INDEX AND DIGEST.

CASES

DETERMINED BY THE

SUPREME COURT OF BRITISH GUIANA.

GULSANIA *v.* BASCOM.

[192 of 1915.]

1915. DECEMBER 9, 17, 18; 1916. JANUARY 4. BERKELEY, J.

Motor-car—Pedestrian run over by car—Negligence—Contributory, negligence—Non-use of brakes and second horn.

The facts sufficiently appear from the judgment.

P. N. Browne, for the plaintiff.

H. C. Humphrys, for the defendant.

BERKELEY, J.: This is an action to recover $600 as damages for injuries received.

The defendant admits liability if the court finds that the injuries sustained are due to the negligent act of his son.

About mid-day on 26th April, 1915, the plaintiff, an old East Indian of about sixty-five years of age, not deaf but at the time with a cloth over her head, was walking on the Vlissengen Road, Kitty, in the direction of the city when she was knocked down by the defendant's motor-car travelling in the same direction and driven by his son, a licensed driver.

The first question that arises is as to the position of the plaintiff on the road. She and her witnesses allege that she was walking within two feet of the grass on *her* right hand side of the road, while the defendant, his son, and a shopkeeper in the same road say that she was in the centre of the road. It is admitted by plaintiff's witnesses that the road on her left was clear, so that according to her case the defendant abandoned the clear road and endeavoured to pass on her right, a feat which would necessarily have placed the car on the parapet with the possibility of landing it in the trench. The position, as deposed to by the witnesses for the defence, is the more probable and I find as a fact that the plaintiff was in the centre of the road. This was her position when the car which had been slowed

down on passing a donkey cart was approaching her travelling about seven miles an hour. She and three or four other foot passengers were noticed ahead, and on the horn being sounded the others went to the left side but plaintiff remained in the centre, apparently unconscious of the car's approach. When within ten to twelve feet of plaintiff the car was swerved to the right with the intention of passing plaintiff, which as an alternative to pulling up altogether seems a reasonable course to adopt under the circumstances. It would have passed with perfect safety but the plaintiff, hearing its approach, looked back over her left shoulder and darted to the right, with the result that she was knocked down by the radiator, and went under the car. She seems to have escaped the front wheels but the right hind wheel went over her body. At this time both the wheels on the right were on the parapet, and the car was not stopped until it had cleared the plaintiff, that is, some two or three lengths beyond where she lay. The defendant then got out and returned to the scene of the accident and took plaintiff in his car to the Public Hospital. She was found to be suffering from fracture of the pubic bone of the pelvis, a wound at back of the head, and shock, and remained in hospital for one month. No doubt the injuries received by plaintiff were serious, but it is clear that the accident was caused by her rushing to the right instead of to the left, due no doubt to her dazed condition on discovering her danger. The law as to negligence is that the plaintiff cannot succeed if it is found that she has herself been guilty of any negligence or want of ordinary care which contributed to cause the accident, but there is a qualification to this, viz., that though she may have been guilty of negligence which may in fact have contributed to the accident, yet if the defendant could in the result have avoided the mischief which happened, her negligence will not excuse him. The real question is, Is it shown that defendant's son did not exercise such ordinary care and diligence?

The car was going about seven miles an hour ten or twelve feet behind the plaintiff when defendant's son altered his course to the right side to avoid a collision with her. He says that the impact took place before the car was straightened, that as the car swerved to the right the plaintiff darted forward and that he had not time to apply the brakes before the accident occurred. Evidence is adduced to show that by applying the brakes the car would have stopped before it reached the plaintiff; on the other hand there is evidence that the use of the brakes would not necessarily have prevented the accident, and that in the case of an old person it would be regarded as safe not to do so as she would not be expected to cover the distance before the car had passed, and that it might be better to run on and clear the person knocked down than

to apply the brakes. It is the duty of persons to drive cautiously and to see that they do not run over foot passengers on a public road, but it is equally the duty of foot passengers to avoid placing themselves in a dangerous position by walking in the centre of the road, and to be on the look out for passing cars. The grounds of negligence imputed to the defendant are the non-application of the brakes and omitting to use the more powerful horn which he had with him. I am disposed to think that neither the use of the brakes nor the sounding of a more powerful horn would have prevented the accident, and that under the circumstances detailed the plaintiff has not shown that the defendant by the exercise of ordinary care and diligence could have avoided the collision. The car was about to pass the plaintiff on its proper side of the road; it was not being driven at an improper speed and the injuries sustained by the plaintiff are due solely to her own negligence. Sympathy must be extended to her on account of her age but the defendant cannot be held liable in damages.

Judgment for defendant with costs.

MASON *v.* MASON.

MASON *v.* MASON.

[256 of 1915.]

1916. JUNE 20. BEFORE BERKELEY, J.

Husband and wife—Divorce—Adultery—Domicile—Evidence by affidavit—Rules of Court, 1900, Order XXXIV.

It does not follow, from the fact that a man has remained away from the colony for some time, that he has changed his domicile.

The ordinary maxim is *ubi uxor ibi domus*, that is, the presumption is that if a man leaves his wife behind, he does not intend to change his domicile.

Claim by the plaintiff, through his attorney in the colony, for a divorce from his wife on the ground of adultery.

The parties were married in the colony in August, 1906, plaintiff being an overseer on a sugar plantation, and they lived together until 1910 when plaintiff left the colony to take up a post in the East Indies. There was no issue of the marriage and plaintiff had not returned to the colony, where he had left his wife.

Defendant admitted adultery in respect of one charge, but pleaded that it occurred in the year 1914, after she had been deserted and left without any means of support for four years, and that her conduct was solely due to the desertion and wilful neglect of the plaintiff.

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

J. A. Veerasawmy, for the defendant.

An affidavit by the plaintiff at present residing in the Straits Settlements, setting out the fact that he was born in British Guiana where his father was employed, and whither he had returned after being educated in England, was put in. He further stated that his domicile was and always had been in British Guiana and he had never formed any intention of changing it.

Veerasawmy, for the defendant consented.

After evidence had been led, judgment was given as follows:—BERKELEY, J.: The plaintiff seeks to obtain a divorce from his wife on the ground of her adultery.

The evidence establishes that the plaintiff, a native of this colony, married the defendant on August 15th, 1906, when an overseer at Uitvlugt on the West Coast, Demerara, that they lived together as man and wife until he left the colony some five or six years ago to better his position, that a few months after his departure she committed adultery with one Sooknandan, and subsequently with Mungra with whom she cohabited for four or

five years. It is shown by plaintiff's affidavit that he has not formed the definite intention of making a permanent home outside of this colony, and the supposition is that if a man leaves his wife behind he does not intend to change his domicile (de Villiers C.J., in *Adams* v. *Adams,* 2 S.C. 24).

The parties being domiciled in this colony and the adultery having been proved, the plaintiff, in the absence of evidence debarring him therefrom, is entitled to an order dissolving his marriage and granting him leave to re-marry. The court makes no order as to costs

NEWARK *v.* HIGGINS AND ANOTHER.

[211 of 1915.]

1916. JUNE 26.

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

Appeal—Sale at execution, application to set aside—Property levied on whilst a portion thereof "in custodia regis" under prior levy—Legality of levy—Rules of Court 1900, Order XXXVI, r. 14 a.

A levy under a writ of execution upon property already *in custodia regis* under a prior levy is not irregular.

Appeal from the decision of Hill, J., (a) who gave judgment for the defendants with costs.

The two principal grounds for appeal by the plaintiff Newark were:—

(1.) that the trial judge erred in holding that plaintiff had sufficient time between the date of the withdrawal of Binda's levy (June 18th, 1915) and the date of the sale at execution to take action; and

(2.) that the property levied on at the instance of Binda, which formed part of the property levied upon at the instance of the Local Authority, the second defendant, being *in custodia regis*, it was not competent to execute a second levy upon the property in question at the time, and the levy was therefore void.

J. A. Luckhoo, for the appellant, Newark.

F. Dargan, for the respondent, Higgins, not called on.

No appearance on behalf of the Local Authority, the second respondent.

(*a*) reported 1915 L.R.B.G. 187.

The necessary facts are fully set out in the report of the proceedings before the trial judge.

SIR CHARLES MAJOR, C.J.: The appeal resolves itself into two parts, the first being whether, one writ of execution having been put into effect against a property, a second writ can be issued, and what is the legal effect of that second issue.

The Rules of Court distinctly provide, contemplating the contingency at the time, that in the event of a writ being issued and the property seized by the marshal thereunder, under the issue of a second, third, or fourth writ, a second, third, or fourth levy shall be deemed to have taken place. That being so, it was perfectly lawful for the chairman of the Local Authority of the Aberdeen country district to issue a writ of execution in respect of the one-twelfth of the property in question, because the proprietors of that portion of the land were liable for the rates. But the case here is stronger. In point of fact Binda's levy extended only to a portion of the property, but the levy of the Local Authority extended to the whole property which was liable for rates; that being so it was not only entitled but it was bound to issue execution in respect of the unpaid rates. The point that a second levy cannot be made upon land *in custodia regis* is an unsound contention.

The second point was that the property having been levied on at the instance of the Local Authority on a certain date, ample time was not given to the plaintiff to bring an opposition suit, and that the sale should have been re-advertised. There is no authority for that contention, the rules being silent on the point. There is reference only to re-advertisement in the case of an opposition to a transport, but it is not necessary in the case of a sale at execution.

There is therefore no ground for urging the court to interfere with the learned judge's decision and the appeal must be dismissed with costs.

BERKELEY, J.: I agree with the Chief Justice that this appeal must be dismissed.

Counsel for appellant hangs his case on reason (4) of his reasons of appeal, viz.:—that under O. XXXVI, r. 14 (a) a second levy was irregular. This rule provides that there shall not be a second levy in respect of property already levied on. It does not apply in my opinion to the present case, as the property *in custodia regis* was one-twelfth of the property levied on in the second levy, and the second levy on the whole of the property was therefore regular and not in contravention of the rule. Appellant must pay the costs of appeal.

LALTOO *v.* TAKOORSING.

LALTOO *v.* TAKOORSING.

[242 of 1915.]

1916. JUNE 16, 30.

BEFORE SIR CHARLES MAJOR, C.J., AND HILL, J.

Appeal—Interpleader—Movables—Sale and purchase—Transfer of property as between seller and buyer—Delivery and possession—Sale of Goods Ordinance 1913.

Appeal from the decision of Berkeley, J., dated the 6th day of March, 1916.

A board and shingle cottage with vat and other appurtenances, on leased land, had been levied upon at the instance of Laltoo against Soobagiah and Jugrahsingh. Defendant interpleaded and claimed the property as his,

The judgment of Berkeley, J., was as follows:—

"The circumstances connected with the purchase of this property by the claimant are somewhat suspicious, but the agreement produced is dated October 27th, 1914, which is long before the commencement of the action which gave rise to the present interpleader claim. Fraud or collusion is not proved and judgment must be entered for the claimant, but without costs."

Plaintiff, Laltoo, appealed on the grounds that the decision was against the weight of the evidence adduced, that the evidence established at most only an agreement of sale between Soobagiah and the claimant (respondent), that there was no delivery, and that Soobagiah remained in possession of the property.

E. G. Woolford, for the appellant.

J. A. Luckhoo, for the respondent.

SIR CHARLES MAJOR, C.J.: I concur in the judgment which my brother Hill is about to deliver.

HILL, J.: The plaintiff, Laltoo, appeals from a decision of Mr. Justice Berkeley in which he gave judgment in an interpleader action in favour of the claimant, Takoorsing, who had claimed certain movable property as his, which had been levied upon by Laltoo under a judgment against Soobagiah and Jugrahsingh.

A litigant, dissatisfied with the decision of a judge, has a right to demand a review by the appeal court, both on questions of fact and law, and that court must consider the evidence, and draw its own conclusions, always bearing in mind that the trial judge has had the opportunity of seeing and hearing the witnesses. I see no grounds, on a review of the evidence, requiring me to say that the trial judge should have drawn a different conclusion to that which he did in considering the evidence.

Laltoo appears to have lent Soobagiah money on a promissory note, and she entered into an agreement with him in which, by way of security, she agreed to transfer to him certain property among which was the subject matter of the levy in question, She also agreed to transfer to him the lease of the land on which the house stood, and it is also stated in the agreement she "has not the right to dispose of any of the property without the consent "of Laltoo."

She never transferred either one, or the other, and so far as can be seen Laltoo never required her to conform to the agreement. Soobagiah, however, sold the property to Takoorsing, and handed it over to him, if the evidence, in that behalf, is to be believed, and in due course transferred the lease to him.

To sustain a claim by a pledgee to an article pledged there must be proof of actual or constructive delivery, and a mere written agreement of pledge, without such delivery and retention of possession affords no security as against other creditors (*Van der Venter* v. *Moss* 4 E.D.C. 222,) (*Lean's Trustee* v. *Cerruti* 1869, Buch, 313). Laltoo has clearly no claim under his agreement with Soobagiah, as against Takoorsing.

The only point is whether Soobagiah remained in possession, after the sale to Takoorsing, and whether, if so doing, she rendered the property executable for the debt.

The Sale of Goods Ordinance 1913 has introduced into this colony some important changes. The question of delivery is one of the most important. "Sale" in the interpretation of terms section is "bargain and sale" as well as "sale and delivery." Under Roman Dutch Law property in goods did not pass to the buyer until delivery, actual or constructive. But English Law has adopted the rule that the property in goods may be transferred by the contract itself if the parties so intend. No difficulty can arise when the intention is clearly expressed, but when no intention is formed, or is not expressed, then section 20 of Ord. 26 of 1913 lays down the rules for determining when the property is deemed to be passed.

In this particular case under review the lease was transferred on September 21st, 1915, and the renters of the rooms were instructed by the execution debtor to pay the rents to the purchaser, if their statements are to be believed, so that the element of "delivery" is actually in evidence. Even if Soobagiah was seen about the place afterwards, I cannot draw, from this fact, the inference suggested that she remained in possession. Laltoo has himself to blame for not availing himself of his rights under the agreement with Soobagiah and he may have an action against her for breach, but there is no privity between him and Takoorsing in the matter. The appeal must be dismissed with costs.

WELLINGTON *v.* HEADLEY.

WELLINGTON *v.* HEADLEY.

[124 of 1916.]

1916. JUNE 30. BEFORE SIR CHARLES MAJOR, C.J.

Appeal—Unlawful possession of spirits—Bush rum—Spirits Ordinance 1905, s. 93 (*5*) *and* s, *122* (*3*)*—Minimum penalty—Seduction of penalty—Power of court on appeal—Magistrates' Decisions* (*Appeals*) *Ordinance, 1893, s, 31.*

Appeal from the decision of the Stipendiary Magistrate of the West Coast Judicial District (Mr. O. E. L. Sharples) who convicted the appellant Headley for the unlawful possession of a quantity of "bush rum," and sentenced him to pay a fine of $260 or in the alternative six months' imprisonment with hard labour, and further to a fine of $2 or in default, seven days' imprisonment with hard labour, to take effect after the previous sentence.

The magistrate's reasons for decision were as follows:—

"In this case, following the law as laid down in *Meerza* v. *Harding* (A.J. 16.12.1905), and the numerous other cases on the subject, I find the defendant guilty. The search warrant was not in evidence, but that does not affect the facts of the seizure (*Fredericks* v. *Nelson,* A.J. 9.2.1906). Counsel for defendant objected that the bottle containing the bush rum could not be admitted on the ground that there had not been compliance with the requirements of section 121 of the Spirits Ordinance 1905 (No. 1 of 1905), and that the court could not convict in the face of such non-compliance. I am of opinion that section 121 does not apply to a case of seizure of bush rum. There is no question of taking a sample. Section 121, to my mind, applies and is intended to apply only in cases coming under sections 21, 36, 40, 70, 112 and other similar sections of Ordinance 1 of 1905. (And see *Haradan* v. *Nelson,* A.J. 23.7.1910).

"The police should certainly have sealed the bottle before it was taken away the first time. I, however, regard their evidence as trustworthy, and I do not believe—nor was it suggested—that there was any tampering with the contents of the bottle. The defendant knew what the bottle contained."

The defendant appealed on the grounds that the evidence was insufficient and that the requirements of sect. 121 of the Spirits Ordinance 1905, with respect to the taking of a sample had not been complied with.

P. N. Browne, B. B. Marshall with him, for the appellant.

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

As regards a reduction of penalty asked for, as $125 is the minimum fixed by the Spirits Ordinance, 1905, the court cannot reduce it below that amount.

SIR CHARLES MAJOR, C.J.: The appeal resolves itself entirely into a matter of evidence. The section under which the appellant was charged is a very drastic one. The possession of bush rum is in itself an offence, and the appellant is guilty of the offence with which he has been charged. When we come to the facts I think under the circumstances it was monstrous to put a fine of $260 on the appellant; it was futile because he could not pay.

The conviction is upheld and the appeal is dismissed, the fine being reduced to $25, or in the alternative three months' imprisonment with hard labour. The appellant must pay the costs of appeal.

COMACHO *v.* PIMENTO AND ANOTHER.

[316 of 1915.]

1916, MAY 3, 4, 5, 9, 10, 16, 17, 18, 19, 22, 30, 31; JUNE 2, 14, 15, 16, 19, 22, 23, AND 30.

BEFORE BERKELEY, J.

Title to land—Transport—Diagram—Boundaries—Prescription—Evidence.

This was an action by the plaintiff to establish his title to a piece of land, part of mud lot No. 14, Werk-en-Rust, Georgetown, as laid down on a plan of the land in question made by Land Surveyor W. H. McTurk, on April 27th, 1915, to recover possession of the same piece of land which was occupied by defendants, for an order upon the defendants to remove their buildings therefrom, and for an injunction restraining the defendants from entering on the said land save for the purpose of removing the buildings.

The claim set out that by transport dated January 23rd, 1915, defendant became the owner of mud lot No. 14, Werk-en-Rust, Georgetown, "the said mud lot being in front of the concession or lot number 6," as set out in the title, whilst the defendants were owners of mud lot No. 13. In 1915 lot 14 was surveyed at the request of the plaintiff by Land Surveyor McTurk and according to his survey certain buildings and erections on defendants' lot 13 encroached upon the northern side of lot 14, a part of which was cut off from the rest of lot 14 by a paling erected by defendants. Plaintiff therefore claimed a declaration that the line shown by W. H. McTurk as the northern boundary of lot 14 was the northern boundary, and he further claimed possession of that part of the lot shown to be occupied by the defendants.

Defendants denied that any of their buildings encroached on lot 14, or that the survey of McTurk was correct. If it was

found to be correct they pleaded that they and their predecessors in title had been in possession of the piece of land claimed by plaintiff for more than one-third of a century and that thereby they had acquired a good and valid title.

H. H. Laurence and *F. Dargan,* for the plaintiff.

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

Evidence was led at some length and during the examination of W. H. McTurk, surveyor, called by the plaintiff, a chart of the land in question was tendered and objected to by counsel for defendants.

De Freitas submitted that the chart was not admissible as the requirements of sections 15, 17, 19 and 20 of Ordinance 20 of 1891 (The Land Surveyors Ordinance) had not been complied with. He cited—

Bhoodunsingh v. *Persaul Dass.* (L. J. 8.11.1907) *Jones* v. *Wills.* (L. J. 13.12.1911) *Bisnauth* v. *Earle.* (L. J. 30.11.1906)

Laurence for the plaintiffs replied.

The Court ruled that the chart was not admissible and further ruled that the report of the survey was likewise inadmissible.

The "Royal Gazette" of August 13th, 1820, containing a notice by Surveyor Hillhouse, whose plan of the locality had been admitted in evidence (Exhibit B.) was tendered in evidence and objected to by defendants' counsel.

The Court ruled, after examination, that the "Royal Gazette" did not come within the provisions of section 25 (15) of the Evidence Ordinance, 1893, and hence could not be admitted.

A copy of a chart by J. P. Prass, Land Surveyor, of part of lot 13 and dated December 6th, 1882, was tendered in evidence for the defendants and objected to on the ground that it was not certified as a true copy, within the requirements of Ordinance 6 of 1880, by an officer of the Registrar's Office where the original was on record.

The objection was withdrawn, it being pointed out that no officer of the department was a qualified surveyor, and the copy was admitted.

On the conclusion of the hearing of evidence and the arguments, decision was reserved.

On June 30th the following judgment was delivered:—BERKELEY, J.: The plaintiff seeks a declaration by this court that the line shown on a certain plan made by W. H. McTurk,

Sworn Land Surveyor, as the northern boundary of mud lot 14, Werk-en-Rust, Georgetown, is the northern boundary thereof, and possession of that part of the said mud lot 14 whereon certain buildings and erections shown on the said plan as occupied by defendants now stand.

The defendants deny any encroachment by them on the said mud lot 14, and in the alternative they say that if the said plan is correct and that their buildings and palings have so encroached they have title thereto by prescription.

The plaintiff in his reply says that if prescription is proved the defendants can have acquired no title, the same being void under the Georgetown Town Council Ordinances, 1 of 1860 and 25 of 1898.

The plaintiff is the owner by transport dated January 23rd, 1915, of a certain mud lot described therein as "mud lot No. 6 situate in Werk-en-Rust, city of Georgetown . . . . . , the said mud lot being *in front* of the concession or lot No. 6 known in the chart of William Hillhouse, Sworn Land Surveyor, as lot No. 14, but known on the Receiver's books as No. 11 with all the buildings and erections thereon." This mud lot is similarly referred to in the transports of

May 10th, 1837,	(Exhibit L (1))
February 13th, 1864,	(Exhibit L (2)) and
January 4th, 1873,	(Exhibit L (3)).

The defendants are the owners by transport dated February 25th, 1905, of the adjoining mud lot described in their transport as "mud lot No. 10 also known as lot 13 situate in Werk-en-Rust District in the city of Georgetown . . . . . with all the buildings and erections and further appurtenances thereon and thereto belonging." This mud lot is similarly referred to in transports and letters of decree of

October 30th, 1846,	(Exhibits K 1 & K 2)
August 24th, 1876,	(Exhibit K 3)
October 14th, 1876,	(Exhibit K 4) and
March 19th, 1900,	(Exhibit K 5).

For the purposes of this case these mud lots will hereinafter be referred to as mud lot 14 and mud lot 13, respectively.

Shortly after the fire of December, 1913, which destroyed a large portion of that part of Georgetown called Werk-en-Rust, Mr. McTurk, Sworn Land Surveyor, was instructed to make a survey of that part of the burnt area which includes land lots 1 to 14. In April, 1915, at plaintiff's request, he surveyed mud lot 14 as described in plaintiff's transport, that is, in front of land lot 14 on Hillhouse's plan. This plan was made in 1820 to 1821 and has been lost sight of for some years, but was recently unearthed and used for the present survey. At the foot of this

plan is the following note: "The boundaries of lots of land here given are such as are clearly defined by existing tenements all.....divisions.....and the spaces left for filling up at the order of proprietors in succession as they may be in future substantiated." The blank spaces are illegible.

Starting from the south-western corner of the building at the junction of Princes and Water Streets (on its eastern side), McTurk took certain measurements and compared them with Hillhouse's plan, and in effect found them to be the same as his. He then took from the iron railing at lot 1 along Lombard Street to a certain spot which was the southern boundary of land lot 14 and found it 96.48 rods. By Hillhouse's plan it was 95.5 rods. The angle formed at this point on Hillhouse's plan was 82° 32'. He then drew a line from a point in Lombard Street 96.48 rods distant from the railing to the south-western corner of the building in Water Street and found the angle to be the same as that shown on Hillhouse's plan. The result was, that he satisfied himself that the south-western corner of the building at the eastern side of Water Street was the correct position of the southern boundary of lot 14 as laid down in Hillhouse's plan. At a spot on an imaginary line which would be the continuation of the southern boundary, if it existed, of land lot 14 at its junction with the western side of Water Street, there was an iron bar marked "L.M.H." the initials of the late Town Superintendent, a Sworn Land Surveyor. From this point, G on Exhibit D, he measured 7.6 rods along the western side of Water Street—same distance as shown to be the facade of land lot 14 on Hillhouse's plan—and at that spot he planted an iron paal marked H on Exhibit D. The western side of lots 13 and 14 showed a difference of 13.3 feet less than Hillhouse's plan. On Water Street end, De Rooy Street is 26.3 feet wide. Hillhouse's plan shows it to be 37 feet. De Rooy Street encroaches on Water Street end, and at the corner, cuts off the end of land lot 13 to the extent of 13.3 feet. In driving in his paal he found stone which had to be removed. He planted bis paal six inches from the south-eastern corner of the building on mud lot 13 going north. He planted it at this spot (H) as in his opinion it represented the spot where the continuation of the northern boundary of land lot 14 would meet the western side of Water Street, and if correct it would represent where the northern boundary of the land opposite land lot 14 on Hillhouse's plan (that is, mud lot 14) would meet the western side of Water Street. McTurk said that he did not take all the measurements over again for the purpose of this survey, but that he took some and found that they agreed with the earlier measurements taken a week after the fire in 1913 and which he therefore adopted,

satisfying himself in addition thereto by personal observation that no change had taken place in the interval. As a surveyor, he considers that in front of a land lot means the land included within the prolongation of the boundary lines of that land lot. This he did with the result that the northern boundary line of mud lot 14 is shown on his plan (Exhibit D) by the letters H to I while the southern boundary line thereof is shown by the letters G to J.

It is incumbent on this court before it can make the declaration as to the northern boundary of mud lot 14 as claimed by plaintiff, to be satisfied that the words "in front of" in plaintiff's transport are correctly construed by the surveyor as meaning the land within the prolongation of the northern and southern boundaries of land lot 14.

It is shown by Hillhouse's plan that of the land lots 1 to 14 in Werk-en-Rust, the boundaries of the corresponding mud lots are defined in respect of mud lots 3, 4, 5, 6, and 7 only, and that the southern boundary of each of these is not the prolongation of the boundary line of the corresponding land lot, but that the mud lot boundary extends in a southerly direction beyond the corresponding boundary of the land lot. The transport dated 10th May, 1837 (Exhibit L (1)) refers to land lot 14 as known on Hill-house's plan as "situate in front of Plantation Werk-en-Rust with all the buildings thereon including the water or mud lot in front thereof." This, no doubt, is the source from which the description appearing in plaintiff's transport is derived, and it can hardly be contended that land lot 14 is in front of Plantation Werk-en-Rust, that is, that its boundaries could be defined by a prolongation of the boundary lines of Plantation Werk-en-Rust.

So in *Fauset* v. *Baveghens* (L.J. Match 5th, 1912) a lot of land is referred to therein as in front of Plantation Zeelandia. The use of the words 'in front of' is clearly not to be limited to a prolongation of the boundary lines of the principal land, and I am satisfied that it ought not to be so limited in the present case. Both the transport of May 10th, 1837, and the boundaries of the mud lots in the same district—where they are defined on Hillhouse's plan—as well as the footnote to that plan, tend to negative such a construction. It follows that the plaintiff has failed to establish his claim as to the northern boundary of mud lot 14, and judgment is given for the defendant with costs.

COLE *v.* FRANK.

COLE *v.* FRANK.

[81 of 1916.]

1916. JUNE 16, 27. JULY 1. BEFORE SIR CHARLES MAJOR, C.J.

Appeal—Possession of raw gold—Powers of officers to search premises—Failure to obtain warrant—Mining Ordinance, 1903, ss. 48, 51.

This was an appeal from the decision of the Stipendiary Magistrate of the Bartica Judicial District (Mr. H. A. Frere) who convicted the appellant Frank for the unlawful possession of raw gold, and sentenced him to pay a fine of $100 or in the alternative two months' imprisonment

The facts and reasons for appeal sufficiently appear from the judgment.

McArthur, for the appellant.

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

SIR CHARLES MAJOR, C.J.: The defendant was charged, under the provisions of section 48 of the Mining Ordinance, 1903, with an offence against the Ordinance in that a certain quantity of raw gold was found in his possession. The gold was found in the house of the defendant by a rural constable, who is an officer under the Ordinance, under some other articles in a box. The constable had not obtained any warrant to search the house. The defendant did not claim the gold as his property, nor attempt to show that he was lawfully entitled to its possession, but stated that he did not know how it got into the box, suggesting that one Thomas, his employer and owner of the claim, had put it there. The magistrate convicted the defendant.

The appeal against the conviction is, among other grounds,—that, section 48 providing that "Every person in whose possession raw gold . . . is . . found by an officer shall be guilty of an offence against the Ordinance," unless he can satisfactorily account for its possession, the defendant could not be convicted because before finding the gold the officer in this case had not complied with the provisions of section 51 which empowers an officer, upon reasonable suspicion of unlawful possession of raw gold, to obtain a warrant from a justice of the peace to search the house of the suspect; in other words, that an officer cannot be said to find raw gold in a house for the purpose of a complaint, unless he has previously armed himself with a warrant to search for it. I cannot agree. Section 48 makes it an offence for a person to be found by an officer in possession of raw gold, unless and until he shows that possession to be lawful. The fact that the officer

has not any warrant to search a house or other building when he finds gold therein cannot affect the matter. He may thereby commit a trespass but that does not alter the finding or the possession. As aids to discovery of raw gold, either on the persons, or in the vessels, carts, or conveyances, or in the houses, stores, shops, or other buildings, of people suspected of being in unlawful possession thereof, the Ordinance gives to officers under its provisions very wide powers of personal examination and search, and an officer, if the exercise of any of those powers depends for legality upon the possession of a warrant in that behalf is, perhaps, incurring a civil risk or liability if he neglects to obtain that warrant. But that is all.

The defendant further objects that there has been no compliance with the provisions of section 55 of the Ordinance. That section provides that, as soon as possible after the seizure of any raw gold, a complaint shall be preferred against the person from whom the same was seized for the unlawful possession thereof; that the complaint may be preferred by the seizing officer, or by any other officer; that on the hearing of the complaint, the complainant shall prove the finding of the gold and reasonable cause, at the time of seizure, to suspect that the possession was unlawful. In this case a complaint was preferred, not by the seizing officer but by another officer, viz., the warden of the district. The complainant proved the finding of the gold by the rural constable who seized it. But it is contended that he must have proved the finding by himself just as much as he must have proved reasonable cause in his own mind, because the expression "the complainant must prove" means this. This contention cannot be maintained. If it were correct, no officer could fee a complainant unless he had found and seized the gold—the finding and the seizure, moreover, might quite easily be by different officers—whereas the section distinctly says that the complaint may be preferred by "any" officer other than the seizing officer.

The question remains to be determined whether there was any proof of reasonable cause for suspecting unlawful possession at the time of the seizure. There was, in my opinion, ample proof. The place where the gold was found—in the defendant's box, in the defendant's house, and strongly suggesting concealment; his denial of knowledge of its presence there; his occupation of gold-digger; his demeanour on the discovery. These were all facts attendant on the seizure.

The other grounds of appeal relate to the evidence before the magistrate. From the conclusions of the magistrate thereon I see no reason to differ, and the appeal, therefore, is dismissed with costs.

In re EMMANUEL SPOONER.

In re EMMANUEL SPOONER.

[130 of 1916.]

1916. JUNE 17, 23, 27, 28. JULY 1.

BEFORE SIR CHARLES MAJOR, C.J.

Extradition—Habeas corpus—Fugitive criminal—Orders in Council—Judicial notice—Evidence Ordinance 1893, sect. 25—Authentication of foreign documents—Extradition Act 1870—Jurisdiction of court to review decision of magistrate.

Upon a motion for *habeas corpus*, if the committing magistrate have jurisdiction and if there is evidence before him on which he can properly commit the prisoner, the court cannot review his decision. The court is not a court of appeal on questions of fact from the magistrate, but has only to see that he had such evidence before him as gave him authority and jurisdiction to commit.

Application for writ of *habeas corpus.*

The motion was made on behalf of Emmanuel Spooner for an order *nisi* calling upon the Stipendiary Magistrate of Georgetown and the Keeper of Georgetown Prison to show cause why a writ of *habeas corpus* should not issue to bring up the body of Emmanuel Spooner in order that he might be discharged from custody.

The prisoner Spooner had been arrested at Meadow Bank, Demerara, at the instance of the Dutch authorities in Surinam and brought before the Stipendiary Magistrate, Georgetown, and by him committed to prison for the purpose of extradition, on a charge of larceny alleged to have been committed in Dutch Guiana.

The order was obtained at the instance of Spooner upon the grounds:—

(1.) that illegal evidence was admitted by the magistrate, as neither the alleged depositions and warrant from the Dutch Government nor the translations admitted in evidence were proved or signed or certified to be original, nor were they certified to be true copies of the depositions in accordance with the provisions of the Extradition Treaty with the Netherlands of the 26th day of September, 1898;

(2.) that the decision of the magistrate in committing the prisoner was illegal and without jurisdiction—

(*a*) there was no reasonable or sufficient evidence in support of the charge to justify the prisoner's committal, had the offence been committed in this colony;

(*b*) assuming evidence of larceny, there was no proof that prisoner was guilty of an offence for which he could be extradited.

(3.) that copies of the orders in Council and of the aforesaid treaty were not tendered in evidence.

McArthur, for the prisoner.

In re EMMANUEL SPOONER.

Nunan, K.C., A.G., shewed cause.

Cur. adv. vult.

Posted. July 1st.

SIR CHARLES MAJOR, C.J.: Emmanuel Spooner, now in prison upon a commitment by the police magistrate for Georgetown for surrender to the Government of Dutch Guiana, a colonial possession of the kingdom of the Netherlands, applies to this Court for the issue of a writ of *habeas corpus ad subjiciendum,* directed to the keeper of His Majesty's prison in Georgetown. The application is made on various grounds. The first is that there was no evidence before the magistrate of the Extradition Treaty between His Majesty and Her Majesty the Queen of the Netherlands, nor of His Majesty's Order in Council directing that the Imperial Extradition Acts of 1870 and 1873 should apply in the case of that foreign state.

By the Evidence Ordinance of this colony, every person authorized to cake evidence shall take judicial notice of the Sovereign's Order-in-Council. His Majesty's Order-in-Council made the 2nd day of February, 1899, applying the Extradition Acts 1870 and 1873, in the case of the Netherlands sets forth *verbatim* the Treaty of Extradition between the States, and is published in the "Gazette" of this colony in its issue of March 18, 1899. The magistrate of Georgetown therefore was compelled by law to notice, that is to know and recognize, the existence the nature and the contents of that Order-in-Council, without requiring any evidence thereof, for that is what is meant by taking judicial notice of it.

The second ground of the application is that a foreign warrant authorizing the arrest of the applicant and certain depositions, or statements on oath, taken in Dutch Guiana, were received in evidence in the proceedings before the magistrate without due authentication thereof. The provisions of the Treaty as to authentication of documents follow (as usually) those of the Extradition Act, 1870, which enacts that foreign warrants and depositions, or statements on oath taken in a foreign state, and copies of the originals may be received in evidence in proceedings under the Act, if duly authenticated. That they shall be deemed to be duly authenticated for the purpose of the Act, if authenticated in manner provided for the time being by law, or if the warrant purposes to be signed by a judge, magistrate, or officer of the foreign state where the same was issued, and the deposition of statements, or copies thereof, purport to be certified under the hand of a judge, magistrate, or officer of the foreign state, where the same were taken, to be the original depositions or statements, or to be true copies

thereof, as the case may require, and if, in every case, the warrants, depositions, statements and copies are authenticated by the oath of some witness, or by being sealed with the official seal of the minister of justice, whereof magistrates are required to take judicial notice. The treaty adds to the minister of justice "some other minister of State of the Netherlands." These requirements are conjunctive.

Among the documents admitted by the magistrate in evidence are the following: Firstly, a document, dated the 21st day of January, 1916, purporting to be signed by J. da Costa, the President, and Messieurs Visser and Carst, two members of Council. Their signatures are verified by the Governor of Surinam. The document is sealed with the seal of the Government of Surinam, and has been translated from the Dutch into the English language by a Mr. R. A. P. C. O'Ferrall, sworn translator. In it appear the words "commits . . . Emanuel Spooner . . . above mentioned for trial in the case above mentioned with a warrant of arrest and charges the investigating magistrate to instruct the case according to law." It is, therefore, a judicial document and is, or at any rate contains, a warrant of arrest. Secondly, depositions were received in evidence (1) by Wilhelm Simon Aurelio Colago Belmonte, signed by the deponent (or "appearer" as he is called in Dutch documents) and followed by the words "of which this warrant has been on oath of office," signed by Jacob Boonacker, in the deposition stated to be a District Commissary; (2.) by the same witness Belmonte, taken by the investigating magistrate assisted by a second functionary of the Roll of the Court, signed by the deponent under the words "This read to him maintained and signed" and also signed by H. P. van Asch van Wijck and J. E. A. Wijngaard, the members of the investigating tribunal; (3.) by Christiaan George Gerrit Buitemann, signed by the deponent, under the words "This having been read to him the undersigned maintains" and by the same investigating magistrates as the second deposition. The warrant and the depositions, therefore, all purport to be signed by officers of the Netherlands Government in Surinam; the depositions seem to me, though not having the actual words "I" or "we" hereby certify," &c, clearly to bear on the face of them sufficient authentication to satisfy the requirement of being certified under the hands of the officers who have signed them to be originals, and the warrant and depositions alike are sealed with the seal of the Government of Surinam, in each case, I consider, even more sufficient than that of the Minister of Justice or (if we consult the treaty) some other departmental Minister of State of the Government of the Netherlands in Surinam, This authentication is complete in itself. In point of fact, however, a witness before the committing magistrate,

Isau William Hermann Alvares swore to the signatures of the investigating magistrates and of the deponents on the depositions.

The third and fourth grounds depend one upon the other and must be taken together. They are, that the offence wherewith the applicant is charged is not the offence of larceny and not, therefore, within the Treaty, nor, in consequence, within the Extradition Acts; and that, after disregarding evidence not receivable before the magistrate (of which the warrant and depositions already disposed of formed the greater part) there was not before the magistrate such evidence as would, according to the law of this colony, have justified him in committing the applicant for trial if the crime whereof he is accused had been committed in this colony.

