INDEX AND DIGEST.

SUPREME COURT OF BRITISH GUIANA.

IN INSOLVENCY—FULL COURT (APPEAL COURT).

THIS 6TH DAY OF JANUARY, 1915.

In re WONG
v.
OFFICIAL RECEIVER REPRESENTING ESTATE CHIN-A-YONG AND COMPANY AND ESTATE JOHN TAT.

Insolvency—Rule 182, Insolvency Rules 1901—Procedure—Production of promissory note—Evidence against Estate of a dead man—Corroboration.

MAJOR, C.J.: Finding myself unfortunately, in dissent, from the views expressed by the other members of the Court in both the matters upon which the Court has heard argument, I have deemed it best to present my own views on them together, and, as the questions involved seem to me to be important, at greater length than otherwise I should have adopted. But the issues, indeed, arise in one matter, and one matter only, namely, insolvency No. 4 of 1914. John Tat and William Chin-a-Yong carried on a partnership business. There is but one petition by the Official Receiver for an order of administration, in which are set forth assets both partnership and private. The claims under consideration are made first, against the partnership estate, and second, against Tat individually. The consideration of both claims, therefore, must, I think, be given upon review of all the transactions, not only between the appellant and the firm, but also between either or both of the members of the firm individually, at the same time.

The appellant story of his claim against the partnership estate, is that the firm of Chin-a-Yong, being, in June, 1912, indebted to him in the sum of $4,800, the amount of a promissory note endorsed by him to, and discounted by, the British Guiana Bank in May, 1911, and paid by him at maturity, together with some $200 for interest on the note, in consideration of his not pressing for payment of the debt, made a promissory note payable on demand for $5,000. The note had not been paid in December, 1913. It was in the appellant's safe on his business

premises at that time. He saw it there two weeks before the 22nd December. On that date a fire occurred at his business premises wherein the note was destroyed.

The appellant also claims $3,000, the sum total of three cheques lent to the firm for business purposes between the 4th July and the 31st October, 1913. The proceeds of these cheques, he says were charged against him by the British Guiana Bank. In exchange for the three cheques, handed to the firm the appellant received three cheques for the same sum total, drawn by them in his favour. This was one episode among many of the same kind in a system whereby he had, from the commencement of their business enterprise, assisted the firm by lending them money and exchanging cheques. The firm's cheques were not cashed by the appellant, but put into his safes where they were destroyed by the fire abovementioned. He was holding them over until the firm could meet them.

The appellant, in cross-examination on this story, admitted that he did not show the note to any one. He said Tat, that is the firm, paid him interest, for which, however, he gave no receipt. He did not think he mentioned the loan—that is of the $5,000—to anyone before the fire (but that he did so immediately after it) being unwilling to expose the position of the firm. He kept the key of the safe himself and none but his eldest daughter had access thereto.

The evidence of the appellant in support of his claim against the assets of Tat is that in 1911 (it might have been in 1910 and 1912 he lent Tat $116 and $305 to enable Tat to assist Chung-fo-Su and Tang respectively, two employees of the firm each "to buy a property," Tat giving him on each occasion a promissory note for the sum lent, payable on demand. There was no stipulation as to interest in either case nor did he get any. He never received payment of the $116 and $305. Both promissory notes, being in his safe at the time of the same fire, were then burnt. In cross-examination he stated that he had not shown either note to anyone and could not specify the last occasion on which he had seen them. He had never spoken to Chung-fo-Su or Tang and did not know whether they had paid Tat or not.

The principle to be applied by Judges to the determination of claims by living persons against the estate of deceased persons have been enunciated by Brett, M.R., in *In re* Garnett, quoted by my brother Dalton and by Sir James Hannen in *In re* Hodgson, cited at the bar. According to the latter Judge—I quote his remarks as being later in date than those of the Master of the Rolls—"There is no rule of English law laying down the proposition "that, in the case of a conflict of evidence between

"living and dead persons, there must be corroboration to establish a claim "advanced by a living person against the estate of a deceased person. The "statement of a living man is not to be disbelieved because there is no cor- "roboration, although in the necessary absence, through death, of one of the "parties to the transaction, it is natural that, in considering the statement of "the survivor, we should look for corroboration in support of it; but if the "evidence given by the living man brings conviction to the tribunal which "has to try the question, there is no rule of law which prevents that convic- "tion being acted upon."

Here I would remark that this is no case of conflict of testimony between living and dead persons. The story of the appellant and his witnesses is uncontradicted by the Official Receiver speaking for the dead man. He calls no witnesses, he produces no documentary evidence, to prove a state of things inconsistent with the appellant's story or to suggest that that story is untrue. He only says to the claimant—"Your evidence is insufficient."

Now the statement of the survivor here, taken by itself and without reference to that of any other person, certainly conveys to my mind the impression of truth, and it is only because I am not actually convinced of that truth, because there are facts in connection with the story, such as Wong's silence on the subject of the promissory note for $5,000 and the cheques, his giving no receipt for interest paid on the loan of $3,000, and the absence of any stipulation for interest on the promissory notes from Tat for the $421, which, not by any means removing my impression, do yet arrest my conviction, that I feel bound to look for corroboration of the appellant's testimony. "Corroboration," said Jessel, "M.R., in *In re* Finch (23 C.D. "267), means some testimony proving a material point—[the learned Judge "did not say all material points]—in the testimony that is to be corroborated." It seems to me that here there is ample corroboration.

First, as regards the promissory note for $5,000. The reason assigned for that note being given was an existing debt of $4,000, the amount of a previous note which Wong had had to meet. Mr. Conyers is called and states that his bank, on May 5th, 1911, discounted a note made by John Tat in favour of Wong and that the note was paid by Wong on the 8th August, 1911. Mr. Conyers thereby proves the very foundation of Wong's present claim. That is corroboration of Wong's story on a material point.

As to the cheques for a total of $3,000, Wong produces his cheques which he gave the firm in exchange for theirs destroyed by the fire. These cheques were endorsed by the firm and charged to Wong—Mr. Conyers says so—and it is in respect of the firm's unpaid cheques to cover the amount so charged against

Wong that he makes his claim. That is corroboration of Wong's story on a material point.

Mr. Stanley Jones, cashier at the British Guiana Bank, states that he has often seen cheques payable to Chin-a-Yong drawn by Wong, thus proving the pursuit of the system of financing the firm by Wong of which this particular transaction was a part. That is corroboration of Wong's story on a material point.

Coming to the claim for money lent, that is $421, my learned brother has found that the appellant's testimony is corroborated in fact on the point of his loan to Tat, namely, by the evidence of Tat's widow, and that seems to me to be, if not the only, certainly the most, material point. Wong's claim is for money lent—there is the claim to show it. He fails, through no fault of his if his story be true—to produce the promissory note given for the loan as part of his evidence in support of his claim. But that non-production, for whatever reason, cannot debar him from requiring the consideration of other material evidence to support the claim. Amongst other evidence is that of Mrs. Tat, and it is corroborative of Wong's testimony on the very material question, was Tat indebted to Wong in the sum of $421 for money lent to Tat to assist Chung-fo-Su and Tang?

With the utmost deference, I think the learned Judge was wrong in holding that in addition to corroboration on other material points, there must be corroboration of the particular fact that the promissory notes were in Wong's possession on the 22nd December, and that in the absence of that corroboration, he could not grant relief. Corroboration there is on some material points, and. that, I think, clearly established as the principle is, to my mind, by the authorities cited, is sufficient.

With reference to the latter part of the appellant's claim it only remains for me to say that, in the particular circumstances of the case disclosed by the evidence—and it is by them that each case must be tested—I agree with the arguments of Mr. Laurence on the authorities he has cited and cannot consider the time that elapsed between the making of the promissory notes and the happening of the fire to have been an unreasonable time to wait before presenting the notes for payment.

For the above reasons I am of opinion that the claims of the appellant should be admitted to rank by the Official Receiver.

APPELLATE JURISDICTION.

22ND JULY,1915

RODRIGUES

v.

CRAIG.

Appeal—Larceny—Explanation by accused of his possession—Reasonable account—Onus probandi.

Where a person found in possession of stolen property gives to those who find him an account of that possession which may be true, and there is no evidence, beyond the possession, upon which the accused may be convicted, it is incumbent on the prosecution to show that that account is untrue. There is, however, no obligation on the part of the prosecution to call the person or persons from whom the accused states he has obtained possession, or otherwise to disprove the truth of his statement, where circumstances exist in the case which render that account unreasonable on the face of it, or its truth improbable. In the latter case the burden of proving the truth of his statement is on the defendant.

Regina v. Crowhurst (1. C. & K. 370); and Regina v. Smith (2. C. & K. 207) followed.

Regina v. Wilson (26. L.J., M.C., 45). Regina v. Harmer (2. Cox 487) and Rex v. Schama and Abramovitch (112 L.T., 480) considered.

Appeal from a decision of Mr. P. A. Farrer Manby. Stipendiary Magistrate for the Georgetown Judicial District, who convicted the appellant for the larceny of a bicycle and sentenced him to six months' imprisonment with hard labour.

J. S. McArthur for appellant.

C. Rees Davies, Solicitor General, for respondent.

The necessary facts and arguments appear from the judgment.

SIR CHARLES MAJOR, C.J.: The defendant was, on the 1st January, 1914, found in possession of a bicycle subsequently identified by Lord as his property and stolen from him on the 1st November. The defendant had left the machine leaning against the wall of the General Post Office and, coming out of that building, was riding it away when he was arrested. He stated to the constable who made the arrest that he had lent "a man" $7 some two weeks before, from whom he had taken the bicycle as a security for the loan.

2.On the hearing of the charge of larceny the defendant gave evidence on oath and repeated and enlarged the story of his possession, then giving the name and appearance of the pledgor—Nathaniel Williams, "a tall, stout man"—and adding that he had known Williams for two years and nine months and that Williams lived—he did not say when—at Belfield. He also stated that he was himself the owner of a bicycle and had removed his badge from his own machine and put it on Lord's.

3.The magistrate convicted the defendant. In the reasons for his decision he states: —"The defendant is found in the recent

possession of a stolen bicycle. He is charged with larceny and fails to satisfy me that his story is true. His account is not a reasonable one within the meaning of the cases R. v. Crowhurst and R. v. Smith, and many other cases. . . . I think R. v. Wilson covers this case." The defendant appealed from the conviction, and, before detailing what followed on his notice of appeal, it is convenient to examine the cases to which the magistrate has referred.

4. E. v. Crowhurst (1. C. & K., 370) contains the well-known principle upon which juries should act when considering a case like this. "In cases of this nature (said Baron Alderson in summing up to the jury) you should take it as a principle that, where a man in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, who is known to be a real person, it is incumbent on the prosecution to show that that account is false; but if the account given by the prisoner be unreasonable and improbable on the face of it, the onus of proving its truth lies on him. Suppose, for instance, a person were to charge me with stealing this watch, and I were to say I bought it from a particular tradesman whom I name, that is *prima facie* a reasonable account and I ought not to be convicted of felony unless it be shewn that that account is false."

5. In R. v. Smith (Henry) (2. C. & K., 207) Lord Denman, C.J., gave the same direction to a jury thus: "I quite agree with the case of R. v. Crowhurst, which is very correctly reported. It was mentioned to me by Baron Alderson at the time when it occurred. If a person in whose possession stolen property is found give a reasonable account of how he came by it and refer to some known person, as the person from whom he received it, the magistrate should send for that person and examine him, as it may be that his statement may entirely exonerate the accused person and put an end to the charge, and it also may often be that the person thus referred to would become a very important witness for the prosecution by proving, in addition to the prisoner's possession of the stolen property, that he has been giving a false account of how he came by it."

6. R. v. Wilson (26. L.J., M.C., 45), upon which the magistrate proceeded for his conviction, involved the same principle, the conviction being affirmed on appeal on another ground. Wilson was in possession of stolen property. On his arrest he stated to the constable that two persons, whom he named, had brought the property to his house and that a third person, also named, was at his house at the time and would say that his story was true. These three persons were all known to the police. Enquiries were made of the third but the result of the enquiries

was not given in evidence, and none of the three persons was called. It was argued that in failing to call them, the prosecution had not discharged their obligation of proving the prisoner's guilt and that he should have been acquitted. The Court refused to disturb the conviction because there was some evidence upon which the prisoner might be convicted. The learned judge said nothing to vary the application of the principle under discussion.

7. I may here refer to another case, that of R. v. Harmer (2. Cox, 487) containing a negative statement of the same principle. The prisoner had at once accounted reasonably enough (argued counsel on his behalf) for the possession of the stolen property by saying that he bought it of a man whose name and residence ha mentioned, and, under those circumstances, it had become the duty of the prosecution to look out for that man and, if he could disprove the account of the prisoner, to call him as a witness. Failing this, the prisoner was entitled to the credit of having reasonably accounted for the possession. Sir Frederick Pollock, C.B., refused an application to direct the prisoner's acquittal on the above ground, because the prisoner's knife had been found at the spot where the property had been stolen, which went to show that he himself was the thief, and, therefore, that the account he had so given was not true, or was not likely to be true. "The rule (said the learned judge) on the matter is that the prosecutor is not bound to call persons named by the prisoner unless his account is evidently true, or there is good reason to believe it to be true, till contradicted."

8. Now, there are some points of variance appearing on the record of these proceedings between the facts of this case in connection with the defendant's explanation of his possession of the stolen property and those either suggested by the judges, or actually appearing, in the above cases for application of the principle. First, the defendant did not "at once" give the "name and residence" of the man who (he alleged) had pledged the bicycle. That omission is only supplied, in some degree, in the defendant's evidence before the magistrate, wherein he said that he had the bicycle from Nathaniel. Williams, whom he describes and who, he states, lived at Belfield. But he also stated that he had told this story—meaning his story as told to the magistrate—to the police on the day of his arrest. And that may very well have been so. Second, Nathaniel Williams, when the defendant told his story, was not "a known person," one "known to be a real person," save as far as the defendant himself was concerned. He was not at that time at any rate, "known to the police."

9. On the 11th February, 1914, the defendant's appeal came on for hearing before the late Sir Crossley Rayner, C.J. After some argument, the Chief Justice made the following order: "The

Court having heard (counsel on both sides) refers the case back to the magistrate to take further evidence, particularly with regard to the man Nathaniel Williams from whom appellant said he obtained the bicycle with the larceny of which he is charged." The order, I observe, is silent as to the general evidence (if any) to be taken, of which that relating to Nathaniel Williams is to form a particular part; it is also silent on the question at whose instance the evidence (general or particular) is to be taken. It does not order that the magistrate shall "send for" Nathaniel Williams and examine him. There is no report of the argument upon which the order was made or of the learned judge's reasons for making it, nor are counsel appearing before me *ad idem* thereon. But upon this, at any rate, counsel are agreed, that the cases of R. v. Crowhurst and R. v. Smith (perhaps others) were cited to the Chief Justice. He had them, moreover, before him at the outset in the magistrate's reason for his decision. As Mr. McArthur for the defendant has addressed arguments to me not only on the conclusions to be drawn from the fact that the order was made, but also on its propriety and effect, I will here forestall consideration of that stage of the enquiry when it first came before myself.

10. As to the reasons for the order I entertain no doubt. With the principle declared in R. v. Crowhurst and other cases before him, I think it is obvious that the Chief Justice was of opinion (a) that the explanation given by the defendant of his possession of the bicycle was so sufficiently reasonable, was so far possibly true, as to call for the evidence of Nathaniel Williams, and (b), with reference made to R. v. Wilson, that there was no evidence beyond the actual possession upon which the defendant might be convicted. Otherwise, it seems to me, the learned judge could not have made the order at all. And I quite agree with him in his reasons and his application of the legal principle that prompted them.

11. With the propriety of the order I will deal later. Its effect, shewn by reference to the same authorities again, was to call upon the prosecutor to supply the evidence of Nathaniel Williams if it could be obtained, or at least make enquiry for and of Williams and give in evidence the result of that enquiry. It also, according to Lord Denman in R. v. Henry Smith, cast upon the magistrate the obligation to send for Williams and examine him if he were known and could be found.

12. On the 1st April, 1914, Mr. Stipendiary Manby reported by letter to the late Chief Justice that he had, in accordance with the order of Court, fixed the case of Craig v. Rodrigues, upon due notice to defendant's counsel, for 12 noon on the 31st March;

that there had been no appearance of the defendant or his counsel on that day, and that he (the magistrate) had been informed in open Court that the defendant could not be found. He gave the Chief Justice that information in order that the Court might "deal with him according to law." The magistrate, therefore, appears to have concluded that it was for the defendant to tender the "further evidence particularly with regard to the man Nathaniel Williams." A wrong conclusion. The appeal record, then, contained nothing to show that the order of Court had been obeyed by any one. And there the matter rested, without any step being taken on either side until the 4th May last, when the Solicitor General filed a notice of motion on the defendant for an order dismissing the appeal for want of due prosecution, which came on for hearing before me on the 11th May.

13. In opposing the motion Mr. McArthur referred to R. v. Crowhurst and R. v. Smith, urging the prematurity at least of the motion, in that the prosecutor had not yet obeyed the order of the Chief Justice of the year before and tendered the further evidence thereby directed to be taken. The question, therefore, (for the first time so far as I am able to gather) then arose upon whom lay the obligation to obey the order. On the authorities cited and for the reasons given in the tenth and eleventh paragraphs of this judgment I made a supplemental order on the magistrate (to make the former order clear) that he should cause to be brought before him and examined, on behalf of the complainant, Nathaniel Williams in the said order of the 11th day of February, 1914, mentioned, touching the matter of the complaint, if the said Nathaniel Williams could be found, and file in the Registry of this Court a transcript of the said examination, and that, if the said Nathaniel Williams, after diligent search and enquiry, could not be found, the magistrate should certify the same to this Court.

14. On the 27th June, Mr. Stipendiary Gilchrist issued a summons, at the instance of the prosecutor, directed to Nathaniel Williams, calling upon him to appear before the Georgetown Court on the 4th instant. On that day there was no appearance of the defendant, but Mr. McArthur attended the proceedings on his behalf. Evidence was given by three members of the constabulary wherefrom it appears that, after most diligent and exhaustive search and enquiry, not only in Belfield but in several other districts, and carried out by constables now and for years past well acquainted with Belfield itself, no person of the name of Nathaniel Williams can be found. Sergeant-Major Nelson deposed that he had been in charge of Belfield district since August, 1912, and, during that time, had neither known nor heard of a Nathaniel Williams therein. A transcript of the evidence taken, together

with the certificate of the magistrate required by my supplemental order, have been filed in the appeal record. Upon the further hearing of the motion to dismiss the appeal I called upon Mr. McArthur to argue the case for the defendant *de novo,* that I might deal with it in its entirety.

15. The learned counsel began by asking me to consider the matter as if the order of the late Chief Justice had not been made. He contended in fact that it should never have been made and cited the case of R. v. Schama and Abramovitch, decided by the English Court of Criminal Appeal in November last, and reported in 112 Law Times Reports for the month of May last, at page 480. The case was one of receiving stolen property and turned entirely on the question of misdirection to the jury as to the *onus probandi* when an explanation of his possession is given by the person charged with receiving, but reliance is placed upon the following remarks of Lord Reading, L.C.J., who delivered the judgment of the Court: "Where an accused person is charged with receiving property recently stolen, after the prosecution have proved possession by the accused and that the property has been recently stolen, the jury should be told that they may, not that they must, find the accused guilty, in the absence of any reasonable explanation. But if the explanation given may be true, it is for the jury to say, having regard to the whole of the evidence, whether the accused is guilty or not. If the jury consider that the explanation may reasonably be true, although they are not convinced of its truth, they should acquit the accused, because the Crown has not discharged the burden which rests upon it of satisfying the jury, beyond reasonable doubt, that the accused is guilty. That burden always rests upon the prosecution and never changes. . . . This Court, looking at the summing up from a broad point of view, cannot find that principle of law anywhere stated, and the jury might have thought that directly they were satisfied that the appellants were in possession of the stolen property, it lay upon the appellants to prove the truth of their explanation."

16. On that pronouncement. Mr. McArthur urges me to hold, by irresistible inference, that the magistrate misdirected himself, in that he proceeded to decision under the impression that, the prosecutor having proved the defendant's possession of the stolen property, it lay upon the latter to prove the truth of his explanation, and, further, that inasmuch as that explanation might be true, the magistrate, in the absence of any evidence from the. prosecution to test its truth or untruth, should have acquitted the defendant. Now, I have already said that I think Sir Crossley Rayner was, obviously, of opinion that the defendant's explanation was reasonable, so far as it might be true, and that I agree with that view. I also agree that, at the close of the case before him, the magistrate

should have acquitted the defendant, because he was wrong in thinking, as his letter to the Chief Justice shews he did think, that it lay upon the defendant to prove the truth of his explanation. But I cannot agree that I ought, on that account, to quash the conviction, because that would be to ignore the evidence given under the order of reference, as reinforced by me, an order made to supply the very evidence for which the magistrate should have called.

17. Nevertheless, counsel would have me ignore what was done under the order because, he contends, it was improperly made. Again I cannot agree. Although the Chief Justice might have dealt with the appeal on the evidence as it stood and, I think on the authorities that have been examined above, quashed the conviction, I think he rightly abstained from so doing until he had given an opportunity for evidence to be brought before him, if it could be obtained, of the truth or falsity of the defendant's explanation. Again, it is too late now to question the propriety of the order, made as it was with full power to do so, with no objection on the part of the defendant and with no step taken by him to have it rescinded.

18. The result of the order of reference I have given above. Mr. McArthur contends, lastly, that it does not detract from the reasonableness of the defendant's explanation. I think it does. It seems to me to create an impression that Nathaniel Williams does not exist so strong as to leave no reasonable doubt whatever that the explanation is untrue. The appeal is dismissed with costs.

19. I have been asked by the Solicitor General to act in the matter of costs under Order XLVI., rule 16a. I should gladly do so were I able, in order to supplement the niggardly allowances prescribed by Ordinance No. XIII. of 1893. But the order only applies where costs have not been fixed by the Ordinance which gives power to award costs. In appeals of this kind they are fixed. The costs I give are all the costs of the appeal from the notice of appeal to date, including the motion to dismiss the appeal. Whether, or to what extent, they can be allowed by law is not my province to determine.

Post Note.—After judgment pronounced, on an application by Mr. McArthur on behalf of the defendant and after hearing the Solicitor General on the point, I modified the decision of the magistrate by substituting for the conviction of the defendant a penalty of one hundred dollars.

In re PETITION M. P. COMACHO,

3RD JULY, 1915.

COMACHO
v.
FORBES.

Petition—Petty Debts Recovery Ordinance, 1893, Section 50—Execution against immovable property—Licence to collect balata on Crown Lands.

Held that the right conferred by a licence to collect balata is immovable property.

In re petition Willoughby, Willoughby v. Grant, 17681, 24.4.1912, and *In re* petition Humphrys, Humphrys v. Webster, 47, 12.2.1914, not followed.

Petition under the provisions of Section 50, Petty Debts Recovery Ordinance, 1893, for leave to levy execution on the right title and interest of the defendant Forbes to two licences to collect balata from trees on Crown Lands.

A certificate by the Commissioner of Lands and Mines that two licences to collect balata issued to the defendant Forbes on September 15th, 1910, had not been determined or cancelled was lodged in support of the petition, and the petitioner further alleged that the Stipendiary Magistrate of the district to which the licences applied had refused to levy on the defendant's rights in such licences as he held that they were immovable property.

The petition was presented to the Chief Justice for an order of course and no argument was offered in support.

The Chief Justice (Sir Charles Major) granted the prayer of the petition, being of opinion that the "property" was something more than a mere licence, being a right not only to go on land but to take the produce of land therefrom, an incorporeal hereditament.

APPELLATE JURISDICTION.

5TH AUG., 1915

BAGOT.

v.

THOMAS.

Appeal.—Summary Conviction Offences Ordinance, 1893, s. *137.—Disorderly behaviour* i*n a place open to public view or within public hearing.—Shop belonging to the holder of a mining licence on the holder's claim.*

A shop on a mining claim whereunto persons are at liberty and accustomed to resort, although all those persons are the employees of the owner of the shop and labourers on the claim, is a place open to public view and within public hearing.

Appeal from the decision of Captain B. V. Shaw, Stipendiary Magistrate for the Bartica Judicial District, who convicted the

appellant Bagot for disorderly behaviour in a shop at Caburi, the property of and on a mining claim belonging to the respondent. Appellant was fined $30, or in the alternative two months' imprisonment with hard labour. Appeal dismissed with costs but the sentence of the Magistrate was reduced to a fine of $10, or one month's imprisonment.

J. S. McArthur for the appellant.

H. C. Humphrys for the respondent.

SIR CHARLES MAJOR, C.J.: The defendant was charged before Mr. Stipendiary Shaw with disorderly conduct in a place open to public view, that is to say, in a shop.

The shop is that of the complainant, the holder of a mining licence in the district of Caburi, and is situate on his claim. It appears to be a shop for the service of the complainant's labourers.

The evidence clearly establishes disorderly conduct, viz., the use of threatening and filthy language, but the defendant, who has appealed against his conviction on the charge named, has raised the question whether the shop of the complainant is a place open to public view or, for I am at liberty to consider the alternative given in the law—within public hearing.

There are some 200 men on the complainant's claim who, according to a witness, and the fact is not disputed, walk up and down outside the shop. The shop has doors and windows.

I am of opinion that a shop on a claim whither some 200 person are at liberty and accustomed to resort, even if all those person be the employees of the complainant and on his claim, is a place open to public view and within public hearing because any of those person might see and hear disorderly conduct by act or speech if they chose to look and listen. Witnesses, in fact, did look and listen and saw and heard the disorderly conduct. The conviction of the Magistrate, therefore, must be affirmed.

But I think $30, or two months' imprisonment much two severe a penalty and reduce it to $10, or one month.

The appeal is dismissed with costs.

APPELLATE JURISDICTION.

13TH AUG., 1915

GRENADA.

v.

POLLARD.

Appeal.—Manner of setting forth reasons for appeal.—Magistrates' Decisions (Appeals) Ordinance, 1893, ss 9. and 10.—Particulars relied on.

Held that the mere setting out of the reason for appeal without mention of the particular matter upon which the appellant relies is not a compliance with the requirements of the Magistrates' Decision (Appeals) Ordinance, 1893.

Appeal from a decision of Mr. W. J. Gilchrist, Stipendiary Magistrate for the Georgetown Judicial District, who convicted the appellant Grenada for the larceny of five greenheart planks. Appellant was fined $126, or in the alternative to undergo 3 months' imprisonment with hard labour.

The reasons for appeal appear from the judgment.

S. E. Wills for the appellant.

The charge did not state a specific date, but was that "during the month of June, 1915, at Georgetown defendant . . . . .". There should be something definite as regards the time at which the alleged larceny took place. As regards the evidence—

His Honour. You cannot argue on the second reason because it is insufficient. It has been held over and over again that where one of your reasons is insufficiency of evidence you must set out in what way the evidence was insufficient. Decisions of Mr. Justice Lucie Smith and Sir Henry Bovell, C.J., have laid down that the way in which the evidence is insufficient must be shown.

Mr. Wills. The evidence was insufficient taking it all together.

After further argument His Honour stated he was unable to hear counsel on the question of insufficiency of evidence, whereupon request was made for reduction of the penalty.

C. Rees Davies, Solicitor General, for the respondent not called on.

J. K. D. HILL, J.: Appellant was convicted before a Magistrate and fined $126, or 3 months' hard labour for larceny of certain greenheart planks. He has appealed from that conviction on the grounds:

(1.) that the decision is erroneous in point of law because larceny has not been proved.

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

Reason 2 as it stands is insufficient, the mere setting out of the reason having been held on other occasions, with which I agree, to be not a compliance with the requirements of the Ordinance which require particulars to be given

Reason 1 was not argued. An application for a reduction of the penalty was refused, the appellant having been convicted in 1912, of larcency (stated in Court to have been unlawful possession).

The decision appealed from is upheld, and the appeal dismissed with costs.

APPELLATE JURISDICTION.

26TH AUG., 1915

LILLA
v.
JARDINE.

Appeal—Sale of goods—Delivery to be taken by purchaser's agent—Payment on delivery for goods by stranger to seller in error—Remedy of purchaser—Detinue—Damages.

Appeal from a decision of Mr. E. A. Bugle, Stipendiary Magistrate for the East Coast Judicial District, who gave judgment for the plaintiff Jardine in an action for the delivery of 35 bags of paddy wrongfully and illegally detained by the defendant or $70 its value. The appeal was allowed but without costs.

The necessary facts appear from the judgment.

H. P. Weber for the appellant.

The facts disclosed no foundation for an action for detinue although the claim was clearly so found. Delivery of the goods had been made and the magistrate was wrong in finding for the plaintiff.

A. B. Brown for the respondent.

The decision of the magistrate was right, as the action of the appellant was fraudulent.

SIR CHARLES MAJOR, C.J.: The plaintiff has sued the defendant in the East Coast judicial district for 35 bags of paddy wrongfully and illegally detained by the defendant from the plaintiff in January, 1915, or in default for $70, the value of the paddy.

2. The magistrate has found the following facts which are not disputed. The plaintiff, being the defendant's creditor for shop goods, arranged with the defendant that the latter should, by way of payment on account of his indebtedness, deliver at the plaintiff's father's rice store thirty-five bags of paddy at seven shillings a bag. The plaintiff's brother Laurence, employed at the father's store, was to take delivery of the paddy. The defendant made delivery of the paddy to Laurence accordingly at his father's store, the thirty-five bags being a portion of one hundred and nine bags delivered all at the same time at the store, and Laurence communicated the fact of delivery to the plaintiff who gave the defendant a receipt for $57.43 on account of his indebtedness at the plaintiff's shop. It appears from the evidence before the magistrate that the father, unaware of the property of the plaintiff in the thirty-five bags, paid the defendant for the total delivery of one hundred and nine bags.

3. No action, therefore, lies for detinue and even if the claim of the plaintiff may be regarded as an action of the kind, the magis-

trate was wrong in giving judgment for the plaintiff. And if, on the other hand, the claim be treated as one for damages for nondelivery of goods, the plaintiff cannot succeed, for there has been no breach of the contract to deliver.

4. The appeal is allowed. The magistrate's judgment is set aside and judgment must be entered for the defendant but without costs either of defence or of this appeal.

APPELLATE JURISDICTION.

26TH AUG., 1915

BENJAMIN

v.

ROTH.

Appeal—Landlord and tenant—Lease entered into with landlord's predecessor in title—Letters of Decree—Property transferred subject to the lease—Action for rent due—Privity of contract.

Appeal from a decision of Mr. H. K. M. Sisnett, Stipendiary Magistrate for the North Essequebo Judicial District, who gave judgment for $74 and costs in an action by the plaintiff, Roth, for the rent of land leased by plaintiff to the defendant Benjamin at his request.

The appeal was dismissed.

S. E. Wills for the appellant.

The decision was erroneous in point of law because no agreement of lease as set out in the claim had been proved, and further there was no privity of contract.

Respondent in default of appearance.

The necessary facts appear from the judgment.

SIR CHARLES MAJOR, C.J.: This is an appeal from the decision of Mr. Stipendiary Sisnett giving judgment for the plaintiff in an action for arrears of rent due from the defendant in respect of his tenancy of part of Plantation Marlborough.

2. The plaintiff is the holder of letters of decree for the land of Marlborough subject as therein mentioned to the defendant's lease granted by James Sargeant, the executor of Margaret Jonas, the plaintiff's predecessor in title. In those letters of decree there is especially excepted from their operation the land to which this appeal relates, namely, the contract of lease in favour of James Benjamin by James Sargeant. The defendant Benjamin, conceiving himself to be the lessee of a piece of land not 25 rods by 50 but 25 by 300, petitioned the Court for leave to come in and take such proceedings by way of opposition or what not against W. E. Roth's title as he should be advised. Certain delay occurred, and the petition proved abortive. It was instructive, however, so

far as it showed that on the 7th April last Benjamin alleged himself to be the lessee of W. E. Roth by reason of Roth's holding a transport of Marlborough grant.

It is contended for the defendant that the lease not having been granted by the plaintiff there is no privity between the parties to the action. That contention is quite untenable and the plaintiff is clearly entitled to retain the judgment he has obtained from the Magistrate whose decision is confirmed. Learned counsel must be well aware that, by operation of law, on the issue of letters of decree expressly containing an express reservation of Benjamin's right, he (Roth) thereby stepped into the shoes of Sargeant or of Margaret Jonas, and that he (Benjamin) retained his position of tenant of the land. There is no question of the lease not having been made "at the request of the defendant." There has been a legal transmission of interest from Margaret Jonas to W. E. Roth who is the landlord. And so the case falls to the ground at once. There is no foundation for the statement that the judgment is erroneous because no agreement such as alleged in the claim was ever entered into. As I have had to say before, Magistrates are not bound in the strictest terms to find that every single fact alleged in the claim, whether material or not, is proved. This is a claim by a landlord against his tenant for arrears of rent and it is only necessary for the landlord to prove the tenancy and the arrears. That has been amply done.

3. The appeal is dismissed with costs.

CIVIL JURISDICTION

2ND SEPT., 1915.

In Re APPLICATION BY BRODIE & RAINER, LIMITED, FOR THE REGISTRATION OF TRADE MARKS.

Practice—Trade Mark—Special Application to register—Trade Marks Ordinance, 1914, s. 8 (5)—Appeal from decision of Registrar—Trade Marks Ordinance, 1914, s. 11 (3.)

> *Held* that applications to the Registrar of Trade Marks to register under Section 8 (5) should be lodged in duplicate, with a request that the application be referred to the Court as required by Rule 17 (2); that the Registrar of Trade Marks should thereupon forthwith forward a copy of the application to the Registry of Court; and that the applicant should thereupon proceed by motion, and not by summons, to the Court for the application to be heard.

Application by Brodie & Rainer, Limited, Manufacturing Chemists and Druggists, a company incorporated in the Colony, to register the following eleven names, letters or words, viz.,

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CASRADA, VITA-NOVA, KILLEM, ANTI-SOL, C.L.B., ONE-EIGHTEEN,

KOF-KUR, LONEY BRAND PURE COD LIVER OIL, "PEPS" CURE FOR INDIGESTION, DR. GEORGE'S NEW VEGETABLE PILLS, AND RAINER'S PECTORAL COUGH SYRUP, as distinctive marks under the provisions of the Trade Marks Ordinance, s. 8 (5.)

One application was made to the Court in respect of the eleven marks, and set out that application had been made to the Registrar on different dates for registration, but that such registration had been refused. User of the respective marks by applicants and their predecessors in business since 1900 was urged but more particularly during the last three years and that the marks had become thoroughly distinctive throughout the Colony as denoting goods of the applicants' manufacture and sale, and as distinguishing them from similar goods supplied by other firms.

The application was supported by one affidavit made by the Secretary of the applicant Company.

The Chief Justice said it would be advisable to settle the procedure to be adopted in relation to the application, as it was the first of its kind in the Colony and inquired of counsel his position in the matter.

E. G. Woolford for the applicants.

The applicants desired to avail themselves of the registration of the trade marks as distinctive marks under Ordinance 27 of 1914 and the rules made thereunder. The applicants had urged upon the Registrar at the time of their application to him that certain of the words—Casrada, Killem, Anti-Sol, Kof-Kur, and Peps—were invented words and were capable of being registered as such, but the Registrar had disagreed with the applicants' contention.

The Chief Justice inquired if, in view of what he said, the proceedings before the Court were in the nature of an appeal from the Registrar's decision.

Mr. Woolford replied that the matter had not reached that stage. The application made had been withdrawn and separate applications had been filed asking the Registrar to obtain the Court's direction that the marks be made distinctive and it was arranged that the matter should be brought before the Court by way of application.

Ll. C. Dalton (Registrar of Trade Marks) in person.

The application appeared in part to be in the form of an appeal from the Registrar's decision, and in part an application for an order of the Court that the marks be distinctive. Applicants should follow the procedure laid down by the Ordinance and Rules if they were appealing; on the other hand applications under Section 8 (5) of the Ordinance should be separately dealt with and could not be

combined in one as had been done, a course which was most inconvenient and cumbersome.

Woolford, in reply.

Any appeal in these cases from the Registrar's decision was discontinued; he asked that all be dealt with under Section 8 (5). He was prepared to produce further evidence in the form of declarations or affidavit in support of his application. For the purpose of convenience the applications could be taken together.

SIR CHARLES MAJOR, C.J.: As this is the first application of this kind it is desirable to settle the procedure which should be followed. The original applications to the Registrar of Trade Marks are not before me, as they should be if the matter is to be properly dealt with by the Court. They form, however, records of the office of the Registrar of Trade Marks. In order that the applications may be referred to the Court as required by the Rules those to be dealt with under Section 8 (5) of the Ordinance should be in duplicate. This is in accordance with the practice laid down and followed in England. The Registrar of Trade Marks will then as a matter of course forward a copy of the application to the Registry of Court and the applicant, if he wishes the matter brought before the Court, will thereupon proceed by way of motion to have his application heard. This also is in accordance with the English practice and the procedure is governed by the provisions of Order XL. of our Rules of Court.

With respect to applications for registration of several marks as distinguished from a series of marks, it is clear from the Ordinance that there must be a separate application to the Registrar in respect of each mark which must, when referred to the Court, unless the parties agree that they shall be taken together and the Court approves of the agreement, be separately considered.

Let the application now before the Court stand over to allow the applicant to lodge their applications in duplicate and to proceed on the lines now settled.

ORDINARY CIVIL JURISDICTION.

6TH SEPT., 1915

WIGHT

v.

DEMERARA TURF CLUB, LTD. (In liquidation.)

Specific performance—Auction Sale—Contract of purchase and sale—Suit for delivery—English and Roman-Dutch law—Audio publica, vel privata (*voluntaria*)*—Addictio in diem,—Consent—Relation of bidder and auctioneer.*

Land, buildings and appurtenances of a race-course, the property of the defendants, were, after advertisement, put up for sale by the liquidator acting as an auctioneer at the sale. Neither in the advertisement nor at the auction was any mention made that the sale was subject to reserve or that the property would be sold to the highest bidder. The plaintiff eventually bid the sum of $16,005. The auctioneer, receiving no advance on that bid, announced that he could not sell at that price and withdrew the property from sale.

On suit by the plaintiff for specific performance by the defendants of a contract by them as vendors to deliver the property to the plaintiff as highest bidder and purchaser upon payment of $16,005:

Held, that there had been no acceptance of the plaintiff's offer by the auctioneer and there was no binding contract between the plaintiff and the defendants from which the obligation to make delivery arose.

A voluntary auction is a transaction whereby property is put up for sale upon the suspensive condition (*addictio*) that it shall not take effect if another person offers a better price and that offer is accepted:

That condition is always subsisting and is not fulfilled until assignment (*addictio*)*:*

The assignment, by knock of hammer or otherwise, is an auctioneer's acceptance of a bidder's offer:

Semble, that a sale by auction not stated to be subject to reserve is a transaction whereby the vendor undertakes that the property shall be sold to the highest bidder, whether those latter words are used or not; and that, under Roman-Dutch law, each bidder at an auction sale is bound by his bid until a better offer has been made and accepted.

The further facts appear from the judgment given below.

H. H. Laurence and *H. C. Humphrys* for the plaintiff:—

The facts admitted are that the defendants put up their land for sale at auction, that the plaintiff was the highest bidder and that the defendants refuse transport.

The plaintiff contends that the highest bid at an auction concludes a contract, which is forthwith binding on both parties, subject only to the conditions of sale. If the vendor, not having reserved the right to do so, refuses to knock down the property, that is a breach of contract, and the Court will enforce performance, or (if there were any obstacle to specific performance) give damages. The defendants will contend that a bid is a mere offer, not binding on either party until it is accepted by the auctioneer.

This question has been much discussed in England, but never decided.

It has not been decided in the South African Courts—*De Smidt v. Steytler,* 1 Searle 136—*Maasdorp, Institutes of Cape Law,* III. 130.

The only case which approaches the point in this Colony is *McGowan v. Gomas,* 1892, L.R., B.G., 171.

But the Dutch jurists are clear that every bidder at an auction is bound by his bid—*Grotius, Introduction,* III. 14. 30—*Matthæus, De Actionibus,* I. 10. 40, 41, 43—*Van Leeuwen, Commentaries,* II. 165—*Burge, Colonial Laws,* 1st ed. II. 576, 582, 607, 608, 635.

The bidder being bound, it follows of course that the seller is bound also: subject to the Conditions of Sale and to the implied condition that no one else bids more. *Matthæus, De Auct:* I. 10. 48.

In the present case, the liquidator of the defendant company held the auction, not *bonâ fide* in order to get the best price, but intending to withdraw, and so to obtain the approval of the Court for a sale to his own syndicate at a small advance on the bidding. It was a bogus auction.

"In omnibus venditionibus quae publice per auctionem fiunt, unusquisque dicto suo promissove stare debet"—*Grotius,* Introd: III. 14. 30. "This is always the law of auctions that the property shall be conveyed to him who offers most . . . . the best in the bidding is always the best in the cause"—*Matthæus, De Auct:* I. 10. 21, 48.

This, the true view of auction sales—that the seller, professing to sell without reserve, defrauds the public if he withdraws, was stated by Lord Mansfield in 1776—*Bexwell v. Christie,* 1 Cowp. pp. 396, 397. But in 1789 Lord Kenyon at Nisi Prius said that an auction is a *locus poenitentiae,* and thereupon held that a bid is a more offer, which may be retracted until the auctioneer accepts it by the knock of the hammer—*Payne v. Cave,* 3 T.R. 148. The case simply begs the question.

In *Warlow v. Harrison* (1858) 1 El. and E., 295. the decision in *Payne v. Cave* was thought too inveterate to be disturbed (per Lord Campbell, C.J., at p. 307), but nevertheless the majority in the Exchequer Chamber (pp. 316, 317) held that "where the sale is without reserve, the contract is completed, not by the acceptance of a bidding, but by the bidding itself, subject to the condition that no higher *bonâ fide* bidder appears. In other words, every bid is in such a case not a mere proposal but a conditional acceptance." The judgment is so stated in *Pollock on Contracts,* 8th ed: p. 19, and in later cases many judges have been prepared so to decide: e.g., *Mortimer v. Bell,* (1865) L.R. 1 Ch., p. 13: *Spencer v. Harding* (1870), L.R. 5 C.P., p 563; *Johnston v. Boyes,* 1899, 2 Ch., p. 77.

And the opinions of text writers to the contrary are no more than this—a decision that the seller is bound would be inconsistent with the decision in *Payne v. Cave* that the bidder is free.

No doubt it would; but, if *Payne v. Cave* is law in England, it is not law here.

The Sale of Goods Act, 1890, s. 58 (2) has exported it to Scotland (Mew's Digest, Vol. I. p. 1183, citing *Fenwick v. Macdonald,* 6 F. 850); and the Sale of Goods Ordinance, 1913, s. 59 (2) to this Colony; but with regard to movable property only. Decision in the present case therefore remains open for deduction from the true premise instead of a false one: when a bid is made the bidder is bound, therefore the seller is bound also.

The vendor may, and he often does, reserve the right to withdraw if dissatisfied with the price bid. There would be no sense in doing so if the right were his in any case without reservation.

As to *laesio enormis,* the value of the property is not proved to exceed $32,000. The liquidator himself in the Statement of Affairs estimated it to realize $25,000. No one knew the value so well as he—*Burge,* Colonial Laws, II. 476.,

The custom alleged in the Defence par. 5 cannot over-ride the law.

Bexwell v. Christie, Cowp., p. 397.

Green v. Baverstock, 32 L.J. C.P., p. 181.

Goodwin v. Robarts, L.R. 10 Ex., p. 357.

Suse v. Pompe, 8 C.B. (N.S.) p. 566.

Reference was also made to

Denton v. G.N.R., 5 E. and B., 860.

Carlill v Carbolic Smoke Ball Co. 1893. 1 Q.B., 256.

Harris v. Nickerson, L.R. 8 Q.B., 286.

Cohen v. Shires, 1 S.A.R. (Kotze), 41.

Maasdorp, Institutes, III. 143, foll:

Matthaeus, De Auct: I. 10. 21—I. 8. 27, 28, 29—I. 10. 40, 41, 43, 48—I. 14. I—II. 2. 5.

G. J. de Freitas, K.C., and *P. N. Browne* for the defendants.

By a long established custom or usage in this Colony parties attending an auction sale understand that a bid is a mere offer which may be withdrawn before acceptance, and that the auctioneer may withdraw the property from sale at any time before a bid is accepted; the Court in giving effect to the contracts and dealings of the parties will assume that the latter have dealt on the footing of such custom or usage.

The price offered being less than half the market value of the property the contract is unenforceable, the doctrine of *laesio enormis* applying. The granting of specific performance is in the discretion of the Court and on the facts proved it should be refused.

The company being wound up compulsorily the sanction of the Court was necessary to ratify the contract of sale. The facts

disclosed show plaintiff acquiesced in the withdrawal by the auctioneer of the property from sale.

Authorities cited:—
Payne v. Cave, 3 T.E. 148.
Warlow v. Harrison, 1 El. and E. 295, at p. 316.
Spencer v. Harding, 39 L.J., C.P. at p. 334.
Mortimer v. Bell, 34 L.J. Ch. 360 at p. 361, and 35 L.J. Ch. 28.
Manser v. Black, 6 H. 443.
Municipality of Willowmore v. Mathews, 8 S.C. (Juta) 20.
Seaville v. Colley, 9 S.C. (Juta) 39.
Raleigh v. Jasmins, B.G. (L.J.) 4.7.1902.
*Haly v. Vieira, B.*G. (L.J.) 26.2,1913.
McGee v. Mignon, 1903, T.S. 89.
Levisohn v. Williams, 1875 Buch. 109.
Douglas v. Baynes, 1908 T.S. 1207.
Day v. Wells, 7 Jur. (N.S.) 1004.
Talbot v. Ford, 13 Sim. 173.
Wedgewood v. Adams, 8 Beav. 103.
Preston v. Luck, 27 Ch. D. 497.
McManus v. Fortescue, 76 L.J., K.B. 396.
Mason v. Armitage, 13 V. Jnr. 25.
Hill v. Buckley, 17 V. 394.
Bridger v. Rice, 1 J. and W. 74.
Stone v. Godfrey, 5 DeG. M. and G. 76.

Reference was also made to the following:—
Hart on Auctions, p. 1.
Burge, Colonial Laws, (1st Ed.), Vol. II., pp. 479, 510, 512, and 574.
Van Leeuwen, Censura Forensis.
Maasdorp's Institutes, Vol. III. p. 129.
Nathan, Common Law of S. Africa, Vol. I. p. 28, and Vol. II. p. 563.
Companies (*Consolidation*) *Ordinance,* 1913, ss. 150, 151.

Laurence, in reply, referred to *Pickard v. Sears,* per Denman C.J., 6 A. and E. p. 474, the *Sale of Land by Auction Act, 1867* (30 and 31. Vict. c. 48), and *Voet* Lib. XVIII., Tit. 5., s. 17.

Cur. adv. vult.

September 6th (after vacation, the hearing having been concluded on June 23rd); the following judgment was delivered by SIR CHARLES MAJOR, C.J.:

In his chapter on Purchase and Sale in the third volume of Sir Andries Maasdorp's Institutes of Cape Law, at page

130,* the author notes: "A very interesting question was raised in the case of *De Smidt v. Steytler* (1 Searle, 136) but not decided. In that case a sale by auction had, in conformity with a resolution of creditors, been advertised in the *Gazette*, and the advertisement stated that the property would be sold 'peremptorily to the highest bidder.' The question arose as to whether the highest bidder at the sale, which was subsequently held, could claim the property though it had not been knocked down to him but had been withdrawn by the auctioneer." On reference to Searle it will be seen that the question can hardly be said to have arisen, for the application to the Court was for an injunction restraining the private sale of the property involved with a view to proceedings into which the question would come for determination, but I refer to the learned judge's note because *De Smidt v. Steytler* is one of the two cases only that have been cited at the bar as in any way involving consideration of a contract of purchase and sale as the same may arise from an auction sale under Roman-Dutch law, the other case *Mc Gowan & Co. v. Gomas*, decided by the Court of Appeal of this Colony in 1892, having points of difference from the case and appearing to have been decided entirely upon English authorities. The opinion, therefore, expressed at the bar that, so far at any rate as Roman-Dutch law is concerned, this case is one of first impression, seems to be correct.

2. The plaintiff's claim is that the defendant Company may be ordered to transport and deliver to the plaintiff the property of the defendant Company, consisting of 55 acres of land, known as Belair Park, formerly part of Plantation Belair, in the county of Demerara, with all the buildings, erections, fixtures and fittings thereon, on payment by the plaintiff of the sum of $16,005 and one half of the costs of transport. The claim, therefore, is for a decree that the defendants shall specifically perform a contract into which, the plaintiff alleges, the defendants entered in the following circumstances. I state the circumstances partly as admitted in the pleadings and partly without reference, for the present, to some facts in issue.

3. The defendant Company has been, since September, 1914, in compulsory liquidation. Nelson Cannon is the liquidator. He is also a licensed auctioneer. As liquidator he obtained leave from a judge in bankruptcy to act as auctioneer at a sale by public auction of the property described in the claim, and advertised the sale in the following terms: "Nelson Cannon will offer for sale at public

* The pages of the various works from which quotations are made in the course of this judgment are those of—Vol. III., Colquhoun, Roman Civil Law; Liber I., Matthæus, De Auctionibus; Vol. IX., Voet (Berwick) and Vol. V., Lib. XVIII., (anonymous translator); Vol. II., Burge, Colonial Laws (1838); Vol. II., Nathan, Common Law of South Africa; Maasdrop, Op. cit., suprá.

auction, by order of Mr. Nelson Cannon, as liquidator of the Demerara Turf Club, Limited, on Friday, 4th December, 1914, at 1 o'clock, p.m., on the premises (in the Grand Stand) 55 acres of land known as Belair Park, with all the buildings, erections, fixtures and fittings thereon." Conditions of sale were prepared and are headed: "Conditions of Sale on which the undersigned will offer for sale at public auction on Friday, 4th December, 1914, at one o'clock, p.m., on the premises in the Grand Stand, by the order of Mr. Nelson Cannon, as liquidator of the Demerara Turf Club, Limited." A description of the property and five conditions of sale then follow. The latter are in what appears to be an accustomed form, requiring good and sufficient security from the purchaser, payment of ten per centum of the purchase money to the auctioneer on the knock of the hammer and the balance upon transport and of church and poor dues in cash on the knock of the hammer, and providing for time of giving possession, cost of transport, and decision of disputes as to biddings or otherwise arising at the auction.

