APPENDIX A.

APPENDIX A.

Note in the minutes of the Court by His Honour N. Atkinson, acting Chief Justice, on the framing of Rules of Court under the provisions of the Supreme Court Ordinance, 1893.

November 17th, 1897.

It having been brought to my notice that questions have arisen as to the non-framing of certain Rules of Court by the judges, I think it proper to place on record (a) a statement as to how the matter actually stands. Before the Supreme Court Ordinance of 1893 was introduced the existing law as to practice and procedure had during the long period of nearly forty years become well settled, and was thoroughly understood both by the judges and by the practitioners, that is, by those of them who had time to acquire the knowledge and possessed the ability to apply it. There was no necessity for any radical change. If any change was necessary, a few simple rules could have effected it. One thing that required checking was the unnecessary verbiage with which some of the pleadings were encumbered. A radical change, however, was resolved upon, I need not enquire now for what reason or in whose interest, and Ordinance 8 of 1893 (b) was passed.

By section 58 (1) of that Ordinance it is enacted that "The judges or a "majority of them *of whom the Chief Justice shall be one*, may make Rules "and Orders of Court relating to all or any of the following matters, that is "to say:—

(a) .....

(b) For regulating the pleadings, practice and procedure of the Court, "the execution of the process of the Court, the duties of the officers of "the Court....."

The italics are mine.

In pursuance of this provision Chief Justice Chalmers undertook to draft new rules, and did draft certain rules during his absence on leave in England. On his return those rules were discussed by the judges. Mr. Justice Sheriff and myself were of opinion that the whole of the rules relating to procedure in the old Manner of Proceeding Ordinance and in the Rules then subsisting, such as the Rules of Pleading

(*a*) See Minutes of Supreme Court, Full, June-Dec., 1897, pp. 600, 616—Ed.
(*b*) Ordinance 7 of 1893 in the 1905 Edition of the Laws.—Ed.

of May 22nd, 1863, the rules regulating amongst other matters the passing of transports and mortgages, summary execution on bills and notes, extension of acts of deliberation, translation of documents in foreign languages, and execution sales of July 22nd, 1871, and the rules as to procedure where accounts are ordered to be debated of August 3rd, 1886, should be embodied in the new Rules of Court 1893, so far as they were not affected by the Rules of 1893. The Chief Justice however was of a different opinion and, as he must by the ordinance be one of the majority of two judges by whom the rules of court can be made, Mr. Justice Sheriff and myself could do no more, and the Rules of Court 1893, as they stand, were sent to the Court of Policy and approved.

I never quite understood the Chief Justice's reasons in the matter, but they were probably the same which influenced him with respect to the repeals mentioned by Mr. Attorney General Carrington in his preface to the Revised Edition of the Statutes 1895.

> "It may perhaps be observed that the Amended Manner of Proceeding "Ordinance, 1855.....have undergone hardly any revision of form. "The reason for this.....is that that ordinance has been to a "great extent superseded by the Rules of Court, 1893. Indeed, when the "Enactments (Courts of Justice, etc.) Repeal Ordinance, 1893, was be-"ing prepared, it was proposed to include the superseded portion of the "Ordinance in the schedule of repealed enactments, but this idea was "abandoned in compliance with the expressed wishes of the late Chief "Justice." (Chalmers.)

I myself, on more than one occasion, spoke to the Chief Justice on the subject, but all I could gather from him, so far as I can remember, was that the rules were there, and there was practically no need to interfere with them. That is how the matter stood until his retirement.

When the new Chief Justice, Sir E. L. O'Malley, came to the colony the matter of these rules was brought to his notice both by myself and by the Executive, but he evinced a decided reluctance to entering into the question and simply wrote to the Government to say that the matter was under the consideration of the judges. He was the Chief Justice and, as I have pointed out, an indispensable party to the making of rules, and no doubt properly so, he being the president of the court *primus inter pares.*

The two puisne judges have, therefore, no power to make

rules by themselves alone, and I, as acting Chief Justice, have no power to act in the matter. This is a matter in matter in which the Chief Justice, *qua* Chief Justice, must act, and he only. So far as judicial questions are concerned I have the same powers as the Chief Justice in all respects, but this is not a judicial matter, and as the enactment does not say "the Chief Justice or the person acting in that capacity for the time being," which is the formula used in statutes when that is intended, it would be *ultra vires* if I were to attempt to prepare new or additional rules.

By the end of 1896 matters had begun to run fairly smoothly under the Rules of 1893, coupled with the old procedure.

But in January, 1897, Ordinance 1 of 1897 (an Ordinance to amend the Supreme Court Ordinance, 1893), was passed, which introduced fresh and to my mind inextricable confusion into our practice and procedure by enacting that, if there is nothing in Ordinance 8 of 1893, and the Rules of Court, 1893, resort is to be had to the English practice applicable to the like matters as far as may be, and nothing being found there, resort is then and then only to be had to our own old practice and procedure.

It is said that this Ordinance originated with the judges. So far as I am concerned I was no party to it. I was out of the colony at the time it was passed, and it had never been cited before me until a few days ago, in the case of *Henriques* v. *Henriques* (*a*). There is no reference to this ordinance in the minutes of the Court, nor is there any correspondence between the judges or the Chief Justice and the Executive with respect to it to be found either in the judges' letter books, or among the papers in the Chief Justice's chambers. I have seen, however, a letter written by Chief Justice O'Malley to Mr. Attorney General Bovell, in which the former writes that he encloses two bills prepared by the judges, one of which is the new Ordinance 1 of 1897. The idea seems to have originated with Chief Justice O'Malley, and to all intents and purposes to have been carried out by him. Mr. Justice Sheriff has told me that he does remember that the Chief Justice mentioned the matter to him in a general way, but that there was no conference of the judges with respect to it, and that Mr. Acting Justice Kirke and himself never had any conversation on the subject at all. However it originated, it is much to be regretted that Ordinance 1 of 1897 was ever introduced into the Court of Policy, and it is a

(*a*) See above p. 101.

mystery to me how it can ever have passed. It is quite explicable that the Attorney General, being new to the colony and being debarred from practice, a provision which necessarily prevents him from acquiring that knowledge of the law and practice of the colony which he would otherwise gain by actual personal experience in the courts, might not see what the bill would lead to. But there are some four barristers, all with more or less experience, who should have been in a position to point out the evil consequences which would result from the measure. One of them, indeed, stated in court when the decision of the court on the objection in *Henriques* v. *Henriques* was pronounced, that he objected to the bill; but I have seen the minutes of the Court of Policy, and from them it is clear that the objection taken by the honourable member was not on account of any evil consequences which would result from its passing, but that it was a matter which the judges themselves should have dealt with by way of rule; in which he was utterly wrong, as section 58 (1), being part of the ordinance itself, could not be repealed by a rule of court.

On the rising of the court after the pronunciation of the decision in *Henriques* v. *Henriques*, I felt the position to be so serious that I immediately went to see the Governor about it, and early on the following morning, November 18th, 1897, I, with the concurrence of Mr. Justice Sheriff, wrote to His Excellency stating what might be or have been the effect of Ordinance 1 of 1897, and making certain suggestions with respect to it and its operation.

That is how the matter stands so far, but I wish to add a word or two with respect to section 58 of the Supreme Court Ordinance, 1893. There seems to be an impression abroad that the judges are by that section bound or compellable to make rules. That is not so. The matter is entirely in the discretion of the judges. They and they only are to consider and determine in what case and in what respect rules may be required, and, if they come to the conclusion that a rule is required in any particular case, it is their duty to; make such a rule, not otherwise. Suggestions coming from proper quarters will be considered by the judges, but no one has the right to dictate to a judge as to what he shall or shall not do in the exercise of the discretion which the law vests in him.

N. ATKINSON,
Acting C.J.

APPENDIX A.

November 22nd, 1897.

With reference to my minutes of the 17th instant, having relation to the Rules of Court, I ought, perhaps to add a word or two with respect to the provisions of section 3 of Ordinance 1 of 1859, (the Public Officers ((Appointments) Ordinance, 1859). The duty cast upon the Chief Justice, as one of the judges, by section 58 (1) of Ordinance 8 of 1893 may be within the letter of section 3, but that letter may in this as in many other cases, be controlled by the provisions of a later ordinance. Applying the provisions of section 3, Ordinance 1 of 1859 to section 58 (1) of Ordinance 8 of 1893 it would on the face of it seem that an acting Chief Justice would be within the meaning of the words "Chief Justice," but in construing section 58 (1) we are to look, as in every other case, not at the mere literal text, but at the true intent and meaning thereof.

The true intent and meaning of the words "Chief Justice" in section 58 (1) as I understand them and, I may add, as Mr. Justice Sheriff understands them, is that the person holding the substantive appointment—the person who *in fact* and not *in function* merely is the Chief Justice of the colony—is meant. Holding that opinion, I have not felt and do not feel myself, as acting Chief Justice, empowered to proceed with the framing of rules and orders of court as in pursuance of section 58 (1).

And, with regard to the situation as it now stands, I may point out also that the Court, as at present constituted, cannot frame rules and orders of court. Section 58(1) says the judges *or a majority of them* of whom the Chief Justice shall be one, may make rules and orders of court. That clearly contemplates that there shall be *three* judges concerned in the framing and making of the rules and orders of court, and that where there is a difference of opinion as to any particular rule or order, the opinion of the majority shall prevail. There can be no majority where there are but two judges only as now. It is not as if the section had said "or any two of them, of whom the Chief Justice shall be one." Thus, even if I held a different opinion as to my powers as acting Chief Justice, the judges are not as at present advised in a position to make rules and orders of court.

N. ATKINSON,
Acting C.J.

APPENDIX B.

No report of the decision of the Court in the case of *Gomes* v. *The Central Board of Health and others,* referred to by Atkinson, J., in this judgment as *Gomes* v. *The Demerara Railway Co.,* can be found in the records of the court, apart from the decision on an application in the action which is reported in 1895, L.R., B.G., at page 101.

The minutes of the court however, which give the court's order and refer to the point mentioned by Atkinson, J., are as follows:—

"Thursday, November 14th, 1895.
Supreme Court of British Guiana
Full Court.

Minutes of Proceedings of the Supreme Court of British Guiana at the Victoria Courts in Georgetown, Demerary.

Present:

His Honour Sir Edward Loughlin O'Malley, Knight, Chief Justice,
His Honour Nicholas Atkinson, Senior Puisne Judge
His Honour William Anthony Musgrave Sheriff, Junior Puisne Judge.

(After Prayers.)

Between Luiz Gomes,
and
Central Board of Health,
and
Demerara Railway Company.

Hutson, for plaintiff.
Kingdon, Q.C, for original and co-defendants.

Kingdon opens the case for the defence.

Hutson objects to counsel addressing the court on behalf of the original defendant, on the ground that original defendant in his answer admits the plaintiffs title by transport to the land in question.

Kingdon submits that the transport to the plaintiff is admitted, but that the quantity of land conveyed by the transport is disputed, and that plaintiff having proved his case

without obtaining judgment on the pleadings the original and co-defendants are entitled to show that on the case as made out by the plaintiffs the land in question does not vest in the plaintiff under his transport.

The Court reserves the question as to whether the defendants can be heard in the face of the admission on their pleadings, and hears Kingdon on the case as put before the court.

The Court rules that it cannot go outside of the transport by the Commissioners of Friendship to Harlequin Hazard and the plan therein referred to, and Kingdon abandons the defence, but submits that plaintiff is not entitled to costs, notice of opposition not having been served on the original defendant three clear days before entry of opposition, and not having been served on the co-defendant.

Hutson answers:

The Court directs that the question of costs be mentioned again on Monday next and gives judgment for plaintiff as claimed.

The Court having heard Mr. Hutson of counsel for the plaintiff and Mr. Kingdon, Q.C. of counsel for the original defendant and the co-defendant, and the evidence adduced, and having read the documents and papers filed herein, declares the opposition entered by the plaintiff on the 29th day of September, 1894, to the original defendant passing and the co-defendant receiving a transport of all that piece or parcel of land forming part of the village of Friendship (section A), situate on the east sea coast of the county of Demerara and colony of British Guiana, as fully set out in the said claim, to be just, legal and well founded, and condemns the original defendant to cancel and withdraw the said advertisement of transport free of cost to the plaintiff, and interdicts him from doing the like in future, and further condemns the original defendant to make good to the plaintiff all losses, damages and expenses sustained or that may yet be sustained by the plaintiff and opposer by reason of the said advertisement of transport, reserving the question of costs."

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CASES

DETERMINED IN THE

SUPREME COURT OF BRITISH GUIANA.

LIMITED JURISDICTION.

DE FREITAS v. HYDER.

1897. *January* 5. *Before* SHERIFF, J.

Promissory note—Accommodation bill—Holder for value—Onus of proof—Specially indorsed writ—Practice—Leave to defend—Affidavit of defence—Rules of Court, 1893, *Order XXVIII.,r.* 3.

Claim by the plaintiff, by summary citation for the sum of $388, on an overdue promissory note made by defendant at Paramaribo, Dutch Guiana, on July 22nd, 1896) in favour of de Freitas & Co., and endorsed by de Freitas and Co., to the plaintiff, the holder thereof in due course, with interest from the date when the said note became due.

Plaintiff moved for judgment for the amount claimed, whereupon defendant filed an affidavit of defence, and asked for leave to defend. The material parts of the affidavit sufficiently appear from the judgment, and leave to defend was refused.

D. M. Hutson, for the plaintiff.

G. J. De Freitas, for the defendant.

SHERIFF, J.—This is an action on a promissory note by indorsee against the maker. The latter applies to defend. The making of the note is admitted in the affidavit showing cause, but it is said that it was made for the accommodation

of the indorser. Paragraph 1 of the affidavit is a mere general denial of indebtedness, and may be ignored in cases like the present. Paragraph 5 alleges that the deponent (defendant) has "reason to believe and does believe" that the plaintiff did not take the promissory note in good faith or for value. This is insufficient (See Order XXVIII. r. 3) (*a*) because he does not set forth "explicitly the grounds for such belief." The allegation that the promissory note was not taken in good faith is also not sufficient. If it amounts to anything, it is an allegation of fraud and is too general. It should have set out "definite facts pointing to the fraud." Apart from this, the plaintiff is a holder in due course, and the defendant cannot call upon the plaintiff to prove consideration by showing that the note was an accommodation note. (See Byles on *Bills* 15th ed. p. 137, and note f. to page 138) (*b*); "the Code apparently makes no difference in the burden of proof in the case of an accommodation bill, hence it lies on the defendant to show that the plaintiff gave no value." See also *Tatum* v. *Haslar,* (38 W. R. 109; 23 Q.B.D. 345). Leave to defend is refused and judgment is given for plaintiff, with costs.

(*a*) Cf. now Rules of Court 1900, Order XII. r. 4, and Order XXXIV. rr. 14-27.—Ed.

(*b*) See Byles on *Bills* 16th ed. p. 143.—Ed.

APPELLATE JURISDICTION.

GOMES *v.* JOHNSTONE.

1897. *February* 26. Before SHERIFF, J.

Appeal—Sale of Food and Drugs Ordinance, 1892, *ss.* 6, 23.—*Sale of article of food not of nature, substance, and quality demanded—Sufficiency of analyst's certificate—Importation of own knowledge of article as article of food by magistrate—Division of sample.*

Appeal from the decision of Mr. P. H. R. Hill, acting Police Magistrate for Georgetown, who convicted the appellant Gomes on June 22nd, 1896 for a contravention of the Sale of Foods and Drugs Ordinance 1892, and sentenced him to pay a fine of $15, or in default of payment to one month's imprisonment with hard labour.

D. M. Hutson, for the appellant.

A. Kingdon, Q.C, S.G., for 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.

a. The certificate of analysis was bad and ought not to have been and was illegally received in evidence as the analysis purported to have been made and the certificate of such analysis signed by a person other than the Government analyst or the assistant analyst

(2.) That the decision is erroneous in point of law.

a. That there was no evidence to show that the compound lard in respect of which the defendant was charged and convicted was an article of food, or was an article used for food or drink by man.

b. That there was no evidence to show that the article alleged to have been purchased was not composed of ingredients in accordance with the demand of the purchaser.

(3.) The conviction is unwarranted by the evidence in like manner as if the case had been before a jury there would not have been sufficient evidence to sustain the verdict.

Before dealing with the case I may say that I am satisfied that the charge is brought under section 6, not 7, of Ordinance 9 of 1892 (Sale of Food and Drugs Ordinance). As to the first reason, there is nothing in the objection. The word "Government" has been struck out twice in the certificate of analysis which consequently appears to be signed "Jno. Williams, Analyst." This is good and sufficient under section 23 (1) and "no proof need be given of the signature or official character of the analyst." This sub-section is in no way affected by section 17 of the ordinance. The certificate was therefore properly received in evidence.

The second reason also fails, see *The Queen* v *Field and others, ex, parte White* (64 L.J. Mags., cases, p. 158). During the argument Wills, J., remarked, "Can Justices shut out a kind of universal knowledge? I thought everyone knew that cocoa nibs were not pure cocoa." As in the case cited, I think it would be better to hear evidence, but I cannot find fault with a magistrate who brings his knowledge to bear on such a question. I thought every one knew that compound lard was an article of food for man.

With regard to section 6 (a) and (f) I need only remark that the section is subject to section 23 (4).

With respect to the last reason, I am of opinion that the purchaser substantially complied with the provisions of section 21 (1) viz., offered then and there to divide the article or drug in the presence of such seller or agent into three parts. The evidence of the respondent reads thus: "I told him I would have it analysed by the Government analyst, and asked if he objected to my dividing it into three parts. He said no, he had none. I then divided it into three parts. . . . . I gave one bottle to defendant," My attention is drawn to the fact that the words "in presence of" found in section 21 (1) are not inserted in the corresponding section of the Imperial statute; however see *Chappell* v. *Emson,* 48 J. P. 200, referred to in *Bell* and *Scrivener's* work on the Sale of Food, &c, p. 57—58 Here the inspector not merely offered to do the act, but actually did it in the presence of the seller, who accepted the third tendered to him. Conviction affirmed with costs.

GENERAL JURISDICTION.

HENRIQUES AND OTHERS v EXECUTORS OF HENRIQUES.

1897 *November* 11, 17. Before ATKINSON, C.J., (Ag.), and SHERIFF, J.

Petition—Removal of executors—Mal-administration—Procedure—Right of proceeding by petition—Supreme Court Ordinance, 1893—*Interpretation—Ordinances Nos.* 1 *and* 23 *of* 1897—*Rules of Court,* 1893, *Order XXIII. rr. 1, 2, and 29*; *Order XXVIII, r. 2.*

On a petition by lour heirs of the testator Henriques for the removal of the executors appointed under the testator's will on the ground of mal-administration, an objection was taken that the petitioners had adopted the wrong procedure, and that they should proceed by action and not by petition;
Held that the procedure adopted by the petitioners was correct, and that the objection must be overruled.

Petition by the heirs of Antonio Gomes Henriques, deceased, for the removal of the executors appointed under the will of the testator on the ground of mal-administration.

Hutson for the respondents (reporters), took a preliminary objection that the procedure to obtain the relief sought should be by action and not by petition.

McKinnon, for the petitioners.

Cur. adv. vult.

Posted. November 17th.

The judgment of the Court was delivered by Atkinson, C.J., (Acting):—

This is a petition by Antonio Gomes Henriques, Jose Gomes Henriques, John Gomes Henriques, and John Oliver Small, four of the heirs under the last will and testament of Antonio Gomes Henriques, deceased, praying for the removal of the executors (Mary Gomes, executrix, Luis D'Arauja and Patrick Dargan, executors) appointed by the said last will and testament, on the ground of mal-administration, the petitioners alleging that the testator left property to a very large amount, that they believe it has been very much dissipated by the executors, and that if the executors are allowed to continue to act they fear there will be very little left when the time comes to divide amongst the heirs. The executors

in their report deny the mal-administration, and that the estate has been dissipated by them.

In paragraph 2 of their report the executors "object in point of law that the petitioners have adopted the wrong procedure and that it is not competent for them to seek or obtain the remedy sought in these proceedings by way of petition as they have done and are attempting to do."

When the case was called the objection was argued. The respondents' (reporters) counsel contended that the proper procedure was by action, not by petition, citing the decision in the antedotal petition of *Winter* v. *Black* (1896, L.R. B.G 22) the petition of *Mary Jardine and others, administrators of estate of Jardine,* (F.C., March 19th, 1896), the antedotal petition of *Ferreira v. Ho-a-Hing* (L.J. April 27th, 1896), and Ordinance 1 of 1897 (An Ordinance to amend the Supreme Court Ordinance, 1893) (*a.*)

Counsel for petitioners contended that the petitioners had adopted the procedure which had been the procedure from time immemorial and said that the decision in Winter's case (*ubi supra*) ought not to be followed, citing the decision of Atkinson, J., in the matter of the *petition of Patrick Dargan* for Letters of Decree (1896, L.R., B.G. 29) and various sections of the Supreme Court Ordinance, 1893, and various rules of court made in pursuance of that ordinance, as showing that petitions were contemplated by the ordinance and the rules as well as actions.

The decision in *Winter's* case was given upon a point which had not been raised by either party, and as to which not a word of argument had been addressed to the Court. If correct, it effected a fundamental change in the procedure of the court and the rights of the subject by taking away the right of approaching the court by way of petition. That being so, the action of the Privy Council in the matter of the appeal of the *Attorney General of New South Wales* v. *Bertrand* (36 L.J. P.C. 51) has an important bearing, although that was a criminal matter. The Supreme Court of New South Wales had granted a new trial in a case of murder and the Attorney General appealed on the ground that there can be no new trial in a case of felony. For the respondent *Regina* v. *Scaife* (17 Q.B. 238) was cited, in which the Court of Queen's Bench had granted a new trial in a case of felony. The judgment of the Privy Council was delivered by Sir John

(*a*) Repealed by Ordinance 23 of 1897.—Ed.

Coleridge and in that judgment the following passage occurs:—"It appears "then from this examination of the case, that a most important innovation "in the practice of our criminal law was here made without a word of ar- "gument at the bar upon it, or the attention of the Court having been for a "moment addressed to it, until after the opinions of all the judges had been "expressed on the point already debated. And, as has been already stated, "the decision has taken no root in our law, and borne no point in our prac- "tice. Are their lordships to be bound by it in the advice they are now to "tender to Her Majesty? It is somewhat embarrassing even apparently to "disregard any judgment of the Court of Queen's Bench; but, in truth, "when examined this can scarcely be said to be a judgment *upon the point* "now to be decided; substantially the Court decided, and decided rightly, "the only question directly for consideration, namely, that of the reception "of evidence and misdirection, and for that alone the decision is properly "an authority. That they adhered to it in spite of the consequences involved, "after it was pointed out to them, is true, and, their lordships now venture "to say, to be regretted; for at all events it would seem that if such an inno- "vation were to be made, it should not have been made without argument "or indirectly. Their lordships therefore will feel at liberty to consider the "present case apart from this authority."

Although that was a criminal case the principle upon which the decision proceeded, that such an important change should not be made without full discussion of the point directly in issue applies equally to a civil case, such as Mrs. Winter's. The decision in that case is, for the reason stated, to say the least, of very doubtful authority. The other cases were not argued and merely rest upon *Winter's* case. We may point out that, in a more recent case, that of the petition of the Administrator General for the removal of the guardians of the minor Bovell, *Winter's* case was not followed, the guardians being removed as prayed by the petition; (F.C. June 15th, 1896).

Apart from the fact that the point was not argued and that Mrs. Winter was deprived of her right to be heard on it before decision was given against her, we are satisfied for the reasons which we are about to give at length that the decision was erroneous in *Winter's* case and ought not to be followed. We fully recognise the fact that, as a broad rule, the judg-

ments of the Supreme Court should be regarded as precedents and, therefore, to be followed; but *humanum est errare*, and it is perfectly competent for the court for good cause shown to decline to follow such a decision. This declinature must be based upon substantial reasons affecting the due administration of justice. While anything tending to introduce uncertainty or doubt with respect to definite judgments is to be deprecated and avoided whenever possible, yet, on the other hand, to perpetuate a wrong with full knowledge thereof would be to sap the very foundation of justice.

Apart from all this, the recent enactment, Ordinance 1 of 1897, also renders it necessary to reconsider the effect of Order I. r. 3 of the Rules of Court, 1893. According to the old saying "Laws are made that lawyers may live," and this enactment, Ordinance 1 of 1897, is an exemplification of the kindly interest taken by our law-framers and law-makers in providing employment for the lawyers swarming in and into our courts. From 1855 to 1893 we had a manner of Proceeding Ordinance (*a*) which, together with two or three short sets of rules, and the works of the Roman Dutch writers who treated of the subject, regulated the practice and procedure of our civil courts. There was considerable complexity here, but as if that were not enough, Ordinance 8 of 1893 (now 7 of 1893) was passed, by section 51 (1) of which it is enacted that "The practice and procedure of the Court in "its general civil jurisdiction shall be regulated by this Ordinance and by "the Rules, and where no provision is made by this Ordinance, by the "Rules, or by any other statute the existing practice and procedure shall "remain in force." The effect of this was to prefix to the old ordinance, the old rules, and the text-writers, a new ordinance and an elaborate system of new rules. The previously existing system instead of being simplified was greatly complicated. Questions constantly cropped up as to which system was to apply in a particular case and in some, as in oppositions, the difficulty had to be solved by deciding that both systems must be resorted to. All this, of course, meant litigation, expense to suitors, and fees to lawyers. But even this was not enough. Ordinance 1 of 1897 was passed substituting for section 51 (1) of Ordinance 7 of 1893 a new sub-section which runs thus:—"The practice and procedure of the Court in

(a) Amended Manner of Proceeding Ordinance 1855; No. 5 of 1855, in Dr. Carrington's Edition of the Laws, 1895.—Ed.

"its general civil jurisdiction shall be regulated by this Ordinance and the "Rules made thereunder, and in matters in respect of which no provision is "made by the same, shall be regulated as far as may be by the practice and "procedure followed in respect of the like matters in England under the "Judicature Acts and the rules made thereunder in force for the time being, "and where no such procedure is applicable, then by the practice and pro-"cedure which was followed at the date of the coming into operation of this "ordinance."

The effect of this is to sandwich, as it were, the English practice and procedure, as regulated by the English rules, between our new ordinance and the new rules and the old Manner of Proceeding Ordinance, old rules, and text-writers. Here we have as nice a combination of complications of different systems as could be desired, even by the lawyers. Now, if a practitioner can find nothing in the new ordinance and new rules, he must wade through the multitudinous and complex English rules to see that there is nothing there applicable to the case in hand. The practice and procedure *shall* be regulated *as far as may be* by the English practice and procedure followed in respect of the *like matters* in England. "As far as may be"; it is quite conceivable that in a particular case the practitioner may be compelled to follow the English practice and procedure to a certain extent, as far as may be, and then fall back upon the old manner of procedure. It is a very serious matter. Take one illustration. There is no provision in the new ordinance and new rules for proceedings in execution. That being so, the new section 51 (1) enacted by Ordinance 1 of 1897 requires the practice and procedure applicable in respect of the like matters in England to be followed, and there are many matters which come before the court here which are like those in England. Hence it may turn out that every step that has been taken in execution here since Ordinance 1 of 1897 was passed, if taken under the old Manner of Proceeding, may have been illegally taken, and that might vitiate every title granted in pursuance of the sales at execution which have taken place during that period. One blessing conferred upon us by the new Constitution Ordinance is that it has given us a legislature which teems with lawyers, each one probably in his own estimation more learned in the laws of the colony than Her Majesty's Attorney General, yet not one of them grasped the

effect of or pointed out the consequences that would flow from this particular piece of legislation. It would have been well for the colony if its legislators in recent years had been acquainted with or had borne in mind the maxim "*Omnis innovatio plus novitate perturbat quam utilitate prodest.*"

The enactment of Ordinance 1 of 1897 renders it incumbent upon the court to enquire whether the present is a matter as to which no provision is made by Ordinance 7 of 1893 or by the Rules of Court 1893, or whether the English rules as to practice and procedure must be resorted to. The question has been expressly raised and fully argued. A reference to the Ordinance and the rules shows at once that petitions are within the contemplation of both. It was said by counsel for the respondents (reporters) that only non-contentious petitions were meant when the word "petition" was used in either. That is not so. The interpretation clause of Ordinance 7 of 1893 says that "Plaintiff includes every person asking any relief (otherwise "than by way of counter-claim as a defendant) against any other person by "any form of proceeding, whether the same is taken by action, petition, "motion, summons, or otherwise:" The inclusion of the word "petition" shows that petitions in contentious matters are in contemplation as well as those in matters *ex parte* or non-contentious, because where there is a plaintiff there must necessarily be a defendant. Again, by the interpretation clause, "'Pleading' includes the statement in writing of the claim of any "plaintiff, and of the defence of any defendant thereto, and of any counter-"claim of a defendant, and of the reply of the plaintiff, and any subsequent "pleadings, and also any petition, citation, or summons:" The petitions here, as in the foregoing clause, by the rule *ejusdem generis*, must be of the like nature as actions citations and summonses with which they are coupled, that is, contentious. Order XXVIII., rule 2 (a) says that "Upon any "motion or petition, evidence may be given by affidavit; but the Court may "order the attendance for cross-examination of any person making an affi-"davit if such person is within the jurisdiction." Here again, by the rule just cited, the word "petition" must be construed in the same way as "motion," and motions under

(*a*) Cf. Rules of Court 1900 Pt. II. Order I. rule 7.—Ed.

the rules are contentious and not merely *ex parte*. Then we have Order XXIII., Rule 19.

