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[The mode of citation of British Guiana Law Reports commencing 1890, is as follows;—1890 L. R., B.G.]

CASES

DETERMINED IN THE

SUPREME COURT OF BRITISH GUIANA.

LIMITED JURISDICTION.

1894. *January* 20. NICOLL, J., Acting.

FARIA v. M. G. AND A. JANICA.

Promissory note.—Debt.—Husband and wife.—Marriage by contract.—Note endorsed by husband to wife.

All the necessary facts appear from the judgment

W. Clarke, for the plaintiff.

D. M. Hutson, for 2nd defendant.

NICOLL, J. (Acting):—The plaintiff here sues the defendants for payment of the sum of $1,563.75. The action was defended by Antonia Janica, the wife of the second defendant, but there was no appearance for M. G. Janica, and the case has been heard *ex parte* so far as regards him.

The facts of the case are these; John de Souza, M. G. Janica, and the plaintiff were the joint owners of the retail spirit business known as the "White Cocoanut Tree." The property was sold in May 1891 to Antonio Ferreira. It was agreed between the parties that Janica and Faria (plaintiff) should take as their share of the purchase money a note by Ferreira for $3,127.51 which was payable twelve months after date. This note was made out in favour of De Souza and Janica, and was endorsed by De Souza to Janica. The plaintiff Faria now sues Janica for his share of that note.

It further appears that Janica some considerable time before this note became due, endorsed it to his wife, (the second defendant) in payment of monies due by him to her, she having a separate estate from her husband. The plaintiff avers that this endorsement or transfer was fraudulent on the part of both husband and wife and that the wife having received payment of the note is liable to him for his interest in the note.

Now from the evidence of the plaintiff himself, it appears that at the same time that the note was endorsed to Janica by De Souza, Faria (the plaintiff) received Janica's own note for the amount of his interest in the business. But the defendant M. G. Janica is not sued here on this note but on the original debt. This note of Janica's has not been produced. The plaintiff says that he endorsed this note to Mr. Rosa for a debt he owed to him and he thinks that he has that note at home. Now until this note has been produced or shown to be under the control of the plaintiff (which has not been done) judgment cannot issue for the original debt. For where a plaintiff sues for a debt for which a dishonoured bill or note has been given he must be prepared to show that the instrument is in his possession or under his control and not outstanding in the hands of an indorsee or any party entitled to sue upon it. (*Vide* Addison on Contracts, p. 1,202 and the cases therein referred to.)

Now I come to the case as against Antonia Janica (the wife). After Faria had received Janica's note for the amount due to him I am satisfied that he had no such right or interest in the original note itself as to raise in Janica any implied trust to hold it for him. Janica was perfectly free to deal with the note as he pleased and was within his rights in endorsing it over to his wife for value received, and there was no breach of trust committed by him in doing so.

But apart from the question whether Janica was entitled to endorse the note to his wife or not, I am fully satisfied that there was no fraud on her part in receiving and cashing the note, and that she is not liable for the debt. I am satisfied that she was telling the truth when she said in her evidence "when I received the note I had no knowledge that Faria had any interest in it." The action cannot be sustained as against her.

Claim rejected with costs as against Antonia Janica.

Plaintiff non-suited as regards the other defendant, no costs, with liberty to bring fresh action for same debt.

GENERAL JURISDICTION

1894. *May* 30. CHALMERS, C.J., ATKINSON and SHERIFF, JJ.

CLEGHORN v. BROWN.

Partnership—Accounting suit—Principle of division—Supreme Court Ordinance 1893, sec. 31—Extent of remedies—Nature of placer claim—Mining Regulations, 1892—Appointment of receiver.

Action for a statement and account of intromissions and dealings of defendant with all placer claims in his possession and occupation in respect of a partnership between plaintiff and defendant for the purpose of prospecting, locating and working gold placers in the Barima river for their mutual benefit.

On the matter coming before the Court in February, 1893, an order for mutual accounts by the parties as partners was made, and accounts were filed. Objections to such were filed by both sides and this was followed by an application by motion on behalf of plaintiff for an order directing—

(1.) An account by defendant of the proceeds of gold procured by him from the placer claims to the date of the filing of the account;

(2.) A sale of the placer claims; and

(3.) The appointment of a receiver of the said claims.

P. Dargan, for plaintiff.

D. M. Hutson, for defendant, showing cause.

Curia, per CHALMERS, C.J.:—This motion has followed upon an action betwixt the same parties in which the Court upon the 7th February, 1893, made an interlocutory order for mutual accounts as partners. The mover asks for an order directing:—

(1.) An account by the defendant of the proceeds of gold procured by him from the placer claims situated on Arakaka creek, a branch of the Barima river, formerly held and worked in partnership by defendant and the mover from the 30th day of June, 1891, to the date of filing the account.

(2.) A sale of the said placer claims.

(3.) That a receiver of the placer claims be appointed.

In his affidavit in support of the motion the mover has averred that the defendant has since June 30th, 1891, received from the placer claims belonging to defendant and himself various quantities of gold aggregating over 2,541 ozs.

The defendant in the motion has filed affidavit showing cause. In this affidavit he has admitted receiving the gold as averred from a placer in the Barima excepting a particular parcel of 151 ozs., which he says came from another placer

on the Barima but he denies that the gold came from a placer belonging to the mover and himself, or that any partnership exists or existed between the mover and himself in respect of the placer or the gold obtained therefrom. He does not deny that the placer on the Arakaka in respect of which the mover claims is one of the same placers in respect of which the mover claimed an account in the action.

In that action Cleghorn, the present mover, alleged a partnership between him and the defendant Brown for the purpose of locating and working gold placers in the Barima, and claimed an account of Brown's intromissions with the placers in his possession and under his control from the commencement of the partnership up to the time of rendering the accounts. The defence was that there was no partnership and that Brown had employed Cleghorn as his agent in the sale of gold; there was no allegation of a partnership limited to the working and not extending to the *corpus* of the placers. It was also alleged that Cleghorn had not fully accounted to Brown for gold with which he had been entrusted, and there was counter-claim for an account of the gold so entrusted and payment of the balance found due. The Court after hearing evidence which extended over seven days held in an interlocutory decision given on February 7th, 1893, that a partnership had been constituted and had existed for some time between Cleghorn and Brown, that it was a partnership terminable at the will of either party, and that in fact it had been terminated, and directed the parties to account to each other as partners in the placers located by Brown in the Arakaka creek from the beginning of the partnership as on November 1st, 1890, to its termination as on June 30th, 1891, adding directions as to bringing into the account certain specific parcels of gold which had been mentioned in the course of the evidence.

So far as it has been brought to our notice, no action was taken by either party in sequence of this order until November 1st, 1893, nearly nine months afterwards, when as appears from the record Mr. Dargan, counsel for Cleghorn, applied to the court to direct what should be done with the partnership property still in the possession of Brown. He then stated that no accounts had been filed by either party. The court directed the accounts to be rendered without further delay, and that an application respecting the partnership property be made before a Judge sitting apart. We are not informed whether this application was ever made, but presumably not, since no order has been quoted. Accounts, how-

ever, were filed by Cleghorn on December 18th, 1893, and by Brown on 2nd February, 1894. Cleghorn on March 2nd, 1894, filed objections to Brown's account, stating *inter alia* that Brown has, since June, 1891, received large parcels of gold from the placer claims, the subject of the partnership, and was continuing to do so, and had not included any of this gold in his account. Brown stated in answer that his account is correct, and in accordance with the order of the Court, and the controversy thus raised is involved in the present application.

Putting aside minor objections to the account which may or may not be valid, but are not necessary to be considered in the present proceedings, it is clear that Brown's account is, *ex facie* at least, in accordance with the order made by the court on February 7th, 1893. It is an account of Brown's intromissions with the placer up to the dissolution of the partnership. And it is to be observed that it is most necessary that the accounts of the partnership, closing at the date of its dissolution, should be rendered and dealt with separately from accounts in respect of anything that occurred afterwards, since the mutual rights and obligations of the parties in the one case and the other are essentially different. Up to the dissolution the presumption is that the two partners were to have equal shares in the gains and burdens of the business, and there is nothing showing that principle of division to have been altered by convention. After the dissolution Cleghorn had no share in the burdens; he was not a partner, and all that he could claim would be a fair compensation in respect of his interest in such joint property as remained in the hands of Brown. It must therefore be clearly understood that the partnership accounts are to be adjusted and settled independently and in complete separation from any accounting which may arise out of the present motion.

The question then arises whether the court can, in this proceeding, make the orders now asked for, and how far it ought to do so. The 31st section of the Supreme Court Ordinance, 1893 (*a*), whether it really adds to powers which the court previously possessed or only declares these powers more specifically, certainly contemplates that the Court, as far as practicable, and as far as compatible with the doing of justice, shall lend its assistance towards extricating the whole controversy between parties who come before it in litigation. But it appears that in this case we scarcely need to have recourse to any

(*a*) Section 36 in the 1905 edition of the Laws. See now sec, 33, Ord. 10 of 1915,—Ed.

extraordinary powers of the court, as the orders now asked for are substantially within the claim made in the action. Cleghorn asked for an account of Brown's intromissions with the placers up to the time of rendering. It was not brought to the knowledge of the court, or at least made to appear clearly, that Brown had continued the working of the placers after the dissolution of the partnership, but as this turns out to have been the case, an account of the working so long as Brown continued to use partnership property therein, so that Cleghorn might ascertain and receive whatever he was entitled to in respect of such user, is within the equitable relief sought in the action.

The appointment of a receiver is an ancillary proceeding, competent to the court whenever necessary and the sale of the partnership property is also an ancillary proceeding within its competency. Thus there does not appear to be any doubt that it is within the powers of the court to make orders of the nature asked for.

In determining what orders ought to be made the court has of course to look at the whole circumstances of the case in order to see what is right and equitable between the parties. We have it that Brown alone carried on the business, alone contributed his skill and labour, alone supplied the funds, and alone bore all risk. Cleghorn gave no active help, not even by advising as a partner would do. The only contribution which came from Cleghorn was that Brown used the placer in which Cleghorn had a half undivided interest. The position of the two parties was thus very unequal, and in a further particular it was unequal. Whilst Brown with the chance of gain was also running the risk of loss, Cleghorn, being no longer a partner, could not be called on to make good any share of loss and was thus in the attitude of lying by ready to claim a share in the joint property, if and when a realization of its value should be effected through Brown's energy and expenditure. Cleghorn was under no disability preventing him from demanding and pressing a sale and division of the partnership property at the time of the dissolution, and a division of the proceeds at that time or shortly thereafter, and that is the course he ought to have followed; and by not following it he has rendered any exact adjustment of the mutual rights extremely difficult. On the other hand we must not forget that it was quite as much in the power of Brown to have freed himself from the future claims of Cleghorn by the like process of sale and distribution, so that it must be taken, except so far as his, ignorance and want of business knowledge may excuse him,

that Brown was an acquiescing, if not assenting, party to the delay in disposing of the property and the now resulting entanglement.

With regard now to the claim to an account of the gold procured by Brown from the placer, the account would be of significance only on the supposition that Cleghorn is entitled to a share of the produce or profits of the placer accruing since the dissolution, and that supposition must be based on the further assumption that Brown used property belonging to Cleghorn in his operations, and that this user materially contributed to his earnings.

What property of Cleghorn was used by Brown? The partnership property comprised property of two classes: first, the placer itself, and second, what may be called the plant of the placer—the tools, boats, machinery, buildings, dams, stop-offs, and whatever else was the product of capital and labour expended thereon during the partnership. Now what is the right of the partners in this placer? It is a right of a peculiar character defined by the Mining Regulations. By the Regulations of 1887 under which the placer in question was held, as well as by the Regulations of 1892, a "li-"cence to occupy a placer claim, shall during the continuance of such li-"cence confer the right, subject to the provisions of any ordinance and of "any regulations from time to time in force, to take all gold and silver "found in the land comprised in such placer claims, except the gold and "silver in veins of quartz or other rock," etc. What is thus conferred is a right to use the surface and to search in the subjacent soil and take any gold or silver found there otherwise than in veins of rock. But no right of *ownership* in the surface is conferred nor any right of ownership in the gold or silver until found and reduced into possession. It is immaterial whether the grant was to Brown and Cleghorn, or as seems to have been the fact, to Brown only, the right of Cleghorn being that which arose out of his partnership with Brown. In either case the right which Cleghorn had during the partnership was a *pro indiviso* right of user of the surface, and of taking gold and silver when found. During the partnership the rights would of course be used under the covenant of the parties and subject to the law of partnership. Upon the dissolution of the partnership, without division of the property, a right of user of the surface and of taking gold and silver remained in Cleghorn. But a like right remained in Brown. He equally with Cleghorn, had the right of digging and searching for gold in the whole placer and in every part of it. Brown exercised his right after

the dissolution of the partnership, Cleghorn did not. But after the dissolution Brown was under no obligation to share with Cleghorn the results which he reaped from the exercise of his right; and even if it be assumed that Cleghorn's abstention from digging and searching tended to augment or even did in fact augment the measure of Brown's success, that does not alter the position. Whatever gold Brown obtained belongs to him *jure apprehensionis* and Cleghorn cannot say to him "If I had searched in the placer I would have obtained a portion of the gold which you have obtained and therefore that portion is mine." To search or not was in Cleghorn's option; Brown had no controlling power over him, and as to his right of user after the dissolution of the partnership, was in no fiduciary position towards Cleghorn. The only reasonable conclusion is that Cleghorn must abide the result of his own choice. No right accrues to him, in respect of Brown having used for himself his own right of searching and of taking what he found.

Then there is the right to search in and take gold from the placer which still remains in Brown and Cleghorn in common, and there is their common right in the plant of the placer. The proposal for the extrication of these rights is that the placer should now be sold and the proceeds divided. That would have been the proper course if taken timeously, but as matters now stand, the objection is obvious that neither the placer nor the plant of the placer is now in the same state in which it was at the time of the dissolution. The method which seems alone capable of meeting the equities under the existing circumstances is that an account be made of the saleable value of the right to dig and take gold from the placer, as that value would have been estimated at the time of the dissolution, and also an account of the plant of the placer as at that time, and that payment should be made by Brown to Cleghorn of half the values, Cleghorn's undivided right to dig and take gold in the placer, and to the property of the plant, simultaneously vesting in Brown. In this way both parties would be placed as nearly as possible in the position they would have been in if a sale and division of the property had taken place at the time of the dissolution.

It remains to determine the principle upon which recompense to Cleghorn should be calculated, in respect of Brown's use of the plant of the placer, which included of course Cleghorn's *pro indiviso* interest therein.

For this purpose it will be sufficient that Brown pay to Cleghorn a fair allowance of the nature of rent or hire for

the use of his share in the plant, as it existed at the dissolution of the partnership. The account of the plant which will have been made for ascertaining its purchase value will, of course, be used as the basis for ascertaining the rent. The period over which the rent will run will be from the dissolution up to the date of adjusting the account of the plant. The account of the value of the right to search in and take gold from the placer, the account of the plant of the placer, and the account of the rent should be furnished by Brown, with liberty, of course, to Cleghorn to surcharge or otherwise object. The Accountant of Court will have power to summon and examine witnesses and call for production of documents.

As Cleghorn has no interest in the working of the placer it does not appear that the appointment of a receiver is necessary.

LIMITED JURISDICTION.

1894. *June* 4. SHERIFF, J.

EXORS. JANE PATTERSON v. SPROSTON DOCK AND FOUNDRY COMPANY.

Action for damages—Trespass—Power ad lites—Interdict—Judicature Act, 1873, sect. 8, and Supreme Court Ordinance 1893, sect. 37, (*1.*)*—Possessory title—Leave and licence—Revocation.*

Action for damages for trespass to land, and claim for an interdict restraining defendants, a co-partnership trading under the name and style of the Sproston Dock and Foundry Company, from a repetition or continuance of their alleged wrongful acts.

A motion for an interim order of interdict was refused and was ordered to stand over to the hearing of the action.

A. Kingdon, Q. C, Solicitor General, for the plaintiff's.

D. M. Hutson, for defendants.

The power of the plaintiff, J. J. Dare, does not authorise him on behalf of the plaintiffs he represented to claim an interdict. Leave and licence to enter upon lands at Christianburg, belonging to plaintiffs, was granted to them by the plaintiff J. D. Patterson, to which the other plaintiff's subsequently by their action agreed. Such leave and licence was revoked, but defendants purchased from J. D. Patterson his undivided interest in the property and as owners thereof remained in possession. Wismar was Crown land and never in possession of plaintiff's.

SHERIFF, J.:—The plaintiff's sue for damages following, as they allege, from certain trespasses and injuries done to lands possessed by them and known as lots 50, 51, and 52, on the west bank of the river Demerara. They also claim an order of interdict against the repetition or continuance of the wrongful acts complained of or any other injury of a like kind.

In the first paragraph of their answer, the defendants in effect challenge the sufficiency of the authority of John Julius Dare to claim an order of interdict, and it was argued that the power conferred was merely to invoke the ordinary process of the Court, but that proceedings for interdict stood on a different footing, being in the nature of an extraordinary remedy.

Whatever may have been the value of this objection, I am of opinion that since the Supreme Court Ordinance, 1893, and the new rules it is of no avail—see Order XV. rr. 1, 2 and 3; an interdict is to be sought by filing a claim and proceeding as in any other action. Besides it is clear that an interdict may be sought in addition to a claim for damages for any "injury of whatever sort." I am not prepared to draw any distinction with respect to this action and say that the power is good so far as the trespass is concerned, but insufficient so far as the interdict is concerned. It is one action and I shall deal with it as such.

It was further argued that though the practice as to interdict had doubtless been changed, yet the law regulating the granting of interdicts remained the same and unaffected by the ordinance or the rules. The case *North London Railway Co.* v. *Great Northern Railway Co.* (L. R. 11. Q. B. 30) was cited. The case turned on the construction of the Judicature Act, 1873, section 25 (8), enacting "a mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." It was held that these words did not confer on a Court a jurisdiction to give the remedy asked for unless the Court previously had the power so to do, and it was remarked by *Brett, L.J.,* that the Act dealt only with procedure and not with jurisdiction at all, and that if no Court had power to issue an injunction before that Act, the High Court had no such power now. It was pointed out that section 37 (1) of the Supreme Court Ordinance, 1893, (*a*) was couched in almost identical language and that the inference to be drawn was obvious. I am prepared to admit the applicability of the principle laid down in the case cited. What then was the law prior to the ordinance and the rules? *Van der Linden* (Henry's edition pp. 296-7) was cited. He lays down three well-known requisites:—

(1.) a clear right on the part of the applicant. If doubtful, the case is not a proper one to be decided simply by the interdict without a complete enquiry and judgment;

(2.) an injury actually committed, or a well-grounded apprehension that an injury will be committed by the defendant, and

(3.) that there is no other ordinary remedy by which one can be protected with the same result.

(*a*) See now Ordinance 10, 1915, See. 34, (1). Ed.

I would also refer to p. 295—"No person has the power to place an interdict upon another of his own authority, at any rate if any person does so of his own authority he must rest content with the fact that pending the action it has no restraining power, but that it first begins to operate when the Court by its judgment interdicts the defendant as prayed for by the plaintiff." It is clear from Order XV. r. 3 that an interim order of interdict may be applied for at any stage of the action. Indeed, such an application was made before me in this action and refused, mainly because the mover did not satisfy me to the first requisite as laid down by *Van der Linden* (*ubi supra*). It. does not follow, however, that the plaintiff who is unsuccessful in obtaining an interim order may not at the hearing obtain the protection he seeks. In *Kerr* on Injunctions (3rd ed. p. 165) the author remarks "After the establishment of his legal right and the fact of its violation, a man is entitled as of course to a perpetual injunction to restrain the recurrence of the wrong, unless there be something special in the circumstances of the case." True that this is English law, but it resembles what Van der Linden says at p. 296. He denies the applicability of the remedy where the right is doubtful "without a complete enquiry and judgment." In this action there has been a complete enquiry and the case is ripe for judgment. See also at p. 295 when the Court by its *judgment* interdicts the defendant.

It is further urged that the plaintiff's have mistaken their remedy, that the action should have been to obtain possession—we acquired possession lawfully and if we have exceeded our licence the plaintiffs' remedy is to recover possession and not for trespass. To determine this point necessitates a decision on a question of fact; who was in possession at the time of the commission of the alleged injuries? It is sufficient to say that the defendants applied by Mr. W. F. Laurie, a person in their employ, to the plaintiff J. D. Patterson for permission to survey, to go through. "He granted me leave unconditionally and unreservedly." "I was prospecting from June to December." This gentleman was called as a witness for the defence, and I prefer to rely on his evidence for the purpose of the objection I am considering, although as a matter of fact there is no room to doubt that permission to prospect was asked for and granted. This in effect amounted to what is known in law as "leave and licence." It involves the recognition by the defendant of the possessory rights of the plaintiffs in the *locus in quo* at the time leave was applied for, and it clearly involved no surrender of possession. It amounted to a mere

permission to prospect for a suitable line for a railway, and for an advantageous spot for a terminus. It authorised the commission of all such reasonable acts as were, in the ordinary course of prospecting, necessary for the due and effectual exercise of the permission accorded. It was tantamount to a leave to *use* the property for a special purpose. Beyond this it did not go. I am therefore of opinion that the plaintiffs never parted with their possession, that in the face of the evidence on this point it is not competent for the defendants to say that they acquired possession in the true meaning and legal acceptation of that word, and consequently that an action "to recover possession" would have been misconceived.

It is further urged that the plaintiffs are not remediless as, if they recover damages, it will be an adequate compensation for any injuries they may have sustained. But is that so? It is in evidence that the defendants have expended large sums of money with a view to establishing a certain line of railway between the counties of Demerara and Essequebo, in pursuance, it is said, of a contract with the local Government. It may well, therefore, be of importance to them to continue even a limited user of a part of the *locus in quo* and abide the result of any suit which may be brought against them for damages. Referring again to the third requisite in *Van der Linden*, p. 297. Is it not a sound proposition in law to say that the remedy, nay, the adequate and only remedy of the plaintiff is by engaging in a multiplicity of suits? This is repugnant to a sense of right, and not, I am happy to say, in my opinion, good law. The plaintiffs have submitted their title "to complete enquiry," and if they have succeeded on this issue, then I am of opinion that they cannot be protected with the same result except by order of interdict.

Another defence is that the defendants acquired certain rights under a verbal contract entered into between the defendant Hugh Sproston, junior, and J. D. Patterson. I deem it unnecessary to decide whether it was or was not competent for Mr. Patterson to enter into a contract of such a nature because, although I believe that a conversation took place between these gentlemen, yet in view of the conflicting evidence as to the upshot thereof, I feel compelled to hold that the parties were not *ad idem.* The only thing that appeared certain to my mind was the uncertainty in which the agreement is enveloped The onus of establishing this agreement is on the defendants and even assuming that I could see my way to accept Mr. Sproston's version of the conversation, it would only amount to this, that the parties had agreed

respectively to sell and to buy five hundred acres of land, part of Christianburg; but whereabouts? The contract would in itself have contained an element of uncertainty fatal in my opinion to its enforcement. It will be admitted that this negotiation was of a very informal character, and as frequently happens in such cases, the parties from a want of precision failed to come to a mutual understanding. Having acquired no interest, it follows that the defendants cannot shelter themselves from liability under the so-called agreement.

It is necessary now that I should deal more specifically with the *locus in quo* where the wrongs are alleged to have been committed. Lots 50 and 51 are known together as Plantation Christianburg, and the title of the plaintiffs thereto is admitted, but the defendants in the thirteenth paragraph of their answer aver that lot 52, which is known as Wismar, is Crown land and that "any occupation of said lot by the defendants has been with and under the authority of the Government of this Colony." I am not prepared to say that this defence would not be a good one, but it must first be clearly established. What is the evidence? Mr. Perkins, Assistant Crown Surveyor, called by both parties, deposes that he defined the boundary between Christianburg and Wismar; that he could find no paals and that a survey was necessary to ascertain the boundaries of the two lots. A plan made by the witness was laid over showing the eastern terminus of the railway between the Demerara and Essequebo rivers as proposed by the contractors. He adds that two hundred acres were marked off on Wismar by direction of the Crown. There is evidence that Wismar and Christianburg have been worked as one for at any rate sixty years, and Mr. Perkins admitted that he, while surveying, found persons on Wismar who stated that their occupation was by permission of the plaintiffs. It is also true that the plaintiffs preferred a claim before the Title to Land Commissioners to 2,000 acres more or less by "prescriptive accumulative possession" for over sixty years. This claim to Wismar was however disallowed. Mr. Perkins also admits that no steps have been taken to eject the plaintiffs from Wismar. He further says that a licence was granted by the Crown, or the equivalent authority, of Wismar in 1748 to one Anthony Sommersall or some such name. It must always be kept in view, as I have had occasion to remark, that neither the Crown nor the local Government are parties to these proceedings, and it is patent therefore that any adjudication affecting the interests or claims of either would be an improper exercise of judicial authority. While I am willing to accept the

evidence of Mr. Perkins as given in all good faith, yet in a question of such importance I should expect *conclusive* evidence, written or oral, and from a higher and more responsible official. In a word, I am not satisfied beyond reasonable doubt,—

(a.) that the Crown has actually claimed Wismar;

(b.) that it has a good title to the same; and

(c.) that it has in any way made over to the defendants any part of Wismar, or authorised the defendants to make use of the same.

I do not for a moment say that the defendants may not be right in their contention, but I cannot shut my eyes to the fact that there is no evidence of any demand of possession by the Crown from the plaintiffs, or any intimation to them that their possessory rights are challenged by the Crown. Whoever may be entitled to Wismar, it is clear that at the time of the commission of the alleged wrongs the plaintiffs were in possession and, according to the Roman-Dutch law which prevails in the colony, possession is a good title except as against the true owner. (*Van Leeuwen,* Vol. I., page 199).

The next point for consideration is the effect of the licence. The plaintiffs, while repudiating the action of J. D. Patterson in granting leave and licence to enter for prospecting purposes, subsequently on the 11th January, 1894, did that which they had a right to do, *viz.*, served the defendants with a notice to withdraw from the land and remove all buildings and erections thereon within fourteen days from the date of such notice. The defendants have not complied with this notice. J. D. Patterson who granted the leave and licence was at the time in possession of Christianburg as manager. He may have exceeded his authority but no objection was taken to his action by the other plaintiffs until October 14th, 1893. It is plain that J. D. Patterson was keenly alive to the importance of getting Christianburg selected as the property through which the proposed railway would pass and where it would have its terminus. It was manifestly to his advantage that such a selection should be made and his action throughout is consistent with this supposition. He readily gave the required permission to prospect; it was essential that he should do so in order to realise the object he had in view. On the other hand I think that the defendants made too sure of their position. Many of their acts were within the scope of the leave and licence granted and as such therefore protected, *e.g.*, cutting lines, cutting underwood, and if need be, felling timber. This would include free access to and from the river and the

erection of temporary accommodation for those engaged in prospecting. The plaintiffs however contend that, after notice of the revocation of the leave and licence, the defendants persisted in using the land and moreover committed acts of such a nature as were not and could not have been contemplated at the time the permission was given. They rely principally on the erection of a mule stable, new store house, and a new frame house, the latter having been built to some extent with timber cut from off the lands of Christianburg. I am inclined to think that the "shop" which was built was of a temporary character, and was put up to facilitate the supplies to the defendants' labourers. Mr. White, one of the defendants, says he commenced building the manager's house because he thought "we had acquired an interest in Christianburg." This of course has reference to the supposed purchase of five hundred acres. I have already dealt with that part of the case. While I readily admit that the defendants have endeavoured to minimise their use of the *locus in quo,* yet that is no answer if they have no right to any user at all. It might perhaps make matters more clear if I deal with the facts as a jury might do. I therefore find:—

(1.) that the plaintiffs are owners by transport of Christianburg and were and are still in possession of Wismar;

(2.) that leave and licence to prospect on the said lands was granted by J. D. Patterson;

(3) that the plaintiffs revoked such leave and licence;

(4.) that the defendants subsequently to such revocation and even up to now continue to use the *locus in quo;*

(5.) that the erection of the manager's house in particular was not within the rights of the defendants, either under the leave and licence granted, or otherwise;

(6.) that the defendants are wrong doers.

The next question is the amount of damages to be awarded. There is a conflict of testimony as to the injuries inflicted. I consider that some damage has been committed, but nothing like what the plaintiffs hope for and ask for. In my opinion Christianburg as a wood-cutting grant has seen its best day, and it is hard to believe that the defendants, engaged as they were in carrying out a large and important contract, would stoop to commit the petty acts which the plaintiffs have laid to their charge. While I have arrived at an opinion adverse to the defendants, it is right to remark that they have under all the circumstances only themselves to blame for taking up a position which has proved untenable. That they exhibited a

want of caution and were too confident is doubtless true, but I am equally certain that what they did was under an honest belief that they were acting within their rights. That they were mistaken is however no answer to this action and they must suffer for their error in judgment.

I therefore assess the damages at $500, and grant an order of interdict as claimed, with costs. It appears to me however that under the circumstances it would be only equitable to afford the defendants an opportunity of removing the manager's house and the other erections, and for this purpose I suspend the issue of the order of interdict for fourteen days.

LIMITED JURISDICTION.

1894. *June 5.* CHALMERS, C.J.

EAST DEMERARA WATER SUPPLY COMMISSIONERS v. PROPRIETORS OF PLN. VICTORIA.

Summary Summation—Parate execution—East Demerara Water Supply Ordinance 1884, s.s. 12 (*6.*) *and 22—Assessments and recovery thereof—Functions of officer nominated as proprietor under s. 29—Attendance and voting at meetings.*

Application for *fiat executio* against the proprietors of Plantation Victoria at the instance of the East Demerara Water Supply Commissioners for the sum of $110.23, being the amount of assessment for current expenditure for the half year ending December 31st, 1893.

D. M. Hutson, for the applicants.

W. Nicoll, on behalf of the Chairman and Council of the village of Victoria, appeared to oppose the granting of the *fiat.*

The further necessary facts, and the argument in opposition to the granting of the application, appear from the judgment of the Chief Justice, before whom the matter, was heard in chambers.

CHALMERS, C.J:—The East Demerara Water Supply Commissioners ask for a *fiat* in parate execution against the proprietors of Plantation Victoria, in respect of a sum of $110.23, described in the summation and account prefixed thereto as being the amount due for assessment for current expenditure for the half year ending December 31st, 1893.

The Chairman and Council of Victoria village, the inhabitants of which own the plantation, have appeared and been heard by counsel in objection to the granting of the *fiat* and counsel for the Commissioners has also been heard.

By the East Demerara Water Supply Ordinance, 1884, which is an ordinance for securing a supply of fresh water for the district between the Demerara river and the Mahaica creek and for purposes auxiliary thereto three commissioners (*a*) are to be appointed, in the first instance by the Governor, afterwards by the proprietors of the plantations in each of the

(*a*) Now five. See section 3, (1.) Ordinance 12 of 1884. Ed.

three districts formed for the purposes of the scheme. These commissioners are empowered, subject to the provisions of the ordinance, to execute works and do other things described in the ordinance; *inter alia*, they are empowered [s. 12, (6.)] to assess and recover from the proprietors of the plantations named in the third schedule to the ordinance, amongst which is Pln. Victoria, all moneys required or expended by them for the purposes of the ordinance. By s. 22 the commissioners may recover all assessments and sums due to them by the proprietors of a plantation by parate execution against the proprietors of the plantation.

The first objection to the granting of the *fiat* is that the proprietor of plantation Victoria was not asked or cited by the commissioners to pay the assessment. The proprietor meant is an artificial or statutory proprietor and is the outcome of s. 29, which is in these terms:—"The Governor may from time to time nominate an officer to exercise the right of voting for the plantations named and specified in the fourth schedule, and the officer so nominated shall for the purposes of this ordinance, be deemed to be the proprietor thereof." Twelve plantations to which the section applies are named in the schedule, plantation Victoria being one, and it appears that Mr. Thomas Daly who then occupied and still occupies the office of Inspector of Villages was in March, 1885, nominated under the enactment. The objection proceeds of course on the view that the officer so nominated represents the villages for the purpose of paying the rates, as well as for the purpose of voting. The section is difficult to construe. How the officer shall exercise the right of voting, which by other parts of the ordinance is given to the proprietors of each plantation and who, it can scarcely be presumed, are always of one mind on all the questions that come before them for voting, I am glad I have not to decide; but as regards the contention that the officer represents the plantations for the purpose of paying the rates I do not consider it can be upheld, and that for these reasons:—

The only specific function assigned to the officer is that he may exercise the right of voting; there is no provision anywhere in the ordinance that the officer shall pay or be liable for the assessments; there is no fund created which he could make use of for paying them; there is no machinery provided by which he could recover by any summary methods the money which he paid on account of the proprietors; and there is no allowance by way of salary or otherwise to recompense him for the labour, responsibility, and losses he would be continually incurring

if he were the paying officer of the twelve plantations under the conditions stated. Add to this that the officer nominated, if an officer in the Government service—and there is absolutely nothing in the section restricting the Governor's choice—could not well refuse the nomination, and so might have all this work and responsibility thrown upon him without his free consent. It is impossible to suppose that an enactment so unjust to the individual could have passed through the legislature, and I must reject the reading of this section put forward, on which it is said the necessity exists for calling on the nominated officer for payment.

The next objection is that the commissioners who made the assessment sought to be levied were not legally elected. This objection is based on a statement that at a meeting for the election of a commissioner for the Annandale district held in the early part of last year, Mr. Daly, the officer nominated under s. 29, was not summoned or notified to attend, and that having nevertheless attended he was refused a hearing. It is regrettable that no exact information was given as to what really occurred in connection with this matter, the statements resting only on counsels' instructions, which were not fully in accord on the one side and the other. It was agreed however on both sides that Mr. Daly, the nominee of the Governor, was present; there is no evidence that he was not summoned, and be that as it may, the fact of his presence obviates any question on that point. On the side of the objectors it is said that he was refused a hearing by the chairman supported by a vote of the proprietors present, but on the side of the commissioners it is said that Mr. Daly himself considered that he had no voting powers and did not attempt to take any part in the proceedings. It is not said on either side that he tendered a vote or attempted in any way to vote. The facts then, so far as we are informed, are that the nominee was present at the meeting, and that somehow, either by his own abstention or by the influence of the voters present, he did not exercise his power of voting. Now it appears to me that the mere nomination under section 29 of an officer to exercise the right of voting for the plantations does not of itself take away the rights of voting given by other sections of the ordinance to the proprietors of the plantations. If the nominee should attend the meetings and vote, then a question might arise whether his vote had not the effect of absorbing all the other votes. But when he does not vote—and there seems no provision making it imperative on him to do so—there seems nothing to hinder

the proprietors freely exercising the powers of voting given to them. The votes of these proprietors then would be quite valid, if the statement on behalf of the commissioners is correct that Mr. Daly voluntarily abstained from taking part in the proceedings. Then if the statement on the side of the objectors is correct that he was prevented from taking part by a *vis major* in the shape of the chairman's ruling supported by a vote of the proprietors, it is clear that the proprietors, who in this argument assume that Mr. Daly had a right to vote, cannot be permitted to say that they themselves by illegally preventing him from voting, rendered the proceedings illegal, so as to free themselves from liability for the assessment. Whichever way the facts are taken, therefore, it appears that this objection must fail.

