DIGEST.

INDEX OF CASES REPORTED.

SUPREME COURT OF BRITISH GUIANA.

FULL COURT (APPEAL COURT).

THIS 9TH DAY OF JANUARY, 1914.

NELSON CANNON
versus
THE ATTORNEY-GENERAL.

Canadian Reciprocity Arrangement—Ordinance No. 6 of 1913 and Regulations under it—Discrepancy between Goods—Discretion of Comptroller of Customs as to admitting Goods under Preferential Tariff.

The plaintiff imported certain flour alleged to be manufactured in Canada which he claimed to have admitted under the British Preferential Tariff, enacted in Ordinance 8 of 1913, s. 2 (a) at a lower rate of duty than the general tariff. Regulation 7 of the Regulations governing the entry of goods under the British Preferential Tariff provides that when goods accompanied by certificate of origin are not in uniformity with the description borne on the certificates by reason of discrepancies as regards the marks, numbers of the packages, or the kind, quantity or value of the goods, they shall not be entitled to preferential treatment unless the Customs Authorities at the port of destination are satisfied as to the origin of the goods and that the differences are soley due to error. The certificate of origin were in accordance with the regulations, and described the flour as of Canadian origin, but the Customs Authorities said they were not satisfied that the flour came from Canada and refused to admit it at the lower duty, but no evidence was given that the flour did not come from Canada. *Held* (Rayner, C.J., and Earnshaw J., Berkeley J. dissenting) that in the absence of evidence that the flour was not of Canadian origin there was no discrepancy between the goods and the description of them in the certificates of origin and that the Customs Authorities could not refuse to admit it at the lower duty.

Appeal from HILL, J. (acting.)

The plaintiff imported certain flour which he alleged came from Canada and he claimed to have it admitted under the British Preferential Tariff under Ordinance 8 of 1913. The Comptroller was not satisfied that it was of Canadian origin and refused to admit it under the preferential tariff. The plaintiff then paid the ordinary duty and brought this action to recover the difference between the amount so paid and the preferential duty. Hill, J. (21 November, 1913,) gave judgment for the plaintiff and the Attorney General appealed.

The facts and arguments are stated in the judgments.

P. N. Browne for the plaintiff.

Nunan, K.C., A.-G., for defendant.

RAYNER, C. J.: In this case the plaintiff imported a quantity of flour which he alleges was manufactured in Canada, and under the reciprocity arrangement with Canada, he claims that it should be admitted under the "British Preferential Tariff" enacted in the Customs Duties Ordinance, 1913 (No. 8 of 1913, *s.* 2 (*a*), for goods produced or manufactured in Canada. "The Regulations made to govern the entry under the British Preferential Tariff" prescribes that all goods to be admitted at the preferential rate of duty must be accompanied by a certificate of origin, in the form given in a schedule to the

Regulations. The plaintiff says the flour in question was accompanied by certificates of origin which were in the prescribed form, and were duly attested as required by the Regulations. The Comptroller of Customs, however, refused to admit the flour under the preferential tariff, as he was not satisfied that it was the produce or manufacture of Canada, and the plaintiff then paid the ordinary duty, and now brings this action to recover the difference between the amount so paid and the amount of the preferential duty.

Clause 7 of the Regulations provides that "when goods accompanied by certificates of origin are not in uniformity with the descriptions borne on the certificates, by reason of discrepancies, as regards the marks or numbers of the packages, or the kind, quantity, or value of the goods, they shall not be entitled to preferential treatment unless the Customs Authorities at the port of destination are satisfied as to the origin of the goods, and that the differences are solely due to error." The Comptroller contends that there is a discrepancy between the goods and the certificates of origin in respect of the "kind of goods," alleging that the kinds of brands of flour described in the certificates are not of Canadian origin.

The learned Judge in the Court below found that the certificates of origin complied with the requirements of the Regulations, and he held that there being no discrepancy between the goods and the certificates of origin, the Comptroller could not refuse to admit the flour at the preferential rate of duty, and he save judgment for the plaintiff, and against that judgment this appeal is brought.

The real question to be decided seems to me to be the true construction of Regulation 7. In my opinion the power of the Comptroller to refuse to admit goods at the preferential rate of duty only arises when there is a discrepancy between the goods and the description of them in the certificate of origin. If there is no discrepancy and the goods are correctly described in the certificate, they must be admitted at the preferential rate.

The question next arises as to who is to decide whether there is such a discrepancy or not. Is that question one of the questions of fact to be decided by the Judge at the trial, or is it a matter which the Comptroller is given power to decide? The Attorney-General contends that it is the Comptroller who is to decide that question, and that is not a question of fact for the Court. I am unable to concur in that contention. If it had been the intention of the legislature to make the Comptroller sole judge upon that point, it would have expressly so enacted, and I should expect to find in Regulation 7 some such words as "in the opinion of the Comptroller," the regulation reading something like this:— "When goods accompanied by certificates of origin are not *in the opinion of the Comptroller* in uniformity with the descriptions borne on the certificates by reason of discrepancies," &c. But there are no such words and I therefore think that the question is one for the Court. The Comptroller, no doubt, must in the first instance come to a conclusion upon the point, for until he has done so, no dispute can arise as to the rate of duty payable, but if litigation ensues, as in this case, the question whether there is a discrepancy or not must be decided by the Court along with the other facts in issue in the case. But if the Court comes to the conclusion that that is a discrepancy, then the Comptroller has a full and unfettered discretion under the concluding words of Regulation 7, as to admitting or rejecting the goods at the preferential rate, and the Court cannot interfere with

that discretion, unless possibly if it be exercised in a wholly unreasonable manner.

The question now arises whether there is in fact a discrepancy between this flour and the description of it in the certificate of origin. It is admitted that it is correctly described so far as the marks and numbers of the packages are concerned, and also as to the quantity and value, but the Comptroller alleges that it is not correctly described as to "kind." The only question, therefore, whether this flour is the kind of goods it is described to be in the certificates. It was argued by Mr. Browne for the plaintiff that the words, "kind" of goods, means goods of a different class or species, as for example, if instead of flour, the goods had been found to be, say, glass-ware. He argued that the words do not mean different sorts or qualities of the same article, as in this case, different sorts or qualities of flour, but wholly different goods. I am not prepared to limit the meaning of the words in this way, and if the goods were found to be of the same class as described in the certificates, but of a different quality or kind I think there would be a discrepancy. Taking the facts alleged in this case, if the flour is described as the produce or manufacture of Canada, when in fact it is the produce or manufacture of the United States, I think that would be a discrepancy within the meaning of Regulation 7. Is that, then, such a discrepancy in this case? The flour is described as of three different sorts or brands, all declared to be the produce or manufacture of Canada, but the Comptroller contends they do not come from Canada. I am unable to find, however, any evidence to support this contention. He says that he had information from the Canadian Government which satisfied him that it was not Canadian flour, but at best this is but hearsay evidence, and is not admissible. Practically the only other evidence is that these brands of flour used to be entered as American before the Canadian reciprocity arrangement came into force. That is no doubt some evidence that the flour in question is of American (that is United States) origin, and not Canadian, but I do not think that that standing alone is sufficient to contradict the certificates of origin and to enable the Court to find as a fact that this flour is not the produce or manufacture of Canada. The certificates of origin are in conformity with the Regulations and are properly attested by a notary public in the manner required, and I do not think such a general statement is sufficient evidence of a discrepancy between them and the goods to which they relate. That being so the Comptroller had no power under Regulation 7 to refuse to admit the flour in question under the preferential tariff. I think the judgment of the Court below was right, and should be affirmed.

A question was raised on the construction of section 23 of the Customs Ordinance (No. 7 of 1884) and it was suggested that it showed that the law gave the Comptroller a discretion to decide as to the proper rate of duty at which goods were to be admitted. This action, however, was not brought under section 23, and no question was raised as to whether this form of action is the proper one in this case, and I do not think it has any bearing on the question now at issue, which, in my opinion, depends entirely upon the true construction of Regulation 7.

The appeal must be dismissed with costs.

BERKELEY, J.: This was a claim for $40.69, being an amount paid by respondent to the Custom authorities under protest as the difference between the

preferential rate duty and the higher rate duty on certain flour imported into this colony.

The main facts are not in dispute. The respondent received a consignment of flour and desired to pass the same—as he had previously passed flour of the same brands—at the preferential rate of duty. At the same time he produced the certificates of origin required by Regulation 4 of "Regulations to govern the entry of goods under the British Preferential Tariff in British Guiana made under the Customs Ordinance, 1884 as amended by the Customs (Canadian Reciprocity) Ordinance, 1913." The Comptroller acting on information received refused to admit the consignment at this rate of duty and required further proof of origin, as he was not satisfied that the flour had been milled and packed in Canada for export or that the brand of flour represented in the certificates was Canadian. He suggested to respondent that a deposit should be made at general rate of duty and further proof of origin furnished. This deposit is provided for by Customs Ordinance (7 of 1884, section 23) which provides that such deposit shall be taken to be the proper duty payable unless the importer brings his action within three months for the purpose of ascertaining the amount of duty payable. No deposit was made but the higher rate of duty was paid under protest.

The learned Judge gave judgment in favour of the respondent and hence this appeal.

No. 7 of the Regulations referred to above is as follows: "When *goods* accompanied by certificates of origin are not in uniformity with the descriptions borne on the certificates, by reason of discrepancies as regards the marks or numbers of the packages, or the *kind,* quantity or value of the goods they shall not be entitled to preferential treatment unless the Customs authorities at the port of destination are satisfied as to the origin of the goods and that the differences are solely due to error." In the present case if the goods or sorts of flour are not in uniformity with the descriptions borne on the certificates, it is in respect to the *kind* of goods. Revenue laws which are intended to prevent fraud, suppress public wrong and promote the public good are to be so construed as to most effectually accomplish those objects. The object of the Ordinances and the regulations made thereunder is to secure the admission into this colony of certain goods (including flour) being the product of certain countries, at a preferential rate of duty and the word *kind* in the regulation must be taken to refer to such goods only. The descriptions borne on the certificates issued in New York state "that the merchandise designated below is of Canadian growth, produce, or manufacture" and this merchandise is given below as various brands of flour which correspond with the brands on the sacks of flour. The Comptroller, however, is not satisfied that this flour is of Canadian origin and this being so there at once arises what must be regarded as a lack of uniformity between the goods themselves and the description (as to kind) given on the certificate. This gives to the Comptroller the right to refuse admission under the preferential tariff.

The respondent has to satisfy the Custom authorities as to the origin of goods. He has not done so but has brought his claim to a refund in this Court. The onus of proving his case rests on him. I am of opinion that this appeal should be allowed and judgment entered for the appellant with costs.

EARNSHAW, J.: This is an appeal from the judgment of Hill, J. in which he decided under Regulation 7 of the regulations which govern the entry of goods under the British Preferential Tariff in British Guiana that "where there is no discrepancy between the goods and the certificates of origin the Comptroller cannot . . . . . exercise a discretion," and so compel the payment of the higher duty as compared with the preferential duty.

The ground of appeal is as follows:— "The decision is erroneous in point of law inasmuch as the learned Judge held that the Comptroller of Customs had no discretionary power, whereas the Comptroller was satisfied that the goods were not in uniformity with the description borne by the certificates by reason of a discrepancy as to the kind of goods and was not satisfied as to the origin of the goods and that the difference was solely due to error, and inasmuch as discretion is vested in him to refuse a certificate of origin and to demand further evidence in such circumstances by the Regulations of the 13th day of May, 1913, made under Ordinance 6 of 1913."

It appears from the record of the case in the Court below that the Attorney General said that the (i.e., I suppose the Comptroller) had a discretion under Customs Ordinance, section 23, but he went on to say "We are now proceeding under Regulations 7 "kind, quantity or value," and the learned Judge in his judgment says "I do not deal with any questions arising under section 23 of Ordinance 7 of 1884 . . . . . as it was understood that this case was to be argued on the interpretation of Regulation 7."

I decide on that and the terms of the ground of appeal that the only question raised in this appeal arises under that regulation.

It reads as follows:— "Where goods accompanied by certificates of origin are not in uniformity with the descriptions borne on the certificates, by reason of discrepancies as regards the marks or numbers of the packages, or the *kind* quantity or value *of the goods* they shall not be entitled to preferential treatment unless the Customs Authorities at the port of destination are satisfied as to the origin of the goods, and that the differences are solely due to error."

Now the regulations themselves, viz., 3, 4, and 5 together with Schedule A thereto provide what "*evidence of origin*" is required from an importer.

All the evidence so required was produced by the importer, who is the respondent, in this case, and I cannot see that the law requires him to prove anything more than what he has proved. He has complied with the regulations.

The certificate of origin conform in every detail with the form set forth in Schedule A, and the "evidence of origin" fulfils all the requirements of the regulations.

That being so, the importer is entitled to preferential treatment unless there is a discrepancy under Regulation 7.

The learned Judge found that there was no such discrepancy.

The appellant now says that there is a discrepancy between the certificates of origin and the goods as regards *the kind of goods.*

Now I think it is quite clear that a careful comparison of the certificates of origin with the goods as *examined at the port of destination* discloses no such discrepancy.

To discover any discrepancy whatever (if such there be and the evidence does not satisfy me that there is any discrepancy at all) it would be necessary for the

Customs Authorities to go outside the "evidence of origin" which the regulations require, and require or produce other evidence. I do think that the law as it stands, permits this.

It would be hard, indeed, if when the importer has carefully complied with the requirements of the law, the Comptroller of Customs should have power to say "yes, you have complied with the law but I require further proof of origin."

When this question was being argued, I suggested by way of argument what I thought might be the proper interpretation of the regulation.

My experience (and I emphasize the word experience) has taught me that what has been happily described as the bound and rebound of argument between Bench and Bar on the hearing of an appeal is most useful and salutary. It has received high judicial encomium and in England the practice is universal. I often have recourse to the same practice here.

Advocates too of experience will tell you that they welcome such a practice as it affords to them the opportunity of discovering what is passing in the Judge's mind and dealing with the same before it is too late.

In pursuit of that practice I advanced an argument (I think most courteously, and the printed report will bear me out).

I was not dogmatic or in anyway laying down the law. I prefaced my argument with the words "It appears to me." Unfortunately my object was not apprehended, and there did not follow any of that bound and rebound of argument of which I have spoken.

After further consideration I do not see that the argument then advanced by me has been in any way answered. I think I can now say that three Judges take the same view.

It is apparently contended on behalf of the appellant that when the Comptroller finds on any information which he may have outside the requisite evidence that there is a discrepancy between the certificates of origin and the kind of goods, he has a discretion and can under Regulation refuse to admit the goods under the preferential treatment.

On these two questions arise.

(1). Is there proof of such a discrepancy as is alleged by him?

(2). Has the Comptroller a discretion not limited by the law or the Courts to decide whether there is a discrepancy or not, or is his finding one of fact which this Court can review?

I answer the second question by saying that as far as I know neither the law generally nor the Regulations as they stand give such unlimited discretion to the Comptroller of Customs as is claimed. He may decide in the first instance; but he is not the sole or final arbiter on the question of discrepancy or no discrepancy. His finding does not bind this Court and can be reviewed by it.

I am further of opinion that if the importer has (as in this case) complied with the regulations as regards "evidence of origin" it is the duty of the Comptroller of Customs if he still finds a discrepancy to place before this Court admissible evidence to prove that his finding is correct.

The Court cannot accept merely such statements as "I was not satisfied it had been milled and packed in Canada for export." "I had information from official sources" or "I was suspicious as since 2nd June 28 per cent. of Canadian flour had increased to 66 per cent. of the total importation of flour and American

imports reduced correspondingly." To do that would be to leave the decision on the question of fact entirely to the Comptroller. It would make him and him alone the judge as to the sufficiency of any evidence which he may have. He must satisfy the Court by admissible evidence outside of his information and suspicions.

In this case he has not done so. Hearsay or second-hand evidence of a very gross type only has been produced. On that ground I decide that there is no satisfactory proof before the Court of any discrepancy between the certificate of origin and the goods as regards the *kind* of goods.

The only discrepancy which in this case he could urge is that the goods are not, as described in the certificate of origin, goods of Canadian origin.

I do not think, however, if the appellant proved that the goods were not of Canadian origin that that is sufficient under the regulations as they stand. Other regulations are required to meet such a fraud as is suggested.

As far as this case is concerned the appellant must satisfy the Court that there is a discrepancy between the kind of goods as described in the certificate of origin and the goods themselves *as examined at the port of destination.* I do not think he has done so. To decide this question one must consider the meaning of the words "kind of goods." The appellant says that if he is satisfied that the goods though flour and described as flour in the certificate are of a different quality or brand of flour or of a different origin from that described, he can rightly hold that there is a discrepancy in the description of the *kind of goods.*

I interpret the regulation differently. 1 think the words "kind. . . of goods" in Regulation 7 merely means "kind of goods" as set forth in the list of articles mentioned under Regulation 1 of those regulations and, if the description sufficiently and truly denotes a class of goods mentioned in that list, Regulation 7 is complied with. That list contains grain and flour and other preparations thereof." In the certificates of origin these goods are described as "flour," and on examination at the port of destination are found to be flour. There is therefore no discrepancy. I hold that so far as "discrepancy in kind of goods" is concerned, the regulation is only intended to apply *e.g.*, to cases where goods of one kind are described as goods entirely of another kind. To describe cases of whisky for instance as cases of aerated water is an example of what I mean.

I cannot find that there is any discrepancy in the description of the kind of goods in this case between the certificates of origin and the goods themselves as examined here. I therefore see no reason for differing from the judgment of the learned Judge in the Court below. I agree with him that "where there is no discrepancy between the goods and the certificate of origin the Comptroller cannot under the regulations exercise a discretion."

In my judgment this appeal should be dismissed with costs.

APPELLATE JURISDICTION.

THIS 11TH DAY OF FEBRUARY, 1914.

MARTIN, Appellant,

v.

CALDER, Respondent.

Summary Conviction Offences Ordinance, 1893 (No. 17 of 1893) s. 96 (1).—Having or conveying property reasonably suspected of being stolen.—Possession.

Section 96 (1) of Ordinance 17 of 1893 only applies when the defendant is found in actual possession of property suspected to be stolen at the time the charge is made, and only when he is in possession of it in the streets and not to possession in a house.

The section does not apply in cases where the owner of the property is known: in such cases a charge of larceny or receiving should be made.

Denhert v. Corry (17th January, 1889), and *Leung v. Calder* (2nd November, 1907), not followed.

Appeal from the Stipendiary Magistrate of the South Essequebo Judicial District.

The appellant was convicted of an offence under section 96 (1) of the Summary Conviction Offences Ordinance, 1893 (No. 17 of 1893) for being in possession of a quantity of gold reasonably suspected of having been stolen, and being unable to give a satisfactory account of how he came by it. Evidence was given that over 55 ounces of gold was on the 27th April, 1913, stolen from the shop of one dos Santos, by whom the appellant was employed, and that two months afterwards, on the 4th July, the appellant sold 34 ounces of gold to one Beckles. He told Beckles that he had got the gold by prospecting, but a few days later when interrogated by the police, he denied having sold the gold. The appellant was not prosecuted till November, when a summons was issued against him. There was no evidence of the possession of the gold by the appellant at the time the proceed-

ings were taken, or at any time except the evidence of Beckles that the appellant sold him gold in July.

Weber for the appellant. The owner of the stolen gold is known, therefore a charge under s. 96 (1) does not lie. *Figueira v. Franklin* (25th April, 1913). The appellant was not found with the gold in his possession or conveying the gold, and therefore could not be convicted under s. 96 (1). *Hadley v. Perks* (L.R. 1 Q.B. 444.)

He was stopped by the Court.

Rees Davies, S.-G. for the respondent. *Hadley v. Perks* does not apply in this colony. The statutes on which it was decided are not of general application and apply only to the Metropolis and certain cities in England The words of the enactment on which it was decided are not identical with s. 96 (1) and the Court decided that case on the construction of another enactment, to which there is no corresponding enactment here. *Leung v. Calder* (2nd November, 1907.)

He also cited *Edun v. Anderson* (14th September, 1906), and *Winter v. Bannister* (20th March, 1904.)

Weber in reply.

Cur. adv. vult.

Judgment was delivered on the 21st February, 1914.

RAYNER, C.J.: This is an appeal from Mr. Bourke, the Stipendiary Magistrate of the South Essequebo Judicial District, who convicted the appellant, Albert Martin, under section 96 (1) of the Summary Conviction Offences Ordinance 1893, (No. 17 of 1893) of being in unlawful possession of gold reasonably suspected of having been stolen, and being unable to give an account to the satisfaction of the Magistrate as to how he came by it.

The facts of the case are that the appellant was employed by one dos Santos who carries on business in the Cuyuni river, one of the gold-mining districts of the colony. On 27th April, 1913, a considerable quantity of gold, over 55 ounces, was stolen from the shop. No suspicion seems to have attached to the appellant at the time, but on the 4th August, over two months after the theft, the appellant sold over 34 ounces of gold to one George Beckles who paid for it by an order in a firm in Georgetown. At the time he sold the gold appellant said he had got it by prospecting, but when the police asked him about the transaction a few days later in Georgetown, he denied having sold the gold or having received the order in payment.

The question to be decided is, does this case come within section 96 of the Summary Conviction Offences Ordinance, 1893. It is to be observed that the appellant was not found with the gold in his possession, neither had he it in his possession when he was charged with the offence in November last.

The words of the section 96 are as follows :— “Every person who is charged before the Court with having in his possession or conveying in any manner anything which is reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account, to the satisfaction of the Court, as to how he came by the same, shall, on being convicted, be liable to a penalty of one hundred and fifty dollars or to imprisonment for six months.”

Mr. Weber for the appellant contended on the authority of *Hadley v. Perks* (1866, L.R. 1 Q.B. 463) that that section applies only when the, accused person is found in actual possession of the articles suspected to be stolen, and only when he is found actually conveying them, and does not apply to cases where, though he may once have had them in his possession, he has not possession of them at the time he is charged. Mr. Rees Davies, the Solicitor-General, contended, however, that that case cannot be taken as an authority on the construction of section 96, because, he says, the words of section 96 are not identical with those of the English enactment the Court was dealing with in that case, and because the Court held that another enactment, to which there is no corresponding one here, must be read with the former enactment. It is therefore necessary to examine that case and see what it actually decides.

In that case persons were charged under statute 2 & 3 Vict. c. 71 s. 24 which enacts as follows:— "Every person who shall be brought before any of the said Magistrates charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained and who shall not give an account to the satisfaction of such Magistrate how he came by the same, shall be deemed guilty of misdemeanour, and shall be liable to a penalty of not more than £5, or in the discretion of the Magistrate may be imprisoned, with or without hard labour, for any time not exceeding two calendar months."

On a careful examination of that enactment with section 96, I find that they are practically identical. The former says "any person who shall be brought before any of the said Magistrates charged with having in his possession or conveying", etc., while the latter says "every person who is charged before the Court with having in his possession or conveying, etc." But the important operative words which describe the offence are identical. Those words are, "any person charged with having in his possession or conveying in any manner anything which is reasonably suspected of having been stolen or unlawfully obtained and who does not give an account to the satisfaction of the Court as to how he came by the same." The only difference is that the English enactment says "which may be reasonably suspected," instead of "is reasonably suspected," and "who shall not give an account" instead of "who does not give an account." The penalty enacted at the end of each is different, for in England it is a fine of £5 or two months' imprisonment, while here it is $150 (=£31. 5s. 0d.) or six month's imprisonment. But no one who carefully compares, as I have done, the words of the two enactments, can say that the microscopic difference between them ("may be" for "is," and "shall not" for "does not") in the description of the defence, makes the smallest difference in their meaning and effect. But it is said that the Court held that another section of another Act of Parliament had to be read along with it, and that that other enactment prevents that case from being any guide to us in construing section 96. It is quite true that the Court held that section 66 of 2 & 3 Vict. c. 47 must be read along with section 24 of 2 & 3 Vict. c. 71. The former section is the one which gives power to arrest a person charged with being in possession of stolen property. As the learned Judges pointed out, being in possession of property suspected of being stolen is not an offence at common law and is not one for which a person could be arrested in the absence of express statutory enactment. The latter section gives no power to

arrest, and therefore in the absence of a power to arrest a person found in possession of property suspected to be stolen, that section would be useless. The former section is in an Act which deals with the Police Force of the Metropolis, while the latter Act deals with the Police Courts of the Metropolis; the one enables the Police to arrest for offences and the other gives the Court power to deal with the persons so arrested. Section 66 of the Police Act gives specific power to arrest and detain persons committing various acts among others, persons "reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained." That was that section which the Court held must be read and construed with section 24 of the Metropolitan Police Court Act.

