# INDEX.


PAGE.

APPEAL— Amendment of plaint—Evidence—Admission of parol evidence of written documents—Case referred back for rehearing

Permally v. Soobdhan .....1

" Food and Drugs Ordinance, 1892—Certificate of analyst—Necessary requirements in certificate—Evidence.

Johnstone v. Gomes.....45

" Landlord and tenant—Claim for rent due for land leased—Alleged inability to use land for purpose for which rented—Service of notice of appeal—Limitation of hearing by reasons for appeal.

Neblett v. Hogg, Curtis, Campbell & Co. .....62

" Landlord and tenant—Rents, etc. Recovery Ordinance, 1846, ss. 11 and 12—Distraint for rent—Procedure to be taken to enforce claim —Claim by third party—Replevin.

Grose v. Elliot .....82

" Unlawful possession—Summary Conviction Offences Ordinance, 1893, sec. 96—Scintilla of evidence—Amendment of reasons for appeal—Magistrates' Decisions (Appeals) Ordinance, 1893, ss. 24 and 25.

Sole v. Hollingsworth.....73

ASSESSMENT— See Water Supply.

CONTRACT— Breach of—Damages—Recission of contract by variation—Amendment of claim—Non-suit.

The Barima Gold Mining Co. Ltd. v. W. Hood & Son .....18

" Goods sold and delivered—Surety—Excussion—Surety not to be proceeded against until principal excussed—Estoppel

Rieck v. Comacho .....56

CRIMINAL LAW— Larceny—Accused found not guilty—Ownership of property found on accused and the subject of the charge—Order on police for return of property to accused refused

*In re* petition Ferguson, *Regina* v. Ferguson .....44

DAMAGES— See Contract; Railway; Trespass; False imprisonment; Master and servant.

DECLARATION OF TITLE— Action for declaration of title and possession—Rules of Court 0. I, r. 12—Proper and sufficient description of property claimed.

The Dem., Railway Co. v. Marques .....5

EVIDENCE— Admission of parol evidence of written documents—Appeal—Case referred back for rehearing.

Permally v. Soobdhan .....1

" Food and Drugs Ordinance 1892—Certificate of analyst—Necessary requirements in certificate—Evidence

Johnstone v. Gomes.....45

" Scintilla—See Appeal.

FALSE IMPRISONMENT— Damages—Trespass—*Bona fide* question of ownership—Arrest—Summary Conviction Offences Ordinance, 1893, sec, 40 (2)—Placing of boundary marks—Unlawful removal—Land Surveyors Ordinance, 1891, sec. 19 (4) and (5)

Felix v. Moses .....57

FIRE— See Insurance.

FOOD AND DRUGS ORDINANCE 1892— See Evidence

HUSBAND AND WIFE—Judicial separation—Account stated—Money received by husband from wife's property during marriage—Repairs and payment of mortgage by husband—Gifts during marriage.

Davis v. Davis .....86

" Liability of husband to supply wife with necessaries—Separation—Liability for debts.

Bishop v. Isaac .....12

" Vagrancy—Summary Conviction Offences Ordinance, 1893, sec. 144 (1)—Neglect of husband to maintain wife—Proof of means—Application of ordinance.

Gomes v. Gomes .....71

INSURANCE— Fire—Excessive claim—Fraud—English and Roman Dutch Law

Pereira v. Hand-in-Hand Mutual Guarantee Fire Ins., Co., Ltd .....91

JUDGMENT SUMMONS— The Debtors Ordinance. 1884—Matters over $250—Right of audience of solicitors.

Sproston D. & F. Co. v. W. Hood & Son .....26

LANDLORD AND TENANT— Claim for rent due for land leased—Alleged inability to use land for purpose for which rented.

Neblett v. Hogg, Curtis, Campbell & Co .....62

" Monthly tenancy—Vacation of premises without one month's notice—Acceptance of rent due and key by landlord—Waiver of notice.

De Souza v. Correia .....97

" Rents, etc. Recovery Ordinance 1846, ss. 11 and 12—Distraint for rent—Procedure to be taken to enforce claim—Claim by third party—Replevin.

Grose v. Elliot .....82

LARCENY See Criminal Law.

LETTERS OF DECREE— Execution sale—Anti-dotal petition—Practice—Rules of Court 1893, Order I. r. 3.

*In re* petition Winter, T. C. v. Proprietor of lot 26, Georgetown .....22

" Petition—Immovable property—Grant of letters of decree as a matter of course following on judicial sale.

*In re* petition Dargan, T. C. v. Proprietor of lot 26, Georgetown .....29

LEVY— Purchase of property at execution sale and failure to obtain letters of decree—Right to levy on purchaser's interest in property—Sale by purchaser of such interest—Right of opposition.

Lawrence v. Trustees. Court "Berbice Heart."....3

LICENCE— Keeping and using mule without a licence—Miscellaneous Licences Ordinance, 1861, sec, 58—Onus of proof on defendant.

Cameron v. Armour....67

" Sunday trading—Summary Conviction Offences Ordinance, 1893, sec. 193—Meaning of words 'every person'—Proof of issue of licence—Miscellaneous Licences Ordinance, 1861, sec. 7

D'Andrade v. Baker ....69

MARRIAGE. See Husband and wife.

MARRIED WOMAN— Promissory note—Surety—*Senatus consultum Velleiainum*—Consideration.

Chung and Co., Ltd. v. Caroline Racker ....84

Jardim v. Rodrigues....95

MASTER AND SERVANT— Negligence—Damages—Liability of master for acts of his servant—Scope of employment.

Byjoo v. Gill....60

OPPOSITION— Execution sale—Proceedings by way of opposition—Right of opposition—Loss of right by claimant who fails to oppose after notice given—Special cases in which right is preserved.

Ferreira v. Ho-a-Hing....78

" Execution sale—Purchase of property at execution sale and failure to obtain letters of decree—Right to levy on purchaser's interest in property—Sale by purchaser of such interest—Right of opposition.

Lawrence v. Trustees Court "Berbice Heart,"....3

ORDINANCE— Statute Law (Revised Edition) Ordinance, 1894—Effect of revised edition on interpretation of ordinances therein.

Martins v. The Dem., Water Supply Commissioners & ors....47

OWNERSHIP— Action by owner against co-owner for value of wood cut from property—Undivided ownership—Relation of parties—Competency of proceedings.

Abdool v. Gomes.....99

PRACTICE— Action by owner against co-owner for value of wood cut from property—Undivided Ownership—Relation of parties—Competency of proceedings.

Abdool v. Gomes.....99

" Application to set aside proceedings—Rules of Court, 1893, Order XLI. r. 2—Entry of appearance—Knowledge of irregularity—Leave to amend—Company incorporated in the colony.

The B. G. E. L. & Power Co. Ltd. v. Conrad and Son.....16

" Pleadings—What must be pleaded—Rules of Court, 1893, Order XI. r. 12—Matters arising pending the action—Rules of Court, 1893, Order XIII.

D'Andrade v. D'Andrade.....14

" Summary citation—Rules of Court, 1893, Order VIII.—Application to set aside proceedings for irregularity—Order XLI r. 2—Entry of appearance.

Sargent v. McLean.....27

" See also Contract; Letters of Decree Trespass.

PRINCIPAL AND AGENT— Liability of principal—Unauthorised acts of agent.

Santos v. Mendonca.....89

RAILWAY— Bridge over canal—Deepening of canal—Right to support—Endangering safety and stability of bridge—Damages and interdict—Interdict made absolute—English and Roman Dutch Law.

The Dem., Railway Co. v. Golden Grove & Nabaclis V. C.....20

The Dem., Railway Co. v. Buxton & Friendship V. C.....53

REPLEVIN— See Landlord and tenant.

RULES OF COURT, 1893—Order I. r. 3. See Letters of Decree

Order VIII " Practice

Order XI r. 12. " "

Order XIII " "

Order XLI r. 2. " "

SOLICITOR— Right of audience—Judgment summons—The Debtor's Ordinance, 1884—Matters over $250.

Sproston D. & F. Co. v. W. Hood & Son .....26

SPECIFIC PERFORMANCE— Action to compel transport—Property sold at public auction—Extent of the property intended to be sold and bought—Authority of seller to auctioneer—Mistake in law.

De Santos v. A.- G .....7

STATUTE LAW— See Ordinance.

SUNDAY TRADING— Summary Conviction Offences Ordinance. 1893. sec. 193—Meaning of words 'every person'—Proof of issue of licence—Miscellaneous Licences Ordinance, 1861, sec. 7.

D'Andrade v. Baker .....69

SUPPORT, RIGHT TO— See Railway.

SURETY— Excussion See Contract

" Married woman—Promissory note—*Senatus consultum Velleianum*—Consideration.

Chung and Co. Ltd v. Caroline Racker .....84

Jardim v. Rodrigues.....95

SURVEY— Placing of boundary marks—Unlawful removal—Land Surveyors Ordinance, 1891, sec. 19 (4) and (5.)

Felix v. Moses .....57

TITLE— See Declaration of title.

TRANSPORT See Specific performance.

TRESPASS— Damages—Trespass to property—Title—Ownership—Practice—Pleading's.

Baillie v. Smart.....24

See also False imprisonment:

VAGRANCY— Summary Conviction Offences Ordinance, 1893, sec. 144 (1.)—Neglect of husband to maintain wife—Proof of means—Application of ordinance.

Gomes v. Gomes .....71

WATER SUPPLY— Opposition to execution sale—Illegal levy—Assessment of plantations for moneys required or expended under the East Demerara Water Supply Ordinance, 1884—Amendment of schedule by the East Demerara Water Supply Commissioners Loan Ordinance, 1886—Statute Laws (Revised Edition) Ordinance. 1894—Effect of revised edition on interpretation of ordinances therein.

Martins v. East Dem., Water Supply Commissioners and others .....47

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# CASES

DETERMINED IN THE

## SUPREME COURT OF BRITISH GUIANA.

### APPELLATE JURISDICTION.

PERMALLY v. SOOBDHAN.

1896, *January 4th.* SHERIFF, J.

*Appeal—Amendment of plaint—Evidence—Admission of parol evidence of written documents—Case referred back for rehearing.*

Appeal from the decision of Mr. W. F. Bridges, Stipendiary Magistrate of the West Coast Demerara Judicial District, who gave judgment for plaintiff Soobdhan (now respondent), in the sum of $60 and costs, against the defendant (now appellant) as compensation for rent due.

*D. M. Hutson,* for the appellant.

Respondent in default of appearance.

SHERIFF, J.—This is an appeal from the decision of the magistrate of the West Coast Judicial District. It is sufficient to deal with the third reason of appeal.

"3. Because illegal evidence was received by the Court in support of the plaintiff's case and that after rejecting such illegal evidence there was not sufficient legal evidence to establish the plaintiff's case."

The plaintiff was examined on the first day and the magistrate made the following note:—"Postponed to next Court; Gangasing to produce transport and all contracts." When the case is resumed he notes, "The plaintiff states Gangasing was summoned, he is not present: he is at Land ma Cabra: he has transports." The magistrate, however, went on to hear the case and admitted a great deal of parol evidence as to the contents

and effects of the written documents referred to by the plaintiff and forming part of his case. This, of course, was irregular. The production of the documentary evidence was essential to the plaintiff's obtaining a decision in his favour. Under all the circumstances, I think he should be afforded another opportunity of establishing his case, and I accordingly refer it back to the magistrate with directions to re-hear and determine the same. The complaint should be amended so as clearly to show what the plaintiff really does claim. The appellant is entitled to the costs of this appeal.

## APPELLATE JURISDICTION.

BISHOP v. ISAAC.

1895, *February 15th.* ATKINSON, J.

*Appeal—Husband and wife—Separation—Liability of husband to supply wife with necessaries—Liability for debts.*

Appeal from the decision of Mr. H. Kirke, Police Magistrate of Georgetown, who gave judgment for the sum of $7.20 claimed by plaintiff Isaac (now respondent) from defendant Bishop (now appellant), for work done and labour performed as a domestic servant for defendant's wife. The appeal was dismissed.

*P. Dargan,* for the appellant.

Respondent in default of appearance.

ATKINSON, J.—This is an appeal from a decision of the police magistrate, giving sentence for $7.20, three months wages, claimed by the respondent for services rendered to the defendant's wife. The ground of appeal is:—

"That the decision is erroneous in point of law, inasmuch as it having been proved that the defendant, the said Richard Bishop's wife, left the house in which he lived voluntarily, and without any fault of his, and against his wish, and so continued to live apart from him, during the time during which the services alleged to have been rendered by the plaintiff, the said Frances Isaac, were alleged to have been rendered, and the rendering of such services having been unauthorised by the said Richard Bishop, the defendant, the plaintiff could not recover against the said Richard Bishop, the defendant, and judgment should have been for the defendant, the said Richard Bishop."

At the hearing in the court below a letter in the following terms was put in evidence:—

"Georgetown, 19th February, 1895.

Mrs. R. BISHOP,
Wortmanville.

Madam:—Your husband, Richard Bishop, has consulted me with reference to your acts of violence towards him within the last three days, and has taken my advice on the matter.

I am now directed to intimate to you that your husband will not in the future remain under the same roof with you. He has given notice to the landlord of the house he now occupies that he

will give up the tenancy of the same at the end of March, 1895; you can therefore remain in the house up to that time, after that you will have to find some place which will be more suitable to you. I am also directed to inform you that your husband will make you a reasonable allowance monthly for your support.

I am, Madam,
Your Obedient Servant,
PATRICK DARGAN,
Barrister-at-Law."

Bishop was examined, and said that that letter was not acted upon, that notwithstanding its terms he and his wife cohabited together after the letter was sent to her, but that she afterwards went away "in a rage." He first of all said this happened on the 3rd of March; next, that it was on the 22nd, and then that he lived with her three days after the letter was sent. He had made her no allowance, and professed to have been always willing to take her back.

The magistrate held that under the circumstances the husband was liable to supply his wife with necessaries, and that a domestic servant at ten shillings a month was a necessity for a person in her position of life.

Cases were cited to show that a husband was not liable for debts contracted by his wife if she had left his house and protection without justifiable cause. That is so. It was argued that, as they had made it up and resumed cohabitation after the sending of the letter, the wife here had so acted, but even assuming that the facts alleged would have established that fact, it was for the magistrate to say whether he considered those facts proved. He may not have been satisfied with the appellant's evidence, and his decision seems to show that he was not.

I see no sufficient ground for disturbing the magistrate's decision, and it is therefore confirmed, with costs.

## GENERAL JURISDICTION.

EXORS. C. C. D'ANDRADE v. EXORS. A. A. D'ANDRADE.

1896. *March 9th.* Before SIR EDWARD L. O'MALLEY, C.J., ATKINSON AND SHERIFF, JJ.

*Practice—Pleadings—What must be pleaded—Rules of Court 1893. Order XI. r. 12—Matters arising pending the action—Rules of Court, 1893. Order XIII.*

Claim for the payment of a legitimate portion and for accounts.

*A. Kingdon, Q.C., P. Dargan* and *H. S. Cox* with him, for the plaintiff.

*Dr. Belmonte* and *D. M. Hutson* for the defendants.

Dr. Belmonte raised a preliminary objection that the case cannot proceed on the ground that the defendants were joint executors, that one is dead, and that the survivor cannot act and cannot be sued.

*Kingdon, Q.C.*, is heard in answer.

The following decision was given by the Court, *per* O'MALLEY, C.J.

This is an action by the representatives of Caesaria Candida D'Andrade against Manoel Gonsalves and John Gomes as joint executors of the will of Alexandre D'Andrade.

Caesaria D'Andrade was the mother of Alexandre D'Andrade, and she claims her legitimate portion of the estate that he left, and an account of the dealings of the defendants with the estate of the deceased from the time of the death of Alexandre D'Andrade, and of the profits accrued on the legitimate portion.

When the case came on for hearing Dr. Belmonte for defendants raised a preliminary objection to the hearing on the ground that one of the joint executors was dead. We think that this was not proper ground for a preliminary objection. The position of the defendants when the action comes on for hearing is defined

by their pleadings: see O. XI. r. 12. (*a*) If after the pleadings were closed new facts creating new defences have arisen, the pleadings can be supplemented and amended so as to set them forth (see O. XIII.) (*b*), and if the defendants desire time to amend or supplement their pleading we will give it. If the plaintiffs are satisfied with the defendant or defendants as they stand, they can go on but they can only recover on showing their right to recover against the defendants before the Court. If they are not satisfied and wish to add parties as defendants they can take such steps, if any, as they may be advised and we will give them time for this purpose if they desire.

(*a*) Cf. Rules of Court, 1900. O. XXII.—Ed.
(*b*) Cf. Rules of Court, 1900. O. XVII. r. 15—Ed.

## GENERAL JURISDICTION.

### THE BRITISH GUIANA ELECTRIC LIGHTING AND POWER COMPANY, LTD. v. CONRAD AND ANR.

1896. *March 9th.* Before SIR EDWARD L. O'MALLEY, ATKINSON AND SHERIFF, JJ.

*Practice—Application to set aside proceeding—Rules of Court, 1893.O. XLI, r. 2.—Entry of appearance—Knowledge of irregularity—Leave to amend—Company incorporated in the colony.*

This was a motion by the defendants to expunge the claim of plaintiffs on the ground of irregularity.

*D. M. Hutson,* for the defendants, the movers.

*A. Kingdon, Q.C.,*—for the plaintiffs.

The judgment of the Court (*per* O'MALLEY, C.J., ATKINSON, J., concurring) was as follows:

The first question is whether the defendant is too late in making his present motion to expunge the claim. It is said that he is, under the Rules of Court, 1893, O. XLI, r. 2 (*a*)*;* this is in the same terms as O. LXX, r. 2 of the English Rules. I have no doubt that the entering of appearance here is, as the entering of appearance in England, a fresh step, and unless the entering of appearance be accompanied by some intimation by the party entering that he does not intend in so doing to waive his right to object to the irregularity of the claim it will bar subsequent objection if done with knowledge of the irregularity (See *Annual Practice,* 1894, note under Order XII, r. 30, p. 303).

The point on which I was in some doubt was whether under our procedure a party, after receiving citation, must be held conclusively to have knowledge of the irregularity of the claim as in England he is held conclusively to have knowledge of the irregularity of the writ after receipt of the writ. In the one case he has seen the irregularity in fact and is presumed to know its legal import. In the other he ought to have seen it but he may not have seen it, and here in fact he did not see it. I know of no

(*a*) Cf. Rules of Court, 1900. O. LI, r. 2.—Ed.

principle upon which it must be conclusively presumed against him that he had seen it, and I think it must be held that the fresh step he took was not with knowledge of the irregularity, and that he is not therefore too late to make his present objection.

Dealing then with the objection, the claim must disclose the place of abode of the plaintiff and that the plaintiff is in the jurisdiction or sues by an attorney who is in the jurisdiction. Here there is no statement that the plaintiff company sues by attorney and there is nothing to show that the company is an inhabitant having an abode in the colony. All we are told is that it carries on business in Georgetown. The claim ought to have shown either that the company was incorporated in the colony or that it had a registered office in the colony.

We give leave to the plaintiffs to amend, and the order is with costs of the motion to be paid by plaintiffs.

SHERIFF J.: With one exception I concur in the decision just pronounced. In my opinion the defendant by simply appearing did thereby waive any irregularity in the plaintiffs' claim. I am content to accept as sound law the argument of the learned counsel for the plaintiff's that enough appeared on the face of the citation to connect it with the claim and to put the defendant on enquiry, and that it is not competent for a defendant thereafter to shut his eyes, appear, and then swear that at the time of appearance he had no knowledge of any irregularity—the means of knowledge being immediately available under the same roof as the place appointed by law for his appearance.

THE BARIMA GOLD MINING COMPANY, LTD. v.
W. HOOD AND SON.

## GENERAL JURISDICTION.

THE BARIMA GOLD MINING COMPANY, LTD. v.
W. HOOD AND SON.

1896, *March 10th.* Before SIR EDWARD L. O'MALLEY, C.J.,
ATKINSON AND SHERIFF, JJ.

*Action for damages for breach of contract—Rescission of contract by variation—Amendment of claim—Non-suit.*

This was an action for damages for breach of contract for the carriage of certain machinery from plaintiffs' landing on the Barima river to plaintiffs' mine.

Evidence was led on behalf of plaintiffs and thereafter counsel for defendants moved for a non-suit.

*A. Kingdon, Q.C., S.G.* for the plaintiffs.

*P. Dargan* for the defendants.

The following judgment was delivered by the Court, *per* O'MALLEY, C.J.

The defendants submit that the plaintiffs should be non-suited. They say the plaintiffs set out and sue upon the original agreement, according to which the defendants were to complete their work within four months from the passing of an Ordinance and they allege as a breach failure to complete within that time, and claim damages as for such breach.

By this answer defendants say that the above agreement was varied by a subsequent arrangement whereby the time was to run, not from the passing of an Ordinance but from the obtaining of a grant. The plaintiffs admit that there was such a subsequent agreement, and say that the consideration for the new term being substituted for the original term was that the defendant should forthwith apply for a grant. These were new terms inconsistent with the terms of the original contract and were a rescission of such contract by a variation. A note on p. 298 of *Bullen's Precedents of Pleadings,* Pt, II, 4th ed. (*a*) is as follows:—"It is competent to the parties to a contract, at any time before breach

(*a*) Cf. Bullen and Leake 5th ed. p. 807—Ed.

of it, by a new contract to add to, subtract from or vary the terms of it or altogether to waive and rescind it (*Goss* v. *Lord Nugent.* 5 B & A. 58,65). The substituted contract forms a good defence to an action on those terms of the previous contract which have been altered by it, and may be so pleaded without any performance or satisfaction, which is required to constitute a good defence after breach. (*Taylor* v. *Hilary* 1 C. M. and R. 741; see *Patmore* v. *Colburn* 1. C.M. and R. 65, *Hobson* v. *Cowley,* 27. L. J. Ex. *205*). So also an agreement by the parties to a contract to rescind it, if made before any breach has been committed, forms a defence to an action brought upon the contract so rescinded."