The real and last objection is that the proprietors of plantation Victoria do not and never did derive any benefit from the East Demerara water scheme. Evidence was given showing that plantation Victoria possesses a natural reservoir of its own which the inhabitants deem and have always deemed sufficient for their wants, that none of the waterways of the commissioners abut on the lands of the plantation and could not be resorted to without laying pipes or cutting channels through lands which do not belong to the plantation, and that as a fact the inhabitants of the plantation have never made any use of the water supplied by the commissioners. Upon these facts a strong argument was made that it would be unjust that the proprietors of Victoria should be compelled to contribute to the support of a scheme which, although it might benefit some of their neighbours, was of no benefit to themselves.

The legal liability depends on section 12, sub-section 6, and sub-section 2 of the proviso to this section. The general power of the commissioners to make and recover assessments under section 12 (6) is not in controversy. The portion of subsection 2 of the proviso under which the question arises is in these terms: "Unless otherwise ordered by the Governor-in-Council, all assessments shall be made on the total area of each plantation, and shall be at an equal rate per acre over the whole district receiving any benefit." It is said that the condition "receiving any benefit" applies to each plantation and is the criterion of liability of each. But by grammatical construction the clause clearly applies to "the whole district" with which it is in juxtaposition. When the scope of the enactment is looked at, there is no reason for holding that the grammatical construction is otherwise than consistent with the intention of the legislature. It is obviously not intended that

there should be minute questions as to the degrees of benefit derived by the different plantations, and hence we have it enacted that the assessment is to be of an equal rate per acre over the whole district. Moreover it would tend to defeat the purpose of the scheme which is to benefit a wide area of country by "securing a full supply of fresh water" if it were incumbent on the commissioners—as would result from the construction contended for—to show as regards each plantation assessed that it was receiving benefit. As regards the equity claimed the clause in the beginning of the proviso seems almost as if it had been framed expressly to meet such a case as is made by the proprietors of Victoria. It is evident from this clause, as well as from others in the ordinance, that the Governor-in-Council is intended to be a supervising and controlling authority as regards the working of the ordinance. By the clause in the proviso the Governor-in-Council is invested with the power of varying the incidence of the assessment, and it appears to be perfectly competent for the proprietors of Victoria to represent their case to the Governor-in-Council and ask exemption from the assessment. My view of the legal obligation under the enactment is that the criterion of a plantation being liable is that it is in a district which is receiving benefit. Victoria is in the Mahaica district and there is no question made that this district is receiving benefit.

I am therefore unable to uphold any of the objections taken and the execution will therefore proceed. I may remark that from the tenor of the summation and service in this case, it appears as if the levy is intended against the whole of Plantation Victoria as a *universitas.* This would not be correct procedure if some of the proprietors have paid the assessment, unless these were *pro indiviso* proprietors of the whole; but as I gather from the tenor of the objections taken that all the proprietors are in default and as no objection has been founded upon the tenor of the summation, it is unnecessary to pursue this subject.

GENERAL JURISDICTION.

1894. *June* 22. ATKINSON and SHERIFF, JJ.

RASHDHARY v. BUTT.

Will—Forgery—Practice—Exception—Rules of Court, 1893, Order XVI, rr. 1, 5*—Right to commence—Effect of deposit of will or other document in Registrar's office—Courses open to heirs disputing will.*

Action, tried in New Amsterdam, in which plaintiff claimed that a document, purporting to be the last will of Gayany, dated June 28th, 1893, and deposited in the Registrar's office on October 20th, 1893, under which will the defendant George Jonathan Butt, *alias* Lutchmansing was appointed sole executor and heir, be declared to be null and void and of no effect on the ground that it was a forgery and that it be set aside. Plaintiff further claimed that a document executed by Gayany on July 31st, 1881, under which he (plaintiff) was appointed sole heir and executor, be declared to be the last will and testament of Gayany who died on Sept. 26th, 1893.

Defendant in his answer denied that the will of June 28th, 1893, was a forgery and excepted that the claim disclosed no cause of action against him.

The further necessary facts appear from the interlocutory and final judgments.

N. McKinnon, for the plaintiff.

D. M. Hutson, for the defendant.

(May 16th). On the exception taken the Court (ATKINSON and SHERIFF, JJ.) gave decision as follows:

The defendant in his answer excepts that the claim discloses no cause of action against him, and that the conclusions thereof are not supported by the allegations in the claim.

Plaintiff's counsel now argues that the objection ought to have been taken earlier, relying on Order XVI, r. 1, in terms of which the objection not having been "taken before the time when the party entitled to object ought to file the next subsequent pleading, shall be deemed to have been waived by such party." One of the objections which may be taken is that the claim discloses no reasonable cause of action. It is difficult to see how if such an objection be so waived, the court could proceed with the trial upon such a claim. It seems to us that the court would be bound to dismiss the claim on that ground, although the objection had not been taken, even if Order XVI, r. 5, which enables the court to give effect to any point of law arising upon the pleadings although

not raised by either party, were not in existence. We therefore overrule the objection now raised by the plaintiff's counsel.

Coming to the exception taken by defendant in his pleading, his counsel argues that the action is a personal one against the defendant; that on the allegations and conclusion of the plaintiff's claim no order could be made against the defendant to do anything; that the action should be one to recover possession of the estate from the defendant, who, being the executor under the will which is on record, must be taken to have possession thereof: and that in such action when the defendant set up his title as under the will, the question of its validity could be enquired into and the whole matter determined.

He referred to Order I, r. 3, which provides that a party who seeks to enforce a right to legal relief against some other person or against a *res,* as a plantation or a ship, shall do so by means of an action. But the words "against some other person" do not mean only that that other person is to be ordered to do something. The action will be equally against the person, where it seeks to restrain him from doing or to deprive him of something, or to declare that a document under which he claims title is invalid. The latter is the case here. The plaintiff asserts that a will was made in his favour, and that the later will recorded by the defendant and under which he claims is a forgery, and the plaintiff in brief demands that this later will be declared to be forged, and the prior will established. A perfectly good cause of action and a proper conclusion appear here, and we therefore overrule the exception.

The objection was not formally raised in the pleadings, bat the argument of defendant's counsel, as applied to the facts pleaded went to this, that the action was not properly brought against the defendant as executor, but should have been brought against the heir or heirs. It was said that an executor here was not in the same position as an executor in England. There the personalty vested in the executor, here it did not. It was argued on the other side that, as the law stood here, the executor was the proper person to appear when the will under which he was acting was attacked.

It was decided by the full Court a few days ago in *Hinds* v. the *Executors of Hinds,* where the plaintiff was claiming her legitimate portion in derogation of the provisions of the will, that the executors were properly sued and we think that that decision governs the present matter.

The plaintiff alleges in his claim that the will under which

the defendant is acting was either obtained by fraud or is a forgery. It was excepted by the defendant that this allegation was badly pleaded, but as the allegation so far as fraud is concerned, has been struck out by the plaintiff's counsel with the leave of the court, we need not consider the arguments advanced on either side, being of opinion that the allegation of forgery, as it now stands, is sufficient.

The case will therefore proceed.

Posted (May 19th).

After closure of the plaintiff's case, counsel for defendant applied for a non-suit.

On this application the Court, constituted as before, gave decision as follows:—

When we had to consider the question as to who was to begin in this matter we felt that as we have not at hand here (a) the various books and authorities to which we might have need to refer, it would be inadvisable to lay down any general proposition as to the right to begin in disputed will cases. If the plaintiff's counsel had not opened his case and we had been called upon to say who should begin, having regard to the particular circumstances existing here, we should certainly have called upon the defendant to begin. Here there is a starting point, a will the validity of which is undisputed. Defendant propounds a later will. Plaintiff sets up the earlier will and disputes the validity of the later will, alleging that it is a forgery and stating a variety of circumstances which point very strongly to the unlikelihood of the testator having made such a second will.

It is said that the plaintiff has not so proved his allegation of forgery that, if the case were a criminal one, there would be evidence to call upon the prisoner for his defence. That might be so, because there the question would be guilty or not guilty of forgery as regards the individual charged, but that is not a parallel case with the present, where the question is not one of the guilt of the person, but whether a particular document is genuine or not, and it is manifest that very different evidence will be requisite in the one case to that which will be sufficient in the other. Where a will is propounded the person attacking it may believe it to be a forgery and may so say; he may not be able to prove that it is so, but he may establish facts which go to show that its genuineness is doubtful, or at any rate does not appear to be perfectly clear. That being done, the onus is certainly on

(a) In New Amsterdam.

the person propounding the will to prove its validity in solemn form. We are of opinion that this is the case here.

We were also of opinion that, as counsel for plaintiff had opened his whole case, he should begin; but we stated at the same time that we should hear the whole case, so that it was so far therefore not really material who began. That being so, the application for a non-suit ought not, on this ground also, to be entertained at the present stage of the proceedings.

It was argued that the will having been recorded must be deemed *prima facie* to be valid. But that is not so. In *Gollard* v. *Nascimento,* (1893, L. R., B. G. 47), the case of *De Coeverden v. Harel* (January 26th, 1857,) was cited, where the court thought that the fact that a closed will was shown by acts duly executed to have been duly opened went to show that the will must have then been apparently duly executed and therefore, that the copy was receivable in evidence. The court pointed out that that went only to show that the document was receivable in evidence, not that, when it came to be considered by the court, it must necessarily be deemed to be a genuine document; and further on it laid down "that the mere deposit or registration or recording of a document in the Registrar's office of this colony may make it receivable in evidence as if it were the original, but can of itself give no validity to a document which is not of itself valid." That disposes of the argument here that the document being on record is *prima facie* valid.

The defendant must now proceed.

Posted (June 22).

The case having carried to a conclusion the Court (per ATKINSON, J.) gave judgment as follows:

In this case there are two wills, the earlier in the plaintiff's favour, the later in the defendant's. In his claim the plaintiff avers that one Gayany, a free coolie, died on September 26th, 1893, and that his wife predeceased him. These facts are admitted. He then avers that Gayany left a last will dated July 31st, 1881, bequeathing all his property to his wife Poinee, and in the event of her predeceasing him, to the plaintiff.

The defendant in his answer says he has no knowledge of these facts. Not having denied he must be taken to have admitted them. For the like reason the plaintiff's averment that Gayany could write in his own language must be taken as admitted.

The plaintiff further avers that Gayany and the plaintiff's

father were shipmates, that Gayany was the executor of the latter, that the plaintiff was brought up by Gayany and lived with him till his death, that all the plaintiff's earnings for twelve years were given to Gayany, they having one common purse, and that the plaintiff had always been told by Gayany that he was his heir. All this the defendant denies.

Then it was averred by plaintiff that a certain other document which he says is a forgery, purporting to be the last will of Gayany, bearing date the 28th of June, 1893, was deposited in the Registrar's office on October 20th, 1893, by which the defendant Butt is left sole heir and executor. This document the defendant asserts to be the true last will. It purports to to have been signed by Gayany by his mark.

Finally there is an argumentative averment that if Gayany had made the will, he would have destroyed the earlier one which was found in his box wrapped up along with his bank book, while the alleged last will was in the possession of one of the witnesses to it at the time of Gayany's death. This was properly objected to by the defendant as bad pleading, being merely inferences of fact and statements in support thereof.

The plaintiff asks that the will of June 28th, 1893, be declared not to be the last will of Gayany, and that the will of July 31st, 1881, be declared to be his last will.

Certain preliminary objections taken by the defendant were argued and disposed of at the hearing. A question arose also at the hearing as to who should begin, but as this was after the plaintiff's counsel had opened his case, we thought he had better go on, intimating however that we intended to hear the whole case. At the close of plaintiff's case the defendant's counsel asked for a non-suit on the ground that the plaintiff in his claim had alleged forgery and had not proved it. We refused the application on grounds which we stated at the time. Defendant's case was then gone into. In summing up his evidence, defendant's counsel again urged that defendant had not proved the forgery and cited the case of *Fraser, executor McDonald* v. *the Administrator General* (June 1st 1861), or rather a *dictum* of ARRINDELL, C.J., to which we will refer later. We gave an interlocutory decision at once, in which we referred to the case of *Gollard* v. *Nascimento* (1893, L. R., B. G., 47.) Fraser's case was not brought to the notice of the court in Gollard's case and as the decisions are not in accord it becomes necessary to determine which should be followed, both having been fully considered.

In Fraser's case, and also in Gollard's case the Administrator General of the day had treated as nullities the wills under

which Fraser and Gollard had respectively claimed, the only difference being that in Fraser's case the will was on record at the time, while in Gollard's case it was not recorded until some time afterwards. In Fraser's case the Administrator General was not allowed to show that the will under which the plaintiff claimed was invalid; in Gollard's case the Administrator General was allowed to dispute the validity of the will and succeeded.

In Fraser's case the two puisne judges (BEETE and ALEXANDER, JJ.) held that the Administrator General had acted illegally in treating the recorded will as a nullity, inasmuch as he should have brought a suit to set it aside, and that having acted thus illegally, he could not be heard in defence. ARRINDELL, C.J., however held that as the defendant had put the plaintiff's quality as executor in issue by denying the validity of the will, he was not only entitled to be heard in that proceeding, but that the legality of his acts could not even be enquired into until the plaintiff had proved the will under which he claimed to act as executor.

In Gollard's case there was also a difference of opinion, CHALMERS, C.J., being of opinion, when the plaintiff's case was closed, that the whole case should be heard out, while ATKINSON and SHERIFF, JJ., thought differently, and held upon the facts disclosed in the plaintiff's own case that it clearly appeared that the will was not valid.

In his reasons CHALMERS, C.J., discusses questions relating to the validity of the will, and it must be taken that if the case had been heard out, he would have been prepared to give a decision for or against its validity, as the circumstances of the case might require. In Gollard's case, therefore, we have it that the two puisne judges and presumably the Chief Justice were at one with ARRINDELL, C.J., in Fraser's case, in holding that when a plaintiff comes into court claiming to be entitled under a will, and the validity of the will is denied by the Administrator General, an issue is raised which can be determined in that proceeding. The weight of authority is therefore against the proposition laid down by the puisne judges in Fraser's case.

But apart from this, if we examine Fraser's case, it appears that the position there taken by the puisne judges is untenable. In that case the Administrator General had issued an advertisement relating to the estate as if it were intestate. Fraser, in his alleged quality of executor, applied for and obtained from the Chief Justice an interim interdict. The question when it came before the full court was whether the

interdict should be confirmed. The puisne judges held that it must be confirmed for several reasons.

In the first place they said the Administrator General's ordinances conferred no power upon him to assume the invalidity of a will. It had apparently been argued that the Administrator General, in ignoring the will, had been assuming the functions of the court, because the Chief Justice in one of his reasons of judgment says he is at a loss to discover anything tending to show that the Administrator General by law represented intestate estates then, as he represents them now. If a man dies without a will his heirs take *ab intestato.* When a will is propounded the heirs who, but for that will, would have taken *ab intestato* have two courses open to them; they may sue to set aside the will or they may decline to recognise it and proceed to interfere with the estate as if there were no will. In the former case they might be called upon to prove a negative, that the will was not the will of the deceased, which might in many cases be difficult, if not impossible. But by adopting the latter course they would put the person propounding the will to prove the affirmative, that the will was the will of the deceased. The latter is obviously the course most advantageous for the heirs, and there can in principle be no reason why the Administrator General representing an intestate estate and standing in a similar position to heirs *ab intestato* should not be entitled to exercise the same right as heirs *ab intestato,* of putting the person setting up a will to the proof. He may be assuming the invalidity of a will, but how in so doing is he acting illegally? So far from acting contrary to his ordinances, he is exercising a right arising, as we have just shown, out of the position in which he is placed by those ordinances. On this point, in our opinion, the reasoning of the puisne judges fails, and that of ARRINDELL C.J., should prevail.

We may point out here that under English law an executor of a former will is entitled to put an executor of a later will upon proof in solemn form of the later will; *Boston* v. *Fox* 4 Sw. & Tr. 199. That is by statute. There is no ordinance to the like effect in this colony; but it is possible that an action framed in accordance or in analogy with those based or borrowed from the *lex diffamari* (Cod: 7. 14. 5.) might lie against the executor of a will, if brought by the person who, but for the will, would be heir *ab intestato,* or by the executor of a former will.

Then the puisne judges say that the will having been exhibited at the Administrator General's Office, and deposited

in the Registrar's office, could only be set aside by a suit brought by the Administrator General for that purpose. ARRINDELL, C.J., does not agree with any of the arguments used as to the registering or depositing of a will being conclusive of its validity. The text books are silent upon the point, and the ordinances respecting the depositing or registering of wills in the Registrar's office have relationship simply to the mode and manner of depositing and registering, and in no way relate to or affect the "question of the invalidity of a will, dependent upon an inherent defect in the making or concoction." There can be no doubt that the Chief Justice was right. As laid down by the puisne judges in Gollard's case, the registering or recording of a will makes it admissible in evidence, but in no way proves its validity. Being in evidence, according to ARRINDELL, C. J., in Fraser's case, it is only presumptive proof which the defendant is entitled to rebut, and does not establish the validity of the will; and according to CHALMERS, C. J., in Gollard's case, "a will admitted to deposit is presumed to have been proved, such presumption being open to rebuttal."

The proceeding in Fraser's case was by way of interdict. Fraser, claiming to be executor under the recorded will, had obtained an interim interdict. In order to get it confirmed he had to show that he had a clear right. That is the very first condition upon which an interdict depends. A presumptive right is not enough. Yet the puisne judges, in spite of the protest of the Chief Justice, confirmed the interdict against the Administrator General, refusing to him all opportunity of showing that the right, which Fraser presumptively had, did not exist, in fact, that is, of showing that the will under which Fraser claimed was not a valid will. Having thus confirmed the interdict, as if Fraser had a clear right, the puisne judges afterwards, in the case of *Administrator General* (representing the estate of McDonald) v. *Fraser* (June 6th, 1862) declared this very will in virtue of which they had confirmed the interdict, to be invalid. It is manifest that the decision of the majority of the Court in *Fraser* v. the *Administrator General* (*ubi supra*) is, to say the least, of doubtful authority.

Coming now to the evidence in the present case. [After a lengthy and detailed review of the evidence here the judgment proceeded:]

The decision of ARRINDELL, C. J., in Fraser's case, quoted by defendant's counsel was this, that the judges were bound to give sentence *secundum allegata ac probata.* The plaintiff had, he said, alleged forgery and was bound to prove it

Having stated at the outset that we should hear the whole case we declined to express any opinion when the plaintiff's case was closed. If we had been called upon to give a decision at that stage, we should have held that the facts before us raised so strong a presumption of forgery that the onus then lay upon the defendant to rebut it, and prove the validity of the will set up by him. We say so now. The defendant has failed to rebut that presumption and to establish that validity. We are satisfied that the will, dated June 18th, 1893, is not a genuine will, and we direct the Registrar of British Guiana to expunge from his records all entries relating to the said document. The defendant is to pay the costs of these proceedings.

GENERAL JURISDICTION.

1894 *March* 5. CHALMERS, C.J., ATKINSON and SHERIFF, J.J.

WIETING & RICHTER v. THOMSON.

Libel on traders—Application to individuals—Privilege—Fair comment.

Publication in a newspaper of an advertisement and paragraph the effect of which, taken in connection with the surrounding circumstances, was to impute to a firm of traders that they were practicing deceit in their business by offering a spurious for a genuine article,

Held—Libellous; in determining whether a writing is or is not libellous the whole is to be read in natural meaning.

Although defamatory words apply ex *facie* to a class of persons yet if they are applicable to an individual, and in fact apply to him, action lies at his instance.

Writings within the rule as to "fair comment" upon matters of public interest give no cause of action, not as being "privileged" but because fair comment is not libel; in order to be within this rule the writing must not misstate or misrepresent the facts commented on. Circumstances tending to augment damages.

Action for libel by an advertisement and paragraph relative thereto published in a newspaper. The advertisement was by an American company of flour millers offering flour for sale in Demerara, and had at the foot a note in these terms:—"Buyers are cautioned against a bogus 'St. "Lawrence Flour' now being offered in this market. It is branded in blue, "while the genuine is red. Legal steps have been taken in New York to pre-"vent a repetition of the fraud." In the issue of the newspaper in which the advertisement first appeared there was an editorial paragraph in these terms:—"We learn from an advertisement in our columns to-day that a bo-"gus St. Lawrence brand of American flour is being sold in this colony. As "the importation of flour is in the hands of the larger merchants in the street "it is very disappointing to find that their mercantile status affords no guar-"antee to the public of the genuineness of the goods they offer for sale." A short time previous to this publication the plaintiffs, who are importers of flour carrying on business in Water Street, Georgetown, Demerara, were offering for sale and sold flour shipped to them from New York the brand of which consisted of words and figures including the words "St. Lawrence" in blue colour. In the answer the defendant claimed absolution from this instance on the ground of a number of exceptions, and as substantive defence pleaded that the words in the advertisement and paragraph complained of did not bear or

convey the meaning alleged by the plaintiff's or any defamatory meaning; that the paragraph was a true, fair, and impartial comment on a matter of great public interest; that the advertisement and paragraph were not libellous; and that the plaintiffs were not injured. Issue. The case was heard on 14, 15, 16 February, 1894.

Clark, for defendant in support of exceptions:—I claim absolution. The plaintiffs do not aver defendant wrote the libel; they do not aver that he wrote and published it falsely and maliciously; there is no sufficient averment of a libel. He cited forms of claim in respect of libel given in *Odgers on Libel* p. 530 and in *Bullen and Leake*; also *Clark* v *Molyneaux* L. R., 3 Q.B.D. 237.

Curia: "Publication of libellous matter without lawful excuse or justi- "fication is a libel whatever the intention may have been." These words of PARKE, B, in *O'Brien v. Clement* 15, M. & W. 435, are applicable to the law now and completely answer the objections which have been raised to the averments in the claim, and we overrule these objections.

Kingdon, Q. C., Solicitor General, with him *Hutson,* for the plaintiffs, as to the meaning of "bogus" cited Webster's Dictionary, and Murray's New English Dictionary: any written words imputing fraud, dishonesty or dishonourable conduct, or tending to injure a trader in his trade are libellous. If the words affect more persons than one, evidence may be given of their application to the plaintiffs; *Le Fanu* v. *Malcolmson,* 1, H. L. C., 637. Plaintiff may give evidence that persons who knew him concluded the libel referred to him. It is a question of fact whether the words were intended to apply to plaintiffs which the court will determine upon the evidence. *Turner* v. *Merywether,* 18 L.J., C.P., 155 and 19 L.J., C.P., 10; *Wakley* v. *Healey,* 7, C.B., 591.

In order to support the defence of "fair comment" the comment must be based on true facts. A writer may not base his comment on untrue or distorted facts. A libellous advertisement may not be made a basis of injurious comment unless the facts stated are true; in the present case they are not true. The defence of fair comment does not apply to imputations upon personal character. He also cited *Odger on Libel,* 2nd Edn. pp. 536, 129, 35, 32, 33, 257 &c.; *Folkard on Libel,* 5th Edn., pp. 410, 411, 190, &c.; *Broom's Common Law,* 8th Edn., pp. 819, 822.

Evidence for the plaintiffs was given.

Clark, for defendant:—

The advertisement makes no reference to individuals. Defendant wrote what he honestly believed. I admit it must be determined as a fact whether the advertisement and paragraph constitute a libel on plaintiffs, if the words are capable of bearing a libellous meaning, but I submit they are not capable. The paragraph is a fair comment upon a matter of public interest. There is no evidence of malice. There is no evidence that defendant when he wrote the paragraph knew the plaintiffs were selling the flour he called a bogus St. Lawrence Flour. He cited *Eastwood* v. *Holmes,* 1, F. & F. 347; *Delany* v. *Jones,* 4 Esp., 190; *Hunter* v. *Sharpe,* 4, F. & F., 983 and 15 L.T., 421; *Jenner* v. *A'Beckett* 7, L. R., Q. B., 11; *Campbell* v. *Spottiswoode,* 3, B. & S., 769; *Mulligan* v. *Cole,* L.R., 10 Q. B., 549; *Paris* v. *Levy,* 30. L. J., C. P., N. S., 11; *Fraser on Libel,* p. 24.

The defendant was examined as a witness.

Hutson, in reply:—

The authorities cited are either distinguishable or in our favour. The defences all resolve into fair comment. There was no evidence of any deceit in introducing the new flour; but the contrary was proved. Even if a dispute as to a patent right were involved, and it is not, that would have been a matter of private concern. It increases our claim that defendant offered no withdrawal after all the facts were explained to him.

Curia, (CHALMERS, C.J., ATKINSON and SHERIFF, J.J.) per CHALMERS, C.J.—The plaintiffs are general merchants carrying on business under the firm of Wieting & Richter, in Water Street, Georgetown, and were at the time of the occurrence complained of, amongst the largest importers in the colony of flour from the United States and elsewhere. The defendant is proprietor and publisher of a newspaper published weekly in Georgetown called the *Argosy.* The claim is for a sentence declaring the defendant to have falsely and maliciously libelled the plaintiffs in the way of their trade and business and condemning him in damages.

The alleged libel was contained in an advertisement and editorial paragraph relating to the advertisement, both published in the same issue of the *Argosy* newspaper on May 6th, 1893. The advertisement is headed Hecker-Jones-Jewell Milling Company, has relation to flour which apparently that firm are offering for sale, and has at the foot a note in the

following terms:—"Buyers are cautioned against a bogus 'St. Lawrence' "flour now being offered in this market. It is branded in *blue*, while the "genuine is *red*. Legal steps have been taken in New York to prevent a "repetition of the fraud." The editorial paragraph is in these terms—"We "learn from an advertisement in our columns to-day that a bogus 'St. Law- "rence' brand of American flour is being sold in this colony. As the impor- "tation of flour is in the hands of the larger merchants in the street, it is "very disappointing to find that their mercantile status affords no guarantee "to the public of the genuineness of the goods they offer for sale." The advertisement was again published on the 13th, 20th and 27th days of May, 1893. The editorial paragraph was only once published. The plaintiffs have stated various innuendoes for the purpose of connecting the advertisement and paragraph with themselves, and defining the defamatory meaning which they say attaches to the words made use of.

Defendant does not deny the publication of the advertisement and paragraph. The defence pleaded (besides certain exceptions already disposed of at the hearing) is a denial that the words in the advertisement and paragraph bear or convey the meaning alleged by the plaintiffs, or any defamatory meaning, or refer to the plaintiffs, and there is also an averment that the paragraph was a true, fair, and impartial comment on a matter then of very great public interest in the colony, viz., the quality of food imported for consumption in the colony, and was published for the benefit of the public without malice and so was privileged. The last mentioned defence has been framed without apparently a clear view of the distinctive nature of the defence of privilege and fair comment. The two defences are not co-relative of each other, as seems to be assumed in the defence. "Privilege," as is implied in the word, refers to cases where under particular circumstances some persons are clothed with greater immunity in speaking or writing than belongs to people generally. On some such occasions the privilege is absolute, on others it is contingent on the communication being spoken or written without malice. On the other hand the right of commenting fairly upon public matters is one which belongs to every citizen. So long as the comment is fair comment there is no question about privilege; there is then no libel at all. It is true that an incorrect application of the term privilege may be found in some of the cases, where the privilege is deduced from the subject matter of the publication, but the distinction is clearly pointed out in *Merivale* v. *Carson* in the Court of Appeal by Lord ESHER,

M.R., and BOWEN, L.J., 20 Q.B.D., 279, approving *Campbell v. Spottiswoode*, 3 B. & S. 769. The distinction is not immaterial. If a public comment or criticism "was privileged in the strict sense of the word, it would in "every such case be necessary for the plaintiff to prove actual malice, how-"ever false and however injurious the strictures may have been; while the "defendant would only have to prove that he honestly believed the charges "himself in order to escape all liability; and this clearly is not the law." *Odgers on Libel*, p. 33. There is nothing in the facts of this case to found a defence of privilege properly so called, and from this and from the nature of the oral argument, the defence must be taken to mean that the publication is within the limits of fair criticism upon a matter of public interest.

Under reference then to the statements in the claim and in the answer, the first question which the court has to decide is whether the words in the advertisement and paragraph, directed as they are against traders are *prima facie* libellous? Although, as we have seen, this was part of the defendant's case on record, there was not even any attempt to show in argument that the words in themselves were not libellous, or capable of any but a libellous meaning, the argument being directed solely to the alleged justification. The gist of libel is injury to reputation, and in determining whether published words are or are not libellous we have to consider what is the meaning which would be conveyed to the readers of the publication? The meaning of the statements in this advertisement is so plain that it does not need to be helped by innuendoes Taking the definition of bogus as given in dictionaries cited by the plaintiffs to which no contradiction or objection was offered *bogus* "St. Lawrence" flour means a spurious or counterfeit St. Lawrence flour. That the advertiser meant to impute that the one St. Lawrence flour was counterfeit of the other is further shown in the clause describing the colours of the brands; and the meaning is still further accentuated by the last clause in which it is said that legal steps have been taken to prevent a repetition of the fraud. What fraud? Clearly the meaning is that this counterfeit St. Lawrence flour is being offered in the market as the genuine St. Lawrence flour, for there would be no fraud (apart from any question as to trade marks, which does not arise here) if the fact merely had been that a blue branded flour was being offered on its own merits as a different St. Lawrence flour from the red one. The statements are of course aimed at some person or persons trading in the flour market who are thus fraudulently offering the

counterfeit. There cannot be a doubt that to say of any trader that he offers a counterfeit article as the genuine article, and does so fraudulently, tends to injure him in his trade and is libellous. The defendant would be of course responsible for the publication of the advertisement even if it stood alone. But then comes the editorial paragraph. This assumes the truth of the statements in the advertisement and points out, what the advertisement did not do, who are the persons implicated, viz., the larger merchants in the street (that is Water Street). In the first sentence it is stated that a bogus "St. Lawrence" brand of flour is being sold in the colony. In the second sentence it is clearly pointed out that the larger merchants in the street are the sellers, and the regret expressed in this sentence as clearly implies that the sellers are doing something which merchants of their status would not be expected to do, and which is unworthy of their status. Reading the whole paragraph together in its natural sense, the effect is that these larger merchants are practising a deceit upon the public. Such being the obvious meaning the paragraph would not be any less libellous if it were supposed that the writer had in his mind any meaning of less injurious tendency. If there was a milder purpose—if for instance the intention was only to draw attention to the advertisement—it would have been easy to have so framed the paragraph as to have drawn attention and at the same time refrained from endorsing the statements. But as the paragraph stands, its terms are consistent with the defendant's statement in cross-examination that it was intended to intensify and draw attention to the advertisement. There is not a hint of dissent from the open imputation of fraud which had been made in the advertisement, or the slightest suggestion that the merchants may not have participated in the fraud knowingly or that the advertiser may be in any way overstating his grievance. The paragraph itself, and connected as it is with the advertisement, is clearly libellous.

We come now to the second question raised. Do the words in the advertisement and paragraph refer to the plaintiffs? *Ex facie*, as we have seen, the words in the advertisement refer to a class of persons who are fraudulently offering the counterfeit St. Lawrence flour in the market of this colony. The editorial paragraph narrows the allusion, pointing it to the larger merchants in the street. The street, as every one engaged in trade here knows, is Water Street, in which the plaintiffs have their place of business. Does this libel go to a still narrower mark? The plaintiffs say it refers to and is a libel on themselves. Have they established this? The rule is that

although the defamatory words may at first sight appear only to apply to a class of individuals, yet if the descriptions are capable of being shown to be directly applicable to the plaintiffs and to apply in fact to them, action lies. This point has been repeatedly dealt with:—"The question is whether the "libel designates the plaintiff in such a way as to let those who know him "understand that he was the person meant. It is not necessary that all the "world should understand the libel; it is sufficient if those who know the "plaintiff can make out that he is the person meant—per ABBOTT, C.J., in "*Bourke v. Warren* 2, C. & P. at p. 309." The words of *Lord Campbell* in giving judgment in *Le Fanu v. Malcolmson* 1 H. L. C. 687 are very apposite:—"The first objection is that this libel applies to a class of persons, and "that therefore an individual cannot apply it to himself. Now I am of opin-"ion that that is contrary to all reason and is not supported by any authority. "It may very well happen that the singular number is used; and where a "class is described it may very well be that the slander refers to a particular "individual. That is a matter of which evidence is to be laid before a jury, "and the jurors are to determine whether, when a class is referred to, the "individual who complains that the slander applies to him is in point of fact "justified in making such complaint. That is clearly a reasonable principle, "because whether a man is called by one name or whether he is called by "another, or whether he is described by a pretended description of a class to "which he is known to belong, if those who look on know well who is "aimed at, the very same injury is inflicted, the very same thing is in fact "done, as would be done if his name and Christian name were ten "times repeated." See also *Turner v. Merywether,* 18 L.J., C.P. 155 and 19 L.J., C.R 10; *Wakley v. Healey,* 7 C.B. 591.