Now section 98 of our Ordinance also contains no power to arrest. Like the English section it enacts a penalty on anyone charged before the Court with having in his possession or conveying things reasonably suspected to be stolen and unable to give a satisfactory account of them. Here as in England the power to arrest must be sought in some other statute, and in this colony the power is given in section 67 of the Police Ordinance, 1891. (No. 10 of 1891.) It is true that the power thus given is general and enables constables to arrest persons found committing any offence or whom they reasonably suspect of having committed any offence: it does not contain the precise and particular provisions of section 66 of the English Act but it gives a general power to arrest for offences, among them offences under section 96 of the Summary Conviction Offences Ordinance, 1891. It was contended, however, that in *Hadley v. Perks* the Court came to the conclusion it did, because the wording of section 66 showed that the offence in question was only committed when the person charged was found actually in possession of or conveying the articles in the street. No doubt the words in that section were relied on as explaining the meaning of section 24 of the other Act, but in his judgment, Lord (then Mr. Justice) Blackburn held that the words of section 24 showed that the legislature only intended it to be an offence when the person was actually found with the articles in his possession in the street. He says "I think the words of the statute" (that is section 24 of 2 & 3 Vict. c. 71) "sufficiently show that the legislature intended to confer this summary power only in the case where a person was "having and conveying" in the sense of "having" *ejusdem generis* with "conveying," being in the streets or roads with them, or carrying them about or perhaps loitering in the streets in such a way that it might be assumed he was carrying them, and probably in the case of his being taken into custody when he has brought them to pawnbroker, or to a person whom he offers them for sale." In that opinion I respectfully concur and as section 66 contains the very words upon which Lord Blackburn bases his opinion, I hold that under that section persons can only be convicted who are found having the goods in their possession or conveying them in the streets or roads of the colony. Authorities were cited to me where this Court has held that the section applies even when the person charged was not in possession of the suspected article at the time he was arrested. (Lucie Smith J. in Denhert v. Corry, 17th January, 1899, and Leung v. Calder, 2nd November, 1907). I regret I am unable to agree with those judgments, and I follow the opinion of Lord Blackburn.

It follows from the above that the section is limited to cases where the per-

son is found in actual possession of the articles at the time proceedings are taken, not where it is alleged he once had them in his possession. I should have come to this conclusion apart from Hadley v. Perks, for the words of the section are all in the present tense: had it been intended to make a man liable under it for goods he had had in his possession some time in the past, the words would have been not "any person charged . . . with having in his possession," but, "having had in his possession," the section in my opinion clearly contemplates possession of the goods at the time the person is charged, and was never intended to apply to cases such as this, where the alleged possession was some time in the past. It was urged upon me that if the police are not able to use section 96 in the way they have in this case, it will be impossible to punish many persons who ought to be punished. To that I answer that the police here have all the powers the police have under the law of England. I must again point out, as I did in a previous case, (Figueira v. Franklin, 25th April, 1913) that the power given by section 96 is an exceptional and extraordinary one, for the corresponding enactment before referred to (2 and 3 Vict. c. 71 s. 24) does not apply generally over the whole of England, but only in London and in some other populous places, for which it has been specially enacted in local Acts of Parliament. The enactment of section 96 in the Summary Conviction Offences Ordinance, 1893, gives the police of this colony a power which is not possessed by the police in England generally. It is a very useful power, but it must be used in the way and for the purposes for which the legislature intended it. In my opinion the real use of the section is to enable the police to detain a person found in suspicious circumstances in the possession of property, until enquiries can be made. Without some such power he could not be detained, and by the time enquiries had been made, he would have disappeared. In cases where the suspected person is not found in possession of the stolen property, he must be charged under the ordinary law with stealing or receiving, and if the evidence is not strong enough to prove the charge, he must be acquitted. But it was never the intention of the legislature in enacting section 96 to enable persons to be convicted of what is substantially stealing or receiving, upon evidence which would not support a formal charge of stealing or receiving. In other words it was not the intention of the legislature to provide a means of convicting persons on evidence too weak to sustain a charge under the ordinary law.

The appellant in this case was never found conveying the gold suspected to be stolen, or having it in his possession, either in the public street or road or indeed anywhere, and therefore he could not properly be convicted under section 96.

But the conviction is bad on another ground also, for in this case the owner of the stolen gold was known, for evidence was given of the loss of the gold from dos Santos' shop, which was not necessary in a charge under section 96. In Figueira v. Franklin, before referred to, I went very fully into this question, and held that where the owner of the stolen property is known, a charge cannot be made under section 96, but a direct charge of larceny or receiving must be made. I may add that I have taken the trouble to ascertain what the practice is in England on this point in those places where a power similar to that given in section 96 is in force, and I was informed by one of the ablest and most experienced Police Magistrates in England, that the practice there adopted is the one I held to be right in that case.

The police here have the fullest powers given to police in England, and I fail to see how it can be said that they will be prejudiced by one of the most useful, and at the same time, most drastic of their powers, being limited in exactly the same way and to exactly the same cases as it is in England.

The appeal is allowed and the conviction quashed with costs.

LIMITED JURISDICTION.

THIS 13TH DAY OF FEBRUARY, 1914.

RAMDEEN
v.
SOODHAYA.

Roman-Dutch law.—Marriage in community of goods.—Wife cannot be sued alone, nor can she defend alone without leave granted under Order XIV. r. 11.

The plaintiff sued the defendant as a single woman whereas she was in fact a married woman and had been married in community of property on the 7th October, 1895. Her husband had deserted her in 1897, but as there was no evidence on which the Court could presume his death, the Court held that she was still a married woman in the eyes of the law. She therefore could not be sued by the plaintiff as if she were a single woman without leave of the Court granted under the provisions of Order XIV. r. 11., of the Rules of Court. The claim was therefore dismissed with liberty to the plaintiff to bring another action in proper form if so advised.

The facts of the case appear from the judgment.

Dargan for the plaintiff.

Johnson for the defendant.

EARNSHAW, J.: In this case the plaintiff claims an order against the defendant compelling her to pass a certain transport, or in the alternative damages for breach of contract.

The defendant is sued as a single woman and two preliminary questions arise for consideration and decision.

In the statement of defence the defendant denies that she is a single woman and avers that she was married in this colony on the 7th October, 1895, in community of goods to one Ramdeen who is still alive, and that therefore it is not competent for the plaintiff to sue her as a single woman or at all.

It was admitted on plaintiff's behalf that the defendant was married as alleged, and, the certificate of marriage having been put in, it is quite clear that the marriage is valid according to the law of this colony.

Apparently however, her husband left her in 1897 to go to India, and has not been seen here since that year.

It was suggested that under the circumstances the Court might allow the case to proceed as if the defendant were a single woman.

There is, however, nothing on which the Court could find or presume that the husband was dead at the time when the writ was issued in this case, or is

dead now. The defendant must therefore be regarded as a woman married in community of goods to a husband who is still alive.

That being so she cannot be sued under Roman-Dutch Law without her husband being joined, except by leave of the Court.

It is contended however, on behalf of the plaintiff, that she cannot defend, *i.e.*, even raise the above defence without either (1) joining her husband or (2) getting the leave of the Court under the provisions of Order XIV. r. 11, and as she has done neither, she has no *locus standi in judicio.*

The rule referred to is as follows:— "Married women may, by leave of the Court, sue or defend without their husbands or without a curator on finding such security (if any) as the Court may require."

The Court upholds this contention of the plaintiff and on a consideration of the rule decides that a woman married as in this case before August 20th, 1904, cannot defend, i.e., file a statement of defence without getting the leave of the Court.

Under ordinary circumstances the defence should therefore be struck out on terms as to leave to apply for leave to defend, etc., but as it is clear that the plaintiff himself cannot succeed on the claim as it stands, the marriage of the defendant having been admitted, I shall adopt another course.

Even if the plaintiff were allowed to proceed as if defendant were in default of pleading, the Court could not give judgment against the defendant alone, she having no *locus standi in judicio,* and even if judgment were given against her, it would for the purposes of execution be useless as she has in law no separate property. What she possesses is part of the community of goods under the marriage.

I therefore dismiss the claim with liberty to the plaintiff to bring another action in proper form if so advised.

I make no order as to costs, as on the one hand, the plaintiff cannot succeed on his claim as it stands, and I cannot on the other hand award costs to the defendant even if I were so inclined, as she has no *locus standi in judicio*, and if awarded the costs would in law not belong to her, but would form part of the community of property.

THIS 25TH DAY OF FEBRUARY, 1914.

DAVILAR

v.

BROWNE AND ADONIS.

Trespass.—Gold Mining Regulations 1905.—How disputes as to location of claims must be settled.—Regulation 178.—Damages for unlawful interference with stop-off and workings.

The plaintiff claimed from the defendants damages for trespass.

The plaintiff alleged that he had located a gold-mining claim for which he got the necessary licence, and that whilst he was lawfully working the same by means of a stop-off placed across the creek the defendants through their agent wilfully destroyed the said stop-off. There was no evidence that one of the defendants, Adonis, ever authorised the illegal act complained of:—

Held as regards the other defendant, Browne, that her agent, W. A. Browne, acting with full authority ordered the commission of the illegal act complained of and that she was therefore liable in damages.

The facts of the case appear from the judgment.

Marshall for plaintiff.

A. B. Brown for defendant Browne.

McArthur for defendant Adonis.

EARNSHAW, J.—The plaintiff in this case claims from the defendants (who are both married women, but married since August 20th, 1904), damages for trespass by them through their servants or agents on lands in the possession of the plaintiff at Sir Walter creek, Pigeon Island, Cuyuni, Essequebo, in the month of October, 1913, and in particular for the destruction by them through their servants or agents of the stop-off placed by the plaintiff in the said creek for the purpose of working a gold-mining claim.

The defendants have each pleaded separately to the claim and were at the hearing separately represented by counsel.

The defendant, Mrs. Adonis raises *inter alia* the defence that assuming the acts which are the subject of complaint were committed, she is in no way liable as the persons who committed the acts were not her servants or agents, and were not in any way authorised by her to commit the alleged trespass. The evidence satisfies me that this contention is correct. I can find no evidence on which she can be rendered liable as a principal acting through her agents.

But the case against Mrs. Browne is entirely different, and I find that she is liable in damages for the illegal trespass.

The questions which I have considered have not, however, been easy of settlement, and I have not arrived at conclusions without considerable hesitation.

On the evidence I find that the plaintiff located a claim on the Sir Walter creek on March 15th last year, for which he afterwards got the necessary licence from the Department of Lands and Mines and paid the necessary fees

The defendant says that plaintiff's claim is bad, as the lands located thereunder are partly lands which she had already located through her husband, W. A. Browne, and that plaintiff was therefore a trespasser on her claim and particularly at the place where the alleged trespass by the defendants was committed.

W. A. Browne gives evidence in support of this contention. I am not however satisfied by his evidence and in fact place little reliance upon it either as regards this point or any other. But assuming that his evidence is worthy of credence, he took the wrong course. The Mining Regulations 1905 provide for the determination of disputes. These regulations W. A. Browne, as the agent of his wife Mrs. Browne, entirely ignored. Regulation 178 says that "all disputes as to what land is or is not lawfully occupied or has not been lawfully located . . . . shall be decided by the Commissioner or by the Warden of the Mining District in which the dispute arises."

The defendant Browne took no steps to have the dispute as to the location settled in the way provided by law, and for the purposes of this case I find on the evidence before me that the plaintiff was at the time of the alleged trespass lawfully in possession of the lands when the trespass was committed.

The trespass committed in going on the plaintiff's land and with a force of men breaking down the plaintiff's stop-off, which was legally placed across the creek, and flooding and damaging his pit and workings.

The defendant, Mrs. Browne, has also raised the defence that the acts were done without any authority from her.

I am however satisfied that they were done by the orders of W. A. Browne, her husband, who says himself that he managed for his wife and had full powers.

They were done also in the course of working claims belonging to the defendant, Mrs. Browne, and the object of them was to prevent the flooding of pits and workings on her claims higher up the creek. I find, therefore, that the acts were done by the orders of her agent acting as such and within the scope of his authority and for her benefit.

She is therefore liable.

The defendant through her agent took the law into her own hands and she must pay.

Lawlessness in the gold-fields must be discouraged.

Taking into consideration what would be the cost of repairing the damages caused and the advisability of awarding something by way of exemplary damages in the circumstances, I fix the damages at $500.

There will therefore be judgment for the plaintiff against the defendant, Brown, for $500 damages with costs, and judgment for the defendant, Adonis, against the plaintiff with costs.

APPELLATE JURISDICTION.

THIS 4TH DAY OF MARCH, 1914

RODRIGUES, Appellant,
v.
THOMAS, Respondent.

Local Government Ordinance 1907, Section 320.—How Local Authority must appear before Magistrate.

The respondent as Overseer of the Local Authority of the Bartica Country District sued the appellant in the Magistrate's Court for rent due to the said Local Authority.

The respondent did not produce any written authority so to sue and appear as is required under the provisions of Section 320 of the Local Government Ordinance, 1907.

Objection was taken on this ground and over-ruled.

On appeal the judgment of the Magistrate reversed on the ground that the respondent had not complied with the requirements of the afore-mentioned section of the Ordinance.

The facts of the case appear from the judgment.

Ogle for the appellant.

No one appeared for the respondents.

EARNSHAW, J.: In this case the appellant was sued by the respondent who describes himself as the Overseer of the Local Authority of the Bartica Country District for rent due "to the plaintiff,"

Judgment was given for the respondent and an appeal therefrom is brought on several grounds.

Counsel for the appellant in his argument relied on two: (1) that the plaintiff had no right to appear on behalf of the Local Authority as he did not produce an authority in writing so to appear by the Chairman as is required by Section 320 of the Local Government Ordinance, 1907; (2) that the amount of rent due was not proved.

As regards the first ground it is quite clear from the evidence that the respondent as plaintiff did not produce any written authority. He says so himself. It is also quite clear that the objection on this ground was properly taken in the Court below. The appellant was therefore entitled to judgment on the ground that section 320 of the Local Government Ordinance had not been complied with. I am also satisfied after a review of the evidence that the amount for which judgment was given was not duly proved.

The appeal is therefore allowed and judgment must be entered for the appellant with costs both here and in the Court below. The Local Authority is of course at liberty to bring a fresh claim.

GENERAL JURISDICTION.

THIS 13TH DAY OF FEBRUARY, 1914.

CORAM.—RAYNER, C.J., BERKELEY, J., AND EARNSHAW, J.

WILLS

v.

WILLS.

Claim to dissolution of marriage.—Judgment under O. 28 r. 6 refused.—Forfeiture by defendant of all his rights derived or to be derived by marriage.

Where in an action for dissolution of marriage brought by the wife, the husband admitted adultery, application was made for judgment under Order XXVIII. r. 6.

Held, following *Wylde v. Wylde* 1 Menzies, 271, that judgment could not be given on the admissions alone, and that Order xxvii. r. 6 did not apply to divorce proceedings.

The wife sued for dissolution of the marriage, adultery being admitted by the respondent.

Laurence, for plaintiff applied for judgment under O. XXVIII. r. 6, but in reply to the Court could quote no precedent in support of his application.

Application was refused and evidence called.

De Freitas, K.C., for respondent did not oppose.

Cur ad vult.

Judgment was delivered on February, 20th, 1914.

RAYNER, C.J.: I have read the judgment about to be delivered by my brother Berkeley and I concur in it,

BERKELEY, J.: This is an action brought by Adaline Mary Wills for a divorce from her husband Frederick Telemachus Wills on the ground of adultery. The defendant in his statement of defence admits the allegations contained in the statement of claim except as to the adultery which he specifically denies. Later, by notice in writing it is admitted through his solicitor "for the purposes of this action only."

At the hearing application was made under O. 28 r. 6 for judgment in terms of the statement of claim. The corresponding English Rule is O. 32 r. 6 which does not apply to divorce proceedings. The admissions of the defendant are proof of his willingness to admit the plaintiff's allegations and to allow her to obtain the dissolution of her marriage, but they cannot be deemed *full proof* to the Court that adultery has been committed. (Wylde v. Wylde 1 Menzies 271.) The Court therefore refused the application for judgment and required counsel for the plaintiff to lead evidence.

This evidence shows that the defendant who is domiciled in this colony was married to the plaintiff in Scotland in December, 1895, that three weeks after marriage he returned to this colony leaving her with her mother, that in 1902 he sent for her, that she lived with him at Morawhanna till October, 1904, when they left together on a visit to Scotland, that in July, 1905, he returned to his duties in this colony leaving her again in Scotland, and that since he so left her in 1905 they have not cohabited as man and wife.

The evidence as to the adultery is that of Caroline McLeod who was a domestic servant in the employ of the plaintiff and defendant from March, 1903, to June, 1904, when they were residing at Morawhanna. She confirms the admission of the defendant as to his having committed adultery with her on several occasions. It appears that the admission of defendant was made when it came to his knowledge that Caroline McLeod was to be called as a witness in behalf of the plaintiff. This disposes of a doubt as to collusion between the parties which was raised in my mind by the conduct of defendant in denying and subsequently admitting the act of adultery. The plaintiff's suspicions were not aroused during her stay at Morawhanna but on hearing rumours in 1909 of what had taken place there she placed herself in communication with her solicitors with a view of taking proceedings. The ground of delay is satisfactorily explained by the solicitor. There is no issue of the marriage nor was an antenuptial contract entered into.

A decree of divorce is granted with liberty to the plaintiff to marry again and the defendant is ordered to forfeit all benefits (if any) already derived or still to be derived by him by virtue of his marriage with the plaintiff.

The defendant must pay the costs of these proceedings.

EARNSHAW, J.: I concur.

LIMITED JURISDICTION.

THIS 4TH DAY OF MARCH, 1914.

YARD
v.
WOODWARD.

Malicious prosecution—Termination of proceedings in plaintiff's favour. Prosecution directed by defendant.

If a criminal charge is made against a plaintiff and then no evidence is offered before the Magistrate and the charge is dismissed, the proceedings have terminated in the plaintiff's favour.

Barnwell v. Williams (1891), 1 B. G. Law Reps., N.S. 150 considered.

The mere sending for a police constable and complaining to him about the plaintiff, does not make the person so complaining the prosecutor, if the constable afterwards arrests the plaintiff.

Danby v. Beadley, 43 L.T. Reps. N.S. 603 followed.

The facts of the case appear from the judgment.

Lewis for the plaintiff.

Mr. Abraham, Solicitor, for the defendant.

EARNSHAW, J.: The plaintiff claims from the defendant the sum of $200 damages for malicious prosecution. It must be noted that there is no claim for false imprisonment. It will appear from the facts of the case that the plaintiff suffered some imprisonment, but that imprisonment, could only be taken into consideration, if at all, in estimating the damages flowing from the alleged malicious prosecution.

It is quite clear from the evidence that the plaintiff has been very badly treated. He ought not to have been prosecuted and he has my complete sympathy, but this must not be allowed to influence my decision as regards the facts proved or the application of the law thereto.

The plaintiff was the owner of a cow and on December 14th last, he had some conversation with the defendant about selling the same to her and stated that the price was $35. The plaintiff also had and has a wife. It is unfortunate for both him and his wife that the latter has at various times not been of sound mind. During some period of last year the plaintiff's wife was an inmate of the Lunatic Asylum.

They are married in community of goods and there can be no question about the ownership of the cow. It belonged to the husband.

On the 1st January last, whilst the plaintiff was absent the defendant went to the wife of the plaintiff and entered into an agreement with her under which she purchased the cow for $25 (*i e.,* $10 less than the price fixed by the plaintiff), paid $5 on account, and had the cow removed to her own place. That agreement with plaintiff's wife was not in any way binding on the plaintiff. There is no evidence of any kind on which the Court can find that the wife had authority to sell as her husband's agent.

The husband on his return home and after discovering what had taken place, went to the defendant's place in Fifth Street, Albert-town. He asked for the defendant, and as she was absent, he left a message for her with her cook, and

then took the cow away. Shortly afterwards on the same morning he returned to defendant's house and saw defendant. He told defendant what he had done, and asked her to explain how she came by the cow. She told him to "clear out of the yard" and this he did. He says he took the cow away because it was his cow. At this stage there may have been grounds for taking civil proceedings, but I do not see any ground whatever for calling in the police.

But on January 3rd, the defendant made a report by word of mouth to John Burnham, Sergeant in charge of the Albert-town Police Station, as a result of which P.C. Glasgow was sent to the plaintiff. Meetings took place between the Sergeant, the plaintiff and the defendant and according to the evidence of the Sergeant himself plaintiff said that "He would pay any money which his wife had received from defendant back to her," and the defendant said "All right, let him bring the money to you at the station." The interviews ceased after that repayment to re-pay.

The plaintiff did not take the money to the Police Station, and on the 8th January, *i.e.,* five days later P.C. Glasgow took possession of the cow as stolen property. Sergeant Burnham on the following day, the 9th January, with the knowledge of all the above swore to an information before the Magistrate "for that Alexander Yard on the 1st January, 1914, at Fifth Street, Albert-town . . . did feloniously steal, take and lead away one cow with bull calf at heels value $25 the property of H. J. Woodward." On this information a warrant was issued to arrest the plaintiff. He was arrested the same day whilst at his work between 9 and 10 a.m. and remained in custody the rest of that day, the night following and until next morning when he was put on bail to appear the following Monday.

He then appeared before the Magistrate when, as the record shows, no evidence was offered by the prosecution and he was discharged.

Before the plaintiff can succeed he must prove (1) that the defendant either herself instituted the prosecution of the criminal charge or was actively instrumental in the making or prosecution of the criminal charge, (2) that the proceedings complained of terminated in his favour. (3) that the defendant acted maliciously (and the malice must not be malice in the legal sense but malice in fact, *i.e.,* spite or ill-will), (4) absence of reasonable and probable cause, and (5) damages (in this case *inter alia* arrest and imprisonment). If I could find in favour of the plaintiff under the first head, I should, as Judge, find a complete absence of reasonable and probable cause, and, as Jury, malice in fact, *i.e.,* spite or ill-will on the part of the defendant towards the plaintiff. The proof too of damages would be satisfactory.

In the absence of authorities I should have found quite readily that as the plaintiff was discharged on no evidence being offered against him, the proceedings terminated in his favour. But it has been contended that such a termination of proceedings is "not a sufficient termination of the proceedings in favour of the accused to enable him to bring an action.

Both in England and in the local Courts it has been decided that the termination of proceedings by entering a *nolle prosequi* is not such a termination.

In the judgment in the case of *Barnwell v Williams* (1891. 1 B.G. Law Reps., N.S., at p. 153), it is laid down that "the plaintiff must prove the termination of the proceedings to have been in such a way that his innocence was pronounced by the tribunal before which the accusation was brought." In this

case the plaintiff when no evidence was offered was discharged. This took place at the stage when the accused was before the Magistrate. Such a discharge by the Magistrate cannot be compared with the entry of a *nolle prosequi* by an Attorney General. In the latter case a *prima facie* case must have been made out before the Magistrate, on which the accused has been committed for trial. In this case no case whatever had been made out against the plaintiff when he was discharged, and in the absence of evidence to the contrary he must be presumed to be innocent. His discharge under such circumstances coupled with the presumption of law in his favour amounts to a termination of proceedings in such a way that his innocence was established. The proceedings therefore terminated in his favour.