> "Apart from, or in addition to all other methods by which any interlocutory order is enforceable, interlocutory orders may also be enforced according to the following provisions,—
>
> If a plaintiff, or petitioner, makes default or fails in fulfilling an interlocutory order, the Court may, if it thinks fit, stay further proceedings . . . . ."

By the same rule, "petitioner" must be construed in the same way as "plaintiff," which word necessarily implies a contentious proceeding.

Turning again to the interpretation clause, we find that "'Cause' in-"cludes any action or other original proceeding between a plaintiff and a "defendant, and any criminal proceeding at the suit of the Crown." We are at liberty by the interpretation clause to substitute the word "petitioner" for the word "plaintiff," and then "cause" includes an original proceeding between a petitioner and a person standing to him in the position of a defendant, who would be technically termed a "reporter."

Then we find that by Order XXXII., rule 3 (*a*) "The Registrar shall "keep a Cause List, in which he shall enter every action and matter (not "being one in which the procedure is by motion) which, by the close of the "pleadings or otherwise, has become ripe for being heard by the Court." As we have seen, a petition is, by the interpretation clause, a "pleading" and "an original proceeding" within the meaning of the word "cause," and it has been shown to be a contentious matter within the meaning of the ordinance and the rules. Every cause is necessarily a matter before the Court, and, by the interpretation clause, "matter" includes every proceeding in the Court not in a "cause" also, such for example as some of the applications to be made by motion pursuant to Order XXIII., r. 1. Petitions therefore are matters which the Registrar is directed by Order XXXII., r. 3 to place on the Cause List.

It is therefore abundantly clear that the Ordinance and the rules contemplate contentious as well as non-contentious petitions.

But it is said that by Order I. r. 3, parties seeking relief can proceed by way of action only, commenced by a claim,

(*a*) Cf. Rules of Court 1900. Order XXXII., r. 3.—Ed.

and that the petitioners should have adopted that course. Order I. r. 3, runs thus:—"Any inhabitant of the colony acting in his own right, or in the right of another, who seeks to enforce a right to legal relief against some other person or against a *res,* as a plantation or a ship, shall do so by means of an action. An action shall be begun by filing a claim with the Registrar."

The words are certainly very wide, imperative in form and, taken alone, might have the effect contended for by the respondents' (reporters') counsel. But in construing an ordinance the Court is not to take any particular passage and decide upon it alone, but it must look at every other part of the ordinance and see in what way, if any, the words of that passage are affected or controlled by other parts of the ordinance. By rule 3, the person seeking relief shall proceed by action, but, if we look at the definition of "plaintiff" above cited, in the interpretation clause, we find that a person is for the purposes of the ordinance and of the rules to be deemed to be a person seeking relief against any other person not only by action but also by petition and in various other ways. We have seen too that petitions, contentious as well as non-contentious, are manifestly within the purview of the ordinance and of the rules.

Looking now at Order I., rule 4, it provides that all proceedings in or incidental or consequent to any action shall be taken and carried on as prescribed by the rules. Then comes Order I., rule 5, "All other proceedings in "and applications to the Court may, subject to these rules, be taken and "made in the same manner as they would have been taken and made if "these rules had not been made." That of course means all proceedings other than those just provided for in the preceding rules 3 and 4, actions and proceedings in or relating thereto. The other proceedings are, subject to the rules, to be taken under the old procedure, if not forbidden or otherwise provided for by the rules. Petitions are other proceedings and not only are not forbidden by, but are in the actual contemplation of the rules. Other proceedings, such as motions generally, and the applications already referred to under Order XXIII. r. 1., are otherwise expressly provided for in the Rules. It is manifest that the words "other proceedings" refer to proceedings other than those in an action, and the Court is to give effect to every word of a statute, unless it leads to a manifest absurdity.

The words "other proceedings" undoubtedly have reference to the other proceedings mentioned in the definition of "plaintiff"—"petition," "summons or otherwise," and in the definition of the word "pleading"—"any petition citation or summons."

Looking therefore at the ordinance as a whole, and at the rules as a whole, as we are bound to do, we are of opinion that the words of Order I r. 3 are controlled and limited by the other provisions of the ordinance and the rules, and that it is competent in point of law for the petitioners to maintain these proceedings. We overrule the objection.

SHERIFF, J. While I am a party to this decision, it must be understood to this extent, only in so far as it is necessary for the determination of the questions raised, and not further or otherwise.

APPELLATE JURISDICTION

SEMPLE v. FRANK & REGO.

1897. *November* 19. Before SHERIFF, J.

Appeal—Practice—Essentials in plaint—Magistrate's Courts Rules, 1896, *rule 16—Service of notice of appeal where two respondents—Admissible reasons for appeal—Manner of setting forth reasons, with particulars—Magistrate's Decisions* (*Appeals*) *Ordinance* 1893, ss. 9, 10.

Appeal from the decision of the Stipendiary Magistrate of the Central Demerara judicial district (Mr. R. A. Swan), who gave judgment for the plaintiffs, Frank and Rego, in a claim by them against the defendant (now appellant) Semple. The reasons for the decision of the magistrate were as follows:—

"In this case Messrs. Frank and Rego, sue William Semple for the sum of $36.10, for goods sold and delivered to him at Plaisance in the Central Demerara judicial district. Defendant was represented by counsel who on his behalf put in the plea (never purchased goods nor authorised anyone to do so) mentioned in the record. After hearing the evidence for the plaintiff, the evidence of defendant and his witness, and evidence called by plaintiff in rebuttal under section 21 of Ordinance 11 of 1893, sub-section 3, I found the plaint established, and gave judgment for the plaintiffs accordingly.

During the hearing of the case counsel for defendant objected to the books of plaintiffs being put in evidence, but, as I was satisfied they were kept in the course of business with a reasonable degree of regularity, I overruled the objection and, under section 15 of Ordinance 20 of 1893, allowed them to be used as evidence in support of the claim. The account of plaintiffs against defendant was spread over a considerable period, and all the items in the claim are against his name in the plaintiffs' books. Taking the evidence as a whole I came to the conclusion as a matter of fact that defendant knew and sanctioned the credit that was given to the woman, Gamble, with whom he was living, and that he, moreover, on his own statement owed money, notwithstanding his defence that he was never indebted. This statement and that of his

woman were in my opinion very unsatisfactory, and I had no hesitation at the close of the case in giving the judgment now appealed against."

The reasons for appeal are set out in the judgment below.

McL. Ogle for the appellant.

W. M. Payne, for the respondents.

SHERIFF, J.—The reasons of appeal are as follows:—

1. Because the plaint does not contain the place of abode of the plaintiffs as is required by the 16th rule of the rules for regulating the practice and procedure of the magistrate's courts. (*a*.)

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

3. Because there is no evidence appearing on the face of the proceedings that the goods in question or any specific portion of them, were ever sold and delivered to the defendant, nor is there evidence or proof that he authorised the plaintiffs to deliver the goods in question, or any portion of them, to any one; nor is there any proof that he authorised any one to pledge his credit, or take the goods, or any portion of them, in his (the defendant's) name.

4. Because the proceedings were irregular, in that the magistrate's court admitted evidence on behalf of the plaintiffs after they had closed their case and while evidence was being given on behalf of the defendant.

5. Because 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.

A preliminary objection to the hearing of the appeal was raised by the respondent. It was urged that, as there were two respondents, each should have been served with a notice of appeal; I over-ruled the objection, as the plaintiffs in the courts below sued *jointly* for goods sold and delivered and the evidence disclosed that they carried on business jointly at Plaisance.

On the appellant proceeding to argue the first reason for appeal respondent objected, on the ground that the reason was purely technical, and the point hot having been taken

(*a*) See now Magistrate's Courts Rules, 1911, rule 16.—Ed.

in the court below could not now be raised for the first time on appeal. I sustained the objection.

On the second reason coming up for argument, respondents objected that the reason did not go far enough, as it did not disclose what the illegal evidence consisted of, and I was referred to the Magistrates' Decisions (Appeals) Ordinance, 1893, sections 9 and 10. After hearing counsel I upheld the respondents' contention.

To the third reason, and as applying also to the fourth, it was likewise objected that such reasons were not recognized by the appeal ordinance which in section 9 enumerated the only reasons which this court could entertain. The appellant's counsel urged that the ordinance fettered the right of appeal, but as I pointed out to him the legitimate reasons were wide and that care only was required in selecting the reason so as to cover almost every if not every substantial objection. In proof of this, while sustaining the objection I may say that the appellant had in fact all the benefit of his third when proceeding to argue his fifth reason.

As to this latter reason I may say that there was ample evidence to warrant the decision, and in. his reasons for decision the magistrate remarks that he "had no hesitation at the close of the case in giving the judgment now appealed against." In like manner I have no hesitation in affirming such judgment with costs.

APPELLATE JURISDICTION

SOLTAU v. HENDERSON.

1897. *November* 26. Before SHERIFF, J.

Appeal—Decision reserved by magistrate—Calling of further evidence after decision reserved—Conviction of defendant in his absence—Summary Conviction Offences (*Procedure*) *Ordinance* 1893, *sect.* 35.

Appeal from the decision of W. F. Bridges, Stipendiary Magistrate of the New Amsterdam judicial district, who convicted the defendant Soltau (now appellant) of cruelly maltreating an animal, to wit, a mare, and sentenced him to pay a fine of $2 or in the alternative to three days' imprisonment.

The material grounds of appeal appear from the judgment.

Neil R. McKinnon, for the appellant.

Davson, Solicitor General, for the respondent.

SHERIFF, J. —It is not necessary to refer to all the reasons of appeal. It is objected *inter alia*: that the decision is erroneous in point of law "(d) because the magistrate convicted the defendant in his absence."

Among the papers sent up to this court is an affidavit by the appellant. He swears that the magistrate reserved decision, but fixed no date when he would pronounce it, and that he received no notification of the day on which decision would be pronounced. I remarked at the hearing that it was irregular to adduce additional evidence without first obtaining the permission of this Court, and my opinion is confirmed by the ruling in *Luckfort* v. *Nudjoe,* Review Cases, 7th October, 1862. I think however that the Court would, under the circumstances, most assuredly have granted its sanction to the production of such additional proof. I have not deemed it necessary to refer the affidavit to the magistrate for his answer. A notice

of appeal, the reasons for appeal, and the affidavit above referred to were served on the magistrate on the 11th September, 1897. The magistrate is required by section 18 (3.) of Ordinance 13 of 1893 to transmit with the copy of the proceeding a concise memorandum of the reasons for the decision. He has not done so and therefore I cannot comply with section 31 (3) of the same ordinance, that is "take into consideration the reasons set forth in the memorandum." After service on him of the affidavit previously referred to, it was open to the magistrate to have applied to the Court for leave to contradict the deponent by evidence, and it is only natural to suppose that as he has taken no action in the matter he is unable to traverse the truthfulness of the allegations contained in such affidavit. On the face of the proceedings forwarded, I only see these words "Decision reserved." "Resumed first September, 1897. Fined $2, or 3 days' imprisonment, hard labour."

Now section 35 (1) of Ordinance 12 of 1893 provides "On the conclusion of the hearing the Court shall, either at the same or at an adjourned sitting of the Court, give its decision on the case" &c., &c., &c. It is clear that if the decision is reserved the magistrate must do more, he must *adjourn* the Court. The object is manifest; it is to enable the parties to attend the adjudication so that a party dissatisfied with the decision may give notice of appeal, see section 5 of Ordinance 13 of 1893. I required a copy of the entries in the record book relating to this case to be furnished (see sections 108 and 109 of Ordinance 12 of 1893), and I have waited and waited for the same, with the result that yesterday I received a copy of the proceedings which had been already furnished. I can only attribute this to one of two reasons. Either the clerk of the court fails to comply with the sections of Ord. 12 before cited, or else he displays a very limited amount of intelligence not to understand what was required by the Court. This accounts for the delay in giving judgment. As I can find no evidence that the case was *adjourned* for the purpose of giving a decision I must sustain the objection and allow the appeal with costs.

BRITISH GUIANA ELECTRIC LIGHTING AND POWER CO., LTD. *v.* CONRAD AND ANR.

GENERAL JURISDICTION

THE BRITISH GUIANA ELECTRIC LIGHTING AND POWER CO., LTD. *v.* CONRAD AND ANR.

1897. *November* 8, 15, 17, 22, 23, 24 and 29.

Before ATKINSON, C.J., (Actg.) and SHERIFF, J.

Accounts—Mortgage—Sentence of willing and voluntary condemnation—Effect of transfer of mortgage—Application of maxim Nemo debet bis vexari pro una et eadem causa*—Res Judicata—Restitutio in integrum—Estoppel—Weight of authority of English decisions—Amendment of claim—Practice—Rules of Court,* 1893, *Order XIX. rr.* 1 *and* 5.

A mortgage bond passed before a judge containing a willing and voluntary condemnation is a sentence or judgment, and until it has been revoked, rescinded, or set aside, the debt dealt with by it is *res judicata.*

In any claim for accounts which would necessarily include an account of the defendants' dealings with respect to the sum for which the mortgage was given, the plaintiff is estopped from raising any question of agency, the mortgage setting forth that the indebtedness therein was for goods sold and delivered.

In an application to amend the claim to make it an action to set aside the sentence of willing and voluntary condemnation on the ground of fraud, with a subsidiary claim, if fraud be proved, for accounts and re-payment of so much as be found to be due to the plaintiff;

Held that the amendment should be allowed as coming within the provision of the Rules of Court 1893. Order XIX. r. 1.

This was an action (*a*) by the plaintiff company to recover from the defendants J. C. and B. S. Conrad, trading as commission agents under the style of Conrad, Son and Company, the sum of $3,364.25, the amount of certain commissions said to have been secretly and wrongly retained by them and any other sum that might be found to be so due, and also for an account of all moneys received and paid by the defendants in respect of all goods imported by them, for the plaintiff company together with all particulars of trade accounts,

(a) See above p. 65, and also 1996 L.R., B.G., 16.

commissions drawbacks and other allowances received by or allowed to the defendants by the manufacturers or sellers.

P. Dargan, A. F. C. Weber with him, for the plaintiffs.

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

Hutson, for the defendants, took a preliminary objection that the plaintiff company, having on April 23rd, 1892, passed a mortgage in favour of the firm Conrad, Son and Company to secure the payment of the amount then admitted to be due by the plaintiffs to the defendants on accounts stated, which mortgage was still in full force and effect, was estopped from demanding accounts prior to the date of such mortgage and that the plaintiff company must first have such mortgage or judgment set aside.

After argument, which is fully set out in the judgment, the Court reserved decision.

Posted, November 15th.

Curia (ATKINSON, C.J., Actg, and SHERIFF, J.), per ATKINSON, C.J., (Actg.)

For the purposes of the present decision the case may be stated thus:—The plaintiff company alleges that the defendants, being their agents, bought large quantities of goods for the company and illegally received from the sellers and retained large sums by way of commission. The defendants deny the agency and aver that the goods were sold by them to the company.

When the case was called on for hearing the defendants' counsel asked to be allowed to argue an objection taken in the answer, which, if good, would obviate the necessity of going into a large part of the plaintiffs' claim, supposing the agency to be established.

On April 23rd, 1892, the plaintiff company being indebted to the defendants or their firm, passed a mortgage in favour of Jacob Conrad and Bernard Shea Conrad, trading in this colony as Conrad, Son and Company, for the sum of $35,810.11. This mortgage was on February 14th, 1895, transferred by the defendants to the Colonial Bank who advanced the said sum to the plaintiff company and took the transfer of the mortgage as security.

Part of the plaintiffs' claim is for an account from the date of the incorporation of the company, April 3rd, 1890, to the date of the filing of the account. Such an account would necessarily include an account of the defendants' intromissions with respect to the sum for which the mortgage was passed, as well as their subsequent intromissions. The objection taken by the defendants' counsel is that the mortgage being in full force and effect, the plaintiff company is estopped from re-opening the accounts as respects the amount for which the mortgage was given, that amount being the amount acknowledged to be at that time due by the company to the defendants as on accounts stated. A mortgage, it was argued, is a sentence of the court and the only way to get rid of that sentence was by appeal or by applying for relief *requeste civiel.* That not having been done the sentence was in full force and the plaintiff company was estopped from saying or attempting to show that the amount which by that sentence was decreed to be due and owing, was not in fact due and owing. It was further argued that, even if the allegations of the plaintiff company that the defendants were its agents, that it was not aware of the retention of the commissions, and that such retention was fraudulent, were true, the sentence being there the company could not go behind it, but must take proceedings to set it aside. It was contended further that the money having been paid to the defendants, it could not be recovered so long as the sentence remained in force, if at all. Various authorities were cited in support of these propositions.

Counsel for the plaintiffs on the other hand argued that the transfer of the mortgage and the payment to the defendants operated, as regards the defendants, as a cancelment of the mortgage; that the defendants had now no further interest in the mortgage—had in fact no rights indirect, and could not set it up as estopping the plaintiffs' claim; that if the defendants had sought to foreclose the mortgage, the plaintiff company could have set up the defence of fraud, and got the amount named in the mortgage reduced; and that the Colonial Bank having paid the money to the defendants on the security of the mortgage at the request of the plaintiff company, the company could not bring an action to set aside the mortgage as that would leave the bank without security. No authorities were cited.

Counsel for the defendants replied that the payment was

in pursuance of the sentence and not in derogation of it, and that although payment had been made it was still a sentence just as in a criminal case a previous conviction was alleged, in an indictment, to be in full force and effect, though the prisoner had served his time or undergone the punishment. A mere transfer was not a cancelment as regards anybody; the mortgage until cancelled in due form retained its legal force and effect and even if it were cancelled, that would not vacate the sentence which would retain its force as a final determination as between the parties, of the matter to which it had reference. Further, that as to the relations between the plaintiff company and the Colonial Bank, the court had nothing to do with that.

The mortgage in question is in the usual form. In it the now plaintiff company admits that it is justly and truly indebted to Conrad Son and Company in the sum named, being for goods sold and delivered by the said Conrad Son and Company to the said now plaintiff company. It states that the company renounces "all pleas and exceptions known in law or equity which if availed of might lessen or tend to lessen or invalidate either wholly or in part the true intent and meaning force and effect of these presents," and that the appearer, the now plaintiff company, requested the judge to condemn the said company in the payment of the capital sum named and interest, and in the performance of the several conditions stated in the mortgage, the appearer "full consenting to such condemnation (judgment)." Then comes the judgment itself. "Wherefore His Honour the said judge hath condemned as he doth hereby condemn" the now plaintiff company in such payment and performance. Lastly it recites that the now defendants appear at the same time and "declared to accept the said mortgage and to be satisfied therewith."

In this document it will be seen that there are two distinct parts, the mortgage, and the willing and voluntary condemnation as it is called. The latter part by its very terms, is a sentence, and if there were need of authority the Full Court (Arrindell, C.J., Beete and Alexander, JJ.) laid it down in *Macauley v. Marks* (31st March, 1858), that "a willing and voluntary condemnation is a sentence." The mortgage might have been passed without the willing and voluntary condemnation, in which case, as stated by *Van der Linden*, the creditor would have to sue the debtor for payment and

conclude that in default thereof the mortgaged property may be declared bound and executable. But where there is the sentence by willing and voluntary condemnation the creditor lays that sentence before the court and applies to the court in the prescribed form for leave to proceed to execution.

Macauley v. Marks (supra) appears to have been an action for the renewal of a sentence which had expired by effluxion of time, and the court declared that as a general rule the only defence to such an action is payment, and that "the grounds of exception and fraud averred" in that case did not amount "to that species of fraud" which will induce the court to set aside so solemn an act as a mortgage judicially passed. There the sentence, having expired, had no force, and the issue was whether or not new force should be given to it. On that issue the defendant could properly raise the plea of fraud. The court held that the proof of fraud failed and sustained the sentence. A *fortiori* the court will sustain a sentence that is in force, until it has been set aside by due legal process.

It was said that the mortgage was cancelled as regards the defendants by reason of the transfer and payment, but if cancelled as regards the defendants it is cancelled as regards the Colonial Bank. The plaintiff company cannot blow hot and cold, for if the payment to the defendants cancelled the mortgage, then the defendants would have no power to transfer it. *Grotius* says that, among other ways, a mortgage is cancelled on payment being made. *Van der Linden* says the right of pledge or mortgage ceases when the debt which founds the obligation is discharged by payment. But we may point out that as to immovable property, a mortgage of which must be passed before a judge, a formal act of cancelment is necessary, also passed before a judge, otherwise the mortgage would remain upon the register as an existing incumbrance upon the property mortgaged.

But apart from the legal formality, payment in the present case, although it satisfies the defendants' claim, has not cancelled the mortgage. The mortgage is still in force, and so is the sentence as regards the plaintiff company, the difference being that the obligation has been transferred to the Colonial Bank and the sentence is enforceable now by the Colonial bank and not by the defendants.

On this state of facts it was argued by the plaintiffs' counsel that the defendants had no longer any interest in the

mortgage, having got their money, but it is manifest that they have a very strong interest in maintaining the mortgage and the sentence of willing and voluntary condemnation as they stand, if, as is contended by the defendants, the sentence acts as an estoppel to the plaintiffs' claim for an account up to the date of the mortgage. If it does act as an estoppel, the defendants are in so far relieved from a liability, if the plaintiff company's allegations are correct (as to which of course we express no opinion), to repay considerable sums of money to the company.

The sentence remains on the records of the court. It has never been revoked or rescinded or set aside or annulled. The debt dealt with by it is therefore *res judicata.* To reopen the questions as to which it has decreed while it stands unrevoked would be contrary to the principles which govern not only our own but every system of jurisprudence. There would be no end to litigation, no finality in the administration of justice if parties, notwithstanding an existing judgment, could bring actions which directly or by a side wind would raise again issues which had already been solemnly judicially determined by that judgment.

If we go back to the civil law we find that certain actions were an extinctive bar to a subsequent action on the same question without a counteractive plea of previous decision, while in other actions such a plea was required (*Gaius,* Bk. IV. par. 106). This distinction proceeded upon the form of action adopted or which the case required, but the principle was the same in both, that a previous decision on the same point and between the same parties was conclusive. The policy of the rule is expressed in the maxim, *Interest reipublicae ut sit finis litium.*

The same rule prevails in English law as will be seen from the cases cited in *Smith's Leading Cases,* Vol. II. p. 410. In *Marriott* v. *Hampton,* 7. T. R. 269, the leading case, Lord Kenyon C.J., said "If this action (for money had and received which had been paid under a judgment though not owing) could be maintained I know not what cause of action would ever be at rest. After a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person." The other judges were of the same opinion.

In Ceylon, where Roman Dutch law is in force, the same rule exists. "As a general rule a judgment when pronounced

and recorded and either acquiesced in, or if appealed against, affirmed, is for ever conclusive of the facts decided as between the parties litigating." (Marshall's *Judgments* etc. *of the Supreme Court of Ceylon.*) Two judgments are quoted in which the Supreme Court applied this principle. The plaintiff company here not only "acquiesced" in the judgment but requested it and would therefore, according to the law of Ceylon, be concluded by it.

The maxims *Nemo debet bis vexari pro una et eadem causa,* and the one above cited, *Interest reipublicae ut sit finis litium,* state the policy of the law of this colony, just as accurately as they do that of the civil law, the law of England, or that of Ceylon. It is immaterial whether a party seeks to proceed directly by bringing a second action or indirectly as in the present instance.

If it were competent to do what the plaintiff company is seeking to do in this proceeding, look at the anomaly that might arise. Suppose that the plaintiff company succeeded in showing that the defendants had acted as its agents and had fraudulently retained commissions, if the defendants were called upon to account for the period prior to and up to the date of the mortgage a lesser sum might be found to be due up to that date than was decreed to be due in the voluntary and willing condemnation, and if a sentence were given to that effect the anomaly would arise that there would be on the records of the court two sentences both equally valid, one decreeing that at the date in question a certain sum was due to the defendants, and the other decreeing that at that very same date a different and smaller sum was due. It is obvious that such procedure would lead to endless confusion and is for that if for no other reason wholly inadmissible. The plaintiff company must plainly get rid of the mortgage sentence of willing and voluntary condemnation before it can re-open the accounts prior and up to the date of the mortgage.

The case of *Gaskin v. Anderson and Coltman* (1896, not reported) is an instance of the application of the principle that by the law of this colony a sentence cannot be impeached indirectly on the ground of fraud, as is sought to be done in the present case. In that case the plaintiff entered an opposition to the sale at execution of certain property which had been levied on by the defendants, in pursuance of a judgment obtained by default, one of the grounds of opposi-

tion being that the judgment had been fraudulently obtained by collusion between the defendants and one or more of the plaintiff's co-partners, in order to deprive the plaintiff of his partnership lights in the property levied on. By the fraud alleged the plaintiff, it was said, had been deprived of the opportunity of appearing to defend his rights, and the court ruled that the proper procedure to impeach the judgment was not indirectly by way of opposition as was attempted, but by an action to set it aside. The maxim *fraus et dolus nemini patrocinari debent,* and the common legal phrase "fraud vitiates everything" apply of course to a sentence as well as other matters. *Voet* (42.1.28) says that a decree "may be rescinded on proof of the fraud," adding however that the party should apply for *restitutio in integrum.*

As to the question raised during the argument, whether the money having been paid can be recovered back, it would be premature now for us to express any opinion.

We feel it our duty to add that this objection which was raised on the pleadings ought to have been argued before the case came on for hearing. Considerable expense would have been saved to the parties if the point had been argued at the proper stage.

No order as to costs at present.

November 17th.

Dargan opens the case for plaintiff and tenders documents.

Hutson, for defendants, objected to a letter by the defendants to the secretary of the plaintiff company, dated October 6th, 1890, being tendered, on the ground that the plaintiff was estopped from tendering any evidence tending to raise the question of agency between the parties prior to the date of the mortgage referred to in the decision of the court on the 15th inst., as it was expressly set forth in the mortgage that the indebtedness therein was for goods sold and delivered.

After hearing arguments on the objection, the Court reserved decision on the point.

November 22nd.

The following judgment of the court (Atkinson C.J. Ag. and Sheriff J.) was given by Atkinson C.J. (Ag.):—

The plaintiff company alleges that the defendants, as its agents, purchased for it various goods, and illegally received and retained divers commissions. The defendants deny the agency and aver that the goods were sold and delivered by them to the company.

In opening his case counsel for plaintiff referred to certain letters which he tendered. When he came to a letter dated October 6th, 1890 from the defendants to the plaintiff company, which he tendered as containing statements which, he said, would go to prove an agency, counsel for defendant objected that the plaintiff company was estopped from going into any evidence to establish a relationship of principal and agent between the parties, by its own admissions or statements contained in the mortgage passed by it (the company) to the defendants on the 23rd day of April 1892, in respect of which the court had already given judgment, that the plaintiff company could not go behind the sentence of willing and voluntary condemnation, but must proceed to set it aside on the alleged ground of fraud.

The mortgage contained this statement made by the plaintiff company and accepted by the defendants:—

"That the said company is justly and truly indebted to Jacob Conrad and Bernard Shea Conrad trading . . . . as Conrad, Son, and Company in the capital sum of thirty-five thousand eight hundred and ten dollars fourteen cents . . . . . for goods sold and delivered by the said Conrad, Son, and Company to the said British Guiana Electric Lighting and Power Company Limited."

That statement was an admission on the part of the plaintiff company, that the goods were sold and delivered to it by the defendants, and stopped the plaintiff company from attempting to show that the defendants purchased the goods for it as its agents. Besides that, the plaintiff company had expressly renounced all pleas in law or equity which might avail against the validity of the mortgage.

Counsel for plaintiff said he was not going into the question of the goods referred to in the mortgage at all, but was referring to matters prior to the mortgage. There was nothing to show the court that the goods referred to in the letter of October 6th 1890 were included in the amount named in the mortgage—indeed it could not be, because the company had given a cheque for $1,892.50 as in payment of the first of the four bills of exchange which Thomson Houston and

Company had drawn on the defendants. The letter was intended to go towards showing, by the course of dealing between the parties, that there was an agency, and not with a view to get back moneys included in the mortgage. He cited *Goucher* v. *Clayton* (34 L.J., Eq. 239) as showing that, notwithstanding the mortgage sentence, the plaintiff company could still question the accuracy of the facts stated in the mortgage. Even if the relationship between the parties were that of vendor and purchaser, the defendants were directors of the company, and would be bound to repay the commissions they had illegally retained, and the letter of October 6th 1890 would go to that.

