



LAW REPORTS

OF

BRITISH GUIANA.

1890-1891

[OLD SERIES.]

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CASES
DETERMINED BY THE
SUPREME COURT OF CIVIL JUSTICE.

3 January, 1890.

WILLEMS v. EXORS. BLACK.

Withdrawal of Counsel.—Reappearance.

Counsel appeared for Plaintiff and not agreeing with a decision of the Court withdrew from the case. At the next calling the same Counsel appeared for Plaintiff and stated that he had been retained afresh.

Judgment: CHALMERS, C.J., ATKINSON, J., SHERIFF, J.—THE Court allows the appearance, but must express entire disapprobation of the proposition that the privilege of Counsel enables him to retire from a case and resume it at his own will. When Counsel throws up his brief he vacates his retainer and has no longer any *locus standi* in the case in which he was retained. The only ground upon which the Court would suffer Counsel who has retired to appear afterwards would be, not that Counsel has any privilege to act in the way suggested, but that the Client notwithstanding the peril to which his Counsel had exposed him chose to renew his confidence in him and to signify his wish that he should still represent him and carry on the case on his behalf.

ARRAS *et al* v. ESTATE BROWN.

3 January, 1890.

Domicile.—Onus probandi—Holograph Will.

Charles Brown died in Georgetown leaving a holograph will made in Cayenne. His heirs executed an act of adiation and they asked the Court to declare that they were entitled to recover possession of the Estate from the Administrator General who had taken possession of his Estate on the ground, that Brown was domiciled in this Colony. Evidence to show the domicile was in Cayenne and is British Guiana was given on both sides.

Hutson for petitioner, *Kingdon* for Reporter.

The facts are stated in the Judgment.

Judgment: ATKINSON, J., SHERIFF, J.—It was admitted at the hearing that a holograph will was in accordance

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with the laws of Cayenne; that the signature to the will was that of Charles Brown and that the will was duly executed according to the laws of Cayenne.

The question is, simply, what was the domicile of the deceased at the time of his death. The rule is that *mobilia sequuntur personam*. If the domicile of the deceased at his death was in Cayenne, then the will is valid and the petitioners are entitled to succeed. If, on the other hand, Brown, after making that will, changed his domicile, and his domicile at the time of his death was British Guiana, then the will is void; "for it is the law of his actual domicile at the time of his death and not the law of his domicile at the time of making his will or testament of personal [movable] property which is to govern." (Story, Con. of Laws section 473, citing, among other authorities, J. Voet, *Ad pand. Lib. 28 tit 3, tom 2*, sections 12 and 13).

In the will Brown describes himself as a "*creole Anglais*," and, at the hearing, witnesses stated that he was a native of Jamaica. His domicile or origin was, therefore, British. He seems to have left Jamaica when a youth. One witness states that he told her, he first went to Sierra Leone and afterwards to Cayenne. There he seems to have lived for over twenty years and it is practically admitted, or at any rate not seriously disputed, that he acquired a new domicile in Cayenne. On the evidence we have no doubt that it is so.

Brown left Cayenne in November, 1881, and came to this Colony, where he died in November, 1887. There is nothing to show that when he left Cayenne, there was any *animus relinquendi*. Consequently no question arises as to the revival of the *domicilium originis* at that time. The petitioners say that Brown always meant to return to Cayenne. The respondent asserts that, whatever Brown's intention may have been when he first left Cayenne his conduct shows that he had, afterwards, as regards this Colony, the *animus manendi*, and at his death had acquired a new domicile here.

The evidence as to this is very contradictory. Brown had lived with the mother of the petitioners in Cayenne, she being a married woman and her husband being alive,

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but having deserted her. Brown appears to have been very fond of this woman, who died some five years before he left Cayenne. After her death he still maintained the children, none of whom were his, till he left Cayenne. He appointed an attorney there, through whom and through Messrs. Ledoux & Co. in this Colony he is said to have frequently sent, from this Colony, money for the support of those children and to pay the rent of the house they occupied. He called them his sons and his daughters-in-law, or step-sons and step-daughters, and they spoke of him as their step-father or father-in-law. He wrote to them and they to him many letters full of loving expressions. This was going on up to a short time before his death. He appears to have gone from this Colony to Cayenne on a visit on three occasions—on one of which he drew out all the money he had in Cayenne and brought it to this Colony, where he is said to have lost it in gold expeditions. Thus, except as regards his affection for the Arras family, he had, at his death, apparently, no ties, in Cayenne.

In this Colony he contracted new ties. He lived with and had children by one F. W. She states that she lived with him from December, 1883, till his death. She says that he promised to marry her. Banns were published but the marriage did not come off—she says because she was confined on the 12th, the wedding day having been fixed for the 15th. The other side says that she alone had fixed the day and issued the wedding invitations.

But there is evidence that he had concurred in the publishing of the banns and in the wedding preparations. On the other hand there is evidence that he purposely absented himself on the wedding-day and was very angry when spoken to about or urged to go on with the marriage. There were reasons why he should have been unwilling to marry this woman. She had a child before she knew him. She was unquestionably a woman of loose morals, and he certainly suspected, apparently not without reason, that during his absences on gold expeditions, she had not always been faithful to him. Still, so far as it can be called a home, he had made his home

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with this woman in Georgetown; he had taken a house, furnished it, lived with her in it as man and wife on his returns from his expeditions, and in that house children were borne by her which he recognised as his. He, undoubtedly, spoke of making a will in favour of this woman, or at any rate the children; and we believe that he fully intended to do it, but, for one reason or other, put it off from time to time, until it was too late. Perhaps this was owing to what one of the witnesses called his "vacillating disposition."

On the one side there is evidence that he spoke of buying a house in Georgetown; on the other that he distinctly said he had no intention of doing so.

Then we are told by the petitioners' witnesses that the deceased repeatedly said he intended to return to Cayenne, while the witnesses for the respondent say he told them the direct contrary, and that he had no intention whatever of going back to Cayenne.

The witnesses on both sides, as a whole, may be fairly described as of a respectable class. We see no reason for saying that any of them deliberately stated what was untrue; and we, as can be well understood, have found considerable difficulty in considering the evidence.

It is, however, established that Brown was domiciled in Cayenne. He did not leave Cayenne *animo relinquendi*. Even if he had, mere abandonment is not enough. "An acquired domicile cannot be lost by mere abandonment, but continues until the intention of making another change of domicile is carried into execution" (2 Wills on Exors. 1526, 8th ed. and the authorities there cited). It was for the respondent to establish that Brown had acquired a domicile in this Colony. On the evidence as it stands we are left in doubt. We cannot say either that the domicile acquired in Cayenne had been lost when Brown died, or that a new one had been acquired in British Guiana. In neither case is the *animus* or the *factum* satisfactorily proved. Consequently the domicile acquired in Cayenne by Brown must, for the purposes of this decision, be taken to have been still existing at his death.

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The petitioners are, therefore, entitled to succeed. As the matter was one of grave doubt the costs will be paid out of the Estate.

Attorney for plaintiff, *J. B. Woolford.*

Attorney for defendant, *G. W. Hinds.*

MURDOCH ET AL V. THE SCHOON ORD SUGAR PLANTATION
CO., LIMITED.

19, 20 May, 1890.

Injury to real Property—Prescription—Disputed Title—Privity of relation.

Plaintiffs claimed as owners of lands, trenches and dams, and set out as their title, an agreement of sale and purchase and a Transport following thereon, in which conditions of the agreement were incorporated. They also averred a lease containing a description of their property granted to and accepted by the owner of contiguous lands who was afterwards Manager of, and a Shareholder in the Defendant Company.

Plea—Prescription (1) as to the whole action, (2) as to causes of action accruing prior to three years next preceding the commencement of the action. Demurrer to all evidence of title except the Transport. Defendant Company also denied the injuries complained of, and claimed right, as owners and as being in possession of said trenches and dams, to the sole occupation and use thereof.

Held—Prescription apply to all the alleged causes which accrued earlier than 3 years next before the commencement of the action

Seemle—Plaintiffs cannot read the agreement at large as part of their own title;

Question of reading the agreement for a different purpose reserved *hoc statu*;

The Defendant Company are not in privity of relation with former Lessee of the land, by reason of such Lessee afterwards becoming their Manager and a Shareholder.

Action claiming compensation for encroachments upon and injuries to Plaintiffs' lands, trenches and dams, and also interdict against future injuries.

The Defendant Company are owners of estates contiguous to Plaintiffs' lands, and claimed the property of the trenches and dams claimed by the Plaintiffs. Plaintiffs averred acts of injury in November 1878, and every year up to the time of beginning the action. They set out as their title an agreement of purchase and sale, and a transport in which conditions of the agreement were embodied. They also pleaded a lease of their lands containing a description affecting the dams and trenches granted to and accepted by a former owner of the estates now owned by the Defendant Company who subsequently to the determination of such lease became Manager of the Defendant Company, and a large Shareholder therein. Defendants pleaded prescription as to the injuries, and demurred to all evidence of the Plaintiffs' title save their Transport.

Solicitor General Kingdon, Q.C., for the Defendant Company; cited the Prescription Ordinance, 27 of 1856, Section 6; section only differs from the English enactment, 21 James I cap. 16, in being somewhat wider: the latter specifies trespass *quare clausum fregit*; section 6 of the local Ordinance applies to all actions for injury to property. As to the Plaintiffs' title, we say that the conditions introduced in the Transport can only affect the land which was the subject of the Transport, and not land which the sellers merely agreed to transport. The agreement, *quoad* the Defendant Company, was *res inter alias acta*. *Steel v. Thomson*, 13 *Moore's*,

P.C.C. 280, is conclusive. But our case is stronger; for in that case it was a servitude only which was being claimed, here it is a right in land. Even if there was an intention to convey the side line and dam, that is of no affect against the Defendant Company. We admit the alleged lease, but say it has no bearing upon the questions now involved. What the lessee did before he was Manager of the Company is irrelevant.

Hutson for Plaintiffs; Section 6 of the Prescription Ordinance does not apply to an action arising out of injury to land. The word "land" is not found in it, whereas in Section 16, the terms "land" and "immovable property" are both used. "Land" does not mean the same thing as "immovable property." Every interference with the land is an infraction of our right to the land. Our right and title are seriously interfered with by the acts we complain of, and hence our remedy is not affected by Section 6. The Ordinance does not affect the common law prescription applicable to land. There is not apparent on the pleadings any *terminus a quo* from which prescription runs. The interference with our land has been continuous. As to title, it is necessary to read the agreement in order to understand the transport. The case in *Steel v. Thomson* was not similar. We say also that we acquired possession as a fact of all the subjects agreed to be sold. If the Defendant Company do not shew their own title, they cannot question ours. Plaintiffs are entitled to comment on their title, and the effect of the agreement will appear.

Sol. Gen. Kingdon, Q.C., in reply; Section 16 of the Prescription Ordinance applies only where there is issue as to the land itself, not where damages are claimed for injury to land. Cited, *Mitchell v. Damley Moor Colliery Co.*, 14, Q.B.D. 125. The continuance of trespass is a constantly recurring trespass, *Bullen & Leak* edn. 1863, p. 358. *Brown v. The Administrator General* representing Estate of J. Allt, an Insolvent, 11th May, 1872.
28 June, 1890.

CHALMERS, C.J.—The Plaintiffs claim pecuniary compensation for alleged wrongful trespasses by the Defendant Company upon their land, dams and trenches, at plantation Goed Fortuin; and also interdict against future

trespasses. They aver acts of trespass in November, 1878, and in every year and at various times in each year, from then to the time of commencing this action, by the Defendant Company entering on and digging up the land and making drains and trenches thereon, and causing the water from their own land to run through these drains and trenches, and by interfering with the side line between plantation Schoon Ord and the Plaintiffs' land, and in various other ways which are stated in detail in the claim. The Plaintiffs also set out the injuries and damages which they say have resulted to them by reason of the wrongful acts of the Defendant Company.

The Plaintiffs aver as their title, firstly, an agreement which they set out in full, made in 1847, by which John Murdoch, their ancestor, purchased from Henry Wortman and John Frederick Boode, then proprietors of plantation Goed Fortuin, certain portions of that plantation which are described by boundaries and otherwise, the agreement also containing a clause that the land "sold will be more particularly specified and set forth in a diagram to be made thereof and "deposited in the Registrar's Office," and various other clauses not necessary to be here specified. They aver, secondly, that in terms of said agreement, transport of the said lands so purchased was on 6th November, 1847, passed to John Murdoch, subject to the stipulations contained in the agreement, and that John Murdoch received possession.

The Defendant Company by their answer plead Prescription, firstly, as to the whole of the Plaintiffs' claim, and secondly, as to so much of the causes of action as are alleged to have accrued prior to three years next preceding the commencement of this action. They also say that it is not competent to the Plaintiffs to plead the agreement of purchase by John Murdoch just now referred to, except in so far as it is embodied in the transport to him. Both of these questions arising as they do upon the pleadings, have been argued as preliminary questions apart from the merits.

As regards Prescription, I am of opinion that it is a

defence to whatever causes of action accrued earlier than three years preceding the commencement of this action. The terms of Section 6 of Ordinance 27 of 1856, are comprehensive and positive; Section 16, whilst it saves the right to the land itself from being affected by any of the short terms of Prescription contained in the Ordinance, in no way conflicts with or qualifies Section 6, which most clearly bars all action for injury done by infringement of the right which has occurred more than three years previous to commencing action. As concerns the argument submitted for the Plaintiffs, that the time of Prescription beginning to run does not appear in the pleadings, it is clear that each act of trespass with the injury and damage which accompanied it, constituted a cause of action at the time the trespass, injury and damage occurred, and remedy might then, or within three years thereafter, have been sought by action, and by interdict. Indeed, if the argument were sound—if action could not, as is contended, have been brought previous to the present action, for the trespasses and injuries which are complained of—it is difficult to understand how action could be brought at the particular point of time which has been selected, as there seems to be nothing distinguishing the present position from that which existed at any time since the first of the trespasses. Although the plea of Prescription was recorded as to the whole causes of action, that was not attempted to be maintained in argument. As regards the causes of action which occurred more than three years preceding the action—that is preceding 31st July, 1886—there can be no doubt the defence is valid.

As regards the Plaintiffs' claim to read the agreement of purchase along with the transport, I think it proper to remark, in the first instance, that the pleading is not altogether satisfactory, inasmuch as while purporting to set forth the title of the Plaintiffs, it does not disclose that the land transported is not denoted in the transport by a description identical in terms with that used in the contract. This difference in terms, whatever may be the effect of it (I am not saying at present whether I think there is any material difference) would have

been properly brought to the notice of the Court by the Plaintiffs, rather than being left to be shown by the Defendant Company quoting the terms of the transport in their answer. Passing from this matter, however, the argument to exclude the agreement was, in effect, that the Plaintiffs could not set up title to any of the property on which they allege trespasses to have been committed, except by his transport, and *Steele v. Thompson*, decided in this Court, and afterwards affirmed in appeal 16th February 1860, was relied on. It was, moreover, urged that even as between the original sellers and purchaser, since there are incorporated *in gremio* of the transport various terms of the original agreement, it must be held that the parties to the transport did in fact embody in the transport as much of the agreement as they intended should apply, and that no further incorporation of its provisions would be even within their intention. On the part of the Plaintiffs, endeavour was made to distinguish the present case from *Steele v. Thompson*, and it was argued in effect that reference to the agreement was necessary for construing the transport. Beyond this, no principle for bringing in the agreement was stated; but a good deal was said as to the construction of the instruments if read together. *Steele v. Thompson*, in so far as concerns the points involved in this discussion, is a clear authority for the proposition that by the common law of this colony, the transfer of immovable property shall only be made by or before a judicial authority. It does not, however, decide that the entire description of the property must necessarily appear on the instrument of transfer without reference to any other document. Their Lordships expressly say that no authority was cited upon this point on either side, and that they abstain from expressing any opinion upon it, resting their decision upon a ground they had previously stated. That ground was that the words of reference to the contract which the transport contained, "all agreeably to contract of sale and purchase recorded," &c, were not in themselves sufficient to operate a conveyance of an interest in a real estate, which estate itself was not included or meant to be

included in the conveyance. And it is to be observed that the 4th of the reasons of Judgment in the Court below, which is, that although the transport does refer to the said contract, “yet such reference is “merely as descriptive of the land, and not as affecting the servitude “mentioned in the agreement”, seems to imply that the opinion of this Court was, that by some different and more appropriate words of reference, the servitude might have been carried. So that, as regards the possibility of making a conveyance of, or affecting immovable property, by sufficient words of reference to some other instrument, without the description being actually embodied in the transport, *Steele v. Thompson* seems to leave the question much as it found it.

Whatever may be the true rule upon this point, I consider that the transport now before the Court, by its terms, sufficiently marks out the extent to which the agreement can be considered as incorporated in the title. The transport conveys certain property, “subject to the “following conditions, provisions, and stipulations, contained and set “forth in an agreement dated,” &c, and then follows a recital of those conditions. I think it is clear that the recited conditions are those the parties to the transport intended should be incorporated in the title, and that they did not intend any others to be incorporated. Therefore without prejudice to any question as to the competency of conveying or affecting an immovable subject by sufficient words of reference falling short of actual description, it seems to me that as there is no general incorporation of the agreement, but a partial incorporation effected in express terms, the Plaintiffs cannot read the agreement at large, as they have proposed to do, as part of their title.

I have used the word title now in its strict and technical sense, as meaning the title of record. The Plaintiffs have alleged another title for maintaining this action of trespass, viz., possession; which it is possible may avail him, and I do not know if the case takes a certain course, it may not be open to them to show that they obtained and held possession in terms of the agreement; and therefore, in saying that they cannot read the agree-

ment as part of their title, I do not wish to say absolutely at this stage, that it cannot be read as part of the case. A further matter argued as a preliminary question, was whether the averments contained in paragraphs 6, 7 and 9, of the claim were irrelevant, so that they should be struck out of the pleadings. In paragraphs 6 and 7, the Plaintiffs aver that a lease dated 12th March 1862 was made between the Executor of John Murdoch and Samuel Barber and Edward George Barr, of a portion of the land of Goed Fortuin acquired by Murdoch, the land being leased under a certain description which is quoted, and with incidents and conditions therein set out; that this lease terminated on 31st December 1872, by notice given by the Plaintiffs to Barber and Barr, since which time the Plaintiffs have been in possession of the whole of their said property. In paragraph 9 the Plaintiffs say that Edward George Barr has always been a shareholder in the Schoon Ord Company, and the manager thereof, and is now the principal shareholder. I think the averment in the last mentioned paragraph by which it is sought to fix the Defendant Company with knowledge of the terms of the lease cannot be deemed relevant, there being no privity of relation between Mr. Barr in his personal capacity and the same gentleman as manager of, and a shareholder in, the Company; but the leasing of part of the property upon certain terms, and resumption of its possession by the Plaintiffs, although the lessees may not be in privity with the Defendant Company, may be relevant, not as bearing upon the title properly so called of the Plaintiffs, but as bearing upon their alleged possession, should they be in a position to found on possession, as a ground of proceeding with the action.

ATKINSON, J.: I concur.

SHERIFF, J.: I concur with the decision just read substantially so far as it decides the three points raised in discussion.

Attorney for Plaintiffs, *J. B. Woolford*.

Attorney for Defendants, *G. W. Hinds*.

GOODRIDGE v. D'ABREU AND BARRY.

8 May, 1890

Opposition—Title by Specific Legacy—Liability of Heirs.

In order to maintain Opposition to execution on property possessed under title of specific legacy, holder need not aver other available assets of Testator. Consent to sentence by Executor implies admission of assets. Payment of legacy made condition of giving off sentence in opposition.

D'Abreu, a legatee of Correia, deceased, proceeded in execution upon lot No. 83, Robbs Town. Goodridge, in right of his wife, opposed on the ground that she was entitled to and possessed the property as a special legacy under the will of Correia. D'Abreu maintained *in limine* that the grounds of opposition were not sufficient; that it lay on Plaintiff to have averred and proved that there were other assets of Correia sufficient to satisfy his claim.

Hutson for Plaintiff.

Brandon for Execution Creditor (D'Abreu).

CHALMERS, C.J.—The question before the Court is in a small compass, but yet is of considerable importance. The point taken by the original Defendant, the Execution Creditor, is, that in order to make the Plaintiff's averments amount to sufficient grounds of Opposition there ought to have been an averment that there were other assets than the property held by the Plaintiff on which the Execution Creditor could have levied. The Plaintiff says that his averment that he holds the property by way of specific legacy is *primâ facie* a good title of Opposition, leaving it to the Execution Creditor to reply if he thinks fit and can maintain it, that there is no other available property. Assuming in the meantime that the proceedings in execution are valid in themselves, I am not aware that there is any peculiarity attendant on title by legacy which places the owner of the property in an abnormal position. I take it, that it would not be disputed that ownership in the Opposer, when he is not the party liable to perform the decree on which the execution proceeds, is a good title of Opposition, and that the party seeking to enforce his execution, must either traverse the ownership, or show some special cause entitling him to carry off the property. That a legacy

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may have to suffer abatement in respect of debts if there are not other sufficient assets, need not be disputed; but I do not see that it lies on the Opposer (supposing he has obtained possession of his legacy in regular manner) to show that there are assets, but on the contrary, on the Execution Creditor who seeks to reduce the legacy to show there are none.

SHERIFF, J., concurred.

9, 10 *May*, 1890.

Thereafter, evidence was adduced on the points in issue. The facts and points dealt with, sufficiently appear from the judgment of the Court (CHALMERS, C.J., and SHERIFF, J.,) per CHALMERS, C.J.:—
30 *May*, 1890.

This is a suit in opposition to a levy by D'Abreu, proceeding on a sentence obtained by him against Barry as one of the Executors under the will of John Pinto Correia, deceased, by which levy, lot 83, Robbs Town, has been taken in execution, and was advertised to be sold.

The grounds of opposition are, that Mrs. Goodridge possesses the property levied on by title of a specific legacy under the will of Correia, and that it is not competent for the original Defendant to levy on the property to satisfy his claim.

The original Defendant in his answer has stated a number of averments to the effect in substance that the Opposer is a vicious intruder with the estate of Correia; that he has wrongfully appropriated funds sufficient to pay the claim of the original Defendant; and also that Mrs. Goodridge as being residuary legatee and heir by legal inheritance of Correia, is liable to pay the claim.

It is apparent from the evidence that great irregularities have been committed in this matter. D'Abreu is legatee of \$200 under the will of John Pinto Correia. Barry was appointed one of two Executors under the will. D'Abreu sued Barry in his capacity as Executor for payment of the legacy. Barry had not acted, and apparently did not mean to act, as Executor. He held no property belonging to the estate of Correia, and had never done so; yet he came into Court upon getting citation, and without giving any information to the Judge as to his position, consented to sentence. D'Abreu

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then proceeded to carry the sentence thus obtained into effect by levying upon immovable property held by Mrs. Goodridge. The consent to sentence given by Barry was, in its legal effect, equivalent to a statement by him that he had in his hands funds available and ready to pay the amount of the legacy, and it might be a question whether, if the sentence were being enforced against him, he would not be estopped from saying that he has not funds. His conduct, unless it may be excused on the ground of gross ignorance, was such as to suggest collusion betwixt him and the legatee. On being sued, the plain course was open to him of pleading that he had not funds; or if he intended to act and intromit with Correia's estate as Executor, it was then his duty to have taken the proper steps for getting the assets under his control, and calling up the creditors and legatees, in order to a proper distribution. Under the facts as they existed, his consent to sentence was a deception on the Judge, and could not be a good legal foundation for proceeding further.

When we turn to the Opposer, it is apparent that although the property attempted to be levied upon, as well as other property in Georgetown, was bequeathed to Mrs. Goodridge by specific description, and not as residue, yet the Testator's property in Madeira was bequeathed to her as a whole, and her position is virtually and substantially that of a residuary legatee; she is also legitimate heir, and as such, and taking the property, she is liable to pay legacies. It is apparent also that Goodridge and his wife took property of Correia at the time of his death in Madeira, which they have not accounted for or communicated to the Executor. Goodridge also received from the Administrator General some money belonging to the estate of Correia: so that there is very strong reason to believe, that, apart from the immovable properties, and over and above any debts the Goodridges paid on account of Correia in Madeira, they came in possession of money enough to pay the legacy to D'Abreu. This view is not of course founded on exact calculation, for which the materials are not before us, but one which may be properly taken under

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reference to the conduct of the Goodridges. But whether as much money passed to them or not, Mrs. Goodridge, as heir, is liable to pay the legacy which, *primâ facie*, is a burden upon the *hereditas*, and is not by the terms of the will subject to any contingent or defeasive condition. We shall not give any sentence for the legacy, which the form of this proceeding does not admit of, but shall make it a condition of giving off the sentence declaring the opposition well founded, that the amount of the legacy be paid to D'Abreu. No costs on either side will be given.

Attorney for Plaintiff, *J. A. Murdoch*.

Attorney for original Defendant, *J. A. G. C. Belmonte*.

CONRAD, WAKEFIELD & CO. v. NEWTON.

12, 13 *June*, 1890.*Pleading—Accounts stated—Cession of Action—Indefinite Answer.*

A stated account may not be opened on indefinite denial of indebtedness; errors founded on must be specifically averred. English cases on practice are only analogies. Circumstances in which Transfer and Cession of Action unnecessary. Indefinite answer to a claim upon account stated will be disregarded.

Action for goods sold and delivered, money lent and due upon accounts stated. An account of the transactions between Plaintiffs and Defendant embodied in the Bill of Particulars showing balance of \$2,024.07 (the sum sued for) due by Defendant, was signed as "correct" by Defendant and Plaintiffs. Defendant in his answer denied that he was "indebted to the Plaintiffs in the sum of \$2,024.07 "sued for herein, and avers that he never was indebted as alleged," but no items of the account were specifically impugned.

Sol. Gen. Kingdon, Q.C., for the Plaintiffs, adduced evidence of the account stated.

Hutson for Defendant, proposed to open the account and give evidence of short deliveries of goods and overcharges, contended that as there had been a change of firm during the dealings entering into the account, the Plaintiffs not having proved cession of action from the former firm, had not capacity to sue. He cited *Gow v. McGibbon*, 4 Price, 200; *David v. Ellige, et al*, 5,

B. & C. 197; *Scarfs v. Jardine*, L.R. 7, App. Ca. 345; *Thomas v. Hawks*, 8 M. & W. 140; *Taylor on Evidence*, p. 293, 5th Ed.

Sol. Gen. Kingdon, Q.C., on question of opening the account. Even if under English practice, Defendant might under plea of *nunquam indebitatus* give evidence of errors in the account, that is not so here. The practice is that Defendant should state in which way he complains of the account, particularly where Plaintiffs have set out that Defendant admitted the account in writing. An account stated is an agreement by all the parties that the items are correct. Some latitude has been admitted in modern times, in allowing omitted credits to be added under *indebitatus*, but there is no case in which Defendant has been allowed to falsify. He cited *Bullen & Leake*, p. 399, Ed. 1863; *Roscoe's Dig.*, p. 558 (Ed. 1884); *Dales v. Lloyd*, 12 Q.B.. 53; *Wilson v. Wilson*, 14, C.B., 616; *Trueman v. Hurst*, 1 T.R. 42; *Pitt v. Cholmondeley*, 2 Ves. Sen. 565; *French v. French*, 2, M. & Gr., 644.

Hutson in reply.

The Court referred also to *Seton on Decrees*, Vol. II. p. 795; *Eyre v. Hughes*, 2, Ch. D., 148; *Parkinson v. Hanbury*, L.R. 2 H.L. p. 1; *Taylor v. Haylin* 2, Bro. C.C., 310; *Johnston v. Curtis*, 3, Bro. C.C., 266, and required as preliminary to any evidence in derogation of the amount, that Defendant should file a statement of the items he intended to impugn, and the nature of the objections, This was not done on the resumption of the case.

26 June, 1890.

CHALMERS. C.J., gave the judgment of the Court:—The discussion which has taken place in this case, turns upon a point of practice, on which the Court reserved decision. The Plaintiffs sue for \$2,024.07, as money due to them for goods sold and delivered to Defendant, for money lent and advanced to the use of the Defendant and at his request, all between the 1st day of January and the 18th day of August, 1888, and for money due by the Defendant to the Plaintiffs upon accounts stated. By the Bill of Particulars, an account between the Plaintiffs and the Defendant is shewn, commencing 1st July, 1888, with a balance then due by Defendant amount-

ing to \$2,914. There are various debit and credit items and the account is closed on the 15th August 1888, with a balance due by the Defendant of \$2024.07, the amount sued for. This account is marked at the bottom with the word "correct" in the handwriting of Defendant, and is signed by him, and bears also to be signed by Conrad, Wakefield & Co. of date 16th August 1888. There is also a marking at the bottom of the account of a "promissory note due 14th Sept. for "\$817.22, since paid," but it was explained that as this sum was not included in the account of Defendant's indebtedness, its subsequent payment did not affect the state of the balance. The Defendant besides pleading certain dilatory pleas, has pleaded as follows, viz.: "Denies that he is indebted to the Plaintiff in the sum of \$2,024.07 "sued for herein and avers that he never was indebted as alleged." This plea although derived from the English Common Law Procedure, and although it may have been tolerated in this Court, is not one that can be approved inasmuch as it is indefinite in meaning by reason of its comprehensiveness, and may have the effect of cloaking the real defence until the evidence is given, whereas good pleading ought to show the issue clearly by its terms. In the present case for instance, it was admitted at the bar that some amount was due by Defendant. The proper pleading would have been to admit the amount known to be due, and deny the portion which was disputed. The Plaintiffs might then have seen it for their interest to take sentence at once for the amount admitted, abandoning the rest, thus saving delay and expense on both sides. Coming to the point immediately before the Court, vizt., the effect of the plea which has been quoted, the Plaintiffs have given no evidence in support of their claim by way of proof of the sale and delivery of the goods, but have rested their case upon the plea of account stated and proof of Defendant having acknowledged the account as correct. The Defendant claims to give evidence at large for the purpose of showing that the items of the account are incorrect by reason of short deliveries of the goods and overcharges in the prices. He has not adduced any authority showing that the opening up of an account

stated has been allowed to the effect proposed under the system sanctioned by the Common Law Procedure, although there are various precedents for opening up accounts for errors and mistakes of other sorts. These have been errors and mistakes of a nature to be corrected on reference to books and vouchers, or else upon grounds of law, and not depending on the slippery memory of witnesses. It is to be observed that although this Court may look at decisions on points of practice under the English procedure, these cases are not authorities in the sense that decisions upon the law of evidence are: indeed they are not authorities at all, but are only aids by way of analogy. Thus if even the Defendant had shewn a direct decision favouring his contention, that would not have been binding on this Court any further than the Court might think it ought to follow it on account of its equity; but when no such decision can be found the Defendant's case is weak indeed. The practice which commends itself to the Court is that which has been established and is substantially followed in the Court of Chancery, vizt., that there should be something distinctly alleged by the party who is attacking accounts stated and treated as settled—as this account has been—to the effect that although the account has been thus stated and acquiesced in, there are errors which escaped notice and which must be rectified, and these errors should be specified, and also a statement given of the grounds as regards each of the errors in respect of which it is proposed a rectification should be gone into. One and the same rule it is clear must in justice prevail for the party *in petitorio* and the party in defence. Could it be tolerated after an account had been presented as shewing the whole transactions, and acquiesced in like the one before the Court, that the Plaintiff should sue for goods sold and delivered during the period embraced by the account to a larger amount than is claimed in the account rendered, and that he should do this in the face of such account being pleaded, and without any explanation as to the errors or deficiencies in the account. And not only this, but that without proposing to add items to the account, he should seek to shew by evidence that

the actual items were larger in quantity and of greater value than he had stated in a claim he made two years ago, and with which he had rested satisfied up to the time of filing his claim and demand. It is just the converse of this which the Defendant has proposed to do.

The Court has in this case required as preliminary to any evidence impugning the account that the Defendant should put in a statement shewing what items of the account he proposed to attack, and the nature of his objections. From what has already fallen from the Defendant's Counsel to-day it appears that he is not in a position to do this. The case is thus in a peculiarly favourable position for laying down a rule for the future.

As a rule for future guidance we shall lay it down that the Court will disregard such a plea as is pleaded in this record, and which has been quoted in the judgment, as a plea in answer to a claim upon a stated account.

The further and only remaining defence, that in respect of the Defendant having had transactions with the former firm of Wakefield & Watson, therefore a transfer and cession of action from them to their successors the present Plaintiffs is necessary to enable them to sue, is of no avail in the face of the evidence which has been given and is uncontradicted to the effect that all Defendant's indebtedness to the old firm is satisfied, no part of it being included in the balance now sued for.

Sentence for the Plaintiffs with costs.

Attorney for Plaintiffs, *G. W. Hinds.*

Attorney for Defendant, *J. B. Woolford.*

HANSARATCH v. NEHAUL.

23 *June*, 1890.

Malicious prosecution—Onus probandi—Justification—Reasonable and probable cause—Disputed ownership—Misjoinder.

Elements of an action for malicious prosecution in this colony are same as by law of England. Circumstances in which justification was sustained. Claim to property improperly joined in this action.

Action for malicious prosecution. Defendant's jewellery disappeared from his house, and about the same time his daughter was missing without having given any intima-

tion where she was going. Defendant reported to his Manager and applied for a search warrant which was executed at Plaintiff's house in Defendant's presence. Defendant claimed some jewellery then and there found in a cannister in which there was also jewellery belonging to Plaintiff. Consequent upon a complaint by Defendant a charge was made by an Inspector of Police, but was not prosecuted to a termination.

Neblett for Plaintiff. Defendant is liable for having caused Plaintiff to be prosecuted. Defendant acted on mere suspicion. We are entitled to damages whether Defendant had reasonable cause or not for giving information: the Police took away jewellery which was not mentioned in the warrant. *Smith's* L.C., 6th Ed., Vol. I., p. 128; *Fitzjohn v. Mackinder*, 9, C.B. N.S., 504; *Leete v. Hart*, 37, L.J., C.P., 158.

Bourke for Defendant. Absence of reasonable cause and presence of malice not proved. We are entitled to judgment. Abandonment of proceedings is not conclusive that there was not probable cause. Defendant is protected under the Larceny Ordinance 22 of 1862. *Lister v. Berryman*, 4 L.R., H. of L., 521; *Abrath v. N. E. Railway Co.*, 11, Q.B.D., 455.

Neblett in reply.

The further arguments and facts appear in the judgment.

26 June, 1890.

Curia (CHALMERS, C.J., and SHERIFF, J.) per CHALMERS, C.J.:— This is an action for a malicious prosecution. Whether the Plaintiff can recover in these proceedings in respect of any other ground laid in the record, I shall come to afterwards, but first and foremost it is an action for a malicious prosecution. I use this term not as having any peculiar significance as a *nomen juris*, but as expressing compendiously the gist and necessary elements of the action, which are the same in this colony as under the law of England. Plaintiff by his pleadings has undertaken to establish those elements. He has averred that the Defendant falsely and maliciously and without any reasonable or probable cause whatsoever, laid an information for a search warrant, caused the Plaintiff's house to be searched, and did other things which form the grounds

of his complaint. I shall quote the very clear exposition of the law applicable to the action for malicious prosecution in the recent case of *Abrath v. N.E. Railway Company*, 11, Q.B.D., 455, which is perfectly apposite and applicable to the case now before us. "The Plaintiff has to prove first that he was innocent, and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the existence of reasonable and probable cause; and lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice." The policy of the law is not to permit the machinery which is provided for the detection and punishment of crime to be made the instrument of spite and oppression, whilst on the other hand, persons who have good ground for resorting to that machinery, are not to be restrained from doing so by fear of actions in the event that it may turn out eventually that the grounds, apparently well founded, on which criminal proceedings were taken were in reality unsound. Accordingly, the law says there shall not be an action unless there was both an absence in the whole circumstances of such probable ground as would move a reasonable man to put the criminal law in operation, and a presence of some such motives other than the legitimate one of bringing a supposed criminal to justice as go under the general name of malice. The law lays the onus of proof as regards both elements on the Plaintiff. He must show that there was *not* reasonable ground for proceeding, and he must show that there was malice.

Can we say that the Plaintiff has done this? So far from having negatived probable cause, as he must do, it appears to us that by the evidence put before us he has established very clearly that there was probable cause. Taking the evidence as true, can we doubt that Defendant's daughter disappeared at the time stated, that

Defendant's jewellery also disappeared, that Defendant received information which connected Plaintiff with the disappearance both of the daughter and the jewellery, and that a very important verification of that information occurred before the search warrant was put in operation by finding the daughter in the very house where Defendant was informed she had been taken? The whole tenor of Defendant's conduct,—reporting his losses to his manager, searching for his missing daughter, going to the Magistrate with a letter from the manager, then going to the Magistrate's Office as the Magistrate directed him to do, there supplying particulars for the information, and swearing to it under the direction of course of the Magistrate—all the steps he took indicate that a larceny had occurred, and that Defendant was using the machinery of the law in good faith as against the offender.

As to the allegation that the jewellery taken under the warrant was not the property of the Defendant but of the Plaintiff, if we assume that as provisionally true, it by no means follows that the Defendant was then bound to withdraw his proceedings, and that his not doing so until some further steps had been taken is evidence of malice or of want of probable cause. The not finding his property where it was expected would be a check in the enquiry no doubt; but the original information and the sources remained, and it cannot be said that Defendant was not in good faith if he permitted the proceedings to go on to a further stage in the belief that the necessary proof to substantiate his accusation would yet be forthcoming. This is assuming that the Court were satisfied that the jewellery is the Plaintiff's; but, as I shall explain presently, we give no opinion upon this point.

As to the other element—malice on the part of the Defendant, we are clear that there is no evidence of malice on which the slightest reliance can be placed. On the contrary, so far as the facts have been unveiled to us, we are satisfied that up to the time of this unfortunate disappearance of the daughter and the jewellery, the Plaintiff and Defendant were perfectly good friends.

According to these views, the action for malicious

prosecution must be rejected, and necessarily with costs under Section 102 of the Larceny Ordinance. As the deduction that the Court makes from the evidence is that the prosecution complained of was instituted in good faith, for the prosecution of a larceny reasonably believed to have been committed, the prosecution is within the definition of having been done "in pursuance of the Ordinance."

As to the count or allegation of trespass, it is clear that all that was done in searching the house and removing the jewellery in the first instance, was done under warrant, which, as we have seen, was sued out and put in operation in good faith, and for that the Plaintiff cannot recover.

A further question emerges, whether the jewellery is the property of the Plaintiff or of the Defendant? But can we, or ought we to determine this question in the present action? According to the obvious reading of the pleadings, the allegation that the jewellery was the Plaintiff's property, was stated as matter of aggravation, not put forward as a separate ground of claim. But if it is not mere aggravation, but a separate ground of claim, what then? It seems to us that in that view the provisions of the Procedure Ordinance which strike against the joinder of causes of action of different classes is applicable: no two causes of action need be more diverse than in the action for malicious prosecution and in the action to establish ownership of property. Although we are not inclined to favour anything like artificial restriction on pleading, there are manifest reasons why a claim to property should not be tacked on to an action for malicious prosecution. One of the most obvious reasons is that if the claim to the property were asserted simply, the party assumed to be wrongly in possession or keeping the owner out of his property would, if he were honest, surrender at once without the expense of legal proceedings, whereas when joined with a claim for malicious prosecution he may very probably feel under the necessity of denying the claim of the Plaintiff *in toto*; and this might be the case here. If the Defendant has really made a mistake about the jewellery he would no doubt give them up to Plaintiff upon application.

There must be rejection as regards the action for malicious prosecution; and as regards the ownership of the property,—apart from the question not being properly before the Court technically in separation from the other parts of the case—we think the justice of the case would be best met by not adjudicating on this question, leaving the parties to act in regard to it as they may be advised.

Attorney for Plaintiff, *J. R. Neblett*.

Attorney for Defendant, *W. S. Cameron*.

ROSS v. PONTIFEX.

11 June, 1890

Contract—Right title and interest.

Contract for transfer of right title and interest in land, is valid.

Action against Defendant, a woman married by Antenuptial Contract, assisted by her husband, to enforce contract averring that Plaintiff sold to Defendant an undivided half share of two gold placers for a price payable in six months, with stipulation that should Defendant not then pay the price, further time should be given, on security. The price was not paid. Defendant placed Plaintiff in possession of land in which she had interest. Plaintiff sued for payment of the purchase money or a transfer of Defendant's right, title and interest in the land.

Dargan for Defendant excepted: Claim is bad, Plaintiff received possession of the land in lieu of payment. Right title and interest is not recognised in law. Only rights by transport or possession are recognised. The quantity of Defendant's interest has not been stated. Cited *Canon v. Wood*, 2 M. & W., 465; *Hooper v. Stephen*, 4 A. & E., 471.

Dr. Belmonte for Plaintiff: Defendant agreed on failure to pay, to transfer her right, title and interest in the land. Such transfers are well known in practice. She has only given possession.

27 June, 1890.

Curia (CHALMERS, C.J., ATKINSON & SHERIFF, J.J.):—

Certain preliminary objections arising upon the record have been argued. The Court rules against Defendant on the point that a sentence cannot be given for a trans-

fer of right, title and interest. It is a species of transfer not unknown in practice, although it does not pass in the solemn manner of a transport; and if the Defendant agreed to make such a transfer and the Plaintiff is willing to accept of it, it does not lie in Defendant's mouth to say either that such a transfer is incompetent or that the Plaintiff must, as a preliminary condition, show what is the extent of Defendant's right, title and interest. Unless the parties arrange the matter by mutual agreement, it will be necessary that evidence be given.

Attorney for Plaintiff: *J. A. G. C. Belmonte.*

Attorney for Defendant, *J. A. Murdoch.*

POKHOYE v. VEERAM MACK, ET AL.

Opposition to Transport—Lease.

Plaintiff opposed passing a transport of land on ground that he held a lease of portion of same land.

Held—Ground of opposition not established in fact.

Suit in opposition to transport of property with object of having certain alleged rights of lease claimed in the property reserved in the instrument of transport. Mack the seller, Original Defendant, denied the leasehold rights. The controversy was one of fact. The circumstances sufficiently appear from the judgment.

Hutson for Plaintiff and Opposer.

Dargan for Original Defendant.

10 July, 1890.

Curia (CHALMERS, C.J., and ATKINSON, J.) per CHALMERS, C.J.:—The Plaintiff opposes the passing of a transport by the Original to the Co-Defendant of the North half of lot 347 North Cumingsburg, on the ground that he holds a lease of a quarter of the same half lot running for 15 years from its commencement in 1878, that he was put in possession by the Original Defendant and holds possession of the land under that lease, and that the lease is not reserved in the intended transport. The claim for a quarter of the half lot is an error, the Plaintiff's evidence clearly showing that it is a half of the half lot which is claimed. The defence (besides dilatory pleas

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which have been disposed of) is a denial of the lease and of the Plaintiff's possession under it. Actual possession of part of the land is not denied.

As regards the proof in this case, we have had to deal with evidence which is not merely conflicting but depends on the witnesses' recollection of circumstances which occurred more than 13 years ago. This makes the statements of many of the witnesses who may be said to have been only casually present at the occurrences they speak of, subject to even more than the ordinary deductions. Some facts, however, are clearly ascertained.

Mack bought the property, transport of which he is now seeking to pass for \$620 in April 1876, and duly obtained transport. There was then existing a lease of part of the land to James Pollard for 8 years from 1st April 1871, at the rent of \$14 a year, the tenant being also bound to pay any taxes imposed in respect of buildings he might put on the land let to him. This lease was not reserved in the transport to Mack, but he chose to adopt it and recognised Pollard as his tenant. James Pollard assigned this lease to Charles Pollard. Previous to 1877, appraisalment of the whole of Mack's half lot with its buildings had been \$150. In 1877 it was raised to \$400, the taxes being then \$8.50, and in 1881 the appraisalment was \$1,000 and the taxes \$20. The last increase appears to have been mainly due to the buildings which Pokhoye put on the land.

At the time when the lease now in question is said to have been entered into, Pokhoye and Mack were not strangers to each others. Pokhoye was a provision merchant in Water Street doing a good business. Mack was captain and owner or part owner of a sloop trading to Essequebo, and got regular employment in carrying the goods which Pokhoye was sending to his customers in that part of the colony. Pokhoye had then a house only separated by Cumingsburg Back-dam Street from Mack's land, and he desired to hire a portion of Mack's land. At first his object—or at least the only purpose to which he applied the land—was the erection thereon of a rude shed or stable. Applying to Mack for the purpose of hiring, he learned from him that Pollard had a lease of the part of

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the land he wished, and Mack would not interfere with Pollard's right so long as it was unexpired. Pokhoye applied to Pollard and got from him a memorandum dated 1 October 1877, of hiring of a portion of land to himself for a year from October 1877, at the rent of \$8. This memorandum shows no definite description of the land, but it is said to denote the land between the house Pollard had erected on the land leased to him, and Back-dam Street, and no doubt it was so intended.

Pokhoye says that contemporaneously with his treaty with Pollard he asked Mack to make a contract with him for the whole of the land leased to Pollard to take effect a year afterwards, when Pollard's lease should have expired, and that Mack consented to do this, and consented that the lease should be for fifteen years at \$8 a year. The paper which has been put in as the outcome of this negotiation does not correspond as to dates with the statement, for it bears date February 1878, and is to take effect from April 1878. This discrepancy is serious; Pokhoye admits that Mack told him he would not interfere with the land whilst Pollard's lease was running, yet according to this document, and the explanations offered with it, he leased it to Pokhoye, to take effect whilst a year of Pollard's lease was yet unexpired without it being alleged that Pollard had consented. Another difficulty about accepting this alleged agreement is that the paper was not signed, and none of the persons who were present when it is said to have been read over to Mack with the purpose of being signed by him would say that he agreed to sign, or signified full assent to the proposed terms. The most intelligent and reliable of the witnesses called in this connection for the Plaintiff only said that he thought Mack understood what was read to him and did not seem displeased, but did not hear what he said by way of answer to the proposals. Mack's friend da Costa is said to have been present on this occasion by Mack's particular request, and to have decidedly approved Pokhoye's proposals, telling Mack that he could not expect better terms. Da Costa who is a Portuguese of apparently much shrewdness, denies that he was present on the occasion of

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reading an agreement of lease to which Mark assented, and denies that he ever on any occasion approved or recommended Mack to agree to such a lease as Pokhoye alleged; but was present at Pokhoye's store when a draft lease was read which Mack refused, and at the same time said he would agree to a rent of \$12 a year, the tenant also paying taxes.

Pokhoye's explanation of the draft lease now under remark not being signed at the time when, as he says, it was read and accepted, is, that Mack though agreeing to the terms, postponed signing, saying the land should first be measured, and also that he would fill up from his transport the number of the lot which had been left blank in the draft, and that he would then give possession. Pokhoye further states that in the afternoon of the same day when the proposed lease was read, himself, Mack, Da Costa and two others went to the land and measured it, Mack shewing him where he could put his house; that the house was ready to be moved over the road on to its new site, but he delayed the actual removal until Mack had given a further verbal assurance on Da Costa's advice, that he would sign the agreement, on the faith of which he moved his house, Mack saying he was then going back to Pokhoye's store where the contract was, in order to sign it. Pokhoye further says that he remained at the place to see his house shifted on to the land, after which, going to his store the same afternoon, he found that Mack had not been there; that he did not see Mack again for a week, when he excused himself from signing on the score of being busy, but promised to do so when he had a little more leisure. In this detail about the signature there seems improbability. If Pokhoye had so much doubt about Mack's adherence to the contract that he hesitated to move his house until the contract was actually signed, would he have left it to Mack to find his own way to the store in Water Street at the close of the day to sign it alone when the very absence of Pokhoye would probably have been a reason for not signing? How much more probable that he would have himself gone with Mack, even at some sacrifice of his time, and made sure of his signature, completing the transaction

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by getting the number of the lot filled in as he says was promised and adding his own signature at the same time and before the same witnesses? Mack entirely denies having been present at any measurement of the land, and on the occasion of Pokhoye bringing his house upon the land. A good deal of reliance was placed on the corroboration of Pokhoye given by Mrs. Heyliger who lived on the next lot to Mack's, but otherwise seemed unconnected with the parties. She says that she remembered the measurement of the land and subsequent removal of Pokhoye's house, Mack, Pokhoye, Da Costa and another being present. As there is no doubt there was a measuring of the land at which Da Costa and some employes of Pokhoye were present and removal of the house did take place, the whole significance of Mrs. Heyliger's evidence lies in her seeing Mack on the occasion when the house was placed on the land. As to this, at the distance of thirteen years with no reason at the time for being particular as to her identification of Mack, it is not possible to feel confident upon what she says that he really was there, it may so very readily have happened that she took some other person for Mack. The person she took for him was not, she says, intervening actively in what was being done, and she does not corroborate any of the statements as to the conversation said to have passed at the time between Pokhoye, Mack and Da Costa. Another infirmity in the statement of the measuring of the land on Pokhoye's side is that none of the witnesses assign to it any practical result, except that the place was pointed out to Pokhoye where he might place his house. It was quite obvious without any measurement that this must be between Pollard's house and Back-dam Street. But the object being (if the alleged draft agreement was to be given effect to) that a half of Mack's half of the lot should be apportioned off to Pokhoye, the silence of the witnesses on this point is to be remarked.

Another inherent improbability in Pokhoye's case is that Mack should have consented to a long lease of his land for what must have been obviously to him a very inadequate rent, and perhaps still more that Da Costa who knew the price paid for the land, and knew about

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Pollard's lease should, as alleged, have recommended Pokhoye's terms as so good that no better could be expected. It is obvious the lease which Pokhoye at first obtained from Pollard was in a quite different position. It was only a part of what he had leased that Pollard was letting, and only for one year. He retained enough for the accommodation of his own house. His lease was drawing near a close; whatever buildings were erected he would (as being a tenant) not become liable for any additional taxes. But Pokhoye in dealing with Mack as alleged, put the whole of the land Pollard had had—the half of his own possession—out of his control for fifteen years at the same rent as Pollard had obtained for a portion only, whilst Mack being owner he was liable for all the additional taxation that was certain to accrue in consequence of Pokhoye's buildings and improvements. In the event, and within a couple of years, this increase of taxation amounted to considerably more than the whole rent Pokhoye says was agreed on. The explanation of Pokhoye's occupancy of the land which comes out in the case made on behalf of Mack, much more commends itself by its probability. Pokhoye wishing to lease land from Mack is by him referred to Pollard who gives him a lease for a year of a portion of what he had himself leased. Pokhoye at first puts up a mule shed or stable on the land between Pollard's house and the street. This is objected to by some of the neighbours and is removed. Afterwards, and while the year's lease from Pollard is still current, he removes his dwelling house from where it stood on the opposite side of the street, to the land included in that lease. He here talks with Mack as to a longer term than is given by Pollard's lease, Mack is no doubt willing to have Pokhoye as a tenant, and considering the advantages he could put in Mack's way in his business of a sloop captain, Pokhoye no doubt looked to having the prolongation of the lease upon favourable terms, and so after the house is on Mack's ground, they have more talk, and one day at his store Pokhoye tells Mack that he has a contract which will suit him—probably the one which has been produced. This is read to Mack and it discloses

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a stipulation for a fifteen years' lease at the rent of \$8 a year, the taxes being left to fall on the owner. This is too much for Mack, and he says he cannot agree, but is willing to give a lease at a rent of \$12 a year, Pokhoye undertaking in addition as Pollard had done, to pay the taxes that will surely be imposed on the lot in respect of the buildings he has put and will put there. Pokhoye demurs to these terms, and they separate without coming to any definite agreement. And there is no reason to think that at any time they did agree. That Mack meant to insist on what he thought a fair rent is evidenced by his suing Pokhoye repeatedly for \$12 as rent, and his refusing to accept \$8 repeatedly offered by Pokhoye. It is not inconsistent that he took no means to eject Pokhoye. Considering the benefits in the way of business which Mack had received from Pokhoye and for a time was still receiving, he would naturally be unwilling to proceed to extremity. And so he allowed Pokhoye to continue to occupy, hoping no doubt than an adjustment would be come to; but the parties were never *ad idem*, and Pokhoye's occupancy was only by sufferance. The incident of Pokhoye doing some drainage work on the lot on the requisition of the Sanitary authority is perfectly consistent with the view of the case alleged by Mack; and having so good a case as he had, it is regrettable that Mack should have discredited it by pretending that the work was not done, or that he did not know whether it was done or not, and also by suggesting that there was some culpable irregularity if the work was done by Pokhoye as occupier. By the Public Health Ordinance, 1878, the owner or occupier of any lot or of any building thereon, may be required to drain a lot, or any one of the owners or occupiers, if there are more than one, the expense of the work being (under certain exceptions) recoverable from the owner. It was clearly proved that Pokhoye did this work by Mrs. Heyliger's evidence apart from other evidence. We do not learn what were the particular reasons which induced the Sanitary authority to call upon Pokhoye rather than the owner, and there is no need that we should; but under the circumstances in which he was occupying, it was natural he

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should make no demur about doing the work, and also it was natural Mack should be willing that he did it.

Under the view of the facts which we have taken, there is no right in Pokhoye to have the transport qualified by any reference to his alleged lease. A sentence rejecting the Opposition with costs must therefore follow.

Attorney for Plaintiff, *G. W. Hinds.*

Attorney for original Defendant, *J. A. Murdoch.*

Co-Defendant in default.

PETITION MANOEL GOMES *re* ESTATE GOMES.17 *January*, 1890*Ordinance 16 of 1887, § 5.—Appointment of Administrator.*

Testator by his will appointed two Executors jointly, with power of assumption, surrogation and substitution and of sale, and a separate Guardian of his minor child. The joint Executors were antagonistic and would not concur in acts necessary for liquidation of debts.

Held—That an Administrator should be appointed.

PETITION by a legatee for appointment of an Administrator of the Estate of Joao Gomes under the provisions of Section 5 sub-section (5) of Ordinance 16 of 1887.

Dargan, for Juliana Gomes one of the co-Executors, Reporter. The enactment does not apply where Executors had interfered with the estate; further, as the co-Executors are at variance as to the expediency of a particular act, vizt. the sale of certain property, the proper remedy is to apply to the Court under sub-section (e) section 5 of Ordinance 17 of 1887 for an order to sell that property; also on a sound construction of sub-section (5) Section 5 of 16 of 1887, an Executor could not be appointed unless the Executors under the will were guilty of misconduct.

Hutson for Petitioner. The Petitioner is not within the description of persons who can apply under subsection (e) Section 5 of 17 of 1887. The appointment of an Administrator is in the Court's discretion. As matters stand liquidation of the estate is inextricable, and hence the appointment of an Administrator is necessary.

Dargan in reply.

23 *January*, 1890

CHALMERS, C.J.—The petitioner is in right of his wife a beneficiary under the will of Joao Gomes, deceased. Joao Gomes appointed Manoel Fernandes and Juliana Augusta Gomes jointly executors of his will, with powers of assumption, substitution, and surrogation, and with leave to sell and transport immoveable property; and appointed Manoel Teixeira guardian of Maria Victoria Gomes, the testator's daughter, and one of his heiresses.

PETITION GOMES

It is stated that Juliana Gomes has refused to join with her co-executor in passing transport of property which it was necessary to sell for the purpose of paying debts due by the estate and legacies, by reason of which refusal the administration is embarrassed, law costs have been incurred, and the estate is brought in imminent danger of being prejudiced by the immovable property being levied upon and sold disadvantageously at execution. It is also stated generally that the relations between the joint executors are most unfriendly, verging on antagonism on the part of Juliana Gomes, and that it has become impossible for them to work in harmony for the benefit of the estate. The Petitioner asks the Court to appoint an administrator of the estate of Gomes with special authority to pass transport of certain properties which the executor Fernandes has agreed to sell.

The petition was by direction of the acting Chief Justice in non-session served upon Juliana Augusta Gomes, the co-executrix. She has filed a report in which she denies it is necessary to sell the immoveable property and takes exception to various of the proceedings of her co-executor, and she admits that she and her co-executor were not on friendly terms. Neither the co-executor Fernandes nor the Guardian Ferreira have been made parties to these proceedings.

The Reporter by her Counsel has raised an objection to the proceedings, viz. that the Court has not jurisdiction to make the order prayed for and by his request parties have been heard on this point as on a preliminary objection.

By section 5 of the "Inheritance Ordinance" 16 of 1887, it is enacted that "In cases where it appears expedient to the Court to do so, "the Court may appoint any person or persons to be an administrator "or administrators to administer the estate of any deceased person in "any of the following cases." Then follow five sub-sections defining the occasions when this power may be exercised. These are:—(1) where there is intestacy, (2) where there is a will but no executors have been appointed, (3) where executors have been appointed but they are unrepresented in the colony, or renounce, or are

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unable or unwilling to act, (4) where an executor is removed, and (5) “where it appears to the Court to be expedient so to do for the realization or protection of the estate.” By section 6, the Court may require the administrator to give security, and may give directions as to the administration. By section 7 an administrator may be appointed on the application of the Administrator General, or of any heir, legatee, creditor, or person interested. By section 9 the powers of the administrator are defined to be the same as if he had been appointed by a last will of the deceased to be executor, and he is to administer in accordance with the will, and by Section 10 he is to be an accounting party to the Court. It is not necessary to enquire how far these and other provisions of the Ordinance are in extension of the common law powers of the Court or are declaratory of those powers; it will be of course the duty of the Court to give effect to the directions and limitations of the Ordinance so far as they extend.

It is contended by the Petitioner that the case he presents is within the purview of the 5th sub-section of section 5. By this enactment a discretionary power is vested in the Court very wide as regards the conditions of its exercise. The Court may appoint an administrator whenever, on a view of all the circumstances, it considers it expedient to do so for the realization or protection of the estate.

But, the Reporter says the power is limited by another condition not contained in the Inheritance Ordinance. He finds on the “Administration Ordinance” 17 of 1887, particularly sections 3, 4, 5 and 7, and contends that in respect under these sections a specific direction could have been obtained from the Court which he thinks would have disposed of the particular question as to which the co-executors are now at variance, viz. the necessity or the expediency of the sale of immovable properties, therefore the Court has not power to appoint an Administrator. This argument, if good for anything, must go as far as that the Court although convinced upon a view of the whole circumstances and position of an estate that it is expedient for its protection or realization to appoint an

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administrator, yet must not do so if the immediate difficulty which has been brought to its notice and for the time perhaps may seem the most prominent can be got rid of in some other way. It is impossible to adopt this view. It imports a limitation on the power unsustainable upon any recognized rule of construction; it assumes that the power is not to be exercised if it is possible to avoid exercising it. There is no term in the enactment to support this assumption, and it seems defeasive of its purpose. The term used is not that the Court may appoint when it considers it *necessary* or *unavoidable* to do so, but when it considers it expedient. There may be many cases where such appointment is expedient and yet the most pressing difficulty may be removed by some other means. Of course the discretion like every judicial discretion is to be exercised with proper regard to the attendant facts and circumstances, and the provisions of the "Administration Ordinance" would be very proper elements for consideration in taking cognizance of any application to appoint an Administrator under the "Inheritance Ordinance" but, that is all; and if the Court notwithstanding the methods thereby provided considered the appointment of an Administrator to be expedient it is abundantly clear that then it may make the appointment.

Another argument was that as the appointment of an Administrator to administer the estate would in effect determine the powers of Executors or at least interrupt the exercise of their powers, it must be held that the Court may not appoint an Administrator so long as there are Executors who have not been charged with misconduct. This qualification is not found in the terms of the enactment and I do not perceive that it can be read into it. In sub-sections (2) (3) and (4) the cases where there are no Executors or none in a position to act are provided for. The purpose of sub-section (5) seems to be that it includes all cases not provided for in the previous sub-sections, and in this view it necessarily involves cases where there are Executors. The fact that there are Executors in any case where application is made to appoint an Administrator would be—as has already been

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observed as to the methods of obtaining directions under the Administration Ordinance—one of the elements to be considered; the Court would not lightly interfere with the Testator's appointment; it would take care that sufficient reason were shown before it did so. But upon a sufficient cause being established if the Court were convinced notwithstanding that there were Executors, that it was expedient for the realization or protection of the Estate that an Administrator should be appointed, the existence of Executors would not be a bar to making the appointment.

I concur however with the argument of the learned Counsel for the Reporter to the extent that I think the Co-Executor should have opportunity of coming in if he is so advised and being heard on the merits of the application.

SHERIFF, J., concurred.

The CHIEF JUSTICE intimated that Mr. Justice ATKINSON who was not present also concurred and the objections were overruled.

Thereafter the Petition having been served on the Co-Executor, he appeared personally and stated that he did not desire to intervene.

The Accountant of Court was then appointed Administrator.

COLONIAL BANK v. REPRESENTATIVES OF LOT 13, WERK-EN-RUST, AND OTHERS.

9, 10, 11 *June*, 1890.*Mortgage—Attorney—Construction of Power—Setum Velleijanum.*

Estate of a Testator consisting of movable and immovable property—being embarrassed, the heirs who had adiated, appointed an Attorney to manage the estate and liquidate debts, with *inter alia* power to mortgage. The creditors were not parties to the arrangement and the estate was not managed as in insolvency.

Held—In a question between Mortgagees and certain heirs of the estate that on sound construction, and having regard to the circumstances of the estate, the power extended to the mortgaging of immovable property forming part of the estate at the time it came under the administration of the Attorney, and was not limited as contended to property acquired in course of management.

Objection that Mortgage was for a past due debt not sustained; creditors not being bound by the arrangement between the heir and their Attorney, could press their claims as they pleased.

Held also that a power to mortgage given by the Court as regards minors' property may be executed by Attorney.

An adiated heiress under a general devolution of estate is a principal debtor as regards her Testator's debts and not merely a surety and consequently not protected by the *Setum Velleijanum*. The *Setum Velleijanum* does not apply to obligations a woman is legally bound to enter into.

Where mortgage bears to be executed by procuracy, creditor is put on enquiry as to authority of Mortgagor.

Suit to foreclose Mortgage executed in favour of the Colonial Bank and British Guiana Bank by an Attorney under power granted by Mrs. Fernandes a widow, and adiated heiress under will of Joao Fernandes, and guar-

dian of two minor heirs under same, and authorised to mortgage by an order of Court, and also granted by the other heir and representative of Joaô Fernandes and containing express power to mortgage. The mortgage extended over property belonging to the estate of Joaô Fernandes, and also over property of Mrs. Fernandes who had been married to the Testator by contract excluding community. It was admitted that the mortgages were *ex facie* regular. Defence (1). The mortgages were not authorized by the power. (2). There was not due consideration. (3). The mortgages were not duly authorised as regards the separate property of Mrs. Fernandes. (4). Mrs. Fernandes had not renounced her privileges as a woman.

Dargan for the opposing heirs. At the Testator's death his estate was deeply involved; the liability to the Colonial Bank and British Guiana Bank arose from these Banks being holders of promissory notes made by the Testator in favour of various merchants. The estate was not solvent. The creditors were willing that the business in which Fernandes had been engaged should be carried on and their claim paid out of the profits of working. The heir adiated and executed an irrevocable power in favour of Henriques the Mortgagor, who was an Executor under the will. His status as Executor was ousted by the adiation. The power in terms authorised selling and mortgaging property, but that did not refer to the property forming Fernandes' estate at his decease, but to property that might be acquired during the management; otherwise the purpose of the arrangement which was to save the *corpus* of the estate and hand it back to the heirs free from liability would be defeated. If the Attorney found he could not pay the debts from the profits he should have applied to the *cestuique* trustee for instructions. Further, the power obtained from the Court to mortgage had been used for a different purpose than was put before the Court. Mrs. Fernandes had renounced none of her privileges as a woman.

Solicitor General Kingdon, Q.C., (*Hutson* with him) for Plaintiffs.

The Court could only enquire whether Plaintiffs had

valid mortgages on the properties on which they could recover. The agreement gave Henriques power to mortgage. The creditors were not concerned with his management and never agreed to give time although forbearant. It could not have been contemplated as possible that the debts of the estate could be paid out of the profits. Supposing the creditors were willing there should be gradual liquidation, that did not imply that they should have no security. There was not here any question of undue preference of creditors. As to Mrs. Fernandes' privileges as a woman, it was not necessary she should renounce. She adiated Fernandes' estate, and by adiating she became liable jointly and severally with the other heir who had adiated for the whole of his debts. The documents laid over show that Henriques as her Attorney had power to mortgage her separate estate.

Dargan in reply.

Judgment was reserved.

11 July, 1890.

CHALMERS, C.J.:—

The Plaintiffs claim to foreclose two mortgages; which are set out in full in the claims and demands, 1st, a mortgage executed on 23rd January 1886, in favour of the Plaintiffs, for \$63,756.22, and in favour of the British Guiana Bank for \$48,368.48, with the right of first mortgage on certain properties described in the mortgage and in the pleadings, and 2nd another mortgage executed on the same date in favour of the Plaintiffs and in favour of the British Guiana Bank, in additional security for the same sums of \$63,756.22 and \$48,368.48, respectively, with right of second mortgage on other properties described in this mortgage and in the pleadings. The Plaintiffs state that various payments have been made to them amounting to \$37,589.55, in respect of which they have released certain of the mortgaged properties, leaving \$22,166.67 remaining due to them which they claim to recover as against the properties unreleased and which are mentioned in the conclusion of the claim and demand.

The British Guiana Bank has instituted proceedings concurrently with these proceedings for the foreclosure

of these mortgages as concerns their interests and recovery of the balance due to them.

In both of the suits conclusions of exception and answer have been filed by Manoel Fernandes and Maria Gonsalves born Fernandes, assisted by her husband Carlos Conrado Gonsalves, the heir and heiress of Joaô Fernandes who were minors at the time the mortgages were executed. None of the other Defendants have appeared. Of course it is only in respect of their minority that the appearing Defendants are in a position to urge any of the objections that have been alleged, as under our public system of passing mortgages, persons of full age and not under disability would be barred by acquiescence unless fraud had intervened.

The mortgages bear to be executed by Joaô Gomes Henriques as the irrevokable Attorney of Maria Fernandes, widow, in her own right, and as one of the surviving heirs by the last will of Joao Fernandes, deceased, and as having adiated his estate and inheritance, and in her quality as the sole guardian of the minors Manoel Fernandes and Maria Fernandes, two of the surviving heirs of the said Joaô Fernandes, deceased, nominated by his said will, and having by their said guardian adiated his estate and inheritance, and as authorised to mortgage by an order of the Chief Justice dated 21st May 1885. Henriques executed the mortgages also in the character of the irrevocable attorney of Joaquina Fernandes Mendes, born Fernandes, another of the surviving heiresses who had adiated the estate of Joao Fernandes, and as sole surviving executor of his wife Guilhelmina Henriques, born Fernandes, the other surviving heiress of Joaô Fernandes.

All the properties mortgaged and against which the Plaintiffs now seek to proceed in execution belonged to Joaô Fernandes excepting two, viz., West two-thirds of lot 169, North Cumingsburg, and lot 52, Lacytown, which were the property of Maria Fernandes, wife of Joao Fernandes to whom she was married by contract excluding community. Questions are raised by the appearing Defendants as touching the validity of the mortgages to operate (so far as concerns their interests) on any of the properties,

and then if they operate on the properties which belonged to Joaô Fernandes, it is contended they are, on other grounds of defence, inoperative upon the separate property of Mrs. Fernandes.

1st. As regards the operation of the mortgages on the properties generally, it is admitted on the part of the Plaintiffs that as the mortgages bear on the face of them that they were executed by procura-tion the creditors were put on enquiry as to the sufficiency of the authority under which the mortgagor acted, and also upon enquiry as to the fulfilment of any conditions on which the authority was dependent so far at least as these conditions were apparent on the face of the instrument of authorization or in other documents therein referred to. The contention on the part of the Defendants was to the effect firstly, that the instrument under which Henriques passed these mortgages did not on a sound construction authorise him to mortgage the properties as regards the interests of any of the owners, and secondly that assuming due authority was conferred as regards the interests of those owners who were *sui juris* yet the mortgages were ineffectual as regards the interests of the appearing Defendants in respect of the deficiency of certain special authorization necessary in the case of minors. It was also maintained that even if the mortgages would have been valid if made in consideration of a simultaneous money advance they were not valid as made in respect of past indebtedness.

Turning then to the instrument under which Henriques executed the Mortgages, we find that it contains *ex facie* a power to pass and accept mortgages, but (it is contended) that this power was not applicable to any of the properties handed over to Henriques for management, but only to such other properties as he might acquire in the course of his management. This question must be determined upon reference to the terms and scope of the instrument itself aided by such information as is before us respecting the situation of Fernandes' estate, the subject matter which was being dealt with. This information is contained in the pleadings, in the recitals of the instrument itself, and in two petitions to the Court by Mrs.

Fernandes, the guardian of the minors referred to in the instrument and in the pleadings. These and other documents have been put in by mutual consent and are relied on upon both sides.

The instrument now in question conferring the power to mortgage purports to be an agreement made between the heirs of Joao Fernandes' *nominatim* including the minor heirs, the appearing Defendants, represented by Mrs. Fernandes their mother and natural guardian, and who was also their testamentary guardian by the will of Joao Fernandes their father, on the first part, and Joaô Gomes Henriques who, as executor of his deceased wife, a daughter of Joaô Fernandes one of the heirs, had himself also an interest, and who had also interest as a creditor of Joao Fernandes. This instrument recites that Joaô Fernandes at the time of his death was carrying on business (1) as a Merchant (2) as a licensed retail spirit dealer and keeper of the Ice House Restaurant, (3) as a licensed retail spirit dealer in premises in Church Street; that on investigation into the affairs of the estate it had been found that the assets were not sufficient to meet the liabilities; that the creditors and heirs had satisfied themselves that if the businesses were carried on instead of being at once realized, the profits would be sufficient to meet the deficiency within a reasonable time, and the business would ultimately be saved to the heirs. There is a further recital that the creditors had required as a condition of time being given, that the heirs should adiate and that they had adiated, a recital of proceedings by Mrs. Fernandes as sole guardian of the minor heirs (the appearing Defendants) under which the authority of the Chief Justice was obtained for continuing the business so far as the minors were concerned until the debts due by the estate of Fernandes were fully liquidated, and a recital that it had been agreed between the parties, that Henriques should take over and conduct the businesses upon the conditions thereafter set forth, and that, in respect Henriques was himself a creditor, the powers granted to him should be irrevocable so long as the debts of the estate as well as his claim remained unsatisfied. Upon this recital there follows a grant of powers to Hen-

riques; firstly he is authorized to take over and continue the businesses of Joaô Fernandes already mentioned, and to take possession of the premises in which these businesses were carried on as well as all the property belonging to the estate of Fernandes of every kind; then there are powers and conditions of very general character as to the management of the businesses. Secondly, there is an appointment of Henriques as Attorney to carry on and manage the affairs of the heirs of Fernandes "so long as the claims on the said estate remain "unpaid" including the claim of Henriques himself; and then without prejudice to these general powers there follows an enumeration of particular powers: amongst others, there is a power to sell moveable and immoveable property, to make and negotiate bills, notes, and cheques in connection with the business and with the estate and inheritance, to execute and accept transports and mortgages, and various other powers which it is not necessary to specify in detail, such as are suitable in the management and liquidation of an estate.