4. On the 4th of December, 1914, the auctioneer attended at Belair Park for the purposes of the auction. He read out the condition of sale and the auction was started with a bid of $15,000. That was increased by $5 and again to $16,000. The plaintiff then bid $16,005, without further advance. After a pause, the auctioneer said, "I am sorry, gentlemen, but I cannot sell at that price," or words to that effect, and the auction was discontinued. The company dispersed. Leave having been obtained to commence proceedings against the defendants, the writ of summons in the action was issued.

5. There has been considerable discussion as to whether English or Roman-Dutch law shall be applied to the facts of the case. There are, admittedly, fundamental differences between the two systems, not only relating to the general contract of purchase and sale of immovable property, but also to the particular form of that contract arising at a sale by auction. While, however, as I have said, no decided case has been or, seemingly, can be, cited to me where the precise question here involved has received the consideration of courts administering Roman-Dutch law, counsel on both sides have made it their business, with altogether admirable industry and skill from which I have derived much benefit and enjoyment, to examine and argue, as well a large number of English authorities on sales by auction extending from early times to the present day, as the pronouncements and opinions of many of the Dutch jurists and commentators on the same subject. But that this suit is governed by the principles of Roman-Dutch law and not those of English law I entertain no doubt. Except where the latter are seen to run parallel with the former, to be

capable of the like application—and, on the subject matter of this suit, argument of counsel has shown how often are the principles of the two systems widely divergent—reference to them must only further confound existing confusion. And the same remark extends to any invocation of the doctrines of an English court of equity in favour of or against relief in a suit of this nature. In *Benjamin v. Mills* (Buch. S.C. 1876, 121) Lord de Villiers said—"It is quite true that this Court is a court of equity as well as of common law, but it can administer equity only so far as consistent with the principles of Roman-Dutch law." I adopt that remark as applicable to the Supreme Court of this Colony.

6. It is manifest that under Roman-Dutch law relief by way of decree for specific performance of a contract is available and for a contract of the kind claimed by the plaintiff to have been entered into by the defendants. Mr. Nathan (p. 676) quoting from the judgment in *Cohen v. Shires et alios*, writes—"The Roman-Dutch law clearly recognizes the right to specific performance of a contract, and Van der Keesel, Van Leeuwen and others hold that such is the true rule of the civil law. By the well established practice of South Africa, agreeing with the Roman-Dutch law, suits for specific performance are matters of daily occurrence." And later (pp. 537, 753), "The purchaser, by force of the contract, acquires the right to demand and receive, and the vendor incurs the obligation of making to him the tradition, or actual delivery of the property it be corporeal. . . . The first remedy open to a purchaser in case of an unfulfilled contract of sale is an action to obtain delivery of the thing sold where the vendor fails to make delivery." Maasdorp (p. 143) states—"When once the contract of sale has become binding, either party may sue the other for the fulfilment of the same, provided he has given or is prepared instanter to give, fulfilment on his part. The vendor is bound to give the purchaser delivery of the thing sold, or what is tantamount to delivery considering the nature of the thing. Thus he will have to give transfer in the case of immovable property."

7. The contract whereon the plaintiff rests his case is set forth in the eighth paragraph of the claim. "Upon such putting up for sale of the said property bids were made by the plaintiff, by W. W. Brassington, and by another person unknown to the plaintiff, and the plaintiff thereupon bid the sum of $16,005, which was the highest bid, and the plaintiff thereby purchased the said property from the defendant Company, and the defendant Company thereby sold the same to the plaintiff for $16,005, upon and subject to the said conditions of sale." In support of that statement, the following legal propositions are advanced by Mr. Laurence in the course

of the exhaustive and valuable argument he has addressed to me for the plaintiff:

(a) This contract (says the learned counsel) is like any other contract, consensual;
(b) an auctioneer is understood to intend to make an offer to all the world;
(c) when a bid is made the law conclusively presumes that the intention of the bidder is to accept that offer, and by each bid the bidder completes the contract conditionally, that is, subject to the condition that it be not bettered;
(d) there is no acceptance of a bid, but the highest bidder is the person who has accepted the offer of the vendor.

Let us see how these things may be, for upon the soundness of these propositions the plaintiff's case, I think, entirely depends for success.

8. Belair Park was advertised for sale at public auction. Now the auction was so far public as it took place in the presence, and with the participation, of members of the public, but it was not, of course, the public auction of the Dutch commentators. "Auctio omnis vel publica vel privata est. Publica, quoties fiscus, aut magistratus, reipublicae nomine, bona aliqua proscribunt, aut auctoritate judicis bona condemnati vel latitantis veneunt. Privata, quoties privati sua sponte auctionantur. In hac igitur distributione non locum spectamus, sed auctorem. Si locum spectes, omnis auctio publica erit." (Matthæus, p. 10.) It is more correct, therefore, to speak of this kind of transaction as a voluntary auction, "voluntaria auctio quam quisque suâ sponte facit."

9. An auction sale is, what its name implies, a sale upon competition by increase of biddings until some competitor is declared victorious. It is, moreover, a conditional sale. The nature and incidents of the condition are very clearly described in the books. "Among the pacts (says Voet, p. 36) commonly annexed to purchase, two of special importance frequently occur and, therefore, have special acts applicable to them, viz.. the *in diem addictio* and the *lex commissoria. In diem addictio* is a sale made on terms that it is become or remain binding if another person does not offer better terms within a certain period. Such a condition, if annexed at the time of sale, sometimes renders them absolute (*puras*), sometime conditional, according to the formula used, as may be gathered from the Digest under this title in fragment 2, and fragment 4, paragraph 5." To that passage is subjoined a note containing the gist of the second fragment. "The purchase is 'pure' or absolute when the agreement is in the formula "ut, meliore allata conditione, discedatur,"

i.e., "the sale is to be off if better terms are offered," it being then complete, but dissoluble on, condition. But if the agreement be in the formula "ut perficiatur emptio nisi melior conditio afferatur," i.e., "that it is not to be deemed complete unless better terms are offered," this is not an out and out, but a conditional, purchase. In the one case the pact is resolutive, in the other suspensive." Colquhoun, (p. 11) puts the statement of the civil law thus: "*Addictio in diem* is a contract ancillary to the chief contract, by which the vendor is allowed to sell the thing elsewhere if within a stated time he can do so more advantageously. This contract is understood in auctions till the last bid is made and may be either suspensive or resolutive." Maasdorp (p. 139) of the condition writes: "Among some of the usual provisions of contracts of sale amongst the Romans which are not unknown even at the present day may be mentioned the *addictio in diem* and the *lex commissoria.* The former consisted in the condition, either (1) that the contract was only to take effect if some other person did not make some better offer within a certain time, or (2) that it was to take effect at once, but was to be dissolved if another person made a better offer within a certain time. In the former case the condition was suspensive, in the latter resolutive." And Nathan (p. 718) treating of purchase and sale and special conditions annexed thereto by competition of offers, after reproducing the dicta of Voet above given as to *addictio in diem*, says: "This species of sale is well illustrated by the cases of sales by auction to the highest bidder, or sales by tender to the person making the highest tender."

10. So much for the nature of this condition "understood in auctions." I turn to consideration of its operation and, for that purpose, to the authors whom I have already quoted. Colquhoun (p. 11) continues: "Its operation is as follows. If a better offer occur within the time, the seller can withdraw but if there be more than one, they must agree; that is understood to be a better offer which presents ever so little extra advantage. . . It depends with respect to the other contracting party on the will of him who made the arrangement for his own advantage whether he will accept or not, as in auctions, such better offer. All sales may be retracted before acceptance or possession taken, and the price is that of the moment of acceptance." Nathan (p. 720) thus explains: "If a better offer is made, the first bidder is not thereby discharged, and it is open to the vendor to reject the better offer and accept the first bid, as if that were better, except in the case of the sale of a pledge or a sale in execution, when the highest bidder is able to pay, for then his offer must be accepted since that conduces to the advantage of both creditor and debtor. . . If the first purchaser does not make an offer

equal to that of the second purchaser, the thing may be assigned to the second, whether unconditionally, or also subject to a better offer by a third party (*in diem*). Nothing prevents a sale of the thing being made every time subject to an *addictio in diem* if the vendor does not consent to the first, second, third, or any prior assignment. The effect of a second or third assignment (*addictio*) is that the first purchaser in the prior assignment is absolutely discharged."

11. An auction sale, therefore, is a transaction whereby property is put up for sale upon a suspensive condition—which is always annexed and subsisting and which is fulfilled upon assignment (*addictio*) to the highest bidder—that the sale shall not take effect if another person offers a better price and is accepted. It seems clear from the above passages that each bidder is bound by the bid he makes, until some one else increases it and is accepted. And that that rule prevails in this Colony I am inclined to agree with Mr. Laurence. It is the rule given in Matthæus in the following passages (pp. 90, 91): "Quoties trahuntur præconia et per plures dies licitationes fiunt, toties singuli licitatores obligantur, donec sequens quisque admissi sint. . . Hoc est (here rendering Grotius) in omnibus venditionibus quae publicè per auctionem fiunt, unusquisque dicto suo promissore stare debet: nec liberatur licitator antequam adjectio a secundo licitatore facta acceptata fuerit. . . Est igitur moribus nostris decisa nelgata illa questio, an primus licitator, adjectione pretii a secundo factâ statim liberetur." And Matthæus gives the answer, on reference to the Digest dealing with the condition *in diem addictio,* "ubi perspicuè docetur priorem licitatorem ita liberari si secundus admissus sit, nisi forte convenerit nominatim ut adjectione facta resilire liceat priori: quo casu prior liberatur etiamsi secundum emtor non admiserit" (The latter words seem an error for "secundus emtor non admissus sit.") A recent article in the South Africa Law Journal by the author of English and Roman-Dutch Law directs attention to the case of *Cohen v. White* (14 C.T.R., 328) and the dictum of the learned judge therein that "until a final sale, it is open to the bidder at any time until his offer is finally accepted to withdraw his bid," and shews that, while that view is in accordance with South African practice, it was the rule appearing from Grotius and Matthæus that in public sales by auction a person could not withdraw from his bid until a higher bid had been made and accepted, and concludes: "Hence, whether in accordance with sound legal principle or otherwise, a person was bound by his bid: quod ea auctionis natura sit ut unusquisque adjectioni a se factae stare teneatur" (Matthæus, p. 92.)

12. Now, at the expense of brevity, I have, in need of refer-

ence to decided cases on this question at issue between the parties, set down the various statements given above with respect to the principles of the law of auction, because in every one of them, including those of Matthæus himself, I find a bidder at an auction described and treated as the person who makes an offer and the auctioneer or vendor as the person who accepts that offer. In none of them do I find the converse of the proposition or any thing suggesting it. I accept, therefore, the statements of the learned writers mentioned as correctly defining the relations of bidder and auctioneer or vendor, and I pass to examination of the principles upon which depends the determination of their rights and liabilities. Burge (p. 574) writes: "The rules by which [a sale effected by the private contract of vendor and purchaser] is governed are equally applicable to a sale by auction when that auction takes place at the instance of the vendor sponte suâ and not under any judicial authority." And the statement of those elementary rules I take from the same author (p. 434): "The contract of sale and purchase has been treated by jurists as consisting of three essential and constituent parts—*res, pretium, consensus.* . . and they have considered that in these are involved all the principal questions affecting its validity." Here we have the *res,* Belair Park; we have a price named, $16,005; we have to enquire of the consent. For "there must be the consent of the vendor and purchaser, both as to the thing which the one sells and the other buys and as to the price for which the one sells and the other buys it. In venditionibus et emptionibus consensum debere intercedere palam est. Cæterum, sive in ipsâ, emptione dissentiant, sive in pretio, sive in quo alio, emptio imperfecta est." I need not multiply extracts relating to this point.

13. How and when, in an auction, does the auctioneer signify his acceptance for the vendor and so enable us to ascertain the period when the consent of both is given, when there is *duorum in idem placitum consensus*? Undoubtedly, to my mind, when the *addictio,* the assignment, is made, that is to say, if and when the property is knocked down (as it is expressed) to the highest bidder. "Est enim haec perpetua auctionum lex, ut res addicatur plus offerenti" (Matthæus p. 81). And when Matthæus (p. 89) states "voluntaria ergo auctio perfecta censetur, simul atque augendi seu adjiciendi facultas precisa sit," he seems to me to affirm the principle of the *perpetua lex* that there must be addiction or verbal assignment, because without it it is impossible to determine whether the auctioneer has accepted the offer and thereby taken away the *facultas augendi seu adjiciendi.* In a note to Voet (p. 38) the translator has—"The *addictio* or assignment is equivalent to an auctioneer 'knocking down' an article to the highest bidder." Maasdorp (p. 141) referring to Voet on

purchase and sale, states: “In the case of a sale by auction, the sale is not concluded until the article has been knocked down to the bidder by the auctioneer, but a good deal in this respect will depend upon the published conditions of sale and the circumstances of each case.” Here the published conditions of sale expressly provide for the knock of the hammer as the time for completion and, therefore, the payment of deposit and other dues. Once more; in *De Smidt v. Steytler* already mentioned, the argument of counsel for the highest bidder claiming the property withdrawn from sale expressly rested the cause of action on the acceptance of the bid by the auctioneer, an acceptance, said counsel, signified by repeating the bid. I am not concerned with the question of method of acceptance—that question was never argued—but the necessity for some acceptance was admitted.

14. On December 4th, 1914, as has been already related, the auctioneer refused his acceptance of the plaintiff’s offer. There was, therefore, no mutual agreement as to the price of the property and, again therefore, an absence of one of those elements upon the existence of which a contract of purchase and sale depends for its binding force and its specific performability.

15. I have deferred until this stage consideration of the various extracts from the treatise of Matthæus on Auctions for a translation of which I am indebted to Mr. Laurence. The translation I (see below) append to this judgment. The extracts are five in number. The first, dealing with the proscription or announcement of sale, does not concern us here. As pointed out by counsel, it merely affirms the liberty of a vendor to postpone or abandon an advertised sale. The second extract discusses (*a*) the question of an offer of a cash sum from one bidder, followed by an offer from another of a higher sum but with postponed payment, and (*b*) the obligation of a previous bidder, who has been outbid by another, to offer a higher price if he wishes to oust the latter. The third and fourth extracts, like the second, are from the author’s chapter “Concerning the Biddings” and are those upon which I thought counsel for the plaintiff most relied. In paragraph 40 the question is asked whether the sale is completed by the bidding or by the instrument giving effect to the addiction, *tabulae addictionis*, and Matthæus expressly combats the opinion of Bartolus and Choppinus that the last bidding completes the sale, pointing out that in public auctions the sale is not completed until the *tabulae* have been executed. In voluntary auctions, he goes on to say, the sale is complete when bidders are deprived of the opportunity of increasing their bids. Burge gives the effect of the paragraph at p. 576 of his work. Matthæus is discussing the question whether a bidding completes the sale at a public auction. He definitely holds that it does not. One would expect,

if it does so at a voluntary auction, to find an equally definite pronouncement of that rule of law. There is none, but only the statement "voluntaria ergo auctio perfecta censetur" &c, with which I have already dealt. Paragraphs 41, 42, and 43 establish the obligation of a bidder to abide by his bid from which he is only released if a second bidder make an advance and be accepted. Through all these paragraphs we hear running the note of acceptance by the auctioneer.

16. Paragraph 48 enquires whether, after bids have been made but before addiction, the vendor can abandon the sale. The opinion of Matthæus in this passage may be well founded that there is at auction (and whether public or voluntary), if the property be advertised or announced to be for sale to the highest bidder (and even without these words) and there be no announcement of the sale being subject to a reserve, a tacit promise on the part of the vendor that the property will be "given," that is, assigned or knocked down, to the highest bidder. It may also be that, on an auctioneer, in those circumstances, declining to knock down a property and withdrawing it from sale, an action for damages will lie against the auctioneer or vendor for breach of the obligation. But that very obligation, "ut res addicatur plus offerenti," itself contradicts the plaintiff's contention that the highest bid completes the contract and constitutes the person who makes it the purchaser, and, moreover, this is not an action for damages for breach of an obligation to knock down Belair Park to the plaintiff, but a suit for delivery of that property by conveyance under a contract alleged to have been fully entered into in all its essentials and for the validity of which the element of acceptance of price by the auctioneer by knock of hammer, or indeed in any other manner, is contended to have been in this auction, and to be in any auction wholly unnecessary.

17. The fifth extract from Matthæus establishes the obligation of the vendor, when there has been a binding contract of purchase and sale, to deliver the property to the buyer. Here, as I have already said, there was no contract of the kind.

18. The conclusions at which I have arrived on the evidence as to the issues of fact raised by the pleadings are—

(a) in respect of the use, or omission, by the auctioneer of the words "to the highest bidder," that they were not used, but the law seems to me to be clear that an auction sale, when the property is not stated to be subject to a reserved price, must be understood as a sale to the highest bidder, whether those words be used or not;

(b) on the point of acquiescence, and (i) the use by the

plaintiff of the words (or their equivalent): "Then I have bought the Turf Club," and (ii) the plaintiff's attendance at the auctioneer's office to make tender (by cheque) of the deposit, that, whether interrogatively or assertively, whether to, or in the hearing of, the auctioneer or the general assembly, the plaintiff did use those words, but that I am far from satisfied that there was any such attendance at the auctioneer's office as is alleged. To the tangled testimony of the plaintiff on this latter point, and without reference to the auctioneer's emphatic denial, is my dissatisfaction due. At the same time evidence of the plaintiff's non-acquiescence is, in my opinion, sufficient;

(*c*) as to the plaintiff's performance of the conditions of sale, that, he was ready and willing to perform them, but was unable to do so by reason of the auctioneer's withdrawal of the property from sale.

It is unnecessary to consider the questions of custom followed in advertising and putting up property for sale, and of voidability of a contract of purchase and sale for *laesio enormis*. Connected with the latter issue is the Slater agreement. Of this I have to say nothing more than that I do not understand it, and that if its suppression on the liquidator's application to the judge in bankruptcy, when its contents might, I may almost say must, have influenced the terms of the order of Court and, perhaps, prevented this liquidation altogether, has created an atmosphere of mystery, of suspicion and profound distrust, the liquidator has only himself to thank.

19. At the close of the concluding argument for the plaintiff Mr. Laurence briefly referred to damages. But there is no claim for damages either specifically or by way of prayer for alternative relief, and, further, the plaintiff has failed in his claim for specific performance. In *Alexander v. Armstrong* (Buch. 1879, 233) Lord de Villiers said:—"In an action in which the summons demands specific performance, and the declaration claims no sum of money as damages, the plaintiff is not entitled to obtain damages in case he fails in the sole object for which he brought his action, to obtain specific performance."

20. The plaintiff is not, in my opinion, entitled to the relief he seeks. The suit is dismissed and judgment must be entered for the defendants with costs.

[NOTE.—On the application of the plaintiff execution on the judgment was stayed for 21 days, any application for further stay pending the hearing of an appeal to the Court of Appeal to be made to that Court.—LL. C. D.]

Translation of Extracts referred to in foregoing Judgment.

I.

MATTHAEUS DE AUCTIONIBUS.

Lib. I. Cap. VIII. De Proscriptione.

S. 27.—An a voluntaria auctione desistere licet?

Lastly we are to consider the consequences and effect of the advertisement.

Here two points are chiefly called in question: firstly, whether he who has advertised a sale may desist from it or is strictly bound to hold the sale? and, secondly, whether the advertisement interrupts the period of prescription?

As to the first question, although the bills of advertisement are put up in the most frequented places of the town, yet the advertiser is under no necessity to hold the sale: that is if he has advertised voluntarily. For no man is compelled to sell against his will, and it follows that the advertiser may change his mind or sell on some other day than that fixed for the auction.

S. 28.—Bartolus indeed and, following him, Damhouderius think that, if he desists, then, in the same way as he publicly advertised the property, he ought publicly to revoke the advertisement. The better opinion is that cancelling bills are not necessary, and those which have been put up may be taken down. Indeed, even if they were not taken down, still I should not consider that the seller could be compelled to hold the sale. The case of a broker is different: if he retires or removes he ought to advertise it publicly, lest those contracting with him should be deceived. But it is no fraud to those who expected a sale if the owner of the property desists from holding one.

S. 29.—But with respect to an auction held by authority of the judge, it is not lawful for the execution creditor or for the Curator Bonorum to desist at his own free will; but only if there is a cause for desisting, both just in itself and consonant with the interest of the creditors. As, if the debtor pays after advertisement of his property; or if some other party is prepared to protect an absentee or to pay for him: this will prevent a sale of the property. Also if one of the creditors stands security for the judgment debtor, although the bills have already been put up, yet the surety will get them taken down.

Again it may be that the judgment debtor appeals against the execution creditor, alleging irregularity in the execution, and the Court of appeal will have power to enjoin the execution creditor to desist.

Lastly a third party may contend that the property in execution is his: then the advertisements and the biddings are not stayed, but the conveyance is stayed if the opposer proves his title. But of this hereafter in the chapter on oppositions.

II.

Lib. I. Cap. X. De Licitationibus.

S. 21.—Let us consider the case of the First bidder offering a lower price in cash and the Second a higher price but not immediate payment: which is to be preferred?

Some take the reasonable distinction that, if the cash bid will satisfy all the creditors, the First should be preferred to the Second; if not, the time required by the Second to pay the higher price should be given to him. For sale at execution should benefit all the creditors if possible.

22. Suppose the First has been beaten by the Second in the bidding: for the First again to depose the Second, is it sufficient if he offers merely as much as the Second has bid beyond him? By no means; to win, he must offer more: for this is always the law of auctions, that the property shall be conveyed to him who offers most. If this is the rule in Addictio in Diem that the First purchaser shall be preferred to the Second unless the Second bids against him and offers more; how much more shall the rule prevail at an auction where the best in the bidding is always the best in the cause. Digest XVIII. 2. s. 6, 7, 8.

III.

Cap. X. De Licitationibus.

S. 40.—Now as to the effect of the bidding.

And herein the first question to be discussed is whether the sale is completed by the bidding or by the decree and the instrument thereof?

Choppinus says that the last bidding completes the sale, even though it happen that the instrument of decree may be completed and delivered by the clerk at a later date. Bartolus also seems to be of the same opinion; for when, says he, the auctioneer announces with my consent that he who bids the highest shall take the property, I must be held to contract with him who offers most; and when the offer is made the contract is complete. And he thinks it no objection that further bidding is allowed until the seal is lifted from the wax; for all that amounts to is that the creditors or the owner of the goods can recede from the sale if better terms are offered, not that the sale is incomplete. So also (he says) property may be sold privately with a time

named in which the seller may withdraw if better terms are offered him; yet that is a true sale and forthwith complete, though terminable on the condition named.

However, whatever Bartolus may have thought about it, the fact is that in our practice the sale cannot be called complete until the instrument of conveyance is made out and signed; that is, when the property is sold at execution by authority of the judge. But when property is sold by auction at the will of the owner, the sale is not generally followed by any decree. Therefore a voluntary sale by auction is deemed complete as soon as the opportunity of bidding higher is broken off; but a sale at execution is not deemed complete until the document of conveyance is signed.

That this is true of execution gales can be shown by several considerations:

First, because, when a sale is complete, the seller can demand the price and the buyer the property; for where an unconditional obligation exists there also is an immediate right of action. But when the bids are made, neither the seller can demand the price nor the bidder the property until the decree has been issued or the conveyance has taken place.

Secondly.....

Thirdly.....

Fourthly.....

Thus neither Bartolus' statement nor the parallel he adduces of addictio in diem can avail against our view on this point.

As regards Choppinus, his authority in no way affects our point. For he speaks of the last bidding, and that is simultaneous with the lifting of the seal from the wax; and if in any case the execution of the document is delayed, the purchase can still be called complete, for the last bidder can no longer in that case be defeated by a higher bidding.

S. 41.—But our rule admits of this qualification that, although the sale cannot be called altogether complete, so long as the bidder is liable to be beaten by a higher bid, still the bidder who may yet be beaten is himself bound unless some one beats him or offers better terms. Thus when auctions are adjourned and bids made during more days than one, then each bidder in turn is bound until the next one is accepted.

Grotius has well stated this custom of our auctions in the following words: "In vercopingen die opentlijck by hooginghe geschieden . . . . ." And more fully Daventrienses: "In alle vercopingen die opentlijck . . . ." That is: "In all sales which are held in public by auction, every one must stand by his word or promise; and a bidder is not released until a higher bid has been made by another bidder and accepted."

Thus our law decides the well-known question, whether the first bidder is immediately released when the price has been raised by another. Whereon the jurists have written diversely, of whom Rebuffus, Pinellus and others agree with us. And our decision entirely accords with the opinion of the Jurisconsult in Digest Lib. 18. Tit. 2. s. 9, where it is clearly laid down that the former bidder is released only if a later one is admitted; unless it has been expressly agreed that the former may withdraw when a higher bid is made, in which case the former is released although the second be not admitted.

This point remains: what amounts to admitting the second bidder, or in our idiom, den tweden hoogher aenneemen? . . . . . .

S. 42.— . . . . . .

But we are quit of this difficulty by the usage of the present day. For it is not now customary for the bidders to state their bids to the execution creditor, but to bid and contend with alternate raising of the price in the court itself on a day which is solemnly fixed and is usually the last day. And the bidder on that day who beats the others, if he is adjudged a proper purchaser, is entitled to take the property sold.

S. 43. —And from this may be collected the answer to another question, whether a bidder can recall his bid, if he changes his mind?

Bartolus indeed thought that he could, provided that he recalled it publicly as he had made it. Angelus on the other hand thought that the bid could not be recalled, because the sale was complete.

Here there is no doubt that the opinion of Angelus is the more correct: Rebuffus records that it has been several times decided accordingly. But the reason given by Angelus is not the true one. The bidder is not precluded from repentance because the sale is complete with his bidding, but because it is the essence of an auction sale that everyone is bound to stand by the bid he has made.

In one case certain writers approve Bartolus' opinion: namely, if it be for the public benefit that a bid made by any one should be revoked. How they arrive at this conclusion, or in what case it can be for the public benefit that a bid should be revoked, is, I freely confess beyond me; for I should have thought there can be no such case of expediency that we ought to break faith for it.

IV.

Cap. X. De Licitationibus.

S. 48. —Lastly it remains to inquire whether, after bids have been made but before conveyance, the seller [at execution sale] or the owner of the goods [at a voluntary auction] can withdraw?

Bartolus and, following him, Damhouderius say that they can, subject however to this proviso that the seller has not added to his advertisement the usual words—"Et plus offerenti dabitur": i.e., "the property will be sold to the highest bidder" (men sal vercopen aen den meestbiedende). The reason they give is that, if this clause is omitted, it is understood that the seller wishes to elicit a price only, not to sell.

Neither the rule nor the exception stated commends itself to me. I dissent from the rule because it is unreasonable that, when a bid has been made, the bidder should be bound while the seller on the other hand is not; for the contract of sale is bilateral and begets an obligation on either side. I dissent from the exception stated because whosoever advertises an auction sale tacitly promises that, whosoever wins in the bidding, the property shall be conveyed to the winner: for that is the essence of an auction sale.

This opinion of Bartolus is expressly rejected by the Urban Edict, which enacts that in voluntary auctions the seller may desist from or defer the conveyance (het goet ophouden), until some one has bid (soo langhe het niet gemijnt is), although the seller has advertised expressly that the property will be conveyed to whosoever shall win in the bidding.

It is however permitted to those who sell by auction at their own free-will to give instructions to the auctioneer, naming the prices at which the goods are to be sold. If the goods are not sold according to such instructions, then, if the price obtained is less, the auctioneer is responsible; if more, the seller is entitled to the excess.

In the letting out of taxes also, this opinion of Bartolus is repudiated by the Edict of the States of Holland.

V.

Cap. XIV.

S. 1.—The first duty of one who sells by auction is to deliver the thing sold to the buyer. That is, if the auction is voluntary; but, if the sale is by decree of the judge, then delivery is effected by the execution creditor, by the official auctioneer or by the judge himself: by the first two named if the property is movable and by the judge if it is immovable. The delivery of movables is actual delivery, made actually from hand to hand. The delivery of immovables is a conventional delivery: when the instrument of conveyance is delivered the land itself is understood to be delivered also.

BRODIE AND RAINER, LIMITED,

v.

THE CITY CASH CHEMISTS.

Merchandise Marks Ordinance 1888—Trade description—False Trade description—Resemblance inducing belief that the goods sold are those of complainant.

MAJOR, C.J.: The defendants were charged with applying a false trade description to goods. They were convicted on that charge, for the Magistrate held that the preparation of the defendants "had applied to it a colour-"able imitation of the trade description invented by the complainants calcu-"lated to lead persons to a wrong belief," and convicted them under section 2, sub-section (2) of Ordinance No. 11. of 1888 to which he specifically refers.

From that conviction the defendants appealed and the learned Senior Puisne Judge affirmed the conviction and dismissed the appeal.

From that dismissal the defendants obtained leave to appeal on two grounds, first, that the Judge was wrong in holding that the words "Vita-Nova Sarsaparilla" or "Nova Vita Sarsaparilla" constitute a trade description within the meaning of Ordinance No. 11 of 1888.

Second, that the Judge was wrong in holding that a limited liability company can institute criminal proceedings otherwise than by some person duly authorized to do so, and that there

being in this case no proof that any person was so authorized, the Magistrate had no power to entertain the complaint.

To deal with the second ground first. The answer to it is that by the Summary Conviction Offences (Procedure) Ordinance, 1893, Section 8, sub-section (3), any complaint may be made by the complainant in person, or by his counsel, or by any person authorised in writing in that behalf; that the complaint here was signed by "Eustace G. Woolford, barrister-at-law," who was in the matter of the complaint, and still is, counsel for the complainants. The words in the sub-section "authorized in writing in that behalf" do not refer to counsel but to the words "any person" immediately preceding them. The fact, moreover, that Mr. Woolford was counsel for the complainants carried with it the presumption that he had their authority, a presumption which there has been no attempt to rebut.

In any event the objection could not be raised except in the manner, at the time, and with the limited effect, prescribed in Section 97, sub-section (2) of the same Ordinance. It does not appear from the record that the objection to the complaint was taken before the Magistrate and the appellant was thereafter concluded.

As to the first ground of appeal, I am of opinion that "Vita-Nova Sarsaparilla" is a trade description of goods by the complainants, because it is a description or statement as to the material of which the particular goods are composed, that is to say, Sarsaparilla; Section 2, sub-section (1), paragraph (*d*) of the Ordinance.

For the same reason "Nova-Vita Sarsaparilla" is a trade description by the defendants.

The defendants have applied a trade description to goods, because they have applied it to the goods themselves contained in a bottle, and to the covering or other thing in which the goods are sold, because they have placed the goods in a covering to which the trade description has been applied, and because they have used a trade description in a manner calculated to lead to the belief that the goods are designated or described by that trade description; Section 5, sub-section (1), paragraphs (*a*), (*b*), (*c*) and (*d*) of the Ordinance.

The trade description applied by the defendants to their goods is, in my opinion, a false trade description, because it is an application to the goods of such an arrangement or combination of figures, words and marks as are reasonably calculated to lead persons to believe that the goods are the manufacture of some person other than the persons whose manufacture they really are; in other words, that the goods are the manufacture of the complainants and not the manufacture of the defendants.

I have only to look at the two cases or coverings in which the goods of the complainants and defendants are respectively contained and compare one with the other to see that the description applied by the defendants to the goods and their covering, in its arrangement, its verbiage, its general "get up"—to use a conventional expression—is so nearly exactly that of the complainants that, even to an ordinarily vigilant and observant buyer—and the majority of buyers are not, and are not bound to be, either vigilant or observant—the belief must be induced that he would be buying the goods of the complainants and not those of the defendants. And inspection of the goods and their covering shows clearly why the false trade description was applied, viz., to pass off the defendants' goods for the complainants.

For these reasons I think this appeal should be dismissed with costs.

BERKELEY, J.: I have nothing to add to my decision of 8th July, 1914, now under review, and I concur in the finding of the learned President that this appeal must be dismissed with costs.

DALTON, Acting J.: This case is an appeal from Mr. Justice Berkeley who confirmed a conviction by the Stipendiary Magistrate of Georgetown (Mr. P. A. Farrer Manby) of the appellants for a contravention of the provisions of the Merchandise Marks Ordinance, 1888, *i e*., for applying a certain false trade description, namely, "Nova-Vita Sarsaparilla" to certain goods, to which goods the complainants apply a trade description, namely, Vita-Nova Sarsaparilla.

The Magistrate found that as a fact the defendants (*i.e.* appellants) have applied to a mixture they sell "a colourable imitation of the trade description invented by the complainants calculated to lead persons to a wrong belief." By the word "invented" is presumably meant "the sole use of which has been acquired by" and this would appear to be so from what is stated in the last paragraph of the Magistrate's judgment.

On appeal to him, the learned Judge in the Court below held that in effect the appellants were summoned under Section 3 (2) of the Merchandise Marks Ordinance, 1888, and not under Section 3 (1), (d), as is alleged by them. Though it is not a point which very materially affects the case I do not agree with that finding, the wording of the complaint and the finding of the Magistrate making it clear to my mind that the offence charged was under Section 3 (1), (d), of the Ordinance. I refer to the matter because under Section 3 (2), certain defences are set out and the fact

that no attempt has been made to use them has been commented on by counsel for the respondents.

Set out shortly and concisely the grounds of appeal are two:

(1.) That a Limited Liability Company cannot institute criminal proceedings other than by some person or persons duly authorised to do so, and that therefore the complaint was not properly brought.

(2.) That the words "Vita-Nova" or "Vita-Nova Sarsaparilla" or Nova-Vita Sarsaparilla do not constitute a trade description within the meaning of the Merchandise Marks Ordinance.

To take the latter point first:

The Ordinance clearly lays down what constitutes both a trade description and false trade description, and it is not necessary to quote it *in extenso.* The learned Judge held that the words "Vita-Nova Sarsaparilla" were a trade description, as indicating the materials of which the goods were composed (Definition of Trade Description, Section 2 (1), (d), and that "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"; from that I infer that he agrees with the Magistrate that respondents have by such usage and custom acquired an exclusive right to sell the article so described.

I would here point out that there is no evidence whatsoever to show what are the ingredients of either the mixture Vita-Nova Sarsaparilla or Nova-Vita Sarsaparilla, or whether they are the same or not, and on that account it has been argued that assuming that the two mixtures are the same there is nothing to show that the description as used by appellants was a false one. What respondents however urge, is that the words properly constitute a trade description the exclusive use of which is in them, and that the appellants have by the use of practically the same words under the same or similar circumstances contravened the provisions of the Merchandise Marks Ordinance. That a description may be true chemically but false as a trade description has been decided in the case of Fowler v. Cripps (22 T.L.R. 73) and the description may be quite a correct description of the article sold—Vita-Nova Sarsaparilla—by either party. Is it, however, *a trade description the exclusive use of which is in respondents, or a trade description at all*? No man can have any right to represent his goods as the goods of another, but have the appellants sold their mixture in the market so as to represent it as being the mixture of the respondents? That is the test which was applied by the Court in the case of Birmingham Vinegar Brewery Co., Ltd. v. Powell (1897, A.C. 710) and there the question was answered in the affirmative. I can find no evidence

on which to give a similar answer in the case now before the Court The case above quoted is what may be called the "Yorkshire Relish" case where it was proved that plaintiffs had for a great number of years manufactured and sold the Relish in question and it had by long usage and custom in the trade acquired the trade description of "Yorkshire Relish." Even in that case, however, it was held that appellant was entitled to use the description if he clearly distinguished his same from the respondents. The exhibits put in the case now before the Court show clearly that appellants used their own name or that of Smith Bros., Ltd., and no other on the mixture they sold, whilst the labels are distinct. A further case is that of Raggett v. Findlater (37 J.P. 822) which seems to me to bear very closely on the case before the Court. There it was held that a manufacturer cannot acquire the right to the exclusive use of an English adjective which is merely descriptive of the article manufactured by him and the Court dismissed the plaintiffs' bill by which he claimed the right to the exclusive use of the words, "Nourishing Stout," as descriptive of the stout manufactured by him. The words "Vita-Nova" are not English but are so well known, like many other Latin phrases, that the case is not altered. They might easily, without much stretching of the imagination, be translated by using the same word "nourishing" as in the case above referred to. A transposition of the words "Vita" and "Nova" does not alter their meaning.

To come now to the point of "custom" and "long usage" which respondents urge as giving them the exclusive use of the words "Vita-Nova Sarsaparilla." The evidence of "custom" and "long usage" adduced before the Magistrate is very meagre, and one of the two witnesses who speak on this matter is the Secretary of the complainant company. Evidence to support "custom," "usage," and "common repute" must be definite—convincing and beyond question, and this certainly cannot to my mind be said of the evidence on this point led in the Magistrate's Court. Respondents' mixture was apparently put on the market in 1904 at which time the evidence goes to show appellants' mixture was also being sold by a firm from whom appellants acquired it. Thus there appears little to choose between the age of either and certainly nothing on which respondents can base a claim for exclusive use of the words, Vita-Nova, as against appellants. I do not agree with the finding of the Magistrate that the appellants have applied a false trade description to any goods as set out in the complaint. That being so, it is not necessary to consider the further point in connection with the institution of criminal proceedings by a Limited Liability Company.

I am of opinion that the appeal should be allowed with costs.

APPELLATE JURISDICTION.

10TH SEPT., 1915

HACK

v.

BURNHAM.

Appeal—Summary Conviction Offences Ordinance, 1893, s. 97—Unlawful possession of animal or part thereof—Actual physical possession—Circumstances of suspicion.

Where H., a butcher, and two other persons N. and L. are in possession of fresh meat, said to have been obtained from H., and H. gives an account for the meat in his possession which may reasonably be true;

Held, that even assuming that the meat in the possession of the three was not all from one animal H. could not be convicted, under s. 97 of the Summary Conviction Offences Ordinance, of the unlawful possession of meat which had passed out of his possession and which was held by L.

Held, further, that even if present physical possession were unnecessary under Sec. 97, that the evidence in this case was not sufficient to entitle the magistrate to leave it to himself, sitting as a jury.

G. J. de Freitas, K.C., and *J. A. Luckoo* for the appellant.

C. Rees Davies, Solicitor General, for the respondent.

Appeal from the decision of Mr. W. J. Gilchrist, Stipendiary Magistrate for the Georgetown Judicial District, who convicted the appellant Hack for that on July 24th part of an animal mentioned in Title VII. of Ordinance 17 of 1893, was found under circumstances of suspicion in his possession. The appeal was allowed and the conviction quashed.

All necessary facts and reasons for appeal appear from the judgment.

J. K. D. HILL, J.: The appellant was convicted before a magistrate that, on the 24th July, 1915, part of an animal mentioned in Title VII. of Ordinance 17 of 1893 was found under circumstances of suspicion in his possession.

The reasons of appeal are founded under Section 9 (sub-sections 7, 8, 9 and 10) of Ordinance 13 of 1893, the particular matters relied on being contained in no less than thirty-three paragraphs

Counsel for the appellant, at the hearing, wisely abandoned reasons 3 and 4 (founded on sub-sections 7 and 10) and grouping reasons 1 and 2 based his arguments on

(*a*) the question of possession,

(*b*) the identification of the meat with the possession by appellant,

(*c*) the circumstances of suspicion.

In dealing with the first point—possession—I shall assume for the purposes of argument that the identification of the meat is complete, *i.e.*, the magistrate had before him three sets of meat

(exhibits B, C and D) which were found, at different places, in the possession of the appellant, Lovell and Nicholson, respectively—Lovell stated he got his meat from the appellant from the animal which he had killed for the appellant. Nicholson stated he got his from Lovell, and appellant himself stated to Sergeant Burnham, at Diamond, before arrest, that the meat in Lovell's possession, at Farm, was the same meat (*i.e.*, from the same animal) as he had, and in his evidence on oath he states that the beef he, Lovell, and Nicholson had was all from the same cow.

Now, as I have stated, I shall assume that these three sets of meat were shown to consist of the meat of two different animals. Has possession on the part of the appellant been shown?

Which particular set of meat contained the proof that it came from two animals is not shown, but it is a fair presumption that appellant's meat—that portion actually found in his possession—did not include the meat of two animals, otherwise there would have been no necessity to introduce the evidence that was given. The 'aggregate' of the meat is dealt with, and in view of appellant's and Lovell's statements liability is sought to be fixed on the appellant (for Nicholson, according to his evidence, got his set of meat from Lovell). But appellant's statement to Sergeant Burnham, and in the witness-box, is not inconsistent with his innocence. He tells the Sergeant at Diamond that the meat in Lovell's possession, at Farm, is the same meat as his. There would be nothing untrue in this, if he knew nothing of the meat of any other animal being in Lovell's possession. Nicholson got his meat from Lovell, and not from appellant direct. Therefore when appellant stated that the meat in Nicholson's possession was the same meat as his and Lovell's, he may have spoken under the belief that Lovell had no other meat to give to Nicholson than that which came from the animal killed by Lovell for him, the appellant. On the other hand suppose Lovell to have been the culprit, and having obtained meat from appellant, he then proceeds to add to this, other meat, obtained without Hack's knowledge, and from this joint stock issues meat to Nicholson.

It has been argued that possession under Section 97 of Ordinance 17 of 1893 clearly points to actual physical possession, or the finding of the *corpus* on the premises. It has already been held that Section 96 does not apply to cases where the possession of an animal or a part of it is concerned (Crawford v. Denbow, A.J. 4.1.10) and it therefore cannot, in my opinion, be held to apply in some respects and not in others, *e.g.*, as regards the possession of the carrier or servant being the possession of the principal. Section 97 points to a present actual possession, and not to a past, and my attention was invited to Section 123 of the same Ordinance where the expression possession is extended to include possession by another

person. In an indictment for stealing goods, and also for receiving them knowing them to be stolen, or for receiving alone, evidence of other stolen goods being found in the possession of the prisoner is not admissible (Sec. 7 (1), Ord. 20 of 1893) unless they are found in his possession at the same time he was found in possession of the article he is indicted for stealing, or receiving. It is not sufficient to show that other property stolen within the preceding period of twelve months has at some time previously been dealt with by the prisoner. Even were I of a different opinion, I must hold in the present case, there was such a doubt in the matter, that the Magistrate was not justified in leaving to his consideration what he evidently did, that possession in law was proved on the part of appellant. For this reason the appeal must be allowed and the decision reversed with costs.

As the procedure adopted by the Magistrate in connection with the identification of the meat has been questioned, I think it right to say that in no way was anything done which was not reasonable, legal, and in the interests of the accused. The meat was offensive—was kept in the Courtyard—the record shows exactly, as it should, the procedure adopted, acquiesced in by the appellant's solicitor, and followed by him when he examined a witness for the defence who had inspected the meat in the Courtyard, and actually heard, and was examined about what had been there said by prosecutor's witness. It seems extraordinary that, after all this, such procedure should have been questioned, and grounds of appeal based on it.

APPELLATE JURISDICTION.

17TH SEPT., 1915.

BALDEO

v.

POLLARD.

Appeal—Criminal law—Unlawful possession—Evidence by accomplice who pleads not guilty but given in mitigation of penalty—Admissibility of such evidence against co-defendant who pleads not guilty—Statement by one defendant to police in presence of other co-defendants implicating the latter—Principles governing the admissibility in evidence of such statement.

B., H., and C., are jointly accused of unlawful possession. H. and C. are first arrested and make a statement to the police incriminating a "coolie." B., a coolie, is subsequently at the police station picked out from amongst six or seven other men by H. and C. as the coolie man from whom they obtained the stolen property. The statement of H. made to the Inspector of Police in B.'s presence that he (B.) was the man from whom H. obtained the stolen property was given in evidence before the Magistrate.

Held that the statement of H. was not evidence admissible in law with reference to the facts contained in such statement, i.e., of identification.

Held further that in the absence of evidence *aliunde* connecting B. with the offence, it was not evidence admissible in law with reference to the demeanour of B. at the time.

Director of Public Prosecution v. Christie 111 L.T.R. 220. followed.

Appeal from the decision of Mr. W. J. Gilchrist Stipendiary Magistrate for the Georgetown Judicial District who convicted the appellant Baldeo for having in his possession two tarpaulins and two sugar bags reasonably suspected of having been unlawfully obtained. The appeal was allowed and the conviction quashed.

All further necessary facts appear from the judgment.

P. N. Browne for the appellant.

C. Rees Davies, Solicitor General, for the respondent.

J. K. D. HILL, J.: The appellant was charged along with William Hannays and Emanuel Charles with having, on 22nd July, 1915, in their possession two tarpaulins and two sugar bags reasonably suspected of having been unlawfully obtained.

The magistrate convicted Hannays and Baldeo and discharged Charles

Baldeo appeals from that conviction on the grounds:

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

There are five particulars given but only (a) and (e) may be considered. (b) (c) and (d) have reference to the duty of the magistrate at the close of the prosecution in not discharging the appellant without calling on him for a defence, but I am of opinion that it was quite within his power to call upon him.

2. Illegal evidence was admitted and there was not sufficient legal evidence to sustain the decision after rejecting such illegal evidence.

(a) The evidence of Inspector Craig.
(b) The evidence of the defendant Hannays.

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

Two particulars are relied upon.

The case for the prosecution rests upon the evidence of two policemen, Inspector Craig, Gooberdhan, Cameron, and Simon, and Hannays, if his evidence is held to be admissible as against the appellant.

The two policemen speak to the discovery of the articles in the possession of first and second defendants, Hannays and Charles, who made certain statements to them incriminating a. “coolie man” as having given the tarpaulins to them on 22nd July, 1915. These men were arrested. On the next day Baldeo was sent to the Police Station by Mr. Ridley—not under arrest—and placed with six or seven other East Indians. He was there pointed out by Hannays and Charles—who were then under arrest—as the “coolie” man referred to

by them. Gooberdhan speaks as to the offer to him by Hannays of a tarpaulin for $9, valued by Mr. Ridley at $25. Cameron, who is a brother watchman at Booker's of Baldeo, swears that on 21st July, 1915, he saw Hannays and Baldeo speaking together. On the same night Hannays came to the gate and asked to see Baldeo and they talked together. It was then 7 to 8 p.m. Simon swears that on the 21st July, 1915, he saw Baldeo speaking to Hannays at the Market stelling. Baldeo, on giving evidence for himself, swears he does not know Hannays at all.

The case for the prosecution being closed, the magistrate discharged the second accused Charles. Mr. Gunning, for Hannays, then addressed the Court and asked for leniency. Mr. Luckhoo for Baldeo addressed the Court, and submitted no case was made out for him to answer. The magistrate then called for a defence, as he had a perfect right to do, and Mr. Luckhoo then led evidence and closed his case.

Then, from the record, it appears Mr. Gunning "asks for leniency for 1 "and would let him go into the box and state what has been said." Hannays then appears to have been sworn and examined by Mr. Gunning—without objection by Mr. Luckhoo, and made certain statements incriminating Baldeo. The Court examined Hannays, and Mr. Luckhoo, indeed, appears to have cross-examined Hannays also. Case was closed, and Hannays and Baldeo convicted

I have no difficulty in concluding that any evidence given by Hannays before the magistrate was not admissible as against Baldeo. A defendant in a criminal matter cannot be called as a witness for the prosecution nor can he be called as a witness, without his consent, for any co-defendant, but a defendant charged with others who has pleaded guilty may give evidence against or for his co-defendants, and even a defendant who has pleaded not guilty, if, in the course of the trial he withdraws his plea and pleads guilty, or if he is acquitted, can give evidence against or for his co-defendants. From the record, Hannays never withdrew his plea of not guilty, and pleaded guilty. He was apparently allowed to make an *ad misericordiam* appeal on the application of his solicitor who examined him (and not the prosecution as would have been the case had he been called by the police on a new plea of guilty). After his statement on oath he was convicted by the magistrate. I hold therefore that his evidence must be rejected as against Baldeo.

The next, and only, point for consideration is whether Inspector Craig's evidence is admissible.

The reasons of appeal 2 (1) are as follows:—

(*a*) that his evidence was secondary,

(*b*)that the defendant Hannays at the time was a prisoner and there was no proof that he had been cautioned,

(*c*)the statements or confession of Hannays were only evidence against himself and not against appellant and did not establish the truth of the said statements.

I think that, if Baldeo's guilt for the moment is assumed, Hannays could only be an accomplice, and the statement by him must be viewed from that point of view.

Inspector Craig's evidence is to the effect that Hannays told him he had got the tarpaulins from a coolie man whose name he did not know, but believed he lived in Ardina Street, and described the man. Charles corroborated. Craig then sent for Baldeo, who is a watchman at Booker's, who had not been arrested (apparently the markings on the tarpaulins caused the reference to Booker Bros'. Store). Baldeo told Craig he lived in Ardina Street. Craig placed Baldeo among six or seven other East Indians. Then he brought out Hannays and asked him if he knew any of the East Indians. Hannays walked straight up to Baldeo and put his hand on him and said "he the one gave me tarpaulins." Then Craig brought out Charles, after sending Hannays back to the lock-up,—they had no opportunity of speaking to each other,—and Charles went and touched Baldeo, and said "he the man who gave tarpaulins to Hannays." This is the evidence that is objected to. Baldeo, giving evidence for himself, swears he does not know Hannays at all, but admits both Hannays and Charles pointed him out at the Brickdam.

A man's confession (Archbold 24th Ed., p. 400) is only evidence against himself and not against his accomplice, unless the confession was made in the presence of the accomplice, and under circumstances giving the latter an adequate opportunity of denying his own guilt, and when the prisoner was not before a magistrate. In such a case it is evidence, although of doubtful value, against the accomplice, and that even though he made no observations upon it. Archbold continues: "Unsworn statements by one "prisoner implicating others have no value as evidence being neither ad-"missions against interest nor strengthened by oath, and if the accusations "are believed the only way to get the full benefit of them is to accept the "accuser as a witness for the Crown." Counsel for the appellant suggested that Hannays should have been called as such a witness. The Police apparently preferred to charge all, relying on Inspector Craig's evidence and that of Simon, Cameron and the other witnesses for the prosecution.

Now the mere fact that an uncontradicted statement is made in the presence of an accused person does not make it evidence

against him. Such a statement can only be given in evidence against him when the accused himself accepts the statement, and so make it his own confession. His acceptance may be inferred from his answers and in some cases from his conduct on hearing the statement. A statement made in the absence of a prisoner cannot be evidence against him and it makes no difference that it was made in his presence, unless evidence is adduced which would justify the jury in finding that the prisoner having heard the statement and having the opportunity of explaining or denying it, and the occasion being one upon which he might reasonably be expected to make some observation, explanation, or denial, by his silence, his conduct, or demeanour, or by the character of any observation or explanation he thought fit to make, substantially admitted the truth of the whole or some portion of it. Whether there is any evidence of this is a question for the judge. If he thinks so he should allow the evidence to go to the jury, and if they come to the conclusion that the prisoner admitted the truth of the whole or any part of it, they may take the statement into consideration, or as much of it as they think admitted, as evidence, not because the statement standing alone is any evidence, but solely because of the prisoner's admission of the truth. Unless the jury find as a fact there was such admission, the statement is not evidence (Taylor on Evidence, 10th Ed. p. 907).