As regards the question whether the defendant was the prosecutor or not on the charge of larceny of the cow, the evidence is not such that I can infer from it that the defendant directed Sergeant Burnham to lay the information on which the plaintiff was arrested and prosecuted. The record itself, beyond the fact that the stolen property is laid in the defendant, contains no reference to her. It is signed by Sergeant Burnham as the informant.

In his evidence before me Sergeant Burnham said: "I swore to the information now before me—I swore on the 9th that the plaintiff had stolen a cow. I swore to that because Sub-Inspector Cox instructed me to swear to it. He instructed me by word of mouth, not in writing, and he was the only person who instructed me. I did not tell him that Yard had arranged to bring money to me" —and further in answer to me he said "Sub-Inspector Cox gave me the instructions after I reported to him and it was in consequence of my report to him that he gave me the instructions."

It has been decided in the case of *Danby v. Beadley* (43 L.T.; N.S. 603) that where there is no evidence that the defendant was actively instrumental in putting the criminal law into force, he is not the prosecutor, and not liable in action for malicious prosecution.

In that case the defendant had sent for a police constable and had said to him "I have had two pairs of clippers stolen from me and they were last seen in the possession of Danby" and the Police had so far as the evidence showed taken the proceedings against Danby without further communication with the defendant (though the defendant afterwards gave evidence against the plaintiff both before the Magistrate and at the Sessions). In this case so far as the evidence shows, Sergeant Burnham had no communication with the defendant after the 3rd January, when he left plaintiff and defendant after they had agreed about the repayment of the money paid by defendant to plaintiff's wife. I am therefore unable to find that defendant was the prosecutor, or actively instrumental in making or prosecuting the charge. To use the words of Lindley, J, in the case referred to "there is not the slightest evidence that the defendant either prosecuted or directed anyone else to prosecute."

As the plaintiff fails on this ground, there must be judgment for the defendant.

In the exercise of my discretion I order that the defendant have no costs. She ought not to have called in the police either in the first instance or at all Her conduct generally in this matter does not impress me favourably.

THIS 6TH DAY OF MARCH, 1914.

In re JOSEPH LINDORE

Ex parte CAROLINE DOUGLAS.

Will—Specific bequest.—Sale by administrator of chattel bequeathed.—Petition by legatee for legacy.

An executor or administrator has no right to sell any article specifically bequeathed to a legatee unless it is necessary to do so to pay the funeral expenses and debts of the testator.

An order to sell property specifically bequeathed in order to pay the testator's funeral expenses and debts will be revoked if obtained improperly.

Petition by Caroline Douglas to have revoked an order made by the Court giving leave to the administrator of the testator's estate to sell a house bequeathed to her by the testator. The petition was referred by Rayner C.J. from chambers into Court. It came on for hearing on the 10th February and 2nd March, 1914.

Mr. Ogle, Solicitor, for petitioner.

Mr. Sampson, Solicitor, for the administrator.

The facts and arguments are set out in the judgment which was delivered on the 6th March, 1914.

RAYNER C. J.: In this case the testator, Joseph Lindore, by his will bequeathed to the petitioner, Caroline Douglas, a house standing on the west half of lot 27, D'Urban Street, Georgetown. The land did not belong to the testator, so the house is a chattel, or movable property. The testator also gave a number of other specific legacies, a bicycle, sewing machine, jewellery, etc., and also two pecuniary legacies of $20 and $30 respectively.

The executor appointed by the will did not act, and Edward Samuel Joseph was appointed administrator of the estate.

On the 17th December, 1912, the administrator petitioned the Court for leave to sell the house before referred to, stating in his petition that he desired to sell it "so as to be able to pay all the debts and expenses of the estate and to close it." On that statement I made an order giving leave to sell, and it was sold to one Adolphus Henry for $120.

On the 19th November, 1913, Caroline Douglas, to whom the house had been bequeathed, petitioned the Court to rescind the above order on the ground that there were sufficient assets of the testator to pay his debts and the expenses of administering his estate without taking the house in question.

On the petition coming before me I directed the Accountant of the Court to examine the administrator's accounts and to report, (1) the amount of the funeral expenses of the testator and the debts due by him at the time of his death; (2) the amount of the assets received by the administrator upon which he is entitled to be paid a commission, and (3) the amount of the costs and expenses properly chargeable by the administrator against the estate. The Accountant reported that the funeral expenses and debts amounted to $132.57, and the costs properly chargeable against the estate to $8.54, making a total of $141.11 properly payable by the

estate. The amount of the assets which have come to the hands of the administrator, exclusive of the house and the other specific legacies, is $171.38 and upon this the administrator is entitled under section 29 of Ordinance 9 of 1909 to about $10 as commission, assuming that he is allowed commission at the highest rate allowed by law. Adding this $10 to the funeral expenses, debts, and costs of administration, the total is $151.11 which leaves a balance of more than $20 over and above the total amount of the indebtedness of the estate. It is therefore clear that the administrator had no necessity to sell this house in order to pay "all the debts and expenses of the estate and to close it." The pecuniary legacies, amounting to $50, do not affect the question, for it is clear law (as was admitted by Mr. Sampson, who appeared for the administrator) that when the assets of the testator are not enough to pay all the legacies, the specific legacies do not abate in favour of general pecuniary legacies, but must be paid in full before the general pecuniary legacies are paid.

The petitioner, Caroline Douglas, claims that she is entitled to the house, and her solicitor, Mr. Ogle, argued that she is entitled in these proceedings to a declaration to that effect, and a writ of possession to put her into possession of it.

The administrator contends that the sale is good, and cannot be upset as it was made under the order of the Court. I am by no means clear that any order was necessary, for an executor or administrator must have power to sell whatever property of the estate it is necessary to sell in order to pay the debts and expenses. At all events if I were satisfied I had made a wrong order, I should hesitate long before I allowed that wrong order to work a manifest injustice, and to deprive a person of property to which he would otherwise be legally entitled. But in this case the order was clearly improperly obtained, for the administrator, who must be taken to know his own business, and to know what assets he had and what debts he had to pay, represented that it was necessary to sell this house to pay the debts and expenses and to close the estate. Had I had before me when I made that order, all the facts I now have before me, I certainly should not have made it. The administrator has come perilously near obtaining the order by a misrepresentation of facts. I am not, on the facts before me, prepared to say he deliberately misrepresented the facts, but at the least he made a statement in his petition, which the exercise of ordinary and proper care would have shown him was erroneous.

Mr. Sampson, for the administrator, contends that Adolphus Henry, an innocent purchaser for value, should not be deprived of the property he has bought, but I confess I can see no more hardship in depriving him of the house than in depriving Caroline Douglas of what the testator intended her to have, and to which she is legally entitled. At all events he has a right of action for damages against the administrator for whatever injury he may suffer.

That Caroline Douglas is entitled to the house, I have no doubt, but I do not think I can make an order to have it delivered up to her on this petition. The remedy by petition is a curious and anomalous one, and as far as I know is peculiar to this colony. It is used in many cases where in England an action would have to be brought in the Chancery Division, and orders are made in chambers on petitions without hearing any party, which in England could only be made in an action. This practice seems open to abuse, and in several cases, this among

them, I have dealt with the matter in open Court, with the parties before me instead of in my private room. I doubt whether on a petition like the one now before me, I have power to set aside the sale, and to order the house to be delivered up to the petitioner. If the petitioner had no other remedy, it might be necessary to take some such step to prevent a manifest injustice, but it is clear that a legatee can sue for his legacy. Van der Linden in Book I. at the end of Section IV (Henry's edition, p. 146) says:— "The legatee has three distinct actions for his legacy.

"First, a personal action under the will against the heir or such other per-"son as is charged with the payment of the legacy; or against the executor for "the delivery of the thing with such increase or decrease as it may have suf-"fered; provided the latter has not been caused by the fault of the heir;

"Second, an action *in rem* to recover the thing itself, against any possessor "whatsoever.

"Third, an hypothecary action on the ground of the tacit or implied mort-"gage which the law gives to legatees in this respect, in all the property which "comes to the heir from the testator."

If the order giving leave to sell this house is set aside, there is nothing to prevent the petitioner from proceeding as above laid down to recover her legacy. I do not intend to extend the remedy by petition beyond the occasion for it, and as the law gives an ample remedy in this case, I shall do no more now than what I am asked to do in the prayer of the petition, namely, to revoke the order giving the administrator leave to sell the house. It was made on a misstatement of fact and would not have been made had the correct facts been stated, and I therefore revoke it and order it to be set aside, leaving the petitioner to proceed to enforce her rights by ordinary process of law.

As the proceedings in this case have been occasioned by the wrongful act of the administrator, I order him, under Order I r. 13 of Part II of the Rules of Court, to pay the costs of the petitioner out of his own pocket.

GENERAL JURISDICTION.
THIS 6TH DAY OF MARCH, 1914.
VIEIRA
v.
DE CAMBRA AND OTHERS,

Will.—Action to dispute validity of—Burden of proof of validity.—Right to begin.

Deposit of a will under s. 5 of the Deceased Persons Estates Ordinance, 1909 (No. 9 of 1909), has the same effect as probate in common form in England, and when the validity of a will is disputed the burden proof is upon the person who asserts the validity of it.

Bean v. Brighton (5th March, 1910), followed.

The plaintiff claimed as one of the heirs of the late Victor de Cambra to have a will alleged to have been made, by him just before his death, and under which he took much less than he would be entitled to as an heir, set aside, as

being a forgery. The will had been duly deposited in the Registrar Office under s. 5 of the Deceased Persons Estates Ordinance, 1909 (No. 9 of 1909). The defendants (exclusive of certain defendants who were added as formal parties, but who had no substantial interest under it) were the executors of the will, and the chief beneficiaries under it.

P. N. Browne, for the plaintiff, contended that the burden of proving the will was on the defendants and that they should begin. The plaintiff alleged the will to be a forgery and the party setting it up had the burden cast on him of proving its validity. *Bean* v. *Brighton* (5 March, 1910); *Hinds v. Hinds* (24 June, 1904.)

He was stopped by the Court.

Laurence for the defendants. Under Ordinance 9 of 1909 s. 31 the effect of depositing a will in the Registrar's office is the same as probate in common form in England, and the person attacking it, has the burden of proof laid on him. (Williams on Executors, ((8 ed) 556). The defendants are not propounding the will: it was propounded when it was deposited in the Registrar's Office, and the burden of proof is not on them.

The Court (Rayner C.J., Berkeley and Earnshaw JJ.) held that the burden of proof was on the defendants and required them to begin. After the defendants' case in support of the will was closed, the Court stopped the plaintiff's case after hearing two witnesses and found that the will was a forgery, and at the end of the judgment dealt with the question as to the party upon whom the burden of proof lies.

RAYNER C.J. (after dealing with the facts of the case and holding that the will was a forgery) said:

Before parting from this case, I desire to deal with the question which was raised at the beginning of trial, namely, as to the party which is to begin and on which the burden of proof lies, and to lay down clearly and definitely what is to be the rule in future.

Wills are not proved in this colony, but the deposit of a will under section 5 of the Deceased Persons Estates Ordinance 1909, has the same effect as probate in common form in England. This is specifically enacted in section 31 for the purpose of carrying into effect the reciprocal arrangements made to enable the executor of a will in England to deal with any property of the testator here and *vice versa.*

In England there are two forms of probate; wills can be proved in common form or in solemn form,

Probate in common form is the usual course pursued but probate in solemn form, that is by decree after action brought in open Court, usually occurs in two cases; first, where the executor is himself doubtful about the validity of the will and second, where the will is disputed by the next-of-kin or others.

In England, a person who disputes a will can enter a caveat, which is good for six months, but can be renewed, and the effect of the caveat is to prevent any steps being taken to prove the will without notice to the person who enters the caveat. Here we have no provision for caveats and nothing analagous to pro-

bate in solemn form except an action such as the one now before us, in which the validity of the will is questioned and in which it is either declared to be valid, or is set aside.

In England, probate in common form can be revoked, but probate in solemn form is irrevocable, provided all the interested parties are before the Court or unless a subsequent will is discovered.

A person whose interest is adversely affected by probate in common form, can call it in and put the party who obtained it to proof in solemn form. That is practically what is being done in this case. The will has been deposited under section 5 of the Deceased Persons Estates Ordinance 1909 and the plaintiff in this action sought to compel the executor to prove the validity of the will.

It is quite clear from this that the burden of proof lies upon the person who has deposited the will and who claims the benefit under it. Were the rule otherwise the consequence would be that any person who produces a will could, on getting a short formal affidavit made as to due execution, throw the whole burden of proving that the will was not properly executed upon anyone who attacked it. That is, the person who had in his possession all the evidence as to the circumstances under which the will was made, is required to prove nothing, but the person who but for the will would be entitled to the deceased's property and who probably knows nothing about those circumstances, has the burden cast on him of proving that the will was not properly made, in other words the burden of proving a negative. That is not the law in England and it is not the law in this colony. If anything were required to show how monstrous such a rule would be, this case is an excellent illustration. If the plaintiff who attacked this will had been required to begin and prove it was not valid, she might have had great difficulty in doing so and the burden of proof being upon her she might well have been able to do no more than raise a case of suspicion and been unable to prove clearly and beyond doubt that it was forged. In that case a will, which beyond all doubt was forged, would have been given effect to and the plaintiff deprived of property to which she is entitled.

The rule now laid down was laid down in the case of Bean v. Brighton (5th. March, 1910) which we followed at the beginning of this case, when we held that the burden of proof lay on the defendants and that they must begin. I refer to it now, because the procedure was disputed by Mr. Laurence, who appeared for the defendants and we desire it to be clearly understood that in all similar cases in future the party who propounds, sets up, or claims the benefit of a will is the party upon whom the burden of proof lies, whether he is the plaintiff or the defendant in the action.

BERKELEY J. The plaintiff claims a declaration that the alleged last will of Victor de Cambra dated 7th February, 1913, and deposited in the Registrar's Office on 24th February, 1913, is a forgery.

The deposit in the Registrar's Office is equivalent to probate in common form under the English Law (Bean v. Brighton et al G.J. 5th March, 1910). The view there adopted by the Court, of which I was a member, is confirmed by Ordinance 9 of 1909, section 31 (1) which provides that the deposit of a will in the Registrar's Office together with an affidavit as to the due execution thereof shall have within this colony the same effect as probate in *common form*, has

by the law of England. The present action is, in effect, similar to proceedings which would be taken in England to obtain revocation of a probate in common form. The *onus probandi* lies in every case upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator (Parke, B. delivering the decision of the Judicial Committee in Barry v. Butlin, 2 Moore's P.C. cases 480). As to the facts, the testator was an old man of 87 with a senile heart and the first two defendants are his widow and his only son, the executors under the alleged will, while the plaintiff is the only child of his deceased daughter, she and the second defendant being the only issue of his first marriage. By his second wife he had no children. The testator was ill on Wednesday 5th February, and was seen by Dr. Clavier twice on Thursday, 6th February, and again on the morning of the following day (Friday). That evening, according to the witnesses called in behalf of the defence, he told his son Emanuel Victor de Cambra to get some one to make his will. The witness Nero who lived near was called by the son about 10.30 and told by him that his father "was sick and sinking". He at once went to the house and he says that he received his instructions from the testator and then wrote the will, which he read over to him explaining each paragraph separately, after which, it was duly executed and witnessed by himself and Ramsey. Ramsey says that Nero wrote the will while the testator talked. He is confirmed by his brother, the only other disinterested party present who says "Nero spoke to testator and wrote he then spoke and wrote again." Nero noticed that the plaintiff was not mentioned by the testator and he drew his attention to this. The testator then said that he had nothing to leave to her as she got her share through her mother. It is peculiar that this reference to plaintiff is the only part of the instructions overheard by those present at the time. Plaintiff was not in the house when the alleged will was made, but she was with her grandfather during the evening and was apparently on good terms with him. Her father was only called by the second defendant after the testator died. All the other near relatives of the testator, including his son and his wife, as well as the testator's second wife, were present. It is a, coincidence that the testator's second wife is a sister of the son's wife so that his step-mother is also his sister-in-law and under the alleged will after bequeathing a few legacies including one of $300 to the plaintiff, the testator bequeathed to these two "the rest, residue and remainder of my estate . . . . . share and share alike." Nero states that he was told that the testator was sinking, but he says that when he gave him the instructions and executed the will he spoke clearly and was wide awake and that his mental condition was good; the members of the family present speak to the same effect. As a fact his death took place about one hour after the will was made. Nero showed in Court that he was capable of receiving verbal instructions and then writing a will such as the one in Court and he admits that he received $15.00 either just before or just after the will was deposited, on 24th February, 1913.

The defendant Emanuel Victor De Cambra tells the Court that the plaintiff's father, Chaves, told him to speak to testator and to tell him to make a proper will and not to leave plaintiff anything as he had not agreed to her marriage and she had a determined mind and would interfere with the family. Now although

he says he gave no instructions as to the will and did not hear testator's instructions, the fact remains, that so far as the plaintiff is concerned, the will carried into effect the alleged wishes of her father. The fact that the Doctor and Priest were both sent for when Nero was called point to the condition of the testator at that time.

Dr. Clavier, who was examined for the plaintiff, says that when he was called to the testator on Thursday morning he found him with a high temperature (over 104) and could get nothing out of him. His condition in the evening was much the same. Next morning, the day of his death, he was much improved, and he ordered him to keep to his bed. He could then understand what was read to him but with the return of the fever and a headache—a condition which existed on the Friday night—in his opinion he would have reverted to the condition in which he found him on the Thursday.

The members of the family gave their evidence in a most unsatisfactory and unreliable manner.

The two defendants (De Cambra) take large benefits under the will, the other defendants are legatees and are in default, but through Counsel, the Roman Catholic Bishop expressed his willingness to abide by the order of the Court. There can be no doubt that the male defendant was instrumental in procuring the making of the alleged will; these circumstances together with those attending the making and execution of the will raise a strong suspicion as to the testator's capacity to make a will. To refer to Parke, B. in Barry v. Butlin "if a party writes or prepares a will under which he takes a benefit, that is a "circumstance that ought generally to excite the suspicion of the Court, and "calls upon if to be vigilant and jealous in examining the evidence in support "of the instrument, in favour of which it ought not to pronounce unless the "suspicion is removed and it is judicially satisfied that the paper propounded "does express the true will of the deceased".

This rule was referred to by Lindley, L. J. in Tyrrell v. Painton (L.R. Probate, 1894, p 157) who says "it is not in my opinion confined to the single case "in which a will is prepared by or on the instructions of the person taking large "benefits under it, but extends to all cases in which circumstances exist which "excite the suspicion of the Court; and wherever such circumstances exist and "whatever their nature may be it is for those who propound the will to remove "such suspicion and to prove affirmatively that the testator knew and approved "of the contents of the document, and it is only where this is done that the onus "is thrown on those who oppose the will, to prove fraud or undue influence or "whatever else they rely on to displace the case made for proving the will."

In the present case the defence have failed to remove the suspicion referred to and have failed to prove affirmatively that the testator knew and approved of the contents of the will propounded.

At the conclusion of the case, and after the Court had found in favour of the plaintiff, council for the defence stated that he had in his possession another will made by the testator. In para. 7 of the statement of claim it is alleged that the testator made no will and died intestate. Paragraph 2 of the defence says that the document in question is his last will. I think the intestacy should have been distinctly denied and the existence of an earlier will pleaded in the alternative.

I find therefore in favour of the plaintiff that so far as the alleged will of 7th February, 1913, is concerned the testator died intestate. The defendants, De Cambra, must personally pay the costs of these proceedings.

EARNSHAW J. I concur and have nothing to add.

GENERAL JURISDICTION.

CORAM—BERKELEY and EARNSHAW, JJ.

THIS 26TH DAY OF MARCH, 1914.

MARIA HAMLETT, Guardian *ad litem* of Miriam Cornette, a minor, and others,

v.

PLAYTER.

Landlord and Tenant—Defective premises—Liability of Landlord for injuries resulting from defect—Latent Defect.

A landlord is not liable for injuries caused to a tenant by reason of the defective state of premises let to the tenant unless he knew of the defect or from the nature of his occupation or other circumstances he ought to have known of it.

Cabral v. Wharton. (Appellate Jurisdiction, 10th August, 1911) followed.

Lewis v. Caetano. (General Jurisdiction, 5th December, 1913) followed.

The deceased, Anna Maria Long, was injured and subsequently died in consequence of injuries received by the breaking down of a platform at the top of a staircase to a house let by the defendant to the deceased. There was no evidence that the defendant knew of the defective state of the platform.

P. N. Browne, for the plaintiff.

de Freitas, K. C. for the defendant.

The action was tried on the 13th March, 1914, in the General Jurisdiction before Berkeley and Earnshaw, JJ. and on the 26th March the judgment of the Court was delivered by

EARNSHAW; J.: The plaintiffs claim from the defendant damages and pecuniary compensation for injuries and losses suffered through the negligence of the defendant in permitting a platform and staircase on Lot 10 or 13, Lombard Street, Georgetown to be in a defective condition.

Many questions were argued by counsel on both sides at the hearing, but for the purposes of this case one only need be considered.

The injuries complained of and the damages sustained thereby were caused by the breaking down of a platform at the top of a staircase on the premises in question. The claim is made against the defendant as landlord.

It is not by any means certain that the evidence proves the defendant to be the landlord but *assuming* that she was the landlord and that both tenants ami inmates other than tenants may claim damages from her as landlord, it is now the settled law of this Colony that when damages are claimed for injuries received as in this case "the landlord is not liable unless he knew of the material defect which caused the injuries or from the nature of his occupation or profession or from other circumstances ought to have known of it." (See the local cases Cabral v. Wharton. App. Jur. August 10th, 1911, and Lewis v. Caetano Gen. Jur. Dec. 5th, 1913.

It was argued that the plaintiffs had a valid claim independently of the common law under section 219 of the Local Government Ordinance, 1907, but, the Court sees no reason at present to differ from the interpretation put on that section by Hewick, J., in the judgment in the case of Cabral v. Wharton above referred to. The section and the argument bearing on its interpretation are there fully set forth and need not be repeated here. His conclusion is that the words "reasonably fit for habitation" in that section must be limited to sanitary arrangements, and that they do not include unfitness or defect in the structure or building as regards its materials or construction.

But it may reasonably be held if the words "reasonably fit" are not so limited and may cover also defects in material or structure that words such as these are necessarily implied in the section, viz., "to the best of the landlord's knowledge."

It cannot be assumed in the absence of express words that the Legislature intended to make the landlord liable for accidents which he could not foresee or provide against owing to a defect of which he had no knowledge, or of which he cannot be reasonably expected to have known.

It can not have been intended that the landlord should be an insurer against damages arising from all defects whether latent or patent. Now did the defendant know that the platform was in a dangerous condition, or was the defect such that from the circumstances in this case she ought to have known of it?

The answer to this question must be gathered from the evidence.

The only evidence against the defendant on this point is that of Samuel Theobald, who says that three months before the accident, the defendant's collector, one Crane, stepped on the platform and his foot nearly went through and that he (Theobald) then said to Crane "Do you see that, you won't repair that?"

This evidence is entirely unreliable in the face of Crane's contradiction and the evidence of the other witnesses that no defect at all was even noticed by them until at or immediately before the time of the accident.

There is no need to discuss the evidence in detail. The Court after considering the same has no hesitation in finding that the defendant never knew of the defect before the accident, and that the defect was latent, and such that it cannot be said that she ought to have known of it.

The defendant is therefore not liable in damages and there must be judgment for her with costs.

APPELLATE JURISDICTION.
THIS 6TH DAY OF APRIL, 1914.
HARBANSE
v.
EUROPE, Sergeant of Police.

A person who aids and abets the commission of an offence punishable on Summary conviction, may under section 24 of the Summary Conviction Offences Ordinance, 1893, be convicted upon an information which charges him as principal offender.

Du Cros *v.* Lambourne (1907) 1 K. B. 40 followed.

The facts are that Appellant and Bacchus attacked one Bachridee. The blow which caused the actual bodily harm was inflicted by Bacchus but the appellant was present aiding and abetting him. Appellant was convicted.

Decision confirmed.

M. J. G. de Freitas for Appellant.

Rees Davis, S. G., for Respondent.

