a mere voluntary promise not acted on, and which cannot be enforced, will not, as it makes no alteration in the rights and positions of the parties, have that effect.

2nd. That the proof of actual detriment is only of use where the arrangement though acted on, sought to change

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the positions of the parties as falling short of an obligation binding of its own force, and that where such an obligation has been undertaken the security is discharged *ipso facto* and without any detrimental change in his position being shown.

That the doctrines of the Courts of Equity on the subject has for long been adopted by Courts of Common Law is clear from a great number of cases which we may not refer to in detail. Many of them are collected in the volume already referred to, *W. & T. cases*, p. 835. So clear is this that various cases on this subject are referred to as illustrations of the rule of the Court of Equity that even they have obtained jurisdiction from defect of the Common Law to provide for the protection of equitable rights. That jurisdiction continues, although the Courts of law should afterwards adopt their rules and furnish a remedy accordingly. The application of the doctrine of law has no doubt been embarrassed partly from the technical rules and form of pleadings of the Common Law, and in some cases from confusion between it and the rules as to the effect of or by the principle of the contract as to the time, nature, and sources of this most wholesome principle. For instance, in some of the authorities referred to on both sides arguments adverse to it had been raised from the rule which does not allow a written document to be varied by parol evidence. But the equity cases show it has been recognised at law (we may suppose finally) in the cases which have been referred to in the arguments of *Boley v.* , that this is a complete misapprehension that the document no more than the writing allows any admission from any other evidence as to matters altogether *dehors* or subsequent to the instrument, though indeed we may add that there are rules applicable to cognate cases such as that which allows a defendant to dispute the considerations which are not less clear because they do in fact form exception to the general rule both at Courts of law and equity on that subject. The true basis of this doctrine discharging a surety is that the dealings between the parties perfectly independent of proper construction of the instrument in question have given rise to mutual

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relations of good faith which imposes that each principle and obligation of doing, or being, or pointing to nothing which can prejudice the rights of the surety, and that to do so without the knowledge of the surety is a violation of that good faith in the nature of a fraud and give rise to a new and dependent "equity" as it is called, or a right to be discharged from liability upon the contract so violated. We know of no authority in which the real nature and source of right is better put than by Lord LOUGHBOROUGH in the case of *Ries v. Bevington*, when time is given, but in a way not legally binding, as the original obligation was a bond, and the giving of time was merely accepted by the acceptance by the obligee of notes payable by instalments. The passages we shall refer to also dispose of an argument used by *Mr. Gilbert*, based on the supposed reasonableness and undeniable-ness of a rule which would rather seem to be one of eminent fairness and propriety, applying as it does solely between parties whose consciences are affected and whose acts should be regulated by the knowledge of the real nature of the surety's contract, and also to the agreement that the subject should even of the case the actual giving of time to damage or detriment suffered. Referring to the fact that by a dealing between the principals unknown to the surety they had deprived the latter of his right to the principal debtor's liability being enforced at once, Lord LOUGHBOBOUGH observes () "it is a breach of obligation in conscience."

It is time now to turn to the facts of this case to see whether it does not fall greatly within the limits of the true doctrine of law on this subject. The case is one of an action for \$300 principal, and for monies due on a note for \$345, dated August 25th 1863, payable three months after date. The Plaintiff advanced on that note to the Defendant Hewlings, knowing that Comacho joined in signing the note as a security only. It may be well to observe here by the way, that as his evidence shows that Comacho knew and that he only agreed to become a surety for a loan of \$300, it might have been difficult to make him liable even had no indulgence been given to the principal, and even if he had known that the note

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was for \$345 and did not know the fact that of that sum \$45 represented not money advanced by the lender to Hewlings, but three months' interest, or 60 per cent, *in advance*, and that \$300 only really passed, the same difficulty would have stood in the Plaintiff's way. However the Defendant is satisfied in his pleading to rely on the other point, and therefore it is not open to us to take this feature of the case into account. The note falling due in November, Hewlings and the Plaintiff came to an agreement without the concurrence and knowledge of Comacho for its "renewal," and thereupon and as part of the transaction Hewlings paid a sum of \$45. No application was made to Comacho for payment of the note until this second period of 3 months had expired, nor was any application made to Hewlings for payment before the expiration of that extended time, the first application that appears being a letter dated 10th February 1864, addressed by one Begg to the Defendant Hewlings reminding him that *his* note in favour of C. T. Stewart would be due on the 27th day of that month, and though this was written by Begg and speaks of the note as one in favour of C. T. Stewart, general evidence was given by Hewlings, and the Plaintiff's Counsel admitted, that Begg and the Plaintiff are both Stewart's agents, and that the application refers to the note now in suit.

Mr. Gilbert argued for the Plaintiff (as have been already mentioned) that even if the suretyship could be proved, it was still requisite for a surety claiming to be discharged to prove an agreement binding in law come to for valuable consideration between principals without security's knowledge to give time to the principal debtor, and also actual damage ensuing thereon. Now, if all this was necessary, we consider it is sufficiently pleaded and proved by the Defendant Comacho. *Renewal* in the proper sense of the giving of a renewal note there has been none. Some talk of it there was between Hewlings and Begg, but it seems to have been a mere talk and the renewal which the evidence shows was given was effected in the loose sense of a renewal of time by giving three months further. Plaintiff's Counsel indeed

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struggled against the conclusion that such a renewal or indulgence was agreed on and given in pursuance of that agreement. But if the evidence of the Defendant Hewlings (a person entirely disinterested in the question) was not conclusive on this point, all hesitation would be removed by the terms of Begg's letter of 13th February. That letter treats the matter in question not as due but as about to fall due at the end of the renewal period of 3 months. The effect of this letter is plain if it binds the principal, and though Counsel argued, while admitting that Begg in writing that application must be considered the Plaintiff's agent, that he was not authorised to write in such terms, it is clear that the letter is evidence as it stands, and must at least have weight sufficient to decide the question of the so-called "renewal" in favour of the Defendant Comacho.

It perhaps might have been pressed further had the Defendant alleged an actual agreement by the Plaintiff to renew on the sole credit of Hewlings, as it treats the note as his without making any sort of allusion to Comacho.

Then it was said that no value passed. But were that requisite we have no doubt that value did pass. It is a fallacy to assume that, supposing the \$45 paid in November to the Plaintiff was \$45 of the \$345 secured by the note in question, it would not support an agreement which might require value. Even an admission of, or consent to pay, or other new security for, to say nothing of a part payment of a debt actually due has frequently been treated, and that in cases *stricti juris* (such as those with regard to Bills of sale and the Statutes of Elizabeth) as a valuable consideration, and it requires only a moment's reflection to see that such an imposed position with regard to an actual right, unless merely illusionary and fictitious, was plainly *value* as a new benefit altogether. But this was not all the consideration which passed from Hewlings to the Plaintiff in the transactions of November, while he is hardly entitled to treat that payment as part of the original \$345 at all. By his pleadings he treats the whole sum as remaining due in November. He gives credit indeed for \$45 as against the full sum of \$345, but he gives that credit

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expressly in respect of a subsequent payment which Hewlings made in February, and the peculiar frame of the Claim and Demand (which asks interest on a note due in November 1863 from 27th February 1864) shows that the former payment of \$45 in November was not lost sight of. Thus it would seem that that payment bears the character of a premium in advance at interest for the usual accommodation. But even if it were treated as a part payment of the original \$345, the Plaintiff got by the transaction the additional benefit which he institutes this action to maintain, and which the Defendants consider was then secured, of a renewal or continual liability on the part of Hewlings for \$345 though in this view of the case \$300 only remained due. Call this commission, premium; interest at the rate of 60 per cent., or anything else, it is plainly value.

Now as to the detriment alleged by the Defendant Comacho, were that a material allegation there is evidence sufficient to decide the point against the Plaintiff, for on his cross-examination it appeared that Hewlings, who was in November a druggist carrying business in a shop, has since the commencement of the year been compelled to give up his business. He has left his shop, and states that he is now absolutely resource-less. In the absence of anything to the contrary, the Court would have to act on this as evidence of damage occasioned to Comacho by the Plaintiff's delay in enforcing his claim, were such evidence necessary.

Under these circumstances it is clear that the Defendant Comacho has been absolved from his liability on the note in question, and the Court therefore rejects the Plaintiff's demand against that Defendant with costs, while it awards sentence against Defendant Hewlings for the sum of \$300 and interest from 27th February with costs, the costs to be taxed as if the sentence had been obtained against him by default.

[NOTE.—The record of the Judgment in this case is badly written. with words left out and now and then are blanks.—*Editor.*]

OF CIVIL JUSTICE.

ADMINISTRATOR GENERAL, GUARDIAN AD HOC OF
R. S. G. KIRKWOOD.

13 *July*,
1864.

Trust money to be placed to separate credits.

This report is taken for notification. The Court, however, considers it undesirable, except under special circumstances and with their authority, to mix up the funds of different trusts, and desires the Administrator General as soon as an opportunity occurs of separating the funds mentioned in this report without loss or detriment to the minors, to do so, and invest the same in deposit receipts of one of the Banks.

OF CIVIL JUSTICE.

DEMERARY RAILWAY COMPANY, APPELLANT, v. 5 December,
CAVAN ET AL, RESPONDENTS. 1864.

Amendment—Negligence.

Where the Railway authorities are bound under Ordinance to fence, and cattle stray they are liable in tort.

Circumstances where Railway authorities not relieved of obligation to put up fence.

The Court allows by consent amendment of reasons of appeal.

For Appellant (*Mr. Trounsell Gilbert*):—Appellant was an adjoining proprietor of land next to those of the Respondents, and neither Respondents nor their predecessors in title of Plantation Success adopted legal measures to compel the Appellants to put up a fence or gate between the adjoining lands. They lost an animal by the negligence of the Respondents in leaving open a gate the closing of which we were not bound to see kept closed. The Respondents' mule strayed on the line through the gate and was killed.

For Respondents (*Mr. Lucie Smith*).

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Reasons:—

“In the Supreme Court of Civil Justice for the Counties of Demerary and Essequibo.

“In the matter of Philip Charles Cavan, Neville Lubbock, Henry McClery, and William Rennie, of the City of London, Merchants and co-partners, trading under the Firm of Cavan, Lubbock, and Company, by their Attorney in this Colony, Alexander Duff, Plaintiffs, *versus* the Demerary Railway Company, Defendant.”

“The Defendant feeling aggrieved by the sentence pronounced against the Defendant in the above matter, and the amount awarded by such sentence exceeding the sum of Ninety-six Dollars, hereby notes with the Registrar of Court the Appeal of the Defendant against such sentence.

“The grounds of Appeal are, that on the evidence given in the cause the Plaintiffs were not entitled to recover against the Defendant the amount claimed by the Plaintiffs, but that on the contrary the Defendant was and is entitled to have the claim of the Plaintiffs rejected with costs, or at least to have an absolution of the instance in the matter with costs.

“Wherefore the Defendant hereby claims a reversal of the said sentence against the Defendant and a sentence in favour of the Defendant rejecting the claim of the Plaintiffs with costs, or at the least a sentence in favour of the Defendant absolving the Defendant from the instance in the matter with costs.

“Demerary, 26 July, 1864. ,

“ROBERT WIGHT IMLACH,

“Attorney-at-Law for the

“Demerara Railway Company.”

Amended Reasons:—

“*In* the Inferior Court of Civil Justice in and for the Counties of Demerary and Essequibo.

“In the matter of Philip Charles Cavan, Neville Lubbock, Henry McClery, and William Rennie, of the City of London, Merchants and co-partners trading under the Firm of Cavan, Lubbock, and

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Company, by their Attorney in this Colony, Alexander Duff, Plaintiffs, *versus* the Demerara Railway Company, Defendant.

“The Defendant feeling aggrieved by the sentence pronounced against the Defendant in the above matter, and the amount awarded by such sentence exceeding the sum of Ninety-six Dollars, hereby notes with the Registrar of Court the amended Appeal of the Defendant against such sentence.

“The grounds of the Appeal as amended are, that according to the evidence given in the cause it does not appear that the Plaintiffs or any former proprietors of Plantation Success ever adopted any legal measures to compel the Defendant to put a fence and a gate or gates between the Railway and the adjoining lands of the Plantation, but that from the evidence it does appear as far as this case is concerned, 1st. That by the course of conduct pursued by the Plaintiffs and the former proprietors of the said Plantation, the Defendant was only not required or called upon to put, but that the Defendant was relieved from the responsibility of putting any such fence and gate or gates; and 2nd. That the accident complained of in these proceedings occurred by reason of the negligence of the Plaintiffs and their servants in leaving open the gate mentioned in the evidence, to the closing of which the Defendant was not by law bound to attend, and which gate if it had not been negligently left open by the Plaintiffs and their servants would have been as sufficient to prevent the mule mentioned in these proceedings from straying on the line of railway as any gate which the Defendant might have put between the Railway and the adjoining lands of the said Plantation, and that therefore the Plaintiffs are not entitled to recover against the Defendant the amount claimed by the Plaintiffs, but that on the contrary the Defendant is entitled to have the claim of the Plaintiffs rejected with costs, or at least to have an absolution of the instance in the matter with costs.

“Wherefore the Defendant hereby claims a reversal of the said sentence against the Defendant and a sentence in favour of the Defendant rejecting the claim of the

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Plaintiffs with costs, or at least a sentence in favour of the Defendant absolving the Defendant from the instance in the matter with costs.

“Demerary, 5th December 1864.

“ROBERT WIGHT IMLACH,

“Attorney-at-Law for the

“Demerara Railway Company.

“To the above-named Plaintiffs and

“GEORGE A. FORSHAW, Esq.,

“their Attorney-at-Law.”

BEAUMONT, C.J., BEETE and NORTON, J.J.:—The Appeal was argued with so much care and ability on both sides, we feel sure nothing material to the decision of the question involved in the case was overlooked. We are of opinion, however, that the decision of the Court below was sound, and we confirm it accordingly.

The questions arising in the case are shortly put by the Chief Justice in the written reasons which he gave for his decision, and we do not think that any useful purpose would be answered by now going at any great detail into the arguments addressed to us, and which we have not the less carefully weighed in coming to our decision.

We think that even if that question would be open, an appeal in case of error as to which we wish to be understood to express no opinion, the Chief Justice rightly held that as the case stands on the record, and evidence, the legal inference to be drawn is that if there had been a fence across the middle walk of the Plaintiffs' estate where the Railway line crosses it, such as the Railway Company's Act requires them by Section 69 to make, the accident complained of would not have happened.

It being conceded that there was no such fence erected, the defence and appeal therefore resolved themselves into the contention that the Plaintiffs had by their “cause of conduct” (as it was put) either emancipated the Company from their statutory obligation towards the proprietors of estate Success, or imposed on those proprietors a sort of obligation to protect themselves by maintaining their own fence, the failure to do which,

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became negligence in the eye of the law, and that so the Plaintiffs having contributed to the accident by such negligence could not recover.

We do not think this argument was made out or could have been made out upon the facts of this case. We adopt the view of the law laid down by the Court below, that a statutory obligation of this nature, imposed for the protection and benefit of the adjoining proprietors can only be discharged by performance or by an agreement or its equivalent without differing from any of the cases quoted to us, in which the claimant was barred from his right on the ground of acquiescence or negligence fully agreeing that a course of conduct may take place which may bar such a right. We think the phrase that it must be something "equivalent to an agreement" though itself general and perhaps even vague, is safer than the use of those equally vague terms, and will be found to afford a safe clue and test to the measure and character of the "acquiescence" or of what is called "negligence" which will have the effect in question.

There can be no doubt that as between parties in the relative situation now in question, a cause of conduct or rather a course of *dealing* may have results equivalent to an agreement or such a manifest assumption of responsibility by the one party in his dealings with the other as may subject a person so acting to the imputation of legal negligence, though not originally open to it. A case greatly relied on by *Mr. Gilbert* for the Appellant shows clearly how this may be, and we think shows equally clearly how widely the case before us falls short of such a result.

We refer to the case of *Ellis v. London & South Western Railway Company*, 26 L.J., 349. There it was held that the Plaintiff could not recover for damage suffered from the alleged default of the Company in not having complied with the requirements of the law as to the accommodation works in the case of a "public footpath," but what were the circumstances?

Why the footpath in question, whether a public footpath or not, and whether if so there was any default by the Company or not, was as put by Plaintiff an "occupation

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road," it was enjoyed by him as such. The Company had erected a gate, complying with the law applicable to occupation roads. They had handed the key of that gate to the Plaintiff who had accepted it, and who as the occupier of the adjoining lands which the occupation road served was expressly bound by law to keep such gate duly fastened. He had lost the key which he had thus accepted and used, and having lost it he left the gate which the Company had thus erected as one for his occupation road unfastened, in violation of the express duty cast upon him. Thus the accident occurred. Surely in such a case there could be no question that whether the way was or was not a public footpath, yet inasmuch as between the Plaintiff and the Company it was an occupation road enjoyed by the Plaintiff, and as such devolving on him the care of the gate, it was not open to him to fall back on what might perhaps have been his rights as one of the general public claiming the due protection of a public footpath. There was then a clear course of "acquiescence," but of "dealing" actually concurring as far as the Plaintiff's case went with the provisions of the law except in this essential particular that he himself absolutely neglected a clear statutory duty imposed on him, and so had contributed by his own legal negligence to his own loss. It would not be useful curiously to criticise the words of the learned Judge in that case, inasmuch as we are satisfied that when they are taken, as they must be, *secundum objectam materiam*, they do not sustain the Plaintiff's case or qualify the propositions laid down in the judgment of the Court below or in this judgment. Were it necessary to strengthen our decision by reference to any of the English cases, we think that of *Besent v. The Great Western Railway L.R.C.B.*, p. 369, is very sufficient for this purpose. There the Plaintiff had folded his sheep against a fence of the Railway Company which was not sufficient to keep out sheep. He had actually in doing so carried his hurdles across part of the Company's land to the fence in question. He was in fact by so doing a trespasser, and yet the Court took so broad a view of the importance of holding the Railway Company to a strict

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performance of their statutory obligations in particular, that although the Plaintiff was not only in strict law a trespasser, but if the arguments of the Appellant in this case were adopted he was guilty of negligence in having relied on an insufficient fence, the Company was held liable. Here the evidence even of acquiescence is as against these Plaintiffs most slender. There is not a syllable of evidence which can prejudice the Plaintiffs' rights prior to the transport in January 1862, nor have we evidence of anything whatever done by him since that time down to the date of the accident.

It is said indeed by Mr. Struthers that "whatever was done" to a barway which had been erected across the middle-walk of the estate some distance (it would seem 30 yards or more) from the Railway Boundary "was done by the estate." But there is no evidence that *anything* was done to this barway after the Plaintiffs' acquisition of the property till after the accident. Something it appears was done to it *either* shortly before *or* after the accident, but we cannot infer from such evidence that it was done *before*. Even if it had been so, is it not perfectly consistent with the evidence that this barway should have been erected and maintained from the general or special purpose of the estate quite apart from the protection of this crossing? We think it is or were it otherwise can we say that by taking such a precaution the proprietors waived their legal right to hold the Railway Company to perform its statutory duties! We think not, we do not see the point to which such arguments might not be pushed if they were to be adopted by the Court.

If mules or cattle had been accustomably penned it would not be safe to turn them out to pasture at all or if previously herded by care takers they could not be turned out without them. Nay it might even not be safe to burn a horse out of his stable to pasture if the Company might say "up to this time you "kept your horse in your stable and therefore relieved us from "the obligation of putting up a fence. If you turn it out to pasture now you cannot expect us to perform a duty which you "have relieved us of."

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We might extend our remarks to shew the other consequence which should deter us from acting on this view of this case were it necessary to say more than we are clear upon the whole evidence and law of the case (and in alluding to the evidence we again desire to guard ourselves against being considered as expressing any opinion that the conclusion of the Court below as to matters of fact can be received by this Court in such an Appeal as this) but we are clear that the decision of the Court below was right and that this Appeal must be dismissed with costs.

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PIETERS, OBTAINER OF AN ORDER PRO DEO, v.
OSBORNE AND PHIPPS.

15 April,
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immobilia—Fraud in obtaining Title—Equity—Will.

When Plaintiff seeks an equitable right he must deal or offer to deal equitably with the Defendant.

Although fraud be proved, the Court will not set aside Letters of Decree if the Defendant has equity.

Action to set aside execution sale as fraudulent.

Plaintiff's case (*Mr. Trounsell Gilbert.*) Plaintiff and Joseph Linckton bought lot 29 from Hannah Bishop. They paid the purchase money and thereafter erected buildings on said lot and rented the same to Defendant Phipps. Osborne sued Phipps on Summary citation, and the property was levied on as belonging to Phipps. Phipps looked after the getting of the sureties for the purchaser Osborne, after having enquired at the Marshal's Office the practices as to purchasing at sales at execution.

Defendant's Case (*Mr. Roney*): — Phipps married Plaintiff's daughter, and the house and land were given

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him as his wife's portion of her father's estate left her under her father's Will. He sued Plaintiff for his accounts, and was thrown out on a technical objection. He had paid all the taxes as they fell due. He was offered transport of ½ lot but refused it as he claimed more. He owed Osborne \$452, and the execution sale was *bonâ fide*.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—In this case the Plaintiff seeks to set aside an execution sale on the ground of fraud, and the second Defendant in answer to the Claim and Demand relates a long story about his wife being entitled to an account from the Plaintiff as Executrix of her deceased father's estate and of payment and delivery to her of that portion of the estate to which she is entitled *ex testamento*.

The Court will not say that an execution sale cannot be set aside on account of fraud, but the Court will not, except upon a stronger case than the present, set aside an execution sale, especially when the Plaintiff says that she seeks an equitable remedy and it appears that she is not inclined to act equitably.

It appears that Andries Aut in his lifetime made a last Will and Testament whereby after bequeathing a certain legacy to the amount of \$1,000; he left the residue of his property to his wife and to his daughter who is the second-named Defendant's wife.

It is not shewn to the Court whether Andries Aut and Anna Maria Pieters, the Plaintiff, were married by contract or in community of goods. If by contract, half of his estate according to the Will would devolve on his wife the Plaintiff, the other half upon his daughter the wife of the second Defendant. If married in community of property then half of the property would belong *de jure* to the wife and she and her daughter would take each one-half of the one-half, or in other words one quarter of the whole property possessed by Andries Aut in community with his wife during his life.

This, however, is not very material as will be presently seen. By his Will, Andries Aut appointed his wife the Plaintiff, and one Joseph Cornelius Linckton, Executrix and Executor to his Will, and guardian of his minor child Henrietta Aut, and died on the tenth September 1828,

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On the 12th July 1831 Linckton and the Plaintiff as Executors and Guardians, purchased lot 29 in Charlestown for the Plaintiff and the second-named Defendant's wife. To what extent each was to be interested is not stated, and therefore the presumption is, that each would be entitled to a moiety, or one undivided half of the lot. It appears that this lot has been sold at execution sale, and it is alleged that the sale was accomplished by and between the two Defendants in fraud of the Plaintiff. It appears also that the Plaintiff was aware of the advertisement of sale on the Thursday previous to the Saturday, the last day for entering opposition, and that she was at no further distance from town than La Retraite on the West bank of the river; but she says that she was ill and could not come to town. She might have sent a messenger, as it appears to the Court that she has a professional gentleman acquainted with her affairs, and whom she could have instructed by letter or messenger to enter an opposition—she however did not take any steps in the matter until Tuesday, when she came to town and found the property was sold.

The Court looking at the fact that Andries Aut having been dead as far back as 10th September 1828, and that the Plaintiff was Executrix and Guardian under his Will, that she administered, that there was property belonging to the estate of Andries Aut, that that property has never been accounted for to the second-named Defendant's wife, that the lot in question was bought for the Plaintiff and the second Defendant's wife, and paid for out of the estate of Andries Aut, that the second named Defendant and his wife had been living on the lot for many years before the execution sale by the permission of the Plaintiff, and, without paying any rent for the same, considers that the Plaintiff in seeking an equitable remedy must do equity and account to the second-named Defendant's wife for that portion of her deceased father's estate to which she is entitled, before she can, by a process of this kind denude the second-named Defendant's wife of part of the small portion of her paternal inheritance received by her.

The Court has therefore granted an absolution of the instance with compensation of costs.

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28 February,
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HAYNES v. BISHOP ET AL.

Evidence—Equity.

A lease is receivable in evidence without proof of its having been recorded, but must bear revenue stamp.

When party seeks equity he must offer to deal equitably.

A person holding as joint tenant in common property cannot ask for account from co-partner unless he himself offers to account.

Suit for account of monies and for possession of one half of common property.

Plaintiff's case (*Mr. Trounsell Gilbert*):—Plaintiff was married to Thomas Gibson, who died leaving the only property (Stewartville) he had to her. Four years after she married Haynes in community of goods. Haynes had two houses at Uitvlugt, some cattle and furniture. When Haynes died, Defendants, his executors, took possession of his property and when asked refused to give us any part of it.

Defendants' case (*Mr. Lucie Smith*):—Plaintiff is in possession of part of the property and also accountable to us. Plaintiff makes no offer to submit documents. Plaintiff has to come in *hotch pot*.

1 March,
1865.

BEAUMONT, C.J., BEETE and NORTON, J.J.:—The Plaintiff does not claim under the Testator's Will, and her claim is therefore not one resting on any trust or any absolute liability of the Defendants to account as executors,

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It is an adverse claim for the settlement of accounts and a division of property which belonged to her and her husband in community of goods, and which now belongs to her and her husband's representatives as tenants in common.

The Defendants say amongst other things that the Plaintiff is herself in possession of and accountable for part of the property which was and is held in this community. If this be so, it is manifestly a case in which the rights and liabilities both with regard to the accounts and division or partition are mutual, and it would be impossible for the Court to entertain a suit of one of two parties so situated to obtain such relief as prayed in this case in which the Plaintiff makes no offer to submit to such accounts or order as may be found required in order to do justice between the parties. Without such an offer and submission by the Plaintiff, for the Court to effect the relief sought by her would be most one-sided and inequitable. Even if it were true that upon a suit thus constituted the Court would ascertain the whole of the common property and the mutual obligations of the parties, so as to admit the true liability of the Defendants with a view to enforce it against them in so far as it may exist, or to relieve them from all claim if they should turn out to have discharged their liability—a supposition which we think cannot be maintained—it would still be clear that the Court ought not to attempt any such adjustment in a case of this mutual character. For when entering on the enquiry the Court cannot tell whether in fact it is not the Plaintiff who may turn out the accounting and responsible party, and whenever this contingency is open upon the case disclosed by the pleadings between parties in such a mutual relation, it is quite plain that the Court ought not to allow the Defendant to be even put to his defence, unless the Plaintiff has offered to submit to and abide by such order as the Court may make for enforcing the mutual liability to account, to pay and effect a division. Any other course would be to expose a Defendant to be harassed by a proceeding which might turn out ineffectual, and would certainly be a proceeding grossly inequitable and opposed to the settled

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principles which govern the relation of parties under mutual obligations of this nature.

The pleadings in this suit clearly disclose such a case. The relationship of the parties is such as has been stated, and the Defendants allege in their pleadings in their defence (amongst other things to which it is not necessary to advert) that the Plaintiff has received and possessed herself of part of the property formerly held by herself and her husband in community, for which she must account, and which must be brought into "hotch pot," to use an English phrase, and subject to the jurisdiction of the Court, before any conclusive division or account can be taken or made

Notwithstanding this, the Plaintiff persists in her suit as originally framed for partial and one-sided relief. Such relief we are satisfied we cannot afford, for this was intimated by us in the course of the opening of the Plaintiff's case, for the conclusion is inevitable upon the pleadings, so that no evidence in support of such a case can affect the issue. The Plaintiff, however, without suggesting any amendment of the pleadings so as to remove the objection (which perhaps in this case it would have been difficult to effect, having regard to some of the circumstances disclosed in evidence), proceeded to adduce evidence in support of her case. She certainly showed that the Defendants were accountable for some part of the common property, but she also afforded the Defendants the opportunity of showing from her own witnesses the truth of the case alleged in their answer, namely, that she was herself accountable for a part of the property. We therefore not only consider that the Defendants have a good defence on the pleadings which was the Plaintiff's business to avoid and those pleadings whether true or false, but that such defence is well founded in fact.

It would therefore have been wholly out of place on our part to call on the Defendants' Counsel, as on this ground alone we decide that we must direct an absolution of the instance with costs.

There remains for our decision a point which the Court would very gladly have avoided, but which is forced

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upon our attention and decision in justice to the revenue and in compliance with the law.

Mr. Gilbert tendered in evidence for the Plaintiff a contract of lease between Haynes the testator and one Mooty, from whom one Baker took possession of the lease and property, and an arrangement which is said to have been recognised by the Defendant Bishop, and under which Baker paid sums of money in respect of some of the rent through Mrs. Watson to the Defendant Bishop, one of Haynes' executors. The object of tendering the lease is to show that the monies received from Baker were received in respect of some of the common property of Haynes and his wife, that it was rent for property leased by Haynes in his lifetime to Mooty through whom the payer, Baker, took. This document, however, was neither stamped or recorded, and its admission was objected to on both these grounds. After some hesitation the Court decided that although not recorded it was admissible and it may be convenient here to notice the grounds of that decision. Reference as made in support of the objection to the former decision of the Court in the case of the Administrator General v. Rebeiro which was thought to sustain it. The Court however, after some hesitation came to the conclusion that it did not do so, and that not only is the direct effect of Sec. 20 of Ordinance 3 of 1850 confined to the transfer and assignment to which it is confined in terms (in so far at least as its invalidating prohibitory effect goes) but that the terms of that section expressly contemplate and imply that original mortgages, leases, &c, might be valid and pleadable as such although not recorded. As to the effect of the 21st section the conclusion of the Court was that especially bearing in mind the provision of the 20th section its operation does not extend to leases as such taking the terms of the 21st section alone, it is plainly confined to the class of instruments specified (which do not include, leases) and "other instruments whereby the interest of third parties may be affected."

Those general words must have some definite meaning attached to them, as in their widest sense they would include every instrument and emphatically every Pro.

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Note or Bill of Exchange. On the whole the rational and proper consideration appears to confine them to instruments *ejus en generis* with those specified which have all a specific bearing *ah initio* upon the interests of third parties. Without discussing or inquiring whether there may not be a case in which under particular circumstances a lease may be so (as the Court seems to have thought in the case of the *Administrator General v. Rebeiro*) the Court decided that leases as such are not within the 21st any more than the 20th Section.

This conclusion was intimated and acted on at the hearing of the case, but on the other objection, namely as to the stamp, the Court is unable to arrive at a satisfactory conclusion. *Mr. Gilbert*, however, requested the Court to admit the document upon the amount of duty and penalty being paid with the Registrar under Section 3rd of the Stamp Ordinance. This course was taken with the understanding that the Court would in favour of the Plaintiff determine the question as to the necessity of the document being actually stamped.

Regretting very much to have to come to the conclusion under the circumstances, as indeed we have to regret having to consider this point, we have concluded that the duty and penalty must be handed over to the Colonial Receiver General, and the lease must be duly stamped. The argument on behalf of the Plaintiff was that this lease was tendered for a "collateral purpose," and various cases on the subject were quoted and referred to. No doubt the common sense and sense of justice of mankind have led the Courts of Justice to allow this question to be introduced notwithstanding the very plain and absolute words of the Stamp Act at Home and here. Indeed such a qualification seems a necessary equity, without which those Acts could hardly be tolerated, although the terms seem to exclude it. Still the plain duty of the Court is not to fritter away the law as to stamps by a lax application of this equity. It would not be useful in our opinion to discuss the various particular cases on the point, which, as might naturally be expected are not easily reconcilable in every instance with one another. But the leading idea adopted in all is

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that the object with which an unstamped document may be admitted as being such a collateral one that the requirements of the stamp law must be taken not to apply-when the object is collateral to or independent of its direct and immediate scope and operation. But the immediate scope and operation of the lease was to constitute Mooty tenant at a fixed rent of property which the Plaintiff says she is entitled to by virtue of her marriage In community of goods, and the object with which it is tendered is to show that Baker in paying certain monies to Bishop paid them as rent for this very property, he then standing (created by Bishop as standing) in the place of Mooty the original lessee, or perhaps more accurately (Mooty's transfer being admissible) that the money was paid by Baker on behalf of Mooty the original tenant under this lease, and that in this way the Plaintiff is entitled to share in monies which are the proceeds of the common property and to call the Defendants to account for these monies. Surely this object is the very object of the lease itself. The lease was executed on the behalf of the Plaintiff, that is, in respect of her common interest, by her husband in respect of his marital right. She now claims certain monies against her husband's representatives, and she says that it is monies received as rent reserved on that lease and which she is entitled to share. It is rent in part payable to her, for it is paid under a lease made on her behalf by her husband in his lifetime. We think it is impossible consistently to hold that the object with which the lease was put in evidence was so far collateral that its purpose and direct object and effect as to relieve the party tendering it from the onus of the Stamp Ordinance. It must therefore be stamped.

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JOHN v. ISAACSON.

2 & 3 *March*,
1865.

Opposition. No departure allowed from reasons.

Plaintiff's case (*Mr. Ross*):—We purchased the property opposed for valuable consideration, and got possession. Defendant was indebted to us, and on a reckoning we took over the property.

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Defendant's case (*Mr. Lucie Smith*):—The property was taken over in security of the debt we owed, for which the Plaintiff has a promissory note.

BEAUMONT, C.J., BEETE and NORTON, J.J.:—This is an opposition suit against the sale of a house in execution on the ground that it is the *bonâ fide* property of the opposer J. John.

That case has wholly failed. The Plaintiff rested his title on a transaction which was embodied in a document which he could not produce, and of which we could not permit secondary evidence to be given as it has plainly shown to have been handed to the Plaintiff's Solicitor, and the possession or loss of it was by no means accounted for or shewn by him so as to make secondary evidence admissible.

Enough, however, appeared to show that the opposition as entered could not be sustained, even had this document been proved, inasmuch as the transaction alleged and which it was said that the missing document would have disclosed, was merely an agreement for security in favour of John.

Such a departure from the reasons of opposition plainly could not be got over and the opposition has failed accordingly.

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2 May,
1865.

Re PROVOST MARSHAL.

Resale—Commission.

Commission allowed on re-sale.

The Court (BEAUMONT, C.J., BEETE and NORTON, J.J.) having had reference to the several records of re-sales and taxed bill of costs submitted by the Provost Marshal, from which it appeal's that the commission on the full amount of re-sales has been heretofore allowed, now orders that the charge of commissions on re-sale in this case shall be allowed and taxed.

SUPREME COURT

10 *May*,
1865.

GULLIVER *v.* GULLIVER.

Decree of separation *a mensa et thoro* pronounced.

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PISTANA v. PISTANA.

9 May,
1865.*Executors—Commission.*

When Executor is lax and allows estate to be closed without deducting commissions, he cannot afterwards claim them.

The facts are stated in the Judgment.

BEAUMONT, C.J., BEETE and NORTON, J.J.:—This is a suit brought by John Pistana, as one of the Executors and Guardians under the Will of one Francis de Silva, deceased, against Claudine Pistana, his co-Executor and co-Guardian, for a general account of all the Defendant's dealings and intromissions with the testator's estate, which he requires to be taken in order to ascertain what sums the Defendant has received in respect of commission and to enforce payment to the Plaintiff as his co-Executor and co-Guardian of his share of these commissions.

Whether it be possible or not for one of a body of Executors so situated to contest the right of another to share in commissions, on the ground that he has not in fact earned them in any case where the claimant has really acted in any material particulars, we need not enquire, although that question is raised by the Defendant against the Plaintiff.

It may however be at least open to question whether a suit of this nature can be sustained for this limited object except under particular circumstances as of wrongful exclusion, or whether the fact that it has been found necessary is not itself a conclusive answer to such a suit as showing that the Executor who sues has not been so far reasonably diligent in the business as to entitle himself to enforce his right in that mode.

In this case however it is clear that the Plaintiff is not entitled to the relief sought by him, inasmuch as the Defendant states, and we think sufficiently shews, that the funds which came to his hands have been distributed by him without deducting commissions, and that (even

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assuming that in any case an Executor so acting would be accountable in such a suit as this) under circumstances which we think preclude the Plaintiff from claiming against him a share of the commissions, which he did not in fact deduct though he might have been entitled to do so.

That there are some circumstances of suspicion to favour the Plaintiff's claim must be admitted; the mode of dealing with the Estate, the loss of the Defendant's cash book, the various offers and proposals by the Defendant, we think justified the Plaintiff's suspicion. But on the whole the Plaintiff has not succeeded in displacing the Defendant's statement that the Testator's estate turned out Insolvent, that he therefore divided it amongst the creditors in full without deducting any commission, and that after paying them their dividends, amounting in the whole to nearly 50 per cent., there remained only a shilling or two undivided. Now considering not only that this course of dealing took place with what may be called the passive concurrence of the Plaintiff who was himself a creditor of the Testator, and as such received these dividends according to a rateable division set forth in formal statements which were placed before him and signed by him, it would be too much to allow him to unravel that course of dealing hereby in order to assert his right to one half of the commissions which ought or might have been deducted.

Had the Plaintiff indeed claimed either absolutely or alternatively the sum of \$100, which there is some evidence was at one time stated by the Defendant to be then coming to him for commission on the footing of a promise, an account stated or an actual appropriation he might perhaps have been entitled to receive that sum. But this he does not do; he sues merely to assert his general right to share in the administration of the estate and the commissions arising therefrom. We conceive it by no means impossible that having the passive concurrence of the Plaintiff and in the mode of dealing between persons of this class in business of this kind, the Defendant deemed himself justified as between himself and the Plaintiff in the course which he took.

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In fact from motives of his own which he represents as disinterested and which are not shewn to be corrupt or wrongful he seems not only to have disregarded the original right to commission *in specie*, but also this alleged representation to or engagement with the Plaintiff. But under the circumstances we think it equally impossible to give on this special footing of promise or account stated, relief which the Claim and Demand does not seek, as it is to afford the more general relief which the Plaintiff does seek in this suit.

On the question of costs however we are not disposed to visit the Plaintiff with them. He has lost his- commission very much owing to his own fault, but we think the Defendant's conduct in the matter irregular and unsatisfactory, and that before disregarding the Plaintiff's position as to commission he should have come and adhered to some clear understanding with him. This lax and arbitrary mode of dealing with persons who have the interests of others in their care is not to be encouraged, and we therefore leave the Defendant to bear his own costs.

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OF CIVIL JUSTICE.

DE SILVA v. DE SILVA'S EXECUTORS

10 May,
1865.*Liability of Executors—Accounts.*

Executors are bound to account for their intromissions, and must be formally discharged by heirs.

The facts are stated in the Judgment.

BEAUMONT, C. J., and BEETE, J.:—This is a suit by Manoel de Silva, one of the testamentary heirs of Jerome de Silva, deceased, brought against the Testator's Executors, one of whom, Lencardia Ferrara, is co-heir of the Testator with the Plaintiff. A short statement of the dealings with the estate as they are to be deduced from the voluminous evidence given in the case appears to us the most convenient introduction to the Judgment of the Court, leaving any disputed points which are material for subsequent discussion.

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The Testator died on the 18th February 1863, leaving a Will by which he constituted the Plaintiff and the Defendant L. Ferrara his residuary heirs, giving them his property in equal shares. He appointed the Defendants his executors. He was possessed of a considerable estate, mostly invested in four retail spirit shops, two principal ones, two subsidiary or at least smaller. The Plaintiff was his brother, and acted as shopman at one of his shops, that at Friendship in Wakenaam. The Defendant was his mistress. She appears to have been the most active person in dealing with the estate, and it is against her that the Plaintiff in his evidence laid most of his complaint. In the first instance, however, she and the Defendant Holdip in point of fact followed out their position in law and assumed the executorship. It may be true that while this office continued operative (which has been a good deal brought in question) she was more active in its duties than Holdip, still it is plain that he acted so far that for some period and to some extent he is accountable as Executor, though whether or not for everything done or undone by his co-Executor during the period of executorship may be open to question. Afterwards, and not long afterwards, the Plaintiff and Lencardia adiated the Testator's inheritance. The act of adiation is dated the 9th day of May 1863, and the understanding of all parties seems to have been at and about that time that Holdip then ceased to be concerned in the matter, and that the two heirs would settle between themselves the division of the inheritance. To some extent they proceeded to do so, but distrust and disputes supervened, and after quarreling for some time the Plaintiff resorts to this Court in the perhaps hopeless endeavour to ascertain and adjust accurately his rights under a course of dealing so confused and blundering as that which has been carried on in the interval.

The suit he brings is one calling on the Defendants the Executors to render him an inventory and account, to pay him what may be due to him on such account, and to deliver his share, his "divided share," as it is put in the conclusion of the residuary estate.

The Defendants answer that they have had no intro-

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missions as Executors, but on the Testator's death. Plaintiff and his co-heir adiated the estate, and that thus the whole business is reduced to one between those coheirs; that the Plaintiff has himself taken possession of a large part of the inheritance and has refused to account for or divide it; and that under these circumstances the Plaintiff is only entitled to sue his co-heir, L. Ferrara, for an account and division; and that in order to obtain such sentence even against her he must account for his receipts, &c.

The Plaintiff replies stating that as to the Friendship shop he continued to work as shopman after the Testator's death down to the month of January 1864; that during such period the Defendant and not he received the profits of the shop; that in January 1864 the Defendant Lencardia Ferrara tried to turn him out of the shop after taking stock there; that he refused to go and since then has retained possession of that shop. He denies all the rest of the Defendants' answer, and persists in his claim and demand as filed, offering however to allow to the Defendants in their accounts the value of the stock in the Friendship shop as that stock was taken in January 1864.

In this state the suit comes before the Court. Had the statements in the Defendant's answer that the Defendant never acted as Executor, but that from the first the Plaintiff and the co-heir had adiated, had these statements been maintainable we should have adopted Defendants' conclusion of answer. We think, however, they have not been sustained, and it appears to us on the other hand clear that when Executors have acted as such they cannot refuse to account to any of the heirs who may call them to account. Again, if the Defendants had been able to plead and establish in a formal way what we apprehend has been in a loose and informal way the course of these transactions, viz., that the action of the Executors had only been very partial and temporary; that in so far as it extended Holdip accounted for as paid to his co-heir Ferrara all that he had to account for; that the Plaintiff and Ferrara then agreed to adiate and put an end to the office of the Executors; that the

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result of the Executorship was adequately stated to the Plaintiff and that upon such statement he agreed to release Holdip from account and to look to his co-heir alone for what had accrued from the Executorship. Here again we conceive that the Plaintiff's suit must have failed altogether. But not only is it the law that an Executor who has become accountable cannot be discharged from his liability except by a proper and final account, but it cannot be considered that a loose arrangement amongst parties beneficially interested to receive from Executors the possession of the trust property (for such it is) as it stands amounts to such an account or has any effect whatever upon the liability which the Executors may be under to account at the moment. An Executor once accountable must go further than this to discharge himself, and if he has become accountable by one single act or for one single week he is not the less exposed in principle to account because his responsibility may be limited.

Is it the case then that the Defendants in this suit are not accountable *as Executors*? Is it the case that as they allege in their answer, they have had no intromissions in that character? This appeared throughout the prolonged hearing of this case to be the main if not the only question of fact to be evolved inasmuch as it is perfectly clear that the result of the account is a matter the Court cannot enquire into upon the hearing, and on the other hand it appeared throughout that the Plaintiff could have no other relief in this suit as framed than an account against the Executors in that character.

We think it is abundantly clear that to some extent at all events, we might perhaps say even to some substantial extent, except that we are not disposed to anticipate the details of such an investigation as the account in question may lead to, but to some extent the Defendants are clearly accountable as Executors. The act of adiation by the co-heirs was not extended until the 9th of May, and the inference from the whole evidence is, that it probably will turn out that down to that time the Executors continued to a considerable extent to act as such, and that from that time without

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saying that *per se* and necessarily the adiation effected a final termination of their function, they ceased to act or (save as to their prior acts) to be responsible as such. The Attorney General for the Defendants agreed that the act of adiation had relation back to the death of the Testator, and so discharged the Executors from any responsibility from that time. But this argument goes a great deal too far. We don't think it necessary to enquire how far adiation may take effect by relation for some purposes, as for instance to affix responsibility to the adiating heirs, but it is impossible to maintain the argument that it relates back so as to discharge the Executors from their liability to account to these very heirs. The inevitable result would be that no heir could safely adiate until he had obtained a final and satisfactory settlement of the Executor's account, and no authority was cited which could sustain such a proposition against the common practice and natural reasonable inference to the contrary. The mode in which *Vander Kessel* speaks of Executors as *quasi* procurators of the heirs certainly does not bear out this doctrine, for without being prepared to accede to all the inferences which the learned Attorney General would seek to draw from that phrase, it surely cannot be said that when a principal supersedes or countermands a procurator's authority he releases him from all account or question for the past, or that where in particular matters he acts without reference to the procurator he supersedes or annuls a general procuratorship. If the liability and authority of the Executors were merely potential or dormant, adiation might *ipso facto* put an end to the office and liability of Executors. But we think there is enough in the evidence to show that the Executors for some time after the Testator's death, even if not down to the time of the act of adiation, were actively engaged in the duties of their office, and that albeit the Defendant Holdip seems to have left the more active management of the executorship to Lencardia Ferrara, he did certainly interfere so far as to lay himself as well as her open to a suit for account. Without attempting to analyse the evidence in this point, we shall now refer to

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a few passages which seem to show clearly that he is under this liability. In the first place, Holdip tells us that after the Testator's death "lists of his property were made out by one Green at the request of myself and the female Defendant."—"One Jose de Silva valued the goods in the shop. He was requested to do so by me and Lencardia."—"After the lists were taken myself and Lencardia carried on the shops up to the 9th of May 1863."—"After the 9th of May 1863 I took no further part in the management of the shops. I did not because Lencardia and Plaintiff then executed an act of adiation and I thought I was acquitted. I thought I had nothing more to do with it. She told me as much herself. I received some small sums of money but tendered them to her." Now we may here notice that this is the utmost attempt which has been made in evidence to establish any discharge of the Executors or of Holdip in that character by any subsequent act. We dare say that *bonâ fide* Mr. Holdip did consider that having accounted to his co-Executor, herself one of the co-heirs, for all his receipts he was acquitted. But it is plain that it was neither because he thought so nor because Madame Ferrara told him so that he was acquitted, certainly not from his liability to the Plaintiff, and though we think it is not unlikely that the Plaintiff also understood as much or at least passively acquiesced in the idea, it is plain that such a confused understanding will not suffice to release an Executor unless it follows upon an account rendered at all events, in which case indeed it might have some operation more or less conclusive as a release. Here, however, no sort of account seems to have been rendered by Holdip to the Plaintiff of the Executorship transactions. We will only add as to Holdip's conduct:—that he was not altogether inactive in the Executorship is clear also from the fact that he appears on one occasion at all events to have come to town with his co-Executor to settle the debt due from the Testator's estate to Manoel Correia.

Now it appears manifest that if the Executors really acted in that capacity their liability to account for their acts is in no way avoided by the fact that the heir?

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interfered also. If indeed it was a case in which *negligence* was imputed to Holdip in *not* acting or *not* acting vigilantly, it would be of great importance to show that the heirs assumed to act for themselves, and that therefore he ought only to be liable for his own acts and not for his omissions or neglects. But this does not seem to furnish the smallest argument against the Executors being held to account for their actual dealings. We do not therefore think it material to consider in detail the evidence showing that before the act of adiation, and from a time very shortly after the Testator's death, the two co-heirs did in fact co-operate in particular transactions and opened accounts with Portuguese merchants in their joint names for the shops in question. None of these circumstances in any degree qualify the liability of the Executors for what they did in that capacity, or displace the evidence that in some particulars they did act in that capacity. No doubt it was very loose dealing throughout, the very kind of dealing which ensures difficulty and lays the ground of litigation. But that is no reason that when the material result does arise, the Executors should be freed from a liability which they should have taken care to discharge themselves, or by a more regular course of dealing. An account, therefore, against the Defendants as Executors we think I the Plaintiff is entitled to have. The point will no doubt recur again and again under the sentence (especially as one of the Executors happens to be one of the co-heirs) how far they are accountable in particular cases, but all those questions the Court must leave to be solved as they arise.

It is quite plain that as to all dealings which they had, they (whether after the act of adiation or before that act, but on the footing of adiation as between the co-heirs) Stand in the relation of being mutually accounting parties. It is true that the evidence seems to show an intention and perhaps even an understanding between them to settle their mutual claims and to come to a sort of partition, but it is also plain that this was too loose an arrangement to be treated as an actual settlement and partition. Whether such an arrangement might possibly have been

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made the basis of a suit to carry out specifically its terms in a case where the materials and the parties were more substantial and exact than in this case, it would be hazardous to say, and it would certainly have been more than hazardous in this case to attempt such a suit. The parties now acriminate on one another, but the conclusion we should be disposed to draw is that they did actually come to a sort of understanding for a division, but that in doing so they did not provide for all the liabilities of the estate and the payment of these has driven them asunder and their arrangement to pieces. The result is that they stand now as co-heirs, each having received and expended the common property in parts, and each having paid and incurred monies and liabilities for the common property, in addition to their joint receipts and their joint expenses and liabilities. It is plain on general principles, which the Court has had occasion to advert to and act on more than once at this session, that in such a case one of these co-heirs cannot have an account against the other and sue for his share or for a division without expressly submitting to account for all he may be chargeable with and to submit the property which he is in possession of to the order of the Court. But the Plaintiff has made no such offer. He has indeed in his Replique made a specific offer to allow to the Defendants in "their accounts" the value of the Friendship stock as taken in the month of January 1864. But such an offer is nothing to the purpose. The Court cannot know at the hearing of such a suit how the account will turn out, and it cannot decree it on one side unless it can make it final and effectual on the other. In this case according to the evidence there are many other things for which the Plaintiff may be chargeable in whole or in part, as for instance the money borrowed from Texeira and the various purchases on the joint credit of the co-heirs for the various shops, while the Defendant Lencardia swears that the Plaintiff received all the profits of the shop at Bank Hall until the stock was removed to Friendship, and also all the profits of the Friendship shop from the death of his Testator. It is therefore impossible in this suit to decree any account as between the co-heirs.

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Following the same principle it is clearly impossible to give in this suit any sentence for a division, or to place the Plaintiff in possession of what he calls his "divided share." It cannot be known until the account is taken on both sides whether he is entitled to more or less, to this or to that, or whether he may not in truth be liable to pay to his co-heirs money or to give up to them property in his possession.

It is perhaps desirable that we should before concluding; notice that the principle which prevents the Court directing an account between the co-heirs has no application in favour of the Defendants as Executors.

For an Executor is not in our judgment then called on to account by a legatee heir or *cestuique* trust who may have received money on account of or been in possession of part of the trust property *in respect* of his share or beneficial interest he is not entitled to treat such claimant as a person in the relation of a mutual accounting party. We by no means forget that Executors or Trustees and their *cestuique* Trustees may under special and frequent circumstances stand in such a position, but it is not the natural incident of their position, as it is the natural incident of the position of co-heirs and other tenants in community when the possession of the common property has not been accurately divided or accounted for. In these cases no one of the joint owners can have a halfpenny from the common property or incur or expend necessarily or as may be said *rightfully*, a halfpenny on behalf of the common property without its giving rise to a right and a liability which is essentially mutual to the extent even of creating a lien on the share of each for the balance due from him to his co-tenant at the foot of such mutual account.

But it is for the very purpose of excluding this inconvenience that Executors under the Roman Dutch as well as under other systems of law have been appointed. Their office it is to stand between the ultimate beneficial owners or heirs whose rights may be unascertained, postponed, or subjected to various qualifications, and to administer the property according to the nature of the case until it can with due regard to all intervening obligations reposed

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in them be delivered to the ultimate beneficial owners “*usque dum devide posit*” as *Vander Kessel* puts it. Whether they have or have not a power of themselves dividing is another matter. Their powers are sometimes larger, sometimes smaller according to the nature of the care; but in no ordinary case, if an Executor's Office is performed carefully, in the course of his strict duty and without entering upon or being party to any special dealing with the estate on the footing of arrangement, in no such case is it his duty to pay to or on account of a legatee or heir a farthing or to permit him to receive a farthing except what belongs *in specie* to that heir or legatee.

The ordinary mode of accounting therefore is fully adequate to all ordinary cases as between parties in this relation, and if Executors have so acted that they have occasion to set up a case of mutual accounts or for just allowance to themselves beyond what the ordinary form of account would give, they must set it up expressly and with some sufficient circumstances to give rise to it. Of course this principle allows an Executor to credit himself in his own accounts with everything which he is entitled to credit for as against his own receipts or debits; if he wants to go further and can make out a case against his; *cestuique* trust for a balance in his own favour he can do it in a suit for the purpose, or even as a Defendant he may sometimes do it by shewing a specific case. But] according to our understanding of the law, an heir, legatee or *cestuique* trust is not bound in ordinary of common right, as we may say, in suing an Executor for account to treat himself as subject to mutual account and to submit to account and pay on that footing.

Now the Defendants so far from making out any case for mutual account towards them in their character of Executors absolutely repudiate all accounts in that character and the contention that the Plaintiff should submit to account is expressly raised with reference to the common possession of the Plaintiff and Defendant Ferrara as co-heirs and under the alleged adiation. Seeing however that the Defendants relied on this objection against the whole account sought, and alleged that they were under

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no liability at all as Executors, we should have been prepared in deciding against them so far as relates to the account in that character to give them the benefit of the right to a cross account if it had appeared that there was any ground for it. But we see no ground for concluding that as between the Plaintiff and the Defendants in the character of Executors, there is any objection to the account on this particular head. There will therefore be the usual sentence for an inventory and an account against the Defendants in respect of their intromissions as Executors.

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Mandamus.

Mandamus does not lie where Plaintiff has other remedies open to him.

Mr. Haynes Smith for Plaintiff applies for Rule calling on the Mayor and Town Council of the City of Georgetown to appear and show cause why a suit of mandamus should not issue whereby they shall be ordered and required to compensate and pay Plaintiff \$75,245 08, amount, of loss sustained by reason of certain buildings specified in affidavits laid over having been blown up and destroyed on 3rd April 1864, by authority and direction of Robert Stuart, being a person in whom under the provisions of the 3rd Section of Ordinance 3 of 1864 the control of the measures to be taken on the occasion of a certain fire which occurred in Georgetown on 3rd April 1864 was vested, and of Plaintiffs and their servants and agents having been prevented from removing goods then in certain buildings adjacent to the one blown up, and whereby otherwise and at all events they shall be ordered and required to receive and investigate claim for compensation.

The Court directs the Mayor and Town Council to furnish Plaintiff with copies of affidavits to be relied on against the Rule.

The Court, hears parties, and issues writ of mandamus directed to the Mayor and Town Council of Georgetown, reciting:—

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1. That fire broke out in Georgetown on 3rd April 1864, about $\frac{1}{8}$ of a mile from Plaintiff's business premises where Plaintiffs kept their merchandize to the value of \$83,248.08.

2. That fire gradually spread.

3. That Plaintiffs removed goods to the value of \$8,000.

4. That they were prevented by Stuart, acting Superintendent of Fire Brigade, from removing more.

5. That to stay spread of fire the adjacent premises were blown up by gunpowder.

6. That the buildings used by the Plaintiffs were destroyed in consequence.

7. That Plaintiffs lost goods to the extent of \$75,245.08.

8. That claim was made under Ordinance 5 of 1864 for payment of loss against Mayor and Town Council.

9. That the Mayor and Town Council refused to compensate them.

10. And refused to investigate the claim.

10 December.
1864.

The *Attorney General* and *Solicitor General* on behalf of the Mover, urges and moves that the mandamus should be made peremptory and that certain parts of the answer of the Defendants to such mandamus should be quashed, and that the prosecution be at liberty to traverse, other parts of such answer or return.

Mr. Trounseil Gilbert for the Mayor and Town Council, objects to the motion being proceeded with by reason of the Court having no jurisdiction to entertain this matter.

The Court decides to hear the *Attorney General* on the motion, without prejudice to any objections to the jurisdiction.

Attorney General is heard.

2 May,
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BEAUMONT, C.J.:—This is a case of very considerable importance whether considered with regard to the substance of the claim involved in it or to the legal questions which have been introduced in argument, albeit that the most important and difficult of those legal questions do not in my judgment call for our decision.

It is the case of a mandamus sought by Mr. Conrad as prosecutor against the Mayor and Town Council of Georgetown.

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The prosecutor says that on the occasion, and in order to arrest the progress of the fire which took place in the district known as Robbs Town in April 1864, certain measures were taken by or under the authority of the superintendent of fire engines which occasioned the loss of a very valuable stock belonging to him : that in consequence the Mayor and Town Council of Georgetown became liable under the provisions of the Ordinance No. 5 of 1864 for the protection of Georgetown from fire to compensate the prosecutor for such loss, which he lays at an amount exceeding \$75,000; that he has duly made such claim upon the Town Council but that they have wholly refused to receive and investigate it as required by Section 5 of that Ordinance; that consequently he is prevented' from taking any of the ulterior steps pointed out by that Ordinance and is thus prevented by the wrongful acts of the Mayor and Town Council from proceeding to obtain the compensation which they are bound to pay him ; and he says in argument (though as I shall presently notice more particularly he has not inserted in the writ which he has obtained and which is now before us, any such statement) that in this state of the case his only remedy is by a writ of mandamus addressed to the Town Council and commanding them to proceed as required by the Ordinance in question to put the prosecutor in a position to recover the compensation which he claims. Now, on this occasion I shall not enter in the least into the merits of his claim to compensation. There are various difficulties of evidence and of law which would present themselves on considering that claim : questions which certainly ought not to be anticipated in our decision; but as we dispose of the case at present on other grounds altogether, it is more convenient and proper to put out of sight any such questions, and indeed in order to do justice to the points which the Court is forced to decide against him it is necessary to assume the merits of the claim in the prosecutor's favour I shall therefore throughout treat the case as one in which the prosecutor has a clear right to recover from the Corporation, and they are under a direct statutory obligation to pay to him the full compensation which he claims, and in

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which they wholly refuse to recognise such claim or obligation or to take the steps prescribed by Law for the settlement of such a claim.

The question which presses for our decision and the only one which we can now decide is whether or not the prosecutor is entitled to the mandamus which he seeks in order to enforce under such circumstances as these the performance of the statutory duty imposed upon the Town Council in his favour and absolutely repudiated by them. The conclusion that I have come to in concurrence with my learned brothers though on grounds somewhat different it may be, is that this is not a case in which the prosecutor is entitled to the particular remedy which he seeks.

The decision of this point has however given rise to much difficulty and doubt in my mind: and had it been necessary to give a judicial opinion on the question which has been so much argued in the case, viz., whether there is any jurisdiction in this Court to issue such a writ at all, I should perhaps have still hesitated to decide on a question itself so grave and difficult and closely connected with others of the first importance. I am of opinion however that this case does not call for the determination of that question inasmuch as it is sufficient to come to the conclusion which I have arrived at that the prosecutor has failed to make out that he has no other appropriate remedy provided by law. And as the adoption of this proceeding must be effected by resorting to fundamental principles of law and of the jurisdiction of this Court, in order to make available a remedy which has at all events and undeniably never hitherto been exercised in this colony and which must therefore be evoked by the aid of those first principles from the breast of the law, it is clear that we should not be justified in extending it except on the footing of a necessity of that kind which the law upon the subject might recognise and point out as affording a ground for thus introducing this special remedy.

Inasmuch as upon the view of the case developed in the arguments of the prosecutor he would be entitled to this remedy *ex debito justitiae* it is only due to him that I should point out specifically the reasons from which I

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conclude that he has failed in that branch of his Counsel's arguments which was addressed to this proposition, viz:—that this remedy must be extended in order to prevent a defect of justice, I ought here to recur in the first place to the fact which I have noticed already that the writ contains no allegation that the prosecutor cannot have recourse to any ordinary legal remedy. In this respect the writ is clearly insufficient, but as the defect is of such a nature as might perhaps be remedied (especially in the absence of a motion to quash the writ) it is proper to address myself to the substantive question.

There is however yet another point which in some sense may be considered preliminary and which was rested upon very much by the Prosecutor's Counsel to sustain the writ and the right to have it made peremptory, viz: that the question of the jurisdiction to issue the writ and of the propriety of its exercise were both concluded on this motion at least by the return having been made. This argument I think is quite unsound. I believe it would have been unsound as applied to this case according to the strictest and narrowest rules which were at anytime applied to proceedings of this nature, but it is clear that it is quite inconsistent with the principles and practice which have been applied to such cases in later times as to the question of jurisdiction. I apprehend that it is a mistake to say that all questions of jurisdiction must be raised by some preliminary step or plea, though it is true that with regards to ordinary actions in Courts of general jurisdiction, where a Defendant must *exempt* himself from that ordinary and general jurisdiction by some special privilege or matter he must as a general rule raise the point at a preliminary stage or he may be deemed to have waived the objection. But where an action is not in a common but in a special form, when the applicability or inapplicability of the remedy to the case in the question on which the jurisdiction to apply it depends, this rule does not and surely cannot apply, though at the same time no doubt there are various questions as to the jurisdiction, and the practice of mandamuses of that settled kind that the Defendant must take advantage of any defence which depends on or is addressed to them in the

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first instance as in an ordinary action. Such a question of jurisdiction as here arises, whether as to the jurisdiction absolute or abstract, or its discretionary application cannot in my opinion from the nature of the case at any stage be foreclosed. Cases may be found in which it has been raised and determined after issue joined upon the return. The Court could never refuse to be informed at any stage at which it may be called on to act that it is or will be acting in excess of its jurisdiction—to say that it ought—is to say that it ought to stultify itself. I remember some years ago in a case of *Jenkins v. Green*, which I alluded to in the course of the argument, a case of considerable importance and which was very elaborately argued again and again having tried (and not by my own arguments) alone, but in aid of those of no less consummate a lawyer and advocate than Sir Roundell Palmer, to establish this very contention before Sir John Romilly, the Lord Justices, and again before Lord Campbell and the Lord Justices together. And that was a case where certainly it was much more plausible than in this case, for it was a case of an ordinary suit to compel performance of a contract to take an Ecclesiastical lease, in which the relief itself was of common form, and in which innumerable objections had been taken and met upon elaborate pleadings which had been again amended, and finally by costly and voluminous evidence. The relief prayer was given at the hearing of the case, but the settlement of the form of lease remained to be accomplished under the direction of the Court. Upon proceeding to settle it various points arose, and after it was settled at Chambers the Defendant brought the matter into Court to have the draft lease rectified on a great number of objections, small and great, I think 28 or 30 in number. When he came into Court he failed on these objections, but he started one altogether new, not against the draft but against the decree in the cause. He said the “decree provides that I shall accept and execute a Lease in conformity with the preliminary Contract, but “the Court cannot compel me to do so for the Contract is to “pay the rent half yearly while the statute of the 5th of the “Queen, as to Ecclesiastical forming leases requires the rent to “be

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“reserved *quarterly*, and although it is true that I raised every possible objection of Law and fact, except this one during a litigation of years, and although every one of them has been decided against me and I have been decreed to execute a lease according to my agreement, and although this Lease is according to it, yet I say now being before the Court merely on this motion which is not addressed to the question, that the decree was wrong and that the Court will not stultify itself by directing the execution of a Lease which it has not jurisdiction to enforce.” Upon this objection so raised the Master of the Rolls actually stayed all proceedings under the decree and although the Plaintiff ultimately succeeded on the merits of the question of law and jurisdiction thus raised, it *was* upon the *merits* that he succeeded, and we who were Counsel for the Plaintiff found it impossible to persuade any of the learned Judges that the Court was bound to adhere to the decree which had been pronounced without permitting the Defendant to question its jurisdiction. They all held without hesitation that the Court could not be bound to pursue it by any further action if it had been made without jurisdiction although the Defendant had not raised the question till after decree.

This case I mention as one that I have always thought went a very long way, but there are numerous cases more exactly opposite to the practice in mandamus. It is sufficient that I should refer to one, which I select as one decided before the greater freedom which the gradual and wide extension of this remedy has introduced into the practice. I take the case of *Regina v. Whaley* (Strange 1137) in which this is established, that when the question of jurisdiction depends on the existence of a right vested in a visitor to exercise in the matter his visitational function, the Court will not dispose of that question on a motion to quash the writ, but will leave it to be raised on the return. It was exactly on the principle of that case that the Court acted in awarding this writ. We fully foresaw the importance of the question of jurisdiction, but while we did so we felt that the existence or application of the jurisdiction might greatly

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depend on the facts of the case, and that on that account it was desirable that it should be finally disposed of upon the return. I have no hesitation therefore in affirming upon reconsideration what I held on granting the writ, that every question would remain open upon the return.

It is true that no very new or decisive right is shown by the facts as they are now before us, but we have had the advantage of a second and an elaborate argument upon the law and the facts as they are stated, and have had the opportunity of a more deliberate consideration of that argument than it would have been desirable to give to the case on the rule.

I regret that the argument was not more expressly addressed to the question on which I think the case must be decided. In truth the difficulty which I have felt in coming to a conclusion was greatly enhanced by the tenor of *Mr. Gilbert's* argument for the Town Council. For he certainly appeared to me to decline to assent that the prosecutor would have a remedy by action; he seemed to say that he might or might not have one; he could not shew it or maintain it, and always returned to this view of the case, that if the prosecutor was entitled to *any* remedy it must be by action, because it could not be by mandamus. Indeed on the first argument it was taken for granted by Counsel on both sides to a great extent, and the Court adopted this view, that the prosecutor had *no* ordinary remedy; the Defendants throughout insisted that he had no wrong to be remedied, but that is of course just the question that we could not decide on either argument, and which on the other hand, and without deciding it, I feel bound on this occasion to assume in the prosecutor's favour in order duly to determine the question which is now before us. On the second argument the prosecutor however maintained in terms that he had no ordinary remedy, while the Defendant's Counsel as I have said appeared unprepared or indisposed to maintain the contrary.

I have however come to the contrary conclusion, viz. that the prosecutor has an appropriate ordinary remedy. This conclusion disposes of the claim for the extraordinary one which he seeks, and explains many of the

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difficulties in the way of his arguments in support of that claim.

In the first place I think it was rather taken for granted than shewn that there is anything to prevent an ordinary action for the full amount claimed by Mr. Conrad. The liability which he alleges the Town Council are under to pay it arises under express words in the following form (Ordinance 5 of 1864, Section 5): "The Mayor and Town Council in their corporate capacity shall be bound and liable to compensate and pay to the several parties damnified the amount of loss sustained by them," and so on. Such words are I take it quite sufficient to entitle "a party damnified" to bring an action for the amount of his loss. It was argued that because the Ordinance proceeded to point out a special mode of ascertaining and enforcing such a claim it must be taken to bar an 'ordinary action, and to restrict a claimant to the course of proceeding pointed out by the Ordinance. But on looking more closely at the Ordinance it will be found not to provide for such a case as this. It does not appear to contemplate any special machinery to assent or establish a claimant's *right*, or even that such right will be disputed. But it directs the Mayor and Town Council to receive and investigate the claim, and it then provides for two cases, 1st that of the parties being agreed as to the *amount*; 2nd for the case of a difference as to the *amount*; and in this latter case it provides a summary proceeding to ascertain the *amount*. But this appears to leave the case of a dispute as to the right or obligation to make any payment or compensation unprovided for, and the apparent consequence would be that like any other such dispute it must fall under the general cognizance of this Court.

I do not lose sight however of this consideration that the Plaintiff may have a considerable interest in the application of the latter part of the 11th section which provides for levying a special rate to provide for compensation "admitted or awarded under this Ordinance." Perhaps however it would be the Corporation, or in the long run the ratepayers, who might practically suffer most from the Plaintiff having to proceed by an ordinary

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action if that would exclude the application of this provision. And at all events I think it will fall on him so to shape his proceedings as best to secure the realisation of his claim. But even supposing it were doubtful whether or not the compensation could be successfully claimed and realised otherwise than in accordance with the provisions of the Ordinance, so that a specific performance by the Town Council of the proceedings pointed out by it were requisite, I apprehend that such a specific performance may be obtained by Mr. Conrad resorting to what I will call his ordinary remedy. In using that term in this place I intend to include such *mandament* as according to the Dutch system he might have claimed. It is true that according to the law as practically adopted and understood at present in this Colony, the special or penal mandaments adopted are few in number, and latterly rarely resorted to. But I apprehend that the special mandaments was really a special mandamus of a more extensive kind, by which the Roman Dutch lawyers provided for such cases as their ordinary actions or mandament did not provide for. This view is to my mind clearly shewn by the Roman Dutch authors. *Voet* states (L 43. t 1. s 9) that mandaments penal are rarely resorted to except in certain cases, amongst which he includes the case of the advocates not finding any action adapted to the case “*vel peculiarun actionem negotio proditam non esse compererint.*”

He goes on, it is true, to state that penal mandaments prohibitory were not so rare as those to compel specific acts, which he points out are usually granted in certain cases which he names and for a limited time. This is quite in accordance with good sense and ordinary practice, but to carry this restrictive usage thus adopted as a reasonable and wholesome practice of the Court (for it is to the instructions of the Court that *Voet* in this place refers) so as to reject and overturn the most valuable use and class of such mandaments, viz., where there is no particular action provided for the case, would be as it seems to me to go a great deal further than I can find any authority for going in the way of narrowing the procedure provided by the Dutch Law. Indeed it may be worth

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observing that it would seem that, as I used it just now the word “mandament” is equivalent to the English word “writ,” and that mandaments are so classed that ordinary mandaments, are the equivalents for ordinary writs, while special mandaments, including those known as mandaments penal, are equivalent or closely allied to special writs. I think this is the natural conclusion to be drawn from various writers on the Roman Dutch Law and in particular *Van Leeuwen* in the *Censura Forensis* (Part 2 B. 1 C. 22.) In that chapter he first speaks of mandaments in general terms as “*omnia mandata curicæ*,” which he explains as “*sive citationum ecticta*,” and says that they are issued by the secretary of either Court of Holland. He then proceeds to distinguish special mandaments from those which I conceive may be called “ordinary mandaments.” He says “*Primæ instantiæ mandata, nobis mandament “in rauw acti equasi novie actiones coram nullo alio iudice “institutæ quotes sunt omnes illæ actiones quæ omisse ordinario iudice inprima instantia coram superiori iudice institui “possunt.*” Now I apprehend that the proceedings in this Court as at present constituted would take their character and effect from those of the Courts of Holland rather than from the ordinary Judges of the Netherlands. *Van Leeuwen* proceeds to point out that these “mandaments of first instance” are so numerous and various that they cannot be classified—saying of them “*quæ ut plurimum ad hoc tendunt ut alicur guid solictur “aut fiat quod tibi ab alio deberi contendit.*” That this application of his intends to *protitu* and corporate such as the Mayor and Corporation of Georgetown is clear from *Van Leeuwen* going on to point out that in the case of “*nobiles, Officiales, Pratores, Civitates, caterague, universitatum collgia*” it is usual in the first instance not to send open letters of “mandament” but letters missive, and the issuing of the mandament depends on whether those corporations &c. pay due regard to the *luten missives*. *Van Leeuwen* then goes on to notice various special mandaments. Now bearing in mind what is here and elsewhere to be found on the nature of actions in the Dutch Law, the fact that the system as adopted in this

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Colony familiarly recognises suits for specific performance, as they are called at home, or to perform an act as they are called here, it would seem that there can be no occasion for a special jurisdiction such as that now appealed to were its existence never so clear. For the same reason the writ of mandamus is disused in the English Court of Chancery which has the power of issuing it. But that Court having in its formula the suit for specific performance which fits all cases properly within its jurisdiction it was on the common law side of Westminster Hall alone, where the form of action did not provide for specific performance at all until very lately, that there was occasion to perpetuate and apply this special writ.

Although therefore the prosecutor contended that being precluded by the effect of the Ordinance from an ordinary action to enforce payment of his demand against the Defendants, there was no action open to him, I think there is every reason to suppose that either by an ordinary action seeking the payment of the compensation claimed, or seeking specifically the performance of the acts which this mandamus is asked to compel, or by proceeding according to the Roman Dutch system for a special mandament penal, and all which as contrasted with this writ of mandamus are ordinary remedies, Mr. Conrad may assert and enforce his rights.

In saying this, I by no means lose sight of this—that the process of execution prescribed by the Manner of Proceeding is not by any means adequate to provide for the specific performance of a sentence which requires to be performed specifically, and that as against a corporation it is perhaps especially inept and defective, so that whether supposing a sentence obtained either upon an action to perform the act or by the process of penal mandament, “*precise ad factum cogatur*” as *Voet* puts it, the prosecutor would be able according to the authorising mode prescribed by the Ordinance to obtain an assessment of the sentence, or if that were achieved to levy the amount against the corporation may be a difficult or doubtful question. It may be that when the prosecutor should get to this point he would find himself worse off than at this moment.

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There is however another clause in the Manner of Proceeding which is taken from the Common Law Procedure Act, and which would enable the prosecutor to place himself at this stage of the proceedings in a position at all events as favourable as this mandamus could place him. It was found in England that this proceeding was as well adapted to numerous cases that it was by the Common Law Procedure Act embodied in the system of ordinary litigation.

This very useful provision has been adapted by our "Manner of Proceeding" in sections from 122 to 128. I say that this statutory mandamus would place the prosecutor in a position as favourable as the Prerogative Writ which is sought; but I might perhaps go further, and say that although there may be difficulties in the way of applying some of the provisions to which I have referred in this case, such difficulties are not greater than nor so great as would arise in attempting to introduce and adopt the practice of the writ of mandamus to the forms known to and practicable in this tribunal.

In considering this part Of the case I have felt that there may be an incongruity in calling these sections in aid of an independent action or mandament expressly to perform the obligation of the Mayor and Town Council; but if there be such incongruity as would impede the combination of these remedies, the prosecutor might beyond doubt, as I take it, sustain an action of yet a different kind, either merely to declare his right or to obtain damages for its infringement with which he might couple an action for this mandamus; and possibly this might turn out the most convenient and secure of all the courses open to him. The case of *Morris v. the Irish Land Company* furnishes an excellent precedent for such an action. There the land company was bound to register the Plaintiff's name in their register of shareholders but as they refused to perform this duty in favour of the Plaintiff he brought against them an action for damages in respect of their refusal and for a statutory mandamus to enforce the registration. The case is reported (8 Ellis. B. page 512) upon demurrer to the declaration, which the Court of Queen's Bench sustained. In this

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mode then if in no other it appears to me that Mr. Conrad can obtain by what may be called an ordinary action a remedy at least as efficient as that which he has sought by this Mandamus. On this ground therefore I consider that this writ ought not to be made peremptory and that the motion of the prosecutor to that effect or for leave to traverse the return must be refused.

I cannot properly dispose of the case however without noticing the argument which took place as to the jurisdiction to issue the writ, having regard to the fact that it has been issued, and to the gravity of the question discussed and the importance of there being no misunderstanding on the subject. As I have said I intend to give no opinion on the question whether or not what is called Prerogative Writ of Mandamus can be issued in a proper case by this Court or not further than to say this, that the *prima facie* view which was acted upon by the Court in issuing this writ, is as I conceive the better opinion or view of this question. Certainly the difficulties in the way of that decision did not escape us in the first instance. I have always felt them and feel them now very sensibly; but in the true view of the argument it is at best a choice of difficulties and it will certainly be long before I can feel justified in saying to the suitor who comes before us as Mr. Conrad did, saying: "The Corporation of Georgetown is bound to pay me \$75,000 under the express provisions of a statute, passed for the public benefit and reposing in them powers for securing a great public advantage and imposing corresponding duties: they totally repudiate their liability: they refuse even to receive and investigate my claim, though required to do so by statute: they keep me wholly at arm's length, and the statute has placed me in a position in which I cannot bring an ordinary action. I am remediless, the Corporation, relying on this, defy me and I claim a mandamus to do me right." I say I shall hesitate a long time, before sitting in this Court, I shall feel justified in answering, "you are remediless, and the Corporation may do as they please; the law cannot help you at all."

Whether I shall be bound to say so whenever such a

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case does really occur is a question I shall not seek to anticipate by expressing any decided opinion, but I consider that an applicant in that place will have at least a very strong claim on the anxious consideration of the Court.

As to the argument addressed by Counsel for the Defendants against this jurisdiction I think many of them but of little weight to support their conclusion on the main question, though very suggestive of the difficulties to be encountered in solving it.

Thus the embarrassment arising from the want of machinery and the requisite formalities is no doubt a serious practical difficulty in the way of adopting a procedure wholly novel and possibly in some details impracticable, but it is a difficulty that the Court must encounter and in my opinion could overcome if, in point of principle it did really become the duty of the Court to exercise this jurisdiction. The main argument based on the source and original character of the law of this colony was according to my understanding of its proper limits greatly overstrained and misapplied. The principal on which it is founded is of course perfectly elementary and well understood, but the limit of its ordinary application is to cases in which the Dutch System as here adopted affords a Law and a remedy adequate to provide for the essential rights of the suitor. To say that, because the ordinary law of this Colony is that which was introduced by its Dutch Governors, there is no place for the subsidiary and supplemental application of the English law is to carry that principle greatly beyond what can be maintained for the illustration of the true principle on this subject it is not necessary to go further than to notice the every day's practice. I know that Counsel may not infrequently be found to urge this argument on question of Law in ordinary cases where the English law is against them but it will be found that the Counsel will in the next case or perhaps in the some case on another point when the English Law may be in their favour appeal to it with perfect confidence.

It is not only the daily practice in the Courts of this Colony but I have no hesitation in affirming

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that it is a practice fully justified and perfectly in accordance with the law, to quote, rely and act on the general English law so far as not inconsistent with the Dutch Law and when the latter is silent, obsolete, incongruous or incomplete—the true principle on which this habitual and most beneficial practice is based being as I take it thus, that though in a conquered Colony the law of the Colony prevails until altered, the law of the conqueror may be taken *in subsiduum*. Certainly this would be a most unfortunate country if it were not so condemned to abide by a Law which was originally a hybrid, or rather a set of imperfect and fragmentary laws taking an ancient and elaborate system *in subsiduum* but still so defective that when superseded by another code imposed by despotic power upon its subjects, those subjects never returned to their ancient laws, though in a few years perfectly free to do so, so that the system is now *dead*, only maintained in a few remote Colonies, deprived of all the force and life, energy and flexibility which an extensive nationality, a succession of commentators, and a large and national profession and judiciary might give it,—and maintained in an artificial existence by the accidental position of a few dependencies of the Mother Country. Certainly, if we had no other fountain of law to draw from, the Colonial stream would long ago have been turbid and stagnant. But instead of this we find that every day and in every sort of case and question English law is appealed to by every suitor who can find in it anything to fit his case, and when the Court is asked in an unprecedented case such as this to adopt an English remedy adapted to it, it is in my judgment asked to do what is only an extension of what it is every day engaged in doing to the great advantage of the law and the suitors. That the extension is an important one which requires great deliberation and involves much difficulty I fully admit, but that the demand is to be met by a short reference to the familiar fact that this Colony was a Dutch one and has adopted the Dutch Law in a great measure, though subject to divers modifications, as its fundamental law is what I can by no means admit.

And I may here notice (though I only notice it in

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passing) that it is only subject to various modifications that the Dutch Law is or ever was here accepted. It is not necessary to do more than to glance into any treatise on the Roman Dutch Law to discover under almost every head propositions which have always been rejected by the Law of the Colony as inapplicable.

This argument was pressed in a form which would have carried it even further but that it forcibly illustrated how much *too far* it goes when it was rested on the footing of the Articles of Capitulation by which the Colony was ceded to the British, and which stipulated for the maintenance of the then existing laws and usages. This it was said must alone prevent the introduction of grafts from the English law based on English principles. This argument I believe was wholly unfounded. The Articles of Capitulation have not, as I understand them, any place in a legal argument such as that between the parties in this case. They must be deemed as far as this question is concerned *res inter alios actæ*; and though the actors have entered into an engagement which may have some indirect bearing on the state of the law the Crown having sovereign and legislative powers and being itself bound to perform in their true sense the obligations of such articles) I cannot think that makes them in any sense part of the municipal law of the Colony. I do not think therefore of discussing what the true effect of those articles may be. But unfounded as is this argument in principle its fallacy may be also shewn by its results. For if it be of the force which *Mr. Gilbert* would attach to it its results must go far beyond what he adduced it to prove. The legal existence and authority not only of this Court but of the Legislature also as at present constituted would by it be shaken to their foundation, and a large part of what are considered and acted on as the laws and legal usages of the Colony would become figments and practices not entitled to any weight or credit.

Nor is there in my judgment anything of mystery or incongruity in the Supreme Court of Justice being entrusted with the authority and discretion to adopt the English law in the sense and within the principle pointed

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out. On the other hand it seems to be a necessary part of the Judicial function attributable to such a Court, and essential for the discharge of its duties. Certainly it has nothing in common with legislative power. It is strictly a judicial authority and discretion, resting on known legal principles by which its exercise is directed restricted and controlled.

No one can even glance over the decisions of the Privy Council in colonial cases, without seeing not completely the wielding of the Colonial and Imperial Laws is a judicial function and one of constant and familiar exercise, though indeed if the argument deduced from the Articles of Capitulation were consistently applied it might be thought that to refer to the practice of the Privy Council is "to beg the question," as the Privy Council would kindly be deemed a legal Court of appeal from this colony if the Dutch Law were inexorably retained by the effect of those Articles.

I shall however refer to a decision of that Court, which is undoubtedly the highest Court of Appeal, in connection with another argument against the adoption of such jurisdiction as has been appealed to based on the ground that it had never been exercised. I refer to the Judgment in the case of *Stuart et al v. Spooner** which I think effectively disposes of such force as this argument might be supposed to have, which I own would to my mind in such a case as that contemplated, not be very great. And when this argument is extended, and it is said that it has not only never been adopted in this Colony but trust it is equally unknown in every other Colony, I don't think it necessary to consider the weight of the argument more particularly, but I should desire first to know how this proposition is sustained. It seems to me a bold and hazardous one at the least, and while I think the resources of the Colony might furnish means of disproving it, I greatly doubt whether it could be possible to establish it. In this state of the argument I do not think it requires further consideration, but I will observe in passing that the doubt with which I received the statement was confirmed a short time afterwards on reading

. . *L.R., B.G., Old Series, Vol.2, p. 57.

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the arguments before the Privy Council in the late case of the *Bishop of Natal v. The Bishop of Cape Town*.

In one stage of that argument it was objected to the Appellant that he should have applied to the Supreme Court at Cape Town for a writ of Prohibition to prevent the respondent from holding the Court at which he deprived the Bishop of Natal. I need not say anything about the value of the argument in that case. It is enough for his purpose for which I advert to it that it was seriously urged and seriously answered, and certainly neither the Counsel nor the Judges, all of whom were well aware of the character of the jurisprudence of Cape Colony, seemed to consider that the fact of its having been a conquered Dutch Colony would prevent the Supreme Court from issuing a writ of Prohibition. I would only add one or two illustrations somewhat apart from the ordinary and daily course of practice as to the mode in which branches of the English law may and must on occasion be grafted by judicial interpretation and action upon the Colonial system. One is the case of proceedings in the nature of *habeas corpus*. It is not necessary that I should enquire into any particular resource which a person deprived of his liberty illegally might have under the Roman or the Dutch Law to obtain it. The matter seems too obscure to enter on unnecessarily. There may have been some remedy, but whether it was of a judicial nature or not may admit of doubt. But it is I believe quite clear, I cannot suppose that it can be denied—certainly it will be denied in vain as far as my judgment is concerned and as I believe without authority for the denial—that the subject right to liberty in this Colony does not depend upon what may or may not be found in the Dutch Law, but that this Court is entitled and is bound to secure and protect that liberty by proceedings in the nature of those upon *habeas corpus*. That act has not nor has the Common Law on the subject then adopted in this Colony by legislation—nor have we the means of judicially adopting the practice of *habeas corpus* as settled in England—yet this Court is beyond doubt bound and does habitually act by analogy to it, and in doing so it acts in my judgment on the

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clearest principle of law, and would forego its most sacred duty if it forewent this jurisdiction. Again, there is now awaiting the consideration of the Supreme Criminal Court a question as to the validity and effect of a conditional pardon granted by His Excellency the Governor, surely it would startle every lawyer to hear it said that that question was to be decided by the Dutch Law yet I know of no legislative act, or any other principle but the general principles of Law duly interpreted by judicial authority and its assistant and reflex professional judgment, which constitutes this question one proper for the application of the English rather than the Dutch Law. It is true that the English Criminal code has been introduced *in the main* by legislation, but it has been so only as the result of a number of special Ordinances none of which govern this question as far as I am aware. I mention this illustration just as it has occurred to me since coming down here this morning. I might make use of others and I dare say more apt ones, but I proceed to advert to the last argument which I shall notice against the jurisdiction of the Court to issue the writ of mandamus in a proper case, viz., that such writ is according to the law of England entrusted only to the Court of Queen's Bench, and that for this Court to adopt it, it must assume to itself the authority of that Court. But I ask why should it not : why, supposing that on other legal grounds this jurisdiction were proper for this Court to adopt and exercise, why should it decline to do so because in England it is exercised by the Queen's Bench? I quite fail to see the force or the consequence of this argument. There is here no Court of Queen's Bench. This Court is the Supreme Court of the Colony and there is not any other Judicial authority to supply its defects. It would certainly be absurd to say that because it is the Supreme Court it must either extend or restrict its Jurisdiction by that of the Queen's Bench. But if the remedy in question is given to the Queen's Bench as the Supreme Court of England and it will be remembered that it is only of late years that the other Common Law Courts have had a general co-ordinate jurisdiction to which this writ could have been supple-

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mented—if it is given to supply a defect of Justice, I certainly cannot understand why it should be an argument against *this* Supreme Court being entrusted with it, that *that* Supreme Court was so entrusted with it. But the argument is not well founded in point of fact. It might indeed have been quite sufficient if this special remedy had been entrusted as this argument would represent it to me to this one Court but it is not so limited. The Court of Chancery can issue it, and though it does so very rarely, it has done so. While so necessary a supplement was it deemed to the English Law, that in the case of districts those inhabitants had the privilege (as it was deemed) of local Courts, even though the Queen's writ would run there, those local Courts received this jurisdiction. Thus the Courts of the Counties Palatine as well as the Welsh Courts were authorised to issue this writ.

I have now said all that I feel called on to say in this case upon the grave question of jurisdiction, which in the result does not arise for our final decision, but which has been so far discussed and in a *prima facie* sense acted on at an earlier stage that it would not have been proper to pass it by.

The only question now remaining is that of costs. I have certainly felt some hesitation about it, because the prosecutor has in the result failed in his motion, and *prima facie* should pay the costs of it. But on the whole I feel satisfied that we ought to leave each party to pay his own costs. In the first place I do not think we can consider the Defendants are clear of the prosecutor's demand upon the merits. Then the position of the prosecutor was certainly a very embarrassing one, owing in part of the failure of the Defendants formally to organise the official staff or the Fire Brigade required by the law. Then the Mayor and Town Council keep him at arm's length. Now I by no means say they should have conceded his claim. On the contrary if they did not think it well founded they were bound to resist it. But they are a public body, deputed to act for the public advantage and in respect of this demand they as much represent the prosecutor as the rate payers—they are not in the posi-

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tion of mere strangers maintaining their own, but I think are concerned in such a case to do justice to Mr. Conrad as much as to the rate payers. I conceive therefore that it would have well become them to forward the decision of Mr. Conrad's claim as far as possible, while they not the less maintained their own contention as to its validity. Suppose they had said: "We can't proceed under the Ordinance because we deny your right *in toto*, but if you will bring an action to settle the right, we will then be quite ready to proceed under the Ordinance to settle the amount." Suppose they had taken any such course, I should have thought them entitled to their full costs of an abortive litigation. But they did nothing of the kind, and I cannot fail to draw the conclusion from the course of the arguments on their behalf and the very guarded way in which their Counsel declined to admit or suggest any mode in which the question of their liability could be solved or brought to an issue, that they were desirous of defeating. Mr. Conrad's legitimate object of bringing it to an issue and having a judicial determination upon it. That is a course which was no doubt within their strict right, but which does not place them *recti in curia* on the question of costs as it here occurs; and taking into account the actual and relative positions of the parties, the obscurity and difficulty of the case the peculiar circumstances out of which it arose, and the peculiar course which it has taken, I am of opinion that in refusing this motion we ought to refuse it without making any order as to costs.

Decision of BEETE, J.:—The conclusion at which I have arrived after the best consideration I have been able to give to this case is that the objection taken on behalf of the Mayor and Town Council to the jurisdiction of this Court and its authority to issue a High Prerogative writ of mandamus is well founded and that the writ now the subject of our judgment ought never to have gone forth. I may state, that from the very commencement of these proceedings I was strongly impressed with the opinion just expressed and that in abstaining from making my views known, I did so out of deference to His Honour the

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Chief Justice who apparently entertained a contrary opinion, and whose acquaintance with proceedings of a similar nature in the Mother Country entitled any opinion of his to the greatest respect and consideration. I was also anxious to make myself a little better acquainted with the nature of the writ of mandamus and the process upon it before coming to any hasty conclusion, for although I had a general knowledge on the subject I confess that I had but very imperfect notions respecting its details and process.

It appears to me now that there is a total want of any authority in support of the doctrine that the power to issue such a writ as the one before us is essentially inherent in every Supreme Court throughout the British Dominions, and nothing short of this could be contended for if such power could be held to be inherent in this Court. I am not aware, nor has it been shewn nor do I think it could be shewn, that any claim of right to issue such a writ has ever been contended for, much less exercised by any Court other than the Courts of Queen's Bench in England and Ireland, the Courts of Counties Palatine in England, and formerly by the Courts of Grand Sessions in Wales as mentioned in the 9th of Anne c. 20.

It is unnecessary to refer to authorities for the purpose of shewing that the power of issuing this writ is not given to all the Superior Courts of England, but is reserved for the Court of Queen's Bench in which the Sovereign is supposed to be always personally present.

In Scotland the judicial system of which country is based on the same foundation as our own, no such writ is known, but I am not aware that on that account there is any failure of justice, or any lack of means to enforce legal rights in that part of the kingdom.

It seems to me a very material question, and one which was forcibly urged by *Mr. Gilbert* for the Defendants, supposing the writ to be issued, how are the proceedings to be carried on? Is the process to be as it was in England prior to the passing of the 9th Anne, c. 20th? Is the obtainer of the writ to bring his action on the case for a false return and prove it to be false? or are the

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proceedings to be according to the provisions of that Statute ? Will it be contended that that Statute passed in the year 1711, just ninety-two years before the capitulation of this colony to the British, is law here now? Are the provisions of the 6 and 7 Vict. c. 67 to be held as law here? and if so how are they to be carried out ? How is either party who may think himself aggrieved by the judgment of the Court to sue out and prosecute a Writ of Error for the purpose of reversing such judgment.

I know it may be said, and I believe it is said, that supposing the Court to have the power to issue such a mandamus all the law relative to that writ in England is *ipso jure* the law here with all deference I cannot assent to such a doctrine. It has ever been held in this Court, and until that holding is overruled by superior authority, I should hold that no act of the British parliament is in force here unless the terms of such Act expressly state it shall extend to the Colonies, or unless the provisions of such act have been made law here by special enactment of the Local Legislature, as for instance the Law of Evidence and the Law of Bills of Exchange and promissory notes.

Assuming this position to be correct, the question still remains, how are the proceedings to be carried on? Is the Court acting in a character more legislative than judicial to frame a mode and manner of procedure analogous to that of the Mother Country? or should it be one more in accordance with our manner of proceeding in ordinary actions? To do this would be to assume a power not claimed even by the Court of Queen's Bench, for that High Tribunal required the sanction of Parliament (which was given by the 6th Victoria c. 20) to enable it to make rules, orders, and regulations for the government of the practice of the Crown side of the Court; of course including mandamus and whenever it has seemed desirable to alter or amend the form of procedure on writs of this nature such alteration or amendment has been made not by the Court of Queen's Bench but by Act of Parliament as may be seen by reference to the Appendix to Mr. Tappin's Book, where the several statutes relating to mandamus and the proceedings thereon in England and

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in Ireland respectively are to be found. Surely if special legislation was necessary for the purpose of assimilating the practice on mandamus in Ireland to that in force in England it cannot be said that it is competent to this Court of its own mere motion to hold that the statutory provisions of England regulating proceedings on mandamus are in force here.

It was urged by the *Attorney General* that mention being made of a mandamus in the 231st Section of the Town Council Ordinance, it must be inferred that the Court has the power to issue the peculiar writ, the subject of the present judgment, but it appears to me that the only mandamus intended by the Section is the “*order commanding*” mentioned in the 122nd and following Sections of Ordinance 26 of 1855 for the concluding words of the Section in the Town Council Ordinance expressly enact that “every such writ when granted shall be proceeded “within the manner and form directed by Ordinance 26 of “1855.”

It was also contended that it was too late to object to the jurisdiction of the Court after return made, but though that may have been the doctrine formerly it is now overruled, see *Tapping* p. 338. In this case the objection was taken on the Rule *Nisi*, but it was suggested from the Bench that it might be just as well urged when the matter came before the Court on the return so that even if in strictness too late, the Court I consider is bound to notice it and give it effect in the same manner as if it had been argued on the Rule *Nisi*.

On the whole, seeing that the present is an attempt to introduce into our practice a proceeding hitherto unknown to this Court, and for the carrying on of which there is no machinery at our command, and considering as I do that this Court had no power to assume the authority it is asked to exercise, and which it has to a certain extent exercised, I am decidedly of opinion that the motion made on behalf of the prosecutor must be refused.

I am authorised by Mr. Justice NORTON to state that in his opinion this Court has no power to issue any other than the statutory mandamus and that that is sufficient.

I agree with His Honour the Chief Justice for the

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1865 reason (expressed by him) that this is not a case in which we ought to give costs.

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NORTON J.:—I concur with His Honour Mr. Justice BEETE in holding that no Court in this Colony has jurisdiction to issue the High Prerogative writ of mandamus, but I dissent from him on the question of costs, as I think that the prosecutor who has sought to introduce a practice wholly unknown in this country should bear the consequence of his own temerity, and pay the Defendants' costs on the matter in which the Court reserved decision on the 20th instant.

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COREIRA v. COMACHO.

Accounts—Agency.

An Attorney has no legal right to set off an unascertained amount alleged to be due to him from his Mandator against an amount actually due by him to his constituent for goods sold &c.

Action: Debitatus account.

Plaintiff's case (*Mr. Roney*):—Plaintiff left the colony in 1855 leaving Defendant as his Attorney along with one J. P. Coreira. Plaintiff was absent 3 years. On his return he found Defendant debited in his books for goods sold, \$747. On applications made, Defendant paid part of the account leaving a balance of \$524.06. On being asked for the balance Defendant said “we must first see if I have to get any share of the profits, *that* must be deducted from that amount of \$524.06. If I owe you anything after that, I will pay you, and if there is nothing for me to get from the profits, I will pay you.” Stock was taken shewing a profit of \$80.

Defendant's case (*Mr. Lucie Smith*):—Denial of indebtedness. Plaintiff not entitled to sue inasmuch as the Attorneys are each entitled to an equal third of the profits made from the business of the Plaintiff during his absence; not competent to the Plaintiff to maintain action. His action should be one for accounts.

ARRINDELL, C.J., BEETE & ALEXANDER, J.J.:—It is proved to the satisfaction of the Court that the sum of \$524.06 is due by the Defendant to the Plaintiff and the Court cannot see any ground of defence in the statement of the Defendant.

Had the Defendant concluded that the Plaintiff should be condemned to proceed with him to an adjustment and settlement of account the Court could have seen a reason for such a demand, but the statement set up amounts to this: “I owe you \$524.06 but I am entitled to one third share of the profits of the business. I will not compel you to come to an adjustment and thereby

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“liquidate my demand, but I will prevent you from getting
“payment of \$524.06, although upon your adjustment of
“accounts the third share of the profits to which I aver that I
“am entitled, may not amount to that sum or to any sum what-
“ever; in fact, by your conduct I will set off against your liqui-
“dated claim, an unliquidated claim amounting to I know not
what.”

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If the Defendant be entitled to a settlement of accounts, let
him sue for the same, but the Court considers that he ought in
the meantime to pay to the Plaintiff the sum which he owes
him, say \$524 06.

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Re McALISTER *in re* WHITNEY.—
(REPORTED IN L.R., B.G., OLD SERIES, VOL. 1 P. 89.)

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Reputed possession—Preference.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—In this case the Court considers that according to the evidence produced, there was never any sale by Whitney and Company to John McAlister of the cattle in question. Had he got possession of the cattle, and sold them under his arrangement with the Insolvents, he would have been entitled to retain the proceeds of such sale in liquidation of the amount of the promissory note sued for.

That independently of there never having been any sale, there was never any delivery of the cattle in question to John McAlister, and the pretended delivery at their estate of the cattle which were left mingled with the herd, but above all were left in the possession of Whitney and Co., cannot and does not entitle John McAlister to the cattle or the proceeds of the sale in any way or share whatsoever. Moreover the Court is of opinion that from the evidence of the Administrator General, that as the cattle were delivered up to him and sold by him as the property of the Insolvents, without any reservation by John McAlister of any right, there was a waiver or relinquishment of his claim or alleged claim. The Court has for all the above reasons rejected the claim of the said John McAlister for preference and awarded to him a dividend *pro rata* with the other creditors.

SUPREME COURT

ELY AND OTHERS v. EXORS.
DE COVERDEN AND OTHERS.

The facts are stated in arguments given and in judgment.

Claim made and filed in the Honourable the Supreme Court of Civil Justice of British Guiana, by and on the part of Catherine Elizabeth Adelaide Ely, born Boode, widow, of Paris in the Empire of France; Augustus Deodatus Boode, of Dusseldorf in the kingdom of Prussia; Jules Victor Houel, of the city of Paris aforesaid; and Honoré Desiré Houel, of the city of Paris aforesaid; severally appearing herein by their attorney in this colony, Roelof Hart, Plaintiffs,—v. John Baker Wright, styling himself sole Executor of and under the last Will and Testament of Elizabeth Ruysch De Coverden, late of the city of Paris, widow, deceased, by his attorney in this colony, Henry Sarsfield Bascom, original Defendant, and John Baker Wright, as Executor to and of the last Will and Testament of Richard Joseph Johan Daly, deceased; Maria Marianne Daly; Jean Eugene Henry Daly, severally represented in this colony by Henry Sarsfield Bascom; the said Henry Sarsfield Bascom; the Administrator-General of Demerary and Essequibo, as representing the insolvent estate of Louis William Boode, deceased; the Administrator-General of Demerary and Essequibo, as representing the insolvent estate of Jules Theophilus Boode, deceased; and John Frederick Charles Hermann Von Greisheim, for himself, and as Executor to and of the.

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last Will and Testament of his deceased wife, Eugenia Clementina Von Greisheim, (born Boode,) and as father and natural guardian of his minor child, Johanna Marianne Elizabeth Ottilia Von Greishiem; and Ernst Christian Hermann Gunther Von Greishiem; and Sophia Luitgard Henrietta Eugenia Von Greishiem, severally represented in this colony by their attorney William Frederick Haynes Smith, co-Defendants.

The Plaintiffs aver that Joseph Bourda, in his lifetime and up to the time of his death an inhabitant of the county of Demerary, made his last Will and Testament on the 6th day of June 1792, in the Dutch language, and which will so far as is necessary to be herein recited is as follows:—

“Komende ter finaale dispositie, verklaare ik onder de “volgende conditien, myne kinderen, Catherina, Elizabeth, “Maria, Nancy, Joseph Charles, en Jan Lodewyk, alle ses “geprocréert by de vry mulatiergent Polly te nomineeren en te “institueeren voor myn eenige en universeele erfgenaame over “myn na te latene goederen zo roerende als onroerende, actien “en crediten, zo ende in diervregen als ik dezelve met de dood “zal komen te ontruymen en na te laten; dan speciaal uytge- “zondert myn plantagiegent *Vlissengen* met alle desezelfs ap “en dependentien geleegeen naast aan Stabroek dewelke zy myn “gemelde kinderen en erfgenaamen, alleen *fidei commissair* “zullen bezitten, zonder eenig aftrek van de Trebellianique “portie, en na haar dood, te succedeeren met titell van eygen- “dom, aan hunne kinderen by Huwelyk verwvkt, hoofd voor “hoofd in egaale portien: des niettemin in zo verre eene ofte “meer, myner kinderen voornoemt, voor hun Huwelyke staat “of meerderjaargheid quam ofte quamen to overlyden, dat “God verboede! zal deszelfs portie of portien accresseeren op “d'overgebleeven tot den langsthleevende toe, welke laatste “dezelve zal bezitten met titel van zuiveren eygendom betrek- “kelyk die goederen, zo nagelaten, en ten aanzien van de plan- “tagie *Vlissengen*, met last van *fidei commis*, indien de lang- “stleevende van hen kind of kinderen in huwelyk mogte ver- “wekt hebben.” The Plaintiffs further aver that the true and correct

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translation of the foregoing is the English language as follows:—

“Coming to a final disposition, I declare under the following conditions to nominate and institute my children, Catharine, Elizabeth, Maria, Nancy, Joseph Charles, and Jan Lodewyk, all six procreated by the free mulatto woman, named Polly, as my sole and universal heirs to all my property which I may leave at my demise, movable and immovable, actions and credits, in manner as they shall be at my death, *from which is specially excepted my plantation called Vlissengen, with all its appurtenances and dependencies situated near Stabroek, which they, my said children and heirs, shall only possess as fidei commissarii, without any deduction of the Trebellian portion, and after their death to devolve with title of property to their children begotten in wedlock, head for head, in equal portions.*” “Nevertheless, if so be that one or more of my before named children should happen to die before being married or before coming of age, (which God forbid,) such share or shares shall accrue to the remainder, and so on to the last survivor, which last shall possess the same with title of clear property as far as regards the property so left by me, *and with respect to plantation Vlissengen subject to the fidei commissum in case the last survivor of them shall have begotten a child or children in wedlock.*”

The Plaintiffs further aver that the said Joseph Bourda departed this life on the 23rd day of April 1798, at Paris, without having altered or revoked his said last Will and Testament, whereby the same became confirmed, and that the said testator was at the time of his death possessed and proprietor of the said plantation *Vlissengen* with all its appurtenances and dependencies.

The Plaintiffs further aver that three of the children described in said Will, namely, Nancy, Joseph Charles, and Jan Lodewyk, all died intestate without ever having attained majority or being married.

The said Nancy having died at Amsterdam on the 27th of September 1800, the said Joseph Charles at the same place on the 14th December 1809, the said Jan Lodewyk at plantation *Vlissengen* in the year 1798.

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The Plaintiffs further aver that by reason of the deaths of the aforesaid three children of the testator, his remaining three children described in said Will, namely, Catherine, Elizabeth, and Maria, became the sole *fidei commissarii* heiresses of the said Joseph Bourda, under and by virtue of the terms of his said Will, and that consequently possession of the said Plantation *Vlissengen* with all its appurtenances devolved upon them as *fidei commissarii* heiresses in three equal undivided shares or thirds, each of them taking a life interest in her share and no more, and subject to the aforesaid *fidei commissum*.

The Plaintiffs further aver that the said Catherine, Elizabeth, and Maria were all married subsequently to the death of the said testator, Joseph Bourda, and that the said Catherine was married to Edward Gustavus Boode, now deceased, the said Maria, firstly to Richard Bass Daly, now deceased, who died in the month of February 1818, afterwards to one Long King, otherwise called Charles, otherwise called Charles Beresford Ingledew, also now deceased, and the said Elizabeth to Jan Louis Ernest Lodewyk Ruysch de Coeverden, otherwise Jean Louis Ernest Ruysch de Coeverden, also deceased, she being the same person as is named, in the rubric of this suit.

The Plaintiffs further aver that the said Catherine Boode departed this life at Mentz on the 23rd of August 1837, leaving six children begotten in wedlock during her said marriage her surviving, and no more, namely—the Plaintiff, Catherine Elizabeth Adelaide Ely, now the widow of Elisha Mills Ely, deceased, Louis William Boode, since deceased intestate without issue, and whose estate being insolvent is represented by the Administrator General of Demerary and Essequibo, Jules Theophilus Boode, since deceased without issue, and whose estate being insolvent is also represented by the Administrator General of Demerary and Essequibo, the Plaintiffs Augustus Deodatus Boode, Eugenia Clementina, afterwards married to the co-Defendant, John Frederick Charles Hermann Von Greisheim, and since deceased, leaving lawful issue, as hereinafter mentioned, and Sophie Eulalie, afterwards married to the Plaintiff, Jules Victor Houel, and since deceased, leaving lawful issue.

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The Plaintiffs aver that on the 6th March 1819, the said Plaintiff, Catherine Elizabeth Adelaide Ely, intermarried with Elisha Mills Ely, who has long since died without issue.

The Plaintiffs further aver that on the 7th of November 1837, the said Sophia Eulalie Boode intermarried with the Plaintiff Jules Victor Houel, and that she departed this life in the city of Paris on the 11th of April 1840, intestate, and leaving one child, the sole issue of her said marriage, namely, the said Plaintiff Honoré Desiré Houel, who is of full age, and her husband the said Plaintiff Jules Victor Houel, her surviving.

The Plaintiffs further aver that on or about the 30th day of November 1837, the said Eugenia Clementina Boode intermarried with the co-Defendant, John Frederick Charles Hermann Von Greisheim, and that previously thereto, to wit, on the 28th of November 1837, at Pempelford, in the upper Burgomastery of Dusseldorf, the said John Frederick Charles Hermann Von Greisheim and the said Eugenia Clementina Von Greisheim, then Boode, before Charles Peter Henry Coninx, Notary Public of Dusseldorf, and two witnesses, executed an ante-nuptial contract bearing date the day and year last aforesaid, by the first article whereof it is provided, as follows:

“The property in common is confined to acquired property “only, so that all personal and landed property at present belonging to the future spouses or hereafter devolving to them “by inheritance, gift, legacy, or other similar title, shall be considered as not belonging to such property in common. On the “other hand the personal debts of each of the future spouses “not arising from subsequent acquisitions are to be paid by that “party by whom they originated, so that the property of neither “spouse, nor that belonging to them in common can be in any “way laid claim to for this purpose.”

And the Plaintiffs aver that the said Eugenia Clementina Von Greisheim, born Boode, departed this life at Mayence on the 4th of March 1849, having previously made her last Will and Testament, which last Will and Testament was, on the 27th of November 1838, handed over by her to Major Van Pallmenstein, and Judge Advo-

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cate Stohmann, Delegates of the Royal Prussian Government Court of the Fortress of Mayence, for the purpose of having the same legally deposited, and was by them so deposited, and that the said testatrix amongst other things appointed her husband, the said John Frederick Charles Hermann Von Greisheim, as sole executor to said last Will and Testament.

The Plaintiffs further aver that there were and are only three children the sole issue of the said marriage, namely, the minor Johanna Marianne Elizabeth Ottilia Von Greisheim, named in the rubric, and the co-Defendants Ernst Christian Hermann Gunther Von Greisheim and Sophia Luitgard Henrietta Eugene Von Greisheim, who are both of age.

The Plaintiffs aver that on the 8th of April 1848, the then Administrator General of Demerary and Essequibo, as representing the insolvent estate of the aforesaid Louis William Boode, deceased, who had theretofore departed this life, executed and passed a transport to and in favour of the said Eugenia Clementina Von Greisheim, born Boode, which purports to be as follows, namely,—

“The said Louis William Boode's one-eighteenth share in “and to the Plantation *Vlissingen*, including the ground rents, “leases and rights of renewal thereof, the same as the said “Louis William Boode or his estate or representatives could or “would be entitled to on the 1st day of February, 1845, and as “sold at vendue on the 3rd day of February 1845, by order of “the Supreme Court of Civil Justice.”

The Plaintiffs further aver that on the 18th day of November 1853, the Administrator-General of Demerary and Essequibo, as representing the estate of the aforesaid Jules Theophilus Boode, deceased, who had therefore departed this life, executed and passed a transport to and in favour of the co-Defendant, Henry Sarsfield Bascom, which purports to be as follows, namely:—“One undivided eighteenth share in and to “the abandoned plantation *Vlissingen*, including the ground “rents, leases, and rights of renewal of the several townships “formed in front of said estate or plantation, including all

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“arrears of rent of and on leases or otherwise due on the 8th
 “day of June 1848.”

The Plaintiffs further aver that the said Maria, the afore-
 said child of the said Joseph Bourda, died in the month of
 April 1849, leaving her surviving only three children, namely,
 Richard Joseph John Edward Daly, named in the rubric of this
 cause, who is admitted to have been a legitimate child, but now
 deceased, and Maria Marianne Daly, and Jean Eugene Henry
 Daly who are both illegitimate and consequently not entitled to
 inherit under the Will of the said Joseph Bourda, deceased.

The Plaintiffs aver that the said Richard Joseph John Ed-
 ward Daly, departed this life on or about the 23rd day of April
 1854, leaving a last Will and Testament, whereby amongst
 other things not necessary to be therein set forth, he appointed
 the said John Baker Wright, Executor thereto.

The Plaintiffs further aver that the said Jean Louis Ernst
 Ruysch de Coeverden departed this life on or about the 25th
 day of March 1832, and that the said Elizabeth Ruysch de Co-
 everden departed this life at Paris on the 1st of November
 1860, without issue.

The Plaintiffs further aver that previous to her death, the
 said Elizabeth Ruysch de Coeverden, signed a document which
 is in the words and figures following, to wit:—

“This is the last Will of me, Elizabeth Ruysch de Coever-
 “den, of the city of Paris, widow.

“I give and bequeath all my one third or other my share
 “and interest of and in all and singular the property, estate, and
 “effects, moveable and immoveable, in Demerara, (derived by
 “me under the Will of my late father Joseph Bourda, Esq., de-
 “ceased, or otherwise,) and all monies, rents and arrears of
 “rent, and other advantages, if any, unto my friend John Baker
 “Wright, Esq., of London, his heirs, executors, administrators,
 “and assigns, and it is my desire that he or they should realize
 “the same respectively, at such times and in such manner as by
 “him or them should be deemed best, and out of the monies to
 “be received (after deduction of expenses) all my just debts
 “should be paid, and subject thereto that the balance, if any, of

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“the said monies, should be paid to such persons or person as I
 “may hereafter desire by any legal codicil to this my last Will
 “and Testament and I appoint the said John Baker Wright to
 “be sole Executor of this my Will.—

“As witness my hand, this 18th day of February, 1856.—

ELIZABETH RUYSCHE DE COEVERDEN.

“Signed by the Testatrix in our presence and witnessed by
 “us at the request and in her presence and in the presence
 “of each other.

“H. ROBERTS, M.D., 21, Rue Montaigne, Paris,

“M. J. POPPLEWELL, 12, Rue du Mont Tabor.”

The Plaintiffs further aver that the said John Baker Wright has deposited the said document in the Registrar's office for the Counties of Demerary and Essequibo, as and for the last Will and Testament of the said Elizabeth Ruysch de Coeverden, and that he has taken possession of and is in possession of her estate and claims to represent the same as her executor.