In *Rex* v. Norton 102 L. T. R. p. 926, which was a case in which the prisoner was charged with carnally knowing a girl under the age of thirteen years; although the girl was not called as a witness, evidence was given of statements made by her in the presence of the accused and of his answers to them; it was held that the contents of such statements should not be given in evidence unless the judge is satisfied that there is evidence fit to be submitted to the jury that the accused by his answers to them, whether given by words or conduct, acknowledged the truth of the whole or part of them. If there be no such evidence, then the contents of the statements should be excluded; if there be such evidence, then they should be admitted, and the question whether the answers of the accused, by words or conduct, did or did not amount to an acknowledgment of their truth, left to the jury.

In Director of Public Prosecutions v. Christie (111 L. T. R p. 220) in which case *Rex.* v. Norton (*ubi sup.*) was considered the respondent was convicted of an indecent assault on a boy of tender years. At the trial the boy was examined as a witness and gave evidence, not on oath, under the provisions of the Children's Act, 1908. The boy's mother and a constable also gave evidence as to statements made by the boy shortly after the act com-

plained of, identifying the accused, and giving particulars of the offence with which he was charged.

It was held that this evidence was admissible in law with reference to the demeanour of the respondent at the time, but a majority held that it was not evidence of identification. The Court of Criminal Appeal had held that, following *Rex* v. Norton (*supra*) Christie having denied the statement made in his presence, the evidence of such statement was not admissible. The House of Lords reversed this, (although on other grounds the quashing of the conviction by the Court of Appeal was upheld) ruling that (per Lord Atkinson at p. 223) "the rule of law undoubtedly is that a statement made "in the presence of an accused person, even upon an occasion which should "be expected reasonably to call for some explanation or denial from him, is "not evidence against him of the facts stated save so far as he accepts the "statement so as to make it in effect his own. If he accepts the statement in "part only, then to that extent alone does it become his statement. He may "accept the statement by word or conduct, action or demeanour, and it is "the function of the jury which tries the case to determine whether his "words, action, conduct, or demeanour at the time when the statement is "made amounts to an acceptance of it in whole or part." The ruling in *Rex* v. Norton as to the inadmissibility of evidence of a statement made in the presence of the accused and denied by him was reversed, for the judgment continues: "It by no means follows, I think, that a mere denial by the ac- "cused of the facts mentioned in the statement necessarily renders the state- "ment inadmissible, because he may deny the statement in such a manner "and under such circumstances as may lead a jury to disbelieve him and "constitute evidence from which an acknowledgment may be inferred by "them." This was followed by Lord Moulton (at p. 224): "It is common "ground that, if on such an occasion he admits it, evidence can be given of "the admission and of what passed on the occasion when it was made. It "seems quite illogical that it should be admissible to prove that the accused "was charged with the crime if his answer thereto was an admission, while "it is not admissible to prove it when his answer has been a denial of the "crime, and I cannot agree that the admissibility or non-admissibility is "decided as a matter of law by any such artificial rule."

On the question of identification Lord Reading (at p. 225) says: "In my "judgment it would be a dangerous extension of the law regulating the ad- "missibility of evidence if your Lordships were to allow proof of state- "ments made, narrating or describing the events constituting the offence, "on the ground

"that they form part of or explain the act of identification, more particularly "when such evidence is not necessary to prove the act, and is not given by "the person who made the statement," and he continues (p. 226) dealing with the question of the value of such a statement given in evidence, "in "general, such evidence can have little or no value in its direct bearing on "the case unless the accused, upon hearing the statement, by conduct and "demeanour, or by the answer made by him, or in certain circumstances by "the refraining from an answer, acknowledged the truth of the statement "either in whole or in part, or did or said something from which the jury "could infer such an acknowledgment, for if he acknowledged its truth he "accepted it as his own statement of the facts," and he also disapproves of *Rex* v. Norton in so far as the admissibility in evidence of a statement made in the presence of the accused is to be governed by the fact that the accused on hearing it, admitted it expressly or impliedly, or denied it.

In *Rex* v. Curnock (111 L.T.R p. 816) it was held that the jury should be directed that, a statement made by one prisoner implicating another and immediately denied, although strictly admissible as evidence, must not be accepted as evidence of the facts contained in such statement.

Inspector Craig's evidence was therefore—had identification been proved—in my opinion admissible as evidence, not of identification, but of demeanour of the accused, on the statements being made by Hannays and Charles in his presence and hearing. It would then have been for the magistrate to consider the truth of these statements in view of the silence of the accused. But I can find no evidence, outside the Inspector's, of identification. There is general evidence of transactions and meetings in the evidence of the witnesses Gooberdhan, Cameron and. Simon, which create strong suspicions that Baldeo was the coolieman referred to by Hannays and Charles in their statements to the two policemen, but there it stops. Now, before the Inspector's evidence was admitted it was necessary to identify by evidence the accused as the person who gave the tarpaulins to Hannays, and the only way, apparently, to do this was as suggested by Archbold (24th Ed., at p. 400). Inspector Craig's evidence was secondary. I must therefore hold that Inspector Craig's evidence was not admissible, and that being so there was not sufficient legal evidence to sustain the decision, after rejecting it.

The decision appealed from is reversed, and the appeal allowed, with costs.

ORDINARY CIVIL JURISDICTION.

1ST OCT., 1915

In re THE DAILY CHRONICLE, LTD.

Company—Mortgage—Omission to register—"Inadvertence"—Sufficiency—Delivery of copy instrument for registration—Companies (Consolidation) Ordinance, 1913, ss. 92, 95—Practice—Form of application for extension of time for registration—Rules of Court, 1900, O. XL.

The *D. C. Ltd.*, on July 3rd, 1914, passed a mortgage in favour of the B.G.M.F.I. Co. The Secretary of the first named company, through ignorance of the law, failed thereafter to register the mortgage with the Registrar of Joint Stock Companies within twenty-one days as required by s. 92 of the Companies (Consolidation) Ordinance, 1913.

Upon an application by the *D. C. Ltd.*, for an order for the registration of the mortgage under s. 95:—

Held, that the omission to register the mortgage was due to "inadvertence" within the meaning of the Ordinance.

This was a motion by the *Daily Chronicle, Ltd.*, under the provisions of the Companies (Consolidation) Ordinance, 1913, s. 95, for an order that the time for registration of a mortgage created by the applicant company in favour of the British Guiana Mutual Fire Insurance Company be extended beyond the time limited in s. 92 of the Ordinance on the ground that the omission to register within the twenty-one days was due to inadvertence.

P. N. Browne for the applicants.

SIR CHARLES MAJOR, C.J.: This is an application by the *Daily Chronicle, Limited*, a company incorporated under the Companies (Consolidation) Ordinance, 1913, for an order extending the time limited by the ordinance for the registration, in the Registry of Joint Stock Companies, of a first mortgage created by the applicants in favour of the British Guiana Mutual Fire Insurance Company, Limited. The mortgage is one coming within the descriptions contained in paragraphs (d), (e), and (f) of the first sub-section of section 92 of the ordinance, and was created on the 3rd day of July last. The particulars thereof prescribed by law, together with the instrument whereby it has been created, should have been delivered to the registrar within twenty-one days after that date.

Section 95 of the ordinance enables me, on being satisfied of the fact (among others) that the omission to register the mortgage within the twenty-one days was accidental or due to inadvertence, or for some other sufficient cause, to order that the time for registration shall be extended. Affidavits of Cecil William Stanley Marchant, the secretary of the applicant company, have been filed in support of the application, wherefrom it appears that the omission to register was due to ignorance of the deponent of the provisions of the Companies Ordinance, 1913. In the case

of *In re* Jackson & Co. (L. R. (1899) 1 Ch. 348) cited by Mr. Browne for the applicants, Kekewich, J., held that the words "accidental or due to inadvertence" were sufficiently wide to include ignorance of the provisions of a statute that had been in operation for thirty years previous to the application before him. Our present Companies ordinance is not yet two years old. It was stated at the bar that no provisions similar to those of Section 95 of the 1913 ordinance were hitherto included in local company statute law. That is not quite accurate. In the Companies Ordinance, 1898, section 63 reproduced the very provisions of the English Act of 1867 which Mr. Justice Kekewich had under his consideration when construing the word "inadvertence" in Jackson & Co. I am, however, satisfied that the omission in this case was due to inadvertence, and am, therefore, enabled to exercise the power of granting the relief which is sought by extending the time for registration.

Applications of this kind are made *ex parte,* they are made under statutory provisions that have in view the interests of creditors and shareholders, who, however, are not before the court. The order, therefore, on the analogy followed in English practice to similar orders under the Bills of Sale Acts for extension of time for registering bills of sale, must be qualified by the inclusion therein of the usual safe-guard of such rights of persons (if any) as may have been acquired prior to the time when the mortgage shall be actually registered. The true construction of the qualifying words has been determined more than once by courts of law in England and it need not be discussed here.

The applicants desire a direction to be included in the order that the registrar do receive a copy of the instrument creating the mortgage instead of the instrument itself, oh the ground that the instrument is a "judicial document," and cannot now be taken from the record of mortgages in the Supreme Court. No authority has been given to me for this latter proposition beyond the impression derived from a practice the origin of which is said to lie behind the mists of ages. There is no provision to that effect in the rules of court governing the creation and completion of mortgages. But, accepting the proposition as correct, the only occasion mentioned in the ordinance when a copy of the instrument creating a mortgage can be received is that when a mortgage or charge is created, and solely comprises property out of the colony. I seem, therefore, to have no power to include in the order the direction mentioned. The registrar of joint stock companies may refuse to do as he is directed in the face of the positive enactment that the person interested in the registration shall deliver to him the instrument itself and not a copy of it. On the other hand it appears certain that the registrar of the

court will certainly refuse to remove the instrument of mortgage from the record of which it now forms a part. In these circumstances, as Mr. Browne intimates that he is ready to take a direction that a copy be received and to accept the risk of the registrar's refusal to conform with it as *ultra vires,* and as it is important that the mortgagee's interests should be protected without further delay, I will give the direction, but only so far as it may enable that protection to be secured.

Referring to the form of application, if rule 143 of the Companies Winding-up Rules, 1905, is to be our guide to the proper method of procedure, this application should have been made by motion. And by motion I mean by filing a proper form of notice of motion and not a mere memorandum of the application. The facts in support of the motion should have been contained in an affidavit or in affidavits. The "grounds of the application" mentioned in rules 3 and 4 of Order XL being, in this case, "that the omission to comply with the provisions of the ordinance relating to registration of the said mortgage was due to inadvertence" and no more. The history of the company's formation and incorporation and the creation of the mortgage, the object of the mortgage and (what is pure argument) the justice and equity of the application, have no place in the notice of motion, or, indeed, in the memorandum filed in this case, for they are not grounds. Generally, applications to the Court, that is to a judge or judges sitting in Court can only be made by motion, unless the application is expressly directed, or by well-founded practice is recognized as one, to be made by petition. Applications to a judge in Chambers are always, can only be, made upon summons. Although there is no express mention of "summons," that is, summons in Chambers, in the rules, Order XL. is, in effect, English practice governing applications to judges either in Court or Chambers, and I can see no reason whatever why the usual and convenient form of summons "Let all parties concerned attend at the chambers of," &c, should not be used. It is for solicitors to determine, on reference to English books on practice what particular form, whether petition, motion, or summons is applicable in each particular case.

ORIGINAL CIVIL JURISDICTION

1ST OCT., 1915

PEREIRA & CO.

v.

RAMDEEHAL.

Contract—Sale of goods by sample—Buyer's right of examining the goods—Reasonable opportunity—Acceptance—Sale of Goods Ordinance, 1913, ss. 34 and 36.

R. purchased three casks of wine from P. and Co., in Georgetown, by sample on June 7th. The wine was duly delivered to R. in New Amsterdam by carrier on June 9th, but R. made no examination of the wine to ascertain if it was in conformity with the contract until June 15th.

Held that R. had not examined the wine within a reasonable time, and must be deemed to have accepted the goods.

Claim for the sum of $111 due by defendant to plaintiff for goods sold and delivered.

The further necessary facts appear from the judgment.

Hon. F. Dias, solicitor, for plaintiffs.

J. A. Luckhoo for the defendant.

J. K. D. HILL, J.: The plaintiff claims from the defendant $111 for three casks of wine sold to him on the 7th June, 1915, on a specially indorsed writ. The defendant obtained leave to defend and in his statement of defence set up sale "by sample" and that the wine supplied was not according to sample.

The plaintiff was instructed to deliver the goods to Sprostons Limited, at Holmes Stelling.

I am satisfied that there was a sale by sample, and that the plaintiff within half an hour of the transaction on the 7th June, delivered the three casks of wine to the carrier named. The wine was sent to New Amsterdam where the defendant carries on his business, and reached there next day; on the following day they were sent to the defendant's business place, and there they remained until the 15th June, when the casks were examined by the defendant and proved to be sour and unfit for consumption. I am of opinion that the wine must have been tampered with—and not by the plaintiff. He had just started business, and was anxious to gain customers, and was hardly likely to tamper with the wine, when he must have known, that examination—immediate, as he had every reason to expect would be the case,—would disclose that fact. Furthermore, he shipped the goods almost immediately after the order.

The tampering therefore could only have been done at Sprostons, Limited stelling, or in transit, or at the defendant's place of business. Under section 34 (1) of the Sale of Goods Ordinance, 1913, the delivery of the wine to Sprostons was a delivery *prima*

facie to the buyer—and under section 36 (1) where goods are delivered to a buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

It is questionable, therefore, whether the "reasonable opportunity" for examination did not arise at Sprostons' stelling, but the authorities are not certain on this point, and I prefer to hold that the opportunity did arise when the wine reached the defendant's store on 9th June, and that waiting until the 15th June to examine was unreasonable in him. His own witness Diego Gomes had to admit that this was so, and the custom different.

Holding this opinion, it is unnecessary to say whether on the pleadings, mitigation could be allowed to the defendant, for, in any course, he would be entitled to no relief, and must fail in any action for damages, he might bring, if so advised.

There will be judgment for the plaintiff with costs.

ORDINARY CIVIL JURISDICTION

16TH OCT., 1915

ARCHER

v.

BRITTON.

Judgment Summons—The Debtors Ordinance, 1884—Insolvency Rules, 1901. Rule 343—Jurisdiction—Supreme Court Ordinance, 1915—Irregularity in form of Summons—Costs.

August 14th, 1915.

Application under the Debtors Ordinance, 1884, in conjunction with Rule 343 of the Insolvency Rules, 1901, by John Archer, the plaintiff, who had obtained a judgment in the Supreme Court on December 29th, 1905, against Henry Aaron Britton, upon which judgment the sum of $125.94 was alleged to be due.

A. G. King, Solicitor, (for *J. A. King*, Crown Solicitor) for the judgment-creditor.

P. N. Browne for the judgment-debtor.

Browne objected that the judgment-summons was only sealed and not signed, and was therefore not in conformity with form No. 160, as required by r. 343 of the Insolvency Rules; further the proceeding was brought in the Limited Jurisdiction of the Supreme Court which was non-existent, whilst it could not be taken in vacation.

A. G. King. The matter was brought in the Limited Jurisdiction in 1905.

HILL, J.: The summons is not properly issued in accordance with r. 343 and form 160. The proceedings should be instituted *de novo.* The question of costs is reserved until the matter is finally dealt with.

Posted (October 2nd, 1915.)

A judgment summons, signed and sealed with the seal of the Supreme Court, having been issued afresh:—

Browne took two objections which appear from the judgment.

HILL, J.: The defendant is before the court on a judgment summons and two preliminary objections have been taken by Mr. Browne on his behalf:

(a) not instituted in right court and that the seal used is that of the Supreme Court. Application should be in the Insolvency Court.

(b) no such action as John Archer by his attorney *v.* H. A. Britton.

I overrule both objections. The application is not in insolvency. The judgment summons is brought under the Debtors Ordinance, 1884, and, formerly, any judge of the Supreme Court sitting apart under his general civil jurisdiction could deal with matters brought under the Debtors Ordinance. And so, under the present Supreme Court Ordinance, 1915, he can do the same. Houston *v.* Applewhaite—20th October, 1894—is a case in point.

With regard to the second point. The plaintiff is out of the colony and the information is given that he, in this application, is appearing by his attorney, Colonel De Rinzy. I can see no objection to this. The attorney is merely the representative of the plaintiff.

The objections are overruled.

Thereafter the matter came on for hearing on October 16th, when an order was made and the question of costs was decided, as follows:—

HILL, J.: When this matter—a judgment summons—came before the court on 14th August, 1915, the judgment debtor, on a technical objection, succeeded in having the summons set aside, and an order was made that proceedings should be taken *de novo.* This was occasioned by an irregularity in the original summons originating in the Registrar's office, and through no fault of the judgment creditor. On 2nd October the matter was again before the court, and certain objections were taken by the judgment debtor which were overruled on 9th October. The further hearing was taken on 16th October, when the only question

before the Court was as to the amount which the judgment debtor ought to be ordered to pay.

In these circumstances, the Court will grant no costs to the judgment debtor for 14th August, but grants costs to the judgment creditor for 2nd and 16th October. These costs the Court fixes at $25 inclusive of all fees and disbursements.

APPELLATE JURISDICTION.

THE 23RD DAY OF OCTOBER, 1915.

SIGOBIND

v.

RAMTOHUL.

Appeal—Magistrate's Court—Change in parties by death after judgment—Writ of Execution—Magistrates' Courts Rules, 1911. r. 44—Trespass—Irregularity in issue of process.

Held, that on the issue of a writ of execution, after change in parties by death, without compliance with the provisions of Rule 44 of the Magistrates' Courts Rules, 1911, which required an order of a magistrate that the writ do issue, the process was merely irregular and not void, and, not having been set aside, afforded a justification in an action for trespass to goods;

Held, further that, until the irregular process had been set aside, the action for trespass could not be maintained.

This was an appeal from a decision of Mr. C. H. E. Legge, Stipendiary Magistrate for the Berbice Judicial District, in which the appellant Sigobind (defendant in the Court below) was sued by the respondent Ramtohul (plaintiff) for the sum of $65 as damages and pecuniary compensation for trespass to goods. The magistrate gave judgment for the plaintiff for the sum of $40 and costs. The appeal was allowed with costs.

S. E. Wills for the appellant.

J. A. Luckhoo for the respondent.

SIR CHARLES MAJOR, C.J.: The defendant, Sigobind, on the 11th March, 1913, obtained judgment against Kaitari. Kaitari died in or about the month of July, 1914. No execution had then been issued on the defendant's judgment.

Before Kaitari's death, he purported to authorize Gursaram, his creditor for the balance of a sum of money paid by Gursaram to one Read for a donkey, cart, and harness, to take the donkey and cart for the debt.

When Kaitari died the debt was still due to Gursaram, who accordingly, with the consent of the heirs of Kaitari, took the

donkey and cart, and on the 21st of September sold them to the plaintiff.

On the 8th November, 1914, after the death of Kaitari and sixteen months after judgment, the defendant issued a writ of execution thereon. No application was made to a magistrate for leave to issue execution.

On the 22nd May last, the bailiff of the Berbice judicial district levied under the writ of the 8th September, 1914, upon the donkey and cart in the plaintiff's possession and the same were sold.

The plaintiff has sued the defendant for damages in respect of the said levy and sale alleging (1) that the issue of execution was unlawful for want of leave of the magistrate pursuant to rule 44 of the Magistrates' Courts Rules, 1911, and (2) that the donkey, cart and harness are his property upon purchase from Gursaram.

The 44th rule of the Magistrates' Courts Rules, 1911, provides that where any change takes place after judgment by death in the parties liable to proceedings to enforce a judgment, the party alleging himself to be entitled to enforce the judgment may, by application made in the judicial district in which the judgment sought to be enforced was given, apply an affidavit to the magistrate for leave to issue the necessary process accordingly, which the magistrate, if satisfied that the applicant is so entitled, may order to issue.

The defendant in this case has justified under his writ of execution, and the maintenance of the plaintiff's action depends upon the nature of the process under which the justification is pleaded. If the issue of execution without an order of a magistrate previously obtained was, as the plaintiff contends, void, the justification fails; if it was an irregularity only, the justification is complete, because the plaintiff has done nothing to have it set aside.

Non-compliance with the provisions of rule 44 of the Magistrates' Courts Rules, 1911, was an irregularity only. The process issued by the defendant was not void. The irregularity not having been cured, nor the process set aside, the plaintiff could not maintain his action.

The judgment of the magistrate for the plaintiff must, therefore, be set aside and judgment entered for the defendant with costs of his defence.

The appeal is allowed and the respondent must pay the appellant his costs of appeal.

ORIGINAL CIVIL JURISDICTION.

4TH NOV., 1915

RUTHERFORD

v.

ISAACS.

Detinue—Sale by agent—Scope of authority—Purchaser's obligation to ascertain nature and extent of authority.

Action in detinue for the delivery of one bay mare and foal and one stallion, the property of plaintiff and detained by defendant or their value, $300.

All the necessary facts appear from the judgment of the Chief Justice.

S. E. Wills for the plaintiff.

J. A. Abbensetts for the defendant.

SIR CHARLES MAJOR, C.J.: The plaintiff, an owner of horses, amongst them a bay mare, placed them in the care of King, his brother-in-law, for pasturage. Some months after, upon information received, he went to Fort Wellington police station and thence to Hopetown village, where, in an enclosure appurtenant to the defendant's shop, he saw the mare with a foal. In company with police constable Haynes, for whom he had returned to Fort Wellington, he went to the defendant's shop and claimed the mare as his property. The defendant said that he was the owner and shewed to the constable a receipt, dated the 16th January, 1915, for $100. payment "for one brown mare, heavy in foal, the same being the property of B. T. Rutherford. Per Abraham King."

The plaintiff, the defendant and the constable then went to the defendant's paddock (whither, on the return of the plaintiff to the police station, the mare and foal had been removed by the defendant) where the plaintiff saw a young stallion, foal of one of his mares. The evidence shews that King sold the stallion to a man called Sirbuksh, giving to him a receipt, dated the 22nd December, 1914, for $40, "for one horse stallion, light brown, no brand, the same being my own property. B. T. Rutherford. Per Abraham King." The plaintiff demanded delivery of the animals from the defendant who refused to make it.

It appears that King, soon after the sale of the mare, absconded with the purchase moneys of the animals, and that early in the morning of the day whereon the plaintiff went to Hopetown to claim them, they were removed from the custody of one Cummins (in whose care King had left them)

and taken to Hopetown where the plaintiff first saw them some hours later.

The stallion has been handed over by Sirbuksh to the defendant for care and pasturage at Fort Wellington where it now is.

The plaintiff has brought his action in detinue, the statement of claim setting forth the plaintiff's possession, his deprivation by the defendant and the defendant's refusal to comply with his demand for delivery. He claims that delivery or $300, the value of the animals, that is to say, $150 for the mare, $30 for the foal and $120 for the stallion. The defendant's statement of defence traverses the claim and alleges simply his ownership of the mare and foal and the ownership of Sirbuksh of the stallion.

In the defendant's evidence, however, (to which no objection was taken by counsel for the plaintiff) he sets up the agency of King for the sales and upon that issue, and that issue only, the determination of the action depends. For, though the defendant pleads the ownership of Sirbuksh in the stallion and has given evidence of his own possession as caretaker of that animal and, though (if the fact had been pleaded) it might be a good answer to a claim in trover, it is no answer to the plaintiff's claim in detinue.

What was the relation of King and the plaintiff? King was a mere caretaker. The defendant contends that he was more than that; that he was clothed with an authority to sell the plaintiff's horses and, acting thereunder, sold the mare to the defendant and the stallion to Sirbuksh. The contention is founded, firstly, upon the allegation that King stated he had that authority and, secondly, upon alleged admissions by the plaintiff made to the defendant and Sirbuksh. The plaintiff has stated that he gave King no authority to sell but instructed him to submit to him (the plaintiff) any offers he might have for the mare. The defendant has given evidence that the plaintiff at Hopetown said to him—"I received a letter from that boy (meaning King) that someone wanted the mare to buy, and I send and authorize him to sell, but he sell too cheap." Regarding these words, that King wrote to the plaintiff with reference to an offer supports the plaintiff's statement of the nature of his instructions.

Sirbuksh, Alexander, a man who was employed by the plaintiff to catch the animals for him, D'Aguiar, who was present at the interview between the plaintiff and defendant, and to some extent, constable Haynes, also spoke to the use by the plaintiff of the words "I send and authorize." There is a very suspicious agreement between all these persons as to the use of the particular words and my disbelief in their having been said in that form is completed when all the persons agree that the statement was volunteered by the plaintiff. Considering that the plaintiff

admittedly went to Hopetown to have his animals caught and taken away, that he made a report at the police station on his way and, on seeing them in the defendant's enclosure, returned to the station for police assistance, I cannot believe that he said that which would obviously give away his whole case and make his journey fruitless and foolishly undertaken.

King, therefore, not being a horse dealer himself, not—as the defendant and Sirbuksh well knew—the owner of the animals nor, by being entrusted with their care, held out by the plaintiff to others as an agent for their sale, not, in fact, authorized to sell them at all without, at any rate, previous reference to his employer, acted clean contrary to his instructions and quite beyond the scope of any authority he might have had.

The plaintiff knew nothing of the sales at the time they were effected; immediately he got to know of them he took steps to repudiate the transaction and recover his property.

It was the bounden duty of the defendant to find out what was the actual nature and scope of King's authority (if any); he made no effort to do so, but took King's word. That he did at his peril and he must now deliver the mare and foal and stallion to the plaintiff. There will be judgment that the plaintiff recover from the defendant the animals mentioned in the statement of claim or their value. That value, after consideration of the evidence on the point, I assess as follows: the mare at twenty-five guineas, the foal at four guineas, the stallion at twelve guineas.

The defendant must pay the plaintiff his costs of action.

COURT OF APPEAL.

12TH NOV., 1915

(CORAM: BERKELEY AND HILL. JJ.)

SMITH BROS. & CO., LTD., Appellants,

v.

THE DEMERARA RAILWAY CO., Respondents.

Appeal—Negligence—Grass fire—Railway passing through coconut plantation—Application to call further evidence—Rules of Court, 1900. Order XLIII. r. 23—Principles on which such evidence should be received—Finding of fact in trial Court—Sufficiency of evidence.

Held that, when once a trial has been concluded, further evidence should not be allowed to be called unless a strong case had been made out for so doing.

Held further that, given evidence of inflammable material on or near a railway track and a fire occurring there soon after the passing of a train, there was evidence of negligence on the part of the railway company to go to the court.

Appeal from a decision of Sir Charles Major, C.J. (see above p. 92) in which the plaintiffs (appellants) brought an action for the recovery of $2,500 for damages alleged to have been caused on their coconut plantation Park in October, 1914, by a fire from defendants' (respondents') railway which ran through the plantation. The Chief Justice dismissed the action with costs.

The appeal was allowed and judgment entered for the plaintiffs (appellants) for the sum of $1,860 and costs in the appeal court and in the court of trial.

Application was made to the Court of Appeal to recall two witnesses and to call fresh evidence but the application, after argument, was refused.

H. H. Laurence for the appellants.

G. J. de Freitas. K.C., and *H. C. Humphrys* for the respondents.

BERKELEY, J.: This appeal is from the decision of the Chief Justice who dismissed a claim made by the plaintiffs for damages caused by a fire which it is alleged occurred on the defendants' railway owing to their negligence, and spread therefrom to the plaintiffs' plantation.

Counsel for the plaintiffs applied under Order XLIII, Rule 23 at the hearing for leave to adduce further evidence, due notice of which application had been served on the defendants. Counsel for defendants raised the question of procedure. The Court held that the application could be entertained, notice having been given to defendants. (Jessel M.R. *In re* Chennell, Jones v. Chennell, 8 Ch. D. at p. 505.)

The further evidence was that of nine witnesses two of whom had been examined at the trial. As to these two it was desired to supplement the evidence of one who had been called by the plaintiffs, and to further cross-examine the other,—a witness for the defence—named Delaney. The other seven witnesses were intended to rebut (if necessary) the evidence of Delaney as to his presence at the fire. The application was refused and the Court undertook to give its reasons in writing in the course of this decision. It is to be noticed that the witness Alexander, called by defendants, said in cross-examination that he did not see Delaney at the fire, although he knew him. This tends to show that Delaney's presence was doubted, and the point probably was not pressed as it would have been if it was foreseen that witnesses could be obtained to testify to the contrary. This is no ground for granting the application. It could be well alleged that the facts to be deposed to were equally untrue and that further evidence should be admitted to prove this. Not only would there by no finality to such a proceeding, but there would be a direct in-

centive to perjury which might tend to prejudice the interests of truth and justice. As to the principle in which fresh evidence should be received, see Jessel, M.R. in Sanders v. Sanders (45 L.T.R. N.S. at p. 638) and Lord Chelmsford in Sheddon v. Patrick and A.G. cited by Lord Chief Justice Vaughan Williams in H.M.S. Hawke (28 T.L.R at p. 320.)

I proceed to deal with the appeal. The case for the plaintiffs is that the cinder or cinders dropped from the defendants' engine on 8th October, 1914, and ignited dry grass or weeds on the line itself, or close thereto, and that the fire thus caused spread into their Plantation "Park" and damaged their coconut trees. The defence set up is that the fire started in the plantation, and worked its way toward the railway line up to the trench, which is on the inner side of the fence, between which, and the six feet kept clear of grass and weeds there is the provision ground of Bourne which was undamaged.

In the course of his decision the learned Chief Justice says that the plaintiff's have not shown conclusively that the fire was caused in the circumstances for which they contend; that they have failed to show that it was caused by the escape of cinders or sparks from the locomotive or that it was started within the railway fence; that there was no eye-witness of its origin and the statement of witnesses on either side are in direct contradiction as to the ignition of heaps of weeded grass along the line and close to the rails: that he is unable to bring himself to disbelieve and discard altogether the testimony of those witnesses who deposed to the absence of weeds and banks of grass; that he declines to adopt the view that it is highly probable that the fire occurred as suggested by plaintiff's; that such a probability ought to amount to practical certainty; that it is quite as probable a grass-cutter was careless in the use of fire on the plaintiffs' land; that he declines to act on either probability contenting himself with the opinion that plaintiffs have failed to prove their claim. I have referred at some length to the decision as it seems to me that the Chief Justice has refrained from finding as a fact that the fire began in the plantation, holding that the plaintiffs had failed to prove their case and not that their witnesses were less reliable than those of the defendants.

The law as laid down in Smith v. London & South Western Railway Company (5 C.P. 98 and 6 C.P. 14) is that it being a matter of common knowledge that engines do emit sparks (or cinders), if the presence of dry trimmings having been seen burning on the line just after an engine had passed is proved, it is evidence of negligence for the jury, and if they so find the Company are responsible for any injury resulting therefrom. In that case as in the present case, there was no evidence that the engine had

emitted any sparks (or cinders) nor was there any evidence beyond the presence of dry trimmings that the fire had originated from the engine, and the jury found in favour of the plaintiff. In fact the law is that, given inflammable matter on or near the line and a fire occurring there soon after the passing of a train, there is evidence of negligence on the part of the railway Company.

After a lengthy review of the evidence, His Honour proceeded:—

It has been urged that this Court would not disturb the finding of the Chief Justice on a matter of conflicting evidence. No doubt great weight is due to his decision, the demeanour and manner of the witnesses having been seen and heard by him, but the plaintiffs are entitled on the facts and on the law to demand the decision of this Court, and the Court cannot excuse itself from weighing conflicting evidence and drawing its own conclusions, bearing in mind that it has not seen or heard the witnesses and making due allowance in this respect. (See Baggallay, J.A., who delivered the judgment of the Court which consisted of (himself, Lord Justice James and Mr. Justice Lush in the Glannibanta 1 P.D. at p. 287.)

If the decision of the Chief Justice is to be regarded as a definite finding that he did not believe the witnesses for the plaintiffs, then after most carefully scrutinizing and weighing the evidence on both sides I am in no doubt as to this fire having been caused by cinders dropping on to the line from the defendants' engine, and igniting dry grass which had been negligently left by their servants, the platelayers, on or near to the line, and this being so the plaintiffs are entitled to damages for the injuries they have sustained.

As to the amount of damages to be awarded, on consideration of the evidence adduced, I estimate the same at $1,860. The appeal must be allowed and judgment entered for the appellants for $1,860 with costs here and in the court below. Costs (if any) of the application to admit further evidence must be paid by appellants.

HILL, J.: This is an appeal from the decision of the Chief Justice, in which he gave judgment for the defendants in an action for negligence, the plaintiffs' plantation having been damaged by fire, it is alleged, arising on the railway, and through the dropping of cinders and sparks from the defendants' engine.

Before the appeal came on for hearing an application was made by plaintiffs, and notice served on the other side, for permission to re-call a witness for the defendants for further cross-examina-

tion, and to call other witnesses to give evidence for the plaintiffs to show that the said witness had, in effect, committed perjury.

The question of the correctness of the procedure arose at the hearing of the appeal, and the Court held, following the English practice, that if witnesses have to be subpoenaed, it is right to apply by motion previous to the hearing of the appeal. Only when affidavits and documentary evidence are to be used simple notice to the defendants that leave to produce further evidence would be applied for at the hearing of the appeal, is necessary. (Dicks v. Brooks L.R. 13 Ch. D. 652.)

The application itself was refused. In the first place it was sought to recall a witness for the defendant to be further cross-examined to show he had committed perjury, and to call other witnesses for that purpose. One of these witnesses, De Weever, had already given evidence at the trial of the action, on 28th June, while the defendants' witness, Delaney, had given evidence on 30th June, the hearing not being concluded until 2nd July. It was further suggested that the evidence sought to be given would affect the value of the evidence already given by most of the defendants' witnesses. It was contended that our rule of Court (Order XLIII, Rule 23) gave us a wider discretion that the corresponding English Rule (Order LVIII, Rule 4) which speaks of "special grounds"; but I am of opinion this is merely a difference without a distinction, and I can see no reason why a wider definition should be applied. I have no doubt that the granting of this application would result in innumerable similar applications and have the effect of seriously impairing the finality of judgments to a very large extent, a result to be deprecated. As said by Jessel, M.R., in Dicks v. Brooks (*ubi supra*): "The Court is very careful not to encourage perjury by permitting fresh "evidence to be adduced after the trial of the action." Further, it seems doubtful whether the evidence sought to be adduced, could be considered fresh evidence, in the sense that it contained fresh matter obtained, and only obtainable, since the hearing, and was material to the plaintiffs' case. It was purely evidence to show a witness had committed perjury, and in the belief that that would affect other evidence. I cannot do better than refer to the remarks of Vaughan Williams, L.J. in The Hawke's case 28 T.L.R. p. 319. "There are certain rules governing the trial of actions, rules which led "to the conclusion that when once the trial took place, further evidence, "*prima facie,* should not be allowed to be called unless a strong case had "been made out for so doing," and, quoting Lord Chelmsford in Shedden v. Patrick and Attorney General, "It is an invariable rule in all the Courts, and "one founded upon the clearest principles of reason and justice that if evi- "dence which either was in the possession

"of parties at the time of a trial, or by proper diligence might have been "obtained, is either not produced, or has not been procured, and the case is "decided adversely to the side to which the evidence was available, no op- "portunity for producing that evidence ought to be given by the granting a "new trial."

The reason of appeal, therefore, is that it was proved at the trial beyond reasonable doubt that the fire was caused by cinders and sparks from the defendants' engine igniting grass and weeds cut by the defendants and by them negligently allowed to remain near to the railway line and that the plaintiffs thereby suffered damage to the amount of $2,419.

There is no law involved, and the sole question is whether on the facts before the judge in the Court below, he should have found that, beyond reasonable doubt, the cause of the fire was as suggested by the plaintiffs—in point of fact that the evidence—sufficiently circumstantial,—showed an overwhelming probability, without its being ocularly demonstrable, that the fire occurred through the negligence of the defendants.

The consideration of this appeal has required a careful analysis of the evidence before the Court below. The judgment of the learned Chief Justice was in reality one of "not proven," —he does not say in so many words that he disbelieves the evidence of the witnesses for the plaintiff, but when comparing such evidence with that brought by the other side, he finds himself unable to "disbelieve and discard altogether" the defendants' evidence.

After a detailed analysis of the evidence His Honour proceeded:

After, therefore, taking into consideration the probabilities to be deduced from the evidence, giving due weight to the question of interest, bearing in mind the direction of the wind on the day of the fire, the strong probability of some weeded grass remaining on the track or near the track, the improbability of any extensive cultivation between the track and the fence as suggested, strengthened as the view I take is, by the course adopted in the conduct of the case by the defendants in connection with this portion of the evidence, the admitted prevalence of cinder dropping from the ash-pan, and frequent small fires, and the certainty, I have formed, on the evidence, that the fire commenced very shortly after the train passed, and the fact that the causes suggested are not of equal probability, I am constrained to conclude that the cause was as alleged by the plaintiffs and that they are entitled to succeed.

As to damages, I am of opinion that $1,860 is a fair amount to be awarded.

The judgment of the learned Chief Justice is reversed, and

judgment entered for the plaintiffs for $1,860 and costs in this court, and in the court below, but the plaintiffs must pay the costs, if any, of their unsuccessful application in regard to the admission of fresh evidence.

ORDINARY CIVIL JURISDICTION.

20TH NOV. 1915.

In re PATOIR,

SIR WALTER EGERTON AND OTHERS

v.

HICKEN.

[1915. No. 250.]

Will—Construction—Bequest for support and maintenance of "coloured widows and spinsters"—Administration Ordinance, 1887, ss. 3, 5—Question arising in the administration of property—Jurisdiction.

Isaac Edward Adrian Patoir, by his will dated the 16th May, 1915, directed the payment by his executor of $60,000 to the Governor and Attorney General of the colony to form a fund to be held on trust for investment and expenditure of the income to be derived therefrom in the support and maintenance of destitute "coloured widows and spinsters" upon conditions of good repute, age, and residence mentioned in the will. The testator appointed, "as the first administrator of the said fund," the Attorney General and Public Trustee of the colony, and a leading merchant therein to be appointed from time to time by the Governor. The testator died on the 30th May, 1915, and the executor paid to Sir Walter Egerton and Joseph John Nunan, the Governor and Attorney General of the colony respectively, the sum of $55,800, the amount of the bequest after deducting therefrom the sum of $1,200 claimed by the executor to be payable in respect of legacy duty.

Held, that according to the true construction of the will, the term "coloured widows and spinsters" meant those who were the offspring (a) of parents one of whom was black and the other white, or (b) of parents one of whom is black and the other coloured, or (c) of parents one of whom was a coloured person and the other a white person, or (d) of parents both of whom were coloured persons, the "colour" in each case being traceable, either remotely or proximately to origin or descent from the African negro.

Held also, that the question whether the trustees should take proceedings against the executor to recover the $4,200 deducted for legacy duty, could not be considered by the Court: it was not a question arising in the administration of the property.

This was a petition presented, under the provisions of the Administration Ordinance, 1887, by Sir Walter Egerton. John Joseph Nunan and William Alstein Parker in their respective capacities of Governor, Attorney General and Public Trustee, of the colony, and arising out of the trusts of the will of Isaac Edward Adrian Patoir, given in the head note, for the advice and direction of the Court (1) whether the petitioners should sue the executor for the sum of $4,200 and (2) what class of persons came within the term "coloured" used in the will.

Nunan, K.C., A.G., for the petitioners.

The executor, who has been cited, is not represented by counsel,

but appears to submit to any declaration or order the Court may think fit to make. The petitioners have thought it advisable to obtain the Court's opinion as to the meaning of the description "coloured widows and spinsters," because, though themselves having but little doubt that the testator meant persons of mixed descent, not including black persons or the Asiatic, in some places like the United States of America and Canada, and, probably, in other places, a wider meaning is given to the term "coloured." The testator resided here all his life and we contend for the local and restricted meaning.

[The Chief Justice: The restricted meaning seems to be that to be applied. On your statement in the terms of which the executor joins, I should, at all events, feel disinclined to attach the wider meaning without being satisfied beyond doubt that the testator so intended.]

I propose to call two witnesses to speak to the meaning popularly given in this Colony to the expression "coloured person." The second point of difficulty is whether we should take proceedings against the executor to recover the sum of $4,200.

[He cited *In re Barnard,* locally decided upon a similar application to the Court on the 20th April, 1903.]

The Chief Justice: I cannot consider a question of the kind at all. The advice to be given by a judge to applicants under the Administration Ordinance, 1887, which, with certain extensions for local purposes to such persons as guardians and curators, reproduces the provisions of the thirtieth section of Lord St. Leonard's Act, cannot include advice whether applicants shall institute proceedings. The question is not one arising in the administration of the property. And there are many authorities to show that the object of the Ordinance is to assist trustees in the execution of trusts in little matters of discretion vested in them, of which many examples are to be found in the books.

It is probable that, under the provisions of the fifth section of the Ordinance. I could have dealt with the point had the question been so framed as to involve determination of the validity of a debt of $4,200 from the executor to His Majesty's Colonial Treasury for legacy duty, or from the executor (if he had paid that duty) to the trustees of the fund, and if the argument proceeded entirely upon a question of law. But the question is not so framed. I will, if you so desire, allow the petition to be amended that the question may be submitted in that form.

Counsel said he would call his witnesses and asked for, and obtained, a short adjournment to enable the amendment to be made.

The executor, Edgar Evans Hicken, and William DeWeever

Wishart, a medical practitioner, both of long residence in the colony, then gave evidence in support of the trustees' view of the meaning of the word "coloured."

The Chief Justice: The meaning I attach to the expression "coloured person" is this: a coloured person is the offspring of parents one of whom is black and the other white, or of parents one of whom is black and the other coloured, or of parents one of whom is a coloured person and the other white, or of parents both of whom are coloured, the "colour," in each case, being traceable, either proximately or remotely, to origin or descent from the African negro; and there will be a declaration in that sense, according to the true construction of the will.

Later in the day the Attorney General mentioned the matter again and informed the Court that the applicants desired to withdraw the question of proceedings to recover the sum of $4,200, as the executor and himself had arrived at a solution of the difficulty.

The Chief Justice: Very well; the order will be confined to a declaration of the meaning of the words "coloured widows and spinsters" in the sense already indicated.

There was no application for costs.

ORDINARY CIVIL JURISDICTION.

20TH NOV., 1915

CHAPMAN
v.
McINROY.

Will—Usufruct—Security—Possession of Estate.

Testator bequeathed to his wife, the plaintiff, the usufruct of his estate, and appointed his niece, wife of defendant as heir of such estate under certain provisions set out in the will subject to the usufruct. Both plaintiff and defendant were jointly appointed executors by the will, defendant retaining possession of the estate after payment of debts and liabilities.

In an action by plaintiff for an account of the dealings of defendant with the estate and for a declaration that plaintiff was entitled to possession of the property:—

Held that plaintiff was entitled as usufructuary to the possession, control, and administration of the property of the estate.

All further necessary facts appear from the judgment.

F. Dargan for the plaintiff.

H. H. Laurence for the defendant.

M. J. BERKELEY, J.: On the suggestion of the Court counsel agree that on the pleadings there are two questions of fact for decision (1) whether Auguste Fernandes is the plaintiff's duly constituted attorney and (2) whether defendant has refused to render accounts.

The power of attorney laid over enables this action to be brought and although certain statements of receipts and payments have been furnished by defendant to plaintiff they cannot be regarded as proper accounts. The defendant in the witness box expressed his willingness, however, to render accounts and to hand over possession of the estate provided sufficient security is given to protect those who inherit at the death of the plaintiff.

The testator by his will bequeathed to his wife, the plaintiff, the usufruct of his estate and after her death the rest and residue of his said estate remaining after her death to his adopted daughter, his niece Alice Elizabeth McInroy (the wife of defendant) and in the event of her death during the lifetime of his said wife, he bequeathed the rest and residue of the estate as therein set out. He further provides that "should my said wife after realization of the balance of my said estate . . . . . find that the fruits thereof are insufficient to support and maintain her then she shall be at liberty to draw upon and take from the said balance or capital of my said estate from time to time sufficient to make up, or sufficient for her support as aforesaid, and thereby to reduce the said rest and residue of my said estate to a finish or finality prior to or at her death." The testator appointed plaintiff and defendant jointly executors.

As executor, when the estate had been fully liquidated and the debts and legacies paid, it was the duty of the defendant to hand over the residue of the estate to the plaintiff who had the right to the full enjoyment of her usufruct. It is shown that the debts and liabilities were paid off with six months of the testator's death in 1912. It would seem that the defendant as executor was influenced by the fact that his wife might benefit at the plaintiff's death. This had nothing to do with his office of executor. The plaintiff is entitled to an order of the Court in the terms of the declaration set out in her statement of claim and defendant individually must pay the costs of this action. This order is made without prejudice to any claim,—that those entitled to benefit at plaintiff's death may have,—for security (if so advised).

COURT OF APPEAL.

27TH NOV., 1915.

(BERKELEY AND HILL, JJ.)

RAMKELAWAN

v.

BARROW.

Appeal—Summary Conviction Offences Ordinance 1893, s. 96—Unlawful possession—Explanation to the satisfaction of the Court.

This was an appeal from a decision of Sir Charles Major, C.J. (see above p. 66) who confirmed a conviction, by the Stipendiary Magistrate of the Georgetown Judicial District, of the appellant Ramkelawan who was found guilty of the unlawful possession of certain boards of wood reasonably suspected of having been stolen.

The appeal was allowed and the conviction quashed.

All the necessary facts appear in the report of the decision appealed from (see above p. 67).

J. A. Luckhoo for the appellant.

No appearance on behalf of respondent Barrow.

BERKELEY, J.: This appeal is from the decision of the Chief Justice confirming the decision of the Stipendary Magistrate of the Georgetown Judicial District (Mr. Manby) who convicted the appellant of having in his possession four pieces of deal board, reasonably suspected of having been stolen. There is no appearance on behalf of Police Constable Barrow, the respondent. [His Honour here refers to the evidence and proceeds;]

The reasons for appeal are that the decision is erroneous because the evidence established (1) that appellant's possession was not unlawful within the meaning of the ordinance, (2) that appellant gave a reasonable explanation in law of his possession, (3) that appellant's possession by law is deemed to be that of the father, (4) that the magistrate by law was bound to cause the appellant's father to be brought before the court touching his possession and that appellant could not be convicted unless he had done so.

These reasons of appeal are based on the provisions of section 96 of Ordinance No. 17 of 1893, which is as follows:

> (1.) 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.

(2.) Where any person is charged before the court with having in his possession or conveying in any manner anything which has been stolen or unlawfully obtained, or which is reasonably suspected of having been stolen or unlawfully obtained, and declares that he received the same for some other person, or that he was employed as a carrier, agent, or servant, or to convey the same for some other person, the court is hereby authorised and required, if practicable, to cause every such other person, and also if necessary, every former or pretended purchaser, or other person through whose possession such thing as aforesaid has passed, to be brought before it, and to examine witnesses upon oath touching the same, and if it appears to the court that any person has had possession of such thing and had reasonable cause to believe the same to have been stolen or unlawfully obtained, every such person shall be deemed to have had possession of such thing at the time and place when and where the same was found or seized, and shall, on being convicted, be liable to a penalty of one hundred and fifty dollars or to imprisonment for six months.

(3.) The possession of a carrier, agent or servant shall be deemed to be the possession of the person who employed such carrier, agent, or servant to convey or deal with such a thing, and such person shall be liable to the punishment herein mentioned.

Sub-section (1) under which the appellant is charged does not contemplate that a defendant on arrest is to be questioned with a view of ascertaining whether his possession is lawful, but when this is done and the answer is admitted by the prosecution to have been found correct, it is not open to the court to ignore such an explanation.

The appellant in answer to the police constable said that his father had given him the boards; he was taken to his father who confirmed this statement. The object of section 96 which corresponds with certain sections of 2 and 3 Vict. Ch. 71 is specially directed to the charging of offenders—in large and populous cities—who are found in possession of property which is suspected to be stolen but the owner of which is unknown. Now on a charge of receiving stolen property it is necessary to prove a larceny, and when this is proved, if the accused gives an explanation which may be reasonably true,—although a jury are not convinced of its truth—they should acquit because the prosecution has not discharged the onus which lies on it of satisfying

them beyond reasonable doubt as to the prisoner's guilt (Rex vs. Schama, Rex vs. Abramovitch, 112 L.T. 480). In unlawful possession the law casts on the accused the onus of satisfying the court how he came into possession of the property, but subsection 2 specially provides that where a prisoner declares that he was employed as a carrier or to convey the property for some other person, the court is not only authorised but required, if practicable, to cause such persons to be brought before it to be dealt with as therein set out.

The magistrate might be justified in not carrying into effect the powers conferred and required to be exercised by him in certain cases and under certain circumstances, *e.g.*, where the prisoner had given contradictory accounts, or where the account given was unreasonable and improbable. In the present case no such question arises and it is shown to have been practicable to obtain appellant's father.

It would seem that the facts which weighed with the magistrate and the learned judge were that appellant had said his father was breaking a house, that the police constable had said that the boards were new, and that Kingsland denied the father's statement that he had given him (the father) the boards. I am not prepared to say that new boards cannot form part of an old house, but the evidence on this point,—if of any value—and also the evidence of Kingsland, is not evidence against appellant but against the father who admits that he gave him these boards—whether new or old—which he was found carrying. The possession therefore of the appellant was that of his father (subsection 3).

The magistrate failed to carry out the provisions of the law, and I am of opinion that the decision appealed from must be allowed. The decision is reversed and the conviction is quashed with costs here and in the courts below.

HILL, J.: This is an appeal to the Full Court from a conviction by Mr. Manby, then Stipendiary Magistrate for Georgetown, which conviction was affirmed, on appeal, by the Chief Justice.

The conviction was, for what is called "unlawful possession" of some boards reasonably suspected of having been unlawfully obtained, under section 96 of Ordinance 17 of 1893.

The law as to "unlawful possession," as at the time of the offence, is set out in Ordinance 17, 1893, s. 96.

The practice, adopted by the police, no doubt with the intention of expediting matters, of questioning a suspected person, is irregular and unwarranted,—a person, who is reasonably suspected, *prima facie*, has to make his explanation to the court. I can understand that, as a result of the police interrogation, it may

often happen that the suspicion is removed, and the court hears nothing of the case at all.