Counsel for defendants replied, as to the latter point, that even if the defendants: were the company's agents, the company was still estopped by the mortgage, and denied that *Goucher* v. *Clayton* was an authority in support of the plaintiffs' contention. The plaintiffs' pleading showed that the $35,810.14 mentioned in the mortgage was the same as that sum referred to in the pleadings. Even if the $1892.50 was paid, that would not matter; the plaintiff could not pick out this item and that. The $35,810.14 was the result of the whole of the transactions, up to the date of the mortgage, on account stated.

The question of estoppel is expressly raised in the defendants pleadings and we reserved decision on the objection. In their claim the plaintiffs aver—

> "4. The defendants before the incorporation of the company were and still are agents in this colony of the Thomson-Houston International Electric Company, now called the General Electric Company, manufacturers of electrical machinery and appliances, carrying on business at New York in the U.S. of America, from whom the whole of the plant and supplies of the plaintiffs were from the time of their incorporation until about the year 1893, and the greater part thereof still are purchased."

Paragraph 5. says

> "5. The plaintiff company shortly after its incorporation became largely indebted to the defendants for goods purchased from the said Thomson Houston and Company, through the defendants, and on the 23rd April, 1892, a mortgage was passed on the property of the company in favour of the defendants to secure the repayment by instalments within two years after the date thereof of the

sum of $35,810.14, then owing by the plaintiffs to the defendants."

The sums named in the pleadings and in the mortgage are identical, and must relate to the same set of transactions, the pleadings alleging an agency, the mortgage a sale and delivery. Defendants' counsel however says that the letter of October 6th 1890 has relation to matters not contained in the mortgage. Now what do the pleadings say? In paragraph 4, that the whole of the plant and supplies, from the incorporation (April 3rd 1890) to the year 1893, were purchased (and by para, 5 through the defendants) from Thomson-Houston and Company. The mortgage having been passed on April 23rd 1892, the goods admitted in it to have been "sold and delivered" must be "the plant and supplies" referred to in paragraph 4.

Then paragraph 5 says that it was shortly after the incorporation (April 3rd 1890) that the plaintiff company became largely indebted to the defendants. The mortgage passed was in respect of that large indebtedness, and the letter of October 6th 1890, six months afterwards, must therefore apparently relate to matters in respect of which the plaintiff company became largely indebted to the defendants "shortly after" its incorporation. That this is so is obvious from the opening statement of the plaintiffs' counsel as to its contents—that the defendants wrote to the plaintiff company to inform it that the first instalment of the plant had arrived in the colony, and that Thomson Houston and Company had drawn four bills of exchange on them, to cover the first of which (which was due immediately) they requested and got a cheque from the company. So far as appears, the other three bills may form part of the amount covered by the mortgage. But, assuming that they do not, all the plant and supplies came from Thomson Houston and Company, and it was with respect to that plant and supplies that the plaintiff company became largely indebted to the defendants, as is expressly stated in paragraph 5 of the claim; the letter of October 6th 1890 relates to the first instalment of that plant, and it is manifest therefore that the transactions or dealings referred to in that letter form part of the transactions or dealings which led up to the debt of $35,810.14, for which the mortgage was given.

It was said, as has been stated, that the $1892.50, having been paid as on account of the first bill of exchange, could not

be included in that sum of $35,810.14. That may be, but the transaction itself was one of the series of transactions which led up to the debt of $35,810.14, and had reference to the first part of the plant alleged by the plaintiff company to have been purchased from Thomson Houston and Company for it by the defendants. To admit the letter of October 6th 1890 would, in our opinion, be to open up part at any rate of a series of transactions the debt resulting from which is the amount mentioned in the mortgage, and in respect of which the sentence of willing and voluntary condemnation was given. That cannot be done until that sentence has been set aside. The decision of the court on the first objection pronounced a few days ago applies in so far to the present objection also. As to this, it is immaterial whether the company has a claim against the defendants as agents simply or as directors or trustees and agents.

As has been stated, an English case was cited by counsel for plaintiff, and it may be well, before proceeding with it, to point out to what extent English decisions are of authority in our courts. Where the English law has been expressly introduced as, for example, with respect to bills of exchange and promissory notes, the English decisions are regarded in our courts as of direct authority. Where our law is the same as or similar to that of England, although not expressly derived from it, the English decisions will be received as of authority, but our courts would not be necessarily bound to follow them if good reason were shewn to the contrary, which would rarely happen. As to those parts of our law which are purely local, the English decisions are not of authority, but they are resorted to whenever desirable by way of analogy. The case of *Goucher* v. *Clayton* (*ubi supra*) cited by counsel for plaintiff is one which would be followed here in cases of the like nature, and we should follow it in the present case were it applicable, which it is not. It is a case of estoppel it is true, but of a different class of estoppel to that in question in these proceedings. The English case was one of disputed fact, the validity or not of a patent. To constitute an estoppel in such a case there must evidently be a joinder of issue. So, is a case of debt, the plaintiff says the defendant owes him a certain sum, the defendant denies that he owes anything to the plaintiff, they join issue as to the fact in dispute, evidence is taken, and judgment is given. Both

parties are thereafter debarred or estopped from denying the facts as settled by the judgment, fraud apart.

But the judgment in question in the present proceedings is one in which the debt was not in dispute and in which, therefore, there was and could be no joinder of issue. Yet the sentence of willing and voluntary condemnation is, until set aside if it can be on proof of fraud, conclusive as to the facts admitted, and acts as an estoppel.

The cases which are analogous in the English law to the present case are those where the action is on a bond or deed, especially in cases of bonds with warrants of attorney, where the defendant by writing authorises an attorney-at-law to appear and receive a statement for him in an action brought or to be brought, or to confess the same, or suffer judgment to pass against him by default, or with a cognovit, where a defendant by written confession admits that he has no defence to an action brought against him. These are very similar to our mortgages with a voluntary and willing condemnation, where the mortgagor confesses that he is justly and truly indebted to the mortgagee in the sum named in the mortgage, and prays the judge to condemn him in payment of the sum.

In England a mortgage deed operates as a conveyance, and vests the title to the property of the mortgagor in the mortgagee; the deed in this colony merely gives the mortgagee a lien upon the mortgagor's property. But in both cases the action is upon the deed or bond, and in England the judgment is conclusive, in the same way as it is here, until set aside by reason of fraud. If a sentence in England were set aside on the ground that it had been obtained by fraud, the deed or bond would still be a good deed or bond, (and so here, where it was not coupled with a sentence of willing and voluntary condemnation), and would act as an estoppel with respect to admissions or statements made in it until the bond or deed itself was set aside, as it might be if fraud were established—the reason being, as stated by Cababe (*a*) "that it seemed incredible that a person should perform an act of so solemn and important a character as the execution of a deed, without first satisfying himself as to the truth of the statements contained therein. He was, therefore, irrefutably presumed to have done so."

(*a*) Principles of Estoppel, 1888, p. 2.

In this colony a mortgage deed or bond is of even a higher degree in this respect than one executed in England, because here a mortgage is passed in solemn form before a judge of the Supreme Court. In the case of a mortgage with sentence of willing and voluntary condemnation, the mortgage and sentence would necessarily go together, if fraud was made out.

The claim in the present case has reference to an amount which is secured by mortgage, as well as to moneys not so secured. From what we have already heard, and from what appears in the pleadings, it seems to us that, with respect to the unsecured sums, the plaintiff company will have to depend to some extent at any rate upon the dealings between the parties in the earlier transactions which led up to the mortgage, and that it might turn out, if the proceedings go further without the sentence being set aside, if that can be done, that the plaintiff might be unable, for lack of proof of the earlier dealings, to establish the alleged fraud with respect to the unsecured sums. Great expense might thus be uselessly incurred, and the plaintiff company, if it afterwards succeeded in setting aside the sentence of willing and voluntary condemnation on the ground of fraud, might perchance be precluded from again going into the question as to the unsecured sums. As to this, of course, we now express no opinion but merely point to the possibility.

Following the precedent of *Gaskin v. Anderson and Coltman* (May 4th 1896) (*a*) we are prepared to stay proceedings herein in order to enable the plaintiff company, if so advised, to bring an action to set aside the sentence of willing and voluntary condemnation on the ground of fraud, and we adjourn the case until tomorrow morning to enable the plaintiff company to consider the position.

November 23rd.

Dargan, for plaintiff, applies for leave to amend the claim, and lodges draft of proposed amendments.

Arguments on application postponed to 24th inst.

November 24th.

Hutson, for defendants, opposes the proposed amendments.

(*a.*) No written judgment in this case appears in the records of the Court—Ed.

Dargan, in reply.

The court reserved decision on the point.

November 29th.

The following judgment of the court was given by Atkinson C.J. (Ag.)

The plaintiff company asks to be allowed to amend its pleadings by adding to its claim two additional paragraphs which may, for the purposes of this decision, be briefly stated thus. The one alleges that the mortgage was passed by the plaintiff company through the fraud of the defendants, the company being ignorant of the facts constituting the fraud, and in breach of the defendants' duty as directors of the company to disclose those facts. The other alleges that the Colonial bank had no knowledge of the alleged fraud when the bank paid the money at the request of the plaintiff company to the defendants.

Upon these averments the plaintiff company asks for a declaration that the mortgage and sentence of willing and voluntary condemnation be set aside as between the company and the defendants, but saving and without prejudice to the rights of the Colonial bank or their assigns, with *restitutio in integrum,* and that each declaration be endorsed on the grosse of the mortgage and annotated on the mortgage itself in the register of mortgages.

The amendment was strongly objected to by the defendants, and the question as to whether it should or should not be allowed by the court has been argued at considerable length. A great deal of the argument was directed as to what would be the effect of the amendment if made, but we do not propose to deal with those questions now. To do that would be premature.

The application was made in pursuance of the Rules of Court 1893, Order XIX., rules 1 and 5. Rule 1 says, "The Court may, at any stage of the "proceedings, allow either party to alter or amend his pleadings in such "manner as may seem just, and all such amendments shall be made as may "be necessary for the purpose of determining the real question in contro-"versy between the parties." (*a*). Rule 5 says "In all cases not provided for "by the preceding Rules of this Order, application for leave to amend may "be made by either

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

"just." (a.)

"party to the Court before or at the hearing, and such amendment may be "allowed upon such terms as may be."

These rules, it will be seen, are of a very wide reaching scope, and, looking at the English decisions or the corresponding Rules from which ours are taken, it is clear that the amendment ought to be allowed if the ruling of the court in *Gaskin* v. *Anderson and Coltman* (May 4th 1896) does not interfere. In that case it was laid down than an action to set aside the sentence attacked on the ground of fraud was the proper procedure. But that was a case of opposition in which, by the express words of the law, no alteration could be made in the reasons of opposition, which are equivalent to the statement of facts on a claim in an ordinary suit. There an entirely new action was necessarily required, but, in the present case, that is not necessary because the result of the amendment will be to make this an action to set aside the sentence of willing and voluntary condemnation on the ground of fraud, with a subsidiary claim, if fraud be established, for repayment of the amounts found to be over-charged, if any, when the accounts come to be examined. In this way a more speedy determination of the questions in issue between the parties will be arrived at than could be the case if an entirely new action were instituted.

We therefore allow the amendment, but the plaintiff company must pay the costs up to and including the costs of this amendment. The defendants will of course be entitled to file such fresh answer, as they may be advised, within the period fixed by the Rules for filing answers.

(a) See now Rules of Court 1900, Order XXVI., r. 6.—Ed.

CROWN CASES RESERVED.

REGINA *v.* HOOKOOMCHAND & SAGUR.

1897. *March* 1, 2, 3, 4, 5, 8, 10.

Before Sir E. L. O'MALLEY C.J., ATKINSON & SHERIFF JJ.

Criminal Law—Murder—Evidence of accomplices—Scintilla of evidence—Duty of judge with respect to leaving the case of the jury—Presumption arising from possession of stolen property—Points of law, as opposed to questions of fact, for the consideration of the Court.

Case stated by Mr. Justice Sheriff.

"The accused were indicted at the last session of the Supreme Court in its criminal jurisdiction held at New Amsterdam, Berbice, for the murder of one Dabidiall. They were defended by Mr. Wills.

At the commencement of my summing up I told the jury that laying aside the evidence of Ramkellowan, Juglall and Juggernath it was competent to find the accused guilty if they believed the remaining evidence, especially with respect to the finding of the body which had been identified by means of the clothes, etc., and especially with regard to a kantha, the knife, Dabidiall's papers etc., the various statements made by Hookoomchand, and the drafting of the deed of gift by Isaacs at the request of Hookoomchand.

I pointed out with respect to the kantha, that the evidence went to show that it was traced to Hookoomchand, and if they believed so, the jury might not unreasonably expect that he would give some account as to how it came into his possession. I pointed out that recent possession in cases of larceny raised a presumption that the person to whose possession the property recently stolen was traced was the thief unless he could account for his possession. I added that the jury might draw their own conclusion from the possession by Hookoomchand, but I certainly did not say that the natural deductions would be that he had committed murder. I referred to it as pointing to a guilty knowledge.

I dwelt on the fact that Isaacs swore that he had prepared the receipt purporting to be from Goberdeen for fifteen cattle purchased from Dabidiall, which receipt was prepared by direction of Hookoomchand which transaction was flatly denied on oath by Goberdeen. I then proceeded to deal with the remaining portion of Isaac's evidence alleging that he had prepared two deeds of gift, one in favour of Jeetun for twenty-five head of cattle, and the other in favour of Sookdeo's baby for a cow and calf, all these documents having been antedated by direction of Hookoomchand, and which were subsequently destroyed by him. I also pointed out this transaction took place only one week before the alleged murder.

I next referred to the alibi set up by Sagur, and I pointed out that the effect of an alibi was to traverse the truthfulness of all the evidence adduced by the Crown. J cited Wharton on *Homicide*, sect. 652, and the footnotes relating to "*Alibi*". I repeated that if the jury accepted as true all the evidence referred to, they might find the accused or either of them guilty of the murder. I further told the jury that if they were not satisfied with this evidence they might consider the evidence of Ramkellowan, Juglall and Juggernath, and I suggested they should see that the evidence of one and all of these witnesses should be corroborated by independent evidence. I told them that they must consider the evidence as it affected each accused separately, and that a statement made by one was not evidence against the other unless made in his presence and hearing.

I did not tell them that the proof against the prisoners is the evidence of alleged accomplices, because I declined to stop the case from going to the jury on the ground that I was satisfied that there was ample general corroborative evidence, and I so ruled in open court within hearing of the jury.

The questions for the court are:—

1. Was there, after excluding evidence of Ramkellowan, Juglall, and Juggernath sufficient evidence to convict the prisoners on the ground that there was no evidence that Dabidiall was murdered and no evidence that he was murdered by the accused Hookoomchand and Sagur? (See evidence of Dr. Perot annexed hereto.)

2. Was there a misdirection with respect to the effect of the evidence relating to the kantha?

3. Was it necessary or not for the judge to warn the jury that it was unsafe to convict upon the evidence of accomplices alone and uncorroborated in some material particular?

4. Under the circumstances above stated was the falsity of the evidence regarding the alibi innocuous or not, and could it or could it not affect the said accused?

5. Does the defence of an alibi put in issue the whole case for the prosecution or not?

Though I have reserved certain points of law and drawn up a case, yet I have done so subject to the opinion of the Court on the following points:—

(a) Can the legal objections be said to have arisen on the trial? and

(b.) Were they properly raised?

The following are the facts; on the jury finding a verdict counsel for the defendant moved in arrest of judgment. I reserved decision, and next morning I overruled the motion, and intimated I would reserve questions for this court. Counsel asked me to add two more reasons to which I acceded.

I attach hereto copy of the notes of evidence taken at the trial as part of the case stated by direction of the court for the consideration and decision of Crown cases reserved."

Kingdon, Q.C, S.G., and *N. McKinnon,* for the Crown.

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

Interpreter Mudhoo, sworn as interpreter, the prisoners, produced by the keeper of the prison at New Amsterdam, being present in Court.

After hearing Mr. Wills open for the prisoners the Court ordered that the case be referred back to be amended by the incorporation of the evidence taken at the trial. Thereafter, this having been done, the notes were read out by the clerk of the Court.

The Chief Justice enquired on what ground the evidence of Ramkellowan was treated as that of an accomplice he apparently being an independent witness. In reply Sheriff J. stated he had treated this witness as an accomplice, through error.

After hearing the arguments adduced decision was reserved

REGINA v. HOOKOOMCHAND & SAGUR

March 10*th.*

The judgment of the court was delivered by Sir E. L. O'Malley, C.J.—

In this case the two prisoners Hookoomchand and Sagur were convicted at the last criminal sessions at New Amsterdam of the murder of one Dabidiall, but Sheriff J., who tried the case, reserved certain points of law which have been stated in a case for the consideration of this court under the provisions of s. 177 of Ordinance 19 of 1893.

The questions raised by the case are as to the correctness or otherwise of certain directions given by the learned judge When summing up to the jury, and as those directions relate to the bearing of the evidence, the evidence itself has been incorporated with the case so as to place the court in full possession of the materials for a judgment.

It appears that at the trial the case against the prisoners rested upon the testimony—

(1.) of two men, Juggernath and Juglall, the first of whom speaks as having been an actual eye witness of the commission of the murder by Hookoomchand and Sagur, and the second of whom speaks as having heard what was going on and of having seen the prisoners about the same time:—

(2.) of a man Ramkellowan, who says that he saw Hookoomchand and Sagur going with Juggernath and Juglall in the direction of the place where and on the night when the murder is said to have been committed, and that he then heard cries and voices in the direction of that place:—

(3.) of a number of witnesses who speak as to certain acts of Hookoomchand and Sagur and as to certain statements made by Hookoomchand at or about the supposed date of the murder, which acts and statements were put in evidence as going to prove that Hookoomchand and Sagur committed the murder.

We gather from the case as stated that in the learned judge's summing up to the jury the evidence of Juggernath and Juglall was treated as being that of accomplices, as it certainly was. The evidence of Ramkellowan was placed on the same footing, but for reasons which are not quite clear. Whatever they were, the prosecution appears to have made no objection to its being so treated, and in dealing with the

case here we must accept it that Ramkellowan's evidence is to be considered at least for the purpose of applying to it the rules regarding corroboration, as being equally with that of Juggernath and Juglall evidence of an accomplice.

The first question submitted to us is thus stated by the judge:—

"Was there, after excluding the evidence of Ramkellowan, Juglall, and Juggernath sufficient evidence to convict the prisoners on the ground that there was no evidence that Dabidiall was murdered and no evidence that he was murdered by the accused Hookoomchand and Sagur"? from which we understand that the point we have to consider is whether, apart from the evidence of Ramkellowan, Juglall and Juggernath there was evidence that might properly be left to the jury as sufficient upon which to convict. The test in such cases is whether there is reasonable evidence on which reasonable men could reasonably or fairly find a verdict. As it was said in the case of *Ryder* v. *Wombwell* (L. R. 4 Ex. 32, at p. 39), "It was formerly con-"sidered necessary in all cases to leave the question to the jury if there was "any evidence even a scintilla, in support of the case; but it is now settled "that the question for the judge (subject of course to review) is, as is stated "by Maule, J. in *Jewell* v. *Parr* (13 C.B. at p. 916), not whether there is "literally no evidence, but whether there is none that ought reasonably to "satisfy the jury that the fact sought to be proved is established. In *Toomey* "v. *London and Brighton Railway Company* (3 C. B. (N.S.) at p. 150.) Wil-"liams J. enunciates the same idea thus. 'It is not enough to say that there "was some evidence . . . . A scintilla of evidence . . . . .clearly would not "justify the judge in leaving the case to the jury. There must be evidence on "which they might reasonably and properly conclude the fact to be estab-"lished.' And in *Wheelton* v. *Hardisty* (8 El. and Bl. at p. 262) in the con-"sidered judgment of the majority of the court, it is said 'The question is, "whether the proof was such that the jury would reasonably come to the "conclusion that the issue was proved. 'This,' they say, 'is now settled to "be the real question in such cases by the decisions in the Exchequer "Chamber, which have in our opinion so properly put on end to what had "been

"treated as the rule, that a case must go to the jury if there were what had "been termed a scintilla of evidence.'"

That was the test which the judge had to apply and that is the test by which we have to determine the correctness of his direction. The test is not a satisfactory one, but it is the best that has been obtainable. Its imperfection was pointed out by Lord Coleridge in a judgment in the House of Lords in the case of the *Dublin Wicklow and Wexford Railway Co.* v. *Slattery* (3. A. C. 1155, at p. 1197) He said "the entire uselessness of such "rules as practical guides lies in the inherent vagueness of the word 'rea- "sonable,' the absolute impossibility of finding a definite standard, to be "expressed in language, for the fairness and the reason of mankind, even of "judges. The reason and fairness of one man is manifestly no rule for the "reason and fairness of another, and it is an awkward, but as far as I see, an "inevitable consequence of the rule, that in every case where the decision "of a judge is overruled, who does or does not stop a case on the ground "that there is, or is not, reasonable evidence for reasonable men, those who "overrule him say, by implication, that in the case before them the judge "who is overruled is out of the pale of reasonable men."

At all events it was obviously an exceedingly difficult test to apply offhand to such a mass of evidence of a very mixed quality as there was here, and the judge seems to have observed the practice which is stated in the authorities to be the safe and proper practice under the circumstances. It is laid down that a judge will not often go astray if in every doubtful case (of this kind) he takes the opinion of the jury and leaves the question as to how far he was justified in thus acting to be decided thereafter by the Court.

We have now considered the point after full argument and careful review of the evidence and with every opportunity of deliberation, and the conclusion that we come at is that we must answer the above question with regard to the prisoner Sagur by saying that there was not such evidence as the test above referred to requires. We are further clearly of opinion that this was a point of law arising on the trial and, as such, properly raised for our consideration in this case. As regards Sagur therefore the conviction cannot be supported.

With regard to Hookoomchand, looking to the conclusion that we have come to on the next question submitted, it is unnecessary for us to pronounce any opinion on this part of the case.

We come now to the second question. It was proved at the trial that some few days after the alleged murder, Hookoomchand was in possession of a certain kantha, or necklace, which had been the property of the murdered man Dabidiall some short time before his death, and the learned judge, in reviewing the hearing of the circumstantial evidence generally, directed the special attention of the jury to the effect of this possession of the kantha by Hookoomchand. The learned judge says as to this, "I pointed out with respect to the kantha that the evidence went to show that it was traced to Hookoomchand, and if they believed so the jury might not unreasonably expect that he would give some account as to how it came into his possession. I pointed out that recent possession in cases of larceny raised a presumption that the person to whose possession the property recently stolen was traced was the thief unless he could account for his possession. I added that the jury might draw their own conclusion from the possession by Hookoomchand."

Was this direction right or wrong? In a case of larceny when property is proved to have been stolen, a presumption arises against the possessor of the recently stolen property that he is the thief unless he gives some account of how he got it, and, therefore it is that it is reasonable to expect him to give an account of it when he is charged with larceny. There is a presumption which will tell against him unless he meets it and therefore it is reasonable to expect him to meet it. But in the case of the kantha there is no corresponding reason to expect Hookoomchand to give an account of how he got it. because the possession of it raised no presumption against him as the possessor that he was a murderer. If it had been proved that the kantha was stole from Dabidiall, and that the robbery had been incidental to or accompanying the murder so that presumably whoever committed the robbery committed the murder also, then in that case the possession of the kantha might have raised a presumption against Hookoomchand that he was robber and murderer as well as robber, and it would be reasonable therefore when he was charged with the murder to expect that he would give some account of how he obtained the kantha. That is not the case here, but the language of the learned judge is such as would have been applicable to such a case. The jury might understand from it that in this case they might act upon a presumption arising from possession unaccounted for, just as in a case of larceny they would act upon a presump-

tion arising from possession unaccounted for, and that, as in that case, they would take it as pointing to the larceny, so in this it would have at least a bearing as pointed towards the murder. We think therefore that the direction was wrong.

It is laid down by the authorities that it is the duty of the judge to point out to the jury any rule of law which gives to any particular species of evidence peculiar weight, and that he should distinctly explain the nature of any presumptions which may apply to the point at issue. That being so we think this direction was in the nature of a point of law arising on the trial and that as such, it was properly raised in the case. The result is that the conviction as against Hookoomchund cannot stand.

Our judgment on these two points makes it unnecessary to give any decision on the remainder of the case. The convictions of both prisoners must be quashed.

SEQUESTRATION OF PLN. PROVIDENCE.

GENERAL JURISDICTION

IN RE SEQUESTRATION OF PLN. PROVIDENCE.

1897. *December* 7.

Before ATKINSON, C.J. (Actg.) and SHERIFF, J.

Sequestration—Plantation in cultivation—Deposit of moneys in hands of sequestrators with Registrar—Appropriation of commissions before passing of accounts—Amended Manner of Proceeding Ordinance 1855, *ss.* 153, 159, *and 211—Charges for legal assistance.*

Sequestrators are not entitled to pay to themselves commissions in connection with the sequestration of estates in which they have been appointed, until such commissions have been fixed by the court.

Charges for legal assistance must, unless the court otherwise orders, be paid by the sequestrators from their commissions.

Accounts had been rendered to the Court by the sequestrators (G. W. Lane and N. R. McKinnon) of plantation Providence, Berbice.

The Accountant of Court examined the accounts and reported to the Court, *inter alia*, that the sequestrators had paid to themselves a sum of $5,536.98, as commission at the maximum rate allowable, although no such commission had been fixed or allowed by the Court. He further reported that, of a sum of $219 paid by the sequestrators for legal assistance and charged in their accounts, the sum of $146.25 should properly be paid by the sequestrators themselves from their commissions; he accordingly recommended the disallowance of the sum of $146.25.

The judgment of the Court was delivered by Atkinson, C.J. (Acg.)

The reporter states that the sequestrators have paid themselves commissions at the maximum rate, and he asks whether they were entitled to so pay themselves.

The sequestrators have evidently acted as in pursuance of section 211, Ordinance 5 of 1855 (The Amended Manner of Proceeding Ordinance). Sect. 211 runs “No accounting

"party, except as aforesaid, shall be allowed to retain in payment of his "commission any portion of the moneys by him from time to time re- "ceived, but shall wait for the payment of such commission until his ac- "counts shall be passed, when, and not sooner, the Court shall order the "Registrar to make payment of the same out of the moneys of the particular "estate deposited." (*a*). The words "except as aforesaid" refer to the exception in the preceding section 209, which runs as follows: "Every account- "ing party to the Court, except the Administrator General, and the seques- "trators of a plantation, on receiving money for or on account of the rust "with which he is invested, shall, within one week after the receipt thereof, "deposit the same in the Registrar's office . . . . ." (*b*).

To see why sequestrators came to be treated in a different manner from other trustees in respect of their commissions, we must go back to the Manner of Proceeding Ordinance, 26 of 1855 (now 5 of 1855), section 147, which says: "A plantation in cultivation being levied on, the Court, or the "Chief Justice during non-session, upon petition of the Marshal, shall ap- "point two capable persons, of whom one must be the Administrator Gen- "eral of Demerara and Essequebo, or of Berbice, as the case may require, "and if the plantation be under mortgage, the first mortgage, (or his agent), "or in the event of there being no mortgage on said plantation, then some "eligible person shall be the other, to be sequestrators. . . . . ." (*c*).

By section 125 of Ordinance 15 of 1887 (now Ordinance 8 of 1887) schedule 1, sec. 147 of Ord. 26 of 1885 is repealed so far as it requires the Court or the Chief Justice to appoint the Administrator General as one of the sequestrators, and in the section in the 1895 edition of the laws (section 153, Ordinance 5 of 1855) the words "of whom one must be the Administrator General. . . . . ." are omitted.

Sequestrators, it is obvious, stand in a very different position from the other trustees mentioned in section 153 of Ordinance 5 of 1855, inasmuch as they have to manage the plantation, and not only to receive moneys, but to make constant payments on account of the plantation during the period of sequestration, and they are therefore excepted from the

(*a*) See now Rules of Court, 1900, Pt. II., Order III. r. 11.—Ed.
(*b*) See now Rules of Court, 1900, Pt. II., Order III. r. 9.—Ed.
(*c*) See sect. 153. Ordinance 5 of 1855, as amended, 1895 Ed of Laws and see now Rules of Court 1900, Order XXXVI. r. 49.—Ed

obligation to deposit moneys received in the Registrar's Office.

But there is no reason for any distinction between them and the other trustees named in section 153; and the reason why they were excepted in the original section 201 of Ordinance 26 of 1855 (now section 211 of Ordinance 5 of 1855) appears when we find that in section 147, Ordinance 26 of 1855 above cited the Administrator General *must* be one of the sequestrators. He, being a public officer accountable to the Court, entitled to charge or detain his commissions in other matters, was allowed to do the like in these cases. But while allowed to retain the amount to cover his commissions, even he could not appropriate them to himself or his office and his co-sequestrator, until the Court had determined in pursuance of section 151 of Ordinance 26 of 1855 which says, "The amount of remunera- "tion, by commission, to sequestrators shall be determined by the Court, "not, however, in any case to exceed four per cent., on moneys received, "and three per cent., on moneys disbursed." (*a*.) That section is now section 159 of Ordinance 5 of 1855.

It is manifest therefore that sequestrators, although they may under section 211 of Ordinance 5 of 1855 retain an amount sufficient to cover commissions at the maximum rate, have no right to appropriate them until the Court has not only passed their accounts, but has determined what their commissions shall be, if any.