BERKELEY, J.: Appellant appeals from a conviction by a Stipendiary Magistrate that he unlawfully assaulted one Bachridee so as to cause him actual bodily harm.

The grounds of appeal are that the decision is erroneous in point of law and unwarranted by the evidence.

The appellant and two others were charged before the Magistrate who dismissed the case against one of them convicting the appellant and Bacchus who has not appealed.

The Magistrate finds that Bacchus inflicted the injury over the left eye of Bachridee which necessitated four stitches by the Doctor.

Counsel for the appellant submits that the Magistrate was wrong in convicting the appellant as he was charged as a principal and not with aiding and abetting as found by the Magistrate, that aiding and abetting in the commission of an offence is a distinct summary conviction offence and that a summary conviction offence is not a misdemeanour.

I am unable to agree with counsel's contention. A misdemeanour is any crime which is less than felony, it cannot be limited to those crimes which are tried on indictment but includes those dealt with summarily. A person who aids and abets the commission of a summary conviction offence can be convicted upon an information which charges him with having committed the offence as principal offender (Du Cros *v.* Lambourne, 1 King's Bench (1907), page 40). In that case the appellant was charged as principal under the Summary Jurisdiction Act, 1848 (section 5 of which corresponds with our local section 24 of the Summary Conviction Offences Ordinance) and the facts shortly are that the owner of a car was charged with driving his car at a speed dangerous to the public. There was a conflict of evidence as to whether the car was driven by him or by a lady seated at his side. The Quarter Sessions dismissed the appeal finding that if the lady was driving she did so with his consent and approval, and the Court of

King's Bench confirmed the decision. See also Hill, acting J., in Anderson *et al v.* Strick (A. J. 22 July, 1913).

Application was made that in the event of the conviction being confirmed I would impose a fine in lieu of imprisonment. The assault is described by the Magistrate as brutal, the use of sticks is too freely indulged in locally and I am not disposed to think that the term of two months is too severe a punishment for the offence committed.

Appeal dismissed and decision confirmed with costs.

GENERAL JURISDICTION.

THIS 30TH DAY OF APRIL, 1914.

PHILLIPS AND LI

v.

SMALL.

Partnership for gold-mining—Writ signed by one partner only—Injunction to restrain Commissioner of Lands and Mines from parting with gold pending trial of action.

Section 44 of the Mining Ordinance, 1903, (No. 1 of 1903) does not apply to the bringing of an action and a power *ad litem* signed by one partner only of a mining partnership is sufficient.

Where an application is made to restrain the Commissioner of Lands and Mines from parting with gold in his possession under the Mining Regulations which is the subject-matter of an action, the Court will order the Commissioner to retain the gold pending the result of the action, if it appears that it cannot decide whether it is proper to order it to be given up to one of the parties to the action without at the same time deciding the questions in dispute in the action.

This was an interlocutory application by the plaintiffs for an order on the Commissioner of Lands and Mines requiring him to detain pending the trial of the action certain raw gold which had been delivered at his office under the Mining Regulations by the defendant, and which the plaintiffs claimed to be theirs and for the recovery of which they brought the action.

RAYNER, C.J. on 27th April, refused to make an order *parte* but gave leave under O. 40 r. 4 to serve defendant with notice of motion for the 30th April, ordering the Commissioner of Lands and Mines not to part with the gold till the hearing and determination of the motion.

The motion came on for hearing on the 30th April.

P. N. Browne for the defendant raised a preliminary objection that as the power *ad litem* was signed by only one plaintiff it was bad and the writ must be set aside. Section 44 of the Mining Ordinance, 1903, (No. 1 of 1903) provides that "no member of any mining partnership . . . . . can by a contract, other than a contract for the employment of labourers, bind the partnership except by express authority in writing derived from the members thereof." He also referred to section 46.

O. 3, r. 9 requires the plaintiff's solicitor when presenting a writ of summons to the Registrar to produce an authority in writing signed by the plaintiff appointing his solicitor to act for him in the action. The plaintiffs are described in the writ as Troyton Phillips and Samuel Li trading together in this colony as gold-

diggers under the name, style and firm of Phillips and Li. Under section 44 of the Mining Ordinance, the authority to the solicitor should have been signed by both parties.

McArthur for plaintiffs not called on.

RAYNER, C.J. I do not think that section 44 of the Mining Ordinance, 1903, applies to the bringing of actions. I think it is limited to contracts in respect of the gold-digging partnership. The Rules of Court provide the procedure for the bringing of actions and O. 14 r. 12 provides for the case of actions by and against partners, and I think the signature of one partner to the authority to the solicitor to act for them is sufficient, as it would be in actions by partners generally. The objection is over-ruled.

The application for the order on the Commissioner of Lands and Mines was then heard.

McArthur for plaintiffs. The questions raised by the defendant in his affidavit in opposition to the application are really the questions which have to be decided at the trial.

P. N. Browne for the defendants referred to Mining Regulations 81 and 82. The plaintiffs' affidavit in support of the opposition does not allege that the gold in question came from a claim owned by the plaintiffs. He cited *Small v. Bacchus* (20th May, 1902).

The proper remedy of the plaintiffs is under Part XI of the Mining Regulations and not by action.

The plaintiffs' claim is for gold obtained without permission, and under section 33 of the Mining Ordinance, 1903, the gold becomes the property of the colony and only the Attorney-General can sue for it.

He cited *Hadley v. London Bank of Scotland* (12 Law Times Reps. 747.)

McArthur not called on to reply.

RAYNER, C.J. It is quite impossible to decide the questions raised by Mr. Browne without at the same time deciding the questions which will have to be decided when the case comes on for trial. In considering whether it is proper to allow the gold in question to be handed over to the defendant pending the trial of the action, that is, whether he has shown that he is entitled to it, I should have to decide substantially the questions which are in dispute in the action. This I clearly cannot do at the present stage. All that the plaintiffs are asking is to have the subject-matter of the action preserved till the Court has decided which party is entitled to it. If I allowed the gold to be delivered up to the defendant, and judgment afterwards went against him, it might be that there would be nothing on which the plaintiffs could levy execution. I therefore hold that the gold must remain in the custody of the Commissioner until the action has been tried. But if the defendant succeeds it is only fair he should be compensated for the, time he has been kept out of his property and I therefore make it a condition of granting the order that if the defendant succeeds, the plaintiffs shall pay him such rate of interest on the value of the gold as the Court may award from to-day to the date of the judgment,

Mr. Browne contended that the plaintiffs had been guilty of delay in taking proceedings and had waited till the defendant had brought down the gold to the office of the Commissioner, and he might be kept out of it for a long time. I am therefore prepared to make an order to secure that the plaintiffs shall proceed promptly with their action. There seems no reason if both sides are wishful to proceed quickly, why the action should not be disposed of in three or four weeks from now.

McArthur consented to an order that the plaintiffs should deliver their statement of claim within four days.

APPELLATE JURISDICTION.

THIS 1ST DAY OF MAY, 1914.

GOMES, Appellant,

v.

DANIEL, Respondent.

Being armed with a dangerous weapon with intent to commit an unlawful act—Ord. 17 of 1893 s. 145 (*6.*)

Section 145 (6) of the Summary Conviction Offences Ordinance, 1893, (17 of 1893) which makes it an offence to be armed with or have any dangerous weapon with intent to commit an unlawful act and renders the offender a rogue and vagabond, does not apply to a single, sudden and unpremeditated act, unaccompanied by any circumstances tending to show a persistent cause of conduct or deliberate act.

Appeal from a conviction by the Stipendiary Magistrate of Georgetown.

A bailiff accompanied by the execution creditor went to execute a levy upon the appellant's property under a judgment of the Magistrate's Court. The appellant was in his shop, and upon seeing the execution creditor enter his shop, told the execution creditor he had promised to wait, and then taking up a cutlass, he jumped on the counter and brandished it and made for the execution creditor, when he was stopped and arrested. He was charged before the Magistrate under Ordinance 17 of 1893, s. 145 (6) with being found armed with a dangerous weapon with intent to commit an unlawful act, and convicted and was adjudged to be a rogue and a vagabond, and fined $50, or two months' imprisonment with hard labour.

Lewis for the appellant. The facts do not bring the case within the section under which the appellant was convicted.

Rees Davis, S.G., for the respondent.

RAYNER, C.J. The appellant was convicted under Part V of the Summary Convictions Offences Ordinance, 1893, (17 of 1893) which deals with offences against morality, religion and public convenience, and from a review of the various acts which are made offences, it shows the persons aimed at are persons who make a practice of doing acts detrimental to the public, acts of a persistent or deliberate nature. A sudden or unpremeditated act is not one of those contem-

plated by this part of the Ordinance. Section 146 which provides as to the proof which is to be given of an unlawful intent, shows that the intent must be deliberate and premeditated, not a mere sudden act done on the spur of the moment. Here the appellant was clearly roused to anger by his creditor levying upon him when he had understood he was to be given time to pay the debt, and in a moment of sudden anger without any premeditation, he seized the first thing that came to his hand, a cutlass (which according to the appellant's evidence in the Court below he was at the moment selling to a customer) and brandished it at his creditor. Before he could do any mischief he was seized and arrested by a constable who had gone with the bailiff. That is clearly not an act which comes within the vagrancy sections of the Ordinance, and the appellant cannot be said to have been found armed with or to have upon him the cutlass. He picked it up in the heat of the moment; he did not have it when the bailiff and the execution creditor entered the shop. That is not an act for which a man is liable to be branded as a rogue and vagabond. If it was desired to punish the appellant I do not understand why he was not charged with an assault or with assaulting or obstructing or resisting the execution of process of law under section 33 (3) of the Ordinance. But in my opinion he cannot be convicted as a rogue and vagabond under section 145 (6).

The conviction must be quashed with costs.

THIS 9TH DAY OF MAY, 1914.

BANKART

v.

CANNON.

Undertaking by Solicitor is binding on Client in cases where an action has been brought unless Solicitor expressly forbidden to do so.—In cases where no action has been brought, a compromise made by Solicitor is binding on Client only when he has accepted it, or has held out the Solicitor as being authorised to compromise.

No Right of Appeal given by Magistrates' Decisions (Appeals) Ord. No. 13 of 1893, from direction of Magistrate on points of law raised during hearing of case.

BERKELEY, J.: This appeal is from the Stipendiary Magistrate of the Georgetown Judicial District.

The Magistrate finds on the facts in favour of the appellant—that is that he was entitled to recover the sum of $49.11 being the difference between the market price of certain scrip and the actual amount received from the respondent. On 11th December, 1913, appellant's solicitor wrote that appellant wished his script returned to him when he would hand over the cheque received by him "plus interest." This offer was accepted on 16th December. The attorney of the appellant says that this offer as to payment of interest was made without his authority and that it was only brought to his notice on receipt of he letter of 16th December. This evidence is uncontradicted and the Magistrate says that he therefore accepts it, but he holds that an offer thus made by his solicitor is binding on the appellant and therefore he is constrained to give judgment in respondent's favour. It is on this legal finding that this appeal is

brought. The Magistrate omitted to draw the distinction as to a solicitor's authority to bind his client in cases where an action has been brought and those cases (such as the present one) in which no action is in existence. In the former the solicitor has authority to compromise unless he is expressly forbidden to do so, in which case he is personally liable to his client in damages although the compromise so entered into by him may be binding as between the client and the third party (Fray v. Voules, 28 L.J. (Q.B.) p. 232). In the latter cases where no writ has been filed, in order to render the client liable it must be shown that he either accepted the terms of the compromise or held out his solicitor as a person authorized to settle the matter and so is estopped from denying his authority. (Macaulay v. Polley (1897) 2 Q.B.D. 122). In the present case it is clear that the terms of the compromise were not accepted by the appellant. Can it be said that by his conduct or otherwise he held out his solicitor as authorised to compromise on his behalf? On 31st October, appellant by his attorney demanded the return of his scrip and expressed his readiness to hand over the cheque. No reference was made to interest either in this letter or in those of 3rd November and 10th December written to respondent by appellants solicitor, informing him that appellant was insisting on his taking proceedings against him and suggesting that respondent should settle. The appellant's attorney says that on seeing the letter of 16th December he at once refused to pay interest. This evidence negatives his holding out the solicitor as authorised to compromise on his behalf.

Counsel for the respondent desired to raise questions on points of law taken by him before the Magistrate but not raised on the reasons of appeal. The Court declined to hear any such argument. Counsel alleged that if the decision of the Magistrate had been adverse to respondent he would have appealed on these points of law. The Court undertook to consider—if necessary—the advisability of referring the case to the Magistrate under section 31 of the Appeals Ordinance of 1893. If it was open to the respondent to have appealed when decision was given this Court would not exercise in his favour the power conferred on it under this section. The question whether or not such a right existed must therefore be considered By section 3 of the Ordinance every person who is dissatisfied with any decision . . . . may appeal therefrom and under section 2 "decision" means and includes any non-suit, dismissal, judgment, conviction, final order, or other determination of any cause or matter. By the County Courts Act, 1888 (51 and 52 Vict. Ch. 43, s. 120) it is provided that if any party in any action or matter (other than those excepted) shall be dissatisfied with the determination or direction of the Judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision or order of the Judge may appeal to the High Court. This section is of far wider scope than the corresponding section in the local Ordinance. Provision is there made for an appeal from the direction of a County Court Judge to the High Court, on points of law raised during the hearing while no such provision is found in the local Ordinance. The respondent had no reason to be dissatisfied with the decision or judgment of the Magistrate and had no right of appeal from the direction of the Magistrate on points of law decided against him. Under these circumstances the Court thinks it right and proper to refer this case back to the Magistrate with directions to deal with the

point of law raised by this appeal, that is to find that Appellant is not bound by the compromise entered into by his solicitor with the respondent, and thereafter to determine the case. (Ordinance 13 of 1893, section 31 (2)). This will enable the respondent to appeal if he so desires.

Respondent must pay the costs of this appeal.

THIS 22ND DAY OF MAY, 1914.

HUMPHREY
v.
CROOKS.

Proof of Jurisdiction in the Magistrate's Court not necessary either in Civil or Criminal matters.

RAYNER, C.J.: In this case the plaintiff sued the defendant in the Georgetown Magistrate's Court for a balance of account of $16.92. After the plaintiff had closed his case, counsel for the defendant objected that the plaintiff had failed to "prove jurisdiction." The local jurisdiction of Magistrates' Courts in this colony in civil matters is limited, like the county courts in England, to cases where either the defendant resides in the district, or where the cause of action arises wholly or in part within the district, or where the chattel or thing which is the subject matter of the action is in the district. (Ord. 11 of 1893, sec. 3 (4.)) There was no evidence given by the plaintiff's witness either that the defendant resided within the boundaries of the Georgetown Judicial District, or that the cause of action arose within that district. The plaintiff's counsel then asked to be allowed to re-call his witness to prove jurisdiction, but the Magistrate refused and thereupon non-suited the plaintiff. Against that non-suit the plaintiff now appeals.

Mr. Dargan, who appeared for the defendant, (the respondent on the appeal) argued that it was necessary for the plaintiff to prove by the evidence of a witness that the case was within the jurisdiction of the court, that is, that a witness must swear either that the defendant resided within the Georgetown Judicial District or that the debt for which he was sued was contracted within the district.

I am aware that it is customary in the Magistrates' Courts of this colony to require a witness to prove in the witness-box that the offence or cause of action, as the case may be, was committed or arose in the Judicial District of the Magistrate. The witness says he resides, or the matter to be enquired into happened, (say) in High Street, in the City of Georgetown, in the Georgetown Judicial District, in the County of Demerara and in the Colony of British Guiana, and unless some such formula as that is recited by at least one witness, the case is dismissed. I understand that it is not considered sufficient for a witness merely to say he resides in (say) Georgetown, he must go farther and add, "in the Georgetown Judicial District, in the County of Demerara and in the Colony of British Guiana," because otherwise the Magistrate would not know that the City of Georgetown is in the Georgetown Judicial District.

I have practised at the bar in England, and I have had experience in the administration of justice, in three other colonies before I came to British Guiana, but neither in England nor in any of those colonies is what is here called "proof of jurisdiction" necessary. The averment in the summons, plaint or information,

that the offence was committed or the cause of action arose within the local jurisdiction of the Court is sufficient, and if the defendant alleges that he has been proceeded against in the wrong Court he must specifically object. I am unable to find in any of the books dealing with the practice of Magistrates' Courts or County Courts anything which lays down the necessity of proving the local jurisdiction of the Court, as a necessary part of the complainant's or plaintiff's case. If it was necessary to prove affirmatively by the evidence of witnesses that the Court has jurisdiction to entertain the case brought before it, I can hardly, imagine that the various works dealing with the practice of Magistrates' Courts and County Courts would be silent on the point.

It is however laid down, as to County Courts, that when it appears either from the particulars of the claim or from the evidence that the Court has no jurisdiction, the judge must strike out the case, and in Thompson v. Ingham (14 A. & E. 710) Patterson, J., held that the judge ought necessarily to go sufficiently into the evidence to satisfy himself as to whether he has jurisdiction or not. It should be noted that the judge is not to strike out the case till he is satisfied he has no jurisdiction: he is not to strike it out merely because it has not been proved he has jurisdiction. The cases above referred to and others to the like effect were not decided on objections to the local jurisdiction of the Courts, but on objections that the cause of action was not one within the competence of the Court to try. Indeed I have not been able to find any English cases decided on want of local jurisdiction, but the same principles apply equally on whatever ground the jurisdiction of the Court is challenged. This is in conformity with my own experience, and that of other members of the bar who have practised in England whom I have consulted. Jurisdiction is not proved, but if in the course of the proceedings it appears that the Court has no jurisdiction, the case is struck out or transferred to the proper court. That is to say, no question of jurisdiction arises, unless the defendant specifically raises it, or in the course of the proceedings it appears that the Court has no jurisdiction. That is the law and practice in England and in the other three Colonies of which I have had experience. The English law recognises the local jurisdiction of Magistrates, and the County Court Districts are similar to our Judicial Districts, but in the Statutes governing their procedure there is no provision requiring the proof of local jurisdiction. The Ordinances governing the procedure of our own Courts are equally silent on the point.

How then has it come about that a practice different to that which obtains in England and other Colonies, has arisen here. It is not owing to any requirement of the Roman Dutch law, for the Roman Dutch law books are as silent on the point as the English works on legal procedure.

So far as I am able to discover, the authority for the practice is contained in certain cases decided many years ago, the most recent being decided over thirty years ago, before the passing of the Ordinances which now govern the procedure of the Magistrates' Courts.

One is the case of Cabral v. Younger, (26th June, 1882) decided by Sir D. Chalmers, C.J. in what was then known as the Court of Review. Mr. Hill, the Magistrate, whose judgment is now appealed from, cites this case in support of his ruling. That was a case where a Commissary of Taxation prosecuted the defendant for being in possession of light weights, an offence for which only

certain persons including Commissaries, could prosecute. It was therefore necessary to prove that the complainant was one of the persons authorised by law to prosecute for the offence. The offence was committed at Lodge Village, and the question arose whether Lodge Village was within the fiscal district of Georgetown, for which the Commissary was authorised to act. No proof was given on this point, but it was contended that as a Proclamation having the force of law had constituted Lodge Village a part of that district, the Magistrate should take judicial notice of the fact. The learned Judge reviewed at length a number of English authorities, and held that the Magistrate could not take judicial notice of the Proclamation, but that it must be put in evidence before him, and he held that no jurisdiction had been proved. That judgment, however, is no longer an authority on that point, as by section 25 of the Evidence Ordinance 1893 (No. 20 of 1893) Courts are required to take judicial notice of Orders-in-Council made under the authority of an Ordinance. Further that case is no real authority on the general question of proving jurisdiction for in that case the Ordinance under which the proceedings were taken required the complainant to prove his authority to act in the place where he did act. There is no statutory enactment requiring proof of jurisdiction in cases like the one now before the Court.

But at the end of his judgment the learned Judge added these words, "It is a first principle in criminal jurisprudence that jurisdiction is co-ordinate with locality, which accordingly in the practice of the Courts is proved in every case even where the locality is notorious and in point of fact is perfectly well known to Court, jury and parties." If by these words the learned Judge meant that it was necessary to prove in every case that the place where the offence was committed was within the county or borough where the Court sits, I can only say it is not so in England. If, for example, a man is tried for burglary at the Assizes, no evidence is given that the place where the burglary was committed is within the county for which the assizes are being held. In the same way if a man is charged at the Old Bailey with a murder committed (say) in Whitechapel, no evidence is given that White-chapel is within the district of the Central Criminal Court. All that is done is to prove that the murder was committed in Whitechapel. If, however, the learned judge meant no more than that the court must be satisfied from all the facts before it, that the place where the offence was committed was within its jurisdiction, I agree with him.

The next case is Abendanon v. Sproston, (31st March, 1883) also decided by Sir D. Chalmers, C. J., which was cited by Mr. Dargan in support of his argument for the respondent. There the offence was committed on a steamer which was about a mile and a quarter from the shore, and it was held that evidence was necessary to show that the place where the steamer was, was within the Magistrates' local jurisdiction. The special facts of the case do not make it an authority applicable to cases of jurisdiction generally, for from the very nature of the case the Magistrate would be put on the enquiry as to whether the steamer had arrived within the Court's jurisdiction, which is very different from a case occurring in the very place where the Magistrate is sitting. In the course of his judgment the learned Judge said: "It was essential not only that the offence should in point of fact have occurred within his jurisdiction, but that such fact should have been shown on the proceedings." In that statement I concur, for the "proceedings"

include everything before the Magistrate, the summons, plaint or information, as well as the evidence of the witnesses.

It is to be noted that these cases, so far as they are authorities at all applicable to cases in the civil jurisdiction of Magistrates' Courts under the Petty Debts Recovery Ordinance of 1893, decide no more than that the Court must be satisfied that the case is within its jurisdiction. I can find in them no authority for requiring the familiar formula which is recited daily in the Courts of the Colony, a formula which in many, if not in most cases, must be meaningless to the witness who recites it, for few of them can know when swearing that a particular place is within a given Judicial District, what are the geographical limits of the district, as specified in the Order-in-Council constituting it. All that a witness can prove, and all that he should be required to prove, is the place where the occurrence took place. That is what is done in England, and if the Court has any reason to suspect that the place is not within its district, a few questions soon settle the matter one way or the other.

There is another case, referred to by Mr. Hill in his judgment as supporting his decision, Strahan v. Darrell (29th Oct. 1864), but which in my opinion is an authority the other way. In that case the charge did not sufficiently set out the place where the offence was committed, and no evidence was given as to it. Beete, J., said, "There is nothing in the charge or the evidence to show that the alleged offence was committed within the jurisdiction of the Magistrate" and he quashed the conviction on that ground. But the learned Judge was evidently of opinion, following the English practice, that an averment of the locality in the charge was sufficient, or failing that proof of it in the evidence, Now in the present case the plaint sets out fully the names and addresses of the plaintiff and defendant, and in the body of the claim distinctly avers that the cause of action arose in the Georgetown Judicial District. On the authority therefore of Strahan v. Darrell, the Magistrate should have held that his jurisdiction had been proved, and I cannot regard that case as any authority for the contention that jurisdiction must be proved by the recitation by a witness of the well known formula. I am at a loss to understand why this case has not been followed in later cases. Sir D. Chalmers, C.J., refers to it in his judgment in Abendanon v. Sproston, and perhaps that is why in that case he said that it was essential that the fact of jurisdiction "should be shown on the *proceedings.*"

Though in my opinion the above cases do not support the view that the jurisdiction of the Court must be proved in every case by the evidence of witnesses, I have great doubts whether they are now of any authority at all. Since they were decided the Magistrates' Courts in this colony have been reorganised and put on a more modern basis. By various Ordinances passed in 1893, the practice and procedure of the Magistrates' Courts were assimilated to that now obtaining in England. In criminal matters the procedure is almost identical with that to be seen any day in an English police court. The main difference is that many cases can be dealt with summarily here, which in England are triable only at Quarter Sessions or Assizes. But the actual procedure itself is practically the same. In civil matters the procedure under the Petty Debts Recovery Ordinance, 1893 (No. 11 of 1893) is very similar to that in the English County Courts. The English County Courts have a much more extended jurisdiction than our Magis-

trates' Courts, but so far as the recovery of small debts is concerned the procedure is much the same. When the Colony intended to constitute, and did in 1893 constitute its inferior courts on the modern English model, it intended those Courts to be guided by the same principles which guide similar Courts in England. I cannot think that it was intended that the re-constituted Courts should have their procedure clogged and hampered by the trivial technicalities which apparently obtained in the old Courts. For some, to me, unknown reason, technicalities seem to have lingered in the legal procedure of this Colony longer than in most other places. In England technicality was rampant up to the middle of last century, when the Common Law Procedure Acts of 1852, 1854 and 1860 began to put an end to it, and it has been steadily disappearing, until at the present time the principle which actuates the Courts is never to allow a technicality to defeat a just claim, if it can possibly be avoided, and to make any amendment and take any step, which will enable the real question at issue between the parties to be decided without delay and without multiplicity of suits. But here technicality seems to have flourished unchecked, and a lawyer accustomed to the practice and procedure of the English Courts must be surprised and somewhat shocked to find that in this twentieth century a man's rights do not depend so much on his having a good case on the merits, as on the observance of a number of trivial technicalities, failure to observe which will defeat the most just claim.