The condition of the estate when these powers were given to Henriques was one of large indebtedness. This is indicated as we have seen in the instrument, but more clearly appears in the petitions of Mrs. Fernandes which have been already referred to. The figures are stated in some detail which it is unnecessary to follow; suffice it to say that in both the petitions the total indebtedness is put at \$293,219.91 not including commissions to executors. The nominal deficiency of assets is stated at \$63,446.96. This is reduced on the hypothesis of a certain valuation of the stock being realized, to \$14,990.78. The precise amount of the deficiency was necessarily a matter of estimate to some extent; but it is perfectly clear that there was no hope that if the estate was at once realized the creditors would be paid in full. The attitude of the creditors in these circumstances was one of holding back, or it may be called forbearance. They were actuated it need not be doubted both by an intelligent regard for their own interests, and by consideration for Fernandes' heirs. It has not appeared what was the precise form or nature of the agreement by the creditors.

It is not said that they at any time agreed in writing to anything. Their agreement is only referred to as we have seen in the most general terms in the recital of the agreement between the heirs and Henriques. In the first of the petitions presented by Mrs. Fernandes, it is stated that the creditors had agreed to waive interest on their claims, and to give 3, 6, 9, 12 and 18 months for payment, and in the second petition a similar statement as to the time given for payment is repeated, but not as to the waiver of interests. In the 37th paragraph of the answer it is stated that the creditors agreed their debts should be paid out of the profits of the businesses and properties belonging to the estate as carried on by Henriques: and that they granted time for this purpose, the allowance of time being stated however quite indefinitely. If this is coupled with the statements made in the petitions as to the instalments of payments, it implies that the creditors expected a clear profit of more than one hundred per cent., upon the assets productive and unproductive to be made in eighteen months; or if not so coupled, that then they were at least contented to wait indefinitely until this very large amount of profits had been realized. It is not surprising that when enquiry was made as to the sort of proof proposed to be given of this agreement the Defendants were not in a position to give any information. But if the very large assumption is made that such an agreement as is stated in the answer was actually entered into by the creditors, there was no consideration for it and clearly it was not enforceable. There was no Composition Deed; that is nowhere alleged, and the estate was not being administered as if insolvent. The creditors seem to have hoped that by forbearing to press their claims, and thus giving time for the assets to be favourably realized, as well as some profit to be made on the going businesses, each would get paid his debt in full within a reasonable time; but if any of the creditors changed his mind or thought payment was becoming delayed unreasonably long, there was nothing to prevent his having recourse to any ordinary legal remedies. I am referring, of course, to the obligation subsisting between the debtors on the one hand and

the creditors on the other, not to any obligation, if there was any, betwixt the creditors *inter se*, which subject has not been in any way brought before the Court.

Construing then the agreement from its language, and looking also to the surrounding circumstances which would necessarily be present to the minds of the heirs, it is clear that the heirs had in view that Henriques should have the most ample powers of administration, and that they gave him such powers. They knew the estate could not at once pay its debts, but they hoped that by judicious administration extending over some length of time, it would be in a position to do so. For this purpose it was necessary not only that Henriques should carry on the businesses, making the best profits he could, of course, but also that he should judiciously deal with the other assets, disposing of them to the best advantage; that he should pay instalments of the debts rateably to all the creditors so long as all were contented with the payments he could give them; and if any should become more impatient than the others he would then have to satisfy or arrange with the most urgent so as to ward off if possible any premature or forced realization under process of execution. The result, if their expectations were realized, would be that the debts would be paid off and the businesses preserved to the heirs as going concerns yielding profits and perhaps even a portion of the other properties; but that they ever expected the whole of the debts to be paid out of the profits only, without realizing the substance of any of the assets left by Fernandes, and that the powers were granted to Henriques upon this footing will not really bear serious consideration. The case of *Hawtayne v. Bourne* 7 M. & W. 595, cited for the Defendants, has no application. This was the case of a manager of a mine who had borrowed money for the purposes of the mine, and the question was whether a shareholder against whom action was brought to recover the loan was liable. From the judgment of Baron Parke, it appears "the extent of the authority conferred upon the "agent by his appointment was only this—that he should conduct "and carry on the affairs of the mine in the usual manner." The Court

negatived that the power of managing implied an authority to borrow money. In the present case the scope of the appointment includes the raising of money, and includes in express terms powers of sale and of mortgage.

As regards the contention that the mortgage was invalid because it was executed in respect of a claim which had already accrued due upon the estate of Fernandes and not for money advanced contemporaneously with the execution of the mortgage, I consider that it cannot be supported. It was manifestly within the scope of Henriques' appointment that he should give security to any creditor where that was necessary in order to carrying out the main and leading purpose of gradual liquidation. It will be kept in view that there is no question here as to whether the creditors were being equally dealt with. The question is as to the extent of the authority given to Henriques. It is clear that the Plaintiffs being very large creditors could by insisting on satisfaction of their claims have upset the whole arrangement, and thus it might readily be the most correct policy to satisfy them by security. And it is also to be observed that on this mortgage being given the Plaintiffs on their part gave a large extension of time so far as their debt was concerned: instead of the whole having to be paid in the course of 18 months from April 1885, in accordance with the arrangement at first said to have been made they extended the time to four years from January 1886. Of course the form of the transaction could very easily have been so arranged that the mortgage would have been given for money actually advanced thereon, which might have been simultaneously paid over to the Bank in payment of their existing claim. The effect of such a transaction would have been virtually the same as of what took place.

Thus far as to the extent of the authority given to Henriques by the heirs of Fernandes, including the minor heirs through their guardian, Mrs. Fernandes. A further objection to the validity of the mortgage as affecting the interests of the minors is that it is said it was not authorized by the Court. This objection is

founded on the fact that the order by which the guardian was authorized to mortgage was subsequent to the grant by her of the power to Henriques. This objection is not well founded. The power which Mrs. Fernandes granted to Henriques was a continuing power. It was not spent in the moment of its delivery to Henriques. Mrs. Fernandes gave the power with the view that she should by the hand of Henriques execute such mortgages as might become necessary in the course of the administration with which he was entrusted. The authority given by the Chief Justice to Mrs. Fernandes although subsequent to the execution of her power to Henriques was long anterior to the execution of the mortgage itself and the authority inured to this act of mortgage done by Henriques as Mrs. Fernandes' instrument in the same way as if she had subsequently to the authority executed the mortgage herself.

The remaining defence is that Mrs. Fernandes did not renounce the privileges to which she was by law entitled, the privileges referred to being those conferred upon women by the *Senatus consultum Velleianum*. The defence was propounded as affecting in particular the two properties, viz., West two-thirds of lot 169, North Cumingsburg, and lot 52, Lacytown, which belonged to Mrs. Fernandes as her separate property, she having been married as already stated to her husband by contract excluding community. These properties were included in the mortgage now sued upon in virtue of a power previously given by Mrs. Fernandes to Henriques by which she empowered him in terms to mortgage these two properties by name and any other immovable property in the Colony belonging to her in favour of the Colonial Bank or British Guiana Bank or any other body corporate or person. There is no specification of ancillary powers except the power to advertise the mortgage and thereafter go before a Judge and execute all necessary documents. There is no attempt in the mortgage itself to renounce the privileges given by the *Senatus Consultum Valleianum*. This law makes every woman, whether married or single, incapable of contracting as surety for another person, unless she expressly renounce the law passed in her favour.

But the question comes whether the obligation undertaken by Mrs. Fernandes in the mortgage was one to which the *senatus consultum* applies. In form it is an obligation as principal debtor. That however is not decisive of the question; the Court must look to the substance of the transaction. What was then Mrs. Fernandes' position; was she virtually and substantially a surety or a principal debtor? It admits not of doubt that upon adiation as one of the heirs of Fernandes she became liable for the whole debts for which Fernandes was liable. It is indeed true as laid down in the books that an heir is liable in proportion to his share of the inheritance; but although this principle may apply in cases where the inheritance is left in distinct portions to different heirs, provided there are assets by which the liabilities are met somehow, and may be taken to regulate always the proportional liabilities of heirs *inter se* it does not apply where as by the Will of Fernandes there was a simple devolution of the whole estate to the heirs and a general charge to pay debts. As all the debts had to be paid in any event each of the heirs adiating became liable for all that the Testator owed, not by way of surety for his co-heirs, but as principal obligant, having by adiation come into the position of the Testator. So far therefore as the mortgage is a security it is a security for an obligation for which Mrs. Fernandes was herself liable as the adiated heir of Fernandes independently of the liability of any other person. The *senatus consultum* has no application to an obligation of this nature undertaken *in rem suam*. See N. II. Voet *de Seto Velleiano*. Even if we view the mortgage of Mrs. Fernandes' property as applicable to secure *pro tanto* the payment of other shares besides Mrs. Fernandes' proper share of the indebtedness, the transaction is nevertheless not within the *senatus consultum*. Indeed it is one of the cases in which Voet expressly says the *senatus consultum* does not apply where a woman has given security in a matter in which she had a common obligation with others. Voet 16-I, II. "*Caret quoque hoc beneficio si in rem suam ac propriam utilitatem vel saltem sine detrimento intercesserit, dum*

“*ipsa forte debetrix erat, aut pro quo intercessit etiam sine intercessione obstricta. . . . veluti si in causa sibi cum alio communi;*” and this is consistent with the whole principle on which the *senatus consultum* is founded, which is to protect women from their real or supposed facility of being induced to enter into obligations as volunteers on behalf of others, not to protect them from the results of obligations they may make for their own advantage or convenience or because they are legally bound to enter into them.

It may be remarked that the defences put forward have been directed against the forms and modes of the transaction which is impugned rather than against its substance, there being no allegation that the Defendants have under the whole circumstances in which the property was dealt with by their guardian or by Henriques as her instrument suffered any actual lesion.

The mortgages being validly executed and none of the defences averred and relied on being legally of avail it follows that there must be sentence for the Plaintiffs with costs; the costs occasioned by their defence being payable by the appearing defendants.

Sheriff, J., concurred. Atkinson, J., took no part in this case being a Shareholder in the British Guiana Bank in whose foreclosure suit upon the same mortgages the same questions had been raised as in this suit.

Attorney for Plaintiffs, *G. W. Hinds.*

Attorney for Defendants, *J. A. Murdoch.*

PETITION SARAH ANN ELLIOTT, GUARDIAN MINORS ELLIOTT.

21 July, 1890.

Petition for authority to raise money by mortgage on a Sugar Plantation in which Minors had interests.

The Court after reference to and report from the Administrator General, required further information from the Petitioner, and made the following Minute:—

In granting authority to pass the proposed mortgage it is necessary the Court should be satisfied that the outlay is prudent and beneficial from the point of view of the minors' interests. What appears on the papers

is rather the expression of an expectation more or less speculative that benefit will accrue. An expectation to this extent is naturally assumed in all outlay of this description. But it is the duty of the Court, and more especially in the present fluctuating condition of the sugar industry, to enquire more fully; and the Court therefore considers it necessary that the Petitioner should go further than she has done, showing approximately in what way and to what extent benefit will accrue to the minors in respect of the intended outlay and mortgage. Amongst other things the Petitioner should show the position of the estate as regards debts already incurred, show the working and profits of the estate with the previously existing machinery from the Testator's death until now, and make an estimate, supported by reliable data of the working and profits under operation of the new machinery.

22 *August*, 1890.

The information was laid over and authority granted.

THOMSON v. HOWARD, ET AL.—(BAIL COURT.)

Judgment Summons—Affidavit as to non-possession—Marshal's return on application for Judgment Summons sufficient.

Plaintiff having obtained judgment, sought to carry on proceedings to a close by judgment summons.

The Registrar of Court brought to the notice of the Court the decision of Mr. Justice ATKINSON in *Symally v. Soondar* on 3rd August 1889, where he held that Plaintiff must show further on affidavit that he had endeavoured to recover the sum due by ordinary process of law, and that the Plaintiff had no other means of ascertaining that the debtor had no other property to satisfy the debt; and to a further decision of Mr. Justice ATKINSON in *Roberts v. Job*, 28th September 1889, where he held that the same principle applied to a case where a judgment summons had already been obtained and proceeded on for default.

CHALMERS, C.J.:—I rule that the Marshal's return that there was no property surrendered is sufficient proof that

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the debtor has no property for the purpose of obtaining the summons.

Ultimately Mr. Justice ATKINSON altered his decision by striking out the rule as to affidavit of the Plaintiff, to the following:—I rule that I will not entertain this application or applications for Judgment Summonses until it is shown that an endeavour has been made to recover the sums due under the sentence by ordinary process.

EX PARTE MANOEL FIGUEIRA.—(BAIL COURT.)

Application for directions—Failure of payments under Administration Order—Effect of Insolvency on Order—Filing of Claims.—Prescription.

Manoel Figueira obtained an administration order on 3rd April 1886 to pay fifty cents in the dollar on concurrent debts, and his preferent debts in full. Figueira made certain payments and the preferent debts were paid in full, and a dividend of 9% was paid on concurrent debts. Having failed to continue his payments on the 17th May 1890, he was adjudged insolvent and his creditors cited. The Administrator General applied for directions as to whether the administration order was annulled by the order of adjudication, and whether dividends were to be paid to concurrent creditors scheduled in the administration order upon fifty cents in the dollar on the full amount of their claim, and whether fresh claims had to be filed by the creditors scheduled in such order, it being assumed that prescription did not apply to such debts.

22 July, 1890.

SHERIFF, J.:—Let the Administrator General read Section 105 of the Ordinance with rule 199 (3), and then read Section 17, s.s. 11, and his question is answered. The composition or scheme of course is entirely annulled, and future dividends are payable on the amounts which are now really due,—of course, fresh claims must be filed. The position, save as to payments, &c, made under the administration order, is exactly the same as if no administration order had ever been made. The Court should be asked for a declaration that the annulling of the com-

position or scheme should be without prejudice to any claim so far as prescription is concerned.

The Administrator General applied for an annulment of the administration order without prejudice to the claims filed so far as prescription is concerned.

19 *September*, 1890.

CHALMERS, C.J.:—As no authority is possessed by the Judges in Insolvency to affect by any order the operation of prescription upon claims in which by law it otherwise would operate, I cannot make the order under the condition asked for. It seems however, on an equitable construction of the saving clauses of 27 of 1856, that as creditors could not bring any suit during the subsistence of the receiving order, the period when it was in force should be deducted from any period of prescription which would have been then running against the claims referred to in the application.

EX PARTE, ESTATE ROBINSON.—(BAIL COURT.)

Application for directions—Will—Estate partly intestate—Construction of Ordinance—A notice calling on parties interested in sale of estate is good so long as it notifies them as to its purpose.

B. A. Robinson on 1st February 1882, then an overseer, made a will whereby he bequeathed to Elvira Cummings “all my money and “property consisting of \$1,500 in the Colonial Bank and \$506 in the “British Guiana Bank, also any stock, cows, horses, goats, &c, on the “estate (Versailles on which he was then an overseer) my property, “to appropriate to any purpose she might deem necessary after my “death.” Subsequently to the making of the will he became possessed of Pln. Dunoon by transport. He made no provision in his will for an Executor, and the Administrator General took over Pln. Dunoon as belonging to an “intestate estate,” but entertained doubts as to whether the words of the will were sufficient to pass to Elvira Cummings the immovable property or any property other than that mentioned specifically in the will, and applied for directions as to what property of the deceased the said Elvira Cummings was entitled to under the will.

9 Oct., 1890.

CHALMERS, C.J.—I cannot entertain the application.

25 Oct., 1890

The parties interested in the sale of the estate were

Re ROBINSON

called up on a petition by the Receivers of the estate and parties cited by the Administrator General to appear heading the notice as on the Report of the Receivers.

Hutson for Elvira Cummings. Court cannot fix day of sale as the petition is by the Receivers instead of by the Administrator General. Rule 182 *et seq.* Insolvency Ordinance 1884.

CHALMERS, C.J.:—I am with you. The Receivers are not the proper parties on whose application the order is to be made, but in this case the Administrator General has also sent in a report.

Hutson:—But the initial proceedings were taken by the Receivers.

CHALMERS, C.J.—The matter having been put into the hands of the Administrator General is it not the same?

Hutson:—No. The notice in the *Official Gazette* calling up parties interested is on the petition of the Receivers.

Davson for the Receivers:—The wording of the Administrator General's notice cannot vitiate the Court's order.

CHALMERS, C.J.:—I do not think the procedure need be treated as a nullity. There is a well-known maxim, *superflua non nocent*, which applies even to proceedings in which the greatest strictness is required—citation in criminal charges,—by which, if the essentials of a good citation are there, the proceeding is good, although it contains also superfluities. I conceive that this rule applies even in a stronger degree to such matters as orders and notices. The essential thing in the present case is the appointment of a day for hearing all persons interested as to the maintenance or sale of the plantation. That is to be done on seeing the report of the Administrator General—not necessarily immediately on seeing that report. Nor is it an essential that reference to that report should be contained either in the order appointing the day of hearing or in the notice given of that appointment. Whilst I believe this is the sound principle of construction, I am aware that in applying it the Court should be careful to see that the notice has been such as to accomplish its purpose,—that there be nothing in it either to mislead parties or to conceal the true effect. I

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do not think the notice is faulty in either of these particulars, and rule against the preliminary objection.

Attorney for Cummings, *M. R. Gonsalves*.

Attorney for Receiver, *G. W. Hinds*.

COELHO v. KING.

Contract of Sale—Breach—Transport.

Circumstances under which Defendant decreed to pass Transport, and damages found due for withholding thereof.

Solicitor General Kingdon, Q.C., adduced evidence for the Plaintiff. Defendant in default.

The facts sufficiently appear from the judgment.

6 Dec., 1890.

The Court (CHALMERS, C.J., ATKINSON & SHERIFF, J.J.) gave judgment per CHALMERS, C.J.:—The Plaintiff claims a sentence condemning the Defendant to pass to him a valid transport of lot 89 Bourda, subject to the lien of the Commissioners of Vlissengen, with the buildings thereon, and further condemning Defendant to pay to Plaintiff \$250 as damages and compensation for the unlawful withholding by him of the premises, or alternatively condemning Defendant to repay to Plaintiff a sum of \$735.01 paid by him under a contract of sale, and a further sum of \$800, money expended by the Plaintiff on the premises, and a further sum of \$500 as damages for breach by the Defendant of the contract of sale. The Defendant has filed no defence, and the case has been heard *ex parte*.

The following facts have been averred and proved:—King purchased from the Commissioners of Vlissengen, lot 89 Bourda, under the provisions of the Vlissengen Ordinance 1873, at the price of \$687.44, whereof he paid in cash \$53, leaving a balance of \$634.44 to be paid in fifteen annual instalments of \$42.29, interest also being payable on the unpaid balances. King never paid any of the annual instalments, and in November 1888, the Commissioners took proceedings to recover the arrears. Coelho then agreed to purchase from King the lot and buildings thereon at the price of \$1,060, Coelho undertaking all the liabilities to the Commissioners, but being entitled

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to deduct from the purchase money the amount which was due up to the time of purchase, also the amount of the instalments still to become due, being in the aggregate \$762.41, the taxes due on the property (\$23.25,) and the expenses of the proceedings which had been taken (\$25.36,) and \$2 as half the cost of preparing the transfer. There was thus a balance of \$246.98 due to King upon the transaction. \$10 of this sum was paid on account to King. But soon after he became dissatisfied with the bargain; then Coelho to save all disputes agreed to add \$100 to the purchase money, making up the balance due to King to \$346.98, which was paid to him on 12th December 1888. Coelho was put in possession, erected a shop on the lot, expending \$550 thereon, and made repairs and improvements on the existing buildings, costing \$200 more. A part of the transaction between King and Coelho was the execution of an instrument whereby King ceded and assigned to Coelho all his right, title and interest in the lot in question with all the buildings thereon, and it was understood that a formal title would be made in favour of Coelho by a transport being passed to him by the Vlissengen Commissioners.

Transport was advertised: it was obstructed by a petition by one Christopher, which petition was subsequently dismissed; but it seems the "Judge in transports" did not allow a transport to pass direct from the Commissioners to Coelho, he not having been the original purchaser from them. The Commissioners it appears are willing to transport to King who would thereby be *in titulo* to transport to Coelho. Coelho has been prevented by King from having any beneficial occupation of the premises and had to stop the completion of his shop owing to his interference. On the 30th November 1889, demand was made upon King to pass transport which has not been done, nor have any steps been taken with that object.

There is no doubt that under the facts which have been established a sentence such as is claimed is justly due, and will be given accordingly.

Attorney for Plaintiff, *G. W. Hinds.*

CASES
DETERMINED BY THE
SUPREME COURT OF CIVIL JUSTICE.

RE DA COSTA.—(BAIL COURT.)

12 *January*, 1891.

*Statement of affairs—Computation of time—Authorisation to examine in
Insolvency.*

A receiving order was granted against Da Costa on 13th December 1890. Under 22 of 1884, s. 15, s.s. i the statement of affairs should have been filed within 3 days from date of order, and under s.s. ii the Administrator General extended the time for 10 days. On the twelfth day after adjudication this statement was handed to the Registrar who refused it until the question was decided whether the ten days to be granted by the Administrator General was exclusive of the three days mentioned in s.s. i.

ATKINSON, J.:—I rule that the ten days which the Administrator General is allowed to grant to the debtor to file his statement of affairs is exclusive of the three days mentioned in the preceding subsection of the Ordinance.

Under section 16 of 22 of 1884, any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor.

Hinds on behalf of a creditor appeared to examine the insolvent.

Dargan:—I contend that an Attorney-at-Law cannot appear without an authorization.

Hinds:—Mr. *Dargan* is in the same position. I hold a power *ad lites*.

Dargan:—It was ruled *in re Halfhide*, 25.5.89, that the section does not extend to a Barrister-at-Law, nor in cases under Sec. 106. *re Chubb*, 15.6.89.

RE DA COSTA

ATKINSON, J.:—Power *ad lites* is not the authorisation contemplated by the Ordinance. Mr. *Hinds* must have a written authorization before he can examine the debtor.

BARNWELL v. WILLIAMS.

Malicious prosecution—Termination of proceedings—Nolle Prosequi.

Information of larceny before a Magistrate resulting in commitment for trial on two charges. Indictment in respect of one of the charges was filed; afterwards *nolle prosequi* thereon. No indictment in respect of the other charge.

Held—It must appear that the proceedings have terminated definitely in favour of Plaintiff; *nolle prosequi* is not such termination.

Action for malicious prosecution: Defendant laid an information before a Magistrate charging Plaintiff with larceny. Plaintiff was referred for trial on charges of two larcenies of similar character, one said to have been committed on 27th May 1889, the other on 13th June 1889. An indictment was filed in respect of the latter charge, and on 5th November 1889 *nolle prosequi* was entered thereon. It did not appear that any indictment had been filed in respect of the earlier larceny. After evidence of these facts had been given it was contended for the defence that the prosecution which is now the ground of the action had not terminated in favour of the Plaintiff.

Hutson for Defendant, relied on *Abrath v. N.E. Railway Co.*, 11, L.R., Q.B.D. 79; 444, 11 App., Ca. 247. After *nolle prosequi* the right to proceed still remains in the Crown. *Regina v. Gaskin S. Crim.*, 14th Nov., 1881; *Silvano v. Camacho*, S.C., 3 April 1878.

Ogle for Plaintiff:—We submit *nolle prosequi* is an end of the proceeding. The Attorney General refuses further to prosecute. By Section 39 of Ordinance 27 of 1846 Attorney General has to file a list of all persons against whom he is proceeding. It would be a stretch of his power not to file against any one in position of Plaintiff; so it must be taken that not filing on the first charge is evidence of abandonment of prosecution.

Hutson in reply:—The *nolle prosequi* only shows that proceedings are in abeyance. The law requires positive termination in favour of the Plaintiff.

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10 January, 1891

Curia (CHALMERS, C.J., ATKINSON & SHERIFF, J.J.), per CHALMERS, C.J.:—This is an action for malicious prosecution arising out of a charge of larceny made by the Defendant against the Plaintiff. The claim and demand contains averments that the Defendant appeared before a Justice of the Peace and falsely and maliciously, and without reasonable or probable cause, charged the Plaintiff with certain acts of larceny which are specified, procured a warrant for Plaintiff's apprehension, caused Plaintiff to be arrested and imprisoned under this warrant and brought before the Justice; that the Justice having heard the charge, committed the Plaintiff to prison until he should be thence delivered in due course of law, and that these proceedings were afterwards determined and ended by the Attorney General of the Colony refusing to prosecute the Plaintiff in respect of said charge and entering a *nolle prosequi* in respect of the same, and that the Plaintiff was thereupon discharged out of custody, and the said prosecution determined and ended. The felonies alleged to have been charged are a larceny on 17th May 1889, of eleven cubic yards of broken bricks, and a larceny on 13th June 1889, of a further quantity of eleven cubic yards of broken bricks. The proceedings before the Magistrate which have been put in as evidence, show that these charges were made by the Defendant, and that in respect of these charges the Plaintiff was referred for trial before the Supreme Court of Criminal Justice. The Defendant in his answer denied, by Ordinance 22 of 1862, each of the statements contained in the several paragraphs of the claim and demand. He also denied all and singular the statements contained in the claim and demand, and averred that he is not guilty.

The evidence given to prove that the proceedings had been determined consisted of an indictment against the Plaintiff, charging him with one of the alleged larcenies, viz., that of date 13th June 1889, with an endorsement on behalf of the Attorney General dated 5th November 1889, that he would not further prosecute on this indictment.

A question arose whether this was such evidence of the termination of the prosecution as the law requires in actions for malicious prosecution, and on this question

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parties have been heard as preliminary to a defence on the merits being called for.

The Plaintiff's Counsel submitted in the first place that he was under no necessity to prove the determination of the proceedings against the Plaintiff, as he contended that point was not in issue under the pleadings. He founded on Rule 1 of the Pleading Rules of 1863, by which where the conclusion of exceptions and answer or of answer amounts to only a denial of the statements in the claim issue is to be joined in these pleadings and the same evidence only is to be admissible as would be admissible under a plea of the general issue in England to a declaration in respect of the like cause of action.

The Plaintiff is hardly in a position to claim any advantage under this Rule if it were applicable, for he has not himself acted upon it, having filed *replique* instead of joining issue. But the rule is not applicable, the conclusion of exception and answer in this case containing more than mere denial. And even if this were not so, the Rule in restricting the evidence of the Defendant to such evidence as might be given under the general issue does not thereby supply the place of admissions by the Defendant of matters which it is essential the Plaintiff should prove if not admitted. In addition the Plaintiff's pleading disclosed, as we have seen, that the termination of the prosecution was by *nolle prosequi*, and it is essential even independently of the answer made by the Plaintiff that the Court should be satisfied that this is such a mode of termination as would let in this action.

In the second place, the Plaintiff's Counsel submitted that the *nolle prosequi* on the indictment must be taken as a permanent termination of the proceedings in respect of the larceny to which it related, that of the 13th of June, and that as to the larceny of the 17th of May, the fact that no indictment had been filed in respect of it, was equivalent to an abandonment by the Crown of all proceedings, and in substance a termination of them. There was no authority adduced in support of either of these propositions.

Now *nolle prosequi* on an indictment is merely a with-

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drawal of the proceedings upon the indictment to which it relates and is not in law any bar to a new indictment being preferred for the same offence or for any other offence which may appear from the proceedings before the Magistrate to have been committed by the accused person, and it is in the experience of those acquainted with the practice of the Supreme Criminal Court of this Colony that *nolle prosequis* are entered and new indictments filed in this way. As regards determination of the prosecution for the alleged larceny on the 17th of May, it is, if possible, in a still more ambiguous position, no proceedings at all in the Supreme Court having been taken with regard to it. It is not enough to say that time has elapsed since the date of the larcenies and of the commitment for trial, and that the Attorney General would have followed up both the charges before now if he considered them fit subjects for prosecution. What is required here is not evidence on which the Court might perhaps form some constructive estimate more or less reliable as to whether the prosecution would or would not be advanced to the conviction of the accused, but clear evidence that it is no longer legally possible through the proceedings having terminated in a way which is definite and unambiguous. The gist of the action is that a false charge has been improperly made from wrong motives, and the Court could not give damages for this unless it was at least satisfied that the charge could not before another tribunal be pronounced to be true. But the law as expounded in recent authorities goes further and shows that the Plaintiff must prove the termination of the proceedings to have been in such a way "that his innocence was pronounced by the tribunal "before which the accusation was brought," per BOWEN in *Arbrath v. N.E. Railway Company*, 11, Q.B.D., 444. This is certainly not done either by the *nolle prosequi* on the indictment filed in respect of one of the charges or by the abstention from filing in respect of the other. The proper sentence will be to absolve this instance with costs.

Attorney for Plaintiff, *J. B. Woolford*.

Attorney for Defendant, *G. W. Hinds*.

KRAMER v. SMITH, ET AL.—(BAIL COURT.)

3 January, 1891

Arrest, suspectus de fuga—Right of foreigners—Construction of Contracts.

Contracts must be construed according to the law of the country where the contract is to be enforced.

The Ordinance 13 of 1863 for arrest *suspectus de fuga* is not repealed by 2 of 1884.

To entitle a ship to “privilege from arrest,” it must be shown in evidence that she is so privileged.

Dr. Belmonte for mover files affidavit for release on the following grounds:—

1. That the said R. H. Kramer, the mover herein, is a subject of Holland and a domiciled inhabitant of the Colony of Surinam, Dutch Guiana.
2. That the said R. H. Kramer, the mover herein arrived at the City of Georgetown in the County of Demerara and Colony of British Guiana on the 10th day of November 1890, by the steamship *Loanda* from Trinidad en route for Surinam.
3. That the said R. H. Kramer intending to return to Surinam waited for the arrival of the Dutch Mail Steamer *Curaçoa* in this port, whereupon he the said R. H. Kramer on the arrival of the said Dutch Mail Steamer on the 12th day of November 1890, at once took and engaged his passage to Surinam.
4. That the said R. H. Kramer thereupon on the 12th day of November 1890, aforesaid being on board the said Dutch Mail Steamer *Curaçoa* was arrested on the strength of the writ of arrest herein on board the said Dutch Mail Steamer *Curaçoa*, then on the eve and ready to leave the harbour and port of Georgetown.
5. That the said R. H. Kramer, the mover herein, was at the time of his being made a civil prisoner on Dutch territory and not subject to the jurisdiction of the Supreme Court of Civil Justice of British Guiana.
6. That besides and apart from this, the contract of purchase and sale put forward by the said firm of Smith Brothers and Company, is a contract governed by the laws of the domicile of the mover herein.

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viz., the laws of Surinam, and not by the laws of the domicile of the said firm of Smith Brothers and Company, the applicants for the writ of arrest herein. 7. That at all events the said R. H. Kramer, the mover herein, being a foreigner and not being a domiciled inhabitant of this colony, the law remedy adopted herein by the firm of Smith Brothers and Company is contrary and adverse to the statute law of this colony by which an arrest for the purpose only of founding the jurisdiction of the Supreme Court (as is the case herein) has been abolished. 8. That with regard to any contract of purchase and sale existing between the parties herein, the said R. H. Kramer is only amenable before and subject to the jurisdiction of the Court or Courts of his domicile which is the colony of Surinam, Dutch Guiana.

Hutson for Smith *et al* showing cause. No allegation where contract was made, and in the absence of any negative allegation—that it was made outside of this colony, it must be assumed that the debt was contracted in this colony. This Court has jurisdiction to enforce the contract, because the incidents of a contract must be governed by the law of the colony where the contract was made. Had the contract been made in Surinam, which was the domicile of the mover and if the law in Surinam justified arresting for a debt, it would not be illegal to enforce payment by arresting the mover here. Mover made a contract with respondents in January last, then left the colony. In November he returned to the colony and was about leaving when the respondents arrested him for certain liabilities which he incurred with their firm some months previously and which he refused to pay. This was a personal liability and “every tribunal would enforce a personal liability in its own way.” *Vander Linden; Castagne v. Wilgen*, S. C, March 1881. The Captain did a wrong, and it was held that this Court had jurisdiction to deal with the matter. With respect to the right of the respondents to arrest the mover on the Dutch Mail steamer, it made no difference in what foreign vessel the mover was; if that vessel was in the port of Georgetown, or within the limits of the Colony he could be arrested on a warrant issued by this Court.

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Dr. Belmonte for movers. The old rule which governs all nations that a ship was part of the territory still exists. There was a great difference, between a merchant's vessel and the Dutch Mail Steamer, because the one belonged to a private individual while the other belonged to the Dutch Government. I will prove that the Dutch Mail Steamer was the property of the Dutch Government, and that the contract between the mover and the Respondents was completed in Surinam where the goods were delivered, and under these circumstances, could the mover, who was a domiciled inhabitant of Surinam, and never resided in this colony, be arrested on a vessel belonging to a foreign Government? The judgment in *Castagne v. Wilgen* bears out this. In that case, the Court only had jurisdiction as what was complained of was a tort, and a breach of contract is not a tort. Under Ordinance 13 of 1863, the judgment-creditor after obtaining sentence against the judgment-debtor, could proceed to execution and apprehension of the debtor; but the provisions of Ordinance 21 of 1884 entirely abrogated the provision of Ordinance 13 of 1863. The two Ordinances were in conflict, and it was illegal to arrest the mover as they did. The respondents should have sued the mover in Surinam where he carried on his business and resided, and where the contract was completed, and the Dutch tribunal, would not have prevented them enforcing payment as the opposers were now endeavouring to do.

Evidence was given.

10 January, 1891

KIRKE, J.:—This is a motion on behalf of Rudolf H. Kramer against Messrs. Smith Bros, of this City to show cause why the mover should not be discharged from custody.

It appears that Kramer who is a Dutch subject, and lives in Surinam, came to Georgetown in January 1890, and purchased goods from Smith Bros, to the amount of \$830, and subsequently between February and June he purchased by order from Surinam more goods, the whole amounting to \$2,284. In part payment of this account he remitted in Bank Bills \$600 in May and \$600 in June, which together with certain drawbacks

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received by Smith Bros, left a balance due to them of \$993.59. The goods which Kramer bought were delivered by his order on board a vessel bound to Surinam and were shipped at his risk and charges. Messrs. Smith Bros, wrote to Kramer demanding payment of the balance due on the account current between them, which had never been closed, but received no further payments.

On the 10th November 1890, Kramer arrived in Georgetown from Trinidad en route for Surinam and on the 12th day of November, was arrested on board the Dutch Mail s.s. *Curaçoa* whither he had gone to proceed to Surinam.

I am asked to declare this arrest illegal and to order Kramer to be released from custody on the following grounds:—(1). That there was no contract here, the goods having been delivered in Surinam.

(2). That the affidavit of Smith Bros, contains no mention of the residence of the person against whom the affidavit was made.

(3). That the arrest was illegal as the ship on which defendant was arrested was a Dutch Government Ship over which the Civil Jurisdiction of this Court has no control.

(4). That by Ordinance 21 of 1884, all imprisonment for debt was abolished and so Ordinance 13 of 1863, under which this warrant was issued, was by implication repealed.

(5). That Kramer was not a resident in this Colony, and the goods were delivered in Surinam, so Smith Brothers should have sued him in that Colony and they have no remedy here.

The learned Counsel for the mover also quoted *Castagne v. Van Wilgen* as supporting his contention. This was a case decided by me in 1881, and afterwards confirmed on appeal by the full Court. In that case a tort had been committed by Defendant, but in this case, there was at most a breach of contract and no tort.

It was contended on behalf of Smith Bros, that the contract was made in Georgetown, and that the account was never closed. That the contract and the debt which was resultant from the contract having been made in

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the Colony was governed by the laws of the Colony. That Smith Bros, had the right to apply the remedy according to the laws of the Country in which the debt was contracted in Surinam, and the law of that Colony justified arrest for debt. Kramer could be arrested here. That breach of contract is a tort and differs little from an assault.

That Ordinance 13 of 1863 gives a right to proceed against all foreigners whether domiciled or not, and the fact of Kramer being in the Colony was justification for taking out a warrant. That the Dutch Steamship was in the Port of Georgetown, and was subject to the laws of this Country, and under the jurisdiction of this Court.

I am of opinion that the contract between Kramer and Smith Brothers was made in Georgetown, that the goods were delivered on board at the owner's risk and charges, and that the contract must be regulated and enforced by the laws of this Colony. In construing contracts, the law of the country in which they are made must govern (*De la Vega v. Viaima*, 1 B. and Ad. p. 287, and the law of a country where a contract is to be enforced, must govern the enforcement of such contract) (*Clark and Finnely*, Vol. 5 p. 1.) It is not necessary that the affidavit should contain the residence of the person named in it for the purposes of Ordinance 13 of 1863.

The learned Counsel has been misled in considering that Ordinance 13 of 1863 is by implication repealed by Ordinance 21 of 1884. The latter Ordinance only abolishes imprisonment for debt in process after execution, and has nothing to do with the apprehension of persons under a warrant *ne exeat regno*, which is still in force in England where imprisonment for debt under ordinary process has been abolished,

There remains the question whether the *Curaçoa* is a privileged ship, over which the jurisdiction of this Court in matters of contract does not extend. In *Castagne v. Van Wilgen* a tort had been committed by the defendant who was the Captain of the *Curaçoa* and the full Court decided that he was liable and the *Curaçoa* could not give exception to her officers against an action for tort. But in this case there is a breach of contract only and no

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tort, and although Mr. Hutson asserted that a breach of contract is a tort, there is a wide difference between them. Does the jurisdiction of this Court extend to the Dutch mail s.s. *Curaçoa* in cases of this kind? Now if it had been shown by evidence that the *Curaçoa* is the property of the Queen of Holland and in her possession control and employ as the Reigning Sovereign of the State and was a public vessel carrying Her Majesty's pennon and was navigated and employed by such Government and officered by officers of the Royal Dutch Navy, I should certainly have considered that the ship itself was safe from any action in *rem* nor could she be seized under any civil process following the case of the *Parliament Belge*, Law reports 5 P. D. p. 197, and it might have been argued that the ship being free from seizure the passengers and cargo on the ship were also free from civil process, But no such evidence as I have indicated as necessary to give the *Curaçoa* the character sought to be imposed upon her has been given. The only evidence I have is the statement of Mr. Colonel, a highly respectable druggist living in Georgetown, to the best of his knowledge the *Curaçoa* is a Dutch Government Steamer and the property of the Government in Holland.

But this evidence is totally wanting in all the requisites to satisfy me that the s.s. *Curaçoa* is a vessel of the nature suspected to be by the learned Counsel who supported the motion.

As the privilege of the *Curaçoa* is the only point raised by counsel which I consider could entitle him to succeed, and as he has failed to produce evidence in support of that privilege, I must reject the motion with costs.

Attorney for mover: *J. A. G. C. Belmonte*.

Attorney for opposer, *J. B. Woolford*.

TRUE'S EXECUTORS *v.* BARR.

2 *December*, 1890.

Action to compel discussion of alleged claim—Sections 12 & 13 of Inheritance Ordinance 1887.

Action lies against a person actually alleging a claim to compel discussion thereof within a reasonable time.

TRUE'S EXECUTORS v. BARR

Extent of protection to Executors on calling up claims under Inheritance Ordinance. What constitutes notice of a claim interpellating creditor from winding up estate.

Per Atkinson, J.:—*Dissentiente*. Although this action lies against a principal claimant, it does not lie against a person alleging he is Attorney for, and instructed to sue on behalf of principal.

Plaintiffs having as Executors given notice to creditors to file claims, and being about to close estate were informed in November 1889 by Defendant as Attorney of Mrs. Parsons that she claimed inventory and payment of one-third of Testator's property. In January 1890, Plaintiffs to whom Mrs. Parsons was unknown, notified Defendant to bring his action for substantiating or discussing her claim. Defendant reiterated claim, and stated that he intended to commence action. Plaintiffs commenced action 12th February 1890, concluding for sentence on Defendant to bring such action as he considered he was entitled to bring within a limited time or be afterwards silent. Mr. Barr as an individual filed answer but was in default of filing *duplicque* and the hearing was *ex parte*.

Dr. Belmonte for Plaintiffs, adduced evidence. He cited *Vander Linden's Institutes*, p. 425 (Henry's Trans) *Merula Manner of Proceeding*, I., 498; *Voet*, V., tit. I., Nos. 21 to 23.

16 January, 1891

CHALMERS, C.J.:—The case of the Plaintiffs is that they are Executors under the will of Colonel Clinton Jones True, who died in this Colony on 27th December 1888; that as such Executors they took possession of Colonel True's estate and that all the residue of this estate after payment of legacies is bequeathed by the will to Letitia Emily Whiteman who is nominated universal heiress; that under the Ordinance 16 of 1887 they did by advertisement dated 9th January 1889, notify all creditors to file their claims within three months of the publication of the notice; that on the eve of bringing the estate to final liquidation they were informed by a letter dated 5th November 1889, from Mr. J. B. Woolford, Attorney-at-Law, that he was instructed by Mr. Barr in the quality of Attorney in this Colony of Helen Louisa Parsons, who alleges herself to be the only child of Colonel True and

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his wife Adelia B. True, to demand from the Plaintiffs an Inventory of all the property taken possession of by them as Colonel True's Executors and payment of one-third of the property; that no such person as Mrs. Parsons is instituted or mentioned in the will of Colonel True or known to the Plaintiffs and they did not consider themselves entitled to comply with the demand contained in Mr. Woolford's letter; that no formal step has been taken to enforce that demand; that on 16th January 1890, the Plaintiffs by letter required the Defendant as the alleged Attorney of Mrs. Parsons to bring his action, if he has any, without any further delay before this Court, to which they received an answer on behalf of Defendant reiterating the intention to bring an action, but stating that Mrs. Parsons must be communicated with before any further steps can be taken. And it is said that these things were done without the Defendant or his Attorney-at-Law submitting to the Plaintiffs any proper or legal document in proof that he really holds the capacity in which he demands on behalf of Mrs. Parsons, inventory and payment of a third of the property to her.

In these circumstances the Plaintiffs claim a sentence condemning the Defendant within six weeks to bring before this Court such action or actions, as he alleges himself to have against the Plaintiffs or any action he considers he is entitled to, or in default of bringing such action, he be debarred therefrom, and perpetual silence imposed on him.

Mr. Barr appeared as an individual, without acknowledging the character of alleged Attorney of Mrs. Parsons in which he had been sued, and filed conclusion of answer raising various pleas; the Plaintiffs filed *replique*, but no *duplicue* has been filed, and the Defendant must be held under Section 60 of the Procedure Ordinance to have abandoned his defence.

The hearing was accordingly *ex parte*. Evidence was given in support of the facts alleged in the Claim and Demand, and these facts must be taken as established. It must also be taken that such an action as the present—an action to compel a person alleging a claim to bring it forward and discuss it within a reasonable time or else

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be debarred from doing so afterwards—is one known to the law albeit it is but seldom resorted to. *Voet* explains that this action originated from the procedure which took place when the status of a free-born person was impugned either designedly with a view to injure him or by mistake. The remedy was extended so as to apply in all cases where one person alleged that he had any claim or accusation against another, and the person so alleging was compelled to bring forward whatever action or accusation he might think he had within a certain time or be for ever silent about it. *Voet de Judiciis, &c. No. 21.*

If the Court shall give a sentence it must of course be satisfied that the sentence is a legitimate outcome from the cause of action. Now I admit that on one point I felt at first some difficulty, and that was whether what was done by Mr. Barr or his Solicitors, there having been no exhibition to the Plaintiffs of any power or authority to Mr. Barr to act for Mrs. Parsons, was sufficient to interpel the Plaintiffs from proceeding with the distribution of the estate. If they were not thus interpellated there would have been no need for this action. What then was actually done? The Plaintiffs are Executors and preparatory to final liquidation of the estate and handing over the residue to the residuary heiress under the will, they publish on 9th January 1889, a notice under the Inheritance Ordinance 1887 calling up creditors. About 10 months afterwards, on 5th November 1889, the claim is made on behalf of Mrs. Parsons. Mr. Barr in a letter written by his Solicitor Mr. Woolford makes the claim “in his quality as the duly constituted Attorney in this Colony” of Mrs. Parsons. The plain meaning of this statement of Mr. Barr’s quality,—the meaning which any person receiving and reading the letter would attach to the words—is that Mr. Barr was the Attorney of Mrs. Parsons having authority to make the claim and to enforce it by legal means. The Plaintiffs do not at once reply to this letter; they wait over two months, and then on 16th January 1890, they, (through their Solicitor) address Mr. Barr by letter requiring him as the Attorney of Mrs. Parsons to prove her claim in an action. Mr. Barr had apparently by this time changed his Solicitor, for he informs the

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Plaintiffs in answer that he had forwarded their letter to Messrs. Hinds and Collins "the Solicitors in the case" and requests them to apply to these gentlemen for further information. On 25th January Messrs. Hinds and Collins answered the Plaintiff's letter to Mr. Barr by a letter to their Solicitor saying that the action to enforce Mrs. Parson's claim will be entered as promptly as the circumstances will admit, that their client resides in Massachusetts, and that it will be necessary to communicate with her and receive a reply before any further steps can be taken. But there is not any expression either repudiating or qualifying Mr. Barr's position as Attorney of Mrs. Parsons, in which capacity he had originally made the claim on her behalf. After waiting twenty seven days without any further communication from or on behalf of Mr. Barr or of Mrs. Parsons the Plaintiffs commenced this action. Can it be said that either upon Mr. Woolford's letter of 5th November, or upon the subsequent correspondence, the Plaintiffs were at liberty to disregard the claim of Mrs. Parsons and proceed with the distribution of the estate in terms of the will? It is of some importance to observe here what is the extent of the protection to Executors and Administrators after giving the notice to creditors under the 12th and 13th sections of the Inheritance Ordinance. It is not enacted that the Executor or Administrator shall not be liable in respect of any claim *not filed* within the prescribed period, but the non-liability is "in respect of any claim of "which he had no notice," so that we are thrown upon the question whether what was done amounted to notice. What shall constitute notice as applicable to various transactions and under varying circumstances may be a matter of considerable nicety, but there is a broad equity doctrine which will often lead to a practical answer to the question, and I think does so in this case. The doctrine is that whatever is sufficient to put a party upon enquiry (that is whatever has a reasonable certainty as to time, place, circumstances and persons) is good notice to bind him, *Story Eq: Jur* : I sec.: 400. In Mr. Woolford's letter there was a notice given of Mrs. Parson's claim in the way in which it is

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customary to give notice of legal claims. There was certainty as to the person claiming and the circumstances and grounds of her alleged claim; there was certainty in the allegation of Mr. Barr's capacity to make and enforce the claim, and I do not think that the not producing the instrument which would have been the authentic evidence of Mr. Barr's capacity was such a hiatus as to render the notice of non-effect or to entitle the Plaintiffs to disregard it. If the Plaintiffs were not then at liberty to disregard the notice it seems to me to follow necessarily that they are in their legal right in using the means which this action affords to force Mrs. Parson's alleged representative in this Colony to put her claim in a position of being tested by instituting her action.

I do not think it is any answer that the sentence may fail to operate on Mrs. Parsons. The main object of the proceeding is to compel the discussion of the claim rather than to extinguish it, and if the time fixed by the sentence for Mr. Barr to proceed should go over without his doing so, and if Mrs. Parsons should then appoint another Attorney he also would have to proceed *tempestive* or else be liable to a similar action and sentence as Mr. Barr is. It is in the highest degree improbable that there would be many successive Attorneys who would refrain from proceeding, or what is equally important that there would be many persons professing to be Attorneys without due and formal authority; but even if it were contemplated that a succession of Attorneys all in similar laches was in the nature of things probable, the fact that each would be liable to an action and sentence might be expected to act as a powerful counteractive; and even if it were demonstrated that the remedy would be imperfect that would not be a reason for the Court withholding it.

In the answer put in for Mr. Barr it is said that he is not the Attorney in this Colony of Mrs. Parsons under any instrument receivable in evidence in the Courts of the Colony. I do not see that the Court can give any heed at all to this statement seeing that the default operates as an abandonment of the defence. At the utmost it is a statement in support of which no evidence

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has been given and which has not been admitted on the opposite side. But according to the view I take of the case the statement is irrelevant. It does not lie on the Plaintiffs here to prove that Mr. Barr was or is the Attorney of Mrs. Parsons or to show the probative character of the instrument of his appointment. He is liable to this action in respect of his having formally informed the Plaintiffs that he is Attorney of Mrs. Parsons and authorized to claim this inheritance on her behalf, and he would be so even if we took the extreme view—which is not suggested—that there is no Mrs. Parsons in existence.

I do not think it is necessary to enter on the question whether Mrs. Parsons is, in the circumstances which have occurred, liable to this action. If the Plaintiffs had directed the action against her they would have had to prove that she had given a valid power to Mr. Barr enabling him to claim and sue for the inheritance on her behalf, and if they did not succeed in this, as they would fail if what is stated in the abandoned answer were correct, they could not get sentence. But if the present Defendant is liable, as I think he undoubtedly is, as the person who has actually moved in the matter, it could not take away his liability that another person was also liable.

As the Defendant has not made any proposals to proceed with the claim alleged in 1889 I think there should be a sentence, with costs.

KIRKE, Acting J.—No case of a similar nature to this has to my knowledge ever been brought before this Court, so I have felt considerable difficulty in coming to a decision upon it especially as the Chief Justice and my brother Atkinson differ in the views they take in the matter.

It would appear at first sight that this action is brought in an improper form, and that it would be impossible for the Plaintiff to succeed, and such indeed was my own opinion at the outset. But further reflection and argument have made me alter my original opinion.

This is an action of a peculiar nature. It is not instituted for the purpose of obtaining a right or redressing

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a wrong; it is brought against a person who publicly asserts that he has an action against the Plaintiffs, and that he has power to claim a portion of an estate which is being liquidated by the Plaintiffs, which power he intends to enforce. It is to compel this person to bring his action within a certain time to obtain the rights which he claims, or else to be condemned to *perpetual silence*. Now it is no part of our business to decide whether the Plaintiffs were well advised in bringing their action, or whether the result will be equal to their expectations. The Defendant is in default, and unless we are satisfied that the action is one which cannot be brought in this Court the Plaintiffs are entitled to a verdict. It is true that the Defendant has denied in his pleadings that he is the legally constituted Attorney according to the law of this Colony of Mrs. Parsons, but issue has not been joined on that plea, so it is not before the Court, and there is no evidence before us as to whether or not Defendant was the duly constituted Attorney of Mrs. Parsons as alleged or not.

The Plaintiffs are Executors of C. J. True, and are anxious to wind up his estate. They receive a notice from Mr. Barr alleging that he is the Attorney of a Mrs. Parsons who claims to be the only child of C. J. True by his wife Adelia B. True, and they cannot close the estate having received such a notice; and as Barr fails to proceed with an action to establish the claim of Parsons, the Plaintiffs are forced to proceed against him to compel him to go on or to be condemned to perpetual silence. I consider that the letter of Mr. Woolford was a sufficient notice under the Inheritance Ordinance, such a notice as could not be disregarded by the Executors. It might be said that it was the duty of the Executors to make enquiries on receiving that notice as to the validity of Mrs. Parsons' claim; but surely the *onus probandi* should lie upon the persons making a claim upon an estate which was virtually if not legally closed, the testator having died in December 1888, and Mr. Woolford's letter being dated 5th November 1889. The Defendant asserts that he is prepared to put forward a claim of Mrs. Parsons to a portion of the estate of True;

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he has failed to perform what he says he can do. The executors are anxious to liquidate the estate, and they are quite justified in bringing this action to compel Defendant to bring to trial the claim which he asserts he has the power to bring against the estate.

Under these circumstances and bearing in mind that the Supreme Court of Civil Justice in this Colony is a Court of Equity as well as Law, I am of opinion that such an action as the present one can be brought in this Court, and I concur with the Chief Justice that there should be sentence for the Plaintiff with costs. I had some hesitation in granting costs, but it is desirable that executors should be protected in the liquidation of estates from any persons who may advance claims at the last moment without taking care to satisfy themselves that there was some foundation for their interference or providing themselves with the proper means for enforcing the claim which they prefer.

ATKINSON, J.—The Executors of True sue “Alexander Barr, alleging to be the duly constituted Attorney in this Colony of one Helen Louisa Parsons, alleged to be the only child of Col. Clinton True and his alleged wife Adelia B. True.”

The Defendant Barr, as the Attorney of Parsons, through an Attorney-at-Law, notified the Executors that Parsons claimed to be the legitimate child of their testator and demanded from them payment of one-third of the estate, and thereupon the Executors brought this suit to compel Barr, as alleging to be Parsons' Attorney, to bring an action against them to establish the claim of Parsons. Barr filed an answer averring, amongst other things, that the Court has no jurisdiction to entertain this suit, and that he is not the Attorney of Parsons under any instrument that could be received in evidence in the Courts of this Colony. The Executors filed a *replique*, Barr did not file a *duplique*, default was taken, and the case was heard *ex parte*.

Such an action as this is novel, but there is no doubt that it will lie against the proper persons. We were referred to *Merula, Van Alphen, Voet* and *Vander Linden*. The latter, the latest writer, says (Inst, p. 425),

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“that when one publicly pretends that he has an action against us, but “neglects or refrains from bringing it, a mode has been introduced “into practice compelling him by a citation for this purpose to bring “such action, if he conceives he is entitled to do so, within six weeks, “before the Court or before the judge of our domicile, or, in default “to do this, to be debarred therefrom and perpetual silence imposed “upon him.” And in, *V. D. L.’s Jud. pr.* (vol. 1. p. 243) it is laid down that, “although according to the general principle of law no “one can be forced to act against his will, yet practice has so estab- “lished that we can legally compel any one who pretends to have an “action against us to institute that action.”

In the Roman law there is an action *ex lege diffamari*. That action was introduced to enable an individual whose status as a free man was impugned to cite the impugner to prove his statement in Court. This action was extended by the Dutch jurisconsults to all cases in which a person said publicly that he had a claim against another. In our time Judges are not free, as jurisconsults in those days assumed to be, to invent or extend process to meet particular cases.

In the present instance there is no doubt that the Executors of True would have been entitled to cite Parsons herself, to bring her action to establish her claim. They have not cited her—the person who says that she has a claim against their testator or his estate—but they have cited a person who, on her behalf, at her request, as her Attorney, has notified them that she says that she has such a claim. None of the authorities cited, so far as I have been able to consider them, say that such an action will lie against an Attorney, and I find nothing, elsewhere, going to that length. I do not, therefore, think that the Court has jurisdiction to entertain this action against Barr as the alleged Attorney of Parsons. No amount of word-twisting will turn an Attorney into his principal, or a claim made by an Attorney on behalf of his principal into a claim by the attorney himself. The Attorney, no doubt, alleges that there *is* a claim, but he does not allege that *he* has a claim. It is the principal, the defamer or claimant, who, by

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his Attorney, makes the allegation. The Attorney is merely the mouthpiece.

This is a case in which the maxim *Argumentum ab inconveniente plurimum valet in lege* applies. If an action will lie against the Attorney in this case for telling the Executors that his constituent claims her legitimate portion under her father's will, it will lie against every Attorney who, on behalf of his constituent, claims payment of an account, the passing of a transport or mortgage, or what not. If such a practice is to be established, a man of ordinary common sense may well, hereafter, hesitate to act as Attorney for a person out of the jurisdiction who wishes to make a claim. Acting as such Attorney he and his legal advisers, honestly thinking the power sufficient, may make the claim. It may turn out that the power is not receivable in evidence, and he, having alleged that he was the Attorney, may, as in this instance, be sued and, it may be, condemned to pay costs which he may not be able to recover from his constituent, who may be in poor circumstances. An Attorney may, of course, before acting, require a guarantee from his constituent or a deposit of money to cover costs which the Attorney may become liable to pay—but why should such a hindrance be placed in the way of an honest claimant, who has the misfortune to be out of the jurisdiction?

The Plaintiffs' testator has made a will in which he does not mention a person said to be his legitimate child and in which, after certain bequests and devises, he has appointed a woman named in the will his sole and universal heiress. If the testator has left a legitimate daughter she has certain rights. Barr, on her behalf, has claimed her legitimate portion. As I understand the pleadings, he was acting under some document which, technically, is not receivable in evidence. If the sentence asked for is given, Barr will be condemned to bring an action or be for ever silent—and to pay the costs. This must follow. He is made the Defendant, although the cause is not his, simply because he, as an Attorney has alleged not that he, but, on behalf of his constituent, that she has a claim on her father's estate!

Supposing that Barr had had a power receivable in

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evidence, he would not have been the *dominus litis*. He would have been the mere creature of the power and could have demanded and sued only as directed by the power. Under the power, he would, no doubt, have had the management of the proceedings, yet it would not have been in respect of any claim of his own, but in respect only of the claim of his principal. This is not a case where an agent has acted on behalf of an undisclosed principal where the creditor or demandant may sue either agent or principal. It is the case of a known principal, and hitherto, in the Courts of this colony suits have always run against the principal appearing by his duly constituted Attorney, not, as in this instance, against the Attorney.

It may be said that if the Executors had in this case proceeded against Parsons they must have failed, because it would have turned out that Barr had no sufficient power. Even so, that will not justify the Court in stretching its jurisdiction to help them. Hard cases make bad law. There is no pretence, however, that the Executors would be otherwise remediless. They may be delayed in closing their accounts—that is all.

It may, of course, be also said that, if the Executors are in fact entitled to what may be only a partial remedy, it is not for the Court to refuse it to them, merely because the remedy is not complete. Taking that to be so, in the present case the giving of such a decision as is asked for will, so far as I can see, be utterly futile. We are asked to say that a person alleging to be somebody's Attorney shall be condemned to bring an action in the name or on behalf of that somebody within six weeks or be for ever debarred from bringing it. The person as has been seriously suggested, may not be the Attorney at all, but a mere pretender. It is obvious that a sentence, in such a case, would be useless. Such a sentence could in no way affect a real claimant, nor would it in any way help the Executors in silencing the claimant. Neither will the Executors be aided by a sentence against a person really intended to be the Attorney of the claimant, but who has only a defective power. A sentence, for instance, requiring Barr in this case to proceed with-

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in six weeks or be for ever silent, will in no way preclude Parsons from bringing her claim through another Attorney, Nay, to make the futility of such a sentence even more apparent—it will not even preclude Barr himself, the person against whom it is directed! He is sued here as alleging to be the Attorney of Parsons. He has either no power at all, or a power not receivable in evidence—which for legal purposes is no power at all. For such purposes, therefore, Barr is not the Attorney of Parsons. Hence the sentence asked for, if given, will declare that Barr shall bring an action as for Parsons whom for legal purposes when the sentence is pronounced he does not represent, or be for ever silent! Parsons may then give Barr a power of Attorney which is receivable in evidence, and Barr will thus become her duly constituted Attorney. The sentence imposing perpetual silence in respect of this claim upon Barr, as an individual having no power receivable in evidence, will in no way prevent him, as the duly constituted Attorney of Parsons from demanding and recovering for her anything to which she may be by law entitled!

I may point out, further, that it might so happen that power after power was defective, and action after action might follow, equally futile as the present.

One effect, indeed, such a decision as is here asked for may have, viz.:—that neither Barr nor any other person will run the risk as Attorney of Parsons of having to pay costs. Parsons may not be able to repay Barr the costs following upon such decision; she may not have money at command enabling her to come to the colony and prosecute her claim in person; she may not be so poor as to be entitled to proceed in *forma pauperis*, and the result of the decision asked for, if given, may be that a legitimate child will be precluded from having recourse to the Courts of this colony against her father's Executors for the recovery of her legitimate portion!

It is, moreover, to my mind, undesirable in the extreme that the Supreme Court of this colony should give any decision which is, to all intents and purposes, practically useless. The dignity of the Court requires that it should not allow its power to be invoked or its judgments to be

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pronounced in cases where its power is inoperative and its judgments cannot be effectually enforced. Such a judgment as is here asked for will not, and cannot be made to compel Barr to proceed. He may well say, "you may make me pay the costs but, beyond that, I wash my hands of the whole matter." In that case the only result of these proceedings will be to put those costs into the pockets of the Executors' lawyers! Whether such a result was contemplated by the Executors, or justifies such a sentence is, to say the least, doubtful.

In instituting these proceedings the Executors, no doubt, hoped that the decision therein would help them to close their accounts and distribute their testator's estate without further delay. It can have no such effect. They will be in no better position than they would have been if they had not sued Barr. Suppose the sentence silences Barr, as alleging to be the Attorney of Parsons they will still be in this position that they have been notified that a person claiming to be their testator's legitimate child was in existence. The silencing of Barr will extinguish neither the daughter nor her claim. Whether the notice is a valid notice provable in a Court of law is, as regards the duty of the Executors, wholly immaterial. If, after such an intimation, they choose to part with their testator's property before it is determined in due course of law that the claimant is not entitled, they will do so at their own proper peril.

For the foregoing reasons I am of opinion that the Claim and Demand should be rejected with costs.

Attorney for Plaintiffs, *J. A. G. G. Belmonte.*

Attorney for Defendant, *G. W. Hinds.*

PETITION SCHWARTZ AND HICKEN AS ADMINISTRATORS OF THE
LUTHERAN COMMUNITY, BERBICE: REPORTER—REV. J. R. MIT-
TELHOLZER.8, 9, 10 & 21 *January*, 1890*Title to sue—Status of Religious body—Construction of Regulations.*

Petitioners claimed to sue as representing a religious body called the “Evangelical Lutheran Community of Berbice,” and sought interdict to prohibit the Clergyman of the Community from using the Church and intruding with the property of the Community. In virtue of “Regulations” for the Government of the Community the Petitioners had been appointed “Administrators,” with powers relating to the temporalities; they gave notice to the Clergyman to determine the contract betwixt the Community and him. By the “Regulations” the appointment or dismissal of a clergyman rests with the Vestry, subject to the approval of the male members of the Community.

Held—That the Petitioners had no title to maintain these proceedings; question as to the Petitioners having ceased from their office, as well as

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survival of powers to one of them (one having died since beginning of these proceedings) superseded.

Semble—The Court will not examine into disputes concerning doctrine or ritual.

PETITION for Interdict to prohibit the Reporter from acting as Minister of the Lutheran Community New Amsterdam, from preaching in the Church of the said Community, and from interfering with the funds or financial affairs thereof; Conclusions in *rauw actie* for delivery to the Petitioners of the Parsonage and all property of the Community in possession or control of Reporter, and for account.

Belmonte, for the Petitioners, led evidence.

McKinnon, for Reporter, was not required to lead evidence.

The facts and arguments bearing upon the point decided sufficiently appear in the judgment.

24 January, 1890

CHALMERS, C.J.—The Petitioners came before the Court as representing and entitled to sue on behalf of a religious body called “the Evangelical Lutheran Community of Berbice,” and they asked for an interdict against the Reporter restraining him from acting as the minister of the Lutheran Community at New Amsterdam in the County of Berbice from preaching in the Church of the Community, from receiving rents, moneys or property due to or belonging to the Community, or interfering with their funds or financial affairs, and from occupying or remaining in the Lutheran Church or the parsonage house, the property of the Community. The conclusions in *rauw actie* shadowed out in the petition, are that the Reporter be ordered to deliver to the petitioners quiet and peaceable possession of the parsonage and all property in his possession or control belonging to the Lutheran Community, to render accounts of his dealings with the property of the Community and with money received by him for rent, dividends, interest, or otherwise belonging to the Community from 1st August 1878 up to the time of accounting, and to pay to the Petitioners the amount found due on adjusting the accounts. There are also the usual ancillary conclusions in an accounting suit.

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Report and Counter Report were filed. The Petitioners asked to be heard and to produce evidence in support of their case, and by a joint Minute between the parties it was agreed that the Interdict and *Rauw Actie* and all questions raised in the Petition, Report and Counter Report should be heard and decided on the Interdict papers without the necessity of further pleadings with liberty to both sides to produce evidence; and the Court ordered accordingly.

The averments in respect of which the Petitioners ask for relief are shortly as follows:—It is averred that the Petitioners on 1st August 1878, then being the Administrators of the property of the Lutheran Community, entered into a contract with the Reporter, they being thereto specially authorised and empowered by virtue of a resolution taken in a meeting of the Vestry of the Lutheran Church of Berbice on the 20th July 1878, by which agreement the Reporter was appointed and engaged as Minister of the Lutheran Church of the County of Berbice on the terms and conditions which are set out in the petition, and that the Reporter entered on his duties under the agreement and was put by the petitioners in possession of the Church buildings and parsonage; that the Reporter has not complied with the terms of the agreement in various particulars which are specified in the Petition; it is further averred that the Petitioners on 21st April 1887, being then still administrators, intimated to the Reporter that they, in the capacity in which they had entered into the contract of 1st August 1878, dispensed for the future with the Reporter officiating or acting under the contract, and that they considered the contract would cease to all effects after three months from the 1st of April, 1887. It is further averred that a majority of the male “true members” of the Lutheran Church approved of the notice given to the Reporter and expressed their desire to put the notice into effect and if necessary to proceed by law for that purpose, and that the Reporter, notwithstanding the notice retains possession of the Church building, and parsonage, has continued to officiate as a minister to a non-Lutheran congregation, and has continued to inter-

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ferre with the funds and financial affairs of the Lutheran Community.

Mr. Mittelholzer in his Report avers that the petitioners had no right to take proceedings as administrators, they having been removed from office at a meeting of the Vestry on 7th June 1887, six months before the petition was presented; he denies that he has deviated from the conditions of the contract under which he was appointed, admits that he received the letter dispensing with his services as stated by the petitioners, but denies its validity the right of dismissal as well as of appointment being, as he alleges, in the Vestry subject to the approval of the Community. He denies that the action of the petitioners had the approbation and consent of a majority of the male members of the Lutheran Church; he admits that he retains possession of the Parsonage and still officiates as Minister, but denies all interference with the funds and finances.

The Counter Report is very discursive and argumentative, but does not appear to raise any further issue which it might be necessary to notice, unless that the petitioners seem to maintain that as administrators and without reference to or approval by the Community they were entitled to dispense with the services of Mr. Mittelholzer, a position which it may be said at once is untenable, being in direct contradiction with Section 1, Article 9 of the "Revised Regulations of the Evangelical Lutheran Community of Berbice," which regulations are declared *in gremio* to be binding upon all members entering the Community, and which have been put in and relied upon as a part of the case on the petition.

On the case coming on for hearing it was objected on the part of the Reporter that one of the petitioners, Schwartz, having died since the last order had been made, the surviving petitioner could not alone continue these proceedings. As the title of both the petitioners, jointly in their capacity as Administrators, was in issue under the Pleadings and required proof, and as it appeared that the survivance of powers in one Administrator on the demise of the other would also be to some extent matter of evidence, depending on the instruments on

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which the title of the Administrators was founded, the Court considered it expedient to reserve the latter question to be dealt with along with the former question after the evidence should have been adduced. The case on the Petition has been fully heard both as regards evidence and argument. The Reporter's counsel was directed to confine his argument to the question whether those proceedings have a valid instance.

It is essential to bear in mind what is the real position in this matter. What is it the Court is asked to do? By Section 1 Article 9 of the Revised Regulations "the appointment or the dismissal of the Minister is vested in the Vestry subject to the approval of the male members." This was fully recognised by the Administrators. In contracting with Mr. Mittelholzer they refer and found upon their authorization in terms; when they give notice to terminate the agreement they profess to do so in the same capacity in which they had contracted. The agreement is not for themselves, the Administrators, but for the Lutheran Community. The dismissal equally is for the Community. The Court is now asked to make that dismissal effectual not for the Administrator, J. Hicken, but for the Community. The Court is asked to give a judgment between the Community and Mr. Mittelholzer. Now, it is essential in every *judicium* that the proper parties be before the Court; if we are not satisfied that the Berbice Lutheran Community is before us, through a representative having due legal authority, it is clear we cannot give the judgment asked.

It was very ingeniously argued that the Petitioners (and the survivor) had interests as individuals in the Lutheran Community and its property, and hence that even although their representative character might be imperfect they could still approach the Court as individuals. But this argument has no real validity; if this were the petition of Mr. Hicken as an individual its character would be altogether different, and the mode of dealing with it would be different. The proceeding before us is essentially for behoof of and by the Lutheran Community, by their representatives, and it must stand or fall according as the authority of the Administra-

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tors to represent the Community *in judicio* is established.

Now, we need not go upon the law of contract; were we to do so, we have already seen that the Petitioners were expressly on the face of the contract and also on reference to the Minutes of the general meeting of members of 20th July 1878, merely agents in making the contract for the Lutheran Community; in the same capacity of agents they gave the notice to terminate the contract. Clearly upon the law of contract they are not the parties either to insist for its performance or its determination. The Lutheran Community is the party. But I assume that the view as to the position and status of the Lutheran Community put forward by the learned Counsel in support of the petition is correct. I assume that the Lutheran Community is, as was stated, a *Collegium licitum*, not only *tolerata* but *approbata*, and entitled to come into Court by an officer having authority in that behalf. Do the Petitioners possess that authority either by the general law relating to the Collegium or by the particular laws which govern the Lutheran Community?

Voet in the commencement of the title *de in jus vocando* (Book II. tit. 4) tells us in general terms who may sue on behalf of a Universitas:—*Vocare autem potest quilibet legitimam habens personam standi in judicio; sive singularis persona sit, sive respublica aut universitas, constituto scilicet ad id actore per eos qui universitati præsunt*. Turning to the title *quod cujusque universitatis nomine vel contra eam agatur* (Bk. 4 tit. 3) we learn more about the ‘actor’ who used to be called ‘Syndicus’ when appointed with relation to the whole business of the Universitas:—*Ad causas universitatis agendas constitui solitus fuit syndicus universitatis. . . . qui et universitatis actor. . . . ac defensor appellator. Est ergo syndicus qui causam universitatis agit aut defendit ex mandato universitatis*; Voet explains the reasons why those *syndici* or *actores* are appointed. Then as to the method of the appointment it is either according to the bye-laws, as we would say, of the Universitas, or if not regulated by bye-laws (*lege cessante*) it is *ab ordine decurionum si talis ordo Universitati*

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præsit, alioguin—(and this is the case with the Lutheran Community)—*alioguin a singulis universitatis membris seu municipiis*. When an election of an ‘actor’ is to take place it is so special an act that Voet explains that all must be summoned who have the right of suffrage, and explains what proportion at the least of the whole voters must be present, and what proportion must concur in order to a valid election.