Nevertheless, the questioning, as I say, is irregular and unwarranted. If the explanation of his possession, is unsatisfactory to the police, the individual is charged, and the court has before it, the evidence, gathered as the result of such improper questioning, on which it may convict. A voluntary statement, of course, by a suspect is quite another matter.

In the case under review, Barrow suspecting the defendant and stopping him finds the boards he is carrying are new. Defendant says his father gave them to him. The father corroborates, volunteering, apparently, the information that Kingsland had given them to him. Kingsland, questioned by the police, denies this.

Assuming that the father had merely confirmed his son's statement, there remained the one feature that the boards were new. Now I cannot, *per se*, after careful examination see anything that warrants the conclusion, or the reasonable suspicion, that the boards were unlawfully obtained so far as regards the son. All he said was that his father was breaking a house, and had given him the boards. The possession of the boards does not necessarily mean that the boards were part of the broken house, nor does he say so. In fact the father's statement that the boards were given to him by Kingsland points to the conclusion that the boards were not part of the material of the house.

The father, however, stated that Kingsland gave him the boards. Kingsland denied this. What has that got to do with the son?

Both factors,—the newness of the boards, and the denial of the father's statement, seem to have influenced the lower and upper court in convicting and upholding the conviction.

The magistrate says "Police constable finds defendant with new boards "on his head, and is suspicious they were unlawfully obtained. This suspi- "cion is reasonable, and becomes greater after defendant's father had said "he got them from Mr. Kingsland and Mr. Kingsland denied it," and the learned Chief Justice, in par. 3 of his decision, says, "In the circumstances "of the case, and seeing that while the appellant's statement that he got the "boards from his father was true, the statement that they were from a house "which his father was breaking was untrue."

With this latter deduction, as I have said, I do not agree.

The most difficult feature in this case rests on the consideration of the procedure followed. It is clear from the Ordinance, sec. 96 (2), that only when the person charged *in court* makes an explanation affecting another person, the magistrate is required

to cause that person to be brought before him. No explanation was given *in court* by the accused, and both the magistrate and the Chief Justice refer to this in their decisions. The magistrate says "Defendant's explanation is not "given in court, counsel for defendant contenting himself with submitting "no case had been made out." And the Chief Justice says "The son's ac- "count of the boards, above stated (Barrow's evidence) was the only ac- "count he gave, it was to the police constable who stopped him, and he "gave no further account to the court."

Nevertheless, the court adopted and considered the evidence of Barrow, and this being so, had the evidence that the accused had made a statement to the police constable, which, if true, converted his possession into that of his father. The son said "My father gave me the boards," the father said "I gave my son the boards." The fact that they were new, and the account of how he obtained them, were matters affecting the father and not the son therefore.

Is the omission of the learned counsel for the defence to put the accused into the witness box to say, or to allow him to state "My father gave me the boards," (which would have required the magistrate to cause the father to be brought before him) to be allowed to militate against the accused?

I cannot think so, seeing that the magistrate had used the evidence of Barrow with its admissions of the truth of defendant's statement, and I think he should have required the attendance of the father. The possession of *new* boards was not such as to render appellant's account unreasonable, or its truth improbable, and his account was confirmed by the father. In my opinion the possession of the defendant was that of the father, and the conviction must be quashed, and the appeal allowed, with costs here, and in the lower courts.

COURT OF APPEAL.

27TH NOV., 1915

(SIR CHARLES MAJOR, C.J., AND BERKELEY, J.)

GOMES

v.

DINZEY.

Appeal—Trial by judge without jury—Findings of fact—Rules to be observed by Court on appeal therefrom—Raising new point on appeal—Laesio enormis—Pleading—Practice.

The rules governing applications to an appeal from the judgment of a trial judge after findings of fact, laid down in *Colonial Securities Trust Co., v. Massey*,

1 Q. B. D. 35, *Coghlan v. Cumberland,* (1898) 1 Ch. 704, and *Khoo Sit Hoh v. Lim Thean Tong,* (1912) A C. 325, will be observed by the Colonial Court of Appeal.

The appellant desired to argue before the appeal court the applicability of the doctrine of *laesio enormis* on the evidence given at the trial. The point had not been raised in the court below. This defence had not been specially pleaded and no facts had been stated in the statement of defence material to that issue.

Held, by the C.J. for the reasons given in *The Tasmania,* 15 A.C. 225, that the point could not be raised in the appeal court.

Semble, that under the provisions of Rules of Court, 1900, O. XVII. rule 5, the point could not have been raised in the court of first instance for want of plea of tacts material to its support.

Held, by Berkeley, J., that a defence of *laesio enormis* must be specially pleaded.

Appeal from a decision of Hill, J. (see above p. 74) who gave judgment for the plaintiff Gomes on a claim for the sum of $750 for services rendered to Dinzey, defendant (now appellant). The appeal was dismissed with costs.

H. H. Laurence for the appellant.

W. E. Lewis for the respondent.

SIR CHARLES MAJOR, C.J.: This appeal comes before us from the court below for consideration of the evidence at the trial and whether the learned judge rightly found for the plaintiff thereon.

2.In this Colony actions are tried by a judge without a jury, and the rules governing applications to the court after trials of that kind are well known. To give but one enunciation of principle, Lopes, L.J., in *Savage v. Adam* (W. N. (1895) 109) said: "Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, then, inasmuch as the appeal is in a nature of a rehearing, the decision should be reversed; if the case is left in doubt, it is clearly the duty of the Court of Appeal not to disturb the decision of the court below." And that principle was expressly affirmed and adopted by the Court of Appeal in *Colonial Securities Trust Co., v. Massey,* (1 Q.B.D. 35.) A valuable statement of the same principle in a more extended form is to be found in the judgment of Lindley, M.R., in the familiar case of *Coghlan v. Cumberland,* ((1898) 1 Ch. 704.)

3. Approaching, therefore, the appellant's case on the presumption, in the first place, that the learned judge's decision on the facts was right, has the appellant displaced that presumption? I do not enter into a detailed discussion of the testimony of the various witnesses, because precisely the same grounds for reversing the judgment thereon are advanced to us as were urged to him for the defence he has rejected. One additional ground has been taken which will be shortly dealt with later.

4. It suffices to say that, after perusal and careful considera-

tion of that testimony and with every attention to the renewed arguments of counsel for the appellant, I entirely agree with the findings of the learned trial judge. I cannot see that he failed to take account of any particular circumstances or probabilities material to the estimate of the evidence, or in so taking account, arrived at an erroneous estimate; I am unable to find that the testimony to which he has given credence is substantially inconsistent with itself or with facts in the case which are indisputable. Unless I can do so, this court ought not, as laid down in *Khoo Sit Hoh v. Lim Thean Tong* (1912 A.C. 325), to disturb the findings of the judge based on verbal testimony.

5. The appellant has not displaced the presumption that the decision of the court below on the facts is right. He has laid nothing to impair the influence necessarily and properly exercised on our minds by the opinion of the judge of trial.

6. It is unnecessary to consider the argument addressed to us on the question of *laesio enormis*, I am very doubtful whether the doctrine applies at all to the facts of the case; at any rate I am of opinion that the evidence does not clearly establish that the value of the plaintiff's services was less than half of the amount of the stipulated remuneration. Moreover, the contention has first been raised here; it was not argued before the trial judge. I do not think that it could have been raised there, because no facts whatever were pleaded by the defendant material and necessary to be proved to support the doctrine of *laesio enormis*, no facts wherefrom the plaintiff was apprised or could anticipate that that doctrine would be involved. The contention seems to me clearly incapable of being considered here, because I am not satisfied beyond doubt, first, that we have before us all such facts bearing upon the new contention as would have been the case if the controversy had arisen at the trial, and next, that no satisfactory evidence could have been offered by the plaintiff of the value of his services in the particular transaction, if an opportunity for so doing had been offered him when in the witness-box or during the conduct of his case. Non constat that the plaintiff might not have called witness to prove that his services were of particular value in the case of the kind litigated. "The conduct of a cause at the trial," said Lord Herschell in *The Tasmania*, (15 A.C. 225), when, in the House of Lords, expounding the principles just given, "is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them."

7. I think the appeal should be dismissed with costs.

BERKELEY, J.: I concur with the Chief Justice that this appeal

must be dismissed. Eight hundred dollars at first sight may seem a large sum to pay for the services of a clerical assistant, but it must be borne in mind that such services were required in more than one action and that in one of these the amount involved was twenty-four thousand dollars. Apart from this the witness Small speaks to his seeing his solicitor (the present appellant) and suggesting to him that a second solicitor should assist him, appellant having complained that he had a great deal of work to do, that the appellant told him that two solicitors could not work together, and added "here is Gomes" (the present respondent)—that appellant further said that Gomes knew more of the Gold Mining Regulations than most barristers in the colony and was a very good man for the work. That at that time he (Small) had already given appellant promissory notes for six hundred pounds, that appellant asked for another note to make it up to one thousand pounds ($4,800) whereupon he (Small) asked him if he could not make it four thousand dollars, to which appellant replied "No. $4,000 for myself and the two barristers and $800 for Gomes." Small also says that he was present when appellant and Gomes made the agreement for eight hundred dollars. The only witness for the appellant besides himself tends to confirm the witnesses for the respondent. He says that when appellant paid respondent something after Small's case was finished (this something is shown to have been fifty dollars) the respondent came out of appellant's inner room where he had been talking with appellant "murmuring" and that he left the appellant on the same day and cleared out his things.

On this evidence I fail to see how the court could have come to any other conclusion than it did.

Counsel for appellant by his reasons of appeal raises *laesio enormis*. There is nothing in the evidence which would warrant this court in finding that the sum agreed on was more than twice as much as the respondent's services were fairly worth. Apart from this I am of opinion that such a defence (1) should be raised on the pleadings, (2) that it cannot apply to a contract of this description (Van der Keessel paragraphs 896 and 898) and (3) if it could be held to so apply and that $800 was more than twice the value of the services rendered, appellant cannot complain of loss or wrong since he acted with his eyes open and was not deceived but rather deceived himself and no wrong is done to a willing and consenting party, nor is that considered to be a loss which a person suffers by his own fault (Voet in the Pandects. Wilson's translation p. 94). Appeal dismissed and decision affirmed with costs here and in the Court below.

COURT OF APPEAL.

27TH NOV., 1915

SIR CHARLES MAJOR, C.J., AND BERKELEY, J.)

BALDEO

v.

POLLARD.

Appeal—Criminal law—Unlawful possession—Accomplice—Plea of not guilty, subsequent conduct amounting to plea of guilty—Admissibility of evidence given merely in mitigation of penalty—Statement by one defendant to police in presence of other co-defendants implicating the latter—Admissibility.

Appeal from the judgment of Hill, J., who reversed a decision of Mr. W. J. Gilchrist, Stipendiary Magistrate for the Georgetown Judicial District convicting the appellant (now respondent) Baldeo of the unlawful possession of two tarpaulins and two sugar bags. The judgment of Hill, J., was affirmed.

The facts are fully set out in the judgment of Hill, J., (see p. 136 above.)

C. Rees Davies, Solicitor General, for the appellant Pollard.

J. A. Luckhoo for the respondent Baldeo.

SIR CHARLES MAJOR, C.J.: Having had the advantage of reading the judgment of my learned colleague upon this appeal which will be presently delivered, it is upon his survey of the record of proceedings before the magistrate who heard the original complaint and upon the authorities he has examined and discussed that these remarks proceed.

2. I content myself by saying that the questions submitted to us are resolved into—

(*a*) was the statement on oath of Hannay made before the magistrate at the hearing of the complaint admissible?

(*b*) was the evidence of Inspector Craig admissible either in whole or in part? and, according to the answers given to these two questions;

(*c*) was any part of Inspector Craig's evidence corroborative of Hannay's evidence identifying Baldeo?

3. The answer to the first question is in the negative. On the record it is clear that the conduct of Hannay's case, after the close of the case for the prosecution amounted to a plea of guilt, and that the magistrate thereupon permitted him to give evidence in mitigation of penalty. The permission was wrongly given and Hannay's statement on oath was, therefore, inadmissible for any purpose.

4. The form of answer to the second question as framed in the notice of appeal depends upon whether the admissibility of Inspector Craig's evidence is asserted as against Hannay's and Charles and

Baldeo, or against Hannay and Charles only, or against Baldeo only. The whole of the evidence given by the inspector was admissible against Hannay's and Charles. That portion of it relating to the statements made to the inspector by Hannay and Charles in the absence of Baldeo, namely, from "on Friday last (1) told me" to "No (2) defendant present and corroborated (1)" was not evidence against Baldeo. The three defendants being jointly tried, this first portion of the inspector's evidence could not be shut out, but it could not be considered by the magistrate in determining Baldeo's guilt. The second portion of the inspector's evidence, namely, from "I then sent for (3)" to its conclusion, was admissible evidence against Baldeo, because it was evidence of facts relating to the demeanour of Baldeo when Hannay and Charles stated that he had handed to them the tarpaulins from which the magistrate might infer his admission of the transfer, a material fact to be proved in establishing Baldeo's guilt. And, for the same reason, it could, in law, have been admissible evidence against Baldeo even if the latter had denied the transfer.

5. It follows from the above that the answer to the third question is also in the negative. Even if Hannay's evidence had been admissible, it was that of an accomplice and any part of it identifying Baldeo needed corroboration. But Inspector Craig's evidence was not corroborative of Hannay's identification of Baldeo.

6. The judgment of Mr. Justice Hill is affirmed and the appeal dismissed with costs.

7. I agree with the view taken by the learned senior puisne judge of the procedure to be followed in connection with charges laid under the provisions of the ninety-sixth section of the Summary Conviction Offences Ordinance, 1893.

M. J. BERKELEY, J.: This appeal is from the decision of Hill, J., who allowed an appeal by the respondent (the original defendant) from the decision of the stipendiary magistrate of the Georgetown Judicial District (Mr. Gilchrist) before whom the present appellant charged William Hannay, Emanuel Charles, and the present respondent for having in their possession two tarpaulins and two sugar bags on the 22nd of July, 1915, reasonably suspected of having been unlawfully obtained.

The charge is brought under Ordinance No. 17 of 1893, section 96 which section is now to be found in the amending Ordinance No. 12 of 1915 the date of which is the 12th March, 1915.

The reasons of appeal are:—

(*a*) The statement on oath of Hannay made as a witness before the learned magistrate was legally admissible as

evidence and should have been received by the learned judge as such.

(*b*) The evidence of District Inspector Craig given before the learned magistrate was legally admissible and should have been received by the learned judge as such.

(*c*) The charge before the learned magistrate was under section 96 of Ordinance 17 of 1893 as amended by section 2 of Ordinance 12 of 1915 which the learned judge failed to take into consideration with reference to the admissibility of the evidence of District Inspector Craig and other witnesses.

(*d*)Even if the whole of the evidence of District Inspector Craig is not legally admissible, that portion relating to the identity of the respondent and his demeanour when identified by Hannay and Charles is legally admissible and is a corroboration in law and fact of Hannay's evidence.

(*e*)The statement on oath of Hannay referred to in (*a*) is properly corroborated in law and fact by the evidence of the witnesses for the prosecution taken as a whole.

(*f*)The learned judge has failed to take into consideration the effect and construction of Section 52 of Ordinance 20 of 1893.

(*g*)The learned magistrate in law and upon the facts properly convicted the respondent.

As to reasons (*a*) and (*f*) the Evidence Ordinance 1893, section 52 renders every person charged with an offence a competent witness *for the defence at every stage of the proceedings* whether the person so charged is charged solely or jointly with any other person, and it provides *inter alia* (a) that he shall not be called as a witness except upon his own application, and (f) that he shall not be asked any . . . . . question tending to show that he has committed . . . . . any offence . . . unless (3) he has given evidence against any other person charged with the same offence; and section 53 provides that where the only witness called by the defence is the person charged he shall be called as a witness immediately after the close of the evidence for the prosecution. These sections are similar to the provisions of sections 1 and 2 of the Criminal Evidence Act, 1898, (61 and 62 Vict, c. 36.) The witness Hannay was therefore a competent witness for the defence at every stage of the proceedings.

The proceedings before the magistrate show that the three defendants, Hannay, Charles, and respondent pleaded not guilty, that the evidence for the prosecution was then taken, and the prosecution closed, that thereupon the second defendant Charles was discharged, that Mr. Gunning, solicitor for the first defendant

Hannay, then addressed the Court on behalf of his client and asked for leniency—having done this he closed his case. So far then as Hannay was concerned all that remained to be done was to pass sentence on him. After this Mr. Luckhoo, counsel for the third defendant (the present respondent), submitted that no case had been made out against his client and the magistrate said 'I call for defence.' At this time the respondent's case was the only one not closed. He then went into the witness-box and called two witnesses, after which Mr. Luckhoo closed his case. The next note is "Mr. Gunning asks for leniency for (1) and would let him go into the box and state what has been said." The magistrate then allowed the defendant Hannay to be sworn, and he said "I got these two tarpaulins in court from (3)" that is, respondent, who had just before given evidence on oath denying that he had given Hannay "any or both these tarpaulins."

Now on whose behalf was Hannay called and examined? It could not be in behalf of the prosecution although his evidence was just what the prosecution would desire, because none of the conditions precedent to his being so called existed, and being a co-defendant he could only give evidence for the defence on his own application. He certainly did not apply to give evidence on behalf of the present respondent, and he could only have been allowed to give evidence—after the case in behalf of all the defendants had been closed as shown by the record—in order to save his own skin, as alleged by the Solicitor General. It was in fact a bid for leniency.

The record shows that the witnesses were cross-examined, and the magistrate addressed by the lawyers, not in the order of seniority but in the order in which the defendants' names stood on the complaint. This is the general and recognised rule, and it bears out the note of the magistrate that the case against Hannays was closed. In Regina v. Hodgkinson and Manning (64. J.P. 808) Darling, J., said "I do not think I ought to hold that a prisoner may, after he has pleaded guilty, be sworn and give evidence on oath and be cross-examined. I hold that 'stage of the proceedings' does not apply to the period between a plea of guilty and sentence." The present case I regard as stronger. The defendant Hannay was the defendant first named on the complaint and this was recognised in the conduct of his case. His solicitor addressed the court and closed his case immediately after the close of the prosecution. It is true that after Hannay had been examined and cross-examined, the magistrate again notes "case closed," but at this time the case against each defendant had already been declared closed. He formally finds both defendants guilty, but Hannay had in effect before closing his case asked for leniency and thereby admitted his guilt. To all intents

and purposes this amounted to a plea of guilty (R. v. Hodgkinson and Manning, supra), but apart from this I have no hesitation in holding that "every stage of the proceedings" cannot apply to the period between the closing of a defendant's case and the passing of sentence. The procedure adopted by the magistrate was in my opinion most irregular, and rendered the evidence of this co-defendant, taken at that period of time, inadmissible, and it cannot be considered in connection with the respondent's case.

As to reasons (b), (d) and (e)—the evidence of District Inspector Craig as affecting respondent, consists of two parts (1) the statements of Hannay made to the inspector in the absence of respondent, and (2) the statements of Hannay and Charles made in his presence. It is clear that (1) is inadmissible and the Solicitor General admits that he cannot press its admission; it was in consequence of what Hannay then said that respondent was sent for and the statements (2) made. Respondent was placed amongst six or seven other East Indians. Hannay was brought out and asked if he knew any of those East Indians. He walked straight up to respondent and put his hand on him and said "He was the one gave me tarpaulins." Then Charles (the prisoner discharged) was brought out. Hannay was returned to the lockup, he and Charles having had no opportunity of speaking to each other, and Charles went and touched respondent and said "He the man who gave tarpaulins to Hannay." It does not appear on the notes of evidence that the prisoner Charles was asked if he knew any of the East Indians.

The law as to the admissibility of a statement made in the presence of accused was fully dealt with on April 7th, 1914, in the House of Lords on an appeal from a judgment of the Criminal Court of Appeal in Director of Public Prosecutions *v.* Christie (111. L.T. 220). The respondent was convicted of an indecent assault on a boy of tender age. On the boy being taken back to the field he said in the prisoner's presence, pointing him out, "That is the man." The constable then asked "which man" and the boy went up and touched the prisoner and said "That is the old man who did so and so" (giving particulars of the assault). The prisoner said "I am innocent." The court which was constituted of six judges held unanimously that the evidence was admissible in law as to the *demeanour* of the respondent at the time, but the majority of the court (the Lord Chancellor (Viscount Haldane), Lords Dunedin, Moulton, and Reading) held (Lords Atkinson and Parker dissenting) that it was inadmissible as evidence of identification. In the course of his judgment Lord Moulton, dealing with these two points, said: "I have great difficulty in seeing how this evidence is admissible on the ground

that it is part of the evidence of identification. To prove identification of the prisoner by a person, who is, I shall assume, an adult, it is necessary to call that person as a witness. Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained. It would be very dangerous to allow evidence to be given of a man's words and actions, in order to show by this extrinsic evidence that he identified the prisoner, if he was capable of being called as a witness and was not called to prove by direct evidence that he had thus identified him. Such a mode of proving identification would, in my opinion, be to use secondary evidence where primary evidence was obtainable, and this is contrary to the spirit of the English rules of evidence." He continued

"There remains the second ground, namely that it is evidence of a statement made in the presence of the accused, and of his behaviour on that occasion. Now, in a civil action evidence may always be given of any statement or communication made to the opposite party, provided it is relevant to the issues. The same is true of any act or behaviour of the party, the sole limitation is that the matter thus given in evidence must be relevant. I am of opinion that, as a strict matter of law, there is no difference in this respect between the rules of evidence in our civil and in our criminal procedure. But there is a great difference in the practice. The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection, and such an intimation from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable. Under the influence of this practice, which is based on an anxiety to secure for anyone a fair trial, there has grown up a custom of not admitting certain kinds of evidence, which is so constantly followed that it almost amounts to a rule of procedure. It is alleged on the part of the respondent that an instance of this is the case of the accused being charged with the crime and denying it or not admitting it.

"It is common ground that, if on such an occasion he admits it, evidence can be given of the admission and of what passed on the occasion when it was made. It seems quite illogical that it should be admissible to prove that the accused was charged with the crime if his answer thereto was an admission, while it is not admissible to prove it when his answer has been a denial of the

crime, and I cannot agree that the admissibility is decided as a matter of law by any such artificial rule. Going back to first principles as enunciated above, the deciding question is whether the evidence of the whole occurrence is relevant or not. If the prisoner admits the charge, the evidence is obviously relevant. If he denies it, it may or may not be relevant. For instance, if he is charged with a violent assault and denies that he committed it, that fact might be distinctly relevant if at the trial his defence was that he did, but that it was in self-defence. The evidential value of the occurrence depends entirely on the behaviour of the prisoner, for the fact that someone makes a statement to him, subsequently to the commission of the crime, cannot in itself have any value as evidence for or against him. The only evidence for or against him is his behaviour in response to the charge, but I can see no justification for laying down as a rule of law that any particular form of response, whether of a positive or negative character, is such that it cannot in some circumstances have an evidential value. I am, therefore, of opinion that there is no rule of law that evidence cannot be given of the accused being charged with the offence, and of his behaviour on hearing such charge, where that behaviour amounts to a denial of his guilt. This is said to have been laid down as a rule of law in Rex v. Norton (102 L.T. 926), and to have been followed by the courts since that decision. If this be so, I think that the decision was wrong, but I am by no means convinced that it was intended in that case to lay down any such rule of law.

"But while I am of opinion that there is no such rule of law, I am of opinion that the evidential value of the behaviour of the accused where he denies the charge is very small either for or against him, whereas the effect on the minds of the jury of his being publicly or repeatedly charged to his face with the crime might seriously prejudice the fairness of his trial. In my opinion, therefore, a judge would in most cases be acting in accordance with the best traditions of our criminal procedure, if he exercised the influence which he rightly possesses over the conduct of a prosecution, in order to prevent such evidence being given in cases where it would have very little or no evidential value. Subject to these words of caution, I am of opinion that this appeal should be allowed on this point, because we have to decide upon the admissibility as a matter of law, and so regarded I have no doubt that the evidence in question was rightly admitted. I think the direction as to corroboration was wrong, and that therefore the conviction should not stand."

I have quoted from this decision at some length as it deals so exhaustively with the reasons which ought to guide a court—sitting as a jury—with regard to the admission of

and weight to be attached to statements made in the presence of a prisoner. It would seem that Lord Reading thought that if the statement had been confined to the words "that is the man" it would have been evidence of *identification.* In that case the boy having given his evidence unsworn, corroboration was necessary, and it was held that the judge had treated the evidence of the mother of the boy and the constable as to what the boy said and did, as corroboration of his testimony at the trial. This was held to be no corroboration. If Hannay's evidence after his case had been closed could be held admissible as against respondent, he was an accomplice, and as such it is generally regarded that there should be corroboration of such evidence. The submission by counsel is that he was corroborated by District Inspector Craig. This witness only repeats what he had heard Hannay say. This amounts to making Hannay his own corroborator and is manifestly no corroboration.

I am unable to agree with the contention of the Solicitor General that section 96 of Ordinance 17 of 1893 as amended by section 2 of Ordinance 12 of 1915 renders the evidence of District Inspector Craig and other witnesses admissible. (Reason (c)). The police constable arrests on a reasonable suspicion, and having done so the accused is charged before the court under section 96 that he did have in his possession . . . . . a certain thing which is reasonably suspected of having been stolen or unlawfully obtained. If the accused pleads guilty the court proceeds to sentence him. If he pleads not guilty the complainant has to prove reasonable suspicion and possession, and if defendant gives no account, or an account not to the satisfaction of the court as to how he came to have the same he is convicted, but under sub-section 2 if he declares that he received the same for some other person or that he was employed as a carrier, agent or servant for some other person, the court is authorised and required if practicable to cause every such other person . . . . to be brought before it, and to examine witnesses upon oath touching the same, and then to proceed as therein directed. The court has no discretion, but it is obligatory, if practicable, to cause such person to be brought before it. If not practicable and there are no witnesses, then unless the magistrate is satisfied on the evidence of the defendant that his possession is lawful he must convict. On the other hand, if "such person" admits or it is proved that the accused received the same for him or was employed as his carrier, etc., the possession of such person shall be deemed to exist at the time and place when and where it was found or seized in the possession of, or under the control of his carrier, etc., whose possession is that of his employer. (Sub-section 3.) It is the practice as I understand on arrest to question an accused person as to his possession.

Although such a procedure may tend to expedite matters it has no warrant in law. A person arrested for unlawful possession stands on the same footing as any other prisoner. A voluntary statement made by accused which is enquired into, should be brought to the notice of the court and the result of the enquiry (if any) tendered in evidence, whether it tells in favour of accused or against him, and it is unnecessary for an accused to repeat in court a statement which it is admitted by the prosecution he made at the time of his arrest or subsequently thereto whether such statement was made voluntarily or in answer to questions improperly put to him by a police constable.

The Solicitor General asked that this court would lay down the proper procedure to be adopted under this section and hence my reason for dealing with the matter.

The decision of the learned judge is upheld. The appeal is dismissed with costs here and in the courts below.

ORDINARY CIVIL JURISDICTION.

7TH DEC., 1915

MEERTINS *et al*

v.

JORDAN.

Opposition to execution sale—Indefinite description of property in transport and letters of decree—Value of proviso excepting parts sold or transported without *defining such parts.*

On a claim by M. and others, to restrain a sale at execution, against G. who in pursuance of a judgment against L. had levied on certain property as the property of L;

Held that in the absence of satisfactory evidence that plaintiffs were the owners of the property levied on, but without deciding the question of L's rights in the property, the sale must proceed.

Claim by Samuel Joseph Meertins as one of the heirs under the will of his father, William Meertins, and by William Cornelius Meertins, Simeon Adolphus Meertins, and Richard Alexander Meertins, under the will of their father Benjamin Meertins, who was the last heir under the will of William Meertins abovenamed for themselves and others, against Montague Jordan for an order restraining the sale at execution of a certain piece of land known as part of Flensburg on the west bank of the Demerara river. This land had been levied on by Jordan in pursuance of a judgment obtained by him against one Alexander Lewis. The sum of $10 for damages for wrongful levy was also claimed.

E. G. Woolford, for the plaintiffs.

S. E. Wills, for the defendant.

SIR CHARLES MAJOR, C.J.: The defendant, pursuant to a judgment dated the 13th day of April, 1911, obtained by him against Alexander Lewis, caused execution to issue thereon and certain lands, sworn by him on the information of his debtor to be the property of Lewis have been taken in execution and advertised to be sold.

2. The land seized is described in the writ as "a piece of land forty roods in façade by seven hundred and fifty roods in depth, being the southern portion of the part of the land known by the name of Flensburg, situate on the west bank of the river Demerara, . . . bounded on the north by a small strip of land, the property of the heirs of Loof and her children, on the south by land at present occupied by one Meertins, on the east by the Demerara river, on the west by Crown lands."

3. The plaintiffs claim to have the levy set aside on the ground that the lands are their property as the son and grandsons of William Meertins deceased. The defendant alleges the title of Lewis in the lands to be derived from one Medas Jack through his wife Phoebe Jack, by whose will the lands were devised to the granddaughters Charlotte Floris and Katherine Jack. Lewis married Katherine, John Floris married Charlotte.

4. In the report of the Land Commissioners on claims to land in the county of Demerara, published in 1892, the Commissioners note that in the *Gazette* of 16th December, 1826, there was an advertisement of transport—"By representatives of J. P. Jennings deceased, transport of land situate on the west bank of the Demerary river named Flensburg as purchased at execution sale on 8th April, 1823, to Jeannette Loof and her children." The Commissioners then state that five claims to Flensburg were presented, among them No. 183, by John Floris as executor of the will of Phoebe Jack, upon which the Commissioners note: "We cannot understand the will, nor how Phoebe Jack became possessed of the land," and No. 184, by William Meertins for himself to "part of" Flensburg.

5. The evidence before me shows that in 1852, Johanna Abigail Coppy granted to "the estate of Medas Jack," that embarrassing and unreasoning form of grant so largely adopted in this colony, "twenty-five roods of land in façade by seven hundred and fifty roods in depth, the southern portion of a part of "Flensburg (the statement of the extent in façade of that part being, for decay, illegible in the grant produced) extending in façade from a strip of land four roods in façade, the property of Jeannette Loof and her children, to land then in possession of Elizabeth Labbee."

6. Phoebe Jack by her will dated the 30th October, 1883, purported specifically to devise to her granddaughters, Charlotte and Katherine abovenamed, forty-five roods and one half of land by

seven hundred and fifty roods "part of the abandoned plantation Flensburg," and constituted them her residuary devisees and legatees, appointing John Floris her executor.

7. In 1884, Richard Parris, James Mcintosh, Josiah Graham, and the Administrator General of the colony, James Loof, Lodewyk Loof, and John Harris, and Margaret Wilson, all representative of (apparently) the entire Loof interest, whatever that was, in Flensburg, granted to William Meertins "the land known by the name of Flensburg, save and except such parts or portions thereof as had been already sold and transported to other persons, with power to the grantee to convey the same to the purchasers thereof on payment of the purchase money.

8. William Meertins, by his will dated the 11th December, 1902, devised unto his sons Benjamin, Samuel Joseph, and Joseph, "his property situate at Flensburg" measuring one hundred roods in façade by seven hundred and fifty roods in depth, "as per transport," save ten roods thereof in façade which was devised to one Bakker and son.

9. Benjamin Meertins, in his father's will mentioned, died in 1910, having by his will dated on the day of his death, devised "his portion of Flensburg" to his sons William, Simeon and Richard.

10. I have been at pains thus to relate the dealings with Flensburg plantation, or portions of it, because it will at once be seen from the documents abstracted how impossible it is on the face of them to gather, much less to determine, first, the extent of the plantation Flensburg as (say) sold at execution in 1823; second, whether the whole of it, or, if not, which particular portion, was in Loof or in which and how many of that family; third, the extent of the Medas interest, the foundation of Lewis's alleged interest; fourth, by the very terms of the grant itself to William Meertins, the foundation of the plaintiffs' claim, precisely what portion of Flensburg he took; and fifth, for the purposes of this action the most important point, whether the land taken in execution is, as the plaintiffs say, or is not, as the defendant says, included in the portion, whatever that was, devised by William Meertins to the plaintiffs and their predecessor in title.

11. And I have had no assistance towards the solution of the problems from either plaintiffs or defendant. Oral testimony has been given, on the one hand by Samuel Joseph Meertins the son, and William the grandson, of William Meertins, and on the other by Catherine Eliza Lewis, the wife of Alexander Lewis, not by Alexander himself, of the most meagre, vague and unsatisfactory character. Samuel Meertins (merely on the strength of a local advertisement, the terms of which have not been proved) claims the whole of Flensburg, stated by him to extend some 240 roods

in façade, except a portion measuring forty-five roods sold by him to an East Indian. But it is plain, not only that while, in 1884, Meertin's grantors purported to convey to him Plantation Flensburg, some portions (which there has been no effort on the part of either party to describe or determine) had undoubtedly been then cut off from the plantation, but also that William Meertins himself derived only ninety-nine roods thereof in façade. And Samuel can say no more than that the land taken in execution is part of Flensburg.

12. The plaintiff's case fails on account of its very weakness, its failure to prove title to the land in dispute even if there were positive proof before me where that land is.

13. I expressly refrain from determining—I am unable, in fact, to do so for want of sufficient material—the ownership of the land. I can only say that in the absence of satisfactory proof that the plaintiffs are the owners, the execution must proceed. Regarding any appearance of hardship in the circumstances on the plaintiff's, they must be left to such proceedings (if any) either in opposition to the grant of letters of decree if and when the same are prayed, or by way of suit for declaration of title, as, upon a more coherent statement of facts than they have been able to present in this suit, they may be advised.

14. The claim is dismissed. I make no order as to costs.

THIS 11TH DAY OF JANUARY, 1915.

CUMMINGS

v.

S.S. SARGASSO.

Vice Admiralty Court Rules 1883—Rules 55 and 118—Trial with or without Pleadings—Practice—Appeal—Principles governing appeals where a judicial discretion has been exercised.

MAJOR, C.J.: By the authorities in English practice, from which the principles adopted by the Courts in appeals from a Judge in the exercise of his discretion are to be gathered it is established that the Court to which the appeal is made, although quite competent to entertain it, does not generally interfere with a Judge's exercise of his discretion unless he has proceeded on a wrong principle, or has not exercised his discretion at all, or there is reason to suppose that some failure of justice, or material injury, has occurred or will occur if relief be not given. (For instance Golding v. Wharton, 1 Q.B.D.; The Queen v. Maidenhead Corporation, 9 Q.B.D.; Knowles v. Roberts, 38 C.D.)

There are also authorities establishing equally clearly that in dealing with an appeal of the kind the Court can, indeed must, review the principles on which the Judge of the Court below proceeded and consider the facts to which he has applied those principles. It must decide whether his reasons are germane and based on right principle. (For instance Young v. Thomas (1892) 2 Ch.; The Port Hunter 26 T.L.R.)

In this case, as appears from the judgment of the learned Senior Puisne Judge refusing an order for pleadings in the action, the application for an order was supported on the ground that without pleadings the defendant would be embarrassed and unable properly to conduct his defence. It was resisted on the ground that acts of negligence in respect of which damages are claimed would not be specified in the pleadings and then delay in the trial of the action would occur to the prejudice of the employment of the plaintiff's vessel. That answer is manifestly insufficient, for a statement of claim, *e.g.*, would certainly contain allegations of the facts upon which the plaintiff would rely as constituting negligence, and, as for delay, it would be in the plaintiff first to move under an order for pleadings, to be prompt himself and see that the defendant conformed with the rules relating to delivery of pleadings. But the onus in the application was on the defendant and the learned Judge says:—"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 the cases arising in this Col-"ony. 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 Reg- "istrar as provided by Rule 118."

And in refusing leave to appeal to this Court against that refusal, the learned Judge repeats "that no real ground has been shown to warrant a "departure from the usual practice of disposing of these cases summarily as "provided by the rules."

Accustomed as I have been for a quarter of a century to a practice whereunder pleadings are the rule and summary disposal the rare exception, I find some difficulty in contemplating anything else, and I cannot, for myself, conceive a case, save one perhaps wherein the issues actually appear from the very nature of the case to be few and simple and practically to be resolved into a mere question the amount of damages, in which the absence of pleadings would not be unsatisfactory. But a case must not be judged according to one's individual predilections nor by reflection of how I personally in this case would have exercised my discretion.

Has the learned Judge applied a wrong principle, or applied a right principle wrongly? Can it be said that an injustice will be worked, whatever form that injustice may take, as, for instance, the embarrassment of the defendant, delay, undesirable or probably avoidable expenses or the like? I think, if he will allow me to say so, that the learned Judge has allowed the exercise of his discretion to be unduly, and therefore, in my opinion, improperly influenced, first by the form of the rule that actions shall be tried without pleadings unless the Court otherwise orders; and secondly by the fact that hitherto in this Colony pleadings have not, generally speaking, been ordered; that is to say, with a negative view of the rule in his mind, in basing his observance of it upon what has occurred or not occurred in local cases.

Examination of those few cases leads me to the opinion that they do not afford that safe guidance in deciding applications under the rule which is claimed for them; they certainly do not contain that controlling principle, almost amounting to a fetter on one's judgment, with which Counsel for the respondent would have the Court invest them.

Further, I am unable to take the same view as the learned Judge of the efficacy of Rule 118, providing for reference to the Registrar of the assessment of damages, on which his judgment seems to me largely to depend. That rule has not, I think, any greater virtue than the similar rule in other matters where damages are claimed, and only applies when, the issues upon the determination whereof the question of damages or no damages depends haying been adjudicated, the amount of those damages

alone remains to be assessed. Action upon Rule 118 is but the aftermath of the conflict, which, in this case, must I think precede it. Now it is a rule of litigation that neither party must take the other by surprise or embarrass him. In Knowles *v.* Roberts, cited above, Bowen, L.J., quoted with approval the remark of James, L.J., in Davy *v.* Garrett," "a defendant may "claim *ex debito justitice* to have the plaintiff's case presented in an intelli- "gible form so that he may not be embarrassed in meeting it," and though that was a case in which pleadings were alleged to be embarrassing, the statement of the Lord Justice contains a principle equally applicable to this case. The plaintiff's case at this moment is not presented at all, and to compel the defendant, on that account, to fight as it were in a dark room, not knowing from what direction his opponent's attack is to be delivered because that opponent wishes it, would be, in my opinion, to work a substantial injury. The preliminary acts have been here filed; these cannot be opened until the action is set down for trial; but they do not contain, they cannot contain, more than the ground-work of the claim and defence, as the case may be. They cannot contain many allegations by the plaintiff he may conceive to be material to success in establishing his claim, and the defendant should be allowed, not only to hear these allegations, but to have an opportunity of answering them.

Lastly, I think that in exercising discretion under the rule at present governing applications for pleadings in Admiralty actions, regard should have been had to its age, when contrasted with Admiralty rules that prevail in England and most other Colonies its decrepitude, and consequently to the desirability, if not the necessity, of taking advantage of the power it gives in the direction of pleadings and not in that of summary trial.

For these reasons I am of opinion that the order of the learned Senior Puisne Judge refusing to make an order for pleadings should be set aside and that the action should be tried with pleadings. This Court can make the order for pleadings or the matter can be referred to the Judge in Chambers to do so.

The appellants should have the costs of this appeal and of the application to the Court below and to this Court for leave to appeal, the costs of the application for an order for pleadings being costs in the cause.

DALTON, Acting J.: This is an appeal from an Order made in this action in the Admiralty Jurisdiction on August 25th last refusing the defendants' motion that pleadings should be filed.

As the learned Judge stated in his judgment appealed from the Vice Admiralty Court Rules provide (See Rule 55) that every action is to be heard without pleadings unless otherwise ordered;

that is, a discretion is vested in the Court which discretion will be exercised according to the circumstances of each particular case. The learned Judge refused to order pleadings on two grounds:

(*a*.) He was of opinion that "no sufficient grounds had been shown for altering the procedure laid down by the rules which has been invariably followed in all cases arising in this colony"; and

(*b*.) If the interests of justice required it the applicants (*i.e.* defendants) would be given an opportunity of calling rebutting evidence, or the assessment of damages would be referred to the Registrar as provided for in Rule 118.

The judgment is appealed from on the following grounds:

(1.) The discretion of the learned Judge was wrongly exercised in refusing to order pleadings.

(2.) The sum of $7,000 is claimed for damages by collision and losses consequent thereon.

(3.) No accounts have been furnished to the defendants and they have not been informed by the proceedings in the action or otherwise of the alleged damages or losses or of the facts on which the plaintiff will rely to establish the defendants' liability.

(4.) The parties will be put to great and unnecessary expense in preparing evidence of facts which, if pleaded, might not be disputed.

(5.) If the nature and particulars of the plaintiffs case and of the damages and losses for which he claims are not disclosed to the defendants before the trial, the defendants will be entitled to an adjournment of the trial to prepare their evidence and great expense and delay will thereby ensue.

Now I take it that all the matter set out in grounds for appeal from No. 2 to the end were duly considered by the learned Judge when he refused to allow pleadings, though it would seem that the arguments in this Court have been very much fuller, and the real question that remains to be answered by this Court is whether, after considering such matter, the learned Judge wrongly exercised his discretion in so refusing the application.

The cases dealing with the exercise of judicial discretion, and the principles governing appeals in such cases are numerous. Where a Judge has exercised his discretion, after a full consideration of the circumstances, in ordering a trial with a jury, the Court of Appeal refused to interfere unless they were satisfied that there was likely to be a failure of justice if they did not. (Mangan v. Metropolitan Electric Supply Co. 1891, 2 Ch. 551.) In the case of Crowther v. Elgood, (34 Ch, D. 691) a case of

contempt under the Debtors Act 1869, Lord Justice Cotton stated in the course of his judgment "In my opinion we ought not to interfere with the discretion of the Judge in accordance with the general rule that where discretion is given to a Judge the Court of Appeal ought not to review his decision unless he has declined to exercise his discretion or has manifestly proceeded on a wrong ground." In the same case Lord Justice Lopes states that it is settled law that where a Judge has a discretion the Court of Appeal will not interfere unless the Judge has not exercised his discretion or unless he has done so under a clear mistake.

A further and earlier case (*In re* Martin; Hunt v. Chambers, 20 Ch. D. 366) is one in which the Court of Appeal decided that the Judge in the Court below had exercised his discretion for a reason not well founded in law and that therefore it did not come within the general rule of non-interference by the Court of Appeal. To quote the words of the Master of the Rolls (Jessel) in that case, "there must be a plain and clear case to justify the Court of Appeal in interfering."

The learned Judge's reasons for refusing to order pleadings have already been set out, and I will now consider them.

The first and I take it the chief reason is that no sufficient reason was shown for interfering with past practice. It is admitted by both sides that there are some five cases which have been tried in the Admiralty Jurisdiction of this Court since the year 1883, the date of the present rules. It is further admitted that in all of these five cases that went to trial, trial was without pleadings, whilst no application for pleadings has ever previously been made.

A careful examination of the cases has convinced me that there is very little indeed on which any argument of past practice of trial without pleadings can be based in so far as the Admiralty Jurisdiction of this Court is concerned, and I should require a much larger volume of work in that Court before I could decide that there was any settled practice here at all. The first case referred to is that of Hovell v. s.s. Solent which by consent was consolidated with (1) the Royal Mail Steam Packet Co. v. the schr. "Hattie P," and (2) the s.s. Solent v. the schr. "Hattie P." The damages sought to be recovered in these three cases varied from $6,000 to $1,000, and in all $8,000. As far as one can gather from the report, there was an agreeable spirit of amity between the parties and in such a condition of things pleadings would not be necessary. In the last word of his judgment the learned Judge (Bovell, C J.) especially calls attention to the consolidation of the actions and to the fact that they were heard without pleadings, a state of affairs which one might reasonably infer

would hardly have been possible save for the special circumstances arising in these particular cases. I am unable therefore for that reason to agree that they can be quoted as supporting any argument in favour of, to use the words of the learned Judge in the Court below, "the usual practice of disposing of these cases summarily as provided by the rules." Special circumstances were present in those three cases which rendered pleadings unnecessary.

Another case, that of McConnell v. the s.s. Essequibo (Admiralty Jurisdiction 7.1. 1907) was an action for $10,000 and was heard without pleadings, the amount of damages being assessed by the Court. No application for pleadings was ever made and it appears to be one of two cases of damages for substantial sums that have gone to an out and out trial in the Vice-Admiralty Court of this colony. In the case of Boismenu v. s.s. Dahome (Admiralty Jurisdiction 3.12 1907) in the same year, only a small amount, *i.e.*, between $400 and $500 was involved.

Another case that of schr. "H. E. Thompson" v. Booker Bros. McConnell & Co., was commenced in 1907 but never came to trial. It was for a very small amount and full particulars of the damages were endorsed on the claim.

The case of Pollard, as owner of the schooner Eagle v. s.s. Terrier (Admiralty Jurisdiction 2.12.1895) was a claim for a large amount, some $20,000, and was also tried without pleadings. It is of interest, however, to note that it would seem from the judgment that had the trial been with pleadings possibly the damages allowed, nearly half the amount claimed, might have been considerably augmented. The Court limited the claim by the description of the capacity in which plaintiff sued as given upon the indorsement of the writ of summons in the suit, that is, claiming only as owner of the schooner Eagle the Court held he could not recover for the loss of freight, or for cargo, or for personal property and effects other than the ship. Plaintiff in that case presumably preferred a trial without pleadings at a possible sacrifice to himself.

Having in view therefore both what I have said with reference to the exercise of a judicial discretion, and to the chief reason supporting the exercise of that discretion in the refusal of the application for trial with pleadings I am of opinion that that refusal is based upon a clear mistake, as to alleged past practice, and is of such a nature as to justify a reviewal of the decision.

I cannot agree, in view of the application in this case for trial with pleadings and the arguments heard in support thereof, that the procedure followed in the two principal cases mentioned above is any answer to or supplies any ground for the refusal of the application or sets up any precedent as to what should be done in the case now under consideration.

The second reason which deals with the calling of rebutting evidence or the assessment of damages by the Registrar, a course which under local conditions would hardly be as satisfactory as an assessment by a Judge of the Supreme Court would not in itself be a sufficient reason on which to base a refusal to allow pleadings; it does not in itself cover all the grounds set out in the application, whilst the defendants would throughout the plaintiff's case be in a most unsettled state, and be constantly open to being taken by surprise for which further adjournments would be necessary. Counsel for plaintiffs admitted that the large amount of the damages claimed was a matter of great importance in deciding the question, with which I entirely agree.

I am of opinion therefore that this is a case in which the Court should review the decision in which a judicial discretion has been exercised for the reasons stated.

The Vice-Admiralty Court Rules as regards pleadings are exactly the converse of the English Rules, that is, in England pleadings are necessary unless otherwise ordered, whereas here trial is without pleadings unless otherwise ordered. The principles however which should guide either Court whether for ordering trial without pleadings in England or trial with pleadings in this Colony are the same. The reasons in support of the application for pleadings in this case may generally be taken to be contained in the grounds for appeal above set out from No. 2 to the end. The defendants are in entire ignorance as to the nature and particulars of the plaintiff's case, save that he is claiming the sum of $7,000 damages for collision. They are entirely in the dark as regards plaintiff's claim in the absence of any such agreement between the parties as was come to in the case "s.s. Solent *v.* schr. Hattie P." The object of pleadings, it need hardly be said, is especially to obviate such difficulties and to secure that both parties may know in detail what is really at issue between them.

It has been argued that owing to a form of pleading in the rules, that even if such pleadings are ordered defendants will be in no better position than they are now. I cannot agree with that. Whatever the form may be, it is not conclusive as to its sufficiency (as has been decided both in England and in this Colony) and all necessary particulars should be stated in proper detail.

The grounds set for in the application are sufficient in my opinion on which to make an order for trial with pleadings. The principal reason for objection was that delay would thereby arise. It seems, however, to me that delay is just as likely to arise from a refusal of the application, from the difficult position in which appellants would be placed. The interests of justice in

the case would be better served, I think, for both parties alike by the granting of the application.

In my opinion the appeal should be allowed and an order made for a trial with pleadings.

BERKELEY, J.: The grounds of this application in the first instance were (1) that unless pleadings be ordered the defendants would be embarrassed and unable properly to conduct their defence and (2) that unnecessary expenses might be incurred. It was urged that in the 3 consolidated cases referred to in my decision of 29th August, 1914, the amount of damages might have been considerably affected if pleadings had been applied for and obtained. The grounds of application have been amplified on appeal to this Court.

In England pleadings are filed unless an order is made to dispose of the matter summarily. The converse is laid down by our rules. These local rules were established by an Order in Council and made with the advice of the Privy Council. At the time of this Order in Council the procedure in England was the same as at the present time and it seems to me that the Privy Council must have had good reason for advising a procedure as applicable to His Majesty's Possessions abroad which is the very converse of that prevailing in England.

It is admitted that in England the rule as to filing pleadings is not usually departed from by an order to deal summarily, except by consent of parties. This being so it would seem to follow that as a rule pleadings should only be ordered in this Colony by consent of parties.

Personally I should approve of the adoption of the English practice locally, but until this is done I hold that it is incumbent on an applicant to satisfy the Court that in the absence of pleadings he would be embarrassed or in some way prejudiced in his defence. This, in my opinion, the appellant has not done, If as submitted by counsel the English practice should be followed in this case and pleadings ordered so as to admit facts and possibly shorten proceedings, I take it that pleadings must follow as a matter of course in every case where application is made to this Court. In my opinion this appeal should be dismissed with costs.

The Court subsequently made an order that pleadings should be delivered in the action, the plaintiff's statement of claim to be delivered within fourteen days from the date of the order.

APPELLATE JURISDICTION.

7TH DEC., 1915

WONG FOOK
v.
MANNING.

Appeal—Ordinance 30 of 1913 (The Opium Ordinance) s. 8—Possession of imported opium without proper authority.

Appeal from a decision of Mr. W. J. Gilchrist, Stipendiary Magistrate for the Georgetown Judicial District, who convicted the appellant Wong Fook for the unlawful possession of a quantity of imported opium contrary to the provisions of the Opium Ordinance, 1913.

The conviction was upheld and the appeal dismissed, the Court holding firstly, that the evidence that the substance in question was opium was conclusive, and secondly that the evidence that the opium was imported opium was sufficient to support the conviction.

P. N. Browne for the appellant.

C. Rees Davies, Solicitor General, for the respondent.

SIR CHARLES MAJOR, C.J.: The defendant has been convicted on a charge, laid under the provisions of the eighth section of the Opium Ordinance, 1913, of having in his possession, without proper authority in that behalf, opium imported into the colony.

Evidence was given for the prosecution, the defendant by his counsel submitted that no case had been made out against him, the magistrate called for a defence, and the defendant called witnesses on his behalf, but did not himself give evidence.