The conditions precedent to the exercise of a magistrate's jurisdiction to commit the applicant to prison, in connection with these two grounds, are four in number. The offence charged must be within the treaty; then, it must be an offence punishable by the law of the Netherlands in Dutch Guiana; then, it must be an offence within the Extradition Acts; and, finally, there must be such evidence before the magistrate as would justify him in committing the applicant for trial were the case one of a preliminary inquiry into an indictable offence. Taking the first three conditions together, the crime charged upon the applicant is larceny. Larceny is within the Treaty; it is within the Extradition Acts; and it is punishable by the law of the Netherlands. It is also an indictable offence in the circumstances disclosed in the evidence here, under the law of this colony, for the contention of counsel for the applicant that the jurisdiction conferred upon magistrates summarily to try charges of simple larceny where the value of the property does not exceed twenty-five dollars does away with the indictability for an offence of that nature and class, is quite unsound. I am thus brought to the fourth condition precedent, and when the able and earnest argument of Mr. McArthur is examined it is found to be, not that no larceny was, in fact or in law, committed, nor, since the depositions were properly received, that there was no evidence before the magistrate to justify the committal, but that, on the whole evidence which was before him, he was wrong in considering that evidence sufficient to establish a *prima facie* case that larceny had been committed and committed by the applicant. Now on an application of this kind, that is ground which the applicant may not take. In support of it Mr. McArthur has urged upon me consideration of the case of *In re Castioni* ((1891, 1 Q. B. 149). But in that case the objection raised to the committal of the magistrate and upon which the whole of the argument turned was that the evidence did not establish that the murder charged upon the prisoner was not of a political character,

and into the question of sufficiency or insufficiency of the evidence on that point the Court entered. It was an objection to the magistrate's jurisdiction attaching at all, not to the weight of evidence as to some fact after his jurisdiction had attached. In the cases to which I now refer Castioni's case is noticed. A few extracts from the judgments in those cases will suffice to make clear the principle by which objections of this kind are governed. Its clearest and most concise exposition is perhaps to be found in the case of *The Queen* v. *Maurer* (10 Q. B. D. 513) cited by the learned Attorney General. Here Mr. Justice Field, after referring to the observations on *Huguet's* case (29 L. T. (N. S.) 41) by the learned author of Clarke on Extradition, said, "It appears to me, however, that the decision in *Huguet's case* is completely in accordance with the principles upon which the courts act and have always acted with reference to the adjudications of justices in general, and without that decision I think we should have come to the same conclusion. The statute says that the magistrate then have the same jurisdiction as nearly as possible as if the prisoner were brought before him charged with an indictable offence in England. So long as the magistrate keeps within his jurisdiction we have no power to interfere with his decision. It is only when there is no jurisdiction, as when there is no evidence before the magistrate, that we can interfere. It seems to me that in *Huguet's* case all the judges intended to decide that it was not for this Court to weigh the evidence, if there was any reasonable evidence of an extradition crime for the magistrate to act upon. If there is such evidence the magistrate is not going beyond his jurisdiction in committing the prisoner upon such evidence." Mr. Justice Mathew followed and said, "The conditions of the magistrate's jurisdiction are clearly indicated by the Extradition Act. The crime in respect of which extradition is sought must be a crime against the law of both the contracting states, and there must be *prima facie* evidence that the prisoner is guilty of such crime. There must be such evidence as, according to the law of England, would justify the magistrate in committing the prisoner for trial if the alleged crime had been committed in England. It appears to me that in the present case there was such evidence. I agree with my brother Field that, there being such evidence, we have nothing to do with any question as to the weight of the evidence." Here, as I have already said, Mr. McArthur does not contend that there was no evidence at all, but that the magistrate ought not to have come to the conclusion he did upon the evidence before him. To enter into the weight of evidence before him would make the Court one of appeal from the magistrate, which it is not. The case of *The King against The Governor of Holloway Prison;* Ex parte *Siletti* (87 L.T. 332) is useful. It was decided as recently as the year 1902 and contains references to

In re Castioni. The application for the writ of habeas corpus was made on the ground "that further evidence had been obtained since the magistrate's committal which might have affected his mind in favour of the prisoner." The further evidence was strong as to an *alibi.* The Court decided that it could not disturb the magistrate's decision to commit, and that if anything could be done in the matter, it must be left to the Secretary of State in whom rested the final discretion to surrender. In giving his judgment, Mr. Justice Bingham said, "If (the prisoner) applies for a *habeas corpus* and obtains a rule, the question arises what points may be taken upon the argument of the rule. For my part, I think the only question that this Court can entertain is the question of jurisdiction, and, applying that observation to this particular Act, all that the accused person may say is that the crime with which he is charged is not a crime within the meaning of the Extradition Act—that is to say that it does not come within the class of offences contemplated, or that it was a crime of a political character and therefore was outside the Act altogether. He may also say that there was absolutely no evidence upon which the magistrate could exercise his discretion as to whether he would commit or not. These things he may say; but I am clearly of opinion that there is one thing he cannot say, namely, that there is evidence one way and the other and that this Court ought to enter into the consideration as to whether the magistrate has exercised his discretion as to it properly. That he cannot say. It is said that the judgments in the case of *Re Castioni* show that the Court can enter into the question of the weight of evidence, and can review the decision of the magistrate. For my part, I do not think that the learned judges in that case meant to say anything of the kind. If they did mean to say that, I am of opinion that their judgment in that respect was *obiter*, and was contrary to a long course of decisions which have been brought to our attention by the Attorney General." Mr. Justice Darling addressed himself almost entirely to the question whether the court could interfere with the magistrate's exercise of his jurisdiction on evidence obtained since the committal, but he made the following remarks in the course of his judgment: "With regard to the statement that it is only upon questions of jurisdiction that the court can interfere, I think jurisdiction is not quite the right word to use. It is used by my brother Bigham, as I understand it, to cover a good deal more than is usually meant when we use the word jurisdiction in ordinary cases. It is used to cover want of jurisdiction in the magistrate—that is want of that which would be properly called jurisdiction. It is also used to cover the cases of there being no evidence against the accused at all, and where there was, in the opinion of this court, no evidence against the accused,

not even *a prima facie* case against him. In such a case as that this court would go into the matter, and on ascertaining that there was no evidence, would make the rule absolute for a *habeas corpus* . . . For myself, I do not think we are overruling what was said by Denman and Hawkins, JJ., in the case of *re Castioni,* but if what we are now deciding necessitates our differing from that case, I think it is because that case makes it necessary for us to do so. I still, however, hold the opinion which my Brother has expressed, that if our decision is in conflict with that case, then it seems to me that we have authority for what we are now deciding in the passage which was cited to us in *Arton's Case,* (1896, 1 Q.B. Seq.) where Lord Russell, C.J., said: "We are not a Court of Appeal on questions of fact from the magistrate. We have only to see that he had such evidence before him as gave him authority and jurisdiction to commit."

None of the grounds, therefore, advanced for the grant of a writ is maintainable and the rule must be discharged.

PETTY DEBT COURT, GEORGETOWN.

SANDBACH PARKER & CO. *v.* JUNIOR CLUB.

[68. 7. 1916].

1916. JULY 19, 26. BEFORE DALTON J. (Actg.)

Contract—Sale of goods—Unincorporated members club—Liability for goods supplied.

An unincorporated members club, not being a partnership or legal entity, cannot sue or be sued in the club name.

Claim by the plaintiff company, through their local attorney, for the sum of $46 due and owing by the defendant club for liquor supplied at Georgetown in December, 1914, and January, 1915.

Abraham, solicitor, for the plaintiffs.

Low, for the defendant, took objection to the proceedings on the ground that the club had no legal entity.

DALTON J., (Actg.): Plaintiffs sue the Junior Club of Hadfield street, Georgetown, for the sum of $46 for liquor supplied in December, 1914, and January 1915.

Mr. Low who appeared for the defendant objected to the plaint, and urged that the club could not be so sued, as it had no legal entity. He lay over a certificate of registration under the provisions of Ordinance 26 of 1907 (the *Registration of Clubs Or-*

dinance) and also a copy of the rules of the club. No provision is made in the rules for suits by or against the club.

He also referred to *Halsbury's Laws,* Vol. IV., para. 914, where authority is given for the proposition that an unincorporated members club, not being a partnership or legal entity, cannot sue or be sued in the club name, nor can the secretary or any other officer of such a club sue or be sued on behalf of the club, even if the rules purport to give him power to sue and provide for his being sued.

Mr. Abraham, for the plaintiffs, contended that the club was a proprietary club and that the rights and liabilities arising out of contracts made on behalf of such a club depend on the ordinary rules and principles applicable to the contracts of traders and trading companies generally (see *Halsbury,* Vol. IV, para. 912).

It is quite clear from the rules, which are not questioned, that the club is not a proprietary club, but is an ordinary unincorporated members club. The question of liability for goods supplied to such a club depend, as stated in the authority above referred to, on the ordinary principles of agency, and the objection taken is a good one. See also *Nathan, Common Law,* Vol. III, p. 1221 *et seq,* and the case *Menear* v. *Bryant* (1910, T.L.D, 85) and other cases there mentioned.

The objection is upheld and the case must be struck out.

PETTY DEBT COURT, GEORGETOWN.

FUNG SHEU FOI *v.* COLTHURST.

[75. 5. 1916.]

1916. JULY 25, 27. BEFORE DALTON, J., (Actg.)

New trial, application for—Petty Debts Recovery Ordinance 1893, sect, 32—Magistrates' Courts Rules, 1911, rule 32—Affidavit—Practice.

An application for a new hearing of an action under the provisions of sect. 32 of the Petty Debts Recovery Ordinance 1893, should be supported by affidavit.

Application by the defendant Colthurst for an order setting aside the judgment given, in the absence of the defendant, on the 18th day of May, 1916, in favour of the plaintiff for the sum of $14.62 with costs, and also for a new hearing, on the grounds that she was not aware that she had been summoned, that she never received any summons, that she was informed that a summons had been left at her house in her absence, and shortly after taken away by plaintiffs agent as not being intended for her, and that she did not owe the sum claimed or any part of it.

J. S. McArthur, for applicant (defendant.)
No affidavit is required to support the application.

E. G. Woolford, for respondent (plaintiff.)
No objection to the application being granted. It should, however, be supported by affidavit.

DALTON, J. (Actg.): This is an application for a new trial on the ground that the summons never reached the defendant through the action of the plaintiff's agent, as set out in the application.

The application in my opinion shows good ground for making the order asked for, if it is supported by affidavit.

I find that the practice in this court with respect to the requirement of an affidavit in support of the application is unsettled. In some cases the affidavit has been required and in other cases not. The Petty Debts Recovery Ordinance, 1893, and the Magistrates' Courts Rules, 1911, are silent on the point. The same remark applies to the Rules of 1896 to which Mr. McArthur referred.

It must not be forgotten, however, that the original judgment has been obtained on evidence, given on oath, and in my opinion, having in mind also the desirability that process in this court should be as cheap as possible within reason, there can be very few cases in which it is not desirable that such an application should be supported by affidavit.

As a rule the affidavit verifying the application should be at the foot or end of the application and not by a separate document. This was the course followed I find in the last similar application before this court in May last.

I make an order for a new trial on condition that an affidavit in support of the application is filed within forty-eight hours.

NURSE *v.* WILTSHIRE AND ANOTHER.

[143 of 1916.]

NURSE *v.* MARSHALL AND OTHERS.

[144 of 1916.]

1916. JULY 20. BEFORE HILL, C.J. (Actg.)

Appeal—Magistrate's Court—Question of foot—Scintilla of evidence—Abetment of summary conviction *offence—Summary Conviction Offences Ordinance 1893, sect. 24—Case of full offence charged, part proved—Summary Conviction Offences* (*Procedure*) *Ordinance 1893, sect, 40.*

NURSE *v.* WILTSHIRE AND ANOTHER.

Two appeals, taken together, from decisions of the Stipendiary Magistrate of the Georgetown Judicial District (Mr. W. J. Gilchrist) who convicted the defendants Wiltshire, Marshall and others (now appellants). The facts and reasons for appeal sufficiently appear from the judgment.

The appeals were dismissed with costs

Lewis, for the appellants.

C. R. Browne, for the respondent.

HILL, C.J. (Actg.): These appeals, argued as one, are from the decision of a magistrate convicting (1) four of the five defendants, and (2) both defendants, who were all charged with actual bodily harm. The charge in (1) was reduced to common assault, and in (2) the defendants were convicted of the higher offence. In (1) No. 4 defendant, F. A. Wiltshire, was convicted of abetting, and fined. The second defendant, Melliman, in (2) has died since his conviction. The reasons of appeal were under three heads, but only the first two were argued:—

(a) that the conviction was altogether unwarranted by the evidence;
(b) that the conviction of F. A. Wiltshire was erroneous in point of law.

For this Court to reverse a conviction by a magistrate on a question of fact it has to be satisfied that his decision was based on a mere scintilla of evidence, or that the evidence was such that he could not reasonably come to the conclusion he did. He is the sole judge of the weight of the evidence. His conviction, there having been evidence on which he could come to the conclusion he did, cannot be disturbed.

With regard to the second reason, section 24 of Ordinance 17 of 1893 says: "Every person who abets . . . the commission of any summary con-"viction offence shall be liable to be proceeded against and convicted for "the same, either together with the principal offender, or before, or after his "conviction, and shall be liable, on conviction, to the same punishment as "such principal offender may be by law liable to." It was competent for the magistrate to convict of abetting under the charge as laid; and furthermore under section 40 of Ordinance 12 of 1893, "Every complaint shall be "deemed divisible; and if the commission of the offence charged, as de-"scribed in the statute creating the offence, or as charged in the complaint, "includes the commission of any other offence, the defendant may be con-"victed of any offence so included which is proved, although the whole "offence charged is not proved, or he maybe convicted of an

"attempt to commit any offence so included." The magistrate found that the defendants were assaulting, and that F. A. Wiltshire was aiding and abetting. He might have found him guilty of the assault, the abetment was part of and included in the assault, and under section 40 he could have convicted him of that portion of the offence included in the commission of the assault, which he considered proved.

All the argued grounds of appeal fail and the convictions are upheld, and the appeals dismissed with costs to the respondent.

EDUN *v.* DEMERARA RAILWAY COMPANY.

[150 of 1916.]

EMAMBUX *v.* DEMERARA RAILWAY COMPANY.

[151 of 1916.]

1916. JULY 28, AUGUST 5. BEFORE DALTON, J: (Actg.)

Appeal—Negligence—Damages—Animals killed on railway—Amendment of plaint by magistrate without application—Evidence.

Two appeals, taken together, from decisions of the Stipendiary Magistrate of the West Coast Judicial District (Mr. O. E. L. Sharples) who found for the plaintiffs against the defendant company (now appellants) in the sum of $50 for damages sustained, in the loss of two animals killed on the West Coast Railway, and costs.

The reasons for appeal sufficiently appear from the judgment.

E. A. V. Abraham, solicitor, for the appellant company.

Amendment of plaint was irregular, *Liberal Printing & Publishing Co., Ltd., v. Conrad,* (1894. L.R. B.G. 44). No evidence as to value of animals, that train was property of defendants, or that the animals were on the land with permission. He farther cited:

Demerara Railway Co. v. *Pragdutt* (A.J. 5.4.1902)
Demerara Railway Co. v. *Vieira* (A.J. 27.5.1902.)
Reis v. *Demerara Railway Co.* (A.J. 21.11.1901.)
Demerara Railway Co., Ltd., v. *Daly.* (A.J. 15.8.1902.)
Demerara Railway Co., Ltd., v. *Jack.* (A.J. 12.9.1902, and 11.10.1902.)
Gaskin v. *Demerara Railway Co.* (I.J: 1.12.1911.)
Dawson v. *Midland Railway Co.* (L.R. 8 Ex. 8.)

Luckhoo, for both respondents.

A corporation created by statute must be taken notice of; *Church* v. *Imperial Gas Co.* (6. A. and E. at p. 856.) Word "Limited" was mere surplusage, and magistrate was right in striking it out. *Humphrey* v. *Crooks* (1914. L.R. B.G. at p. 47. The evidence was sufficient to support the judgments. The court must take cognisance of well known facts.

He cited also *Demerara Railway Co.* v. *Lee,* (A.J. 12.5.1909)
The Kim and others. (32 T L.R. at p. 23.)
Dawson v. *Midland Railway Co.* (L.R. 8 Ex. 8.)

Abraham, in reply.

Cur. adv. vult

Posted. August 5.

DALTON, J. (Actg.): These are two appeals, heard together, against decisions of the Stipendiary Magistrate of the West Coast Judicial district, who gave judgment for the plaintiffs (now respondents) in a claim brought by each of them against the Demerara Railway Company (the appellants) for damages sustained through the loss, in one case, of a bull, and in the second case, of an ox, said to have been killed on the West Coast railway.

The magistrate found that the animals were killed by a train the property of the company, and that the animals were on the line through the defective fencing of the company. In each case judgment was given for $50 damages and costs.

The reasons for appeal are very long, but were argued by counsel under the following heads:—

(*a*.) That the suit was brought against the Demerara Railway Company, Limited, that there is no such company in existence, that the word "Limited" was struck out of the plaint by the magistrate without any application for such amendment being made, that the magistrate had no power to make such an amendment, and that the provisions of Ordinance 2 of 1846 do not apply to the West Coast Railway.

(*b*.) That there was not sufficient evidence before the court whereby the court could award $50 as damages.

(*c*.) That there was no evidence that the appellant company ran a line of railway through Plantation Windsor Forest where the animals were killed, or that the train was the property of the appellant company; and that the "notorious facts" upon which the magistrate based his judgment should not have been taken cognisance of by him, without proof.

(*d*.) That the animals in each case were strays and had no permission to be on the rice-fields from which it is alleged they got on to the railway.

A large number of authorities were cited on both sides and all the points were very thoroughly gone into. Only one matter has, however, given me any difficulty, and that is with respect to the sufficiency of the evidence respecting the damages sustained to support a judgment in favour of each of the plaintiffs in the sum of $50.

The word "Limited" in the plaint was under the circumstances mere surplusage. The appellant company is a company incorporated locally under an ordinance (No. 2 of 1846) and is so sufficiently and properly described in the plaint, the amendment by the magistrate was not really necessary as affecting the proceedings and. in no way prejudiced the appellants. Cases were referred to in which the defendants had on previous occasions appeared under the same description, in which apparently no objection had been taken. That would not of course justify the continuance of the error, but here they were properly before the court, the provisions of section 115 of Ordinance 2 of 1846 with respect to service had been properly complied with, whilst the question whether Ordinance 2 of 1846 applies to the West Coast railway is answered in the affirmative by the clear and explicit provisions of Ordinances 8 of 1896, Ordinance 10 of 1897, and two later amending ordinances. Section 49 of the schedule to Ordinance 10 of 1897 specially makes reference to both ordinances of 1846.

Taking into consideration the provisions of the ordinances mentioned of which the magistrate took judicial notice, and the definite evidence given that the oxen were both killed by a train running on the West Coast railway at Windsor Forest, there was quite sufficient ground for the decision identifying the defendant company with the railway company above referred to locally incorporated by statute, and as the owners of the train and line in question.

That the animals were not strays is also adequately proved in the evidence which the magistrate believed. They were in the rice land pasture (by which term I mean the rice lands given over to pasturage during the dry weather, as distinct from the pasture itself) bordering upon the railway with permission of the overseer in charge of the plantation. In the absence of any evidence to that effect, I am quite unable to assume, as asked by counsel for the appellant, that the overseer was acting beyond the scope of his authority. He was the officer in charge of the plantation acting in the duties of his office and there was no evidence whatsoever that he was not entitled to do what in this case he did do.

I come now to the question of damages. The claim in each case is for "$50 as damages being the value of a bull (ox)." In the first case the plaintiff Edun says "I claim $50 damages . . . . for

killing one of my plough bulls . . . . . It was a serving bull." He was not cross-examined on the question of the value at all, and there is no further evidence whatsoever as to the value of the animal.

In the second case the plaintiff Emambux says "I claim $50. . . . for killing my plough ox." He also underwent no cross-examination as to the amount at which he assessed the value of his ox, and no further evidence was led as to its value.

In each case therefore the evidence as to value is meagre, though there is on record the sworn valuation of each of the plaintiffs. That value has been accepted by the magistrate, who has found as a fact that the damages suffered in each case amounted to $50. That there is evidence in the statements of both the plaintiffs to support his finding is clear, but I must admit that had I only the notes of evidence before me, and did not know what was the finding of the magistrate who heard the witnesses and saw their demeanour I should have some difficulty in coming to a conclusion as to the value of the animals. It must not be forgotten however that there is also the further fact that counsel for the appellants in the magistrate's court in no way questioned the plaintiffs' valuation, or submitted the plaintiffs on that point, to that most efficacious test of ascertaining the truth, namely, cross-examination.

Under the circumstances, therefore, the decision of the magistrate on this point must stand.

His decision in both cases is affirmed and the appeals are dismissed with costs.

PETTY DEBT COURT GEORGETOWN.

CLARKE *v.* HAND-IN-HAND FRIENDLY BURIAL SOCIETY.

[88. 7. 1916.]

1916. AUGUST 9, 15. BEFORE DALTON, J. (Actg.)

Friendly Society—Claim for sick relief—Dispute—Mode of deciding dispute—Jurisdiction—Ultra Vires—The Friendly Societies Ordinance 1893, Sect. 46.

Plaintiff, on behalf of his wife to whom he was married in community of property, claimed from the defendant society sick relief alleged to be due to her, but withheld by the society. The defendant society objected that the dispute should be decided in conformity with the rules of the society and not in a court of law;

Held, that a question of sick relief was a dispute within s. 46 of the Friendly Societies Ordinance 1893, and therefore should be decided only in the manner directed by the rules of the society: that the rules were not *ultra vires*; and that the action was not maintainable.

This was a claim by the plaintiff against the Hand-in-Hand

Burial Society, a society established in Georgetown and registered under the Friendly Societies Ordinance 1893, for the sum of $34.82, balance of sick relief stated to be due to the wife of plaintiff as a member of the society.

All further necessary facts, and objection taken appear from the judgment.

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

C. R. Browne, for the defendant society.

DALTON, J. (Actg.): This is a claim by Abraham Clarke, as having married in community of goods his wife Mary Clarke, against the Hand-in-Hand Friendly Burial Society, for the payment to him of the sum of $34.82, balance said to be due to Mary Clarke as a member of the society for sick relief from December 3rd, 1915, to April 10th, 1916.

An objection was taken to the proceedings by counsel for the defendant society, on the ground that, admitting that Mary Clarke was a member of the society, the society being duly registered under the provisions of Ordinance 1 of 1893 (the Friendly Societies Ordinance), the mode of deciding any dispute between a member and such a society is laid down in section 46 of the ordinance. That section runs as follows:—

> 46. "Every dispute between a member . . . of a registered society, "and the society or any officer thereof, or between any Regis- "tered branch under this ordinance, or an officer thereof, . . "shall be decided in manner directed by the rules of the soci- "ety, and the decision so made shall be binding and conclusive "on all parties without appeal, and shall not be removable into "any Court of Justice or restrainable by injunction . . ."

There are certain provisos to this section providing for arbitration of disputes by consent, reference to the Registrar of Friendly Societies, and for trial in a court of justice where the rules make no provision for deciding disputes. Counsel's objection proceeded that under the rules of the society, which were not disputed save in so far as I will mention later, the decision of disputes is, under Rule 5. (h), (a) to (e), vested in the committee of management of the society. That rule reads as follows:—

5. (h.) . . . The committee of management shall also decide the following:—

> (a) All disputes or charges arising between members.
> (b) All claims affecting the society whether arising from members or otherwise.
> (c) No officer or member of the committee of management against whom a charge may be made shall sit upon the committee during the hearing of such a charge.

(d) No action shall be taken in connection with such decision of the committee of management until such decision be taken to the general body.
(e) If in any case unforeseen circumstances should arise to which none of these rules herein apply, the committee of management shall have power to decide the point, and their decision shall be final.

It is clear that the mode of deciding disputes is here clearly provided for by the rules

Counsel for plaintiff argued, however, that the claim in question was not such a dispute as come within the provisions of section 46 of the ordinance or the rules, that section 47 of the ordinance clearly contemplates legal proceedings by and against the society, and that the rules of the society, in so far as they provide that the committee of management shall adjudicate in disputes in which the society is itself one of the parties, are *ultra vires.*

There being sufficient facts before me on which to decide the objection as to whether I have jurisdiction or not, it was not necessary to hear any evidence, and after argument I reserved decision.

The equivalent provision in the Friendly Societies Act, 1896 [59 and 60. Vict., c 25], the existing English statute laying down the law on this subject, is section 68, which provides for the decision of disputes practically on the same lines as our Ordinance. As stated by *Fuller* in "The Law relating to Friendly Societies" (2nd Ed. p. 88) this section provides a cheap and expeditious means of settling disputes and is intended to prevent the funds of societies from being wasted in litigation. Where the rules of a society have provided a mode for the settlement of disputes between the society and its members, that mode is *prima facie* binding on all parties. The words "shall be decided" in the ordinance are imperative, and oust all other jurisdiction except such as is specially provided for.

Section 47 does not affect the objection taken in any way. That there are occasions when legal proceedings can be taken by or against the society is not and cannot be denied; what section 46 provides is that certain disputes shall be decided in conformity with the rules of the society, if there are any, and not by a court of law.

It has already been held in *Bache* v. *Billingham* (1894, 1 Q.B. 107) that a claim by a member of a society against the society for sick pay is a dispute to be settled by the committee of the society in accordance with the rules of the society. A later case in the House of Lords (*Catt* v. *Wood* 1910, A.C. 404) decided also that questions about sick pay and expenses were disputes within section 68 of the Friendly Societies Act, 1896, and

therefore should be decided only in the manner directed by the rules of the society, In this case it was also held that the rules of the society were not *ultra vires.* Though it does not appear on the report what the rules in question were, it is sufficiently clear that they were not *ultra vires* in giving the committee power to adjudicate in the disputes.

Counsel for plaintiff laid stress on the difficult position a member would occupy if he or she could not get satisfaction from a society which refused to meet claims made on it. A member joining a society presumably ascertains what the rules are before he joins, and both he and the society ate equally bound by them. If the committee of a society which by the rules is required to decide any dispute does not do so in conformity with the rules, then recourse may be had to a court of law. In the case however before me the rules of the society clearly provide the procedure to be followed by the plaintiff, and he cannot maintain this action in a court of law.

The objection is a good one and I have no jurisdiction to try the case.

PETTY DEBT COURT, GEORGETOWN.

KELLMAN *v.* HOWELL.

[247. 7. 1916.]

AUGUST 8, 10, 17. BEFORE DALTON, J. (Actg.)

Contract—Sale of land—Opposition to transport—Loss of profits—Interest on instalment of purchase money paid—Fraud and collusion.

In an action for damages for breach of contract, plaintiff is not entitled to claim as damages any profit he might have made by the use of the land, the subject of the contract, if it is transported in due time.

This was an action to recover the sum of $100 for damages alleged to have been sustained by the plaintiff owing to the failure of defendant or her attorney to transport to him or give him possession of a property, lot 109, Regent street, Bourda, Georgetown, in accordance with an agreement entered into between the parties on January 12th, 1916.

The further necessary facts appear from the judgment.

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

C. R. Browne, for the defendant.

DALTON, J. (Actg.): Plaintiff claims the sum of $100 for damages sustained by him from defendant under the following circumstances. He states he agreed to purchase from the

defendant on January 12th, 1916, a property at lot 109, Regent street, Bourda; that on the same day he paid $50 on account of the purchase price $1,170, and defendant agreed to give possession of the property on February 1st, transport to be passed on the first available date after advertisement, which would be February 5th. As a result plaintiff adds that, as he had to raise the major part of the purchase money by a loan, he advertised a mortgage on the property to be passed in favour of the Demerara Mutual Life Assurance Society on the same date. On February 4th the transport in question was formally opposed by one Jackson, and it was not until June 9th that this opposition was declared to be unfounded. The transport therefore could not be passed on February 5th, and it was not until July that plaintiff got his transport. He urges the delay was due to the act of the defendant or her attorney, H. Abraham, and the greater part of the damages sustained by him is for rents from the property which he states he would have received if the transport had been duly passed, as agreed, and possession had been given in February. A small sum of $3.50 is also claimed, being the amount paid for the re-advertisement of the mortgage which could not go through in February, and the sum of $5.40 as general damages. In reply to my enquiry counsel for plaintiff made it clear that he claimed no damages arising out of the use of plaintiff's $50, which was paid to defendant on January 12th.

From the evidence given I have no difficulty in arriving at the terms of the agreement between the parties. Plaintiff gave his evidence in a clear, lucid, and convincing manner, answering all the questions, both in his examination-in-chief and in his cross-examination, briefly and readily. The defendant's attorney, the chief witness for the defendant, on the other hand made long rambling statements, frequently on matters that had nothing to do with the case, and his own counsel experienced some difficulty in keeping him to the point. He further exhibited and admitted considerable animus against the plaintiff.

I am satisfied on the evidence that a verbal agreement was come to, whereby defendant sold to plaintiff the property in question, and received the sum of $50 on account of the purchase money. It was agreed that she should give possession on February 1st and transport of the property as early as possible afterwards, the earliest date after the three advertisements being February 5th. With that in view the plaintiff wrote out the receipt for the $50 in which appears the words "possession of the said property to take effect on the passing of the transport." When the receipt was signed I am quite satisfied that both plaintiff and defendant had in view the giving of possession and the passing of transport in February. The receipt is not, as urged by defendant's counsel,

the agreement; the agreement as I have already stated I find was a verbal one made at an earlier stage of the proceedings between the parties, and the receipt is merely confirmatory of part of it.

As a result of an opposition, the transport could not be passed, and possession was not given owing to the fraud and collusion of the defendant, says the plaintiff. This is denied by defendant. The only evidence of such fraud and collusion put forward is the admitted enmity of defendant's attorney to the plaintiff; he admitted he said he would take care that Kellman, the plaintiff, should not get the property, but there is no connection, in the evidence before me, between defendant's attorney and Jackson, who was the opposer. I can find no evidence whatsoever of fraud and collusion on the part of defendant, and in fact as soon as the opposition was declared unfounded, steps were taken to put the transport through, and plaintiff obtained the property.

Is, however, plaintiff entitled, as he claims, to any rents for the period between February 1st, when he says he should have got possession, and the actual date of transport? The agreement to give possession on February 1st was part of the agreement but only part. There was also that part agreeing to give transport on February 5th. It must of course be read and interpreted as a whole, and not by parts. The inability of the defendant to pass transport was caused by the opposition which had been entered. Plaintiff might never have been entitled to possession, had the opposition proceedings gone the other way, but as soon as they were disposed of, transport was passed to him. It has been held by a late Chief Justice (Sir Henry Bovell) that a plaintiff is not entitled to claim as damages any profit he might have made by the use of land if it is transported in due time (*Persaud* v. *Jussodah* L.J. 30.3.1903). Another case, *Philip* v. *Metropolitan and Suburban Railway Co.* (10. S.C. 52) though not definitely deciding the point also goes far to support that proposition. *De Villiers,* C.J. appears to doubt whether such profits could be legally claimed, though he is satisfied that plaintiff is entitled, by way of special damage, to claim interest on money paid by him in advance. That, in the case before me, plaintiff has not done. He pleads, however, that he might have made $91.10 by rents from the property if he had got possession on February 1st, while defendant's attorney admits that he received $28 for rents, after the deduction of expenses, after February 1st.

After consideration of the above mentioned cases and also of *Voet* (XIX. 1. 20. *Berwick's* translation), I am of opinion that plaintiff is not entitled to any damages in respect of rents which he might have received as he claims, nor has he proved any other

damages sustained at the hands of defendant. The utmost that he could recover, which he has not claimed, is interest on the instalment of purchase money paid. I accordingly on that account grant a non-suit. In view of the attitude and demeanour of the defendant's attorney, I grant no costs.

BRITISH GUIANA MUTUAL FIRE INSURANCE CO., LTD. *v.* THE DEMERARA TURF CLUB, LTD. (in liquidation); *ex parte* P. C. WIGHT.

[837 of 1915.]

1916. AUGUST 15, 16, 24. BEFORE HILL, C.J. (Actg.)

Company—Winding up—Mortgage—Levy by mortgagee—Mortgaged property subject of judgment in earlier suit in which sale of property alleged—Judgment proceeding to appeal—Effect of sale at instance of mortgagee if judgment affirmed—Stay of execution pending hearing of appeal—Proof of debts in liquidation proceedings—Companies, Consolidation, Ordinance 1913, s. 205—Proof by secured creditors—Insolvency Ordinance 1900, s. 35, and second schedule ss. 9 17.

P. obtains judgment against C. whereby C. is ordered to transport a property to P. C. appeals from the judgment to His Majesty in Council. Meanwhile the B.G.I.Co., who hold a mortgage on the property in question, obtain leave to proceed to execution on their claim, levy, and advertise the property for sale.

On an application by P., to stay the sale on the ground, *inter alia*, that his judgment against C., if affirmed, would be rendered nugatory if such sale was allowed to proceed;

Held, that the sale should be stayed until the appeal to His Majesty in Council is determined.

Application by P. C. Wight for an order that execution in the judgment in the above-mentioned action, dated the 19th day of January, 1916, be stayed.

The grounds of the application, and all further necessary facts are fully set out in the judgment.

H. H. Laurence, H. C. Humphrys with him, for the applicant.

E. G. Woolford, for the mortgagees.

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

HILL, C.J. (Actg.): Applications for stay of execution have to be made under Order XL. of the Rules of Court, 1900, and the requirements of that order have been complied with by the applicant.

It is necessary to shortly detail the proceedings in this matter which have led up to the making of this application.

The Demerara Turf Club, Limited, was ordered to be wound up by the court in 1914, and on November 4th, 1914, Nelson Cannon, a licensed auctioneer, who is also liquidator of the

company, was authorised to sell and transport the property of the defendant company. On December 4th, 1914, the property was advertised to be sold, and the sale was duly held. At that sale Percy Claude Wight bid $16,005 for the property, and claimed to be the purchaser. This the auctioneer declined to admit. The result was that by leave of the court on March 23rd, 1915, Wight commenced an action against the liquidator asking for specific performance. The Chief Justice, on September 6th, 1915, gave judgment for the defendant with costs. From this judgment Wight appealed and on April 17th, 1916, the Appeal Court allowed the appeal, and ordered specific performance. While this appeal was pending, the B. G. Mutual Fire Insurance Company, the holders of a first mortgage on the aforesaid property, after obtaining leave from the Chief Justice, brought an action under their mortgage, against the defendant company for the sum of money due under the mortgage, and for a declaration that the mortgaged property is liable to be taken in execution and sold. In granting leave (on December 18th, 1915), the Chief Justice ordered that the company "be at liberty to "institute proceedings against the Demerara Turf Club, Limited, for the "recovery of the sum or sums of money due and payable under a certain in-"strument of mortgage made between the said Demerara Turf Club, Lim-"ited, and the said B. G. Mutual Fire Insurance Company, Limited, and to "prosecute the same to judgment as they may be advised," and further ordered, "that no proceedings be taken to enforce the said judgment for a pe-"riod of six months from date."

On December 31st, 1915, the B.G. Mutual Fire Insurance Company filed a specially indorsed writ for the amount of the mortgage and eighteen months interest, foreclosure, and leave to proceed to execution, subject to the stay of execution for six months in accordance with the order of the Chief Justice dated December 18th, 1915.

On January 6th, 1916, the liquidator filed a consent to judgment for the amount of the claim and costs, and on January 19th, 1916, Berkeley, J., gave judgment in the usual form, "that the willing and voluntary condem-"nation decreed and passed on June 25th, 1910, before Hawtayne, acting J., "upon the bond and deed of mortgage executed before him, be strength-"ened and confirmed according to its legal tenor and effect, and conse-"quently that the plaintiffs be admitted to proceed in execution against the "property thereby mortgaged . . . . . ."

On July 20th, 1916, the plaintiff company levied on the property aforesaid, and the sale at execution was duly advertised for August 8th, 1916.

On August 5th, however, Percy Claude Wight applied for a

stay of execution, and this is the application now before the Court.

The grounds of the application are:—

(1) The Demerara Turf Club, Limited, defendants in the said action No. 337 of 1915 are a company which is being wound up by the Court, and execution on the said judgment in the said action has been issued and levied upon the property of the company in liquidation without leave and in contempt of the Court.

(2) The said execution is void under section 209 of the Companies Ordinance, 1913.

(3) The property levied on is the property which in the above named action No. 65 of 1915 has been found by the Appeal Court to have been sold by the said Nelson Canon as liquidator of the said company to the said Percy Claude Wight and which in the said action the said N. Cannon as such liquidator has been ordered by the Appeal Court to transport to the said P. C. Wight accordingly.

(4) The said N. Cannon having obtained leave to appeal from the judgment of the Appeal Court to His Majesty-in-Council and execution of the said judgment having been suspended pending such appeal it is just and convenient that the execution levied as aforesaid should be stayed also, pending such appeal, inasmuch as if the said property is now sold at execution, the judgment of the appeal court if affirmed by His Majesty in Council will be wholly nugatory and incapable of being enforced, and the said company has no other property from which the plaintiff in the said action could recover damages for breach of the said contract.

(5) The right of the said British Guiana Mutual Fire Insurance Company, Limited, to enforce their said mortgage accrued before and they delayed to assert it until after the said property had been sold by the liquidator in winding up.

(6) The said N. Cannon has acquiesced and has actively assisted in the proceedings by the plaintiffs in the said action No. 337 of 1915, and he has neglected and refused to take any steps to prevent the said proceedings in execution.

I cannot but think that much of the difficulty that has arisen in this matter is founded on the fact that, while we have in this colony an Ordinance No. 17 of 1913 (The Companies Consolidation Ordinance) which is very much the same as the English Act of 1908, the law of mortgage and the procedure necessary to realisation of the mortgaged property, before and after insolvency, differs substantially from the law of England.

A mortgage in England vests the property in the creditor, subject to the mortgagor's equity of redemption; in cases of bankruptcy the mortgaged property still remains in the creditor

the equity of redemption vesting in the trustee in bankruptcy. The creditor can realise his security, notwithstanding the bankruptcy.

In a mortgage under Roman-dutch law, the mortgagor remains the owner of the property. If the debt is not paid at the proper time, by an action, the court condemns the mortgagor to pay the debt due and declares the property executable; in the event of bankruptcy, however, the ownership vests in the trustee subject to the mortgage. The trustee realises the mortgaged property and pays over the proceeds to the secured creditor.

In *Whinney* v. *Gardner* (10 S.C. 333, at p. 341) De Villiers says: "Such "a thing as a mortgagee taking possession of the mortgaged property for "the purpose of selling it is wholly unknown to our law and practice, even "as between the mortgagee and the mortgagor himself. The mortgagee can "only realise his security by order of the court, and through the medium of "the sheriff or other officer of the court, as was fully explained in the recent "case of *Cape of Good Hope Bank* v. *Melle* (10 S.C. 280). In case of the "insolvency of a mortgagor or pledgor it is the trustee of his insolvent es-"tate, and not the mortgagee or pledgee, who is entitled to take possession "of, and realise the property . . . . . The trustee in insolvency is, of course, "bound to give effect to the mortgagee's or pledgee's real rights, and to "award to him such preference in the distribution of the assets as the law "allows him. Where the debt is owing by a company in the course of being "wound up, the principles regulating the proof of claims and payment of "debts in the case of the judicial insolvency of any individual must be ob-"served by the liquidator." And in *Cape of Good Hope Bank* v. *Melle* (10 S.C. 280), "It is important to bear in mind what the exact nature of a pledge "is in our law. It confers no right of ownership on the pledgee, but only "what is termed a *jus in re aliena*; the ownership still remaining with the "pledgor. After the insolvency of the pledgor his rights of ownership are "transferred to the trustee of his estate. In some respects, however, the "rights of the trustee are even greater than those of the pledger. As a conse-"quence of the care with which our law guards the pledgor against any "abuse of the pledgee's rights, the latter is not, as a general principle, al-"lowed to sell the thing pledged without the authority, of a court of justice "if the debtor objects (*Voet* 20.5.6), and where the debtor had made a *ces-*"*sio bonorum*, the Dutch law did not permit any secured creditor to sell the "things pledged, but conferred the right to possess and sell them on the *cu-*"*rator bonis* appointed to administer the estate (*Voet* 42.7.7 and *Voet* "42.3.8). The 98th

"section of the Insolvent Ordinance enjoins the trustees, subject to the di-
"rections of the creditors, forthwith to make sale of all the property belong-
"ing to the estate, and the 56th section makes it incompetent for such credi-
"tors to direct the trustees to do anything calculated to interfere with or in-
"jure the just rights of any creditor holding a preferable security. Whatever
"those just rights may be, the ordinance nowhere confers on such creditor
"the power of himself realising the security."

By section 157 (3) of Ordinance 17 of 1913, among the powers of the liquidator is that of selling the movable and immovable property, effects, and things in action of the company by public auction, or private contract, with power to transfer the whole thereof, to any person or company, or to sell the same in parcels.

Now by section 205 of the same ordinance it is laid down that in the event of a company being wound up under this ordinance, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained, or sounding in damages, shall be admissible to proof against the company, a just estimate being made, so far as may be feasible, of the value of all such debts or claims as are subject to any contingency, or sound only in damages, or for some other reason do not bear a certain value; provided that in winding up any company under this ordinance the same provisions shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to the debts and liabilities provable, and as to the valuation of annuities, and future and contingent liabilities respectively, and as to the ranking and payment of all debts and liabilities as may be in force for the time being in insolvency, with respect to the estates of persons adjudged insolvent; and all persons who, in any such case, would be entitled to prove for and receive dividends out of the assets of any such company, may come in under the winding-up of such company and make such claim against the same as they may respectively (not "respectfully" as printed) be entitled to.

Now what are the provisions that prevail with respect to the respective rights of secured and unsecured creditors, and the admissibility of proof of debts and claims with respect to the estates of persons adjudged insolvent?

Section 35 of Ordinance 29 of 1900 is applicable to the proof of debts, and the rules in the Second Schedule apply.

Section 36 (1) gives a secured creditor, with the assignee's consent, or with the Official Receiver's approval, if he is not assignee, the right to realise any *movable* property, without any sentence or order of the court, upon which his security exists, if the same is unaffected by any other security, by sale at public auction or by tender after due advertisement.

Section 36 (2) reads as follows: "The assignee, with the approval of the "Official Receiver, if he is not assignee, if more creditors than one hold "securities affecting the same property, or if he deems it inexpedient to "consent under the preceding subsection, or the Official Receiver with-"holds his approval, shall, without any sentence or order of the court being "necessary, realise such property by selling the same at public auction or "by tender . . . and shall distribute the proceeds of sale in accordance with "section 37 of this ordinance, after making the payments thereout in that "section specified. The assignee, with the approval of the Official Receiver, "if he is not assignee, may, with leave of the court, transport or transfer "such property to any secured creditor having a claim thereon, and may set "off wholly or in part as the case may be, the claim of such creditor against "the purchase money thereof."