Now, if we turn to the Constitutional Laws of the Lutheran Community already referred to—the Revised Regulations of 24th April 1876—we find they are silent as to the *actor, syndicus*, or other person competent to represent the Community *in judicio*. The appointment of such a person would therefore, according to the law as stated by Voet, take place *a singulis universitatis membris*, that is as I would conceive by the whole of the voting members of the Community assembled in general meeting. It need not be enquired whether the Vestry could make such an appointment. They have not attempted to do so.

The Administrators as such have no authority to appear in judicial proceedings for the Community. Their powers are specially defined in Section 3 Article 11 and succeeding Articles of the Revised Regulations. They have the government, charge, and supervision of the church and buildings, the management, control and disbursement of the funds, revenues, and income of the congregation. They are not to dispose of any capital without the consent of the Vestry, and even as regards disbursements of income the consent of the Vestry is to be obtained wherever the sum exceeds \$700. The whole tenor of the articles relating to these Administrators shows them to be officers possessing powers in relation to the treasury and property of the Community, but not possessing either any general powers of managing the affairs of the Community in other respects, or the special power of instituting or appearing in litigations for or on behalf of the Community.

It is said in the Petition, as has already been noticed, that a majority of the true or real Lutheran members have declared that they approved of the notice to ter-

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minate the contract which was given by the Administrators to the Reporter, and in the counter-report reference is made to certain "declarations" said to have been laid over with the Petition, although there is no mention in the Petition itself of those declarations nor are they found amongst the records. The absence of these declarations is really however unimportant; for assuming that they might have been receivable as *prima facie* evidence when the Petitioners were putting forward their case in the first instance, it was still necessary that the approval of the persons referred to should have been proved in the ordinary way in accordance with the laws of evidence before such approval could have been acted upon in any way in the ultimate decision. So far was it from being proved that any of the members of the Community approved of the action of the Administrators or authorized them to institute legal proceedings, that Mr. Hicken, the surviving Petitioner, has not been able to put any witness before the Court except himself to support his view of the facts. He indeed called one or two witnesses, but so little interest did they feel in supporting the case on the Petition, that they one and all exercised their right of declining to be examined unless their expenses were provided for. The support, if any, which the Petitioners' case might have been capable of receiving from the approval or ratification of the action of the Administrator by members of the Community, if such approval had been established, has thus entirely failed.

It thus appears upon the view of the facts which the case on the Petition has presented, and without going into any controverted matter, that the Petition has been presented and proceeded in without the Petitioners having any valid authority to bring the Lutheran Community before the Court, in other words that the Petition is without any valid instance, and on this ground it must be dismissed.

Having reached this conclusion as regards the title to sue of the Administrators jointly, all questions as to the survivance of title in one of the Administrators is superseded. It is also altogether unnecessary to consider how far a judgment upon the merits, had it been possible to

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arrive at one, would have required to be modified with reference to the rights and duties of the Trustees constituted under Ordinance 15 of 1888. It is certain, however, that after the disclosure of his own laches (to use the mildest possible term) committed by Mr. Hicken in his office of Administrator, the Court would not by any judgment have replaced him in the position of holding, or intromitting with the funds or property of the Community.

It may be well to remark one thing more here, although it has been already indicated in the course of the discussion. It has appeared that a material part of the difference between those who instituted these proceedings and Mr. Mittelholzer related to the doctrines, rites and rules of the Lutheran Church, and raised questions as to Mr. Mittelholzer's conformity or the contrary in his ministrations to those doctrines, rites and rules. These are matters of ecclesiastical cognizance with which a Municipal Court has no right to interfere; and we should have been travelling out of our proper sphere if we had taken upon us either to examine or to pass a judgment upon these matters: so that even if these proceedings had been really and validly taken by the Lutheran Community, it seems not improbable that it might have been necessary to bring them to a close without any determination upon questions which are doubtless of very great interest and importance, but the cognizance of which belongs not to this but to other tribunals.

SHERIFF, J., concurred, and the Court dismissed the Petition.

Attorney for Petitioners, *J. A. Murdoch.*

Attorney for Reporter, *G. W. Hinds.*

NIGHTINGALE v. FERNANDES.

12 January, 1891

Sufficiency of Pleading—Forcible entry and asportation—Bailment—Costs.

Bailment for mutual advantage may not be determined at will by Bailor.

Where Inferior Court has jurisdiction Supreme Court will only condemn in costs of Inferior Court in terms of 2 of 1856, s. 36.

Action for alleged unlawful breaking and entering Plaintiff's premises and forcibly seizing and taking a

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carriage and two horses out of Plaintiff's possession, claiming damages for the illegal entering and asportation and also restoration of the carriage and horses. The carriage and horses belonged to Defendant, and were being worked by Plaintiff under an agreement with Defendant.

Exceptions: Claim and Demand does not state facts sufficient to constitute cause of action; *Ineptus et obscurus libellus*. On merits, the property being that of Defendant and the contract on which Plaintiff had the custody having been broken Defendant was entitled to take back his property.

Hutson on Exceptions. Plaintiff's case is that he was working the carriage and horses for Defendant; his possession was of no avail against the owner, who was entitled to resume his exclusive possession at any time. Plaintiff claims for detention, but there is no averment that Defendant detains. There is improper joinder of action.

Dr. Belmonte for Plaintiff. The possession of Plaintiff was under a contract which may be ended by reasonable notice. We were in possession *nec vi nec precario*. If a pleading can by interpretation be assisted in favour of the Plaintiff it must be sustained. Cited *Merula*, Secs. 111, 112, 113. "It is nearly impossible to be so pertinent in the "Claim and Demand that there will not be a hole open for a cavelling "Attorney to pick a hole open." *Obscurus libellus* is obsolete. The true description of this exception is given in *Zangerus de Exceptionibus*, part 2, chap. 14, Nos. 10, 12, 13, 17, 21, 22; *Merula* vol. 2, p. 44. It means nothing more than "nullity of citation."

Hutson in reply.

2 July, 1891

Curia, per CHALMERS, C.J.:—An exception has been argued that the Claim and Demand does not state facts sufficient to constitute a cause of action. There is also on record an exception of *ineptus* and *obscurus libellus* and misjoinder of causes of action.

The exception of *ineptus* has not been much pressed, but it appears to the Court that the Defendant is not entitled to sentence upon any of the exceptions. With-

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out going into details, it appears clearly enough that what the Plaintiff has averred in substance is that he was lawfully in possession of two horses and a cab under an agreement with Defendant, and that the Defendant broke into his premises and unlawfully removed the horses and cab. If these facts were proved, the Plaintiff would, it is clear, be entitled to some pecuniary compensation. It would be needless and indeed undesirable to go further than this until the evidence has been put before the Court. A day for trial will be fixed.

The case was heard on its merits on 7th and 8th January, 1891.

Dr. Belmonte for Plaintiff.

Dargan for Defendant.

The further facts and arguments sufficiently appear from the judgment.

16 *January*, 1891

Curia (CHALMERS, C.J., ATKINSON, J., and KIRKE, A.J.):—The Plaintiff claims a sentence ordering the Defendant to restore to his possession two horses and a carriage wrongly converted and taken out of his possession and to pay \$500 as compensation for the conversion and deprivation of the use of the horses and carriage and also \$1,000 as damages and compensation for the forcible seizure and carrying away by the Defendant of the horses and carriage, and a further sum of \$1,000 as damages and compensation for forcible breach and entry by the Defendant on the Plaintiff's premises.

The following facts may be taken as established. Defendant who is owner of the two horses and the cab made an agreement with the Plaintiff on 3rd July 1888, by which the Plaintiff agreed to work two horses and a carriage as a cab or otherwise for hire on behalf of the Defendant and to pay over all moneys made by the same weekly, one-half of the profits to be paid to the Plaintiff, all expenses being deducted previous to division. The parties were to reckon at the end of each week, when their interest was to be ascertained. There was a postscript to the agreement which was acknowledged by both parties to form a part of it, viz.: that Fernandes "agrees to hand over the "turn-out to Nightingale when Nightingale pays Fernandes the value "of the horses and

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“carriage \$507.75.” The Defendant put two horses and a carriage into the possession of Plaintiff, in pursuance of this agreement. Plaintiff hired a stable and a carriage house for their accommodation and went on working. The Plaintiff rendered his accounts weekly showing the amounts received by him as fares and the disbursements, which included rent of stables, wages of groom, food and shoeing for the horses, current repairs on the carriage, and a sum of 56 cents monthly on account of licences, the money for which had been advanced by Defendant. Matters went on to the mutual satisfaction of the parties for some time. Afterwards the profits appear to have greatly fallen off, and the Defendant became dissatisfied, and proposed to terminate the arrangement under which the carriage and horses were being worked on the system of half profits, and to employ Plaintiff simply as driver. Plaintiff did not agree to this at once, and there was negotiation as to his purchasing the carriage and horses, but at a lower price than was named in the agreement. Defendant was willing to sell at the price of \$350, but Plaintiff had not the money. Defendant still promised to employ the Plaintiff, if the expenditure were all under his own control. No agreement being come to, Defendant caused his Solicitor to send Plaintiff a letter dated 23rd of September 1889, in which he demanded immediate delivery of the two horses and carriage as being illegally detained by the Plaintiff. Notwithstanding this letter the negotiations went on. Defendant was still willing to sell for \$350, and it seems that if Plaintiff could have got a note backed for that amount a sale would have been concluded. On the evening of 3rd October Defendant sent for Plaintiff, asking him to come to his shop, and they had further conversation about the horses and carriage. It is difficult to feel satisfied as to what was the precise effect of their conversation, but it seems to have become clear to the Defendant that there was not now any feasible prospect of the purchase by Plaintiff being carried out, neither was the previous working arrangement being continued satisfactorily. Defendant states that Plaintiff said he must come and take the horses and

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carriage if he wanted them, but it does not seem that leave to take them was given, or that Defendant gave any definite notice to Plaintiff that their contract was to terminate. At about daybreak the next morning the Defendant went with some assistants to the premises where the horses and carriage were under charge of the groom hired by Plaintiff, opened the gate giving access to these premises, (in which process the gate was damaged) and removed the horses and carriage. The number of assistants employed is a matter on which considerable discrepancy of statement might be expected and we find this here; the Plaintiff's witnesses estimate them at from fifteen to twenty-five, the Defendant says there were only five including himself, that there were no threats on his part and no opposition, but it is quite clear even on the Defendant's own showing that a *vis major* was brought to bear and the removal was at least in its form a forcible one. The defence relied upon was that the Plaintiff had only the custody of the property as agent of the Defendant, and that Defendant was entitled to determine his mandate at any moment and remove his property when he pleased. This is not a correct view of the situation of the parties. The property was bailed to Plaintiff by Defendant in order that he might hold it and use it in the way prescribed by the agreement for their mutual benefit. Even as to the method of user the Plaintiff had an alternative, and he was not controlled by Defendant as regards the management. The Defendant could determine the bailment and resume his possession after reasonable notice to the Plaintiff but not *brevi manu*, as he did. The notice given by Mr. Woolford on Defendant's behalf was not a notice to determine the contract; immediate return of the property was claimed as illegally detained, which in fact it was not. Besides the notice seems to have been superseded by the negotiations afterwards. There was also an option to Plaintiff to purchase the property, and however improbable it might seem to Defendant that Plaintiff would be in a position to avail himself of it, the Plaintiff had thereby a further interest in the retention of the property which could not be taken from him without reasonable notice or clear renunciation on his part.

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Although Plaintiff is entitled to a judgment we all think he has been greatly in error in making a speculative claim for a large sum of damages, utterly out of proportion to any injury he can have received. The action should not have been brought at all in this Court. We award \$25 as damages, and such costs as the Plaintiff might have obtained in the Inferior Civil Court. But there is no ground for reinstating the Plaintiff's possession of the horses and carriage.

Attorney for Plaintiff, *J. A. G. G. Belmonte.*

Attorney for Defendant, *J. B. Woolford.*

FARNUM AS EXECUTOR OF BLACK'S ESTATE v. WEBER, ET AL.

29, 30, 31 December, 1890.

Promissory note—Invalid transaction—Limited power—Executor de son tort.

Defendants made a note payable on demand to Plaintiff's Testator. One of the Executors of the Will substituted the Administrator General as Executor, and the latter whilst acting as such substituted Executor took from the makers in substitution of the original note a new note payable in instalments spread over five years. Previous to this, Plaintiff and another of the Testamentary Executors had taken proceedings to have the substitution of the Administrator General set aside, which resulted on appeal to the Privy Council in the substitution being declared null and void.

Held, (diss. ATKINSON, J.):—That the Administrator General whilst acting under the substitution was only holding the estate for behoof of the lawful possessor and not clothed with powers conferred on him *virtute officii* by Statute; that his powers whilst so holding the estate extended only to the doing of such acts as either the true representative would have been compellable to do, or as would have been proper and necessary acts of management, and that the arrangement in question was not such an act, and *ultra vires*; and that the new note did not support a plea of Payment and Satisfaction.

Per ATKINSON, J.:—All acts, such as might lawfully be done by a rightful Executor, honestly and fairly done by a person who has reason to believe that he is a duly substituted Executor, should be held good. Under the circumstances in this case any rightful executor must necessarily and properly have done some such act as the Administrator General did, and the Defendants should be absolved.

Suit on promissory note for \$50,000 payable on demand to Plaintiff's Testator. The Defendants admitted making the note, but pleaded payment and satisfaction. Some time after the Testator's death, Moore, one of the Testa-

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mentary Executors, on 30th June 1887, substituted the Administrator General as an Executor in his place, and under this substitution the Administrator General took possession of and administered the estate in this Colony. Whilst so administering he applied to the Defendants for payment of the note sued on. Not obtaining payment, he took from the Defendants on 19th August 1887, in substitution for their original note, a new note for the same sum of \$50,000 payable in instalments spread over a period of five years ending on 31st December 1892, and gave up the original note. Two of the other Executors of the Will disputed the validity of the substitution of the Administrator General made by their co-executor Moore, and on 22nd July instituted proceedings to set it aside. A majority of the Judges of this Court upheld the substitution, but the Privy Council on 25th July 1889 reversed this decision and declared the substitution null and void as contrary to the terms of the Will, and ordered the Administrator General to transfer the estate to Farnum the continuing Executor in the Colony. In the proceedings to set aside the substitution no allegation was made of improper acting by the Administrator General and the Privy Council allowed him in accounting for the estate "to deduct all outlays necessarily and properly incurred by him," but not official fees or remuneration for personal services. The Defendants paid the instalments on the new note whilst the estate continued in possession of the Administrator General, and were willing to go on paying them as they fell due to the Executor to whom the estate was transferred.

Solicitor General Kingdon, Q.C., in support of the plea of satisfaction. The arrangement made by the Administrator General should be upheld. The Privy Council have treated the position whilst the substitution subsisted as that of an Executor *de son tort*. If he had been a mere trespasser he would not have been allowed credit for outlays. The taking of the new note was a proper proceeding in the interest of the estate. The Defendants when payment was demanded were not in a position to pay, but were able to do so upon time being given. Acts

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of Executors *de son tort* bind the rightful Executor, *Comyns Digest. tit., Administrator C. 1, Exor, de son tort; Coulter's case, 3 Coke's Reps., p. 60, 30 a; Read's case, 3 Coke's Reps., 24 a; Parker's case, 1 Lord Raymond 658; Mountford v. Gibson, 4 East., 441; Thompson v. Harding, 2, E. & B., 630; Vander Linder, p. 143 Henry's Translation; De Montford v. Broers, 13 App. Ca., L.R. 149.*

Evidence respecting the facts was taken.

Dr. Belmonte for Plaintiff:—The note is not satisfaction. What has been done is to change the security. It is not an ordinary act of administration. A lawful Executor could not lawfully have postponed the time of payment. Executor is merely agent of the heirs. II. *Consultationes*, 3rd part, p. 403; *Vander Linden*, p. 148; *Pothier on Testaments*, p. 453; *Vander Keesal. Thes: 323; Voet de Transactionibus*, bk. II., 15, No 3; *Grotius*, bk. 3, chap. 4, No. 3—6; 4, *Burge Col. Law*, 437; *Pothier on Mandate*, vol. 3, p. 158. There is no obligation on Executor to collect the debt if he cannot do so. He need only show he has not been careless. The Administrator General waived immediate payment, but obtained no better security. In any view the old note should have been retained as security. The Administrator General held the estate also as guardian of minors; he could not as such change the security of his ward. Further, he was aware when he made this arrangement that his status and authority were impugned. Supposing the Administrator General were an Executor *de son tort*, it is only the lawful acts of such an Executor that can be sustained. This was not a lawful act. 2 Tudor's Equity Ca., 2nd Edn., p. 725.

Solicitor General Kingdon, Q.C., in reply. The Plaintiff has admitted certain acts of administration are lawful by Executor *de son tort*. The act in question can be supported as beneficial to the estate. It was lawful to give time, and it was beneficial the time given should be exactly stated to the debtors. No useful result would have been attained by pressing the Defendants. There was no compromise as to the substance of the debt. But even if it were, the Administrator General's Ordinance

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empowers him to compromise. These powers were not affected by his appointment being illegal. The payments of the instalments show that the Administrator General exercised a wise discretion.

(The parties laid over a written consent to the Court however constituted delivering judgment in the above matter, including the judgment of H. KIRKE, lately acting as Junior Puisne Judge, notwithstanding he had ceased to be a member of the said Court.)

CHALMERS, C.J.—In this case the Court has not had the task—often a difficult one—of determining issues of disputed facts, and upon the legal questions which are involved we have had the advantage of able arguments from both sides of the bar. For myself I may say that I have not since the close of the hearing felt any doubt as to the decision which ought to be given.

The claim is for a sentence on the Defendants, jointly and severally, to pay to the Plaintiff \$50,000, the amount of a promissory note payable on demand, dated 20th October 1884, made by the Defendants, jointly and severally in favour of the Plaintiff's testator—the deceased Mr. Black. The Defendants admit the title of the Plaintiff and admit the making of the note; a defence pleaded by way of exception was not maintained at the bar. The defence relied upon is that the Defendants have paid and satisfied the note on 19th August 1887, to the Administrator General of British Guiana, who, they aver, then represented and administered the estate of Mr. Black, the payee of the note.

The facts of the case, so far as material, may be taken to be as follows:—

On 30th June 1887, John Moore, one of the Executors of Mr. Black's will by an Act of Substitution substituted the Administrator General as an Executor in his place, and with certain powers of administration and guardianship conferred by the will, and thereupon the Administrator General obtained possession of the estate and did acts in administration thereof. While so in possession a new note dated 19th August 1887, for the sum of \$50,000 was made and delivered by the Defendants to the Administrator General and by him accepted in satis-

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faction of the note now sued on, the latter being delivered up to the Defendants and destroyed by them. The new note is set out in the pleadings. The interest stipulated upon moneys unpaid is the same in the two notes, viz: 5 per cent, but the new note materially differs from the note in lieu of which it was given and accepted in respect that by the new note payment of the money is promised in certain instalments spread over a period of five years ending on 31st December 1892, with a proviso that in case of default in payment of any instalment the whole sum then remaining unpaid shall become payable, whereas by the former note the whole was payable unconditionally on demand.

The Defendants aver that they paid to the Administrator General the instalments which became due upon the new note previously to 26th October 1889, and that the Administrator General then handed the moneys so received and the note itself to the Plaintiff, and that he is therefore estopped from suing the Defendants on the note of 1884. It appears that the Plaintiff has received from the Administrator General various moneys and securities belonging to the estate, including this note, and some moneys paid on account of it, but as the moneys and securities were received without prejudice and subject to later adjustments of accounts there is no estoppel. The point indeed was not much pressed in argument.

Going back somewhat in point of time we find that the validity of the substitution of the Administrator General by Mr. Moore was disputed by the present Plaintiff and by Mr. Culpeper—another executor of Mr. Black's will. Intimation was made on behalf of these gentlemen to the Administrator General by way of protest as early as 28th June 1887, before the substitution was made, that they were opposed to it, and on the 22nd July 1887 they presented a petition to this Court in which they alleged, amongst other things, that under a proper construction of Mr. Black's will Mr. Moore had not, when he executed the Act of Substitution, any right of so doing, and that the so-called substitution by him of the Administrator General was illegal, null, and void, and prayed the Court to declare accordingly, and to

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declare that the petitioners were the true and lawful Executors, Administrators, and Guardians, under the will of Mr. Black, and to direct the Administrator General to cease administering or interfering with the estate, and to hand over everything belonging to the estate to the petitioners. This petition was served on the Administrator General on the day of its date, and after the usual procedure by report and counter report came on for hearing in this Court in December 1887; and on the 6th January 1888, this Court gave judgment holding (by a majority, the Chief Justice dissenting) that the substitution was valid under the powers of substitution given by the will and refusing the prayer of the petition. One of the Executors Mr. Farnum, carried this judgment to the Privy Council by appeal, and on the 25th July 1889, their Lordships gave judgment reversing the judgment that had been given in this Court, and declared the act of substitution by Moore to be null and void as being contrary to the terms of the will and ordained the Administrator General to transfer to the Appellant the estate of the Testator.

The question which the Court has now to decide is whether the transaction regarding the note which took place between the Defendants and the Administrator General, whilst he was intruding with the estate of Black under the substitution by Moore, is valid and binding upon the rightful Executor who now seeks to enforce the original note. In doing so it is necessary to see what the legal position and powers were of the Administrator General whilst so intruding, and also what was the nature and quality of the transaction which is being called in question.

It is indeed somewhat difficult to define the legal status of the Administrator General under Moore's substitution by reference to any *nomen juris* familiar in the Roman Dutch Law. To say that he was holding the estate *pro possessore* expresses however his position nearly accurately. He was not the Administrator General with the powers of an Executor, Administrator and Guardian conferred by Mr. Black's will. The expressions used by their Lordships in their judgment in the appeal of Farnum

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show this very clearly. They do not say that the substitution by Moore shall be avoided or set aside but that it was “null and void as being contrary to the terms of the will,” that Moore “had no power to confer any administrative office on Respondent;” in relation to Moore they characterise the act of substitution as a “gross breach of trust on his part,” and they declare that the Respondent “will not be “entitled to any official fees or to remuneration for personal services “in the administration of the estate which he illegally took possession “of and has wrongfully withheld from those entitled to it.” The disallowance of official fees marks very clearly—if indeed the other expressions used by their Lordships had left any room for doubt—that they considered that the Administrator General never held the estate in the character or with the powers of the officer created by law under that name. That this was so is a plain corollary from the nullity of the substitution. The Administrator General’s office and functions are strictly defined and the circumstances under which he may take possession of and administer an estate are also strictly defined in the Ordinance by which his office is constituted and regulated. He may not as Administrator General accept whatever administration is offered to him, or do whatever he is asked to do. He must see that the administration he is asked to undertake, or the act he is to do is within the law of his office. If not within the law of his office all that he does as Administrator General is *ultra vires* and derives no authority from his official position. No suggestion is made—or indeed seems possible—that the Administrator General was either *virtute officii* or otherwise holding or dealing with the estate under any other title than the substitution by Moore. He was not a mandatory as he had no mandate, and he was not a *negotiorum gestor*, acting for an unrepresented estate, as the rightful Executor under the will was in the Colony, not only willing to administer, but claiming by judicial process to be put in the position to do so.

The learned Solicitor General in his argument for the Defendants laid stress on the fact that their Lordships of the Judicial Committee in their judgment in the appeal

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of Farnum stated that “there is no charge of malversation made “against the Respondent, and he will therefore be entitled in accounting for the estate to deduct all outlays necessarily and properly incurred by him,” and he contended that their Lordships thereby indicated that the status of the Administrator General while acting under Moore’s substitution was similar to that of an Executor *de son tort* as known in the law of England, and that the Court should take it, in the absence of any precise category in the Roman Dutch Law applicable to the circumstances under which his status could be defined, that it should be deemed that of an Executor *de son tort*. And it was further said that the powers of an Executor *de son tort* were such that he could do anything a rightful Executor could have done. As far as I understand the law on this subject the latter proposition is not accurate. The only support for it, indeed, is in some loose expressions that may be found in some of the decisions in which it is said that the *lawful* acts of an Executor *de son tort* are good. This is very far from bearing out the proposition in the broad sense in which it was stated. Subject to this qualification I am content to take it that the position of an Executor *de son tort* affords an apt analogy, and I say further that I believe the Court will be safely guided to a right decision in the present matter if it follows the principles which have been applied as regards the validity of acts done by Executors *de son tort* and does not go beyond those principles. It is material to add, as has been already stated, that the Administrator General was in the position of having notice that the true Executor under the will was judicially disputing his right to hold the estate or to act in any way concerning it. As regards this point *Wooley v. Clarke* 5 B and Ald. 744 is of some significance. In this case it was held that an Executor who had proved and administered under the will of his testator, but who had notice of a second will which ousted his authority was liable in trover for goods which he had sold and he was not allowed to take credit for disbursements.

The legal conception of an Executor *de son tort* is

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expressed in 43 Eliz. c. 8, which enacts in substance, that any person receiving and having any assets of a person who has died intestate without any lawful title shall be chargeable as an Executor of his own wrong so far as such assets will satisfy, and he is allowed to discharge himself by payments such as lawful Executors or Administrators may and ought to pay. Before and since this statute there is a good deal of disquisition and authority as to what acts of intromission shall render a person liable so as to be sued as Executor *de son tort* and also as to the acts by which he may discharge himself. The principle springs out of and is dependent on the holding, or *de facto* possession of property without any right to hold it. It is just that one who takes upon him to act as Executor and to hold assets of the estate out of which creditors ought to be paid should be liable in the same way as if he was the true Executor, and he is credited when he disburses assets in discharging obligations which were legally binding on the estate or in acts of management for its benefit and preservation. It has been also held that payments to an Executor *de son tort* are good in discharge of the debtor where the money has come into the estate. But when we enquire what further rights or powers belong to an Executor *de son tort* there is nothing to extend the boundary. Mr. Justice Williams in his work on Executors, vol. ii p. 269, says an Executor *de son tort* has all the liabilities but none of the privileges that belong to the character of an Executor. The test of the validity of his acts so as to bind the true Executor, is that they are such as the latter would be *bound* to do. This is stated by Grose, J., in *Montford v. Gibson*, 4 East 446, and expressly decided by Park B, 6 Ex. 183, in *Buckley v. Barber*, in 1851, which appears to be the latest decision touching on this point. "He says the act of an Executor *de son tort* is "good against the true representative of the deceased, only where it is "lawful and *such an act as the true representative was bound to perform* in the due course of administration." It seems that Baron Park was using the word "bound" in the sense of the earlier authority (*Grasbrook v. Fox*. Plowd. 282), to which he refers, that

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is legally compellable, but the expression might, in accordance with principle be read to include such acts as are *necessary* in due management and for the preservation of the property. Throughout the authorities which were cited for the Defendants, nor so far as I have been able to discover otherwise, there is not one that supports the view that an agreement of the character which we are now dealing with would have been sustained if made by an Executor *de son tort*.

Now, as I have already said, I consider the position of the Administrator General was in close analogy with that of an Executor *de son tort*. Equally as the Executor *de son tort* he was holding the estate *de facto* and without any valid title. We are under no need to decide in this case what extent of discretionary power may be vested in the Administrator General under his Ordinance. Here he was not clothed with those powers. His power of acting so as to bind the true representative of the estate were, like those of the Executor *de son tort*, such as sprang immediately and proximately out of the mere holding of the estate for behoof of the lawful possessor, and extended no further.

If then the powers of the Administrator General, thus holding the estate of Black, to make the agreement now in question are to be determined, as I think they may, with reference to what has been decided concerning the powers of Executors *de son tort*, we have to ask in the first place whether the agreement was one which the true representatives of the estate would have been legally bound or compellable to make? To this question the answer must be at once an unqualified negative.

Then would the true representative have been bound to make it in the sense that it was a proper and necessary act of management for the preservation or protection of the estate? In assuming that the agreement, if it were of this character would be good as against the rightful Executor I am carrying the argument in favour of the Defendants as far as it will go. Let us view the matter in the first place apart from the notice the Administrator General had that his title and status were disputed. And here it need scarcely be remarked that

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their Lordships of the Judicial Committee in allowing the Administrator General “in accounting for the estate to deduct all outlays necessarily and properly incurred by him” were simply stating the principle of accounting applicable to the circumstances then before them, no allegation of illegal or improper administration having been made in the proceedings with which they were dealing. Any question as to the necessity and propriety of particular acts of administration remained of course to be decided until such a question should arise. Nor need it be remarked that a principle of accounting with reference to outlays incurred has not necessarily any bearing on the question of the validity of executory contracts. Well then what was this agreement? It was not a compounding of a debt, such as we might conceive might have been justified if there had been an insolvency and the person actually holding and managing the estate might have felt himself in the necessity of claiming and accepting a composition which otherwise would have lapsed. It was not a compromise. In saying this I by no means imply that a compromise of this debt “would have been valid. What I am pointing out now is that the elements of a compromise were absent. Voet in the title *de Transactionibus* explains what is a compromise (Voet *ad Pandectas* II, 15 § 1.) *Est super re dubia et lite incerta conventio non gratuitu, aliquo dato, retento, vel promisso,*” and further on he states that it is essential the instrument embodying the compromise should express what and how much upon both sides is given, or retained or promised. Here the debt due on the note was not a doubtful thing, and there was no mutual give and take. The Administrator General gave up the right which belonged to the estate of demanding immediate payment of the note, but nothing was given, or retained, or promised by the debtors which did not belong to the creditor before. No increase was made on the amount of the debt, no readier or more summary method of recovery was provided, no security was given. It was in all essentials an indulgence to the debtors without any stipulation beneficial to the creditor. Not only was it not beneficial, but it injured the position of the creditor; for whereas the

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payment of the note which was given up could be demanded at any moment, that of the substituted note could only be obtained by postponed instalments spread over a period of five years. The proviso adjoined to the new note that the whole of the unpaid balance should become payable in case default were made in payment of any of the instalments did not place the matter in the same position as if the original note had been retained and payment had not been immediately pressed. The proviso could only be acted upon at six monthly periods and after a default in payment of an instalment had actually been made, and in such case there would be the greatest probability that the insolvency of the debtors was already imminent. I entertain no doubt whatever that the arrangement was *ultra vires* of the Administrator General holding the estate without valid title in the way he did. It is not necessary to go further, but I may add that it seems to me in the utmost degree doubtful whether such an arrangement would have been within the Administrator General's powers even if he had been holding the estate by a valid and undisputed title and clothed with all the powers of his office. An agreement formally giving time to the debtor, without any equivalent coming from his side is essentially of the nature of donation—*dona quæ nulla necessitate juris aut officii sponte præstantur Voet 39 5 1*. It is a species of transaction which can only be validly accomplished by owners who have unrestricted powers of dealing with their property *suo arbitrio*. Even those procurators or Attorneys who are constituted with the most ample powers.—*Cum libera administratione* as it is expressed—who could do almost anything which an absolute owner could do, have no power of donation; *cum donatio potius sit perdere quam administrare. Voet 3, 3, 7*.

The invalidity of the transaction is still further emphasized by the fact that at the time it was made one at least of the persons beneficially interested in the estate was a minor.

Evidence has been put before the Court to show the reasons by which the Administrator General was actuated in making the agreement. In substance these were that

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the debtors said they were unable to pay at once, that the Administrator General had information their pecuniary position was not good, and that if he should presently sue them for payment of the whole debt it might, or would probably bring on insolvency in which the dividend would be small; and the Administrator General said that he believed there would be a better chance of recovering the money if time was given than if he sued at the moment. The Solicitor General in his argument for the Defendants ingeniously assumed rather than stated that the alternative lay between suing at the moment and making this agreement to give time. But no such alternative existed; if the Administrator General had refrained from suing and been called in question for refraining, then evidence to show that abstinence was the most prudent course might have been relevant, but the inability of the Defendants to pay at the time could be no reason for formerly giving up the debt and accepting a novation which put it out of his power to ask for payment except by instalments and at postponed periods. That the debtors' position was embarrassed or uncertain seems rather a reason the holder of the estate should have retained full power in his hands, so that he might in the interest of his constituents have taken advantage of any such improvement in the position of the debtors as might have enabled them to meet their obligation—a contingency which in the rapid fluctuations of trade in this colony was perfectly possible,—or on the other hand have remained free to do what might be advisable to obtain security or a preference if their position was becoming seriously less hopeful. By the agreement his hands were tied.

It was said that it was desirable the Defendants should know exactly their position, and that if the Administrator General was to give time or to abstain from suing the terms should be precisely embodied in a document; and the Court was left to make the inference, if it could, that the agreement to give time was valid because it may have put the debtors in a better position for carrying on their business than if they had remained liable to pay the whole of the debt at once in case the creditors should

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require payment. In point of fact the Court has no data for forming an opinion as to the effect the mere existence of this debt as one that could be at once exacted might have had on the Defendants' business, and it is not our province to draw a speculative inference. But beyond this, even if it had been shown that the business of the debtors was facilitated by the agreement, and that so it tended to promote the chances of the debt being ultimately recovered, it would still have been beyond the powers of the mere holder of the property. To say that he could make, as against the true Executor or the heirs, this arrangement, on the ground that it might be expected to be beneficial, would be to exalt the mere holder as regard his powers of handling the property into a position of equality with the owner or a procurator *cum libra administratione*.

Some stress was laid also on the fact that the debtors had regularly paid the instalments on the new note as they became due, that a considerable proportion of the debt had been in this way recovered, and that there was good reason to hope that the whole would be recovered, so that it was said the wisdom of the course taken by the Administrator General was justified by the event. It is of course fortunate that the event has thus far turned out as well; but in my opinion this consideration cannot affect any of the questions the Court has to decide. Even if there had been a question of discretionary powers of full administration being wisely exercised, that would be estimated under reference to the circumstances existing at the time of the transaction not to those which might have arisen afterwards; but here no such question enters. It was also put before the Court that the loan was made by the late Mr. Black by reason of his friendship for one of the makers of the note and that the latter were given to understand by Mr. Black during his lifetime that it was not his intention to call up the loan on a sudden, or even that, if his own circumstances continued to be prosperous, he might indefinitely postpone calling for it. No provision respecting this debt was made by Mr. Black in his Will, and it seems to have been represented to the Administrator General that the

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obligation of paying the note had come upon the debtors as something like a surprise. I have no doubt that the true representatives of the estate into whose hands it has now passed will be quite capable of giving due effect to the peculiar circumstances of this loan, and especially as the heiresses are all now of age and capable of exercising a voice in the matter, but the circumstances under which Mr. Black made the loan and the understanding between him and the debtors respecting its repayment are not relevant with reference to what was done by the Administrator General. He had no authority to make a contract to postpone suing, even if he thought there was personal hardship on the debtors in their being sued.

Thus far concerning the Administrator General's power to make this agreement supposing that at the time of making it he had no notice that his title was questioned; but in view of the fact that he then had notice that the true representative had petitioned the Court to oust him from the possession and management of the estate the test for determining the validity of the agreement must be formulated in this way,—Was the agreement one which the true representative, assuming his title to have been disputed, would have been compellable or bound to make either forthwith or within such period as would necessarily intervene before a decision upon the disputed question of his title could be obtained? The only possible answer here is a negative. In the face of such an objection as had been raised to his title the Administrator General could have no authority, unless upon urgent and immediate necessity, to alter a valuable property belonging to the estate. Necessity there was none.

For the reasons I have stated I am of opinion that the agreement which the Defendants have set up was *ultra vires* of the Administrator General holding the estate in the way he did, and null and void. It was advanced in argument, but not I think seriously contended, that although the agreement might be beyond the powers of the Administrator General it might nevertheless be pleadable by the Defendants in answer to the claim in this action. But it is clear upon the principles

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of agency that any agreement made by a person acting not in his own right but with vicarious powers on behalf of others is only valid—apart from ratification which does not enter at all here—so far as it is within the scope of these powers. Sere the Defendants were even aware that they were not dealing with the Administrator General merely as the officer created by an Ordinance; they dealt with him, as is shown by the terms of the new note, expressly as the substituted Executor of the Will of Black their creditor. They were thus put upon enquiry if that were necessary into the validity of the Substitution. The terms of the will itself were perfectly well known at least to Mr. Weber. Since the judgment in the appeal draws back to the date of the Substitution, the debtors legally speaking were aware they were making an agreement with one who had no authority to make it. There is no question of *rei interventus*, or of the Defendants' position being altered for the worse by anything that has been done, if this agreement be declared of no effect. The agreement as we have seen was all on one side, and all that the Defendants have done under it has been to pay certain instalments of the money which independently of the agreement they were bound to have paid on demand in a lump.

I consider that there ought to be sentence for the amount claimed, but allowing the Defendants to take credit for such sums as have been paid by them on account of the new note and have passed into the assets of Black's estate.

KIRKE, A.J.—In the case of Farnum and Willems *v.* the Administrator General I expressed an opinion that the substitution of the Administrator General by Moore, as Executor of Black, although performed with somewhat indecent haste, was a legal act, and that the Administrator General by that act of substitution was placed in the same position as Moore under Black's Will. Now, although by the Roman-Dutch Law the powers of Executors are extremely limited, all the authorities agree in stating that the Executors must be guided by the terms of the Will of the testator. In his Will, Mr. Black gave the fullest powers of administration to his Executors,

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inter alia the power to sell debts due to his estate; so if the Executors had power to sell debts, this must be taken to include the power to compromise or compound them, and the Administrator General, being in the full possession of the powers of an Executor, would have been perfectly and legally able to make the arrangements which he did with Messrs. Weber and Perot.

But whatever my opinion was then, and whatever it is now, it is obvious that this Court must be governed by the judgment of the Judicial Committee of the Privy Council which overruled the decision of the majority in this Court, and the present case must, as I take it, be decided by the interpretation which we place upon their Lordship's judgment, and the scope which we concede to it.

That judgment which was the unanimous decision of five Lords of the Council (14 Appeal Cases p. 651) asserts, as I interpret it, that under the terms of Black's will, Moore had no power of substitution at all, that the act of substitution was a nullity, and that the Administrator general was merely the holder of the estate which he illegally and wrongfully withheld from the lawful Executors. Of course if Moore had no power to substitute another for himself, he could not do what he had no power to do, and the so-called Act of Substitution was null and void and a mere piece of waste paper, and the Administrator General was a wrongful holder with all the liabilities and none of the privileges of a lawful Executor. It follows therefore that the Administrator General had no power of Administration and could only perform such acts as he might be compelled to do by law, or which he was bound to do to maintain the integrity of the estate, under neither of which heads can we include this transaction with the Defendants. There was no necessity for it; the Administrator General could not be compelled to do it by law, neither was it necessary for the preservation of the estate; whilst on the other hand it debarred the heirs for five years from obtaining in full a debt due to the estate.

The Administrator General not only wrongfully and illegally withheld the estate from the rightful Executors,

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but this contract with the Defendants was made nearly a month after he had received legal notice that his title as Executor was disputed, which should have been a warning to him to hold his hand, and await the result of the petition against him.

I have come to this conclusion with great reluctance, as I am satisfied that the action of the Administrator General in compromising this large debt was the wisest under the circumstances, and best calculated to promote the true interests of the heirs, and of all who are beneficially interested in the estate of Black. At the same time I am clearly of opinion that, taking the judgment of the Lords of the Privy Council as our guide, the action of the Administrator General in this matter was *ultra vires* and must be set aside.

ATKINSON, J.—The testator died on the 2nd of September, 1886. By his will he appointed as Executors, Administrators and Guardians Edward George Barr and John Moore, jointly and severally; failing either of them, then, J. P. Farnum the younger, and failing both, then Farnum and S. A. H. Culpeper, with powers of assumption, surrogation and substitution, “to any of them to the two last surviving of “them.” Barr and Moore accepted office and acted. On the 29th of June 1887, Moore, professing to act under these powers, substituted the Administrator General of British Guiana in his place and stead as an Executor, Administrator, and Guardian. Farnum petitioned this Court to have this act of substitution declared null and void; the decision of the majority of the Court was against him; he appealed to the Judicial Committee of the Privy Council; their Lordships advised Her Majesty to reverse the judgment of this Court, to declare the act of substitution by Moore to be null and void, and to order the Administrator General to deliver to Farnum the whole estate of the testator, with the accounts and vouchers.

On the execution of the Act of substitution by Moore, the Administrator General took possession of the testator’s estate. Among the papers was a promissory note for \$50,000, dated 20th October 1884, made by the Defendants, payable on demand, and bearing interest at

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the rate of five per cent., per annum. Moore, while acting, had demanded payment of this note. The Defendants were unable to pay and, after some negotiation, the Defendants offered, and Moore, as Executor, was willing to accept a new note for the same amount, bearing interest at the same rate, payable by instalments extending the payment over five years, with a proviso that on the failure to pay any instalment the whole should become payable at once. The Executors petitioned the Court to authorize them to carry out this arrangement. The Court made no order. The Plaintiff's Counsel tried by force of iteration to turn this refusal to make any order into a disapproval by the Court of the proposed arrangement. It was not so. Section 3, of Ordinance 17 of 1887, authorising Executors, &c., to apply to the Court for directions, had not then been passed, and the Court said that the discretion was in the Executors and they, themselves, must exercise it.

It is admitted on the pleadings that when the note came into the Administrator General's possession he, as substituted Executor, demanded payment. After further negotiation the Administrator General, as substituted Executor, took from the Defendants a new note, in terms the same as that which, Moore, as Executor, had been willing to accept. That new note the Defendants aver was taken in payment and satisfaction of the original note payable on demand. The original note was handed to the Defendants and destroyed.

When the Administrator General gave over the estate to Farnum, the Defendants it is said, had paid to the Administrator General, (including a mortgage in their favour on Pln. Dunoon, deposited in the Registry of Court), the instalments and interest due up to that date. The moneys so received were handed over by the Administrator General to Farnum, along with the other moneys belonging to the estate. Since that the Defendants have regularly tendered the instalments and interest as they fell due, but Farnum has refused to receive them. It was stated that, in these ways, some \$30,000 of the original \$50,000 had been either paid or tendered.

It was contended for the Defendants that the position

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of the Administrator General under the Act of Substitution by Moore was similar to that of an executor *de son tort* in England, and that the Judicial Committee of the Privy Council, in the appeal of Farnum *v.* Executors of Black, (14, App. Cas. 651,) had so treated him, their Lordships having said "There is no charge of malversation made "against the respondent, and he will, therefore, be entitled, in accounting for the estate, to deduct all outlays necessarily and properly incurred by him; but he will not be entitled to any official fees "or to remuneration for personal services in the administration of the "estate which he illegally took possession of and has wrongfully "withheld from those entitled to it." That, it was argued, is, practically, what would have been the position of an Executor *de son tort* in England under similar circumstances.

According to the English law "If one who is neither Executor nor Administrator intermeddles with the goods of the deceased or does any other act characteristic of the office of Executor, he thereby makes himself what is called an Executor of his own wrong, or, more usually, an Executor *de son tort*, (*Wms. on Ex.*, 261, citing *Swin., Went, and Godolp*). As their Lordships have decided that the act of substitution was, at its execution, null and void, the Administrator General never was a real Executor or Guardian or Administrator. His position would, therefore, seem to have been in some degree analogous to that of an Executor *de son tort*.

As to the position of an Executor *de son tort* it is laid down in the books that he "cannot by his own wrongful act acquire any benefit, "yet he is protected in all acts not for his own benefit which a "rightful Executor may do." (*Wms. on Ex.* 271, *ed.* 8, citing *Swin, Went, and Godolp.*) The dicta of the English Judges, on the face of them, would, in many cases, seem to support the Solicitor General's contention. In *Oxenham v. Clapp* (2 B, and Ad. 315,) Patteson, J. said "A wrongful and rightful Executor only differ in this respect that the "first is to take no benefit by his wrongful act, as regards other creditors' there is no difference; an *Executor de son tort*, as well as a "rightful Executor, may

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“administer the assets in due course of law.” Again, in *Thompson v. Harding*, (2 Ell. and B. 640), Ld. Campbell, C.J. says “Where the “Executor *de son tort* is really acting as Executor and the party with “whom he deals has fair reason for supposing that he has authority to “act as such, his acts shall bind the rightful Executor, and shall alter “the property.” To the same effect is the dictum of Ld. Holt in *Parker v. Kett* (1 Ld. Ray, 661). And we have Ld. Coke saying, “It is “clear that all lawful acts which an Executor of his own wrong* * “doth is good,” (3 Coke, pt. 5, 30 b.). This was said, by the Solicitor General, to be the basis of all the subsequent decisions.

So far the contention of the Solicitor General for the Defendants that all lawful acts which a rightful Executor might do are good when done by an Executor *de son tort* would seem to be borne out; but then comes the statement in *Wms, on Ex.*, (p. 277, citing *Buckley v. Barbar*, 6 Ex., 183), “that the act of an Executor *de son tort* is “good against the true representative of the deceased only where it is “lawful, and such an act as the true representative was bound to perform in the due course of administration.” When we go to *Buckley v. Barbar* we find that the authority relied on is the same as that on which my Lord Coke bases his dictum, (*Graysbrook v. Fox*, Plow. 282). Taking up this case we find that the whole doctrine is founded upon a dictum of Mr. Justice Walsh, in which the other two judges acquiesced. It is somewhat remarkable that, while it is stated in the books (*Wms. on Ex., n.y.*, 270), that there can be no Administrator *de son tort* the doctrine as to the limitation of the powers of an Executor *de son tort* seems to have been first stated in a case where an Administrator was acting, who as it turned out, had no more legal right to act than the Administrator General in the present case. In *Graysbrook v. Fox* the Bishop’s Commissary had granted letters of Administration, not knowing that a will was in existence. The Administrator sold certain agricultural implements. The Executor proved the will and brought an action in detinue to recover the chattels from the purchaser. Lord Dyer C.J. and Walsh J. held that he

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ought to succeed, Weston J. dissented. Although Walsh, J. was with the Plaintiff, he pointed out that, if the question had been one where the goods had been alienated by the Administrator to pay debts or funeral expenses, the Defendant would have succeeded,—“the reason is because by the commission to him (the Administrator) by the ordinary, who was ignorant of the testament, he has a colour of authority though it is not a rightful one, and he that has the right, (the true executor), suffers no disadvantage although he be bound by the act of the Administrator, for it is no more than he (the Executor) was compellable to do and the Administrator having done that which the Executor was himself obliged to do, his act shall be allowed good, because the Executor is thereby freed and excused from the trouble of doing it. . . . and it is reasonable and no detriment to any one that the thing done should remain stable and firm without impeachment.”

The doctrine being thus traced back to its origin or first statement it would seem that, in so far, the Solicitor General’s contention fails and that, under the English law, it is not all lawful acts which a real Executor may do that are good when done by an Executor *de son tort*, but those acts only which a real Executor would have been compellable to do, although the dicta of the later judges, in terms, go much further.

There is, however, one fundamental distinction between an Executor under the English law and one under the Roman Dutch law, which makes wholly inapplicable in this colony, this narrow doctrine as to the acts of an Executor *de son tort* being good only where the acts are such as a real Executor was compellable to do the like. Under the English law an Executor has a direct personal pecuniary interest in the residue of his testator’s estate. “At law it has been the rule, from the earliest period, that the whole personal estate devolves on the Executor, and if, after payment of the funeral expenses, testamentary charges, debts and legacies, there shall be any surplus, it shall vest in him beneficially. In equity the rule has been the same as at law.” (*Wms. on Ex.* 1480.) Under the Roman Dutch law, on the contrary, the Exe-

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cutor takes nothing—the residue going to the heir. The fact that an Executor under the English law is entitled to the residue supplies one reason why the Judges in *Graysbrook v. Fox* should have been of opinion that a true Executor ought to be bound by the acts of an Executor *de son tort* in those cases only where he, as true Executor was by law compellable to act. In all other cases, he might by acting himself secure for himself more favourable results as regards the residue of the estate. No such reason would have operated upon their minds, if the Executor in that case, like an Executor in this colony, had had no interest in the residue. I venture to think that, if such had been the case, and it had appeared that the Administrator had acted honestly and fairly in selling the ploughs and harrows and what not there in question the sale would have been upheld on the ground stated by Walsh, J., that he that has the right (the true Executor) suffers no disadvantage. On that view, if the taking by the Administrator General of the new note giving time was done in good faith and under an honest and reasonable belief that it was for the benefit of the testator's estate—as to which, on the facts in proof, there can be no doubt—it would seem that by the analogy of the English law, the act was right and proper. In other words it is admitted that an Executor *de son tort*, who may be a mere intermeddler, although he has no legal right to act, may yet so act as to bind the real Executor in certain cases, the reason assigned being that in those cases the real Executor is not prejudiced. Apply that reason to the present case the real Executor is not prejudiced by the fact that the Administrator General, acting under a strong colour of right, has, as substituted Executor, given time to the Defendants.

Coming now to the local law there is, it would seem, absolutely nothing bearing upon the question as to the rights, duties and liabilities of a person in the position of an Executor of his own wrong, and, so far as I am aware, the question has never before arisen in our Courts. As we have neither local law, nor local decision nor the civil law to guide us, and as the English law does not

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apply to Executors under Roman Dutch law we must fall back upon first principles and endeavour to ascertain what is right and just under the circumstances.

In delivering the judgment in the appeal of *Farnum v. the Administrator General*, Lord Watson says "This Board had occasion in the "recent case of *De Montfort v. Brouers* to explain that, according to "Roman-Dutch law, the Executors of a testament are in reality "procurators, and that their powers, in relation to the estate falling to "the testator's heirs, are merely those of management. That such is "the law of British Guiana appears from a judgment delivered in the "year 1861, by a former Chief Justice (Arundell) of the Colony "which is printed in the papers before us. He states the law of the "Colony to be that the authority of the Executors is derived from the "will of the testator, which governs and defines the limits of that au- "thority and in the case before him he held, in respect of the inten- "tion of the testator, as appearing from the text of his will, that the "appointment of Executor was more of the nature of an Attorney or "Administrator than of a pure Executorship. In the present case the "testator has not left in doubt the nature of the office which he meant "to confer upon the persons named in clause 13 of the will. He spe- "cially constitutes them 'Administrators' of the property bequeathed "to the residuary legatees, and gives them all the powers by law or "custom incident to that office."

The Judgment referred to (Executor *Mackintosh v. Stuart*), was not the Chief Justice's judgment, but a judgment of the Court (Ar- rindell, C. J., and Beete, J.), and the words used are "than of a pure "Executorship such as is referred to in *Vander Linden*" (Henry's trans, p. 148). In that case, no doubt, by the wording of the will, the persons named as Executors were rather Administrators than pure Executors, but the very fact that the Court contrasted the offices of Administrators and Executors shows that, as the Court understood the law, there was a difference between the two offices.

The Plaintiff's Counsel laid very great stress upon this passage in the judgment of the Judicial Committee, as determining that Execu- tors under the Roman-Dutch

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Law are mere procurators, and he referred us in general terms to various authorities having reference to the powers of procurators and mandatories. So far as appears from the report of *De Montfort v. Brouers* (13 App. Cas. 154) the Judicial Committee so far as regards the capacities and powers of Executors had before them the Thes. 323 of *Van der Keesel* only, a text writer of undoubted and great authority. He does not say that Executors are procurators but merely *quasi procurators*. He was simply commenting upon a particular passage in *Grotius*. He was not professing to deal with the functions as a whole of Executors as such, nor was he in any way dealing with the distinction, which in his time existed, as it undoubtedly does today, between the offices of Executor, of Administrator, and of Guardian. By clause 13 of his Will the Testator, in so many words states his intention to be, to confer upon each of the persons he names not only the office of Administrator, but the offices of Executor and Guardian also. The three offices are quite distinct but they may all three be conferred upon one person. An Executor, an Administrator and a Guardian may each in turn be concerned in giving effect to the provisions of their Testator's Will, but that does not make an Executor or a Guardian an Administrator. A person named as Guardian, may, by the Will, have the administration of the property conferred upon him and so may the person named as Executor; but while, in the former case, the two capacities of Guardian and Administrator may co-exist, in the latter, the Administrator comes into being only when the Executor ceases to exist. Administrators are those who are charged with the administration of property after the office of Executor is determined. (*Lyb. Red. Vert. c. 30, s. 1; Kerst. Holl. Voogd. and Ex. 19; Herbert Fragt. p.p. 47 and 85*). In *Lyb. Red. Vert. c. 30, s. 1*, we are told that the duty of an Executor is to bring an unliquidated estate to a state of balance, by paying debts, collecting claims, redeeming capital, selling property and, in general, by doing all things which may tend to the bringing into order and balancing the estate. That being accomplished the executorship ceases and determines (*Herbert*

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Fragt. 25), and according to *Van der Linden*, (Inst. 148, Henrys' trans.) the duty of the Executors is then, to make out a clear statement of account and to give over the residue of the estate to the heir or to those who are entitled to take charge of it who are called Administrators. In *Tent. Not. man*, the duty of Executors at the Cape of Good Hope is thus stated: "The Executors having paid the major heirs and legatees, the Testamentary Executor must pay to the Tutor or Administrator the portions of the minor heirs and legatees, or, as the offices are usually conjoined, he holds those portions in the latter capacity." (p. 128, Ed. 5. 1887.)

It is clear that the Testator, in the present case, meant to confer upon the persons named in his Will the three several offices of Executor, Administrator and Guardian to come into operation as the occasion arose and not the office of Administrator only. For that matter, the petitioner Farnum prayed the Judicial Committee to declare him to be the true and lawful Executor, Guardian and Administrator.

As Black's estate had not been brought to a state of liquidation and balance when this new note giving time was taken by the Administrator General, he must have acted when taking it in the capacity of substituted Executor. It may help us to arrive at a right decision as to the effect of his action if we enquire what would have been the effect of such action if it had been taken by either of the original Executors, Barr and Moore, while they were acting.

Kersteman says that an Executor "is one to whom another by his will commits the execution of his last Will and Testament and for that purpose confers on him authority to inventorize his property or estate immediately after his death and to bring it to a state of liquidation." (*Holl. Voogd and Ex.* 16, 16; *Herbert Fragt.* 1); and it is laid down (1 *Lyb Red. Vertoog c* 30, s. 42) that he "derives his authority from the Will of the Testator, which governs and defines the limits of that authority." It is upon this statement in *Lybreghts* that the passage cited by the Judicial Committee from the judgment of this Court delivered by Arrindell, C.J. in 1861, in

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Mackintosh's case is based, as is expressly stated in the judgment itself.

Black, by his Will, gives his Executors, &c, jointly and severally, "all such ample power and authority as are granted by law or custom "to Executors, * * and to Guardians and Administrators of funds and "properties belonging to heirs and residuary legatees, especially the "right to sell, convey, transport and to make over immovable, move- "able, and other property, bank shares, insurance scrip, debts, secure- "ties of all kinds, mortgages or otherwise." This note on demand for \$50,000, came into the possession of the Executors, and it became evident that the makers of the note, the Defendants here, could not pay. It became evident, also, that if the makers were pressed they must become insolvent. In that case, it is certain that the Executors would have recovered but a small percentage of the \$50,000. Under these circumstances, the Executors were, as we have seen disposed to accept the Defendants' proposals, to give a new note payable by instalments.

I take it to be established, indeed the Plaintiff's Counsel admitted at the bar, that the Testator never meant that the Defendants should be called upon suddenly to pay this note, though nominally payable on demand. The Defendants, with another partner, had carried on a very large business and by misfortune had lost practically everything. The Testator had for many years, been on the most friendly terms with the Defendant, Weber, and he gave the Defendants cheques amounting to \$50,000 to enable them to start a new business, telling them to give him such acknowledgment therefor as best suited them selves, adding that, unless unforeseen misfortunes compelled him to call in the money, they could take their own time for payment. They gave the note on demand for \$50,000.

The real question here being whether the Administrator General, acting as substituted Executor, was justified in taking the new note giving time, these particulars came properly before the Court.

Having no authority to guide them, what were the Executors to do? They had the amplest powers. One

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thing is clear, that Executors are not to throw good money after bad by suing men of straw. The Defendants, the makers of the note for \$50,000, payable on demand, had some means, but, if sued, they would, as we have seen, have had to go into the Insolvency Court. That would have meant a certain and a very heavy loss to the Testator's estate, The Executors, therefore, had to determine whether by giving time they might not probably recover the whole or a much larger proportion of the amount due. If, on a full consideration of the whole circumstances, the Executors came to the conclusion honestly and fairly that by giving time they would be likely to recover the whole or a much larger proportion of the sum due than they could get by suing at once, it would in my opinion, have been their bounden duty to give time. If, therefore, Moore, as Executor, had, in the exercise of his discretion, taken a new note, in terms such as the one taken by the Administrator General, I do not think the transaction could have been successfully impeached; especially when the terms on which the money was originally lent to the Defendants by Black are taken into account.

It is true that, whether they are acting under the English or the Roman Dutch Law, Executors, Administrators and Guardians are not justified in allowing moneys of their testator to remain on personal security, *if they are able to get in the moneys!* If they are not it is simply idle to talk of the wrong done to the heirs by their being debarred for five years from recovering moneys which originally were payable on demand. Even under the English Law "Executors have a "fair discretion whether they will press a debtor for payment and will "not be held liable for wilful neglect or default if they have exercised "their discretion honestly and fairly in giving time to a debtor, although loss may result from the delay." (*Wms*, citing *Re Owens*, 47 L.T., N.S., 61). I know of nothing in the Roman-Dutch Law hindering an Executor from doing the same under the like circumstances. It would, indeed, be a strange thing if an Executor, as having no discretion, were bound to rush into law suits to recover claims doubtful or not, no matter

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at what cost to his Testator's estate! To state is to show the absurdity of such a proposition. It follows of necessity that an Executor may give time. That being so—what time? It is evident that the time must vary with the circumstances of each case and, if an Executor has exercised that discretion fairly and honestly, it is difficult to see how the Court can interfere.

A great deal was said by the Plaintiff's Counsel about the Administrator General as substituted Executor, having changed the "security" by taking a new note payable by instalments for one payable on demand. But Lord Chancellor Hardwicke, (in *Ryder v. Bickerton*), pointed out that "A promissory note is evidence of a debt; but it cannot be considered as a security for money." (See note to *Walker v. Symonds*, 3 Swans. 81). The note here giving time is as good evidence of the debt as the one on demand.

As I have stated we are in this matter without guidance either as regards local law, local decision, or civil law. In our endeavour to arrive at a just *ratio decidendi*, we must, for the reasons I have shown, discard altogether the narrow rule which has been adopted in the English Courts with respect to Executors *de son tort*. If we are to go to the English Judges for guidance we shall be more likely to do what is just and right if we adopt the broader rule deducible from the dicta of the English Judges—after discarding the limitation founded upon *Graysbrook v. Fox*, which has no application to Executors under the Roman Dutch Law—that all acts which a real Executor may lawfully do are valid when done by a person in the position of an Executor of his own wrong acting honestly and fairly.

Apart from these dicta, it can be deduced from the judgment of the Judicial Committee on Farnum's petition that the action of the Administrator General in taking this new note ought to be upheld. Their Lordships have held that the Act of substitution is null and void. Upon that it is said that the act of the Administrator General in taking the new note giving time is also void, because, never having been really substituted Executor, he had no power to enter into this arrange-

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ment. The Judicial Committee have, however, decided that the Administrator General, being an illegally substituted Executor is *entitled* to treat certain of his acts as valid, although he had no legal right to do them. That decision can have proceeded only upon the ground that the Administrator General, having, in law, no right to act, did, in fact, act under a colour of right. Once it is admitted that the Administrator General, as an illegally substituted Executor, could do any one act which must be treated as valid, the contention that this particular act, the accepting of the new note giving time, must necessarily be bad, because the substitution of the Administrator General was void, fails in principle. Either all his acts must, for that reason, be treated as bad or none must necessarily be so treated. The Plaintiff's Counsel did not pretend that all the acts of the Administrator General, as substituted Executor, were void. He admitted that the Administrator General in that capacity might not only properly make payments but also receive rents, &c, belonging to the estate and, by consequence, give receipts binding upon the real Executor.

The Administrator General is a public official and could only, as the Solicitor General pointed out, be put in motion under the provisions of his Ordinance. It is not questioned that he honestly believed the Act of substitution to be good. So believing, he was bound to proceed under that Act until it was declared void in due course of law. Though it turned out that, in point of law, he had no right to act as substituted Executor, yet, in point of fact, he had a strong colour of right so to act. It must, as already stated, have been on this ground, that the Judicial Committee declared him to be entitled to deduct all outlays necessarily and properly incurred. He was not a mere trespasser. Nor was he a vicious or simple intermeddler like an Executor *de son tort*. He was a public officer, acting in pursuance of a formal act of substitution which he had very good reason, seeing by whom the execution of the act was advised, for believing to be good.

Hence, so believing, he necessarily and properly expended moneys of the estate in payment of debts, &c,

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hence, also, he was, as the Judicial Committee say, entitled to charge those outlays against the estate; hence, also, he necessarily and properly received moneys and gave receipts for and on behalf of the estate; hence, also, he as substituted Executor, necessarily and properly did all other acts, as occasion arose, which he would necessarily and properly have had to do if he had been the rightful Executor. It seems, indeed, to be clear that under the circumstances existing in this case any rightful Executor must necessarily and properly have done some such thing as that which Moore, as the rightful Executor, proposed to do and as that which the Administrator General supposing himself to be the rightfully substituted Executor, actually did. I think, therefore, that the action of the Administrator General should be upheld by the Court.

That the action taken appears to have been in fact beneficial to the Estate does not influence my decision, as I am of opinion that all acts such as might lawfully be done by a rightful Executor, whether the result be gain or loss, which are honestly and fairly done by a person who has reason to believe that he is in fact a duly substituted Executor should be held good if only to avoid the endless confusion that must otherwise arise. Suppose *e.g.* that a person acting as substituted Executor has liquidated and divided an estate, and it then turns out that the Act of Substitution under which he has acted is void. Are all his transactions to be declared void also, except those only which, according to the narrow English rule he was compellable to do—based upon a circumstance which, as regards Executors in this Colony, does not exist!

The fact the Administrator General, before he accepted the new note giving time, had notice from Farnum and Culpeper that the validity of the Act of Substitution was disputed has caused me a good deal of consideration. It is naturally said that after receiving such a notice the Administrator General should have held his hand. If he had he might have acted more cautiously, but the question is whether the validity of the act done is affected by the fact of the notice. I do not think so. If a real

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Executor had had such a notice that his title was disputed and still went on acting, the validity of his acts would in no way depend upon the propriety of his conduct in acting after such notice. If his acts, as acts, were valid, the notice could not affect their validity. If his acts, as acts, were not valid, that would not be by reason of the notice. The same reasoning applies to the acts, as acts, of the Administrator General, as substituted Executor doing under a strong colour of right what a rightful Executor might lawfully do.

I am of opinion that the Plaintiff is not entitled to succeed, and that there should be an absolution of the instance with costs.

Attorney for Plaintiff, *J. A. G. C. Belmonte.*

Attorney for Defendants, *G. W. Hinds.*

ANDERSON v. PHILLIPS.—(BAIL COURT.)

3 January, 1891

Motion to vacate order—Practice—Res judicata—Stay of proceedings.

A motion will not lie to vacate an order to furnish security for costs. Party must give security before he applies for stay of proceedings.

Defendant obtained an order on Plaintiff (she being absent from the colony but represented by an Attorney) for security for costs. Plaintiff now sought a rescision.

Phillips for self, objects preliminary—Plaintiff has no *locus standi*. I got order for security under 26 of 1855.

Dr. Belmonte for Plaintiff—On the logic of the Ordinance we are entitled.

KIRKE, A.J.—I refuse to hear the motion, and grant costs to Defendant.

5 February, 1891

Dr. Belmonte moves subsequently for stay of proceedings.

Dargan for Defendant pleads *res judicata*.

Dr. Belmonte—First motion was to vacate the order calling on us to give security for costs; this motion is under sections 33 and 74, for an order on Plaintiff to stay proceedings.

The Court calls on parties to argue whether *ex facie* the order moved for was reasonable and could be entertained.

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Belmonte.—There was a motion before Mr. KIRKE which had been dismissed without the merits being entered into. It seemed to have been held that in applications for security for costs Plaintiff was bound at once to comply with the notice given to him, and that if the security was insufficient, then there could be interference by the Judge—if security is not given there must be absolution of the instance. That was an anomaly quite unknown in the procedure of the Roman Dutch law. Under Section 74 we have a right to ask for a stay of the proceedings, and the Judge has more than a discretionary power, he has a right to consider the reasons given by the mover to have the proceedings stayed. *Edinburgh & Leith Railway Co. v. Dawson; Dowling* 7. p. 573. A British subject could not be called before a British Court to give security for costs, *Voet, lib 4, tit. 8. n. 6. Vander Linden* Bk. 2. We have attachable property in the colony. The 31st section states that security for costs should be claimed if the party was “out of the colony,” i.e., out of the jurisdiction of the colony; sec. 31. M.P. *Vander Linden* 58. *Vander Keesal. Thes: 30.*

Dargan.—Under the 31st section of the Manner of Procedure Ordinance Plaintiff was bound, after citation had been served on her and within a specified time after to give the security. Defendant complied with the law by serving notice on the Plaintiff’s Attorney demanding security for costs, and subsequently filed his answer. The Plaintiff refused to comply with the notice and a motion had previously been brought before Mr. Justice KIRKE, who dismissed it. That motion was similar in its subject matter to the one into which the Court is now enquiring. Plaintiff is prevented from proceeding until she paid costs in the motion originally dismissed. The Plaintiff not having given security for costs as per notice, is prohibited from proceeding with her action. The notice was not for an enlargement of time as provided under Sec. 74, but to stay proceedings until it had been decided whether they should comply with the provisions of the 31st section of the Ordinance. Cited *Willems v. Administrator General.*

7 February, 1891

SHERIFF, J.—The learned Counsel for the Defendant

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has been heard in pursuance of leave reserved with the result that he has satisfied me that the word "plea" employed by him in his notice of motion was used in the sense of objection, and though I am unable to admit that "plea" and "objection" are synonymous expressions yet if it had been necessary I should have allowed an amendment. This being the case I am again brought face to face with the objection that the matter has been practically, though in a different form already judicially disposed of by KIRKE, acting Judge. On reference to the Minute Book of the Clerk of Court the following minute appears: "Mr. Phillips takes objection to the motion. No *locus standi*, no right "to make the motion under any Ordinance whatever. Refers to Man-
"ner of Proceeding Ordinance. I have further objections if Your Hon-
"our rules against me on this objection. Dr. Belmonte is heard in an-
"swer on the objection. Refers to *Willems v. the Administrator Gen-
"eral*. Mr. Phillips replies and ask for costs. Motion rejected with
"costs of to-day and Monday."

I am satisfied that the sections of the Ordinance must have been, and indeed it was not controverted were the 33rd and 34th. What KIRKE, acting Judge, did decide then was that in the face of those two sections the Defendant had no *locus standi*. It may well be that was so in the motion then made but does it necessarily follow that that decision is to be regarded as applicable to all motions made by the Defendant.—Strictly speaking I think not, but the same objection which was taken and successfully on the former motion is taken now and I too am of opinion that it must prevail. The learned Doctor attacked the Ordinance referred to with all his wonted vigour, but Judges are not law-makers, they are merely bound to construe and to give effect to the law as they find it. No doubt a Judge would hesitate before giving effect to a law which would involve an absurdity or which might work some great irrevocable injury. But these are extreme cases of rare occurrence and the present case falls within the well recognised canon of construction to be placed on the language employed by the Legislature, viz: according to the ordinary and primary

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signification of the words used. I have no right to enter into speculative theories as to the reason which prompted the makers of the Ordinance to enact a law dissimilar in some respects both from the Roman Dutch Law as well as the Law of England in the like case. It is a trite proposition to say that the law of the Colony is what is known as the Roman Dutch Law save and except where the same has been abrogated or partially modified by local enactment. No doubt this is so, so far as the *law* is concerned but is not so with respect to the mere mode of procedure which is to be looked for chiefly in the Ordinance which has evoked such strong animadversion from the learned Counsel for the defence. Sections 32 and 33 are obligatory and no doubt arise as to what was intended. There is no saving clause, no qualification and no exemption—compliance, a literal compliance with the very letter of these sections is absolutely necessary, and while admitting that both according to the Roman Dutch and also the English Law of practice there are circumstances disclosed in this present case which might and in all probability would have absolved the Plaintiff from the necessity of giving security for costs, yet such is our local law that no such relief is obtainable in our Courts—not at any rate until the sections have been recognised and complied with and even then the mover would be wise not to be too sanguine as to the success of his motion. Holding this opinion the motion for a stay of proceedings must be refused with costs.

Attorney for Plaintiff, *J. A. G. C. Belmonte.*

Attorney for Defendant, *W. S. Cameron.*

PORTER v. PHILLIPS, EXECUTOR OF ELMS.

2 March, 1891.

Amendment of claim—Liability of Executors and Guardians to account.

Plaintiff amended his Claim and Demand after exception had been taken by striking from it the plaint for security.

An Executor who is also Guardian, is liable to his co-Executor for accounts.

Suit by an Executor against co-Executor for account.

Dargan for Defendant:—We are not Executor only but

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we are Guardian along with Plaintiff, and therefore she cannot sue us to render an account, as she is liable along with us to account. Her only remedy is to remove us by petition. We are only liable to an account when the minor becomes of age. She also has possession of part of the estate.

ATKINSON, J.—What authority have you for saying a Guardian cannot demand an account from another?

Dargan—None; but there is none the other way.

Kingdon, Q.C., for Plaintiff:—Defendant is bound to account. We may also be called upon to furnish account.

Curia—CHALMERS, C.J., ATKINSON, J., SHERIFF, J.:—We are of opinion that accounts should be rendered on both sides.

(Evidence was given as to who should bear the costs of suit.)

Attorney for Plaintiff, *F. Abraham*.

Attorney for Defendant, *W. S. Cameron*.

EX PARTE, KRAMER.—(BAIL COURT.)

3 April, 1891.

Arrest suspectus de fuga—Release.

Although the Arrest Ordinance 13 of 1866 allows a creditor to arrest *suspectus de fuga*, Ordinance 21 of 1884 prohibits the granting of a *fiat apprehensio* against the debtor.

Dr. Belmonte for mover:—Debtor was arrested on a warrant *suspectus de fuga* and lodged in gaol. The Plaintiff proceeded to obtain *fiat* after having got sentence and was refused under Ordinance 21 of 1884, and we now apply for release.

Hutson for Plaintiffs, Smith Bros. & Co.:—Although the law allows us to lodge the debtor in gaol and go to expense in obtaining *fiat*, we cannot get the *fiat apprehensio* of the Chief Justice, and we cannot further keep debtor in custody.

ATKINSON, J.:—Having read section 3 of the Ordinance referred to, I must discharge the debtor with costs.