The Plaintiffs further aver that the said Elizabeth Ruysch de Coeverden, *as fidei commissary* heiress of the said Joseph Bourda as aforesaid, possessed in her lifetime and up to the time of her death a life interest as *fidei commissary* heiress in one undivided third of the said Plantation *Vlissingen* with its appurtenances which interest ceased and determined immediately upon her death, but that the said John Baker Wright, in violation of the terms of the said Will of the said Joseph Bourda, and wrongfully alleging that the said undivided third of the said Plantation *Vlissingen* with its appurtenances passed under the aforesaid alleged Will of the said Elizabeth Ruysch de Coeverden and was thereby devised, has illegally taken possession of the said undivided third of the said Plantation *Vlissingen*, and continues in the possession thereof.

The Plaintiffs further aver that the said instrument purporting to be the last Will and Testament of the said Elizabeth Ruysch de Coeverden is null and void, and of no effect whatever, on the grounds and for the reasons following, namely:—

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Firstly—Because the same is void for uncertainty.

Secondly—Because the same contains no institution of an heir, and because no codicil or other testamentary disposition was ever made by the said Elizabeth Ruysch de Coeverden, appointing any heir or residuary legatee.

Thirdly—Because the same is entirely in the handwriting of the said John Baker Wright himself, and because at the time he so wrote the same he, the said John Baker Wright, was the legal adviser and solicitor of the said Elizabeth Ruysch de Coeverden.

Fourthly—In so far as the said Plantation *Vlissengen* with its appurtenances is concerned, because the said Elizabeth Ruysch de Coeverden had in law no disposing power over the said property or any part thereof, the same being strictly limited by the terms of the aforesaid Will of the said Joseph Bourda.

The Plaintiffs further aver that up to the time of the death of the said Elizabeth Ruysch de Coeverden, the last dying of the aforesaid children of the said Joseph Bourda, the said Plantation *Vlissengen* with all its appurtenances continued burdened with a *fidei commissum* under and by virtue of his said Will, and that immediately upon her death the said plantation with its appurtenances vested absolutely in equal shares in such of the grandchildren of the said Joseph Bourda born in wedlock and in their lawful descendants as were in a capacity to take at the time of the death of the said Elizabeth Ruysch de Coeverden, the said descendants dividing between them equally *per capita* the share of their deceased parent, being a grandchild of the said Joseph Bourda.

The Plaintiffs further aver that the aforesaid transports of the 8th of April 1848, and 18th of November 1853, were ineffectual to convey any title in the *corpus* of the said plantation *Vlissengen* with its appurtenances, and that no legal title thereunder is now vested in the said John Frederick Charles Hermann Von Greisheim in his own right and as executor and guardian aforesaid, or in the said Ernst Christian Herman Gunther Von Greisheim, and Sophia Luitgard Henrietta Eugenia Von Greisheim, or in the said Henry Sarsfield Bascom, or in

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to the said plantation *Vlissingen* and its appurtenances or any part thereof.

Wherefore the Plaintiffs demand and conclude that by sentence of this honourable Court the instrument alleged by the original Defendant, John Baker Wright, to be the last Will and Testament of Elizabeth Ruysch de Coeverden, deceased, shall be declared null and void and of no effect whatever, on the grounds and for the reasons set forth in the narrative part of the claim and demand herein, and that it be further declared that the said Elizabeth Ruysch de Coeverden had in law no disposing power over any part of the said plantation *Vlissingen* with its appurtenances, the said property being strictly limited by the terms of the last Will and Testament of the said Joseph Bourda, and that it be further declared that immediately upon the death of the said Elizabeth Ruysch de Coeverden, the said plantation *Vlissingen* with its appurtenances vested absolutely in equal shares in such of the grandchildren of the said Joseph Bourda born in wedlock as then survived and in the lawful descendants of such of the aforesaid grandchildren as were then dead, the said descendants of each such deceased grandchild dividing between them equally such share as their deceased parent, being a grandchild of the said Joseph Bourda would have taken and become entitled to in case such parent had survived the said Elizabeth Ruysch de Coeverden; and that the rights and interests of the said Plaintiffs and Defendants in this suit in and to the said pln. *Vlissingen* with its appurtenances devised by the said Will of Joseph Bourda may be ascertained and declared by the sentence of this honourable Court; and that (if and so far as may be necessary for the purpose of ascertaining and declaring such rights and interests) it may be declared that the said transports of the 8th April 1848, and the 18th November 1853 set forth in the narrative part of this claim and demand are void and of no effect, save as to such shares and interests in the property thereby purporting to be transported as this honourable Court may deem and declare that the Administrator General of Demerary and Essequibo was entitled to transport thereby; and that the original Defendant,

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John Baker Wright, may be ordered to account to the Plaintiffs for and in respect of the rents, issues, and profits of the said plantation with its appurtenances and the lands and property now representing the same, and to pay and deliver to the Plaintiffs respectively what may be found due and of right coming from him to them upon taking such accounts; and lastly with condemnation of the original Defendant John Baker Wright in the costs.

J. LUCIE SMITH,
 Barrister-at-law.
 W. H. CAMPBELL,
 Attorney-at-Law.

Demerary, 26th January 1866.

*Exceptions
 and
 Answer.*

Conclusion of Exception and Answer made and filed in the Supreme Court of Civil Justice of British Guiana, by John Baker Wright who claims to be sole Executor to the last Will and Testament of Elizabeth Ruysch de Coeverden, late of the city of Paris, widow, now deceased, by John Baker Wright, as Executor to the last Will and Testament of Richard Joseph Johan Edward Daly, deceased; Maria Marianne Daly, and Jean Eugene Henry Daly, all by their attorney Henry Sarsfield Bascom; and the said Henry Sarsfield Bascom, in his own right Defendants in the matter entitled Catherine Elizabeth Adelaide Ely, born Boode, widow, of Paris, in the Empire of France; Augustus Deodatus Boode, of Dusseldorf, in the Kingdom of Prussia; Jules Victor Houel of the city of Paris aforesaid; and Honoré Desiré Houel, of the city of Paris aforesaid, severally appearing herein by their attorney in this colony, Roelof Hart, Plaintiffs,—v. John Baker Wright, styling himself sole executor of and under the last Will and Testament of Elizabeth Ruysch de Coeverden, late of the city of Paris, widow, deceased, by his attorney in this colony, Henry Sarsfield Bascom, original Defendant, and John Baker Wright as executor to and of the last Will and Testament of Richard Joseph John Edward Daly, deceased, Maria Marianne Daly, Jean Eugene Henry Daly, severally represented in this colony by Henry Sarsfield Bascom, the said Henry Sarsfield Bascom, the Administrator General of Demerary and

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Essequibo as representing the insolvent estate of Louis William Boode, deceased, the Administrator-General of Demerary and Essequibo as representing the insolvent estate of Jules Theophilus Boode, deceased, and John Frederick Charles Hermann Von Griesheim, for himself and as executor to and of the last Will and Testament of his deceased wife, Eugenia Clementina Von Griesheim, born Boode, and as father and natural guardian of his minor child, Johanna Marrianna Elizabeth Ottillia Von Griesheim, and Ernst Christian Hermann Gunther Von Griesheim, and Sophia Luitgard Henrietta Eugenia Von Griesheim, severally represented in this colony by their attorney, William Frederick Haynes Smith, co-Defendant.

The said Defendants admit that Joseph Bourda, in his lifetime and up to the time of his death an inhabitant of the county of Demerary, made his last Will and Testament on the 6th June 1792, in the Dutch language, and that the passage in the claim and demand in Dutch is correctly quoted from the said Will, and that the translation of such passage is sufficiently exact.

The said Defendants admit that the said Joseph Bourda departed this life on the 23rd day of April 1798, at Paris, without having altered or revoked his said last Will and Testament, whereby the same became confirmed, and that the said testator was at the time of his death possessed and proprietor of plantation *Vlissingen*, with all its appurtenances and dependencies.

The said Defendants admit that three of the children described in said Will, namely, Nancy, Joseph Charles, and Jan Lodewyk, all died intestate without ever having attained majority or being married; the said Nancy having died at Amsterdam on the 27th of September 1800, the said Joseph Charles at the same place, on the 14th December 1809, and the said Jane Lodewyk at plantation *Vlissingen*, in the year 1798.

The said Defendants admit that by reason of the deaths of the aforesaid three children of the testator, his remaining three children described in said will, namely, Catherine, Elizabeth, and Maria, became the sole *fidei commissary* heiresses of the said Joseph Bourda, under and by virtue of the terms of his said Will, and that con-

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sequently the said plantation *Vlissingen* with all its appurtenances devolved upon them as *fidei commissary* heiresses in three equal undivided shares or thirds; but the Defendants deny that each of them took a life interest in her share and no more.

The said Defendants admit that the said Catherine, Elizabeth, and Maria were all married subsequently to the death of the said testator, Joseph Bourda, and that the said Catherine was married to Edward Gustavus Boode, now deceased, the said Maria, firstly, to Richard Bass Daly, now deceased, who died in the month of February 1818, afterwards to one Long King, otherwise called Charles, otherwise called Charles Beresford Ingledeu, also now deceased, and the said Elizabeth to Jan Ernst Rodewyk Ruysch de Coeverden, otherwise called Jean Louis Ernest Lodewyk Ruysch de Coeverden, also deceased, she being the same person as is named in the rubric of this suit.

The said Defendants admit that the said Catherine Boode, departed this life at Mentz, on 23rd August 1837, leaving six children begotten in wedlock during her said marriage her surviving, and no more, namely, the Plaintiff Catherine Elizabeth Adelaide Ely, now the widow of Elisha Mills Ely, deceased; Louis William Boode, since deceased without issue, and whose estate was heretofore represented by the Administrator General of Demerary and Essequibo; Jules Theophilus Boode, since deceased without issue, and whose estate was heretofore represented by the Administrator General of Demerary and Essequibo; the Plaintiff Augustus Deodatus Boode, Eugenia Clementina, afterwards married to the said John Frederick Charles Hermann Yon Greisheim, and since deceased, leaving lawful issue as hereinafter mentioned; and Sophia Eulalie, afterwards married to the Plaintiff Jules Victor Houel, and since deceased, leaving lawful issue.

The said Defendants admit that on the 6th March 1819, the said Plaintiff, Catherine Elizabeth Adelaide Ely, intermarried with Elisha Mills Ely, who has long since died without issue.

The said Defendants admit that on the 7th November

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1837, the said Sophia Eulalie Boode intermarried with the Plaintiff Jules Victor Houel, and that she departed this life in the city of Paris on the 11th April 1840, intestate, and leaving only one child, the sole issue of her said marriage, namely, the said Plaintiff Honoré Desiré, Houel, who is of full age, and her husband the said Plaintiff Jules Victor Houel her surviving.

The said Defendants admit that on or about the 30th day of November 1837, the said Eugenia Clementina Boode intermarried with the said John Frederick Charles Hermann Von Greisheim, and that previously thereto, to wit, on the 28th day of November 1837, at Pempelfort, in the upper Burgomastery, of Dusseldorf, the said John Frederick Charles Hermann Von Greisheim and the said Eugenia Clementina Von Greisheim, then Boode, before Charles Peter Henry Coninx, Notary Public of Dusseldorf, and two witnesses, executed an antenuptial contract, bearing date the day and year last aforesaid, by the first article whereof it is provided as follows:—

“The property in common is confined to acquired property “only, so that all personal and landed property at present belonging to the future spouses or hereafter devolving to them “by inheritance, gift, legacy, or other similar title shall be considered as not belonging to such property in common; on the “other hand, the personal debts of each of the future spouses “not arising from subsequent acquisitions are to be paid by that “party by whom they originated, so that the property of neither “spouse nor that belonging to them in common can be in any “way laid claim to for this purpose.”

And the said Defendants admit that the said Eugenia Clementina Von Greisheim, born Boode, departed this life at Mayence on the 4th March 1849, having previously made her last Will and Testament, which last Will and Testament was on the 27th November 1838, handed over by her to Major Von Palmenstein and Judge Advocate Stohmann, Delegates of the Royal Prussian Government Court of the Fortress of Mayence for the purpose of having the same legally deposited, and was by them so deposited, and that the said Testatrix amongst other things appointed her husband, the said John Frederick,

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Charles Hermann Von Griesheim as sole executor to the said last Will and Testament.

The said Defendants admit that there were and are only three children the sole issue of the said marriage, namely, the minor Johanna Marianna Elizabeth Ottilia Von Greisheim, and Ernst Christian Hermann Gunther Von Greisheim, and Sophia Luitgard Henrietta Eugenia Von Greisheim, both of full age, all three named in the rubric of this suit.

The said Defendants admit that on the 8th of April 1848, the then Administrator General of Demerary and Essequibo, as such administering the insolvent estate of “the said Louis “William Boode, deceased, who had theretofore departed this “life, executed and passed a transport to and in favour of the “said Eugenia Clementina Von Greisheim, born Boode, of the “said Louis William Boode's one eighteenth share in and to the “Plantation *Vlissengen*, including the ground rents, leases, and “rights of renewal thereof, the same as the said Louis William “Boode or his estate or representatives could or would be entitled to on the first day of February 1845, and as sold at vendue on the 3rd day of February 1845, by order of the Supreme “Court of Civil Justice.”

And the said Defendants aver that the said Eugenia Clementina Von Greisheim and her estate have ever since held and enjoyed the eighteenth share so transported, and received and used the rents, issues and profits thereof.

The said Defendants admit that on the 18th day of November 1853, the Administrator General of Demerary and Essequibo, as representing the estate of Jules Theophilus Boode, abovementioned, and who had theretofore departed this life, executed, and passed a transport to and in favour of the said Henry Sarsfield Bascom, his heirs and assigns, of “the “one undivided eighteenth share in and to the abandoned plantation *Vlissengen*, including the ground rents, leases and “rights of renewal of the several townships formed in front of “said estate or plantation, including all arrears of rent of and on “leases or otherwise due on the eight day of June 1848.”

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And the said Defendants aver that the said Henry Sarsfield Bascom has ever since held and enjoyed the 18th share so transported to him, and has received and used the rents, issues, and profits thereof.

The said Defendants admit that the said Maria, the aforesaid child of the said Joseph Bourda, died in the month of April 1849, leaving her surviving three children, namely: Richard Joseph Johan Edward Daly, named in the rubric of this cause, but now deceased, the said Maria Marianne Daly, and the said Jean Eugene Henry Daly; but the said Defendants deny the truth, pertinency, and relevancy of the Plaintiffs' statements of the illegitimacy of the said Maria Marianne Daly and the said Jean Eugene Henry Daly.

The said Defendants admit that the said Richard Joseph Johan Edward Daly departed this life on or about the 23rd day of April 1854, leaving a last will and testament, whereby he appointed the said John Baker Wright executor thereto.

And the said Defendants aver that by the will of the said Richard Joseph Johan Edward Daly, he gave and devised all his property to the said Maria Marianne Daly and the said Jean Eugene Henry Daly, thereby according to the law of this colony constituting them his heirs, and that the said Richard Joseph Johan Edward Daly held and enjoyed one-third share of the said plantation *Vlissengen*, and received the rents, issues, and profits thereof, and that his executor since his death has held, enjoyed, and administered the same, and received for the benefit of his estate the rents, issues, and profits thereof.

The said Defendants admit that the said Jean Louis Ernest Ruysch de Coeverden departed this life on or about the 25th day of March 1832, and that the said Elizabeth Ruysch de Coeverden departed this life at Paris on the 1st of November 1860, without issue, and that previous to her death the said Elizabeth Ruysch de Coeverden signed a document, which is in the words and figures following, to wit:—

“This is the last Will of me, Elizabeth Ruysch de Coeverden, of the city of Paris, widow.”

“I give and bequeath all my one-third, or other my

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“share and interest of and in all and singular the property, estate, and effects, moveable and immoveable, in Demerary, (derived by me under the Will of my late father Joseph Bourda, Esquire, deceased, or otherwise,) and all monies, rents, and arrears of rents; and other advantages, if any, unto my friend, John Baker Wright, Esquire, of London, his heirs, executors, administrators, and assigns; and it is my desire that he or they should realize the same respectively at such times and in such manner as by him or them, should be deemed best, and out of the monies to be received (after deduction of expenses) all my just debts should be paid, and subject thereto that the balance, if any, of the said monies should be paid to such persons or person as I may hereafter desire by any legal codicil to this my last Will and Testament. I appoint the said John Baker Wright, to be sole executor to this my Will.

“As witness, my hand this 18th day of February
 “1856.

“ELIZABETH RUYSCHE DE COEVERDEN.

“Signed by the Testatrix in our presence, and witnessed by us at her request and in her presence, and in the presence of each other.

“H. ROBERTS, M.D., 21, Rue Montaigne, Paris.

“M. J. POPPLEWELL, 12, Rue du Mont Tabor.”

The said Defendants admit that the said John Baker Wright has deposited the said document in the Registrar's Office for the Counties of Demerary and Essequibo as and for the last Will and Testament of the said Elizabeth Ruysch de Coeverden, and that he has taken possession of and is in possession of her estate and claims to represent the same as her executor.

And the said Defendants aver that said Will is a good and valid Will, and that the said John Baker Wright is the executor of the said Elizabeth Ruysch de Coeverden, and that the said John Baker Wright as such executor is rightly in possession of her one-third share of Plantation *Vlissingen*, which she held in *fidei commis* during her life, and which by her death without leaving issue formed part of her estate and vested in her proper heirs,

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subject to the payment of her debts, as provided for in her Will.

And with respect to the averment as to the effect of the transports of the 8th of April 1848, and the 18th December 1853, the said Defendants say that it is not competent to the Plaintiffs to question the validity of these transports, and further that the first of these transports was passed after and in pursuance of a decision of this Honourable Court in a suit in which the same question which is now raised by the Plaintiffs as to the effect of the Will of Joseph Bourda was raised by the said Jules Victor Houel as natural guardian of the said Honoré Desiré Houel, then a minor, as Plaintiff, against the Administrator General of Demerary and Essequibo, as curator to the insolvent estate of Louis William Boode, deceased, in order to prevent the passing of the said transport, and was decided against the Plaintiff, and because the present Plaintiffs each have always held and now hold from their deceased mother the same share and by the same title as the said Louis William Boode in his lifetime held. And the said Defendants say that the averments with respect to the said transports are of no effect or force whatever, inasmuch as the Plaintiffs do not conclude that the said transports shall be set aside.

And the said Defendants deny the truth, pertinency, relevancy, and sufficiency in law of all the allegations, whether of law or fact, of the Plaintiffs, not hereinbefore admitted or expressly denied.

And the said Defendants submit that the said plantation *Vlissengen*, with its appurtenances, vests, in so far as the said Defendants are concerned, as follows, namely, the undivided third share held by Maria Daly in *fidei commis* during her life vests absolutely in the Defendants Maria Marianne Daly, and Jean Eugene Henry Daly; of the one undivided third share held by Elizabeth Ruysch de Coeverden in *fidei commis* during her life, and now vested in her heirs, one undivided half share vests absolutely in the said Maria Marianne Daly and the said Jean Eugene Henry Daly; and the undivided eighteenth share formerly held by Jules Theophilus Boode, now

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deceased, vests absolutely in the Defendant, Henry Sarsfield Bascom; and the Defendant John Baker Wright further submits that as executor of Richard Joseph Johan Edward Daly, he is entitled to administer whatever interest the said Richard Joseph Johan Edward Daly took on the death of his mother, Maria Daly, in the said plantation *Vlissengen*, with its appurtenances; and that as executor of Elizabeth Ruysch de Coeverden, he is entitled to administer, on the trust and for the purposes of her will, the undivided third share vested in her in *fidei commis* during her life, and now vested in her heirs.

Wherefore, the said Defendants conclude that by sentence of this Honourable Court the said plantation *Vlissengen* with its appurtenances shall be declared, in so far as the said Defendants are concerned, to vest as above submitted, and that the said John Baker Wright, in his respective qualities aforesaid, shall be declared entitled to administration as above submitted; and consequently that the claim and demand of the plaintiffs herein shall be rejected with costs.

J. TROUNSELL GILBERT,
 Barrister-at-Law.

O. ANGLIM GILBERT,
 Attorney-at-Law.

Demerary, 3rd March 1865.

Answer.

Conclusion of Answer made and filed in the Honorable the Supreme Court of Civil Justice of British Guiana, by and on the part of John Frederick Charles Hermann Von Greisheim, for himself and as executor to and of the last Will and Testament of his deceased wife, Eugenia Clementina Von Greisheim, born Boode, and as father and natural guardian of his minor child Johanna Marianne Elizabeth Ottilia Von Greisheim; and Ernst Christian Hermann Gunther Von Greisheim, and Sophia Luitgard Henrietta Eugenia Von Greisheim, severally represented in this colony by their attorney William Frederick Haynes Smith, co-Defendant.

In the matter of Catherine Elizabeth Adelaide Ely, born Boode, widow, of Paris, in the empire of France;

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Augustus Deodatus Boode, of Dusseldorf, in the kingdom of Prussia; Jules Victor Houel, of the city of Paris, aforesaid; and Honoré Desiré Houel, of the city of Paris, aforesaid, severally appearing herein by their attorney in this colony, Roelof Hart, Plaintiffs,—*versus* John Baker Wright, styling himself sole executor of and under the last Will and testament of Elizabeth Ruysch de Coeverden, late of the city of Paris, widow, deceased, by his attorney in this colony, Henry Sarsfield Bascom, original Defendant; and John Baker Wright, as executor to and of the last Will and testament of Richard Joseph Johan Edward Daly, deceased; Maria Marianne Daly; Jean Eugene Henry Daly, severally represented in this colony by Henry Sarsfield Bascom; the said Henry Sarsfield Bascom; the Administrator General of Demerara and Essequibo, as representing the insolvent estate of Louis William Boode, deceased; the Administrator General of Demerary and Essequibo, as representing the insolvent estate of Jules Theophilus Boode, deceased; and John Frederick Charles Hermann Von Greisheim, for himself and as executor to and of the last Will and Testament of his deceased wife Eugenia Clementina Von Greisheim born Boode, and as father and natural guardian of his minor child, Johanna Marianne Elizabeth Ottilia Von Greisheim; and Ernst Christian Hermann Gunther Von Greisheim, and Sophia Luitgard Henrietta Eugenia Von Greisheim, severally represented in this colony by their attorney, William Frederick Haynes Smith, co-Defendants.

The said co-Defendants admit that Joseph Bourda, in his life time and up to the time of his death an inhabitant of the county of Demerary, made his last Will and Testament on the sixth day of June 1792, in the Dutch language, and that the passage in the claim and demand in Dutch is correctly quoted from the said Will, and that the translation of such passage is accurate.

The said co-Defendants admit that the said Joseph Bourda departed this life on the 23rd day of April 1798, at Paris, without having altered or revoked his said last Will and Testament, whereby the same became confirmed, and that the said Testator was at the time of his death

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possessed of and proprietor of the Plantation *Vlissingen* with all its appurtenances and dependencies.

The said co-Defendants admit that three of the children described in the said Will, namely, Nancy, Joseph Charles, and Jan Lodewyk, all died intestate without ever having attained majority or being married; the said Nancy having died at Amsterdam on the 27th of September 1800; the said Joseph Charles at the same place on the 14th December, 1809; and the said Jan Lodewyk at Plantation *Vlissingen*, in the year 1798.

The said co-Defendants admit that by reason of the deaths of the aforesaid three children of the testator, his remaining three children described in said Will, namely, Catherine, Elizabeth, and Maria, became the sole *fidei commissary* heiresses of the said Joseph Bourda, under and by virtue of his said Will, and that consequently possession of the said Plantation *Vlissingen* with all its appurtenances devolved upon them as *fidei commissary* heiresses in three equal undivided shares or thirds, but the said co-Defendants leave the Court to decide the extent of the interest which each of such children took in said Plantation.

The said co-Defendants admit that the said Catherine, Elizabeth, and Maria were all married subsequently to the death of the testator, Joseph Bourda, and that the said Catherine was married to Edward Gustavus Boode, now deceased; the said Maria, firstly to Richard Bass Daly, now deceased, who died in the month of February 1818, afterwards to one Long King, otherwise called Charles Beresford Ingledeu, also now deceased; and the said Elizabeth to Jan Louis Ernst Lodewyk Ruysch de Coeverden, otherwise Jean Louis Ernst Ruysch de Coeverden, also now deceased, she being the same person as is named in the rubric of this suit.

The said co-Defendants admit that the said Catherine Boode departed this life at Mentz, on the 23rd of August 1837, leaving six children begotten in wedlock during her said marriage, her surviving, and no more, namely, the Plaintiff Catherine Elizabeth Adelaide Ely, now the widow of Elisha Mills Ely, deceased, Louis William Boode, since deceased, intestate, without issue, and

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whose estate being insolvent is represented by the Administrator General of Demerary and Essequebo, Jules Theophilus Boode, since deceased, intestate, without issue, and whose estate being insolvent is also represented by the Administrator General of Demerary and Essequebo, Plaintiff, Augustus Deodatus Boode, Eugenia Clementina, afterwards married to the co-Defendant, John Frederick Charles Hermann von Griesheim, and since deceased, leaving lawful issue as hereinafter mentioned, and Sophia Eulalie afterwards married to the Plaintiff, Jules Victor Houel, and since deceased, leaving lawful.

The said co-Defendants admit that on the 6th March 1819, the said Plaintiff, Catherine Elizabeth Adelaide Ely intermarried with Elisha Mills Ely, who has long since died without issue. The said co-Defendants admit that on the 7th November 1837, the said Sophie Eulalie Boode intermarried with the Plaintiff, Jules Victor Houel, and that she departed this life in the city of Paris on the 11th April 1840, intestate, and leaving only one child, the sole issue of her said marriage, namely, the said Plaintiff, Honoré Desiré Houel, who is of full age, and her husband, the said Plaintiff, Jules Victor Houel, her surviving.

The said co-Defendants admit that on or about the 30th day of November 1837, the said Eugenia Clementina Boode intermarried with the co-Defendant, John Frederick Charles Hermann von Greisheim, and that previously thereto, to wit, on the 28th November 1837, at Pempelfort, in the upper Burgomastery of Dusseldorf, the said John Frederick Charles Hermann von Greisheim and the said Eugenia Clementina von Greisheim, then Boode, before Charles Peter Henry Coninx, Notary Public of Dusseldorf, and two witnesses, executed an antenuptial contract bearing date the day and year last aforesaid, by the first article whereof it is provided as follows:—
 “The property in common is confined to acquired property
 “only, so that all personal and landed property at present belonging to the future spouses or hereafter devolving to them
 “by inheritance, gift, legacy, or other similar title, shall be considered as not belonging to such property in common; on the
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“personal debts of each of the future spouses, not arising from subsequent acquisitions, are to be paid by that party by whom they originated, so that the property of neither spouse nor that belonging to them in common can be in any way laid claim to for this purpose.”

The said co-Defendants admit that the said Eugenia Clementina von Greisheim, born Boode, departed this life at Mayence on the 4th March 1849, having previously made her last Will and Testament which last Will and Testament was on the 27th November 1838, handed over by her to Major Van Palmenstein and Judge Advocate Stohmann, delegates of the Royal Prussian Government Court, of the fortress of Mayence, for the purpose of having the same legally deposited, and was by them so deposited, and the said testatrix amongst other things appointed her husband, John Frederick Charles Hermann von Greisheim, as sole executor to said last Will and Testament.

The said co-Defendants admit that there were and are only three children, the sole issue of the said marriage, namely, the minor Johanna Marianne Elizabeth Ottilia von Greisheim, named in the rubric, and the co-Defendants Ernst Christian Hermann Gunther von Greisheim, and Sophia Luitgard von Greisheim, who are all of age.

The said co-Defendants admit that the said Maria, the aforesaid child of the said Joseph Bourda, died in the month of April 1849, leaving her surviving only three children, namely, Richard Joseph Johan Edward Daly, named in the rubric of this cause, who is admitted to have been a legitimate child, but now deceased; and Maria Marianne Daly, and Jean Eugene Henry Daly, who are both illegitimate, and consequently not entitled to inherit under the Will of Joseph Bourda, deceased.

The said co-Defendants admit that the said Richard Joseph Johan Edward Daly departed this life, on or about the 23rd April 1854, leaving a last Will and Testament, whereby he appointed the said John Baker Wright executor thereto.

The said co-Defendants admit that the said Jean Louis

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Ernst Ruysch de Coeverden departed this life on or about the 25th day of March, 1832, and that the said Elizabeth Ruysch de Coeverden departed this life at Paris, on the 1st November 1860, without issue.

The said co-Defendants admit that previously to her death, the said Elizabeth Ruysch de Coeverden signed the document mentioned in the claim and demand, and that the said document is therein correctly set out.

The said co-Defendants admit that the said John Baker Wright has deposited the said document in the Registrar's Office for the Counties of Demerary and Essequibo as and for the last Will and Testament of the said Elizabeth Ruysch de Coeverden, and that he has taken possession of and is in possession of her estate and claims to represent the same as her executor.

The said co-Defendants admit that the said instrument, purporting to be the last Will and Testament of the said Elizabeth Ruysch de Coeverden, is null and void and of no effect whatever, on the grounds and for the reasons following, namely:—

Firstly—Because the same is void for uncertainty.

Secondly—Because the same contains no institution of an heir, and because no codicil or other testamentary disposition was ever made by the said Elizabeth Ruysch de Coeverden, appointing any heir or residuary legatee.

Thirdly—Because the same is entirely in the handwriting of the said John Baker Wright, and because at the time he so wrote the same he the said John Baker Wright was the legal adviser and solicitor of the said Elizabeth Ruysch de Coeverden.

The said co-Defendants declare that notwithstanding the said transports herein before mentioned, they are willing to abide by whatever this honourable Court may decide as to the true construction and effect of the said Will of the said Joseph Bourda, and as to the true effect of the said document signed by the said Elizabeth Ruysch de Coeverden, set forth in the claim and demand herein and as to the effect of the said transports hereinbefore mentioned; the co-Defendants claiming costs from whomsoever this honourable Court may decide, may

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Ottilia Von Greisheim, and Ernst Christian Hermann Gunther Von Greisheim, and Sophia Luitgard Henrietta Eugenia Von Greisheim, severally represented in this colony by their attorney, William Frederick Haynes Smith, co-Defendant.

The above named co-Defendant, the Administrator General of Demerary and Essequibo, as representing the insolvent estate of Louis William Boode, deceased, and also as representing the insolvent estate of Jules Theophilus Boode, deceased, admitting that the several transports of the 8th April 1848, and 18th November 1853, mentioned in the Plaintiffs claim and demand, were passed and executed, and were of the tenor and effect therein set forth, and maintaining the validity of each of said transports, disclaims any interest in the matters in question in this suit, and respectfully submits that he is entitled to his costs to be paid to him by such of the parties to this suit as the Court may be pleased to direct.

E. C. ROSS,

Barrister-at-Law.

ROBERT WIGHT IMLACH,

Attorney-at-Law.

True copy,

ROBERT WIGHT IMLACH, Attorney-at-Law.

Conclusion of Answer in Exception and Replique made and filed in the honourable the Supreme Court of Civil Justice of British Guiana, by and on the part of the Plaintiffs, to the conclusion of Exception and Answer, made and filed by John Baker Wright, who claims to be sole executor to the last Will and Testament of Elizabeth Ruysch de Coeverden, late of the city of Paris, widow, now deceased, by John Baker Wright, as executor to the last Will and Testament of Richard Joseph Johan Edward Daly, deceased, Maria Marianne Daly, and Jean Eugene Henry Daly, all by their attorney Henry Sarsfield Bascom, and the said Henry Sarsfield Bascom in his own right, Defendants, in the matter of Catherine Elizabeth Adelaide Ely, born Boode, widow, of Paris, in the Empire of France, Augustus Deodatus Boode, of Dusseldorf, in the Kingdom of Prussia, Jules Victor Houel, of the city of Paris afore-

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said, and Honoré Desiré Houel, of the city of Paris aforesaid, severally appearing herein by their attorney in this colony, Roelof Hart, Plaintiffs—v. John Baker Wright, styling himself sole executor of and under the last Will and Testament of Elizabeth Ruysch de Coeverden, late of the city of Paris, widow deceased, by his attorney in this colony, Henry Sarsfield Bascom, original Defendant, and John Baker Wright as executor to and of the last Will and Testament of Richard Joseph Johan Edward Daly, deceased, Maria Marianne Daly, Jean Eugene Henry Daly, severally represented in this colony by Henry Sarsfield Bascom, the said Henry Sarsfield Bascom, the Administrator-General of Demerary and Essequebo, as representing the insolvent estate of Louis William Boode, deceased, the Administrator General of Demerary and Essequebo, as representing the insolvent estate of Jules Theophilus Boode, deceased, and John Frederick Charles Hermann Von Greisheim, for himself, and as executor to and of the last Will and Testament of his deceased wife, Eugenia Clementina Von Greisheim, born Boode, and as father and natural guardian of his minor child, Johanna Marianne Elizabeth Ottilia Von Greisheim, and Ernst Christian Hermann Gunther Von Greisheim, and Sophia Luitgard Henrietta Eugenia Von Greisheim, severally represented in this colony by their attorney, William Frederick Haynes Smith, co-Defendants.

The Plaintiffs, reiterating and relying upon all and singular, the statements, averments, and allegations contained in their Claim and Demand herein, and maintaining the truth, pertinency, relevancy, and sufficiency in law of the same, and taking in their favour the admissions of the Defendants appearing herein in their conclusion of exception and answer, and denying the truth, relevancy, pertinency, and sufficiency in law of the averments and allegations contained in their said conclusion of exception, and answer, except in so far as the same agree with the averments of the Plaintiffs in their claim and demand herein, for answer in exception, declare to reject the innominate exception of an absolution of the instance proposed by the appearing Defendants herein,

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with costs, and for repliche declare to persist by their well-founded Claim and Demand herein, with costs.

J. LUCIE SMITH,
Barrister-at-Law.
W. H. CAMPBELL,
Attorney-at-Law.

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Conclusion of Replicq in exception and of Duplicq made and filed in the Supreme Court of Civil Justice of British Guiana, by John Baker Wright, who claims to be sole executor to the last Will and Testament of Elizabeth Ruysch de Coeverden, late of the city of Paris, widow, now deceased, by John Baker Wright, as executor to the last Will and Testament of Richard Joseph Johan Edward Daly, deceased, Maria Marianne Daly, and Jean Eugene Henry Daly, all by their attorney Henry Sarsfield Bascom, and the said Henry Sarsfield Bascom in his own right, Defendants, in the matter entitled by the Plaintiffs Catherine Elizabeth Adelaide Ely, born Boode, widow, of Paris, in the Empire of France, Augustus Deodatus Boode, of Dusseldorf, in the Kingdom of Prussia, Jules Victor Houel, of the city of Paris aforesaid, and Honoré Desiré Houel, of the city of Paris aforesaid, severally appearing herein, by their attorney in this colony, Roelof Hart, Plaintiffs,—v. John Baker Wright, styling himself sole executor of and under the last Will and Testament of Elizabeth Ruysch de Coeverden, late of the city of Paris, widow, deceased, by his attorney in this colony, Henry Sarsfield Bascom, original Defendant, and John Baker Wright, as executor to and of the last Will and Testament of Richard Joseph Johan Edward Daly, deceased, Maria Marianne Daly, and Jean Eugene Henry Daly, severally represented in this colony by Henry Sarsfield Bascom, the said Henry Sarsfield Bascom, the Administrator General of Demerary and Essequibo, as representing the insolvent estate of Louis William Boode, deceased, the Administrator General of Demerary and Essequibo, as representing the insolvent estate of Jules Theophilus Boode, deceased, and John Frederick Charles Hermann Von Greisheim, for himself, and as executor to and of the last Will and Testament of his deceased wife, Eugenia Clementina Von Greisheim, born Boode, and as

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Replicq.*

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father and natural guardian of his minor child, Johanna Marianne Elizabeth Ottilia Von Greisheim, and Ernst Christian Hermanne Gunther Von Greisheim, and Sophia Luitgard Henrietta Eugenia Von Greisheim, severally represented in this colony by their attorney, William Frederick Haynes Smith, co-Defendants.

The Defendants, for replicq in exception, declare to persist by the innominate exception or an absolution of the instance proposed by them, with costs, and for duplicq declare to persist by their answer herein with costs.

J. TROUNSELL GILBERT,

Barrister-at-Law.

O. ANGLIM GILBERT,

Attorney-at-Law.

Demerary, 7th March 1865.

A true copy.

O. ANGLIM GILBERT, Attorney-at-Law.

3 April,
 1865.

For the Plaintiffs (Catherine Elizabeth Adelaide Ely, Augustus Deodatus Boode, Jules Victor Houel, and Honoré Desiré Houel.)—*The Attorney General*.

For the Defendants—(J.B. Wright exor. of de Coeverden, and of R.J.J.E. Daly; Maria Marianne Daly, J.E.H. Daly, and H.S. Bascom)—*Mr. Gilbert*.

For the co-Defendant, (the Administrator-General representing the insolvent estate of Louis William Boode, deceased, and the insolvent estate of Jules Theophilus Boode, deceased)—*Mr. Ross*.

For the co-Defendants, (J.F.C.H. Von Griesheim, as executor of his deceased wife, and guardian of his minor child; Ernest C.H.H.G. Von Griesheim, and Sophia L.H.E. Von Griesheim)—*The Solicitor General*.

Plaintiffs'
Case.

Attorney-General.—The present is an action brought for the purpose mainly of obtaining a final declaration of the construction to be placed upon the Will of Joseph Bourda, who died in the year 1798. The parties before the Court comprise the whole of those who claim in any way to be interested in the inheritance. The amount involved is very considerable; for, great as was the property left by the testator at the time of his death, yet, as

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the greater part of that property has since been incorporated into this city and comprises no inconsiderable portion of it, the amount may fairly be estimated at something like £100,000. I will proceed to read the statements in the claim and demand, and after that submit to the Court the points of law on which in behalf of my clients, Mrs. Ely Boode, and the two Houels, father and son, I contend that that Will ought to be decided. Connected with this question is the construction to be placed on the Will of Madame Ruysch de Coeverden, the last survivor of the original testator's children: and although he died so far back as 1798, she, having attained a great age, died only in 1860; and according to our construction of the Will of Joseph Bourda, it was only on her death, the last survivor of the original testator's children, that the corpus of the inheritance became divisible as an estate in fee simple. In short, I may put it in this way—that up to the time of Mrs. de Coeverden's death the inheritance was held *in fidei commissum*, and only on the death of the last survivor of the testator's children that *fid. commis.* ceased and the estate vested in the parties for whom it was intended.—“The Plaintiffs aver that Joseph Bourda in his “lifetime and up to the time of his death an inhabitant of the “county of Demerara, made his last Will and Testament on the “6th day of June 1792, in the Dutch language, and which will, “so far as necessary to be herein recited, is as follows:” . . . The original Dutch in which the Will was written is set out on the face of the record, and then follows a translation according to our interpretation. On previous occasions, I understand that there have been nice verbal distinctions as to the literal rendering of particular passages into English. There have been differences, which may or may not have effected the construction of the Will, in the translations of Mr. Moliere, Mr. Reis, and other gentlemen who have been examined before; but in this case I am happy to say I apprehend there will be no difficulty of the kind, for the substantial accuracy of our translation is agreed to on all hands.—“Coming to a final disposition I declare under “the following conditions to nominate and institute my children, Catherine, Eliza-

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“beth, Maria, Nancy, Joseph Charles, and Jan Lodewyck, all
 “six procreated by the free mulatto woman named Polly, as my
 “sole and universal heirs to all my property which I may have
 “at my demise, movable and immovable, actions and credits,
 “in manner as they shall be at my death, from which is spe-
 “cially excepted my plantation called *Vlissengen* with all its
 “appurtenances and dependencies, situated near to Stabroek,
 “which they my said children and heirs shall only possess as
 “*fidei commissarii*, without any deduction of the Trebellian
 “portion, and after their death to devolve with title of property
 “to their children begotten in wedlock head for head in equal
 “portions. Nevertheless, if so be that one or more of my be-
 “fore-named children should happen to die before being mar-
 “ried or before coming of age, (which God forbid,) such share
 “or shares shall accrue to the remainder, and so on to the last
 “survivor, which last shall possess, the same with title of clear
 “property so far as regards the property so left by me, and with
 “respect to pln. *Vlissengen* subject to *fidei commissum* in case
 “the last survivor of them shall have begotten a child or chil-
 “dren in wedlock.”

Mr. Justice NORTON—What I should like to know is, whether that “which” coming after “near to Stabroek” is singular or plural in the Dutch.”

Mr. Justice BEETE—It refers to pln. *Vlissengen*. Mr. Justice NORTON—I want to know whether it refers to *Vlissengen*, or to all the property.

Attorney General—Clearly only to *Vlissengen*. There can be no question about that. I do not wish to enter into the general argument of law till I have lead the pleadings; but I may remark incidentally that there can be no question that this passage in the testator's Will must be taken distributively; one part of his bequest refers to the general property he left. The other part refers exclusively to *Vlissengen* which is burdened with *fidei commis*. For the purpose of making my argument more clear I have had the whole passage written out, and those parts of it that refer to this particular bequest underlined in red-ink, and when the Court looks at the way in which the bequest is made and see how very easy it is

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to make all the words that refer to the general bequest of his residuary property harmonise together, and the words that refer to the bequest of *Vlissengen* also harmonise together, I hope your Honours will agree with me that that is the proper way of construing the bequest; and it will go very far, in my judgment, to support the contention I am now laying before your Honours.

CHIEF-JUSTICE—I understand you, *Mr. Solicitor*, to appear for the Baron in his proper character and as guardian of his child?

Solicitor-General—Yes, and for his two other children.

Attorney-General—It so happens that, although from one point of view this construction of the Will might be said to be prejudicial to the interests of Baron Von Greisheim and his children, yet he himself is so impressed with the conviction that it is the correct view of the question that he does not dispute it, and he submits the question of his own transport to the decision of the Court:—“The Plaintiffs further aver that the “said Joseph Bourda departed this life on the 23rd day of April “1798 at Paris, without having altered or revoked his said last “Will and Testament, whereby the same became confirmed, “and that the said Testator was at the time of his death possessed and proprietor of the said Pln. *Vlissengen* with all its “appurtenances and dependencies. * * The Plaintiffs further “aver that three of the children described in said Will— “namely, Nancy, Joseph Charles, and Jan Lodewyck, all died “intestate without ever having attained majority or been married.” Therefore, three of the six children are out of the question altogether, “the said Nancy having died at Amsterdam on “the 27th of September 1800, the said Joseph Charles, at the “same place on the 14th December 1809, and the said Jan “Lodewyck at Pln. *Vlissengen* in the year 1798.” The youngest child died very shortly after his father, in the same year.— “The Plaintiffs further aver that by reason of the deaths of the “aforesaid three children of the testator, his remaining three “children described in said Will, namely, Catherine, Elizabeth, “and Maria, became the sole *fidei commisarii* heiresses of the “said Joseph

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“Bourda, under and by virtue of the terms of his said Will, and “that consequently possession of the said *Vlissengen* with all “its appurtenances devolved upon them as *fidei commissarii* “heiresses in three equal undivided shares or thirds, each of “them taking a life interest in her share and no more, and sub- “ject to the aforesaid *fidei commissum*.” We admit the posses- “sory right during life, and no more.

CHIEF-JUSTICE—*Fidei commissarii* heiresses?

Attorney-General—Perhaps it would have been better to have said *fiduciary* heiresses, for that is what was meant. All the parties in the suit claim in one way or another from these three daughters of Joseph Bourda; and therefore to satisfy the minds of the Court that every individual who has any possible interest in the matter is before the Court, the title has been reduced in this way. We say that they “were all married subse- “quently to the death of the said Joseph Bourda, and that the “said Catherine was married to Edward Gustavus Boode, now “deceased,” and Madame Ely and Augustus Deodatus Boode, two of my clients, Plaintiffs in this suit, are the only surviving children of that marriage, which shows what havoc time has made in this family. So remote is the period and so many years having elapsed owing to the great age that Mrs. de Coeverden lived, before it became possible to settle the title, that I believe these two grandchildren are themselves of great age. I understand that Madame Ely is nearly eighty years of age, and that Augustus Deodatus Boode is considerably over sixty.

Mr. Justice BEETE—You say that there are only two grandchildren. What of Houel?

Attorney General—He is a great-grandchild. He is the son of Mrs. Boode's daughter, Sophie Eulalie. But to proceed with the claim and demand—“The said Maria was married firstly to “Richard Bass Daly, now deceased, who died in the month of “February 1818; afterwards to one Long King otherwise called “Charles, otherwise called Beresford Ingledew, also now de- “ceased.”

CHIEF JUSTICE—Is the averment admitted with respect to this gentleman with the aliases?

Mr. Gilbert—Yes; I believe they were all aliases. He

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was not altogether a very respectable member of society. He was called Long King.

CHIEF JUSTICE—And was known as Charles?

Mr. Gilbert—Yes, I believe so.

Attorney General—I believe he bore the same relation to the Bourda family that the celebrated Mr. Chevy Slyme bore to the rest of the Chuzzlewit family. At all events, he rejoiced in a number of aliases.—“And the said Elizabeth to Jan Louis “Ernest Lodewyck Ruysch de Coeverden, also deceased, she “being the same person as is named in the rubric of this suit.” I now proceed to trace the descent as regards Catherine, the eldest of the three daughters, she being the mother of the Boodes, the most numerous branch of the family, who are represented by my clients and Baron Von Greisheim. “The Plaintiffs further aver that the said Catherine Boode departed this life at “Mentz on the 23rd of August 1837, leaving six children begotten in wedlock during her said marriage her surviving, and “no more, namely, the Plaintiff Catherine Elizabeth Adelaide “Ely, now the widow of Elisha Mills Ely, deceased, Louis William Boode, since deceased intestate without issue, and “whose estate being insolvent is represented by the Administrator General of Demerary and Essequibo, Jules Theophilus “Boode since deceased without issue and whose estate being “insolvent is also represented by the Administrator General of “Demerary and Essequibo, the Plaintiff Augustus Deodatus “Boode, Eugenia Clementina, afterwards married to the co- “Defendant, John Frederick Charles Herman Von Greisheim, “and since deceased, having lawful issue as hereinafter mentioned, and Sophie Eulalie afterwards married to the Plaintiff “Jules Victor Houel and since deceased leaving lawful issue” The next averment is:—“That on the 6th March 1819, the said “Plaintiff Catherine Elizabeth Ely, intermarried with Elisha “Mills Ely, who has long since died without issue.”

CHIEF JUSTICE—Jules Theophile and Louis William Boode's estates are insolvent and the former intestate?

Attorney General—Yes; the Administrator General represents what interest they have:—“The Plaintiffs further

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“aver that on the 7th of November 1837, the said Sophie Eula-
 “lie Boode, intermarried with the Plaintiff Jules Victor Houel,
 “and that she departed this life in the city of Paris on the 11th
 “April 1840, intestate and leaving only one child the sole issue
 “of her marriage, namely, the said Plaintiff Honoré Desiré
 “Houel, who is of full age, and her husband the said Plaintiff
 “Jules Victor Houel, her surviving.” The next member of the
 family who married was Eugenie, who was married on the
 30th November 1837, to Baron Von Greisheim, and “previ-
 “ously thereto, to wit, on the 28th November 1337, at Pempel-
 “fort, in the upper Burgomastery of Dusseldorf, the said John
 “Frederick Charles Hermann Von Greisheim, and the said
 “Eugenie Clementina Von Greisheim, then Boode, before
 “Charles Peter Henry Coninx, Notary Public of Dusseldorf,
 “and two witnesses, executed an antenuptial contract bearing
 “date the day and year last aforesaid, by the first article
 “whereof it is provided as follows:—‘The property in common
 “‘is confined to acquired property only, so that all personal
 “‘and landed property at present belonging to the future
 “‘spouses or thereafter devolving to them by inheritance, gift,
 “‘legacy, or other similar title, shall be considered as not be-
 “‘longing to such property in common. On the other hand the
 “‘personal debts of each of the future spouses not arising from
 “‘subsequent acquisitions are to be paid by that party by whom
 “‘they originated, so that the property of neither spouse, or
 “‘that belonging to them in common, can be in any way laid
 “‘claim to for this purpose.’” We next proceed to aver the
 death of Madame Von Greisheim. She died “at Mayence on
 “the 4th, March 1849, having previously made her last Will
 “and Testament, which last Will and Testament was on the
 “27th November 1838, handed over by her to Major Von
 “Pallmenstein and Judge Advocate Stohman, Delegates of the
 “Royal Prussian Government Court of the Fortress of May-
 “ence, for the purpose of having the same legally deposited,
 “and was by them so deposited, and that the testatrix amongst
 “other things appointed her husband the said John Frederick
 “Charles Hermann

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“Von Greisheim as sole executor to said last Will and Testament.” We then proceed to aver that there are only three children of the marriage, namely, the minor Johanna Marianne Elizabeth Ottilia Von Greisheim, and the co-Defendants Ernst Christian Hermann Gunther Von Greisheim, and Sophia Luitgard Henrietta Eugenie Von Greisheim. We next set out the transports that were passed. The Court will understand that the object of making all these averments was to enable your Honours to see that every person who could by any possibility claim an interest in the property has been brought before the Court. As to the effect to be given to the transports, that may be a question for further consideration; but what the Court has to determine in this ease is, (without reference to what may have been done in any other proceeding), the true construction to be placed on the Will of Joseph Bourda; and the only reason why these averments are introduced is that the parties who claim an interest in certain rights which purport to have been transported to them should be brought before the Court and have the opportunity of urging anything they please in reference to that subject, just in the same way that other parties have been brought before the Court whom we believe to be illegitimate and who have been always treated by the family as illegitimate up to this time. So that the sentence, whatever it may be, will conclude ad as to the legal construction to be placed on the Will.—“The Plaintiffs aver that on the 8th April 1848, the Administrator General of Demerary and Essequebo, “as representing the insolvent estate of the aforesaid Louis William Boode, deceased, who had theretofore departed this life, executed and passed a transport to and in favour of the “said Eugenie Clementina Von Greisheim, born Boode, which “purports to be as follows:”—This transport, I must say, appears to have been rather a singular instrument, and I thought the best plan was, without a word of comment, to set it forth, and it is as follows:—“The said Louis William Boode’s one-eighteenth share in and to the plantation *Vlissengen*, including “the ground rents, leases, and rights of renewal thereof, the “same as the said Louis

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“William Boode or his estate or representatives could or
 “would be entitled to on the 1st day of February 1845, and as
 “sold on the 3rd day of February 1845, by order of the Su-
 “preme Court of Civil Justice.” I leave that for the present
 without any comment.

CHIEF JUSTICE—Was that a transport from the Admin-
 istrator General?

Attorney General—Yes, to Madame Von Greisheim.

Mr. Justice BEETE—Whose son was Louis William
 Boode?

Attorney General—He was the son of Edward Gustavus
 Boode, and was one of the grandchildren.—“The Plaintiffs
 “further aver that on the J 8th day of November 1853, the Ad-
 “ministrator General of Demerary and Essequebo, as repre-
 “senting the estate of the aforesaid Jules Theophilus Boode,
 “deceased, who had theretofore departed this life, executed and
 “passed a transport to and in favour of the co-Defendant Henry
 “Sarsfield Bascom, which purports to be as follows.” In the
 same way, I just set it forth:—“One undivided eighteenth share
 “in and to the abandoned plantation *Vlissengen*, including the
 “ground rents, leases, and rights of renewal of the several
 “townships formed in part of said estate or plantation, includ-
 “ing all arrears of rent, of and on leases or otherwise due on
 “the 8th day of June 1848.” That is what was transported, and
 that is all. I now come to Maria Bourda's branch of the fam-
 ily:—“The Plaintiffs further aver that the said Maria, the afore-
 “said child of the said Joseph Bourda, died in the month of
 “April 1849, leaving her surviving only three children, namely,
 “Richard Joseph Johan Edward Daly, named in the rubric of
 “this cause, who is admitted to have been a legitimate child,
 “but now deceased and Maria Marianne Daly, and Jean
 “Eugene Henry Daly, who are both illegitimate, and conse-
 “quently, not entitled to inherit under the Will of the said Jo-
 “seph Bourda.” Now, these parties appear. It was necessary to
 bring them before the Court, and as we could not admit that
 they were legitimate children it was necessary to make that
 averment; and it appears to me that the way in which certain
 members of the Bourda

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family now are willing to admit their legitimacy, or rather not to contest the fact of their legitimacy, is one of the most singular features of this singular case. The idea that they were to be considered as legitimate appears to me and has all along so appeared, (for that is the view I expressed over and over again long before this suit ever was brought,) to have originated from a complete misconception of what the Court decided in the suit against Harel, which I dare say Mr. Justice BEETE will recollect. The extraordinary part of the case is this, that up to the time of that decision which took place in 1855 these two parties, Maria Marianne Daly and Jean Eugene Henry Daly, have been treated and dealt with by the whole family as illegitimate, without the slightest attempt on their part to dispute it. All the leases had been granted in the names of the other parties, excluding them. All the dealings with the property had been on the basis that they were illegitimate. In fact, by a sort of *conseil de famille* the whole question had been gone into between the Dalys, and an act of donation executed for the express purpose of preventing any question on the subject. I believe the French law and other continental laws recognize a family proceeding like this for the express purpose of preventing any subsequent difficulties. Madame Daly never pretended that they were legitimate, for the simple reason that they were born in Germany at a time when it was known to every member of the family that her husband was resident in this country; and up to the time of the Harel suit they never dreamt of being considered as legitimate. It is one of the unfortunate circumstances that have arisen in this case from the lapse of time which was more or less unavoidable, that there was a lady whom I have been depending upon certainly very strongly for the purpose of proving the whole course of dealings of the family—Madame Boome, the widow of Mr. Boome, whom Mr. Justice BEETE must recollect perfectly well as the individual who represented to a great extent the Bourda inheritance. For many years the representatives of the estate were Mr. Boome and Mr. Vyfhuis, and this old lady recollects the Daly family perfectly. She has travelled in company with these two

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children, and knows all about them, and I certainly expected to have had the full benefit of her evidence; but I regret to say that although she had been in good health for some time past she was taken ill recently and this morning is not expected to live. She has been conforming very strictly to the ordinances of her religion at this season of Lent, and the long fasting has proved too much for her strength, and she is not expected to recover. However, if the doctor will allow me, I shall certainly apply for an examination *de bene esse*. But we have other evidence, and there can be no doubt that up to the time of the suit against Houel these children were treated as illegitimate, and no person interested in the estate can have any moral doubt of the fact. All the leases and all the transactions of the property proceeded on the basis that they were illegitimate; and how did this, as it appears to me, delusion on the part of the heirs of Bourda, that they must be treated as legitimate, arise? It arose in this way. The parties claiming to be heirs of Bourda brought an action to recover a large amount of arrears of ground rent from Louis Harel due in respect of the property known as Marshal's Hotel. For the purpose of making out their case and proving that they were the sole heirs of Bourda, they were obliged to set forth, and they averred it in their claim and demand, that Madame Daly died leaving only one legitimate child, and no other, and for the purpose of showing that fact they had to give in evidence certain documents, a declaration of the mother herself, a legal donation founded on family arrangement, and so forth. Well—I was then acting for Mr. Harel, the Defendant, and the ground I took was this:—All that may be so, but it is a cardinal rule of law that you cannot deprive a party of his rights without his being heard; you have not made these other Dalys Defendants in the suit; they have had no opportunity of being heard, and the Court cannot pass a sentence which will have the effect of denuding them of their rights, without their being parties to the proceeding.

Mr. Justice BEETE—They were not Plaintiffs in that action?

Attorney General—No, necessarily not, because the

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Plaintiffs proceeded on the basis that they were illegitimate; and, appearing for a third party, the individual who was sued for the use and occupation of the land, in a proceeding in which it was incumbent upon them to prove strictly their title as heirs of the testator, I said—You cannot do this—you cannot say they are bastards, and the Court will not pronounce sentence in a suit between A and B, which has the effect of depriving a third party of his rights. It appears to me the matter is so clear that it is difficult to understand how any member of the family could have come to the conclusion that the Court meant by their sentence to decide that these two parties must be considered as legitimate. However, so it is; after that sentence some of the members of the family appear to have been under the impression that these two Dalys must be treated as legitimate children, although I have gone over the reasons of the Court's judgment several times and I cannot see myself what passage in it there is to sustain any such impression. But the singular circumstance is that the members of the family who had been up to the time of the suit between themselves and a third party treating these children and been treated by them on the basis of their being illegitimate should suppose that they must be considered thenceforward legitimate in consequence of what the Court said in a suit in which the question really could not be raised, and they could not contest it. The consequence is that if their contention as to the construction of Bourda's Will be correct, individuals with respect to whose illegitimacy, whatever may be the legal difficulties of proof, they themselves can entertain not the slightest moral doubt, for even their own mother never professed to treat them as her lawful children— will actually come into possession of property worth considerably over £30,000.

CHIEF JUSTICE—That is a very good reason for their trying to be so considered.

Attorney General—Your Honour does not quite understand me. I say one of the singular features as regard the other members—of course, it is not their interest to lose £30,000, but it all arises out of a misconception of the meaning of the Court in Harel's suit.

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Up to that suit there was not even any idea of their legitimacy.

Mr. Justice BEETE—What members of the family recognise them now?

Mr. Gilbert—I am not aware that any member of the family recognizes them now. I appear for Mr. Wright representing the estates of Richard Daly and Mrs. de Coeverden.

Mr. Justice BEETE—You do not appear for Maria and Jean Daly?

Attorney General—*Mr. Gilbert* appears for Mr. Wright who claims one-third as executor to Mrs. de Coeverden's Will. Mr. Wright at all events is willing to treat them as entitled to share in the property; and that is curious after the previous case.

CHIEF JUSTICE—*Mr. Gilbert* appears for both Mr. Wright and Mr. Bascom.

Mr. Gilbert—It is a matter with which Mr. Wright has nothing to do. Nor has Mr. Bascom anything to do with it. The parties themselves have something to do with it.

Attorney General—I think that Mr. Wright as representing Madame de Coeverden would have a very great interest in the question, so far as Madame de Coeverden's estate is concerned. As for Mr. Bascom, it may not much matter to him; because the utmost he can claim would be an eighteenth. But the gist of the case is that under Bourda's Will the lawful children only are to inherit. Here there are three children, but only one of them legitimate, and we are obliged to state that. "The Plaintiffs further aver that the said Maria, the aforesaid child of the said Joseph Bourda, died in the month of April 1849, leaving her surviving only three children, namely, Richard Joseph Johan Edward Daly, named in the rubric of this cause, but now deceased, and Maria Marianne Daly, and Jean Eugene Henry Daly, who are both illegitimate and consequently not entitled to inherit under the Will of the said Joseph Bourda, deceased." One strong feature in the case showing how great the misconception must have been in this, that in 1855, very shortly indeed before sending out the suit

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against Louis Harel, after the leases in Newtown had determined and they were required to be renewed, I, acting on the part of the lessees, and *Mr. Gilbert* acting on the part of the lessors—even at that time, in 1855, so little conception had any member of the family that there was the slightest doubt about these parties not being heirs of Bourda and not being entitled to claim,—all the leases were renewed and granted on the assumption that Richard Joseph Johan Edward Daly was the sole legitimate surviving child of his parents. “The Plaintiffs further aver that the said Richard Joseph Johan Edward Daly departed this life on or about the 23rd April 1854, leaving a last Will and testament whereby, amongst other things not necessary to be herein set forth, he appointed the said John Baker Wright executor thereto.” With respect to these Dalys, I may here mention, before I pass to the next allegations which refers to Madame Ruysch de Coeverden, that if the Defendants' contention be correct—if Madame Daly took an estate of inheritance to the extent of one-third, or rather if she had such an estate as on her death became absolutely vested in her child or children—it might perhaps not matter much whether these Dalys were legitimate or illegitimate; because it may be said that there was at all events one of them legitimate, and therefore her third vested in him. But if our contention be correct and the estate did not vest at all till the last surviving child of Bourda died, then of course it becomes exceedingly important. We say that the *fidei commis* did not cease at all till all the testator's children were dead, and then the estate became vested. If, on the other hand, as they say, the *fidei commis* ceased as regards Madame Daly's share when she died, then the question is of no importance.

CHIEF JUSTICE—Then they take *per stirpes*.

Mr. Gilbert—May I ask the First Puisne Judge if he has the notes in the suit that was decided in 1848?

Mr. Justice BEETE—No—I was away for the first six months of 1848.

Mr. Gilbert—It was decided, I know, while the late Chief Justice was acting Chief Justice.

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Attorney General—We then proceed to narrate the history of Madame Ruysch de Coeverden, who was the youngest child of Bourda. She married Jean Louis Ernst de Coeverden, who died on the 5th March 1832, and she departed this life in Paris on the 1st November 1860. The decision of this case is somewhat complicated by a most extraordinary Will, or so-called Will, that this old lady left, which was written by Wright, and which fact by the way is one of the pieces of evidence that the Court will have to consider.—“The Plaintiffs further aver, that “previous to her death the said Elizabeth Ruysch de Coeverden “signed a document which is in the words and figures following, to wit—“This is the last Will of me Elizabeth Ruysch de “Coeverden, of the city of Paris, widow. I give and bequeath “all my one-third or other my share and interest of and in all “and singular the property, estate, and effects, moveable and “immoveable, in Demerara (derived by me under the Will of “my late father Joseph Bourda, Esquire, deceased, or otherwise,) “and all moneys, rents, and arrears of rent, and other “advantages, if any, unto my friend, John Baker Wright, Esquire, of London, his heirs, executors, administrators, and “assigns, and it is my desire that he or they should realize the “same respectively at such times and in such manner as by “him or them should be deemed best, and out of the moneys “to be received (after deduction of expenses) all my just debts “should be paid, and subject thereto that the balance, if any, of “the said moneys, should be paid to such persons or person as “I may hereafter desire by any legal codicil to this my last “Will and testament. I appoint the said John Baker Wright, to “be sole executor of this my Will.” I may say, *en passant*, that it appears to me that this document, which I cannot call a Will, is similar to the celebrated Will of Sir Gilbert East.

CHIEF JUSTICE—Does Wright claim under this Will?

Attorney General—Yes.

Mr. Gilbert—No—he does not.

Attorney General—He claims as executor.

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Mr. Gilbert—Yes; but he does not claim to have any beneficial interest under it.

Attorney General—I did not say that he did.

CHIEF JUSTICE—What is the struggle about then?

Attorney General—We say that the Will is wholly bad and that Wright cannot act as Mrs. de Coeverden's Executor; and if that be so, there will be no difficulty in the heirs of Joseph Bourda adiating as soon as the question is decided; but even if not, I am quite willing that the Administrator General should represent the de Coeverden estate, and probably it will be found that, so far as our interest is concerned, it will just as much facilitate the final settlement as if Mr. Wright acted under a Will which is bad.

CHIEF JUSTICE—For the purposes of this suit for ascertaining the rights of parties, I suppose it must be immaterial what name you use as representing the estate?

Attorney General—It might not be as regards this suit; but we do not know what other questions may arise at some future stage of the proceedings. I do not know whether the fact of a party being brought into Court as Executor under a Will, if that Will is legally void, may not affect the whole question elsewhere; and therefore I should like to have the whole question brought before the Court, and to have it decided whether Wright is entitled to act as Executor.

CHIEF JUSTICE—AS adiating the Will?

Attorney General—There will be very little difficulty in getting the question settled if the Administrator General represents the estate of Madame de Coeverden, supposing she has any vested right to be represented.

CHIEF JUSTICE—He must get possession.

Attorney General—There would be no difficulty in doing so, because we could go against the party in possession. Of course, the Administrator General could claim to have the property delivered over. Wright admits that he is in possession of it under a Will; but we say, the Will is void.—“The Plaintiffs aver that the said John Baker Wright has deposited the said document in the Registrar's office for the counties of Demerara and Essequibo, as and for the last Will and Testament of

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“the said Elizabeth Ruysch de Coeverden, and that he has
 “taken possession of and is in possession of her estate and
 “claims to represent the same as her Executor. The Plaintiffs
 “further aver that the said Elizabeth Ruysch de Coeverden as
 “*fidei commissarii* heiress of the said Joseph Bourda as afore-
 “said possessed in her lifetime and up to the time of her death
 “a life interest as *fidei commissarii* heiress in one undivided
 “third of the said plantation *Vlissengen* with its appurtenances,
 “which interest ceased and determined immediately upon her
 “death.” That is to say, that her interest being a mere *fiduciary*
 interest ceased immediately on her death, and there has all
 along appeared to me to be more or less a contradiction in the
 Defendants' claim, for according to their contention she had
 only a life interest up to the time of her death, and yet at the
 moment of her death she had a vested estate to go to her heirs;
 but what we say is this, that at the time of her death she had no
 vested estate at all to go to her heirs, and that her interest went
 to the heirs of Joseph Bourda. “But that the said John Baker
 “Wright, in violation of the terms of the said Will of the said
 “Joseph Bourda, and wrongly alleging that the said undivided
 “third of the said Pln. *Vlissengen* with its appurtenances passed
 “under the aforesaid Will of the said Elizabeth Ruysch de Co-
 “everden and was thereby devised, has illegally taken posses-
 “sion of the said undivided third of the said Pln. *Vlissengen*,
 “and continues in possession thereof.” That point raises the
 question. Of course, all the parties are anxious to have the right
 interpretation put upon the Will, and then to enter upon what
 has been a sort of promised land to many of them, after more
 than forty years wandering. “The Plaintiffs further aver that the
 “said instrument purporting to be the last Will and Testament
 “of the said Elizabeth Ruysch de Coeverden is null and void
 “and of no effect whatever on the ground and for the reasons
 “following, viz. Firstly—Because the same is void for uncer-
 “tainty. Secondly—Because the same contains no institution of
 “an heir, and because no codicil or other testamentary disposi-
 “tion was ever made by the said Elizabeth Ruysch de

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“Coeverden, appointing any heir or residuary legatee. Thirdly—
 “Because the same is entirely in the handwriting of the said
 “John Baker Wright himself, and because at the time he wrote
 “the same he (the said John Baker Wright) was the legal ad-
 “viser and solicitor of the said Elizabeth Ruysch de Coever-
 “den.” Now, of course the parties whom I represent make not
 the slightest imputation upon Mr. Wright. I would not do so. I
 do not profess to cast the least imputation upon him; but at the
 same time the rules of the Dutch law are very strict on the sub-
 ject; and naturally the Bourda family, that is to say the Boode
 branch of it whom I represent and who I believed always lived
 on very good terms with Madame de Coeverden, especially
 Madame Ely, were a little surprised when they found that she
 had made this singular Will; and unless it is a valid Will they
 are not disposed to admit that Wright is her legal Executor at
 all. “Fourthly—In so far as the said Pln. *Vlissingen* with its
 “appurtenances is concerned, because the said Elizabeth
 “Ruysch de Coeverden had in law no disposing power over the
 “said property or any part thereof, the same being strictly lim-
 “ited by the terms of the aforesaid Will of the said Joseph
 “Bourda.” That is the main point. That she had no disposing
 power over *Vlissingen*, the same being strictly limited by the
 Will. Of course, that goes to the whole root of the matter, be-
 cause, supposing the Will to be correct in form, yet so far as
 any bequest of Pln. *Vlissingen* is concerned it would be abso-
 lutely null, for the property was strictly tied up.

CHIEF JUSTICE—But there is a question of great import-
 ance, a question of how far *Vlissingen* passed to Madame de
 Coeverden so as to give her any dominium over it, and it is of
 the greatest importance that her estate should be represented
 here. It seems to me that if the Will is gone we do not get her
 estate represented here so as to be able to decide the question.

Mr. Gilbert—I believe that all the parties interested are be-
 fore the Court.

Attorney General—It so happens in this particular suit that
 the heirs of de Coeverden would be these very Boodes.

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Mr. Gilbert—The Boodes and the Dalys. I admit that everybody entitled to be before the Court is before the Court.

CHIEF JUSTICE—I suppose that appears.

Mr. Gilbert—It appears in this way. It is stated who the whole family are, and they are all here.

Attorney General—We next proceed to state the position that I am about to maintain before your Honours. “The Plaintiffs further aver that up to the time of the death of the said Elizabeth Ruysch de Coeverden, the last surviving of the aforesaid children of the said Joseph Bourda, the said plantation *Vlissengen* with all its appurtenances continued burdened with *fidei commissum* under and by virtue of the said Will, and that immediately upon her death the said plantation *Vlissengen* with its appurtenances vested absolutely in equal shares in such of the grandchildren of the said Joseph Bourda, born in wedlock, and in their lawful descendants, as were in a capacity to take at the time of the death of the said Elizabeth Ruysch de Coeverden, the said descendants dividing between them equally *per capita* the share of their deceased parent, being a grandchild of the said Joseph Bourda.” It is just possible that your Honours may take this view of the case, that if our contention is right, the two surviving grandchildren will take everything; but I must say, so far as I can form an opinion, I do believe that the terms in which this word—grandchildren—is used are wide enough to include the descendants of grandchildren—that is, great-grandchildren—and therefore we are willing to admit that the children of grandchildren should take their parents' share.

CHIEF JUSTICE—Is it any part of the Dutch law that the term grandchildren has a meaning to include family descendants?

Attorney General—Yes—I think it is in the case of the testator's own descendants. I believe it is the same also in the French law; but whatever may be the result, according to our contention either two out of the three of my clients will take the whole of the estate, or those two will divide the estate with the children of the grandchildren that survived.

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Mr. Justice BEETE—Honoré Desiré Houel and the children of Von Greisheim are great-grandchildren?

Attorney General—Yes—but I apprehend that the parties must be in a capacity to take at the time of Madame de Coeverden's death, and that no vested estate could have been in any of them previous to her death.

CHIEF JUSTICE—What do you understand by being in a capacity to take?

Attorney General—That they survived her. They were not in a capacity to take before she died, because until she died the *fidei commis* still subsisted.

CHIEF JUSTICE—That is all you mean by being in a capacity to take?

Attorney General—That is all I mean. Adverting now to the transports, the claim and demand after setting them out proceeds thus—“The Plaintiffs further aver, that the aforesaid “transports of the 8th of April 1846, and 18th of November “1855, were ineffectual to convey any title in the corpus of the “said plantation *Vlissingen* with its appurtenances, and that no “legal title thereunder is now vested in the said John Frederick “Charles Hermann Von Greisheim in his own right and as ex- “ecutor and guardian as aforesaid, or in the said Ernst Christian “Hermann Gunther Von Greisheim and Sophia Luitgard Hen- “rietta Eugenie Von Griesheim, or in the said Henry Sarsfield “Bascom, in or to the said Pln. *Vlissingen* and its appurte- “nances or any part thereof.” It is no part of my contention in this case to dispute that some interest may have passed to Mr. Bascom and the Von Greisheims. They may have been entitled to a usufructory right and to certain arrears of rent to a certain day. That is a matter which is of no concern to us in this case. All that we contend for is that if our construction of the Will be correct these grants are ineffectual to convey any title in the freehold, for the reason that they were passed when the *fidei commis* was subsisting.

CHIEF JUSTICE—Then do I understand that you consider that if any of the grandchildren survived Madame de Coeverden they took *per capita*?

Attorney General—The descendants take *per capita* as

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between themselves. Suppose a grandchild died leaving six children, they would stand in his place.

CHIEF JUSTICE—They would take *per stirpes*, but suppose a grandchild was living?

Attorney General—Of course he would take *per capita*. I am willing to admit Honoré Desiré Houel in his mother's place, and the Von Greisheims in their mother's place, but only to the extent of their mother's interest. My meaning of the word "capacity" is that they must be living at the time the *fidei commis* ceased, and I think that great-grandchildren may be considered grandchildren so far as their parents' shares are concerned. Of course, it must be proved that they are legitimate descendants of Joseph Bourda. I presume that when the old gentleman made his Will few people had any idea that any child of his would have lived to so great an age as Mrs. de Coeverden, who must have been considerably over ninety. The claim and demand concludes thus:— "Wherefore the Plaintiffs demand and conclude that by sentence of this Honourable Court the instrument alleged by the original Defendant, John Baker Wright, to be the last Will and Testament of Elizabeth Ruysch de Coeverden, deceased, shall be declared null and void and of no effect whatever, on the grounds and for the reasons set forth in the narrative part of the claim and demand herein. And that it be further declared that the said Elizabeth Ruysch de Coeverden had in law no disposing power, over any part of the said plantation *Vlissengen* with its appurtenances, the said property being strictly limited by the terms of the last will and Testament of the said Joseph Bourda." Now, this is the main point.—"And that it be further declared that immediately upon the death of the said Elizabeth Ruysch de Coeverden the said plantation *Vlissengen* with its appurtenances vested absolutely in equal shares to such of the grandchildren of the said Joseph Bourda born in wedlock and to their lawful descendants as were in a capacity to take at the time of the death of the said Elizabeth Ruysch de Coeverden, the said descendants dividing between them equally the shares of their deceased parent, being a grandchild of the said Joseph

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“Bourda; and lastly with condemnation of the original Defendant to the costs.” I believe that a suit without concluding for costs would be so unprecedented here, that it might almost be open to special demurrer, but I presume there can be no question that whatever way this case goes, the Court will direct the costs to be paid out of the estate. If ever there was a case that justified that course it is this. I think it would be advisable to clear away the ground to show what is admitted and what is the contention raised on the part of each member of the family. So far as the Von Greisheim branch is concerned, they do not deny any of our allegations of fact and as to any question that may be raised as to the transport Baron Von Greisheim and his family are quite indifferent. Whatever view the Court may take of their transport they are quite willing to abide by. The real matter for decision, for which they are just as anxious as any other member of the family, is the principle on which this inheritance is to be divided. The only parties with which I have any question to argue at all in this case are Wright on behalf of the estate of de Coeverden and as executor of Richard Joseph Johan Edward Daly, and the two Dalys who are stated to be illegitimate. Now, they raise a question which, if their contention is correct, and these Dalys are legitimate, will in substance, I admit give them one third of the whole estate.

CHIEF JUSTICE—Surely, if grandchildren under the Will means descendants of grandchildren, all these parties would claim to take *per capita*. I want to understand exactly how the argument is intended to lie, how you seek to establish that, interpreting grandchildren under the Will as letting in the descendants of deceased grandchildren, these descendants will take *per stirpes*. I thought you were going to argue that the property remained in the family for all descendants.

Attorney General—Well, I am not concerned to raise that question.

CHIEF JUSTICE—But the claim under the Will is this, that all who do take head for head; so that I cannot understand how you are to establish that they are to divide among them the share of their deceased parents.

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Each person who takes, must take as much as any other person, if I understand what you mean by descendants.

Attorney General—It so happens that I think in this case it really makes very little difference. In Houel's case there is only one child and in Von Greisheim's three; there are not a great number of descendants. Of course, if these Dalys are legitimate, they will come in, but I contend that they ought not to come in at all.

CHIEF JUSTICE—You misapprehended my question; with respect to the Von Greisheim's, are they to take one share or three shares?

Attorney General—It is an important question as to them. We conceive that they ought to take one share, that is, their mother's share.

CHIEF JUSTICE—I can only say that according to the English phraseology, if they were to take by substitution they would take only one share; but I understand you that the descendants take, not by substitution, but by designation—that they are actually described.

Attorney General—I certainly meant the same thing as your Honour, that they would take by substitution—that they would succeed to the grandchild's share.

CHIEF JUSTICE—That is an important distinction.

Attorney General—It appears to me that what the testator meant was that so far as his own children were concerned they should have only a life interest in plantation *Vlissengen*, but that the plantation should vest absolutely in his legitimate grandchildren.

CHIEF JUSTICE—That I understand—children, as he says, begotten in wedlock.

Attorney General—I will allude to that point more particularly by and by, but I only touch the point there. There seems to have been an obvious reason for it. You see these were illegitimate children of the testator begotten of a slave, and he knowing that this property, which was laid out in townships, was likely to become very valuable, was anxious that his three daughters and his sons also should marry, and they should beget offspring in lawful wedlock, and that this fine inheritance should be vested in his legitimate grandchildren. I think his intention was that as regards his three daughters

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they were only to take a life interest, and that the estate was to vest in their lawful children.

CHIEF JUSTICE—I suppose when he says children he always means legitimate children, unless otherwise expressed. It struck me that in speaking of their children begotten in wedlock he meant their actual children, the children of his own children, just like what is meant by the English phrase children begotten on the body of so and so.

Attorney General—I can understand his reason for putting it in that way. He was anxious that this large property which he left should be vested in the lawful issue of his daughters, and unless he had inserted some express provision of that sort, a question might have been raised. We know that a mother makes no bastard, and if he had made the *fidei commis* in favour of his daughter's children there might have been a question, if his daughters had left bastard children, whether they were not included; but he meant that they should be honourable heirs, and that the property should vest in them. Although *Vander Linden* intimates a doubt on the point, there are other authorities that take a contrary view as to the rights of bastard children under a Will. I believe myself that in the Dutch law as well as in the English law children must mean and ought to mean lawful children. But in this case, there can be no question on the point, because the testator has been careful to express his meaning. I will just give a summary of the admissions that are made on behalf of the several Defendants. First, as to *Mr. Gilbert's* clients—“John Baker Wright, who claims to be sole “executor to the last Will and Testament of Elizabeth Ruysch “de Coeverden late of the city of Paris, widow, now deceased—John Baker Wright as executor to the last Will and “Testament of Richard Joseph Johan Edward Daly, deceased, “Maria Marianne Daly, and Jean Eugene Henry Daly, all by “their attorney, Henry Sarsfield Bascom, and the said Henry “Sarsfield Bascom in his own right.”—These Defendants admit the Will of Bourda and that the passages in the Dutch are correctly translated. They admit that Bourda died on the day mentioned by us, whereby his Will became

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confirmed, and that he left this plantation. They admit the death of the three children, Joseph Charles, Jan Lodewyk, and Nancy. In fact, they admit all the matters of fact in the Claim and Demand, with the exception of certain points which I shall now proceed to notice. The main point on which we are at issue is with respect to my averment that his three daughters as *fidei commissary* heiresses took a life interest and no more, and they say this.—“The said Defendants admit that by reason “of the deaths of the aforesaid three children of the testator his “remaining three children described in said Will, namely, “Catherine, Elizabeth, and Maria, became the sole *fidei commis* heiresses of the said Joseph Bourda, under and by virtue “of the terms of his said Will, and that consequently the said “pln. *Vlissengen*, with all its appurtenances devolved upon “them as *fidei commis* heiresses in three equal undivided “shares or thirds; but the Defendants deny that each of them “took a life interest in her share, and no more.” And it is here, I think, there is something like confusion or a contradiction in terms; because, if each of them was only a *fidei commis* heiress for her life, I do not see how immediately on the point of death by what curious process that *fidei commis* estate could be enlarged to an absolute estate of inheritance so as to devolve on her heirs. If she was *fidei commis* heiress I should imagine that as a matter of course on her death the estate would devolve in terms of the original Will. A *fidei commis* heiress must derive her title from the Will which created the life estate and the devolution of that life estate must, it appears to me, be decided by the terms of the original Will.

CHIEF JUSTICE—But surely the *fidei commis* might be on other terms and conditions than the life of the persons.

Attorney General—I submit it is a contradiction in terms to say that a *fidei commis* heiress, who has a *fidei commis* estate only, can have any disposing powers over the inheritance.

CHIEF JUSTICE—Only in respect to *fidei commis* heirship?

Attorney General—That is all.

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CHIEF JUSTICE—But they might have a *fidei commis* heirship and another when the *fidei commis* ceases.

Attorney General—But if it ceases there is nothing more to come after it so far as such heir is concerned.

CHIEF JUSTICE—That is just what I want to know.

Attorney General—I do not see how it can. If a person has only a life estate, I do not see how anything can come to him after death.

CHIEF JUSTICE—I am sure in the English law it could; it might be uncertain till he died. It is a common case for a man to be left tenant for life with contingent remainder.

Attorney General—But there is no contingent remainder in the Will of Joseph Bourda, which would give any such claim. I have read it all. He intended to give to his daughters what is a mere usufruct of the property, and nothing beyond it.

CHIEF JUSTICE—That is meeting *Mr. Gilbert's* contention.

Mr. Justice NORTON—But it is not a *fidei commis* of the whole estate?

Attorney General—No. The bequest of *Vlissengen* is a special bequest in *fidei commis* and the bequest of the general estate is separate and distinct from it. But your Honour must read the Will with the sequence to see what he gives the children. Of course, the Court will put such a construction upon the Will of Joseph Bourda as will give effect to the whole of his intention, and I think there can be no question that his intention was to bestow an immediate interest of a limited nature on his children, and that interest was simply the usufruct of this property. As to the rest of his property, he gave an absolute interest. With respect to *Vlissengen*, he carefully declared that they were to have a limited interest or *fidei commis*, and our construction is that he devised the estate itself to his grandchildren, and their issue. So far as I know, there will be no occasion for the niceties of the English law here; for there can be no doubt that under the Dutch law, a person may create a *fidei commis* in favour of particular individuals and leave the estate to their unborn descendants, and in this

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case the Defendants admit that after the death of three of the children the other three became *fidei commis* heiresses, but they deny that each of them took only a life interest. The only other averments in this answer that I need notice are with respect to the Dalys and with respect to the transports. As regards to the legitimacy or illegitimacy of these two Dalys, the Defendants deny “the truth, pertinency and relevancy of the ‘Plaintiffs’ statements of the illegitimacy of the said Maria ‘Marianne Daly and Jan Eugene Henry Daly.’” With respect to that point, I have already explained to the Court that as I was bound to bring the parties before the Court, so in order to protect my clients, I felt bound to state that we did not recognize them as legitimate children of Madame Daly. The real point at issue in the suit can be determined without any final decision on this question; but it was necessary to bring them before the Court, and that being so, we could not admit that they were legitimate, and I think we have evidence, very strong evidence, to satisfy your Honours that they are not legitimate. Now, with respect to Madame de Coeverden's Will, they admit that it is correctly set forth; they admit that Wright has deposited the Will and is in possession of the estate and claims to represent it; and they aver that the Will is a good and valid Will and that Wright is executor, and that Wright as such Executor is rightly in possession of her one-third of the plantation *Vlissengen*, “which she held in *fidei commis* during her life, and which by “her death without leaving issue formed part of her estate and “vested in her proper heirs, subject to the payment of her debts “as provided for in her Will.” That, of course, is one of the points of the case, whether the third which she took as *fidei commis* heiress vested on her death in her heirs or in the heirs of Joseph Bourda. They say that that share which she possessed in her life as a *fidei commis* vested in her heirs. We say, no, that immediately on her death it vested in the heirs of Joseph Bourda under his Will. With respect to the averments as to the transports, the Defendants say, “that it is not competent “to the Plaintiffs to question the validity of these transports.” I do not know

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that it is not competent to us to do so. I do not know that a transport is a document of such a sacred nature that it is not competent to a person to question it; but that is not the question here. The question is as to the Will of Bourda.—“And further, that the first of these transports”—in fact, one of these transports was passed when some of the parties must have been infants, if in existence at all. At ill events, it was passed when they were mere children, and they could not be denuded of any right they held by any transport that any Court in the world may have passed. But they go on to say:— “And further “that the first of these transports was passed after and in pursu-
 “ance of a decision of this Honorable Court in a suit in which
 “the same question which is now raised by the Plaintiffs as to
 “the effect of the Will of Joseph Bourda was raised by the said
 “Jules Victor Houel, as natural guardian of the said Honoré
 “Desiré Houel, then a minor, as Plaintiff, against the Adminis-
 “trator General of Demerary and Essequibo as curator to the
 “insolvent estate of Louis William Boode, deceased, in order
 “to prevent the passing of the said transport, and was decided
 “against the Plaintiff.” I conceive that that is an erroneous
 statement of the fact. At all events, the party interested was a
 minor at the time and could not be prejudiced by the proceed-
 ing. But even admitting that it is correct, any suit between the
 guardian of Houel and somebody else, the Administrator Gen-
 eral as curator to the estate of Louis William Boode, could not
 in the slightest degree affect the Plaintiffs in this case for it
 was *res inter alios acta*:—“And because the present Plaintiffs
 “each have always held from her and now hold from their de-
 “ceased mother the same share and by the same title as the said
 “Louis William Boode in his lifetime held.” It appears to me
 that all this statement could amount to would be that totally
 different parties, namely, Madame Ely, Houel, and Von Grei-
 sheim, are to be bound by a decision which was given with
 respect to a similar claim, in a suit in which the Administrator
 General and another person were parties, and in which this
 particular question may or may not have been raised. I was not
 here when the case was

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pleaded. I have heard of it, and I have been told as a curious instance of how Counsel may be embarrassed in arguing a case, that with reference to this Will of Bourda, on which almost every lawyer that ever practised in the colony and many other lawyers out of the colony have given opinions—in this case Sir William Arrindell was on one side and Mr. Harvey on the other, and it so happened that each was arguing against his previously expressed opinion, and it may not have been so easy for them to put forward their opinions with the same confidence as if their positions were reversed. At the same time, as there have been a variety of opinions given, I hope your Honours will give a decision which will be final and conclusive.

Mr. Justice BEETE—Was that case absolutely decided on the merits?

Mr. Gilbert—Yes, it was decided on the merits. There was an opposition suit at first by Mrs. de Coeverden, but in those days, there was always something wrong about the powers of attorney sent out, these people doing things in the cheapest way they could. There was some defect in Mrs. de Coeverden's power, and the opposition failed. Then an interdict was taken out on behalf of the minor Houel, and the question was raised. I remember that Mr. Justice DOWNIE, who, as the first Puisne Judge knows, understood the Dutch language very well, took home the Will and translated it for himself. The question was precisely whether the *fidei commis* was in favour of the whole of the children or on the death of the last survivor. That was the question raised in that suit. The Acting Chief Justice, Sir WILLIAM ARRINDELL, did not at first take any part in the case, because he had been engaged in it before; but after the decision was given he concurred in the construction of the Will and in the decision.

Mr. Justice BEETE—Was that translation different from the present translation?

Mr. Gilbert—There was no material difference.

CHIEF JUSTICE—And this transport was passed after and in consequence of that decision, the transport specifying one eighteenth share?

Mr. Gilbert—Yes.

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CHIEF JUSTICE—Then, the Court must have put a definite construction on the Will to enable it to come to such a decision.

Mr. Gilbert—I do not think it necessary to quote that transport as evidence, but as we were stating all the facts, I thought it proper to refer to it in the pleadings.

CHIEF JUSTICE—Certainly, it is necessary we should have that decision before us, not that we are bound to follow it.

Mr. Gilbert—No. I only say that the Court came to that decision. But it may be a downright erroneous decision.

CHIEF JUSTICE—We must have the decision.

Mr. Gilbert—I am sorry that in those days the Judges did not give reasons, and I do not know that there is a report of the judgment.

Attorney General—It is very unfortunate that in these cases we should have to depend so much upon personal recollection. This case happened long ago. Of course, I know nothing of it from my own knowledge, but the information I have received from other parties leads me to doubt that the actual question was decided in that case; and I can only say, so far as Baron Von Greisheim is concerned, he did not consider that the decision had that effect, and he has always been under the impression that the Judges took a very erroneous view of the English meaning of the Dutch words. I understand there was a translation of Mr. Moliere in that case, which was incorrect.

Mr. Gilbert—You are wrong. There was a translation which left out the words “head for head,” but that was not used. I have the translation here.

CHIEF JUSTICE—Still, that is only what Baron Von Greisheim's impression was. You say it was contested, and the passing of the transport showed that the Court had solemnly decided the question; because, otherwise, it could not get at the share to be transported. If the records of the Court do not show all that, then of course the decision will be of no value in this case.

Attorney General—Even if they do, then we are in this position—supposing this will has been considered on one

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occasion, we on the part of our clients claim a re-consideration of it now. Of course your Honours will attach what weight you think right to the view taken on the previous occasion; but at the same time that will not prevent you from pronouncing your own unfettered decision on the case as it stands before you. I have heard it said over and over again by the Judges of this Court that they were not bound by precedents and this is a sentence that cannot bind us, because we were no parties to it. We had no opportunity of raising the question then, and in any point of view the Court could not have pronounced any decision as to the devolution of the estate after the final determination of the *fidei commis*, because Mrs. de Coeverden was then alive, and according to our view the estate was only divisible among the grandchildren at her death, and was under trust up to that time. From the extreme old age that she attained, many changes have taken place in the meantime; but under ordinary circumstances, I apprehend, there would be little or no difficulty in deciding that what the testator meant was that his daughters should have the usufruct of the property and that the property was to vest in their legitimate descendants. Whatever decision was come to before, your Honours are not bound by it in this suit. If a transport was passed while the *fidei commis* was still subsisting, then I can only say with all respect that the Court was mistaken as to the legal construction of the Will, because if the *fidei commis* was still subsisting it was improper that any transport of a share of the corpus of the estate should be passed.

CHIEF JUSTICE—If you consider that transports cannot be passed here of estates in remainder, as we say at home.

Attorney General—I think it was impossible at that time to ascertain the share of the corpus of the inheritance.

CHIEF JUSTICE—You say it was impossible to ascertain the share in the inheritance.

Attorney General—Yes, I say it was.

CHIEF JUSTICE—But the decision might have been only an erroneous one, without the Court being incompetent to entertain the question. Was the Court competent?

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Attorney General—No—I do not think it was; and if I should go before the Privy Council that certainly is a contention I should make before the higher tribunal.

CHIEF JUSTICE—It might be a mistaken decision, and yet a competent one. It might be that the Court was entitled during the continuance of the *fidei commis* to determine the question as to the shares, if their construction of the Will was what the Defendants now contend for. They may be wrong in that conclusion, but still it was a competent decision.

Attorney General—I think it was not, and I put it to your Honour in this way. If it is to have the effect contended for, then the Court ought not to have pronounced that decision till all the parties interested were before the Court, just in the same way that your Honour would not hear this suit on the previous occasion till all the parties were before the Court; and as on that view you held you were incompetent, so now I maintain that the Court was not competent to pass a sentence to conclude the rights of parties not before it.

CHIEF JUSTICE—It did not conclude them. This is a suit as to the construction of the Will in general. I understand that to have been a suit between two parties to decide a question between themselves.

Attorney General—No—not as *Mr. Gilbert* puts it, It was going the extreme length of concluding the rights of everybody, from *Mr. Gilbert's* construction of it, to decide that one eighteenth share was vested in Louis William Boode, and that on his death or insolvency the Administrator General was authorised to vest it in others. If that is a correct view of the sentence, then the Court did conclude the rights of all parties, without having all the parties interested before it.

CHIEF JUSTICE—It did not conclude the whole of the parties. I understand that one of the parties asserted his own right, and it was contested by another.

Attorney General—What I understand is, that the Administrator General advertised an undivided eighteenth share of the estate, and one of the heirs who happened to be represented here at the time tried to stop the transport.

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CHIEF JUSTICE—Because he thought that it was in derogation of his right.

Attorney General—He tried to stop it; but the transport was passed. What is the effect of that transport, is another question. So far as it is concerned, I am prepared to contend that on the face of the instrument, it is no conveyance at all.

CHIEF JUSTICE—This suit seeks for a declaration of the Will as between all the parties interested.

Attorney General—I was anxious to have a declaration on the previous occasion as between the parties who appeared and were willing to be bound by it; but your Honours' said you could not consent to that. On the ground that all the parties were not before the Court you would not declare the rights of those who did appear.

Mr. Gilbert—In the first instance, when Mr. Kennedy came up to pass the transport, one of the parties came up and opposed, but the opposition was thrown out on the ground that the power of attorney was wrong. Then, there was an interdict taken out. The other parties did not appear.

CHIEF JUSTICE—And the interdict was set aside—it might have been on any ground.

Mr. Gilbert—I know the ground was that the Court put the same construction on the Will that we do.

CHIEF JUSTICE—Does that appear in the case.

Mr. Gilbert—I do not know that I can show it, for I have not the Judges' notes.

CHIEF JUSTICE—Unless it is conceded on the other side, you could not expect that a bare tradition as to the grounds on which the Court acted would be taken in support of your side.

Mr. Gilbert—The *Attorney General* admits it himself.

Attorney General—I say according to your statement. I was not here at the time.

Mr. Gilbert—You can see the grounds that were taken in support of the interdict.

Attorney General—I can only say this, that if the decision had the effect that *Mr. Gilbert* contends for, the other parties who were not represented in the suit were exceedingly prejudiced.

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Mr. Gilbert—They could have opposed.

Attorney General—You say one of them was turned out.

Mr. Gilbert—Because his power of attorney was wrong; but the other might have come up.

CHIEF JUSTICE—Mr. Justice BEETE does not understand how an interdict would lie in such a case after opposition had failed,

Mr. Justice BEETE—The interdict could not have been taken out.

Mr. Gilbert—No—Mrs. de Coeverden first opposed, and after it was decided against her then Houel came up for his son.

Attorney General—At all events, I hope I may feel some confidence that your Honours will feel yourselves at liberty to pronounce a decision on the construction of the Will of Joseph Bourda, without being fettered by any views expressed in proceedings in which the great majority of persons interested in the estate had no opportunity of being heard. If it were otherwise, I certainly should go the length of saying that it was incompetent in the Court in any former proceeding to pronounce a decision so far as our interests are concerned. With respect to the answer put in on behalf of the Von Greisheim family, it amounts substantially to an admission of all the statements of fact contained in the Claim and Demand and submits the questions of law to the judgment of the Court.—“The said co-Defendants admit that by reason of the deaths of the aforesaid “three children of the testator his remaining children described “in said Will namely, Catherine, Elizabeth, and Maria, became “the sole *fidei commissary* heiresses of the said Joseph Bourda “under and by virtue of his said Will, and that consequently “possession of the said plantation *Vlissengen* with all its appurtenances devolved upon them as *fidei commissarii* heiresses “in three equal undivided shares or thirds, but that the said co-Defendants leave the Court to decide the extent of the interest “which each of such children took in said plantation.” They submit the point entirely to the Judges. With respect to the Daly family they admit:—“That

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“the said Maria, the aforesaid child of the said Joseph Bourda, “died in the month of April 1849, leaving her surviving only “three children, namely, Richard Joseph Johan Edward Daly, “named in the rubic of this cause, who is admitted to have “been a legitimate child, but now deceased, and Maria “Marianne Daly and Jean Eugene Henry Daly, who are both “illegitimate, and consequently not entitled to any interest un- “der the Will of Joseph Bourda deceased.” They entirely con- cur in all the objections taken to the Will of Madame de Co- everden and that Wright is not entitled to represent her estate; and with respect to the transports they declare:—“that not- “withstanding the said transports hereinbefore mentioned, they “are willing to abide by whatever this Honourable Court may “decide, &c. &c.” It is not a matter about which Baron Von Greisheim's family have any wish to conceal their real view, and they conceive that these transports, if they are to be con- sidered as transports of the fee simple of plantation *Vlissingen*, really ought never to have been executed, that it was out of the power of the Court to pass a transport of the corpus of the estate; and therefore it is not the interest of Von Greisheim or any of his children to maintain the validity of the transports.

CHIEF JUSTICE—It would not do for the Court to make a declaration which may be adverse to the other side, without entertaining the question of the legitimacy of the two Dalys who were said to be illegitimate; because if those points only are in contention with regard to the shares of the property the decision may not determine the principle without other pro- ceedings to carry it into effect.

Attorney General—The only reason for the allegation is that it appeared to have been the view of the Court, and I con- ceive it to be a proper view, that they should be introduced in order to show that all the parties who claim to be interested are before the Court. In fact, all these parties were introduced into the Robbstown Ordinance, which of course the Court will take judicial notice of, so far as it contains a recital of the names of all the parties who claim to be interested in the estate under the

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Will of Joseph Bourda. Now, supposing we are right to the full extent, and that the Will is interpreted in the way we seek, it might or might not—I am willing to admit that it might not—be necessary for us then to bring an action against the party claiming to be entitled to an eighteenth share of the fee simple of *Vlissengen* estate under his transport, and he might say—what would be the validity of defence it is not for me to state, but he might at all events say—“I am entitled to maintain my right because, although the Court may have made a mistake, I am entitled to take advantage of the error of the Court; notwithstanding that you may not have been represented at the time, the question was decided, and you are bound by the decision.” But even in Mr. Bascom's case, he cannot claim the slightest interest in any share of Madame de Coeverden's estate. Whatever he has, he has only an eighteenth, without reference to Mrs. de Coeverden's share; and therefore the Court with respect to that part of the corpus of the inheritance your Honours will have to decide upon the construction to be placed on the Will of Bourda, without reference to the question whether the transports to Bascom and Von Greisheim are good or bad.

CHIEF JUSTICE—The construction of the Will most favourable will give them an eighteenth.

Attorney General—The construction of the Will can only support them so far as is consistent with the law of the case. Your Honours cannot view those transports as transports of the fee simple of the estate. It must be only an eighteenth share of what could be received at the time. It might have extended to arrears of rent. There was the Lacytown property which was leased out and on which, long arrears were due. Bourda's representatives were remiss, and there were difficulties in realising the rents, and large arrears were due. The party who received the transport of Louis William Boode's share or any other share might have had the right to join in suing for any arrears of rents, and to that extent the transport might have been perfectly good; but it is not my intention to enter into the question.

CHIEF JUSTICE—But, must not those transports stand

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in your way? If the decision asked for cannot be pronounced without setting aside those transports, must not those transports stand in your way?

Attorney General—I do not see that. It will depend a good deal upon the wording of the transports themselves. All that the Court will look at in order to give a decision on the Will of Joseph Bourda is that all the parties who claim to be interested are before the Court.

CHIEF JUSTICE—Then, what is Mr. Bascom's position before the Court? He has had one decision before, and he has a transport giving him an eighteenth. Can there be a decision of this Court which does not give an eighteenth and does not set aside the other decision?

Attorney General—I conceive that in a suit for a declaration of the Will I could not mix up another question for a decision on a transport; but if your Honours think that a claim to have the transports set aside should be inserted I hope you will allow us to add it to the claim and demand; because the only object the parties can have is to raise the whole question.

CHIEF JUSTICE—Of course, if the other parties are willing I do not know that there can be any difficulty about it.

Mr. Gilbert—I have no objection.

CHIEF JUSTICE—Then you will have the question as to the transport settled now?

Mr. Gilbert—Yes, because the question is virtually raised.

CHIEF JUSTICE—Yes, and the effect might be to reduce the value of our decision unless the transport is brought under review.

Attorney General—That is the reason I wish to put it in.

Mr. Gilbert—I have no objection to its being put in. The only thing I say is that the construction contended for by the opposite side will be tantamount to saying that those transports ought not to have been passed.

CHIEF JUSTICE—All I wish is that the argument should go on, and if it is desired that it should be put in at any time; or if you prefer it, let the claim and demand remain as it is.

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Attorney General—No—I am not wedded to my pleadings.

CHIEF JUSTICE—Then, the same course will be taken with respect to the question as to legitimacy?

Attorney General—No—that question is specially raised.

CHIEF JUSTICE—Do you seek for a declaration only on the principle of the Will, or do you call upon the Court to pronounce on the rights of every person and on all the questions introduced by statements of fact.

Attorney General—I thought it very probable that this might be done to meet the justice of the case—that if your Honours made up your minds as to the law, then you would give a decision as to the law of the case, and you might, if you thought it necessary to do so, allow any further questions to stand over for further hearing—that is, as to legitimacy or illegitimacy. I understood that that course would suit all parties.

CHIEF JUSTICE—Even supposing that you have a partial declaration for further discussion, should not the conclusion be in a form to give rise to these further considerations?

Attorney General—I apprehend not. I understand that provided you set out the facts fully in your Claim and Demand, the conclusion may be very much briefer than according to the old formula; and we set out the facts and issue is joined upon them. If your Honours consider it necessary to have a further statement in the conclusion I am willing to make it. Why I say I thought the question of illegitimacy might stand over for further consideration is this—with regard to the greater number of the parties there can be no dispute as to a particular portion of the funds, and there is no reason why that portion should be tied up pending the decision of other questions. In the same way, if there is any doubt as to the legitimacy or illegitimacy of the Dalys, supposing your Honours are not satisfied, further proof may be obtained by opening points of office or otherwise, without preventing your Honours from dealing with the main point of law which is as to the construction of the Will.

CHIEF JUSTICE—It seems to me that you seek a declara-

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tion on the general principle as to the construction of the Will, and then to decide collateral questions.

Mr. Gilbert—I am very anxious to have them decided. The suit would be of very little use to us unless all these points are decided.

Attorney General—As we are agreed, then, I will make the addition.

CHIEF JUSTICE—Yes—that you seek a declaration as to the actual specific rights of the several parties.

Attorney General—Yes—even the smallest one is considerable. I may tell your Honours that I am representing an old lady upwards of eighty years of age living in penury; and as to this unfortunate old gentleman Augustus Deodatus Boode, although he is interested certainly to the extent of many thousand pounds, because he is a grandchild, and a legitimate grandchild, whose rights are therefore good, he also is in extreme want.

CHIEF JUSTICE—The question necessarily arose in my mind while we were on the other question of the transport, because I think it will advance the final decision of the case.

Attorney General—I am very anxious to aid in that. So far as I am concerned I only wish to have a declaration of the rights of the parties, and whatever their just rights are, we will be satisfied. I will not take advantage of any slip or oversight, because these proceedings are adopted only to ascertain what are our undoubted rights. Before coming to the main question I wish to deal with the preliminary one which has somewhat embarrassed the proceedings, namely, this Will of Madame Ruysch de Coeverden. It might be of comparatively little importance to us, but I believe the real question at issue, so far as I have any information on the subject; is, whether Madame de Coeverden's usufructory share is to go to the heirs, or whether it is to be swallowed up by a crowd of creditors.

CHIEF JUSTICE—A crowd of creditors?

Attorney General—Of course, if Wright is her executor and the Will is good the first thing to be done is to pay her debts out of the share.

CHIEF JUSTICE—Then, as you put it, the question

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whether her creditors are to be paid or not will depend upon the decision of this question?

Attorney General—Certainly, because she states that he is first to pay her debts. Of course, the heirs would only get what might remain after the payment of the debts; but, looking to the way in which the Will is drawn, it appears to me that that question makes it worth the while of the heirs of Bourda to dispute the Will on the ground that she had no vested interest to dispose of, whereas, in the other case, whether she left a Will or not, makes no difference, because they are the heirs of Bourda and her heirs.

Mr. Gilbert—But as to the Dalys, their legitimacy or illegitimacy could not affect their interest from her.

Attorney General—I do not agree with *Mr. Gilbert* there. I admit that there are authorities on the other side; but I conceive that in an inheritance of this sort only the lawful heirs of Mrs. de Coeverden could succeed her. Bastards could not succeed.

CHIEF JUSTICE—I understood you that that was one of the questions to be decided.

Mr. Gilbert—If Mrs. de Coeverden took an interest which her heirs could take this question would not arise. I do not know that it will arise in this suit.

CHIEF JUSTICE—Yes it will arise in this suit, because it is pleaded.

Mr. Gilbert—If you merely set aside the Will—if Wright could not take the property to pay her debts—then her heirs come in.

CHIEF JUSTICE—That is supposing Madame de Coeverden had a power of disposition.

Attorney General—The grounds on which we take objection to the Will of Madame de Coeverden are shortly these:—“First, because the same is void for uncertainty. Secondly, because the same contains no institution of an heir, and because “no codicil or other testamentary disposition was ever made by “the said Elizabeth Ruysch de Coeverden appointing any heir “or residuary legatee.” Now as your Honours will perceive, this is a suit touching immovable property in this colony.

CHIEF JUSTICE—That is the first question?

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Attorney General—Yes; I wish to clear away the outwork before I come to the main point. I do not conceive that it is necessary for me to quote authorities for the purpose of establishing this proposition—that a Will purporting to dispose of immovable property must be construed according to the law of the place where the property is situated—the *lex loci*. Now, the property in dispute is a portion of what was once Plantation *Vlissengen*—in fact, a very considerable portion of the city of Georgetown—immovable property of the most valuable description; and therefore this Will must be construed according to the law of this colony. Now, the distinction between a Will in the English law of immovable property and a Will in the civil law was very concisely pointed out by Lord MANSFIELD in the case of *Harwood v. Goodright*, 1st vol. *Cowper's Reports*, p. 90. After referring to the facts of the case, which I need not read, Lord MANSFIELD said:—“But I will just state “the short compass in which the question lies. Though, as to “personal estate, the law of England has adopted the rules of “the Roman Testament, a devise of lands in England is considered in a different light from a Roman Will. For a Will in the “civil law was an institution of the heir.” And, as I apprehend, no Will can have the slightest effect in this colony without containing the institution of an heir. In fact, the illustration given in the 4th vol. of *Burge* is, “*Titus Hares esto*.” The appointment of executor is a matter that crept in afterwards. An executor may be appointed to represent an heir, but without the institution of an heir in the Dutch law, the Will is void.

CHIEF JUSTICE—Need that be done in any form of words?

Attorney General—You must name him, or otherwise designate the heir, so that he can be ascertained. But your Honour will see how she worded her will; and it is void also for uncertainty. Lord MANSFIELD proceeded to observe:—“A devise of “lands in England is considered in a different light from a Roman Will. For a Will in the civil law was an institution of the “heir. But a devise in England is an appointment of particular “lands to a

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“particular devisee and is considered in the nature of a conveyance by way of appointment; and upon that principle it is “that no man can devise lands which he has not at the date of “such conveyance.” I do not suppose your Honours want any authority about the rule by which a Will disposing of immoveable property is to be construed according to the law here.

CHIEF JUSTICE—If there had been a codicil disposing of the property, I apprehend there would have been no question.

Attorney General—But there was no codicil. I have a great many authorities here, but they all come to the same thing. Then the next point is—“Thirdly, because the same is entirely “in the handwriting of the said John Baker Wright himself.” Now there has been an express decision of the Court, as I understand, on this point, in the case of Fraser. In this case it appears to me that Wright must have considered that he took a benefit, and the Will is entirely in his handwriting. The authorities are, 4th vol. *Burge*, p. 405; *Voet*, b. 34, tit. 8, sec. 3; *Peckkius*, b. 3, ch. 10; *Bynkherschoek*, b. 3, ch. 8; *Censura Forensis*, part 1., b. 3, ch. 2. sec. 5. There are a number of other cases that were cited in the case of Fraser, and if the Court wants any more authorities I will take them down. There is *Groenewegen*, b. 8, tit. 23, and a number of decisions in the *Hollandsche Consultatien*, 4th vol., p. 362. These were decisions in the cases of persons taking benefits under a Will, and the rule is so exceedingly strict in the Dutch law that even in case of a joint Will between husband and wife where they mutually benefit each other, even in that case it is not allowed.

CHIEF JUSTICE—Where it but extends to a bare executor who takes no benefit?

Attorney General—*Yes*—that is the decision in Fraser's case, who was a bare executor.

Mr. Gilbert—No, no. All the property was left to his wife.

Attorney General—It was certainly a hard case; but the Court felt itself bound to administer the law strictly. It was the case of a young man who conceived that he

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had been treated with harshness by his family. He received great kindness from Mrs. Eraser, who nursed him while he was sick. He was quite at war with his relatives, and declared over and over again to the doctor who attended him and to others that as a recompense to Mrs. Fraser he intended to leave her the bank-shares he owned. He had the Will made, and he left the shares to Mrs. Fraser, and appointed Fraser her husband, his executor; but Fraser, not knowing the law made the Will himself, in consequence of which the Will was declared void, his wife lost every farthing, and those very relatives who had treated the testator so very unkindly got his money. I must confess that I am not one of those who conceive that every rule of Dutch law must necessarily be a good one, and it is this particularity about Wills that strikes me as needlessly severe. Take the case of a husband and wife; it does appear to be a rather curious thing that a husband and wife making a Will and mutually benefiting each other and their offspring—as that the survivor should get the usufruct and that the property should go to the children—should be liable to have their intentions frustrated, simply because the Will happened to be written by one of them. According to these authorities such a Will if written by either would be bad.

Mr. Justice BEETE—I know that many years ago I made such a Will in my own handwriting.

Attorney General—With respect to the case of Fraser, I think I have the pleadings and all the reasons on the point, and there I argued that these authorities could not be considered applicable, so far as the appointment of Fraser as executor was concerned, because the commissions of an executor must be considered as simply compensation for services rendered, but my impression is that the Court was against me and considered that commissions were a benefit in the meaning of the Dutch law. If that be so it will bear me out in this case. Certainly I do not mean to say that the Court had not some ground, because we all know the old Dutch saying here, “leave whom you will your heir, but make me our executor;” and considering that executors get 10

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per cent, suppose the Court holds that Mrs. de Coeverden was entitled to make the Will, her executor will get 10 per cent on the value of about £30,000, and he will receive at once 10 per cent on one-third of \$117,000. I think that a pretty clear benefit.

Mr. Justice NORTON—Is it your impression that the Court held that to be a benefit?

Attorney General—My impression is that the Court held the view that the position of an executor was a beneficial one, and that a man could not appoint himself executor.

CHIEF JUSTICE—It may be a valid disposition according to the law of the place of executor, although it is in the handwriting of the execution, and is it right to declare that such a principle should apply in the case here?

Attorney General—I think so; or else it would lie on the parties to prove that it was drawn up with the solemnities required under the French law. If it was a correct Will made here with respect to immoveable property, there could be no objection; but I feel certain it would be worth nothing in France. The *Code Napoleon* is very particular on the subject of Wills., and there are many cases in which parties making Wills in France have found their intentions defeated. Of course, they turn mainly on the domicile, but incidentally the French law is brought in, and I understand according to the French code a Will must either be holograph in which case every word must be in the handwriting of the testator, or it must be executed before a notary public in the presence of witnesses. I might say here in respect to this Will made by a lady in France, if you want to show that you are executor you must show that it was made according to the solemnities of the French law. But I am quite willing to admit that if it is according to the law of the colony he is executor. It must, however, be established plainly that the Will is valid according to the law of this colony; and that is one point of objection. Then, the next objection is:—“And because at the time he so wrote the same he, the said “John Baker Wright was the legal adviser and solicitor of the “said Elizabeth Ruysch de Coeverden.” I am not sure whether that is admitted or not.

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Mr. Gilbert—I do not believe it to be the fact. I am willing to admit everything I can.

Attorney General—I will not undertake to say that I am in a position to produce papers to prove it, but what we believe is that he had been acting for many years as Mrs. de Coeverden's solicitor. I think I have various letters which will show that there was that relation subsisting between them. Now, the Dutch law is perfectly clear that no notary or professional man shall write a Will under which he takes benefit.

Mr. Gilbert—It is put in the way of a notary in the Dutch law.

CHIEF JUSTICE—Still it is no stronger case.

Mr. Gilbert—No.

Attorney General—I think it will be found in the Dutch law—I am not certain whether the word executor is mentioned, but I think there is something about it in *Vander Linden* and I doubt very much whether a professional man, who is consulted by a client to draw out a Will, could appoint himself as executor. But I do not care about the word executor.