Section 36 (3) says: "Any secured creditor who is dissatisfied with any "intended action of the assignee, or with any action of the Official Re-"ceiver, in dealing with the property in respect of which security is given, "may apply to the court to issue directions to the assignee in respect of the "rights of such secured creditor and the mode in which such property shall "be dealt with."

Section 37 gives the priority of debts in the distribution by the assignee, legal mortgages, and special conventional mortgages ranking fifth in order.

The Second Schedule, referred to in section 35, in Rules 9 to 17 regulate the procedure in the case of proof by secured creditors, and by Rule 17, if the secured creditor does not comply with the foregoing rules, he shall be excluded from all share in any dividend. And by the Common law a creditor secured by a special mortgage may be estopped by his conduct from asserting his *jus in* re (*Grotius* 2. 48. 32). (*Maasdorp's Grotius* 2. 48. 24. *Schorer's* Note CCLVI.). And in *Berwick's* translation of *Voet* (20. 1. 13) we read: "Unless creditors are silent when the subject of an hypothec is sold by "the Fisc and refrain from asserting their rights, in which case they are con-"sidered to have lost their right of action *in rem*, for the trust reposed in a "fiscal sale should not be lightly upset." In a note to this *Berwick* says: "The reference is to sales on behalf of the Government revenue, but the "maxim (*cum fides hastae fiscalis facile convelli non debeat*) is applied "equally to sales of debtors' estates, etc., under judicial decree." *Voet* continues: "or unless the subjects of pledge have been publicly sold and deliv-"ered by public sale with all due formalities under a judicial decree on the "petition of creditors, and creditors having the right of hypothec have kept "silent; in which case, however, by our usages, the price succeeds

"in the place of the thing." (And see on this point also *Voet* 20. 14. 15).

When, therefore, in my opinion, the liquidator, by judicial authority, advertised for sale and proceeded to sell the mortgaged property, in the presence of the representative of the mortgagee, who had instructions from his principal to bid to $15,000 for the property, as appeared by the evidence before the appeal court of which I was a member, the liquidator was acting under the provisions of section 157 (3) of Ordinance 17 of 1913, and the mortgagee not having availed himself of the provisions of section 36 (3) of Ordinance 29 of 1900, must be taken to have acquiesced, and to be presumably acting under the Rules of the Insolvency Ordinance having reference to the proofs of debts of secured creditors.

That sale has been held by the appeal court to be binding, and until the appeal to His Majesty in Council is determined to the contrary, stands. With the order, and judgment following thereon, of my learned brothers on December 18th, 1915, and January 19th, 1916, I do not agree, but the applicant has not availed himself of his right of appeal under section 175 of Ordinance 17 of 1913, and the order and judgment therefore stand, and I am unable to say that the plaintiff company, in view of that order and judgment, can be held to be in contempt, nor can I say that under section 209 of Ordinance 17 of 1913, the execution is void, but, in the view I have taken, I am of opinion that it is just and convenient there should be a stay of execution until such time as the appeal to His Majesty in Council is determined, when the parties can take such action as they may think fit.

I have considered all the circumstances, in connection with the question of costs, and order each party to bear his own costs.

PUBLIC TRUSTEE *v.* DOWNER.

PETTY DEBT COURT, GEORGETOWN.

PUBLIC TRUSTEE *v.* DOWNER.

[52. 8. 1916.]

1916. AUGUST 22, 24. BEFORE DALTON, J, (Actg.)

Alien enemy—Right to sue—Liability to be sued—Effect of internment as civilian prisoner—Public Trustee—Power to carry on business of alien subject—Public Trustee Ordinance, 1910—Ultra Vires.

An alien enemy cannot sue in the courts of the colony, but the test as to whether a person is an alien enemy or not is the place in which he resides or carries on business, and not his nationality.

The Public Trustee has no power under the provisions of the Public Trustee Ordinance, 1910, to act as attorney for a person present and residing in the colony.

This was a claim, by Martin Frederick Juister carrying on business without partner as Mehler and Company, by his attorney William Alstein Parker, Public Trustee, against W. V. Downer to recover the sum of $100, amount of a promissory note said to have been made by defendant, which note had been presented for payment and had been dishonoured.

H. C. Humphrys, for the plaintiff.

J. Gonsalves, solicitor, for the defendant.

Two objections to the proceedings were taken by defendant and argued. The necessary facts and objections fully appear from the judgment.

DALTON, J. (Actg.):—The plaintiff William Alstein Parker, Public Trustee, as the attorney of Martin Frederick Juister trading in this colony as Mehler and Company without partner, as set out in the plaint, sues the defendant for the sum of $100 due on a promissory note dated July 15th, 1915, and payable at the Colonial Bank, Georgetown.

Two objections to the proceedings are taken by the defendant, first, that the Public Trustee is acting *ultra vires* of Ordinance 15 of 1910, in acting as the attorney of Juister who is present in the colony and is not an absentee, and secondly, that Juister, his principal, is an alien enemy and as such cannot sue either by himself or by an attorney in the courts of this colony.

It is admitted that Martin Juister is a German subject and that he is present in the colony. It is submitted, however, that he is present under licence, and therefore for the purposes of such an action as the present one that he is not an alien enemy. The material terms of the letter conveying the leave and licence from the Government are as follows:—

> "I am directed to say that, if you will assign your business for the duration of the war to Mr. W. A. Parker in his capacity as a Government officer, His Excellency the Governor will be prepared to consider the question of allowing you to continue it in the capacity of manager under Mr. Parker's supervision."

As a result of the course suggested in this letter an agreement was come to between Mr. Parker, the Public Trustee, as is stated therein "for and on behalf of the Government of the colony of British Guiana" and Mr. Juister. The agreement sets out fully the terms on which the business can be allowed to be carried on and contains an irrevocable power of attorney in favour of Mr. Parker as Public Trustee with complete power to supervise and control the business with Mr. Juister under him as manager on a monthly salary.

With respect to the question of enemy character it may be laid down that the general rule with respect to individuals is that the subjects of belligerents at war with one another bear such character. This, however, has become modified in course of time, but not at any recent date, with respect to civil rights, so that the old rule that an enemy subject has no *persona standi in judicio* and therefore is prevented from suing or being sued in a court of law is not now of universal application. This question, the question of the right of an alien enemy to sue in the courts of the country with which his nation is at war has been the subject recently of several decisions in England, the chief of which is that in *Porter* v. *Freudenberg* (1915, 1 K.B. 857). That case was heard before a full bench (seven judges) of the Court of Appeal and the judgment of Lord Reading, which was the judgment of the Court, reviews and discusses the history of the subject from the earliest times and makes reference also to all the cases and authorities bearing on the subject. The rule accepted and laid down by that court may shortly be put thus; an alien enemy cannot sue in the King's courts, but the test of a person being an alien enemy is not his nationality but the place in which he resides or carries on business. If the subject of a state with which Great Britain is at war resides in England or in a British possession during the war, carries on trade there, being protected and obtaining leave, whether express or implied, to remain, he will not be regarded as an alien enemy but will be allowed to take and defend proceedings in the courts of justice. And the inverse equally applies. As was laid down so long ago as the year 1802 in the case of *McConnell* v. *Hector* (3 Bos. and P. 113) by Lord Alvanley, C.J.: "Every natural-born subject of England has a right to the King's protection so long as he entitles himself to it by his conduct, but if he live in an enemy's country he forfeits

that right. Though these persons may not have done that which would amount to treason, yet there is an hostile adherence and a commercial adherence; and I do not wish to hear it argued that a person who lives and carries on trade under the protection and for the benefit of a hostile state, and who is so far a merchant settled in that state that his goods would be liable to confiscation in a court of prize, is yet to be considered as entitled to sue as an English subject in an English court of justice."

As Lord Reading states in his judgment referred to, he was stating what was the common law of England in regard to the question before the court. If I may be allowed to say so, he was however applying principles which are not peculiar to the common law of England alone, but which are also part and parcel of our common law in this colony, and principles of public and international law. The granting of leave and licence, further, appertains to the King's prerogative. In such a matter the court must be guided "by the King's Courts in England and by the principles of international law in so far as these principles have been recognised by the King's Courts and are not contrary to English law In a. question like the one before us, namely, whether an alien enemy can sue for the recovery of a debt in the King's Courts, it is obvious that there can only be one uniform rule throughout the Empire." (Per *Kotze,* J. in *Labuschagne* v. *Maarburger* 1915, C.P.D. at p. 434. See also *Stern & Co.* v. *De Waal* 1915, T. P. D. 60.)

Applying the ruling therefore in the case of *Porter v. Freudenberg,* which I respectfully follow, it is clear that in the case before me Martin Juister is in this colony with the leave and licence of the Crown, conveyed to him in the letter above referred to from the Government, and that therefore he is entitled to take and defend proceedings in the courts of this colony. That letter, it is true, grants a conditional licence, but I can find in it no such condition as to deprive him of the right of protection of the courts of the colony. The very wording of the agreement (to which the Government was a party) and power of attorney entered into and signed by him as a result of the licence being granted, whereby he grants to his attorney the right "to receive and collect all book debts and other claims of the said business and for such purpose to appear in all courts of law. . . . ." at once rebuts such a suggestion. It might be here remarked that the Court of Appeal in England has gone so far as to lay down that the restraint imposed upon an alien enemy by his interment as a civilian prisoner of war does not of itself make him an alien *ex lege* and deprive him of the civil rights which he had before his interment. (*Schaffennis* v. *Goldberg,* 113 L.T. 949.) This, however, I would add is directly contrary to the decision of a court of three judges

in South Africa in the recent case of *Labuschagne* v. *Maarburger* (*ubi supra*).

On the question therefore as to the principal's right to sue in our courts, and the attorney appearing merely in the right of his principal, I overrule the objection taken for the reasons given.

The further question to be decided, as to the authority of the plaintiff to act as the attorney of his principal, and as such to sue on his behalf, brings us from the wide field of public law to the more limited subject of domestic legislation.

It is clear that, for reasons known to themselves, the Government desired to obtain supervision and control of the business of Mehler and Company in this colony, as the sole partner was of enemy nationality. It is equally clear that for that purpose, exercising the prerogative which was in his hands, the Governor granted that sole partner leave to carry on the business on conditions. As a result of carrying out those conditions, Mr. W. A. Parker, who is Public Trustee, was appointed the attorney of the partner to supervise and control the business, with the partner as manager under him. Counsel for plaintiff admitted that as Public Trustee Mr. Parker had no authority at all to undertake such an appointment, and he argued that he had not been appointed as attorney in his official capacity, but merely during such time as he should hold the post. I regret I am not able to agree with him. Under the provisions of Ordinance 15 of 1910, the ordinance which constitutes the Public Trustee and defines his duties, the Public Trustee has no power or authority to undertake such a business as Mr. Parker has undertaken in this case. This is admitted and it is not therefore necessary for me to say any more on that point.

There is in this colony no such emergency legislation as has been passed in England to meet cases such as this. We have no such provision as 5 Geo. 5 c. 12 which designated the Public Trustee in England as the custodian of enemy property for England, and gave him large powers additional to those which he had under the Public Trustee Act, 1906, nor have we any such provision as 5 and 6 Geo. 5 c. 105 which enables the Board of Trade to appoint an official receiver as the controller of the businesses of persons of enemy nationality. If, however, the licence to Martin Juister, the agreement with him, and the power of attorney are read, it seems clear to me that William Alstein Parker, in his capacity as Public Trustee and solely because he was Public Trustee, was appointed as the attorney of the business. He "in his capacity as a government officer," to quote the words of the licence, "and his successors in office and all persons for the time being holding or acting in the office of Public Trustee in British Guiana," to quote the words of the power, are nominated as the

"irrevocable attorney of the principal." Taking the plain meaning of the words and clearly expressed intention, I must hold that he was appointed in his capacity as Public Trustee, and not in his capacity as a private individual but only so long as he shall be Public Trustee, the attorney of Martin Juister, and that his appointment is *ultra vires* of the Public Trustee Ordinance, 1910. I accordingly uphold the latter objection and the case must be struck out.

MILNE *v.* TAFARES.

In re ESTATE E. J. REISS; *ex parte* PUBLIC TRUSTEE.

1916. September 4, 11.

BEFORE HILL, C.J. (Actg.)

Public Trustee—Application for advice and directions—Public Trustee Rules, 1911, rule 16—Estate duty—Money paid for use of another—Voluntary payment—Refund.

Petition by the Public Trustee for the advice and direction of the court under the following circumstances. An action is pending between one Milne and Tafares whereby the first named as plaintiff seeks to establish as valid a document dated March 28th, 1900, purporting to be the last will and testament of Eliza Jane Reiss, deceased, under which she, the plaintiff, is sole surviving heir. Defendant claims that the said will is invalid, and that she as next of kin of the deceased is her sole heir *ab intestato.*

Petitioner was appointed administrator of the estate of deceased by the court on July 21st, 1916, pending the termination of the action.

Milne had paid the sum of $5,754.23 to the Official Receiver, the proper officer, on June 2nd, 1916, in respect of estate duty on the net value of the estate of deceased, as declared by her, and has now filed with the administrator a claim against the estate for the said sum.

Petitioner now asks—

(1.) Whether under the circumstances under which the payment was made, a debt was created due by the estate of the deceased to the plaintiff as creditor such as the administrator would be justified in paying at this stage; or

(2.) Whether the payment was a voluntary one, or was made under such circumstances as would give the plaintiff no right in law to receive the same as a creditor from the estate.

Citations, as provided by sect. 7 of Ordinance 10 of 1887, were served on both plaintiff Milne and defendant Tafares.

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

Laurence (*C. R. Browne* with him), for the plaintiff, cites *Hales* v. *Freeman* (1. B. and B. 391, at p. 398), and *Ambrose* v. *Kerrison* (10. C.B. 776).

De Freitas, K.G., for the defendant. Refers to *Anson* on *Contracts,* 9th Ed. pp. 425, 426, and cites *Exall* v. *Partridge,* 8 D. and E. at p. 310.

HILL, C.J. (Actg.): This is an application by the Public Trustee of British Guiana, as administrator of the estate of Eliza Jane Reiss, deceased, duly appointed on July 21st, 1916, to administer such estate pending the termination of an action brought by Antoinette Emile Milne against Helen M. Tafares, in which she seeks to establish the validity of a document dated March 28th, 1900, purporting to be the last will and testament of the said Eliza Jane Reiss, under which the said Antoinette Emile Milne is sole surviving heir.

From this application, it appears that Miss Milne has filed with the administrator a claim against the said estate for $5,754.23, the amount paid by her to the Official Receiver on June 2nd, 1916, in respect of the estate duty on the net value of the estate of the deceased, as declared to by her. The administrator seeks the opinion, advice, and direction of the court (under rule 17 of the Public Trustee Rules of 1911, and section 3, Ordinance 10 of 1887) as to—

(1) whether under the circumstances under which the payment was made, a debt was created due by the estate of the deceased, to the plaintiff as a creditor, such as the administrator would be justified in paying at this stage, or—

(2) whether the payment was a voluntary one, or was made under such circumstances as would give the plaintiff no right "in law to receive the same as a creditor from the estate of the deceased.

The claim filed with the administrator by the plaintiff is for moneys paid and advanced by her on behalf of the estate of E. J. Reiss, deceased, for the payment of estate duty.

I have considered sections 11, 12, 13, 15 (1), 15 (4) and 17 of Ordinance 4 of 1898 (The Estate Duty Ordinance), section 5 of Ordinance 9 of 1909 (The Deceased Persons Estates Ordinance), and the cases referred to in the course of the hearing of this application by the learned counsel for the plaintiff and defendant in the

action, and I am of opinion that the plaintiff is entitled to have the amount paid by her as estate duty, refunded to her out of the estate, forthwith. I cannot see that anyone will be prejudiced; she has, in my opinion, paid what she was, at the time of payment, legally liable to pay, that is, a debt due to the colony as a preferent claim for which the deceased was liable (secs. 11 and 12 Ord. 4 of 1898). The heirs at law, in case of intestacy were, and are, as much liable to pay as she was, under the will.

At the time of payment, June 2nd, 1916, no questions seem (Petition 144 of 1916) to have been raised as to the validity of the will, but the Registrar refused to receive it for probate on that day. On June 30th, 1916, directions were given to that officer to receive the will, and it was a condition precedent to its reception that the estate duty must be paid. Miss Milne was therefore bound to pay it, and had actually done so on June 2nd, 1916. If, in the action she has brought to confirm its validity, she is successful, she will only have received back what is hers. If, on the other hand, the heirs at law (sec. 26, Ord. 4 of 1898) are successful, she will only have received what she has legally paid on their behalf (*Bate* v. *Payne* 13 Q.B. 900), and it is only in the unlikely event of her having paid more estate duty than she ought to have paid that the heirs at law may be said to have been prejudiced. But this would not really be so, as sec. 18, Ord. 4 of 1898 provides for the refund of any over payments, and I am satisfied they can suffer no loss.

All costs in connection with this application must be paid out of the estate.

WIGHT *v.* DEMERARA TURF CLUB, LTD. (in liquidation); *ex parte* THE BRITISH GUIANA MUTUAL FIRE INSURANCE CO., LTD.

1916. SEPTEMBER 11, 15. BEFORE DALTON, J. (Actg.)

Company—Winding up—Application to discharge order on petition—Practice-Leave to proceed—Companies (*Consolidation*) *Ordinance, 1913, s, 133—Meaning of 'proceeding'—Waiver of irregularity—'Step in a proceeding.'*

An application under Order XL. of the Rules of Court, 1900, is a 'proceeding' within the meaning of section 133 of the Companies (Consolidation) Ordinance, 1913.

Is either party can by any step or act on his part waive the necessity of obtaining the leave of the court to take proceedings against a company being wound up by the court.

Application by the British Guiana Mutual Fire Insurance Company, Ltd., for an order discharging an order made by the Chief Justice (Sir Charles Major) on a petition in chambers, dated April 29th 1916, whereby leave was granted to the liquidator of the Demerara Turf Club, Ltd. (in liquidation), defendants in the action of Wight v. Demerara Turf Club, Ltd. (in liquidation) to appeal to His Majesty in Council.

M. J. C. de Freitas for the applicants.

P. N. Browne, for the liquidator.

H. H. Laurence, for the plaintiff Wight.

An objection to the proceedings was taken on behalf of the liquidator, on the ground that the leave of the court had not been obtained to commence the proceedings as required by the Companies, (Consolidation), Ordinance 1913.

After argument, decision was reserved.

Posted (September 15.)

DALTON, J. (Acting): This is an application under Order XL of the Rules of Court for an order discharging an order of the Chief Justice made in chambers, and dated April 29th 1916, made on the petition of Nelson Cannon, liquidator of the Demerara Turf Club, Ltd. (in liquidation), to enter and prosecute an appeal to His Majesty-in-Council from a judgment of the Appeal court given on April 17th for the plaintiff in the action of Wight v. Demerara Turf Club, Ltd. (in liquidation), and to incur all such costs and expenses necessary for prosecuting such appeal.

An objection to the proceedings was taken on behalf of the liquidator, on the ground that the application was a "proceeding" within the meaning of section 133, Ord. 17 of 1913 (The Companies, (Consolidation), Ordinance 1913.), and that no leave of the court had first been obtained. That section runs:—

> "When a winding up order has been made, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose."

Without going into the question of the propriety or regularity of the procedure followed in the application which I have now before me, it is quite clear from the *dictum* of Lord Esher in the case cited at the bar, *In re Onwood Building Society* (1891, 2 Q. B. 462) that, at any rate, the application in question is a "proceeding" within the meaning of the section quoted. Applicant, however, urged that it could not be said that his application was against the company. It is true that it was against the liquidator, but as in the case cited, the application is really against the company, and the leave of the court is necessary before it can be brought.

Mr. de Freitas then urged that the liquidator was debarred from taking such an objection at that stage, as he had filed an affidavit in reply to the application, thereby taking a "fresh step" in the proceedings, and waiving any irregularity that may have arisen.

It is true that the filing of affidavits in opposition to a motion was held to amount to a waiver of irregularity in an order for service of a writ and notice of motion for injunction in England of a person resident abroad, (*Boyle* v. *Sacker,* 39 Ch. D., 249), whilst, on the other hand, the mere filing of affidavits in answer to a motion for a receiver in an action for dissolution of partnership has been held not to be a "step in a proceeding" under the Arbitration Act 1889, the taking of which would preclude defendant from moving to refer the case to arbitration (*Zalinoff* v. *Hammond,* 1898, 2 Ch. 92).

In the application however before me the requirement of section 133 is an imperative and peremptory requirement of the statute law, and such a requirement as can be waived by neither party. The Demerara Turf Club, Ltd., is being wound up by the court, and the court's leave is necessary before such an application can be made. Neither the liquidator nor anyone else can set aside that necessity. As *Palmer* says (*Company Law* 10th ed., p. 403), it is indispensable on winding up, and he is making reference to the section in the English act which corresponds to our section 133, that proceedings against the company by way of action, execution, distress or other process should be suspended, subject to the discretion of the court. Here admittedly no reference has been made to the court for leave, and I must accordingly uphold the objection.

The application is dismissed with costs.

LEWIS *v.* LOW.

PETTY DEBT COURT, GEORGETOWN.

LEWIS *v.* LOW.

[108. 9. 1916.]

1916. SEPTEMBER 26, OCTOBER 5.

BEFORE HILL, J.

Landlord and tenant—Rent due—Tacit hypothec—Power of constable to detain furniture being clandestinely removed—Small Tenements and Rent Recovery Ordinance, 1903, sect. 9—Unlawful seizure—Damages.

L., the plaintiff, was the tenant of Low, the defendant. Low gave L. notice to quit the premises tenanted by her, which notice L. accepted. Whilst vacating the premises in accordance with such notice, and whilst removing her furniture, Low had the furniture seized by a police constable and removed to the police station. It was subsequently levied on there by a bailiff at the instance of Low, for rent due to him by L. L. claimed the sum of $100 for damages for the alleged wrongful and unlawful act of the defendant, and the return of the furniture or its value;

Held that, in the absence of any proof that L. was removing her goods with the intention of evading payment of her rent, the seizure at the instance of Low, the defendant, was, under the circumstances, illegal.

Action by the plaintiff Lewis to recover the sum of $100 for damages for the wrongful and unlawful seizure of her furniture by the defendant Low, and for an order that the furniture or its value be returned to her.

H. Gunning, solicitor, for the plaintiff.

McArthur, for the defendant.

HILL, J.: The plaintiff in this action claims $100 as damages under the following circumstances as set out in the claim.

She alleges she was a tenant of the defendant in July, 1916, and in possession of the tenement, that before the termination of the contract of hiring the defendant, on the 31st July, 19l6, wrongfully caused certain furniture of the plaintiff, value $14, to be taken to the Market police station, and on 10th August, 1916, the said articles were levied on by the plaintiff and taken by him into custody and are still retained in such custody at the instance of defendant, and as landlord of the plaintiff, for rent of the tenement alleged to be then due, whereas no rent was due.

She claims $86 as general damages and an order from the court that the goods be returned to her, or failing return that she be paid the value.

From the evidence it appears that the plaintiff occupied, as a monthly tenant of defendant, three rooms at a rental of $6.16 per month. Low had given her a verbal notice a month before to quit, plaintiff swears; she did not go, but had obtained another residence as from July 31. On July 27 he served her with a notice

to give him possession on July 31, 1916, and on failure to comply legal proceedings would be taken to forcibly eject her, and the rent would be increased double if she did nor give up possession. This was, of course, an illegal notice, but the plaintiff appears to have accepted it, and on July 31 was removing her furniture in the afternoon about 6-7 p.m. When the last load was being removed, the defendant appeared on the scene with a policeman, and ordered him to take the load to the Market station. There the furniture remained until 10th August, when the defendant, having obtained a warrant of distress, instructed the bailiff to levy on the goods at the Market station, and had them removed to the sales room. Plaintiff then instituted this action.

Mr. McArthur, for the defendant, relied on the tacit legal hypothec of the landlord which existed, he submitted, during the accrual of the rent for July, 1916, and also on sec. 9 of Ordinance 9 of 1903, which is as follows:—"It shall be lawful for any police constable, in the presence of and "at the desire, or under the direction of a landlord or his agent, to stop and "detain, until due enquiry can be made, all carts and carriages which he "may find employed in removing furniture between the hours of six in the "evening and six in the following morning; and he may detain and take to "the nearest police station all furniture removed during the said hours, "whenever he may have good grounds for believing that such removal is "made for the purpose of evading the payment of rent."

By the law of Holland a landlord, in order separate to secure his lien and privilege, must under a judicial authority seize and detain the property whilst it is on the tenement or in the act of removal from thence (*Burge, Colonial Laws*, Vol. III. 1st ed. p. 600). It does not seem that he could of his own authority without judicial process seize or detain goods, which might lead to a breach of the peace. And, according to *Voet* (Lib. 20 : Tit 11, par. 3) "we must remember, however, that now with us and in many "other countries the right of tacit pledge in the "*invicta et illata*" of a tene-"ment, whether rural or urban, has no force unless they are sequestered "(*praecludantur*) by public authority while they are still in the tenement; or "unless, when the tenant removes them, they are seized by a vigilant credi-"tor, in the very act of removal, in which case the things which had been "begun to be transferred, but had not reached the place destined for their "concealment are to be taken back to the land."

If the plaintiff could be shown to have been removing her goods with the intention of evading payment of her rent, the seizure would no doubt have been legal, but the difficulty is enhanced by the fact that the defendant had given a notice—illegal no doubt

—but on which plaintiff was acting, when her goods were seized. Her rent was no doubt due on July 31st, 1916, although not in arrears, and under Ordinance 9 of 1903 the goods could be taken in distraint after the lapse of the legal time—but the seizure under the special circumstances was illegal.

I think the plaintiff is entitled to some damages—her goods must be given up to her or payment of $14, the value, and I fix the damages at $10, with costs.

MILNER *v.* MILNER.

[273 of 1915.]

1916. SEPTEMBER 25, OCTOBER 6. BEFORE HILL, J.

Practice—Pleading—Counterclaim—Question of convenience of disposal in pending action—Rules of Court, 1900, Order XVII, r. 4.

This was a claim by the plaintiff for an account from the defendant of his dealings and intromissions with the property estate and effects of the late Rachael Milner.

Defendant counterclaimed for an account from plaintiff of his intromissions with certain rents, said to have been received by him as agent of the defendant,

Plaintiff, in his defence to the counterclaim, contended that certain matters in the counterclaim, relating to paddy transactions, could not be conveniently and properly dealt with in the action, and should therefore be struck out.

M. Ogle, for the plaintiff.

P. N. Browne, for the defendant.

HILL, J.: Plaintiff, as an heir *ab intestato* of his deceased mother Rachael Milner, who is alleged to have been married in community of property to the defendant Peter Milner, and having obtained *venia agendi*, claims:—

(*a*.) an inventory of the estate of Rachael Milner, deceased;

(b.) an account of the dealings and intromissions of the estate from June 20th 1906 until the date of the rendering the same;

(c.) delivery and payment of whatever property and money may be found due and owing by defendant on the taking of such account.

Defendant files a counterclaim, and asks for an account from plaintiff of his intromissions with certain rents alleged to have been received by him as agent of the defendant, and also for an

account of his intromissions as agent in connection with certain transactions in the purchasing of paddy, and the commissions received therefrom. He further asks for payment of whatever may be found due, and such other relief as may be found to be just.

In his defence to the counterclaim plaintiff (par. 5) asks that the counterclaim, in so far as it relates to the "paddy" transactions, may be struck out, as such transactions cannot be conveniently and properly dealt with in this action.

Order XVII, rule 4, which is exactly the same as the English Order XIX, rule 3, gives the Court power, on the application of the plaintiff *before trial*, if the Court is of opinion that a counterclaim cannot be conveniently disposed of in the *pending* action or ought not to be allowed, to refuse permission to the defendant to avail himself thereof.

For the defendant it was contended that, since the passing of the Judicature Act, counterclaims are in the nature of cross actions, and need not be in any way connected with the plaintiff's claim, or arise out of the same transaction, and this is undoubtedly so.

Further, it was submitted that under Order XVII, rule 4, application should have been made before trial, and it was not competent at the trial to advance such a plea as set out in paragraph 5.

The correct procedure in such a case is, in my opinion, for application to be made in chambers that the pleading be struck out. But by Order XVII, rule 29 (English Order XIX, rule 27) a general provision to enforce the preceding rules, the Court at any stage of the proceedings, can strike out any pleading which tends to embarrass, prejudice, or delay the fair trial of the action, and the Court can deal thereunder with a counterclaim which cannot be conveniently dealt with in the pending action, but the application should always be made promptly, and as a rule before the close of the pleadings (*Cross* v. *Howe* 62 L. J. Ch. 342.)

We have not in our Rules the equivalent of Order XXI, rule 15 of the English practice.

While, therefore, under Order 17, rule 4, the plaintiff cannot, at this stage, succeed, the Court can, and does, under Order XVII, rule 29, consider whether paragraph 5 of the defence relative to the "paddy" transaction should be struck out.

It sees no reason to do so, and makes the order in terms of the plaintiff's claim, and also in terms of the defendant's counterclaim for accounts under Order XXIX.

On the Accountant's report being received, the Court can then proceed to hear such evidence as may be brought before it to determine the legal position of plaintiff and defendant in lot 34, Werk-en-Rust, and their relationship in the alleged transactions in connection with the purchase of paddy.

The question of Costs is reserved.

PARKER *v.* CHAPPELLE.

PARKER *v.* CHAPPELLE.

[168 of 1916.]

1916. OCTOBER 19, 21. BEFORE BERKELEY, J.

Appeal—Review—Keeping a fire-arm without a licence—Tax Ordinance, 1916 (*No. 34 of 1915*), s. *45—Aboriginal Indian—Meaning of term as used in Tax Ordinance.*

The term "aboriginal Indian," as used in section 45 (1.) of the Tax Ordinance, 1916, means a person whose parents are both of pure Indian blood, and belong to the aboriginal tribes of this colony.

This was a decision of the Stipendiary Magistrate of the Pomeroon Judicial District (Dr. W. E. Roth) brought before the court by way of review under the provisions of s. 12 of the Magistrates' Decision (Appeals) Ordinance 1893. The application to the court for review was granted, and the time for serving notice of and reasons for appeal was extended to twenty days from the date of the order.

The defendant (now respondent) Chappelle was charged with keeping a gun without a licence, not being an aboriginal Indian.

The charge was dismissed on June 14th, the magistrate's reasons for decision being as follows:—

"There is no question as to the possession of the gun, which is not denied by defendant. All that concerns me is whether defendant is one of the class of persons exempted from taking out such licence, in this case whether he is an aboriginal Indian.

In the absence of any definition of the term 'aboriginal Indian' in the ordinance (No. 34 of 1915) in question, I have to seek for a legal interpretation of the term elsewhere, and the only satisfaction I can find is in Ordinance 28 of 1910 (the Aboriginal Indians' Protection Ordinance), which deals specially with aboriginal Indian legislation.

The complainant states that he is satisfied that defendant is a half-breed Indian, presumably he means a half-caste aboriginal Indian, that is, any person being the offspring of an aboriginal Indian mother and other than an aboriginal father (s. 30. Ord. 28 of 1910). It is not denied that defendant's mother is a pure blood Arawak. As to his father who died many years ago, defendant never knew him, and he (the father) in the absence of any evidence to the contrary may have been an aboriginal Indian. However, for the sake of argument, I am prepared to admit that defendant's father was not an aboriginal Indian, that is, that defendant is, legally speaking, a half-caste aboriginal Indian.

But under certain conditions, e.g., sect. 29 (2) and (3) of Ordinance 28, 1910, a half-caste becomes in the eye of the law an aboriginal Indian, and the evidence before me, which is not denied, complies with such condition, namely that defendant has been married to his full-blood aboriginal Indian wife for upwards of fifteen years, and has been living amongst the Tapacooma Indians ad his life.

In my opinion defendant is therefore legally speaking an aboriginal Indian and accordingly exempt from taking out a licence.

I may perhaps be allowed to point out that the complainant, acting as commissary, presumably under instructions of his department, has already informed me in open court that persons registered under the Indian Regulations of 1890, the majority of them quadroons and as white as myself, are exempt from gun and other taxes, and accordingly are not being prosecuted by him.

Such being the opinion of the Commissary's Department, an opinion with which I am in agreement, the exemption of such persons from the Tax Ordinance, 1916, can only possibly be based on the assumption of their being aboriginal Indians in terms of the very ordinance (section 29 (5) Ordinance 28 of 1910) upon which I had placed reliance is giving my decision in this case."

The appeal was allowed, and the respondent was convicted and ordered to pay a fine of $2 with costs, and in addition to take out a gun licence for the current year

C. Rees Davies S. G. for the appellant

Respondent was in default of appearance.

BERKELEY, J. This appeal is from the decision of the Stipendiary Magistrate of the Pomeroon judicial district, who dismissed a complaint brought by the appellant against the respondent for keeping a gun without a licence.

The respondent does not appear, and the evidence shows that the possession of the gun is not denied.

Under the 'Tax Ordinance 1916,'—that is No. 34 of 1915, section 45 (1) requires a licence to be taken out for firearms, but it contains a proviso exempting an aboriginal Indian from any liability in respect of non-compliance therewith. The sole point for the magistrate's decision was, and now on appeal to this court is, does the evidence show respondent to be an aboriginal Indian?

The magistrate finds the respondent to be a half-caste aboriginal Indian, that is, the child of an aboriginal Indian woman by some one other than an aboriginal Indian. He further finds that

respondent was married to his wife, an aboriginal Indian, at the commencement of Ordinance No. 28 of 1910, and therefore holds that he comes within section 29 (2), which provides that such a person shall be deemed to be an aboriginal Indian "within the meaning of the ordinance." The object of that ordinance is to provide for the better protection of the Aboriginal Indian, and for the purposes of such protection it includes a half caste either married to or habitually living with an aboriginal Indian. It specially provides that such a person shall be deemed an aboriginal Indian within the meaning of that ordinance. It does not follow that such a person is to be deemed an aboriginal Indian under the tax ordinance or any other ordinance of the colony.

This court cannot do better than adopt the definition given for the purpose of those regulations in "the Indian Regulations 1910" rule 2 (1) (*Rules and Regulations* Vol. 1, page 236). It holds therefore an aboriginal Indian is a person whose parents are both of pure Indian blood and belong to the aboriginal tribes of this colony.

The respondent has failed to bring himself within this definition and the appeal is allowed. Respondent is convicted and ordered to pay a fine of two dollars with costs, and in addition thereto he is to take out his licence within fourteen days.

GAMBLE *v.* CHU TAM.

[213 of 1916.]

1916. NOVEMBER 1. BEFORE SIR CHARLES MAJOR, C.J.

Appeal—Opium—Possession without the proper authority—The Opium Ordinance, 1916, sect, 8—Burden of proof.

This was an appeal from the decision of the Stipendiary Magistrate of the Georgetown Judicial District (Mr. W. J. Gilchrist) who convicted the defendant Chu Tam (now appellant) for being found in the possession of a quantity of opium without the lawful authority, and sentenced him to pay a fine of $100, recoverable by distress, or in default to two months' imprisonment, the opium to be forfeited to the Crown.

The defendant appealed, on the grounds that there was no proof that he did not come within the exceptions provided in section 7 of Ordinance 5 of 1916, and further, that, there being no proof that he was the owner of the opium in question, he could not be called upon to produce the authority mentioned in section 11 of the ordinance.

P. N. Browne, for the appellant.

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

SIR CHARLES MAJOR, C. J. Chu Tam was convicted for contravention of the provisions of the eighth section of the Opium Ordinance, 1916, which enacts that where any opium is, without the proper authority, found in the possession of any person . . . such person . . . shall . . . be deemed guilty of an offence. The complaint disclosed that offence. The section is also aimed at persons who keep opium in a place other than a colonial bonded warehouse, but the defendant came within the first named class of offender.

The appeal is quite without foundation and must be dismissed with costs. The necessary ingredients of proof in the charge were (1) that the substance was opium; (2) that it was found in the defendant's possession; (3) that he had not the proper authority to possess it. It was not disputed that the substance was opium, nor that it was found in the defendant's possession. The proof of the defendant's lack of proper authority was contained in the unchallenged statement of a member of the police force (who found the opium concealed in a box belonging to the defendant) "Defendant had no lawful authority with him." The defendant never at any time produced any, nor did he give evidence before the magistrate.

The prosecutor therefore discharged his obligation of proof. The defendant made no answer to the charge, and was properly convicted.

CHARLES *v.* WONG.

CHARLES *v.* WONG.

[212 of 1916.]

1916. NOVEMBER 3. BEFORE SIR CHARLES MAJOR, C.J.

Criminal law—Unlawful possession charged,—Larceny proved—Summary Conviction Offences (*Procedure*) *Ordinance, 1893, Amendment Ordinance, 1915, sect.* 2*—Power of magistrate to call for evidence at any stage of the proceedings—Evidence Ordinance, 1893, sect. 90.*

In a case where as well the fact that a theft has been committed as the owner of the property stolen are known to the prosecutor, a charge of larceny should be preferred rather than a charge of unlawful possession. The provisions of Ordinance 13 of 1915, apply to the latter charge even when improperly laid.

A magistrate, in a criminal proceeding, has power of his own motion to call evidence at any stage of the hearing.

This was an appeal from a decision of the Stipendiary Magistrate of the West Coast Judicial District (Mr. O. E. L. Sharples) who, on a charge of unlawful possession of property suspected to have been stolen, convicted the appellant of larceny.

The reasons for appeal were as follows:—

(1.) That the magistrate's court had no jurisdiction in the case:—

(*a*) the prosecutor having been informed before taking proceedings as to the loss of two cart wheels, and by the owner thereof, the prosecution against the defendant should have been for larceny and not for unlawful possession;

(*b.*) the magistrate, having heard the case on the 11th September, 1916, reserved his decision on objection taken after the close of the case for the prosecution, and could not convict for larceny on summary conviction on the evidence before him at the close of the prosecution.

(2.) The magistrate's court, had exceeded its jurisdiction in the case—

(*a.*) having reserved decision on the 11th September, 1916, after objection taken thereto, the magistrate informed the inspector prosecuting that if he (the inspector) applied for leave to recall a witness, he (the magistrate) would grant him such leave.

(*b.*) That the following specific illegality substantially affecting the merits of the case was committed in the course of the proceedings, namely, the case for the prosecution and for the defence having been closed, the magistrate could not legally allow fresh evidence to be given in order to support a charge of larceny.

P. N. Browne, for the appellant.

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

SIR CHARLES MAJOR, C. J.: It is contended for the appellant that, since the owner of the property suspected by the police to have been stolen was known by the prosecutor before proceedings commenced, those proceedings could not take the form of a charge for unlawful possession, but must have been for larceny or receiving. It is always advisable, for I think it obviously fairer to a person charged, that, when as well the fact that a theft has been committed as the owner of the property stolen are known to the prosecutor, a charge of larceny or of receiving should be preferred and not that of unlawful possession. The ever recurring resort by the police to the latter charge in circumstances which straightly point to the former seems to me to savour of oppression. But the provisions of the law are quite plain. The second section of Ordinance No. 13 of 1915 enacts that "where unlawful possession . . . is charged, and the evidence establishes the commission of the offence of larceny. . . the defendant . . . may be convicted of the larceny. . . and punished accordingly."

Here unlawful possession was charged—the section quoted says nothing about 'properly' or 'legally' charged—and the magistrate had jurisdiction to hear that charge. In the course of the hearing certain facts were brought to light which indicated the commission of larceny. The section applies.

But the appellant further objects that, upon a charge of larceny punishable on summary conviction, it is necessary for the prosecutor to prove such value of the stolen property as to give the magistrate jurisdiction; that the prosecutor closed his case without that proof; and that, on objection to that effect by the defendant's solicitor who had closed his case without evidence, the magistrate called for fresh evidence, that is to say, evidence of the value of the stolen property, thereby exceeding his jurisdiction, and committing a specific illegality substantially affecting the merits of the case There was, in my opinion neither excess of jurisdiction nor illegality. A magistrate is. no less undoubtedly than a judge, invested with the power and, indeed, the duty, at any stage of criminal proceedings, and notwithstanding the close of the case on either side, to call for, or require or allow to be given, fresh evidence on a material point necessary for the just determination of the charge before him, subject to the usual conditions as to examination and cross-examination by either side. The criminal law administered by magistrates in this colony expressly provides for a conviction for larceny upon proceedings taken for unlawful possession, and it was particularly the magistrate's duty in this case to afford every facility to the prosecutor for proving the former offence, or himself to require the proof which the prosecution had omitted to furnish,

The appeal must be dismissed with costs.