The law being that the plaintiffs, although not named, may show that the libel applies to them, then comes the question: Have they shown the application? A good deal of evidence has been given on the question. It has been proved that a particular flour has been for a number of years past imported into this colony from New York under the name of St. Lawrence flour, and that the millers interested in this flour and the millers of some other flours have recently formed themselves into a trust or syndicate by the name of the Hecker-Jones-Jewell Milling Company and under this name are exporting to the colony flour which has the words "St. Lawrence" and other words and devices stamped in red colour on the barrels; it has been proved that shortly before

the publication of the advertisement and paragraph the plaintiff's had received a shipment from New York (which as it happened they had not ordered) of 300 barrels of what is called a Western flour, the brand of which was in blue colour and contained the words "St. Lawrence" along with others, but except as containing the words "St. Lawrence" had no similarity with the brand of the Hecker-Jones-Jewell Milling Company's flour. It has also been proved that the plaintiffs had the blue brand flour in their warehouse, and on May 2nd, four days before the publication of the libel, they sold a parcel of 100 barrels to a dealer in flour, Mr. Manoel Correia, and that this sale became known on or about the day after it occurred to the agent (Barnett) of the Hecker-Jones-Jewell Milling Company, who was then in Georgetown. It has been proved that Barnett gave instructions on May 4th to the defendant personally for the advertisement which is complained of, informing him then that the plaintiffs had the blue branded flour. It has also been proved that the plaintiffs were amongst the largest importers of flour in this colony, being, save one firm, the firm importing most largely, and that up to the date of the libel no firm except the plaintiffs had imported the blue branded flour; and it has been proved that merchants acquainted with the flour trade in this colony and as carried on with New York, and the plaintiffs' position in the trade, considered that the libel applied to the plaintiffs. The evidence of Mr. Wilson, who read the advertisement and paragraph in Barbados and at once came to the conclusion that the plaintiffs were the parties referred to, is particularly significant. This evidence has not been impugned in any way. The defendant in giving his evidence stated that he knew the plaintiff's were importing the blue branded flour, but that the paragraph was not intended to refer to them. Taking it so, this in no way answers the evidence given for the plaintiffs. "What meaning the speaker" (and it is the same as to a writer) "*intended* to convey is immaterial. Words cannot "be construed according to the secret intent of the speaker." *Odgers on Libel*, p. 92, and authorities there cited. We consider that the plaintiff's have proved their averment that the libel applies to them. It may be well to observe that even if the libel had applied also to other merchants than the plaintiffs then it would not have followed that the plaintiffs could not have maintained their action. If A has slandered B, it does not seem a defence that he has also slandered C, D, and E. It is not however necessary to consider this point at present, as the evidence shows that to whomsoever else the

publication might have been intended to apply, it did in fact apply under the existing circumstances solely to the plaintiffs. The next point is as to the defence of fair comment upon a matter of public interest. The defendant has in his evidence stated the circumstances upon which this defence is based; shortly they are as follow:—The agent of the Hecker-Jones-Jewell Milling Company, named Barnett, as already mentioned, gave instructions to defendant personally for inserting in the *Argosy* the advertisement complained of, which with the exception of the foot-note was all contained on in a stereotyped plate in Barnett's possession. The original of the foot-note in Barnett's handwriting is in evidence. Defendant describes Barnett as being a person whom he does not think he would have believed upon any question of importance, on his own credit, but Barnett showed him a letter from his principal having reference to the blue branded flour, and from this letter and from Barnett's statements, he came to understand that this flour was being imported by the plaintiffs, and he thought also by others, under the name of St. Lawrence flour, and the flour of the Hecker-Jones-Jewell Milling Company was also being imported here under the name of St. Lawrence flour. Then defendant had in his own knowledge and memory that a flour of good character had been known in the colony under the name of St. Lawrence flour for a period of thirty years or more. Whether this old established St. Lawrence flour was identical with the flour the Hecker-Jones-Jewell Milling Company were now exporting under that name does not clearly appear—but the defendant seems to have taken for granted that it was. Acting then upon the information received from Barnett, and upon his own knowledge of the old established character of what he considered the original St. Lawrence flour, defendant without further enquiry wrote the paragraph, thinking that it was for the public benefit he should do so.

The first remark which occurs upon this statement is that it shows something much more resembling a complaint by a trader against other traders than a matter of public and general interest. Barnett comes to the editor and says, "These people are appropriating the name under which my "firm sell their goods; will you publish this advertisement for us. showing "up the fraud?" The editor accepts the advertisement after hearing some statements by Barnett. How is this a matter of public interest? The catalogue of such subjects has been a good deal extended in modern times. Political, ecclesiastical, and legal matters, the conduct of Local Boards and Councils, published books, pictures exhibited to the public, theatrical and other

entertainments offered to the public, and other matters which are either in their own nature of importance to the public, or have come to be of importance or interest through attention being much directed to them, may probably all be subjects of fair comment and criticism, in the course of which more freedom of language is permitted than would be allowable as to matters which were not of public interest. But so far as we learn the claim of the sellers of the red branded flour to the exclusive use of the name St. Lawrence was only brought before the public by Mr. Barnett's advertisement and the paragraph complained of. According to the defence stated on the record it would have been expected that some question would have been found involved as to the quality of the flours, but we were expressly told by the defendant that no question as to qualities was involved, and that the whole matter concerned the use of the words "St. Lawrence." It is difficult to see how this was anything but a question of private right between the rival millers. Even the defendant's own view appears to have been at one time so much to this same effect that he did not consider it incongruous to write to the Hecker-Jones-Jewell Milling Company when the action was threatened asking them to meet expenses. After giving them a sketch of what had taken place he wrote: "I have acted in the belief that I "have anticipated your wishes in this matter and that you will be prepared "to take the quarrel up yourselves, as it is altogether yours, I personally "having no knowledge of the transactions, further than as they have been "related to me by your representative. If I had apologised or withdrawn the "foot-note it would have allowed the bogus to sail over triumphantly and "this would have been detrimental to your interests." If the quarrel of the brands are not a subject of public interest then this defence fails altogether.

But, passing from this point, let it be assumed that the matter was somehow one of public interest. There is in the decisions no precise definition of fair comment, but certain limitations are clearly ascertained. A writer may comment on facts fairly and honestly, but he must keep substantially to the facts established. If he departs from or misrepresents the facts or gives a one-sided or partial view of them so as to convey false and calumnious reflections that will take away the quality of fair comment. He may not impute deceitful or dishonest conduct unless on a sure foundation of fact.

Now, what were the facts in the present case? There is evidence which it has not been attempted to contradict or discredit, that at the time of the publication the plaintiffs had in

their warehouse and were offering for sale both the red branded St. Lawrence flour of the Hecker-Jones-Jewell Co., and the blue branded St. Lawrence western flour; that the blue branded flour was never offered for, or as being the same as the red branded flour - purchasers being left to choose the one or the other upon the merits of the flours only-; and not only that the blue St. Lawrence was never offered for red St. Lawrence, but also that from the perfect familiarity of members of the trade with the red brand, and its perfect dissimilarity from the blue brand, it was impossible that such a deception could be practised. It is also in evidence without contradiction that the blue branded flour was of equal or somewhat superior quality to the red, and that the owners of the blue brand had shortly before the importation here, been able to register it as a trade mark in the Patent Office of the United States while there is no evidence of the red brand having any legalized status. What was the comment? We have already analyzed this and seen that it amounts to a charge of fraudulently offering and selling the blue branded flour for the red branded flour. This is not fair comment upon the facts.

In awarding damages we have to consider the serious nature of this libel as one impugning the integrity of traders in the way of carrying on their business; we have to consider that it was published in a newspaper which is widely circulated and influential, and, therefore, the more likely to do a wide-spread injury; that this newspaper is usually conducted carefully and temperately as was urged on us by defendant's counsel only tends to make a calumnious publication appearing in it more likely to be read with attention and to do injury. The defendant moreover showed haste and carelessness in the publication, taking his information, as he admits, entirely from one deeply interested source, and making no enquiry as to the real facts from the defendants, who he knew had the flour, and were in a position to give him information. Had he made enquiry there seem no question that the paragraph either would not have been written, or it would have been in different and non-libellous terms. Again, the publication of the foot-note of the advertisement was persisted in after its objectionable character had been pointed out, and the demand of an apology was refused although the terms of the apology asked for only involved an admission that the defendant had been in the first instance misinformed. The offer to refer the question as to what is a bogus flour to the Chamber of Commerce was not an apology for the published libel, and besides it would have been

re-opening a question as to the status of the brand of the flour which, according to the plaintiffs' information, had been already discussed between the rival exporters in New York and decided there. Evidence was given of some ill-feeling of old standing between the defendant and one of the plaintiffs. We are unwilling, however, to think (and especially in the face of the positive denial) that this contributed to the publication of the libel. If it had done so, it would have been a very serious aggravation.

Under the whole circumstances, we give sentence for the plaintiffs with $1,500 for damages, and costs.

LIMITED JURISDICTION.

1894. *June* 23. SHERIFF, J.

LIVERPOOL v. JOHNSON AND MCPHERSON.

Opposition action—Undivided interest in immovable property—Survey and agreement to divide—Necessity of transport.

Held that a division of undivided interests in immovable property can only be effected by transport.

McLean Ogle, for plaintiff.

A. B. Brown, for defendant Johnson.

SHERIFF, J.:—This is an opposition suit. The original defendant Johnson, having recovered judgment against the co-defendant McPherson, the marshal being thereunto duly authorised gave notice that he would sell the west half of lot No. 6, part of Pln. Uitvlugt. The plaintiff opposed as one of the heirs of Rose Carter under whose will John McPherson was appointed usufructuary of one-quarter of the said lot 6, and of no more. It appears that Rose Carter and William France lawfully acquired lot No 6 under the will of Catharine Tinne. One of the reasons of opposition is that there was never any division of the testatrix's property. From the evidence it appears that the services of a surveyor were obtained who surveyed the land and prepared a plan. France was the moving party and although there is a conflict of evidence I am satisfied that Rose Carter not only knew of the survey but acquiesced in the division thereby effected. But this may well have been an agreement between these persons, who by the way were brother and sister, for their mutual convenience. It certainly amounts to no more in law. It requires something more than a surveyor's tape line to divide immovable property. *In re Belmonte's petition,* 1892. L. R., B. G. 42 was cited by the plaintiff. It appears to me to be in point. It comes to this, that a division can only be effected by transport. The plaintiff has been successful and there will be the usual decree. I am not satisfied that notice of opposition was properly addressed and I cannot see my way to reject the oath of the defendant that he never received any such notice. There will therefore be no order as to costs.

LIMITED JURISDICTION.

1894. *September* 15. ATKINSON, J.

COMACHO v. ADMINISTRATOR GENERAL

Representing Estate Comacho.

Opposition action—Opposition declared deserted and abandoned—Application by motion to set aside order dismissed on objection—Further application—Costs of first application not taxed and unpaid—Rules of Court, Order XXXIV. r. 12, and Order XXXVIII. r. 11—Supreme Court Ordinance, 1893—Definition of 'action,'

Held.—That non-payment of costs in a prior motion is a bar to any subsequent motion in respect of the same matter, and is not ground merely for a stay of proceedings.

All the necessary facts appear from the judgment. *W. Nicoll, Acting Solicitor General,* for applicant (plaintiff). *R. J. P. Hendricks,* for respondent.

ATKINSON, (C.J. Actg.):—The Administrator General as representing the estate of M. F. Comacho, an insolvent, advertised certain property for sale. An opposition was entered by M. F. Comacho, and on June 2nd, 1894, on an *ex parte* motion by the Administrator General the opposition was, by an order of Sheriff J., declared deserted and abandoned, with costs. A motion dated June 8th, 1894, returnable on the 16th, was served on the Administrator General and came on for hearing in due course. The motion paper was entitled "British Guiana, in the Supreme Court. Proceedings under the Administrator General's Ordinance, 1887." A preliminary objection was taken by the Administrator General that the motion was wrongly entitled, as the Administrator General's Ordinance, 1887, did not apply to proceedings in insolvency. Sheriff J. upheld the objection and dismissed the motion with costs.

Another motion dated June 28th, 1894, returnable on July 14th was then served on the Administrator General and came on for hearing before me. The Administrator General's counsel stated that he had certain preliminary objections. The mover's counsel said no ground had been laid in the opposer's

affidavit for such objections. As the opposer need not necessarily file an affidavit at all, it is obvious that he is not bound to lay any such ground; and no authority was cited to show that an opposer was under any obligation to give the mover notice of preliminary objections.

The first objection was that the matter was *res judicata,* the mover having asked for precisely the same relief in the previous motion. As that motion was not dismissed upon the merits but upon a technical objection, there is no *res judicata.* Then it is objected that the costs of the previous motion and of the original order had not been paid before service of the new motion. As to the latter, I do not see how a party can be asked to pay the costs of an order before he can move to set that order aside. The case as to the costs of the motion which was dismissed was different.

The mover's counsel contended that this objection could not be taken at the hearing but should have been made by motion, relying upon a *dictum* of COTTON, L.J. "The matter ought not to be disposed of upon an objection taken by counsel at the hearing that costs have not been paid; there ought to be an application for the purpose." (*In re Wickham* 35 Ch. D. at p. 279). But that was at the hearing of an action. Here it is at the hearing of a motion. The action had been put on the paper for trial and the Court might well say, you should have moved the Court to stay proceedings and to take the action off the paper, and not have waited until the witnesses were summoned and everything prepared for the hearing of the case. A motion is an application to the Court on short notice, a sort of summary proceeding based upon affidavits, and it would be cumbrous, expensive, and unnecessary to make an application to the Court, which would have to be by motion, to stay a motion, when the same end could be obtained by objecting when the motion came on for hearing that it could not be heard as the costs of the previous proceeding had not been paid.

It was argued for the mover that under the English Rules non-payment of the costs of a prior proceeding would only be ground for staying proceedings and it was contended on the strength of Order XXXVIII. r. 11 of the Supreme Court Rules 1893 (*a*) that the case was the same here. But the English rules do not contain such a provision as is found in our Order XXXIV. r. 12 (*b*). "Whenever costs are ordered to be paid such costs shall be paid before any fresh proceedings

(*a*) Cf. Rules of Court, 1900. Order XLVI. r. 13. Ed.
(*b*) Cf. Rules of Court, 1900. Order XXXV. r. 13. Ed.

are taken in respect of the same cause of action." That is an imperative direction. If proceedings are taken before such payment is made, the proceedings are bad, and it was so held in the cases of *Crosby and Forbes* v. *Exors. of Dove* (2nd August, 1893) and *McClintock* v. *Exors. of King* (*supra* p. 25) in which the instances were absolved on the ground of non-payment of the costs of prior proceedings. Those were cases in the limited jurisdiction of the Supreme Court. This is no new departure. In *Persepot* v. *Blyden* (12th December, 1876) SNAGG, C. J. absolved the instance, the action having been brought after withdrawal of a previous suit before payment of taxed costs in that case; and I think it probable that other similar local decisions could be found. The English practice has been the same; that is shown by the very case cited by the mover's counsel, *Morton* v. *Palmer* (9 Q.B.D. 89). That was a motion for a stay of proceedings in the action until payment by the plaintiff of the costs of certain interlocutory proceedings which he was ordered by the Court of Appeal to pay. The Court (MATTHEW and CAVE, JJ.) refused under the circumstances there to stay the proceedings. In his judgment CAVE, J. referred to *Bellchamber* v. *Giani* (3 Madd, 550) and *Oldfield* v. *Cobbett* (12 Beav. 91) equity cases, and *Hoare* v. *Dickson* (7. C.B. 164) and *Cobbett* v. *Warner* (L.R. 2. Q.B. 108), common law cases, as showing what had been the practice prior to the passing of the Judicature Acts, and went on to say "the principle of the practice in each court was the same, viz, that if a litigant had brought an action or made a motion against another and had failed, he should not bring a fresh action or renew his motion until he had paid the costs of the previous proceeding. This practice is however no justification for our making such an order in the present case. The plaintiff here is not seeking to try over again something in which he has failed before."

But it was argued for the mover here that Order XXXIV. r. 12 applies to actions only and not to motions. The rule says that "subject to particular rules, any judgment of non-suit, or by default, unless the Court otherwise directs, shall have the effect of a judgment upon the merits for the defendant;" but in case of surprise or accident, such judgment may be set aside. Then follows the provision as to costs already quoted.

The opposer's counsel replied that a motion was within the meaning of the word "action" as defined by the Supreme Court Ordinance, 1893 (*a*); "Action means a civil proceeding commenced by filing a claim or in such other manner as may

(*a*) See now Ordinance 10 of 1915, sec. 2. Ed

be prescribed by the Rules…….” A motion, he said, was a civil proceeding commenced in the manner prescribed by the rules. But in the definition of a “plaintiff” in the ordinance an action is expressly distinguished as something other than a motion, a plaintiff being a person seeking relief “by any form of proceeding whether the same is taken by action, petition, motion, summons or otherwise.” If “action” included “motion” it would seem that there would have been no need to name the latter. A defendant is defined to include “every person served with any citation or other process or served with notice of or entitled to appear in any proceeding.” The mover and opposer are therefore plaintiff and defendant in this proceeding taken by way of motion. Then a “cause” is defined as including “any action or other original proceeding between a plaintiff and defendant, and any criminal proceeding at the suit of the Crown,” whilst a matter “includes every proceeding in the Court not in a cause.” It is not material to enquire whether this motion is a cause, which includes an action, or a matter. In either cafe the mover and opposer stand to each other in the relation of plaintiff and defendant. Whether it is a “cause” or a “matter,” the proceeding is founded upon “a cause of action.” Order XXII., r. 1 (*a*), expressly provides that “an action or matter shall not become abated by reason of the marriage……of any of the parties if the cause of action survive or continue.” In dealing with the cause of action in any cause or matter the Court arrives at a decision one way or other and pronounces what is in its essence termed—a judgment. The word “non-suit” in Order XXXIV., r. 12, is no doubt more technically applicable to an action, but the words “by default” are as applicable to a petition or motion—they or any other cause or matter may go by default. I am, therefore, inclined to think that the operation of rule 12 is not to be restricted to formal actions only. Even if motions were not within the term of rule 12, they are certainly within the reason of the rule. In *Dias* v. *Exors. of Rodriques*, (p. 53 above) the Full Court applied Order XVI., r. 1, to a case which was not within its terms but was within its reason, and I think the same principle should be adopted in the present case with respect to rule 12.

It was said that immediately on the dismissal of the previous motion the Administrator General advertised the sale of the property; that it was, consequently, necessary to move at once, and that the mover could not have paid the costs before

(*a*) Cf. Rules of Court, 1900. O. XV, r. 1. Ed.

moving as they had not been taxed. But the mover could have applied to the Court to stay the sale until the costs were taxed and the new motion determined; or he could have brought into Court a sufficient sum to cover the costs when they were taxed.

I am of opinion for the foregoing reasons that the mover was not entitled to move again until he had paid the cost of the previous motion. I am strengthened in this view by the English case of *Oldfield* v. *Cobbett* (*ubi sup.*), in which it was held that a motion having been refused with costs, the party could not afterwards renew the motion till those costs had been paid; and of *Bellchamber* v. *Giani* (*ubi sup.*) in which the Vice-Chancellor refused to hear a motion, the costs of a previous motion not having been paid.

The motion is dismissed with costs.

LIMITED JURISDICTION.

1894. *September* 21. ATKINSON, J.

SANTOS v. Exors. OF HENRIQUES

Practice—Application to expunge claim—Rules of Court, 1893. Order XLI r. 2—Entry of appearance.

Held.—That entry of appearance is not a fresh step within the meaning of the Rules of Court which will bar an application to set aside any proceeding.

Application by defendants to expunge the plaintiff's claim from the Record Book of suits and to set aside all proceedings founded upon such claim by reason of non-compliance with the Rules of Court, 1893 and for nullity of citation.

D. M. Hutson, for applicants.

A. Kingdon, Q.C., Acting Attorney General, for respondent.

All other necessary facts and the argument appear from the judgment.

ATKINSON, (C.J. Actg.):—In this case Santos filed a claim against the executors and duly intimated that he wished to proceed by summary citation.

The executors now move to expunge the claim on the grounds, briefly stated, that the executor first named on the rubric is not a substituted executor of Henriques as stated; that there are three joint executors to the will, and it is not competent for the plaintiff to proceed against two only; and that the place of abode of the plaintiff's attorney is not stated in the claim as required by the Rules of Court, 1893.

At the hearing, Santos' counsel referred to Order XLI, r. 2. which says that "No application to set aside any proceedings for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity", and argued that as the executors had entered an appearance in the action the rule applied, and they were not entitled to rely upon the alleged irregularities.

Counsel for the executors replied that the executors could not take any step in the action until they had entered an appearance and that consequently the entry of appearance was not a step within the rule.

I think the latter is the sounder argument. A defendant takes no step at all in the action until he enters an appearance. That is his original step. Each subsequent step made by him is a "fresh step," and I am of opinion that these subsequent steps are the fresh steps referred to in the rule. The words "any fresh step" imply that some prior step has been taken.

It was further said that the application to expunge was not made within reasonable time as required by the rule. The citations were returnable on the 20th and 21st of August. The motion to expunge is dated the 31st of August. Parties must have some time to consult their legal advisers, and their advisers must have some time to consider the facts and the law, and to prepare the necessary documents. I cannot say that in this case there has been any unreasonable delay.

Something was said at the hearing as to the return to the colony of certain parties and of an application proposed to be made in consequence, but I have to deal with the application now before me, as it stands.

Beyond the objection as to the alleged fresh step no cause was shown on behalf of Santos, and as the proceedings as they stand are undoubtedly irregular, I uphold the defendants' application and direct the Registrar to expunge the claim in question from his records, together with all entries having relation thereto, and I grant the applicant the costs of this motion.

LIMITED JURISDICTION.

1894. *October* 20. KIRKE, J.

HOUSTON v. APPLEWHITE.

Judgment-summons—The Debtors Ordinance, 1884—Jurisdiction—Supreme Court Ordinance, 1893.

Held that proceedings by judgment summons under the Debtors Ordinance, 1884, are not proceedings in insolvency, but come under the general civil jurisdiction of the Court.

J. B. Woolford, solicitor, for plaintiff.

E. A. V. Abraham, solicitor, for defendant.

KIRKE, J. (Actg):—When this case was called Mr. Abraham on behalf of the defendant raised two preliminary objections, firstly as to the jurisdiction of the court, and secondly as to the insufficiency of the title in the plaintiff's claim.

This case is known as a judgment summons brought under Ordinance 21, 1884 (a). By that ordinance a single judge is given jurisdiction over all matters brought under section 4, of which the case before me is one.

Part III. of the new Supreme Court Ordinance, No. 8 of 1893, confirms ail the powers exercised by any judge in pursuance of any statute in force at the passing of that ordinance, so that any judge of the Supreme Court now sitting apart can, under his general civil jurisdiction as a judge of the Supreme Court, deal with matters brought under section 4 of Ordinance 21 of 1884.

With regard to the question of title, it would be a mis-statement to put "In Insolvency," as defining the court in which the judgment summons is brought. The defendant is not an insolvent nor are the proceedings in any way proceedings in insolvency. Nor do I think that in a judgment summons it is necessary in any way to define the jurisdiction of the court. It comes under the general civil jurisdiction of the judge. This view of mine is borne out by Part III. of the Supreme Court Ordinance where the several jurisdictions of the court are defined:—

(1.) General jurisdiction.

(2.) Limited civil jurisdiction.

(3.) Appellate jurisdiction.

(4.) Admiralty jurisdiction.

(*a*) See now Ordinance 9 of 1884 in 1905 Edition of the Laws. Ed.

(5.) Miscellaneous jurisdiction,—such as interdicts, temporary remedies and reliefs, mandaments, etc.

There can be no doubt that the present case comes under the general civil jurisdiction of the court and need not be defined in any way.

It was argued that the rules regulating these summonses, which are published as rules 219-223 (*a*) at the end of the Insolvency Ordinance, would bring them under that ordinance, but these rules are headed "Applications under the Debtors Ordinance, 1884" and are evidently included in these rules for convenience sake. Similarly the forms Nos. 126-7 which are to be used with such variations and additions as the circumstances may require are placed where they are for the same reason.

The objections are disallowed and the case must proceed.

(*a*) See now Rules 343-358, Insolvency Rules, 1901. Ed.

LIMITED JURISDICTION.

1894. *Oct* 24. KIRKE, J.

FARNUM v. EXORS. OF HENRIQUES and FARNUM.

Opposition action—Immovable property—Movables—Fixtures— Rules of Court, 1893, O. VII. r, 2.—Default of appearance.

Held that a mirror fitted into a window to block up the window space and retained in position with screws, but which is movable with but slight damage to the walls, such damage being remediable at small cost, is not a fixture.

All the necessary facts are fully set out in the judgment.

L. E. Hawtayne, for plaintiff.

The mirrors had been affixed for a permanent purpose, to block up the windows, and thereby became a part of the house.

W. S. Cameron, solicitor for the first defendants.

E. A. V. Abraham, solicitor for co-defendant.

KIRKE, J. (Acting):—This is an opposition suit by Ellen Eliza Gertrude Farnum, widow, against the sale by the Provost Marshal of certain mirrors, the property of the co-defendant, and seized in execution by the defendants.

The mirrors were the property of Mrs. Julia H. Farnum and were placed in her house on lot 216-7, Camp Street. This lot in Camp Street, with the buildings and erections thereon, was sold and purchased by the plaintiff in January, 1894. Mrs. Julia Farnum had previously sold by auction all her furniture and effects; but the three mirrors were left in the house. These mirrors were levied on at the instance of the executors of Henriques by the Provost Marshal, conveyed to his office, and advertised in the usual way for sale.

To that sale opposition has been entered. All of what may be called the technical part of an opposition suit is admitted on both sides; the facts as to the seizure and advertisement of the mirrors are also admitted, so the question for me to decide is reduced to one. Were these mirrors fixtures? When the buildings and erections on lot 216-7 were purchased by the plaintiff, were these mirrors part and parcel of those buildings, or did they remain amongst the personal effects and chattels of the co-defendant, Mrs. Julia Farnum?

This is a very difficult case to decide, as no similar case has ever, to my knowledge, been decided in this colony. I have

searched amongst the Roman and Dutch authorities but they do not throw much light upon the subject; so I am driven for guidance to English law. Fixtures are defined by the latest authority (*Amos and Ferard* on Fixtures) as "articles which on account of their annexation to the freehold have ceased to be chattels." Here an initial difficulty presents itself in applying English law, as there is no such thing as a freehold in the colony. Again it is necessary, in order to constitute a fixture, that the article in question should be let into or united to the land or to some substance previously connected with the land. It is not enough that it has been laid upon the land or brought in contact with it. Now do these mirrors answer to this definition?

Mrs. Julia Farnum had three back windows in her drawing room which looked into the pantry; wishing to block them up she tried various methods which did not succeed, and finally she ordered three mirrors from England which were placed in front of the windows. To place the mirrors flush with the wall part of the moulding on each side of the windows was cut away leaving a ledge on each side on which the bottom of the mirrors rested, and they were secured at the top by screws fastened into the wood work. Without these screws the mirrors would have fallen down with the least vibration. They could easily be removed, but on removal certain injuries to the mouldings would be apparent and unsightly; this damage, however, could be remedied at a trifling cost and the windows left as aforetime, before the mirrors arrived.

An English house is real property; it is a fixture built in the soil and annexed to it. What degree of annexation must these mirrors have had in an English house to make them fixtures. *Avery* v. *Cheslyn* (3 Ad. & Ellis 75) is a case somewhat on all fours with this one. In that case the judge instructed the jury that if the cornice which had been pulled down was a mere matter of ornament fixed during tenancy and capable of removal without doing substantial injury to the freehold, the defendant who pulled it down would not be liable, as it was not a fixture. *Woodfall* (Landlord and Tenant, 12th Ed. p. 602), says: "Articles put up for ornament and convenience" as in this case "during the term have been long allowed to be taken away by the tenant at the expiration of his lease. They are considered rather as articles of fixed furniture, or of utility and domestic convenience, than as part of the house."

Now in this case the mirrors were erected principally for ornamental purposes; they could be removed easily without

any substantial injury to the building and were so removed. But another difficulty presents itself in applying English law to things in this colony. In England houses are fixtures, part of the soil, realty; whereas here the majority of our houses are movables, mere chattels, and have been so considered frequently in the decisions of this court. There is nothing to show that Mrs. Farnum's house was not, as others, a mere chattel that can be raised by jack-screws and removed bodily across the road; so how can anything be a fixture in a house which is not itself a fixture but is a mere movable?

It was argued that when lot 216-7 was sold with all the buildings and erections thereon, everything then being or lying on that lot of land was sold also, but that argument will not stand, as in that case any fowls which had wandered into the compound, the auctioneer's horse and wagon under the house, would have been sold with the lot. In *Beck* v. *Rebow* (1 P. Wms, 94) A.B. had covenanted to convey a house and all things affixed to the freehold thereof This was held not to include hangings and looking-glasses fixed to the walls with nails and screws and which were as wainscot, there being no wainscot underneath.

Suppose these mirrors had been put up by a tenant, he would, I think, have had the right to remove them at the end of his tenancy, replacing the windows as he found them or paying the landlord for any little damage their erection may have occasioned. I am of opinion that these mirrors placed as they were would not have been fixtures in an English house and could not have been sold with the house as part of it; *a fortiori* they were not fixtures in Mrs. Farnum's house, so I declare the opposition bad and ill-founded and I reject the plaintiffs claim with costs.

Mr. Cameron objected at the hearing to any counsel being heard for the co-defendant, as she was in default, not having filed any answer to the claim. The objection in my opinion was taken too late. By the rules it is provided that if any defendant in a suit makes default in filing an answer, the plaintiff may enter the action in the cause list for an *ex parte* hearing, and the Court may give judgment for the plaintiff against that defendant. The plaintiff in this case has failed to take the advantage which the rules afforded her, and it is too late at the hearing for any one to raise this objection.

LIMITED JURISDICTION.

1894. *Oct.* 30. KIRKE, J.

DE PAIVA v. LEWIS.

Judgment summons—The Debtors Ordinance, 1884—Service—The Insolvency Rules—Amendment of summons—Supreme Court Ordinance, 1893.

Held that the Court has power to grant an amendment of a summons; *quaere* whether such a summons under the Debtors Ordinance is governed by the Rules of Court.

J. B. Woolford, solicitor, for the plaintiff.

A. E. Messer, solicitor, for the defendant.

KIRKE, J. (Actg.):—This is a motion on behalf of the defendant to set aside the plaintiff's judgment summons. This summons which is brought under Ordinance 21 of 1884 (a) is governed by rules 219-20 of the Insolvency Ordinance Rules, which specially refer to applications under the Debtors Ordinance. By rule 220 (*b*) it is ordered that "A judgment summons shall be served in like manner as is by these rules prescribed for the service of a creditor's petition." Turning to the rule as to creditors' petitions we find under Rule 69 (c) "Every solicitor suing out or serving any petition, notice, summons ……. shall endorse thereon his name or firm and place of business." In the summons before me, which is the subject of this motion, there is no endorsation at all, so the summons is clearly bad and should be dismissed. But plaintiff's counsel applies to me now for permission to amend his summons by adding the necessary endorsation. The defendant objects to this being done and says that it is not within the power of the court to allow the amendment. In support of this statement he quotes the cases of the *Colonial Company* v. *Awood* (May 3rd, 1893) and *Melson* v. *Barr* (February 10th, 1894). The case of the *Colonial Company* v. *Awood* was brought under the old Procedure Ordinance 15 of 1855 when the rules of practice were much stricter than they are at present, so I do not think that the case will apply to the present motion. In *Melson* v. *Barr,* SHERIFF J., gave

(*a*) See now Ordinance 9 of 1884, in 1905 Edition of the Laws. Ed,
(*b*) See now Rule 344 (1.), Insolvency Rules, 1901. Ed,
(*c*) See now Rule 68, Insolvency Rule, 1901. Ed.

the plaintiff liberty to file an amended claim within four days together with a new appointment of domicile. To this amended claim the defendant objected that the place of abode of the plaintiff was not stated on the claim as required by the Rules of Court, 1893, and ATKINSON J., declared the claim to be invalid but granted leave to amend. Defendant's counsel also argued that a summons under the Debtors Ordinance is not governed by the Rules of Court, 1893. That may be, but certainly the Court sitting to hear judgment debtors' summonses is sitting under Ordinance 8 of 1893, (*a*) and by section 36 of that ordinance the Court has power given it to grant, and shall grant, all such remedies and reliefs whatsoever as any of the parties may appear to be entitled to.

I am therefore of opinion that this summons is amendable, and I give the plaintiff leave to amend by endorsing the summons as required by the rules within four days. The new endorsation must be intimated to the defendant within that period and the plaintiff before proceeding must pay to the defendant the costs of this motion.

(a) See now Section 33, Ordinance 10, 1915. Ed.

LIMITED JURISDICTION.

1894. *November* 22. SHERIFF, J.

HASTINGS v. COMACHO AND HASTINGS.

Opposition to execution sale —Practice—Pleading—Rules of Court 1893, Order XLI. r. 2.—Entry of appearance—Waiver of irregularity.

Held that entry of appearance is a fresh step which will bar an application to set aside any proceeding for irregularity.

Santos v. *Executors of Henriques* (p. 137 *supra*) not followed.

Application was made *ex parte* to expunge the plaintiff's claim on the grounds that she is a married woman and as such cannot sue (1) except by a guardian *ad litem,* and (2) without her husband and without a guardian except by leave of the Court, and further because it was not competent for her alone to sign or execute a power *ad lites* in favour of her solicitor.

Notice of the application ordered to be served on plaintiff, to allow her to show cause against such application.

D. M. Hutson for mover, C. A. Comacho the original defendant.

L. E. Hawtayne, for plaintiff, showed cause.

Plaintiff is a sole trader carrying on business in Georgetown. Her property had been levied on to pay a debt of her husband, and was an attempt by him to get her property.

Even admitting the grounds of objection taken by defendant, he had taken a fresh step within the meaning of O. XLI. r. 2. after knowledge of the irregularity, and could not now be heard on them.

Hutson in reply.

SHERIFF J:—The original defendant, Comacho, seeks an order to expunge from the record book of suits the plaintiff's claim, for various reasons which it is not necessary to refer to more particularly. The plaintiff showed cause and argued that, assuming the objections to be well taken, yet as the original defendant had appeared he had by so doing taken a fresh step within the meaning of Order XLI. r. 2. (Rules of Court 1893) (*a*) after knowledge of the irregularity, and could not now be heard.

(a) See now Rules of Court, 1900, O. LI. r. 2. Ed.