CHIEF JUSTICE—You depend upon the general rule, that nobody can write a Will under which he takes a benefit?

Attorney General—Yes, and I believe that rule is very strict. It also applies to doctors. I am obliged to the Court for mentioning to me the point that suggested itself to their minds. I shall now proceed with the objections to the Will of Madame de Coeverden. I find that when I gave your Honours the authorities on which I rely in support of the proposition that the Will is bad because it is in the handwriting of Wright, I overlooked one or two authorities that are really important, because it appears to me that no matter who wrote it, the Will itself is a nullity. I have already cited the passages as to uncertainty. In *Van Leeuwen*, p. 229, he thus lays down the general principle of which I think there can be no dispute—“The real or essential part of a Testament, or full last Will, consists in bequeathing an inheritance, without which no Will can exist; on which account it is usually inserted first of all, and. in the first part of a

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“Will, after which follow the other bequests, and those directions which the heir is obliged to satisfy and execute; which, according to our manners, are enumerated before the inheritance as a proviso of what the Testator wishes should be done and followed by the heir. * * * Bequeathing inheritance is a last Will, in which a testator institutes any one heir to his whole estate, with all rights, actions, and claims, both active and passive.” And it is also a cardinal rule of the civil law, I apprehend, that a party cannot die partly testate and partly intestate. Here she does not appoint any heirs at all. It would appear as if the old lady could not make up her mind as to whom she would make her heirs. She left herself a *locus poenitentiae* and she never made up her mind to name any body.

CHIEF JUSTICE—She said to her executor I. leave you to take possession of the corpus of the estate and to dispose of it in a certain way; and it is only with respect to the residue that I burden you with a trust. You shall sell it and first pay my debts, and after that give the residue to some person whom I shall name.

Attorney General—This is the case of a Will under which Wright is either heir or not. If he is heir, then the Will is undoubtedly bad, because it was written by himself.

CHIEF JUSTICE—That is according to the Dutch law; and by heir you mean beneficial heir.

Attorney General:—Undoubtedly. I go this length— that it would be absolutely contrary to the whole policy of the Dutch law, that a person should be constituted a sort of trustee for an unknown purpose. It is not as if the testator had indicated a certain class for whose benefit this trustee, under British law, was to exercise his functions; but at the time she intended Wright to act as her administrator, for that is the correct term. The whole question was gone into in the Albouy case, where a trust was instituted for certain devisees, and the executors, were held to be administrators of the property. Now, the cardinal defect of Madame de Coeverden's Will is that at the time of her death she had not made up her mind who were the parties for whom Wright was to act as administrator.

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CHIEF JUSTICE—There is the Will of De Saffon, in which there are no heirs, in your sense of the term.

Attorney General—No; but he indicates certain persons as a class.

CHIEF JUSTICE—But I cannot see how you can apply the term heirship to such a fluctuating body.

Attorney General—I am not aware of the precise terms of De Saffon's Will, and I am not in a position to discuss it or to say whether anything would arise out of it to strengthen my argument. But here it appears that Madame de Coeverden intended in a further instrument to designate the persons who were to be her heirs, and she died without having done so. *Burge* in the 4th vol. p. 172 and following passages, treats thus on the law of succession by testament:—"The civil law not "merely permitted but required the deceased to nominate or "institute in his testament the person who should succeed to all "his rights."

Mr. Justice NORTON—That is just it—the person to succeed to all his rights.

Attorney General—Yes. "The testament was itself the law, "*Paterfamilias uti legasset ita jus esto, dicat testator et erit lex.* "The law did not call to the succession heirs of the blood, unless "there had been no institution of heirs by the testament." That is precisely the same thing as in *Vander Linden*.

Mr. Justice BEETE—Yes; but it need not be for the whole. He could leave part of it out.

Attorney General—*Burge* proceeds as follows:—"The restriction to which the civil laws subjected the exercise of the "testamentary power consisted in requiring the institution of "heirs as essential to the validity of the testament, and by "obliging the testator, as to a portion of this estate, to institute "particular persons as his heirs, or in other words, prohibiting "him from disposing of it to any other persons than those particular heirs." And then he shows further on that a codicil cannot stand as regards the devolution of property, without the institution of an heir. In fact, *Burge* sums up that whatever may have been the old law, a codicil is a testament now, and "If it failed, either from the institution

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“itself being vicious, or in consequence of the person instituted “having died in the testator's lifetime, or from the instituted “heir having renounced the inheritance, the testament became “wholly inoperative, unless it contained what was termed the “codicillary clause, namely, a declaration that if the instrument “could not take effect as a testament, it should operate as a “codicil.” Now, this is the part that shows what Madame de Coeverden intended, and where she failed:— “He might institute his heirs by referring to a codicil or any other writing.” And here is the illustration given:—“I institute him as my heir ““who will be found named in a writing which I have deposited with Titius,’ or, ‘Let him be my heir whose name I will ““write in a codicil.”” That is about as near a case as can be conceived. Then:—“By this reference the Will incorporated “into itself that which was written in the codicil or paper, and “thus the institution was considered as having been made by “the Will, and therefore valid.” And *Burge* puts it generally:— “The law of Holland adopted most of the general rules of the “Civil Law which have been stated. But it rejected some. It “required the institution of one or more persons as heirs.” That passage which I have read from *Vander Linden* shows that to be the case. I believe it is also treated in other books. I refer to *Voet*, b. 28, tit. 1, note 1, and note 15; and to *Coren Observations*, 10, note 14.

Mr. Justice NORTON—Suppose a man devise seven-eighths of his property, and said nothing about the other eighth, would the Will be valid.

Attorney General—The party would not be bound to accept the property at all. If the property was left to two or three people, and one of them thought it an onerous inheritance, he could renounce it.

CHIEF JUSTICE—It is positively stated in the law that if a man is heir of a fraction he is heir of the whole?

Attorney General—I do not raise that question. The testator said she intended to institute heirs. She could never have intended to make Wright her heir. She intended to make him trustee, and she stated that she would name her heirs in a codicil; but she died without doing so.

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Mr. Justice NORTON—And what does Wright succeed to?
Attorney General—I understand that if heir he succeeds to the *universum jus*—that is, to all the rights and liabilities. I suppose the reason of the passage cited by *Burge*, that it is a rule that a man cannot die partly testate and intestate, to be this that as the heir succeeds to the *universum jus*, there could not be half an heirship. I am speaking of a Will that might be good; but I say this Will is bad altogether.

CHIEF JUSTICE—*Van Leeuwen* interprets the Roman Dutch law to require twelve shares.

Attorney General—I do not understand what he means by twelve shares.

CHIEF JUSTICE—Nor do I. He says—“An inheritance was usually divided into twelve shares.”

Attorney General—It is a very good book, however.

Mr. Gilbert—The *Censura Forensis* is a very good book, but there are several doubtful things in it.

Attorney General—Here is another passage from *Van Leeuwen*, page 243:—“The leaving of an inheritance is an institution by which any person transfers the management of his estate to another after his death.” But I hardly think it necessary to cite authorities, because I do not think a case can be found of a Will being held good where a testator states her intention of declaring that the parties to be beneficially interested are to be named in another document, and dies without making that document. *Van Leeuwen*, page 234, goes on to say:—“For this purpose a clear declaration is required, together with the name or other certain description of the persons to whom such inheritance is appointed.” Now, what I complain of is that there is no certain description of the parties.

CHIEF JUSTICE—But you have not yet touched the point whether this is not the institution of an heir—the mention of a person, who would succeed to the estate for his own use.

Attorney General:—Yes—I lay it down broadly, and I am much mistaken if I am not stating the law correctly, that the only mode in the Dutch law devising an inheri-

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tance in that way would be by *fidei commis*; and any analogy from the English law must be a false analogy.

CHIEF JUSTICE—I do not speak of the English law. I ask you, is there any law which deprives a man of the right to say—“I give you my property to do what you like with it, except that when you have turned it into money, you shall pay so and so.” Is it possible that the law says a man should not do that?

Attorney General—He cannot succeed but to the *universum jus*.

CHIEF JUSTICE—A man may succeed so far that the legal right of property should be in him, but that he should do certain things with it.

Attorney General:—A man must be either heir or not. If he is heir he cannot institute himself by a Will in his own handwriting. The question your Honour raises is of very little importance, because if Wright is considered to be heir, it is plainly laid down that no man can constitute himself heir. If on the other hand he has not instituted himself heir, then there is no heir, and the estate is intestate. It appears to me that your Honour is on the horns of a dilemma, and it is indifferent to me on which side you decide.

CHIEF JUSTICE—Then, I understand you to say that according to the Roman Dutch law their cannot be a fiduciary heir.

Attorney General—I am sorry your Honour understands me to say so. I say the only way in which the trust could be founded would be by *fidei commiss*.

Mr. Justice BEETE—I do not see that there is any *fidei commiss* here, because if there is to be a *fidei commiss*, it must be clearly pointed out.

Attorney General—The fiduciary heir is the person who has to account to the *fidei commissary* heir and clearly Wright is not such a person.

Mr. Justice NORTON—He might certainly be fiduciary heir under this Will, which says:—“And out of the monies to be “received (after deduction of expenses) all my just debts “should be paid and subject thereto that the balance of any of “the said monies should be paid to such person or persons as I “may hereafter desire.”

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Mr. Justice BEETE—But the person to whom the property is to go must be ascertained, which is not the case here.

Attorney General—Certainly Wright is not heir in any sense in which the Dutch law treats of heirs. The only way he could be treated would be as a sort of executor or administrator. The testator intended no doubt to appoint heirs, and to constitute him executor, but she died without doing so, and it is impossible to say that he is heir for any single purpose. *Vander Linden* says:—“As it is very possible that the person named as “heir may, by dying before the testator, or for some other “cause, not be heir at the death of the testator, it is prudent in “such case to provide for it by naming one or more others in “case of such failure. This is termed *substitution*.” And then he goes on:—“Sometimes also a person is appointed heir, under “the condition that the property after his death shall pass to “another; this is termed a *fidei commissum*.” I submit that this is the only reversionary interest that the Dutch law recognizes; and in neither case can Wright be considered as heir, With respect to any technicality as to codicils, the *Institutes* show that there is a distinction between a codicil and a Will. I also refer to *Groenewegen* b. 6, tit. 28. I should have thought that according to our law, the Will must be considered void for uncertainty, for this reason that Wright is clearly not the person intended to be benefited; but the bequest is for the benefit of “such person or persons as I may hereafter devise by any legal “codicil;” and when she fails to indicate who are the parties to be benefited, I should have conceived that the Will would be held void for uncertainty. There is the case of *Stubbs v. Sargon*, in the 2nd vol. or *Keen's Reports*, which was afterwards affirmed on appeal before the Lord Chancellor;—“A testatrix “devised to trustees and their heirs, her copyhold dwelling “house, garden, and ground, together with the furniture and “effects therein; and also the ten cottages and two new cottages “built by her, with their appurtenances at L, upon trust, to pay “the rents of the said hereditaments to her niece S. S., the wife “of G. S., or to permit and suffer her to use and

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“occupy the said hereditaments during her life, to the intent that the same hereditaments, and the rents, issues, and profits thereof, might be for her separate use; and after her decease to G. S., for his life, and after his decease to stand possessed of the said hereditaments, in trust for such of the testatrix's nephews, and nieces, or grand-nephews and grand-nieces, as S. S., should appoint; and in default of appointment upon trusts to sell and dispose of the said hereditaments and premises, the produce of such sale to constitute part of her residuary personal estate.—*Held*, that the furniture and effects did not pass to S. S., but belonged to the residuary legatees.” I need not dwell on that part of it, but I refer to the latter part in respect to a promissory note:—“E. J. endorsed a promissory note for £2,000 and sent it to S. S., in a letter, whereby she gave the same to S. S., for her sole use and benefit, for the express purpose of enabling her to present either branch of her family any portion of the interest or principal thereon, as she might consider most prudent; and in the event of the death of S. S., by that bequest, she empowered her to dispose of the said sum of £2,000 by Will or deed, to those of either branch of the family she might consider most deserving thereof.” It was held that that letter created a trust, but the objects were so uncertain that it was absolutely void.

CHIEF JUSTICE—It was not that the whole was void.

Attorney General—No; but this is the whole Will.

CHIEF JUSTICE—The Will is to convert the property and pay the debts.

Attorney General—The whole intention of this Will was that Wright should act as executor or administrator, but for the benefit of certain heirs whom she intended to name but never named. In *Stubbs v. Sargon* the Master of the Rolls said:—“Unfortunately the letter is so expressed that the objects cannot, from the words of it, be ascertained; and thinking the trust too indefinite for the Court to act upon, I am of opinion that the £2,000 must be treated as part of the testatrix's personal estate.” That case went before the Lord Chancellor, and it would be found in the 3rd vol. of *Mylne and Craig*.

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It went before the Chancellor in January, 1838, and Lord COT-
 TENHAM said:—"Another question of some difficulty remains;
 "namely, as to the £2,000. This sum was due upon a promis-
 "sory note of other persons, having two years to run. The testa-
 "trix specially endorsed it to Sarah Sargon, a married woman,
 "for her sole use and benefit, independent of her husband, for
 "the express purpose of enabling her to present to either
 "branch of the testatrix's family, any portions of the principal
 "or interest thereon, as she might consider most prudent. It
 "was not constituted a trust which could be executed. It was
 "therefore either an absolute gift to Mrs. Sargon, or being for a
 "purpose which fails, it reverts to the original owner, and so
 "constitutes part of her estate." And then he goes on to
 show:—"It is observed that the words are not 'for her *own* use
 "and benefit,' as in *Wood v. Cox*, which was referred to, but
 "'for the *sole* use and benefit, independent of her husband,'
 "apparently meaning not to describe an extent or quality of
 "beneficial interest, but to mark the character in which the
 "donee was to hold the property, namely, as a *femme sole*, and
 "not as dependent upon her husband. The latter part of this
 "paper strongly confirms the character of trust, which I think
 "belongs to the part I have already considered. It provides that
 "in the event of the death of Mrs. Sargon, the author of the gift
 "by that 'bequest' empowered her to dispose of the said sum
 "of £2,000 and interest, by Will or deed, to those of either
 "branch of the family she might consider most deserving. If
 "the gift had been intended for the benefit of Mrs. Sargon,
 "with only an intimation of a wish in favour of others, not
 "amounting to a trust, this power to dispose of it by deed or
 "Will was wholly useless, being necessarily incident to the
 "gift; but if Mrs. Sargon was to be merely the donee of a dis-
 "cretionary power in favour of others—the mere depository
 "of a discretion to be personally exercised—then it was natural
 "and proper to specify that such power and discretion might be
 "exercised by deed or will." Now, in this case, so far as re-
 gards the parties that were meant to be benefited, Wright
 clearly was intended by

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the testator to be only the channel through which the gift to others was to flow, and she reserved to herself the right to state in a subsequent document the parties who were to enjoy the gift. Of course, as regards the creditors, whether she left a Will or not is wholly immaterial, because they would have power to get payment from whatever she left; she only intended that Wright should act as administrator to her property. The general law in England is laid down in the 1st volume of *Jarman on Wills*, pages 316 and 322, in the same way that I put the case here:—"To the validity of every disposition, as well of personal as of real estate, it is requisite that there be a definite subject and object; and uncertainty in either of these particulars is fatal." And uncertainty is thus explained:—"Uncertainty in regard to the objects of gift arises either from the testator having described such objects by a term of vague and unascertained signification, or, from his having shown that all are not to take and then left it in doubt which of them he intended to select as the object or objects of his bounty." And a number of cases are cited. In the case of *Clayton v. Lord Nugent* and others, *Meeson and Wellsby's Reports*, p. 200, 13th vol.:—"A testator wrote his Will in various pages of a book at different times part of it being executed and attested in 1820, and the remainder in 1827. No devises were mentioned by name but the testator's real estates were devised 'first to K, then to _____, then to L, then to M, &c. On a slip of paper pasted into the book, and forming part of the Will at the time of the alteration in 1820, the testator stated that the key and index to the letter, initials, &c.' was in a writing case in the drawer of his writing desk, on a card. The testator died on the 11th December 1838, and on that day a card, in his handwriting and signed by him, was found in the above writing desk, dated 30th January 1828, as follows:—"K signifies Eleanor Mary East; L signifies Gilbert East Clayton; M. signifies second son of William Robert Clayton; N signifies eldest son of 'Richard Reece Clayton,' &c. Two years before the testator's death a card with writing on it had been seen by a person lying before the

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“testator, together with the book containing the Will which “appeared to be similar to the card and writing thereon found “after his death,—*Held*, that the card found after the testator's “death was not admissible in evidence, as a declaration of the “testator, to show who were the persons meant to be design- “nated in his Will by the letters K, L, M, &c.” And of course the very large amount of property that this gentleman left went to his heirs at law. It is quite clear according to the law of this colony, which must govern the decision that your Honours arrive at on the Will of Madame de Coeverden, that at the time she executed this instrument she considered it to be an inchoate and incomplete document—she considered that she had not fully exercised her disposing power in the way of leaving an inheritance, it being absolutely essential that she should declare to what heirs her inheritance should go—who in fact were to be the parties to be benefited. She had intended to indicate who those heirs should be by a codicil to her Will.

CHIEF JUSTICE—Have you any authority at hand to the effect that a testator cannot die partly testate and partly intestate? I should like to see the sense in which that is held.

Mr. Justice NORTON—No one except a soldier can die partly, testate and partly intestate. That is Lord MCKENZIE'S rule.

CHIEF JUSTICE—The result of that rule seems to be that where there is a partial heir he takes, and Wright would be entitled to the whole of the property, instead of having to pay the debts.

Attorney General—I am not afraid of any result so absurd as that.

CHIEF JUSTICE—It would not be more absurd than to say that the man should take half of the estate.

Attorney General—I cannot put my hand just now on the authority. But the only way in which this Will is sought to be supported, as I understand it, is that by it Wright is created trustee for the heirs of Madame de Coeverden, whoever they may be.

CHIEF JUSTICE—That is to take a common sense view

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of it? but according to the Roman Dutch law it may have a different effect.

Attorney General—It appears that the English rule would give it a different effect; but I will not enter upon that now, because we are not considering what would be the construction of this Will in the Court of Chancery. I will illustrate my position, though I really thought your Honours would have agreed with me at once on the point. Suppose the testatrix had carried out her intention and had named the parties; there could be no manner of doubt that those parties would be the persons to say whether they decided to accept the inheritance or not—they would be to all intents and purposes her heirs. Not having appointed heirs, she died. Without heirs she died intestate; and the mere naked executorship cannot under our law be recognised for the purpose of supporting a trust. If she had made the codicil she intended to make, the parties nominated in it would have been her heirs, but Mr. Wright could not. I do not know that I can put the point more plainly before your Honours. The next point on which we object to the Will has reference to the construction to be placed on the original Will:—“Fourthly; so “far as the said plantation *Vlissengen* with its appurtenances is “concerned, because the said Elizabeth Ruysch de Coeverden “had in law no disposing power over the said property or any “part thereof, the same being strictly limited by the terms of “the aforesaid Will of the said Joseph Bourda.” With reference to that point, what I have to submit is this, that if I am right in my general contention, then clearly Madame de Coeverden, who was a mere fiduciary heiress, had no right to will away any portion of the inheritance; for this reason, that she could not will away more than belonged to her, and all that belonged to her was a mere personal right during her life, the testator having expressly excluded her from any other right. Where there is no exclusion a party in that position might exercise certain rights; but the right is limited by *fidei commis*, and the heiress is restrained from any disposing power.

Mr. Justice NORTON—But a *fidei commis* does not necessarily take away the right of disposing of the property.

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Attorney General—A fiduciary heiress where there is a trust might have the right to dispose of a certain part; but it appears to me that the plain intention of the testator was that the whole estate, without the keeping back of any portion of it, should go to his grandchildren; and if that be the case his daughters would have no power to will away any portion of the plantation; but the whole of it must vest in his grandchildren.

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Attorney General—Before proceeding further in this case I desire to acknowledge that I made a mistake yesterday afternoon when I stated that by the Dutch Law a person could not die partly testate and partly intestate. I was thinking of the Roman law, but I found on referring to the authorities afterwards that I was wrong. *Burge*, vol. 1, p. 461, says that the Dutch law rejects that rule.

Mr. Justice BEETE—The same is in *Van Leeuwen*.

Attorney General—Yes, and the same is in *Vander Linden*, p. 230 and p. 245. There may be, therefore, the case of a party leaving part of his inheritance for one person, and leaving the residue or the bulk of his property undisposed of. In that case I think the undisposed property would go to the heirs of the individual who died so far intestate; but at the same time I do not see that that weakens the force of my argument that as regards this particular Will of Madame de Coeverden she must be considered to have died intestate by the Dutch law. Any trust for the payment of debts may be a good devise under our law, but the estate is only burthened with the payment of the debts and the heirs could in no event take their property except with that burthen; and therefore there is nothing that Mr. Wright has to do under that Will but simply that which any trustee, or administrator, to use the Dutch phrase, would have to perform; and where the Will appoints a trustee for certain heirs who are not constituted or specified the trust fails. It is a singular thing that we have what appears to have been a copy of the original draft of that Will of Madame de Coeverden, in which a codicil is written underneath, and there purports to be a bequest of this

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property to her niece, Madame Ely, with whom she was on intimate terms; but it is not so in the Will as executed, and therefore I presume after the original draft was executed, she must have changed her mind and left it entirely an open question. I have now said all that I intended to say on the first part of the conclusion, that “the instrument alleged by the original Defendant, John Baker Wright, to be the last Will and Testament of Elizabeth Ruysch de Coeverden, deceased, shall be declared null and void, and of no effect whatever, on the grounds and for the reasons set forth in the narrative part of the claim and demand herein.” The next point is—“And that it be further declared that the said Elizabeth Ruysch de Coeverden had in law no disposing power over any part of the said Plantation *Vlissingen* with its appurtenances, the said property being strictly limited by the terms of the last Will and Testament of the said Joseph Bourda, and that it be further declared that immediately upon the death of the said Elizabeth Ruysch de Coeverden the said Plantation *Vlissingen* with its appurtenances vested absolutely in equal shares in such of the grandchildren of the said Joseph Bourda born in wedlock, and in their lawful descendants, as were in a capacity to take at the time of the death of the said Elizabeth Ruysch de Coeverden, the said Defendants dividing between them equally the shares of their deceased parent, being a grandchild of the said Joseph Bourda.” Well I have only to add, with reference to that, that *Van Leeuwen* at page 225 very clearly lays down how a Testament becomes void in the part that professes to exercise a disposing power over property that the testator is not entitled to Will away; and the illustration he gives is that it is just as if you attempted to dispose of property that is bound by entail, and the meaning of bound by entail is shown in a subsequent passage as property bound in *fidei commis*. And if this property was bound in *fidei commis*, no doubt the bequest of Madame de Coeverden is entirely void.

CHIEF JUSTICE—I suppose it is not void, but that it has no operation.

Attorney General—I suppose it would be void so far

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as that particular property is concerned—so far as any controlling power over *Vlissingen* is concerned. It is void, because it is the exercise of a power which she does not possess.

CHIEF JUSTICE—The English law distinguishes between an act which is void because inconsistent with principle, and one which has no operation,

Attorney General—I use the word void in the claim and demand because that is the word used in the text books on the subject. The passage I allude to in *Van Leeuwen* is this:—“Testaments or last Wills became void in part, when and so far “as property is disposed of by the testator, of which he has not “the free disposal; or when any property is bequeathed to per- “sons who cannot inherit by last Will; or, when anything is “insisted upon which is impossible, or is desired, which mili- “tates against sound reason. The following are the different “kinds of property of which a testator has not the free disposal, “viz.: First, property that is bound and entailed. Secondly, all “feudal property of which a person may not dispose by last “Will, without the permission of government.” And in the very elaborate grounds of judgment of the Supreme Court in the case of Harel there is also the same thing decided by the Court. In fact it appears to me that if we look at the decision of the Court in Harel’s case, it will be found that the whole case is decided and there is an opinion in favour of the contention I now submit to your Honours; and that was a case that underwent great discussion.

CHIEF JUSTICE—You mean that Madame de Coeverden had no disposable interest?

Attorney General—Yes. The suit was heard in June 1856, and sentence was not pronounced till April of the following year, showing the time that the Court took to deliberate on all the points in the case. I have a copy of the reasons for judgment, and the 22nd is this:—“Because, admitting that the lease “did not labour under the defects heretofore pointed out, yet “Mrs. Ruysch, Mr. Boode, and both the children of Mrs. Maria “Daly, parties to the lease, being dead, their respective inter- “ests did not descend to their heirs, but became vested in

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“the person entitled to the property under the Will of Joseph Bourda, deceased.” And the 24th is:—“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 Bourda, deceased.” He being the common ancestor—the party who created the trust.

CHIEF JUSTICE—Madame de Coeverden was living then?

Attorney General—She was living then; but the Court held that with respect to the others they could only claim under the Will of Joseph Bourda, and that the property became the property of persons interested in property under the Will of Joseph Bourda, deceased.

CHIEF JUSTICE—Of course, this case is different in this respect—Mrs. de Coeverden was the last surviving child.

Attorney General—Yes; but the view the Court appeared to have taken throughout was that in respect to a suit brought for rent, the only parties who could sue were those who were heirs under the original Will of Joseph Bourda, and here the contention is with respect to Madame de Coeverden that after her death, the property descended under the original limitations of the Will of Joseph Bourda, and not to any parties who may happen to be heirs of Madame de Coeverden; that is to say, she took no vested interest in it. I now come to the main question in the case, which is as to the Will of Joseph Bourda himself; and as it is possible that the construction to be placed upon it by your Honours may turn upon nice verbal distinctions—although I do not think it will be so—for instance, as to the antecedent of “which,” and so on, I have summoned the Registrar to produce the original Will, and it can be put in evidence.

CHIEF JUSTICE—There is one important point that our decision may turn upon. I observe that in the translation you begin with “Nevertheless” at the beginning of a paragraph, breaking it off entirely from the preceding paragraph and introducing it after a full stop as a new paragraph; but the original as it is set out in the claim and demand has no stop. It proceeds as one sentence. That may have an important action in the matter.

Attorney General—Of course, your Honours would

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require naturally to see the original Will and see the way in which it is punctuated. It has been set forth in the claim and demand in the way we consider best adapted to put the points we wish to raise fairly before your Honours. It was not the intention to alter the punctuation of the passages of the Will in our copy of the claim and demand; but, judging from the copy of the Dutch Will I have seen, it appears to me perfectly plain that there is a marked break in the way in which the Will runs, from “from which specially excepted,” down to “Nevertheless.”

CHIEF JUSTICE—In the original there is a full stop and a capital letter; and there is here a colon between “they shall have equal proportions” to “Nevertheless.”

Attorney General—That “Nevertheless” is intended to be a taking up of the devising part of the Will. As I read the Will, there is a general devise of the whole of his property except *Vlissengen* to his children making them absolute heirs. That is the general devise to all of his children, and further on there is a proviso, that in case any of the children should die before coming of age or marrying their shares should go over to the survivors by the *jus accrescendi*. But as to pln. *Vlissengen*, “nevertheless.” So far it takes up the general question of devise, and then in continuation, there is a proviso—in case any of the parties die without bearing issue, he provides for the case; so at the end of the general devise, he inserts a special bequest with respect to *Vlissengen*, and the way in which I read the whole devise is shortly this—that the testator made his six children his universal heirs as to his general property, but as to pln. *Vlissengen* he gave it to them only with the burthen of a *fidei commis*. He excluded the *Trebellian* portion, and his wish was that on the death of all those who held the *fidei commis* the trust was to cease and his grandchildren were *per capita* to become the proprietors, with title of full property, as he calls it, or of fee simple; that is to say, that the first generation must pass away before the estate vested absolutely, and the trust should only determine on the death of the last of the first generation; and the way

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special provision at the end was with respect to the contingency, which might have happened of course with respect to the *Vlissingen* as with respect to the general estate—I take the two cases separately—he made his children absolute heirs of his general property, but those children might have died under age, or without being married. In that case the last survivor would take the property as absolute owner. With respect to *Vlissingen*, if the same thing happened then one survivor was still to hold *Vlissingen* burdened with *fidei commis* up to the time of his or her death. If he or she died, then and then only would there be power to divide *Vlissingen*; but even if there had been one survivor and only one child, according to our contention, the parent of that child would only have a *fidei commis* in *Vlissingen* estate as an entirety, and the property as an entirety would vest and devolve on her death in that sole child. That is the way we read it.

CHIEF JUSTICE—But if the last survivor had not children—

Attorney General—If the last survivor did not leave children, then I admit that the last survivor would have the power of devising the property; but this condition with respect to the last survivor has no reference to the contingency that the testator contemplated of his other children happening to die without leaving grandchildren. In that case as his children died unmarried without children, the property would go on and become vested in the last of them; and even in the last of them it would still be in *fidei commis*. It is only in the event of the death of the last survivor that the property would vest.

CHIEF JUSTICE—The last survivor, being childless.

Attorney General—The last survivor, being childless, the others having predeceased also childless.

CHIEF JUSTICE—Then, in fact, it is a gift to the children by substitution. If they had no children, then by the *jus accrescendi* to the survivors, and so on to the last; and if that one died childless she had the power of disposition.

Attorney General—Yes, if only one child had issue that child would be heir of the property; and in the event of

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none of them having had legitimate issue, the last survivor would have the power of disposing of the property.

CHIEF JUSTICE—Then, suppose one or more of them died leaving children, and another died leaving brothers and sisters alive, would the life interest survive, or would there be a devolution of the inheritance?

Attorney General—No. I conceive that although as between themselves they may divide their portions of the usufruct of the estate according to their separate interests, yet the entire estate would be kept together as one property till the death of the last child. That is, that the estate never vests at all till the death of the last of Bourda's children.

CHIEF JUSTICE—But the usufruct would survive.

Attorney General—I think so.

CHIEF JUSTICE—Then it is a gift for life to his children and their survivors, and to his grandchildren and their survivors; and if there were no grandchildren then, on appointment of the last surviving child as heir.

Attorney General—Yes; that is the way I understand it. It is a gift of life. Of course, there would be great difficulty under an English Will; but according to our view the estate never vested; that is to say, what Bourda calls title of full property, which was equal to the fee simple, never vested till the first generation passed away. It was a devise in favour of his grandchildren.

CHIEF JUSTICE—Still *eo instante* it would vest in the last surviving child. It is not a question of years. It would vest *eo instante* on the death of the last survivor.

Attorney General—Yes. The Will is not very long, and I would just shortly refer to its provisions. I think all of them are more or less important for the purpose of showing what is its intention. This is the Will. I am reading from the translation which is in Court, and which is perfectly correct.—“I the undersigned Joseph Bourda, considering the certainty of death, and the uncertainty of the hour thereof, have resolved to dispose of all my property which I may have at my death. I hereby revoke all my former Wills and codicils, specially the one remaining at the Secretary's office of this colony. Disposing anew, I bequeath to the poor of this colony

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“twenty-five guilders. I bequeath to my sister, Sarah Charlotte, “having in marriage N. Akkerman, at present residing at Amsterdam, the sum of five hundred guilders, annually during “her life-time, to be paid from the revenues of my plantation “*Vlissengen*.” From that I deduce the argument that the testator clearly contemplated that the estate was not to vest so as to be alienable till a considerable time after his death. But he leaves legacies to be charged out of the revenues of *Vlissengen*:—“I “bequeath to my house-keeper, the free mulatto woman, “named Polly, mother of my hereafter named children”—That is another reason why the testator may have desired to leave the most valuable portion of his property in this way, namely, to found a family of descendants born in wedlock. These were children of his housekeeper Polly; and I think that the whole scope of his bequest shows that he intended to be the founder of a family and to leave this property to his descendants:—“A “like sum of five hundred guilders to be paid as above annually during her lifetime, provided she continues to conduct “herself with propriety, and to live free of charges on any of “my estates at her choice. I bequeath to my nephew Joseph “Charles Rapin two hundred and fifty acres of land, that is to “say, lot one hundred and twenty-five situate in Canal No. 2, “on the South side thereof, between the lands at present in “possession of Messrs. Kerson and Kessey, together with a “sum of five thousand guilders from the revenues of plantation “*Vlissengen*, wherewith to purchase slaves for the cultivation “of the same, burthened, however, with *fidei commis*, and after “his death to devolve with right of property upon his child or “children which he might procure in wedlock.” This old gentleman seems to have been very anxious that all his relations should have lawful children. From what we hear of the state of society at the time, marriage was not so common and these connections were much more frequent than now:—“Failing “which to devolve after his death upon any hereinafter named “children and heirs, who in that case shall then on their part be “obliged and bound to allow from the revenues of the said “piece of land to each of

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“his sisters, my nieces, named Elizabeth, Henrietta, and___, at
 “present residing at the Hague, or to each of them that shall
 “then be alive, the sums of three hundred guilders annually
 “during their lifetime, and which sums, should he remain alive,
 “he shall be bound to pay out to them himself in manner as
 “above. Having promised to J. L. LeBlanc the freedom of his
 “two mulatto children procreated by my negro woman Nancy,
 “I leave the further disposal thereof to my testamentary ex-
 “ecutors, in case that he by his attachment and good conduct
 “should be deserving of this boon. Lastly, I bequeath to the
 “three sons, or to each of them as shall be alive, of my paternal
 “half sister named Louisa, deceased, the sum of eight hundred
 “guilders, once told, to each of them, as above, and which
 “sums are to be paid to them, whenever they shall have
 “through marriage or otherwise become of age, without any
 “interest. Coming to a final disposition, I declare under the
 “following conditions to nominate and institute as my sole and
 “universal heirs my children, Catherine, Elizabeth, Maria,
 “Nancy, Joseph Charles, and Jan Lodewyck, all six procreated
 “by the free mulatto woman named Polly, to all my property
 “which I may leave at my demise, moveable and immoveable,
 “actions and credits, in manner as they shall be at my death—
 “specially excepted, my plantation called *Vlissengen* with all
 “its appurtenances and dependencies, situate next to Stabroek
 “which they my said children and heirs shall only possess with
 “*fidei commis*, without any deduction of the *trebellian* portion,
 “and after their death to devolve with title of property to their
 “children begotten in wedlock,”—Before leaving that passage,
 I beg to call your Honours’ attention to a passage which I con-
 sider important:—“head for head in equal portions. Notwith-
 standing, in that so far should one or more of my before men-
 tioned children happen to die before their marriage or before
 coming of age (which God forbid) such portion a pertains
 shall accrue to the survivors, and so on to the last of them,
 which last one shall possess the same with title of clear prop-
 erty, as far as regards the

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“property so left by me, and with respect to plantation *Vlissingen* under charge of *fidei commis* in case the survivor of “them shall have begotten a child or children in wedlock.” The contingency he is there dealing with is that should one or more of them die under age or before marriage, the property goes to the longest liver. “I appoint as guardians over my “above-named minor children my good friends, Messrs. “Henry Koop, partner in the House of Hope & Co of New “Amsterdam, and Anthony Meertens, and the same also as “executors, together with my above-named nephew Joseph “Charles Rapin, as co-executor, to this my testament, with “powers of assumption and surrogation, until such time that “my said sons Joseph Charles and Jan Lodewyck shall have “attained their majority, either by marriage or otherwise, “when I release them from all trouble herein, and request my “said sons to take charge of the estate.” Now, that is another part of the Will on which I found an argument in favour of my contention. It shows that the testator clearly contemplated the estate being kept together, and by way of keeping the trust in the family he appointed, as soon as they should be in a position to act, his two youngest children, for these were the two youngest of all the six children, and he intended that after they became of age they should exercise the functions of executors, as he calls them, meaning administrators, the whole showing what length of time he thought would elapse. That very fact of the two youngest children being appointed to act when they became of age either by marriage or otherwise, is an argument in favour of my contention:—“Trusting “that they, my good friends, will take particular care of the “education of my children, consistent with their respective “capacities and with their stations, to the house of us all; excluding therefore from my estate all Orphan Chambers “wheresoever my demise shall happen to take place, and especially in this colony; reserving to myself entire power to “add to or diminish from the legacies, and to alter the appointment of guardians and executors, either by codicil or “otherwise under my signature, as I shall deem proper; requesting that this my Testament, shall have

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“due effect—Demerara, 6th June 1792, on Plantation *Vlissengen*—Joseph Bourda.”

CHIEF JUSTICE—It is a very carefully framed Will, taking it from corner to corner.

Attorney General—Now, on that Will we ask for this declaration by the Court:—“That it be further declared that immediately upon the death of the said Elizabeth Ruysch de Coeverden the said Plantation *Vlissengen* with all its appurtenances vested absolutely in equal shares.” Probably it might have been better to have said “head for head,” but we say in equal shares in such “of the grandchildren of the said Joseph Bourda born in wedlock and in their lawful descendants as were in a capacity to take at the time of the death of the said Elizabeth Ruysch de Coeverden, the said descendants dividing between them equally the share of their deceased parent, being a grandchild of the said Joseph Bourda.” What I mean is this, supposing these Dalys are illegitimate—I will put it both ways—suppose they are illegitimate, the *Vlissengen* estate has become vested absolutely in the following shares, one-fourth in Madame Ely, as one of the grandchildren, one-fourth in Augustus Deodatus Boode, another grandchild; Houel in place of his mother would take another fourth, and the three Von Greisheims in place of their mother by representation would get the other fourth. Or, if the Dalys are legitimate, it will be divided into fifths.

CHIEF JUSTICE—One of the Dalys is dead?

Attorney General—Yes, one died long ago.

CHIEF JUSTICE—Then, the question of legitimacy or illegitimacy of these Dalys has a larger effect than you consider.

Attorney General—According to my view it has a large effect. If they are legitimate, then they are entitled to take a fifth.

CHIEF JUSTICE—If the great-grandchildren are to take *per capita* they will get more.

Attorney General—But I do not think they take *per capita*. The only way in which great grandchildren come in is by representation. *Kinderen* in the Dutch is the same as our word “children,” and the Court will construe

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the word in such a way as they consider best to carry into effect the intention of the testator.

CHIEF JUSTICE—So we might where the testator indicated as much, but the testator does not indicate that we are to take the word in any other than its proper meaning.

Attorney General—There are questions in the English law which more or less effect an express class of descendants; but with respect to this particular devise the question is, who were the parties that the testator intended to be his heirs. I conceive that he intended his heirs to be his legitimate grandchildren. I apprehend that there can be no doubt that according to the Dutch law we draw a great distinction between a person appointing his own children or grandchildren as his heirs and the children or grandchildren of a stranger. In the one case, supposing it was a stranger, it would be construed strictly, and would not mean grandchildren. In the other case, leaving it for his family, it would be presumed that he intended that the child of a deceased child, or the children of deceased children would take. It is in that point of view that I conceive that a fair construction can be put upon the Will, and I come here and ask the Court to put that construction upon it. I conceive that the testator intended to appoint his grandchildren as his heirs. A considerable period of time must elapse before the devise could take effect, and if his daughters married and had legitimate children, and those children died leaving lawful issue, I consider that issue would stand in the place of the deceased ancestor; and in that way young Houel and the three Von Greishems come in.

CHIEF JUSTICE—Can you furnish us with any authority under the Roman Dutch system that in the case of a gift to children their children take by substitution.

Attorney General—I will refer your Honour presently to one or two authorities, but whether they bear out that principle it will be for the Court to decide. I apprehend that I may very fairly lay down this as my view of the case, that where a bequest is to the children as a class the descendants of those children would be entitled to take by representation, provided they are the

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children of the testator; but if they are the children of strangers then the bequest would be construed strictly, because it would be leaving the property out of the testator's family.

CHIEF JUSTICE—In the one case it would be presumed to be for the benefit of his descendants generally: and in the other case, only of the particular persons mentioned?

Attorney General—Yes. It is a matter on which the family have never had any difference amongst themselves, and therefore I have no instructions to raise the question at all. I am quite satisfied that the contention of the family, as opposed to the Daly's interest and to Wright as claiming to represent Madame de Coeverden, is simply this, that the grandchildren and the descendants of deceased grandchildren take by representation their shares of the estate under the Will of Joseph Bourda; and the counter claim is, that at all events as regards Madame de Coeverden's third, she had a vested interest which she had a right to will away, or which in default of a Will would go, *ab intestato* to her heirs, and not to the parties who claim under the Will of Joseph Bourda. That is the main contention.

CHIEF JUSTICE—Does the answer state to what extent Madame de Coeverden claims?

Mr. Gilbert—She claims the right to give away a third. A *fidei commis* is not a mere life interest. I may as well state at once that my contention is this, that the *fidei commis* was in favour of all three, the three surviving children. It was not of all the children, but for each; that is to say, Madame Daly's children took her share, Madame Boode's children her's, and Madame de Coeverden's children, if she had any children, would take her share; but as she died childless her share vested in her heirs.

CHIEF JUSTICE—But how do you draw the distinction between the three children who died and the three who survived?

Attorney General—Because I say that the heirs were to be the grandchildren. No doubt the children had a share of the rents and profits so long as they lived, but when they died their rights passed over to the grandchildren.

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CHIEF JUSTICE—Then the only difference between them and Madame de Coeverden is that she attained the full age and they died minors. So that if she is right in her contention that she had a right to dispose of her share, those minors could not dispose of any shares, because they would not go to their lawful descendants.

Attorney General—I will go this length, that if they had attained majority they might have acquired a vested right; but they all died in minority.

Mr. Gilbert—And unmarried.

CHIEF JUSTICE—YOU claim for Madame de Coeverden a right, in consequence of not having a child?

Mr. Gilbert—Yes.

CHIEF JUSTICE—Would not the same right be in the others?

Mr. Gilbert—It could not be well so if they died unmarried or minors.

Attorney General—From the way *Mr. Gilbert* puts it, it appears to me that his main contention is this—that each of the three married daughters of Boode took a separate and independent third, which third went over on her death to her children; and that Madame de Coeverden, not having children, the *fidei commis* ceased at her death, and she had a right to leave it as she pleased. But that really assumes the question I have been contending for all along, namely, whether by the Will of Joseph Bourda he gave these parties any disposing power at all over the *corpus* of *Vlissengen*. We say no. We say he created a trust, which was to subsist during the lifetime of the whole of the first generation, and that it was only when the last of his daughters, or children, should die that *Vlissengen* would vest, and then it vested absolutely in such of their grandchildren or their descendants as were in a capacity to take—that is, as survived Madame de Coeverden. Now, with respect to this point, can your Honours hold this Will to mean that after the death of each child leaving lawful issue, each share should vest absolutely in her descendants? That is to say, that each of his children was to hold a separate and distinct share as opposed to the others, and that as each of them died, the grandchildren of the par-

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particular one dying obtained a vested interest? Or, must you not rather hold that these words “after their death” mean the death of all of them—that after the death of all of them, then the grandchildren were to take the estate as full property.

CHIEF JUSTICE—A very important argument on that point is, when the grandchildren did take were they to take *per capita* or *per stirpes*; If *per stirpes* they would take after the death of the head of their family.

Attorney General—Yes, but we say they are to take *per capita*, that is, head for head. The estate was to be kept together during the life of the children, and when they died the property was to be divided *per capita* among all the legitimate children that they left. We admit that in that point of view the issue of a deceased legitimate child is entitled to take a full share; because that “head for head” means the grandchildren as a collective term. No matter whether one of his children left many descendants and another left one. Suppose one of them had left two, another one, and another a dozen, our contention is in this case that the whole class of grandchildren would divide head for head the inheritance—“which they my said children shall only possess as *fidei commis*.”

Mr. Gilbert—That is an incorrect translation.

CHIEF JUSTICE—I have got it that it was intended that the grandchildren were to take per family.

Attorney General—No, *per capita*. I set it forth in this way because there are two grandchildren, and one child of a deceased grandchild, and three children of another deceased grandchild; and I say the property must be divided into fourths.

CHIEF JUSTICE—The grandchildren take *per capita*, and the children of grandchildren take the share of their deceased parents.

Mr. Justice BEETE—The great grandchildren take *per stirpes*.

Attorney General—Yes—supposing there had been all grandchildren in this case—that is, suppose Madame Ely, Houel, Boode, and the three Von Greisheims—that is, the six—were all grandchildren, then each would take a

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sixth; but as only two of them are grandchildren, and the others who claim are descendants of two grandchildren, it would make four grandchildren, and we say the two grandchildren would each take a fourth; one of the others would take his ancestor's fourth, and the three children of the other grandchild would take between them their ancestor's fourth. *Mr. Gilbert* says it is a mistake.

Mr. Gilbert—I say it is a mistake to say *fidei commis*.

Attorney General—"What he says here is:—"And after "their death to devolve with title of property to their children "begotten in wedlock, head for head in equal portions." Now, all the children of Joseph Bourda on attaining majority, could undoubtedly, and did dispose of their portion of the general estate of the testator; but as we read the Will they had no disposing power whatever over *Vlissingen* estate, which was to remain tied up and limited for the benefit of the children that might be born to them in lawful wedlock; and if it should so happen that they all died, the last child of Joseph Bourda would still have only a *fidei commis* in *Vlissingen* in favour of any child that such last survivor might have; but if he had no child at all, then the trust would entirely fail, and the Will gives the last survivor the power of devising.

CHIEF JUSTICE—But if the gift of a *fidei commis* was a gift to the surviving child, the devise of it without any dedication of it would be rather inconsistent. It would be only under the gift that they had a right to devise.

Attorney General—It might be so. There might be various considerations connected with that subject; but the very fact of the testator having made the exclusion of the *Trebellian* portion shows that he meant to prevent his daughters from exercising any right of property whatever over *Vlissingen* estate; because he even denuded them of the ordinary right given to them under the law of retaining a certain portion. That shows that his intention was that they should have no control at all over the *corpus* of the estate. They might have the rents of the property. They might participate in it, but so far as *Vlissingen* is concerned, he left it to his legitimate grandchildren, who were not *in esse* at the time. But the fact of their not

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being *in esse* at the time makes not the slightest difference; according to the Dutch law a man might tie up his property at all events till the fourth generation; he might prevent his property from vesting till the fourth generation. In this case the intention was to postpone the vesting till the second generation, they being lawful children. I now come particularly to *Mr. Gilbert's* argument, that the children of Mrs. Boode and Mrs. Daly took respectively a separate and distinct portion of the *fidei commissary* estate and that on each of their deaths her third vested absolutely in the particular children of each mother; that is to say, that they took a separate and distinct third as their mother died, and had not to wait till the last survivor of the children of Bourda died. But it is not said in the Will that the children of Bourda *each* should receive a part of *Vlissengen*, which was under *fidei commis*. He did not leave each of his children a separate and distinct portion of *Vlissengen* burdened with *fidei commis*; but he nominated his children heirs, and he stated that the plantation should be burdened with *fidei commis*, and, as we contend, should remain burdened with it till all his children were dead. If the contention on the other side were upheld, the result would be that before Madame de Coeverden's death two-thirds of the property would vest. Now, we contend that that would be defeating the object of the testator, which was to keep the property together as an entirety, a trust which was to subsist so long as his children lived, and when they died it was to be divided "head for head" among all the grandchildren, the children of his children. There might have been fifty heirs. No matter whether any of his children had a numerous family, while others had no family at all, yet when the property vested it was to be divided equally among all his grandchildren "head for head." In that way the Will of Bourda can only be effectuated on the death of his children, and then the grandchildren are to come forward and each of them is to get an equal share of this plantation or township which has been tied up so long. I say that the construction which *Mr. Gilbert*, on the part of his clients, seeks to get the Court to put on the Will would do away entirely

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with the effect of those most important words “head for head.” I do not see how it is possible to construe the Will in any other manner; because if you do you will be construing it so that the distribution of the estate is to be *per stirpes*, and not to the grandchildren per capita. No matter whose children they are—the grandchildren of Bourda are to divide “head for head.”

CHIEF JUSTICE—That last clause seems to be in favour of the idea that there was to be a survivorship among the original children.

Attorney General—Yes, it appears to me, as I said before, with respect to that last contingency, that if only one of Bourda's children should marry and have a child, then such grandchild is nominated his heir.

CHIEF JUSTICE—That is, subject to the *fidei commis*, in case of the last survivor dying childless. Of course, it must mean till the possibility of the last survivor having children ceases.

Attorney General—Yes. He draws a broad distinction between the general property and this property. With regard to the general property the children were to do what they liked with it, and he made them his universal heirs. With respect to *Vlissengen*, he did not make them his universal or absolute heirs. He constituted his grandchildren his heirs, and his children's interest was only the usufruct. As regards his own children, they were not his absolute heirs as to *Vlissengen*; they had only a qualified interest in it, that is to say, *Vlissengen* being burdened with *fidei commis* so long as they lived, they had a certain interest in it, but they had no disposing power. The testator had already disposed of it to his grandchildren, “head for head,” no matter how many of them there might be. His object was that his children should marry and have lawful children; and then when the contingency happened the estate was to vest in his grandchildren, who, so far as he was concerned, might be supposed to have equal rights, all of them taking “head for head.”

CHIEF JUSTICE—It is a maxim of the English law, and I think of the civil law, that the last words of a Will prevail.

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Attorney General—Yes; you will find it in *Burge*, on the rule of construction of testaments, p. 533. But that testator having nominated and appointed his grandchildren as his heirs there was a possibility that his intention might have been defeated by there being no grandchildren; and it is with respect to that contingency, and that only, that he gave the last survivor of his children, supposing there were no grandchildren, power to Will away the estate. If all the children were to die without lawful issue, then in that event he gave the last survivor power at his or her death to will away. The bequest was to his grandchildren, and the contingency to be provided for was there being no grandchildren.

CHIEF JUSTICE—Do you admit that the Roman Dutch system allows a testator to give power to one heir to substitute or constitute another heir in a given event?

Attorney General—Yes; for instance, in Albouy's Will he gave his widow, afterwards Mrs. Norton, power to appoint whichever of his own relations she chose. Now, when we come to the contention that is raised for Mrs. de Coeverden and her estate, it is incumbent upon those who advocate her interest to show that she had a vested estate to dispose of; because we may say this, that the testator specially excluded her as well as all his other children from having any title of property in *Vlissingen*. She had no title of property, and therefore there was no vested interest that she could dispose of, or that would pass to her heirs. The destination of the property was fixed by the original will, and not one of the children of Bourda could do anything to divert that destination. It was in favour of the legitimate grandchildren. In fact, for all purposes of this argument, I submit that they had no more power over *Vlissingen* than I have. It was strictly devised to the legitimate grandchildren; and those grandchildren, under what are their rights devised? Surely, not under the Will of Madame de Coeverden. Surely, not under any Will of Madame Von Greisheim, or Mrs. Boode. Their rights are devised under the original Will. It was by the Will of Joseph Bourda that the trust was constituted, and it was by the Will of

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Joseph Bourda that the grandchildren were made his heirs; and therefore anything that any one of those children may have done or attempted to do could not in any possible way divert the inheritance. It was the property of his grandchildren as soon as the event happened that he provided for. There is a very significant-little word in that bequest, which no doubt must have been considered tight enough at the time, “specially excepted *Vlissengen*, which my children shall *only* possess as *fidei commis*,” or, as it might also be rendered, which my children shall only possess with *fidei commis*. Now, that shows the limited interest that they were to possess in that property. He left them simply in possession of the property.

Mr. Justice NORTON—Where is the Dutch word for “only”?

Mr. Justice BEETE—*Alleen*.

Mr. Gilbert—It is written differently in some copies.

Attorney General—The correctness of the translation is not disputed, and it is—“From which is specially excepted my “plantation called *Vlissengen*, with all its appurtenances and “dependencies, situate near to Stabroek, which they, my said “children and heirs, shall only possess as *fidei commis*.” That shows what was meant.

Mr. Justice BEETE—The word *alleen* comes immediately after *genaamen*, or “heirs.” It does not refer to the verb “possess.”

Mr. Gilbert—No—the reading of the passage appears to be, “only as *fidei commis* shall possess.”

Attorney General—Yes.

Mr. Justice NORTON—But “only” should come after *fidei commis* in English. The qualification seems to be for “possess,” but it appears that *fidei commis* is qualified: “as *fidei commis* only,” is your construction?

Attorney General—The word “only” is a limitation and restriction introduced for the purpose of showing that their rights were to be limited and less than those of an heir who has rights of property—that the right of property, as he says, should only devolve upon their children.

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Mr. Justice NORTON—I merely refer to the position of the word, according to the common grammatical rule.

Attorney General—Yes; but if YOU say, “You shall only have a part of the property,” it is a limitation.

Mr. Justice NORTON—But it would be an improper collocation of words. It should be “a part only.”

Attorney General—Yes; but the meaning here is clear enough. It is for the purpose of limitation. Now, for any object the testator had in view—and this is a point that I cannot press too often upon the attention of the Court, because it is of the utmost importance in the suit—the very object of the testator's Will would be defeated if the contention now sought for could be maintained; and for this reason—if it could be said that immediately on the death of each of his children leaving issue the *fidei commis* ceased *pro tanto*, and the grandchildren took as absolute heirs their mothers' shares, then it would be impossible that the estate could be divided on the death of the last survivor, among the whole of the grandchildren “head for head,” because the divisions would have previously taken place *per stirpes*. It is impossible to get over that; and unless *Mr. Gilbert* can show any authority on which these words can be struck out, it is decisive. What is to devolve? Is it separate portions of *Vlissengen*? No; but “my plantation *Vlissengen*.” Your Honours will look at the collocation of the words there. What is to devolve? Separate and distinct interests in the plantation? No, but the entirety of the property—“my plantation “called *Vlissengen* with all its appurtenances and dependencies “situated near Stabroek.” That is to devolve; and it is to devolve to their children begotten in wedlock, head for head, in equal portions,

Mr. Justice NORTON—Would not that equally apply to the children of deceased children—that is, could not the grandchildren say, “we take over our parents' share?”

CHIEF JUSTICE—That is what *Mr. Gilbert* seeks to establish; but the *Attorney General* denies that each takes separately.

Mr. Gilbert—Really, I do not seek to establish that. They take in common.

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CHIEF JUSTICE—Yes, in common, each his own interest.

Mr. JUSTICE NORTON—Suppose one daughter died leaving three children, could they not take *per capita*?

Attorney General—My view is that it is for the benefit of all the grandchildren.

Mr. Justice NORTON—My term *per capita* is not inconsistent with your view.

Attorney General—We insist upon the words "head for head." We believe it to have been the intention that the grandchildren are only to be ascertained at the time the *fidei commis* ceases, which we conceive to be at the time when all of Bourda's children are dead, and the entirety of *Vlissengen* is to devolve to those grandchildren begotten in wedlock, "head for head." Any other construction would be inconsistent with its devolving on the grandchildren "head for head," because previously to that a portion would have devolved to the children of deceased daughters; whereas we contend that the property is to be kept together till all are dead, and then the one undivided property is to devolve. Any other construction would show a devolution previously of a portion of it.

CHIEF JUSTICE—I must say, the main point seems to be, to learn whether in the gift to them or their heirs or children, there was any dedication; and if so, whether the several persons mentioned take respectively or take jointly.

Attorney General—I say they take jointly. Of course, they divide in shares, but they take jointly the whole inheritance.

CHIEF JUSTICE—They take as one body by right of survivorship?

Attorney General—Yes. It is not said in the Will that each of the six children shall receive a sixth of the *fidei commis*, but that each of Bourda's children should possess jointly, or all together, the *fidei commis*.

CHIEF JUSTICE—But it seems to me, according to the grammatical construction, that when a man says he gives a thing to each of a number of children, he means that each shall take an aliquot share, and so it would be when three are to take the entirety, or when two were to take

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it, or when one was to take it. "What is the use of the pronoun? I should like to know if there is any absolute rule on the subject.

Attorney General—There is no absolute rule.

CHIEF JUSTICE—I mean a general rule.

Attorney General—I do not know that I have any express authorities on the point: but I shall refer to some authorities.

CHIEF JUSTICE—It seems to me a very important point.

The Court adjourned for ten minutes.

Attorney General—When the Court adjourned, I was on the subject of joint bequests. Now, there can be no doubt that according to the civil law there would be a joint right which goes by survivorship. There can be no question about that.

CHIEF JUSTICE—I have been thinking that the very use of the phrase *jus accressendi* shows that the doctrine comes from the civil law.

Attorney General—Yes, in *Burge's Commentaries*, p. 808, he says:—"If there be more than one joint usufructuaries, they "have *jus accressendi*, or the right of survivorship."

CHIEF JUSTICE—If there be more than one joint usufructuaries. That is begging the question, as it is stated.

Attorney General—That may be; but where a person bequeaths property as a whole to several persons that is the case. I was about to state that with respect to the Dutch law it is not so closely fettered as the civil law, and does not make the same strict application of the *jus accrescendi*. In the 4th vol. *Burge*, p. 561:—"The law of Holland rejects the rule of the civil law "that a party could not die partly testate and partly intestate, "and therefore does not make the same strict application of the "*jus accrescendi* between heirs; jointly instituted. It adopts it, "or rejects it, as will best give effect to the testator's intention." I am quite willing to put the case in that view—which will best effectuate the testator's intention. I have to submit to your Honours that undoubtedly his intention was that *Vlissengen* with its

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appurtenances and dependencies was to devolve on all his grandchildren head for head on a particular contingency arising, and that in no other way is it practicable or possible to effectuate that intention than by holding that the inheritance is not divisible till the last surviving daughter died. That is the view which *Burge* states in regard to survivorship, and the same view is stated by *Vander Linden*, at page 133, where he speaks of the *accrescendi*.

CHIEF JUSTICE—That authority does not help you much.

Attorney General—I admit that it is very general; but I believe the jurisprudence of Holland is rather flexible on these points. The great question that the Court has to look at in determining a Will is, what was the intention of the testator? Now, if what *Mr. Gilbert* contends for had been the intention of the testator, I do submit to your Honours that the bequest would have been in this way—I leave *Vlissengen* burdened with *fidei commis* in equal sixth parts to each of my children, and on the death of each of my children leaving lawful issue his or her share shall devolve upon them with full title. But, on the contrary, the intention appears here to have been to prevent the entirety from being split up, and that the one undivided property should devolve upon all the grandchildren indiscriminately head for head. The very use of the word devolve—the devolution of the entire property among all the grandchildren—I submit to your Honours, shows, according to the plainest rules of common sense, that he contemplated one act of devolution applying to the entirety and to all the grandchildren equally, not to each of them in separate portions, of so much one year, another portion twenty years hence, and another fifty years hence. Such a construction cannot legally be placed on the Will, and is as opposed to the law of the case as it is to the intention of testator; for why did he draw that marked distinction between this and the rest of his property? With respect to the rest of it they could do as they pleased with it; but with respect to this entire plantation it was not to devolve—what was the meaning of devolve? The Dutch word is *succederen*; that it is not a separate share.

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CHIEF JUSTICE—But, in the meantime, in order to carry out your own views, there must be a series of devolutions.

Attorney General—Not of the plantation. There may be of the usufructuary right. I draw a wide distinction. The usufructuary right would devolve during that period; but it is only, as I conceive, when the trust ceases that the inheritance devolves with right of property. There is no title of property, because that devolution is the title of property, or in other words the vesting of the fee simple. That is my argument. I wish to draw a marked distinction between the rents of the estate and the estate itself. We say the estate itself is only divisible when Madame de Coeverden dies, and that it then devolves to the heirs who are to inherit among all the branches of the family. The words of the bequest are, the one and undivided plantation *Vlissengen* to all the grandchildren head for head. And the very fact of all the grandchildren being spoken of—that is to say, the children of one daughter, no matter how many, being put in the same position with the children of another daughter, no matter how few—shows that the intention was that the devolution of the property, that is, the vesting of the estate, was to be postponed till all the grandchildren were in a position to participate. I have not many passages to trouble your Honours with on the part of the case, because, after all, it is a matter of the construction of a Will which your Honours are perfectly competent to deal with, without any authorities at all. The Will must be construed in reference to that which you believe to have been the intention of the testator; and your Honours will put that construction upon it which appears best to effectuate that intention. In the 2nd vol. of *Burge* under the head Property, the modifications of estates thereon, p. 120, he treats of cases where property is tied up in favour of parties who are not *in esse* at the time, as is the case here. According to our view of the Will, the unborn grandchildren were the heirs of *Vlissengen* property, and the daughters were simply recipients of the rents, and profits:—“It is not necessary that the persons “who are to take under any of the limitations contained in *fidei commissis*-

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“*sum* should be *in esse* at the death of him who creates the *fidei commissum*. It is sufficient that they be *in esse* when the event happens on which the property is to devolve on them. The right which will become vested in those who are nearest in degree at the time when that event happens will not be divested in favour of those subsequently born, who may be nearer in degree, unless the testator has clearly expressed his intention that the estate should be divested in favour of any nearer kindred who may be subsequently born.” This is important, I think, as touching the argument sought to be drawn from the terms of the Will, that Madame de Coeverden’s third was to go to her heirs; for if it would go to her heirs *ab intestato* it would go to her heirs *ex testamento*, if she had left a proper testament:—“The effect of the *fidei commissum* is to render the property unalienable during the period of its duration, except in those cases in which its author has sanctioned a disposition for particular purposes, or in favour of particular persons.” Now, there is no particular exception here; and the general rule is:—“Its duration is not understood to extend beyond the fourth generation, unless the testator has clearly expressed his intention that it should continue for a longer period. In some countries it did not extend beyond three generations, for the instituted heirs, or *fiduciary*, was reckoned as one of the four. . . In Holland, the person who took by *fidei commissum* under the first limitation, was recorded as the first of the four generations, and the person who was in the fifth generation would receive the property with an unrestrained power of disputation.” That shows the extent to which property can be tied up under the law of Holland in favour of parties who are not in existence. It can be tied up until the fourth generation, and all the previous estates are mere *fidei commissary*, giving the parties no power of disposition.

CHIEF JUSTICE—But the law infers a dominium for the protection of rights.

Attorney General—I suppose there is a qualified dominium for the purpose of bringing suits; but what is

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to be done in the meantime to protect the rights might be a question for consideration. It is not a point that has come before us in practice, and I should say that in such a case the Court themselves as upper guardians have the power to protect parties who could not protect themselves.

Mr. Justice NORTON—Of course, the fiduciary heir has the dominium.

Attorney General—I was answering the question, supposing the remainder not in existence at the time.

CHIEF JUSTICE—Then, would it not go to the heirs *ab intestato*?

Attorney General—No.

CHIEF JUSTICE—As in England—it would go to the testator's heirs. Here I suppose it would go to his representatives.

Attorney General—Till the *fidei commis* heirs were in a position to assert their rights. However, that is not a point of any importance in this case. It appears, from what *Surge* says in page 166, that there are hardly any limits to which the caprice of the owner of property may not extend with regard to its disposition. Whether it is expedient to pass any such act of Parliament here as was passed in England after the Thellusan Will it is not for me to say; but he observes:—"There are scarcely any dispositions of property which even the caprice of its owner could suggest, which might not be affected by substitutions, *fidei commissum*, and conditions. He might dispose of the property in perpetuity, but at the same time provide that in a certain event it should sift from that person to another, or revert to himself. He might create any number of limited and partial interests." So that after all a party might create a limitation almost to any extent:—"To the first taker he might give an estate for years, and, on its determination, another in perpetuity. He might select line or class of descendants of the first taker, male or female, to whom it should descend after the estate of the latter had ceased. He might give interest to persons unborn, and impose on the donee or devisee various restrictions on the power of alienating the

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“property. It is considered that there is scarcely any modification of the ownership, or any species of strict settlement of “property, which its owner was not able to effect under these “provisions of the civil law.” And here the contention is that he has made a very strict settlement of *Vlissengen* estate to the legitimate children of his children.

CHIEF JUSTICE—It did not strike my mind, in what I said just now as to the devolution of the estate, whom the absolute dominium vested in. Under the continental system there should be such a dominium in somebody. The English system supposes all property to be in the Crown. On the contrary, under the continental system there must be an absolute owner; if not it would be *bonum vacans*.

Attorney General—I do not think there is such a thing as vacant possession. I think the Crown would be entitled to take. You will find that in Holland, the Sovereign Power granted charters to various cities under which they claimed vacant inheritance. The question as to the Crown's succeeding is discussed in *Burge*, p. 199. There is one point that I do not wish to omit to notice, although it has not been raised by any one. We are not disputing the right of each of the grandchildren to take by substitution or representation from their parents; but certainly if the Court were to hold that all our contention is wrong and that Madame de Coeverden had a vested third of *Vlissengen*, and that that third would go to her heirs, I should contend that from the way in which the word children is used in this Will the illegitimate children could not come in, and that if the Dalys are illegitimate they would not be entitled to succeed. I believe that even if Bourda had not used those words, “born in wedlock,” the trust would still have been created in favour of the legitimate branch. *Burge* shows authorities on that point, and he is so correct that I am quite satisfied to refer to him, in page 107, 2nd vol.:— “The *fidei commissum* “of the most frequent occurrence, is that, by which the “substitution of another is to take effect *si gravatus heres sine “liberis moriatur*. This substitution will not take effect, if any “legitimate

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“children survive the heir who is thus burthened. Under he
 “term *liberis* legitimate children are alone included, and there-
 “fore, if the heir left only natural children, it will take effect,
 “unless, indeed, it can be clearly collected that the testator con-
 “templated natural as well as legitimate children of the heir, . .
 “Natural children who have become legitimated by subsequent
 “marriage, even if that marriage took place immediately before
 “the death of the heir, would be included under the term *liberi*,
 “unless the testator's expressions admitted only of children
 “born in lawful wedlock.” There might have arisen, if those
 words had not been used, the case of a father having some of
 his children not born in wedlock and afterwards legitimatising
 them.

CHIEF JUSTICE—Then, those words have a scope.

Attorney General—Yes. In fact the whole chapter in *Voet*,
 b. 36, tit. 1, is pertinent to this matter:—“*Idemque dicendum*
 “*videtur, si in legitimationem concenserit ipse fidei commissa-*
 “*rius, ad quem ob defectum liberorum fidei commissum de-*
 “*beret devolvi. Cum enim is consentiendo legitimum talem*
 “*agnoverit idoneum, qui sibi succedat ac ipse quoque ad talis*
 “*legitimati successionem ab intestato venire possit, et ita ilium*
 “*odem loco habeat, quo alios agnatos legitime natos, videretur*
 “*deinceps contra suum velle factum vocare, si, post mortem*
 “*gravati superstite tali legitimo, adhuc ad fideic commissum*
 “*sub conditione si sine liberis, relictum, adspiraret.*”

Mr. Justice NORTON—That is conclusive as to children
 meaning grandchildren.

Attorney General—That is only in case of a third party.

CHIEF JUSTICE—But would these children take as persons
 designated, or would they dispose of it by their parents?

Attorney General—They would come in under the head
 children. They would take by representation. If I leave prop-
 erty to my son A, and after his death to his children, and if he
 died without children then to B—if A died without children,
 but with grandchildren, his grandchildren would take the place
 of children.

Mr. Justice BEETE—The bequest to a man's own children
 includes his grandchildren.

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Attorney General—Yes; but not when it is to a stranger's children. There are a number of cases here in *Burge* where a man leaves bequests to his children and they dying his grandchildren would not share equally with the children. All that is meant is that lawful descendants are entitled in a general bequest to take if the parent is not living to take himself, provided it appears from the Will that it is the intention of the testator that that should be the case, for that is always to be understood. Now in this case there is a bequest to certain individuals, six persons who are named, and whom he calls his children procreated by a free mulatto woman. He appoints these children as his heirs to his general property, and with respect to *Vlissengen* he gives them a fiduciary interest in the plantation, appointing their offspring born in lawful wedlock heirs to the property. And where he uses the words “their children begotten in lawful wedlock,” he appears to me to have used the word as *nomen collectivum*. He referred to the grandchildren as a class, and the grandchildren would be entitled to take by representation the interest of the deceased parents. That point is of no practical importance, because all the members of the family have been always willing to consider that that is the case. It is for the Court to determine the issue between us and the executor of Madame de Coeverden, who says that Madame de Coeverden took such an interest in a third part of the *corpus* of this estate that at her death it was transmissible to her heirs. Now, that is the main contention. We say she had no interest at all that was transmissible to her heirs; that the only interest she had ceased at her death; that the claim of a right to make a Will and dispose of any part of *Vlissengen* can only be derived from a supposed meaning to be attached to the last part of the bequest, “subject to *fidei commissum* in case the “last survivor of them shall have begotten a child or children in “wedlock.” The argument may be a plausible one, but I apprehend that when it comes to be tested it has no real weight. It is the case, and it cannot be disputed as the case, that Madame de Coeverden was the last survivor. Neither can it be disputed that she died

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leaving no children or child born in wedlock. But that whole passage on which her claim is sought to be rested applies to a totally different state of things. It applies to a contingency which, if it had happened, would have defeated the Will.

Mr. Gilbert—I am sure I made no such contention.

Attorney General—Well, if that is not the argument, I cannot see in what way it can be maintained. If it is a fact that the heirs to the title of the property were the grandchildren born in Wedlock, then none of the children can have any title of property, because there are grandchildren born in wedlock now living. The passage which has given rise to all this difference of opinion is not a long one. I apprehend it is a clear one, and it is only singular that there should have been these doubts and difficulties about it. There can be no real question when the Will is narrowly looked at and treated as a whole. There are numerous bequests to other parties, pecuniary legacies, and annuities to individuals to be paid out of the estate, the appointment of executors to act as trustees or administrators, provisions that on the attaining of age of the two youngest of those children they should be entitled to come into the trust for the purpose of carrying out the intention of the testator—I think all this shows that it was not his intention that any of his children should have any right of property in plantation *Vlissengen* at all. On the contrary, he appointed two of his own children—the two youngest of them—for the purpose of conserving that property and carrying out the trust.

Mr. JUSTICE BEETE—There were four daughters and two sons.

Attorney General—Yes, and the two sons and one daughter died. I have a word to say with respect to the legitimacy of these Dalys, for that really is a most important question. I have a strong feeling on the subject personally. I believe it would be a most unfortunate thing, if where the testator wishes and so expresses his desire that the property should go to the children that were begotten in lawful wedlock; yes, that when the property vests and comes to be determined, persons who

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are known and treated by the family as bastards—whom their own mother treated as bastards, in consequence of which family arrangements were made—I say it would be a most unfortunate thing, beyond the mere question of law, if parties who were treated in this way—notoriously by the family, as not being legitimate children—should come in and succeed to a very considerable portion of the inheritance, to the injury and prejudice of the lawful children. Now, the fact has been that up to the time of the Harel suit, as I have already stated, they were excluded from all participation in the property. Under the leases, all dealings with the property were on the basis that they were not heirs of Bourda, and that the only rights they had were under a bequest in the Will of a legitimate son of Mrs. Daly. He appeared to have been very kind to these persons, and when he died he left them certain rights. They had only a claim under their brother's Will, and any claim they may have had to a usufructory interest under that Will will not be disputed by any person, and when I come to read the reasons in Harel's case, which were very long ones—but there are passages which refer to this question. But so complete was the view of the whole family and every person interested that these were illegitimate children, that even on the 10th March 1856, when these reasons were pronounced—and of course before they were pronounced no one knew what view the Court would take—but even Mr. Bascom himself was under a mistake as to the effect of that sentence which was pronounced and of which he did not know when he wrote his letter:—We do not dispute that they are fairly entitled under the Will; but that being the state of the facts it is extraordinary to my view that the mistake could have arisen, for all that the Court decided was that those parties were not before the Court in the suit, merely because other persons said they were sole heirs and these were bastards, and the Court would not say they were bastards.

CHIEF JUSTICE—If this is the first opportunity they have had of protesting against it, it is not unnatural they should take advantage of the opportunity.

Attorney General—It is not the first opportunity.

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CHIEF JUSTICE—They are not parties to any other suit. *Attorney General*—But look at these parties lying by so long and allowing the whole usufructary right of the Dalys' family to be exercised without their being parties—look at the various leases for a number of years executed in the names of the other members of the family and excluding them. Is not that course of dealing for half a century admitting the whole question?

CHIEF JUSTICE— But they might not have been entitled to a usufructory right.

Attorney General—Supposing they were entitled to a usufruct at all, they would be entitled to it just as much as the legitimate brothers. The leases speak of two minor children, but all the Dalys, with the exception of these two who were admitted by their mother to be illegitimate, were parties to all the leases granted during all this period; and certainly it is very strong evidence I do not know there can be stronger—that in the family itself, where the Daly branch joined the Von Greisheim branch and others in leasing the property, that in granting receipts and renewals of leases, the only legitimate members of the Daly family were the parties to them, to the exclusion of these parties. It will be found that when even the Newtown leases were renewed shortly before the suit of Harel, in 1855, they were excluded.

CHIEF JUSTICE—Who renewed those leases?

Attorney General—All the parties who claim to be heirs of Bourda, except the two Dalys.

CHIEF JUSTICE—Were they of age at the time?

Attorney General—Yes. In respect to these renewals they claimed certain rights under the Will of their brother, which was also very significant, because, if they were legitimate, they would have claimed under their mother, but up to the suit against Harel they claimed under their brother. I have the declaration of Von Greisheim and of A. D. Boode, showing the terms on which these two persons had been recognised and treated by the family, since Von Greisheim became a member of it, by marrying Eugenia, and Augustus Deodatus Boode, who was younger than these children; and I think that that, coupled with other evidence of the course of

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dealing in the family, ought to satisfy your Honours that there is no ground whatever for believing them legitimate. I shall also tender the act of donation. It is true that in the case of Harel the Court held that it was not evidence to bastardise them. But then they were not parties to the suit, and now they are.

CHIEF JUSTICE—Were they parties to the act of donation?

Attorney General—By their representatives.

CHIEF JUSTICE—How came they to appoint representatives?

Attorney General—It is a proceeding, I am told, not uncommon on the Continent where such questions arise, for an arrangement to be made by a *conseil de famille*, for the purpose of avoiding any confusion. An arrangement of this sort was made—a legal donation which excluded the rights of these two Dalys, and gave to all the others. There was another ground on which the Court held that it could not be decided that they were illegitimate. The Plaintiffs in that action tendered a certain declaration of the mother herself. I took the objection at the time that a mother could not bastardise her own offspring. I was unsuccessful at the time, but the Court afterwards reconsidered the point, and that part of the evidence was struck out.

Mr. Gilbert—I do not think there was any declaration of the mother beyond what was in the act of donation.

Attorney General—I think there was a declaration by pro-curation.

Mr. Gilbert—It was in the act of donation.

Attorney General—We said:—“Because even admitting”—

Mr. Gilbert—I wish to state that the leases were drawn up by me in a particular sort of way.

Attorney General—But there was an express averment by Mr. Bascom and Baron Von Greisheim that Madame Daly only left such and such children:—“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 par-“ties to the lease, whose legitimacy was admitted by all, and “whose interests

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“ought to have been protected by their being made parties to “the lease.”—I believe there was a transport signed.

CHIEF JUSTICE—Was that the fact—that some of the children were not accounted for?

Attorney General—They were not accounted for, but the transport was not signed. But no doubt your Honours have now the whole of the children of Mrs. Daly. There was one rather important decision of the Court, I think, in that case, as throwing light upon this. That was in 1855, and the Court distinctly held that the original lease itself was bad, or at all events was too wide. The Court held that none of the parties could make any lease of any portion of *Vlissengen* estate, beyond their own lives. That is an important part of the case.

CHIEF JUSTICE—I understand *Mr. Gilbert's* argument not as contradicting that view of the case, because if Madame de Coeverden had children she would not have had the disposal of it.

Mr. Gilbert—I admit that any of these persons who had children could not make leases which could operate beyond themselves. I do not mean that they could make leases which extended beyond them as fiduciary heirs. It happened in that case that the leases were made in 1821 and expired long before the death of any of them. They had power to make leases to operate up to the death of the fiduciary heir.

Attorney General—Then, the reasons in respect to the powers of fiduciary heirs are important, as illustrating other passages as to the right of fee simple being vested in these parties under the Will of Joseph Bourda. I shall read the 24th reason, which sums up the arguments:—“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 Bourda, deceased.” Their rights would be derived under the Will of Joseph Bourda, and not from a particular bequest of Mrs. Daly or Mrs. Boode. And with respect to the ground on which the Court held that they would not in that suit decide the question of

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legitimacy, although the whole family had treated these two Dalys as illegitimate, it was because the evidence was immaterial; but I can show by evidence of reputation that they were so treated.

CHIEF JUSTICE—Is evidence of reputation admissible?

Attorney General—Yes; I have a direct authority on the point.

CHIEF JUSTICE—It could not be admissible against direct evidence of birth.

Attorney General—The evidence of family. If a man says—“I know So and So. I have always heard my father “speak or treat her as illegitimate.”

CHIEF JUSTICE—Against direct evidence of birth?

Attorney General—I apprehend so.

CHIEF JUSTICE—I think not. Of course illegitimacy itself is often made out in that way, in the absence of direct evidence of birth.

Attorney General—I have sent for *Taylor*. The declaration is put on the same footing as a commission to examine witnesses; and surely if we had a commission to examine witnesses that statement as to the footing on which these parties were dealt with by the family would be admissible evidence. I do not mean to say it would be conclusive proof; but certainly it is strong evidence in conjunction with the fact that these parties allowed the property to be dealt with on the basis that they were illegitimate, having had the opportunity of coming forward and saying whether they were legitimate or not. Suppose a man leaves £5,000 a year to his four children begotten in wedlock, and the family refuse to acknowledge one of them as legitimate, and for a long series of years that one did not say, “I claim a portion of this property—I claim my share as one of “the four children,” but submitted to be treated as a bastard all the time—suppose it was found that he had been all that time treated by the other members of the family as if he had no interest in the family,—that is the position of these parties, and I do not conceive they can complain of being placed in a hard position, because if they claimed to be legitimate they could bring their action and assert their rights.

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CHIEF JUSTICE—I apprehend that so far as the property under lease was concerned, they were not entitled to join in the leases till the mother died. They may have said, “We are not going to join—we are not going to the expense of having representatives in Demerara. We will stay till it devolves.”

Attorney General—Who was to stay in possession of it?

CHIEF JUSTICE—Those who claimed it.

Attorney General—I do not understand that the rents and profits were to remain in abeyance till the devolution of the estate.

CHIEF JUSTICE—But in respect to this last claim, “subject to *fidei commissum* in case the last survivor of them shall have begotten a child or children in wedlock,” in order to make it a case of acquiescence you will have to show that these parties were in a position in which they were deprived of some clear right.

Attorney General—But suppose I show this, that at all events the Daly branch of the family shared the rents and profits, which were received by certain of the children, on the ground of an acquiescence in that course of dealing. Is not that very strong evidence?

CHIEF JUSTICE—If you show a claim on their part to it, and that they never asserted it.

Attorney General—Suppose they were so satisfied that they could not prefer any claim at all, would not that be still stronger evidence against them? It is a hard case, but it cannot be said there is any moral doubt about it. I am not seeking to bastardise parties about whom there is the slightest doubt. If they succeed at all it is simply from the lapse of time producing a want of proof.

CHIEF JUSTICE—They will have to prove their own birth.

Attorney General—I know it is exceedingly difficult. I admit that where parties are living together as man and wife, it is an exceedingly difficult thing to prove that the children are bastards, and I know at this time of day it might be exceedingly difficult, almost impossible to prove it. It is undoubtedly the fact that the husband of Mrs. Daly was living in this colony all the time; but the nearest approach I can attempt is to summon the Registrar, as I have done, to produce the book

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kept in the old time in which parties coming to the colony were registered, and also going away. I think that a strong presumption can be made out from that register that he was here during the time these children were born in Holland. Of course if the parties had suffered from any omission they must take the consequence, and their children must take the consequences of the parents' omission. I can only say, as to that act of donation, that I never expected the question would have been raised, and it never would have been raised but for that suit of Harel.

CHIEF JUSTICE—If the act of donation was intended to close the question, how comes it that it did not?

Attorney General—Because it was done by attorney, by procuration. I intend to tender it, and it will be for your Honours to say whether it is admissible or not. I should think it very material that the parties never took any steps to set it aside, and although in another suit between members of the family and a stranger the document was held not sufficient, I do not know that the Court would go the same length in a suit between the parties themselves. It may fairly be said if the parties complain of the proceedings they ought to have taken steps. I shall tender it in evidence among other pieces of proof, for the purpose of showing that these parties must be held, by their own admission and their own course of dealing, to be not members of the family who were meant by the testator when he gave the property to those who were born in wedlock. And I think it is also a material circumstance—I think I shall show that when they claim certain rights those rights were under their brother's Will. If they had been legitimate children they would have been entitled to succeed to any property of their mother the same as the others.

CHIEF JUSTICE—With respect to this question, how do you prove that?

Attorney General—Your Honours see how I have been obliged to put it in, because you require that every person interested should be before the Court. CHIEF JUSTICE—You have it in issue here to be decided.

Attorney General—Yes; they never have denied it.

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CHIEF JUSTICE—According to my understanding, if the heirship of those two children were to be proved by evidence of reputation, it would be admissible to rebut the presumptive evidence, but on the other hand, this is evidence of reputation going directly to prove their illegitimacy. How are we to approach the question? They deny the truth, pertinency, and relevancy of your denial.

Attorney General—According to the general rule, the affirmative lies upon them.

CHIEF JUSTICE—Is there such a case as legitimacy being affirmed as a direct assertion?

Attorney General—Here is a curious case:—“In an older case, where the question was whether an eldest son who had taken possession of the paternal estates, and conveyed them to one of the litigants, was born in wedlock, his own declaration that he was a bastard, though made subsequently to the conveyance, was, after his death, received by Mr. Justice LE BLANC.”

CHIEF JUSTICE—But how did that arise? It did not arise in opening. It must have been introduced in rebuttal of presumptive evidence.

Attorney General—It amounts simply to this, that such a declaration shall be evidence.

CHIEF JUSTICE—But it is mere hearsay—that is, reputation.

Mr. Gilbert—Taylor gives a very refined reason— “The learned Judge appears to have considered this statement admissible, as the representation of one of the family of the degree of relationship he bore to it; but if the case just cited be law, as it would probably be deemed at the present day, the decision can scarcely rest upon this ground, unless the special circumstances of the case be prayed in aid; and if he contended that since the Defendant's claim rested on the legitimacy of the vendor, he could not object to the vendor's declaration, without relinquishing the only prop of his title, should this refined argument be deemed inconclusive, perhaps the admissibility of the declaration might be sustained on the ground that the case turned, not only on the condition of the father's family, but on the actual status of the declarant himself: but here

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“we are met by the difficulty that the son could only have known the fact of his own illegitimacy by information received from others; and as a bastard has in the eye of the law no relatives, the hearsay must have been derived from strangers, and its admissibility might on that ground be questioned.”

CHIEF JUSTICE—The serious question that I am now engaged upon is, how are we to approach it? You assert illegitimacy. That seems to me a matter for evidence. It must always be considered in reference to the assertion of legitimacy. We cannot say what evidence of the negative is admissible till we know what is the evidence of affirmative. One depends upon the other.

Mr. Gilbert—There is none; therefore they have to prove everything.

CHIEF JUSTICE—I can understand all this evidence about admission when it is put to negative evidence of legitimacy.

Attorney General—The way in which *Taylor* puts it is this:—“On the whole, it may be considered as a point of great doubt, whether, under any circumstances, the declarations of a person deceased, asserting his own illegitimacy, can be received; excepting as admissions against himself and those who claim under him by some title derived subsequently to the statement being made.” I think it might be a very doubtful question how far a declaration of that sort would be evidence against a third party; but I think there can be little doubt that it may be received against the party himself:—“In the case referred to above, evidence was received that the father had specified the time of his marriage, had declared his eldest son to have been born before that date, had heaped upon him opprobrious epithets implying illegitimacy, and had on his death bed pointed to his younger son as his heir, and these declarations would seem to have been clearly admissible, if not as directly proving the bastardy of a person, who, though *de facto* his son, was *de jure* a stranger to him, at least as showing the position of the legitimate portion of his family, through whom the Plaintiff claimed his title.” That might be said to be a hard case. Here a father on

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his death-bed pointed to his youngest son and said:— “That is my heir.” It may be said that was a hard case; but in that case it was the declaration of the father.

CHIEF JUSTICE—The old case of Esau and Jacob illustrated.

Attorney General—Then, he says:—“It may be observed, “by way of caution, that had the declaration of the father been “confined to a general statement that his eldest son was illegitimate, they might possibly have been rejected; for, as such “statements might have been made in consequence of non- “access after marriage, they would seem to fall within the rule “of law which precludes parents from giving testimony to bastardise their issue born during wedlock.” I must confess that “seems to me a great refinement.

CHIEF JUSTICE—No doubt the law on the subject is very refined.

Attorney General—Again:—“If a man has once been connected with a family by marriage, the death of his wife will “not dissolve that connection, so as to render inadmissible declarations subsequently made by him; and therefore where in a “case of pedigree, a witness was asked whether he had not “heard a husband since deceased state, after his wife's death, “that she was illegitimate, the answer was received, though the “Counsel declined to put the further question, whether the husband had derived his information from the wife during the “coverture. The Court presumed in this case that the knowledge must have been obtained by the husband whilst he was a “member of the family.” I think that is carrying the case pretty far. In a case of pedigree, after the wife's death, the witness was asked whether he had not heard the husband, since deceased, state after his wife's death that she was illegitimate, and that was held admissible.

CHIEF JUSTICE—I suspect you will find that admitted in a case where the affirmative evidence was very slender, of the same nature.

Attorney General—Again:—“Even *general repute in the family*, proved by the testimony of a surviving member of it, “has been considered as falling within

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“the rule. Moreover, it is not necessary to show that the declarations were contemporaneous with the events to which they relate; for, as Lord BROUGHAM has well observed, such a restriction ‘would defeat the purpose for which hearsay in pedigree is let in, by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence.’ And, to use a homely illustration, it would even render inadmissible the statement of a deceased person as to the maiden name of his grandmother.”

CHIEF JUSTICE—All that hearsay evidence is admissible in a question of pedigree, which is a different question from the admissibility of reputation to establish illegitimacy as an issue which the party himself to the action comes forward to prove.

Attorney General—But that appears from other passages in *Taylor*. I quite understand the way in which your Honour is now considering this point; but at one stage or another of the proceedings it is quite clear that reputation among the members of the family as to the way in which individuals are treated is very material; and these declarations are for the purpose of showing that they were always so treated:—“Thus, in the *Berkeley* peerage case, Sir JAMES MANSFIELD remarked that, ‘if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate.’” That is meant to apply to assertions on the part of other members of the family that a child is illegitimate. Of course it is and must be negative evidence, because any question of illegitimacy must proceed on the assumption that so and so as heir claims to be a member of the family; and I think that tends to show that the onus rests upon the party himself.

CHIEF JUSTICE—The action denies the claim.

Attorney General—The whole of the law is in p. 562 in *Taylor* as to family conduct:—“Since the principal question in pedigree cases turns on the parentage a descent of an individual, it is obviously material, in order to resolve this question, to ascertain how he was treated and acknowledged by those who sustained

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“towards him any relations of blood or of affinity.” And there are many cases that follow, all of importance. I merely tender the course of dealing of members of the family.

CHIEF JUSTICE—Putting it in that way, as a question of pedigree, we all understand it means more or less remote pedigree, and hearsay evidence of all kinds—fragmentary memoranda in books—are all admissible.

Attorney General—Yes.

CHIEF JUSTICE—Suppose we leave that point for the present. When the evidence is tendered we will get through it the best way we can.

Attorney General—I was just turning up a passage to show that all the children born of Mrs. Daly are brought before the Court. We say:—“The said Maria, the aforesaid child of the “said Joseph Bourda, died in the month of April 1849, leaving “her surviving only three children, namely, Richard Joseph “Johan Edward Daly, named in the rubric of this case, who is “admitted to have been a legitimate child, but now deceased, “and Maria Marianne Daly, and Jean Eugene Henri Daly, who “are both illegitimate, and consequently not entitled to inherit “under the Will of the said Joseph Bourda, deceased.” There are no averments in the Claim and Demand that they were born during the existence of the marriage between Mrs. Daly and her husband. The dates are not set out; but we state the facts that are sufficient for our purpose. If they say, “We were “born during the marriage,” it would be then incumbent upon us to show non-access and to rebut the presumption of their legitimacy. I am happy to say I have arrived at the end of my opening of this case. I have indicated generally the nature of the evidence I propose to give. I have summoned the Registrar to produce the original Wills both of Bourda and Madame de Coeverden. I have also summoned him to produce certain slave compensation papers, which are I believe of importance as bearing out our contention that this was a trust which could not be defeated till the property lapsed; because I think the monies were directed to be invested in some way—how it was done I do not know; but I believe

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there were some directions about it which the records would show. I shall tender the pleadings in the various suits against Harel, which at all events will be evidence, I submit very strong evidence, as against the de Coeverden interest and Mr. Bascom's interest. The only parties who affirm the legitimacy of the Dalys are the representative of Mrs. de Coeverden, Mr. Bascom, and the Dalys themselves. Now, I shall show as to them that they have proceeded on the assumption that they were not so.

CHIEF JUSTICE—I understand that the question is only raised on the part of the ladies themselves and Wright.

Mr. Gilbert—Mr. Bascom and Mr. Wright have no interest in that part of the pleadings.

Attorney General—Well, that would diminish the documents to be put in. So far as they are concerned I would get rid of any issue on their part, and join issue only with respect to the Dalys. It will then be narrowed down to these two persons, and suppose the Court want further information with respect to them, that would not prevent them from dealing with the general question. I am much obliged to your Honours for the patience with which you have listened to me. I hope the importance of the question is a sufficient justification for the time I have occupied.

Attorney General—Before proceeding to put in the documentary evidence or to tender the evidence I have to give in, I wish to add one word to what I have already said with respect to survivorship. A conversation arose yesterday afternoon with respect to that question, and I desire to say that if the Court take the view that was then expressed they will confirm our contention, that the fee-simple vests in us. Still I desire to put this other view of the case, namely, that the devise being, as we contend, in the grandchildren in fee *per capita* on a certain death, and until that death occurred the fiduciary heirs and their descendants by representation would be entitled to the reception of the rents and profits during the continuance of the trust. I apprehend that that view of the case would obviate every difficulty. With respect to the wording of the Will, the words of the Will

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are "my children and heirs." They would be fiduciary heirs, and they would be entitled to the benefits of the trust till the *fidei commissary* heirs were entitled to have the property vested in them; and I contend that they are not so entitled till the trust has wholly failed. But in the same way that the fiduciary heirs are entitled to the benefit of the *fidei commis* till the *fidei commis* heirs are entitled to take, in the same way these parties representing the *fidei commissary* heirs, no matter whether grandchildren or not, would be entitled to the usufructuary benefit. That is the way I wish to put my view to the Court.

CHIEF JUSTICE—By the children and their children by representation?

Attorney General—Yes. I have turned the matter over in mind, and it appears to me that every effect could be given to the Will; because they would be children and heirs. They would be fiduciary heirs, and entitled to all benefits till the estate vested; and if that view be right the question of survivorship, it appears to me, does not arise.

CHIEF JUSTICE—The summary of your contention is that when this event takes place——

Attorney General—That when the event takes place then the plantation with all its appurtenances vests and absolutely devolves in title of property, as the testator calls it, on the grandchildren *per capita*. And for that purpose we are willing to admit that the descendant of a deceased grandchild would by representation take his parent's share; but the division should be *per capita* among the grandchildren, and the children of the grandchildren would divide amongst them.

CHIEF JUSTICE—And that is, in the event of the death without issue of the last of the testator's children?

Attorney General—Yes. In fact, it is immaterial, as I conceive, whether the last survivor died with or without issue; but at all events when the last survivor dies then the estate vests. Up to that time it was tied up by *fidei commis*. I have summoned the Registrar to produce the original Wills of Bourda and de Coeverden. I do not suppose he will be required to be sworn.

Mr. Gilbert—No.

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Attorney General—I have also summoned him to produce the proceedings in the other suits; but the matter is not contested by Mr. Bascom and Madame de Coeverden.

Mr. Gilbert—I put it in this way, that Mr. Wright and Mr. Bascom deny that they have anything to say to it.

CHIEF JUSTICE—They do deny it, but it is an immaterial allegation as it affects them, inasmuch as the argument against them does not depend upon that question at all.

Attorney General—It is a material allegation as against Mr. Bascom; but I am not so sure it is material against Madame de Coeverden's estate, which Wright represents.

CHIEF JUSTICE—But their interest is to exclude the Dalys just as yours is; and therefore it is an immaterial issue as between you two.

Attorney General—I also tender the translation of Bourda's Will.

Will admitted.

Registrar—You do not put in the pleadings?

Attorney General—No. The first document is the translation of the Will of Madame de Coeverden. Thirdly, I tender the notarial copy of the act of donation; and I tender it on the ground that it must be considered a judicial document. For this reason: your Honours will see that it was passed judicially before the Councillor Commissaries of the Court, and all the parties were represented; and there are formal acceptances on the part of every person interested. It amounts in fact to an act consented to by the family, and passed before the Councillor Commissaries, and till the instrument is set aside it must be considered as binding on those parties at all events who were represented to the satisfaction of those Councillor Commissaries, who were judicial officers, and it will not be presumed that a Judge of this Court, for instance, will allow an instrument of that sort to be passed before him, unless he is satisfied that the parties who appear and purport to have authority to bind their several constituents to such a document had such authority. I apprehend that that is the safeguard of judicial proceedings of that sort, and it is on that ground mainly that I submit the document, as at all events *prima facie* evidence.

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CHIEF JUSTICE—Have you no doubt whether the proof of legitimacy or illegitimacy lies upon the Defendants? Of course the onus of proof lies upon the person who asserts; but this is an assertion of the illegitimacy of the children, and a negation on their part.

Attorney General—I do not suppose, and never have supposed, that these proceedings could conclusively decide that point, although I do admit that this further declaration appended to the conclusion would formally raise the question. But I should suppose that in a matter of that sort, after you have decided the law of the case, you would afford both parties an opportunity of going into the case; because the Court will see that it may or may not be a matter of great consequence as to the construction to be placed upon Bourda's Will. In one view it may be of great importance, and in another not. The expense may be very great on either party. At all events, we allege that these parties are illegitimate. We have brought them before the Court, and we give *prima facie* proof—we submit at all events *prima facie* evidence.

Mr. Gilbert—I think it right at the outset to make one observation in reference to what has fallen from your Honour, as to the allegation of illegitimacy being a negative. It is no more a negative than to call them bastards.

CHIEF JUSTICE—We were speaking of the legal intendment of bastardy. The legitimacy is put in defence.

Mr. Gilbert—It is a defence, but it is proved by evidence in the same way as legitimacy. The difference between affirmative and negative is this, that no man is bound to prove a negative. If you affirm a fact it is considered you can prove it. If you affirm that a thing did not occur, that is what is called a negative, and it is more difficult to prove that a thing did not occur than that a thing did occur. But illegitimacy is as much a positive fact capable of distinct proof as legitimacy. Illegitimacy depends upon positive circumstances just in the same way as legitimacy. I wish to make that observation at the outset. But, in the first place, there is a presumption in favour of legitimacy; and moreover, as in the case of these two parties coming before the

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Court, it has been admitted throughout that there had been a marriage between Daly and Maria Bourda. When this fact is admitted and the parties come before the Court with the name of Daly, and they are not denied to be the children of Mrs. Daly, that is a strong presumption of their legitimacy.

Mr. Justice NORTON—Yes. The law presumes that the children of the wife are the children of the husband.

Mr. Gilbert—Another thing—it is incumbent on the plaintiffs, who seek to make out the illegitimacy, to state the facts which they propose to prove at the outset, and prove them; not to give vague and indefinite statements as to the illegitimacy of the parties, and put them to the proof of their legitimacy. If legitimacy is to be impugned the facts ought to be set out and proved. The *Attorney General* yesterday did make the most of his case, but he did not express himself very definitely as to what the facts were, or how he intended to prove them.

CHIEF JUSTICE—By non-access, as I understood.

Mr. Gilbert—He stated that his instructions were something to this effect, that these children were born in Europe, while the mother resided there, (of course, no person, except an Irishman, is born at home when his mother is out,) and the father in this Colony, at such a period as not only to rebut the presumption of legitimacy but to prove the impossibility of access. If that be the case—and the *Attorney General* let it out to a certain extent—he is bound to prove it. This is an admission, or a *quasi* admission; but he is bound to give a full statement of the facts, and to prove them. He is bound to prove non-access. He cannot state in this misty manner that he charges these Defendants with illegitimacy, and say we ought to be put to the proof of legitimacy. I do not think it necessary to quote authorities on this point.

CHIEF JUSTICE—This document is tendered by the *Attorney General* as leading to an admission.

Mr. Gilbert—I must refer to the document, although it cannot have the slightest effect upon the minds of the Judges.

CHIEF JUSTICE—I must say, the admission of a party

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of illegitimacy, unless it be for the purpose of stopping a counter-claim to property, can hardly stand as such; because it is a fact that you can hardly know. It is mere evidence of repute, I can understand it if it be for the purpose of an estoppel.

Attorney General—And that is the very object of the arrangement.

Mr. Gilbert—The first party to this document is Mrs. Daly by her attorney, and if it is to be taken it must be as a whole. She cannot bastardise her own children born in wedlock.

CHIEF JUSTICE—That document relates to the very property now in question?

Attorney General—Yes, the Bourda property.

Mr. Gilbert—The case of *Legge* against *Edmunds*, in the 15th vol. of the Law Journal, shows that a mother cannot bastardise her children. But this is scarcely a declaration even of the mother. It is a declaration of her attorney. Then, the next parties to the document are Richard Joseph Johan Daly and Richard Bass Daly, two of the children who are stated in the document to be legitimate. Nothing said by them can be of any consequence. The third party is H. Vande Water on behalf of the two minor children; and these two unfortunate illegitimates, as they are called, are no parties to the document at all.

CHIEF JUSTICE—Your clients are no party to it at all?

Mr. Gilbert—No.

Attorney General—There are four children admitted in this deed to be legitimate, and they are parties, two of them by their attorney, and the other two, who were minors, by a Sworn Clerk.

CHIEF JUSTICE—But all that are there are the legitimate children?

Mr. Gilbert—Yes.

CHIEF JUSTICE—And that is a declaration in favour of their own interest?

Attorney General—Yes, but other benefits are given.

Mr. Gilbert—There are certain benefits given:—“Personally appeared Peter Charles Ouckama of this colony Esquire, in his capacity as special attorney of Mrs.

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“Maria Bourda, widow of the late Richard Bass Daly, agreea-
 “bly to a certain power executed by her before the Notary
 “Joannes Baptiste Josephus Bartin, residing at Brussels in the
 “Province of South Brabant, in the Kingdom of the Nether-
 “lands, on the 8th February, 1823, both in the English and
 “Dutch languages, in original hereunto annexed, which ap-
 “pearer q.q., declared that whereas a certain deed of gift had
 “been executed in the name of his constitutrix in this colony,
 “on the 12th September 1812, (by virtue of a special power,
 “granted by her on the 12th October 1811) granting thereby to
 “her two eldest children named Richard Joseph Johan Edward
 “Daly, and Richard Bass Daly, Junior, on certain conditions,
 “and stipulations therein set forth, her one third share or por-
 “tion in the plantations *Vlissengen* and *Nieuwen Aanleg*—both
 “situated in this Colony; and whereas this appearer's consti-
 “tutrix has, since that time, begotten two additional legitimate
 “children who cannot be completely deprived from a share in
 “their said mother's property; and whereas she (this latter) has
 “also had three illegitimate children who have a right to main-
 “tenance; she has deemed it just and equitable, with the appro-
 “bation of V. A. Heyliger, of this colony. Esqr., as testamen-
 “tary guardian, by virtue of the last Will and testament of the
 “said Richard Bass Daly, over the aforesaid legitimate chil-
 “dren, to make a new arrangement with regard to the disposal
 “of her aforesaid " property; In pursuance whereof, and of an
 “agreement entered into and concluded in this colony on the
 “16th day of July 1821, between the said V. A. Heyliger,
 “Esqr., and him, this appearer, q.q., which agreement has been
 “fully approved of both by this appearer's constitutrix and by
 “the said R. J. J. E. Daly and R. B. Daly, the former by the said
 “act of the 8th February 1823, and the two latter by deeds
 “dated 8th and 11th February 1823, respectively hereto an-
 “nexed; This appearer therefore now declares in the name of
 “his said constitutrix, in the first place, to revoke, cancel, an-
 “nul, and make void and render of no value and force whatever
 “the aforesaid deed of donation *inter vivos* of

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“the 12th September 1812, the same being thus here-with re-
 “voked, cancelled, annulled, and made void and of no value
 “and force accordingly, and thus considered as having on the
 “31st December 1822, lost all its power, virtue, authority, and
 “effect; provided always that the said agreement of the 16th
 “July 1821, entered into in favour of the appearer's constitutrix
 “and of all her children, be fully, punctually, and strictly com-
 “plied with and fulfilled.” There was an agreement in pursu-
 “ance of which this donation was passed; and the terms of the
 “agreement seem to be referred to in this document. I lay no
 “stress upon it but for the admissibility of this document:—
 “And secondly the appearer, *nomine quo supra*, now declared
 “irrevocably to give and to grant by this present act of *donatio*
 “*inter vivos* to and in favour and behalf of her four legitimate
 “children named, 1st, Richard Joseph John Edward Daly; 2nd,
 “Richard Bass Daly; 3rd, Kitty Eliza Daly; and 4th, George
 “Bourda Daly, to be possessed by them in equal shares the
 “whole of the property, without exception, that his said con-
 “stituent is possessed of, both in capacity as joint heiress to the
 “estate of her late father Joseph Bourda and P. E. Bourda; and
 “more especially her (the appearer's constitutrix's) undivided
 “one third share or part (this being her free and unincumbered
 “property) in the plantation named *Nieuwen Aanleg*, together
 “with her one third share or part in all the shares, cattle, build-
 “ings, utensils, cultivation, and other things thereto appertain-
 “ing, situated in this colony; and also the third part or share in
 “the rents, produce, or other revenues bequeathed to her for
 “her life time by her said father and relatives, arising from the
 “plantation *Vlissengen*, situated in this colony; and conse-
 “quently to give up, cede, abandon, and renounce for ever in
 “favour and behalf of her aforementioned four legitimate children
 “as aforesaid, her whole right, title, share, claim, and property
 “therein; she, the appearer's constitutrix, however, expressly
 “reserving to herself or her order or representative, firstly, the
 “claim, restitution, and receipt of all what is justly due and ow-
 “ing to her, agreeably to and conformably with the tenor,

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“conditions, provisions, and stipulations of and expressedly the
 “first-named deed of gift, (vizt.—three thousand guilders an-
 “nually, and a third part or share in the Reserved Kas) which,
 “however, shall only begin from the first day of February
 “1818, being the day on which her late husband died”—He
 appears to have died in 1818, and this deed, if your Honours
 look at it for any purpose, shows that these children were born
 in wedlock.

Attorney General—Yes, but you cannot look at it, unless
 you admit it.

Mr. Gilbert—You may look at it for the purpose of ex-
 cluding it:—“Until the 31st day of December 1822, which bal-
 “ance shall be paid to her or her representative from the third
 “part of the rents and revenues to be made from the said plan-
 “tations *Vlissingen* and *Nieuwen Aanleg*, under deduction of
 “one hundred and eighteen bags of coffee and three hundred
 “bales of cotton received by this appearer qq; and whereas this
 “balance is to be applied to pay all the debts contracted by the
 “appearer's said constitutrix since the demise of her said hus-
 “band, it is consequently agreed and understood that in case
 “the said balance might be found insufficient to pay off all
 “those debts which she so owes up to that date, she the ap-
 “pearer's constitutrix shall by her attorney in this colony re-
 “ceive also such deficiency from the first revenues of the prop-
 “erties already made or yet to be made from the date hereof,
 “before any appropriation of the revenues as hereinafter speci-
 “fied can be made in order to free and clear her completely
 “from all debts. Secondly, that the appearer's constitutrix fur-
 “ther reserves unto and for herself an annual revenue of four
 “thousand guilders, Holland's currency, which shall be paid to
 “her or her order during her lifetime, either in Holland, Eng-
 “land, or France, as she may deem preferable, free from all
 “charges, yearly in advance, which shall commence from the
 “first day of January of this present year. And thirdly, for each
 “of her three illegitimate children, named, I, Antoinette
 “Augustine.—” She is dead. I do not wish to complicate these
 proceedings. I believe

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she is dead:—"2nd, Maria Marianna; and 3rd, Jean Eugene
 "Henry for their maintenance during their life, the moiety or
 "one half of what each legitimate child shall receive for his
 "share from the net proceeds of the said plantation *Vlissengen*
 "and *Nieuwen Aanleg* during her life, and after her death either
 "an annual revenue of one thousand guilders free in Europe as
 "aforesaid for each of the illegitimate children or the one half
 "of what each legitimate child shall receive for his share for
 "and from the net proceeds of the said plantation *Nieuwen*
 "*Aanleg* this last to be left to the option of the two eldest le-
 "gitimate children now of age, and that of the guardians here-
 "inafter named for the two youngest in their name and behalf
 "during their minority." That is all that is reserved for what she
 "calls her illegitimate children:—"And this appearer, in the
 "name of his constitutrix and by virtue of the power and au-
 "thority in him vested by the said act of the 8th February 1823,
 "declared to nominate, constitute and appoint as guardians
 "over her two youngest legitimate minor children (the two eld-
 "est being of age as aforesaid) for the administration in Europe
 "of the property given and granted to them by this act J. L. E.
 "Ruysch Esq., residing at St. Cloud, and Philip Combault
 "Esq., residing in London, giving and granting unto the said
 "guardians all the power and authority to which they are enti-
 "tled by law, and more especially the power of assumption,
 "substitution, and surrogation, nominating and appointing by
 "these presents as administrators of the said property in the
 "colony the said Peter Charles Ouckama." This Ouckama al-
 "ways appears:—"And by his absence or death Stephen
 "Cramer, both of this colony, Esqrs., with directions to de-
 "mand a regular and proper account, duly substantiated, from
 "the said V. A. Heyliger, Esq., of the administration held by
 "him over the said properties by virtue of the first named act of
 "donation and the last Will and Testament of the said Richard
 "Bass Daly, Esq., deceased, and to give him final acquittal and
 "discharge thereof; the said Peter Charles Ouckama, or *casu*
 "*quo* Stephen Cramer being obliged (for as far as regards

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“said two minors) to render due substantiated accounts to the “above named guardians both of the accounts so to be received “from the said V. A. Heyliger, Esq., and also of his own administration annually during his management of those concerns, and to act in conformity with the instructions which “shall be given to him (as far as regards said two minors) by “the said guardian now appointed.” That is the sum and substance of it.

CHIEF JUSTICE—Who appeared on behalf of the two minors said to be illegitimate?

Mr. Gilbert—Not a human being.

Mr. Justice NORTON—Did those children acquiesce in it?

Mr. Gilbert—It is impossible for me to say.

Mr. Justice NORTON—There is nothing to show?

Mr. Gilbert—No.

CHIEF JUSTICE—In the sense in which the *Attorney General* tenders that admission of the parties, it seems not to be an admission at all.

Attorney General—I am under the impression that in the document you will find those testamentary guardians concurring in the arrangement.

CHIEF JUSTICE—Till that is shown it cannot be admissible.

Mr. Gilbert—But if these children were illegitimate, then Richard Bass Daily had no right to appoint guardians over them,

CHIEF JUSTICE—*Mr. Gilbert* disputes the document unless it is shown that there is anything on the face of it showing that there was an admission on the part of these illegitimate children; and I confess I cannot see it is admissible.

Mr. Gilbert—This document was admitted, it is true, in the case of the heirs of Bourda and Harel. I stated yesterday how it came to be admitted. I have not only the report of the proceedings, but the written reasons of the Court, and on reference I find that I tendered the document, because the lease was made out in the extraordinary way in which such old documents were made out. It was signed by Ouckama, qq., without any explanation, and Heyliger, qq., and somebody else, qq.,

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showing that they represented somebody; and I was obliged to give an explanation in order to show how Ouckama came to represent these parties in the lease. I considered it necessary to put in the provisional agreement and the *donatio inter vivos*. I did not do it to prove the illegitimacy of my present clients—certainly not; but that Marshall, the predecessor of Harel, had taken a lease under certain parties, and that he could not dispute it.

Attorney General—*Mr. Gilbert* is mistaken. There Ouckama signed qq. the heirs of Daly.

Mr. Gilbert—I say so; but I was bound to prove what it meant.

CHIEF JUSTICE—The signature to the lease showed more than that document.

Mr. Gilbert—The lease was signed thus:—“Stephen Cramer, qq; V. A. Heyliger, qq., the heirs of R. B. Daly; P. C. Ouckama, for self and E. G. Boode, junr., E. G. Boode; Robt. Marshall.” I put in this document to show what were meant by the heirs of Daly. When I tendered it was objected to by the counsel on the other side:—“First, because it was void on the face of it. Secondly, because it purported to be a contract between a mother and her own children through the medium of their guardian, or because rather it purported to be a contract between Heyliger as guardian of the two eldest children of the father, and Ouckama as attorney of the mother. Thirdly, because the contract was an attempt on the part of their mother to render certain of her children illegitimate, which she could not do.” It did not seem to me that Harel had any great interest in this question, except to avoid payment of his creditors; and it is put here in the reasons:—“The Court having consulted the authorities cited in support of the second ground of objection, considered them inapplicable, and with respect to the third objection, the Court considered that the document was tendered as showing the parties to the lease, and not with a view of rendering certain children illegitimate, and admitted the document.” These are the reasons of the Judges, not the report of the case. The Court were referring to the objections to the document. They come later to their own reasons.

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CHIEF JUSTICE—That is the prefatory part of it, stating the course of the argument?

Mr. Gilbert—Yes. I have stated the way I came to tender the document, and why the Court admitted it; but I submit that under any circumstances it cannot be admitted as a statement of the illegitimacy of the persons; and especially as regards the mother, if it is to be considered a statement on her part, she could not make such a statement. But, however, it does not go so far as that, because it is simply a statement on the part of a person for the purposes of it.

Mr. Justice BEETE—The power of attorney is not attached to it?

Mr. Gilbert—No—the power of attorney just expressed the authority to do it.

Attorney General—There are three powers of attorney. I will tender them all.

Mr. Justice BEETE—The power of attorney sets out the deed to be passed.

Mr. Gilbert—Then it amounts to a declaration of the mother.

Attorney General—I do not think *Mr. Gilbert* has answered my objection, because the ground on which I tender this document, after a full consideration of the point, and not intending to object to (as general propositions of law) many things I have heard him state. As to a mother not bastardising her own issue—I am not objecting to the general proposition of law, but I tender this document as a document passed by the Counsellor Commissaries, equivalent to a Judge of this Court, and under the circumstances it was considered a family arrangement recognized by the Court. Your Honours will find that in the Dutch law no instruments purporting to confer rights in immoveable property by way of donation can be good unless they are passed judicially. *Vander Linden*, in page 215, expressly states thus:—“The rule of the Roman law, that every “donation above the value of 500 *aurei* should be publicly registered, does not exactly prevail with us; although with respect to the donation of immoveable property, it must be judicially transported and made over, and the duty of two and a “half per cent thereon.”