Attorney for Plaintiffs, *J. B. Woolford*.

Attorney for Defendant (Mover), *J. A. G. C. Belmonte*.

THE ADMINISTRATOR GENERAL (GUARDIAN OF MINORS
VIERA) v. JOSE MARQUES, (EXECUTOR OF MANOEL VIERA.)

27 May, 1891.

The Executor of an estate cannot charge heir with legal expenses in resisting Claim by heirs for handing over estate.

Curia—CHALMERS, C.J., ATKINSON & SHERIFF, J.J.:—The Plaintiff sued for an Inventory and account of the estate of Manoel Viera as taken possession of by Defendant, the Executor of Manoel Viera on 8th March 1883, and an account of Defendant's intromissions with said estate, and for payment and delivery of the money and property found in the accounting to be due to Plaintiff in his capacity of Guardian of the minors Viera. The case came before the Court on 9th June 1890, when it appeared just that the Defendant should account, and accordingly the usual order for an Inventory and account was made.

Inventory and account have been rendered, and debate has taken place before the Accountant, both parties being represented by their legal advisers. The Accountant has reported and the matter has been left for the judgment of the Court upon the Accountant's report without any objection to any of his findings. The Accountant has disallowed certain of the items of charge, vizt.:—1st —a sum of \$100, and then a further sum of \$500 claimed by Defendant as paid by him to Boulier his co-Executor for the use of the heirs. 2nd—A sum of \$165 paid by Defendant for legal aid in resisting the claim of the Plaintiff to an account and which there is no reason should fall on the estate.

The Defendant has also been charged in addition to the money in the Inventory with certain sums due by him for interest amounting together to \$337.63; and he has been credited with small sums paid to Boulier for the heirs admitted by her to have been received, and also a sum of \$206.96 paid to the Administrator General, but not charged in Defendant's intromissions. He has been credited also with ten per cent., commission on the

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amounts received by him, acknowledged in his account less \$65 of commission on the assumed value of property not realized by him. The result is that the Defendant is indebted to the Testator's estate in the sum of \$675.59, for which there will be sentence. The Plaintiff is also entitled to the two deposit receipts with the moneys and interests due thereon, the one dated 19th October 1885, for \$800 deposited in the British Guiana Bank by Jose Marques and Boulier, Executor and Executrix of the will of Viera, the other dated 13th November 1889, for \$748, deposited with the British Guiana Bank by Jose Marques as an individual. The sentence will include a direction to the Bank to pay the sum due on the latter receipt to the Plaintiff upon due acquittance by him. It appears that there is a life interest for the support of Boulier payable out of the estate which will need to be provided for by the Plaintiff.

Attorney for Plaintiff, *J. A. Murdoch.*

Attorney for Defendant, *W. S. Cameron.*

LA PENITENCE WOOD WORKING CO. v. FARNUM, ET AL.—
(BAIL COURT.)

6 June, 1891.

Summary Proceeding—Granting of time.

The Judge in summary proceedings has discretion to grant time.

Plaintiffs sued Defendants on a promissory note on summary proceeding. One of the Defendants on facts laid in affidavit moved for time to pay.

Kingdon, Q.C., for Plaintiffs.—It is against the principle and practice of the proceedings in summary execution to grant time.

Dargan for mover.—Judge has discretion.

13 June, 1891

SHERIFF, J.—It was urged that in these proceedings no time is granted, but I am satisfied from the Records that time has been granted on the merits of each case. The Judge has a discretionary power to grant time. In the present case an affidavit has been filed, and looking at the affidavit I find that the note sued on was given for materials for building a house, and I must therefore refuse the application for time.

Attorney for Plaintiffs, *G. W. Hinds*.

DE FREITAS v. DOS SANTOS, ET AL.

24 June, 1891.

Insolvency of party to suit—Power of Assignee.

When one of two Defendants become insolvent, the Assignee should be made a party to the suit if he be so advised.

On *Hutson* for Plaintiff proceeding to argue exceptions the Court calls attention to the fact that Da Costa, one of the Defendants, had become insolvent since action.

Hutson applies for leave to substitute the Administrator General in his place.

Kingdon Q.C. for Administrator General leaves it to the Court to say whether he ought to be made a party.

The Court directs notification to the Administrator General of change of Rubric, and that notice of motion for leave to proceed under s. 9 of Insolvency Ordinance, 1884, should be served on him.

Consent of Administrator General laid over as to continuance of suit.

Attorney for Plaintiff, *J. A. Murdoch.*

Attorney for Defendants, *G. W. Hinds.*

PENDLETON v. PENDLETON.

29 June, 1891.

Change of Rubric—Practice.

Parties must apply for change of Rubric on motion before the day of hearing.

Hendricks for Plaintiff moves for name of W. E. Downer to be substituted for that of the Rev. F. C. Glasgow, who had left the colony.

Dargan for Defendant:—I object. Copy of the Petition was served on us on 27th inst. at 10.30, without a date. The order was dated 19th June, so that the Plaintiff had ample time to move for the change of the Rubric.

CHALMERS, C.J.:—The motion is one which the Court is not inclined to entertain. We strongly disapprove of

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the laxity on the part of Counsel in not having such matters put right before coming to Court on the day fixed for hearing the case.

ATKINSON, J., SHERIFF, J.:—Concurrens.

Dargan: I ask that the motion be dismissed with costs.

Hendricks:—There is no motion before the Court.

Costs granted.

Attorney for Plaintiff, *J. A. Murdoch*.

Attorney for Defendant, *G. W. Kinds*

PATERSON v. MANSFIELD (DEFENDANT) AND SPROSTON
DOCK & FOUNDRY COY., GARNISHES.

2 May, 1891.

Garnishment—Right of stranger to be heard—Jurisdiction—Examination of Witness.

A party not on the proceedings in garnishment cannot be heard.
Having admitted debt, Garnishee cannot be examined.

Garnishment does not lie for an amount within the jurisdiction of the Inferior Court.

Plaintiff having sued Defendant in the Inferior Court, attached an admitted debt due by Garnishees. J. Paterson claimed to be the true owner of goods sold.

Dargan for J. Paterson:—We are the true owners of the timber sold to the Garnishees.

Kingdon Q.C. for Paterson (Plaintiff).—I object to any party save those on the record being heard

SHERIFF, J.—I cannot hear you, Mr. Dargan, you have your legal remedy. I will hear you as to Mansfield.

Kingdon Q.C. for Garnishees.—We admit the debt and will pay the money into the Registry of Court to abide the result.

Dargan.—The debt garnished is within the jurisdiction of the Inferior Court, and this Court has no jurisdiction to hear same. I also propose to examine the Garnishees.

SHERIFF, J.—Having admitted the debt and deposited the money in the Registry of Court they cannot be examined.

Kingdon, Q.C.—We also admit that we bought the timber from the Defendant, and we are prepared to pay

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to the rightful owners if it turns out that Defendant is not the rightful owner.

Dargan argues that the Court has no jurisdiction. SHERIFF, J. refers case to Supreme Court as to whether the Court had jurisdiction to grant garnishment in Inferior Court matters.

Dargan on question of jurisdiction.—The affidavit is insufficient; it is entitled in the Inferior Court, and the Judge was moved in the Bail Court. It should be entitled in the Court in which the motion is made. *Chitty's Archbold*, 2nd Ed. p. 160; *Wigden v. Birt*; 1, *Dow*, N.S. 93; *Ackroyd v. Read*, 5 M. & W. 545. There is no address of the deponent. *Chitty's Archbold* 706. The deponent is not the same person as in the Rubric. *C. Archbold*, 3rd Ed., 706. Affidavit does not show that Defendant had no property. Secs. 115, 116, 26/1855. *Davis County Court*, 466. County Courts had no jurisdiction to attach debts until Order in Council 1867. Inferior Court has no jurisdiction to grant garnishment. Supreme Court has no jurisdiction when affidavit says deponent is informed and verily believes. *Quartz Hill Con. Gold Mining Co. v. Beall*; 20, Ch. Div., 501; *Gillot v. Endean*; 9, *Chan*, D. 254. Grounds of belief should be stated. 20 C.D., 508.

Kingdon, Q.C., for Plaintiff:—Plaintiff is right in heading affidavit as in Inferior Civil Court as the cause of action is in that Court. *Archbold*, Ed., 1879, Vol. 1, p. 666. We follow by analogy the heading in *de bene esse* examinations of matters in Inferior Court. The English procedure as to the address of the deponent does not apply here. The affidavit is by Mr. Dare, who is Plaintiff as Executor of Paterson. As to the point “that Plaintiff verily believes” it is one on which the Judge granting the order is to be satisfied. Under S. 115 the Judge has wide powers. It is discretionary as to examination. The application is *ex parte*. The Judge had jurisdiction to make the order. S.S. 115 and 116 are wide in their terms, and the law is silent as to garnishments in Supreme Courts, therefore Manner of Procedure applies. The point was raised in *Edoo v. Smith*, 17th May 1873, but not decided.

Dargan in reply.

1 July, 1891.

CHALMERS, C.J.—The principal question discussed in

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this reference is as to the competency of proceeding by way of garnishment in respect of a claim sued for in the Inferior Court of Civil Justice. It appears that Paterson and other Plaintiffs in an action in that Court against Mansfield garnished upon a sum of money which was due to the latter by the La Penitence Wood Working Company. The garnishment was opposed by Mansfield and was maintained by certain of the Plaintiffs.

The matter was argued on both sides on the footing that the proceedings by way of garnishment, as known in this colony, are the outcome of legislation, it not being contended that the common law confers any right on creditors to obtain in this way the benefit of debts due to their debtors. Further it was conceded that there are no enactments directly relating to the Inferior Civil Court which authorize proceedings in that Court by garnishment. Section 13 of the Ordinance 8 of 1872 enacts that the practice of the Supreme Court is to be applied in the Inferior Civil Court where there is no express provision. It is not contended however that this applies to garnishment, and it seems clear from the last clause of the enactment, if from nothing else, that it could not be so intended. That clause makes the application of the Supreme Court practice discretionary in the Judge. It is not compatible with the nature of garnishment that it should be available or not as matter of discretion. A Plaintiff either has right to resort to it or he has no such right. Taking account further of the well known principle that no jurisdiction is assumed to be in an Inferior Court except what is expressly conferred on it, it seems clear that the special procedure by garnishment is not competent under the existing law in virtue of any jurisdiction existing in the Inferior Civil Court. But it is said that apart from any jurisdiction in the Inferior Court the words of sections 115 and 116 of 26 of 1855 (The Manner of Proceeding Ordinance) are so wide that they include the case of a creditor who has commenced any action against his debtor in the Inferior Court equally as if he had done it in the Supreme Court, and that he may come before a Judge exercising the powers of the Supreme Court and carry out a process of

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garnishment. The words of section 115, “any creditor who has commenced an action against his debtor” taken in themselves are no doubt wide enough, but in examining into the meaning of these words we have to bear in mind the principle, that words and phrases must be construed *secundum subjectam materiam*; they must be taken in the sense which harmonises with the subject matter, and however wide an expression may be in itself its meaning is to be looked for in connection with the purposes of the enactment in which it is found. Now the entire scope of the Ordinance 26 of 1855 as appears from its title, preamble and the tenor of the substantive enactments, is to provide an amended procedure in the Supreme Courts, not in other Courts. It is true that some provisions are declared to apply in the Inferior Civil Court but that is done in express terms, and the fact of such express applications being made moreover shows (if it were necessary) that the enactments are not applicable of their own force. I may also point out that if the words of section 115 were held to operate as concerning debts sued for in the Inferior Civil Court there is no principle by which they could be restrained so as not to apply also where the action had been brought in a Magistrate’s Court. We should then arrive at the anomalous result that whilst the Legislature has made the jurisdiction of the Magistrates strictly local with regard to debts falling within their jurisdiction, there would be engrafted on the local jurisdiction a general one which would enable every petty creditor throughout the colony to bring his debtor before a Judge of the Supreme Court in Georgetown. That could never be the intention of the Legislature. I am thus of opinion that these garnishment proceedings as the law stands are not competent.

ATKINSON & SHERIFF, J.J., concur.

Attorney for Plaintiff, *G. W. Hinds*.

Attorney for Defendant, *J. A. Murdoch*.

MILLER v. CRAIGEN.

8 June, 1891.

Cause List—Discretion of Court—Right to place case for hearing.

The Court cannot *per se* put a case on the list, but has an inherent right to place it on the hearing list.

Pleadings were filed and concluded at 10 o'clock of the morning of 25th May. The Registrar had the list prepared on 23rd May for issue on 25th, fourteen days before the Session.

Dargan for Plaintiff.—We ask for case to be put on list. Having filed on 23rd May we were in time, as that day was fourteen days before the Session.

Hutson.—We do not consent.

Curia: CHALMERS, C.J., ATKINSON J., SHERIFF J.:—The Registrar had to prepare the list and have it ready fourteen days before the Session, and the list having actually been printed on 23rd May, we cannot place the case upon the Registrar's list except by consent, but we reserve the question as to putting it for hearing as by special leave.

1 July, 1891.

CHALMERS C.J., ATKINSON J., SHERIFF J.:—Although the Registrar cannot place a case on the list after it had been completed, yet as the Court has an inherent right to hear and determine a case, so it has a right to place a case on the list, and we place this case on the Cause-list but postponed to all other Causes already standing thereon.

ADMINISTRATOR GENERAL, REPRESENTING DA COSTA, v.
WILLEMS, ET AL.

13 July, 1891

Exceptions—Demurrer—Liability of Partners—Misjoinder of Parties.

Exception *inept et obscurus libellus* must show grounds.

Semble. Plaintiff cannot argue exceptions not proposed in answer.

Semble. Misjoinder of Parties not matter for exception.

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Semble, Where the parties do not raise exception on a point of law the Court will not allow them to argue it, but if the point arises on the case, the Court will take notice of the same. Where there is a misjoinder of Defendants one may be absolved.

Defendants excepted *inept et obscurus libellus* without averring grounds for such exception. They also pleaded *nos competit hæc actio*. Plaintiff relying on case of *Brown v. Dalgetty*, L.R., Brit. Guiana, p. 62, demurred.

Kingdon, Q.C., for Plaintiff on Demurrer. The exception of *inept* should state the grounds. 26/55 ss. 34, 37. They conclude to a rejection; it ought to be an absolution.

Dr. Belmonte for Defendants.—We need not allege grounds for exception *nos competit hæc actio*.

Court, per CHALMERS, C.J.—The first ground of exception that “Claim and demand does not constitute a cause of action” is as far as it goes a good ground for exception, and as regards the second ground of the exceptions, from the words “do not show in manner and form” and defendant “avers in manner and form” to the words “in respect of the Claim and demand” that the Defendants should have set out the grounds of their exception and not having so set out the grounds of the exception sufficient to show a cause for rejection, they cannot argue such, but so far as the first ground of exception goes the Court overrules the demurrer.

Dr. Belmonte.—The Administrator General has no right under the Insolvency Ordinance 1884 to institute an action as Administrator General.

Court, per CHALMERS, C.J.—We cannot hear you as this exception is not taken in your Answer or within the exceptions raised, but if such point arises on the proceedings we will of ourselves notice it.

Dr. Belmonte on liability of partners.—Action is for wrongful seizure of a property without title. Trespass is a personal act and cannot be committed by a firm. *Van der Kesseel*, Th, 701, *Grotius* 384 par. VII. One partner could not bind the other *in tort* without his concurrence. Add. on Torts 98. We are sued as a firm and it is alleged that one partner committed a tort. *Lindley* on Part., p. 149, 485. If firm is liable, firm must be sued along with individuals, 3 *Dowl Rep*, *Arbuckle v. Taylor* 160.

ADMINISTRATOR GENERAL v. WILLEMS, ET AL

ATKINSON, J.—What about 26/55 s. 26.

Dr. Belmonte.—They can be sued as a firm I admit, but here they have sued us as individuals. They should have averred that the partners jointly did the act. 4 B. & C. 223, *Morencie v. Hargreaves*.

Court, per CHALMERS, C.J.—The Plaintiff has alleged that the Defendants who in terms of the rubric are “P. J. Willems and J. P. Farnum carrying on business in copartnership in this Colony under “the name style and firm of Farnum & Co.” did certain wrongful and unlawful acts by which he has sustained loss and injury. That is the substance of the cause of action as stated. If the cause of action so stated is established by evidence it appears clear that the Plaintiff would be entitled to compensation for the loss and injury sustained and consequently the claim and demand taken broadly according to its terms discloses a *primâ facie* right of action against the Defendants. It appears to us further that any decision in the abstract at present as to the liabilities of partners would be unnecessary for deciding the exception and would be premature.

Dr. Belmonte on exception of misjoinder.—They have sued two partners, only one on their showing is liable. There is clearly a misjoinder.

Kingdon, Q.C.—Misjoinder does not matter. One Defendant can be absolved, the other condemned. *Ross v. Little, et al.* S.C. 14 July, 1891.

Court, CHALMERS, C.J., ATKINSON & SHERIFF, J.J.:—In *Ross v. Little & Co.*, the effect of absolving one of several partners was then considered. It was a suit for breach by a firm, of a contract. The Plaintiff treated his claim as a partnership liability against three persons in virtue of their being partners of the firm which committed the breach. Sproston, one of the partners sued, had entered the firm subsequently to the alleged breach, and there had been no assumption by the new firm of the old liabilities of the previous firm. There was an exception of misjoinder as to Sproston, and also one of *obscurus libellus*, both of which the Court held to be established. There were some other exceptions which were not sustained. This opinion was intimated on 21st July

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1883. The Court did not immediately give absolution, but allowed Plaintiff to consider what he would do so as to put himself in a position to proceed. On 25th July the Court absolved Sproston, his non-liability being clear beyond possibility of being implicated through any amendment, but allowed Plaintiff further time as he stated he would amend. In December 1883 the case was again moved before the Court, Plaintiff had on 31st October 1883 filed a paper in which he stated that he would not amend but proceed with the action against the two remaining partners as they were sued in the pleadings. These Defendants moved for absolution. After full argument the Court decided that the course proposed by Plaintiff would not be proper, pointing out that whereas the suit as laid was against a firm existing at the commencement of the suit, the suit in which Plaintiff proposed to proceed would be one not against that firm or any existing firm, but against a firm which had existed some time previously to which different liabilities might attach and different defences might be available than in the case of the firm which had been sued and had pleaded; the continuing Defendants would have been in fact members of a firm which had not been sued, and had not answered, and with whom issue had not been joined; the Court would not allow the action to proceed without giving the continuing Defendants opportunity of making such further answer as they desired in the new state of circumstances. Up to this time there had been no attempt to remedy the securities and effects in this statement of the case, which the Court had pointed out in July previously. Under all these circumstances the Court still did not absolve, but allowed the Plaintiff an option of proceeding by way of amendment, fixing however a definite time within which he was to make his election. All this was done in conformity with the spirit of the Procedure Ordinance as we construed it and also with specific provisions which it contains—the effect of which is that a proceeding is to be sustained if possible rather than destroyed. Finally an amended Claim and demand was filed on which the instance was ultimately absolved upon a different ground. The Judges who took

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part in the last mentioned decision are not now in the colony.

The course which was taken in those proceedings clearly show that even in a case of wrong issuing out of a contract alleged to have been done by a firm, the Court did not consider absolution of all the partners to be an inevitable consequence of the absolution of one of them. The present case which alleges wrong independently of contract is manifestly less strong in the direction of absolution, for such wrongs are several as well as joint, and the Plaintiff might have elected to sue one only of these partners. There is a clear exposition of the English Law on the subject by Findal, C. J., in *Petri v. Lamont*, 1 *Carr and Marsh*, page 95, substantially the same as it is understood in this Court. Adopting the view of the law acted on in *Ross v. Little*, and assuming that this is an action against the Defendants for a liability against partners, the absolution of both would not follow as of course upon the absolution of either *ab instantia* or *a lite*, we therefore allow the demurrer to the exception. This of course does not in any way hinder the Defendant Willems from showing his non-liability in respect of the contract in part set out in the answer when he proves it as part of his case in defence.

Attorney for Plaintiff, *G. W. Hinds*.

Attorney for Defendant, *J. A. Murdoch*.

PETITION, SHERRINGTON *re* ESTATE OF TRUE.

21 August, 1891.

Ordinance 10 of 1887—Executors accounting.

This Ordinance does not provide a method of compelling Executors to account and denude of the inheritance.

Semble—It may be available where Executors are in doubt whether the position of the estate is such that they ought to denude.

The heir and residuary legatee under the Will of Colonel C. J. True, deceased, petitioned for an order on the Executors of the Will requiring them to render Inventory of the estate and account for their intromissions, and to hand over the inheritance to her.

SHERRINGTON *re* ESTATE OF TRUE

Dr. Belmonte for the Executor, objected *in limine* that such order is not within the scope of the Ordinance, which does not supersede the existing procedure by the *Partitio hereditatis*.

Dargan for the Petitioner, *contra*:—We ask for account under sub-sections *c* and *e* of section 5. We do not contend that the Ordinance takes away the right to sue in the ordinary way, but it enables persons interested in an inheritance to obtain accounts and their property in much shorter time than under the ordinary procedure. An order under the Ordinance would have the same effect as a sentence for accounts and for payment and delivery of the inheritance, and would be worked out in the same way. The Ordinance being beneficial should be widely interpreted.

Dr. Belmonte in reply.

8 September, 1891

CHALMERS, C.J.:—This is an application to me as Chief Justice, exercising the powers of the Court under the Administration Ordinance 1887, the Court not being sitting. The application contains averments that Clinton Jones True, an inhabitant of the County of Demerary, died at Georgetown on 27th December 1888, leaving a last Will which has been duly deposited, by which Will the Testator after bequeathing certain legacies, willed the whole of his property movable and immovable to Letitia Emily Whiteman, the Petitioner, nominating her his sole and universal heiress, and appointed Charles Ross and Benjamin Robinson Clarke as Executors: that the Executors now acting under the Will are Mr. Ross, and Mr. Elias D'Oliveyra, who was assumed under power of assumption in the Will, upon the death of Mr. Clark in February last without having exercised any of the powers of an Executor; that the Petitioner has been informed by Counsel and Attorney for the Executors that the Executors have paid all the debts and legacies except a legacy of \$100, and that nothing remains to be done by them except to hand over the inheritance to the Petitioner. There are also averments that the Petitioner has adiated the estate and given notice of the adiation to the Executors, and has compromised a claim upon the estate, but is unable to carry out the compromise on account of the

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Executors refusing to give over the inheritance to her, and that the claimant has intimated that the arrangement will be cancelled if not carried out within a reasonable time; also that the Petitioner has demanded an account from the Executors without success, and that the Executors impose conditions which she considers unreasonable before handing over the inheritance; that unnecessary law expenses have been incurred; and that about \$15,000 the value of the estate, has been uplifted by the Executors and is uninvested.

The Petitioner asks that the Executors be ordered to furnish an inventory of the estate and an account of their intromissions and the vouchers of payments, and to hand over the inheritance to her, and to pay the costs of these proceedings. Citation has been served upon the Executors and they have appeared upon the citation by Counsel, who whilst expressing the Executors' willingness to account and to hand over the inheritance, took a preliminary objection that the present proceeding was not one provided for or authorized by the Administration Ordinance.

This is the first case I believe in which the question has arisen whether the provisions of this Ordinance are available for obtaining an account and delivery of the inheritance from Executors, and I have carefully examined the Ordinance and weighed the observations of Counsel in order to arrive if possible at a correct decision. The Ordinance does not expressly say that an heir or residuary legatee may apply to the Court for an order on an Executor to render accounts and hand over the inheritance, and therefore the question arises whether there are any terms which by fair construction authorise the Petitioner in taking the course which she has done, and would authorise the Court in making the order prayed for.

The broad rule of construction so often adverted to is "that the "words in an Act of Parliament or other written instrument be read in "their natural and ordinary sense giving them a meaning to their full "extent and capacity unless there is strong reason upon the face of it "to show that the words were not intended to bear that construction, "which could not have been absent from

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“the minds of the framers of the Act or the instrument, which must arise from the giving them such large sense.” Per Maul, J. in *Arnold v. Ridge*, 13, C.B. 763. The rules are thus stated by Pollock C.B. in *Salkeld v. Johnson*, 2, Exch. 273. “We propose to construe the Act of Parliament according to the legal rules for the interpretation of Statutes, principally by the words of the Statute itself, which we are to read in their ordinary sense, and only modify or alter so far as it may be necessary to avoid some manifest absurdity or incongruity, but no further. It is proper also to consider the state of the law which it professes or purports to alter, the mischief which existed and which it was intended to remedy and the nature of the remedy provided, and to look at the Statutes in *pari materia* as a means of explaining this Statute. The preamble is undoubtedly a part of the Act and may be used to explain it, and as Lord Coke says, is a key to open the meaning of the makers of the Act and the mischief it was intended to remedy; but although it may explain, it cannot control the enacting part which may and often does go beyond the preamble.” The following is a most important remark: “words in the enacting part must be confined to that which is the plain object and general intention of the Legislature in passing the Act.” per Tenterden, C.J., in *Halka v. Cove*, 1 B. & Ad. 558. Valuable remarks will also be found in the *Sussex Peerage case*, 11 Cl. & F. 143. *Attorney General v. Walker* 3 Exch. 258. *Miller v. Solomons* 7 Exch. 546 and 8 Exch. 778. *Claydon v. Green* L.R. 3 C.P. 522, &c.

In the present case it will be seen, I think, that the guidance to be derived from three elements—the general intention of the Legislature, the natural meaning of the words, and the antecedent state of the law—is concurrent and leads to one and the same conclusion. What do we gather to have been the object and general intention of the Legislature in passing this Ordinance? In the preamble we are told that it is for the “better administration of property held in trust.” Administration of property, although it issues in distribution and handing over the residue to the parties ultimately entitled, is not

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the same thing as distribution, and turning to a contemporary enactment, 16 of 1887, we find that in that Ordinance the Legislature undertook to deal with matters of distribution, thus showing very clearly if that was necessary that they considered distribution a separate subject from administration. Going further and enquiring as to the purposes of the Ordinance as shown in the enacting part, we find the leading purpose (Sections 3 and 4) are to enable Guardians and other persons having the duty of administering other people's property, for the benefit of such other people, to obtain the help of the Court in determining any questions touching the administering of such property or their own conduct in the administration; and, provided the party applying for such assistance has made full disclosures of the facts, and acts in accordance with the directions which the Court may give, he is, as regards the subject matter of such application, discharged of responsibility. Then in Section 5 we have an enumeration in seven sub-sections of the classes of subjects in which the Court is authorised to exercise this peculiar jurisdiction. The first subsection provides for the disposal of any "question affecting the "right or interest of any person claiming to be creditor, devisee, legatee, heir or person beneficially interested." If this sub-section were read in isolation one would be ready to say that it is a question very materially affecting the interests of an heir or residuary legatee whether or not the inheritance is at a particular time to be made over to him. But it cannot be so read; it must be read along with sections 3 and 4, and as going to define the questions with regard to which persons who are administering property can come to the Court. That brings us then to ask is there in the present application any question of making over, or not making over the inheritance, arising in such way as to be within the meaning and scope of these sections? The question might, perhaps, so arise, if for example there remained unaccomplished purposes of the trust, or if some other person than the heir or devisee had appeared and was claiming the inheritance or some material part of it, but nothing of the kind appears here. The very chief ground

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of the application is "that nothing further remains to be done by the "Executors in carrying out the directions of the Testator except to "hand over the inheritance." In that situation there is no question on which the Executors could seek for directions; for there is but one course legally open to them, that is to account and hand over. If we go over the remaining six sub-sections of Section 5 we find none of them appropriate to such a state of facts as is alleged in this application, but all refer to cases in which there would be some question relating to the administration or to the acting of the Administrator. Sub-section *b* which relates to the "ascertainment of any class of creditors," &c, plainly has no bearing upon the application, nor has sub-section *c* which relates to "the furnishing of any particular accounts by the Guardian," &c, and "the vouching where necessary of "such accounts." It may be remarked in connection with this sub-section that as the subject of accounts and vouchers was clearly at this stage present to the minds of the Legislators, and as they were dealing expressly with the subject of *particular* accounts, if they had intended also to create a method by which the *cestuique* trust might call for a general account and delivery of the property they would have inserted an express provision to that effect. The absence of any such provision when viewed in connection with the tenour of sub-Section *c* is thus an additional reason for holding that the Legislature did not intend to deal with the matter of general accounting. Clearly, the present question does not arise either upon sub-Section *d*, or sub-Section *f*, the one relating to the payment of money into the Registry of Court, the other to the approval of sales or other particular transaction. The applicant founded particularly on sub-Section *e*, maintaining that a direction to the Executor to account and denude of the property would be a direction to do a particular act in his character as Executor. As I have already shown we cannot read the clauses in isolation, and a direction to an Executor to do an act would not be within the scope of the Ordinance unless there was a question whether the Executor should or should not do such act, and that does not arise where

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all things have been accomplished except the accounting and denuding, and the Executor is without reasonable cause holding on to the property. The same remarks apply to the very general provision contained in sub-Section *g*, “the determination of any question arising in “the administration,” &c.

I have not overlooked that it is contemplated (Section 7) that other persons than those denoted in Section 3 should have the power of bringing the machinery of this Ordinance into operation. The enactment is indefinite as to who those “other persons” are, or under what circumstances it would be competent for them to come in, but I think it is clear that “other persons” could only apply to the Court upon the same classes of questions as those upon which the persons denoted in section 3 could apply, and as I have already pointed out, there is no question arising or existing within the meaning of that or the 4th or 5th section when the purposes of the trust are accomplished and a clear duty lies on the Executors to account and hand over the property.

If we examine the Ordinance from the point of view of what was the previously existing law, we find that the powers and jurisdictions referred to in the Ordinance relate to a method of evoking the powers of the Court unknown under the previously existant procedure except in some particular cases where the interests of minors are involved, whereas for calling upon Executors and Administrators to account and denude in favour of their beneficiaries there is already a well-known and unquestioned jurisdiction and procedure. It has not appeared that this procedure has become discredited in the estimation of the Legislature. It is said to admit of delays and to be tedious. I cannot help thinking that a good deal at least of the delay complained of would be obviated if those who are interested habitually used the means in their power for pressing on. Passing from this, however, which is a parenthetical remark, we do not find any provisions in this Ordinance, directed to the acceleration of procedure, except that applications may be made whilst the Court is not sitting. But no precedence is given to business under this Ordinance over ordinary business

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and if the Ordinance were used to compel an unwilling Executor to account and denude, the procedure would not, I apprehend, be substantially different from what it is at present.

For the reasons stated I consider that this application is neither within the scope, nor the words fairly construed of the Ordinance, and it must be refused.

Attorney for Petitioner, *L. B. K. Collins.*

Attorney for Executors of estate, *J. A. G. C. Belmonte.*

CHANGADOO v. RAMSAWMY, ET AL.

23, 24 March, 1891.

Actio Familiæ ereiseundæ—Communio bonorum—Evidence.

Suit for account and division of inheritance, and opposition to passing of transport of property alleged to form part of the inheritance,

Held—(per CHALMERS, C.J.)—That the evidence as to the property in dispute being part of the inheritance was imperfect, and that this being so, and there having been already a partition by arrangement *quoad* the other property, the action should be rejected.

(Per ATKINSON, J.)—That the property in dispute had not passed, that there had been partition, and that the suit was bad for want of pleading that Defendant had accepted the inheritance.

Frances, daughter of Changadoo, was married to Ramsawmy without contract and died without issue, leaving a Will bequeathing the whole of her property to Ramsawmy, her husband. Changadoo claimed as for *legitim* on Frances' share of the common property of the spouses, and that certain land and property, which had been purchased but the title of which had not been passed to Ramsawmy during the marriage, should be dealt with as part of the common property, and opposed the sale of that property by Ramsawmy to Alamaboo the Co-Defendant.

Dr. Belmonte for Plaintiff. The father is entitled to a legitimate portion of his child's inheritance where the child has left no descendants, and he cannot be deprived by Will. The property, the sale of which we oppose, was part of the community, the right thereto having been fully acquired by sale and purchase and by payment

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of the price during the lifetime of the wife. The purchaser could act as *dominus* and was entitled to all possessory actions. It makes no difference that he had not prior to his wife's death received a transferable title; the origin of titles being passed by the Court was to secure the *Fisc* in payment of its dues. As soon as money belonging to the community is paid for land, that land becomes part of the community.

Evidence was adduced.

Dargan for Defendant.—The evidence does not show when the property in dispute was purchased. Neither the property nor the parties mentioned in the copy of Petition by Plaintiff for Letters of Decree founded on, are identified. The date of the alleged payment is not proved. Property does not pass without transport or Letters of Decree.* At the utmost Plaintiff has only right to claim his share in the value of the land, which he could do in the Inferior Court. There has been already a division of the common property with concurrence of Plaintiff, and he is thereby estopped from proceeding further. There is an Executor under the Will, and this action should have been brought against him if anyone.

Dr. Belmonte in reply.

16 September, 1891

CHALMERS, C.J.—The Plaintiff concludes for a sentence ordering the Co-Defendant—(1), to render to him an account of the estate and inheritance of Frances Alfred as at the time of her death, and of his intromissions therewith; (2), to enter with him after the accounts shall have been adjusted into a partition of such estate and inheritance, and to put him in possession of one-third part thereof as his legitimate portion as surviving father of his deceased daughter Frances Alfred, with the fruits and profits since her death; (3), to declare well-founded an opposition entered by the Plaintiff on 22nd August 1890 against the original Defendant passing a proposed transport to the Co-Defendant of West half of lot No. 114, Bourda and buildings thereon. The averments on which these conclusions are founded are, that Frances

* See as to property passing into *communitas*. Voet 23, S. 65, *et seq.* Christenius *de Jure: Mat, de com.* p. 488. Van Leuwen *Cen. For.* 4. 23. 8.

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Alfred now deceased, was the daughter of the Plaintiff, was married to William Alfred the original Defendant in community of goods and died without leaving any issue, but having executed a Will by which she appointed William Alfred her heir. These statements may be taken thus far as established. Then it is averred that Alfred has not accounted to Plaintiff, and that Plaintiff is entitled to a legitimate portion of the property left by Prances Alfred at her death. It is also averred that the property, the sale of which is opposed, formed part of the common property of William Alfred and Prances Alfred.

With regard to the latter averments, the evidence is not of a satisfactory character. As regards the property the subject of the opposition, Alfred has stated in his answer that he acquired the title to this property by Letters of Decree on 14th May 1889 after his wife's death. This is not disputed, so that the proof of the property having come into the community depends upon its being established that the purchase was completed and the right to a transport fully constituted previous to the wife's death. The only evidence to prove when the right to the transport accrued is a copy of a Petition dated 29th April 1889, purporting to be the Petition of a William Aired praying for Letters of Decree, in which Petition the statement is contained that the Petitioner became purchaser of the property on 8th of April 1889, and that he has paid the price. For the purpose of obtaining the Letters of Decree the mere averments in the Petition were not evidence, and it is of course only by way of personal estoppel against Alfred that they could be evidence now to any effect. Then the identification both of the Petitioner and the subject in this Petition has been left to inference. Moreover the date of the wife's death as subsequent to the purchase and payment of the price rests on no evidence at all, unless the statement in the Act of deposit of the Will be evidence. As that depends on a mere declaration before the Registrar or Sworn Clerk, the accuracy of which is subject to no particular test, and the only necessity of which is that it be some date previous to the deposit, there is difficulty in seeing that it can have force as evidence.

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An extract was tendered from the Register of the Church of the *Immaculate Conception* in Georgetown showing the death and burial of one Francesca Alfred, but without even any attempt at identification. However satisfactory this Register might be in some points of view, (assuming there was identification), there has been no evidence put before us showing that it is kept and dealt with according to the law relating to Registers so as to render it available in evidence. It is unsatisfactory to have to deal with imperfect or really defective evidence of facts which from their nature admits, and in which a Tribunal naturally expects perfectly clear and direct evidence. It may be added that there is here no equity leaving the Court to look with any favour, (if that was possible), on the evidence of this property having come into the community, there being not even the slightest suggestion that any part of the purchase money was contributed either directly or indirectly from the wife's actual resources. Indeed it is not shewn that when she was married to Alfred she had any property.

But further, as regards property which did without any doubt come under the community, there is evidence of a partition having already taken place. This came out mainly in the cross-examination of the Plaintiff and of the Executor under the Will of Mrs. Alfred who is a son of the Plaintiff. They were unwilling witnesses on this subject and yet from their evidence it was clear that the movable property which would be deemed personal to the wife, and also some not in this situation, was distributed to the Plaintiff and to his family with his knowledge and approval. In addition, the Plaintiff and his family obtained other advantages in the shape of the free use and occupancy of the house and premises now claimed as part of the joint estate which they have continued to occupy along with Alfred down to the present time. It seems in the highest degree probable that the partition was made on the footing either that the property divided was all in which the Plaintiff could claim interest, or that what he and his family obtained was equal in value to the Plaintiff's share in the inheritance.

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At all events it is clear that there was a partition by mutual consent and the circumstances are not such that the Court should interfere to disturb the settlement thus aimed at. If any account were ordered there would have to be a mutual accounting which might not improbably result in a balance against the Plaintiff. On whichever side the balance were, it would be a very inconsiderable one. But to open up the settlement would be contrary to the good faith in which the parties acted at the time. Having regard to the whole circumstances I consider that the action ought to be rejected with costs.

ATKINSON, J.—The Plaintiff opposes the transport of a part lot of land and the buildings thereon, on the ground that he is entitled as father of Frances, the wife of the original Defendant who died childless, to his legitimate portion of her share of the property held in community at her death, and asks for an account and partition.

As to the movable property, I have no doubt whatever, on the evidence of the Plaintiff himself and his witnesses that the Plaintiff and his son Lazarus Joseph, who was left by Frances Executor of her Will, and the other members of the family, knew perfectly well what that movable property was.

I have no doubt, also, that that movable property was, with the consent of all concerned, the Plaintiff included, divided by Lazarus and the original Defendant among the members of the family who were, or were taken to be entitled, and that the Plaintiff at that time was perfectly satisfied with the share thereof allotted to him. There is therefore no reason for directing an account as respects the movable property.

The only immovable property which is alleged in the Reasons of Opposition to belong to the communion estate is the transport which is opposed herein. It was bought at Execution Sale on the 8th of April 1889 by the original Defendant, and a petition for Letters of Decree was presented on the 29th of April 1889. This was before the death of Frances which took place on the 3rd of May 1889. The final order on the petition

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granting the Letters of Decree was made on the 14th of May 1889.

Copies of the petition and of the final order were put in. They show merely that the Letters of Decree were granted on the 14th of May 1889, and that there was then *primâ facie* proof before the Chief Justice that the purchase money had been paid at *that* date.

For the Plaintiff it was contended that this property was purchased and paid for before the death of Frances, and that that being so, the *dominium* was in the common estate, although Letters of Decree were not obtained until after her death. No authority was adduced for this proposition beyond the statement at the Bar of the Plaintiff's Advocate, who must or ought to have known perfectly well that there was no authority for his proposition but the very contrary. Van der Linden (p. 120) says "In immovable property the title "does not pass, unless the conveyance or transport is made before the "Judge of the place where it is situate." The learned Advocate professed to scout the authority of Van der Linden's Institutes on the ground that they were elementary, but Van der Linden merely states what is laid down by other writers of authority. Where there has been no delivery although the price has been paid Matthæus says (*de Auc. b. 1, c. 18, n. 15*), "*non est res in ejus bonis, sed actio, quare creditores, vel curator bonorum rem a venditore petere debent, itaque "distrahere. Pacto enim dominium non transit, sed traditione; neque "moribus nostris quaevis traditio sufficit, si de re immobili agatur, "sed mancipanda res est in jure: quae mancipatio donec rite fiat, "fundus in bonis venditoris manet."* And Van Leeuwen (Com. Bk. 2, c. 7) says immovable property is not considered as delivered unless legally transferred before the Court of the place where it is situated; while Voet (Bk. 8, t. 4, s. 1) lays it down that immovables can only be conveyed by an Act duly passed before the Judge. In a Berbice case, the name of which I have not by me, but which can be turned up, ARRINDELL, C.J., and ALEXANDER, J., say that this law of Holland "is the law of this colony." See also *Steele v. Thompson*

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(Sup. Civ. Ct., 19th June 1858, Reas. 1; 13 Moo. P.C.C. 298.)*

That being so, the action must fail, as the property, the sale of which is opposed, had not been reduced into possession before the dissolution of the marriage by the death of Frances, and therefore, as follows from the authorities above cited, never formed part of the common property.

Apart from this, the Plaintiff must fail on a technical ground. In the third reason of opposition, the Plaintiff alleges that Frances appointed the original Defendant as her heir. In the answer it is excepted that the Claim and Demand does not contain facts sufficient to constitute a cause of action, one omission alleged being that it is not averred that the original Defendant accepted or adiated the inheritance. That is so. Unless the Defendant accepted the inheritance he could have no liability in respect of it. Van der Linden p. 247 places among *quasi* contracts, “the accepting or entering upon an “inheritance.” “This,” he says, “gives to the legatees and *cestuique trusts* a right of action for the legacies and trust property left by the “Will or Codicil.”

To enable a claimant under a Will to succeed in an action against a person instituted heir, he must it is plain, aver and prove that that person has accepted the inheritance, because, until he has accepted, he has no more to do with the Testator’s estate than anybody else. There is no such averment in this case, and there can be no proof of what is not averred.

There must be a rejection with costs.

Attorney for Plaintiff, *J. A. G. C. Belmonte.*

Attorney for Defendants, *W. S. Cameron.*

* The following cases decided in the Supreme Court, British Guiana, uphold the same point and hold that the only title to land in this colony is by transport or Letters of Decree:—Vestry of St. Marks v. Col. Receiver General, 16.4.59; Brown v. Allt, 17.3.72; Trotman v. Pequeno, 21.7.71; *Exp.* Col. Receiver General, 13;1.60; Cornette v. Croal, 16.4.58; Hurrie v. Bascom, 7.1.60; Griffith, *et al.*, v. Coombs, 3.6.65; William v. Cornette, 16.4.59. Best v. Foster, 7.7.66; Coombs v. Griffith, 19.1.66; Stelman v. Sam, 21.1.71; Frank v. Douglas, 29.12.80; Yipli Hing v. Administrator General, 30.7.84.

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1, 2 June, 1891.

Costs on Withdrawal—Procedure Ordinance 1855, Sections 67, 74, 75, 236—Requests Civile—Agency of Defendant.

Plaintiff having withdrawn his suit under Section 67 of the Procedure Ordinance, thereafter on a motion *ex parte* an order was made on him by a Judge sitting apart to pay costs. Plaintiff moved the Court to annul the order;

Preliminary objection that party dissatisfied with order as to costs must seek remedy under Section 5 of Ordinance 18 of 1880 repelled;

Held (diss. ATKINSON, J.)—That the order had been erroneously obtained without notice, and that the full Court had jurisdiction to set it aside;

Semble—Requete Civile is not applicable for redressing errors of the Tribunal;

Held—per ATKINSON (dissentiente)—As this proceeding is of the nature of an appeal concerning costs only, and concerns the Administrator General, it is invalid in respect no special leave to appeal has been given;

Per CHALMERS, C.J.—Where there is change of Attorney after proceedings instituted, notice must be given, otherwise the new Attorney cannot validly act.

Motion to annul an *ex parte* order on Willems the mover for payment of taxed costs of a suit. The suit had been instituted against Moore, one of the Executors of Black's estate, original Defendant, and the Schoon Ord Sugar Plantation Co., Limited, by Moore their representative in this colony, Co-Defendant. Moore, after the suit had been commenced, substituted the Administrator General in his place as Executor, and the Administrator General appeared in the suit as representing Black's estate, but there was no change of rubric. Thereafter, and whilst the suit was still pending, it was decided in an appeal to the Privy Council, that the substitution of the Administration was void *ab initio*, and the Administrator General was ordered to denude of the estate. After the suit had been withdrawn, bills of costs were taxed as due to the Administrator General repre-

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senting the estate of Black, original Defendant, and to the Schoon Ord Sugar Plantation Co., Limited, as Co-Defendant, and an order by a Judge apart was obtained on the Plaintiff to pay the taxed costs of the original Defendant and Co-Defendant.

Dr. Belmonte for the Plaintiff moved that the order be reversed and annulled.

Solicitor General Kingdon, Q.C., for the Administrator General and the Attorney of the Co-Defendant, *contra*.

The facts and arguments fully appear in the judgments.

16 *September*, 1891.

CHALMERS, C.J.—This is a motion arising out of a suit in Opposition formerly before the Court in which P. J. Willems as an individual and as having in marriage in community of goods Elvira Elizabeth Willems, one of the heiresses under the Will of H. M. A. Black, deceased, opposed the sale by Moore, one of the joint and several Executors of Black, of Plantation *Maryville* to the Schoon Ord Company. The suit was instituted against John Moore as such Executor as original Defendant and the Schoon Ord Sugar Plantation Company, Limited, represented in this colony by their Attorney John Moore, Co-Defendant. After various steps of procedure, and when the suit was ripe for judgment, Willems by his Counsel on 6th January 1890 withdrew his instance as under Section 67 of the Procedure Ordinance. After this, on 5th May 1890, two bills of costs with notices of taxation were served on the Plaintiff, one for \$495.50 as due to the Administrator General representing the estate of H. M. A. Black as original Defendant, the other for \$105.50 as due to the Schoon Ord Sugar Plantation Company, Limited, as Co-Defendant. Willems by his Attorney-at-Law gave notice that he objected to both or either of the bills being taxed and stated his objection to the Taxing Officer, denying it is said, qualification in the parties applying for taxation. It does not appear whether the Taxing Officer overruled the objection, or more probably, disregarded it as outside of his jurisdiction, for he taxed the bills without making any reference to the objection so far as appears on the papers. The taxations are dated respectively on 2nd and 3rd of June 1890, and the result of the taxation is to leave the one bill at

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\$416.91 and the other at \$66.75. On 14th June, Counsel appeared in the Bail Court for the Administrator General and for the Schoon Ord Company and moved as under Section 67 of the Procedure Ordinance for an order on Willems to pay the taxed costs. *Dr. Belmonte* who had been Counsel for Willems in the suit was present in Court, accidentally as appears, and asked to be heard, but the learned Judge who presided declined to hear him in opposition to the motion and ordered the Plaintiff to pay the costs of the original Defendant and Co-Defendant as taxed.

Willems has moved this Court to declare the taxation of both bills of costs illegal null and void, and to reverse and annul the order of payment.

The Solicitor General who appeared for the parties en whom notices of the motion had been served, vizt., the Administrator General of British Guiana, and the Schoon Ord Sugar Plantation Company, Limited, by George Louis Davson, Esq., one of the joint and several Attorneys in this colony of said Company, stated two preliminary objections to the hearing of the motion : (1), That no appeal lay to the Full Court from an order of a Judge sitting apart; and (2), that in taxations of costs if the party against whom costs are taxed is dissatisfied his remedy is under Section 5 of Ordinance 18 of 1880 in pursuance of which Willems objecting to the bills of costs being taxed by the Registrar ought to have appealed to a Judge. As regards this latter objection, it is true that if this were a question of taxation properly so called, the remedy would be as stated, but the motion before us does not raise any such question. The mover's objection is to being required to pay the costs of the parties who on the bills appear as claiming costs, and not to any of the particular items on the bills. If we look at Section 5 of Ordinance 18 of 1880 and Sections 5 and 6 of Ordinance 27 of 1855, we see that the later enactment substitutes a taxation as of first instance by the Registrar instead of the taxation of first instance by the Chief Justice or a Judge jointly with the Registrar which was the method provided by the earlier enactment, and also interjects an intermediate appeal from the Registrar to a Judge in

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addition to the appeal to the Full Court which was formerly the only appeal. The provisions of Sections 140 and 141 of the Amended Manner of Proceeding Ordinance 26 of 1855 are similar to those of Sections 5 and 6 of 27 of 1855, except that the latter makes “a Judge” as well as the Chief Justice competent to tax along with the Registrar, and introduces some details as to notices, &c. It is clear that all these enactments have relation to the taxation of costs in the ordinary and well understood meaning of the term. It is a term very familiar to every legal practitioner. It means the revision, adjustment and authentication where necessary of the items claimed in a bill, and no practitioner acting in his ordinary understanding of the term would dream of saying it included a discussion of the question whether costs are payable or not to a particular party or are due at all. Reading the enactments thus, according to what has been called the golden rule of construction, i.e., according to the plain meaning of the words it would be a perversion of their intent to say that a party can by objecting *en bloc* to the whole of the items of a bill of costs confer a jurisdiction on the Registrar to decide upon a question of parties or of liability. The present taxation happens to have been previous to the order for payment of costs, but for the purpose of construing the enactment this is immaterial; and if we take the ordinary case the view that only taxation properly so-called is dealt with in the enactment derives additional strength. In the ordinary case the taxation follows the adjudication of costs: what would happen then if the Registrar’s jurisdiction were not limited to taxation in its proper sense? After the Full Court had awarded costs we would have the Registrar sitting in review and deciding whether the party who had been adjudged entitled to costs was rightly so entitled, and whether the party ordered to pay ought to pay, and then the Registrar’s decision along with that of the Full Court would be open to the review of one Judge, and finally after a Judge had decided, the question would come round in the next appeal to the Court which had originally made the order. It is impossible to hold that this was intended. I am

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of opinion then that the second of these objections cannot be upheld.

Under the first objection it was submitted that orders made under Section 67 were on the same footing as regards not being appealable as sentences and orders made under Section 72 which are expressly therein declared to have the same force and validity as if pronounced by the Court. There is no such declaration as regards the orders made under Section 67, and the inference from the express declaration in the one case is that the Legislature intended that the orders and sentences under Section 72 should be final, and that they considered the declaration necessary in order to give finality, and from the omission of the declaration as regards orders under Section 67 that they did not intend these to be final. A better argument was that appeal does not lie except when expressly given. But this does not conclude the matter. It is said that the motion under S. 67 is necessarily *ex parte*. It has been dealt with in this case as *ex parte* in the most emphatic manner. Not only did the parties claiming costs give no notice to the Plaintiff, but when without notice he was nevertheless present in Court and asking to be heard, the Claimants opposed his being heard and the Judge allowing them to shape the procedure at their own risk refused to hear him. Now was the motion correctly dealt with as *ex parte*? If it was, then it is clear that the order made thereon was not and cannot be final, for there can be no such thing as a Judicial act imposing a pecuniary obligation upon any one without his having opportunity of being heard at some stage or other. I do not know what ground there is for holding the motion to be *ex parte*, unless it be that judgments for costs upon discontinuance are given *ex parte* in the English Courts. This rests on a rule—the creation of positive enactment applicable to these Courts. But it need scarcely be said that neither positive enactments relating to the English Courts nor the practice of these Courts is, *per se*, of authority here. On the other hand there is very good reason for saying the motion is not *ex parte*. I am indebted to my brother SHERIFF for pointing out a Section of the Procedure

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Ordinance which was not referred to by either side in the discussion, but which I think puts the matter beyond doubt. I mean Section 236, the terms of which I shall quote: "Whenever any person shall enter "into or upon any appeal to the Supreme Court, or into or upon any "legal process or proceeding whatsoever, not hereinbefore provided "for by which the party against whom any such appeal process or "proceeding shall be directed incurs any costs, and shall withdraw "the same without paying the costs incurred by such party, such "party may apply by motion to a Judge for an order for the payment "of all such costs." Here we have the completely general case of any proceeding, whereby an adverse party has been caused to incur costs, being withdrawn. Under Section 67 we have the particular case of a suit, whereby the Defendant has of course incurred costs being withdrawn. In the general case the method of seeking remedy is to apply by motion to a Judge for an order for the payment of the costs. Can there be any doubt that under Section 67 when the Legislature says the Defendant may apply to a Judge for an order for payment of the costs, the true construction is that he may apply by motion? The reason in the one case and the other is identical. If then we take it that the application for the order on the Plaintiff who has withdrawn to pay costs is to be by motion, all possible question as to its being an *ex parte* application is at an end since Section 75 which is quite general in its terms clearly prescribes that notices of motion are to be given. Hence without entering upon the merits of the order it would be sufficient to adjudge that it has not been made under such conditions as the law prescribes, and that therefore it should be set aside. But it has been said that even if the order were erroneously made, it could be set aside by moving the same Judge who made the order, or another Judge sitting apart, and that recourse should not have been had to the full Court. I do not find anything in Section 67 or elsewhere in the Ordinance which vests power in the Judge making an order under that Section or any other Judge to allow the party upon whom the order has been made to come up again and move to

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rescind the order, nor any expression from which such power would be fairly deducible. The power conferred on a Judge apart to make an order certainly does not imply a power of cancelling the order after it has been made a record, and he is then *functus officii*.

The only clause which may perhaps at first sight be supposed to empower a single Judge to give the sort of remedy which is asked for in this case is Section 74 in its last clause which provides that applications may be made upon motion before a Judge sitting apart "for any other matter which according to the Dutch law and practice in force in the colony prior to the 16th day of February 1845, would have been the subject or ground of a Petition for Judicial relief (*re-queste civile*)." The operation of the section it is obvious is to substitute motions before a Judge in the matters to which it relates to the former method by Petition. The first part of the Section relates to enlargements of time, stay of proceedings, amendments, filing of claims upon estates, none of which have any connection with the present matter. What then is included under the later clause which I have quoted? Turning to the Procedure Ordinance which was in force prior to February 1845 that vizt. of 15 July 1834, we find that the method of obtaining Judicial relief is by Petition, and amongst the subjects of relief mention is made of the filing of claims against estates under the control of the Court, and against estates in the hands of deliberating Executors but there is no description or enumeration pointing out exhaustively either by general description or specifically what are to be deemed the proper subjects of relief. But in Van der Linden's Institute we find the matter sufficiently elucidated. Thus at page 467 of Henery's Translation we are told that the different species of relief "relate either to the original matter itself (*substantial relief*) or merely to some omission or error in the process or pleadings (*judicial relief*)." In Juta's translation (page 318) it is stated that reliefs are of two kinds: "They either affect the case itself (*substantial*), or they are granted against some omission in the proceedings (*judicial*). They are granted either by way of a *writ* if the case has still to

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“be instituted, or by letters of *requeste civile* if the case is already “pending.” Then he puts a case in illustration of this distinction. Then he enumerates further cases in which judicial relief is granted, all being defaults or the nature of defaults or omissions. The cases are: “1, against defaults; 2, against bar of plea; 3, for amending one’s “declaration and prayer; 4, for adding thereto; 5, for producing evidence after the time for doing so has elapsed; 6, for amplifying and “augmenting evidence already put in; 7, for introducing new facts “and proving them.” There is not a trace in Van der Linden or in Van Leeuwen’s *Censura Forensis*, nor in Voet’s Commentaries, so far as I have been able to discover, of judicial relief having been at any time in use as a method of redressing any error alleged to have been made by the Tribunal, and it is not by its nature applicable to this purpose.

It is not, however necessary to say that a Judge apart could not hear the present motion; it is sufficient that the Court can hear it, and it is abundantly clear that it is within the scope of our general jurisdiction to do so.

It were enough for disposing of this motion to express the opinion that the order was not duly made as having been made without notice to the party who has been ordered to pay costs, and that therefore it ought to be discharged, but as there has been arguments as well as written reasons upon several other topics, I shall not be going beyond what has been brought fully before this Court if I go on to express the opinions which I have formed with reference to these topics.

Coming then to the order itself (which by some curious oversight was not *in verbis* before the Court during the argument, but has since by consent been supplied), it is in terms an order on the Plaintiff herein “to pay the costs of the original Defendant and Co-Defendant “as taxed,” and if construed by operation of the prefixed rubric, it is an order on the Plaintiff to pay their costs as taxed “to John Moore in “his quality as one of the joint and several Executors to and of the “last Will and Testament of H. M. A. Black, original Defendant, and “to the Schoon Ord Sugar Plantation Company, Limited,

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“represented in the colony by their Attorney John Moore, Co-Defendant.” But it is judicially known to the Court by the affidavit of Mr. Murdoch filed with the motion, that Moore left the colony in July 1887, when he must have ceased to represent the estate of Black and the Schoon Ord Company in the colony, and there is no information that his representation has ever since then been restored. And it is also known to us through proceedings which have taken place in the suit which has given rise to this motion, that Moore ceased to have the character of an Executor of the Will of Black by his Act of Substitution in 1880 in favour of the Administrator General. But, moreover, the order if thus construed by the rubric is not consistent with or supported by the bills of costs which are not taxed as due to either Moore as Executor of Black’s estate, nor Moore as Attorney of the Company. Supposing then we could disregard the rubric and construe the order by the names on the bill it would be an order to pay the costs of the original Defendant to the Administrator General as representing the estate of Black, and those of the Co-Defendant to the Schoon Ord Sugar Plantation Company without any Attorney. I do not perceive as the order stands how it would be permissible to construe it in this way; but supposing it were permissible, or suppose the order were amended so as to be of the tenor I have stated, other difficulties occur. As regards the order to pay to the Schoon Ord Company without any Attorney, it would be at least irregular, unless the Company had a corporate existence and status locally in the colony which does not appear, and on the contrary is negatived, *pro tanto*, by the fact that the Company appeared in these proceedings by an Attorney representing it in the colony. The order could not be followed by a summation or a fiat without some further intermediate proceedings, and that of itself shows that the order as it stands is not complete or effectual for its purpose. Then suppose there was here an order to pay costs to the Administrator General as representing the estate of Black, it has been brought to our knowledge in these proceedings, and it is also known to the Administrator General that he does not represent that estate,

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and did not represent it when the suit was withdrawn or when the bill of costs were filed and taxed. When the Privy Council by their judgment declared the substitution of the Administrator General to be null and void, and ordered him to transfer the whole estate to the continuing Executor Farnum, that meant a transfer of choses in action as well as in possession, and at once took away from the Administrator General all capacity to represent the estate of Black in judicial proceedings as it did in every other way.

But it has been said the order as one to pay to the Administrator General should be supported in respect of what has taken place in Court, and particularly in respect of what had occurred on 5th January 1888, when Willems objected to the Administrator General defending the suit, and of what occurred on 6th January 1890, when the suit was withdrawn. This requires one or two remarks. This suit was instituted against Moore as one of the joint and several Executors of Black, original Defendant, and the Schoon Ord Sugar Plantation Company, Limited, represented by Moore then Attorney of the Company in this colony, Co-Defendant. Moore after signing Power *ad lites* substituted the Administrator General in his place and left the colony before any answer had been filed. Afterwards the Administrator General as representing the estate of Black filed Conclusion of exception and answer. No motion was made by Plaintiff to take this pleading off the file or to change the rubric, but the Plaintiff in his Replique objected that the pleading was bad in respect that the Administrator General in his alleged representative character was not a party to the proceedings; that he was not substituted Executor as he alleged he was, and for certain other reasons of the like tenor. The gist of the objection which impugned the validity and effect of Moore's substitution of the Administrator General raised similar points to those taken in the Petition of Farnum and Culpeper to declare the substitution by Moore of the Administrator General invalid, which was then *sub judice*. When the suit came on for hearing on 5th January 1888 the learned Counsel for the Plaintiff urged the objection

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taken in his Replique. The objection could not have been decided as to its main points then without deciding the question involved in the Petition, and as it was immaterial in discussing the merits of the Opposition whether the estate of Black was represented by the Administrator General or any of the Executors, it was ruled that the merits should be discussed, any question of rubric of course remaining over. I do not say there could not have been a change of rubric which would have held good until the decision of the Privy Council, and certainly there could have been three days after the discussion just now referred to when a majority of two of the Judges of this Court decided in favour of the substitution. But the Plaintiff's Counsel had in the meantime fallen ill. The Defendant's Counsel had left the colony, and neither party moved. The change of rubric, if made, would have been immaterial as regards the motions then before the Court in the Opposition, and would not have affected the position now. Owing to the illness of Counsel on one side and the absence from the colony of Counsel on the other side, the case was in abeyance for some time. But a hearing took place in December 1888 after which an interlocutory decision was given by their Honours the Puisne Judges. As to this and what follows, I am referring to what I have found on the records, for being out of the colony at the time I was not myself of course in a position to take any part in the proceedings. After this, the next step was a decision by the Privy Council dated on 25 July 1889: presumably it was made known to the Court and the parties within a few weeks at most thereafter. Some time after it was placed on the Minutes of this Court, there was a further occasion on which a motion for change of rubric or some other proceeding to bring the pleadings into conformity with actual situation would have seemed appropriate; but I do not find that anything was done until the case had been set down for resumed argument upon certain points their Honours had raised in their interlocutory decision. Then the Counsel for the Plaintiff objected to the appearance of Counsel on behalf of the Administrator General, and upon their Honours making a certain ruling upon

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this objection he withdrew the Plaintiff's instance. That ruling as embodied in the Minutes was, "that the Administrator General has sufficient interest in the case to entitle him to appear and defend his interests; that the case is ripe for decision but for the points raised in the interlocutory judgment as to the Belgian law, and that the Court will hear *Dr. Belmonte* on these points, and will consider them and the point now raised that the Administrator General has no *locus standi*, when it comes to determine the whole case." It appears to me from the course which the Administrator General has taken as well as from some remarks of his Counsel on the argument as if the effect of this ruling had been somewhat misunderstood—at least that it was understood differently from the way in which I understand it—as if it was thought that it was meant provisionally to rehabilitate the Administrator General in the representation of Black's estate for the purposes of the defence, or at all events of somehow placing or continuing him in the position of Defendant in the suit with the ordinary rights incident to that position. But their Honours did not say this. They said he had sufficient interest in the case to entitle him to defend his interest. What interest? Not an interest as then representing Black's estate: that was impossible, but an interest connected with his past administration to show that he has acted prudently in defending the suit, and that involved indirectly a pecuniary interest, for if he had acted properly and prudently he would be entitled to have credit for the costs he had incurred as in account with Black's estate. The Judges did not even affirm that they would eventually decide that he had as much interest as this, but only that it should be deemed hypothetically for the purposes of argument that he had or might have as much. In so ruling no injury was done. It is a mistake altogether to say as was said by the Plaintiff's Counsel, that on the Administrator General ceasing to represent Black's estate there must have been judgment for the Opposer. Until the Plaintiff withdrew there was still a *lis pendens*, an *actor* and *reus*. The Plaintiff was maintaining the opposition, the Co-Defendant opposing it.

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For although the Co-Defendant had, and said he had no interest in the particular controversy between the Plaintiff and the original Defendant, he had most material interest in the result of that controversy—that is, he was interested that his bargain should be carried out, and he would have been entitled to a decision even although the Executor who had at that time represented the estate had come in and said he was content judgment should go in favour of the opposition. The sort of interest which the Judges said the Administrator General might have did not make him a Defendant; it was an interest under which he might watch the case, and perhaps, might intervene by permission of the Court for his own behoof in what affected him personally or as a public officer; but it could not confer on him in any sense the capacity of representing the estate of Black, which capacity after the judgment of the Privy Council, rested solely in the Executor, or in the heirs, but in no one else unless by delegation from the true representative.

The present case is not similar to the Petitions by the heiresses of Black's estate, in which the Administrator General was ordered to pay the Petitioner's costs. That was a liability which had been fully incurred whilst his representative character was *ex facie* valid, and if properly incurred would be an item of credit in his account with the estate just as if the amount had been disbursed whilst he was still administering. Here he does not possess the representative character which he alleges, and on which he bases his *jus exigendi*. The Administrator General at the time the order sought to be set aside was made was neither Defendant by the rubric nor entitled *de jure* to be made Defendant; consequently the provisions of Section 67 as to the payment of costs to a Defendant did not and cannot apply to him.

I am of opinion that the order to pay the original Defendants' costs was bad in respect of the party to whom they were ordered to be paid, whether that party be taken to be Moore as Executor, or the Administrator General representing the estate of Black, and that the taxation of these costs is also bad, that the order to pay the Co-Defendants' costs is bad, viewing it as an order to

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pay to Moore, and irregular and defective as an order to pay to the Schoon Ord Company without any Attorney. The taxation of the Co-Defendants' bill I am disposed to hold was sufficient if that point had to be dealt with separately and merely with reference to the entitling of the bill.

As regards the objection to the taxation of the bills that the Attorney who acted in the taxation was not the Attorney in the suit, I think that whenever an Attorney whose name does not already appear as such on the proceedings is brought in as Attorney for any of the parties from whatever cause, there should be due notification to the other parties in the cause, and there should also be an entry on the record of the alteration. Without these steps I do not think the new Attorney could be recognised, or any notice given by him deemed effectual. It by no means follow that because a party may act without an Attorney that what an Attorney does irregularly is valid.

SHERIFF, J.—I wish merely to say to prevent misapprehension that this case in my opinion does not come before the Court by way of *appeal*, inasmuch as Section 185 of the Manner of Proceeding Ordinance (not cited at the Bar) declares that all sentences for costs are in effect final. The Court is moved, as I take it, on the ground of abuse of its procedure. I was inclined to think that the application under Section 67 was an *ex parte* one, the word *motion* being omitted, but I am not able to distinguish the procedure provided by Section 236 in the case of the withdrawal of appeals from the procedure in the case of the withdrawal of a suit. If one is obtainable on *motion* so is the other, and whenever there is a motion Section 75 requires a written *notice* thereof. The present movers were therefore entitled to notice of motion. That being so, the order obtained *ex parte* was bad and must be discharged, the same having been obtained in abuse of the procedure of the Court.

If an order in itself is bad an appeal may lie, but an order in itself may be good, but, as in this case, improperly obtained, and if so, the Court has authority to prevent an abuse of its own procedure.

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ATKINSON, J.—In this matter in the first instance Willems, in his own right and as having Elvira Elizabeth, born Black, in marriage in community of goods, opposed the transport by Moore, one of Black's Executors of Plantation Maryville, etc. to the Schoon Ord Sugar Plantation Company, Limited. Moore afterwards substituted the Administrator General as Executor in his place. Farnum, who was named in Black's Will as an Executor, failing the Executors first-named in the Will, petitioned the Judicial Committee of the Privy Council; the substitution of the Administrator General was set aside, and Farnum took over as Executor.

After this the opposition suit, at its then stage, came before the Court and some discussion took place as to the Administrator General's right to appear. In the end the Plaintiff's Counsel withdrew the suit.

Thereupon the Administrator General, as original Defendant on the record, and the co-Defendants applied to SHERIFF, J. under section 67, Ordinance 26 of 1855, for orders on Willems to pay their costs. The orders were made, and Willems has moved this Court to set aside the orders.

When the motion came on for hearing a preliminary objection was taken, that this being a question of costs, the movers should, in the first instance, have proceeded to review the taxation under section 5 of Ordinance 8 of 1880. But this is not an application for a review of the taxation, as such. The objection is not to the taxation as regards the items taxed but as to the status of the party claiming to have the costs taxed. That is a question which the Registrar had no power to decide under the Section.

It was further objected that the Judge's orders were final in terms of section 72 of Ordinance 26 of 1855, which enacts that any one of the Judges of the Supreme Court may sit apart and "hear and decide "upon matters on motion and make rules and orders in causes and "business depending in said Court in the same manner and with the "same force and validity as if done by the said Court." It appears to me, therefore, that the orders in question are final unless they are appealable to

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the Privy Council. Section 185 has also been referred to, but when looked at, it does not appear to apply.

A question, however, has been raised in this way. It is said that admitting the finality of the order, as under Section 67, if it was properly obtained, there is room for saying that it was obtained by an abuse of the process of the Court and in that case it may be set aside by the Court.

The argument is that because Section 236 of Ordinance 26 of 1855 provided that, in cases of appeal, if the appellant withdrew, the other party might apply *by motion* to a Judge for his costs, it follows that, under Section 67, the application to the Judge should also be by motion in terms of Section 75 which requires notice to be given to the opposite party.

I do not so understand the matter. The words of Section 67 are perfectly plain. The Legislature may have thought that in appeals the procedure should be more formal, but that is no reason why the Court should import in Section 67 the provisions of Section 236. We are not bound to reconcile the procedure under the different Sections, but we are bound to give the ordinary common-sense meaning to the words of Section 67, and according to that meaning, the procedure is not to be by motion under Section 75. The motion or application in this case under Section 67 was one of the thousands of similar motions or applications which have been made *ex parte* under different Ordinances since Ordinance 26 of 1855 came into operation. If it can be held that this application or motion under Section 67 was bad because it was not made in terms of Section 75, then there can be no motion *ex parte* at all, and all those *ex parte* applications and motions which have been made, entertained and decided during the last 30 or 40 years, must have been bad *ab initio*, which is impossible.

Moreover, Section 236 is repealed so far as it relates to the Administrator General. The Ordinance by which that repeal, was effected has been itself repealed, but that, by Section 3 of Ordinance 9 of 1856, does not revive Section 236. It is said, however, that general rule 42 of the Administrator General's Ordinance of 1887 practi-

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cally revives the provisions of Section 236. That rule says that “subject to the foregoing rules, appeals to the Court of Appeal shall be “regulated by the Rules of the Supreme Court for the time being in “force in relation to such appeals.” Putting aside all other difficulties—assuming that Section 42 applies to this case, then, by Rule 38 (1) “Except by leave of the Court there shall be no appeal to the full “Court from any order made as to costs only.”

This is, in its very terms in the nature of an appeal as to a question of costs. There is no evidence that any such leave has been obtained. The question it would seem, is one which must be determined upon the provisions of the Administrator General’s Ordinance. The Administrator General is not an ordinary suitor who comes within the general provisions of the Manner of Proceeding Ordinance 26 of 1855. It was as Administrator General in terms of the then existing Administrator General’s Ordinance that he was substituted Executor. As such his rights, duties and liabilities are to be determined by the then existing or by the now existing Ordinance. This question of costs is a question as to something done, rightly or wrongly, by him, not as an individual, but as Administrator General in the fulfilment of the duty cast upon him as under the provisions of his Ordinance. He had no option but to perform that duty. The Court here held that he was rightly acting, the Privy Council said he was wrongly acting, but he could not anticipate that. He was bound to act according to the best of his own judgment, after taking the best advice he could get.

This is certainly not the case of a deliberate abuse of the powers of the Court, but it is the case of a legitimate application to the Court, made in pursuance of the provisions of a Section which are expressed in the plainest and most unambiguous language. Supposing, however, the contention that the application for costs under Section 67 should have been by motion under Section 75 to be correct, I do not see how this Court can rectify it, the decision of the Judge being, by Section 185, the same thing as a decision of this Court.

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I may point out that all this difficulty and expense might have been avoided if the Plaintiff's Counsel had adopted the simple course, after the decision of the Judicial Committee was made known, of asking the Court to substitute Farnum on the record as Executor in place of the Administrator General. Farnum could then have determined whether he would or would not go on with the proceedings.

I am of opinion that both motions should be dismissed with costs.