I think this system was intended to be swept away in 1893 and the principles and practice of the English Courts adopted. I am confirmed in this opinion by the wide powers of amendment given in the Ordinances relating to both the civil and criminal procedure of the Magistrates' Courts (No. 11 of 1893, s. 59 and No. 12 of 1893, s. 97), those given in respect of civil proceedings being especially wide, much more so than any possessed by the Courts before 1893.

I am further confirmed in this opinion by the provisions made in the above Ordinances as to the procedure to be adopted when it appears that the Court has no jurisdiction. Indeed I think these provisions are conclusive of the whole matter, and have abrogated all the authorities which formerly governed this question. Taking civil proceedings first, section 28 of the Petty Debts Recovery Ordinance, 1893 (No. 11 of 1893) provides that "when an action is com-"menced in the Court over which the Court has no jurisdiction, the Magistrate "shall order it to be struck out." It is clear from this that an action is not to be struck out until the Magistrate is satisfied that he has no jurisdiction. It does not say the action is to be struck out if it is not proved to be within his jurisdiction: his power to strike it out only arises when it has been shown that he has no jurisdiction. This section is in almost identical words with section 114 of the County Court Act, 888 (51 & 52 Vict. c. 43), and I have already referred to the practice in England on that point, and to the judgment of Patterson, J., in Thompson v. Ingham (14 A. & E. 710) in which he lays it down that the Judge ought necessarily to go sufficiently into the evidence to satisfy himself whether he has jurisdiction or not.

Turning now to criminal cases, the law is even stronger, for section 32 of the Summary Convictions Offences (Procedure) Ordinance, 1893 (No. 12 of 1893) says, "If on the hearing of any complaint it appears that the cause of "complaint arose out of the limits of the jurisdiction of the Court before which "such com-

"plaint has been made, the Court may, on being satisfied that it has no juris- "diction, direct the case to be transferred to the Court having jurisdiction where "the cause of complaint arose."

Here it is clear that the intention is that if the case is brought to the wrong Court, the Magistrate is to transfer it to the right one: he is given no power to dismiss it for want of proof of jurisdiction, "*but on being satisfied that ha has no jurisdiction*," he is to transfer it to the Court which has jurisdiction. The words "on being satisfied that he has no jurisdiction" are very strong, and negative any idea that he is to dismiss the case because his jurisdiction is not proved or is left in doubt. It is not enough to show that some other Court has jurisdiction (a case might be within the local jurisdiction of two Courts) but he must satisfy himself affirmatively that he has no jurisdiction.

These two sections in these Ordinances seem to me to sweep away all the learning and technicality which had grown up as to proof of jurisdiction. If the old rules were to be still in force, there was no need to enact these two sections: if the jurisdiction was not proved the case would be dismissed, and there would have been no need to enact that the Magistrate must satisfy himself that he had no jurisdiction before he dismissed or transferred a case.

I am satisfied that since 1893 the question of jurisdiction depends on these two sections, and a Magistrate like the Courts in England cannot lawfully dismiss a case for want of jurisdiction until he is satisfied that the case is not within his jurisdiction. If no evidence is given of. jurisdiction it must be taken that the Court has jurisdiction. If in point of fact the case has been brought in the wrong jurisdiction, that fact will soon appear, and if the Magistrate is in doubt about it, a question or two will generally settle it one way or the other. I cannot assent to the view I have occasionally heard promulgated here, but I am glad to say not generally adopted, that a Magistrate has no right to ask questions of the witnesses, but must decide on what the parties chose to put before him. A Magistrate sits to administer justice, and it is his duty to ask any question which will enable him to get at the real facts of the case, and if the question of jurisdiction arises it is his duty under the sections before referred to ask such questions as will satisfy him as to whether he has jurisdiction or not, and he should not dismiss a case for the want of it without any attempt to ascertain if he has jurisdiction or not.

I have gone into this question at some length because it is important to ascertain if it really is the law of this Colony that parties who resort to the Courts are liable to have a good cause of action defeated for failure to give formal proof of what in the great majority of cases, no one disputes or can dispute. I have also dealt with the question of jurisdiction both on the civil and criminal side of the Magistrates' Court, because though the case now before me, is a civil case, the authorities which have been cited, though criminal cases, have been taken to apply equally to civil and criminal cases. For the reasons I have given I hold that it is not now necessary if it ever was necessary to prove jurisdiction in a case in a Magistrate's Court, and that the Magistrate was wrong in non-suiting the plaintiff in the present case.

But even had the Magistrate been right in holding that jurisdiction must be proved, in my opinion jurisdiction was amply proved in this case. It is true no one recited the usual formula, but the plaintiff's witness in his evidence said, "I

"know Crooks the defendant. I keep the books of account kept in the ordi-
"nary course of business The defendant is the Crooks mentioned in the books
"of account." The defendant so referred to can be no other than the defendant in the case then before the Court, the person very fully described in the plaint as "J.T.J. Crooks, whose place of abode is at Mrs. Wight's boarding-house, "Brickdam, Georgetown, aforesaid, defendant." At the head of the plaint are the words "In the Georgetown Judicial District Magistrate's Court to be held at "Georgetown within the said District," clearly showing that the defendant resided within the Georgetown Judicial District, which under section 3 (4) (*a*) of the Petty Debts Recovery Ordinance gives the Court jurisdiction. The plaint was before the magistrate and he was bound to look at it and consider it, to see who the parties were, and what the claim was. It is as much a part of the case as the evidence of the witnesses, and the reference of the witness in his evidence to the defendant was sufficient to show who the defendant was and where he lived. The judgment of Beete, J., in Strahan v. Darrell, also shows that the Magistrate had before him in the averment in the plaint sufficient evidence to prove jurisdiction.

Before parting with this case I must make a few remarks on the refusal of the Magistrate to allow the plaintiff to re-call his witness to prove that the defendant lived in the Georgetown Judicial District. The Magistrate gives his reasons for refusing as follows:— "I know of no obligation on Magistrate to "require him to allow a plaintiff who has failed to prove an essential part of his "case, on objection taken, to re-call a witness to do so, especially in civil mat-"ters. It is unnecessary to expatiate on how objectionable this would become in "practice."

I have already referred to the disinclination of Courts at the present day to allow technicalities to interfere with the determination of the real question in dispute between the parties. One of the greatest Judges within living memory, Lord Bowen, has laid down the principles on which Courts should act in this respect in clear and unmistakable words. In his judgment in Cropper v. Smith (26 Ch. D. 700) his Lordship says, "It is a well established principle that the "object of Courts is to decide the rights of the parties and not to punish them "for mistakes they may make in the conduct of their cases, by deciding other-"wise than in accordance with their rights. . . . . I know of no kind of error "or mistake which if not fraudulent or intended to overreach, a Court ought not "to correct, if it can be done without injustice to the other party. The Courts do "not exist for the sake of discipline, but for the sake of deciding matters in con-"troversy, and I do not regard such amendments as a matter of favour or grace. ". . . . . It seems to me that as soon as it appears that the way in which a "party has framed his case, will not lead to a decision of the real matter in "controversy, it is as much a matter of right on his part to have it corrected, if "it can be done without injustice, as anything else is a matter of right." Lord Bramwell in Tildesley v. Harper (10 Ch. D. 393) and Lord Esther in Clarapede v. Commercial Union Association (32 W. R 262) have both given utterances to the same effect.

It is true that the above judgment was delivered on a question of amendment of proceedings, but the principles there laid down are applicable to the whole conduct of the case, and it is the duty of the Court to do whatever is necessary to

enable it to decide the real question in issue between the parties, so long as no injustice is done to the other side. I cannot see how re-calling a witness to formally prove a fact which no one denies, and which he could have proved when he first went into the witness-box, could possibly prejudice the other side.

Mr. Dargan, in the course of his argument, cited the case of Gildhary v. the Commissioner of Lands and Mines (16th April, 1912), in which my brother Berkeley held that a Magistrate should not, after a plaintiff's case was closed, recall a witness to prove jurisdiction. In his judgment my learned brother quoted some remarks of Lord Chelmsford in Sheddon v. Attorney General (22 L.T., N.S. 633), where his Lordship said: "The permission to re-"call a witness is entirely in the discretion of the judge, a discretion usually "exercised with great caution, on account of the obvious danger of the pro-"posed evidence being skilfully applied to supply any deficiencies which "might have been left in the case upon the former proofs."

When the question upon which the witness is to be re-called is disputed by the other side, the danger referred to by Lord Chelmsford is apparent but where the witness is merely to prove formally some fact not in dispute, as in the present case, the place of residence of the defendant, I fail to see what mischief can arise.

The words of Lord Chelmsford in the above case were considered by Sir D. Chalmers, C.J., in Faria v. Inniss (14 Feb., 1891) and in the course of his judgment in that case, after referring to two local cases, the learned Judge said, "There is no case in the Superior Courts so far as I am aware in which a Judge "or jury has formed and expressed an opinion that the evidence adduced on a "necessary *and not merely a formal point*, was inconclusive, the party on "whom the onus lay was permitted to adduce evidence to supplement the proof "which was deficient." It is clear that the learned Judge did not consider it improper to allow a witness to be re-called to prove a merely formal point.

No doubt my brother Berkeley had good grounds on the facts of the particular case before him in Gildhary v. Commissioner of Lands and Mines for coming to the conclusion that in that case the Magistrate exercised his discretion wrongly, but speaking generally, in my opinion it is the duty of a Court to allow a witness to be re-called to prove any fact necessary to be proved, to enable the Court to do justice between the parties, unless under the circumstances of the case the Court thinks it would be unfair to the other side or dangerous for the reasons given by Lord Chelmsford.

The Magistrate, in his reasons for his decision, says it is unnecessary to expatiate on how objectionable in practice it would be to allow witnesses to be recalled. What the objection is, unless it be the one specified by Lord Chelmsford, I do not know, but it seems to me that it is at least as objectionable, to say nothing of the injustice of it, to deprive a man of his rights for a trivial technicality, which could have been rectified without any injustice to the other side.

The non-suit entered in this case is set aside, and the case remitted back to the magistrate to be heard on the merits. The respondent must pay the costs of the appeal.

FULL COURT (APPEAL COURT).

THIS 13TH DAY OF JUNE, 1914.

CORAM.—BERKELEY, Acting C.J.: HILL, Acting J., and FARRER MANBY, Acting J.

DAVILAR (Respondent.)

v.

BROWNE (Appellant.)

Gold Mining, Regulations 1905—Trespass—Regulation 178—Damages for unlawful interference with stop-off and workings.

The plaintiff claimed damages from Browne and Adonis for trespass and Earnshaw, J., gave judgment for $400 and costs as against Browne, holding that plaintiff was in lawful possession of the land trespassed upon, and that the defendant, Browne, through her agents, had committed the acts complained of. Browne appealed.

Held, that on the facts the judgment must be affirmed, but that failure to adopt the procedure laid down under Regulation 178 does not bar a person's right, if such exists, or prevent the subsequent enforcement of such right in a legal manner.

Hutson, K.C., with *A. B. Brown* for appellant.

Marshall for respondent.

The facts and arguments are set out in the judgment:—

BERKELEY, Acting C.J.: I have read the decision about to be delivered by Mr. Justice Hill and I concur therein and have nothing to add thereto.

HILL, Acting J.: This is an appeal from the decision of Earnshaw, J., by which he awarded to the respondent the sum of five hundred dollars and costs, against the appellant as damages for trespass, and destruction of a stop-off placed by respondent in a creek for the purpose of working a gold-mining claim.

The learned Judge found on the evidence before him that Davilar located a claim on the Sir Walter Creek on 15th March, 1913, and that he afterwards obtained the necessary claim licence from the Department of Lands and Mines. That claim licence is dated 15th August, 1913. He disbelieved Browne's evidence that he (Browne) had, for his wife, then Miss Medas, already located a portion of Davilar's lands, and consequently that Davilar's claim was bad, as he was a trespasser on the claim, and particularly at the place where the alleged trespass by him (Browne) was said to have been committed.

The learned Judge found that Davilar was, for the purposes of the case, and on the evidence before him, lawfully in possession of the lands where the alleged trespass was committed.

The grounds of appeal against his decision, are that the learned Judge was mistaken in so holding, and that appellant showed a prior location and occupation to that of the respondent in which case there could be no location by respondent whatever under the Mining Regulations, 1905.

The argument advanced was that there was no corroborative evidence in support of the location by Davilar on 15th March, 1913, that the visit of the

Warden, and verification, somewhere about 14th March, 1913, of claims in the Sir Walter Creek pointed to the improbability of the location on 15th March, 1913, and that this being so, the learned Judge, in view of the evidence of Browne and the claim licences put in by him, should have held that the respondent's title was bad as against Mrs. Browne's.

No doubt it is better, where possible, to have corroborative evidence, but I cannot hold that, without it, a plaintiff's claim must be, or ought to be, rejected. Davilar put in his claim licence, which speaks of a location by him on 15th March, 1913, and the Warden's receipt for the notice of the location, and application for licence, dated 30th May, 1913. It is clear also that he was in actual occupation of what he alleged was his, and Browne, according to Abraham's evidence, speaks of Davilar's claim "lower down." There was *prima facie* evidence calling for rebuttal.

Claim licences have the following note at the foot thereof: "This licence "is issued in accordance with the description of the claim given by the locator "thereof, and without prejudice to the rights of any other persons in respect of "the same land, and the locator takes the same, subject as to the condition that "the location is, as he alleges, on Crown land which can legally be located un-"der the authority of the Mining Ordinance, 1903."

Under Regulation 14 (1) of the Mining Regulations of 1905 it is a condition precedent to the issue of a licence that the boundaries of the claim have been verified to the satisfaction of the Commissioner, and as Davilar's licence was issued to him under date 15th August, 1913, it must be presumed that the boundaries of his claim had been verified according to his location notice.

That Davilar had a claim there is no doubt, the evidence abundantly shows this, as also that Mrs. Browne had 10 claims, the licences for which were issued on the 5th August, 1913, and if Davilar, as is alleged, encroached on Mrs. Browne's lands recourse should have been had to the Warden under Regulation 178, rather than for Browne to take the law in his hands, and do the acts complained of, but the fact that he did not so avail himself would not, however, bar Mrs. Browne's right, if she had any, or prevent the subsequent enforcement of such right, in a legal manner.

Davilar was in the possession and lawful occupation of a claim of which the boundaries, it must be presumed, had been verified, and for which there was no evidence before the learned Judge showing a previous location by another party, other than Browne's testimony and the ten claim licences. Davilar's licence, therefore, conferred on him all the rights referred to in Regulation 15, and the onus was on Mrs. Browne to show that she had a better title; that is, that when the licence was issued to Davilar, she had previously lawfully occupied or previously located the same land, and then, and not till then, would the claim licence confer no rights upon Davilar.

The learned Judge did not believe Browne on this point, and the contention of counsel for the appellant that corroboration of the location by Davilar on 15th March, 1913, was necessary, is equally applicable in the case of Mrs. Browne's locations, for it is clear from the evidence that Davilar's claim was on a portion of the one unoccupied piece of land between the creek mouth and Mrs. Browne's No. 1 Claim.

In point of fact, if the evidence of the Warden is looked at, he speaks of

"going to Pigeon Island in February and leaving on 14th March," of his verifying claims for Browne "who had two claims taken in E. W. Medas's "(Mrs. Browne's) name." On reference to Mrs. Browne's ten claim licences, I find that three were located on 8th March, 1913, and seven on 12th March, 1913. It follows, therefore, if Mr. King verified two claims in Medas's name, these two must have been two of the ten. If he verified them before 12th March he should then have verified three, if after 12th March and before he left on 14th March, he should have verified ten. This is on the presumption that the verification was made before the preliminaries required by Regulations 8 and 11 had been gone through, as would seem to have been the case.

Not only, in my opinion, has Mrs. Browne failed to show prior location, but it would seem that the dates of Browne's locations for Miss Medas are not reliable, and certainly call for corroboration quite as much as, it is suggested, Davilar's does.

I am of opinion that the decision appealed from, must be affirmed with costs.

FARRER MANBY, Acting J., concurs in this decision.

APPELLATE JURISDICTION.

THIS 29TH DAY OF JUNE, 1914.

WILLIAM LAVRICK.

v.

H. GRAVESANDE, Corporal No. 1356.

Malicious Injury to Property—Section 69, Ordinance 17 of 1893—Malice express or implied equally applicable.

Section 69 of Ordinance 17 of 1893 applies whether the malice is express or implied, and a person who commits, intentionally, a wrongful act, without just cause or excuse is as much liable under Title VI, as the person who, through ill-will towards the owner of the property, commits the offence.

HILL, Acting J.: This is an appeal from the decision of a Magistrate of the Berbice Judicial District convicting the appellant on a charge of unlawfully and maliciously killing a goat. The Magistrate found express malice, and on the evidence could so have found, and the Court will not interfere with his decision, but as the case was argued on those lines, it may be as well to point out that under Title VI of the Summary Convictions Ordinance malice against the owner of property need not be shown (Sec. 69) and if the act be done intentionally, be wrongful, and without just cause or excuse, a person is still liable for any offence committed under that Title.

LIMITED JURISDICTION.

THIS 30TH DAY OF JUNE, 1914.

FONSECA

v.

BRITISH GUIANA MUTUAL FIRE INSURANCE COMPANY, LTD.

Policies of Insurance—Conditions 12 and 14—Insufficiency of information in Claim. (Condition 12)—Affidavit in support—Untrue statement therein—(Condition 14.)

The plaintiff filed a claim under two policies of Insurance for $978, and an affidavit in support. The affidavit swore to an entire destruction of stock, whereas, in fact, such was not the case, within his knowledge, at the time he swore to the affidavit. The defendant Company pleaded Condition 12 had not been complied with, inasmuch as the information supplied in the Claim was not as much as was "reasonably practicable" for plaintiff to have supplied; and breach of Condition 14 in that plaintiff had sworn to an untrue statement in the affidavit.

Plaintiff, in reply, pleaded waiver of Condition 12 by letters and conduct, if the Court held that the information was insufficient, and denied breach of Condition 14.

The Court held that Condition 12 had been sufficiently complied with, that the books of the business were not an integral part of the claims but only to be produced, if called for by the Company, but that if it had held otherwise, the letters and conduct of the Company in no way showed waiver of the Condition.

The Court further held that the plaintiff having thoroughly sworn to an untrue statement in the affidavit the policies, under Condition 14, were, in the circumstances, absolutely void.

McArthur for plaintiff.

Hutson, K.C., for defendant Company.

HILL, J.: Plaintiff claims $978 on two Policies of Insurance dated 7th March, 1910, and 20th December, 1910.

The defendant Company admits making the two Policies, but sets up breach of Condition 12 attached to the policies, alleging that the plaintiff did not comply with the Condition. That Condition is as follows:—

On the happening of any loss or damage, the insured must forthwith give notice in writing thereof to the Company and must within 14 days after the loss or damage, or such further time as the Directors may in writing allow in that behalf deliver to the Company a claim in writing for the loss or damage containing as particular an account as is reasonably practicable of all the articles or items of the property damaged or destroyed and of the amount of the loss or damage thereto respectively, and of any other insurances, and must at all times at his own expense, produce and give to the Company all such books, vouchers and other evidence as may be reasonably required by or on behalf of the Company, together with an affidavit, statutory declaration, or other legal form of the truth of the claim and of any matters connected therewith. The amount of the insurance shall be no basis for assessing the damage. No amount shall be payable under this policy unless the terms of this condition have been complied with.

The defendant Company also allege breach of Condition which is as follows:—

If the claim be in any respect fraudulent, or if there shall appear any fraud or any false statement in such account, or in any of such books.

vouchers or other evidence, or if such affidavit or statutory declaration or other such legal form shall contain any untrue statement, or if it shall appear that the fire shall have happened by the procurement or wilful act or by the means of connivance of the insured, then this policy shall be absolutely void. And if no claim shall be made for the space of three months after the occurrence of any fire, or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th Condition of this policy), within three months after the Arbitrator or Abitrators or Umpire shall have made their award, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim, and all benefit under this policy shall be forfeited.

The defendant Company allege that the affidavit filed in support of the claim was untrue, and in consequence the policies became absolutely void.

The plaintiff in reply pleads that the defendant Company excused and discharged the plaintiff from complying with Condition 12, and waived the requirement of the said Condition by their letters of 6th January, 1914, 29th January, 1914, and 5th February, 1914. The plaintiff further pleads that it was not reasonably practicable in the circumstances to give a more particular account of his loss or damage, that he gave the defendant Company, of all the articles or items of the property damaged or destroyed, and of the amount of the loss or damage thereto respectively, neither was nor is the plaintiff able to give the defendant all such books, vouchers, and other evidence required by the defendant Company owing to the destruction of the same by fire.

It may be taken as admitted, or, as in my opinion, proved, that there was a fire on the 22nd December, 1913, that in the plaintiff's drug shop there were stock and fittings to the value of $1,200 or $1,300, that the fire destroyed the stock and fittings, with the exception of two glass-cases and stock of the value of $65 or thereabouts, that the glass-cases and stock of the value of $65 or thereabouts were in the plaintiff's possession on the afternoon of 22nd December, 1913, having been removed to a shop in Camp Street, chat on the 24th December, 1913, the plaintiff filed his claim with the defendant Company, supported by affidavit in which, *inter alia*, plaintiff swore that his drug business was completely destroyed by the fire on the morning of the 22nd December, 1913, and that his stock was also destroyed.

Under date 24th December, 1913, plaintiff wrote the defendant Company: "I herewith forward you affidavit in connection with the Lombard Street fire "of the 22nd instant. My average monthly sales amounted for the last six "months to $150 per month, and the additions to stock about $100 per month "more or less. The fire having occurred during the Christmas season when an "unusual large stock is put in, it is perhaps unnecessary for me to say that my "loss has been far in excess of the claim."

Plaintiff swears that at that time he had no books in his possession, saved from the fire, but his clerk, Altt, who swears that he did have the Sales Book, and Smith Bros. Pass Book, which it is evident would have enabled plaintiff to fairly accurately arrive at his actual loss, assuming that his stock was as stated by him at the middle of June, 1913, when he last took stock. Altt is positive that he himself handed plaintiff four books on the 22nd December, 1913, which

he had saved from the fire, and two of those books were the Sales Book, and Smith Bros. Pass Book. Plaintiff, on the other hand, swears he got the Sales Book out of the safe, which had gone through the fire, a week or so later.

The Secretary of the Company wrote plaintiff on 6th January, 1914: "My "Directors have information that you saved all of your books and papers in- "cluding your stock book, and they would like to see it. Will you kindly bring "it to the office."

The plaintiff replied on the 7th January, 1914: "In reply to yours of yes- "terday's date asking for my stock book, I beg to refer you to my affidavit "wherein I have affirmed that my stock book has been lost in the fire."

"I left my shop and the scene of the fire immediately the explosion oc- "curred, and have no knowledge that all of my books and papers, including my "Stock Book, have been saved. . . ."