That being so there is a complete defence to this action disclosed on this case as it stands. But a non-suit is asked for, the ground being that the plaintiffs did indeed prove the original contract sued on, but they have also proved rescission by variation, so that no evidence remains to support the present claim on the original contract. We hold that this is so and that there must be a judgment of non-suit with costs, and we direct that the judgment is not to have the effect of a judgment on the merits.

As regards the amendment, we think, following what we take to be the principle of the decision in a case before Kekewick, J. (*Lowther* v. *Heaver* 37 W. R. 55), that in this case the balance of convenience is against permitting an amendment.

THE DEMERARA RAILWAY CO. v. GOLDEN GROVE AND NABACLIS VILLAGE COUNCIL.

## LIMITED JURISDICTION.

THE DEMERARA RAILWAY CO. v. GOLDEN GROVE AND NABACLIS VILLAGE COUNCIL.

1896. *March 14th.* Before SHERIFF, J.

*Damages and interdict—Railway bridge over canal—Deepening of canal—Right to support—Endangering safety and stability of bridge—Interdict made absolute.*

Action for an order of interdict (an interim order having been obtained on September 25th, 1895) restraining the defendants, the Village Council of the villages of Golden Grove and Nabaclis, and their servants, from deepening or digging out or continuing to deepen or dig out the bottom or sides of a canal running between the village of Nabaclis and Craig Milne, and under the control and management of the defendants, adjacent to the bridge by which the said canal was crossed by the line of the plaintiffs' railway, in such manner as to weaken or endanger the safety of the foundations or abutments of the bridge, or in any other way to weaken or endanger the bridge, and for $1,000 by way of damages.

The defendants pleaded that the digging had been performed in the same way as it had been done for fifty years past without let or hindrance, and if there was any danger to the stability of the bridge it was due to plaintiffs' own negligence in failing to keep the abutments in proper order.

*P. Dargan* for the plaintiff company.

*D. M. Hutson,* for the defendants.

After argument, Sheriff, J., expressed the opinion that the matter was one which should be settled by agreement between the parties. It was not in controversy that the railway bridge in dispute was built by the Company under the provisions of the two enabling Ordinances of 1846, and it was only common sense to assume that the bridge was made on the foundations of the canal as then constituted. There was evidence that the bridge had been in the use of a certain section of the public who travel between Georgetown, the adjacent stations, and Mahaica. It was

needless to remark that it was of absolute importance that the general public should have the right of travelling over this particular bridge with every precaution taken for its safety. If he had to express an opinion he was prepared to do so to the extent that the canal in question was not originally created for the purposes for which it was now desired to apply it. There was evidence that a like canal of a similar nature had been deepened and widened with marked success in the interests of the villagers on the coast. He accordingly commended the matter to the consideration of the parties, and reserved judgment in the hope that an agreement would be arrived at.

Thereafter (March 14th) no agreement being come to, judgment was given as follows:—

SHERIFF, J.—The plaintiffs obtained an interim order of interdict restraining the Village Council of the villages in question from deepening and widening a certain canal over which the plaintiffs for the purposes of their railway had several years previously erected a bridge, the operations so carried on by the defendants being of such a nature that if proceeded with the stability and safety of the said bridge would be endangered. I may remark that I have attempted, I regret to say unsuccessfully, to induce the parties to effect an amicable arrangement. I find that the plaintiffs were entitled to maintain their bridge where it was erected and to the user of so much of the bed of the said canal and the adjacent land at any rate as was necessary for the efficient support thereof. I further find that the acts of the defendants were directly calculated to imperil the stability of the said bridge.

For the defendants it was urged that this was not a case where interdict would lie, and that damages would afford ample compensation, I am unable to accept this view. Bearing in mind that the railway is used by the public, it was a matter of urgency that these injurious acts should be stopped without delay. It is unnecessary to decide what the rights of the defendants, if any, may be to control and manage the canal in question or the procedure they should adopt, but assuming that they had authority and had adopted the proper procedure, their acts in the present instance cannot be justified, inasmuch as they worked a wrong. The order of interdict must be therefore made absolute. The plaintiffs also seek damages, and there is the evidence of Mr. Dorman that to make the bridge once more secure and stable the sum of $157.87 has been expended. The defendants must pay this amount together with the costs of suit.

*In re* PETITION OF M.M. WINTER; TOWN CLERK OF GEORGETOWN v. PROPRIETOR LOT 26, GEORGETOWN.

## GENERAL JURISDICTION.

*In re* PETITION OF M. M. WINTER; TOWN CLERK OF GEORGETOWN v. PROPRIETOR LOT 26, GEORGETOWN.

1896. *March 19th.* Before SIR EDWARD L. O'MALLEY, C.J., ATKINSON, AND SHERIFF, JJ.

*Execution sale—Letters of decree—Anti-dotal petition—Legal relief to be sought by action—Practice—Rules of Court, 1893, Order I. r. 3.*

*Held.*—That a person seeking to oppose the granting of letters of decree to the purchaser of property at execution sale must proceed by action and not by petition.

*Semble*, per Atkinson, J, that even in the absence of any opposition letters of decree are not granted as a matter of course following on the sale and purchase at execution.

This was a petition by Mrs. Margaret Matheson Winter praying the Court to refuse to grant letters of decree for lot 26, Main Street, Georgetown, sold at the instance of the Town Clerk for taxes, and purchased by Patrick Dargan, except subject to a reservation to the petitioner of her rights and interests in the premises on the lot, or for such other relief as the Court might deem right.

Petitioner claimed a life interest in the upper portion of the premises on the lot in question under the will of H. M. A. Black who died on September 2nd, 1886, leaving as his residuary legatees three minors who at the time the petition was made were still the proprietors of lot 26, subject to petitioner's rights. From 1886 to April, 1895, petitioner remained in possession of the upper portion or received the rent thereof, but in the latter year the proprietors failed to pay the town taxes, whereupon the Town Clerk levied on the property in due course and it was purchased by Patrick Dargan.

Petitioner further set out that the executor of Black had represented to her that the taxes had been paid, there being no liability upon her to pay them and further, that she had no right to oppose the execution sale, the whole property subject to taxes being liable to execution in default of their payment. The petition was referred for report to the heirs of H. M. A. Black and Patrick Dargan amongst others and thereafter came on for hearing, evidence being led.

## *In re* PETITION OF M. M. WINTER; TOWN CLERK OF GEORGETOWN v. PROPRIETOR LOT 26, GEORGETOWN.

*A. Kingdon, Q.C., S. G.*, for the petitioner.

*D. M. Hutson* for reporters Dargan and Misses Black.

E. E. Willems (an heir) in default.

The judgment of the Court dismissing the petition, but without costs, was delivered by Sir Edward O'Malley, C. J.—

This is a petition brought by Mrs. Margaret Matheson Winter setting out that a certain property, 26 Main Street, was recently sold in execution, and praying that letters of decree may not be granted except subject to the petitioner's interest therein.

In substance the petitioner sought to enforce a right to legal relief against the purchaser who unless the petition were granted, would in due course Be entitled to the letters of decree.

The petition could not be dealt with *ex parte*; it is essentially a litigious proceeding, the relief sought is relief which will operate directly in derogation of the rights of another party, viz., the purchaser, and as to which, therefore, that party has a right to be heard. That being so, we are of opinion, that the relief sought should have been sought by means of an action, see Rules of Court, 1893, O. I. r 3. (a). The Rules of Court are in the nature of statutory provisions, and we are of opinion that rule 3 has the effect of taking away any common law or statutory right of proceeding by way of petition in litigious matters that may have existed before the coming into force of these rules.

We shall not grant letters of decree for a fortnight, in order to give the petitioner time to take such steps for obtaining the relief she seeks as she may be advised.

We make no order as to costs.

ATKINSON, J.—With reference to the words "We shall not grant letters of decree for a fortnight, in order to give the petitioner time to take such steps for obtaining the relief she seeks as she may be advised," they form no part of the reasons of the Court and do not, as far as I am concerned, express the real intention of the Court, which was to limit the period within which Mrs. Winter should proceed, so that the matter might not be hung up indefinitely. I had just before the judges came into Court, as I had done before more than once, said to my brother judges that, although Mrs. Winter might fail on a technical ground, the question as to whether letters of decree should be granted would still remain to be considered.

(*a*) See now Rules of Court 1900, Order II. r. 1. Ed.

## LIMITED JURISDICTION

BAILLIE v. SMART.

[BERBICE, 3 OF 1896.]

1896. *March 27th.* Before ATKINSON, J.

*Trespass to property—Damages—Title to property—Ownership—Practice—Pleadings.*

In an action for trespass, where the question of the title of the plaintiff is not raised on the pleadings, the defendant is not entitled thereafter to raise any question putting such title in dispute.

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

*N. R. McKinnon,* for the plaintiff.

*S. E. Wills,* for the defendant.

ATKINSON, J.—The plaintiff claims $240 as damages for an alleged trespass and for injury to his property. He alleges that he is the owner of a certain piece of land at Pln. Alness in the county of Berbice, and that he had fenced in and expended large sums of money in planting up the said land; that the defendant broke into and entered the said land and pulled down and converted the fencing to his own use, by reason whereof cattle and other animals entered upon the said land and destroyed the cultivation thereon.

The defendant, by his answer, denied the breaking and entering of the land of the plaintiff and the pulling down of the fencing, and the converting of the same to his own use, or the committal of any unlawful acts upon the lands of the plaintiff by which the plaintiff was in any way damnified.

At the close of the plaintiff's case counsel for the defendant said he would show that the plaintiff was not the owner of the land upon which the alleged trespass had been committed. Plaintiff's counsel submitted that, upon the pleadings as framed, the defendant could not go into any question of the plaintiff's ownership. I held that, as the answer stood, the only issue was trespass or no trespass, and that the ownership of the land had not been put in dispute, Thereupon the defendant's counsel said

he could not further contest the matter. He could have given evidence to show that the damage, as stated by the plaintiff and his witnesses, wag exaggerated.

The breaking of the fence and the carrying off of the materials by the defendant were fully proved, as well as the consequent destruction of the growing provisions by cattle. Indeed these facts were practically admitted.

As the question of title was not gone into, I shall not give damages in respect of the trespass itself but simply in respect of the injury actually sustained, which I assess at $85, with costs.

## LIMITED JURISDICTION.

SPROSTON DOCK AND FOUNDRY CO. v. W. HOOD & SON.

1896. *March 30th.* Before ATKINSON, J.

*Judgment summons—The Debtors Ordinance, 1884—Matters over $250—Right of audience of solicitors.*

*Held* that, following *Houston* v. *Applewhite* (1894, L.R. B.G. 139), proceedings by judgment summons under the Debtors Ordinance, 1884, come under the general civil jurisdiction of the Court and not under the insolvency jurisdiction, and that solicitors have no right of audience therein in matters over $250.

The necessary facts appear from the judgment. *E. A. V. Abraham,* solicitor, for the judgment creditors. *P. Dargan,* for the judgment debtors.

ATKINSON, J.—This is a judgment summons. When the matter came on for hearing, defendants' counsel objected that the plaintiffs' solicitor had no right of audience and could not appear alone, the judgment debt being over $250, *viz.,* $388.61. The plaintiffs' solicitor contended that this was an insolvency matter, but that is not so. The rules relating to judgment summonses are to be found amongst the Insolvency Rules of 1884, but they are not really insolvency rules, but rules framed under the Debtors' Ordinance, 1884. This question was fully discussed in the case of *Houston* v. *Applewhite* (1894, L.R. B.G. 139).

No authority was cited to show that a solicitor had a right to appear in a matter of this kind, but it was argued negatively that there was nothing to show that he could not. It is clear that in ordinary Supreme Court matters where the amount is over $250—a solicitor has no right of audience. This is a matter in the Supreme Court over $250,—and I see no reason why a solicitor should have a right to appear in this any more" than in any other Supreme Court matter over the amount stated.

I stated at the hearing that I would bring the matter before the Full Court but I find that on November 9, 1894, in *Juister* v. *Sharples,* I held that a solicitor had no right of audience on appeal in civil matters from magistrates' decisions, and I think, therefore, that it will be better to follow the course I adopted in that case and give a decision which can be appealed against if the parties are so advised.

## LIMITED JURISDICTION.

SARGENT v. McLEAN.

1896, *April 18th.* Before KIRKE, J. (Actg.)

*Practice—Summary citation—Rules of Court, 1893, Order VIII—Application to set aside for irregularity—Order XLI r. 2—Entry of appearance.*

*Held,* that entry of appearance is a fresh step, within the meaning of Order XLI, r. 2, which will bar an application to set aside any proceeding for irregularity.

*Hastings v. Comacho and anr.* (1894 L.R., B.G. 146), followed.

Claim, by summary citation, for the sum of $250, being balance of amount due by defendant for work done by plaintiff at his request, in accordance with bill of particulars filed.

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

*J. A. Murdoch,* solicitor, for the defendant.

KIRKE, J. (Acting.)—The defendant in this matter wishes to raise an objection to the claim of the plaintiff as not coming within the provisions of Order VIII. of the Rules of Court, 1893.

The plaintiff opposes, saying that, under Order XLI, it is too late now to object to any irregularity in the claim. The claim was filed on March 4th. The defendant entered appearance on March 17th. The order to show cause was made on March 28th, for April 11th.

The defendant filed an affidavit disclosing his defence on April 10th. My opinion is that it is too late now for the defendant to raise an objection to the claim. In *Mulkern* v. *Doerks* (51 L.T.R. 429) it was held that "even by entering an appearance to the writ the defendant has taken a fresh step after knowledge of the irregularity within the meaning of Order LXX r. 2" (which corresponds with our Order XLI. r. 2.) How much more then where the defendant has not only entered an appearance but has filed an affidavit disclosing his defence. Sheriff, J., in *Hastings* v. *Comacho.* (1894, L.R., B.G. 146) says: "If the defendant intends to attack the claim or the citation or the service thereof, he must do so before entering an appearance." And the means whereby this can be done are set out in Order XXIII. r. 13, *et seq.*

I have had some hesitation in coming to this decision, as it seems contrary to a judgment on a similar point given by Atkinson, J., in *Santos v. Henriques* (1894, L.R., B.G. 137.) I do not read the words "fresh step" in the same way as that learned judge. I think that the words refer to any fresh step taken in the action, and are not confined to the party applying.

In the case *B.G. Electric Lighting Company v. Conrad* (*a*) on a preliminary objection, it was laid down by the Chief Justice, Atkinson J. concurring, as follows: "I have no doubt that the entering of appearance here is, as the entering of appearance in. England, a fresh step, and unless the entering of appearance is accompanied by some intimation by the party entering, that he does not intend in so doing to waive the right to object to the irregularity of the claim, it will bar subsequent objection if done with knowledge of the irregularity." But Sheriff, J. dissented from the doctrine laid down in the latter part of the judgment as to "whether a party after receiving citation must be held conclusively to have knowledge of the irregularity of the claim, as in England he is held conclusively to have knowledge of the irregularities of the writ after receipt of the writ. In the one case he has seen the irregularity in fact and is presumed to know its legal import. In the other he ought to have seen it, but he may not have seen it, and here in fact he did not see it. I think it must be held that the fresh step he took was not with the knowledge of the irregularity, and that he is not therefore too late to make the present objection."

I cannot understand how the defendants and their attorney-at-law can deny knowledge of irregularity, when the citation has been served on them with full particulars of the claim, the parties to the suit, and the place and tribunal at which he is to appear.

Objection over-ruled and leave to defend granted.

(*a*) Reported above at p. 16.

*In re* PETITION OF P. DARGAN; TOWN CLERK OF GEORGETOWN v. PROPRIETOR LOT 26, GEORGETOWN.

## GENERAL JURISDICTION.

*In re* PETITION OF P. DARGAN; TOWN CLERK OF GEORGE TOWN v. PROPRIETOR LOT 26, GEORGETOWN.

1896. *May 4th.* Before SIR EDWARD O'MALLEY, C.J. ATKINSON, J., and KIRKE J., Actg.

*Petition—Letters of Decree—Immovable property—Grant of letters of decree as a matter of course following on judicial sale.—Rules of Court 1893, O. 1. r.* 3*—Ultra vires.*

*Held* that, (Atkinson, J. dissenting), in the absence of any legal proceedings staying or preventing the issue of letters of decree, petitioner, as purchaser, was entitled to letters of decree as a matter of course.

Decision of the Court (Hampden King. J., and Kirke, J. Actg., Chalmers, C.J., dissenting) *in* re *petition E. A. Van Kinschot* Feb. 27th, 1882, followed.

Petition by Patrick Dargan praying that letters of decree for lot 26, Main Street, Georgetown, purchased by him at execution sale, be granted to him.

A petition by M. M. Winter had been filed praying the Court to refuse to grant the letters of decree in question, but was dismissed (*a*) on the ground that petitioner should proceed by action and not by petition.

Petitioner Dargan filed a certificate of non-institution of proceedings by the said M. M. Winter, dated April 8th, 1915. 20th April.

*D. M. Hutson,* for the petitioner.

Asks for an order granting title, and states that Mrs. Winter has not taken any steps since the decision of the Court on March 19th dismissing her petition, against the granting of letters of decree.

The Chief Justice expressed the opinion that an order should go, but Atkinson, J., being absent, and as he understood he was of a different opinion, the application should stand over.

(*a*) See above p. 22.

April 27th,—Hutson is heard, and the Court reserves decision; judgment was given on May 4th, as follows:—

O'MALLEY, C.J.—This is a petition by Mr. Patrick Dargan praying the Court to grant him letters of decree for lot 26, Main Street, Georgetown, which he purchased at execution sale.

A petition by Mrs. M.M. Winter against the granting of this petition was brought before the Court some weeks ago and was dismissed on the ground that the petitioner had mistaken her remedy. It was stated at the time when the petition was so dismissed that the Court would not grant letters of decree for a fortnight, in order that Mrs. Winter might commence proper proceedings to prevent the granting of letters of decree, if so advised. More than six weeks have elapsed and no steps have been taken by Mrs. Winter in the matter, and the petition for letters of decree stands unopposed. I think the petitioner is now entitled to his decree.

ATKINSON, J.—This is a petition by Patrick Dargan for letters of decree for lot 26, Main Street, Georgetown, which was knocked down to him at execution sale for town taxes on October 15, 1895.

Before proceeding to deal with this matter on its merits I find it necessary to make a few preliminary observations. The arguments on Mrs. Winter's antedotal petition having been closed the Court held that, under the Rules of Court, 1893, O. I. r. 3., the proceeding should have been by action and not by petition. A rider was added to the effect that the Court would suspend the granting of the letters of decree for a fortnight in order to enable Mrs. Winter to take such action as she might be advised. Mrs. Winter took no further action within the fortnight, and the petitioner Dargan's counsel moved the Court in my absence to grant the letters of decree. The learned counsel professed to be surprised to learn that there was a difference of opinion having supposed, he said, that the matter was settled by the order of the Court when Mrs. Winter's petition was dismissed.

That is not so. What was said by the Chief Justice did not, so far as I was concerned, express the real intention of the Court, which was that in order that the matter might not be indefinitely delayed, Mrs. Winter should be required to proceed within a fortnight. It was in no way intended that if she took no action within a fortnight, the letters of decree would be granted as a matter of course. That could not have been so because a minute or two before the judges went into Court I had been impressing

upon my brother judges, as I had done before more than once, the fact that, although Mrs. Winter's antedotal petition might fail upon a purely technical ground, the question whether the letters of decree should be granted to the petitioner Dargan would still remain to be determined.

It may be said that in terms the order would seem to say that he letters would be granted if Mrs. Winter did not proceed. That is one construction. Even if it were the only construction it would not be binding upon the Court. It formed no part of the reasons of judgment, but was a mere condition imposed upon one of the parties, and that condition having been erroneously stated, the Court is bound to correct it. I may here call attention to the fact that the law requires the judges in giving judgment to assign the reasons of judgment in writing; "each judge shall assign in writing the reasons of his judgment, unless the judges shall be unanimous when the Chief Justice or any other judge may state in writing the reasons of the court's decision." (Order xxxiv. r. 1., Rules of Court, 1893). Under the Manner of Proceeding Ordinance, 1855, the same rule is laid down. The words are "the reasons" and not "some of the reasons," and to state the reasons partly in writing and partly orally is not in my opinion a compliance with the law. When the reasons are carefully written it means that they have been carefully considered and there is no room for mistake.

If in the present instance I had realised at the time they were uttered the effect of the words used as to the fortnight's limit, I should certainly have objected; but I suppose I was so occupied in listening to the oral reasons which I had never heard before, that the real effect of what was said as to the fortnight's limit escaped me. One thing is certain, that the petitioner Dargan is not entitled to ask that his petition shall be granted as of course upon the strength of what was said by the Chief Justice upon that occasion.

I may add that I was simply astounded by the outrageous suggestion made by the petitioner Dargan's counsel, that the Chief Justice might deal with this matter in non-session. This matter is a matter now before the Full Court, and the Chief Justice can no more deal with it alone than he could with any other matter that had been brought before the three judges sitting in the Full Court.