Attorney for Willems, *J. A. Murdoch.*

Attorney for Administrator General, *G. W. Hinds.*

Attorney for Schoon Ord Company, do.

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13, 16, 19, 20 *January*; 6, 10, 13, 15 *April*; 14, 15, 27 *May*, 1891.

Injury to real Property—Disputed Title—Construction of Transport and related Diagram—Incorporated Conditions—Forms of Action.

The statement of this case will be found *ante* at page 102. At the subsequent hearing on the merits the title of the Plaintiffs, consisting of their Transport and a related diagram was founded on; oral evidence was given bearing on their possession and as to the injuries complained of. The Defendant Company, besides disputing the title of Plaintiffs founded on their own title and adduced evidence.

Held—That on true construction of their title the Plaintiffs had right in the side trench and joint right of user of the dams in dispute (ATKINSON, J. *dissentiente*);

Also that conditions incorporated in title of Defendant Company were thereby notified to them;

Defence of possession by the Defendant Company as against the action in the form in which it had been brought not sustained;

The procedure of this Court does not recognise technical and artificial *formulae*.

Per ATKINSON, J.—That *dominium* in the side trench and in the dams had not passed to Plaintiffs and that they could only sue in respect of interference with the block of land inclosed within the trench and dams.

Hutson (*Dargan* with him) for Plaintiffs. We rest our case on a transport and also on possession on which we entered by title of sale and purchase. The transport

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and diagram incorporated therewith convey all “which was contracted to be conveyed by the agreement of purchase. I propose to read correspondence showing negotiations prior to completion of the purchase. [This course was objected to by Counsel for the defence, and was disallowed.] Our transport and diagram show that the South trench is included in the conveyance as stipulated. We received and held possession of the trenches claimed by the Defendant Company and had use of the side dams. The obligation imposed by the transport on the purchaser to allow the seller right of drainage through the South side trench shows that the *dominium* of this trench passed to the purchaser; if it remained with the seller the obligation would be meaningless. A proprietor cannot reserve a servitude over his own property in favour of himself; *Voet de Servitutibus* 8, 6, 2. The statement in the transport of the width of the façade does not exclude the purchasers’ rights in the trenches and dams. The title in the Defendant Company is subject to the agreement between us and their predecessors in title. The latter recognized and admitted our rights.

Evidence was adduced in support of Plaintiffs’ case.

Solicitor General Kingdon, Q.C., for Defendants.—We are willing to concede to Plaintiffs a right of user of the middle road and claim a similar right for ourselves. As to the alleged trespasses, we say we did not originate them, but have carried on the estate as we took it over, and trespass cannot in these circumstances be maintained. We submit further that the Plaintiffs have not proved such right in the side trench and dam and middle road as to enable them to maintain trespass. As to the references in our title to the agreement between Murdoch and our predecessors, it is only the land conveyed to Murdoch and not the land conveyed to us which is subject to conditions. Murdoch could take advantage of stipulations affixed to the land conveyed to him but not of others. The fact of the side line being marked on the diagram is not evidence of its being conveyed. In a transport advertised by Murdoch’s Executors in 1861, the description did not mention the side-line

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or dams. *Esto* that Plaintiffs have proved enough to sustain trespass against a wrong-doer, the remedy is not applicable as against us. Our predecessors received possession of all we now hold. If they were infringing on Plaintiffs' rights they ought to have opposed the transport to us; but they allowed us to take possession without notice of their adverse claims. We committed no fresh trespass, but used the land as our predecessors had done. The doctrine that continuation of a trespass is equivalent to fresh trespass applies only where the trespasses are by the same person; *Battishill v. Reid* 18 C.B. 696. If the Plaintiffs had possession of the dams it was not exclusive, but only a joint use with others. They had only an incorporeal right of use and we would not be liable for encroachment thereon; *Bullen and Leake*, 358; *Roscoe Nisi Prius*, 15 Edition p. 854; *Stephen's Commentaries* III, 398, *Crosby v. Wadsworth*, 6 East 602; *Cox v. Glue*, 5 C.B. 544; *Mainwaring v. Giles*, 5 Barn and Ald 356; *Cubbit v. Porter*, 8 Barn and Cress 257; *Jacobs v. Seward*, L.R. 4 C.P. 328. As to the former drainage of the land, the evidence is discrepant and uncertain. The navigation canal complained of is on land belonging to us. Whatever has been done was from the commencement well known to the Plaintiffs. The Plaintiffs have not suffered any injury, but on the contrary, have benefited by the drainage of their land being kept open by us.

Evidence was adduced on behalf of the Defendant Company

Hutson in reply argued that the transport and diagram properly construed conveyed the South side trench and the use of the dams to Plaintiffs. The operations on the dams by the Defendant Company destroyed their use to the Plaintiffs. Our right is shown by our own title; and appears even still more from the title of the Defendant Company. He cited *Voet de Pandectas*, Bk. 8 tit 6 No. 2; also tit 8, No. 13, *Butcher v. Butcher*, 7 Barn and Ores. 399; *Deere v. Guest* 1, M. & C. 455, 516.

CHALMERS, C.J.—The Plaintiffs claim a sentence condemning the Defendant Company to pay to them \$20,000, by reason and in consequence of alleged wrong-

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ful, unlawful and injurious trespasses upon their lands dams and trenches at Plantation *Goed Fortuin*, and also for interdict against repetition and continuance of the injuries. The Plaintiffs are proprietors of the Southern portion of Plantation *Goed Fortuin*, of fifty roods façade, and the usual depth of a sugar plantation. This property lies between and abuts on the remaining or Northern portion of *Goed Fortuin* on the North, and the estate *Schoon Ord*, on the South. These abutting lands are the property of and are worked together as one sugar estate by the Defendant Company. The Plaintiffs allege the injuries they complain of to have been commenced by the Defendant Company in 1878, and to have been repeated yearly and at various times in each year up to the time of commencing the action and it was said that they were still being continued up to and during hearing. The defence of prescription was pleaded and by an interlocutory judgment given on 28th May 1890, (page 104), was sustained as to all causes of action which had accrued within three years next before the action, was begun. By the same judgment certain other questions raised on the pleadings were also dealt with. We are now to consider the claims so far as not prescribed. Although these are limited by prescription to the three years preceding to the commencement of the action on 31st July 1889 yet their history and the evidence bearing upon them have carried us over a period beginning as far back as 1847, when the ancestor of the Plaintiffs acquired the lands.

The several allegations of injury and the answers thereto are as follows:

The first allegation is that the Defendant Company have wrongfully broken and entered the Plaintiffs' lands forming part of Plantation *Goed Fortuin*, lying on the West of the public road bounded on the South by the side-dam between the Plaintiffs' land and Plantation *Schoon Ord*, and extending Northwards 50 roods, on the North by the middle road and extending to the back-dam of Plantation *Goed Fortuin*, and wrongfully made and maintained drains and trenches in the lands, and caused the water from the part of *Goed Fortuin* owned by the

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Defendant Company, to run through these drains and trenches. The Defendant Company have admitted the Plaintiffs' ownership of the portion of land here said to have been intruded on but not the boundaries alleged by the Plaintiffs. They have denied by their pleading the alleged intrusions, but after evidence had been given they admitted the draining across the Plaintiffs' land.

2ndly. The Plaintiffs aver that the Defendant Company have wrongfully dug a trench across the side-line or dam which they say is between their land and the Defendant Company's Plantation *Schoon Ord* and used this trench as a navigation canal for transportation of canes and otherwise between their Northern portion of *Goed Fortuin* and Plantation *Schoon Ord*. The Defendant Company deny the intrusion and also deny that the Plaintiffs have any right of property or otherwise in or over the side-line or dam. The Defendant Company allege moreover that the side-line or dam is their absolute property and allege ownership in a strip of land known as lot 74 lying between their portion of *Goed Fortuin* and Plantation *Schoon Ord* and intersecting the Plaintiffs' land in a direction nearly North and South, and they say that their navigation canal runs through this piece of land, and was existing as it now is when they acquired the land.

The 3rd item of claim refers to the intrusion for the purpose of the same navigation canal upon the trench on the South of the Plaintiffs' lands between those lands and the dam last mentioned. The Plaintiffs aver that the Defendant Company have put in and maintained stop-offs in this trench and made their navigation canal pass through the trench. The Defendant Company answer by a denial of the alleged intrusion and of the Plaintiffs' right in or over the trench, and aver that the trench is their own absolute property.

The 4th and 5th items of claim refer to the middle road and trench on the Northern side of the Plaintiffs' land where it abuts on the Northern portion of *Goed Fortuin* belonging to the Defendant Company; and the Plaintiffs aver property in half of the width of this middle road and in the trench between it and their own land,

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and aver that the Defendant Company have put the navigation canal across the road and trench, cutting through the road and interrupting the trench by stop-offs. The Defendant Company deny the alleged acts of intrusion and deny that the Plaintiffs have title to half of the middle road or have acquired possession thereof and say that if ever they had any such rights they have been lost by the non-fulfilment by the Plaintiffs of the condition relating thereto in their transport of the lands. The Defendant Company further plead that the side trench and the whole of the middle road are their property. It was conceded however at the bar by the Defendants' Counsel that the Plaintiffs were entitled to receive transport of land for the purposes of a middle road, and he stated that the Defendant Company were willing to grant a transport. By this concession the dispute so far as concerns the Plaintiffs' *pro indiviso* right in and to the use of the middle road is practically eliminated, and also so far as regards their ownership of the trench between the middle road and Plaintiffs' land.

6thly. The Plaintiffs aver further acts of intrusion on their half of the same middle road and adjacent trench by various cuts made across and through the same in the parts lying betwixt the navigation canal and the back dam. The Defendant Company deny the intrusions and as before the rights in the dam and trench alleged by the Plaintiffs.

The Plaintiffs have set out under six several items or heads of averments the particular injuries which they say have accrued to them by reason of the wrongful acts of the Defendant Company of which they complain: these are:—

1. That the Plaintiffs have lost the use of their lands from the place where they are intersected by the navigation canal already mentioned up to the back-dam of the estate, that they have been unable to make use of the lands by hiring them out to tenant cultivators and consequently have lost the rents, and that the lands themselves have been greatly injured by drains cut across which have no proper outlet.

2. That they have lost the use of the half of the side-

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dam between *Schoon Ord* and their said lands and have been deprived of the right of way over this side-dam.

3. That they have been deprived of drainage through the trench on the South side of their lands, and that the drainage of their lands has been impeded, diverted and prevented to the injury of their lands and that they have been deprived of control of the said side-line trench.

4. That they have been deprived of the use and possession and right of way over the middle road lying on the North side of their property to their back lands and that the middle road has been rendered useless.

5. That they have been deprived of drainage through the trench on the North side of their lands, and the drainage has been impeded and prevented, and they have been deprived of the control of this side trench, and

6. That the half of the middle road and the trench on the North side of their lands have been greatly damaged and the use thereof lost to them. The Defendant Company have denied all the allegations of injury.

There are thus in issue upon the pleadings all the acts of intrusion and interference complained of, the Plaintiffs' title to the dams and trenches in which the major part of the injuries are said to have occurred, and there are also in issue the alleged injurious effects of the several intrusions supposing these in fact to be established. Besides the several denials of the Plaintiffs' title which I have stated, the Defendant Company have also put their own title before the Court and have raised various objections to the proceedings which will be afterwards noticed. The Plaintiffs besides founding on their title to the several subjects claimed by them also found on possession.

It will be convenient to deal in the first instance with the question of the Plaintiffs' title. That consists in a transport dated 6th November 1847, by Henry Wortman and John Frederick Boode who were owners by transport of Pln. *Goed Fortuin* in favour of John Murdoch, his heirs and assignees, and certain instruments of devolution (as to which latter there is no controversy) from John Murdoch to the Plaintiffs. Let us examine the transport. It conveys "part of the Pln. "*Goed For-*

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“*tuin* situate on the West bank of the River Demerary laid down on a “diagram thereof by the Sworn Land Surveyor, James Hacket, dated “September 1847, and marked La A B C D, and E F G H.” Then there is a reference to the deposit in the Registry of this diagram, and the transport is declared to be subject to “the following conditions, “provisions and stipulations contained and set forth in an agreement” between the granters and grantee which are afterwards set out in the transport. The Court has already held in the interlocutory decision dated 28th May 1890, that inasmuch as the parties to the transport incorporated therein certain recited conditions of the agreement they did not intend any others to be incorporated and the Plaintiffs could not read the agreement at large as part of their title properly so called. It might be added to the reason thus stated that the transport does not contain any words that seem capable of meaning an incorporation of the agreement as a whole. It will be found afterwards that the reference to this agreement contained in the title of the Defendant Company is in different terms: in the meantime I am dealing only with the title adduced by the Plaintiffs. Now it is very important to observe that the transport contains in itself no description by boundaries or abuttals of the property conveyed. We must then turn to the diagram to see if we can discover the boundaries. There has been a good deal of argument as to the reading of the diagram as well as of the transport. It appears to me that there is no difficulty in determining the principles which should be followed. The transport and diagram are component essential parts of one instrument of conveyance. Everything seen on the diagram is a part of it whether it be words, signs, or delineations, all of which taken together constitute its language. This language is the language of the parties to the transport and is to be read in the same way as that of the transport, that is to say ordinary expressions are to be taken in their ordinary meaning, technical expressions, if there are any, in their technical meaning, unless there is a context which convinces us that some other method of construction should in any

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particular be applied. The incorporated conditions also are to be read with the conveyance as forming part of the same instrument. As then there are no boundaries on the transport itself, we must turn to the diagram in order to find the boundaries. It is entitled "Diagram* of "two pieces of land marked A B C D and E F G H being part of "Plantation Goed Fortuin as sold by the proprietors of that estate to "John Murdoch, Esq." We see that the two pieces of land are separated by the public road, and that the letters A B C D are placed near the corners of one of the pieces of land, that on the East of the public road, E F G H near the corner of the piece to the West of the road. We are only concerned with the latter. No conclusion can be drawn from the position of the letters with regard to the boundaries; they could not have been intended to denote boundaries since each letter goes over a space of apparently not less than five roods on the diagram and is placed at least a rood inside of any possible boundary as shown on the diagram. The letters distinguish the portions of land being dealt with, but beyond doing this they do not, independently of words of description indicate anything. This view is supported by Mr. Luke Hill who is a Sworn Land Surveyor and expert in diagrams. They serve a similar purpose as a single letter or an arbitrary sign placed on each portion of land would have done, but nothing more. Looking again at the diagram we see that extending along the Southern side of the land marked E F G H are the words "part of "Plantation Schoon Ord" and closer to the same land we see an outline delineation of a side-line on which is written "side-line *between* "*Plantations Schoon Ord and Goed Fortuin*" and this side-line is in close abuttal upon the delineation in colour of a trench which is obviously the side-line trench of Plantation *Goed Fortuin*, a part of that estate and not a part of Plantation *Schoon Ord*. This trench is on the face of the diagram included in the delineation of E F G H. It is not denied, I think, that apparently it is thus included, but the effect of the inclusion is

* There are two copies of this diagram. The one I have used is that brought out of the Registry and marked "Record."

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sought to be explained away by saying that the position of the trench being such as it is, it was inevitable the draftsman should have represented it *in situ* just as he represented the public road, which of course was not conveyed, and that therefore it could not be inferred from the delineation that the parties intended the trench to be transported. It has in no way been shown why it was inevitable to represent the trench in the way in which it has been. But besides this there is a fallacy in severing the act of the draftsman from that of the parties. The delineation by the draftsman is in the strictest sense the delineation of the parties seeing that they have used it in place of all delineation by words: it speaks their intentions and they are as completely committed to and bound by what it expresses as they would have been bound by the words used by the conveyancer had he inserted in the transport a verbal delineation of the land by its boundaries. Taking then that this is as it purports and is acknowledged by the parties to be a diagram of a piece of land part of Pln. *Goed Fortuin* as sold, and that it on the face of it includes the side-line trench, is there any reasonable inference except that the sellers who are to be taken to have instructed and who at any rate were in fact satisfied with the delineation as it appears, intended to sell the side-line trench? If that was not the intention then assuredly some expedient of draftsmanship would have been adopted on the diagram to show that it was not included, or if the draftsman could not suggest any mere form of delineation, the sellers would assuredly have insisted on some direct expression plainly showing that the trench was not included. There is an expression in the transport which it has been argued has such an effect. I shall show that is not so, in my opinion at least, when I come to the covenants incorporated in the transport. But dealing still with what is seen on the face of the diagram I do not attach importance to the expression "pieces of land" in the title of the diagram, or read it as excluding any of the trenches; land is a generic term and would include land with trenches (which really are land on which water is superimposed) as well as entirely dry land. It has

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never been suggested that the term "land" should be read so as to exclude the cross trenches, nor does there seem any stronger inherent reason that it should exclude the side trench. I consider that the natural and obvious construction of the language of the diagram is that the side-line trench abutting on the piece of land sold on the *Schoon Ord* side was sold and transported along with the land and as part of it. There is no difficulty as to the boundary on the Northern side of the piece of land E F G H. It is marked by a red line and a series of red points which no doubt represent *paals* marking the boundary line on the ground A *paal* which was probably one of these was found by Mr. Hill near the present navigation canal, and immediately on the North of these *paals* is marked "intended line of new road." It is noticeable that two similar points with a red line, mark also the boundary of the land A B C D where it abuts on the sluice trench which latter was not included (except as to a right of user) in the transport. The fact that no such *paals* are shown marking off the side-line trench on the South is a confirmation of the view I have already stated with regard to the inclusion of that trench in the conveyance.

We learn further from inspection of the diagram that the width of the piece of land E F G H at the back dam measured perpendicularly from the Northern edge of the side line trench on the South to the Southern edge of the intended new road on the North, is 50 roods and there is a similar measurement marked at a point about 200 roods nearer the front; there are no further markings of the width, but when tried with the compass, the measure throughout the entire depth is found to be the same. That is in conformity with the usual method of laying out estates. We also learn that a trench communicated between the Northern part of *Goed Fortuin* and the sideline trench on the South of the piece of land E F G H. This trench which appears to be about the same size as the side line trench crosses the Northern boundary of the land E F G H at a point 152 roods by the scale from the public road immediately to the West of one of those *paals* I have already mentioned, crosses the strip

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of land in a direction perpendicular to its side-lines, or nearly, but not quite North and South, and enters the side-line trench at a point $136\frac{1}{2}$ roods by the scale from the public road. The South side-line trench appears to have a clear run from the back dam to the public road, thence along the West side of the public road until it runs into the sluice trench of Pln. *Goed Fortuin* where the public road crosses the latter by a bridge. The sideline dam between *Schoon Ord* and *Goed Fortuin* appears to be free of interruptions of any kind, so that it would give a free road aback to the use of both the conterminous estates.

These are all the facts to be learned from the diagram so far as I have observed. Then I turn to the transport again to see what may be learned from the conditions of the agreement between seller and purchaser therein incorporated. First, there is a provision that the purchaser should be at liberty to sell the land in front of the public road and also 300 roods in depth of the 50 roods of land on the West of the public road. This measurement of the land confirms what is shown in the diagram. The provision itself is not explained by anything else in the transport and is immaterial in the present discussion. Secondly, the purchaser "binds himself and his heirs and Executors "to give the right of drainage through the side trench at the *Schoon Ord* side to the sellers provided the sellers keep up one half of the "same as long as they may require to drain through said trench." This clause in my opinion establishes very clearly that the *dominium* of this side trench was passed to the purchaser. If the *dominium* did not pass but remained in the sellers as the Defendant Company contends, I am unable to perceive how it could be necessary that the purchaser should give the sellers a servitude over this trench, nor can I perceive how it was possible to do so. (see L 15, sec.], *Dig. de Serv.* also *Voet* on this title.) It is not legitimate in construction to assume that a stipulation is absurd, as would be one by a seller for creating a servitude in favour of himself over property which he retained. The learned Counsel for the defence with all that fertility of argument and of resource with

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which I think we all credit him, did not so far as I have perceived attempt any feasible explanation of the anomaly which would exist if we adopted the construction he contended for; but a good deal of reliance was placed on a stipulation found later on in the transport to which we shall come presently. Next, after covenanting to give the right of drainage, the purchaser covenanted "to keep up his 50 roods façade of the public road, and also that portion or part of the public "road turning to the *Schoon Ord* road and the front dam." Then the purchaser covenanted to bear one-fourth of the expense of keeping the sluice and sluice trench of Pln. *Goed Fortuin* in good order, and the sellers and purchaser mutually covenanted to keep the respective front dams in order. Then the transport proceeds that the party of the first part (*i.e.* the seller) guarantees drainage through the sluice of the estate and the use of the sluice trench to low water mark to the purchaser, that the purchaser is to have the use of part of a logie as a dwelling house for 18 months, and then comes this clause in immediate collocation "also that the 50 roods façade extending Westward "to the back dam of said plantation *Goed Fortuin*, does not include "the South side-line dam and trench." The Defendant Company sought to read this clause as if it were a limitation of the subject transported to 50 roods façade of land and in express exclusion of the side trench and of all rights in the dam. To my mind the true reading is the opposite. It is important to be observed in the first place that there is not in the transport any expression either antecedent or subsequent which makes 50 roods façade exhaustively descriptive of what is transported. Secondly, there is no good ground for inferring it to be exhaustive. The expression "fifty roods" occurs twice previously in the transport; the first time in the permission to the purchaser "to sell 300 roods in a depth of the 50 roods of land." Naturally there would be no permission to sell a part of the trench to a stranger, for the owner of *Goed Fortuin* required to preserve his stipulated drainage rights in the trench, and it was also necessary to preserve the drainage for behalf of the back lands. The second occasion is where the

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purchaser covenants to keep up “his 50 roods façade of the public “road,” but this in no way shows his transport is limited to the fifty rods; immediately the clause proceeds “also that portion or part of “the public road turning to the *Schoon Ord* road and the front dam,” and this it is seen on the diagram amply includes all that portion of the public road which abuts on the *Schoon Ord* side-line trench and dam as well as on the front lands transported at the same time. Thus on neither of these occasions is this expensive “fifty roods” exhaustive as to the subject sold. Thirdly, the clause itself now in question is a covenant by the seller; it is he who “guarantees that the 50 roods “façade does not include” &c. If this had been a stipulation restricting the purchaser’s right or explaining it in the direction of restriction it would have been the purchaser not the seller who would have thus guaranteed this restriction or in any event there would have been a mutual stipulation of restriction. Such a guarantee of restriction by a seller would have no clear meaning. Fourthly, the words have not in themselves any difficulty if we look at what was really taking place. The transaction is a sale of a certain piece of land, the measurement and boundaries of which are not stated directly in the disposing words of the transport, but are denoted on a diagram incorporated with it. A measurement of the land as 50 roods, has been accidentally referred to in the ancillary covenants of the transport, and the seller says “I guarantee that this measurement of 50 roods “does not include the trench and dam on the South side;” in other “words I am selling you 50 roods in width clear of the trench and “dam.” This is entirely in accordance with what is seen on the diagram, where the arrow heads denoting the points of departure of the measurement are placed on the North edge of the South trench, so as to give 50 roods in width clear of the trench. Separately the construction sought by the Plaintiffs ought to be sustained as being in accordance with a previous clause in the transport which in itself is free of ambiguity that viz., in which the purchaser guaranteed drainage through the South side-line trench to the seller; the construction

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contended for by the Defendant Company would evacuate this previous clause of all meaning.

On these grounds I am clearly of opinion that the Plaintiffs are owners under their title of the trench bordering their property on the South and abutting on the North side of the side-line dam, shown in Hackett's diagram of 1847, incorporated in the transport, as the side-line between Plantations *Schoon Ord* and *Goed Fortuin*.

As to the side-line or more correctly the side-line dam bordering on *Schoon Ord*, the Plaintiffs do not claim *dominium plenum*, but only rights of user, especially a right of way by this darn to their back lands. There is nothing found in the transport to Murdoch or the relative diagram except the delineation and reference in the clause I have just been discussing. We have not been informed whether the side-line dam between Plantations *Schoon Ord* and *Goed Fortuin* is one of those, the *dominium* of which was reserved by the Crown in the original grant, and which by the permission of the Crown are used in common by the owners or tenants of the conterminous estates. But I take it that apart from any reservation and permission of user by the Crown, the nature of a side-line dam is such that it is necessarily the subject of common use to the adjoining estates for certain purposes, that is supposing there is nothing in the title showing sole ownership or right of absolute control in the proprietor of either estate. One of these common uses is as a means of access to the back lands, and especially where the estates were laid out without any middle walk as *Goed Fortuin* appears to have been. Another use is to act as a barrier in times of flood to prevent water flowing laterally from one estate upon another. The transport to Wortman and Boode contains no specific mention of the side-line, but assuming, as is assumed by the Defendant Company, that Wortman and Boode had right as owners of *Goed Fortuin* to the use of the side-line in common with the owners of *Schoon Ord* it would follow as an incident of the transaction that in selling 50 roods of the estate next to the side-line dam they also sold and conveyed such right of use of the side-

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line dam as would be appurtenant to the portion of land which was sold and transported.

As regards the right of the plaintiffs to the use of the middle road on the North side of their property, their Transport, (the terras of which the Defendant Company admit as qualification of their own title), contains a stipulation that the sellers are to transport to the purchaser "the right and title to the half of the land for a middle road "through the intended village of 30 feet broad to the backdam adjoining purchaser's land." This obligation was one which the sellers of the land imposed on themselves and their successors as owners. The Defendant Company being in privity of title, and having notice of the obligation are bound to carry it out and this was properly recognised by their Counsel in the concession made at the Bar to which I have already referred. The plaintiffs have the *jus ad rem* as concerning an undivided half with right of common use along with the Defendant Company of the middle road and are entitled to a transport, but I think the claim which was put forward to one-half of the *solum* of the road in absolute property cannot be sustained. The right contemplated in the stipulation is such a right as is appropriate for the purposes of a middle road, that is not an absolute right in one half of the *solum* but a *pro indiviso* right in the whole.

Recapitulating, I am of opinion that the Plaintiffs ought to succeed on the issues of title; that is to say I consider they have title not only to the area of land which they claim but also to the side trenches on the South, and on the North of that area, and title as appurtenant to their land to a *pro indiviso* share of the sideline dam on the South side, with right to use the dam for the purposes of their land and also an equitable right or *jus ad rem* to a *pro indiviso* share of the middle road on the North side of their land with right of use and right also to receive a transport from Defendant Company conveying to them *the jus in re*.

I shall here make some remarks as to the title of the Defendant Company put before the Court in support of their case. The titles to the Plantations *Schoon Ord* and

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Goed Fortuin were united in one owner, Samuel Francis Nurse on 8th June 1869. The antecedent progress of the title to Plantation *Schoon Ord*, commencing with a transport 29th March 1851, by Samuel Blair to Augustus Samuel Dalzell does not contain anything material in this litigation. The preceding title to *Goed Fortuin* derives by transport from Wortman and Boode. First, there is a transport by Boode 11th June 1849, to Jacobus Barkey of the undivided half of Plantation *Goed Fortuin*, excepting that part of the estate transported on 6th November 1847 to Murdoch, and with another exception immaterial in this discussion: 2nd. There is a transport 22nd February 1851, by Barkey to H. S. Clarke of his undivided half of *Goed Fortuin* excepting the land transported to Murdoch and some other immaterial exceptions; 3rd. There is a transport by the heirs of Wortman to Clarke, 29th March 1851, of the undivided half of the plantation excepting the lands transported to Murdoch and with other exceptions. Clarke by these two transports became owner of the whole of *Goed Fortuin*. In the three preceding transports there is no description of the property transported to Murdoch nor reference to the contract between him and Wortman and Boode. The owner of *Goed Fortuin* under each of these transports in order to ascertain what portion of the estate had passed to Murdoch would have to examine Murdoch's transport. But in the next transport, that passed on 27th September 1858, by the heirs of Clarke to James Griffith, Murdoch's property excepted from the conveyance of *Goed Fortuin* is described as in Murdoch's transport with some slight verbal alterations only, *viz.*, "part of said plantation laid down in a diagram by the Sworn Land Surveyor, James Hackett dated September 1847, and deposited in the Registrar's Office of the Counties of Demerary and Essequibo, on the 23rd day of September 1847, and marked letters A B C D and E F G H." But there is no reference to the conditions as incorporated in Murdoch's transport, in place of which there is a reference to the conditions, provisions, and stipulations contained in the agreement between Wortman and Boode as seller, and John Mur-

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doch as purchaser; and then follows a reference to the Book of Records, in which this agreement is recorded identical with that in Murdoch's transport. The next transport of *Goed Fortuin* was on 8th June 1859 by Griffith to A. S. Dalzell and S. F. Nurse, and on the 8th June 1859, Dalzell transported his undivided half to Nurse who thus became owner of the whole of *Goed Fortuin* under reservation of the excepted portions; he was also at the same date owner of *Schoon Ord*. On 30th January 1861, Nurse by two transports conveyed his interest in Pln. *Schoon Ord* and in Pln. *Goed Fortuin* to Samuel Barber, and Edward George Barr, described as carrying on business under the firm of Samuel Barber & Co.; Samuel Barber having died, his Executors on 2nd July 1872, transported in one transport his undivided half of Plns. *Schoon Ord* and *Goed Fortuin* and also his undivided half of lot 74 (which had been acquired from Murdoch's Executors by Dalzell and Nurse in 1859, and hitherto been devolved separately) to his only son George Little Barber. On 13th November 1878, Barr and G. L. Barber transported the Plns. *Schoon Ord* and *Goed Fortuin* to the Defendant Company excepting the portions formerly transported. In all of these devolutions the property of the Plaintiffs excepted from conveyance is described as in Murdoch's transport under reference to Jack's Chart of 1847 subject to the conditions, provisions and stipulations contained in the agreement between Wortman and Boode and Murdoch referred to by its date and registration. Now as regards the effect of these references to the agreement between Wortman and Boode, and Murdoch carried through all these devolutions, the view which I take to be correct is this:—The Defendant Company took their title to *Goed Fortuin* qualified by the condition that the part of that estate which had been transported to Murdoch was excepted from their conveyance, and further that Murdoch's transport should be read as subject to all the conditions, stipulations and provisions contained in the agreement made between Murdoch, and Wortman and Boode. Whether these conditions, provisions and stipulations thus became available to the owners of Mur-

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doch's lands so that they could have made use of them, had it been necessary as in support of their own case as in *petitorio* I shall refrain from discussing, as it is not necessary to do so; but to my mind it is clear that the conditions of the title they accepted are binding upon the Defendant Company, and they are available to the Plaintiffs by way of answer, when the Defendant Company put their title before the Court for the purpose of asking the Court to say that as consequent upon their ownership of the *Schoon Ord* and *Goed Fortuin* estates they had absolute ownership of the South side-line trench and dam and absolute ownership of the middle road as they pleaded. Founding on their title the Defendant Company cannot ignore what is plainly discovered in it, and reading the title it is at once seen that Wortman and Boode declared that they had sold and Murdoch had purchased a certain portion of the estate described in the "agreement along with the side trench and the use and occupancy or right and title of the one undivided half of the side dam between *Schoon Ord* and *Goed Fortuin*." The *jus ad rem* as regards these subjects was by this agreement vested in Murdoch independently of the transport conveying the *jus in re*, and the adoption of the agreement and all its conditions by the Defendant Company, as well as their predecessors in title was equivalent to an acknowledgement that the *jus ad rem* was when they took their transport still remaining in Murdoch's estate or in his representatives. Putting this more shortly, Wortman and Boode made a contract establishing certain relations between them and Murdoch affecting the land sold to Murdoch and the land which they retained. The Defendant Company deriving their title by transports flowing from Wortman and Boode and that title bearing on the face of it ample notice of the agreement with Murdoch, the Defendant Company cannot maintain what is inconsistent with that agreement, according to the maxim *qui in jus dominium ve alterius succedit jure ejus uti debet*. D. 50. 17. 177. The principal of estoppel comes in—"he who takes an estate under a deed is privy in estate, "and therefore never can be in a better position than he from

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“whom he takes it” *per* Lord Mansfield in *Taylor v. Needham* 2 Taunt. 278. There are various cases in the English Equity Courts, of which *Tulk v. Moxhay* 2 Phil. 774, and *Wilson v. Hart* 1 L. R. Chan. App. 468 may be taken as types, giving effect to the same principle or even carrying it further, and although these are not direct authorities in our Court they are instructive analogies, the principles by which the English Courts are guided being in many respects closely allied to those of the Roman and Dutch law. It will be apparent that the matter to which I have now been referring is entirely different from that of the incorporation of the agreement in its entirety in the Plaintiffs’ own title, which was what was discussed and dealt with in the former argument and interlocutory decision. I do not consider that the evidence afforded by the agreement in the manner in which I thus think it is available is necessary for the Plaintiffs’ case, as I have already stated, but as the matter has been a good deal discussed I have thought it right to make as much of observation upon it.

As regards the possession acquired by Mr. Murdoch upon the passing of the transport to him the proof has of course been under some difficulty from the long period which has elapsed. There is nevertheless sufficient evidence from old witnesses who were grown men at the time and also from Mr. Murdoch, one of the Plaintiffs, the son of the purchaser. The old witnesses as might be expected are not very exact as to dates; but we get it that after the transport to Murdoch and for a number of years afterwards he and his tenants were in possession of the lands and used the side-line trench on the South or *Schoon Ord* side and the middle road on the North side. There is some discrepancy in the statements as to the mode of using the South side line trench, and also as to the time after the transport when the North middle road was made up; but if the witnesses were speaking truly—which there was no reason to doubt—there was use of all these subjects. The South side-line trench is spoken of by several of the witnesses as having been used for navigation by *batteaux*, by which the produce of the back lands was carried to the front. It is also

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said that it was used for drainage. Mr. Murdoch who was a boy at the time of the transport, but whose recollection is reliable, is very clear that in the years 1854 to 1856, when he frequently visited the estate, this trench was used as a punt trench, there being a stop off where it met the public road, but no other interruption. He also recollected clearly that at this time the back lands were mostly all let to tenants who used the dam as a side walk for access, and that the tenants also planted portions of the dam with provision vegetables. Keith an old witness who was summoned on behalf both of the Plaintiffs and the Defendant Company, stated that he knew the land in the time of Murdoch, the purchaser, and that at that time the South side-line trench was open all through from back to front and was used for the transportation of plantains from aback. Of course, after the navigation canal was made and the South side-line and dam were intersected, there must have been material changes as to the mode of use, but it seems not improbable that even before this there may have been some variations of use at different times.

Now as to the encroachments complained of, whether they should be called by the name of trespasses or any other name: it seems to admit of no doubt as a fact that there are existent certain interferences with, or encroachments on the property of the Plaintiffs substantially those which they have stated in their claim, and that some of these encroachments have been made and that all are kept up by the Defendant Company, and used for their purposes. A navigation canal has been dug from the North part of *Goed Fortuin* to *Schoon Ord*, in a direction nearly North and South, and is used by the Defendant Company for the passing of punts. This canal intersects the middle road and the trench on the North side of Plaintiffs' land; interrupts their right of way over the middle road, and interrupts by means of stop-offs their trench running East and West both to the East and West of the Canal. On the South side the canal in like manner interrupts the trench on that side, and cuts through and interrupts the side dam. This South side-line dam is also interrupted by another cut which

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has been made for carrying the drainage of the North part of *Goed Fortuin* into the *Schoon Ord* draining trench; and a large draining trench runs North and South across land which the Plaintiffs say is their land, but which the Defendant Company say is lot 74, which they claim as their property. Besides these interruptions, the middle road on the North of Plaintiffs' land has been further interfered with by a number of drains cut across it—as many as sixteen it appears—to the West-ward of the navigation canal. These are used for carrying the drainage of the Defendant Company's portion of *Goed Fortuin* through the Plaintiffs' lands. Then there have been interferences also with the area of the Plaintiffs' back lands by cutting or enlarging drains there. All these interferences with the Plaintiffs' property, (saving as to the ownership of the land across which the large cross trench and the navigation canal run) are established beyond possibility of doubt. Indeed, there was no conflict of evidence concerning them, and I have had difficulty in understanding, and I cannot say I understand now why the Defendant Company thought it necessary to put the Plaintiffs' upon proof of matters as to which it would seem the local managers of the Company could not have been in any uncertainty.

As regards the navigation canal the Defendant Company aver that it runs through their own land. I have found considerable difficulty in coming to any satisfactory conclusion as to this matter, owing, (amongst other reasons) to the position of the strip of land which is called lot 74, not being precisely determined. Indeed, it is only an approximate estimate as to its position that can be arrived at, and that inferentially. It may be well to remark here that the Defendant Company are not, and never have been, owners of lot 74, which either by accident or for some unexplained reason was not transported to them, when, in 1878, the other properties belonging to Barr and Barber were transported to the Company, so that what I am about to say has reference rather to what would be the situation should the Company make up their title by obtaining a transport from the owners than to the existing situation. The

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Defendant Company aver that lot 74 was purchased by Dalzell and Nurse from the Executors of Murdoch for the express purpose of connecting the two plantations by means of a water way through the lot. No evidence has been offered as to anything that passed in negotiation, and the title affords no evidence that the lot was acquired for the alleged purpose. The transport to Dalzell and Nurse, which is dated on 8th June 1850, is of “a lot of land part of that part of Plantation *Goed Fortuin*, situate on the West bank of the River Demerary, “being of the value of one hundred dollars of the current money of “British Guiana aforesaid, now known as and called *Albion Tillage*, “said lot measuring from East to West in façade six roods, and from “North to South in depth 50 roods, containing one Rhymland acre, “defined and described on a diagram thereof by George T. Jack, “Sworn Land Surveyor, dated February 1859, and deposited &c, as “lot 74 (seventy-four), subject to the keeping up of the public road, “dams and trenches to the extent of the façade of the said lob.” Under the same date, Dalzell transported his undivided half of lot 74 to Nurse. On 30th January 1861, Nurse transported to Samuel Barber and Edward George Barr, the lot 74, and Samuel Barber having died, his Executors, on 2nd July 1872, transported to his only son George Little Barber, his undivided half of lot 74. No further transport has been produced, and from a certificate of a search in the Registry, it appears that no later transport of this lot has been passed. In all the devolutions, the descriptions, references, and conditions as in the original transport by the Executors of Murdoch to Dalzell and Nurse have been repeated, and the Defendant Company if they should make up a title, would not be at liberty to drop out or alter any of these terms to the prejudice of the Plaintiffs as owners of the abutting lands.

It is clear from the terms of the transport and from the diagram of February 1859 incorporated with it, that only the lot of land of the breadth and depth stated was conveyed. The obligation as to the keeping up of the public road, dams, and trenches to the extent of the

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façade indicates what I would infer in any case, that the conveyance of the land carried with it also a right of user of the road, dams, and trenches in the state in which they were at the time of the conveyance, but the rights of property are clearly limited to the land as measured, and those measures exclude the side trenches. So that if it were taken as established that the canal was contained within lot 74, and that the Defendant Company had the *dominium* of that lot, no defence would thereby be constituted as regards the encroachments made by the passage of the canal through and across the Plaintiffs' side trenches, and the dams in which they have rights of user and of access.

But is it proved that the canal is within lot 74? I do not see that it is possible to affirm this. Mr. Luke Hill, who made measurements on the land, has laid down a position for lot 74, on his diagram, but it is more or less conjectural. He tells us that there are no physical features by which lot 74 could with confidence be identified, nor is there in the title any position assigned to the lot with reference to its distance from the front of the estate, or any fixed point of departure so as to be capable of measurement. I may state, however, what appears to me to be upon comparison of the evidence the most probable view in this matter. We saw that in Hacket's chart of 1847, there was delineated a draining trench running across the land purchased by Murdoch in a direction almost North and South. In Smith's chart of the same year there is also a draining trench across the land but somewhat more to the Eastward and bearing more to the North East, the bearings being almost identical with those of the navigation canal as laid down by Mr. Hill from a survey. In Smith's chart of 1854, which shews the village of *Albion* as laid out for occupation, this draining trench is shown, and it is put as between lots 72 and 73, which each run over half the width of the Plaintiffs' land and were meant to be the most Western of the house lots, and lot 74, which runs the whole width of the land, and was meant to be the first of the field or back lots. Then in Jack's chart of 1859, which is incorporated in the title to lot 74, there is like

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delineation of the draining trench as between lots 72 and 73 on the East side and lot 74 to the Westward. Further, we have it in evidence from old witnesses that before the navigation canal was dug, the tenant of the lot immediately, to the East of the draining trench was one Bylow, whose name forms a sort of landmark in the minds of these witnesses, and it is said that he planted cocoanut trees and other trees on his lot near the border of the trench. Then Mr. Hill tells us that on the Eastern bank of the present navigation canal, there is a house and some cocoanut and mango trees, the trees about 10 or 12 feet from the edge of the canal. Mr. Hill further tells us that there is no trace of the old draining trench as laid down in the charts anywhere to the East of this canal, nor did he see any trench corresponding to the draining trench of the charts to the West of the canal. Then there is concurrent evidence from five of the old witnesses, Bagot, O'Neil, Adventure, Hinds, and Keith, that the navigation canal is now in the same place as the drain to Westward of Bylow's lot. The four first spoke in somewhat general terms; but Keith, a witness relied on, as I already remarked, both by the Plaintiffs and the Defendant Company, said that he was at the time the canal was dug in the employment of the *Schoon Ord* estate, that he superintended the digging, that the navigation canal was made by widening the old four foot draining trench which was behind Bylow's lot, adding to it seven feet in width on both sides, taken from the parapet of the old trench. He also told us that the cocoanut trees on Bylow's lot were about a rod from the edge of the canal as dug by him—corresponding with the position of the trees which Mr. Hill observed, and further that the digging of this canal took place after the two estates *Schoon Ord* and the North part of *Goed Fortuin* had been united in one ownership, probably very soon after Nurse became proprietor. L'Esperance, a witness called for the defence, made a statement as to the navigation trench having been dug out originally on occasion of an emergency that occurred in the drainage of *Schoon Ord*, when there was an undue amount of water on that estate owing to some failure of the koker.

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I have not perceived that he materially varied the position of the canal as stated by the other witnesses.

Up to this point the whole effect of the evidence seems to be to place the navigation canal on the Eastern side of lot 74, part of the canal to the extent of more than half (about two-thirds) of its width being on the Plaintiffs' property. Then there comes a certain lease of the Plaintiffs' lands to the back of lots 72 and 73, which on the face of it contain matters not consistent with the other evidence. This lease, dated on 12th March 1862, is between Bryden, then sole surviving Executor of Murdoch and Samuel Barber and Edward George Barr, who at this time were owners of *Schoon Ord* and of the North part of *Goed Fortuin*. It was objected that this lease was not evidence as against the Defendant Company and there was an argument upon this question as it presented itself on certain averments in the pleadings, in which the relevancy of the lease was sought to be maintained on the ground of the privity of personal relation or partial identity said to exist between Mr. Edward George Barr, one of the lessees, and the Defendant Company of which he is manager and a principal shareholder. The Court ruled against the relevancy of the lease as on the ground on which it was then maintained. But it has since been admitted into the evidence as bearing upon the possession had by the Plaintiffs and the history of the transactions, and the Defendant Company made it their evidence by cross-examining upon it. For the present moment it has relation to the allegation of the Defendant Company that the navigation canal runs through lot 74, and is in the position of testimony going in support of that allegation. We find that the lease refers to a trench or canal "dug across or through the "said lot number seventy-four and connecting the canal or trench on "the south side of the said Plantation *Goed Fortuin*" with the part of *Goed Fortuin* belonging to the lessees. Express power is given to the lessees of keeping open and using this canal during the lease. But I cannot reconcile the description of the canal as running through lot 74 with what is stated by Keith and the rest of the old witnesses. If they are correct, the canal could

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not be said to run across or through lot 74, as it only skirted the lot and the larger part of its width ran off it altogether. The most probable solution of the discrepancy has appeared to me to be this,—that the clause in the lease was framed not in accordance with facts actually existing when it was entered into; but with what was intended; that the old drainage trench had been cleared and perhaps widened to allow of the water passing from *Schoon Ord* in an emergency as was stated by the witness L'Esperance; that the owners of *Schoon Ord* and *Goed Fortuin* intended when they took the lease to make a canal through lot 74, but that for reasons which are not traced, or perhaps, are now untraceable, the intention was not carried out, and the drainage trench, enlarged into a canal, was afterwards and has continued to be used as such.

The precise position of the navigation canal is not after all of great importance; the quantity of land belonging to the Plaintiffs which it actually occupies supposing it to run along the border and to be in part outside of lot 74, is not large; but there is also another circumstance, making the point of still less substantial importance. I am alluding to the cross drainage trench which the Defendant Company have admittedly made parallel to the navigation canal connecting the North and South side trenches belonging to the Plaintiffs. If the navigation canal is within lot 74 and clear of the old draining trench then this parallel trench must be entirely or almost entirely on the Plaintiffs' land, whereas if the canal be taken as being where the witnesses have placed it, the parallel trench would run nearly within lot 74. The gravamen of the canal as affecting the Plaintiffs lies in its interference with their side trenches and dams rather than in its occupying a portion of their land not exceeding an acre at the most.

We come now to an argument of a technical nature which was directed against these proceedings, founded on the allegation that the Defendant Company did not originate the encroachments which are complained of. It is said their immediate predecessors in the estates were in possession of the water ways and of the portion of

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the dams cut through, that this possession passed to the Defendant Company when they received transport from them, and that if it is assumed the Defendant Company could be sued by process of ejectment on the Plaintiffs proving a better title to these water ways and dams yet they cannot be reached in this action which it is said is founded on trespass, because the action of trespass only lies where the Plaintiff is disturbed in his possession. How then does this matter of possession stand? The possession of Barr and Barber as a lawful possession is attributed to the lease from Murdoch's Executor of which I have spoken. I am taking it as I must now do that the Plaintiffs have a good title. Now as regards third parties (if the Defendant Company are in that position towards Barr and Barber, as it is said they are) the possession of Barr and Barber was the possession of the lessors (Insti: Bk. 4, tit 15 s 5). If the Defendant Company succeeded to the possession of Barr and Barber, assuming it to have been a lawful possession they took and held possession for the owners. "It would be a very odd thing in the law of any country" to use the words of Lord Mansfield in *Taylor v. Needham* "if A could take by any form of conveyance a greater or better right than he had who conveys it to him, it would be contrary to all principle." But further whatever possession Barr and Barber had, ceased to have any legal foundation long before their conveyance to the Defendant Company, when the lease was terminated in the end of 1872. Mr. Murdoch at that time on behalf of himself and the other heirs, took steps to determine the possession actually as well as juristically. The possession was formally surrendered by the lessees which surrender, of course, included all rights acquired and held under the lease. After this surrender it was found that Barr and Barber had not in fact restored the dams and trenches to the state in which they were before the lease. Mr. Murdoch then vindicated an actual corporal possession by putting a stop-off to restore in part his middle road, which had been cut through; in so doing he was *vi dejectus* in the way he described in his evidence, and his stop-off was dug out forcibly by a band of labourers, who it

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cannot be doubted received their orders from the *Schoon Ord* Manager. Such physical possession as was retained by the lessors was not a *bonâ fide possessio* but a *vitiosa possessio*. Gail book 2. obs 75 has a remark very pertinent to the circumstances “*Item colonus vel conductor qui degenat rem restituere postquam desiit esse colonus vel conductor dicitur se spoliare possessione mea.*” Such possession clearly could not have assisted the lessees in the interdict *uti possedetis* or in any way. These things occurred whilst the estates of *Schoon Ord* and *Goed Fortuin* were in the ownership of Edward George Barr and George Little Barber, the immediate predecessors of the Defendant Company. The next step was the passing of the estates to the Defendant Company. Let it be taken that such actual possession as had been held by their predecessors was passed to the Company, could the Company thus acquire a *bonâ fide possessio* of these dams and trenches? I am now disregarding the quality of Barr and Barber’s possession as lessees. The definition of *bonâ fide possessio* is thus given in the Digest—“*Bonâ fides aestimatur ex eo, quod possessor putavit eum a quo rem accepit dominum esse, aut jus transferendi dominium habere ut pro inde opinetur se quoque statim dominum effectum esse.*” It is not a mere belief of right which will suffice but a belief founded upon feasible grounds of law; the text proceeds:—“*Haec autem opinio necesse est ut remota sit ab errore juris. Nam juris error acquirere volentibus nunquam prodest.*” l, *bonae fidei* 109, *de verb sign*, l, *qui a quolibet* 27, *de contr. emp. par. signis*. It is clear that the Defendant Company taking the title from Barr and Barber which they did, and thus having express notice both of the transport to Murdoch and of the contract of sale, could not in *bonâ fide* have taken possession of the South trench and sole possession of the dams, for the conditions of the title must be taken as known to those concerned according to their true legal meaning; and the title vested the ownership of the trench and the joint ownership and use of the dam in Murdoch and his successors. At all events it lay on the Defendant Company to show how they did or how they could take in legal good faith a possession

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not consistent with the title. And as their predecessors certainly could not have set up their possession as against the Plaintiffs so I do not see how the Company can do so.

But I think this argument rises out of a partial, artificial, and incorrect view of the situation. The Plaintiffs are in possession of the lands; what they complain of are encroachments and interferences with certain of the accessories and approaches which hinder them in the free and profitable use of the land. These encroachments and interferences are constantly and from time to time being renewed by the Defendant Company, but there is certainly not possession by the Defendant Company of any of the subjects as a whole which the Plaintiffs say are being interfered with, so that putting aside the question of *bonâ fides* and even if we recognized the technical formulae of actions I am not at all prepared to say that ejectment would have been a correct procedure. But there is also a broader ground rendering the objection to the form of action of non-effect. The objection is grounded upon a technical and artificial distinction, which our procedure does not recognise. The technical modes of pleading which in England ceased to have importance by the operation of the Judicature Act never existed under our procedure, which is in its main principles a sound and equitable procedure notwithstanding deficiencies of detail. A Plaintiff is not trammelled by any special writs or formulae of actions; neither those of the *ante-Justinian* nor *post-Justinian* period, much less those of the old Common Law pleading in England. The Ordinance of 1855 prescribes our procedure. It is based upon that most equitable of all legal aphorisms "*ubi jus ibi remedium.*" What is our form of instituting an action? It is given in section 12 of the Ordinance—"a statement of the facts constituting the cause of action in ordinary and concise language without repetition and in such manner as to enable a person of common understanding to know what is intended; a demand of the remedy to which Plaintiff considers himself entitled." Now, that is what the Plaintiffs have done. They have not declared in trespass, or in ejectment, or in case,

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as the law no way required them to do, nor have they asked for the Interdict *Unde Vi*, or *Uti possedetis*, or for any summary or penal interdict; they have stated in detail various interferences and encroachments which the Defendant Company have made and are making upon their property, and explained the modes in which they have been injured and are being injured, and they ask the Court to award them compensation for the past injuries and to prohibit the Defendant Company from continuing or repeating those injuries. The remedies are such as they are legally entitled to and will meet the injuries complained of. It is true that in describing the injuries, they have said the Defendant Company have trespassed. What does that mean? It simply means that they have transgressed the Plaintiffs' lawful rights, and certainly the use of the word such as has been made does not convert the action technically into an action of trespass, so that it is capable of being met by the technical defences to which such an action under the old Common Law pleading in England might have been liable.

Nor am I able to see how the fact that injuries such as are now complained of were first committed by the predecessors of the Defendant Company can alter the legal responsibility of the Company. Every continuance of the injuries complained of is a fresh injury, and that in no way depends on the persons committing the successive injuries being identical. Barr and Barber might have been sued for the injuries done up to any particular period, and then sued again if they continued the injuries for those done in a subsequent period. It can be no good answer on the part of the Defendant Company, when sued to say that Barr and Barber were doing injuries of the same kind before them. The Defendant Company can be sued for the injuries commenced and continued by them, so far as prescription does not intervene.

There was one other point of a technical nature; viz that as the Plaintiffs' claim in the dams is only that of a *pro indiviso* right jointly with the Defendant Company, an action in trespass would not lie for disturbance.

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Whatever might be the case if this were technically an action of trespass I do not consider the objection applies here. As I have already pointed out this is not such an action; the Plaintiffs simply set out the facts they complain of and ask for remedy. It would not be tenable to say that a joint proprietor has no liability to his co-proprietor if he by an undue use of the common property destroys or impairs its common use, and that is the case here. The Defendant Company in cutting through the dams have done what they are not entitled to do. The Plaintiffs are entitled to prohibit them from continuing the injuries and for compensation for past injuries. Even the technical action of trespass has been held to apply at the instance of one joint tenant against another where there has been an actual expulsion from the land, *Murray v. Hall* 7 C. B. 441, overruling *Cubitt v. Porter* 8 B. & C. 269, which was cited for the Defendant Company. I take it the principle would apply where the joint tenant does something to the common property which is inconsistent with the use to which it is intended to be applied and is by its nature applicable.

I consider that the Plaintiffs ought to have judgment.

I have not overlooked in the consideration of this case that a right of drainage through the South side-line trench on the *Schoon Ord* side was imposed on the Plaintiffs' lands by their transport. The right is in favour of the sellers, it is not defined as to its nature, and it is not stated in respect of what lands belonging to the sellers, it is to be used. There is no plea that this right has passed to the Defendant Company or inures to their benefit as owners of the Northern part of Plantation *Goed Fortuin*, or that they have reasonably or properly used this right, nor has this subject been dealt with in the argument. But it seems to me to be clear that supposing the Defendant Company could claim such a right of drainage as appears in the Plaintiffs' transport, and attach it as appurtenant to the Northern portion of *Goed Fortuin*, that could not imply a right to arrange a drainage for their lands through and across the Plaintiffs' lands, trenches, and dams, merely at their own will, which is what the Defendant Company have done.

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It is clear that substantial injury has been done to the Plaintiffs by the acts of the Defendant Company through the deprivation of convenient access to their lands by the dams and by the water approaches, and also through interference with the drainage, and to a smaller extent with the *solum* of the lands themselves.

My colleague Mr. Justice SHERIFF and I have carefully considered the subject of damages, and we have come to the conclusion that for the injuries for the three years preceding the action, taking the whole circumstances into consideration, an award of \$3,500 is not excessive, and that is the amount to which we find the Plaintiffs entitled. The judgment will be with costs.

SHERIFF, J.—Stripped of all unnecessary verbiage which only tends to confuse, the issue between the parties is not difficult to understand. One John Murdoch (from whom the Plaintiffs claim) on the 28th of July 1847 entered into an agreement with certain persons (the then owners of a Plantation called *Goed Fortuin*) for the purchase of a portion of the said Plantation, and it was provided *inter alia*, and so far as it is necessary *in limine* to refer thereto, that the vendors should within three months after the date of signing the agreement pass a transport to the purchaser. There was also a provision for a mortgage to secure half the purchase money. No such mortgage was however executed, but it is admitted and indeed proved, that the purchase money was paid in full. On the 6th of November 1847, part of the Plantation *Goed Fortuin* was transported to the said John Murdoch by reference to “a diagram thereof by the “Sworn Land Surveyor James Hacket, dated September 1847, and “marked La A.B.C.D. and E.F.G.H. deposited in the Registrar’s Office &c. &c.” With respect to the former piece of land there is no dispute. The transport sets out that the passing thereof was subject to the following conditions provisoes and stipulations contained and set forth in the agreement to which I have referred. It is as well at once to say that the transport does not in express words contain all the conditions provisoes and stipulations set out in the agreement. At the time of the agreement and of the subsequent transport, *Goed*

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Fortuin abutted on the South with Plantation *Schoon Ord* that is to say that there was a dam with trenches on either side running between the two properties. It is clear that since 1859 the proprietors of Plantation *Schoon Ord* have exercised rights of ownership over both this dam and the South side-line trenches inconsistent with the rights which the Plaintiffs assert. The Defendant Company have continued to benefit by these alleged wrongs and the Plaintiffs now seek compensation therefor. The Plaintiffs give particulars of the wrongs committed thus, they alleged injuries (1) to the South side-line dam (2) to the South side-line trench (3) to the middle road (4) to a trench to the North side of Plaintiffs' land and (5) to lands well within the Plaintiffs' boundaries. This Court ruled and I think properly so that whatever title the Plaintiffs have must be sought for and discovered in the transport and diagram alone, without any reference to, or assistance from the agreement. According to the Law of the Colony a transport is a judicial act equivalent to a sentence. Whatever may have been the force and effect of the agreement prior to the passing of the transport its efficacy was expended when the transport was passed. The maxim "*transit in rem judicatem*" would appear applicable. To use a well known legal expression "it is not competent for the parties to go behind the transport." On examining the diagram referred to in the transport, both pieces of land appear and are marked off by the letters A.B.C.D. and E.F.G.H. respectively. The Letters E.F. are placed *inside* the South side-line trench and dam. Hackett has not endorsed any written descriptions of the lands transported or the boundaries thereof. This is unfortunate. I think however that *primâ facie* it may be assumed that only the land comprised within the letters was transported unless indeed such an interpretation is repugnant with what is set out in the transport itself. Gauged by this standard of construction neither the South side-line dam nor trench passed per diagram to John Murdoch, being outside of the letters. I have not lost sight of the statement made by Mr. Luke M. Hill that the position of letters without a written description are mean-

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ingless but it appears to me that when this does occur it is for the Court to place an interpretation thereon if that be possible. On reference however to the transport it will be seen that the said John Murdoch “bound and obliged himself, his heirs and Executors to give the “right of drainage through the side trench at the *Schoon Ord* side to “the parties of the first part, provided the parties of the first part keep “up one half of the same as long as they may require to drain through “said trench.” It was well argued that if the side line trench did not, and was not intended to pass, it would remain in the vendors and there would be no necessity for the reservation of the right of drainage. No man can have an easement over his own property. The two cannot co-exist in the same person—the easement is merged in the ownership. Still looking at the transport we find a provision “that “the 50 roods façade extending Westward to the back dam of said “Plantation *Goed Fortuin* does not include the South side line dam “and trench.” The wording of this proviso is singularly unhappy as it is capable of two incompatible constructions, one excluding the dam and trench from passing to John Murdoch, the other an exclusion only so far as measurement was concerned. The latter is in my opinion the one which should prevail. When an Instrument, even a definite sentence of a Court of Record is capable of two constructions, one involving an incongruity, and the other giving effect to that which obviates a repugnancy without doing violence to the language employed, the latter should prevail. I hold from the wording of the transport itself that it was intended that the side line trench should pass to John Murdoch. The effect of this is to rebut the *primâ facie* presumption that *only* the lands *within* the four letters passed, because the side line trench is *without* the letters. It simply comes to this that the Diagram must be read by the light of the transport and in conformity therewith, and *vice versa*. It seems quite clear that no value can be attached to the position of the letters on the diagram. It is indeed urged that if land, be it dam or trench outside of the letters, is to be taken as transported the public road must likewise be regarded

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as transported but this does not follow. A seller cannot pass what he does not possess and the diagram reveals the fact that the road though delineated is plainly described as belonging to the public, moreover from the body of the transport itself it is evident that this public road is referred to as a point of departure in measuring, *ex grâ*. "300 roods in depth"—and for like purposes and no further. Bearing in mind that the dam ran between *Schoon Ord* and *Goed Fortuin* it was a road common to the owners of both Plantations and even assuming the dam or a half thereof did not pass, John Murdoch would have *ex necessitate* a right of uninterrupted user to get from the front aback. Suppose in the Diagram instead of a dam a river was depicted, would not Murdoch though he did not acquire the bed of the river or any part thereof have a right to make use of the river as a water way he being a riverian proprietor? The view I have taken is supported by the subsequent acts of the parties. There is abundant evidence that John Murdoch by his tenants freely used both the dam and trench without any objection thereto being raised by the vendors or anyone subsequently deriving title from or under them. The other portion of *Goed Fortuin* abutting on Plaintiffs' portion has been transported from time to time to various persons until acquired on the 8th June 1859, by one Nurse who on the same day became sole owner of *Schoon Ord*. Since then the two properties have been transported together. Nurse had agreed to purchase the Plaintiffs' portion of *Goed Fortuin* from the Executors of Murdoch but the transport was opposed and successfully. I am inclined to think with Counsel for the Plaintiffs that he made too sure of his purchase and that most, if not all of the acts complained of were committed by him in assertion of his right as a proprietor. He subsequently leased Murdoch's *Goed Fortuin* a portion of which he planted in cane. He sold to Barber and Barr in 1861, who in the following year also leased Murdoch's *Goed Fortuin* from Joseph Bryden, sole surviving Executor of the last Will and Testament of John Murdoch deceased for the period of 5 years. The front part of Murdoch's *Goed Fortuin* was laid out in Lots

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subsequently known as Albion Village—one of these lots—described as lot 74 was acquired in 1859 by Nurse, who sold to Barr and Barber, but in the transport to the Defendant Company from Barr and Barber, the land, E. F. G. H. was excepted and consequently as lot 74 was included in the land comprised by these letters the lot remained in Barr and Barber. From the Diagrams which have been laid over including Hackett's, there was at the time of the transport to Murdoch a draining trench running from the South side line trench right across the *whole* of *Goed Fortuin*. In the transport to Murdoch the vendors undertook “to give and transport the right and title to the “half of the land for a middle Road through the intended Village of “30 (thirty) feet broad to the Back Dam adjoining purchaser's Land “the purchaser to pay half expenses of making such roads bridges or “tunnels and keeping same in order.” No transport has ever been passed, but there is evidence that Clark a former owner of that portion of *Goed Fortuin* now belonging to Defendant Company made up his half of this middle road and dug a trench alongside and Murdoch two years after, did likewise with respect to the other half. The old draining trench bisected the middle road but Murdoch filled it up “to let people pass.” It is proved that this road has been improperly dealt with. It appears unreasonable that the Defendant Company should set up a want of title in the Plaintiffs while admitting that they the Plaintiffs are entitled to claim transport for a half of this middle road. It may be that the Plaintiffs have unwisely stood by for years without demanding a transport, but can the Defendant Company avail themselves of their own wrong or the wrong of others, their predecessors in title? To decide this point it is important to bear in mind that this Court is not merely a Court of Law (*strictum, jus*) but is empowered to give such decisions as may, as far as possible, do entire justice *ess æquo et bono*. Lord Bacon wrote “all nations have “equity. But some have Law and Equity mixed in the same Court “which is worse and some have it distinguished in several Courts “which is better”, 7 Bac: work p. 448. The Civil Law is the fountain from which principles of general equity and

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Justice flow and it is incumbent on this Court to apply such principles whenever the necessity for so doing arises. It occurred to me that this case was argued very much on the same technical lines as an action of trespass tried in the Common Law side of the High Court of Justice in England—at any rate the Court was not specially solicited to consider “the equities” involved. As Lord Bacon remarked “all nations have equity” using the expressive of course in its limited sense, that is to say exclusive of duties of imperfect obligation such as charity &c, or engagements not founded on what amounts to a meritorious consideration. Mitford, afterwards Lord Keddesdale in his Treatise on Pleading 3 Edit., page 2 remarks “In the construction “of every system of laws the principles of natural justice have been “first considered and the great objects of Municipal Laws have been “to enforce the observance of those principles and to provide a positive rule where some Rule has been deemed necessary or expedient “and natural justice has prescribed none. It has also been an object of “Municipal Law to establish modes of administering justice. The “wisdom of Legislators in passing positive enactments to answer all “the purposes of justice has ever been found unequal to the subject, “and therefore in all countries those to whom the administration of “the laws has been entrusted have been compelled to have recourse “to natural principles to assist them in the interpretation and application of positive law, and to supply its defects, and this resort to “natural principles has been termed judging according to equity. “Hence a distinction has arisen in jurisprudence between positive “law and equity but the administration of both has in most countries “been left, at least in their Superior Courts, to the same tribunal.” It appears to me to be almost a misnomer to speak of this suit as an action of trespass. No doubt it is in the eye of English Law a trespass to land but the technical distinctions which surround the various common law actions have not as far as I have been able to find out any place in the system of procedure which prevails in this Court. Thus it was contended that the Plaintiffs should not have brought trespass but

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an action for the recovery of the land itself. I cannot concur in this suggestion. The Plaintiffs allege a grievance—a substantial wrong if they establish the same, as they have done; why should they not obtain redress? With respect to the middle road the right of Plaintiffs to a transport of 15 feet was admitted. This stipulation was reserved in the transport itself. It formed part of the bargain and though until the transport was actually passed the legal ownership remained in the vendors yet can it be doubted that the rights to beneficial enjoyment at once accrued and that the vendors are to be regarded as trustees for the purchaser? No lapse of time could affect the position of the parties of their privies in title—Once a trustee always a trustee so long as the trust remains unexecuted. That is not all—there is a well known maxim based on the clearest principles of Justice viz.: that “Equity looks upon that as done which ought to have been done.” To apply this maxim can it be said that it is just, seemly, or proper for the Defendants to say you have no legal title as you have no transport and until then we may do what we please? This is not a case where independent third parties might be affected through the absence of notoriety given when transports are passed but it is a case confined to the parties and their successors in title. The Defendant Company can stand in no better position than the original vendors to Murdoch from whom they themselves deduce title and they must stand or fall accordingly. I have given due weight to the argument advanced by the Defendant Company that they themselves have committed no wrongful act but merely continued to drain &c. their property in the same way as when they acquired it. That may be so but that does not relieve them from liability for continuing a user which is injurious to another and which user has never been recognized, but on the contrary, resented. As I remarked just now Murdoch filled up the old trench when making up his half of the middle road, but it is clear that this trench was widened into a cross-navigation canal during Nurse’s time or soon after in the interests of *Schoon Ord* with the object of carrying canes from *Schoon Ord’s Goed Fortuin* through

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Murdoch's *Goed Fortuin* to *Schoon Ord* Factory. The more the position of the Defendant Company is considered the more indefensible does it appear. From their own title it is shewn that they had direct notice of the agreement with Murdoch and the attempt made to establish that the cross-navigation canal was on Lot 74 signally failed, so much so that it was eventually conceded that the old drainage trench was about the middle of what is now the cross-navigation canal. There can be no doubt that this is the case—Counsel for the Defendant Company made the most of the difficulty which exists in ascertaining precisely the actual position of Lot 74 but after all it was for them to demonstrate this—at any rate it is not necessary for the Court to arrive at any definite conclusion on the point. Practically there is no substantial defence to this suit. The Defendant Company have clung with desperate tenacity to the argument (the offspring doubtless of some ingenious legal brain) that the transports did not pass either the South side-line dam or trench and in like manner with respect to the middle walk they seek to secure for themselves immunity from liability by insisting not on the righteousness of their own acts but on a purely legal flaw. (You have no transport.) The Court I am glad to say, is, as I have previously remarked, called upon to deal with the case on broader principles, those principles of natural justice which commend themselves alike to our consciences and our common sense. The Plaintiffs having been successful “all along the line” it becomes unnecessary to assess damages for each of the several torts laid as a separate cause of action, it is sufficient to award damages generally. I think judgment should be entered for the Plaintiffs and the Interdict as prayed for granted.

ATKINSON J.—The Plaintiffs allege that in July 1847, their father John Murdoch, entered into an agreement, which they set out, with the then owners of Pln. *Goed Fortuin* for the purchase, firstly, of a piece of land on the East of the public road, as to which there is no question in these proceedings, and secondly, of “a piece of land aback of the public road bounded on the South by the *Schoon Ord* side-line, extending Northwards, say

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(fifty) 50 roods; on the East, by the public road extending Westward to the back-dam of said Plantation *Goed Fortuin*, with the side-line trench and the use and occupancy or right and title of the one undivided half of the side dam between *Schoon Ord* and *Goed Fortuin*, said two pieces of land extending in depth from low-water mark to the back-dam of *Goed Fortuin*, seven hundred and fifty roods, more or less, and which lands hereby sold will be more particularly specified and set forth in a diagram to be made thereof, which is to be deposited in the Registrar's Office." The Plaintiffs say that, in pursuance of this agreement, a transport of the lands so purchased was passed to their father in November 1847, "subject to the conditions, "provisoes and stipulations contained in the said agreement," and that he obtained and remained until his death in possession of the "said lands, dams and trenches."

One of the stipulations was that Murdoch should give a mortgage for part of the purchase money, but the whole seems to have been paid without the intervention of a mortgage. Another stipulation was that the sellers should give Murdoch transport of a certain interest in a piece of land for an intended new or middle road through the intended village. By the diagrams put in it seems that both Murdoch and the sellers contemplated laying out the front lands of their respective portions in village lots, and this new road was to run between or in the middle of the two sets of lots.

The Defendants admit that a transport which is set out in the answer was passed to John Murdoch by the then owners of *Goed Fortuin* subject not to *the* conditions, &c, of the said agreement, "but "subject to the *following* conditions," &c, contained in the agreement, *i e.* to so much of the agreement as was embodied *verbatim* in the transport and to nothing more; and the Defendants excepted that it was not competent to the Plaintiffs to plead the agreement except in so far as it was embodied in the transport relying on the case of *Steele et al v. Thompson*, 13 Moo. P.C.C. 280. As to this, it was held by this Court, after argument, that the Plaintiffs could not read the agreement at large as part of

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their title by transport, but so much of it only, as is incorporated in the transport itself; but that at this stage, the Court did not say that the agreement might not be read as part of the Plaintiffs' case upon the question of possession.

The Plaintiffs aver that their father received possession of the lands dams and trenches mentioned in the agreement; that on his death, in May 1852, his Executors took possession of and administered the same and that, on the youngest of the Plaintiffs attaining his majority in Nov. 1864, the Executors gave up possession of the same to the Plaintiffs and two other persons interested under the Will of John Murdoch, whose interests had since vested in the Plaintiffs.

The Defendants admit this vesting, but say that John Murdoch and his Executors got possession of what was transported to him and nothing more: *i.e.* they assert that the side line trench and the use and occupancy or right and title of the one undivided half of the side line dam were never transported to Murdoch; that neither he, nor the Plaintiffs, nor their predecessors in title, ever acquired any rights in, to, or over the same, and that the same are not the property of the Plaintiffs. They say further that neither Murdoch, nor the Plaintiffs, nor their predecessors in title, ever acquired transport of the land for the new or middle road, or acquired possession thereof. On the contrary, the Defendants say that they and their predecessors in title have been in the undisturbed and uninterrupted possession of the said side trench of the undivided half of the said side dam and of the land intended for the said middle road for upwards of forty years. The Defendants say, further, that even if Murdoch or the Plaintiffs, or their predecessors in title ever acquired any title it has been lost by the non-fulfilment of the conditions in the transport relating thereto. Moreover, the Defendants allege that this middle road was never made further West than lot 74—, lots 72-3 being the last of the front or Village lots as laid down on a plan of the intended Village made by J Smith, Sworn Land Surveyor, dated October 1847.