The present matter affords a striking illustration of the wisdom of the maximum *Omnis innovatio plus novitate perturbat quam utilitate prodest,* which we recently cited. The muddle and confusion caused by the renumbering of the ordinances and sections in the "Revised Edition" is and will be never ending. This particular innovation has not even utility to justify it.

The Court made an order that, with the exception of the item charged as commission, and with the exception of the item paid for legal assistance, the accounts of the sequestrators be passed and they be discharged from the trust accordingly.

(*a*) See now Rules of Court 1900. Order XXXVI. r. 55.—Ed.

LIMITED JURISDICTION.

MAHABEAH AGITOLA *v.* LEWIS.

1897. *December* 10. Before ATKINSON, C.J. (Actg.)

Specific performance—Claim for transport—Practice—Identification of property—Rules of Court 1893, *Order I. rule* 12*—Insufficient description.*

This was an action in which the plaintiff claimed a legal and valid transport of a piece of land being "the half of lot No. 18 situate in the village of Sisters" on the west bank of the Demerara river, alleged to have been purchased by plaintiff from the wife of the defendant in March 1897, part of the purchase price having been paid on account, and the balance of which plaintiff was ready and willing to pay.

A. B. Brown, for the defendant, took the objection that the property was not properly and particularly described in the claim.

Correia, for the plaintiff, the description in the claim was sufficient. It was a matter of evidence.

ATKINSON, C.J. (Actg.)

This is a claim for transport of a piece of land. In the answer it was objected that the land was not sufficiently described as required by Order I., rule 12, which says that immovable property must be described with such certainty as to enable an officer proceeding in execution to identify it. In the claim the property is simply described as "a half share of land—being the half of lot No. 18 Sisters village, west bank, Demerara river." That may mean either the north or south or the east or west half, and there is nothing in the description to enable an officer to identify which is the half. *Martin* v. *Pieters* (L.J. November 2nd, 1894) and *Demerara Railway Company* v. *Marques* (L.J. Jan. 25th, 1896) were cited in support of the objection, and following those decisions there will be a non-suit with costs, the non-suit not to have the effect of a final judgment

GENERAL JURISDICTION.

MCKINNON *v.* DAVSON AND COMPANY.

1897. *December* 14, 16.

Before ATKINSON, C.J. (Actg.) and SHERIFF, J.

Practice—Pleadings—Application for better particulars—Rules of Court 1893, *Order XI. rule* 22;. *Order XXIII. rule* 2.

Application under the provision of Rules of Court, 1893, O. XXIII. (*a*) by the defendant for further and better particulars, as provided for in O. XI. r. 22 (*b*), of the matter set out in plaintiff's statement of claim.

The necessary facts appear from the judgment,

C. S. Davson, for the applicant.

N. R. McKinnon, for the respondent.

Curia, per Atkinson, C.J. (Actg.)

This is a motion by the defendant for particulars. The plaintiff in his claim alleges that he was in 1896 and 1897, in the occupancy, under licences from the Governor, of two tracks of land each four miles in facade, on the left bank of the Corentyne river, extending inwards it is not said how far; that on divers days in the months of April to September inclusive, 1896 and 1897, the defendant himself and his agents wrongfully entered the said lands, bled trees thereon, and collected therefrom balata, india-rubber and other substances and converted the same to his own use; that by reason thereof, he, the plaintiff, has lost the said balata, india-rubber and other substances and the profits he would have made from its sale, has been inconvenienced in his business, and has been put to trouble and expense in seeking to protect his interests.

The defendant asks for particulars:—

(a.) Which, if either, of the tracts of land referred to in

(a) See now Rules of Court 1900, Order XL.—Ed.
(b) See now Rules of Court 1900, Order XVII. r. 8.—Ed.

the statement of claim he alleges that the defendant broke and entered, and on what dates respectively.

(b.) From which of the said tracts of land and from what parts of the same respectively he alleges that the defendant collected and converted to his own use balata, india-rubber, or other substances, with the dates of such alleged collection and conversion as to each or either of the said tracts of land, the quantity or quantities of such balata, india-rubber, or other substances alleged to have been collected or converted, and how much of the same is alleged to have been so collected and converted from each or either of the said tracts of land.

(c.) The value of the balata, india-rubber, or other substances alleged to have been collected and converted by the defendant aforesaid.

(d.) Particulars of the profits which the plaintiff alleges he would have made from the sale of the same.

(e.) Particulars of the alleged inconvenience of the plaintiff's business.

(f.) Particulars of the trouble and expense to which the plaintiff alleges he has been put in seeking to protect his interest.

As to (a.), the claim alleges that "the said tracts of land were entered," meaning the two tracts for which the licences were granted. No particulars are required, as both tracts are clearly meant.

As to (b), particulars are required. The two tracts together are eight miles in facade by an unknown depth; it may be a mile or may be ten—eight or eighty square miles as the case may be. The plaintiff must specify approximately, by reference to their distances from the boundaries or in some other way, the parts of each of these extensive tracts of land on which the alleged trespasses were committed. The plaintiff must also specify approximately the dates on which the alleged trespasses occurred, it not being alleged, as was argued at the bar, that the trespasses were continuous, the allegation in the claim being only that they took place "on divers dates in the months" named. The defendant is entitled to know with some degree of precision the times at which he is alleged to have done the acts complained of, to enable him to come prepared to meet the allegations of the plaintiff.

As to the quantities, it would be practically impossible for the plaintiff, under the circumstances, to state in his claim the quantities, if any, of balata or other substances collected

by the defendant or his servants. It is the fact of wrongfully taking, not the quantity taken, that constitutes the cause of action.

As to (c.) and (d.), the values and profits form no part of the cause of action proper, they merely go to the extent of damages and are matters of evidence.

As to (e.) and (f.), the special inconvenience and the special trouble and expense should be more particularly indicated, if special damages are to be asked for in respect of them.

Further and better particulars were ordered to be filed within six weeks, a copy thereof to be served on defendant defendant to file his answer thereto, if any, within ten days of such service. The question of costs was reserved until the determination of the action.

GENERAL JURISDICTION.

GARRAWAY v. MARTIN AND ANR.

1897. *December* 15, 16.

Before ATKINSON, C.J. (Ag.) and SHERIFF, J.

Title to land—Opposition action—Sale at execution—Failure to oppose—Extinction of claim.

On the petition of Martin, leave was granted to levy on the immovable property of Sarah Harop in respect of a petty debt judgment, and as a result of such petition the abandoned plantation Hackney comprising the lands known as and called Muncher or Monger, on the east bank of the Pomeroon river, was levied on and advertised for sale. The sale was opposed by Garraway, the plaintiff, in this action, on the ground that he had purchased at execution sale on April 23rd, 1866 "that piece of land know as Monker or Monger, now being part of the abandoned plantation called Hackney" then levied on at the instance of one Pollard v. Josephine Harrop. Plaintiff further set out that having failed for certain reasons to obtain title after the sale in 1866, the property had again been levied on in a suit against himself, and he had bought it in at execution sale on April 3rd, 1872, since which date he alleged he had been in quiet and peaceful possession of the property.

No appearance was entered on behalf of Martin or Harrop, and the action was heard *ex parte.*

D. M. Hutson, for the plaintiff; led evidence and asked for judgment.

Curia, per Atkinson, C.J., (Actg.)

This is a suit in opposition. The original defendant had obtained a petty debt sentence against the co-defendant, and had levied on "the abandoned plantation Hackney, comprising the lands known as and called Mouncher or Monger,

situate on the east bank of the Pomeroon river" without the buildings thereon. The original defendant and the co-defendant are both in default.

It was stated by the opposer's counsel that the co-defendant, being illegitimate, claimed to have some interest in these lands under the will of her reputed father, which she was not able to produce. Be that so or not, so far as the lands called Monger are concerned, any claim which she might have had would be extinguished by the sale at execution of those lands on April 23rd, 1866, when they were purchased by the opposer Garraway, who swore that he had been in possession of the lands ever since—over thirty-one years—and that he had expended large sums of money in erecting buildings and in putting over three hundred acres into cultivation. It is rather late in the day for the co-defendant now to seek to set up a title.

There was a subsequent sale at execution when the lands were bought in for the opposer. There were certain disputes which were never settled, between the opposer and one Bunbury, which prevented for the time the granting of letters of decree, but into these matters we need not enter.

It is clear that, as against the original defendant and the co-defendant, the opposer is entitled to maintain this opposition so far as the Monger lands are concerned, and there must therefore be sentence in his favour.

GENERAL JURISDICTION.

CAMPBELL *v.* CAMPBELL.

1897. *December* 14, 16, 21.

Before ATKINSON, C.J., (Actg.) and SHERIFF, J.

Husband and wife—Alimony—Application for reduction—Arrears—Insolvency—Contempt of court.

Application by the defendant, in a suit at the instance of his wife for a judicial separation, for an order of the court to vary an order made for the payment of alimony to the plaintiff, by reducing the amount from $30 per month as ordered to $18 per month.

Application set out that the amount of the support due and the costs of the suit amounted to $329, which he was unable to pay, that he had applied for a receiving order, and was adjudged insolvent on April 27th, 1897. He further stated that a judgment summons was issued against him for payment of the alimony then due and that on October 14th, 1897 he was ordered to pay the sum of $60 in cash (which he had done) and the balance $150 and costs, in monthly instalments of $25 each. (*a.*)

Applicant in person.

P. Dargan, for the plaintiff (respondent.)

Curia, per ATKINSON, C.J., Actg.

This is a motion by the defendant for the reduction of the alimony, $30 *per mensem*, payable by him to his wife in terms of the sentence of judicial separation given on March 17th, 1897, to $18 *per mensem.*

It was objected that, as the mover had not complied with that sentence, he was in contempt and could not be heard. The court took evidence in order to ascertain whether the non-payment was wilful or owing to inability to pay. It appears that although he might have made some payment on account, he was, at the date of the sentence and afterwards up to the date of the adjudication of insolvency against him,

(*a*) See above p. 71.

not in a position to pay the $30 per month. The adjudication relieved him as regards all his debts other than the alimony payable in terms of the sentence.

Under a judgment summons he was ordered, on October 14th, 1897, to pay $25 a month on account of the arrears of alimony, and $60 at once. This sum has been paid, as well as some of the other amounts in respect of which the judgment summons order was made. But additional current sums have become payable as to which no payments have been made. As to these the mover might undoubtedly have made some payments on account, although he had other payments to meet, for instance, insolvency expenses, but the question of contempt is entirely for the court, and we do not, looking at the circumstances, think it necessary to consider that question further.

We have considered the facts carefully and have come to the conclusion that the mover, in asking the court to reduce the alimony to $18 per month, has considerably overstated the amount of his absolutely necessary expenditure, and that he can be reasonably asked to pay a larger sum per month.

In dealing with a matter of this kind the court will always endeavour to make such an order as will be best for both parties. The mover's present rate of salary appears to be $84.89 per month, and out of that he has to maintain himself, and a son at present dependent upon him, in the respectable manner which his position requires. As matters stand, he has only that salary to depend upon, and out of that it is obvious he can pay a certain sum only. There is up to the present date a large sum, for a man in his position, owing for arrears of alimony, and each succeeding month the current alimony will become payable. The one sum which he can afford to pay out of his salary and live is the only sum that is applicable for the payment of the alimony accrued and accruing.

We cannot, of course, interfere with the amount that has; accrued up to the present date; we can only deal with that which is to accrue. The mover deserves no sympathy. He has acted very badly both before and since the sentence of judicial separation. But it would be worse than useless for the court to make an order which the mover could not possibly comply with. The order must be for as large an amount as the mover can reasonably be expected to be able to pay, and taking into account all the facts, we think that that amount is $25 per month, and we so order.

This order is to supercede the judgment summons order of October 14th last, and the monthly payments of $25 are in the first instance to be deemed to be payments of $20 as alimony, and $5 as on account of the taxed costs of the judgment summons. When these costs are paid, then the payments are to be deemed to be payments of $20 as alimony, and $5 on account of the arrears of alimony. When the arrears are paid then the payments of $25 are to be deemed to be payments as alimony alone.

The mover must clearly understand that a non-compliance with this order will render him liable to be severely dealt with.

APPELLATE JURISDICTION.

D’ORNELLAS *v.* GOMES.

1897. *December* 31. Before SHERIFF, J.

Contract—Goods sold and delivered—Cause of action—Sale conditional on receipt of gold—Non-suit.

Appeal from a decision of the Stipendiary Magistrate of the Essequebo River judicial district (Capt. B. V. Shaw) who gave judgment for the plaintiff Gomes (now respondent) in the sum of $74.56, for goods sold and delivered.

The reasons of appeal are set out in the judgment, and the appeal was allowed.

Farnum, for the appellant.

The respondent did not appear.

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

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

(a) That there was no evidence to show that the goods were sold and delivered by the plaintiff to the defendant (appellant) or that the defendant (appellant) held himself out to the plaintiff as responsible for the payment thereof.

(b) The evidence established if anything at all a recommendation by the defendant to the plaintiff to give credit to E. A. Semple, the defendant only promising to pay the account on behalf of Semple out of moneys passing through his hands the proceeds of gold to be received from Semple.

(c) That the evidence showed that the defendant was only the agent of a disclosed principal, and therefore not liable on the account sued for by the plaintiff.

(d) Even if the effect of the evidence was to show that the defendant was liable as principal, yet it appeared from the evidence that the defendant’s liability was conditional on the receipt of gold from Semple, and it not

having been shown in evidence that the defendant received such gold, there was no cause of action, and the magistrate ought to have non-suited the plaintiff in such view of the evidence.

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

3. That the magistrate exceeded his jurisdiction in the case by making the satisfaction of the judgment conditional on the receipt of gold from Semple as mentioned in the memorandum of the defendant to the plaintiff, which was admitted in evidence.

The case would appear to fall within 1, (d) and 3 of the reasons of appeal.

The judgment of the magistrate reads thus:—"Judgment for plaintiff for $74.56, payable as soon as the condition named in Crosby & Forbes' memorandum is fulfilled, and costs." The memorandum as far as it is necessary to refer to it says:—"So if you give him credit we shall pay you in instalments what we can out of gold to be received from him." The number of the instalments is not mentioned, nor is the amount of each instalment. The judgment cannot stand. The magistrate in his reasons for decision says:—"I took the memorandum to be a promise to pay on receipt of gold." Quite right; but the magistrate has not given effect to this construction,—until the gold was received no liability to pay had accrued. The receipt of the gold was a condition precedent to the right to sue.

Appeal allowed, with costs.

LIMITED JURISDICTION.

FRASER *v.* MILNER AND ANR.

[BERBICE; 12 of 1896.]

1897, *March* 16. ATKINSON J.

Practice—Address for service—Rules of Court, 1893, *Order I. rule* 8—*Signing of notice by a barrister.*

A domicile paper, under the provisions of Order I, rule 8, must be signed by a solicitor and not by a barrister.

Application by the defendant Milner to expunge the claim of the plaintiff and all other documents from the records filed in the registry on the ground that the domicile paper filed by the plaintiff had been signed by a barrister.

E. A. V. Abraham, solicitor, for the mover. Referred to Rules of Court 1893, Order I. rule 8 (a), and cited *Conrad* v. *De Sousa* (1896, not reported) and *Haynes* v. *Gomes* (1897, not reported.)

S. E. Wills, for the plaintiff. Referred to Rules of Court 1893, Order IV. rule 1.

ATKINSON, J.—In this matter, a motion to expunge a claim, the domicile paper was signed by a barrister at law on behalf of the plaintiff.

The defendant's solicitor objected that it should have been signed by a solicitor and not by a barrister, and cited the case of *Haynes* v. *Gomes* (L. J. Feb. 6, 1897) in which it was decided by Sheriff J. that the signing of a domicile paper must be done by a solicitor, and the claim was ordered to be expunged.

It was said by counsel for the plaintiff that I was not bound to follow that decision, but even supposing that to be so, I think the better course is to follow it and to leave the party affected to take the opinion of the higher Court, if so advised, as to whether the decision was right.

The claim will be expunged with costs.

(*a*) Cf. Rules of Court 1900, Order V. rule 2.—Ed.

GENERAL JURISDICTION.

PADDENBURG v. PEREIRA AND ANR.

1897. *April* 14, 15, 21.

Before Sir E. O'MALLEY, C.J., ATKINSON and SHERIFF, JJ.

Opposition to transport—Opposer in possession of property to be transported—Opposition action—Onus of proving title.

Held, that when the opposer (plaintiff in the opposition suit) is in possession of the property the transport of which is opposed, and such possession is admitted by the transporter (defendant in the opposition suit), the onus of proving his title is thrown on the defendant.

Transport of a portion of Plantation Dantzig was advertised by M. Pereira to J. Joaquin, and was opposed by Guilhermina Paddenburg for herself and others. Possession by the plaintiff was admitted by the defendant.

D. M. Hutson, for the plaintiff.

W. M. Payne, for the original defendant.

Co-defendant in default of appearance.

Hutson for the plaintiff submitted that the onus of proof of title was on the defendant, possession by the plaintiff being admitted

Payne is heard in answer.

Cur. adv. vult.

Curia (per the Chief Justice.)

The question we have to decide here is whether, when the opposer is proved or admitted to be in possession of the land the transport of which he is opposing, the onus of proving his own title is thereby thrown upon the defendant in the opposition proceedings. We are of opinion that it is.

When the plaintiff in the opposition proceedings establishes the fact that he is in possession he establishes his right to the rights of that position. The rights are described and illustrated in *Van der Linden,* pp. 183, 184, and *Van Leeuwen* I. 198. "No one without a previous judgment or decree can be dispossessed and even were he to be dispossessed on the

ground of right of property in another he must first be restored to the possession before his title can be gone into." "Bare possession is sufficient and excuses a person from further showing how he acquired his title"; sufficient, i.e., to entitle him to retain possession until somebody else who disputes his possession has lawfully established his right of property, "so that when any one claims a thing as his property, and cannot clearly establish his right, judgment must always be in favour of the possessor, although the latter offers no evidence in his own behalf."

The plaintiff having proved possession then is entitled to retain possession until somebody else, that is the transporter here, has lawfully established his right of property. We have to determine the point of procedure so as to give effect to this right. The test at this stage is which party would be successful in the proceedings if no more evidence were given? See Best on *Evidence* 7th ed. p. 267. If the right means anything, the answer must be the plaintiff, therefore the onus of proving his title is thrown on the defendant.

Payne is heard and closes his case.

Curia (per the Chief Justice.)

We take it that plaintiff has proved his title to Content as running up to the western boundary of Dantzig, and possession of the same. The proposed transport describes the land to be transported in such a way as to recognise Ramlogan's title to twenty five rods of the eastern part of the said Content. Plaintiff has a right to protect his title and possession of that piece of land, opposing the transport as at present advertised.

The opposition is held good, with costs.

APPELLATE JURISDICTION

KELLY v. DOWREE.

1897. *April* 10. Before ATKINSON, J.

Appeal—Errors in notice of appeal—Giving or receiving notice of appeal—Magistrates' Decisions (*Appeals*) *Ordinance,* 1893 *sect.* 5. (1.)

Appeal from the decision of the Stipendiary Magistrate of the Demerara River Judicial District (H. H. Cunnignham), who convicted the appellant Kelly for wilful trespass on the property of the complainant Dowree, and sentenced him to pay a fine of $10, and to pay $15 to the complainant as compensation, or to undergo one month's imprisonment with hard labour. The appeal was dismissed.

J. R. Neblett, solicitor, for the appellant.

J. A. Abbensetts, for the respondent.

ATKINSON, J.—This is an appeal from a decision of Mr. Cunningham, Stipendiary Magistrate. The case was one of wilful trespass, and was dealt with under section 39 of Ordinance 17 of 1893, the Summary Convictions Ordinance. The notice of appeal refers to a case decided by the magistrate in the Magistrate's Court for the East Bank Demerara River district in its civil jurisdiction. There is no such district, the one meant being apparently the Demerara River Judicial district. The notice would appear to be bad on this ground, but taking it to be good it is a notice having relation to a civil matter, and, therefore, can have no value as a notice in a criminal one.

But it is said that notice of appeal was given in open court at the hearing. Section 5 (1), Ordinance 13 of 1893, enacts that the person who desires to appeal from any decision shall at the time of the pronouncing of the decision and before the opposite party has left the Magistrate's court, by himself, or by his counsel, or attorney at law, give notice in open court to the magistrate and to the opposite party of his appeal.

The magistrate has placed on the record the words "Neblett gives notice of appeal," and it seems from the record that Mr. Neblett appeared for the defendant. That minute would show a notice to the magistrate in open court, but it does not show that it was given before the opposite party had left the court, or that in fact the opposite party had notice at all. It was argued that this court should presume that all the parties were there. This court will presume nothing of the kind. That is a fact which must be proved by the party appealing, and in this case that could have been done in the proper way It was not proved.

The appeal is dismissed with costs.

GENERAL JURISDICTION.

JAMES v. DARDIER.

1897, *January* 5, 6. *February* 22. *March* 22, 24. *April* 15, 26, 27, 18. *May* 3, 4, 5, 11.

Before Sir EDWARD O'MALLEY, C.J., ATKINSON and SHERIFF, JJ.

Mining—Placer claims—Forcible ejection of licensed holder by person claiming prior location—Mining Ordinance, 1887, *section* 27*—Power to make regulations—Mining Regulations* 1892*—Determination of disputes—Creation of special tribunal—Ultra vires.*

Regulations setting up a special tribunal for the determination of. disputes and made under the provisions of the Mining Ordinance 1887, the Ordinance not providing for the making of such special regulations, are *ultra vires* of the powers conferred by the Ordinance.

Costs refused to a successful party who has been guilty of improper conduct.

This was a claim that the defendant Josiah Dardier and all others under his direction or control be interdicted from working on or removing anything from two placer claims on the Tiger creek in the Potaro district. Plaintiff also claimed the sum of $5,000 as damages for the wrongful acts of defendant in dispossessing him of the claims, and further an account of all the gold taken by him, the defendant, from the said claims.

Further necessary facts appear from the judgment.

A. B. Brown, for the plaintiff.

P. Dargan, for the defendant.

Dargan, for the defendant, raised the question whether the Mining Regulations, 1892 were in force from January to October 31st, and asked that the question should be taken first.

After argument thereon decision was reserved.

Posted (January 6th.)

In delivering the decision of the Court on the question raised the Chief Justice said:—

The Court finds it unnecessary to give any opinion as to the question whether the Regulations of 1892 were in force from January to October 31st, 1896, because we think the particular issue involved can be sufficiently disposed of as one turning upon whether the rules in part VIII. of the Mining Regulations, 1892, providing for the determination of disputes, are or are not *ultra vires* of the power to make regulations given to the Governor and Court of Policy by Ordinance 3 of 1887.

It is contended that according to the true construction of those rules exclusive jurisdiction was given to the gold officer to determine disputes to such claims as that in question in the present case. So that the question is whether the ordinance by direct words or by implication gives the Governor and Court of Policy a right by regulations to create a tribunal having jurisdiction and exclusive jurisdiction in those matters. The subjects for which the Governor and Court of Policy may make regulations are defined by section 27 of Ordinance 3 of 1887. We hold that such intention is not to be gathered from those general words, and assuming that the ordinance of 1896 provides a new section in place of section 27, Ordinance 3 of 1887, in which it is provided amongst other things that the Governor and Court of Policy must make Regulations for the determination of disputes, but without giving a decision on the point, we think it right to say that even with such words we would question whether there is any power to create a special tribunal to decide disputes. If it is desired to make such provision the proper way is to do it by ordinance

The hearing of the case was resumed on the dates set out above.

April 26th.

Dargan, for the defendant, objected to the hearing being proceeded with on the ground that the costs of the day granted on March 22nd, had not been paid.

The costs of the day were thereupon paid to defendant’s solicitor in Court.

In view of the fact that the Chief Justice was leaving the colony on April 29th, should the hearing of the action not be concluded by that date the parties agreed to proceed with the hearing on the understanding that they be satisfied with the judgment of the remaining two judges.

The hearing was concluded on May 5th and decision was reserved.

Posted, May 11th.

The judgment of the Court was delivered by Atkinson C.J. (Acting.)

This is a dispute as to the right to possess and work two placer claims situate on the Tiger creek in the Potaro district.

On June 12th, 1895, one Fraser for the plaintiff James, located the two placer claims on a tributary of the Tiger creek which he called Good Hope and Good Faith, respectively. The plaintiff's agent had commenced working these claims when on February 5th, 1896, and on a subsequent day the defendant Dardier with a body of men forcibly ejected them, on the ground that these two pieces of land were part of certain claims which had previously been located by Theobald and company and which had been sold by them to the defendant Dardier and one Childebert. The defendant also filed a complaint with the gold officer of the district, who on March 19th, 1896, walked over the disputed claims with the parties and with E. L. Theobald, the original locator, and after taking evidence decided in favour of Dardier. The plaintiff James, not being satisfied with the gold officer's decision, brought the present action against Dardier claiming to be replaced in possession, and $5,000 damages. He also claims an account of the gold taken from the said claims by the defendant.

We are satisfied upon the evidence that the plaintiff's servants and agents, when they located these two claims, knew perfectly well that the land had been previously located and by whom, and there is good reason for believing also that they deliberately removed the original location boards and replaced them by those of the plaintiff.

It was contended that the plaintiff being actually in possession under a licence the defendant had no right to take the law into his own hands and forcibly eject him, but should have proceeded to recover possession before the gold officer.

That is so. It was further contended that even if the defendant were entitled to the land as holding under the original location, he was bound to replace the plaintiff in possession before he could proceed against him, *Van der Linden,* p. 143 being referred to. That would have been a proper objection to have raised when the matter was before the gold officer, because at that time Dardier was the person seeking to establish his claim as the *bona fide* possessor under a prior location, and if the question had then been raised, that official might have directed the re-instatement of James before entertaining Dardier's claim and proceeding to investigate and adjudicate upon the rival claims. But here it is James not Dardier who is seeking to recover possession of claims which he had located *mala fide* by means of his servants and agents, and, although the defendant Dardier had no right to act as he did, it does not follow, at any rate at this stage of the proceedings when the case has been fully heard and the Court is in possession of the whole case, that the Court ought, even if technically the plaintiff might claim to be re-instated, to so decree, because if it did so decree it would at the same time have to decree that immediately upon the delivery of possession by Dardier to James, the latter should at once re-deliver possession to the former. The proper course is to decide now that Dardier shall retain the possession as representing the original locator. But inasmuch as James had obtained possession formally in pursuance of a licence Dardier had no right to disturb that possession although he had a prior and better title—that is, he had no right to treat the plaintiff James as a mere trespasser, take the law into his own hands and forcibly eject him. The law had provided a remedy to meet such a case and he ought to have lodged his complaint and asked the proper authority to vindicate his rights. Therefore, although the decision in this matter must be in the defendant's favour we feel it our duty to mark our sense of his improper conduct by refusing to give him costs.

The Court discharged the interim order of interdict and the order appointing a receiver made on June 30th, 1896, and rejected the claim for damages and for an account, but without costs.

LIMITED JURISDICTION.

WATT *v.* HINDS AND WATT.

1897. *May* 15. Before KIRKE, J. (acting).

Claim for wages—Gold mining transaction—Status of parties to transaction—Master and servant—Principal and agent—Partnership.

This was a claim by the plaintiff for the sum of $247.53, balance of amount said to be due to him by the defendants, for 8⅓ months' work as manager of the placer of the latter on the Cuyuni river from February 4th to October 15th 1896, at forty dollars a month.

Defendant Hinds set up the defence that plaintiff was his manager for the months of February, March and April only, acting as his agent from May to July, in which latter month his services were discontinued for misappropriation of property, after which he never employed him either as manager or as agent; he further pleaded that plaintiff had received the sum of $95 as remuneration during the period he was employed as stated.

T. W. Phillips, for the plaintiff.

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

KIRKE, J. (acting):—

This is an action to recover the sum of $247.53, balance of an account for wages as manager of defendant's placer in the Cuyuni.

The parties are all related, Hinds is plaintiff's uncle, and Mrs. M. A. Watt is his mother. It appears that in January 1896, Hinds and plaintiff went prospecting in the Cuyuni. Plaintiff sent to town for a licence, which to his disgust came back in Hinds' name. The plaintiff discovered a creek, and located a placer on which Hinds worked as a labourer; they were fairly successful, and Watt came to town with gold on three or four occasions. Watt behaves throughout as a partner, he buys a boat and provisions for the company, signs a promissory note for

Hinds together with his mother, M. A. Watt, sells the gold and pays tradesmen's accounts. When he returns to the placer he only remains two or three days, and returns to town with the gold the proceeds of which are divided between the three of them. He gives credit in his account for different amounts received by him when the gold money was divided.

In July there was a quarrel between Hinds and Watt about some gold not accounted for, and Watt insisted that a legal transfer of the placer should be made to the three partners. The exhibits clearly show that such a treaty was in progress, and that $7.50 had been deposited for the Government fees. Hinds refused to carry out this arrangement, and said he would have nothing more to do with Watt, Watt remained in town for a month living with his mother, who says she did not know who was managing the placer.