The question of the granting of these letters of decree being before the Full Court I suggested that as Mr. Justice Sheriff had heard the whole of the evidence and the arguments on Mrs. Winter's petition, that the matter should await his return on

Wednesday next when the matter could be dealt with between that day, the 8th of May, and the 14th, on which day I have to leave the Colony. The suggestion appeared to me to be reasonable, but the Chief Justice insisted upon the matter being dealt with by the Court as at present constituted. The Court as at present constituted can no doubt, technically speaking, deal with the matter. But whether it ought to do so, is a different question, and whether it can do so without doing injustice to Mrs. Winter will appear from what I shall have to say later on.

The fact has been brought to my notice that the decision in this matter was given by the Court, although the parties had not had an opportunity of arguing the particular point upon which the decision turned. Speaking for myself, I was too deeply interested in considering the point when it turned up to give a thought to the question whether the point ought not to be argued and I am sure that was the case with my brother judges. It is to be regretted that counsel did not call the attention of the Court to the fact when the reasons for the decision were being delivered, in which case the Court must have heard the parties if they desired it, before giving a final judgment. It will be always matter of regret to me that I concurred in this decision without taking time for fuller and more mature deliberation. In that case the fact that the parties ought to be heard on the point before we decided would certainly have occurred to me, and if there had been an argument, certain facts to which my attention has since been called, would almost certainly have been brought out and the decision of the Court might nave been different.

This unfortunate old lady, Mrs. Winter, is not only in danger of being deprived of what was said to be practically the whole of her little income, but has by the act of the court itself been deprived of the right which every litigant is entitled to, of being heard before decision is given against him. The case is one not only of hardship but of manifest injustice, and under these circumstances, the court may well pause. It is said that Mrs. Winter has taken no action within the fortnight, and that, therefore, the letters of decree ought to go as a matter of course. Is it not conceivable that this unfortunate lady may have no means of taking further action and yet may not be in a position to entitle her to an order *pro Deo*? Is it not conceivable also, after what has happened, that those who may have already helped her to take proceedings may very well feel unwilling to throw away more money upon the uncertainties and risks of the law? If that be so, I fail to see how those facts go to show that the letters of decree should go as of course. On the contrary; in my opinion

the court ought to make even a more careful enquiry into the matter before it consummates the injustice by granting the letters of decree on the ground that she is no longer formally and technically opposing the grant.

There is another reason why the court should pause, and that is, that notwithstanding the fact that the decision professes to dismiss the petition antedotal, that petition may yet be actually still before the court by reason of this, that Order I, r. 3., on which the decision was based may, if the construction of it is that stated in the decision, turn out to be *ultra vires.* So far as it affects to or actually does interfere with or abrogate the right of the subject to pray the court for relief by way of petition, and the power of the court to grant relief when approached by way of petition. Of one thing I am certain, it was never contemplated when the rule was framed that it would have any such effect, nor was it intended that it should, as is shewn for one thing by the fact that Chalmers, C.J., by whom the Rules as a whole were drafted, continued to deal with petitions after the Rules of Court, 1893, come into force, until his resignation, in the same way as before. I have no hesitation in saying that during the whole of my lengthened experience until recently the procedure by way of petition has worked satisfactorily, and has enabled the court to do justice and to prevent injustice being done in numberless cases, and in matters of very varied character, where parties not able to obtain an order *pro Deo* by reason of their not being able to swear they were not worth £5, have yet not been able on account of their limited means to retain counsel and go to the expense of a regular action. Besides this, there are many matters which may be more suitably dealt with by way of petition than in a regular action.

The right of the subject to petition the Supreme Court of this colony is in its essence the right to petition the Sovereign whom, in these matters as in others, the Court represents. That is so now that the colony is English It was so when the colony was Dutch.

Van Leeuwen (1. *Comm.* 34., Kotze,) says. “The power of the Sovereign is mostly acknowledged in bestowing grace, where, beyond the written laws, something has been granted or remitted to any one out of special favour; such as pardons, remissions, abolitions, letters of legitimation, respite or *surete des corps,* benefit of inventory, *venia aelatis* and the like; . . . Moreover, all cases that may occur can be brought to its notice by way of petition, and a suitable favour prayed for and bestowed, unless the petition tends to prejudice or injure a third person, or the

community; or is clearly contrary to the law or would be of no service to the petitioner. I say all cases that happen without distinction, although they may be subject to the course of justice, against which we can always be relieved and aided by petition, *vulgo request civil,* to the Supreme Government (in whose stead the High Court acts in such matters) whenever the circumstances of the case require it; even against the decision of the High Court by way of re-examination or revision or upon other good grounds."

A right of this nature cannot be taken away except by express enactment. No mere rule of court could take it away even if it expressly purported to do so, much less can it do so by implication. Neither can a mere rule take away a power of this nature vested in this court as representing the Sovereign to entertain petitions for relief. That would be so in any case, but in this case s. 66 of the Supreme Court Ordinance, No. 8 of 1893 (s. 64 of Ordinance 7 of 1893, revised) expressly enacts that "nothing in this Ordinance shall be construed to take away or abridge any jurisdiction, power or authority vested in the court." And s. 3 (2) of the Ordinance says "The Court shall be a superior Court of Record, and shall have and may exercise all the authorities, powers, and functions belonging to or incident to such a court according to the law of England, and all the authorities, powers, and functions which, at the time of this colony coming under the dominion of the British Crown, belonged or were incident to the High Court of Justice of Holland and to the National Court of Holland or other Courts then possessing and exercising in Holland or in this Colony the jurisdiction of Superior Courts." (*a*)

It follows, therefore, that if the effect of the recent decision with reference to Order I. r. 3, is to take away or abridge the power of the court to grant relief when approached by petition, the rule to that extent is manifestly *ultra vires,* because no rule can have any greater effect than the Ordinance under which it is framed, and if the rule itself is *ultra vires* to that extent then it follows further that the decision is *ultra vires,* in which case Mrs. Winter's antedotal petition is still before the Court notwithstanding the decision.

There is yet another reason why the court should pause before granting these letters of decree. Even supposing that Mrs. Winter's petition antedotal is by the decision disposed of as a petition, the court is not the less able, and in my opinion none

(*a.*) See now sect. 3 (2.), Ordinance 10 of 1915. Ed.

the less bound to inquire into the truth of the statements made in that petition before granting the letters of decree.

A petition for letters of decree stands on a very different footing from an action in which the judges, sitting as a jury, have simply to find whether the plaintiff has or has not proved his case. If he has, they must decide in his favour, if he has not, they must decide against him. It is not a question of exercising a discretionary power. There is in that case no discretion.

But in the case of a petition for letters of decree it is different. The very fact that a petition is necessary shows that something is asked which in its discretion the court may grant or withhold. The court is not a mere automaton in the matter. Where there is no suspicion of fraud or irregularity, the court will grant the title as of course. But where facts are brought to the notice of the court, no matter how informally, which raise even a suspicion of fraudulent dealing, the court will hold its hand until it is satisfied that the suspicion has no foundation. The Court in exercising its discretion is bound to exercise it conscientiously, and not as if it were performing a mere legal formality. Yet it is here actually contended that, because there is no formal opposition to the granting of these letters of decree, they must be granted, although the court has had and has before it facts which, not to put the case more strongly than is necessary here, raise a strong suspicion of collusion by the applicant to defraud an elderly widow of her legal rights by an abuse of legal process. The court is asked, in short, in the exercise of its discretion, by its own deliberate act to place a stamp of absolute legality upon a transaction or a series of transactions which may be and which it has very good reason for believing to be of a nefarious character. I say, without fear of contradiction, that by the law of this colony it is not necessary that there should be a formal opposition to the granting of letters of decree. The court has always had and has always exercised the power to refuse to grant letters of decree upon its own motion, when facts are brought to its notice by its own officers, or in any other way, which satisfies it upon enquiry that letters of decree should not be granted. Putting aside my own experience in the matter, that is conclusively shown by the cases cited at the hearing of Mrs. Winter's antedotal petition and others. I referred to one which I have since had turned up. In this case certain facts came out in Berbice in a matter before me. As there was then pending a petition for letters of decree, I caused these facts to be laid before the court and the court refused to grant letters of decree, (*Petition of Georgiana Belgrave,* for letters of decree for part lot 11, New Amsterdam

Order, 16th April, 1886). In that case there was no formal opposition.

Chief Justice Beaumont, being of opinion that he was not at liberty to grant letters of decree in absolute terms without the production of the title of the defendant in execution, reserved the question for the Full Court. (*Re Hubbard* 4th January, 1864). The court of its own motion considered the question as to whether letters of decree should or should not be granted, but if it had held otherwise the letters would not have been granted, although there was no opposition of any kind by anybody.

In the case of *Iskenius* (18th January, 1858) the court, in refusing letters of decree, must have acted upon facts brought before it without any formal opposition, as there is no record I am told of any such formal opposition, and the petition was not referred for report to anybody. The same observations apply to the case of the *Mayor and Town Council* (6th May, 1859), in which letters of decree were refused.

Then we have the petition of *Van Kinschot,* (27th February, 1882). There was no opposition, but the question originated with the court itself as to whether letters of decree should be granted or not. (*a*)

In the case of the petition of *Maskell,* (3rd July, 1884), certain facts were brought to the notice of Chalmers, C. J., by Mr. Olton, acting Registrar, and the Chief Justice refused of his own motion to grant letters of decree. In that case there was no formal opposition.

In the case of *Edmond's petition* for letters of decree (23rd July, 1885), the court of its own motion referred the petition back to the petitioner to explain certain facts brought to its notice by the officer of the court. There was no formal opposition, and the letters of decree were not granted.

The case of the *petition of Belmonte* for letters of decree (1st April, 1892) well illustrates this, and if not on all fours with this case is in perfect analogy with it. There was no formal opposition to the granting of the petition for letters of decree as such. But there was a petition for an order *pro Deo* to enable the petitioner to oppose the execution sale. Before the order *pro Deo* could be obtained, the sale had taken place and, according to the contention now put forward by the petitioner Dargan and apparently acquiesced in by the Chief Justice and Mr. Acting Justice Kirke, the letters of decree should

(*a*) For full report of the decision in this matter see Report of Titles to Land Commission 1892, (Demerara), Appendix C. page 9,—Ed.

have been granted as of course, there being no formal opposition to the petition as such. Yet the court did not so regard the matter. The court took notice of the allegations made in the petition for the order *pro Deo*, enquired into the truth of these allegations, and refused to grant the letters of decree.

That is in effect precisely what has happened here, or rather I should say the case here is stronger. There the petition which the court took notice of was not a petition as is the case here praying directly that the letters of decree should not be granted, but in that case as in this there were facts alleged which if established went to show that the letters of decree should not be granted. In that case those facts were considered by the court. In this case the court is equally bound to take notice of them and, if it refuses to do so, will not the court be inflicting a further injustice upon this lady?

I may now ask in what position does the acting Puisne Judge stand. He is bound before giving his decision to enquire into the truth or otherwise of the allegation in the petition antedotal, that the petitioner Dargan had colluded with the heiresses of Black to defraud Mrs. Winter, by the abuse of legal process, of her rights under the will of Mr. Black. So far as I know he has had no opportunity of making such inquiry. Is he justified under those circumstances in taking part in this decision at all?

Coming now to a consideration of the facts. Lot 26, Main Street, Georgetown, for which the petitioner Dargan asks for letters of decree formed part of the estate of the late Mr. Henry Marius Alexander Black who by his will left to Mrs. Winter a life occupancy of the upper part of the principal building on the said lot. After Mr. Black's death Mrs. Winter was informed by his executor acting in the colony, that she was at liberty to let the upper part of the building of which the occupancy was left to her, and that the taxes in respect of the lot and buildings would be paid out of Mr. Black's general estate. She did let her part of the building, and the executor, and afterwards Mr. Black's heiresses, paid the taxes for the lot and buildings during eight successive years. Then, without a word of warning to Mrs. Winter, they left the taxes unpaid. Mrs. Winter supposing that the taxes would be paid this year, as they had so long been, was not on her guard and did not see the advertisement, and the first she knew of the matter was that the property had been sold at execution and bought by Mr. Dargan.

Mrs. Winter presented an antedotal petition against the granting of the letters of decree, on the ground that the petitioner Dargan had acted in collusion with the heiresses of Black in the

matter with a view to deprive her of her right under Mr. Black's will. The motive so far as the heiresses were concerned was supplied during the argument by counsel who appeared for them and for the petitioner Dargan. Mr. Black died some years ago leaving to his daughters a large fortune. From what fell from the learned counsel I gathered that the greater part of that large fortune had disappeared. Whether the heiresses had in scripture phrase fallen among thieves, he did not say, but he did say that they were beginning to feel the pinch of poverty. That being so they seem to have cast covetous eyes upon the pittance left to Mrs. Winter by their father.

Then they and their advisers set to work to deprive Mrs. Winter of what was left under the will. First of all two tricky letters were written by Dr. Belmonte to try and get Mrs. Winter to give up possession of the property, on the pretence of a necessity of painting etc. She declined. They did not say to her then, as they did later, when her antedotal petition came on for argument, that by not occupying the premises herself but by hiring it out she had forfeited her rights under the will. That would not have done, it would have put her upon her guard. Neither did they dare to bring an action against her to recover possession from her on the ground of the alleged forfeiture. No, they used, that is they abused, a legal process by means of which hundreds of poor people in this colony have been ruined. They get the property sold at execution, and it was bought in for them, so Mrs. Winter contends, by the petitioner Dargan.

It was suggested by Mrs. Winter's counsel, and upon the evidence there is strong reason for believing that a sale of the premises as a whole to Mr. Strong, the pianoforte dealer, who occupies the lower part of the premises, was in contemplation, and in order that the heiresses might be able to sell it to him free from incumbrance, it was necessary to get rid of Mrs. Winter's right of occupancy. When the sale of the property at execution was advertised the son of Mrs. Hampden King, Mrs. Winter's tenant, spoke about it to one Biddick, Mr. Strong's agent. Biddick said that on a previous occasion he had paid the taxes and deducted it from his rent—he had paid the taxes before. Now this appears to have been a deliberate untruth. Why uttered? Manifestly to prevent Mrs. King or her son from communicating with Mrs. Winter, as they might otherwise have done, and thus interfere with the projected sale to Strong. Biddick was called upon to report but did not. No man tells an untruth without an object, and I am satisfied that Biddick was a party to the collusion by which the sale at execution was brought about.

*In* re PETITION OF P. DARGAN; TOWN CLERK OF GEORGETOWN v. PROPRIETOR LOT 26, GEORGETOWN.

The petitioner Dargan alleges that he was a *bona fide* purchaser. That is what he says. Mrs. Winter's counsel argued that the conduct of Dargan showed that he was not a *bona fide* purchaser. After the sale Dargan never went near the property he professed to have purchased. That was not what a real purchaser would have done. He collected no rents from the tenants in the yard—gave them no notice to pay the rents to him. Was that like what a real purchaser would have done? Mrs. King's son went to Dargan on the afternoon of the clay of the sale and was told that his mother's tenancy could continue and that certain repairs should be done. No repairs were done.

Up to December 2nd, 1895, there was nothing to lead the petitioner Dargan to suppose that his complicity was suspected, but on that day Mrs. Winter's supplementary petition was sent in charging him with having acted in collusion with Black's heiresses in the alleged fraudulent attempt to deprive Mrs. Winter of her rights. Three days later Mr. Dargan wrote to Mrs. King demanding rent. That was the first time he had asked for rent, and Mrs. Winter's counsel contended that it was merely done to create a piece of evidence in support of his allegation that he was a *bona fide* purchaser. But even now that his eyes were opened he either forgot or did not know that there were tenants in the yard, and he gave no notice to any of them that they must pay their rent to him. Was it possible, Mrs. Winter's counsel asked, that Dargan could be a *bona fide* purchaser when he never went near the place, took no trouble to collect the rents, and did not even give the tenants notice that he had become the owner. As to Strong there was nothing to show whether he had or had not received notice.

Now we come to certain pieces of evidence which to my mind point conclusively to the fact that the purchase was really made by Mr. Dargan, not for himself, but for the heiresses of Black.

In July, 1895, Miss A. F. Black began to collect the rents of the rooms in the yard, telling one of the tenants that these rents were for herself and her sister. A man called Grandison collected for her.

In October the tenants heard of the sale to Mr. Dargan, and subsequently that it was sold to Strong. They had reasons to suppose that to be so.

Alice Allicock says: "I heard Biddick say that Mr. Dargan had bought it for Mr. Biddick—I mean for Mr. Strong." Then John Edward Fox says: "I heard a little talk about the property being sold—that Strong had bought the property. I heard Biddick, Strong's man, say so in January and February (this year). He

said Strong had bought the property and told his porter to pick up some wood, saying Strong had bought the property."

Mehitabel Fox says: "Biddick, Strong's clerk, took up some old wood in the yard, and said the place was theirs; this was in January this year, that was the reason I refused to pay."

This brings us to a very remarkable piece of evidence. When Mrs. Fox refused to pay Grandison, Miss A. F. Black's collector, the rent for January (they had all paid him for December) Grandison went away and came back with a letter from Miss Black

Tuesday, 4th February, 1896.

> Mrs. Fox,
>
> You must not refuse to pay to Mr. Grandison the rent of the rooms you occupy. I have not yet sold the property to Mr. Strong. When the sale is concluded you shall be duly informed by me.
>
> A. F. BLACK

Can any reasonable man suppose after this that the petitioner Dargan had purchased the property for himself as a *bona fide* purchaser? Are there twelve men of commonsense to be found who could come to any other conclusion than that the purchase was really made for the heiresses of Black in order that they, having ousted Mrs. Winter, might sell the whole property unencumbered to Strong? If the property had been really bought by Mr. Dargan for himself, Miss A. F. Black could not have been ignorant of that fact. She had signed an order authorizing him to receive her share of the purchase money and, if the transaction were not what Mrs. Winter contends it is, Miss Black must have received her share of the purchase money. Is it conceivable that Miss Black could have gone on collecting rents, which she in that case must have known belonged to Mr. Dargan, after the sale on October 15th, and up to December 31st, or that she would have tried to collect and would have collected them for January if the tenants had not refused to pay. Is it conceivable, if the property had been bought by Mr. Dargan for himself, and not for her and her sisters, she could in February, nearly four months after the sale in execution, knowing the property, as in that case she must have known, to be his, that she could have written to Mrs. Fox: "I have not yet sold the property to Mr. Strong. When the sale is concluded you shall be duly informed by me."? I say it is inconceivable. The only conceivable explanation is that the petitioner Dargan bought the property on behalf of the heiresses of Black, and that, having done so, he did not bother his head about giving

notice to the tenants and collecting the rents, as a *bona fide,* purchaser would have done, and that Miss Black knowing that to be so thought she might as well collect the rents.

The sale at execution took place, as we have seen, on October 15th, and it may be desirable to give the dates of the subsequent occurrences. The sale was advertised on September 28th to take place on October 15th. On September 20th a power of attorney in Mr. Dargan's favour was made by Mrs. Willems in Europe; that might have left England by the mail on September 25th, arriving here on October 9th in time for the sale. It is evident that, for some reason or other which is unexplained, Mrs. Willems did not trust her husband who is in the colony to act for her. The purchase money being once in the hands of the Provost Marshal, Mr. Willems might as in right of his wife have claimed and received her share of the purchase money, and held it, which might not have suited the parties concerned in the collusion— and in this respect it is noteworthy that no report was sent in by or on behalf of Mrs. Willems, although she must presumably have been represented in the colony, either by her husband or some other person before she appointed Mr. Dargan.

Mrs. Winter's petition antedotal was lodged on October 26th, some days after the sale.

Mrs. Willem's power of attorney in Dargan's favour was recorded on October 28th, 1895; the purchase money was paid by him to the Provost Marshal on November 19th, and uplifted by him on the same day.

Whatever else these facts indicated, they show this:—That taxes not having been paid on September 1st, the Town Clerk would certainly, having regard to the decision of Chalmers, C. J., sue sooner or later after that date, before the end of the year. Mrs. Willems executed a power in Mr. Dargan's favour which arrived shortly after that date, in time to enable Mr. Dargan to uplift the proceeds on behalf of Mrs. Willems. It is hardly likely that Mrs. Willems would have appointed him without some previous arrangement with him, and it is a coincidence at any rate, if nothing more, that these things should have occurred at the time they did.

The learned counsel for the petitioner, Dargan, took this piece of evidence and that piece of evidence, and said what does that prove; that of course is the usual line adopted by sophistical reasoners. One fact pointing in a particular direction may prove nothing, another will raise a suspicion, but if a third occurs the suspicion begins to approach certainty, because according to the doctrine of probabilities, it is highly improbable that three events,

all pointing in one direction, will occur accidentally in connection with the same matter in which the same people are more or less concerned, and when it comes to a larger number all pointing more or less the same way, the probabilities become overwhelming. It is not a mere matter of addition, but the probabilities increase by leaps and bounds with each additional fact.

There is one fact which more than any other convinces me that the petitioner Dargan and the heiresses of Black acted in collusion. Neither he nor they ventured into the witness-box to undergo the ordeal of the searching cross-examination to which they would have been subjected. Their counsel, it is true, undertook to take upon himself to exercise the right which he said counsel had of deciding whether he would call witnesses or not; generally speaking counsel do exercise that right, and wisely, for very often a defendant's witnesses damn his case.