The case *Mulkern* v. *Doerks* (51 L. T. N. S. 429) was cited as a direct authority in point. The plaintiff on the other hand said that his appearance was not a fresh step and I was referred to the case of *J. P. Santos* v. *Exors. of Henriques* (21st September 1894) determined by ATKINSON, J. I have carefully considered the decision in that case and it is important to observe that it may safely be assumed that, as the learned judge makes no reference to any case, no authority bearing on the point was referred to during the argument. In *Mulkern* v. *Doerks,* HAWKINS, J., after setting out O. LXX. r. 2. which corresponds with our O. XLI. r. 2. remarks "This rule though not in the Rules of 1875 is the same as Rule 135 of H. T. 1853, and in Archbold's Practice (13th Ed.) p. 1194 it is stated that a defendant takes a fresh step within the meaning of that rule by entering an appearance. How can the defendant make this application now?" Huddleston, B. also took the same view. In the same volume there is reported a case in the Court of Appeal, *Wilmott* v. *Freehold House Property Company,* 51 L. T. N. S., 552, where the defendant by his defence raised the objection that the writ of summons was issued without leave of the Court. At the end of this case there is a foot-note, "compare *Mulkern* v. *Doerks.*" There is also another case, *in re Pilcher, Pilcher* v. *Hinds,* (11 Ch. D. 905). In the Annual Practice 1894 at p. 441 there is a note to the effect that the two judges who decided *Mulkern* v. *Doerks* also thought *Pilcher* v. *Hinds* was abrogated. The case was certainly cited, but I can find no expression of opinion going to that length, although if the decision in *Mulkern* v. *Doerks* is good law the objection sustained in that case would have been equally applicable to *Pilcher* v. *Hinds* KEKEWICH J., in *re Derbon* 36 W. R. 667 recognised and followed *Mulkern* v. *Doerks* remarking "On any irregularity a party should come at once to have it cured." See also *Hewitson and anr.* v. *Fabre* (21. Q. B. D. at p. 9,) where WILLS, J. remarked: "The defendant was a foreigner residing in a foreign country and the writ was served upon him abroad. Such a service is no service at all, for it is forbidden by the rules, and unless some act amounting to an estoppel has been done by the defendant the service is wrong and wholly void. I do not say what might have happened if the defendant had appeared to the writ; he might in such a case have been estopped, as by so doing he would have induced the plaintiff to go on with the action……."

See also *The Western National Bank of the City of New York* v. *Perez Triana & Co.* (1891, 1 Q. B. 304)

where, so far as it is pertinent to the point under consideration, it was held that the service of a writ of summons on the defendant (a partner) as an individual would have been good if he had been named in the writ, and that he had by appearing waived the irregularity.

The conclusion at which I have arrived from a perusal of these authorities is that if a defendant intends to attack the claim, or the citation, or the service thereof he must do so before entering an appearance. I have not overlooked the argument that this is an opposition suit and that the procedure is said to be regulated by ss. 212 and 214 of the Manner of Proceeding Ordinance 1855. The former section forbids the amendment of or departure from the grounds or reasons of opposition. It does not appear that the grounds or reasons of opposition have been amended; it is the claim which has been amended. Moreover O. XLI. r. 3. provides that where application is made to set aside any proceeding for irregularity the several objections intended to be insisted upon shall be stated in the motion paper. Nothing is said in the motion paper as to the impropriety of any amendment, the objections are levelled at the original claim. No notice is taken of the amended claim. It was argued that the procedure in opposition suits is regulated not by the rules but by the ordinance referred to. I am not so sure about that; see the Supreme Court Ordinance 1893. s. 58 (2); but even assuming that the rules do not apply and that it was open to the mover to adopt he course he had done, it would be necessary for him in his notion paper to disclose the grounds on which he objected to the amendment. As I have said before, he raises no objection to the amendment, nor does he in any way refer thereto. I am dealing solely with the motion before me. Whether the plaintiff can on the pleadings as they stand prosecute her suit to a successful issue is a matter on which I express no opinion. The order obtained must be discharged but without costs.

LIMITED JURISDICTION.

1894. *Dec.* 6 SHERIFF, J.

CORREIRA AND DOS SANTOS v. D'AGUIAR AND BAPTISTA.

Purchase and sale—Action for moneys paid—Sale by Administrator General—Conditions of sale—Records—Parol evidence to vary conditions—Estoppel.

Held that D'A., having signed conditions of sale as purchaser, C. and S. signing the conditions as sureties for him, is estopped from pleading as against C and S. that he is not the purchaser and that the sureties did not pay moneys for him as their principal.

P. Dargan, for the plaintiffs.

W. E. Lewis, for the defendants.

All necessary facts and arguments are set out in the judgment.

SHERIFF, J.:—The plaintiffs sue for money paid under certain conditions of sale of certain property, sold by the Administrator General, as representing the estate of John Baptista, an insolvent, to the defendant, and which said conditions of sale were signed by the defendant D'Aguiar as purchaser and by the plaintiffs as sureties.

The defendant D'Aguiar in his answer denies such payments as aforesaid, and while admitting that he signed the conditions of sale as purchaser and that the plaintiffs signed as sureties, he avers that the plaintiffs well knew when they signed that they did so as sureties of one Vincent Baptista on whose behalf, as the plaintiffs well knew, defendant had purchased the said property. The same defendant further alleges that the said Vincent Baptista, being desirous of purchasing the said property and believing that he could not purchase the same himself, requested him, the defendant, to sign the conditions of sale as the purchaser thereof, and the said Vincent Baptista requested the plaintiff's to become sureties on his behalf, which they did, and signed the conditions accordingly. The plaintiffs replied and in effect alleged that the defendants were estopped from raising the defence set out in their answer. After hearing counsel on the question of law so raised, I

reserved decision, and I thought it expedient that the pleadings should be served on Vincent Baptista and he is now a defendant. He has filed an answer and he alleges that the statements set up in the answer of D'Aguiar are true. Why, as he does not offer to pay the plaintiffs what he alleges they paid on his behalf, he should have been joined as a defendant I am at a loss to understand. The plaintiffs are not suing him. All that he says in his answer only amounts to what might be evidence if the Court allowed parol evidence to be given. This of course leaves the question of estoppel untouched. Both parties were afforded an opportunity of supplementing the arguments they had previously adduced on the first hearing; on neither occasion was any authority cited on behalf of D'Aguiar.

I may at once say that I attach more importance to legal decisions than to the naked assertions of counsel however learned he may be or however vehemently he may express himself. "Estoppe," says Lord Coke (Co. Litt. 352 a) "cometh of the French word estoupe, from whence the English word stopped, and it is called an estoppel or conclusion because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." I do not say that this definition is altogether satisfactory but it is sufficient for the purposes of this decision. It must be remembered that so far as applicable to the colony, and save as modified or altered by local enactment, the common law rules of evidence are in force in British Guiana. According to English law estoppel is of three kinds:—

(a) by matter of record,
(b) by deed, and
(c) by matter *in pais.*

With regard to the second description there is a distinction between the English and the local law. In England great importance is attached to a document to which a seal is affixed; it is otherwise under the Roman Dutch system of jurisprudence. In other words, a sealed document has no greater efficiency here than a mere written agreement. The conditions of sale referred to in the pleadings have been laid over and are before me. It is readily admitted by the plaintiffs that these conditions are not under seal, but it was contended that inasmuch as they were signed before an assistant sworn clerk as required by law, there was such a solemnity about the execution of the document as would place it on quite as high a level as a deed in England with the like attendant results. Without expressing any opinion

as to the correctness or otherwise of this view of the case, I would place my decision on a yet higher ground, that is to say, that these conditions of sale are a matter of record or perhaps to be strictly accurate a matter of quasi record. The conditions of sale in this case and in others of the like nature are to be found bound together in a volume. In every case there are six identical printed conditions of sale. There is in each case a sheet with printed headings and ruled off, thus—Property—Purchasers—Securities—Amount. I have satisfied myself that these conditions are drawn up in pursuance of and give effect to the ordinances which regulate such sales. That being so, in my opinion this volume is a record of a public department and can only be successfully impeached on the ground of fraud. It is a well-known maxim that fraud vitiates everything. In *Horton* v. *Westminister Improvement Commissioners* (7 Ex. Rep, 780), Martin B. says the meaning of estoppel is this, that parties agree for the purpose of a particular transaction to state certain facts as true and that so far as regards that transaction there shall be no question about them. But the whole matter is opened when the statement is made for the purpose of concealing an illegal contract, for persons cannot be allowed to escape from the law by making a false statement. See also *Hill* v. *The Manchester and Salford Water Works* (2 B. and Ad. 544). The question of estoppel which is raised by the pleadings must be decided by the pleadings only, and that being so, I have to free my mind from statements made at the bar which may or may not be true and which are beside the question raised. Looking at the pleadings, no change of fraud is raised. The defendant D'Aguiar merely says that Vincent Baptista, being desirous of purchasing the said property and believing that he could not purchase the same himself, requested him to sign the conditions of sale, as already described. He gives no reason for Vincent Baptista's belief, which may or may not have been erroneous. Not knowing what was in his mind I cannot assume that he had any fraudulent intent or that he was evading or seeking to evade the provisions of any statute. Vincent Baptista's own answer is a mere echo of D'Aguiar's and carries the matter no further. In *Humble* v. *Hunter* (12. Q. B. Rep. 310.) the court of Queen's Bench *in assumpsit* on a charter party executed not by plaintiff but by a third person who in the contract described himself as "owner" of the ship, held that evidence was not admissible to show that such person contracted merely as

the plaintiff's agent. This was as between the parties. As between D'Aguiar and Baptista there is no question of estoppel any more than between the plaintiffs and Baptista. The principle of estoppel applies only to the persons who executed the conditions of sale as between themselves. D'Aguiar has in a formal manner declared himself to be the purchaser, and as the conditions of sale are of record, in my opinion it is not competent for him as against the plaintiffs to say that he is not the purchaser and that the plaintiffs did not pay moneys for and on his behalf as their principal. I may add that I have been unable to find any local case having any bearing on the question now raised, and in the absence of direct judicial authority to the contrary I am not going to break in upon a doctrine which commends itself as reasonable. I certainly will not lend any sanction to defences such as the one which is set up. It would in my opinion be fraught with danger, and open the door to fraud and in all probability to a multiplicity of suits. If D'Aguiar is a sufferer I have no sympathy with him, because on his own showing he lent his countenance and his name to a transaction which, even if not fraudulent, was at any rate fictitious and as such not free from suspicion.

I give sentence against D'Aguiar in terms of the claim, and I dismiss the suit as against Vincent Baptista, he bearing his own costs.

GENERAL JURISDICTION.

1894. *Dec.* 14. ATKINSON, C.J. (Actg.), SHERIFF and KIRKE, JJ.

ADMINISTRATOR GENERAL representing the Estate of DA COSTA v. HENRIQUES and OTHERS.

Special case—Rules of Court, 1893, O. XVII.—Security bond—Interpretation—Ordinance 13, 1863 (*An Ordinance to amend the law relating to personal arrest in civil actions*)*—Absence of principal from the colony.*

In February 1891 the Administrator General, representing the estate of J. S. Da Costa, commenced a suit against Pierre Jacques Willems and John Parry Farnum, then carrying on business in co-partnership under the name of Farnum and Company, for the recovery of $50,000 for damages; in May 1892 judgment was given against the said defendants for the sum of $23,350.

On May 6th, 1891, Willems being desirous of leaving the colony for a time, Henriques, the defendants' testator, entered into a security bond in the sum of $7,500, to abide the result of the above-mentioned action in so far as the defendant Willems was concerned, and to satisfy any sentence obtained in the said action against the said Willems to the extent of $7,500.

The Administrator General, as representing the estate of J. S. Da Costa, now claimed the said sum of $7,500.

A. Kingdon, Q.C., Solicitor General, for plaintiff.

D. M. Hutson, for defendants.

Curia, ATKINSON, C.J., (Acting), SHERIFF, J., and KIRKE, J. (Acting):—In this matter a special case was stated, in pursuance of Order XVII of the Rules of Court, 1893 (*a*), as follows:—

> "1. The defendants admit the making of the bond in the plaintiff's claim mentioned and their liability in respect thereof if upheld by the Court, but allege the same to have been given as security during the then contemplated absence from the Colony of Pierre Jacques Willems. referring to the said bond in support of such contention.

(a) See now Rules of Court 1900. O. XXX. Ed.

2. The plaintiff admits that after the bond had been duly signed the said Pierre Jacques Willems left the colony and subsequently returned thereto, but contends that the said bond is not expressed to be limited as alleged by the defendants, and that the same is an unconditional guarantee of the sentence which might be given and therein referred to for the sum claimed according to the terms of the said bond.
3. Both parties are desirous of having the construction of the said bond determined by the Court without pleadings, and agree to be bound by the decision of the Court; the defendants waive service of citation."

The Bond in question runs thus:—

"Be it known that on this day the sixth day of May Eighteen Hundred and Ninety-one before me Edward Adolphus Victor Abraham, Sworn Clerk and Notary Public of the Registrar's Office of British Guiana personally appeared Antonio Gomes Henriques, an inhabitant of the county of Demerara, who stated and declared that the Administrator General of British Guiana as representing the estate of Jose Simao Da Costa, an insolvent, had commenced a suit against Pierre Jacques Willems and John Parry Farnum as carrying on business in co-partnership under the firm of Farnum and Company for the recovery of the sum of fifty thousand dollars as damages in respect of the matters and things mentioned in the claim and demand filed in the said suit on the day of February, Eighteen Hundred and Ninety-one, and the appearer stated and declared that the said Pierre Jacques Willems was desirous of leaving the colony for a time and that in consequence thereof security had been demanded by the Administrator General in his capacity aforesaid from the said John Parry Farnum and Pierre Jacques Willems and that the said Pierre Jacques Willems had requested him the appearer and he had consented to enter into this bond of security on behalf of the said Pierre Jacques Willems, wherefore the appearer declared to renounce all pleas and exceptions whatsoever known in law or otherwise which if availed of or resorted to might in any way invalidate or lessen either wholly or in part the true intent and meaning force and effect of these presents and under such renunciation to become and constitute himself as surety, principal debtor for and on behalf of the said

> Pierre Jacques Willems in the sum of seven thousand live hundred dollars and no more to abide the result of the said suit so far as the said Pierre Jacques Willems is concerned and to satisfy any sentence obtained in the said suit against the said Pierre Jacques Willems to the extent of seven thousand five hundred dollars.
>
> "And for the due and faithful performance and fulfilment the conditions and stipulations hereinbefore mentioned the appearer declared to bind and oblige his person and property, his heirs, executors and administrators."

It was strenuously argued for the defendant that the operative words of this bond, although in terms they make the defendant absolutely liable to pay the amount $7,500, named in the bond, in the event of sentence, going against the defendants in the suit of the *Administrator General* (representing da Costa) v. *P. J. Willems and J. P. Farnum* (trading as Farnum and Co.), were controlled by the words in the recital "that the said Pierre Jacques Willems was desirous of leaving the colony for a time and that, in consequence thereof, security had been demanded by the Administrator General," and that the operative words of the bond must be read as if the bond ran that it was only to take effect during the absence of Willems from the colony. In support of this contention the defendants' counsel urged that the plaintiff could not have demanded security from the defendant at all unless the defendant was leaving the colony; that in doing this the plaintiff must have acted in pursuance of Ordinance 13 of 1863; that consequently the bond must be construed as if it had been entered into under that ordinance; that the security given in terms of that ordinance was a security for the return of the debtor to the colony or for payment of the amount stipulated, if sentence was given during his absence; and that, on his return, the security bond lapsed and had no further force and effect.

The fallacy of this argument lies in the assumption that a security bond given in pursuance of Ordinance 13 of 1863 is intended to run only during the defendant's absence from the colony. Section 3 of the ordinance enacts that, if any person in the colony or his representative, by affidavit, shows to the satisfaction of a Judge that he has a cause of action against any other person actually in the colony exceeding $96, and that there is probable cause for believing that such other person is about to leave the colony unless forthwith apprehended, it shall be lawful for the Judge to grant an order for suing

out a warrant of arrest against such other person and to direct that such other person shall be at liberty to give security for such sum as such judge shall think fit, not exceeding the amount of the cause of action, and a certain sum to cover costs, or to deposit such sum and costs.

There is nothing here, nor is there anything in the ordinance elsewhere which even suggests that the security so given is to run only during the time that the debtor is absent from the colony. And if we look at the form of the security bond annexed to the ordinance (sect. 10) it will at once be seen that such a bond could not be limited in its operation in the way suggested by the defendant's counsel.

The form succinctly stated runs thus—We……., do jointly and severally renounce from the exceptions and under such renunciation do jointly and severally undertake and promise that if C.D. shall be condemned in an action at the suit of ……. the said C.D. "shall, satisfy and pay the amount of capital and costs in which he shall be condemned" or render himself to the custody of the Provost Marshal, "or we will jointly and severally do it for him."

There is nothing here limiting the liability of the sureties to the defendant's absence from the colony or showing that on his return to the colony the bond would become, as was contended, a dead letter. On the return of the debtor to the colony, by the very terms of the bond, if he does not pay or render himself to the custody of the Provost Marshal the sureties are "to do it for him." Whether the "it" means to pay or to give up the debtor to the Marshal is immaterial as regards the argument. In either case the conditions of the bond are enforceable only after the return of the debtor. It is clear, therefore, that if a bond had been given under the Ordinance, after the debtor had been arrested, that bond would have been enforceable notwithstanding the return of the debtor to the colony.

It does not appear that the debtor was arrested under Ordinance 13 of 1863; and the bond given by the defendants' testator is certainly not a bond given as under that ordinance. In the bond sued on Henriques does much more than promise to pay in case the debtor fails to pay or to render himself. He constitutes himself not only surety but principal debtor for and on behalf of Pierre Jacques Willems to abide the result of the suit and to satisfy any sentence obtained in the said suit. This is an absolute undertaking to pay on the failure of Willems to do so and in our opinion would not be controlled by the provisions of Ordinance 13 of 1863, even

if those provisions went the length contended for by the defendants' counsel which they certainly do not.

Sentence having been given against the defendants P. J. Willems and J. P. Farnum in the suit brought against them by the Administrator General (representing Da Costa), there will be sentence for the plaintiff herein with costs.

LIMITED JURISDICTION

1894. *December* 18. SHERIFF, J.

DELPH v. FERDINAND and MATTHEWS.

Promissory note—Interest—Usurious interest—Ordinance 7, 1893 (*The Supreme Court Ordinance*) *s. 35—Allowance of time without surety's knowledge.*

SHERIFF J.:—This is one of a class of cases with which the Court is familiar. It is the old story, impecuniosity on one side, and rapacity on the other. Ferdinand wanted $100 badly, and he prevailed on his friend Matthews to be his surety and to join him in making the promissory note sued on. The plaintiff agreed to advance Ferdinand $100 for two months whereupon the promissory note in question was drawn up for $120, the $20 being the trifle which the plaintiff stipulated for as the consideration for the exercise of his benevolence in opening his purse strings. It almost goes without saying that the note was not met at maturity. The matter however was arranged, Ferdinand paying the plaintiff another $20 for another two months' respite. History repeats itself and so did this little transaction, until Ferdinand had actually paid $60, in what I may call "smart money." Matthews was privy to the first arrangement after the note fell due, but his recollection of what took place is very vague, and he pleads total ignorance of the subsequent arrangements by which Ferdinand obtained extension of time. His evidence is far from satisfactory, but as the onus of establishing that he was cognizant of these extensions of time and an assenting party thereto lies on the plaintiff, and as his evidence is still less satisfactory, I shall grant rejection of the claim against Matthews with costs. (See *Devonish* v. *Hewlings and Comacho,* 28th June, 1864.)

With regard to Ferdinand, the plaintiff's counsel argued that as he had admitted paying the sum of $20 three times in consideration of an extension of time, the original note remained due and payable. It was also argued that the case did not fall within section 35 of the Supreme Court Ordinance, 1893—even if I thought that the charges made were excessive, because the plaintiff was not seeking to enforce any such agreement but merely payment of the note. Ferdinand in one

breath admits that he paid for time and in another that the payments were on account of the note. I have no doubt that being in the grip of his remorseless creditor he paid these moneys for an extension of time, and that so far as these payments are concerned there is an end of the matter. I am unable to find the case *Johnson v. Aird* (I. C. C. 1884) referred to, but even if the newspaper report is correct that case does not apply, the facts being dissimilar. Ferdinand has paid $60 into court; this amount must be applied towards payment of the principal sum $100. This leaves a balance of $40 for principal and $20 for interest. This latter sum does fall within section 35 of the ordinance and is in my opinion excessive, and I reduce the sum to $4.

There will therefore be sentence against Ferdinand for $44, and costs; and I direct that the $44 be paid monthly in instalments of one dollar each, the first payment to be made on the 3rd day of January next ensuing.

LIMITED JURISDICTION.

1894. *Dec.* 22. KIRKE, J.

MANGOO v. ROBERTS.

Promissory note—Husband and wife—Marriage in community—Debts contracted by wife and liability of husband—Necessaries—Tacit approval—Roman Dutch and English law.

Where two persons are married in community of property and the wife borrows money and signs a promissory note for the amount, the husband cannot free himself from liability for the debt when by his action he gives tacit approval to the transaction.

M. R. Gonsalves, solicitor, for plaintiff.

W. W. Badley, solicitor, for defendant.

All necessary facts are set out in the judgment.

H. KIRKE, J. (Actg.):—This is an action upon a promissory note for $168.60, with interest of $1.88. The defence in substance amounts to this, (1) the defendant had no transactions with the plaintiff at all, and (2) the promissory note was obtained by fraud.

With regard to the second defence, the defendant's wife acknowledged that she had borrowed $30 and $15 at different times from the plaintiff, and she also acknowledged that she put her mark to a promissory note at Pln. Farm on October 2nd, 1893. The old woman cannot read or write and is rather deaf, but she was always accompanied by her daughter who is an educated woman and who, to judge by her appearance in the witness-box, is endowed with an unusual amount of sharpness and aplomb. Both the woman Roberts and her daughter swear that the former only signed the note believing it to be one for $45 and not for $168.60, but after hearing witnesses on both sides I am satisfied that the promissory note produced is a good note and that Mrs. Roberts was aware when she signed it that it was for $168.60.

With regard to the first defence, no doubt by Roman Dutch law a husband married to his wife in community of goods is liable for her debts contracted after marriage but there has been a tendency, and I think justly, of late years not to construe this absolutely, but to lean towards the English practice and

confine a husband's liability to debts contracted before in her capacity as wife, and to make her husband be held liable for necessaries supplied to the joint household ……..able expenditure for clothing, carriage hire, and other ……suitable to his household and position in society, also be held liable for any debts contracted by his wife……..these restrictions if he be cognizant of the matter and given it his tacit approval.

It has not been shewn for what purpose this debt of $168.60 was contracted, and if I were satisfied that this money had been borrowed by Mrs. Roberts entirely without her husband's knowledge and for purposes from which no possible benefit could accrue to him. I should have hesitated in making him liable for the amount. But Roberts himself acknowledges that he was aware that his wife was borrowing money from Mangoo, but he, like his consort, denies that the amount exceeded $45. He says "My wife told me about it, she told me she had borrowed money from him at two different times and that she gave him a paper for $45." Under these circumstances Roberts gave a tacit acquiescence to his wife's proceedings with Mangoo which extended over three years, the first note having been given in 1891, and he took no steps to relieve himself of any responsibility.

There will be sentence for the plaintiff with costs.

LIMITED JURISDICTION.

1894. *March* 6. ATKINSON, J.

MCCLINTOCK v. EXORS. OF KING.

Promissory note—Summary proceedings—Ordinary action—Costs on summary proceedings not paid.

Held that the summary proceedings are separate and distinct from the action, and that defendant is entitled to be paid his costs incidental to the summary proceedings before he is again sued.

R. J. P. Hendricks, for the plaintiff.
W. E. Lewis, for the defendant.

ATKINSON, J.:—The defendant objected that this suit had been previously brought as a summary matter in the Bail Court when the plaintiff was referred to his ordinary remedy and ordered to pay the costs, that he had not paid those costs, and that consequently the present proceedings were irregular and void (*Crosby and Forbes v. Exors. of Dove,* L. J., 2. 8. 1893). In that case Sheriff, J. absolved the instance because the costs of a prior action had not been paid before the action was instituted. There are, I believe, other decisions to the same effect. An English case (*Cobbett v. Warner,* 36 L. J. Q. B. 94.) was also cited.

The plaintiff's counsel said the point had already been disposed of in the Supreme Court and quoted *Pokhaye v. Da Silva* (30 June. 1883), as supporting this statement. In that case the plaintiff had issued a summary citation but was referred to his ordinary remedy. He brought his ordinary action but it was held to be prescribed and the court decided amongst other things that the ordinary action was not to be deemed a continuing proceeding with that originated by the summary citation, but that it was a separate and independent proceeding commencing, as actions usually commence, with the filing of the claim and demand.

How does that case dispose of the objection taken here, that in a prior proceeding between the same parties with respect to the same subject matter the costs had not been paid? The decision merely says that the two proceedings were separate and independent and leaves the position of the parties and the matter in dispute untouched. The decision if it has any bearing at all tells, as happens now and again in

our courts, against the party citing it. It establishes that a summary citation is one thing, that the ordinary action which may follow is another. Hence they are as much separate and independent proceedings as are two ordinary suits, one following upon the other, where the instance in the first has been absolved. That being so, the decision of Sheriff J. is as applicable to the one as to the other.

But for the case so cited on his behalf the plaintiff might have plausibly argued that the present suit was only a continuation of the summary proceedings and that therefore the costs in the summary matter were costs in the cause, payable only after the action itself had been heard and determined. Some such argument was indeed set up for the plaintiff, but the case cited for him shows that, as the summary and the ordinary proceedings are separate and independent, the costs must be so likewise.

That is in accordance not only with common sense but with the practice also. The costs in summary matters have always been payable, if demanded in the proper way, as soon as the decision was given, unless the judge directed as was done in Pokhaye's case that the costs in the summary proceedings should be costs in any action which the plaintiff might bring. Even in such a case they would be separately recoverable if no action were brought by the plaintiff within reasonable time.

I am of opinion that a defendant is just as much entitled to have the costs in a summary proceeding paid before he is again sued as he is the costs of an ordinary suit.

It was urged that the defendant could not set up this objection because he had not given notice of taxation until a few days ago, after the present suit had been instituted; but the plaintiff knew he had to pay the costs; and he ought to have applied to the court for an order giving him liberty to proceed anew if the defendant did not serve, notice of taxation within a certain number of days, as was done afterwards in the case of Crosby and Forbes abovementioned.

There will be an absolution with costs.

LIMITED JURISDICTION.

1894. *March* 14. ATKINSON, J.

ABDOOL ROHOMAN v. HAREE PERSAUD.

Wrongful seizure and conversion—House and shop goods—Sale and transport of house and land—Failure to oppose—Ejectment.

R. with the permission of S. erects a house on S.'s property. S. sells and transports the property with all buildings thereon to P. it being agreed that S. shall pay R. for his house out of the purchase money to be received from P. R. does not oppose the transport and S. fails to pay him as agreed. P., ejects R., from the house together with his goods and R. sues him for unlawfully taking possession of the house and for wrongful conversion of his goods therein.

Held that P. was in view of his transport entitled to possession, and that there was no evidence of wrongful conversion.

Quaere whether an action for damages for trespass would lie.

R. J. P. Hendricks, for plaintiff.

W. E. Lewis, for defendant.

ATKINSON, J.:—The plaintiff's claim alleges that he owned and was in possession of a house on lot 22, Albouystown; that he carried on business therein as a retail provision dealer having a stock worth $180; and that the defendant in August, 1893, unlawfully took possession of the said building and goods and converted them to his own use, whereby the plaintiff suffered in his business and lost profits he would have made. The plaintiff claims $500, being $220, the value of the building, $180 stock, and $100 profits lost.

In his answer the defendant denies all this and avers that he is possessed of the building by transport and that the plaintiff has no interest therein; that the alleged taking possession and conversion thereof was done under certain warrants executed by the proper officers; that it is not competent for the plaintiff to proceed as he has done; and that the amounts claimed are excessive.

It appears that one Sooraj Maraj was owner of four half lots in Albouystown, one being ½ lot 22; that he leased a part of this half lot to one Majahar Khan who built upon it the house in question; and that Sooraj sold the four half lots to the defendant. On these half lots were buildings belonging to various coolies as well as that of the plaintiff.

On the evidence it is clear to me that all the other houses were, with the consent of their owners, sold by Sooraj to the

defendant and that their value was included in the purchase money paid by the defendant to Sooraj for the half lots and buildings. The half lots were advertised by Sooraj to be transported by him to the defendant with all the buildings thereon. No opposition was entered and the transport was passed, all the coolies being present except the plaintiff. The arrangement was that on the passing of the transport, Sooraj was to pay the owners the agreed value of their houses out of the purchase-money paid to him by the defendant. He did not. The coolies, the plaintiff excepted, sued Sooraj and got judgment. As to this I was referred to the records of the court and it so appears.

For the defendant it was alleged that the plaintiff, being a party to the arrangement and having failed to get the money from Sooraj, was now trying to get it out of the defendant. The plaintiff denies this and alleges that there had been an understanding, not a definite bargain, between him and the defendant, that the defendant was to give $220 for the house, $100 down and the balance three months after transport. The defendant admits he had a talk about buying the house but says the price asked by the plaintiff was $200, and that this sum was to be paid by Sooraj out of the purchase-money in the same way as with the others.

The transport having been passed, the defendant subsequently demanded possession of the house, and finally took possession under cover of certain warrants to give possession against persons who were or had been occupying the place as the plaintiff's tenants.

As to the house, if all the plaintiff's statements were taken to be established it is difficult to see how he, not having opposed the transport, can now sue as for a conversion of the house by the defendant who when he became by transport owner of the legal title at once acquired a right to the possession. But on the view I take of the evidence it is unnecessary to consider this point. I am satisfied that the defendant's version is the true one not only from the evidence for the defence but from the conduct of the plaintiff himself. When Sooraj was about to go to India the plaintiff on his own admission claimed from him a certain sum of money. He swore before me that this sum was $20 only and denied more than once that he had told the acting police magistrate that Sooraj owed him $200. The plaintiff and Sooraj had a fight and both were fined on cross-charges in the magistrate's court. The minutes of the proceedings on the charge by the plaintiff against Sooraj are in evidence before me

and from them it appears that the plaintiff at that time swore that Sooraj owed him $200.

I have no doubt that the plaintiff was to have been paid like the other coolies out of the purchase money received by Sooraj from the defendant; and that consequently even if he could otherwise have gone behind the transport, he is not entitled to succeed in this claim as for a conversion of the house.

As to the stock, it seems that up to eight or ten days before the alleged conversion, the room had been occupied by a woman named Clark. As she went out the plaintiff at once placed shop goods in the room and took out a shop licence. The woman says she quitted the place in the second week in August. On August 16th the defendant obtained the warrants before mentioned. The plaintiff's goods were put out on the street by a bailiff, the defendant being present, and remained on the street for a day or two, and some of them would seem to have been stolen; but as to the bulk there is evidence that they were afterwards seen in a cart which the plaintiff's shopman was accompanying or following. It does not appear whether they actually went back to the plaintiff's shop, but in the absence of anything to the contrary the presumption is that the servant dealt honestly by his master.

On this state of facts it appears that the plaintiff being until the transport was passed the owner of the house remained in possession of the room or shop after it was passed up to the time of the execution of the warrant. Under these circumstances if the claim as to the goods had been differently framed, the defendant might have been liable in some damages as for trespass but the claim alleges a conversion of the goods by the defendant to his own use. The evidence does not support that allegation. I reject the claim with costs.

LIMITED JURISDICTION.

1894. *February* 10. SHERIFF, J.

ROBERTS v. CLEGHORN.

Promissory note—Interest—Usurious interest—Onus of proof.

The rate of interest which the Court will allow will depend upon the circumstances of each case.

E. R. Forshaw, for the plaintiff.

P. Dargan, for the defendant.

SHERIFF, J.:—This is a claim to recover on two promissory notes. The defendant obtained leave to defend on payment of the actual amount which she admitted she had received together with interest thereon at the rate of six per cent. It is not disputed that the remainder of the claim is made up of interest, and while I quite believe that the plaintiff did not charge the defendant "a higher rate of interest than he is accustomed to charge others" still that does not induce me to think that one hundred and twenty per cent., is not a grossly exorbitant rate of interest.

I wish it to be understood that the rate of interest which the court will allow will depend on the circumstances of each case. The absence of security, the risk which the lender runs of losing his money altogether will always be taken into consideration. In the present case I am without information and if there were any such circumstances it was on the plaintiff to establish the same. I think therefore that the interest already paid is sufficient; there will therefore be rejection. The plaintiff will have the costs of suit up to the order giving leave to defend. All costs subsequently thereto to be paid by the plaintiff.

APPEAL COURT.

1894. *March* 15. CHALMERS, C.J., ATKINSON and SHERIFF, J.J.

Ex parte SARAH CONRAD.

In re JULIUS CONRAD, insolvent.

Marriage Contract—Profits of separate estates—Increase, improvement, amelioration—Insolvency Ordinance, 1884, *s.s.* 90 (1), 36. *Schedule* II., *rules* 23, 24, 25—*Administrator General—Powers of Judge in appeals—Rules of Court,* 1893. *Order* XXXV. *r.* 29.

Claim to be ranked preferent on insolvent estate by wife of insolvent, by her curator, in respect of property brought by her into the marriage. The marriage was by contract excluding community of property. Three years after the marriage wife became *non compos mentis* and the husband took possession of the property movable and immovable of the wife and drew the rents and profits. The claim was for $101,841.37, made up of the following items, viz, $3,857.81 amount of three promissory notes, $2,200 for eleven shares 60 per cent., paid up of the British Guiana Bank, $300 for one fully paid up share of same bank, $1,200 for household furniture, and the remaining $94,282.50 was for accumulated rents of the immovable property and interest thereon; the Administrator General admitted the claim to the extent of $6,357.81, being the amounts claimed for the promissory notes and bank shares, rejected the claim for rents and interest, and did not deal with the item for furniture. Claimant appealed from the Administrator General's decision in so far as it rejected the claim for rents and interests. There was no cross appeal or motion to reduce proof.

Held by the Judge in insolvency—the rents and interest on property which is excluded from community by antenuptial contract are in community unless specially excepted therefrom by the contract.

Held further that the claim sustained for $2,200 for value of bank shares should be reduced by one-half, there not being proof that the wife's interest in those shares was more than one-half, and that the claim for furniture should be disallowed for want of proof.

On appeal from decision of Judge in insolvency so far as it concerns the items for bank shares and furniture;

Held in admission, rejection or reduction of proofs in insolvency, Administrator General is the tribunal of first instance, and inasmuch as there was no appeal from his decision as regards the bank shares, and he had not dealt at all with the claim for furniture the decision of the Judge as regards those items was *ultra vires,* and must be recalled.

The allowance or disallowance of each item of claim founded on different grounds of right, raises a separate question as regards each item, and the judge can only deal with the particular items brought before him. This rule in insolvency is not controlled by Order xxxv., rule 29 of Rules, 1893.

December 13, 1893.

Before Judge in insolvency.

Dargan for claimant (appellant).

Husband took possession of his wife's property; the husband is bound to support his wife out of his own moneys whether she has or has not separate property. The husband was in

the position of trustee of his wife's property and is liable for interest and compound interest. Cites *Livingstone v. Da Costa*, January, 1875, I.C.C., *Davidson v. Wood,* 32 L.J. Ch. 400. The respondent must prove that the interest and rents of wife's estate were applied to her support; *Dixon v. Dixon,* 9 Ch. D. 587. The wife being insane, there is no presumption that husband was his wife's agent; *Van der Linden* p. 418, (3) compound interest is due by a trustee; *Lewin on Trusts,* 9th ed., p. 378.