Then the Plaintiffs aver that in March 1862, their

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father's surviving Executor leased to S. Barber and E. G. Barr the *Goed Fortuin* lands, belonging to his estate, commencing at the draining trench to the Westward of Lots 72-3, and running to the backdam: that the said E. G. Barr had always been a shareholder in and the manager of the *Schoon Ord* Company, and at the time of filing the Claim and Demand was the principal shareholder; that the said lease was determined on the 31st of December 1872; that the lessees ceased to occupy the leased lands on the 31st of December, 1873, and that since that time the Plaintiffs have been in possession of the whole of their said property.

The Defendants admit the making of the lease, and "that possession of the premises so leased was given up" on the 31st of December 1873; but insist that the facts connected with the lease and the statements as to E. G. Barr are irrelevant to the issue and must be disregarded. As to this, the Court, after argument, held that the knowledge of Barr as to the terms of the lease was not the knowledge of the Defendants, there being no averment of privity; but that the fact of the lease might be relevant to the question of possession.

With regard to Lot 74, the Defendants say that it was sold by the Executors of Murdoch, to certain of their predecessors in title by whom it was purchased for the express purpose of connecting Plantations *Schoon Ord* and *Goed Fortuin* by a water-way through it; that they acquired the said lot together with the said two plantations, and that, at the time they so acquired the lot, a navigation canal connecting the two plantations was running through it as the same at present exists. All this is denied by the Plaintiffs.

The Plaintiffs having stated their title proceed to allege the trespasses they complain of, asserting that in November and December 1878, and in each and every year since that time the Defendants by their servants, agents and workmen have trespassed:—

Firstly. On the piece of land of fifty roods façade by digging, making and maintaining trenches thereon, and causing water to flow there-through.

Secondly, on the side-line dam between *Goed Fortuin*

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and *Schoon Ord*, by digging through it, covering the space dug out with water, maintaining a trench there, and passing punts, &c, along such trench;

Thirdly, on the South side line trench of *Goed Fortuin*, by putting stop-offs in, and maintaining a navigation canal across it;

Fourthly, on the middle village road, by digging up the Plaintiffs' half, as well as the other half, covering the space dug out with water, maintaining a trench and passing punts, &c, across it;

Fifthly, on the trench on the North side of the Plaintiffs' lands, by putting stop-offs in and maintaining a navigation canal across it and by using this canal for navigation purposes; and

Sixthly, on the middle village road and on the North trench just mentioned by digging across both from the Navigation Canal to the back-dam.

By reason of these trespasses the Plaintiffs allege that they have lost the use of their said lands, dam, road and trenches, and claim \$20,000 by way of damages in respect of such trespasses, and pray that the Defendants be interdicted from doing the like in future.

As to the damages the Defendants excepted that all the alleged trespasses which had occurred previously to the three years next preceding the filing of the Claim and Demand were prescribed and this Court upheld the exception.

The transport cedes, transports and in full and free property makes over to and in behalf of John Murdoch "part of the Pln. *Goed Fortuin*, situate on the West Bank of the River Demerara, laid down "on a diagram thereof by the Sworn Land Surveyor James Hackett, "dated September 1847, and marked La A B C D and E F G H, de- "posited in the Registrar's Office, * * subject to the following condi- "tions, provisoes and stipulations contained and set forth in an agree- "ment dated the 28th July, 1847, between the sellers and John Mur- "doch, recorded in the Registrar's Office, viz.—(1.) That the sellers "thereby covenanted and agreed with Murdoch that he should be at "liberty to sell and transport the whole of the piece of land in front of "the public road to low water mark, also 300 * * * roods in depth of "the fifty roods of land situate

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“on the West side of the public road sold by them to him; (2) that Murdoch thereby bound and obliged himself and his heirs and Executors to give the right of drainage through the side trench at the Schoon Ord, side to the sellers provided the sellers keep up one half of the same as long as they may require to drain through said trench; (3) that Murdoch bound and obliged himself, his heirs and Executors to keep up his fifty roods façade of the public road, also that part of the public road turning to the Schoon Ord road, and the front dam fronting the land sold to him, he bearing one fourth of the expense of keeping the sluice and sluice trench of said plantation Goed Fortuin in good order; (4) that the sellers and Murdoch bound themselves respectively their heirs, Executors, or assigns to keep their respective front dams in good order to prevent injury to each other; (5) that the sellers, their heirs, Executors, or assigns guaranteed drainage through the sluice of said estate, also the use of the sluice trench to low water mark to Murdoch, his heirs, Executors, or assigns; (6) that Murdoch is to have the use of part of the logie for a dwelling for himself and family for eighteen months from the date of the day of this transport being passed; (7) that the fifty roods façade extending Westward to the back dim of said Pln. Goed Fortuin does not include the South side-line dam and trench; (8) that the sellers are to pay all the expenses of surveying the land, also of this transport, and (9) to give and transport the right and title to the half of the land for a middle road through the intended village of thirty feet broad to the back dam adjoining Murdoch’s land, he to pay half expenses of making said roads and bridges or tunnels and keeping the same in order.”

There are thus four distinct pieces of land in question; the piece having fifty roods façade, the village middle road; the lands covered with water or South sideline trench, and the South side-line dam; and in order to ascertain what rights the Plaintiffs have in each of these several pieces of land, the evidence as to each will have to be considered separately.

Firstly, as to the title by transport. The transport to Murdoch does not describe the two pieces of land trans-

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ported to him by naming the other pieces of land by which they are surrounded, but simply refers to a diagram on which they are laid down and distinguished by the letters "A B C D" and "E F G H." To ascertain, therefore, what lands were actually transported, the transport and the diagram must be read together. In *Steele v. Thompson* their Lordships say, (p. 301), "Nobody reading the transport would "infer from it that anything more was intended to be conveyed than "is expressed." So, here, taking the transport and the diagram alone as they stand no one would have dreamt of supposing that it was intended by them to pass anything outside of the rectangles indicated on the diagram by the letters, "A B C D" and "E F G H," in the corners, and by red and pink lines on the borders, or that anything outside of those borders did pass. It is only by reference to the agreement that it appears that there was an intention to sell and purchase the South side-line trench and dam.

In *Steele v. Thompson*, (p.300), their Lordships further say "the "transport, if it be read as conveying the property described in it, is, "as 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 clear "that it was never intended that this transport should complete the "agreement. Two other mortgages were to be executed, and other "things to be done." In the present case it appears also that the transport was not intended to complete the agreement. A mortgage and a transport of the half of the land for the village middle road were to be passed. The agreement is set out in the pleadings and was admitted in evidence in support of the Plaintiffs' alleged title by possession. Having got it before the Court for this purpose, the Plaintiffs' Counsel, persistently, right through the case, used and argued upon the agreement successfully as it would appear, as if it could be considered by the Court in construing the transport and diagram. But for that purpose it is as if the parts of the agreement not embodied in the transport had no existence, as if the Court had never heard

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of them. By its own decision and by the rules of construction, the Court cannot look at the parts of the agreement relating to the South side-line trench and dam and to the making of a diagram of the lands sold, none of which are incorporated in the transport. Neither in the transport nor on the face of the diagram does it appear that the diagram was made in pursuance of the agreement.

Notwithstanding all this the Plaintiffs' Counsel contended that because the agreement provided for the making of a diagram of the lands sold, that because the side line trench and dam (*i.e.*, a use of the latter) were part of the lands sold, and that because the diagram showed these as well as the rectangle, "A B C D," and the land having fifty roods façade, marked "E F G H," they all passed under the transport. That such an argument should be used by Counsel in a strait is understandable, but that it should be accepted or acted upon by any lawyer as a valid argument as regards the construction of this transport and diagram is hardly conceivable. The question as to the meaning to be put upon these documents is one of strict law to be determined upon what is contained within the four corners of the documents themselves. It is not what the parties agreed to do before, or what they intended to do at the passing of the transport, but what they did when they did pass it. That can be decided only by what they placed on record. This Court when construing what they placed on record knows or ought to know nothing of what the parties had agreed to do on some former occasion.

The transport takes notice of the fact that a certain interest in the village road was to be transported in terms of the agreement, but is absolutely silent as to the South side line trench and dam, both of which were included in the agreement. The maxim *Expressio unius exclusio alterius est* applies. The parties may have changed their minds in the interval. The sellers may well, on further consideration, have hesitated about parting absolutely with their interest in the South side-line trench and dam upon which they were greatly dependent for drainage of, and means of access to their back lands.

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John Murdoch was, it would seem, a man well able to look after his own interests, and, if it had been really intended to pass the South side-line trench and dam, it does seem strange that he did not insist upon its being done, seeing that he took care to have certain comparatively minor matters inserted in the transport. If the omission were accidental neither he nor his successors took or have taken any steps to get transport of the South side-line trench and dam, or for that matter, of the middle road. If it was the duty of the sellers to pass, it was at least equally the duty of Murdoch and his successors to see that the sellers did pass the transports. There was no obligation on the successors in title of the sellers to go out of their way to find out what the Plaintiffs were entitled to.

It was for the Plaintiffs to enforce their rights, and after lying by for all these years they are hardly entitled to much sympathy now if they are in difficulties. If the Plaintiffs or their ancestor had taken the trouble to acquire legal titles to the land in question which they now say they are entitled to, the Defendants could hardly have committed the trespasses they are said to have done: and if they had, the Plaintiffs would not have had to ask the Court to put a strained construction upon their documents of title in order to enable them to recover damages in trespass.

Let us see now, more particularly, how far the transport affects the four pieces of land taken individually.

As to the piece having a façade of fifty roods there is no question that the ownership or *dominium* of it passed to Murdoch under the transport, or that he got possession. The Plaintiffs' title by transport to this piece is perfectly clear.

As to the village middle road the Plaintiffs, admittedly, are entitled to have a transport of what is stipulated for in the 9th covenant in the transport. But the right to have is a very different thing from the having got a transport. The ownership of land in this colony cannot be changed by a mere covenant to pass transport. "By the law of "Holland immovable property can be conveyed or effected only by "an act or instrument duly

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“executed or passed before the Judge of the place. Voet, lib. viii, tit. “4, § 1.” *Steele v. Thompson*, (Sup. Civ. Ct., 19th June 1858: ARRINDELL, C. J., BEETE and ALEXANDER, J.J.) “Immovables are not by us “considered as delivered until they have been legally transferred before the Magistrate.” Van. Leu. Com. Bk. 2, c. 7, s. 4.—“*Quia sane “qui nondum rem emptori tradidit, adhuc ipse dominus est.” Inst. Bk. 3. t. 23, s. 3.* “The alienation of immovable property, as well by the “ancient law, as by the placaat of the 10th of May 1529, cannot be “effected without a solemn session in law, in presence of the Judge “of the place, * * * When the cession has been made, it passes the “*dominium* or property in the thing sold.” V. der Kees. Th. 202. See also Grot. Introd. Bk. 2. c. 5, s. 13.

Consequently, no transport having been passed, the contention of the Plaintiffs that the 9th covenant gives them an absolute title in the fifteen feet of the middle road which lie next to their land wholly fails. Moreover, the covenant is not even for the transport of the land, itself, but merely of “the right and title to the half of the land “for a middle road * * * thirty feet broad * * adjoining Murdoch’s “land.” That again is not the same thing as saying that it is to be the half adjoining Murdoch’s land; and Murdoch is to pay, not for the making and keeping in order of that half, but half the expenses of the road as a whole. It is plain that, even if the transport had been passed it would have given Murdoch an undivided interest only; and it is open to doubt whether it would have given him an undivided interest in the *dominium* as a whole or an undivided interest in the use only, which would amount to a servitude. I may add that the interest being an undivided one, each owner would be entitled to use the whole or both sides of the dam at pleasure; and, if one owner for his own purposes so used the whole as to interfere with the rightful use by the other, then that other would have his remedy no doubt, but that would not be by an action of trespass.

As the sellers were never divested by judicial act of their *dominium* or property in this middle road, it follows that it would pass by transport along with the rest of their portion of plantation *Goed Fortuin*, of which it

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remained an integral part, to their successors in title down to the Defendants; and that, in case the sellers or any of their successors in title had got into difficulties, and their portion of *Goed Fortuin* had been sold at execution, the middle road must have been sold with the rest. The decision of this Court in the case of *Brown v. The Administrator-General Estate Allt*, (11th March, 1872), is conclusive as to this. Brown had bought a property from Allt, had paid the purchase money, and had had possession for years, but, as he had not got transport, the Court held that the property must be sold for the benefit of Allt's creditors.

Then as to the South side-line trench and dam. the transport, by its terms passes that part only of *Goed Fortuin* "laid down on a diagram thereof by the Sworn Land Surveyor Jas. Hacket, * * * "marked La A B C D and E F G H." Hence, to enable the Plaintiffs to succeed as to the South side-line trench, they must show that it forms part of the two blocks "A B C D" and "E F G H." The trench by reason of its position cannot form part of the block "A B C D" Neither can it, as I understand the diagram, form part of the block, "E F G H." Looking at the diagram, it seems to me self-evident that the trench is not part of this block.

On the face of it the diagram professes to be a diagram of *two* pieces of land lettered as in the transport. Looking at the diagram there are two rectangular spaces laid down, each being enclosed within four fine red lines which are shaded on the inner side by a broader pink line, the one having the letters "A B C D" and the other the letters "E F G H," one letter within each corner as close into the angle as it can be placed without impinging upon the pink lines. Outside of the red lines of the rectangle, "E F G H," are shown, on the North, the intended new middle road; on the South, the South side-line trench and dam between *Goed Fortuin* and *Schoon Ord*; on the East, the public road and trench; and, on the West, a line indicating, presumably, the position of the back dam.

Mr. Luke Hill, the Town Superintendent, was asked what he, as a draughtsman, would understand if the

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letters had been outside of the rectangles instead of inside and he said it would all depend upon the description of the drawing as to what was meant by the letters. There is no description either in the transport or the diagram. He said that the letters being inside or outside would convey to him as a draughtsman no particular inference without a description; but added that if there was no description they would indicate the corners of the land whether inside or outside; and, further, that as the letters appeared on the diagram in question they would indicate the corners of the pieces of land bordered by pink lines. This is Mr. Hill's evidence as taken by me. As taken down by the Clerk of Court, it is, as a whole, much to the same effect. The really important part of the evidence as taken down by him as to the point under consideration is that contained in the concluding sentence: "*As the letters (A B C D and E F G H) appear here they refer to the corners and are to distinguish the pieces of land bordered by a red tint.*" "Here," means in Hackett's chart, the one referred to in the transport, which the witness had before him. I will venture to say that ninety-nine out of every hundred persons accustomed either to the drawing or the use of plans would say the same as Mr. Hill. No other pieces of land than "A B C D" and "E F G H" are distinguished on the diagram by a red tint. That means that the space enclosed by the fine red lines on the diagram, with the letters E F G H in the corners, represents the piece of land referred to by those letters in the transport.

Outside of the red line which forms the Southern boundary of the rectangle "E F G H" is a blue line, and the space between the red and blue lines is filled in with a lighter shade of blue. This represents the South sideline trench. On the face of it, being outside of the rectangle E F G H, it can form no part of the rectangle, and this is made still more manifest when the dotted lines across the rectangle, with "50 roods" written alongside of them, representing the width of the rectangle, are looked at. The points of the arrow heads which mark the terminations of the dotted lines coincide with—touch, but do not go through, the fine red lines.

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The South side-line dam is indicated outside of the South side-line trench and, *a fortiori*, it can form no part of the rectangle E F G H. Finally, there cannot be a shadow of doubt that this rectangle within the red lines represents “the fifty roods façade extending Westward “to the back dam” which façade the 7th covenant or stipulation expressly says “*does not include* the South side-line dam and trench.”

I think, therefore, that it is abundantly clear that the South side-line trench and darn are not included within the piece of land “E F G H” as laid down on the diagram.

If the South side-line trench, merely because it happens to be laid down on a diagram in blue alongside but Outside of the red and pink rectangle “E F G H,” passed as part of that rectangle, then, by a parity of reasoning, the old draining trench which is laid down in blue alongside but outside of the pink rectangle marked “74,” on Jack’s diagram of lot 74, made in 1859, passed as part of lot 74, When it was transported by the Executor. If that were so, it would be very convenient for the Defendants as will appear by and by. In precisely the same way the village middle road, being laid down alongside but outside of the rectangle “E F G H,” would have passed as part of that rectangle. But the 9th covenant shows conclusively that the village middle road did not pass with “E F G H,” because it is expressly provided that the sellers are to give a transport of the right to that road. I may point out that if the Plaintiffs’ contention as to the South side-line trench and dam were true, there was no necessity for this 9th covenant at all, because, being laid down on the diagram alongside of the block “E F G H,” it would pass as part of the block in the same way as the trench and dam. Then again the public road and trench are laid down on the diagram alongside of “E F G H,” and by the same reasoning they also would pass with it. It may be said that the public road and trench cannot be included in “E F G H,” because in the first covenant the fifty roods of land is expressly stated to be “on the West side of the public road.” True, but what comes of the Plaintiffs’ conten-

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tion that the trench and dam are included in "E F G H," when by the 7th covenant it is as expressly stated that the fifty roods façade "does not include the South side-line trench and dam."

I may point out further that if the transport to Murdoch of this land "E F G H," necessarily carried with it the whole South side-line trench and dam because they are laid down on the diagram alongside of "E F G H" it follows, inevitably, that a transport by Murdoch of any of the village lots parts of "E.F.G.H." will as necessarily carry with it that part of the trench and dam which are opposite to the façade of the lot as laid down on Jack's diagram.

It would have a most mischievous effect in unsettling the titles to land in this colony if it could be held that merely because a draughtsman when laying down the outlines of a particular piece of land on a plan, almost of necessity depicts some of the surrounding places so as to enable him to show more distinctly the precise position of that particular piece of land—those surrounding places might pass when that particular piece of land was transported by reference in the transport to its number or its lettering on the plan. Very many if not a large majority of transports passed in this colony are passed by reference to letter or number on a diagram, and the uncertainty and confusion that would be caused by the introduction of such a doctrine are incalculable.

Before proceeding further it will be necessary to consider another contention put forward on behalf of the Plaintiffs with respect to the South side-line trench. It was said that even if the trench was not included in the rectangle "E F G H," it still passed by reason of the second covenant in the transport, by which the purchaser bound himself to give to the sellers the right of drainage through that trench, so long as they might require it, they keeping up one half of the trench. "How," it was asked, "could the purchaser give the easement unless he had the property in the trench?" Effect it was said must be given to every clause in the transport, and no effect could be given to this clause giving the right of drainage unless the Court held that

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the title to the trench had vested in the purchaser under the transport. The argument is plausible but fallacious. A man intending and hoping to get title to certain lands may use words which if he did get title to those lands would create a servitude over them; but if for any reason he fails to get the title to those lands it is manifest that no words of his will create a servitude over them. To state the proposition is to show its absurdity. It is, manifestly, still more absurd to say that because Murdoch used words which would have created a servitude if he had got the land, it follows that the title to the lands themselves vested in him! The most that can be inferred from the words used is that there may have been an intention to pass the trench, but, in this colony, immovable property does not, as we have seen, pass by intention. There must be an express grant—clearly stated in the transport.

It is perfectly plain that the words used by Murdoch neither change the title to, nor create a servitude over the South side-line trench. Still the words are not necessarily meaningless. By the terms of the transport Murdoch took the lands “E F G H,” subject to the conditions stated in the transport, one of which was this clause binding him to give drainage to the sellers through the South side-line trench. The *dominium* in the trench remained, as has been shown in the sellers after the passing of the transport to Murdoch. At that time their only, or at any rate their principal means of draining their remaining portion of *Schoon Ord* was through that trench. It is certain that they wanted to continue to drain through it, or that clause would not have been inserted in the transport. But Murdoch’s portion “E F G H,” cut off the sellers’ remaining portion of *Goed Fortuin* completely from that trench. Consequently, to get their surface water from the back lands especially of their remaining portion of the estate, it was absolutely necessary for them to drain across Murdoch’s block “E F G H,” and this, in my opinion, gives the clue to what was in the minds of the parties and to the true meaning of the second clause or covenant in the transport.

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Murdoch's block being, by the terms of the transport, passed to him subject to this condition, amongst others, that he should give this drainage through the South sideline trench, the block was of necessity, from the moment he got transport of it, subject to a servitude enabling the sellers to drain across the block as long as they might require to do so.

It is possible that the parties may have had it in contemplation that the servitude should not be of long duration, but the words they used are wide enough to enable the sellers to continue to drain across Murdoch's lands and through the South side-line trench, by themselves or their successors in title, down to the present time, in the same manner as they were draining at the time the transport was passed. In the absence of any statement as to how the drainage was to be effected, I take it that the servitude created was of the drainage as it then existed.

It is not material to the present inquiry to ascertain what the system of drainage then was, but I am satisfied on the evidence that when the block E F G H was transported to Murdoch, the drainage of the back lands of the Southern half of *Goed Fortuin* which would include both the sellers' and Murdoch's portion, ran down the South side-line trench to the old draining trench between lots 72-3 and lot 74, and thence across the sellers' portion of *Goed Fortuin* to the middle walk and so to the koker.

Another thing is also perfectly certain which is, that when Murdoch got transport of the block E F G H he had no means of drainage as regards his front lands at any rate except through the South side-line trench. It must therefore have been in the contemplation of the parties that for the time being he was to drain through that trench. To do that he would have to keep up the trench, and, as the sellers were, of necessity going to drain through his lands into that trench, he might well object to their reaping the advantage of his expenditure in keeping up the trench, and so stipulate, as he did, that they should keep up half the trench.

That part of *Goed Fortuin* which belonged to the sellers and to Murdoch was, as I understand it, the Southern half of Pln. *Goed Fortuin* taken as a whole:

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The half to the North of the middle walk being, it seems, worked with Pln. *Versailles*. The Southern half would, so to say, drain naturally through the South side-line trench. Up to the moment of the passing of the transport the sellers' portion was draining through that which then became Murdoch's portion, and the words of that second clause or covenant, to my mind, amount to no more than this that Murdoch said "I will give you the right to drain through the South "side-line trench *across my lands*, as you are now doing, provided "that you pay half the expense of keeping up the trench." This is the more likely because the parts of the agreement embodied in the transport show that the agreement was not very artistically drawn, the aptest phraseology being by no means used in many instances. The reading of this second covenant which I suggest requires the Court to hold merely that Murdoch by the words he used created a servitude over lands which in fact vested in him on the passing of transport and of which he then acquired the *dominium*. That is both reasonable and possible. The reading suggested by the Plaintiffs' Counsel requires the Court to hold that Murdoch could create a servitude although he had not the *dominium* by using words in a transport which if he had the *dominium* would create a servitude—which is absurd; and not only so but that by using those words in the transport he gave himself title to lands which the transport did not profess to pass, which is not only unreasonable but utterly impossible.

For the foregoing reasons I am of opinion that the *dominium* in the South side-line trench and *a fortiori* in the South side-line dam remained in the sellers and would pass through their successors in title to the Defendants.

It thus appearing that the Plaintiffs have no title by transport to either the village middle road or the South side-line trench and dam, the next question is whether the Plaintiffs have shown such a possessory title as will enable them to maintain this action of trespass.

Looking at the way in which the pleadings are framed it is evident that the Plaintiffs when framing them were

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under the impression that they had title by the transport to all four: the averments amounting to this, that their father got possession in pursuance of the transport and that he, his Executors, the Plaintiffs and the other beneficiaries named in his will had retained that possession ever since. There is nothing in the pleadings to show that the Plaintiffs proposed to establish a title by prescription to any of the four pieces. The setting up a possessory title was apparently an afterthought suggested by what appears as to possession in the interlocutory decision of the Court holding that the agreement as a whole could not be read as part of the transport. Whether, on these pleadings, it was competent for the Plaintiffs to set up a possessory title is open to doubt. Be that as it may, they were allowed to do it at the hearing, and it will be necessary to consider whether they have established such a title to all or any of the three pieces of land in question.

It was alleged by the Defendants that this middle road had never been made up, at any rate, beyond the old draining trench at the back of the village. The evidence, however, shows that it must have been thrown up on Murdoch's side before his death, because several witnesses who rented beds on the back lands from him, speak of a trench used for drainage on the North side of his land, within his boundary. The earth thrown out would go to form his side of the middle road. An entry of the 16th Aug. 1854, for making three cuts to let the sellers' back water through Murdoch's lands shows that it was so far made up on his side at that date. And immediately after that, as shown by other entries, the road was thrown upon the sellers' side when their trench was dug there.

Evidence was given by several persons who leased certain portions of the back lands from Murdoch who stated that the tenants, or some of them, used to plant up those parts of the halves of both the South side-line dam and the middle road adjacent to Murdoch's lands, opposite to their beds, and some of them said they paid no rent for these parts but in lieu thereof had to keep up the trenches on both sides to the extent of the façade

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of their beds. That, if true, and I see no reason to doubt it, would go to show an actual occupation by Murdoch of the middle road and of the South sideline dam and trench. That would go to establish the first element necessary to constitute legal possession, the *apprehensio*. There is not much, as regards the South side-line trench and dam, beyond the fact of occupation and use to show the second element, the *animus*, and the intention to hold as owner. As regards the middle road, the case is stronger as Murdoch would hardly have made up the dam, which the evidence shows he did to a certain extent, unless he had regarded himself as in some sense the owner. Later on his Executors put a stop-off in the South side-line trench, turning it from a draining into a navigation trench. The possession so acquired would be acquired *pro emptore* and, therefore *ex justa causa* if that were necessary. It would also I think on the facts proved be *bonâ fide*, if that were necessary. I say if necessary, because *Van der Kees*, (Th. 207) says that in “prescriptions of a third of a century * * * neither *bonâ fides* nor a just title is required (citing *Matt Paroem* 9. s. 2 & 3) as was the case with the prescription *longissimi temporis* of thirty years in the Roman law. (C. 7, 39).” But *Van Leeuwen*, (*Com. Bk. 2, c. 8*, says that full ownership is not only acquired by actual tradition but also *by a long bonâ fide* possession of “another’s property.” He goes on to say in section 3 that the possession, if it be “*bonâ fide* and undisturbed, will, by the addition of prescription be converted into full ownership.”

In Section 5 *Van Leeuwen* lays it down that “at the present day, “the prescription of the common longest time only is without distinction adopted.” (*Kotze’s tr.* p. 200). He was commenting on *Grotius Bk. 2, c. 7, s. 9*, and *Van der Keesel* (Th. 206), also so commenting, states that in 1637 it “was held by the Court of Holland “as a rule “that prescription is completed, in respect of immovable property “and annual rents, by the third of a century” (*Lorenz’s*). This law is in force in this colony and is continually acted upon. The Plaintiffs, therefore to establish their title by possession must show that they

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have been in undisturbed possession for a third of a century.

They have not been in undisturbed possession for that period. Let it be assumed that Murdoch took possession of the three pieces of land at the same time as he did the block E F G H at the passing of the transport in Nov. 1547. In the first place, the sellers or their successors in title made three cuts as just stated through the middle road in Aug. 1854, to drain their back lands through Murdoch's side. Then sometime before the digging of the navigation canal, the koker of *Schoon Ord* was "blown out," and the sellers, or their successors in title, who at that time owned the adjoining estate *Schoon Ord* also made a cut through the South side-line dam near the public road to let the *Schoon Ord* water drain through that cut into the South side-line trench and so through the *Goed Fortuin* koker. That not sufficing they made another cut through the same dam opposite the old draining trench between lots 72-73, and lot 74, opened out the old draining trench through the middle road and thus drained off the *Schoon Ord* water right across the South half of *Goed Fortuin* to the middle walk and thence to the koker. Some attempt was made to show that these acts were done by the permission of the Executors of Murdoch but all that is proved is that from the nature of the case he must have known of what was done. Even if he had wished to prevent it, he would not have been able, because the sellers or their successors in title were the owners of all three pieces of land, the *dominium* being still in them; and the mere possession gave the purchaser and his representatives no real rights in those pieces of land but only entitled him and them to have their title protected against everybody but the true owners.

It was argued that by taking the lease from the Executors, the Defendants' predecessors in title had admitted the Plaintiffs' title. Even if that were so that would not prevent the persons who were lessees or their successors in title, after the expiry of the lease, from disputing, in other proceedings, the title of the persons who were lessors. But apart from this the real question is what

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lands were actually leased. The lease speaks of that part of *Goed Fortuin* laid down on Hackett's diagram of 1847 "marked La A B C D, and E F G H, commencing at the draining trench to the Westward of Lots seventy-two and seventy-three "and extending thence to the "back dam, save and except Lot number 74 the property of the parties of the second part" to the lease—the Defendants' predecessors in title, "with all the rights and privileges of drainage possessed by "the estate of the said John Murdoch, deceased, and with the right of "keeping open and using a certain trench or canal dug across or "through the said Lot No. 74 and connecting the canal or trench on "the South side of the said Plantation *Goed Fortuin* with that part of "Plantation *Schoon Ord*."

I have already shown that the middle road and the South side-line trench and dam form no part of the block E F G H laid down in Hackett's diagram. It follows that they formed no part of the lands leased, because the lease like the transport deals only with the lands marked E F G H on that diagram (the block A B C D not being in question.) That being so, the taking of the lease could amount to no admission as regards the title to these three pieces of land.

The use of the words "with all the rights and privileges of drainage possessed by the estate of John Murdoch, deceased," does not carry the matter any further. He had a right to drain his lands through the koker; and he had a right to drain through his own North trench across lot 74. The words as to the water-rights of his estate used in the lease cover these rights. Any right Murdoch had to drain through the South side-line trench had long ceased to be exercised. If the right could be revived then the words would cover that too, but that would not amount to an admission that the title to the land of the trench was in Murdoch's Estate.

Then the giving of the right to keep open the canal across Lot 74, can amount to no admission of title as regards either the middle road on the South side-line trench or dam. They formed no part of the lot and not having the *dominium* the lessors could give no permis-

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sion as regards them. The keeping of the canal open, if it ran across lot 74, was in derogation of the conditions of the transport requiring the transportees to keep up the trenches and dams on the façade of the lot, which was, of course, impossible while the navigation canal ran through them. All that this stipulation can mean according to the proper construction is, therefore, that, during the continuance of the lease, the lessors waived their right to enforce those conditions and allowed the canal to remain open contrary to those conditions.

The acts of the lessees were in accord with the views I have just stated. The lessees having held over after the time mentioned in a notice determining the lease, the Plaintiffs petitioned for an interdict. Reporting upon the petition the lessees, the Defendants' predecessors in title, expressly deny that they are in any way affected by the agreement except in so far as it is embodied verbatim in the transport to Murdoch and as expressly aver that he on the passing of the transport obtained possession of what was transported to him but of nothing more, and that his Executors took possession only of what had been transported to him. That is, the lessees recognised Murdoch's estate as owning the block "E F G H" as transported but nothing outside of it. And when the lessees gave up possession of the land they had leased, they did not give up the middle road or the South side-line trench and dam. In fact when the Plaintiffs in 1872 attempted to assert what they considered their rights by putting a stop off across the navigation canal it was at once dug out by the Defendants' predecessors in title.

There was thus a further disturbance of the possession during the running of the $33\frac{1}{3}$ years, and the Plaintiffs, therefore, have failed to establish a title by prescription to any one of these pieces of land.

Having no title either by transport or by prescription to these three pieces of land the Plaintiffs are not, as respects them, entitled either to the damages they claim or the interdict they pray for against the Defendants, who, holding the *dominium*, are in point of law the true owners. In almost similar circumstances, under the

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Roman law, if a person who had been in *bonâ fide* possession of lands, which had been retaken by the owner, sought to recover possession of the lands by the *actio Publiciana*, the action would have been met by the *exceptio justi dominii*. (D. 6, 2, 16).

Title to the village middle road and to the South sideline trench and dam by transport and by prescription failing the only other ways, so far as I see, in which it can be suggested even that the Plaintiffs could have any rights with respect to those three pieces of land would be that, as the block "E F G H" was part of plantation *Goed Fortuin*, Murdoch, by reason of that fact, had certain rights in these three pieces of land or, of necessity, had certain rights over them.

As to the former, while the block "E F G H" was unsevered from the plantation it would, so to say, naturally drain like the rest of the Southern half of *Goed Fortuin* through the South side-line trench and access would be got to it as to the rest of the plantation by passing along the South side-line dam. That being so, it may be said the right to drain through that trench and the right to pass along that dam would remain attached to the block "E F G H" and would pass with it to Murdoch. That would have amounted to the creation of a servitude over the trench and the land on which it is constructed and over the dam, the *dominium* in which trench and land and dam remained in the sellers. But a servitude cannot be so created. In giving judgment in *Steele v Thompson* this Court said "We have given sentence "in this case for the Defendant. Firstly, because, by the law of Holland, a servitude on land (*bonâ immobile*) partakes of the nature of "the property, and is classed or considered as immovable property. "In support of this they quoted the passage in *Voet ad Pandectas*, l. "1, t. 8. p. 20, who cites H. Grot., *man ad jurispr.* Holl. 1. 2, c. 33, "and they went on to say that being immovable property it (the servitude), was governed '*lege loci ubi sunt*,' *Lita p. Voet Mob. et Im-* "mob. c. 23, p. 3. Thus a servitude on land in this Colony can be created only by a judicial act, or by the prescription of the third of a "century." See *Grotius, lib. ii, cap. 36, sec. 4.*

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“Secondly, because this law of Holland is in force in this colony, and “has been acted on as lately as the 14th of November, 1857.”

A right to drain the block “E F G H” through the South side-line trench and a right of access to that block was never created by any judicial act, and we have seen that there was not an undisturbed possession of either trench or dam for the third of a century required to create such rights by prescription. As to the drainage, indeed no such right could possibly have accrued by prescription because supposing the period to have begun to run, Murdoch’s representatives put an end to it by turning the side-line draining trench into a navigation or sweet-water canal. Murdoch in fact, had no more right to drain, “E F G H” through the South side-line trench or to use the drain, than he would have had to drain through the estate’s koker but for the express reservation of this latter right in the transport

There is a great difference between selling and transporting the Southern undivided quarter of *Goed Fortuin* and the selling and transporting of the piece of land “E F G H,” carved out of the estate and defined by metes and bounds. In the former case the transport would necessarily pass the title to the undivided one-fourth of both the South side-line trench and the dam. In the latter case, which is the present, it would not: the bare land only as meted and bounded would pass unless it was expressly stated in the transport that the right to use the trench and dam was ceded also.

As regards the question of necessity, Murdoch’s land E F G H, was not within the category of lands which having no means of drainage and no means of access to the public road must of necessity have the *les fluminis* (*waterloozing*) or right of drainage and the *iter* or right of passage over the adjoining lands of others. Murdoch’s lands had a façade of fifty roods on the public trench and road—for that matter, owing to the angle, the façade measured along the line of the public road was some sixty roods; and his façade along the river bank was much longer. He had, therefore, a means of getting both drainage and access to the public road without

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going on the lands of the sellers. It is true that at the moment of the passing of the transport he had no means of drainage except through the South side-line trench, and, although he could have passed over his own lands, he had no easy means of access to his back lands except along the South side-line dam, but that would not necessarily give him the right to use either, much less would it give him a right in or title to either. And, when he constructed his North trench and the village middle road on his own side the necessity, if it could be called a necessity, to use the South side-line trench and dam ceased and with the necessity would cease the right if any to use.

Even if Murdoch had had either right by necessity that would not have prevented the sellers from stopping the trench or cutting the dam if they chose. *Voet*, (Bk. 8, tit. 3, s. 4,) citing *Grotius* and *Van Leeuwen*, says that a right of way of necessity and by concession can be closed by the owner of the servient tenement and he may cut and dig across it, although if requested to reopen it, and there is urgent necessity, he must do so and make it fit for use. He is speaking of a right of way only, but I take it that the principle would apply equally to a right of drainage. In any case the remedy against the owner of the servient tenement would not be by an action of trespass.

It thus appears that the only piece of land as to which the Plaintiffs have established a title upon which they can sue in trespass or ask for an interdict is the block "E F G H." They may have enjoyed the use more or less of the village middle road, and the South side-line trench and dam and it may seem hard that it should turn out now that what they have so long regarded as their own does not belong to them. But we as judges cannot take hardship into account. The case of *Steele v. Thompson* was a very hard one. One of the conditions of the agreement in that case was that a certain fresh water canal should be for the joint use of two plantations belonging to different owners, the bed and soil of it belonging to one of them. The transport referred to the agreement "as recorded," and the one to whom the "bed and soil" did not belong and his successors had

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actually enjoyed the use of the canal as in terms of the transport and agreement uninterruptedly for thirty years and nine months when the then owner of the bed and soil put an obstruction in the canal which prevented the use of it by the then owners of the other plantation, although it was the only means they had of conducting the shipping and navigation of their plantation. The latter brought an action claiming that they might be declared entitled to the use of the canal, and that the Defendant might be compelled to remove the obstruction, but the Supreme Court decided against them. They appealed to the Privy Council, who upheld the decision, but in giving judgment said: "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," (p.303). That case is pretty much on a parallel with the present one. There the party had not taken the precaution to get his servitude created by a judicial act; here Murdoch and his successors have neglected to get transport as they might have done of the interest in the middle road and, if justly entitled, of the South side-line trench and the use of the dam. We are bound to apply the same rule as did their Lordships, and decide according to law, even if as in that case our decision may disappoint the real justice of the case. In a matter of this kind, which is *stricti juris*, we are not entitled to import equitable doctrines, especially those of English Equity law. In a case decided not very long ago at the Cape of Good Hope, where the Roman Dutch Law prevails as well as in this colony, the question was as to the renunciation by a married woman of the *ben se. Vell vel Auth. si qua Mulier* she having signed a promissory note as surety for her husband and, in giving decision, SHIPPARD, J. said: "The alleged liability of Mrs. Goldschmidt cannot be determined by English precedents, though in many respects the principles underlying the decisions will be found to be almost identical with those of the Roman Dutch Law on the same subject." *Whitnall v. Goldschmidt* (3 Buch. E.D.C. Rep. 314) That would be the same here. The English law knows nothing of the

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se. vell, or of the *Auth*. Neither does it know anything of our law requiring transports of immovable property to be passed *coram lege*. The fictions of the English Equity Courts by which they professed to modify the strictness or harshness of the English Common Law as regards titles to land can have no application as to the transfer of the *dominium* of immovable property in this colony. We must decide the questions before us according to the Roman-Dutch Law, and in case that law leaves us in doubt we are bound to go to the Roman Law itself for principles to guide us and not to seek them at second hand in the English Law. *Van der Kees. Th.* 18, r. 7; Grotius Introd Bk. 1, c. 2, s. 22; Van. Leew. Com. Bk. 1, c. 1, s. 11:

So far as the claim by transport is concerned the matter is one *stricti juris* and the Court cannot by equitable construction extend the rights of the Plaintiffs beyond what the transport and diagram give them in express terms. And as regards the claim to title by possession the matter is also *stricti juris*, inasmuch as the Court cannot by any stretch of its equitable power declare that the Plaintiffs have acquired the possession by prescription if it is plainly proved that they have not had undisturbed possession for a clear third of a century. To entitle the Plaintiffs to succeed in the present action of trespass they must prove one title or the other. I may add that if we look at the *Institutes* (Bk. 4, t. 6, s 28) from which the Dutch jurists took the division of actions into those *stricti juris* and those *bonae fidei* we shall find that an action of trespass is not one of those specified as being *bonæ fidei*.

The Plaintiffs having established a title by transport to the block "E F G H," the next question is whether the Defendants have trespassed on that block so as to render them liable in damages and to an interdict.

It will be well first of all to deal with the evidence as regards Lot 74, which was part of the block "E F G H." That lot was sold by the Executor of Murdoch in 1861, to certain of the Defendants' predecessors in title. Through inadvertence, apparently, transport of this lot was not given to the Defendants when they acquired

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Pln. *Schoon Ord* and the sellers' portion of *Goed Fortuin*. But they have all along dealt with it as if they had got transport. They say it was originally acquired in order to connect their part of *Goed Fortuin* with *Schoon Ord*, by a navigation canal, such as now exists. That is, as we have seen, inconsistent with the terms of the transport.

The trench running along the North side of lot 74 is part of the trench running along the whole length of "E F G H" on its North side. A servitude of the right to drain the remainder of "E F G H" through this trench across the North side of lot 74 was thus created by the transport. And the undertaking by transport to maintain the village road and the South side-line trench and dam to the extent of the façade of lot 74 on the part of the purchasers of the lot would, they being the owners of the soil of the road, the trench and dam, amount to the creation of servitudes to that extent for the benefit of the rest of Murdoch's lands.

It is manifest that the construction of the navigation canal across the village road, the North trench and the South side-line trench and dam was contrary to the stipulations of the transport. This, however, was the act of the Defendants' predecessors, and the lot is still the property of those predecessors, who, therefore, so far as the lot is concerned, are the persons and not the Defendants who are keeping the navigation canal there. They are allowing the Defendants to use it, no doubt, but I do not at present see how the Defendants can be liable to the Plaintiffs in trespass for using it. Assuming the navigation canal to be on lot 74, it is difficult to see how trespass would lie even against the real owners. The land under the North trench on lot 74 as well as the rest of the lot is their property.

An action may lie to compel them to comply with the conditions of the transport but that will certainly not be an action of trespass. The proper action in cases of servitudes are the *actio confessoria* or the *actio negatoria* (or *contraria*) as the case may require.

There was a good deal of evidence taken on the question as to whether the navigation canal is or is not with-

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in the bounds of Lot 74. If it is on Lot 74, then it appears that trespass will not lie in respect of it. If it is outside the boundaries of Lot 74, then as regards the lands "E F G H," the Defendants would be trespassing in going on and running water across and putting stop-offs on the land not part of Lot 74. It is practically impossible, in my opinion to say from the evidence before us, what is the true position of Lot 74. The charts differ, the total widths of the several lots up to and including Lots 72-73, as stated in figures on one of the charts, differ from the total widths as laid down on the charts, and Mr. Hill, the Town Superintendent has ascertained by actual measurement that if the total widths stated were taken to be the true total widths of the lots taken together, it would throw lots 72-73 further to the Westward by some roods; that would throw the old draining trench, which is shown on the charts as, and which is stated by the witnesses to have been, situated between lots 72-3 and lot 74 also further to the Westward. I am disposed to accept the evidence of the witness Skeete who having been summoned by both sides may be presumed to be unbiassed as settling the point. He swears that he laid out the new navigation trench and that the old draining trench is in the centre of it. At that time the old trench was 4 feet wide, but it had silted up and had been originally wider. He measured 7 feet, he says, from each side of the old trench, or 9 feet from the centre which made the new navigation canal 18 feet wide. He states that between the old draining trench and lots 72-3 there was a space or parapet left, and that the owner of lot 73 planted a row of cocoanut trees exactly in a line with the West paal and parallel to the canal. He swears that the 7 feet he added on that side to the old trench in no way trenched on lot 73, and Mr. Hill states that there is still a space between the trees and the Eastern edge of the navigation canal. The Plaintiffs are now the owners of lots 72-3, and they and their ancestor were the owners of the space between the old trench and that lot as well as of the bed of the old trench itself. As the old trench was between lots 72-3 and lot 74, it could form no part of lot 74. The

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owners of lot 74 in taking in the bed of the old trench and 7 feet to the Eastward of it were therefore, trespassing on the Plaintiffs' lands, and if there were the same space between the Western edge of the old trench and lot 74 as there was between the Eastern and lots 72-3, the 7 feet on that side also would be on the Plaintiffs' land. If that be so, no part of the navigation canal would be on lot 74, and the keeping of water in it, and the going on and otherwise using it would be trespasses on the part of the Defendants.

Then as to the rest of the block "E F G H." The right which the sellers had in the first instance to drain across Murdoch's lands into the South side-line trench had, in my opinion, ceased, when the necessity ceased, viz., when the sellers or their successors in title dug a new trench in 1854, on the South side of their remaining lands on the North side of the middle road, which was then made up on their side also. That trench ran down into the public road trench, they could thus drain directly into the koker without crossing Murdoch's lands at all. After that the owners of the remaining portion of *Goed Fortuin* would have no right of entry on Murdoch's lands, much less would they be entitled to dig trenches, run water across, and put in stop-offs. Those who took the lease from Murdoch's Executors would be bound by the provisions of the lease. It is doubtful whether the giving them the water-rights of his estate would entitle them to change the system of drainage, but supposing it did, they would be bound, at any rate if so required, when the lease expired, to leave the drainage as they found it. Thereafter, neither those persons nor their successors in title could continue to enter upon the land which had been leased, dig and keep open trenches, drain across and put in stop-offs.

The Defendants admittedly have done all these things on this part of the Plaintiffs' block "E F G H" during the three years last preceding the bringing of the action, and are consequently liable in damages to the Plaintiffs in respect of the several trespasses. The Plaintiffs are also entitled to an interdict as regards this land.

As my brother Judges are of opinion that the Plaintiffs are entitled to damages in respect of all four pieces

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of land it is unnecessary for me to consider what damages should be awarded in respect of the trespasses on the one only, especially as, if the Plaintiffs are entitled to damages in respect of trespasses on the South side-line trench and dam and the middle road, those trespasses are of a more serious character, as having more injurious consequences, than those on the block E F G H. Consequently the damages awarded by the majority of the Court must be greater than I should consider adequate in the one case only.

Attorney for Plaintiffs, *J. B. Woolford*.

Attorney for Defendants, *G. W. Hinds*.

EX PARTE ADMINISTRATOR GENERAL *re* ESTATE DESOUZA.
CLAIMS OF DEFREITAS AND OTHERS.

6 March, 1890

Administrator General's Ordinance, 1887.

Application for directions—Requisites—Functions of single Judge.

Applications for Directions should be brought in the first instance before a single Judge.

Genoveira Rosa De Freitas, widow, and six other persons claimed upon the estate of Maria de Souza *non compos mentis* under various titles of claim. The Administrator General submitted these claims to the Court as under Section 66 of the Ordinance, and prayed for directions as to whether they were prescribed.

Hutson, for the claimants, maintained that the procedure under Section 66 was not applicable, the claims not being those of creditors but of co-heirs.

Dargan, for the Administrator General, *contra*.

The Court (CHALMERS, C.J., ATKINSON and SHERIFF, J.J.) ruled that the proceedings ought to be brought in the first instance before a single Judge.

CHALMERS, C.J.—This is an application to the Court for directions under the Administrator General's Ordinance No. 15 of 1887. The application was addressed to the Registrar of British Guiana and was brought before the Full Court for hearing. On considering the matter it has appeared to us that to bring the application in the first instance before the Full Court was an error as to practice which it would be well to correct. It seems not improbable that the error resulted from the phraseology of the Interpretation clause of the Ordinance in which "the Court" is defined to mean "the Supreme Court of Civil Justice, and also the Chief Justice during non-session of the said Court," and "the Full Court" is defined to mean "the Court comprised of two or more Judges," without any expression indicating that the functions of the Court may be performed by one Judge. But, turning to the Rules (which under Section 112 of the Ordinance have the same effect as if enacted by the Ordinance) we find in Rule 5 that

ESTATE DESOUZA.

“Except as regards any matter required by the Ordinance or these “Rules to be heard or decided by the Full Court, the powers of the “Court may be exercised by a Judge; provided that when any matter “is decided by one Judge there shall, subject to any General Rules, “be an appeal to the Full Court.” Again we find that under Section 114 of the Ordinance which along with Section 113 deals generally with applications for directions, appeals are contemplated; and that these last mentioned appeals are appeals to the Full Court and not to the Judicial Committee of the Privy Council is very clearly gathered from what is said as to the last mentioned class of appeals under Section 70. Rule 5 is by its mere terms *permissive*, but it is obvious that its true intent is that the powers of the Court in all but the excepted cases shall be exercised by one Judge, wherever interests may be affected either directly or indirectly by the orders or directions made or given, otherwise the parties would lose the benefit of that full discussion of essential points in appeal, as well as in a tribunal of first instance which it is clearly intended they should have. As the matter has thus not been brought before the proper tribunal, the Full Court will not adjudicate. As the hearing has however taken place, one of my brother Judges will take the application *pro forma* and adjudicate without calling for additional argument.

With regard to applications for directions generally, we think it advisable that the application, in addition to the bare statement of the facts having immediate relation to the questions submitted, should contain also information as to the position of the estate or trust and also as to the persons whose interests may, in the opinion of the Administrator General, be affected by the direction or order applied for. The application should also show what citations, if any, have been made.

Attorney for claimant, *G. W. Hinds.*

The arguments urged before the Court were taken as heard before a single Judge in the Bail Court, and

ESTATE DESOUZA.

10 *March*, 1891

SHERIFF, J., pronounced in that Court the following decision:—

There can be no doubt that the Administrator General has approached the Court under section 66 of Ordinance 15 of 1887. Sections 64 to 68 inclusive fall within a sub-division of the Ordinance and is headed “Calling up creditors and proof of debts.” Now the word “claim” in section 66 I read to mean a claim in the nature of a debt (see section 64.) The claims which have been submitted to the Administrator General are not claims in the nature of a debt due and owing by Maria de Souza, but a claim to property which it is asserted should never and could never have legally devolved upon him and which, therefore, the Administrator General has no right to intermeddle with. Be that however as it may, it is sufficient for the purposes of this application to say that I rule that I have no jurisdiction to pronounce the judgment asked for under section 66 of the Ordinance.

MOTION PESTANO v. DE FREITAS.

Garnishment—Practice—Ordinance 22 of 1884—Payment into Court—Costs.

Pistano obtained judgment against de Freitas and proceeded on a judgment summons under rule 219 of Ordinance 22 of 1884. Defendant was ordered to pay the debt by instalments, and while such order was in force, Plaintiff Pistano sought to garnish money payable to defendant by Barr for timber sold by one Hubbard the agent of defendant. At the hearing an affidavit was read on behalf of Barr, who deposed that although he had dealt with Hubbard he did not know for whom he sold, and he could not admit the debt as due to defendant.

16 March, 1890

Hutson for de Freitas—So long as the order on the judgment summons is in force, Plaintiff is bound to accept the monthly allowance, and has no *locus* in a matter of garnishment. The remedies open to Plaintiff cannot be concurrent.

Forshaw for Pistano—Defendant has not obeyed order of Court and is in default. Proceedings on the judgment summons do not debar Plaintiff from garnishing money due to defendant.

Kingdon, Q.C., for Barr.—Defendant having been ordered to pay \$20 a quarter and being in default for 3 quarters, only \$60 can be garnished by Plaintiff.

PESTANO v. DEFREITAS

Hutson, for Defendant, filed affidavit of facts relating to sale of lumber to Barr.

SHERIFF, J.—I refer the Plaintiff to his ordinary remedy and order the money to be paid into the Registry of Court to abide the result of any suit instituted by Pestano v. Barr.

Kingdon.—My client was forced to come into Court, I apply for costs.

Hutson.—I have never heard such a proposition as the garnishee asking for costs.

SHERIFF, J.—I grant costs.

Attorney for Pistano, *J. B. Woolford*.

Attorney for Garnishee, *G. W. Hinds*.

Attorney for Defendant, *L. B. K. Collins*.

ADMINISTRATOR GENERAL (CURATOR OF DESOUZA) v.
GOMES AND DESOUZA.

27 March, 1890

Recompense in arbitrio judicis is due for services independently of Contract.

Accounts had been rendered and adjusted before the Accountant, the only matter remaining in issue being the remuneration of the Defendants for services as shopmen. *Hutson* for Plaintiff, and *Dargan* for Defendants, submitted the question as upon the Report of the Accountant without argument.

The Court (CHALMERS, C.J., ATKINSON and SHERIFF, J.J.) gave Judgment:—In this suit the Court by its sentence on 16th May 1888, set aside as fraudulent an alleged agreement between Maria de Souza and the Defendants for the sale of two spirit shops and ordered an account to be taken of the intromissions of the Defendants with the business of the shops from 23rd September 1887 when the shops were taken possession of by them up to the time the accounts should be rendered, and ordered the Defendants to pay to the Plaintiff the amounts due in respect of profits in relation to the diligent and due management of the shops whilst in the Defendants' possession.

The Account has been taken accordingly and a Report has been made by the Accountant of Court, from which it appears that the Plaintiff has admitted all the items in

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the Accounts rendered by the Defendants except a debit of \$680 claimed by them as salary for their services in the shops at the rate of \$40 each a month during the time they were in possession of the shops under the alleged agreement of sale. The Plaintiff contended that the Defendants were not entitled to any remuneration for services, there being no contract between Mrs. DeSouza and them and that even if they were so entitled the sum charged was unreasonable and excessive. It was agreed between the parties when before the Accountant (they being at one as to all the other items) that this charge should be referred to the Court for its decision without further argument.

Undoubtedly the remuneration claimed cannot be sustained on the ground of contract. It was not controverted however that the Defendants gave their services in the shops, nor was it said that their services were not efficient or beneficial to Mrs. de Souza, or that they were unnecessary by reason of sufficient services having been rendered by other employes in the shops; other persons would presumably have had to be paid for doing those services if the Defendants had not done them. In these circumstances remuneration is due to the Defendants upon the principle of recompense, well known in the Roman Dutch Law. It is true that the Defendants' possession began in a bargain which the Court has had to set aside as fraudulent, but there is no allegation that their subsequent actings in connection with the business of the shops had any colour of fraud and there is thus nothing hindering the principle of recompense from receiving effect. There appears no justification however for so large a claim as is made. We shall allow the rates suggested by the Accountant, vizt. \$20 a month to Soares de Souza and \$10 a month to Gomes for nine months. The item salary will thus be \$270, and the balance at the credit of the Plaintiff \$1,871 17. Sentence accordingly.

Attorney for Plaintiff, *G. W. Hinds.*

Attorney for Defendants, *J. A. Murdoch.*

PETITION A. F. AND M. J. BLACK [re Estate BLACK]

PETITION P. J. WILLEMS AND WIFE [re Estate BLACK]

REPORTER, ADMINISTRATOR GENERAL.

27 March, 1890

Lis Pendens—Administration of Estate—Costs.

Circumstances in which costs of proceedings to recover an Estate from the Administrator General were allowed.

The Administrator General held an Estate under an Act of Substitution by an Executor which was found by the Privy Council on appeal to be null and void. Pending the appeal the Petitioners (who were heiresses of the estate) had applied for an order on the Administrator General to account and render to them their property the period for the distribution of which, they maintained, had arrived. The Administrator General opposed. Final order became unnecessary as the Privy Council directed the estate to be restored to the continuing Executors.

Belmonte for the Petitioners moved for costs.

Kingdon, Q.C., for the Administrator General—the Petition was unnecessary and improper under the circumstances; costs ought not to be given.

Belmonte replied.

The Court (CHALMERS, C.J., ATKINSON and SHERIFF, J.J.) gave the following judgment:—Application was made by motion on behalf of the Petitioners for an order on the Administrator General to pay the costs incurred by them, and the parties were heard, decision being reserved.

The petition was filed on the 15th March, 1889, praying the Court to order that a statement of the Petitioner's property belonging to the Estate of the late Mr. Black in the hands of the Administrator General might be rendered them and the property passed and paid over. The Petitioners had previously, on 25th February 1889, demanded their money and property without effect. The ground of their demand was that the period of distribution of the estate as fixed by the Testator's Will had arrived on 30th January 1889, by the youngest of the heiresses having then attained majority. It was un-

PETITION *re* ETS. BLACK

doubted that on that event *jus exigendi* had accrued. Final order on the Petition was rendered unnecessary by reason of the estate having been taken out of the administration of the Administrator General and restored to the Testamentary Executors of Mr. Black by decision of the Privy Council, but previous to this decision this Court had recognised that the prayer of the Petitioners was just, by an interlocutory order in which they directed the Administrator General to state the amount of funds available for distribution, under reservation of such moneys as might be necessary to cover commissions and expenses. The existence of *lis pendens* regarding the custody of the *boedel* and regarding one of the subjects comprised in it was the ground on which the Administrator General opposed the prayer of the Petition, but the duty of distribution devolved on the Boedelholder for the time being on the condition of distribution being fulfilled, and as the Petitioners did not get their property when they were entitled they were in their right in coming to the Court, and there is no ground disentitling them to costs. Costs will therefore be allowed to the Petitioners against the Administrator General.

The Petition of Willems and wife.—In this Petition the situation is the same as in that of the Misses Black just now dealt with excepting that a further question was raised by the Administrator General as to a settlement on Mrs. Willems of her share of Mr. Black's inheritance to her separate use exclusive of the rights of her husband. It might have been very reasonable in meeting Mrs. Willems' demand for transfer of her share to have sought the direction of the Court as to the manner in which it should be paid or settled; but this was not done; her demand was resisted on all grounds, and she was in her right in coming to the Court. She is entitled to her costs.

Attorney for Petitioners, *J. A. Murdoch.*

Attorney for Reporter, *G. W. Hinds.*

EX PARTE, RECEIVER GENERAL *re* ESTATE OF ABRAHAM
VANIER, DECEASED.

16 SEPTEMBER, 1891.

Insolvency Ordinance, 1884—Appeals.

Appeal does not lie from an opinion stated by a single Judge where no order has been made.

Curia, per CHALMERS, C.J.:—This is an appeal to the Full Court from a decision of his Honour Mr. Justice SHERIFF on the 26th day of July 1890, in the matter of a motion by John Parry Farnum, Executor in the colony of the Will of H. M. A. Black, deceased. It appears that certain claims on behalf of the colony of British Guiana were made by the Receiver General on the insolvent estate of Vanier. A claim on the same estate was made by Black's Executor for a sum due on a Mortgage. The Administrator General, sustained both claims, ranking that of Black's Executor as preferent to the claim for the colony. The Receiver General moved to vary the decision of the Administrator General in so far as it postpones the colony's claim to that on the Mortgage. This motion has not been disposed of, but was followed by a motion of Black's Executor to expunge the colony's proof. On this last motion Mr. Justice SHERIFF gave a decision which is now in question. In connection with the appeal there has been put before the Court an opinion or as it may be called, grounds or reasons for a decision, but no

RECEIVER GENERAL *re* ESTATE OF ABRAHAM VANIER

order. It is clear as well from the terms of the enactments relating to appeals, contained in the Insolvency Ordinance and Rules, as from the inherent nature of the case, that appeal does not lie except where there has been an order, and if it had been discovered during the hearing in this matter that no order was before the Court, we would have postponed further hearing until an order had been produced. We shall take the course which is the nearest approximation now possible, allow the Appellant to lay over with the Registrar the original or an authentic extract copy of the order he complains of, and then proceed to a decision.

BUTTERY v. BUTLER.—(BAIL COURT.)

Judgment Summons—Debt—Petty Debt—Demand.

The Bail Court has jurisdiction in granting orders on Judgment Summons on sentences given in the Petty Debt Court.

Semble—No demand of property is required on Petty Judgment Summons cases for amounts under \$100.

Under Sec. 4 of 21 of 1884, “the Court may commit to prison . . . “any person who makes default in payment of any debt in pursuance of any order or judgment of any Court for the payment of “any sum exceeding twenty-four dollars.”

Plaintiff obtained a sentence in the Petty Debt Court and proceeded to levy but was unsuccessful, as no entry could be made.

SHERIFF, J.—Under the order of the Court, *Thomson v. Howard, et al*, L.R., British Guiana, p. 143, in cases of Judgment Summons should there not be a demand made, such demand to be shown by return endorsed?

Ogle for Plaintiff—A demand is necessary no doubt in cases within the jurisdiction of the Inferior and Supreme Civil Courts, but in the Magistrate’s Court there is no demand of property necessary, the Bailiff has no means of making a demand, he has only power to make a levy, and he has made a return that no entry could be effected. This is the first case brought on Judgment Summons from Magistrate’s Court.

BUTTERY v. BUTLER

SHERIFF, J.—I see there is a return by the Bailiff that no entry could be effected, and as I am satisfied that no demand of property is necessary in Petty Debt cases, and that the Bailiff has done all that is required by law, I must order the Defendant to pay \$5 a month until the judgment is satisfied, with permission to creditor (Plaintiff) to apply for an increase.

For Defendant, (in person).

RODRIGUES, et AL, v. BLOOMFIELD.—(BAIL COURT.)

Nullity of Citation—Appearance—Effect of default on Judgment Summons proceedings.

Defendant was summoned to appear before the Inferior Civil Court on a day in June. The case was on the May list. Defendant did not appear, and sentence was given against him.

Held.—That Defendant cannot on a Judgment Summons except to the validity of citation.

Sentence by default was obtained against Defendant in the Inferior Civil Court. He was brought on Judgment Summons.

Woolford for Defendant.—Defendant was cited to appear in the Inferior Court on 25 June: case was on Hay list, and judgment given 6 June. We plead nullity of citation. It was Plaintiff's duty to see proper service. Judgment Summons cannot be got against us.

Collins for Plaintiffs.—Defendant's action is against the Marshal, not against us. We hold sentence. Defendant should have appealed from sentence.

SHERIFF, J.—On the Judgment-Debtor appearing on a Judgment-Summons, his Attorney-at-Law raised the following preliminary objection, viz., that the sentence of the Inferior Civil Court on which the present proceedings are based, was obtained in contravention of the practice as laid down by law and cannot stand. Bearing in mind that I am sitting in the Bail Court, I rule that it is not competent for me to examine into the validity of a sentence pronounced in the Inferior Civil Court, (though, as in this case, I was the Judge before whom

the sentence was pronounced), the case being confined to the parties only, and not affecting the rights of third parties. It is unreasonable to suppose that where a sentence is improperly obtained the party injuriously affected thereby is without a remedy; but he must seek redress before a tribunal authorised and competent to afford same. The Bail Court is not such a tribunal. Objection over-ruled.

DOS RAMOS v. RODRIGUES.—(BAIL COURT.)

Judgment Summons—Means to pay—Procedure.

An application for Judgment Summons will not lie where the debtor possesses property which the creditor can discuss.

The facts are contained in the judgment.

Belmonte for debtor.—The debtor is possessed of immovable property and creditor must levy, and cannot proceed by way of Judgment-Summons.

Collins for creditor.—By the Marshal's return, the debtor denied having property.

ATKINSON, J.—By the return of the Marshal which is *primâ facie* evidence, I find that the debtor had no property whereon to levy. The Attorney-at-Law for debtor having admitted at the Bar that he had property, I must for the purposes of this claim, take it that such property was not in the possession of the debtor at the time of the demand of the Marshal, but that he has such property now, and I therefore cannot grant an order on Judgment-Summons. Of course if the debtor is damnified by the Marshal's return he has his action. I order the debtor under the circumstances, to pay the costs up to and including demand on him for surrender of property.

Re GARDNER.

Construction of Ordinance—Annuities.

Pln Annandale was left to S. Gardner charged with certain annuities. After possession Gardner became

insolvent. The Administrator General as representing his estate, desired directions whether the plantation was to be sold irrespective of the annuities.

The Administrator General.—I apply under rules 27 and 28 of the Insolvency Ordinance 1884, and I am not required to give notice to the other side under rule 29. Under rule 179, I cannot sell the estate for less than three-fourths of its value. The estate is charged with annuities, and I apply for directions whether the “actuary” value of the annuities is to be deducted from the value of the estate or whether I shall sell the estate irrespective of the actuary Value.

Kingdon, Q.C., for creditors.—The appraised value under rule 179 I take it means the market value unencumbered.

ATKINSON, J.—I think the term “appraised value” in rule 179 means the actual value of the property irrespective of the incumbrances.

EX PARTE, OUKAMA *re* PROVOST MARSHAL'S OFFICE.

10 December, 1891.

Provost Marshal's Office—Execution Sale—Giving off copy of conditions.

A purchaser at Execution Sale is entitled to obtain a copy of the conditions of sale from the Provost Marshal upon payment of the prescribed fees, but no right in or to the property is vested by the sale until the whole of the purchase money has been paid.

Rule on the Provost Marshal to show cause why he should not grant to the purchaser of certain property at an Execution Sale, a copy of the conditions of sale.

The Provost Marshal in person showed cause and stated reasons for refusing the copy. vizt.:—

“1. Because the contract of sale and purchase of the said property “is incomplete, only the first instalment of the purchase money hav-
“ing been paid.

“2. Because it has never been the custom of the office so far as I
“have able to ascertain to give off a copy of the conditions until the
“whole of the purchase money and interest thereon have been fully
“paid, and I have only followed this custom, the copy of conditions
“being looked upon as equivalent to the grosse of a transport

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“and is the only document with the certificate of the Provost Marshal
“endorsed thereon that the whole of the said purchase money and
“interest have been fully paid, and that can be used when applying
“for Letters of Decree.

“3. Because had I given off the said copy as applied for, I do not
“know what use Mr. Oukama might make of it, and when any of the
“subsequent instalments of the purchase money became due and re-
“mained unpaid I would have to petition the Court for leave to retake
“possession of and re-sell the said property, and I do not know that
“even then the petition might not be opposed on the strength of hav-
“ing obtained the copy of the conditions of sale.

“4. Because I consider that it is necessary to use very great dis-
“cretion before such a copy of conditions of sale as the one applied
“for could be given off, even if it were the custom to give off such
“copies, because a dishonest person applying for such might go to
“some ignorant person and represent himself as the owner of the
“property purchased and might obtain the whole or part of the pur-
“chase money on the strength of having the copy of the conditions of
“sale, and when the ignorant person came to look for title he might
“find to his cost that the purchase money had not been paid, and the
“Provost Marshal had been obliged to petition the Court to re-take
“and re-sell the property and thus be prevented from suing for a
“transport because the title would not be in the said dishonest person.

“5. Because although I refused to give Mr. Cameron the copy
“asked for, I offered to give him in lieu thereof a certificate costing
“only one dollar, containing everything necessary relating to the sale
“and purchase of the said property as contained in the original condi-
“tions of sale which would answer every legitimate purpose, but he
“refused to accept it stating that nothing but the conditions of sale
“would answer the purpose for which he wanted it.

“6. Because the property sold to and purchased by Mr. Oukama
“was sold as the property of Mr. Dargan, and was levied on and sold
“at the instance of the

OUKAMA *re* PROVOST MARSHAL'S OFFICE.

“Building Society of British. Guiana on account of his having failed
“to satisfy the mortgage held by the said Society.

“7. Because I suspected that something was wrong on account of
“the persistent manner in which the said copy of conditions of sale
“was applied for.

“8. Because on the day of the sale Mr. Dargan used every en-
“deavour to induce me to allow him to purchase the said property but
“I refused, because he was the Defendant in the suit that foreclosed
“the mortgage. Had I done so, it would be putting the property back
“again into the hands of the person from whom it was taken, and it is
“my duty to protect as far as possible the interest of the party entitled
“to receive the purchase money.

“9. Because having failed to be allowed to become the purchaser,
“and before the sale commenced, Mr. Dargan sent for Mr. Oukama
“who arrived at the place of sale a few minutes before it commenced,
“and when it began the bidding was brisk, but Mr. Oukama made the
“highest bid, and in consequence the property was knocked down to
“him.

“10. Because after the property was knocked down to the said
“purchaser he said he would pay cash, but he had it not with him
“then, but he went for it, the sale remaining unsigned in the mean-
“time. On his return after a short absence he stated he could not get
“the cash, and in consequence, had to get two sureties who, together
“with himself, signed the conditions of sale, thus making it a credit
“sale.”

Affidavits were filed on both sides.

Dargan for Oukama the purchaser in support of the rule.

Curia (CHALMERS, C.J., and SHERIFF, J., per CHALMERS, C.J.):—

The question is whether the purchaser at an execution sale is en-
titled to obtain out of the Provost Marshal's office a copy of the con-
ditions of sale, no question being made that the sale and purchase
were valid. The proceedings in the department being matters of re-
cord, and the purchaser having manifestly an interest to

OUKAMA *re* PROVOST MARSHAL'S OFFICE.

obtain a document showing the contract he has made, it lies on the Provost Marshal who opposes the giving out of the copy to show sufficient reasons.

The first reason assigned is that the contract of sale and purchase is incomplete in respect that part only of the purchase money had been paid. This is a misconception. The contract is complete, although by a peculiar provision of the law it vests no right to the property until the purchase money has been all paid.

The second reason is that it has not been the custom of the office to give off copy of the conditions. It is not said that the question has been ever dealt with by refusing copies. At the utmost the grounds of a custom are always examinable, and if it rests on no just principle the mere repetition of an error does not make law. There is no analogy in the case put by the Provost Marshal of the copy with indorsation of payment of the purchase money and the mere copy without indorsation which is all that is now asked for. Nor is there any just analogy with the giving off the grosse of a transport. The grosse is receivable as evidence that a conveyance has been made. The copy of conditions is only partial evidence of a contract which unless followed by payment vests no right in the purchaser.

The reasons of refusal stated in the remaining seven paragraphs of the Provost Marshal's answer all turn on particular circumstances connected with the case, and seem to imply that the Provost Marshal hesitated whether it was not his duty to decline giving the copy on account of some irregular purpose for which he thought the copy might be used. However much we respect the cautiousness in the discharge of his duty thus manifested by the Provost Marshal we are bound to say that the reasons under reference could not receive effect. They rest only on surmise and we may not assume that an irregular purpose is intended.

We make the order asked for but without costs, the Provost Marshal having acted rightly in taking the opinion of the Court on the points raised, and this being a test case.

Attorney for Ouckama, *W. S. Cameron.*

(IN THE BAIL COURT.)

EX PARTE DEFREITAS ET AL v. ADMINISTRATOR GENERAL
REPRESENTING CORREIA.

JARDIM v. ADMINISTRATOR GENERAL REPRESENTING
CORREIA.

31 May, 1890.

Will—Legacy to Creditor—Compensation.

W. Correia was never married, and had no heirs. By his will he left to the claimant DeFreitas, \$500 and his household furniture, and to Jardim \$1,000. He made other bequests. Deceased owed money to DeFreitas not exceeding the legacy she received, while to Jardim he owed \$1,200 or \$200 more than the legacy. The Administrator General refused to pay the sums due on the ground that the creditors were legatees, and treated the legacies as compensation to the legatees for the sum due them.

Held—That legacies are not in the nature of compensation.

31 May, 1890.

Hutson for claimants. Under Roman Dutch Law it must appear from terms of bequest that it is in satisfaction, there is nothing in will to show it was in satisfaction of debt. Van der Linden, 143; Grotius, 160, Bk. 2, s. 5; Talbot, Duke of Shrewsbury, Chancey's case, Justinian Bk. 2 tit. 20. Policy of both English and Roman law is to prove the bequest unless contrary clearly shown.

SHERIFF, J., I hold that the legacies are not to be deemed in satisfaction of the debts.

Hutson—I ask for costs.

SHERIFF, J.—I grant costs.

OF CIVIL JUSTICE.

[1890]

BAIL COURT—IN INSOLVENCY.

CHEUNG ET AL v. FRYER.