In the present instance the learned counsel was at great pains over and over again to impress upon the court that it was he who was responsible. I was irresistibly reminded of the passage in Shakespeare, "Me thinks he doth protest too much." In an ordinary case, counsel, as I have said, wisely exercise, such a discretion. But this is not an ordinary case. Here is a barrister-at-law, a member of an honourable profession, the honour of whose members should be above suspicion, accused of attempting by an abuse of the process of the law in collusion with the heiresses of Black, to deprive an aged widow lady of the benefits conferred upon her by Mr. Black's will. Would not an honourable man who knew that he was innocent have scorned to take shelter under his counsel's wing? It is not as if the petitioner Dargan were an ignorant wholly uneducated man. He is a man of some education, supposed to have some knowledge of the law, and, by reason of his profession, presumably aware necessarily of the conclusion that might and probably would be drawn by honourable and intelligent members of the community.

I purposely abstain from saying anything here as to the legal question, whether the right given to Mrs. Winter under Mr. Black's will is or is not within the term *habitatio.* That might have had to be decided if we were now dealing with the petition antedotal. As the matter stands, we have only to enquire whether, upon the facts before the Court, there was or was not collusion by the petitioner Dargan with the heiresses of Black to deprive Mrs. Winter of her rights whatever they were, and until it is settled by competent authority that she had no rights it must be taken that the rights she so long enjoyed under the will were rights to which she was legally entitled.

Only one word more remains to be said, and that is with reference to the conduct of the Provost Marshal in this matter. Having received notice of Mrs. Winter's claim he ought to have left the matter to be decided by the Court and not have undertaken to decide himself that Mrs. Winter had no legal rights in this matter, the property having been sold at execution. Even if the sale at execution extinguished all legal rights in the property itself which he assumed, although that is not so absolutely in all cases, the question as to Mrs. Winter's rights as regards the proceeds of the sale remained to be determined, and the Provost Marshal should not have taken upon himself to decide that she had no rights in the proceeds at all, thus placing her at a considerable disadvantage.

I need hardly say after what has gone before that I have come to the conclusion that these letters of decree ought not to be granted. If my brother judges choose to make the order, the responsibility will be theirs, not mine. It was urged that if these letters of decree were not granted it might tend to deter future purchasers. That might have been argued in all the cases to which I have referred, and in many others which I have no doubt are to be found in the records of the Court, in which letters of decree have been refused. *Bona fide* purchasers need have no fear that they will not get their titles because the Court has rightly refused them in cases of so different description. If the letters of decree are refused here, that will occur which has occurred in the other cases where letters of decree have been refused, viz.—that the title will remain unaltered, the Town Clerk will have got his taxes, and the parties to the fraudulent scheme will be rightly left to settle matters between themselves as best they may.

KIRKE, J. (ACTING.)—I concur with the decision of the Chief Justice, because I feel that on the papers before me and the previous decision of the Court, I am both by law and precedent compelled to do so. At the same time I must add that I view our present system of granting letters of decree with much disfavour. They are in many cases obtained, if not by fraud, at any rate by irregular means and *mala fide,* and they are themselves often the cause of oppression. I am surprised that during the late alteration in our ordinance some method was not adopted superseding letters of decree by some process of law less exposed to contamination.

## LIMITED JURISDICTION.

LAWRENCE v. TRUSTEES, COURT "BERBICE HEART."

1896, *January 20th.* ATKINSON, J.

*Opposition to execution sale—Purchase of property at execution sale and failure to obtain letters of decree—Right to levy on purchaser's interest in property—Sale by purchaser of such interest—Right of opposition.*

If A. purchases a property at execution sale, and fails to complete his title by obtaining letters of decree, his legal interest in such property can be levied on at the instance of his creditors.

If A. sells such property to B. who does not obtain transport thereof, B. has no right of opposition against any creditor of A. who levies upon and advertises the sale of such property.

This was an opposition action by the plaintiff Lawrence to the sale at execution at the instance of the defendants, the trustees of Court "Berbice Heart" Ancient Order of Foresters, a society incorporated and registered under Ordinance 1 of 1893, of a portion of lot 17, New Amsterdam, in proceedings by the trustees against one S. C. Lucienne. The sale was opposed on the ground that the plaintiff had purchased the property in question on the 14th day of September, 1894, from Lucienne and was the true and beneficial owner thereof. Lucienne had himself purchased the property at execution sale and had not obtained letters of decree. He had not passed transport to Lawrence.

*S. E. Wills,* for the plaintiff (opposer).

*N. R. McKinnon,* for the defendants.

ATKINSON, J.—The plaintiff opposes the sale at execution of certain property at the instance of the original defendants on the ground that he had purchased the property in question from the co-defendant Lucienne, paid him for it, and got possession.

It was stated at the hearing that the co-defendant had also bought the property at execution sale, but had not got letters of decree. The plaintiff, of course, has a right of action against the co-defendant to compel him to pass transport of the property, but

meanwhile, the right to the legal title in the land is in the co-defendant; that being so, the case is governed by the decision in *Brown* v. *Administrator General, Estate J. Allt* (March 11, 1872), and any creditor who has obtained judgment against the co-defendant is entitled to levy upon his legal interest in the property.

The plaintiff is no more entitled to oppose the sale of the property itself than he would have been to oppose the sale of the co-defendant's interest in it.

There must be rejection, with costs.

## *In re* PETITION ISABELLA FERGUSON; REGINA v. FERGUSON.

*In re* PETITION ISABELLA FERGUSON; REGINA v. FERGUSON.

1896. *May 7th.* Before ATKINSON, J.

*Petition—Larceny—Accused found not guilty—Ownership of property found on accused and the subject of the charge—Order on police for return of property to accused refused.*

Petition for an order on the police directing them to hand over to the petitioner a certain pass book and money amounting to $5.72. Petitioner was indicted on April 20th, 1892, for the larceny of a purse, and notes and coins to the value of $77.08, alleged to be the property of Augustus Marques. During the course of the trial a savings bank book with $50 therein to the credit of the accused was ordered by the Court to be impounded, and on her arrest the sum of $5.72 was found on her and kept by the police.

On the charge of larceny the accused was acquitted.

On April 25th, 1892, petitioner presented a petition asking for the delivery of the pass book, on which petition an order was made stating that the question was one to be settled by civil proceedings.

Petitioner now urged that no claim to the pass book or moneys had been made by Augustus Marques or by any one else since the trial, and that any claim was now barred by prescription.

ATKINSON, J.—When I made the original order in this matter I did it while the facts were fresh before me. I was then of opinion that, although the jury had acquitted the present petitioner, that did not decide the question as to the right to the pass book and the money therein mentioned. A jury may and often does acquit a prisoner accused of theft, but that by no means amounts to a decision that the accused person is entitled, as of right, to the things he is accused of stealing.

On the contrary the facts struck me as being of so suspicious a character that I ordered the pass book to be detained, leaving the woman to get possession of it by due process of law, if she were so entitled. I see no reason now to alter that opinion.

## APPELLATE JURISDICTION.

JOHNSTONE v. GOMES.

1896. *May 15th.* Before SIR EDWARD O'MALLEY, C.J.

*Appeal—Sale of Food and Drugs Ordinance, 1892—Certificate of analyst—Necessary requirements in certificate—Evidence.*

Appeal from the decision of Mr. P. H. R. Hill, acting Police Magistrate of Georgetown, who dismissed a complaint brought by the appellant Johnstone against the respondent Gomes for the unlawful sale of half a pound of compound lard, not of the nature substance and quality demanded, on the ground that the analyst's certificate was not good evidence to support the complaint. The appeal was allowed, and the case referred back to the magistrate for hearing and determination.

*A. Kingdon, Q.C., S.G.,* for the appellant.

*D. M. Hutson,* for the respondent.

O'Malley, C. J.—In this case the question the magistrate had to try was whether the defendant had committed an offence against section 6 of Ordinance 9 of 1892, in that he had sold to the prejudice of the purchaser an article of food, to wit, compound lard, which was not of the quality nature and substance demanded by the purchaser.

A certificate was tendered in evidence, wherein the analyst stated that he was of opinion that the sample was adulterated "and contained foreign ingredients as under, 10% of water," I am of opinion that a certificate in these terms is good evidence of the fact that the lard was adulterated with 10% of water, and I base my opinion upon the judgment in the case of *Fortune v. Hanson,* 1896 1 Q.B. 202. In that case the question was whether a certain certificate was good evidence, and it was held not to be so on the ground that, in order to be good evidence, it should state facts from which the magistrates themselves could come to a conclusion as to whether the article had or had not been adulterated—should present the facts of analysis in a form sufficient to show without further evidence that a foreign substance had been mixed with the article, and that it did not state such facts, but in the judgment it was pointed out that a certificate such as we have in the present case would have been

sufficient as fulfilling these conditions. Hawkins, J., says: “If the analyst found in the milk some material substance which could not or ought not to be found in milk at all, it would be sufficient for the certificate to state that the sample of milk submitted to him contained so much percentage of foreign ingredient,” and Kennedy, J., says: “If something which could not exist as a constituent in water, such as pepper or sand, were found, then it would be sufficient to state in the certificate that the sample analysed contained so much per cent, of foreign ingredient.” Judgment for appellant. No order as to costs.

## GENERAL JURISDICTION.

### MARTINS v. THE EAST DEMERARA WATER SUPPLY COMMISSIONERS AND OTHERS.

1896. *June 8th.* Before SIR EDWARD O'MALLEY, C.J., SHERIFF, J., AND KIRKE J., Actg.

*Opposition to execution sale—Illegal levy—Assessment of plantations for moneys required or expended under the East Demerara Water Supply Ordinance, 1884—Amendment of schedule by the East Demerara Water Supply Commissioners Loan Ordinance, 1886—Statute Laws* (*Revised Edition*) *Ordinance 1894—Effect of revised edition on interpretation of ordinances therein.*

*Held,* that the effect of Ordinance 15 of 1886 was to substitute the schedule therein, for the third schedule in Ordinance 24 of 1884, and was not merely to alter, for purposes of assessment, the areas of the plantations as set out in the old schedule;

*Held,* further, that the Statute Laws (Revised Edition) Ordinance 1894 is absolutely and conclusively binding as a sufficient and correct statement of the statute law of the colony up to February, 1895.

This was an opposition to an execution sale of certain property in Supply village levied on at the instance of the East Demerara Water Supply Commissioners in proceedings against the proprietor or representative of the abandoned plantation Helena, to recover assessments on that plantation.

The further facts and arguments appear from the judgment.

*L. E. Hawtayne* and *W. M. Payne* for the plaintiff, opposer.

*D.M. Hutson* for the Commissioners.

The decision of the Court was delivered by the Chief Justice (SIR EDWARD O'MALLEY) as follows:

In this case the sale by the Marshal of certain property in Supply village is opposed on the ground that the levy under which the property in question was seized was illegal, the debt not being recoverable as against the opposer or as against his property. The levy which took place in July, 1895, was supposed to be made under the provisions of ordinances which were then in force and which at that time were known as Ordinances 24 of 1884 and 15 of

1886 (*a*), and was for a sum alleged to be due to the East Demerara Water Supply Commissioners under those ordinances as money assessed upon and payable in respect of plantation Helena, being the plantation Helena mentioned in schedule 3 to Ordinance 24 of 1884. By that ordinance it was provided that the plantations mentioned in the third schedule thereof should be separately assessed each as a whole and that moneys receivable in respect of any plantation so assessed might be recoverable by execution against such plantation as a whole including the various other plantations, if any, worked with it. This provision which is contained in s. 13 of the ordinance (*b*) is not very clearly worded, and some doubt is suggested as to whether it is intended that the plantations to be included with any named plantation are to be such as were worked with it at the time when the ordinance was passed, or such as were worked with it at the date of the assessment, or such as might be worked with it at the date when the money should be recoverable, but on the whole we think the most probable construction is the last.

The plantation Helena mentioned in the schedule above referred to included several other plantations, and amongst them plantation Supply, so that Supply formed part of that Helena which was assessed as a whole under the provisions of Ordinance 24 of 1884. By s. 5 of an amending Ordinance, 15 of 1886, it was provided that the sums of money to be recovered under the Ordinance of 1884 should be assessed on the areas as stated in a new schedule which was given in the amending ordinance. In that schedule the plantation, which in the previous schedule had been treated as a whole, *viz.*, plantation Helena, is broken up, and the several plantations which had together made up the plantation Helena mentioned in the previous schedule now appear as separate plantations, each with its own name, Supply being one of them.

For the opposers it is contended that for all purposes of assessment, *viz.*, both as determining what plantations were to be separately assessed each as a whole in itself, and what was to be taken to be the area of each, the new schedule was to be regarded as substituted for the old; in which case Supply being assessed separately from Helena, and not being a plantation worked with Helena at the date of the levy, would not be liable to be levied on for moneys due by the proprietor of Helena or in respect of plantation Helena.

(*a*) Ordinances 12 of 1884, and 9 of 1886 in 1905 edition of Laws.—Ed,
(*b*) S. 12 in 1905 edition of the Laws.—Ed.

On the other hand, for the Commissioners it is contended that the effect of the amending ordinance was to provide, not that the new schedule should be substituted for the old, but merely that when assessing the named plantation mentioned in the old schedule, the area of such plantation should be taken to be, not the area given in the old schedule, but the sum total of the areas which in the new schedule were given as the areas of the plantations (in the new schedule severally mentioned by name) which together formed the named plantation mentioned in the old schedule.

Assuming that this question could be determined by reference to the two ordinances as set forth in the original editions, we are of opinion that the former contention would prevail, and that the effect of Ordinance 15 of 1886, was practically to substitute the schedule of that ordinance for the third schedule of Ordinance 24 of 1884. Therefore we should uphold the contention of the opposers. As helping to justify this conclusion we may point out that a reference to the case of certain other plantations, dealt with in the two schedules, shows that the new schedule is not so formed as to make it possible to use it in all cases as giving new areas to old writs of assessment. For instance, in the third schedule of the Ordinance of 1884, Ann's Grove and Two Friends are assessed together as one plantation as a whole, with an area of 700 acres, Lusignan and Good Hope as one plantation as a whole with an area of 3,100 acres, and Two Friends as one plantation as a whole by itself with an area of 100 acres; and in the schedule to the Ordinance of 1886 we find Lusignan together with Two Friends and a plantation called Nogeens assessed together as one plantation with an area of 2,064 acres, and Good Hope by itself with an area of 1,964 acres. So that it is obviously impossible to obtain from the new schedule any information as to what new area is to be assigned to the old limit of assessment Ann's Grove and Two Friends, or to the old limit Lusignan and Good Hope, or to the old limit Two Friends.

But a point was raised as to whether we must not decide the present question, not by reference to Ordinance 24 of 1884 and 15 of 1886 as they were passed and as they appear in previous editions of the Ordinances, but solely by reference to the law as it appears in the new edition of the Ordinances. If we were to do so in this case it was admitted by Mr. Hutson, for the original defendant, that our judgment must be for the opposers. In the present instance, therefore, as the effect of the law as stated in the revised version would be the same as the effect of it according to the original ordinances, the matter is not one of

practical moment. But the question as a general one is important. The question is important as being typical of questions that must necessarily arise in a large proportion of all these cases, that is to say, where existing rights have to be determined by reference to statutory provisions of date earlier than 1895.

The preparation of the new edition of the Ordinances was provided for by an Ordinance which appears in that edition as Ordinance 1 of 1894. A commissioner to prepare the edition was appointed and his powers were defined. They comprised power to omit repealing enactments; to omit all preambles where such omission could be conveniently made; to consolidate ordinances of various dates into one ordinance under one date; to cut up and transpose sections and parts of sections; to combine enactments that had been separate, and to separate enactments that had been combined, and to place old enactments in the midst of new contexts; and they were to be so exercised as not to make any alteration in the substance of the law. To carry out this process was, if not a work of impossibility, at all events one of great difficulty and nicety. It was also one of great responsibility. The subject matter to be manipulated was nothing less than the whole fabric of the statute law, a law which to a large extent defines the rights and estates of every one in the colony, so that any mistakes made would be certain to involve the doing of injustice to someone. It would have seemed, therefore, a reasonable precaution to enact that before the new edition should be accepted as an authoritative statement of the law and in super-cession of the older editions its accuracy should be submitted to some careful test. No real provision, however, seems to have been made for such a test. The ordinance merely says that when the edition is printed it shall be published for six months and then on the approval of the Court of Policy shall become law. It shall, says the ordinance (*a*) "be deemed to be and shall be, without any question whatsoever, in all Courts of Justice and for all other purposes whatsoever, the sole and only proper Statute Book of this Colony, up to the date of the latest of the Ordinance contained therein." The question for us is as to what is the true construction and effect of those words. Do they confine us to the new edition as the authority for the law that we have to administer in the case before us? We feel reluctant to answer this question in the affirmative unless absolutely driven to do so. The Court ought not, except under the compulsion of plain words, so to construe an ordinance as to curtail its own jurisdic-

(*a*) Cf. s. 10. Statute Laws (Revised Edition) Ordinance 1904.—Ed.

tion, and yet that is what we must do if we are to decide this question in the affirmative.

If we hold that we cannot look outside of the new edition, then, even though the commissioner may have made mistakes in his estimate of what the law was, or, in his method of restating it, may have misjudged or overlooked the effect of amending and repealing and saving enactments upon the ordinances to which they refer, or may have failed to realise the consequences of post-dating or ante-dating any enactment, or of separating an enactment from its context, or of depriving an ordinance, which may have been constructed with a preamble, of all the lights and shades of meaning which that preamble reflected upon the enacting words, we must give effect to his mistakes because we have no means of correcting them, because we are not allowed to look at that by which alone we could have corrected them, *viz.*, the original ordinances themselves. We are reluctant to come to this conclusion, because we have strong misgivings as to whether many such mistakes may not have been made, but it does not follow that we should be justified in assuming that the legislature was influenced by any such misgivings; and if by the use of sufficiently plain words it has thought fit to put the Commissioner's version of the law above the criticism of the Courts and to declare it infallible we have nothing to do but to accept it on that footing. Applying the ordinary principles of construction to this provision we feel ourselves forced to the conclusion that this is its effect and that what it means is that the new edition shall be the sole authoritative statement of what the statute law of the colony was in the past and up to February, 1895, that it is the only statement of that law with which we shall concern ourselves, or to which we can look when determining questions of right that come before us. If the ordinance meant to give the new edition any less authority than this, it appears to us that it might have done so by simple and appropriate words for the purpose, and further, if we are to be at liberty to correct the law as stated in the new edition by reference to the old, how can it possibly be said that the new edition is the only proper statute book of the colony? To follow the old statutes instead of the new edition would seem to be in the very teeth of the words of this provision. We hold, therefore, that the new edition is absolutely and conclusively binding as a sufficient and correct statement of the statute law of the colony up to February, 1895, the date of the latest ordinance contained therein.

We had some doubts as to whether the Interpretation Ordinance of 1891 might not so operate in connection with this

Ordinance as to make it possible for us to qualify our conclusion as thus stated, but after carefully considering its bearing we do not think that it does.

There will therefore be judgment for the opposer with costs.

## LIMITED JURISDICTION.

THE DEMERARA RAILWAY Co., v. MARQUES.

1896. *January 25th.* Before ATKINSON, J.

*Action for declaration of title and possession—Rules of Court, 1893. O. I. r. 12.—Proper and sufficient description of property claimed.*

The facts sufficiently appear from the judgment.

*A. E. Messer,* solicitor, for the plaintiffs.
*D. M. Hutson,* for the defendant.

ATKINSON, J.—The plaintiffs allege that the defendant has unlawfully erected a building on a certain piece of land at Plaisance, their property, and they claim, firstly, a declaration that they are entitled to the land on which the building is erected; and secondly, possession of the said land. They claim certain other things which need not be considered at this stage of the proceedings.

The defendant takes a preliminary objection that the property in dispute is not sufficiently described as required by law, and claims a non-suit. He relies on Order I. r. 12, and cites the decision in *Martin* v. *Peter* (L. J., 2. 11. 1894.)

Order. I. r. 12 says that when the recovery of immovable property is claimed, the property must be described with such certainty as to enable an officer proceeding in execution to identify it. The plaintiffs state in their claim that they are the owners of a certain piece of land as set forth in their transport, reference being made therein to a plan of the land; and they allege that defendant "erected a building on a portion of the said piece of land near the west side-line of the said village of Plaisance."

The question is whether this is a description of the property sought to be recovered such as is required by the rule. In *Martin* v. *Peter* the dimensions only of the strip of land there in question were given, and it was held that the boundaries should have been set out in order to show where the strip lay. Here there are no dimensions given, nor boundaries either. All that is said is that a certain building stands on it near the west sideline of the village. How can that be said to be a description of the property? It was said the portion of the land was indicated by

the building on it, and an officer would find the land by looking for the building. But to indicate the position of a building standing on a piece of land is not to describe the property, the land on which the building is erected.

It is not even said that this is the only building near the west side-line on this piece of land, and it cannot be presumed that there are none, especially as the land runs right through the village, as appears by the plan. Assuming this particular building to have been "unlawfully" erected, as alleged, and that the plaintiffs, consequently, seek its removal, there may be others which have been lawfully erected.

There would have been no difficulty in describing this land by its metes and bounds. Its dimensions could have been stated, as also its distance from lot 39 or 40, on whichever side of the railway it happens to be, its distance from the nearest of the railway metals, and its distance from the side-line. The distances could have been measured from the sides and ends of the land if they are parallel with the sides of the lots and with the side-line respectively, or from the nearest corners of the land if the sides and ends are not so parallel.

It is manifest that the description in the claim would be utterly inadequate if it were sought to pass a transport of this piece of land on which the building stands. I am not supposing, of course, that the same absolute particularity of description is requisite under the rule as in the case of a transport, but I am clear that the so-called description in the present case is not in itself sufficient to enable an officer proceeding in execution to identify the property. It is not by invoking the aid of extraneous assistance that he is to identify it, but he is to be able from the description itself to do so.