At the end of August plaintiff went up to the placer, as he himself says, to represent his mother, stayed one day, and brought down twenty-eight ounces of gold. George Wilson, who was working on the placer for four months, says "Hinds and Long managed the placer, Long was head. Watt came up three times but only stayed one or two days on the placer. Long was in charge from May till September."

In the face of this evidence it is absurd for the plaintiff to claim wages at $40 a month as manager of the defendant's placer from February to October, 1896. I have no doubt that he considered himself and was considered by the others as a partner, but Hinds, knowing that the placer was in his name, refused to surrender any share to the plaintiff, and the plaintiff is now endeavouring to recover part of his share under the guise of wages.

There will be rejection of the claim, but I shall make no order as to costs.

WINTER v. BLACK.

1897. *January* 6, 7, 11.

Before Sir EDWARD O'MALLEY, C.J., SHERIFF, J. and KIRKE J. (Actg.)

Will—Bequest of life interest in premises tore *town property—Failure to pay town taxes—Judicial sale of property in execution—Duty of heirs to legatee—Loss of life interest—Damages.*

Claim by the plaintiff for the sum of $5,427.12 as damages for the loss by her, through the defendants' neglect, of her life interest in the premises known as lot 26 Main Street, Georgetown, or in the alternative such security as the Court might approve for payment by the defendants to the plaintiff of the sum of forty dollars per month so long as she should live.

The defendants objected that plaintiff had forfeited her interest under the will of H. A. Black owing to her non-residence on the premises in question and further that there was no obligation on them to pay the whole of the taxes on the property, that plaintiff had equally omitted to make such payment. Any agreement by them to pay the taxes (which was denied) was without consideration and of no effect.

The facts are fully set out in the matter of the petition of *M. M. Winter; Town Clerk of Georgetown* v. *Proprietor of Lot* 26, *Georgetown* (*a*).

Kingdon, Q.C., S.G., for the plaintiff.

Hutson, for the defendant.

Cur. adv. vult.

(*a*) 1896. L.R., B.G. 22.

Posted, January 11th.

The judgment of the Court was delivered by the Chief Justice, as follows:—

We do not think it necessary for the purposes of this decision to enter into any elaborate discussion of the facts or of the law bearing upon them. As regards the facts they are practically undisputed and as regards the law Very little authority of any kind was adduced on either side in the course of the hearing.

We have to determine first whether the action of the defendants in allowing the house at 26, Main Street, including the upper portion occupied by the plaintiff, to be taken and sold in execution for town taxes was a breach of any duty that they owed to the plaintiff. Under the will of Mr. Black the plaintiff was a legatee and the defendants were heirs, and out of that relationship certain rights and duties were created as between them. We hold that there was given to the legatee a right to occupy the upper part of 26, Main Street in a certain manner for her life time, and that there was imposed upon the heirs the duty of securing to the legatee the enjoyment of that occupancy or at least of doing or allowing to be done nothing in the use and enjoyment of their own interests under the will that would interfere with the legatee's enjoyment of that occupancy. What was the occupancy? It was an occupancy of such a nature and with such incidents attaching to it as had been enjoyed by the plaintiff at the time when the testator made his will; and upon the evidence of Mrs. Winter that was an occupancy free of rent and free of taxes. The defendants in our opinion failed in this duty. They failed to pay the town taxes for the house and suffered it to be taken and sold including the upper part in question. They might have raised money on the house to pay the taxes or they might at least have warned the plaintiff and thus have given her the opportunity of paying them herself in the first instance so as to protect her interests.

The least that the law demands from parties in their position is that they should exercise such care to secure the object of the legacy to the legatee as would be expected from a good *pater familias.* We hold that, acting as they did, they failed in this, and that they are liable in damages to make good the loss sustained by the plaintiff in consequence.

A question was raised as to whether the occupancy mentioned in the will was personal occupancy or whether it included liberty to let. Mrs. Winter's evidence is that during Mr. Black's life time and during her occupation which was continuing at the time when Mr. Black made his will the premises had been let furnished with her furniture, and that she had received the rent for them, and from this and from the language of the will we hold that the occupancy intended included the right to let.

It is difficult to fix with precision the value of the interest lost, but taking the age of the plaintiff and the rental for which the premises let, we fix the damages at $4,500; we do not think that anything is properly claimable for the vat. There will be costs for the plaintiff.

LIMITED JURISDICTION.

D'LYON v. OUCKAMA AND OTHERS.

1897 *May* 18. Before KIRKE, J., (acting).

Negligence—Injury caused by mare—Racing mare of uncertain temper being led on public highroad—Want of proper control—Contributory negligence.

Where a racing mare of uncertain temper is taken out for exercise on a. public thoroughfare, it is incumbent upon the owner or person responsible that she should be under complete control.

This was a claim by the plaintiff, D'Lyon, for the sum of $1,500 as damages sustained by him from the kick of a mare the property of Ouckama and others. Plaintiff claimed that he had suffered this injury on the public highway where the mare, a racing mare "of vicious and mischievous nature and propensity and accustomed to bite and kick mankind" was allowed to be, without any proper control.

For the defendant it was pleaded that they had no knowledge of any such vicious and mischievous propensity in the mare, nor was it true, and further that it was properly and sufficiently secured and led. They further pleaded that plaintiff was guilty of contributory negligence, inasmuch as he placed himself so close to the mare as to be within easy reach of her heels, although the roadway was of sufficient width to allow him to avoid the mare.

A. B. Brown, for the plaintiff.

P. Dargan, for the defendants.

KIRKE, J., (acting).

This is an action for damages and pecuniary satisfaction for injuries caused to the plaintiff by the defendants' horse. The plaintiff claims $1,500 but at the commencement of the trial, the amount was reduced to $800.

On Sunday, August 12th, 1895, the plaintiff was standing on the road leading to Lodge village talking to a woman. A Portuguese boy in the employ of the defendant came along the road leading by a rope the racing mare 'Tappacooma.' As the mare passed the plaintiff she lashed out with one of

her hind legs, and struck him with her hoof in the groin. The effect of this kick was to cause great pain to the plaintiff, and to inflict serious injuries, so that he was incapacitated from work for some weeks, during which time he was attended by a medical man. The injuries turned out to be not so severe as at first was anticipated, but there is no doubt that the plaintiff suffered much pain, and was put to expense in paying his doctor's bill, and the purchase of medicines, besides being incapacitated from earning his living for five or six weeks. Plaintiff has been clerk on a gold placer at $25 a month with food, and just before the time of this occurrence he had been earning $10 a month as a schoolmaster.

The question for me to decide is, whether the defendant's servant was guilty of negligence in the way in which the mare was conducted along the road. Lord Blackburn says: "Those who bring property where they know that they or it may come into collision with the persons and property of others have by law a duty cast upon them to use reasonable care and skill to avoid such a collision."

'Tappacooma' was a mare used exclusively for racing and, like most racing mares, seh was of an uncertain and skittish disposition, nay more, the evidence goes to show that her temper was bad, that she was given to kicking and biting, and the headgroom never went into her stall without being armed with a stick. When a mare like this is taken out for exercise on a public thoroughfare, it is necessary that she should be under perfect control. The boy who was leading the mare was called as a witness for the defence, and he stated that he was leading the mare in a halter by a rope six feet long, holding the end of the rope in his hand. It is clear to anyone who knows anything about horses that he had not the slightest control over the animal. The witnesses all agree that the plaintiff was on the side of the road on the grass, so that there was ample room for the mare to pass along the road without going near to him. The mare was unshod, and the boy barefooted, so they could make little or no noise to attract attention, and in their shoeless condition it is probable that the horse was led by the boy close to the edge of the parapet brushing past the man whom the mare kicked as she passed him.

I am of opinion that there is proof of negligence, and that the defendants are liable, and I assess the damages at $120, with costs.

APPELLATE JURISDICTION

GOMES v. CALLENDAR.

1897, *April* 12, *May* 28.

Before ATKINSON, C.J., (acting.)

Appeal—Essequebo River Boat Regulations 1896*—Boats to which applicable—Power of rule-making authority to impose penalty—Ultra vires—Interpretation Ordinance,* 1891, *section* 21.*—Statute Laws* (*Revised Edition*) *Ordinance* 1894*, section* 16*—Validity and operation of new edition.*

Appeal from a decision of the Stipendiary Magistrate of the Essequebo River Judicial District (Mr. H. Read), who convicted the appellant Gomes for employing a steersman of a licensed boat without having a certificate of competency to act as such, contrary to the provisions of the Essequebo Boat Regulations, 1896. The appellant was fined $24 recoverable by distress, or in default to one month's imprisonment.

A. B. Brown, for the appellant.

Respondent in default of appearance.

April 12th.

ATKINSON, J.—This is an appeal from a decision of Mr. Read, Stipendiary Magistrate, Essequebo River Judicial District, by which he convicted the appellant of a breach of the Essequebo River Boat Regulations, 1896 (a). The appellant's counsel, before proceeding to argue his reasons for appeal, submitted that the regulations themselves were not of any validity and that there could not, therefore, be any conviction as for an offence committed under them. There should, perhaps, have been an objection to this effect before the magistrate, but as the magistrate had jurisdiction in this matter only if the regulations are valid, it is necessary now to consider the question.

(*a*) See now Vol. I. Rules and Regulations pp. 248, 258. Upper River Boat Regulations, 1912, and Lower River Boat Regulations 1912.—Ed.

The contention amounted to this, that although these regulations are mentioned in the index they are not embodied in the Revised Edition of the statute law of the colony, and that no provision having been made to keep them alive the regulations are no longer in force.

Section 11 of Ordinance 1 of 1894 (Statute Laws, Revised Edition, Ordinance) is repealed and a new section substituted by section 16 of Ord. 12 of 1896—passed on the 12th of September, 1896, and evidently in consequence of the decision of the Full Court in *Martins* v. *The East Demerara Water Supply Commissioners* (1896 L.R., B.G., 47) shortly therebefore pronounced. The first sub-section of the new section 11 enacts that "the new edition shall be in all Courts of Justice and for all purposes whatsoever the sole and only proper statute-book of the colony with regard to the ordinances inserted therein." In the case referred to the Court held that the new edition is absolutely and conclusively binding as a statement and correct statement of the statute law of the colony up to February, 1895, the date of the latest ordinance contained therein, being of opinion, though with misgiving and reluctance, which, if I may so say, was very well founded, that it must accept the new edition as the sole authoritative statement of what the law of the colony was in the past up to the date just mentioned. That being so we have this: The new edition became law on the 1st of January, 1896. On that date the ordinance authorising the making of such boat regulations became No. 17 of 1891. Up to that date it was No. 24. The regulations were approved by the Governor and Court of Policy on the 31st of December, 1895. Hence they must have been framed and approved under the ordinance as No. 24 and not under it after it became No. 17. Yet, owing to the way the matter is dealt with by the Revised Edition they must be deemed to have been made in pursuance of No. 17, and not only that but, according to the decision just cited, it must be taken, contrary to the fact, that in the past that ordinance was what it is in the present—No. 17.

Be that as it may, the regulations must, it would seem, be deemed to be valid and in full operation.

It was further objected that the conviction was *ultra vires,* as there was nothing in the ordinance which authorised the Governor and Court of Policy to approve a regulation imposing, or enabling the officer to inflict a fine. That is so.

But sectional (1, b), Ordinance 14 of 1891, enacts that "there may be annexed to the breach of any rule such penalty not exceeding twenty-four dollars as the rule making authority may think fit and any such penalty may be used for and recovered under the Summary Jurisdiction Ordinance." Art. 26 of the Regulations here in question makes a person committing a breach of the regulations liable to a penalty not exceeding twenty-four dollars.

Neither objection, therefore, will lie, and the case must proceed.

May 28th.

After further argument for the appellant, the conviction was quashed.

ATKINSON, C.J. (acting). This is an appeal from a decision of Mr. Read, Stipendiary Magistrate, convicting the appellant on a charge that he "did employ one Thomas Gaskin not having a certificate of competency in that behalf to act as steersman of a licensed boat contrary to the Essequebo River Boat Regulations, 1896."

Section 3 of those Regulations says—

"These Regulations shall apply to the river Essequebo, in its upper course from the foot of the first Falls upwards and its tributaries, and to the rivers Massaruni and Cuyuni and their tributaries, and to boats conveying registered or other labourers to or from any placer or mining claim, or on any prospecting expedition for gold or precious stones, or to or from any wood-cutting or balata grant."

And Sec. 14 (1) says—

"Every person who—

(b.) employs or allows to be employed any person not having a certificate of competency in that behalf to act as steersman or bowman of a boat shall be guilty of a breach of these regulations."

One of the reasons for appeal is—

"That there was no evidence to show that the alleged employment of Francis Gaskin as steersman, was in respect of a boat conveying registered or other labourers to or from a placer or mining claim, or any prospecting expedition for gold or precious stones,—or to or from any wood cutting or balata grant."

The words “a boat” in clause (b) can refer only to one of those boats to which the regulations apply, and they are specified in sect. 3,—the Legislature having left unprotected the lives of persons who face the dangers of the rapids on trips of pleasure, or exploration, or duty, outside of the cases stated. To bring the case within the regulations, it was necessary to prove that the boat in question was a boat used in one of the ways specified in sect, 3. That not having been done it was not proved that there had been a breach of the regulations. The conviction, therefore, cannot stand.

The conviction is quashed with costs.

APPELLATE JURISDICTION

MCGOWAN & CO. v. FERREIRA.

1897, *May* 29, Before KIRKE, J., (acting).

Sale of goods—Purchase and sale—Delivery of goods— Acceptance.

The plaintiffs, McGowan & Co., claimed from the defendant the sum of $19.60, as the amount due to them for clothing supplied to defendant. The magistrate held that the claim for price of the goods supplied would not lie, as the defendant had not appropriated, or accepted the goods since their completion. He accordingly non-suited the plaintiffs, who now appealed.

The reasons of appeal appear from the judgment.

D. M. Hutson, for the appellants.

W. M. Payne, for the respondent.

KIRKE; A.J.—This is an appeal from Mr. Nicoll, Stipendiary Magistrate, then acting Police Magistrate of Georgetown, sitting in his court of civil jurisdiction.

The reasons of appeal are as follows:

1. That the decision is erroneous in point of law because on the evidence the complainants' case had been fully proved, and judgment should have been entered for the complainants.

2. That the defence established the fact that the suit of clothes sold and supplied to the defendant was not a misfit as alleged by the defendant.

It appears from the evidence that respondent Ferreira ordered a suit of clothes from the appellants to be delivered to him at Plaisance on Friday—the clothes were not sent till Saturday, and respondent swears that on trying them on he found that they did not fit, which fact he telephoned to appellants. He took the clothes back to the store, and although the appellants agreed to make and did make certain alterations in the garments respondent refused to take them.

The only question to decide is: Was there an acceptance by the respondent of these goods? The receipt is not disputed and the respondent seems to have taken a reasonable time to decide whether he would accept them or not. The second reason of appeal is not good in law, for it did not signify whether the clothes were a misfit or not. The respondent was still at liberty to reject them. Lord Blackburn says: “It is immaterial whether the buyer’s refusal to take the goods be reasonable or not. If he refuses the goods assigning grounds false or frivolous or assigning no reason at all it is still clear that he does not accept the goods and the question is not whether he *ought* to accept but whether he *has* accepted them.”

There can be no doubt from the evidence in this case that the respondent never accepted the goods, and whatever remedy the appellants may have against him it is clear that they cannot recover the value of these clothes in an action for goods sold and delivered.

The decision of the magistrate is upheld, and the appeal dismissed with costs.

APPELLATE JURISDICTION.

LOPES v. SANTOS.

1897. *May* 31. Before KIRKE, J. (acting.)

Interpleader—Moneys, proceeds of sale of judgment debtor's property, in hands of third party—Sale for benefit of creditors—Property seizable in execution—"Sums of money due"—Petty Debts Recovery Ordinance, 1893, *section* 44.

D. handed over to a creditor S. certain property to be sold for the benefit of S. and other creditors. The property was sold and the proceeds were in the possession of S. L., another creditor, proceeded to judgment against D., and instructed the bailiff to levy on the moneys in the possession of S.

Held that the proceeds of the sale in the possession of S. were not "other sums of money due" to D., and were not attachable under sect. 44 of the Petty Debts Recovery Ordinance, 1893.

Appeal from the decision of the Stipendiary Magistrate for Georgetown (Mr. W. Nicoll) in an interpleader suit, in which one Santos claimed the sum of $60, in his possession which had been levied on by the bailiff under a judgment at the instance of one Lopes against D'Aguiar. Lopes levied on the money as the property of D'Aguiar. The magistrate decided that the levy was bad, and Lopes appealed.

D. M. Hutson, for the appellant.

P. Dargan, for the respondent.

KIRKE, J., Ag.—This is an appeal from Mr. Nicoll, then acting Assistant Police Magistrate of Georgetown, sitting in his civil jurisdiction.

The reasons of appeal are:—

1. That the Magistrate's Court had no jurisdiction in the case.

2. That the decision of the magistrate was erroneous in point of law.

In three sub-sections the reasons why the decision was erroneous are set out in full, but at the hearing only one was insisted upon and argued, viz.: "That it was fully and clearly established that the claimant was in pos-"session of monies exceeding the sums mentioned in the writ of exe-

"cution, and the said sum sought to be levied was executable or leviable as "the property of the execution debtor under sections 43 and 44 of Ordi- "nance 11 of 1893."

It appears from the evidence that A. R. D'Aguiar owed money to various creditors, who pressed him for payment. He agreed to hand over to Santos, who was his largest creditor, all his properties and stock-in trade to be realized by Santos, and the creditors paid. D'Aguiar owed Santos $680, Vieira $371, and Lopes $45. Lopes sued him for this amount, obtained judgment, and then levied on the money which Santos held by the disposal of D'Aguiar property for the benefit of his creditors. The ordinance, 11 of 1893, section 44, enacts that "every bailiff executing any process of execu- "tion issuing out of the Court against the movable property of any person "may also attach any salary, wages, or other sums of money due to such "person." The money levied on in this instance had ceased to be D'Aguiar's. He had handed over all his property to Santos, and the money obtained from their sale belonged to his creditors, of whom Lopes was one. The property realised $450, the liabilities appear to have been over $1,000. I consider that the words "other sums of money" mean sums of money *ejusdem generis* with wages and salary, and therefore not attachable under section 44.

With regard to the first reason of appeal, I think that the jurisdiction of the court was clearly shown.

The decision of the learned magistrate is upheld, and the appeal dismissed, with costs.

APPELLATE JURISDICTION.

GONSALVES v. WOOD.

1897, *June* 12. Before Sheriff, J.

Appeal—Landlord and tenant—Goods of third party brought on premises for temporary purpose—Landlord's tacit hypothec—Principal and agent—Liability of principal.

A landlord's hypothec for rent does not attach to goods the property of a third party brought on to the premises for a temporary purpose only. The question as to what is a reasonable or unreasonable time for such purpose must depend upon the circumstances of each particular case.

A principal is not liable in trespass for the act of his agent unless he authorised it before hand, or subsequently assented to it with knowledge of what had been done.

Appeal from a decision of the Police Magistrate of Georgetown (Mr. H. Kirke). The plaintiff Wood, claimed the sum of $100 as damages for illegal distress. All necessary facts fully appear from the decision of the magistrate, and the judgment of the Appeal Court. The appeal was allowed.

The decision of the magistrate (Mr. H. Kirke) was as follows:—

The plaintiff claims $100 damages for illegal distress. Mrs. Wood, who is suing by her husband, as they were married in community of goods, had been living at Bartica. Her husband who is a clerk to Garnett & Co., was removed to Rockstone and until he could obtain a house for her, Mrs. Wood removed her furniture to her sister's house in Regent Street, Georgetown.

The defendant obtained a distress warrant from the police magistrate, and broke into the house in Regent Street, and carried off the plaintiff's furniture, which was sold, and defendant received the money from such sale.

The legal points to be considered in this case are:—

(1.) Was the warrant illegally obtained?

(2.) Was the defendant liable for the illegal acts of the agent?

(3.) Had the landlord a hypothec On the goods of a guest or lodger in his tenant's house?

(4.) Can the plaintiff in this case bring an action for damages, having failed to replevy?

1. With regard to the warrant, it was obtained under section 3, Ordinance 4 of 1846, (Rents, etc., Recovery Ordinance) (*a*), and it was urged that it was illegally obtained, as the agent swore that two terms of rent were due, whereas in reality three or more terms were in arrears. But I think that the section which is somewhat obscure means, provided always that no rent in any case in which the same is in arrears shall be recoverable under this ordinance for more than two months or double the period of time contracted for. The object of this restriction is clear. It is to prevent landlords allowing their tenants to run up large arrears of rent, and then levying on them by summary execution under a warrant obtained on the oath of the landlord alone. The fact that the tenant might be in arrears for more than two terms would not invalidate the warrant to recover two terms rent, which is all the law allows to be recovered by summary execution, provided such rent in arrears does not exceed $240.

2. The question whether the defendant was liable for the illegal acts of his agent cannot arise in this case, as Gonsalves accepted his agent's acts and benefited by them, receiving the money which had accrued from his illegal seizure and subsequent sale.

3. The arguments as to whether the landlord has a claim to all goods found on his premises was thoroughly thrashed out by Sir William Snagg, C.J., in the case of *Cornwall v. Gonsalves* (Inf. Ct. Sept. 30th, 1871), and that learned judge decided that the landlord had no interest in the plaintiff's goods which were not taken into the house to remain, but only until he could hire another, which was the plaintiff's position in this case.

4. I am of opinion that although be did not replevy, the plaintiff may bring an action for damages under sect, 15 of ordinance 4 of 1846 (b).

In this case the defendant had no warrant to break and enter the premises, but he broke and entered his tenant's house and carried away the plaintiff's furniture which was sold, and pocketed the money. I think the plaintiff has made out a case and I award him $85, and costs.

(*a*) See now sect. 5, Ordinance 9 of 1903.—Ed.
(*b*) See now sect. 14, Ordinance 9 of 1903.—Ed.

The defendant appealed from this decision, his reasons being set out in the judgment below.

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

No appearance by or on behalf of the respondent.

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

1. 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.

2. That the decision is erroneous in point of law.

(a) Because on the facts proved before the magistrate, the plaintiff had no cause of action as laid against the defendant, inasmuch as it was not proved that there was any privity of contract between the plaintiff and the defendant.

(b.) Because there was no proof that any duty flowed from the defendant towards the plaintiff in respect of the occupation or tenancy of the premises alleged to have been unlawfully broken and entered.

(c) Because the goods levied upon were proved to have been on the premises at the time of such levy and during the term when the rent for which the said levy was made, accrued due, and previously, and that in law the said goods were at the time of said levy subject to the legal and preferent mortgage of the landlord for rent due in respect of said premises.

(d) Because on the evidence the appellant would not be liable for the unauthorised and illegal acts of his agent acting beyond the scope of his employment nor could the agent bind his principal (the appellant) by the illegal acts of a third person acting on the instructions and at the request of the agent.

(e) Because if any illegal acts were committed before the entry of the bailiff (the door being open), that the appellant was not in any way connected or responsible for such acts to the plaintiff.

(f) Because it was not proved that the furniture in respect of which the plaintiff made his claim was on the premises where the levy was made with the consent approval or knowledge of the plaintiff, or that the said furniture or any part thereof belonged to the plaintiff.

Put shortly the case was argued before under two heads.

1. It was said that the goods of the plaintiff found in the appellant's premises were liable to the landlord's hypothec. That the doctrine laid down by Sir Wm. Snagg in *Cornwall v. Gonsalves,* (Inf. Ct., Sept. 30, 1871) viz., that the landlord had no interest in the plaintiff's goods which were not taken into the house to remain, but only until he could hire another premises should not be extended to the present case when the occupation continued for about two months, and when the owner knew that the tenant was in arrears for rent. I have consulted two decisions, *Strong v. de Freitas.* (Feb. 4th, 1892) and *Juister v. Sharples,* (Dec. 14th, 1894), and I see no reason for differing with the learned magistrate. There is no fixed limit of time. Each case must depend on its own particular circumstances, and I. cannot say that two months was an unreasonable time within which to procure another abode. In the absence of her husband the wife had sufficient control over the furniture so as to bind him as to a temporary disposition thereof.

2 . The other point was that in the absence of evidence that the appellant authorised the illegal acts of his agent the mere receipt of the proceeds of the levy by appellant without more would not amount to such a ratification as to be binding on him. It must also be shown that at the time he accepted such proceeds it was with knowledge of the illegal acts of his agent. There is no such evidence in this case. *Freeman v. Rosher,* (13 A. & E., N.S. 780) was cited. On the strength of this authority which does not appear to have been brought to the notice of the learned magistrate, the decision must be reversed. No order as to costs.

GENERAL JURISDICTION

TEIXEIRA v. GOMES.

1897 *June* 14, 28.

Before ATKINSON, C.J., Sheriff, J. and KIRKE J., Ag.

Inheritance—Repudiation of bequest—Legitimate portion.

This was a claim by Alexander Teixeira as executor of Cesaria Cardida D'Andrade, and others for a declaration that the said C. C. D'Andrade was, and the plaintiffs, now are, entitled to her legitimate portion in the estate of her son Alexander A. D'Andrade, and for the payment of such legitimate portion.

Alexander D'Andrade whose estate was said to be of the net value of $300,000 or thereabouts, died on Dec. 13th, 1893 bequeathing to his mother the monthly sum of $100 for the term of her natural life, and bequeathed the rest of his property to the defendant.

By a notarial act dated January 12th, 1894, Cesaria C. D'Andrade repudiated the above bequest and claimed her legitimate portion. She died on October 19th, 1895, naming the plaintiff as her executor.

Objection was taken to the claim by the defendant:—

(i) that paragraph 4 of the claim, which stated that the only relatives of Alexander D'Andrade who survived him were his mother Cesaria C. D'Andrade and his sister did not establish the right of the mother to a legitimate portion in her son's estate;

(ii) that A. A. D'Andrade was not previously to his death or at any time domiciled in this colony;

(iii) that no statement of the amount claimed as legitimate portion is set out;

(iv) that the plaintiffs have not disclosed in them any right to bring the action in question.

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

D. M. Hutson, for the defendant.

Curia (ATKINSON, C.J., Ag., SHERIFF J., and KIRKE, J. Ag.) per KIRKE, J., Ag.

As to the first objection, the question is, does paragraph 4 of the claim, if proved by evidence, establish the right of Caesarea Candida D'Andrade to a legitimate portion in her son's estate? We think it does.

The domicile of D'Andrade is what alone concerns us in this case, and that is asserted as being in this colony; and the judgment of the Court will only affect the property which is within its jurisdiction.

As regards the third objection a claim can be made for the legitime generally without defining the exact proportion of the estate sought to be recovered. The legitime is in itself a fact recognised by law. This has been already decided by this Court in the case of *Camacho v D'Aguiar,* 1895, L.R., B.G., 84.

As to the fourth objection, the parties joined with the executor in this action are not described as heirs, but there seems little doubt that they were heirs in the will by which was bequeathed to them all the property of the testator equally and absolutely; and it seems to us that these parties stand in the place of the testator, and if her claim to the legitime were good theirs must be equally good, and they are suing for their rights.

With respect to the fifth objection it would seem impossible to admit that a stranger like the defendant who can have no claim to the legitime in question, either with or without the will, can be allowed to question the rights of the parties as heirs under the will of their grandmother. It was evidently the intention that the executor should remain in possession of the estate until the provisions of the will were carried into effect; see *Garnett v. Exors, of Macintosh,* 1861, L.R., B.G., 66.

The objections are overruled.

The parties subsequently came to a settlement and judgment was given in terms of the joint minute of settlement signed by the parties.

GENERAL JURISDICTION

STEELE and OTHERS v. DUNDAS.

1897 *June* 16, 17, 21, 25, 29, 30, *July* 3.

Before SHERIFF, J., and KIRKE, J. (Acting.)

Will—Inheritance—Action to set aside—Next of kin and heirs ab intestato—Right to sue—Nomination of heir—Formalities as to execution—Character of witnesses to will—Legality of bequest to "infamous" person.

A will is not invalidated by reason of the fact that no heir has been instituted therein.

The right to set aside a will when the legitimate portion has been improperly withheld is not transmitted to an heir except when the deceased has already brought or commenced his action with the intention of prosecuting the same.

Quaere whether a concubine, as distinguished from an adulteress, is in this colony at the present day an "infamous" person and as such debarred from taking a bequest under a will.

Claim by Adolphus Steele, John Roberts and Jonas Ramsay against Eva R. Dundas in her capacity as executrix under a document purporting to be the last will and testament of Solomon Benjamin Roberts (1) that the said will be declared to be invalid and of no effect, and consequently that Solomon Roberts died intestate; or

(2) that the said Solomon Roberts died intestate so far as regards the property in the will bequeathed to Eva Dundas; or

(3) that the plaintiffs be declared to be entitled to one-third of the estate as their legitimate portion, and that defendant be ordered to render accounts.

The first two plaintiffs were the illegitimate children of Leonora Ramsay, testator's sister, Jonas Ramsay being a son of a uterine brother of the testator.