This letter was disingenuous, as he had at this time certainly, the Sales Book in his possession, which, as I have said, could readily have supplied information, as it included practically all the transactions of the business. That the plaintiff, it will be observed, prepared to deal with the Secretary's letter strictly, and the request for "it" that is, the Stock Book, is met by the reference to it as shown before.

On the 29th January, 1914, the defendant Company wrote plaintiff as follows:

"I am instructed to inform you that my Directors do not see their way to "admit your claim for loss, and it has accordingly been rejected." In the meantime,—on the 20th January, 1914,—plaintiff's house had been searched under authority of a search warrant, and certain stock, and the two glass-cases had been found, and on 4th February, 1914, Mr. McArthur, on behalf of the plaintiff, writes the Secretary of the defendant Company asking the Directors to reconsider their decision in connection with plaintiff's application.

That letter continues: "I understand that your Directorate has received cer- "tain information to the effect that my client's property was salvaged and was "not destroyed by the fire as alleged by him. This I have every reason to be- "lieve is not the case. Every attempt was made by some of his friends to re- "move as much of his goods as possible out of the fire area, but as it was im- "possible to obtain the services of carts, on that occasion, the efforts made to "minimise your Company's loss was not successful, and except two glass- "cases containing a few sundries the entire stock had to be left near the en- "trance to the shop and was lost to him. Mr. Fonseca was not on the premises "or near it when these efforts at salvage were made and was at his residence at "Camp Street when the two glass-cases arrived there. The glass-cases together "with the sundries therein contained amounted in value to about $65. Mr. "Fonseca had locked up his premises but the police for reasons of their own "had the door broken open. From the perusal of the previous correspondence "that passed between my client and yourself it appears to me to be singularly "unfortunate that all the books and papers, &c, saved from the fire were not "required by your letter of 6th January, 1914, nor was any inquiry made as to "salvaged goods; instead only the stock book was demanded. My client has no "desire or reason to withhold any information from your Directorate, and I "shall be most willing to give you every assistance in any enquiry you may "decide to make in the circumstances.

"As an earnest of this I herewith attach several letters giving as full par-
"ticulars as possible of the value of his stock and of all the circumstances by
"those who were present on the occasion, and I trust I shall be favoured with
"any demand for further particulars which your Directors may require."

An important feature of this letter is the recognition that the salved goods would minimise the Company's loss, when the plaintiff's statement is borne in mind that he did not mention them, as he considered they were his in view of the insurance not covering his actual loss. This statement was clearly not *bonâ fide,* for if it was, why should he have concealed the existence of the salvaged goods from the Directors, until forced to disclose?

On the 5th February, 1914, the Secretary replied: "My Directors have re-
"considered your claim and all the circumstances as put forth in your letter and
"I am instructed to state that they do not see their way to admit it."

I may say at once that if the question of waiver of Condition 12 had to be considered by me, on the basis of the three letters from the Secretary of the Company, I should certainly have no hesitation in holding that there was no waiver The letter of the 6th January was not a dealing with the claim. The Directors made a statement and asked to see the stock book. There was nothing to show the Company considered the claim sufficient. And the further letters of 29th January, rejecting the claim, and 5th February, 1914, re-affirming that rejection are not sufficient to constitute a waiver of Condition 12, if it were necessary for me to consider that point.

It is unnecessary for me so to do, as I am of opinion that the plaintiff's letter of the 24th December, 1913, must be held to have contained as particularly an account as was "reasonably practicable" of the property destroyed, when taken with the supporting affidavit. The fact that he had certain books in his possession, certainly the Sales Books, would not have helped the sufficiency of the claim; and there was no obligation on the plaintiff, under Condition 12, to produce his books and papers except he was asked for them by the Company. As I have said his reply to the letter of the Secretary of 6th January, 1914, was disingenuous, and though strictly within the scope of the demand, leads one to question his *bona fides.*

So far as Condition 12 is concerned therefore, the defendant Company must fail, and there remains to be considered Condition 14 dealing with fraud.

It is admitted that plaintiff in swearing in the affidavit filed with his letter of 24th December, 1913, that his entire stock was destroyed, told an untruth, but his counsel puts forward the argument that the untruth must be of a *material* fact, and that *material* must refer to a large or substantial discrepancy between the actual loss and the amount claimed by the insurer. In this case it is argued that while the affidavit was admittedly untrue, the salvage only amounted to $65.

The Court was referred to several authorities in which the conclusion finding fraud was based on wilful representation showing large discrepancies between the claims and the actual loss as found.

Levy *v.* Baillie 7, Bingham, p. 349.

Beltar *v.* Royal Fire Insurance Company, 4 Foster and Finlason, p. 905. Chapman *v.* Pole, 22 L.T.R., 305.

Norton *v.* Royal Fire & Life Insurance Company (1885), 1 T.L.R., 460.

These cases merely show, in my opinion, that the large discrepancies were

evidence on which the jury were justified in concluding that fraud must or must not have been intended. Now, a contract of Fire Insurance is a contract of indemnity on which the assured is only entitled to recover the value of the property destroyed (or the full amount of insurance), and wilful misrepresentation of the value of the property destroyed, would (under Condition 14) defeat and vitiate the whole claim.

This is in accordance with justice, and also better sound policy —that a person who has made a fraudulent claim should not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It would be most dangerous to permit parties to practise such frauds, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed. And if there is wilful falsehood and fraud in the claim, the insured forfeits all claim whatever under the policies. (Bultan *v.* Royal Fire Insurance Company. 4 F. & F, 909). This is not a case of *bonâ fide* mistake, a mere exaggeration, or over estimate in a claim which would absolve plaintiff (Chapman v. Pole, 22 T. L. R. 305.) The intention of the plaintiff is to be looked at and his whole conduct (Norton *v.* Royal Fire and Life Insurance Coy. (1885) 1 T. L. R. 460).

What is the conduct of the plaintiff? He receives into his house on the afternoon of the fire—22nd December, 1913—certain salvaged goods—and on the 24th December, 1913, swears to an affidavit that his entire stock was destroyed. He has opportunities of rectifying his statement and amending his claim (Norton *v.* Royal Fire and Insurance Coy., supra) but remains silent. After his house is searched, and on 4th February, 1914, comes the first notification by him to the Directors that he has had the salvaged goods in his possession since the day of the fire. During this period he is in possession of books which he does not produce, quibbling over the word “it” in the Secretary’s letter of 6th January, and pointing out in his reply of 7th January that he has affirmed that in his affidavit that “it” (the stock book) was destroyed: and at the same time, he, when so writing, knows that in that same affidavit he has sworn to an untruth in that he has sworn his entire stock was destroyed, when he knew it was not.

If the argument for the defence is correct an insurer who salves ten per cent. in value of the goods insured, and wilfuly swears to an untrue statement that the entire stock has been destroyed, is, and ought to be, in no worse position, on his fraud being discovered, that the honest insurer who discloses his salvage, and claims accordingly.

I cannot assent to such a proposition. To find such would be to encourage what is, in effect, in the nature of petty pilfering. Condition 14 is quite clear on the point, and there must be judgment for the defendant Company with costs, as the policies are absolutely void.

FULL COURT—(APPEAL COURT).

THIS 30TH DAY OF JUNE, 1914.

WILSON
v.
KENSWIL.

CORAM.—BERKELEY, Acting C.J.; HILL, Acting J., AND FARRER MANBY, Acting J.

Mining Ordinance, 1903, Section 74—Cash Deposit to prosecute Appeal—Sections 73 and 75.

The appellant, dissatisfied with the decision of a Warden, appealed under Section 73, and deposited $50 in cash. At the hearing, on objection, Berkeley, J., held that the deposit was not in conformity with Regulation 74 and dismissed the appeal. From this decision, Wilson appealed to the Full Court.

Held, that Section 74 was a statutory requirement, and must he strictly construed, and that the Court could not presume otherwise. Further, that under Section 73 the appellant could have, if unavoidably prevented from appealing within the time allowed, applied by motion for leave to appeal—and that Section 75 did not recognise the practice and procedure of appeals from Magistrates' decisions in respect of notice, and security, in appeals under the Mining Ordinance, 1903, such being expressly provided for in Sections 73 and 74.

McL. Ogle with *Humphrys* for appellant.

Browne for respondent.

HILL, Acting J.: Section 74 of the Mining Ordinance, 1903, requires an appellant to enter into a recognisance with at least one sufficient surety, in fifty dollars, to the satisfaction of the Commissioner or Warden, conditioned for the due prosecution of the appeal and for abiding the result thereof including the payment of all costs of the appeal and otherwise. This, he has to do, within one month after the date of the decision appealed against. Instead of doing this he lodged fifty dollars in cash and the Commissioner accepted the amount. The Section must be construed strictly in my opinion, and the Court cannot presume that the legislature did not consider the point, and cannot amplify the specific provisions of the law as to security in these appeals, by reading into the Section something not there. The Commissioner's acceptance does not affect the question.

The appellant could have approached the Court, by motion, in the event of his having been unavoidably prevented from appealing, under section 73 and obtained leave to appeal.

The words in Section 75 "subject to the provisions of this Ordinance," regulate the procedure and practice as regards notice, and security, in appeals under the Mining Ordinance, 1903, and the practice and procedure in appeals from the decisions of Magistrates, does not apply in these respects.

The decision appealed from is affirmed with costs.

P. A. FARRER MANBY, A.J.: I agree.

Counsel for the appellant in asking us to disregard the words in Section 75 subject to the provisions of this Ordinance" entirely and to read in the provisions of the Magistrates Appeal Ordinance,

We cannot do that and we cannot suppose that Section 74 is a mistake by the Legislature. If we did suppose that, I do not think we could make new law by inserting words into the Ordinance which do not appear.

Decision appealed from affirmed with costs.

BERKELEY, Acting C.J.: I concur. This appeal must be dismissed with costs. I have nothing to add to my decision of the 15th of May, 1914.

LIMITED JURISDICTION.

THIS 15TH DAY OF MAY, 1914

WILSON

v.

KENSWIL.

Mining Ordinance, 1903. Section 74 not complied with by depositing $50.

M. J. BERKELEY, J.: This appeal is from the decision of the Commissioner of Lands and Mines who held that certain diamonds amounting to 788½ carats were the property of the respondent.

Objection is taken to the hearing of the appeal inasmuch as no recognizance has been entered into as required by Section 74 of the Mining Ordinance, 1903.

Counsel for the respondent submits that the spirit of the law has been complied with by the deposit of $50.

The Court holds that the procedure laid down by the Ordinance has not been complied with although the deposit of $50 is as good if not better than the entering into a recognizance. It is reluctantly bound to hold that in the absence of a recognizance as required by the Ordinance this appeal cannot be entertained. Appeal dismissed. No costs.

APPELLATE JURISDICTION.

THIS 3RD DAY OF JULY, 1914.

OMRASING
v.
SOODHOO.

Detinue—Action maintainable where possession obtained by wrongful act, and detention wrongful.

HILL, Acting J.: In this appeal from the decision of a Magistrate, in which, in an action in detinue he found for the plaintiff, counsel for the appellant contended that for detinue to be the possession must be rightful, and the detention

wrongful. The appellant, he contended, was shown to have been in wrongful possession, effected by his wrongful taking, and exercising dominion, and the action should be one of conversion.

This is not so. The injurious act is the wrongful detention, and it is immaterial whether the goods detained were obtained by the appellant by lawful means, or by a wrongful act, as by trespass or conversion.

I can find no evidence sufficient to support his further contention that plaintiff must be held to be the agent of Salamat, and the decision of the Magistrate is affirmed, and the appeal dismissed with costs.

THIS 8TH DAY OF JULY, 1914.

GOMES *et al,* Appellants.

v.

BRODIE & RAINER, LIMITED, Respondents.

False trade description applied by alteration of words of a trade description reasonably calculated to lead person to believe that the goods are the manufacture of some person other than the person whose manufacture they really are. (Ord. 2 of 1888 s. 2 (2.)). Trade Mark not necessarily registered.

M. J. BERKELEY, Acting C.J.: Appellants appeal from a decision of the Stipendiary Magistrate of the Georgetown Judicial District who convicted them for that they did "in and about the month of October, 1913, apply a cer- "tain false trade description, viz: "Nova-Vita Sarsaparilla" to certain goods, "viz: Sarsaparilla and certain *remedy* for purifying the blood and to which said "goods the trade description, viz: "Vita-Nova Sarsaparilla" is used by the said "Brodie & Rainer, Limited, in connection with their business in regard to the "preparation, manufacture and sale of a certain remedy for purifying the blood "the said use of which trade description by the said F. J. Gomes and John Fer- "nandes was not authorized by the complainants, contrary to law."

The appellants were in effect summoned under section 3, sub-section (2) of the Merchandise Marks Ordinance, 1888, for having in their possession for sale a certain preparation, to wit, a bottle of Nova-Vita Sarsaparilla to which a false trade description had been applied. This sub-section provides that no offence is created where the person charged proves that he comes within the sub-sections (*a*), (b) and (c). It is unnecessary to deal with these sub-sections as the appellants set up no such defence.

The evidence establishes that the respondent Company who are Chemists and Druggists have manufactured for the last ten years a preparation to which the trade description Vita-Nova Sarsaparilla has been applied, and that this preparation is put by them in bottles which are placed in a covering, that is in a cardboard case, which is kept in their possession for sale and to which the words Vita-Nova Sarsaparilla have been affixed as well as the words "prepared only by Brodie and Rainer."

It further shows that the appellants who have opened a similar business

within the last year or thereabouts have in their possession for sale a preparation named Nova-Vita Sarsaparilla, that this preparation is put in bottles which are placed in a covering, that is in a cardboard case, to which the words Nova-Vita Sarsaparilla have been affixed as well as the words "Agents: Smith Brothers & Co., Limited. The card-board cases used by the two firms are yellow in colour, that of the appellants being of a slightly darker shade, on the cases of both firms reference is made to the contents as "the Marvellous Blood Purifier," the complaints in connection with which the preparation is said to be "used with great success," and the directions as to their use are verbatim the same on each "case" while the price on each case is forty-eight cents.

The reasons of appeal are attached to this decision and the substantial ground of appeal is that there is no false trade description within the meaning of the Ordinance. It is not necessary to register a trade description. Section 2 (1) defines a trade description to mean any . . . . . indication direct or indirect (a) as to the material of which any goods are composed. In the use of the words Vita-Nova Sarsaparilla by the respondents there is such an indication and by long usage it would seem to have become the custom of the trade to regard Vita-Nova Sarsaparilla as a preparation manufactured by the respondents.

By section 5 (1) a person shall be deemed to apply a . . . . . trade description to goods who—(*c*) encloses any goods which are sold or exposed or had in possession for any purpose of sale . . . . . in . . . . . any covering . . . . . to which a . . . . . trade description has been applied and by sub-section (2) the expression "covering" includes any . . . . . case, and by sub-section (3) a . . . . . trade description shall be deemed to be applied (when) it is . . . . . affixed . . . . . to any covering. It follows therefore that the respondents having affixed their trade description Vita-Nova Sarsaparilla to the cardboard case in which their preparation was kept in their possession for sale appellants would have applied a false trade description if they had affixed the same words Vita-Nova Sarsaparilla to their covering. Instead of this they changed the arrangement of the words Vita and Nova and describe their preparation as Nova-Vita Sarsaparilla. This arrangement of words brings them within section 2 (2) which runs: "The provisions of this Ordinance respecting the application of a false trade description to goods shall extend to the application to goods of any such . . . . . words . . . . . or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture . . . . . of some person other than the person whose manufacture . . . . . .they really are. This sub-section corresponds with section 3 (2) of the English Merchandise Marks Act, 1887, and in a footnote thereto in Stone's Justices Manual (1914) it is submitted that this sub-section will be interpreted upon the principles on which an injunction is granted against a fraudulent use of names and marks commonly understood to indicate the goods of a plaintiff.

The Merchandise Ordinance was passed to ensure as far as possible that terms shall not be applied to substances when the application would, according to the common acceptation of those terms in the trade, lead a purchaser to assume that he was buying something different from what he really was buying, (Wills, J., in Fowler v. Cripps, 1 K.B.D. 20). I agree with the Magistrate that an ordinary person buying a bottle of the appellants' preparation would assume

that he was purchasing the respondents' preparation known in the trade as Vita-Nova Sarsaparilla.

I have in the course of this decision dealt with most of the other reasons of appeal. As to a limited liability Company not being competent to prosecute in a criminal charge, it is open to any *person* to make a complaint (Ord. 12 of 1893, sec. 6) and the word person includes a body of persons corporate. (Ord. 14 of 1891 sec. 5 (25).

I do not consider that it was necessary to introduce the use of the word "unlawful," it is not to be found in the section creating the offence.

The appeal is dismissed and the decision of the Magistrate confirmed with costs.

THIS 9TH DAY OF JULY, 1914.

MANGARAJ
v.
SPEED.

M. J. BERKELEY, Acting C.J.: This appeal is from the decision of the Police Magistrate of the Georgetown Judicial District, who convicted the appellant that he did on the 25th day of March, 1914, attempt to commit a summary conviction offence by attempting to obtain from Sandbach, Parker & Company the sum of eight dollars by false pretences with intent to defraud.

The evidence is to the effect that appellant agreed to sell to the firm of Sandbach, Parker & Company two casks of cocoanut oil at 80 cents per gallon. He took the two casks of oil to the respondent who was in the employ of the firm and delivered them as cocoanut oil. The respondent had the testing machine put into one of the casks and found that it brought up a mixture of oil and water. A police constable was sent for and in his presence as well as in that of the appellant a nail was driven into the cask near the bottom of it and a second nail on top for ventilation and about one gallop of water was extracted. The cask was then sealed and appellant with the extracted water was taken to the Police Station. The next day in the presence of P.C. Eadie, No. 1631, the seals were removed when nine gallons of water were extracted making a total of ten gallons of water in the cask, the capacity of which was thirty-eight gallons. The second cask was not full and contained pure cocoanut oil.

The appellant, who called no witnesses, gave evidence on his own behalf and said that he had bought the oil from a Portuguese at Belfield who had filled the cask—the appellant himself having placed the oil in the cask partly full.

The reasons of appeal are (1) that the pretence as laid was not false and was not proved (2) that there was a variance between the pretences as laid in the complaint and as proved at the hearing and (3) no evidence of guilty knowledge as required by law to secure a conviction.

The Magistrate finds that the attempt in this case is abundantly proved. I consider there was ample evidence to warrant such a finding. It is contended that only one gallon of water was extracted in the appellant's presence but the Magistrate believed the evidence adduced, which showed that the ten gallons were

in the cask when appellant delivered it. Counsel submits that if there was any false pretence it was in respect of quantity and not quality as stated in charge. The false pretence is set out as falsely pretending the barrel contained oil whereas in truth and in fact it contained cocoanut oil mixed with ten gallons of water. It seems to me that quantity is here referred to. It is a misrepresentation as to the quantity of oil agreed to be sold. There is evidence on which the Magistrate could find that the appellant knowingly made a fraudulent representation when he stated that the cask contained oil and it is clear that but for the testing process he would have succeeded in obtaining $8 for ten gallons of water. (See R. v. Sherwood 26 L.T. p. 81.)

Appeal dismissed and decision confirmed with costs.

THIS 10TH DAY OF JULY, 1914.

CANNON
v.
BANKART.

Action to recover damages for fraudulent misrepresentation by Broker. Stipendiary Magistrate has jurisdiction when damages claimed not more than $100. (Ord. 11 of 1893, s. 3 (1) (2.)).

M. J. BERKELEY, Acting C.J.: This appeal is from the decision of the Stipendiary Magistrate of the Georgetown Judicial District to whom this case was referred back by this Court on 9th of May, 1914, as more fully appears by the judgment of that date. Counsel desired to re-argue the point of law decided on the first appeal but the Court declined to allow him to do so.

The grounds of appeal dealt with are that the Magistrate had no jurisdiction inasmuch as the value of the Scrip which was the subject-matter of the action exceeded $100, that damages if recoverable should have been assessed on the market value of the Scrip when respondent offered it to appellant for sale, and that illegal evidence was admitted.

The facts shortly are that the respondent entrusted to the appellant as Broker in the month of September, 1913, certain Scrip to be sold. The appellant forwarded a cheque for $717.89 with a Broker's note which refers to a sale on account of Bankart. It subsequently came to respondent's knowledge that appellant himself had purchased the Scrip. He then demanded its return, at the same time expressing his readiness to return the amount of his cheque. This the appellant refused to do. Eventually the respondent's solicitor in December, 1913, without the authority of the respondent offered to return the amount received "plus interest" thereon. When this offer came to his knowledge respondent declined to be bound by it. On 22nd December, a serious fire occurred in Georgetown and as a result of this fire the value of the Scrip in question was depreciated. Respondent then consulted another solicitor with the result that this action was brought.

It is argued that the subject-matter of the action being Scrip of the value of $717.89 it is not competent for the Magistrate to entertain it. If the respondent had elected to claim a return of his Scrip, it would have been necessary for him

to bring his action in the Supreme Court. He had, however, received a cheque in payment for what he at the time believed was the price at which his Broker sold, he subsequently discovered that his Broker was the purchaser and he brings this action to recover damages for a fraudulent misrepresentation. It is open to him to bring such an action. (See Waddell v. Blockey, 4 Q.B.D., p. 678.) The amount of damages claimed being "not more than $100" the Magistrate had jurisdiction (Ord. 11 of 1893, sec. 3 (1) (*b*), the present case not coming within any of the exceptions provided for by sub-section (3) of the same section.

As to the assessment of damages it is true that in the case above cited it was held that the measure of damages was not the amount of the loss ultimately sustained, but the *difference* between the price paid for the rupee paper and the price which would have been received if it had been re-sold in the market forthwith after purchase. In that case the Broker had sold rupee paper of his own which he fraudulently led the purchaser to believe was the property of a third person and the purchaser held for many months, the value becoming considerably less and then re-sold. In the present case it is the Broker who wrongly detained the Scrip until they were worth on 17th December, 1913, $118, and therefore I think the Magistrate was right in his finding as to the measure of damages.

The last reason is based on the fact that the respondent having put in a letter written by his solicitor to the appellant could not deny by oral evidence that he had not authorised a certain offer made therein and that he repudiated it as soon as it came to his knowledge. I see nothing illegal in the admission of such evidence.

Appeal dismissed and decision affirmed with costs.

THIS 24TH DAY OF JULY, 1914.

GALL

v.

YHAP.

Held, that in absence of statutory provision statement in information that appellant is a Commissary of Taxation is not evidence of his appointment but that the Magistrate had power to call the appellant to prove same. (20 of 1893, s. 90.)

BERKELEY, Acting C.J.: This appeal is from the decision of the Stipendiary Magistrate of the North Essequibo Judicial District, who dismissed a complaint brought against the respondent in respect of a breach of section 16 (2) of the Wines, &c, Licences Ordinance, 1868.

2. By section 88 the recovery of fines and penalties is limited to any "Commissary of Taxation" and in the body of this information or complaint the appellant is referred to as such Commissary of Taxation.

3. The evidence establishes that respondent, who admitted that he held no licence, sold two bottles of ale to be drunk on his premises and that he attempted to bribe a Police Constable by offering him $5 to make up the case.

4. The Magistrate states as the ground of dismissal that there was not a tittle of evidence adduced to prove complainant was a Commissary of Taxation.

5. The reasons of appeal are that the Magistrate was (1) wrong in holding as

above, and (2) if such proof was necessary it was within his power and was his duty to call the complainant as a witness to prove it.

6. It is argued that the statement in the information is presumptive evidence that appellant is a Commissary of Taxation. An information need not be in writing and when in writing need not be on oath. It is, therefore, not evidence but when reduced to writing contains the substance of a complaint against a defendant and prays that he may be summoned to answer the same. The present information was not on oath

7. No doubt the fact that a person has acted in a public office is *prima facie* evidence of proper appointment, but this fact must be in evidence. In Halsbury's Laws of England (Volume 13, page 443) dealing with facts which may be proved, it is said "acting in a public office is evidence of due appoint-"ment . . . . . the appointment of the following officials has been held at "common law to be provable in this manner . . . . and this common law rule "has in a few cases been extended by statute, *e.g.*, to the proof of the appoint-"ment of officers of Excise and Customs.