I am of opinion that the rule has not been complied with, and that there must be a non-suit with costs; but this is not to have the effect of a final sentence.

## GENERAL JURISDICTION

### THE DEMERARA RAILWAY Co. v. BUXTON AND FRIENDSHIP VILLAGE COUNCIL.

1896, *June 12th.* SIR EDWARD O'MALLEY, C.J., SHERIFF, J., AND KIRKE, J., Actg.

*Damages and interdict—Railway bridge over canal—Deepening of canal—Right of support to abutments of bridge—English and Roman-Dutch law.*

*Held*, that a right to lateral support depends upon enjoyment without interruption for a period necessary to establish prescription rights.

Action for an order of interdict restraining the defendants, the Village Council of the villages of Buxton and Friendship, and their servants from deepening or digging out or continuing to deepen or dig out the bottom or sides of a canal running between the villages of Buxton and Friendship, and under the control and management of the defendants, adjacent to the bridge by which the said canal was crossed by the line of the plaintiffs' railway, in such manner as to weaken or endanger the safety of the foundations or abutments of the bridge, or in any other way to weaken or endanger the bridge, and for $2,500 damages already incurred.

The defendants pleaded that for drainage transport and water purposes periodical digging of the canal was necessary, as had been done for fifty years without let or hindrance, and that if there was any risk in the safety of the abutments it was due to the negligence of the plaintiff company in failing to keep them in proper order.

*P. Dargan*, for the plaintiff.

*D. M. Hutson* and *M. Ogle* for the defendants.

The decision of the Court was delivered by the Chief Justice (Sir EDWARD O'MALLEY) as follows:—

In this case we find as facts that since between 1847 and 1850 the plaintiffs have been in occupation of a strip of land (indicated as railway on the plan put in) running east and west, and abutting towards the west upon the east bank of the canal referred to in the case which runs north and south. On the strip of land

but close to the east side of the canal the plaintiffs about the year 1850 erected a brick pier or abutment for a bridge by which the railway crosses the canal at that point. At intervals of a few years from the time when the bridge was first erected, beginning at some time in the sixties, the canal has been cleaned out and deepened, and the cleaning out and deepening was carried out to at least as great an extent under and in the neighbourhood of the bridge, as the deepening and cleaning which has recently been carried out and which is the ground of this action.

McKenzie (witness) says: "I dug two feet under the brickwork. I dug at the bottom, two feet. Dug again in 1868, 1870, and 1872 to same depth. It was dug in 1862. I have seen recent digging by defendants. Canal was dug same as before. They have dug it less wide this time."

Carter says, "I have known the canal dug several times under that same bridge, sometimes three feet deep, two feet below projecting ends. I saw it last year (*i.e.* this time), it was dug shallower and the width was even narrower. We generally dig three feet from the level of the dam, last digging only two feet from same."

Kryenhoff says, "I know canal. I have dug it out I think three times, 1878, 1880, and 1889. I have dug three feet, two feet, and one and a half feet deep."

The plaintiffs complain in effect that the action of the defendants has deprived their land and abutment of that lateral support which is needed for the stability of their abutment, and have thus damaged and imperilled their bridge. We are of opinion that under the circumstances the action of the defendants complained of gives no cause of action to the plaintiff's. In order that the plaintiffs should succeed they must show that, in some way as incidental to their occupation of the land on which the abutment is built, they have a right to support for this abutment from the land or soil which is outside of the land they occupy. According to English law, to establish any such right, they would have to show that the building was an ancient building and that the right had been possessed for many years, (*Gale* on *Easements*, p. 338).

So far as we can ascertain the Roman-Dutch law applicable to such questions, if there be a corresponding right under that law, it must depend upon enjoyment without interruption for the period necessary to establish prescription rights, (*Van Leeuwen* 1, 292, 300.)

In the present case there has been no such uninterrupted enjoyment of the right to lateral support from the soil of the canal as is claimed here; on the contrary, that support has been re-

moved repeatedly in the same way as it has been removed recently, and, so far as the evidence goes, without any objection on the part of the plaintiff's.

There will be judgment for defendants with costs. We give judgment for costs for the defendants but not without hesitation. We think that a public body such as the Village Council should not have provoked litigation, as in this case, by hasty action, when a little delay and a little common sense would have enabled them to settle the matter in a friendly way.

## LIMITED JURISDICTION

RIECK v. COMACHO.

1896. *June 17th.* Before KIRKE, J. (Actg.)

*Contract—Goods sold and delivered—Surety—Excussion—Surety not to be proceeded against until principal excussed.*

Claim for the value of goods sold and delivered to one Manoel Comacho, for the payment of which defendant, Jose Comacho, had undertaken to be responsible.

Further necessary facts appear from the judgment.

*P. Dargan,* for the plaintiff,

*D. M. Hutson,* for the defendant.

KIRKE, J. (Actg.)—The plaintiff sues defendant as surety for the debt of Manoel G. Comacho, for the sum of $207.80, balance of an account for goods sold and delivered to him.

Jose Comacho took his brother Manoel to Rieck's store, and asked the manager Mr. Ouckama to allow his brother to purchase a certain amount of goods to stock a shop at Danielstown, and he would be responsible for his debt or account. Both Mr. Ouckama and the two clerks who were called as witnesses use the same words, that Jose said he would be responsible for the payment of the debt. Now if this means anything it means that if Manoel did not pay for the goods Jose binds himself to settle the account. Now there is no evidence before me that Manoel has ever been asked to pay the account sued for. No legal demand has apparently been made upon him, nor has he been sued in any Court. Under these circumstances can I give judgment against the surety Jose? *Grotius, Butch Jurisprudence* (Herbert's trans.) p. 295 says "A surety has by the law of the Emperor Justinian the right to delay the creditor until he has sued the principal." *Van Leeuwen* (Kotze) Vol. II. p. 42., "A surety has the following privileges: 1st, that he cannot be proceeded against until the principal has been excussed." So in this case it is the duty of the creditor to sue the principal before he can attack the surety. At the same time, from the evidence I am of opinion that Jose Comacho has made himself responsible for the whole debt contracted by his brother at the plaintiff's store. So under these circumstances I direct a non-suit with costs, this non-suit not to have the effect of a rejection.

## LIMITED JURISDICTION.

FELIX v. MOSES.

[BERBICE, 11 OF 1896.]

1896. *July 3rd.* Before SHERIFF J.

*Damages—False imprisonment—Trespass—Bona fide question of ownership—Arrest—Summary Conviction Offences Ordinance 1893, sec. 40* (*2*)*—Placing of boundary marks—Unlawful removal—Land Surveyors' Ordinance 1891, sec. 19.* (*4*) *and* (*5*).

All the necessary facts appear from the judgment.

*N. R. McKinnon,* for the plaintiff.

*S. E. Wills,* for the defendant.

The hearing of the case was concluded in New Amsterdam on June 18th.

The decision of Sheriff, J., was read by Kirke, J. (Actg.) in Georgetown on July 3rd.

SHERIFF, J.—This is an action for false imprisonment. The facts appear to be as follows:—the defendant claims to be the owner of part of the abandoned plantation Philadelphia, commonly called and known as Doe Park, situate on the Canje creek in the county of Berbice, laid out on a diagram made by Duncan Fraser, sworn land surveyor, dated July 12th, 1852, and deposited in the Registrar's office in Berbice. The plaintiff on the other hand has been, since October, 1893, and still is, tenant of part of pln. Philadelphia, his uncle having previously had it in possession since 1880. The defendant conceived or imagined that he was entitled to the land occupied by the plaintiff. On July 31st, 1894, he wrote to the plaintiff as follows:—"I hereby give you notice that from the 1st of August instant I will charge you $60 for the use and occupation of land, two fields, part of Doe Park which you hitherto occupied free of charge." On November 6th he charged the plaintiff with committing a wilful trespass on such lands.

By adopting such procedure he had recourse to quasi-criminal law. On the case coming on before the district magistrate, he dismissed the same on the ground that he had no jurisdiction, as the title to the land was in question.

The plaintiff had previously been arrested by the defendant under Ordinance 17, 1893, sec. 40, s-s. 2 (*a*). I need hardly observe that though the law authorised such arrest, it was a very high-handed proceeding for the defendant to have adopted, and the circumstances certainly did not warrant his having recourse thereto. The remedy is one only open to a person who is beyond all question the absolute owner of the land, or acting under or by virtue of his authority. The mere fact of the notice sent by the defendant to the plaintiff, demanding a rental of $60, was amply sufficient to establish that there was a question of title at issue, and such being the case, it was not competent for the defendant to do what he has done.

I pause to remark that since I have been in the colony I have noticed a growing tendency to abuse the power of arrest. Take the present case, for instance; both parties knew each other, and the residence of each other, and that being the case I am at a loss to understand why the defendant, giving himself the credit for acting *bona fide*, did not content himself in taking out a summons. But no, nothing less than an actual arrest satisfies the defendant.

The plan of Doe Park, as described in the diagram by Fraser, has been verified by Mr. Henry A. Bougie, sworn land surveyor, and he has furnished a plan dated June 30th, 1896. According to this plan which has been adduced in evidence, sworn to and explained by Mr. Bougie, the spot on which the defendant caused the arrest of the plaintiff was not part of Doe Park, but the remaining portion of Philadelphia. There has been some hard swearing between the defendant and Mr. Bougie, but as to matters collateral to the main issue and not in my opinion affecting it. Mr. Bougie committed an error in judgment in my opinion when he admits not putting up a paal where one ought to have been erected, for the reason that defendant said if he did erect such paal he (defendant) would immediately remove same, I would refer both of them to Ordinance 20 of 1891, sec. 19. ss. 4 and 5. To prevent a possibility of misconception I will give you these subsections *in extenso*:—

> (4.) Any land surveyor who neglects to place such boundary marks or paals shall be liable to a penalty not exceeding fifty dollars.
>
> (5.) Any person who wilfully removes, destroys or defaces any boundary mark or paal lawfully placed on land shall be liable to a penalty not exceeding five hundred dollars.

(*a*) See now sec. 39 (2.) Ordinance 17 1893.—Ed.

I. direct Mr. Bougie within one month from the date of this decision to place the paal on the proper spot for it to be erected, and the defendant had better be very careful as to any action on his part with respect thereto.

As to damages, they must be of a substantial nature because it is a great indignity to be arrested in broad daylight in the sight of all men, as any ordinary felon is, in the present case. The last remark I have to make is that the defendant appears to be a singularly obstinate man, and he would have come out of this transaction much better had he endeavoured to compromise for his gross blunder as soon as he discovered how utterly wrong he was.

I assess damages at one hundred and twenty dollars with costs, including those for the attendance of Mr. Bougie as stipulated when I granted the last adjournment.

## APPELLATE JURISDICTION.

BYJOO v. GILL.

1896. *September 5th.* Before KIRKE, J. (Actg.)

*Appeal—Master and servant—Negligence—Damages—Liability of master for acts of his servant—Scope of employment.*

Appeal from the decision of Mr. J. E. Hewick, Stipendiary Magistrate of the New Amsterdam judicial district who dismissed a claim by the appellant Byjoo for the sum of $40 for damages sustained. The further necessary facts appear from the judgment. The appeal was allowed.

*N. R. McKinnon,* for the appellant.

No appearance on behalf of the respondent.

KIRKE, J. (Actg.)—This is an appeal from the decision of the magistrate of the New Amsterdam judicial district.

The reasons of appeal are as follows:—

"1. That the decision is erroneous in point of law.

2. Because the evidence having fully established the relationship of master and servant, the master was liable for the acts of his servant, and the plaintiff was therefore entitled to a verdict."

Mr. Gill, the respondent, is manager of pln. Canefield, and had in his employment, as general field labourers, two men named Seejuthon and Maraj. One Tuesday in March last, Mr. Gill saw some donkeys and sheep trespassing on the estate in a field where some young canes were growing, and he told the driver Jugroo to take some coolies, amongst whom were the two men named, catch the animals and take them to the pound. The sheep got away, and as the men proceeded to catch the donkeys, no rope could be found, so Mr. Gill instructed the men, if they could not get a rope, to drive the donkeys out of the field. The only way to get the donkeys out of the field on to the road was across a narrow bridge. The two men, Seejuthon and Maraj, caught the appellant's donkey and as they were dragging and pushing it over the bridge it fell into the trench and broke its neck.

Now there can be no doubt that these two men were servants of the respondent.

2ndly. They were acting within the scope of their employment. As field labourers they could be properly ordered to drive out or impound animals destroying their master's growing crops.

3rdly. Under the circumstances was the master liable for the carelessness or negligence of his servants?

A master is answerable for the negligence or other tortious conduct of his servant in doing the class of acts which he was ordered or authorized to do. It matters not what were the instructions given to the servant as to the manner in which he ought to do his duty; it matters not that the servant has abused his authority, exceeded or deviated from his instructions; it will be no defence, in proceedings against the master, that his servant has done wrongfully that which he was ordered to do properly. (See *Macdonald's Master and Servant,* Chap. 28.) In the case of *Bayley* v. *M. S. and L. Rly. Co.,* (8. L.R., C.P. 148.) Kelly, C.B., in his judgment says: "The principle to be deduced from the authorities on this subject is, that where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable even though the acts done may be the very reverse of that which the servant, was actually directed to do."

A still stronger case, if possible, is that of *Limpus* v. *London General Omnibus Co.,* (32 L.J. Ex. 34), where a master was held liable for the negligence of the servant, although he acted in disobedience to the master's express orders.

Both these cases are much stronger as to the liability of the master than the case before me. Mr. Gill does not deny that he ordered the men in his employ first to impound the donkeys, and then, no rope forthcoming, to put them out of the field; and if in so putting them out the men were guilty of negligence, so that a donkey was killed, the master must be held as distinctly liable.

The decision of the magistrate is reversed with costs.

## APPELLATE JURISDICTION.

NEBLETT v. HOGG, CURTIS, CAMPBELL & CO.

1896. *September 18th.* Before SHERIFF, C. J. (Actg.)

*Appeal—Landlord and tenant—Claim for rent due for land leased—Alleged inability to use land for purpose for which rented—Service of notice of appeal—Limitation of hearing by reasons for appeal.*

Appeal from the decision of Mr. W. Nicoll, acting Assistant Police Magistrate of Georgetown, who gave judgment for the plaintiffs Hogg, Curtis, Campbell and Co. (now respondents) for the sum of $100 for rent of land due from the defendant Neblett (now appellant), and costs.

The further necessary facts appear from the judgment.

Appellant in person.

*A. Kingdon, Q.C.,* for the respondent.

Sept. 12th, SHERIFF, C. J. (Actg.) On this case coming on for argument a preliminary objection was taken by the Solicitor General, for the respondent, that the case was not properly before the Court because the affidavit of service disclosed that the notice and reasons of appeal were served upon the respondent by leaving the same with a clerk in the employment of G.R., Garnett, who was the attorney of the respondent, at his office, and it was said that the objection was well taken. I was referred to my decision in *Cabral* v. *Trent,* (1895 L.R. B.G. 96). Section 6 of the Magistrates' Decisions Appeals Ordinance, 1893, enacts that the appellant is within a given time to "serve upon the magistrate and upon the opposite party notice in writing of the reasons for his appeal." All that I decided in *Cabral* v. *Trent* was that a notice of appeal left with the magistrate's clerk is not a good service within the meaning of the section. The Chief Justice and my brother Atkinson whom I consulted were of the same opinion.

My attention has been drawn to a subsequent decision of the Chief Justice in *Tarabally* v. the *Barima Railway Company* (March 23rd, 1895), where the service was effected by leaving a duplicate original of the notice and reasons of appeal, in the absence of the respondent, with his mother, Nankee, at his residence. It was held that this was a sufficient service, and I understand that the Chief Justice in orally deciding the point

referred to *ex parte Lowe.* (15 L. J. (N.S.) M.C. 99) and the *Queen* v. *the Justices of Cheshire*, in the same volume at p. 114. His attention was also called to *Cabral v. Trent* (*ubi supra*). From the English authorities it is clear that service on the clerk to justices is not a compliance with a direction that service should be on them.

I have come across a case, the *Queen* v. *Justices of North Riding* (8. Q. B. 154) (*a*), where the service at the dwelling house of a justice of the peace, though not on him personally, was held sufficient, the court giving no reasons but apparently regarding it as settled law. The ordinance does not in express terms require personal service; the appellant is merely to serve "upon the magistrate and upon the opposite party."

The decision in *Tarabally* v. *Barima Railway Company* does not conflict with the decision in *Cabral* v. *Trent.* The respondent and his clerk occupy a very different position from that of a magistrate and a magistrate's clerk. An ordinary clerk may well represent a merchant or private individual as his agent to the limited extent of receiving documents or papers or messages on his behalf, or in other words of being a medium of communication. A principal by putting a clerk in his office holds him out to the public as having such limited authority, more especially if he himself is absent. Not so with a magistrate. The ordinance imposes on him personally the duty of preparing the record and of transmitting the same to the Registrar. It would appear right, therefore, that the service should either be personal or at his dwelling house or by means of a registered letter. In England service on a clerk to the justices is specially authorised by enactment in certain cases, here there is no such law. It is a condition of appeal that the notice of appeal, etc., is to be served on the magistrate, and the clerk is not by law or by implication either his agent or substitute. Like the magistrate himself, he is a creature of the statute law, and their duties and obligations are to be regulated thereby. For these reasons I overrule the objection.

*Posted.* (Sept. 18th)

SHERIFF, C.J. (Actg.)—The following are the reasons of appeal:—

"1. That the decision is erroneous in point of law, the nature of the error being that although the plaintiff stated that the defendant had agreed that he, the plaintiff, should take over the paragrass and realise it, pay rent due and, if any balance, hand it

(*a*.) There appears to be some error here. No such case can be found. *Queen* v. *Justices of North Riding* (31 L.J., M.C., 189) does not deal with this matter; *Queen* v. *Justices of Kent* (8. Q.B. 305) may possibly be meant.—Ed.

to defendant, and on the other hand if balance due plaintiff, defendant would be responsible for it; yet the magistrate did not consider the carrying out of this agreement a condition precedent to the institution of the plaintiff's claim against the defendant herein.

2. That illegal evidence was admitted and that there is not sufficient legal evidence to sustain the decision after rejecting such illegal evidence, inasmuch as the evidence with respect to the value of the paragrass growing on the land was not given by expert evidence.

Because it was not shown that either of the witnesses had any experience necessary to the formation of an opinion, or that any of such witnesses were specially skilled to give such opinion.

Because evidence contrary to a written receipt signed by W. St. Aubyn was admitted as an explanation thereof.

Because the evidence given by St. Aubyn of the defendant's possession of the fields was hearsay.

3. That the decision is altogether unwarranted by the evidence in like manner as if the case had been tried by a jury there would not have been sufficient legal evidence to sustain the verdict, inasmuch as there is no evidence beyond that of the plaintiff that he tried to realise the grass and that it was found valueless, while, in fact, the plaintiff, when cross-examined, stated that the grass was of a. certain value.

Because plaintiff admitted in cross-examination that St. Aubyn, when he gave the receipt, had authority to rent the said beds, and the date of the said receipt was previous to the date from which plaintiff claims rent from the defendant, and having given that authority to St. Aubyn the plaintiff divested in point of law the defendant of the possession of the said fields and the obligation to pay rent.

Because there was no corroborated evidence to sustain the decision."

As to the first ground, Mr. Garnett says that the appellant told him paragrass was valuable, and subsequently he says that he tried to realize the grass but found it valueless. The appellant argued that he could not be sued until the grass had been actually sold even if it only realized five cents. That is not the true construction to put on the agreement. The respondent accepted the representation of the appellant that the grass was valuable, and, relying on that representation, he undertook to realize the same, but in effect he says that he found that the representation was not true. The representation amounted to this, that the grass was of *substantial* value not a mere nominal value as for instance, $5. It is repugnant to common sense to suppose that Mr. Garnett would have agreed to postpone his right of action and assume the

responsibility of selling the grass unless he expected to realise the whole of the amount due or at any rate a *substantial* sum. In a letter, dated 15th May, the appellant writes to Mr. Garnett that the 13 beds of paragrass were "now valued at $260." That was a substantial value. At the hearing of the case the appellant, however, gave no such evidence himself nor did he adduce any testimony whatever of the value of the grass.

With respect to the second reason of appeal there is no occasion to say much. Evidence was adduced as to the value of the grass growing on the land. No objection was taken as to the admissibility thereof nor were these witnesses cross-examined as to their knowledge or experience for computing the value of the grass. It is to be assumed that they had both until the contrary was shown. I was referred to the Evidence Ordinance, 20 of 1893, section 16, but I fail to see its applicability. It is further objected that evidence contrary to a written receipt was admitted as an explanation thereof. Assuming that the evidence objected to was inadmissible the objection should have been taken at the trial and cannot be raised subsequently on appeal. According to the record no such objection was raised in the court below. See *Taylor on Evidence*, page 952. If it were necessary, however, to decide whether the objection is good I should overrule it as the evidence does not go to contradict, vary, add to, or subtract from the receipt, but was adduced to explain the same. *Taylor* p. 985. Lastly, under this reason of appeal, it is objected that the evidence of St. Aubyn as to the appellant's possession was hearsay. On reference to the record it will be seen that this evidence was elicited by the appellant's counsel in cross-examination. That being so how can he be allowed to argue that it was inadmissible because it was hearsay?