Evidence for the appellant was then led.

Dargan sums up and cites Insolvency Ordinance, 1884, Second Schedule, rule 22.

Dr. Belmonte for the respondent.

The onus is on appellant to prove that his claim is correct. The construction of contract is governed by the Roman-Dutch law. The contract governs the rights of parties. The decision of the Administrator General is right. Cites *Keessel sel Thesae,* par. 233 and 234; G*rotius* II. Part XII., 8; *Van der Linden,* p. 75; exclusion of community generally does not cover profits or losses of the separate estates; cites *Wesel de Com. Bonorum,* p. 225; *Van Leeuwen,* p. 199; *Keessel's sel Thesae,* p. 252, 253 and 254; *Grotius de Dotalibus* II. Bk. XII. 6; a husband can never be illegally and wrongfully in possession of his wife's estate; *Keessel's sel Thesae,* par. 255. There is evidence that money went to support the wife and the presumption is in favour of that. Compound interest is entirely forbidden by Roman-Dutch Law except in commercial transactions. *Van der Linden* p. 210.

Nicoll, J. Actg.;—Julius Conrad was married to his wife Sarah Howes or Conrad by ante-nuptial marriage contract in 1861. After their marriage they lived in family together till 1864, in which year Mrs. Conrad became insane and has been since then an inmate of an institution in England. On May 17th, 1892, Benjamin Conrad was appointed by the court to be curator over the property of. Mrs. Conrad.

On November 10th, 1892, a receiving order was made against the estate of Julius Conrad, and on November 26th of the same year he was adjudged an insolvent. Benjamin Conrad, as curator of Mrs. Conrad's estate, then filed a claim on the insolvent's estate for the sum of $101,841. The Administrator General admitted the claim to the extent of $6,357, and the curator has appealed to the court against this decision.

The claim is in respect of the property brought by Mrs. Conrad into the marriage and detailed in the inventory attached to the marriage contract, and for the interest thereon and compound interest from 1861 till 1892. It was contended for the appellant, (1) that Julius Conrad was bound to support his wife out of his own moneys. In the view that I have taken of the whole matter it is unnecessary for me to deal with this point; (2) that Julius Conrad wrongfully and unlawfully took possession of the property of his wife, administered the same and received the rents and profits thereof and that his estate is liable now for the value of such property and interest thereon.

Now according to the common law of the colony when a marriage is completed (in the absence of express provisions to the contrary set out in an ante-nuptial marriage contract) the property and goods then belonging to or subsequently acquired by the spouses become common, and over that common property the husband has the sole control. The wife has only contingent interest in this property, namely, a right on the dissolution of the marriage, after payment of all the debts, to a share in the property, but she has no claim at all until all the debts of her husband have been paid.

Now the question here is how far do the provisions of the ante-nuptial contract entered into by Julius Conrad and his wife, alter or set aside the provisions of the common law? Let us examine then, what provisions are made in the contract with respect to their respective properties. The first and second clauses in the contract are as follows:—"First—that for *the* "*support of their said marriage* the appearers shall respectively *bring in* "*such separate property as they now possess* whereof inventories signed by "them are attached to this contract and are to be considered as of equal "force as if herein recited, and also such property as they respectively here- "after acquire, without, however, thereby inducing any community of "goods. Second—there shall be *no community* of *goods between the ap-* "*pearers* either as regards the property specified in said annexed invento- "ries or that which they may respectively hereafter acquire or become enti- "tled to."

Therefore, it is clear that the parties expressly stipulated and agreed that the property of the wife detailed in the inventory should be excluded from community. This property therefore never belonged to the husband, it being further provided by clause five of the contract, that the wife should have the power of management and alienation thereof, without interference on the part of her husband. Then the further

question arises, does the property excluded from the community include the interests on the fruits of such excluded property? In other words, did the interests on and profits of Mrs. Conrad's property come into or were they excluded from the community they not being specially mentioned in any other clause of the contract. Now the principle laid down in all the text books of the Roman Dutch law (which is the common law of this colony), is that whatever is not expressly excluded from the community by the terms of the antenuptial contract is subject to the community. Grotius (Bk. IT. chap. XII, section XII), lays it down thus:—"The *fructus* or profits of "property come also into community unless the same be expressedly and *eo* "*nomine* excluded therefrom." Therefore, it follows that there being no special exclusion of fruits and profits from the community in this marriage contract the fruit, profits and rents of the property brought by Mrs. Conrad into the marriage were common, and consequently that the husband had the sole control over them, and having sole control, the wife has no interest in them till all her husband's creditors are paid.

There only remains now to consider what is the effect of clause four of the marriage contract. The clause is in these terms:—"Fourth: That both "during the said marriage (in case of need) and after its dissolution the said "Sarah Howes shall have the right at her free will and after having had "laid before her a proper and pertinent statement of the affairs and property "of the said Julius Conrad (which she shall be entitled to demand) either *to* "*share in the profits and losses arising during the marriage or* to content "herself with *taking back the property brought by her into the marriage* at "the period of the same taking place and subsequently acquired by her *with* "*all its improvements, ameliorations and increase,* in which latter case she "expressly reserves to herself for the security of the same the *jus dotis et* "*legalis hypothecae,* and for the purpose of declaring such her choice she "shall have the period of six months granted her from the time of such dis-"solution."

Now this claim as filed is certainly not a claim to share in the profits and losses of the insolvent. Then looking at it as a claim to have her property given back to her, does this clause give the wife any further rights or improve her position? Now, as I have already stated, the wife reserved the power of management and alienation of her property, but it appears from the evidence of Julius Conrad in his examination in insolvency that Mrs. Conrad soon after the marriage gave

over the management and control of her property to her husband, and this apparently that he might realise the securities and apply the money to his own purposes. Now having done so if this clause had not been in the contract I think it would have been doubtful whether the wife was entitled to a preference for any part of her claim over the ordinary creditors of her husband.

But under the terms of this clause I consider that the wife has a preference in respect of the property brought by her into the marriage over the ordinary creditors of the insolvent.

Then further, do the terms of this clause entitle the wife to compensation for anything in addition to compensation for the property brought by her into the marriage? In other words, what do the words improvements" "ameliorations," "increase," mean? I read the word "increase" here as being *ejusdem generis* with the foregoing words improvements and ameliorations, and that these words simply mean improvement in the substance or value of the property, but certainly do not cover or include the fruits of, or interest or rents of such property. Now, in this case, these properties having been alienated presumably with the wife's consent, I consider that the substance or value of her property must be taken as at the date of alienation.

I therefore hold that the wife is entitled to be ranked as a preferent creditor on her husband's estate for the value of the property brought by her into the marriage and alienated by her husband. Then what was this property?

The property mentioned in the inventory attached to the marriage contract is as follows:—

1. One fully paid up British Guiana bank share. This share was admittedly sold by Julius Conrad shortly after his marriage, and the proceeds thereof, which have been stated to be $300, were used by him for his own purposes.

2 One undivided half of eleven 60% paid up British Guiana bank shares (dealt with in the same way as No. 1). The proceeds of each share being put down at $200. The Administrator General has allowed the claim for eleven shares, but there is nothing to show that the wife ever had more than an undivided half of these shares.

3. The promissory notes for various sums, which moneys were received and used by Julius Conrad, amounting in all to $3,857.81.

4. Furniture valued at $1,200. Whether that property has been disposed of by Julius Conrad or not, does not appear,

and I disallow any claim in respect of it. There is nothing to show what has become of that property.

5. ½ lot 20, Brickdam. This property is still Mrs. Conrad's. No claim, of course, is made in respect of the property itself, but only for the rents of it. I would simply point out with regard to this property that it was sworn by the curator that Sarah Conrad was the owner of the whole lot, that she had bought the other half soon after her marriage, though he could not say where she got the money to buy it. Now it appears that Julius Conrad in his statement of affairs has sworn that the other half of that lot was his property, and has entered it as one of his assets.

I recall the decision of the Administrator General, dismiss the appeal, and order the Administrator General to rank Benjamin Conrad as curator of Sarah Conrad as a preferent creditor on the estate of Julius Conrad, for the sum of $5,257.81. Costs to respondent.

From this decision the claimant appealed, in so far as the judge reduced the amount of the claim admitted, and disallowed the claim for furniture.

The appeal was heard before CHALMERS, C.J., and ATKINSON and SHERIFF, J.J. February 27th, 1894.

Dargan for appellant.

The judge had no jurisdiction to lessen the amount allowed by the Administrator General. The extent of the wife's interest in the bank shares was not discussed; if it had been we could have proved that she owned the whole. The Administrator General did not say he had made any mistake, nor did he ask reduction of the proof; R. 23 of Schedule II. of Insolvency Ordinance. The Administrator General did not deal with the $1,200 claimed for furniture; apparently an omission and no evidence was adduced, but we could have given evidence if we had opportunity.

Dr. Belmonte for Administrator General.

Even if the Administrator General did not deal with the claim for furniture the judge could do so. Cites Rules of Court 1893, O. XXXV., R. 29. He could also deal with the claim for the bank shares.

Dargan in reply.

Cur. adv. vult.

Posted (March 15th, 1894).

Curia per CHALMERS, C.J.:—Benjamin Conrad, curator of Mrs. Sarah Conrad, claimed on the insolvent estate of Julius

Conrad for $101,841.37, for moneys received by Julius Conrad on account of Sarah Conrad, and interest thereof. Julius and Sarah Conrad were married under ante-nuptial contract dated March 18th 1861, whereby community of goods was excluded. Mrs. Conrad brought into the marriage certain properties, as to which there was not community. These properties, however, some time after her marriage were applied by the husband for his own uses, and the principal moneys comprised in the claim consist of the values of these properties. They were as follows: one fully-paid up British Guiana bank share value $300; eleven 60 per cent, paid British Guiana bank shares, value $2,200; three promissory notes of the aggregate amount of $3,857.81, and household furniture $1,200. The rest of the claim is made up of rents of immovable property belonging to Sarah Conrad, drawn by Benjamin Conrad, and interest and compound interest accruing on the moneys of Sarah Conrad used by or in the hands of Benjamin Conrad. The Administrator General admitted the claim as preferent for $6,357.81, which is the amount claimed for the bank shares and promissory notes, and rejected her claim for rents and interest. So far as appears he did not deal with the claim for furniture, neither admitting nor rejecting it.

From this decision appeal was brought before the judge sitting apart in Insolvency matters (NICOLL, J. Actg.), the appellant moving on behalf of Sarah Conrad "for an order whereby the claim filed by the said Sarah Con-"rad against the estate of Julius Conrad, an insolvent, in so far as it has "been rejected by you for the reasons therein stated, shall be held good as "against the estate of the said Julius Conrad, and. the portion of the claim "so rejected by you shall be held to be illegal, null and void, bad and ill-"founded." The last part of this motion, read in connection with the first part and having regard to the gist of the proceedings, is unintelligible, and should be taken *pro non scripto.* Rejecting then the unintelligible part, the motion is one to sustain the claim so far as the Administrator General has rejected it, that is, as to the rents and interests. There was no cross appeal and no motion before the judge apart to reduce or expunge any part of the proof.

The judge, after hearing counsel for the appellant, and for the Administrator General, disallowed the claim for rents and interests. He also disallowed one-half of the sum which had been claimed, and allowed by the Administrator General for the eleven 60 per cent., paid bank shares, that is $1,100, on the ground that there was nothing to show that the wife ever

owned more than an undivided half of these shares, and disallowed the claim in respect of the furniture, and he recalled the decision of the Administrator General, dismissed the appeal and ordered the Administrator General to rank Benjamin Conrad as curator of Sarah Conrad, preferent on the estate of Julius Conrad for the sum of $5,257.81.

Benjamin Conrad as curator of Sarah Conrad, has appealed against this decision, in so far as the judge reduced the amount of the claim admitted and disallowed the claim for the furniture, not, however, questioning the decision in so far as it affirms the disallowance by the Administrator General of the rents and interests. Counsel for the appellant and for the Administrator General have been heard on this appeal.

The appeal, as regards the disallowance by the judge of the one half of the value of the eleven bank shares, is maintained on the ground of there having been no cross appeal or application to the judge to reduce the proof, and, as to the disallowance of the claim for furniture, on the ground that as that item had neither been admitted nor rejected by the Administrator General, nor dealt with by him at all, it was not under the cognizance of the judge to any effect.

These points must be decided upon reference to the Insolvency law. In section 90—(1) of the Insolvency Ordinance there is a grant to the court in very large terms of general jurisdiction in cases of insolvency. But as regards the court's interposition in questions respecting the proofs of debts, the general powers mentioned in section 90 (1) are regulated by section 36, and by the second schedule. By section 36, it is enacted that "with respect "to the mode of proving debts, the right, of proof by secured and other "creditors, the admission and rejection of proofs and other matters referred "to, in the second schedule, the rules in that schedule shall be observed." These rules thus establish a procedure in the matters to which they relate. Turning to that schedule, we find that as regards the matters referred to, the tribunal of first instance is the Administrator General or the assignee, and the powers of the court are those of an Appeal Court. The jurisdiction of an Appeal Court, as of every other court, can only be exercised legitimately on the appropriate parties and circumstances being before the court. Rules 23, 24, and 25 of the schedule show the parties who may come to the court upon questions respecting the admission, rejection, or reduction of proofs and the circumstances in which they may do so.

In all these cases it is an essential condition of the court's

interposition being asked for or exercised, that the Administrator General or assignee has first dealt with the matter The court is only to correct or alter a decision already given, not to act as a tribunal of first instance. This being so, and as the claim for the furniture was neither allowed nor disallowed, the decision of the judge upon this claim was *ultra vires*, and must be set aside. It seems probable enough that a mistake was made in supposing that this claim had been dealt with by the Administrator General from the circumstance that it was inserted awkwardly in the account amidst the items for the rents and interests, and not sufficiently distinguished from these items.

The claim for the value of the eleven bank shares had been dealt with by the Administrator General, and thus one of the conditions for the judge adjudicating existed; but this was not enough. On general principles, a judge on appeal acts only when and so far as he is asked to act by a party having interest in his decision, and under the Insolvency Ordinance there appears no provision for the judge exercising his jurisdiction except upon the request of some party interested, and with regard to the particular matters which such party may bring before him. This being so, and there having been no request in this case that the judge would open up the question of the value of the bank shares or adjudicate concerning the claim which had been allowed in respect of these, there was a deficiency of the necessary precedent conditions for his doing so, and his decision on this point also must be set aside.

Counsel for the Administrator General appeared in this appeal and asked that the decision of the judge should be affirmed. It was not at all apparent why he did so, for he did not show that the Administrator General had examined into the claim for furniture or dealt with it, nor did he say that the Administrator General had discovered that he had made any mistake in allowing, as he had done, the full value claimed for the hank shares. He cited Rule 29 of Order XXXV., of the Rules of Court, 1898, his contention being, apparently, that the whole claim of Conrad as curator of Sarah Conrad, had been brought before the judge by the appeal, and that he was in a position to adjudicate upon all the items as he might think just. But this is an incorrect assumption. Interlocutory proceedings in preparing for and facilitating the hearing are all, of course, fully under the control of the court. But it is different as to definite judgments in insolvency. The allowance or disallowance of each item of the claim, the items being founded on different grounds of right, gives rise

to a different question as regards each such item, and only such items are before the judge as are brought under his cognizance by the acts of the parties. Were the view put forward correct the whole system of dealing with proofs as established in the Insolvency Ordinance would be to that extent altered Repeal of statute law by implication is never to be presumed.

We allow the appeal, and remit to the Administrator General to proceed according to law.

GENERAL JURISDICTION.

1894. *February* 27. CHALMERS, C.J., ATKINSON and SHERIFF, JJ.

MARTINS v. DE FREITAS.

Account of communitas.—Presumption.—Liability to account.—Co-heirs.

Defendant, who was married to his wife in community averred that after death of his wife he made an inventory of the common estate, but not any disposed thereof:

Held—Presumptively defendant is in possession of the estate, and plaintiff in right of his wife, a daughter of defendant, is entitled to an account. Objection that the only competent action was *actio familiae erciscundæ* not sustained, but co-heirs allowed to join in the accounting.

Action for inventory and account of intromissions of defendant with common estate of himself and his deceased wife who died intestate survived by five children, and for payment and delivery of one-tenth share to plaintiff as one of the heirs of the wife. Defence: action for account is unsuitable. Plaintiff can only claim a *pro indiviso* share. Action for division could only be brought by all the heirs: on which follows exception *Tibi adversus me non competit hæc actio.* The facts are admitted, except holding the property; but inventories have been filed.

Dr. Belmonte was heard in support of exception.

Curia (CHALMERS, C.J., ATKINSON and SHERIFF, J.J.,) per CHALMERS, C.J.:—The claim here is for an account of the estate sometime held by the defendant in common property with his wife Maria de Freitas.

It is averred and is undisputed that defendant was married in this colony in community of goods to Maria de Freitas who had not before been married; that of this marriage six children were born, one of whom died in infancy; that Maria de Freitas died in this colony on October 1st, 1878, intestate, leaving five children her heirs *ab intestato*, one of whom named Maria, was married in this colony in community of goods to the plaintiff on August 4th, 1889.

It is further averred that at the time of the death of the plaintiff's mother-in-law, Maria de Freitas, the defendant was possessed of a considerable amount of property in the colony, both movable and immovable, held by him in community of

goods with his said wife. The defendant states in answer to this averment that he denies holding the property, and that after the death of his wife, he on October 24th, 1879, made an inventory of the common estate which had existed between himself and his wife, and that on April 25th, 1892, he made a second supplementary inventory, both inventories showing the property of the common estate existing at the time of the death of his wife. He does not state, however, that any disposal has been made of the property or of its fruits and increase, and that is *prima facie* an admission that the property with its fruits and increase, remains in his hands.

Under these averments it is clear that the plaintiff is entitled to receive his share of the estate held in community by his mother-in-law and the defendant, and of whatever increase has taken place therein during the defendant's administration thereof. But the defendant objects through his counsel that the proceeding should have been against the co-heirs for a division of the common estate by the *actio familiae erciscundæ.* As according to the averments the property is in the possession of the defendant and not in that of the co-heirs, and as moreover the first step to a division under whatever process would be an account, the court cannot sustain the objection to the action as a whole The co-heirs however are entitled to come in and join in the accounting if they desire and they will have opportunity of doing so.

We accordingly make interim order for inventory and account of the common property and for account of the defendant's intromissions therewith in ordinary form, with liberty to the co-heirs who are *sui juris* viz., Manoel do Freitas, John de Freitas and Jose de Freitas, to join in the action as plaintiffs if so advised, and appoint the Administrator General guardian *ad hoc,* of the minor co-heir Caroline de Freitas, with liberty to join in the action for her interest if so advised, and pending the accounting, reserve all further order and all questions of costs.

LIMITED JURISDICTION.

1894. *March 15.* ATKINSON. J.

TEIXEIRA v. THE BRITISH GUIANA MUTUAL FIRE INSURANCE CO., LTD.

Insurance—Fire—Fires Inquiry Ordinance 1880*—Payment by company withheld pending inquiry—Issue of citation—Needless litigation—Payment of costs.*

Action for the recovery of the sum of $2,500 alleged to be due to plaintiff by the defendant company under a certain policy of insurance.

The defendant company admitted the liability and paid the amount claimed into court under the circumstances set out in the judgment.

Plaintiff thereupon moved that the amount be paid out to him.

D. M. Hutson, for the plaintiff.

A. Kingdon, Q.C., Solicitor General, for the defendant company.

ATKINSON, J.:—This is a motion to uplift certain moneys paid into court by the defendant company.

A fire took place. The mover's property was destroyed. It was insured with the defendant company, and the mover at once lodged his claim. The circumstances were such that an enquiry was held under the Fires Enquiry Ordinance 1880 as to the origin of the fire; and the company not unnaturally withheld payment until that enquiry was concluded.

The Attorney General, having received the inquiring magistrate's report, wrote to the company on the 14th day of February last to the effect that he was satisfied that the fire was not incendiary. That same day the defendant company's solicitor told plaintiffs counsel that the company would pay the claim. The plaintiff's counsel lost no time, but that same afternoon sent a receipt to the company's office by a messenger, who was to get the money. The messenger was told that the matter must go before the directors of the defendant company at their next meeting, and it was stated at the bar that some chaffing observations were made by the company's officers.

The next meeting of the directors took place on the 16th, two days later, and, while the directors had under consideration the claim and the Attorney General's letter, the secretary of the company was served with a citation. The directors admitted the claim and paid the amount into court, If the plain-

tiff had not sent out citation he would now in all probability have had the money. The citation seems to have been issued in a moment of irritation. Whether that be so or not, the citation was in my opinion, on the facts before me, wholly unnecessary, and that being so, I ought not to give costs against the defendant company.

It is no doubt true, as urged at the bar, that the right of a person insured to recover arises immediately upon the destruction of his property; but it by no means follows that he is entitled to immediate payment of the insurance money. It was said that the directors could have called a meeting to specially consider this question. That is so, but were they bound to do it in order that the mover might get his money *instanter*? I do not think so. The directors of the company are men who have their own business affairs to attend to, as the mover must have known when he effected the insurance; and he must be taken to have known that these insurance matters would be dealt with by the directors, unless something extraordinary occurred which is not the case here, on those occasions only when they met in the ordinary course to discuss the affairs of the company.

I am of opinion that the mover, the more especially as he had been told that the claim would be paid, should have waited at least until the next regular meeting of the directors of the company had taken place, before filing his claim.

The order is that the money paid into court by the defendant company may be paid out to the mover on payment by him of the costs of this motion.

LIMITED JURISDICTION.

1894. *March* 17. SHERIFF, J.

PIMENTO v. SUNDAC AND HENDRICKS.

Action to compel transport—Pleadings—Fraud.

Any allegations of fraud must he clearly and explicitly set out in the pleadings.

The judgment sets out all the necessary facts.

E. R. Forshaw, for plaintiff.

A. B. Brown, for defendant.

SHERIFF, J.:—This is a suit brought against the defendants who have adiated the estate and inheritance of James Sundac, deceased, asking that they may be condemned to pass in plaintiff's favour a valid and legal transport of lot No. 4 or 36 in New Charlestown, with buildings, etc., thereon. In the second paragraph of their answer the defendants aver "that at the time the alleged agreement of sale was said to have been made the said James Sundac was unable to write." The agreement referred to is an agreement of sale between the plaintiff and the said James Sundae, deceased, and is the foundation of the plaintiffs action. If the defence amounts to anything it means that James Sundae did not sign the said agreement, *ergo* that his signature was forged. In the third paragraph of their answer the defendants aver "that there is on the face of the original agreement of sale certain suspicious writing." It is not alleged whose writing but I suppose by implication it means the same James Sundac. It will be noted that both these paragraphs are from their very wording half-hearted. As is well known, fraud vitiates everything. At the same time allegations of fraud should be explicitly stated, and above all, every care should be taken that such allegations are not made lightly or wantonly. I deem it necessary also to observe that apart from the execution of the agreement the defendants do not impeach the transaction. No charge of inadequacy of consideration, of undue influence, of the absence of independent advice or other ground are averred. A brother of the deceased was called by the defendants to prove that the deceased could not on the day when the agreement is said to have

been executed sign his name, and secondly that as a matter of fact he did not on that day sign any paper whatever. He is however entirely uncorroborated. On the other hand there is the evidence of the plaintiff, of the two witnesses to the agreement, Wharton and Lopes, of D'Ornellas, and of Christina Meertins—live persons in all—who swear, among other things, that the deceased could and in fact did on the day in question sign his name and the said brother of deceased was not present when the agreement was executed.

I find for the plaintiff, and as there are other suits in which I am about to give judgment, I order that the balance of the purchase money be paid into court by the plaintiff to abide the further order of the court.

LIMITED JURISDICTION.

1894. *March* 19. ATKINSON, J.

THE LIBERAL PRINTING AND PUBLISHING CO., LTD. v. CONRAD.

Practice—Application to expunge claim—Elected domicile of plaintiff—Rules of Court, 1893, *Order* VI, *rr. 2,* 3 & 4*—Amendment of claim—Order* XIX r. 2;*—Order* XLI *r.* 2.

Application for an order to expunge the claim of the plaintiff on the ground that the claim filed did not contain the elected domicile of the plaintiff and that the requirements of Rules of Court, 1893, Order VI. rr. 2, 3, and 4 had not been complied with.

E. A. V. Abraham, solicitor, for the applicant (defendant).

J. B. Woolford, solicitor, for the respondent (plaintiff).

ATKINSON, J.:—This is a motion by the defendant to have the plaintiff's claim expunged from the record on the ground that the claim does not contain the elected domicile of the plaintiff and that rules 2, 3 and 4, Order VI of the Rules of Court, 1893 (*a*) have not been complied with.

For the plaintiff it was contended that the motion was premature, because by rule 8, Order XIX (*b*) the plaintiff might without any leave amend his claim once at any time before the expiration of the time limited for reply, *i.e.,* within ten days of the filing of the answer. But rule 2, Order XLI (*c*), says that "no application to set aside any proceeding for irregularity "shall be allowed . . . . if the party applying has taken any fresh step after "knowledge of the irregularity." Therefore the defendant, if he wished to take advantage of the omission, would seem to have been bound to move before filing answer.

It was further contended for the plaintiff that as the plaintiff, at the time of filing his claim, had appointed a domicile at

(*a*) See now Rules of Court, 1900. Order X, *rr.* 6, 8 & 9. ED.

(*b*) See now Rules of Court 1900. Order XXVI, *r.* 2. Ed.

(*c*) See now Rules of Court 1900. Order LI, r. 2 Ed.

the Registrar's office in terms of rule 8, Order I, and as the defendant had taken shares in the plaintiff company, he knew or ought to have known the domicile of the company.

But the fact that the defendant knew or might have known the domicile in no way answers the defendant's objection that the claim does not contain one of those statements which rule 9, Order I, says expressly that the claim shall contain, viz:—"the elected domicile of the plaintiff." The words of the rule are imperative and it was urged that the omission of the statement as to domicile rendered the claim a mere nullity—no claim at all, and that it ought, therefore, to be expunged from the file as of course.

The case of *The W. A. Sholten*, L. R. 13 P. D., 8, was cited as being in point. In that case it was held that a writ *in personam* for service within the jurisdiction was invalidated by the omission of the address of the defendant and the writ was set aside. Our rule says that besides the elected domicile, the claim shall contain, amongst other averments, "the name and place of abode of the defendant so far as known." As regards the defendant's address, therefore, the case of *The W. A. Sholten* is in point.

But there is a difference between our rides of court and the English rules with regard to the commencement of an action, by reason of which English decisions will at times be difficult of application to cases occurring in our courts. Under our rules the action is commenced by filing a claim with the Registrar which is followed up by a citation served by the Marshal. Under the English rules the action is commenced by a writ of summons or by an originating summons which is itself served. The writ is endorsed with a statement of the claim, &c., and so may, in some respects, be deemed to be equivalent to our claim and citation taken together.

In the present case the claim does not contain the elected domicile; the rule says the claim shall contain the elected domicile; the claim is therefore defective in one of the particulars which are requisite in a valid claim. Unless therefore this claim can be and is amended it must be deemed to be an invalid claim by reason of its non-compliance with the imperative requirements of the rule.

Whether the claim could have been amended in this case I am not called upon to determine, there having been no application for an amendment. It is not for the court but for the party, to move. If an amendment is necessary it should be asked for. If not asked for, the court must deal with the matter as it stands on the record. In *Hipgrave* v. *Case*, 28

C. D., at p. 360, the Lord Chancellor (Selborne) sail: “If an amendment upon the record would have altered the case it was for the plaintiff to make such amendment, or ask for leave to make it, at the proper time and in the proper manner . . . Having omitted to amend then, at any rate he should have applied for an amendment at the hearing. The court then might have granted such amendment upon such terms as it might have thought reasonable.”

I order the claim to be expunged by the Registrar from the record book and I grant to the mover the costs of this motion.

GENERAL JURISDICTION.

EXECUTORS OF HENRIQUES v. SANTOS.

1894. *March* 30. ATKINSON and SHERIFF, J.J.

Procedure—Summing up—Rules of Court, 1893, O. *XXXIII, r.* 8.

The liberty to sum up and comment at the close of his case given to defendant in rule 8 of Order XXXIII of the Rules, 1893, is confined to summing up and commenting on the case of the defendant.

Hutson, for plaintiff.

Nicoll, for defendant.

The point arose incidentally. The plaintiffs' counsel had concluded his case; *Nicoll* for defendant, had stated his case and led evidence, and in summing up was discussing the evidence led for the plaintiffs, when *Hutson* objected, and both parties were heard.

Curia, per ATKINSON, J:—When the hearing of this case was resumed yesterday, the defendant's counsel had to address the court as in pursuance of rule 8, Order XXXIII, of the Rules of Court (*a*), which says that "when "the party beginning has concluded his case, the opposite party may state "his case and adduce evidence, and sum up and comment thereon."

The learned counsel's opening observations had relation to the case generally; and he was entering upon a discussion of the evidence given for the plaintiffs, which went to show that in purchasing the property mentioned in these proceedings the defendant had acted as the agent of the plaintiffs' testator, when the plaintiffs' counsel objected that this was not allowable under the rule, inasmuch as the plaintiffs' counsel was not summing up and commenting on the defendant's evidence, but was going into the whole matter as if he were opening the defendant's case. The defendant's counsel urged that he could not effectively sum up the defendant's evidence without placing it in juxtaposition with that of the plaintiffs'. That may be so from his point of view, but the question is not how the defendant might, if allowed his own way, place his case before the court in the

(*a*.) See now Rules of Court 1900. Order XXXIII. *r.* 6. Ed.

most favourable light for his client, but what, as a matter of law, he is entitled to do under the rule,—it being borne in mind that, but for the rule, he would have no right to address the court at this stage at all.

When a defendant's counsel opens his case he knows what the evidence of the plaintiff is, and he is presumed to know what evidence the defendant can give, and he at that time can place the two in juxtaposition. When he comes to sum up and comment on his own evidence he can then point out how far his evidence bears out or does not bear out what he had stated in his opening.

The rule says that the opposite party may "adduce evidence and sum up and comment thereon." These words are perfectly plain and unambiguous. "Thereon" can only refer to the evidence the opposite party may adduce; and it is therefore, that evidence when adduced that the opposite party is to sum up and comment upon.

The rule under consideration is taken, though not *verbatim*, from the English Rules of Court. Rule 36, Order XXXVI, of the English Rules of Court of 1875, which is the same as the corresponding rule in the Rules of 1883, says the "Opposite party . . . shall be allowed to open his case and "also to sum up the evidence, if any." That rule is taken from the Common Law Procedure Act, 1854, section 18, it might perhaps, have been argued that the words "the evidence" as there used, enabled the opposite party to go into the whole of the evidence in the case. But that is not so. In *Gilford* v. *Davis*, 2 F. & F., 23, WILLES, J., said:—"The right of counsel to sum up "is restricted to commenting upon the defendant's evidence, and does not "permit him to address the jury generally upon the case. My brother MAR-"TIN has expressed the like opinion, which is also that of a majority of the "judges; but the question has never been made the subject of any decision, "and, should you desire to raise it, it shall be reserved." Sergeant Hayes, however, did not ask that the point should be reserved, but expressed his acquiescence in the judge's ruling, and summed up the evidence for the defendant. That was a civil case and is in point here, as this court has to perform the function which a jury in such a case would have to discharge in England, *Gilford* v. *Davis* is cited in *Roscoe* (Nisi Prius Evid.) with this comment by the learned author:—"But it must be observed that the sum-"ming up usually amounts to a general reply." The temptation to seize the opportunity of making another speech traversing the whole case is no doubt very great, and, if no objection

is taken, judges are generally loth to interfere. The law is there, nevertheless.

We are of opinion that the defendant's counsel must confine himself to summing up and commenting upon the evidence adduced for the defendant. We may add that, as this is a matter of practice of some importance for future guidance, we thought it better to consult with the Chief Justice, and he is of the same opinion.

There is one matter as to which we ought, perhaps, to say a word. An observation fell from the defendant's counsel to the effect that rule 8 merely authorized the defendant to open his case, and was silent as to his right to comment upon the plaintiffs evidence, from which he deduced an argument that if an opposite party could not, when summing up the defendant's evidence, deal with that of the plaintiff, he might have no opportunity of discussing it all.

It is true that the rule says, simply, that the opposite party may state his case, and does not, in terms, empower the defendant to comment upon the plaintiff's evidence; but it is manifest, rule or no rule, that the defendant must, as of right, necessarily be entitled to discuss the effect of the evidence brought against him. That is a right which a defendant has by the common law, and of which he could be deprived only by statutory enactment. The proper and most convenient time for a defendant to do this is when he opens his case. That has always been the practice both in England and in this colony; and, in the present case, the defendant's counsel followed that practice, he having in his opening discussed and commented upon the plaintiffs evidence.

The words, "the opposite party may state his case," while they, of course, include eases where there are special defences, such as in confession and avoidance, cover also cases where there is no special defence. The case of a defendant in such a matter might consist merely of a denial of the plaintiff's claims, and he might proceed to demonstrate by the plaintiffs own evidence that he either had no claim or had not proved it.

GENERAL JURISDICTION.

1894. *April* 11. CHALMERS, C.J., ATKINSON and SHERIFF, JJ.

BISHOP OF GUIANA *In re* PETITION OF

Petition—Lord Bishop of Guiana and his successors in the See—Leave to mortgage—Letters Patent 1842*—Interpretation—Power to mortgage—Ordinance* 2 *of* 1873*, incorporating the Diocesan Synod of Guiana.*

Held that the Letters Patent of 1842 give no authority to mortgage immovable property, and that the Court had no power to confer such authority on the petitioner.

Petition for leave to mortgage immovable property, being "the official residence of the holder of the See for the time being . . . . comprising the whole or parts of lots 49, 50, 51, 52 and 53, Kingston, with the buildings and erections thereon."

The petition set out further that the property to be mortgaged is the property of the See of Guiana being in the name of "The Lord Bishop and his successors in the See"; that by Imperial Letters Patent of the 1st clay of August, 1842, which constituted the See and ordained Georgetown to be a city, full power is conferred upon the holder of the See for the time being to deal with property held by him as the absolute owner thereof; and that by the same Letters Patent the Lord Bishop of Guiana is constituted a corporation sole with a perpetual succession.

On the mortgage being brought before the Judge in Transports for passing, the judge expressed a doubt as to whether the mortgage could be passed and referred the petitioner to the Full Court.