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CHIEF JUSTICE—Has that been done?

Attorney General—That was a matter for the Counsellor Commissaries to look after. The donation must be passed judicially, and this is a judicial instrument:—“Be it known that on “this day, the seventh of May 1823, before us, James Robert—“son and John Kingston, Counsellor Commissaries of the “Honourable Court of Criminal and Civil Justice of the United “Colony of Demerara and Essequibo”—It is just as solemn an instrument according to the law of the colony as any judicial conveyance of property; and I submit that in that state of the case you must presume that these Counsellor Commissaries must have been satisfied that the parties had authority to do what this deed purports to do.

CHIEF JUSTICE—By the authority of the mother?

Attorney General—It is a transfer of property.

CHIEF JUSTICE—By the mother?

Attorney General—Yes; but I presume it must have been passed in the same way, after advertisement, it being a judicial act. I should imagine that that must have been the case; but at all events, all the presumptions necessary to support a judicial instrument will be made.

CHIEF JUSTICE—But it would not go further than an expressed admission of the mother. You do not mean to say that the Counsellor Commissaries decided the question, or had any opportunity of deciding whether these children were or were not illegitimate.

Attorney General—I go this length, that they must have been satisfied from the documents laid over that this was done with authority for the benefit of those called illegitimates, because it is stated that the mother was liable for their maintenance, and she made a liberal provision for them, and that is part of the arrangement on which the whole course of dealing with the matter was based, on which the subsequent Wills of the legitimate children were founded, and on which the last of the recognized lawful children of Madame Daly bequeathed his interest to his illegitimate brothers and sisters. The whole of the arrangement of the Daly family proceeded on the basis of this instrument being a valid and subsist-

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ing one. So that the course of dealing of the family amounted to an acquiescence in that which was a family arrangement really intended for the common benefit of all. And I would put it to your Honours whether, if an instrument of this sort had been opposed to the wishes of the parties, they ought not to have taken some steps before the Court with respect to it?

Mr. Gilbert—It only disposes of Mrs. Daly's life interest in the property, and we could not interfere with that.

Attorney General—The way in which these documents were tendered before the Court on the occasion to which reference has been made was this, that the lease purported to have been signed by an individual on behalf of the heirs of R. B. Daly, and of course it was necessary to show that the lawful heirs of R. B. Daly were all joined in the suit against Harel. You can see that the lawful heirs were all joined.

CHIEF JUSTICE—Did it go further? It said that the parties to the lease were all joined, and Harel could not dispute.

Attorney General—The lease was drawn up to bind them to give distinct proof of their title—qq. the heirs of R. B. Daly; and in that case it was incumbent on the Plaintiffs to show that the legal heirs of R. B. Daly were all brought before the Court. In discussing their title it necessarily followed that they had to account for those two children that were said to be illegitimate; and in order to establish the Plaintiffs' case in that instance they were bound to show that those children were illegitimate, because they were excluded from the suit.

Mr. Gilbert—The provisional agreement was in, you will recollect.

Attorney General—I will first read what the averment was:—"That the said Stephen Cramer, by signing the words "and letters Stephen Cramer, V. A. Heyliger, qq. the heirs of "R. B. Daly, meant as follows—Stephen Cramer acting for "Victor Auguste Heyliger, as representing the said Richard "Joseph Johan Edward Daly, since deceased, Richard Bass "Daly, since deceased, George Bourda Daly, since deceased, "and Kitty Eliza Daly, since deceased, the last mentioned four "persons

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“being the only children of Maria Daly, born Bourda, hereinafter particularly mentioned, begotten, in wedlock, with her husband Richard Bass Daly, then deceased.” That was the averment—that those four were the only children born in wedlock.

CHIEF JUSTICE—Born in wedlock? or begotten in wedlock?

Attorney General—Begotten in wedlock; and it was for the Plaintiffs to show that, as they sued in the name of these Dalys, as the only children begotten in wedlock by Mrs. Daly with her husband, Richard Bass Daly. I thought *Mr. Gilbert* was mistaken in saying that he did not raise the question.

Mr. Gilbert—No—I did not raise the question. I merely stated how the signatures were put. The Court distinctly stated that they did not raise the question of legitimacy.

CHIEF JUSTICE—So far as the decision of the Court goes, must we not act upon that writing? *Mr. Gilbert* read a passage in which the Court guarded itself against admitting the document in reference to that question.

Attorney General—But *Mr. Gilbert*, will find, if he will read further, that the Court was then giving a resume of the objections taken from day to day, and that the Court afterwards came to conclusions on the different points; but you will find that when they gave their reasons for the judgment they pronounced, they did give a reason with respect to this document that it ought not to be admitted, on that ground among others, that a mother should not bastardise her own issue. I am not disputing the general proposition of law, but it appears that was all the result.

CHIEF JUSTICE—The Court did not admit the document?

Attorney General—It did admit it; but not on the ground that a mother could bastardise her issue.

CHIEF JUSTICE—Only in the sense that *Mr. Gilbert* put it?

Attorney General—I admit that there was no decision on that point.

Mr. Gilbert—I have not time to read all the reasons, but the Court gave its reasons.

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CHIEF JUSTICE—The *Attorney General* admits that there was not a decision on this point.

Attorney General—There was a further averment:—“That “the said Maria Daly, mother of the said Richard Joseph Johan “Edward Daly, Richard Bass Daly, George Bourda Daly, and “Kitty Eliza Daly, after the death of her husband, Richard Bass “Daly the elder intermarried with one Long King, otherwise “called Charles, otherwise called Charles Beresford Ingledew, “and that on or about the 13th April 1849, she departed this life “in London, intestate, leaving no other issue begotten in wed- “lock her surviving, save and except the said Richard Joseph “Johan Edward Daly.” But the ground on which I tender this instrument is that, whatever it may be worth, it was judicially passed, and as such the Court will notice it as part of the proceedings in this case. The Court may hold that it does not go the whole length of conclusively establishing the fact that these children are bastards; but at all events I think it goes a considerable length in bearing out our statement when we bring all the parties before the Court, and these two individuals among them, and when we say we do not recognize these two as legitimate; and I think that in that point of view, at all events, your Honours will admit the document, it having been passed in the way I have stated.

Mr. Gilbert—I do not know if your Honours wish to hear me. The *Attorney General* spoke of his objection. It is not his objection. It is mine. I do not know that the *Attorney General* can get out of the objection to a declaration of a mother bastardising her own children. Nor do I think he can get over the fact that the document was tendered for a different purpose in Harel's case.

CHIEF JUSTICE—It is clear that a mother cannot bastardise her own children.

Mr. Justice NORTON—She cannot, either directly or indirectly:—“In an action to try the legitimacy of a son born of a “married woman, since dead, her declarations that he was not “the son of her husband, but of another man, are not admissi- “ble; nor are similar declarations of the husband.” That of course could not bastardise them.

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CHIEF JUSTICE—The rule of law is that a mother shall not be allowed to rebut the presumptions of the law that children born in marriage are the children of the father. But there are some qualifications to the rule, as where non-access is proved.

Mr. Gilbert—But this declaration involves access, and if there is access the husband must be presumed to be the undoubted father.

CHIEF JUSTICE—Take the case of a woman living in open adultery although there may be opportunities of access.

Mr. Gilbert—Even in that case the husband would be presumed in law to be the father. I will just refer to the report in the former case:—“*Attorney General*—But there was another “objection to the document on the face of it. It was an attempt “made by a wife to make certain of her children illegitimate, “by saying that they were illegitimate, which she could not do. “The law sealed the mouths of parents on that point, and they “could not make arrangements founded on a statement that “certain of their children were legitimate and certain of them “illegitimate. That was a question which was decided only the “other day, after a deliberate review of all the law on the sub- “ject, in the case of *Legge v. Edmonds*. In that case the hus- “band was bed-ridden or suffering from some infirmity and “after his death a letter was found written by the wife to a per- “son with whom she notoriously lived in adulterous cohabita- “tion, stating that he (her paramour) was the father of her child. “The Judge held that the mother could not bastardise her own “child * * * Now, in this case the declaration of the mother by “her attorney that two of her children were legitimate and three “illegitimate was an attempt to bastardise her own issue, and “could not be admitted * * * CHIEF JUSTICE—He would tell “the learned counsel what his opinion was—that all this would “be very well *inter se* hereafter. If any of these children who “were said to be illegitimate chose to come afterwards and “dispute the question when the property was being divided, “they would be perfectly at liberty to do so, and these argu-

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“ments would be very proper in such a case. But what all this “had to do with Mr. Harel’s paying his rent, he could not possibly see.”

Mr. Justice NORTON—That is the very case I referred to—*Legge* against *Edmonds*.

Attorney General—I do not object to *Mr. Gilbert’s* taking this course, though it is irregular in reply to bring up a quantity of new matter; but if he is to be allowed to go over new matter, the Court will allow me a reply.

CHIEF JUSTICE—Yes—if there is any new matter.

Mr. Gilbert—I am not referring to new matter. I refer to the report of the case.

CHIEF JUSTICE—The judgment in *Legge* and *Edmonds* goes elaborately into the question, and seems to adopt absolutely the rule that a mother cannot bastardise her issue, *except aliunde*.

Mr. Justice BEETE—*Mr. Gilbert* quoted the case of *Whewright* and *Moss* in Harel’s case.

Mr. Gilbert—I have no recollection of it. I expressly put my argument throughout that I was not bastardising these people. I was only showing the state of the circumstances at the time, and that they were such as neither Harel nor Marshall could dispute; and the observation of Mr. Justice BEETE, and the final judgment of the Court show that the Court did not admit the document for the purpose of proving illegitimacy, but only because it was a document acted upon by the parties. I put it in to explain how the lease came to be signed in that way, and that Mr. Harel could not dispute the signatures.

CHIEF JUSTICE—The strongest case in support of the rule is this—a man marries a woman on the verge of parturition, and although he may never have seen her before, the child is his.

Mr. Gilbert—In page 36 *Roscoe*, we have:—“Thus declarations of deceased parents are admissible to prove the legitimacy of their children.”

CHIEF JUSTICE—The case that has been pressing on my mind is this—I thought there was some qualification to the rule. This is the case of *Legge* and *Edmonds*, which has been floating in my mind. It refers to the distinction

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between examining a witness and admitting a declaration:—
 “Lord REDESDALE there makes this observation, which will
 “be found in p. 470 of Sir Harris Nicholas's book—‘If the
 “‘declaration of parents can in any case be evidence, this is an
 “‘instance in which it ought to be admitted’—that is the curi-
 “ous way in which Lord REDESDALE puts it.—‘It is generally
 “‘excluded, from the apprehension that it may be the result of
 “‘some unnatural hatred towards the child. Here, the motives
 “‘of the parent were unequivocally parental, and the welfare
 “‘of the children was the sole object of the declaration. Be-
 “‘sides, this was no inconsiderate exclamation—no hasty un-
 “‘premeditated act,—it was an allegation on a record framed
 “‘after due deliberation under legal advice, and the veracity of
 “‘it was attested by Lord Vaux and Lady Banbury themselves
 “‘coming into Court and solemnly acknowledging their deed.’
 “The Judge would therefore appear, as far as could be gath-
 “ered from his expressions, to have admitted the evidence.”
 Taking that passage, the supposed declaration here seems to be
 very similar—a declaration made in a formal document for the
 purpose of making provisions for the children. It is carrying
 out the parental intention, as Lord REDESDALE puts it.

Mr. Gilbert—Your Honour does not know whether there
 was the evidence there which was in the Banbury peerage case.

Mr. Justice NORTON—Take the case of Savage, who was
 bastardised by his own mother.

CHIEF JUSTICE—I must say it appears to be a good rule,
 because it would be hard to give a father or a mother, who may
 be actuated by various feelings of irritation, the power of de-
 claring their children bastards. There is such a multitude of
 evidence and points of various kinds quoted in the Banbury
 peerage case, that I should like to refer to it. Here is another
 passage referred to in *Legge* and *Edmonds*—a quotation from
 Lord ELDON'S judgment in the Banbury peerage case, which
 would sustain the point perhaps on another ground. Dealing
 with Sir SAMUEL ROMILLY'S argument, he says:—“I will not
 “say that all simple declarations are evidence

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“in such a case; but I will say, that the conduct of a husband and wife towards a person claiming to be their legitimate child is in some cases admissible evidence upon the question, whether the husband and wife had sexual intercourse at such time as by the course of nature that child might have been the fruit of that intercourse. It is often a most material species of evidence. It is not always, but it is frequently, a safe ground for inference, for it comes from the least suspicious source, that is, from the very individuals who are the most interested to give a different testimony. If there was a case where circumstantial evidence of this description is admissible, it is this.” So that there are such passages for the Judges to limit the rule. There it was admitted in evidence at once.

Mr. Gilbert—But you do not know what other evidence there was in the case.

CHIEF JUSTICE—True, we are in the dark. He appears to have been dealing with something tendered as a declaration, and he seems to think it might be admissible as evidence of conduct. Sir SAMUEL ROMILLY put it in this way:—“We admit that a declaration cannot be received, but conduct is in effect a declaration. If she had taken her child upon her arms and offered it to the supposed parent to caress it as its parent, that would be a matter which you might give in evidence, and yet you cannot give evidence of a declaration to the same effect.” And it was in commenting upon that argument that Lord ELDON used the observations I have read.

Attorney General—The conduct here is that she made provision for her children, divesting herself of property for their benefit.

Mr. Gilbert—No; she had made an arrangement eleven years before. She revoked that, and now made another.

CHIEF JUSTICE—That peerage case is one that decides so many points that it is referred to in all the books.

Mr. Gilbert—But not on this point. Both Lord ELDON and Lord REDESDALE referred to other circumstances. But so far as this case goes, we have this naked point— it amounts to a declaration of the mother, there being no other evidence that can make it admissible at all.

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CHIEF JUSTICE—I think with these points now before us, this document is something more than a mere declaration. There is her declaration in it, but there is a solemn declaration of parental intention for the benefit of the children. Surely, that is a strong circumstance.

Mr. Gilbert—But before you introduce that consideration you will have to believe and admit the declaration of bastardy.

CHIEF JUSTICE—Of course, it is subject to question and consideration; but is admitted on argument. It is admissible; it may be credible; and it is put here *prima facie* that parents are greatly interested in proving the legitimacy of their children—at least it is so where marriage is held sacred. It may be different where the usages are different; but parents, especially mothers, are interested in proving the legitimacy of their children, and as Lord REDESDALE lays it down, though not impossible, it is difficult to suppose a case in which a mother is so hostile and cruel to her child as to give it a pretended benefit for the purpose of cursing it.

Mr. Gilbert—It may have been no benefit to these children. Supposing them to have been illegitimate, she was bound to support them, and all she did there was to make over her life interest providing at the same time for their maintenance.

Attorney General—But you must look at the amount.

CHIEF JUSTICE—We must look at this as a natural act with more or less a rational intention, which was to give them something. Plainly she was actuated by the intention of providing for them.

Mr. Gilbert—This is property in which she had a life interest, and might have more; but what she undoubtedly had she disposed of in this way. She gave a certain portion of it to her children, and she retained something else.

CHIEF JUSTICE—I am not quite sure that if we got the Banbury peerage case we would find that there was proof of non-access.

Mr. Gilbert—Very likely, because the judgment did not turn upon that point. I think in the absence of the case itself we may take the rule as laid down in *Taylor*, that these declarations are admissible only in cases of

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non-access proved, and if there had been any such exception in the Banbury peerage case I do not think the authority of *Taylor* would be set aside.

CHIEF JUSTICE—He quotes several cases of non-access proved *aliunde*, but he does not quote that case.

Mr. Gilbert—But unless non-access had been proved in that case he would have stated it as an exception and a case in which the rule had been carried farther than he appears to carry it. I have nothing further to say, except to refer to the general rule, and I think the admission of this document would be a violation of it. This is a declaration by attorney. It is stated that this deed is set out in the power of attorney. If so, it purports to be the declaration of a mother by the mouth of another.

CHIEF JUSTICE—I do not know if it would be convenient to proceed with the case leaving this point unsettled. I have not a decided opinion but it would be undesirable to adjourn the case till we can refer to the Banbury peerage case.

Mr. Gilbert—Reference was made by the *Attorney General* to this being a public act.

CHIEF JUSTICE—I think it is only of value as showing its solemnity, but it is of no judicial value.

Mr. Gilbert—As a deliberate declaration.

Attorney General—It must be a judicial act.

CHIEF JUSTICE—The act itself must be judicial, but it is not to be inferred that everything stated in the body of the act is judicially established.

Mr. Gilbert—It merely amounts to this, that it is a deliberate statement.

Attorney General—Your Honours will understand that I tender this document, not as a declaration, but as a judicial document, and that the mother and guardian of these minors agreed to it.

CHIEF JUSTICE—That is not the way you introduced it; but that forces itself upon the minds of the Court.

Attorney General—Then, it comes within the case quoted.

CHIEF JUSTICE—But not as evidence, except in support of non-access. The marriage raises the presumption of

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legitimacy, and till that presumption is rebutted by proof *aliunde* of non-access, it would not be admissible.

Attorney General—I do not see that by the case quoted here.

CHIEF JUSTICE—It is perfectly consistent with that case.

Attorney General—Your Honour says there is no statement as to when these children were born; but *Mr. Gilbert* says it was after the marriage of the mother. If the document is to be looked at for one thing, it must be looked at for the other.

CHIEF JUSTICE—That is the very reason of my observation yesterday. Till we know whether these children are legitimate or illegitimate, we cannot come to any decision.

Mr. Gilbert— But my argument is this, that if they charge illegitimacy, they should state that, and prove the facts on which they rely. The burden of proof rests upon them. They ought to know on what facts they rely, and they ought to prove them.

Mr. Justice BEETE—What is the date of that act?

Registrar—It is dated 4th May 1823.

Mr. Justice BEETE—And Richard Bass Daly died in 1818?

Mr. Gilbert—That act is founded on the provisional agreement of 1821. In fact, the act of donation ought not to go in without the provisional agreement.

Attorney General—Any provisional arrangement was done away with by the permanent arrangement.

Mr. Gilbert—But in the case of Harel the discussion was on the provisional agreement. There was no discussion on the act of donation.

Attorney General—That is a new statement.

Mr. Gilbert—Well—it is the fact.

Attorney General—I know it was set out.

Mr. Gilbert—But you will see that it was on the provisional agreement that the discussion arose.

CHIEF JUSTICE—Is the date of the provisional agreement referred to?

Mr. Gilbert—I know it was in 1821.

Attorney General—That is a new objection altogether.

Mr. Gilbert—I am not making it an objection. I am

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stating it as a fact in answer to a remark from the First Puisne Judge. The power of attorney under which that act was passed was referred to because it is in the book of record.

Attorney General—I thought *Mr. Gilbert* was mistaken when he said it was the provisional agreement, and not the act—

Mr. Gilbert—I am referring to the report of the case, which I know to be correct.

Attorney General—Here it is:—“The Plaintiff next tendered an authentic copy of a provisional agreement, &c.—“The Defendant objected to that document”——

Mr. Gilbert—It is wrong, if it is so stated.

Attorney General—It is very difficult for me to go on when I am reading a statement which I know from recollection to be correct.

Mr. Gilbert—I say I have the report of the discussion.

Attorney General—Allow me to read further:—“The Plaintiff next tendered authentic copy of an act of donation *inter vivos*, &c, &c.—The Defendant objects to that document “on the same grounds upon which he objected to the last document. The Court, for the reasons already stated, considered “the objections invalid, and as the document was a copy or “extract from its own records admitted it.”

Mr. Justice BEETE—Was the provisional agreement admitted?

Attorney General—Yes; and the act of donation.

Mr. Gilbert—That is precisely what I say.

CHIEF JUSTICE—With some objection?

Attorney General—Yes; it was not admitted without objection.

Mr. Gilbert—I did not say it was admitted without objection. I said it was admitted without discussion.

Attorney General—*Mr. Ross* has just handed me a book with the Banbury peerage case, giving the points that went before the House of Lords.

CHIEF JUSTICE—We will see whether there was any proof of non-access.

Attorney General—I must remind your Honours that this is a matter showing an act that materially affected

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the rights of persons of whom the Court is upper guardian—I mean the illegitimate children, and therefore that act could never have been passed "without the Court's being satisfied.

CHIEF JUSTICE—Certainly, it appears here that there was no proof of non-access. All the questions appear to have proceeded on the footing that there were opportunities of access.

Attorney General—Was not one of the instances that your Honour read the case of a mother holding up the infant to the father.

CHIEF JUSTICE—That is the case put by Sir SAMUEL ROMLLY, against your position, as distinguishing acts from declarations.

Attorney General—What can be a more solemn act than a mother attesting:—"She has deemed it just and equitable with "the approbation of V. A. Heyliger of this colony, Esq., as testamentary guardian, by virtue of the last Will of the said "Richard Bass Daly, over the aforesaid legitimate children, to "make a new arrangement with regard to the disposal of her "aforesaid property; and in pursuance whereof and of an agreement entered into and concluded in this colony on the 16th "day of July 1821, between the said V. A. Heyliger, Esq., and "him, this appearer, &c. &c." And when that arrangement affecting the interests of these minors is passed before the Court, it is about as solemn a proof as you can require. It goes even beyond the case your Honour refers to.

Mr. Justice NORTON—Then, every declaration will amount to an act. The Judges say not.

Attorney General—But by this declaration she divested herself of property.

CHIEF JUSTICE—And the declaration was antecedent to the conduct.

Attorney General—Yes; and I submit it is admissible as showing the conduct of the mother.

Mr. Gilbert—So much has been said about the act; but the mother could cancel that act at any time. There was a previous one cancelled.

CHIEF JUSTICE—Still she thought it worth her while

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to have an elaborate power prepared, and to send it out here to provide for these children; and in connection with that conduct she stated that they were illegitimate. Still all this seems to lead to the inference I have stated. You must judge whether you will proceed with the case, this point not being decided. So far as I am concerned, I am afraid that it will become a sort of Banbury peerage case, if it stands over on every point; but still this is so far an important point that it would hardly be excusable to decide it at once without consideration.

Attorney General—The Court can have no difficulty in admitting the document as a judicial record.

CHIEF JUSTICE—Well—there may have been no difficulty in the sense in which *Mr. Gilbert* put it forward, as a certain piece of evidence to show who were meant by the heirs of R. B. Daly.

Mr. Justice NORTON—I do not think that the document is admissible. I cannot see any distinction between this declaration and that in the case of *Legge v. Edmonds*; and if this is received, then every declaration would imply an act, and in that case we would sweep away all distinction between declarations and conduct, and the wholesome policy of the law would be defeated, which is to prevent parents from directly or indirectly bastardising their offspring. The CHIEF JUSTICE seems to think that in *Legge* and *Edmond's* case the Judge's opinion would have been in favour of the admission of the letter, if the letter had been posted and had come to the custody of the person to whom it was written. Now, I cannot draw that conclusion. The Judge says:—"Now, here, an effort must of course be made to keep this declaration as an act of conduct, in fact, as being an external act, which is in one sense conduct—the committing to paper thoughts passing in the mind. Mr. Rolt felt himself in a difficulty in this respect; he said, he must couple it with a further external act—the sending of the letter. It was put by Mr. Horn, that to say the mere committing to writing those thoughts which may be passing in your mind is to be treated as an act of conduct, when what is written down is communicated to nobody, would in truth subvert and get rid by a

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“side-wind of the established course of law with reference to
 “mere declarations, because it is a mere declaration committed
 “to paper, instead of a declaration made *viva voce*. But I am
 “not by any means prepared to say that if these letters had been
 “traced to Mr. Edmonds, (and that is one point which has
 “weighed on my mind throughout the argument.) if they had
 “been sent by the post and had been traced to Mr. Edmonds,
 “and if the putative father had remained in possession of them
 “without taking any notice of their contents, that would not be
 “a circumstance of conduct between the parties bearing on the
 “question of adultery, an external circumstance independent of
 “declaration to be submitted to the jury, just as the conduct of
 “Mrs. Davies, with regard to the particular act referred to by
 “Lord LYNDHURST, in *Moore v. Davies*, was thought by him
 “proper for the consideration of the jury.” So that the utmost,
 so far as I can understand, that it amounts to is this, that if the
 letter had been sent it might have been evidence. I see no case
 at all to support the admission of such declarations. It can only
 be by an ingenious simulation—if I may so call it—by treating
 every declaration as an act, and then admitting it on the ground
 of conduct demonstrating the feeling of the parent towards par-
 ticular offspring. I do not think that any case has been cited to
 show that such an instrument or document as the one under
 consideration is admissible.

Mr. Justice BEETE—I have a strong opinion on the point;
 but I should like to see that case.

CHIEF JUSTICE—It is quite apparent that the point must
 have been discussed in the Banbury peerage case.

Attorney General—Of course, if the children were not bas-
 tards, this act of donation deprived them of a portion of their
 inheritance.

Mr. Gilbert—No, it did not, because the document only
 purports to make an assignment of Mrs. Daly's property for
 life.

CHIEF JUSTICE—I only look at the general fact that she
 was engaged in making provision for her illegitimate children,
 and whether that amounts to much or little, I think for the pur-
 poses of that question is not very mate-

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rial. It was plainly so far a solemn act that it was one she took the means of doing in legal form before the Commissaries of the Court, parting with interests of her own. By strict rule of law we are entitled to look at it. Shall we be obliged to adjourn the case?

Attorney General—I should be very sorry to do so. I am anxious to do everything that is convenient to your Honours, and perhaps your Honours will be so kind as to suggest the course to be pursued.

CHIEF JUSTICE—Perhaps you may go on with the case to-day till we come to a decision. I cannot give you any promise as to the time, although I may go out of Court with the hope of making up my mind by to-morrow morning.

Attorney General—If your Honours are in hopes of making up your minds by tomorrow morning, in the meantime I will tender another document.

CHIEF JUSTICE—Perhaps that will be the best course.

Attorney General—I am sure the Banbury peerage case is in some of my books.

CHIEF JUSTICE—How far does the *Times* newspaper go back here?

Mr. Gilbert—I do not think it will be found so far back. The only place where it is filed is the Agricultural Rooms, but it does not go so far back.

Attorney General—At all events, the majority of the Court have not yet expressed any opinion on the point.

Mr. Justice NORTON—I certainly thought Mr. Justice BEETE was ready to express his opinion.

Mr. Justice BEETE—You misunderstood me if you thought so.

Attorney General—I tender the affidavit of Baron Von Greisheim. He states how these children were treated by himself and the other members of the family, and he also states from information derived from other members of the family:—
“That the said Eugenia Clementina Von Greisheim did often in “her life state to me that the said children, Maria, Marianne, “and Jean Eugene Henri, of her said aunt, Maria Ingledeu, “formerly Daly, born Bourda, were illegitimate.”—

CHIEF JUSTICE—Is that objected to?

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Mr. Gilbert—Yes.

Attorney General—The last declaration is dated 9th November 1864.

CHIEF JUSTICE—This suit was not instituted at the time.

Attorney General—I apprehend the declaration might be made at any time.

CHIEF JUSTICE—According to the law of England, a man could not be indicted for perjury for making a false declaration in a legal proceeding that is not pending at the time. It is a statutory declaration by way of evidence.

Attorney General—In Harel's case declarations that were most warmly contested had been taken years and years before the suit commenced.

CHIEF JUSTICE—Declarations of deceased persons?

Attorney General—No, of living persons.

CHIEF JUSTICE—It strikes me that such a construction would reduce the value of a declaration, by removing from it the sanction of the law of perjury. In England unless the legal proceeding be pending there can be no perjury.

Mr. Justice BEETE—It has been frequently the case here that declarations without any heading at all have been sent out for the purpose of commencing a suit.

Attorney General—True, they were headed “in the Supreme Court,” and no names were inserted, but I am willing to take out the heading and put it on the footing that it is not entitled in the cause. I think it was a mistake to have any heading at all. As Mr. Justice BEETE says, these documents are generally sent out without any heading at all. In fact, the way this occurred is that the Baron sent out a power of attorney authorising a person to sue for him, and he attached the affidavit to the power of attorney.

CHIEF JUSTICE—The words of the Act are:—“From and “after the commencement of this Act, in any action or suit then “depending or thereafter to be brought or intended to be “brought”——Do you rely upon any declarations, *Mr. Gilbert*?

Mr. Gilbert—No; I have no declarations at all.

CHIEF JUSTICE—It seems a very odd thing that it should be made to apply not only to actions brought, but

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to actions intended to be brought:—"And every declaration so made, certified, and transmitted shall in all such actions and suits be allowed to be of the same force and effect as if the person or persons making the same had appeared and sworn or affirmed the matters contained in such declaration *viva voce* in open Court or upon a commission issued in the examination of witnesses or of any party in such action or suit respectively." This, I suppose, was in a suit intended to be brought.

Attorney General—I tender the declaration. It stands quite by itself. I admit that the heading has nothing to do with it; and unless it must be made after the suit is brought this declaration is a good one.

CHIEF JUSTICE—It will give rise to some awkward questions. Properly it ought not to be entitled.

Attorney General—Yes; I admit that that is not necessary; and it will be for your Honours to say whether, not being entitled, it is admissible.

CHIEF JUSTICE—Then, before you tender it, you think it right to make that statement? It is necessary to make an entry on the minutes.

Attorney General—Yes; without including the title. In fact, it may be almost impossible to comply with the section in strictness, because the rubric might have to be altered.

The *Registrar*, by direction of the Court, made the entry.

CHIEF JUSTICE—I believe in all the codes of the colonies a false declaration is perjury under the statute; and that really leads to difficulty; because here it seems that a man might make a declaration which is false, and yet not be guilty of perjury, because the particulars cannot be material till the suit is brought.

Attorney General—Of course any part of a declaration that could not be given by word of mouth could not be evidence if written down.

CHIEF JUSTICE—Where was that declaration made?

Attorney General—Wherever Baron Von Greisheim resided in Germany.

CHIEF JUSTICE—Would the Act of Parliament extend to that?

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Attorney General—That point was most elaborately argued in Harel's case, whether the Act of Parliament would extend to that.

CHIEF JUSTICE—The Act says:—"In any action or suit in any Court of Law or Equity within any of the territories, plantations, colonies, or dependencies abroad, being within and part of His Majesty's dominions, for or relating to any debt or account wherein any person residing in Great Britain and Ireland shall be a party."

Attorney General—Where one of the parties resides in Great Britain. Wright resides in England.

CHIEF JUSTICE—Then:—"It shall and may be lawful to and for the Plaintiff or Defendant, and also to and for any witnesses, to be examined or made use of in such action or suit, to verify or prove any matter or thing relating thereto by solemn declaration or declarations in writing in the form in the schedule hereunto annexed, made before any Justice of the Peace, Notary Public, or other Officer now by law authorised to administer an oath." Do we know whether he is authorised?

Attorney General—There was a great deal of argument on that point in Harel's case.

CHIEF JUSTICE—The Act of Parliament makes it a misdemeanour in a person to make a false declaration; but it could not be a misdemeanour in a foreign country, because the person would be out of the jurisdiction.

Attorney General—I assure your Honour that there were any number of declarations made in the case of Harel,

Mr. Gilbert—I do not think any one of them was made before a foreign Notary.

Mr. Justice BEETE—They were made before Consuls.

Mr. Gilbert—They have special authority. The only declarations in Harel's case were taken before Consuls.

Mr. Justice BEETE—These were declarations made by J. P. Holmes and Moens.

Attorney General—Yes, Moens made a declaration about the bastardy of these children. I objected to the declaration of Jacob Bernelot Moens, "first, because there was no seal of the mayor to the declaration." Then,

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there was a declaration made by Jules Theophilus Boode. There were a considerable number of declarations, some made in Paris, and some in Germany. If the Court once admit the principle that a declaration may be made by a person abroad, the declaration made before a Notary Public is just the same as a declaration made before any other officer.

CHIEF JUSTICE—Authorised by law; but we have no means of judging of the foreign law.

Attorney General—I assure your Honour that was one of the main grounds I took up in Harel's case, that the foreign law must be adduced; but the Court went against me. I addressed to the Court a very long argument on the subject, but it was completely given against me, and the declarations were received. I think the Court went on the 7th clause of the 14th and 15th Vic, ch. 29. But the main question there was whether the Act of Parliament extended to declarations made in foreign countries.

Mr. Gilbert—In the first place, I have to submit to the Court that, looking at the intention and scope of the law, this is not a case in which a declaration can be received on the subject at all. The 5th Geo. 2, ch. 7, which was taken from some old statute was followed up by the 5th and 6th W. 4, ch. 62. The first is an Act for the more easy recovery of debts in his Majesty's plantations in America; and the second is an act passed in the reign of Geo. 3, for the more easy recovery of debts in the colony of New South Wales. There are a variety of provisions in it, but I do not think it necessary to refer to any of them. The 15th section of the 5th and 6th W. 4, ch. 62 is intended to be merely an enlargement of the provisions of the Act of Geo. 3; and let us see whether by analysing it we cannot come to the conclusion that this is a case in which a declaration ought not to be received at all, but that if the evidence is admissible at all it must be got by commission:—“Whereas an “act was passed in the 5th year of the reign of his late Majesty “King George the Second, instituted an Act for the more easy “recovery of debts in his Majesty's plantations and colonies in “America; and whereas another Act was passed in the 54th “year of the reign of his late Majesty King George

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“3rd, instituted an Act for the more easy recovery of debts in
 “his Majesty's colony of New South Wales; and whereas it is
 “expedient that in future a declaration should be substituted in
 “lieu of the affidavit or oath authorised and required by the
 “said recited Acts; be it therefore enacted. That from and after
 “the commencement of this Act, in any action or suit then de
 “pending or thereafter to be brought or intended to be brought
 “in any Court of Law or Equity within any of the territories,
 “plantations, colonies or dependencies abroad, being within
 “and part of his Majesty's dominions.” — I think your Hon-
 ours are perfectly satisfied as to the heading of the affidavit. I
 do not take any exception at all to the heading. Indeed, I do not
 see that it would be a proper objection for me to take, because
 those suits were withdrawn and modified and the delay was
 occasioned to suit the convenience of all parties.

CHIEF JUSTICE—If there is any objection to the heading it
 would be as well to bring it forward at once.

Mr. Gilbert—I do not take that objection, and I go with the
Attorney General to this extent, that headings are not necessary
 in these declarations. I am often obliged to give instructions for
 declarations myself in suits that are not yet brought, and they
 must be prepared without headings. .

CHIEF JUSTICE—But you must see that it is a very odd
 thing, the unfortunate declarant being at the mercy of the law
 of a foreign place whether he shall be considered guilty of a
 misdemeanour or not.

Attorney General—I do not see that.

CHIEF JUSTICE—But it is so. If his statement be material in
 the suit he may be guilty of misdemeanour; and whether it is
 material or not will depend upon the way in which the suit is
 brought.

Mr. Gilbert—At any rate, all that is necessary to be done
 in these cases is to send instructions as to the proper way of
 bringing forward the facts, and the parties ought not to swear
 to anything that is not the fact.

CHIEF JUSTICE—It would be very immoral to swear to
 what is not the fact; but what is material will depend upon the
 issue.

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Mr. Gilbert—This clause goes on:—“For or relating to any debt or account wherein any person residing in Great Britain and Ireland shall be a party, or for or relating to any lands, tenements, or hereditaments or other property situate, lying, and being in the said places respectively, it shall and may be lawful to and for the Plaintiff or Defendant, and also to and for any witness, to be examined or made use of in such action or suit, to verify or prove any matter or thing relating thereto by solemn declaration or declarations in writing in the form in the schedule hereunto annexed.” It seems to me that the object of this is, not to include foreign domiciles. The Plaintiffs here, Augustus Deodatus Boode, and Baron Van Griesheim, reside in Prussia, Madame Ely, Jules Victor Houel and Honoré Desiré Houel, all in Paris. Now, it does not seem to me that this act of Parliament was ever intended to benefit the Plaintiffs in this manner. We must see what the old Act of Parliament was, and see what are the benefits that parties residing in foreign countries are intended to have. We cannot go beyond the intention, and an enactment of this sort will not be carried beyond its strictest limits. It has been over and over again held in this Court that this is an act to be construed strictly, because it is to a certain extent a violation of the ordinary rules of evidence.

CHIEF JUSTICE—It is to the detriment of the very persons it is quoted against.

Mr. Gilbert—It is. We have had some very nice discussions on the subject, and Mr. Justice BEETE will remember cases in which the discussions have been very fine indeed as to the construction of this clause. Now, as regards that principle, it is not intended that you should go before a foreign notary in the way this is done to make a declaration. The declaration is to be made:— “By solemn declaration, &c, and made before any Justice of the Peace, Notary Public, or other officer now by law authorised to administer an oath, and certified and transmitted under the signature and seal of any such Justice, Notary Public duly admitted and practising, or other officer, which such declaration, and every

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“declaration relative to such matter or thing as aforesaid, in
 “any foreign kingdom or state, or to the voyage of any ship or
 “vessel, every such Justice of the Peace, Notary Public, or
 “other officer shall be and he is hereby authorised and empow-
 “ered to administer or receive.” It does not refer to a declara-
 tion made in a foreign kingdom or state, but relating to any
 matter or thing in a foreign kingdom or state:—“And every
 “declaration so made, certified, and transmitted shall in all
 “such actions and suits be allowed to be of the same force and
 “effect as if the person or persons making the same had ap-
 “peared and sworn or affirmed the matters contained in such
 “declaration *viva voce* in open Court, or upon a commission
 “issued for the examination of witnesses or of any party in
 “such action or suit respectively; provided that in every such
 “declaration there shall be expressed the addition of the party
 “in making such declaration, and the particular place of his or
 “her abode.” Now, as to the latter part of this section, we shall
 see by and by whether it applies in any way to this document;
 but take the section on the face of it, is there anything from
 which you can infer that any power of taking declarations is
 intended to be given to any person carrying on a profession in
 a foreign state? It refers first to Justices of the Peace, then to
 Notaries Public, (who are not strictly officers, but professional
 men,) or other officers authorised to administer oaths. It cannot
 be said that Justices of the Peace apply, or
 that Notaries Public apply, in the sense used here, or
 any other officer in Prussia.

CHIEF JUSTICE—A Notary Public is an officer taken notice
 of.

Mr. Gilbert—For certain purposes.

CHIEF JUSTICE—I should say for the purpose of taking de-
 clarations.

Attorney General—I think that the Notary has a sort of in-
 ternational character.

Mr. Gilbert—True; a Notary may do things of that kind in
 commercial matters.

CHIEF JUSTICE—He is a person whose acts are recognized
 within the scope of his power.

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Mr. Gilbert—But I submit that this act is not within the scope of his power. You would not say that a Notary comes within the meaning of justice or other officer.

CHIEF JUSTICE—You say this applies to English officers, whose duty it would be. If that is the scope of the act it would not apply to foreign officers; and it might unfortunately happen that one person might be able to get a declaration in his favour while another might not.

Mr. Gilbert—Parties must be subjected to some inconveniences.

CHIEF JUSTICE—According to your construction that inconvenience would not arise. I am only pointing out the inconvenience that might arise from its more extended construction.

Mr. Gilbert—Exactly. I did not at first understand your Honour. Two parties might be residing abroad, and one of the parties might be able to get a Notary Public, but the other might not.

CHIEF JUSTICE—What language is it taken in?

Mr. Gilbert—It is in German. There is a translation. I do not put the parties to the inconvenience of proving that translation; but I submit that the Act of Parliament does not apply to a case of this kind. Let us see how this declaration is to be taken:—“I, John Frederick Charles Hermann Von Greisheim.”—

CHIEF JUSTICE—What does he state himself to be?

Mr. Gilbert—He does not state himself to be anything, and that is another objection. He says that he is named in the rubric of this cause.

Attorney General—It is the same suit.

Mr. Gilbert—It gives no addition:—“I, John Frederick Charles Hermann Von Greisheim, named in the rubric of “this cause, residing at the city of Potsdam, in Prussia, do solemnly and sincerely declare.” Whether this is a sufficient description of his place of abode, I will not say.

Attorney General—I have never written to him otherwise than as Baron Von Greisheim, Potsdam.

Mr. Gilbert—I suppose he is always on the look out for letters. It is a question for the consideration of the

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Court whether the requirements of the statute have been sufficiently complied with as regards the place of abode; but it is quite clear that the want of addition is fatal to the declaration:—"Provided that in every such declaration there shall be "expressed the addition of the party making such declaration."

CHIEF JUSTICE—Is he not described as a Baron?

Mr. Gilbert—I do not think he is; but the addition ought properly to come after a man's name. We all know what addition is.

CHIEF JUSTICE—The description of a man's status—for instance Eight Honourable. He has nothing more to do than to state that he is a peer of the kingdom.

Mr. Gilbert—He states that he is named in the rubric of this cause; but there is no addition at all in that:—"I was married at Dusseldorf on the 12th day of December 1837 to "Eugenia Clementina Boode, who was the daughter of Edward "Gustavus Boode by Catherine his wife, born Bourda, all "named in the Claim and Demand herein, and that the said "Catherine Bourda was the daughter of Joseph Bourda, the "Testator in this cause."

CHIEF JUSTICE—That must be very alarming knowing that there was a suit pending.

Attorney General.—He had a copy of the Claim and Demand.

CHIEF JUSTICE—That was a declaration in a particular suit.

Mr. Gilbert—He goes on:—"That the said Eugenia "Clementina Von Greisheim, born Boode, departed this life at "Mayence on the 4th March 1849. That Maria Bourda, daughter of the said Joseph Bourda, the testator, married one Richard Bass Daly, also named in the Claim and Demand herein, "and during the continuance of the said marriage gave birth to "six children, named respectively Richard Joseph Johan Edward, Richard Bass, George Bourda, Kitty Eliza, Maria "Marianne, and Jean Eugene Henri." Now, I may pause here. It really does not appear that Von Greisheim knew all about this family's affairs, because there appears by the documents tendered to have been another child.

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CHIEF JUSTICE—But is that connected with the question you are now upon?

Mr. Gilbert—No, it is not. I mentioned it only as showing his means of knowledge:—“That the said Richard Bass Daly “died leaving the said Maria Daly who thereafter married Long “King, otherwise called Charles Beresford Ingledew. That the “said Maria Marianne and Jean Henri Daly are illegitimate “children of my late wife's aunt, the said Maria Ingledew, formerly Daly, born Bourda.”

CHIEF JUSTICE—This is going into the contents of the document, and anticipating.

Mr. Gilbert—I am reading it now to ascertain whether there is anything to remedy these defects:—“That the said “Eugenia Clementina Von Greishem deceased did often in her “lifetime state to me that the said children, Maria Marianne “and Jean Eugene Henri, of her said aunt, Maria Ingledew, “formerly Daly, born Bourda, were illegitimate, and that the “said children were always treated and considered as illegitimate by the relatives of her said aunt, Maria Ingledew, and “that she did often state to me that the said children were both “born in Holland at a time when, although their said mother, “Maria Ingledew, formerly Daly, born Bourda, had been continually residing in Holland for many years, the said Richard “Bass Daly had been continually absent and residing beyond “the seas, in the colony of Demerary, for the space of several “years preceding the birth of both said children, and when it “was therefore physically impossible that he could have been “the father. That the said Maria Marianne and Jean Eugene “Henri Daly have always been considered and treated by the “relatives of the said Maria Ingledew, formerly Daly, born “Bourda, as illegitimate and bastards.” This is the paper. There is not a single word of addition in it. Now, in the first place, I submit that it is inadmissible on the ground of want of addition. We must construe the act strictly, and it must be strictly complied with to give the benefit it is intended to give. Then again, supposing a foreign notary could legalise a declaration of this sort, the declaration requires

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to be made before him, and “certified and transmitted under his signature and seal.” Now. the way in which it is. certified is this:—“Done at Potsdam, the fifth of November, one thousand “eight hundred and sixty-four. Before the undersigned, Adolph “Licht, Notary Public, residing at Potsdam, appeared this day “John Frederick Charles Hermann Ton Greisheim, Lieutenant- “Colonel in the Prussian army, half-pay, residing at this place, “personally known to the notary and qualified to transact legal “business.” That is not an addition:— “The same produced the “foregoing English document of today's date, and declared— “The signature at the foot of said document is mine, and I ex- “pressly acknowledge having written with my own hand the “names John Frederick Charles Hermann Von Greisheim; the “following attesting witnesses, 1, Adolph Boch, furrer, and 2, “Frederick Twiez, tailor, both of Potsdam, were admitted to “this transaction by the notary drawing up the document.”

CHIEF JUSTICE—Which he did not draw.

Mr. Gilbert—No:—“They and the notary affirm that they “are not excluded by any of the circumstances which, accord- “ing to paragraphs five and nine of the law of the 11th July “1845, would disqualify them from participating in this trans- “action. Thereupon the foregoing transaction was read aloud to “the party appearing in presence of the two attesting witnesses, “who are personally known to the notary to be natives of “Prussia, of age, and qualified to transact legal business,—was “approved of by the party concerned, and signed by him with “his own hand, namely, John Frederick Charles Hermann Von “Greisheim, Adolph Boch, Frederick Twiez, Adolph Licht. “This is to certify that the foregoing transaction has taken “place in the same manner in which it was taken down, that it “was read aloud to the party concerned in the presence of the “notary and the two witnesses, that it was approved and signed “by him with his own hand. Endorsed in the Notary Register, “sub-number 560 of the year 1864. Adolph Boch, Frederick “Twiez, Adolph Licht.” Now, this declaration is for the pur- pose of evidence; but the

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signature of this notary could not prove itself. There is no law here by which it could prove itself. Ordinance No. 21 of 1845, section 4, refers to the proof of declarations of this kind. It says:—"The signature and seal, and every signature and seal of any justice of the peace, notary public, or other officer by law authorised to administer an oath in Great Britain and Ireland, subscribed and affixed to the certificate or attestation of any declaration heretofore made or hereafter to be made before any other justice, notary public, or other officer, under and by virtue of an act 6 W. 4, ch. 62, shall, without any proof, be received as evidence in all Courts of Justice, and in all civil cases whatsoever in British Guiana of such declaration having been duly made." But all these are English officers. It does not apply to a case of this description; and it is scarcely necessary to say that the seal of a notary of a foreign country does not prove itself. We find in *Taylor*, p. 11, what is judicially noticed:—"They will also judicially notice the seal of the corporation of London, and the seal of a notary public, he being an officer recognised by the whole commercial world." In the 3rd note on that page he says:—"But see *In re Earl's Trusts*, 4 Kay and J. 300, where it was held that the seal of a notary public of a foreign country not under the Queen's dominion could not be judicially noticed."

Attorney General—All I can say is that under the Act of 1845 the Court recognised it.

CHIEF JUSTICE—In that act it is expressed.

Attorney General—Even foreign notaries.

Mr. Gilbert—But even under the most favourable circumstances it must be legalised.

Attorney General—I know I had to urge all these arguments in the other case.

CHIEF JUSTICE—Yes, it seems that you are in reversed positions.

Mr. Gilbert—I do not remember that there was any such declaration in Harel's case.

Mr. Justice BEETE—Not made before foreign officers.

Mr. Gilbert—No; there were plenty before British Consuls.

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Attorney General—I contended at the time that under the act of George 4th the signature must be proved before certain diplomatic agents.

CHIEF JUSTICE—But it was not a declaration before a Notary.

Mr. Gilbert—No. There are a great many foreign documents that may be legalised by officers of this status, as British Consuls, and given in evidence here. Now, the way in which this is attempted to be legalised is this:—"The foregoing signature is hereby attested and that Licht of Potsdam, Councillor of Justice, is a Sworn Notary Public, within the jurisdiction of the Royal Court of Appeal. Berlin, the 8th November, 1864. V. Strampff." What he is does not appear. He makes reference to the Supreme Court; he may be the usher of it for aught we know. Then next:—"The above signature is hereby attested. Berlin, November 9th, 1864. The Minister for Foreign Affairs. By order, Konig." Then follows the attestation at the British Embassy. It does not say who certified it:—"I do hereby declare that the foregoing is a true and faithful translation into English of the subjoined German Deed of acknowledgment." Who certified it, it is difficult to know. Then comes the declaration. I shall say nothing about that. Then, a Mr. Wagner attests it in this way:—"The foregoing signature is attested with the remark that the Teacher Wagner is also Sworn Translator of the English language before the Court, and that the declaration made by him in this capacity has full faith and force." And this is the seal. They are great people for legalization.

Attorney General—If it is worth the money it cost, it ought to be a very valuable document.

Mr. Gilbert—I submit on all these grounds that the document is not admissible.

CHIEF JUSTICE—I should be glad if some arrangement could be made with respect to all these objections; because it is quite clear that this case will go before the Court of Appeal, and it is desirable that it should go on all its merits. Suppose we reject one of the documents, and the Court of Appeal should be of opinion that it should have been admitted. We would be glad to let in

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everything that is possible; but if our opinion is required on the admissibility of the document, of course we must give it.

Attorney General—As I understand it, your Honours may give an opinion on the question of law that will affect all the parties, and if there is a question affecting any particular individuals, it may stand over; but the settlement of the case between all the parties is what is sought.

CHIEF JUSTICE—It seems to me that it concerns all the parties to have all these questions settled. Take the case of these persons. They may say, “We are anxious not to have two issues—we wish to have one decision, and one appeal; let us have all the points decided.” Of course, if these documents are tendered, we must deal with them as tendered. I should be sorry to reject any document before the Court which may have the effect of postponing the decision, if the Court of Appeal should differ with us on any question.

The Court was adjourned for a few minutes.

On the re-opening of the Court,

Mr. Gilbert said—I do not know if the suggestion made by his Honour the CHIEF JUSTICE will have any particular effect upon this question. It might shorten the case very much, but I do not know how to answer it. I must consider it a little, and perhaps the Court would adjourn the case till to-morrow to consider whether it is desirable to withdraw the question.

CHIEF JUSTICE—The question of the legitimacy of the children?

Mr. Gilbert—Yes.

CHIEF JUSTICE—I hope not on the footing that it is to be postponed to be settled hereafter.

Attorney General—This is the way in which it appears. Our main object was to get a decision on the whole case. We got the parties and brought them up, and we state certain things with respect to these parties; but they deny the pertinency and relevancy of it.

CHIEF JUSTICE—I cannot see how the issue can be decided except these parties are before us, even if they could properly say they have an abstract right, without

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applying it to this case. I am not aware that it is competent to the Court to declare an abstract principle.

Mr. Gilbert—Very well, after that intimation, I will go on. These are all the objections I take to the admissibility of the document, without reference to its contents.

CHIEF JUSTICE—You will see that the principle right one, that a question of this kind raised in this way could not be raised unless all the parties interested in the construction of the Will are before the Court; and it must be decided on the face of the pleadings who those persons are.

Mr. Gilbert—I feel the force of the observation. I feel that this question cannot be taken into consideration unless the parties are before the Court.

CHIEF JUSTICE—If they are not before the Court, how are you to satisfy us that all the parties interested are before the Court? It all goes back to this question—is there a jurisdiction to declare the rights or not: If there is not a jurisdiction, it is the more unfortunate for the parties, because there will have to be a series of such suits by each of the parties to get possession of particular parts of the property. So that, instead of simplifying the case, it will complicate it.

Mr. Gilbert—I may say this, that it was only with a view to the possibility of an arrangement among the parties after the main question had been decided that I entertained the proposal, or thought it feasible at all; but I would rather go on, after the view the Court takes of the necessity of having all the parties clearly in some defined position before it. Now, as to the statement purporting to be a statement of facts, I ask, can the Court take a statement in that manner for the purpose of proving an illegitimacy? We must look at the statements to see what they are.

CHIEF JUSTICE—This is not objection to its inadmissibility, but to its relevancy.

Mr. Gilbert—I state the objection very shortly. I do not think the *Attorney General* can show any case in which a declaration of this kind has been admitted for the purpose of showing illegitimacy. It is admitted that

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these children were born during marriage, and Von Griesheim takes it upon himself to say this:—"That the said Richard Bass "Daly died leaving the said Maria Daly him surviving, and that "the said Maria Daly thereafter married Long King, otherwise "called Charles, otherwise called Charles Beresford Ingledew. "That the said Maria Marianne and Jean Eugene Henri, are "illegitimate children of my late wife's aunt, the said Maria "Ingledew, formerly Daly, born Bourda." Now, he simply states that in so many words, and then he goes on to give us some of the means of his knowledge, and he says:—"That the "said Eugenia Clementina Von Greisheim did often in her life- "time state to me that the said children Maria Marianne and "Jean Eugene Henri, of her said aunt, Maria Ingledew, for- "merly Daly, born Bourda, were illegitimate, and that the said "children were always treated and considered as illegitimate by "the relatives of her said aunt, Maria Ingledew, and that she "also did often state to me that the said children were both "born in Holland at a time when, although their said mother, "Maria Ingledew, formerly Daly, born Bourda, had been con- "tinually residing in Holland for many years, the said Richard "Bass Daly had been continually absent and residing beyond "the seas in the colony of Demerary, for the space of several "years preceding the birth of both of said children, and when it "was therefore physically impossible that he could have been "the father of the said children." I ask the *Attorney General* to "point out a case where a declaration so loose as this has been "allowed to affect the legitimacy of children born in wedlock. I do not think he can. It does not come within the rule as to the admissibility of hearsay evidence in respect to pedigree. Unless he can show that it does, this document is not admissible. Simply his wife said so and so, without any reference to her means of knowledge; because although she was a member of the family it may be assumed that she had not the least knowledge of them. I am not going to read at length passages from the books; but I glance at cases of evidence of hearsay in cases of pedigree, and I do not find a case analogous to this. If

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the *Attorney General* can find any authority, he is at liberty to cite it; but I proceed on the ground that as this is a strictly technical mode of admitting evidence, it is a very fair objection to take to this document that it ought not to be admitted at all, as it does not come within the purview of suits under the Act of Parliament. It does not purport to be taken under the Act of Parliament. It is not taken before such a party as is competent by the Act of Parliament; and if all these requisites had been complied with, it is not in such a form as to satisfy the Act. We know that in documents of this kind coming from England or Scotland the declaration is put in this way. This day such a person appeared before me and declared so and so. This is the mode of giving the certificate, which, although not strictly prescribed by statute, has been adopted, and I conceive it to be the right mode.

CHIEF JUSTICE—We propose not to consider this objection as to relevancy. Supposing it to be admissible on other grounds, we propose to admit it, subject to the objection as to relevancy. You will confine yourself simply to the technical grounds. That is merely because we are desirous, if possible consistently with any usage, to get all the evidence that is tendered before the Court; so that the whole case may be decided.

Attorney General—Then, as to the technical question raised by *Mr. Gilbert*, I may say he has rather adopted a line of argument pursued by me on the former occasions, when the whole of these points were sifted. I will take the liberty of reading the way in which it was put before the Court:—“The “Plaintiffs next tendered declaration of Elizabeth Ruysch de “Coeverden—No. 10.—Defendant objected on the grounds, “first, that it purported to be evidence given by Mrs. de Coeverden with reference to the various members of the Bourda “family before Thomas Pickford, Her Britannic Majesty's Consul at Paris, without the Defendant having had an opportunity “of cross-examining her. Secondly, that the statute of 5 and 6 “W. 4, ch. 62, sec. 15, related only to parties residing in Eng- “land, and not to parties residing abroad. Thirdly, that if the “evidence had

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“been material, it should have been obtained by commission. Fourthly, that the act being in derogation of the rights of parties, must be construed strictly. Plaintiff in answer—The act “said *any person* residing in *Great Britain*.” It seems that the plain intention of the statute was to include parties in foreign countries, because it says:—“To verify or prove any matter or thing thereto by solemn declaration or declarations in writing “in the form in the schedule hereunto annexed, made before “any justice of the peace, notary public, or other officer now “by law authorised to administer an oath, and certified and “transmitted under the signature and seal of any such justice, “notary public duly admitted and practising, or other officer, “which declaration, and every other declaration relative to “such matter or thing as aforesaid, in any foreign kingdom or “state.” That is, a declaration made in a foreign kingdom or state. That is how it runs.

Mr. Justice BEETE—Relative to any matter or thing in any foreign kingdom.

Attorney General—This is what the Judges said:—“Defendant replies.—The right is given to subjects of Great Britain or British subjects. The declaration must refer to the debt or land sought to be recovered. The Court admitted the document; first, because in the 5 and 6 W. 4, ch. 62, No. 15, “nothing was said of the cross-examination of a witness being “required. The declaration in form was clearly admissible under that Act. What credit or weight was to be attached to the “contents of the declaration was a matter which the Court “would take into consideration afterwards. 2ndly., because “according to the last mentioned Act, it was not necessary that “all the parties to the action should be residing in Great Britain “or Ireland. The words of the Act were ‘wherein’ any person “residing in Great Britain and Ireland shall be a party.”

CHIEF JUSTICE—The objection does not seem to have been put on the ground that the document was made in Paris, but that the party resided there.

Attorney General—Well—that may not make much difference. I am only showing your Honours that the

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question was considered. The Court further said:—"That John "Baker Wright, one of the Plaintiffs, was residing in England, "and his residence in England brought the declaration within "the provisions of the Act, and made it admissible." Then, there was another document. A power was sought to be provided by declaration:—"The Court upon examining the document, found that the execution of the power was duly proved "by declaration made under and by virtue of the 5 and 6 W. 4, "c. 62, sec. 15. before Thomas Pickford, Her Majesty's Consul "at Paris, that such declaration was fully certified under his "hand and seal, and therefore admitted the document." I find on my notes that I referred to the Privy Council's reports, to the effect that the declaration must refer to British subjects only, and that in passing the Act, Parliament could not be supposed to be legislating beyond the subjects of England. I must say I read these words, "in any foreign kingdoms"—I am unable to read them in any other way than—as first dealing with declarations made in England. "In such terms as aforesaid" cannot mean declarations in such terms as aforesaid in foreign kingdoms, but declarations in the colonies.

CHIEF JUSTICE—Then, how came in the ships?

Mr. Justice NORTON—What complicates things is the phrase "or to voyages."

Attorney General—I think the intention was to allow ship-masters who had an interest at home in suits to make declarations in any matters relating to voyages, because these notarial protests are made all over the world, and they are admitted in all Courts of the world.

CHIEF JUSTICE—Then, one branch of the sentence would apply to the place of making the declaration, and the other branch would apply to the subject of the declaration.

Attorney General—It is so by the punctuation.

CHIEF JUSTICE—But it is divided by a comma.

Attorney General—The curious part of the matter is that I am not sure—although I should be sorry to have to decide such a point—I am not sure that according to the construction of these words, it is necessary, in order

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to render the declaration admissible in a British colony, that any one of the parties should be resident in Great Britain, supposing the suit to relate to any landed hereditaments.

Mr. Justice NORTON—Not necessary?

Attorney General—It appears to me that any matter relating to property abroad may be proved by declaration.

Mr. Justice NORTON—Besides, you may give declarations about the matters in foreign countries.

CHIEF JUSTICE—The declaration may be made as much about matters in foreign countries as in English countries.

Attorney General—The subsequent part of the clause does not require that to make the declaration admissible in a suit in respect to property situate in the colonies, any of the parties should be in England. It is this:—“It shall and may be lawful to “and for the Plaintiff or Defendant, and also to and for any witness to be examined or made use of in such action or suit to “verify or prove any matter or thing relating thereto.” Which means relating to either debts or accounts, or any lands, tenements, or property abroad. You cannot have any doubt about that:—“By solemn declaration or declarations in writing in the “form in the schedule hereunto annexed made before any justice of the peace, notary public, or other officer”—Now, that clearly does not mean to confine it to Great Britain and Ireland. I do not suppose that anybody can entertain a doubt that a declaration can be made before a justice of the peace in a British colony.

CHIEF JUSTICE—If the Act has application to the colony.

Attorney General—It says:—“Before any justice of the “peace, notary public, or other officer now by law authorised “to administer an oath, and certified and transmitted under the “seal and signature of any such justice, notary public duly admitted and practising, or other officer.”

CHIEF JUSTICE—It is the most extraordinary section I ever read in my life.

Attorney General—And:—“Which declaration, and

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“every declaration relative to such matter or thing as aforesaid, “in any foreign kingdom or state.” Now, surely that means a declaration made in a foreign kingdom or state.

CHIEF JUSTICE—I confess I do not understand the argument. There are two branches of the sentence, with the same nominative, the same verb, and the same objective. One is relative to such matters or things, or to the voyage of any ship or vessel; and you say the first branch is to apply to the place where the declaration is made, and the second branch to the object for which the declaration is made.

Mr. Justice NORTON—There are two members—the place and the subject of the declaration.

Attorney General—Yes—the way I read it is this—that the declaration may be made in England, or in any foreign country, with reference to any voyage. That is the only way to make sense of it—any other way would make nonsense of it—Declarations made in England, or in foreign countries, relative to voyages of ships. Your Honours will see there is here a new element. There was nothing before about voyages of ships; but there were proofs with regard to debts, lands, and tenements situated in the colonies. It is expressed in rather an obscure manner, I must confess; but for the first time we hear something about the mode of proof relative to the voyages of ships, and as I understand it, parties are admitted to prove anything relating to the voyages of ships in any of Her Majesty's dominions or in any foreign country; and I apprehend that according to the practice in England notarial protests in relation to voyages of ships would be received in any of the Courts at Westminster.

CHIEF JUSTICE—But that is relative to voyages in any foreign state—every declaration relative to such matters or things in any foreign state.

Attorney General—Yes—but it means declarations generally—declarations made either in England or in foreign kingdoms.

CHIEF JUSTICE—Then, how would these words “any foreign kingdom or state” come after “relative to?” It

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is to be relative to one of two things—to any such matters or things aforesaid, or to any voyages of ships; and after that comes foreign kingdom or state.

Attorney General—What does “such matters or things” mean? It means debts or accounts in any foreign kingdom or state, or lands and hereditaments in the colonies. It is impossible to give any meaning at all to “such matters or things,” if you do not mean “lands, tenements, or hereditaments, as aforesaid;” that is, in any colony abroad.

Mr. Justice NORTON—Was not that very point decided by the Court?

Attorney General—I think so; because there the declaration was made in Paris.

Mr. Justice NORTON—But was the declaration taken formally.

Attorney General—I will not undertake to say.

CHIEF JUSTICE—The reasons you read do not show that the declaration was taken formally.

Attorney General—Although those reasons are voluminous they are not so voluminous as the objections that were taken. I recollect myself, and I should be rather surprised if Mr. Justice BEETE does not find on looking into the case, that the objection was taken somewhere. It was a suit that went on for some days.

CHIEF JUSTICE—It strikes me that the case we have been referring to, requires not merely a justice officer, but a justice or officer authorised by law to act; so that we must have the means of judging of the state of the law—not only what the law of Prussia is now, but what it was when this statute was passed.

Attorney General—I believe it has been a very remedial act in enabling parties to recover their claims.

CHIEF JUSTICE—Still it is a very restrictive act. I do not state it judicially, but I believe this act was intended to apply generally, but it was cut down to reach Her Majesty's dominions, and in doing so this line was not amended. It would be interesting to consult Hansard on the subject.

Attorney General—It says:—“And every declaration so “made, certified, and transmitted”—No matter—

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the party may reside anywhere; but to give jurisdiction the property must be in the colony:—"Shall in all actions and suits "be allowed to be of the same force and effect as if the person "or persons making the same had appeared and sworn or affirmed the matters contained in such declaration *viva voce* in "open Court, or upon a commission issued for the examination "of witnesses or of any party in such action or suit respectively". There is another oddity about this. So far as I recollect, parties to suits were not then admissible as witnesses in suits; for I think it was Lord DENMAN'S Act that first allowed parties to suits to appear as witnesses in them. The next objection made was that the declaration was not made by the proper officer. I submit that this is clearly made, certified, and transmitted under the hand and seal of a Notary Public, and that is all that we have to see to. All the subsequent parts are only from superabundant caution.

CHIEF JUSTICE—But it is to be a Notary Public duly admitted and practising.

Attorney General—I submit that by law the signature and seal of the Notary prove themselves. The passage cited by *Mr. Gilbert* is in a foot note, but it says see so and so.

CHIEF JUSTICE—What is the case? I always understood that the seal of a Notary Public proved itself.

Mr. Justice NORTON—*Taylor* says so.

Attorney General—Let us take the declaration by an English creditor before a Notary Public. Surely if it was attested by his seal and signature, the Court would assume that he was duly admitted and practising. If any argument is to be drawn from the practice of the Court, here we never require any proof that a Notary is practising. The fact would appear from his seal and the execution of the document. It is a solemn instrument, and so far as this Notary is concerned it is almost in diplomatic form:—"Done at Potsdam, the 5th of November 1864." And you will see that the previous declaration of Baron Von Greisheim to which this is attached is certified and transmitted under the hand of the Notary:—"Before the undersigned, Adolph Licht,

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“Notary Public, residing at Potsdam, appeared this day John Frederick Charles Hermann Von Greisheim, Lieutenant Colonel in the Prussian army, half-pay, residing at this place, personally known to the Notary and qualified to transact legal business. The same produced the foregoing English document of today's date and declared.—The signature at the foot of said document is mine, and I hereby expressly acknowledge of having written with my own hand the names John Frederick Charles Hermann Von Greisheim. The following attesting witnesses, Adolph Boch, furrer, and Frederick Twiez, tailor, both of Potsdam, were admitted to this present transaction by the Notary drawing up the document. They and the Notary affirm that they are not excluded by any of the circumstances which, according to paragraphs five and nine of the law of the 11th July 1845, would disqualify them from participating in this transaction.” I presume you must assume that to be the fact. I cannot suppose that in the case of an English Notary, where a declaration was made, certified, and transmitted under his signature, you would require proof that he was duly admitted, because the principle of law is that where a party assumes to be acting in a public capacity you must assume that all things are rightly done, unless the contrary appears in some way. It would defeat the whole purpose of the Act to require a Justice of the Peace to prove his commission.

CHIEF JUSTICE—No; it has been held at home in many cases that the signature of a public officer must be proved, and modern Acts of Parliament put it in this way, purporting to be signed.

Attorney General—The instrument says:—“Thereupon the foregoing transaction was read aloud to the party appearing in presence of the attesting witnesses, who are persons personally known to the notary to be natives of Prussia, of age and qualified to transact legal business—was approved of by the party concerned, and signed by him with his own hand; viz., John Frederick Charles Hermann Von Greisheim, Adolph Boch, Frederick Twiez, Adolph Licht. This is to

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“certify that the foregoing transaction has taken place in the same manner in which it was taken down, that it was read aloud to the parties concerned in presence of the notary and two witnesses, that it was approved, and signed by him with his own hand. Endorsed in the Notarial Register, sub number 560, of the year 1864. Adolph Boch, Frederick Twiez, Adolph Licht.” So that it was made, certified, and transmitted under the signature and seal of the Notary Public, and although these other legalizations are here as it appears from extra caution, I do not believe they were necessary. The first is a certificate as follows:—“The foregoing signature is hereby attested, and that Licht of Potsdam, Councillor of Justice, is a “Sworn Notary Public within the jurisdiction of the Royal “Court of Appeal. Berlin, 8th November, 1864. V. Strampff.” The Court is bound under the last Act to take judicial notice of all foreign courts:—“The above signature is hereby attested. “Berlin, November 9, 1864. The Minister for Foreign Affairs. “By order, Konig.” And then the previous signature is certified. Well, by way of being still more precise, there are attached to these documents English translations. They have been translated twice over, and here are attached the English translations, which also are certified, and Wagner, the official interpreter of the high Court of Appeal sets his hand and seal of office to it, and there is a seal of the Court of Appeal to the correctness of the English translation, showing what extreme particularity there was. If this document is to be thrown out on the grounds stated, all I can say is that the statute is a dead letter. It is impossible to have any instrument more carefully attested and legalised than this. Then, the only other objection is that there is no sufficient statement of the addition. Now, it so happens that there is, because although at the commencement of his declaration he is called Baron Von Greisheim, yet in the same paper which follows is a statement that he is a Lieutenant-Colonel on half pay in the Prussian army. Now, although there is that provision, I am not prepared to admit that it is essential to the validity of the declara-

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tion. I should be sorry to do so, because if it should be so I do not know how many Powers of Attorney in this colony might be objected to on the ground that the attesting witness did not state his addition. What do I see in the Act? "A declaration in the form annexed;" and when you come to the schedule, do you find any addition? No—I. A. B. state so and so. Therefore, I submit that whatever may be Your Honour's view of the provision, it does not go to this extent, that without the addition the document would be inadmissible in evidence. These are the technical objections that have been made to the admissibility of this instrument, and I submit that I have answered them all. The only one that appears to be supported by reference to the Act is as to the absence of addition; but even admitting that addition was required, I have shown that it is stated in the declaration. It is all one instrument. It is both in English and German. You have to follow it on the same piece of paper, and Baron Von Greisheim or Lieutenant Colonel Von Greisheim signs the declaration in which his addition and status are mentioned. On these grounds I submit that you would hold it to be admissible. Some reference was made to the Ordinance No. 21 of 1845. Now I have a distinct recollection myself of arguing on that Act and attempting to show that those words could not be applied; because if the Court were to scrutinize the section it would be found that according to the grammatical construction of it, it is perhaps more difficult to put a construction upon that section than upon the English statute, and I remember distinctly His Honour the late CHIEF JUSTICE admitted as much, but he said the Court had no difficulty in pronouncing a decision as to what was meant by it, which was done by taking the 2nd section in connection with the 11th. If the 2nd section be taken by itself:—"Deeds, letters of Attorney, and other "powers and instruments in writing heretofore made and hereafter to be made in places out of this colony, the due exertion "of which proved by one or more of the subscribing witnesses "by affidavit sworn, or declaration made, before the Mayor or "other chief officer of any city or town corporate within the "kingdom of Great

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“Britain and Ireland, and purporting to be attested under
 “his hand and the public seal of such city or town corporate, or
 “under the hand and seal of any chief Governor or Magistrate,
 “Lieutenant Governor, or President of the Council, or chief or
 “senior Justice of any Court of Record of any colony in Her
 “Majesty's dominions”—There is a curious confusion about it.

Mr. Gilbert—There is an omission in the clause.

Attorney General—Yes, I pointed it out, and the Court
 said there was no difficulty in interpreting the clause. The view
 the Court took of it was that it would take judicial notice of
 foreign officers, provided they appeared to be acting in their
 official capacity, just the same as officers in England.

Mr. Gilbert—I will take the last objection first, and I sub-
 mit, notwithstanding what the *Attorney General* states, that it is
 a very good one. He says that it is not essential that there
 should be any addition. If so, it is not essential that there
 should be any place of abode. If the clause has a meaning it
 ought to be strictly complied with. If it has no meaning it ought
 not to have been there. But if the *Attorney General* had taxed
 his memory he would have recollected that there was a deci-
 sion on the point.

Attorney General—On the addition? I do not remember it.

Mr. Gilbert—I do not remember the case. I cannot tell if
 Mr. Justice BEETE remembers that it has been held that the ab-
 sence of addition was fatal, and also that the absence of the
 place of abode was fatal.

Attorney General—I do not understand that there is any
 objection about the place of abode.

Mr. Gilbert—I say that if this is not necessary, there is no
 necessity for the place of abode. The Court will see that it is
 very sharp:—“Provided that in every such declaration there
 “shall be expressed the addition of the party making such dec-
 “laration, and the particular place of his or her abode.” That
 follows the part of the section which makes these documents
 admissible in evidence:—“And every declaration so made,
 “certified, and transmitted shall in all such actions and suits be

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“allowed to be of the same force and effect as if the person or persons making the same had appeared and sworn or affirmed the matters contained in such declaration *viva voce* in open Court or upon a commission issued for the examination of witnesses or of any party in such action or suit respectively; provided &c. &c. &c.” Provided that the addition be placed after the name.

Attorney General—It does not say placed after the name—it says expressed, but it may be expressed in another part.

Mr. Gilbert—I should like to know where you put a man's addition but after his name. I know it has been held so. But, says the *Attorney General*, there is an addition in the declaration—this is a declaration of the notary.

Attorney General—Von Greisheim signs it.

Mr. Gilbert—This is a statement of the Notary, although signed by Von Greisheim, and not a declaration. It is a separate notarial act. Von Greisheim appears to have made it, then gone to the Notary with his witness and acknowledged it, and the Notary signed it; but this is not an equivalent in the declaration for his addition.

CHIEF JUSTICE—But does not the Notary's declaration come after? That statement is signed by Von Greisheim, and then there is the Notary's certificate after that.

Mr. Gilbert—It is altogether a very singular document. The Notary begins in this style:—“Done at Potsdam, the 5th of November, 1864. Before the undersigned Adolph Licht, Notary Public, residing at Potsdam, appeared this day John Frederick Charles Hermann Von Greisheim, residing at Potsdam.” And then he describes him. That is not an addition. What is meant by an addition is where a man makes a declaration—“I so and so, of so and so.” Then, the Notary goes on to say:—“The same produced the foregoing English document of today's date, and declared—The signature at the foot of said document is mine, and I hereby expressly acknowledge of having written with my own hand the names—‘John Frederick Charles Hermann.’”—The following attesting witnesses, “Adolph Boch,

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“furrer, Frederick Twiez, both of Potsdam, were admitted to “this present transaction by the Notary drawing up the document.” But they are not witnesses to the declaration by that transaction. Then:—“Thereupon the foregoing transaction was read aloud.” The transaction is a notarial transaction:—“Thereupon the foregoing transaction was read aloud to the “party appearing in presence of the two attesting witnesses, “who are personally known to the Notary to be natives of “Prussia, of age and qualified to transact legal business, was “approved of by the party concerned, and signed by him with “his own hand.” Then appears Von Greisheim's signature, and then the signature of the two witnesses, and then the signature of the Notary; and then:—“This is to certify that the foregoing “transaction has taken place in the same manner in which it “was taken down, that it was read aloud to the party concerned “in the presence of the Notary and the two witnesses—that it “was approved and signed by him with his own hand.” I do submit that this does not comply with the requirements of the statute as to additions. The Notary says what the man is, but he himself does not put it in the declaration. This is certainly a very singular clause, and it is drawn almost as badly as anything I ever saw. I am bound to say that I have seen things almost as bad; but this is as bad as bad can be. There is a sort of disconnection certainly between suits for accounts and suits for lands, tenements, and hereditaments; but the object of the old act and this act is to favour English Plaintiffs. I submit that it does not properly apply to Plaintiffs residing in foreign countries.

CHIEF JUSTICE—Mr. Justice BEETE points out to me another point, in which it is said:—“I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of an Act made and passed in the fifth “and sixth years of His late Majesty King William the Fourth.”

Attorney General—All these declarations are made in the same way. The schedules require it.

Mr. Gilbert—Suppose a Prussian making that declara-

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tion—he would not say any such thing. That shows that it is meant to apply to Englishmen.

Mr. Justice BEETE—It does not say in her present Majesty's reign.

Mr. Gilbert—Yes.

Mr. Justice BEETE—But this says, in his late Majesty's reign.

CHIEF JUSTICE—But you are not bound to follow the very terms of the schedule.

Mr. Gilbert—I am only pointing out another peculiarity. They had the statute before them, and yet they left a blank for the year in which it was passed. I do not think the *Attorney General* has in any way got over the objection, that notary public here does not mean a foreign notary public. As to justice of the peace he is an English officer.

Mr. Justice NORTON—There is a precisely analogous clause in the Bankrupt law where the word Magistrate applies to the corresponding term in other countries.

Mr. Gilbert—Magistrate is a wider term than justice of the peace.

CHIEF JUSTICE—The section in its terms applies to foreign countries. It is actually taken out of the United Kingdom.

Mr. Gilbert—There is nothing at all to lead to the construction of these words in any other than their ordinary sense—justice of the peace, an English officer, and notary public, an English notary public.

Attorney General—It does not say English.

Mr. Gilbert—No; but it designates an English officer. I say I conceive that notary public here does not mean a foreign notary public, and that is strengthened by the words “duly admitted to practice.” Now, what do we know about a foreign notary public being admitted to practice?

Attorney General—That Act of Parliament that I quoted refers to foreign notaries public. It was passed in 1855, and it is an act with reference to the legalization by consuls and other officers.

CHIEF JUSTICE—Where is it?

Attorney General—At page 18, at the bottom of the page.

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Mr. Gilbert—This is very much in my favour, because it shows that declarations before foreign notaries public are not recognized.

CHIEF JUSTICE—Evidently the object is to authorise consular officers to perform notarial acts.

Mr. Gilbert—That is the object of it. It seems to point out that the proper persons to do notarial acts in foreign countries are the persons appointed out there.

CHIEF JUSTICE—And on very good ground, by giving to English officers the character of notaries public within the meaning of the Act, so that decisions of the Court with regard to acts done by consular officers might be supported under that Act.

Mr. Gilbert—There was another Act before that.

Attorney General—The Act of Geo. 4. It so happened that some of those declarations in the Harel case were admitted under that Act and our own Act.

Mr. Gilbert—There can be no doubt that till our own Act the signature and seal of a notary public did not prove themselves. I believe there is no exception. The signature and seal of a notary to a protest is taken all over the world; but with respect to these other matters foreign notaries have nothing to do. These signatures and seals are not taken for proof. They never are unless there is some express enactment on the subject. Now, up to 1845 questions were always arising in reference to documents executed in foreign countries. With respect to documents executed in England we used to get them in under the seal and signature of the Lord Mayor of London, because the seal of London proves itself; but it did not follow that the signature and seal of a notary proved itself; and it was necessary to pass Ordinance No. 21 of 1845 to get over the difficulty. Before then you had to prove signature and seal of the officer, whoever he was in every case of documents executed before a foreign notary; even if by a sort of comity arising out of foreign law it was advisable, you still had to prove the signature of the foreign notary. Now, what did our law do? It simply did this—By the first section it provided that:—“Deeds, &c, heretofore and hereafter made or executed out of “the colony and legalized and heretofore received

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“in evidence, are declared to have been legally received in evidence.” There is not much in that. The second section is one which certainly requires some little interpretation to make it intelligible:—“That deeds, letters of attorney, and other powers and instruments in writing heretofore made and hereafter to be made in places out of the colony, the due execution of which proved by one or more of the subscribing witnesses, by affidavit sworn, or declaration made, before the Mayor or Chief-officer of any city or town corporate within the Kingdom of Great Britain and Ireland.”—And then we have interpolated these words:—“or before any Chief Governor or Magistrate, Lieutenant Governor, or President of the Council, or Chief or Senior Justice of any Court of Record of any Colony in Her Majesty's dominions, and purporting to be attested under the hand of such Mayor or other Chief Officer.”

Mr. Justice NORTON—Are they not in the Act?

Mr. Gilbert—No; they are not:—“and the public seal of such city or town corporate, or under the hand and seal of any such chief Governor or Magistrate, Lieutenant-Governor, or President of the Council, or chief or senior justice of any colony in Her Majesty's dominions, and annexed to any such deeds, letters of attorney or other power, or to any such instruments in writing so proved, shall be deemed adjudged, and taken to be as sufficiently proved, as if the witness or witnesses were personally present and made such proof on oath in open Court or before one of the Judges of the Supreme Court of Civil Justice of British Guiana.” Now, that makes the seals and signatures of all the officers mentioned here—many of them officers mentioned in that very Act of 5th and 6th Wm. 4.—admissible in evidence without any proof. That was the effect of this second clause of our Ordinance. They were not admissible before. The seals and signatures of officers acting under the 15th section of the statute were, as Mr. Justice BEETE well knows, not admissible in evidence before, without proof.

Attorney General—Not of a notary?

Mr. Gilbert—No, except in protested bills of exchange.

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Attorney General—I do not know that that was the case.

Mr. Gilbert—I am not stating the proposition too broadly. A notary's signature here was of no more value than that of any other person authorised to act under the statute. It never was pretended that it was. Then the 3rd section legalises the signatures and seals of Consuls General or Consuls, and makes them admissible without proof. Then comes in special reference to the Act of Wm. 4th, which we are now discussing:—"That the "signature and seal, and every signature and seal purporting to "be the signature and seal of any Justice of the Peace, Notary "Public, or other officer by law authorised to administer an "oath in Great Britain and Ireland"—I do not mean to say that the Legislature can dictate their views to this Court, but still according to their view it was necessary to state here that they considered that the statute of Wm. 4th was applicable to officers in Great Britain and Ireland.

Attorney General—Do you contend that the Act does not apply to colonial notaries?

Mr. Gilbert—It never has been held to apply to colonial notaries. Of course there are certain legal documents which may be prepared by officers in the colonies; but notaries in the colonies have no right to take declarations or affidavits to be used here.

CHIEF JUSTICE—Of course, that goes beyond your argument.

Mr. Gilbert—It is a strong illustration of my argument. Nobody ever thought of getting a declaration from a notary in the colonies.

Attorney General—When I said the colony, I did not mean the same colony, but another colony.

Mr. Gilbert—From any other colony either—Barbados, for instance.

Attorney General—Or Australia.

Mr. Gilbert—Or Australia.

Attorney General—I must say I have seen some.

Mr. Gilbert—The way they get powers of this kind from the colonies is under the 2nd section; but it was never thought of applying to a Justice of the Peace or notary. I refer to *Bailey on Bills*:—"Production of the

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“instrument is sufficient evidence of a protest.” It cannot be for a moment supposed that that is meant to apply to the colonies the same as Great Britain and Ireland.

CHIEF JUSTICE—I must say that according to the practice I think it applies to the signature of a notary.

Mr. Gilbert—He puts it as an officer recognized throughout the whole commercial world; but I do not know that in common law any certificate of a notary is admissible in evidence at all.

Attorney General—I think you are mistaken in that general statement.

Mr. Gilbert—Now, I come to the enactment about foreigners in this Ordinance, and certainly this enactment does not apply to such a case as this, for it says:—“Whenever procurations, powers, or letters of attorney, contracts or agreements, or other instruments in writing, are made and executed, or purport to be made and executed in any foreign countries in the presence of witnesses, before or with one or more notaries, &c.”—That does not mean a declaration of this sort. It means an instrument made and executed between parties in the shape of an agreement; but not a statement. This is a simple statement to be used by way of evidence.

CHIEF JUSTICE—See, in this case, Baron PARKE lays it down:—“In *Omeally v. Newell*, 8 East, 368, Lord ELLENBOBOUGH, C. J., says, ‘In a note subjoined to the case of *Sir John Walrond v. Van Moses*, Mich. II Geo. 1, being the year immediately preceding the statute 12 Geo. 1, as reported in 8 Mod. 322, it is stated that the Court held that a Plaintiff who was in Holland might make affidavit there and get it attested by a public notary, and that it should be admitted as evidence to hold the Defendant to special bail here.’” And not in reference to the common law procedure. That decision was in 1855. It is the case of *Cole v. Sherard*.

Mr. Gilbert—That is a very different thing from proving a certificate.

Attorney General—Of course the affidavit could not be admitted if not proved.

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CHIEF JUSTICE—It was taken in Jersey:—“I, Henry L. Manuel, Notary public, by royal authority duly admitted and sworn, dwelling and practising at St. Helier, Island of Jersey, do hereby certify that the signature, ‘Phil. Le Gallais, Magistrate, Jersey,’ written at the foot of the preceding page, and of “the paper writing hereunto annexed, is of the own proper handwriting of Philip Le Gallais, Esqr., one of the jurates or Magistrates of the Royal Court of Jersey; and that the said Philip Le Gallais, Esqr., is as such duly qualified to administer oaths in the said island.”

Mr. Gilbert—And did Baron PARKE admit the signature on that certificate?

CHIEF JUSTICE—It seems so.

Mr. Gilbert—It is certainly against all my pre-conceived notions, for it seems a very extraordinary thing that a notary public should be entitled to certify anything that he pleases. Of course, it is no part of his duty to certify that a Magistrate is a Magistrate. He may certify to any fact.

Mr. Justice NORTON—But it would not be evidence of the fact?

CHIEF JUSTICE—I think his very name implies his office. He can verify certain public matters, and when he does his signature is taken. That is the rule adopted by the English Law.

Mr. Gilbert—*Taylor* refers to another case in the note at p. 11, the case of *King and Johnson*, which was a Chancery case:—“But see in *Earl's Trusts*, 4 Kay and J., 300, where it was held that the seal of a Notary Public of a foreign country not under the Queen's dominions could not be judicially noticed.” Then, he quotes a case from the modern reports, *Bailey on Bills*, which no doubt refers to protests, the case of *Herman and Stackpole*. Now, that case from Jersey was not exactly out of the Queen's dominions.

CHIEF JUSTICE—It is said here:—“The recent act for the amendment of the practice of the Court of Chancery, 15 and the Vic, c. 86, requires that Court to take judicial notice of the seal of a Notary Public, but that only recognizes the general law of the land.”

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That is, in the dominions of Her Majesty in foreign parts.

Mr. Gilbert—Yes; but this is the case of a foreign country. According to this section it is quite clear that it is considered in this colony that the signature of a foreign Notary is not to be noticed judicially, unless proved; and this section goes farther and enacts that with instruments so executed none of them shall be considered good instruments, and that their seals shall be proved by means of certificates:—“Under the hand and seal “or seal of any officer of state, Court Judge, or Magistrate of “any foreign country, or of any ambassador of England, or of “his *locum tenens*, or of any British consul or his *locum tenens*, “residing or being in any such foreign country.” That is the 5th section of an Ordinance which has always been considered a vast extension of the law of evidence.

Attorney General—Well, this is proved by a Judge of the Court of Appeal.

Mr. Gilbert—I do not know that it is proved by a judge. It purports to have a seal; but this is not one of the instruments I see mentioned in this 5th section. I submit that this is not one of the instruments that come under the clause of the Ordinance, and even if it could be taken before a foreign Notary, it could not be admitted without strict proof of the signature. Even if a proper declaration could be taken before a foreign Notary under the English statute, that declaration would not have been admissible in any other way, before the passing of this Ordinance, and now only by proving the signature. On all these grounds I submit that this declaration is not admissible as evidence in this case. I do not see how the objection as to the addition can be got over; nor do I see how the objection as to the foreign notary can be got over. If it can be, then there is this further objection, that if a foreign Notary can make a declaration, it cannot be received in evidence till his signature is proved; and my argument is supported by this law, under which, in order to admit documents properly executed before Notaries public, their signatures must be certified by legalization in a certain way.

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Attorney General—I do not see how *Mr. Gilbert* can say this does not purport to be certified and legalized under the hand of the Judge, Von Strampff.

Mr. Gilbert—He may have enough to do with the Court; but I say this is not a document for that purpose. It is in the same position as if that section of the Ordinance had not been passed. The 11th section does not carry the previous sections one whit further; and with respect to this word notary, it is repeated in such a way that one must be led to believe that what the Legislature meant was an English Notary Public—in fact, that where the document has the signature and seal of a certain officer, it shall be admitted. That is the only effect. And as to the words, any matter or thing in a foreign state, I think from the collocation of the words, that it means any matter or thing at sea.

Attorney General—No; it says any matter or thing as aforesaid.

Mr. Gilbert—It goes this length—that you may make the declaration in a foreign state, but it must be before a British Consul.

CHIEF JUSTICE—That is under a different Act.

Mr. Gilbert—It is; and it is recognised in our Ordinance—that a British Consul may take declarations under the Act of Wm. 4th; and it has also been held that the taking of a declaration before a British Consul by a British subject is very much like taking a declaration in Great Britain and Ireland itself.

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CHIEF JUSTICE—We have considered the question before us yesterday. I have given the best consideration I could to it, and I am sorry to find that my learned brother NORTON continues to hold the opinion he expressed yesterday with regard to that very important question of the admissibility of the Act of Donation and its accompanying documents. I have come to a different conclusion. I do not pretend or feel myself competent to express as I should wish, or as the case requires, the grounds of that conclusion, without more careful consi-

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deration and preparation of my reasons than I have had the opportunity of giving them. There will be an opportunity hereafter of putting them in better form; but having come to the conclusion I am bound to state that conclusion, and also to state the general nature of the grounds, so as to guide the party in the case. This certainly I am quite clear about, that the rule as laid down in the elementary treatises of law that *pater est quem nuptæ demonstrant*, as it is put in the civil law, that is, the presumption of paternity, cannot be rebutted by evidence properly so called of the parent. That I believe is as absolute a proposition as any in the English law. But then comes the question, whether with regard to such a point a declaration can be properly called evidence—that is to say, when the person is not summoned as a witness and asked questions, whether a declaration made more or less casually or solemnly is admissible as such evidence. I observe, indeed, that there has been a case in which a mother has been examined as a witness and allowed to be asked the question in general terms as to the period during which she had known her husband; but when she answered that question there was no more specific question allowed to be put to her. The document now in question was in the first place put by the *Attorney General* in his opening as an admission. Now, as an admission properly so called, it cannot be admitted, because an admission must be by a party to the record or somebody privy to the suit. Then it was put forward as a declaration; and as a declaration I think it would be exceedingly doubtful, because I am very much disposed to think that it will be found on enquiry that declarations—that is to say, statements of a general kind *ante litem motam*—are not admissible any more than direct evidence. But then a third view of the case is that it is a declaration incident—in short, that the document in question is not so much a declaration as an act which is in itself part of an important step in the conduct of the mother, who is certainly competent to speak on the point, if she had not been debarred from speaking by the rule of law. Then the question comes, whether the conduct of a person in

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this position is admissible. The enquiry I have been able to make has led my mind to a conclusion on that point, which has been hanging on my mind from the early part of the case. It is a point in the Banbury peerage case which my memory had been struggling after till I was reminded of this case. Now, the Banbury peerage case, I have no hesitation in saying, does furnish an authority for this conclusion. It is lamentable to think in such cases that we should only have, so far as I can learn, the authorities in, the colony in a fragmentary form; because this is a most important rule of law. But we know sufficient to enable us to decide the point. There are certain passages that I referred to yesterday quoted by an eminent Judge in the case of *Legge* and *Edmonds*, from the Banbury peerage case, and also in the case of *Legge* and *Edmonds* itself and I think he clearly interprets the rule in a way to support the view I have adopted. The passage in *Legge* and *Edmonds* seems to go farther, because he treated it as one declaration, although it is quite true he considered it as a declaration so far as to the particular circumstances of the case showing the status and motive of the person making the declaration; but although he used the phrase declaration, yet Vice-Chancellor WOOD shows that he did treat it as a declaration having the effect of conduct, and not merely a form of words. But Lord REDESDALE puts it in this way; he says:—"If the declaration of parents can in any case be evidence, that is an instance in which it ought to be admitted. It "is generally excluded, from the apprehension that it may be "the result of some unnatural hatred towards the child. Here "the motives of the parent were unequivocally parental, and "the welfare of the child was the sole object of the declaration. "Besides, this was no inconsiderate exclamation—no hasty "unpremeditated act,—it was an allegation on a record framed "after due deliberation under legal advice, and the veracity of "it was attested by Lord Vaux and Lady Banbury themselves "coming into Court and solemnly acknowledging their deed." [His Honour then referred at some length to the case of Lord Hope in the reign of W. 3, and then proceeded.] I cannot find the

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Banbury case any where else, but it is quite certain that the points on which Lords REDESDALE and ELLENBOROUGH expressed their judgments was whether or not some document to which Lady Banbury, the mother of the alleged illegitimate child, had been a party, after, as it is said, she had come into Court and solemnly acknowledged the deed—whether such an act on the part of Lady Banbury could be admissible in evidence. I think we have enough to satisfy us that with regard to that point that case was precisely similar to this. Vice Chancellor WOOD in the case of *Legge* and *Edmonds* pointed out what would be a very serious objection to this evidence if it was the only evidence that could be produced; but, as I understand, with regard to the question of admissibility, it has always been the practice of the Court to admit documents on the faith of Counsel's representations that there is evidence, more or less cogent or more or less important, that will carry the line of argument somewhat farther. If this document was introduced alone, I am quite clear that it would be plainly irrelevant; because it is quite clear that the law does not allow a woman to bastardise her issue. In this sense if there was visible opportunity of access she would not be allowed to say they were illegitimate; and therefore, as Lord ELLENBOROUGH says, the admission of adultery does not prove illegitimacy, because it may be perfectly true that a woman from knowing her own conduct, her own misdeeds, and the various circumstances as to her domestic life, which she cannot depose to or will not be allowed to depose to, may have in her mind that such and such children are not the offspring of her husband, but of some person else; but in the case of *Legge* and *Edmonds* Vice-Chancellor WOOD says:—"If he is not satisfied that the husband is incompetent to procreate a child, and he finds them cohabiting together, he cannot but allow that evidence of adultery is perfectly inconclusive in such a case. But it is admissible in this sense, when we seek to estimate the value of evidence of non-access. It is not clear and conclusive. There is always a presumption in favour of the honest and virtuous conduct of the woman and the legitimacy of the child born in matri-

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“mony. If there is no proof of non-access the Court will not “infer it; on the contrary, the presumption is in favour of legitimacy; but it will take evidence of non-access, and then evidence of adultery is admissible as an ingredient.” In that way Vice-Chancellor WOOD considers that evidence of adultery would be admissible in order to corroborate and confirm evidence of non-access; but evidence of non-access is necessary in the first instance to allow the woman's declaration, if it could be otherwise admissible, in favour of the illegitimacy of her children. In short a mere declaration of illegitimacy is inadmissible. Lord ELLENBOBOUGH, in the Banbury peerage case, in reviewing, as Vice Chancellor WOOD says he was doing, the argument of Sir SAMUEL ROMILLY for the petitioner, puts it in this way, and I think it quite corroborates the inference I have stated:—“I will not say that all simple declarations “are evidence in such a case; but I will say that the conduct of “a husband and wife towards a person claiming to be their legitimate child is in some cases admissible evidence upon the “question whether the husband and wife had sexual intercourse at such time as by the course of nature that child might “have been the fruit of that intercourse. It is often a most material species of evidence. It is not always, but it is frequently, a “safe ground for inference, for it comes from the least suspicious source, that is, from the very individuals who are the “most interested to give a different testimony.” Now, these are the passages on which I rest my judgment. There are other cases; but I will take the opportunity of addressing myself to them hereafter. From these two passages, taken in connection with each circumstance of the Banbury peerage case as I have been able to ascertain, I feel no hesitation in saying that where the circumstance, whether in writing or an act on the part of the mother—when it is used as evidence of conduct, and when it is at all events not extraneous or attended with any suspicious circumstances, but when it is done from a good motive and apparently for the benefit of the children—the illegitimate children—I say such a circumstance of conduct is admissible. Of course, the document will be

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introduced. I say nothing of its effect afterwards; but it is introduced as conduct of the most weighty kind—conduct on the part of a mother who had taken pains to make a donation on behalf of her children before, and watching their interest when family changes took place made another donation. She arranged with the officers of another country to make a settlement for the children. It does not appear that it is from anything but a parental and benevolent motive, for the benefit of the children; there is no pretence that it is for any abuse. It may of course be dismissed by other evidence which may be given hereafter; but as the document stands before us now, that it is evidence of such circumstances of conduct as to be admissible, I do not entertain any doubt.

Mr. Justice BEETE—I shall be very brief in what I have to say. I have listened to what His Honour the CHIEF JUSTICE has said, and I have taken some pains in going through the arguments yesterday and this morning. I look upon it that this evidence is admissible. It is material evidence of the conduct of the mother with regard to these children. As His Honour has said, the effect of the evidence is a matter for future consideration. I shall not go through the aspects in which this document has been offered in Court; but as I have already stated, it is evidence of the conduct of the mother towards her children.

Mr. Justice NORTON—I am very sorry to find myself differing from the other members of the Court; but after the utmost consideration that I can give to the question I am still disposed to adhere to my opinion, and there is nothing in what His Honour the CHIEF JUSTICE has put so forcibly forward that affects that opinion. As I understand, the rule is strict that a mother is not permitted, directly or indirectly, openly or covertly, to impeach the legitimacy of her offspring. It is the policy of the law that it is contrary to public decency that persons standing in that relation should be competent to give evidence of that sort. But it is said it is not as a declaration the document is tendered. Undoubtedly it would not be competent to the mother to come into Court and testify on oath that her children are illegitimate; but it is contended that this declaration made

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ex parte is admissible simply in the light of conduct. In the case of *Legge* and *Edmonds*, the view of the Judge was the same as my own. A particular letter alleged to have been sent to the reputed father was sought to be put in on the same ingenious ground on which this document is tendered, and the Court there refused the document. Undoubtedly the Judge there did enter into some surmises as to what might have been if certain things had been done; but what I understand to be the rule is this, that if there be conduct on the part of the parent—the case is put of the mother dandling the child and presenting it to the father as his child—showing the light in which the parent regarded the child, it may be admissible, but here is a document that was executed by power of attorney in which there is a statement by the mother's attorney that the children are illegitimate. It is perfectly true that the power of attorney also makes the same statement; but on this mere casual and unnecessary statement in the document that these are children illegitimate, is it to be received in evidence against them? I conceive that the party stands on the same ground as a party to a transport. Suppose a mother had executed a transport, which is a judicial instrument, by which some family settlements were made, and she travelled out of her way to cast a stigma upon the legitimacy of some of the members of the family, surely that would not be evidence as to their status. Are there not cases of delusion to be found? There are several cases in which that doctrine is put forward. She might have been under a delusion, that the children were not the children of her husband, but of another man, and it would be rather hard against persons who were born in wedlock. But then comes the difficulty, if the mother cannot, directly or indirectly, give evidence in Court, so as to be subject to cross-examination, is she to be allowed to do it by letter—to fabricate evidence of illegitimacy? If such a doctrine is admitted, then by a side wind the rule is set aside, and the mother may easily bastardise her child, in spite of that rule. This is not an imaginary case. We know the case of Lady Macclesfield; it is well known that she sought to bastardise Savage, who was

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known to be her offspring, and that she persevered in the greatest cruelty towards him. This document ought not to compromise those who were not parties to it. The children did not appear. It is true they may have derived a benefit from it, but that does not make the document evidence. The CHIEF JUSTICE said something about non-access. There is nothing to show non-access—not a tittle of evidence to show the impossibility of her having begotten those children by her husband. The document is tendered on the ground that it benefits the children at the same time that it says they are illegitimate, and it is on that ground that it is admitted; but if the children themselves had made the admission, according to the rule it would have been inadmissible; so that whereas a deliberate statement of the children themselves would be inadmissible, and a deliberate statement of the mother, subject to cross-examination, would be inadmissible, an instrument of this sort is to be admitted. I do not consider that the fact of the mother having made what may be called a good arrangement for her children entitles the document in which they are called illegitimate to be received in evidence against them. I cannot understand it in the way the CHIEF JUSTICE does, as evidence of conduct, and the reference to the Banbury peerage case is entirely beside the question. We have not got the full report of that case, and we do not know under what particular circumstances the instrument was held to be evidence; therefore I consider that any authorities that have been quoted here are against the admission of the document.

CHIEF JUSTICE—There was another point argued yesterday, as to the admissibility of the statutory declaration of Von Greisheim. On that question I have looked over the objections raised on the several points. I do not think there was any great substance in the objections; but I need not discuss them all. The main question is one on which I have come to a conclusion about which I have no doubt. I am not able to think that there is to be gathered from the expressions of the statute any intention to provide that in the cases to which it applies the declarations might be made out of the United

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Kingdom, or at all events out of the British dominions; but there might be another question as to its application to other parts of the kingdom; but that it was not intended to authorise evidence of this nature to be given under its provisions where the declaration is made is a point on which I cannot allow myself to entertain any doubt. I am very sorry that I should have occasion to consider a question of that kind and to come to a conclusion which, so far as I can learn, is different from that formerly adopted by the Court; but at the same time so far as the decision has been read to me, I have not been able to learn that the question had been expressly raised before the Court in this form, and even were it otherwise, the matter is one of such fundamental importance, and having been now raised in a form which the Court cannot evade, that is, the admissibility of evidence which may be very material in this very important case, it is incumbent upon us to come to a conclusion, and I have not been able to come to any other conclusion. Now, of course, the general principle, we all know, of Acts of Parliament and legislative ordinances is *prima facie* that they apply solely within the limits for which the legislature can provide, and indeed taken in its full sense they can have no further application; because unless the objects of their provisions are subject to the legislature, it is impossible for the legislature to make any provision for them. Now, the legislature can make provision for everybody within its territory, and can also, subject to certain international regulations, make provision for all its subjects; but this act does not apply to liege subjects out of the realm, nor are its provisions extended to liege subjects out of the realm; nor in this case has it been applied to a person who is a liege subject out of the realm. It is the case of a foreigner acting out of the realm, and I am at a loss to understand how it is possible for the English Parliament to assume to provide that any person not a liege subject of the crown, out of the kingdom of Great Britain and Ireland, out of the English dominions, should be competent to do certain things subject to certain penalties; and inasmuch as the act does provide that these things are to be done

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subject to certain penalties, that a false declaration is to subject the party to be indicted for misdemeanour and to the penalty of misdemeanour, it seems to me to be perfectly clear that unless the enacting words of the 15th section are of themselves too clear to admit of doubt, in which case of course it would not be for us to reduce their effect by reference to another clause; but if those direct words in the 15th section are not too clear to admit of doubt, then I feel that this provision as to making a false declaration misdemeanour must clearly have this effect, to show what is the intention of the Act. Acts of Parliament operate only in the British dominions. To carry this argument further is an assumption on the part Of the legislature to do something which it could not possibly do. There is no power of any sort or kind by which the English Parliament can make perjury by a foreigner in a foreign country a misdemeanour. It is not competent to the legislature to do so; and therefore when it is expressed that a person who makes a public declaration shall be guilty of misdemeanour, and when it is so expressed in connection with a section providing for the making of declarations, which is not clearly extended to foreigners in foreign countries, I think the argument is very clear indeed that the 15th section must have a more limited interpretation. Now, the section itself is certainly a great bundle of confusion. There are many difficulties which may arise, and perhaps have arisen, with regard to this question. There is certainly nothing expressly extending it to the case of a foreigner making a declaration in a foreign country, and it appears to me that that is not its natural intention. Certainly there is a very odd division at the beginning of the section. It is to take effect in actions or suits depending, or actions brought, or intended to be brought. It is very odd to say that in any suit intended to be brought it shall be lawful for a party to make a declaration. I cannot see how there can be any responsibility for making a false declaration, to be afterwards ascertained, when it is uncertain whether the suit will be brought or not. Then having been introduced in that rather incoherent phraseology, it goes on:—"In any

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“Court of law or equity, within any of the territories, plantations, colonies, or dependencies abroad, being within a part of his Majesty's dominions, for or relating to any debt or account wherein any person residing in Great Britain and Ireland shall be a party, or for or relating to any lands, tenements, or hereditaments or other property situate, lying, and being in the said places respectively.” Now, certainly it is the desire of the Court to find out whether in a suit relating to a foreign land, it does not make it a condition that one of the parties to that suit should be in the realm; and in cases of personal action it does. Then, it says:—“It shall and may be lawful to and for the Plaintiff or Defendant—” Not a party within Great Britain and Ireland, but “The Plaintiff or Defendant, also to and for, any witness, to be examined or made use of in such action or suit.” What the *Attorney General* commented upon is this:—“To verify or prove any matter or thing relating thereto by solemn declaration or declarations in writing in the form in the schedule hereunto annexed, made before any Justice of the Peace, Notary Public, or other officer now by law authorized to administer an oath, and certified and transmitted under the signature and seal of any such justice, Notary Public duly admitted and practising, or other officer, which declaration, and every declaration relative to such matter or thing as aforesaid, in any foreign kingdom or state, or the voyage of any ship or vessel, every such Justice of the Peace, Notary Public, or other officer shall be and he is hereby authorised and empowered to administer and receive.” Well, I must say that I do not see a word in it that leads to the inference even that it was intended to apply or to have any operation out of the realm. I do not think it is a reasonable supposition that it should do so; because it is quite clear that in proceedings for this remedy it would provide a certain security. If it was said that certain persons should have the power of doing certain things, then it would have imposed the obligation upon certain officers of having those things done; and, as I said, yesterday, it would be a very unfortunate thing to con-

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stitute officers of foreign countries to take declarations of this kind, because those officers could take the declarations when they chose, and refuse to take them when they chose; so that a person in a British colony might have a suit brought against him supported by declarations taken before an officer who chose to take them, and he might himself be deprived of the same opportunity of supporting his case by declarations. But it is said the words “foreign kingdom” are to be interpreted in some way so as to extend the interpretation of the section. Now, these words come in this sequence:—“Which declaration, and every declaration relative to such matter or thing as aforesaid, in any foreign kingdom or state, or to the voyage of any ship or vessel, every such Justice of the Peace, Notary Public or other officer shall be and he is hereby authorised and empowered to administer or receive.” Now, the phrase “foreign kingdom or state” is to be taken in its collocation and in its grammatical construction. It is not to be connected with “Justice of the Peace, Notary, or public officer,” who is empowered to receive the declaration. It is to be used in a different sense. What are the words it is coupled with? They are “or to the voyage of any ship or vessel.” So that I am unable to give to the section any other construction than that which it appears to me that it is intended to have—that is, an operation within the limits of Her Majesty's dominions. At the very utmost, it could only have operation within the limits of Her Majesty's dominions and over subjects out of those dominions. That is the utmost scope that can be given to it, and it is impossible to carry it beyond that. There is another point, on which I think Mr. Justice BEETE and also Mr. Justice NORTON concur with me, and which, although apparently of a minor kind, may yet be important. It is that the section applies either to suits actually in existence or to intended suits. Well, any intended suit may lead perhaps to a great deal of difficulty; but I cannot help thinking that where there is a declaration made in an actually pending suit it is impossible to say that the declaration can be made in any other suit, taking it in its widest sense.

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Attorney General—Allow me to remind Your Honour that *Mr. Gilbert* said he did not raise that technical objection—that the pleadings in this suit have been amended for the convenience of all parties.

CHIEF JUSTICE—That is quite clear, and if *Mr. Gilbert* admits it in that way I will take it as an admission applying to *Mr. Gilbert* and his clients only. Then it would be only a declaration by admission, and although *Mr. Gilbert* may forego the point and not choose to take advantage of it, yet if a document of this kind were afterwards to be tendered as a statutory declaration, the Court would be unable to treat it in that light, because it appears to me that the statute does not allow it to be as a statutory declaration, the Court would be unable to treat it in that light, because it appears to me that the statute does not allow it to be so. It is evidence tendered on the footing of the statute—not of *Mr. Gilbert's* admission, but on the footing of the statute, and the statute does not admit it. It is quite plain that the terms of the declaration itself would not admit of the Court's recognizing it, because the gentleman himself speaks of the declaration having been taken under a certain statute and in this suit, whereas this suit was not framed at the same time the declaration was taken; therefore there is sufficient before us to satisfy us judicially that that declaration was in truth made in another suit which is not now in existence.

Attorney General—So far as all the parties are concerned, it is the same suit. There was this alternative— either to alter the original claim and demand or to file a fresh claim and demand, the averments being the same, with the addition of the name of Baron Von Greisheim.

CHIEF JUSTICE—There are new parties—are there not?

Attorney General—The Administrator-General and Baron Von Greisheim.

CHIEF JUSTICE—If you call that a technical objection, it is one that cannot be got over. This is a statutory declaration in a suit which is not in existence.

Mr. JUSTICE BEETE—I am placed in rather an embarrassing position, I have considerable doubt on the point,

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in respect to the decision in the case of the heirs of Bourda tried in 1856. In that case, *Mr. Smith* objected to the admissibility of this document which he now tries to pass. I must confess I do not find on my notes that the declaration was made before a foreign Notary; nor am I aware whether there was any document tendered.

Mr. Gilbert—There was not.

Mr. Justice BEETE—That relieves me of some portion of the embarrassment. There were declarations made before British Consuls?

Mr. Gilbert—Yes.

Mr. Justice BEETE—Well—that was considered when the question arose; but I have not the slightest hesitation in agreeing with the view expressed by the CHIEF JUSTICE as to the meaning of the statute.

Mr. Justice NORTON—I am of a different opinion. I do not see how any sense can be given to the statute if the words “in any foreign kingdom or state” are made to apply to “the aforesaid matters.” I read the clause in this way, that the declaration is to be made about the subject matters referred to or about the voyages of ships, and that that declaration may be made in a foreign country. The difficulty suggested by his Honor the CHIEF JUSTICE as to the applicability of the statute, I do not think can affect its construction. We know that often the framers of Acts of Parliament go far beyond their intention. Nothing is more common than to find the provisions of an Act of Parliament going far beyond the purview of the preamble. It appears to me that something of this sort has occurred in the framing of this particular Act of Parliament. The intention was to substitute affirmations for oaths, and it went further and extended the provision to foreign countries, giving these declarations certainly very great effect and placing them on the same footing as sworn testimony in a Court of Justice subject to be met by the most rigorous cross-examination. That view of the case certainly being in derogation of the common law would make me scrutinize the section very narrowly. But the meaning is clear to me. There are two modes of interpreting it. One mode will give no effect to certain words; the other makes

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every word equally sensible, and gives effect to the whole section. That is the construction to be upheld. Now, here by the construction contended for by the Court these words are wholly insensible. But supposing any sense could be attached to them, this is the only possible, the only conceivable sense—that it is intended to apply to foreign countries. It cannot mean that a person in England or in an English dependency is to certify to some matter in a foreign country. The absurdity is patent—that a deponent in England is to certify to certain facts in a foreign country—in other words, that a gentleman in London or Glasgow is to certify to something going on in New York or Amsterdam. I cannot put that construction upon it. The only way to construe these words sensibly is to make the declaration apply to some subject matter in a foreign country; and with respect to the provision relating to English justices of the peace, and the penalty in the law, effect can be given to the act of the legislature so far as English subjects are brought within the provisions of that measure. Whenever a declaration is taken in England and the declarant is an Englishman, of course he will be liable to all the consequences of perjury which is treated as a misdemeanour. With respect to foreigners, of course, as the CHIEF JUSTICE points out, our jurisdiction does not apply to them, and so far the penal provisions of the act would be inoperative. But is that any serious objection to it? I do not see that it is. Again, the form of the declaration is objected to, and it is argued from that, that the Act of Parliament must be taken to refer exclusively to British subjects. I cannot see that. The same objection would apply to a commission for witnesses. Commissions are sent to foreign Courts to take evidence and send home depositions; but what control have we over foreign Courts? Might not the same objection be urged in that case to show that the provision with regard to commissions does not apply to people who are not subject to our jurisdiction? This case shows that the provision may be made to apply to those over whom we have no power. Then, the words “foreign kingdom or state” in the clause are capable of two interpretations. One of

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them, as it appears to me, would make the clause a gross absurdity, but the other would reconcile it with common sense; and this view, as I understand, was taken by the Court in the former case.

Mr. Justice BEETE—The question never came before the Court before.

Mr. Justice NORTON—The general principle did.

Attorney General—Certainly, the general principle did.

Mr. Justice NORTON—I am only following the footsteps of my predecessors, who thoroughly examined the question. Not that the present Court is not entitled to take their own view of the question; but I think I am supported by the authority of the Judges who preceded me, for I am sure the matter received every consideration from them. I am quite sure that this point must have been presented to the view of the Court, because it is patent on the face of the proceedings.