On the third reason of appeal I would refer to my remarks on the first reason of appeal. Judged by the circumstances of the case it appears to me that even if the grass was worth $5 it might well be described as practically valueless. On cross-examination, Mr. St. Aubyn says, "I went to value these lands for grass this year in May. No. 8 at nothing, no paragrass there. No. 10 not worth 12/-." I certainly think that there was sufficient legal evidence to sustain a verdict. Under this head it is said that as Mr. Garnett gave Mr. St. Aubyn authority to let, he divested in point of law the appellant of the possession of the said fields and the obligation to pay rent. No authority is cited for this proposition and I should have been surprised if there had been. When the authority to let was given by Garnett to St. Aubyn he only transferred the general authority which he himself possessed. There was no mandatory order to let but merely authority to let

if he thought fit. From St. Aubyn's evidence it appears that he considered he had authority to let "if fields given up and no arrangements made at the office about them." Mr. Neblett does not say that Mr. Garnett communicated to him the fact that he had authorised Mr. St. Aubyn to let these lands, and how can a tenant be divested of possession by any act of his landlord done behind his back and not communicated to him? This is assuming that Mr. Garnett's act had the legal effect attributed to it by the appellant, which I certainly do not attach to it. It is likewise said that there was no corroborative evidence to sustain the decision. I consider that there was ample evidence to support the judgment.

It is right to remark that the appellant cited *Van der Linden* to show that where the land let was inundated or proved sterile, or was affected by drought, the lessee was exonerated from the payment of rent. He also complained that the magistrate had refused him permission to call certain witnesses. The record is silent as to this occurrence and I shall not consider these objections, as it is "not competent for the appellant to go into or to give evidence of any other reasons of appeal than those set forth in his notice of reasons for appeal." See section 24 of Ordinance 13 of 1893. One fact has struck me somewhat forcibly. As the appellant was only sued for $100 in June and the grass was valued (so he wrote) in the previous month of May, at $260, why he did not pay the $100 and thereby acquire the difference, viz., $160. He does not appear to have had much faith in his appraisement.

Considering that there was evidence and that it was for the magistrate to determine to whom credence should be given, I am of opinion that the judgment should not be disturbed. Appeal dismissed with costs.

## APPELLATE JURISDICTION.

CAMERON v. ARMOUR.

1896. *September 24th.* Before SHERIFF, J.

*Appeal—Keeping and using mule without a licence—Miscellaneous Licences Ordinance 1861, sec. 35—Onus of proof on defendant.*

Appeal from the decision of Mr. J. Brumell, Stipendiary Magistrate of the Essequebo judicial district, who dismissed a charge brought by the appellant Cameron against the respondent for keeping and using a mule, without taking out a licence for the same. The appeal was allowed and the case referred back to the magistrate.

*A. Kingdon, Q.C., S.G.,* for the appellant.

*P. Dargan,* for the respondent.

SHERIFF, J.—The following is the reason of appeal:

"That the decision dismissing the case is erroneous in point of law inasmuch as the facts proved by and on behalf of the complainant were sufficient to sustain the complaint and to require the magistrate to call upon the defendant for his defence and in default of sufficient defence to convict the defendant."

I have, as required by Ordinance 13 of 1893, section 29 (3), considered the reason given by the magistrate set out in the memorandum mentioned in section 18 of the ordinance.

The appellant, a commissary of taxation, established the following facts in the court below:—

That the respondent was manager at plantation Golden Fleece, that he owns a waggon, and that on the 9th of May last, he saw a red mule not licensed belonging to Golden Fleece, in this waggon, which was driven by respondent's groom, and a Mr. Choppin was in the waggon.

The magistrate says: "I am not satisfied from the evidence given in the case of the criminality of the defendant, and before I can find him guilty of the offence charged the evidence ought to be fully satisfactory and convincing to my mind and conscience." No doubt as a general rule this proposition is sound, but it is not applicable at the stage at which this case had arrived. The magistrate's sole duty at the close of the case for the prosecution was not to determine whether the charge was proved or not but to carry out the provisions of section 35 of Ordinance 2 of 1861.

The magistrate also objects that the evidence is not precise, but he is apparently forgetful that all that he had then to determine was whether the prosecutor had made out a *prima facie* case or not within the meaning of the section. The magistrate further says, he is not satisfied from the evidence given that the defendant Armour is the person, as set out in the section, who is required by law to take out the licence, and he gives his reasons. This, however, is not a matter left to the decision of the magistrate. The law points out by whom *prima facie* the mule shall be deemed to be kept, &c, &c. Assuming that the mule was used by Mr. Choppin, the mode of use, the respondent's waggon, and the presence of his groom, all point, *prima facie*, to the fact that the respondent being its custodian had *inter alia* "permitted" the mule "so to be used." I have previously shown what facts the appellant proved, and immediately those facts were in evidence *without more*, the onus of proof shifted, and it became imperative on the magistrate to call upon the respondent to rebut the *prima facie* case. To sum it up, the law having declared what shall amount to a *prima facie* case, the duty of the magistrate is to see firstly that the facts proved bring the case within the section, and, if so, then secondly, to call upon the defendant, and lastly, to determine whether the defendant has or has not rebutted the *prima facie* case, and decide accordingly. I would call attention to the case of *Bethune* v. *Burrowes*, decided by me in July 1892, and which appears in Review Cases for 1893, page 21. I consider the law, as laid down there, applicable to the present case. The worthy magistrate has erred in judgment, and I recall the adjudication and direct that his attention be specially drawn to this decision for his information and further guidance.

I award costs to the appellant.

## APPELLATE JURISDICTION.

D'ANDRADE v. BAKER.

1896. *September 24th.* Before SHERIFF, J.

*Appeal—Sunday trading*—Summary *Conviction Offences Ordinance 1893, s. 193—Meaning of words 'every person'—Proof of issue of licence—Miscellaneous Licences Ordinance 1861, s. 7.*

Appeal from the decision of Mr. P. H. R. Hill, Acting Police Magistrate of Georgetown, who convicted the appellant D'Andrade for unlawful trading on a Sunday, and sentenced him to pay a fine of $50 or two months' imprisonment with hard labour. The decision was affirmed.

The reasons for appeal appear from the judgment.

*W. E. Lewis* for the appellant.

No appearance on behalf of the respondent.

SHERIFF, J.—The following are the reasons of appeal:—

"1. That illegal evidence has been admitted by the magistrate's court and that there is not sufficient legal evidence to sustain the decision after rejecting such illegal evidence.

2. That the decision is entirely unwarranted by the evidence in like manner as if the case had been tried by a jury there would not have been sufficient evidence to sustain the verdict."

The two reasons of appeal may conveniently be considered together. Section 7 of Ordinance 2 of 1861 enacts: "In any proceeding in any court, the fact that a licence of any description has been issued to any person may be established by the production—

(1.) Of an extract certified by the Chief Commissary, from the books of the Commissary Department, of the entry recording the issue of such licence, and

(2.) Of proof that such person and the person named in such entry are one and the same."

Such a certificate was tendered on behalf of the prosecution. Mr. Lewis for appellant objected to its admission "as it is," but it was admitted by the court, and in my opinion, properly so. It was admitted for as much as it was worth. As it stood and without additional evidence to connect the person alleged to be the licensee with the person named in such entry, viz., "that they are one and the same," it was valueless. But this identification might properly be supplied by some other witness. As a matter

of fact, no such evidence was forthcoming, and therefore there was no evidence that one Leopoldina Teixeira was the licensee of D'Urban Fountain rumshop at 77, Stabroek. Well then, how does that affect the case? The charge is for Sunday trading and it is brought under Ordinance 17 of 1893, section 193, which commences: Every person who on any Sunday opens or keeps open any store, shop, house, room, &c, for the purpose of selling any goods, &c. Taken in their ordinary meaning the words used prohibit *every person* from trading on a Sunday in a shop, &c. and it is immaterial whether the shop, &c, be licensed or not, or who the owner of the shop may be. According to appellant's counsel "Every person" does not mean every person, but it is to be read together with sections 195 and 196 of the Ordinance. All that s. 195 provides is that owner of goods, &c.,

(1) is to be personally liable for the acts committed by any member of his family or by any person in his employment in the same manner as if such act had been committed by himself;

(2) renders the evidence of any such persons admissible and otherwise protects him;

(3.) defines who are comprised in the word "owner." Not a word, however, is said that "every person" *only means* a member of the owner's family or a servant or a person in his employ. It is argued that this shop must be shown to have an owner and it must be shown that D'Andrade was a servant of such owner. I dissent from this view entirely. The true test of the case is this question: Was there evidence that D'Andrade was found keeping open a shop on Sunday for the purpose of selling any goods not specially exempted? Answer, yes; and as a matter of fact he sold liquor and cigars. Let me put another case. A. buys a bottle of rum on Saturday and keeps his room open on Sunday and sells drinks, must it be shown who the owner of the room is, and that A. is a member of his family or is his servant? Certainly not.

The magistrate convicted, but while affirming his decision, I must dissent from his reasons. It appears that he attached undue weight to the argument of counsel, the fallacy of which I have exposed.

Decision affirmed.

## GENERAL JURISDICTION.

1896. *February 11th.* SIR EDWARD O'MALLEY, C.J., and ATKINSON, J.

DE SANTOS AND ANOTHER v. ADMINISTRATOR GENERAL
REP. EST. J. S. F. ROSA, DECD., AND ANOTHER.

*Specific performance—Action to compel transport—Property sold at public auction—Extent of the property intended to be sold and bought—Authority of seller to auctioneer—Mistake—Duties of executors.*

Action for the specific performance of a contract alleged to have been entered into between the parties, plaintiffs claiming to have purchased at auction sale from the defendants lots 25 and 57, Lacytown, Georgetown. Defendants claimed specific performance of the contract of sale and purchase of lot 57 only. Further necessary facts appear from the judgment.

*D. M. Hutson,* for the plaintiffs.

*P. Dargan,* for the defendants.

The judgment of the Court was as follows:—

*Per* O'MALLEY, C.J.—This is an action wherein the plaintiffs seek to obtain a decree for a transport to them by the defendants of two lots of land, 57 and 25 in Lacytown, alleged to have been purchased at auction by them from the executors whom the present defendants represent, in March, 1895. The defendants say that the lot 25 was included in the sale by mistake and that the executors never did and never intended to sell that lot, and that therefore the Court ought not to grant a decree for specific performance against them.

The defendants further contend that the plaintiffs were mistaken as well as the executors and really thought that they were buying lot 57 only, and that the purchase and sale of lot 57 alone was the true contract between the parties, and by their counterclaim they ask for a decree for the specific performance of the contract so modified.

The properties in question were put up for sale by auction by Mr. Bagot, the auctioneer, upon the premises of lot 57, on March

26th, 1895. The conditions of sale specifying the properties to be sold as lots 25 and 57 were read, the property as so put up was bid for on behalf of the plaintiffs and knocked down to them for $3820, and the conditions of sale were thereupon signed by the auctioneer as agent for the executors, and by Mr. J. A. Pereira as agent for the plaintiffs. We think that this was a good and binding contract between the parties as regards the lots mentioned in the conditions, *viz.*, lot 25 and lot 57. The auctioneer, acting strictly within the authority given him by the executors, was selling and intending to sell those two lots, and the plaintiffs were buying and intending to buy them, and the transaction was being conducted primarily with reference to the statement of what the property was as given in the conditions of sale.

Mr. Bagot, when called as a witness by the defendants, is asked "Did you have any instructions from the representatives of Rosa's estate to sell lot 25?", and he answers "I did certainly, and 57, they sent me the transport and told me to sell that." We do not think that the evidence establishes that the plaintiffs had any other intention than to buy lots 25 and 57. We have it that Mr. Pereira, the agent of the plaintiffs, went to the office of the Vlissengen Commissioners shortly before the sale and there ascertained from Mr. Hubbard, the assistant, that there were two properties, lots 25 and 57, and that they were jointly liable for a lien of $1,800, and that they had been so made jointly liable at the request of a former owner. "They came," says Mr. Hubbard, meaning by "they" Mr. Pereira and two others, "they came to the office two or three times, the first time was before the sale. . . . I told them there were two properties owing one amount," and Mr. J. A. Pereira says, "I went to the Vlissengen Commissioners to find out about the lien and I found there were two properties together, 25 and 57, and that the lien was on both together;" and then speaking of the sale he says, "There was no doubt whatever in my mind about what I was buying. I understood I was buying lots 25 and 57. At the time I bought the two properties the only information I had was the conditions of sale and the information from the Vlissengen Commissioners."

Then young de Santos says that before the sale he, too, went to the Vlissengen Commissioners, and that the information he got about the lots confirmed what Mr. J. A. Pereira had told his father, namely, that there were two lots jointly liable for lien; he also speaks of going round with the plaintiffs and looking at the two lots on the morning of the sale, and again he says, "My father's wish was to buy lot 57, but I said Buy both if both are put up to save trouble about the lien"; and the elder de Santos

says, "Pereira found out that there were two lots, 25 and 57. Teixeira and I went round the properties on the morning of the sale. I heard lots 25 and 57 called out at the auction; these were the lots I instructed Pereira to buy."

So far for direct evidence to show that the plaintiffs intended to buy lots 25 and 57, evidence resting upon the oaths of the parties and their agent. As against this the defendants sought to show that the conduct of the plaintiffs after the sale attempting to collect rents from lot 57, whilst they made no corresponding attempt in regard to the rents of lot 25, showed that they did not really know at the time or within a month after that they had bought anything more than lot 57, and they say also that the notices which were served by the plaintiffs on certain tenants on lot 57 were so worded as to point to the same conclusion. A great deal of evidence was given about this collection of rents between the date of the auction and the early part of May, and on the whole we are satisfied that while the plaintiff's did endeavour to get rents from lot 57, they did not make any persistent endeavour to get them from lot 25. But then it seems to us that the explanation of this is to be found in the evidence of the young de Santos who says that the plaintiffs did go, soon after May 1st, to try and get rents from lot 25, but that when he saw that they did not get them he said "Wait till the transport is passed." We cannot help thinking that the plaintiffs' conduct in leaving the rents of lot 25 alone while they were collecting from 57 is to be attributed to that advice and not to ignorance of the fact that they had bought lot 25. Young de Santos seems not only to have known what he was about but also to have had a shrewd idea of how to conduct the business. We think that he suspected that there was some mistake about the inclusion of lot 25 in the sale, and thought that the best way to prevent difficulty would be to avoid calling the attention of the executors to it in any way until the transport was actually passed and the purchasers' title completed. It was a shrewd view, but we are not prepared to hold that the plaintiffs in acting as we believe they did on his advice were acting dishonestly or even inequitably. There was no duty cast upon them to open the eyes of the executors either at the auction or after it, and we do not think that there is anything in this that should deprive them of any such equitable remedy in regard to the contract as they might otherwise be entitled to. The explanation which thus suggests itself to our minds as the true explanation of the plaintiffs' conduct has the advantage of not requiring us to disbelieve the positive statements of the plaintiff's when they say that they

knew they had bought lot 25 as well as lot 57 which we certainly must do if we were to accept the defendants' theory.

There remains the wording of the notices which, it is said, supports the defendants' contention, but we cannot see that this is so. It seems to us that whatever else the notice shows, it shows this much beyond question, that the plaintiffs knew they had bought lots 25 and 57. On the whole we are of opinion that the plaintiffs intended to do what they did when they bid for and bought the two lots, 25 and 57.

Then say the defendants it was by mistake that those two lots were put up for sale. In the pleadings the mistake is alleged to be that of the auctioneer, but the defendants' evidence failed to support this allegation, and if the defendants were to rely on any mistake it would have to be on the mistake of the executors themselves, which led them to instruct the auctioneer to sell lots 25 and 57 while they had no formed intention to sell anything but what was comprised in 57. We are satisfied that the executors did give the auctioneer an authority which warranted him in selling lots 25 and 57, but at the same time we think it is open to doubt whether they had anything in their minds but the property which as a fact was comprised in lot 57, or any formed intention with regard to any sale except of that property; but whether, while thus intending one thing to be done and authorising something different to be done, they were making what can be called in equity a mistake seems doubtful. A mistake implies some activity of the mind in relation to the subject matter where as here the attitude of the executors towards the transaction was according to their own account, from beginning to end, one of absolute carelessness and inattention as to what they were doing, and of absolute ignorance as to its effects. If under those circumstances they make what courts of equity mean when they speak of mistake, we are of opinion that it was not such a mistake as ought to deprive the purchaser of any equitable remedy that he may require to secure the benefits of his contract.

When a man is going to sell his own property there are certain obvious precautions that he takes for his own security, and when he is selling as an executor those precautions become duties; by himself or by some competent agent he should make sure of what it is that he means to sell and he should be careful as to the scope of the authority that he gives for the sale. But how does the conduct of the executors appear in the light of those duties? Mr. Abraham says "I did not know of the existence of lot 25 at the time of the sale. I had not taken possession of it as executor," (though he afterwards admits that he had signed an inventory of

Rosa's estate in which lot 25 was mentioned, and also that he had a note in a private book of his own of the value of lot 25 as $800). "The business of the estate was really left to Rosa's brother, I did the legal part. I paid no attention to the conditions of sale." And Vasconcellos says "The advertisement that appeared in the newspaper was the only information I had about the whole business. 1 took the transport to Bagot's office on the morning of the sale. I gave it to Forrester, Mr. Bagot's clerk. I told him, that is the transport of the property you are advertising for sale. I left it there."

The facts admitted speak for themselves. We consider them discreditable to the executors and particularly to Mr. Abraham, who was, under the circumstances of his position both as executor and as a lawyer, specially bound to give his attention to the transaction, and we think that they are such as to deprive the executors of any claim to the assistance or protection of a court of equity. The executors by their almost apparently deliberate neglect, by a mistake, if it be such, which they had no title to make, have allowed the plaintiffs to become the purchasers of lot 25 and for a price which, as it stands, does not appear to be wholly inadequate for the property purchased. There is some inadequacy and for this we can provide by making the decree for specific performance conditional upon the payment of some additional price.

Upon the whole our judgment is a decree that the transport be passed on payment by the plaintiffs to the defendants of the balance of the purchase money agreed together with a further sum of $280, from which must be deducted the $1,800 for the lien. We dismiss the counterclaim and we give costs for the plaintiffs.

## APPELLATE JURISDICTION.

GOMES v. GOMES.

1896, *October 10th.* Before SHERIFF, J.

*Appeal—Vagrants—Summary Conviction Offences Ordinance, 1893, sec. 144* (*1.*)*—Neglect of husband to maintain wife—Proof of means—Application of ordinance.*

Appeal from the decision of Mr. W. Nicoll, acting Assistant Police Magistrate of Georgetown, who dismissed a complaint brought by Mary Gomes (appellant) against her husband John Gomes (respondent) for neglecting to maintain his wife, in contravention of the provisions of sect. 144 (1.) of the Summary Conviction Offences Ordinance, 1893. The appeal was dismissed.

*J. Correia,* for the appellant.

*T. W. Phillips,* for the respondent.

SHERIFF, J.—The following are the reasons of appeal:—

"1. That there was sufficient evidence to warrant a conviction in the like manner as if the case had been tried by a jury there would have been a conviction.

2. That the magistrate, having found that the defendant was able by labour to maintain his wife, his wife being without any means of support, and having found that he neglected to do so, was bound to convict the defendant.

3. That the decision is erroneous in point of law inasmuch as the magistrate having found as aforesaid and that he neglected to support his wife, the said Mary Gomes, held that the ordinance only applied to idle and disorderly persons and not to persons in the position of defendant."

The magistrate's reasons of judgment are as follows:—

"The defendant is a shopkeeper earning $12 a month, but who does not support his wife. I am of opinion that section 144, subsection 1 of Ordinance No. 17 of 1893 does not apply to a husband who is earning a good wage, but who is not supporting his wife. I think the section applies only to loafers and persons who will not work. The Poor Law Ordinance No. 2 of 1855 meets the case in question."

The sole matter for decision is what is the true construction to be placed on section 144 (1) of Ordinance 17 of 1893. I concur in the view taken by the stipendiary justice. The section is the first under part 5, "offences against religion, morality and public

convenience," it comes under "Title 12, Police Offences, Vagrants." The section is levelled at persons who "being able by labour or other lawful means to support (in this case) his wife wilfully refuses or neglects so to do." The evidence shows that the respondent does work and earns $12 per month. He is a person who has the means wherewithal to maintain his wife, but fails to do so; a person who can work or by lawful means can support (in this case) his wife and wilfully refuses or neglects so to do may well be described as a vagrant—*aliter* if he does work though he does not support his wife. To sum up the matter the statute is a penal one and must be construed strictly. See in connection herewith Ordinance 2 of 1855, section 36 (1) (*a*).

Decision affirmed with costs.

(*a*) See now Ordinance 14 of 1903.—Ed.

## APPELLATE JURISDICTION.

SOLE v. HOLLINGSWORTH.

1896, *October 29th.* Before SHERIFF, J.

*Appeal—Unlawful possession—Summary Conviction Offences Ordinance, 1893, s. 96—Scintilla of evidence—Amendment of reasons for appeal—Magistrates' Decisions* (*Appeals*) *Ordinance, 1893, ss. 24 and 25.*

Appeal from the decision of Mr. H. H. Cunningham, Stipendiary Magistrate of the Demerara River judicial district, who convicted the appellant Sole for the unlawful possession of a quantity of low wines, and sentenced him to three months imprisonment with hard labour. The decision was affirmed.

*W. E. Lewis,* for the appellant.

No appearance on behalf of the respondent.

SHERIFF, J.—The following are the reasons for appeal:

"1. That the magistrate's court has exceeded its jurisdiction in the case.