The Acting Registrar (*M. P. Olton*) reported:—The title to the property which the petitioner seeks to mortgage is not vested in him for the reason that when the See became vacant by the death of the late Bishop, no successor thereto was appointed under Her Majesty's Letters Patent. The solution of the difficulty is to have an ordinance passed vesting the property in the Diocesan Synod of Guiana. (*Vide* Ordinance No. 2 of 1873).

IN RE BISHOP OF GUIANA.

CHALMERS, C.J.:—This matter at present savours rather of an academic question. It does not appear there is any actual mortgage or mortgage now *in pendente.* If there was a lender professing to take a mortgage he would, I suppose, satisfy himself as to the validity of the mortgage. Nor is it said that any actual difficulty has occurred in passing a mortgage but that a difficulty occurred some time ago when the Roman Catholic Bishop of the Colony proposed to pass a transport. The legal status of the latter is very dissimilar to that of the Bishop of Guiana. In paragraph 8 of the petition it is said that the consent of the court is necessary to enable the Bishop to pass a mortgage. I scarcely follow this; if the Bishop has by law power of passing a mortgage, then it passes as of course before the judge in Transports; if he has not the power by law, this court cannot confer it.

Referring to the Registrar's report I may say—without proposing to give my final opinion upon the point—that I do not take quite the same view as he does. True, no successor to the late Lord Bishop was appointed by letters patent, but it appears to me nevertheless that Dr. Swaby is his successor in the See, if the steps prescribed by Ordinance *2* of 1873 were followed, which would be presumed.

The letters patent of 1842 do not merely appoint Dr. Austin Bishop of Guiana. They constitute and erect the diocese of the Bishop of Guiana then nominated and of his successors; all the powers and functions given by the letters patent are given to the Bishop of Guiana and his successors, and he and his successors are made a perpetual corporation. The powers given to the successors of Bishop Austin are not by the letters patent limited to successors appointed by letters patent or appointed by Her Majesty.

There may perhaps be some question whether Ordinance 2 of 1873 is a valid ordinance as being within the powers of the Colonial Legislature, but I do not see that the court could deal with that question.

There is a separate question as to the power of mortgaging, supposing that Dr. Swaby possesses the powers of the Bishop of Guiana conferred by the letters patent. Power is given to purchase, take, hold, and enjoy, manors, messuages, lands, tenements, and hereditaments of what nature and kind soever in fee and in perpetuity or for term of life or years, but no power is given in terms either to sell or to mortgage. As at present advised I do not think that there is here any implied power to mortgage.

The property under one of the transports exhibited is not

in the Bishop by his proper *nomen juris.* This however is a matter the court could correct upon suitable materials, so far as that goes.

ATKINSON, J.:—When the papers came before me in the ordinary way I was doubtful on this point and said the parties had better bring the matter before the Full Court. This petition is the result. The transport is to the Bishop "and his successors to the See," the other runs "and his successors in the See for ever." I do not see how the Bishop is entitled to pass a mortgage under the Order-in-Council, although I am inclined to thick looking at Ordinance 2 of 1873 he may claim to be a "successor in office of the late Bishop."

SHERIFF, J.:—The question raised is, has the Bishop of Guiana power to mortgage certain immovable property? I am of opinion that he has not.

The Court made an order that they could not grant the prayer of the petition.

GENERAL JURISDICTION.

1894. *April* 20. CHALMERS, C.J., ATKINSON and SHERIFF, JJ.

DIAS v. EXORS. OF RODRIGUES.

Executors—Account—Venia agendi—Prescription—Accord.

A and B were married in community of property. B. died in 1885, leaving one child, C, born to B before her marriage with A. C. was married to the plaintiff in community of property. After the death of B, the common property of A. and B. was retained by A. who transferred some property to the plaintiff, but no account of the common property of A. and B. was made, nor did plaintiff discharge the interest he had therein in right of his wife C. A. died in 1893, having by his will appointed the defendants his executors.

Held: Venia agendi is not necessary in action for account against the executors of a parent; the objection of want of *venia agendi* ought to be taken *in limine* before answer, by application to stay or dismiss action;

Held: None of the prescriptions enacted by Ordinance 27 of 1856 (a) apply to actions for accounts against executors acting as such and holding the estate;

Held: Plaintiff is not debarred by acceptance of property from claiming from the executors of A an account of the joint property of A. and B, and of A's and the executors' intromissions therewith, and recovering his wife's share thereof.

Action against executors of will of Antonio Joao Rodrigues, claiming (1) inventory of the common estate of Joao Rodrigues and Mary de Freitas his wife, at date of the death of the latter; (2) account of the intromissions of Rodrigues and of his executors with the common property from date of death of Mary de Freitas; (3) payment and delivery of money and property belonging to plaintiff as husband of Christina Dias, wife of plaintiff, and daughter of Mary de Freitas. Answer, *venia agendi* not obtained; Rodrigues made an inventory which was approved by plaintiff, and property was transferred to him and accepted in satisfaction of his interest; plaintiff is estopped by his conduct. Reply, averments and denials joining issue.

McKinnon for defendants.

The parties are within the principal of *venia agendi.* The object is to prevent children from instituting frivolous actions against parents; therefore they are required to satisfy the court *in initio* that there are *bona fide* grounds for proceeding. The principle includes relations by affinity; *Voet de in jus vocando,* Bk. II. tit. 4; *McKenzie* v. *McGee,* 1857 L. R., B. G. 65. Christina Dias was related to Rodrigues by affinity. He

(a) Now Ordinance 1 of 1856. ED.

was *in loco parentis* to her and plaintiff. It is conceded that Rodrigues is not personally before the court, but is so by his executors. But they are equally entitled to the privilege, as the agents of Rodrigues, and also for the protection of his property; *Jasmins* v. *Exors. of Correia,* S.C. June 8, 1888. Further; prescription applies: the right of action arose on the death of Mrs. Rodrigues in 1885. Plaintiff is estopped by having accepted property from Rodrigues in satisfaction of his wife's claim.

Dargan for plaintiff.

McKinnon leads evidence in support of case of defendants.

Dargan submits that plaintiff is entitled to the order claimed.

Curia, per CHALMERS, C.J.:—Manoel Da Silva as having in marriage of community of goods Christina Dias, sued the executors of the will of Antonio Joao Rodrigues. He averred that Mary de Freitas, who was the mother of Christina Dias, was married to Antonio Joao Rodrigues in community of property, and that she died on September 20th, 1885, intestate and leaving no other child than Christina Dias, her sole heiress, who had previously been married to plaintiff, and that plaintiff was thus in right of his wife entitled to one-half of the property held in common by Mary Rodrigues (formerly de Freitas) and Antonio Joao Rodrigues. Plaintiff further averred that the share of the common property to which he was thus entitled was not paid or assigned to him except a portion thereof, but, excepting that portion, remained in the possession of Antonio Joao Rodrigues; that Rodrigues died on May 7th, 1893, leaving a last will by which he appointed the defendants jointly and severally his executors who had accepted and acted in the office of executors and were in possession of the estate, and had not rendered him any inventory of the estate or account of their intromissions, and plaintiff claimed (1), an inventory of the movable and immovable property held in common between Mary and Antonio Joao Rodrigues at the date of the death of the former; (2) an account of the intromissions of Antonio Joao Rodrigues and the defendants with the common property; and (3) payment and delivery of whatever money and property might be found due and belonging to the plaintiff upon the accounting.

The defendants have not denied the plaintiff's allegations of facts. They claimed a dismissal of the action on the objection that the *venia agendi* had not been obtained. This objection,

which is a dilatory one, ought to have been brought forward at the earliest opportunity, that is, by a motion to have the action stayed or dismissed on the ground that the plaintiff was not qualified. It is aimed at in all modern procedure that questions which are merely preliminary and do not affect the substance involved in a proceeding, should be disposed of *in limine*, not kept pending until the pleadings have been completed, and the cause comes on for hearing; and it is in that spirit that Rule 1 of Order XVI. of the Rules of Court, 1893, directs that objections which are within its scope when not taken within the time prescribed shall be deemed to have been waived, and although that rule does not in terms include all dilatory exceptions, the reason of the rule applies, and the widest application of the rule in practice would be most beneficial for all who are concerned.

As to the merits of this plea, the court was asked not only to say that the principle of the *venia agendi* applied as between Rodrigues himself and Christina Dias, the natural daughter before her marriage of Mary de Freitas whom Rodrigues married, but that it also applied as between Dias and the executors of Rodrigues. The defendants' counsel, although admitting that the position was to the best of his knowledge new, cited no authority in support of it. The reason why the *venia* is required in certain cases is that it is indecorous and inexpedient that, where the relation of persons is such that peculiar respect is due on the one side and may be justly expected on the other side, these persons should become adverse parties in litigation unless there is some necessary ground for the litigation; *Voet de in jus vocando*, Bk. II., tit. 4, n. 4, 5, 6 and 8. Quoting *Modestinus*, he says: "*Mod-* "*estinus regulam tradit, generaliter eas personas quibus reverentia debita* "*in jus vocari sine venia non posse.*" *Van Leeuwen* Cen. For., Pt. II., Lib. I, Ch. 10, sec. 16, says: "*Propter reverentiam quam liberi debent parentibus,* "*suis non aliter eos in jus vocare permittitur quam impetrate prius venia a* "*Praetore sive Judice coram quo disceptatio instituenda est.*" And he states that the same rule applies in the case of those who are *in loco parentis*, and mentions a number of instances. But there appears to be no authority for holding that *reverentia* is due to the estate or to the executors of an estate, nor whatever might be said as to heirs is any principle discoverable on which the principle should extend to executors. The objection must be over-ruled.

It was also excepted by the defendants that the claim of the plaintiff was prescribed, since it had accrued on the death of

Mary de Freitas in September, 1885, and this action was not commenced until after the lapse of more than eight years, in December, 1893. The defendants' counsel was not in a position to insist on prescription as it was not pleaded, but he was allowed to be heard. He admitted that if this claim was prescribed it must be by operation of some of the short terms of prescription declared by the ordinance of this colony, No. 27 of 1856. But he failed to show the application of any of the clauses, as indeed none of them apply. There is, of course, a short prescription as to executor's accounts after the executor has ceased to act, but so obviously is the ordinance inapplicable to any claim against executors, who are still acting and in possession of the estate, to account to those having rights in the estate, that the plea can hardly be taken as having been seriously stated. It must be overruled.

The defence on the merits relied on was, in substance, that Rodrigues during his life-time had transferred property to plaintiff, which plaintiff had accepted as in satisfaction of his wife's interest in the common estate of Rodrigues and his deceased wife. Evidence was adduced, but although it was proved that plaintiff had received some property from Rodrigues, it was not proved that there had been a settlement of his claims upon the common estate. Although the plaintiff by allowing so long an interval to elapse has somewhat disentitled himself to consideration, and increased the difficulty of making an account, the account is due, and the defendants must make as complete an account as they can. Costs reserved.

Under the whole circumstances of this case, it is very advisable the parties should come to some voluntary arrangement without incurring further costs in litigation, and although we have thought it right to put on record the opinion we have formed upon the points discussed at the hearing, we shall, in order to facilitate an arrangement, postpone making the formal order to account.

GENERAL JURISDICTION.

1894. *April* 20. CHALMERS, C.J., ATKINSON and SHERIFF, J.J.

DAVIS v. HENRIQUES, AND OTHERS.

Master and Servant—Remuneration by percentage on profits—Breach of agreement—Dismissal of servant for breach of duty—Claim for commissions.

Manager of a commercial business agreed to serve for remuneration, to consist partly of percentage on gross profits of the business to be ascertained at the annual stock-takings. The manager used money of his employers, nominally as an advance to the attorney of his employers having control of the business, but really to be expended in a speculation for behoof of himself, the attorney, and a third person. This occurred previously to the period for stock-taking, but was not discovered until some time afterwards. The manager was dismissed.

Held: The manager had committed misconduct amounting to breach of his contract of employment, such contract implying agreement to render good and faithful service, and that his dismissal was justified.

Held: The employers were not barred from resisting a claim for account and for percentage by the circumstance that the period at which the percentage would have become due if there had been no misconduct had passed when the misconduct was discovered and acted on.

Held: Manager using money of employers for his own purposes is sufficient justification of dismissal, although only one such act proved. Every contract of employment raises conditional obligations, and it is a condition of either party being entitled to enforce performance on the other that he, on his side, has performed or is ready to perform the obligations that lie on him.

Held: A manager placed by terms of his employment expressly under orders of an attorney of his employers may justify errors in business by showing the attorney ordered the acts objected to. But an act outside of the scope of the business cannot be thus justified even although the attorney joined in it.

Action for an account of the profits of the business of Crosby & Forbes from April 14th, 1891, to May 31st, 1892, and payment of percentages on the profits at the rate of five per cent., on such profits. Answer, the plaintiff misconducted himself in his employment as manager and was discharged, and was not entitled to maintain the action. Reply, denial of misconduct alleged; when dismissed the commissions under one stocktaking had already accrued due. Further, plaintiff, as manager of defendants' business, was by them placed under the order of their attorney, and all that he did or omitted was by direction of the attorney.

Hutson, for plaintiff, led evidence.

Dargan, for defendants, claimed rejection on the ground that, before the annual stock-taking, plaintiff misconducted himself. He entered on the employment on April 14th, 1891, the first

stock-taking thereafter was on February 28th, 1892. There was misconduct on January 6th, 1892, and although not found out till April the effect relates back to the actual occurrence of the misconduct. He cited *Ridgway* v. *Hungerford Market Co.*, 3 Ad. & Ell. 171; *Willets* v. *Green*, 3 C. & K., 59.

Evidence for defendants was led.

Hutson, in replying, cited *Le Loir* v. *Bristow*. 4 Camp. 134; *Taylor* v. *Laird*, 1 H. & N., 266.

Curia (CHALMERS, C. J., ATKINSON and SHERIFF, J.J.) per CHALMERS, C. J.:—The plaintiff was manager of the business of the defendants known as "Crosby & Forbes." He has averred in his claim, and it has been admitted by the answer, that he was to be remunerated by a monthly salary, commencing at $150 a month, rising yearly by increments until it reached $200 per month, "together with five per cent., on the gross profits earned "by the said business to be ascertained at each annual stock-taking."

Plaintiff commenced his service on April 14th, 1891, and continued therein until May 5th, 1892, when he was dismissed. He has received salary up to the end of May, 1892, but no percentage on profits. He claims, as being entitled thereto under the agreement, an account of the profits from the 14th day of April, 1891, to the 31st day of May, 1892, which he says is the date when his employment legally ceased, and payment of the sum that may be found due to him in respect of the profits.

The defence is that the plaintiff misconducted himself in his service as manager and was therefore discharged, and is not entitled to maintain these proceedings. Particulars of the misconduct are set out under three heads: (*a*) that plaintiff wrongfully made use of the moneys of the defendants, unknown to them, for the purpose of engaging in gold transactions for his own benefit; (*b*) that plaintiff, to the loss of the defendants, and without their knowledge or consent gave excessive credit to certain persons for goods taken; (*c*) that plaintiff received an order of transfer in bond of 6,000 bags of rice to Crosby & Forbes, and improperly failed to present the transfer, in consequence of which the defendants lost the rice and its value, and profits thereon, to the extent of $7,000. Counter-claim is made for $20,000 as damages on account of these alleged acts and neglect of plaintiff. The plaintiff in his reply denies that he misconducted himself, and avers separately that the defendants placed him as manager of their business under the orders

of John Parry Farnum of the firm of Farnum & Co., their agent or attorney, and that his acts or omissions were by the direction and with the approval of Mr. Farnum; and as to the purchase of the rice, that the defendants did not suffer loss through his default, and further, that it was an arrangement between the partners of Farnum & Co. and the defendants, over which he had no special control, and which was controlled by Mr. Farnum.

We are disposed to consider that except as to the wrongful use of the money of the defendants the reply has been established. The plaintiff was appointed manager of Crosby & Forbes by Mr. Farnum, acting as the attorney of the partners of the firm. A memorandum of the terms in which the appointment was offered to plaintiff and accepted by him bears expressly that he was to be "Manager of Crosby & Forbes under control of Mr. Farnum," and his responsibility is therein defined to be for the proper working and conduct of the business "under Mr. Farnum's order." The circumstances connected with the giving of credits show very much reason to believe that the persons who obtained the credits did so under Mr. Farnum's sanction, and it is clear that the rice transaction was thoroughly controlled by him.

But the matter of the plaintiff making use of the defendants' money in gold transactions has a different character. Evidence has been given of one distinct act of this kind, and it is this: Crosby & Forbes owned a share in a gold-mining adventure known as the Rhodius Syndicate, and they carried on the working of this adventure for their own behoof and that of the other shareholders. John P. Farnum, Davis and one Shrimpton, who was a foreman or manager of the syndicate at one of their outlying creeks, formed together a scheme of purchasing gold in the bush from those who had it to sell, these purchases being carried out through Shrimpton. In order to provide for the due report to the Government authorities of the gold so, purchased, as it would not have served their purpose to report it as coming from the Rhodius placers, the joint adventurers purchased a placer which had, or to which they gave the appropriate name of Jumbo, and was situated about forty minutes' walk from the principal workings of the Rhodius Syndicate, and whatever gold was purchased in pursuance of the arrangement was to be reported as the produce of the Jumbo placer. On the occasion to which the evidence relates, $400 was sent to Shrimpton by Davis for the purchase of gold. $100 of this money was clearly traced as being the money of Crosby & Forbes, and it was debited in

their books to John Parry Farnum as advanced to Shrimpton; the remaining $300 is not clearly traced. Shrimpton with this $400 bought gold of the value of over $1,100 in three separate parcels, asking no questions, as he naively told us, as to where the gold had come from, or even the names of the sellers. He sent this gold to the manager at the principal placer of the Rhodius Syndicate to be sent to Georgetown, but the scheme did not turn out as intended. This manager seized the gold and dealt with it as the property of the Syndicate, and neither the plaintiff nor Farnum, so far as we have been informed, made any attempt to dispute that disposition of it. Of the $400 given to Shrimpton $100 had been debited to him in Crosby & Forbes' books, and he told us that he objected to this debit when the adventure proved a failure, and, as he says, made a noise about it: that upon this Davis asked him to allow the sum to remain as it was in the books and he would be paid the $100, and, in fact, it was paid to him. There is some evidence that Farnum and Davis intended to work the Jumbo Creek as a placer, as well as use it as the nominal origin of the stray gold which might be purchased. That could only show Davis' breach of duty towards his employers in a stronger light. These facts rest upon evidence which there has been absolutely no attempt to contradict.

The application of the employer's money by the manager to an adventure of his own, whatever persons he might be associated with, and in whatever form the transaction might be wrapped up, is a matter quite different in kind from the giving of excessive credits or other errors that might occur in the course of management, which might partake more or less of the nature of errors of judgment. It was a clear breach, which no lack of judgment could palliate, of the condition implied in every contract of service or agency of this kind—the condition that plaintiff would faithfully and truly discharge his duty towards his employers. Being a thing altogether outside of the business over which Farnum had control, no order or pressure from him could authorise or excuse it, supposing there had been any such order or pressure, and it has not been said that there was. The learned counsel for the plaintiff, who conducted the case on his behalf with his usual discretion, whilst candidly admitting that the plaintiff had done wrong in this transaction, did not put him in the witness-box, so that the opposite party had no opportunity of cross-examining him as to any other possible transactions of similar character. This particu-

lar transaction comes before us as a solitary one of its kind, although we have no evidence from the plaintiff that it is a solitary case. It is worth while to notice the decision of the Appeal Court on the question whether a solitary instance of misconduct was sufficient ground of dismissal. In *Boston Deep Sea Fishing and Ice Company* v. *Ansell*, 39 Ch. D. 339, the misconduct was that the company's manager received a commission to his own use from shipbuilders with whom he contracted on behalf of the company, his employers. The judge who tried the case as of first instance, although disapproving of the receipt of the commission, gave weight to the argument that it was "an isolated case not necessarily bearing on the gen- "eral conduct of the business of the company and to some extent at least "remediable by the recovery of the amount received by the manager," and thought it was going too far that the company should dismiss their manager, who was under a contract of employment for five years, upon this ground. But the Lord Justices of Appeal, COTTON, BOWEN and FRY, all considered that the breach of duty in receiving this commission, although there was only evidence of one instance, was amply sufficient to justify dismissal. "Suppose it be an isolated case," said Lord Justice FRY, "is that "an excuse? Is a man to commit a gross fraud on his master, to conceal that "fraud, and then when it is discovered, say, Oh, this is an isolated case, and "therefore you cannot dismiss me. That is not according to my view of the "law of the land with regard to the relation of master and servant." We are quite satisfied that the plaintiff's act in using the money of his employers in a speculation of his own was a thorough-going breach by plaintiff of his contract of employment, and was ample justification for his dismissal.

Where then is the effect of the breach of contract as regards the plaintiff's right to recover the share of profits stipulated by the contract? It is beyond doubt "that the servant who is dismissed for wrongful behaviour "cannot recover his current salary which is not due and payable at the time "of his dismissal, but which is only to accrue and become payable at some "later date;" per BOWEN L.J., in *Boston Deep Sea Fishing and Ice Co.*, already cited; and this rests on the principle that the contract of the employer to pay remuneration at stated terms is contingent on the servant having performed his part of the contract during the whole period in respect of which such remuneration is claimed. Neither is there any doubt that, although the wrongful

behaviour was not found out and acted on by dismissing the servant at the time of its occurrence, the employer may dismiss him afterwards when he finds it out. *Ridgeway v. Hungerford Market Co.*, 3 Ad. and El. 171, *Boston Deep Sea Fishing and Ice Co.* v. *Ansell, supra.*

Now in the case we are considering, according to the agreement averred by plaintiff in the claim, the percentages were to be "on the gross "profits earned by the said business to be ascertained at each annual stock-"taking." According to the written memorandum of proposals made to plaintiff, and accepted by him, the percentages were to be "on profits of stock-lists annually." The stock-lists and annual stocktaking must be understood as meaning the ordinary stock-takings of the business for ascertaining progress and profit or loss, and these stock-takings were fixed by the articles of partnership of Crosby & Forbes to be as on the 28th day of February of each year. Until that date, at any rate, no percentage or profit would accrue due to the plaintiff, since only then would it be ascertained what was the profit, or if there was any. There might be a question whether the percentages were to accrue until after a year of service by the plaintiff, which would not be until the 14th of April, 1892. But this question is not at present material. What occurred was that before the first of the annual stock-taking periods viz., in January, 1892, the plaintiff committed this act of misbehaviour by applying the money of his employers to the gold speculation. A precise date is fixed by an entry January 6th, 1892, in the books of Crosby & Forbes, of the advance of the $100. The plaintiff was dismissed after more than a full year of service had run, and after the period of stock-taking. If there had been no misconduct there is no question his right to the percentages would have accrued due before his dismissal. Can, then, the plaintiff, notwithstanding the misconduct and dismissal, maintain action upon his contract for these percentages? The answer to this question clearly appears upon reference to the principle already alluded to. Every contract of service is bilateral and raises conditional obligations on both sides, the condition of either party being entitled to enforce performance on the opposite party being that he, on his side, has performed or is ready to perform the obligations that lie upon him. If then the plaintiff had asked for an account of percentages and payment of the sum due to him upon February 26th, or upon the termination of a year of service, whichever be taken as the period of the right vesting in him, the breach of the

contract for good and faithful service on his part would have been an effectual answer at that time. It is true that where an employer knows that there has been a breach of contract by the servant, affording ground for dismissal, and nevertheless allows the service to go on, he may be deemed to have, as a a fact, condoned the offence, so that the mutual relations of the parties resume their former position as if there had been no breach of the contract. But taking it that the plaintiff's act of misconduct was unknown, and there is no plea of condonation here, nor is it said that the defendants knew of the misconduct, the only indication of which was the entry in the books of the $100, which did not in the least disclose the true character of the transaction—it cannot be said that the mere lapse of some months can deprive the defendants of the right which they had to resist the plaintiff's claim. And thus to the claim for the portion of the percentages which might have become due on the 28th of February, 1892, at the stocktaking, or upon plaintiff concluding a year of service on April 14th, (whichever of these be taken as the true period of accruing) the defendants are entitled to answer that the plaintiff is not on the contract entitled to percentages, because he has himself failed to fulfil the contract for the period in respect of which he is claiming to be paid. As regards the percentages for the period subsequent to the 28th of February, or April 14th, 1892, the right to these would not accrue until February 28th, or April 14th, 1893, and hence it is enough to say that, as the service was terminated by dismissal of the plaintiff for sufficient cause long before the completion of the period in respect of which these percentages could become due, no claim lies.

These considerations are sufficient for disposing of the action. It is laid upon the plaintiff's rights under the contract and upon nothing else. Under the contract he cannot succeed. The learned counsel for the plaintiff urged somewhat strongly that the defendants were *in pari delicto* with him by having seized the gold which Shrimpton had purchased and applied it to their own purposes. This is not accurate as a fact, for it was not the defendants who seized the gold, but the manager of the Rhodius Syndicate, acting, so far as has appeared, on his own responsibility and for behoof of the whole of the partners. But apart from this there is no *par delictum.* The delict alleged against the defendants is that they wrongfully possessed themselves of property belonging to some unknown persons; the delict proved against the plaintiff is that he wrongfully applied money of the defendants to a

purpose of his own—two causes of complaint which are quite separate and apart, so that the doctrine of *par delictum* does not at all apply. If it did, the result would be that the court would refuse aid to either party, and as it is the plaintiff who has sought the aid of the court it is he who would most feel the deprivation.

The sentence will reject the claim for account and payment of percentages, and reject the counter-claim, except as to $100, which we find due by plaintiff to the defendants. As to costs, the defendants have succeeded as regards the main purposes of the action and are entitled to the costs of the action generally, which will include the costs of the *de bene esse* examination specially asked for at the beginning of the hearing. As to the costs attributable to the counter-claim, if there are any which could be severed from the costs of the action, which seems improbable, we think the proper course, as there has been partial success on both sides, will be to allow compensation of costs.

GENERAL JURISDICTION.

1894. *March* 5. CHALMERS, C.J., ATKINSON and SHERIFF, J.J.

CUNHA, IN RE PETITION OF.

ADMINISTRATOR GENERAL (MARIA DE SOUZA), REPORTER.

Curatorship.—Marriage.—Insanity.—Onus of proving mental capacity.—Evidence.—Lex Fori.

Administrator General was appointed curator of a woman of unsound mind in 1887. In 1889 he sent her to Madeira for improvement of health. In 1890 she was married in Madeira to petitioner, who asked an order on reporter to transfer her property to him. Question arose as to her mental capacity to marry. Evidence was offered by extract of a certificate by officiating priest and certificates of ecclesiastical and medical persons as to her mental condition. An expert in Portuguese law gave evidence that marriage of insane persons was voidable by ecclesiastical court, but not invalid in itself.

Held—Certificate of officiating priest in evidence as to fact of marriage but not as to sanity of party; the other certificates not admissible. A certificate averring facts as to mental condition of an individual is not an instrument within the meaning of *Ordinance 5 of 1884, sec. 4. Where curatorship of a woman is averred to have been terminated by her marriage, the *onus probandi* is on the party so averring. Evidence to establish a foreign marriage must be such as is admissible by the *lex fori.*

Petition for an order on the Administrator General to pay and transfer to petitioner as having in marriage in community of property Maria de Souza. Maria de Souza had been many years resident in British Guiana and was married there and had become a widow. On October 7th, 1887, the Administrator General was appointed curator over her person and property she being then of unsound mind. In July, 1889, being partially recovered the curator sent her in charge of friends to Madeira for improvement of her health. The petitioner met with Maria de Souza in Madeira, and in June, 1890, went through a ceremony of marriage with her, according to the rites of the Roman Catholic Church. Petitioner claimed payment and delivery of all her property in this colony.

Dr. Belmonte, with him *Correia*, for petitioner.

Right of Administrator General to hold the property is at an end. Petitioner and wife are Portuguese subjects: even if the woman was not validly married, as she is out of the jurisdiction, Administrator General cannot hold her property. Being married she has come under curatory of the husband and that super-

*[cf. Ordinance 20 of 1893, sec 29.—ED.]

sedes any other curator. The status of the husband cannot be questioned except in the country of his allegiance. We say the insanity did not exist at the time of the marriage and tender the certificate of the officiating priest authenticated by the British Consul in Madeira, also tender a certificate by priests in Madeira showing Maria de Souza to be of sound mind, and a certificate by medical practitioner to same effect. Cites Ordinances 21 of 1845, sec. 5, and 5 of 1884, sec. 4.

Oral evidence was led in support of petition.

Dargan for reporter.

The certificates tendered are not admissible as evidence of facts in issue. They are unsworn and the person making them cannot be cross-examined. The marriage does not abrogate the appointment of the curator. Curatorship ceases only by act of the court. *Van der Linden*, p. 111. In England a person marrying a ward of court without consent of court is in contempt. The petitioner is in contempt and is bound to purge it before asking for an order in his favour. *Ashe's* case, Precedents in Chancery, 208; *Chitty's Equity Index,* III. 2812; *Hope* v. *Hope*, 26 L.J., Ch. 417. We admit the marriage as a fact in Madeira, but it cannot receive effect here if its incidents were not according to the law of this colony. By our law no one found insane can marry. Petitioner can only succeed by showing that the woman was sane when he married her. *Camacho's* case, S.C. 8 January, 1886. Petitioner has offered no evidence upon which court would cancel appointment of curator. On the merits, the curator has good reason, from information he has received, to oppose the petition.

Dr. Belmonte in reply:—

Court cannot enquire as to validity of the marriage, because the parties are out of jurisdiction and it is a question of ecclesiastical law. The marriage must stand good, whilst not annulled in ecclesiastical court. The Curatorship of the reporter is superseded. The only question is: is there a marriage? On merits, if the woman was improperly treated the laws of her country can protect her. Cites *Consultations of Mayer*, p. 130, No. 4, p. 184.

Curia (CHALMERS, C.J., ATKINSON and SHERIFF, JJ.) per CHALMERS, C.J.—The petitioner prays for an order on the Administrator General requiring him to render to the petitioner an account of all the good and property of Maria de Souza

taken possession of by him as her curator, and of his administration thereof, and to hand over such goods and property to the petitioner, and also to hand over to the petitioner without awaiting the accounting, but without prejudice thereto, any cash belonging to Maria de Souza, which may be in his hands. The order is claimed on the grounds that Maria de Souza is the wife of the petitioner, he having married her at Funchal in Madeira on June 5th, 1890, in community of goods and that he is by the law of Portugal in force in Madeira, the administrator of all her property.

There are further averments that even if Maria de Souza was not a married woman, she is a Portuguese subject residing in a Portuguese country, and, therefore, the administration of her property could not be legally continued by a department under the jurisdiction of this colony. But as the petitioner alleges no right to receive the property he claims, or to have *locus standi* in the present proceedings in any other capacity than as the husband of Maria de Souza, it is obviously unnecessary to consider an abstract proposition founded on an hypothesis upon which if true the petitioner would be at once out of court.

As regards the condition of Maria de Souza when the Administrator General was appointed her curator, that appointment having been made in a proceeding to which she was not a party, its effect is not conclusive upon her or any one claiming through her; but the evidence then given, followed as it was by the appointment of the curator, constitutes *prima facie* proof that Maria de Souza was then in fact, as averred in the petition of appointment, incapable through mental derangement of managing her affairs; and that being so it is incumbent on the petitioner in order to rebut this proof to do more than merely deny that the evidence was sufficient to justify the appointment of the curator. This, however, is all that he has done, and we must, therefore, take it as one of the facts with which we have to deal that Maria de Souza was of unsound mind at the time when the Administrator General was appointed her curator.

When insanity is proved or admitted to have existed in a person at a particular period, then if it is alleged that the person once insane was subsequently of capacity to do an act for which a sound mind is necessary, it lies on the party setting up such an act to give evidence of the restoration of the person in question to such extent as may show the court that he was able to understand the nature and effect of the act he was doing. What is the evidence before us?

The curator of Maria de Souza was appointed on October 7th, 1887, and the next point in her history to which our attention has been drawn is that the curator in February 1889, asked the court to sanction his sending her to Madeira. She was then and had been for some time an inmate of the Berbice Lunatic Asylum, and it appears that the Medical Superintendent of the Asylum recommended a change to the more salubrious climate of Madeira as likely to conduce to the improvement of de Souza's health both physical and mental. Arrangements were made for safeguarding the patient during the voyage, and for her being received and taken charge of by her mother on arriving at Madeira. Some difficulties, however, presented themselves to the curator, the nature of which do not appear precisely on those proceedings, and as to which we have not been informed; but the result was that the curator did not at that time send Maria de Souza to Madeira. Some months afterwards the application was renewed, and authority was granted by the acting Chief Justice on July 20th, 1889, and M. de Souza was taken to Madeira, There is no evidence here of Maria de Souza's restoration to soundness of mind, although it may fairly be supposed that her condition was not violent or dangerous. We hear no more of Maria de Souza until Cunha meets her at the house of a relative in Madeira. Cunha had been formerly employed for some months in the Demerara Ice House. When he met M. de Souza in Madeira he had no profession or occupation; he was living in his father's house having no income or means of living of any kind except what his father gave him; he was twenty-three years of age; Maria de Souza was a widow of thirty-nine. Cunha tells us she was going about as a beggar, and says he would not have married her if he had not loved her, but he admits that she told him about her property in Demerara. They met frequently at church he tells us, and on June 5th, 1890, they were married in the parish church in Funchal according to the Roman Catholic ritual. In all this there is nothing to show the court that at the time of this marriage ceremony Maria de Souza had recovered from her mental ailment and was in a state to give an intelligent and valid consent to her marriage.

It is very clearly laid down in our law that those who suffer from such mental incapacity as not to be capable of giving consent are not capable of marrying at all. *Van der Linden* p. 18 (*Juta's translation*). *Voet* in the passage cited by *Van der Linden* in support of this position says: "*Porro consensus ipsorum nuptias contrahentium usque adeo neces-*

"*sarius est, ut defectus ejus nuptias ipso jure nullas efficiat.*" See also L. 2 *Dig. de rit. nupt.* and L. 30 *Dig. de reg. jur.*

As evidence showing that de Souza was of sound mind at the time of her marriage petitioner relied, in the first place, on some expressions in the record of the marriage made by the celebrating priest. We admitted an extract of this record as evidence, upon the statement of Senor Mello (who was called by the petitioner as an expert in Portuguese law) that such an extract would be admissible in a Portuguese court in proof of a marriage. There may, perhaps, be some doubt whether this admission was not an undue encroachment on the law of our own forum; but this particular point was not contested. The expert did not say that it would be available for any purpose except proving the actual fact of the celebration; but it would seem not an unfair inference that the extract (assuming it admissibility) might also be looked at for any matter of *res gestae* immediately connected with the celebration appearing on the face of it. The expressions relied on are that Cunha and de Souza "appearing for the purpose of being married with "all the necessary documents inclusive of one dispensing the publication of "banns without any impediment for the marriage of the two contracting "parties whatsoever, either canonic or civil." It is clear that these words, taking them in the fullest sense which they can bear, show nothing more than would, without them, be inferred from the celebration, viz., that the proceedings were in form regular and that no impediment as to which the priest had to determine was brought to his notice; but they afford no evidence on the question of Maria de Souza's mental condition at the time.