Attorney General—The declaration of Moens was taken.

CHIEF JUSTICE—He was an Englishman. Mr. Justice NORTON—And you made no objection to it on the point of form?

Attorney General—The first declaration was Madame de Coeverden's.

Mr. Justice BEETE—But it was taken before a consul.

CHIEF JUSTICE—And she was a British born subject. Mr. Justice NORTON—I may be under a mistake, but I certainly understood the argument to be raised from the bench that there were declarations in foreign countries. *Mr. Gilbert*—That is the fact.

Mr. Justice NORTON—I think the Court must have looked at every aspect of the question; and therefore I do not see any ground for acquiescing in the decision just arrived at by the Court. With respect to the addition, I have great doubts on the point. I consider there is considerable weight in the objection urged by *Mr. Gilbert* on the point. The provision is one which confers a privilege in derogation of the common law, and therefore it ought to be strictly construed. I have some little doubt whether the addition ought not to be required. The declaration does not contain an addition; but I am inclined to agree with my brothers that that deficiency

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is supplied by the notary. Then, with respect to the suit, my recollection is this, that there was a case some time ago in the Court in which that question was fully discussed, as to the admissibility in one case of an affidavit taken for another, and it was held to be admissible. In this case only the rubric has been changed. There has been a change only in the names of the parties, but the subject matter is the same. On all these grounds, I think that the document is admissible, without pronouncing any opinion as to its relevancy.

CHIEF JUSTICE—The rejections to which my brother NORTON refers are objections on which I have not expressed any opinion. I do not say I do not concur in his conclusions. I only say I do not express any opinion on them. I can only express my regret that Mr. Justice BEETE has not been able to concur with Mr. Justice NORTON in admitting the evidence. If there was any way by which it could possibly be admitted I should be glad. On the main question I omitted to notice a point that was not alluded to in the argument yesterday, but which I think a most important point, with regard to the construction of this section. The recital refers to two former Acts, the first the Act of Geo. 2nd, and the other the Act of Geo. 3rd, which Acts I shall not advert to, and then it goes on—“And whereas it is “expedient that in future a declaration should be substituted in “lieu of the affidavit on oath authorised and required by the “said Acts.” So that, according to the section itself, its only intention was to substitute declarations for affidavits. Now, the Acts of Geo. 2nd, and Geo. 3rd, are expressed in a peculiar way. By the former Act it is provided:—“It shall and may be “lawful to and for the Plaintiff or Defendant, and also to and “for any witness, to be examined or made use of in such action “or suit, to verify or prove any matter or thing by affidavit or “affidavits in writing upon oath, or in case the person making “such affidavit be one of the people called Quakers, then upon “his or her solemn affirmation made before any Mayor or chief “Magistrate, &c.” And then in the marginal note it says:— “After Sept. 29 Plantation Debts may be proved here on oath “before a chief

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“Magistrate.” So that it is clear this Act provides solely for the making of affidavits in England; and the Act of Wm. 4th states in the preamble that its object is to substitute declarations for affidavits.

Mr. Justice NORTON—The preamble of the Coventry Act refers to the offence of slitting a man's nose, but the provisions of the Act go to other offences.

CHIEF JUSTICE—I do not see how this document can be let in. I was in hopes that Mr. Justice BEETE would have followed the decision of the Court in the other case.

Attorney General—I certainly feel very much embarrassed, as your Honour must admit that any counsel would under the circumstances; because if I had not conceived that it was the settled law that the declaration could be received here, when the question of the legitimacy of the Dalys was raised, I would have taken out a commission for examining witnesses.

CHIEF JUSTICE—I am unwilling to alter the practice of the Court, but if this declaration is material to your case, although it may not be strictly admissible, I would give my voice to its being taken, subject to all just objections, so that it may be got in with the evidence. That would be certainly going a great way.

Attorney General—I must say I came in not expecting this question to be definitely settled.

CHIEF JUSTICE—If you think you will succeed in getting in the declaration before the Privy Council, and if the other Judges will agree to admit it, perhaps it would be for the interest of all parties to have it in.

Mr. Gilbert—I must object to your Honours admitting a document which you consider inadmissible.

Mr. Justice NORTON—I have no doubt about it myself.

CHIEF JUSTICE—IS it not your object, *Mr. Gilbert*, to have all the evidence in appeal?

Mr. Gilbert—If the Court can give a different construction to the Will of Bourda from that given before, I would advise my clients to appeal.

CHIEF JUSTICE—And suppose we give your construction, then the *Attorney General's* clients will appeal.

Mr. Gilbert—But I do not know that I should advise

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my clients to appeal from any decision your Honours may give as to the legitimacy or illegitimacy of the Dalys. If the Will of Bourda is construed differently from our contention, I shall appeal, but not on any other ground.

Mr. Justice NORTON—That is, if you are declared to have had only a life interest?

Mr. Gilbert—Yes.

Attorney General—Supposing there is an appeal, I fancy that these documents, whether you take them subject to the exceptions or not, would go home as having been tendered.

CHIEF JUSTICE—But the Judges would not look at evidence which was not admitted; but if they considered the evidence admissible they would say that the decision of the Court ought to go on that point; and therefore if there is anything substantially relevant which is excluded, the case would have to come back; but the Privy Council would be acting on a very different principle from what I understand to be the practice if they looked at any material evidence that has not been admitted.

Attorney General—That proceeding would be equally inconvenient. Of course if the case goes home, this will be one of the points, whether the Court has acted rightly in rejecting the evidence. If the Privy Council thinks you were wrong in rejecting it, they will remit the case back to you to receive the evidence.

CHIEF JUSTICE—Or to take further evidence.

Attorney General—But that would be as inconvenient to me as any other proceeding; whereas if the papers went home at once they would take them at once.

CHIEF JUSTICE—Yet, we are doing something which we would do only in case of appeal, and *Mr. Gilbert* intimates that that is not a point on which there would be an appeal. '

Mr. Gilbert—So far as my clients are concerned.

Attorney General—As it is a practice of the Court, I was in hopes that Mr. Justice BEETE would have received the document.

CHIEF JUSTICE—That was my reason for hoping so too.

Mr. Justice NORTON—Do you know of any case of taking evidence of that sort, subject to just exceptions?

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Attorney General—I have known Sir WM. ARRINDELL did it often; but I cannot remember any particular case.

Mr. Justice NORTON—What is the effect of it? Why take the opinion of the Court at all?

Attorney General—I dare say *Mr. Gilbert* will bear me out.

Mr. Gilbert—I cannot go so far as the *Attorney General* asks me to go, that in the case of a document of this sort, which is objected to on purely legal grounds, and the objections to which have been held good, the document has been admitted, subject to just exceptions. I do not think that Mr. Justice BEETE can remember any such case. There may have been cases in which Sir WILLIAM ARRINDELL has said, “I will admit the document, but I do not mean to say what will be the effect of it.”

Mr. Justice BEETE—A document has been admitted by the Court to say what could be done with it afterwards.

Mr. Justice NORTON—That is only deferring the decision on the admissibility of the document, not admitting it for the Privy Council.

CHIEF JUSTICE—I think it ought to be put in this shape, that a document which appears not to be admissible may be put in *sub modo*, the question of its relevancy being reserved.

Mr. Gilbert—That is a question that may fairly be argued in arguing the main question.

CHIEF JUSTICE—Very often it is not convenient. Have you other declarations of the same kind, *Mr. Attorney-General*?

Attorney General—I have one from Augustus Deodatus Boode, but I will not tender it till this question is decided. I only wish the Court to consider the position in which I am placed in consequence of this decision, because this decision applies not only to declarations, but also to Powers of Attorney from all parts of the world.

Mr. Gilbert—No—there is an express provision in our Ordinance for Powers of Attorney.

Attorney General—If the learned counsel will refer to the report he will find that this discussion was gone over in the former case. There were various declarations

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admitted in that case, and knowing that these questions had been argued over and over again, and that the Court had taken some nine months to consider its decision upon them, I considered it the settled law. Now, the Court rules in a contrary direction. I do not dispute its right to do so; but I must say it puts the litigants in a peculiar position.

CHIEF JUSTICE—Certainly, as you have put it in that position, you ought not to be prevented from having the case decided on that evidence. I was in hopes that Mr. Justice BEETE, although his views on the subject seemed to concur with mine, would have considered himself entitled to adopt the practice which to a certain extent has been established as governing these cases, with the view of letting the question go to the Court above. Of course, it is a serious thing for a Judge to do, and he has no right to do it unless he can meet the views of both parties, to forego his own opinion; but I certainly think, from what I have heard, that the matter has been so brought in issue by declarations made before consuls, that the Plaintiff might naturally consider that the Court would pursue the same steps in regard to foreign nations and admit a declaration like this as proper evidence; and if you were so-misled it would not be right for the Court to reject the document.

Mr. Gilbert—I must remind the Court of this, that I did not take any objection to anything that has been decided in the previous case. My objection was this, that in this case the Plaintiffs were foreigners and the declaration was before a foreign notary. I do not say that a foreigner cannot make a declaration before a British consul.

CHIEF JUSTICE—I do not say how far the point was raised; but I do feel that enough was done in that case to make it a natural conclusion on the part of experienced practitioners that the Court would adopt that view. *Mr. Gilbert*—In that case Wright was a party to the suit and resided in Great Britain.

CHIEF JUSTICE—He is now resident there. *Mr. Gilbert*—But I am merely pointing out my objection, which is, that the Act could not be taken advantage

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of by a foreign Plaintiff, and even if it could not be taken before a foreign notary.

CHIEF JUSTICE—The Act says Plaintiff or Defendant resident in Great Britain.

Attorney General—I can only say that if *Mr. Gilbert* has no objection and Your Honour will look over the report of the Harel case you will see how these questions were raised and argued and the decisions come to upon them.

CHIEF JUSTICE—But *Mr. Gilbert* does not consent to this document going in.

Attorney General—Then, I must beg the *Registrar* to put his mark on a copy of the document, so that it may be sent home.

CHIEF JUSTICE—There will be no difficulty in getting it before the Privy Council.

Attorney General—But I wish it to be understood by the higher Court that I have tendered certain documents, and that the Court should see what the evidence is.

CHIEF JUSTICE—Just as before this Court—the Court must have the documents to look at them, and the Privy Council must look at them.

Attorney General—There is an express order from the Judicial Committee of the Privy Council with reference to certain papers not having been sent home—I think in 1853, and requiring that all the papers in every case should be sent home.

Mr. Justice NORTON—In cases of appeal from the Inferior Civil Court to the Supreme Court, would copies of the papers rejected be sent up?

Attorney General—I think they ought, or how could the Court know whether they had been properly refused?

Mr. Gilbert—I can only say I have no objection to the document being marked, if the Court considers that a copy should be transmitted.

CHIEF JUSTICE—Yes.

Mr. Gilbert—I understand that is all the *Attorney General* wants.

CHIEF JUSTICE—Where the document is in your own hands, there can be no difficulty in getting it before the Privy Council.

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Attorney General—But the marking of the *Registrar* will prove its identification. I would certify it; but I am afraid it might require an affidavit.

CHIEF JUSTICE—The documents sent to the Privy Council at home are the originals.

Attorney General—Not in appeals from the colony. The *Registrar* sends home copies,

CHIEF JUSTICE—I am speaking of appeals at home.

Attorney General—The practice with regard to appeals from the colony was that each party had to take up copies and send them home; but the practice For the last twelve years has been for the *Registrar* to send home copies of the papers, and each party sees that all the papers that he wants are sent.

CHIEF JUSTICE—This application of yours is a special application on which to found an appeal?

Attorney General—I do not make an *ex parte* application. I will allow the case to go on, and if the Court decides against me I will appeal.

CHIEF JUSTICE—I thought you would take the appeal on that question.

Attorney General—No—I defer it for the consideration of the main question.

CHIEF JUSTICE—Yes—I should like the case to go on complete.

The document was marked by the *Registrar*.

Attorney General—I next tender the declaration of A. D. Boode.

Mr. Justice NORTON—Is that in the same predicament?

Attorney General—Yes.

Mr. Gilbert objected.

The document was marked by the *Registrar*.

Attorney General—I now tender a document which will be admitted, I apprehend, after the decision on the act of donation. It is the provisional agreement. CHIEF JUSTICE—Does that strengthen the case? *Attorney General*—It was passed by the Councillor Commissaries.

CHIEF JUSTICE—It is strengthening it on a different point. That we admitted on the ground of its being the act of the mother.

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Attorney General—At all events, I tender it.

Mr. Justice NORTON—I do not understand the nature of it. What is the nature of it?

CHIEF JUSTICE—It shows that it was a judicial act on the part of this Court to treat those persons as illegitimate.

Mr. Justice NORTON—What is the act?

Attorney General—It is an act passed before “H. J. Vander “Water, Sworn Clerk in the Secretary's office of Demerara and “Essequibo, as such acting as a Notary Public, and in presence “of the witnesses hereinafter named—Personally appeared “Victor Amadeus Heyliger, of this colony, Esqr., as appointed “guardian by will of the late Richard Bass Daly, dated 15th “April, 1810, over his two eldest children, Richard Joseph “Johan Edward Daly and Richard Bass Daly, junior, of the first “part, and P. C. Ouckama of this colony, Esq.” In fact, it is the same in substance as the act of donation; but this is the preliminary arrangement entered into in this colony on the 16th July 1821; and it was lastly agreed, “that this present contract “remains subjected to the approval and sanction of the said “Honourable Court of Justice of this colony as chief guardians “of minors.” And then the act of donation which has also been put in shows that it was passed before the Councillor Commissaries, the same thing as if before a Puisne Judge; and the reason given was that they were chief guardians of minors. I cannot see how the Court can have a more solemn act than that.

CHIEF JUSTICE—I was going to suggest to *Mr. Gilbert* to admit it, because it does not amount to much. Certainly if it did amount to much we should see how they came to be the guardians of the minors.

Mr. Gilbert—It is not these minors at all.

CHIEF JUSTICE—Do you understand the Court to act as the guardian of all illegitimate minors? Because otherwise it would have nothing to do with the case. I understand you to put it in this way, that the Court acted as the guardian of the illegitimate minors.

Attorney General—Well, the Court would be upper guardian of all minors. The fact is that the Court did

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sanction the arrangement, and certainly after such an arrangement as that entered into, I think all the members of the family were justified in concluding that there was a settlement of the question.

CHIEF JUSTICE—It shows how careful the Court ought to be in such matters, even when they are said to affect nobody. That was nominally a judgment.

Attorney General—Not exactly a judgment. It was put on the footing that it was sanctioned by the Court as guardian of the minors.

CHIEF JUSTICE—And so far as sanctioned it was a judgment.

Attorney General—I put it much in this way, that it was a family arrangement having reference to certain illegitimate as well as legitimate members of the family, under sentence of the Court.

Mr. Gilbert—This is not of much importance, after the other being in; but for the sake of consistency I object to it. I stated yesterday before the other went in that this ought not to go in, and of course I object to this the same as to the other. I think that the course pursued by the *Attorney General* shows that my suggestion more than objection was a proper one, because now he puts this in as the provisional agreement referred to in the act of donation *inter vivos*, and so far as the persons whom I now represent, these two Dalys who are said to be illegitimate, are concerned, I think the Court will agree with me, on looking at the document, that they had no more to do with it than with the other. It is impossible to say they had, and it is impossible to say that this reference at the conclusion to the Court as upper guardian of all minors can have anything to do with them.

CHIEF JUSTICE—That is the argument on which the *Attorney General* puts it.

Mr. Gilbert—The document begins—“Before me, H. Vander Water, Sworn Clerk in the Secretary's office of Demerara and Essequibo, as such acting as a Notary Public, and in presence of the witnesses hereinafter named, personally appeared Victor. Amadeus Heyliger, of this colony, Esq., as appointed guardian

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“by will of the late Richard Bass Daly, dated the 14th April, 1810, over his two eldest children, Richard Joseph Johan Edward Daly, and Richard Bass Daly, junior.” This is what he comes before the Notary Public as.

CHIEF JUSTICE—They were not in the colony—were they?

Mr. Gilbert—I rather think not. “And P. C. Ouckama, also of this colony, Esq., as attorney of Mrs. Mary Bourda, widow of the said Richard Bass Daly, agreeably to power recorded in this office in the Book of Records No. 26, 2nd prt. page 263.” I think I have seen some power of attorney and said it ought to have been produced, and I said before this could go in, if it is at all admissible, the power of attorney ought to go in. It is impossible to tell whether the notary made a mistake, or whether this attorney exceeded his authority or not.

Attorney General—You will find that it was formally ratified.

CHIEF JUSTICE—In the other case the power of attorney was put in.

Mr. Gilbert—It was attached to the deed. “Which appears declared that whereas a certain deed of gift was executed in this colony on the 8th day of September, 1812, in the name of the said Mary Daly, in favour of her two eldest children above named, thereby bequeathing to them, under certain conditions therein mentioned, her one-third of the pln. *Vlissingen* and *Nieuwen Aanlag*, both situated in this colony”—

Attorney General—Of course, that is not a legal document, because she had lawful children afterwards.

Mr. Gilbert—Why not? I am not a married man, and am not in a position to have a family; but if I had half a dozen children, I could give away all my property. I am not aware that a child can control the disposal of his father's property in his life time. “And whereas the validity of the above deed is disputed by and on the part of the said Mary Daly, in consequence of which a suit at law for the annulment of that deed has been instituted in her name, and is now pending before the

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“Hon’ble the Court of Justice of this colony. And whereas both
 “parties are inclined to arrange and settle the above differences
 “in an amicable and equitable manner, both the appearers
 “therefore declared to have agreed, as they do hereby agree, as
 “follow, vizt: Art. 1st. The appearer of the first part, in his
 “aforesaid capacity, consents that the said deed of gift shall be
 “regularly recorded by the appearer of the second part or his
 “successor in that quality, on condition that the said deed of
 “gift shall be and is hereby considered to have full force and
 “effect up to the day of its revocation, and each party therein
 “concerned shall enjoy the benefit thereof in manner as is
 “therein expressed and stipulated; with this difference, how
 “ever, that the clause of the annuities and one-third of the re-
 “serve chest, reserved by the said Mary Daly to herself in that
 “donation, shall have had its force and effect only from the 1st
 “February 1818, being the day of the said husband’s demise;
 “and should the annuities and one-third of the reserve chest so
 “to be reserved by her not be sufficient to relieve her of all her
 “debts, the said Mary Daly is to receive out of the reserves of
 “the estate the deficiency, before any appropriation of the re-
 “serves as hereinafter agreed on can take place by virtue of the
 “new donation. Art. 2nd. The appearer of the first part q.q.
 “consents also that, at the same time of the revocation of the
 “above mentioned deed, a new deed of gift shall be executed
 “by the appearer of the second part or his successor, in the
 “name of his said constituent, thereby irrevocably giving and
 “granting her free and unencumbered property, being one un-
 “divided third part of and in the said plantation *Nieuwen*
 “*Aanlag*, with the slaves and further things thereto belonging,
 “and her equal third share of the rents and revenues she is enti-
 “tled to during her life in and from the said plantation *Vlissen-*
 “*gen*, both being situated in this colony, to and in favour and
 “behalf of her four legitimate children, by equal share, named,
 “first, Richard Joseph John Edward, second, Richard Bass,
 “third, Kitty Eliza, and fourth, George Bourda Daly, reserving,
 “however, thereby, from the value of her property

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“and rents and revenues as aforesaid, in the first place, for her-
 “self an annuity of four thousand guilders Dutch currency, to
 “be paid to her during her life, either in Holland, in England,
 “or in France, as she shall prefer it, free of all cost, charges, or
 “expenses, or loss of exchange, every year in advance, to com-
 “mence from the day of the passing of the new deed of gift,
 “and in the second place, for each of her three illegitimate chil-
 “dren, named, first, Antoinette Augustine, second, Maria
 “Marianne, and third, Jean Eugene Henry, one half of what
 “each legitimate child shall have for his share of and from the
 “net revenues of said plantations *Vlissingen* and *Nieuwen*
 “*Aanlag* during her life, and after her death either an annuity
 “of one thousand guilders, free in Europe as aforesaid to each
 “of the illegitimate children, or one half of what each legiti-
 “mate child shall have for his share of and from the revenues
 “of said plantation *Nieuwen Aanlag*; the latter to be at the op-
 “tion of the legitimate children, or of their guardian in their
 “name and behalf. And lastly, that she shall nominate and ap-
 “point one or more of her relatives or friends in Europe to
 “guard the said interest of the first named four legitimate chil-
 “dren during their minority, with power to him to appoint one
 “or more attorneys for the administration of said property in
 “this colony after having taken it over from the said V. A.
 “Heyliger, Esq., with the regular and substantiated account of
 “his administration, which he promises to deliver accordingly.
 “And further, that the said Mary Daly shall execute and send
 “out the necessary powers for passing the said deeds of revoca-
 “tion in this colony in manner as above described. Art. 3rd. It
 “is further hereby understood and agreed that pending the ac-
 “tual execution of the said deeds of revocation and donation
 “the said Mary Daly shall by her attorney in this colony, re-
 “ceive one half of the revenue of said estate, the net proceeds
 “whereof, together with that which the appearer of the second
 “part has lately received for her account, shall be in deduction
 “or diminution of her claim to the annuities and one-third of
 “the reserve chest, from the first day of February 1818, as
 “afore-

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“said, or should those net proceeds exceed that amount the
 “surplus shall be in part or in extinction (if sufficient thereto)
 “of the sum required for paying off her debts aforesaid. Art. 4.
 “It is further agreed that from this day till the new donation
 “shall be passed in this colony, the administration and disposal
 “of the revenues so belonging to the two oldest children of
 “Daly, in virtue of the donation of 8th September, 1812, shall
 “be and remain under the exclusive control of Stephen Cramer,
 “Esq., who is hereby thereto appointed irrevocably by the ap-
 “pearer of the first part with all the powers he is possessed of,
 “and who shall account for the same on the day of the passing
 “of the new deed of revocation and donation as aforesaid.” I
 may observe here that as with all those documents passed in
 those days, this is utterly illegal, Heyliger deputing his power
 in this way to Cramer. However, that has nothing to do with
 this case. “Art. 5th. Whereas John Hall, Esq., of the Circus
 “Minories, London, has been appointed by the Honourable the
 “Prerogative Court of Canterbury as guardian over the above
 “named legitimate children of the said Richard Bass Daly, this
 “present agreement shall be subject to this approval, and
 “equally to that of the said Mary Daly, for which purpose an
 “authentic copy hereof shall be forthwith transmitted to the
 “said John Hall, Esq., and to the said Mary Daly, respectively,
 “for their consent or dissent, when, in the event of their assent
 “the said process so instituted as aforesaid shall be and the
 “same is hereby *casu quo* now for ever totally cancelled and
 “annulled; and in case all parties should not consent to this
 “present contract, an humble application shall be made to the
 “Honourable the Court of Justice of this colony, praying that
 “the said law-suit now pending in this matter before them (and
 “which notwithstanding this agreement is considered to remain
 “untouched and unprejudiced) may be brought forthwith to
 “their bar for pleadings by the parties and for their Honours’
 “decision.” I have read the whole of the document that there
 should be no mistake about it. This is quite clearly an agree-
 ment between the guardian of the two elder

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children, they being alive still, and their mother, it appearing that in September 1812 she had passed a deed of donation, and that she instituted a suit for setting it aside; and this was a sort of agreement for putting a stop to the suit and making a new donation.

Attorney General—A new donation to provide for subsequently born children.

Mr. Gilbert—We need not enter into that. It is an agreement between the guardians of these two children who were still minors and their mother, and if what the Court did was to sanction the proceeding it should be carried out; if not, it should not be carried out. It cannot be taken to refer to people who were not parties to it. I do not know that this document prejudices my case any more than the document already put in; but it is quite clear that whatever may have been Mrs. Daly's subsequent acts, Ouckama was going beyond his powers, because this agreement was to be subject to the approval of his constituent. At any rate, I think that the power should be put in before the agreement.

CHIEF JUSTICE—It gives rise to more dispute, whether a father can give all his property to his children. I understood that the law here was that a parent could not give any property to minor children.

Attorney General—It means this, that he cannot make a private donation. It must be done by public act. It must be by transport.

CHIEF JUSTICE—How do you propose to connect this with the other document?

Attorney General—It refers to it.

CHIEF JUSTICE—But how do you trace the connection?
Mr. Justice BEETE—By anticipation, I suppose.

Mr. Gilbert—This was made in 1821, and the other in 1823.

CHIEF JUSTICE—It takes this form:—"Personally appeared Victor Amadeus Heyliger on the part of the two children, of the first part, and Ouckama, on the part of Mrs. Daly, of the second part." So that the whole document is between these two parties.

Attorney General—So it is; and so is the other, the act of donation. This document is expressly referred to

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in the act of donation, although it appears to me to be the proper course to put in the act first, and afterwards the document to which it refers.

Mr. Gilbert—I am objecting to this document on the ground that it cannot be admitted as a declaration. It cannot be taken as conduct of Mrs. Daly, because it was subject to her approval.

CHIEF JUSTICE—That is not the ground on which it is sought to be introduced.

Mr. Gilbert—What is the good then? It is sought to be introduced as evidence of illegitimacy for the Court.

CHIEF JUSTICE—The ground is that this Court is quite competent to entertain the question, having acted on behalf of the children on that assumption.

Mr. Gilbert—No—that is not the ground, because the Court has nothing to do with these children.

CHIEF JUSTICE—If it had been rested on the same ground as the other, and been succeeded by the other, I do not think it ought to have been rejected..

Mr. Gilbert—It simply amounts to something which Mrs. Daly must sanction.

CHIEF JUSTICE—In what character were the illegitimate minors subject to the Court?

Attorney General—As minors.

Mr. Gilbert—There is no proof that they ever were in this colony.

Attorney General—But they were interested in property in this colony.

CHIEF JUSTICE—If they were illegitimate they were not.

Attorney General—Certainly, in the property of their mother.

Mr. Gilbert—Not if they were adulterine bastards, as you say.

CHIEF JUSTICE—The property the subject of this donation was given to adulterine bastards?

Attorney General—Adulterine bastards are entitled to provision. A mother makes no bastards, and the property of the mother was in this colony.

CHIEF JUSTICE—The adulterine bastards living out of the colony, and the mother living out of the colony? We all consider that the document is not admissible. My own

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feeling is that it could only be admissible as an act of the Court done on behalf of the children, introduced to found the question of illegitimacy as against these minors. Now, so far as it refers to minors—to the consent of the Court being given on the part of minors, my opinion is certainly at present that it refers to the legitimate minors—those who were the wards of Heyliger, who is introduced as being the guardian of those minors, and the parties to the document are those minors.

Mr. Justice BEETE—The sanction of the Court was to be obtained to an arrangement less favourable to those minors.

Attorney General—Your Honours will remember that there were four minors. This was a notarial act passed before the Court, and whether the words there “guardian of the minors” referred to the four legitimate minors or not, the effect is the same, because the Court could not sanction an arrangement that was to benefit one class of the minors, without injuring another class of the minors. There is no escaping from that; and therefore when the arrangement was for the benefit of one class and the injury of another, the Court must have considered the whole question, and it would not allow an arrangement which was to injure other minors born of the same mother, unless it was satisfied that the facts set out were fully established. I cannot suppose that the Court would have sanctioned it, and it must have considered the interests of the whole of the offspring of Mrs. Daly. It was an arrangement that provided for the whole of her offspring—four on a certain footing. It proceeded on the assumption that some of them were illegitimate, and the Court would not have sanctioned the arrangement unless satisfied of the fact. I do attach weight to this point; because the arrangement was not made in a corner, but in the Registrar's Office, where I find that special power should be entered into at home for carrying it out; and that deed of donation is a judicial act, setting forth in so many words and special care was taken to do what was intended to see that the arrangement was ratified by subsequent conveyance of the Councillor Commissaries, in the same manner as if it had been passed by one of your Honours. Therefore, I say it is a proceeding clothed

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with all the sanctity of a judicial proceeding of the Court as upper guardian of all minors.

Mr. Gilbert—As upper guardian of the minors mentioned there, who were before the Court, and who were supposed to have certain interests in this colony—Richard Joseph Johan Edward and Richard Bass.

Attorney General—More than those—Kitty, Eliza and George Bourda.

Mr. Gilbert—Is it shown that they were before the Court? I put it in this way—Richard Joseph Johan Edward and Richard Bass were donees under the instrument of 1812, and so far as this was authority to the mother to put a stop to and set aside the arrangement, the only parties before the Court were those two children and the mother. As to minors having an interest in their mother's property, I cannot understand it. I do not understand what recognized interest these illegitimate minors had in their mother's property which the Court was to protect. I suppose the mother could dispose of her property without any reference to them; and therefore, if there is any difficulty at all in the matter, it is more difficult to find out what interest these three illegitimate children could have. The *Attorney General* is mystifying himself in trying to make out that that last clause has anything to do with any other minors than those who are interested. Does it appear that they ever were in the jurisdiction of the Court? It rather appears not, for the mother was away.

CHIEF JUSTICE—The argument is that the guardians came before the Court to get the sanction of the Court to deal with the property of his wards, of whom the Court was upper guardian.

Mr. Gilbert—Richard Joseph Johan Edward and Richard Bass were in that position; but I would like to know what the other minors had to do with it. It does not appear that they were ever within the jurisdiction, and you may just as well sanction the argument of property in any minor now in England as to suppose that there was any assignable interest to them under, that donation. What I wish to point out is that the Court was not guardian over these minors. They had

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no interest that the Court was called upon to protect. It is true their mother was going to give them something; but the Court had nothing to do with that. It was a mere voluntary and spontaneous act on her part, and all that the Court had to do was to sanction the annulment of the previous donation with respect to certain of the minors and the passing of another. But that last clause, I repeat, can have no reference to any other than the two minors mentioned. The Court had no control over Kitty, Eliza and George Bourda, unless they had property here, and then it could have control only over the property. The Court may constitute itself guardian over a minor's property here, but not over his person, unless he is here too.

CHIEF JUSTICE—That is the *Attorney-General's* argument, that these parties had an interest in their mother's property.

Mr. Gilbert—They had no interest. What interest could they have?

CHIEF JUSTICE—The *Attorney-General* thinks they had.

Mr. Gilbert—The *Attorney-General* can make any statement he chooses, but it is impossible to argue with any reference to common sense that they had any interest in the mother's property. They had an interest in the mother's keeping the property, but that was not an interest in the legal sense. She could dispose of it without reference to others.

Attorney General—But she could not make a donation to the benefit of one and the prejudice of another.

Mr. Gilbert—If she can make a donation at all, she can make it to the prejudice of any of them.

Mr. Justice NORTON—I wish you to give us some authority on that point.

Mr. Gilbert—It is necessary to give some authority on the other side. I say a man can dispose of his property as he likes.

Attorney General—Not to his children.

Mr. Justice NORTON—No—not to his children.

Mr. Gilbert—If he can dispose of it to anybody else he can dispose of it to his children. Could not Mrs. Daly have spent her property out and out?

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CHIEF JUSTICE—That may be true under ordinary systems of law; but here we have a law which says you cannot give children anything privately.

Mr. Gilbert—That may be the argument of the *Attorney-General*, although I have heard him argue the other way; but if the Court sanction the proceedings for making a donation a donation may be made. The reasons why a father cannot make an ordinary donation to a minor child is that a minor child cannot receive it. He has no *locus standi*; but if it be legal for the Court to appoint a guardian over a minor to receive a donation from a parent, then the parent is entitled to deal with his property as he likes. I should like to have the distinction pointed out between this case and a man making away with his property under transport. What would any of the minors have to say to it? It is simply a disposition of his property on the part of the parent, and just the same as he could dispose of the whole of his property to a third party, so he could make it over to one child.

Mr. Justice NORTON—Could a man make a donation of all his property, leaving out his children?

Mr. Gilbert—Why, he could sell it.

Mr. Justice NORTON—Yes—the money forthcoming; but could he give it away?

Mr. Gilbert—A man having a million of money could give it all away. If he leaves property behind him that is a different thing; but I cannot conceive it possible to argue that a man cannot do as he likes with his property during his lifetime.

CHIEF JUSTICE—It is strange to have to ask the question.

Attorney General—I am really surprised to hear *Mr. Gilbert* making these statements; for here we have *Vander Linden* saying:—“A donation, however, of our entire property, “whereby we deprive ourselves of the power to make a Will, is “invalid in law. * * * When the donor of a gift of great value “afterwards has lawful children.”

Mr. Justice NORTON—That is what I referred to.

Mr. Gilbert—The *Attorney General* quotes those two passages triumphantly, as if he thinks he puts me down by quoting them; but what are they? One is the case of

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a man making a donation whereby he prevents himself from making a Will; and then there is a case from *Grotius* of a man making a donation and subsequently having children. That is not the case I am dealing with. I am dealing with the case of a man having children and disposing of his property.

Attorney General—And subsequently having more children.

CHIEF JUSTICE—Then, the first donation is voided.

Mr. Gilbert—The cases quoted by the *Attorney General* do not in the slightest degree affect my argument. I say if a man had a dozen children and a million of pounds, he can give away all his property. I put it in this way—There is nothing to show that a man having immoveable property may not transport it by way of donation. The transport must be properly, and legally, and judicially passed; but I should be very much astonished if anybody were seriously to argue that a man having immoveable property and advertising a transport of it by way of donation, by sale, or any way he chose, the transport could be opposed by any of his children.

CHIEF JUSTICE—Otherwise every transport passed might be voided on the ground of its being all the man's property.

Mr. Gilbert—The ground is not sustainable at all.

CHIEF JUSTICE—If a transport is to be challenged on the ground of its being the whole of a man's property, then every transport may be challenged in that case; or the Court would have to enquire whenever a transport came before it that it is not all the man's property about to be transported.

Mr. Gilbert—I must confess this is the first time I have heard the doctrine that a man cannot dispose of his property as he pleases.

Attorney General—Well—it is admitted that he cannot by gift to his children.

Mr. Gilbert—Because his children cannot receive; but it is in his power to give to any body who can receive. But I come back to the point before the Court. There is nothing to prevent a parent from disposing of his life interest.

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Mr. Justice NORTON—Hear what *Vander Keessel* says in p. 487:—“*Jure Romano quidem, ex saniori doctrina, omnium bonorum donatio non fuit prohibita.*” He states the proposition broadly,

Mr. Gilbert—I am really sorry I have gone into this discussion. I do not see what it has to do with the question.

CHIEF JUSTICE—We are of opinion that the document is not admissible. The argument of the learned counsel is that the document shows that to some extent the Court acted on behalf of the persons whose legitimacy is now in question in this case; but it is clear to my mind that the Court's action was on behalf of the minors of whom the Court was guardian—the two legitimate children stated to be the wards of the party appearing. But with respect to the two who are said to be illegitimate, and who as adulterine bastards could have no claim whatever on the legitimate portion, neither they nor the mother being here, the Court could not be guardians of them. The document must therefore be rejected. The Court adjourned for 1/4 hour.

Attorney General—Since the Court rose, I have been endeavouring to review my position, after the very unexpected decision your Honours came to with respect to the declaration, and I find that it does put me in such a position with reference to the question of illegitimacy that I prefer to let the question stand as it is. I shall offer no further evidence on it.

Mr. Justice BEETE—I understood you to say just now that the Court was not in a position to give any declaration on that point.

Attorney General—I do not think the Court can. If your Honours think you can give a declaration that will conclusively decide this point, it will be for you to say so; but it really appears to me that what all the parties interested in this question were desirous of ascertaining is, what is the meaning of the Will of Bourda; and if we get a declaration binding on all the parties who appear to be Claimants either on the one side or the other, that will be sufficient.

Some conversation then followed, and on the suggestion

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of the CHIEF JUSTICE, it was agreed between counsel that the pleadings should be amended, and a claim for accounting inserted.

CHIEF JUSTICE—What other evidence have you?

Attorney General—I have disposed of my case. I hand in my copy of the Will of Bourda.

CHIEF JUSTICE—I have been thinking of the mode in which this question of legitimacy stands. It appears to me you assert the marriage and the birth, and you assume to rebut the presumption of legitimacy.

Attorney General—Yes, the marriage is stated in so many terms, but there is no averment that these children were born during the marriage; and if we could have agreed on the facts, of course the averment would have been made; but that is just the point on which we differ. I have no objection to one part of the facts being taken, namely, that they were born during the marriage, but during the time that the father was absent.

CHIEF JUSTICE—They are admitted to be her children, although it is not admitted that they were born in wedlock.

Attorney General—And there is a contrary averment, that it is not a material averment. I think your Honours will come to the conclusion that you are not at all bound to entertain the question.

Mr. Gilbert—I am afraid I shall not be able to conclude my case to-day, although I shall not be so lengthy as the *Attorney General*. My observations on the evidence that has been given will be very brief, and my evidence very trifling. I shall take the case very much in the order in which the *Attorney General* took it, because I think that more convenient for my purpose. I shall address myself to the validity of Madame De Coeverden's Will apart from the validity of old Board's Will, under the construction that has been put upon it. I shall then proceed to argue on the construction of Bourda's Will; and then I shall take the question of the legitimacy of the Dalys. Now, although in the course of the proceeding the *Attorney General* has referred more than once to the Will of Madame De Coeverden, it will be necessary for me to go over those objections for the purpose of giving

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to each of them what I submit is a conclusive answer. The first objection is that the Will is void for uncertainty. Now, it seems to me that the Will is certain enough as regards its intention. So far as it goes what is meant by the Will, it is quite clear is this, that Wright should take the property—I do not use the expression as trustee, because it may lead to some misconception, trustee under the English law being very different from what is sometimes called trustee here—but that he should take it as administrator—not that it should vest in him as regards the legal estate, but that he should take it for the purpose of paying off her debts. The absolute dominium would vest in him for certain purposes, and it is given to him in such a way as that in giving over any portion of it that may remain in the position of immoveable property to her heirs, he would not have to give a transport.

CHIEF JUSTICE—The question has been fully discussed at home, whether trustees take what they call a legal estate. But where a trustee is directed or entrusted to pay debts out of real property, it is argued that he must have the dominium.

Mr. Gilbert—What I say is that the property of which Mrs. de Coeverden had the disposing power at her death Wright could transport; but if it was not disposed of in that way, he could give it to her heirs without a transport. A trustee in England is in a similar position; he would have to make a conveyance. But I say that the Will is certain enough in that it says what is to be done with the property up to a certain point; and the mere fact of the codicil not stating who her heirs are to be, shows that she chose to deal with it in that sort of way—that after Wright had paid off her debt as she directed, the estate should go to her heirs *ab intestato*. There is enough in the Will to effectuate that. The next objection is:—“Because the same “contains no institution of an heir, and because no codicil or “other testamentary disposition was ever made by the said “Elizabeth Ruysch de Coeverden appointing any heir or re-“siduary legatee.” Now, it is perfectly true that no subsequent disposition was ever made on her part; but I join issue with the

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Attorney General on the doctrine that there must necessarily be an institution of an heir. I think I shall show that it is not necessary. The *Attorney General* quotes a case from *Cowper's Reports*, in which Lord MANSFIELD refers to the difference between a Will under the civil law and a Will under the English law, and also puts it as a necessity that there must be the institution of an heir under the civil. Lord MANSFIELD is perfectly right as to the general principle of the old law; but I think I shall show that in the modern Dutch law no such thing is necessary. Then the doctrine under the Dutch law that a man could not die partly testate and partly intestate was submitted by the *Attorney General* on the first day, and afterwards admitted by him not to go to the extent to which he would carry it; but it is so mixed up with this question as to the institution of an heir that I cannot avoid referring to it. It was put on this ground, that there must be an heir to every part of a testator's property, and the doctrine of accretion—not exactly the *jus accrescendi*, by which a part of property is left to one person and the rest is not disposed of any sort of way, the whole would go to the party who was left a part of it—was adduced as a sort of illustration of the necessity for an heir.

CHIEF JUSTICE—As a consequence of it.

Mr. Gilbert—Now, it seems to me that the paragraph in *Van Leeuwen's* Roman Dutch law which was referred to, is expressly to meet a case like the one we have before us of the Will of Mrs. de Coeverden for disposing of the property to a certain extent. *Vander Linden* lays it down in page 230:—“And it was a rule that any testator may bequeath part of his estate by Will; but if any one was instituted heir only to an inferior part, without any other person being nominated together with him, it was understood that the whole was included, and that the remainder became the acquisition of the instituted heir, because no one was instituted with him. And again, if there were more than twelve shares named, so much was deducted from each share, according to its extent, as would make it equal to the twelfth part, or in case of double the number, as much as was want-

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“ing to the computation of twenty-four, instead of twelve
 “shares, which amounts to one and the same thing. A mere
 “mistake in the calculation of the testator cannot impede or
 “alter his expressed will and meaning, to which more regard is
 “to be paid than to his words. For instance, if a testator had by
 “his Will nominated *four* particular persons to be his heirs, to
 “each of whom he had bequeathed a third part; or *five* persons,
 “to each of whom he had bequeathed a fourth part of his estate;
 “the third part or fourth part of each ought to be diminished to
 “a just fourth or fifth part, because it sufficiently appears that
 “he intended to give to each of his nominated heirs an equal
 “portion of his estate.” Here he is entering into all those dis-
 “cussions which run so fine and which are curious to our ideas
 “under the old Roman Dutch law. But he goes on:—“Where
 “any one is nominated heir to a certain share, without a joint
 “heir to the remaining shares, the subtlety of the Roman Dutch
 “Law is not regarded; accordingly in such case the remaining
 “shares, to which no one was instituted heir, do not become an
 “acquisition to the nominated and instituted, but remain and
 “devolve upon him who is the testator's nearest relation by
 “blood, pursuant to the law of succession.” Now, it seems to
 me that this is just what Mrs. de Coeverden has done here. She
 disposes of part of her property, as much as is necessary to pay
 her debts; she says, so far as it is necessary to make provision
 for the payment of my debts, Mr. Wright is to see after the re-
 realization of the property into money, to do everything neces-
 sary for that purpose. And so far as it can be carried out. She
 disposes of her property by giving it into the hands of a person
 to whom she entrusts the payment of her debts. He is in the
 position of her heir, who is to realise the property and pay her
 debts; but as regards the residue of the property she says in her
 Will, I will dispose of the residue—that which remains after
 the payment of my debts—in some other document; but the
 effect of her not doing that is this, that she allows the other part
 to go according to the law of succession; and it is, I conceive,
 precisely the same thing as if in the

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codicil of her Will she had said, “then let my property go to “my heirs.” That is just the effect of her conduct. There is no express statement, but it must be considered that that was her intention, that the property was to go in the same way as if she had not made any Will at all.

CHIEF JUSTICE—I should have been inclined to carry the construction of the Will a little farther; if it is allowable according to the law of the case, I should have been willing to suppose that she meant this to take place—“There are certain “persons whom I wish to benefit. I will declare them hereafter; “but whomsoever I should choose to benefit, I think Mr. “Wright a very judicious person, and he should have the conduct of my property; therefore I appoint him for the purpose “of carrying out my intentions so far as to the payment of my “debts and the distribution of the property.”

Mr. Gilbert—Precisely. Your Honour sums it up more concisely and in better words; but that is just what I mean.

CHIEF JUSTICE—She not only appoints him to pay her debts, but also as the administrator of her estate.

Mr. Gilbert—She intended in the first instance that he should hand it over to certain persons, but the effect of her conduct afterwards was to leave it to him to be handed over to her heirs.

Mr. Justice NORTON—But is not that provision for the payment of the debts necessary?

CHIEF JUSTICE—I know the effect of it, according to the English law, would be very material; it would be to protect every one of her creditors from the operation of the limitation law. Whether it would be so here or not, I cannot say. Having appointed some one to pay her creditors, they become objects of gifts and are not barred.

Mr. Gilbert—What would be the case under our Ordinance, which is a very tight one, I am not prepared to say; but what she did was to appoint Mr. Wright as administrator of her estate, and Mr. Wright announces this, not merely after the proceedings have been taken, but from the first he considered himself as administrator. He never dreamt of putting it forward that he was heir. I feel it right to say that. The *Attorney General* referred to *Burge*, 4th vol., p. 172. I do not think he quoted any particular

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passage in it. He merely referred to a passage which I am surprised to find, because it amounts to an inaccuracy in *Burge*. He says:—"The law of Holland adopted most of the general "rules of the civil law which have been stated." Among the rules he is stating the necessity for the institution of an heirs:—"But it rejected some. It required the institution of one "or more persons as heirs." Now, *Burge* states that without any authority for it. It will be found on reference to the Dutch authorities that he has made a mistake. I refer to it because the *Attorney General* referred to this chapter of *Burge's* in support of his doctrine, and it would support him if it was in reality the law. He quotes also on this point, as to the institution of an heir, *Voet*, b. 28, tit. 5, section 1, where it is laid down in very general terms:—"Præcipuum caput et fundamentum testamenti, quo illud a codicillis distat, aut, si malis, præcipua solemnitas iterna, est heredis institutio." The translation of which is, that the principle of the Will, in which it differs from the codicil—the principle of internal solemnity is the institution of an heir. Now, there has been considered to be some difference between a codicil and a Will, according to the Dutch law; but this is undoubted, that according to the old Dutch law you could not disinherit in a codicil. *Voet* lays down in these general terms the old law:—"Seu designatio successoris in universum jus defuncti." The appointment of a successor to all the property of the deceased. But this is merely a general and broad statement at the commencement.

Mr. Justice NORTON—*Burge* says:—"By the Roman law "an heir can be appointed by a testament only, and not by a "codicil; but the appointment may be validly made by any "words sufficiently denoting the intention of the testator."

Mr. Gilbert—Yes—I have read a great many authorities on both sides. I think the *Attorney General* also referred to section 15 of the same title of *Voet*, and all that that amounts to is this, that if a man says anything in his Will about appointing his heir by another writing, and does not do it, his heirs *ab intestato* take—it goes as an intestate estate. This is the effect of the section.

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Mr. Justice NORTON—In fact, the Will is void for all purposes.

Mr. Gilbert—No—he does not say that:—“*Quo casu, si nomen a testore deinceps expressum non inveniatur, necesse est, ut non apparente uspiam successore testamentario, ad heredes ab intestato hereditas devolvatur.*”

CHIEF JUSTICE—Exactly the same phrase is used in the English law.

Mr. Gilbert—The property goes to the heir *ab intestato*; but the passage does not say that the Will is therefore void, in respect to any other dispositions. For instance, it cannot be said that any person in the position of a legatee would be deprived. The heirs would have to pay those. And if it would be good to that extent I cannot see why it would not be good to the extent that Mr. Wright could act under it. I do not know that the argument of the *Attorney General* goes the length that the Will is necessarily void. I will just put the case of a man dying and leaving a number of legacies—to one man such a thing, and to another such a thing, and then saying that he would appoint his heirs by codicil; and suppose the case of his dying without appointing heirs. Surely, the heirs *ab intestato* would be bound to carry out his intentions.

Attorney General—Not if he says “I intend to leave the balance to certain particular persons I shall name,” and does not name them.

CHIEF JUSTICE—Who would take then?

Attorney General—It would be a void Will.

CHIEF JUSTICE—Then the heirs must take.

Mr. Gilbert—The *Attorney General* quoted *Graenewegen*, b. 2. tit. 5; but as I read it, it is entirely against him:—“*Codicilli et testamenta, moribus confunduntur, paremque ordinationis, solemnitatem requirunt.*” And he goes on to say:—“*Testamentorum hodierna solemnitas non requirit testatoris et testiu subscriptions aut signacula.*” And he adds:—“*Hodie non requiritur ut per manus restatoris vel testium nomen hæredis exprimatur.*” Now-a-days practitioners deny that it is necessary to the substance of a Will that an heir should be instituted.

CHIEF JUSTICE—Does he refer to Coren?

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Mr. Gilbert—Not for this particular purpose. He refers to Coren for the purpose of showing that the Supreme Court of Holland decided that a Will and a codicil should be signed in the same way; and then he goes on to say that practitioners deny that the institution of an heir is now necessary to the substance of a Will, and he goes on further to say that an inheritance may be given or taken away in a codicil. But he lays down this, that practitioners deny that the institution of an heir is necessary to a Will.

Attorney General—I do not think that he goes the length of laying down the law on the subject. All that he says is, that an heir may be instituted in an instrument which may be considered a codicil.

Mr. Gilbert—No—that it is not necessary to the Will that an heir be instituted. But I have a direct authority in *Grotius*, b. 2, ch. 17, sec. 3:—“A testament is that which contains the *relictio hereditatis* directly, or in which such at least has been “intended, a codicil is that in which no such *relictio hereditatis* “is contained.” But a note on that from *Vander Keessel* says:—“*Valet hodie testamentum, in quo heres non est institutus, non tam ob favorem clausulæ codicillaris, quam ob cessantem usum et rationem.*” Now-a-days a Will is valid in which no heir is instituted—not with any reference to a codicil, or the differences between a Will and a codicil. So that, if *Vander Keessel* is an authority, and it cannot be disputed that he is, it is not necessary to have the institution of an heir. *Vander Linden*, p. 156, says:—“When the persons named by the testator as “heirs happen to die before him, or refuse or cannot become “heirs, in which case, however, the legacies must be paid, especially when the testament contains the clause that if it cannot take effect as a Will, it shall at least be good as a codicil, “which is termed the *Chausule Codicillair*.”

Mr. Justice NORTON—*Vander Keessel* puts it not so much on the ground of *Chausule Codicillair*, but of convenience.

CHIEF JUSTICE—I do not think that an unnatural consequence of the practice of Executors springing up and having nobody to represent the estate.

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Mr. Gilbert—I admit that, because really Executors seem to be a modern invention in the civil law, so far as I know anything of them in the books. But this I conceive is an authority as direct as any authority can be on the point; and as regards the doctrine of partly testate and partly intestate, it is not necessary for me to make any reference to it now; because in thesis 309 *Vander Keessel*, he says:—“*Ex parte institus solutus heres, pro ea parte succedet, reliqua pars ad here des ab intestato pertinebit.*” All in illustration of the same view I put to the Court. I have referred to the authorities quoted by the *Attorney General*, and I have referred your Honours to others, and from the passages from *Groenewegen* and *Vander Keessel* there cannot be the slightest doubt that the modern doctrine is the one more in consonance with reason. There cannot be any reason against property being left in the way that this has been left. As to the more abstract idea of the old Roman law, that a man must of necessity have heirs for the whole of the property left, and if not his Will was void, I presume the Court will not be bound by it in any case; but it is not necessary for me to ask the Court to place themselves in any such position, because I conceive that the modern law as laid down in *Vander Keessel* is clear enough. The third objection to the Will is:—“Because the same is entirely in the handwriting of the said “John Baker Wright himself.” It is not put forward here as a specific ground that Mr. Wright as Executor could not write this Will, but it is put forward as an argument that his position as Executor makes it void. Whether it could be put upon a specific ground may be questioned, but it may be said, perhaps not unfairly, as an argument that may be adduced, that the Will is entirely in his handwriting. “With respect to his being the legal adviser of Mrs. de Coeverden, there is no proof of that.

Attorney General—No; after what Mr. Bascom has stated, I do not persist in that.

Mr. Gilbert—I was under the impression that some time before he had retired. I acknowledge all the authorities quoted by the *Attorney General*, and I acknowledge the force of them, that they are strictly applicable in any

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case in which a party writes a Will in his own favour, or giving himself a legacy. No question that in the Dutch law a party cannot write a Will under which he is to take a legacy. All the authorities quoted go to that extent, and there is no question on that point.

CHIEF JUSTICE—There is no evidence that the Will is in Wright's hand-writing.

Mr. Gilbert—But it is admitted to be Mr. Bascom is aware that it is.

CHIEF JUSTICE—Is that admitted on the pleadings?

Mr. Gilbert—No—not expressly admitted on the pleadings; but it may be taken as admitted. The fact is so.

Mr. Justice NORTON—It was admitted in one of the previous pleadings.

Mr. Gilbert— But this rule, as to parties taking benefits under Wills, will not be carried a bit further than necessity requires. I do not think it necessary to quote authorities, but I conceive they go this length, that a man cannot give himself a legacy. Executors in this colony, true, are entitled to commissions; but they are not given to them by the Will. The law of this colony says that such work may be paid for.

CHIEF JUSTICE—Can an Executor here charge for his agency besides receiving commissions?

Mr. Gilbert—I do not think so.

Attorney General—It is done.

Mr. Justice NORTON—Is it clear that an executor is entitled to 10 per cent, at all? Because *Van Leeuwen* says they are not entitled to charge anything.

Mr. Gilbert—It has been a matter of custom here, and it has been so held.

Mr. Justice NORTON—*Van Leeuwen* says distinctly that any expense that the executor might incur should be left to the decision of the Court.

Mr. Gilbert—The amount that has been admitted here is 5 per cent, for receipts and five per cent, for payments. In saying that I am making an admission which may be turned against me, but, that is the fact. This is the Will,—“I give and be-
 “queath all my one-third share and interest of and in all and
 “singular the property, estate, and effects, moveable and im-
 “moveable in Demerara

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“(derived by me under the Will of my late father Joseph Bourda, Esq., deceased, or otherwise,) and all monies, rents, and arrears of rent, and other advantages, if any, unto my friend John Baker Wright, Esq., of London, his heirs, executors, administrators, and assigns, and it is my desire that he or they should realize the same respectively, at such times and in such manner as by him or them should be deemed best, and out of the monies to be received (after the deduction of expenses) all my just debts should be paid, and subject thereto that the balance, if any, of the said monies should be paid to such persons or person as I may hereafter devise by my legal codicil to this last Will and Testament. I appoint the said John Baker Wright to be sole executor of this my last Will.” But here if Wright is entitled to commission he will get it for work performed. It cannot be considered in the nature of a bequest; and certainly, this does not make him a beneficial heir. It merely amounts to this, that he is appointed executor, and the law of the place where the property is situated, it being immovable property to be administered, says he shall be entitled to a certain remuneration for his services. This doctrine is one which I conceive the Court will not carry a bit farther than it is compelled to carry it; and none of the authorities quoted go the length of saying that a Will may not be in the handwriting of an executor. I have never been able to find that an executor was held to be placed in the position of a person who could not write out the Will of the testator.

CHIEF JUSTICE—What is the case of Fraser?

Mr. Gilbert—It is this—Fraser wrote out the Will in which all the property was given to his wife, whom he had married in community of goods, and whose property he could do what he liked with. The property under the Will consisted of bank shares, and all that he needed do was to go and sell them out.

Attorney General—Yes, but he was executor too, and I held that the Will might be supported as executor, and not as heir, but the Court would not agree to that.

Mr. Gilbert—I remember that.

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CHIEF JUSTICE—I suppose on the ground of undue influence.

Attorney General—No; there was no imputation of undue influence.

Mr. Gilbert—As the *Attorney General* has referred to his own argument with respect to the executorship, I may say that the only object of Fraser in making himself executor was to realise the property as soon as possible to realise the money and put it into his own pocket. As soon as the money was realised it belonged to him as the husband of the heir; so that he could not be prevented from availing himself of it, as executor, a purpose which the law does not admit.

Attorney General—But according to your argument he would pay it over to the heir at law.

Mr. Gilbert—But you could not prevent him from availing himself of the office of executor to possess himself of the money. The executorship was only ancillary to the heirship, and the effect would have been to have put the bank-shares into Fraser's possession, as the husband of Mrs. Fraser, the heir. Here Wright gets nothing. He only receives remuneration for work.

CHIEF JUSTICE—The shares in that case were the whole of the property?

Mr. Gilbert—Yes—six of them. I think they were the whole of the property. There was no other property mentioned in the Will. The next point raised with regard to this Will relates to the main question in the suit, which is as to the construction of the Will of Bourda.

Mr. Justice NORTON—There is another direct authority on the point that the institution of an heir is not necessary—Vinnius, referred to in the marginal note by *Vander Keessel*.

Mr. Gilbert—I now come to the main point raised here, and I may as well enter upon it at once, as to the proper construction of this clause of the Will, which is the only one I conceive we have anything to do with. I do not agree with the *Attorney General* that it is illustrated by any other parts of the Will. I may refer to those parts in the course of my observations—I am not sure I shall;

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but I may say this, that as to the appointment of his youngest sons as executors leading to the supposition that he meant that the estate should be kept together, he might very well do that in any case. It turns out, whatever the construction of the Will may be, that there certainly was a very long keeping together of this estate while Mrs. de Coeverden was alive. Before I use any argument of my own on the construction of this Will, I will refer to the case I mentioned. The interdict suit, taken out on behalf of one of these parties in 1847 and 1848, will show that the question was raised there in the same way I raised it here, as to the construction of this Will, and although I cannot refer to the decision of the Court and the reasons given by the Judges, for there is no report that I can find, yet I think the decision was given on the merits:—"The Court declares the "mandament of penal interdict obtained by the plaintiff from "the Supreme Court of Civil Justice by provisional order dated "12th April 1847, and final order of 17th June 1845, to be un-"just, illegal, and unfounded, and now condemns him to cancel "and withdraw the same, free of all costs, losses, damages, and "expenses sustained or to be sustained by the Defendant by "reason of such mandament of penal interdict, with interdic-"tion on the Plaintiff to do or attempt the like in future, with "condemnation of the Plaintiff in the costs of these proceed-"ings." This is a decision on the main question. There is no exception in law there. The practice is, if the exception is admitted to state in the sentence that such exception is admitted, in order to show that the sentence is not on the merits.

CHIEF JUSTICE—What is that case?

Mr. Gilbert—The case of J. V. Houel, as guardian of H. D. Houel, against the Administrator General representing the estate of Louis William Boode, to restrain a transport of Louis William Boode's estate.

Mr. Justice NORTON—And the Court declared the opposition to be unfounded?

Mr. Gilbert—The Court rejected the interdict, as I find. What we say is this, that the *fidei commis* is established under this will in favour of the three children

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of Joseph Bourda who survived the others and were married. There were six in existence at the time of his death, and three of them died minors.

CHIEF JUSTICE—Then, three of the children survived the testator, and the other three died in his life time.

Mr. Gilbert—No—one of them died in his life time, and two of the others after his death, but all minors; so that the clause as to survivorship never came into operation. The effect of that has been, that Mrs. Boode's third on her death went to her children who survived her; Mrs. Daly's on her death went to her children who survived her; and as to Mrs. De Coeverden, she dying and having no children, her portion went to her heirs. The word usufruct has been used frequently by the *Attorney General*, and I am surprised at the use of it, because the difference between usufruct and *fidei commis* is well established. If property is left to A with remainder over to B, the property is in B. and the usufruct in A; and the effect is that B. dying before, A may dispose of his interest in the property. But *fidei commis* is different. If property is left to A in *fidei commis*, and afterwards to B, B dying before A, the property becomes absolutely A's. The *Attorney General* argues that *this fidei commis*, is not in favour of each of the children *per capita*, but of all at the time of the death of the last survivor.

CHIEF JUSTICE—But the only clause that introduces that question of full age and marriage is that clause of survivorship which the *Attorney General* quotes. That is the only clause in the Will that introduces this discussion between the three children.

Attorney General— You are speaking of the three children of Bourda?

CHIEF JUSTICE—Yes, the persons adverted to just now. How came you to confine your attention to those three children?

Attorney General—Whether it is under the Will or not, those dying minors, the brothers and sisters would be the heirs.

Mr. Gilbert—Not according to your own argument, that the *fidei commis* is in favour of the children.

CHIEF JUSTICE—But how do you proceed in claiming

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thirds? You may say that there were six children, and three died, while three survived, and the estate devolved among them in thirds? Then, this question of survivorship was introduced by that clause; but you say that the clause has no reference to *Vlissingen*. I can understand *Mr. Gilbert's* view of it, because he adopts the clause as applying to *Vlissingen*.

Attorney General—Yes—the first part of the clause refers to *Vlissingen*, and the survivorship was in respect to the general property.

CHIEF JUSTICE—You have handed me a copy of the Will divided into four parts—the first two in red ink which you say apply to *Vlissingen*, and then you argue that the others have no application to *Vlissingen* at all.

Attorney General—I have underscored the latter part of it, the other clauses as to survivorship generally, without any condition; but *pln. Vlissingen* was subject to *fidei commis*.

Mr. Gilbert—That clause in the Will is sufficient to show that the testator's idea was that unless he made it apply to *Vlissingen* and to the share of any of his children dying without issue, the *fidei commis* could not take place. It is quite sufficient to show that the testator's view was that the *fidei commis* was not in favour of the children altogether, because if so the exception of *Vlissingen* as to survivorship was not necessary. I do not know if I have made myself sufficiently understood. However, I will not expatiate upon that point now. I shall have something more to say on it when I come to my own construction of the Will. I was forced to refer to the proceedings in the interdict suit, and it will be necessary for me to refer to them at some length, there being no report of the proceedings; but the petition for interdict was quoted in the claim and demand. It stated:—"That Joseph Bourda, in his lifetime and up to the "time of his death an inhabitant of the county of Demerara, "made his last Will and testament bearing date the 6th of June, "1789, whereby, amongst other dispositions not necessary to "be herein recited, he devised as follows."—And then the whole passage is set out. There are two verbal differences, but they are of no consequence at all:—

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“That the said Joseph Bourda departed this life on the 23rd day
 “of April, 1798, at Paris, without having altered or revoked his
 “said last Will and testament, and that the said testator at the
 “time of his death was possessed of the said Pln. *Vlissengen*.
 “That three of the testator's children, described in said last Will
 “and testament as Nancy, Joseph Charles, and Jan Lodewyk,
 “all departed this life without ever having attained majority or
 “been married, the said Nancy having died at Amsterdam on
 “the 27th of September, 1800, the said Joseph Charles at the
 “same place on the 14th December, 1809, and the said Jan
 “Lodewyk at Pln. *Vlissengen* in the year 1798.—That the three
 “remaining children of the said testator, namely, Catherine,
 “Elizabeth, and Maria, have all been duly married, Catherine
 “to Edward Gustavus Boode, now deceased, Maria to Richard
 “Bass Daly, also deceased, and Elizabeth to John Lodewyk
 “Ernst Ruysch de Coeverden, now deceased.—That the said
 “Catherine Boode departed this life at Mentz on 23rd August,
 “1837, leaving six children by her above marriage her surviv-
 “ing, namely, Catherine Elizabeth Adelaide Mills Ely, widow,
 “Louis William Boode, Jules Theophilus Boode, Augustus
 “Deodatus Boode, Eugenie Clementina Von Greisheim, born
 “Boode and Sophia Eulalie Houel, born Boode.—That the said
 “Sophia Eulalie Boode inter-married with your Petitioner, now
 “Plaintiff, and afterwards on the 11th of April, 1840, died
 “without leaving any issue except your Petitioner's ward, now
 “Plaintiff's, the said minor, Desiré Honoré Jules Houel.—That
 “the said Sophia Eulalie Houel, your petitioner's (now Plain-
 “tiff's) wife, previously to her death, made her last Will and
 “Testament, whereby she bequeathed the whole of her move-
 “able and immoveable property to your petitioner, now Plain-
 “tiff, but as this document was not attested by any witnesses,
 “your petitioner, now Plaintiff, has been advised that she must
 “be considered to have died intestate so far as regards her in-
 “terest in pln. *Vlissengen*, said Will not having been executed
 “in conformity with the laws of the colony where the said
 “plantation is situated, and that consequently any interest pos-
 “sessed

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“by her in said plantation would on her death devolve on the “said minor as her sole heir.” That Will was put in Mr. Harel’s case, but it was put in only as a document which had been executed, because it could not operate in this colony. It was a very simple document, and there being no witnesses to it, it could not be acted upon, but was invalid:—“That amongst the transports advertised in the *Royal Gazette* of British Guiana, dated “24th October 1846, to be passed before one of the Judges of “the Supreme Court of British Guiana on any day after Saturday the 7th November 1846, which said Judge should please “to appoint, appeared the following at the instance of John “Kennedy, Administrator General of the counties of Demerary “and Essequibo, as Curator to the insolvent estate of Louis “William Boode, deceased (the Defendant,) namely, Transport “of the said Louis William Boode’s one eighteenth share in the “pln. *Vlissingen*, including ground rents, leases, and rights of “renewal of the several townships formed in front of said estate or plantation, including arrears of rent of and on leases or “otherwise due on the 1st day of February 1845, the same as “the said Louis William Boode, or his estate or representative, “could or would be entitled to, the whole as sold at public vendue by W. O. Canzius, then Curator of the said estate of “Louis William Boode, on the 3rd day of February 1845, to “and in favour of Eugenia Clementina Von Greisheim, born “Boode.” This is a statement of the transport of an undivided eighteenth share of the corpus of the property. That it passed in this shape is most singular, but it did pass, and it gave also the ground-rents due up to the time of the sale. There can be no question that this is an advertisement of Louis William Boode’s eighteenth share of the plantation. Now *prima facie* that was a correct description, and it entirely substantiates my argument, namely, that on the death of Mrs. Boode, she leaving six children, her share became apportioned into eighteenths, and each of her children had an eighteenth:—“That the “absolute property or fee simple in pln. *Vlissingen* as possessed by the said Joseph Bourda, did not by the

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“clause of the Will hereinbefore recited, devolve on his afore-
 “said children or their descendants, the only title derived by
 “the said descendants being burthened with a *fidei commissum*,
 “which prevented the said absolute property or fee simple
 “from vesting in any of the said descendants except such as
 “should be in existence at the time of the deaths of the surviv-
 “ing child of the said testator, and that consequently at the
 “time of the death of the said Louis William Boode any inter-
 “est he possessed in pln. *Vlissingen* became subject to the said
 “*fidei commissum*, and could not be transported, as attempted
 “by the said John Kennedy, the Defendant.” Now, I would in-
 terject an observation here, that it would be difficult to under-
 stand how far he ever had any interest at all, if the contention
 of the opposite side is correct. The *Attorney General* is obliged
 to admit a sort of shifting fiduciary interest held until the death
 of the last coming child, as heirs of their parents by the grand-
 children; but I shall show by and by, if the construction of the
 Will on the other side could be sustained, what would become
 or ought to become of the property, from the time of the deaths
 of Mrs. Boode and Mrs. Daly respectively to the death of Mrs.
 de Coeverden. I cannot understand what interest Louis Wil-
 liam Boode had in the property at all, unless he came in abso-
 lutely by the death of his mother, or, to use the words in the
 Will, succeeded her. I consider the word “succeed” to be an
 important element towards the decision of this case.

Mr. Justice BEETE—You acquiesce in the correctness of
 the translation of it?

Mr. Gilbert—I do not mean to say that the word “devolve”
 does not mean the same thing; but I might show that the literal
 English meaning of it is succeed. Although I do not dispute the
 correctness of the translation, yet I should render the Dutch
 word “succeed.”

Mr. Justice NORTON—Does it mean to come in as heir?

Mr. Gilbert—Yes, as heir to property—that the property
 goes in succession. I may say that the translation which was
 used in that case also used the word devolve, and Mr. Justice
 DOWNIE, who understood the Dutch language, took the Will
 home and translated it himself,

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and as there was no material difference between them the word used in the translation was “devolved.”

CHIEF JUSTICE—The fact is, the English word succeed would not be used exactly in that sense.

Mr. Gilbert—I have not been able to find the word in the Dutch dictionaries. The words in the Will are:—“Which they “my said children and heirs shall only possess as *fidei commis-sarii*, without any deduction of the Trebellian portion, and “after their death to devolve with title of property to their children begotten in wedlock.” But I say the word is of some importance, as it gives you the idea of succession—that the estate is to go in succession.

Mr. Justice BEETE—It does not say at the death of each of them.

Mr. Gilbert—No—nor was it necessary. He said after their death.

CHIEF JUSTICE—Perhaps succeed is a word that more naturally applies to parents and children, and devolve is a word that more naturally applies to brothers and sisters. I understood you to mean that the use of the word encourages the idea that the property was to go from the parents to the children.

Mr. Gilbert—Yes—the *fidei commis* was to go from the parents to the children.

Attorney General—I wish you had raised that point as to the translation on the pleadings.

Mr. Gilbert—I am not disputing the translation. Property devolves from parent to child just the same as it succeeds from parent to child; but I am referring to the particular Dutch word which is used. The words “head for head,” have been referred to by the *Attorney General*, but there was one translation in which they were left out. In my opinion they mean nothing. They certainly do not mean *per capita*.

Attorney General—Baron Von Greisheim does not think that they were properly left out at all.

Mr. Gilbert—Oh, Baron Von Greisheim believes that everybody here is in a conspiracy against him. I have seen an abusive letter that he wrote about me, because I gave an opinion hostile to his interest. He was here in

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1847, and I believe he was the instigator of this suit. He has always been under the impression that it was not a correct translation; but the translations in substance are the same. Then the claim and demand goes on to say:—"That moreover, "if the said transport should be allowed to be passed, the said "Eugenia Clementina Von Greisheim might herself, holding "under the title, sue for a division of the said pln. *Vlissengen*, "or might dispose of her interest acquired by said transport to "any person soever, who might then sue for such division; and "this your petitioner, now Plaintiff, would confidently submit "was a very strong and of itself a sufficient reason why the "said John Kennedy (the Defendant) should be prohibited "from passing the transport, inasmuch as, independently of the "proposition which your petitioner, now Plaintiff, had above "submitted, that only such of the further descendants of the "said Joseph Bourda as should be in existence at the time of "the death of the last of the survivor of his children could have "any absolute property in the said pln. *Vlissengen*, it undoubt- "edly appeared from the portion of the Will of the said Joseph "Bourda above recited it was his intention that the said pln. "*Vlissengen* should not be brought to a division until after the "death of the last survivor of his children." I do not know that it in any way appears that the property was to be kept together till the death of the last survivor, but I hold that any one of his children arriving at majority or marrying would have an interest which he or she might transmit to his or her children, and which the children might take—which might be disposed of. I do not see the intention of keeping the property together which the *Attorney General* sees.

CHIEF JUSTICE—I do not see that it is indicated in any other sense than under the construction of the Will—except as the indication may arise from the terms of the Will.

Attorney General—It is a singular fact that it should have been kept together.

Mr. Gilbert—There is no doubt that the whole of it could not be disposed of by the parties voluntarily. For

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example, Mrs. De Coeverden could not transport her share; nor could the others join and transport their shares; but there was nothing to prevent a grandchild of Bourda from transporting his or her share derived from the mother. I cannot see what there was to prevent any one of the Boode's from transporting his share. There is nothing to show that the policy or intention of the testator was that the property should be kept together till all his children were dead. Then, if my construction, that any of the grandchildren who became entitled to it could sell, would lead to the division of the property, all I can say is that that would be a favourable construction of the Will. Then, it was further stated, in respect to the opposition of which I have spoken:—"That an opposition was entered to said transport at "the instance of Elizabeth Ruysch. de Coeverden, which your "petitioner's (now Defendant's) Attorney conceived would "have been sufficient to protect the rights of the said minor, "but that an objection had been taken to the Power of Attorney "filed in behalf of the Plaintiff in said matter of opposition, "which might prevent the same being discussed on its merits, "which opposition had prevented the transport from being then "yet passed."

Mr. Justice NORTON—What was the reason of this being an interdict, and not an opposition?

Mr. Gilbert—The time for opposition had passed.

Mr. Justice NORTON—But that was not the ground on which it was thrown out?

Mr. Gilbert—No. I may mention that not only has a transport been passed of Louis William Boode's eighteenth share, but also a mortgage has been passed on the share of one of the Plaintiffs, Madame Ely, in favour of the children of Von Greishem; and there were other mortgages to be passed on Houel's share. He sent out a Power of Attorney for the purpose.

Mr. Justice BEETE—How long is it since that mortgage was passed?

Mr. Gilbert—Two or three years ago. It was passed by positive and express instruction.

Attorney General—It must have been passed before

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Madame de Coeverden's death. But it has not been pleaded, and cannot affect the legal decision on the question.

Mr. Gilbert—No. I do not mention it for any such purpose. If the Court come to the conclusion that the Will must be construed in a particular way, these acts can have no effect. Then comes the prayer of the petition. The answer in the suit is rather curt, but the report shows what was presented to the minds of the Court at the time.

Attorney General—The report just took each of the allegations and denied it.

Mr. Gilbert—The report says:—“That your reporter admits “that the said Joseph Bourda departed this life on the 23rd day “of April 1798, at Paris, without having altered or revoked his “said last Will and Testament, and that the testator at the time “of his death was possessed of the plantation *Vlissengen*. Tour “reporter admits that three of the testator's children described “in the last Will and Testament as Nancy, Joseph, Charles, and “Jan Lodewyk, all departed this life without ever having at- “tained majority or been married.”

Attorney General—I find that the mortgage was passed on the 6th October, 1860.

Mr. Gilbert—That was shortly before the death of Madame de Coeverden. The way in which the statements were met as to the vesting of the property is this:—“That your reporter denies that the absolute property or fee simple in pln. “*Vlissengen* as possessed by the said deceased Joseph Bourda “did not by the clause of the Will in the petition recited de- “volve on his aforesaid children or their descendants, and that “the only title derived by the said descendants was or is bur- “thened with a *fidei commissum* which prevented the said ab- “solute property or fee simple from vesting in any of the said “descendants except such as should be in existence at the “time of the death of the surviving child of the said testator.” That amounts to this, that Louis William Boode, or rather his representative, had a right to transport. Then it goes on:— “That your reporter does not know what the petitioner means

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“when he states that if the said transport should be passed the
 “said Eugenia Von Greisheim may, herself holding under this
 “title, sue for a division of the said pln. *Vlissengen*, or may
 “dispose of her interest acquired by said transport to any per-
 “son soever, who may then sue for such division, and al-
 “though the petitioner would confidently submit that in this
 “passage he has assigned a very strong and of itself a suffi-
 “cient reason why your reporter should be prohibited from
 “passing the transport, your reporter must say that he cannot
 “see in said statement any reason or any thing approaching to
 “a reason why he (your reporter) should be prohibited from
 “passing the said transport.”

CHIEF JUSTICE—He asserted that till then he had a certain share.

Mr. Gilbert—Yes:—“There never was any impediment to
 “Eugenia Von Greisheim suing for a division. The Will does
 “not prohibit a division, and the law is express that *non eos*
 “*solos hanc actionem (ie. actio familiae eriscundæ) instituire,*
 “*posse ad, quos jure directo devoluta est hereditas, verum*
 “*etiam ipsos heredes fidei commissarios bonorum distribu-*
 “*tionem inter se recte contendere.* P. Voet, *Fam. Eriscums*, c.
 “11, § 2. It thence follows that her having purchased the inter-
 “est of L. W. Boode deceased does not alter or affect her rights
 “as one of the heiresses of Joseph Bourda, deceased; as there is
 “no prohibition in the Will against a division, any one of the
 “heirs or any person becoming entitled by purchase or other-
 “wise to any share or interest of, in, or to pln. *Vlissengen*
 “would have a right to sue for a division if he or she should
 “think fit to do so.” Then he admits the entry of the opposition.
 But it is quite clear as put forward in this report, that the point
 was raised. The answer in the case does not enter into the mat-
 ter at length, as the report does:—“The Defendant proposes the
 “exception of non-qualification, concludes to an admission
 “thereof, and for the benefit thereof to an absolution from this
 “instance.” There were technical objections taken on the score
 of non-qualification and also on interdict not being the proper
 remedy, and it sums up:—“And in the event of

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“the said exception being overruled, the Defendant declares
 “that the Plaintiff is not legally entitled to restrain him (the
 “Defendant) from passing the transport referred to in the Plain-
 “tiff’s claim and demand, by the extraordinary remedy of inter-
 “dict, and on the contrary the Defendant avers that the Plain-
 “tiff’s proper and legal remedy under the circumstances by him
 “averred and set forth in his claim and demand should have
 “been by entering an opposition to the passing of such trans-
 “port, and if necessary by following up such entering of op-
 “position by a suit.” These are the pleadings, and the sentence
 I have stated. I do not think that there was any report of the
 case; but the pleadings—the claim and demand and the re-
 port—show that the question was raised, and that the case did
 not go off on an exception. I recollect that Mr. Justice DOWNIE
 declared that the translation was correct and he and the First
 Puisne Judge gave the decision, Chief Justice ARRINDELL who
 had been engaged in the case taking no part in it. The transport
 was passed under the cognizance of the Court, after the whole
 question had been sifted. The Judge would not have passed it if
 he had thought it wrong. It was the business of the Judge to see
 that it was a transport that he was authorised to pass, and that
 the property under the transport was properly identified under
 the Will; and he would never have passed it unless he was sat-
 isfied that the Will authorised him to do so. After the discus-
 sion of the matter the decision that was then come to amounted
 to this, that on the death of Mrs. Boode, one-eighteenth share
 of the estate fell to one of her children, which could be made
 the subject of a transport. That was the effect of the decision.

CHIEF JUSTICE—There can be no question that in passing
 that transport the decision was so far a decision of the right.

Mr. Gilbert—Yes, and you see it was after a full dis-
 cussion. If the *Attorney General’s* construction of the Will is
 correct the transport ought not to have been passed.

CHIEF JUSTICE—If we can enquire into the question
 whether he had an eighteenth we can disregard the

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transport as a mistake; but I have always heard that a transport gave a person an indisputable title in land.

Attorney General—Not even letters of decree are indisputable, and that is a higher title.

Mr. Gilbert—What would be said by upsetting the transport would amount to this, that Louis William Boode never had any interest that could be conveyed under that transport. That would be the effect of it.

CHIEF JUSTICE—The effect of it would be that the passing of the transport was a mistake.

Mr. Gilbert—Yes—that the construction put upon it by the Judge was entirely erroneous, and that this interest never accrued to Louis William Boode.

CHIEF JUSTICE—That is what I wish to know— if it is relied on as conclusive. There is nothing to show that this transport is entitled to less regard than any ordinary transport passed for money value. I look upon it as a most important matter.

Mr. Gilbert—This is a transport of Louis William Boode's undivided eighteenth share. It is considered to convey what is called in the English law the fee simple, and what we call here the absolute dominium.

Attorney General—That is not the meaning of the words. It may mean less.

Mr. Gilbert—The transport of an undivided fourth of pln. *La Penitence* would mean the absolute dominium of that portion of the plantation.

CHIEF JUSTICE—Transports do not require words of limitation. The transport of half of a house means the dominium of half of the house.

Mr. Gilbert—Unless there are some words restraining the meaning; but the words are, “the same as the said Louis William Boode or his estate or representatives could or would be entitled to on the first day of February, 1845, and as sold at vendue on the third day of February, 1845, by order of the Supreme Court of Civil Justice.” It was sold by order of the Court of Justice.

CHIEF JUSTICE—By execution, I suppose.

Mr. Gilbert—No. At that time they appointed curators to estates. Mr. Canzius was one of the curators of

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this estate, and the practice was to report to the Court when an insolvent estate ought to be sold, and the Court sanctioned it in this case.

CHIEF JUSTICE—But the direction to sell such or such an estate was not assumed to be a decision on the insolvent's title.

Mr. Gilbert—No.

CHIEF JUSTICE—The Court would merely act upon information from its officers.

Mr. Gilbert—It would assume *prima facie* that the property was the property of the insolvent. At all events, this is a transport in the ordinary way, making over in and full and free property one-eighteenth of the estate. It was passed after opposition and a decision of the Judges on that opposition; and the opinion of the Court then on the construction of the Will of Bourda was that the title of the property became absolute. That was in 1848; but there is another transport of property sold in 1853.

CHIEF JUSTICE—We will not go further this evening.

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Mr. Gilbert—When the Court adjourned yesterday, I was about to refer to the transport of Jules Theophilus Boode's share. I had pointed out the proceedings referring to the case of Louis Boode, and I had drawn the attention of the Court to the fact that after a solemn consideration of the case, the transport was passed of Louis William Boode's eighteenth share of pln. *Vlissingen*, which was intended to convey the dominium of the eighteenth share of that plantation. Jules Theophilus Boode's share was passed in the same way. He died, and the Administrator-General became possessed of whatever of immoveable property he had in this colony, and in that way represented this eighteenth share, or was considered to represent this eighteenth share—that is, in the ordinary way in which the Administrator-General represents estates. It is not necessary to give any evidence of it, because the Court will presume that everything

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necessary was done, and I do not consider it necessary to load the record. On the 18th November, 1853:—"Before His Honour our John Noble Harvey, Acting First Puisne Judge of the Supreme Court of Civil Justice of British Guiana aforesaid. Be it known that on this day, the 18th of November, 1853, appeared John Daly Administrator-General of Demerary and Essequibo, as representing the estate of Jules Theophilus Boode, deceased; which appearer declared by these presents to cede, transport, and in full and free property to make over to and in behalf of Henry Sarsfield Bascom, his heirs and assigns, one undivided eighteenth share in and to the abandoned pln. *Vlissengen*, including the ground rents, leases, and rights of renewal of the several townships formed in front of said estate or plantation, including all arrears of rent of and leases or otherwise due on the 8th day of June, 1848." Why they go back so far as the 8th June 1848, I do not know, unless it was the time of his death. It could scarcely be the time of the sale.

CHIEF JUSTICE—Possibly it was the time of the death of his parent.

Mr. Gilbert—No. Madame Boode died long before. She died in 1837. However, here is a transport of the dominium of another eighteenth share to Mr. Bascom. As I have already observed, of course the opinion of the Judges is not conclusive on your Honours; but any expression of opinion on the part of the Judges would have some weight with you. Now, the Judge by whom that transport was passed was Mr. Harvey, who was acting for the first Puisne Judge in 1853 during his absence from the colony; and as I have already remarked, Mr. Harvey knew what had taken place. He had been counsel in a case in which this question had been previously tried, when the interdict was taken out. It was stated by the *Attorney General* and it was the fact, that he had acted in that matter contrary to his own view in bringing the suit for getting the question tried. Mr. Roney, who was on the other side, was also acting contrary to his opinion; but they brought it before the Court for the purpose of getting it tried.

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CHIEF JUSTICE—Counsel happily have no opinions.

Mr. Gilbert—They had their private opinions, but they brought the case for the purpose of getting it tried. Mr. Harvey must be presumed to have known all about it, and he had no hesitation on the bench in passing the transport. It was his business to see the transport passed, and he was capable of forming an opinion. He was a man of great ability in his profession, of a sound and most dispassionate judgment; and here we have another transport, passed by him, for another eighteenth share of the property. And if the contention on the other side be correct both of these transports must have been improperly passed; because if all the parties were to wait to ascertain the rights of the grandchildren till the death of the last survivor of the children, there was no right in anybody. Besides, this is not a transport of a life-interest, as suggested by the *Attorney General*. It is a transport of the absolute property.

Attorney General—There is a difference in the wording of the two transports.

Mr. Gilbert—There is a difference in the wording, but no material difference:—“To and in favour of Henry Sarsfield “Bascom, his heirs and assigns, one undivided eighteenth “share.” There is one eighteenth share.

CHIEF JUSTICE—Does the other call it the abandoned plantation *Vlissengen*?

Mr. Gilbert—Yes.

CHIEF JUSTICE—But there are no words to cover the leases?

Mr. Gilbert—Yes:—“Including the ground rents,. leases, “and rights of the several townships formed in front of said “estate or plantation, including all arrears of rent of and on “leases or otherwise due on the 8th day of June, 1848.”

CHIEF JUSTICE—But this is the lease and the right of renewal, not the reversionary title.

Mr. Gilbert—It is a part of the plantation. No question arises but about a part of the plantation.

CHIEF JUSTICE—But it would not cover the part of the plantation which has been sold out as building lots.

Mr. Gilbert—Abandoned plantation means abandoned

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as a plantation. If they had only meant to transport that part on which a township was not built, this question would have been precisely the same.

CHIEF JUSTICE—Yes; the question would have been the same; but the question is whether Mr. Bascom and the other party took any interest in the ground which was leased or not.

Mr. Gilbert—An eighteenth of *Vlissengen* means an eighteenth of the whole property—that is, the township in front and the abandoned plantation. It is not necessary to raise the question that suggests itself to your Honour's mind now. I shall be prepared to meet it if it is ever raised.

CHIEF JUSTICE—Yes, except that our sentence—I forget how it is asked in the claim and demand—is intended to extend to all the property that passed by the Will under the name of plantation *Vlissengen*.

Mr. Gilbert—The only difference between the two transports is that in the transport of Louis William Boode's share there is nothing said about townships. Then comes the mortgage that was passed in 1860.

Attorney General—That mortgage is not referred to in the pleadings. It has not been pleaded, and I do not know on what ground it is admissible in evidence.

CHIEF JUSTICE—You referred to it to see how it would affect this case. Do you introduce it as an admission binding on the decision of the Court?

Mr. Gilbert—I introduce it to show what was the opinion of the Judges as to the construction of the Will.

CHIEF JUSTICE—I presume it is introduced on the same ground as the other two.

Mr. Gilbert—We pleaded the other two because the claim set up might affect the title, but this I adduce as it might affect the proceedings in this case.

CHIEF JUSTICE—If it is adduced as an admission it ought to have been pleaded as such.

Mr. Gilbert—I refer the Court to the fact of the mortgage just as I would refer them to the fact of a decision.

Attorney General—If you refer to it only as a fact showing what were the views of the Court, I have no objection.

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CHIEF JUSTICE—On the same ground as the other two.

Mr. Gilbert—The other two might be in some different position, as these proceedings might affect the rights of the two persons who held these transports.

CHIEF JUSTICE—And the rights of the person, Mrs. Ely, who made the mortgage, would be affected by the mortgage. Whom is it to?

Mr. Gilbert—The minors Von Greisheim.

CHIEF JUSTICE—Probably the decision would affect the rights of the mortgagee.

Mr. Gilbert—The mortgagees are the three children of Von Greisheim. I think they were all minors then. However, two of them were; and this mortgage was to secure some money which was due, or was said to be due, by Mrs. Ely to their mother's estate.

CHIEF JUSTICE—That is another interest which they have in the property. *Mr. Solicitor General*, you have not taken any notice of the mortgage. Ought we not to have it on record?

Solicitor General—It does not arise in the suit.

CHIEF JUSTICE—It is just this question—have they a right as mortgagees on an eighteenth share?—a very material right.

Solicitor General—No doubt it is a very material right, but the conclusion of the claim and demand only asks for certain things, and all the other proceedings are founded on that conclusion. The Plaintiffs in fact have brought us into Court saying that by a certain reading of the Will they have a benefit, and to get that benefit they will also give us a benefit; so that we do not offer any objection to their claim.

Mr. Justice BEETE—I cannot re-call to mind the circumstances under which that mortgage was passed, but I cannot help thinking that some particular representation must have been made to me—that some document was produced to lead me to pass it.

Attorney General—It is a matter exclusively between Mrs. Ely and the Von Greisheims, and I cannot see what *Mr. Gilbert* has to do with it.

CHIEF JUSTICE—He has this to do with it—he now contends for that very construction which under that

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mortgage your client seemed to put upon the Will. He does not put it conclusively, but at all events, he says that is the way you seemed to treat the Will then.

Attorney General—But clearly the understanding of all parties was that the matter should go into Court to have a construction put upon the Will of Bourda, under the law.

Mr. Gilbert—I have said more than once, and I repeat it, that my reason for using this mortgage is to show how it was treated by the Court, in the same way as in the suit of Harel to show how the Judges construed the Will. At that time Mrs. Ely had the property. I did not put in the transport. I referred to it in the same way as I refer to this mortgage.

Mr. JUSTICE BEETE—When was the mortgage passed?

Mr. Gilbert—On the 6th October, 1860.

Mr. JUSTICE BEETE—Before me?

Mr. Gilbert—Yes. I am merely referring to the mortgage. I do not put it in as evidence. I am referring to it to show the way in which the Court treated the Will.

Mr. JUSTICE BEETE—It must have been passed before me on the representation that two shares of the property had been transported by two other Judges, Mr. FIREBRACE and Mr. HARVEY. At the same time, I do not feel myself bound by it.

Mr. Gilbert—I do not mean to say, if your Honour did even come to a positive conclusion and you change your mind now, that you will be bound by it. But I say that referring to these three separate dealings, you can only infer that the Judges of the Court proceeded on the construction of the Will that I put on it.

CHIEF JUSTICE—*Mr. Attorney General*, do you persist in your objection to this mortgage?

Attorney General—It has not been tendered in evidence. I do not know that I can object to it as a matter of history. In the same way *Mr. Gilbert* might refer to the other suits.

Mr. Gilbert—There is a reason also given in the suit of the heirs of Bourda against Harel which shows what the Judges who decided that case thought. It is the 21st

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reason:—"Because even admitting that Mr. Ruysch and Mr. Boode and the guardian of the two eldest children of Maria Daly, were duly authorised to execute a lease of the property "in question"—This is the important part of it:—"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 Maria Daly's life, (admitting for argument's sake that she had permitted the execution of it by the guardians 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 Ruysch and Boode, as such, could never have any right to the property, the right to two-thirds of which was limited by the Will of Joseph Bourda to the heirs of Elizabeth Ruysch, born Bourda, and Catherine Boode, 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 guardians to the lease." He is referring to the two-thirds belonging to Messrs. Ruysch and Boode, who were made parties to the lease. It was a sort of mistake, and this reason pointed it out:—"The right to two-thirds was limited by the Will of Joseph Bourda to the heirs of Elizabeth Ruysch, born Bourda, and Catherine Boode, born Bourda, and the remaining one-third to the heirs of Maria Daly," &c.

Attorney General—Read the 22nd reason.

Mr. Gilbert—That is:—"Because, admitting that the lease did not labour under the defects heretofore pointed out, yet Mrs. Ruysch, Mr. Boode, and both the children of Mrs. Maria Daly, parties to the lease, being dead, their respective interests did not descend to their heir, but became vested in the persons entitled to the property under the Will of Joseph Bourda deceased." We know that.

Attorney General—It did not descend to their heirs.

Mr. Gilbert—It did not descend, but there is not the slightest difficulty in putting a proper construction upon that. The husbands of the children of Bourda had

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nothing to do with it, but the children of their wives had something to do with it. "*The person* entitled to the property under the Will of Joseph Bourda." The 21st reason shows what was meant by that:—"The right of two-thirds was limited by the "Will of Joseph Bourda to the heirs of Elizabeth Ruysch, born "Bourda, and Catherine Boode, born Bourda, and the remaining one-third to the heirs of Maria Daly, born Bourda." The 22nd reason shows quite clearly that it does not mean the absolute heirs who might be appointed by Will, but the natural heirs, the issue of Bourda's children.

Attorney General—Look at the 24th reason.

Mr. Gilbert—Well:—"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 Bourda, deceased." What is the difference? The 21st reason points out how it is limited. The word "heir" there, I admit, is not the best word to use. It ought to have been "children."

CHIEF JUSTICE—In one case it is the heirs of Bourda, and in another case it is the heirs of Bourda's children.

Mr. Gilbert—Well—the children of Bourda's children were *fidei commissary* heirs of Bourda. It is impossible to read this 21st reason without coming to the conclusion that the construction put by the Court was that the children of the mother took the shares of their mother.

CHIEF JUSTICE—If you say that the heirs of Bourda are the heirs of Madame Ruysch. That is your argument. The *Attorney General* says it means something different.

Mr. Gilbert—I am perfectly willing that your Honours should judge between us. The 21st reason is perfectly consistent with my construction:—"The right to two-thirds was limited by the Will of Joseph Bourda to the heirs of Elizabeth "Ruysch, born Bourda, and Catherine Boode, born Bourda"—That is, the heirs of his children:—"And the remaining one—"third to the heirs of Maria Daly, born Bourda." I have put them together, because he is distinguishing them from their husbands—Ruysch and Boode from Mrs. Ruysch and Mrs. Boode. This of course expresses an altogether different meaning. It would have been that the right to this property had

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been vested in these three persons during their lives, and that it was to go to their children in common at their death. It must have been expressed in that way. It could not have been expressed in this way that the property belonged to Mrs. Ruysch and Mrs. Boode, and after their deaths it was to be separated into thirds. The Court expressed a positive opinion, which we contend for now, that each set of children was to take the share of their parent. Then, I sum up this part of the case in this way. So far as regards the view of the previous Judges, to give such an interpretation of the Will as the Plaintiffs wish would have the effect of upsetting the previous decision in this case. It would set aside the transports and the mortgage and would be directly contrary to the views expressed and the reasons given by the previous Judges. Of course, if your Honours feel yourselves compelled to do it, it would be done.

CHIEF JUSTICE— Then, I understand you do not argue that Mr. Bascom having that transport, we are bound to give him an eighteenth at the expense of everybody else—that the transport is indefeasible.

Mr. Gilbert—I would rather not enter into that argument.

CHIEF JUSTICE—But it may affect the issue.

Mr. Gilbert—Then, I do claim for him that he cannot be divested of it.

CHIEF JUSTICE—The effect of that would be, if we come to the conclusion that Mr. Bascom is entitled to the eighteenth, the other heirs would have to contribute to raise an eighteenth for him.

Mr. Gilbert—If his transport is to stand whether or not.

CHIEF JUSTICE—Yes, an eighteenth must be raised for him. I suppose that on your construction of the Will, it Mr. Bascom has an eighteenth part every one will have to contribute to raise an eighteenth for him, and their shares must be reduced *pro rata*.

Mr. Gilbert—That is a matter for your Honours to decide.

CHIEF JUSTICE—You do not seem inclined to take that view of it.

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Mr. Gilbert—I maintain this, that Mr. Bascom has an eighteenth, and that he is entitled to hold on to it. If your Honours decide in favour of the Plaintiffs' view, then that transport ought not to have been passed.

CHIEF JUSTICE—Then the question arises, is it on that account worth nothing?

Mr. Justice NORTON—No; the well-known rule comes in. It ought not to have been passed, but having been passed it ought to be binding.

Mr. Gilbert—This decision given in respect to Louis Boode's share was given on the merits of the case, not on technical grounds.

CHIEF JUSTICE—We can neither introduce nor pass over such a question, for it is not raised at the bar, but I wish to know whether Mr. Bascom does rest upon it.

Mr. Gilbert—He rests upon his transport according to the effect of it.

CHIEF JUSTICE—I want to know whether you are going to test it.

Mr. Gilbert—Most decidedly.

CHIEF JUSTICE—Whether you are going to test it, because it is right; and also whether you go further and say, even if it is wrong the Court cannot set it aside.

Mr. Gilbert—Then, I go that length. Your Honours will remember that this transport was passed after discussion and in pursuance of a decision of the Court.

Mr. Justice NORTON—If ever a transport ought to be indefeasible that ought to be.

Mr. Gilbert—The first was passed in pursuance of a decision of the Court, and with regard to Mr. Bascom's, can they, having lain by and permitted the transport to be passed, come up now and upset it?

CHIEF JUSTICE—That is one argument. Certain notice is given of transports, and parties have the opportunity of opposing.

Mr. Gilbert—They could have opposed it. Madame de Coeverden certainly was not dead; but if they entertained these same views they could have come up and said that Jules Boode had no right to transport the property.

Attorney General—But Mr. Bascom represented the same parties.

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Mr. Gilbert—No—he represented some of them, but not all. At that time I believe he represented some of the parties, but he did not represent Houel, nor Mrs. Ely, nor Von Griesheim. He bid for the property in his individual capacity, and the representatives of the other parties bid against him.

CHIEF JUSTICE—It is merely the case of a person buying out a property at public sale, advertising the transport and getting the transport, and then somebody coming up and saying, “You have bought nothing because the person you bought from had no title, and although the Court allowed you to pass the transport the decision of the Court has no effect, because the person you bought from had nothing.”

Mr. Gilbert—Yes, but the position of the party not opposing is very much against him. These are parties who must be considered to have been acquainted with the circumstances.

CHIEF JUSTICE—I do not see why they need oppose the transport. The question goes to the very heart of the transport. If this argument is to be maintained there was no occasion to oppose the transport, because they did not suffer by it. You say the argument ought not to be maintained, and that they do suffer something. It seems to me that the decision which overturns this transport is a decision which would make it wholly unnecessary to oppose it.

Mr. Gilbert—To oppose it on the score of a title?

CHIEF JUSTICE—Yes, necessary to oppose it on the score of title.

Mr. Gilbert—All these points I leave the Court to deal with and to give as much weight to as they consider them entitled to. And now let us look at the words themselves, which seem on the other side to have been assumed always to mean exactly what the Plaintiffs wish them to mean, and really the words that can create any, the slightest, doubt whatever in favour of the Plaintiffs are the words “head for head.” I am not aware that “head for head” is a proper translation of *per capita* in law. *Per capita* has a distinct meaning in law as against *per stirpes*.

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CHIEF JUSTICE—But does it not mean head for head?

Mr. Justice NORTON—Head for head means per individual; *per stirpes* means by representation.

Mr. Gilbert—Yes; but I do not know that the words in Dutch exactly mean that. I do not know that they mean something from which representation is entirely excluded.

CHIEF JUSTICE—Head for head means individually, because each individual has a head.

Mr. Gilbert—The meaning of the Will is this—that Bourda leaves all the residue of his property, after providing legacies—he leaves the residue to each of his children with a peculiar sort of survivorship specified as regards a portion of it, *Viissengen* estate—he leaves that to his children in *fidei commis* for their children. Now, what is the plain meaning of it? We will not speak of any more than the three. I put the others out of the question, what does a man mean by leaving property to his children and after their death to be divided among their children? Would it not mean to be divided by representation? And do these words mean any more than that the property was to be held in *fidei commis* among them, and after their death to be equally divided among their children?

CHIEF JUSTICE—No doubt the use of the word "equally" will help the division among the children, but the question still remains, in what way were the parents to take it?—whether successively—whether four together when there are four, three together when there are three, two together when there are two, and the last when the others die. Or, as each died, did his portion go to the others? The question is, how the parent takes, and when she dies how the children take.

Mr. Gilbert—I do not know that the question is how the parent takes.

CHIEF JUSTICE—I understand you that each parent took one-third, and on her death the share went to her children. The *Attorney General* says as each died the survivors took her share.

Mr. Gilbert—I do not understand him to put it in that way.

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Attorney General—Yes, I do put it in that way.

Mr. Gilbert—Well—the *Attorney General* puts it in a variety of ways. I understood his construction to be that on the death of one of them, the survivors became a sort of fiduciary heirs themselves. These are the strange shifts he is driven to. .

Mr. Justice BEETE—That the survivors had only a life interest.

Mr. Gilbert—That is the way I understood he put it. He may have put it the other way, and it escaped me.

Attorney General—I put it in both ways.

Mr. Gilbert—He has to manufacture a construction

CHIEF JUSTICE—The question is this, did the testator contemplate several inheritances? or did he contemplate one inheritance to be finally divided amongst them as a whole?

Mr. Gilbert—Of course that is the alternative. I argue for the first branch of the alternative, and the *Attorney General* for the second; but I think the first branch of the alternative is the one that the Court must support, unless it is actually driven and compelled to construe the Will in favour of the other.

CHIEF JUSTICE—It seems more reasonable to my mind that the testator intended to allow the use of the word “respectively,” and to treat each of his children equally.

Mr. Gilbert—Yes, respectively is the English phrase:—“I declare to nominate and institute my children, &c, &c, &c, “heirs to all my property which I may leave at my demise, “moveable and immoveable, actions and credits, in manner as “they shall be at my death.” That is one of the clauses that constitute them heirs. Then, in a style of phraseology that might have been improved upon, but the meaning of which is clear, he goes to except a portion:—“From which is specially excepted my plantation called *Vlissingen*, with all its appurtenances and dependencies, situated near Stabroek, which they, “my said children, and heirs, shall only possess as *fidei commissarii*.” The *Attorney General* dwelt on the word “fiduciary,” but I cannot see any real meaning in it:—“Without any “deduction of the Trebellian portion, and after their death to “devolve

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“with title of property to their children begotten in wedlock, “head for head in equal portions.” Does that mean anything more than this, that after their death their children are to succeed to the parents, taking equal shares?

Attorney General—Then, you strike out “head for head” altogether?

Mr. Gilbert—I cannot attach any meaning to the words “head for head.”

Attorney General—Nor to the words “in equal portions?”

Mr. Gilbert—Either one or the other would have answered, and both being there makes them useless. If my construction is right “head for head” is unnecessary, and if the *Attorney General* is right “in equal portions” is unnecessary. It is a sort of tautology.

CHIEF JUSTICE—Perhaps they mean the same thing.

Mr. Gilbert—Suppose the words “head for head” were not there, would you have any doubt that the property was to go in equal shares in succession?

Mr. Justice NORTON—It is like “each for each” in the old books.

Mr. Gilbert—Very much like it. I am not aware that any meaning can be put on it—any distinct or defined meaning.

CHIEF JUSTICE—Besides, there is a question what class of persons is to take “head for head”—one class of persons or all? Are the three children to take?

Mr. Gilbert—Where there is any doubt about expressions of this sort the property is always distributed as amongst a class. For example if a man left property to his brother and the two children of a deceased brother, it would be considered that his brother took one share, and the two children of his deceased brother took another share.

CHIEF JUSTICE—Not under the English law.

Mr. Gilbert—It would be so under the Dutch law.

Attorney General—Yes; but suppose the phrase “head for head” was there, surely you would divide the property into three parts.

CHIEF JUSTICE—But here you have a different case—

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children in the first instance, and their children, “head for head,” in the second instance; and it seems to me that the other clause is a rider on the application of “head for head”—whether each child takes a share, or the children of all take.

Mr. Gilbert—Yes—the question still remains whether there is to be a class division amongst all, or a class division amongst different sets. This is very strongly in my favour, b. 4, tit. 2, definition 2, *Sande's Decisions*. It is a case of a woman leaving property to the son of one sister, and the children of another sister, without saying in what parts. It was held that one child took half and the others took the other half. I put it in this sort of way:—the very fact of the words “in equal portions” being there with “head for head” shows that it means no more than that the division was to be in class portions, because if “head for head” had any other meaning then it would be unnecessary.

CHIEF JUSTICE—It appears to me that they mean exactly the same thing.

Mr. Gilbert—Well—suppose it said that after the death of the children the grandchildren should share in equal portions, that would mean no more than this, that each set of children were to succeed to their parents as amongst themselves.

Mr. Justice NORTON—This case that you refer to is rather a different case, as you must see. The testator left an amount to the son of one sister and the two sons of another sister, without expressing the portions, and it was determined to divide the property into two equal parts.

Mr. Gilbert—I merely quoted that to show that the Dutch law really recognized these classes.

CHIEF JUSTICE—Where the property is left to members of the family without distribution, it is divided *per stirpes*.

Mr. Gilbert—The presumption is always in favour of the division *per stirpes*; and therefore unless the words are clear that it is to be *per capita* it must be *per stirpes*.

CHIEF JUSTICE—There is a speciality in the case to which you have referred on which perhaps the case turned—that one of the persons is named by his proper

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name and the other persons are named by their characters. The testator names Ajeas, the son of his sister, and the two children, not naming them, of another sister.

Mr. Gilbert—That would mean two persons, as the other meant one person. It would not have made any difference if he had only said the son of his sister.

Mr. Justice NORTON—I see the point. If he mentions one by name that one takes half, but if there are three individuals none of them named they would divide it into three.

Mr. Gilbert—If it had been to A, B, and C, it would have been divided *per capita*.

CHIEF JUSTICE—It says:—“*In ultimis voluntatibus collectivé vocatos unam, tantam personam repræsentare, ideoq ex hereditate vel legato tantam accipere portionem quantam accipiunt singuli distributivé vocati.*”

Mr. Gilbert—Well—their children means the children of each. They had no children in common. You must argue that the children must mean the children in common, to give the construction contended for on the other side. It is only a different form of saying after his or her death to his or her children. If you put any other construction on the Will, see what a maze it will lead you into. Has the Court any means of deciding what the testator meant? Suppose that construction is put upon the Will—that the property, after the death of one of the children, leaving children, was to be turned over to the survivors to be used by them during their lives, and then to go to their children, and they were to take as fiduciary heirs—if the Court undertake to decide that, it must say what ought to have been done with Mrs. Boode's share from the time of her death, and with Mrs. Daly's share from the time of her death. Is there any provision in the Will for that sort of thing? And does not that show that he never meant any such thing? Is it possible that the testator meant that if Mrs. Daly died, the property was to be enjoyed in the meantime by her children and Mrs. Boode's children? Is it possible to say what he meant? Can you come to any conclusion on the subject? If you allow yourselves to be led away into this maze into which the *Attorney General* wishes to take

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you, can you make anything at all of the Will? You find, on the other hand, that a certain construction has been put on it by the parties themselves.

CHIEF JUSTICE—You see this is one of the *Attorney General's* strong points—that there is a clear expression on that point—that in a certain event a devolution should occur with respect to *Vlissengen*, subject to *fidei commis*, in case the last survivor shall have children.

Mr. Gilbert—As I observed yesterday, that last provision is very strong in my favour.

CHIEF JUSTICE—Well, I should be very glad to feel it, because I think it one of the strong points of the *Attorney General*.

Mr. Gilbert—I will come to that by and by. But I may put this question to the Court—have you any means of saying what is meant as to the intermediate dealing with the property between the deaths of his respective children? Is it possible for the Court to say that he meant that Mrs. Boode should enjoy it for some time, and after that it should go to her heirs? Or to Mrs. Daly? And then to her heirs, or to Mrs. de Coeverden, and that she should hold the property up to the time of her death, when it must be divided amongst the survivors? Because you must come to one or other of these conclusions to put upon the Will the construction of the other side. You cannot escape. And have you any means of coming to either conclusion? If you cannot come to either conclusion, that is the strongest reason for construing the Will in the plain and easy way. If you construe it in the way I contend for it will be plain and easy—on Mrs. Boode's death her children take; on Mrs. Daly's death her children take; and on Mrs. de Coeverden's death, she having no children, her own heirs take. But I will glance at another point, as to the word used for the Dutch “succeed.” I do not object to the word “devolve,” but succeed means to go in succession, from *succederen*; it cannot mean to go in succession from one parent to the children of another. It cannot mean to go in succession from one child to another. It must mean to go in succession from the child of Bourda to her children, if the word is of any force at all. Then, the

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Will proceeds:—"Nevertheless, if so be that one or more of "my before mentioned children should happen to die before "marriage or before coming of age, (which God forbid), such "share or shares shall accrue to the remainder, and so on to the "last survivor, which last shall possess the same with title of "clear property so left by me." Now, so far it means this—that none of the property is to vest till the children marry or attain majority. That is the plain meaning; and in case of the death of any one of them her share is to go to the survivor. Pln. *Vlissengen* is referred to, and it is for the purpose of showing that the survivorship in that case is still to be subject to *fidei commis*. Now, I put it in this way, that from the construction contended for on the other side, that would be entirely unnecessary, because if the property was to go after the death of the last survivor to the children in common, there would be no survivorship in the sense absolutely of survivorship as regards pln. *Vlissengen*, and then the proviso would be altogether unnecessary. I am not sure whether I make myself perfectly intelligible. The clause as regards survivorship is absolute as regards the property left in what is called clear property; but it could not, even with this clear provision, if the construction on the other side is correct, leave the survivorship in *Vlissengen* absolute; and I think that clause, being there, shows that it is so. For example, if our contention is right, then on the death of any one of the children unmarried and not having attained majority, his or her share would go to the survivor. If our construction is correct, the *fidei commis* as regards *Vlissengen* would be at an end, for *the fidei commis* was in favour of the children's children, and it appears that Bourda anticipated that, and he said this survivorship as regards *Vlissengen* should still be subject to *fidei commis*. He felt it necessary to guard against the survivorship becoming absolute, which it would not have been necessary to do if the previous words of the Will could have prevented that. If the property was to go to all the grandchildren, no such provision would have been necessary; and therefore the very fact of his putting in that provision with regard to *Vlissengen* is a strong argument

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that he knew the construction contended for by me would take effect unless he put in the provision.

Mr. Justice NORTON—Do you contend, *Mr. Attorney General*, that if the last survivor had no children the property went to the grandchildren *per capita*?

Attorney General—I contend this, that the entire property was to be kept together till all of the first generation were gone, and then the entire property one and indivisible was to be divided amongst them all.

Mr. Justice NORTON—That is, if the last survivor had children; but here the case contemplated is the last survivor dying without children.

Attorney General—Supposing there were grandchildren, it does not matter whether the last survivor had children or not.

Mr. Gilbert—Suppose they all died unmarried and not having attained the age of majority, till the last?

Attorney General—If I understand—suppose there are no grandchildren at all?

CHIEF JUSTICE—No; he puts the question in the case that has happened, the last surviving having died without children. In whose favour is the *fidei commis*?

Attorney General—It is in favour of Joseph Bourda's grandchildren, no matter who they are.

CHIEF JUSTICE—Suppose the last survivor had begot a child in wedlock—then the *fidei commis* would have taken effect, and it might be argued that that child was to take.

Attorney General—If Madame de Coeverden had had a child, according to our construction, when she died her child would take with the other grandchildren.

CHIEF JUSTICE—The other grandchildren?

Attorney General—Yes, they would have been as much Bourda's grandchildren as the children of Madame de Coeverden.

CHIEF JUSTICE—I cannot see the use of the survivorship clause here.

Mr. Gilbert—As regards the survivorship clause, if all had died without marrying or attaining age, the whole would have come to her, and the *fidei commis* would have been tied up till her death. Therefore, if the event had

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happened which I suggest, no doubt all the property would then have been kept together up to the time of her death. If she had left children, *Vlissingen* would have gone to those children. If she had left no children, then it would have gone to her heirs. The *Attorney General* does not dispute my doctrine that if at the time of the death of the fiduciary heir the *fidei commissum* heir is not in a position to take, the property does not revert to the testator, but becomes absolutely the property of the fiduciary heir. In this way, if property is left to A, *in fidei commis* to B, and B dies before A, on B's death A can dispose of it as he pleases.

CHIEF JUSTICE—That depends upon the terms of the bequest.

Mr. Gilbert—But that is the meaning of the term.

Attorney General—I do not admit that with respect to a *fidei commis* in favour of persons not in existence, as soon as they come into existence they can take.

Mr. Gilbert—I am not disputing that. I say that at the time of the death of the fiduciary heirs, if there is nobody in a position to take. At p. 138 *Vander Linden*, it says:—“An heir thus “affected with a trust has a real though burdened right of “property, and thus 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, al- “though he die before the *usufructuaries*.” And then in the next page he points out when *fidei commis* ceases:—“First, by failure of the condition upon which it is made.” The same with Madame de Coeverden: in the absence of children the *fidei commis* is at an end.

Mr. Justice NORTON—It does not say that it becomes the property of the fiduciary heir; but the *fidei commis* ceases.

Mr. Gilbert—It is a burden on the estate, and the burden is taken off. I do not understand the *Attorney General* to dispute that proposition. He knows what *fidei commis* is.

Attorney General—I do dispute the proposition.

Mr. Gilbert—You do not dispute that from Mrs. de Coeverden dying in this sort of way the *fidei commis* is disposed of.

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Attorney General—I will not answer that.

Mr. Gilbert—Well—I am surprised I cannot get an answer to that.

Mr. Justice NORTON—It may be an elementary authority, but it seems to me a startling proposition that the ceasing of the *fidei commis* should be a vesting of the property in the fiduciary heir.

Mr. Gilbert—It must be so, because that is the only qualification of the property.