GLASFORD *v.* TSOY-A-KHIN.

GLASFORD *v.* TSOY-A-KHIN.

[10 of 1916. Berbice.]

1916. NOVEMBER 3, 7. BEFORE BERKELEY, J.

Appeal—Criminal procedure—Offence under repealed Ordinance—Institution of legal proceedings—Savings in cases of repeal—Interpretation Ordinance, 1891, sect. 28.

Appeal from the decision of the Stipendiary Magistrate of the Berbice Judicial District (Mr. W. J. Douglass), who dismissed a complaint brought by the plaintiff (now appellant) against the defendant Tsoy-a-Khin, on the ground that, the ordinance under which the charge was made having been repealed, there was no charge before him that he could try.

The reason for appeal appears from the judgment below, the decision of the magistrate being reversed, and the case referred back to him to be dealt with on its merits.

Rees Davies, S.G., for the appellant.

R. T. Egg, for the respondent.

BERKELEY, J.: On the 5th of May, 1916, an information was laid against the respondent for a breach of section 3 of Ordinance No. 30 of 1913. This complaint was dismissed on the 23rd of June by the stipendiary magistrate of the Berbice judicial district, Mr. Douglass, but not on its merits. Thereupon a fresh information was laid under section 8. The ordinance itself was repealed by No. 5 of 1916 which came into operation by proclamation on the 8th of May. The magistrate held that inasmuch as the ordinance under which the charge was brought had been repealed there was no legal charge before him. This is the sole ground of appeal.

The Interpretation Ordinance, No. 14 of 1891, contains a saving clause (28) which provides that where any ordinance passed after the commencement of that ordinance repeals any other enactment, then unless the contrary intention appears the repeal shall not (sub-section 4) affect any penalty incurred in respect of any offence committed against any enactment so repealed, and that any legal proceedings may be instituted and any such penalty imposed as if the repealing ordinance had not been passed.

It is admitted by counsel for the respondent that this saving clause applies where no charge has been instituted between the commission of an offence and the repeal of the ordinance, but it is argued that it does not apply in the present case as a previous charge had been laid and dismissed. Counsel's reference to *Hardcastle* on *Statute Law* (p. 392) does not apply to the present case. The learned author there refers to a statement

by Lord Tenterden in *Surtees* v. *Ellison* (1829) 9 B & C 752 where he is reported to have said: "Where an (entire) act of Parliament is repealed, it must be considered (except as to transaction passed and closed) as if it had never existed. That is the general rule." *Hardcastle* then points out that this rule is recognised in section 38 of the Interpretation Act, 1889. This section corresponds with the saving clause of the local ordinance, and the general rule of recognition referred to is contained in sub-section 1, viz.:—the non-revival of anything not in force or existing at the time at which the repeal takes effect. The present case, as already pointed out, comes within s. s. 4, which preserves the power to punish for offences which existed at the time of the repealed ordinance.

Moreover, the second complaint was brought under a different section of the ordinance for an entirely different offence, and the mere fact that an earlier charge under the same ordinance against the same respondent had been heard and dismissed not on its merits cannot affect the provisions of the sub-section.

This case is referred back to the magistrate with directions to hear the defence (if any), and then to deal with the case on its merits.

ROBINSON *v.* PEOPLE'S PAWNBROKING CO., LTD.

[118 of 1916.]

1916. NOVEMBER 10.

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

Pawnbroken—Sale to innocent purchaser of forfeited pledge pledged by holder under subsisting hire and purchase agreement—Warranty of title—The Pawnbrokers Ordinance, 1884, sect. 12.

Where unredeemed or forfeited pledges are sold in a shop by a pawnbroker in the ordinary course of his business, the pawnbroker gives no warranty of title but only that article sold is irredeemable.

Appeal from a decision of Hill, J. in the Petty Debt Court, Georgetown (reported above at p. 66) who gave judgment for the plaintiff Robinson. The defendant company now appealed. The facts are fully set out in the report of the proceedings in the court below.

P. N. Browne, for the appellants cited *Morley* v. *Attenborough* (L. J. 18 Ex. 148) and *Burrows* v. *Barnes* (82 L T. 72).

Humphrys, for the respondent.

There were circumstances to take the case, out of the rule and

justify the court in holding that there was a special warranty. The respondents hold a licence to sell goods and carry on general trade.

Sir CHARLES MAJOR, C.J.: The appeal must be allowed. *Morley* v. *Attenborough* affirmed the old English common law rule, that a pawnbroker gives no warranty of title in selling a forfeited pledge, and that rule still prevails. There are, moreover, no special circumstances in this case showing that the sellers acted otherwise than as pawnbrokers, and their licence to sell goods does not extend their business beyond pawnbroking and the power to sell forfeited pledges. Their warranty is no more than that the goods sold are irredeemable.

BERKELEY, J. I concur. This appeal must be allowed. Counsel for the respondent admits that the sale of unredeemed pledges by a pawnbroker carries with it no warranty of title, but suggests that such warranty may be gathered from the evidence in the present case. This is not so. There is nothing in the evidence as to the manner in which the appellant company carried on their trade which raises such an inference, nor is there anything to show that they undertook to do more than to sell an unredeemed pledge.

Appeal allowed with costs.

GILL *v.* SPROSTONS, LTD.

[5 of 1916. Berbice.]

1916. OCTOBER 25, NOVEMBER 13.

BEFORE SIR CHARLES MAJOR, C.J.

Negligence—Wire rope stretched across river—Injury to motor boat whilst passing—Contributory negligence.

Appeal from the decision of the Stipendiary Magistrate of the Berbice Judicial District (Mr. W. J. Douglass) who gave judgment for the plaintiff in the sum of $82 and costs, in a claim by the plaintiff Gill against the defendant firm, for damages for injuries done to his motor boat owing to the alleged default of the defendants or their servants, who, it was claimed, whilst engaged in salvage operations in the Canje creek, wrongfully illegally and negligently stretched a submerged rope across the creek, which caused the motor boat to be damaged and the engine of the boat to be sunk.

The defendant company appealed, on the grounds that plain-

tiff's servant had been warned of the existence of the rope, and that his subsequent neglect of that warning was the direct and proximate cause of the injury.

The appeal was heard in New Amsterdam and decision reserved.

Humphrys, for the appellants.

E. A. Luckhoo, solicitor, for the respondent.

SIB CHARLES MAJOR, C.J.: The magistrate's judgment, in my opinion, proceeded rightly on findings of fact and the law applicable thereto.

He found that the plaintiff had proved that the defendants were engaged in an operation, for one of the necessary parts of which they had not obtained proper authority, and which was a dangerous operation on that account; that the respondent's launch was being lawfully taken over the place where the operation was being conducted in this unauthorized manner; and that the injury done to the launch was caused by the appellants' neglect to take precautions against damage to river craft resulting from the operation whereby the respondent's launch did, in fact, sustain damage.

After those findings the only question the magistrate really had to decide was whether the respondent himself had shewn such negligence that that negligence and not the appellants' was the decisive cause of the damage. It has been argued for the appellants that the respondent, having been called by the appellants out of his course, when on his journey upstream that he might pass under a rope lifted for the purpose, had received notice that the rope stretched across the stream and that it constituted a danger to navigation and had, therefore, been warned, once for all, against that danger, and that, on returning shortly after, notwithstanding the absence of anyone to repeat the warning, he proceeded at his own risk and courted the disaster that followed. Now, even if the simple direction to pass under the end of the rope—there was nothing more than that—could be said to be notice that the rope extended across the stream and was a warning—the magistrate found, and was amply justified in finding, that the respondent did not know that the rope was across the stream—the fact remains that the warning was not given to the respondent on his return while the same unauthorized and dangerous state of things continued. The respondent, it was shewn by the evidence, on again approaching the spot, slowed down and looked for a repetition of the previous directions. No one was there to give them and, entitled to assume that the necessity—whatever its cause—for diverging from the usual and proper course no longer existed, the respondent held on and his

boat engine was forced off by the submerged rope and sank. The absence of anyone (particularly after the events of the up-journey) for the appellants at the spot to keep the respondent out of the danger the appellants had created was an invitation to proceed, and that was the decisive cause of the damage.

The appeal must be dismissed with costs.

DE SOUZA AND ANOTHER *v.* SOARES.

[12 of 1916.]

1916. OCTOBER 7, 14; NOVEMBER 18.

BEFORE SIR CHARLES MAJOR, C.J.

Practice—Committal for contempt—Affidavits in support of application—Service—Rules of Court, 1900, Order XL., r. 4—Order XXXVI., r. 93—Attachment or committal.

Generally speaking, if a party to a suit is ordered to do anything and he omits to do it, the remedy is attachment and not committal.

Service of an order is not necessary before applying for a writ of attachment for its disobedience.

An affidavit of service of notice of an application is not an affidavit "in support" of that application.

Application by the plaintiffs in the action for an order for the committal of the defendant for contempt in not obeying an order of the court, or in the alternative for a writ of attachment.

The facts sufficiently appear from the judgment.

McArthur, for the applicants.

P. N. Browne, for the respondent.

SIR CHARLES MAJOR, C.J.: This is an application for an order for committal of the defendant to prison, or in the alternative for leave to issue a writ of attachment against her, for failing as usufructuary, to give security to the plaintiffs for keeping the property subject to the usufruct undiminished and unimpaired, pursuant to order of court made by Hill, J., as part of his judgment in his action, on the 30th May last The value of the property has been ascertained and agreed. No time was limited for compliance with the order and it stood for obedience forthwith.

Notice of the present application and two affidavits in support thereof, the one of Antonio Figueira, one of the plaintiffs, and the other of Edward Darnel Clarke, the plaintiffs' solicitor, proving disobedience of the order and suggesting a *devastavit,* were filed on the 25th September and on the 27th of the same month served on the defendant personally. The hearing of the application was fixed for the 7th instant.

Two other affidavits have been filed by the plaintiffs. One by Ramlogan purports to prove due service on the defendant of the order for security on the 14th June last by leaving a copy thereof with an adult inmate of the defendant's residence who undertook to deliver the same to the defendant. This affidavit was sworn on the 4th instant. The other affidavit is by Lionel Allen, clerk to the plaintiffs' solicitor, sworn on the 5th instant, proving personal service of the notice of the application, together with a copy of the order for security and the two affidavits in support of the application mentioned above. Neither Ramlogan's nor Allen's affidavit bears any stamp or other indication of the date of its filing—a careless omission on the part of the proper officer in the Registry—but I will assume them to have been filed on the same day whereon they were respectively sworn, that is to say, in each case, less than four clear days before the day fixed for the hearing.

On the 6th instant the defendant filed under protest an affidavit in the matter of the application for the purpose of taking the following objections to the procedure. Mr. Browne objects, firstly, that personal service of the order for security being necessary before proceedings for committal or attachment, there is no proof of that service shewn by either of the affidavits of Figueira and Clarke; secondly, that if that service is said to be proved by the affidavits of Ramlogan and Allen or by either of them, the defendant has not, pursuant to the provisions of Order XL., rule 4, been served with a copy of those affidavits; and thirdly, that, if Ramlogan's affidavit may be considered, the service therein sworn is not personal service.

Taking these objections in their reverse order the service effected by Ramlogan was not personal service. Rule 4 of Order VII., under which apparently the service was effected, relates specially to writs of summons which may not be personal. It does not apply to service which is as, for instance, in rule 93 of Order XXXVI, directed to be personal.

Referring to the second objection above, Order XL. rule 4 directs that a party to be affected by any application shall be served with a copy of every affidavit filed with the application at least four clear days before the day fixed for its hearing.

Although rules 3 and 4 of this Order contemplate the filing of all affidavits in support of an application together with the notice of application itself, the words "with the application," in rule 4 do not mean "at the same time as the application," but cover all affidavits in support of the application whenever filed. But an affidavit of service merely of notice of an application is not an affidavit "in support" of that application but one merely for the information of the court, not of the opposite party, and, properly

speaking, should only be filed if, and, usually, is not filed unless, the opposite party does not appear. Affidavits in support of this application are those which are necessary to establish the case for attachment or committal, such as the affidavit of service of the order (if service is necessary) and of default. So far, therefore, as objection is taken to Allen's affidavit of service of notice of the application it cannot be sustained. But attached to the copy notice of application served was a copy of the order for security and in this respect the affidavit (if service of that order was necessary) may be in support of the application.

I come, therefore, to the question, the answer whereto really decides the matter, was service of the order for security necessary. And the answer depends upon the nature of the application. Now it is not only permissible, it is advisable in practice to couple an application for committal with one for attachment for a doubt may well arise—doubts have in fact frequently arisen in English practice (and I am concerned with none other)—as to which is, in the circumstances, the proper remedy. But generally speaking, as Bowen, L. J., said in *in re Evans* (1893, 1 Ch. at page 266,) "if a party to a suit is ordered to do anything, and he omits to do it, that is a case for attachment." Committal, on the other hand, is sought when a person has done that which he is prohibited from doing. In this case, therefore, the remedy is attachment and only as an application for leave to issue a writ can the matter be considered.

The Court of Appeal in *Fernandes* v. *Ferreira* 15.11.04, decided, and the decision is binding on me, that service of the order—in that case precisely the same as here—was not necessary before applying for a writ of attachment for disobeying it. Service of the order here, therefore, was supererogatory and no affidavit of that service needlessly effected is required to support the application. And so, the affidavits of Ramlogan and Allen may be disregarded.

The conditions precedent to obtaining leave to issue a writ of attachment are that the party sought to be attached is in default of obedience of an order and that he or she has been personally served with notice of the application. In respect of this second condition Allen's affidavit proves personal and timely service and, being unobjectionable, leads to consideration of the defendant's affidavit, protest whereunder is ineffectual. The defendant admits the default, stating her continued inability despite every effort at obedience.

His Honour on consideration of the affidavits and after hearing arguments ordered a writ of attachment to issue but to lie in the office for fourteen days to permit the defendant to apply to discharge the order on good cause shewn.

HAMILTON *v.* CONSOLIDATED R. & B. ESTATES.

PETTY DEBT COURT, GEORGETOWN.

HAMILTON *v.* CONSOLIDATED RUBBER AND BALATA ESTATES, LTD.

[175. 10. 1916.]

1916. NOVEMBER 8, 14, 16, 21. BEFORE DALTON, J. (Actg.)

Contract—Registration of labourer to bleed balata—Employers and Labourers Ordinance, 1909—Employment under contract to prospect for bullet trees—Meaning of term "to prospect"—Remuneration of labourer.

This was a claim by a balata bleeder named Hamilton against the defendant company for the sum of $49.03, said to be due to him for work and labour done and performed and services rendered by him at the grants of the defendant company in the Murawa creek, Essequebo river, between the 14th day of April and the 28th day of September, 1916, the contract for the said services having been entered into at Georgetown.

The particulars of the claim were as follows:—

April 14th to September 27th—To 107 days building and clearing camp, pulling boats, transporting goods and prospecting for balata at 48 cents per day...		...$ 51 36
To 157 lbs. balata delivered to the company at 18 cents		$ 28 26
To feeding for 121 days' total prospection, payable by company, at 40 cents per day		$ 48 40
		$128 02
Credit:—		
By Advance, store order, cash, etc.	$25 26	
" goods had on grant	$55 73	$ 80 99
Balance due		$ 47 03

Evidence was led, and at the close of the plaintiff's case, it was submitted for defendant that no case had been made out for him to answer. On that submission decision was reserved.

R. Dinzey, solicitor, for the plaintiff.

C. E. Shepherd, solicitor, for the defendant company.

Posted. November 21st.

DALTON, J. (Actg.) [After setting out the nature of the claim His Honour proceeded:—]

The evidence led shows that on March 15th last the plaintiff

was registered as a labourer, with others, by the proper officer to serve the defendant company as a balata bleeder "and also for prospecting, if re-"quired by the superintendent or foreman." The following are references to and extracts from the contract which was made, which references and extracts deal with the points that have been mentioned during the hearing.

Clause 1 states that the labourers agreed to "work as balata bleeders for "a space of nine months or as prospectors when called upon to do so."

Clause 3 provides that from Potaro mouth to the depot nearest their grant (in this case at Murawa creek mouth) and back again, the labourers agree to load and unload boats and transport goods getting free rations during such time. The contract is silent as to loading and unloading boats and transporting goods beyond that point, but clause 6 provides that "In the "event of it being necessary to employ boat-hands to take provisions from "the depot to the labourers, the said provisions shall be supplied at an extra "four cents per lb. and four cents per pint. Should the labourers leave their "working ground to go to the store for the provisions they shall do so free "of charge to the employer." No such extra charge has, I understand, been made by the employer.

Clause 8 states that when bleeders arrive at the grant and do not find wood enough to start bleeding, they shall not be justified in leaving the grant until they have done at least two weeks' thorough prospection.

Under clause 11 each labourer agrees "If from any cause whatever his "services are not required for the full term of this agreement he shall have "no claim against the employer save for prospection and for payment for "the balata collected by him after deducting the amount owing by him for "goods supplied and advances made."

Clause 12 provides that if through any cause whatever the amount due to any of the labourers for balata delivered by him be hot sufficient to cover the amount due by him for advances made and goods supplied, such labourer binds himself to work for the employer "as a prospector or bleeder or boat-hand" on any grant until such indebtedness has been paid off in full, previous to entering into any other employment.

Then lastly, and this is a clause upon which great stress has been laid in this case, though quite wrongly in my opinion (for the reason which I give later), clause 15 provides as follows: "Each of the labourers hereby binds "and obliges himself at the end of the bleeding season, if required to do so "by any person duly authorised by the employer, to do such prospecting "work as the person so authorised may require. During such pros-

pection the labourer shall be paid 48 to 64 cents per day with "free rations on Government scale."

So much for the contract. It is most minute in narration, being three foolscap pages of closely-printed matter, and not easy to follow even to a legal mind. I very much doubt if any of the labourers really understood what they were signing or what the terms of their engagement were, though the evidence shows that it was read to them. Even the solicitor for the plaintiff during the hearing of the case found that he had misunderstood it in at least one material point. I am surprised to say after the arguments which have been addressed to me, that I can find in it no provision whatever for the payment of the employee for any of his services, supposing he renders any, apart from the issue to him under certain conditions of free rations, save in clause 15. That clause, as I state later, does not in my opinion apply under the conditions of this case. The sole remuneration to the employee under the contract subject to what I have just said, appears to me to be the right which he has to get from the employer a certain price for balata bled by him. This "amount earned for balata," as the contract terms it, is subject, however, to deductions for advances made and goods supplied to the employee by the employer. Whether that remuneration pays him sufficiently to enter into the contract is entirely a matter for the labourer to consider, but, as one of the witnesses said, "It pays better to bleed than to prospect."

I will deal now with plaintiffs evidence. He states that between the months of May and September he cleared and built camps, pulled boats, transported goods, and prospected on the defendants' grants for a period of 121 days. In cross-examination, he admitted that the actual prospecting work occupied roughly 54 days, and the solicitor for the company appeared to concede that he was entitled to be paid for that time at 48 cents a day. I can find, however, no right to such payment under the contract, though of course payment for the services may be equitable. That again only shows how unsatisfactory the actual terms of the contract are. It was further sought to prove that the word "prospecting" included such duties as building a camp or pulling a boat, but with that submission I cannot agree. It would indeed be stretching the ordinary meaning of the word to include within its range such duties, and it is in fact negatived by the actual wording of the contract which in clause 12 speaks of "a prospector or bleeder or boat-hand." The point, however, is not material, for if I find no provision under the contract for the payment for prospecting for 54 days (although, as I say, that has been conceded by the defendant company) I am likewise unable to find any provision for payment for the period claimed, which is 107 days.

Clause 15 of the contract, which I have fully quoted above, appears to have been relied upon by plaintiff to support his claim for such payment, but its terms do not appear to me to be unambiguous. It states that "at the end of the bleeding season" a labourer binds himself to do what prospecting is required by his employer and "during such prospection" he is to be paid from 48 cents to 64 cents a day with free rations. There is no other provision for payment for prospection at all. There is no evidence before me that plaintiff was ever employed in terms of this clause, nor am I able to extend the provision for payment made in this clause to any other part of the contract. Clause 8, which I have quoted, does provide for fourteen clays thorough prospection before a labourer would be entitled to leave a grant, but both the plaintiff and Mr. Winter, the registering officer, agree that a charge could be made for that. Clause 11 also makes reference to payment for prospection, but that must refer to the special arrangement to be made in case of the labourers' indebtedness under clause 12 or to clause 15.

The last item in the claim, feeding for 121 days during prospection at 40 cents a day ($48.40), is also made under the provisions of clause 15. In this case also the defendant company concedes the claim for 54 days, but as I have said before, I find no right in the plaintiff on his evidence to any such sum at all. I have no evidence at all that any prospection in terms of clause 15 was ever made by the plaintiff or any other labourer. The claim is made under the provisions of the contract entered into between the parties and that is the contract which I have to interpret. Whether or not any confusion has taken place between the terms of a bleeder's contract, such as the one I am dealing with, and a prospector's contract, such as Mr. Winter mentioned and which differs materially, he states, from a bleeder's contract, I cannot say. He does not himself, however, seem quite clear as to the rights of the labourers, for he stated they should be paid for any prospecting done by them. He can, however, point to nothing in the contract, save the provisions of clause 15, to support his statement.

After hearing the evidence led for the plaintiff and after due consideration of the terms of the contract between the parties I must come to the conclusion that plaintiff has not made out any claim such as requires me to call for any defence from the defendant company.

The case will be non-suited with costs.

LILLIA *v.* BEHARRY LALL.

LILLIA *v.* BEHARRY LALL.

[129 of 1916.]

1916. NOVEMBER 10, 11, 24. BEFORE DALTON, J. (Actg.)

Immovable property—Definition—Buildings—Sale and delivery—Ownership—Seizure in execution of property apparently in judgment-debtor's ownership—Interpleader.

Whatever is built as a fixture upon ground becomes part and parcel of the land. The question whether a structure is such a fixture is one which depends on the circumstances of each case. The chief points to be considered are the nature of the structure, the manner in which it is fixed to the soil, and the intention of the person who erected it.

This was a claim by one Lillia to two buildings which had been levied upon by one Beharry Lall as the property of Taney, the judgment debtor, in an action brought against Taney by Beharry Lall.

The claimant was, by order of the court made in vacation, made the plaintiff and the judgment-creditor the defendant and trial was ordered without pleadings.

All further necessary facts sufficiently appear from the judgment.

De Freitas, K. C. for the plaintiff (claimant).

E. G. Woolford, for the defendant.

DALTON, J. (Actg.): This is a claim by way of interpleader by one Lillia to one small board and shingle house on brick pillars and one cottage, with zinc roof, on wooden pillars and used as a shop, the buildings in question being situated at Belle Plaine, Wakenaam. The buildings had been levied on, under a judgment of the Supreme Court, by one Beharry Lall as the property of Toney, the judgment-debtor.

During the vacation it had been ordered that the trial proceed without pleadings, the sole issue to be tried being the ownership of the property at the time of the execution.

At the trial the question was raised by counsel for the defen-dani whether the matter before the court could properly be decided by an interpleader summons, seeing that the property in dispute consisted of two buildings which presumably were immovable property, whilst from the nature of the proceedings taken it could only be assumed that the property in dispute was movable. Argument was heard on this point, and from what was then stated it was clear that considerable doubt exists in this I colony as to the proper place that buildings hold in the classification of "property." No local authorities were referred to dealing with the law on the matter, although a similar case was mentioned (*Ramsay* v. *Booker Bros., McConnell & Co., Ltd.,* 1915

L. R. B. G. 57) as the one now before me, in which a building was also the property in dispute.

The general rule is that whatever is built as a fixture upon ground becomes part and parcel of the land and, as such, becomes the property of the owner of the ground, whether such building has been erected by such owner himself or by another person, and whether it has been erected by another person with his own material on the ground of another or with another's material on his own ground. (*Voet,* 41.1.24; *Maasdorp's Institutes. II,* p. 48). And the English law is the same. As Lord Blackburn says in *Holland* v. *Hodgson* (L. R. 7 C. P. 328), "there is no doubt that what is annexed to the land becomes part of the land." In both cases, however, the difficulty is to say what degree or amount of fixing or annexation will suffice to determine the question of immovability.

In the local case of *Farnum* v. *Henriques and Farnum* (1894 L. R. B.G. 141) there is a *dictum* of Kirke, J., that "here the majority of our houses are movables," but that is apt to be misconstrued by persons who do not remember the distinction in law between "movable" and "immovable" property. In various parts of the world, by means of mechanical contrivances, buildings of great size can be removed considerable distances and without much injury, but as Buchanan, J., says in the case of *Kimberley Mutual Building Society* v. *Lewis* (I. H.C. G. 241) "as far as I am aware it has never been contended that, on account of the possibility of this being done, such buildings lose their legal character and classification as immovable property." Nor does the fact that buildings are made of wood decide the question. I rather gathered that it was sought to show that there was authority to say that "wooden tenements" were necessarily movable property in law, but with that I cannot I agree. The old action *de tigno injuncto* had reference to all materials for building, including wood as well as brick or stone.

In the difficulty above mentioned the principal tests to be applied in arriving at a solution are, first to ascertain the manner of attachment to the ground, secondly, the nature and object of the building and its possible removal entire without injury, and thirdly, the intention of the party affixing or erecting the building. This latter is an important part (but only a part) of the test, and is the one which will help to settle the question in this case.

Where movables are affixed to land, or where buildings are erected thereon, the intention that they shall permanently remain there is an element which goes to make up their quality of immovability. "No such intention, however, can be presumed when the person by whom they are affixed has only a temporary in-

terest in the land or house; movables therefore which would be immovable if affixed by the owner continue movable as between him and his tenant." (*Burge* 2nd Ed., Vol. IV., p. 632, and *DeBeers Consolidated Mines* v. *The London and South African Exploration Co.* 10. S.C. at p. 370). In the case of any process of execution issuing out of the Magistrates' courts, special legislation making an exception to the general rule, as stated by Hewick, J., in the case of *de Freitas* v. *Gonsalves* (L. J. 18. 4. 1904), has been locally enacted with respect to the mode of levying execution upon buildings (Ordinance 11 of 1893, section 51), and for such a purpose any house or building on leased land "shall be dealt with as movable property." In this particular case, therefore, the provisions of the common law have been considerably widened.

Seeing then the necessity of applying the tests above mentioned to each case as it arises, it is impossible to lay down one general rule by which to decide whether a building is movable or immovable. Each case must depend on its own circumstances.

Applying the tests to the facts of the present case, it is clear that the buildings are on leased land. That however is by no means sufficient to enable me to decide the nature of the property in question, and no evidence has been forthcoming to show in any detail the nature of the buildings or the way in which they are fixed to the soil. It is obvious of course that an interpleader summons is not at all an appropriate way of deciding a dispute of this kind from the very nature of the proceedings. A similar case in which the same difficulty arose is that of *Oliver* v. *Haarhof and Co.* (1906 T. S. 497). I think, however, that here I am quite justified in deciding, from the fact that defendant gave instructions to levy on "movable" property, and that his agent pointed out the buildings in question to the marshal to be so levied on, and from the added fact that they are on leased land, that he cannot now come forward at this stage long after the issues were fixed, and deny that the property was movable.

Going into the merits of the case, I am satisfied that there was a *bona fide* sale and transfer of the property in question by Taney, the judgment-debtor, to the claimant, Lillia, in May last, It is not questioned by the defence that she had a judgment against him, and it is quite clear that she was prepared to proceed to execution thereon. She does not do so, however, but settles the case and a further loan by receiving from Toney the two houses in question. She completes the sale in writing before the magistrate, and the court interpreter and bailiff are witnesses. The paper was signed in open court, and the evidence shows that Lillia obtained and retained possession of the property. I do not see what more she could have done to make the transaction

sufficiently "open and notorious" (*Fivaz* v. *Boswell* 1. Searle 235).

The failure to call Taney as a witness was commented on, and of course was most noticeable, and each side blamed the other for not calling him. It seems to me desirable in these cases, if it can be done, to join the judgment debtor as a party to the proceedings so that he may be before the court.

The sum of $75 for unlawful levy has been claimed but no damages have been proved, though the claimant's rights have been interfered with. The sum of $1 will suffice to cover that. The levy is declared bad and judgment will go in favour of the claimant with costs.

BHEEKHUM *v.* VIEIRA.

BHEEKHUM *v.* VIEIRA.

[No.197 of 1915.]

1916. FEBRUARY 1, 12. BERKELEY, J.

Appeal—Magistrates' Courts Rules, 1911, r. 16—Essentials in plaint—Amount of particularity required in Magistrates' courts.

Appeal from the decision of Mr. W. J. Douglass, Stipendiary Magistrate of the Berbice Judicial District. The plaintiff Bheekhum (now respondent) averred that in January, 1915, he hired eight beds of land at Yeoville, West Coast, Berbice, from the defendant Vieira (now appellant) through his agent, which beds he prepared and planted with rice; that on May 3rd, 1915, the defendant wrongly dispossessed him of the land whereby he had suffered damages and loss; and that he claimed $100 as damages and pecuniary compensation. Judgment was given for the sum of $55 and costs.

An application *ex parte* on behalf of the appellant for an extension of time, under Ordinance 13, 1893, s. 14 (1), within which to prosecute the appeal, was granted.

The reasons for appeal argued were as follows:—

(*a*.) The learned magistrate was wrong in overruling defendant's objection to the claim as disclosing a *nudum pactum,* and without amendment the claim should be struck out.

(*b*.) There was no evidence before the magistrate of any contract of letting and hiring as alleged in the plaint.

(*c*.) The evidence showed that both the front lands and the savannah of Yeoville where the plaintiff alleged he had his beds are "under water" and therefore no damages were sustained by the plaintiff by reason of the alleged ejection.

(*d*.) There was no evidence of eviction of the plaintiff by the defendant or his alleged agent.

(*e*.) The damages claimed and awarded are too remote and are not assessed according to the measure laid down for wrongful eviction. The appeal was dismissed.

J. S. McArthur, for the appellant.

E. A. Luckhoo, solicitor, for respondent.

BERKELEY, J.: This appeal is from the decision of the Stipendiary Magistrate of the Berbice Judicial District (Mr. W. J. Douglass) who, in an action for damages for the loss of certain rice plants, gave judgment for the respondent for $55 and costs.

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

The claim contains all the necessary particulars to enable a person of common understanding to know what is intended, and this is all that is required by rule 16 of the Magistrates' Courts Rules, 1911. I do not think that in these actions it is essential to specifically state consideration.

There is evidence on which the magistrate could find that the appellant's agent had rented certain beds to respondent, that respondent had cleaned these beds, and that he had planted paddy in a nursery common to all the tenants, from which in due time his plants would be removed to the prepared beds, that before this was done the appellant's agent took possession of the beds, forbidding him to come on the estate and telling him that he would be locked up if he did so. It is also shown that when the respondent complained to the appellant, he refused to listen to him.

On the question of the damages being too remote, I am of opinion that it can be gathered from the evidence that the right to use the nursery was covered by the agreement for the beds which were cleaned and ready for use.

Appeal is dismissed and decision affirmed with costs.

ROYAL BANK OF CANADA *v.* HOP LEE CHUNG.

[88 of 1916]

1916. NOVEMBER 13, 14, 15, 27.

BEFORE SIR CHARLES MAJOR, C.J.

Claim for money had and received—Cheque—Plea of forgery—Proof of handwriting—Skilled witness—Evidence Ordinance, 1893, s. 20.

Witnesses called to express an opinion as to the genuineness or otherwise of a person's handwriting formed from comparison of it with other writing of that person must be expert, that is skilled, in so doing. They need not be professional experts, but they must be shewn, whatever be their calling, to have greater opportunity, whether by necessity or choice, than others of making the comparison and arriving at, and acting upon, the judgment so formed. Bankers are, of necessity, skilled witnesses as to handwriting.

The plaintiffs claimed from the defendant $239.38, debit balance on his account current with them. The defendant denied his indebtedness, alleging that a cheque for $240 purporting to have been signed by him and presented to and paid by the plaintiffs had not been so signed and was a forgery. The defendant gave the plaintiffs a written indemnity against loss of the proceeds of the cheque subject to their proof that its signature was genuine.

The plaintiff called three witnesses, all of them accustomed, in the performance of their duties as manager, cashier, and accountant respectively of the plaintiffs' local bank, to inspect and pass cheques of the bank's clients as correctly signed, it being part of the duty of each witness to make himself familiar with the handwriting of those clients. The manager obtained the specimen signature of the defendant on opening the account, the cashier paid the cheque, the accountant posted it in a ledger. These witnesses, and a fourth officer of the same bank of long standing and experience whose knowledge of the defendant's signature was

acquired after the transaction in issue, all stated without hesitation their opinion that the disputed signature was genuine.

De Freitas, K.C., for the plaintiffs.

P. N. Browne for defendant.

The following observations were made by Sir Charles Major, C. J., in the course of his judgment.

The evidence tendered in support of the claim goes to proof of handwriting. "The rule as to proof of handwriting," said Coleridge, J., in *Doe dem. Mudd* v. *Suckermore,* 5 A. & E. 703, "where the witness has not seen the party with the document in question, may be stated generally thus: either the witness has seen the party write on some other occasion, or has corresponded with him, and transactions have taken place between them upon the faith that letters purporting to have been written or signed by him [and a cheque comes into this category] have been so written or signed. On either supposition the witness is supposed to have received into his mind an impression, not so much of the manner in which the writer has formed the letters in the particular instances, as of the general character of his handwriting; and he is called on to speak as to the writing in question by a reference to the standard so formed in his mind. It is obvious that the weight of this evidence may vary in every considerable degree, but the principle appears to be sound." The weight to be attached to this evidence it is for me to determine. Now, witnesses called to express an opinion as to the genuineness or otherwise of a person's handwriting formed from comparison of it with other writing of that person must be expert, that is skilled, in so doing. They need not be professional experts, but they must be shewn, whatever be their calling, to have greater opportunity, whether by necessity or choice, than others of making the comparison and arriving at, and acting upon, the judgment so formed. Bankers are, of necessity, skilled witnesses as to handwriting. They are constantly, in large banking establishments continuously, during business hours called upon to act upon their judgment of handwriting by comparison of it with the standard supplied by each client in the first instance and subsequently observed. Their evidence, therefore, is of peculiar weight. This however, does not relieve me from the obligation to test that weight by my own examination of the disputed writing and its comparison with the genuine signatures of the defendant, of which many are in evidence.

[His Honour then referred to the arguments for the defendant addressed to the formation of particular letters in the disputed

signature, and said that he had failed to find any reason for decreasing the weight of the evidence of the plaintiffs' witnesses, to which, in the absence of anything beyond a mere denial by the defendant that he had signed the cheque, be was compelled to give effect.]

Judgment for plaintiffs.

JOHNSON *v.* PRICE.

[161 of 1916.]

1916. NOVEMBER 24, 29. BEFORE BERKELEY, J.

Appeal—Gaming Prevention Ordinance, 1902, sect. 4 (*a*)*—Using a place as a common gaming house—Presumption on finding appliances of gambling—Non-production of information.*

To sustain a charge, against the owner or occupier of premises, of "using" the premises as a common gaming house, it is not necessary to prove that the owner or occupier was present on the premises at the time of the alleged offence.

This was an appeal from a decision of the Stipendiary Magistrate of the East Coast Judicial District (Mr. E. A. Bugle), who convicted the appellant Price of an offence against the provisions of Ordinance 42 of 1902 (Gaming Prevention Ordinance), and sentenced him to pay a fine of $100, or in the alternative, to two months' imprisonment with hard labour.

The reasons for appeal sufficiently appear from the judgment below.

P. N. Browne, for the appellant.

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

BERKELEY, J.: Appeal from the Stipendiary Magistrate of the East Coast Judicial District, who convicted the defendant, now appellant, for that he on the 20th May, 1916, being the occupier of a certain house, did use the said place as a common gaming house contrary to law. (Ord. 42 of 1902, s. 4 (a))

The reasons of appeal are—

(1) that the decision is erroneous in point of law;
(2) the admission of illegal evidence; and
(3) that the decision is unwarranted by the evidence.

On the 17th May an information was taken on oath that the appellant, as the occupier of *part of* a house, kept the said house as a common gaming house, and on this information a warrant was issued to search *the house* of appellant. It is admitted that appellant is the occupier of the house, but it is submitted that the warrant was invalid, inasmuch as the information referred to only

a part of the house. Under section 18 of the ordinance the information is not to be admitted in evidence except under the circumstances and conditions therein set out. The warrant is the sole authorisation for the search, and it is not competent to go behind this. The effect of this warrant under the ordinance is that, if any instruments or appliances of gambling are found, or any of the circumstances set out in section 14 are shown to exist, then the place is presumed to be a common gaming house, until the contrary is proved, whereas without a warrant the prosecution has to prove the affirmative. I agree with the magistrate that all the necessary elements under this section are shown to have been present. No attempt has been made to prove the contrary.

It is further submitted that, to sustain the charge of *using* the place as a common gaming house, it is necessary that the appellant was present at the time of the alleged offence. There is the evidence of a police constable that he saw the appellant in the house through the flooring. The inspector says that his attention was not called to any opening, but he adds that his weight on entering caused the floor to give way. I see no reason to doubt the positive evidence of the constable, but apart from this I am not prepared to limit the meaning of the word "use" to the actual presence of the appellant. The evidence showed that he, as occupier, had previously used his house on more than one occasion for similar purposes.

Appeal is dismissed and decision is confirmed with costs.

The Solicitor General not objecting, the fine is reduced to fifty dollars.

THE KING *v.* MANGALI.

CROWN CASES RESERVED.

THE KING *v.* MANGALI.

1916. NOVEMBER 27; DECEMBER 2.

BEFORE SIR CHARLES MAJOR, C.J., BERKELEY, J., AND DALTON, J. (Actg.)

Criminal Law—Larceny—Receiving stolen goods—Accused found guilty of receiving—Sufficiency of evidence to support conviction.

Recent possession of stolen property is evidence, either that the person in possession stole the property, or that he received it knowing it to be stolen, according to the circumstances of the case. Where, on a charge of larceny and receiving, there was evidence for the prosecution merely to show that the prisoner was found in the possession of stolen cattle some hours after their loss, and he denied on oath at the trial that he had ever had possession of them;—

Held, that there was evidence to go to the jury that he received them knowing them to be stolen.

Case stated by His Honour the Chief Justice

"Mangali, with two Benjamins (father and son) and Aziz, was tried before me at the October session of the Supreme Court for the county of Demerara on the 3rd of October, 1916, upon an indictment charging him with the larceny of cattle. There was a second count in the indictment, charging the prisoners with having received and had the cattle knowing the same to have been stolen.

Among other witnesses, the persons mentioned below gave the following evidence:—

Hitai. "I keep eight head of cattle at Yarrow creek. On a Sunday five months ago I missed five of them. They are in the court house yard now. I went to the police. Next saw them three weeks after, near Abary creek at a place next to Yankee (?) plantation."

Jagrup. "Live at Lovely Lass. Remember last Easter, day before saw Benjamin's son driving up five head of cattle at Lovely Lass savannah. He drove them to our pen at Lovely Lass. They are now in the court house yard. Mangali lives at Bush Lot, a mile from Lovely Lass. He drove them at my pen. I saw Mangali come and take away the black steer in the afternoon; four were left in the savannah. Mangali had the steer working Mangali came about 5 to 6 p.m."

John Reeburg. "On 17th April last met Mangali, "Bull" (Benjamin's son), and Aziz. Mangali and "Bull" were driving five head of cattle. I asked Mangali where he had stolen the cattle. He said he hadn't stolen them but was bringing them from Mahaicony. I see the cattle in the yard here now. Mangali's place is at Bush Lot. Where I met Mangali is a mile and a half to two miles from Lovely Lass.

Sudin. "I live at Bush Lot and know Mangali's house. On Monday before Easter saw Mangali and "Bull" driving five head of cattle from Bush Lot back. They were put in Mangali's yard at 5 to 6 p.m. The same cattle are in the yard here now."

Mohabir. "I live near Mangali at Bush Lot. On Monday before Easter last, at 5 to 6 p.m., saw cattle tied there in a fenced yard. Five of them are in the yard here now. (Of those five) saw Mangali milk the brown cow which kicked him."