31 *May*, 1890*Creditor's petition—Service of.*

Fryer being indebted to Cheung & Co. they petitioned the Court to have him declared an insolvent. Under rules 124 and 125, Ord. 22 of 1884, service of the petition was directed to be made by registered letter addressed to his last known residence. The letter was addressed to E. S. Fryer, Bartica Grove, his last known residence being Bartica Hotel.

SHERIFF, J. *Held*—That there being no service of the application for the receiving order in terms of the Ordi-

SUPREME COURT
CHEUNG v. FRYER

[1890]

nance, the Receiving order already granted be cancelled along with the order fixing the examination.

Attorney for Fryer, *J. B. Woolford*.

MACKENZIE v. PEREIRA.

10, 11 *December*, 1891.*Conversion—Assessment of Value—Costs.*

Plaintiff owned a life interest in a shop which interest was purchased under execution by Defendant. Defendant took possession of the shop and furniture therein. The furniture had not been levied upon and belonged to Plaintiff. When Defendant obtained possession the shop and furniture were under lease to a tenant who continued to occupy after the execution, as the tenant of Defendant and paying rent to him. There were negotiations between Plaintiff and Defendant as to the price to be paid for the furniture, but no agreement that the tenant should use it.

Held—There was conversion of the furniture; held also that although the furniture was not ascertained to be marketable, damages for the conversion could be assessed upon evidence of value.

Claim of consequential damages in respect of a sale at execution of other property of Plaintiff which it was said could have been avoided if Plaintiff had timeously received the value of her furniture held too remote.

In conversion Plaintiff need not necessarily prove demand and refusal.

Action for conversion of furniture.

Dargan for Plaintiff.

Hutson for Defendant.

The facts and arguments sufficiently appear from the judgment.

Curia (CHALMERS, C.J., SHERIFF, J.) per CHALMERS, C.J.—Plaintiff claims \$1,000 as damages and pecuniary compensation for the wrongful conversion by the Defendant of certain articles of shop furniture. The following facts are admitted or proved: Plaintiff was owner of a life interest in property at lot 1 or 3, Werk-en-Rust which life interest was sold under execution in January 1890, and purchased by Defendant. The principal part of the property was a house and shop of which Defendant took possession, the shop being then let to Mr. Reid, who after the sale continued in occupation as tenant of Defendant and paid rent until May 1891. At the time of Defendant taking possession there were in the shop various counters and other furniture, all being movable which were included amongst the subjects of which Reid

MACKENZIE v. PEREIRA

had the use under his tenancy, although it does not seem that any rent was specifically paid for the furniture in separation from the rent paid generally for the shop. The furniture had been originally placed in the shop for the purposes of his trade at his own expense by Chow-Wai-Hing, a former tenant in 1885, and on the expiration of his lease in September 1888 it was taken over by the Plaintiff at an estimated value of \$400. The next tenant after Mr. Reid had no use for the furniture as he wanted the shop for an auctioneer's warehouse, and to accommodate him, and on his request, Defendant removed the furniture to his own premises. Negotiations were carried on for a considerable time between the Plaintiff and Defendant as to the price to be paid by Defendant for the furniture, but it is not shown that there was at any time a demand by Plaintiff for delivery of the furniture to her.

In this state of the facts the primary question is whether there was any conversion by the Defendant? I consider there was conversion by Defendant continuing or rather renewing the letting of the furniture to Reid. As soon as Plaintiff's right to the building was determined by the execution, her letting of the furniture, which had been made as appurtenant to the letting of the building and as one indivisible transaction thereunto, was at an end. The letting by Defendant to Reid was inconsistent with Plaintiff's right to immediate possession which she had when her right was determined. It is said that Defendant had no notice of Plaintiff's right to the furniture. He says in his evidence that it was some months after he had taken possession that his attention was drawn to the subject. Taking it that this was so, I do not see that there is here any good answer. Defendant was notified by the very nature of the articles that they were not fixtures, and hence could not have passed by the execution on the immovable property, and the slightest enquiry would have led to his knowing that Plaintiff was the owner. He took upon himself the responsibility of dealing with the furniture as if it had passed to him by the execution. As regards another point made for Defendant that demand and refusal of

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delivery of the furniture were not proved, it is not law that there cannot be conversion without demand and refusal. Demand and refusal is evidence of conversion but it is not essential evidence. Where demand and refusal are not proved the Plaintiff is thrown on the the proof of positive acts of conversion.

Taking it then that there was a conversion, the next question is, what damages is the Plaintiff entitled to? In an ordinary case of conversion of a chattel, a fair although rough measure of the damage would be the price at which a similar chattel to that of which the Plaintiff had been deprived could be purchased in the market. But there is difficulty in the present case from the fact that it seems impossible to say, or at least to say with any confidence, that this furniture has any value corresponding to what is known as market value, the price at which it could be sold depending very greatly upon circumstances and opportunities. Originally in 1885 it cost \$1,200; then when Chow-Wai-Hing in September 1888 gave it over to Plaintiff as owner of the premises and when it was going to be retained there, the valuation was \$400, to be paid by monthly instalments. But the appraiser said he made this estimation as representing the value of the furniture to Mrs. McKenzie without reference to its remaining in the same premises. Apart from its loss of value by removal from the premises for which it was adapted, it is in evidence that this shop furniture suffers deterioration by time and use, so that from this cause it would be worth something less when Defendant converted it, than when Plaintiff acquired it.

It seems probable that Plaintiff would have been in a better position than she is now if she had dealt promptly with Defendant according to the right the law gave her. She had the right to demand the delivery of her furniture: had she done this, then as it seems that it would have suited the Defendant as well as Reid, his tenant, that the furniture should remain, Plaintiff could probably have made a contract on favourable terms for it remaining in the premises. But she stood by whilst perfectly aware that Defendant was using her furniture, and now, in changed circumstances her action is brought. The

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Defendant too would have fared better if he had used his right, which was to direct the Plaintiff to remove the furniture, when he would either have got rid of it altogether or kept it by agreement on fair terms without the intervention of a lawsuit.

We consider that \$300 will be an adequate compensation to the Plaintiff, the title to the furniture now, of course, passing to the Defendant. It was stated as a ground for consequential damages that by not obtaining the value of this furniture at the time of the conversion, the Plaintiff was incapacitated from meeting debts when due by her in consequence of which she suffered loss through a forced sale of some property. No authority or precedent was cited for assessing damages on such a ground, and we consider it too remote. As to costs we cannot consider that either party is in a clearly favourable position. The Defendant says, and we believe truly, that he was willing to settle the claim before the action was brought, but unfortunately he contented himself with general proposals and never made a specific offer. On the other hand, the offer to the claim and demand contains an offer to settle on terms of a fair valuation. Looking to the antecedent negotiation, and to the whole circumstances, we think this offer (although not technically a presentation and offer) should have been taken up by the Plaintiff, and that the cost to be recovered by her should not extend beyond the filing of the claim and demand.

Attorney for Plaintiff, *W. S. Cameron.*

Attorney for Defendant, *J. B. Woolford.*

DE CARMO v. ADMINISTRATOR GENERAL Representing
DE CARMO.

Appeal—Consideration for Service—Contract.

An action will not lie for wages not specifically contracted for at the time of entering service.

Hendricks for mover.

Administrator General in person.

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This is an appeal from the decision of the Administrator General rejecting a claim of Appellant for wages found due and for which a promissory note was given a few months before a Receiving Order was made against the maker. The facts and arguments appear in the judgment.

29 December, 1891.

SHERIFF, J.—This case comes before me on an application brought under Rule 24 of the second Schedule to the Insolvency Ordinance of 1884 to reverse the decision of the Administrator General whereby he rejected the claim of the mover. I construe this Rule to mean that this Court shall examine into the evidence which was before the Administrator General and decide whether he ought or ought not to have rejected the claim. In addition, however, to certain affidavits which had been laid over with the Administrator General the mover adduced oral evidence amounting to fresh and additional matter. The Administrator General did not oppose the production of this evidence and I was reluctant to shut it out. *Primâ facie* by calling additional evidence it may be assumed that the mover had doubts as to the strength of his proof as submitted to the Administrator General. It appears that acting under Rule 22 the Administrator General required further evidence in support of this claim and some affidavits were filed. An opportunity was therefore afforded for the production of the evidence which for the first time has been brought to light in this motion. The evidence is however before me and I shall deal with the same. The mover bases his claim to rank as a creditor against the estate of the Insolvent Jose de Carmo upon a Promissory Note dated the 19th of August 1890, signed by the Insolvent whereby he promised to pay the mover one thousand five hundred and eighty-four dollars for work and labour done and performed for him and on his account for the last eleven years. The parties stand in the relation of father and son, the former being the maker of the note. It is necessary to inquire into the origin of this claim. Joao de Carmo, the mover, deposes that he was shopman of his father “from the time I left school at the age of between 13 and 14. I am now 28 years old. I

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“remained with my father up to February this year when he became insolvent. I received no wages during this time. I lived with my father and he fed and clothed me. Several times I spoke to him about wages. I first spoke to him about three years ago. He said all he had intended leaving to my sister and self. He gave me nothing. In August last year I told him I was to be married and I wanted to know what my wages were and he said he would give me a note for 11 years at \$12 a month. I was satisfied as he had not charged me for food or clothing.” Jose de Carmo in his evidence says “When my son was with me I used my parental authority over him and he did what I directed him. I paid him no wages. I only fed and clothed him.” Towards the end of his cross-examination he says “I agreed to pay my son \$12 a month when he first began to work with me.” This latter statement is not only in conflict with the mover’s evidence but we have it from Mr. Abraham that the father said he had fed the son “from the shop and gave him a suit of clothes now and then, that he always intended to pay him something for what he had done, but there being only his sister and himself he had allowed everything to go into the business.” Mr. Abraham asked him what would be a fair price to put down for wages, and the father said “\$15 and found.” Mr. Abraham advised him to put it down as \$12 a month and struck off 2 or 3 years. So much for the facts—now as to the law. In *Macdonell’s Master and Servant*, p. 142, it is said that “It is the duty of a master to pay his servant the wages or salary agreed upon. No presumption that wages or salary arises from the mere fact that services are performed or work is done for another.” At page 145, referring to *Davies v. Davies*, 9 C. and P. p. 87 he writes: “The Plaintiff and his wife who boarded and lodged in the house of the Defendant the brother of the Plaintiff and assisted him in his business sued for reward for their services. The Defendant pleaded a set-off for board and lodging. In leaving the question to the jury Mr. Justice Williams said ‘Neither the services on the one hand nor the board and lodging on

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“ ‘the other can be charged for unless the Jury are satisfied that there “ ‘was a contract.’ ” Such a contract must, it is submitted be proved in the ordinary way. In the present case it appears that the son rendered services to the father but they were rendered gratuitously. When first spoken to by the son about wages, the father remarked, “all he had he intended leaving to ray sister and self.” Such a remark negatives the idea that there was any agreement between the parties for the payment of wages. *Foord v. Morley*, 1 F. & F., p. 496, decides that “when services have been rendered without any express “contract for wages, but with board and lodging, or other benefits for “the party serving, a contract to pay for such service is not to be im-“plied.” The present case is stronger, for there the parties were strangers to each other. See also *Reeve v. Reeve*, 1, F. & F., p. 280. The marginal note reads thus: “Service, however long continued, “creates no claim for remuneration without al bargain for it either “expressed or implied from circumstances, showing an understand-“ing on both sides that there should be payment.” On these authorities it is clear that the son could not have maintained an action against the father to recover remuneration for his services. Nor could he maintain an action upon this promissory note, for there was no sufficient consideration for giving the same. In order to make the note a valid note payable on demand, it must have been given in consideration of past services which the parties had at the commencement of the service mutually agreed should be paid for. To put it in another way, I find that the relation of master and servant never existed between the parties—they were father and son, nothing more. It is only necessary to add that the father at the time he gave this note was practically insolvent. Had his business prospered, it may be presumed that the question of wages would not have arisen. Being unsuccessful, however, it is not surprising that he should have yielded to the advice of Mr. Abraham and given the son the promissory note which he doubtless hoped would enable his son to get something out of the insolvent estate. Holding as I do that the note is to be treated as a mere “gift” from

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the father to the son, it follows that it cannot be “debt” which may be proved against the estate of the Insolvent. I feel bound to add that I am not sorry that this claim has failed;—in the interest of the other creditors it does seem hard that a claim extending back 11 years and of which they could have had no notice should be suddenly brought forward to their manifest disadvantage. For the reasons I have given it follows that the decision of the Administrator General rejecting this proof must be affirmed though not for the reasons given by him—indeed the decision has turned upon the oral testimony which was not adduced before him, and without which it was impossible correctly to determine whether the proof should be admitted or not.

Attorney for Mover—*J. A. Murdoch.*

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[1890]

March, 1890

Interdict—Pleading—Contract.

Action to confirm Interdict; containing count for damages and for money received by Defendant in course of certain acts complained of; Exception of misjoinder.

Held—1st. There is no rule generally excluding Exceptions in Interdicts;

2nd. There was here no improper joinder of causes of action;

3rd. On merits onus of proof of partnership on party averring; Interdict confirmed.

Action to confirm Interdict whereby Defendant was prohibited from representing himself as a partner with Plaintiff in the firm of J. Tengely & Co., from acting as a partner in or interfering with the business of said firm, concluding also for damages for trespass and for payment of certain moneys received on account of Plaintiff by Defendant in the assumed character of partner in said firm. There was also a cross action at the instance of Hughes against Tengely for breach of agreement to enter into partnership with him. Defendant excepted to the joinder of count for money received with claim for damages. Demurrer to Exception.

Sol. Genl. Kingdon, Q.C., in support of demurrer cited Van der Linden section 10 (Henry's Translation p. 144), (2) Defendant could not by his answer take an exception not taken in his Report on the Petition for Interdict; Plaintiff in Interdict may not depart from the grounds stated in his Petition, Defendant equally may not depart from his Report. (3) Improper joinder is not a subject of Exception.

Hutson in answer. The passage in Van der Linden applies to the status of the Petitioner not to the form of the proceedings. On the claim in *rauw actie* being filed the proceedings are similar to those in an ordinary action, and Defendant is not restrained by his Report.

Sol. Genl. Kingdon replied.

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The Court referred to Jutas translation, p. 299, and comparing it with Henery's translation, considered that the law laid down by Van der Linden was not that no Exception could be admitted in Interdicts, but that the Exception of Incompetency could not be taken, and decided to hear Counsel on the alleged improper joinder of causes of action.

Hutson for Defendant: Claim on account of trespass is of a different class from claim for money received. Plaintiff by his pleading has severed, claiming a specific sum for the trespass and a separate sum for moneys received; cited Stephens on Pleading, 5th ed. p. 302.

The Court, per CHALMERS, C.J.—We are of opinion that the parts of the Claim and Demand which relate to money arise out of one and the same matter in respect of which Interdict is sought, vizt. the acting as a partner without just right to do so, as is alleged.

It is not shown that there is any legal inability or embarrassment in entertaining these claims in this action. All the questions arise between the same parties and in relation to the same subject, and we think it is clearly one of those cases in which unnecessary multiplicity of actions should be avoided and the whole matter in controversy determined in the same proceeding. We overrule the objection to the joinder of claims.

The case was heard on the merits on 5th, 6th, 7th, 17th, 18th, 19th, 20th, 21st, 24th, and 25th March.

CHALMERS, C.J.—This is an action for confirmation of an interim Interdict whereby the Defendant was on the 3rd June, 1889, at the instance of the plaintiff interdicted from representing himself to be a partner with the plaintiff in the firm of J. Tengely and Company, from acting as a partner in that firm in certain ways specified, and generally from interrupting or interfering with or doing acts to the injury of the business of J. Tengely and Company. The Plaintiff also claims \$250 as damages for trespass by the defendant upon the place of business, and unlawful interference with and interruption of the conduct of the business of the same firm and he claims \$1,542 50

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as money received by Defendant upon account of the firm.

The defence, besides containing a denial of certain of the acts of trespass and interference alleged by Plaintiff is that on the 31st December 1888 the Defendant and the Plaintiff agreed together to be partners in the firm of J. Tengely and Company for a term of five years, and that in virtue of this agreement Defendant was and acted as a partner in the firm from 1st January 1889, and continued to be and to act as such partner at the date of the acts which were the grounds of the interdict. The receipt by the defendant of the \$1,542 50 is not denied on the pleadings and is acknowledged in a letter written by the Defendant's attorney.

Besides setting out in his pleadings the particular facts in respect of which interdict was prayed, the Plaintiff has also averred certain introductory matters, viz. that in September 1885 being then carrying on business under the firm of J. Tengely & Company he admitted the Defendant as a partner in that firm for a term of three years which partnership expired by effluxion of time on 31st August 1888; that on 17th October 1888, the defendant by transfer and assignment and cession of actions transferred to the plaintiff all his right and interest in the assets of that partnership, the Plaintiff assuming the debts of the partnership and indemnifying Defendant of all liability in respect thereof, and that by the same instrument the defendant and plaintiff mutually discharged each other in relation to their partnership transactions; that by an agreement in writing dated 16th October 1888, but to take effect as from 1st September 1888, the plaintiff agreed to employ defendant as General Manager and Salesman in the said business until 31st December 1888, at a remuneration which was to be equal to two-fifths of the net profits of the business. The Defendant by his pleadings has admitted all these introductory averments under the qualification that he says the partnership deed of September 1885 was not executed until some months after defendant had been admitted and entered into the partnership. But the narratives of the circumstances from the 31st of December, 1888, as stated in the Plain-

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tiff's pleadings and in those of the defendant are divergent.

The statement in the Plaintiff's pleadings as to the facts which led up to the application for the interdict is as follows, viz: That by a verbal arrangement with Defendant made on 31st December 1888 he at Defendant's request agreed to continue him in the employment he had held up to that date of general manager and salesman, but at a remuneration of one-third of the net profits of the business instead of two-fifths as previously, from 1st January 1889 to 31st December 1890, subject to the employment being terminated at any time by either party giving to the other three months notice in writing; that on 25th February 1889 he gave such a notice to the Defendant and dispensed with his services as on 31st May 1889, from which time accordingly the Defendant ceased to have any right to come into his business premises or interfere in his business affairs, but that notwithstanding the notice the Defendant after the 31st of May came into the premises and interfered in the business, which necessitated the application for the interdict.

The Defendant's case as averred in his pleadings is, on the other hand, that on the same 31st of December 1888 the Plaintiff stated to him that he was prepared to renew the partnership with him in the firm of J. Tengely & Co. on the same terms as in the previous partnership, except that his proportion of the net profits of the business would be two-fifths instead of one-third, to which proposal Defendant agreed, adding that the duration of the partnership should be extended to five years, to which plaintiff also agreed and promised to instruct his legal adviser to prepare a document regulating the partnership. The defendant further states that relying on the plaintiff's promise he remained from 1st January 1889 with the Plaintiff and exercised the functions and duty of a partner in the firm of J. Tengely & Co. and was recognised by the plaintiff as a partner up to about the 2nd of March 1889, when for the first time the plaintiff requested him to desist from exercising the functions of a partner.

There is thus on the record direct conflict of statement

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as regards the transaction which took place between the Plaintiff and the Defendant on 31st December 1888. The conflict was not less emphasized when the parties gave their evidence orally; and as the transaction was without writing of any kind, and was unwitnessed by any third party the Court is confronted with a task which it would rather avoid if possible—that is, of forming a comparative estimate of the accuracy of the narratives given by two gentlemen, either of whom would in ordinary circumstances be fully accepted as accurate and reliable witnesses.

The burden of proving the alleged partnership lies on the Defendant. If we apply the test of supposing his allegations respecting the constitution and continuance of the partnership struck out of the record and no evidence to have been given regarding them, leaving the Plaintiff's allegations and evidence as to defendant having interfered with his business, it is quite obvious the Interdict would have to be confirmed. It appeared to be taken for granted by both the parties that the Plaintiff as asking for the confirmation of an interdict should begin, so that no question as to the right to begin was suggested. It may have been deemed and probably was an advantage to the Defendant not to begin as he was thereby in a position to cross-examine Mr. Tengely before opening his own case, an opportunity he very fully took advantage of, having cross-examined Mr. Tengely during somewhat over seventeen solid hours.

There is before the Court the narrative by the Plaintiff of the agreement between him and Mr. Hughes, which was made upon the expiration on 21st December, 1888, of the previous agreement under which Mr. Hughes had been for the four preceding months in the employment of J. Tengely & Co. and of the circumstances which led up to the application for interdict. There is also before the Court the narrative of the defendant concerning these matters, and there is evidence brought in corroboration by each party of the view of the main facts which each has propounded.

The narrative of the Plaintiff stated briefly is as follows: he said that on the morning of 31st December 1888

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while Mr. Hughes was speaking to him on matters of business he reminded him that the four months agreement between them expired on that day, to which Mr. Hughes answered that he intended to continue with him, informing him in answer to a question that the negotiations for a partnership which he had had with a Mr. Watson had come to nothing; that he on this offered to continue Mr. Hughes in the same employment he then held of salesman and manager but at a somewhat reduced remuneration, viz., one-third of the clear profits of the business instead of two-fifths as during the previous four months, that he proposed an engagement for one year, whilst Mr. Hughes wished one for three years; that they agreed to split the difference and have an engagement for two years but to be terminable at any time by three months' notice; that so definitely was this arranged that Plaintiff took the memorandum of agreement under which Defendant had been in his employment during the preceding four months from its repository and made emendations in pencil upon it adapting it to the arrangement just made, intending to have it re-copied and signed as their new agreement. This was not carried out, because very soon afterwards on the same day a new departure took place as will appear presently. The plaintiff further stated that during the same conversation Defendant proposed a partnership to which he distinctly declined to accede, that, later on the same 31st of December, Defendant asked him whether he would not put him in the position of a salaried partner as that would give him a better standing and more influence with dealers. Plaintiff said to Defendant that this seemed an attempt to put in the thin edge of the wedge of partnership and at first declined the proposal altogether, but on Defendant's pressing it he so far acceded that he promised to consult his legal adviser, Mr. Forshaw, and ascertain whether a partnership, such as Defendant proposed, could be so constituted as that Plaintiff or his business would not be responsible for Defendant's acts, and if this could be done he would consider about it. Plaintiff stated further that there was delay in consulting with Mr. Forshaw owing to his illness, and in the meantime Defendant continued in his employment

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as manager and salesman; that about 20th or 21st of February Defendant asked him whether he had seen Mr. Forshaw about the salaried partnership, when he informed him that he had not been able to see him at his office but would go at once to his house to consult him, and if he could make Mr. Hughes a salaried partner with the proposed restrictions he would do so. It thus appears that Mr. Tengely's consulting with Mr. Forshaw was not a mere polite way of getting rid of Mr. Hughes's proposal, and he candidly admitted that he changed his intention, which at first had been entirely adverse to having Mr. Hughes as a partner in any way, and was willing to give him the name of a partner if he could do so without also giving him powers over his business. Defendant's counsel has commented on this idea of a salaried partner without having the usual powers of a partner, and urged that it was so at variance with law and practice that the Court should deal with it as a subterfuge invented to explain away negotiations for full partnership. It is to be observed however that Mr. Tengely in the communings he narrates with Mr. Hughes on this subject never committed himself to an adoption of the proposal (which was Mr. Hughes') but merely took a course which common sense usually commends—referred the proposal to the opinion of his legal adviser. Recurring to the narrative the Plaintiff stated on the same 20th or 21st of February that Mr. Hughes without awaiting the result of the consultation with Mr. Forshaw told him that he had himself taken advice and found that the partnership in the way proposed could not be effected; Mr. Tengely said upon this that then the matter was at an end, and Mr. Hughes replied that he did not think so and that he considered himself a partner. On 23rd February Plaintiff received from Mr. Hughes a letter in relation to certain entries Mr. Hughes wished made in the books prior to closing as at 31st December 1888, and on 25th February he answered by a letter which contains a notification to Mr. Hughes that the agreement under which Plaintiff had secured his services as from 1st January 1889, must terminate on the 31st May 1889. After that on 2nd of March Mr. Tengely remonstrated

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with Mr. Hughes for having signed a Charter-party with the firm's name. The fact of this signature had only then come to Mr. Tengely's knowledge though the Charter-party had been signed on 15th February. Mr. Hughes maintained that he had right to do so and intended to continue to sign the firm's name, and thereupon Plaintiff had a lawyer's letter sent to Mr. Hughes requiring him to desist from signing the name of the firm, and informing him that in the event of his persisting in doing so proceedings would be instituted. This letter was answered by one from Mr. Hughes' legal adviser, in which the latter stated that his client asserted he had entered the firm of J. Tengely and Company from the 1st of January 1889, on terms and conditions which were to be arranged and settled between them. If the letter of Mr. Hughes' Solicitor were taken as accurately representing an agreement which had been made by the parties there would be a somewhat nice question of construction whether there had been more than a negotiation for a partnership which might or might not have resulted eventually in a concluded agreement; but the issue in the pleadings is a wider one and this question may be disregarded. After this interchange of letters Mr. Hughes continued to act in the business of the firm much the same as previously except that he did not sign the firm's name. What he did thereafter up to the 31st of May was consistent with his employment as Manager and Salesman. On 1st June he still continued to act contrary to the notice that had been given to terminate the employment and contrary to the expressed desire of the Plaintiff, and he then claimed to do so as a partner. Application for interdict was filed on 3rd June and the order was made on that day.

As the Court must necessarily give some heed to the manner in which witnesses give their evidence, especially where there is conflict of testimony, it is just to state that Mr. Tengely's evidence appeared to be very straightforward in its character: to the extent even that his Counsel on more than one occasion felt it to be his duty to restrain him from answering some questions.

The Defendant's statement is as follows:—The agree-

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ment as salesman had been framed so as to terminate on 31st December 1888, in order, as he said, that he might then be at liberty to associate himself in a partnership he was negotiating with a third person; that negotiations had however broken down, and although he had not informed Mr. Tengely of this fact the latter was aware that it was so. On the afternoon of Wednesday 31st December, as they were both leaving their office, Mr. Tengely opened the matter with Mr. Hughes, calling to his attention that their agreement terminated on that day, telling him he knew his negotiations about the other partnership had fallen through, and offering to renew the partnership between them which had ceased on the 31st of August previously, the Defendant to have the same interest as he had had during the past four months, viz. two-fifths, which proposal Defendant at once accepted. Nothing more was said on the subject until the 5th of January when Mr. Tengely, reverting to what had taken place, said that although he would give Mr. Hughes the same interest as he had promised it might not be necessary to make him a partner, to which Mr. Hughes replied that he thought such a contract could not be made, that it would be unfair to him, and that for his part he was indisposed to agree to it, whereupon, Mr. Tengely dropped that part of his proposal and promised to have a contract of partnership drawn up by his legal adviser, Mr. Forshaw. Mr. Hughes then said he wished the partnership to be for five years, instead of the former period of three years, to which Mr. Tengely assented. Mr. Hughes continued to take part in the business of the firm. He stated further that about 15th January he asked the Plaintiff about the partnership deed, when plaintiff told him that he had been to Mr. Forshaw about it, but that Mr. Forshaw could not then attend to it on account of the Hutchens' enquiry in which he was engaged; that about the end of January he repeated his enquiry and received a similar answer; that early in February he himself went to Mr. Forshaw and had a conversation with him, the result of which he at once made known to Mr. Tengely, which was that Mr. Tengely had never been to him at all about the deed, and

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that Mr. Forshaw was now ready to prepare the deed when Mr. Tengely should give him the instruction; that thereupon Mr. Tengely protested he would attend to the matter at once; that the deed was not however prepared; that Mr. Hughes again about ten days afterwards recurred to the subject, insisting upon having the deed completed, when Mr. Tengely's only reply was, that the deed was being prepared.

At this point the remark very obviously occurs with reference to the supposed delay in preparing the deed, when that delay was attributed to Mr. Forshaw being unable to overtake it why did not Mr. Hughes who knew of the existence of the copy of the old deed of partnership (which is part of the evidence) not at once say to Mr. Tengely "Let us have the old deed re-copied in our own office, altering my interest to two-fifths and making the term for five years instead of three years?" This would have been an appeal which Mr. Tengely could not have evaded; and why especially did Mr. Hughes not take this course when he found out as he says that Mr. Tengely had been deceiving him about Mr. Forshaw being too busy to prepare the deed? It is not said that there was the slightest suggestion of changing any of the conditions except the respective shares of the partners. Connected with this point it should be remarked that there was a discrepancy between the opening statement of the Defendant's counsel and his own statement in evidence. His counsel no doubt perceived quite clearly that the copy of the former agreement which was in the office, upon being re-copied with the very slight alterations required, would supply all the deed which was necessary, and he frankly admitted that. But speaking of course, on the instructions of his client, he said that further alterations were needed—that the former deed contained no provisions as to the carrying on of the business or the termination of the partnership, that this had led to disagreement on the dissolution of the old partnership, and that it was for the purpose of drawing up an appropriate clause on this subject and also a clause by which the partnership could be determined on three months' notice that it was necessary to have recourse

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to Mr. Forshaw. In point of fact the copy contains a clause as to the determination on notice; as to the other clause the Defendant's evidence was no way in accord with what his counsel had stated. He did not say a word showing that Mr. Forshaw had to be consulted on the clause suggested, and when expressly asked whether there was any clause or condition of the new partnership different from the previous contract other than the altered interest of the partners and the lengthening of the term, he expressly said there was none. There is not the slightest reason for thinking the copy of the old contract which Mr. Hughes said he knew Mr. Tengely had was not a correct copy of the original. There is the positive statement of Mr. Tengely that it was a correct copy, and although the Defendant's counsel keenly opposed the admission of the copy as secondary evidence of the original, he did not ask Mr. Hughes any question to show there was any discrepancy, except that certain figures left blank in the copy had been filled up in the signed original. The Defendant's counsel himself was also at variance with the pleadings, in which it is expressly said that the new partnership was to be on the same terms as the previous partnership except that the Defendant's proportion of the net profits was to be two-fifths instead of one-third, and the duration five years instead of three years. There were more discrepancies than this in the course of the hearing. For instance, at one period the Defendant's counsel sought to set up that after the dissolution of the former partnership, and notwithstanding the transfer of rights and mutual discharges effected by the agreement and cession of actions, there remained in Mr. Hughes certain rights in the American branch of the business of the late firm, and that the subsequent communication of these rights to Mr. Tengely was either the consideration or the inducing cause (for it was not put very precisely) for Mr. Tengely offering the new partnership to Mr. Hughes in December 1888. Nothing of this had been averred in any part of the pleadings, and the Court of course could not entertain a consideration for the agreement other than had been pleaded—which would have amounted in effect to the setting up of a different contract. As

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everything that counsel pleads or alleges is understood to be upon instructions, variances of such nature tend to indicate that the instructions have been shifting or uncertain.

In considering the defendant's narrative the question naturally occurs—as men must be taken as a general rule to act upon reasons and with consistency—what reason supervened to induce Mr. Tengely to determine on rescinding the partnership which he had, as is said, of his own accord freely offered to Mr. Hughes? Defendant supplies a reason; he says the difference arose about certain entries Plaintiff proposed to make in closing the books as on 31st December 1888, which would have injuriously affected his interest. He states that on the morning of the 23rd of February Mr. Tengely had attended a meeting of creditors on an Insolvent estate, and finding the dividends would not amount to more than 50 per cent., informed him that in closing the books it would be necessary to write off 20 per cent., from the debtor's account. Mr. Hughes states that he said nothing at the time, but remembering the agreement and cession of actions he recognized that the proposed entry was improper and took legal advice. Later in the day he found certain other closing entries were about to be made which he objected to; in the afternoon of the 23rd February he wrote to Mr. Tengely a letter which has been put in. In commencing he refers to a difference of opinion as to how "our books" should be closed, and specifies various entries he desires to be made. The language and tone of the letter generally are those of an equal addressing an equal. Mr. Tengely on Monday, 25th February, acknowledged the letter. The answer is like that of a man who without having become angry yet entirely disapproves of the letter and the disposition in the writer which it evinces. He abstains from discussing the particular points touching the accounts as he had not yet taken legal advice, but informs Mr. Hughes that the position he has assumed in his "letter is such that I feel it will be impossible to "continue our present arrangement with any degree of comfort and "security to myself. I therefore now beg

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“to give you formal notice that the agreement under which I secured your services as from 1st January 1889, must terminate on 31st May 1889.” We have to ask here whether this letter of Mr. Hughes and the answer are consistent with the supposition that Mr. Tengely was on 31st December so desirous of forming a partnership with Mr. Hughes that he then, unsolicited, offered to him that position. It is clear that it was not the substance of the letter that was the ground of Mr. Tengely giving the notice. He dealt with the substance as a purely business matter, and in a way that was fair and reasonable. It must of course have been obvious to him that the entries must be either made or not according to the legal right of the matter, and that getting rid of Mr. Hughes could make no difference on this question; and we learn from Mr. Hughes’ own statement that this was precisely the way Mr. Tengely dealt with it; for he told him on the day after—the 26th of February—that he had consulted Mr. Forshaw about the proposed entries and that Mr. Forshaw’s opinion was unfavourable to his own view, and in consequence the entries Mr. Tengely had proposed were not made. Mr. Tengely’s objection to the letter was the assumption of the partnership relation. But why should the assumption of the position which *ex hypothesu* Mr. Tengely had voluntarily conferred have been thus objectionable, even although in addition it was couched in language not entirely suitable as coming from the junior partner to his senior? Is it not much more consistent that Mr. Tengely objected to the letter because his intention only had been to employ Mr. Hughes as a subordinate, even although he might get the name of a partner if it could be done without liabilities, and here while the question is still under discussion Mr. Hughes is assuming and foisting upon him that there is a partnership already constituted to all intents and purposes? He sees that it will not be safe or comfortable to go on with Mr. Hughes and that to make matters clear it will be best to give notice to terminate the connection.

Outside of Mr. Hughes’ own statement what is the evidence on which his case depends? It is put forward,

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and no doubt with justice, that Mr. Hughes is an excellent business man. He left the house of Samuel Barber & Co. in 1885, after a service there of 13 years, with a high testimonial. At the termination of the partnership between him and Mr. Tengely in 1888 Mr. Tengely wrote concerning him in very approving terms. The business of J. Tengely & Co. prospered whilst he was a partner. Mr. Tengely in his oral evidence has borne abundant testimony as to his good business qualities, and also in letters written at the close of their partnership in August 1888. These facts point with more or less of probability to Mr. Tengely desiring to continue to be associated with him in business. But the question being as it is whether he desired to be associated *in partnership* we have the positive evidence of Mr. Tengely that he did not, and so he stated before any dispute whatever had arisen in a letter he sent to Mr. Hughes on 1st September 1888, when the partnership terminated. He wrote at that time, whilst complimenting Mr. Hughes, that he had made up his mind not to renew or prolong the partnership. In his oral evidence he gave reasons for this determination which were to the effect that he had been in some respects dissatisfied with Mr. Hughes' method of doing business, and particularly when he had been left to himself during a period Mr. Tengely was absent from this colony. It was very industriously endeavoured to be shown on the part of the defendant by cross-examination of Mr. Tengely and otherwise that his reasons for dissatisfaction were invalid or frivolous. This is a point on which a Court of Justice could hardly undertake to adjudicate, nor is it necessary it should. *Dilectus personæ* in partnership is a matter so closely concerning the individual that the reasons why one man should select a particular person for a partner can never be a rule to another. A Court of Justice could never say that there ought to be a particular choice, and hardly that a particular choice on personal grounds was probable. The mere fact that the choice did or did not exist is all it can deal with. Although the evidence is that Mr. Tengely did not like Mr. Hughes as a partner it is clear he had a high opinion of him in other ways and that

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his services were valuable to his business, and therefore he was willing to pay him highly. His estimate of Mr. Hughes committed to writing at the time he considered he was re-engaging him as manager and salesman and before the beginning of any dispute is significant. It is contained in Mr. Tengely's letter to his agent in London, Mr. Stevens, written on 1st January 1889. He speaks of him as being in the subordinate position in which he had put him "the right man in the right place, he knows his duties, has agreeable manners, any amount of patience, and is generally liked by his dealers." Then it is said that Mr. Hughes' association with Mr. Tengely was essential to the latter to enable him to carry on the American branch of his business. The fact seems to be that after the severing of connexion with Mr. Hughes the American business was for a time diminished in extent, but that Mr. Tengely carried it on for some time in this way without assistance and is still carrying it on, having recently engaged a new assistant. But assuming that Mr. Hughes was more valuable, whether in the American business or in the business generally than any one else could have been, his services it would seem were secured by his engagement as manager or salesman with interest in the profits (or by the salaried partnership if that had been possible) equally as if he had been a partner, and he had every interest to use his best endeavours; and his services were thus secured without Mr. Tengely being exposed to the risk of commitments he apprehended if Mr. Hughes had been a partner with full powers. It does not therefore seem that any just inference can be drawn on this ground in support of the Defendant's contention.

Then we have it that Mr. Hughes acted as a partner after the 1st of January 1889 until the 2nd of March when he was interpellated by a threat of legal proceedings from doing so any longer. The only acts not attributable to Mr. Hughes' employment as manager and salesman (besides signing the charter-party) consisted in his signing with the name of J. Tengely & Co. certain letters on the business of the firm which were inserted in the letter book of the firm and of course were within the know-

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ledge of Mr. Tengely. A good deal of the significance of these signatures, so far as they might be indicative of Mr. Hughes's view of his relation to Mr. Tengely, is taken off by the fact that during the preceding four months when he was manager and salesman he signed a number of business letters with the firm's name. Moreover if in January and February he had formed any idea of insisting that his position was that of a full partner, it was not improbable that he should make evidence of this nature. It is a little remarkable that he signed no letters at all with the firm's name before the 16th January whilst the partnership is said to have commenced from the 1st. Moreover, Mr. Hughes signed a large number of letters with the firm's name as already stated during the four months preceding 1st January 1889, when there was no possible belief on his part that he was a partner. As far as Mr. Tengely was concerned he seems to have not attached importance to the signatures in themselves. He tells us he did not use to take any notice of Mr. Hughes signing in this way when he was manager and salesman, attributing it merely to force of habit. And again during the whole of January and the most of February there was the question as to the salaried partnership still depending: After that was at an end and Mr. Tengely saw that these signatures might have significance he took energetic measures to stop them. It is clear that for whatever reason Mr. Hughes was not prepared during March, April and May to bring the question of right to sign to an issue by persevering in these signatures. Obviously it would have been of much higher significance if Mr. Hughes had been replaced in his position of signing cheques; and as according to his view the agreement constituting him a partner was perfectly settled on both sides from the 5th January, it is somewhat to be remarked that no proposal to this effect came from him. On 1st June 1889, Mr. Hughes sent a letter to the Manager of the Colonial Bank intimating "as a partner of J. Tengely & Co. that matter of a probably serious nature is pending between us." This is too palpably self-serving evidence to be of any consequence.

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A further topic was that it was essential to the firm of J. Tengely & Co. obtaining or continuing certain credits that Mr. Hughes should be a partner. How far is this verified? There is evidence that as a general rule the existence of more than one partner in a firm facilitates the obtaining of credit from Banks, the principal reason being that where there are more partners than one the business is not as a rule wound up when one of them happens to die, but is continued. It is also shown that in 1885 when Mr. Hughes first became connected with Mr. Tengely's business it was his first employment to go to America and to England to negotiate as to credits for the intended firm of J. Tengely & Co. and such credits were obtained. The foundation on which these credits were obtained was a recommendatory letter from the manager in Demerara of the Colonial Bank, Mr. O'Maley, given in favour of Mr. Tengely on 22nd September 1884, nearly seven months before Mr. Hughes became connected with him. That Mr. Hughes by his persuasive address also contributed to obtaining the credits need not be doubted. Mr. O'Maley stated that Mr. Tengely had banking facilities at the Colonial Bank since he began business, and that these facilities were not affected in the least either when Mr. Hughes joined him in 1885 as a partner or on his afterwards ceasing to be a partner. The credits were negotiated in London with Messrs. Carvalho Bros., Messrs. Ellis Kistionbury & Co., and a third credit with Messrs. Isaacs & Samuels. They were granted to J. Tengely & Co., and as stated in Mr. Hughes's letter to Mr. Tengely of 21st July 1885, the understanding was that Mr. Tengely had a partner. In connection with the letter last mentioned it must be remarked that Mr. Hughes informed the Court that he, in negotiating the credits in London represented himself as being a partner of Tengely & Co., that he made a like representation when he went to America, that Mr. Tengely authorised him to do this, and that when Mr. Tengely said in giving his evidence that he joined him as confidential clerk with a view to becoming a partner it was untrue. The letters written to American correspondents by Mr. Hughes himself, on 15th April 1885, in

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which he describes himself as Mr. Tengely's "Confidential Clerk," and Mr. Tengely's letter of which Mr. Hughes was the bearer, dated on 16th April, in which Mr. Hughes is described in the same way are entirely in accordance with what Mr. Tengely stated, and shew convincingly that Mr. Hughes knew perfectly well that his position was then that of confidential clerk, the partnership being a thing to come afterwards. The request of Mr. Challenor of New York in his letter of 14th May 1885, to whom Mr. Hughes was sent, that Mr. Tengely would send his Power of Attorney in favour of Mr. Hughes to London is to the same effect, so is Messrs. Isaacs & Samuels' letter of 29th July 1885 to J. Tengely and Co. in which they say they have arranged a credit with "your representative," (not your partner) and send to Demerara an undertaking to hold the proceeds in a certain way to be signed by Mr. Tengely. If anything still more conclusive were needed it is furnished by Mr. Hughes's own letter to Mr. Tengely dated from London on 21st July 1885, after he had received Mr. Tengely's letter of 15th June, sending him the Power of Attorney in which letter Mr. Tengely said: "As to admitting you a partner "in the firm at this juncture when your affairs with Davis are about to "be ventilated in Court it is of course out of the question," and that his idea is to admit him after his engagements for behoof of Davis are arranged. Mr. Hughes's letter contains no sort of remonstrance or representation that his position is incorrectly assigned, but he writes—"The credits have been granted on the understanding that "you *had* a partner." The word "had" about which a question was raised is apposite; what is intended to be expressed is that there was an understanding there should be a partner; this is clearly shown by what immediately follows in which Mr. Hughes goes on to explain the view taken, viz., "that in case of Mr. Tengely's death, executors would have right to twelve months to close up, and to obviate this possibility 'they' (the Bankers) have specially expressed their wishes to me on the subject and which I told them on my return would be arranged." It is perfectly clear that Mr. Hughes represented himself to

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the Bankers correctly as the confidential clerk, attorney, and expectant partner of J. Tengely & Co.: at any rate that he did so when the negotiations came to close quarters. Why he should have made the incorrect statement whilst giving his evidence it is indeed difficult to conjecture; taking the most favourable supposition that it was merely an unintentional error although repeated (in substance more than once) even that tends to indicate a looseness in his grasp of facts unfavourable to a high estimate of his evidence.

Coming back to the credits it is in evidence without contradiction that all the credits negotiated by Mr. Hughes in 1885 have ceased. Mr. Tengely having negotiated new credits from the same parties whilst Mr. Hughes was still with them. The credit of Messrs. Carvalho Bros. and Messrs. Ellis Kistionbury & Co. appear up to the present time to be subsisting and being acted on, and Mr. Tengely is still carrying on the American business.

The credit with Messrs. Isaacs & Samuels was discontinued in the beginning of 1889. Upon and around this fact an elaborate endeavour has been made to show that the discontinuance was caused by Mr. Hughes having ceased to be a partner on the 31st August, 1888, and that in consequence of this and for the purpose of regaining this credit Mr. Tengely offered to renew partnership with Mr. Hughes. What are the facts?

Notice dated 16th October, 1888, of the dissolution of the former partnership of J. Tengely and Co. and that the business would be carried on in future by Mr. Tengely alone was sent to Messrs. Isaacs & Samuels as to other correspondents, and in ordinary course would reach them in the beginning of November. They on 9th January 1889 wrote to Messrs. Tengely & Co. saying nothing at all as to the change in the constitution of the firm, but that they "have decided to relinquish the granting of credits in the West Indies which involves the cancelling of the credit given to Messrs. Tengely & Co." and they request Messrs. Tengely & Co. to instruct Messrs. Strauss of New York (the firm through whom the credit was being operated on) not to draw

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further on them on Messrs. Tengely's account. This letter reached the plaintiff on 25th January, 1889, and there is not the slightest suggestion that he had any earlier intimation of Messrs. Isaacs and Samuels' intention. Defendant says that Plaintiff offered him the partnership on the 31st December, 1888. The anachronism in date it would seem was enough to have demonstrated the futility of this evidence.

But this is not all: the Court is asked to believe that when Messrs. Isaacs & Samuels wrote that they were giving up their West India credits they did not mean that, but were only saying in a polite way that they did not wish to carry on the credit of J. Tengely & Co. unless Mr. Tengely had a partner. Mr. Maynard, a partner of Messrs. Challenor & Co. who were formerly correspondents of J. Tengely & Co., was brought to support this view amongst other things, and he assigned as a reason for thinking Messrs. Isaacs & Samuels did not mean what they said, that in point of fact his firm had some of their credits still open. An explanation of this might very probably be found in the fact that some of the accounts were in a situation in which they could not at once be closed, whereas it is obvious there was no difficulty of this kind as regards Messrs. Tengely's account, for in the close of their letter Messrs. Isaacs and Samuels say, "the account has invariably been conducted in the most satisfactory manner never causing us a moment's uneasiness." Following the subject we find that on 1st February, Mr. Tengely wrote to Messrs. Isaacs and Samuels, proposing that they should re-consider as to the credit. On 20th February they answered, stating that to obviate inconvenience they will grant a credit of £2,500 to be used once only. After his letter of 1st February, Mr. Tengely wrote again on 15th February, and on 3rd April, Messrs. Isaacs and Samuels replied stating that they must adhere to their decision, merely to grant the credit of £2,500 to be used once only. Mr. Tengely did not use this credit, and on 9th July, 1889, Messrs. Isaacs and Samuels wrote saying that as he had not found it necessary to use it they cancelled it. Throughout this correspondence there is not

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a single allusion to the constitution of the firm of J. Tengely & Co., to Mr. Hughes, or to his connection with the firm. The absence of all such allusion is the more completely ascertained inasmuch as the Defendant had full opportunity of seeing all the letters in Messrs. Tengely & Co.'s office, an opportunity he did not hesitate to avail himself of in connection with a letter written by Mr. Maynard to which reference will have to be made presently. He has not even attempted to say there was any allusion, but that all the same the motive for discontinuing the credit was that Mr. Tengely was carrying on business without having a partner, Messrs. Isaacs & Samuels, unlike English Bankers generally, not being able or willing to say what they meant in plain terms.

But we are not yet at the end of the matter. Whilst Messrs. Isaacs & Samuels are thus coquetting with the subject, not venturing to say what they mean, Mr. Maynard arrived in Demerara, Mr. Maynard's firm had suspended in 1887, and in consequence their dealings with Messrs. Tengely and Co. had then ceased. Mr. Maynard came here to endeavour to get back their agency, but it is also put that he came to enquire about the position of the firm of Tengely & Co., and that the matter of there being only one partner was a material element; it is further put that he came here in consequence of a letter sent by Messrs. Isaacs and Samuels to his firm, Messrs. Challenor at New York desiring them to make enquiry; this letter it is said reached New York about the end of December, 1888. Assuming all this to have been as stated, it follows that Messrs. Isaacs & Samuels after having directed this enquiry through Messrs. Challenor, some two or three weeks afterwards and before any answer could possibly reach them took the step of withdrawing the credit by a letter sent directly to J. Tengely & Co. in which an untrue reason for the withdrawal was assigned. Still further anomalies remain. Mr. Maynard told us that on 29th of January he wrote and posted a letter to Messrs. Isaacs & Samuels in which he informed them as a result of the enquiry he had been asked to make, that the partnership between Mr. Hughes and Mr. Tengely "has been resumed so

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that all objection on that account has been removed," and a press copy of this letter is in evidence. The letter in the course of post would probably reach Messrs. Isaacs & Samuels by the 15th or 16th of February at latest. It removed the whole difficulty which *ex hypothesu* they had about the credit. Why when they replied to Mr. Tengely's letter of 1st February on 20th February asking them to reconsider their decision, and again when they replied on 3rd April to Mr. Tengely's further letter did they not renew the credit? They did not do so as we have seen and they have made no allusion to the re-constitution of the firm.

After these facts it is not possible to believe that Mr. Hughes being not a partner or being a partner had anything to do with the withdrawal or renewal of this credit, and the whole argument on this branch fails.

Mr. Maynard's letter of the 29th of January to Messrs. Isaacs & Samuels, and what Mr. Tengely said to him about partnership with Mr. Hughes which is said to have been the ground of the letter, was a part of the evidence much relied on. Mr. Maynard came here on 25th or 26th January 1889, and left again on the 27th. He told us he had several conversations with Mr. Tengely on business and that he was assured by him that Mr. Hughes had been re-admitted a partner in the business. Mr. Maynard said that part of his errand here was an enquiry directed by Messrs. Isaacs & Samuels as to the firm of J. Tengely and Co. and their business. He did not bring the letter of Messrs. Isaacs & Samuels with him or a copy of it when he came to make the enquiry, and neither the letter nor a copy was produced in evidence. He admitted in cross-examination that the principal or primary object of his visit was to get back the agency in New York for J. Tengely & Co. which had been formerly held by his firm, for which the renewal of the credit with Isaacs and Samuels was necessary. He said he informed Mr. Tengely that the chief cause of the suspension of the credit was that the firm as then constituted contained only a single name and that he brought this very strongly to the attention of Mr. Tengely and that it was necessary for getting back the credit of

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Messrs. Isaacs and Samuels and doing business that he should be associated with a partner. This all took place, be it observed, before Mr. Tengely had written on 1st of February asking Messrs. Isaacs and Samuels to reconsider as to withdrawing the credit. When he had thus ascertained the secret of the withdrawal (which had been concealed by Messrs. Isaacs and Samuels) why did he not mention to them that he had become aware of the difficulty about his not having a partner and that it had been obviated if the fact then was that Mr. Hughes had been re-admitted a partner and if he had said so to Mr. Maynard during his visit as is stated? There is not on the evidence any reasonable explanation of Mr. Tengely not taking a course which seems so obvious. There is no suggestion that anything had occurred previous to the 1st February to induce Mr. Tengely to alter his mind on the subject. And again when the matter was specially brought to his notice by Mr. Maynard's letter enclosing copy of his letter to Messrs. Isaacs and Samuels, of which we are told confirmation by Mr. Tengely was necessary before it would be acted on, why did he not confirm that letter if it represented the arrangements as they existed?

As regards the alleged statement by Mr. Tengely to Mr. Maynard respecting Defendant's re-admission into the firm, it is attended with a remarkable qualification. Mr. Maynard said that Mr. Tengely stated to him that Mr. Hughes had been re-admitted, that when he did so he volunteered information as to the terms of the partnership and the status of Mr. Hughes in the firm, upon which he stopped him, saying that it did not concern him what interest the partners had, and when questioned further Mr. Maynard would not say that Mr. Tengely had not said that he meant to admit Mr. Hughes as a "salaried partner." This gives the clue to the difference in the evidence of Mr. Maynard and Mr. Tengely on this point. Mr. Tengely stated more fully than Mr. Maynard that on one occasion Mr. Maynard asked what position Mr. Hughes held in his house, when he told him that he was then salesman, but that he contemplated making him a salaried partner if it could be done on

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certain conditions, when Mr. Maynard stopped him saying that particulars were immaterial to him. It is not necessary to comment largely on Mr. Maynard's evidence. The conclusion from an attentive consideration of it is, that Mr. Maynard's principal object was to resume business relations with J. Tengely & Co.; that the question of a second partner in that firm although it was present to a certain extent in Mr. Maynard's mind did not bulk nearly so large as he seemed to think it had done when he was under examination by Defendant's Counsel, and that learning from Mr. Tengely that it was intended to bring Mr. Hughes into the firm in some way he gave no real consideration as to the particulars, but thought at once he was justified in concluding that his former relation of a partner was to be resumed. Add to this that Mr. Hughes was in daily communication with Mr. Maynard during his short visit here, and whatever view he had of the relation between him and Mr. Tengely existing or about to exist would doubtless be communicated, it is not difficult to understand the impression which would arise in Mr. Maynard's mind.

One more point in the Defendant's case ought to be noticed. It is said why did Mr. Tengely when he saw that Mr. Maynard in his letter of the 29th January to Messrs. Isaacs & Samuels had incorrectly represented the position of Mr. Hughes as a partner in his firm not take steps to correct the misrepresentation? As concerns Messrs. Isaacs & Samuels, Mr. Tengely has himself said that they never before or after Mr. Maynard's letter made any allusion to the position of his firm as having a second partner or not, that he had written to them asking them to reconsider as to the credit before he received Mr. Maynard's letter, that if he had received Mr. Maynard's letter prior to his writing Messrs. Isaacs & Samuels, he would have written differently, but having already written he did not think it worth while to introduce a new topic; to this it may be added that when Mr. Maynard's letter was received, its information though premature in the sense that no definite arrangement had been come to about re-admitting Mr. Hughes, yet that step was still in contemplation; to have written that

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Mr. Maynard's information was incorrect, would have been erroneous whilst the negotiation for the partnership was still pending: after the negotiation had finished there was no longer a question as to renewing the credit, as to which the correspondence had closed, and to have then written to Messrs. Isaacs & Samuels would have been to introduce a new subject to them which their own letters had not suggested and which was not likely to affect any practical conclusion. As regards Challenor & Co., Mr. Tengely told us that he was under no obligation to them; he seemed to resent that their Mr. Maynard should have made an incorrect representation, and desired to leave it without notice, a frame of mind which it is not possible to say was unnatural or indicated any sort of agreement in what Mr. Maynard had written.

The evidence of Mr. Weber who was party to the charter-party already mentioned, showed that he took it that Mr. Hughes was entitled to sign with the signature of the firm. But he did not know what arrangement existed between him and Mr. Tengely. That is all his evidence came to. Mr. De Jonge's evidence amounted to this, that he had transacted business with Mr. Hughes believing him to be a partner of J. Tengely & Co., Mr. Hughes's own conversation being the source of his belief. Mr. Psaila gave evidence that Mr. Hughes had declined some overtures of employment by him in the early part of 1889, and after the interdict had been issued he informed him that he was free to act for him.

There has not been much corroborative evidence directly introduced in support of that view of the agreement with Defendant which the Plaintiff has alleged, nor in the nature of things was much to be expected. One of the clerks in Plaintiff's employment spoke of having heard conversations between Mr. Hughes and dealers about the beginning of 1889 in which Mr. Hughes said not that he was a partner, but that he was going to be, or would be a partner. This evidence was vaguely given and unreliable. Evidence of the same sort but much more clear and distinct in character was given by Mr. Wakefield, who stated that on 31st January 1889, at the monthly settlement of dealings with J. Tengely & Co. a

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receipt was handed to him by Mr. Hughes signed in his own handwriting with the firm's name. On observing the signature, Mr. Wakefield who was very intimate with both Mr. Hughes and Mr. Tengely and knew that their previous partnership had been terminated remarked "So Vincent, you and Tengely have made it up;" to which Mr. Hughes answered "Oh yes, that will be all right, Joe and myself "will make it all right." The force of this evidence is strengthened by the consideration that the incident made so much impression on Mr. Wakefield as to lead him to speak of it to Mr. Tengely a few days after. Mr. Hughes's answer, it is obvious, fits in much more with the suggestion that he was then in expectancy of a partnership should Mr. Forshaw's opinion prove favourable, or, that Mr. Tengely would somehow accede to Mr. Hughes's wishes than that a positive agreement for a partnership had been already made. This probability is all the greater when it is remembered how Mr. Hughes spoke of his position as being that of a partner on a previous occasion already referred to when he was undoubtedly only in the position of expecting to be a partner. Mr. Hughes said that no such conversation as Mr. Wakefield had stated occurred on the 31st of January, that if he settled the account at all it would have been about the 15th of January, that Mr. Wakefield asked him if he had arranged with Mr. Tengely and that he told him "matters had been arranged and he was again his partner." The receipt contains the refutation of this statement as to the date, as to the rest it seems impossible to find a reason for the circumstantial narrative of Mr. Wakefield except that the incident he described occurred as he described it.

Evidence on behalf of the Plaintiff which was adduced virtually by way of answer to evidence on behalf of the Defendant has been under consideration in the review which has already been made.

To sum up, it appears that to buttress the Defendant's statement there have been piled together a mass of circumstantial evidence which when analysed is either irrelevant or is equally consistent with the view of the

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case put before the Court by the Plaintiff; so that after all is told the probability of the Plaintiff having made the unasked and unconditional offer of partnership alleged, is not rendered materially stronger than it was upon the Defendant's personal statement; whilst certain infirmities in the evidence on his side have tended to detract from the probative value of that statement. In the opposite scale there is clear and so far as can be discerned consistent evidence on behalf of the Plaintiff. The *onus probandi* which as already stated lies on the Defendant has not been satisfied; and it cannot be held that an agreement of partnership was concluded either on the 31st December 1888, or on 5th January 1889.

Before closing, reference may be made to the letter of Mr. Tengely written to his confidential correspondent, Mr. Stevens, on 1st January 1889, which has already been mentioned in a different connection. This letter has not indeed been necessary in arriving at the conclusion stated. It could perhaps hardly have come into the evidence had the defence not attacked the good faith and genuineness of that part of the Plaintiff's statement in which he said he altered in pencil the former four months agreement with Mr. Hughes so as to adapt it to the new agreement made on the 31st December 1888. It thus became relevant to show by a contemporaneous writing what was in Mr. Tengely's mind at the time of this agreement. This the letter very clearly does, and it was adopted by Defendant's counsel after production with reference to the estimate it contained of Mr. Hughes's business ability as already noticed. In this letter Mr. Tengely refers to various phases of Mr. Hughes's scheme for starting a business apart from him with another partner and to the failure of this scheme. He goes on "yesterday Mr. Hughes's engagement with "me ended he informed me that he would like to remain with "me if such would suit; I said 'yes,' but on my terms, which are that "you attend to the sales and out-door as hitherto, and for which I pay "you a salary equal one-third of the nett profits as ascertained at the "end of each year; there will be no partnership between us and you "have no claim on the firm. Natur-

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“ally he was but too glad to accept. . . I told him that I would not “have him as a partner. He has since approached me on the subject of “making him a salaried partner so as to give him a standing in the “community and with our friends abroad.” Is it conceivable that the day before writing this letter, and nothing having intervened in the meantime, Mr. Tengely had offered to Mr. Hughes a full partnership in his business and Mr. Hughes had accepted? The letter was acknowledged by Mr. Stevens in London on 23rd January.

Having regard to the nature of this case, and to the manner in which it has been put before the Court, it has seemed advisable to deal with the alleged agreement of partnership and concomitant circumstances in some detail rather than to decide on the single ground that the agreement has been determined by notice. But Plaintiff is entitled to succeed on this ground also. Both by his pleading and in his evidence Defendant has said that the partnership offered to and accepted by him was to be on the same terms as that which terminated on 31st August 1888, except as to the proportional interests of the partners and the duration of the partnership and the previous partnership was determinable upon three months notice by either party. If there was an agreement of partnership as alleged, (the finding is that there was not) the notice given to Defendant on 25th February 1889, would be a determination of it.

The sentence will confirm the interdict and adjudge the Defendant to pay to the Plaintiff the sum of \$1,542:20 as concluded for. Damages as claimed are also due. Looking to all that has transpired it is clear Mr. Tengely has no desire to press against the Defendant for damages but only to vindicate his position; in this view the amount will be restricted to the somewhat nominal sum of \$25. The sentence will include costs.

The decision which I have given is concurred in by all the Court.

EX PARTE ADMINISTRATOR GENERAL *re* PARNELL, INSOLVENT.

3 *January*. 1890.

Ord. 22 of 1884: Fees of Administrator General.

A Receiving Order having been made against the debtor, his business was managed by a Creditors' Assignee and Committee of Inspection. The Assignee was authorised under Section 7, sub-section (3) of the Insolvency Ordinance to make his payments into and out of a local Bank. By the schedule of fees the Administrator General is entitled to \$3 for every \$100 received by him from an Assignee. Commission held not payable on moneys banked by the Assignee.

THE Administrator General applied for directions, reciting the above facts, as to whether he was entitled to commission on all the sums received by the Assignee whether paid into the Bank or to the Administrator General, or only on sums received by him from the Assignee.

The Court (CHALMERS, C.J., and SHERIFF, J.) having heard the Administrator General, ruled that the Administrator General is entitled to Commissions only on sums received by him from the Assignee.

WILLEMS ET AL v. MOORE & SCHOON ORD COMPANY.

6 *January*, 1890

Withdrawal of suit—Opposition.

Belmonte for Plaintiffs stated that he withdrew the suit, and cited section 67 of the Procedure Ordinance, and *Colonial Bank v. Pequeno*, 10th December, 1880.

Solicitor General for Defendants contended that this suit being an Opposition was on a different footing from other suits and asked for absolute.

THE COURT (ATKINSON, J. and SHERIFF, J.) This case is governed by the principle of the decision in *Colonial Bank v. Pequeno*. A Claim in Opposition stands in no different position from a Claim in an ordinary suit. There are certain preliminary steps to be taken, but once a Claim is filed it is that upon which the Plaintiff is

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suing and endeavours to succeed. If he does not wish to succeed on that Claim it is within his province to withdraw it as in an ordinary suit. The entry on record will be that the suit is withdrawn by the Plaintiffs.

EX PARTE ADMINISTRATOR GENERAL RE EST. ALEXANDER.

3 January, 1890

Succession ab intestato.

A. E. Alexander died in New Amsterdam intestate owning property there. He left a brother and sister and mother

Quære: Should his estate be administered according to *South* or *North-Holland* law.

A. E. Alexander was owner by transport of land in New Amsterdam. He died intestate and unmarried, survived by his mother and a brother and sister. The Administrator General asked to be directed whether the estate should be distributed according to the law regulating intestate succession of North-Holland or of South Holland.

The Court made reference to the Regulations, 6th December, 1732, by which the States General granted to every person settling in Berbice power to choose such known law of succession as might please him, but, in case of no choice being made, ordered that in such cases the law laid down for the East India Company by the Resolution of the States General of 10th January, 1661, should be followed. The Court also referred to the last named Resolution which provides that, subject to the "Interpretation" dated 13th May, 1594, by the States of Holland and West Vriesland of the doubts daily occurring in the Ordinance of Succession, the Political Ordinance of 1580 is to be observed in the Company's East India Possessions, with the proviso amongst others, that where one parent only of an intestate is alive the surviving parent is to take half and the brothers and sisters of the intestate and their children and grandchildren the other half of the inheritance. The Court also referred to the Rules for the government of places in the West Indies made by the States General, 13th October, 1629, and Instructions 23rd August, 1636.

Re ALEXANDER

The Court (CHALMERS, C.J., ATKINSON, J., SHERIFF, J.) directed that the estate be distributed among the heirs of the intestate as follows, viz: one-half to the mother of the intestate, and the other half in equal shares to his brother and sister.

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CHALMERS, C.J.—There is also before the Court an action by Mr. Hughes claiming damages against Mr. Tengely for breach of an agreement to enter into partnership with him and preventing him from acting as a partner, the facts averred being the same as in the action for Interdict. The decision in the Interdict case, it was understood, would rule also in the action for damages, and, indeed, necessarily it must do so. The judgment will be one of rejection, with costs.

Attorney for Tengely, *G. W. Hinds*.

Attorney for Hughes, *J. B. Woolford*.

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8 March, 1890

Change of Venue—Removal of Records—Costs.

Plaintiffs, merchants in London, sent out a suit in Berbice against Defendants, both of whom resided in Berbice. Counsel and Attorney-at-Law for Plaintiffs, the Plaintiffs' Attorney, and the Attorneys-at-Law for Defendants, lived in Georgetown. The Counsel for Defendants lived in New Amsterdam, and the books relating to the matter were in New Amsterdam.

Held—Change of venue was necessary under the circumstances, and books should not be removed.

Bourke for movers (Defendants).—The whole transaction took place in Berbice, Defendants, their witnesses, and the books to be produced are in Berbice; if heard in Berbice costs will be greatly diminished.

Kingdon for Plaintiffs.—Change of venue will entail considerable costs on Plaintiffs.

10 March, 1890

SHERIFF, J.—This is a motion for change of venue made by the Defendants and opposed by the Plaintiffs. The test in such cases is the balance of convenience. It is sworn to by Mr. Woolford and also by Mr. Cameron that the books, papers and documents connected with the business of William Leslie & Co. in relation to which

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this suit arises are in the County of Berbice. During the argument it was admitted by the learned counsel for the Plaintiffs that some of the documents, books, and papers shewing the business transactions of the said firm were in the possession and custody of the Administrator General in Berbice; but it was urged that there would be no difficulty in getting such documents, books, and papers transferred from Berbice to Georgetown. I am unable to accept that view. I think that unless special reasons are disclosed upon affidavit, shewing the absolute necessity for a transfer from one county to the other of records or documentary evidence, they should be allowed to abide in what I may term the domicile of their origin. It may also well be that persons other than those engaged in the present suit are entrusted with the safe keeping of the books and papers referred to; and though the risk attendant upon a transfer may be infinitesimal, yet they are entitled to be safe-guarded against any risk whatever.

The order asked for is therefore granted, costs to be costs in the cause.

[The cause was tried in New Amsterdam on April 10 & 11.]

Pleading grounds of Exception—Guarantee—Deviation by Creditor—Action on Contract of Guarantee—Discharge of Sureties.

Exceptions that claim is bad in substance and law, and *ineptus et obscurus libellus*; demurrer in replique; grounds of exception not stated. Defence on merits in Answer: that creditors had deviated from the contract.

Held—Exceptions not stating grounds thereof *in gremio* are bad. On merits defence sustained.

Action to recover from sureties balance due by principal debtor. Plaintiffs had agreed to supply goods during three years to William Leslie & Co. on credit, on terms that whenever balance due for such goods should reach £2,000 they might refuse further goods except for cash payments. Defendants guaranteed payment of the balance due by William Leslie & Co. in respect of the goods so supplied to the extent of £2,083. Plaintiffs without knowledge of the guarantors assumed liability for an old debt of £900 due by William Leslie

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and Co. to a third party. In Plaintiffs' accounts relating to the guaranteed transactions the latter sum was debited and dealt with as if it were a debt accrued in respect of these transactions.

Defendants excepted to the Claim and Demand that it was bad in substance and in law, and also pleaded *ineptus et obscurus libellus*.

Sol. Genl. Kingdon, Q.C. for Plaintiffs demurred. Both exceptions are bad in not stating the grounds thereof, citing Sections 34 and 37 of Ordinance 26 of 1855. If good grounds for Exception were stated Plaintiffs might amend or file new Claim. Exceptions are technical and must be pleaded strictly as law directs.

DeGroot, for Defendant Dalgetty, relied on alleged practice.

The Court allowed the demurrer.

On the merits *DeGroot* for Dalgetty contended that the contract had been broken by the charge of debt due to a third party, the effect of which was that William Leslie & Co. did not get the benefit of the credit guaranteed. Cited *Kinnaird v. Webster*, 10 Ch. D. 139; *Pearl v. Deacon*, 1 D. G. & J. 461; *Pollock on Contracts*, 692; *Offord v. Davies, et al*, 31 L.J.C.P. 319; *Van der Linden*, p. 211.

McKinnon for Evans—The guarantors are prejudiced by the act of Plaintiffs and thereby the guarantors are relieved; a material part of the transaction was concealed: Plaintiffs had no right as in question with guarantors to appropriate payments to the old debt. Cited *Morell v. Cowan*, 7 L.R. Ch. D. 151; *Polak et al v. Everett*, 1 L.R., Q.B.D. 669; *Watts v. Shuttleworth*, 5 H. & N. 235, 7 H. & N. 353; *Hamilton v. Watson*, 12 C. & F. 109; *N.B.I. Co. v. Lloyd*, 18 Exch. 523; *Railton v. Matthews et al*, 10 C. & F. 934.

Evidence was given for Plaintiffs and Defendants.

Sol. Genl. replied, contending that Plaintiffs were entitled to appropriate remittances from William Leslie and Co. to their old debt; that the assumption of this debt was beneficial to the debtors and guarantors, and Plaintiffs had in fact supplied goods in exchange for all payments by the debtors.

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13 May, 1890

CHALMERS, C.J.—The Plaintiffs claim \$9,998 40 as the amount due to them by the defendants on a guarantee.

The Court had to deal *in limine* with certain exceptions and a demurrer thereto, and as it appeared that the point involved in the demurrer had never been dealt with before, or at least that, if it had, there was no record of it, it will be well to state the decision. In the answers it was objected that the claim and demand was bad in substance and in law and did not state facts sufficient to constitute a cause of action and there was also propounded the exception *ineptus et obscurus libellus*. The Plaintiffs demurred to both the exceptions, because it was not alleged by the Defendants how or in what manner the claim and demand was bad in substance or in law, and because no grounds were stated in support of the exception *ineptus et obscurus libellus*. Sections 34 and 37 of the Procedure Ordinance are perfectly explicit as to the necessity of specifying in every exception the grounds on which it is taken: The Defendants could offer no argument against the demurrer beyond saying that precedent and practice allowed exceptions in the form in which these exceptions were framed. The only verification was the citation of one case, Mrs. Clark v. The Administrator General, in which it was said that exceptions such as are pleaded in this present case had been sustained in a judgment in 1881 or 1882. The record was not before the Court and it was not said that the form of the exceptions had been questioned. The Court had no hesitation in allowing the demurrer. This of course had not the effect of depriving the Defendants of any legal defence arising either in respect of the facts averred in the record or upon evidence being offered. It is right to add that since returning from New Amsterdam to Georgetown, I have been, through the industrious research of Mr. Sworn Clerk Olton, supplied with the record of a case which is doubtless the one referred to at the Bar, although the reference was five years out in date, the true date being in June 1877—one more illustration of the necessity of there being accessible Reports of the proceedings of these Courts. The exceptions were *ineptus et obscurus libellus*. *Tibi ad-*

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versus me non competit actio and *Tibi adversus me non competit hæc actio*. There is no trace of there having been any objection to the form or substance of any of these exceptions, from which the probable inference is, that they were correctly stated according to law with the reasons on which they were founded: if this was not so the defect was passed without notice. In either of these views this record in no way affects the argument. Even if it were shown that there was a practice such as is stated by the Defendants, that could not override the express terms of the enactment on this subject.