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

Neblett, for the plaintiffs.

Hutson, for the defendant.

Hutson proceeded to argue preliminary objections to the claim.

June 17. The following decision was given on the objections raised.

Curia (per SHERIFF, J.)

In this action the plaintiffs claim:—

(1) that the will of Solomon B. Roberts be declared invalid;

(2) If the will be admitted, they claim their legitimate portion as heirs;

(3) If the will be admitted as good in itself, that it be set aside as being drawn up in favour of an "infamous" person.

It is objected by the defendant:—

(a) That the plaintiffs have not shewn in their claim that they have any right to sue at all;
(b) that the claim does not show such circumstances as would entitle them to claim their *legitime*; and
(c) that as nephews they have no right to bring an action to set aside a will on the ground that the beneficiary is an "infamous" person.

In their claim the plaintiffs describe themselves as nephews of the testator, children of his brother and sister respectively, as "next of kin" and heirs *ab intestato.* The primary and proper meaning of "next of kin" is the nearest in proximity of blood (whether of the whole or half blood) living at the death of the person whose next of kin are spoken of. See *Stroud's* Judicial Dictionary p. 509. So the words "next of kin" in the claim necessarily imply that the plaintiffs were the nearest in proximity of blood to Roberts when he died; as such they would have been heirs *ab intestato* in the case of Roberts dying intestate. If this be so the plaintiffs are clearly entitled to bring an action to set aside the will as a forgery.

We consider that there is no necessity to decide the other points raised until the validity of the will be established or otherwise.

The hearing of the action proceeded and evidence was led for the plaintiff. On the close of the case for the plaintiff as regards the allegations of fraud and forgery Hutson was heard in answer and asked that the Court rule whether the defendant should be called upon to adduce evidence.

June 25.

Curia (per SHERIFF., J.)

The will of Solomon B. Roberts has been attacked by the plaintiffs as a forgery. They may believe what they say, but they have not by the evidence produced proved forgery nor fraud and conspiracy as pleaded, but in our opinion they have established facts which cast doubt upon the genuineness of the will. A perusal of the will itself does not help to dispel our doubts so we consider that the onus is thrown upon the person propounding the will to prove its validity.

Evidence was thereupon led for the defence.

June 29.

ATKINSON, C.J. (acting) informed counsel that SHERIFF, J., was indisposed and would not be able to attend Court for a few days. He intimated that if the parties were willing KIRKE, J., (Ag.), would continue taking the evidence in the case and then confer with SHERIFF, J., and give decision during the vacation. He (ATKINSON, C.J., acting) would sit with KIRKE, J., in order to constitute the Court but would take no part in the decision.

The proposal was consented to by counsel.

The hearing was concluded on June 30th and decision reserved.

July 3rd.

The decision of the Court (SHERIFF, J. and KIRKE, J., Ag.) was given by KIRKE, J., Acting.)

Solomon B. Roberts died on the sixth day of December, 1896, leaving a last will and testament dated December 3rd, 1896, which will was deposited and recorded in the Registrar's Office on the fourth day of January, 1897.

The plaintiffs Steele and Roberts are the children of one Leonora Ramsay, a sister of the testator. The plaintiff Ramsay is the son of a uterine brother of the testator, and in the action they claim that the said will of S. B. Roberts be declared invalid, his estate to be declared partly intestate and the property bequeathed to the defendant by the said will to be handed over to the plaintiffs and that they be declared entitled to one-third of the testator's estate.

The reasons given for this claim are shortly as follows:—

(1) that the will of December 3rd, 1896, is a forgery;
(2) that it was obtained by fraud and conspiracy;
(3) that even if Roberts made the will it is bad and undutiful;

(a) because no heir has been nominated;
(b) because the legal formalities prescribed by law were not followed;
(c) because one of the witnesses who signed the will was not of good character as required by law;
(d) because the bulk of the property has been left to an "infamous" person;
(e) because the plaintiffs are heirs *ab intestato,* and have been illegally passed over.

The first two objections may be taken together. Roberts Who had not been in good health was taken ill on Tuesday, December 1st, and died on December 6th. On the first, second, and third days of December he was visited once a day by Dr. Fisher, and it was not until Friday that serious symptoms developed which necessitated an operation on the Saturday. On Sunday Roberts rallied a little but sank suddenly and died about 2 p.m. The will is said to have been made on the Thursday before the serious symptoms developed and we have evidence from independent sources that on that day Roberts was in the possession of his senses, conversed rationally, and knew every one around him and all that was passing before him. The same morning at his request a petition was drawn up for obtaining a marriage licence, and he himself requested a friend of his named Major to go for someone to make his will. The will was drawn up by one Applewhite and was signed by Roberts with a cross in the same way that he had signed the petition in the morning. One of the chief objections to the will was that as Roberts could read and write he could not have made his mark; but literate men when tremulous from excitement or illness often make their marks when their shaking hands refuse to obey their nerves. We have known high officials of this colony unable to sign their names in the Supreme Court when under the influence of nervous excitement.

Several other objections to the will in itself were put forward and it was plausibly argued that although each fact might not in itself be of much importance yet when grouped together they raised serious doubts as to the validity of the will. It is not necessary to state all these points in detail; suffice it to say that we attach little importance to them, and in the face of the direct evidence as to the making of the will they have little or no value. We are of opinion that the will was not a forgery but was what it purports to be.

With regard to the conspiracy we are asked to believe that the defendant Dundas, Applewhite, and Major conspired together to defraud; that they stupified Roberts with drugs and when he was in a state of unsound mind they concocted the will and obtained Roberts' mark to it when he knew not what he was doing. Of this conspiracy there is not a tittle of evidence; there is nothing to show that Dundas, Major and Applewhite ever met together before December 3rd, 1896. Major was a friend of Applewhite, and Dundas had known him many years ago, but Major says he went over to the West Coast by the 3 p.m. ferry as soon as he had told Applewhite that Roberts wanted Mm, and Dundas swears she had not seen Applewhite for years until she saw him on the afternoon of December 3rd; and these statements remain uncontradicted. Where then is the evidence of conspiracy? There is indeed some evidence that, after the testator's death, Applewhite endeavoured to get a written authority from the defendant to act as her agent but nothing appears to have been definitely settled.

But the plaintiffs further urge on the Court that even if Roberts made a will as described it is bad for the reasons assigned.

(1) That no heir was nominated in the will, that the word "heir" must be used and some person so nominated.

No doubt the law of the XII. Tables and the most antiquated Roman laws such a process had to be gone through. But we are dealing now with modern Roman Dutch law, and it is clear from all the authorities that it is not necessary to use the word "heir." See *Van der Linden* p. 132. *Van der Keessel* (Thesis 290) says—"At the present day a testament where no heir has been instituted is valid."

(2) That the legal formalities prescribed by law were not followed.

Ordinance 3 of 1839 enacts that all wills "shall and may be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall and may be made and acknowledged by the testator in the presence of two witnesses present at the same time." It was argued that Roberts never directed his will to be signed, but there is evidence that he held the pen when his mark was made in the presence of the two witnesses, which is a sufficient direction.

It was also argued that Roberts never acknowledged his signature in the presence of the subscribing witnesses, but

that is only necessary when the will was signed in their absence.

(3.) It is said that one of the witnesses subscribing the will was not of good character.

Grotius says that witnesses to a will must be of good character. (Juris., p. 129). One of the witnesses was once a stipendiary magistrate's clerk and was dismissed from the Government service for misconduct, irregularity, absence from office, and irregular accounts—very good reasons indeed for dismissing a man from a post of great responsibility, but not sufficient to brand him as a man of such bad character as to be incapable of performing such a very simple function as that of witness to a legal document.

(4) The property was principally left to a woman who is known in law as an "infamous" person, who cannot inherit against the heirs *ab intestato.*

In this matter we have to consider two points. Was the defendant an "infamous" person? and if so, have the plaintiffs a right to claim as against her?

Amongst infamous persons as described by *Voet* (5.2.10) are classed prostitutes, concubines, the offspring of adulterous or incestuous connections; but under Roman Dutch Law although concubinage was disapproved of, it was not forbidden to leave anything by testament to concubines. A bequest to a concubine was only invalid when the concubinage was accompanied by adultery or incest—which would seem to be *Voet's* idea when he places concubines between prostitutes and the offspring of adulterous or incestuous unions. But we feel obliged to pause before we apply to the defendant Dundas the epithet of "infamous." Roberts was a widower without legitimate children; the defendant went to live with him and has lived with him and with him only for twenty-five years. She has kept his house, nursed him when sick, helped him in his business, and by her assistance and economies has helped him to raise himself from the position of a poor man to one of comparative affluence. He was well aware what he owed to her and but for the sudden collapse which hastened his death she would have been his lawful wife, seeing that several days before his death he had, as already stated, applied for a marriage licence in which her name was placed. We must consider the environment of this woman. Actions which are infamous in China or India pass unnoticed in Europe. And in this colony if we were to judiciously brand Dundas as

infamous we should be applying the epithet to half the women who inhabit the colony. Concubine though she may be and in legal phraseology an infamous person, she is certainly not so in the ordinary and accepted meaning of the word, far from it.

But taking it for granted that she is legally an "infamous" person, have the plaintiffs the right to oust her from her inheritance under the testament of Roberts? The right to set aside a will when the legitimate portion or legal inheritance has been improperly withheld is not transmitted to an heir except when the deceased has already brought or commenced his action with the intention of prosecuting the same, *Van Leeuwen, I.* p. 358. So it is clear that the plaintiffs cannot have any right to bring this claim on the ground of being Roberts' nephews representing their parents. Brothers and sisters can be even disinherited and yet they cannot set aside a will unless an "infamous" person has been instituted heir, but beyond brothers and sisters the complaint *ab intestato* is not allowed to others, neither to brothers on the mother's side nor to brother's children. *Voet* 5.2.11; *Censura Forensis,* 3.4.6. So it appears that even if we admit that defendant was a concubine who cannot inherit sender a will, the plaintiffs have not the right of complaint *ab intestato,* and cannot oust her. The old limitations which were imposed upon the testamentary power have gradually been relaxed, and whilst upholding the law, it would seem to be the duty of this Court not to encourage such actions as the present one, and to allow people as much latitude in the disposal of their property as the most liberal interpretation of the law will permit. It seems absurd that a man should be hindered in the disposal of his property according to his wishes because of the so-called claims of his sister's illegitimate children.

There will be judgment for the defendant with costs.

IN RE B., A SOLICITOR.
EX PARTE THE ATTORNEY GENERAL.

1897, *June* 23, 24, *July* 1.

Before ATKINSON, C.J., (Actg.) SHERIFF J. and KIRKE J., Acting.

Solicitor—Professional misconduct—Acquittal on charge of larceny—Effect of acquittal as regards misconduct disclosed—Custody and care of money held in trust.

Motion by the Attorney General for an order that the admission of B. to practice as a solicitor be cancelled and that he be precluded from practising as a solicitor in British Guiana, on the ground that he had been guilty of gross misconduct, and was an improper person to further practise as a solicitor.

The document, relied upon were—

(i) Certificate of admission to practise;
(ii) Official Gazette notifying such admission;
(iii) Indictment preferred by the Attorney General against the said B. for larceny;
(iv) Judge's notes of the trial of the said B. for larceny, with the documents produced in evidence.

Kingdon, Q.C, Acting Attorney General, in support of the motion.

Wills, for the respondent, objects that the court cannot sit in review of the finding of the jury in the criminal charge against B., and that no charge of any particular act of misconduct is contained in the motion, the charge as therein set out being too general in its terms to call for an answer.

The objections were overruled.

Wills proceeds to show cause and the respondent B. is examined on oath.

Cur. adv. vult.

Posted, July 1st.

The judgment of the Court was read by Kirke J. (acting):

This is a motion by the Attorney General for an order

that the admission of B. to practise as a solicitor before the Supreme Court of British Guiana be cancelled, that his admission be expunged from the records of the said Court, and that he be precluded henceforth from practising as a solicitor in this colony, on the ground that the evidence given at the recent trial of the said B. for larceny shows that he has been guilty of gross misconduct and is an improper person to remain a solicitor or to further practise as a solicitor before the court.

It was contended by counsel for the respondent B. that the acquittal on the charge of larceny was equivalent to a decision that the respondent had not acted improperly with respect to the cheque which he had been charged with stealing. That is not so. The verdict of the jury only amounts to this, that the evidence did not establish all the requisites essential to the technical offence termed larceny. It does not follow that, because the respondent has not been guilty of larceny, he has not been guilty of improper conduct as a solicitor. Solicitors are officers of the court amenable to the discipline of the court, and the acting Attorney General was in duty bound to move the court, if, in his opinion, the respondent had been guilty of acts which showed that he ought not be longer permitted to practise as a solicitor.

The respondent was put into the witness box and gave his version of the circumstances, and we have now to deal with the motion upon his evidence and upon the evidence taken or produced at the trial, oral and documentary.

It seems that two men named Jones and Rodrigues had been partners in a gold expedition in the Pomeroon district and had secured 24 oz. 8 dwts. of gold. A permit to remove the gold had been issued in the name of Jones who had come to town leaving the gold and the permit to be brought to town by Rodrigues. Jones apparently heard or suspected something and went to the respondent on the morning of Saturday, April 24th last, to consult him about stopping the passing of the gold at the Gold Commissioner's office. About ten o'clock on the same morning B. went to the Commissioner's office with Jones. There they saw a man named Gonsalves handing in the gold in question to be passed. B., acting as Jones' solicitor, objected and the Gold Commissioner detained the gold until Rodrigues, the other partner should be in attendance.

On Monday, April 26th, Rodrigues was in town. B. went with Jones to the shop of one Serrao where they saw

Rodrigues and there was some discussion. Rodrigues claimed to have $166, money spent by him for provisions and other things for the expedition, repaid in addition to the sum of $140 paid by him to the labourers. B., for Jones, admitted the claim for $140, but refused to admit that for $166, and no agreement was come to.

Later in the day the parties met at the Gold Commissioner's office and then Mr. E. A. V. Abraham appeared as Rodrigues' solicitor. He claimed to have the sum of $166, as well as the sum of $140, repaid and the balance divided, producing a contract in writing between the parties in support of his contention. B. objected to the Cold Commissioner looking at the contract as it was not duly stamped. The Commissioner detained the contract, the parties being told that they would have to pay, and they subsequently did pay, a penalty of $24, and twelve cents for the stamp on the contract. No settlement was come to. So far there was nothing improper in B.'s conduct, except in his keeping from Jones the fact that he intended to charge him a fee of fifty dollars.

Jones, possibly not relishing the first result of B.'s professional efforts on his behalf, which had let him in for the penalty, met Rodrigues later in the day at the market stelling and there, he swears, they settled their dispute. He swears further that having done so he went to B.'s office that same afternoon, paid him $10 the fee agreed upon, and told him he did not require his service any longer. B. on the other hand swears that no fee was agreed upon and that the $10 was paid to him by Jones as part of the fine of $24 that was to be imposed upon him, that Jones asked him to advance the balance of $14 and deduct it out of the proceeds of the gold, and that he agreed to this. B.'s clerk and a man named Cameron tell the same story, but Jones denies having either paid the $10 on account of the fine or having said anything to B. about the fine.

There are several reasons which lead us to doubt the truthfulness of B.'s story on this head. In the first place the twenty-four dollars was not a "fine" imposed upon each of the parties to the agreement, or for that matter a fine at all. By section 27 of the Stamp Duties Management Ordinance of 1888 (No. 4 of 1888) an unstamped instrument may be stamped by the Commissioners after the execution thereof on payment to the Commissioners of the unpaid duty and a penalty of $24. B. must, as a solicitor, have known that

the $24 was not a fine imposable upon each of the partners, and that at the most Jones was liable for one half only, and if Jones had brought this $10 as on account of the supposed fine would have told him so. Apart from this, it is improbable that B. would have agreed to advance $14 without getting from Jones an authorisation in writing to receive and deal with the gold. Moreover, as will be seen, we are satisfied that both B. and Cameron swore falsely with regard to another point as to which they could not possibly have been mistaken, and that tends to discredit other parts of their testimony. Besides this, Jones' act which speaks more strongly than his words point to the truth of his version. The next morning about nine o'clock he went with Rodrigues to the office of Mr. Abraham, and thence with Abraham's clerk, Parker, to the Gold Commissioner's office. There he signed on the back of the permit an authorisation to pass the gold. Rodrigues then gave Parker the money to pay the royalty and the gold was passed. That shows that the parties were agreed and that Jones had given up B., otherwise he would have had him there to protect his interests.

B.'s own conduct at this stage further confirms Jones' story. B. went to the office while they were there. He says other business took him there. He says "I saw the gold passed." He did not interfere and say "I represent Jones—the authorisation must be in my favour." The inference is that he knew that Jones had dispensed with his services and had paid him his fee. When asked why, if he did represent Jones as he now pretended, he did not so interfere, he replied that he had no time as Parker was just passing out with the gold. That was not a truthful answer. He not only had already stated that he saw the gold passed, but he had described the position of the parties in the office and gallery while it was being passed. Parker says B. was there, but took no part in the passing of the gold. The truth is, it appears to us, that B.'s inaction at this time was due to the fact that he knew that Jones had dispensed with his services. If not, he was not the man to stand quietly by and see the gold passed by another, out of which he had hoped and intended to get $50. It was apparently not until the gold had been passed by Parker and the parties were leaving the office that the idea occurred to him that he might even yet by a little strategy succeed in getting the $50, which he appears to have securely calculated upon at

first. He tells us that no fee was agreed upon on the Saturday, certainly none was paid on that day. But although none was agreed upon, B. had fixed it in his own mind and he told us how he arrived at it. He estimated the value of the gold roughly at $500; ten per cent, on that is $50.

Having conceived the idea he followed Parker to the Colonial Bank. He says Jones beckoned to him to come. Jones' conduct, quite apart from what he says, shows that he was acting independently of B. and that being so, there was no reason why he should have beckoned. At the Colonial bank B. says he spoke to Jones who said "look after it for me," but Jones swears B. was in no way acting for him. B. put himself forward and spoke to the bank clerk, as did Parker also, about the gold. The clerk refused to buy it, and at Jones' suggestion, they went to the British Guiana Bank, Parker still carrying the gold which he placed on the counter. He says he pushed it toward Ferguson, the bank clerk, and he is corroborated by Ferguson. B. denies this, but it is really of very little importance whether it was so pushed or whether Ferguson reached across and took it. The material question is, from whom did Ferguson receive the gold? As to that, there can be no doubt that it was from Parker. Here again B. spoke to the clerk about the gold, but his conduct showed that he knew he was not really representing Jones. He did not boldly assert that he was so acting, but took Ferguson aside on his way to and on his return from the managers office where he had been to get the cheque signed. Out of the hearing of the others he asked Ferguson to give him the cheque as he represented Jones. Parker swears that Jones had expressly asked him to represent him and that "whenever B. spoke to the clerk I told him he did not represent Jones and he never denied." From what we saw of B. in the witness box, there can be no doubt that if he had really represented Jones, he would have openly and loudly proclaimed the fact. What more easy than for him to have appealed to Jones who was there, and could have confirmed B.'s assertion if it really were so. He did not so appeal because he well knew that Jones would have said that he did not represent him.

B. asserts that Ferguson said "all right" when he asked for the cheque, but Ferguson denies this and says he refused and told him he could not do it as he did not get the gold from him. Ferguson told B. to go to the front of the counter-

He did so. Ferguson passed to his place behind and asked "who is this cheque for?" Upon this, says Ferguson "B. stretched out his hand and asked me to give it to him. Rodrigues shouted out, don't give him the cheque. I held the cheque up and B. stretched forward and snatched the cheque from my hand." B. at once left the bank. Weber, another clerk in the. bank, Parker, Rodrigues, and Jones all swear that the cheque was seized by B. and not given to him, B. on the other hand swears that he asked Ferguson whether he was going to give the preference to a solicitor or a solicitor's clerk, that Ferguson said "certainly not," and lowered his hands towards him, and that he then held the cheque and Ferguson loosed it. A witness named Cameron says Ferguson lowered the cheque and shifted his hand round towards B.

Ferguson swears he never gave the cheque to B. and had no intention of doing so. That can be well understood when we look at the position in which he would have placed the bank and himself if he had done so without the consent of Parker, or of the owners of the gold. The bank had nothing to do with the division of the proceeds of the gold, and would have remained liable to pay the person from whom it received the gold, notwithstanding the delivery of the cheque to B., and in case of loss the bank would in all likelihood have required or might have required Ferguson to make it good. This alone throws discredit upon B.'s story. His demeanour in the witness box did not impress us as that of a truthful witness. He was, of course, a highly interested one, and was most necessarily under a strong inducement to give such a version of the transaction as he might think would place his conduct in the most favourable light. Cameron, on his own showing, is a hanger on at B.'s office, and if he was at the bank on this occasion, he had not gone there on business. He had nothing to do with the gold. When asked what took him there, he said "I followed them from curiosity—I went into the bank because I thought there was something up." Why should he have thought that? According to him B. was then representing Jones, and he knew that Parker was the clerk of Mr. Abraham who represented Rodrigues. What was there to excite curiosity in the fact that the four were going to or went into the bank? Does it point to this, that Cameron, having been present when the $10 was paid, and knowing that Jones had told B. that he no longer required his services, was surprised to see B. going with them to the

bank and was curious to know what B. was about to do? If so, it is very significant.

Even on B.'s own version of the matter and that of Cameron, the truthfulness of their account of what happened appears very doubtful. But when the evidence on the other side is considered, there can be no doubt at all. Five persons all of whom were undoubtedly there deny its truthfulness, some having no personal or pecuniary interest in the matter at all.

What conceivable motive could the clerk Weber have for swearing that he saw B. snatch the cheque, if he had not done so? As the case stands it is impossible for us to come to any other conclusion than that B. and Cameron both deliberately swore to that which they knew to be untrue. This throws discredit upon the statement of both on other points.

If B. had been entitled to receive the cheque as representing Jones, the snatching of it in the way described would have been a grossly unbecoming act on the part of a professional man. But when it appears, as in our opinion upon the evidence it does conclusively appear, that he was not at the time entitled to act for Jones and had no right whatever to take or receive the cheque, the act assumes a much graver character. The jury have found that what was done did not amount to larceny. Taking that to be so and that there was no actual intention to steal, it is manifest that there was an intention to extort. As is shown by his subsequent conduct and by his statements in the box B.'s main object in getting possession of the cheque was to place himself in a position to compel Jones to pay him the $50, or something like it, under colour of a fee for services rendered professionally. He told us that he had made up his mind almost at the outset to charge $50; ten per cent, he said was the usual charge made by legal men acting in these gold matters. He took care however not to tell Jones that he was going to charge $50. It would be time enough to do that when he had got the gold or its proceeds into his own hands. He could then make his own terms. Even if $500 had been the value of the gold the proposed fee was extortionate. He knew quite well that after deducting the $140 and the royalty, some $30, the share of Jones would not be more than $160 or $170. And even when he knew that only $390 was received for the gold and that Jones' share, after deducting the $140 the royalty $21.96 and the penalty

for non-stamping the contract, would be less than $102, B. still intended to exact $50 as his fee, practically one half, as is shown by his leaving as we shall see $50, part of the proceeds of the cheque, in the Savings Bank as his fee. This is taking B.'s contention on behalf of Jones to be correct; but if Rodrigues' claim to have the $166 deducted was right, as appears probable, Jones having apparently agreed to that, then Jones' share would amount to no more than $18.96, for which Jones was to pay to B. $50, or rather for which Jones was to pay the $18.96 and Rodrigues the balance of $31.04.

Having got the cheque in the way described, B. says he told Jones to come to his office and settle. In order to be in a position to settle it was necessary to cash the cheque, and it was argued by the acting Attorney General that if he had received the cheque from Ferguson, as he pretended, he would at once have cashed the cheque and settled on the spot. Asked why he did not do this, B. said he was a solicitor and did not do business that way—he had an office. Even so, the natural course, one would think, if he had really received the cheque as representing Jones, would have been to cash the cheque at once and then go to his office and settle.

Another reason he gave was that it was easier to carry a cheque than a bundle of notes. The real reason, we have no doubt, was that he had not received the cheque from Ferguson, but had snatched it, and knew quite well that if he had attempted to cash it, Ferguson would have told the cashier not to pay the money to B., and to detain the cheque. Payment of it was in fact stopped by the manager within ten minutes of its being snatched, on hearing from Ferguson what had happened.

Jones did not go to B.'s office. He swears that he had given up B. upon Monday afternoon, and, as we have said, in our opinion his subsequent conduct shows that to have been so. Of course, it was absolutely necessary for the success B.'s plan to get Jones to go to his office as if he were still his client, and he made several efforts oral and written to induce him to do so. If Jones had yielded and had gone to B.'s office it would have been taken to be an admission that B. had been acting for him, and then B. would have been in a position to exact his $50 fee.

It is clear from his evidence that B. would have stopped his $50 out of the $390 and handed over the balance to Jones. He had nothing to do, he said, with Rodrigues. He would have advised Jones to settle with Rodrigues, but if he refused

he would have given him the whole sum and left Rodrigues to get his share the best way he could, utterly ignoring or being really ignorant of the fact that even if he had received the cheque legitimately with the consent of the other party, he would have had to hold the proceeds in trust for the parties entitled to them and not for his own client only. He knew that there was a dispute, and he knew that until that was settled there could he no division. He knew that the question might have to be settled in a Court of Law, yet he, a solicitor, was prepared to deal and swear that he would have dealt with the money in this arbitrary and illegal fashion.

Jones, although he knew nothing of the proposed charge of a $50 fee, put B. off, and would not go to his office. Immediately after the abstraction of the cheque he and Rodrigues were taken by Parker to Mr. Abraham's office where they were told to look to the bank for payment, and were no doubt told also that the cheque having been so taken would certainly be stopped.

Now comes a further and even graver aspect of the case as regards B.'s conduct. Having got the cheque in this improper way he took it to the Savings Bank, lodged it in his own name, and at once drew out $90 on the strength of it. He says he did not then know it was stopped. The manager swears that on the same day not very long after it was stopped, he told B. that it had been stopped. B. denies that Conyers told him it was stopped. He also denies that Ferguson so told him later in the afternoon. Ferguson swears he did. It is hardly conceivable that Conyers and Ferguson should not have told him so. They wanted him to give back the cheque and the fact of its being stopped and valueless would be a strong argument for them to use. Besides this, we are not prepared to accept B.'s denial he having sworn falsely in another respect, as against the oaths of these two untainted witnesses. Conyers says he so told him between 12.20 and 1.20 p.m. B. says he paid the cheque in about 2 o'clock, between one and two, and that he had paid it in some ten minutes before Conyers spoke to him. Austin, the bank clerk, says it was paid in about 2 o'clock. If Conyers is correct B. must have known as a fact, when he drew out the $90 that the cheque was of no value. Be that as it may, he was a solicitor and must be taken to have known, when he paid in the cheque and

drew out the $90, that the cheque having been taken in that way by him, would not be paid by the bank and was valueless. Still more, next morning he was told by the bank's solicitor that a summons was out against him for the larceny of the cheque. Yet he went straight from the solicitor's office to the Government Savings Bank and drew out another $250 in respect of that stopped cheque. If he knew when he drew out the $90, as it would appear he did, that the cheque had been stopped then, he obtained that $90 by a false pretence. He certainly knew when he drew out the $250 that the cheque was stopped and, therefore, he obtained that sum by a false pretence. It is not necessary that a false pretence shall be in words. Acts are sufficient. When he paid in that cheque to the clerk he in effect said "this is a good cheque which will be paid by the bank when presented." When he asked for the $250 he in effect said, "that cheque I paid in yesterday is a good cheque and will be paid." That was false as he knew at the time, and he obtained that $250 by means of that false pretence, whatever was the case as to the $90. Whether there was an intent to defraud in either case would be for a jury to say. He says he drew both sums out in order to pay their respective amounts to Jones and Rodrigues leaving the $50 in the bank as being his fee. The acting Attorney General suggested that these moneys were drawn by way of self-serving evidence to meet the charge of larceny. One thing is clear; there was not only an intention to appropriate but an actual appropriation of $50 part of the proceeds of that cheque to his own uses, with an utter disregard of Rodrigues' claim. If that claim was correct, then by appropriating the $31.04 over and above Jones' share of the proceeds of the gold, he was defrauding Rodrigues to that extent, whatever was the case as regards Jones. By his conduct Jones and Rodrigues have been kept out of their money all this time; and, as regards the custody of that money, B. as a solicitor and as holding it in trust, acted in a grossly improper manner by handing it over to a young man named Stoby to keep. He refused, until compelled by the Court, to say where it was. It so happens that Stoby kept it safely, but he might have lost it, had it stolen, or dealt with it so that it might not have been recoverable. That is not the way for a solicitor to deal with trust moneys. If he had been acting honestly and straightforwardly he would, when he found he could not get the

parties to come to him to settle the matter, have paid the money into Court.