Hanif. "I live at Bush Lot in Mangali's house. On Monday before Easter, in the afternoon, between 5 and 6, saw some cattle in Mangali's yard, the same very cattle now in the court house yard. They were at Bush Lot next morning, but in the evening had been taken away."

Mr. Manoel de Freitas, who appeared for Mangali (and Aziz) commenced his address to the jury by saying that the evidence was confined to the issue of stealing and that they would consider the case from that point of view alone.

The Attorney General did not exercise his right of reply.

In summing up to the jury, after explaining the tenor of the indictment, I dealt with the evidence generally, but, being of opinion that it was rather more in support of the count for receiving the animals knowing them to be stolen than of that for their theft and abduction. I specially referred to the second count of the indictment, directing the jury in the course of my remarks that if they were not satisfied that the cattle had been stolen and driven away from the prosecutor's pasture by the hands of the prisoners themselves, but were satisfied on the evidence—some of which I have set forth *in extenso* above—firstly, that the cattle had been stolen, and secondly, that the prisoners had received them knowing them to have been stolen, they were at liberty to return a verdict on the second count.

The jury found the prisoners Mangali and Benjamin the son guilty of receiving.

On the 5th October, Mr. de Freitas, K.C., informing the court that he was instructed by Mr. solicitor Dias—neither he nor Mr. Dias had been present at the trial—appeared before me (Mr. Manoel deFreitas with him) on behalf of Mangali to apply that I should state a case for the consideration of the Court of Grown Cases Reserved. Counsel prefaced his application by saying that, according to his instructions, his learned junior's statement at the trial to the jury I have mentioned above, as to the effect of the evidence, had not been "challenged" by the learned Attorney General nor by me, and cited to the court the case of the King against Evans, reported in a recent issue of the Law Journal Reports, apparently, therefore, under the impression that I had accepted the pronouncement of his learned junior regarding the

nature and extent of the evidence and dealt with the case as one of larceny merely, and that the jury, in convicting the prisoners of receiving, had, he submitted, overstepped their province.

Upon my pointing out to counsel that I had in fact summed up to the jury as stated above, he objected that there was no evidence of receiving to go to the jury and that, therefore, in directing the jury as already stated I misdirected them.

The question, therefore, for the consideration of the court is, was there any evidence to be left to the jury in support of the count of the indictment charging the prisoner with receiving the cattle knowing them to be stolen? If there was any such evidence, the conviction is to stand. If there was no such evidence, the conviction is to be quashed."

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

De Freitas, K. C. (*M. J. C. de Freitas* with him), for the prisoner, cited *Rex v. Evans,* L.J.R., 85 K.B., 1176; *Regina* v. *Langmead* Leigh & Cave C.C. 427; and referred to *Roscoe,* Crim. Evidence, p. 83; *Russell* on Crimes, 6th ed. Vol. III. pp. 355, 438.

BERKELEY, J.: The question reserved for the consideration of this court is whether there was any evidence on which the jury could find the prisoner guilty of receiving the cattle knowing them to have been stolen.

The cattle were missed on a Sunday, and the evidence of Jagrup is that on the following day he saw 'Bull' bringing them to a pen at Lovely Lass, that in the afternoon the prisoner came about five to six p.m. and took away one of the animals. He says that the prisoner lived at Bush Lot, one mile from Lovely Lass

Further evidence showed that prisoner was seen with 'Bull' driving the animals on that same Monday and that they were in his yard at five to six p.m. When met by the witness Reeburg who asked him where he had stolen the animals, the prisoner said that he had not stolen them but was bringing them from Mahaicony.

Now, on this evidence, the court is not called on to say that the verdict of the jury was a proper one, but whether there was any evidence to leave to the jury on the second count of the indictment, that is, receiving stolen property.

The prisoner is found in possession some hours at least after the cattle are missed and there is evidence that 'Bull' was seen driving them by himself. According to the evidence of Reeburg he denied having stolen them and his counsel stated in court he had sworn that he never had possession of them.

It was open to the jury to come to the conclusion, either that

'Bull' had stolen them and that the prisoner had received them from him, or that a third party had stolen them, from whom 'Bull' and the prisoner had received them.

There was therefore a probability, or even a *possibility* (see Palles, C.B., in *Regina* v. *McMahon* 13 Cox 281), that the actual theft had been committed by some person other than the prisoner.

The law of recent possession is clearly laid down by Pollock C.B., in *Regina* v. *Langmead*, C.C.R. Leigh & Cave. 439. "If no other person is involved in the transaction forming the subject of the enquiry and the whole of the case against the prisoner is that he was found in the possession of the stolen property, the evidence would no doubt point to a case of stealing rather than a case of receiving; but in every case, except, indeed, where the possession is so recent that it is impossible for any one else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen property stole it himself or received it from some one else. If, as I have said, there is no other evidence, the jury will probably consider, with reason, that the prisoner stole the property, but if there is other evidence, which is consistent either with his having stolen the property or with his having received it from some one else, it will be for the jury to say which appears to them to be the more probable solution;" and Blackburn, J., at p. 441, "When it has been shown that property has been stolen and has been found recently after its loss in the possession of a prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest and that he was either the thief or the receiver according to the circumstances. If he had been seen near the place where the property was kept before it was stolen, they may fairly suppose that he was the thief. If other circumstances show that it is more probable that he was not the thief, the presumption would be that he was the receiver. The jury should not convict the prisoner of receiving, unless they are satisfied that he is not the actual thief."

In *Regina v. Evans* (L.J.R. 85 K.B. 1176), referred to by counsel, (and also 114 L.T. 616), the *dictum* of Pollock, C.B., (*supra*) is, in my opinion, followed. Lawrence, J., who delivered the judgment of the court, said (as reported in L.T.R.), "All the evidence went to show that the appellant was guilty, either by himself or with others, of the theft of money, but to justify a verdict of guilty of receiving there must be some evidence, which in this case was wanting." The words 'either by himself or with others' show that there was no evidence on which the jury could find that any person or persons other than those who were principals in the first degree were connected with the transaction.

In my opinion the conviction must be affirmed.

DALTON, J., (acting): I concur.

Sir CHARLES MAJOR, C.J.: I also concur in the judgment delivered by the learned senior puisne judge and have nothing to add, save this. Although, in the defendant's interest and upon the urgency of counsel on his behalf, I consented to state the case, I held a strong opinion that the question was hardly arguable. I have heard nothing to induce me to change that opinion.

DE FREITAS *v.* COMACHO AND OTHERS.

[190 of 1915.]

1916. FEBRUARY 15, 16, 21. SIR CHARLES MAJOR, C.J.

Immovable property—Specific performance—Contract for purchase and sale—Intention of parties—Powers of executors to sell—Judgment by default against executor—Costs.

This was a claim by the plaintiff Augusta Theresa de Freitas, duly assisted by her husband, for a declaration that she was the purchaser on August 30th, 1912, of the second depths of Plantations Prospect and Carlton Hall, held under licence from the Crown by the proprietors of the said plantations, and for an order on the defendants to transfer such property to her.

It was admitted that one Jose Gomes, the proprietor of Prospect and Carlton Hall, held the second depths of the two plantations by licence from the Crown, and that he died on July 2nd, 1909, appointing two of the defendants, Julia Comacho, his widow who had now remarried, and Jose de F. Pombo as his executors. After obtaining leave of the court the executors proceeded to sell the immovable property belonging to the estate and in fact sold the plantations Prospect and Carlton Hall to the plaintiff.

Plaintiff claimed, but defendants denied, that the second depths of the plantations were included in the contract, the defendants pleading that neither the executors nor guardians had authority or sanction to sell the same.

The claim was brought against Julia Comacho and Pombo in their capacity as executors, against Julia Comacho in her individual capacity, and against the Public Trustee and Julia Comacho as guardians of the minors Gomes. The defendant Pombo suffered judgment by default.

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

P. N. Browne, for the defendant Julia Comacho.

M. J. C. de Freitas (with him, *J. A. Luckhoo*) for the Public Trustee.

Sir CHARLES MAJOR, C.J.: It is unnecessary for me, otherwise than briefly, to refer to the events mentioned in the pleadings or evidence given in this suit, beginning with the death, in July, 1909, of the testator Jose Gomes and ending with the conveyance, in November, 1912, of those parts of his property called Carlton Hall and Prospect.

2. Jose Gomes by his will appointed the defendants Jose de Freitas Pombo and his wife Julia Amelia Gomes (now Comacho) his executor and executrix and guardians of his infant children, with a power of sale of his property. The will, dealing expressly with the testator's interest only in the property common to the marriage, contained no specific devise, but constituted his infant children his residuary devisees and legatees. The executors determined to sell the plantations Carlton Hall and Prospect and petitioned the court for leave to do so, particularly in respect of the infants' interests, on evidence deemed sufficient by the court to authorise the sale. The properties were advertised for, and duly set up at, sale by auction, but, the reserve price not being reached, were withdrawn. The executors then applied for leave to sell privately, stating the result of the auction and setting forth certain offers received for the properties. The application was granted, an advertisement of conveyance by Jose de Freitas Pombo and Julia Amelia Camacho appeared in the *Gazette,* and the plantations were, on the 16th November, 1912, conveyed accordingly to the plaintiff.

3. I have spoken of the proceedings before the court and the subsequent transactions as having been by the executors (whereby I mean the executor and executrix) because, despite a suggestion that, as Mrs. Comacho was not expressly a party

in the petitions to the court and as the advertisement of the auction sale stated that the properties were to be sold by order of "the executor of Jose Gomes, deceased," she did not join therein nor in any of the steps taken pursuant to the orders of the court, it has been clearly proved by a variety of circumstances (proof indeed of which the defendants advanced no contradiction, for they offered no evidence) that Mrs. Comacho not only stood by throughout the proceedings and transactions, with full knowledge of the nature and effect of the same, in manner sufficient to work acquiescence therein and subsequent ratification thereof, but, through her husband and admitted representative as well as personally, took an active and urgent part in everything that was going on in connection with, the intended and completed sale.

4. Some doubt has been thrown, on behalf of the defendants, on the power of the executors to sell Carlton Hall and Prospect at all, that is if the statements of defence contain anything further than a denial of authority to sell the second depth thereof which is doubtful. But assuming the plea to go thus far, it must he said that an executor's power of sale is referable to two contingencies. If property be sold to satisfy liabilities its exercise is compulsory, and no application to the court therefor need be made or, indeed, should be made, even where infants' interests are concerned and property is specifically devised or bequeathed. If property be sold, but not to satisfy liabilities, the exercise is optional subject only to the condition that the beneficiaries who *are sui juris* consent arid the interests of those under disability are protected by the sanction of the court. Further, the sale should be by public auction but may be private if the vendor is prepared to show, on the question arising, that the latter mode has not been prejudicial to the estate, Here, there is some evidence that the sale of Carlton Hall and Prospect was necessary to satisfy liabilities. But, apart from that, it remains that Pombo, co-guardian with Mrs. Comacho, with the approval and by the order of the court, on behalf of the infant residuary devisees, conveyed their interest in the plantations to the plaintiff, and Mrs. Comacho, as the owner of an undivided half share thereof in marital community joined in the conveyance.

5. The issue in the suit upon the determination whereof relief for the plaintiff depends is whether there was included in the agreement for the sale and purchase of Carlton Hall and Prospect, between the plaintiff and the defendant, executors and guardians, that portion of each plantation called the "second depth." And that again depends upon the answer to the question, did the parties intend to include it? That that answer must be in the

affirmative seem to me conclusively proved. The advertisement of the auction sale specified the second depth, and after the abortive auction it was upon the statement in the advertisement as to the extent of the properties that negotiations for the private sale proceeded. At no stage of the proceedings and subsequent transactions was there any mention of reservation of the second depth nor protest by the defendants against its inclusion. The properties have been shewn by the plaintiff to be practically valueless without the second depths. Cultivation areas clearly intended to be sold are in the second depths and nowhere else. Finally it has been proved that Charles Comacho, Mrs. Comacho's husband, employed, with her knowledge and approval, perhaps at her instigation, by the plaintiff after conveyance, and accounting to him for rents and profits, of the plantations, paid, on two separate occasions, rent to the Government for the second depths and from time to time collected rent moneys for portions thereof, both transactions on behalf of the plaintiff. The inference that those second depths were included in this agreement is irresistible.

6. The relief claimed amounts to a desire for specific performance and the plaintiff is entitled to a declaration accordingly and consequential order. Judgment to that effect in appropriate form must be entered for the plaintiff. In respect of costs, the defendant Jose de Freitas Pombo has suffered judgment by default, thereby admitting assets, and the judgment against him will be for costs *de bonis testatoris et si non de bonis propriis*. Against the defendant Mrs. Comacho the judgment will carry costs *de bonis propriis* in respect of her individual interest in the second depth. The Public Trustee has protected himself from personal liability to costs by obtaining the sanction of the court to defend the action upon legal advice that he should do so. The recourse for costs must be had to the proper goods and chattels of the executor Pombo, the public trustee as co-guardian of the infants will contribute one-half of the same out of the infants estate in his hands.

In re WIGHT *v.* THE DEMERARA TURF CLUB, LTD. (in liquidation); *Ex parte* THE BRITISH GUIANA MUTUAL FIRE INSURANCE CO., LTD.

1916. NOVEMBER 11, 25. DECEMBER 2.

BEFORE SIR CHARLES MAJOR, C.J.

Company—Winding up—Application for leave to commence proceedings—Delay in making application—Circumstances justifying refusal.

In determining whether or not leave should be granted to commence proceedings against a company in liquidation, the court is bound to consider the special circumstances of each case. Thus, where the contemplated proceedings were, for various reasons, in the opinion of the judge, unlikely to succeed, leave was refused.

Application by the British Guiana Mutual Fire Insurance Company, Limited, for leave to commence proceedings against the Demerara Turf Club, Limited (in liquidation) to set aside or vary an order of the court made on April 29th, 1916, on the petition of the liquidator of the company empowering the said liquidator to expend the funds of the company in the prosecution of an appeal to His Majesty in Council in the matter of Wight *v.* Demerara Turf Club, Ltd. (in liquidation).

The facts of the case sufficiently appear from the judgment

M. J. C. de Freitas, for the applicants

P. N. Browne, for the respondent.

SIR CHARLES MAJOR, C.J.: This is an application for leave to commence proceedings against the respondents to set aside or vary an order giving the sanction of the court to the liquidator to incur all such costs and expenses as may be necessary in prosecuting an appeal, for which he has obtained final leave from the Appeal Court, from a judgment of that court to His Majesty in Council, in the action Wight *v.* The Demerara Turf Club, Limited (in liquidation).

The applicants are secured creditors of the company by virtue of a first mortgage of the company's property, Bel Air Park.

They have not proved in the winding-up, but, upon leave granted to commence proceedings to realize their security, obtained judgment therein, on the 19th of January last, in the usual form of decree. Execution on that judgment has, however, been stayed in certain proceedings at the instance of Mr. Wight, the respondent to the above-mentioned appeal.

The order which is the subject of this application was made as long ago as the 29th April last on the application of the liquidator, supported by counsel's opinion that an appeal should be made.

The grounds advanced in support of the application are, first, that the order was obtained by the liquidator without consulting the applicants as to their desire to prosecute the appeal, and without any information that a petition would be presented to the court for its sanction to incur the necessary expense of the appeal, or that an order had been made thereon authorizing the expenditure of the funds of the Demerara Turf Club in the prosecution of the appeal, or that an application would be made to the Appeal Court for leave to appeal; second, that the only asset of the Turf Club is the Bel Air Park; third, that the applicants have no desire that the appeal should be prosecuted if the costs are to fall on them.

The first ground above proceeds on the assumption that it was necessary for the liquidator to consult the applicants upon the matter of the prosecution of the appeal and notify them of the various steps taken therein, and that failure to do so gives them the right to ask that the order sanctioning the expense of that appeal may be set aside, or, at any rate—although the mode of variance has not been suggested—that it may be so varied that no part of that expense shall be chargeable to them. Now, it was not necessary for the liquidator to consult the applicants at any stage of the steps he has thus far taken. A liquidator has power to take any legal proceeding in the name and on behalf of the company, if the court or committee of inspection sanctions it. It is, in fact, quite open to argument that, by the provisions of section 145 (2) of the Ordinance, (No. 17 of 1913) and notwithstanding the terms of section 157, he has the power to do so without the sanction of either court or committee, but he would be wise, in any case, to obtain the court's sanction for his own protection. He may, of course, but he is not bound to do so, ascertain the wishes of the creditors in the matter in order, if they are consenting, to strengthen the application for the court's sanction, and if he does so he must call a meeting and give notice thereof, not only to creditors who have, but also to creditors who have not, proved in the winding up. In this case it appears that, after the order of sanction had been obtained, the liquidator did

call a meeting of creditors to consider (*inter alia*) the question of a contribution from the funds of the company towards the cost of the appeal, but did not give notice of the meeting to the applicants. But even if that notice had been given the applicants could not have voted therein for they had not proved; they have not proved up to the present time and, I must assume, advisedly refrain from so doing. Moreover the order had then been duly obtained.

The second ground for the application is obviously no ground at all. Even if it were, no attempt has been made by the applicants to show that Bel Air Park is any way affected by the contemplated expenditure in connection with the appeal, or that the applicants' security will be prejudiced or impaired thereby. The *corpus* is unaffected and subject to their mortgage; they have no hold over the rents, issues and profits.

As to the third ground, it proceeds on an hypothesis: "if the costs are to fall on them." I cannot act on hypothetical suggestions which are not supported.

There is this much more to be said. In determining whether leave should be given or not on applications of this kind, the court is bound to regard the special circumstances of each case, and it is incumbent on me here to consider the nature of the remedy prescribed by the Ordinance for persons aggrieved by any order made, as in this case, by a "judge sitting apart," in a winding up. It is unnecessary for me to examine in detail the remedy itself or the method for its employment, but if the applicants, as they urge, are aggrieved, and if the Ordinance means what I think it does mean, they are undoubtedly in lengthy default, and it is hard to see how they can, at this rate, granting an efficacy in other respects not yet apparent, take the very proceedings they contemplate. I certainly ought to be satisfied on an application of this kind that the contemplated proceedings may be, at any rate, properly commenced. In this connection, counsel for the applicants has suggested that the proceedings may be commenced under the provisions of Order XL., rule 6, of the Rules of Court, 1900. The inapplicability of that rule, in the circumstances attending, and the law and practice governing, the facts of this case, to such a proceeding as is contemplated, is so plain as to confirm and strengthen my impression that the applicants' prospect of success would be faint indeed.

The application is dismissed with costs.

DA SILVA *v.* HEADLEY.

PETTY DEBT COURT, GEORGETOWN.

DA SILVA *v.* HEADLEY; *ex parte* HEADLEY.

[258. 10. 1916.]

1916. DECEMBER 7, 12. BEFORE DALTON, J. (Actg.)

Practice—Proceedings under Small Tenements and Rent Recovery Ordinance, 1903 power to order new hearing—Petty Debts Recovery Ordinance, 1893, sect. 32.

There is no power under the Small Tenements and Rent Recovery Ordinance, 1903, to order the re-hearing of any proceedings taken under that Ordinance; the power to order a re-hearing, given by sect. 32 of the Putty Debts Recovery Ordinance, 1893, does not extend to proceedings under the Small Tenements and Rent Recovery Ordinance, 1903.

Application by the defendant Headley for the re-hearing of proceedings taken under the provisions of Ordinance 9 of 1903 Small Tenements and Rent Recovery Ordinance 1903).

The application was opposed. The necessary facts and arguments appear from the judgment.

Clarke, solicitor, for the applicant.

F. Dias, solicitor, for the respondent.

DALTON, J., (Actg): This is an application by one Headley, the defendant in proceedings taken under the provisions of the Small Tenements and Rent Recovery Ordinance 1903 (Ordinance 9 of 903), for the possession of a certain lot of land rented by him from one Da Silva, for retrial of the case in which he was ordered to give up possession of the land within one month, on the rounds that the applicant was prevented "by causes beyond control" in placing his case fully before the court at the first hearing, and that it was not brought to the notice of the court at such hearing that there were crops on the land the subject of the proceedings. The defendant was present at the first hearing and he was also represented by counsel.

The solicitor for the respondent objected that there was no provision in Ordinance 9 of 1903 for the re-trial of any proceedings thereunder, and that even if there was, the application set out no cause or reason why any re-trial should be granted.

It was urged for applicant that under the provisions of section 32 of the Petty Debts Ordinance 1893 (Ordinance 11 of 1893) this court has power to order a new hearing in any case that has been brought before it, and precedent was referred to in which such order was in fact made (*Demerara Railway Company* v. *Nicholas,* No. 160-4-1916).

In section 8 of the Petty Debts Recovery Ordinance it is provided that the action thereunder is instituted with the filing of the writ-

ten statement of claim. The word "claim" is defined in section 2 of the same ordinance as meaning "any debt demand or damage claimed, or any chattel or thing sought to be recovered, *under this Ordinance.*" Then section 32 provides that "if in any order the court is satisfied by an unsuccessful party to an action . . . . . the court may, if it think just, order a new hearing of the action." This can in my opinion only apply to an action under the provisions of the Petty Debts Recovery Ordinance, 1893, and does not, in the absence of any special provision, extend to any other ordinance. Ordinance 9 of 1903 under which the, proceedings were taken is a special ordinance providing a speedy and effectual remedy for the recovery of rents of small amount with special procedure set out, and I cannot read into it the provisions of Ordinance 11 of 1893 for the re-trial of proceedings as now applied for. I am strengthened in my opinion by the decision of Swan, J., in *Robinson* v. *Adams* (A. J. 14. 11. 1902) which was an appeal against an order for possession made under Ordinance 4 of 1846 (amended and replaced by Ordinance 9 of 1903). He says there, *inter alia*, "The claim in the court below was under section 17 of Ordinance 4 of 1846—but the magistrate in dealing with it appears to have followed the procedure down in Ordinance 11 of 1893 (Petty Debts Recovery Ordinance There is under section 17 of Ordinance 4 of 1847 a certain procedure to be followed in the recovery of the possession of tenements after determination of a tenancy, and that being so, Ordinance 11 of 1893 would not apply."

I am therefore unable to follow the precedent to which I am referred by the applicant, and I must decide that I have no jurisdiction to hear the application. I need not, therefore, deal with the further objection taken.

The application must be struck out.

NELSON *v.* CAMPBELL AND ANOTHER.

NELSON *v.* CAMPBELL AND ANOTHER.

[231 of 1915.]

1915. OCTOBER 4; 1916. FEBRUARY 28. BEFORE HILL, J.

Appeal—Unlawfully carrying sticks to cause terror—Disorderly behaviour in a public place—Summary Conviction Offences Ordinance, 1893, ss. 137, 139—Case of full offence charged and part proved—Summary Conviction Offences (*Procedure*) *Ordinance, 1893, s. 40.*

Where two persons are charged under s. 139 of Ordinance 17 of 1893 with unlawfully carrying sticks and knives with intent to cause terror to the public, and the evidence led discloses that they are guilty of riotous behaviour in a public place, in contravention of s. 137 of the same Ordinance.

Held that, under the provisions of s. 40 of Ordinance 12 of 1893, it was competent for the magistrate to convict them on the offence disclosed, both offences coming under the heading of disorderly conduct.

Appeal from the decision of Mr. E. A. Bugle, Stipendiary Magistrate of the East Coast Judicial District, who convicted the appellants, Campbell and Stewart, of riotous behaviour in a public place in contravention of the provisions of s. 137 of the Summary Conviction Offences Ordinance, 1893. The charge laid was of unlawfully carrying arms in a public way under s. 139 of the ordinance.

The reason for appeal was that the decision was erroneous in point of law, it not being competent for the magistrate to convict under s. 137 when the charge was brought under s 139.

J. A. Luckhoo, for the appellant Campbell.

P. N. Browne, for the appellant Stewart.

Rees Davies, S.G., for the respondent Sergeant-Major Nelson.

October 4.

HILL, J.: The appellants were convicted by a magistrate of an offence under s. 137 of Ordinance 17 of 1893, on a charge brought against them under s. 139 of the same ordinance.

They appealed from that decision on the ground that the decision was erroneous in point of law inasmuch as it was not competent for the magistrate to convict under s. 137, the charge being under s. 139. Both sections come under “Title XI—Disorderly Conduct” —and under s. 40 of the Procedure Ordinance 12 of 1893 “every complaint shall be deemed divisible; “and if the commission of the offence charged, as described in the “statute “creating the offence or as charged in the complaint, includes the commis- “sion of any other offence, the defendant may be convicted of any offence “so included which is proved, although the whole offence charged is not “proved, ...”

The magistrate found that the evidence for the prosecution

proved a condition of disorderly conduct which warranted him, (dealing with it under s. 40,) in convicting of an offence under s. 137, but not of the offence charged under s. 139, and I am of opinion he could deal with the matter as he did.

But, it appears to me, that when magistrates find that such a procedure under s. 40, can be exercised by them, they should at the close of a case for the prosecution express their opinion, and thus enable a defendant to meet the case then before the court.

In the present case, counsel for the defendants it would appear by the record, contented himself with submitting that the offence under s. 139 had not been proved, and closed his case.

In these circumstances, the right course to adopt is to refer the case back to the magistrate to hear such evidence, if any, as may be tendered, on behalf of the defendants, and to then adjudicate—and the order will be accordingly. There will be no order as to costs.

The case was referred back to the magistrate and no further evidence was tendered on behalf of either defendant.

The magistrate confirmed his previous decision convicting the defendants (appellants).

February 28, the matter came again before the Court.

Luckhoo, for the appellants.

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

HILL, J.: I affirm the decision of the magistrate and dismiss the appeal with costs.

CASSELS *v.* FUNG KEE FUNG.

CASSELS *v.* FUNG KEE FUNG.

[336 of 1915.]

1916. FEBRUARY 25, 29. BERKELEY, J.

Appeal—Sale of Food and Drugs Ordinance, 1892, and amending Ordinances—Whisky—Whisky of one maker sold when another demanded—Article not of the nature quality and substance demanded—Sale to the prejudice of the purchaser.

F., a licensed retail spirit dealer, is charged with selling to one S, a certain article of food, namely, whisky, which whisky was not of the nature substance and quality demanded by the purchaser. S. asked to be supplied with Dawson's whisky but was served by the shopman in F.'s employment with Haig and Haig's whisky.

Held that in the absence of any proper and sufficient proof that the whisky supplied was inferior in quality to that demanded, there was no sale to the prejudice of the purchaser S.

Appeal allowed and conviction quashed with costs.

Appeal from the decision of Mr. W. J. Gilchrist, Stipendiary Magistrate for the Georgetown Judicial District, who convicted the appellant and sentenced her to pay a fine of $15, or in default one month's imprisonment with hard labour. The charge was brought against the defendant Fung Kee Fung (now appellant) on the information of J. B. Cassels (now respondent), a director of a firm the sole agents in the colony of Dawson's whisky. All further necessary facts and arguments appear from the judgment.

E. G. Woolford, for the appellant.

H. G. Humphrys, for the respondent.

BERKELEY, J.: This appeal is from the decision of the Stipendiary Magistrate of the Georgetown Judicial District who convicted appellant of selling to the prejudice of the purchaser (Solomon) certain whisky not of the nature substance and quality demanded by him.

For the purposes of this appeal it is admitted by counsel that the man Solomon called for Dawson's whisky but was served by the appellant's agent with that of Haig and Haig for which he paid eight cents. The only ground of appeal argued is that it was not shown to have been sold to the prejudice of the purchaser. Prejudice is that which the ordinary customer suffers, viz., that which is suffered by any one who pays for one thing and gets another of *inferior quality* (Lush, J. in *Hoyte* vs. *Hitchman* (1879) 4 Q.B.D. 240).

In *Smith* vs. *Wilson* (66 J.P. 150) Lord Alverstone, C.J. adopted this definition of the word prejudice and the High Court of Justice reversed the Court of Quarter Sessions which had confirmed the decision of the summary court convicting the appellant of having sold to the prejudice of the purchaser

who had demanded marmalade, a certain article, as marmalade which contained thirteen per cent., of glucose, an ingredient not injurious to health and not added to the marmalade to increase its bulk or weight or to conceal its inferior quality but to prevent fermentation.

So in *Sandys* vs. *Rhodes* (67 J.P. 352) where tapioca was sold as sago Lord Alverstone on appeal said it was open to the justices upon the evidence (the result of the analysis) to come to the conclusion that the sale was not to the prejudice of the public because the two articles were of the same value and for a considerable number of years the public had bought this quality of tapioca as sago thereby establishing a custom in the trade. In *Knight* vs. *Bowers* (14 Q.B.D. 845) relied on by respondent the article demanded was saffron and that sold was savin. These two articles according to the evidence of the public analyst were totally dissimilar in colour, size, shape and appearance, and had diverse medicinal properties which were used under totally different circumstances and conditions. Smith J. said it was not of the nature demanded by the purchaser and the case was sent back to the magistrate for conviction. All that this case decided was that the operation of the act was not limited to cases of adulteration only but extended to any unadulterated article which was delivered instead of the article demanded, to the prejudice of the purchaser. These words "to the prejudice of the purchaser" are necessary because if they had not been inserted a person might have received a superior article to that which he demanded and paid for, and yet an offence would have been committed. The words are intended to show that the offence is not simply giving a different thing, but giving an inferior thing to that demanded and paid for. (see Lush J. in *Hoyte* vs. *Hitchman*, *supra.*)

In all the cases referred to there had been an analysis of the article It is the duty of the court so to construe the ordinance as not to be a weapon of oppression, or otherwise than a proper protection of the public. In the present case in order to obtain a conviction it should be shown by analysis that Haig and Haig whisky is inferior to Dawson's whisky either in nature substance or quality. It is possible that such an analysis might show that it is superior in quality in which case there would have been no sale to the prejudice of the purchaser.

The statement of the purchaser that he was not satisfied with the inferior whisky supplied to him is not evidence that it was in quality to that demanded by him. It follows therefore that it has not been proved that appellant sold to the prejudice of the purchaser.

Appeal allowed. The decision is reversed and the conviction quashed with costs.

ADAMS *v.* BAICHU.

ADAMS *v.* BAICHU.

[4 of 1916.]

1916. FEBRUARY 25; MARCH 3. BEFORE SIR CHARLES MAJOR, C.J.

Appeal—Possession of goods suspected to have been stolen—Summary Conviction Offences Ordinance, 1893, section 96—Procedure.

Procedure to be followed on proceedings for unlawful possession against a person from whom another, charged with the same offence, states that he bought the goods.

Appeal from the decision of Mr. W. J. Gilchrist, Stipendiary Magistrate of the Georgetown Judicial District, who convicted the appellant Baichu for the possession of a quantity of gheera reasonably suspected to have been stolen. The appeal was allowed and the conviction quashed, with costs.

J. A. Luckhoo, for the appellant.

Rees Davies, S G., for the respondent.

SIR CHARLES MAJOR, C.J.: The defendant's appeal must be allowed and his conviction quashed.

When a defendant charged with unlawful possession of goods states that the goods were given, or handed, or entrusted, or sold, to him by another person and it is desired to proceed against that other person for unlawful possession or control, the latter should be brought before the magistrate on complaint and tried thereon in the method prescribed for the trial of any offender against the provisions of the Ordinance. He may be charged and tried jointly with the first defendant or separately, but a complaint there must be. The complaint may be oral; if oral, it must be reduced into writing by the clerk of the court. The defendant thereon must plead thereto. If he pleads not guilty, witnesses must be examined "touching the matter," that is to say in support of and, if need be, in defence against the charge. On a charge of unlawful possession the prosecutor must prove first, either that the goods were in fact stolen or that the suspicion that they were stolen was reasonable; second, the possession or control of the goods by the defendant; and third, that he had reasonable cause to believe them to have been stolen or unlawfully obtained. The defendant may controvert or justify his possession, he may show that it would have been unreasonable for him to suppose that the goods were stolen or unlawfully obtained. All this seems very obvious.

Here, Baichu was charged, and that separately from Chedda, who had said that he bought the goods from Baichu. After

the hearing of the complaint against Chedda, but before his conviction, Baichu was brought before the court on his complaint which was read to him. He was also informed by the court that "Chedda had alleged that he "(Baichu) sold to him (Chedda) the gheera the subject matter of the "charge." I quote from the record. It does not appear that he was called upon to plead or did plead. The prosecutor asked for leave to withdraw the complaint. That request was unnecessary; the leave of the court was not required. On resumption of the hearing, the prosecutor stated that he offered no evidence against Baichu. The magistrate, therefore, dismissed the complaint, "not," it is noted, "on the merits." It is unnecessary for me to consider whether the opinion of the magistrate that his dismissal of the complaint was not on the merits is correct or erroneous. I am inclined to think that it was correct. If a dismissal on the merits means after a hearing on the merits, then, on the authority of *Reed* v. *Nutt* (24 Q.B.D. 669) there does not appear to have been a hearing of the complaint against Baichu.

The subsequent procedure adopted by the magistrate was as follows.— The minutes record: "Baichu asked whether (he) has anything to say and "whether he wishes to have witnesses examined touching his alleged pos- "session. Baichu states: Mr. Archer, the wharfinger, gave me 21bs. gheera "sweepings which I sold to Chedda. Calls no witnesses. Each [that is "Chedda and Baichu] $50 or 2 months hard labour."

Now Baichu could not be convicted except upon a complaint, for every proceeding in the court for obtaining of an order (which includes any conviction) against any person in respect of a summary conviction offence shall be instituted by a complaint. The first complaint having been dismissed, had any fresh complaint been made? The minutes of the proceedings are silent on this point. In the magistrate's reasons for his decision he states: "I therefore dismissed the charge but not on the merits. I, however, "held that he was still before the court as to the allegation against him and "subject to its jurisdiction. Assuming, however, that the charge as laid "against him by the prosecution had been dismissed, it must be borne in "mind that it was not dismissed on the merits. The allegation, therefore, "remained and practically amounted to a complaint, which enabled the "court to hold Baichu under its jurisdiction." That the charge was dismissed was sufficient to extinguish it for all purposes; that there had been no hearing of it on its merits could neither keep it alive, "practically" or legally, nor revive it when extinguished.

The magistrate proceeds: "He was verbally informed by the court of "the complaint against him and such was reduced to writing in the minutes "of the case," These latter words seem,

from their context, clearly to refer to the complaint originally made and dismissed and that could not help the matter. “In my opinion,” the magistrate perpends, “under section 96 of Ordinance 17 of 1893, it was not re-“quired that all the evidence given against Chedda be again gone over by “replacing the witnesses in the box.” It was most certainly required, for Baichu was not then—he never had been—jointly charged with Chedda—it seems that he was not then charged at all—and there was no such short cut to determination of his case as to take as given and read, in support of allegations against him, statements of witnesses examined out of his presence on a charge against another man, and without any opportunity whatever afforded him of cross-examination thereon.

Amid all this irregularity and impropriety, it is not uninteresting to note that, even if the allegation in the first charge “remained” and the evidence taken on the hearing of the charge against Chedda could be considered as evidence properly taken on a charge against Baichu in the latter’s absence, that allegation was that Baichu, on the 24th day of September, had stolen goods in his possession, whereas the evidence showed clearly that Baichu had brought the goods to Chedda’s shop and parted with all possession and control over them three or four days before the 24th September.

ADAMS *v.* CHEDDA.

[4 of 1916.]

1916. MARCH 10. BEFORE SIR CHARLES MAJOR, C.J.

Appeal—Possession of article reasonably suspected to have been stolen—Evidence of statements explanatory by accused in answer to questions by constable—Admissibility—Weight of evidence.

"A statement made by a person to a constable in answer to an inquiry by the constable is admissible in evidence on subsequent criminal proceedings against such person although no caution was given by the constable, provided that the person was not at the time in custody on the charge, that the constable on making the enquiry had not formed the intention of instituting proceedings whatever the answer might be, and that no inducement was held out or threat made to induce the person to make the statement."

Lewis v. Harris 110 L.T.R. 337.

This principle is to be observed at the trial of persons charged with possession of goods suspected to have been stolen under the provisions of the Summary Conviction Offences Ordinance, 1893, s. 96. But as the ordinance contemplates that those persons should explain their possession "to the satisfaction of the court," i.e., when before the court, and not in answer to enquiries by constables in advance of the trial, police officers, having in view possible proceedings under the ordinance against the persons interrogated, should abstain from making those enquiries, and magistrates should attach little weight to evidence so obtained.

Appeal from the decision of Mr. W. J. Gilchrist, Stipendiary Magistrate of the Georgetown Judicial District, who convicted

the appellant Chedda for the unlawful possession of a quantity of gheera reasonably suspected to have been stolen. The conviction was affirmed.

P. N. Browne, for the appellant.

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

SIR CHARLES MAJOR, C.J.: On the hearing of the charge against the defendant who was convicted by the Stipendiary for Georgetown for unlawful possession of goods, a considerable amount of evidence for the prosecution consisted of answers given by the defendant to a series of questions put to him by police constables before and after his arrest. The questions were proved to have been put by the constables, not with the intention of taking proceedings against the defendant whatever his answers were, but only if they were unsatisfactory.

Any question as to the admissibility of this evidence is, in my opinion, concluded by the decision in *Lewis* v. *Harris* (110 L.T.R. 337) The observations of the judges in that case seem to me to constitute a valuable guide to members of the Constabulary in the performance of their duties for the detection of crime. But the admissibility of the evidence is one thing, the value to be attached to it is another As the Court of Appeal has already pointed out, in cases of this kind we are dealing with an enactment which clearly contemplates a defendant charged with unlawful possession explaining (if he can) that possession, not to the satisfaction of police officers in advance (and often, it seems, in aid) of the charge, but to the satisfaction of the court when he is before the court thereon. Magistrates, therefore, should attach but little value to evidence consisting of answers to enquiries touching possession put by constables to persons suspected of offence, even though the constables may not have infringed the rules relating to that evidence. Acting on that principle myself I exclude from my mind evidence of this kind here and consider only that obtained and given apart from it.

The defendant gave an explanation of his possession that first that his clerk and afterwards that he himself, had bought the goods from Baichu. Baichu denied this, but I think it is quite clear that the purchase took place. It is contended for the defendant that that was sufficient to excuse him. I cannot agree. It was open to the magistrate, it was, indeed, his duty to look at all the circumstances of that purchase and judge whether they established, or failed to establish, that the defendant knew or had reason to suppose, when he did buy the goods, that they had been stolen or unlawfully obtained. The magistrate considered the circumstances and came to the conclusion that they did establish the

defendant's knowledge, or at any rate were sufficient to give him reason to suppose, that the goods had been stolen or unlawfully obtained. That conclusion was, in my opinion, justified on his consideration of the evidence before him, outside and excluding that obtained from the series of questions and answers. Even if, therefore, the magistrate gave more weight to the answers of the defendant to the constable's questions than they possessed—which I think he did—it follows that his conviction of the defendant was right and must be affirmed.

In re E. A. HUNTE, a Solicitor.

Ex parte THE ATTORNEY GENERAL.

[334 of 1915.]

1916. JANUARY 4, 6. MAJOR, C.J., BERKELEY AND HILL, JJ.

Motion—Solicitor—Advice to client to *swear falsely—Professional misconduct—Evasive explanation—Application at hearing for leave to file further evidence.*

Motion by the Attorney General for an order that the name of Edward Augustus Hunte, solicitor, be struck off the rolls of the Court, or that he might be suspended from practice as a solicitor, or that such order might be made as the Court should think right, on the ground that the matters of fact stated in an affidavit of the Stipendiary Magistrate of the North Essequebo Judicial District, accompanying the application, constituted professional misconduct of the said Edward Augustus Hunte in his said capacity as solicitor.

The statements contained in the affidavits of the magistrate and of the respondent in reply, appear from the judgment.

Nunan, K.C., A.G., in support of the motion.

The respondent in person.

Cur. adv. vult.

Posted (Jan. 6.)

The respondent applied for permission to call further evidence.

Mr. Justice Berkeley: Have you got any case, Mr. Hunte,

in which, after both sides had been heard and the Court adjourns to give its decision in writing, it then allows an application and accedes to the application that evidence be adduced?

Mr. Hunte: In the case of Mr. Dargan it was done.

The Chief Justice: Mr. Hunte, you should know that coming here and making an application on authorities you should have those authorities in your hand. If you could not do so yourself you should have endeavoured to get a practitioner to do so for you. We cannot at this moment send for books, consult them, read them and decide on them. It is your duty to put them before us and argue on them.