These exceptions having been thus disposed of; the case proceeded to proof. It is averred and proved that Agnes Leslie, widow, carrying on the business of Draper at Berbice under the style of William Leslie & Co., along with the Defendants and Herbert Hewitt Barnard now deceased, entered into an agreement with the first named Plaintiff then carrying on business under the style of Jonas Brown & Son which is set out in the Claim and Demand. This agreement is dated 15th March 1886, and is under seal; it recites that Jonas Brown & Son at the request of the Defendants and of Herbert Hewitt Barnard (thereinafter called the guarantors) had agreed to purchase merchandize in England as Agents for William Leslie & Co. for three years from the date of the agreement upon the terms thereinafter mentioned, and in consideration thereof the guarantors had agreed to enter into the guarantee; there is then a covenant that Jonas Brown & Son during the three years shall purchase in England and forward to William Leslie & Co. at Berbice such merchandize as they should require, but so that whenever the amount due to Jonas Brown & Son in respect thereof amounts to £2,000, they may refuse further supplies except for cash payment. Then there are covenants as to the commissions and interests to which Jonas Brown & Son are to be entitled in respect of the merchandize so supplied and upon balances due to them in account, and as to the mode in which William Leslie and Co. are to make remittances. The guarantors jointly and severally guarantee the payment to Jonas Brown and Son of the ultimate balance due to them from

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William Leslie & Co. on 31st December 1889, in respect of the agency and transactions, but not a greater aggregate sum than £2,083. There is a covenant that the guarantee may be forthwith enforced in regard to any of the moneys due to Jonas Brown & Son in manner aforesaid in either of two events; (1) in case William Leslie and Co. should suspend payment or become bankrupt, (2) in case any moneys due to Jonas Brown & Son should remain unpaid for more than twelve months. There is a covenant that the guarantee is to be a continuing security and not affected by any other security or right to the benefit of which Jonas Brown & Son might be entitled, nor by changes in either of the firms, &c., a covenant as to the termination of the agreement upon notice by either William Leslie & Co. or Jonas Brown & Son, and lastly, a covenant that the agreement shall be construed as an English contract and enforceable both in England and in the country where William Leslie & Co. should carry on business as Jonas Brown and Son should determine.

It is further averred and proved that the Plaintiffs acted to a certain extent as agents of William Leslie and

Co. under this agreement, and purchased and forwarded goods to them; that William Leslie & Co. suspended payment in November 1888, and on 17th December 1888, Agnes Leslie and her firm of William Leslie & Co. took the benefit of the Bankruptcy law, and that moneys due to Plaintiffs by William Leslie & Co. had been, at the time of commencing this action, unpaid for longer than twelve months. The Plaintiffs say further that on 1st January 1888, and at the time of commencing this action there were due and payable to them by William Leslie & Co. in respect of merchandize supplied, interest and commissions the sum of £2,234.9.6 or \$10,725.48.

The Defendants amongst other defences which it will not be necessary to notice, raise the defence that the balance now said to be due by Leslie & Co. is not the balance to which their guarantee applies, but includes a large amount of money which was due by William Leslie and Co. to one Robert Milner of London previous to the execution of the agreement and was transferred to the

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Plaintiffs' account without the knowledge or consent of the Defendants. They also say that the Plaintiffs did not purchase and forward the goods and merchandise for William Leslie & Co. in accordance with the terms of the agreement.

The account rendered by the Plaintiffs of the transactions between them and William Leslie & Co. show debit items on 7th February 1887, "draft for Milner £875.3.2 and £43.15.2 commission at 5 "per cent., for disbursing same," making together £918.18.4. It appears from further evidence that this draft represented a balance due by Leslie & Co. to Milner who had been agent of the firm in London before Brown & Son became agents. Brown and Son took over responsibility for this balance on request of Leslie & Co. and transferred it to the debit of their account subsequently to the date of the contract of guarantee. It is not shown or alleged that this transaction, or even the existence of the debt, was known to or assented to by the guarantors.

It further appears that Jonas Brown & Son treated this debit of £918.18.4 in the same way as if it had accrued in respect of goods purchased and supplied by them to Wm. Leslie & Co. under the agreement. They placed it against the credit guaranteed by the Defendants, and when the balance (including this debit) reached the limit of £2,000 they refused to furnish any more goods unless covered by cash remittances. In point of fact no goods were supplied upon the credit subsequently to 23rd February 1887, and from this date to the end of the dealings the credit always appeared in the accounts as fully drawn upon, whereas if the items for Milner's debt had not been debited there would have been considerable margins of the credit available for supplying goods during the whole period. Subsequent charges accrued upon this debt for interest and additional commissions, and thus it further diminished the margin of credit. It resulted that orders by Leslie & Co. for goods which they required were refused or delayed until they had sent cash remittances to cover them, which would have been within the guaranteed credit had it not been absorbed *pro tanto* by the extraneous burden placed upon it, and it is in evi-

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dence that the business suffered in consequence of these delays and refusals.

Now was there here a departure from the contract which was the subject of the guarantee? It was argued by the learned Solicitor General in his able statement of the case on behalf of the Plaintiffs that they were not bound to supply any particular amount of goods, and that if diminished supplies resulted out of the arrangement as to Milner's debt, yet that was a matter which was entirely in the Plaintiffs' own hands and afforded no ground of complaint either to Leslie & Co. or the guarantors; and it was put as if the debits in the account for this debt were in the same position as any items arising out of the supply of goods by the Plaintiffs, and that they were entitled to apply remittances from Leslie and Co. towards the liquidation of these debits without distinction from any other item and simply according to the order of priority in the account. That mode of dealing with the debits would no doubt be correct were the question only between the Plaintiffs and Leslie & Co.; but in the present question with the sureties it is not correct. What did the sureties undertake? By the express terms of the contract they guarantee a balance that might become due "in respect of the agency and transactions" which are set out in the contract, but not in respect of any other dealings. There is no word or clause that by any possibility can bear the construction of a guarantee for any past debt of Leslie & Co., for any balance due on any separate or general account between Leslie & Co. and Jonas Brown & Son, or for any debt or balance whatever except the balance that may emerge in respect of the supplying of goods by Jonas Brown and Son in the manner provided by the contract. Thus the present case is clearly distinguished from such cases as *Williams v. Rawlinson*, 3 Bingh 71 or *Hamilton v. Watson* 12 C. & F. 109, in which there have been securities for Banker's accounts, and it has been held that the securities might be used so as to cover advances that had been made anterior to the security. These cases have turned both on the terms of the instrument of security and on the nature of the transaction, where

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security had been interposed whilst there was a subsisting series of past transactions between the creditor and principal debtor as well as contemplated future transactions. The transactions between Brown & Son and Leslie & Co. began after the date of the contract; and the terms of the guarantee are only applicable to the future transactions under the contract and not to any transactions anterior to the contract in date or outside the scope of the operations which it defines. The arrangement respecting Milner's debt was in effect to bring under the guarantee an outstanding debt of Leslie & Co. which the Defendants did not contract to guarantee and of which, so far as the evidence goes, they knew nothing. It was clearly a departure from the contract.

Moreover it increased the responsibility of the sureties inasmuch as it rendered Leslie & Co. *pro tanto* less able to pay for the goods they obtained from Brown & Son, payment of which goods was the thing the sureties guaranteed. The sureties were entitled to expect, and no doubt did expect that the ordinary course of trade would be followed; that the proceeds of the goods which Brown & Son were to supply to Leslie & Co. would, when received by the former, be applied in paying for the goods and so keeping down the balance for which they engaged to be ultimately responsible, and it was clearly to their prejudice that a portion of Leslie & Co.'s remittances to Brown & Son would have to be diverted to liquidate an obligation which was extraneous to the dealings which they had guaranteed. *Pidcock and others v. Bishop*, 3 Barn & C. 605, is so cognate in this connection that I must here refer to the case. Bishop guaranteed the Plaintiffs in payment of £200 price of pig iron to be delivered to one Tickel. Tickel was already indebted to Pidcock, and he promised that he would pay him 10s. a ton for the iron beyond the market price to be applied towards liquidation of his old debt, This arrangement was not communicated to the surety. The Court unanimously held that non-communication was a fraud upon the surety. They said that the undisclosed agreement for the 10s. per ton extra increased his responsibility as the effect would be that the vendee "would have

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“to appropriate to the payment of the old debt a portion of the goods which the surety might reasonably suppose would go towards defraying the debt for which he had become responsible.” This is precisely the situation here. It is somewhat curious to notice that in *Pidcock’s* case an argument was ineffectually advanced which was also suggested in the present case, viz. that the arrangement with regard to *Milner’s* debt tended in favour of the sureties as saving the principal debtors’ property from possible judgment and execution in respect of the old debt. It is clear the Defendants could not, in the event of an execution, have been in the situation of having any more claimed from them than the full amount of the guarantee which is now claimed, whilst on the other hand if *Leslie & Co.* had been brought to a stoppage earlier a lesser claim against them would have accrued. But where there is prejudice from the course taken it is beside the question to attempt to estimate what might have been the effect if something quite different had been done. The enquiry is too hypothetical and speculative for a Court of Justice.

The arrangement made as to *Milner’s* debt was further in derogation of the contract inasmuch as it tended to diminish (and in fact as the evidence shows did diminish) the supply of goods furnished to *Leslie & Co.* on credit on the security of the guarantee. I do not think it is material to consider whether the covenant by *Jonas Brown & Son* to supply to *Leslie & Co.* “such merchandize and goods as they shall require”—covered of course by the guarantee or by cash payments—is one which *Leslie & Co.* could enforce. It is to be observed, however, that this is not the case of a simple guarantee for the price of goods. It is a contract solemnly entered into under seal, and if I rightly understand the English doctrine of special contracts it creates an obligation which affords a cause of action without proof of consideration. It is most reasonable that a contract of this kind stipulating for a supply of goods over a stated period to a trader in this country where he cannot go and purchase in the market upon short notice should be binding. But however this may be, it is clear that the consideration

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inducing the guarantors to enter into the contract was that Brown & Son should keep up a supply of goods to Leslie & Co., and that it should be kept up to the extent the contract admitted of, that is that Leslie & Co. might always obtain goods on credit to the extent of £2,000 if they asked to have them. This again they would presumably always do if it was profitable. By blocking off this credit by an item of more than £900 on which no profit was being made by Leslie & Co., or could be made, there was a clear departure from the contract. It affected the situation of the sureties adversely since whilst their responsibility was the same as if goods were being supplied, the non-supply *pro tanto* of the goods diminished Leslie & Co.'s chance of doing profitable business and so being in a situation to keep their sureties harmless.

I am of opinion then that by the dealing between the Plaintiffs and Leslie & Co. as to Milner's debt; by their mingling the debt and charges upon it in the account of the transactions which were the subject of guarantee and by their limiting the supplies of goods to Leslie and Co. by the amount in which the account had been thus improperly loaded so to speak, the situation of his sureties was substantially altered for the worse and the promise of the Plaintiffs which had been the consideration of the sureties entering into the guarantee was not carried out in its true intent and meaning.

That being so what effect follows as regards the liability of the guarantors? It is undoubted that where the position of a surety has been altered to his prejudice by any dealings between the creditor and principal debtor to which he has not assented, or by the creditor without assent of the surety failing to do something which his duty towards the surety required him to do, the surety is discharged. This rule is found uniformly pervading the whole of the authorities on this subject. Reference may be made to *Bacon v. Chesney*, 1 Starkie, 192; *Bell v. Banks et al*, 3 Scott N.S. 497, Story's Equity Jurisprudence, sec. 324 and 325; *Bacon v. Macdonald*, 3 H.L.C. 226; *Owen v. Homan*, 3 MacN. & Gordon 400; *Whitcher v. Hall*, 5 Barn & C. 269; *Blest v. Brown*, 10 W.R. 570; *Watts v. Shuttleworth*, 5 H. & N. 235 and

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7 H. & N. 353; *Lawrence v. Walmsley*. 31 L.J.C.P. 143; *Polak v. Everet*, 1 L.R. Q.B.D. 669; *Holme v. Brunkshill*, 3 Q.B.D. 495; *In re Sherry London Co. Bank*, 32, W.R. 394. Indeed the doctrine as to the release of sureties goes further than I have stated it, or than is necessary to the decision of the case. The sureties, having made themselves responsible in an instrument setting out the relations between the creditor and the principal debtor, ought to have been consulted; it cannot be said that it was self evident that the alteration was either immaterial or certainly beneficial to the sureties, and they had right to be the sole judges whether they would consent to remain sureties notwithstanding the unproductive debt due to Milner being placed against their guaranteed credit. It is clear that the sureties are discharged.

I may remark in conclusion, that at the first view of this case, my leanings, so far as it is permissible to have any leanings, were somewhat in favour of the Plaintiffs. There is no doubt Leslie & Co. got a considerable amount of goods on this security, and the assuming of Milner's debt so far as appears was an act of good nature on the part of Jonas Brown & Son for which it does not seem they would receive any equivalent except the interest and commissions. But when we look at the other side of the matter, there is a clear equity in favour of the Defendants. They were to receive no benefit whatever for themselves. What they intended and stipulated for, was that Leslie and Co. should have a free working credit of £2,000, by the aid of which they hoped no doubt that a profitable business would be done. They did not get the thing which they bargained for, and equity as well as strict right is with them when they say to the Plaintiffs "you have not performed the contract which we guaranteed and our obligation therefore is at an end."

SHERIFF, J.—This is a suit brought to recover the sum of £2,083 from the Defendants under an agreement in writing which purports to have been executed on the 15th of March 1888. Under this agreement the Plaintiffs' firm undertook to purchase merchandise in England for the firm of Wm. Leslie & Co. of Berbice for a period of three years from the date of the agreement. They

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were to receive 5 per cent, upon the gross cost of the said merchandise, with a further sum of 6 per cent, per annum from the dates of shipment to the respective due days of payment. There was also a provision for payment of compound interest under certain circumstances. The Defendants together with one Barnard (since deceased,) were parties to the said agreement, and they thereby jointly and severally became responsible for the payment to the Plaintiffs on the 31st December 1889, in respect of "the agency and transactions aforesaid," the liability however being limited to £2,083. The guarantee was to be enforceable (1) if William Leslie & Co. should suspend payment, or take or attempt to take advantage of bankruptcy proceedings; or (2) if any moneys due to Plaintiffs should remain unpaid for more than twelve months. It was also stipulated that the contract was to be deemed and construed as an English Contract, and no alteration in the personnel of the Plaintiffs' firm was to affect the agreement. George Grunton Brown was at that time sole partner. The Plaintiffs contend that on 1st of January 1888, a large sum of money was due to them for merchandise supplied to the said firm of Wm. Leslie & Co., and for commissions and interest in respect thereof. The firm of Wm. Leslie & Co. suspended payment in November 1888, and in 1889 Agnes Leslie the sole partner of Wm. Leslie & Co., took the benefit of the Bankrupt law in Berbice. The Defendants have set up various defences, but I do not propose to investigate these seriatim, but rather to concentrate my observations on one point, which going as it does to the root of the whole matter appears to me to require further consideration. Various letters which passed between the firm of Wm. Leslie & Co. have been put in. The overtures for negotiating a business connection with Plaintiffs, emanated from Leslies' in their letter of the 15th of April 1886. The names of the sureties were first mentioned in a letter to Plaintiffs dated 2nd September 1886, and I infer that the "enclosed letter" was one from the guarantors. On the 28th October 1886 Leslie acknowledged receipt of the agreement, but one clause (9) requiring them to give up other business relations which they had at home they

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refused to assent to. On the 9th of December 1886, Leslie wrote to the Plaintiffs as follows:—"Re minute of Agreement; we are now "satisfied with all proposed alterations which your agents will fully "explain to you by this mail. We requested them at same time to ask "you to take over the balance of our old account with our late Lon- "don agent Mr. Robert Milner (£844.8.1). This account is payable by "us at the end of January next. Should you see your way to do this, "account must be treated in the ordinary way of credit." They ask for an answer by cable, and add "Of course if you take over this debt we "will begin remittance to yourselves and liquidate same as quickly as "possible." On the 20th December 1886, the Plaintiffs wrote to Leslie's agreeing to take over the balance due to Milner, adding "the "amount we pay of course is subject to 5 per cent commission to us "for advancing as if goods had been shipped." On the 9th of February 1887, the Plaintiffs wrote Leslies that Milner's debt had been paid, but complained that the agreement had not been properly executed and it was returned. In another letter from the same to the same dated 8th March 1887 is to be found the following sentence—"we have failed to grasp the meaning of your first paragraph headed "Milner's debt. The draft you drew upon us went to your debit when "paid plus our disbursement commission of 5 per cent." This letter is in reply to Leslies' letter of the 17th of February 1887, in which is to be found the following passage—"we trust you do not understand "this amount to be paid off by us. We intend to pay more as we go "along than what is really due from invoice date, so that when this "account of Milner's comes on the amount may be reduced. We trust "this is in order." From this correspondence it appears that the agreement was prepared to give effect to the understanding arrived at by all the parties, viz. that the Plaintiffs' firm should for 3 years, purchase and forward goods to the firm of Wm. Leslie & Co. not exceeding £2,000. It is clear that after the agreement was drawn up and after the letter from the sureties enclosed in Leslies' letter of the 2nd September there was a serious departure from the under-

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standing at first arrived at, and it is equally clear that the agreement though really executed subsequently thereto was not altered to meet the proposed change. The law governing the case is not difficult of comprehension. A surety is bound by the letter of his contract. He incurs a liability without any consideration, and such liability can only be gathered from within the four walls of the contract. Mr. Evans swears that he did not know of the existence of Milner's debt at the time he executed the agreement, but even assuming he did know, he was no party to the assumption of this debt by the Plaintiffs. The agreement is silent as to debts then due by Leslie's. Contracts of this description cannot be altered or varied in any material respect. Moreover as Milner's debt was taken over behind the backs of the sureties it may well be called a *private* transaction, and every private bargain made between the seller and the purchaser of goods which tends to vary the liability of the surety should be communicated to the surety. It is only reasonable to suppose looking at the nature of the agreement that the Defendants expected and had right to expect that Leslie's as they received goods would sell same and remit from time to time the net proceeds to Brown. Worked out, it comes to this, that the Plaintiffs have treated Milner's debt on the same footing as if they had *actually* shipped goods to that value to Leslie's and then have applied the proceeds of the sales of the goods *really* shipped which Leslie's remitted in satisfaction of such *imaginary* shipment. The Plaintiffs in all probability thought that Milner's was a debt which could and would be enforced and which must be paid off, but before taking it over they should have consulted the sureties and reshaped the guarantee accordingly, that is, assuming that the sureties having knowledge of Milner's debt were still willing to incur liability, which appears to me to be improbable. Be that however as it may, all that the sureties undertook to do, was to guarantee the monies (within the given limit) which plaintiffs might disburse for merchandise *to be* thereafter purchased. Keeping this in view, can it be said that there has not been a variance of the original contract and one moreover

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directly calculated to prejudice the position of the Defendants as sureties? Such is undoubtedly the case and the effect of such variance is to discharge the Defendants. There was, not to use stronger language, a great want of candour on the part of Leslies, and I am surprised that the Plaintiffs as commercial men were not put on their guard by the subsequent disclosure of a debt, the existence of which was never even hinted at in the correspondence which paved the way to the agreement. The Plaintiffs however expressed no surprise that such liability was not disclosed at the outset and before the agreement was drawn, but paid it off relying on their guarantee. In so doing they committed a fatal error and must abide the consequences. I have not deemed it necessary to refer to any authorities, but there is one which appears to me to put the law so clearly, that I shall conclude my decision with an extract therefrom. Lord Chancellor WESTBURY IN *Blest v. Brown*, 10 W.R. p. 569 says:—"Now it must always "be recollected in what manner a surety is bound. You hold him to "the letter of his engagement. Beyond the proper interpretation of "that engagement you have no hold upon him. He receives no benefit "and no consideration. He is bound therefore merely according to the "proper meaning and effect of the written engagement that he has "entered into. If that written engagement is altered in a single line no "matter whether it be altered for his benefit, no matter whether the "alteration be innocently made, he has a right to say the contract is "no longer that for which I engaged to be surety. You have put an "end to the contract that I guaranteed and my obligation therefore is "at an end."

Attorney for Plaintiffs, *G. W. Hinds*.

Attorney for Dalgetty, *W. S. Cameron*.

Attorney for Evans, *J. B. Woolford*.

J. M. ROHLEHR, PLAINTIFF HO-A-HING, DEFENDANT.

Berbice, 19 Dec. 1889

Interdependent Contracts—Onus probandi.

Plaintiff having leased premises from Defendant sought rescission of the lease on the ground that Defendant had failed to carry out an agreement to import for him certain goods to be used in a business to be established in the premises;

Held—That onus lay on plaintiff to show that the agreement to import was integral of the entire transaction; Rescission not granted.

Georgetown, 23 January, 1890

The facts and arguments are sufficiently stated in the judgment.

DeGroot for Plaintiff; *McKinnon* for Defendant.

CHALMERS, C.J.—The case averred by Plaintiff is as follows:—He says that in September, 1888, Defendant promised that he would import from England for him a sufficient quantity of drugs to enable him to carry on the business of a Druggist in New Amsterdam, and that these drugs were to be delivered to Plaintiff on credit, he paying ordinary Bank interest on the price; that the consideration for this promise was that he (the Plaintiff) was to lease certain premises belonging to Defendant in New Amsterdam, and do such repairs thereon as would render them suitable for the carrying on of a Druggist's business, and some other alterations and repairs, and that in pursuance of the agreement the Plaintiff executed a lease in writing of the Defendant's premises for five years at the yearly rent of \$360. Plaintiff was put into possession under the lease, and he executed the repairs and alterations at an expense he says of \$406 12. Plaintiff avers further that the Defendant imported the drugs but failed to deliver them to him, and that in consequence of such refusal the lease has become onerous and non-beneficial, that he has lost the benefit of the repairs and improvements made by him on the Defendant's premises,

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and he prays for a sentence cancelling the lease and awarding him \$406 12 as damages for the breach by the Defendant of the contract to supply drugs, and offers on his part to give up possession of the demised premises.

The Defendant avers that the agreement to import drugs was separate and independent of the agreement of lease; that he did not agree to deliver on credit, but that the drugs were only to be delivered on payment of the price or on good security being given for payment within a reasonable time. He avers further that he imported the drugs and requested the Plaintiff to take delivery of them on payment or security; but that Plaintiff failed to do so, and ultimately released Defendant from all obligations regarding them.

There are two main propositions which are essential to the granting of the relief claimed; the one is that there was in fact an agreement by Defendant to deliver drugs on credit, secondly that this agreement was so integral to the entire transaction, as to be a condition suspensive of the lease having binding operation, so that in effect if the condition failed there should be no lease. Hence even if the Court was satisfied as to the agreement to deliver drugs and breach thereof unless this agreement was thus suspensive of the lease, the remedy would be not a sentence for rescission but one placing the parties as nearly as might be in the position they would have occupied had the agreement been carried out, that is to say, an award of damages representing the additional expense the Plaintiff would have incurred in procuring his drugs otherwise than by the fulfilment of Defendant's promise.

As regards the first of these propositions the law is that the buyer of goods must be prepared to pay for them forthwith on delivery, unless a term of credit is imported into the bargain by custom or by particular agreement. The plaintiff here relies upon a particular agreement; the onus lies on him to establish it. As regards the second proposition the onus of proof also lies on the Plaintiff, its assertion and maintenance being essential to his case; *Ei incumbit probatio qui dicit, non qui negat.*

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According to the evidence given by Plaintiff, his starting a drug store was suggested to him by Defendant asking him in conversation why he did not import drugs and keep a drug store, to which Plaintiff answered that he had not money enough, whereupon Defendant volunteered to import drugs for him. Nothing was settled on this first occasion, but two or three days afterwards there was a further conversation when it is said Defendant agreed that provided he (the Plaintiff) took a lease of his premises for five years and would do some repairs and fitting, he would import drugs for Plaintiff which he would not need to pay for until six months after delivery, interest at 6 per cent being charged upon the purchase money while remaining unpaid. Plaintiff says nothing as to any limit of the value of the stock to be imported on these terms, but he handed lists of the drugs he required to the Defendant about two weeks before the lease was signed. We learn from Defendant's evidence that the lists were furnished on 11th September, and the order for the supply was sent by Defendant to his foreign correspondent on 13th September. We learn also from Defendant that on his expressing some anxiety about the apparent extent of the order as shown by the lists, Plaintiff assured him before he gave effect to the lists by sending them to the merchant who was to supply the goods, that the cost would not exceed \$500 to \$600. This is uncontradicted. The limit of the order is an important matter and will have to be referred to again. Recurring to the Plaintiff's evidence we find him stating: "I agreed to execute a lease; I did so on the strength of the importation; I would not have done so otherwise for the place is much smaller than the place I was previously living in and very inconvenient, and the rent was \$8 a month more than that of the other place." It is impossible to avoid observing that the advantage the Plaintiff was to receive,—assuming the agreement as to the drugs to have been entirely as he has put it—seems most inadequate to the sacrifice he represents himself as making. He is fixing himself to a five years' lease of very inconvenient premises, much smaller than those he was to remove

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from at an increase of rent of \$96 a year, which rent he characterises in part of his evidence as exorbitant (which estimate is however uncorroborated); he was also to make fittings and repairs which he says cost him over \$400: Why? In order that he may get six months credit for between \$500 and \$600 the price of drugs he must have expected to sell rapidly and with large profits. It is not suggested that there was any agreement that Defendant was to keep up the supply of the drugs by periodical importations, which perhaps might have been a matter of importance in the working of the drug business. There is not an indication that such a thing was ever mentioned by either party, the whole of their communings relating only to the sort of drugs required for starting the business. Had Plaintiff borrowed money to pay for the drugs on their arrival even from the greediest usurer he could scarcely have been put in a position of such pecuniary disadvantage as he represents himself as willingly entering into by his agreement with Defendant. We must weigh not only the bare statements but the circumstances which go to make up the case we have to decide on. The transaction as represented by Plaintiff manifests a degree of miscalculation as to what was to be given and taken such as an educated man like Plaintiff could scarcely have made, and the conclusion is almost inevitable that there must have been some other material factors inducing him to take the lease besides the temporary accommodation of getting his first instalment of drugs on a six months' credit.

Following the evidence further it is found that the lease was executed after the agreement about the drugs was settled and as much as seventeen days after the agreement had been acted on by the order for the drugs being sent off. Yet the lease contains not the slightest allusion to the agreement for the drugs, which according to Plaintiff, was, on his side, its sole inducing cause. The only explanation given of this very important omission is that Plaintiff stated that he and Defendant were very friendly and that he did not anticipate that there would be any breakdown in carrying out the condition

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about the drugs, but, Plaintiff was not indifferent as to what he signed, for it is in evidence that he objected to a contract of lease which was first submitted to him, and for which the lease finally agreed on and signed was substituted. It is familiar in the experience of all Courts that people in making their contracts do not anticipate that difficulties will afterwards arise, and in this false confidence they are careless as to the stipulations they make. But Courts cannot for this reason refuse to attend to the inferences which arise from what stipulations the parties have either made or not made.

Then again the Court has to consider whether after the drugs arrived and Defendant objected to deliver them unless on terms of payment or security, the behaviour of Plaintiff was that of a man who felt that he could stand upon a firm and clear contract for the delivery upon credit. He does not seem ever to have boldly stated to Defendant that such was the contract and demanded its performance. On the contrary he accedes to suggestions first that the licence for the drug business should be in Defendant's name, and that the weekly sales should be paid to Defendant, and then that he should admit as a partner on an equal footing with himself, a young man whom he had intended to employ as an Assistant, and it is only when further conditions were proposed, which (until the price of the drugs was paid) would have made him almost a nonentity in the business, that he finally declines to go any further.

With regard to the limit of value it must be taken on the evidence that if there was a contract at all to deliver drugs on credit, it was restricted to the delivery of drugs not exceeding \$600 in price; it could not then be said that Defendant was bound on the Contract to give possession of goods which turned out to cost \$1,200, and this the Court is asked to hold by its judgment in this action.

The Defendant's case is not attended with difficulties as that of the Plaintiff would have been even if no contradicting evidence had been given. The Defendant states that the agreement to import drugs and the Contract of lease were entirely independent of each other. The omission of all incorporation of the two contracts

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in the written instrument is in accordance with this view. The Defendant further states that he did not volunteer as the Plaintiff alleged, to supply him with drugs, but the proposal came from the Plaintiff after they had agreed as to hiring the premises. He says further that he hesitated about ordering the drugs, being doubtful about the payment for a valid enough reason, vizt. that Plaintiff was then his debtor to the extent of between \$200 and \$300; that Plaintiff assured him the drugs would not cost more than from \$500 to \$600; that he could easily save from the income he was deriving from his medical practice as much as \$200 or \$300 before the drugs would arrive, and that he could then pay half the price in cash on delivery, and give security for the balance—and that it was on this footing he agreed to make the importation. Defendant's statement is corroborated by that of his clerk Henry who was in charge of his foreign correspondence, and to whom the list of drugs was passed, and who forwarded them for fulfilment. Henry narrates a conversation with Plaintiff just after he had arranged with Defendant, in which the former stated to him the substance of the agreement nearly in accordance with what was stated by Defendant. Plaintiff does not deny this conversation although he says he does not remember whether he spoke to Henry about the order or not.

Looking to the whole evidence I consider that Plaintiff has not established either of the propositions which it had been previously stated is essential to his success in this action. That there was loose talk between Plaintiff and Defendant on the subject of the drugs may be easily believed. That Plaintiff conceived the idea that there would be easy dealing about the payment is also not improbable, and that he may even have persuaded himself that he was going to get the drugs on credit is not out of possibility; but, that there was either any contract to this effect, or that such a contract was the moving cause for subsequently entering into this lease, the evidence has failed to establish. It follows that judgment must be for the Defendant.—SHERIFF, J., *concurrrens*.

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Opposition—Right to oppose—Extract Minute—Execution in excess of right of Debtor.

Execution on whole property in which Debtor held only a fractional interest is bad. Owner of an undivided share of property although not holder by transport has right to oppose levy on whole property. Court will not aid execution which is contrary to good faith. Extract Minute of Opposition incorporated in record and not brought in issue by Defendant need not be formally tendered or proved.

Opposition to sale under execution, on grounds that property levied on belongs to Plaintiff, sentence on which execution proceeded fraudulent and void, levy in excess of the debtor's interest: Answer traversing case of Plaintiff. Evidence was given. At the close of the case of the Plaintiff, *Clark* for the original Defendant moved for absolute in respect that the Extract Minute of Opposition had not been proved or formally tendered and cited *Bell v. Robertson & Miller*, 6 December 1886, in Inferior Civil Court.

Dargan for Plaintiff.—The pleading in Inferior Civil Court is only a citation. In Supreme Court the Extract Minute is incorporated in the pleadings. Cited sections 214, 219, 220 and forms B. and C. of Ordinance 26 of 1855. *Clark* in reply.

12 May, 1890

Court per CHALMERS, C.J.—The first point is whether the Opposition book kept by the Provost Marshal would be on production, evidence of the entries relating to an Opposition, or whether, as contended for the Defendant, the facts although entered in the Opposition book require to be proved by separate testimony. Now it is clear that when the law directs entries to be made in a book of record under the supervision of a public officer who is to certify in his public capacity that the entries were duly made, the record thus found is to be admitted as at least *prima facie* evidence of the facts stated in it without calling the officer to speak to them. This being so, the Extract of Opposition filed under Section 214 of

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the Procedure Ordinance, and which is appended to the record is within the terms of Section 3 of 49 of 1834; it is the copy of a public record authenticated by the officer who has the custody of the original, and is by that enactment receivable in evidence without the production of the original, and without the testimony or attendance of the officer. Further, the Extract is before the Court, and the parties are incorporated in the record as a part of the statutory procedure. The case referred to in the Inferior Civil Court stands on a different footing. As I understand, there was no evidence at all of an opposition; in such state of the proof there would be of course nothing to discuss. We refuse the motion for absolution.

The other points dealt with sufficiently appear in the judgment.

20 *May*, 1890

CHALMERS, C.J.—Williams under a sentence against Steaman levied in execution upon East half of the South half of lot 63, Stabroek, with the buildings thereon. The Plaintiff opposes firstly on the ground that the property levied on is not the property of Steaman but of the opposer, and secondly, that the sentence in respect of which the levy was made was given in respect of a fictitious debt fraudulently contrived between Williams and Steaman.

On the question of ownership, evidence was given on the part of the Plaintiff and opposer that she purchased the piece of land levied on in March 1889 from Mr. Herman Vyfhuis, executor under the will of Mrs. Frances Ann Schrack; she did not get any transport but was put in possession. At the time the possession was passed to her there were two small cottages on the land. She repaired these, erected a two-storey cottage and made other improvements. Evidence was further given that one George Steaman (or Starman) had been in possession of this land some twenty-two years ago, it being then a piece of open ground without any houses on it; that at that time the possession passed from George Steaman to Mrs. Schrack who erected the two cottages which were existing upon the land when it was purchased by the Plaintiff. There was evidence that on the death of Mrs. Schrack which occurred on 26th February 1877,

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Miss Sophia Bishop, sister of Mrs. Schrack took a life interest in this property by a devise to her in the will of Mrs. Schrack and that under this devise she was in possession of this property for a number of years. Whilst so in possession she employed Williams, the original Defendant, to collect the rents of the cottages. Miss Bishop died in 1885 or 1886 and Mrs. Elliot and other heirs in fee under the will of Mrs. Schrack came into possession. They continued to employ Williams as rent collector. Both Miss Bishop and Mrs. Elliot seem to have been of very trusting nature or else they did not consider their rents of much consequence; for they permitted Williams to draw the rent, pay taxes, disburse money for repairs, and pay over to them the balance from time to time without ever calling for or seeing any accounts or vouchers. The balances which the ladies received were not large.

In effect there was proof that the opposer is a *bona fide* purchaser for value as regards the land from a seller who by his predecessors in right had uninterrupted possession for twenty-two years, and as regards the buildings that as to nine-tenths of their value they were erected by the opposer at her own expense.

On behalf of Williams, the original Defendant, there has been put in a transport dated 18th December 1839, by Maria Archer to Midas Sterman and George Sterman of the South half of lot 63 Stabroek, with the undivided half of the buildings thereon. That vested in Midas and George Steaman respectively undivided interests in the south half of lot 63. Then by a will exhibited on 2nd March 1846, George Sterman bequeathed the half of his property to his wife Phillis Sterman, and the other half to his son George Sterman, the undivided half of a half lot No. 63 Stabroek, being part of the property. The interest of the son George Sterman was thus an undivided half of that of the original George Sterman or an undivided fourth of the half lot. It appears from the statement of Maria Steaman, who was a witness for the opposer that George Sterman and Midas Sterman the disponees in the transport were brothers, and that George Steaman (Sterman) the co-defendant is the son of George

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Sterman. There is no evidence showing that Phillis Sterman is not still alive, and there is nothing even against natural probability that she is. If then it be assumed that the title has devolved by the instrument mentioned to George Steaman so that the land to the extent of his interest would be subject to execution by his creditors, that, upon the evidence is only an undivided fourth of the quarter lot. The execution which has gone for the whole of the quarter lot is clearly bad, and on this ground ought to be set aside.

But the case does not rest here. There is evidence from which it is to be inferred that Midas and George Sterman separated their interests in the land they acquired by the transport. It seems that at the time the half of the East half of South half of lot 63, was passed to Mrs. Schrack, an actual division was made, and from the fact that George Sterman the co-defendant suffered Mrs. Schrack to take and remain in possession, there is strong ground for the Court inferring that he sold his share to Mrs. Schrack. In connection with this, there is a paper purporting to be a receipt by George Sterman for the purchase money of his interest in the land. It has not been proved according to the strict rules of evidence, and so cannot be dealt with as such, but the Court cannot refrain from observing that the original Defendant avoided all explanation by not calling George Steaman into the witness box; and he also in the same way avoided all explanation of Steaman standing by for 22 years and suffering the possession of Mrs. Schrack and her successors to be undisturbed. Midas Sterman who died long after the co-defendant came into possession, viz., in 1881, dealt with the property in his will as restricted to the west quarter of the lot; a further proof that there was in fact an actual division of the half lot.

The connexion of Williams the original Defendant, with the property comes in with relation to Midas Sterman and his wife Rosetta. They both seem to have attained great age, Rosetta who survived her husband dying in 1884 at the age of 101. In their later years they entered into an agreement with Williams by which he was to assist them in their maintenance, in return for

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which he was to succeed to their property. Thus he was much about the Stermans; as early as 1879 he was paying for them the taxes on the property. Whilst he had this relation with the Stermans he was employed by Mrs. Schrack to collect the rents of the cottages on her portion of the land as we have seen. In 1884 he came in possession in his own right of the west quarter of lot 63 under the wills of Midas Sterman and of Rosetta Sterman. From 1879 until 1889 when the sale to the opposer took place, he was in the position in virtue of the employment, first by Mrs. Schrack, and afterwards of her heirs, of paying the taxes for the half lot, both the quarters being treated as one possession, and the tax for both being included in the same receipt. From Williams's connexion with the Stermans, and with their property—finally becoming owner himself—and again from his dealing with Mrs. Schrack and her heirs over a number of years as owners of the property, it cannot be doubted that he was aware of the transaction by which George Steaman parted with the right he had in the land to Mrs. Schrack, and that the present attempt to carry it off by levy is in the very worst faith; so that even if the levy had been good in strict law (which it is not) the Court would have refused all aid to give effect to it.

Mr. Justice SHERIFF concurred, and sentence was given for the Plaintiff and opposer with costs.

Attorney for Plaintiff, *F. Abraham*.

Attorney for Defendant, *W. S. Cameron*.

DAVSON & CO. v. GARNETT & CO.

Practice—Cause List—Relief—Jurisdiction.

Cause erroneously placed on Cause List and heard *ex parte*; Relief granted by vacating proceedings jurisdiction not being limited to County in which Court is sitting. Court has jurisdiction to order removal of record of a case from one County to another. Damages for wrongful seizure of Ballata on Grant. On merits: *Held*—That to maintain possession in article seized or forcibly acquired, Defendant must show a superior right. Further: no legal advantage can be taken by a wrong-doer from his wrongful act.

Subsequently to the drawing up of the statutory Cause List of a Session for the County of Berbice a cause was

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placed, through inadvertence, without joint consent of parties, on the list for hearing. The Plaintiffs appearing at the calling were heard *ex parte*, the Defendants not appearing. Before judgment had been given

Hutson for the Defendants moved in Georgetown for a new trial or that the *ex parte* hearing be vacated.

McKinnon for Plaintiffs; the notice of motion does not sufficiently show for whom it is made; the motion is not competent in respect that the cause was on the list for Berbice and heard in that County, and could not be heard in Georgetown unless order changing the venue had been first made in Berbice: new trial cannot be given where there has been no judgment.

Hutson in reply.

3 January, 1890

CHALMERS, C.J.—The practice at New Amsterdam is that every case included in the list made up under Section 87 of the Procedure Ordinance is set down for hearing on the first day of the session. When the Court was held in December last the Judges found the present case, with another, on the Cause List as for hearing, and they were thus led to suppose that it was duly set for hearing, and proceeded to hear it on that assumption. But from the facts put before us it appears that the case was not on the original Cause List for the Session and had not been fixed for trial by a Judge in terms of the section. Consequently it was not in a position in which it could legally be called for hearing. The proceedings which have taken place from the placing on the list inclusive ought to be vacated. As regards the objection to the form of the notice, it is obvious that the whole documents served, including the statement of the grounds of the motion and the signature “J. B. Woolford, Attorney for the Defendants” constitute the notice and these abundantly show for whom the notice is given. As to jurisdiction it is to be observed that although the Court is sitting here in a Session for Demerary and Essequibo, the arrangements as to Sessions are designed for the convenience of suitors, but do not limit the powers of the Court which extend over all the colony. Accordingly although the primary purpose of this Session is the hearing of matters originating in Demerary or

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Essequebo, the Court may hear any matter within its jurisdiction properly brought before it although the subject matter may be locally in Berbice. Further if it were necessary to order the record of the cause to be removed from New Amsterdam to Georgetown, the Court sitting here has abundant jurisdiction to order the removal.

ATKINSON, J. and SHERIFF, J. concurred, and order was made vacating the proceedings and directing cause to be set down of new.

9 & 10 *April*, 1890

Thereafter the cause was heard and evidence adduced on the merits. The facts and arguments appear from the following judgment.

21 *May*, 1890

CHALMERS, C.J. for himself and SHERIFF, J.—The Plaintiff claims \$1,000 as damages and pecuniary compensation for the wrongful taking by the Defendants out of his possession and conversion of 2,794 lbs. of ballata. He avers that he was the owner and in possession of this ballata on a certain tract of Crown land of which he was licensee and occupier under a license from the Governor of the Colony.

The Defendants join issue upon all the Plaintiffs' averments. They also aver that at the time of the alleged trespass and conversion the land on which the ballata is alleged to have been, was in their lawful occupation under a license from the Governor and that the ballata is their property.

The evidence shows, without any manner of doubt, that a quantity of ballata which had been collected by the Plaintiffs was seized and taken possession of by persons for whom the Defendants are responsible, and that the Defendants adopted the seizure.

It further appears that both Plaintiffs and Defendants hold licences to occupy certain Crown lands for the purpose of collecting ballata thereon. Davson & Co. hold a licence to collect on a tract the description of which is "situate on the left bank of the Courantyne River between the Epicooroo and Canacaboury creeks. Garnett and Co. also hold a license; the description of the land is situate on the "left bank of the Courantyne River between the Epicooroo, Kimpia "and Mapenna creeks."

As the licences contain words of description only, without

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reference to any map or survey, the localization of the land actually included had to be effected by the licencees at the spot, upon such information as could be obtained from Indians or other frequenters of the woods and rivers who professed to know the names of the creeks, and to recognise the creeks to which the names are appropriated. There was an additional difficulty in the present case from there being two creeks, about two miles from each other, known to the local guides by the name Epicooroo; and according as one or the other of these Epicooroo is taken as the boundary between Messrs. Garnetts' and Messrs. Davsons' concessions, the river facade of either concession would be increased or diminished proportionally, and in like manner the surface extent of either would be affected. As there is nothing in either of the licences showing *which* Epicooroo was meant to be the boundary, the demarcation between the two concessions is uncertain even from its starting point. Again, whichever of these creeks be taken as the boundary the course of either extends but a short way inland, apparently not more than about a mile on Mr. Perkins's survey sketch, and in Schomburgh's map with Brown's additions. It is also stated by witnesses who were on the spot that the distance is only about a mile. Hence as the concessions can only be held to have been granted to the extent the boundaries can be traced, it appears that both Davson & Company's concession and Garnett & Company's terminate where they abut on the Epicooroo at a point very much less inland than the place where the ballata was seized. Garnett & Company's concession has however a further uncertain extension inland by means of another of its boundaries. There are nominally three boundaries to Garnetts' concession in the instrument of License (besides the Corentyne River which forms the facade): there are really only two, as the Kimpia, if it is traced, is a tributary creek of the Mapenna, joining the latter some miles aback from the Corentyne. It appears however that no creek could be located by the name of the Kimpia; but a creek was found under the name of the Urua which appeared to be its equivalent, and this creek is shown upon Mr. Perkins'

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sketch. A line drawn from the head of this creek to the head of the Epicooroo would be the third boundary of Garnett & Co.'s concession, but as neither the head of the Kimpia nor the Epicooroo is fixed with precision, so the boundary line on that side is undefined. The place where the ballata was seized, was either on Messrs. Garnett's side of the line last referred to, or on Messrs. Davson's side, or on Crown land not included in either concession. Judging from the contour of the creeks as given in the maps it seems most probable that it was on Garnett's side; but this is uncertain.

A much more important point, is to determine whether the seized ballata was collected within the concession of Messrs. Garnett & Co. as they allege. Here we are met by all the difficulties which have already been referred to: for obviously in order to know whether the ballata was collected within Messrs. Garnett's boundary, the first step is to know what that boundary is, and this as we have seen, is not ascertained upon the evidence before the Court. In addition, the actual places of collecting the ballata are only described in conflicting, contradictory and imperfect statements.

In what I have said as to the boundaries of the concessions, I have been referring exclusively to the boundaries as discoverable from the licences, and from the evidence given in the suit. Mr. Perkins when on the request of both parties he was endeavouring to arrive at a method of amicable adjustment between them, drew what has been termed an "equitable boundary" between the two concessions, by running a line from the upper end of one of the Epicooroos in the same direction by the compass as the general or mean direction of the creeks Mapenna and Canacaboury which form the outside boundaries of the two concessions respectively. This line Mr. Perkins considered would fairly divide the concessions. This, although a happy thought in an arbitration between the parties (as seems to have been their purpose in referring to Mr. Perkins) is of course not of any authority when they have put themselves upon their legal rights as they have now done. Much of such evidence as was given respecting the places on which the ballata was collected

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—as being on Davson's or on Garnett's land—had reference to this equitable boundary; so far as dependant on that boundary it has to be disregarded.

It is also proper to remark that the alleged privilege of licensees to go inland for the collection of ballata beyond the limits which the terms of their licences determine, does not seem capable of being the basis of any legal right, as between one licensee and another. That there is an idea that such privilege exists, was shown clearly in Mr. Downer's evidence, and it derived support from what was said by Mr. Duggan and even by Mr. Perkins. Of course the legal rights of the licensees are those appearing on the face of the instrument and arising out of the Crown Lands Ordinance. Any extension of the right conferred by constructive interpretation in the Crown Surveyor's department might perhaps be pleaded in a question arising between a licensee and the Crown, but not between one licensee and another. At the utmost, it is a mere sufferance by the Crown conferring no active title or right.

Eliminating all that depends on the equitable boundary, having regard to the fact that the boundaries both of Davson & Co.'s and of Garnett & Co.'s concessions are on the landward side undetermined, then in whichever way the preponderance of reliability may be assigned to the witnesses who have given evidence as to the places of collection of the seized balatta, the right to claim the ballata, as depending on its place of origin, gets no further than to be the subject of more or less probable conjecture. There is no reason even for conjecturing that the whole or the major part of it was collected on Garnett's concession, although it is probable that a portion was so collected. Some portion, there is every reason to believe, was collected on Davson's concession, and probably a considerable portion on Crown lands not included in either of the concessions.

The conclusion which follows as to the legal position of the parties to this action is obvious. The Plaintiffs had possession of the ballata. As to a large portion of it there is no reason to think it was not a *bona fide* possession acquired *jure perceptionis*. The defendants in

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making seizure were wrong doers. A forcible seizure is so repugnant to the spirit of law that at one time if a man forcibly seized even what belonged to himself he thereby lost his property in the thing seized. This severity may be tempered now, but it is clear that no legal advantage can be gained by such a course. The Defendants moreover (by their employes) were not content with seizing what possibly might be theirs, but seized a great deal that was not theirs. There is no option in the state of the facts which has been presented, but so far as attendant considerations may be looked to, it is clear that the method adopted was one to which the Court ought to tend no encouragement. The plain course for the Defendants if aggrieved, was to have proceeded against Davson & Co, in so far as they had interfered with their rights under their license. The Defendants have not been able to show any superior right which alone would enable them to maintain the possession which they acquired forcibly. The Plaintiffs are entitled to judgment. The damages will fairly be assessed at \$860, and there must be costs.

Attorney for Plaintiffs, *G. W. Hinds.*

Attorney for Defendants, *J. B. Woolford.*

PORTUGUESE BENEVOLENT SOCIETY v. D'ORNELLAS,
EXECUTRIX.

6 & 7 May, 1890

Rubric—Pleading—Mortgage—Onus.

Averment of qualification in Rubric is sufficient and need not be repeated in body of Claim. Error in endorsement of Claim is not matter of Exception.

Suit to foreclose mortgage and also to enforce general mortgage on Testator's estate to extent of \$2,500. Plea that only \$1,500 due. Plaintiffs were Trustees under the Portuguese Benevolent Society winding-up Ordinance 1883, and so described in the rubric, but without an averment to that effect in the narrative of the Claim. Endorsed on claim was a reference to the Ordinance and to the Power *ad lites*.

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Neblett for Defendant excepted *non qualificate* on grounds that Plaintiffs had not in Claim and Demand disclosed authority to sue, and that there was no sufficient endorsement on the claim in terms of section 13 of 26 of 1855.

The Court without calling on *Sol. Genl. Kingdon, Q.C.* for the Plaintiffs, overruled exception; held also (referring to *Cambridge v. D'Olivera*, 23rd December 1875) that even if there had been defect in the endorsement it was not matter for Exception although motion might be competent *in limine* to take the Claim off the record. As to describing parties in rubric the Court referred to *Little & Co. v. Quong Shong-Long & Co.*, 16th May 1879; *Administrator General v. Lorimer*, 8th February 1882; and *Pitcairn v. Richardson*, 4th January 1881.

Evidence was then given as to the balance due on the mortgage, the exception that no specific sum was mentioned as sued for in the plaint having been withdrawn.

21 MAY, 1890

CHALMERS, C.J.—The Plaintiffs sue to foreclose a mortgage for \$4,000 (of which \$1,500 have been paid) over lot No. 309, Cummingsburg, and the Western three-fifths of lot No. 343, South Cummingsburg, and the buildings thereon. As these properties have been sold free of the mortgage it is not sought to affect them by this suit with liability, but only to confirm the general mortgage as against the estate of D'Ornellas. The real issue to be decided is whether the balance due on the mortgage is \$2,500 as averred by the Plaintiffs, or \$1,500 as averred by the Defendant, the Defendant pleading that she paid \$1,000 more than the sum which has been credited on the mortgage.

The onus of proving this payment is on the Defendant. The evidence given directly in support of payment consists in the statement of Mrs. D'Ornellas and a receipt purporting to be that of Mr. Leal, who for a short time acted as Secretary to the Portuguese Benevolent Society, and afterwards as Secretary to the Liquidators when the Society went into liquidation.

Mrs. D'Ornellas states that she was aware that her late husband, Severiano D'Ornellas owed the Portuguese Benevolent Society \$2,500 on this mortgage; that Mr.

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Leal the Secretary sent her a letter asking for payment, and also called upon her personally at her house with reference to the subject; that sometime after Mr. Leal had thus demanded payment, she, on 15th August 1887, went to his office, paid him \$1,000 of which \$970 was in paper money and \$30 in silver; that Mr. Leal then wrote in her presence and read over a receipt for \$1,000; that she took this receipt home with her, showed it to her son Manoel Jose D'Ornellas; that she put it away folded in an envelope in her trunk, gave it on one occasion to her son to show after she had got a letter from Mr. Forshaw demanding payment; that her son returned it to her again; that she took it out and she gave it to her son to show to Mr. Forshaw after getting the citation in this action; that he brought it back to her, and she again kept it until it was necessary to hand it to her solicitor for the hearing. As Mrs. D'Ornellas cannot read or write, her identification of the receipt exhibited was not perfect; but that was supplemented by her son who identified the receipt as having been that shown to him by Mrs. D'Ornellas on the evening of the day she had paid the \$1,000. The possibility of any deception having been practised on Mrs. D'Ornellas by some one having personated Mr. Leal and so fraudulently obtained money from her, was eliminated by her stating in answer to questions from the Court that she had known Mr. Leal for many years, and had not the slightest doubt whatever that the person to whom she made the payment was Mr. Leal. Mrs. D'Ornellas was cross-examined and reexamined as to whence and how she was possessed of the money to make this payment. Her explanations were not altogether satisfactory, and in what she said as to jewellery in pawn at much less than its value, which was unredeemed and finally lost to her whilst it might have been redeemed by \$300 of the money paid by her on account of the mortgage, there was some deviation from probability; but in result it could not be said that the possibility was negatived of her having had the money to make the payment as represented. Mrs. D'Ornellas' demeanour and character are such as *primâ facie* to inspire confidence in her evidence. When we turn to the

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paper which has been put in as the receipt given to Mrs. D'Ornellas by Mr. Leal, the character of the evidence entirely changes. Three witnesses who had excellent opportunity of knowing Mr. Leal's handwriting were positive that the receipt was not written by him, whilst excepting Jose D'Ornellas, only one witness said he believed the writing was Leal's, and he took good care to fence himself under the assertion which he reiterated several times, that Mr. Leal wrote three or four different hands. We are aided by the fact that a large quantity of handwriting and a number of signatures, proved beyond question to be those of Mr. Leal, are before us for comparison with the disputed receipt; so that although the weight of the oral evidence against the authenticity of the receipt very greatly preponderates over any that goes to uphold it, we are under no necessity to rely upon a balancing estimate. The writing and signature of the receipt is so conspicuously different from the proved writings and signatures of Mr. Leal that there is no conclusion which our senses will endorse except that the receipt is not genuine.

On the part of the plaintiffs it was given in evidence that the book in which it was the duty of Mr. Leal to have entered the \$1,000 if it had been paid contained no such entry although the entries extended beyond the date of the alleged payment. Mr. Leal died in December last, and the book was admissible as containing entries made by him against interest. It was also shown that through a mistake in the instructions given by the Plaintiffs to their solicitors, the sum remaining due on the mortgage was stated in the letter from them demanding payment as being \$1,500 instead of \$2,500. This letter is dated 26th February 1889. Subsequently to that date and long before the citation Mr. Jose D'Ornellas (who assisted his mother in the executory business of her husband's estate) was informed of the mistake and that the true amount due was \$2,500. He replied that his mother had a receipt for \$1,000 which she had paid to Mr. Leal. He was asked to bring it to the office of the Plaintiffs' solicitor with a promise that if on inspection it was found satisfactory the suit would not be instituted.

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D'Ornellas did not produce any receipt until some months after, when the citation had been served and return upon it was due. Then he produced the receipt which is before the Court; and we are told that when produced, it bore the appearance of having been quite recently written.

Without going further into the details of the evidence it is sufficient to say that it is impossible upon what is before the Court to hold that the paper offered by the defence as Mr. Leal's receipt is established. In the face of this failure it is impossible to hold that the onus of proving the alleged payment which lay on the defence has been satisfied. The Plaintiffs are entitled to judgment, but excluding of course from the operation of the foreclosure the properties which have been sold out free of mortgage.

ATKINSON and SHERIFF, J.J. concurred.

Attorney for Plaintiffs, *G. W. Hinds.*

Attorney for Defendant, *J. A. Murdoch.*

EX PARTE RECEIVER GENERAL *re* ESTATE VANIER.

21 May, 1890

Insolvency Ordinance, 1884.—Functions of Single Judge.

Application to the Full Court by motion to reverse a decision of the Administrator General preferring a claim under Mortgage upon an Insolvent estate to an unsecured claim for moneys due by the estate to the colony. Held that the application ought to be made to a single Judge.

Claim by the Receiver General to be ranked preferently on the estate of Vanier an Insolvent for moneys due to the colony in priority to a claim due on the same estate to the Executors of H. M. A. Black on a mortgage. The Administrator General had sustained both claims but ranked the mortgage claim preferently to the claim by the Receiver General. The Receiver General moved the Court to reverse the decision of the Administrator General so far as it preferred the mortgage claim.

Belmonte for Executor of Black objected to the procedure by motion. The *Attorney General* (Carrington) maintained its competency. The question of the proper forum arose during the discussion.

EX PARTE RECEIVER GENERAL *re* ESTATE VANIER

The Court (CHALMERS, C.J., ATKINSON and SHERIFF, J.J.) gave the following direction:—

The question is raised whether this motion should be entertained by the Full Court before which it has been brought or by a single Judge sitting apart. It is clearly contemplated in the Ordinance and in the Rules that a Judge apart should be competent to exercise the powers of the Court (unless in matters specially exempted) subject to appeal to the Full Court. Reference to Rule 93 and following Rules under the heading “Appeals” as well as other Rules in the “General “Rules made under Section 109 of the Ordinance” put this beyond question. This being so we think it is in accordance with the policy of the law that the matter of this motion should be heard and decided in the first instance by one Judge, and that for the same reason which was stated a short time ago in dealing with certain applications for directions under the Administrator General’s Ordinance 1887, which had been brought before the Full Court instead of before a Judge apart, viz., “That by coming here in the first instance the parties “would lose the benefit of that full discussion of essential points in “appeal as well as in a tribunal of first instance which the Legislature “intended they should have.” Following the precedent in those applications the Court will refrain from deciding on the point taken as against the form of the motion.

The motion has been set down before the Full Court as was rightly said by the act of the Registrar, and to save the argument from being wasted we would suggest the same course be followed, as in those applications for directions alluded to, viz.: that the parties appear *pro forma* before a single Judge who has heard the argument and would be ready to give his decision on the objection without further hearing.

Attorney for the Receiver General, *Acting Crown Solicitor F. Abraham.*

Attorney for Black’s Executor, *J. A. Murdoch.*

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1, 2, 5, 6, *May*, 1890*Sale—Alleged Fraud—Blindness of Purchaser.*

Action for balance of purchase money of lot of land and buildings. Defence: Purchaser blind and induced to purchase by fraudulent misrepresentation of sellers, and bargain repudiated; separately that agreement sued on was superseded by later agreement for lower price.

Held—Defences not established; blindness *per se* does not give special privileges to Contractor. What misrepresentation will avoid contract.—*Caveat Emptor.*

Action for recovery of \$550 as the balance of the purchase money of a piece of land and buildings. The facts and arguments sufficiently appear from the judgment.

Hutson for Plaintiffs, *Dargan* for Defendant.

30 *May*, 1890

CHALMERS, C.J.—The Plaintiffs sue for \$550 as the balance of the purchase money of a piece of land and buildings thereon, sold to defendant at the price of \$850 and for \$56 as money paid by the Plaintiffs for taxes due on the property, offering on their part to pass transport of the property to the defendant.

The Defendant by denials have put the Plaintiffs upon proof of the sale of the property at the price averred. He has propounded besides two other defences, the one being that he is blind, and that he was induced to agree to purchase the property through the fraud of the Plaintiffs, and within a reasonable time after he had knowledge of the fraud and before he had any benefit he repudiated the agreement and gave notice of repudiation to the plaintiffs; the second defence is that after the repudiation of the alleged fraudulent agreement there was a fresh agreement between the Plaintiffs and Defendant that Defendant should pay to them \$650 as the price of the property from which was to be deducted the sum of \$300 which admittedly has been paid on account of the purchase. The Defendant further avers that he has always been ready and willing to pay

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the balance due to the Plaintiffs, but the Plaintiffs were not in a position to pass transport to him, and he makes offer to pay the balance of \$350 on receiving from the Plaintiffs transport of the property.

It is clearly proved that the Defendant agreed with the Plaintiffs to purchase the property. After some previous communings the parties met on 28th February, 1886, at the house of Mr. A. M. Abbott, defendant's son-in-law, when a written instrument was mutually agreed upon and signed by the Plaintiffs. It purports to be a contract of sale. The Plaintiffs thereby assign all their right, title and interest in the land and buildings to the Defendant in consideration of \$300 to be paid down and \$550 on passing transport, subject to an existing lease of part of the premises. By some omission the defendant did not sign, or his mark was not put to this instrument, but he most fully admitted having agreed to the terms contained in it. \$300 was paid by the Defendant to the Plaintiffs at the same meeting and he was put in possession in terms of the agreement in the beginning of March, 1886.

Then it is said that the defendant was induced to enter into this agreement by the fraud of the Plaintiffs, and this fraud is alleged to have consisted in "concealment from the Defendant of the condition "and state of the buildings". It is undoubtedly true that a contract which has been entered into through the fraud of the opposite party is not binding. But can we say this doctrine is applicable to the facts in this case? What are the facts? The Plaintiffs were owners of land with a three-storey house and some other buildings upon it valued for municipal taxation at \$2,800. They and the Defendant come into negotiation with a view to sale and purchase. The Plaintiffs naturally desired as good a price as possible; knowing however that the appraised value was a great deal too high, they offer the property at half that value \$1,400. The Defendant says that price is too much. He employs a carpenter named Anthony to examine the buildings and report to him. Anthony makes an examination, reports to the Defendant that the principal building is old, part of the frame bad, that it is capable of

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repair, and names a sum for which in his opinion a feasible repair might be made. Anthony says that he also reported that in his opinion \$800 would be a fair purchase value. Mr. Jardine says Anthony did not state the value when reporting on the condition of the buildings, but did so afterwards; that whilst he and one of the Plaintiffs, Mrs. Waddy, were talking about the price Mrs. Waddy asked Anthony what he thought the place was worth, and he answered about \$800, and upon Mr. Jardine asking Anthony if he thought it was really worth as much he replied "the house is a Dutch house, you can "give \$800." Mrs. Waddy then said that she could not say what price her sisters the joint owners would agree to, but she would consult with them. Anthony's report was not the only information Mr. Jardine had. His wife went with Anthony to the house and with his assistance made a further examination; she found a good many defects and reported to her husband that the house was old and rotten in many places. After having got his wife's report, Mr. Jardine meets with the Plaintiffs again at the house of Mr. Abbott, who is well acquainted with the house as he passes it frequently in going from and returning to his own residence. Mr. Abbott advises Defendant to have nothing to do with the house as it was rotten, and Defendant's daughter, Mrs. Abbott, joins in dissuading him from the purchase. Notwithstanding all this advice from those on whom it might be supposed Mr. Jardine would most rely, or which at least would have put any man of ordinary prudence upon further enquiry, he agrees to give \$850, actually \$50 more than the amount the carpenter had thought it reasonable to suggest, and the bargain is forthwith concluded in writing. Being asked in his examination why, under the circumstances, he had agreed to give \$850, he answered that it was because Anthony had told him it was a Dutch house and they (the sellers) all said it was a good house. Bight or nine months after this when defendant was dissatisfied with his purchase he got other carpenters to examine the house. Two of these were examined at the hearing and estimated the value of the land and buildings, the one at \$475, and the other at \$500, the latter valuation

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it is to be remarked dealt with the house on the footing of its being sold for removal of the materials, a quite different thing from valuing it as a residence, albeit a residence in bad repair.

Now apart from the alleged relation between the Plaintiffs and the carpenter Anthony, as to which I shall speak separately, it is impossible to say there was fraudulent concealment by the Plaintiffs. As sellers of the property they were not under obligation to give any description of it, and it is not shown that there were any particular defects or faults peculiarly within their own knowledge or not readily discoverable on inspection. Benjamin in his work on Sales states the rule thus with reference to the purchase of chattel; it is equally applicable in the present case of a building. "In general where an article is offered for sale and is open to the inspection of the purchaser the common law does not permit the latter to complain that the defects, if any, of the article were not pointed out to him. The rules are *caveat emptor* and *simplex commendatio non obliget*. The buyer is always anxious to buy as cheaply as he can and is sufficiently prone to find imaginary fault in order to get a good bargain, and the vendor is equally at liberty to praise his merchandize in order to enhance its value if he refrains from a fraudulent representation of facts." In the present case the very fact that a piece of land the estimated value of which is \$300 to \$350 with a three-storey house and other buildings were being sold for \$850 was enough to suggest on the very slightest reflection that the house could not be in good condition; the house was easily accessible and open to inspection; there is no pretence of saying that there was any attempt to prevent or discourage examination or to conceal its condition, or that there was any fault which the Plaintiffs alone knew of, or which was peculiarly within their knowledge; it is not said that the Plaintiffs represented it as being in any particular state as of repair or of fitness for habitation. When the Plaintiffs said in the chaffering over the bargain that Defendant must not allow himself to be dissuaded by Mr. Abbott, and that it was a good house, that was *simplex commendatio*. *Ea quæ*

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commendandi causa in venditionibus dicuntur si palem appareant venditorem non obligant, Dig. 18.1.43. Some of the statements in commendation it seems were true. One of these was that the frame was of hardwood, which is admitted, and again, that it was a Dutch house, which was one of the elements that influenced Mr. Jardine. Moreover, I feel much doubt whether Mr. Jardine really was influenced by what the Plaintiffs said. It appears to me that when he met with them at Mr. Abbott's, he had made up his mind to buy the property if he could get it at the price he thought suitable to give for it; otherwise it is impossible to understand how it was that when dissuaded, as he no doubt was strongly dissuaded by the Abbotts, he persisted without any further examination in going on to complete the bargain.

As regards Anthony who was employed by Mr. Jardine to examine and report on the property, it is clear that Mr. Jardine placed great confidence in him; but in order to rescinding the contract by reason of representations made by Anthony, it is necessary the Court should be satisfied that he made representations which to his knowledge were materially false in fact, and also that in doing so he was acting under the instigation or direction of the Plaintiffs in such a way as that he was their Agent in making these representations. As to Anthony's representations being false in fact, the only evidence is that two other carpenters called in subsequently by Mr. Jardine gave lower valuations, one of them at any rate estimating on a different principle from Anthony, that is, estimating the value of the principal building if sold for removal, whilst Anthony took it on the footing of being repaired for residence. Without this source of variance, it is obvious that in a matter so uncertain as the value of an old dilapidated house, there must be room for very considerable difference of opinion even amongst expert carpenters. Taking all the facts together, this Court is not in a position to say that Anthony's valuation is in reality less correct than those of the two other carpenters, much less to say that he intentionally deceived Mr. Jardine by a valuation which he knew to be erroneous. As to the Plaintiffs having instigated Anthony to make

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misrepresentations, the circumstance mainly relied on was that they had agreed to pay him \$15 upon the sale being concluded. Besides examining the building for Mr. Jardine, Anthony acted as a sort of go between or agent for both parties, carrying messages and bringing them together on more than one occasion, and there seems nothing more unnatural in his receiving a small present from either side than in an agent in a different walk of life receiving a commission upon a sale taking place. The circumstances that one of the Plaintiffs declined to pay his portion of the \$15, over which there was a little quarrel, and that Anthony without hesitation made the facts known to Mr. Jardine, seem to indicate that there was no dishonest understanding connected with this payment either on the part of the Plaintiffs or of Anthony.

A peculiarity in this case is that the Defendant is totally blind, and has been so for many years. This circumstance has occasioned me a good deal of anxiety, and the more so as the learned counsel on either side have not with all their diligence been able to furnish any precedent bearing upon the matter, nor have I myself been able to meet with any. The question is whether a blind man in perfect possession of his mental powers, who puts himself in the position of dealing on equal terms with those who have their sight, can claim any other right than he would be entitled to if he were in possession of all his senses, or as it was put by my brother Sheriff in the course of the discussion, whether the blind man's condition imposes on those with whom he deals the obligation of taking precautions which would not be incumbent on them but for his infirmity. It appears to me to be most in accordance with the principles of contract that the blind man should generally himself be the judge how far he is able to transact business and how far he can trust the agents whom by the necessity of his situation he must in great measure rely upon, and that when he chooses to put himself forward as capable of bargaining, no special obligation of safe-guarding his interests lies on those with whom he deals. I do not say there may not be cases where, from the nature or cir-

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cumstances of the transaction, a blind man has acted to a greater extent than ordinary in reliance upon the statements of those with whom he deals, in which his blindness would not impose additional obligations; but I think that in the present case where the Defendant employed such agents as he thought fit to examine the property, there was no special obligation upon the Plaintiffs. The Defendant might of course have made it a term of his contract that the house was guaranteed to be in a particular state as regards repairs, or he might have protected himself in other ways; but having left the matter on the footing of a purchase without any special terms as to quality or condition, I do not think the Court would introduce any. The question hardly indeed arises, as it has not been proved by any sufficient evidence that the property was really bought at an over-value, but as the Defendant's blindness was one of the topics particularly addressed to the consideration of the Court, I have thought it right to make these remarks upon it.

I am of opinion that the alleged vitiation of the agreement through the fraud of the Plaintiffs is not established.

I may add that even if there had been fraud entitling Defendant to rescind the purchase, it appears to me most doubtful whether there was not an election on the part of the Defendant to retain the property, notwithstanding its faults. He received possession on the 10th March, 1886; he lived in the house till about the 14th of May of that year, during which time all defects must have most fully presented themselves, and yet I do not gather that he intimated to the Plaintiffs that he was dissatisfied until over six months had elapsed from the date of the purchase. Even then, there seems to have been no proposal to rescind the contract and reinstate matters, but Mr. Jardine merely says he has been deceived as to the value, and proposes an adjustment by having new valuations made, and from then until now he has retained the property and dealt with it as his own.

I come now to the question whether after Mr. Jardine became dissatisfied a fresh agreement was made by which the Plaintiffs agreed to receive \$650 for the property

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instead of \$850. The Plaintiffs deny that they agreed to this; but even upon Defendant's own narrative it is difficult to trace with confidence that such an arrangement was acceded to by the Plaintiffs, although it was no doubt proposed by the Defendant. He says that after getting another valuation made by Mr. Smith of Smith & Oldfield (which valuation has not been put before the Court) the Plaintiffs Webb and Waddy, along with Mrs. Moore's son, met with him and agreed to accept \$650, but that he did not then agree to give this sum, but stated that he wished to hear what Mr. Haynes Smith, then Attorney General, would say; that after this Webb and Waddy went to Mr. Haynes Smith's chambers, as well as himself, and that they narrated to Mr. Smith his offer to pay them \$650, and accepted it, and that he then agreed to pay this sum. Assuming this as stated, it was of course no agreement at all on the part of Moore. Then there seems to have been a good deal of talk about getting a title by means of Letters of Decree. Mr. Chawner was called to corroborate Defendant. From his evidence it was shown that Mr. Jardine and Webb and Waddy had gone to Mr. Haynes Smith. Mr. Chawner's impression (for he had not closely attended to the matter) was that they came to Mr. Smith as a peacemaker, having disagreed as to money, and they had a short interview with him; that Mr. Jardine made a statement, and then Mr. Smith called on the others for their statement, after which, Mr. Smith said to Mr. Jardine that he thought he had better agree to what the others proposed, and that the affair seemed settled. What the thing to be agreed to was, Mr. Chawner did not know at the time. In cross-examination, he added that it seemed to him that Mr. Smith tried to appease Mr. Jardine, who was very excitable. It appears to me that if Webb and Waddy had intimated their willingness to accept the \$650, as that was the proposal which Mr. Jardine says he went to Mr. Smith's office prepared to make, there could not have been room for excitement, or opposing statements. Moreover, as Mr. Jardine considered he had been unfairly dealt with by the Plaintiffs previously, and as the previous agreement to pay \$850

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was in writing, it seems most unaccountable if the parties had consented to modify the agreement so materially, that the opportunity was not taken whilst they were at Mr. Haynes Smith's office to have a written memorandum made of the fresh agreement. The Court could not act on a mere surmise that an agreement might possibly have been made by Webb and Waddy to accept less than the \$850. We would only do so upon clear evidence that they did so agree. As to Moore, there is not any evidence whatever that she agreed to any fresh arrangement. Under the uncertain evidence presented, I think it is not necessary to consider the further question which would arise here, whether the alleged modification of the agreement if it had been made, was legally binding. It must, I think, be put aside altogether.

There is evidence of payment by the Plaintiffs of the \$56 for Town Taxes in the year 1886, which they have claimed. It should be abated by \$9.33 for two months which had run before the Defendant's entry. I consider that sentence should be for the Plaintiffs for \$596.67, and they are entitled to their costs.

Mr. Justice Atkinson, I concur.

Mr. Justice Sheriff, I also concur.

Attorney for Plaintiffs, *J. A. Murdoch.*

Attorney for Defendant, *J. B. Woolford.*

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