At the close of his address to the Court respondent's counsel, Mr. Wills, made a, to us, somewhat astounding statement to the effect that conduct such as B.'s in this matter was common amongst the members of the legal profession in the colony. The acting Attorney General indignantly repudiated this as a gross aspersion upon the profession. Mr. Wills possibly may, as regards these gold matters, be in a better position to speak than the Attorney General. The desire to be in the scramble for gold may explain the apparent mystery why so many men, have been eagerly rushing into the legal profession when there is not sufficient legitimate business to maintain a tithe of them. The legal profession in both its branches is supposed to be both learned and honourable, but if such practises are common here, what becomes of the honour?

We are of opinion that the conduct of the respondent as disclosed in these proceedings has been of such a character as to show that he is not a fit person to practice as a solicitor and there will, therefore, be an order as by the motion prayed.

REX v. SUPERINTENDENT OF GEORGETOWN PRISON; *Ex parte* LENDEN

GENERAL JURISDICTION.

REX v. SUPERINTENDENT OF GEORGETOWN PRISON; *ex parte* LENDEN.

1897. *January* 7, 11, 12.

Before Sir EDWARD O'MALLEY C. J., SHERIFF J. and KIRKE Actg. J.

Extradition—British and Dutch Guiana—Habeas corpus—Fugitive criminal—Warrant of arrest by magistrate—Proceedings as to fugitive criminals in British possessions—Extradition Act 1870 (33 *and* 34 *Vict. c.* 52) s. 17 (2).

Rule calling on the Keeper of the Georgetown Prison to show cause why a writ of *habeas corpus* should not issue directed to him to bring one A. C. Lenden before the court.

The rule was obtained at the instance of Lenden upon the grounds amongst others (a) that he was arrested on a warrant wrongly granted by the Police Magistrate of Georgetown issued on production of a telegram from the Governor of Dutch Guiana to the Governor of British Guiana; and

(b.) that the treaty of June 19th, 1891, between Great Britain and Holland did not apply to Dutch Guiana or British Guiana, there being no order in council under the Extradition Act of 1870 (33 *and* 31 *Vict. c.* 52) applying the treaty to those possessions.

Lenden was brought before the Police Magistrate, Georgetown, having been detained on his arrival from Surinam on receipt of the following cable from Paramaribo to the Governor of this colony:—

> "Postmaster Lenden left Paramaribo yesterday per Scrutton. Has stolen about ten thousand guilders or more from Government cash. Has probably money with him. If possible will help me in retaining him and the money. Please cable answer if he is caught, then I send police."

The magistrate then granted a warrant for his arrest for embezzlement and larceny in Dutch Guiana. He was subsequently committed to prison to await removal to Paramaribo.

Carrington, Q.C, A.G. Kingdon, Q.C, S.G, with him, showed cause.

Belmonte, in support of rule.

Curia, per Sir EDWARD O'MALLEY, C.J.

We are of opinion that the writ should issue and that upon the return thereto the prisoner should be discharged. We hold that the proceedings before the committing magistrate were invalid as not being within his jurisdiction; See sub-section 2 of section 17 of the Extradition Act, 1870.

We rest our judgment on that sufficient ground and do not therefore think it needful to decide upon certain detailed objections to the legality of the proceedings taken before the magistrate that were raised by Dr. Belmonte.

We think it right to point out that when called upon to exercise special and exceptional statutory jurisdiction as was the case here, the magistrate should observe the precaution of referring to the particular enactments by which his jurisdiction is conferred and limited so as to be sure that he has the authority requisite. We think it right further to say that we have no manner of doubt whatever as to the application of both treaty and act in relation to fugitives from Surinam to this colony.

BRITISH GUIANA ELECTRIC LIGHTING AND POWER CO., LTD. v. CONRAD AND ANR.

GENERAL JURISDICTION

THE BRITISH GUIANA ELECTRIC LIGHTING AND POWER CO. LTD. v. CONRAD AND ANR.

1897. *June* 9, 28, 29. *July* 3.

Before ATKINSON C.J., (Ag.), SHERIFF J., & KIRKE J. (Ag.)

Practice—Rules of Court 1893, *Order XXX—Interrogatories—Discovery and inspection—Notice to produce—Information material and relevant to the case—Order XIX. rule* 2; *Notice to admit documents—Admissibility of copies of documents—Commission to examine witnesses abroad*

Motion by the plaintiffs in the action (*a*) for an extension of time in which the defendants do produce for inspection certain books, accounts, letters and other documents as is more fully set out in the judgment below.

An order had been made on April 5th ordering the defendants to produce at the office of their solicitor certain documents, letters and books of account for inspection by the plaintiffs or their agents for a period of two weeks from April 12th, with leave to take copies and extracts therefrom.

Kingdon, Q.C, Solicitor General, for the plaintiffs (movers).

Hutson, for the defendants (respondents).

July 3rd

Curia (Atkinson C.J. Ag., Sheriff J. and Kirke J. Ag.) per Atkinson;

The movers, the plaintiffs, ask for an order that the defendants do produce and leave with the Registrar of Court the documents mentioned and referred to in the order made in the cause on the 5th day of April 1897, and which the defendants were thereby ordered to produce, also the copy

(a) See also 1896 L.R., B.G., 16.

letter-books of the defendants' firm from April 3rd 1890 to the end of 1895, and also the defendants' confidential invoices for the same period; and that the plaintiffs their solicitors and agents and Mr. Birch, accountant, be at liberty to inspect and peruse such documents and to take copies and abstracts thereof and extracts therefrom; and that the Registrar shall produce the same at the trial.

The movers further ask that commissions be issued to New York and Boston for the examination of witnesses on the plaintiffs' behalf; that the trial be postponed until after the return of the said commissions; and that the costs of this motion, of the execution of the order, and of the commissions be paid by the defendants.

The grounds on which the motion is made are:—

That the defendants have refused to produce nearly the whole of the documents referred to in the order of the 5th day of April, 1897;

That it is necessary for the plaintiffs to have such production and also the production of the copy letter book and confidential invoices which are in the defendants' possession, and are material and relevant but are omitted from the defendants' affidavit of documents;

That the plaintiffs are entitled to the production of the copy letter books and the confidential invoices, but the defendants have refused to produce them;

That the plaintiffs cannot get a satisfactory inspection of documents produced at the office of the defendants' solicitor;

That the refusal of the defendants to produce their copies of their own letters renders necessary the commissions to America to examine the persons to whom the letters were written and to obtain the original letters as evidence in this action.

That such evidence cannot be obtained except by such commissions to New York and Boston out of the jurisdiction of this Court;

That in order to avoid further delay and the great expense of such commissions the plaintiffs' solicitor has requested the defendants' solicitor to consent to the production of the documents mentioned in the order of April 5th and of the copy letter books and confidential invoices, and to the admission in evidence of the defendants' own copies of

their letters to persons in America, but the defendants solicitor has refused.

An affidavit by the plaintiffs' solicitor in verification of these statements was read, and counter affidavits by the defendant J. Conrad and the defendants' solicitor were also read. There was a good deal of discussion as to facts and allegations contained in these affidavits, but we do not think it necessary to go into the matters discussed in detail. When the order to produce was made on April 5th the plaintiffs asked for fourteen days from a certain day within which to inspect the documents produced, and make copies, etc. The plaintiffs' counsel said that the fourteen days were unfortunately chosen as they included two race days and holidays, which with mail days, and Sundays materially reduced the time for inspection. On the other side it was said that the plaintiffs' solicitor did not begin his inspection for three or four or more days after the day named and afterwards attended very irregularly, and it was urged that if the plaintiffs did not choose to avail themselves properly of the opportunity given them, they were not entitled to ask for further time. It appears however that the documents are extremely voluminous and that a good deal of work in the way of inspection and copying was actually done by or on behalf of the plaintiffs during the fortnight.

The defendants counsel contended that this motion was merely another attempt on the part of the plaintiffs to delay the hearing and alleged that the plaintiffs had shown great dilatoriness in prosecuting their claim, which disentitled them to have what they asked in the present motion. It was retorted by plaintiffs' counsel that the delay that had arisen was owing solely to the conduct of the defendants in refusing to produce in the first instance the documents ordered, and in other ways.

The plaintiffs are in a peculiar position as they have to establish their case almost entirely out of books and documents in the hands of the defendants. The latter naturally are not anxious to assist the plaintiffs in this and, as naturally, have done nothing that they were not absolutely compelled to do in that direction. The defendants also, naturally, would be glad to force the plaintiffs to a hearing while their case is incomplete, and the plaintiffs, as naturally

wish to get all their facts and evidence complete before going into court.

It seems to us on a consideration of the whole circumstances, that the plaintiffs are entitled to a reasonable extension of the time allowed for inspection and other matters. They say that a month at least will be required. To avoid the necessity for any further discussion on this head we allow them five weeks commencing on Wednesday, the 7th day of July next.

As regards the copies of the defendants own letters and the confidential invoices, it appears from the extracts appended to the affidavit of the plaintiffs' solicitor from letters from persons in America to the defendants that those letters and confidential invoices do or are likely to contain information material and relevant to the case set up by the plaintiffs. How far they will establish it is another matter. We therefore order them to be produced for the purposes named in the motion.

With respect to the commissions the defendants' counsel contended that the plaintiffs were not entitled to commissions to examine witnesses in America and get the original letters until they had exhausted every means of getting the copies here admitted by the defendants. He argued that they could take copies of the copies in the defendants' possession of the defendants' letters to the persons in America and give notice to the defendants to admit those copies of copies in pursuance of Order XXIX. rule 2, of the Rules of Court 1893 (*a*). It would be time enough he said to ask for a commission when the defendants, having been served with such a notice, refused to admit. That is—the defendants having refused to admit their copies of their own letters, the plaintiffs are to ask them to admit copies of those copies. To say the least, that would seem to be a round about proceeding. This of course is no valid objection, if such procedure is in accordance with the law. Rule 2 says "Any party may, by notice in writing, call upon the opposite party to admit any deed, agreement, letter, account, extract from books of account, or documents of any and whatsoever description, saving all just exceptions." Documents in the possession of the opposite party are not within the meaning

(a) See now, Rules or Court 1900. Order XXVIII. r. 2. Ed.

of the rule and we doubt very much whether a copy of those documents in the possession of the party giving notice would be a document within its meaning. It is unnecessary to go into the reasons for this, because even assuming that they are within its meaning a notice to admit them would be of no real service to the plaintiffs. The admission of the defendants, if given, would only be an admission that the copies were true copies of the copies of the defendants' letters to America. The notice in terms of the rule is a notice to admit, "saving all just exceptions." Even if the notice to admit did not contain the saving clause the defendants could still raise just exceptions. So that if the plaintiffs went to trial on the strength of an admission under such a notice they would be met, when they tendered the admitted copies, by the objection that copies of copies are not evidence—that the copies themselves even would not be evidence until it was shown that the originals, the best evidence, could not be produced by reason of their destruction loss or other cause.

There was some suggestion that the plaintiffs could give notice to admit the truth of the contents of the letters under Order XXIX. r. 3, but that rule applies to specific facts categorically enumerated in the notice, and not to the contents of letters generally. The proper way to get at such contents is to give notice to produce the letters themselves, but as the letters here are in the possession of parties out of the jurisdiction of this Court such notice cannot be given, and if the defendants persist in refusing to admit their copies of the letters in evidence, the commissions to America will have to issue at the expense of the defendants. Owing to the great expense which will be thereby incurred we are extremely reluctant to issue the commissions, and the order will be that if the defendants do not before the expiration of the period now allowed for inspection intimate to the plaintiffs that they will admit their copies of letters in evidence in place of the originals the commissions asked for will then be issued.

Something was said about the non-naming of the witnesses to be examined under such commissions but we think the witnesses to be examined are sufficiently indicated as regards both commissions. There appears from the affidavits and the arguments to be

some friction between the solicitors of the respective parties and we think, therefore, it is advisable that the books and documents should be produced at the Registrar's Office where they will be accessible to both parties, and we direct the defendants to deposit all the books and documents in question in the registry of court before four o'clock p.m. on Tuesday the 6th day of July next.

We reserve the question of costs to be dealt with by the Court when the case has been heard and decided.

LIMITED JURISDICTION.

CAMPBELL v. CAMPBELL.

1897 *June* 12, *July* 10.

Before KIRKE J. (Actg.)

Judgment summons—The Debtors Ordinance, 1884, *sec,* 4.—*Debt payable in instalments—Alimony—Insolvency—'Debt or liability' provable in insolvency.*

A husband who has been ordered to make monthly payments of alimony is liable to continue such payments, notwithstanding his insolvency.

Arrears or payment of alimony constitute a debt enforceable under sect. 4 of the Debtors Ordinance, 1884.

Judgment summons under the Debtors Ordinance, 1884.

The judgment debtor was called upon to be examined touching his means to pay the sum of $60, being two instalments of alimony for the months of April and May 1897, under a judgment obtained by the plaintiff against the judgment debtor on March 17th, 1897, and to shew cause why he should not be committed to prison for his default.

P. Dargan, for the plaintiff.

J. A. Murdock, solicitor, for the defendant, the judgment debtor.

Kirke, J. (actg.)

The defendant is brought up on a judgment summons to shew cause why he should not be committed to prison for default in payment of $60, being two instalments of alimony under a judgment of the court dated March 17th, 1897.

Objection was taken to the summons in as much as the judgment creditor has only proceeded on two instalments. The sentence, it is argued, cannot be put into execution in part. It is also argued that the debtor cannot be examined until all other means of recovering the money from him have been exhausted.

I see nothing to support this argument either in the local ordinance, or in the English practice. A demand was made on the debtor for judgment of the money, and in default the summons was taken out. Ordinance 9 of 1884, sect. 4, says:—

> "Subject to the provisions hereinafter contained, the Court may commit to prison for any term not exceeding six weeks or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of any Court for the payment of any sum exceeding twenty-four dollars: Provided that such jurisdiction shall only be exercised where it is proved, to the satisfaction of the Court, that the person making default either has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same."

In the county courts in England the right of commitment is now limited to a single commitment for a single default, each neglect when the order is for payment by instalment being considered a fresh default. In a decision of the Court of Commons Pleas, under the provisions of the Debtors Act (32 *and* 33 *Vict. c.* 62) from which our Debtors Ordinance is copied, section 5 of the act being similar to section 4 of the ordinance, Cockburn C.J., says "It is true that where, under this act, an order is made for payment of the debt by instalments, each instalment becomes a separate debt for default in payment of which a separate order of commitment may be made. This, no doubt, is somewhat anomalous; for the debtor may thus be imprisoned under repeated commitments for a whole year." *Evans* v. *Wills* (1 C.P.D. 229, at p. 234).

The case of *De Lossy* v. *De Lossy,* (15 P.D. 115) cited by the learned solicitor is not in point, as that was a direct application to the court for the attachment of the judgment debtor for non-payment of instalments.

The objections are therefore overruled, with costs. But the bankruptcy of the defendant will be a sufficient answer to a judgment summons unless it can be shewn that the payment of alimony under an order of the court cannot be avoided nor discharged by insolvency.

Posted. July 10th.

Kirke J. (Actg.)

This matter, which came before me in the form of a judgment debtor summons, calling upon the debtor Campbell to show cause why he should not be sent to prison for failing to pay sixty dollars, being two months alimony due to his wife under the order of the Supreme Court made on the 17th March, 1897, is again brought before me to decide the question mentioned in my last decision on the objections to the judgment summons taken by the learned solicitor who appeared for the debtor, namely, whether it can be shown that the payment of alimony under an order of the Court can be avoided or discharged by insolvency.

On the 17th March 1917, by a judgment of the Supreme Court, Rebecca Campbell and Samuel Augustus Campbell were separated from bed, board, co-habitation, and goods; and further, the defendant was ordered to pay to the said Rebecca Campbell the sum of thirty dollars per month in advance for the support of herself and her children, with liberty to either party to apply to the court hereafter with respect to the alimony, if it should become necessary. The instalments have not been paid and the defendant has become insolvent. The judgment summons was taken out against him, and he appeared; several objections have been taken against the summons which I have overruled.

It is now argued—

firstly, that the English cases which are relied on were based upon an English act, namely, 29 *and* 30, *Vict. c.* 32, expressly providing for matters of this kind, that no such ordinance exists in this colony, and therefore the order made by the Supreme Court under the common law of the colony has not the same force as if made under a special ordinance;

secondly, that the debt is a judgment debt, and can be proved in bankruptcy like any other debt. If it be not a debt how can it be made the subject of a judgment debtor summons?

thirdly, that it cannot be said that the salary of the insolvent, out of which the alimony is to be paid, cannot be touched, as there is a special provision in the Insolvency Ordinance, sect. 47 (2), by which the Administrator General can apply to the Court for an order to attach part of the salary of the insolvent for the benefit of his creditors (*a*).

(*a*) See now Ordinance 29, 1900, Sect, 48 (2).—Ed.

The separation from bed, board and goods between husband and wife was incorporated into the law of Holland from the Canon law, and is now part of the common law of this colony. Divorce was not known in England before the Matrimonial Causes Act, 20 *and* 21 *Vict. c.* 85, and could only be obtained by a special act of Parliament; whereas divorce has always been obtainable here under the common law. An order of the Supreme Court made under the common law has equal force with one made under the statute law.

In *Linton* v. *Linton* (15 Q.B.D. at p. 246) which is a similar case to this, Bowen L. J., says "I think it is not too wide a construction to say that arrears of alimony are a debt within section 5, though they do not constitute a debt at law. . . . This being sufficient to found . . . . . jurisdiction . . . . . under the Debtors Act the question arises whether the defendant is relieved from the obligation to keep his wife alive from year to year by his bankruptcy. I think it would be absurd to say that this obligation is a 'debt or liability' provable in bankruptcy." He states earlier that "unless the payment of alimony can be enforced under sect. 5 of the Debtors Act, there seems to be no way of enforcing it."

Section 5 of the Debtors Act corresponds to section 4 of the Debtors Ordinance (No. 9 of 1884), so Bowen's, L. J., remarks apply to Campbell's case also with regard to salary. The provisions of sect. 47 (2) of our Insolvency Ordinance (No. 10 of 1884) are the same, *mutatis mutandis*, as sect. 53 (2) of the English Act, As the provisions of that act must have been well known to Bowen L. J., it does not seem to have affected his decision. There is nothing to prevent the Administrator General from applying to the Court for an order for the payment of part of Campbell's salary for the benefit of his creditors, but certainly the Court, if it granted the order, would grant it with due regard to its former order of the 17th March, 1897.

The objections are overruled with costs.

Thereafter, on October 14th, 1897, the judgment debtor was ordered to pay to the judgment creditor the sum of $210 in the following manner, namely, the sum of $60 forthwith, and the balance, $150, together with the costs of the judgment summons by monthly instalments of $25, the first Instalment to be paid on October 31st.

APPELLATE JURISDICTION.

GOMES v. MURRAY.

1897. *July* 31. Before ATKINSON, C.J. (Actg.)

Appeal—Practice—Criminal procedure—Separate and distinct charges taken together.

Appeal from the decision of the Stipendiary Magistrate of the Essequebo River Judicial District (Mr. H. Read) who convicted the appellant Gomes on two separate and distinct charges of larceny.

The cases were taken together at the request of the solicitor for the defendant, the police prosecutor assenting, and the reasons for appeal did not question the procedure.

A. B. Brown, for the appellant.

No appearance by or on behalf of the respondent.

ATKINSON, C.J. (Actg.) When this case was called the appellant's counsel drew attention to the fact that two charges against the appellant by different persons and respecting different quantities of gold had been heard together. This appears to have been clone by the magistrate at the request of the parties on both sides, but the matters being criminal, the adoption of such a course was wholly illegal and the convictions cannot stand.

APPELLATE JURISDICTION.

DA SILVA v. STEWART.

1897. *August* 20. Before ATKINSON, C.J. (Actg.)

Appeal—Manner and conditions of appeal—Entry into recognisance before serving notice of appeal—Noncompliance with requirements of ordinance—Magistrate's Decisions (*Appeals*) *Ordinance* 1893, *s.* 16.

Appeal from the decision of the Stipendiary Magistrate of the West Coast, Demerara, Judicial District (Mr. C. S. Davson) who gave judgment in favour of the plaintiff Stewart in the sum of $31.12, wages claimed, and costs.

The defendant, Da Silva, appealed, and the appeal was dismissed.

ATKINSON, C.J. (Actg.)—On this matter coming on for hearing, my attention was directed to an apparent discrepancy on the face of the "recognizance to prosecute" entered into by the appellant.

The recognizance purports to have been signed on the 3rd of May, 1897, while the condition endorsed on it states that it was entered into in respect of a decision or judgment pronounced on the 4th of May.

I directed the Registrar to communicate with the magistrate, and his explanation is now before me. It appears that the recognizance was entered into on the "4th of May," the "3rd" being a clerical error. That being so, it was entered into before the notice of appeal, and notice of reasons of appeal were served, the dates of the services being the 11th of May.

As I pointed out in the case of *Wilson* v. *Binns,* 1895, L. R., B.G. 8) decided on the 1st of February, 1895, this is not in compliance with the law, which requires that the recognizance *shall* be entered into *after* service of the notices of appeal and of reasons of appeal. I therefore dismiss the appeal but without costs.

APPELLATE JURISDICTION.

GOMES v. ROSS.

1897. *August* 20. Before ATKINSON, C.J., (Actg.)

Appeal—Notice of and reasons for appeal—Service—Practice—Method of service—Magistrates' Decisions (*Appeals*) *Ordinance,* 1893, ss. 6, 7, *and* 48*—Retention of solicitor—Extent of instructions.*

Appeal from the decision of the Stipendiary Magistrate of the Essequebo River Judicial District (Capt. B. V. Shaw) who gave judgment for the defendant Ross on a claim by the plaintiff Gomes for the sum of $11.70 for monies paid by the plaintiff to and for the use of defendant.

The appeal was dismissed.

ATKINSON, C.J., (Actg.)—In this matter it appears from the affidavit laid over to prove the service of the notices of appeal, and of reasons of appeal, that the notice of reasons of appeal was served on the respondent "by posting the same in care of" the solicitor who represented the defendant (respondent) in the magistrate's court.

When the decision had been given the case was at an end, the solicitor's duties as representing Ross in the matter were discharged. The appeal was an entirely new proceeding, and the solicitor would have had to be expressly instructed to act in the appeal before he could take it up. A service on a solicitor so instructed would not, as the authorities show, be a good service, much less will the mere sending of a letter by, post "to his care" whether he has or has not been so instructed.

The "service" is no service at all, and I therefore dismiss the appeal, but without costs.

APPELLATE JURISDICTION

DE SANTOS v. DE RINZY.

1897. *August* 20. Before ATKINSON, C.J., (Actg.)

Appeal—Giving or serving notice of appeal—Mode of service—Magistrates' Decisions (*Appeals*) *Ordinance, 1893. ss.* 5, 48.

Appeal from the decision of the Stipendiary Magistrate of the Mahaica Judicial District (Mr. H. Read), who convicted the appellant De Santos on a charge of larceny of a sheep, and sentenced him to two months imprisonment with hard labour.

The appeal was dismissed.

ATKINSON, C.J. (Actg.)—This matter came on for hearing at the last sitting of the Court and was allowed to stand over to to-day on the application of appellant's counsel, in order to allow him to prove service of the notice of appeal and notice of reasons of appeal.

The keeper of the Georgetown gaol was called to prove the service which it was said was made by him under section 5 (3) of the Magistrates' Decisions (Appeals) Ordinance, 1893. In the course of his examination, however, it appeared that the notices were posted by him in the ordinary way instead of being registered, as required by section 48 of the ordinance. The service is therefore bad and I dismiss the appeal, but without costs.

JACKSON v. DE RINZY.

APPELLATE JURISDICTION.

JACKSON v. DE RINZY.

1807. *August* 27. Before ATKINSON, C.J., (Actg.)

Appeal—Police prosecution—Non-commissioned officer appearing for complainant, a commissioned officer—The Police Ordinance 1891, sect. 82—Service of notice of appeal—Practice—Magistrates' Decisions (*Appeals*) *Ordinance, 1893, s.s. 5, 6.*

The complainant is an inspector of police, who on the first day of hearing in the Magistrate's Court himself conducted the case. On the second day the case was conducted by a non-commissioned officer, under the provisions of sect. 82. Ordinance 10 of 1891. Notice of appeal was served on the non-commissioned officer;

Held that the service should have been on "the opposite party," and that it was bad.

Appeal from the decision of the Stipendiary Magistrate of the West Coast, Demerara, Judicial District (Mr. F. A. Gall) who convicted the defendant Jackson (now appellant), and sentenced him to pay a fine of $25, or in the alternative to one month's imprisonment.

ATKINSON, C.J., (Actg.)—This is an appeal from a decision of Mr. Gall, acting Stipendiary Magistrate, convicting the appellant of wilfully beating a drum in a public place to the disturbance of the inhabitants contrary to law. The acting Solicitor General who appeared for the respondent, took a preliminary objection that the case was not properly before the court, inasmuch as no valid service of the reasons for appeal had been made upon the respondent.

The complainant below (respondent here) is an Inspector of Police, and when the case came on before the magistrate, on the first day he conducted the case in person. On the day to which the case was adjourned he was not present, and Sergeant Major Boyce appeared in his place and cross-examined a witness who appeared for the defence. The defendant's solicitor objected to his so doing, but the magistrate held that the Sergeant-Major was entitled to appear for Mr. De Rinzy, in pursuance of section 82 of the Police Ordinance 10 of 1891 (*a*).

(*a.*) See now Sec. 72. Ordinance 10 of 1891, in 1905 Edition,—Ed.

On the decision being given, the defendant's solicitor at once gave notice of appeal, and on the same day served notices of the reasons for appeal. The service on the magistrate is not in dispute. As to the service on De Rinzy, the affidavit of service by the appellant's solicitor, runs: "2. That I did on the said 1st day of June, 1897, serve G. C. De Rinzy with a notice of reasons for appeal in the above matter, by delivering said notice of reasons for appeal to the said Joseph Nathaniel Boyce, the person who appeared at the trial of said complaint for the said G. C. De Rinzy."

A good many points were discussed at the hearing, and there was a good deal of argument, but the only question to be determined is, was the delivery to Boyce a valid service to De Rinzy.

Sec. 5. Ordinance 13 of 1893, says that "The person who desires to appeal from any such decision shall—(1). At the time of the pronouncing of the decision and before the opposite party has left the Magistrate's Court by himself or by his counsel or attorney-at-law give notice in open court to the magistrate and to the opposite party of his appeal;" and sec. 6 (1) says "The appellant shall also, within fourteen days after the pronouncing of the decision, serve upon the magistrate and upon the opposite party notice in writing of the reasons for the appeal."

"The opposite party" is one or other of the parties to the case, complainant or defendant,—the persons whose names appear upon the record. Here the opposite party was De Rinzy, and the appellant Jackson's solicitor treated De Rinzy as the opposite party, because he swears that he served De Rinzy, *i.e.*, the opposite party, by delivering to Boyce.

It was strenuously contended by the appellant's counsel that this was a good service on De Rinzy looking at the provision of the section under which Boyce appeared for De Rinzy—that Boyce "stood in the shoes of De Rinzy, and that there "was a fusion" of the individuality of De Rinzy in that of Boyce.

Sec. 82 (a) enacts that "Where any member of the Force lays an information or makes a complaint against any person, any officer or non-commissioned officer of the Force may appear before the Stipendiary Magistrate or Justice of the Peace who is trying or inquiring into the matter of the said information or complaint and shall have the same privileges as to addressing the said Magistrate or Justice and

as to examining the witnesses adduced in the said matter as the member of the Force who laid the information or made the complaint would have had."

There is nothing here to show either that "a fusion" of individuality took place when Boyce appeared for De Rinzy, or that he stood in De Rinzy's shoes for all purposes or for any other than those expressly defined—the "privileges" named. The object of the section is to enable police cases to be conducted by members of the Force, who, by reason of their superior rank and presumably high training, are better qualified for the task than the ordinary rank and file. It does not place the officer or non-commissioned officer in the shoes of the member who made the complaint, but rather gives him in effect as regards these cases the status of an advocate or solicitor in these courts.

If the legislature had intended that the officer or noncommissioned officer should to all intents and purposes take the place of the member of the Force who made the complaint, it could easily have said so, but, so far from that, it has expressly defined in what respects he shall stand in the place of that member. A service on a party by delivering the notice of the reasons to the solicitor who had appeared for him before the magistrate would be undoubtedly bad, and nothing has been shown to justify the application of a different rule to an officer or non-commissioned officer of police who by the section is for the nonce enabled to assume the role of a solicitor. There is nothing in the section itself to authorize such a service as has been made here, and apart from the section there is no authority for saying that a service by delivery to one member of the Force is a good service on another. That is not even pretended.

It was said by the appellant's counsel that as De Rinzy was absent, the solicitor was compelled to serve the delivery to Boyce, as otherwise his client would have had to go to gaol, because he could not enter into recognizances until he had served the notices. That, he said, would have entailed great hardship upon the appellant, and he even went so far as to suggest that the Court might take upon itself "to bend the law" to meet the case, This, I need hardly say, is an argument that cannot be entertained for a moment.

As to the hardship, that is a matter for the Legislature to deal with and not for a Court of Justice, which has simply to administer the law as it finds it.