CHIEF JUSTICE—If there had been a gift of the property with that burden, when the burden ceased the property vested.

Mr. Gilbert—The very case here. In every case of *fidei commis* a person is instituted heir, burdened with *fidei commis* in favour of other parties. If that burden is taken off the property becomes the property of the fiduciary heir.

CHIEF JUSTICE—I understand that.

Mr. Gilbert—Well—that is the very case here.

CHIEF JUSTICE—I suppose there is no such thing known in the Dutch law, as in the English law, as resulting trusts; but I suppose if there is an indication that the fiduciary heir should take as a mere trustee, with a beneficial interest in the property, there might be a resulting trust according to the Dutch law.

Mr. Gilbert—A *fidei commis* is this—I institute A as my heir, and at his death he is to give over the property to B. If B dies before A, the property vests in A.

CHIEF JUSTICE—I confess I think that very much a trust, and I think it is very well expressed in *Vander Linden*.

Mr. Gilbert—In the case of trusts the legal estate is in one party, and the beneficial estate in another; but *fidei commis* is another thing. It is giving property to one party, after his death to be given over to a third party. The estate is in the fiduciary heir, subject only in case of the third party surviving him to this, that it should be given over to that third party; but if the third party dies the estate vests in the fiduciary heir. A *fidei commis* is not a trust.

CHIEF JUSTICE—I do not mean to say that in every

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case in which the English law applies to trusts the Dutch law applies to *fidei commis*; but *Vander Linden* calls it trust.

Mr. Gilbert—The English translator calls it trust. Mr. Justice NORTON referred to *Vinnius*.

Mr. Gilbert—Well—I really do not think it necessary to refer to the old Roman law, to find what *fidei commis* means. It means giving a man property with a request to hand it over at his death to another.

Attorney General—That is a pure trust.

CHIEF JUSTICE—Yes, it is a trust.

Mr. Gilbert—No, because as a trustee he could not take the estate under the English law.

CHIEF JUSTICE—I do not mean to say that the rules of the English law apply to trusts under the Roman law.

Mr. Gilbert—In the English law a trustee would not get a beneficial estate.

CHIEF JUSTICE—Suppose it is shown that a person is a trustee, and nothing else, then on the failure of the trust he would not take.

Mr. Justice NORTON—Lord M’KENZIE used the word trust.

Mr. Justice BEETE—It is so translated in *Vander Linden*.

Attorney General—Of course the Dutch word used is translated trust.

Mr. Gilbert—*Vander Linden* in p. 135 says:—“Sometimes also a person is appointed heir under the condition that “the property after his death shall pass to another; this is “termed *fidei commissum*.” Now, here is the point—these persons are appointed heirs:—“With this change or condition the “testator may affect all those who take any benefit under his “Will, except his legitimate children in so far as their legitimate portion is concerned.” Then, he goes on to say:—“This “must always remain free, and only that portion which exceeds “it can be burthened with a *fidei commissum*.” They do use the word trust, no doubt.

Mr. Justice NORTON—But do you not see that he wishes to narrow the trust?

Mr. Gilbert—That is the case here. I admit that

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a *fidei commis* may be constituted by deed, and I am not going to enter into the difference between *fidei commis* by deed and *fidei commis* by Will. It is not necessary. I merely quote him as referring to this point, that where property is given to an heir burdened with *fidei commis*, if the burden is taken off the property becomes absolutely the property of the fiduciary heir. In p. 122, 2nd Vol. *Burge*, he says:—"The *fidei commissum* is "determined by the non-performance of the condition expressed or implied, on which the *fidei commissum* was to take "effect, or by a failure of those to whom the *fidei commissum* "was limited." Well, that is the case here as regards Mrs. de Coeverden; therefore as regards Mrs. de Coeverden the *fidei commis*, as we argue, is determined; and that is the only thing that affected her right to the property. I do not go further. If my construction of the Will is correct, the *fidei commis* was determined, and at her death the property became hers to be disposed of by her Will. *Voet*, b. 36, tit. 1—he treats of *fidei commis* in other places, but it is very cursorily dealt with. In section 65 he says:—"Evanescit *fidei commissi gravamen* "variis modis, puta vel facto *fidei commissari*, vel ex voluntate "fidei committentis, vel casu, vel publici auctoritatis inter- "ventu." The burden of *fidei commis* is then done away. He puts it just as a simple burden—from section 65 to section 68. This is a sort of episodal discussion, in order to establish what I have asserted. I do not know whether I have made myself intelligible on this point.

Mr. Justice NORTON—I have followed you; but I am not convinced that the death of the *fidei commissari* heiress is followed by the vesting of the dominium in the fiduciary heir. I think it a termination of the trust, and no more.

Mr. Gilbert—Very well. I will not say any more on that subject. If I were not so secure on the point, I would; but if anybody can make it out the other way, I shall be satisfied.

CHIEF JUSTICE—I do not understand how it applies to this clause.

Mr. Gilbert—I say with regard to Mrs. de Coeverden, that as she had no children, she took the third. In the

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same way, if all the brothers and sisters had died without children, then the whole would have come to her.

CHIEF JUSTICE—That is with reference to the last clause.

Mr. Gilbert—The only argument as to the *fidei commis* arises out of the last clause. Then, I say, if she had no children, or if all her children had died before her, the property would go to her.

Mr. Justice NORTON—That may be true from the terms of the Will, but not from the general proposition you lay down.

Mr. Gilbert—It is to be inferred from the Will, and the general law as to *fidei commis* supports it.

CHIEF JUSTICE—I understand your view—that the institution of an heir does operate as to the dominium in the first instance; but this Testator has, as to *Vlissengen*, said that the heirs should also possess it as *fidei commis*, in a trust of a particular nature; but it has failed, and therefore the institution made subject to it remains free from any burden.

Mr. Gilbert—As regards Mrs. de Coeverden.

CHIEF JUSTICE—With regard to any of the children in whom, under a proper construction of the Will, the property vested.

Mr. Gilbert—It is then only as regards Mrs. de Coeverden, she having no children.

CHIEF JUSTICE—I do not see that there can be any doubt of that proposition, that if any property is given to these children subject to trust for their children, and their children fail, the property vests in them.

Mr. Gilbert—That is all I contend for. The *Attorney-General* contends that the *fidei commis* remains for all their children. Now, we are agreed as to the drift of my argument. I am perfectly satisfied that if the construction contended for by the *Attorney General* is correct, there could never be any survivorship as regards *Vlissengen*, because the absolute ownership must continue in abeyance till the death of the last survivor of Bourda's children, and then must go to the surviving grandchildren; and if that construction is to be put upon the Will, then there is no necessity for this exception as to *Vlis-*

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sengen. On the other hand, according to the construction we contend for, it is necessary.

CHIEF JUSTICE—As I understand, there is a *fidei commis* for the benefit of the last survivor of the children, and she has it. I read it in this way. It provides for the case of survivorship, and so far it appears to me to be greatly in favour of the argument on the main clause, because it is assuming that he was providing for the children separately. Suppose any of them died without children, then it would go over—the first survivor would not take, but it would go on to the last survivor; and then he provides for the last survivor:—“Which last shall possess the same with title of clear property as far as regards the property so left by me, and with respect to pln. *Vlissengen*, subject to *fidei commissum*, in case the last survivor of them shall have begotten a child or children in wedlock.” The implication being that the *fidei commis* in that case is for his children; but, except subject to that clause, he will hold it as he held the other property. That is the interpretation which at this moment it seems is to be put on these last two clauses.

Mr. Gilbert—But your Honour will see that that is not necessary at all, unless the construction I contend for can be carried out.

CHIEF JUSTICE—I put it in the view that this clause is greatly in favour of your argument.

Mr. Gilbert—Decidedly in favour of my argument; for the clause would not be necessary at all there, except upon my construction.

CHIEF JUSTICE—I thought the *Attorney General* struck out this when he said that the clause as to survivorship did not apply to *Vlissengen*.

Attorney General—I did not understand what your Honour was referring to when you asked me about the paper marked with red ink.

CHIEF JUSTICE—I thought it was for that purpose, and that the *Attorney General* felt that it was against his argument.

Mr. Gilbert—But it goes further; because, if this is a *fidei commis* to all the children at the death of his last

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child, then there could not be any survivorship as regards *Vlissengen*. I do not know whether I carry your Honours with me. If the *fidei commis* was in favour of one child, it would not matter till he came to the last.

Mr. Justice BEETE—If they all died without children.

Mr. Gilbert—Except the last of them. If that was the case, it was not necessary to put in that clause, for the property must still be kept together for the survivors amongst the grandchildren till the death of the last survivor; and that clause was not necessary.

CHIEF JUSTICE—Not necessary nor proper, because there was no separate interest to survive.

Mr. Gilbert—No—there could be no survivorship with respect to *Vlissengen*. If by the first part of the Will it is absolutely to be kept together till the death of the last surviving child, and then go to the surviving grandchildren, it would not have been necessary; and the fact of its being there shows that Bourda intended that there should be a survivorship with respect to this, in the same way as in respect to the other property—that the surviving children would take absolutely the shares of those without children. That must have been his view, and we must take it in the same way that we take the view which the *Attorney General* attributes to him of looking forward to the founding of a family some seventy-five years ago. He was an exceedingly sagacious person, and would not have put into his Will what was unnecessary, and this clause would be clearly unnecessary. The *Attorney General*, in respect to one of these weaknesses of the case, was obliged to contend that when Bourda referred to “children and heirs,” that would bring in grandchildren, in this half-and-half kind of way, themselves as fiduciary heirs. But children and heirs here mean the same thing. The phrase means simply his children. It does not mean other children. The whole thing would be nonsensical if it did. I do not think I need refer to the other parts of the Will. Whatever Bourda's wish may have been, the question for us is, has he expressed it in this part of the Will? And the rest of the Will does not in any way help us. Therefore I will make no farther observations on it. But I will

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refer to the terms in which the *Attorney General* expresses this proposition. He says Joseph Bourda founded a trust to subsist during the lives of the whole of the first generation. But how was it to subsist? That is the question. If this proposition is laid down that the trust is to subsist, some way must be pointed out by which it can subsist; and I say no way is pointed out. The Court will have to invent a way, and I think it would exceedingly puzzle the Court to find a way by which this trust was to subsist during the whole of the first generation. Then, the *Attorney General* says, confounding the terms *fidei commis* and usufruct, that the grandchildren were heirs and the children were usufructuaries. It is not necessary to say more about that. I think I have convinced the Court that this is a *fidei commis*, not a usufruct.

CHIEF JUSTICE—A *fidei commis* is not a usufruct, but the question is, whether a fiduciary heir has a usufruct.

Mr. Gilbert—The *Attorney General* put it in this way, that they had only a usufruct; but this is a different thing from a usufruct.

CHIEF JUSTICE—Very different. The property is given to his children in trust—after their death for their children. That leaves a beneficial interest in them during their lives; and that is a usufruct.

Mr. Gilbert—The *Attorney General* used it, knowing the meaning of the term.

Attorney General—The Court knows how I used it.

Mr. Gilbert—You said the children were only usufructuaries. Now, they are not usufructuaries. The children are as much heirs as the grandchildren—heirs in *fidei commis*. Then, some reference was made, although it is scarcely necessary for me to refer to it, to the reasons of judgment in the case of the heirs of Bourda against Harel. Now, that does not affect the present question before the Court, because the Court could not have intended to go further than that they could not make leases beyond their lives. So far as they considered the question, this part of the decision does not affect the question at all. This being so purely a question of construction, and not being aware that there is any authority for the purpose

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of showing how similar words ever arose in any other Will, I have nothing more to say on the subject. I have pointed out to the Court, as I conceive, the absolute necessity there is for construing the Will in this way to give it any operation. I have pointed out that there is no difference between the words "head for head" and "equal portions." I have pointed out also that this *Vlissengen* survivorship taken in that connection is in favour of my construction. These are arguments which cannot be got over as to the construction of the Will. There is another question, as to the legitimacy of the Dalys. Now, I would just say as to them, that from my construction of the Will, they must get their third of the property under the Will of their brother, Richard Joseph Johan Daly. The Will is referred to in the proceedings in this way, and Wright is said to be the executor. I shall put the Will in, and it will appear that Richard Joseph Johan Daly, who is admitted to have survived his mother, and who is said to be the only legitimate descendant of his mother who survived her, gave all his property to these children. So that if the *fidei commis* is in favour of the children of the three daughters of Bourda, on Mrs. Boode's death her children took; and suppose for a moment that these two Dalys are illegitimate, on the death of Mrs. Daly, Richard Joseph Johan Edward Daly then had a third, and by this Will "he gave and devised "all his property to the said Maria Marianne Daly and the said "Jean Eugene Henry Daly, thereby according to the law of this "colony constituting them his heirs." So that if my construction is correct, whether these two are legitimate or illegitimate, will make no difference. He took as a grandchild under old Bourda's Will, and he could dispose of the property as he pleased.

CHIEF JUSTICE—Do you think it perfectly clear, as the pleadings stand, and these two Dalys must have taken under that Will, assuming that they are legitimate even? You say if we take your view of the Will it gave Daly a disposing power as a testator, and the question of legitimacy is immaterial, as they would take under that Will. Now, I ask the question, supposing they were

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legitimate, would they take under that Will? He describes them as his brother and sister; but I always understood that the question of legitimacy was raised to show that there were no other brothers and sisters of that name.

Mr. Gilbert—I intend to put in the declaration of Maria Daly, who states who all the children of her mother were and the dates of their births. In the Claim and Demand these two children are stated to be the children of Daly, and they are stated to be illegitimate.

CHIEF JUSTICE—And it is stated and admitted that these two and some others were the only children of Mrs. Daly.

Mr. Gilbert—Yes; “The Plaintiffs further aver that the said “Maria, the aforesaid child of said Joseph Bourda, died in the “month of April 1849, leaving her surviving only three children.” Her illegitimate children would be her children. Then there were only three surviving her, two of them said to be illegitimate. That excludes the idea that there were two others who were without doubt legitimate.

CHIEF JUSTICE—Yes, I think they would take under the Will.

Mr. Gilbert—I am sorry that on this question of illegitimacy I have not the Banbury Peerage case. However, the Court will have the opportunity of looking into that case and seeing how far it applies. There is no evidence at all before the Court of the illegitimacy of these Dalys, except the act of *donatio inter vivos*.

CHIEF JUSTICE—I am really of opinion that there is no evidence. If you remember, that document was admitted in connection with some evidence to rebut the presumption of law, and there being no such evidence we cannot admit it as a declaration of the mother. In fact, it cannot be. They may have been begotten in adultery while she was living with her husband, and in that case they would be the children of the husband. We are clear that there is no evidence on that point.

Mr. Gilbert—Then, there being no evidence of illegitimacy, the presumption is in favour of legitimacy, necessarily under any circumstances, because the document is in, and this is quite clear, that they were born in wedlock.

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CHIEF JUSTICE—Does that appear?

Attorney General—No.

CHIEF JUSTICE—I do not know that that appears.

Mr. Gilbert—The averment in the Claim and Demand does not go nearly so far as the evidence attempted to be given for the averment is illegitimacy, not adulterine bastardy, which is attempted to be proved. But I think the inference may be drawn from the *donatio inter vivos*, which may be taken for any purpose except as a declaration of the mother that her children are illegitimate. It appears that these children were born in wedlock. The Power of Attorney which sets out the act of *donatio, inter vivos* states that since the execution of the act of *donatio inter vivos* she had had two legitimate children, and before that she had had the three illegitimate children.

CHIEF JUSTICE—I thought you were addressing yourself to something to prove that your clients were born in wedlock.

Mr. Gilbert—I really think that if these children are charged with illegitimacy the other side ought to say on what ground—whether they were born out of wedlock, or otherwise.

CHIEF JUSTICE—You have no proof of your statement? You have a statement that they were born in wedlock, but nevertheless they are illegitimate.

Mr. Gilbert—No, the pleadings keep that out of view, and that is the reason I object to their relevancy and pertinency.

CHIEF JUSTICE—The evidence must be taken in connection with some species of evidence of birth in wedlock; but I do not know that there is any rule against preventing a mother from bastardising her children not born in wedlock. The rule is always to protect the domestic interests of married people.

Mr. Gilbert—I do not dispute that, but *prima facie* they bear the name of their mother's husband. They are called by that name in the Claim and Demand; and it is said that they are illegitimate. Then, the proper meaning of that must be that they are adulterine bastards.

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CHIEF JUSTICE—That is just a question that will go a long way in your favour.

Mr. Gilbert—I took this objection in the first instance. I have objected to the pertinency and relevancy of this statement. Well, I put this question—is this statement sufficient to raise a presumption that these parties bearing the name of their mother's husband, is this statement sufficient to put us to any proof of the legitimacy of these two Dalys? And under circumstances such as we have in this suit, is it competent to the Plaintiff to come forward and submit a case of this sort to the Court, without stating specially on what ground he impugns the legitimacy? He is bound to state his own case. He says there are two children illegitimate. He is bound to state on what ground he makes that statement. In his opening speech the *Attorney General* stated that he was going to make out that they were adulterine bastards, and he attempted to give that proof. The Court must look at the documents. As to the declaration of Von Greisheim, it is inadmissible on technical grounds; but you will see from it that they are made out to be adulterine bastards. That is a part of the Plaintiff's case.

CHIEF JUSTICE—We cannot notice that against the party tendering the document. It would be unfair.

Mr. Gilbert—It is in the spirit of the argument of the *Attorney General* that they are adulterine bastards. And with regard to the contents of the document, I understood the Court that they would not take it into consideration; but I say, just take notice of it—it is part of the Plaintiff's case. He cannot shift his ground. He cannot say, “They are illegitimate, but I will not say how,” and then say that they are adulterine bastards. The Court has sufficient from the opening of the *Attorney General* and from the evidence he has adduced, to know that he means that they are adulterine bastards. But there is also a recital here which may throw a little light on the subject. The fact is that George Bourda Daly and Kitty Eliza Daly, who are stated to be legitimate, were both born after these three who are stated to be illegitimate.

CHIEF JUSTICE—Does that appear?

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Attorney General—No.

Mr. Gilbert—It will appear in the act of donation. The children George Bourda and Kitty Eliza Daly must have been the legitimate children of her husband, for she was not married a second time. The *Attorney General* cannot blow hot and cold. The Plaintiffs cannot say one thing at one time and another thing at? another time; nor can they put it at one time on the footing that these children are adulterine bastards——

CHIEF JUSTICE—You see our decision must go according to the record, and not according to the arguments of counsel.

Mr. Gilbert—But I think that you might state in your reasons that it was put forward as a case of adulterine bastardy, and also attempted to be proved in evidence, which cannot be disputed. However, if any question is to arise about this, and if my clients are to be prejudiced in any way by the course which has been pursued on the other side in not stating the facts of their case, then I put it that the facts of their case are not sufficiently stated to raise an issue, if you are to go by the record.

Attorney General—I do not say that I wish that the Court should conclusively find them bastards.

Mr. Gilbert—It is stated.

CHIEF JUSTICE—But if they are to take anything under the sentence of this Court as the legitimate children of their mother, we must have something to satisfy us of it. If you are to be recognized under the sentence of the Court as parties entitled to take a share as legitimate children, it must appear that you are legitimate children. Now, the only thing before us is an averment of your illegitimacy on the part of the Plaintiffs, and a denial on your part of the relevancy of that averment. We must have some evidence.

Mr. Gilbert—This must be taken into account, that these parties are *prima facie* legitimate, because they bear the name of their mother's husband. They are brought before the Court in conjunction with the acknowledged legitimate children; but, say the Plaintiffs, these two persons are not legitimate. It is not a case of throwing the proof of a negative upon them, but it is

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just as much a fact as legitimacy. If it is to be a matter in issue and to be decided, the facts should have been stated.

CHIEF JUSTICE—Your right can only depend on your showing that you are legitimate, and you have no evidence of that.

Mr. Gilbert—We have evidence as to our being children.

CHIEF JUSTICE—No—as to your being legitimate. We have the statement that you are offspring; but not that you are legitimate offspring.

Mr. Gilbert—If our construction of the Will is correct it does not matter whether they are legitimate or illegitimate, unless they are adulterine bastards, because as illegitimate children they are entitled to take the property of their mother's relations.

CHIEF JUSTICE—That is another question to be looked at.

Mr. Gilbert—It is sought to deprive the Dalys of any share of the property. Supposing the *Attorney General's* construction is correct, then the property is to be divided amongst Bourda's descendants born in wedlock. That is the way it is put forward. But if our construction of the Will is correct, then these Dalys will take under their brother's Will, and they will also come in as heirs *ab intestato* of Mrs. de Coeverden for a portion of her property. In that point of view it does not matter whether they are legitimate or illegitimate, unless they are adulterine bastards, because simply illegitimate children inherit from their mother's relations. But an illegitimate child would not be considered to mean an adulterine bastard. That reminds me to refer to what I was very nearly passing over, the law of inheritance.

CHIEF JUSTICE—I presume that you could not infer adulterine bastardy.

Mr. Gilbert—To infer adulterine bastardy you must infer that the children were born while the mother was a married woman, for that is the claim and demand. But it is not proved in any way. The presumption is always in favour of legitimacy, because it involves an assumption that they were born while the mother was married. I am not going to enter into this point now;

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but I admit that even if they be considered illegitimate children and my construction of the Will is correct, they can succeed to the inheritance of de Coeverden, I refer to *Vander Linden*:—"With respect to the law of inheritance *ab intestato*, the following peculiar distinctions are also to be observed." Then, he goes on:—"That illegitimate children succeed to the inheritance of their mother *ab intestato*, as the mother makes no bastard. But are they, in like manner, admissible to the inheritance, *ab intestato*, of their mother's relations? We are inclined to the opinion of those who answer this question in the negative." But there are a great many authorities the other way.

CHIEF JUSTICE—Yes; I suppose we have authorities the other way. •

Mr. Gilbert—I am going to give them. First, there is the *Placaat* of 15th Decr., 1599; *Digest*, b. 38, secs. 2 and 4; *Grotius*, p. 108.

CHIEF JUSTICE—It is the ordinary practice here—is it not?

Mr. Gilbert—Illegitimate children succeed to the mother no doubt. As to the mother's relations, that is the question. *Vander Linden* gives the authorities on both sides, but he inclines to the authorities for the negative. That is only a statement of the opinion of *Vander Linden*. *Grotius*, in p. 108, says:—"By relatives or next of kin, in case of succession *ab intestato*, are denominated those who are born in wedlock and out of wedlock. Except that natural children, or those sprung from them, may inherit by succession the property of the deceased, either wholly or in part, in so far as they are related by a legal descent to a female, but not to a male. For, as regards the mother, natural children are on the same footing as legitimate, unless the children were sprung *ex prohibito concubita*, because they and their descendants may not take by descent or succession *ab intestato*." But he puts them in every respect on the same footing. He refers to *Vander Keessel* thesis 342:—"Liberos naturales sive spurios non modo matri, sed et cognatis maternis, jure Zelandico, ab intestato succedere, certum videtur." And then he goes

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on to say:—“*Hollandia Boreali idem juris esse videtur, post legem de successione A. 1559 art. 14. in sursidiam recipiendum jus civile.*” Then he goes on to say.—“*Quin immo et in Hollandia meridionali exæquitate juris civilis idem recipi potest.*” Then he refers to *Bynkerschoek*. So that *Vander Keessel*, following up *Grotius*, is a clear authority on the point. The next authority I refer the Court to is *Bynkerschoek*, b. 3, ch. 11. Also in *Voet*, b. 38, tit. 18, sec. 21., it is laid down that natural children succeed to their relations on the mother's side the same way as legitimate children. I have not *Bynkerschoek* here, and *Burge* adopts the doctrine of *Vander Keessel*:—“Illegitimate children succeed to their mother, together with her legitimate children. There is no distinction between children born *concubinato*, and those who are the fruit of any other illicit intercourse. The right of representation is allowed to prevail amongst such children, whether they be legitimate grandsons descended from an illegitimate daughter, or whether they themselves be illegitimate. And they may succeed to their maternal grand-father and to their maternal relations.” He quotes *Vander Keessel* for that. I also refer you to the *Censura Forensis*, part 1., b. 3., ch. 15, sec. 11. And the reason is, the doctrine that a mother makes no bastards. Well—even if the evidence were to remain as it is, and you consider that this is a statement simply of legitimacy, if my view of the Will of Bourda is correct, it would make no difference whether these are legitimate or illegitimate children—they may succeed to Mrs. de Coeverden's inheritance. There is one point, which may or may not be of importance, but which I do not like to pass over; and it is as to the construction of this Will with reference to the great grandchildren. I think if the construction were to be as contended for by the *Attorney General* he would find it very difficult to bring in the great grandchildren. I would not object to their coming in, if our construction is a correct one; that is, I would not object to their coming in, if they are entitled to come in.

CHIEF JUSTICE—I understood the *Attorney General* to avoid that difficulty by saying that he did not object to their coming in under the head of children.

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Mr. Gilbert—But I do not well see how they can come in even by representation.

CHIEF JUSTICE—But it is a point that does not affect you. The *Attorney General* is only putting the argument that they take by representation, and that does not affect you.

Mr. Gilbert—It may affect us in this way. Suppose the Court construes the Will as the *Attorney General* contends, and at the same time let in these two Dalys on the ground that they may be presumed to be legitimate. Then the construction as to the great-grandchildren must affect us. Of course, the admission of the Von Greisheims and Houel must affect us, if the Dalys come in as grandchildren under the Will.

Mr. Justice NORTON—The proportion of the property they get will be affected by the portions of the Von Greisheims and of Houel.

CHIEF JUSTICE—But they would take their parents' shares.

Mr. Gilbert—No; because they would get nothing. Mrs. Houel and Mrs. Von Greisheim died long before Mrs. de Coeverden.

Attorney General—If you dispute my contention the Dalys would get nothing.

Mr. Gilbert—They are grandchildren. The *Attorney General* would divide it in this way:—He would give A. D. Boode a share, Mrs. Ely a share, Houel a share, and the Von Greisheims a share, dividing it into fourths. He may be right in dividing the shares as to the grandchildren, taking head for head; but supposing the Dalys are legitimate, then it is a material question to them whether the Von Greisheims and Houel come in or not. If his main construction of the Will is correct and the Dalys are legitimate, then, if the Von Greisheims and Houel are admitted, the estate will have to be divided into sixths. On the other hand, if the Von Greisheims and Houel are excluded, the others will get fourths. It is a matter of some importance to them.

CHIEF JUSTICE—Very considerable importance.

Mr. Gilbert—Yes; and if the *Attorney General's* construction of head for head is correct, I cannot see that

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the Von Greisheims and Houel could come in. I refer to *Sande*, b. 4, tit. 5, defin. 10 and 11:—“*Appellations* kindt *vel* kinderen “*in fidei commissis regulariter nepotes non comprehendendi.*” That I admit is not the case of grandchildren of the testator:—“*Appellatione* kinderen *etiam in fidei commissis venire* kindts “*kinderen, quando testator, quos in una testamenti parti vocavit* kinderen, *in alia nominat descendents, vel quæ aliæ, conjecturæ ex testamento desumptæ hoc suadent.*” They were not descendants of the testator.

Attorney General—Well—that is in *Burge*:—“When the *fidei commissum* is in favour of the children of a stranger, it “has been doubted whether the grandchildren would take under the description of his children.”

Mr. Gilbert—In the next case they were let in, because in that case the term descendants also was used to designate the children.

The Court adjourned for a few minutes.

Resumed.

Mr. Gilbert—The *Attorney General* made some allusion to *Sande*, the same book:—“*Fidei commissum a filio relictum sub conditione, si filius sine filio decedat, extingui nato filio, nec reviviscere, si hic filii filius vel testator is nepos, vel ex hoc pronepos adsque mascula prole decesserit.*” That is the effect of the discussion, and I merely refer to it. If my contention, then, is correct in this case, I conceive that these two Dalys are entitled to a third, their mother's share, and as heirs to a portion of Mrs. de Coeverden. That is the situation they ought to be placed in—Wright administering the estate of Mrs. de Coeverden in the meantime, and Mr. Bascom retaining his share; and this whether the Dalys are legitimate or illegitimate, unless they can be shown to be adulterine bastards. But there is a document I must refer to and which I shall put in. It is a declaration by Maria Daly made in 1859, and it refers to the different members of her family:—“My brother”——

Attorney General—Can that be referred to after the decision of the Court?

Mr. Justice BEETE—It is a declaration made in England.

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Attorney General—But not in this suit.

CHIEF JUSTICE—The act contemplates that a person may make a declaration with a view to an intended suit.

Mr. Gilbert—If you construe that word “intended” strictly, it may mean that the Plaintiff may make a declaration, but the Defendant may not; because the Plaintiff may say, “I intended to bring the suit.” But the words are:—“In any action or suit “then depending or thereafter to be brought or intended to be “brought.”—Suits depending at the time of the passing of the act, and after the passing of the act to be brought.

CHIEF JUSTICE—The declaration, as I understand, was made years ago. In fact, it was made in reference to some other suit.

Mr. Gilbert—I do not think it was made in reference to any suit at all.

CHIEF JUSTICE—Then, it was made at large.

Mr. Gilbert—But the *Attorney General* contended that that declaration need not be headed in any particular suit.

CHIEF JUSTICE—I presume some meaning must be given to the word “intended.”

Attorney General—It must mean that the suit should be in contemplation; or a person might get a declaration and bring it up in any suit.

Mr. Gilbert—There is no reason why he should not.

CHIEF JUSTICE—I do not see myself why in policy it should not be so.

Mr. Gilbert—It is a way of giving evidence.

CHIEF JUSTICE—But it seems from what we know of this document that it cannot be said to have been made with regard to a suit intended to be brought.

Mr. Gilbert—If the plaintiff can make a declaration before the suit, I do not see why the defendant should not.

Mr. Justice NORTON—It may mean a declaration was to be used in any suit then or thereafter to be brought.

Mr. Gilbert—If it means that the suit must be in contemplation, or the plaintiff must intend it, then the plaintiff can get up as many declarations as he pleases, but the defendant cannot.

Mr. Justice BEETE—That would be a very fair ground

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for the defendant's asking to stay proceedings that he might get up declarations.

Mr. Gilbert—But I am only showing what is the effect of the clause.

Mr. Justice NORTON—But what is the use of the words “then intended to be brought?” They only encumber the sense.

Mr. Gilbert—They mean a suit that may be brought. However, the objection can be taken when the document is tendered. I have stated the nature of the document. It is a declaration by Maria Mariana Daly, who states—

Attorney General—She is declaring a fact that took place before she was born.

Mr. Gilbert—Yes. Von Greisheim undertook to declare a fact that he heard from his wife.

Attorney General—That was known to the family.

Mr. Gilbert—Well—she can state family traditions too.

CHIEF JUSTICE—She was one of the children.

Mr. Gilbert—She is one of the children said to be illegitimate. She says she was born in 1810. Antoinette was born before her, in. 1806. A brother was born in 1812. Kitty Eliza was born in 1818. That is a matter she might recollect. I can recollect things that happened when I was five years old. George Bourda Daly was born in' 1818, when she was eight years old. I shall submit that this declaration is admissible. It is for the Court to say whether it is or is not admissible. The tradition as regards the brother is borne out by what Mrs. Daly states in the act of donation, that since the first act of donation she had had two children born. I also lay over the Will of Richard Joseph Johan Edward Daly. I lay over the papers in the former suit—the claim and demand, with the petition, report, transport, and mortgage.

Attorney General—I distinctly understood that the mortgage was not to be put in.

Mr. Gilbert—I do not put it in as evidence. I only refer the Court to it.

CHIEF JUSTICE—Just as the Court would take from unsuspecting sources reports of judicial proceedings.

Mr. Gilbert—That is all the evidence I feel called upon

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to adduce. This declaration shows that the children were born in wedlock, and I submit that that appears from all the circumstances of the case. It was opened by the *Attorney General*, not that they were adulterine bastards, but illegitimate children, and if the Court considers that I am called upon to disprove it, and decides the point against them, it will not exclude them from Mrs. de Coeverden's part. There are three branches into which this case divides itself. Legitimacy is the last, and I will say no more about it. The construction of the Will is the second point; and I conceive that I have clearly pointed out to the Court that the only proper construction they can give to the Will is the one I contend for, and that if they give to the Will the construction contended for on the other side it would lead them into a mass of difficulties and they could not say in whom the undivided estate was to vest; they could not settle the matter between the parties at all; they could not give a construction to the Will; in relation to that point there is nothing to guide them, directly or by inference, on the face of the Will. Whereas if you adopt my construction, it is in accordance with the ordinary rules of construction, and really I think that that word which seems to point to succession is a word of significant importance in this case. Then, the third point in this argument is with respect to Mrs. de Coeverden's estate. I do not wish to sum up that except to put it in this way—it was asserted by the *Attorney General* that it was partly testate and partly intestate; and that a party may die partly testate and partly intestate we find in *Vander Linden's* Roman Dutch Law. And as regards the institution of an heir, it is clearly shown by the authorities that I have cited, that it is not now necessary that a Will should contain the institution of an heir. Therefore, on all these grounds, I contend that we are entitled to have a declaration in our favour in this way—these two Dalys are entitled to a third, taking from their mother—in any point of view, they are entitled to it, even if not legitimate; they are also entitled to their share of Mrs. de Coeverden's intestate estate; and that Wright in the meantime is entitled to administer that estate and pay

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the creditors out of it, and to divide the residue of it; and that Mr. Bascom is entitled to retain the one-eighteenth share which he has obtained. That is the declaration I think I am entitled to ask.

CHIEF JUSTICE—I think you understand that we shall not be able to give any sentence which proceeds on the footing of your clients being legitimate children, without some evidence of their having been born in wedlock. Without that we should not have it before us that they are legitimate children.

Mr. Gilbert—That they were born in wedlock?

CHIEF JUSTICE—Yes.

Mr. Gilbert—That is, supposing you adopt the construction that is contended for on the other side?

CHIEF JUSTICE—All I say is that we shall not be able to give a sentence on the footing that they are legitimate—even supposing we proceed on the ground that they are legitimate, we shall not be able to give such a sentence unless we have some evidence of their having been born in wedlock. It is necessary that there should be some evidence.

Mr. Gilbert—Well—is not the statement of counsel that he intended to prove this—does not that show what his case is? The statement of counsel on the other side shows that he considers them adulterine bastards.

CHIEF JUSTICE—I do not take the statement of counsel for pleadings.

Mr. Gilbert—If it is put forward as his case, and he cannot prove it, would it not be a reasonable judgment? From the statement put forward by counsel there is a reasonable presumption that they were born in wedlock; and he states that they were adulterine bastards. Must you not take notice of the case put forward by counsel? He has attempted to give proof, but he has failed.

CHIEF JUSTICE—You do so for proceeding on trial, but not to draw a sentence. You will recollect it has been said, does counsel admit it, and if admitted the officer enters it as formally admitted, in order that it may constitute part of the legal evidence.

Mr. Gilbert—I can only say that the *Attorney General* did say that they were born in wedlock.

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CHIEF JUSTICE—No doubt about it.

Mr. Gilbert—Very well. I cannot see how the Court can put that out of the case. It is put in this sort of way—that they were born in wedlock; and it is not proved that they were adulterine bastards.

CHIEF JUSTICE—Well—in closing your case I thought it as well to call your attention to the point.

Mr. Gilbert—I am much obliged to you. I think too it must be inferred from the act of *donatio inter vivos*.

CHIEF JUSTICE—All the circumstances we will attend to. If we can pick out from the pleadings and the evidence anything to assist us, we will do so.

Attorney General—But why should this question be conclusively decided in this case? I do not see why it should be. It seems to be a totally different question from the question of law. I do not see why the decision on the question should be pressed in this case. I should not seek by any failure of proof at this moment to deprive these parties conclusively of their rights, if they really have rights; and I wish the same measure to be meted out to me.

CHIEF JUSTICE—One consequence I suppose is that you may be able to make a better case of their illegitimacy.

Mr. Gilbert—This declaration was admitted, and it is clearly admissible.

CHIEF JUSTICE—Of course, that remains to be discussed. You feel that you have a difficult case to get that document in.

Mr. Gilbert—Not according to the former decision of the Court in Harel's case.

Attorney General—I understood the Court that declarations made in foreign countries were not to be admitted.

Mr. Gilbert—In foreign countries. That does not militate against anything that was decided in Harel's case. This declaration was made in England, and I say that declarations of this sort were admitted in Harel's case. It is a declaration taken, so far as we know, without any view to the suit. I tender the Will of Richard Joseph Johan Dalys and I hand in the papers in the former suit, if the Court wishes to see them. I put in the transports referred to in the former proceedings, and the Court will be good enough to consider the mortgage.

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CHIEF JUSTICE—I consider these documents merely handed up.

Mr. Gilbert—The Will is put in, and the transports; but the mortgage is only handed up.

CHIEF JUSTICE—I do not suppose that there is any objection to their coming before us in that way?

Mr. Gilbert—I do not see why there should be.

Attorney General—No—if they are put in that way.

Mr. Gilbert—Now, I tender this declaration. If the Court wishes to see any of the papers in the former suit, I have them here.

CHIEF JUSTICE—I suppose the reasons are all there.

Attorney General—There is a report of the arguments. I will be very glad if your Honours will look at it.

CHIEF JUSTICE—Then, let us have the report.

Attorney General—I suppose it belongs to us as; well, for it must have been paid for by the Von Greisheims as well.

CHIEF JUSTICE—We do not wish to hear you, *Mr. Attorney General* on that declaration. Our impression is in your favour.

Mr. Gilbert—If you decide in this way we cannot get out powers of attorney, for all powers of attorney are proved by declaration. In every suit that is brought in this colony there must be a power of attorney, and you . must get a power for every suit.

CHIEF JUSTICE—That does not apply, because the power of attorney for a suit must refer to the suit.

Mr. Gilbert—No—unless it is a special power for a special suit it cannot refer to the particular suit. I should regret very much if your Honours come to the conclusion that a declaration got not for a particular suit cannot be put in, because, if you will look over these reasons you will find that various declarations were put in which had been got without reference to, any suit at all; and I have kept those declarations for the purpose of perpetuating the testimony.

CHIEF JUSTICE—I presume with regard to those powers of attorney you speak of it is competent to the Court to reject them.

Attorney General—There is a special provision in our Ordinance with respect to powers of attorney.

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Mr. Gilbert—But will you have the goodness to point to any power of attorney that does not depend upon a declaration under that statute? Powers of attorney sent out from England or Scotland are all proved by declaration. That makes them evidence. If they are objected to they must be proved. When the declaration is proved they are then documents in the suit in which they are proved, and they are proved by means of the declaration.—This Ordinance No. 21 of 1845, does not alter the law in any respect as regards declarations from Great Britain and Ireland. It provides that all signatures and seals should prove themselves, and it provides for the signatures and seals of Consuls which were held equivalent to the signatures and seals of the officers mentioned in 5 and 6, Wm. 4. The *Attorney General* complained the other day of hardship, and that he was taken by surprise; but my objection was a specific one, and I took up ground against the admissibility of the document on a ground that never had been decided. My main ground was that the statute did not apply to foreign notaries—that it had never before been decided to apply to foreign notaries.

CHIEF JUSTICE—The fact is, the point is of sufficient importance, without requiring it to be strengthened with reference to what the practice might be in other cases.

Mr. Gilbert—I do not see how that objection can be got rid of, that in every suit that is brought, you must have a fresh declaration under 4 and 5, Wm. 4.

Mr. Justice NORTON—Is there not a provision in the power of attorney authorising the party to institute and defend suits? There particular suits are contemplated.

Mr. Gilbert—But there was no particular suit contemplated here, though this document was obtained in contemplation of a suit. I am obliged to your Honour for the argument—if it is said of a power of attorney made in that way that it is made in contemplation of a suit coming within the words of the statute,, then I say in the same way may this declaration, if it was made for the purpose of evidence, be said to come within the words of the statute. A declaration attached to a power of attorney is for the purpose of proving the power of attorney. The power of attorney of course is made in contemplation of

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a suit, because although in the general run of business ' here it includes a power to institute suits, it does not mean any particular suits; but if the doctrine is that any particular suit must be contemplated in any declaration in that suit, then we must have a fresh declaration.

CHIEF JUSTICE—This declaration was made in 1859. Have we any judicial notice of any suit pending in 1859? The words of the Act of Parliament are so loose that I am very much inclined to let the document in. I cannot put an intelligible construction on the words. My reason does not at all follow your argument that a declaration may be made at large to be used in any suit; still the words of the act are so loose that I was considering, from the importance of this suit, it would be better to let the declaration in.

Mr. Gilbert—I think your Honour will agree with me in this, that unless you take the view I thought you were inclined to follow, a fresh declaration must be taken out in every suit.

CHIEF JUSTICE—I cannot agree to that, because the law of this colony specially provides for that.

Attorney General—*Mr. Gilbert's* whole argument proceeds on a mistake. It is the 16th section under which a declaration in writing is sufficient to prove the execution of a deed.

CHIEF JUSTICE—But in any way by this Ordinance of 1845 powers of attorney are verified in a particular way. Then, after all, it can only be an argument *ad inconvenienti*.

Mr. Gilbert—Whatever may be the effect of this Ordinance, the 4th section applies to declarations made under the Act of Parliament.

CHIEF JUSTICE—Whether it is a necessary provision or not, the scope of it is that in declarations under that act it shall not be necessary to prove the seal.

Mr. Gilbert—That is the effect of the 4th section; but I put this case—suppose a power of attorney sent out and verified under the statute by a declaration, if the construction your Honour puts upon the 15th section be correct, then under the 16th section, which the *Attorney General* points out, I am of opinion it can be

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applied to the execution of deeds and include powers of attorney, which of course are deeds. It is the same in its effect as the 15th section. The declaration under the 15th section is for the purpose of proving an independent fact, which can be given in evidence *viva voce*. A declaration under the 16th section is for the same purpose as for the proof of a deed; and they are to be construed precisely in the same way. Therefore, I still say that any power of attorney sent out here and purporting to be verified under this statute can only be used in one suit. In fact it would be difficult to say that it could be used in any suit at all, if not specified.

CHIEF JUSTICE—Well—it may be said that this declaration has only a professed bearing upon the interests of the heirs of Bourda, and the suit now pending is one between the heirs of Bourda. Parties who claim to be heirs of Bourda make this solemn declaration. It is a different argument, and certainly is more favourable,—though I do not say what the decision would be then—but this goes the whole length that a person may sit down and from the love of making statements may make a perfectly incoherent statement, have it engrossed by a law stationer, and forward it to any part of the world to be made use of by picking out passages here and there.

Mr. Gilbert—That is supposing a very extreme case. It is made only for the parties interested, and it must be considered that it was made with that view. It cannot be supposed to have been made with any other. If the Court will look at the decision given on the document in Houel's case——

CHIEF JUSTICE—Was this argument raised there?

Mr. Gilbert—No; it was not. Then, the *Attorney General* said he would strike out the heading altogether. I did not wish it struck out. Nor do I think that the objection was tenable on the ground that the paper must have reference to some suit. I have always been of opinion, and my opinion has been confirmed by the constant practice, that these documents were admissible. I have frequently tendered these declarations, and I do not recollect any objection taken on this ground. At any rate, I have seen them over and over again admitted.

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Mr. Justice NORTON—How can this declaration be said to have been made in England in an action in the future? At the same time there are the words.

CHIEF JUSTICE—There can be no doubt that the terms of the act contemplate that. The inconsistency is as to the limit to be put on the words “intended action.”

Mr. Gilbert—It would be introducing something of a ludicrous effect for a person to say “an action may by possibility be brought against me, and therefore I make this declaration.” It follows that the words of the act assume that which would be really a laughable declaration, even if the plaintiff said he intended to bring the action.

Mr. Justice BEETE—You say that in that suit of Houel there were a number of old declarations?

Mr. Gilbert—Yes; some of them were seven years old; and I do not recollect that this objection was taken.

Attorney General—No—it was not.

Mr. Gilbert—For example, the qualification was objected to, and we had to put in all the qualifications, some of them very old, and a great many other documents of the same description. There was a declaration from Lamaison several years old, and others.

CHIEF JUSTICE—The question appears to be a new one because it is of such a character in regard to this Act of Parliament that it could hardly be raised before.

Attorney General—It is not raised by me; but my impression is that the decision of the Court on the other point is equivalent to a decision on this. Of course, *Mr. Gilbert* may differ from me; but that is my impression.

CHIEF JUSTICE—I do not know whether the other Judges may be inclined to admit the document on the strength of the view of the case as put by *Mr. Gilbert*.

Attorney General—I must say I am rather surprised that this course should be taken after your Honours have stopped me in my argument.

CHIEF JUSTICE—Well now that the question is put in a different point of view we are ready to hear you, unless the other Judges agree with me.

Mr. Justice NORTON—I adhere to my opinion.

Mr. Justice BEETE—We will hear the *Attorney General*.

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Attorney General—The whole of the first part of *Mr. Gilbert's* argument is inapplicable. He assumes that a power of attorney must be proved.

CHIEF JUSTICE—We do not think there is anything on that point. The point on our minds is, what effect we are to give to the Act of Parliament. If it applies not only to suits but also to suits intended to be brought, what is the rational restriction? Is it not the rule of law that the suits must be in contemplation?

Attorney General—When your Honour asks me what is the rational construction, you do not assume that this is an irrational statute?

CHIEF JUSTICE—I say what is the rational restriction to put on it?

Attorney General—It appears to me to stand precisely in the same position as a proceeding Which is brought to perpetuate testimony. If a party comes before the Court and announces his intention to bring his action hereafter, it is the same as if he sent a commission. Under the 15th section this declaration has the same effect as if the party was introduced in open Court or in a commission issued for the examination of witnesses.

CHIEF JUSTICE—Of course, that cannot be the test of the words intended to be brought, because before the commission can be instituted the suit must be brought.

Attorney General—I beg your Honour's pardon.

CHIEF JUSTICE—The words of the Act of Parliament provide that in a suit intended to be brought, as in a suit actually brought, it shall be lawful for the Plaintiff or Defendant to take evidence on any matter relating thereto.

Attorney General—Is not that a conclusive answer as to what is meant by a suit intended to be brought? Because was she one of the Defendants in this case, and did she make the declaration in respect to the suit? Certainly not.

CHIEF JUSTICE—It is the Plaintiff and Defendant that can bring it. I can understand that the Plaintiff may intend to bring a suit; but can the Defendant?

Attorney General—I thought I was right that in our Ordinance in respect to a future suit any party either

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by himself or his attorney would have the power to perpetuate testimony. I find in the 94th section of the Ordinance:—"The party wishing to obtain or perpetuate the evidence of such witness, may, at any time before or after the commencement of a suit, move one of the Judges *ex parte* for an order to have such witness examined before a Judge."

Mr. Gilbert—That is in the case of a witness in the colony.

CHIEF JUSTICE—It is perfectly plain that in such a case the Judge would require that you mention the suit.

Attorney General—Exactly; and I say it is precisely the same in this case. Your Honour must agree with me that the only ways in which declarations are at all admissible in any proceedings in the colony are:—"In any action or suit then pending or thereafter to be brought or intended to be brought in any Court of law or equity within any of the territories, plantations, colonies, or dependencies abroad, being within and part of His Majesty's dominions for or relating to any debt or account wherein any person residing in Great Britain and Ireland shall be a party, or for or relating to any lands, tenements, or hereditaments or other property situate, lying, and being in the said places respectively, it shall and may be lawful to and for the Plaintiff or Defendant"——Now, at that time, in 1859, it is impossible to say that this party could be considered in the relation of a Plaintiff or Defendant in a suit intended to be brought. The declaration under the Act of Parliament is plainly meant to be a declaration by one of the parties to the suit or the intended suit, and having reference to the particular suit; but it cannot be said that a declaration made by Miss Daly in 1859 was made by her in the capacity either of Plaintiff or Defendant in respect to the suit now before the Court.

CHIEF JUSTICE—I should certainly be inclined to infer that she must have known that there would be a suit in which she would be concerned with the other legitimate or illegitimate children of her mother. She must have contemplated some suit, or this very suit.

Attorney General—She could not have contemplated

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this suit; because Mrs. de Coeverden was alive, and this is a suit to declare the Will after Mrs. de Coeverden's death. But if the Act of Parliament has not this meaning, I cannot see what construction you are going to put upon it. You certainly have put a very strict construction upon it in the other respects. You say it must apply only to British subjects in foreign dominions. In the same way you must put a strict construction upon it in this respect. The declaration must be made either by a Plaintiff or a Defendant for the purpose of being used in a suit which they have actually commenced or which they intend to commence. If it be shown to the Court that the declaration is in reference to a suit which has been commenced, then there can be no difficulty. If it be shown that it is in reference to a suit intended to be commenced, it must be considered with respect to that suit.

Mr. Justice NORTON—How could you declare that a suit is in contemplation?

Attorney General—Where the suit has not actually arisen, you state it is probable it will arise. The whole object of this act was, I believe, to dispense with the necessity for commissions to examine witnesses, and that parties to suits either brought or intended to be brought should have the opportunity of proving matters in respect to those suits by declarations, instead of bringing witnesses out of the colony or going to the expense of commissions. But if a declaration under different circumstances before Mrs. de Coeverden's death can be admitted after her death in a suit as to the meaning and effect of her Will, then it comes to this, that a party may make a declaration at any time he pleases, and at any time hereafter, if it so happens that he is concerned in a suit, this declaration could be produced, and it would be said then to be used with reference to a suit intended to be brought:—"And every declaration so made, certified, and transmitted"—It does not say every declaration shall be; but in such actions—that is,—actions brought or intended to be brought at the time of the making of the declaration. I am obliged for a suggestion I just received from a friend near me, and it does appear to me to be a very excellent argument; that if the Act refers to

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action intended to be brought, the cause of action must ' be subsisting at the time, or else it cannot be said to be an action intended to be brought.

Mr. Gilbert—I hope your Honours will allow me to say one word with respect to some of the questions raised previously.

Attorney General—I do not know that *Mr. Gilbert* is entitled to reply.

CHIEF JUSTICE—Of course not.

Mr. Justice NORTON—As the CHIEF JUSTICE has not formed any definite opinion on this point, and as Mr. Justice BEETE agrees with me, it falls to me to pronounce the view of the Court. It appears to me that the only way to construe the section of the Act is to restrict it to cases in which actions are brought. If it were to be taken in the general way that *Mr. Gilbert* contended for, then in point of fact it would be authorising speculative declarations—that is, declarations might be made by parties to be kept for some contingency in which the declarants might be interested. I do not think the Act of Parliament intended that. * No doubt its language is very obscure, because it is not very clear how the Plaintiff or Defendant can exist before the action is brought. However, it is used proleptically, and it means that the party may make the declaration before the actual institution of the suit. There are three kinds of action; and looking at the effect of the analogous case of perpetuating evidence referred to by the *Attorney General*, I have not the slightest doubt that the Court would not allow the evidence to be taken without some definite action. I think that the object of this particular clause is that supposing notice of action has been given, or, as the *Attorney General* observes, the cause of action exists, then the declaration may be made, because it may fairly be said to be within the contemplation of the party to bring the suit. On all these grounds, and for the reasons so well put forward by the *Attorney General*, which appear conclusive, I am against the admission of the document.

CHIEF JUSTICE—I do not know that I have any definite opinion to express, but certainly I do not remember a

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point that has given rise to greater doubt in my mind than this. If I were to form a judgment from the earlier part of the section, I must say I adhere to what I intimated after *Mr. Gilbert* had addressed the Court, that there was no rational restriction to be put upon the words. Whether there is any rational meaning in them I cannot say; but there is no rational restriction to be put upon them. [His Honour made some further remarks with respect to the wording of the clause, and concluded.]—I have a difficulty in coming to a conclusion; but it is clear that it is not shown that this suit was intended to be brought. I feel that the Judges are right, and having come to a conclusion it is their duty to act upon it, and leave the question to be settled by another Court hereafter.

Mr. Gilbert—I may be able to give further evidence tomorrow. Therefore, I do not close to-day.

CHIEF JUSTICE—Are you in hopes of getting the evidence of somebody in the colony?

Mr. Gilbert—No. I refer to the Will of Richard Joseph Johan Edward Daly, who called them his brother and sister.

Mr. Gilbert—I have no further evidence to offer. I do not recede from one word of what I have advanced with respect to the declaration. I have looked over my notes, and I find that the declarations were made, one of them six years, and one two years before the case. There is only one word further that I have to state, in reference to the merits of the case. I have submitted Bourda's Will and Madame de Coeverden's Will, but I have explained what I consider the Dalys are entitled to. I consider that they are entitled to their mother's third, anyhow; and if our contention is correct, they would come in by representation for their deceased parent's half of Madame de Coeverden's property, the Boode branch getting the other half, brothers' and sisters' children coming in by representation. So that if our contention is correct they will come in for one-third of the whole property, and one-half of a third; that is to say, they

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will be entitled to three-sixths, or half of the whole estate.

Mr. Justice BEETE—Did you state yesterday the terms on which you sought to have the declaration before the Court?

CHIEF JUSTICE—I understood you to argue on the purport of the declaration.

Mr. Gilbert—I did not state it distinctly, but that is the fact. I put it in this way, as your Honours will recollect, that if our contention is correct as to the construction of the Will of Joseph Bourda, then the mere question of the simple illegitimacy of the Dalys does not affect their position, because they would come in as heirs of their mother's share any how, whether they got it from her, or from their brother. The brother's Will is before the Court.

CHIEF JUSTICE—You aver in your answer that Richard Joseph Johan Edward Daly devised his property to these Dalys?

Mr. Gilbert—Yes.

Mr. Ross—I appear for the Administrator General; but I am not aware that it will be necessary for me to go at any length whatever into the argument on which the case of the Administrator General rests, because it has already been gone into at considerable length and with great ability by my learned friend, *Mr. Gilbert*. A considerable part of his case rests upon the same grounds as the Administrator General does. The answer that has been filed by us is to this effect, the Administrator General admits the transport in question, and he states that he has no interest whatever in the matter. He says substantially that he has acted in the ordinary discharge of his duty under the orders of the Court.

CHIEF JUSTICE—If that is all your case——

Mr. Ross—It is hardly necessary for me to go over the proceedings, they have been gone over so elaborately and so learnedly.

CHIEF JUSTICE—Of course, if you disclaim all interest, there is no necessity to go on.

Mr. Ross—No—it would be idle to argue on the transport without putting the transport before the Court.

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CHIEF JUSTICE—If the question were raised I should feel great difficulty. However, it is quite clear that it is not. Is that your disclaimer too, *Mr. Solicitor General*?

Solicitor General—I appear in this way—the Plaintiffs wish that the Will of Joseph Bourda should be explained by the Court. The interpretation they put upon it would give me a larger share in the property than I would get if the Will was interpreted in the way that the Defendants wish; and therefore I am willing to leave it to the Court to decide. So far as the transports are concerned, I admit that those transports have been passed, and I say I leave it to the Court to decide whether they affect the issue; and as to the question of the legitimacy of the Dalys, they have a certain interest in having the Will declared, and when the Plaintiffs come into the Court and say they are illegitimate, and there is no proof on either side I submit that the Court could not declare them legitimate or illegitimate. But all that the Court is asked to do is to declare the meaning of the Will of Joseph Bourda, and it is in that state of the facts that I come before the Court, and I submit that whatever decision the Court may come to, not arguing one way or the other, as I am brought, into Court in this way, I am entitled to my costs.

Attorney General—I am happy now to approach the termination of my task in this matter, which was, to set before the Court the various grounds and reasons of law on which we contend, in the first place, that Madame de Coeverden's Will ought to be declared null and void, and in the next place, that the judicial declaration of the original Will of Joseph Bourda should be in the way we understand it; and having submitted these arguments, I now reply to those offered by *Mr. Gilbert*, and after the careful attention your Honours have given to this case, I have no doubt that the decision at which you will arrive, having referred to the authorities, will be a decision which will be correct and be accepted as such. Now, with respect to the de Coeverden Will, it is necessary to enter into that question first, and I will shortly notice the technical grounds irrespective of the main question as to the Will of Bourda itself, on

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which we conceive that that Will is bad. It does not appear to me that *Mr. Gilbert* was very clear or distinct as to Wright's position. As I understand, he must fill one or two offices. He must either be acting under the Will as *quasi* Executor, or he must be acting under the Will as *quasi* heir. If he is acting under the Will as administrator, then that is acting as *quasi* executor. The analogies that have been cited from the English law are of use but only to a certain extent. It might have been that under the English law a trust for the payment of debts and then to pay over the residue to the right heir of the party bequeathing would be good; but there is this wide distinction between the two systems of law, that there is nothing in our law here at all analogous to the English law with respect to debts and their being charged on real estate. The debts of a testator here are just as much a charge upon his movable property as upon his immovable property, and the heir takes his immovable property just as much subject to payment of those debts as he would take personally.

CHIEF JUSTICE—Subject to the payment of the debts.

Attorney General—There is a distinction between simple contract debts and mortgage debts.

CHIEF JUSTICE—As to their relative priority.

Attorney General—Well—that is a distinction, but there is no difference at all here. When an inheritance is bequeathed the whole inheritance in an equal degree is liable and responsible for the payment of the debts; and therefore Mrs. de Coeverden's heirs would be bound, so far as their property we are now speaking of is concerned. *Vlissengen* is the only property that purports to be bequeathed, and it is bound for the debts.

CHIEF JUSTICE—Would it not be a regular thing here for persons to dispose of their property to some person to pay their debts? Why, one of the creditors might have to send out a power of attorney to obtain priority, and they might in that way have to account for all their receipts and the partial payment of debts; but where we have an individual with a trust vested in his hands for the express purpose of paying the debts, and who is therefore liable to a suit to the extent to which he receives, surely that creates a benefit.

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Attorney General—I do not see what difference it makes.

CHIEF JUSTICE—If I were a creditor on property in this colony, and I were living in Europe, I should think so.

Attorney General—In an English Will where there is a trust of this description the trustee has the legal estate. In this colony he is acting as procurator—as *quasi* Attorney for his heirs; and Mrs. de Coeverden intending to designate certain individuals for whose benefit he would be *quasi* Attorney, it would be for the benefit of the residuary heirs that Wright would be bound, as I conceive, to administer the estate and pay off the debts, and he would be bound and liable to them for his administration. Mrs. de Coeverden died without having fulfilled her intention, and it is now said that Wright is still entitled to act as administrator for the right heirs of the deceased.

CHIEF JUSTICE—I understand *Mr. Gilbert* to argue that he was instituted heir.

Attorney General—This is the way I took down the note of the argument—that it is not necessary to institute an heir under the Roman Dutch law; that the intention was that it should go to the right heirs; and that Wright was to act as administrator. That was *Mr. Gilbert's* argument, as it appears on my notes, which I think are correct. Now, that is not the view I take. I conceive that from that point of view this Will cannot be considered a good Will. Suppose a person making a Will here, saying “I appoint So and So administrator for the purpose of paying off my debts and handing over the nett proceeds of the property after the payment of the debts to such persons as I shall by a codicil designate.” I conceive that if the party fails to make that codicil, he is in the same position as if he had made no Will at all, because the essential element is the naming of the individuals who were to be the recipients of the testator's inheritance, and for whom A B was to act as administrator. It would be in fact creating a trust, but not designating the objects of that trust; and that appears to me to be the main defect of this de Coeverden Will. Looking at Wright, he cannot be anything more than an

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administrator. If he was supposed to be a sort of heir, in that case I apprehend the Will would be absolutely null and void, because he drew it himself, and the authorities on that point are clear. Therefore, the only way to support the Will is to look at it as the appointment of Wright as administrator; and I am willing to admit that if the testatrix had completed her intention, and if she had made the codicil and stated the persons who were to take the residuary inheritance, then the Will would have been complete, and there would have been what we might call a trust of which Wright was trustee. But the fatal defect, as I put it to the Court, is that she intended to create a trust in favour of certain individuals, and she died before having made up her mind as to the objects of that trust. The payment of her debts was merely incident to the office of administrator. An administrator without power to sell immovable property could not sell. She appears to have given him the power to sell; but these are powers incident to the office of executor to an estate. They are not at all powers incident to any other office under our law, or even under the English law. I apprehend that this is the rule as to Wills being void for uncertainty that for the validity of every disposition, as well of the personal as of the real estate, even in England, it is requisite that there should be a definite subject and object; and the failure of these is fatal. Now, with respect to the case which *Mr. Gilbert* did not notice, but which I think of some importance as throwing some light on this case—it is the case of *Stubbs v.*—In that case your Honours will observe the Will was held void for uncertainty, because it was a trust of £2,000, and the *cestui que* trusts were not specifically pointed out, and it is important because the trustee was to exercise a discretion as to who were the parties on the one side or the other to take.

CHIEF JUSTICE—But the trustee was under the unmistakable declaration that he was to select from three persons at his discretion, and the Court held that that was a discretion he could not exercise, and therefore the Will was held void for uncertainty.

Attorney General—That was a partial bequest, I admit;

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but suppose the testator had left the whole of her property, instead of £2,000, in that way, the object of her bounty not being ascertained, the Will would be invalid.

CHIEF JUSTICE—Suppose it to be a clear gift to G. B., in trust, and then these persons to be all unascertained, the Will will be good, and from the words of limitation the trustee would have to convey the property to the heirs at law. The Will would be perfectly good.

Attorney General—But then we come to the distinction between the two systems of law. A trustee in England would have the legal estate.

CHIEF JUSTICE—He would only have it on the ground that it was given to him.

Attorney General—He would have it as legally invested with the estate, and he would have to make a legal conveyance. Now, suppose Mrs. de Coeverden had fulfilled her intention and written the codicil, Wright would not have had to execute any legal conveyance, but the heirs would have come in as heirs of the deceased. They would be entitled to adiate her inheritance, or repudiate it. It would be a right they would exercise in their own independent character, and Wright would be simply the administrator, in that way being *quasi* procurator of these very individuals selected for the purpose by the testator. I think that does raise an important distinction between the two systems of law; and therefore I conceive that the same footing as if the Will had been made thus—“I appoint So and So as administrator; he is to sell my property; I give him power to pay off all my debts, and after that to pay the residue to So and So whom I appoint as my heirs.” Well, all these acts would be performed in the capacity as *quasi* executor under the Will. But let us take the case of a person simply making a Will and appointing an executor, and nothing else. I conceive that according to the law here such a Testament would be wholly void; although I am willing to admit that if the testator simply gave legacies and his Will was in due form those legacies would be binding on the heirs and the heirs would have to pay them, yet the executor is a person who is appointed to be procurator of the heirs, and if there is no heir

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named under the Will, then I say the appointment of procurator for an individual who is not designated wholly fails; because there is a great distinction between heirs *ab intestato* in our law and heirs under a Will. Heirs under a Will take at their own option, or reject; it is a matter entirely in their own choice. If they take under the Will they have certain rights, and the executor acts as their representative; and I believe there can be no doubt that unless there be some special prohibition in the Will of the testator, they can at any moment they please oust him of his functions by assuming the administration themselves. In fact, one principal object of an executor as at present understood is to carry out the somewhat anomalous provision of the Dutch law that obtains in this colony, that the heir has a certain time to make up his mind—the act of deliberation as it is termed—whether he will accept or reject. In the meantime, no act is considered as relating to the inheritance, and the parties are confined to the necessary disbursements of the estate. But could it be considered that a Will appointing A B as executor and stating the intention in a subsequent instrument to name who are the heirs, and if the heirs are never named at all, that the office of executor, which was intended under the Will to be with respect to certain individuals who were to be selected—can it be considered that that is the office of executor was to submit under the Will with reference to the heirs *ab intestato* of the testator? I submit that the very fact of the difference between heirs *ab intestato* and heirs taking under Will, and the executor being their representative, shows that if the testator has not nominated the heirs, the executor cannot act under the Will. I will admit that in cases of legacies the heirs would be bound to pay the legacies, but the simple appointment of executor and nothing else would not be a Will or codicil, as I conceive; nor is there any authority for such a proposition.

CHIEF JUSTICE—Of course, I quite understand that the result of any enquiry about a Will here would be quite different from it at home, because the rules of law are in different positions; but so far as I understand, though

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there may be technical differences, the principles of construction remain the same, and modified as they are at home, if you can ascertain the intention of the testator from any part of his Will, it should prevail, except in so far as it may seem to be in conflict with the law. I suppose you do not differ from that ordinary rule of construction.

Attorney General—The rule of construction, no.

CHIEF JUSTICE—And that if the intention of the testator can be ascertained from the terms of the Will, it may be carried out so far as the law permits.

Attorney General—So far as the law permits.

CHIEF JUSTICE—Well—there may be differences in the law; but I presume the principle of construction is the same.

Attorney General—The principle of construction is the same; but the principle of the law with respect to immoveable property is very different in England and in this colony. Because a person takes in England as trustee, that is no reason why if a person in this colony is made executor, who has not the legal estate at all and who acts as representative of the heirs, if the heirs are not named, that the Will should be a good Will.

CHIEF JUSTICE—But may there not be a form of words to this effect, that the testator intended that a person should take the fee simple of his property, whether for his own benefit or a particular use, and from which it would be equally plain, by the colonial law, that the person, whether you call him trustee, fiduciary heir, or executor, that that person should take the dominium of the property—either absolute or partial—for the purpose which required it? Do you deny that that Will would give him the dominium of the property?

Attorney General—Yes, I do deny that it would give him the property, or as your Honour calls it, the dominium.

CHIEF JUSTICE—When I say the dominium, of course I know it must be a dominium subject to all the obligations and conditions. I mean the dominium so far that he must be considered the owner of it for the purpose stated.

Attorney General—I do deny that proposition, for this

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reason, that I believe no such thing is contemplated in the Dutch law—that the utmost extent of the powers of an executor is what I have stated, though they may be enlarged and continued by the appointment of administrators; and it is in that view that the various discussions took place on the Will of Albouy. If your Honours are referring to cases that occurred in this Court, probably you will look at that Will, because it was a Will in the English form under which property was conveyed to certain individuals as trustees. It was a regular English trust, but it had reference to immovable property in this colony; and therefore it could only be construed as constituting those gentlemen administrators for a certain time, which extended the ordinary powers of executors, and which prevented the residuary heirs from taking the property away, so far as the administration was concerned. But there the heirs were named in the Will. Any transport that was passed must be passed by them as executors. They could not pass it in any other way. Now, I do think there is a great difference between the two systems of law.

CHIEF JUSTICE—Do you say it is impossible, whether you name him heir or anything else, to give him the dominium as trustee?

Attorney General—You may name him fiduciary heir.

CHIEF JUSTICE—Suppose I want to buy a house, and I ask a friend of mine to take the transport in his name; do you say that by the Roman Dutch system he would not be a trustee?

Attorney General—As between the parties, but not as regards the creditors. I admit that a testator can appoint a fiduciary heir, and a *fidei commissary* heir, with any conditions; but that is with respect to the quality of the person appointed heir, and the question I endeavour to raise in this part of the case is, whether, having reference to our peculiar local law, Mrs. de Coeverden intended to institute Wright as heir in the sense in which heir is spoken of in our colonial law, or whether she did not, on the contrary, having reference to our local law, intend to institute him in the capacity as administrator, reserving to herself the right to appoint heirs.

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CHIEF JUSTICE—I can understand your enquiry, if you think you are not at liberty to gather that the intention of the Will was to establish a *fidei commis* subject to trust.

Attorney General—No, I would not admit that. I think it would be really to admit that the English doctrine as to trusts subsists in this colony under the Roman Dutch law, and I submit it does not. The characters of an heir are various. He may have various conditions imposed upon him. There may be various kinds of conditions and *fidei commis*, or trust—I am not afraid of the word; but the question is whether the individual is entitled as heir. If Mrs. de Coeverden having said I appoint you heir and require you to do so and so, he is bound to execute that trust as heir. The meaning I put upon it is this, that she did not intend to institute Wright heir at all; but that she intended to create a trust, and he was to administer it.

CHIEF JUSTICE—That I quite understand. The argument is that Wright was to pay the debts out of what was given to him; but if what was given to him was not real property, how was he to pay the debts without having power to sell; and if he had power to sell must he not have the dominium? Therefore, we come to the conclusion that the property was given to him to carry out the trust imposed upon him.

Attorney General—Nothing is more common in this colony than to give executors and administrators the power of sale. If he transports property it must be by power under the Will; but it is always in reference to that quality.

CHIEF JUSTICE—You say he might sell in quality as executor?

Attorney General—If specially authorised—no question about it. No Judge would allow a transport to be passed by an executor without looking at the Will and seeing that power was given under the Will; and then it would pass by him as being executor and having power under the Will.

CHIEF JUSTICE—You say as specially authorised, and not otherwise?

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Attorney General—Yes; but even in that case he would only sell supposing he was still continuing the administration of the property. If the heir chose to adiate and take it over at once the executor then would have nothing more to do with it.

CHIEF JUSTICE—We adopt the same thing too for trustees. When a guardian gives over property to the heirs the law will presume that the object of the trust has been satisfied.

Attorney General—I think, without taking up further time on this part of the case, I may leave it on this footing, that the difference between the two systems is essential. The English trustee has the legal estate, and there is a conveyance. The colonial trustee or administrator has not the legal estate, and the heirs take in their own right as being vested with the estate, under the Will, the trustee having no right whatever to convey it. In that state of the case, if the trustee is not appointed heir the mere appointment as administrator of the estate is null, because the party that has the legal and equitable estate is the heir. A party may have a legal estate, and there may be parties following him who have equitable rights which the heir will be bound by. But the two characters are so distinct that the Dutch administrator never can be treated in a similar position to the English trustee. I do not know that it is necessary for me to go through the authorities. *Mr. Gilbert* says that *Burge* must be mistaken when he laid it down as a rule that the institution of an heir, although various other particulars of the Roman testament were dispensed with, was still an indispensable condition of the Dutch Will. It is in the 4th vol. *Burge*, p. 883:—“The “law of Holland adopted most of the general rules of the civil “law which have been stated. But it rejected some. It required “the institution of one or more persons as heirs.” And it is a singular thing that *Vander Linden*, who after all is the latest writer, because his work was published in 1806, certainly considered that the institution of an heir was a requisite. But whether it be so or not, these authorities can only go this length, that supposing a party makes what would be called a codicillary disposi-

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tion which would be with respect to the payment of legacies and so forth, although it was not made as a codicil, but the Will being done away with, it would be a good testamentary disposition, whether in the form of a codicil or of a Will. But certainly no authority can be cited, and certainly there is no precedent in this Court, on which the bare appointment of an executor without any appointment of an heir at all, could be considered a good testamentary disposition. It must fall to the ground, for the very office of executor is to be exercised for the benefit of the party to be designated heir. Now, I do think that the case of Fraser very strongly bears out my argument, for this reason, that the Will there was declared wholly null and void. *Mr. Gilbert* says that the cases differ, because there the executorship was ancillary to the heirship. Well, I presume that in every case executorship must be ancillary to heirship. But suppose the executor's wife be appointed heir, *pro tanto* the Will is gone; but then so far as to Fraser's executorship the Will must be supported upon *Mr. Gilbert's* argument. I did not see how to escape that conclusion. If the Will failed because of the heirship of his wife, that was no reason why his executorship should fail—no reason why he should not be executor for the heirs of M'Donald. But the Court held 'that not only the bequest was void, but the Will itself was void. In order that your Honours may not be under any misapprehension with respect to the facts of the case, I think it right to mention this, having been counsel in the case, and if Mr. Justice BEETE does not recollect the circumstances, although J. dare say he will, I am sure his notes will verify what I say—that, although there were charges of collusion and fraud in the claim and demand, yet there was no proof of it tendered. On the contrary, the case was postponed, in order that certain witnesses that the Plaintiff thought could sustain a case of that sort, from one session to another, and the witnesses were not put into the box. There was not the slightest proof offered that could invalidate the Will on this ground, and the decision went purely on a point of law; and if your Honours will look at the records you will see that. I think it right to mention that fact,

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Mr. Gilbert—The witness who was expected to prove these things did not turn up.

Attorney General—Yes; he was here.

Mr. Gilbert—He was not here when I was in the case.

Attorney General—Mr. Roney and Mr. Bent were in the case after you; but it was impossible to get over the evidence of Dr. Houston. I have the papers in the suit before me; but it is not worth while to take up time in reading it; but that is the fact, that the Will was wholly set aside. One of my arguments in that case was on this very point, that even supposing the Will void, and Mrs. Fraser not entitled to the bank shares, yet Fraser was entitled to act as executor, and his commissions were not considered to be as a benefit, but as a remuneration for service performed. However, the Will was set aside wholly, and the declaration of the Court amounted to this, that M'Donald died intestate.

CHIEF JUSTICE—Did the Will mention the bank shares, or did it merely say all the property?

Attorney General—It named the bank shares which constituted the whole inheritance. He gave them to his friend for her kindness to him, and he appointed her husband as executor.

CHIEF JUSTICE—And that was all it gave?

Attorney General—It bequeathed the inheritance to Mrs. Fraser, and it gave the executorship to Fraser. Under the rule of construction that seeks to support this Will of Mrs. de Coeverden, it appears to me that the Will need not have been declared to have been wholly void, because although the bequest might have been considered as void, being written by the husband of the individual who was to benefit, yet that was no reason why the executorship should wholly fail.

Mr. Justice NORTON—The wife was not left heir?

Attorney General—Yes.

CHIEF JUSTICE—Have you got the Will?

Attorney General—I have sent for it.

Mr. Gilbert—The wife was virtually appointed heir.

Attorney General—And the Will was set aside on the ground that it was in her husband's handwriting, the whole of it. *Mr. Gilbert* endeavours to distinguish the

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two cases, because there the executorship was ancillary to the heirship, and Fraser might have sold the bank shares and pocketed the money; but that does not help the argument. Any executor may pocket the money; and if so, he is responsible to the heir; but that is no reason why the Will should be bad. But it supports my argument that the appointment of an executor without designating the parties who are to be heirs is not a good testamentary disposition.

CHIEF JUSTICE—That might be, because of this very startling provision of the colonial law that people are not allowed to exclude the Administrator General, and this excludes the administrator General.

Attorney General—People cannot exclude him now.

CHIEF JUSTICE—Well—the appointment of an executor is nothing more than an exclusion of the Administrator General.

Attorney General—In that case of Fraser the shares were arrested by the Administrator General as claiming to represent the intestate estate of M'Donald. A suit was brought against Fraser and the British Guiana Bank. They did not think proper to sue him as executor; but I filed an answer for Fraser in his quality as executor.

CHIEF JUSTICE—Although you were not sued in that form?

Attorney General—Yes.

CHIEF JUSTICE—Sued in one quality, and answered in another?

Attorney General—We were not sued in any quality at all. I thought the Plaintiff might have paid us the compliment of suing us in the quality of Executor. We claimed to be Executor; but he made us personally a party to the suit, but I would not admit that. The Plaintiff's conclusion in *rauw* action was:—"That a certain document bearing date the 15th day of "June, 1860, exhibited and recorded by the original Defendant, "J. T. Fraser, in the Registrar's office of Demerary and Esse- "quebo, and which document purports to be the last Will and "Testament of one Donald P. M'Donald, deceased, be declared "to be, as a last Will and Testament, illegal and invalid, and as "such null and void and of no effect,

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“upon the grounds, among others, that said document was
 “never legally executed before his death by the said Donald P.
 “M’Donald, deceased, and that it is entirely written in the
 “handwriting of the said original Defendant, James Thomson
 “Fraser, who is therein named as the sole Executor thereof”—
 That was considered a vital fact:—“And who thereby as the
 “husband of one Amelia Fraser, to whom he is married in com-
 “munity of property, and who is named and constituted sole
 “heir to the property of the said Donald P. M’Donald, de-
 “rives a direct beneficial interest under said alleged Will, and
 “therefore ought not to have written it in. his own handwrit-
 “ing.”

CHIEF JUSTICE—You go into the question of interest
 there—of beneficial interest.

Attorney General—I am reading the Plaintiff’s Claim and
 Demand. The sentence was pronounced at a time when reasons
 of judgment were given; and you will see, on looking at the
 records of the suit, that the case entirely proceeded on the
 ground that the Will was in the handwriting of Fraser. But I
 am willing to take the other alternative for the purposes of this
 argument. Suppose Wright was instituted as heir, which I deny
 but for argument sake take it in that way, I think the authorities
 at all events go this length, that a party cannot institute himself
 heir to a Will that is written by himself, and therefore it comes
 to this dilemma—is he administrator or heir? If he is heir, the
 Will is bad, as being written by himself. If he is administrator,
 there is no heir, and the Will is bad. I come now to the ques-
 tion as it refers to the construction to be placed upon the
 Bourda Will.

CHIEF JUSTICE—It is very difficult to say that an Executor
 could sell property without what may be called express power.

Attorney General—An Executor requires power to sell
 immoveable property.

CHIEF JUSTICE—But I see a limitation put upon their
 power by *Vander Keessel*.

Attorney General—He is the representative of the heir— a
 sort of agent, and he cannot, without the consent of

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his principal, sell. In fact, the heir can oust him just as an attorney.

CHIEF JUSTICE—It strikes me that an executor is intended to have some function that the heir cannot interfere with; but that cannot be the function.

Attorney General—That is the function of an administrator.

CHIEF JUSTICE—Where are the functions of administrator laid down?

Attorney General—You will find it in *Librechts*; and also a reference to the authorities in a little work of *Herbert's*, the Dutch Executor's Guide. I do not mean to say he is a safe guide as to the law itself, but that on the authorities where the law is to be found. But in the case of Albouy's Will, that was the light in which the office of trustee was viewed. We were obliged to refer to these authorities then for that purpose. They were English trustees. The Will was drawn up by an English lawyer in the English form, and it contemplated a conveyance, and so on. It was necessary to see what the position of the parties was, and in the first place Mrs. Norton thought that he as a tenant for life was entitled to get possession of the estate in her capacity as tenant for life. The first action was brought for possession; and I am bound to admit that I conceive that the view taken of the subsequent case, and which was upheld by the Privy Council, was the correct view, which was this, that she then claimed to be admitted into the administration in her capacity as executrix and trustee—that is, as administrator. It was given in her favour here. The case went home to the Privy Council, and I think you will see that the Privy Council viewed the position of an administrator of a Will under the Dutch law not in the light of a trustee, but administrator of the property. A person when he has appointed heirs can appoint an administrator to act for these heirs, and he can allow the executorship to continue for a much longer time than usual, if he did constitute him administrator.

CHIEF JUSTICE—Is that case of Albouy's reported?

Attorney General—It is in the Privy Council's reports.

Mr. Gilbert—The last case is reported.

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Attorney General—You will see the same words in that thesis of *Vander Keessel*:—“*Executores testamentorum, cum sint quasi procuratores a testatore constituti ad funus curandum, credita exigenda, legata et aes alienum solvendum, bonaque administranda, usque dum dividi possint, cumque adeo et heredum negotia gerant, non possunt heredes ab he reditere arcere, nisi aliud jusserit testator,*” He is referring there to the same thing.

CHIEF JUSTICE—There is nothing about administrators.

Attorney General—What he means is that if he is appointed administrator the heir could not put an end to his function.

CHIEF JUSTICE—He says:—“*Nisi aliud jusserit testator.*”

Attorney General—Yes; but an ordinary executor must relinquish when the heir pleases by the heir's adiating and taking the management.

CHIEF JUSTICE—But he is still executor.

Attorney General—An administrator is only an executor whose powers are to last for a much longer time. The passage I am referring to is in page 138 of *Vander Linden*, where he is speaking of fiduciary heirs, and shows that he retains the property under his disposition, except where the testator has appointed a special administrator. That is the same view that *Vander Keessel* is referring to, and if in case of a fiduciary heir the testator has intended that the executorship should continue, say for twenty-five years, or any other time, there would be a special administration, even although the fiduciary heir was in possession of the rents and profits of the estate; and he cites *Librechts*, b. 1, ch. 30, n. 4.

Mr. Justice NORTON—HOW would you distinguish the functions of the executor from those of administrator?

Attorney General—There is this broad distinction—that an administrator may last for a lifetime.

Mr. Justice NORTON—And the executor is only to wind up the property?

Attorney General—Yes, and an executorship may be put an end to at any time.

CHIEF JUSTICE—Unless the testator otherwise directs.

Attorney General—Then, he becomes administrator. The only difference is in the duration.

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Mr. Justice NORTON—An administrator is in the position of an executor confirmed?

Attorney General—I happen to know a case now of a very valuable property left to certain heirs, but the testator, reposing great confidence in the executor, constituted him administrator, and there are certain special powers under which the executorship continues much longer than an ordinary executorship, from which the heir cannot oust him; and that is what I mean by the distinction. There is no difference in the quality of the estate, but there is in the duration of the estate and the extent of the powers. Albouy's case went before the Privy Council. The point there was decided that the executrix and devisee in trust in England could appoint an attorney to represent her here in the colony. That point went before the Privy Council; but when the case was here before the Court one of the parties concerned treated it as a case of devise in trust according to the English law, but the Court treated it in the way of a continual executorship.

CHIEF JUSTICE—The Privy Council could not see the distinction, and took it in the simple character of a devise in trust.

Attorney General— [The learned counsel read a portion of the Will.] The power of assumption and surrogation. When you surrogate and substitute you put somebody in your place; but the question was whether a person entitled to act in this way could act by her representative; and the way they put it was that, living in England, as she could not be in two places at once, she could appoint some one here to act for her. When I approach the main question in this suit, I must shortly notice the reference that has been made by *Mr. Gilbert* to certain proceedings. Now, of course, he does not put it that the Court is in any way bound by the decision in the case of the Administrator General as representing the estate of Louis William Boode; but he says that it would show that the Court on the previous occasion took a different view of the Will of Bourda. Well, supposing that it did, and I am bound to accept his statement as to what took place in that case—I do not doubt him for a

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moment; but even supposing it did, the question for this Court to determine is whether that proceeding was right—whether the Will of Joseph Bourda is to be construed in the way now maintained. That is a question about which a considerable diversity of opinion has existed. It is a question which could not be finally and conclusively determined, as I apprehend, and as those whose interests I represent conceive, till the death of Mrs. de Coeverden. She having died and the estate being now vested, the question for the Court to determine is whether the construction we put upon the Will is the proper one, or whether the construction they put upon it is the proper one. It may be that the Court now may put a different construction on the Will from that which they put before. That is the very question at issue in the case, and whatever may have been the view of the Court at that particular time, it does not bind this Court in any way. The very tact of this great property having been kept together as leasehold property up to this moment shows that there must have been something more than a casual doubt in the case. But a grave question of importance must be settled, and before this property can be divided and titles granted to the lessees of a great part of this town—the very fact, as I said before, that this property has been held together under leases of this kind and no transport for any portion of Bourda's property, shows that the time has now come to decide what the Will of Bourda means. *Mr. Gilbert's* contention is this, that the *fidei commis* was in favour of each daughter and their children respectively. That is the point on which we join issue. *Mr. Gilbert* seems to think that it was a strong argument in his favour by putting it in this way—what is to become of the property between the time of the death of the several mothers up to the time of the death of Madame de Coeverden? I do not see that there is any anomaly in the view I have put forward, but suppose it is so, his construction puts a still greater anomaly, namely, that the *fidei commis* may have continued as to one undivided part of the inheritance and may have ceased as to another. Suppose the first of the three daughters died leaving one child, and the other two

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married daughters survived, according to his construction there would be an undivided two-thirds of the trust, and with respect to the third it would be absolutely vested in the child. That would be an anomaly. That could never have been intended, for according to that contention there would be a subsisting trust with respect to two-thirds, and a vested interest in a third.

CHIEF JUSTICE—What is the anomaly?

Attorney General—What is the anomaly in my case?

CHIEF JUSTICE—I do not observe that *Mr. Gilbert* called it an anomaly.

Mr. Gilbert—I did not use the word at all.

Attorney General—I understood *Mr. Gilbert* to be arguing that it would be an anomaly on my interpretation. I say it would be the same in that point of view; and so far we stand in the same position.

CHIEF JUSTICE—As I understand his view, according to the way you put it there would be a period in which the rents and profits would remain undisposed of.

Attorney General—I did not put, it in that way.

Mr. Gilbert—I said the Court could not see how they were to be disposed of.

Attorney General—The view on which I rest my case is this, that under the Will he left his daughters simply in possession of the property, recipients of the rents and profits.

CHIEF JUSTICE—Each of his daughters?

Attorney General—No—I did not say each of his daughters, because he bequeathed to each of his grandchildren *per capita* the fee simple of the estate. *Mr. Gilbert* argues that the words *hoof for hoof* meant nothing more than in equal portions. I must say I was surprised at that argument, because it appeared to me that *hoof for hoof* referred to the persons that were heirs of the testator, and equal portions to the shares that they were to receive; and consequently if the testator constituted his grandchildren, *hoof for hoof*, head for head, his heirs, then my contention must be right. And I attach the utmost possible importance to these words, which are a key to the whole Will, because the intention of the testator was, as we put it here, that the grand-

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children, born in wedlock, were to have the estate absolutely as an undivided whole with title of full property.

CHIEF JUSTICE—On the death of the last surviving child?

Attorney General—Yes.

CHIEF JUSTICE—But in the interim what was to become of it? That is the anomaly.

Attorney General—I do not see any anomaly, because the trust would be still subsisting. The fiduciary heirs and their children would be entitled to the benefit of that trust till the testator's bequest took effect, just in the same way that the trust would continue where a testator had tied up his property till the third or fourth generation.

CHIEF JUSTICE—I asked you just now if you meant the last survivor, and you said yes; but you see the case you are now putting is not the case of the fiduciary heir, but you are considering the other alternative. Well, this is a gift to the grandchildren, but not to be ascertained till the last survivor of the mothers died. What is to become of the rents? That is the anomaly.

Attorney General—I do not see any anomaly.

CHIEF JUSTICE—Where would the rents go?

Attorney General—To the fiduciary heirs.

CHIEF JUSTICE—And till the death of the last survivor?

Attorney General—To the heirs of the fiduciary heirs.

CHIEF JUSTICE—Not as taking the gift under the Will; but as representing their parents, they take the interim rents?

Attorney General—Yes. I say it can be taken in one or two points of view. In one, as the children of Bourda died, the last survivor would be entitled to all the rents and profits; but I do not think that that is the view. The way the Will is to be looked at is this, that Joseph Bourda intended that *Vlissingen* estate should be kept up as a trust till it was in a position to be absolutely vested in certain individuals; that till that event happened his children were to take the benefit of it; and according to the general rule of Dutch law, that even if no children are named, the lawful children of his own children would be entitled to the benefit of the fiduciary trust, so long as it subsisted; but that it was a trust as a whole, and the trust must cease as a whole. He did not bequeath

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it—it would have defeated his entire Will if it was to be considered that he left the trust to be divided and to be severed as his children happened to die, leaving lawful issue—that is to say, when the first of them died that the trust was to cease as regarded her share of the estate, and a certain number of the grandchildren were to have a vested estate. That is inconsistent with the words which he makes use of, whereby he plainly considered that whenever that period arrived plantation *Vlissengen* was to devolve as a whole, and a particular class was to be entitled to it.

CHIEF JUSTICE—Then, in that case, the interim rents, from the death of the first child up to the period of the gift to the grandchildren, I understand you to say, went to the grandchildren, as representing their deceased parents?

Attorney General—The interim rents would go to whoever were the heirs of the fiduciary heirs, and they happened to be the children. The trust still subsisted. The trust was to go on and it applied to *Vlissengen* as a whole.

CHIEF JUSTICE—I understand the general drift of your argument. The point I now wish to know is, in what way you get over the case that *Mr. Gilbert* puts, that there would be a period at which there would be nobody pointed out to take the rents of the property.

Attorney General—There would be somebody appointed, for this reason, that the children of the children are entitled just as much as if the words were inserted in the Will; and they would be entitled to take by representation. What I wish to submit to your Honours is this, there is an entire trust created; there are fiduciary heirs appointed; and there are certain *fidei commissary* or residuary heirs who were not at the time *in esse*. The testator, therefore, clearly contemplated that the estate was to be kept together, as I conceive, till those who were not *in esse* at the time were in a capacity to take; and the question before us is this, whether he contemplated the trust being broken up and going in undivided sixths, as it might have been, supposing all his six children had lived—or whether he contemplated that so far as his children were concerned, they should have the

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mere perception of the rents and profits of pln. *Vlissengen*, and the absolute bequest of the property was to take effect in favour of an unborn class *per capita*—that is to say, all those who should be legitimate grandchildren at the time of the last survivor dying. If it was so it would be an ordinary case of bequest by testator to certain fiduciary heirs, with a resulting *fidei commissary* trust in favour of unborn children, or parties not *in esse*. Even supposing that the testator in that Will had made no use of the word inheritance, and had said, “I leave to so and so and his heirs,” there could be no question that according to the Dutch law, till the individuals who were to get the absolute estate were in a capacity to take it, the fiduciary heirs would be entitled to receive the rents and profits; the trust would continue till the class to which the fee simple of the property had been devised was in a capacity to take it. I apprehend there can be no doubt about that. If you look at the authorities collected in *Burge* and the cases he cites from *Voet*, I think you will see that there can be no question at all about this proposition, as a general proposition of law, that if the testator creates a *fidei commis* in favour of a party not *in esse* at the time, the trust will subsist and the fiduciary heirs and the heirs of the fiduciary heirs will continue burdened with the trust up to the very moment of the limitation taking effect; and in that way this Will can be construed without, so far as I can see, the slightest anomaly. The fact of their being grandchildren, and the operation of the clause as to who might get the benefit of the testator's bequest cannot, I conceive, in the slightest degree, affect the question, because it does not matter whom the testator has appointed as his fiduciary heirs, if he appoints any other individual *fidei commissary* heir. He appointed a trust in *Vlissengen* in favour of a particular class who were not *in esse* at the time. Then, no matter who the fiduciary heirs are till that class was in a position to take, the fiduciary heirs by representation would continue, and the trust would subsist up to the moment of the limitation over.

CHIEF JUSTICE—I quite go along with you; but at the same time that makes a great concession to *Mr. Gilbert*,

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that the fiduciary heir has a several heirship—that each daughter takes severally. If the estate they take descends to their heirs, that seems to me a great concession to the argument which says that they take severally and their children take severally.

Attorney General—Your Honour appears, as I have noticed throughout, to view it in that light; but you must perfectly understand that I do not give up either of the first grounds about survivorship; but I say I am willing to argue it on that other ground, and I am unable to see in what way it is a concession.

CHIEF JUSTICE—But as I understand, *Mr. Gilbert's* argument is that in both cases he wants inserted the word “respectively.” If he could get that word in, I think his argument a very strong one, and you coincide that in the gift to the daughters, the fiduciary heirs, as you call them, each of them does take.

Mr. Justice NORTON—By virtue of the law, not under the Will.

Attorney General—I did not say under the Will. I say it is a general rule of law.

CHIEF JUSTICE—Well, that clause of the Will will be equally satisfied whatever construction you put upon it. Here you have a gift to three, and the question is whether it is to the survivor of them or to each of them. You concede that the gift is to the testator's own children. Is it to each of them? In order to suspend and keep the trust alive till the division, will each of the heirs of the fiduciary heirs, or will the whole, take the property till the division?

Attorney General—I am willing to argue the question in that way; but. it comes to the same thing. The main question your Honours have to decide is this, in whose favour was this trust created? Was it in favour of the separate children, or each of them—that is, *per stirpes*? Or was it in favour of the whole of the grandchildren as a class? And here the contention throughout is this, that the devise is to the entire number of grandchildren *per capita*, and that it can only take effect when all of his daughters are dead. If our contention on that point is correct, it does, not matter in the slightest degree how

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the fiduciary heirs are treated in the meantime; with respect to the fiduciary heirs and their heirs by representation, it does not matter in the slightest degree. The question is, to whom is the devise? Now, what are the words:—"All my property which I "may leave at my demise, moveable and immoveable, actions "and credits, in manner as they shall be at my death, from "which is specially excepted my plantation called *Vlissingen* "with all its appurtenances and dependencies situated near "Stabroek, which they, my said children and heirs, shall possess as *fidel commissarii*, without any deduction of the *Trebellian* portion. And after their death." What does "their death" mean but "the death of the whole of my children?"—"And after their death to devolve with title of property to their "children begotten in wedlock, head for head, in equal portions." Now, with respect to these other words, what do they mean? Their children born in wedlock. All of their children—all of my grandchildren, head for head. It is impossible, to my understanding, to give the construction that *Mr. Gilbert* seeks to put upon those words, head for head, without giving them no meaning at all. If equal portions and head for head are convertible terms, then they do not give effect to the testator's intention, namely, that his plantation *Vlissingen* was to be held in undivided entirety, not divided among his children. It was subject to a trust, and they had no right to the corpus of the estate. There might be four or five or more interested in it. There might be perpetual changes; but he expressly declares that *Vlissingen* is *only* to be possessed by his daughters. He does not leave it to them. They are only to possess it. They are not to have the right even of deducting the *Trebellian* portion. They are not to have a disposing power over the plantation at all; but it was to devolve on an event which the testator knew could not happen till many years after his death, because these children of his were minors at the time. It appears from the wording of the Will and the fact of his appointing guardians that they were minors; and yet he contemplated that *Vlissingen* was to devolve on the unborn offspring of those who were minors at the time. How is

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it possible to read this Will without reading it in its connection, the first part of the sentence in its connection with the next? What is to devolve? The entire property. And in what way is it to devolve, and when is the entire property to devolve? After their death—that is, after the death of all his children. And on whom? On their lawful children, head for head. In that state of facts, there must necessarily be a considerable period during which the fiduciary estate would subsist; but the way in which that fiduciary estate would be divided, as it appears to me, really does not affect the question who are the residuary heirs. It may be a question to be raised between the parties. I do not think there is the slightest chance of anything of the kind; but I am quite willing to argue it if it should arise. But the real question is, to whom was the plantation devised? Was it not willed to certain parties who could only be ascertained after the death of all his children? And these words head for head appear certainly put in with a meaning, namely, that it was his wish that plantation *Vlissengen*, then several townships, should be kept together, that his daughters should only possess that property, that they should have no right of inheritance in it, that they should have no disposing power over it at all; because they were not even to deduct the *Trebellian* portion, a right which, unless it is specially taken away, is given in the Roman law and the Roman Dutch law, of having a disposing power over a certain part of it. But they are not to have a disposing power over any portion of it. It is to devolve on the grandchildren after the death of the last of his children. *Mr. Gilbert* argued at great length that if my construction is correct, those words are unnecessary.

CHIEF JUSTICE—I think both of you point to the same construction of the words. *Mr. Gilbert* construes head for head to mean that the estate is to be divided equally between the three daughters and the stock to take. Only he says that the grandchildren are to be ascertained at the death of the parent. You say at the death of the last survivor.

Attorney General—I do not think that *Mr. Gilbert's*

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construction is the same as mine. The testator left *Vlissengen* to his grandchildren as a class. It was possible that none of his family, although they married, might have children; and therefore it was possible that at the death of the last of his children, when the resulting trust should take effect, there would be no person in a position to take. In that case, these not being his own legitimate children, although he treated them as his children and was willing to give them all the benefits—in that case, the property as undisposed of would go to his own relations in Holland; and in that case those children, as he puts it, procreated out of the body of the free mulatto woman Polly, would not have enjoyed the benefit he intended; but to prevent the contingency of intestacy he gave the last survivor without their being any legitimate grandchildren the power of disposal over the property, and that is the only power of disposal he gave to any of his children. If that is correct, then Mrs. de Coeverden's Will is bad, because she had no disposing power. The only way that she could have any disposing power over any part of the estate would be in the event of there being no legitimate grandchildren at all, and it would have been for the purpose of preventing the estate going out of the family. Now, I attach weight to this provision with respect to the exclusion of the *Trebellian* portion. It appears to me that according to the rational construction of the Will, the testator contemplated the case of one of his daughters dying leaving legitimate children before the event happened on which the estate was to vest. I hope your Honours understand the point I wish to put. If they had been simply fiduciary heirs, and there had not been this exclusion, even in that event, according to the provision of the Roman law introduced into the Dutch system, a fiduciary heir, although he has only that limited interest, might take, to the extent of the *Trebellian* portion, and the balance merely would go to the residuary heir; and I maintain that the very fact of the testator excluding this right at the time that he contemplated the possibility of his daughters having legitimate children—the very fact of his providing that even if they should die leaving legitimate children, they

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should not exercise the right of the *Trebellian* portion,—shows conclusively that his intention was that these children, were not to take any vested interest in the corpus of the estates, but that the residuary bequests were in favour of the grandchildren who happened to be alive and in a capacity to take at the time of the death of the last survivor. With respect to the vesting of the estate, if he had not inserted those words of exclusion, his daughters might under the Dutch law have retained certain interests which would vest to the extent of the *Trebellian* portion. But when he did not allow his daughters even to do that, but gave them only a possessory right in the estate, I think the fact strongly and overwhelmingly supports my argument that the bequest of the corpus of the estate, without any deduction at all, was made in favour of an entire class, which was not ascertainable till all his children died.

CHIEF JUSTICE—Would not the doctrine of the *Trebellian* portion apply equally to the children being ascertained on the death of the mother?

Attorney General—No.

Mr. Gilbert—Most decidedly.

CHIEF JUSTICE—It is a point in the argument that occurred to me, and I thought it right to point it out to you.

Attorney General—I am obliged to your Honour; but I do not see how it would operate, because the intention of the exclusion was, as I apprehend, that the whole of the plantation, without any portion carved out, should devolve to a certain class *per capita*.

CHIEF JUSTICE—Suppose each of them had been constituted heir of a share, subject to *fidei commis*. In the case of her own children at her death, the right of the *Trebellian* portion would then be excluded.

Attorney General—But these daughters might not have had children; and the object of the insertion of these words was, as I conceive, to prevent a contingency, but one necessary to provide for to enable his children to exercise a disposing power over the property. The contingency was, the whole of his children dying and there being no grandchildren at the time of the last survivor.

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In that single event he gave a disposing power; but with respect to everything else, no matter whether each of his children married and had offspring or not, they would have no disposing power at all in favour of any one. And the object appears to me to be clear—to keep the property together,—and when I speak of property I draw a wide distinction, as the testator does, between the rents of the property and the plantation itself. I presume he thought over the matter, and considered that, the event taking place so long after, the property would increase very much in value, and that it would be greatly increased by being kept in entirety, not split up into a multitude of undivided shares. But when the event on which this property had been bequeathed to his grandchildren took place, they should get the full benefit, and it should devolve upon them as an entire whole. Of course, the testator making his Will at that time and none of his grandchildren being born, and having no predilection in favour of one over another, he could not be supposed to draw any distinction as to one parent dying and leaving a great number of children, and another parent dying and leaving only one child. His intention was to benefit his legitimate grandchildren. He evidently wished to leave a lawful family to take after him, and all his, natural daughters were amply provided for; they had the rents and profits of the estate; but the parties to whom he left *pln. Vlissengen* were not his daughters. He did everything that it is possible for a person to do to prevent his daughters exercising any disposing power over it. He appears to have drawn the widest distinction between this estate and the rest of his property. With respect to the rest, he instituted them as his heirs. With respect to *Vlissengen* he instituted a particular class as his heirs, and he simply gave to his daughters the usufruct of it. And when I say the usufruct, I am not at all so unaware of the meaning of the term as *Mr. Gilbert* appears to suppose. When I use it I use it in the sense of his intending his daughters simply to receive the rents and profits of the estate, not that they should exercise the slightest control over the *dominium* of the estate; and from that point of view—for that appears

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to be the plain meaning of the words—there is the greatest reason why these words “hoof for hoof” should have been inserted. According to *Mr. Gilbert's* contention they mean nothing; but according to my argument, effect is given to every word; for he did not institute his children as heirs, and he would naturally put in those words. No matter what number of grandchildren there might be, the whole estate was to be divided amongst them.

CHIEF JUSTICE—I understood one part of your argument to be that “equal portions” meant that each family branch was to take a share, and “head for head” that each member of each family was to take an equal part of that share.

Attorney General—I have failed to express my meaning. I never intended that. What I intended was this, that the grandchildren as a class took, but in equal portions. Of course, the children of grandchildren would divide their parents' portions.

CHIEF JUSTICE—“Head for head” then applies to the children of grandchildren, and “equal portions” means that each should take an equal share?

Attorney General—The great-grandchildren do not affect the argument; but what I say is that the great-grandchildren simply take by representation the grandchildren's share. “Equal portions” means equal portions of the grandchildren's share, and the great-grandchildren would divide *per capita*. The fact of the grandchildren dying does not affect the case, because I believe the Dutch law is undoubtedly this, that where parties are not *in esse* at the time for whom a trust is raised, if they afterwards come into being, even supposing they happen to die before the entire devolution of the property, yet as a particular class for whose benefit the testator appointed the property, their children are entitled to all the benefits, supposing it is in the family; for in a case in which strangers are interested, and not the testator's own family, the rule of construction would be stricter.

CHIEF JUSTICE—Yes; but is not that inconsistent with the argument by which you seek to postpone the ascer-

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tainment of the class? You say the grandchildren are only to be ascertained at the death of the last survivor of the children. When that event happens we find that there are certain grandchildren who have died. In what light, then, are their descendants placed by an argument which says that the members of the class to be benefited is only to be ascertained in 1860? You let in the descendants of persons who died within that period, and you let them in as representing deceased grandchildren. But does not that seem to be at variance with your argument that the class of grandchildren is not to be ascertained till this postponed period?

Attorney General—No—I think not, because it is a peculiar rule of construction of the Dutch law with respect to representation. A bequest to children is a bequest to grandchildren and their descendants; provided they are in the family. In this way the testator's bequest is to his grandchildren and their children for the purpose of keeping the property in his family. It was to legitimate grandchildren that he wanted to leave this property, and he wanted it to be held, together as an entire estate, and only to devolve after the death of all of his children—that is, the entire estate. If he had intended to put it otherwise he would have used very different words. He would have said on his or her death his or her share shall devolve on his or her children. The great grandchildren do not take head for head; they take *per stirpes*.

CHIEF JUSTICE—You mean to say that it is possible some of his grandchildren might have died in the interval without children?

Attorney General—Yes; it is only great grandchildren by representation. According to the wide and liberal rule of construction which is quite in accordance with common sense, those children when the estate comes to be divided are entitled to have their parents' share, just as if those parents were alive themselves; and I am quite sure that the passages in *Burge* which I cited, both in the 2nd and 3rd vols., the 2nd especially, bear me out. There are various cases; and with reference to this *Mr. Gilbert* cited the decisions of *Sande*; but what *Sande* says is exactly making the distinction which I draw

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between a bequest or trust in favour of the family and a trust in which strangers are interested. All that *Sande* really says, if you compare the two decisions, 10 and 11, is that it is a doubtful question with respect to strangers; and the way in which *Voet* puts it amounts to this, that with respect to strangers it has been doubted and is to be decided according to the intention of the Will, whether grandchildren can take. The whole passage in *Voet* goes to this extent, that a bequest in favour of children as a class would in regard to the family itself be a bequest in favour of their representatives, being lawful, who would take by representation.

CHIEF JUSTICE—Yes; that is, the descendants of those who are members of the class; but you argue that the members of the class are only to be ascertained at the death of Mrs. de Coeverden; therefore it is the descendants of those grandchildren who might take.

Attorney General—I do not quite understand descendants of grandchildren in the way your Honour puts it—that is, those who were alive at the time.

CHIEF JUSTICE—Yes.

Attorney General—Then of course they would not come in as grandchildren. They would only succeed to their parents' interest. But whatever may be the devolution of the estate, as regards the rents and profits, I am perfectly willing to admit that, being members of the family, they are entitled in one way or another to their parents' interest. But it does not appear that this question is raised. The question that is raised is this, all of Bourda's children being dead, in whom does the estate vest? I must return once more to that “head for head.” I have always understood, and I believe it to be correct, although *Mr. Gilbert* says “head for head” does not necessarily mean *per capita*, that it is exactly the expression in the Dutch for what lawyers, using the phrase technically, in English mean by *per capita*.

CHIEF JUSTICE—I do not know how you could translate *per capita* into English except by “head for head.”

Attorney General—The grandchildren take *per capita* the fee simple on the death of all the children. That was the intention of Joseph Bourda—that the estate was

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not to vest till the death of the last of his children; and of course that the estate must be kept up by the fiduciary heirs, dividing the rents and profits among them in one way or another according to the law of survivorship; but that does not at all affect the contention as to the vesting of the estate when all his children died. I have tried to look at the question from various points of view, and I do not see how effect can be given to the Will of the testator if it is considered that plantation *Vlissengen* was not at the time of the Will intended to be kept together, so far as regards the fee simple of it till all his children died; because the only rights that were given to his children were fiduciary rights and the devolution of the estate is not contemplated at all till they are all dead; and the very fact of his using the words head for head and in equal portions shows that he contemplated the one entire property being divided at one point of time, and not that separate vestings of it should take place repeatedly with respect to undivided portions of it. He contemplated only one division of pln. *Vlissengen*, after the death of all his children. *Mr. Gilbert* says that it was an elliptical sort of expression and that it meant each child; but how could that construction consist with the devolution once and for all of the entire estate?

CHIEF JUSTICE—Of course, that is just the point on which he joins issue with you, that is to devolve once for all in entire estate.

Attorney General—Well—I have been paying the best attention I can to the case, and I have little doubt of what must have been the intention of the testator. I cannot see how it can be otherwise, because the whole scope and framework of this provision with respect to *Vlissengen* appear to show that the testator's object was to tie it up and put it beyond the power of his daughters to do anything with it.

CHIEF JUSTICE—Does *Mr. Gilbert* say that it gave the daughters any power to do anything with the estate, except that Madame de Coeverden had a right to devise her share?

Mr. Gilbert—As survivor and dying without children.

Attorney General—I think if the testator had intended

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to do that which it is now said he intended to do he would necessarily have used very different words. The very phraseology of the bequest as regards *Vlissingen* shows that he treated it as property that none of his children in any event whatever but one had anything in the world to do with, and in the subsequent part of the Will he provides for that one contingency; but the words of the Will, on which I am now addressing your Honours, I submit are words which evidently show that he intended to prevent his daughters, each and everyone of them, from having anything at all to do with *Vlissingen*. He left it to the grandchildren, and going on after providing for a certain casualty, he thus again takes up *Vlissingen* in a subsequent part of his Will with reference to the possibility of there being no grandchildren at all—that is to say, of there being no heirs at the time when the bequest would take effect; and then for that one single purpose, of disposal of the estate in the family, he gave the last survivor the power of appointment. But let us take Mrs. de Coeverden's Will—let us suppose that that Will is free from technical objections—suppose it to have been in every respect unobjectionable; she had no children, and she had no right to leave her one-third to whom she liked. If *Mr. Gilbert's* argument is correct she might have constituted Wright absolute heir of her one-third; and I ask you, is not that repugnant to the plain intention of the testator? Was it not his intention that the whole corpus of the property should go to his grandchildren, and not only two-thirds of it? If *Mr. Gilbert's* contention is right, this might happen—supposing all the children to have been married, two of them only having children, according to *Mr. Gilbert's* argument, there being six, the four-sixths could be left away in absolute fee simple from the testator's legitimate grandchildren. It may follow that five-sixths might—it may happen that one child only had issue. All the others might make Wills, not having children themselves, and say they each had a vested right to dispose of an entire sixth of plantation *Vlissingen*; and this would happen, that at the time of the death of his children the first devolution of five-sixths of

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Vlissengen would be held by entire strangers, and only one-sixth would go to his grandchildren. I think it very possible for that to happen, but that could not have been the intention of the testator, because his intention was even with respect to his daughters, if they had no children that *Vlissengen*, so far as they were concerned, should go to his grandchildren; and as I submit, Mrs. de Coeverden had no disposing power over *Vlissengen*, and the only way to effectuate the intention of the testator is that there being grandchildren, the class of persons in a capacity to take Mrs. de Coeverden's, it is vested in the grandchildren *per capita*, and they have a right to divide it among them.

CHIEF JUSTICE—But surely, it is not impossible that the intention of the testator may have been different. He may have said this—“I am going to provide for my children. I shall provide for those only who attain the age of 21, or who shall marry. I provide for them by giving them shares of my property; but I am also anxious that their children should be provided for, and therefore I qualify my parental intention so that each of their shares shall go in favour of their children; but if they have no children, they can do what they like. I have enough for all. If any of them have no children, and they want the property kept together for their benefit, let them do so; if not, let them dispose of it.” There is nothing unparental or impossible in that.

Attorney General—I think it quite impossible, because whether they have children or not, he excludes them from the disposal of the *Trebellian* portion.

Mr. Gilbert—Only in favour of their children.

Attorney General—Now, what was the bequest in favour of his children? Was it a bequest of the nature contemplated by your Honour? I think not. I think all he intended to leave to his children was the enjoyment of property without any power to dispose of it. We then come to another part of his bequest in which he disposes of the corpus of the property, and that corpus he disposes of to his grandchildren, and not to his children. If he had intended to confine the trust simply to the children who might be married, then I think that those words,

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without any deduction of the *Trebellian* portion, would have been out of place. But if, on the other hand, he intended that they should only possess as fiduciary heirs, without any disposing power, I think these words are essential to the intention of keeping together the property. If the testator did not wish to keep the property together, for the benefit of a different class, I think they might have had the right to exercise the benefit known as the *Trebellian* portion; but if his intention was to keep the property together, he had a right to exclude his daughters from it. Now, Mrs. de Coeverden claims the power to dispose of a portion of the property. This is the contention on the other side; but I submit it is perfectly plain that the testator's intention was that the children were only to possess as *fidei commissarii*, without any disposing power at all, and his grandchildren were to have the title of property. The testator's intention was to prevent Mrs. de Coeverden from doing that very thing which it is now sought to do. If Mrs. de Coeverden in years gone by had thought she had this right, I think she would have done many things which she never ventured to do, but the very fact that the property has been kept together in this way is a strong argument that she must have doubted in her own mind whether she had any interest in the property which could subsist after her death. I think she had none. She could only possess it as *fidei commissaria*, without the right to the *Trebellian* portion. The question is, where there are grandchildren has she the right to will away the property from the grandchildren? On the other hand, is it not the case that immediately after her death the property is to devolve on the grandchildren under the Will of Joseph Bourda? She could not prevent the division of that property by any Will after her death. I think that was the view taken by the Court in Harel's case. I think the Court in Harel's case at all events took this *view*, that the property on the death of Mrs. de Coeverden would have to go to the heirs under the Will of Joseph Bourda. The question was not raised at that time with respect to the division of the shares, and therefore it was not gone into. *Mr. Gilbert* read a passage from one of

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the reasons which I think seems to go this length, that according to the view the Court then took of it, the property would go in undivided thirds under the Will of Joseph Bourda; but I should be very much mistaken if my recollection of the case is incorrect in this respect, that the Court threw out nothing and said nothing which would indicate an opinion on their part that Mrs. de Coeverden had a disposing power over one-third of the estate; so that it should go away from the grandchildren. I only state that. The Court will look for their own satisfaction. What we wish is to have a decision on the Will. The Court is not bound by any precedent whatever. What we want is a decision whether the property devolves on the grandchildren under the Will of Joseph Bourda, or whether at all events Mrs. de Coeverden's share as claimed by her is to go away from the testator's estate to her heirs.