After further argument the Court decided that the application could not be entertained, being neither in proper form nor in time, and only made after the applicant had had every opportunity for filing affidavits in reply to the matters alleged against him.

The following judgment of the Court was read by the Chief Justice:

This is a motion by the Attorney General of the colony for an order that the name of Edward Augustus Hunte, a solicitor of the Supreme Court, be struck off the roll of the Court or that such other disciplinary order may be made in the matter as the Court shall think fit.

2. The motion is supported by the affidavit of Herbert Kortright McDonnell Sisnett, a stipendiary magistrate of the colony, whereby it is alleged that the solicitor appeared before him to represent the plaintiff in an action by dos Santos against Gilkes to recover the sum of $20; that the plaintiff in his evidence stated he had received from the defendant a promissory note for the $20 and, in answer to the learned magistrate, that he had torn it up, as unstamped and, therefore, useless; that the defendant denied the making of the promissory note and, when under cross-examination by the solicitor, was warned by him in these words: “Be careful; the promissory note is still in existence and can be produced in evidence against you;” that the magistrate, having drawn the solicitor’s attention to the statement of his client that the note had been torn up, the solicitor replied—“I advised the plaintiff to say that he had destroyed the note;” and that, the magistrate saying to the solicitor—“So your client deliberately swore to a lie on your advice?”, the solicitor rejoined—“It is not a lie, as subterfuges of that sort are allowable in certain cases.”

3. To the affidavit of Mr. Sisnett, with a copy whereof the solicitor was duly served on the 21st day of December last, the solicitor, on the morning of the 4th instant, filed an affidavit

in reply and appeared in person at the hearing of the motion on that day. This affidavit sets forth that dos Santos instructed the solicitor that Gilkes had given him a promissory note for $20 which after search therefor, he could not find and which he was under the impression had been by him mislaid, lost, or destroyed, and that the solicitor, believing that statement, told dos Santos that, if asked by the court, he was to say that he had done so. The fifth paragraph of the solicitor's affidavit is in these words: "That on giving his evidence he stated that he had destroyed it, without adding that he had also mislaid or lost it." Further, that the solicitor in cautioning Gilkes said that the note "might be," not that it "was," still in existence, and that the word "subterfuges" in his rejoinder to the magistrate above quoted was used "in connection with the caution and question put to Gilkes with reference to them and not to the word 'lie.'"

4. We observe from the solicitor's affidavit that he makes no attempt to traverse or explain—it hardly admits, on the face of it, of satisfactory explanation—the sworn statement of Mr. Sisnett that he said at the trial—"I advised the plaintiff to say that he had destroyed the promissory note." We are forced to believe that he did say so, that he did advise his client to make that statement, and that nothing was said to him by his client about mislaying or loss before the trial of the action, for we believe further that the solicitor asserted to Gilkes that the note was, not might be, in existence. There is no affidavit by the client as to the mislaying or loss of the note and of inadvertent omission to couple an allegation thereof at the trial with his bare statement of destruction; there is no statement, even now, of the solicitor that he has never seen the note, nor had it in his possession; we believe that it was in existence at the time the solicitor asserted it to be and that it still is extant and, perhaps, in the possession of the respondent himself.

5. That being so and believing that, knowing of the existence of the note and having it then in his possession or under his control, the solicitor, in order to assist his client to escape the expense of stamping it before it could be given in evidence, prompted, or at least adopted and advised the statement on oath that it had been destroyed, we regard the solicitor's affidavit as at least evasive, perhaps in material particulars, positively untrue and rather an aggravation than a palliation of professional misconduct.

6. At that misconduct we must look as much in its relation to the respondent himself as affecting the legal profession as a whole and those numerous members of the public who resort to practitioners for advice and conduct of their cases. Judges, when considering direct testimony as to facts the existence or non-

existence whereof must be peculiarly within the knowledge of a witness, are entitled to assume that that knowledge is the legal adviser's also and, therefore, in the absence of prompt disavowal by the latter, if he knows it to be false, or to be at any rate contrary to his instructions, that the testimony is true. If that be the positive side of the matter, how much more confidently ought not a judge to take for granted that a solicitor can never advise a client to make a statement on oath which the practitioner either suspects, or is satisfied the client knows, to be false. That is what the respondent has done here. His motive in doing so is immaterial; the mere act is a serious disregard of those principles of integrity and clarity of conduct which solicitors are, or ought to be, proud to assert and careful to observe.

7. In considering what shall be the term of the order on the motion, although the respondent has shewn an initial, we fear an incorrigible, misconception of professional duty and responsibility, we are unwilling to bring him into extreme ignominy and consider that our opinion of the gravity of his conduct will be sufficiently emphasised by ordering that Edward Augustus Hunte be suspended from practice as a solicitor of the Supreme Court for a period of five years from this date and that he do pay the taxed costs (if any) of this application.

DAVIS *v.* LOW.

[9 of 1916.]

1916. MARCH 3, 4, 10. BEFORE SIR CHARLES MAJOR, C.J.

Appeal—Customs Ordinance, 1884, sec, 164 (*6*)*—Knowingly keeping uncustomed tobacco—Mens rea—Onus probandi.*

In any charge of knowingly keeping uncustomed goods, the word "knowingly" in sub-section 6, section 164 of Ordinance 7 of 1884, qualifies the word "keeps" only and does not extend to the word "uncustomed."

Vieira v. Reid (A.J. 6. 10.1913) approved and followed.

Appeal from the decision of the Stipendiary Magistrate of the Georgetown Judicial District who convicted the appellant Low for knowingly keeping uncustomed tobacco and sentenced him to pay a tine of $500 and in default of payment, to six months' imprisonment with hard labour. The necessary facts and reasons for appeal sufficiently appear from the judgment. The conviction was affirmed.

E. G. Woolford, for the appellant.

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

SIR CHARLES MAJOR, C.J.: The defendant has appealed from his conviction by the Stipendiary for Georgetown on a complaint that, on the 26th day of October, 1915, he "unlawfully and knowingly did keep," in a shop certain quantities of tobacco, "the duties of customs in respect of such goods not having been paid."

The first ground of appeal, urged in the court below and taken here, is that the complaint disclosed no offence, by reason of its not in terms charging the defendant with keeping "uncustomed goods," the expression used in the ordinance creating the offence of knowingly keeping those goods. Whatever general meaning the word "uncustomed" may bear, it certainly means, specifically,

that in respect of which customs duties have not been paid. The complaint, therefore, is sufficient.

The direct evidence in support of the complaint, upon the credibility of which or otherwise the value of the test of the complainant's evidence mainly depends, is that of a man called Steer. This man has been attacked for drunkenness, gambling and vagabondage. Yet I see no reason for differing from the magistrate's belief in Steer's testimony and his conclusions based thereon.

The defendant further objects that it was necessary for the prosecutor to prove that the defendant knew that customs dues had not been paid on the tobacco, an obligation which the prosecutor did not discharge. This question has been the subject of local decisions more than once, and I concur with the judicial opinions hitherto expressed that "knowingly" in the sixth paragraph of the 164th section of the ordinance qualifies "keeps" only and does not extend to the words "prohibited," "restricted," or "uncustomed." The defendant, therefore, had to negative his guilty knowledge, and that he did not do.

A third objection to the conviction was that the prosecutor failed to prove that the defendant kept the tobacco, because his possession, custody, or control of it—he being merely a salesman—was that of his employer But the law draws no distinction. The words of the section are "every person who keeps."

The conviction is affirmed and the appeal is dismissed with costs.

I may add that, while I am not prepared to disturb the magistrate's decision relating to the tobacco seized other than the eight tins of it (to the possession of which latter quantity the evidence of the prosecution was almost entirely directed), I think the proper officer or officers should return it to the defendant for his employer.

JARDINE *v.* TOMBEY.

JARDINE *v.* TOMBEY.

[42 of 1916.]

1916. MARCH 10. BEFORE SIR CHARLES MAJOR, C.J.

Appeal—Contract—Account for goods sold—Delivery of other goods in settlement—Subsequent payment by stranger therefor in error to person delivering—Fraudulent appropriation by latter.

Appeal from a decision of the Stipendiary Magistrate of the East Coast Judicial District (Mr. E. A. Bugle) who gave judgment for the plaintiff, Jardine (now respondent) in an action for the sum of $58.80 due by the defendant Tombey (now appellant) to the plaintiff for goods sold and delivered and for money lent. The appeal was allowed but without costs.

The facts appear from the judgment.

H. C. Humphrys, for the appellant.

A. B. Brown, for the respondent.

SIR CHARLES MAJOR, C. J.: The plaintiff and defendant herein are the same parties as those in an action Jardine v. Lilia, tried by the Stipendiary for the East Coast judicial district on the 19th of July, 1915, wherein the plaintiff claimed in detinue, but in circumstances that showed his action to be for damages for non-delivery of goods. The judgment then given for the plaintiff was the subject of an appeal (I) heard by me and was set aside on the ground that the defendant, having agreed to deliver to the plaintiff thirty-five bags of paddy in settlement of his indebtedness to the plaintiff for goods sold and delivered did so deliver the paddy To the plaintiff's brother for the plaintiff, receiving from the plaintiff a receipt for the payment of his account.

The present action was in respect of the same transaction being framed as a claim for the amount of the shop account and on the same ground as in the first action, namely, that after delivery of the paddy to and acceptance by the plaintiff as above mentioned, the plaintiff's father (at whose rice factory the paddy was delivered), unaware that of a contemporaneous delivery of one hundred and nine bags to him by the defendant the plaintiff's thirty-five bags formed a part, paid the defendant for the one hundred and nine bags and the defendant put the money for the thirty-five bags into his pocket.

The issue, therefore in both actions has been delivery or nondelivery of the paddy. For when the plaintiff agreed to accept

(I) 1915, L.R., B.G. 110.

the thirty-five bags in payment of his account and did accept them, the defendant's indebtness to him was extinguished. That the defendant afterwards, taking advantage of the plaintiff's father's mistake—possibly in collusion with the plaintiff's agent—fraudulently appropriated moneys to which he was not entitled (he never sold the thirty-five bags of paddy to the father at all) could not affect the contract between himself and the plaintiff which had been fully performed by both parties.

As I said during the argument the defendant is a rascal, and though the judgment of the magistrate must be set aside, I allow no costs to the appellant either of this appeal or in the court below.

RAJWANTIA *v.* THE DEMERARA RAILWAY COMPANY.

[277 of 1915.]

1916. MARCH 8, 9, 11. BEFORE SIR CHARLES MAJOR, C.J.

Infant—Guardian ad litem—Institution of action—Rules of Court, 1900, Order XIV, rule 10—Procedure.

An infant cannot institute or defend an action otherwise than by a guardian *ad litem,* who is a creature of the Court and must be appointed.

Neither a testamentary nor a natural guardian is a guardian *ad litem.*

This was an action by Etwaria, single woman, as mother and natural guardian of her minor daughter Rajwantia, against the Demerara Railway Company for the sum of $6,000 for damages and compensation for injuries sustained by Rajwantia through the alleged negligence of the defendant company's servants at the railway station at Boerasirie on the West Coast, Demerara.

Lewis, for the plaintiff.

de Freitas K.C., for the defendant company.

A preliminary objection was taken by the defendant that the action was not properly constituted.

SIR CHARLES MAJOR, C.J.: A preliminary objection has been taken that this action, which is instituted by "Etwaria as mother and natural guardian of her minor daughter Rajwantia," is not properly constituted, by reason of Etwaria being the plaintiff and not Rajwantia the minor. It was suggested by Mr. de Freitas for the defendants that had the action been instituted in terms by "Rajwantia, an infant, by Etwaria her mother and natural guardian," no objection would have lain, or, at any rate, that the

technical irregularity in form could have been instantly cured by amending the mere statement in the writ in respect of the plaintiff to make it correct. The action would, however, in my opinion, still be improperly constituted, and for this reason. Out of the objection has appeared another and more serious defect.

It is provided by Order XIV, rule 10, that an infant may sue by a guardian *ad litem,* that is, may not sue in any other manner. This rule, it is to be observed, is one of a code of rules whereby "all proceedings in the Civil Jurisdiction of the Supreme Court shall be regulated and not otherwise." Since the making of that rule, therefore, an infant must sue by a guardian *ad litem.* A guardian *ad litem* is a creature of the Court and must be appointed. A guardian, testamentary or natural, is not a guardian *ad litem,* Etwaria, therefore, is not a guardian *ad litem* and must be appointed so to be. She has not been appointed. The action therefore is not properly constituted and the defect must be cured. Ample provision for the cure is contained in the thirteenth rule of the same order which, when the appointment of a guardian *ad litem* has been made, will enable the Court to substitute as plaintiff "Rajwantia, an infant, by Etwaria her guardian *ad litem*" for Etwaria now posing as plaintiff. The hearing will be interrupted for an hour to enable the appointment to be made, and on resumption I will allow the necessary consequential amendments.

Etwaria, a mother, having been appointed next friend of the infant, the latter was substituted plaintiff and the necessary amendment of the title of the action and the allegations in the proceedings ordered to be made forthwith on the application of the parties.

The action was subsequently dismissed.

GREENIDGE *v.* GARLAND FLOWER LODGE.

GREENIDGE *v.* GARLAND FLOWER LODGE.

1916. April 14. HILL, J.

Practice—Costs—Taxation—Counter Claim—Professional witness.

Costs which have been incurred partly in support of or in opposition to a counterclaim and partly in support of or in opposition to a defence must be apportioned by the taxing officer, but no costs incurred in the action which have not been increased by reason of the counter-claim are to be apportioned.

Atlas Metal Company v. *Miller,* (1898) 2 Q.B.D. 500, followed.

In this case the plaintiff brought an action to recover the sum of $380 for extra work done in connection with certain repairs to the Garland Flower Lodge building, on which building he had, under a contract, done other work. Defendant alleged that all that had been done came under the contract and counterclaimed for work not done or badly done under the contract.

Judgment was given for the plaintiff for the sum of $249 with costs, and the counterclaim was dismissed with costs.

Plaintiff's bill against the defendants was delivered at $132.53, but the taxing officer allowed it at $58.07, striking out various changes including ten per cent, on the amount of the counterclaim, filing particulars, and the expenses of an alleged expert witness.

Plaintiff filed objections to the taxation as follow:—

(1.) The plaintiff got judgment on the defendant's counter-claim with costs, therefore he is entitled to the ten per cent, claimed:

(2.) the defendant requested the plaintiff to file his particulars and the same were filed at his request;

(3.) the witness J. H. Greenidge is a contractor and builder and gave expert evidence and is therefore entitled to $5 *per diem* for his attendance.

The taxing officer's decision, save as regards an item of 48 cents, was upheld.

Dias, solicitor, for plaintiff.

Laurence, for the defendants.

Hill, J.: This is an application for review of taxation on behalf of the plaintiff in connection with certain changes for costs of counter-claim, filing particulars, and expenses of a witness, which the taxing officer has disallowed. Plaintiff succeeded both on his claim, and on the counter-claim, and in addition to recovering 10% charged on the amount recovered on the claim, seeks to recover 10% on the amount of the counter-claim. In my opinion the law on this point is governed by *Atlas Metal Coy.* v. *Miller*

(1898) L.R. 2 Q.B.D. 500. The note to the English Order XXXIII, rule 3 shows that its operation is similar to our Order XXI, rule 4. Costs recoverable on a counter-claim are those occasioned by the counter-claim, and in determining these, costs which have been saved by the counter-claim being brought instead of a cross action are not to be taken into account. Costs which have been incurred partly in support of, or in opposition to a counter-claim, and partly in support of or in opposition to a defence, must be apportioned by the taxing officer, but no costs incurred in the action which have not been increased by reason of the counter-claim are to be allowed. The taxing officer was right in disallowing the charge.

The second item, for forty-eight cents, challenged is for filing particulars. There does not appear to be any rule requiring this, nor does it appear to be always the practice—although a very desirable procedure. It was done at the defendant's request in this instance, and I see no reason why the successful plaintiff should not recover the amount.

The amount fixed by the taxing officer for the witness Greenidge I allow. Greenidge is not a professional man within Appendix I, part 1 (d) of the Rules of Court, 1900, and is only entitled to $2 a day. The extra $2 allowed is, I understand, for procuring the evidence under the last paragraph to Ap. I, part 1 (a) and I see no reason to interfere.

The plaintiff must bear the costs of this application, fixed at $5.

WIGHT *v.* DEMERARA TURF CLUB, LTD. (in liquidation).

1916. FEBRUARY 21, 22, 23, 24. APRIL 17.

BEFORE BERKELEY AND HILL, JJ.

Appeal—Auction sale—Contract of purchase and sale—English and Roman Dutch law—Specific performance—Relation of bidder and auctioneer—Laesio enormis—Custom.

A sale by auction not stated in the conditions to be subject to reserve is a transaction whereby the vendor undertakes that the property shall be sold to the higher bidder, each bidder being bound by the bid he has made until released by a higher bid, and the highest bidder being entitled to have the property knocked down and delivered to him by the vendor.

Appeal from the decision of Sir Charles Major, C.J., already reported (*a*) in which judgment was given in favour of the defendants (now respondents) in a claim by the plaintiff Wight (now appellant) for specific performance by the defendants of a contract by them as vendors to deliver land, buildings and

(*a*) 1915 L.R. B.G. 115.

appurtenances of a race-course, the property of the defendants, to the plaintiff as the highest bidder at an auction sale of the property in question by the liquidator acting as an auctioneer.

The facts fully appear from the judgment of the trial judge.

The appeal was allowed and specific performance ordered in the term of the plaintiff's (appellant) claim with costs of appeal, and costs in the Court below.

H. H. Laurence and *H. C. Humphrys,* for the appellant.

It is clear that, in our law, bids at an auction are not revocable (as it seems they are in England, until the fall of the hammer), but that every bidder is bound forthwith by his bid. On that point there is no conflict of authority, and it is accepted in the judgment of the court below.

All discussion of the subject has hitherto assumed that, if a contract is concluded by the bid, which binds the bidder, it must be binding on the seller also: which is the question for decision in this case.

Matthaeus expressly raises the point and decides it as the plaintiff contends: "It is unreasonable that, when a bid has been made, the bidder should be bound, while the seller is not; for the contract of sale is bilateral and begets an obligation on either side . . . . . 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." (*Ant. Matthaeus, De Auctionibus,* 1.10.48).

None of the Roman-Dutch writers dissent from this opinion, but the learned Chief Justice has declined to follow it because, he says, a bid is an offer, and there can be no contract until the auctioneer accepts it.

It is true that bids are spoken of as "offers;" *e.g.*, in the phrase "*Est perpetua auctionum lex ut res addicatur plus offerenti"* (*Matth. De Auct.* 1.10.22). And so in a sense they are. But to infer that they are *mere* offers, not binding without acceptance, is simply to repudiate the law there stated.

If this contract must be adjusted to the formula of offer and acceptance it is easy to say (as in fact we all do) that the vendor offers for sale, and that the bidder accepts the offer. *Matthaeus* puts it in that way (*De Auct.* 1.10.48), and so have the English judges who have been prepared to decide accordingly—*Warlow* v. *Harrison,* 1 E. & E. p. 316—*Johnson* v. *Boyes,* 1899, 2 Ch. p. 77.

But the truth is that the learned Chief Justice has been misled here by the fallacy noticed in *Pollock on Contracts,* 8th Edn., p. 7. The formation of most contracts may be analysed as consisting

of a proposal by one party and acceptance by the other. But the essential matter is the assent of the parties, not the process of offer and acceptance whereby such assent is commonly arrived at and ascertained. If the process cannot in this case be so analysed, so much the worse for the analysis—"the exclusive pursuit of the analytical method in dealing with legal conceptions always leads into some strait of this kind, and, if the pursuit be obstinate, lands us in sheer fictions." The bidder at an auction indicates by his bidding his assent to purchase at the price bid, and the vendor by putting up the goods has already indicated his assent to sell to the best bidder. The plaintiff was the best bidder when the auctioneer in this case "withdrew" and walked away. "*Voluntaria auctio perfecta censetur simul atque augendi seu adjiciendi facultas precisa sit*" (*Matth: De Auct.* 1.10.40). To deny that these parties have expressed their assent, because they have not expressed it in the usual form of offer and acceptance, is like saying that an idea has not been expressed because the sentence conveying it does not conform to normal rules of grammar or language.

The decision of the court below is further based on a misinterpretation of the word *addictio,* which in the passages cited by Matthaeus means conveyance or assignment of the property. The learned Chief Justice seems to translate *addictio* as "knocking down"—a misapprehension apparently derived from a passage in *Maasdorp's Institutes of Cape Law,* Vol. III., p. 141. Matthaeus nowhere mentions the "knocking down" of property at an auction. *Van Leeuwen* (*Commentaries*: Book 4. Ch. 20 s. 7) does refer to a similar custom (*palmslag*), and it there appears that the auctioneer strikes with his hand, not in order to bind the last bidder by acceptance, but to give notice that "the opportunity of bidding higher is broken off," and the previous bidders are released.

But if the passage cited from *Matthaeus* (1.10.22) were correctly translated as the learned Chief Justice translates it—"the universal law of auctions is that the property shall be knocked down to the highest bidder"—that would suffice to sustain the plaintiff's claim. We alleged a contract to convey, and, if we have proved a contract to knock down, that was no ground for dismissing the action. We claimed specific performance, and, if the facts proved entitled us to damages only, we should have had "other relief" under Order XVIII, Rule 3. But the remedy for breach of contract is no more confined to damages in such a case than in any other. Even without the aid of modern procedure courts of law were not so futile—*Pothier, Contract of Sale* ss. 476, 479.

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

The further arguments adduced and authorities cited are fully set out in the report of the decision in the trial Court.

Cur. adv. vult.

Posted. April 17th.

BERKELEY, J.: The point raised by this appeal is whether in view of the learned Chief Justice's findings in paragraph 18 of his decision he was wrong in holding that at a voluntary auction without reserve there was no sale to the highest bidder as the auctioneer did not intimate his acceptance of the highest bid either by knock of the hammer or in some other manner.

So far as can be ascertained there seems to have been no judicial decision on this point in any court where Roman-Dutch law is administered, although it was raised in *De Smidt* v. *Steytler* (1 Searle 136), where an injunction was obtained to prevent the sale of certain property with a view of bringing an. action in which the question would be determined.

The knock of the hammer is referred to in a note by the translator in *Berwick's* translation of *Voet* (18.2.4). *Voet* has been discussing the *addictio in diem,* which is a sale made on the terms that it is to become, or to remain binding, if another person does not offer better terms within a certain period. He points out that the first purchaser under certain circumstances has to restore the fruits gathered between the first and second addiction to him, and the translator in a note says, "the addiction or assignment is equivalent to an auctioneer knocking down an article to the highest bidder." That is, in a case where a thing has been sold subject to *addictio in diem,* and within the period a better offer has been made, and the original purchaser having now offered as much; the addictio or assignment to him is not the first *addictio* when it was knocked down but the second *addictio* or assignment when he made the second offer, and as a consequence he has to restore the fruits gathered between the two addictions. *Addictio in diem* does not arise in the present case, as the auctioneer denies that there was a sale, and therefore no condition could have been attached thereto by him. As a fact there was no adjournment of the sale to any period certain or uncertain but a withdrawal of the property from sale.

Maasdorp (Institutes, Vol. III) on p. 141 says that a sale at auction is not concluded until the article has been knocked down. He refers to *Voet* (18.6.7). In this section *Voet* is discussing to whom the *risk* belongs when things sold by auction perish during the auction. The addiction is there said to be the "formal confirmation of the sale to the purchaser." He adds "For as a sale by auction cannot be considered perfected before the instrument

of addicton has been signed, since it is only from that time that a purchaser is no longer liable to be outbid and makes the fruits of the thing his own, it follows that not till then does the risk pass to him." It is to be noted that he here speaks of the sale being perfected, that is, the purchaser obtaining the *dominium* or *jus in rem* by the addiction or formal confirmation and not the agreement to sell. This is clear from the translator's reference to *Matthaeus, De Auctionibus* (1.13.20) where he says: "The question propounded and answered to the above effect by *Matthaeus* is, 'whether the risk pertains to the purchaser from the time of his having finally outbid the other bidders or from the time of the judicial decree (confirming the sale), or from the time of actual corporeal delivery of the property and the purchaser being put in possession of it.' In respect to immovables he gives the rule and reason stated above and adds that, with respect to movables, there is scarcely room for any doubt, as the purchaser removes them, almost at the moment he becomes the successful bidder." The addiction is therefore not to be limited to the knock of the hammer but includes the instrument of addiction, that is, the conveyance or transport to the purchaser.

The law is that a sale is complete as soon as the parties have agreed on the commodity and the price (although the price has not yet been paid nor any earnest money given), and it cannot then be receded from (*Voet* 18. 1. 24). A foot-note to this section points out that until the price is paid and possession delivered there is only acquired an obligation or *jus in personam* and not *dominium* or *jus in rem.*

Now a consensual obligation (such as purchase) is defined by *Van Leeuwen* (Commentaries, Vol. II, p. 129) as that which takes place by agreement between two persons in good faith and with the sincere intention that the one shall thereby effectually bind the other without any writing or delivery of the thing being necessary for the purpose. *Burge* (Vol. II, 1st Ed.) on *Colonial and Foreign Laws* (p. 576) says when the auction is at the instance and by the voluntary act of the vendor, the sale is complete when the power of advancing on a bidding no longer exists. There is no reference to the acceptance of the bid by the use of the hammer or otherwise, and in the present case it is clear that the power of advancing on the bid no longer existed. This was brought about by the action of the auctioneer who did not adjourn the sale but withdrew the property from sale.

The learned Chief Justice has found that the appellant was ready and willing to perform the conditions of the sale but was unable to do so by the withdrawal of the property. Now a sale at auction without reserve indicates on the part of an auctioneer

an offer or agreement or consent on the part of the auctioneer to sell to the highest bidder, provided he is prepared (as found to be the case with the present appellant) to carry out the conditions attached to such sale. In the opinion of *Matthaeus* (1. 10. 48) whosoever advertises an auction sale tacitly promises that, whosoever wins in the bidding, the property shall be knocked down or conveyed (*addictum*) to the winner, for (he says) that is the substance of an auction sale.

The same learned author says in Bk. 1, Ch. 4 "*Hoc autem preconis munus nostris moribus publice locatur, addiciturque ei qui vicerit licitatione,*" that is "it is the office of the auctioneer to lease (or sell) publicly and to knock down to him who beats in the bidding" but I can find nothing to warrant the suggestion that the knocking down is a necessary act to conclude the agreement. To hold that it is, renders nugatory the very essence of a sale *without reserve*, as it would be open to an auctioneer at any time to render abortive such a sale by merely refraining from the use of the hammer and declining to accept the highest bid. He would, in effect, place himself in as good a position as if he had originally stated that there was a reserve price.

Further, it is clear on all the authorities that a bidder is bound by his bid. To refer to *Matthaeus* again. He says that 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 every one is bound to stand by the bid he has made (1.10.43). In section 48 he proceeds to deal with the vendor. He discusses the question whether, after bids have been made but before addiction, the seller or owner can withdraw. He finds it unreasonable that the bidder should be bound while the seller on the other hand is not, and he gives as his reason that the contract of sale is bilateral and begets an obligation on either side.

There remains to be considered the various grounds urged in behalf of the respondent company in the event of this Court being against them on the point of law raised by the appeal.

At the time of the sale the appellant claimed that he had bought the property. Apart from anything else this negatives acquiescence and warrants the finding of the Chief Justice that there was no acquiescence on his part in the withdrawal of the property.

It is argued that the auctioneer believed he had a right to withdraw and that therefore equity will not order specific performance where there has been an error of law. This defence should have been specially pleaded, but apart from this what are the facts? On the company going into liquidation Cannon was appointed liquidator at the request of the creditors. He subsequently applied for leave not only to sell at public auction

but to sell and transport to the purchaser, the property of the company. Under the *Companies* (*Consolidation*) *Ordinance, 1913* (s. 145) the liquidator has power to sell such property without reference to the Court either by public auction or private contract. It may be that the liquidator thought it advisable to apply to the court for leave in view of s. 157 which reads, *subject to the provisions of s. 145,* the liquidator shall have power with the sanction of the Court to do the following things . . . (3) to sell the movable and immovable property. . . by public auction or private contract. On January 27th, 1914, as liquidator of the respondent company Cannon had contracted with James Slater as agent of the Bel Air Park Club, Limited, (a company intended to be registered) for the sale of the property to him for fifty thousand dollars, to be paid,—as to fifteen thousand dollars in A shares fully paid in the new company, and the balance in cash or B shares at the option of the liquidator. This company has never been registered, and there is no satisfactory explanation as to why an agreement so beneficial to all the creditors was not carried into effect or why the court was not informed that there was such an agreement when the liquidator applied for leave to sell at public auction and to transport to the purchaser. As a licensed auctioneer the liquidator obtained leave to conduct the auction sale free of charge, in order to save the usual expenses in connection therewith, for the benefit of the creditors of whom he was the largest unsecured creditor. He says that he had arranged with Slater 'to protect the Club to the extent of his agreement,' that was that $5 should be bid over any reasonable offer. Slater says that the idea was that no one else should get the property, "nobody but Bel Air Club," and that he only acted at the request of Cannon and did not know of any liability on his part.

On January 27th therefore we have Cannon as liquidator entering into an agreement with Slater to sell to him the property of the respondent company for fifty thousand dollars, and on December 4th we have Cannon (liquidator and auctioneer) requesting Slater to augment any reasonable bid by five dollars. On this evidence I do not believe that either Cannon or Slater regarded the agreement of January 27th as in force on December 4th.

The evidence of Bollers (p. 19 and 21) as the secretary of the British Guiana Mutual Fire Insurance Company, Limited, is that this company had a mortgage of twenty thousand dollars on the property of the defendant company—ten thousand of which was guaranteed by ten guarantors, and that he was instructed by his directors to bid it up to fifteen thousand dollars in order to protect their mortgage. In answer to Cannon as to his directors' instruction on the day of sale, Bollers said "to bid up to fifteen

thousand dollars." Cannon then asked "Why not ten thousand, you have guarantors?" He replied that his directors did not consider all the guarantors good, but that five thousand was good so he was to bid up to fifteen thousand. Bollers continues: "Cannon beckoned to Slater and said to him, "Bollers says he has instructions to bid up to fifteen thousand dollars (I had told Slater so), you bid another five dollars and I'll knock it down to you." This is denied by Cannon, but the evidence of Slater on page 26 confirms the statement of Bollers, for Slater says that when fifteen thousand was bid by Brassington he bid fifteen thousand and five by nodding his head to the auctioneer. Cannon says this bid was made by Wight, but Wight says "Five dollars advance was announced by auctioneer." In any case the instructions to Slater as overheard by Bollers coincide exactly with what actually took place and explain the conduct of Slater, who made no further bid but allowed the property to be withdrawn when the bidding had reached sixteen thousand and five dollars. It is difficult to account for his conduct apart from Bollers' evidence. Cannon (auctioneer) also says that if he had heard appellant claim to have bought the place he would have gone on with the sale. The conduct of the liquidator throughout thus lends itself to the suggestion that the withdrawal was due to some ulterior motive and not to a belief that he could legally withdraw the property from sale. Equity (as said by *Innes,* C.J. in *Kent* v. *Transvaalsche Bank,* 1907 T.S. p. 774) can only be administered in accordance with the principles of Roman-Dutch law, and if it cannot be done in accordance with those principles it cannot be administered at all.

As to *laesio enormis,* regard is to be had to what would have been the just price at the time of the sale in the place where it was made and not to the value of the commodity at the time of the action, (*Voet* 18. 5. 7) and lower down in same section he quotes *Seneca*: "The value of anything is what it is worth at the time (that is, what it will fetch)."

The Official Receiver (p. 23) says that the liquidator fixed twenty five thousand dollars as the value, that at first he was inclined to state fifty-one thousand dollars, what the property had cost, but it was pointed out to him that the value required by the law was what it was estimated to produce—he then put it down at twenty-five thousand dollars, stating also the cost. Murray on page 16 value it at twenty-four thousand dollars. Cannon (liquidator) p. 36 says a reasonable offer would have been thirty or forty thousand dollars, while Greenidge (p. 51) values it at twenty-seven thousand five hundred dollars. The value at the time of the auction sale would seem to have been twenty-five thousand

dollars as valued by the liquidator to the Official Receiver, but even if the property could be valued at thirty thousand dollars or twenty-seven thousand five hundred dollars the doctrine of *laesio enormis* does not apply as sixteen thousand and five dollars is more than half of either of these valuations.

It is argued that the liquidator could not complete the sale without the sanction of the Court, but he has already obtained leave not only to sell but to transport the property, and therefore if he regarded such leave as necessary he had already obtained it.

As to abrogation of the law by local custom and practice, *Van der Linden* (1. 1. 7) says that such custom must rest upon sound reason; otherwise it is properly regarded as bad, and so far from having the authority of law it should be abolished. Further it must be satisfactorily proved, *e.g.*, by a great number of witnesses, by an unbroken chain of decisions founded upon this custom. This expression of opinion by *Van der Linden* was referred to by *De Villiers*, C.J., in *Seaville* v. *Colley* (9 S.C. at p. 43) and this learned judge later on says: "The best proof of such usage is furnished by unoverruled judicial decisions. In the absence of such decisions the Court may take judicial notice of any general custom which is not only well established but reasonable in itself. Any Dutch law which is inconsistent with such well established and reasonable custom, and has not, although relating to matters of frequent occurrence, been distinctly recognised and acted upon by the Supreme Court may fairly be held to have been abrogated by disuse." Although the appellant denies it, the evidence shows that both he and Cannon—who are rival auctioneers—have on occasions withdrawn properties from sale when the highest bid did not satisfy them, but Bollers (p. 21) says that he told Wight (appellant) frequently that he ran a risk and that Wight said that he knew what he was doing. Neither this statement nor that of Cannon (already referred to) that if he had heard appellant claim to have bought the place he would have gone on with the sale, tend to show that the custom was well established. There is also some evidence that other auctioneers had been known to adopt the same course.

There is no judicial decision to support such custom or usage, nor on the evidence adduced can it be said that such custom has been well established. Further a custom which would abrogate the common law of the Colony by placing one of two parties to an agreement in a better position than the other contracting party, does not seem to me to rest upon sound reason.

In my opinion the appeal must be allowed and specific performance ordered in the terms of appellant's claim with costs of the court below and of this court.

HILL, J.: In this appeal from the decision of the Chief Justice dismissing an action brought by the plaintiff (appellant) for specific performance of a contract of sale of certain property at Pln. Belair, the question at issue, primarily, resolves itself into an enquiry whether the "knock of the hammer" at an *audio privata publice facta* and under the conditions pertaining to this sale is a condition precedent to the completion or perfection of the sale? Up to that point, I am in entire agreement with the Chief Justice in his findings of fact, and also on the law, in this case, as set out in paragraph 18 of his decision, and I now proceed to consider the question above.

An *auctio* is a sale after public announcement of the place, date, and things to be sold, open to the public, and at which the property is assigned by the *preco* (public crier or auctioneer) to the highest bidder, *Voet* (18.3.23—*Berwick*—note); *Matthaeus* (1.2.5 *et seq.* and chap. 3. note 2). The conditions of sale read at the auction must, *prima facie,* be deemed to contain the terms of the contract between the parties.

The law governing auction sales of immovable property in this colony is the Roman-Dutch law. Many English decisions have been quoted to us, but the courts of this colony only recognise such under circumstances which it may be desirable again to set forth. Where the English law has been expressly introduced as, *e.g.*, with respect to Bills of Exchange, Promissory Notes, and Sale of Goods, the English decisions are regarded in our courts as of direct authority. Where our law is the same as, or similar to, that of England, although not expressly derived from it, the English decisions will be received as of authority, but our courts would not be necessarily bound to follow them if good reason were shown to the contrary,—which would rarely happen. As to those parts of our law which are purely local the English decisions are not of authority, but they are resorted to whenever desirable by way of analogy.

A question similar to that which the court is now asked to decide was raised in the case of *De Smidt* v. *Steytler* (1 Searle 136), and an interdict was granted on an application to restrain the transfer of the property to some one other than the highest bidder pending an issue to be tried. The argument went to this, that there was acceptance of the highest bid because the auctioneer repeated the bid. Viewed from that standpoint, the auctioneer, in the present case, apparently did the same (*vide* Murray's evidence). The point was never settled as the case went no further. In the local case of *McGowan & Co.* v. *Gomas* (1892, L.R., B.G. 171.) the question arose on highest tender. McGowan & Co. advertised for tenders for the stock of a dry goods store, offering to receive the same up to noon of February 29th,

1892, add stating "highest tender gets it." Gomas was the only tenderer and McGowan & Co. refused to sell at the price tendered. The Court held Gomas was entitled to succeed. It said: "What the advertisement really "amounts to is an offer to sell the stock, if the offer should not be retracted "before noon on 29th February, at the highest price that shall then have "been tendered. Gomas accepted this offer by his tender so far as it was in "his power to do so . . . but the offer of McGowan & Co. and the accep- "tance by Gomas constituted a contract between those parties, which would "no doubt have been defeated if another person before noon on 29th Febru- "ary had offered a higher price. . . . As the matter now stands Gomas ac- "cepted absolutely, and at noon on 29th February, in terms of the adver- "tisement, he was bound. It could never be that the acceptor of the offer "was bound and the offeror was not bound. It was doubtless a risky "method, for the seller, of offering the goods for sale, but the contract hav- "ing been made must stand."

We have, therefore, the expressed opinion of who is the offeror and who the acceptor, and the effect of an acceptance on the acceptor, and its corresponding effect on the offeror, and on this point we have the authority *of Nathan* (Vol. II, p. 718) who after quoting from *Voet* as to the ancillary contract, *addictio in diem,* says, "this species of sale is well illustrated by "the cases of sales at auction to the highest bidder, or sales by tender to the "person making the highest tender. In such a case the first bidder (assume- "ing that the sale, in the instance under consideration, is unconditional and "without reserve) will become the absolute owner of the thing sold if no "better offer is made within the time fixed—by auction or tender."

I think "most favourable" bidder or tenderer to be the better term to be used inasmuch as it is evident that it is possible for a lower tender or bidder to be preferred to a higher (see paragraph 10 of the decision of the Chief Justice); but the question still remains, is the offeror not bound to accept or "declare victorious" that bid or tender which he is obliged to consider the most favourable, if the acceptor, *i.e.,* the bidder or tenderer, be bound?

The essential elements in this consensual contract are consent, a merchantable article, and price. The second named is present—the price—$16,005 is fixed. Was there consent? Were the minds of offeror and acceptor *ad idem* to create a binding contract?

The intention of parties is a fact, says *Pollock,* (*Principles of Contract* 8th Ed. p. 5.) or an inference of fact, which has to be proved according to the general rules of evidence. "True intent" means such an intent as a court of justice

can take notice of. "If A., being a capable person, so bears himself towards B, that a reasonable man in B.'s place would naturally understand A. to make a promise, and B. does take A.'s word or conduct as a promise, no further question can be made about what was passing in A.'s mind." "Mental acts or acts of the will are not the materials out of which promises are made." Under such circumstances the law does not allow a party to show that his intention was not in truth such as he made or suffered it to appear.

Cannon offered the property for sale, without specifying that that it was subject to a reserve price, or that it was to be to the highest bidder, and under certain conditions as to the method of payment of the purchase price. The effect of this was that he offered the property to the highest bidder. Such is the finding of the Chief Justice, and with that finding I agree.

In England, in auction sales, it has been held there is a *locus poenitentiae* (*Payne,* v. *Cave* 3. T. R. 148). In *Warlow* v. *Harrison* (1. El. and E. 295) the court, on appeal, held that "an auctioneer, who puts up a property "for sale upon such a condition (without reserve) pledges himself that the "sale shall be without reserve, or in other words, contracts that it shall be "so,—and this contract is made with the highest *bona fide* bidder and, in "case of breach of it, he has a right of action against the auctioneer. The "highest *bona fide* bidder at an auction may sue the auctioneer as upon a "contract that the sale shall be without reserve." *Pollock* (8. Edit. p. 18) says that in *Johnston* v. *Boyes* (1899) 2 Ch. 73, *Cozens Hardy,* J., now Master of the Rolls, was prepared to hold on the authority of *Warlow* v. *Harrison* that there is a contract by the vendor with the highest bidder that he shall be the purchaser distinct from the contract of sale. He also says that in *Warlow* v. *Harrison* the majority of the court held "in effect (con- "trary to the general rule as to sales by auction) that where the sale is with- "out reserve the contract is completed not by the acceptance of the bidding, "but by the bid itself, subject to the condition that no higher *bona fide* bid- "der appears. In other words, every bid is in such a case not a mere pro- "posal, but a conditional acceptance."