This is just one of those cases where a draughtsman in

framing a hard and fast rule forgets to make provision for those cases which by reason of other enactments of his own framing or adoption ought to be kept out of that rule. It is that in police cases within sec. 82 the opposite party may not be in court and that, consequently, the person desiring to appeal will not be able to give notice in open court to the opposite party. Sec. 31 (3) of Ordinance 12, 1893 says, "If at the time and place to which the hearing or further hearing is so adjourned either or both of the parties does or do not appear the court may proceed to such hearing or further hearing as if such party or parties was or were present, or if the complainant does not appear the court may dismiss the complaint." In any case proceeded with under this subsection, where one party only was present and the decision went against him, the party present might be desirous of appealing, but would not be able to give notice of appeal in open court to the opposite party, or serve him there and then with notice of the reasons for appeal. The person desiring to appeal would be in a similar predicament to that in which the appellant, it is said, would have been placed—that is have to go to prison and thence prosecute his appeal.

I am of opinion that the service in question was not a good service and, therefore, dismiss the appeal, but without costs.

GOMES v. JOHNSTONE.

1897. *February* 3, 26. Before SHERIFF J.

Appeal—Sale of Food and Drugs Ordinance, 1892*—Sale to prejudice of purchaser—Knowledge of purchaser—Power of Appeal Court to take evidence—Magistrates' Decisions* (*Appeals*) *Ordinance,* 1893, *ss.* 29, 31.

Appeal from the decision of Mr. W. Nicoll, acting Police Magistrate for Georgetown who, on December 4th, 1896, convicted the appellant Gomes for a contravention of the Sale of Food and Drugs Ordinance, 1892, and sentenced him to pay a fine of $30, and in default, to thirty days' imprisonment with hard labour.

The appeal came on for hearing, and there being a contradiction in the evidence of the respondent taken before the magistrate, he was called to be further examined before the Appeal Court. Thereafter the conviction was quashed and the case remitted to the magistrate for re-consideration.

D. M. Hutson, for the appellant.

A. Kingdon, Q.C, S.G., for the respondent.

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

(1.) That the decision of the magistrate is erroneous in point of law.

(a.) That there was no evidence to show that the article alleged to have been purchased was not composed of ingredients in accordance with the demand of the purchaser.

(b.) That the purchaser first saw and inspected the article he subsequently bought and was informed previously to his buying same that the said article was watered lard or lard containing water.

(c.) That the evidence shows that the purchaser obtained an article in accordance with his demand, and that therefore what he bought was not to his prejudice.

(d.) That there was no evidence to show what the article known as compound lard is composed of, nor that water is not a necessary ingredient in such composition or compound lard.

(e) That there was no evidence showing that the conditions imposed by section 21 of Ordinance 9 of 1892, were carried out.

(2.) The conviction is altogether unwarranted by the evidence in like manner as if the case had been before a jury there would not have been sufficient evidence to sustain a verdict.

It is only necessary to decide (b) of the first reason of appeal. As it appeared that the respondent had in his evidence before the magistrate made two inconsistent statements, I required his attendance before me, with the result that I am of opinion that it was duly and sufficiently brought to the knowledge of the purchaser that the lard on sale was watered, and that being so the sale cannot be regarded as having been made to his prejudice. As I am almost certain that the learned magistrate would have adjudicated otherwise had he been in possession of the additional evidence elicited in this Court, I recall the adjudication and remit the case to him to be dealt with in accordance with the views above expressed.

ADMINISTRATOR GENERAL v. RODRIGUES.

APPELLATE JURISDICTION.

ADMINISTRATOR GENERAL, as representing the Estate of JOSE GONSALVES, v. RODRIGUES.

1897. *October* 16. Before SHERIFF, J.

Insolvency—Undue preference—Suit at instance of Administrator General—Insolvency Ordinance, 1884, s. 52 (1.)*—Claim under* $100*—Petty Debts Recovery Ordinance, 1893, s.* 3*—Jurisdiction.*

Appeal from the decision of the acting Police Magistrate for Georgetown (Mr. S. G. T. Bourke) who dismissed the claim of the plaintiff, on the ground that the court had no jurisdiction.

The plaintiff's claim was for the sum of $30 under the following circumstances:—that on May 3rd, 1897, one Gonsalves was adjudged an insolvent, that within a period of three months prior to that date, on or about April 23rd, being unable to pay his debts, he (Gonsalves) did deliver to Rodrigues the defendant and one of his creditors, in preference over the other creditors, goods to the value of $30.80, and that the delivery of such goods was fraudulent and void as against the plaintiff who had requested delivery of the goods by the defendant but without effect.

P. Dargan, for the appellant.

W. M. Payne, for the respondent.

SHERIFF, J.—The sole reason of appeal in this case was as follows:—

"That the decision of the magistrate is erroneous in point of law inasmuch as the claim being one which could be heard and determined in the court in which it was pled, the magistrate had jurisdiction to hear and determine the matter."

Reference was not made by counsel for the appellant to section 51 (1) (b) of The Insolvency Ordinance, 1884 (*a*) which authorizes the Administrator General with the con-

(*a.*) See now Sec. 52 (1.) (b) of Ordinance 29 of 1900.—Ed.

sent of the committee of inspection, where a committee is appointed, or, where no committee is appointed, *inter alia* to "Bring, institute or defend, any action or other legal proceeding relating to the property of the insolvent," Surely this cover the present case. Reliance is placed by respondent on rule 5 (f) of "The Insolvency Rules," (*a*) and his counsel laid down as law that, because the rule says that certain matters and applications *shall* be heard and determined in open court *ergo* the remedy by action is gone. This is a pure fallacy. All the rule says is that *if* certain steps are taken under the ordinance the procedure shall be as provided.

The Administrator General is entitled to say, where an insolvent has disposed of moveable property to one of his creditors, that the transaction against him shall be void— See *Heilbut v. Nevill,* L.R. 4 C.P. 354 and *Marks v. Feldman,* L.R. 5 Q.B. 275—not cited at the bar. It was competent for the Administrator General to avoid the contract and demand the goods back from the transferee as he has done. The Petty Debt Court has jurisdiction to hear and determine *inter alia* actions "for the recovery of any chattel or thing where the value of such chattel or thing is not more than one hundred dollars." See 11 of 1893, Sec. (1) (c.) The decision appealed from is reversed and the case remitted to the magistrate who tried the case with this expression of opinion. No order as to costs.

(*a*) See now Insolvency Rules, 1901. Rule 5. (f).—Ed.

LIMITED JURISDICTION.

MARTINS v. PIETERS.

1897. *October* 22. Before ATKINSON, C.J. (Actg.)

Land—Claim for declaration of title—Strip of land in dispute—Transport—Letters of Decree—Prescription.

This was a claim by the plaintiff Martins for a declaration of the court that a certain piece of land claimed by plaintiff formed part of and was included in lot 62, a lot owned by him in Supply Village, and for an order that he was entitled to the quiet and undisturbed possession thereof. Plaintiff also claimed that defendant withdraw from the occupation of the said piece of land and remove his building therefrom. He further claimed the sum of $100 as damages.

D. M. Hutson, for the plaintiff.

A. B. Brown, for the defendant.

ATKINSON, C.J. (Acting):—

This is a dispute between the plaintiff as owner of lot 62, Supply village, Mahaica, and the defendant as owner of lot 61, plaintiff claiming a strip of land as part of lot 62, which is occupied by the defendant as being part of lot 61.

The defendant derives his title to lot 61 from the will of his grandfather who obtained transport on the list day of February, 1851, of lot 61 “known and described on a diagram thereof by the sworn land surveyor A. G. Glascott,” and deposited in the Registrars Office on November 5th, 1847, the survey having been made in April 1843. The grandfather appears to have taken possession of the strip of land in dispute as part of lot 61, a small house built by him being partly on it, and to have kept possession until his death; and the defendant has been in possession since then. The defendant says, therefore, that even if the strip of land in question is not part of lot 61, he, by possession of it for a period over a third of a century, has acquired a prescriptive titles.

The plaintiff acquired title to the southern half of lot 62 by letters of decree, dated June 13th, 1887, and of the northern half by transport dated October 8th, 1892, the lot in the transport being described as laid down on Glascott's chart. The land has been surveyed on two different occasions by sworn Land surveyors belonging to the Government Lands Department at the instance of the plaintiff, and by one of them at the instance of the Government, along with the rest of the village lots. In each instance it has been found by actual measurement that the strip of land in dispute is part of the plaintiff's lot 62, as laid down on Glascott's chart, and not of lot 61 as there defined. I called upon defendant's counsel to show me any authority that a prescriptive title would still exist after a sale at execution and letters of decree, and after transport which might have been but had not been opposed. He asked for time to look up authorities on the point during the adjournment. The claim was filed so long ago as May 7th, 1895, and has been before the courts on more occasions than one, the question as to the prescriptive title is of the very essence of the defendant's case, and yet on the 19th of October, 1897, the defendant's counsel comes into court not only unprepared with authorities but also utterly unprepared to argue the point. Comment is needless.

The defendant's title by prescription can stand on no higher ground, it is plain, than one by letters of decree or by transport, and it is clear law that no one can go behind letters of decree or a transport unless in case of fraud. The Full Court acted upon that doctrine in the recent case of *Gomes* v. *The Demerara Railway Company* (not reported) (*a*), which was cited by counsel for the plaintiff.

Lot 61, as laid down, is six roods in width, whilst lot 62 is twelve roods, and in the reference in the corner of the chart the areas of the two lots differ in proportion. Defendant in his evidence said his lot 61 was twelve roods in width, that he believed so though he had never measured it, and that he had only continued to occupy the land which his grandfather had occupied, and which his grandfather had pointed out to him as his. That old gentleman seems to have had an eye to the main chance, because he not only took part of lot 62 on the one side but also of lot 60 on the

(*a*) See Appendix B.—Ed.

other, according to the statement of one of the surveyors who gave evidence.

The defendant was very ill-advised in defending the action. The sentence must be for the plaintiff as regards the possession of the land.

The plaintiff also claims $200 as for use and occupation but his counsel said that plaintiff's object was not so much to get damages as to get his title to the land settled, and I, therefore, award the sum of $5 only on this part of the claim. The defendant must pay the costs.

MCKENZIE v. BRUNKER.

APPELLATE JURISDICTION.

MCKENZIE v. BRUNKER.

1897. *October* 23. Before ATKINSON, C.J. (Actg.)

Criminal Law—Procedure—General right of making complaint—Summary Conviction Offences (*Procedure*) *Ordinance 1893, s. 6—Right of police to prosecute—Police Ordinance* 1891, *ss.* 71, 77 (3)—*General power of magistrate to call evidence—Evidence Ordinance,* 1893, *s.* 83—*Appeal—Amendment of error in record.*

Appeal from the decision of the Stipendiary Magistrate of the West Coast, Berbice, Judicial District (Capt. J. T. Cartwright), who convicted the appellant McKenzie on a charge of the larceny of a heifer, and sentenced him to three months' imprisonment with hard labour.

The reasons for appeal are fully set out in the judgment of the court.

W. M. Payne, for the appellant.

C. S. Davson, Actg. S.G., for the respondent.

ATKINSON, C.J., (Actg.)—This is an appeal from a decision of Capt, Cartwright, S.J.P., convicting the appellant of the larceny of a heifer.

The reasons for appeal briefly stated are—

1. That the Magistrate's Court had no jurisdiction:—

(a). The appellant was arrested at the instance of one Rugamondsing, who had no interest in the matter of complaint;

(b). That appellant was tried on a charge by Inspector Brunker, who was not entitled by law to prosecute, and had no authority to prosecute;

(c). That there was no prosecutor legally before the court;

(d). That the matter was of a civil nature.

2. That the magistrate exceeded his jurisdiction inasmuch as he recalled the prosecutor after the case for the prosecution had been closed, and after objection taken to the

status of the prosecutor and took further evidence after the defence had been gone into.

3. (This reason was abandoned.)

4. That the decision was unwarranted by the evidence in like manner as if the case had been before a jury there would not have been sufficient evidence to sustain the verdict.

5. That the decision is erroneous in point of law inasmuch as there was no evidence to connect the defendant with a larceny, or any evidence of *animus furandi* or *lucri causa* (the same thing in different words.)

The complaint on which the appellant was arrested in Georgetown and referred to Fort Wellington was made by one Jamandansing, (not Rugamondsing as stated in the reasons for appeal), who in the complaint alleged that the heifer was the property of one Sookhoy. At Fort Wellington a fresh complaint was made by Sub-Inspector Brunker of the Police Force, and on this the appellant was tried and convicted.

Reasons 1 (d), 4 and 5 were argued together. It was practically contended for the appellant that as there was conflicting evidence the case necessarily became one of a civil nature. That is not so. In many cases where prisoners are indicted for cattle stealing, evidence is adduced that the animal belongs to the prisoner, but that does not make the matter a civil one—it is for the jury to determine which side they believe. As for the rest, if the magistrate believed the evidence for the prosecution, there was evidence to go to a jury, (and the magistrate was sitting as a jury), that the taking was *animus furandi* or *lucri causa.*

As to reason 1, it is plain that the magistrate had jurisdiction on a charge of larceny.

As to (a), Jamandansing was the cattle-minder, from whose possession the heifer was said to have been taken, and, as such, he clearly had an interest in the matter; even if he had not, that would not take away the jurisdiction from the magistrate in a case where a complaint alleging an offence punishable on summary conviction was made before him. In *Wright v. Garnett* (Review Cases, Oct. 9th, 1885), objection was taken that an information was invalid inasmuch as it was laid, not by the policeman alleged to have been assaulted in the execution of his duty, but by a police inspector. Chalmers, C. J., said “the objection is not valid

in law. There is no rule that the informant must be the individual upon whom the offence was committed. Any person may inform and prosecute in a public matter, except where there is a limitation by statute to particular persons." If for the words "upon whom" we substitute, as we properly may, the words "against whom" the *dictum* applies exactly to the present matter. Since the case of *Wright* v. *Garnett* Ordinance 12 of 1893 has been enacted. Section 6 says that "It shall be lawful for any person to make a complaint against any person committing a summary conviction offence, unless it appears from the statute on which the complaint is founded that any complaint for such offence shall be made only by a particular person or class of persons."

As to reason 2, the appellant's counsel, in order to be in a position to support this reason, asked to have the record amended, alleging that it was not correct and laying over an affidavit of the appellant's solicitor to that effect. I directed the affidavit to be sent to the magistrate in order that he might either admit the correctness of its statements or file a counter-affidavit. He has done the latter.

The case was part heard on the 28th of June, 1897, and resumed on the 5th of July, when the appellant's solicitor first appeared for the defence. He objected to the sub-inspector's "appearing to prosecute on the ground that it is not part of his duty as defined under Ordinance 10 of 1891, (the Police Ordinance) section 71," (*a*). The hearing was adjourned to enable the magistrate to consider the point and to give the sub-inspector time to communicate with the Inspector General.

Section 71 runs thus: "Every member of the Force shall, so long as he continues to be such member, be a constable in and for the whole Colony, and shall have all such rights, powers, authorities, privileges and immunities, and be liable to all such duties and responsibilities, as any constable duly appointed now has or is subject or liable to, or may hereafter have or be subject or liable to, either by the common law of England or by virtue of any law which now is or may hereafter be in force in this Colony."

On the 19th of July, the hearing was again resumed, and the appellant's solicitor again appeared. The magistrate gave, it would seem, no actual decision on the point raised

(a) See now Sect. 61. Ordinance 10 of 1891, in 1905 Edition.—Ed.

as to section 71, but sub-inspector Brunker was sworn, apparently on the magistrate's own motion, and gave evidence in which he stated that in his opinion Sookhoy, the owner of the heifer, was unable to pay the costs of the prosecution.

The sub-inspector's evidence was obviously taken with reference to the provisions of section 77 (3), Ordinance 10 of 1891 (*a*), and when he had given it, the appellant's solicitor took a further objection, which the magistrate swears he noted at the time in the solicitor's own words "that Inspector Brunker having sworn that his opinion as to the poverty of the prosecutor was only formed after objection had been taken as to his prosecuting, such an opinion cannot be received in evidence, as it should have been proved before he prosecuted. There being no prosecutor before the court defendant is entitled to an acquittal." At most, the magistrate could only have dismissed the case on the technical ground. He could not have acquitted on the merits.

It was alleged in the affidavit of the appellant's solicitor that, as stated in the reasons for appeal, the sub-inspector was recalled, after the case for the prosecution had been closed, and objection taken to the sub-inspector's status as prosecutor. The magistrate in his counter-affidavit swears that the prosecution had not been closed when the sub-inspector gave evidence and that the record as it stands is correct. I am bound to accept that statement which is in accordance with the record written at the hearing in preference to the recollection of the solicitor two months after the event. I hold, therefore, that the sub-inspector was examined before the prosecution was closed and decline to order the record to be amended.

As to the allegation that the evidence was given after objection taken, that is met by the provisions of section 83 of Ordinance 20 of 1893 (*b*) which says that "the judge shall have power of his own motion to call or recall any competent person as a witness and to examine him in such manner as he thinks fit;" and by the interpretation clause, "Judge" includes all persons authorized to take evidence either by law or by consent of parties.

It was contended by the respondent's counsel that section

(*a*) See now sect. 67 (3), Ordinance 10 of 1891, in 1905 Edition.—Ed.
(*b*) See now sect. 90, Ordinance 20 of 1893, in 1905 Edition.—Ed.

83 would have authorized the magistrate to recall the sub-inspector even after the prosecution had been closed, but on the view I have taken this point does not arise.

As to (b) and (c) something was said about there being nothing on the record to show that the charge by Jamandansing had been withdrawn; but supposing it not to have been withdrawn or dealt with, that would not in any way affect the magistrate's jurisdiction to entertain and dispose of the complaint subsequently made by sub-inspector Brunker.

As to the allegations that the sub-inspector was not entitled by law to prosecute, that he had no authority to prosecute, and there was no prosecutor legally before the court, it was argued that the provisions of section 77 (3) of Ordinance 10 of 1891 were conditions precedent to the making of a complaint by a member of the Force, and that, unless those conditions precedent had been fulfilled, the magistrate had no jurisdiction, inasmuch as the member of the Force would have no locus standi to enable him to prosecute. Sec. 77 says "It shall be the duty of the Force . . . . . .

(3) to summon before Justices of the Peace and to prosecute persons reasonably suspected of having committed offences in the following cases:—

(a). In all cases of offences, whether punishable on summary conviction or on indictment, where the complainant or prosecutor is, in the opinion of an officer of the Force, unable through poverty to pay the costs and expenses of the prosecution;

(b). In all cases of offences punishable on indictment, where the alleged offence is of a serious nature, and it is, in the opinion of an officer of the Force, desirable in the public interest that the prosecution should be undertaken by the Force; and

(c). In all cases of offences, whether punishable or summary conviction or on indictment, where an order to that effect is made by the Governor, the Attorney General, or the Inspector General.

The duty imposed upon the member by sub-section 3 is to prosecute, *if* he is of opinion that the prosecutor is unable through poverty to bear the cost; no duty arises until he has formed that opinion, and until the duty arises he is not authorized to act as in pursuance of sub-section 3.

Then comes the question whether, he having prosecuted, as he admits he did, before he had formed his opinion, does that so far vitiate the proceedings as to render them void. I do not think so. The provisions of subsection 3 are, in my opinion, amongst the class of enactments which have been held by the courts to be merely directory and not imperative, though imperative in terms. Thus it has been held that an enactment, that no person named in the Commission of the Peace shall be authorized to act as a Justice of the Peace until he had taken and subscribed the oaths required by law subject to a penalty, does not render his acts as a Justice, before he has taken the oaths, invalid, although it was unlawful for him to do the acts. The principle may be thus stated: The non-fulfilment of such a condition precedent does not vitiate an act which would be a valid act had the condition precedent been fulfilled before the act was done. Hence the complaint made by the sub-inspector must be held to be a valid complaint although the sub-inspector when making it had not formed the opinion required by the sub-section and had not, therefore, fulfilled the condition precedent. That being so it is immaterial whether the opinion was formed before or after the prosecution was closed.

I may point out that, the sub-inspector having formed the opinion during the hearing after inquiry into the circumstances of Sookhoy, the owner of the heifer, it is a reasonable presumption that if he had inquired at the outset, as his duty was, he would have formed the like opinion. In that case the appellant would have been just where he is now and no injustice can be done to him if I hold, as I am bound to do, that the non-fulfilment of the condition precedent does not invalidate the proceedings.

To hold otherwise would work injury to the appellant himself because he could not set up the dismissal by the magistrate on such a technical ground, supposing there had been a dismissal, as a defence when fresh proceedings were instituted, as they must at once have been, against him, and he would be put to the expense and worry of a fresh defence.

But apart from this, the conviction must be sustained on a broader ground. I have already cited section 6 of Ordinance 12 of 1893 when dealing with the question as to the complaint made by Jamandansing. As was contended by the respondent’s counsel at the hearing, a member of the Force by becoming such does not lose his civil rights, duties

or status generally. As a member of the Force sec. 77 of Ord. 10 of 1893 imposes duties upon him which as such member he must perform; but a policeman is just as much a person within the meaning of sec. 6 of Ord. 12 of 1893 as any other member of the community. In other words, Section 77 (3) makes it his duty, under certain circumstances, to do something which otherwise he would have been at liberty to do or not as he thought fit. The conviction must stand.

LIMITED JURISDICTION.

MCLEAN v. ROSS.

1897. *October* 23. Before ATKINSON, J.

Damages—Trespass by cattle on provision beds—Sale of land subject to condition that it shall be fenced—Omission of condition from transport—Validity and effect of agreement.

This was an action to recover the sum of $300 for damages and pecuniary compensation for the destruction and loss of provision and growing trees by the cattle of the defendant Ross, at plantation Land of Canaan on the east bank of the Demerara river in the month of June and December 1896.

M. Ogle, for the plaintiff.

L. Hawtayne, for the defendant.

ATKINSON, J.

The plaintiff claims $300 as damages, alleging that the defendant's cattle trespassed on his provision lands and river dams, causing injury to the extent of the sum claimed.

It seems that in 1892 the defendant, who is the owner of plantation Land of Canaan, on the Demerara river, sold a piece of land being eight and a half roods facade and of the full depth of the plantation to the plaintiff. In his answer the defendant avers that a part of plantation Land of Canaan has been used as a cattle farm since 1874, and that the said piece of eight and a half roods facade is part of the lands used as pasture lands of the said farm, and that the said land was sold to the plaintiff on the express condition, and it was specially agreed, that the defendant would not be liable to make or maintain fences to keep cattle from the said land, or be liable for any trespass by cattle thereon; but that the plaintiff should make, maintain and keep in good order fences sufficient to keep the cattle of the defendant from going upon the said lands should the same be put under cultivation.

The plaintiff's reply denies these allegations specifically. I directed the evidence in the first instance to be confined to this particular issue because, if the agreement were established, the question of damages need not be gone into.

The plaintiff went into the box and denied positively that he bought the land in question on the conditions and in terms of the agreement alleged. He swore further that he had had, but had not now, any cattle on the estate, and that there were none there except those of the defendant. The plaintiff said that the agreement for the purchase of the land was made in the presence of Mr. Read, the Stipendiary Justice of the Peace who happened to be there, and that that gentleman, the defendant, and himself were the only persons there. Mr. Read was not called by the plaintiff as a witness.

The defendant swore as positively that the land was sold subject to the conditions of the alleged agreement. The lands of the plantation were, he said, divided by a creek into two parts, the northern, properly drained and having river dams, being used for cocoa and provision growing; the southern, he said, is undrained and swampy, the river dams being broken and the tide going in and out. This, the defendant said, is and at the time of the sale to the plaintiff was the part of the estate used as a cattle farm. The defendant swore that there were before, and at the time of the sale, and now a number of cattle belonging to the owners of the other lots on the estate as well as his own, and that as regards these other owners he had arranged with them that as their lands were swampy and poor, he would give them provision grounds on the northern side where the land was not only drained but of better quality, on condition that they allowed his cattle to graze with their own over their lots. This they had agreed to and the arrangement was still in force. The lands sold to the plaintiff formed, he said, part of the pasture lands on the southern side; and he would on no consideration have sold them to the plaintiff except on the conditions named in the pleadings. He had twice refused to sell at all and it was only on the prayer of his old housekeeper, the mother of the plaintiff's wife, that he consented at last.

Louisa Cummings, the plaintiff's mother-in-law, corroborated the defendant's evidence. She said she had been on Land of Canaan for twenty-seven years, and, when asked

whether cattle were kept there, replied "I keep cattle at Land of Canaan. I had at that time (when the land was gold to plaintiff), always had, not I alone, plenty, McLean (plaintiff) he-self got." Having described the visits of her daughter, the plaintiff's wife, and of the plaintiff himself afterwards to ask the defendant to sell and his refusals, she thus describes the final interview between the plaintiff and defendant when the latter agreed to sell;—"McLean came the last time. I was there and hear him and Mr. Ross conversing. Mr. Ross said 'McLean, I'm very sorry to sell you the ground because I afraid there will be a contention with the cattle.' McLean said 'No, sir, I'll fence it off.' McLean said he wanted to keep a shop and build a little house there."

It appeared that there had been some disagreement between the plaintiff and his mother-in-law, a thing which has happened in other cases, but when questioned about it she admitted it good humouredly enough, although she professed not to remember what the contention between them first arose about, implying no doubt that the fault was all on the son-in-law's side. She gave her evidence simply and satisfactorily, and impressed me as a truthful witness, which is more than I can say for the plaintiff. The evidence in my opinion is overwhelmingly in favour of the defendant's version, and I hold that the lands were sold subject to the terms of the agreement as set out in the answer.

It was contended by the plaintiff's counsel that even if such an agreement were made it could have no validity now, as it had not been embodied in the transport. Such an argument does not reflect much credit on the plaintiff's honesty, and the question hardly arises on the pleadings as they stand, but I may deal with it.

It is clear that the plaintiff and defendant might have entered into such an agreement after the passing of the transport. Why not before? What was done simply amounts to this. The plaintiff says, I will sell and give you title to the land for a certain sum, but as this is part of my pasture lands I will only sell and give you title on condition that you agree to fence to keep off my cattle. The plaintiff agrees. There are here in reality two agreements, one as to the title to the land, the other as to the user. The latter is quite distinct from the former. The plaintiff has got his legal title which is evidenced by his transport. The agreement is not in derogation of the title. The title itself is not affected by

the agreement to fence. That is a personal obligation upon the plaintiff enforceable when the occasion arises.

Something was said about such an agreement being contrary to the uses of the district which it was alleged is a purely agricultural one. If it were necessary to go into that question enough appears upon the evidence before me to show that the district cannot be regarded as a purely agricultural one.

There must be sentence for the defendant with costs.

APPELLATE JURISDICTION.

FAIRBAIRN v. BOWMAN.

1897. *November* 12. Before SHERIFF, J.

Servitude—Trespass—Nuisance—Overhanging coconut tree—Damage caused by falling nuts—Means of abating nuisances.

Appeal from the decision of the Stipendiary Magistrate for the New Amsterdam Judicial district (Mr. W. F. Bridges) who dismissed a claim by the appellant Fairbairn against the respondent Bowman for $50 damages. The facts fully appear from the judgment.

N. R. McKinnon, for the appellant.

W. M. Payne, for the respondent.

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

Because the defendant in the court below had no common law right to cut down the coconut tree in question.

The facts are as follows:—

The appellant some thirty-five years ago planted a coconut tree, (I may remark the length of time is not material), it bears fruit and the value is said to be five dollars a year.

The appellant very unwisely planted this tree too close to his boundary line, with the result that part of the branches overhang the respondent's land and that some of the nuts fell thereon. The present occupier, with knowledge of this circumstance, proceeded about three or four years ago to build a kitchen with the result that some of the nuts fell on the kitchen and "then striking main building window and sending in splinters of glass injured two children." I should have thought that a prudent man would have entered into negotiations with his neighbour before building the kitchen. I am satisfied that the respondent was justified after notice in entering on the appellant's land and abating the nuisance, but only to the extent to which it existed, that is to say, to cut away the overhanging branches and remove such nuts as would in the ordinary course of things fall on

his land. We cannot follow the Roman Dutch law too closely simply because cocoanut trees are of tropical growth and would not come within the special cognizance of the courts. In the case of urban servitudes (as in the present case) it was competent to exercise the limited right as stated above, see Grotius (Herbert's translation) p. 209. *Van Leeuwen* (Kotze's translation), Vol. 1, p. 299, in case of rural servitudes, goes further but speaks in the same passage of not allow trees to grow higher than six or eight feet, which is clearly inapplicable to coconut trees.

It would be as well that the appellant should know that by allowing his coconut tree to remain, after knowledge that some of the nuts fell in a locality where persons were and had a right to be, that if any one was killed he might be criminally prosecuted for manslaughter. After such an expression of opinion he may think that it is quite as well in his own interest that the tree no longer exists.

The case is a trumpery one, the outcome of ill feeling.

The respondent exceeded his rights, and while I think that the appellant should have had a decision in his favour, the damages awarded should under all the circumstances be merely nominal together with costs. Let this expression of opinion be conveyed to the Court below for its guidance. Appeal allowed with costs.

1897

TABLE OF CASES REPORTED.