2. The appeal is grounded on three propositions:

(a) that the prosecution failed to prove that the substance found in the defendant's possession was opium;
(b) that the prosecution failed to prove that the substance, if opium, was imported into the colony, and if imported into the colony, was so imported since the Ordinance came into operation:
(c) that the defendant, at the close of the case for the prosecution, was entitled, for want of establishment of the charge, to dismissal of the same and should not have been called upon for a defence.

Of these three propositions the third was unarguable on the face of it and was not pursued.

3. In respect of the first ground, much has been said about the terms of the certificate given by the Government Analyst describing the exhibited substances which was put in evidence for the complainant. Its contents are: Report on examinations for the nature of the following articles . . . Description of the articles "two small parcels". . . Result of the chemical examinations: "These each contain opium ("raw opium")." Now the sole object of the application to the analyst was the determination, by analytical examination, of the nature of the contents of the parcels, not the nature of the parcels themselves, and on the wording of the certificate only it is clear that the fact certified by the analyst is that the substances in the parcels contain opium. But it is contended for the appellant that that statement is insufficient to support a charge of possession of opium. The chemical constituents of a substance are a matter of fact and it is not, in the circumstances, material to enquire what precise meaning is to be attached to the statement "These each contain opium ("raw opium")" for the analyst has himself given evidence of his examination and its results. Professor Harrison, who was called for the defendant, not only explained any ambiguity that the certificate may contain, but also gave direct testimony as to the nature of the substances to which it relates. He said: "I examined B. and C. in the usual manner, and found no reason to show that they contained anything else than opium, raw opium, so described as following the Ordinance. . . Had I not had interview with the Attorney General, I would simply have said opium in my certificate, would have called it opium as given in the last definition in section 2. . . I say B. and C. are chemically speaking raw opium. They correspond in their properties—

colour and hardness—with certain Indian raw opium. . . Previous to this, between 1890 and 1897, seen number of opium samples similar to B. and C." That evidence puts the matter beyond doubt, and it is clear fact that the substances found on the defendant's person are opium. Regarding the endeavour to confine the interpretational extent of the word "opium" to raw opium, medicinal opium, morphine, cocaine, heroine and similar drugs all as the same are defined by the Ordinance, it is to be observed that the Ordinance directs that "opium," when used without a qualifying epithet, is to be taken to include, not to be taken to mean, those several substances, that is to say it extends the meaning of "opium" (which, for the purposes of the Ordinance, needs no interpretation) to other substances, themselves defined; it does not exclude opium itself, which may be neither raw nor medicinal.

4. Turning to the second point raised by the appellant I agree with the Solicitor General that the evidence of Messieurs Rodway and Pairaudeau, and of Professor Harrison raises a strong presumption that the *papaver somniferum,* for the purpose of extracting or obtaining opium therefrom, has never grown here and cannot grow here. I am almost judicially persuaded thereto. The defendant, at any rate, has done and said nothing to arrest that persuasion, and the evidence which I have mentioned is quite sufficient to show that the opium found on the defendant was imported into the Colony. And it is immaterial whether that opium was imported before or after the passing of the Ordinance. The importation of opium into the Colony is not an offence if made by sea; its possession without lawful permission thereto it is which brings the possessor within the prohibition in the section.

5. Finally the defendant is admittedly neither registered medical practitioner, dentist, nor chemist and druggist, and for that reason he cannot have the written authority which the law declares to be necessary to lawful possession of opium. Ergo, his possession is unlawful.

6. The appeal is dismissed with costs.

COURT OF APPEAL.

14TH DEC., 1915.

(BERKELEY AND HILL, JJ.)

SMITH BROTHERS & CO., LTD., Appellants,

v.

DEMERARA RAILWAY COMPANY, Respondents.

Appeal—Leave to appeal to Privy Council, application, for—Order in Council, January 10th, 1910. Rule 2 (b)—Question of general and public importance—Supreme Court Ordinance, 1915—Interpretation of the word "Court"

Application by the respondents (defendants in the trial court) for leave to appeal to the Privy Council from the judgment of the Court of Appeal (see above p. 153) which reversed the decision of Sir Charles Major, C.J., dismissing the claim, and gave judgment for the appellants, Smith Brothers & Co., Ltd., for the sum of $1,860 and costs.

Held that no grave question of law or of great general or public importance was raised and that the application must therefore be dismissed;

Held further that, under the provisions of the Supreme Court Ordinance, 1915, the Appeal Court is the Full Court as therein mentioned.

Petition by the Demerara Railway Company for leave to appeal to His Majesty-in-Council from a judgment of the Court of Appeal which reversed the judgment of the Chief Justice in the trial court and awarded the sum of $1,860 to the plaintiffs, Smith Brothers & Co., Ltd., as damages.

G. J. de Freitas, K.C., for the petitioners.

H. H. Laurence, for the respondents, Smith Brothers and Co., Ltd.

The judgment of the court was delivered by Berkeley, J.

BERKELEY, J.: This petition is for leave to appeal to His Majesty-in-Council from a judgment of the Appeal Court which reversed the judgment of the Chief Justice and awarded $1,860 as damages to the plaintiffs.

Counsel on both sides in view of the recent legislation raise the question as to the power of the Appeal Court to hear this petition, pointing out that by the Order in Council of 10th January, 1910, the word "Court" means the Full Court of the Supreme Court of this colony.

"The Supreme Court Ordinance, 1893," is repealed by section 58 of "the Supreme Court Ordinance, 1915," which provides *inter alia* that wherever in any ordinance or rules "an appeal from a single judge is referred to, the Full Court shall be taken to mean the Full or Appeal Court as constituted hereunder." The same ordinance further provides that the Full Court is "hereinafter called the Appeal Court" (s. 28), and that an appeal shall lie thereto from the judgment of a single judge (s. 29 (1)) and "sub-

ject to such restrictions . . . . . prescribed by His Masjesty-in-Council" an appeal shall lie to His Majesty-in-Council from any judgment of the Appeal Court (s. 30). The Appeal Court is therefore the Full Court of this colony, but apart from this the Colonial Appeal rules contemplate that application for leave to appeal to His Majesty-in-Council should be made to the court from whose judgment it is desired to appeal.

The present application is made under rule 2 (b) which gives this court a discretion as to granting leave if in its opinion the question involved is one by reason of its great general or public importance or otherwise ought to be submitted for decision. This court will be guided in interpreting this sub-section by the decisions of the Privy Council in granting special leave to appeal.

The reasons urged in support of this petition are—

(1) that the defendant company is the only concern of its kind in the colony, and as its railway line runs through valuable coconut districts there is a question of general importance involved which affects not only the public but the company itself in resisting similar claims;

(2) that the court has conceived an erroneous impression as to the law as laid down in Smith v. London and South Western Railway Company, which case would not be regarded as good law at the present day; and

(3) that the court ought not to interfere with the finding of facts by a single judge.

This last reason is in conflict with O. XLIII. r. 24 which is in effect O. LVIII. r. 4 of the English Rules of 1883, and as shown by the judgment there are other circumstances quite apart from the manner and demeanour of witnesses which not only warranted but forced the court to draw inferences of fact different from those arrived at by the trial judge.

Admitting for the sake of argument that there is anything in reason (2), both this reason and reason (1) raise in the opinion of the court no grave question of law or of general public interest or importance. The decision can have no after consequences. The sole point in the case is whether or not the fire originated on or near to the defendants' railway line under the circumstances as found. The finding as to this tact affects only the parties to the action, and after reference to the cases available referred to in Bentwich's "Privy Council Practice" p. 209 this court can find nothing which, in its opinion, warrants the granting of the prayer of this petition.

The petition is dismissed.

ORIGINAL CIVIL JURISDICTION

14TH DEC., 1915.

NEWARK

v.

HIGGINS, AND THE CHAIRMAN, LOCAL AUTHORITY OF ABERDEEN COUNTRY DISTRICT.

Sale at execution, application to set aside—Property levied on whilst a portion thereof in custodia regis under prior levy—First levy withdrawn—Second levy followed by judicial sale without opposition—Effect of failure to oppose—Legality of levy—Restitutio in integrum.

B. in pursuance of a judgment against the heirs of G. levies on their interest in the back-lands of Pln. Aberdeen. H. enters an opposition thereto. Whilst the suit in B.'s levy is pending the Aberdeen Local Authority levies on part of the back-lands of Pln. Aberdeen including the portion already levied on by B. for rates. On June 18th H. withdraws his opposition to B.'s levy and on June 21st the property levied on by the Local Authority is sold at execution, H. being the purchaser. No opposition was entered by N. to the sale at the instance of the Local Authority and he was present at the sale.

On an application by N. to set aside the sale at execution on the ground of irregularity and illegality;

Held that N. having failed to oppose the sale, though he had full knowledge thereof, was not entitled to any relief.

Obiter, that a levy of property already *in custodia regis* under a prior levy is not necessarily irregular.

Claim for an order setting aside the sale at execution of

(1) the East half of the South half of the West two-thirds of the back-lands of Pln. Aberdeen, and

(2) the North half of the West two-thirds of the back-lands of Pln. Aberdeen Country District, which took place at the Law Courts, Georgetown, on June 21st, 1915, at the instance of the second named defendant against the proprietors of the said lands, and for an order declaring the said sale to be null, void and of no effect on the grounds that the execution was irregular and illegal.

J. A. Luckhoo, for the plaintiff.

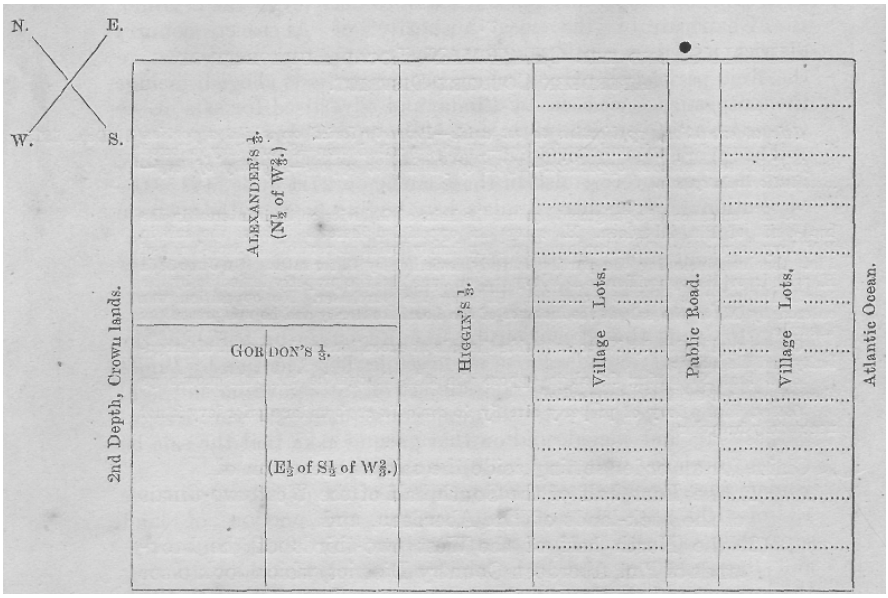
A second levy cannot be made on a property when a prior levy is still in existence; Rules of Court, O. XXXVI. r. 42.

F. Dargan, for the defendant Higgins.

Plaintiff having been present at the sale at the instance of the Local Authority is estopped from making any claim to set it aside; cites Cairncross v. Lorimer 3 L.T., N.S., 130; Maling v. Hargreaves 25 S.C., 123; Beckett & Co. v. Gundelfinger, S.A., Rep. 1897, Off. Rep. (S.A.R.) 77; Compania Naviera Vasconzada v. Churchill & Sim, 1906, 1 K.B., 237; and Jamieson v. Kettles 3 E.D.C. 183.

The second defendant was in default of appearance.

A plan, as follows, of the property in dispute was put in by the plaintiff, by consent.



HILL, J.: Plaintiffs claim is for an order setting aside the sale at execution of—

(1) the E½ of S½ of W⅔ of the back-lands of Plantation Aberdeen, and

(2) the N½ of the W⅔ of the back-lands of Plantation Aberdeen country district—which sale took place at the instance of the second defendant for rates, on the ground of illegality, irregularity, and otherwise with leave to intervene.

No appearance has been entered by the second defendant.

Plaintiff says he is one of the owners of the property sold. That on 22nd April, 1911, one Binda got judgment against the heirs of Mark Gordon, deceased, and instructed the Registrar to levy and sell:—

Firstly, one undivided twelfth share in and to the North West ⅓ of the back-lands in the country district of Aberdeen.

Secondly, one-twelfth undivided share in and to the S.W. one-third of the back-lands in the country district of Aberdeen, These properties were advertised for sale on 7th, 14th, and 21st November, 1914.

On the 21st November, 1914, Higgins entered an opposition to the sale at execution of these properties, and, on or about 15th April, 1915, while the suit *in re* Binda's levy, was pending, the Chairman of the local authority of Aberdeen country district issued execution against the proprietors mentioned in the first paragraph hereof, which properties, it is alleged, include the properties levied on by Binda, and advertised for sale in the *Official Gazette* on 5th, 12th, and 19th June, 1915.

The properties mentioned were sold at execution to Higgins, who had an interest also in these lands, on 21st June, 1915, the opposition suit against Binda's levy having been withdrawn on 18th June, 1915.

It is contended by the plaintiff that it is not competent for the Registrar to levy on the properties he did—

(a) that the Pln. Aberdeen is undivided property.

(b) that the execution by the Registrar on behalf of the second defendant was made while the execution by Binda was opposed, and the subject of an opposition suit, and that the said execution and consequent sale were irregular and illegal, and on that ground asks that the sale be declared null, void, and of no effect.

Under the interpretation of terms Section (2) to Ordinance 13 of 1907, a "lot of land" means any portion of land separately assessed for taxation by any local authority, and the secretary of the Local Government Board swears that the lots of land as mentioned in the execution of 21st June, 1915, were so assessed under the authority of the Local Government Ordinance of 1907. It was therefore competent for the country authority of Aberdeen to proceed for the recovery of rates in the way they did. At the time, however, of execution there was a levy at the instance of Binda on what is alleged to have been a portion of the property levied on for the rates. At the time of sale, however, Binda's levy had been withdrawn (18th June, 1915).

Newark, the present plaintiff (the defendant in Binda's levy) was present at the sale on 21st June—he made no protest, he offered no opposition, although he had ample time between the date of the withdrawal of Binda's levy and the date of the execution sale on 21st June, 1915, to have taken action. He stood by, and allowed the property in which he had an interest to be sold for rates. Two co-owners, Newark (plaintiff) and Higgins (defendant) were present at the sale at execution. The one stands by, the other purchases. It would have been lawful for either one or the other to pay the rates and to claim contribution from the other, but to do so was not obligatory. Higgins preferred to purchase, pay, obtain his certificate, and apply for

letters of decree. Then Newark steps in and asks for an order setting the sale aside. He has had two opportunities of avoiding or attempting to avoid the sale, firstly, by opposing, secondly, by paying the rates, neither of which he follows. Furthermore, the execution by Binda was against, it is admitted, a portion of the land levied on for country authority rates. It appears, however, that Binda's levy was agreed to, and acquiesced in by Newark and other co-proprietors as there is an agreement in evidence to the effect that the Newarks agreed not to oppose the sale at execution by Binda but to allow him to purchase, subject to his transporting the property to them on payment of $768 to him, the amount of their indebtedness. It is difficult to see how in the face of this Newark could have sworn, as he did, that he would have opposed Binda's levy.

Roman Law, says Nathan, only permitted restitution where a special law provided that certain circumstances should furnish a just ground for obtaining relief. But Roman-Dutch law conferred a wider and more equitable jurisdiction—"Where a person's goods have been seized by the sheriff, and sold in execution under the mistaken belief that they belong to some one else, and the true owner, whether on account of absence, or some other just cause, has raised no objection to the execution sale, he may afterwards claim relief, and have the sale set aside." But in cases of restitution, there must always be shown to have been ignorance, and a just cause of such ignorance—entirely absent in the present case.

See also Lange and others v. Liesching and others (Foord's Reports (1880)) 55 at p. 60. Voet 6.1.13. and South African Association v. Van Staden 9. S.C. 95.

It has been held for well over a century in this colony that letters of decree follow automatically the evidence of sale and purchase, and payment of purchase money, where no opposition has been entered, but the judges have held that there are exceptions to the general rule that no right of action exists if no opposition has been entered, or where there has been fraud or irregularity the court would not hold itself bound by the conditions of sale. The exceptions are enumerated in Matthaeus Book 1. Chap. 6. par. 20 and 21, and in Bruge (II.) p. 580 *et seq.* The present plaintiff does not come within the exceptions therein, and should have entered opposition

Nor can I conclude the levy by the country authority is bad. It was, without question, perfectly good as against that portion not included in Binda's levy, and when the court takes into consideration the attitude of the plaintiff, his agreement with Binda, the withdrawal of Binda's levy on 18th June, which left the second levy standing, the absence of opposition on the part

of plaintiff, it certainly feels no inclination to grant him any relief, even if entitled thereto in strict law.

Nor can I subscribe entirely to the suggestion that land levied on and *in custodia regis,* cannot be levied on under a second execution at suit by another person. On the contrary, Order XXXVI rule 32 of the Rules of Court would seem to contemplate that it is possible. For by this order, the marshal is empowered, after taking movables, forthwith to levy on the immovable property of the judgment debtor, to the extent in value of such part of the judgment creditor's claim as will, in the marshal's opinion, remain unsatisfied after the sale of the movable property levied on. Surely this negatives the suggestion that immovable property *in custodia regis* for a portion of the judgment debtor's debt, is to be exempt altogether from any other levy, so long as it is in custody for this portion?

After consideration of the whole circumstances of this case, the court is of opinion that the plaintiff is not entitled to the relief he seeks, and gives judgment for the defendant with costs.

ORIGINAL CIVIL JURISDICTION.

18TH DEC., 1915

In re THE DEMERARA TURF CLUB, LTD. (In liquidation.)
BRITISH GUIANA MUTUAL FIRE INSURANCE CO., LTD.
v.
THE DEMERARA TURF CLUB, LTD.

Company—Petition by mortgagee, after winding-up order, for leave to commence proceedings for realization of mortgage security—Companies Consolidation Ordinance, 1913, sec. 133.

Generally speaking, leave will be granted as a matter of course to a mortgagee to commence proceedings against a company in compulsory liquidation for realisation of the mortgage security.

This principle is not altered nor restricted by the fact that, by the law of the colony, (a) a mortgagee has no estate in the mortgaged property, and (b) his remedy, therefore, is not a suit for foreclosure, but an action for the sum of money due under the mortgage and a declaration that the mortgaged property is liable to be taken in execution and sold.

Petition by the British Guiana Mutual Fire Insurance Company, Limited, for leave to institute proceedings against the Demerara Turf Club, Limited, (in liquidation) to "foreclose" a mortgage for the sum of $20,000 and interest on a racecourse and premises known as Belair Park.

Notice of the petition was served on the liquidator, who did not oppose the application.

The further necessary facts appear from the judgment.

J. S. McArthur, for the applicants.

P. N. Browne, for the liquidator.

H. H. Laurence, for P. C. Wight, alleging an interest which entitled him to be admitted to oppose the application.

SIR CHARLES MAJOR, C.J.: This is a petition by the abovenamed Insurance Company for leave to commence proceedings against the abovenamed Demerara Turf Club, Limited, a company under compulsory liquidation, to recover payment of a mortgage debt the payment of which is secured by an instrument of mortgage of the property of the respondents called Bel Air Park. Notice of the application for leave to proceed was served on the liquidator and the liquidator only. This was right, for leave to proceed against a company in liquidation by order of court cannot be given on an *ex parte* application. The liquidator appeared at the hearing of the petition on the 13th of November by counsel to admit the default of the mortgagors and the mortgagees' right to apply to the court for leave to "foreclose the mortgage." This was in effect to do away with the necessity for an order, which would have been made as of course, for a report by the liquidator on the petition and, therefore, for that report itself. The subsequent embodiment of the admission in a report filed on the 19th of November without any order for the same was unnecessary and no costs of that report can be allowed to the liquidator in any event.

2. But at this stage, when counsel for the respondents had asked for leave to proceed and the liquidator by his counsel submitted to an order in that behalf, counsel for Percy Claude Wight was permitted to intervene to state reasons why he should be allowed to oppose the grant of the prayer of the petition, on grounds asserted to be sufficient to shew that he was a person whose interests were involved in the subject matter of the petition, or, at any rate, a person whose report it was necessary or desirable to procure. The statement by counsel for Mr. Wight seemed to me to contain some ground to shew the desirability of procuring his report on the petition. That report has been filed and Mr. Wight desired to be heard on the petition. There has been no counter report by the liquidator.

3. Mr. Wight states, as ground for urging that leave should not be given to the applicants to proceed against the respondents for recovery of the mortgage debt, that, while the mortgagors are the legal owners of the property charged with the payment of their debt, the liquidator, in December, 1914, put up the same sale at auction when Wight was the highest bidder; that the liquidator refused to transfer the property to Wight; and that, having been brought by Wight to compel the transfer in

which the plaintiff was unsuccessful, he has appealed from the judgment therein and has still to be heard thereon. This is to base his *locus standi* in this application, firstly, on a contingent success in the forthcoming appeal, and secondly, on the contention that that contingency affords good ground why the prayer of the applicant should not be granted.

4. On the adjourned hearing of the petition, therefore, I expected to hear arguments on the above bases and those only, for the expression in his report of desire on the part of a respondent to be heard on a petition does not, I think, entitle him to travel beyond the grounds of opposition set forth in that report. Be that, however, as it may, no argument was addressed to me on the grounds of opposition advanced in the report, but counsel for Mr. Wight, without any objection on the part of the applicants or the respondent liquidator, gave the court an interesting exposition of the law governing generally the relation of mortgagor and mortgagee in this colony and the rights of the latter in connection with his security for, and recovery of payment of, the mortgage debt, as contrasted with those of a mortgagee in England, and particularly affecting proceedings to enforce those rights against a company in liquidation.

By the law of this colony a mortgagee has a right, upon failure of his debtor to observe and perform any of the covenants, stipulations and conditions contained in the instrument of mortgage, to take proceedings against the debtor to enforce the security given for his so doing. The proceedings take the form of an action for ascertainment (where that is necessary) of the amount of the debt and for a decree that the mortgaged property be declared liable to be taken in execution and sold to satisfy the same. The mortgagors in this case were, on and after the 26th day of June in each of the years 1912, 1913, and 1914, in default of payment of the sum of $4,000. On the 25th June last past a further instalment of that amount was payable and remained unpaid, but on the 24th September, 1914, an order was made for the winding up of the mortgagors' company by the court. On the 25th December, 1914, and the 25th June last interest on the principal debt, amounting, on each of those dates, to $1,200, became payable and has not been paid. The mortgagees, therefore, have been since the 26th June, 1912, and are to-day entitled to exercise their right Of action against the mortgagors to enforce the security, subject only to this qualification, that, by reason of the liquidation proceedings having supervened, they must obtain the sanction of this court in that behalf, for by section 133 of the Companies' Ordinance, 1913, "when a winding up has been made. . . no proceeding shall be. . . commenced against a company except by leave of the court, and subject to such terms as the court may impose."

6. It is in these circumstances that the present application has been made. The mortgagees ask for leave to institute proceedings against the respondents to "foreclose" the mortgage bond "in respect of the said premises." The term "foreclose" is inaccurate and misleading. It is inaccurate because it is a term applicable to a mortgagor and his equitable interest in the mortgaged property, not to a mortgagee and his instrument of mortgage. It is misleading because it implies the remedy of a mortgagee to obtain that equitable interest to be vested in him, a remedy which itself has no reference to sale of the mortgaged property. In this colony the remedy under an instrument of mortgage is sale, and not the mortgagee's acquisition, by means of a decree for foreclosure, of his mortgagor's interest in the mortgaged property without sale. Here that interest (which is the ownership) can only be obtained by purchase at sale, unless, of course, the mortgagors convey the property to the mortgagees in consideration of the existing debt, or any greater or less sum agreed by the parties.

7. Regarding the position of a secured creditor—and the applicants are secured creditors of the company in liquidation— he may take such proceedings, with the leave of the court, as he could have taken before the winding-up order was made and the sole question to be determined is, should that leave be granted here? Mr. Palmer, in his treatise on Company law, puts the matter tersely and highly. "The power of the court [he writes] to allow actions and other proceedings to be brought, taken, or proceeded with, notwithstanding a winding-up order, is often exercised. Thus, secured creditors are, as a matter of course, given leave to proceed with any action for enforcing their security." And the writer refers to *Lloyd's* case (6 Ch. A.C. 344) so fully discussed in the argument to which I have listened in this case, as an authority for that proposition.

8. Although, therefore, many of the authorities cited during the argument for granting leave to a mortgagee to proceed (as, for instance, the judgment of Lord Justice James in *Lloyd's* case) were dealing with mortgagees who, in England, have the legal estate in the mortgaged property instead of, as in this colony, a right to resort to the property for realization of the debt, I am unable to see that that difference in the legal position alters or restricts the principle that leave should be granted, according to Mr. Palmer, as a matter of course. And that difference is the only ground of opposition advanced.

9. The claim of the mortgagees is not subject to any rights of creditors; no relief is asked against the company beyond what the law allows, or which is inconsistent with the winding up. Whether in England or in this colony, the test to be applied is, not the incidents of the mortgagor's or mortgagee's legal interests

in the property, but the realization of the security, whatever may be the particular remedy to be adopted therefor. The mortgagees hold an instrument whereunder the mortgagors specially bind and oblige their property Bel Air and, furthermore, agree that the mortgagees shall, in case of default, have the right of "foreclosing the said mortgage"—[that is of enforcing the security for the performance of the terms in respect of which default has been made] and of bringing the property thereunder mortgaged to sale at execution.

10. In the *Longdendale Cotton Spinning Company's* case (8 CD. 150) a preference debenture holder commenced proceedings against a company in voluntary liquidation for a declaration that the debentures contributed a first charge on the property of the company—the mortgagees need no declaration of charge here, they have it already—and to have the charge enforced by foreclosure or sale. The liquidator had admitted that the debentures constituted a first charge and had expressed to the holders his willingness to sell the property for the purpose of discharging the debenture debt. Here the mortgagees have an instrument acknowledging the debt and charging the property of the company with repayment in the event of default. That is, at least, as good a security as debentures. The liquidator admits the debt and the default, but he makes no offer of any kind to the mortgagees, he suggests no question of the mortgagor's liability, he consents to an order. Something has been said, not, however, by the liquidator, about the possibility or probability of sale by the liquidator being more advantageous (that is for the general body of creditors) than sale at execution. In the *Longdendale Company's* case, on an application to stay the debenture holder's action on a question of jurisdiction of the court over the property, Jessel, M.R., after deciding for jurisdiction, said : "The third objection is that the mortgagors are themselves desirous of selling the property, and that, if the mortgagee sells the property in the action, the probability is that nothing will be left for the general creditors; whereas, if the mortgagors sell it, the result may be better for all parties. The answer to that is, the mortgagors had better redeem. If the mortgagee wishes to sell he has the right to sell and to prevent him from selling would be an interference with his rights and I see no equity in the mortgagors which should deprive him of those rights. Then the only other point is whether the winding up makes any difference or confers any new rights. The mere fact that a winding up order has been made makes no difference and does not confer on the company the right of preventing a mortgagee from realizing his security; and for that proposition I have the authority of the Court of Appeal in *In re David Lloyd & Co.*"

11. The only other point for consideration is whether I shall, in the exercise of the discretion given to the court by the section mentioned, impose any terms or conditions upon the applicants. First, I find them, after a lapse of three years and a half since the first default of the mortgagors, only now moving to enforce their security. There is no allegation or suggestion of waste or jeopardy of the mortgaged property. In fact, save as regards, perhaps, the party who has been admitted to oppose the petition, there appears to be the utmost amity and mutual accommodation prevailing in this leisurely liquidation between company, creditors, and contributories alike. The mortgagees shall have relief very much like that granted to mortgagees in a foreclosure suit properly so called. The order I make is that the mortgagees be at liberty to commence proceedings against the company to enforce their security for the payment of the mortgage debt in the petition mentioned and to prosecute the same to final judgment, but that no step in the proceedings subsequent thereto be taken until the expiration of six months from the date of the decree. The costs of the parties to this application must in each case be paid by themselves.

ORDINARY CIVIL JURISDICTION.

21ST DEC., 1915.

BHUDIN SINGH

v.

RAMCHARAN AND PATIA.

Contract for sale of infants' immovable property by testamentary guardian-Specific performance—Approval of contract by court at the trial—Supreme Court Ordinance, 1915, sec. 33—Extent of remedies.

Under the provisions of the thirty-third section of the Supreme Court Ordinance, 1915, the Court, in a suit by the purchaser for specific performance of a contract by a testamentary guardian for the sale of infants' immovable property which has not received the sanction of a judge, will determine the question whether that sanction should be given or withheld.

Action for specific performance of a certain verbal agreement alleged to have been made on December 19th, 1913, whereby the defendants contracted to sell and transport to plaintiff a piece of land, portion of Plantation De Ridder's Faith, for the sum of $460, part of which sum amounting to $120.50 was alleged to have been already paid. In the alternative plaintiff claimed the return of the sum of $120.50 and $500 as damages.

Defendants pleaded that Ramcharan was a minor at the time of the alleged agreement and no contract of sale if made was binding

on him; that Patia had no interest in the property alleged to have been sold which had been left to her three minor children, and that no such sale by Patia had been allowed or sanctioned by the court.

J. S. McArthur, for the plaintiffs.

H. C. Humphrys, for the defendants.

SIR CHARLES MAJOR, C.J.: This suit, which is for specific performance and in the alternative for damages, resolves itself into the questions—(a) did Ramcharan make the contract? (b) as Patia's contract requires the sanction of the court, can that sanction be given in this suit, and if it can, should it be given? (c) on the question of damages, what has the plaintiff paid on account of the purchase money and to whom was the payment made?

2. (a) I am of opinion that Ramcharan did not make or join in the contract. First, he was not made a party to the petition to the court for leave to sell the infants' property for the purpose of consenting to the sale of the entire interest, a consent which, the interests being undivided, was necessary; and, although that petition contained an allegation that he was willing to sell and to accept a certain sum for his interest, he was not even represented before the court on that petition, and there is no evidence given to show that Patia's allegation of his willingness to sell was ever brought to his knowledge. Second, he actually petitioned himself against the attempted sale. Third, he never joined in the receipts given, first for $10 and second for $100 said to have been paid on account of the purchase money. Fourth, his privity to the contract rests merely on his presence on two or three occasions when steps were being taken in connection with the agreement to sell by Patia and that presence is not inconsistent with his sworn unwillingness at all times to sell his interest. Fifth, even if the plaintiff's statement that Ramcharan made an offer to him originally could be believed, that fact itself could not prevail against the subsequent intention and determination of Ramcharan, as shown by his acts and statements before the contract was complete amounting to a withdrawal of the offer. But I do not believe the statement of the plaintiff; it is too strongly disproved by subsequent events.

3. (*b*) I think that a contract which the parties know, when they enter into it, cannot be carried out without the sanction of the court as in this case, gives no right of action for performance until that sanction has been obtained, nor, if the sanction be refused, any claim for damages for non-performance thereof consequent on the refusal. I am asked to give the court's sanction now, and the provisions of the

seventh paragraph of the twenty-fourth section of the Judicature Act, 1873, as reproduced in the thirty-third section of the Supreme Court Ordinance, 1915, are invoked to support the request. Those provisions seems to me to be subject to the condition that all material facts to support the particular kind of relief sought shall be pleaded. Here there is not only no plea of the kind but an express denial by the plaintiff in his reply that any sanction of the court is necessary to enable Patia to sell the infants' interests, although in the same breath he pleads that the petition to this court "to grant leave to her (Patia) to sell the minors' interest in the said property" was presented but withdrawn to defraud the plaintiff, and now asks that that sanction be given.

Assuming the difficulties—if so they be—I have just mentioned to be out of the way, I am of opinion firstly, that I can, in this suit, determine the question whether the court's sanction of the contract should be given or withheld and, secondly, that in the interests of the infants, it ought not to be sanctioned. The property is their home; they are not in needy circumstances—one of them, Rampersad, has money of his own; the estate of the infants' devisor is solvent. I have seen the infants in court; they are well doing, they are not necessitous at all. Rampersad, a bright intelligent lad, has given evidence and repeated his unwillingness for himself and his co-infants to have their interest sold. The allegation in the petition of Patia, an old woman and, apparently, a foolish old woman, that the three infant children "are in great need of the necessaries of life" is untrue; it is one of those allegations in petitions of parents, or persons standing *in loco parentis,* made to support an attempt to make havoc of infants' interests in real property with which I am continually confronted.

4. There remains the question of damages. The plaintiff on the above findings is entitled to be put in the same position as he was before the negotiations for sale and purchase commenced, that is to say, to the return of moneys paid by him in respect of the abortive transaction. The claim for $500 over and above those moneys is fantastic. There are two sums of $10 each paid respectively on the 19th day of December, 1913, and the 28th day of January, 1914. These must be returned. In respect of the $100, the evidence adduced in support of its payment can only be regarded with the greatest suspicion. There is the flimsy explanation for deserting the practitioner who had hitherto transacted Patia's business in connection with the proposed sale and, in fact, prepared the receipt for the first payment on account, and going to the office of another, for the preparation of the second receipt, where no practitioner was, in fact, employed, nor even, as far as the evidence goes, a practitioner's clerk, but a man called Woolford, who, it is

said, has left the colony. There is the signature of the receipt by mark only and the attestation of the mark by the same Woolford and two others, one of whom is dead and the other unable to identify Patia, the markswoman. There is the fact that, while alleging himself to have been in possession of that receipt when charged before a magistrate with trespass on the land in dispute, the plaintiff never mentioned nor produced it, but only produced that for the $10, both sums having been paid on precisely the same account. There is the letter written by Patia's legal adviser to the plaintiff on the 16th February, offering to return the $10 and no claim made by the plaintiff in answer thereto for return of the $100 as well until that sum appears on the writ of summons on the 27th April thereafter. All these things are against the plaintiff and they are followed by the denial, *quantum valeat,* of Patia that she ever received the $100; they are too strong for me to say, notwithstanding, that the plaintiff has satisfactorily proved its payment.

5. The order of the court will be that judgment be entered for the plaintiff against Patia for the return of $20 and the general costs of the action, and for the defendant Ramcharan against the plaintiff for his costs of suit.

ORDINARY CIVIL JURISDICTION.

22ND DEC., 1915.

PAYNE

v.

TOWN CLERK OF GEORGETOWN.

Town Taxes—Parate execution—Wrongful levy after payment of taxes—Negligence—Georgetown Town Council Ordinance 1898, s. 207—Protection of Council's officers—Justices Protection Ordinance 1850, s. 2.

The Town Clerk, Georgetown, and other officers of the Council are entitled to the benefits of the provisions of the Justices Protection Ordinance, 1850, and in any action brought against him or them for any act done in the execution of his or their duty as such, it shall be expressly alleged and proved that such act was done maliciously and without reasonable and probable cause.

Claim by plaintiff for the sum of $250 as damages for the alleged negligent acts of the Mayor and Town Council of Georgetown in allowing on April 26th, 1915, her property, the west half of lot 56, Hadfield Street, Georgetown, to be levied upon and sold for town taxes for 1914, after payment by plaintiff of the taxes due for that year.

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

E. A. W. Sampson, Solicitor, for the defendant.

BERKELEY, J.: This action is brought to recover the sum of $250 as damages for the negligent and other wrongful acts of the defendant whereby the west half lot 56, Hadfield Street, Wortmanville district, Georgetown, with the buildings and erections thereon, the property of the plaintiff, was sold at execution on April 26th, 1915.

As had happened in previous years, the plaintiff's property was levied on in respect of the taxes due for 1914, and was advertised along with some 17 others for sale on Monday, April 26th, 1915. On Friday, April 23rd, Joseph Pereira in behalf of plaintiff sent his clerk Pestana to the Marshal's office to enquire the total amount due under the writ. This he was informed was $13.45. Pereira then gave a cheque for this amount to Pestana which was taken by him to defendant's office, and handed to Pacheco, a clerk, with the remark "it is to pay Mrs. Payne's taxes." Pacheco referred to a book and said it was fifteen cents short. This fifteen cents Pestana obtained from Pereira who thought that the marshal had made a mistake, and it was handed on the same day together with the cheque to Pacheco who gave receipts for $13.60. It was only discovered by plaintiff after the sale of her property that the receipts were in respect of the taxes for 1915. As a result she has lost her property.

According to the marshal, enquiries are constantly made as to the amounts due, and when these are paid the defendant (the Town Clerk) recalls the act of levy, sending a slip either by a clerk from his office or by the debtor himself.

On April 26th no less than 18 properties were advertised to be sold for taxes, and the acts of levy were withdrawn in every case except that of the plaintiff.

The defendant calls no witnesses, and it is submitted that in the absence of directions it was open to defendant to apply the money received in payment of the taxes for the year 1915, and that plaintiff by looking at her receipts would have discovered that a mistake had been made. This is so, but on the other hand a reference to the books for 1914 would have shown the defendant that these taxes were unpaid, and the amount first tendered was the correct amount for that year. In any case, he was asked by the plaintiff's agent whether he should go back to the marshal and was told "No, it is all right." Now a reference to the marshal should at once have suggested to defendant that a levy had been made which could only have been in respect of the taxes for 1914.

On the facts I am of opinion that the plaintiff has suffered a great hardship at the hands of defendant by the act of his clerk in applying the payment as he has done, which with the exercise of a little care he would have avoided, but under section 207 of

Ordinance No. 25 of 1898 the benefit and protection of the provisions of the Justices Protection Ordinance, 1850, is extended to the members of the Town Council, their officers and servants. Under this latter ordinance it is provided that there shall be expressly alleged in the claim that the act complained of has been done maliciously and without reasonable and probable cause (s. 2). No such allegation appears in the present case.

The plaintiff is non-suited—that is, this decision shall not have the effect of a judgment upon the merits. Defendant is entitled to his costs.

DE FREITAS

v.

CONSOLIDATED RUBBER AND BALATA ESTATES, LIMITED.

Landlord and tenant—Notice by tenant to quit—Holding over—Tacit re-location—Compensation for use and occupation.

MAJOR, C.J.: I concur in the judgment of nay brother Dalton which I have had an opportunity of reading and have nothing to add.

BERKELEY, J.: I also concur and have nothing to add to what I said in the Court below.

DALTON, J. (Acting): Plaintiff (now respondent) in the Magistrate's Court claims from defendants (now appellants) the sum of $40, being one month's rent for a dwelling house at Lot 162, Lamaha Street, Georgetown, under the following circumstances. According to the facts admitted at the original hearing, defendants rented from plaintiff the dwelling house in question as a residence for their general Manager, on a monthly tenancy. On December 30th they gave plaintiff one month's notice of their intention to terminate the said tenancy on January 31st, 1914. They did not however vacate the premises on that day, but continued in occupation into February, and on February 18th notified the plaintiff that for certain reasons set out they had been unable to vacate before February 6th. On February 18th, however, defendants still had the keys of the premises and in the letter in question they asked the landlord to whom he wished them to be handed. The landlord on these facts claimed to be entitled to rent for the month of February, on the grounds that there had been a tacit re-location of the premises. The Magistrate found that plaintiff was not so entitled. His judgment was reversed on appeal, and defendants now appeal from the decision of Berkeley, J., to the Full Court.

Numerous cases and authorities have been cited by both sides and I propose to consider them in detail. The particular interests at stake in this case are small, but the matter has never definitely been decided in this colony before, and is one of interest to all householders.

Reference to Voet (XIX. 2, 9 and 10) shows that there the subject of the tacit renewal of leases is fully dealt with. "It should be observed," he states, "that not only express but also tacit leases are approved by the law; wherefore if on the completion of the term fixed for the hiring the lessee does not restore the subject but perseveres in its use, without objection by the lessor the lease is considered to be continued or renewed." He proceeds to state that every tenant who holds over at the expiry

of the original contract is considered to have renewed his tenancy upon so *far as may be* (and stress must be laid upon those words) the same terms as the original hiring. According to him the time during which a tacit renewal continues, varies according to circumstances. In the case of urban tenements, according to Roman law, the tenant was liable for rent for the time he inhabited the house, but in Holland a gradual change seems to have been effected resulting both from direct enactments and custom. As a consequence of this change the leasing of houses in Voet's time was continued by the silence of both parties "till the next term for flitting." With this Grotius agrees (III. 19. 6, and See Van Leenwen, Vol. 11. p. 172.). Van der Keesel, (Thes. 671) however differs, though he bases his opinion merely on a custom which he states is contrary to that to which Voet refers. Different customs existed in the different states doubtless causing much uncertainty as to the law. Its application, however, in modern times by modern writers and in present day courts will solve the difficulties for us here.

Maasdorp (Institutes, Vol. 111. p. 202) follows what has been laid down by Voet as already quoted, both as regards the effect of holding over, and the recognition of local custom. Nathan also in his "Common Law of South Africa" (Vol. 11. p. 791) takes the same view, both these writers quoting the case of Victor *v.* Courlois (2. Menzies 165), as supporting their contention. In Ceylon the question appears never to have arisen in this form, Pereira in his "Laws of Ceylon" (at p. 677) merely referring to what Van der Keesel and Grotius say on the subject.

The general custom in force in this Colony with regard to the letting of house properties is that a verbal agreement for a monthly tenancy at a fixed rent per month is entered into between the parties. The existence of this custom is admitted by both sides. The tacit continuance of this occupation is based upon an implied contract of tenancy to be gathered from the actions of the parties, a state of affairs which is shortly described as "relocatio." Whether there is this implied contract of tenancy can however only be gathered from the circumstances of each particular case. If a lessee holds over after the expiration of his lease without anything being said on either side there will be presumed, as was laid down in the case of Rodrigues *v.* Joaquim (A.J. 24.3.1908) to be a tacit relocation. Tacit relocation will be presumed where both parties adopt and continue the position which the termination of the lease found them in; in other words, that the lessor is content that the lessee should remain and the lessee is content to remain (Bowhay *v.* Ward, 1903 T.S. 772). This relocation, however, depends just as much upon the consent

of the landlord as inferred from his conduct, as it does upon the conduct of the tenant (Parkin *v.* Lippert 12. S.C. at p. 188) and hence there can be no danger as was suggested by counsel for the appellants, that the tenant could never be ejected from premises he occupied. A tenant who wrongfully holds over is liable to the lessor in damages. As was clearly set out in the local case quoted above, the conduct of the parties clearly showed that there was there no tacit relocation, the evidence clearly contradicting the existence of any contract of tenancy between them.

Another local case, that of Humphrey *v.* Kaps (A.J. 28.10.1905) has been much quoted, though it does not really deal with the question which is now before this Court. In the course of his decision in that case, however, the learned Judge (Bovell, C.J.) threw some doubt upon the case of Victor *v.* Courlois, referred to above, and which has been subsequently followed in the South African Courts. It is not necessary to say more of the case of Humphrey *v.* Kaps than this, namely, that the point at issue there is clearly distinguishable from the point now at issue, the former being an action for compensation for use and occupation. This remark also applies to the case of Trustees of the Wesleyan Church *v.* Eayrs (19. S.C. 111.) which has been referred to, though it clearly sets out what will be considered to be the measure of damages in an action for wrongful holding over.

In the case of Victor *v.* Courlois (*ubi sup.*), the Court decided 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 is to renew the lease from month to month and each time for the term of a month only. This decision was followed in the case of Japtha *v.* Mills, Executors (1910 E.D.L. 150, and S.A.L.J. Vol. XXVII. p. 452) where the facts were very much the same. The case of Gau *v.* Stokes (1903. T.H. 158) does not in any way seem to be contrary to these cases, as the appellant urges. All that Wessels, J., there decided was that the leaving of goods upon premises occupied as a shop after the expiration of a lease and in abnormal times was not of itself sufficient to constitute a tacit relocation.

What then do the facts here show? In December, 1912, the tenant gives notice that he will terminate his tenancy on January 31st next. He does not so terminate it but continues in occupation after that date, doing nothing to notify the landlord of his action. If he had on February 1st or as early as was possible after that date notified the landlord that he was forced owing to certain circumstances to occupy the house for a few days longer there could then have been no tacit relocation, though he would of course be liable to pay compensation for use and occupation. But he does nothing save to continue in occupation. Such action

on his part and the absence of any action on the part of the landlord (whence his consent is presumed) fully, constitute in my opinion a further implied tenancy of the premises. It was not until February 18th when more than half the month had gone that the tenant explained by letter what he states was his position. He cannot by such a letter at such a late date change his legal position, a position which his previous conduct and action had already settled and confirmed. Applying the law as set out in the authorities and as laid down in the cases above referred to, to the facts in this case, and having in view the local custom of monthly tenancy, there is here a tacit relocation for the period of one month, and the respondent is liable for one month's rent.

The decision of the Magistrate in my opinion was wrong and this appeal must be dismissed with costs.

GENERAL JURISDICTION.

THIS 9TH DAY OF JANUARY, 1915.

In re PETITION M. H. G. PEREIRA,

ESTATE HENRY FERNANDES, DECEASED.

Administration Ordinance 1887.—Application to the Court.—Will—Intention.—Devise of rents and profits of land.—Dominium.

Where no one is indicated by the will who should take the property after the death of the person to whom the life interest has been bequeathed, the person having the life interest, if he is not a simple usu ructuary, but a fiduciary heir or legatee, takes the estate absolutely.

The judgment of the Court (MAJOR, C.J., and BERKELEY, J.) was delivered by Sir CHARLES MAJOR, C.J.: By his last will and testament, Henry Fernandes directed that out of the rents and revenues of his immovable property his executor should pay certain sums of money monthly to three illegitimate children and divers nephews and nieces, at the time of making his will all apparently minors, and directed that "the balance remaining "from such rents and revenues after the above amounts have been paid "every month to be divided equally between his sister Matilda Pereira and "his niece Angela Reis for their sole use and benefit."

The testator further directed that in the event of the rents and profits of his property being insufficient to pay the moneys aforesaid it should be sold—for that is the effect of the words "in the event it is found necessary "to dispose of the properties, etc."—and from the income derived from investment of the proceeds of

sale the payments should be made to his said three children and the balance, if any, divided between his nephews and nieces. The testator here contemplated the income from investment being insufficient to pay the nephews and nieces and made no provision for his sister Matilda and his niece Angela out of that income.

The payments to the minors were to continue until the attainment by the youngest child of the age of fourteen years and, if the properties had not then been sold and the executor thought it desirable, for a further period not exceeding five years when they were to cease and be made to the testator's needy relations.

Review of the will in its entirety shows clearly that the testator intended to dispose of the whole of his estate, and it is contended by counsel for the executor and Matilda Pereira and Angela Reis that he did make a complete disposition of his estate, that is to say, that by the devise above quoted of the residue of the rents and profits of his "properties," the properties themselves passed, and that, consequently, the capital fund derived from the investment of the proceeds of their sale, of which the testator did not specifically dispose, would, if the sale had taken place, have become vested in the same sister and niece. For those who would benefit if an intestacy, either as to the properties or as to the capital fund, has taken place, Mr. Woolford contended that there was an intestacy in both cases.

It is firstly to be observed that the Court is not called upon to deal with a capital fund, for no sale of the testator's properties has in fact taken place. We do not, moreover, find anything in the testator's disposition of the income of the fund to control or defeat the effect of the prior devise of the rents and profits of the unsold properties.

That effect appears when the rule for which Mr. Browne contends is applied to the devise, namely, that a devise of the rents and profits, or of the income, of land passes the land itself, a rule firmly established many years ago and affirmed by a long chain of authorities some of which have been cited at the bar.

And reference to the principles of Roman-Dutch law which govern the construction of a will containing dispositions like those under consideration gives the same result. Those principles are enunciated in the authorities that have been cited by Mr. Browne and Mr. Laurence, particularly in the judgment of De Villiers, C.J., in the case of Castleman *v.* Strides' Executor (4 Juta).

We are therefore of opinion that, upon the true construction of the will, the residue of the testator's immovable property

passed to and vested in Matilda Pereira and Angela Reis. And the Court so declares.

The costs of the parties represented will be taxed as between solicitor and client and paid out of the estate.

APPELLATE JURISDICTION.

THIS 18TH DAY OF JANUARY, 1915.

MAYOR OF GEORGETOWN

v.

SYLVESTRE DE FREITAS.

Georgetown Town Council—Local Government Ordinance, 1907—Mosquito By-laws, 1907—Barrel used for the storage of rain water—Proof.

Sir CHARLES MAJOR, C.J.: The defendant was charged that he did fail to screen a barrel used for the purpose of storing rain water on his premises in Georgetown, contrary to the provisions of Municipal By-Laws of 1907.

The by-laws were made under the power given by sub-section (4) of Section 179 of the Local Government Ordinance, 1907. That section relates to Water Supply and enacts that the owner of every building in any district other than a plantation . . . shall erect and maintain in good order a tank or tanks for the storage of rain water, that the tank or tanks shall contain a prescribed quantity of water, and that every Local Authority may make by-laws for rendering tanks, vats, or other receptacles for the storage of water, mosquito-proof, and for prescribing the means by which the tanks, vats, and receptacles shall be made and kept mosquito-proof.

The by-laws with alleged contravention whereof the defendant is charged provide that all vats, tanks, or other vessels shall be screened with mosquito-proof wire netting or other suitable material. This deals with inlet and overflow pipes into the vats, tanks, or other vessels and the work of screening them.

The learned Magistrate of the Georgetown Judicial District (Mr. Manby) has convicted the defendant stating that the barrel was unscreened and contained mosquito larvae.

The Ordinance is directed against vessels used for storing rain water, as part of a water supply, and the by-laws made pursuant to the Ordinance do not and cannot travel beyond that direction. In other words a vessel to come within their provisions must be proved to be one used for storing rain water.

But the evidence shows quite clearly that the barrel was not used for the purpose of storing water and the defendant was wrongly convicted. The conviction, therefore, must be quashed. The appellant is entitled to his costs of this appeal.

APPELLATE JURISDICTION.

THIS 19TH DAY OF JANUARY, 1915.

FITZPATRICK—Judgment-Creditor.

v.

VANIER—Judgment-Debtor.

Appeal—Magistrate's Court—Debtors Ordinance, 1884—Petty Debts Recovery Ordinance, 1893—Power to commit debtor to Prison—Interpretation.

Held that a Stipendiary Magistrate has jurisdiction to commit a judgment debtor to Prison for non-payment of any sum of money adjudged to be paid, if that sum be over twenty-four dollars and otherwise within the jurisdiction of the Magistrate.