In our law there is no *jus poenitendi* recognised; in case of an inchoate agreement, a mere *pollicitatio,* not accepted by the person to whom it was made, there would no doubt be this right to withdraw. (*Hossack* v. *Lippert,* 3 S.C. 272). In that case, *De Villiers,* C.J., says: "In the same way it has "been decided in England that a person who makes a bid at a public auction "may withdraw at any time before the hammer falls. Until the auctioneer "has accepted the offer, there is only an inchoate agreement, and the bidder "may withdraw. This in my opinion does not apply

"to a sale at public auction, *volunte suo,* under Roman Dutch law, and un-
"der the circumstances of the sale under review."

Matthaeus, the recognised authority on Auctions, in reply to the query, can a bidder recall his bid, if he changes his mind? says he cannot, not because he is precluded from repentance because the sale is complete with his bidding (agreeing with the opinion in *Warlow* v. *Harrison*) but, he goes further, "because it is the essence of an auction sale that everyone is bound "to stand by the bid he has made," and he answers the query whether a vendor can withdraw after bids have been made but before conveyance in the same way. *Bartolus* and *Damhouderius* having said that he can provided he has not added to the advertisement the words "*et plus offerenti dabitur,*" and expressed the opinion that if these words are omitted it is understood that the seller wishes to elicit a price only, and not to sell (and here we have the idea of an inchoate agreement as expressed by *Voet* 18. 1. 2 and *Nathan* Vol. II, p. 697), *Matthaeus* dissents from the rule and the exception. He dissents from the rule because it is unreasonable that a 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. He dissents 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 (*Matthaeus* 1. 10. 48). But there can be a reserve price (1. 10. 48).

When then is a sale at auction complete? The word complete, does not find favour with all, as expressing the effect of the transaction. Under the *jus gentium,* we are told, the contract of sale was attended with none of those material symbols which characterised the foundation of contracts under the Civil Law. Directly one person agreed to sell a particular thing and another to buy it, for a fixed sum of money, the contract was complete, nothing need be delivered, no money paid, in that an obligation should arise. On the mutual consent being given, the seller was bound to deliver, the buyer to pay the price. *Justinian* laid it down that when in giving the mutual consent, they agree that the terms of the contract shall be reduced into writing they shall be considered not to have consented to the contract until all the formalities have been gone through. Until then the agreement is inchoate. In Roman-Dutch law a contract of sale may be complete although no delivery has taken place. Delivery (which in case of land is transfer) passes the *dominium,* but the contract as such may be complete for certain purposes although no *dominium* has passed.

Van Leeuwen (Commentaries, Vol, II) at p. 137 says "Although

"in purchase and sale a note or writing frequently exists, yet the same is not "necessary (as has been already observed of other transactions in general) "unless it has been clearly stipulated. But this must be understood of im- "movable property only, for by *Placaat of Emperor Charles of 1529* it has "been introduced that no sale or alienation of immovable property shall "exist, until the same has been lawfully conveyed before the magistrate of "the place where the property is situated." Then dealing with the risks and benefits attaching before legal conveyance he continues, "it has been held "that the placaat refers to third persons, and not in respect of the transactors "themselves," and at p. 138, sec. 9 he states, "for which reason we must "hold that although the sale of immovable property is considered not con- "summated before and until legal conveyance has followed, yet the vendor "or purchaser cannot retract from the sale within that time, but be legally "compelled by virtue of his contract the one to give transfer, the other to "receive the same."

At p. 130 *Van Leeuwen* is speaking of the time when the sale is completed, and the note to this says, "Better if. . .the sale is considered to be "*perfected* instead of completed; since there is a difference between 'per- "fection' and 'consummation'; the sale is perfected as soon as the thing and "price have been agreed upon, *haec est perfectio emptionis vienditionis ex* "*qua obligatio naseitur*, and the seller acquires by the sale an action for "payment of the purchase money, just as the purchaser acquires by the pur- "chase the action for the delivery of the thing." And *Berwick* in a note to his translation of *Voet* (18.1.14) says, "the Civil law distinguishes between "the 'completion' of the mere contract of sale (which is effected by consent "alone and agreement of parties as to the commodity and price), and its "'consummation' or 'implement' which is effected by delivery of the *res* "and payment of the price, which is *the finis extremus* of the contracting "parties." *Voet* (18.1.24) says "the sale is complete as soon as the parties "have agreed on the commodity and the price (although the price has not "yet been paid nor any earnest money given), and it cannot then be receded "from unless (as already said), it has been provided that the purchase "should be made in writing or something else is necessary by a special pact "under which there still remains something to be done." See also the re- marks of *Maasdorp* at p. 189. Ownership does not pass until possession is delivered Until this is done a *jus in personam* is acquired but not *dominium* or *jus in rem. Burge* (Vol 2, 1st Ed. p. 536) says "a sale made *sub hasta*, "*i.e., ex decreto judicis* (p. 575) is not perfect until the *tabulae addictionis* "are signed, as there can after that time be no higher bidder, and as he then "becomes entitled to the fruits, he

"becomes liable to 'risk'"; and at p. 576, "a sale, *sponte suo* (or *privata* "*publice facta*) is complete when the power of advancing no longer exists." (See also *Matt.* 3.10.40 "A voluntary sale at auction is deemed complete "when the opportunity of bidding higher is broken off"). *Burge* continues: "In sales by private contract property may be sold subject to a condition "that if another person within a given time makes a better offer, it shall be "sold to the latter. This *condictio* is called the *addictio in diem.* The sale "however is deemed perfect notwithstanding it takes place under this con- "dition. The condition does not suspend, but, if it takes effect, resolves a "sale previously made. If, however, the sale be *ex decreto* neither the ven- "dor can demand the price nor the purchaser the property until the addic- "tion or act of adjudication has taken place."

But in the present case, it appears to me that any argument based on *addictio in diem* is not applicable. This sale was an unconditional offer to sell at a certain hour on a certain day without mentioning any reserve. It was subject to the ordinary increase of biddings as at any auction sale, and when the opportunity of further increase ceased it became the duty of the auctioneer to accept, or I prefer to say, to declare that the highest, or more favourable, bidder had obtained the property, or as the learned Chief Justice says, was "victorious."

It is possible that, if the auctioneer was dissatisfied with the price offered he might then have attached the ancillary pact of *addictio in diem* for the purpose of attempting to obtain a higher bid, and that this would seem to be so appears in *Matthaeus* (1. 13. 20) where, dealing with the liability for risk attaching in case of deferred sale he writes, "*Cum postremus licita-* "*tor nec dum satis pretii videretur obtulisse, dilata est auctio in diem, se-* "*quentem; ea nocte tempestas corrupit segetem; an cogi potest postremus* "*ille licitator, ut fundum pretio a se pridie indicato emtum habeat?*"

In no way, he says, for the sale is not completed because the terms did not satisfy the auctioneer.

But it will be seen, there is no suggestion of withdrawal, but a postponement.

Nathan's remarks at p. 720 and 721, (quoted by the Chief Justice in para. 10 of his decision) must be read in conjunction with the note at the end of the section (860) in which he sums up the matter thus, "All the fore- "going distinctions will be perfectly clear if one bears in mind the two main "rules, (*a*) if a second or later buyer offers better terms, the vender may sell "outright either to him or to the first bidder, (*b*) if the second or later bidder "does not offer better terms, the vendor is bound to sell to the first buyer." And *Colquhoun* (p. 11) does not carry the

matter any further, for he merely says the same as *Nathan, i.e.*, it is optional to the vendor to accept the better offeror, but he does not say that he need not accept any offer. The quotation as from *Colquhoun* (p. 11): "All "sales may be retracted before acceptance and possession taken, and the "price is that of the moment of acceptance" occur on p. 16 and are applicable to Mussulman Law, the differences in the general principles of which in bargain and sale, and those of Roman Law, are being pointed out by *Colquhoun.*

Maasdorp (Vol. III, p. 141) states definitely "in the case of a sale at "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." The references he gives to support this opinion do not appear to bear him out, but here again there is no definite statement that the knock of the hammer is necessary to signify acceptance of any offer, and the obligation on the auctioneer to knock the hammer down is not dealt with.

The conclusion I have formed is that, in this colony, when an auctioneer advertises, *volunte suo*, a property for sale, on a certain day, and at a certain hour, without reservation of price, that the sale having commenced, he is bound to, at some time, knock down the property to the highest, or most favourable, bidder. He may postpone the sale (*addictio in diem*) if the price offered by the acceptor of his offer is not sufficient in his opinion, but he cannot withdraw the sale, and in the event of his obtaining no further offer, or more favourable offer, he is bound to knock down the property to the then highest, or more favourable, bidder. The insertion of the words "10% to be paid on the knock of the hammer" does not, in my opinion, confer a discretionary power on an auctioneer to perform, or to withhold, the act of knocking down, in these circumstances, and cannot be considered to take a sale at auction, under these conditions out of the bilateral contract of an offer by the seller, and an acceptance by the bidder, *i.e.,* to have the effect of leaving a bidder bound absolutely by his bid, while the other party had a *locus poenitentiae,* and in this case, it has been well found by the Chief Justice that appellant was ready and willing to conform with the conditions of sale. Why have a reserve announced at all, if an auctioneer can, at any time, after a sale has commenced, withdraw?

In point of fact, the difference between the English and Roman Dutch law resolves itself into this, that under the former there is always a *locus poenitentiae* for bidder and seller, if *Payne* v. *Cave* (*supra*) is good law, *i.e.*, until acceptance of a bid by the auctioneer, the agreement is inchoate, while under the latter, in

a sale *volunte suo,* without reserve, there is no *locus poenitentiae, i.e.,* it is more than a promise to sell, or to enter into a contract (*Voet* 18.1.12) (*Nathan* Vol. II, p. 697) it is an unconditional offer on the part of the seller to sell to the highest bidder, an offer accepted when the highest bid or most favourable bid is made, and the opportunity no longer exists for further bidding. As said by *Lord de Villiers,* in *Municipality* of *Willowmore* v. *Matthews* 8 S.C. 20: "As to the question whether an action would not be "for the refusal to take a bid, there is no proof that the sale was without "reserve, and all the authorities seem to point to this, as a necessary ele- "ment before damages can, if at all, be recovered."

Such being what I conceive to be the law, the purchaser may, without doubt, sue for specific performance, as he has done in this case, and the defendant has pleaded custom as regards the withdrawal of the property from sale, *laesio enormis,* and acquiescence in the withdrawal by the purchaser. The last named submission may be disposed of at once, as I am satisfied that he never did acquiesce.

Laesio enormis can still be pleaded, in this colony, in cases of sales of immovable property, although no longer the law with regard to movables. The proof of *laesio enormis,* or excessive disproportion in price rests on the party pleading it, since it is a question of fact, and *laesio* is never presumed in bilateral contracts. The standard of price is the fair price at the time of the sale, at the place where the contract was made; whether the price is fair or unfair must be determined according to the quality of the property and the amount of profits obtained from it, but not according to any peculiar affection by which a person may be drawn towards the thing in question.

It is open to question in a sale under all the conditions pertaining to this one, from its inception and all the attendant circumstances, whether *laesio enormis* could be pleaded. *Nathan* (Vol. II, p. 778) expresses the opinion that it cannot, where it is shewn the seller knew of the fair market price current at the time, and nevertheless sold the thing below half its value,—in other words, acted with his eyes open. In the view I have taken, a reservation announced as to the price would have obviated any difficulties, but in its absence the auctioneer was bound to sell, and may well be taken to have acted with his eyes open. I proceed, however, to consider the plea on its merits.

In a note to *Voet* (18.1.22) *Berwick* says: *Justum pretium* is stated by *Warnkoenig* and *Heineccius* to mean a price which is not less than half the true value, *i.e.,* which does not cause enormous lesion, but it is explained that a sale for less is not invalid, but renders it liable to rescission. *Burge* sums up, "the price cannot be said to be real or serious when it

"bears no proportion to the value of the property sold. It is, however, "wholly distinct from that inadequacy of price which may constitute a "ground for rescinding the sale. It applies to a price so wholly dispropor- "tionate to the value of the property that it could never be a consideration "for the alienation." It is in that sense that *justum pretium* is used in the text of *Voet.*

The "fair" or "just" price, in my opinion, on which the Court can estimate is the price of the land *plus* the buildings for removal. This from the evidence appears to be something like $29,000 to $30,000 and the offer of $16,005 was not a price "so wholly disproportionate to the value of the "property that it could never be a consideration for the alienation." Cannon himself says $30,000 to $40,000 would have been a reasonable offer.

Voet says an enormous disproportion in price implies fraud, and as we know, the plea is available to a purchaser, as well as a vendor. The purchaser in this instance has sworn, and is corroborated that he was prepared to go to $24,000 for the property, and when, as appears by the evidence, we have the fact that Slater, who had entered into a contract with Cannon, the liquidator and auctioneer, to purchase for "$50,000" *inter alia,* a contract still subsisting, says Cannon (although concealed by him from the Court and from the Official Receiver), but under which Slater seems to have had but a hazy idea of his responsibilities, when we have the fact that Slater was present at the sale and refrained from bidding more than $15,005, the inference to be drawn is strongly against their version of the transaction. Rather the trend of events on the day of sale points to Bollers' account of the conversation between Slater and Cannon being the correct one, and that Cannon, never intended, as Murray swears he told him he never intended, to have a sale at all, except on terms suitable to his views. The purpose for which the agreement was made with Slater had fallen through when the new company was not floated, and Wight clearly believed it had ceased to exist.

While on the facts I am of opinion the plea of *laesio enormis* cannot avail, I express the opinion that, under all the circumstances as disclosed, it is doubtful whether the Court would have countenanced such a plea.

A ground for *restitutio in integrum* says *Maasdorp* (Vol. III, p. 61) is error, which is either error of fact or error of law. An error is one of fact whenever either an actual fact is not known to be a fact, or what is not really a fact is supposed to be a fact. An error is one of law whenever a person knows the facts of the case, but is ignorant as to what his rights are under the circumstances. Relief will only be granted on the ground of an error of fact, and not also on the ground of a mistake as to the law

applicable to the known facts. It is not, however, every error of fact which will entitle a person to relief, the error must be reasonable (*Justus error*) and not due to reckless carelessness. This defence of *Justus error* was not pleaded, but may be considered to have arisen under the fifth paragraph of the defence. In *Heath* v. *Colonial Government* (5 S.C. 353) and *Logan* v. *Beit* (7 S.C. 197) it was held that for such a plea to avail, it must be reasonable and justifiable, and when the person pleading it has not fallen into the error through negligence.

This defence, says *Maasdorp* (Vol. III, p. 131) should not easily be allowed; there must be a clear and definite proof of a mistake which amounts to a *justus error, i.e.,* a reasonable and justifiable mistake, for where the mistake has been accompanied with gross negligence, the Court would have some difficulty in finding there was any mistake at all. Ignorance of one's right, if it be a just and probable ignorance, is in Roman Dutch law a good ground for relief or *restitutio in integrum* but that is quite a different thing to saying that Cannon, the liquidator and largest unsecured creditor, should not have known, as an auctioneer, the law governing auction sales. Cannon in fact says that if he had heard Wight say "I have bought the place," he would have gone on with the sale. Wight, who is also an auctioneer, apparently knew (*vide* his conversations with Bollers on the subject). I am of opinion Cannon has failed to show a good cause for relief on this ground.

The remaining plea is par. 5 of the defence, that there exists a custom sanctioning withdrawals. For such a plea to succeed, the proof of an abrogation of the law by long usage must be clear and explicit. There is no doubt withdrawals of properties from sale, where a reserve has not been announced, and bidding has commenced, have not been infrequent in the past. Bollers says he has known such to have been done by the appellant himself, that he has frequently told Wight he ran a risk and Wight said he knew what he was doing. This contradicts Wight's evidence as to never withdrawing, and I have no doubt is correct. Peppiette's evidence is negatived by his cross-examination in which he admits "reserve might have been mentioned." And one is irresistably compelled to ask why should an auction sale ever be announced as subject to a reserve, if the auctioneer has, by custom, acquired a right to withdraw? Relief on this ground must be refused.

The appeal is allowed, and the decision reversed, and an order in terms of the relief asked for in the statement of claim will issue, with costs here and in the Court below.

[NOTE.—Conditional leave to appeal to the Privy Council was granted by the Court on May 16th, 1916. See below, page 68.—ED.]

SINGER SEWING MACHINE CO. *v.* FARINHA.

PETTY DEBT COURT, GEORGETOWN.

SINGER SEWING MACHINE COMPANY *v.* FARINHA.

[150. 1. 1916.]

1916. JANUARY, 25. FEBRUARY 1. BEFORE HILL, J.

Detinue—Sale of goods, agreement for—Possession of goods under agreement with option to buy—Hire and purchase agreement—Pledge of goods by person having option to purchase—Right of pledgee as against owner.

A. acquired possession of a sewing machine from the S. S. M. Co. under a hire-purchase agreement. The machine was to remain the property of the S. S. M. Co. until the last instalment of the purchase price was paid. Before completing the purchase by the payment of the last instalment A. pledged the machine with F.; on an action by the S. S. M. Co. against F., for the return of the machine or its value,

Held that an action will lie against F.

Claim by the Singer Sewing Machine Co., carrying on business at 17, Water Street, Georgetown, against M. F. Farinha, for the delivery of three sewing machines, the property of plaintiffs, or their value, wrongfully and unlawfully detained by the defendant.

It was admitted by defendant that the machines had been pledged with him by three persons who had acquired the machines from the plaintiff company under a hire-purchase agreement.

W. I. Sousa, solicitor, for plaintiff company.

M. J. C. de Freitas, for defendant.

HILL, J.: The plaintiff company claims from defendant the return of three sewing machines of the respective values of $21, $21 and $18 detained by him, after demand. There is a further claim for damages, $10.

By consent, the admitted facts are that three persons who acquired the sewing machines, on the hire-purchase system, gave them to the defendant as security. He, seeing that the company was instituting proceedings against a large number of hirers in arrear, gave the company the information that he had three machines as security. He maintains the company cannot take action against him to deliver them up.

On this point of law, I am of opinion he is wrong, and an action will lie against him.

The cases having reference to this are *Fenn* v. *Bittlestone 7* Ex. 152, *Bryant* v. *Wardell* 2 Ex. 479, *Cooper* v. *Willomatt* 1 C.B. 672, *Loeschman* v. *Machin* 2 Stark, 311, *Singer Sewing Machine Company* v. *Clark* 5, L.R. Ex. Div. 37, and *Helby* v. *Matthews* (1895) A.C. 471.

Judgment for plaintiffs for the delivery of the three machines, or the payment of the admitted values, with costs; fee $6. No damages.

FERNANDES *v.* SARABJIT PERSAUD.

PETTY DEBT COURT, GEORGETOWN.

FERNANDES *v.* SARABJIT PERSAUD.

[84. 12. 1915.]

1915. DECEMBER 29. 1916. FEBRUARY 1. BEFORE HILL, J.

Landlord and tenant—House owned by tenant on hired land—Sale of house for rates—Claim by landlord on purchaser of house for rent—Small Tenements and Rent Recovery Ordinance 1903.

Claim by the plaintiff, who had purchased at a judicial sale a house on the land of defendant (which house had a second time been sold for rates) against defendant for moneys the latter had uplifted from the Magistrate's Office, Georgetown, as rent due to him (the defendant) from plaintiff's predecessor in title.

The further necessary facts appear from the judgment.

M. J. C. de Freitas, for the plaintiff.

P. N. Browne, for the defendant.

HILL, J.: The plaintiff claims $15.15, for moneys had and received by the defendant to and for the use of the plaintiff at Georgetown, and the particulars show that that amount was received from the Magistrate's Office, Georgetown.

The circumstances are that the defendant owns certain land at Plaisance which is leased to the owner of a house thereon. That individual was levied on for rates and his house was sold to the plaintiff. Defendant omitted to file his landlord's claim for rent due under the lease, and it is agreed that he was aware of plaintiff's purchase, and his agent and plaintiff spoke about the continuation of the lease. Plaintiff, however, found his purchase unremunerative, and allow the property to be sold for taxes. He had, however, not had any alteration made in the village books as to his ownership of the house, and the advertisement of sale appeared giving the former owner's name as the owner. Defendant, by his agent, promptly swore to a landlord's claim for three years rent, the tenancy being a yearly one, and drew the amount (subject of the present claim) from the Magistrate's Office. This was clearly in excess of anything he could claim, either under the Small Tenements and Rent Recovery Ordinance, or the Petty Debts Recovery Ordinance, 1893. Furthermore, he was fully aware that the ownership had passed into other hands. I do not agree with the submission that the owner of a house under these conditions is liable for back rent, nor do I think the plaint is improperly brought as it has been. There would seem to have been mistakes both of fact and law;

but I think the plaintiff is liable for the rent from the time he took over—in May—and there will thus be judgment for $11.95, and costs.

PETTY DEBT COURT, GEORGETOWN.

SINGER SEWING MACHINE COMPANY *v.* DE FREITAS.

[251. 12. 1915.]

1916. JANUARY 18. FEBRUARY 1. BEFORE HILL, J.

Detinue—Hire and purchase agreement—Contract—Legality of contract with infant—Proof of benefit to infant—Novation.

Claim by the plaintiff company for the sum of $29 alleged to be owing by the defendant for the hire of a sewing machine for two years and six months at $1.50 per month, and for the return of the machine and accessories, or its value $21.

Under the provisions of sect. 12, Ordinance 11 of 1893 (Petty Debts Recovery) the defendant set up the special defence of benefit of infancy.

W. I. Souza, solicitor, for the plaintiff company.

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

HILL, J.: The defendant, at the time of purchase of the sewing machine on the hire system, and for which rent and return are now claimed, admittedly was a minor, and this was known to the canvasser who sold her the machine.

It is stated that this canvasser afterwards agreed with one Teixeira to take a certain amount in full settlement of the claim, but I am not satisfied that this is so. Even if the canvasser had made such an agreement with Teixeira on behalf of the defendant, I must hold that he had no authority to do so. The attorney of the company signed the contract with the defendant, whose brother signed for her with her knowledge and consent, and although the suspension of demands for the hire gives colour to the testimony of the defendant and Teixeira that the canvasser had told them the attorney had agreed to the novation, Mr. Lord, the attorney, when in the witness-box, was asked no questions as to this. The defendant has, therefore, not proved any agreement to cancel the original contract. The explanation of the cessation of demands by the company is that the defendant could not be found. The canvasser had no authority to fix, and could not alter, the price.

The other point taken for the defendant is that, as an infant, she

could not contract. *Grotius* says that all obligations incurred by minors are invalid, except in so far as they have been benefited. *Van Leeuwen* (*Commentaries*, Vol. I. *Kotze's* translation, p. 135) says: "Acts and obligations "entered into by the wards, without the guardian's knowledge, are not bind-"ing, but void to the extent to which they have been defrauded or preju-"diced thereby. But if the wards have profited by the transaction it will "hold good; so that they may stipulate and bind others, and indeed be them-"selves bound where it is for their benefit; but they cannot bind themselves "to their prejudice." *Maasdorp* in his *Institutes* (*Vol.* I. p. 243) says: "A "contract entered into by a minor without his father's consent will be *ipso* "*jure* null and void (*Bekker* v. *Van Heerden* 14 S.C. 398) and will not bind "either himself or his father, except in so far as either of them has been en-"riched thereby; and, if any payment has been made by the minor under "such contract, it may be recovered by the *condictio indebiti.*"

As stated in *Nel* v. *Divine Hall & Co.* 8 S.C. 16, the real test is whether the minor has benefited, that is, whether the contract was for her benefit. The proof of this lies on the person seeking to enforce it. The allegation that she is a dressmaker, and purchased the machine under a hire purchase contract, has not been proved to my satisfaction. The purchase might have, and indeed has, proved arduous. I cannot, therefore, find that the transaction was to her benefit and I must give judgment for the defendant, with costs, and fee $5.

PETTY DEBT COURT, GEORGETOWN.

LE MAY AND COMPANY *v.* CAREW.

[158. 1. 1916.]

1916. FEBRUARY 2, 15. BEFORE HILL, J.

Contract—Sale of goods—Goods, passing of property in—Bill of lading, goods deliverable to order—Right of re-sale—Damages—Sale of Goods Ordinance 1913, ss. 41 (1) c., 49 (4) and 51.

Le M. shipped goods to C. The bill of lading and draft attached were forwarded to the Colonial Bank, Georgetown, the goods being deliverable to the order of Le M. or assigns. C. did not accept the draft and the goods remained in bond, being eventually sold to defray expenses of storage;

Held, in an action by Le M. against C. for the balance of the value of the goods, that the property in the goods had not passed to C., and that C. was not liable under the contract of purchase and sale for the balance.

Claim by the plaintiff company, through their attorney residing in the colony, against the defendant for the sum of $15.15, being the balance of amount due for goods stated to have been

sold by the plaintiff company to the defendant at Georgetown in November, 1914. The account for the goods amounted to $56.22 but the company had received the sum of $41.07 from the colonial bond, as proceeds of the sale of the goods less expenses, and a balance of $15.15 remained due and payable.

Mc Lean Ogle, for the plaintiff company.

Mc Arthur, for the defendant.

HILL, J.: This is an action for balance for goods sold and delivered to defendant at defendant's request, and for moneys paid and advanced to and for defendant's use.

The defendant ordered certain goods from plaintiff, and in due course they were shipped, the draft and bill of lading being held by the Colonial Bank. The defendant did not pay, and the goods were eventually sold by the Colonial Government for storage, the proceeds being paid over to the plaintiffs, who now claim for the difference between the cost, and the amount received by them.

I am of opinion that the property never passed to the defendant. This case is governed by *Mirabita* v. *Imperial Ottoman Bank* (1878) 3 Ex D. 164. In that case Cotton, L.J., at p. 172 says, "If, however, the vendor, "when shipping the articles which he intends to deliver under the contract, "takes the bill of lading to his own order, and does so not as agent or on "behalf of the purchaser, but on his own behalf, it is held that he thereby "reserves to himself a power of disposing of the property, and that conse-"quently there is no final appropriation, and the property does not on ship-"ment pass to the purchasers . . . . . If the vendor deals with, or claims to "retain the bill of lading in order to secure the contract price, as when he "sends forward the bill of lading with a bill of exchange attached, with di-"rections that the bill of lading is not to be delivered to the purchaser till "acceptance or payment of the bill of exchange, the appropriation is not "absolute, but until acceptance of the draft, or payment, or tender of the "price, is conditional only, and until such acceptance, or payment, or ten-"der, the property in the goods does not pass to the purchaser." Plaintiffs exercised their *jus disponendi* under section 41 (c) of the Sales of Goods Ordinance, 1913, but without success, and plaintiffs' remedy, if they have any, is in damages under section 51 (1). And under section 49 (4) where a right of re-sale is expressly reserved, in case of the buyer's default, and the goods are re-sold, the original contract is thereby rescinded, but without prejudice to any claim the seller may have in damages.

Nonsuit.

HORATIO *v.* PEREIRA.

[Berbice. No. 25 of 1915.]

1916. FEBRUARY 1, 3. BERKELEY, J.

Appeal—Trespass—Injury by donkey stallion to mare donkey—Common pasturage —Negligence.

Appeal from the decision of Mr. W. J. Douglass, Stipendiary Magistrate of the Berbice Judicial District, who dismissed a claim by the plaintiff Horatio (now appellant) for the sum of $25 as damages for the loss of his mare donkey said to have been killed by a stallion donkey the property of defendant Pereira (now respondent).

The decision of the magistrate was as follows:—The facts clearly proved in this case are that proprietors at Eldorado had equal rights in pasturing their animals on the common pasture there, and that both parties to this suit had donkeys on that pasture.

In Roman-Dutch law there could be no delict without fault, *i.e.*, either *dolus* (malice or fraud) or *culpa* (negligence), and in South Africa it has been held that as noxal actions are obsolete

there is no action for damage done by: animals without negligence on the part of the owners; but dogs are considered an exception to the general rule. There is no question of trespass on the land in this case, as both animals had an equal right to pasture there, so that the English cases of *Lee* v. *Riles*, 18 C.B., (N.S.) 722, and *Ellis* v. *Loftus Iron Co.* L.R. 10 C.P. 10, do not apply. Was there any question of negligence? I have had no proof of it and nothing to show that the stallion was known to be vicious. An accident such as occurred was one of the common risks that owners of animals choose to run when they pasture their animals together.

Plaintiff appealed on the ground that there was no evidence that the death of the mare was due to an accident as found, but that it was proved that the loss was caused by defendant's stallion. The appeal was dismissed.

J. Abbensetts, for the appellant.

E. A. Luckhoo, Solicitor, for the respondent.

BERKELEY, J.: Appeal from the decision of the Stipendiary Magistrate of the Berbice Judicial District (Mr. W. J. Douglass) who on a claim for $25 as damages for trespass by the respondent's stallion donkey upon the appellant's female donkey, entered judgment for respondent.

The ground of appeal is that the magistrate was wrong in finding that the injury was due to accident.

The facts as proved by the evidence are that the two donkeys with other male donkeys and other animals were all lawfully on a pasture where animals are pastured, and that the appellant's donkey in foal was injured by a male donkey and died from the effect of such injury. The evidence raises a doubt as to the ownership of the donkey that caused the damage and the magistrate in his decision has not dealt with this aspect of the case. Assuming, however, that it was the respondent's donkey, the pasturing of the donkeys was common to both parties. There is no evidence of negligence on the part of the respondent. He cannot be held liable for damages under the special circumstances shown in this case. If negligence is to be attributed to any one it would seem that appellant acted carelessly and with negligence in placing his female donkey—in the condition it then was—in a pasture where he knew there were animals of the same description and of the opposite sex.

The appeal is dismissed and the decision affirmed with costs.

In re WELCOME. *Ex parte* CURIEL.

In re WELCOME. *Ex parte* CURIEL.

[Insolvency; 4 of 1916.]

1916. APRIL 15, 19. BEFORE HILL, J.

Insolvency—Petition by attorney of creditor—Powers of the attorney—Levy and continued possession by the marshal—Act of insolvency—Insolvency Ordinance, 1900, Amendment Ordinance, 1913, sec. 9—Petitioning creditor's debt—Effect of merger in judgment.

A power of attorney which gives power to "institute and effectually prosecute one or more suit or suits . . ." and "to appear in all courts . . . and to take all other necessary legal proceedings" covers the presentation of a creditor's petition in insolvency.

A levy and seizure by the marshal, his remaining in possession for ten days, and his subsequent continuing in possession under the same levy does not constitute a further or continuing act of insolvency.

This was a petition by Adolf Curiel, a judgment creditor, for a receiving order against Jacob Conrad Welcome of Sisters Village, Berbice. The petitioner, a resident of Dutch Guiana, appeared by his attorney, Samuel Saywack, resident in this colony.

The act of insolvency alleged was that the debtor allowed certain of his property, which had been levied upon and seized at the instance of one Arthur under process in execution in an action in the Supreme Court, to remain in execution for seven days without taking steps to have such execution set aside and such property released; *vide* the provisions of the Insolvency Ordinance, 1900, sec. 3 (e), as amended by Ordinance 16 of 1913, sec. 9.

By an order of the Court, on the application of the petitioner, the sale of the property levied on at the instance of Arthur was stayed until further order.

The petition was opposed by the debtor for the reasons which are fully set out in the judgment.

J. Eleazer, solicitor, for the debtor.

J. A. Luckhoo, for the petitioning creditor.

Posted, April 19th.

HILL, J.: Opposition has been entered by the debtor to an application by the petitioning creditor for a receiving order to be made on the grounds:—

(1) because S. Saywack, by his power of attorney, has no authority to institute these proceedings;

(2) because the alleged act of insolvency on which the petition is grounded has not occurred within three months before the presentation of the petition;

(3) because the petitioning creditor's debt did not accrue due before the alleged act of insolvency.

With regard to (1) the power of attorney gives power to Saywack to "institute and effectually prosecute one or more suit or suits, action or ac-"tions," and "to appear in all courts,". . . and "to take all other necessary legal proceedings." This covers the presentation of a creditor's petition in bankruptcy. *Ex parte Wallace—in re Wallace*—14 Q. B.D. 22.

With regard to (3) the judgment obtained by Curiel was so obtained on July 10th, 1915. It was for $8,197.60 and costs, and the general rule that where judgment has been received on a simple contract debt, the original debt is for most purposes merged in the judgment, does not cause the judgment to operate as an extinguishment of the debt for the purpose of bankruptcy proceedings, and such debt is still available as a petitioning creditor's debt. It would have been preferable if the original debt founded the bankruptcy proceedings. (*In re King and Beesby,* 1895, 1 Q.B. 189).

But on the second ground of opposition I think the opposer must succeed. The act of insolvency is the levy of the marshal on October 7th, 1913, and the remaining in possession for seven days (or as it then was, ten days), the subsequent continuing in possession under the same seizure did not constitute a further or continuous act of insolvency on the part of the judgment debtor.

Thus any creditor's petition to avail must have been presented within the completion of that period, *i.e.*, for three months and ten days (or seven days now) from October 7th, 1913. (*Re Beeston,* 1899, 1 Q.B. 626.) (*Re Hurley,* 1893, 10 Morrell, 120).

The creditor's petition for a receiving order against Welcome must be refused.

Costs to the opposer.

CAMPBELL *v.* SUKADOS.

CAMPBELL *v.* SUKADOS.

[74 of 1916.]

1916. APRIL 28, BEFORE SIR CHARLES MAJOR, C.J.

Appeal—Damages—Trespass by animal mansuetae naturae.

The owner of an animal *mansuetae naturae,* such as a steer, is liable for its trespass and injury of another animal while so trespassing, apart from any question of negligence on the defendant's part.

Appeal from the Stipendiary Magistrate of the East Coast Judicial District (E. A. Bugle) who gave judgment for the plaintiff in an action to recover damages for injury to the plaintiff's cow by the defendant's steer, and awarded the plaintiff $40 therefor. The magistrate found that defendant's steer was trespassing on the plaintiff's land.

Defendant Sukados appealed, principally on the grounds that there was no proof of trespass or of negligence on his part.

The appeal was dismissed and the magistrate's decision affirmed, with costs.

J. A. Luckhoo, for the appellant.

A. B. Brown, for the respondent.

SIR CHARLES MAJOR, C.J.: The magistrate found that the defendant's steer was a trespasser. While the evidence on that issue is, in some respects, conflicting, the appellant has failed to show me that it was insufficient to support the finding, and I decline to go behind it.

Then, it having been clearly shown that the steer, while then trespassing, so injured the plaintiff's cow that it died, the defendant's liability in damages is established, in the absence of any just excuse for the trespass and quite apart from any proof by the plaintiff of the defendant's negligence, for it is not at all unusual for a steer, an animal *mansuetae naturae,* to butt or horn strange animals particularly when finding itself among them at night time.

The judgment of the magistrate is affirmed. The appellant must pay the respondent his costs of appeal.

CAMACHO *v.* ROHLEHR.

CAMACHO *v.* ROHLEHR.

[92 of 1915.]

1916. MARCH 13, 14, 21, 22, 23, 24, 27, 28. MAY 1.

BEFORE SIR CHARLES MAJOR, C.J.

Partnership—Promissory notes—Rules for determining the existence of a partnership—The Partnership Ordinance 1900, sec. 4.

The plaintiff claimed the sum of $1,038.57, the aggregate amount of four promissory notes made by defendant in favour of plaintiff.

The making of the notes was admitted, but the defendant counter-claimed that when the notes were made a partnership existed between the plaintiff and himself and that the debt was due to that partnership. He further counter-claimed for a decree of dissolution of the partnership and the usual accounts. The business had been sold by the plaintiff before action, the defendant alleged at a profit, which the plaintiff denied.

DeFreitas, K.C. (*Dargan* with him), for the plaintiff.

McArthur, for the defendant.

The hearing was concluded on March 28th and decision was given on May 1st. After stating the nature of the claim His Honour (SIR CHARLES MAJOR, C.J.) proceeded:—

With respect to the notes for $390.75 and $130 which the defendant admits he made, it is obvious that the transactions which those two notes represent, cannot in any way be referred to the relations which are said to have existed between the plaintiff and the defendant in connection with Isaacson & Co., nor drawn into the defence raised by the defendant in his counterclaim, There must, therefore, be judgment for the plaintiff on those two notes.

Referring to the other two notes, those for $315.24 and $202.59 respectively, it is quite as plain that they are to be referred to the contention raised by the counter-claim, and that the defendant's present or deferred liability thereon depends, firstly upon the success or failure of the contention raised by the counter-claim, and, if he be successful, secondly upon the applicability of authorities like *Neale* v. *Turton* (4 Bing. 149) and *Fox* v. *Frith* (Car. & M. 502), to which the learned counsel for the plaintiff referred. Turning to the consideration, therefore, of the question what were the relations existing between the

plaintiff and the defendant in connection with the acquisition and subsequent conduct of the business of Isaacson & Co., one finds, on reference to the various authorities where this question has received the consideration of the judges, several general principles governing its elucidation, but, as is not unusual, that no assistance is to be obtained in considering the facts of this case from those authorities, for the simple reason that, in them, the facts are rarely, I might say hardly ever, identical the one with the other, and I have been unable to gain any, or at any rate very little, assistance as regard the facts. But those general principles to which I have referred seem to me, for the purpose of this case at any rate, to be summed up conveniently under two heads. Both are given in the late Lord Lindley's treatise on the law of partnership (*Law of Partnership,* 7th Ed.), and have been, on many occasions, affirmed and re-affirmed.

The first general principle to which I refer is to be found on page 25, where he states ". . . the main rule to be observed in determining the existence of a partnership, a rule which has been recognised ever since the case of *Cox* v. *Hickman* [(1860) 8 H.L. Cas. 268] is that regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case." And the second principle, to be found on page 47, is "If they have in fact stipulated for all the rights of partners, an agreement that they shall not be partners is a useless protest against the consequences of their real agreement."

The real agreement in this case depends, for its construction, upon the view I am brought to adopt of the evidence relating to three stages of the transactions between the plaintiff and the defendant. Each phase of that evidence depends upon the others for explanation, comparison and, often it would seem, qualification, either by way of amplification or restriction.

The first stage of evidence is the testimony of the plaintiff and the defendant respectively of their recollection of what passed between them and what was done and what was said in the early days of August, 1912, when, in fact, the terms of their arrangement were first mooted, discussed and mainly defined. I say mainly defined, because, throughout the other evidence to which I am going to refer, one finds continual reference to "as has been said before" and "our arrangement of so and so."

The second stage of evidence is the large mass of correspondence that passed between the plaintiff and the defendant, which covers practically the whole period from the inception of their venture into the drug business to their subsequent estrangement.

The third class of evidence comprises the three drafts of a written agreement, contemplated to be executed by the parties, to give effect to their original agreement and the treatment and

conduct thereof between the plaintiff and the defendant in connection therewith.

Now all these classes of evidence have their own particular value, but their relative value seems to me to differ very considerably in degree. For instance, I attach greater value to the written statements of the parties, covering the period to which I have referred, going right up to the end of their association, than to the recollection of the plaintiff and the defendant of what occurred between them.

Again, although, according to the second proposition to which I have referred, the drafts could not alter or prejudice the antecedent relations between plaintiff and defendant, if, in fact and in law, that arrangement embraced all the essentials of a partnership, and had been acted upon by the parties on that basis, still the drafts and the conduct and treatment of them by the parties possess to my mind a peculiar value in judging of just what those essentials were.

Now, I have no intention of embarking on a narrative of the method I have adopted in extricating what I consider to be the version of the plaintiff and the defendant of what occurred in August, 1912. Scattered and interjected over the whole of their testimony are what I may call speeches,—I can call them nothing else—from both plaintiff and defendant in which they, despite my efforts, indulged and were allowed to indulge while in the witness-box. My efforts did not, I may observe, hardly receive that assistance from counsel on either side which I expected. There are at intervals various statements as to what did occur, and it is for that reason that I do not think fit to cumber these remarks with a description of the method which I have adopted, by means of comparison, to extricate that version. But I may say this, that, after careful perusal of the evidence and comparison of one statement with another, I find that both are in substantial accord. At the same time I do find them both plainly and, as far as the defendant goes, glaringly, inconsistent with their written statements contained in the correspondence.