CHIEF JUSTICE—When the testator here says:—“My “children and heirs shall only possess as *fidei commissarii*, “without any deduction of the *Trebellian* portion, and after “their death to devolve with title of property to their children,” does he mean that they should only possess as trustees in favour of their children that is not only as trustees but as trustees so that it should devolve on their children?

Attorney General—That is a question as to how the Will is to be read. The Will is this, that the bequest in favour of his children is a strictly limited one. *Vlissengen* is bequeathed to his legitimate grandchildren, subject to certain benefits that his daughters were to receive in their lives; and as I understand they were only to possess *Vlissengen as fidei commissarii*. They were to possess it without the right of disposal; and the meaning I ask your Honours to put on the Will is this, that taken in connection with the rest of the devise the limited possessory right given to his daughters shows that the testator never contemplated that any one of those daughters was to exercise any disposing power over the property to the exclusion or detriment of the legitimate grandchildren; and I think, looking at the latter part of the paragraph, it is also material as showing that the testator only con-

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templated one single event in which any one of his children would have any disposing power at all over the plantation, and that was for the purpose of preventing the property from going away out of his family. But when he says they shall only possess as *fidei commissarii*, without any deduction of the *Trebellian* portion, and considering that these words have reference just as well to their not having children as to their having children, if the testator wished that his daughters should have any greater power, it would have been just the same as a person dying childless and wishing to leave her share of the estate to some particular friend or person she wished to designate. I think that the only effect of these words of such strict limitation is that the children are simply to possess as fiduciary heirs; they are not even to have all the rights of fiduciary heirs; and Mrs. de Coeverden had not the right to exercise a disposing power over *Vlissengen*.

CHIEF JUSTICE—Does the restriction stop at their children, or does it go further?

Attorney General—I conceive that the testator's object is to prevent the fee simple of the property from being split up. His object is that with all its appendages it should go to his heirs.

CHIEF JUSTICE—Of course your argument on the general question is that the trust was not for the children of any one, but for the grandchildren generally. But suppose the Court should take a different view on the general question, and go with *Mr. Gilbert's* construction that the bequest was to each daughter a third with remainder to her children on her death, so far as Mrs. Daly and Mrs. Boode are concerned, your view may be borne out; but when it comes to the case of Mrs. de Coeverden, is there any restriction on her, she not having any children? This is a view of the case in which the trust is assumed to be a trust not for any or all of the grandchildren, but for the children of each particular mother; but in this case there is no child; is there then any restriction on her right of possession beyond that in favour of a person who never has been born?

Attorney General—Of course, that is part of the general

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question. I do not give up my argument; but I submit that in any state of circumstances, putting it in the most favourable way for *Mr. Gilbert*, you could not hold it was the intention of the testator that were Mrs. de Coeverden was the last survivor and where their are grandchildren, one third of the property could be diverted from those grandchildren. I think the words of the bequest show the very limited nature of the right given to the children; and it cannot be considered, even from *Mr. Gilbert's* point of view, that Mrs. de Coeverden had any disposing power over one-third of the plantation.

Mr. Gilbert—My point of view, is that it absolutely belongs to her, she having no children.

Attorney General—I never could understand that, even in the view of the opposite side. It could only subsist if there were no grandchildren; but the intention of the testator was that if there were grandchildren the entire property should be kept in the family. If it were otherwise, Mrs. de Coeverden might, if this Will had been correct, have instituted Wright as her beneficial heir; she might have brought a stranger into the family; and then *Vlissengen* would have devolved in title of property, not to the grandchildren, but as regards this portion of it, to a total stranger.

CHIEF JUSTICE—I suppose Mr. Bascom is a total stranger.

Attorney General—I shall come to that question afterwards.

CHIEF JUSTICE—It might have happened in any other way, because any one of those grandchildren who take an undeniable share on Mrs. de Coeverden's death could bring a stranger into the family. That is according to your own account.

Attorney General—Then, it would have been the grandchildren doing what they liked with what was their own. Here it is Mrs. de Coeverden doing what she likes with what is not her own.

Mr. Gilbert—That is your statement.

Attorney General—Of course the testator never intended to tie up the property for ever; but he never intended that his daughters should divert the property

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from his grandchildren, and Mrs. de Coeverden had no more right to dispose of one-third of the estate than any other of his children. My contention is that none of his children had any power of disposition over the property, but they were only to possess it; and I think the word “only” a very important one—a word of strict limitation. It is a word showing that the children had no disposing power at all—the testator by his will exercised a complete disposition over the corpus of the property. He left to his children a simple possessory right; and in that point of view, whatever might be the decision of the Court, no one of his children had any disposing power. I am unable to say what meaning the Court could have had in Harel's case, if they did not take that view with regard to this point, because it is stated in the 24th reason:—“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 Bourda, deceased.” The Court will look at the way in which the suit was brought, and they will see that the parties were claiming as heirs of their respective mothers.

Mr. Gilbert—They did not claim as heirs of their mothers.

CHIEF JUSTICE—They must have claimed in the quality in which the lease was signed.

Attorney General—No—for if it had been in that way there would have been no occasion to prove the pedigree at all. There was no quality set out; and therefore it was necessary to prove the heirship.

CHIEF JUSTICE—I thought it was “*qq.* the heirs of so-and-so.”

Attorney General—It was incumbent upon the Plaintiffs in those proceedings to show that the fee simple of the property was vested in them—that they were entitled to it. All the leases of that time were framed on the Will of Bourda, and of course we resisted at every stage, the object being to put the parties to the proof that they were heirs of Bourda.

Mr. Justice BEETE—The rubric of the case was:—“Elizabeth Ruysch de Coeverden, John Baker Wright,

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“executor, Catherine E. A. Ely, Augustus Deodatus Boode, “Jules Victor Houel, for himself and as guardian of his son, by “their attorney Henry Sarsfield Bascom, John F. C. Von Grei- “sheim, as executor, &c, by his attorneys Adam Vyfhuis and “Colin Simson, and the said Henry Sarsfield Bascom in his “own right.” How Mr. Bascom could be an heir of Bourda I do not know.

Mr. Gilbert—They were generally called heirs.

Attorney General—The 22nd reason also shows the view the Court took:—“Because, admitting that the lease did not “labour under the defects heretofore pointed out yet Mr. “Ruysch, Mr. Boode, and both the children of Mrs. Maria “Daly, parties to the lease, being dead, their respective inter- “ests did not descend to theirs, but became vested in the person “entitled to the property under the Will of Joseph Bourda, de- “ceased.”

Mr. Gilbert—“Became vested.”

Attorney General—Of course the decision in Harel's case is not a decision that any member of the Court would absolutely feel bound by; because this question then did not arise. It was not discussed, for Mrs. de Coeverden was still alive. But I attach great weight to the further objection that I take, that even supposing the Court are against us, as I hope they are not, on the general construction Mrs. de Coeverden had no disposing power, because the only right given to her was a simple possessory right; and that being so, she had nothing to do with the property, and when she died her right ceased. Of course, she could pledge or give security on the rents of the property, during her life-time; she could do anything she pleased so long as she lived; but she had nothing at all to do with the property after her death.

The Court adjourned for ten minutes.

Attorney General—With respect to the question of the transports, I do not see that it in any way complicates the case; because if our contention as to the construction to be placed on the Will of Joseph Bourda is correct, then plainly these transports ought never to have been

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passed, and they are *ipso jure* null. There is no such thing as an indefeasible title in the sense in which the contrary argument goes; and that being so, of course the transports would have to be declared in these proceedings to be null and void, so far as they purport to convey any portion of the corpus of the estate. It is not my place to speak of the transports. I seek a declaration of the Will of Joseph Bourda, and I have brought these parties before the Court for the purpose of showing that everybody interested is before the Court. This doctrine will be found in *Mathias de auctionibus*,—that in judicial sales, which are the highest kind of titles—more so than transports—where there is a judicial title it is supposed to be a judicial warranty. But I apprehend the principle would be, supposing there were shares held by parties as fiduciary heirs, that the transport would be so construed as to give it legal effect, provided the words admitted it. Of course it would be absolutely wrong altogether if the Judge exceeded his jurisdiction in passing the transport. You will find the authorities on judicial title, which is higher than transport, collected in 2nd *Burge*, p. 573, and *Mathias*, b. 2, ch. 16. Even a title of this sort could be rescinded *ipso jure*.

CHIEF JUSTICE—It is a curious question, to know what is the value of a transport.

Attorney General—Well, it is very considerable; but it is not absolute.

CHIEF JUSTICE—It seems to be entirely tested by the title.

Attorney General—Not exactly. It does not bind us to errors or mistakes. If the Court is in error, then it is *ipso jure* null and void.

CHIEF JUSTICE—Then it does not stand higher than a transaction out of doors?

Attorney General—Well—it may be so; but errors may happen to all; but errors so rarely happen that, though it is not an indefeasible title, yet during the time I have been practising there has been only one case, that of Somersall, in which a transport has been set aside. It was a transport which ought not to have been passed.

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Mr. Gilbert—Because the Administrator General transported more than he ought.

Attorney General—I am not sure the Administrator General had anything to do with it. In 2nd *Burge*, p. 578:—“If the “preceding grounds are established, they render the sale *ipso jure* void.” But I do not know that it will be necessary in a case of this sort to declare the transports themselves null and void. It is a matter of no importance; because it would be sufficient to declare them a good conveyance of the rents and profits.

CHIEF JUSTICE—But if the Will is construed in your favour, the Boodes would have no interest to be transported to Bascom.

Attorney General—If you hold that by virtue of law Boode had no transportable right, then you cannot hold the transport good.

CHIEF JUSTICE—I thought you said it was a question of no importance to you.

Attorney General—No—I say if my construction is good, Louis William Boode had no share, and the transport is *ipso jure* void. If it conveys what the Judge could not transport, it is *ipso jure* void.

CHIEF JUSTICE—It seems to be merely a case of defective title.

Attorney General—It is a transport from A to B of such and such property, and we must go back to A's title. But the point I am now addressing myself to is this, if the Court wishes to support the transport as a transport of something, it might perhaps be maintained as a conveyance of the rents and profits to a particular day. It could not be a transport of the trust property after Mrs. de Coeverden's death, although it might be considered as a conveyance of a fiduciary interest. The first, which was to Baron von Greisheim, certainly might mean one or the other:—“The said Louis William Boode's one eighteenth share “in and to the plantation *Vlissengen*.” Now, the question is, what was his share?

CHIEF JUSTICE—An eighteenth share of plantation *Vlissengen*.

Attorney General—And:—“Including the ground rents, “leases, and rights of renewal thereof, the same

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“as the said Louis William Boode, or his estate or representative, could or would be entitled to on the first day of February, 1845.” It is singularly worded; because here is a transport passed on the 8th April, 1848, purporting to transport what he would be entitled to three years back. The whole of the transport is this:—“On this day, the 8th April, 1848, appeared John Kennedy, Administrator General of Demerara and Essequibo, “as such administering to the insolvent estate of Louis William Boode, deceased, which appearer declared by these presents “to cede, transport, and in full and free property to make over “to and in behalf of Eugenia Clementina Von Greisheim, born “Boode, her heirs and assigns, the said Louis William Boode’s “one-eighteenth share in and to the Pln. *Vlissengen*, including “the ground rents, leases, and rights of renewal thereof, the “same as the said Louis William Boode, or his estate or representatives could or would be entitled to on the 1st day of Feb., “1845, by order of the Honourable the Supreme Court of Civil “Justice.” Perhaps if it was necessary to enter into the question here it might be as difficult to give a construction to this transport as to give a construction to the Will of Joseph Bourda itself; but it is not of importance, because if it purports to transport any portion of the corpus of the estate, it is simply null and void. Mr. Bascom’s transport is similarly worded, although there is a slight difference; and what might be the effect of that transport is a matter which I will not now discuss. However, it is brought before the Court, and we do not enter into that discussion. We simply say that a transport was passed which purports to be as follows—whatever it may mean:—“One undivided eighteenth share in and to the abandoned plantation “*Vlissengen*, including the ground rents, leases, and right of “renewal of the several townships formed in part of said estate “or plantation, including all arrears”——The wording is not very accurate. There are two “includings”:—“Including all “arrears of rent of and on leases or otherwise due on the eighth “day of June 1848.” That is the only interest Mr. Bascom has in the matter. What is the extent of that interest may be a question;

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but if it purports to be a conveyance of any portion of the absolute corpus of the inheritance in this suit, then, in my apprehension of the law, it is null and void. The passage I cited from *Voet* lays down the doctrine distinctly that during the existence of *the fidei commis* it is impossible for any person to alienate any portion of the property. There may be cases, and I do not dispute it, in which the conveyance might be supported as the conveyance of the fiduciary interest, but this is all; and if a transport could be made of a fiduciary share it might to that extent, but that is all. If it is sought to be read as a conveyance, what is called a transport of the fee simple itself, then it is *ipso jure* null and void. Then, with respect to the question of the Dalys, the suit was brought for the purpose of having it declared that Mrs. De Coeverden's Will was null and void for certain reasons of a technical nature, and further for the substantial reason that she had by law no disposing power over any part of the property, the same being strictly limited by the terms of Joseph Bourda's Will; and we further declare that by the terms of that Will the property was to vest in the grandchildren born in wedlock. Thus the Dalys were brought into the case much in the same way as Mr. Bascom, as having an interest. *Mr. Gilbert* says whether legitimate or illegitimate they will still have an interest, and therefore that shows that they are parties who ought to be brought before the Court as having an interest in the construction of the Will of Joseph Bourda. But I do hope that your Honours will not hold that in a suit brought for this special purpose you should determine the actual status of these Dalys.

CHIEF JUSTICE—Then, two-eighteenths and one-third of the property are to remain unappropriated?

Attorney General—I do not say that.

CHIEF JUSTICE—If we are to leave the question whether Mr. Bascom has a title and whether the Dalys have a title, the effect will be to leave it.

Attorney General—No—the decision will settle the law of the case, and by the suggestion thrown out by your Honour, for which I feel obliged, namely, the legal accounting, Wright would be liable to account as claiming

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to be Executor; and if you give a judicial decision on the Will that would be sufficient. There are points that may not arise, or if they do arise they may be settled by the parties themselves. But the main point on which this decision is sought is entirely irrespective of the question whether those parties were born in wedlock or not. Of course, if the Court is to give a decision as to the rights held by Mr. Bascom under his transport, then, if our point of view is correct, the decision must be that he has no sort of right at all in the corpus of Plantation *Vlissengen*. If, on the other hand, the Court consider the transport as transporting one eighteenth of the corpus of the estate, and that Louis "William Boode had a transportable interest, then the Court will give it to him; but if he had not a transportable interest, then the Court will decide accordingly. With regard to Baron Von Greisheim, he submits himself to the Court. He has always had his opinion on the subject. *Mr. Gilbert* seems to consider him insane on the subject.

Mr. Gilbert—I did not say that.

Attorney General—You used the word insane.

Mr. Gilbert—Not for holding those opinions. He thinks everybody in a conspiracy against him.

Attorney General—No—he does not.

Mr. Justice BEETE—Is he willing to submit to the declaration that his transport is not good?

Attorney General—Yes; he is perfectly willing to submit that the Court should declare that; but he has an interest in keeping the estate in the family. Some reference was made to the mortgage. Mr. Bascom represented both Mrs. Ely and the Von Greisheims when it was passed. It is not put in evidence. I do not know if the Court will look at the various transports and mortgages; but I do not object to the Court doing so, if it pleases. It was a family arrangement. The power of attorney will show that Mrs. Ely was indebted under the Will of her parent to each of her sisters. It says:—"Whereas my late sister, "Eugenia Clementina Von Greisheim, the wife of John Frederick Charles Hermann Baron Von Greisheim, at the time of her "decease was executrix of my late father, the said

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“Edward Gustavus Boode, and she claimed of me in such capacity or otherwise the sum of three thousand eight hundred “and ninety eight dollars fifty-seven cents, in respect of money “due by me to her as such executrix of my said late father, or “otherwise due to her from me; and whereas my said sister “Eugenia Clementine Von Greisheim being deceased, the said “claim is setup against me by the said John Frederick Charles “Hermann Von Greisheim on account and behalf of his infant “children by his said late wife, Eugenia Clementina Von Greisheim, Ernst Christian Hermann Gunther Von Greisheim, “Sophia Luitgard Henrietta Eugenia Von Greisheim, and Otilia “Johanna Marianna Elizabeth Von Greisheim, as their natural “and lawful guardian; and whereas I have agreed with the said “John Frederick Charles Hermann Von Greisheim to enter into “and execute the security hereafter mentioned; now know ye “that I, the said Catherine Elizabeth Adelaide Mills Ely, do “hereby nominate, constitute, and appoint Henry Sarsfield “Bascom, of Demerary, in the colony of British Guiana, “Esquire, my true and lawful attorney for me and in my name “and on my behalf to convey and make over by way of mortgage to such person as he shall think most proper”——It was merely a security to these children of Von Greisheim:—“All my share, estate, and interest.” She does not say what it is—she puts it generally:—“All my share, estate, and interest, present and future, of and in all that pln. called or known by the “name of the *Vlissengen* plantation, situate in Demerary, in the “colony of British Guiana, and appurtenances, for Will securing the payment of the said sum of three thousand, eight hundred and ninety-eight dollars fifty-seven cents to the children “of my said sister respectively, or the survivors or survivor of “them, within ten years after the decease of my aunt, Elizabeth “Ruysch.” That shows pretty well what she thought it was to secure; because it was to take effect *after* the death of Mrs. Ruysch.

CHIEF JUSTICE—It affects to give a very substantial interest.

Attorney General—But it is simply security. It is a

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bond securing the parties to whom she was indebted. However, if the status of these Dalys is to be determined one way or another, although I submit that it is not a question before the Court, in what position does the case stand? There is no evidence whatever with respect to them; there was certain evidence tendered, which was rejected. I understand your Honours to say you do not attach any weight to the judicial act of donation. I understood his Honour the Chief Justice to say that. I should have wished to put it on the ground that as it was a judicial instrument passed by the Councillor Commissaries, it must have been considered as a family settlement passed under the sanction of the Court in the same way as a family settlement might have been passed before the High Court of Chancery, supposing it gave directions to that effect. I think it is in the nature of a judicial arrangement. It is not a private settlement, but a settlement judicially passed, just in the same way as if passed before your Honours; and in that point of view I submit that it is a most solemn document. Of course, if your Honours think it is worth nothing, without independent evidence, so much the worse for me; but according to my understanding of the Banbury peerage case, the law goes to this extent, that even were the husband and wife living together, a solemn instrument of that sort as evidence of conduct would be received.

CHIEF JUSTICE—Other circumstances being shown of non-access, although there was cohabitation, a living together within the four seas, or four walls. There were other circumstances shown in that case, on which the Court sought to determine. The circumstance of impotency was present in the Banbury peerage case, although there was cohabitation.

Attorney General—Well, if the declaration had been admitted, coupled with the act of donation, it would afford ample proof. But if you think that the donation cannot be taken as an act I must submit. If on the other hand you think it can be supported as evidence of a judicial settlement, then there is evidence of the highest possible kind to show that in years gone by these Dalys were treated as illegitimate, because where an instrument

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of this nature is sanctioned by the Court it amounts to conclusive evidence of a family arrangement. It is something more than a mere private deed or instrument; but if it had been a private deed it would have been evidence as conduct of the mother. If the declarations had been admitted that presumption would have been fairly raised; but the declarations are not before the Court. They have been rejected; but the act of donation is before the Court, and I submit that it stands on its own merits as a substantive document. It really amounts to the same thing as if there had been a suit to declare legitimacy, and I submit that if these Dalys had considered the arrangement a prejudicial one, they might have instituted proceedings, or they might have appealed, or done something for themselves; but from the fact of an instrument of that formal nature having been passed, I submit we must infer acquiescence.

CHIEF JUSTICE—You treat lying by as acquiescence.

Attorney General—Not mere lying by, but I say it must be presumed when there is an instrument of that sort declaring their illegitimacy, and making a family arrangement, that they acquiesced in the arrangement.

Mr. Justice NORTON—We do not know that it ever came to their knowledge.

CHIEF JUSTICE—We do not know up to this moment whether one of them has even known of it. They may never have received a half-penny of the money.

Attorney General—If your Honours will look at Harel's case you will see.

CHIEF JUSTICE—Were they parties to it?

Attorney General—No—I admit they were not; but they took a benefit under the Will of Richard Joseph Johan Edward Daly, and not as heirs of their mother. But of course the case stands in this position, that we were bound to state illegitimacy. There has not been the slightest proof on the other side. We have tendered certain proof, which has been rejected by the Court. If that proof is rejected and if the parties choose to appeal, the case may come back for evidence on that point. But if your Honours hold that this question must be determined one way or the other, I do trust that you will give

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a decision on the whole question for appeal; and it would depend in a great measure on the construction you give of the Will of Joseph Bourda whether that is a question worth raising or not. If it be decided that it was only a vested interest that Richard Daly had to bequeath, it might not be a matter of much importance; but on the other hand it might be a question of considerable importance; and therefore all the parties being before the Court, I think that a collateral matter of that sort might be allowed to stand over for further hearing. But I wish that there may be no misunderstanding on the point. If you hold that you cannot do so, then I submit that you must declare these Dalys illegitimate, unless they are proved to be legitimate. Of course, I must stand or fall by the rejection of this document; but what I want, and all the parties want, and I fancy the Dalys as much as ourselves, is a declaration of law; and even supposing that this was one of those cases in which there could be an absolution of the instance on that particular point, or for the case to stand over for further hearing, then there would be no reason why the main point of law should not be decided. But if your Honours hold that you must decide on that question, then I must take the consequences of my evidence; but I do submit that the very way in which the pleadings are framed shows that every person who can possibly be interested is before the Court; and that only in order to do that we bring the Dalys before the Court, not that the Court may say whether they are legitimate, which we do not acknowledge them to be. On the other hand, they deny the relevancy and pertinency of our allegation. Of course, they are admitted to be children of Mrs. Daly. *Mr. Gilbert* says that in one point of view it does not matter, because they can take in right of their mother. They are brought into the proceedings and joined as Defendants in the suit, with a party who claims a third of the estate as Executor to Mrs. de Coeverden; but to join every person who has an interest, and to prevent a multiplicity of suits, all parties who have a conceivable interest are brought in. In the same way *Mr. Bascom* and every person in the suit will be bound by the decision. It will be *res judicata*

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as regards them. These are the various observations that have occurred to me in answer to the case put forward by *Mr. Gilbert*, and to sum them up briefly, I put the several points in this way—First, that if the Will is read according to the rules of construction of English Wills, then there would be a clear survivorship in favour of the last daughter, and a limitation over to the grandchildren of the testator. If, on the other hand, the Will is to be read as a bequest in favour of the fiduciary heirs, *the fidei commissarii* heirs not being *in esse* at the time of the Will, then, although the words of the Will may be apt with respect to the fiduciary heirs—although the words of the Will may be perfectly apt to give their heirs the right by representation to receive the rents and profits during the existence of the trust—yet when you come to the devise over it is a devise in favour of a particular class, and it is perfectly consistent with the wording of the Will that the fiduciary heirs and their children by representation should be entitled to the reception of the rents and profits of the estate—I say it is perfectly consistent with that interpretation and the wording of the Will to hold as regards the limitation over which is a bequest to a class, none of them in existence at the time, that the fiduciary estate should subsist till the trust ceased and so soon as the parties came into existence and the event took place, namely, the death of the last survivor, then there is an end of all beneficial, or usufructuary, or whatever other phrase you might be pleased to use—there is an end to every participation of the rents and profits; then for the first time *Vlissengen* vests—it vests as an entirety at one moment of time, and in favour of an entire class, that class being the grandchildren of the testator.

CHIEF JUSTICE—And the descendants of deceased parents?

Attorney General—I am coming to that—the grandchildren of the testator, and who consequently take *per capita*. If a grandchild born in wedlock, and therefore entitled to this benefit as *fidei commissary* heir, died, his children would be entitled to succeed to his place, because it is a bequest in favour of the grandchildren of the

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testator. If the bequest had been in favour of the children of a stranger, then it might have been different; but where the bequest is to the grandchildren of the testator himself, their issue take by representation from their parents, because the law says that the intention will be presumed. The Court will find that laid down in *Burge*.

CHIEF JUSTICE—Anything different from what you have already given us?

Attorney General—No—the same two chapters. If it were not so, then the two surviving grandchildren would shut out all the others, and Mrs. Ely and A. D. Boode would be entitled to the whole; but acting on behalf of these, I am not asking for any undue advantage over any of the others, I ask only for what Bourda intended should be carried out. Nothing should be taken from his testament. They are quite willing to admit the descendants of grandchildren, Houel and the Von Greishems; but the others we refuse to admit, because they were not born in wedlock.

Mr. Justice NORTON—Suppose the great grandchildren had children, would they come in? Where would you stop?

Attorney General—I think *Burge* says at the fourth generation, and instances are given in which it has been carried to that extent. Then, that is the construction we place on Bourda's Will. We say that if our construction is correct then the Will of Mrs. de Coeverden is worth nothing; but even on a more limited construction, we say it is wholly inoperative, in so far as it purports to bequeath a portion of the corpus of *Vlissingen*, because the testator never intended that any of his daughters should have any disposing power over the property, except in the one single contingency of its otherwise lapsing and going to his relatives in Holland; but the daughters were only to have a *fidei commis* without the *Trebellian* portion; so that Mrs. de Coeverden only possessed an interest in the rents and profits of *Vlissingen*, and she had no disposing power over the corpus of the estate. If that is so, then the Will must be set aside, and Wright has no right to administer the corpus of a

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portion of the estate, or sell a portion of it for payment of her debts; because the moment she died the right vested in the grandchildren. With respect to Baron Von Greisheim's transport, he submits himself to the Court. With respect to Mr. Bascom's transport, we say if that purports to convey the absolute eighteenth share of the property, it is *ipso jure* void, because Louis William Boode had no disposing power over it. With respect to the Dalys. they were brought before the Court merely to show that every one interested was here. That is the only reason they were brought, for the purpose of getting a decision as to the meaning of Mrs. de Coeverden's Will, and by a necessary consequence Bourda's Will, by which all parties claiming an interest should be bound. On the other hand, if your Honours should think it necessary for you to determine, in a suit brought for the purpose of ascertaining what is the meaning of the Will, and which for all the purposes of the suit can be exactly fulfilled without determining that question—we say that they are not legitimate, and there is no proof on either side; but if you hold that you must determine that question, then rather than have a postponement of the decision I am willing to stand or fall on the evidence. I only hope, however, that on that point the Court will give both parties the opportunity of adducing further evidence, because I certainly conceive that I had a right to believe, and I did believe, that these declarations would be admissible, and I had no idea that they would be thrown out, because they were not objected to before. On the other hand, if *Mr. Gilbert* says—and I concede to him the same implicit credence that I claim for myself—that he understood that they would be——

CHIEF JUSTICE—Let us understand that. If the question is postponed, are we to proceed on the evidence as it stands?

Attorney General—I would rather the Court proceed on the evidence as it stands, so as to obtain a final settlement.

Mr. Gilbert—I am quite satisfied.

CHIEF JUSTICE—If you seek to postpone the case for further evidence, we would have no objection to let it stand over.

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Attorney General—These are the various points I have to submit on behalf of my clients. At the same time, I do trust, that is if your Honours consider that you must deal with the question of the status of the Dalys, you will not consider that you are bound to decide it conclusively one way or the other in this suit. I must confess I have a sort of personal feeling on the point. It seems to me, and it must appear to everybody, that when this old gentleman was so anxious that this property should only go to legitimate grandchildren, we ought not to defeat his intention.

CHIEF JUSTICE—Of course in the absence of evidence, we presume that you are proceeding on the assumption that they are illegitimate.

Attorney General—It must be very vexatious to have this property going to illegitimate children.

CHIEF JUSTICE—I suppose the various parties have endured a great many vexations already.

Attorney General—I merely said that as a matter of feeling. No person can have any moral doubt about the matter. At the same time, my clients are anxious to get a final sentence, and they are convinced that half loaf is better than no bread.

CHIEF JUSTICE--With the view of facilitating matters, I this morning hastily wrote some passages here which seem to me likely to carry out the suggested alterations in the pleadings. The Plaintiffs ask us to give a declaration hostile to the Defendants, and the Defendants object to such a declaration. Consequently, unless we can make a declaration in a particular sense, we must reject the suit. What I would suggest I have taken down. I do not propose that it should be settled formally now but in the interval in settling our judgment it may be considered by Counsel. [His Honour read the memorandum.] The Registrar will give Counsel copies, so that in the interval of considering our judgment, it may be adopted.

Mr. Gilbert—It amounts to this, that in my answer I state specially what we claim.

CHIEF JUSTICE—Yes; I think it would be better.

Attorney General—*Mr. Gilbert* might well conclude that our claim be rejected.

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CHIEF JUSTICE—The fact is that he does conclude to reject your declaration; but he also claims, as I understand, that the Court should declare certain rights and interests of his clients.

The case was then closed.

EXTRACT

From the minutes of the proceedings of the Supreme Court of Civil Justice of British Guiana, held for the counties of Demerary and Essequibo, at the Court House in Georgetown, Demerary, Monday, the 19th of June, 1865, in the matter of Catherine Elizabeth Adelaide Ely, born Boode, widow, of Paris, in the Empire of France, Augustus Deodatus Boode, of Dusseldorf, in the Kingdom of Prussia, Jules Victor Houel, of the city of Paris aforesaid, and Honoré Desiré Houel, of the city of Paris aforesaid, severally appearing by their attorney in this colony, Roelof Hart, Plaintiffs—*versus* John Baker Wright, styling himself sole executor of and under the last Will and Testament of Elizabeth Ruysch de Coeverden, late of the city of Paris, widow, deceased, by his attorney in this colony, Henry Sarsfield Bascom, original Defendant, and John Baker Wright, as executor to and of the last Will and Testament of Richard Joseph Johan Edward Daly, deceased, Maria Marianne Daly, Jean Eugene Henry Daly, severally represented in this colony by Henry Sarsfield Bascom, the said Henry Sarsfield Bascom, the Administrator General of Demerary and Essequibo, as representing the insolvent estate of Louis William Boode, deceased, the Administrator General of Demerary and Essequibo, as representing the insolvent estate of Jules Theophilus Boode, deceased, and John Frederick Charles Herman Von Greisheim, for himself, and as executor to and of the last Will and Testament of his deceased wife, Eugenia Clementina Von Greisheim, born Boode, and as father and natural guardian of his minor child Johanna Marianne Elizabeth Ottilia Von Greisheim, and Ernest Christian Hermann

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Gunther Von Greisheim, and Sophia Luitgard Henrietta Eugenia Von Greisheim, severally represented in this colony by their attorney, William Frederick Haynes Smith, co-Defendants.

It is to us a matter of regret that, although Mr. Justice NORTON concurs in the result and decision at which the Court has arrived in this case, he so far dissents from the mode in which we have come to that conclusion, that we have not the satisfaction of his concurrence in these reasons. The case is one which has received the fullest and best consideration of the Court, not so much because of the magnitude of the interests involved in it directly and indirectly, as because of the importance of some of the questions on which those interests may be thought to depend, and the extent and elaboration of the arguments of Counsel to which they, gave rise at the hearing. *It is therefore with great regret that we find ourselves forced to the conclusion that the Court cannot decide the questions or determine the rights which have been thus submitted for its decision, and that for reasons which it has on various occasions had to notice and enforce on the attention of Counsel, viz: that as we are asked to interpose so as finally to declare and set at rest the rights of the parties interested in this large inheritance, it is necessary to have a complete statement and evidence of all those facts on which such decision ought to depend.*

The suit is one in which the parties seek to have their rights ascertained and declared with regard to the property which under the denomination of Plantation *Vlissengen* was devised by the Will of Joseph Bourda who died in the year 1798. The plantation in question at the date of the testator's Will was on the verge of the Dutch town of Stabroek, and it has since to a great extent been incorporated in that town, or rather in the colonial capital of Georgetown, into which Stabroek has under British rule been absorbed. A portion of the property has, at least as regards the supposed interests of most of the parties to this suit, become vested in a body of Commissioners for public use, and is now represented by a large sum of money in the hands of the Colonial Receiver General. This fact is not noticed in the pleadings, but

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it is within our common knowledge, and it has been brought about by an Ordinance of which we have judicial knowledge.

This is not the first occasion by several on which the rights of the parties interested in this plantation or parts of it have been called in question. Indeed, this suit is a reproduction with some extension of its scope and parties of one very similar, which was brought to a hearing in this Court a short time ago, but which the Court then deemed so far defective and restricted in its frame that the relief thereby sought could not be given in it.

The view which was then acted on, and which the Court took some pains to explain and enforce, inasmuch as one of us in particular thought that he could foresee some danger of that view not being fully apprehended and applied, was really nothing but the judicial embodiment of the ordinary practice of men of business, who might' have to determine similar questions in order to discharge a trust reposed in them under a Will in similar terms. And such trustee would as a matter of course under proper advice consider every doubtful point which might reasonably arise under such a Will; he would enquire into every step of the pedigree which the questions might give rise to or which might give rise to questions,, and until he was satisfied that there was no doubtful point that had been overlooked, and no persons other than the claimants at his hands who were interested in the property claimed by them, he would decline to admit their rights or to hand over the property to their possession.

It would be strange indeed if a Court of Justice, having such analogous yet so far more responsible functions as we are asked in this suit to exercise, should be expected to act with less precaution and less information than any trustee in ordinary life would be bound to adopt and to seek. We thought and held therefore that where a number of persons ask us to decide and establish their rights to an inheritance, and when to ascertain and establish those rights involves, besides the possession of that inheritance, the determination of points, not of general law common to all the world, but of the particu-

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lar construction of a private Will and the decision of various supervening questions of fact and law, where such questions are raised, not by a party claiming under the instrument against a stranger invading his possession or his alleged right, but as between those who take under the instrument itself, the Court is bound to decline such questions except in the presence of all parties interested who can be brought before it and upon evidence shewing that all such parties are in fact present, represented, or accounted for.

That decision was in conformity, so far as we are aware or has been shown at the bar, with the practice of this Court; and, though a case of this precise nature does not appear to have occurred, it will be found that in the elaborate reasons of the Court pronounced in a former suit brought by some of the parties interested in this property against Mr. Harel as the occupier of some part of it, that the Court gave great weight to the consideration, which perhaps might not appear to occur there so inevitably or forcibly as in this case, that all the parties interested in the subject matter or in the questions discussed were not before it.

Our decision was moreover in conformity with the analogy of the English law and practice in cases of this nature as well as with the principles of justice, order, and caution by which the Court ought to regulate its practice. Indeed, as this Court has not any practice or machinery which would enable it to refer to its officer any preliminary enquiry as to the parties to a suit, whether they fill the characters alleged and fill up the classes represented, it is evident that in any other mode of proceeding the Court would place its judgment and authority at the service of any designing persons who might wish to make it a cat's paw to accomplish their own objects, and enable them upon a given or assumed state of facts to obtain a decision which would not appear to be one by consent but which might operate in some cases as a final judgment, and short of that as a grave practical hardship and injustice such as might greatly impede and prejudice the rights and interests of persons not before it.

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Having regard to the circumstances of this case, we think it is eminently one for a somewhat rigid application of this wholesome principle. For though it is said that the parties before the Court have been waiting for many years under circumstances of pressure to obtain the final adjustment and possession of their rights, (as to which it may be observed that there appears no good reason why they should have so long delayed, and that in the meantime they have enjoyed other large benefits under the testator's Will, including to a great extent the income of this property), but certainly, after such long delay the pleading and evidence might well have been now complete at every point. The family pedigree lies in a reasonable compass, as to its periods and steps; and though it is extensive the property is very large. The law of the colony greatly facilitates the case by authorising the Administrator General to represent absent parties. And not only are the questions raised such as are proper for the decision of the Supreme Appellate Court, so that their decision would be practically final, but some £24,000, now in the hands of the Colonial Receiver General, might under our decree be at once paid amongst parties some of whom are said to be in very narrow circumstances, so that it would so far be practically irrecoverable should it turn out under the circumstances of the case to represent the share of any one else interested in the estate.

We have enlarged so far on the principle of our former decision, because we regret again to have to apply that principle to this case, as we shall presently show in detail. The result of that decision was that the former suit was abandoned, and this was instituted on a somewhat enlarged basis, and bringing some new parties before the Court.

To apprehend the case as it stands it is necessary now to turn to the Will of the testator which is at its foundation. The Will was duly executed as what is called a "closed Will," and we may pass over its contents down to the general residuary gift, which is set out in the claim and demand both in the original Dutch and in a translation. The translation, which may be taken as correct, though some points in it may be open to criticism, is as

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follows—"Coming to a final disposition, I declare under the following conditions to nominate and institute my children, Catherine Elizabeth, Maria Nancy, Joseph Charles, and Jan Lodewyk, all six procreated by the free mulatto woman named Polly, as my sole and universal heirs to all my property which I may leave at my demise, moveable and immoveable, actions and credits, in manner as they shall be at my death, from which is specially excepted my plantation called *Vlissengen* with all its appurtenances and dependencies situated near to Stabroek, which they my said children and heirs shall only possess as *fidei commissari*, without any deduction of the *Trebellian* portion, and after their death to devolve with title of property to their children begotten in wedlock, head for head in equal portions.

"Nevertheless, if so be that one or more of my before-named children should happen to die before being married or before coming of age, (which God forbid), such share or shares shall accrue to the remainder, and so on to the last survivor, which last shall possess the same with title of clear property as far as regards the property so left by me, and with respect to plantation *Vlissengen* subject to *fidei commissum* in case the last survivor of them shall have begotten a child or children in wedlock."

The testator seems to have left five of these children (who appear to have been illegitimate) surviving him. But we know nothing more of the state of his family at his death. It is stated that the sixth, Jan Lodewyk, died in the year 1798, but whether before or after the testator there is nothing to show. This suit stands now as one by Madame Ely and Mr. Boode (two children of the testator's daughter Catherine who married one Boode), Mr. Houel, senr., the widower of another child of Catherine Boode, and his son by Madame Houel, deceased, against Mr. Wright, the executor of the impeached Will of Madame de Coeverden, (the testator's daughter Elizabeth), and the executor of the Will of one Richard Joseph Daly, (a deceased son of Mrs. Daly, the testator's daughter Maria), Miss Maria and Mr. Jean Daly, (two children of Mrs. Maria Daly, whose status as legitimate

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is in question), Henry Sarsfield Bascom, the purchaser of a share in the inheritance attributed to one Jules Theophilus Boode, deceased, (son of Madame Catherine Boode), the Administrator General, (as representing the estate of the said J. T. Boode, and of his brother Louis William Boode, deceased), and the Baron Von Greisheim and his child. The Baron appears as a party in the capacity of executor of the Will of his deceased wife, (who was one of Madame Boode's children, and who took a transport of her brother, J. T. Boode's share of this property), and as guardian of one of her children, who is a minor, and named a defendant, the others of his children being of full age, and all these children being great grandchildren of the testator.

Thus framed as to parties, the suit was originally addressed to three objects. First, to declare that Madame de Coeverden's Will was null and void, or at all events (having reference to the true construction to be put on the testator's Will) inoperative to pass any interest in the *Vlissengen* estate; 2nd, to declare that upon Madame de Coeverden's death, the plantation devolved under the testator's Will in a certain mode in the Plaintiffs' interest; and 3rdly, to affix the costs of the suit upon Mr. Wright.

Upon the case being argued, it appeared that the relief sought, even if technically such as the Court could grant, was much too narrow to effect the object in view, and by consent of all parties, and by leave of the Court, the pleadings were amended by introducing certain additional matters, and in particular by asking that the rights and interests of the several parties in and to plantation *Vlissengen* might be ascertained and declared, for an account against Wright (who has been in possession as to part for some time) of his receipts from the property on the footing of such declaration, and for some ancillary relief against the transports of the shares of J. T. Boode and L. W. Boode, deceased, which have been passed in favour of Mr. Bascom and Madame Greisheim.

The case is substantially one of construction and consequent devolution, the history of the devolution involving a great number of facts mainly bearing on pedigree.

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It is we think very clear that the Court ought not to make a dry declaration on the construction except with reference to the actual rights of the parties before it, and thus the question of construction is inevitably connected with the history of the devolution. The main point of construction which awaits decision is as to what interest the testator's children who have been named and their descendants took under the terms of the Will in the *Vlissingen* estate? And as this suit is framed it would seem to be addressed solely to the question of their rights as at the death of Madame de Coeverden, the testator's daughter, Elizabeth, who died in the year 1860, without issue. It is said that Jan Lodewyk. Nancy and Joseph Charles died unmarried and infants, and all the parties assume that the property in question has devolved amongst the three daughters, Catherine, Maria, and Elizabeth, and their descendants as if the names of their brothers and sister were struck out of the Will.

The Plaintiffs contend that the true construction is that the testator's daughters, Catherine, Maria, and Elizabeth, took as fiduciary heirs, *separatim*, or as tenants in common, the dominium or some descendible interest, but charged with a *fidei commis*, a trust, or rather a substitutionary gift, to take effect on the death of the last survivor of them in favour of all their children then living, and the descendants (taking by representation) of such as were then dead.

The Defendants the Yon Greisheims maintain the same contention on this point. The Administrator General disclaims all interest. The Defendants Wright, the Dalys, and Bascom contend that the true construction is that each of the testator's daughters, Mrs. Boode, Mrs. Daly, and Madame de Coeverden, took one-third, that as first Mrs. Daly and then Madame Boode died, her third devolved upon her children then living *per capita*, and that as to Madame de Coeverden who died without issue her third remained subject to her own control and testamentary disposition.

Now, although we do not see our way to make any judicial declaration in this case, we think that, considering the course which the case has taken and how fully it

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has been argued and considered, it will not be convenient or altogether right to pass *sub silentio* the questions of construction, but that it is desirable to point out the defects of the suit which prevent us from passing any sentence, by taking up those questions and seeing the practical issue to which they would bring the Court in deciding them on these pleadings in the mode in which we should be disposed if not actually prepared to decide them. Those defects might be equally illustrated upon applying any other construction, or upon considering the various constructions which have been or might be argued. But although during the argument the Chief Justice urged upon Counsel the defects in statement and in proof which he apprehended might be found fatal, we were urged to decide the case as it stood and were assured by Counsel on both sides that they would be able to satisfy us that all questions which the case could reasonably give rise to were duly raised, and all persons interested in them would be found before the Court. And though it was not easy to see how this could be effected without any evidence, the Court felt it their duty to comply with this urgent wish as far as possible; and accordingly we not only allowed the case to be argued throughout, but we took it into our consideration with the anxious desire to determine, if by any means we could, the questions thus brought before us.

It was only after pursuing that course, taking what we apprehend will be found the true construction into our consideration, applying it to the situations of the several parties before us, and thus seeing the result analytically, as we may say, that we became finally (and so far unanimously) convinced that it is in this suit impossible for us to determine the rights submitted to our decision. That result therefore we propose to state in fact as the best exposition of our conclusion.

Now, on the first point and for a moment we will assume the construction which we should be disposed to adopt and act upon, viz.:—that the true construction of the gift as to *Vlissingen* to the testator's children (and that whether merely of a usufructuary or a life interest, or of the dominium burden with *fidei commis*) is that

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it was a gift to them *separatim*, in equal shares, or to use the English phrase, as tenants in common. If this be so, and if Jan Lodewyk died in the testator's lifetime, the gift to him, or the share of the inheritance to which he was instituted by name *lapsed*, or at all events (for we desire to decide or assume nothing that has not been argued and is perfectly clear) it may well be thought to have lapsed. Now, (as we have already said), we are not even informed by way of statement whether Jan Lodewyk survived the testator or not. But while the question of lapse is therefore apparent, it is not raised, nor could it be determined in the absence of the testator's heirs *ab intestato*, who are not in any way shown to be brought before the Court, or of the Crown, which would be entitled in default of them.

The Court then is absolutely in the dark, nor has it either the means or the right to determine whether the whole or 5-6ths only of plantation *Vlissengen* passed under the testator's Will. It may be as likely that Jan did survive his father as that he died in his lifetime, and had the fact been only stated and shown this first difficulty would have been avoided. But we must decline to make any assumption or question the subject.

Again, though the pleadings state that Nancy and Charles Joseph survived the testator, and so far would seek to preclude as to their 6ths the question of lapse, these statements are not proved; and by what authority is this Court to decide upon a mere statement to this effect, without any evidence whatever and in the absence of the parties who, if the statement be not correct, would take those shares, that they have devolved under the will to their sisters and their sisters' children? We know of none, and we are of opinion that to do so would be quite beyond the proper functions of the Court.

We turn now to the main question of the construction of the Will, whether applicable to the whole estate or five or four or three-sixths of it only. Seeing the conclusion to which we have come as to the result of the whole case, it would not indeed be in place for us to discuss here the elaborate arguments addressed to the Court by the *Attorney General* and *Mr. Gilbert* on the question of

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construction, to which, however we have given the best and fullest consideration in our power. It would at the same time be unsatisfactory were we even in this conditional way merely to state in so many words the construction which we conceive will be found to be the correct one. We shall, therefore, enter just so far into this part of the case as to shew the general nature of the principles and considerations by which we have been led so far to adopt the view which we proceed to apply to the pleadings.

Now, on approaching the construction of the terms by which the testator disposed of the *Vlissingen* estate, that disposition at once assumes three leading features—1st.—The gift to his children as fiduciary heirs.

2nd.—The gift over to their children “with title of property.”

3rd.—The proviso for survivorship. And all these must be considered in connection with one another.

Considering the original gift to the children by itself, the first question which occurs upon it is this: Does the gift to them as fiduciary heirs “only” ensure to them jointly or severally, *conjunction* or *separatim*, as forming one class, variable as to its members but which takes *as a class* the whole benefit, or as individuals each taking a separate and equal share in the subject matter? In the former case the *jus accrescendi* would attach; in the other case it would seem otherwise; so that the event of death in the one case would lead to survivorship, in the other case it would lead (according to the time and circumstances of its occurrence) to the lapse or the further devolution of the several shares, As to the second part of the disposition, the first question which occurs is, does the gift over, the trust, or the substitutionary institution of “their children,” mean the *children of all of them as one class*, or the *children of each of them as several classes*? And these two questions are very closely connected.

Now, the ordinary construction which the law puts upon a gift to several persons is that it is one joint gift and not several separate gifts. But, as this construction, though perhaps as sound in principle as it is clear in law, no

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doubt often conflicts with the intention with which such gifts are made, the law readily lays hold of, or (as it is said) “leans towards,” any legitimate ground for inferring a construction in favour of a separation into several interests, or what is called in English phraseology a tenancy in' common; words not only of separation but of mere equality, implications derived from provisos for survivorship and other circumstances, and even sometimes extrinsic considerations have been fastened on to afford such an inference. The same considerations apply to a gift to the children of several persons, or at all events, where *gifts* to several persons and to “their children” are found in the same instrument, to the enquiry whether the latter is a gift to children of all as members of one class or to the children of them respectively as so many several classes.

Now, in this case, after careful consideration of what we have called the original gift, we find nothing from which to rebut the presumption of law that a gift to several is a joint gift, so that we should be led on looking at that disposition alone to treat the testator's six children as joint tenants and their children as One “class.”

But the proviso for survivorship we think may well be thought to afford grounds on which to modify and change this construction. The use of the clause at all with reference to *Vlissingen* seems to rebut the ordinary construction. For if that construction were proper to the intention and effect of the original disposition, the property would survive in exactly the mode which the proviso prescribes, and in fact in other cases also in which, though without in terms guarding against accruer by survivorship, the proviso plainly implies that the testator did *not* contemplate such event. For the property if given jointly would not only survive in the events which the proviso notices of death *before* marriage or majority but also in the event of death after marriage or after majority without having had issue.

It may be said indeed that as the survivorship implied in a joint tenancy might be put an end to by severance or partition, therefore there was occasion to secure it from this liability by a special proviso. But in the first place,

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speaking of survivorship amongst joint *fiduciary* heirs, the power of severance may be questionable; certainly if such heirs take the dominium subject to an obligation of & *fiduciary* character, rather than a particular estate subject to a substitution or gift over, it seems that it could hardly be admitted. In the next place, one of the two cases expressly contemplated by the proviso is one where no such severance could naturally be contemplated or would perhaps be practicable, viz.:—the event of death *under age*. In the third place, the *terms* of the proviso appear to contain just that recognition of *severalty* of interest which the original disposition wants. Had it provided that “the property” should accrue it might have been weaker, but it is that such share, or rather (for here the translation is evidently mistaken and it seems that the word “deszelfs” is the possessive pronoun) *the share of the child so dying* shall accrue. We think therefore that we find or might find in the whole Will sufficient to lead us to construe the original disposition as one to the testator's children *separatim* and to their children *per stirpes*, as if it had run thus, “*Vlissengen* they my said children “and heirs shall only possesses *fiduciary* heirs in equal shares, “and after their respective deaths their several shares shall devolve with title of property to their children respectively and “*per capita*.”

Though we do not here enter upon the general arguments of Counsel as to the construction, we ought not perhaps at this point to overlook the argument which the *Attorney General* pressed on us very ably in order to induce us to hold that the ultimate disposition was in favour of the children of all those named as one class, viz.—that it provides that the distribution shall be “head for head in equal portion.” But this argument does not seem to us of any great force in determining whether the first devolution is or is not one *per stirpes*. There is equal room for these words whether the construction be in the first place to the several families *per stirpes* and *then* amongst their members *per capita*, or *uno flatu* amongst all the members of all the families *per capita*. Unless shown to be used distinctly, “head for head” only means in equal shares, or in

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severalty, or each for himself, so as to preclude the joint tenancy which would otherwise occur amongst the members of any class, whether larger or smaller, of joint heirs or legatees.

We consider therefore that it is at all events a highly probable construction that whatever passed under the Will to the testator's daughters and their families passed in equal shares to the daughters with a gift over on the death of each who should have issue, to her children. And now comes another question, leaving open at present that as to what should become of the share of any child who should not have issue, viz.—who are included as “her children?” Here we think there is a construction at the least highly probable, though the pleadings on both sides would seem to have overlooked it, to this effect—that on a gift by will to children to take effect on the death of one who also takes an interest in the property, *all* the children living at any time after the testator's death and before the period when the gift takes effect will share. If that is the principle to be applied to this case, the deaths of the several children of the testator being the periods of distribution, and the testator's daughters (as we assume) not having been married at his death, the class of children to take would be *all* the children of the deceased daughters, and not only (as the pleadings assume) those who survived their mothers. The general principle that would give to *all* the children living after the testator's death, and before the period of distribution, a vested and transmissible interest, has been clear law in the English system ever since the case of *De Visme v. Mello* (in 1. Bro. C. C.) We have not been furnished, nor have we met with any authority amongst the Civil Law writers upon the subject, unless certain propositions which appear exceedingly doubtful to the effect, that such substitutions are in their nature conditional or contingent, so that if the object should die before the period of distribution, their interests are not transmissible, but fail altogether, could be sustained as applicable to this question. In the absence of any such clear authority, we should feel called on to adopt the English rule of construction,

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which appears just as applicable to the system of law of this colony as to that of England, and which is adopted without reserve by *Mr. Burge* in his Commentaries, written of course, with especial view to foreign and colonial law, (vol. 4 p. 569).

We turn now to another important question, which, if the case would, permit us to determine it, we apprehend we should probably have to determine adversely to the view of the Plaintiff, and in favour of that contended for by the Defendant Wright. Did Madame De Coeverden take the dominium in the 3rd or other share which became vested in her? Now, in order to give rise to this question, the parties ask the Court to assume a great deal, for it could only arise in the case of her *not having had* any children. Does it appear that she never had any? By no means—it is not even so stated, while there is no evidence whatever as to either her marriage or her family. The only statement on the subject in the pleadings is, that she married one de Coeverden, that he died in 1832, and that she died in 1860 “without issue.” Consistently with these statements and with the evidence before us, (or we should say, the want of evidence), she may have married several husbands, and had numerous children. We say, therefore, that the parties before the Court ask us to assume the whole of the facts requisite to give rise to the rights they assert and the questions they raise with regard to this share; and we must certainly decline to declare rights or to decide questions on such assumptions.

But suppose that the requisite facts were alleged and proved, we apprehend that the better opinion would be, though we may have felt the point as one of some difficulty, that Madame de Coeverden did take absolutely such share as became vested in her *under the clause of survivorship*, though it may perhaps be less clear that she took an absolute interest in such share as she took under the original disposition which provided that she should “only possess” as *fidei commissaria*. The original disposition contrasts this gift or institution in a mode so marked with the gift or institution of the children with “title of property,” that it may be found very difficult to sustain

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the contention that under it any absolute dominium could pass; and we doubt whether there are any other words in the Will to enlarge its effect, though we think the words of the proviso of survivorship may well upon a fair construction of them be held to give the *surviving shares* to the last survivor with “title of property,” but subject to a *fidei commis* in favour of any children she might have.

Now, then, putting out of sight the question as to the shares of Jan Lodewyk, Nancy, and Joseph Charles, dealing only with whatever interest *did* pass under the Will, and assuming that it went, or rather (taking our opinion as not definitive) that it probably went in the mode we have pointed out, equally amongst the daughters Catherine, Maria, and Elizabeth, so that we cannot ignore or proceed in the absence of those entitled under that construction—it is true to enquire whether there is any one before us who has made out a title, so clear and proven that the Court ought to declare or to act on it, to any one of these shares? As the result of very deliberate reflection we say, certainly not.

Let us consider first what we will call “Madame de Coeverden's third,” supposing it were shewn that she had no children to take it, what would become of it? Why, as to so much as she held absolutely it would go to her heirs either *ex testamento* or *ab intestato*, while if any portion did not become vested in her as to the dominium it would appear that it was undisposed of and lapsed for the benefit of the testator's heirs *ab intestato*. Of course in default of any such heirs it would go to the Crown.

But the testator's heirs *ab intestato* are not brought before us, nor is the Crown, while we are not even informed whether Madame de Coeverden died testate or intestate. Still less are her heirs either in the one event or the other before us. We say we are not informed whether she died testate or intestate. Now, let us see how the case stands as to this. The Plaintiffs allege that Madame de Coeverden signed “a document” which the Defendant Wright alleges is a Will, but which the Plaintiffs say and ask may be declared is null and void. But they do not assert, still less do they show, that she died intestate. The Defendants Von Greisheims echo the

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Plaintiffs. The Defendants, Wright, (and it would seem by a rather odd conjunction), the Dalys and Mr. Bascom aver that such document was a good and valid Will. There is then an issue on this head, whether a particular document is a valid or effectual Will, but not the larger and proper question whether Madame de Coeverden died intestate or not. It is, true that the issue raised as to the document would be involved in the larger question of intestacy, but it is evident that it is only part of the question, for she may have left a very good Will, although the document in question be a very bad one. The practical importance of this Will becomes very clear when the conclusion is arrived at which we do arrive at that " the document " is not a Will valid to dispose of Madame de Coeverden's share in the *Vlissengen* estate. But does it therefore follow that Madame de Coeverden died intestate? By no means—there is no proof whatever of her intestacy. It was said by Counsel more than once in reference to the want of proof of other intestacies which were alleged and presumed in the course of the argument, that intestacy being a negative could not be proved. No doubt it is a negative of that character that it cannot be proved positively, but it may be and must be proved presumptively. It has to be proved in every pedigree case which involves it, and nothing is more familiar than the proper *prima facie* evidence on the point. All that we can say as to Madame de Coeverden is that we have *no* evidence upon the subject, and that therefore it would be as impossible to assume that she died intestate as it would be vain to speculate whether she did or did not leave a Will.

Now, we have said that in our opinion the Will which is set out is not valid to pass the property in question; we ought perhaps rather to say that it does not appear to be valid. For we certainly cannot decide the question directly in this case. The Plaintiffs dispute it, it is true; but to enable the Court to decide such a question judicially it must not only be disputed, but it must be disputed by persons having an interest in the dispute. Now, the only persons who can be interested in disputing a Will are either those who claim to be heirs *ab intestato* of the testator, or those who claim under another Will

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as heirs *a testamento*. But the Plaintiffs do neither, and therefore they have no interest in the question.

But a suit of this nature when duly framed and sustained is not only *duplex* but *multiplex querela*, and if any sentence could be awarded on it the Defendant Wright might perhaps claim to have his position under Madame de Coeverden's Will recognised. It is therefore proper in taking this survey of the suit to mention more particularly the view which we take of that position.

Without discussing the elaborate arguments which were addressed to us by Counsel on either side as to the objections to it which are raised in the pleadings, and especially as to its inherent or substantive defects, we may say that we are not disposed to adopt the views contended for by the *Attorney General* as against the Will. The only point of the arguments which might, well be singled out for a passing notice as of general importance is as to the Will having been penned by Wright, who is said to take an interest under it in respect of his commissions as executor. We are not disposed to hold that this is such an interest as of itself to invalidate a Will written by the executor. It appears a very different case from that of Fraser in this Court, to which we were referred, and would seem rather to fall within the scope of the decision of the Privy Council in the case of *Freyhams v. Cramer*, (1 Knopp, P. C. cases), in which it was held that an executor's interest in his commissions was not such a beneficial interest as to entail the personal liability of the executor to the testator's creditors.

But there is an objection to the Will which, though not raised in the pleadings, is so apparent that as the matter stands before us, and without being able to say that the Will is bad, it would make that result more than probable. It is certainly not shown to be a Will duly made, and on the other hand, so far as we can form an opinion, it is invalid to pass immoveable property in this colony. This objection arises thus. Even at this time of day it is one of the moot questions in the conflict of laws whether a Will is valid to pass immoveable property when not executed according to the law of the place where that property is situated. Now,

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the law of this colony is that Wills made in the colony are to be executed as provided by the Ordinance of 1839, but in all other cases the old Dutch law remains intact. The old Dutch law as here adopted (putting on one side nuncupative and closed Wills) required a Will to be executed in the presence of a Notary and two witnesses or a larger number, (whether five or seven), of ordinary witnesses. Now, the document in question is not so executed, but is merely attested by two witnesses.

Some Jurists contend however that a Will is good even as to immoveable property if executed according to the law of the testator's domicile; and, though this is an exceedingly doubtful proposition, if Mr. Wright had shewn that Madame de Coeverden was domiciled in some place according to the law of which this document was a formal Will, he might have argued that question. We have however no statement or evidence of the kind, and therefore need not consider whether this Will which is bad by the *lex loci rei sitae*, can be good by the law of the domicile. Other Jurists contend, and with perhaps some authority, that a Will even of real property is good if executed according to the form of the place of execution. If therefore Mr. Wright had shewn us that this Will was good by the law of France where it was executed, he might have urged this view in support of the Will. But not only has he not done this, but we cannot fail to know that he could not do it, for that the law of France is very precise and burdensome as to Wills which are not holograph, and such as this Will (which is said and admitted to have been written by Mr. Wright) in no respect complied with.

Therefore as to Madame de Coeverden's share we have no person before us who is shown to have any interest in it whatever upon the view which we take of the construction of the Will.

Now, then, let us turn to Mrs. Daly's share—for so we find it more convenient to call her throughout, though she is said to have married a second husband of the name of King. She had children, and her children are said to be represented before us by Mr. Wright, as Executor of the Will of a son, Richard Joseph Daly, and Maria and

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Jean Eugene Daly, who claim to be legitimate children and to be R. J. Daly's testamentary heirs.

But does Mr. Wright or do the Dalys represent even R. J. Daly's interest, whatever that was? We think not—or at all events they are not shewn to do so. As the effect of Richard's alleged Will is set out in the Defendant's answer, we need not do more than notice that Wright would appear to have nothing to do as Executor with real estate which passed under an English Will, which we will take to have been sufficiently proved by the probate copy. But can we take this to be a good Will, to pass a share in the *Vlissengen* estate? We think we cannot except R. J. Daly's heirs *ab intestato*. The invalidity is not indeed so clearly presumable as that of Madame de Coeverden's, but it is apparently a very doubtful Will, and one which we can only consent to confirm and recognise in a formal and authentic way.

The apparent doubt is on a point of law, itself of the utmost importance, being one which has been greatly controverted by various Jurists. For this Will, which is well executed according to English forms, having been executed in England, gives rise to the question noticed already, whether a Will executed according to the forms of the place of execution is valid to pass immoveable property elsewhere. The English Jurists are quite clear that it is *not*. But as to the civil law, jurists of the greatest authority differ on the subject. It is evidently what is called a "moot point," and the authorities who express themselves most strongly in favour of the efficacy of such a Will speak of it as a matter of question, of opinion, and of controversy. We have no intention of entering upon that controversy here in order to express a gratuitous opinion on its' merits, but it is our duty to take note of it, and of the probability that it must result in this Court adversely to this Will. We shall avoid discussing the subject further than to refer to the *resume* of the various opinions upon it given by *Burge*, though in a mode perhaps somewhat inconsistent and partial, (vol pp. 582 and following), and to the more exhaustive and complete *resume* given by *Story* in his *Conflict of Laws* (c.c. 10 and 11 V. also c. 4.) It is curious that

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this controversy appears so much to rest in opinion that the only case in which the point would seem to have been judicially decided is a case which *Sande* reports as decided by the Senate of Friesland in 1599, and to which those Jurists refer who favour the opinion that the law of the place of execution should govern. It is curious also that *Sande* himself, who not only reports but supports this decision, expresses himself thus on the point—“*Variæ de hæc questione sunt nostrorum opinionēs.*” (Decis. Fris. c. 4. t. 1 def. 14.) While there is this one case decided in Friesland in 1599 on the one side, *Vennius* and *Christnaeus* tell us of a case of Brabant promulgated in 1611 expressly to the contrary effect. It may be the case that the different provinces of Holland adopted different rules on the subject. And if this should be so, unless some other mode can be discovered of reconciling the conflicting authorities as to the "general civil law, there can be no doubt that the clear voice of the English Jurisprudence would decide the controversy against this Will; at all events it is plain that we should not be justified in asserting *ex parte* its validity in favour either of Mr. Wright or of the Dalys.

But, again, the pleadings only inform us that Mrs. Daly died leaving her surviving only three children. We are not here left to say merely that there *may* well have been other children consistently with their statements, for it is clear not only from statements at the bar, but from documents which have been laid before us, that she had many other children by her first husband, and as to whether she had any by her second we are told nothing. What has become of these others, and why are they not represented or accounted for? Because it would seem the parties wish the Court to presume that they have no interest, or that their interests have devolved to some of the parties who are before the Court. We must however decline to make any such presumption; we must have it alleged and proved that those before the Court are the only Dalys interested, before we can declare it, and we have no such allegation or proof.

But, again, if it were shewn to be the case that there are no other children of Mrs. Daly or claimants in their

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right now entitled except Mr. Wright and the two Defendants, a further difficulty arises. The Dalys are stated by the Plaintiffs to be illegitimate. In the view which we take of the construction of the Will, that is a contention in which the Plaintiffs do not appear to have any interest. Were it otherwise we should conclude that, as it has been raised, the Plaintiffs have not made out their allegation. But, on the other hand, knowing that their legitimacy has been and is challenged, and that they have been treated by their family and even by their own mother as illegitimate, that evidence has been tendered to establish it in this suit which has been shut out on technical or formal grounds, observing that they themselves, while they deny and demur to the allegation of illegitimacy, not only have furnished us with no proof of their birth so as to establish their rights *prima facie*, but rest in their answer, and as we must presume advisedly, on a second leg (that of their brother's Will) and allege that his executor Wright is possessed of one third of the estate as executor of the brother—can we under these circumstances declare the Dalys entitled to their mother's share *ex parte*, and in the absence of any one representing their brothers and sisters, the testator's heirs *ab intestato*, or the crown which in default of these would probably be found entitled to Mrs. Daly's third? We can come to only one conclusion—that, as there is no one before the Courts who has shewn any title to the shares (if any) which lapsed before the testator's death, or to that of Madame de Coeverden, so there is no one who has made out a title to Mrs. Daly's share.

There remains, then, Madame Boode's share. Who are entitled under the gift to her children? We can only say that we do not know. First, the pleadings do not even state how many children she had, though they say that she left six children of her marriage with Mr. Boode her surviving, and no more. There is no evidence even of this fact, but so far, though no further, we have a statement. Subject to these observations we may assume that these six children all took shares; but it is plain that we cannot say *what* shares they took. Then it is said that the Plaintiff Mrs. Ely, as one of these

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children, took one of these shares, that she married one Elisha Ely, and that he is dead. If it were shewn that her husband were dead, she might be considered, subject to our former observations, to be entitled to an unascertained share of Madame Boode's third. And if the deaths of Louis W. Boode and J. T. Boode intestate had been proved, the Administrator General or Mr. Bascom and Madame Von Greisheim's heirs would in like manner have been entitled to represent their unascertained shares, Mr. Bascom and Madame Von Griesheim's heirs each for one-eighteenth of the estate of these shares would respectively come to so much, and the Administrator General for anything ultra if they should be found to exceed those fractions.

Then comes the Plaintiff, A. D. Boode, as to whose claim there is nothing special to be said, but that (in common with the others of the family) he neither proves that he is a child entitled to share, nor on the assumption of his birth does he shew what share he is entitled to.

And then come the Von Greisheims who would assume to be entitled to a similar unascertained share and also to one-eighteenth, formerly of Louis Wm. Boode in right of Madame Von Greisheim, deceased. As to this combined but unknown share, if Madame Von Greisheim's birth was proved' the matters remaining for evidence would be the antenuptial contract set out in part in the Claim and Demand, her death and (assuming that nothing in the contract limited her disposing powers over either her descended or her acquired position) either that the Defendants represented her as testamentary heirs or as heirs *ab intestato*. That would involve in the one case the consideration of her Will both as to the *factum* (which would probably introduce the questions adverted to in connection with Madame de Coeverden and Mr. R. Daly's Will) and as to its effect. In the other event, of an intestacy, evidence would be requisite to show who are the heirs *ab intestato*. None of these facts are either proved or stated. We are therefore unable to determine either what share Madame Von Greisheim took (assuming she took any) or on whom that share has devolved.

There remains the claim of the Plaintiffs Houel, in

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right of Sophia who is stated to have been one of Catherine Boode's children, to have married the Plaintiff J. V. Houel, and to have died intestate leaving one child, the sole issue of her said marriage, viz.:—the Plaintiff Honoré Desiré Houel. Now, these statements are about the most complete of those we have as to any step in the family, and if they were proved and if the evidence of Madame Houel's marriage with Mr. Houel were in such a form as to show that she was not previously married, we might indeed take it that the Plaintiffs Houel shewed a title to Madame Houel's unascertained interest.

Still as to these parties and the others of their stock, we do not find even statements adequate to shew what particular shares they are either collectively or individually entitled to, while there is not one single piece of evidence in support of such statements as we do find, except only the official copies of the two transports to Madame Von Greisheim and Mr. Bascom from the Administrator General of two-eighteenths in right of Messieurs L. W. and J. T. Boode, deceased.

These transports want no declaration in this suit to confirm them, in saying which we do not mean to express any opinion either as to their effect and construction or as to how far they may or may not be impeachable at the suit of any one interested and entitled to impeach them. But they will remain as they are, at all events until set aside, *prima facie* valid and effectual according to their proper tenor.

Thus, after having gone carefully over the whole case in connection with that construction of the Will which we believe to be the soundest, we see no portion of the relief prayed that this Court can grant. We cannot declare against the Will of Madame de Coeverden or her testamentary power, because neither the Plaintiffs nor any other parties have any interest in obtaining such declaration. We certainly cannot declare in favour of the Will, because in so far as appears it is invalid to pass property in this colony. And while we should not be prepared to adopt and establish as the basis of a declaration of the rights and interests of the parties to the construction of the testator's Will which is

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intended for either by the Plaintiffs or the Defendants, we are unable to make any such declaration, because the parties concerned in the decision are not only not shewn to be, but on the other hand appear *not* to be before the Court. As to whatever share or shares, whether one-sixth or more, which may have lapsed to testator's heirs *ab intestato* as undisposed of, neither are those heirs nor is the Crown before the Court. As to whatever share vested in Madame de Coeverden, be it one-third or less, neither are her heirs *a testamento* nor *ab intestato* nor is the Crown before the Court. As to Mrs. Daly's share the same observation applies, unless the Court is to guess or assume without any evidence that her share has vested in Mr. Wright under a Will which is at least doubtful and is unproved, or in the Defendants the Dalys who are of doubtful and unproved status. As to the Boode family, to declare their rights the Court must guess or assume without evidence that Madame Boode had the children alleged and no others, that Mrs. Ely's husband is dead, that the two deceased sons died intestate, that Madame Von Griesheim's antenuptial contract had no effect on her disposing power, and that either under a testament valid to pass land in this colony or *ab intestato* her husband and the three alleged children who are Defendants represent her share; and finally that Madame Houel died intestate and that the Plaintiffs Houel represent her share. These guesses we cannot make. If we were at liberty to guess or draw inferences from matters stated or shewn otherwise than by proper evidence, we might be led to guess, what may nevertheless be quite erroneous, viz.,—that as to a share or shares which may amount in the whole to much the larger share of the property, and in so far as its right may not have been barred or intercepted by adverse possession, the Crown has become entitled in default of heirs *ab intestato* of Bourda, of , heirs of Madame de Coeverden, and of legitimate children or heirs of legitimate children of Mrs. Daly. But we could not even guess what the different members of Madame Boode's family take nearer than that each would seem to take an uncertain fraction not exceeding one-sixth of another

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uncertain fraction not exceeding one-third and not less than one-sixth. Under these circumstances, it is quite clear that the instance in this suit must be absolved.

Much as we regret this result in so far as those of the parties who have undoubted and substantial interests in the property may be prejudiced by delay, it is plain that such consideration ought not to sway us to come to a decision which might not only prejudice absent persons who may have a title by ignoring questions on which their title may depend, but which might go much further. For we cannot forget that if there be any persons having titles whose titles are not duly represented or have not been duly kept alive, such accidents may ensue not for their co-owners in title as such, but it may be either for them or for others who have had the possession of the property. So that we might do the greatest injustice in -this direction were we to make any declaration of title by assuming either a state of facts or a result of law not strictly made out before us.

With regard to the cost, we think that the Administrator General's costs must be provided for by the Plaintiffs. He disclaimed all interest; he has no interest according to the Plaintiffs' construction nor according to the construction suggested by the Court; and though he might have been a proper party to the suit in so far as it seeks to set aside the transports which have been passed by him, the suit has entirely failed as against those transports. There can be no question, however, that the costs of the other Defendants who have all concurred in seeking a declaration of their rights must be borne by themselves save in the case of Mr. Bascom as purchaser of J. T. Boode's share. As, however, he is not only a Defendant in that character, but also on behalf of his constituents, Mr. Wright and the Dalys, and as these have all joined in one defence, we see no reason or means of separating these costs; and therefore, save as to the Administrator General, there will be compensation of costs. It is needless for us to point out that we have no power to give the costs out of the estate.

It remains to notice certain questions as to the admissibility of evidence which arose at the hearing. We shall

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notice them as shortly as possible, because the *rationes deciderendi* were fully though verbally given at the time, and moreover as they have occurred in a suit the result of which is thus abortive.

An Act of Donation made by Mrs. Daly in favour of the Defendants Daly on the footing of their being her illegitimate children was tendered, together with the power annexed to it, and under which it was executed by her attorney. It was admitted on the statement of the *Attorney General*, who tendered it, that he would produce other and independent evidence of illegitimacy. The ground on which it was so admitted was this, that after the best consideration we could give to the objection which was rested on the well known rule that a mother cannot be allowed "to bastardise her issue," the documents seemed to us admissible as "evidence of conduct" and in or for corroboration of other and independent evidence of illegitimacy to be adduced by the Plaintiffs. In coming to this conclusion the Court was governed by the rules laid down, sanctioned or recognised in various authorities, and in particular by the great Judges whose opinions as to the effect of the rule of evidence on this subject were expressed in the Banbury Peerage case, and in the case of *Legge v. Edmonds*, (L. 1 ch.)

The result, however, of other discussions as to evidence was that the *Attorney General* was unable to adduce independent testimony of non-access by Mr. Daly to his wife, as to let in evidence of the conduct of Mrs. Daly to corroborate the illegitimacy of the Defendants, and thus the Act of Donation became of no effect for the purpose for which it was tendered.

This was partly occasioned by the refusal to admit the declaration of the Defendant, the Baron Von Greisheim, which purported to have been made at Potsdam before a foreign Notary under the provisions of the Statute 5 and 6 W. 4, c. 62. A number of objections more or less substantial were made to this declaration, but many of them and of the reasons which might be referred to in support of the decision of the Court on the main objection, we think it not necessary now to go into. The ground on which we acted was this, that, whatever other questions

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there may be as to the extent to which the Act applies, it does not apply to declarations made by a foreigner in a foreign country. It was considered in the first place that the statute must have a somewhat strict construction, as it greatly infringes on the ordinary rules of evidence, and might, if extended beyond its proper scope, produce much hardship.

It was considered, then, that the actual effect of the statute taken altogether, (and especially taking section 15, on which this question especially turns, in connection with the statute *in pari materia*, to which it refers—5. Geo. 2nd,) was to dispense with oaths and substitute declarations to be made and taken within Her Majesty's dominions. And as the Act could not speak beyond those dominions, except in the cases of persons in natural allegiance to the Crown, this construction was the more inevitable from considering the records in which the officers before whom the declarations are to be made are referred to, *i.e.*, as those now by law authorised “to administer an oath,” the terms whereby they are “authorised and enforced,” to take the declarations, words which from the nature of the case seem not only to empower and authorise, but to require such officers to take such declarations, and also from the section of the Act which provides that to make a false declaration under its provisions shall be a misdemeanour. No doubt this Court has more than once received declarations made in foreign countries under this statute, and such decisions will be found, as may be presumed, sustainable on their own circumstances. But we are not aware that a declaration made under these circumstances has ever been admitted, and the Court concluded that it ought not to be so.

Another objection as to this declaration we may notice, *viz.*:—that it appeared to have been made not in this suit nor with a view to this or any intended suit, but actually *in another then pending suit*, to wit, the previous suit of *Ely v. de Coeverden*, which was abandoned when this was commenced. *Mr. Attorney General* tendered it without the heading of the rubric, which he stated had been added by mistake (and a very serious mistake) after

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the declaration arrived in this colony; but the objection is apparent from the body of the declaration, which refers to the suit in which it was made as then existing, while the date of the declaration is before the commencement of this suit.

A similar question arose as to a declaration of the defendant Maria Daly, tendered by *Mr. Gilbert* on behalf of the defendants Wright and Daly. That declaration contained a number of statements as to Mrs. Daly's family. It was made in the year 1859, when there was no suit pending between these parties, nor so far as appears was any intended, though the possibility of some suit about the property or about the declarant's family and status may well have been contemplated.

There seems considerable difficulty in putting any clear interpretation upon the words of the 15th section of the Statute 5 and 6 Will. 4, "in any action or suit then pending or thereafter to be brought or intended to be brought;" and perhaps the most satisfactory construction might be to apply the words "intended to be brought" to such declarations as are requisite for steps preliminary to the institution of a suit. But, however that may be, it appeared to the Court that it was impossible reasonably to give the words such a very wide interpretation as should admit this declaration, made apparently merely by way of precaution, and five years before the institution of this suit, as a declaration in a suit "intended to be brought." The collocation of those words in the Act with the words "hereafter to be brought" strengthens the inference that they must have some reasonable restriction, for that otherwise any promiscuous declarations made advisedly or unadvisedly by anybody anywhere might be admitted in any suit instituted after the 1st of October, 1835. And though it seems difficult to put a definite and inclusive construction upon the words, we considered that this declaration ought to be excluded from their operation.

It seems to us right that the actual scope and principle of these decisions on evidence should be recorded, because of the grave importance of the questions connected with them, and it is with regret that we have also to record that

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the Court was not unanimous on these points, inasmuch as Mr. Justice NORTON dissented from our conclusions.

A true extract,

JAMES S. HITZLER, Registrar.

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EXTRACT from the minutes of the proceedings of the Supreme Court of Civil Justice of British Guiana, held for the counties of Demerary and Essequibo, at the Court House in Georgetown, Demerary, Monday the 19th of June, 1865.

No. 6.

(AFTER PRAYERS.)

Catherine Elizabeth Adelaide Ely, born Boode, widow, of Paris, in the Empire of France, Augustus Deodatus Boode, of Dusseldorf, in the Kingdom of Prussia, Jules Victor Houel of the city of Paris aforesaid, and Honoré Desiré Houel of the city of Paris aforesaid, severally appearing by their attorney in this colony, Roelof Hart, Plaintiffs—*versus* John Baker Wright, styling himself sole executor of and under the last Will and Testament of Elizabeth Ruysch de Coeverden, late of the city of Paris, widow, deceased, by his attorney in this colony, Henry Sarsfield Bascom, original Defendant, and John Baker Wright as executor to and of the last Will and Testament of Richard Joseph Johan Edward Daly, deceased, Maria Marianne Daly, Jean Eugene Henry Daly, severally represented in this colony by Henry Sarsfield Bascom, the said Henry Sarsfield Bascom, the Administrator General of Demerary and Essequibo, as representing the insolvent estate of Louis William Boode, deceased, the Administrator General of Demerary and Essequibo as representing the insolvent estate of Jules Theophilus Boode, deceased, and John Frederick Charles Hermann Von Greisheim, for himself and as executor to and of the

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last Will and Testament of his deceased wife, Eugenia Clementina Von Greisheim (born Boode), and as father and natural guardian of his minor child, Johanna Marianne Elizabeth Otilia Yon Greisheim, and Ernest Christian Hermann Gunther Von Greisheim, and Sophia Luitgard Henrietta Eugenia Yon Greisheim, severally represented in this colony by their attorney, William Frederick Haynes Smith, co-Defendants.

The Court, having heard the parties and having read and examined the documents and vouchers filed and produced in this matter, absolves the defendants of this instance, with compensation of costs, except as regards the costs incurred in this matter, by the Administrator General of Demerary and Essequibo as representing the insolvent estates of Louis William Boode and Jules Theophilus Boode, deceased, in the payment of which last mentioned costs, the Court condemns the plaintiffs herein.

A true extract,

E. H. G. DALTON, S. C.

To the Honorable the Supreme Court of Civil
 Justice of British Guiana.

The humble petition of Catherine Elizabeth Adelaide Ely, born Boode, widow, of Paris, in the Empire of France; Augustus Deodatus Boode, of Dusseldorf, in the kingdom of Prussia; Jules Victor Houel, of the city of Paris, aforesaid; and Honoré Desiré Houel, of the city of Paris, aforesaid, severally appearing by their attorney in this colony, Roelof Hart,

Respectfully sheweth,—

That in a certain suit wherein your Petitioners were Plaintiffs, and John Baker Wright, styling himself sole executor of and under the last Will and Testament of Elizabeth Ruysch de Coeverden, late of the city of Paris, widow, deceased, by his attorney in this colony, Henry Sarsfield Bascom, was original Defendant, and John Baker Wright, as executor to and of the last Will and

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Testament of Richard Joseph Johan Edward Daly, deceased, Maria Marianne Daly, Jean Eugene Henry Daly, severally represented in this colony by Henry Sarsfield Bascom, the said Henry Sarsfield Bascom, the Administrator General of Demerary and Essequibo, as representing the insolvent estate of Louis William Boode, deceased, the Administrator General of Demerary and Essequibo, as representing the insolvent estate of Jules Theophilus Boode, deceased, and John Frederick Charles Hermann Von Greisheim for himself and as executor to and of the last Will and Testament of his deceased wife, Eugenia Clementina Von Greisheim, (born Boode), and as father and natural guardian of his minor child, Johanna Marianne Elizabeth Ottilia Von Greisheim, and Ernest Christian Hermann Gunther Von Greisheim, and Sophia Luitgard Henrietta Eugenia Von Greisheim, severally represented in this colony by their attorney, William Frederick Haynes Smith, were co-Defendants, your Honourable Court was pleased on the 19th day of June last to pronounce the following sentence:—
 “The Court, having heard the parties and having read and examined the documents and vouchers filed and produced in this matter, absolves the Defendants of this instance, with compensation of costs, except as regards the costs incurred in this matter by the Administrator General of Demerary and Essequibo as representing the insolvent estates of Louis William Boode, and Jules Theophilus Boode, deceased, in the payment of which last mentioned costs the Court condemns the Plaintiffs herein.”

That your Petitioners feel aggrieved by said sentence, and the same being pronounced in respect of a matter at issue above the amount of Five Hundred Pounds Sterling, are desirous of obtaining from your Honourable Court leave to appeal therefrom to Her Majesty in Her Privy Council.

That although the said sentence is one of an absolution of the instance only, yet that the same has the effect of final and definitive sentence, inasmuch as your Honourable Court has by your written reasons for said sentence definitely determined that in the suit as brought your

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Honourable Court cannot decide the questions or determine the rights which were thereby submitted for decision.

That your Petitioners respectfully submit that upon the allegations contained in the pleadings, and the admissions of matters of fact made by the several parties to the suit, it was legally competent to your Honourable Court to decide the legal questions raised by your Petitioners with respect to the alleged Will of Elizabeth Ruysch de Coeverden and the construction to be placed upon the Will of the late Joseph Bourda, deceased, and consequently to determine the right of your Petitioners.

That your Petitioners have an interest in the decision of these questions, and that the whole of the parties are before the Court, who are recognised in a public Ordinance of the Colony as being all the claimants to the Bourda inheritance.

That your Petitioners respectfully submit -that the whole of the parties necessary to be joined in the said suit have been so joined; and if this be so, it is manifest that the sentence of your Honourable Court from the reasons upon which it is founded has the effect of a final or definitive sentence adverse to the views submitted by your Petitioners.

That under these circumstances your Petitioners respectfully submit that they should be allowed to appeal from said sentence.

Wherefore your petitioners humbly pray,

That your Honourable Court will be pleased to grant to your Petitioners leave to appeal to Her Majesty in Her Privy Council from the said sentence of your Honourable Court, dated and pronounced on the Nineteenth day of June last, and as hereinbefore set forth, with authority on the Registrar in *communi forma*, or etc.

And your Petitioners as in duty bound will ever pray,

J. LUCIE SMITH,
 Barrister-at-Law.

W. H. CAMPBELL,
 Attorney-at-Law.
 Demerara, 1st July, 1865.

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Order.—The Court cannot grant the prayer of this Petition.

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Thus done in the Supreme Court of Civil Justice of
British Guiana held for the Counties of Dem-
erary and Essequibo at the Court House in
Georgetown, Demerary, Twenty-sixth day of
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By the Court,

JAMES S. HITZLER, Registrar.

A true copy,

E. H. G. DALTON, S.C.

12 April,
1859.

MORTGAGE.

Formal Sentence.

The practice up to the present time in drawing up a formal sentence:—To confirm and if need be to renew the willing or voluntary condemnation passed on the _____ day of _____ in favour of _____ for the capital sum of _____ on the Plantation _____ and consequently admits the Plaintiff to proceed by execution against the property thereby mortgaged, to wit, the said Plantation _____ for the recovery of _____ the amount of capital and interest due on said Bond as on and up to the _____ day of _____ and with further interest at ___ per. cent. on the unpaid capital, to wit, the sum of _____ from the day of _____ until the same be paid and satisfied _____ with costs.

SUPREME COURT

15 April,
1859.

ADMINISTRATOR GENERAL *re* HICK.*Verweezing—Preference.*

Where act of Verweezing is unnecessary the minors still hare a preferent lien on the estate of the mortgagor and the rights thereunder cannot be varied by anything done by the grantor or written in his books.

An act of Verweezing is not necessary where the party seeking to contract a second marriage had been previously married by antenuptial contract.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—In this case the Court is of opinion that the act of Verweezing was altogether unnecessary, but whether or not, the Court's decision will not set it aside nor impugn its validity in any way whatsoever.

At the death of the minor's mother the proportion of the mortgage awarded to the minors was vested in her mother. This portion her mother, being married by contract, bequeaths to her daughter and appoints the father of that daughter, her own husband, Executor and Guardian.

The minor has a clear legal tacit mortgage upon the father's estate for this proportion of the mortgage had he received it and spent it; but he has not done so; the money before the Court arises on this identical mortgage and the Court cannot see that any statement of her father and Guardian when he was alive, or in his books after his death can diminish or affect the minor's claim to her own property.

With respect to the statement by all the parties in the petition filed and alluded to, the rights of all the parties to that petition being reserved, notwithstanding the statements in that petition and the presentation of the same, they render in the opinion of the Court, the petition perfectly harmless and in no way affecting the minor's claim.

OF CIVIL JUSTICE.

FERNANDES *v.* MacDONALD.15 April,
1859.*False Imprisonment—Damages—Costs.*

Circumstances where damages awarded.

Presumption of malice.

Full costs awarded.

Action for false imprisonment.

Plaintiff's case (*Mr. Lucie Smith*):—Oxen were sold at auction. Plaintiff purchased one. The Ox so purchased was taken to the Slaughter House. A dispute arose. Plaintiff shewed his receipt. Defendant stated that the receipt was unsatisfactory as not signed by the auctioneer and that the Ox was his property. The Ox was seized. Defendant charged Plaintiff for theft of the Ox. The Magistrate, without entering into the case, delivered the Ox to Plaintiff and told Defendant that his charge was vague, and he could not entertain the same as the theft had not occurred in his district.

Defendant's case (*Mr. Roney*):—Defendant received information that one of his oxen branded "C" was in

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the Slaughter House. He saw it and charged one Coelho, and after getting further information from some of the slaughterers, charged Plaintiff.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—In this case the Court has given sentence for the Plaintiff.

First: Because the Defendant did not make a sufficient enquiry into the circumstances of the case before he preferred the charge of felony.

Secondly: Because without sufficient grounds, he charged the Plaintiff with having committed a felony.

Thirdly: Because his letter to the Plaintiff averring that he had further evidence than he had adduced, when in fact no such further evidence was ever produced, shows that he was acting towards the Plaintiff under the influence of malice.

Fourthly: We have moderated the damages (\$50 02 and costs) because the Plaintiff brought an action and recovered from the Defendant the value of the ox with costs, thereby in a great measure vindicating his character, which under all circumstances, would not have been brought.

OF CIVIL JUSTICE.

*Re SAFFON.*15 *April*,
1859.

Children born in Berbice hare no interest in the funds, and cannot be appointed to a vacancy under the trust.

The Court having taken into consideration this matter and having reference to the Will of P. L. de Saffon deceased, from which it appears that children born in Demerara only are entitled to any advantage or benefit under that Will, and being satisfied that the minor in question was born in Berbice, discharges its order of the 10 June 1858, and directs the Administrators of the estate of P. L. de Saffon, deceased, to restore the said minor to her surviving parent.

SUPREME COURT

18 June,
1859.

ADMINISTRATOR GENERAL,
GUARDIAN MINORS GORDON

Power of Court—Tenders.

The tenders for lease of Pln. Union were laid before the Court, and the Court approved of the tender of H.S. Bascom, and directed the Administrator General to enter into and lay over contract of lease for approval.

SUPREME COURT

21 June,
1859.

Re JOSEPH HENRY.

Insolvency—Fraud—Imprisonment—Ordinance 29 of 1846.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—
Upon hearing of the matter of the schedule of the said insolvent, and upon examination made into the same, and upon insolvent swearing to the truth of the same;

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Forasmuch as it appears to the Court that the said insolvent has contracted the debt due to A. W. Perot & Co., without any reasonable expectation at the time of paying the same.

It is decided, ordered and adjudged, that the said insolvent shall be discharged from and not be entitled to the benefit of the said Ordinance as to the several debts and sums of money due or claimed to be due at the time of making the provisional order of insolvency . . . The Court now orders the said insolvent to be imprisoned in Her Majesty's Goal in the City of Georgetown, in the County of Demerary, in the Colony of British Guiana, for the period of six months to be computed from the 2nd March 1859, the date on which the said insolvent was arrested and detained at the instance of A. W. Perot & Co., with order on the Administrator General to pay the costs of these proceedings out of the estate and effects of the said insolvent.

(Formal warrant placed on minutes of the Courts.)

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Re PETITION MANOEL DE SOUZA. (*Ante* p. 5.)

17 June,
1859.

Right of Court re Practitioners.

The Court orders A.B., Advocate, to appear before the Court on Tuesday morning next the 21st instant, at 10.30 o'clock.

The letter of A.B., Advocate, 21st June being dated 21st June 1857 received by the Registrar in answer to the extract minute containing the Court's order of 17th instant is laid over.

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1859.

The Court observing that the said A.B. has failed to comply with the said order now orders the said A.B. to appear before the Court to-morrow morning at 10.30 o'clock on pain of being held guilty of a contempt of the said order of Court.

Mr. A. B., Advocate, having appeared at the Bar of the Court in compliance with the Court's order of 21st instant, was admonished by His Honour the Chief Justice with closed doors in presence of the gentlemen of the Bar for his conduct in the matter.

22 June,
1859.

SUPREME COURT.

21 June, 1869.

COELHO v. MCALLISTER.

Specific performance.

Where property is lost, &c, and cannot be produced action for specific delivery will not lie.

Case: specific delivery and value of enumerated hhds. of sugar.

Plaintiff's case (*Mr. Lucie Smith*):—Plaintiff bought sugar at auction from Defendant who was the Auctioneer and paid for same. He applied for delivery from the owner who referred him to Auctioneer. He got a delivery order and found empty puncheons the sugar having been taken away by Duff & Co.

22 June, 1859. Defendant's case (*Mr. Trounseil Gilbert*):—Innominate exception of absolution: Sugar cannot be produced, no one knows what has become of it, cannot be delivered in kind.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—In support of the claim Plaintiff has referred to *Vander Linden*, p. 193, wherein it is said that if the obligation consists in the doing some particular act then the obligee may sue the obliger for the performance of the act.

Referring to the same author on p. 196, he says. "He who contracts to give anything is bound to deliver it at a proper time and place to the other party, or to anyone empowered by him to receive it. If that which is to be given consists in a certain definite thing, the party bound must take good care of it till the time of payment or delivery and in case of want of due care, or if, purposely or through neglect, the thing perishes, or is lost or spoiled, he is bound to the other party in damages and interest, and in p. 197 the consequence of an obligation by which anyone binds himself to do anything consists in this, that he must do the act stipulated for, and on failure, is liable in damages and interest to the person in whose behalf he has bound himself."

OF CIVIL JUSTICE.

Looking then at the reason of the law, it seems clear to the Court that the article being destroyed and incapable of being delivered, although it may be so for want of care, or purposely, or through neglect of the purchaser, the action should have been for the value of the sugar and not for a specific delivery of that particular sugar and no other.

1859
COELHO
v.
MCALLISTER.

OF CIVIL JUSTICE.

COLONIAL BANK *v.* SPOONER & GONSALVES,
LATELY CARRYING ON BUSINESS AS SPOONER & GON-
SALVES.

5 December,
1859.

Pro. note.—Misjoinder of parties.—Partnership.

Misjoinder of parties sued jointly and severally is not a fatal objection to action as one may be acquitted the other condemned.

Semble.—Parties although they may bind themselves cannot bind others except on special notice.

Suit:—*Promissory Note.*

SUPREME COURT

1859
 COLONIAL
 BANK
 v.
 SPOONER
 AND
 GONSALVES.

Plaintiff's case. (*Mr. Bent*):—On 27th Dec, Plaintiffs refused to discount a note signed by Spooner alone. Another note signed by Spooner on behalf of the firm was discounted. Spooner became insolvent before suit and was still insolvent at the time of institution and trial of suit. A claim was made against his estate by Plaintiffs.

Defendant's case. (*Lucie Smith*.) Spooner is in default. Misjoinder. Partnership deed gives no right to sign notes.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—The Court sees no validity in the objection of misjoinder. Where Defendants are sued jointly and severally, one may be absolved of the instance and the other condemned.

2ndly: The Defendant Gonsalves further opposes the action on the ground that although there was a partnership between him and Spooner yet in the deed of partnership it was stipulated that neither of them should have any power or authority to use the partnership name upon any Bill of Exchange, Promissory note, or obligation in writing except for the legitimate business of the said copartnership.

The Defendant Gonsalves has failed to prove that the Plaintiff had any notice of this stipulation and as the stipulation was "as between the parties" it cannot operate as against third parties. *Byles on Bills* 5 ed. p. 33. The Court has therefore condemned the Defendant Martinho Gonsalves to pay to the Plaintiff the sum claimed with interest and costs.

OF CIVIL JUSTICE.

Re COSTS.28 *June*,
1859.

Fee not in Tariff to be disallowed.

Mr. Henry Watson, Attorney-at-Law, filed a Bill of costs against the insolvent estate of Alexander Rodie. There were items in the bill not in the recognized Tariff. The costs were taxed and allowed only so far as they were in Tariff of fees.

On appeal.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— The Court having considered the matter of taxation of costs in this matter declares it to be their opinion that no item of it ought to be allowed unless it is provided for in the authorised Tariff.

OF CIVIL JUSTICE.

Re PETITION MANIFOLD.

5 December,
1859

Commission to examine witnesses in England issued, returnable, 23rd March 1860.

SUPREME COURT

5 December,
1859.

Re PETITION ADMINISTRATOR GENERAL
REP. MINORS CORNETTE.

Minors' Interest.

The Court authorises the Administrator General to bid for and purchase on behalf of the Minors N½ lot 198, S. Cumingsburg, with the buildings thereon belonging to the estate of their father Louis Cornette.

OF CIVIL JUSTICE.

Re PETITION *v.* ADMINISTRATOR GENERAL
REP. MINORS FLEMINGS.

5 *December*,
1859.

Minors' Interest.

The Court authorises the Administrator General to sell the property of the Minors.

OF CIVIL JUSTICE.

Re PETITION EXECUTRIX ALVES.5 December,
1859.*Minors' Interest.*

The Court authorises sale of Plns. St. Grenhager, Gebroedas and Sisters, and also sale of Pln. Bel Air, Berbice, and No. 6, reserving life interest in favour of Petitioner, and also to transport to Edward Field, Pln. Cotton Tree, securing by first mortgage \$600 to each of Petitioner's 4 children for a period of 8 years, commencing at the expiration of 5 years from the passing of the Transport should they so long live respectively, and that in passing of Transport mutual discharges and releases shall be executed by and between the several parties interested in the inheritance of the late Wolfart Katz, deceased, in terms of the agreement of 27th May 1856.

OF CIVIL JUSTICE.

ADMINISTRATOR GENERAL GUARDIAN WISSER v. 5 December,
COLVIN, ORIGINAL DEFENDANT AND 1859.
CATAMBO, CO-DEFENDANT.

Opposition Suit—Non-joinder—Tibi adversus non competit actio—Costs.

Accounts ordered where there is *ce questi* trust.

Plaintiff's case (*Mr. Trounseil Gilbert*):—Account due and right to oppose till accounts be rendered and money paid to settle accounts.

Defendant's case (*Mr. Bent*):—Non-joinder as wife of original Defendant is co-Guardian of minor (Plaintiff) and ought to be joined.

SUPREME COURT

1859

ADMINISTRATOR
GENERAL
v.
COLVIN
AND
CATAMBO.

Plaintiff and original Defendant's wife in possession.

ARRINDELL, C.J., and BEETE and ALEXANDER J.J.:—
Were the joinder necessary the minor would be without protection and without remedy.

But the original Defendant, even could such an objection be taken, waived it when he promised, as has been proved by the evidence, to render the account which he now refuses.

2ndly: The Defendant says that this action ought not to be maintained because the Plaintiff and his the original Defendant's wife are in possession of the property and no trust has ever existed or does exist between the said original Defendant and the Plaintiff, that could or can create a right on the part of the Plaintiff, to demand an account from him the original Defendant.

The evidence disapproves these allegations and shews that the original Defendant is in possession of the property and has promised to account.

3rdly: The next objection is that the intention of passing Transport was withdrawn before the opposition was entered and that the Plaintiff has no right to proceed after such withdrawal.

This objection affects the costs, and the Court will give no opinion as to costs until the account has been rendered. The Court considering its present sentences interlocutory merely.

SUPREME COURT

5 December,
1859.

DE JONGE v. GONSALVES.

*Promissory Note—Partnership deed not binding on third parties
without notice—Liability of Partners.*

Plaintiff's case (*Mr. Lucie, Smith*):—On 14th Oct. a promissory note was signed by the firm of Spooner & Gonsalves for two wagons sold to Spooner who afterwards became insolvent. Plaintiff believed the sale was to Spooner & Gonsalves.

Defendant's case (*Mr. Bent*):—Gonsalves knew nothing of transactions. Admits making of note as alleged and when he was informed, refused to take wagons and

OF CIVIL JUSTICE.

Spooner took them over. Not liable under deed of partnership.
Note was for accommodation of Plaintiff.

1859

DE JONGE
v.
GONSALVES.

ARRINDELL, C.J., and BEETE and ALEXANDER J.J.:—It is not averred nor has it been proved that the Plaintiff had any notice of the stipulation in deed of partnership that neither parties should have any power or authority to use the partnership name upon any Bills of Exchange &c, except for the legitimate business of the co-partnership and it cannot operate against him. See *Byles on Bills*. 5 ed. p, 33.

It is further pleaded that the note sued for was made for the accommodation of the Plaintiff or Walter Spooner or one or both of them, but this is disposed of by the evidence of both Plaintiff and Walter Spooner.

There being no defence to the action the Court has given sentence in favour of the Plaintiff.

OF CIVIL JUSTICE.

DE JONGE v. GONSALVES.

6 *January*,
1860.

Sentence for Plaintiff.

OF CIVIL JUSTICE.

STEELE, LOXDALE & CO., v. GONSALVES.

6 January,
1860.

Same as above cases.

OF CIVIL JUSTICE.

PETITION OF LADE & CO.

Courts power over Solicitor.

Court orders A. B. to pay Petitioners \$55.52 under deduction of any legal costs due to the said A. B. in the special suit at the instance of Petition against _____ and further orders the said A. B. to pay all costs incurred by the said Petitioners and for which they are rendered liable in the proceedings at law adopted, after the sale mentioned in evidence and to pay all the costs and all the proceedings and the Court warns Mr. A. B. to be more circumspect in future.

5 December,
1859.

OF CIVIL JUSTICE.

KENNEDY v. RICHARDSON, ET AL.

*Joint Defendants—Payment—Transfer.*12 April
1859.

Sentence consented to.

Formal sentences condemning Defendants jointly and severally on a promissory note, the one Defendant paying to have restitution of the promissory note sued for, and transfer and cession of action against the one in default of paying.

OF CIVIL JUSTICE.

ROBERTS v. RAMSAY.

14 April 1859

Accounting—Costs.

Formal sentence to account condemning Defendant to proceed with Plaintiff to a due account and reckoning of all the partnership accounts by virtue of a verbal agreement of partnership, and for such purpose to deposit in some neutral place (or in case of difference) in some place to be appointed by the Court, all books, &c, with usual affidavit, and after such accounting to pay to Plaintiff such sum found due, with reservation of costs.

OF CIVIL JUSTICE.

LOCKETT v. McKENZIE.

14 April 1859.

Immobilia—Contract.

The fact that *Immobilia* has decreased in value since agreement for sale is no defence to an action to complete contract, and the keeping of possession by the seller until transport is passed does not debar the carrying out of the purchase.

Plaintiff's case (Mr. *Lucie Smith*):—Plaintiff owned lot 34, Kingston, with the buildings which Defendant bought for \$1,630; payment to be made on passing of transport. The transport was advertised

SUPREME COURT

1859
 LOCKETT
 v.
 McKENZIE.

The parties on 30th October, appeared but the transport was not passed. On 7th November, Defendant refused to carry out the bargain as she was told Kingston would be inundated, and returned the keys.

Defendant's case (*Mr. Roney*):—Kingston was inundated by the sea, and we were advised not to carry out the bargain; Plaintiff did not deliver possession.

ARRINDELL, C.J., and ALEXANDER & BEETE, J.J.:—Sentence decreed condemning Defendant to accept and receive from Plaintiff transport, and to pay to Plaintiff immediately on passing of transport the purchase money with costs.

The Plaintiff's case has been fully established by the evidence adduced.

The defence is, that according to *Voet ad Pandectas, lib, 18, tit. 1, s. 3*, the Defendant enjoyed the *poenetentiae locus* up to the time of transport being passed.

The Court is not of that opinion, the *instrumenta emtionus* mentioned in this passage of *Voet*, means the contract of purchase and sale and not a transport, and the passage relied upon for the defence clearly supports the Plaintiff's case.

SUPREME COURT

6 December,
1859

ADMINISTRATOR GENERAL, CURATOR or E. A.
BOURNE, v. BOURNE.

Arrest—Separation a mensa et thora.

Court declares arrest good. Decrees separation, and orders support of children till they arrive at 14 years or respectively be able to gain their own livelihood. Costs granted.

SUPREME COURT

6 December
1859

BUTTS v. BRATHWAITE.

Functions of single Judge—Jury—Costs—Signing of Minutes.

Verdict of One Dollar does not carry costs.

His Honour the Chief Justice stated that in this case he will preside, whereupon Their Honours the First and Second Puisne Judges retired.

12 special jurors drawn.

Mr. Trounsell Gilbert for Plaintiff.

Mr. Bent for Defendant.

Evidence taken by Registrar.

Action. Libel.

Defendant the proprietor and editor of the "Creole" published an article charging Plaintiff, an Inspector of Police that he had used the fodder of the Colony in feeding his horses, and in using the Police for private purposes, winking at certain charges against a policeman in order to procure his dismissal as such policeman because he was not subservient to Plaintiff.

Plaintiff denied the charges and adduced evidence.

The case occupied 10 days and on 15th December the Foreman of the jury delivered a verdict for the Plaintiff, damages one dollar.

Mr. Bent moved the Court to certify that the cause was a proper one for a special jury.

Mr. Gilbert consented.

OF CIVIL JUSTICE.

The Court directed the parties to be heard on the question of costs on 16th December.

The Judge having heard the parties, rules that the verdict of One Dollar does not carry costs.

The minutes of each day on which case was heard were signed by the Chief Justice alone.

1859

BUTTS

v.

BRATH-

WAITE.

16 *December*,
1859.

OF CIVIL JUSTICE.

HARLEY v. BAIRD.

21 June,
1859.

*Poor Law—Non-compliance—Arrest—Damages—Record—
Evidence—Notice of Action.*

The only evidence of conviction is the record.

Where Magistrate exceeds his jurisdiction he is liable in tort.

Where Ordinance declares that Defendant cannot be convicted for more than 12 weeks' maintenance of child and Magistrate awards more he exceeds his jurisdiction.

Mr. Gilbert for Plaintiff moved for a Rule on A. F. Baird, S.J.P., to shew cause why a certain order and commitment made by him in the matter of Phœbe Douglas against W. H. Harley, a Police Constable, should not be quashed. Lays affidavit shewing that Harley was adjudged putative father of child borne by P. Douglas, and on consent an order was made on Harley to pay 48 cents per week; that such sum was paid up to December 1858, when P. Douglas left for Berbice and Harley did not see or hear of her till March 1859, when she came to him and asked for payment, but promised to return next day, but did not, and on 15th April he was arrested on a warrant alleging more than 12 weeks' maintenance as due, signed by Mr. Baird, S.J.P., without a hearing; that he told Mr. Baird after his arrest that he was willing to pay and explained the reasons for non-payment; that the Inspector of Police offered to pay the amount due, but Mr. Baird refused to accept such payment; that he was taken to the gaol at New Amsterdam, Defendant telling him: "If you have never been to gaol you shall go now." That he was kept at hard labour till 11th May 1859 when he was released on an order of the Governor.

SUPREME COURT

1859HARLEY
v.
BAIRD.

Order: Court cannot grant this rule.

Action on facts above stated for damages for fake imprisonment.

Plaintiff's claim, \$3,000 (*Mr. Gilbert*):—Loss of earnings as Policeman; loss of situation. Ordinance 31 of 1853, 2nd Section, need not aver malice on case.Defendant's case (*Mr. Lucie Smith*):—Ordinance pleaded, Ord. 6 of 1855, Sec. 36. Plaintiff should have been summoned to show cause. Ordinance 6 of 1855, Secs. 38, 39, 40.16 December,
1859.

ARRINDELL, C.J., BEETE and ALEXANDER, J. J.:—The 36th Sec. of 6 of 1855, referred to by Defendant on the margin of writ is beside the question.

The warrant does not show that Plaintiff was warned to appear and that he did appear, and it does not show that any distress had been issued against the Plaintiff, before it, the warrant of arrest was granted.

The Plaintiff having tendered the notice of action such as is required by Sec. 9 of 31 of 1850, the Defendant objected to the same being received on several grounds which were overruled by the Court.

Because on the authority of *Morgan & Leach* the service by C. Heather at the request of the Plaintiff's Attorney-at-Law was sufficient.

That by the warrant of commitment, coupled with the judicial notice that the Court was bound to take of the towns, counties and parishes of the Colony, the offences alleged to have been committed were fairly proved to have been committed within the jurisdiction of the Court.

Independently of the objection to the notice of action and which was overruled by the Court the Defendant urged that by Section 2 of Ordinance 31 of 1850 no action could be brought until the original conviction or order had been quashed; but he failed to prove that any order had ever been made, and instead of producing the record of conviction or order or judgment, or copy of the same as he ought to have done, he relied upon the recital on the warrant of commitment as sufficient evidence of a conviction having been made.

The Court, however, on the authority of *Stephens v. Clark, 2 M. and Bob, 435*, where it was held that a

OF CIVIL JUSTICE.

warrant of commitment on an offence summarily punishable had been held no evidence of a fact recited on it and necessary to give jurisdiction on an information on oath, was and is of opinion that the recital in the warrant of commitment in this case is no proof that a conviction or order was ever made, and that there was no necessity for the Plaintiff to seek to obtain the quashing of a conviction or order, which, for anything shown to the contrary never existed.

If the Defendant based his decision upon any such conviction or order the record of it would have been in his possession and he ought to have produced it, which he has not done. On the above grounds the Court is of opinion that the proceedings of the Defendant against the Plaintiff was altogether illegal; that the Defendant exceeded his jurisdiction; that without repeating here the words of the claim and demand he has injured the Plaintiff and that the Plaintiff is entitled to the amount of damages awarded by the Court with costs, \$300.

1859
 HARLEY
 v.
 BAIRD.

OF CIVIL JUSTICE.

MANGET v. JOHNSON.

5 December,
1859.*Postponement—Practice—Trial by Jury.*

Mr. Roney for Defendant applies for postponement on the ground of absence of H. Ridler, a material witness, files affidavit of defence and certificate of Resident Surgeon of Colonial Hospital. Postponement opposed but granted. Defendant to pay costs of day, and Marshal notifies special Jury and witnesses to attend on adjourned day.

OF CIVIL JUSTICE.

PETITION W. H. HOLMES, PROVOST MARSHAL.

16 *December*,
1859.

The Court authorises the Provost Marshal to retake possession of and re-sell property bought at execution sale, the purchase money of which had not been paid.

SUPREME COURT

5 December,
1859.

PETITION VESTRY OF ST. MARK'S
FOR LEAVE TO APPEAL.

ARRINDELL, C.J., BEETE & ALEXANDER, J.J.:—Although it is alleged by the Petitioners that the property mentioned in the sentence is of the value of £500, yet such is not the fact.

By the evidence produced to the Court in the proceedings in which the sentence now sought to be appealed from was pronounced, it was shewn 1stly, that the whole 5 acres of land when taken over by the Colony in 1820 was appraised for the sum of 5,000 guilders or £357 2s.

2ndly—That shortly after about ½ of this land was marked off and a dwelling-house and out-buildings were erected thereon, and a church was built on the other half, or part of the land.

3rdly—That in 1847 the colony having resumed possession of the half of the land and dwelling-house and buildings attached thereto, sold the same upon an appraisement to the Rev. Robert Duff, then the Minister of the Parish of St. Mark's, for \$1,500 or £312 10.

4thly—That subsequently thereto, the Rev. R. Duff sold the portion and buildings attached to R. G. Butts for \$1,000 or £229 1s. 8d.

5thly—That it is evident if the value of the whole 5 acres was originally 5,000 guilders or £357 2s. 8d., that 2 acres 257 roods with the buildings thereon erected were sold by the Colony for \$1,500 or £312 10s., and subsequently by the Rev. R. Duff for \$1,100 or £229 1s. 8d., 2 acres and 357 roods without any buildings, and it is this portion of land only without the buildings which the petitioners claim cannot be worth even \$1,100 or £229 1s. 1d., and that therefore, the sentence given and pronounced in this matter does not involve directly or indirectly the title to property amounting to or of the value of £500.

6thly—That such being the facts, the sentence is not appealable.

OF CIVIL JUSTICE.

COMACHO v. COREIRA, ORIGINAL DEFENDANT,
AND COREIRA, CO-DEFENDANT.

6 January,
1860.

Opposition—Account.

A co-attorney is under obligation to account to his comandator.

Suit against original and co-Defendant jointly and severally for Accounts.

Plaintiff's case (*Mr. Lucie Smith*):—Original Defendant on leaving the Colony appointed Plaintiff and co-defendant his Attornies, jointly and severally, and was to receive along with co-defendant one-third of profits made during absence of original Defendant.

Defendants' case (*Mr. Roney*):—Offer to account. Presentation of offer of what was admitted due. Co-Defendant not liable. Original and co-Defendant should not be sued together.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—The Court is of opinion that the action is rightly brought. The second named Defendant was a party to the firm's dealings and transactions and accounts of which an adjustment and settlement is sought, and although the Plaintiff does not pretend to have any money claim against him, yet the Plaintiff is entitled to have been present aiding and assisting in the adjustment and settlement of those dealings transactions and accounts to which he was a party.

The Court has therefore given the usual interlocutory sentence with reservation of costs.

OF CIVIL JUSTICE.

GRAY AND OTHERS v. MURRAY.

6 January,
1860.*Partnership—Non-joinder.*

All parties in an action to render account must join.

Action for account.

Plaintiff's case (*Mr. Roney*):—Defendant was manager

SUPREME COURT

1859
 GRAY
 v.
 MURRAY.

of a shop in which Plaintiffs and he were partners, and was bound to account.

Defendant's case (*Mr. Lucie Smith*):—Non-joinder, there being two other partners who have not sued.

ARRINDELL, C.J., BEETE & ALEXANDER, J.J.:—It was proved at the trial that they were two other partners at the commencement of the business, and as the Plaintiffs claimed as having been with the Defendant the only partners in the concern, the objection is fatal to the action, and the Defendant is absolved from the instance.

The case of *Adonis v. York* relied on by the Plaintiff's Counsel, is not in point with the present case.

SUPREME COURT

6 January.
1860.

NUNES v. COELHO AND FERREIRA.