SIR CHARLES MAJOR, C.J.: A judgment summons having been issued against the judgment-debtor at the instance of the judgment-creditor, out of the Court of Mr. Stipendiary Sisnett, for non-payment of a debt of $17.58, the learned Magistrate dismissed the summons, holding that by the combined operation of Ordinances No. IX of 1884, and No. XI of 1893, he had no jurisdiction to order the committal to prison of a debtor for non-payment of a judgment debt which does not exceed twenty-four dollars. From that dismissal the judgment-creditor has appealed.

In 1884, by the Debtors Ordinance of that year, the Legislature of this Colony adopted the provisions of the English Debtors Act, 1869, with some modifications, of which it is material for this case to consider, only one, namely, that whereby the jurisdiction of the Supreme Court under the Ordinance was only to be exercised when the debt or sum of money in respect of the non-payment whereof application was made for the debtor's committal to prison, exceeded the sum of twenty-four dollars. That is to say, the Legislature enacted that a debtor should not, unless his default came within the exceptions mentioned in the Ordinance, be imprisoned for default in payment of a sum of money which did not exceed twenty-four dollars. Among those exceptions, for instance, is that of default in payment of any sum recoverable summarily before a Stipendiary Magistrate, because a Magistrate may enforce an order for payment of a sum of money by warrant of distress, and, in default of distress, by warrant of commitment.

In the year, 1884, the maximal pecuniary limit of a Stipendiary's Civil Jurisdiction was twenty-four dollars and he had no jurisdiction to commit a judgment-debtor to prison in any circumstances.

In 1893; however, by the combined effect of the Magistrates' Courts Ordinance, Section 36, and the Petty Debts Recovery Ordinance, Section 3, the maximal pecuniary limit to Magistrates' jurisdiction was raised to one hundred dollars, and by Section 39 of the latter enactment it was provided as follows:—

"The provisions of the Debtors Ordinance, 1884, relating to the imprisonment in certain cases of judgment-debtors, shall, with the necessary modifications, apply to persons adjudged to pay any sum of money by the Court, and, within the limits of its jurisdiction, the Court shall be deemed to be within the meaning of the terms 'The Court' as defined in the said Ordinance."

It has been contended for the judgment-creditor that the effect of the provisions of the section just quoted is to give a Magistrate jurisdiction to commit a judgment-debtor to prison for disobedience of an order for payment of any sum, the argument resting on the actual words of the section "adjudged to pay any sum of money," and on the construction which, it is said, ought to be placed on the words "with the necessary modifications," is contended that one of the "modifications" of the original Ordinance must be the removal, for the purposes of an application to a Magistrate, of the restriction of committal to cases in which the debt is more than twenty-four dollars.

But modification of expressions in a previous statute conferring superior jurisdiction to enable it to be effective within an inferior jurisdiction is one thing, a modification to work a repeal of that statute by implication is quite another. For, to remove the restriction imposed by the former Ordinance would be, in fact, to repeal the Ordinance to that extent not only so far as it applies to Magistrates but also in its application to the Supreme Court. Otherwise, as pointed out by the learned Magistrate, we should have a Judge of an inferior Court invested with a power which the Legislature has said Judges of a superior Court shall not have. I think there must have been express enactment for that purpose. In its absence I am constrained to hold that no repeal was intended nor, if intended, achieved, but that the Legislature intended, and has said, that a Magistrate shall have jurisdiction to commit judgment-debtor to prison for non-payment of any sum of money adjudged to be paid if that sum be over twenty-four dollars and otherwise within the jurisdiction of the Magistrate.

In my opinion, therefore, the Magistrate's decision must be affirmed.

GENERAL JURISDICTION.

CORAM : MAJOR, C. J. AND BERKELEY, J.

THIS 12TH DAY OF FEBRUARY, 1915.

FERNANDES
v.
FERNANDES.

Action for divorce—Adultery—Admission—Proof necessary—Alimony.

Quaere whether evidence can be lead of acts of adultery not alleged in the statement of claim, even if merely to show nature of the acta therein alleged.

SIR CHARLES MAJOR, C.J.: This action is for dissolution of marriage and is not defended. The plaintiff, Beatrice Fernandes, and the defendant, Joseph Santos Fernandes, are domiciled in British Guiana.

The plaintiff has proved her marriage with the defendant and their subsequent cohabitation. She has also proved that her husband committed adultery with one Fanny Barry, of the city of Georgetown, on more than one occasion.

The plaintiff, therefore, is entitled to a decree of this Court of dissolution of her marriage with the defendant, and a declaration that he is not a fit person to have the custody of the children of the marriage whose names are set forth in the statement of claim. That custody is accordingly given to the plaintiff.

The plaintiff has also shewn that the defendant is a person of sufficient means to authorize the Court to order him to provide his wife with permanent alimony at the rate of £100 per annum, payable by equal monthly instalments and an order to that effect is made.

The plaintiff is entitled to the costs of suit.

M. J. BERKELEY, J.: The defendant is in default and the evidence shows that the parties are domiciled in this Colony. It is further shown by the evidence of Holder, the cab-driver, that in the months of January, February and March, 1914, the defendant was frequently at the house of one Fanny Barry at the corner of Wellington and North Streets, Georgetown, under circumstances which point to the commission of adultery. The evidence of Elcock and Mrs. de Souza tend to the commission of the same offence by the same parties at a house in Light Street, Georgetown, on 4th October, 1914. On this evidence together with the letter written by defendant and which amounts to an admission (although by itself it could not be regarded as sufficient proof) I find that adultery has been proved. During the trial

Mr. Laurence, counsel for the plaintiff, led evidence which tended to prove an act of adultery not referred to in the pleadings, and argued that such evidence was admissible in order to strengthen the evidence of those witnesses who had deposed as to acts set out in the plaintiff's claim. I held on the authority of Klaase v. Klaase (7 Juta p. 157) it was not admissible. There being a difference of opinion it was admitted, subject to the provision of section 13 (2) of Ordinance 7 of 1893. The necessity of stating a question of law for the consideration of three Judges does not, however, arise as in my opinion adultery was proved without considering this latter evidence which was not taken into consideration by me.

The adultery having been proved and there being no evidence showing that plaintiff is disentitled to a divorce, the marriage is dissolved. Evidence adduced shows that the defendant's annual income warrants an order of maintenance, the order of the Court will therefore be in the terms of the claim. Defendant to pay the costs of these proceedings.

APPELLATE JURISDICTION.

THIS 13TH DAY OF FEBRUARY, 1915.

HENRIQUES

v.

CRESSALL.

Magistrate's Court—Appeal—Licensed Places (Hours of Closing) Ordinance, 1902, Section 3—'opening' and 'keeping open'—Sale—Evidence.

M. J. BERKELEY, J.: Appellant was convicted by the Stipendiary Magistrate of the East Coast Judicial District, Mr. E. A. Bugle, for that he did open his retail spirit shop for the purpose of selling spirituous liquor therein on Sunday, 22nd November, 1914 (Ord. 20 of 1902, s. 3).

The reasons of appeal dealt with are (1) that the decision is erroneous in point of law and (2) the admission of illegal evidence. Counsel for the appellant dealt with the latter reason first. Objection is taken to the evidence as to the ingress and egress of people to the spirit shop oh the ground that appellant is not charged with 'keeping open' but 'with opening' his shop. It is argued that as the section creates these two offences, evidence which tends to prove a 'keeping open' is inadmissible on a charge of 'opening.' This evidence tends to prove the

commission of the offence charged and the mere fact that it may or may not prove some other offence cannot affect its admissibility.

As to reason (1) the evidence shows that a man named Jug was seen to come down certain steps at the top of which was an open door leading into the licensed premises. He was arrested and a bottle of rum was found in the pocket of his trousers. This man was called by the defence and said that the rum was purchased by his wife on the previous night. The Magistrate did not believe him. On the evidence adduced it was right and proper for the Magistrate to infer that the rum found on this man had been bought at the appellant's licensed premises on the Sunday and therefore that the premises were open for the purpose set out in the complaint.

It is not necessary, as urged by Counsel, that there must be actual proof of a sale. In such a case defendant could be charged with selling, an offence created by the same section of the Ordinance. I do not consider that the cases referred to support such a contention.

Appeal dismissed with costs.

DA SILVA
v.
VAN EEDEN.

Magistrate's Court—Appeal—Promissory Note—Duress—Evidence.

The Court will not interfere with the finding of a Magistrate when there is evidence to support his finding.

M. J. BERKELEY, J.: This appeal is from the decision of the Stipendiary Magistrate of the Georgetown Judicial District (Mr. H. K. M. Sisnett) who gave judgment for the respondent in an action brought by the appellant to recover the sum of $64, due on a Promissory Note.

The substantial grounds of appeal argued are (1) that the Magistrate was wrong in finding that the note was made under duress, that is, that King in whose favour it was drawn had threatened to shoot respondent if certain gold alleged to have been taken by him was not returned or the note signed, and (2) that the evidence showed that appellant had accepted the note in good faith.

These are both questions of fact and this Court will not interfere with the finding of the Magistrate when there is evidence to support his finding.

The Magistrate having believed the evidence as to the threats made by W. King in whose favour the note was made and who was not called as a witness, it was a question for him whether or not duress according to law was established and he has found in favour of the respondent.

This being so the burden of proof is shifted until the appellant proves that value has in good faith been given for the note.

The defence of duress and plaintiff's knowledge thereof was raised before the Magistrate before any evidence was taken and the only evidence as to the note having been taken in good faith is that of appellant and the witness Small who both speak to the latter owing appellant money and to his endorsing note to appellant. The evidence of Small was on the face of it unreliable and there was therefore only the evidence of the appellant himself who produced no books in support of his statement, but admitted in cross-examination that he had never dunned the witness Small for his indebtedness to him. The note in question was endorsed by King to Small and by him to appellant who handed it to Mr. Dinzey for collection. It had been already in Mr. Dinzey's hands for collection and had been given back to Small. A great deal of suspicion attaches to the transactions in connection with this note and on a careful consideration of the evidence I think the Magistrate was correct in coming to the conclusion that appellant had not satisfied him that he had received the note in good faith.

Appeal dismissed with costs.

LIMITED JURISDICTION.

THIS 19TH DAY OF FEBRUARY, 1915.

PORTER

v.

JONES.

Transport—Opposition—Pleading—Part II., Order II., R. 5.—Landlord and Tenant.

Held that in an opposition action the reasons of opposition must be incorporated in the statement of claim and further, that the plaintiff being tenant of the defendant, was thereby estopped from disputing his landlord's title.

Lewis for the plaintiff.

Humphrys for the defendant.

BERKELEY, J.: The plaintiff's oppose the passing of transport by defendant of a piece of land 30 roods in facade by 750 roods in depth forming part of Plantation Soesdyke and known

as Lucy's Delight, situate on the east bank of the river Demerara which is claimed by them as the heirs *ab intestato* to the estate of William Porter, deceased.

Objections is taken by counsel for the defendant to the non-incorporation of the reasons of opposition in the statement of claim and to the service of an uncertified copy at the same time as the service of the statement of claim.

The claim ought to include the grounds of opposition. This is intended by the Rules of Court (O. II, r. 5.) which limit the claim to such grounds. The copy served with the claim is said to be a true copy and to this statement is attached the signature "W. E. Lewis." No doubt this is counsel for plaintiffs but it ought in any case to be a copy certified by the Registrar's Department.

Counsel for the defendant, however, withdraws his objections in order that the case may be determined on its merits.

For the purposes of this case it is agreed between the parties—

1. That the plaintiffs are the heirs *ab intestato* of William Porter.
2. That the land in question is the same as referred to in Teixeira *v.* Porter (L. J. 9.6.1909) and in Jones *v.* Porter (L. J. 23.2.1910) and (F. C. 18.3.10.)
3. That the facts as found in these cases are to be taken as the facts in this case.

In Teixeira *v.* Porter the plaintiff who had obtained transport of 220 roods more or less of Plantation Soesdyke claimed that defendant was in possession of part of such lands, to wit, 37 roods. The defendant admitted that he was in possession and that he had paid some rent to plaintiff's predecessors in title but he denied that this formed part of the land purchased by plaintiff, and said that he paid rent under a mistake until the attorney of plaintiff's predecessors in title told him that their estate had no title to this 37 roods. The Court held that those 37 roods were not included in the transport on the following amongst other grounds (a) that the transport referred to 220 roods and to find in favour of the plaintiff would be holding that this included 374½ roods (37 roods being part thereof), that is nearly double the amount expressed in the transport, (b) that the Court believed the defendant when he said that he had paid rent by mistake and that the attorney of plaintiff's predecessor in title had told him that she had no title to the piece of land which he had paid rent for.

There was no appeal from this decision and it is clear that the defendant in the present action who now desires to transport the same land which it was held had not passed to the purchaser (the then plaintiff) could not have appealed as she was not a party to that suit.

In Jones *v.* Porter the plaintiff (defendant in the present action) opposed the passing of transport of this same land by defendant (the present plaintiff). The learned Judge found that the impression that the 37 roods known as Lucy's Delight formed part of Soesdyke was clearly wrong. He further found that the plaintiff's predecessors in title had no title to this 37 roods and that as the defendant had paid rent under a false impression prescription would run in his favour during occupancy.

On appeal the Full Court held that the defendant did not hold the land with the intention of keeping it for himself but had always recognised (that is since 1881) that he held it as tenant of plaintiff's predecessors in title and of herself, and being the appellant's tenant on the evidence adduced he was estopped from disputing his landlord's title. It was further held that in order to succeed it was not necessary for plaintiff to prove that she was legal owner so long as she proved her right as against the defendant. The learned Judge who heard this action in the first instance concurred with the finding of the Full Court that the appeal must be allowed. In the course of his decision he says "as a matter of fact from the evidence neither the plaintiff nor the defendant is in a position to give transport, but so far as the parties themselves are concerned the plaintiff has the better right to the land, the possession of the defendant being only through her. The possession of the plaintiff has not yet ripened into ownership according to the evidence, and she may before it does so ripen be ousted by an owner who has any one of the recognized forms of title."

The Full Court having found that the plaintiffs in the present action are the tenants of the defendant it is not open to them to oppose the passing of the transport by their landlord, and this action must be dismissed with costs. It does not necessarily follow that the title is in the defendant.

THIS 23RD DAY OF FEBRUARY, 1919.

BOOKER BROS., MCCONNELL AND CO., LTD.

v.

M. G. HENRIQUES.

Practice—Pleading—Order xvii. R. 18—Striking out reply—Raising new ground of claim.

Where plaintiffs sue on a guarantee and in their reply rely for the first time on a verbal agreement not referred to in the guarantee.

Held to be in effect a desertion of the guarantee and the paragraphs of the reply relating to the verbal agreement struck out.

The facts appear from the judgment.

de Freitas, K.C., for plaintiffs.

P. N. Browne for defendant.

BERKELEY, J.: Application is made to strike out paragraphs 2, 3, 5 and 6 of plaintiffs' reply inasmuch as a new ground of claim is raised thereby contrary to O. 17 (r. 18) of the Rules of Court.

The statement of claim endorsed on the writ, sets out that the sum of $679.82 is due as balance of an account for dry goods sold and delivered by the plaintiffs to Joe and George Rodriques under the following guarantee dated 7th January, 1913. "Under renunciation of the *beneficium ordinis excussionis* I hereby undertake and agree to be answerable and pay for all dry goods supplied or which may at any time hereafter be supplied by you to Joe and George Rodriques, Camp Street Store, and for all notes, cheques and bills of exchange given or which may hereafter be given in respect thereof provided they the said Joe and George Rodriques shall neglect to pay in due time." This is signed by defendant.

Defendant on 16th May, 1914, obtained leave to defend and by his defence (p. 6) alleged that in respect of the goods sold and delivered under the said guarantee and which appears by the particulars to be $703.25 the plaintiffs have been paid by the said J. and G. Rodriques $1,268.31 in full satisfaction thereof.

Plaintiffs by their reply (p. 2) allege that on or about 7th January, 1913, it was verbally agreed between the plaintiffs, the defendant and J. and G. Rodriques that in consideration of the plaintiffs withdrawing an action against the defendant's brother, J. G. Henriques, for $848.34 due for goods sold and delivered to the said brother, he the said defendant would procure the transfer of his brother's business carried on at Camp Street—and in respect of which the debt had been incurred—as a going concern to his nephews the said J. and G. Rodriques, that the plaintiffs should open an account in their names and transfer to the debit of that account $848.34, that the defendant would guarantee the payment of the said sum of $848.34 and the payment for all dry goods supplied thereafter to the said J. and G. Rodriques by the plaintiffs for the said business and that the defendant should give the plaintiffs a guarantee in writing.

Paragraph 3 refers to the carrying into effect of the said agreement while p. 4 states that on or about 13th January, 1913, the defendant gave the written guarantee sued on herein bearing date 7th January, 1913. In p. 5 the plaintiffs allege the appropriation of the moneys received from the said J. and G. Rodrigues amount-

ing to $1,276.87 in the ordinary and usual course of business and in pursuance of the said verbal agreement, and in p. 6 they allege that defendant was fully aware of the details of the said account and of the said appropriation of the payments made.

These paragraphs of the reply raise an entirely new ground of claim, that is the verbal agreement set out in paragraph 2 with reference to the assumption by the brothers Rodrigues of a debt due by defendant's brother to the plaintiffs and which is not referred to in the guarantee given by defendant, on which the statement of claim is alone based. It is in effect a desertion of the guarantee which refers to goods supplied or to be supplied to the Rodrigues Brothers and a resort to another and different ground that is a verbal agreement (Odgers on pleading 7 Ed: p. 256.) In my opinion it is inconsistent with the previous pleading of the plaintiffs and does not come within the ruling of James, L.J., in Hall *v.* Eve (4 L.R., Ch: Div: p. 341) inasmuch as this reply goes beyond meeting the defence by confession and avoidance. See also dictum of Bovell, C.J., in DeFreitas *v.* Reid (5.9.1908) that in view of O. 17 r. (18) a plaintiff cannot be presumed to raise any new ground of claim by his reply.

These paragraphs are ordered to be struck out.

On application by plaintiffs for an adjournment with a view to an appeal the same is granted. Plaintiffs to pay the costs of the day.

THIS 26TH DAY OF FEBRUARY, 1915.

In re Transport VIVEIROS to WOO.

Transport—Affidavit—Rules of Court—Part II. Order II. R. 29.—Drawing.

Held that unless an affidavit is wholly prepared or drafted by a barrister or solicitor or by his personal clerk under his supervision, and in discharge of his duties as such clerk it cannot be said to comply with the provisions of Rule 29 and cannot be received.

BERKELEY, J.: The Registrar has submitted to me as Transport Judge the following facts and asks for the Court's ruling as to the construction to be placed on Part II. O. 2. (r. 29) of the Rules of Court.

It would seem that on 18th February one Giles, a house agent, lodged an affidavit which, in the opinion of the Registrar, was not drawn as required by the rule, that is, by "the person on whose behalf it is to be used or a Solicitor or Barrister." Giles admits that he drew it and that Mr. Clarke, the Solicitor, had not seen it, although in the body of the affidavit it is set out "that this affidavit is prepared by E. D. Clarke, Solicitor" (par. 2). Giles further says that he got nothing for drawing the document, that

the Solicitor was to initial it and to receive the fee for drawing it, as he had done frequently before in similar cases. Giles evidently communicated with Mr. Clarke, the Solicitor, who interviewed the Registrar and admitted that he had passed And initialled on previous occasions affidavits which had not been strictly drawn by him stating that the word “drawn” in the rule meant “passed,” and that he would have initialled the present affidavit if it had been brought to him before it had been sworn to.

The statement of the Solicitor as to the meaning of the word “drawn” suggests on his part a desire to excuse himself for conduct which he is aware is improper and unprofessional. The rule is clear on the point “no affidavit drawn by any person other than the person on whose behalf it is to be used, or a Solicitor or Barrister shall be received.” In putting his initials to affidavits drawn by house agents and others, Mr. Clarke is guilty of mi conduct on his own admission. Unless an affidavit is wholly prepared or drafted by a Barrister or Solicitor, or by his personal clerk under his supervision and in discharge of his duties as such clerk, it cannot be said to comply with the provisions of Rule 29 and cannot be received.

Any attempt to evade the requirements of this rule must be regarded as unprofessional conduct.

APPELLATE JURISDICTION.

THIS 5TH DAY OF MARCH, 1915.

DE FREITAS
v.
FRANKLIN.

Appeal—Larceny—Asportation—Felonious intent.

Held that the receipt by accused with felonious intent of a packet of capsules from a shop assistant, the shop assistant having been requested by accused some time previously to obtain them for him, and a trap being set for him, constituted the offence of larceny.

Wills,—for appellant.

Rees Davies, Solicitor General,—for respondent, not called on.

BERKELEY, J.: Appeal from decision of Mr. P. A. F. Manby, Stipendiary Magistrate.

On 12th January, 1915, appellant asked Bettencourt, a clerk in the employ of J. D. Smith and Co., to steal three dozen methylene capsules for him. In consequence of information given appellant was watched on 23rd January and he was seen

by Mr. Gouveia, the store-walker, to receive something from Bettencourt which he placed in his right pocket. Mr. Gouveia having signed the check for magnesia and salts value twopence purchased by appellant said to him "You have not paid for the capsules you have in your pocket, come to Mr. Gomes." Appellant went to a counter and tore a piece of paper in which to wrap up a parcel.

On being taken into another department to Mr. Gomes, the Chief Clerk, no capsules were found upon appellant. Gouveia then returned to the counter where appellant had torn paper and found on the floor the three dozen capsules which Bettencourt identified in appellant's presence as those he had given to Mm.

A trap was laid for appellant and both he and the clerk Bettencourt were concerned in the taking of the capsules.

In order to constitute the offence of larceny there must be a felonious intent. In the case of the clerk Bettencourt such a felonious intent did not exist but in the case of the appellant the felonious intention has been distinctly proved. (See Rex v. Dannelly, R. & R. p. 310) Appeal dismissed with costs.

FULL COURT (APPEAL COURT.)

CORAM: MAJOR, C.J., BERKELEY, J. AND HILL, J.

THIS 8TH DAY OF MARCH, 1915.

PORTER
v.
JONES.

Leave to appeal—Order XLIII, Rule 5—Question of law involved—Res judicata—Transport—Opposition—Pleading—Landlord and Tenant.

Held that no question of law being involved beyond that which was already *res judicata* the application must be dismissed.

An application for leave to appeal from a judgment of Berkeley, J., given on the 19th February in which he held that plaintiff in an opposition suit being tenant of the defendant was thereby estopped from disputing his landlord's title. Berkeley, J., had refused leave to appeal.

Lewis for appellant.

Humphreys for respondent.

SIR CHARLES MAJOR, C.J.: The plaintiffs in the Court of first instance ask for leave to appeal from the decision of Mr. Justice Berkeley giving judgment for the defendant for that the plaintiffs

are the tenants of the defendant and consequently are estopped from opposing the defendant's intended transfer of certain lands subject to the tenancy and thereby disputing their landlord's title thereto.

It appears that the Full Court of this Colony decided the same way in 1910 in an action between the same parties, with reference to the same lands and wherein the same question arose.

Estoppel of the plaintiffs, therefore, has worked twice over, and, as there is no question of law involved other than that already *res judicata*, the plaintiffs' application fails.

BERKELEY, J.: I adhere to the opinion already expressed by me that no substantial question of law is involved in this appeal and therefore leave to appeal must be refused.

HILL, J.: The decision of the Full Court in Jones *v.* Porter (18.3.10) gave to the plaintiff Jones a better title than to the defendant, and held that he was estopped, as Jones's tenant, from disputing her better title. The present application is for leave to appeal from the decision of Berkeley, J., who has merely emphasised the fact that Porter is Jones's tenant. In effect, it is an application to appeal from the decision of the Full Court also. No question of law, not already dealt with, is involved in Berkeley J., decision, and the application must be dismissed with costs.

LIMITED JURISDICTION.

THIS 10TH DAY OF MARCH, 1915.

SMITH BROS. & COMPANY, LTD.

v.

W. E. LEWIS.

Promissory Note—Presentment for payment—Account stated—Interpretation of Agreement—Security—Pledge.

Plaintiffs claimed the sum of $1,574.41 alleged to be due to them under the following circumstances. Defendant signed four promissory notes dated 22nd Feb ruary, 27th March, 14th April and 15th May, 1913, for $440, $198, $220 and $280, respectively, in their favour payable at the Colonial Bank, Georgetown. Subsequently by an agreement in writing between the parties accounts were stated in respect of defendant's debts to plaintiffs and the sum of $1,157.77 was found to be due by him to them. At the same time defendant delivered to plaintiffs as security for this debt a printing machine belonging to him and which they still held at the time this, action was taken. There were other sums of money included in the claim for advances, insurance, storage, interest, &c.

Defendant urged that the printing machine and the stock-in-trade of the printer's office should have been sold by plaintiffs to liquidate his debt to them and that they should thereupon deliver up his promissory notes, that they still retained these goods and had not carried out the terms of the agreement. He further counterclaimed for deterioration in the value of the printing machine and stock-in-trade owing to plaintiff's alleged neglect.

Laurence for plaintiff.

McArthur for defendant.

HILL, J.: Plaintiffs' claim is based on two counts (a) on four promissory notes and (b) on account stated, and for certain I.O.U.'s, for expenses incurred by them at defendant's request, and for interest.

The first point for consideration is whether the plaintiffs can recover, on the evidence before the Court, on the four promissory notes, the defence contending that presentment and nonpayment have not been proved. Presentment is satisfied when a note is presented at the place at which it is made payable in its body, and this requirement is shown by the evidence of Mr. Smith, and by the notes themselves, to have been complied with. Mr. Smith, who produces them, swears that they were handed in at the Bank, in due time, and returned unpaid, and the Bank clerk swears they were not taken up when due. I do not think the absence from the colony of the Bank clerk on the dates on which the notes became due affects this particular question. The transaction is one that would not require personal knowledge of the individual on the occurrence of the fact, but his knowledge is based on information drawn from the notes and the books of the Bank. It is suggested that an extract from the Bank's books is necessary, but in this particular instance it does not seem to me it would have have any great effect. It would support a negative proposition without absolutely confirming the possible inference—as, for instance, the production of a copy of Mr. Lewis's account, without charges corresponding to the amounts of the notes on due dates, might be some evidence that they had not been paid on presentation, but would certainly not be positive evidence; for he might have taken them up in some other manner.

I am therefore disposed to think that the evidence of Mr. Smith, the Bank clerk, and the notes themselves is sufficient—certainly sufficient to call for rebuttal which has not been done.

But whether this be so or not, defendant is clearly liable on the account stated as set out in paragraph 6 of the claim and 1 of the agreement.

After consideration of the evidence of the witnesses both for plaintiffs and defendant, and the documentary evidence, especially Mr. Lewis's letter of 5th November, 1913, to Mr. Barnes, I am satisfied that the plant was held by the plaintiff's as security, and was not at their absolute disposal, to realise when, and for any price, they choose. It is impossible to think otherwise when they are found submitting to defendants a buying proposition from Mr. Dewar which, if accepted, would have paid off their

claim in full, and refusing it because defendant did not agree, for obvious reasons.

The amounts claimed under the I.O.U.'s have been proved—and the amounts charged for insurance, storing, removal expenses, and auction dues are impliedly to be borne by defendant.

On the counter-claim, I find for the plaintiffs also. No great deterioration in the stock-in-trade by plaintiffs' unskilful handling, nor exposure to all weathers, causing the machinery to rust and become unfit for further use has been proved, and the type is not shown to have been mixed as alleged. Mr. Cunningham's evidence for the defence shows that dust is not such a destructive agency to type as is alleged by Mr. Dewar. Deterioration must necessarily occur in stock of this kind which was out of use for some 18 months before plaintiffs dealt with it in any way, and I cannot find they have been guilty of any negligence such as would warrant them being held liable in damages.

Judgment for plaintiffs on claim and counter-claim, with costs.

THIS 11TH DAY OF MARCH, 1915.

WILLIAMS, *et al*,
v.
HING.

Transport—Purchase of property—Neglect to transport—Action for purchase price—Reasonable time for advertising and passing transport—Laches of Seller.

Dargan for plaintiffs.

Low for defendant.

The facts appear from the judgment:—

BERKELEY, J.: By agreement dated 21st April, 1913, the defendant agreed to purchase lot 23, La Bagatelle, Leguan, with certain buildings thereon, for $600, to be paid on the passing of the transport. He further agreed to purchase the goodwill of the spirit shop situate thereon, together with the licence and the stock, which was carried into effect as set out in the said agreement, that is within three days of the date thereof.

The transport of lot 23 was not effected owing to the persistent refusal of the plaintiffs to carry out their part of the agreement, the plaintiff Robert Soomally Williams declining to move in the matter unless defendant would agree to pay the half of expenses, which he desired to incur in order to test a decision of the Transport Judge.

On the 1st October, 1913, the defendant demanded transport

within one month from date and informed the plaintiffs that failing compliance the alleged agreement would be regarded as null and void.

On 10th October plaintiffs wrote refusing to do anything until they received from defendant the half of the costs previously demanded.

They did not advertise the transport as they should have done, but on 16th October they petitioned the Court and as a result of this petition they were authorised on 22nd October to pass transport without re-advertising.

In November the defendant obtained a transfer of his licence to another lot in the same village, and in the following January he was called upon by plaintiffs' solicitor to accept transport.

The Court being against the plaintiffs on the facts it is submitted by Counsel that one month was not a reasonable time given by defendant for the purpose of carrying out their agreement. It was open to plaintiffs to at once advertise but instead of doing so the letter of 10th October is written to defendant.

Then again in view of the Court's Order of 22nd October, it was open to the plaintiffs to have sought to pass transport during that month. They did not make the least effort to do so. Under the circumstances if cannot be held that the time allowed was not reasonable.

There must be judgment for the defendant with costs.

FULL COURT (APPEAL COURT.)

CORAM : MAJOR, C.J., BERKELEY, J., AND HILL, J.

THIS 15TH DAY OF MARCH, 1915.

SEWMANGAL

v.

BASCOM.

Appeal—Immigration Ordinance 1891, Section 109 (1) (a)—Absence from work—Assignment of work—Statutory obligations on employer and employee.

Held, by the Court, that where on a plantation a general or special order has been given or there is a recognized custom that labourers shall assemble at a given time and place for assignment of work to them, a labourer who fails to obey that order or conform, with that custom absents himself from work if it be shown that work was in fact assigned at that time and place.

Held also, per Berkeley, J., that under Section 109 (1) (a) an employee is bound to present himself at the place where general orders are given in order that he may have work assigned to him.

Held further by the Court that from the facts as found by the Magistrate the appellant had without lawful excuse absented himself from work, orders for the performance of which he knew had been given to immigrants including himself.

Appeal dismissed and conviction by the Judge in the Court below affirmed with costs.

This was an appeal from a judgment and conviction by Berkeley, J., who allowed an appeal from Mr. E. A. Bugle, Stipendiary Magistrate for the East Coast Judicial District by Mr. Bascom, appellant in the Court below.

Sewmangal, an indentured immigrant, was charged by Mr. Bascom, manager of the Plantation Cove and John, for contravening the provisions of Section 109, Ordinance, 18, 1891 (Immigration Ordinance) by absenting himself from work. The charge was dismissed by the Magistrate but on appeal, the Magistrate's decision was reversed by Berkeley, J., and Sewmangal was convicted. It was from that decision and conviction that appeal was now made to this Court.

C. Rees Davies, Solicitor General, for appellant.

It was not necessary for appellant to present himself for work although in fact he did all he could to do so. To sustain the charge of "absenting" it was necessary that there should be an intentional or wilful absence. The ordinance is penal and must be construed strictly and in favour of the appellant against whom proceedings for a penalty are taken.

H. C. Humphrys, for respondent.

SIR CHARLES MAJOR, C.J.: Sewmangal, the appellant, has been convicted by the Judge in appeal from Mr. Magistrate Bugle for being absent from work on the plantation Cove and John in the colony on the 31st day of August, 1914, without lawful excuse. From that conviction he has appealed.

2. The Magistrate who heard the charge refused to convict and states his reasons for that refusal in the following words:

". . . In this case the overseer, Mr. Roberts, gave evidence, and the "value of his evidence only goes to this fact, that he gave certain orders to "the driver to be given to the immigrants of which defendant was one, but "he is unable to say further, whether defendant did in fact ever receive this "specific order which forms the subject of this complaint. The driver's evi- "dence carries the case no further. All he can say is that he gave everybody "orders to go to B. 1 to work, to fork mould, adding that the defendant was "then standing at his door. There is no evidence by this witness showing "that the defendant ever received, or even understood the general order, so "casually given. There is no corroboration of this order as alleged to have "been given, and defendant having pleaded not guilty is entitled to have the "case fully established as against him. His statement on oath by way of de- "fence, though not assisting the prosecution, goes greatly to show that he "never was given the order as set out in the complaint. For these reasons "the case is dismissed."

3. I read those remarks as a finding that the overseer's orders to the driver for the assignment of work to the labourers on the plantation for the 31st of August were communicated by the driver to, any rate, some labourers, amongst whom was the appellant,

but as ground for refusal to convict because the prosecution failed to prove that the appellant received (that is, heard), or "even understood," those orders. That, in my opinion, was a wrong reason in law.

4. By virtue of the provision of Section 93 of the Immigration Ordinance, 1891, an employer of an indentured labourer is bound to provide him with work, within the limits of time and extent prescribed by that section and the three following sections. Assignment of work, be it general or special, must be made. That may be done in various ways. In this case, the overseer, through the driver, assigned to certain labourers present in the negro yard, amongst them the appellant, certain work. And there the obligation of the employer ceased. If the appellant, although present, did not then actually hear the particulars of the order, or did not understand them, it was his duty to find them out. He had no right to absent himself from the work, orders for the performance of which he knew had been given to labourers including himself.

5. The Solicitor General for the appellant contended that on the charge it should have been proved by the complainant not only that assignment of work was made but also that the appellant heard and understood the orders to perform that work. At least so I understood him. As said in my last paragraph, the latter proof was not obligatory on the Complainant because the appellant was shown to have been present when the order was given. The law does not require an employer to take care that each labourer of a band or gang, sometimes, perhaps, present in large numbers, in a yard, or at a house, or in a field, or otherwise, that he has heard and understood orders except by individual examinations it is difficult to see how an employer could do so.

6. On the other hand, I do not assent to the proposition, stated unqualifiedly, that a labourer is bound to present himself before his employer for work, if by that be meant that he must go and find out what work in his absence has been, or, on presenting himself, will be assigned to him without any general or special order to do so. The statutory obligations are two. The first is on the employer to provide work, the second is on the labourer to perform that work, and the discharge of the second is conditional Upon the fulfilment of the first. But the labourer is bound, when specifically directed, or when there is a general direction, equivalent to a standing order, on a plantation that the labourers shall assemble to receive orders at a time and place mentioned, to obey that direction and, in that sense, and in that sense only, to present himself for assignment of work. But this latter obligation is created by the previous direction to present himself (or assemble with others) not implied because his employer is bound to provide him with work.

7. In this case the appellant was shown to have been present when orders were given for certain work to be done to a number of labourers of whom he was one. He was shown to have absented himself from that work on the excuse that he had not heard the orders, in his own words, that he had "got no orders." As he was present when the orders were given that is not a lawful excuse. In my opinion, therefore, he was rightly convicted and the appeal should be dismissed with costs.

BERKELEY, J.: In the decision under review I held that it was not necessary to prove a specific order, that is, that work had been already assigned to appellant, in order to obtain a conviction under sub-section (a). I held further that there was an obligation on the part of the appellant to present himself in order that he might be provided with work and that he might have assigned to him work for which he was physically fit.

I made no reference as to the place of presentment as I thought it unnecessary to do so, but in order that there may be no misunderstanding, I may add that such place would be where the labourers are accustomed to assemble. In the present case there is some evidence that they assemble in the negro yard and the appellant ought to have been there and not have remained inside his house or at his door which enabled the Magistrate to find as a fact that it was not proved that he had received the order, which I take to mean, that he did not hear it.

Appeal dismissed with costs.

HILL, J.: The appellant was charged before the Magistrate by the Manager of "Cove and John" for being absent from work without lawful excuse, the nature of the work, viz: fork-moulding in Field B.I., being set out in the complaint. The evidence was of the most meagre description; the driver swore "he told everybody to go to B. 1 to work to fork mould. De- "fendant was at his door standing up." The defendant (present appellant) swears he got no orders to go to work, that he was not told to go to a certain field to go and do any particular work. In cross-examination, he says he saw Mr. Roberts (the overseer who gave the orders to the driver) go through the nigger yard. He saw him far off but got no orders from him. He was in his house and saw him (overseer) from his range but got no orders. He was not aware that a new field was being taken up.

On this evidence the Magistrate dismissed the case holding there was no evidence to show that defendant ever received or understood this general order, and that the defendant's evidence on oath went greatly to show that he never was given the order as set out in the complaint. I take this to mean "individually" given.

From this decision the Manager appealed and Berkeley, J. allowed the appeal. In his reasons for decision, the learned Judge says "the evidence "before the Magistrate sought to establish a specific order given to respon- "dent and the Magistrate in his decision deals only with that order and finds "that it is not proved. On this evidence this Court would not interfere with "this finding of the Magistrate" (following numerous decisions in the past that on questions of fact there is no appeal from a Magistrate if there is evidence to support his finding). But the learned Judge continues, "It is, how- "ever, contended by Counsel that it was unnecessary to prove any such or- "der 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 specific 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 . . . ." The complaint was laid under 109 (a) and the learned Judge held that it was not necessary to prove that work had already been assigned to an immigrant to obtain a conviction under 109 (a). He refers to Sections 93 and 94 which renders it obligatory on employers to provide work for indentured immigrants on any day of the week except Sundays and authorised 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 days wages, and considers that there is a corresponding obligation on the part of the immigrant to present himself in order that he may be provided with work for which he might be physically fit (94 (1)) and to fix the mode of payment (94 (2)).

From this decision the defendant Sewmangal has appealed to the Full Court. As I have said the evidence is of the most meagre description—there is hardly any as regards practice, which, in my opinion, in the absence of any definite enactment, would carry much weight in determining this question. The sub-sections (*b*) and (*c*) to Section 109 clearly point to refusal or neglect to attend at a specified time and place to do a *particular* work, or, having attended, co a refusal or neglect to begin or finish such *particular* work. There remains (*a*) the sub-section under dispute, and in my opinion the "work" therein referred to refers more to "general" work—and not to the "particular" work referred to in the other sub-sections. I can well imagine, on the ground of convenience that it would be most desirable for immigrants on a plantation to present them-

selves at certain specified places and at certain hours of the morning to be then told the work which they are to do; but I can equally well imagine that at certain times "the willing and able" worker is rather a drug in the market, *e.g.*, in abnormal dry seasons when work is scarce. But even if we assume, as can be gathered from the evidence before the Magistrate, that it is the practice on this estate to walk through the nigger yard and there "provide" the work—it does not follow that the immigrants at that particular place, *e.g.*, the nigger yard are not required to present themselves to the overseer or driver issuing the orders. I cannot subscribe to any suggestion that individual orders must be issued—and I cannot see how there can be anything but "presentation" by the immigrants if orders are, admittedly, to be given collectively. In this particular case, the immigrant admits that he saw the overseer pass through the nigger yard. He has been under indenture since 21st February, 1911, and must have been well aware what he was there for. The overseer says he gave orders to the driver, and the driver says he issued the orders to the immigrants, and that defendant was at his doorway. Even if we assume, that the immigrant did not hear, to hold that he was not guilty of absence from work would be to hold that he was entitled to individual orders, and this the Solicitor General disclaimed. It therefore seems to me, that Sewmangal was put upon enquiry to ascertain what the orders were that he must have known had been issued. This he did not do, and I think he ought to have been convicted for absence from work without lawful excuse. Although not on the same grounds entirely, I think the judgment of the learned Judge must be affirmed, and this appeal dismissed with costs.

WONG
v.
OFFICIAL RECEIVER, REPRESENTING ESTATE CHIN-A-YONG & COMPANY.

BERKELEY, J.: The appellant claimed before the Official Receiver $8,107.61 against this estate. His claim was rejected as to $7,387.61 and on appeal to this Court a further sum of $295.11 was admitted, the rejection of the Official Receiver as to the balance of $6,092.50 being upheld. The present appeal is against this Order.

I have dealt in my judgment of 15th May, 1914, with the various sums which form the aggregate and a review of the evidence confirms the opinion I then arrived at, viz., that in the absence of corroboration, I cannot hold that appellant has discharged the duty which devolves on him, that is, he has not established to my satisfaction that the Insolvent Estate is indebted to him in respect of any part of this amount.

This appeal must be dismissed with costs.

DALTON, J.: The facts have already been sufficiently stated.

The question raised in this case is whether the appellant has satisfactorily shown that on December 22nd last the firm of Chin-a-Yong & Co. was indebted to him in respect of a certain sum of $6,813, as set out, after some deductions, in the statement of account filed. The circumstances in this case are not of the ordinary kind, a fact which can be used as an argument both for and against the claim, owing to the complete destruction both of persons and property wrought by the disastrous fire, and the evidence produced in support of the claim is to all intents the evidence of the appellant alone, the evidence of the witness Sampson Lee, an employee of the firm, not bearing on the point in question at all, whilst almost the same may be said of the evidence of the Manager of the Bank who was called, in so far as the existence of the debt at the time of the fire is concerned.

In the case *In re* Garnett, Gandy *v.* Macauley (31 Ch. D. I.) a case quoted by both sides, the Master of the Rolls says that “The law is that when an attempt is made to charge a dead person in a matter in which, if he were alive, he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of the Judge who hears it ought to be, first of all, in a state of suspicion.”

He proceeds to say that if a Judge in such a case is satisfied with the truthfulness of a witness who is not corroborated in such a case, and that the claim is a true one, the absence of such

corroboration would not be a sufficient reason for not allowing the claim.

For my part, apart from the question of corroboration, a perusal of the evidence in this case leaves me far from satisfied that the amount claimed has been proved to be due, though that does not say the claim was made in all good faith. The burden of proof in such a case lies on the claimant, and he has not brought by the evidence adduced conviction to my mind that the debt still existed.

The appeal in my opinion should be dismissed with costs.

APPELLATE JURISDICTION.

THIS 19TH DAY OF MARCH, 1915.

DA SILVA

v.

DA SILVA.

Appeal—Landlord and tenant—Damages sustained by injury caused owing to defect in bridge to premises—Knowledge of defendant of defect—Costs allowed.

Held that a person having management and control of bridge leading to premises of which he is the landlord is bound to keep the same in a proper state of repair for the use of those lawfully resorting thereto, and is liable for injuries sustained by another by reason of a defect therein known to him.

Appeal from a decision of Captain B. V. Shaw, Stipendiary Magistrate of the Bartica Judicial District. Decision affirmed as to damages, but case referred to Magistrate to review items of costs allowed.

R. C. Dinzey, Solicitor, for appellant.

M. Ogle for respondent.

SIR CHARLES MAJOR, C.J.: The plaintiff in Mr. Magistrate Shaw's Court claimed from the defendant $100 damages for injuries sustained by reason of the defendant's negligence to keep a "bridge" to which the plaintiff lawfully resorted in proper repair.

The "bridge" leads across water to premises of which the defendant is the owner and whereon is a shop kept by the plaintiff for which she pays the defendant rent.

The bridge on the 26th September, 1914, was in a state of disrepair in that the boards of which it is made were unstable and insecure. The plaintiff stepping on to one of the boards it tilted up and she was precipitated into the trench below. She sustained bodily injuries for which she was medically treated

It was proved by the plaintiff that the defendant is the person in whose possession and under whose control the "bridge" or gangway is. His legal obligation therefore is to keep it in a state of repair for the use of those who lawfully resort thereto. The plaintiff also proved that the defendant knew of the insecure state of the "bridge." The plaintiff showed no contributory negligence.

The judgment, therefore, of the Magistrate that the plaintiff do recover $10 damages against the defendant is affirmed and the appeal is dismissed. As, however, the Magistrate appears to have proceeded upon wrong assumptions in the allowances he has made to the plaintiff for her costs of proceedings the case is referred to him to review those allowances and to hear any objections that may be raised by the defendant to the items in the plaintiff's bill of costs under the provisions of the law applicable to costs in Magistrate's Courts exercising civil jurisdiction.

DA SILVA
v.
DA SILVA.

Appeal—Landlord and Tenant—Notice to quit—Acceptance of rent after expiration—Waiver—Evidence—Magistrates' Decisions (Appeals) Ordinance, 1893, Section 16—Giving security to prosecute appeal.

Held that a landlord waives a notice to quit by accepting rent covering a period subsequent to the expiry of notice and a fresh notice is then necessary.

Held further that a duplicate of the notice to quit is admissible in evidence, although notice to produce original has not been given.

Appeal from a decision of Captain B. V. Shaw, Stipendiary Magistrate of the Bartica Judicial District. The appeal was allowed.

The facts sufficiently appear from the judgment.

M. Ogle for appellant.

R. C. Dinzey, Solicitor, for respondent.

SIR CHARLES MAJOR, C.J.: The plaintiff in the Magistrate's Court served upon the defendant, his tenant of premises on a monthly tenancy, a notice to quit. The notice was dated the 27th October, 1914, and was for the defendant to quit at the end of November, 1914.

At the trial the plaintiff put in evidence a duplicate of the notice to quit, not having given notice to the defendant to produce the original notice served upon her. That was good evidence. (Doe Fleming v. Somerton, 7 Q.B. 58.)

But the defendant proved that the plaintiff received from her rent of the premises after the expiry of the notice to quit, that is to say, for the month of December, 1914, and a receipt for that rent was put in. The plaintiff thereby waived his notice to quit and a fresh notice was necessary. This the plaintiff had not given when in the month of January last he commenced his action against the defendant to recover possession of the premises on the ground of the defendant's non-compliance with a notice to quit the same.

Mr. Magistrate Shaw gave judgment for the plaintiff. That judgment is therefore set aside and judgment is ordered to be entered for the defendant with costs.

This appeal is allowed with costs.

A preliminary objection to the hearing of the appeal was taken by Mr. Dinzey for the respondent, namely, that the appellant had not complied with the requirements of section 16 (1) of the Magistrates' Decisions (Appeals) Ordinance (No. 13 of 1893) in that he had failed to enter into a recognizance conditioned not only for the due prosecution of the appeal and for abiding the result thereof including the payment of all costs of the appeal and otherwise, but also conditioned to pay the costs of the proceedings in the Magistrate's Court. I overruled the objection.

The recognizance, with one sufficient surety, to the satisfaction of the Magistrate entered into in this case was conditioned to prosecute with effect an appeal made to the Supreme Court from the decision of the Magistrate's Court and to satisfy any judgment which might be pronounced against him by the Supreme Court in respect of the said appeal, including the payment of all costs of the said appeal and otherwise and in all respects to abide the results of the said appeal. That condition covers all the

requirements of section 16 (1) of the Ordinance. It was to the satisfaction of the Magistrate. With the fact that the defendant and her surety were bound in the sum of ten dollars only to fulfil the condition of the recognizance this Court has nothing to do.

THIS 24TH DAY OF MARCH, 1915.

HO-A-SHOO, LIMITED.

v.

COLE.

Appeal—Limited Liability Company charged with quasi criminal offence—Appearance before Magistrate.

Held that though such a Company is as a rule represented by its Secretary, an authorisation in writing by the Secretary to an officer of the Company in the district where the offence was alleged to have been committed is sufficient for such officer to appear and represent the Company.

This was an appeal from a decision of the Stipendiary Magistrate of the Demerara Judicial District who convicted the appellants for purchasing raw gold in contravention of the provisions of Section 63, Ordinance 1 of 1903 (the Mining Ordinance).

The Magistrate refused to allow the District Manager of the defendant Company to represent such Company at the hearing, although he produced an authorisation in writing signed by the Secretary of the Company, and after hearing the case *ex parte*, convicted the defendants. From such conviction defendants now appeal.

Decision of Magistrate reversed and case referred back to Magistrate for retrial.

P. N. Browne for appellants.

C. Rees Davies. Solicitor General, for respondent.

BERKELEY, J.: This appeal is from the Stipendiary Magistrate of the Demerara Judicial District (Mr. Sharples) who convicted the appellants of purchasing a certain quantity of raw gold otherwise than in accordance with the Mining Regulations (Ord 1 of 1903, s. 63).

It appears that on the case being called before the Magistrate an authorisation to appear on behalf of the appellant Company and to represent them at the hearing was produced by G. R. Lowe, who is admitted to be the manager of their places of business in that district. This authorisation was signed by the Company through their Secretary but the Magistrate held it to be "ineffectual" and declined to allow an appearance to be entered. He then proceeded to hear the case *ex parte* and convicted the appellant Company.

This matter is quasi-criminal and the appellants being a limited Company differ from an ordinary defendant who appears in person or by Counsel. A Company cannot appear and is as a rule represented by its Secretary. In the present case it duly authorises its manager who represents its interests in a certain district where an offence is alleged to have been committed, to

so appear and represent it, and in my opinion the Magistrate should have recognised such authorisation.

It is clear that the authorisation was given in good faith and it shows a desire on the part of the appellant Company to be heard at the trial. Holding as he did it was incumbent on the Magistrate to adjourn the hearing so as to enable the appellant Company to make some other arrangement in order to place their case fully before the Court.

It is ordered that this case be referred back to the Magistrate who is directed to re-hear the same and to adjudicate afresh after taking such evidence as may be tendered by either party.

MANNING
v.
AH FOOK.

Appeal—Ordinance 30 of 1913 (the Opium Ordinance)—Ordinance to come into force on date fixed by Proclamation—Evidence of Proclamation—Ordinance 20 of 1893 (Evidence Ordinance) Section 25—Judicial Notice.

Held that the Magistrate should take judicial notice of the proclamation, and that evidence to prove it was not necessary.

The facts sufficiently appear from the judgment.

C. Rees Davies, Solicitor General, for appellant.

P. N. Browne for respondent.

BERKELEY, J.: This appeal is from the decision of the Stipendiary Magistrate of the Georgetown Judicial District (Mr. P. A. F. Manby) who dismissed a complaint brought under the Opium Ordinance, 1913 (see. 8).

It is provided by section 17 of the Ordinance that it shall come into operation on such day as the Governor shall notify by Proclamation in the *Gazette.* At the close of the case Counsel for the respondent submitted that the "Official Gazette" should have been tendered in evidence. The Magistrate thereupon held that the omission to prove the Proclamation of the Governor by the laying over of the *Gazette* was fatal.

This holding of the Magistrate is the sole point raised on appeal.