2. That illegal evidence has been admitted by the magistrate's court, and that there is not sufficient legal evidence to sustain the decision after rejecting such illegal evidence.

3. That the decision is altogether unwarranted by the evidence in like manner as if the case had been tried by a jury there would not have been sufficient evidence to sustain the verdict.

4. That the decision is erroneous in point of law, (a) there being no evidence of possession; and (b) that the magistrate's court after the case was closed and the defendant had been found guilty recalled witnesses."

On the case coming on for argument I drew the attention of appellant s counsel to the fact that (b) in his 4th reason of appeal which corresponds to (9) of section 9 of the Magistrates' Decisions (Appeals) Ordinance was not an error in point of law. Section 25 was then cited, and I was asked to amend by striking (b) out of reason 4 and laying it as a separate reason. I ruled that section 25 did not warrant my granting the amendment as it would be in contravention of section 24, and as I should be adding an additional reason of appeal. I pointed out that the appellant had in

(b) of the 4th reason of his appeal laid matter which did not come within the scope of (9) of the reasons of appeal given by section 9 of the ordinance and that the objection was one not of form but of substance. See section 10.

I have set out the reasons of appeal but on looking at my notes it appears that certain propositions were argued without reference to any particular reason. I have satisfied myself that these propositions do come within the reasons of appeal, and I shall therefore proceed to consider and dispose of the same. While admitting the rule that the degree and sufficiency of the evidence and the credibility of the witnesses is a matter left to the judgment and discretion of the presiding magistrate, it was submitted that in this case the evidence was "too slight to found a conviction" amounting merely to a scintilla, that at most it was only a case of suspicion and that the magistrate had drawn a wrong inference from the evidence. Lastly it was urged that the respondent must be regarded in the light of an informer whose testimony is valueless unless corroborated, and that there was not only an absence of such testimony but he was contradicted by his own witnesses.

The following authorities were cited: *King* v. *Davis,* 6 T.R., 177; Paley on *Summary Convictions,* p. 135 (*a*); *Spencer and others v. Maclaine,* Review Cases, 12th December, 1890; *Dick v. Duggin,* Review Cases, July 11th, 1868, p. 29, and *de Ruche* v. *Watson,* Review Cases, May 26th, 1866, p. 167.

I have referred to these authorities because they really are more or less in point. I wish I could say the same in all cases, I can find nothing that warrants my treating the respondent as an informer. The rule of law which I have to apply as to the sufficiency of the evidence is this. Assuming I had been trying the accused with a jury, was there such a case made out as would warrant my leaving the matter to them? I think so. I should have read the evidence of prosecutor to them and pointed out that his was the only evidence to connect the accused with the possession of the flask; that there was other evidence to show a wrestling between respondent and appellant though the witnesses describe the occurrence as taking place at different places in the neighbourhood. I fail to see how it can be said that this evidence is necessarily contradictory. There may have been a wrestling in all three places. The direct statement of the respondent that appellant threw away the flask cannot be designated as a scintilla of evidence or that it merely raises a suspicion. It is a positive assertion of a fact. The magistrate in his reasons of decision says

(*a*.) See p. 147. 8th ed.—Ed.

(1) I found as a fact that accused was found having in his personal possession and carrying a quantity of rum (low wines).

All that I am required to do is to see if there was evidence before the magistrate to warrant such a finding. I have just stated that in my opinion there was. It is unnecessary that I should have formed the same opinion, a jury *might* have found accused guilty and a like course was open to the magistrate, which he has adopted.

Decision affirmed, with no costs.

## LIMITED JURISDICTION.

RIECK v. COMACHO.

1896. *November 20th.* Before SHERIFF, J.

*Goods sold and delivered—Surety—Excussion of principal—Surety estopped from denying guarantee.*

Claim for the value of goods sold and delivered to one Manoel Comacho, for the payment of which the defendant Jose Comacho had undertaken to be responsible.

The undertaking or guarantee was now denied.

*W. S. Cameron,* solicitor, for the plaintiff.

*D. M. Hutson,* for the defendant.

SHERIFF, J.—The present plaintiff sued the present defendant on his guarantee. The entire case was left to the judge, the defendant calling no witnesses, but arguing *inter alia* that, it having been disclosed that defendant was a surety, it was not competent for plaintiff to sue him until after he (plaintiff) had instituted a suit against the principal, or to use technical language, until the principal had been excussed. This view was taken by Kirke J., who in a written decision (*a*) found that the defendant had made himself responsible for the whole debt contracted by his brother at plaintiff's store. A nonsuit was directed but the same was not to have the effect of a rejection.

The present suit is similar, with the additional averment that judgment has been recovered against the principal and execution issued thereon but without result, there being no property available. Evidence to the above effect having been adduced, the plaintiff moved for sentence, alleging that, by the decision of Kirke J., before mentioned, the defendant was estopped from controverting his liability. For the defendant it is said that he is not estopped, because it was not necessary for the purposes of the decision to find, as the Judge did, that defendant was liable as a surety. Although I cannot accept this view I am equally certain that I ought not at this stage to give sentence.

The position of the case stands thus: I rule that the defendant is estopped from denying that he is responsible on his guarantee,

(*a*) See above p. 56.

but on the other hand I hold that he is entitled to call for proof of the actual sum remaining due. It is true that there was evidence before Kirke J., but there was no judicial finding thereon of the exact amount due, in other words, no judgment and therefore no estoppel. The claim must be established as if there had been no previous suit. That a certain sum has been recovered by judgment against the principal is immaterial. The surety is entitled to have the liability proved as against himself in the same way as against the principal debtor, (*Ex parte Young,* re *Kitchin* (17 Ch. D. 668.) The plaintiff will therefore proceed with his proof. See also *Evans and others v. Beattie,* 6 Espinasse 26.

The defendant thereafter consenting to sentence, judgment was given for the plaintiff for the sum of $207.81 with interest and costs.

## LIMITED JURISDICTION.

FERREIRA v. HO-A-HING.

1896. *November 21st.* Before SHERIFF, J.

*Sale in execution—Proceedings by way of opposition—Right of opposition—Loss of right by claimant who fails to oppose after notice given—Special cases in which right is preserved.*

Action for a declaration that a levy made by defendant on a portion of lot 4, New Amsterdam, be declared bad and illegal, and that the sale thereof at execution on September 19th, 1895, be cancelled as regards the plaintiff's share of the property, or in the alternative that defendants pay the sum of $900 as damages for the wrongful and unlawful levy.

*D. M. Hutson,* for the plaintiff.

*N. R. McKinnon,* for the defendant.

A preliminary objection was raised by the defendant that opposition to the execution sale should have been entered, and that the present action would not lie.

After argument judgment thereon was reserved and was thereafter delivered, as follows:—

SHERIFF, J.—A preliminary objection has been argued before me, which amounts to this, that the action does not lie and that the plaintiff ought to have entered opposition to the execution sale and that not having done so, he is now barred by time and is remediless.

Proceedings by way of opposition are peculiar to this colony. It is no doubt in form a proceeding *in rem,* but incidentally it also operates *in personam.* It is material to note that the plaintiff admits knowledge of the intended sale but that "he was unable to oppose for want of means." This, of course, is no reason at all. I have come across a case, *in re petition of Elizabeth Van Kinschot* (*a*), for letters of decree, February 27th, 1882. I do not refer to the case itself as in point, but in consequence of the argument adduced by the Chief Justice, Sir David Chalmers, in his judgment. The part I allude to and which, for the purposes of my decision, I have adopted is as follows:—"Matthaeus indeed discusses the question to which I am "now alluding

(*a*.) See footnote to p. 38 above.

"(Lib. I., cap XI, par. 30). *Si dominus intra constitution tempus non inter-*
"*cesserit, an amittat dominium rei suae, eaque pleno jure addici possit em-*
"*tori?* and he comes to the conclusion *fateamur dominum non interce-*
"*dentem amittere dominium*; and so far I own that his authority seems to be
"against my view, but his argument proceeds mainly on the ground that the
"terms of the notice (*comminatio*) warning persons having adverse rights to
"come in and oppose must be construed so as to receive their full meaning,
"*comminatio inanis profecto foret si, nulla esset contumacis silentii poena.*
"From the expression '*contumacis silentii*' it would seem that Matthaeus
"applied his argument to cases where there was evidence of actual notice to
"the owner, for unless there was actual notice how could his *silentium* be
"*contumax?*

"But whatever might be the particular limits within which the rule
"stated by Matthaeus, assuming it correctly stated by him, may have been
"applicable, there were undoubtedly under the old law a number of ex-
"cepted Cases where opposition was not necessary, and if we go to the old
"law to enlarge in any way the effect of our own statutory expressions, we
"must fake it, I need scarcely say, with all its qualifications. *Matthaeus*
"[Cap. XI, par. 64 *et seq.*] enumerates a number of these. *Quoties jus tertii*
"*manifestum est, et in oculos omnium incurrit . . . . . Si . . . . publico jure*
"*munitus fuerit. . . . Omissa intercessio non nocet ecclesie reipublicae vel*
"*civitati. Non nocet silentium iis qui cum certi essent adversarii, nomi-*
"*natim citati non sunt . . . . Qui praedium proscriptum vere et naturaliter*
"*possident, his neque proscriptio neque addictio secuta nocet . . . . Itaque*
"*sive dominium sive quasi dominium aut hypotheceam habeat qui non in-*
"*tercessit, per naturalem illam possessionem jus suum conservat.* Several
"other cases are enumerated, including those of absent persons, pupils, mi-
"nors, *furiosi, prodigi,* and others who are by law subject to curatory, who
"are relieved either by force of their position of privilege or by means of
"*restitutio in integrum. Burge* (Vol. II, 581 et seq.) (*a*) states similar excep-
"tions, adopting the language of Matthaeus in many passages. 'There are
"some cases in which the right is preserved notwithstanding there has been
"no opposition in the sale interposed. Thus it need not be interposed where
"the right of the third person is manifest, *in oculos omnium incurrit;* or if
"the right be established by the general law and known to attach to the
"property . . . . . Neither can the omission to make his opposition preju-
"dice the person who is in the actual possession. . . .

(*a.*) 1st edition.—Ed.

"Minors and persons under mental incapacity are not prejudiced by an "omission to interpose their opposition to the sale, etc. So that even were it "clear, in the case of a person of full age and capacity, and not within the "exceptions, failing to enter opposition within the prescribed time, that his "right of ownership or other right in the property was by his mere neglect "*ipso facto* evacuated, it would still, in applying such a rule, be requisite "that the court should enquire whether the person to be thus affected was "within the general rule or within any of the exceptions.

"Going back to the Procedure Ordinance, it is no doubt there enacted "(sect. 219) that in execution sales every person having right to oppose the "sale may do so within a limited time after the first advertisement of the "sale, and it is also provided by a clause of reference 'that all the provi- "sions relative to opposition to transports and mortgages shall be applic- "able to oppositions to execution sales,' and amongst the former there is an "enactment that after the lapse of a time prescribed for entering opposition, "no interdict or other process for delaying the transport shall be allowed. It "is not clear whether this prohibition is applied by the clause of reference "to the sale or to the passing of the letters of decree. Take it that as most "analogous to the transport and as most favourable to the practice for "which the petitioner contends, it is to the passing of the letters of decree "that it is applied, I am unable to see that this is in any way conclusive of "the question. There are necessary limitations of time in all matters of pro- "cedure, for without such limitations the period at which the tribunal would "be at liberty to exercise its faculty of judgment would never arise, but a "limitation of time for receiving adverse claims or oppositions does not in "itself confer or take away any right; it merely puts the tribunal in a situa- "tion to exercise its judgment and to act according to the truth of the matter "before it. Now if the maxim *cursus curiæ est lex curiæ* is applicable in "this matter, and I think it is, the course of proceeding which takes place in "transports may be some guide as to the course that should also take place "in letters of decree; I mean approximately and in point of principle, for I "am well aware of the practical difference that exists betwixt a voluntary "transfer and a transfer by compulsion. It is to be kept in view that the pro- "hibition of interdict or other process for delaying the transfer subsequent "to the prescribed period applies precisely in the same way to the voluntary "and the compulsory conveyance. In both cases all adverse claims seem to "be equally shut out."

The deduction to be drawn from these remarks appears to be this, that where notice of the execution sale is brought home to a

claimant, then his "*silentium*" is to be regarded as "*contumax*" Indeed he says so. I do not agree that the plaintiff in this case can stand by with impunity and subsequently sue for damages. He could have stopped the sale in its inception, but by standing by he is to be regarded as waiving or abandoning any right that was vested in him. I am prepared to go further if necessary and to hold that he is estopped by his own conduct from successfully asserting any claim to such property, much less damages for the commission of the wrongful act complained of, and in which by his inaction he must be regarded as acquiescing. Though the plaintiff makes certain charges against the defendant which just fall short of fraud, yet even if they did amount to fraud the plaintiff admits that he acquired knowledge thereof before the sale, and his wilful negligence, therefore, as before remarked, debars him from relief.

There must be rejection with costs.

## APPELLATE JURISDICTION.

GROSE v. ELLIOTT.

1896, *November 21st.* Before SHERIFF J.

*Appeal—Landlord and tenant—Rents, etc., Recovery Ordinance 1846, ss. 11 and 12—Distraint for rent—Procedure to be taken to enforce claim—Claim by third party—Replevin.*

Appeal from the decision of Mr. W. C. Harragin, Stipendiary Magistrate of the New Amsterdam judicial district.

One Applewhite, a tenant of the defendant Grose (now appellant), was alleged to have fraudulently removed goods from the premises hired by him to the plaintiff's premises to prevent the defendant distraining upon them for rent due. The goods were seized by a bailiff at the instance of defendant, and plaintiff Elliott then entered an interpleader and sued for unlawful levy and damages. Judgment was given in the plaintiff's favour but with no damages or costs.

*P. Dargan,* for the appellant.

No appearance on behalf of the respondent.

SHERIFF J.—In this case it is only necessary to consider the first reason of appeal which reads as follows:—

"That the magistrate's court had no jurisdiction in the case inasmuch as (a) the plaintiff had not taken the steps prescribed by sections 11 and 12 of Ordinance 4 of 1846 (*a*) to replevy the goods distrained and which was a condition precedent to his bringing his claim; (b) that there was no claim before the said magistrate's court on which the said court had power to adjudicate."

The following facts are in evidence:—Paul Hercules, as agent for the defendant, brought a complaint and procured a warrant to search for the goods of one Applewhite, a tenant of defendant, which he alleged were fraudulently removed to and kept in the premises of the plaintiff to prevent the said Hercules, as such agent as aforesaid, from distraining thereon for rent then due. The plaintiff thereupon instituted interpleader proceedings under section 56 of the Petty Debts Recovery Ordinance, 1893. Subsection (1) of section 57 commences thus: "Where any person desires to make a claim to any movable property taken in execu-

(*a*.) See now Ordinance 9 of 1903, sec. 11.—Ed.

tion under the process of the court," &c, &c. It is objected, and I think rightly so, that this remedy was not open to the respondent, because the property claimed could not be said to have been taken in execution under the process of the court but was goods or chattels distrained upon for rent due. The proceedings were initiated by the appellant or on his behalf under Ordinance 4 of 1846, and sections 11 and 12 define how the plaintiff should have proceeded to enforce his claim. In other words he ought to have replevied. The persons upon whom the duty of working the ordinance is imposed are a justice of the peace and a stipendiary magistrate, and now by section 37 (1) of Ordinance 10 of 1893, sub-section (c) this duty devolves on the magistrate of each district.

The reasoning in *ex parte Birmingham and Staffordshire Gas Light Company*, L.R. 11 Equity, 615, and *ex parte Harrison, in re Peake*, 13 Q.B.D. 753, cited by the appellant, though dealing with bankruptcy proceedings, by analogy is equally applicable to the present case.

I have considered the reasons furnished by the magistrate for his decision but, save the third, they do not touch the conclusions at which I have arrived. He remarks, "third, the defendant Grose made no objection to jurisdiction until the plaintiff's case was finished and after he had examined the witnesses," but if he refers to section 9 (1) of the Magistrates Decisions (Appeals) Ordinance, 1893, he will find that the objection to jurisdiction must have been "formally taken at some time during the progress of the case and before the pronouncing of the decision." I would like to remark that where a case is heard and determined by some person other than the magistrate of the district it would be as well if such person annexed a memorandum stating, for the information of the court, the authority under which he assumed to act. Appeal allowed. No costs.

## LIMITED JURISDICTION

CHUNG & Co., LTD., v. CAROLINE RACKER.

1896. *November 24th.* Before KIRKE, J. (Actg.)

*Promissory note—Surety—Married woman—Senatus consultum Velleianum—Consideration.*

Action to recover $116.20, balance due on a promissory note

All further necessary facts appear from the judgment.

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

*E. A. W. Sampson,* solicitor, for defendant.

KIRKE J. (Actg.)—This is an action to recover $116.20, balance of an amount due on a promissory note drawn by the defendant in the usual terms.

The making of the note is not denied, but the defendant denies her liability as she only signed it as a surety, and by the common law of the colony no woman can be surety for another person. In support of this contention counsel quoted *Rodrigues and D'Amil v. De Ryck and McDavid* decided by me, and *Da Silva and Gouveia v. Da Costa,* decided by Atkinson, J.

In the first case the promissory note was given for goods supplied by plaintiff to defendant, and co-defendant's name was added to the note as a surety at plaintiff's request, she the co-defendant having received no consideration for the note and being unknown to the plaintiffs. I held that she was not liable.

In the second case Mrs. Da Costa's name appeared on the note as security for her husband, but renouncing her rights under the senatus consultum Velleianum, the judge held that such renunciation of her rights could only be made by a public document, so the renunciation in the body of the note was void and of no effect.

In this case Paul Henry Racker, the defendant's son, had been engaged in gold-digging operations and owed the plaintiffs $1,068 for goods. Without making any arrangements for paying this amount young Racker was leaving the colony for Cayenne in s.s. Cappy, when he was stopped by a fuge warrant taken out by

the plaintiffs. To enable him to leave the colony his mother, the defendant, went to Mr. E. A. V. Abraham, plaintiffs' solicitor, and asked what she could do. After some consideration it was agreed that if Mrs. Racker would give the plaintiffs two promissory notes for $150 each, they would not enforce the warrant against her son. She signed the notes and her son was allowed to sail for Cayenne where he has since resided. I believe that Mrs. Racker's statements that she only signed the promissory notes as security for her son until his remittances arrived from Cayenne were an afterthought. No remittances have ever come from the son in Cayenne. Mrs. Racker is a widow and to obtain her son's release and so allow him to leave the colony she gave these promissory notes and she made herself a principal in so doing; I am of opinion that the consideration is good and sufficient. As to the $40 detained in payment, the promissory notes were overdue and the solicitors were justified in detaining the money to meet them. There will be sentence for plaintiffs with costs.

## LIMITED JURISDICTION.

DAVIS v. DAVIS.

1896. *November 26th.* Before KIRKE J. (Actg.)

*Husband and wife—Judicial separation—Account stated—Money received by husband from wife's property during marriage—Repairs and payment of mortgage by husband—Gifts during marriage.*

Action for the payment of the sum of $1,095.24 as per bill of particulars filed, and for the transfer to plaintiff of one share of $1,000 in the Gold Miners Association Ltd.

All the necessary facts appear from the judgment.

*W. M. Payne,* for the plaintiff.

*P. Dargan,* for the defendant.

KIRKE J. (Actg.): This is an action by a husband against his wife (by her curator), from whom he is separated by judicial order, for the payment of $1,095.24 as per account stated; and also for the transfer of a share in the Gold Miners Association Ltd., valued at $1,000.

The parties were married under an ante-nuptial contract in 1879. A house and store were purchased and transported to the wife, subject to a mortgage for about $1,600. The parties lived happily together until 1894 and in the meantime Mr. Davis had paid off the mortgage on the house, received the rents from the property, and had executed various repairs to the buildings, all out of the profits of the business and the rents received. He had also acquired a share (value $1,000) in the Gold Miners Association Ltd. which he had presented to his wife and which was registered in her name.

Some dispute arose between the spouses, and on November 18th, 1895, an order of the Supreme Court was made separating them from bed, board, cohabitation and goods. The plaintiff sets out along account of moneys which he says are due to him by his wife; and the defendant retaliates by a counter-claim for rents, etc., due to Mrs. Davis and received by the plaintiff during coverture. This account may be for convenience divided into three heads—

(1.) Money spent in repairs, etc., to the buildings.
(2.) Money paid in redemption of the mortgage.
(3.) Law costs in the case of Crosby and Forbes v. Davis and Farnum.

With regard to item (1), I am of opinion that plaintiff cannot recover any money which was spent by him in the maintenance of buildings which were for the common use and benefit of himself and his wife.

With regard to item (2), the sums of money paid by plaintiff in redemption of the mortgage on his wife's property might, if he had seen fit, have been secured to him, but he allowed them to merge into the estate, and he acknowledges that, until disputes arose between himself and his wife, he had no thought of claiming anything.

With regard to item (3), his payment of his wife's costs in the law case appears to have been the result of a bargain, *viz.*, that if the interest in the placers in question were handed over to him he would pay the costs. This was done and he dealt with the placer shares as his own.

The rents, etc., in the counter-claim were also thrown in with the common stock, and used for the mutual advantage of the spouses, so they cannot now be separately dealt with.

With regard to the share in the Association, Mr. Davis bought this share and presented it to his wife, she was registered as the owner, the share certificate is filled in with her name and she was and is the virtual owner. By the Roman Dutch-law she has the possession and anyone who wishes to dispossess her must show a better title. Plaintiff swears that he bought the share with his own money and put it into his wife's name as he was in bad health, expected to leave the colony, and if he died she would take the share without any trouble.