Opposition Suit.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—In this suit the Court is perplexed by the contradictoriness of the evidence by Plaintiff and that adduced by the Defendant. The Court admits that formerly a debtor might obtain payment from his insolvent creditor under certain circumstances without incurring the risk of the *actio Pauliana* or other remedies pointed out in *Voet, Bk. 42 tit 8. Quæ in frendem creditorum facta sunt ut restituantur.*

The Court, however, in the present case believes that the Plaintiff was perfectly well aware of the original Defendant's claim, and that the relative position of the Plaintiff and the co-Defendant gave to the Plaintiff an influence over the Defendant which he was unable to resist and which produced the arrangements proved in evidence by which the original Defendant was with full knowledge of the Plaintiff and of the co-Defendant of her claim upon the original Defendant shut out from the participation in the proceeds of the property of the co-Defendant. The Court views the whole business as a fraud upon the original Defendant, and that therefore the property in question never did legally rest in the Plaintiff, and has been legally levied on by the original Defendant.

OF CIVIL JUSTICE.

NUNES *v.* COELHO, ORIGINAL DEFENDANT, and
FEREIRA, CO-DEFENDANT.

16 December,
1859.

NUNES *v.* PROVOST MARSHAL.

Opposition—Co-Defendant.

Plaintiff's case (*Mr. Trounsell Gilbert*):—Case 1. Original Defendant levied under sentence, goods of Plaintiff.

Case 2. Provost Marshal had no right to levy after having been warned by debtor that levy -would be illegal.

Defendant's case (*Mr. Lucie Smith*):—Case 1. Levy good.

Case 2. Marshal was bound to carry out instructions of Plaintiff in execution, and was only his agent and not liable to a suit for obeying instructions.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—In this case the Court rejects the claim and demand, inasmuch as the Marshal must in any case levy at the peril of the Plaintiff, and is not personally responsible.

6 January,
1860.

OF CIVIL JUSTICE.

LUCKIE v. KIRKWOOD.

6 *January*,
1860.

Sentence for Plaintiff on merits.

OF CIVIL JUSTICE.

HUREE v. BASCOM ET AL.

7 January,
1860.*Servitude—Evidence—Costs.*

Servitude not expressed in transport is lost by holder.

Semble.—Evidence cannot be led to vary transport.

Plaintiff's case (*Mr. Roney*):—Defendants were proprietors of Good Success. Plaintiff had in 1856 on lease from former proprietor 3 fields now taken over by Defendants.

SUPREME COURT

1860
 HUREE
 v.
 BASCOM.

Defendants' case (*Mr. Trounsell Gilbert*):—No lease reserved in transport.

Evidence led to show that it was agreed that rights of lessees should be respected.

Held: inadmissible, inasmuch as the effect would be to vary the transport.

ARRINDELL, C.J, BEETE and ALEXANDER, J.J.:—The Plaintiff, if he had chosen, might have opposed the transport unless his rights were recognised and reserved expressly in it; The Court has therefore given absolution of the instance, but having regard to the relative positions of the parties and the way in which the case for the Plaintiff has been met, has compensated the costs.

SUPREME COURT

9 January, ADMINISTRATOR GENERAL *Re* HICKS (MINORS).
1860.

Practice *re* sale of Minors' property.

The Court, on petition for leave to repair minors' property after seeing report of master carpenter, orders *fiat*.

SUPREME COURT

6 *January*,
1860.

ADMINISTRATOR GENERAL, REPRESENTING
WADDELL, *v.* WATERTON.

Court opens Points of office to enable Defendant to produce Petition of Curator of Waddell with order of Court thereon.

Sentence for Plaintiff for amount found due.

SUPREME COURT

10 *January*,
1860.

PETITION CURATOR OF HEIGMANS

Husband to pay costs of suit for separation *a mensa et thora*.

For separation.

Court orders Defendant, the husband, to appear and show cause why he should not be ordered to pay to the Curator the sum of \$240 for the purpose of instituting such proceedings as may be necessary against him.

Court orders the husband to pay the taxed costs of these proceedings.

OF CIVIL JUSTICE.

PETITION RECEIVER GENERAL.*

11 January,
1860.*Servitude.*

Only title to land in this Colony is Letters of Decree or Transport.

Semble.—In matters relating to servitude, the Colony is in no better position than a private individual.

Case:—The Vestry of St. Mark's took over certain property as Church lands from the Government who had bought the same from the proprietors of La Retraite.

After possession by Colony the proprietors of La Retraite sold out estate to several persons for a village.

Colony never got transport of the land it had bought, and sought to transport the land to Church body.

Held, Land was property of proprietors of La Retraite, as they never divested themselves of same by transporting same.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:—In this case, the Court is asked to authorise and direct the passing before one of the Judges, transport by and on behalf of the Colonial Receiver General of British Guiana, for and on behalf of the Colony of British Guiana, to and in favour of the Reverend Robert Duff, of a certain piece of land being a portion of five acres of Plantation La Retraite.

In support of an application to pass a transport, various documents were laid over, commencing with an order called a mandamus by Sir Benjamin D'Urban then Governor of the Colony, dated 2nd May 1827, addressed to certain persons to take possession of the five acres of land, to ascertain by appraisal the value thereof, and to offer the appraised value to the proprietors, all of which was then done.

At the time the land was so taken possession of, the then proprietors of La Retraite held their title to that

* See case Vestry of St. Mark's, p. 12.

SUPREME COURT.

1859*Re*PETITION
RECEIVER
GENERAL

estate, including the land in question under transports of the fourth of June 1794, and sixth April 1802, and on the third December 1829, they transported La Retraite, *cum annexis*, not including the five acres of land claimed and purchased by Government, but it is not shown that they ever passed any transport or gave any title for the five acres to the Colony. Various documents were filed to prove that the Colony paid the purchase money, took possession of the land, parted with possession and guaranteed a transport to the Reverend R. Duff, and it was contended that the simple fact of the Government of the Colony taking possession, vested in the Colony a dominium or title sufficient to enable the Colony to pass a transport without shewing that the Colony has ever had the land vested in it by a legal title.

In support of this doctrine, *Voet*, c. 1, t. 4, s. 7; *Van der Linden*, p 122, and *Grotius*, 204, were relied upon.

The Court admits the right of the Colony to take possession of the land for the purposes and in manner and form stated, but the Court is not aware that the mere taking possession, gave to the Colony a legal right to the land, especially as the proprietors of the land at the time held it under and by virtue of a transport, and could as readily had transported the same on the third of December 1829, as they had transported the rest of the estate. The Court also holds that *Voet*, *Van der Linden*, *Bynkershoek* (referred to by *Van der Linden*), and *Grotius*, all treat of the taking possession of land when the State has need of it, and that the *plenum dominium* of the possession at the time is thereby lost, but that not any one of these authors nor any other author that they know of says anything as to the mode and manner of vesting a legal title in the State, and that by the law of the Colony, transfer of or title to immovable property could only be given by act of transport before the Judge of the place where the property is situate. See *Voet*, *lib.* 41, *tit.* 1 s. 38.

That the Colony has adopted and acted upon this law is evidenced by a transport passed on the 6th September 1814 by Henry St. Hill to A. Bone of lots numbers 61 and 62, with all the buildings thereon, in Kingston Georgetown, and on the same day by the said A. Bone

OF CIVIL JUSTICE.

transports of the same lots to the Civil Government of the Colony, and which lots on the thirteenth March 1839 were transported by the Civil Government of the Colony to H.E.F. Young.

But in support of the application two transports by the Receiver General of a part of a certain piece of land to Matthew Steele, and of the other part of said piece of land to Louisa Anne Manget, were filed. These transports were held to be of no authority, because the piece of land mentioned in them had always been the property of the Crown or Colony and never belonged to any private individual. Prescription was pleaded. The term of prescription in this case would be thirty-three years and a third. The warrant of the Governor was dated 2nd May 1827, not thirty-three years and a third ago. The ruling of the Court on this point is that if the Government or State omitted to get a title from the proprietors of La Retraite who could at the time have given one, the omission may be regretted but cannot be amended by this Court.

The Court of Policy may by Ordinance vest in the Crown or Colony a title to the land in question, as has been done on more than one occasion, but the Court is of opinion that the Judge acted correctly in declining to pass the transport, and therefore cannot grant the prayer of the petition.

1860

Re

PETITION
RECEIVER
GENERAL.

SUPREME COURT

11, 12 April,
1859.

LUCKIE, ET AL v. ESTATE KIRKWOOD.

Evidence—Points of Office.

Action for accounts and for money due.

Agreement of dissolution tendered.

Advertisement of dissolution as appearing in newspapers tendered. Objected to on the ground that it had not been shown that such advertisement was with the consent of Defendant's Testator. Objection overruled.

The Court opens Points of office, directs the Defendant to produce evidence of interest of the estate of Falcon Campbell on Pln. Smithson's place at the time of the agreement laid over dated 19th June 1855, and what interest his estate has in the said plantation.

2: Evidence of other property owned by the said Falcon Campbell either here or elsewhere.

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3: Evidence of amounts received by Plaintiffs from the estate of Ellis John Troughton or of Troughton Brothers from the nett proceeds of the sale at execution of Pln. Adelphi on account of the Bills of Exchange mentioned in the Bill of particulars of the Plaintiff.

1859
LUCKIE, *et al*,
v.
ESTATE OF
KIRKWOOD.

Case decided afterwards on merits. Appeal to Privy Council. Accounts debated by judgment of Privy Council.

OF CIVIL JUSTICE.

CADELL v. KNIGHTS.

10 January,
1860.*Civil prisoner—Escape—Liability of Keeper of Gaol.*

What is necessary to be proved to make Gaoler liable for escape of prisoner.

The use of a Judge's Order not countersigned by Registrar is irregular.

Plaintiff's case (*Mr. Lucie Smith*):—Plaintiff had Lewis Marks incarcerated as a civil prisoner for failing to render accounts under a sentence. He was released by Defendant the keeper of the gaol on an order signed by the Chief Justice, but not countersigned by the Registrar.

SUPREME COURT

- 1859 Defendant's case (*Mr. Trounseil Gilbert*):—Order of Judge
 CADELL to release.
 v. ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—In order
 KNIGHTS. to render the Defendant liable it should have been proved that
 the prisoner in question was legally apprehended, and that the
 Defendant had due notice of the order by virtue whereof he
 was so apprehended. This latter was neither averred nor
 proved, and the Court has therefore rejected the claim and de-
 mand with costs.
- 16 *January* The Court considers the conduct of A.B., Attorney-at-Law,
 1860. in having obtained the Chief Justice's order and acted upon the
 same without the Registrar's countersignature, highly repre-
 hensible, and orders the Said A.B. to be more circumspect in
 future and to pay the costs.

SUPREME COURT

17 January,
1860.

ACCOUNTS.

The only accounts to be examined by the Court are those referred to in Sec. 205 of 26 of 1855, viz., the accounts of every accounting party to the Court, and not to the Administrator General's Office.

Quære—Whether examiners of accounts should not have some knowledge of law.

Held: Not in province of Judges of the Court to undertake a complete and effectual examination of accounts, the Auditor General being the proper authority in this respect.

SUPREME COURT

23 *March*,
1860.

STEELE *v.* THOMPSON.

Servitude.

Decision of Privy Council laid over, confirming judgment of Court, L.R. B.G., old series, vol. 1 p. 92.

Lord KINGSDOWN, Lord Justice KNIGHT BRUCE, Sir RYAN, Sir JOHN TAYLOR COLERIDGE:—In this case three points were raised:—

OF CIVIL JUSTICE.

1. Whether the servitude in question was well constituted?
2. Whether, if well constituted, it was duly transferred to the Appellant?
3. Whether, if well constituted and duly transferred it was lost by the failure of the Appellant to intervene and bring forward his claim on the transfer of the servient tenement to the Respondent.

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STEELE
v.
THOMPSON.

There was very little controversy at the bar either as to the material facts of the case or as to the general principles of law applicable to the subject, and the argument was conducted on both sides in a manner most creditable to the Counsel and most useful to their Lordships.

It is admitted that the servitude in question is of the character of immoveable property, and like other immoveable property can only be passed according to the Roman Dutch Law which prevails in the Colony, by the proceeding in the presence of some Judge at the place in which the property is situated. The first question in this case is whether the transfer which was made of the dominant tenement with all due solemnities before Judges Commissary can or cannot be construed by the rules of law to include the servitude in question.

This again depends, first, on the question whether the terms of the instrument import that all which was mentioned in the articles of agreement as intended to be conveyed, should be actually included in the transport; and, secondly, whether supposing this to be the true import of the words, such a transport by way of reference to another document, is a sufficient compliance with the rule requiring a transport in the presence of the Judge. The articles of agreement made between the vendor of the first part, and the purchasers of the second part, purport that the vendor offers to sell to the purchasers certain lands described by metes and bounds, and forty-three negroes, for the sum of £12,000, of which sum £6,000 are to be paid by bills upon London to be given at the time when the transport was passed; £4,000 are to be secured by a first mortgage to be passed also at the time of the before mentioned transport, to be charged on

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 v.
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the Plantation and negroes agreed to be sold, and also on twenty-five other negroes to be put on the Plantation by the purchasers, the mortgage to be paid in two instalments of £2,000 each, and the remaining sum of £2,000 is to be secured by a second mortgage on the same property, to be passed at the same time with the first, and to be paid in two instalments of £1,000 each.

The agreement then states that the trustees have agreed that the purchasers and their successors, owners of the Plantation sold, should have for the benefit of that Plantation a right to the use of a canal belonging to the vendor for certain purposes therein specified, with a right to divert and change the course of it, and with various stipulations as to the expense of the repairs and cleansing out of the canal, a part of which is to be thrown on the Plantation sold. It is not clear that by the effect of the agreement the Plantation sold is not charged at all events with a proportion of the expenses of keeping up the canal whether the easement is used or not, and the expenses are to be such as may be mutually agreed upon.

The offer was made, which must according to the fair construction of the agreement, mean the offer to sell the Plantation with such rights in the canal as are specified in the articles, is then at the close of the agreement accepted by the purchasers.

If therefore the transport is to be read as embodying the agreement, and as conveying all that by the requirement was meant to be conveyed, there can be no doubt that it must be read as conveying not only the Plantation and negroes, but also the right over the canal which was intended to be attached to the Plantation.

But can the Court fairly attribute to the words used a meaning so extensive?

The vendor by the transport professes to sell, transport, and in full property make over to the purchasers the Plantation in question, adopting the description in the agreement and also the number of forty-three negroes as per schedule of Registration hereunto annexed all agreeably to contract of sale and purchase recorded in

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the Secretary's office of the Colony in book No. 27, vol. 1 page 469, acknowledging to be fully paid and satisfied for the same, and engaging to warrant the property free from all claims whatsoever according to law. Now the transport if it be read as conveying the property described in it, is so far as it goes, in conformity with the agreement. It does not, it is true, exhaust the agreement, it is not a fulfilment of all the terms of the agreement, but it does not purport to be so, it is in effect—whereas the vendor has contracted to sell a Plantation and certain slaves to the purchasers at a certain price. Now in conformity with that agreement he hereby makes over such property to the purchaser, and acknowledges to have received the purchase money. Nobody reading the transport would infer from it that anything more was intended to be conveyed than is expressed.

It is clear that it never was intended that this transport should complete the agreement. Two other transports are to be executed by way of mortgage, and not only so but twenty-five additional negroes are to be put upon the property and included in such mortgages. It cannot be pretended that if the agreement had been for the purchase of two plantations, and only one had been conveyed, the words “agreeably to articles of agreement “of such a date recorded in such a book,” would have been sufficient to include the other plantation, the properties being distinct. A conveyance of A., in pursuance of an agreement, could not amount to a conveyance of B., also, though the agreement to convey included B. But it is said that here the properties were not distinct, that the one was an incident to the other, and that the conveyance is to be read as if it purported to convey the plantation to be held and enjoyed with the incidents to it, specified in the article. But this is not the language of the instrument, and what in this argument is termed an incident, does not become an incident until it has been legally constituted. At the date of the transport it was a distinct interest in a real estate, which real estate was not included, and was not meant to be included in the conveyance. The plantation conveyed and the right over the canal were not inseparably con-

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nected. The right over the canal could not, it is true, be enjoyed, according to the agreement, except by the owner of the plantation. But the plantation might well be conveyed and enjoyed without the right over the canal, and the plantation being first conveyed, the right over the canal might be the subject of a separate conveyance. There seems, therefore, to their Lordships to be no sufficient reason for extending the words of the transport beyond their ordinary sense, viz.:—that the conveyance thereby made, was made in consequence of the articles therein referred to. A consequence of the right over the canal, mentioned in the articles with the several conditions to which it was to be subject, might have required a distinct instrument containing mutual engagements by the owners of the dominant and servient tenements, as to expenses and other matters. It is said that the constructions which we have adopted give no effect to these words, “All agreeably to the articles of agreement.” But this is not quite so; the transport is in truth, an acknowledgment before the Judge, and by him put upon record, of an agreement previously made between the parties, and which it appears may be either verbal or in writing. It is, therefore, the usual practice to refer to the agreement.

If, however, it could be held that the intention of the parties to include in the transport everything which is included in the agreement is sufficiently apparent, the question would still remain whether effect could be given to such intention consistently with the rules of law prevailing in the Colony. The law provides that the transfer of immoveable property shall only be made before some Judicial authority. It is, in fact, a judicial act. It is to be collected from *Mr. Burge's Commentary*. pp. 719 to 721, that the instrument of transport must “contain a “description of the lands, situation, and boundaries. That when “it is acknowledged, it is entered instanter among the Acts of “Court and becomes a judicial record. That a grosse or copy is “given to the parties, and that the production of this instrument “affords sufficient proof of the title.” Whatever may be the reasons for requiring the sanction of the Court to

OF CIVIL JUSTICE.

the sale, if one be, as suggested in *Van Leeuwen*, (book ii., cap. 7, sec. 4) to prevent parties from being deceived in the buying, selling, or mortgaging of immoveable property, and if the production of the copy of transport be evidence of title it should seem capable of argument, that in order to prevent fraud, either in the immediate or in subsequent transactions the description of the: property sold should appear upon the instrument itself without reference to any other document. No authority however, upon the point was cited to us by the Counsel on either side and their Lordships therefore abstain from expressing any opinion upon it, resting their Judgment on the ground already stated. It is not without regret that their Lordships have come to the conclusion at which they have arrived, which probably disappoints the real justice of the case between the parties. In reporting their opinion to Her Majesty, they will recommend that the decree be affirmed, without costs.

The view which they have taken of the first point in the case has made it unnecessary for their Lordships to consider the others.

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SUPREME COURT

23 *January*,
1860.

Re APPEALS TO PRIVY COUNCIL.

Seal of Supreme Court to be on transcript. Signature of Registrar to be authenticated by Chief Justice or by Senior Puisne Judge.

OF CIVIL JUSTICE.

ADMINISTRATOR GENERAL REP.
MINORS GORDON.

30 *March*.
1860.

Re Minors' Property.

Court authorises repairs to property.

OF CIVIL JUSTICE.

MANGET v. JOHNSON.*

24 *March*.
1860.

Trial by Jury before Chief Justice.

Verdict—\$5 damages.

* No evidence on record in either of these cases. No written decision of Jury.

OF CIVIL JUSTICE.

SMITH *v.* JOHNSON.*24 *March.*
1860.Trial by Jury before Chief Justice.
Verdict for Plaintiff for \$25 damages.

* No evidence on record in either of these cases. No written decision of Jury.

SUPREME COURT

30 *March*,
1860.

ACCOUNTS.

Report of Accountant of Court on Books, &c., of Administrator General, Curator of Mellbourne, owner of Pln. Verge-noegen.

Court enquires why Administrator General did not apply to the Court for order as Administrator in terms of Section 41, Ordinance 7, 1851.

SUPREME COURT

30 March,
1860.

SMELLIE v. SMITH.

Public Roads—Liability of co-Proprietors.

A proprietor of an estate is bound to keep his roads and bridges in good order.

Semble.—If not kept in good order any one of the public can maintain an action to compel him to erect and maintain bridges on public road and maintain roads in good order.

Plaintiff's case (*Mr. Trounsell Gilbert*):—An old road ran from Mahaica Ferry on the East Bank of Mahaica Creek. The road was abandoned as a public road, but passengers went to and fro on it. A new road was opened, but there were abandoned estates which were not accessible except passing through this road. The bridge was washed away, and Defendant refused to rebuild it stating that it was of no use to anyone.

Defendant's case (*Mr. Lucie Smith*):—Plaintiff is not entitled to maintain action even if we were bound to put up the bridge.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—Sentence for Plaintiff.

1. That by the Land Regulations of Their High Mightinesses of 24 July 1792, S. 7, to keep up the communication with the respective plantations, and in order to have a passage to each of them by land, the grantees of the land are bound to make and keep up on the front dams of their plantations connecting the

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one with the other in the same line or direction a proper road or path for the use of the public two roads in width, which road or path the several owners of the land in each district shall make and keep up at their joint expenses along those lands which the Counsel for the Colonies may deem best as being of most advantage for the State, for which a reasonable compensation shall be allowed to those parties by the Court of Policy, and the said Court is therefore directed to take care that this road or path be properly inspected every year.

2. That by the Regulations just quoted, it is quite clear that a legal liability rests upon every proprietor for the time being of any plantation in the colony to keep up such Public Road.

3. That although it has been doubted in argument that Plantations on the banks of creeks are excluded, yet such a doubt cannot be maintained if the whole of the Regulations be read and construed together as they ought to be, (Sections 5, 6 and 8,) wherein rivers and creeks as well as the sea coast are specially mentioned.

4. That although the particular district in which the road in question is situated was mentioned in and subjected to the Rules and Regulations contained in Ordinances of the Court of Policy of 28th July 1818, 3rd May 1820, 9th November 1826, 10th August 1836, No. 7 of 1844, No. 12 of 1849, all of which are no longer in force, and although not mentioned in Ordinance 30 of 1856, and which last Ordinance is in force, yet as Ordinances not in force cannot have any effect upon the Regulations of 1792 which have never been repealed and are in force now, and as the mere omission of the district in question from the Ordinances now in force can have no effect in repealing, altering or varying the Regulations of 1792, it appears to the Court that the omission in the last Ordinance passed by the Governor and Court of Policy leaves the road in question under the operation of the Regulations of 1792.

5. That it has been proved to the satisfaction of the Court that the road in question was in existence and has been and is a polder road for upwards of a third of a century up to and before the time when the Defendant

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purchased and obtained transport of the Plantation through the front land of which the said road runs, to wit, January and April 1859, and that this gives to the Plaintiff a prescriptive right.

6. That by the evidence it is clear that the canal or draining trench cut across the road was and is for the purpose of draining the Defendant's properties, and that the bridge therefore must have been of necessity put up by the proprietor of these properties who, as the drainage was for their advantage, and as the line of road was thus cut through and interrupted, were bound under the conditions attached to the property in keeping up the road, to erect and keep in repair the said bridge. The Court has used the term "proprietor" because the canal or draining trench is between plns. Nismes and Batavia, but as the Defendant is the proprietor of both plantations, he alone is liable.

7. That as the Plaintiff, as one of the Public was entitled to the use of the road, and has been deprived of that use by the Defendant neglecting to keep in repair the bridge, he the Plaintiff has as good a right to maintain this action against the Defendant as he would have had against the Defendant had his the Plaintiff's horse fallen through the bridge and been killed in consequence of the bridge being out of repair and incapable of bearing its weight.

OF CIVIL JUSTICE.

ADMINISTRATOR GENERAL *as* OBTAINER OF AN ORDER 8 April, 1859
PRO DEO REPRESENTING ESTATE OF
WADDELL, *v.* HEIRS OF BUTTS.

Points of Office.

The Court previously to pronouncing sentence in this matter opens Points of office and orders the Plaintiff to produce, Firstly the Last Will and Testament or authentic copy of the Last Will and Testament of John Waddell deceased mentioned in these proceedings.

15 April,
1859.

Secondly: The order or copy of the order of this Court appointing the late Robert Waterton to administer the estate of the said John Waddell.

Thirdly: Inventory of the estate and effects of the said late Robert Waterton as taken immediately after his decease.

Fourthly: Power of Attorney or authentic copies thereof by the heirs of Waterton upon their Attorney or Attornies in this colony.

All of which documents were filed, or ought to have been filed in these proceedings, but are not among the documents laid over to this Court.

Lastly the Court orders this case to be placed on the list of pleadings at its next session to be held in the month of June next.

Decided afterwards on merits.

OF CIVIL JUSTICE.

Re PETITION OF MANOEL DE SOUZA, No. 2696.

15 *April*
1859.

Complaining a Practitioner.

The Court having read the petition together with the

SUPREME COURT

1859 report thereon, now orders A. B., Advocate, to appear before
PETITION OF the Court at its next Session to be held on the tenth day of June
DE SOUZA. next, and following days. (See *Supra.*)

SUPREME COURT

23 June,
1860.

WILLIAMS v. COREIRA.

Arrest—Prosecution for Perjury.

Dismissal of charge before Magistrate is not *per se* a bar to defence on action for false arrest.

Case:—Plaintiff was arrested by Defendant. The case was dismissed by the Magistrate. Plaintiff sues for malicious arrest. Defendant pleads justification and proves same.

ARRINDELL, C.J., BEETE and ALEXANDER, J. J.:—Notwithstanding that the Magistrate dismissed the complaint of the Defendant it does not necessarily follow that the

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arrest was wrongful, unlawful, injurious, malicious and without reason or probable cause.

On the contrary, the Court is of opinion that the Defendant had just and legal grounds for the course he adopted, and has therefore rejected the Plaintiff's claim and demand with costs.

The Court directed that the Plaintiff and the witness for the Plaintiff be prosecuted for perjury.

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WILLIAMS
v.
COREIRA.

OF CIVIL JUSTICE.

BASH v. FLEMING.

28 March
1860.*Proof on Pro. Note.*

Value must be proved in a note.

Quality of goods and work done cannot be disputed in an action on a note given for such goods and work.

Plaintiff's case (*Mr. Trounseil Gilbert*):—Plaintiff demands \$696 from Defendant. Defendant claims deduction of \$84 and that note was given for \$612.

Defendant's case (*Mr. Lucie Smith*):—No value.

ARRINDELL, C.J., BEETE and ALEXANDER, J. J.:—The Court admits that before the Act 14 and 15, Vic. c. 99, such a presumption as to value received would have been sufficient, but as under that Act the Defendant has waived the right he possesses of swearing positively that no value or consideration was received for the note, the Court cannot allow a presumption however strong to outweigh positive and direct evidence, but as it is possible that the Plaintiff may be able to prove value or consideration, the Court has therefore granted absolution of the instance with costs.

When the parties were before the Court at its last session the Defendant denied on oath that there was any consideration for the note. In the present instance, however, the Plaintiff has shown that there was some consideration, and the Defendant tries to get out of his liability by a train of legal arguments wholly untenable. It is quite clear that where a bill or note is given for goods sold and work done, the price, amount, and quality of the goods or work cannot be disputed in an action on

26 June,
1860.

SUPREME COURT

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BASH
v.
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the Bill or note. *Byles on Bills*, 5 ed. p. 94. In this case there cannot be a doubt but the Plaintiff did supply to the Defendant's wife board and lodging to some amount.

The Plaintiff swears to an amount of twelve dollars per month. The Defendant denies this and wishes to show that the whole amount for which the note was given was excessive, but upon the authority already quoted the Plaintiff cannot be allowed to go into the question whether the price or amount charged was just or not. He has admitted by his note that the amount was due and the Court cannot enter into a question of assessment of the precise value of the board and lodging.

The Court has therefore given to the Plaintiff a sentence for the whole amount sued for with costs.

SUPREME COURT

25 June,
1860.

ADMINISTRATOR GENERAL, ET AL, v.
STEELE, ET AL.

*Opposition—Right to oppose—Right of party to cancel execution—
Costs—Answer in opposition.*

To levy on a half of a co-proprietor's property is voidable. Levy must be on the undivided half.

Semble—The mover in a case of opposition should pray for a cancelment of levy.

Secus—The Court is bound to guard against accumulation of costs.

Case for Plaintiff (*Mr. Trounsell Gilbert*):—The Plaintiffs, the Administrator General and McAllister, were appointed Sequestrators of Patrick Gilbert's undivided half of Huis t'Dieren and Middlesex. The Provost Marshal before sequestration, at the instance of original Defendants, Steele, Loxdale & Company, levied on the half of the produce of the estate for a debt due by the said Patrick Gilbert, when he ought to have followed the instructions of the execution creditor and levied on the undivided half. The Provost Marshal is made a co-Defendant. Instructions were given to levy on the produce first, and if insufficient, to levy on the estate. Defendant should have cancelled levy after mistake was found out.

OF CIVIL JUSTICE.

For original Defendant (*Mr. Roney*):—Marshal did not carry out instructions.

Co-Defendant in default.

ARRINDELL, C.J., BEETE & ALEXANDER, J.J.:—In this case although the original Defendant ran a great risk in losing money by a fruitless levy, yet in strictness they were fully authorised in giving instruction to levy on Patrick Gilbert's undivided half of the sugar and rum in question.

Had the Marshal followed the instructions and levied on the undivided half the Court will not say but that it might have been sold.

In such case, however, the creditors of the property belonging as well to the other partner, as to Patrick Gilbert, would have had a right to arrest the proceeds, and to have placed in *custodia Reginæ ad opus jus habentium*.

But neither the Defendant nor the Marshal had any right to levy upon a half which was in fact only an undivided half. The levy therefore was and is illegal, and ought to be cancelled, not as is contended by the parties themselves or by the Marshal, but by the authority of the Judge who granted the warrant of execution.

The levy being illegal, the sale of a half instead of an undivided half would have also been illegal, and the Plaintiff had a right to oppose such sale. The sale as advertised if it had taken place would have been a fraud upon the creditors of the parties to whom the property belonged for it was an attempt to sell absolutely and unconditionally as Patrick Gilbert's property which did not belong to him as stated in the advertisement, but pledged to him and another, subject to the joint liabilities. The sale advertised being illegal, the Court has declared the opposition good, but the Court has granted compensation of costs because although the opposition was good as far as it contends, there ought to have been a claim made in the same proceedings for a cancelment of the levy, which not being done will give rise to further legal proceedings, and the Court is bound to discourage accumulation of costs in all cases in which it ought not to take place.

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ADMINISTRATOR
GENERAL
v.
STEELE.

SUPREME COURT

26 June
1860. McALLISTER v. STEELE, ET AL, AND PROVOST MARSHAL,
CO-DEFENDANT.

Same as above case, the Plaintiff being the co-proprietor of
the estate and property.

SUPREME COURT

29 June
1860.

Re PETITION JOHN ROBERTS.

Letters of Decree—Cancelling.

The Chief Justice being of opinion that he was wrong in granting *fiat* in granting Letters of Decree, brought the fact to the notice of the Court. The Puisne Judges after due consideration concurred with the opinion of the Chief Justice that the order granting Letters of Decree should be discharged.

SUPREME COURT

29 June
1860.

Re PLN. TUSCHEN DE VRIENDEN.

Rights of Mortgagee—Practice as to priority of Debts.

Sentence, *pref. et con.* Debts directed to be paid in the following order:—Expenses attending the decision ; Provost Marshal's taxed bill re sale; Judicial *legis* calling up creditors; Registrar's fees; Accountant's report; Stamp duty; Monies paid to Sequestrators; First mortgagee so far as there was a balance. The Court refers the 1st and 3rd mortgagees for the balance due on 1st mortgage, and the amount due for 3rd mortgage to any further property of the late proprietor or proprietors should any such property be found.

SUPREME COURT

29 June
1860.

Re VILVORDEN.

The practice as to order of Preference.

Colonial dues, for repairing roads, servants' wages during sequestration, overseers' salaries for six months, cash advanced by Sequestrators on account of the plantation. Mortgage.

OF CIVIL JUSTICE.

PETITION COLVIN

30 June,
1860.*Insolvency—Power of Court.*

Court (ARRINDELL, C.J., BEETE and ALEXANDER, J.J.) directs insolvent to place in his schedule debt due to minors, to strike out debt due to himself, to place in schedule debts due by him in the United States of America and elsewhere, to pay over to Administrator General \$428.37 salary received by him as American Consul for quarter ending March 1860, as well as all fees received by him and to which he was entitled as American Consul, and the amount he expected to receive from the United States Government for balance of salary.

OF CIVIL JUSTICE.

GARNETT *qq.* STEELE *v* THOMPSON.*15 *December*,
1860.*Servitude.*

Servitude is lost when not expressed in Transport.

Plaintiffs brought an action in 1858 for right of servitude in a fresh water canal. They were unsuccessful on ground that the servitude was not included in transport. The decision was upheld by the Privy Council. † They

* See case Steele v. Thompson, L.R., B.G., Old Series, vol. 1 p. 92.

† Vol. 2 p. 42.

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now claimed to use a part of the canal as a necessary way from their land, on South side of canal to their buildings.

Defendant's case (*Mr. Lucie Smith*):—Decision of Privy Council gives us substantial defence.

For Plaintiffs (*Mr. Trounsell Gilbert*).

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—The right of way *ex necessitate* was certainly not put forward or touched upon in the former action but that is materially unimportant, the foundation of the claim of such right is servitude, and it was finally and conclusively determined by the former action that no servitude either for shipping or navigation existed in favour of the Plaintiffs in regard to the canal in question. This being the case, the Court have again rejected the Plaintiff's claim and demand with costs.

OF CIVIL JUSTICE.

*Re A.*13 December,
1860.*Power of Court over Solicitor—Entry of satisfaction.*

Court orders A., a Solicitor, to pay to B. monies deducted for costs more than which he was entitled to and to pay the costs, and to pay costs to C., he having brought his conduct to the notice of Court.

Entry of satisfaction entered up on sentence.

SUPREME COURT.

18 *December*, DEMERARA RAILWAY COMPANY v. MANIFOLD.*
1860.

Suit to deliver possession of certain lands. Sentence for
Plaintiff by consent.

* See page 6. No written reasons on record as stated in Minutes.

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18 December,
1860.

Re PLN. MARIONVILLE.

Preference

Court decrees sentence *perpetuum silentium*, and preference as follows:—Repairs to public road, service of immigrants; acreage money, sequestrators, disbursements, mortgage in so far as there are funds available, and refers mortgagee for balance due to any further property of late proprietor should any such be hereafter found.

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18 *December*,
1860.

Re PLN. MIDDLESEX.

Idem, referring concurrent claimant to any further property of Proprietors, &c. †

† The practice in this case and in the matters of Tuschen de Vrienden and Vilvoorden, p. 54, and Marionville seems to have been carried out in all matters *pro* and *con* and *perp. sil.*

OF CIVIL JUSTICE.

STUART ET AL v. NORTON*

1 March
1861.

Right of Trustee abroad to appoint an Attorney in the Colony, although not clothed with authority of substitution, surrogation, &c.

Costs of action between executors not to fall on estate.

Judgment of Privy Council laid over.

Present: LORD CHELMSFORD, LORD JUSTICE KNIGHT BRUCE, SIR EDWARD RYAN, LORD JUSTICE TURNER:—The question here, except so far only as mere form and mere expression are concerned, is substantially whether a trustee resident in England, appointed by the will of a proprietor who was resident in England, of lands in British Guiana, must, in order to act in the trusteeship, be personally resident in Guiana (for the controversy amounts to this), or may appoint a person to act there, not as a substitute for the trustee, but as the agent and attorney of the trustee in the matter of the trust. In this instance it happens that there are other trustees resident in Guiana, who, according to the terms of the will by which they were appointed, may act alone or together with the trustee resident here. In this state of things, the trustee resident here has appointed an attorney, against whose integrity, capacity, or fitness, no suggestion has been made. He is resident in the colony. He is appointed to act there for the trustee resident here in respect of the matters of the trust. The powers purporting to be conferred certainly are very full; but the question is not here what particular acts to be done by the attorney may be, or may not be, within the just limits of the powers. It is, generally, whether the trustee in England may appoint such a person as I have described to act in Guiana for the trustee in the affairs of the trust.

It is said that, according to the English law, a trustee cannot delegate discretion, cannot act by another in a mat-

* See case decided. L.R., B.G., Old Series, vol. 1 pp. 66, 99.

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ter of discretion; but even in the English law that general rule may be open to exception, and their Lordships are not at the present moment prepared to say that a trustee in England, under an English will, may not effectually appoint an Attorney to act in matters of discretion connected with the trust in a colony or any foreign country.

That point, however, it is unnecessary to decide, for this case must be regulated by the Dutch Law prevalent in British Guiana; and no authority has been cited to their Lordships, nor are their Lordships aware of any, rendering such an act inconsistent with the principles or practice of the Dutch law. What the practice is, as far as the colony is concerned, the judgment, indeed, of the learned Judges in the present case shows. Nor are their Lordships disposed, in point of principle, precedent, or usage, to deny or question the position that a trustee—an English trustee—appointed by a Will, made in England, of a proprietor of land in an American' Colony, governed by the law of Holland, may appoint a competent person, such as the gentleman in question, to act in the colony in matters of discretion, as well as in other matters connected with the trust. It is said that this point is precluded by the judgment in the suit which was instituted by Mrs. Norton in 1857 against her co-trustees in the colony; but when the papers are referred to, that claim seems to have been very much of the same nature as that made by the co-trustees against herself, namely, that she desired to have exclusive possession of the property, and to intercept and prevent her co-trustees from all power of action during her life. The Court by its judgment, of which their Lordships see no reason to doubt the propriety, held that the lady was not entitled to any such exclusive possession. That, however, does not decide the point now in question: it seems rather an authority on this occasion for the present Respondent, if it has any bearing upon the case. The particular wording of the sentence under appeal, adopting very much the language of her last claim, has been observed upon as not strictly accurate. Perhaps it may not be so, but it may fairly receive the exposition which their

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Lordships have given to it, and it can hardly be worth while—if I may use such an expression—to make any alteration in the language used, when the intention is sufficiently evident. It has been observed also, that the Will of the owner of the property forbids assumption, substitution, and surrogation; but the act of necessity, substantially, from the circumstances of the case, which has been done, is not an act of assumption, substitution, or surrogation within the meaning of the Will; it only enables the Respondent to act in a distant colony by means of a fit person in respect of matters in which it is impossible for her to act personally while resident here, and it being consistent with her duty that she should not be resident there. For these reasons, and with that understanding of the language of the sentence which has been declared, their Lordships think the present appeal unreasonable, and that it must be dismissed with costs.

Mr. Lush, Q.C.—Do your Lordships intend to decree the costs out of the estate?

Lord Justice Knight Bruce.—Their Lordships do not intend that the costs should fall on the estate.

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WARNER *v.* BRYDEN.2 *March*,
1861.*Contract—Breach—Costs.*

Where no claim for damages is joined in an action for breach of contract the Court may award damages for the breach.

Sentence of \$100 carrying costs,

Plaintiff's case (*Mr. Landry*) :—Plaintiff leased part of Lima from Defendant and it was agreed “that should lessor or “lessee neglect or refuse (after due notice in writing) to do or “perform anything required by this contract, the other party “may, (should he see fit) have such neglect or omission made “good and charge the neglecting or refusing party with the cost “of the same, together with 10 % damages and the usual inter- “est, and should such neglect or refusal occur a second time “compensation may be awarded or the contract declared

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“null and void by arbitration.” While Plaintiff's servants were working, Defendant sent and ordered them away from two 10 acre fields and he held possession up to time of suit. One of these fields was abandoned when leased to Plaintiff who planted it in canes. Notice as stated in agreement not served.

Defendant's case (*Mr. Trounsell Gilbert*):—We gave money to Plaintiff to work the fields, Loss to Plaintiff is remote and nominal.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—The Court considers under all the circumstances the Plaintiff was forcibly and illegally dispossessed by the Defendant of the land before the expiration of the term of the lease.

With regard to the amount of loss, the Court although it cannot impute to the Plaintiff anything wrong, has no confidence in his statement, and there is no other evidence to show that the Plaintiff has suffered any loss, but as the disposition was illegal the Court has awarded to the Plaintiff a sum of \$100 by way of *solatium* with costs.

SUPREME COURT

15 April,
1859.

MANIFOLD v. DEMERARY RAILWAY COY.,
ORIGINAL DEFENDANT, AND THE COLONY OF
BRITISH GUIANA, CO-DEFENDANT.

Forms of servitudes expressed in Transports.

Sentence given, and decision in writing pronounced afterwards. Opposition suit for money due.

Mr. Roney for Plaintiff:—Plaintiff had charge of the Demerary Railway from 1855. He resigned in February, and on a promise from the Local Board of Directors that his account for work done would be paid, he gave up the management on 18th July 1857. Under his agreement he was to get 58 per cent, of the gross receipts of the traffic which he devoted to the payment of the expenses of the Railway. His reason for resigning was that the Court of Policy had refused to recognize him as lessee of the Railway.

In default of appearance of the Defendant, the Court upheld the opposition of the Plaintiff against the original Defendant passing and the co-Defendant from receiving a mortgage on the following properties:—

The undertaking of the Defendant Company including all the works, lands, buildings, tenements, messuages, and hereditaments of any tenure and all present and future; carriages, machinery, and rolling stock, premises and appurtenances of the said Company and more especially on the following properties:—Lot 3, N. Cumingsburg, transported 12th June 1847; lots 1, 2, 3, N. Cumingsburg with all the buildings thereon transported 14th July 1847; rectangular piece of ground at Kitty; strip of land 300 feet broad running from said rectangular piece of ground in a direction leading to Bel Air, said strip containing 82 acres, 1 rood and 37 square poles, with the free and uninterrupted right (if not injurious to the Kitty Plantation), of navigation through any of the canals or trenches of Kitty and said strip of

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land respectively to the sea, and of taking and bringing from the land in front of said Plantation Kitty shell, caddy, and sand for the purposes of the proposed railway, and also the free and uninterrupted right of way from the said rectangular piece of land and strip of land respectively to the sea and upon and over that portion of the side-line road between Plantation Kitty and Plantation Thomas, which belongs to the said Plantation Kitty; also such right of draining of the said rectangular piece of land and strip of land as said Plantation Kitty now or at any time hereafter shall or may possess, transported 24th July 1847; piece of land laid down on Downer's chart, deposited in the Reg. Office, 28th July 1849, granted by the Governor; lots 153 and 154, Plantation Thomas; pieces of land on Plantation Ogle, with reservation to the said Plantation Ogle of the full and uncontrolled right of shipping and drainage at all times coming through the side-line or strip of land, transported 4th February 1849; part of Bel Air and Blygizicht, part of Sophia, transported 24th February 1849; W. 1/2 147, Cumingsburg, 21st April 1849; Lot, in front of lot 5 Cumingsburg, 3rd July 1847; Mud lot, N. Cumingsburg, 29th February 1848; part of Bladen Hall and Strathspey, 147 roods by 16 roods, 8 feet, with reservation of right of shipping as above through sideline of Railway, 13th October 1849; part of Haslington, 11 33/4 roods by 12 1/2; 7th April 1851; part of Better Hope, 102 x 16, 8; 8th September 1851; part of Cumings Lodge, 156 x 16, 8; 13th September 1851; part of Lot 8 Enterprise, now called Hope, 107 1/2 x 16, 8; 27th September 1851; part of Lowlands 13 x 16, 8; 27th September 1851; part of Dochfour 106 1/4 x 16, 8; 27th September 1851; part of New Orange Nassau being 65 square roods more or less, part of lot 97 now called Buxton; 26th August 1854; Idem 32 s.r. more or less, part of lot 93 Buxton; 26th August 1854; Idem 104 s.r. more or less, part of Buxton; 26th August 1854; Idem 103 s.r. more or less, part of lot 96 Buxton; 26th August 1854; 104 s.r. more or less, part of lot 46 Buxton; transported 26th August 1854; 101 s.r. part of lot 45 Buxton; 26th August 1854; 99, 71/2 inches x 16,8 part of

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Triumph; including all present and future plant premises and rolling stock and on the tolls, profits, revenues, sum and sums of money now arising or to arise during the existence of the mortgage from and out of the undertaking on, and on all the estate, right, title, and interest of the said Demerara Railway Company in and to the same.

Memorandum Friday 6th May 1859.

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

The Court deliberating on the several causes remaining for sentences and pronounciation came to the cause of opposition of Manifold v. the Demerary Railway, whereupon the Chief Justice requested His Honour the Second Puisne Judge to state his opinion of the case. The Second Puisne Judge considered the opposition good. The Chief Justice then enquired of the First Puisne Judge what he thought of the case. The First Puisne Judge agreed with the Second Puisne Judge. The Chief Justice then said that in allusion to the statements regarding himself set forth in the case submitted by the Demerara Railway Company to the Attorney General and Solicitor General of England and to Mr. Loyd, and laid on the table of the Court of Policy and to the remarks that had been made in that Court respecting himself, he wished for the expression of the candid opinion of their Honours, as to whether he, the Chief Justice, should or should not give his opinion upon the aforesaid cause of opposition.

The First Puisne Judge said that he was in the Court of Policy at the time, and heard the expression used to which the Chief Justice alluded to, and he saw no reason why the Chief Justice should not express his opinion and join himself and the Second Puisne Judge in their opinions or dissent from them if be thought fit so to do.

The Second Puisne Judge was aware of the matter alluded to by the Chief Justice, and he agreed entirely with the First Puisne Judge.

The Chief Justice then said that he considered the advice given by the Puisne Judges was correct and he would therefore declare his opinion of what he thought the sentence ought to be, and that was, that the opposition should be declared to be good.

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The Second Puisne Judge observed that until that moment he had not known the opinion of the Chief Justice and had suspected that it was in favour of the Defendant. The First Puisne Judge said that he had laboured under a similar impression.

The reasons for declaring the opposition good were then discussed and the First Puisne Judge undertook to commit them to writing.*

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* The reasons are not on record.

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5 March,
1861.

DOS SANTOS v. D'ANDRADE.

Arrest—Warrant—Malice.

Circumstances where malice presumed.

The fact that Defendant did not sign the charge on which warrant was obtained does not, *per se*, release him from the consequences *re* arrest on warrant if he by his acts causes arrest.

Plaintiff's case (*Mr. Lucie Smith*): Plaintiff and Defendant owned adjoining water lots. Plaintiff found some timber across his lot injuring his boats. Plaintiff had them lashed. Defendant was refused delivery of the timber unless compensation was made. Plaintiff was taken before the Magistrate on three charges by Defendant. After all the charges were dismissed for nonappearance and want of prosecution, two policemen came up with a search warrant got on information of one Faber, and Defendant said to the policeman, "Arrest the fellow; he is a "damned thief; he thief my wood." Defendant

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was taken to the station and kept till near five o'clock when he was released on bail. Defendant appeared before the Magistrate and the charge was dismissed.

Defendant's case (*Mr. Bent*):—Reasonable and probable cause. It was our timber and we found it on Plaintiff's land. We neither signed the charge nor swore to the information on which warrant was obtained.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—It is proved to the satisfaction of the Court that the Defendant homologated and acted upon this warrant and so acting caused the Plaintiff to be arrested and carried to the lock-up in the Reliance station and that he was there imprisoned for some time. It was also clear to the Court that there was no justification for the fresh and illegal proceedings, and that Defendant was actuated by malice.

Looking however at the station of life in which the Plaintiff and Defendant are, the Court considers that the justice of the case has been met by the sentence given, \$100 and costs.

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ALTT v. BOOKER BROTHERS ET AL.

6 March,
1861.*Interdict—Opposition—Compensation of Costs.*

Opposition or interdict to an ascertained account does not lie for an unliquidated amount.

Semble.—Interdict lies against a successful litigant proceeding on sentence of the Court.

When both parties are in error Court will not grant costs.

Case:—Interdict against Defendants proceeding on a sentence of Supreme Court.

Plaintiff's case (*Mr. Lucie Smith*):—Plaintiff owed Defendants money and offered to pass a mortgage for what was found due and the same was advertised. An Accountant was called in and the accounts debated so far as Plaintiff could get them debated, but Defendants made excuses to prevent the accounts being finally debated, and insisted on the mortgage being passed for the amount

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stated by them as due. Plaintiff refused to pass a mortgage except for what was actually found due by the Accountant. Defendants threatened to put in force a sentence obtained on a pro. note which had been taken into account by the Accountant. There are charges in the account not accepted by Plaintiff, and Plaintiff seeks to interdict Defendants from proceeding on the sentence on the ground that he believes he is owed by the Defendants an amount not yet ascertained.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—The practice of this Court in respect to proceedings in execution is laid down and set forth in many books, and the Court in citing one presumes that all the books treating of the practice of the Court agree with this one. *Simon Van Leeuwen* in his *Cens for. par. 2 lib. 1 c. 33 s. 14*, says, “*Ipse condemnatus si executioni se opponere voluerit propterea quod executio contra ordinem et procedendi modum intentetur, ipsum sententiæ sensum interpretat aut secus, quam ejus tenor permittit interpretando, inique adversus condemnatum exequetur l. 4. ff. de appell l, 5 cod.. Quorum app non recip et l. 21. Cod. de Appell ubi Bart et alii D. D. aut quod solutionem, compensationem, aliudare, peremptorium, remedium allegare voluerit, in superioribus tribunalibus haud oliter quam per pænale mandatum ad id impetrandum executionem impedire, aut inhibere potest, quia condemnatus adversus sententice executionem regulariter audiri non potest, l. 4 ff de appellat b. 5 cod. Quor appellat non recip l. 21 cod. de appellat et ibi D. D. Vide instruct cur Holland art. 177. Quod appellationis vide fugitus, quæ licet regulariter adversus executionem admitti non debeat secundum d. l. 4 ff. de appellat in excessutamen et pro solutionis compensationis aut simili peremptoria exceptione admittitur si modo de iis liquide constet.*” From this passage it is clear that an execution for a clear and liquid account cannot be opposed by interdict on the ground that the Defendant had a set-off against that sentence unless that set-off be a clear and liquid sum. It appears then that the Defendant had no right to oppose by interdict the sentence in question on the ground that he had a right of set-off to the extent of \$1,665.83 and \$2,251.23

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making together the sum of \$3,917.06. The Plaintiff although he admits the sum of \$1,665.83 ought to be deducted, declares that so large a sum as \$2,551.22 ought also to be debited. The Court, according to its practice, cannot allow the parties to contest in this proceeding a disputed, open and unliquidated account. It may be asked, why was the interdict granted? The answer is plain: Because the petition sets up an agreement between the parties which had it been proved might have supported the interdict, but the Plaintiff having failed to prove that agreement in its entirety as stated by him, has no right to the remedy prayed for on the grounds set forth in his petition.

Why then has the interdict been held good to the extent set forth in the sentence? The answer to this is equally plain: Because the Defendants admitted the validity of the interdict to the extent mentioned, withdrew the summation and offered to pay costs.

The Court has granted compensation of costs from the time the offer to pay costs was made because both parties were in error in the subsequent proceedings, the Plaintiff in that his interdict was groundless, the Defendant in making such a presentation and offer leading to useless litigation when the common contrary conclusion would have afforded him any means of defence.

The sentence of the Court is the confirming the interdict and interdicting the Defendants from proceeding on the summation, and in *rau actie* condemns the Defendants to withdraw the said summation and all proceedings taken thereunder and to pay costs of proceedings up to the day of presentation and offer, with compensation of costs as regards the subsequent proceedings made herein.

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OGLE v. PORTER.

11 *March*,
1861.*Tort—Rep. capacity—Notice to quit.*

Where no evidence is offered in opposition to Plaintiff's, the Court must admit the same to be correct.

Tort by an Agent makes such Agent personally responsible.

Plaintiff's case (*Mr. Trounsell Gilbert*):—Defendant took over in November 1859 and was in possession of

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Pln. Paradise as one of the devisees in trust and as Attorney of the other devisees in trust of Henry Porter. Plaintiff was then in possession of 5 or 6 acres of land on the estate at a monthly rental and had paid rent from January 1859 to January 1860, to the previous manager, and had worked the land. On 12th or 13th January 1860 Plaintiff was put off by Defendant. Plaintiff had an offer of \$400 for his provisions then growing. Defendant refused to allow him to sell, stating that he had some one to take them over. Plaintiff cut plantains and was taking them away when he was stopped by the constables at the instance of the manager, Struthers. Plaintiff tendered the rent for February but it was refused. He was taken before the Magistrate but the case was dismissed, and Defendant told the overseer to keep the Plaintiff off the land. The charge before the Magistrate was preferred by another tenant named France, and was written by the overseer of the estate and the estate paid the money for bringing the same. France bought the provisions from the estate. Defendant in answer to a demand that Plaintiff should hand over to his under tenant, wrote that the price asked for the provisions was exorbitant and that he had already given his word to another. He afterwards offered \$240 for the provisions. This was refused.

Defendant's case (*Mr. Roney*):—Plaintiff advanced no claim to provisions or occupation. Defendant was acting solely as one of the representatives of the estate and as attorney of the remaining representatives, and not in his individual capacity. As an individual he had no right, and therefore on 15th January he gave notice in his representative capacity to Plaintiff to quit on 1st February. He gave Plaintiff notice that he would be treated as a trespasser. The arrest took place after notice and after Plaintiff had cut provisions. We except *tibi adversus me non competit hæc actio*.

ARRINDELL C.J., BEETE and ALEXANDER, J.J.:—To all of the facts given by the Plaintiff no evidence has been opposed, and the Court must therefore admit them to be correct.

This being a matter of tort the Defendant was not authorised by the Power of Attorney from his consti-

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tents to commit a tort without rendering himself responsible for the consequences thereof.

That in the present case the Defendant admits that he was in possession of the estate as one of the representatives thereof, meaning thereby as trustee as well as attorney of the other representatives or trustees, and as such the Court holds him personally responsible to the Plaintiff.

It is quite clear that the Plaintiff was a tenant and that rent was received from him for the month of January, and without pretending to say what notice was to be given, the assertion of the Defendant in the middle of January that the Plaintiff must leave on the 1st of February was not a sufficient, reasonable, or legal notice.

That the Plaintiff if turned off as he was, was entitled to the value of his growing crops, and that value has been proved to the satisfaction of the Court to have been \$500 at least.

The Court, looking at the annoyance and injuries had and suffered by the Plaintiff as proved in evidence, considers that the Plaintiff is entitled by way of damages to a sum of \$700.

That the whole of the acts of the manager and the constables complained of arose from the instructions given by the Defendant to the overseer and by him conveyed to the manager, that the Plaintiff was to be kept or prevented from entering upon the land.

That the Defendant by his letters and the other evidence adduced, and by the conclusion of Exceptions and Answer filed by him, is shown to have been the active and ostensible party to all the proceedings against the Plaintiff.

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VACATION LEAVE.

21 *June*,
1861.

Despatch 162 of 13th August 1860 from Secretary of State that he had no objection to the Judges making arrangements among themselves, subject to the approval of the Governor, for allowing one of their number to be absent in each year for the term of the long vacation without forfeiture of pay.

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21 June,
1861.

GARNETT v. EXOR. OF MACKINTOSH.

Executors—Construction of Will.

Where there are joint executors each of them has power to surrogate or substitute another in his place without the knowledge or consent of the others.

Donald Mackintosh by his Will left three executors. One of them died, surrogating the Plaintiff in his stead. The two remaining executors refused to allow him to intromit, on the ground that all the executors should have joined in surrogating, and the suit was for immitting Plaintiff as surrogated executor jointly with the other two executors in their quality as the remaining executors, and to declare Plaintiff to be entitled to the administration of the estate.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—We have given sentence for the Plaintiff in this case.

1. Because the authority of the executors is derived from the Will of the testator, which governs and defines the limits of that authority. See *Lybrecht's redenerend, Wertoog*, v. 1, c. 30 s. 42.

2. Because every testator has the power to appoint heirs, subject to conditions. See *Voet*, l. 58 tit 7. If this be so, a testator can appoint executors with such powers and subject to such conditions not contrary to law as he may think fit.

3. Because the appointment of executors in this case is more in the nature of an attorney or administrator (*Van der Kessel*, th 321) than of a pure executorship such as is referred to in *Van der Linden, Henry's translation*, p. 148.

4. Because the passage in the Will whereby Macintosh the testator empowers his executors after all his just and lawful debts are paid, and after the legacies and bequests therein are paid, to transport all his right and title in Plantation Reliance, that being the whole of his estate with the exception of the houses mentioned, to James and Henry Mackintosh share and share alike, but not

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till then, and without good security be given for the payment half-yearly to his mother of her annuity till she dies; and the other passage in the Will whereby the testator declares that in the event of his death before the aforesaid James Mackintosh and Henry Mackintosh are of age and experience earnestly desires that his executors should continue for them to look after their half of Plantation Reliance, and until they are of opinion they can do so of themselves without the protection of his executors, show the intention of the testator to have been that the executors should remain in the possession of his estate until the provisions of the Will are carried into effect. Besides, he would not have authorised his executors to transport, a work of supererogation, had he chosen to institute at once by his Will the two legatees James and Henry Mackintosh.

5. Because the first objection of the Defendants is unfounded, inasmuch as *Lybrecht's Red Ver overt Notaris ampt.* says that guardians, executors, and administrators, &c, may be appointed by Last Will and Testament or by a separate notarial act. The &c. includes acts of assumption, substitution, and surrogation, and of such acts many forms may be found in *Lybrecht's Practycq overt Notaris ampt.*, pp. 26, 27, 28. Moreover, substitution and surrogation by a separate notarial act other than the Last Will and Testament has been in practice in this Colony for a period of 41 years, as one of the Court and its Registrar can testify.

6. Because with respect to the second objection the Court considers the object of the testator in appointing three executors without saying whether jointly or severally was that so large a property should not be administered by fewer than 3 persons, and that the surrogation was in consonance with the intention of the testator and within the authority contained in the Last Will and Testament. In this opinion the Court is supported by *Lybrecht's Red Pract. overt Not. ampt.*, who says:—
 “Further, in the event of the death of one of the three at all
 “times and within two months and so on from future and until
 “the final close a competent person in the same quality to as-
 “sume and to surrogate.”

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In a note to this passage the same author says this was done because there raised greater security in three than in one, particularly if such a boedel (estate or effects) has considerable immoveable property and by the death of some of the appointed persons the administration should not remain with one alone.

An act of substitution or surrogation must be by the person in whose place the substituted or surrogated is to stand. Hence it follows that the party substituting or surrogating is alone to pass the act.

There is not much to be found in the Dutch law respecting executors, but it is clear that if there are several guardians the authority of any one of them is sufficient. *Burge Com.* V. 3 p. 950, and authorities there cited.

7. Because the Court is not aware of any such law prevailing in this colony, as that stated by the Defendants to exist in support of their third and last objection.

SUPREME COURT

21 June,
1861.

MAYERS v. RODRIGUES.

Arrest—Reasonable and probable cause—Party liable.

Where the police authorities make out charge against a policeman for felony the party laying information and signing charge is not liable if he believed at the time he signed the charge that he was only reporting matter for official investigation.

Plaintiff's case (*Mr. Norton*):—Plaintiff, a policeman, owed Defendant. He paid him 16s. 6d. and asked for a receipt. Defendant urged that a larger amount was owing and refused receipt until he had got a dollar more, and he put the money paid by the Plaintiff in a saucepan behind his counter. Plaintiff being behind the counter threatened to take his money back if he did not get the receipt, and in the presence of Defendant and others he took away his money and left, but was afterwards arrested on a charge written by the Police and signed by him. Defendant gave evidence before the Magistrate and the case was dismissed.

Defendant's case (*Mr. Roney*):—Defendant went to the Station and reported the facts to the Sergeant-Major

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in charge. Plaintiff being a policeman, the Sergeant-Major wrote the charge and Defendant put his "X" to it after having had the same explained to him. The Inspector, after the charge was read, gave instructions that Plaintiff, who was a policeman, should be taken into custody and if he did not come he was to be forced to come. At the time Defendant signed the charge he believed he was only reporting Plaintiff to his superior officers.

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ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—In this case it appears to the Court that the Defendant, according to the facts disclosed, is not responsible. He, knowing that the Plaintiff was a policeman, repaired to the police station for the purpose of complaining to the superior officers of the Police Force of what he considered to have been an injury done to him by the Plaintiff. The Sergeant-Major of the Force declared the act complained of to be a felony, thereupon writes a charge and causes the Defendant to put his cross to it, he the Defendant being unable to read or write.

The charge is not sworn to, and without any warrant the Police Sergeant-Major orders the Plaintiff to be taken into the guard-room where he remains for about an hour, when the Sergeant-Major informs the Inspector General of the circumstances.

The Inspector General thereupon orders the Sergeant-Major to either take or send all parties, including the Defendant, before the Police Magistrate, who upon hearing the statement of the Defendant dismisses the case.

The Defendant in the whole matter, except when he went up first to the police station to enquire what he was to do, appears to have been a passive instrument in the hands of the Police Force, and the Court cannot arrive at the conclusion that the Plaintiff has been imprisoned by the Defendant.

The Court has therefore rejected the Plaintiff's claim and demand with costs.

SUPREME COURT

24 June,
1861.

MAYERS v. RODRIGUES.

Arrest suspectus de Fugae.

Where suit is rejected an arrest founded on such suit is at an end.

Plaintiff having a cause of action against Defendant had him arrested on a fugae warrant, on the ground that Defendant was selling his shop and had told him that if he wanted \$500 (amount of damages claimed between the parties) he would have to go a long way for it, as he was going to Madeira.

ARRINDELL, C.J., BEETE and ALEXANDER, J J.:—In this case the Defendant was arrested by the Plaintiff to give security for such as might be recovered in the last action.

That action having been tried, and the claim and demand rejected, the arrest falls to the ground.

SUPREME COURT

25 June,
1861.

ADMINISTRATOR GENERAL v. SHIP "HORATIO."

Right to moor vessel.

A master of a vessel has a right to cut any tacklings made fast to his ship by those in charge of another vessel without his consent.

Plaintiff's case (*Mr. Bent*):—The master of the *Horatio* had no right to cast us off, even if we did use his gear as ours was not good and we were in peril.

Defendant's case (*Mr. Lucie Smith*):—We came to Booker's and were moored alongside the wharf. The Plaintiff's punt was loading bricks from our hold. We requested them to take more bricks; they refused, and we told them to go. They said they would not, as the tide was too strong. We asked them to cast off the line as the punt was chafing our sides. They refused. She was fastened with a rope fore and aft, and also (without our consent) with our gear. We ordered our gear to be cast off, and about five minutes after the bow line of the punt parted and she swung and the other rope broke, and

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she went adrift with one man in her the other having got on board our vessel. This man jumped aboard a barque after the punt had swung, leaving her to her fate instead of casting her anchor. Help arrived and she was anchored in the stream, but could not ride and was lost.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—It is clear from the evidence on both sides that the punt was not found with sufficient good rope to lash her alongside of the brig.

The Plaintiff had no right to use the running gear of the brig for the purpose of keeping his punt alongside, and the mate when he saw the running rigging so used was fully justified in ordering it to be cut off.

The Court considers the evidence of the mate and master of the brig, and Hewitt, the seaman, to be clear and conclusive, and upon that evidence it is considered that the punt was lost for want of proper tackling being placed on board of her, and by the desertion of her crew when she was cast off.

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RAMSAMMY v. MANNAMOOTOO, ORIGINAL
DEFENDANT, AND SOWDOY, CO-DEFENDANT.

25 June,
1861.

Reputed Ownership.

Moveables in reputed ownership of a debtor is liable for his debts.

Plaintiff's case (*Mr. Lucie Smith*):—Plaintiff and co-Defendants jointly bought cattle. They had 5 cows and 5 calves grazing at Triumph. Co-Defendant sold the whole lot to one Valladares, and Plaintiff and co-Defendant bought with the purchase money 2 cows and 2 calves and agisted them at Triumph.

Defendant's case (*Mr. Bent*):—Cattle even if bought by the parties as stated were in reputed ownership of the co-Defendant, and were liable for his debts. Co-Defendant's name was in the pasturage book as the owner of the cattle, and the cattle were levied on for a debt of co-Defendant's.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—It is not shown that there was any legal delivery of the cows in question, the Plaintiff, even if they had been sold to

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1861 him, never having taken them out of the possession of the co-
 RAMSAMMY Defendant.
 v. The property being left in the possession of the co-
 MANNAMOO- Defendant, and being moveable property, remained liable for
 TOO his debts, and being levied on the sale at execution cannot be
 AND opposed by a party claiming that property also.
 SOWDOY. See *H. Matthews de Auctionibus*, p. 1, c. 21 s. 10. *Voet ad
 pand*, bk. 20, t. 1 ss. 12, 13, 14.

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9 December,
1861.

MITCHELL v. BRYDEN EXECUTOR MURDOCH,
ORIGINAL DEFENDANT, AND BARBER, CO-DEFENDANT.

Construction of Will—Costs as against Executor.

Conditions where an Executor who is also Guardian under a Will mulcted in costs.

Plaintiff's case (*Mr. Lucie Smith*):—Mitchell as mother and natural guardian of her minor children opposes the passing of transport of part of Goed Fortuin by the Executor of Murdoch's estate to the co-Defendant. Murdoch had purchased the estate and had it laid out into lots and rented out the back lands for farming and sold out the front lands. In his Will he directed: "I will and desire that my affairs be conducted as "nearly as possible in their present condition regarding the "selling and renting of the land on Pln. Goed Fortuin." We say that Defendants cannot sell the back lands, as under directions in Will to conduct the testator's affairs as he did, such lands must be rented out.

Defendant's case (*Mr. Roney*):—Sale is *bona fide*. Testator speaks of "selling" and we are only carrying out his instructions.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—The passage in the Will (quoted above) ought to be construed according to the rule *Redendo singula singulis* and that the word "selling" refers to the lots of land which had been sold since the death of the testator, and the word "renting" to the back lots which it appears the testator intended to rent or let out to different parties, he haying

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for that purpose had the greater part of the back lands surveyed and parcelled out before his death.

Because there is no other part of the Will that authorises the sale of the land in question.

Because if the original Defendant insists that he is authorised to sell the land in the manner proposed, he is bound to show that the testator at the time of his death was intending so to dispose of it.

The Court has condemned the original Defendant personally in costs, because it would be an extremely hard case upon those who are interested in the estate to have it frittered away in consequence of the illegal conduct of the guardians of the minors who are also executors to the Will.

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BRYDEN
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BARBER.

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TEIXEIRA v. SERRAO.

10 March,
1862.*Arrest suspectus de Fuga.*

Where action on which arrest was founded is terminated, arrest *ipso facto* is at an end.

Plaintiff's case (*Mr. Bent*):—We obtained a mandament of arrest and defendant was lodged in gaol. We now seek confirmation of the arrest.

Defendant's case (*Mr. Lucie Smith*):—We were successful in obtaining absolution of the instance in the Supreme Court of Civil Justice, and arrest must now fail.

ARRINDELL, C.J., and BEETE, J.:—It is admitted that the suit was terminated by an absolution of the instance, and that being so, the Court is of opinion that the arrest, being limited to the claim in that suit, has fallen to the ground with it.

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Re BEVANE, INSOLVENT.*4 June,*
1862.

The Insolvent fraudulently made away with part of his property and concealed another portion.

The Court orders restoring of property in the creditor

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Re BEVANE. so soon as Insolvent shall have been in custody for three years to be computed from the date of his imprisonment, and orders Insolvent to be forthwith taken into custody and lodged in gaol for three years to be computed from the date of his imprisonment.

The Court orders the Administrator General to pay the costs of these proceedings out of the estate and effects of the Insolvent.

SUPREME COURT

3 June,
1862.

SUMNER v. CHESTER AND HORATIO.

Arrest—Reasonable cause—Evidence.

The Roman Dutch Law governs arrests.

For Plaintiff (*Mr. Trounsell Gilbert*):—We tender copy of proceedings in Court below, attested by Magistrate.

For Defendant (*Mr. Lucie Smith*):—We object to document going in without further proof.

The Court admits objection.

Plaintiff's case:—Plaintiff and his brother, by direction of his father who was one of the proprietors of Golden Grove, were cutting wood on Golden Grove seaside when they *were* stopped on the public road opposite Horatio's house by Hercules and Sam, who alleged that they had had orders from the manager, Chester. Horatio came out of his house and said, "Hold the men till I write a charge." Plaintiff left and some time after returned to the police station, and Hercules thereupon handed the policeman a charge, and Plaintiff was arrested for stealing wood the property of the proprietors.

Defendants' case:—There are about 50 shareholders of the village, and the wood was kept for sale to the Railway authorities for the benefit of the shareholders of the village, and Plaintiff's father had been previously warned not to cut.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—In this case we have condemned the Defendant Damon Chester because in his conclusion he admits and avers that the several acts complained of were done by him,

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but he failed to prove that they were done with reasonable and probable cause.

2ndly. We have condemned Filbert Horatio because it is clear to us that he was the party who caused the Plaintiff to be arrested.

3rdly. We are of opinion that we are not to look to English authorities as our guides in this matter, and according to the Dutch Law, *Voet de injuris famosis libellus* 1. 47. the acts of the Defendants amount to a wrong and injury, for which they are responsible.

4thly. We have assessed the damages at an amount commensurate with the calling in life of the parties, especially taking into consideration the other action against them and the heavy costs they will have to pay.

Damages assessed against the Defendants jointly and severally, \$50 and costs.

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HORATIO.

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FRASER v. ADMINISTRATOR GENERAL.

11 *March*,
1861.*Will—Proof of same being inofficious, etc,*

Where there is a Will *prima facie* valid the Administrator General cannot interfere with estate until the same has been judicially set aside.

Case:—The interdicting Administrator General from interference with testator's estate, and to cancel all proceedings taken with respect to such estate.

Plaintiff's case (*Mr. Trounsell Gilbert*):—We are the executor appointed under Will, and the Administrator General cannot interfere with the estate while Will is in force and there is no legal decision that Will is bad.

Defendant's case (*Mr. Roney*):—Plaintiff must prove he is executor. To prove this he must put in issue what we raise: that the Will is not a legal one, having been executed contrary to law.

BEETE, J.:—In this case I consider that Plaintiff is entitled to a confirmation of the interdict obtained by him to the extent mentioned in the sentence just pronounced.

Mr. Justice
BEETE.

1. Because the Administrator General in assuming on mere unsworn testimony the invalidity of the Will of

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McDonald exercised a power not conferred on him by the Ordinance which regulates his office and defines his authority.

2. Because the Will in this case is apparently a good Will, properly executed and attested, and was duly exhibited at the Administrator General's office, and registered conformably with the law in the Registrar's office, and such being the case can only be set aside by proceedings properly taken in this Court and terminating in a sentence declaring the invalidity of such Will.

3. Because it is evident from the letter to the manager of the British Guiana Bank, put in as evidence, that the Administrator General was of opinion that he could set aside the Will by proper legal proceedings, and his subsequently adopting the course he did in excess of the authority given him by law, forms no reason for placing the Plaintiff in a worse position than he would have been in had the Administrator General acted legally.

4 Because I consider the only defence competent to the Administrator General in this action was to show that he acted legally and within the scope of his official authority in treating the Will as a nullity in the way he did and as no proof could possibly be given to that effect it was not competent to him to give evidence to impeach the validity of the Will or the Plaintiff's quality as executor under it in these proceedings.

Mr. Justice
ALEXANDER.

ALEXANDER, J.:—I am of opinion that the Administrator General cannot interfere with the property bequeathed by a testator without proving the invalidity of the testament in a legal manner. *Prima facie*, testator made a good and valid Will which was duly exhibited to the Administrator General and afterwards deposited in the Registrar's office and a copy given off to the Plaintiff, thus recognizing him to be executor.

There is nothing in Ordinance 7 of 1851 by which the office of the Administrator General is regulated, authorizing him to assume on the mere statement of others the invalidity of a Will and to serve notices and publish advertisements and act as if there was no Will, good or bad, in existence.

I think he ought to be Plaintiff in interdict in a suit

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in this Court to disprove the validity of the Will, and that he had no right to proceed as he has done without the authority of the Court, and that having in my opinion acted illegally and having assumed that McDonald died intestate, all that Fraser had to do to entitle him to an interdict was to show this Court that he had performed the requirements of the law by exhibiting and depositing a Will good at least upon the face of it.

It is said that by shutting out evidence of the invalidity of the Will we prevent him defending himself, and that if he were a wrongdoer he ought to get leave to defend himself. In my opinion he could only defend himself by showing that in the discharge of his duty he acted according to law, and I am not aware of any law in the Colony that authorises him without proof first established before this Court to treat a Will as a mere nullity—if he could do so in one case he could do so in every case—and I confess that with me it becomes a question worthy of consideration whether the Administrator General or any other public officer could have a right to proceed in whatever way he pleased without reference to the Ordinance that regulates his office and without a sentence of this Court.

ARRINDELL C.J.:—I cannot concur in the sentence pronounced.

1. Because it is the duty of the Court to make up and pronounce a sentence "*secundum allegata a probata*" a duty which the Court has not allowed itself to perform in this case, inasmuch as the majority of the Court has refused to receive evidence tendered by the Defendant in support of his allegation and which evidence ought to have been received.

3. Because the Plaintiff has come into Court styling himself James Thomas Fraser, *in his quality as sole executor under and to the Last Will and Testament* of Donald P. McDonald, deceased, and in such quality has cited and therefore compelled the Defendant to appear, who, appearing, has expressly denied that the said J. T. Fraser possesses the qualifications claimed by him in these proceedings, and the Plaintiff with whom rests the affirmative is bound to prove his qualification.

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4. Because the qualification being expressly put in issue, ought to be proved by the Plaintiff, which has not been done, inasmuch as the copy of the Last Will and Testament though admitted notwithstanding the objection taken, is Only presumptive evidence and does not prove the validity of the Will.

5. Because although the copy has been admitted, yet the Defendant is undoubtedly entitled to rebut any presumption raised by its production by showing that the Will itself is invalid, and which he has been prevented from doing by the Court refusing to receive the evidence tendered, and thus preventing him from proving his case, a proceeding in my opinion contrary to every principle and rule of evidence.

6. Because although it has been urged that the Administrator General has no right to assume the functions of the Court, I am at a loss to discover in the proceedings anything tending to show that he had been guilty of any such attempt.

7. Because whether the Administrator General's advertisement is legal or not in all its parts, has not been fairly tried, the Court having no right whatever to entertain that question before disposing of the preliminary issue on the validity of the Will.

8. Because whether the Administrator General's proceedings before the petition for interdict was presented were right or wrong, cannot be a matter of discussion in a suit in which the Plaintiff forces him into Court, before the right of the Plaintiff so to do, and which is denied, has been duly tried and determined.

9. Because I do not agree in any of the arguments that have been urged as to the registering or depositing a Will being conclusive of its validity, for upon this point the law books are silent, and all the Ordinances respecting the depositing or registering Wills in the Registrar's office relate simply to the mode and manner of depositing or registering, and do not in any way relate to or affect the question of the invalidity of a Will dependent upon an inherent defect in its making or concoction.

10. Because if the doctrine which this sentence would

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establish was correct, no one can hereafter dispute the validity of a Will deposited or registered in the Registrar's office, though it were a forgery or otherwise steeped in fraud.*

* See case Administrator General v. Fraser, immediately following.

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ADMINISTRATOR GENERAL, REPRESENTING ESTATE
OF McDONALD, v. FRASER, ORIGINAL DEFENDANT,
CORPORATION OF BRITISH GUIANA BANK,
CO-DEFENDANT.

4 April
1862.

Will—Non-joinder—Executor's Commission.

A Will written by one who indirectly takes an interest under same is invalid. Not necessary to join wife married in community in non tortous suit against husband.

Although arrest cannot be supported by bad *rauw actie* sentence may still follow.

Plaintiff's case (*Mr. Bent*):—Defendant Fraser and his wife Amelia were married in community of goods. D. P. McDonald had some shares in the British Guiana Bank, and by his Will he left as heir Amelia Fraser, original Defendant's wife. McDonald, who had been supported by Fraser, original Defendant, particularly requested Fraser himself to write out his Will. This was done and it was read over to him twice or thrice before he signed the same. All the other requirements of the law as to soundness of mind, attestation, &., were duly proved. We now sue for arrest with *rauw actie* to have Will declared invalid, inasmuch as the same is in the handwriting of the husband of the heir. *Burge*, vol. 4, pp. 374, 375. *Cen. For.* pt. 1, lib. 3 c. 2 s. 5; *Voet*, l. 34, tit 8 s. 5; *Holl cons.*, vol. 2, c. 147 p. 295; *Holl cons.*, vol. 4, c. 202 p. 362, vol. 6, c. 134, p. 610; *Van der Keezel Thes.* 292.

Defendant's case (*Mr. Lucie Smith*):—Plaintiff not entitled to maintain this action. Arrest is not proper remedy. If part of Will is invalid the whole is not, as by Will payment of funeral expenses and appointment of Defendant as executor are provided for. *Voet*, l. 2 tit 4 s. 51; *Van der Linden*, pp. 120, 433; Preamble of

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Ordinance 20 of 1839; *Maule & Selwyns*, Rep., p. 532; *Grotius*, bk. 2 c. 17; *Van Leeuwen*, p. 210; *Voet*, l. 34 tit 8 s. 3; *Van der Keezel Thes.*, 290 v. 1.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J.:—The Court having referred to the various authorities quoted on both sides, and in particular to *Bynkershoek Quæst jur.*, l. 3 c. 8 as referred to by *Burge*, vol. 4 p. 374, has arrived at the conclusion:—

First. That by the Administrator General's Ordinance 7 of 1851, s. 2, he is entitled to maintain this action.

2ndly. That although an arrest cannot be supported by a bad *rauw* action, yet a sentence can be given upon a good *rauw* action. The Court has therefore rejected so much of the claim and demand as appertains to the suit.

Thirdly. That the Defendant and his wife being married in community of property, it is not necessary that she should be a party to the suit. *Van der Linden*, M.P., bk. 1 c. 8 s. 2.

4thly. That the Will is invalid, being written by the Defendant, as is proved from beginning to end, because the institution of the wife as heiress is in effect the institution of himself, he and she being married as aforesaid.

Because the appointment of the Defendant by himself as executor would, if valid, entitle him to ten per cent, commission, a benefit and advantage which according to the authorities cited cannot be granted.

Because the direction to pay the expenses of the trust is a mere declaration of the law which provides that the funeral expenses of a deceased person should be paid out of his estate.

SUPREME COURT

11 *June*,
1862.

Re PHIL. RICHARDS.

Arrest—Governor's jurisdiction.

The Governor of the colony has no jurisdiction over a civil prisoner.

Richards was a civil prisoner. He applied for release and the same was refused by the Court. He appealed

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to the Governor through the Government Secretary, who wrote to the Registrar: "The prayer of the accompanying petition is "obviously one which it is not in the province of the Executive "to grant, but as the Governor is under the impression that the "Supreme Court of Civil Justice is the proper tribunal for the "petitioner to apply to if he knew the mode of procedure, he "directs me to forward the petition to you in order that it may "be brought to the notice of their Honours the Judges."

ARRINDELL, C.J., BEETE & ALEXANDER, J.J.:—The Court having taken into consideration the contents of the said document declare that His Excellency the Governor is quite correct in stating that it is not in the province of the Executive to grant the prayer of such memorial.

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DA SILVA v. MCARA.

11 June,
1862.*Servitude—Vacant space.*

A vacant space between two properties is common, and neither party may build thereon.

Action to compel removal of a flight of stairs on vacant space.

Plaintiff's case (*Mr. Trounsell Gilbert*):—There was for 19 to 20 years a vacant unoccupied space between Plaintiff's premises and those owned by Defendant. Plaintiff's premises had a window in the back part of the lower storey with shutters to the window opening into the vacant space. There was an office kept there and the window was left open for light. Defendant put up a staircase on the vacant space, the sides of the staircase touching Plaintiff's house, and in such a way that the shingles on that side of his house could not be removed or repaired without removing the staircase. Had Defendant instead of putting up a staircase, built on the spot, it would be impossible for the Plaintiff to repair his premises or open the window. By Hadfield's chart, Defendant's frontage in Water Street is 56 feet

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3 inches, without parapet; including the parapet adjoining the stelling, 58 feet 2 inches; parapet 1 foot 11 inches; actual measurement including parapet, 56 feet 7 2/12 inches; below Defendant and Plaintiffs premises 3 feet 6 1/2 inches; width 60 feet 1 8/12 inches, thus making the staircase beyond Defendant's boundary. Originally by the chart which was made when the two premises were in the same position, save the staircase, there was a platform or vacant space. We both derive our title from Heirs of Bourda, and under the leases we are both bound by the chart of Hadfield, 1817, as to disputes of boundary. The wall or vacant space between two adjacent houses in the absence of clear proof that it is the sole and separate property of the one, is presumed to be the common property of both proprietors. *Burge*, vol. 3, p. 406, *Dig. lib.* 35 t. 3 c. 4, *lib.* 17 tit. 2 c. 83, *Inst. lib.* 2 tit. 1, s. 31, *Van Leeuwen Cen. for.* p. 1, b. 2, c. 14, n. 11, *Hug Grot man ad juris*, *Holl b.* 2, c. 34, n. 4, *Voet b.* 8, t. 2, n. 15, *Christ, ad leg.*, *Mecht tit.* 14 art. 12. Lease shows vacant space contemplated. Article 3 enacts that the boundaries are correctly ascertained on Hadfield's chart. In case of difference concerning the building or exact extent of lot, same were to be decided by that chart, without interference of lessors, and it was understood that who had possession of lot should at all times guarantee lessor against consequences of whatever attempt may be made to include lessor in the dispute. These are the stipulations in article three of both our leases.

Defendant's Case (*Mr. Lucie Smith*):—The vacant space is land belonging to us, and we placed a gateway. Plaintiff could not shut the window he speaks of except by getting through the window, putting in the pin and going through same on our land to get back to his office. There were previous disputes about this vacant land, and we made the Plaintiff stop up his gutter to prevent water falling on the space. As to difficulty of repairs, we say if two proprietors of adjacent lands build up to their boundaries the same question would occur. All buildings in Water Street were originally erected on platforms. There was a brick vault on space which was pulled down. There was also a kitchen there.

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We had right to put up staircase on our own land. The land in question forms part of our lot and our predecessors in possession have always been in the occupation of the land. We admit that we are bound by Hadfield's chart as to the boundary.

ARRINDELL, C. J., BEETE and ALEXANDER, J.J.:—A number of witnesses have been examined on each side, and the Court unwilling to find fault with the course each party has thought proper to adopt, cannot help feeling that nearly the whole of such evidence is beside the question, the chart of 1817 being the only guide before it. The Defendant has attempted to prove that she and her predecessors have occupied this piece of land for upwards of a third of a century. The Court considers this a futile attempt, because of the leases laid over it is clear that the lessors were legal possessors of both lots at the time the leases were executed, namely, 1st May 1840, and there is no servitude belonging to either lot over the other set up or pretended. It is to the Court clear that in a case of this sort, anything like a servitude of a third of a century cannot exist, the Court looking at the leases and at the chart and also at the evidence throughout, the latter of which, however, is not necessary to the conclusion at which the Court has arrived, and is of opinion that the vacant space is defined on the chart, that neither party had any right to build on such vacant space, and that the Defendant having so built is bound to give clear proof that the vacant space is her sole and separate property, that she having failed to do this, the presumption is that it is the common property of both the proprietors of the adjacent houses and that the Plaintiff is entitled to have the staircase which obstructs or fills up this vacant space removed.

Defendant has also excepted to Plaintiff's right of action on the ground that he had no assignment of the lease. By the document laid over it appears that the lease under which the Plaintiff claims was originally made in favour of John Bryden, that he died insolvent, that curators for his estate were appointed by the Supreme Court, that by order of said Court all his property was sold at vendue, and that the lease was

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purchased by the late firm of Croal & Co., who paid the Vendue Officer the purchase money, the receipt for which is produced, and that regular assignments from James Croal & Co. have transferred the lease to the Plaintiff. The Defendant agrees that this may be all true, but that there is no formal transfer to James Croal & Co., which was necessary inasmuch as the sale at Vendue by order of the Court was not a judicial sale. To this doctrine the Court cannot assent. By the laws of the colony, see *Voet*, 1. 42, tit. 7, *De curatore bonis*, s. 2, the Court, *ex officio*, can, and always did, and still has the power to appoint a curator to an insolvent estate. If then the Court not only appointed curators to the estate of Bryden, but gave them express authority to sell, by this it must be implied it also gave them authority to transfer.

SUPREME COURT

12 June,
1862.

Re SPROSTON *qq.* CROAL.

Practice as to fees of Office.

Petitioner had the creditors of his testator summoned by edict. The Provost Marshal made a mistake in publishing the citation. Petitioner applied for a re-publication at cost of Marshal.

Fiat as prayed, The Court ordering the Provost Marshal to re-publish the edict at his own cost, and to pay all the costs consequent on his erroneous proceedings.

SUPREME COURT

12 December,
1862.

ROBERTSON, AS MOTHER AND NATURAL
GUARDIAN OF HEIRS OF HILLARY AS CURATOR, v.
SPROSTON AND WATSON.

Pleadings.

On suit for work done, &c., Defendant cannot set up plea that work was badly done and useless, unless he sets off or claims in reconvention what he has spent in making such work useful to him.

Plaintiff's case (*Mr. Trounseil Gilbert*):—We sue for work and labour done and for materials found.

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Defendants' case (*Mr. Lucie Smith*):—Work performed in unskilful manner, and no use to us. *Farnsworth v. Garrard*. We sustained damages by loss of time, and services of vessel repaired.

ARRINDELL, C.J., BEETE and ALEXANDER, J.J. :—In this case the Court, having regard to the form of pleading adopted by the Defendants, has felt bound to give sentence for the Plaintiff, although by no means convinced that the decision arrived at is at all satisfactory and one that does substantial justice to the parties.

In *Farnsworth v. Garrard*, relied on by the Defendants' Counsel, the Defendant's plea of *non assumpsit* was accompanied by a notice of set-off. Had the same course been adopted in this case or had a claim in reconvention been filed, the Defendants might have given evidence both of the cost of the work they were under the necessity of doing after and in consequence of the break-down of the machinery fitted by the Plaintiff's testator, and also of any loss they may have sustained from the services of the vessel not being available for towing and other purposes during some weeks.

In the absence of any such pleas and under the circumstances, the Court cannot say the Defendants have derived no benefit from the work of the Plaintiff's testator. We have consequently awarded \$300 and costs.

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Judgment of Privy Council (delivered 28th July 1862) laid over.

Present: LORD CHELMSFORD, LORD KINGSDOWN, SIR JOHN TAYLOR COLERIDGE :—This is an appeal from an order of the Supreme Court of British Guiana admitting certain objections to an account rendered by the executors of Robert Watterton deceased. From the length of time during which the proceedings in this case have been pending, there is much obscurity about some of these items, and one material point for their Lordships to determine is to whom the delay which has occurred is to be attri-

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buted, and on whom the consequences of any uncertainty must fall.
The Appellants are the residuary legatees of Robert Waterton.
The Respondent represents in his official character the estate of John Waddell.

John Waddell died on the 1st October 1833, having by his Will bequeathed the residue of his estate equally amongst his six children, Catherine, John, Anne, Jane, Margaret, and George.

On the 15th October 1833 Robert Waterton was appointed to act as administrator to the estate of Waddell.

By the rules of the Court under which he was appointed he was bound to file annually accounts of his intromissions with the estate of the deceased, and to pay the balance into Court, and he accordingly on the 27th October 1834 filed an account of his transactions from the commencement to the 18th October 1834.

By that account and the balance of his receipts and payments, there appeared to be due from him a sum of 8,167 guilders 16 stivers 8 cents. Against this, however, he made a claim for commission of 5 per cent on all receipts and 5 per cent, on all payments, together amounting to 2,463 guilders 4 stivers 5 cents.

These accounts were laid before the Sworn Accountant, and having been allowed by him were submitted to the Supreme Court of Justice on the 19th January 1835.

The commission claim having been allowed, the balance in the hands of the Administrator was reduced to 5,704 guilders 12 stivers 3 cents. This account was approved and confirmed by the Supreme Court on the 24th January 1835, and to the order confirming the report was added this note: —

“The Court requires information as to the readiest mode of “bringing this estate to a close to be given to the Registrar.”

The balance appearing on the account was not paid into Court, as it ought to have been.

It is material to observe that in the account thus allowed, credit was taken for sums of very unequal amount paid to four put of the six residuary legatees of Waddell

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sub cautione de restituendo, viz., George Waddell, 4,034 guilders; John Waddell, 4,038 guilders; Mr. Harman, 3,675 guilders; Margaret Waddell, 500 guilders.

These payments, of course, could only be properly allowed as against the other residuary legatees on the assumption that there remained assets of the deceased, out of which all the legatees might be put upon an equality.

Waterton continued to act as Administrator up to the time of his death, which took place on 29th June 1837, but he filed no accounts for the years 1834, 1835, and 1836, and of course paid no balance into Court. He was clearly therefore in default at the time of his death.

Waterton by his Will named amongst executors, two, Watson and Davison, who were appointed by the Supreme Court to act as Official Administrators of the estate of Waddell.

On the 5th July 1838 they filed upon oath an account of the dealings and transaction's of Waterton as Administrators of the estate of Waddell.

This account commenced with the balance found due from Waterton on the former account, and was continued up to the 31st December 1837 in respect of interest and commission, but it does not appear to have included any receipts or payments from Waterton's death.

These accounts were referred, in the usual manner, to the Sworn Accountant of the Court who reported upon them and as it appears allowed them, with one exception. What that exception was we are unable to discover. No order, however, was ever made by the Court approving of the Report or passing these accounts.

It is with respect to items found in these accounts thus rendered in the year 1838 that we are now required to pronounce a decision in 1862.

This account, after taking credit for commission claimed by Waterton's estate, showed a balance due from it to the estate of Waddell of 32,429 guilders 3 stivers 12 cents.

Watson and Davison were soon afterwards discharged from their office as Administrators of the estate of Waddell, and by order of the Supreme Court, dated the 12th of December 1838, Andrew Galloway was appointed Curator of that estate, the estate being represented to

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be insolvent in consequence of unexpected claims which had been brought against it.

This, however, we presume not to have been the case, as the first act done by the Curator was to obtain an order for a further distribution of the assets of Waddell amongst his remaining legatees.

Andrew Galloway soon after his appointment sent in a Report to the Court, neither the particulars nor the substance of which appear in the papers before us, and upon that Report an order was made on the 2nd August 1839, by which the Curator was authorised to pay to the residuary heirs of John Waddell 75 per cent, of 32,759 guilders, 4 stivers (equal to 10,919 dollars 75 cents) represented by the order as being the balance of the estate of Waddell paid into Court on the 5th July 1838, such payment however was to be made taking into account certain sums paid by Robert Waterton in his lifetime to those residuary legatees or heirs.

It is greatly to be regretted that this order and the Petition on which it is founded are not amongst the papers transmitted to this country and that we have no precise information of what was done under them.

All we know of this transaction is from a reference to it in the Minutes of the Supreme Court on the 13th January 1860.

Again although this order speaks of the balance as paid in on the 5th July 1858, the money appears not to have been actually paid in till the 29th October 1859, and how the exact balance was made out we cannot ascertain for it exceeds by some hundred guilders the balance appearing upon the account of July 1838.

On the 12th December 1838, Waterton's representation of the estate of Waddell ceased, and it is not alleged that the Defendants are chargeable with anything as received by Watson and Davidson on account of the assets of Waddell. All the receipts with which the Appellants the residuary legatees of Waterton can be charged occurred before the end of June 1837.

In consequence of the neglect of Watson and Davidson to obtain sanction of the Court to the accounts approved by the Accountant, the Appellants are justly

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exposed to the present litigation, but they are not responsible for any acts of omission of the residuary legatees of Waddell or the Curator of his estate. They are not responsible for the neglect of the Curator in disregarding the terms of the order of the 2nd August 1839, nor for the neglect of the residuary legatees of Waterton permitting the order to be disregarded.

From 1833 to 1846 no claim seems to have been made upon the estate of Waterton in respect of his intromission with the estate of Waddell.

But in 1844 a change was made in the law of the Colony. The Board of Orphans and unadministered estates was abolished, and new officers were appointed, an Administrator General for the Counties of Demerara and Essequibo, and an Administrator General for the County of Berbice. The duties of these officers were to take effect on the 17th February 1845.

The effect of this appointment seems to have been, that the Curator of Waddell's estate was superseded, and the Administrator General came into his place, and Galloway handed over all the accounts of Waddell's estate, including those to which we have referred, to the Administrator General so appointed and on the 25th March 1846, that officer instituted the suit in which the present Appeal is brought.

The suit was instituted against the present Appellants, persons all, as it seems, residing in this country, or in other countries in Europe, though represented by attorneys in the Colony, and they are sought to be charged with the receipts of Waterton during the period comprised between the 18th October 1834, the time to which the account rendered in his lifetime and allowed by the Court, was carried down and the time of his death on the 29th June 1837.

The Defendants are charged as persons who had adiated the boedel, as it is termed of Waterton, or in other words, had taken possession of his assets without benefit of inventory, and were liable for his debts.

We must say that the delay in bringing forward this demand is neither excused nor explained by anything which we can find upon this record. The real parties inter-

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ested appear to be the residuary legatees of Waddell, who from the papers before us seem to have been resident in the Colony and capable of looking to their own interests, yet they lie by during all these years without calling the legal representative of the estate into activity, or taking any step whatever to object to the accounts of Waterton, if they had any objection to make.

The Defendants put in their answer on the 27th May 1846, by which, after stating that accounts had been rendered after Waterton's death by Watson and Davidson which they believed to be correct, they averred that all books, documents, and vouchers upon which the accounts were founded, had been taken possession of, and were then in possession of the Plaintiff.

On the 13th March 1847 an order was made by the Court, directing the Defendants to account for the intrusions and transactions of Waterton with the estate of Waddell, and we have no doubt that this decree would be sufficient to charge the Defendants with what, in the technical language of the Court of Chancery, is called wilful default.

The accounts rendered by Watson and Davidson were referred by the Court to its Auditors for examination. Those gentlemen made their Report on the 29th December 1847, This Report raises most of the questions which we have to decide.

It seems to have been the subject of discussion at different periods in the course of the year 1848, and by order dated 11 December 1848, it was referred back to the Auditors for revision.

Nothing effectual was done under this order. Some objection seems to have been taken by the Plaintiff to the regularity of the proceedings of the Auditors previously to the Report and by an order of the Court dated the 14th May 1849 the Report was quashed, and the Auditors were directed to investigate the accounts *ab initio*.

Again, no progress was made for many years in this investigation. In 1850 a change took place in the auditors of the Court, and a new reference was directed. In April 1853 the Plaintiff moved to discharge the order

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of reference on the ground that the Auditor General was interested in the matter.

On the 9th of May 1853 this motion was refused with costs.

In 1854 it seems that by length of time the original order of 13th March 1847 had become inoperative, or in the language of the Colony superannuated, and on the 1st November 1854 the Plaintiff presented a Petition to the Court to renew the order and to be at liberty to sue *pro Deo*, as it was termed.

The Defendants insisted that there was no power in the Court to renew the proceedings, but these objections were overruled by the Court, and on the 12th February 1855 an order to renew the suit was made against which the Defendants applied for liberty to appeal but were refused. At length, after a report by the Accountant, dated 5th June 1858, and various proceedings before the Court the particulars of which it is difficult to ascertain, and not necessary to state, a sentence was pronounced by the Court on the 16th January 1860, deciding matters which might have been settled and ought to have been settled in 1838.

We have thought it necessary to go through the long history of the proceedings, which it is impossible to regard without great pain, as well that the attention of the Colonial authorities may be drawn to the manner in which the suit has been protracted, as in order to show the grounds on which we have arrived at the conclusion that the delay which has arisen in the final settlement of these accounts is attributable mainly to the Respondent and those whom he represents, and that in case of doubt arising from the loss of evidence and the absence of explanations, which might have been given if demanded at an earlier period, the presumption must be in favour of the Defendants. We now proceed to the particular items the subject of dispute.

The first is a sum of 22,333 guilders 12 stivers 1 cent, which is described in the Order as amount unpaid by the late Administrator to three of the children and residuary legatees of Waddell. As we understand this matter, the estate of Waterton is charged with this sum on this

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ground:—The Judges take the whole amount of all the sums which appear in the several accounts of Waterton to have been paid to the residuary legatees, and find it to amount to 116,143 guilders 14 stivers 2 cents. They find that, dividing that sum by six, the number of the residuary legatees, each legatee ought to have received on an equal division 19,358 guilders, 2 stivers 4 cents, but that in fact three of the legatees have received more and three less than that amount; and they find the sum overpaid to those who had received in excess, and underpaid to those who have received too little, to amount to the disputed item of 22,333 guilders 12 stivers 1 cent, with which they have charged Waterton's estate.

It seems to their Lordships impossible to maintain the principle of this decision. If the 116,148 guilders had been the whole residuary estate, an equal division would have required the sum in dispute to be made good from some quarter, but we know that this was not the whole residue, for a sum of 32,759 guilders was paid into Court by the Administrator in October 1839, and 15 per cent of that sum was ordered by the Court to be paid to the residuary legatees in that year, having regard to the payments already made.

It is stated by the Supreme Court in its Minutes of the 13th January 1860 that this sum was paid out on the recommendation of Galloway to the heirs of Waddell, which they say is admitted on all sides, and if the terms of the order were attended to the inequalities have been wholly or in a great degree remedied. If the terms of the order were not attended to, and the money was distributed equally, amongst the heirs without regard to the sums which they had severally received, it is difficult to understand how the estate of Waterton can be responsible for the neglect. His responsibility for the management of the estate ceased in 1838, when a Curator was appointed.

Again, the principle of making advances to the residuary legatees provisionally on account of their shares, had been sanctioned by the Court in its allowance of the first account rendered by Waterton in his lifetime. The sums so paid had been paid *sub cautione de restituendo*,

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and it appears incidentally in the course of the proceedings that an order was made by the Court on the 4th March 1841 on the petition of Galloway, the Curator, presented on 26th November 1840, that he should proceed against the heirs to whom an excess appeared to have been paid. What was done under this order or whether anything was done under it, and if not, why it was not prosecuted, we have no information, nor does it appear what has become of the excess of the 32,759 guilders beyond the 75 per cent paid out of Court. In this state of things the order appealed from cannot in their Lordship's opinion be supported as to the item now under consideration.

The next item in question is a sum of 10,000 guilders alleged to have been received by Waterton and not credited by him. This appears to stand thus:—

He is alleged to have received from the Vendue Master's office, on account of sale of Waddell's estate on the 8th July 1835, the sum of 6,000 guilders, and to have debited himself with only 5,000 guilders.

If this matter had been investigated at the proper time there would no doubt have admitted of a clear explanation either in favour of one side or of the other. At present it seems to us impossible to say that the error is made out. The Vendue Master's office was a public office, the proceedings of which were regulated by an Ordinance of the then Government in 1784.

The evidence produced of the payment of the 6,000 guilders to Waterton is, first a receipt in the Vendue Master's books, signed by Crossman, Waterton's clerk, in these words:—

“May 3, 1837.

“Received the acceptance in favour of G. Anderson and
“Co. p. 6,000 guilders, dated 8th July 1835.”

There is another entry in the Vendue Master's books in these words:—

“Demerara, July 1835.

“Rept., est. J. Waddell, Dr. to bills payable to accepted or-
“der for G. Anderson, 6,000 guilders.”

What the meaning of these entries is, none of the Counsel at the Bar were able to explain, nor can we

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explain them. They do not of themselves import that Waterton received 6,000 in cash from the Vendue Master on the 8th July 1835. The only other evidence of the receipt was the examination of S. H. Goodman, who was acting Vendue Master from 1832 to 1844. He is shown the receipt of the 3rd May 1837 (which after objection made by the Defendant's Counsel is admitted by the Judge for what it is worth) and his testimony is in these words:—

“I presume the 6,000 guilders were paid from the entry in “the books. I cannot say positively it is entered in the books as “6,000 guilders. I cannot say if that amount was paid. Beyond “that I cannot say.”

Now as far as we can discover the Court has allowed this overcharge of 1,000 guilders simply because it considers there is proof that 6,000 guilders were received by Waterton from the Vendue Master on the 8th July 1835, and that a sum of 5,000 guilders and only that sum is credited on that day. If the whole sum of 6,000 guilders was received the alleged deficiency may have been credited in other items.

It was assumed in the arguments on both sides as we understood it that the word acceptance found in the receipt of the 3rd May 1837, meant a "Bill of Exchange accepted on the 8th July 1835" and it was suggested by the Appellant's Counsel that the usance in the Colony for Bills on Europe is at 90 days date, and that there is credited on the 5th October 1835 (which would be the 90th day if both the 8th July and the 5th October are included) the sum of 6,000 guilders, as received from the Vendue Master; and that this sum is probably the amount of the acceptance of the 8th July, If this explanation were the true one, it could hardly have escaped attention in the Court below, but it does not appear to have been offered in the Colony, nor is it given in the Appellant's case, and it was not suggested in the argument before us till the reply. From what appears in the evidence in the next case, we doubt whether the word acceptance means a Bill of exchange accepted in the ordinary sense of the term.

The evidence distinctly applicable to this item is, we

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think, insufficient to support the charge, and a strong argument against it will appear in the observations which we shall make on the next item. We shall, therefore, advise its disallowance.

The next sum is thus stated in the sentence:—"Short credited on the 28th January 1836, on which day he received "13,800 guilders, but only gave credit for 1,380 guilders—"12,420 guilders."

Upon this the evidence is thus: Credit is taken in the account by Waterton's estate for the sum of 13,800 guilders, as paid on the 28th January 1836, "to the executor of Frankland, deceased, on account of their claim with interest for the purchase money of half lot No. 22 and buildings situate in Stabroek." On the same 28th January 1836, a sum of 1,380 guilders is debited to Waterton's estates as received from the Vendue Master.

Now the allegation of the Plaintiff is that this half lot had been purchased by Waddell from Frankland, and that this sum of 13,800 guilders remained due for the purchase money; that this half lot was sold by the Vendue Master with other property as part of the estate of Waddell, and that an order was given by Waterton on the Vendue Master for payment, out of the proceeds to executors of Frankland of the sum so due, and that such sum was paid by him accordingly.

If this be made out, of course the item of 13,800 guilders should appear on both sides of the account.

In support of this charge the Plaintiff produces first an entry on the Vendue Master's books on these terms:—

Demerara, January, 1835.

"Executor John Waddell Dr. to Bills payable. Accepted "order. Executors Frankland 13,800 guilders."

And another entry in these words.

"May 3, 1837.

"Received the acceptance in favour of Executors of Frankland p. 13,800 guilders, dated January 26, 1836.

"R. Waterton, per W. Crossman."

There is then the evidence of Goodman, who looking at the book, says:—

"On the 28th January, 1836 there is an entry 13,800

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“guilders paid executors of Frankland. There is a receipt on “the 3rd May, 1837 for that amount by R. Waterton, per W. “Crossman. The sum of 13,800 guilders was paid.”

Why the receipts for these two acceptances for 6,000 guilders and 13,800 guilders by Waterton are both dated on the 3rd May, 1837, though the transactions have no connection with each other, and neither seems to be connected with that date, we cannot understand. It may have been, as suggested at the bar, that there had been an omission to sign them at the proper time, which was afterwards supplied, or the documents proving the payments by the Vendue Master on account of Waterton, under and by his order, may on that day have been handed over to his clerk.

We think this evidence is sufficient to show that the payment of the 13,800 guilders was made by an order on the Vendue Master dated the 26th of January 1836, “accepted,” which perhaps means acknowledged by him as valid, and paid on the 28th. If this be the effect of the transaction, it is clear that the entry to the debit side of the account ought to have been 13,800 guilders, by mistake. In the course of the argument we suggested that the truth with respect to the two items of 1,000 guilders, and 12,420 guilders must be capable of being easily ascertained, for that very nearly all if not all the sums with which Waterton's estate is debited in the account consist of sums received from the Vendue Master, and that the sums which he had received must appear upon the books of the office; and it would then be seen whether all the sums credited equal the sums so received.

We were not at that time aware that this plain course had ever been taken, but on referring to the Report made by the Auditors in December 1847, it appears that they actually adopted it; and they state in detail the different sums received by Waterton from the Vendue Master for sales of different parts of Waddell's estate, including amongst other items, “for premises in Georgetown, and half lot No. 22, Stabroek,” 32,300 guilders, and they make the whole amount so received by him. 229,137 guilders 19 stivers; whereas they say that the

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total amount credited by him for these sales is 216,492 guilders 13 stivers, leaving a deficiency of 12,645 guilders 6 stivers. They then point that this deficiency is principally occasioned by the mistake in crediting 1,380 guilders only, instead of 13,860 guilders on the 28th January, 1836, for some alleged irregularities in the proceedings of the auditors on an objection taken by the Plaintiff; but at all events the fact of this alleged excess of sums received beyond those credited, with all particulars of the estates which had been sold and of the prices received for them, was by this report brought to the notice of the Defendants. They had the means of showing any mistake if there had been any in so simple a matter; they had not attempted to do so, and we have no doubt that on this item the Court below has come to the right conclusion. It will be seen that this Report is inconsistent with the allowance of the item of 1,000 guilders, which we have already disposed of.

The next item is a sum of 5,034 guilders 4 stivers for compensation money received, or which ought to have been received, for eight slaves belonging to the estate of Waddell.

It sufficiently appears these slaves were in existence when the compensation was payable, and an appraisement was made of them and a claim for the amount was prepared and signed by Waterton in 1834. No reason is assigned why nothing was received in respect of this claim, it appears that other slaves owner received, in 1835 or 1836, about 38 per cent, on the amount of the appraisement, and with a sum calculated at this rate we understand that the Court has charged the estate of Waterton.

We think it has acted rightly in doing so. The next item is a large sum of 12,626 guilders 10 stivers 11 cents, the amount of the commission charged by the administrators, after Waterton's death, in respect of his receipts and payments on account of Waddell's estate,

Waterton, by the codicil to his Will, which we think is sufficiently proved, has declared that it is not his intention, nor his wish to make any further charge for commission than his executors may pay to his clerk Grossman.

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We think that this must be considered as a direction to his executors not to make this charge.

It is in truth a remission of a debt to the heirs of Waddell, and we cannot say that the Court was wrong in striking out the charge.

There remains the question of interest. The Court has charged the Defendants with interest on the whole balance found due for sixteen years and eight months "being" as they say "a period less than any of the times which have expired since Waterton ought to have deposited in the Registry of the Court the several sums of which the capital is formed." Of course, as, by our advice to her Majesty, the balance will be altered the interest will also be reduced.

We feel it to be a hardship upon the Appellants that after so great a length of time, and upon a demand so tardily brought forward and so negligently prosecuted they should be charged with interest which will amount, at the Colonial rate, to as much as the principal, and with respect to the sum disallowed for commission, which in truth the legatees of Waddell take as a legacy, the case is peculiarly hard. But we do not see how upon general principles, we can relieve them.

Their testator ought, in his lifetime to have paid into Court, in each year the balance in his hands on account of the Estate of Waddell. He neglected to do so. His Administrators, after his death, rendered an inaccurate account, and did not pay into Court the full amount of the money in their hands and when they were removed from the administration of the Estate of Waddell they ought to have taken care that their accounts were allowed by the Court. The persons entitled to the Estate of Waddell will lose the interest which they ought to have received unless the Defendants are charged with it.

Their Lordships will humbly advise Her Majesty to allow the Appeal from the sentence complained of, as to the two items of 22,333 guilders 12 stivers 1 cent and 1,000 guilders and of course as to the interest of those sums, and to affirm the sentence as to the other items and interest and they will advise that each party shall bear his own costs of the Appeal.

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Re WHITNEY.15 April,
1859.*Insolvency—Act of Verweezing—Records.*

An Act of Verweezing gives the minor children of the maker a tacit preferent mortgage over his property either owned as an individual or jointly with others.

Semble.—The recording of a judicial document is notice to the public of the existence of such document and puts them on enquiry.

Secus.—Post creditors cannot attack an Act of Verweezing.

Whitney on his second marriage executed an Act of Verweezing which was placed on record.

Whitney carried on business with B. J. Godfrey. The partnership concern became bankrupt and passed to the Administrator General as Official Assignee. The creditors at the time of failure of the firm attacked the right of the minors to preference over the partnership property.

ARRINDELL, C.J., and BEETE and ALEXANDER, J.J.:— It appears to the Court that the Act of Verweezing was passed prior to any of the debts for which the creditors claim were incurred. The Act of Verweezing is a document on record in the Registrar's Office. To the records in the Registrar's Office the public have access.

The Act of Verweezing shows that Francis William Whitney had been married, had had by his wife, six children, that he was about to enter into a second marriage, and therefore passed that act. The creditors, who subsequently trusted him, were bound to know the law of the colony, as *ignorantia legis non excusat*.

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If knowing the law, and the facts of Mr. Whitney's first marriage, of his having had children, of his having contracted a second marriage being notorious, the creditors did not look into the circumstances of Whitney & Co. or of Francis William Whitney, before or when they trusted them or him, they have themselves to blame.

It may be thought that the minors have no claim on the joint property of Francis William Whitney & Co. Should this idea occur to any of the creditors, the Court considers that at the time of their mother's death the legal right of the children attached to Whitney's undivided half of the partnership property, and that no act of his, subsequent thereto, could divest the minors of their rights, evidenced as their rights were and are by the Act of Verweezing.

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CORRIM BOCCUS *v.* CLEGHORN, ORIGINAL DEFENDANT, AND CADELL, CO-DEPENDANT. *7 March*
1863.

Opposition suit. Question of fraud alleged. Decided on merits. Pleading fee taxed at \$25. *9 March*
1863.

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RODRIGUES *v.* WIDDESS.9 March
1863.*Agency—Contract.*

Circumstances under which Agent binds Principal.

Action for transport of land and buildings purchased at auction sale.

Plaintiff's case (*Mr. Trounshell Gilbert*):—Defendant employed H. L. Davis, an Auctioneer, to sell at auction, lots 83 and 84, N. Charlestown, with the buildings. The same in October 1861 were knocked down to Jose Soares for \$1,010, the upset price, Davis having been authorised by the owner to guarantee transport. Soares paid \$200 but did not carry out the conditions of sale, and the property was re-advertised and sold in November to Plaintiff for less than the upset price. Plaintiff paid the purchase money and resold to one Cummings, who was at the time of action waiting for transport to him. Defendant knew of the several sales and made no objection thereto. Plaintiff was placed in possession to Defendant's knowledge. Defendant has received the money paid on account of the sale.

Defendant's case (*Mr. Landry*):—We hold the Auctioneer responsible for the entire amount of the fresh sale. Davis has since become insolvent, and we have only received \$400. We gave no instructions about the second sale in November 1861.

BEETE and ALEXANDER, J.J.—The Defendant swore that he did not authorise the second sale, but it does not appear that he took any steps to prevent it, and on

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WIDDESS.

the contrary received from Davis part of the purchase money.

The Plaintiff has paid the whole of the purchase money to Davis who afterwards failed and has since passed through the Court as an insolvent. This is very hard upon the Defendant, but it affords him no ground for refusing to pass the transport of the property sold by him through the agency of Davis, and he is accordingly condemned to pass the same.

PREFACE.

IN bringing out this Volume of the Law Reports a word of apology is due for its delay.

I have had to do the work without any help, copying out the whole of the manuscript, collating, &c, along with my professional duties.

The Vlissengen case is given *in extenso*, as I am of opinion that its importance demands it.

E. A. V. ABRAHAM,

Solicitor.

March, 1896.

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