By the Evidence Ordinance, 1893 (sec 25 (4)) a Judge is required to take judicial notice of all Ordinances unless the contrary is expressly provided in any such Ordinance. A Proclamation, referred to in the Ordinance and which brings the same into operation, is of a public nature and is to be judicially noticed (Dupays *v.* Shepherd, Mod. R., Vol. 12, p. 216). If the Magistrate was unacquainted with such Proclamation he could on his own initiative have referred to the "Official Gazette" to satisfy himself

in relation thereto. It is to be noticed that section 40 of the Evidence Ordinance, which deals with the proof of Proclamations, etc., specially exempts those "being within the provisions of section 25."

This case must be referred back to the Magistrate who is directed to take judicial notice of the Proclamation and to determine the case on the law and facts as found by him.

THIS 31ST DAY OF MARCH, 1915.

RAMSAY

v.

BOOKER BROS., McCONNELL & CO., LTD.

Interpleader suit—Sale of movable property—Delivery—Roman-Dutch Law—Sale of Goods Ordinance, 1913.

This was an interpleader action in which the plaintiff Ramsay laid claim to a certain cottage levied on by Booker Bros., McConnell & Co. as the property of one S. Hill, defendant, in an action by them against the latter.

On the application of the Registrar *ex parte,* an interpleader order was issued under the provisions of Order XLII, R. 16.

The further facts appear from the judgment.

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

G. J. de Freitas, K.C., for defendant.

BERKELEY, J.: The plaintiff claims a cottage valued at $200 which was levied on by the defendants to satisfy a judgment debt due by S. Hill.

It is alleged by the plaintiff that this cottage was purchased by him on 18th April, 1914, as shown by exhibit ‘A.’ In January, 1914, the judgment-debtor sought plaintiff’s assistance in having certain repairs done to the cottage, and plaintiff then agreed to pay and subsequently did pay the carpenter $55 for work done.

The Court is satisfied on the evidence of the witnesses to the receipt that on 18th April, 1914, the plaintiff paid to the judgment-debtor the sum of $110 agreed on as the price of the building and that the judgment-debtor then returned to plaintiff the sum of $55 which he had loaned to him. After this the three keys—tied together—were handed to plaintiff, but whether taken by the debtor from the front door as deposed to by Horsham, or handed to plaintiff by him because he had them on him, as suggested by Braithwaite, is in the opinion of the Court immaterial. It sees no reason for disbelieving these apparently disinter-

ested witnesses. These keys were handed by plaintiff to the debtor's wife and she was given eight days to quit the cottage.

The plaintiff says that the judgment-debtor's wife subsequently saw him and rented the cottage at 10/- per month. The judgment-debtor says that his wife and himself had ceased to live together and that he allowed her 8/- to 10/- per week. As a fact he had rented a room elsewhere since 1913, but he frequently went to the house and occasionally gave his wife a 'shilling or two.'

The land on which the cottage stood was leased and there is a receipt dated 6th May, 1914, for land rent in advance to March, 1915, paid by judgment-debtor; the plaintiff's evidence as to the period for which this rent was paid, is unreliable, but the landlord says that it was handed to him in April and was sometimes kept by him two or three weeks until one Hackett came. This is the person who always wrote the receipts and the present receipt is written and signed by him. This is a reasonable account as to the receipt being dated 6th May. As the rent was payable in advance and the debtor was the owner of the cottage on 12th March he was the proper person to pay the rent in 1914.

The debtor's wife alleges that she paid the rent of 10/- per month from 18th April and she produces certain receipts. These are from a receipt book produced by plaintiff, the counterfoils of which show entries of payments made by the judgment-debtor's wife in 1914, while the immediately preceding entries are payments of a later date (1915) by other tenants. The plaintiff says that these were copied by him from another book. This other book is subsequently produced and only shows entries of rent due under the name of the judgment-debtor's wife. On this evidence the Court cannot hold that it has been proved that rent was paid.

According to Roman-Dutch Law there was a delivery of the cottage by the owner handing the keys thereof to the plaintiff who returned them to his wife in order that she might remove her furniture within eight days. The facts in connection with the payment of rent may raise a suspicion that the transaction might have been intended to operate as a pledge but in the face of the evidence adduced the Court cannot so find.

Apart from this the Court is of opinion that since the coining into operation of 'The Sale of Goods Ordinance, 1913,' the rules of the Roman-Dutch Law do not apply (sec. 60 (2)) and that under that Ordinance, in the absence of fraud, there was a sale of the cottage to the plaintiff for the sum of $110.

Judgment for plaintiff with costs.

APPELLATE JURISDICTION.

THIS 7TH DAY OF APRIL, 1915.

DEMERARA RAILWAY COMPANY, LIMITED.

v.

MAYOR AND TOWN COUNCIL OF GEORGETOWN

Appeal—Local Government—Bye-laws—Screening of Vats—Owner of buildings—Owner of premises—Construction—Ultra vires.

By section 179 of the Local Government Ordinance, 1907, owners of buildings are made liable to erect and maintain in good order tanks of prescribed capacity for storing rain water. By the same section local authorities are empowered to make bye-laws for cleansing tanks and other receptacles for storing water and rendering them mosquito-proof and for prescribing the means whereby the tanks, etc., shall be made and kept mosquito-proof. The local authority for Georgetown made a bye-law providing that vats, tanks, or other vessels for storing water should be screened with mosquito-proof wire netting and that the work of screening should be done by the owners of the properties on which they were situated. "Owner" is defined by the Ordinance to mean, unless the context otherwise requires, "the person for the time being receiving the rack rent of the lands or premises in connexion with which the word is used," etc.

The defendants, a Railway Company and owners of lands leased by them to C., upon which C. had erected a building, of which he was the owner, having attached as appurtenant thereto a vessel for storing water not screened with mosquito-proof wire netting, were convicted for contravention of the bye-law.

Held that the conviction was bad, the bye-laws being *ultra vires* of the local authority, inasmuch as, on the proper construction of the section of the Ordinance, the owners of buildings are made liable to render water vessels mosquito-proof, and the local authority could not, without express power in that behalf, shift the liability to another.

This was an appeal from a conviction by Mr. P. A. F. Manby, Stipendiary Magistrate of Georgetown. All the necessary facts appear from the Judgment.

H. C. Humphrys for appellant.

H. H. Laurence for respondent.

SIR CHARLES MAJOR, C.J.: The defendants now appellants were charged before the Magistrate for the district of Georgetown that they, being the owners of premises situate at Lot 87, Railway Line, in this city, failed to screen with mosquito-proof wire-netting a vessel then being on the said premises and used for storing water so as to prevent the entrance into and exit from the vessel of mosquitoes.

2. The material facts proved before the Magistrate were that the defendants are the owners of Lot 87, Railway Line, that is to say, that they are the persons for the time being receiving the rack-rent of the lands or premises known as Lot 87. This lot, or a portion of it, was, in 1906, and still is, leased by the defendants to one Carrington on a monthly tenancy. On the land leased Carrington has erected a house. Attached or appurtenant to the house is a barrel used for storing water for consumption by

Carrington's household. The house and barrel are the property of Carrington. The barrel, on the 5th of January last, was found by a Sanitary Inspector employed by the complainants, who are the Local Authority for the city, to be unscreened.

3. The charge was laid under the provisions of bye-laws Nos. 2 and 5 of the Mosquito Prevention Bye-laws, 1907, made by the Local Authority for the city, pursuant to the power conferred by Section 179, sub-section (4) of the Local Government Ordinance, 1907. The first and fourth subsections of this section are as follows:

> "179—(1) The owner of every building in any district other than a plantation, and the owner of every plantation, shall erect and maintain in good order a tank or tanks for the storage of rain water and capable of storing the quantities of water prescribed under the provisions of this Ordinance and in this Ordinance referred to as the prescribed quantity.
>
> * * * * * *
>
> "(4) Every Local Authority may make bye-laws for the cleansing and rendering mosquito-proof of tanks, vats, and other receptacles for the storage of water, and in such bye-laws may prescribe the means by which such tanks, vats, and other receptacles shall be made and kept mosquito-proof."

4. Soon after the Local Government Ordinance, 1907, came into operation the Local Authority for the city made the Mosquito Prevention Bye-Laws, 1907, which were confirmed by the Governor and the Court of Policy on the 2nd of September, 1907. The second and fifth bye-laws run thus:

> "2. All vats, tanks, or other vessels shall be screened with mosquito-proof wire-netting or other suitable material so as to prevent the entrance into or exit of mosquitoes from such vats, or tanks, or other vessels
>
> * * * * * *
>
> "5. The work of screening the vats, tanks, and all such other vessels shall be done by the owners of the properties on which they are situated, and all vats, tanks, or other vessels shall be screened within three months from the date of the coming into force of these bye-laws."

5. To their conviction by the Magistrate for contravention of these bye-laws the defendants object that the decision is erroneous in law, inasmuch as—

(*a*)The bye-laws are *ultra vires* of the local authority conferred by the Ordinance under which they were made;

(*b*)the defendants are not the persons declared by law to be liable for contravention of these bye-laws;

(*c*) the bye-laws were repealed by implication by Ordinance No. XIX of 1910.

6. Before dealing with these objections it is necessary to review the history of the law which governs their consideration. Until 1907, the Public Health Ordinance, 1878, stood where the Local Government Ordinance, 1907, now stands. Up to 1904 section 35 of the former contained three sub-sections corresponding in every material respect with the first three sub-sections of section 179 of the latter. In 1904 section 35 was amended by the addition thereto of the following fourth sub-section:

"(4) Every Local Authority may make regulations for the cleansing of tanks."

In 1907, by Ordinance No. III of that year, the section was further amended by the repeal of the fourth sub-section and the re-enactment of the provision as to cleansing of tanks ("bye-laws " being substituted for "regulations") together with rendering them mosquito-proof, power being given at the same time to the Local Authority to prescribe how the cleansing and mosquito-proving should be done.

7. It appears, therefore, that the fourth sub-section of section 179 of the Local Government Ordinance, 1907, originally related to the cleansing of water tanks and was, as it is now, part of a section providing for the erection and maintenance in good order of those tanks; that, subsequently and supplemental to the cleansing of the tanks, the rendering them mosquito-proof was introduced, opportunities being taken at the same time by the Legislature to give Local Authorities power to say how those liable to clean them and render them mosquito-proof should do so.

8. Now, the Legislature having declared, in Section 179, that the liability to erect and maintain water tanks should fall on the owner of every building, it follows, as a legal construction to my mind indisputable, that in adding to the requirements in that section first the cleansing of water tanks and then the rendering them mosquito-proof the Legislature declared that the liability to fulfil the added requirements should also fall on the owners of buildings.

9. It has been contended for the respondents that the provisions of the fourth sub-section should be regarded as a substantive enactment, as quite separate from the other provisions of the section and not to be construed with or controlled by the latter. It is impossible so to regard them in view of their history. Deliberately in 1904 the Legislature made the cleansing of water tanks, not the subject of separate legislation, but as an amendment of what is now Section 179. As deliberately in 1907 it added rendering tanks mosquito-proof to the cleansing, coupling with the addition power to make bye-laws as to both requirements. The

fourth sub-section, therefore, never was separate from, but clearly has always been a part of, an expansion of, the previous provisions of Section 179.

10. But the respondents further contend that even if the fourth subsection is to be construed with the rest of the section, the Legislature by its terms gave an unlimited discretion to Local Authorities to make bye-laws as to cleansing tanks and rendering them mosquito-proof, and thus to impose the liability to do so upon whomsoever they would. I cannot agree. A bye-law the contravention whereof is followed by a penalty must not be in excess of the statutory power under which it is made, and here the power was restricted to prescription of how tanks should be rendered mosquito-proof. To accede to the argument would be to hold that the parent Ordinance having indicated the person, viz., the owner of every building, upon whom the liability should lie, on the one hand to erect and maintain water tanks of certain capacity, and on the other hand to cleanse and render them mosquito-proof, gave power to Local Authorities to throw that liability on some one else. Without express words to that effect I am unable so to hold. And even if it can be said that there is in the sub-section no express indication of the person liable to obey the bye-laws I must follow the familiar canon of construction that the intention of the Legislature when it delegates its powers to corporations must always be sought and followed. From the history of the subsection, from its context with the rest of the section, that intention seems to me abundantly clear.

11. When, therefore, the Local Authority for the city, in the exercise of its power to make bye-laws prescribing *how* water tanks or other vessels should be rendered mosquito-proof, also prescribed *by whom* that should be done, namely, by the owner of the properties on which the tanks were situated, that is to say, a person who might very well be, and in this case is, not the owner of the building at all, they travelled not only beyond their necessity but beyond their powers. And so it follows that the defendants, not being the owners of the building with which the vessel used for storing rain water in this case is connected or used, are not the persons declared by law to be charged with the rendering of the vessel mosquito-proof and were, therefore, wrongly convicted.

In connection with a remark of the learned Magistrate in his decision—"the hardship is that the landlord has no power to enter and view. I consider this should be specified in the lease when necessary"—I think it right to add to this judgment an expression of my opinion that, apart from its invalidity for excess of statutory authority, the bye-law is open to objection for the vice of unreasonableness, because it purports to apply to an owner

of lands or premises who, in the event of their being leased, may not reserve, and in this case has not reserved, a power of entry to inspect. In other words a landlord, in order to protect himself from penalties for contravention of the bye-law, might have to commit a trespass.

13. It is unnecessary for me to consider the appellants' contention that the bye-law was repealed by implication by Ordinance No. XIX of 1910.

14. The appeal is allowed and the conviction by the Magistrate is quashed. The respondents must pay the appellants their costs of this appeal.

WONG

v.

OFFICIAL RECEIVER, REPRESENTING ESTATE JOHN TAT.

BERKELEY, J.: On 6th May this matter came before me on appeal from the Official Receiver. A claim was made by the appellant against the Insolvent's Estate in respect of $421 lent to the Insolvent during his lifetime on two promissory notes payable on demand made by Chung-Fo-Sue and William Tang respectively in favour of the Insolvent and duly endorsed by him to the appellant for value which said notes, it was alleged, were destroyed by fire on 22nd December, 1913. On 2nd April, 1914, the Official Receiver notified the appellant that his claim had been rejected on the following grounds (1) insufficiency of evidence (2), non-production of the promissory notes claimed on (Insolvency Rule 182). Amongst the reasons of appeal was (d) that the notes were accidentally destroyed by fire.

After counsel for the appellant had opened his case counsel for the Official Receiver sought the Court's ruling on Rule 182. He submitted that the Official Receiver had no alternative but to reject the claim, no special order of the Court having been sought under regulation 182 and that under these circumstances no appeal would lie and that the cause must be struck out. Counsel for the appellant admitted that the appellant had to obtain such special order and stated that respondent had had notice of this application. I held that such special order should have been applied for before an appeal was brought. It was then intimated to the Bench that it had been agreed between counsel to ask the Court to waive the non-application and to proceed with the case on its merits.

It was not in the power of the Official Receiver without a special order of the Court to waive the non-production of the notes as it is alleged by, appellant in this appeal that he did. It was not suggested that the Court should make such an order

and in the absence of evidence the Court could not have done so. That appellant did not so interpret the Court's ruling is shown (1) by his leading evidence to establish that the notes were destroyed in the fire, and (2) by not raising amongst his reasons of appeal that the Judge had dispensed with their production. That such production was not dispensed with is also shown by the decision of 15th May now under review. If I had been satisfied on the evidence that the notes were so destroyed, I should have found to that effect, but on appellant's own evidence that he lent the money without interest, that he knew the purpose for which the money was borrowed, that in one case he had allowed a period of two or three years, and in the other, one year, to elapse without calling on the Insolvent for repayment, coupled with the fact that the loans had been paid to the Insolvent by those in whose behalf the money had been obtained from appellant, I was not satisfied that appellant had established his claim by proving that the notes were in his possession on 22nd December, 1913, that is, that he was correct when he said that the notes were in the safe with other papers. With reference to the costs I am of opinion that respondent's counsel is correct when he says that it was agreed that the appellant should pay the costs of appeal, but apart from this I think the Court should hesitate before it sanctions the payment by an Insolvent estate of costs incurred by the action of an unsuccessful claimant, a procedure which might tend to affect the dividends payable to creditors who had proved their claims according to law.

DALTON, J.: I agree that the appeal must be dismissed.

The evidence is no doubt stronger than in the. previous case, but the learned Judge who heard the witnesses was not satisfied on their evidence that the debt existed at the time of the fire, and it is not necessary to repeat what I said there. He has had the benefit of personally seeing and hearing the witnesses and I can find no good reason to differ from his finding.

The appeal should be dismissed with costs.

THIS 20TH DAY OF APRIL, 1915.

DEFREITAS
v.
RIBEIRO.

Practice—Action for dissolution of partnership and appointment of interim receiver and manager—No appearances—No defence—Evidence—R.C. 1900, Order xxv, r. 4.

On an application under Order xxv, r. 4, for final decree in default of defence in suit for dissolution of partnership where there has been no appearance;

Held by the Chief Justice that no evidence on behalf of the plaintiff is required or should be received.

This was an application under Order xxv, rule 4, for final decree in a suit for dissolution of partnership and usual consequential relief. There had been appearance. A statement of claim had been filed, but no defence had been put on record.

The question arose whether any evidence on behalf of the plaintiff was required.

G. J. de Freitas, K.C., for the plaintiff, submitted that no evidence on behalf of the plaintiff was necessary. He was prepared, however, to offer formal proof of the allegations in the statement of claim if the Court called for it, but asked for a ruling on the point of practice.

SIR CHARLES MAJOR, C.J.: I understand that it has been and still is the practice of the Court to take evidence on an application for judgment in default of defence. As this is the first application of the kind that has come before me, I think it as well to give in writing my reasons for saying that I disagree with that practice, as it seems to me to be contrary to the authorities on the very point here raised.

Rule 4 of Order xxv of our Rules of Court is identical with rule 11 of Order xxvii of the English Rules of Court save that the former gives wider power to grant relief under its provisions than the latter.

The note in the Annual Practice to rule 11 of Order xxvii— "proof of plaintiff's case"—is: "At a meeting of the judges a majority decided that "the Court cannot receive any evidence in cases hereunder, but must give "judgment according to the pleadings alone," and the case of Smith v. Buchan (1888), 58 Law Times, 710, is cited, in which Kay, J. used the words I have quoted.

In Young v. Thomas (1892,) 2 Chancery, a case in which the same rule came under consideration, Lindley, L.J., at page 136, said— "I am of opinion that the proper interpretation of Order xxvii, rule 11, is that, so far as the rights of the plaintiff and the relief claimed in the action are concerned, the judge is to look to the statement of claim and nothing else." Bowen, L.J., at page 137, said—"There is no doubt that, in determining the rights of the parties in the action, the statement of claim alone is to be looked to and the reason of the rule is obvious, namely, that the facts stated therein are taken to be admitted by the defendant, and, as has been decided by Lord Justice Kay in Smith v. Buchan [*ubi supra*] no evidence can be admitted as to the facts."

In Webster & Co. v. Vincent, 77 Law Times, 167, the same question was raised, whether it was necessary to file any evidence on behalf of the plaintiff, (the application for judgment there being by way of motion for judgment) and the brief treatment of the question by Lawrence, J. (with which Collins, J. concurred) was in these words: "You can have your judgment; evidence is not required."

On the above authorities I must follow the ruling I have always given on the question and hold not only that no evidence is required but that no evidence can be received.

APPELLATE JURISDICTION.

THIS 24TH DAY OF APRIL, 1915.

DOUGLAS

v.

BOODHOO.

Appeal—The Pounds Ordinance 1866—Seizure of animal for the purpose of being impounded—Releasing or rescuing strays on the way to the pound.

This was an appeal from a decision of the Stipendiary Magistrate of the West Coast Judicial District who convicted the appellant for releasing a stray which had been taken for the purpose of being impounded while on the way to the pound. The

facts found were to the effect that the stray was released by appellant whilst still on the land of the respondent on which it had been seized for the purpose of being impounded.

Held, that on the facts disclosed by the evidence, the stray was released whilst on the way to the pound.

Allen and Deolin *v.* Radhoo (A.J. 4.6. 1912) followed.

J. S. McArthur for the appellant.

The stray was not "on its way to the pound" when it was released.

A *bona fide* question of title arose from the fact that there was doubt as to the boundaries of respondent's land and hence the Magistrate's jurisdiction was ousted.

A. B. Brown for respondent in reply.

M. J. BERKELEY, J.: This appeal is from the decision of the Stipendiary Magistrate of the West Coast Judicial District (Mr. J. Brumell) who convicted the appellant that she did on 28th January, 1915, release a stray which had been taken for the purpose of being impounded while on the way to a pound.

The reasons of appeal are (1) that the decision is erroneous in law because (*a*) the cow was not on its way to the pound when released, (*b*) if it was the persons taking it were not legally authorised to do so, and (c) a *bona fide* question of title arose which ousted the Magistrate's jurisdiction, and (2) that the decision was unwarranted by the evidence.

The Magistrate finds that the stray was released by appellant on the land of the respondent after it had been taken for the purpose of being impounded, and on the authority of Allen *et al v.* Madhoo (A.J. 4.6. 1912) held that it was legally on its way to the pound from the time it was taken with the intention of sending it there.

The evidence for the respondent is to the effect that appellant and Peters—against whom the case was dismissed—released a cow which had been seized on respondent's instructions when straying on his land. At the time of the release the stray was still on respondent's land although it was then being taken to the pound by the two witnesses who seized it, and the respondent, as he says, was with them.

It is urged by counsel under reason 2 that as the Magistrate did not convict the second defendant he could not have believed the evidence of the witnesses for the prosecution who stated that the two defendants had released the stray and that he must have accepted the evidence of the appellant who said that she had released it. He further submits that this being so the Magistrate should have accepted her further statement that the stray had been dragged from Government land into respondent's land. I cannot agree with this proposition. It is open to a Magistrate to

accept certain facts deposed to by a witness without accepting his evidence in its entirety. In the present case although the evidence for the complainant was equally strong against both defendants the appellant went into the witness-box, admitted ownership and that she was the person who had released the stray. She thus made herself solely responsible and this may have induced the Magistrate to take a lenient view of the conduct of the other defendant.

As to reason 1 (*c*) owing to the removal of the eastern paal which divided the respondent's land from Government land it is alleged that a *bona fide* question of title has arisen. The evidence all points to the stray having been seized on respondent's land except the evidence of appellant who admits that she released it on his land but alleges that it had been dragged there after seizure. As to (*a*) further consideration confirms the opinion expressed by me in Allen *et al v.* Madhoo, referred to by the Magistrate, viz: that a stray is legally on its way to the pound from the time it is seized. The 6 and 7 Vict. Ch. 30. s. 1 after reciting that cattle which are lawfully impounded, or which are lawfully seized for that purpose are rescued from the pound or place in which they are so impounded or on the way to or from such pound or place, provides that in case any person shall release or attempt to release any "stray" which shall be lawfully seized for the purpose of being impounded, *from the pound*, or, on the way to the pound such person shall be liable to a penalty. It is to be noticed that section creates two offences—the same which are in effect created by the local Ordinance No. 1 of 1866. (S. 8 (1) and (3)). As to (*b*) the evidence shows that the respondent was with the two witnesses who were taking the stray to the pound. He was in effect himself taking the stray and therefore an authorisation under s. 4 was unnecessary.

Appeal must be dismissed with costs.

THIS 28TH DAY OF APRIL, 1915.

RAMKELAWAN

v.

BARROW.

Appeal—Summary Conviction Offences Ordinance, 1893, Sect. 96—Unlawful possession—Explanation to the satisfaction of the Court.

This was an appeal from a conviction by Mr. P. A. Farrer Manby, Stipendiary Magistrate of the Georgetown Judicial District, appellant being found guilty of the unlawful possession of certain boards of wood reasonably suspected of having been stolen.

All the necessary facts appear from the judgment. Conviction affirmed.

J. A. Luckhoo for appellant.

The appellant, on being asked by a constable to account for his possession of the boards, stated that he had got them from his father who was breaking a house. That account was reasonable and sufficient in law to satisfy the Magistrate. The Magistrate should thus have dealt with the matter under the provisions of sub-section (2) and (3) of sec. 96 of the Summary Conviction Offences Ordinance, 1893, as the son must have been presumed, in the circumstances, to have been the servant of his father and was, therefore, excused from any offence by reason of his possession of the boards.

There was in addition no evidence of any reasonable suspicion that the boards in question were stolen or unlawfully obtained.

C. Rees Davies, Solicitor General, for respondent not called on.

SIR CHARLES MAJOR: The appellant was charged before the Magistrate for the district of Georgetown for having in his possession some boards reasonably suspected to have been stolen.

2. The boards were proved to have been in the appellant's possession. The Magistrate found on the evidence that the suspicion that they had been stolen was reasonable and with that finding I concur. The appellant's explanation of his possession was that his father was breaking up a house and had given him the boards to carry away. The boards, however, were new boards, and it was shewn that, on application to the father, he confirmed the son's statement of having received them from him, but said that he (the father) had got them from a Mr. Kingsland, which was not true. The son's account of how he came into possession of the boards, above stated, was the only account he gave; it was given to the police constable who stopped him and he gave no further account to the Court. The Magistrate was not satisfied with the appellant's account of his possession and convicted him.

3. In the circumstances of the case, and seeing that while the appellant's statement that he got the boards from his father was true, the statement that they were from a house which his father was breaking was untrue, I was of opinion that the Magistrate's dissatisfaction was justified and affirmed the conviction.

I was unable to agree with the contention of counsel for the appellant that the son, having stated to the constable who stopped him when carrying the boards that he had got them from his father—which on reference to the father was found to

be true—thereby gave an account sufficient in law to satisfy the Magistrate and excuse him, nor could I agree with the learned counsel's argument that the provisions of sub-sections (2) and (3) of the 96th section of the Summary Conviction Offences Ordinance, 1893,—under sub-section (1) whereof the appellant was charged—precluded the Magistrate from consideration of any further statement by the appellant by way of accounting for his possession.

CROWN CASES RESERVED.

(CORAM: SIR CHARLES MAJOR, C.J.: BERKELEY AND HILL, J.J.)

THIS 7TH DAY OF MAY, 1915.

REX

v.

KHAN BAHADUR KHAN AND NASIBUN.

Breaking and entering, and theft—Husband and wife—Coercion by husband.

A presumption arises that a wife is acting under the coercion of the husband if she commits an offence in his presence—Presumption is rebuttable.

The Judgment sets out the case as stated and the Court confirmed the conviction of Nasibun.

J. A. Luckkoo for the prisoner.

Hon. J. J. Nunan, K.C., Attorney General, for the Crown.

There are only three things for the Court to consider—

(1.) Is there any presumption?
(2.) If so, is it a rebuttable presumption?
(3.) If so, has not the presumption been rebutted by the evidence led?

J. A. Luckhoo in reply.

M. J. BERKELEY, J.: This case is stated by Sir Charles Major, C.J., as follows: 1. At the Criminal Sessions holden at Georgetown for the county of Demerara during the present month of April, Khan Bahadur Khan (whom I hereinafter described as Khan) and Nasibun were tried before me on an indictment charging them, in the first count, with feloniously breaking and entering the dwelling-house of Dhulam with intent to steal and stealing therefrom certain moneys of Dhulam, and in the second

count, with feloniously receiving of the said moneys knowing them to have been stolen.

2. Khan and Nasibun are, for the purposes of this case assumed to stand in the relation of husband and wife.

3. The prisoners occupied a room next to, and divided by a partition from, a room occupied by Dhulam and one Bhagwantia.

4. At the trial it was proved by Bhagwantia and a witness called Jagdeo that, during the absence of Dhulam from his room and when they were the only persons other than Khan and Nasibun on the premises, Nasibun induced them to leave the place and accompany her to a distance and for an absence of some two hours. On returning to his dwelling Dhulam, hearing Khan complain of the loss of some money, made search in his room and discovered the loss of his own moneys. The witness Jagdeo testified to seeing Nasibun, immediately after Dhulam's announcement of his loss receive from Khan and bury in the floor of their dwelling a packet or bundle which was subsequently unearthed by the police and found to contain among other coins, six in number and denomination corresponding with those sworn by Dhulam and Bhagwantia to have been hidden in their room.

5. At the close of the case for the prosecution it was objected by counsel for the prisoner Nasibun that there was no case against her to go to the jury, forasmuch as, being the wife of Khan, she must be taken, whatever she had done, to have acted under his coercion and was, therefore, entitled in any event to an acquittal. The Attorney General submitted (a) that evidence for the prosecution had been given to support the contention of the Crown that Nasibun, in inducing Bhagwantia and Jagdeo to leave Dhulam's premises in order that Khan might commit and where the Crown submitted that Khan did commit, the crime firstly charged, acted independently of her husband, and (*b*) that the jury should be directed to consider that evidence. Counsel for Nasibun repeated his objection that, even if she could be said to have so acted, she could not be convicted.

6. I over-ruled the objection, holding that I must leave the question of independent action by Nasibun to the jury and that the jury must consider the evidence in support of that submission.

7. After hearing the evidence of Khan and Nasibun the jury convicted the prisoners.

8. At the request of counsel for the prisoner Nasibun I respited judgment on her conviction and consented to reserve for the opinion of this Court the question—

Whether, at the close of the case for the prosecution and notwithstanding the evidence tendered by the Crown in support of the submission that Nasibun took an active part in the commission of the crime independently of her husband, I should have

directed the jury to acquit Nasibun as conclusively to be presumed as having acted under the coercion of Khan. If the Court should be of opinion that the objection on behalf of Nasibun was good then a verdict of acquittal is to be entered; if the Court should hold that the objection was invalid, the conviction of Nasibun is to stand.

CHARLES MAJOR, C.J.
17th April, 1915.

The sole point reserved for the consideration of this Court is set out in paragraph 8.

As regards a crime charged to have been committed by husband and wife jointly no presumption arises in favour of the wife merely from the fact of the conjugal relation, but where certain crimes are committed by a wife *in the presence* of her husband she is presumed to have committed them under his coercion. (Russell on Crimes 7th ed. 92). It is to be noted that this is *prima facie* presumption only and is rebuttable.

In the present case the evidence is to the effect that the prisoner and her husband occupied a room separated by a partition from the room of Dhulam, and that during his absence, the prisoner induced the other two occupants to go out with her for the space of two hours, during which time the room of Dhulam was broken into and certain moneys were stolen, which were subsequently seen to have been handed to the prisoner by her husband and found under the floor of their room.

The case against the prisoner was that she was a party to the offence, as she induced the inmates of the room to go away with her in order to enable her husband to break and enter Dhulam's room and steal his money.

There is evidence that the prisoner's husband was on the premises but there is no evidence that he was present when the prisoner induced the two inmates to accompany her away from the place. It is no excuse for the wife that she committed the offence by her husband's order and procurement if it was committed *in his absence*, at least, it is not to be presumed in such a case that she acted under coercion (Russell on Crimes, 99) and Lord Chancellor in Brown v. The Attorney General for New Zealand (1898 A.C. 234).

This being so it is doubtful whether the question of coercion arises at all, but assuming that the husband was in his room and thus although not present was in a position to coerce the prisoner and it could be legally held that he did so coerce her, it is urged on her behalf on the authority of R. v. Knight (1 C. and P. 116) that the Judge should have directed an acquittal. This case is referred to by Stroud on 'mens rea' (264) as showing that for-

merly it was open to some doubt whether the presumption that certain crimes committed by a woman in the presence of her husband could be rebutted, but the learned author proceeds to say that it is now clearly established that such a presumption is always rebuttable.

It would seem on the authorities to be a question for the jury whether the wife was taking an independent part or acting under the husband's control. See R. v. Baines (C.C.R. L.J. 1900 V. 69, 681), R. v. Cohen (11 Cox 99), and R. v. Dykes (15 Cox 771). In the first two of these cases the conviction was affirmed by the Court of Crown Cases Reserved and in the third case the jury found the prisoner guilty but that she acted under the coercion of her husband, whereupon the presiding Judge directed an acquittal to be entered.

Counsel for the prisoner referred to a point not stated for this Court, namely, that the jury were not directed to consider the question of coercion. He subsequently admitted that it was not open to him to argue this point. This Court has power to send back a case for amendment but this power does not extend to the stating for the Court's consideration a new point not referred to in the case then before the Court. (R. v. Tyree L.R. 1 C.C.R. 177.)

The conviction is affirmed.

J. K. D. HILL, J.: We cannot travel outside the limits of the case stated, and, in this, counsel for the prisoner Nasibun agrees.

Our opinion is asked, on the facts as set out in the case, (and further supplemented by the notes read at the hearing by the Chief Justice with reference to the presence of Khan) whether the Chief Justice at the close of the case for the prosecution should have directed the jury to acquit Nasibun as conclusively to have been presumed as having acted under the coercion of Khan.

To that I content myself by answering "no." There was no obligation in law on the Chief Justice to give such a direction and the conviction must stand.

SIR CHARLES MAJOR, C.J.: I concur and have nothing to add.

APPELLATE JURISDICTION

THIS 10TH DAY OF MAY, 1915.

MACKENZIE
v.
NELSON.

Appeal—Magistrate's Court—Larceny—Larceny as a bailee—Summary Conviction Offences Ordinance, 1893. s.s. *71, 72.*

M. was convicted on a charge of larceny of moneys "the property of D." simply. D. never had possession of the moneys and had no property in them except as derived from M.'s temporary custody of the moneys for subsequent payment to him. The Magistrate found that there was no bailment.

Held that the conviction must be quashed and that the Court of Appeal had no power of its own motion and without appeal from that finding to affirm the conviction on the ground that the evidence disclosed that the defendant was a bailee.

This was an appeal from a decision of Mr. E. A. Bugle, Stipendiary Magistrate of the East Coast Judicial District. The judgment fully sets out the facts.

H. C. Humphrys for appellant.

C. Rees Davies, Solicitor General, for respondent.

SIR CHARLES MAJOR, C.J.: Mackenzie, a Sheriff's officer, entrusted, in August, 1914, with the execution of a writ of *fi. fa.* against the goods of Adams at the instance of D'Abreu, Adams' judgment creditor, withheld the levy on an agreement between Adams, D'Abreu and himself that Adams, when and in sums convenient to him, would pay the judgment debt by instalments to be handed to Mackenzie who should receive the same and pay them over to D'Abreu. Pursuant to agreement, on four occasions between the 10th of August and the 23rd November, 1914, Adams sent to Mackenzie money orders in Mackenzie's favour for $2.92, $2.08, $2.40 and $4.00 for payment of the proceeds to D'Abreu. Mackenzie cashed the money orders and appropriated the proceeds to his own use.

Mackenzie was charged thereupon before the Magistrate of the East Coast district with the larceny of $11.40 the property of D'Abreu. Evidence of the above facts was given by Adams, D'Abreu and the Postmaster at Buxton post office (the office where Mackenzie cashed the money orders). No evidence was given by the defendant. The Magistrate convicted the defendant of larceny. Against that conviction Mackenzie appealed.

I allowed the appeal and quashed the conviction because D'Abreu never had possession of the moneys charged as his property nor, apart from the actual possession of them, had he, in my opinion,

such property in them, either absolute or special, as could support a charge of larceny from him.

I was urged by the Solicitor General, who appeared for the prosecutor, to affirm the conviction on the grounds—

(*a*) that under the provisions of section 72 of the Summary Conviction Offences Ordinance, 1893, a person who is a bailee of money and converts the same to his own use is guilty of larceny and can be convicted thereof on a complaint for simple larceny;

(*b*) that on the evidence before the Magistrate the defendant was shewn to be a bailee when he converted the moneys to his own use; and

(*c*) that, therefore, the Magistrate rightly convicted the defendant of simple larceny. The powers of the section are exercisable only when, notwithstanding the fact that the complaint against the defendant charges simple larceny, he is shewn to have been a bailee and to be guilty of larceny in that character.

But, on the facts before him, the Magistrate specifically found that the defendant was not a bailee; in his own words, that "no question of bailment arose;" and convicted him of simple larceny. I was not aware of any power of mine, on my own motion and without any appeal to the Court from that ruling of the Magistrate on a point of law, to reverse it and, holding (if I did hold) that the evidence disclosed a bailment in the defendant, to set aside the existing conviction for simple larceny and substitute for it a conviction for larceny when the defendant had the character of bailee.

17 MAY, 1915.

DE SANDERS
v.
DE SANDERS.

Claim to dissolution of Marriage—Adultery and Malicious Desertion—Domicile—Jurisdiction.

Plaintiff sued for the dissolution of her marriage on the grounds of adultery and malicious desertion. Defendant did not appear. Her domicile is that of her husband. Defendant's domicile of origin was Dutch.

Held that in the absence of clear evidence that defendant had abandoned his domicile of origin the Court had no jurisdiction.

All necessary facts appear from the judgment.

Mc. Ogle for plaintiff.

Defendant in default.

HILL, J.: The plaintiff in this action seeks to obtain a divorce from her husband, the defendant, on the grounds of his adultery

and malicious desertion. No appearance has been entered by the defendant, but the burden of proving her case still rests on the plaintiff and the first question is whether the Court has jurisdiction to pronounce a decree of divorce between the parties.

This depends on the domicile of the parties. If actually domiciled here, the Court has jurisdiction, otherwise it has not.

Plaintiff's domicile is that of her husband. His domicile of *origin* is Dutch, but it is contended he has acquired a domicle of *choice* in this Colony, and has thus changed his domicile.

On the evidence before me, I am satisfied that the plaintiff has not proved the defendant has abandoned his domicile of origin, and is domiciled in this Colony, and that therefore the Court has no jurisdiction.

ORIGINAL CIVIL JURISDICTION.

28TH MAY, 1915

GOMES
v.
DINZEY.

Application—Amendment of writ of Summons—Costs—Rules of Court, 1900, Order XLVI. r. 13—Stay of proceedings in action for non-payment of costs.

Power to stay proceedings for non-payment of costs is not exercised unless the nonpayment or the inability to pay is accompanied by some vexatious, frivolous or other improper conduct.

Ewing v. Buttery L.J., 26.3. 1902, followed.

Action for the payment of $750 balance of money due by plaintiff to defendant for work done and services rendered as clerical assistant and clerk from May, 1914, to January, 1915, in terms of a verbal agreement, and for money had and received. Application was made by defendant to have the writ of summons set aside as irregular and as not complying with the Rules of Court, Order IV., r. 7, and leave was thereupon given to amend the writ, the plaintiff to pay the costs of the application. These costs were not paid and at the hearing of the action defendant applied for a stay of proceedings under the provisions of Rules of Court, 1900, Order XLVI., r. 13.

W. E. Lewis for plaintiff.

H. H. Laurence for defendant.

HILL, J.: Plaintiff, in this action, claims from the defendant the sum of $750, balance of a sum of $800, for work done and services rendered in terms of a verbal agreement made between them on or about 9th May, 1914.

On application by counsel for the defendant, the Chief Justice ordered that the plaintiff be at liberty to file an amendment to his writ of summons, within two days of the order, the defendant, if appearing, to appear within two days of the filing of the amended writ. It was also ordered that the costs of the application were to be taxed and paid by the plaintiff.

These costs were taxed, and execution levied on the plaintiff, but nothing has been paid, nor anything found to satisfy the execution.

At the trial before me, application was made under Order XLVI., rule 13, to stay proceedings in the action until these costs were paid. I was informed by counsel for the plaintiff that such application was made in the first instance when application to set aside the writ of summons was made before the Chief Justice, and was refused. I saw no good reason to order a stay. If the plaintiff succeeded in his action, the taxed costs should be allowed against the sum recovered by him, and there did not seem to be anything vexatious, or frivolous in the plaintiff's action in not paying them. As stated by Lucie Smith, J., in Ewing v. Buttery (L.J. 26.3. 1902) the inherent power to stay proceedings for the non-payment of costs is never exercised unless the non-payment of, or the inability to pay the same is accompanied by some vexatious, frivolous, or other improper conduct.

His Honour then proceeded to deal with the action proper and found that on the evidence the claim of plaintiff had been made out. He therefore gave judgment for the plaintiff with costs.

APPEAL COURT.

31ST MAY, 1915.

(CORAM: SIR CHARLES MAJOR, C.J., AND HILL, J.)

BOOKER BROS. MCCONNELL & Co., LTD.

v.

HENRIQUES.

Appeal—Practice—Pleading—Rules of Court. 1909, Order XVII. r. 18.—New ground of claim—Amendment of pleadings—Order XXVI. r. 12. and Order LI. r. I—Rejoinder.

Appeal from the decision of Berkeley, J., (see above page 39) granting an application made at the hearing by defendant to strike out certain paragraphs of plaintiffs' reply as raising a new ground of claim contrary to R.C. 1900, Order XVII. r. 18.

Appeal allowed, the paragraphs struck out to be restored to the pleading and defendant to be at liberty to apply within seven days from date for lease to rejoin if so advised.

Hall v. Eve (L.R. 4 CD., 341) followed.

Per the Chief Justice, *obiter*, where inconsistent or contradictory matter is introduced into a pleading amendment should generally be allowed or directed to admit the same under the power given by Order LI., rule 1 and on the principle stated in Order XXVI. rule 12.

Further, that here the defendant's delay disentitled him to relief under Order LI., rule 2.

G. J. de Freitas, K.C., (*H. H. Laurence* with him) for appellants.

P. N. Browne for respondent.

SIR CHARLES MAJOR, C.J.: On the 4th May, 1914, the plaintiffs issued a specially indorsed writ claiming against the defendant the payment of $659.82, stated to be due on a balance of account for goods sold and delivered to Joe and George Rodrigues, the defendant's nephews, under the defendant's written guaranty. The guaranty is in the following terms: "7th "January, 1913. Under renunciation of the beneficium ordinis [seu] excus- "sionis, I hereby undertake and agree to be answerable and pay for all dry "goods supplied or which may at any time hereafter be supplied by you to "Joe and George Rodrigues, Camp Street Store, and for all notes, cheques, "and bills of exchanges, given or which may hereafter be given in respect "thereof, provided they the said Joe and George Rodrigues shall neglect to "pay in due time.

"(Signed) Manoel Gomes Henriques."

2. The indorsement on the writ of summons being the plaintiffs' statement of claim, the defendant delivered his defence on the 28th May, 1914. To that defence the plaintiffs replied on the 24th June, 1914, not only with a joinder of issue but with a special reply. The defendants did not ask for leave to rejoin specially, but the pleadings being thus, the action was entered by the plaintiffs for trial on the 23rd February last.

3. It does not seem to me necessary extensively to set out the pleadings, or those parts of them with which this appeal is concerned. They seem to me to be conventionally summarized in the following manner.

4. The plaintiffs say to the defendant: "You have given to us a written undertaking to pay us the amount which shall be due from your nephews for goods sold and delivered by us to them. A balance of $659.82 is due." The defendant answers: "By a verbal agreement I undertook to pay you for goods to be supplied to my nephews and the guaranty signed by me was given in pursuance of that agreement. In respect of goods sold and delivered by you to my nephews, which you stated to have been of the value of $703.25, my nephews have paid you $1,268.31 in full satisfaction thereof and my nephews are not indebted to you in any sum for the payment whereof I am responsible." The plaintiffs reply: "We can explain that, and show how, notwithstanding the payment of the $1,268.31 we still claim that your nephews are indebted to us in respect of a balance of account for goods sold and delivered. Since the 7th January, 1913, your nephews have been supplied by us with goods to the value of $1,108 and have, as you say, paid us $1,268, but, as a matter of fact, they were indebted to us in another sum, viz., $848, a debt incurred by your brother, the liability for payment whereof was, by the verbal agreement to which you refer, transferred to your nephews. Out of the $1,268 therefore we have credited your

nephews first with the $848, then with some $402 for goods supplied between January and June, 1913, and then with the remainder against goods supplied to them since June, 1913, and you knew of our having done so. That leaves the balance given in the indorsement of the writ. It is due and we call upon you to pay it. Why? Because you undertook to do so by the terms of your guaranty."

5. The action coming on for trial on the 23rd February, the defendants at that stage applied to the judge for an order striking out the paragraphs of the reply in which reference is made to the verbal agreement and the $848 and the mode in which the $1,268 was appropriated, on the ground that their averments were contrary to the provisions of rule 18 of Order XVII. That rule provides that "No pleading shall, except by way of amendment, raise any new ground of claim, or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same." In granting the application the learned senior puisne judge said: "These paragraphs of the reply raise an entirely new ground of claim, that is, the verbal agreement set out in paragraph 2 with reference to the assumption by the brothers Rodriques of a debt due by defendant's brother to the plaintiffs and which is not referred to in the guarantee given by the defendant, on which the statement of claim is based. It is in effect a desertion of the guarantee . . . and a resort to another and different ground, that is, a verbal agreement. In my opinion it is inconsistent with the previous pleading of the plaintiff." . . .

6. I am unable to come to those conclusions, or to see that the plaintiffs' reply contains either a new ground of claim or any inconsistency. And the accuracy of the contention that it does seem to me to be capable of easy test. Rule 18 allows—I think, on the authorities relating to amendment, it invites—the introduction of contradictory or inconsistent matter into a pleading by amendment. Assuming the averments in the reply to which objection has been taken to be introduced by amendment of the statement of claim, of what would that amendment consist? Obviously the bringing of the $848 and the goods supplied between January and June, 1913, into debit account, and the payments of $1,268 into credit account, leaving the same balance against the nephews as now claimed, and claimed on the same ground, namely, the defendant's guaranty. Where then is the second or new ground? Where is the departure from, or desertion of, the first ground? There is none that I can see. The claim remains the same.

Whether the plaintiff's version of the verbal agreement, first pleaded by the defendant, is correct, whether either party will be at liberty to give evidence of that agreement at the trial, whether the plaintiffs were entitled to debit the nephews with the $848,

whether payments by the nephews to the plaintiffs were in fact made with specific appropriation or generally, whether the state of the account between the plaintiffs and the nephews and the method of appropriation of payments made by the nephews against that account was within or without the defendant's knowledge, whether the $848 is included in the words of the guaranty "supplied or which may at any time hereafter be supplied"—these are, all of them, questions that may very well arise at the trial. With their answers this Court has, of course, nothing to do. They were not, in my opinion, before the learned judge in the Court below and, if raised, should not have been considered on the application to strike out the alleged offensive paragraphs of the reply.

8. I think the plaintiffs properly omitted, in the first instance, to refer in their accounts to the $848 and to the goods supplied between January and June, 1913. The defendant having pleaded a verbal agreement as that to which his guaranty relates and also the payment by his nephews to the plaintiffs, for goods sold and delivered, of sums totalling nearly double the value of those goods, the plaintiffs were compelled, in order that the facts and figures in connection with that agreement and those payments might appear, to explain them. As put by Mr. Laurence, the plaintiffs traversed the denial of indebtedness, they confessed the payments of the nephews as alleged by the defendant and avoided the effect sought to be given thereto by explaining how they came to be made and how they were appropriated. That is the function of a reply. I am unable to see that the plaintiffs have done anything more.

That being my opinion and although the decision on other grounds of appeal argued before the Court thereby becomes unnecessary, I think it worth while to say that even had the matter introduced into the reply been contradictory or inconsistent, the least that should have been ordered was amendment of the statement of claim to let that matter in. And that with or without the plaintiffs' application for the purpose. Order LI., rule 1, gives the power of amendment for an irregularity. This could have been nothing more. The principle upon which amendment should proceed is laid down in Order XXVI., rule 12. (also giving the Court general powers of amendments); "all necessary amendments shall be made [that is, if a judge thinks fit, on his own motion] for the purpose of determining the real question or issue raised by or depending on the proceedings." On the other hand Order LI., rule 2 provides that "no application to set aside any proceedings for irregularity shall be allowed unless made within reasonable time." I think the delay of the defendant in waiting for eight months and then until the hearing of the action was highly unreasonable and disentitled him to relief.

10. The appeal is allowed. The order of the learned judge is set aside and paragraphs two, three, five and six of the plaintiffs' reply are restored to that pleading. The defendant is to be at liberty to apply within seven days from the date of this judgment for leave to rejoin if he should be so advised. The respondent must pay the costs of this appeal and the costs of the day given by the order now set aside.

J. K. D. HILL, J.: This is an appeal from the decision of Berkeley, J., in which he ordered paragraphs 2, 3, 5 and 6 of the plaintiffs' reply to be struck out as raising a new ground of claim, and contrary to Order XVII. rule 18 of the Rules of Court.

The grounds of appeal are (1) that the paragraphs do not raise any new ground of claim or contain any allegation of fact inconsistent with their statement of claim; and (2) that the objection was incompetent as not made by a proper application supported by affidavit and in the manner provided by the Rules of Court.

I am of opinion that as soon as the defendant in his defence set up a verbal agreement and stated he subsequently signed a document which he believed gave effect to the said verbal agreement (par. 4 of defence) and, in effect, pleaded payment (par. 5) it became incumbent on the plaintiff to do that which he did in his reply (pars. 2, 3, 5 and 6). Had he merely joined issue he might have been debarred at the hearing for want of pleading, in going into matters vital to his case (Order XVII, rules 13, 19, and 21) for a joinder of issue is merely a denial, it does not confess and avoid. The reply is the proper place for meeting the defence by confession and avoidance, and the plaintiff was under no obligation to anticipate the defence and to state what the plaintiff would have to say in answer to it (Hall v. Eve 4 C.D., 345).

The learned judge appears to have anticipated matter in his decision, which might well have to be considered at the hearing of the case, but I am unable to agree that the paragraphs struck out do more than reply to the statements made in the defence, and am of opinion that they do not raise a new ground of claim.

It is unnecessary to deal with the other reason of appeal.

The order will be for the paragraphs struck out to be restored.

Costs to the appellants.

NOTE.—[Browne, for the defendant, proposed to apply to the Court of Appeal immediately for leave to rejoin, but the judges said the application must be made to the judge of the Court of trial in whose province lay its consideration and the power to grant or withhold the relief as he might think fit.—ED.]

FULL COURT (APPEAL COURT).

THIS 6TH DAY OF JANUARY, 1915.

FONSECA

v.

BRITISH GUIANA MUTUAL FIRE INSURANCE COMPANY.

Fire Insurance—Filing of as particular a claim of the damage suffered as was possible under the circumstance—Purport of such requirement—Untrue statement in claim—Fraudulent intent.

MAJOR, C.J.: Condition 14 of the policy of insurance, upon which the judgment of the learned Judge in the Court below is based is as follows:—

"If the claim be in any respect fraudulent, or if there shall appear any "fraud or any false statement in the account, or in any of the books, vouch- "ers, or other evidence, or if the affidavit or statutory declaration or other "legal form shall contain any untrue statement—[the usual stipulation re- "garding arson follows]—then this policy shall be absolutely void."

The terms of the condition are aimed at (1) fraud and (2) arson, and to be properly construed must be read together, that is to say, the "false statement" and the "untrue statement" must be made with intent to defraud the insurer. I cannot, therefore, assent to the proposition that, after these expressions, there should be read into the stipulation the additional words "whether fraud," or "whether an intention to defraud, shall appear or not."