There can be no doubt that in presenting his wife with this share valued at $1,000 Davis was doing an illegal act, and his wife was equally an offender with him; they were *in pari delicto*, and it is true that *potior est conditio possidentis* holds in such a case. Where there is equal fault in each party, the law favours him who is actually in possession. Davis does not come into court with clean hands, and the law will not assist the wrongdoer. Also I cannot do what I am asked to do in the claim, namely, order Mrs. Davis to transfer this share to her husband as I cannot order a person to do a thing which is illegal. The fact that she is separated from her husband makes no difference in her position, as the law of Holland always contemplates a reconciliation between the spouses as being possible.

In this case which has been before the Court for a considerable time a great deal of dirty linen has been washed in public, so I hope now that the matter will be allowed to remain in the obscurity from which it ought never to have emerged.

There will be judgment for the defendant with costs.

## LIMITED JURISDICTION.

SANTOS v. MENDONCA.

1896. *November 26th.* Before KIRKE J. (Actg.)

*Principal and agent—Liability of principal—Unauthorised acts of agent.*

The defendant, a merchant, opened a bakery and salt goods shop and appointed a manager of this business. By the agreement between defendant and his manager the latter was to obtain goods for the business from defendant's Water street store and not elsewhere: but the manager in contravention of his instructions ordered such articles from the plaintiff and others for use in the business; the plaintiff supplied the goods and gave credit for them to the manager. Subsequently, upon the business being closed down, plaintiff sued defendant for the value of the goods supplied to his manager:

*Held* that the plaintiff was entitled to succeed, for the defendant, as the real principal, was liable for all acts of his agent which were within the authority usually conferred upon an agent of his particular character, although he had never been held out by the defendant as his agent and although the authority actually given to him by defendant had been exceeded.

Action on a balance of accounts, for goods supplied.

*P. Dargan,* for the plaintiff.

*G. J. de Freitas,* for the defendant.

KIRKE J. (Actg.)—This is an action on a balance of accounts for goods supplied to the amount of $117.22.

It appears by the evidence that the defendant started one Marques in a bakery and salt goods shop, and gave him the whole management of the concern; his remuneration was to be two-thirds of the profits. It was understood that Marques was to buy flour and other goods from Mendonca's store in Water Street and nowhere else. All went well whilst Mendonca was in the colony; but when he went to Madeira, Marques had some words with the clerks at Mendonca's store as to the price charged for flour and other goods used in his business, so he went and purchased from Santos, Abel da Silva, Rodrigues and others. All the goods purchased were for the purpose of his business in the bakery and shop.

On Mendonca's return he took stock and as the business was not paying, took over the contents of the shop and bakery, and paid off the outstanding debts with the exception of Santos whom he refused to pay.

It was argued that, as Marques had been told only to buy from Mendonca's store, the latter could not be made liable for any debts which his manager in the course of his business might contract outside. But a late English case says otherwise. In *Watteau* v. *Fenwick*, 1893, 1 Q.B. 346, where the manager of an hotel bought certain goods on credit although absolutely forbidden to do so, such goods as would be used in such an establishment, the judges (Coleridge C. J. and Wills J.) held that defendant who was the proprietor of the hotel was liable.

This decision may seem to be at variance with the case of *McGowan* v. *Conrad*, decided by Hampden King J. in 1883, but the circumstances are not quite similar, and as the learned judge decided that case by the principles of English law, I prefer the decision of the Queen's Bench which was given ten years later.

There will be sentence for the plaintiff with costs.

## LIMITED JURISDICTION.

PEREIRA v. HAND-IN-HAND MUTUAL GUARANTEE FIRE INSURANCE Co., LTD.

1896. *December 1st.* Before SHERIFF J.

*Insurance—Fire—English and Roman-Dutch law—Excessive claim—Fraud.*

Claim for the sum of $800 alleged to be due by the defendant company, under a policy of insurance dated March 10th, 1894, to the plaintiff who alleged that his stock of provisions, wares, merchandise and malt liquors contained in a building on lot 24, James street, Albouystown, which stock was covered by the said policy, was burnt and damaged by fire on August 12th, 1896. Defendants in their answer alleged that if any loss was sustained, it only amounted to a few dollars, and that the claim was fraudulent.

*P. Dargan,* for the plaintiff.

*A. Kingdon, Q.C., S.G.,* for the defendants.

SHERIFF J.—This is an action to recover $800 on a policy of insurance against fire. The defendants, *inter alia,* pleaded fraud.

The case has been argued on both sides according to English law, but I am not at all certain that it is not governed by Roman-Dutch law. Marine insurance cases no doubt are to be determined according to the law of England (see Ord. 6 of 1864, s. 3.). But as to the other form of insurance, *quaere*? Be that as it may I have arrived at a decision which I consider valid under either system of law. It has been decided over and over again in England that a fire insurance is a contract of indemnity. As a broad rule the same general principles apply equally to fire as to marine insurance. The latter followed upon and is an emanation of the former. This is important to keep in view. It is equally true that maritime insurance was known to the Dutch. *Van der Linden, Institutes of Holland* (Bk. IV. ch. 6) treats of insurance, and at p. 460 (Juta's translation) treating of "Obligations of the insured," he remarks, "He is bound to prove by

proper evidence both the value of goods loaded and insured, and the amount of the damage they have sustained. Although the value of the goods insured is fixed at a certain sum in the policy, it is not sufficient for the assured to confirm this statement upon oath, but its correctness must be proved by other evidence."

So also *Van der Keessel.* Sec. Theses 738,739, page 266 (Lorenz' translation).

*Grotius,* (*Dutch Jurisprudence,* Herbert's translation) treating of insurance (Bk. III, ch. 24, s. 20, p. 398) says, "Whoever deals fraudulently in these agreements is liable for all costs, damages and loss of profits, besides the penalty by the authorities."

In the present case it was incumbent on the plaintiff to show the value of the goods at the time of the occurrence of the fire. According to English law, if the claimant makes a wilfully false and delusive assertion in his claim a question arises whether the assertion does not amount to fraud and does not vitiate the transaction. This contention was argued on behalf of the defendants, and *Haigh v. Delacour,* 3 Camp. 319; *Chapman v. Pole* 22 L.T. (N. S.) 306, and *Levy v. Baillie,* 7. Bing., 349 were cited. The plaintiff, however, challenged the relevancy of these authorities. With respect to the first case, it was said that the contract had its inception in fraud, and that in the other two cases the policy contained a condition that any attempt at fraud in preferring a claim would on proof thereof absolutely debar the plaintiff from recovering on the policy. The policy sued on, however, contains no such stipulation, and in the absence thereof the plaintiff had not forfeited his right to recover. While it must be admitted that it was competent for the parties to an insurance contract to embody such a condition in the agreement, yet a larger question remains untouched and has to be determined apart from any condition. What is the effect of fraud on a contract? I have come across a case, *Britton v. Royal Insurance Company,* 4 F. and F. 905, which, with the exception of the condition above referred to, is very similar, as by reference thereto will appear. The defendants were successful under "the condition," but the judgment of Willes J., goes to show what "the legal principle and sound policy of the law is." "It would be most dangerous," he remarks, "to permit parties to practise such frauds, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed." It is an old dictum, fraud vitiates everything. See *Grotius,* Bk. 3, chap. 48., s. 8.; and *Van der Linden* Bk. I, chap. 14., s. 2., p. 189. *Story's Equity Jurisprudence,* 12 ed., Vol. I., p. 189, thus puts it:—"Where the party intentionally or by design misrepresents a

material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case there is positive fraud in the truest sense of the term"

Rearing in mind that the obligation assumed by an insurance company is to make good the losses actually and *bona fide* incurred, it is essential for a plaintiff to observe good faith in rendering his claim, and to be as accurate as the circumstances of the case permit. Of course there might be error arising from inadvertence or other cause, falling short of fraud, which would not debar a plaintiff from recovery. In the present case the plaintiff claimed the full amount of the policy, viz. $800, alleging that his losses exceeded that amount. Was this a truthful assertion? Unquestionably not. In common parlance it was a "try on." He could not have claimed more if the premises had been reduced to ashes. No books are forthcoming; it is said they were destroyed in the fire. If his evidence is laid on one side, where is the proof of the quantity and value of the goods in the shop when the fire occurred? There is the evidence of Mr. Reid, the accountant to defendants, and he says that he satisfied himself before the policy was granted that plaintiff's stock was worth what he represented it to be, namely, $800; that was in 1893. The policy is dated March 10th, 1894, and the fire took place on August 12th, 1896. One Dickson swears that he was at the shop the Saturday previous to the fire. "All shelves filled and goods outside of counter. It was a middle sized shop. It appeared to have the usual quantity of stock. Stock appeared to have been kept up." He was not asked to place a value on the goods he saw, nor did he volunteer any information on the point. Mr. Mattos swore that he had been two years with one Manoel Gonsalves, and that plaintiff had dealt with that merchant, and that during such time the plaintiff had kept up his purchases for that shop. It was not unreasonable to expect that further evidence as to these purchases would have been forthcoming but the plaintiff carried his case no further. Plaintiff as a shopkeeper being engaged in buying and selling, it does not follow that because he once had $800 worth of goods it is to be assumed that his stock always remained of the same value. *Goulstone v. Royal Insurance Co.* (1 F and F. 276) is distinguishable. The value of furniture at the time of insurance is some evidence of its value at the time of the occurrence of the fire.

I am not at all sure that plaintiff could recover even if fraud were not alleged. He made a declaration in which he avers, "but I calculate my losses above $800." Despite all argument

to the contrary this means in the plainest English a claim for a total loss. In the claim not a word is said about any loss by robbery and Mr. McKay, the assistant secretary to the company, swears that he had an interview with the plaintiff the morning after the fire, that nothing was said about loss by theft, and that he understood from plaintiff that the whole of the goods were seriously injured. This is fully supported by the letter written by plaintiff's solicitor to the company, in which he refers to the stock as having been "totally destroyed by fire." The plaintiff himself is compelled to admit that all the stock was not destroyed. His own witness, Mattos, swears "there may be $180 worth of undamaged goods there now." The plaintiff on cross-examination says: "I cannot say value of goods damaged by fire, may have come to $150, $100, or less. By water say $200 to $300 or more or less." Assuming for the sake of argument that on the night of the fire his stock was, as he swore at the trial, worth from $700 to $800, and taking his own valuation at the highest estimate, the loss by fire and water would be $150 plus $300, *i. e.*, $450. If the stock was only worth $700, there would have been undamaged stock left representing $250. How about a total loss in the face of this? I attach no weight to the plaintiff's uncorroborated statement about theft; I regard it as an afterthought and in keeping with his conduct throughout this matter. But here again, even assuming that there was stealing, it could not have been to any serious extent, possibly a few dollars, certainly not to $250 or anything like it. Plaintiff says he based his calculation at "what I had seen night of fire." In my opinion he never made any calculation at all. He wanted all he could get, $800, and he declared that he had sustained damage beyond $800.

I have gone into the case somewhat fully, as it is a serious one for the plaintiff. It only remains for me to refer to the evidence of Mr. Rodrigues, a witness for the defence, a gentleman possessing twenty years' experience of rum and provision shops. He was sent by the company to the shop. He is a disinterested person and took stock of everything, with the result that he estimated the goods that were in the ship on the night of the fire at $253, and the loss sustained by plaintiff at $77.

To sum up, I find that the claim was grossly fraudulent and the defendants were justified in keeping the plaintiff at arms, length and leaving him to enforce his rights as best he could.

There will be judgment for the defendants with costs.

## LIMITED JURISDICTION

### JARDIM v. RODRIGUES.

1896. *December 3rd.* Before KIRKE J. (Actg.)

*Married woman—Promissory note—Surety—Senatus consultum Velleianum—Valuable consideration.*

Claim for the sum of $1,050, the capital amount of a promissory note made by defendant Julia Rodrigues jointly and severally with one A. C. de Faria in favour of the plaintiff. Defendant denied indebtedness and pleaded that she signed the note at the request of and for the accommodation of A. C. de Faria, and that she received no benefit or consideration whatsoever.

*W. Maynard Payne,* for the plaintiff.

*A. Kingdon, Q.C., S.G.,* for the defendant.

KIRKE J. (Actg)—This is an action on a promissory note to recover $1,050. The defendant is a widow, and she pleads that although she made the note, she only signed it as a surety; that she received no consideration for the note, which was made for the accommodation of A. C. de Faria and was endorsed by Jardim; that she was not indebted to either the maker or endorser of the note; so she claims exemption from any liability under the provisions of the *senatus consultum Velleianum.*

The principle of the *senatus consultum Velleianum* is, as stated by Chalmers, C.J., in *Colonial Bank* v. *Representatives of Lot 13, Werk-en-Rust* (1890, L.R., B.G., 130); "It is to protect women from their real or supposed facility of being induced to enter into obligations as volunteers on behalf of others." This is a case in point. Defendant is related to de Faria by marriage, and he begs her to sign the promissory note for his benefit; she at first refused, but yielding to his importunity at last consents to sign the note, from which she derived no benefit and for which she had no consideration.

It was argued for the plaintiff that if a woman were guilty of fraud she could not claim her privilege under the *s.c. Velleianum,* and that in this case Mrs. Rodrigues having signed the note as "for value received," she deceived the plaintiff and induced him

to believe that she had received consideration. But the plaintiff was a party to the accommodation note and knew that it was drawn for de Faria's benefit only and he had asked de Faria to obtain another name to the note. *Oak* v. *Lumsden* (de Villiers, C.J., referred to in *Van Leeuwen, Commentaries*, Vol. 2, p. 604) (*a*.) was relied upon as upholding that view, but in that case the creditor was a *bona fide* holder for value. Dr. Kotze, the translator of Van Leeuwen, in commenting upon that case, says: "It is immaterial whether the holder of the promissory note knew or not that the note was merely an accommodation one, for where a woman signing a note intercedes as surety, ignorance on the part of the creditor will not deprive her of the benefit of the *senatus consultum Velleianum*" To sign a note 'for value received,' which is a mere form occurring in every note, cannot be construed as a practice of fraud, which would deprive a woman of her legal rights.

There will be judgment for the defendant with costs.

(*a*.) Reported at 3 S.C. 144.

## APPELLATE JURISDICTION.

### DESOUZA v. CORREIA.

1896, *December 19th.* Before SHERIFF J.

*Appeal—Landlord and tenant—Monthly tenancy—Vacation of premises without one month's notice—Acceptance of rent due and key by landlord—Waiver.*

Appeal from the decision of Mr. W. Nicoll, acting Assistant Police Magistrate of Georgetown, who dismissed a claim by the plaintiff de Souza (now appellant) for the sum of $25 alleged to be due to plaintiff by the defendant Correia (now respondent) for failure to give notice to quit. The appeal was dismissed.

The necessary facts appear from the judgment.

*D. M. Hutson,* for the appellant.

*W. M. Payne,* for the respondent.

W. A. M. SHERIFF J.—The following are the reasons of appeal:—

"That the said decision is erroneous in point of law and unwarranted by the evidence;

(a) Because by law the defendant as the tenant of the plaintiff was bound to give one month's notice to the plaintiff to terminate the monthly tenancy proved.

(b) That it was proved that the defendant was a monthly tenant, and that he vacated the tenement held by him without giving the plaintiff one month's notice before doing so.

(c) That upon the evidence the plaintiff was entitled to judgment for the amount claimed."

Judgment was given for the defendant with costs, and the reasons given for such decision are as follows:—

"The plaintiff received notice from the defendant on 21st July of his (defendant's) intention to vacate premises at the end of July. He also received the keys of the premises and the July rent and gave the defendant no intimation that he required a month's notice. I find, therefore, that the plaintiff is barred now from claiming damages in lieu of a month's notice."

It appears that the magistrate was satisfied from the evidence that a month's notice was customary. *Van Leeuwen*, vol. II, page 173, says: "It is in many places customary that both the lessor and lessee shall give each other notice and warning within a proper time, generally three months before expiration of the lease, that the lease shall cease." It was competent, therefore, for the magistrate to receive evidence of the existence of the custom and to find as he has done. There can be no doubt that the notice, according to the custom alleged, was bad. The magistrate, however, has found that the appellant is barred owing to his acts and conduct from maintaining this suit. As there was evidence establishing the facts relied on, it only remains for me to say whether such or any of such facts warrant the deductions that the magistrate has drawn therefrom. It is well to bear in mind that the provisions of the Imperial statute known as "The Statute of Frauds" are not in force in this colony. I am of opinion that the acceptance of the key by the landlord after knowledge of the insufficient or invalid notice to quit amounted to a waiver of a valid notice, and as demonstrating his acquiescence in the termination of the tenancy. Beyond this I deem it unnecessary to go. The following English cases throw considerable light on the subject. *Whitehead v. Clifford* 5 Taunton, 517 and *Doe v. Ridout*, same volume, page 518, *Dodd v. Acklom*, 6 M & G., 672 and *Furnivall v. Grove*, 8 C.B. (N.S.), 494. I have not overlooked the reference to *Voet*, Book XIX, tit. 2, paragraph 22, but it does not touch the question, but seems applicable to dissimilar circumstances and not to so small a matter as a monthly hiring or to cases turning upon the validity or otherwise of a notice to quit.

Decision affirmed with costs.

## APPELLATE JURISDICTION.

ABDOOL v. GOMES.

1896, *December 19th.* Before SHERIFF J.

*Appeal—Action by owner against co-owner for value of wood cut from property—Undivided ownership—Relation of parties—Competency of proceedings.*

Appeal from the decision of Mr. F. A. Gall, acting Stipendiary Magistrate of the Pomeroon judicial district, who gave judgment for the plaintiff Gomes (now respondent) against Abdool (now appellant) for the sum of $26.88, being the value of sixteen cords of wood of which the defendant deprived the plaintiff. The appeal was allowed.

*D. M. Hutson,* for the appellant.

*P. Dargan,* for the respondent.

W. A. M. SHERIFF J.—The following are the reasons of appeal:—

"1. That there was evidence before the magistrate that appellant was lessee of an undivided half of the property on which the said cordwood was cut.

2. That the complainant on the evidence before the magistrate mistook his remedy (if any) against the appellant.

3. That there was no evidence before the magistrate that the appellant wrongfully converted the sixteen cords of wood or that he wrongfully deprived complainant of same.

4. That the complainant failed to establish his claim against the appellant (defendant in court below)."

The action is brought to recover $26.88, being the value of sixteen cords of wood converted by the defendant, &c. The magistrate found for the plaintiff, and the following are his reasons for so doing.

"1. I believed the evidence for the prosecution. That the defendant did not produce any document to show that he was lessee of the undivided half of the estates.

2. That there was no rebuttal of evidence and practically no defence.

3. I was of opinion that complainant had proved his claim, and I gave judgment accordingly for the full amount and costs, with fee to counsel."

The case has been fully argued before me, but it is sufficient to say that on the plaintiff's own evidence I hold that the action brought does not lie. Plaintiff only claims the value of half the wood removed thereby admitting by implication that the other half belongs to the defendant. He also says "I keep cow-minders, and the expense is equally divided between defendant and myself." This goes to show that the plaintiff and defendant were not strangers to each other but had interests in common. When such is the case it is not competent for either party to maintain a suit of this description. The plaintiff has misconceived his remedy, and for this reason I reverse the decision in the court below with costs.

# 1896.

# TABLE OF CASES REPORTED.


PAGE.

Abdool v. Gomes ....99

Baillie v. Smart....24

Barima Gold Mining Co. Ltd. v. W. Hood & Son ....18

Bishop v. Isaac ....12

B. G. E. L. & Power Co. Ltd. v. Conrad & anr ....16

Byjoo v. Gill....60

Cameron v. Armour ....67

Chung and Co. Ltd. v. Racker....84

D'Andrade v. Baker ....69

D'Andrade, Exors, of v. D'Andrade, Exors, of....14

Dargan, P. *In re* petition; T. C. of G/town v. Proprietor of lot 26, G/town ....29

Davis v. Davis ....86

Dem., Railway Co. v. Buxton & Friendship V. C....53

Dem., Railway Co. v. Golden Grove & Nabaclis V. C....20

Dem., Railway Co. v. Marques ....5

De Santos & anr. v. A. G....7

De Souza v. Correia ....97

Felix v. Moses....57

Ferguson, J., *In re* petition; *Regina* v. Ferguson ....44

Ferreira v. Ho-a-Hing....78

Gomes v. Gomes ....71

Grose v. Elliot ....82

Jardim v. Rodrigues ....95

Johnstone v. Gomes ....45

Lawrence v. Trustees. Court "Berbice Heart."....3

Martins v. East Dem., Water Supply Commissioners *et al* ....47

Neblett v. Hogg, Curtis, Campbell and Co....62

Pereira v. Hand-in-Hand Mutual Guarantee Fire Ins., Co., Ltd. ....91

Permally v. Soobdhan ....1

*Regina* v. Ferguson; *In re* petition of J. Ferguson .....44
Rieck v. Comacho .....56
Rieck v. Comacho .....76
Santos v. Mendonca .....89
Sargent v. McLean .....27
Sole v. Hollingsworth.....73
Sproston D. & F. Co. v. W. Hood & Son .....26
T. C. of G/town v. Proprietor lot 26, G/town; *In re* petition P. Dargan.....29
T. C. of G/town v. Proprietor lot 26. G/town; *In re* petition M.M. Winter .....22
Winter M.M. *In re* petition; T. C. of G/town v. Proprietor lot 26, G/town .....22