The other proof offered of Maria de Souza's capacity consisted of two certificates, neither of which was said to be admissible by virtue of any special Portuguese law, but which were said to be entitled to admission under two Ordinances of the colony, viz., No. 21 of 1845, section 5, and No, 5 of 1884, section 4. The citation of these enactments for this purpose could hardly have been more than an inadvertence. If not so, it proceeded on a total misconception of their effect. The effect is not to make any writings admissible in evidence which are not in their nature evidence according to the ordinary law of the colony, but to allow proof of the execution of certain instruments, when executed abroad, to be made through the written attestation of public functionaries in substitution for the usual method by the testimony of the instrumentary witnesses personally present in court.

The enactments have no bearing whatever as regards the admissibility of these certificates as evidence. The question like other questions of procedure depends on the law of the forum where the litigation has been instituted and carried on (Story, Conflict of laws, 8th Edn. p. 355) that is, on the law of this colony. These certificates being unsworn, and the persons certifying not being available for cross-examination, clearly are not by our general law admissible in evidence, and not being made admissible by any special law, we had no alternative but to reject them, as we did when they were tendered.

But then it is argued that, although Maria de Souza may have been insane at the time the marriage ceremony was gone through, the insanity does not make the marriage void by the law of Portugal but only voidable by the sentence of an ecclesiastical court, and that, unless and until so declared void, the marriage is valid, and the petitioner is entitled to all legal rights that would flow from a valid marriage. The argument is fallaciously used as in these proceedings; but, apart from and before coming to this, we may remark that the view of the Portuguese law put forward rests upon slender and hesitating, we might almost say contradictory evidence. The petitioner's counsel asked Senor Mello, the expert, these questions, to which he gave the answers noted: Question. "Do you know that by law a "marriage between one person and another a little out of his head, is pro-"hibited?" Answer. "Yes, it is, and the priest would be punished." Question. "If a marriage were celebrated, one of the parties being out of his bead "what would be the result as regards the validity of the marriage?" Answer: "The marriage should then be made null before the ecclesiastical judge." Question: "Would such a marriage be deemed valid until the ecclesiastical judge said it was bad?" Answer: "Yes." That is the evidence in chief, but in cross-examination Senor Mello said that marriage with an insane person would be in the same position as an attempted second marriage where one of the parties was already married to a husband or wife still alive, that is that it would be a nullity, and he also said that marriage, by Portuguese law, was a contract, and that persons not capable of consenting cannot make contracts. It would be indeed strange if it had been found that the Portuguese law departed from the view so emphatically held in the civil law that consent, and therefore also a mind capable of consent, are essential to marriage. Of course we know that according to the Christian view of marriage there is not only the consent to marry, but also the public declaration of the consent and the sacerdotal

blessing in the face of the church; and in Roman Catholic countries the ecclesiastical ceremony is elevated to the rank of a sacrament. It may very well be that where there has been a Roman Catholic celebration, a declaration of nullity by an ecclesiastical court should be required to take off the religious part of the marriage, although the marriage as a contract is invalid from the want of consenting capacity, and this, perhaps, may be the explanation of the seeming discrepancies in Senor Mello's evidence. But even if we accept the statement broadly put as petitioner wishes us to accept it, that a marriage would stand good, notwithstanding the insanity of one of the parties, until declared invalid by an ecclesiastical court, there is fallacy in the argument sought to be deduced. There is not before this court any question of dissolving a marriage or declaring it null; the question with which we have to deal is whether we shall affix the incidents of a valid marriage to a so-called marriage which, according to the evidence before us, is invalid by our own law, and, according to the law of Portugal cited to us, would be declared invalid by a Portuguese tribunal as soon as the requisite proceedings were taken and the evidence adduced; and whether we shall do this to the effect of directing the curator of Maria de Souza to transfer her property to a man who has no right to it by our law, and would have none by the Portuguese law if the appropriate proceedings were taken in Portugal for ascertaining the rights of the parties, the evidence being similar to that before us. There can be only one answer, and that a negative one, to this question.

As there are thus quite sufficient reasons, arising out of Maria's de Souza's disability according to the evidence before us to enter into a valid marriage, for refusing the petition it is unnecessary to consider the other grounds which have been suggested for the court's staying its hand in dealing with the curatory estate, founded on matters alleged to have occurred subsequently to the marriage The petition will be refused with costs.

GENERAL JURISDICTION.

1894. *April* 24. CHALMERS, C.J., ATKINSON and SHERIFF, J.J.,

DAVIS v. CLEGHORN.

Joint purchase—Transport—Retaking property by Administrator General—Arbitration.

In pursuance of agreement between A and B. A purchased a plantation from Administrator General on terms of paying the price in instalments at three, six, nine and twelve months, and other conditions usual in sales by the Administrator General, and was put in possession. A and B were to pay the purchase money jointly, in equal shares, carry on the plantation, and when A obtained title he was to pass transport of one undivided half to B. The instalments were not fully paid as they became due, but moneys were paid on account. After the last instalment was overdue the Administrator General retook possession of the plantation, but before he had re-exposed it to sale A paid the balance due to the Administrator General who passed transport to A;

Held—A is bound to transport one undivided half of the plantation to B on receiving payment of the arrears due by B: the Administrator General consenting to receive the balance due and to transport the plantation was not a new contract but related back to the original sale to A: A having been himself in default as regards his share of his purchase money cannot treat a like default by B as breach of contract.

Action for transport of undivided half of Plantation Good Success. Defendant purchased the plantation from the Administrator General on the usual terms of paying the purchase money in equal instalments at three, six, nine and twelve months, and subject to the other usual conditions of sales by the Administrator General, and was put in possession. It was agreed between the plaintiff and defendant that they should pay the price jointly, in equal shares, and that upon defendant obtaining title he should transport an undivided half of the plantation to plaintiff; the estate was to be worked by them in partnership. The instalments were not paid as they became due, but moneys were paid on account. When the last instalment was some months overdue the Administrator General, using his legal remedy, re-took possession of the plantation, but before he had re-exposed it to sale, defendant paid the outstanding balance to the Administrator General, and he passed transport to defendant.

Answer—Plaintiff has not complied with the terms of the agreement and cannot claim its fulfilment. On the re-taking of the plantation by the Administrator General the agreement between defendant and plaintiff was at an end, and the subse-

quent acquisition of the plantation by defendant was a new transaction in which the plaintiff is not entitled to claim interest. Action is ousted by arbitration clause and agreement.

Hutson, for plaintiff, stated plaintiff's case and led evidence.

Dargan, for defendant, stated case of defendant, and led evidence.

Hutson in reply.

The other facts and arguments, so far as material, appear in the judgment.

Curia (CHALMERS, C.J., ATKINSON and SHERIFF, J.J.,) per CHALMERS, C.J.:—The plaintiff asks for a sentence ordering the defendant to transport to him an undivided half of Plantation Good Success, under the following circumstances:—This plantation was purchased by Cleghorn, the defendant, on March 8th, 1892, from the Administrator General as representing the estate of Rankin, an insolvent, at the price of $11,000, payable in four equal instalments at three, six, nine and twelve months from the date of sale, and under the usual conditions of sales by the Administrator General. At the time of the purchase there was an agreement between Davis, Cleghorn, and two other persons, that the purchase was to be on behalf of the four persons, that they should each contribute equally towards the purchase money as it became due, and that the plantation should be carried on for their joint benefit. Two of the parties withdrew from the arrangement before the first instalment of the price was due, and without contributing any part of it; Davis and Cleghorn continued the arrangement as between themselves, each undertaking to contribute one-half of the purchase money. The instalments were not paid punctually as they became due, but various sums were from time to time paid on account to the Administrator General. These sums were made up by contributions both from Davis and Cleghorn, those of the latter being considerably the larger in amount.

On December 28th, 1892, Davis and Cleghorn entered into an agreement of partnership in writing, on the recital of the purchase by Cleghorn of Pln. Good Success already mentioned, and that it was at the time of the purchase agreed between the now contracting parties that they should have equal interest in the property although purchased in the name of Cleghorn, and that they should enter into the said agreement for the purpose of carrying on the cultivation of the plantation

and the manufacture of sugar. The agreement contains various stipulations relating to the partnership to be carried on by Cleghorn and Davis for these purposes, and regulating their mutual rights and obligations. The second article provides that when the instalments of the purchase money of the plantation become due, Cleghorn and Davis shall pay the instalments equally between them, and the purchase money when paid off shall be the capital of the business, which may be increased by any further money contributed by the partners for the working. The third article provides that on the purchase money being fully paid off by the partners as aforesaid, and the Administrator General in consequence passing transport of the plantation to Cleghorn, Cleghorn shall be bound, *semel et simul* with the passing of the transport by the Administrator General, to pass transport of one undivided half of the property to Davis, and there is a proviso that this transport shall not be necessary if previously thereto Cleghorn shall have acquired the interests of Davis in any of the ways provided by the agreement. This proviso connects with what is stipulated in article 1, viz., that either party may give to the other three months notice to terminate the agreement, when the party to whom the notice has been given is to have right to purchase and acquire the interest of the other party, but should he not choose to do so then the party giving the notice is to have similar right to purchase the interest of the party notified. The proviso might also come into operation under the stipulations of article 10, which deals with acts of insolvency by either of the partners. There is no evidence, however, of anything having occurred which would bring the matter within the scope of either the first or tenth article.

When the fourth instalment of the purchase money became due in March, 1893, it was not paid. A considerable proportion of the whole had, however, been paid, viz., $8,295.38, and the Administrator General did not at once resort to the extreme remedy provided by law. Sometime afterwards, however, he put that remedy into motion. He obtained an order of the Court authorising him to re-take and re-sell the property, and sent messengers to re-take possession. On June 26th, Cleghorn intimated to the Administrator General that he relinquished the possession in order to save the expense of more formal proceedings, having then no expectation of raising the money. But on the next day, June 27th, he tendered the balance due to the Administrator General, which the latter accepted and passed transport to Cleghorn in terms of the conditions of sale. The balance paid by Cleghorn, which, including interest on

unpaid balances and some other charges, amounted to about $3,500, was obtained by him as a loan from a friend, and Davis did not contribute towards it in any way. The transport was passed on October 7th, 1893, and previous to that date, viz., on September 6th, Davis, through his solicitors, demanded from Cleghorn transport of an undivided half of Plantation Good Success in terms of the agreement of partnership, offering at the same time to pay the half costs of transport and any balance of the purchase money due by him. This demand not having been complied with, Davis seeks to enforce it by the present suit.

Several defences have been raised. A principal one is that Cleghorn obtained transport of the property not under the contract of sale with the Administrator General, entered into in March, 1892, but upon a fresh contract made with him upon June 27th, 1893, when the Administrator General accepted from Cleghorn the overdue balance of the purchase money;

that the whole transaction in the benefit of which Davis was entitled to participate by the agreement of partnership was thus at an end; that his right of participation did not attach to the new transaction; and that the only right—if any—which remained in Davis was an equitable claim to obtain an account and repayment from Cleghorn of the contributions he had made towards the purchase money.

It must be borne in mind here that we have not to deal with such a case as might have presented itself if the Administrator General had gone on to expose the property anew to sale, and it had been purchased at a second exposure by Cleghorn. The Administrator General had the remedy in his power of re-taking and re-selling the property, but he only proceeded to a certain extent. Under the law of the Administrator General's sales the right of property "in any immovable property sold by the Administrator General "shall not devolve to the purchaser until the purchase money is fully paid." (Ordinance 15 of 1887, section 59.)

It is not necessary to determine now what may be the precise meaning of this provision; but it is clear that an interest in the property begins to accrue to the purchaser, at all events, from the time he begins to pay the purchase money, and this grows into a complete *jus ad rem* when he has paid all that is due. The inchoate *jus ad rem* is liable to be taken away in case the purchaser is not punctual in meeting the instalments. What really occurred in this case was that the Administrator General, after proceeding to a certain length towards taking away Cleghorn's interest under the contract of

sale, agreed, upon receiving tender and payment of the outstanding balance upon the 27th of June, to cancel what he had done, and to act upon the original contract as if there had been no default, and he carried out that contract accordingly by advertising and passing the transport. There was no complete breach of the continuity of the original transaction, and so far as there was any failure, it was rehabilitated and the continuity was preserved by the tender and acceptance of payment and proceeding to advertise transport as under the contract. We must accordingly overrule this branch of the defence.

Then it is said that the agreement of partnership was broken by Davis not carrying out his part of it in providing the halves of each instalment of the purchase money as these became due. Here again we have to attend carefully to the precise situation of the matter. We are not dealing with such a case as might have presented itself if Cleghorn had himself been punctual in meeting his share of the instalments. Up to the final dealing both parties were in default with the Administrator General, and neither was in a position to say to the other "I will exclude you from the benefit of "this agreement, because you have not fulfilled the stipulations incumbent "upon you," assuming for the moment that this would have been a valid reason for excluding him. What took place finally? We find from the evidence given on the side of Cleghorn, as well as on that of Davis, that up to the last moment—up to the time of Cleghorn obtaining the Joan from his friend—that both Davis and Cleghorn were doing their utmost to raise money to pay what was due and save the property, and that each was working for their common interest. There was a want apparently of complete confidence and accord betwixt them as to the particular persons they were asking to assist them, or the particular steps to be taken; so that the result was that Cleghorn secured the requisite loan and made the payment to the Administrator General before Davis had succeeded in obtaining a loan; but according to evidence which is uncontradicted, Davis had entered on negotiations for an advance of the requisite sum, and might have completed the negotiations and obtained the money requisite had it not been for some cross-purposes betwixt him and Cleghorn, so that the latter, rather from the accidental sequence of the occurrences than of any set purpose, anticipated Davis in getting the money and making the payment. As regards, then, the result of the payment so made on the subsequent rights of parties, it is impossible to say that there was a breach of the contract by Davis fatal to his interest. There was no defeasance of the contract of sale, and when it had been pre-

served and carried out the default of Davis—such as it was—was in a situation in which it could be made good by payment of his arrears and the interest due thereon.

The other defences were rather applicable to what the situation might have been if we had held that the contract of sale was at an end on the Administrator General re-taking the plantation, and that Davis's claim to come in for the half-share of the plantation was an equitable one. These defences, stated generally, consisted in Davis having denied his liability, a d by inference it was said his position of partnership, when his liability came in question, in certain suits in which he and Cleghorn were sued jointly for claims incurred on behalf of the plantation Good Success These, as we have indicated, are not applicable, holding as we do that there is a legal right in Davis, and not merely an equitable one; but we think it right to say that even if we had to consider the allegations more closely, we could not have come to any conclusion adverse to Davis on these grounds, without a more complete examination and scrutiny into the circumstances of the dealings which led up to the claims in question, than the materials supplied by the evidence before us admit of.

The last ground of defence which we need mention, is that it is said the jurisdiction of this Court is ousted by the arbitration clauses in the agreement. Apart from any other considerations, it is right to say that this clause by its terms contemplates the adjustment of differences arising between the partners as to their rights, powers and privileges under the agreement—viewing that as a subsisting and operating agreement—and not differences which involve questions as to the binding force of the agreement itself, or the continuance of its existence.

Upon these findings, we are prepared to give a sentence decreeing the defendant to pass to the plaintiff a transport of an undivided half of Plantation Good Success, the plaintiff paying to the defendant whatever moneys are due to him for his share of the purchase moneys and interest; but in view of what has been said on both sides of the bar as to an adjustment of the whole outstanding claims between the parties by an order for dissolution of partnership and mutual accounting, we think it better to defer giving sentence so as to give parties opportunity of conferring further as to their position.

Thereafter the following order was made:—

The judgment of the Court is that plaintiff do forthwith pay one-half of the moneys which have been paid to the Ad-

ministrator General by, way of purchase money, interest or otherwise, as the condition of his passing to the defendant transport of plantation Good Success in fulfilment of the contract of sale between the Administrator General and the defendant on March 8th, 1892, under deduction of whatever moneys have been paid by the plaintiff to the Administrator General, or to the defendant for the purpose of being paid to the Administrator General by way of contribution towards the said purchase money, into the Registry of Court for behoof of the defendant, to abide the passing of the transport after mentioned, and that immediately after being notified that the plaintiff has paid such money into the Registry, the defendant do advertise transport from him to the plaintiff of one undivided half of plantation Good Success, *cum annexis*, and after advertisement do pass the said transport to the plaintiff at the first available sitting of the Court for the passing of transports, and that the Registrar do simultaneously with the passing of the said transport, and without any further order of the Court, pay out to the defendant the moneys paid into the Registry as aforesaid, and that an account of the said moneys be taken, if necessary, such account to be taken by the Accountant of Court, with power to summon and examine witnesses, and call for production of documents, and that the defendant do pay the costs of the action generally, and the plaintiff the costs of any necessary accounting, costs not to be taxed until the judgment in other respects has been fulfilled.

GENERAL JURISDICTION.

1894. *April* 24. CHALMERS, C.J., ATKINSON and SHERIFF, JJ.

THOMSON, *In re* PETITION OF

WIETING AND RICHTER v. THOMSON.

Practice—Appeal to Privy Council—Right to appeal—Conditions—Measure of value as determining right of appeal—Powers of Colonial Court.

The Colonial Court has no discretionary powers in granting or refusing leave to appeal, but must determine whether or not a proposed appeal is within the conditions prescribed by the Queen's Order-in-Council. In determining whether a judgment is appealable the proper course is to look at the judgment as it affects the interests of the parties who seek relief by the appeal.

Petition for an order allowing appeal to the Queen-in-Council from judgment awarding damages to the reporters in an action at their instance against petitioner. The case is reported *supra* at p. 13. Petition was referred for report and the report for counter-report.

Clark in support of petition. The matter at issue was $10,000 which the reporters claimed in their action.

Kingdon, Q.C., Solicitor General, with him *Hutson,* for reporters, was not called on.

Curia (CHALMERS, C.J., ATKINSON and SHERIFF, JJ.,) per CHALMERS, C.J.:—The Order-in-Council of June 20th, 1831, which regulates *inter alia,* the conditions and methods of appealing from the Supreme Civil Court of the Colony to the Queen-in-Council, enacts that any party in the civil suit pending in the court may appeal against any final judgment, decree or sentence, subject to the rules and limitations therein prescribed. The first of these rules and limitations is—"such judgment, decree, order, or sentence "shall be given or pronounced for or in respect of a sum or matter at issue "above the amount or value of £500 sterling, or shall involve, directly or "indirectly, the title to property, or to some civil right amounting to or of "the value of £500 sterling, or shall determine or affect the right of some "alleged slave to his or her freedom." Nine succeeding rules deal with the procedure in the Colonial Court upon the petition for leave to appeal

and the securities to be given, and the eleventh rule provides that if the security be given within the prescribed period and in the manner directed, then, and not otherwise, the court from which the appeal is brought shall make an order allowing the appeal. It is only when the first rule or limitation is complied with that any of the subsequent rules come into operation.

The grounds stated for the petition we are considering are that in a "suit in which the matter at issue was $10,000," in which petitioner was the defendant and Carl Wieting and Gustav Henry Richter were the plaintiffs, this court pronounced a definite sentence adjudging petitioner to pay to the plaintiffs the sum of fifteen hundred dollars and costs, from which sentence he is desirous of obtaining leave to appeal, and further that the suit involves a "matter of civil right of more value to the petitioner than £500, and is one "of public importance, and seriously affects the freedom and liberty of "press in the colony."

The reporters maintain in their report that the sentence against which the appeal is proposed was not given for a sum above £500, or in respect of a matter at issue above that value; that the sum or matter at issue in the suit was such sum as might be assessed by the court as damages, which sum has been fixed by the decision of the court to be $1,500 and costs, and that the damages and costs together will not be of the amount of £500, and that the sentence does not involve any matter of civil right amounting to, or of the value of, £500.

The petitioner has argued in his counter-report to the effect that it is the sum claimed in the suit, not the sum for which judgment is given, that is the criterion of appealable value, proposing as a test that as the plaintiff's in this suit would have been entitled to appeal if their claim for $10,000 had been rejected, so the defendant must have conversely equal right of appealing against any judgment in the same suit adverse to himself. The petitioner has not in the counter-report made any endeavour to develop or strengthen the other grounds originally stated in the petition. The petitioner's counsel was by his desire heard in support of the petition, but his argument added nothing to what had been already stated in the petition and counter-report, and he admitted that he was unable to refer to any authority supporting the petition even by analogy.

Referring now again to the petition, it has to be remarked that the grounds on which the petition is rested are not in terms within the conditions for obtaining an allowance of appeal stated in the Order-in-Council. The Order-in-Council does not say that the *suit* shall involve a matter of the value of

£500, but that *the judgment* is given for, or in respect of a sum or matter of this value, or involve some of the alternatives to which we shall come presently. Further, there is not in the conditions any element of relative value, or value in relation to some particular individual, as the petitioner introduces by the expression "of more value to your petitioner." The criterion as concerns value, simply refers to such value as is ascertained according to the ordinary money standard, and has nothing to do with relative value. The measure of value, as determining the right of appeal, was discussed in *Macfarlane* v. *Leclaire*, 15, M.P.C. 181, and a principle was stated which applies here, although the particular facts in that case were not the same as in the present case:—"In determining the question of the value of the mat-"ter in dispute upon which the right of appeal depends, their Lordships con-"sider the correct course to adopt is to look at the judgment as it affects the "interests of the parties who are prejudiced by it, and who seek to relieve "themselves from it by an appeal." This principle was expressly adopted and given effect to in *Allan* v. *Pratt*, 13 A. C. 780. In this case the circumstances were the converse of those in *Macfarlane* v. *Leclaire*, and similar to those of the present case, inasmuch as damages had been claimed in the Colonial Court larger than the appealable amount, but decree was given for a sum under that amount. The Colonial Court had admitted an appeal, but their Lordships held that leave had been erroneously given, and dismissed the appeal. The rule laid down in these cases is binding upon us, even if we had ourselves any doubt as to the proper measure of appealable value, which we have not. It may be remarked that this rule meets the argument of the petitioner as to the identity of the reciprocal rights of the opposite parties in maintaining appeal. The light of appealing is indeed similar on both sides, but the practical question is what is the value involved in the judgment of which the appellant party complains? If the claim in this case had been rejected that would have been a judgment in respect of a sum of $10,000, and within the express description of appealable judgments contained in the Order-in-Council, but the judgment against defendant of which he complains is one only for $1,500 and costs. That is the whole of his liability. "The injury to the defendant, if he is wrongly adjudged to pay "damages, is measured by the amount of damages which he is adjudged to "pay. That is not in the least enhanced to him by the fact that some greater "sum had been claimed on the other side," per Lord Selborne in *Allan* v. *Pratt, supra*. It is clear that this judgment is not

within the first alternative of the limitations of the Order-in-Council.

There are other alternatives. There is to be an allowance of appeal if the judgment "shall involve directly or indirectly the title to property or to "some civil right amounting to or of the value of £500." This judgment obviously does not involve title to property. The petitioner does not say it does. Does it involve title to any civil right of the value of £500? A judgment involving title to a civil right of the value of £500 implies that there is some right, the title to which is in issue between the parties to the litigation, capable of vesting in the appellant, and of definite or at least appraisable value of the prescribed amount. That is not the case here, and the petitioner does not say, and has not attempted in any way to show, that it is. The remaining alternative condition in the Order-in-Council is obsolete.

As regards the averments in the petition already mentioned, other than the allegation of the value involved in the suit, under which the petitioner asks for leave to appeal, they are averments of matters not included either explicitly or implicitly in the conditions under which the court is by the Order-in-Council authorised to give leave to appeal. That being so, it is unnecessary and would be irrelevant to remark upon them further.

The powers of this Court in granting leave to appeal are solely those conferred by the Order-in-Council. The order gives the court absolutely no discretionary power in granting or refusing leave. There is the power and duty to grant leave if the judgment comes within the prescribed conditions, but not otherwise. The petitioner has not shown that the judgment from which he proposes to appeal is within any of the conditions, and according to our opinion it is not, in fact, within them. We are consequently unable to make the order prayed for. It is unnecessary to consider the questions as to securities raised in the report, which would only have come within our cognizance if the judgment had been within the conditions rendering an allowance of appeal competent. Costs to the reporters.

GENERAL JURISDICTION.

1894. April 30. ATKINSON and SHERIFF, JJ.

EXORS. OF HENRIQUES v. SANTOS.

Sale at execution—Practice—Purchase of property by agent on behalf of principal—Ostensible purchase by agent for himself—Agreement between parties after sale—Lease—Specific performance.

S., defendant, at the request of plaintiffs' testator, H., in H.'s absence from Georgetown, purchased for him a property at execution sale. Subsequent to the purchase being completed as arranged the parties agreed that the sale should be a joint one, S. to obtain title by letters of decree in his own name and to pass transport of an undivided half of the property to H.

S. denied any agreement prior to the sale at execution but averred that he purchased the property in his own name and for himself; that after the sale an agreement was come to between himself and H. to the effect that the purchase should be a joint one between them on condition that he (S.) should have a lease of the whole property purchased for a term of five years at an agreed rental; that on the completion of the said lease he was prepared to pass transport of an undivided half of the property in question.

The Court found that S. was asked to attend the sale to bid for H. and agreed to so attend; that even if he did ostensibly buy for himself, the purchase must in equity be held to have been made for and on account of H.; that to hold otherwise would be to allow him to take advantage of his own wrong.

Claim that defendant be condemned to pass transport to and in favour of plaintiffs of an undivided half of a property purchased by defendant at an execution sale in accordance with an agreement between the parties, and further to pay over one half of all rents and profits received by him from the said property since the said purchase.

D. M. Hutson for plaintiffs.

A. Kingdon, Q.C., Solicitor General, for defendant.

The judgment of the Court (ATKINSON and SHERIFF, JJ.) was as follows;

The defendant is son-in-law of the plaintiffs' testator, Henriques, an old man who had taken to himself a young wife, in consequence of which the defendant and he had not been on good terms for some time. A few days, however, before the sale mentioned in these proceedings a reconciliation seems to have taken place.

The sale in question was an execution sale for arrears of town taxes of certain premises in Water Street, Georgetown, formerly belonging to George Little & Co., but standing on the day of sale in the name of Farnum & Co, At the sale the premises were in the first instance knocked down to one

William Farnum and in the next to one Gilbert, but as neither could find the required sureties the premises were put up a third time and were finally knocked down to the defendant, as a purchase on his own account, he says, as a purchase for their testator, the plaintiffs say. It is alleged in the claim that the defendant, at the request of the plaintiffs' testator, agreed to attend a sale at execution of lots 54 and 55, Robbstown, with the buildings thereon, and purchase the same for the testator at a sum not exceeding $55,000; that the defendant did purchase the property, but in his own name, for $51,635; that the testator became one of his sureties, it being agreed that the purchase should be deemed a joint one between them, and that the defendant, on getting title should transport one half to the testator; that the testator assisted the defendant in raising the purchase money, and that the defendant got letters of decree and in pursuance of the agreement advertised transport of one half to the testator, but has since refused to pass the transport and has remained in possession. The plaintiffs ask that the defendant be condemned to pass the transport, to account for the rents, etc., received and to pay the costs. Certain exceptions proposed by the defendant were abandoned.

The defendant denies everything, and goes on to aver that the property was purchased on his behalf by his attorney-at-law; that, after the purchase, it was agreed that the purchase should be a joint one between the testator and himself, on condition that the defendant should have a lease of the whole property for five years, at a yearly rent of $600; that a contract of lease should be prepared by the defendant's attorney-at-law and submitted to the plaintiffs' counsel for approval; that such contract was prepared and submitted; and that the defendant believing it would be approved, advertised transport of the half, but that the testator refused to carry out the agreement and demanded an unconditional transport without reference to the lease whereupon the defendant gave notice to the testator that he withdrew his offer to transport the half. The defendant finally avers that he is still willing to carry out the agreement on the condition named and proceeds, in reconvention, to claim that the plaintiffs (defendants in reconvention) shall be condemned on receiving transport of the undivided half to join with the defendant (plaintiff in reconvention) in executing the lease to the defendant.

For replique the plaintiffs deny the agreement and aver that even if such an agreement were made it would be bad for want of consideration, and for answer in reconvention make

a general denial and say that the claim in reconvention is insufficient and discloses no cause of action.

At the hearing it was stated that the testator having lost a good deal of money through his connection with Farnum & Co., thought he might perhaps recoup himself somewhat by buying the premises in question at the execution sale, on the supposition based upon the general result in such cases, that the premises would not at such a sale fetch anything like their real value, his reason for asking the defendant to buy the premises for him being that he himself had an important engagement which would take him out of town on the day of the sale.

The evidence was of a very contradictory character. The decision hinges very much upon the answer to the question whether the testator did or did not ask the defendant to attend the sale and buy these premises for him. The testator is dead, and we cannot now hear his version—we can only infer what he would have said from what he did. On the Saturday before the sale the testator had a conversation with Mr. Dargan about these premises. Mr. Dargan could not, of course, state what was said or what he advised, but he says that after what had taken place between the testator and himself he was not surprised when he heard that the defendant had bought the property. One Barreiro, who was sent to fetch the testator after the premises were knocked down, says that when he told the testator that Santos had bought the place he did not seem surprised—was glad, and when told the price said it was very cheap. If the testator had asked Santos to buy the place for him, as alleged, he would not be surprised, and would naturally be glad at getting the place cheap. The plaintiffs' witnesses, Bettencourt and D'Andrade, say that Bettencourt being anxious to secure his business stand in the premises in question thought of buying them himself and a few days before the sale went to the testator and ask him to be one of his sureties, but that Bettencourt gave up that intention on finding that the testator himself wished to buy the premises, and on the testator's promise if he did buy them to renew Bettencourt's lease. At the sale Bettencourt and D'Andrade swear that when they saw the defendant bidding, which he admittedly did on the third occasion at any rate, they each asked him separately for whom he was bidding and he replied to each, "for the old man" meaning the testator. They knew that the testator and the defendant had been on indifferent terms on account of the marriage and this they say was the reason why they were anxious to know for whom the defendant was bidding—the testator not being present as they expected. D'Andrade

swears that the defendant said "The old man had come to him on Saturday and made it up because the old man knew he was wrong," and Bettencourt swears that the defendant said "Henriques had come to him the Saturday previous and asked him to come and buy the property." The defendant denies having made the alleged statements to Bettencourt and D'Andrade and says he did not speak to D'Andrade at all, and did not speak to Bettencourt till after the sale. The Marshal, however, swears he saw the defendant speaking to Bettencourt during the sale, and that he saw him also speak to D'Andrade.

In a report of the proceedings which appeared in a newspaper next day, it was stated that Bettencourt was one of the bidders. Bettencourt contradicted this in the next issue. The bare statement that a man has made a bid or bids for a certain property does not on the face of it seem to call upon him to rush into print to contradict the statement. But if Bettencourt had agreed that he would not bid as Henriques was to buy there was a very strong reason why Bettencourt should contradict the statement without delay. The fact of this contradiction having been so made at that time, long before any question as to these legal proceedings arose, affords very strong presumptive proof of the truth of Bettencourt's statements as to his interview with the testator.

The defendant and his managing clerk or partner Pereira deny that any such request was made by the testator on that Saturday, but as to Pereira, it is possible that as he, during the interview, was occasionally called away on matters of business, the testator might, during one of those absences, have requested the defendant to buy the premises. While denying that the testator made the request, it is a somewhat singular coincidence that they both admit that the question of those very premises by the testator was discussed by the testator and themselves on that very Saturday. Pereira says he told the testator they were for sale, and suggested that he should buy them, but the testator refused, saying amongst other reasons that the premises would go too high, there being two mortgages on them, one for $100,000 and that he had as much property of the kind as he cared to own. The defendant and Pereira say they had been wanting increased accommodation and had been looking out for other premises but although they say this conversation took place about Farnum's premises on the Saturday, they swear that it never occurred to either of them to buy the premises until the Monday morning. Then Pereira says he suggested to Santos to go and buy the place.

They both say that the defendant was unwilling, and that it was only when Pereira sent for a cab that the defendant consented to go. There was another property to be sold, and the defendant asked one Gomes to go and bid for it, and told him he might bid for Farnum's place up to $35,000. The defendant says that when he went to the sale he had no intention of buying the place, as he did not suppose it would go for $35,000, that it was only after he got there that he made up his mind to go up to $50,000, and that the bids made by Abraham over that sum were against his express wish.

Assuming the witnesses on both sides to be equally credible, we consider the balance of probabilities on the evidence to be in favour of the plaintiff, as regards the question under discussion. But we are constrained to say that we do not think the witnesses on the one side are as worthy of belief as those on the other. Mr. Dargan, except as executor, has no interest in the matter, and there is no reason for doubting his testimony. We have the testimony of Bettencourt and his book-keeper D'Andrade, on the one side, and of the defendant and Pereira on the other. All four are strongly interested in the result of this suit. So far they stand on a common footing, but when their demeanour in the witness-box is considered, they stand on a very different footing. Bettencourt and D'Andrade gave their evidence in what appeared to us to be a truthful and straightforward way; whereas the defendant and Pereira could not be got to give a plain answer to very many questions, and we cannot regard them as truthful witnesses. As to this part of the case, therefore, we have come to the conclusion that it is true, as alleged by the plaintiffs, that the testator did ask the defendant to attend the execution sale, and buy the property for him within a certain limit and that the defendant promised to do so. The premises having been knocked down to the defendant, it then being nearly four o'clock the testator was sent for. He was at home having returned to town. When he came some conversation took place between him and the defendant.