Now it is plain from the facts of the case that there could be no fraud of the insurers in the sense that they would have to pay more than the sum to which the insured was entitled. and assuming that the sworn statement by the plaintiff that the tire "completely destroyed" his "drug business" meant "completely destroyed" his "stock," the latter being admittedly untrue, it seems to me that the consideration by the Court of the question whether the untrue statement was made with intent to defraud must be very largely influenced, firstly, by the knowledge that the untrue statement could not defraud the defendants because, while the stock has been abundantly proved, before and since proceedings were commenced, to be of the value of $1,200 at least, the plaintiff could not recover more than $978, and the value of the salved articles amounted to $65 only; secondly, by the fact that the plaintiff—not then, not indeed, be it observed, until the defendants' defence in the action was delivered, being aware why his claim had been rejected—wrote, apparently quite at the end of January or beginning of

February last, "I did not know that I was required to make mention in my affidavit of the few things that arrived at the Camp Street shop on the day" [*i.e.*, of the fire], a statement amplified and confirmed by his solicitor in the letter of the 4th February; thirdly, by the plaintiff's sworn testimony in the action, "I did not think it necessary to disclose the possession of the articles as my stock was worth so much more than the insurance."

These considerations taken together seem to me almost peremptorily to negative a fraudulent intent on the part of the plaintiff. They do not appear to have received the attention they certainly deserved by the learned Judge who tried the action in his remarks on the conduct of the plaintiff in connection with the salved goods. The plaintiff's letters may have been disingenuous, his conduct may have been in some respects such as to excite suspicion, his statements may have been, strictly speaking, untrue, but of evidence of dishonest statement, of statements which cannot be reconciled with good faith, of a claim and affidavit fraudulently untrue, I find no trace. The mere omission on the part of the plaintiff to state that he had salved $65 worth of goods out of stock of the value of $1,200 and insured for only $978, does not, in my opinion, even raise a presumption of intent to defraud; it certainly does not prove that intent.

With regard to the respondents' contention for breach by the plaintiff of condition 12, that condition is not, in my opinion, one to be strictly construed. It seems to me to be a condition inserted more for safeguarding the Company's directors in the performance of their duties from setting claims against the Company upon insufficient evidence than anything else. It is a stipulation which is fulfilled by substantial compliance. It has been said to mean that the assured is, within the time limited by its terms, to produce to the assurers *something* which will enable them to judge whether he has sustained a loss or not. It is always subject to the qualification that the assured must have the means substantially to verify his claim. It must be reasonably enforced. The enforcement should not be oppressive or capricious.

In this; case the plaintiff did, I think, substantially comply with the terms of the stipulation, considering the means at his command so to do, and in view of the steady abstention by the defendants from giving him information of their requirements under the condition, beyond a solitary request for a look at his stock-book, from the date of the receipt of the claim until its final rejection.

I am of opinion that the appeal of the plaintiff should be allowed and that the judgment of the Court below should be reversed and judgment ordered to be entered for the plaintiff

with costs. The application of the defendants to vary the judgment of the Court below should be refused. The respondents must pay the appellant his costs of this appeal.

BERKELEY, J.: This appeal is from the decision of Hill, J., who in an action brought by the appellant against the respondent Company on two Policies of Fire Insurance found that the claim was fraudulent and gave judgment for the respondent Company. Under O. 43 (r. 21) the respondent Company asks that the Judge's decision should be varied as to his finding that as particular a statement of the damage suffered as required by Condition 12 of the Policy had been filed by the appellant.

The Policies are dated 7th March, 1910, and 20th December, 1910, respectively, and thereby the appellant was insured against loss or damage by fire, in respect of the first Policy for $500 "on the stock of the drug shop, namely, on the stock—$400, on the fittings, $100." (This insurance was reduced on 16th September, 1910, to $478); and in respect of the second Policy for $500 "on the stock."

On the 22nd December, 1913, a fire took place, when the stock and fittings were destroyed with the exception of two glass-cases and certain stock of the value of $65, a sales-book and a passbook were also salved but the stock-book was lost. The learned Judge finds that the value of the stock and fittings so destroyed was $1,200 or $1,300.

The substantial reason of appeal urged in behalf of the appellant is that on this finding judgment should have been entered for the appellant, the liability of the respondent Company on the said Policies being for the sum of $978 only.

> It is required by Condition 14 that ". . . . . if such affidavit (that is, the affidavit required in Condition 12) . . . . . shall contain any untrue statement . . . . . then this Policy shall be absolutely void." It seems that appellant on 24th December (two days after the fire) forwarded by way of claim a letter together with an affidavit in which he swore that his drug business was completely destroyed by fire, and that six months ago the value of the drug business was about $1,200, and that his stock-book was also lost. The complete destruction of his drug business could only mean that his entire stock and fittings were destroyed. This was an untrue statement, as $65 in stock and fittings had been salved. I cannot agree with the learned Judge that this untrue statement rendered the claim fraudulent. This might have been the case if the value of the stock and fittings had been found to be of less value than $978, but the Judge has found that at the time of the fire the value of such stock and fittings was $1,200 or $1,300 and that the fire destroyed the

same with the exception of the said two glass-cases and certain stock. On this finding the $978 insured under the two Policies does not cover the loss sustained by appellant. In my opinion this negatives the intention of the appellant to deceive and defraud the Company, that is, to get out of them money that he knew he had no right to. (Lord Coleridge in Norton *v.* The Royal Fire and Life Assurance Company, T.L.R., Vol. 1., p. 461.)

As to respondent's application that the decision be varied, Condition 12 attached to the Policies provides that "the insured must within 14 days . . . . . 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 must . . . . . produce and give to the Company all such books . . . . . as may be reasonably required by . . . . . the Company, together with an affidavit . . . . . .of the truth of the claim . . . . . .

In the letter written to the Company on the 24th December and sent with the affidavit, the appellant sets out that his average monthly sales for the last six months amounted to $150 and the additions to stock about $100 per month, more or less. The letter together with the affidavit were intended to be the claim in writing required by Condition 12, to be delivered to the Company within 14 days after the loss or damage. The respondent Company did not ask for further proof until the limit of 14 days had expired. That is on 6th January, the appellant was informed that the Directors had information that he had saved all his books and papers including his stock-book, which they would like to see. On 7th January, appellant wrote that in his affidavit he had affirmed that his stock-book was lost in the fire. It would have been more straightforward on his part to have mentioned the recovery of the sales-book and a pass-book. They are exhibits "C" and "E." I have examined them and I agree with the learned Judge that they would not have helped the sufficiency of the claim and that under Condition 12 appellant was not bound to produce any books unless they were asked for. No further application was made by the respondent Company, but on the 29th January, appellant was informed that the Directors did not see their way to admit his claim for loss and that it had been rejected.

On 4th February, Mr. McArthur wrote to the Company the letter set out in the decision of the learned Judge and forwarded letters addressed to the respondent Company by Dr. J. A. Browne and Mr. John Fernandes, clerk in charge of the Drug Department at Messrs. Smith Brothers, who were subsequently called as

witnesses at the trial and who on oath confirmed the statements made in their letters as to the value of the stock about the date of the fire. On the next day appellant was informed that his Claim had been re-considered and was not admitted, no reason being assigned for the rejection of his Claim.

In my opinion, it is not open to the respondent Company to plead as they have done that a particular account, as is reasonably practicable, was not delivered within 14 days. It was after the 14th day that they called for the stock-book, and correspondence connected with the payment of the Insurance money was carried on until their letter of 5th February, when they finally decided that after re-consideration of the Claim, it could not be admitted. Having allowed the 14 days to expire without asking for the stock-book, there was a waiver of the time-limit and they could no longer fall back on the 14 days (Maasdorp, J., in Xannemeyer *vs.* Sun Insurance Company, Juta 13, p. 463; De Villiers, C.J., in Hollander and Co. *vs.* Royal Insurance Company, 4 Juta, p. 71).

By "as particular an account as is reasonably practicable" is meant the best particulars that can be given under the circumstances. The business destroyed was a drug shop and any attempt to give particulars from memory would be mere guess work. The object of condition 12 is to give the Company such information as will enable it to judge whether or not a loss has been sustained, and to afford the Company a basis for investigation. (Bovell, C.J., in Northey vs B. G. M. F. I. Coy., Ltd., 21.11.1906.) This the appellant did in the first instance by his letter and affidavit, and then by the letters as to the value of the stock written on his behalf. In Hiddle *vs.* National Fire and Marine Insurance Company of New Zealand (1896 A.C. 372) relied on by respondent Company, the Court held that the plaintiffs had in their possession materials which enabled them to give a much fuller, more detailed and better account for enabling the Insurance Company to *test their liability and extent of the loss.*

In this case I find that it was not in the appellant's power to give an account with particulars, the books relating thereto having been destroyed (C.J. in Myburgh & Co. *vs.* the Protecteur Coy. 3 Roscoe p. 24), and that under the circumstances he gave the best information procurable.

The appeal is allowed and judgment entered for the appellant for $978 and costs.

DALTON, J. (Acting): I have very little to add to the judgments already given and with which I generally concur. The fact that there is an untrue statement in support of the Claim against the Insurance Company is not sufficient to deprive the appellant of

all benefit under the policy. All the cases go to show that such a statement must be accompanied by fraudulent intent or by such circumstances as would lead one to gather a fraudulent intent. Such a statement would of course raise strong suspicion against any claimant and require explanation by him, and after a careful perusal of the evidence and of the judgment in the Court below, I am satisfied that in this case there was no attempt or intention to get more out of the Insurance Company than they were justly bound to pay, in other words, no such untrue statement as would under Condition 14 of the Policy deprive the insured of his benefit under the Policy.

With respect to the point raised by the respondents in their cross appeal (defendants in the Court below) I agree with the learned Judge in the Court below that as particular a claim of the damage suffered as was possible under the circumstances was filed by the plaintiff, and as I generally concur in what has already been stated on that point, I have nothing to add.

The cross appeal should be dismissed and the appeal allowed with costs.

APPELLATE JURISDICTION.

1ST JUNE, 1915

NURSE
v.
PHERAI.

Appeal—Magistrate's Court—Question fact—Evidence—Insufficient evidence.

Appeal from a decision of Mr. P. A. Farrer Manby, Stipendiary Magistrate of Georgetown Judicial District. A levy was made at the instance of one Pherai in an action by him against one Collins. Nurse claimed the cottage levied on and entered an interpleader. In the interpleader action Pherai sought to prove fraud and collusion between Nurse and Collins, but the magistrate believed Nurse and the witnesses he called in support of his claim. He therefore found for the plaintiff and declared the levy bad.

From this decision defendant Pherai now appealed and the appeal was allowed upon the ground that the magistrate's conclusions on which his decision was based were not warranted and moreover that there was insufficient evidence to support his decision.

E. G. Woolford for appellant.

The decision of the magistrate is altogether unwarranted by the evidence, for there is not sufficient evidence to sustain his finding. The circumstances attendant on the preparation and signing of the receipt produced to support the alleged sale of the cottage by Collins to Nurse were suspicious and fraudulent.

E. A. V. Abraham, Solicitor, for respondent.

SIR CHARLES MAJOR, C.J.: This was an appeal from a judgment of the Magistrate of the Georgetown District for the plaintiff in an interpleader issue, declaring the levy of the judgment-creditor in the action of Pherai *v.* Collins to be bad.

2. The ground of appeal upon which my judgment rested was that the magistrate's decision was altogether unwarranted by the evidence, inasmuch as there was not sufficient evidence to sustain the verdict of a jury to the same effect. That ground is one open to a party dissatisfied with the decision of a magistrate. It has been taken in this case and is good.

3. My reasons for upholding the appeal are—

(a) that, since no case presents more favourable opportunity for fraud than that of disputed ownership in interpleader issues and since, as the learned magistrate himself remarked in giving his judgment, "one frequently finds a family conspiring to defraud a judgment creditor," it behoves the Court to have before it much clearer and

much stronger evidence of the truths of the claimant's story—particularly where the transaction set up to defeat the judgment creditor's claim is shewn to have been carried out (as here) by the members of the same family—than would be expected or demanded in other cases.

(*b*) that, although there was here some evidence to support the claimant's case, that evidence was in my opinion manifestly insufficient in the circumstances of the case, to sustain a verdict of a jury in the claimant's favour.

4. It was contended by Mr. Abraham for the respondent that this Court has no power to disturb the decision of a magistrate on a question of fact, and that there are scores of decisions of the Full Court to that effect. None of these authorities were cited and I cannot agree with the contention. If it means that a judge cannot reverse a magistrate's decision on facts simply because he might not himself have come to the same conclusion on the same evidence, I concur. If it means that a judge cannot enquire into the sufficiency of the evidence before the magistrate upon which his decision is based, I entirely dissent. I have so enquired in this case. I am of opinion first, that the magistrate's conclusions that the plaintiff's witnesses were quite untouched by cross-examination and that on their evidence, therefore, he had to find for the plaintiff—conclusions on which his decision was based—were not warranted, and second, that there was not sufficient evidence before him to support his decision.

5. I stayed execution, however, at the respondent's request, for seven days to enable him therewithin to apply to me for leave to appeal from this judgment if he shall be so advised. But I am not at present aware of any question of law being involved therein.

APPELLATE JURISDICTION.

1ST JUNE, 1915

REIS

v.

JOHNSON.

Appeal—Magistrate's Court—Order of Board of Agriculture—Infected area—Contagious Diseases (Animals) Ordinance, 1892, s. *15—Veterinary Committee of Board of Agriculture—Board of Agriculture Ordinance, 1910, s.* 6*—Grazing animals within an infected area.*

R. was charged that he did "permit animals to graze" within an area infected with anthrax. The offence created by an order of the B. of A. is that of grazing an animal.

Held that assuming to graze an animal means to permit an animal to graze, R. could not be convicted without proof of his knowledge that the animal was grazing or

had been put to graze by his servant by his authority or with his connivance. His permission could not be presumed merely from his ownership of the animal.

Appeal from the decision of Mr. E. A. Bugle, Stipendiary Magistrate of the East Coast Judicial District, who convicted the appellant on a charge of contravening an order of the Veterinary Committee of the Board of Agriculture made under the provisions of the Contagious Diseases (Animals) Ordinance, 1892, and the Board of Agriculture Ordinance, 1910, by permitting animals to graze within an infected area.

Conviction quashed.

P. N. Browne for appellant.

The complaint discloses no offence under the order of the Board of Agriculture. The order of the Board is *ultra vires* of Contagious Diseases (Animals) Ordinance, 1892. Appellant had no knowledge of the alleged offence and could not therefore be made liable.

C. Rees Davies, Solicitor General, for respondent.

SIR CHARLES MAJOR, C.J.: This was an appeal from the conviction of the defendant by the magistrate for the East Coast District on a charge that he, "being the owner of two cows and a calf, did permit the said animals to graze upon a highway within the infected area declared by the order of the Board of Agriculture dated the 22nd February, 1915, contrary to the order of the Board of Agriculture dated the 26th February, 1915."

2. The evidence was the *Gazette* of the 27th of February, 1915, containing two orders, one of the Board of Agriculture and the other of the Veterinary Committee dated respectively the 22nd and 26th of February, 1915; of Johnson, District Police Inspector, who proved that the animals were grazing on the public road within an infected area, and that they bore the brand F.R.,/41 that no one was at the spot where he found the animals and that he saw no other brand on them; of Constable Luke, who proved that the brand F.R./41is the defendant's brand.

3. The magistrate found (a) that the defendant was the owner of the animals: (b) that the defendant permitted them to graze "without proper "control or supervision, either by him or through any servant of his, and "that by reason of these negligent acts, such were so permitted through de- "fendant's own laches, to have them properly looked after, in so much that "they went upon the public road or highway at Hope in this judicial district "on the 9th March, 1915": (c) that the animals grazed on the public road.

4. The order of the Board of Agriculture declaring the infected area makes it an offence for any person to permit or suffer any animal to be taken or moved, or to stray thereinto or thereout. The order of the Veterinary Committee enlarges the order of the Board, for it makes it an offence for any person, not only to permit or suffer an animal belonging to him or under his control to stray into, in, or out of, any infected area, but also to tether or graze an animal therewithin. Neither order makes it an offence for a person to "permit an animal to graze," or an offence for an animal to graze.

5. Supposing the expression to "graze an animal," when coupled with the word " tethers," to mean taking, or causing, or sending, or putting an animal to graze, the evidence before the magistrate stopped short of that fact. And assuming that grazing an animal means permitting an animal to graze, it was necessary for the prosecution to prove the permission of the defendant. That permission could not be presumed merely from the ownership. There must have been some evidence of knowledge in the defendant that the animal was grazing in a prohibited spot, or of the animal having been put there to graze by his servant with his knowledge or by his authority or with his connivance.

6. The conviction is quashed with costs to the appellant.

COURT OF APPEAL.

7TH JUNE, 1915

(CORAM: SIR CHARLES MAJOR, C.J., AND HILL, J.)

PAUL

v.

BAKARALLI.

Appeal—Leave to appeal, application for—Assignment of reasons for judgment in action, Order XXXV, r. 1—Substantial question of law, Order XLIII, r. 5.

An application *ex parte* by the plaintiff Paul for leave to appeal from an order made by Berkeley, J., on May 5th refusing leave to appeal from a decision given by him on April 29th dismissing the claim of the plaintiff against the defendant for possession of Lot 74, Kingston, Georgetown.

S. E. Wills for appellant.

The necessary facts and argument are set out in the judgment

SIR CHARLES MAJOR, C.J.: This was an application by the plaintiff, on renewal from the learned senior puisne judge who had

refused it, for leave to appeal to this Court from the judge's judgment in the action for the defendant.

2.The grounds of the application were that the judgment was erroneous in point of law because—

(a) upon the evidence the plaintiff established a *prima facie* claim to the land in question;
(b) the learned judge was in error in not calling upon the defendant for his defence;
(c) the learned judge was in error in not assigning in writing the reasons for his giving judgment in favour of the defendant.

3. In refusing leave to appeal the judge has disposed of the second and third grounds for the application by stating that they are incorrect. We are informed by him that upon the trial of the action the defendant's counsel, at the close of the plaintiff's case, elected to call no witnesses. And the judge's reason for giving judgment for the defendant has, in fact, been assigned in writing, in the following terms: "On the evidence adduced in the case, the plaintiff has not established his claim to the land referred to in the statement of claim." The learned judge added to his remarks in refusing leave to appeal; "in addition thereto there is no substantial question of law involved: Order 43, (5)."

4. Mr. Wills, however, contends before us that it was not sufficient for the judge, in whose opinion the plaintiff had failed to establish his claim, merely to state that fact in assigning his reasons for dismissing the action, but that he should have stated wherein the failure consisted, so that it might be seen by this Court whether a substantial question of law was involved or mot. Now, however convenient and, indeed, desirable it may be, in the absence of any official transcript of a judge's remarks in delivering an oral judgment, or some other means of our knowing what those remarks were, that they should appear in the written assignment of the reasons for his judgment which followed them, a judge is not, of course, bound to include them therein. He is not bound to set out the process of reasoning whereby he comes to a conclusion, he is only requested to give the reason itself. Here the conclusion was judgment for the defendant; the reason for the conclusion was that the plaintiff had failed to establish his case.

5. Moreover, Mr. Wills has not alleged to this Court any specific question of law in substance which, he contends, arose and was determined by the judge at the trial. He contents himself by saying that if the judge had more fully set forth the grounds upon which he proceeded to the opinion that the plaintiff had failed to establish the claim, it would appear that a question of law was involved. That is not enough, and this Court accordingly is bound by the pronouncement of the judge of trial that no

question of the kind was involved. There is none involved in the judge's refusal itself and the applicant, therefore, is concluded.

The application is dismissed.

HILL, J.: I agree.

ORIGINAL CIVIL JURISDICTION.

25TH JUNE, 1915.

LYNCH
v.
VAN VEEN *et al.*

Action to restrain transport—Agreement entered into by testamentary guardian during minority of owners—Ratification or repudiation by owners on attaining majority—Restitutio in integrum.

C. a widow, was appointed by will guardian of three minors Van V. In 1909 she leased certain property of the minors to L. with the option of offer of purchase over others. L. continued to lease the property under the agreement made with C. after the minors reached their majority. In 1915 the defendants Van V. being of age, sold the property to A. L. thereupon entered opposition to the transport and sought to enforce his option of offer to purchase.

Held that he was entitled to succeed, defendants having been in no way damnified by the contract made during their minority and having ratified it by their action on attaining majority.

J. S. McArthur, for plaintiff.

A. McL. Ogle, Solicitor, for defendants.

HILL, J.: The plaintiff asks for an order of the Court (a) restraining the passing of transport of lot 40 (forty), situate on First Avenue, Bartica, and (b) compelling the defendants to sell the said property to the plaintiff for the same sum as that for which it was sold to Farinha, and that they further be compelled to pass transport to the plaintiff within a month of the date of the order, failing which the Registrar to pass transport. In the alternative damages are claimed.

The facts disclose that the testamentary guardian, during the minority of the defendants, entered into an agreement in writing with the plaintiff leasing to him the said land, at a yearly rental, and giving to the defendants, should they at any time wish the land, the right to give plaintiff six months' notice to quit the same, and, if the defendants were disposed to sell, giving to the plaintiff the right to preference of offer before selling to any one else.

This, in my opinion, was a good contract; the defendants were in no way damnified by it, in which event they could have asked for *restitutio in integrum* or relief. They are therefore liable to be sued on it. And as a matter of fact they would seem, since attaining majority, to have received certain moneys from the

guardian, forming part of the rents, although it is not quite clear in what capacity she has continued to receive the same since the defendants attained majority.

I order that the defendants be restrained from passing the transport as advertised. If disposed to sell they must give plaintiff the preference of offer before offering the same to any one else. Costs to the plaintiff.

ADMIRALTY JURISDICTION.

3RD JULY, 1915

CUMMINGS

v.

S.S. SARGASSO.

Admiralty—Collision—Steam vessel and Sailing vessel—Regulations for Preventing

Collisions at Sea, 1910, art. 20 and 21—Steam vessel, keeping out of way of Sailing vessel.

Action of damage by collision. The trial of the action was commenced without pleadings, but an order was made for trial with pleadings, after application to the Appeal Court (See above p. 18).

P. N. Browne for plaintiff.

G. J. de Freitas, K.C., for defendant.

All the necessary facts sufficiently appear from the judgment. The action was heard on May 7th, 8th, 10th, 11th, 14th, 15th, 27th, and 28th and judgment was delivered on July 3rd.

BERKELEY, J.: This is an action for damages arising out of a collision on the high seas inside of the Demerara lightship on the night of the 29th December, 1913, between the Schooner Lettie M. Hardy owned by the plaintiff who was in charge of her and the steamship Sargasso.

The case for the plaintiff, as told by the witnesses who were on board the schooner is that the schooner steering S. by E. ½ E arrived from Barbadoes at the lightship about 7 p.m. and then changed her course to S.W. for Georgetown. The night was hazy with lifting clouds and an ebb tide, and having passed to west of the lightship and gone about three-quarters of a mile or possibly one and three-quarter miles the ‘look out man’ reported ‘light on lee bow.’ The captain who was standing on the left of helmsman went forward and satisfied himself that his lights were burning and saw the masthead light of a steamer about three miles off and within five or six minutes her green light, two miles off. The schooner was still steering S.W. and on taking, by means of the compass, the bearings of the steamer it was found to be W.S.W., that is, she was steering E.N E. two points on the schooner’s starboard bow. At this time the only lights of the

steamer seen from the schooner were the masthead light and the green light. The schooner continued to steer S.W. and on the captain, some eight minutes later, leaving the compass and going forward saw for the first time the steamer's red light, in addition to the masthead and green lights. She was almost dead ahead and on returning to the compass he found that the schooner had kept her course (S.W.) but on taking the steamer's bearings he found that she had come one point nearer, that is, she was now steering N.E. by E. She was then not more than one quarter of a mile off. Those on board the schooner shouted whereupon the steamer ported her helm and showed her red light, the green light being now lost to sight. The steamer, in attempting to cross the bows of the schooner, struck with her port quarter the starboard side of the schooner's bowsprit carrying it away, together with the flying jibboom and the stem head with its figure and causing the planks of deck to open and the mast to become loose. The schooner was swung round with the result that both vessels after the collision were heading for the lightship. The captain stopped his steamer and returned by boat to schooner, saw damage, and on being asked to arrange for payment of damages incurred, referred plaintiff to the local agents. At the time of the collision there was an ebb tide with the wind N.E. and the schooner doing two to three knots, the tide not being favourable. The schooner was not insured; by yawing she could take in at most one point, and there was nothing to prevent her doing this.

In addition to those on board the schooner, Captain Winfield of the schooner Comrade, speaks to his having been passed on his way to the lightship by the Sargasso on the evening in question; that he was steering N.½ W., and that the steamer passed seven to eight points on his starboard side going towards lightship, speed about seven knots, with her two masthead lights. He found it difficult to get out as the steamer being to windward of him, in tacking he might have collided with her and the result was he grazed his schooner's bottom.

McInniss, the pilot of the Royal Mail Steam Packet Company who was on the lightship and who brought back to Georgetown the Sargasso's pilot, speaks to seeing the schooner having passed the lightship steering S.W. by S. and the steamer coming towards the lightship. When near enough thereto for her side-light to be seen he saw only her green light—red light not visible as she was steering so far to windward; steamer was to windward of schooner, lightship was to eastward of both vessels. That is, schooner was between lightship and steamer. Steamer altered her course about two points bringing her nearer to lightship, she showed one masthead light and her two side-lights, red light was seen more than green,—this latter only at intervals. The

schooner kept her course and steamer gradually approached schooner. On looking again he saw red and green light of schooner. Within five to seven minutes of seeing steamer's three lights she stopped. At this time lights of schooner were not visible but only her sails. The steamer crossed the schooner but he could not then say whether at bow or stern. He then saw red and green lights of schooner and knew she had turned round. It is untrue to say that she showed two masthead lights. If steamer had kept her original course green to green she would have passed to westward of schooner

Cozier, a shipwright, speaks of the damages to schooner. Marks on starboard side, bowsprit broken clean off and hanging on port side, flying jibboom broken about 20 feet from end of jibboom, the point of flying jibboom not damaged, and planks of deck opened up.

Hannibal Johnson, shipbuilder, says that the condition of flying jibboom is not consistent with its going end on. This would have shattered the end, and he saw it intact. Both this and the bowsprit are sound with no part rotten. There is a difference between this witness and the attorney of the defendant company called by defendant, as to witness having informed the attorney that he had already had a fee from plaintiff, when asked to examine for defendant certain accounts rendered by plaintiff. In the result it does not affect this case, as Mr. Austin says that although he would not have employed him if he had known that he had received a fee from the other side, nevertheless, he believes witness gave an honest opinion and has no fault to find with it.

The account of the collision related by the captain, pilot and those on board the Sargasso is that after passing the bar travelling about seven knots the red light of the schooner was seen a little on starboard bow, and a green light intermittently, for about one minute, about three and a half miles off. The captain asked the pilot which way of the schooner he was going and he replied that he would port—he was told to give her plenty of room. This he did changing the course about two points to starboard, that is, from N.E. to E.N.E., after which the schooner's red light only was seen—the Sargasso being then about four miles from lightship on her way out from Georgetown. Within a minute or two the 'lookout man' reported a red light on port bow. This course was continued until the schooner's red light was six points on the steamer's bow. It was too dark to see the sails. About 7.50 p.m. when preparations were being made to drop the pilot the flapping of the sails was heard and the schooner was seen showing her green light and heading for steamer's bow. According to the captain the schooner appeared to put her helm up to regain her course but before

she could do so she struck the steamer about sixteen feet before the amidships on the port side—end on—with her jibboom point; that she could not have kept her course (S.W.) but was gradually luffing up with the result that the distance between the vessels at the point of passing would be less than what it was intended to pass her at, and that after the flapping of sails was heard and the green light seen the schooner was 150 to 200 yards oft. The chief officer says that on going on to the bridge he was near the pilot amidships, and saw the schooner's hull not more than half mile away but said nothing to the captain who was at the port side on bridge—that he might have drawn the pilot's attention to it, but that he gave no directions as to altering the course. The chief engineer on the lower deck says he saw her turn and come into steamer. On seeing green light he considered a collision was bound to occur but that he did not call out or do anything. Martin, an able seaman, speaks to the same effect. The captain says that he told the pilot to give plenty of room as schooners are erratic; he further says that her luffing up was extraordinary, and that he had never seen the like of it before. The witnesses all speak to the steamer having two masthead lights in addition to side lights in accordance with regulations. The shouting on board the schooner was after, and not before, the collision. The schooner then slid along port side of steamer. The captain with others went in a boat alongside schooner and saw the damage. The deck planks forward were opened, the mast was shaking, stem looked as if crushed in and come out. This damage was consistent with their case that she came into them stem on, but equally consistent with the story of the plaintiff. There was a white paint mark 'rub up' on steel plate of steamer—sixteen feet before amidships forward of middle line of ship on port side—and lower down three feet from water, a scratch extending some twenty feet from amidships, going aft, which would be caused by anchor or cat head of the schooner. The chief officer says the plate was dented, and the engineer describes it as a small indentation, more an abrasion of paint than anything else, a circle mark on paint. Able seaman Martin saw no dent or impression or white mark beyond a scratching. It seemed to these witnesses that the helmsman on schooner had deserted his post and left the vessel to herself. The captain, from the impact, considers the schooner was doing six knots but the chief officer says three or four, and the steamer seven knots. The captain admits that he did not look at the compass after the course to the lightship was set until after the collision, but that the bearing of the lightship shewed that the course was kept; in fact he did not look to see that the order to port two points had been carried out, but he says that if both vessels had kept their course they would

have passed each other at from half to three-quarters of a mile apart.

The pilot speaks to the course being E.N.E., after she was ported and her head put two points to starboard, and to the red light of schooner being two points on the steamer's port bow and one and a half to two miles from steamer. Red light continued to approach nearer but the bearing did not show much difference. When under port bow he saw schooner come up to the wind on the port tack showing only her green light and in a minute she came into steamer. The porting two points gave ample room for safety, he considers the ebb tide was setting schooner to eastward bringing her nearer to steamer and that she did not make the course she intended owing to drift of current. That either bad steering, bringing her up to wind, or leaving the wheel to itself would bring about the same result. He admits schooner was running "southward, more S. W., S. W." So far as he saw course of schooner was not altered until she turned and came into steamer. Porting two points would give forty to fifty yards apart which he considered plenty of room; he corrects this, however, and says it ought to give nearly half a mile apart. He admits that he could have ported a second time when the schooner was narrowing the distance half mile away but that he expected her to steady her course again.

It is submitted by counsel for the defendant that the porting two points by the steamer which, according to the captain would have enabled the vessels to pass each other half mile to three-quarter mile apart, was a compliance with Article twenty of the Regulations and that this article ceased to be operative on the steamer's porting these two points.

Article twenty provides that when a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel. The case relied on is The Jesmond and the Earl of Elgin (L.R.P.C.C. Vol. 4, p. 1). In that case the vessels were both steamers. The Articles referred to are 13 and 16 corresponding with 18 and 23 of the present Articles. It is to be observed that these refer to steam vessels *only* nor do I think the decision in that case justifies the submission of counsel when the vessels are both steamships.

In Hovell v. Solent (Adm. Juris. 8. 1. 1906) it was held that about one mile and not much less could be allowed with safety. In the present case the captain of the Sargasso admits that the schooner would gradually luff up with the result that the distance between the two vessels at the point of passing would be less than was originally intended (the plaintiff says he might have come a point nearer by yawing) and on a night when it was too dark to see the schooner's sails I am of opinion that the porting

two points did not render it safe for the vessels to pass each other without risk of collision. Apart from this the chief officer of the Sargasso on the bridge with the captain and pilot says that he saw the schooner's hull 'not more than half a mile away,' while the pilot says that he could have ported a second time when the schooner was narrowing the distance half mile away but that he expected her to steady her course again. In my opinion it was incumbent on the steamer to again comply with Article 20 and if this had been done the collision would, on the pilot's own showing, in all probability have been averted. I am unable to adopt the suggestion of the defence that the schooner's helm was left to itself. She had made the lightship and altered her course to S.W. for Georgetown and it is inconceivable that captain, crew and passengers had all become indifferent to their surroundings on the eve of getting into port. The captain of the Sargasso says that at the time of the collision she was making four or five knots and the schooner about six judging by the force of the impact. I am disposed to accept the chief officer's evidence that the steamer was making about seven and the schooner three or four knots. I am satisfied that the schooner did not alter her course (S.W.). The pilot of the Sargasso says that she never did so, until, as he alleges, 'she turned and came into steamer.' The captain of the schooner speaks to the steamer having altered her course from N.E. to E.N.E., and that he could only see her green light, but he further says that some eight minutes after he saw all three lights of the steamer and on taking her bearings he found she had come back one point nearer and was now steering N.E. by E. He is confirmed by pilot McInniss who says that from the lightship he saw the schooner steering S.W. by S. and that when he first could see the steamer's side-lights only her green light was visible and she was to windward of schooner, the schooner being between lightship and steamer and that after a time steamer altered her course about two points as he could see her three lights and the red light was then seen more than the green light. The difference between one point referred to by the captain of schooner and two points mentioned by the witness is accounted for by the witness being of opinion that the schooner was steering S.W. by S. and not S.W. as stated by the captain. McInniss also says that he saw the steamer cross the schooner but whether across her bow or stern he could not at the time say. This pilot is an independent witness apparently on friendly terms with his brother pilot of the Sargasso. He is in no way interested in the result of this case and I cannot do otherwise than accept his testimony. It is admitted by the captain of the Sargasso that the damages incurred by the schooner are consistent with the plaintiff's case. I am disposed to think that the condition of the planks of the deck and the mast of the schooner is more consistent

with the schooner having been struck forward as alleged by plaintiff. After the collision the steamer is said to have had a rub up or dent on the port side. The engineer of the Sargasso refers to it as more an abrasion of paint than anything else. This, I am of opinion, could have been caused by the schooner gliding along the side of the steamer after the collision. The evidence as to the number of masthead lights on the steamer is conflicting. I am inclined to the belief that she had two but I am not prepared to say that those witnesses who speak to her having only one are wilfully stating what is incorrect. Whether she had one or two lights does not affect the issue.

I cannot reconcile the evidence as to the side-lights of the two vessels, but with the aid of the chart I am satisfied that the facts deposed to by plaintiff and his witnesses are the more probable and that the steamer's red light was only seen *without the green light* shortly before the actual collision.

The schooner kept her course and complied with Article 21 of the Regulations and I find that the Sargasso is solely responsible for the collision. In my opinion she misjudged the distance and in attempting to cross the bows of the schooner collided therewith.

It was arranged between counsel that no evidence should be tendered as to the extent of the damages sustained, as there was every probability that the parties would agree as to the amount for which judgment was to be entered in the event of the plaintiff being successful.

ORIGINAL CIVIL JURISDICTION.

5TH JULY, 1915

SMITH BROTHERS & CO., LTD.

v.

THE DEMERARA RAILWAY, CO.

Negligence—Grass fire—Railway passing through coconut plantation—Special risks attaching to railway undertakings in tropical countries—Contributory negligence.

Where a dangerous undertaking is carried on under circumstances or in a place or places which enhance the ordinary risks of the undertaking, particular care and special precautions must be adopted by the undertakers against damage being caused by the enterprise.

Action for the recovery of $2,500, for damages alleged to have been caused on plaintiffs' coconut plantation Park in October, 1914, by a fire from defendants' railway which ran through the plantation. The fire was said to have been caused by sparks or cinders from an engine which set fire to heaps of dry grass and weeds left within the railway fence by defendants' employees.

Negligence was also alleged in defendants' servants allowing sparks and cinders to escape from the engine.

Defendants denied any negligence such as was alleged, or in the alternative pleaded that the plaintiff company was guilty of contributory negligence in permitting large quantities of dried coconut husks, leaves, and other inflammable material to remain on their land.

H. H. Laurence for the plaintiffs.

G. J. De Freitas, K.C., *H.C. Humphrys* with him, for the defendants.

The action was heard on June 28th, 29th, and 30th, and, with the consent of and for the convenience of the parties, on July 1st and 2nd. Judgment was reserved and delivered on July 5th, as follows, on the law involved in the case:—

SIR CHARLES MAJOR, C.J.: The law applicable to the circumstances of this claim seems to me to be quite clear. The defendants, a railway company, carry on a dangerous undertaking. In the construction and control of their engines they are bound to adopt the best methods for preventing the escape therefrom of particles whereby property through or adjacent to which their trains are taken may suffer damage by fire. If they fulfil this obligation and notwithstanding their precautions sparks or cinders drop from their engines—it is conceded that that danger can never be absolutely eliminated—and damage is caused, they are not, without more, liable to make compensation. If, however, it be shewn that, although a company has adopted those proper and reasonable precautions, an escape of fiery particles has nevertheless occurred, and that damage by fire has been caused owing to the neglect of the company of some other precaution against it, which a prudent person carrying on a business of the kind would or ought to adopt, the company will be liable.

Now, the defendants pursue their undertaking in this colony under conditions different from and more dangerous than those prevailing in northern climes. The growth of vegetation is more rank and more rapid. Here a fierce sun always beats upon the land. Spells of rainless weather occur, sometimes of considerable length, when everything becomes very dry and highly inflammable. These conditions were all present in October, 1914, and were accompanied by a strong wind. The degree of caution, therefore, to be exercised by the defendants, not only in the construction of their locomotives, but in the care of the permanent way, their embankments, and, in fact, the whole of the land lying between their fences, if they

would guard against liability for damage by fire, is much greater than in places where the present conditions of heat, extreme aridity and high inflammability do not prevail.

The plaintiffs here contend that, although it has been shewn that the defendants use, and on the 8th of October last, when the fire occurred which has damaged the plaintiffs' property, were using all proper precautions against the escape of sparks and cinders from their locomotive, a cinder or cinders did drop which, in the circumstances, the Court must say ignited dry grass or weeds, either growing on the permanent way itself, or so close thereto as to be very dangerous, or, after being cut and weeded, heaped at the sides of the track; that the fire, thus started, spread across the company's fence and into the plaintiffs' coconut plantation and caused the damage which is the subject matter of the claim.

Now, in this colony, permitting grass to grow on the permanent way, or, if some growth cannot possibly be prevented, failing at least to take precautions against its being ignited in such climatic conditions as prevailed in October last, still more, cutting or weeding the grass and heaping it or leaving it, in its cut state, anywhere between the company's fences, without similar precautions against its ignition, seems to me such a failure on the defendants' part to discharge their obligations to those through whose properties their trains run as to amount to gross negligence. And the defendants' plea of the plaintiffs' contributory negligence can avail them nothing. Because the plaintiffs' practice of cutting and weeding their plantation and leaving the grass or undergrowth in heaps thereon, is one, the evidence shows, very generally adopted by others, one that is husbandlike and one that the plaintiffs are in no wise obliged to abandon because the defendants run their trains through the land where it is followed. It was not, in fact, the proximate or decisive cause of the plaintiffs' damage, the true test to be applied to any contention of what is called contributory negligence. On the contrary: I think the fact that the railway line runs through plantations where that practice, in itself not unjustifiable or unreasonable, is adopted, rather increases than diminishes the obligations of the defendants to the owners of those plantations.

If, therefore, the plaintiffs had shewn conclusively that the fire was caused in the circumstances for which they contend, there is no doubt whatever in my mind that the defendants would have been liable to make compensation. But, after listening very care-fully to the witnesses in this case and to the arguments of counsel for both parties, I formed the opinion, which more leisurely perusal of my notes of evidence has only served to confirm, that the plaintiffs have failed to show either that the fire of the 8th of October

was caused by the escape of cinders or sparks from the defendants' locomotive, or that it started within the railway fences.

His Honour then reviewed the evidence which led him to that opinion and dismissed the action with costs.

APPELLATE JURISDICTION.

9TH JULY, 1915.

MANNING
v.
AH FOOK.

Appeal—Ordinance 30, 1913, (the Opium Ordinance)—Possession of imported opium without authority—'Opium,' and 'prepared opium'—Application of maxim 'expressio unius est exclusio alterius,' insufficient certificate of analysis.

Appeal from a decision of Mr. P. A. Farrer Manby, Stipendiary Magistrate of the Georgetown Judicial District convicting the appellant for being found in the possession of a quantity of opium imported into the colony without the proper authority.

J. S. McArthur for the appellant.

C. Rees Davies, Solicitor General, for the respondent.

The reasons for appeal and other necessary facts appear from the judgment.

HILL, J.: This is an appeal from the decision of a magistrate convicting the appellant of a charge under the Opium Ordinance 1913, for that on the 13th December, 1914, a quantity of opium imported into the Colony was without the proper authority found in his possession in a room at lot 26, Lombard Street, Georgetown, contrary to section 8. The reasons of appeal are:—

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

(*a*) It was not proved that either of the exhibits A.B.C.D. or E. contained opium as defined by the Opium Ordinance 1913.

(*b*) If the said exhibits contained opium, as defined by the said Ordinance, it was not proved that the opium had been imported or that such importation was made after the Opium Ordinance 1913, came into force.

(*c*) it was not proved that opium was without the proper authority found in the possession of the defendant.

(*d*) the analyst's certificate was invalid and not admissible in evidence. It was indefinite and defective and did

not contain the information required by the Opium Ordinance.

(*e*) At the close of the case for the prosecution the offence charged was not established and the magistrate should have dismissed the case and not called on the defendant for a defence.

(2.) The decision is unwarranted by the evidence in like manner as if the case had been tried by a jury there would not have been sufficient evidence to sustain the verdict for the several reasons set out above.

Take first, reason 1 (*a*) and (*d*), "Opium" is defined in the opium Ordinance (Sec. 2 Interpretation of Terms), *when used without any qualifying epithet*, as including "Raw Opium," "Medicinal Opium," "Morphine," "Heroine," "Cocaine" and "Similar drugs" and these different kinds of opium or drugs are, in their turn, defined in that section. In addition, there is "*Prepared opium*" which is also defined, and which, it will be seen, is not included in the definition of what comes under the term "opium" in the Ordinance. I am unable to agree with the Solicitor General that the words "any opium" in section 8 must include "prepared opium" but am of opinion that the maxim "*Expressio unius est exclusio alterius*" applies and that "any opium" includes everything as defined under "opium." It follows, therefore, that the dealing with "prepared opium" as specially defined in section 2, is absolutely prohibited in any shape or form, and it also follows, therefore, that "any opium imported into the colony" as laid down by section 8, could not include "prepared opium," especially as reference is made in section 8 to "any opium" being "kept in a place other than a Colonial Bonded Warehouse," in which it would be an impossibility to keep "prepared opium."

The analyst's certificate or report on an examination for the presence of opium is to the effect that the exhibits A.B.C.D. and E., respectively, "contain opium in admixture with other substances" and excludes "prepared" opium.

The charge is under section 8 which reads as follows:

"Where any opium imported into the colony is without the proper au-
"thority found in the possession of any person or kept in a place other than
"a Colonial Bonded Warehouse such person and unless he can prove that
"the same was deposited there without his knowledge or consent, the occu-
"pier of such place, and also the owner of any opium so found shall each be
"deemed to be guilty of an offence."

Now, under section 3

"It shall not be lawful—

(*a*) to import into this colony any prepared opium.

(*b*) to export from the colony any prepared opium.

(*c*) to manufacture, buy, sell, barter, or use any prepared opium."

Now the definition of "prepared opium" as well as of "opium" might well be covered by such a certificate, and I do not think it is sufficient to enable a conviction to be obtained under section 8 of the Opium Ordinance, which expressly mentions "opium" and excludes, by its omission, "prepared opium."

For this reason I think the conviction must be quashed with costs to the appellant.

It is unnecessary to decide the other reasons of appeal.

APPELLATE JURISDICTION.

10TH JULY, 1915.

VANIER

v.

WREFORD & CO.

Appeal—Magistrates' Decisions (Appeals) Ordinance, 1893, s. 5 (1.)—Giving or serving notice of appeal—Contract—Acceptance of offer.

Appeal from the decision of Mr. W. J. Douglass, Stipendiary Magistrate of the Berbice Judicial District, who dismissed the claim of plaintiff (appellant) for the sum of $75 as damages for breach of contract.

Appellant in person.

J. A. Abbensetts for respondent.

The necessary facts and argument appear from the judgment.

BERKELEY, J.: The appellant appeals from the decision of the Stipendiary Magistrate of the Berbice Judicial District, Mr. W. J. Douglass, who in an action for breach of contract gave judgment for the respondent.

Counsel for the respondent takes the preliminary objection that the proceedings show that notice of appeal was given in open court but that it is not shown that respondent was present. It is, however, admitted that counsel representing the respondent was in Court and this is a sufficient compliance with Ordinance No. 13 of 1893 s. 5 (1).

The substantial ground of appeal is that a contract was entered into by the respondent through his clerk Harrison to make and deliver a serge suit to appellant who agreed to pay cash for same on delivery which contract was accepted by the respondent.

The evidence shows that on 15th May appellant entered respondent's store and asked Harrison who is in charge of

Gentlemen's Department to be shown serges; this was done, he selected a pattern and his measurement was taken. When about to leave he was asked by Harrison if he meant to pay in advance; he said he was not paying on account, to put it down to him. Entries were made in the measurement and order books. At the time the witness Harrison looked for Mr. Logan, the only person authorised to give credit by the respondent. He could not see him but as soon as he did he reported what had taken place. On 17th Mr. Logan sent a memo., to appellant thanking him for order for serge suit and enquiring if cash was to be paid for it when finished. To this appellant replied on 18th that he always paid for whatever he ordered when made to his entire satisfaction. On the same day a reply was sent by the respondent stating that the suit would be made up on a deposit being made against order.

The order book shows a deposit paid under the head "On Account" by every one except the appellant. It is argued that there was an acceptance by respondent as shown by their memo, of 17th March. On the contrary this seems to show a desire for further information before acceptance. It enquires "do you propose to pay cash?" An answer in the affirmative might have brought about the desired result but the appellant's reply is evasive and only makes a bald reference to the practice adopted by him under certain circumstances.

I am satisfied on the evidence that the witness Harrison never intended to enter into a contract with appellant; that he asked him when leaving if he meant to pay in advance, and that he at once informed Mr. Logan of what had taken place, are facts which show that there was no acceptance of the offer. This being so it is unnecessary to enquire whether Logan had authority to bind the respondent.

Appeal is dismissed and the decision confirmed with costs.

APPELLATE JURISDICTION.

22ND JULY, 1915

ARCHER

v.

CAESAR.

Appeal—Employers and Labourers Ordinance, 1909, ss. 1 and 4—Contract of service—Admissibility in evidence—A contract of service under the Ordinance may be enforced if it be either in writing signed by both parties or entered into in the presence of two witnesses.

Appeal from a decision of Mr. P. A. Farrer Manby, Stipendiary Magistrate for the Georgetown Judicial District, who discharged

the defendant on the ground that the written contract put in had not been signed in the presence of two witnesses.

Appeal allowed and case remitted to the Magistrate for sentence.

E. G. Woolford for appellant.

Defendant neither present nor represented.

All necessary facts appear from the judgment.

SIR CHARLES MAJOR, C.J.: The defendant was prosecuted before Mr. Stipendiary Manby under the provisions of Ordinance No. 26 of 1909, section 1, for absenting himself from the service of the prosecutor's principal before completion of his contract of service. The contract was in writing and signed by both parties thereto.

2. Preliminary objection was taken before the magistrate to the validity of the contract on the ground that it had not been entered into in the presence of two witnesses. The magistrate thereupon refused to admit the document in evidence, but took the evidence of the prosecutor and his witnesses proving the service and the absence therefrom of the defendant. The defendant gave no evidence. The magistrate dismissed the complaint on the ground that the contract had not been entered into in the presence of two witnesses. The prosecutor has appealed. The defendant is not represented on this appeal.

3. The law as to the form of, and entry into, contracts of this nature relates to their enforcement, not their admissibility as evidence. Section 4 of the Employers and Labourers Ordinance, 1909, enacts that no contract of service shall be enforced under this ordinance unless the same is in writing signed by both parties thereto, or unless it has been entered into in the presence of two witnesses. The document, therefore, was wrongfully excluded. Moreover it is not required that a contract shall be in writing signed by both parties thereto, and also entered into in the presence of two witnesses. The conditions precedent to enforcement are disjunctive. The contract here satisfies the first condition, and that is sufficient for the prosecutor to enforce it.

4. The appeal is allowed, the decision of the magistrate is set aside and the case is remitted to him for sentence. The defendant must pay the costs of the appeal.

REPORTS OF DECISIONS

OF

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1915.

WITH INDEX AND DIGEST.

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1916.

JUDGES OF

THE

SUPREME COURT OF BRITISH GUIANA

DURING 1915.

SIR CHARLES HENRY MAJOR, Kt.	... Chief Justice.
MAURICE JULIAN BERKELEY ...	... Senior Puisne Judge.
JACOBUS KERR DARRELL HILL...	... Junior Puisne Judge.
LLEWELYN CHISHOLM DALTON...	... Acting Puisne Judge. (January).

SUPREME COURT ORDINANCE, 1915.

On March 12th, 1915, Ordinance 10 of 1915 (The Supreme Court Ordinance, 1915) came into operation, repealing Ordinance 7 of 1893 (The Supreme Court Ordinance, 1893). By the former Ordinance the Limited Jurisdiction of the Court was abolished, a single judge thereafter exercising the whole of the original jurisdiction of the Court.

TABLE OF ABBREVIATIONS.

(ADDITIONAL TO THE USUAL ABBREVIATIONS USED IN REFERRING TO ENGLISH REPORTS.)

A.J.	...	British Guiana, Appellate Jurisdiction.
B.G.L.J.	...	British Guiana, Limited Jurisdiction.
E.D.L.	...	Eastern Districts Court Reports (Cape Colony.)
F.C.	...	British Guiana, Full Court.
Juta	...	Supreme Court Reports (Cape Colony.)
L.J.	...	British Guiana, Limited Jurisdiction.
Ltd.	...	" " " "
S.A.L.J.	...	South African Law Journal.
S.C.	...	Juta's Supreme Court Reports (Cape Colony.)
T.H.	...	Witwatersand High Courts Reports (Transvaal.)
T.S.	...	Supreme Court Reports (Transvaal.)

[The mode of citation of British Guiana Law Reports commencing January 1st. 1914, is as follows:—1914 L.R., B.G.]

ERRATA.

PAGE	LINE	FOR	READ
17	13 from top	T.P.	J.P.
63	2 and 3 of head note	Order XXVII.	Order XXV.
66	Last word of page	sold	stolen.
68	Title and margin	3rd April	7th May.
159	Last line of head note	It was not a question	It was not a question arising in the administration of the property.
165	2 from top	Ahamavitch	Abramovitch.
178	19 from top	Deputy	District.

TABLE OF CASES REPORTED.