8. The Inland Revenue Regulation Act, 1890, 53 and 54, Victoria Ch. 21, s. 27 provides *inter alia* that officers may conduct proceedings before Justices, while Section 24 (3) provides that "evidence of a person being reputed to "be or having acted as an . . . . . officer . . . . . shall, unless the contrary is "proved, be sufficient evidence of his appointment."

9. This provision shows that the fact that an officer is named in an information is not *evidence* of his appointment, otherwise it would be unnecessary to prove that he had so acted. It might, however, be made *prima facie* evidence by statute.

10. Under 7 and 8 George IV, Ch. 53, s. 71, an averment in a Customs or Excise information that the Commissioners had ordered a prosecution was to be deemed sufficient proof of such order. In a prosecution for not having taken out an Excise Licence the information alleged that the prosecution was by order of the Commissioners. After the case was closed objection was taken that no written order of the Commissioners of Inland Revenue had been put in (on alternate mode by statute of proving authorisation). The officer of Inland Revenue then offered to put in a written document and on this being objected to he cited the section above referred to alleging that it was not necessary to put in the written order but if it was necessary the Court had power *then* to accept same. The Justices dismissed the case but stated a case for the Queen's Bench Division of the High Court of Justice. It was held that the Justices were wrong in ignoring 7 and 8 George IV, Ch. 53, s. 71 and further that they were wrong in not reopening the case. (Hargreaves v. Hilliam 38 J.P., p. 655.) This case shows that as the statute required an officer to have the authority of the Commissioners to prosecute, in the absence of special provision by statute, that the averment in the information was to be deemed sufficient proof, it was necessary to prove that he had such authority. It shows further that where, as in the present case, the defence has not been gone into and further evidence is tendered, it is a very fit and proper thing, unless there is some good reason to the contrary, to allow such evidence to be given. In the course of his decision the Magistrate says that he asked the appellant if he was going to give evidence and that he said it was not necessary. It does not appear whether this was before or after attention had been

drawn to the omission. The appellant at no time appears to have tendered the necessary evidence but it was in the power of the Magistrate to call the appellant to prove that he was a Commissary of Taxation (No. 20 of 1893, Sec, 90.)

11. Under the Magistrates' Decisions (Appeals) Ordinance No. 13 of 1893, sec. 29 (2) the Court may in any case where it may consider it necessary that evidence should be adduced refer the case back to the Magistrate to take such evidence. In the present case the evidence seems to establish the guilt of the respondent and the sole point dealt with by the Magistrate in his reasons for decision is the non-proof that appellant was a Commissary of Taxation. Under the circumstances I think justice requires that this case be dealt with under the section referred to. It is ordered that it be referred back to the Magistrate to take evidence as to whether the appellant is a Commissary of Taxation and he is directed after taking such evidence to report his specific finding of fact for the information of this Court.

ADMIRALTY JURISDICTION.

THIS 25TH DAY OF AUGUST, 1914.

CUMMINS

v.

S. S. SARGASSO.

M. J. BERKELEY, Acting C.J.: This is an application by the defendant for an order that pleadings be filed in this matter.

Under rule 55 of the rules for "the Vice-Admiralty Courts in His Majesty's Possessions Abroad" every action is to be heard without pleadings unless otherwise ordered.

The ground urged in behalf of the mover is that without pleadings he would be embarrassed and unable properly to conduct his defence inasmuch as there is nothing to show how the $7,000 claimed is arrived at and that without such knowledge he could not call rebutting evidence.

The application is opposed on behalf of the respondent on the following grounds that the acts of negligence would not be specified in the pleadings and that if pleadings are ordered it meant a further delay in the hearing of the action during which time the respondent's vessel would be kept idle.

The Court is of opinion that no sufficient grounds have been shown for altering the procedure laid down by the rules which has been invariably followed in all cases arising in this colony. The Court would in the interest of justice give the mover an opportunity of calling rebutting evidence or refer the assessment of damages to the Registrar as provided by rule 118.

The application is refused with costs.

APPELLATE JURISDICTION.

THIS 25TH DAY OF AUGUST, 1914.

SPROSTONS, LIMITED,

v.

JOHNSON, INSPECTOR OF POLICE.

Colonial and Contract Steamer Traffic Ordinance No. 18 of 1914, Section 11 (1)—Colonial Steamer Traffic Ordinance No. 4 of 1885, Section 10 (1)—Servitude—Usus—Right of Ferry—Highway—Jurisdiction of Magistrate in cases of offences punishable only on Summary Conviction.

Held, that Authority granted to Appellant by the Governor-in-Council on 13th March, 1901, under Section 10 of Ordinance No. 4 of 1885 as amended by Ordinance No. 9 of 1897 Section 3 (2), did not create anything in the nature of a servitude, being merely a licence or permission, revocable at will.

Where commission of an act is by Ordinance constituted an offence punishable *only* on summary conviction a claim of right to do such act would not oust the jurisdiction of the Magistrate since the effect would be to render the enactment nugatory.

BERKELEY, Acting C.J.: This appeal is from the decision of the Stipendiary Magistrate of the Georgetown Judicial District, Mr. P. A. F. Manby, who convicted the appellants for a breach of "The Colonial and Contract Steamer Traffic Ordinance, 1914."

The Magistrate in his reasons for decision says that the only defence raised was that the alleged offence was committed by authority of the Governor-in-Council, who had legislative power to grant authority but no power to either revoke or limit that authority after it had been granted. With this defence the Magistrate says that he did not agree, the authority in his opinion being merely a licence capable of being revoked or limited at will and that no servitude was created.

The reasons of appeal are:—

1. Because the Magistrate's Court had no jurisdiction to hear and determine the said case, a question of servitude arising on the facts of said case.

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

(*a*.) Because the evidence before the Court established the fact that the defendant was authorised by the Governor-in-Council on the 13th day of March, 1901, under the provisions of Section 10 of Ordinance No. 4 of 1885, to carry on a Ferry Boat Service between Charlestown and Pouderoyen on the Demerara River, which fact, when proved, freed the defendant from punishment under the Section in respect of which the complaint was made.

(*b*.) Because the letter of the 20th March, 1914, signed by George Ball Greene and addressed to the Secretary of the Defendant Company, purporting to withdraw the authority of the 13th March, 1901, does not *ex facie* disclose the authority to withdraw the said authority, and must in law be regarded as of no legal force whatever.

(*c*.) Because it was not competent in law for either the Governor in the colony alone, or the Governor-in-Council, or any other person, except the Legislative of the colony, by its own enactment, to cancel or revoke the said authority, granted to the defendants on the 13th day of March, 1901, under the provisions of Ordinance No. 4 of 1885.

(*d*.) Because there is no inherent right in the Governor of the colony of British Guiana nor in the Governor in Executive Council, over the tidal and

navigable waterways of the colony, by which their use by the inhabitants of the colony can be restrained or interfered with and that such restraint and interference can only be by Legislative Enactment.

(*e.*) Because the authority given by the Governor-in-Council in terms of the Ordinance of 1885 created in the defendants a particular right of way and use of the Demerary River apart from the common law right of the defendants which could only be taken away by Statute.

(*f.*) Because at the date of the granting of authority to the defendants by the Governor-in-Council there was no Ordinance or Statute of the colony in force other than Section 10 of Ordinance No 4 of 1885, which dealt with either the creation, establishment, and organisation of a ferry or ferries across the Demerara River.

The object of the Ordinance as set out in the preamble is to provide for the proper regulation of the traffic on steam vessels of the Colonial Government and on steam vessels worked under contract with the Colonial Government.

Section 11(1) under which the present complaint is brought provides that "every person who not being employed on any Colonial or Contract Steamer or authorised to do so by any contract now or hereafter existing with the Government of this colony or by the Governor-in-Council carries any passenger . . . . . for money or reward . . . . . shall be guilty of an offence punishable on summary conviction . . . . . ". The facts are not in dispute, viz., that the respondent who is a Sub-Inspector of Police together with the Police Constable Goulding, travelled by the Launch Ismay, the property of the appellants within the prescribed limits set out in Section 11 (1) and paid for their tickets for so travelling. It appears that up to the 1st day of July, 1914, the appellants were under a contract with" the Colonial Government for the running of certain steamers and that on the 21st February, 1901, they made application for permission to ply a small steam launch as a ferry boat on the Demerara River between Charlestown and Pouderoyen under Ordinance No. 9 of 1897, S. 3 (2). This sub-section amended S. 10 (1) of No. 4 of 1885 by inserting in that section the words "not being authorised to do so by any contract now or hereafter existing with the Government of this colony or by the Governor-in-Council." Ordinance No. 4 of 1885 has now been repealed by No. 18 of 1914, Section 11 of which corresponds with Section 10 of the old Ordinance. It is to be observed that until the passing of the 1897 Ordinance the carrying of any passenger for money or reward within the limits set out in Section 10 of Ordinance No. 4 of 1885 was in effect prohibited. The permission thus sought by the appellants on 21st February, 1901, was granted on the 13th March of the same year in the following terms: "Referring to your letter of the 21st ultimo, I have the honour to acquaint you that the Governor-in-Council under the provisions of Section 10 of Ordinance No. 4 of 1885 authorises your Company to carry on a ferry-boat service between Charlestown and Pouderoyen on the Demerara River." This authorisation was acknowledged by the appellants on 16th March following when the Directors tendered "their thanks for the permission which has been so readily given." On 20th March, 1914, the appellants were informed that under "Section 10 of Ordinance 4 of 1885 the transport of passengers for money or reward . . . . . is prohibited except to persons so authorised under contract with the Government or by the Governor-in-Council," and that they "were

so authorised by the Governor-in-Council in March, 1901, but . . . . . this permission is withdrawn from the date of the termination of the existing Steamer Contract held by your Company on 1st July next." On 12th June, 1914. the appellants acknowledged this letter and informed the Government "that the Governor-in-Council, though clothed with special legal power to grant the permission, is not clothed with legal authority to withdraw it . . . . . and this Company has acquired a right to run a ferry across the said river which cannot now be taken away from them." The appellants having continued to run their vessels for money after the permission had been withdrawn, the present complaint is brought.

Under the contract referred to in the correspondence no authorisation could have been given to any person other than those named in paragraph 30 of the contract. The correspondence does not show that the appellants obtained such authority *qua* Contractors, but it is a reasonable inference to draw in view of the term of the contract. This, however, does not affect the termination of the authorisation.

The question for this Court is what power has the Legislature conferred upon the Governor-in-Council under Ordinance No. 4 of 1885, Section 10, and does it authorise the creation of anything in the nature of a servitude as claimed by appellants? If this question is answered in the affirmative then in the absence of any words authorising the Governor-in-Council to cancel or revoke such servitude he cannot do so.

It is admitted by counsel for the appellants that all the essentials necessary to constitute a servitude proper are not present but it is submitted that the authorisation is in the nature of a servitude and creates at least a right of way for them to use, for the purpose of their ferry, so long as they choose to do so. The case relied on is the *Johannesburg Municipality versus Transvaal Gold Storage, Limited*, (1904) Transvaal L.R. p. 722.) In that case certain land had been expropriated for railway purposes by the Government acting under legislative sanction, and the use of a portion of such land had with the concurrence of the Railway Company been withdrawn by the Government from the Railway and granted to the defendants for the purposes of erecting Cold Storage Chambers. "This was done by a resolution of the Executive Council placing the land "at the disposal of the Transvaal Cold Storage, Limited," and a contract was subsequently entered into by which the Government placed the land at the disposal of the Company and the Company excepted same. This land was subsequently expropriated by the plaintiffs under the provisions of the Insanitary Area Expropriation Ordinance, and the Court held that the right granted to the Transvaal Cold Storage, Limited, was some form of personal servitude although it could not be definitely placed under any of the heads into which such servitudes are usually divided, that perhaps it was a restricted form of *usus* but that it was clearly an interest in land for which the defendant were entitled to compensation under the Ordinance. It further held that the contract was part of the law of the land and that the grant in question was within the power of the Executive. It is to be noticed that in that case a contract had been entered into by the Government with the defendants who acquired an interest in the land and as such contract was binding as between the Government and the defendants and as by the law of

the land it was at the disposal of the Executive Government, the defendants were entitled to compensation.

In the present case what is the nature of the alleged right of way? It can only arise if the Governor-in-Council by virtue of the section referred to, had authority to authorise the running of a ferry and a ferry had been run. The mere use of the word "ferry" in the correspondence by both parties will not create a ferry any more than the use of the word permission will limit appellant's right if a ferry is authorised. The right of ferry carries with it obligations. A public right of way is a right of way common to all the King's subjects and is called a highway (Halsbury's Laws, Vol. II p. 284). The Demerara River being a public river is in law a highway and is open to the appellants and all other subjects of the King. It is only by legislation that this common law right may be restricted.

A ferry is a continuation of the highway across a river or other water for the purpose of public traffic. An Act of Parliament or a local Ordinance may confer a right of ferry as it may do anything else, but generally they arise by grant from the Crown or by prescription. The right to carry passengers thus becomes an exclusive right. It is in derogation of the common right and an evil. The public suffer the evil of being debarred from having another passage across the river at or near the ferry, but they have a compensation by having a constant means available to them of travelling on the King's Highway. As a set-off to the profits which the owner of a ferry derives he is under certain special obligations; he is bound to provide proper boats or vessels and competent boatmen to navigate them, he is also bound to keep up the ferry with all the necessaries for conveyance and ferrying, and he must continue to do this. Such is the compensation derived by they public from the disadvantage of the monopoly. (*Letton versus Goodden* 35 L.J. p. 430). Counsel for the appellants admits that there is no legal liability on the Company to carry on this ferry. There would seem therefore not to be that compensation to the public which exists in a ferry. Under the section of the Ordinance which it is argued creates a ferry, the only provision is, that subject to the exceptions therein named, every person who carries a passenger for money or reward is guilty of an offence. Under the Ordinance a person authorised by the Governor-in-Council is not under any *obligation* to provide means of transport across the river, nor can such an obligation be implied any more than the authorisation to cancel or revoke any right in the nature of a servitude is to be implied in the absence of special provision therefor. In fact, counsel for the appellants is correct when he says that there is no legal liability on the appellants to keep up the ferry. As argued by the Solicitor General if the appellants are successful they might on the following day cease to run their ferry launch In *Letton versus Goodden* cited above it was held that a right of ferry (being in derogation of the common rights of the public) rests upon the corresponding obligation to maintain the ferry at all times for the use of the public; so an Act of Parliament empoldering the plaintiff Company to ply on Sundays from certain points on the south bank of the Thames but imposing no obligation to provide means of transport of to maintain their plying places, does not confer an exclusive right which the Court will interfere to protect. I cannot do better, than apply the words of Vice-Chancellor Kindersley to the present case. "It is impossible I think to maintain that the right conferred on the Company by this

(Ordinance) stands in any respect on the same footing or carries with it the same right to protection as that which pertains to the owner of a ferry."

In my opinion the authority conferred on the Governor-in-Council is that of granting leave, licence or permission to any person to carry for money or reward and there is no limit to the number of persons who can be so permitted. Such permission is admitted by counsel to be revocable at will.

This disposes of sub-Reasons *(a)*, (*c*), *(d)* and (*e*) of Reason 2. Sub-Reasons *(b)* and (*f*) have been abandoned.

There remains to be considered Reason 1, viz., that the Magistrate's jurisdiction was ousted, a question of servitude having arisen on the facts. The test is, can the title to property be said to arise? It is for the Magistrate to determine whether or not upon the facts before him this is so. I have held there is no right in the nature of a servitude created by the Ordinance and although appellants may have *bona fide* believed that was such a right, I am disposed to think that the Magistrate having taken evidence and found that no such right could be acquired under the Ordinance was correct in proceeding with the case. It might be different if in this offence *mens rea* was a necessary ingredient. This question is dealt with at length in *Hudson versus M'Rae* (33 L.J. 65.)

Apart from this it would seem that where the commission of a particular act is by an Ordinance constituted an offence punishable *only* on summary conviction, and that independently of the Ordinance there would be no offence, remedy, or punishment, then a claim of right to do any such act would not oust the jurisdiction of the Magistrate since if it had that effect it would render the enactment nugatory.

The decision of the Magistrate is affirmed and the appeal dismissed with costs.

ADMIRALTY JURISDICTION.

THIS 29TH DAY OF AUGUST, 1914.

CUMMINS

v.

S. S. SARGASSO.

Application by Defendants *ex parte* for leave to appeal from Order refusing their application to have the case heard on pleadings instead of summarily, refused.

53 and 54 Victoria, Cap. 27, Section 5—Rules of Court, 1900, (*O. XLIII, R6.)—Vice-Admiralty Court Rules, 1883—Supreme Court Ordinance No. 7 of 1893, Sections 34 and 58 (2).*

Held that appeals from interlocutory orders in Vice-Admiralty Court cases are governed by the local Rules of Court, 1800.

M. J. BERKELEY, Acting C. J.: This is an *ex parte* application for leave to appeal from the Court's order of the 25th instant refusing an application that pleadings be tiled. The application is brought under Order 43, Rule 6 of the local "Rules of Court, 1900."

It is urged by counsel for the defendant that under 53 and 54 Victoria, Ch. 27, s. 5 the local Rules of the Supreme Court apply to cases arising in the Vice-Admiralty Court. This section provides that "subject to Rules of Court under this Act judgments . . . . . shall be subject to the like *local appeal*, if any,

as judgments of the Court in the exercise of its Ordinary civil jurisdiction. By section 7 of the same Act, provision is made for the making of rules by the same authority and in the same manner as Rules of Court in its ordinary civil jurisdiction are made. Under the Supreme Court Ordinance No. 7 of 1893 (Section 34) the Supreme Court of this colony is made a Colonial Court of Admiralty within the meaning of that Act and it is authorised to make rules for regulating the practice and procedure in its several jurisdictions. By section 51 (5) the practice and procedure in Admiralty Jurisdiction is to be regulated by the Rules "provided that in default of such rules . . . . . such practice and procedure shall be as near as may be and with the necessary modification in accordance with the rules for Vice-Admiralty Courts in Her Majesty's Possessions abroad approved by Her Majesty's Order-in-Council bearing date the 22nd day of August, 1883. No rules having been made, these rules of 1883 made under the Vice-Admiralty Act, 1863, apply. This provision is similar to that in the Colonial Courts of Admiralty Act 1890, section 16 (3), which provides that if local rules have not been approved by His Majesty, the rules made under the Vice-Admiralty Act, 1863, shall have effect as rules of Court. If these latter rules are to be regarded as made "under this Act", then it would seem that the present application for leave to appeal is in order, but the local rules made under Ordinance No. 7 of 1893 for the Court in its ordinary civil jurisdiction (under O. xliii, R. 6 of which, this application is made) provide that these rules shall not apply to proceedings in the Admiralty . . . . . jurisdiction of the Courts (O. I. R. 3). How does this affect the question? I should prefer to, have heard counsel on both sides before finally deciding the point. This rule (although it has the force of law) cannot alter, amend or repeal the provision of the Act of Parliament, (See No. 7 of 1893, section 58 (2).) and I am disposed to think that an appeal lies under O. XLIII, R. 6. As to the facts, no fresh argument has been advanced which induces me to alter the view expressed in my decision of 25th instant, viz., that no real ground has been shown to warrant a departure from the usual practice of disposing of these cases summarily, as provided for by the rules. In the three consolidated cases of Hovell *versus* s. s. Solent, Royal Mail Steam Packet Company *versus* Ship "Hattie P", and owners and *others* of s. s. Solent *versus* Ship "Hattie P" (Admiralty Jurisdiction, 8th January, 1906), the amount involved in the three claims was $8,000, and they were disposed of summarily. It is clear from the judgment of the Chief Justice that the parties concurred in evidence of damage being given and the questions connected therewith being argued before the Court itself. This can only be interpreted to mean that the parties elected to adopt this course rather than have the question of damages referred to the Registrar under Rule 118. This was the case relied on in support of the application, and is no authority for saying that, due to the absence of pleadings, the defendant could not call rebutting evidence as to the damages incurred. It was pointed out in the judgment of the Court that the shipwright who gave evidence had been selected by the opposite party to estimate the cost of repairs to his ship and that therefore he was presumably reliable. In fact, he had been employed by the owners of both vessels. I am satisfied that, unless it is agreed on that the question of damages should be otherwise settled, the proper course is to have such damage assessed as provided by Rule 118.

On these grounds this application for leave to appeal must be refused.

APPELLATE JURISDICTION.

THIS 25TH DAY OF SEPTEMBER, 1914.

DE FREITAS

v.

CONSOLIDATED RUBBER AND BALATA ESTATES, LIMITED.

Landlord and Tenant.—Monthly tenant holding over after expiration of notice to quit.—Tacit relocation for a part of a month is relocation for a whole month.

M. J. BERKELEY, Actg. C.J.: This appeal is from the decision of the Stipendiary Magistrate of the Georgetown Judicial District, Mr. H. K. M. Sisnett, who, on a claim for $40, being one month's rent of a certain house for the month of February, 1914, gave judgment for the respondents with costs.

A statement of facts signed by the parties was submitted to the Magistrate and it was agreed that after argument he should give his decision on these facts.

The respondents, tenants of the appellants, gave one month's notice to quit and deliver up on 31st January, 1914, possession of the house occupied by them, but they held over until some time in February. The question for determination was: Is the appellant entitled to be paid rent for the whole month of February? The Magistrate held that there was a tacit relocation for the period during which the respondents actually occupied the house and for a proportionate part of the rent, and in answer to the question submitted he found that the appellant was not entitled to recover one month's rent as claimed.

It is argued by counsel for the appellant that the Magistrate is wrong inasmuch as it was admitted that the tenancy was a monthly one which created a fixed time for quitting.

The case cited and relied on by the Magistrate is Humphrey *vs.* Kaps (A.J. 28.10.05). In that case the claim was for use and occupation for 11 days at the rate of $16. per day. The question before the Court was that of increased rent for the 11 days, and the point as to the defendants' liability for the whole month did not arise. It is true that reference was made as to tacit letting being as *a rule* for an indefinite period, viz., as long as the premises are occupied: and that in the course of his judgment the learned Chief Justice said that the decision in Victor *vs.* Courlois (2 Menzies p. 79) and Voet. XIX, 2.10, may appear to be in conflict with his decision but that in his opinion the passage in Voet appeared to refer to cases where there is a fixed time for quitting *(e.g.* Lady Day). On this point Voet says "with us and in most other districts the "rule now is that a tacit relocation of houses or domestics or maid servants, "after the expiration of the original term shall be held to continue to the end of "the *next current term,* for by statute and by ancient custom there have been "established certain fixed times for quitting houses and also certain terms for "the duration of the service of domestics and maidservants." This was the principle followed in Victor *vs.* Courlois where it was held that the effect of a tenant being allowed to keep possession by tacit relocation, after the expiration of the original term, of a house originally let for one year, at a monthly rental, was to renew the lease from month to month and each time for the term of one month only. In Trus-

tees of the Wesleyan Church *vs.* Eayrs (1902, 19 S.C. p. 111) in which the plaintiffs claimed (1) an order that defendant forthwith deliver up possession of certain premises and (2) payment of £150 as damages, Buchanan J. in the course of his decision which was concurred in by Maasdorp J. said "although "the defendant held over from the 1st November until the present time (19th "February) the plaintiffs do not claim from her rent as such but claim damages "for continued occupation. Ordinarily speaking the damages would have been "the rent the premises would have brought in during that time. She was paying "£7 per month and in most cases the damages would have been assessed at 4 "months' rent at £7. per month = £28." It was shown, however, that defendant was told that the premises were sold and possession required and damages therefore were given "at £15 per month or £60 in all." In the words of the learned Judge "covering any rent due based upon the real rent which could have been obtained for the property, viz., £60." The Court further ordered possession to be given within one week. This case is referred to as showing that in the opinion of the Court the tenant having held over, the landlord in a claim for rent was entitled to recover for the whole of the then current month, although the defendant had not possession for the whole month. It is true that on a subsequent application by counsel the Court as a matter of grace said that possession could be given by the last day of the month. This, however, does not affect the view taken by the two Judges. See also Donegal *vs.* McCarthy (1893, 1. Q.B.D. p. 736).