D'Andrade says Santos asked the testator if he wanted the place all to himself, and the testator replied—if Santos cared they could go into partnership. This was said in Portuguese. The defendant denies this and some of his witnesses say they did not hear it. The defendant says that when the testator came "he asked me to give him half of the place: I said I will on no condition." Nothing more was said, and his witness William Farnum, says the defendant told him at the time, in the testator's hearing, that he could not carry out a certain

arrangement with him relating to the property, as the testator wanted half. Farnum swears that, while the bidding was going on, and before the property was knocked down he arranged with the defendant that the purchase should be on their joint account. It was urged for the plaintiff that this was so improbable as to be incredible. The defendant, it was said, whatever else he may be, is no fool, but a keen business man. Why should be give an interest in the property to and ally himself with a man of straw like Farnum? There were some vague allusions to relations existing between Farnum and the defendant, but nothing was made to appear which would render it in the least degree likely that the defendant would act in a way apparently so contrary to his own interest. Apart from this, according to his own story, the defendant relied upon getting the testator and Jose F. de Freitas, both good business men, to stand as his sureties. Farnum admits that he has nothing. Were they likely to be ignorant of his position and knowing it, would they have been likely to agree to become sureties for Farnum as a joint purchaser? It may be said they would have known nothing about the agreement with Farnum, but that would be imputing to the defendant an intention to do that which would have been in the nature of a fraud upon them.

In support of the defendant's proposition that he was in fact the purchaser evidence was given by himself and two or three witnesses to show that he, the moment the property was knocked down, signed the conditions of sale before the testator came on the scene at all. As against this it was urged for the plaintiffs that the rule was that sureties and principal should be present and sign at the same time; and it seems to be the fact that when this property was knocked clown on the first and second occasions the purchasers did not sign the conditions, no sureties being forthcoming. No reason appears why the defendant in the absence of his sureties should have been permitted by the Marshal to sign the conditions of sale. There was no certainty that he would get sureties. One of those he named did not appear, and, if Bettencourt had not signed, the sale might have fallen through. There was another man present who would probably have been accepted, but that would have been of no use if the testator had happened to be delayed in his return to town.

However, the plaintiff and his witnesses swear that the conditions of sale were signed by the defendant outside the office before the testator came. Bettencourt and D'Andrade on the

other hand were equally positive that the defendant signed inside the office after the testator came. Bettencourt says he saw the defendant hand the pen to the testator telling him in Portuguese to sign for the property, but the old man said, "No, you sign," that Santos then signed, that the testator next put his mark and that he, Bettencourt, then signed. D'Andrade says it was the Marshal who handed the pen to the testator and told him to sign but the old man said the defendant could sign first. Much stress was laid by the defendant's counsel upon the fact that several of the plaintiffs' witnesses had said that the defendant signed outside whereas Bettencourt and D'Andrade said he signed inside and actually saw the pen handed, as showing that the two latter were not speaking the truth. It does not follow the larger the number the greater the truth—that depends upon the character of the witnesses, their powers of observation, the accuracy of their recollections and so on. There was admittedly great excitement and confusion at the time and the Marshal who con-ducted the sale complicates matters still further by saying not only that the defendant came round through the rails and signed immediately after the place was knocked down, but also "that Bettencourt signed there and then at the same time as Santos."

There is one circumstance which throws a good deal of light upon the question as to who was the real purchaser, whoever appeared on the conditions of sale as the nominal one, as well as upon the question of the defendant's veracity. Immediately after the conditions of sale were signed, the testator the defendant and Bettencourt left the Law Courts and walked towards the defendant's store in Water Street. On their way they passed the Hand-in-Hand Buildings. At the corner they met one Reid, clerk of the Hand-in-Hand Insurance Company. The testator told Reid, the defendant being there, that he had bought the premises in question, and said he would want some money, $30,000 to $40,000. Reid said there was plenty. Next morning the testator and the defendant went to the Hand-in-Hand Office and signed a joint application for a loan of $35,000. The defendant swore that he didn't remember anything about this meeting with Reid near the Hand-in-Hand, or the talk about the money. A mere casual remark might escape a man's memory, but we find it difficult to believe, looking at the circumstances, that the defendant could have forgotten a conversation of so much interest to himself, having reference to the raising of the purchase money to pay for the property just bought. The

forgetfulness may perhaps be explicable on the supposition that the defendant was not anxious to remember that the testator, immediately after the sale, had told Reid that he had bought Farnum's premises. It was forcibly argued for the plaintiff that even assuming that the defendant had bought the place for himself, his story that he had agreed to let the testator have half "on condition" was in the highest degree improbable. The testator though uneducated was admittedly an able and experienced business man. Was it likely that he would have become surety for the payment of the whole purchase money, that he would render himself as partner liable to find half the purchase money—on condition—without knowing what the conditions were on which he was to get transport of his half of the property? It appears from the evidence of the defendant himself that there was no verbal agreement to that effect. Pereira says the defendant on the afternoon after the sale told him the testator had agreed to give the lease; the defendant says he didn't speak to the testator that afternoon about the lease or mention the conditions to him. Next morning Pereira says the defendant sent him to the testator, and the defendant says he was sent to tell the testator the conditions, but, according to his own account, all that Pereira told the testator was that the defendant wanted him to go to Abraham's office. Some time later in the day the testator went to the defendant's store. Pereira says that there and then all the details as to rent, duration of lease, etc., were settled between the defendant and the testator; the defendant himself swears that he didn't mention any of the terms to the testator then except as to the rent, but told the testator to go to Abraham's office, where "everything was written," and "sign the conditions." The defendant gives as his reason for not speaking to the testator about the lease on the afternoon of the sale that he had to consult with Pereira as to what rent they should pay. We doubt very much whether the alleged 'condition' was even thought of till that evening after the testator had left the defendant's store. The defendant being entered on the conditions of sale as the purchaser was, in point of law, the real owner. He wanted increased accommodation. Why not make it a condition of giving the testator transport of the half that he should join in giving the defendant a lease of the property? Pereira hurries off to the solicitor's office that same afternoon. Abraham says it was the defendant who came, but whichever it was the agreement was drafted that very evening. Why this hot haste

It is plain that the testator from the very first refused to sign the lease. On the 29th of November the defendant and he had signed the application to the Hand-in-Hand for a loan of $35,000; on the 30th or 1st the defendant withdrew that application so far as he was concerned. He thus states his reason, "I told him (the testator) to go and sign and he would not, and then I withdrew." On the 2nd of December the defendant applied to the B.G. Mutual for a loan of $40,000 and on the 6th the Directors agreed to lend the money.

As will be seen, the evidence as to what occurred at the sale is most contradictory, but taking into account the pre-existing circumstances, we have no doubt that we ought to hold that the purchase was made for and on account of the testator.

Even if it were the fact that the defendant bought the property for himself he has failed to prove his averment that it was agreed that the purchase should be a joint one on condition that the defendant should have a lease of the whole property for five years at a yearly rental of $600. In the defendant's pleading it is averred that it was arranged between the parties that an agreement in writing should be prepared and submitted for approval but it is not averred that any such agreement was approved—the contrary indeed, is implicity stated. Although such approval is not averred, an actual approval was attempted to be proved. Certain draft agreements were put in and certain evidence was tendered to show that the testator did in fact at one time consent to the terms of one of the draft agreements granting a lease of the whole premises to the defendant on the terms stated, although he could not be brought to execute it. The testator undoubtedly was very strongly pressed by the defendant and his advisers to join in granting such a lease, but we are of opinion that he never really did so agree as to make the agreement binding upon him. Several witnesses who had for many years had ample opportunity of forming an opinion as to the testator's character as a business man, spoke of him as an honourable man whose word was his bond. Bettencourt and D'Andrade both swear that at the signing of the conditions of sale they severally asked the testator whether the arrangement as to the lease to Bettencourt held good and that he said it did. D'Andrade says the testator was annoyed at the question, asking if he had not already given his word.

On the evidence there can be no doubt that the testator had in fact promised that if he bought the premises he would give Bettencourt a lease on the same terms as the one put an end to by the execution sale, and that upon that understanding,

Bettencourt did not bid for the property, and signed the conditions of sale as one of the sureties. The defendant has failed to convince us that the testator whose reputation in business circles for honourable dealing during so many years was so high, would all at once belie his character and agree to thrust out Bettencourt in this dishonourable way by giving the defendant a lease of the whole premises. The testator's conduct from first to last contradicts such a supposition. He may at times have wavered under the pressure to which he was subjected by the defendant and those acting for him, but his honourable instincts prevailed and he died without executing the lease to the defendant.

This disposes of the argument for the defendant that even if in buying the property he had, as alleged by the plaintiffs, acted as the testator's agent, the relation of principal and agent had been by agreement turned into one of partnership and that the plaintiffs could not ask the defendant to perform his part of the agreement without at the same time performing theirs—that is, joining in a lease to the defendant of the whole property. That assumes that the testator did in fact agree to give such a lease, and we have come to the conclusion that he did not.

The case for the defendant was argued as if, assuming that he bought for himself, the granting of a lease of the whole premises to him was a condition precedent to the passing of transport to the testator of the individual half. But, until the testator got the transport he could not join in such a lease. A man cannot lease property of which he has not the legal title. It is true, no doubt, that if anyone professes to execute a lease of property to which he has no title but of which he afterwards acquire title, he can then be compelled to execute the lease, but that is not the case here. No such condition precedent is averred in the pleadings. As we have seen it is averred that it was agreed that the purchase should be a joint one on condition that the defendant should have a lease of the whole property on certain terms. That, understood in its ordinary grammatical sense, which is the sense in which it must be understood according to the rules of legal construction, must be taken to mean that the lease was to be granted by the joint purchasers, which they could only give where they both had legal title to the property. On the defendant's pleading therefore, the condition precedent is not that the lease should be executed, but that the transport shall be passed. We may point out here that, whether from a knowledge of the testator's promise or from a desire to keep a tenant or from the

defendant's own sense of justice, the defendant was, at the outset, willing to join in giving Bettencourt a lease of the greater part of that portion of the premises which he had occupied under the lease put an end to by the sale at execution. All that the defendant wanted immediately after the sale was that Bettencourt should give up a part of the lower front store which the defendant wanted to use as an office. Had Bettencourt consented, these proceedings would never have become necessary. The defendant would have passed the transport to the testator and would have taken a lease of the premises less those parts leased by Bettencourt. But Bettencourt refused. That fact seems to point to the truth of Bettencourt's story, that the lease of the whole of the premises occupied by him had been promised to him. If that had not been so the presumption would appear to be that he would have been only too glad, instead of being turned out altogether, to get a lease which would, after all, have given him three-fourths of the lower front premises. On Bettencourt's refusal the defendant apparently resolved to get rid of him entirely. It was said for the defendant, that it was because Bettencourt offered the testator $800 for the whole premises that the testator refused to approve and sign the lease prepared by defendant's attorney-at-law. But as the evidence stands it may be fairly argued, on the other hand, that Bettencourt made this offer when he found that the defendant was trying to oust him altogether.

And in this connection we ought not to omit to notice a conversation which Abraham, the defendant's solicitor, says he had with Bettencourt, but which the latter disputes. After the property had been knocked down, the question as to sureties arose—Abraham says: "I then asked Bettencourt if he would sign. He said if he signed would Santos be turning him out? I told him I would see that he was not turned out. He then agreed to sign." Santos says that Abraham, unasked, began bidding for him, and this is practically admitted. However, Santos ratified Abraham's bid, and became the purchaser. The bystanders, seeing Abraham thus bidding for Santos and further occupying himself after the place was knocked down about getting the conditions of sale signed, would naturally suppose that Abraham had been duly employed to act, as he certainly did act for the defendant. There can be no doubt, if we accept Abraham's account, that Bettencourt would be under that impression when this alleged conversation took place. On this view, therefore, Bettencourt was induced by the guarantee given by Abraham acting as the defendant's solicitor, to sign as surety. If so, good faith required both

the defendant and his solicitor to see that Bettencourt was not turned out, in other words that he got his lease.

To conclude, on the facts before us we find that the defendant was asked to bid for the testator, that the defendant knowing that the testator could not attend the sale himself, promised to attend on his behalf, and that the testator was thus prevented from appointing anybody else to represent him. This being so, even if the defendant did ostensibly buy for himself the purchase must in equity be held to have been made for and on account of the testator. To hold otherwise would be to allow the defendant to take advantage of his own wrong.

It is unnecessary for us to consider the question as to the sufficiency of the counter-claim.

We are of opinion that the plaintiffs are entitled to sentence with costs.

GENERAL JURISDICTION.

1894 *May* 11. CHALMERS, C.J., ATKINSON and SHERIFF, J.J.

WHITE v. HAMILTON.

Accounts—Consent to refer—Accounting Rules 1886—Objections after consenting to reference—Counsel withdrawing from proceedings.

Plaintiff claimed on *indebitatus assumpsit.* Defendant counter-claimed for money due under an agreement of partnership. Plaintiff excepted. A consent order was made for mutual accounts. Plaintiff filed accounts. Defendant filed an affidavit that he had had no intromissions and no accounts. Defendant's counsel, after objecting to the procedure before the Accountant, withdrew, and the examination of the accounts was continued *ex parte.*

Held.—The consent to account and order following thereon constituted a binding contract between the parties. The defendant having stood by and allowed the accounting to go on, without applying to the Court to correct alleged errors going to the competency of the entire accounting, is disentitled to raise objections to the completion of the accounting.

The case came before the Court upon the report of the Accountant of Court, petition of objection thereto, and answer.

Dargan for defendant:—It was not competent for the Accountant of Court to hear the debating of accounts. A Judge is required to be present (Ordinance 5 of 1855, ss. 186, 187). Rule 10 of the Accounting Rules, 1886, does not enact that the accountant shall take the evidence. He has no authority to administer an oath, and the evidence must be on oath. Further, if rule 10 is to dispense with the Judge it was *ultra vires*; section 249 of Procedure Ordinance, 1855.

[CHALMERS, C.J.: Can the competency of the Rules be discussed after being confirmed by the Court of Policy?]

Forshaw, for plaintiff:—The presence of a Judge is not required. The parties consented to have the accounts investigated and adjusted by the accountant, well knowing the practice before him. The objection not having been taken *in limine* is out of time.

Dargan in reply:—The consent was to render accounts and have them adjusted according to law, and not otherwise.

Curia (CHALMERS, C.J., ATKINSON and SHERIFF, J.J.,) per CHALMERS, C.J.:—This case comes before the Court

upon the report of the accountant and objections of the defendant to that report. The situation is somewhat peculiar. The claim is for $331.15, balance of an account for money lent, money paid, and money due by the defendant on account stated. The defendant in his answer denied indebtedness, and in re-convention alleged that the plaintiff and one Henry Thomas and himself had become partners in the business of mining, under an agreement by which the plaintiff was to make all necessary advances and receive the gold that might be obtained and divide the proceeds in certain proportions amongst the partners, and that the plaintiff had not accounted to the defendant, and he claimed an account of plaintiff's intromissions with the gold and payment of whatever sum might be due to him. The plaintiff in his replique, whilst admitting an agreement between himself, Thomas, and defendant, denied that its effect had been correctly stated by the defendant, and he also raised various objections against the competency of claiming in re-convention under this agreement in the present action. By the duplique, issue was joined upon the various questions raised in the replique.

Although thus at variance in their pleadings the parties appear to have come to the conclusion that the best thing they could do as sensible men was to have the accounts investigated, so that it might be made clear on whose side the balance lay, and what was the amount. Accordingly, the counsel of plaintiff and defendant jointly consented that the accounts should be taken by the Accountant of Court and a consent order was thereupon made, directing the parties mutually to account to each other.

A detailed account of his intromissions was laid before the accountant by the plaintiff, including the account for advances made to the defendant constituting the original claim in the action. The defendant furnished no account, but filed an affidavit stating that he had had no intromissions. As he was manager of the placer, and by the agreement had expressly promised to account for the gold found in the working, an account from defendant showing the output of the placers would certainly have been expected. The defendant filed affidavit of objections to the plaintiff's account, which was replied to by an affidavit of plaintiff. After the filing of these affidavits, the accountant of court proceeded to the debating of the accounts in presence of the parties or their representatives. Upon the discussion of the first objection to the accounts, the counsel of the defendant, objecting both to the substance and method of the proceedings before the accountant,

took the course of retiring, leaving the matter to be extricated in any way it might. The position now before the accountant was just the same as if the defendant had been conducting his case in person, and at this stage had said he would take no further part in the discussion before the accountant; for whatever may be the counsel's responsibilities in abandoning a client and it is a course of which the court has gravely disapproved (*Willems* v. *Executors of Black*, 1890 L.R. B.G. 1)—the court's action is binding on the client in any question with the opposite party or with the tribunal. The accountant was accordingly quite justified in proceeding with the accounting, which he did after having, in greater caution, brought the matter to the notice of the Judges, who then were Mr. ATKINSON, acting Chief Justice, Mr. SHERIFF, Justice, and Mr. KIRKE, acting Justice. The accountant's report shows that there was a loss of $1,277.02 on the mining business, and that the sum claimed by the plaintiff in his account of personal advances to and on account of the defendant to which no objection at all appears to have been taken, was due.

The Court has now to deal with the petition in objection to the report of the accountant. This petition, it may be remarked, is unusual in form, being made in the name of the solicitor of the defendant in his behalf, and is signed by counsel. It sets out certain objections which are obviously the same in substance as were taken before the accountant; but it is not said, and there is no reason to believe that there was anything in the procedure before the accountant not in conformity with the practice he has followed since the Accounting Rules of 1886 came into operation, and which is familiarly known to every practitioner of the court. The whole that took place, it may be noticed, was under the old practice as to accounting prior to 1894. It appears to us that it is wholly unnecessary, so far as the action now before us is concerned, to discuss whether that practice is sound or unsound. The parties, with full knowledge of what was the practice to which they were submitting—for the knowledge of the counsel in such a matter is the knowledge of the client—consented to submit their accounts to the investigation of the accountant according to the usual methods. It is not a question of the jurisdiction of the accountant, but a question of adhering to the contract made in a litigation. By such a contract parties are bound as much as by any other contract if there be no valid ground for departing from it, and here no such ground has been alleged. All the more is the defendant disentitled to raise objections now to the procedure from

the course which was taken by him through his counsel. The objections did not go to mere details, so that they might have been noted and reserved for the consideration of the court, the accountant going on in other respects, but they were such that if valid they would have had the effect of stopping the proceedings before the accountant entirely. But the defendant took no means at the time of bringing any question to the notice of the court, so that if the accountant was wrong he might be set right, but lay by until the accounting was completed, and now asks that the whole should be made abortive. Such a course would be against equity, and even apart from the obligation of the initial contract to submit to the investigation of the accountant, ought not to be allowed.

There being thus no objection to the accountant's report to which effect ought to be given, we give judgment according to its tenor, for payment of the sum found to be due by the defendant to the plaintiff, viz., $331.15 with costs.

APPEAL COURT.

1894. *May* 25. CHALMERS, C.J., ATKINSON and SHERIFF, JJ.

RE JULIUS CONRAD, INSOLVENT.

EX PARTE BENJAMIN CONRAD.

Evidence—Marriage settlement executed in England—Admissibility—Ordinance 3 *of* 1860, *Sec.* 21.

A settlement on marriage executed in England is not admissible in evidence in support of an alleged preferent claim on an insolvent estate until deposited or recorded in the Registrar's Office.

An appeal from the decision of a Judge sitting apart, reducing a proof in insolvency, involved the question whether a mortgage given under provisions of a marriage contract was or was not effectual against general creditors so as to support a claim of preference. It was stated for the appellant that since the hearing before the Judge, it had been found that an English marriage settlement executed between the spouses, established that there was valuable consideration for the marriage contract and mortgage on which the preferent claim was founded. The Court allowed appellant to give the English settlement in evidence, and stayed proceedings in order that the instrument might be obtained from England. One of the trustees of the settlement appeared in court and gave evidence showing the execution, and the settlement was tendered.

Kingdon, Q.C., Solicitor General, for the creditors, objected on the grounds, (1) That the settlement could not be received until recorded or deposited in the Registrar's Office; citing Ordinance 3 of 1860, secs. 21 and 24 (*a*). (2) The witness who has given evidence is a party, and proof by party is not one of the modes of proof authorized by section 24.

Dargan for appellant: The enactment cited does not deal with settlements executed in England. It refers to antenuptial contracts, &c, executed according to the law of this colony. It would be impossible to deposit this settlement in the Registrar's Office here; it affects English property. There might be a valid instrument executed in England without

(*a*) See now Ordinance 6, 1880, Sec. 28. Ed.

attesting witnesses, and then the conditions in section 24 could not be fulfilled. As it only affects English property, it could not affect the rights of creditors here. We do not found our right on the settlement, but only use it to show a quality in another instrument.

Curia (CHALMERS, C.J., ATKINSON and SHERIFF, JJ.) per CHALMERS, C.J.:—We have been informed by Mr. Conrad, the witness who has just been examined, that the instrument proposed to be put in evidence is a settlement on the marriage of Mr. Walter Faucet Scott and Miss Beatrice Bertha Conrad. We know as yet nothing otherwise as to the contents of the instrument, but the description given has not been controverted in any way, and for the purpose of determining the admissibility of the document in evidence, may be taken as authentic. Section 21 of Ordinance 3 of 1860 has been cited on the opposite side in opposition to the admission of the document. The enactment is, "No act of verweezing, ante-nuptial, nor marriage "contract, *donatio inter vivos*, act of division of an inheritance, nor other "instrument whereby the interests of creditors or third parties may be af-"fected . . . . . shall be good, valid, and effectual in law, or be in any way "pleadable, or be allowed to be pleaded in any Court of Justice of British Guiana," unless the same is executed in certain ways prescribed, "and until "the same shall be duly deposited in the Registrar's Office or recorded "therein."

The deposit or recording in the Registrar's Office is thus made a condition of every document within the comprehension of the enactment being put before the Court in evidence. It is clear that this instrument as described by the witness is within the comprehension. It is a settlement on marriage, therefore within the words of the section; such a settlement by its nature may affect the rights of creditors and third parties. Whether this settlement does or does not affect creditors is immaterial, it is excluded by its name, and by its inherent potentiality of affecting creditors, until the section is complied with. But as regards the present contention, we have also inferential proof that it does in fact affect creditors on this estate under the circumstances in which they are before us, the very object of using the instrument in evidence being to support a certain preferent claim, which, so far as it is sustained, must diminish the share of general assets coming to other creditors. The instrument being thus excluded by the law, we cannot receive it in evidence, however desirous we are of doing so, in sequence of the allowance already made to stay

proceedings until the instrument could be brought from England, which allowance was made upon the statement that it was essential the provisions of this instrument should be before the Court in order to a correct determination upon the equities involved. It will be for the appellant to take such steps as he thinks tit for complying with the condition prescribed by section 21, after which we shall be in a position to receive and consider the instrument in its bearings upon the questions involved upon the appeal.

Dargan for appellant, moved for time to have the settlement duly proved and recorded, which was unopposed, and was granted.

LIMITED JURISDICTION.

1894. *May* 26. ATKINSON, J.

NASSIBUN v. STOUTE ET AL.

Action for damages—Assault—Levy—Taking jewellery from the person—Judgment summons.

All the necessary facts appear in the judgment.

E. A. V. Abraham, solicitor, for plaintiff.

H. H. Laurence, solicitor, for defendant.

ATKINSON, J.:—The plaintiff alleges that the defendants assaulted her by forcibly holding her and taking from her person certain articles of jewellery, by reason of which she has lost the same and has been otherwise damnified. She claims $240 by way of damages. The defendants deny the assault and aver that the plaintiff voluntarily delivered the jewellery in question to the defendants, Rupine (a bailiff) and Spooner (a rural constable), who were acting in the execution of their duty in satisfaction of a distress warrant against the plaintiff lawfully obtained by the defendant Stoute (manager of Pln. Reliance), the said jewellery not being in value more than sufficient to satisfy the plaintiff's claim. As an alternative defence the defendants have brought into the registry the sum of $5 as sufficient to satisfy the plaintiff's claim.

It seems that the plaintiff had rented certain cocoanut trees belonging to Pln. Reliance and was sued by the deputy manager, Stogden, in the Magistrate's court, for $30 rent due. She admitted the debt and sentence went against her on July 30th, 1893, for the amount claimed, with costs ninety-six cents. She did not pay the amount and a distress warrant was obtained by Stogden on August 7th, 1893.

On December 2nd, plaintiff was at the Reliance market selling goods. The defendant Rupine went there to execute the warrant, accompanied by defendant Stoute who pointed out the plaintiff. Rupine read the warrant to her and demanded the amount due. She said she had no money. Stoute told the bailiff to levy on the jewellery she was wearing, and the bailiff told her he was going to levy on it. Upon this the bailiff swears that she said he could take the jewels, held

out her arms, and herself assisted him; that some little force had to be used upon the jewellery to get some of it oft, and that Spooner, the constable, was called to assist. Spooner corroborates the bailiff.

[The Judge here proceeds to state that the evidence led by the plaintiff is in direct conflict with that led by defendants, and that he believes the witnesses called by defendants].

It was argued at the hearing that the bailiff should have taken the woman's furniture before proceeding to levy on her jewellery, but I am not aware of any requirement of the law to that effect, even if the bailiff had known that she had furniture, which he swears he did not. The plaintiff had been living with a Portuguese man who had died shortly before the levy; there was some furniture in the house but so far as the bailiff's knowledge went it might have been the man's.

Something was said about its being the duty of defendant Stoute to proceed by way of judgment summons, but that would have been an abuse of the procedure. A judgment summons may be appropriate where a defendant has not paid in pursuance of a sentence, and the judgment creditor does not know of any property of the debtor to levy on, but why should a judgment creditor put himself to that trouble and the debtor to that expense when he knows, as in this case, of property belonging to the defendant more than sufficient to cover the amount of the judgment.

The case was argued as if it wee a sort of crime to take jewellery off the person of a cooliewoman, and reference was made to English cases relating to damage feasant, and to English decisions that things in actual use may not be levied on (a); but it is unnecessary for me to consider whether these decisions have any application here even by way of analogy, because I am of opinion that there was no forcible taking in the sense which might entitle the plaintiff to damages—but I may say that it by no means follows that because you may not levy on the horse a man is riding, the tools he is using, or the clothes he is wearing, you are also precluded from touching the jewellery with which he is adorned.

I reject the claim with costs.

(*a*) See now Section 44, Ordinance 11, 1893. Ed.

GENERAL JURISDICTION.

1894. *May* 28. CHALMERS, C.J., ATKINSON and SHERIFF, JJ.

MCARTHUR v. BETTENCOURT.

Contract—Agreement between owner and manager of shop business—Claim for salary and commissions—Account settled—Credit given by manager to customers—Liability of manager—Scope of authority.

Circumstances in which plea of settled account sustained. Manager of a shop giving credit to customers contrary to instructions is liable for deficiencies, and is not discharged by his credits having been, with knowledge of employer, entered in stock sheets.

Action on agreement between owner and manager of a shop Manager was to be remunerated by salary and a share of net profits. He claimed an account and payment of balance appearing due thereon. Answer, account stated and settled; claim in re-convention for value of goods given out on credit from shop by plaintiff and moneys overdrawn by him. Issue, and reply in re-convention that credits were given in ordinary course of business, and defendant had received part payment.

The other facts and arguments sufficiently appear from the judgment.

Hearing was on April 30th, and May 1st, 2nd, 4th and 7th, 1894.

Hutson, for defendant, open case on plea of settled account, and led evidence.

Dargan, for plaintiff, opened and led evidence.

Hutson in reply.

Curia (CHALMERS, C.J., ATKINSON and SHERIFF, JJ.) per CHALMERS, C.J.: Plaintiff in March, 1891, became manager of a dry good business carried on by defendant in Camp Street, Georgetown, at a salary of $40 a month and one-third of the net profits, defendant supplying the necessary goods at Georgetown wholesale prices. In July, 1891, it was agreed that plaintiff's salary should be increased to $50 a month. Plaintiff alleges that in July, 1892, it was agreed that his salary should be further increased to $60. This is denied by defendant and is one of the points in issue. Plaintiff claims

an account of the working of the business from March, 1891, to January 31st, 1893, when he left the employment, and payment of whatever balance may be due to him. In answer the defendant avers that all the accounts of the dry goods business up to January 3lst, 1893, were fully settled and adjusted before action. The defendant further avers that at the adjustment of accounts for the period from March, 1891, to July 31st, 1892, it was found that plaintiff was indebted to him in $414.24, for which he gave his promissory note, upon which he has been sued and judgment recovered; and that at the adjustment for the period from August, 1892, to January, 1893, plaintiff was found to be indebted in a further sum of $284.84, for payment of which he makes claim in re-convention.

The discussion and evidence upon the plea of account settled have had the result of showing that there are really only three questions in difference between the parties, viz., whether interest at the rate of five per cent., per annum should be charged against the business of which plaintiff was manager upon the balances of stock appearing at the stock-takings, whether plaintiff should be charged personally with the value of goods he sold on credit, and whether plaintiff's salary was raised to $60 per month from July, 1892, and should be counted as of that amount to the end of the employment. Counsel on both sides were satisfied that all available evidence on these questions had been given during the hearing, so that it remains now only for the Court to decide upon these questions, which will be a disposal of all that the action involves.

The charge of interest on the stock balances was not a part of the original agreement between the parties; but we are told by defendant that after the first stock-taking in July, 1891, and before the second stock-taking in January, 1892, it was arranged that it should be charged. Accordingly the charge was made in the stock-taking in January, 1892, and also in that of July, 1892. These charges were, with other entries made in the stock-taking, inserted in pass-books which were kept at the Camp Street store in plaintiff's custody, and showed the account between that store and defendant's larger store in Water Street, from which the goods were supplied. Plaintiff told us that after this interest was charged in the stock he remonstrated with defendant about it, pointing out to him that it had the effect of making his position worse than under the original agreement, and he said that defendant thereupon agreed to make his monthly salary $50 instead of $40, as it had been at first, and promised to consider about

discontinuing the charge of interest. The effect of this increase of salary, in relation to the share of the interest (one-third) which fell on plaintiff, appears, when the figures are worked out, to counter-balance the burden of the interest, so that plaintiff was as well off as at the beginning, Defendant, it seems, also had a particular reason for continuing to charge the interest, as he had done so under the recommendation of the person in England who supplied him with goods and advised him respecting methods of carrying on his business. In effect, moreover, the charge of interest on the stock balances was nearly compensated for by the allowance of one per cent., given on the whole amount of the cash sales. The weight of probability clearly is that when the additional salary was given, the understanding on both sides was that the interest was to continue to be charged.

The giving of the promissory note by plaintiff supports the view that he acquiesced in the charge of interest, as it also supports strongly the plea of settled account up to the period when it was given. Evidence was given showing that at the time of making this note plaintiff was indebted to defendant in an exactly similar amount with that in the note. A debtor and creditor account of the transactions between plaintiff and defendant was put in evidence. It appears that the Camp Street store was not by any means the first dealing in which plaintiff and defendant had been engaged. Defendant assisted plaintiff in keeping a store at Mahaica-Ballie on the Demerara River, and from time to time had lent him money. In this account plaintiff was debited with various sums due on account of these past transactions; he was also debited with overdrafts in money and goods taken by him from the Camp Street store, and he was credited with the Mahaica-Ballie stock which had been transferred to defendant and with his share of profits from the Camp Street store as ascertained at the stock-takings of January and July, 1892. In these stocks the charges for interest had been given effect to. In answer to questions in cross-examination, plaintiff admitted all the items of this account to be correct, except one, as to which he hesitatingly said he did not remember it, and the charges of interest on the stock balances. He had given defendant a promissory note for the exact balance on this account, which he admitted was due. He said he had given this note because defendant wanted to raise some money and he knew that he was indebted, but that he gave the note without ascertaining and without reference to the amount of his indebtedness at the time, a statement which commends itself more for its ingenuity than for the weight it

carries. After the giving of this note we have the plaintiff stating that he again objected to the charge of interest, and that defendant agreed to discontinue it, but this is positively contradicted by defendant. Plaintiff stated that at the same interview defendant also promised that his salary should be raised to $60 a month. The defendant stated that he had not raised the salary but had authorised plaintiff to draw $60 a month instead of $50 as previously, against his salary and profits, so as to enable him to have more money in hand. In these circumstances it is quite possible that plaintiff might have mistaken the defendant's meaning, whereas defendant could be under no mistake as to his own. It is contradictory of plaintiff's statements as to his salary and the interest, that although on his own showing he obtained on this occasion all he could expect from defendant—both the rise of salary and the removal of the charge for interest—yet soon after he gave notice that he would leave the employment, and did so, opening a store of his own in the immediate neighbourhood of defendant's store. The reasons he gave for leaving, one being a difference as to the liability for a breakage of a glass show case involving only a small amount, the other being a matter going back to a period considerably before the time when plaintiff obtained the removal of his grievances, do not commend themselves. Plaintiff is in the position of one who has gone on taking all the benefit of a contract as long as it suited him, and then when something else suits him better says, I never consented to this and the other stipulation, whilst by continuing to deal under these stipulations he has given the opposite party very strong reason to believe that he did consent.

As regards the items charged against plaintiff for goods given out by him to customers on credit, we have herein direct conflict of evidence, defendant stating most positively and circumstantially that he had prohibited the giving of all credits, but plaintiff nevertheless persevered in giving some credit, and when challenged for so doing, promised that he would personally guarantee the payment. It is beyond any question that the business was to be carried on essentially as a cash business, and hence it lies on the plaintiff here to show that he was authorised to give credit. There is no collateral evidence supporting his assertion that he was allowed to give credit, provided he was careful as to the persons he trusted, except that debts due for goods given on credit have been entered in the stocks. It was said that if credits were not recognized and allowed these debts would merely have been charged in the aggregate against plaintiff and he

would have been left to deal with them on his own responsibility. But this argument does not seem of much cogency. The defendant might very naturally say to plaintiff "you have given these credits contrary to my instruct-"tions. I have no particular confidence in your ability to get them in nor to "make good the amount if you fail, and if I leave this all to you the loss "may be greater than if I co-operate in the collecting. But for any defi-"ciency you will be responsible as guarantor." And this in effect is what occurred.

The weight of the evidence supports the view that there was a stated and adjusted account up to the giving of the promissory note after the third stock-taking, and independently that the interest is properly chargeable to the stock balances, that the plaintiff's salary was $50 a month to the termination of the employment and not $60, and that he is chargeable with the amount of the credits he gave. The amount of this last charge will, however, be diminished to the extent of whatever debts were got in by or paid to the defendant.

We reject the claim for an account at large; remit to the Accountant of Court to ascertain what amount of credits given out by plaintiff during any period of the business were received by the defendant, with power to the accountant to summon and examine witnesses and also for production of documents. The sum claimed in re-convention, viz., $284.84, is made up of the overdrafts by plaintiff upon the Camp Street business, and the credits given out by him contrary to orders, between August 31st, 1892, and January 31st, 1893, under deduction of his salary and share of profits as shown in the bill of particulars appended to the answer. The remit to the accountant will include the examination and verification of these overdrafts and credits, with power to reform the account if necessary.

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