Under these circumstances I am of opinion that the appeal must be allowed and judgment entered for the appellant for the amount claimed with costs.

THIS 5TH DAY OF SEPTEMBER, 1914.

IN THE MATTER OF THE ACQUISITION FOR A PUBLIC WORK OF A TRACT OF LAND AT POUDEROYEN, WEST BANK, DEMERARA RIVER, AS LAID DOWN AND DEFINED ON A PLAN BY JAMES A. P. BOWHILL, SWORN LAND SURVEYOR, DATED THE 30TH DAY OF JUNE, 1914.

Prescription can only run in favour of illegitimate children from the time of possession by themselves, and such possession is not that of lawful heirs of original squatter.

M. J. BERKELEY, Acting C.J.: *In re* the claims of (1) The Versailles Plantation Company, Limited, (2) the illegitimate children (and their children) of Henry Grassford Archer, the original occupier of the said tract of land and (3) the lawful heirs of the said Henry Grassford Archer.

A further claim by a judgment debtor, H. G. Faria, to be paid under a levy, is made. This claim is only to be considered if the Court holds that the tract of land is the property of those referred to in claim (2).

The facts as found by the Court show that the Versailles Plantation Company, Limited, purchased the south half of the Plantation Klien Pouderoyen, save and except such lots, parts or portions of same transported to other parties and subject, as regards the lots, parts or portions sold but not transported, to the terms of a certain agreement therein mentioned which do not affect the claims (2) and (3) inasmuch as the said agreement was made in 1857,—that

Henry Grassford Archer had possession of the tract of land forming part of the plantation so purchased (now purchased by the Government) from 1863 to 1887 when he died, that his two illegitimate sons George Philip Archer and Jacintho Correira Archer with Mary Elizabeth. Archer, his daughter (the mother of Alexandrina Rodriques) lived with him, that since his death in 1887 the two sons have continued in possession. They claim title by prescription. Under the common law of this Colony undisturbed possession must exist for 331/3 years. It is impossible for the Court to hold that these brothers were in possession during the lifetime of their father; it is true they lived with him and during his latter years assisted him in looking after the place but the possession was that of the father. They were not born in wedlock and so prescription can only run in their favour from the date of his death in 1887. This would give them 27 years. Their possession is said to have been disturbed by the Versailles Plantation Company, Limited, in 1899, 1904, 1907 and 1914, but under the circumstances it is unnecessary to find whether such possession was peaceable, continuous, and uninterrupted.

It is argued as to claim (3) that the lawful heirs are entitled to the land inasmuch as the illegitimate brothers had possession for them. It is admitted that these claimants are the lawful heirs and that they have never been in possession. It is clear that the two brothers held possession on their own account after the death of the father, and I can find no authority to support counsel's contention that it must be held in law that their possession was that of the lawful heirs.

The case of the illegitimate brothers is a hard one, but I am bound to hold that the Versailles Plantation Company, Limited, are legally entitled by transport of 12th February, 1896, to the land in question and are entitled to be paid the $600 deposited in Court, free from all deductions for office and other costs.

APPELLATE JURISDICTION.
THIS 4TH DAY OF NOVEMBER, 1914.

CORREIA
v.
GONSALVES.

Small Tenements and Rent Recovery Ordinance,—No. 9 of 1903, Section 16.

Held that on a complaint under said section, complainant should begin by proving the tenancy, etc., before the defendant is called upon to show reasonable cause.

M. J. BERKELEY, J.: This appeal is from the Stipendiary Magistrate of the East Coast Judicial District, Mr. E. A. Bugle, who struck out a claim made by the appellant under the Small Tenements and Rent Recovery Ordinance, 1909 (s. 16).

It was submitted by the solicitor for the appellant that it was for the respondent to begin and on the Magistrate holding otherwise no evidence was

led and the case was struck out. The object of the solicitor in not leading evidence was that a ruling of this Court might be obtained as to the correctness or otherwise of the Magistrate's ruling.

Section 16 of Ordinance No. 9 of 1903 corresponds in effect with the provisions of Section 1 of 1 and 2 Victoria Ch. 74 as does also the form of complaint given in the respective schedules except that under the local Ordinance the complaint is taken on oath. Sub-section (6) provides that "if such tenant or occupier does not appear . . . . . or does appear but does not show . . . . . reasonable excuse why possession should not be delivered up and still refuses or neglects to deliver up . . . . . it shall be lawful for the Magistrate on proof of the holding and of the end or determination of the tenancy and the time and manner thereof" . . . . . to issue a warrant . . . . . while the complaint a copy of which is served on the defendant contains no reference to his being called on to show reasonable cause. It is this complaint that is to be heard and determined and the Magistrate is correct in requiring the appellant to prove the tenancy, its termination, and that defendant is in possession under that tenancy before the defendant is required to show reasonable cause. (See Jones v. Chapman *et al* (14 M. and W. 124) and Bees *v.* Davies (4 C. B. N. S. 56.) Decision affirmed and appeal dismissed with costs.

THIS 7TH DAY OF NOVEMBER, 1914.

CHOY

v.

GALL, Commissary of Taxation.

Wines, etc., Licences Ordinance No. 8 of 1868, Section 16 (2).

Evidence having been given at the trial that Appellant 'held no licences to deal in spirits of any kind,' the Court held on appeal that this was sufficient for a conviction on a charge of selling malt liquor to be drunk on the premises, which could be only so sold by the holder of an Hotel or Tavern Licence, or of a Retail Spirit Shop Licence, both of which are licences for sale of spirituous liquors.

M. J. BERKELEY, J.: This appeal is from the Stipendiary Magistrate of the North Essequebo Judicial District, Mr. H. P. Weber, who convicted the appellant for a breach of Ordinance No. 8 of 1868, section 16 (2).

The solicitor who signed the reasons for appeal, is apparently unaware of the provisions of Section 9 of the Magistrates' Decisions (Appeals) Ordinance, 1893, which enumerates the reasons admissible on appeal. Most of the reasons set out in the present appeal are inadmissible and on this account are abandoned by Counsel, for the Appellant who admits that his argument must be confined to reason 3 (1) and (2) which are practically the same, viz.: that the Magistrate's decision is wrong in law as the charge as laid has not been proved. The charge s that appellant not being the holder of an Hotel or Tavern Licence or a Retail Spirit Shop Licence did sell certain malt liquor to be drunk on the premises. The evidence shows that malt liquor was sold and consumed on the premises and the evidence as to appellant not being licensed is that of the Commissary who says "she holds no licences to deal in spirits of any kind."

It is argued that malt liquor is not spirits of any kind and therefore it is not proved that appellant had not a licence to sell malt liquor. In order to sell malt liquor to be consumed on the premises it is necessary under the Ordinance to be the holder either of an Hotel or Tavern Licence or of a Retail Spirit Shop Licence, both of which are licences for the sale of spirituous liquors. When, therefore, the Commissary in his evidence says that appellant holds no licence to deal in spirits of any kind it is evident that she has no licence to deal in malt liquor to be drunk on the premises.

Appeal is dismissed and the decision of the Magistrate affirmed with costs.

PHILLIPE
v.
ALLT.

Customs Ordinance No. 7 of 1884, Section 164 (6)

The conviction of the Appellant by the Magistrate on a charge of knowingly keeping uncustomed tobacco, quashed by the Court on the ground that it had not been proved that he so kept it.

M. J. BERKELEY, J.: This is an appeal from the Stipendiary Magistrate of the Georgetown Judicial District, Mr. P. A. F. Manby, who convicted the appellant for that he did unlawfully and knowingly keep in his shop uncustomed tobacco.

The evidence for the respondent shows that an Officer of Customs accompanied by two men visited appellant's shop in his absence on 13th August between 12 and 1 o'clock and on the foreman of the shop being asked if he had leaf or plug tobacco on which duty had not been paid, he showed black leaf tobacco, and on being asked if there was any more he pulled out a parcel from under the counter which contained yellow leaf tobacco the subject-matter of the present charge. The evidence further shows that the foreman at the time of seizure said that two black men had brought this parcel of tobacco to the shop between 10 and 11 a.m. saying that appellant had sent it, and that the Customs Officer saw appellant and told him what his foreman had said when he replied that "he did not know what kind of a law we had to allow people to bring things into a shop and bring trouble." The fact that a parcel was left by two men about an hour before the visit of the Customs Officer is deposed to by witnesses for the appellant as well as the foreman of the shop who says that the parcel so left contained the tobacco in question.

The Magistrate, in his reasons for decision, says that the tobacco being found in the shop the onus of proving it was customed, is shifted to the appellant and that it is an unlikely story that the foreman would receive tobacco without enquiry.

In proceedings under the Customs Ordinance the onus of disproving guilty knowledge is on a defendant unless otherwise expressly enacted. It is so enacted by section 164 (6) under which the present complaint is brought. That section runs: "Every person who knowingly . . . . . keeps . . . . . uncustomed goods." The evidence shows that appellant was away from his shop when the tobacco was brought there and that it was seized before he returned. In the

absence of evidence that he sent the parcel by the two men who took it to his shop it cannot be held that he knowingly kept uncustomed tobacco. Appeal allowed. Conviction quashed with costs.

THIS 14TH DAY OF NOVEMBER, 1914.

BASCOM

v.

SEWMANGAL.

Immigration Ord. No. 18 of 1891 Section 109, subsection (*a*.)

*Held th*at it is not necessary to prove that work had been assigned to an immigrant in order to obtain conviction under said sub-section.

M. J. BERKELEY, J.: This appeal is from the decision of the Stipendiary Magistrate of the East Coast Judicial District, Mr. E. A. Bugle, who dismissed a complaint brought against the Respondent for that he did without lawful excuse absent himself from work, namely, fork moulding in field B 1 = 12 beds for 24 cents.

The substantial ground of appeal is that the Magistrate was wrong in holding that on the offence charged the appellant must prove that a specific order had been given to and received by respondent.

The evidence shows that the respondent is an indentured immigrant and the only witness who speaks as to the facts is the driver who says that on 31st August (Monday) he told everybody to go to B 1 to work, to fork mould, and that respondent was standing up at his door. The respondent denies that he got any order and was not aware that a new field was being taken up. The evidence adduced before the Magistrate sought to establish a specific order given to respondent, and the Magistrate in his decision deals only with that order and finds that it is not proved On the evidence this Court would not interfere with this finding of the Magistrate. It is, however, contended by Counsel that it was unnecessary to prove any such order under the sub-section of the Immigration Ordinance, 1891, creating the offence charged. The section is 109, and reads: "Every indentured immigrant who (a) without lawful excuse, absents himself from work: or (*b*) having been directed by some duly authorised person to attend at a specified time and place for the performance of any particular work, refuses or neglects so to attend; or (*c*) refuses or neglects to begin or to finish any particular work which he has been directed by some duly authorised person to perform, shall be liable . . . ." A reference to Form No. 13 (which is the form of complaint to be lodged under Section 109) shows that this complaint was laid under sub-section *(a)* and not under (*b*) as suggested by the evidence.

The question that this Court has to decide is whether it is necessary to prove that work had been already assigned to an immigrant in order to obtain a conviction under sub-section (*a*). I am disposed to think that this question must be answered in the negative, as in the present case it is shown that the immigrant without lawful excuse absented himself from work. S. 93 renders

it obligatory on the employer to provide every indentured immigrant with work on every day of the week except Sundays and authorized holidays, and where such work is not provided and the immigrant is willing and able to work, he is entitled to be paid his full day's wages. I take it therefore that there must be a corresponding obligation on the part of the immigrant to present himself order that he may be provided with work and that he may have assigned to him work for which he is physically fit (S. 94 (1)), and in order that he may be told the mode of payment for the work so assigned (S. 94 (2)). If it were otherwise, sub-section (*a*) would be superfluous as (*b*) and (*c*) would cover work that had been assigned.

The appeal is allowed and the respondent is convicted. Under the special circumstances of the case and Counsel for the appellant having stated that the sole object of the appeal is to obtain a ruling of this Court on the point raised and not to punish the respondent, I order that the respondent be reprimanded and discharged. I make no order as to costs.

THIS 30TH DAY OF JANUARY, 1914.

In re DAVID YOUNG, DECEASED.
Ex parte MATTHEW FRENCH.

Executor and Guardian—Securities in which minor's moneys may be invested—Liability of Guardian for improper investment—Commission payable to Executor—Ordinance 9 of 1909, s, *29—Right to charge legal expenses against Estate—Receipt upon which Commission payable.*

A guardian can only invest minor's moneys in Government securities, and if he invests in other securities without the previous sanction of the Court, he is personally liable for any loss occasioned thereby.

The Commission payable to an executor or administrator under Ordinance 9 of 1909, s. 29 is not merely to remunerate him for his time and trouble in administering the estate, but is to cover expenses incurred by him, including costs of legal advice and assistance and the costs of depositing the estate's will.

The receipts upon which an executor or administrator is entitled to commission under Ordinance 9 of 1909 s. 29 (2) include only what is actually received. The testator at his death had had a sum on deposit in a Bank, and was also indebted to the Bank for an overdraft:—

Held that the executor was not entitled to Commission on the whole amount of the deposit, but only on the balance remaining after re-payment of the overdraft.

This was a petition by Matthew French, executor under the will of David Young, deceased, to have his commission as executor fixed by the Court under Ordinance 9 of 1909, s. 29. Two other persons had also been appointed executors under the will, but one had refused to act, and the other had been released by the Court. The Public Trustee was appointed co-guardian of the testator's minor children with Mr. French, by an order of the Court made on the 30th September, 1912 Mr. French filed his accounts as executor, and the Public Trustee in a Report dated 17th November, 1913, objected to certain items.

As some of these objections raised questions of considerable importance Rayner, C.J., adjourned the consideration of them from Chambers into Court, and the matter came on for hearing on the 27th January, 1914.

Hutson, K.C., for the executor.

The Public Trustee (Mr. W. A. Parker) in person.

The questions raised and the arguments of Counsel are set out in the judgment which was delivered on the 30th January, 1914.

RAYNER, C.J. In this case the Public Trustee, as one of the guardians of the minor children of the deceased David Young, objects to certain items in the accounts of the executor of the estate, Mr. Matthew French, who is also a co-guardian of the minors. The objections are made in a Report upon the executor's accounts, dated the 27th November, 1913.

There are three important questions raised, which I will deal with seriatim.

The first question raised is whether Mr. French should not be required to pay out of his own pocket the cost of certain shares in the Demerara Electric Company, in which he invested $4,500 of the funds of the estate. The testator, David Young, in his will, empowered his executors to invest in "recognised securities", and after the purchase of these shares Mr. French applied for directions as to what were the "recognised securities" in which he might invest. The matter came before me in chambers, and I directed that the executors might invest in any securities authorised by law as securities in which executors and guardians may invest, and in addition, in any of the following securities—*(a.)*

Fully paid up British Guiana Bank shares, but not shares on which any amount is liable to be called up. (*b*.) Scrip of the British Guiana Mutual Fire Insurance Company, Limited. (*c*.) Scrip of the Hand-in-Hand Insurance Company.

The shares in the Demerara Electric Company, which Mr. French had bought, had in the meantime depreciated in value, and he then applied for permission to retain them till the value improved, but Earnshaw, J. (then acting C.J.) refused on the ground that an executor or guardian ought not to hold securities for a rise, in other words could not be allowed to speculate with trust funds. It appears however that the shares are still unsold, because, Mr. French says, he cannot find a purchaser for them.

In England there are several statutes which specify the securities in which trustees may invest trust funds, and when so invested trustees are under no liability if the funds are lost. There is no similar legislation in this colony, but the law bearing on this subject is clearly laid down in Van der Linden, Book I, Ars, 5. (Henry's edition, p. 102), where dealing with the duties of a guardian with respect to the property of his ward, it is laid down as follows:— "He must "collect and call in with the greatest diligence the outstanding debts, and the "cash in hand must be laid out in Government securities yielding interest. "Other sorts of investment on security, as mortgages and the like, however "secure they may be, require the previous sanction of the Court, in order to "protect the guardian, in case of unforeseen loss, from becoming personally "liable." This is a clear and explicit statement of the law, which I am bound to follow. Here the guardian invested in a security, without the previous sanction of the Court, and the security having become depreciated, he is personally liable for the loss. I have no doubt that Mr. French acted *bona fide* and in perfect good faith in purchasing these shares, which were no doubt an investment in which an ordinarily prudent man might well invest his own money. But they are not a security in which a guardian may invest his ward's money, without the previous sanction of the Court, and he is therefore liable. Mr. French must therefore obey the order already made and sell the shares without further delay, and make good to the estate whatever loss may be sustained on the sale. Probably the best and simplest course would be for Mr. French himself to take over the shares, and refund the $4,500 paid for them to the estate. If he adopts this course he will probably not suffer much loss, as the Demerara Electric Company is a large and important undertaking and even now pays 4 per cent. on its shares, and from what was said in the course of the argument, there seems every reason to suppose they will again recover their former value. Whatever course he adopts however, the funds of the estate must no longer be invested in them, and the sum paid for them must be replaced by Mr. French.

The next point to be considered arises under paragraph 15 of the Public Trustee's Report, and it is in respect of certain payments made by Mr. French to Mr. Barnes, a solicitor, for professional services rendered and advice given to him in connection with the administration of the estate. These charges, which amount to $100.00, the Public Trustee contends should be disallowed. By the law of this colony an executor is allowed remuneration in the shape of a commission, for his services, while in England he is allowed nothing, unless the testator has expressly provided for it in his will.

In England an executor is entitled to have the services of a solicitor, and to be allowed his charges against the estate. In this colony, however, the commission he receives is considered to include such charges as that, and Mr. Hutson admitted that several of the items could not be allowed. The will, however, contains, among other things, items in respect of depositing the testator's will in the Registrar's Office, as required by law. This is a proceeding analogous to probate of a will in England, and in England the solicitor's charges in connection with obtaining probate would be allowed against the estate. The question therefore is whether Mr. French is to be allowed to charge against the estate so much of Mr. Barnes's bill as in respect of depositing the testator's will. I am informed by the Accountant of the Court that the uniform practice, whenever the matter comes before the Court, is to disallow the costs of depositing the will, and that it has always been considered that this is one of the charges which the executor's commission is intended to cover. I think this practice is a reasonable one, and I am not prepared to disturb it, especially as I learn that the same is the practice in South Africa. But it was suggested that as Mr. French lives in the North West, at a considerable distance from Georgetown, and that as the testator appointed him his executor knowing that fact, the solicitor's charges for depositing the will should be allowed in this case I do not think so however. To have one rule for people living in Georgetown and another for people living at a distance, would be very inconvenient, and the same rule must apply in all cases. I therefore disallow the amount of Mr. Barnes's bill of costs. There is really no hardship in so ordering, for in this case Mr. French will receive a very substantial sum as his commission, which will more than cover all his disbursements in respect of the estate. It should be clearly understood that the commission, which the law of this colony allows to an executor is not a perquisite which he is entitled to put into his pocket but is a payment made to him to cover the costs and expenses he is put to in performing his duty as executor, and to remunerate him for his time and trouble. If instead of spending his own time and trouble he prefers to employ a legal practitioner, to act for him, he must pay the costs himself out of his commission. He is not entitled to pocket the commission and charge the estate with the expenses of administration as well.

The next point raised is as to the amount on which Mr. French is to receive commission in respect of a certain part of the estate. It appears (paragraph 18 of the Public Trustee's Report) that at the date of his death, the testator had in the British Guiana Bank the sum of $58,600 on deposit, and at the same date he owed the Bank $38,052 on an overdraft. This overdraft was paid off and the transaction squared up by the Bank crediting the executor's account with the amount of the deposit and interest, which then amounted to $59,451 and by Mr. French drawing a cheque for the amount of the overdraft, which is debited to the account. Mr. French claims that he is entitled to commission on the whole amount of the deposit, contending that he has "received" that amount. The Public Trustee, however, contends that all that the executor received from the Bank was the balance of the deposit after deducting the overdraft, that is $21,398, and that he is entitled to commission on that alone. Now under section 29 of the Deceased Persons Estates Ordinance, 1909 (No. 9 of 1909), an executor is only entitled to commission on "receipts," that is on amounts he

has received. The question therefore is, what was the amount Mr. French, as executor, received from the Bank, as the amount of the testator's estate in the hands of the Bank. If Mr. French had gone to the Bank and produced the testator's will and demanded as executor under it, all the property of the testator in the hands of the Bank, what sum would the Bank have handed over to him, and how much would he have walked away with? Clearly $21,398, the difference between the amount of the deposit and the overdraft. To put it in another way; suppose the executor had had to sue the Bank to recover the testator's property in its hands, and had claimed the full amount of the deposits (as he now claims commission on it), the Bank would have set-off the amount of the overdraft against the amount deposited, and judgment would only have been given for the difference. That is the amount the executor would have received. The Bank never gave and Mr. French never received $58,600. The fact, which was much pressed upon me by Mr. Hutson, that the Bank in the executor's pass-book credited the estate with the whole amount of the deposit, and had made Mr. French give a cheque for the overdraft, does not in my opinion make Mr. French receive $58,600. All he received is the amount the Bank would have allowed him to carry away, that is the amount of the deposit, less the overdraft. The mere book entries in the Bank's books cannot affect the real nature of the transaction. I suppose it better suited the Bank's system of book-keeping to enter the transaction in the way it did, than merely to credit the estate with the balance in its hands. But no book entries can alter the fact that all the Bank had belonging to the testator at the date of his death, was the balance of his deposit after payment of the overdraft. I am clearly of opinion that all the Bank had to pay over, and all that Mr. French received, was $21,398, and I order that he be paid commission on that only and not on $58,600.

The only other question to be decided is the rate of commission to be allowed. It is admitted that Mr. French has had a large amount of work and been put to considerable trouble over the administration of the estate and the care of the testator's children, and I think he should be allowed the maximum amount allowed by law (Ordinance 9 of 1909 s. 29) namely, 10 per cent. on $10,000 and 5 per cent. on the remainder of the estate. The greater part of the work in administering the estate has now been done, and in future that will be much less to be done than formerly, and therefore I think a lower rate of commission will suffice for the future. I allow the rate already ordered up to the date of this order, but from to day the rate is to be 8 per cent. only. From the date of the appointment of the Public Trustee as guardian of the minors, the commission is to be divided between him and Mr. French.

Another point raised by the Public Trustee (paragraph 17 of his Report) is as to the expenses of Mr. Young, who was appointed an executor and guardian by the testator in his will, in obtaining his release from continuing to act as such. Mr. Young was entitled to share with Mr. French the commission payable to him, but he agreed to waive his share of the commission if the expenses of obtaining his release were paid. Under that circumstances I think the costs must come out of the commission payable to Mr. French.

There is a transaction between the testator in his lifetime and Mr. French, referred to in paragraphs 10, 11 and 12 of the Report, in which Mr. French claims

$1,500 in respect of a launch and other articles, which belonged to them jointly, but which the testator had taken over, agreeing to pay $1,500 to Mr. French for his share in them. The Public Trustee did not contest the *bona fides* of the transaction, but felt bound, properly so I think, to call attention to it. I see no reason to doubt Mr. French's account of the matter, and I allow him to reimburse himself the $1,500.

There are three other minor points to be referred to, which were agreed on by the parties. In paragraph 9 of the Report, the amount to be allowed is $50, not as stated in the Report, the sum of $190 reduced by $50.

In paragraph 15 the Public Trustee objected to a payment of $96 on account of certain expenses incurred for the minors, which however is to be allowed, but another amount of $70 paid for keeping the executor's accounts is to be disallowed.

A formal order will be drawn up in accordance with this judgment.

REPORTS OF DECISIONS

OF

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1914.

GEORGETOWN, DEMERARA:

"THE ARGOSY" COMPANY, LIMITED, PRINTERS TO THE GOVERNMENT OF BRITISH GUIANA.

1915.