Equally is it not my intention further to cumber my judgment with a detailed examination and analysis of the mass of correspondence. I have done so with care; and I think it is sufficient for me to say so. I am content to state what my view of the case is upon the whole facts, after giving every consideration to the evidence of the plaintiff and defendant, and subject to the remarks that I have made with reference thereto. After an examination of the correspondence, which was exhaustively and ably criticised by counsel on both sides, and after giving due weight to the three drafts and the actions of the parties in connection therewith, f am satisfied that there never was a present partnership between the

plaintiff and the defendant. Further, that neither of the parties intended their arrangement so to be, but, on the other hand, that they did enter—that they intended to enter—into an arrangement whereby a partnership relation would be established and created upon a contingency that never arose; that they, in the meanwhile stood, and that they still stand, merely in the position of creditor and debtor. That being so the counter-claim fails. Nothing else can be set against the liability of the defendant to the plaintiff upon the promissory notes which are the subject of the plaintiff's claim, and I order, therefore, that judgment be entered for the plaintiff upon the claim and upon the counter-claim, with costs.

PETTY DEBT COURT, GEORGETOWN.

ROBINSON *v.* PEOPLE'S PAWNBROKING CO., LTD.

[348. 3. 1916.]

1916. APRIL, 4. MAY 4. BEFORE HILL, J.

Hire and purchase agreement—Pledge of article subject of the agreement with pawnbroker—Sale by pawnbroker to third party—Seizure of article by owner—Rights of third party as against pawnbroker—The Pawnbrokers Ordinance 1884, sect. 13.

Where property is pledged by the hirer with a pawnbroker, the provisions of section 13 of the Pawnbrokers Ordinance 1884 do not affect the common law rights of the owner of the property which is pledged against his will to recover the property from a person to whom it has been sold by the pawnbroker.

Claim by the plaintiff against the People's Pawnbroking Company of British Guiana, Ltd., for the payment of the sum of $10 being the amount paid by the plaintiff to the said company for one sewing machine purchased by her from the company, which machine was subsequently seized and taken possession of by the Singer Sewing Machine Company as their property, and for $5 damages.

W. I. Souza, solicitor, for the plaintiff.

F. Dias, solicitor, for the defendant company.

HILL, J.: Plaintiff bought from the defendant company on October 20th, 1915, a singer sewing machine for ten dollars. On March 20th, 1916, the Singer Sewing Machine Coy. seized and took possession of the machine under a hire purchase agreement made on October 10th, 1913, between one P. Johnson and the company.

The plaintiff claims the return of the ten dollars paid by her, and $5 further for damages.

There is no doubt that the machine purchased by Robinson is the same machine let to P. Johnson and pledged with the defendant company by Wm. Aaron on June 5th, 1914. Under the hire purchase agreement it is equally clear that the property never passed to the defendant company, as the pawner could give nothing better than that which he had to give. He never had the property in the machine. The provisions of the Pawnbroking Ordinance 1884 (sec. 13) do not apply.

In my opinion *Singer Sewing Machine Co.* v. *Clark,* 5 Ex. Div. 37, governs this case. In that case it was held that the provisions of the Pawnbrokers Act, 1872, secs. 25 and 29, do not affect the common law rights of the owner of the property which is pledged against his will; and only applies as between the pawnbroker and the pawner, or owner who has authorised the pledge. See also *Cooper* v. *Willowmate,* 1 C.B. 672, in which it was held that a bailee of goods for hire, by selling them, determines the bailment; and the bailor may maintain trover against the purchaser, though the purchase was *bona fide.*

In *Helby* v. *Matthews,* 1 C.B. 471, it was held that upon the true construction of the agreement (as in this case) the hirer was under no legal obligation to buy, but had an option either to return the piano, or become its owner by payment in full,—that by putting it out of his power to return the piano he had not become bound to buy,—that he had therefore not "agreed to buy goods" within the meaning of the *Factors Act* 1889, see. 9, and that the owner was entitled to recover the piano from the pawnbroker.

In *Loeschman* v. *Machin,* 2 Stark 311, it was laid down that the general rule was that if a man buy goods, or take them in pledge, the owner has a right to take them out of the hands of the purchaser; except, indeed, in the case of a sale in market overt. With that exception it is incumbent on the purchaser to see that the vendee has a good title, "and" says Abbott, J.: "I "am of opinion that if goods be let on hire, although the person who hires "them has the possession of them, for the special purpose for which they "are lent, yet, if he send them to an auctioneer to be sold he is guilty of a "conversion of the goods; and that if the auctioneer afterwards refuse to "deliver them to the owner, unless he will pay a sum of money which he "claims, he is also guilty of a conversion."

The Sale of Goods Ordinance, 1913, does not apply to this case, in my opinion, nor am I prepared to hold on the evidence that the pawner stole the goods. The Singer Sewing Machine Coy. had a right to retake the machine, and the plaintiff has her remedy to recover from the Pawnbroking Coy. the amount paid by her for the machine. I give judgment for $10 and costs No damages.

WIGHT *v.* DEMERARA TURF CLUB, LTD.

WIGHT *v.* DEMERARA TURF CLUB, LTD. (in liquidation.)

1916. May 8, 16. BEFORE BERKELEY AND HILL, JJ.

Appeal—Privy Council—Practice—Stay of execution of judgment and payment of costs pending appeal—Conditions.

It is the duty of the Court, where an appeal lies to the Privy Council as of right, to order a stay of proceedings under the judgment appealed from as will prevent the appeal, if successful, from being nugatory.

Petition by the Demerara Turf Club, Ltd., (in liquidation) for leave to appeal to His Majesty-in-Council from the final decision of the Court of Appeal given on the 17th day of April, 1916, (*a*).

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

H. H. Laurence and *H. C. Humphrys* for the respondent.

The judgment of the appeal court should be carried into effect.

Cur. adv. vult.

Posted. May 16th.

Curia. per BERKELEY, J.

The appellant petitions for conditional leave to appeal to His Majesty-in-Council from the judgment of the Full Court dated April 17th, 1916. The matter in dispute exceeds in value £500 sterling and therefore an appeal lies as of right (Rule 2 (a) Order-in-Council January 10th, 1910) upon the conditions referred to in Rule 5 (a) being complied with and any further conditions imposed (Rule 5 (b) and subject to the discretionary power of the Court as set out in Rule 6.

The Court under the special circumstances of this case is of opinion that all proceedings should remain *in statu quo* and directs that the execution of the judgment shall be suspended pending the appeal.

The Court further grants leave to appeal on condition (1) that the petitioner within one month from the date hereof enter into good and sufficient security to the satisfaction of this Court in the sum of £500 for the due prosecution of the appeal and for the payment of all such costs as may become payable to the respondent in the event of the appellants not obtaining an order granting final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty-in-Council ordering the appellants to pay the respondent's costs of the appeal;

(2) that the appellant within three months of the date hereof

(*a*.) See above p. 36.

shall take the necessary steps for the purpose of procuring the preparation of the record and its despatch to England which will include the final leave to appeal.

The appellant shall give notice to the respondent of the security he proposes to give and such party shall within four days approve or object thereto and such approval or objection shall be initialled by the solicitor of such party and the matter shall then be brought to the notice of the Registrar that it may be dealt with by the Court in Chambers, or otherwise, with, or without, the attendance of the parties as may be deemed necessary.

The order of the Court was in the following terms: *It is ordered* that the execution of the judgment given by this Court in favour of the plaintiff in the above-mentioned matter on the 17th day of April, 1916, be suspended pending the determination of this appeal to His Majesty-in-Council. *And it is ordered* that the defendant company do within twenty-one days after the Taxing Officer shall have made his certificate pursuant to the said judgment pay into this court the amount of the costs thereby directed to be paid to the credit of this court to an account entitled "the taxed costs of the plaintiff;" or in the alternative do enter into good and sufficient security to the satisfaction of this court in the sum of the said costs, the appellant company to give notice to the respondent of the security they propose to give, and the respondent within four days after such notice to approve thereof or object thereto, and such approval or objection to be initialled by the solicitor of the respondent and the matter then to be brought to the notice of the Registrar that it might be dealt with by the Court in Chambers or otherwise with or without the attendance of the parties as may be deemed necessary. *And it is ordered* that upon such payment being made or security being given all proceedings under the said judgment to enforce payment of such costs be stayed until after the appeal by the defendant company has been disposed of. *And it is further ordered* that the defendant company be at liberty to appeal from the said judgment to His Majesty-in-Council on the conditions (a) That the defendant company within one month from the date hereof enter into good and sufficient security to the satisfaction of this court in the sum of £500 for the due prosecution of the appeal and for the payment of all such costs as may become payable to the respondent in the event of the appellant company not obtaining an order granting final leave to appeal or of the appeal being dismissed for want of prosecution or of His Majesty-in-Council ordering the appellant company to pay the respondents the costs of the appeal. (b) That the appellant company within three months from the date hereof shall take the necessary steps

for the purpose of procuring the preparation of the record of appeal and its despatch to England which will include the final leave to appeal. *And it is further ordered* that the appellant company shall give notice to the respondent of the security they propose to give and that the respondent shall within four days approve thereof or object thereto, and that such approval or objection shall be initialled by the solicitor of the respondent and the matter shall then be brought to the notice of the Registrar that it may be dealt with by the Court in Chambers or otherwise with or without the attendance of the parties as may be declared necessary.

In re DEMERARA TURF CLUB, LTD. (in liquidation);

Ex parte BERKELEY.

[115 of 1916.]

1916. MAY 20, 22. BEFORE SIR CHARLES MAJOR, C.J.

Company—Winding up—Removal of liquidator—"Due cause"—Companies (*Consolidation*) *Ordinance, 1913, ss. 144, 155.*

C., the secretary of a company" formed to promote and conduct racing, was, in September, 1914, appointed liquidator by the Court under a compulsory winding up order upon a resolution of creditors (which the present petitioner alone opposed) and ordered to open a banking account. C. continued to organize race meetings and to receive moneys in respect of fees for entries of horses and charges for admission to the company's race-course from which were paid expenses (including cash prizes) of meetings and upkeep of the course. C. had never kept a banking account and had retained the moneys mentioned in his hands from time to time. His accounts sent in to the Registrar shewed all receipts but had been described by the auditor as unsatisfactorily kept; the auditor had stated that he could not in the circumstances say that the accounts were correct. C. disputed the auditor's statements and claimed that fees for entries of horses for races were stakes which he did not receive for the company but as stake-holder and which, therefore, need not and ought not to be banked.

On an application by the creditor who alone opposed the liquidator's appointment for his removal for retention of moneys in his hands and not keeping a bank account and for sending in unsatisfactory or incorrect accounts, other grounds being held either irrelevant or unsupported by evidence, it appearing that none of the other creditors desired the removal of the liquidator or joined in the application,—

Held, that fees for entries of horses were moneys received by the liquidator on the company's account and should have been paid into the bank without deduction;

Held also, that in the circumstances the failure to keep a banking account or correct accounts (even if the latter were assumed to be incorrect) without more was not due cause shewn for the liquidator's removal.

Petition by John H. A. Berkeley, a creditor of the Demerara Turf Club, Limited (in liquidation), for the removal of the liquidator, Nelson Cannon, and for the appointment of the Official Receiver to that post. The principal grounds in support of the petition were set out therein, as follows:—

(*a*) The liquidator's accounts tiled under section 147 of the Ordinance, when audited by the Accountant of Court, were reported on as unsatisfactory, the accountant stated

"the method of accounting for the moneys received by the liquidator seems to me to be a very unsatisfactory one and I cannot say, under the circumstances, that I have found the accounts correct"

(*b*) The liquidator had failed to comply with the provisions of section 144, sub-sections 1, 2 and 3, of the Ordinance, with respect to the keeping of a banking account.

The petition was referred to the liquidator for report, the liquidator setting out in reply to the petition that he had no funds with which to open a banking account, whilst the finding of the Accountant of Court on the accounts was unjustifiable and unwarranted, when the means and sources, from which the revenue of the Turf Club were obtained, were taken into consideration. He further urged that the Official Receiver was not a proper person, in view of his position, to carry on and liquidate the affairs of a racing club.

The petition was heard in chambers.

A. M. Ogle, solicitor, for the petitioner.

P. N. Browne, for the respondent.

Objection was taken by counsel for the respondent against audience being granted in the matter to a solicitor for the petitioner. Objection overruled on the ground that a solicitor has right of audience in any proceeding in chambers.

Posted. May 22nd.

SIR CHARLES MAJOR, C.J.: This is a petition for the removal of the liquidator in the winding up of the Demerara Turf Club Company preferred to the Court by John Henry Astley Berkeley, a creditor of the company, and before adverting to the allegations in the petition I will refer to some general principles governing the Court's jurisdiction in the matter and its discretionary exercise to be gathered from the authorities cited during the argument and others.

In the case of *In re Sir John Moore Gold Mining Company* (12 C.D. 325) the Court laid it down that the jurisdiction to remove a liquidator for "due cause shewn" is not to be exercised in the same way as if the power had been to remove the liquidator "if the Court shall think fit;" that some unfitness in the liquidator must be shewn in order to justify his removal; and that his removal is not a matter of pure judicial discretion. This case, again, was explained in *In re Adam Eyton Limited* (36 C.D. 299) when the Court declared that the words "due cause" do not confine the jurisdiction to cases where there is personal unfitness in the

liquidator, but that whenever the Court is satisfied that it is for the general advantage of those interested in the assets of the company that a liquidator should be removed, it has power to remove him and appoint some other person in his place. There are the further principles that, as shewn by the trend of authorities on these questions in the administration of company law, the tendency is for courts to rely more on the wishes of those interested in the liquidation than on its own discretion, and that importance is always to be attached to the desires, express or implied, of the majority of creditors.

So far as the evidence before me goes, it appears in this case that the liquidator was appointed by the court some eighteen or twenty months ago, on a resolution of the creditors which the present petitioner alone opposed; that none of the creditors have, up to this time, challenged or taken exception to the liquidator's conduct of the liquidation; that he has taken part in certain litigation, now adversely criticized by the petitioner, not only at the instance and with the sanction of those interested in the liquidation, but, where necessary, with the leave of the court; and that this application is made by the petitioner without the concurrence of any of the other creditors who the petitioner is informed and verily believes are prepared to allow the liquidator to continue in office and will take no steps to interfere in any way or to have him removed therefrom.

Coming to the petition itself, its allegations have been treated by Mr. Ogle as falling under two heads; the first, that the liquidator has not kept a banking account as directed both by the Ordinance and by the order of court appointing him, and that his accounts filed in the Registry have been condemned by the officer who audited them as unsatisfactory; the second, that the liquidator did not, at the proper time, bring to the notice of the court the existence of what, through various stages of the liquidation, has come to be styled "the Slater agreement."

There are other statements in the petition, either altogether irrelevant or unsupported by evidence, reference to which Mr. Ogle has very properly omitted: such, fur instance, as that the liquidator has not paid the petitioner his costs of the litigation whereby he obtained a judgment against the Turf Club; that the liquidator is actively hostile to the petitioner in the matter of his claim; that the liquidator "canvassed for or at least obtained" from all the larger creditors proxies in his favour to secure his appointment. On the other hand, the respondent's counsel has ventured upon the assumption that the endeavour to secure the removal of the liquidator is really made in order that, if successful, an appeal to His Majesty-in-Council now pending from the judgment of the local Court of Appeal, given in favour of a suitor of the

Turf Club with whom the petitioner or his attorney is identified in interest, may be abandoned. Even if these facts and motives were clearly proved they would not affect the application of the principles I have already stated that govern the determination of the present question. But they are not supported by any evidence and I decline to make assumptions, to impute improper motives, to act on conjectures and suspicions on insufficient evidence, or no evidence at all.

Dealing with the specific allegation that the liquidator has not kept a banking account and his explanation of the same, it was clearly his duty to do so, and it was equally clearly his duty to pay into that account all moneys received by him on the company's account without deduction. Moreover, I have no doubt that fees received by him from persons entering their horses for races on the company's premises—a company formed to promote and conduct racing and award prizes for events whether by trophy or in money—form part of the moneys so to be paid in. There may be something by way of excuse in the facts urged by Mr. Browne that the liquidator did apply to the court for leave to open an account as showing his intention to fulfil his obligation, and that he has, in fact, shewn in his account all moneys received by him that should have been banked. But they cannot do away with the clear duty laid upon a liquidator by the Ordinance.

Again, the liquidator's accounts appear to have been unsatisfactorily kept, and I am referred to the auditor's statement that he "cannot say, under the circumstance, that he has found them correct." It is not for me on this application to enquire into the causes of the auditor's dissatisfaction nor to decide whether the accounts are correct or not. The respondent challenges the justice of the auditor's comments and the justice or injustice is not yet determined.

The petitioner relies on the provisions of section 144 of the Ordinance, and it is quite true that under that section a liquidator who, for more than three days, retains in his hands moneys which the court has not authorized him to retain, renders himself liable to be removed, unless he explains the retention to the satisfaction of the court, but I have not heard—and if I had heard, I should not agree—that the liability to removal attaches on mere proof of retention without more. The evidence here goes to show that the retention was made under a misapprehension of the custody of entrance fees. There is nothing compulsory in the provisions of section 144; everything is subject to that discretion of the court with which it is invested and which must be exercised on the principles to which I have already referred. What, therefore, I have to decide is whether the liquidator's not keeping a bank account and not keeping his accounts in a satis-

factory manner, even if the latter be established, have occurred in circumstances and are accompanied by facts that show the liquidator's unfitness for his office, and that it will be to the disadvantage of all those who are interested in the liquidation that he should be allowed to continue therein. I have no hesitation in saying that the petitioner has failed to show anything of the kind.

The same principles apply to the argument on the Slater agreement which has been confined to reference to my own observations on the episode in giving the judgment which I have said was lately the subject of local appeal and is now the subject of English appeal, and to those of the learned judges of the local court. Neither in the former nor in the latter am I able to find any relevancy to the question now before me.

For these reasons I am of opinion that the application fails and I dismiss the petition with costs.

PETTY DEBT COURT, GEORGETOWN.

MADARBACCUS *v.* GURIBUN.

[406. 3. 1916]

1916. MAY 4, 24. BEFORE HILL, J.

Contract—Loan—Commodatum—Infant—Liability of parent or guardian for loan to infant—Liability of infant.

M. loans jewellery to H., a minor. H. fails to return the jewellery, and M. brings an action against G. the mother and guardian of H. for the delivery of the jewellery. The loan to H. had been made without the knowledge or consent of G.

Held that neither G. nor H. could be held civilly liable for the return of the jewellery to M.

Claim by Madarbaccus for the delivery of certain articles of jewellery, all to the value of $39, lent to Halliman, the minor daughter of the defendant Guribun.

Clarke, solicitor, for the plaintiff.

A. B. Brown, for the defendant.

HILL, J.: On the facts in this case, I find that Halliman went to Madarbaccus, and borrowed the jewellery now claimed by him. It was a loan for use—*commodatum.*

Halliman has never returned the jewellery. Plaintiff now sues Guribun, the mother of Halliman. Mr. Brown for the defence submits; no liability on guardian's part—no acquiescence in the loan—no ratification by her. Mr. Clarke sets up that such a

submission is not applicable to a tort of the minor, and that the minor is sued through her mother, as the only method of bringing her before the court.

Under the old Roman law, the *Senatus consultum Macedonianum* provided that persons who made money loans to children under paternal power should not institute any action or claim for the recovery of the money against the minors, after the death of the parent in whose power they were. Afterwards, this law was extended to all loans, whether of money or other things. In modern law a minor is in the same position with regard to a loan as with regard to any other contract, and the general law relating to restitution protects him.

According to Dutch law, parents are not liable on the contracts of their children where they have not given their authority or consent; and if Guribun were to be held liable, it would in effect be applying the *actio de in rem verso,* as for a conversion to her use of jewellery from which she has apparently derived no benefit, nor has she acquiesced in its borrowing.

As regards the minor, she entered into this contract without the knowledge or consent of her mother, nor was it for her benefit, nor can I find any satisfactory evidence that can be accepted of ratification by Guribun of Halliman's act. The detinue therefore arises from a contract made by a minor under circumstances which reluctantly compel me to hold that neither Guribun nor Halliman can be held, in law, to be civilly liable.

Judgment for defendant, but under the circumstances, without costs.

TEIXEIRA *v.* GEO'TOWN LIVERY STABLES CO., LTD.

TEIXEIRA *v.* THE GEORGETOWN LIVERY STABLES COMPANY, LIMITED.

[322 of 1915.]

1916. MAY 24, 25, 26. BEFORE SIR CHARLES MAJOR, C.J.

Practice—Review by judge of his award of damages after judgment but before same perfected—Costs—Rules of Court, 1900, App. I. Part I., (*b*) *and* (*c*).

Although a judgment be not perfected, the court has no power to review it as to its a ward of damages and increase the amount of the damages so as to enable the plaintiff thereby to obtain costs on a higher scale.

But the direction in Part I. (*c*) of Appendix I. to the Rules of Court, 1900, that a fee calculated at the rate of 10 per centum on the amount recovered, or, in the case of a successful defendant, on the amount claimed, shall be paid to counsel and solicitor, only applies to actions in which the amount claimed does not exceed $250. Where, therefore, a plaintiff claims more than $250, but recovers only that sum or less, his costs are to be taxed on the higher scale given in Part I. (*b*).

The plaintiff claimed $500 in an action for damages for injuries caused by the defendant's motor car driver's negligence. He recovered $250 and the court in awarding him costs, upon application by his counsel and information that the direction was necessary, directed the costs to be taxed on the higher scale given in Appendix I, Part I. (*b*) of the Rules of Court. On the day after judgment and before it had been drawn up and entered, plaintiff's counsel applied to the trial judge to vary his judgment with respect to damages by increasing the same to an amount exceeding $250, on the ground that otherwise the costs would be taxed on a basis of one fee for counsel and solicitor calculated only after the rate of ten per centum on the amount recovered, and that the information counsel had given the court on the previous day was erroneous.

Humphrys for the plaintiff.

M. J. C. de Freitas, for the defendants, took the objections, first, that the application was irregular for nonconformity with the provisions of Order XL, rules 1-4; that he only appeared on the application in deference to what he understood to have been a direction of the judge given on the previous day when the matter had been mentioned by counsel for the plaintiff in chambers after the judge had left his bench

[SIR CHARLES MAJOR, C.J.—I appreciate your position, Mr. de Freitas, but, while I am always ready to sustain well-founded objections to noncompliance with our Rules of Court, the provisions of which are so often ignored, I am clear that this is a case in which my undoubted power to waive the observance of a regulation, where the objectionable act is nothing more than an irregularity and substantial justice requires it, ought to be exercised.]

Counsel then took a second objection, that the court had no power to alter the judgment as asked. He was not, however, for want of notice, prepared with authorities in support of his latter objection.

SIR CHARLES MAJOR, C.J.—This second objection is good. I have no power now to increase the amount awarded as damages simply in order, if the assumption as to the scale of costs is correct, to enable the plaintiff to get more costs. The court has, of course, an inherent power to rehear or review a case, until the judgment therein has been drawn up and entered, and even after its order has been perfected, for instance to correct a mistake, or to express its real intention which has been misunderstood, or to make doubtful language plain, or generally, "to bring the record into harmony with the order which the judge obviously meant to pronounce" as Lord Watson said in *Hatton* v. *Harris* (1892) A.C. 560. Here I intended to assess and did assess the damages at $250 and no more. There has been no mistake, no doubt has arisen, my meaning is clear, and no question as to the scale of costs was in my mind when awarding that amount. The application, therefore, of the plaintiff cannot succeed, But it is based on a misapprehension. As for yesterday's direction that the costs should be taxed on the higher scale, it is now clear that I had no power to give it. Still, the costs are, in my opinion, to be taxed on that scale.

Part I. of Appendix I. divides actions into two classes, one where the amount claimed exceeds, the other where the amount claimed does not exceed, $250. In the former class, costs shall be taxed item by item, in the latter class by "one fee to be calculated at the rate of ten per cent. (in the case of a successful plaintiff) [for these words must, inferentially, be parenthesised] on the amount recovered, or, in the case of a successful defendant, on the amount or value claimed." This is an action of the former class, that is to say, the plaintiff claimed $500, an amount exceeding $250. It matters not, for the purposes of taxation, what he has recovered, for the taxation of costs by calculation of commission on the amount recovered only follows when the claim does *not* exceed $250. To tax the plaintiff's costs here by calculation on a commission on the amount recovered would be to put it into the class mentioned in (*c*) when it is in fact in class (*b*), or to apply to class (*b*) a principle expressly confined to class (*c*).

There would, therefore, have been no necessity for my varying my judgment as to damages, even if the law had allowed the variance.

PASEA *v.* VIEIRA.

PASEA *v.* VIEIRA.

[91 of 1916.]

PASEA *v.* VIEIRA.

[92 of 1916.]

1916. MAY 26. BEFORE SIR CHARLES MAJOR, C.J.

Appeal—Magistrate's Court—The Miscellaneous Licences Ordinance, 1861, s. 12—The Tax Ordinance, 1916. s. 21—Failure to take out licence—Exposure of goods for sale—Unjust weights—Trial and comparison of weights in place other than shop where seized—The Weights and Measures Ordinance, 1851, s. 12.

Two appeals, taken together, from decisions of the Stipendiary Magistrate of the Georgetown Judicial District (Mr. W. J. Gilchrist) who convicted the appellant Vieira—

(1.) for occupying a shop in which goods were exposed for sale and failing to take out a licence therefor;
(2.) for having in his possession in his shop in which goods were exposed for sale a certain unjust weight.

The decisions of the magistrate were confirmed and the appeals dismissed.

The reasons for the appeals and the necessary facts sufficiently appear from the judgment.

P. N. Browne, for the appellant.

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

SIR CHARLES MAJOR, .C.J.: The defendant in these complaints was charged with and convicted for on the first neglect to obtain a licence for a shop wherein goods, to wit, coffee and sugar, were exposed for sale, and on the second, keeping, at the same time and in the same shop, wherein goods were exposed for sale, a certain unjust weight.

It was urged against the conviction on the first charge that there was not proof of exposure of the coffee and sugar for sale, and that even if there were, the defendant's knowledge of the exposure was not proved. The defendant is the holder of a licence to keep a bread shop, This does not entitle him to sell coffee or sugar therein. The evidence as to the coffee being for sale was sufficient, that respecting the sugar was insufficient, to support the conviction. It was not necessary, in the circumstances, to shew that the defendant knew that his servants, one Skeete and a boy selling in the bread shop, were exposing the coffee for sale.

Against the conviction on the second charge, the injustice of

the weight being admitted, it was contended that there was no evidence that the goods, in this case bread "and also coffee and sugar," were exposed for sale. There was not sufficient before the magistrate to show that the coffee and sugar were for sale; there was clearly, on the other hand, sufficient evidence that the bread was exposed for sale; the shop is one for that very purpose.

A further contention on the part of the appellant was that, if the examination of the weight took place in the shop, the comparison and trial of the same with the copies of the Imperial Standard weights, were not made in the shop but elsewhere. The evidence is clear that the examination at any rate took place in the shop, but it was (and very properly) admitted by the Solicitor General during the argument that the comparison and trial were made at a later time, in the Commissary's office and not in the shop at all.

Section 12 of the Weights and Measures Ordinance, 1851, provides that it shall be lawful for a commissary to enter a shop "and there to examine weights. . . and to compare and try the same." At first sight the word "there" seems to apply no less to the comparison and trial than to the examination. But I have been referred to a series of cases, beginning with *Gomes* v. *Burrowes* in 1876, followed by *Mendes* v. *Burrowes in* 1877 and *Jeffreys* v. *Burrowes* in 1891. I have not been given nor been able to find a report of the first case. From *Mendes* v. *Burrowes* it merely appears, in Pounds Supplement, p. 529, that the Chief Justice (Sir William Snagg) ordered the weight involved to be brought up to town and tested by the Chief Commissary. But in *Jeffreys* v. *Burrowes* Sir David Chalmers, C.J., said—"The objection by the appellant is that the comparison or testing by the copy of the Imperial weight was not done in the shop. The case of *Gomes* v. *Burrowes* cited by the learned counsel for the respondent is a direct authority for the position that it is not necessary that the comparison with the Standard weight should take place in the same place where the seizure was made. . . I see no reason to question the correctness of the decision."

I am not satisfied on the wording of the section that I should ignore those long standing and hitherto undoubted decisions.

The appeals are dismissed but I only allow the costs against the appellant on one appeal.

MANNING *v.* HUTT.

MANNING *v.* HUTT.

1915, DECEMBER 21ST AND 23RD. 1916, FEBRUARY 10TH.

SIR CHARLES MAJOR, C.J.

Appeal—Pharmacy and Poisons Ordinance, 1899, Amendment Ordinance, 1911—Keeping open shop not under direct management or supervision of a registered chemist or druggist—Meaning of direct management and supervision—Patent and proprietary medicine.

Appeal from the decision of Mr. W. J. Gilchrist, Stipendiary Magistrate of the Georgetown Judicial District, who convicted the appellant Hutt, in that he did keep open shop for retailing patent medicines, such shop not being under the direct management and supervision of a duly registered chemist and druggist, contrary to the provisions of section 3 of the Pharmacy and Poisons Ordinance, 1899, Amendment Ordinance, 1911. The appeal was allowed—conviction quashed.

The necessary facts appear from the judgment.

P. N. Browne, for the appellant.

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

SIR CHARLES MAJOR, C.J.: The defendant was convicted by the Georgetown police magistrate (and nominally fined) on a charge that he "on the 28th day of October, 1915, at La Penitence did keep open shop for retailing patent medicines such shop not being under the direct management and supervision of a duly registered chemist and druggist, contrary," etc.

2. Hutt, on the day charged, was keeping open shop wherein were exposed for sale by retail bottles of Wampole's Preparation of Cod Liver Oil. This preparation is recommended by advertisement as a remedy for impaired nutrition, and, therefore, despite the advertiser's statement that "it is scientific—not a patent medicine," comes within the class of medicine or preparation described as "patent or proprietary medicine."

3. The sole point for consideration is whether the shop was under the direct management and supervision of a duly registered chemist and druggist The evidence before the magistrate shows beyond dispute that Henry Gollenstede was at the date charged, employed by the defendant as salaried manager of the business carried on in the shop; that he was, as his employer testified, "in charge of the shop;" that the shop is a distributing centre to three other shops of the same kind kept by the defendant wherein also were employed, in the same capacity as Gollenstede and with the same duties as his, three other managers called respectively Cust, Graves and Day; and that, save for occasional

visits to those other shops for the purpose of taking stock and the like Gollenstede's duties kept him in constant attendance and supervision of the shop of which he was in charge. That, in my opinion, clearly places the shop under the direct management and supervision of Gollenstede. And Gollenstede, like each of his fellow managers in the other shops, is a duly registered chemist and druggist.

4. The charge failed and the conviction is quashed with the costs of appeal.

CASSELS *v.* FUNG KEE FUNG.

CASSELS *v.* FUNG KEE FUNG.

[336 of 1915.]

1916. MAY 29. BEFORE SIR CHARLES MAJOR, C.J., AND HILL, J.

Appeal—Sale of Food and Drugs Ordinance, 1892, and amending Ordinances—Whisky—Whisky of one maker sold when another demanded—Article not of the nature quality and substance demanded—Sale to the prejudice of the purchaser.

Appeal from the decision of Berkeley, J., already reported (*a*), who quashed the conviction of the defendant Fung Kee Fung (now respondent) by the Stipendiary Magistrate of the Georgetown Judicial District.

The complainant Cassels now appealed from the decision of Berkeley, J., on the ground that the sale was to the prejudice of the purchaser, and that the judge was in error in holding that it was necessary for the complainant to prove that the article supplied was inferior in quality to the article demanded.

The necessary facts have already been reported (*a*).

Humphrys, for the appellant, Cassels.

E. G. Woolford, for the respondent, Fung Kee Fung.

SIR CHARLES MAJOR, C.J.: I see no reason for disturbing the judgment from which the appeal is made. That judgment decided that the magistrate was wrong in convicting the defendant in the circumstances set out in the evidence before the court. The offence having been charged that the defendant sold an article of food, firstly, "not of the nature substance or quality demanded" by the complainant, and secondly, "to the prejudice of" the complainant, he was found, guilty of contravening the provisions of sect, 3 of the Sale of Food and Drugs (Standards of Purity) Ordinance, 1906. The words quoted are the words used in the section; the learned judge decided on grounds which appear to me to be irrefutable and in accordance with existing judicial authority that the words "to the prejudice of the purchaser" govern the whole section and mean the prejudice which an ordinary purchaser suffers from receiving an article not only different but inferior in quality to the one asked for.

It is therefore obvious that on the complainant lay the burden of proof that the article he received was not only not of the nature and substance, but was not of the same quality as that of the article he demanded. Even assuming that the quality of Haig and Haig's whisky differs from that of Dawson's, the inferiority was not proved, and that being the case I am of opinion that the decision of the learned judge must be upheld.

(a). See above p,.24.

CASSELS *v.* FUNG KEE FUNG.

HILL, J.: This is an appeal from the decision of Berkeley, J., who reversed the decision of a stipendiary magistrate convicting a person charged with an offence against the Food and Drugs Ordinance 1892, as amended by Ordinance 3 of 1906.

The charge was for selling to the prejudice of the purchaser whisky not of the nature, substance, and quality demanded by him.

The learned judge found, contrary to the decision of the magistrate, that in order to obtain a conviction it was necessary to show by analysis that Haig and Haig's whisky (the article supplied) was inferior to Dawson's whisky, either in nature, substance, or quality, and that the statement of the purchaser that he was not satisfied with the whisky supplied to him was not evidence that it was inferior in quality to that demanded by him It might have been better in quality, in which case there was no sale to the prejudice of the purchaser.

The findings of the learned judge are in accordance with the decisions of the English courts whose Food and Drugs Ordinance is similar to ours.

To bring and sustain a charge under sec. 3 of Ordinance 3 of 1906, the prosecutor must show that he has been supplied with an article entirely different to that for which he has asked, or that the article supplied was of inferior quality, or was adulterated in the ordinary sense of the word. None of these elements appear in this case in which Haig and Haig's whisky was supplied instead of Dawson's Had there been analysis disclosing certain constituents in each whisky, on which expert evidence might have based the opinion that the former was inferior to the latter, then a conviction might, no doubt, have resulted, but I cannot acquiesce in an argument that the condition of a man's palate should be the judge of ascertaining whether a whisky supplied is inferior to another asked for, when as a fact it may be of a superior quality.

The judgment of the judge in the court below is affirmed with costs.

The appeal was accordingly dismissed with costs.

DE SOUZA AND ANOTHER *v.* SOARES.

DE SOUZA AND ANOTHER *v.* SOARES.

[12 of 1916.]

1916. MAY 22, 30. BEFORE HILL, J.

Will—Legacy—Construction—Bequest to wife "for the term of her natural life"—Vesting—Meaning of "blood relations"—Fideicommissum.

A. S. bequeathed the residue of his half of property held in community with his wife to his wife "for the term of her natural life and at her death such residue shall go to my relatives by blood who may be alive at the time of my death (and excluding my wife's relations) in equal shares."

M. S. and A. F., sisters of A. S., were his only blood relations alive at his death.

Held that the term "blood relations" is synonymous with the term "heirs *ab intestato*" unless a clear intention to the contrary is expressed in the will.

Held further, that the interests of M. S. and A. P., the plaintiffs, vested at the time of the testator's death and that the widow, the defendant, was only entitled to the usufruct of the property.

Claim by the plaintiffs Mary de Souza and Antonia Figueira for an inventory and valuation of all the property estate and effects of Antonio Soares, as at the date of his death on December 9th, 1914, and for security that on the determination of the usufruct of the testator's widow, the property subject to the usufruct shall be restored undiminished and unimpaired to the plaintiffs.

The defendant denied that plaintiffs were the only blood relations of the deceased according to the true construction of the will.

F. Dargan, for the plaintiffs.

P. N. Browne, for the defendant.

HILL, J.: The plaintiffs' claim is in their own right as reversionary heiresses under the last will and testament of Antonio Soares, deceased, the husband of the defendant, subject to the usufruct for life of the defendant as usufructuary under the said will.

They ask for an inventory of the property of the deceased as at the date of his death, the same being one-half of the common property of Antonio Soares, deceased, and the defendant, who were married in community of goods, and to which they are reversionary heiresses, subject to the usufruct before mentioned, and that the defendant do find security that on the determination of the said usufruct the property will be restored undiminished and unimpaired to the plaintiffs or to those then entitled.

The case rests on the construction of certain words in the will, which are as follows:—"The residue of my half of such property which may be "held by me in community as aforesaid at the time of my death I give and "bequeath to my wife aforesaid

"for the term of her natural life and at her death such residue shall go to my "relatives by blood who may be alive at the time of my death (and exclud- "ing my wife's relations) in equal shares."

The words of importance in the above are:

(*a*) "for the term of her natural life;"

(*b*) "relatives by blood;"

(*c*) "excluding my wife's relations;"

(*d*) "who may be alive at the time of my death."

From the evidence it appears that the father and mother of the testator were married in Madeira, and had six children in all, who were born either here or in Madeira. The eldest died in infancy. Then the father and mother died, and Manoel, the second son, also. This left four surviving, Antonio (the testator), Maria or Mary, Antonia, and Rosa. Some time before Antonio's death Rosa died unmarried, and leaving no issue. In 1910, when Antonio made the will now in question the two plaintiffs, Mary or Maria and Antonia, were the only sisters alive, both brothers being dead.

Relatives of blood or next of kin or heirs of blood, when mentioned in a will, are understood as intended to be instituted to the same inheritance to which they would be entitled under the Common Law of the locality, unless there are clear indications of a different intention (*Maasdorp's Grotius*, Book 2, Chap, XVIII., par. 22), and *Schorer* in his note to this (p. 459) says "It is asked whether, if a testator in general terms institutes his "next of kin or blood relatives, all those and only those are considered in- "stituted who are heirs *ab intestato* by the law of the domicile of the testa- "tor, or whether these are instituted only as regards the movables, and as "regards the immovables those who are heirs *ab intestato* by the law of the "place where the immovables are situate," The latter is the view of *Rodenburg*, but *Voet* dissents and is not moved by the fact that the laws of the domicile of the testator cannot extend their force or effect to immovables situate elsewhere, since it is not less true that, as long as the statutes of the place where the immovables are situate permit the making of wills, the last will of the testator pertains to all his goods, although these would have been governed by a different law of succession.

The domicile of testator was this colony, and by the Common Law in case of intestacy, the testator having no children, his parents having predeceased him, the words "relatives by blood who may be alive at the time of "my death" must refer to the two plaintiffs who would have been his heirs *ab intestato* at the time of his death, And this would seem to have been the intention of the testator, for at the time he made his will in 1910 he, so far as I can gather from the evidence, had no communication with, or even knowledge of, any uncle or relatives in

Madeira, and it was only after his visit there, and after his will was made, that he would seem to have formed any knowledge of their existence.

The real question then is: When does or did the property vest in the plaintiffs? For on the answer to that depends the issue whether the bequest in the testator's will is one of ownership burdened with a *fideicommissum* in favour of the plaintiffs, or whether the *dominium* is in the plaintiffs subject to the usufruct to the defendant for her life.

The construction of wills is in favour of usufructuary and against fiduciary interests (*Voet* 39.1.10) *Rahl* v. *De Jager* 1 S.C., 38), and in *Juta's Leading Cases* (p. 156) it is said that in the construction of wills the presumption is against a *fideicommissum* which is not construed from the words except as a necessary consequence.

The ordinary rule is that all parts of a will should be construed so as to form a consistent whole. (*Lucas* v. *Hoole,* 1879, Buchanan 132).

De Bruyn's Grotius (p. 216), however, says "The presumption, in case "of ambiguity, is always in favour of a *fideicommissum,* and the burdened "heir will be considered a fiduciary in preference to a usufructuary. The "mere use of the words 'for life' in a bequest does not always confer a bare "usufruct, but sometimes ownership, depending upon the construction "placed upon the will. This is certainly the case where the interests of "creditors are concerned." *Maasdorp's Grotius* (Book 2, Chap. XX, par. 14), on the other hand, says: "Whenever the usufruct of an inheritance is "bequeathed to any one for life, with the proviso that he is to give the in-"heritance over to another, the word 'usufruct' is incorrectly understood in "the sense of an encumbered ownership." *Schorer's* note on this, CXLIX., is as follows: "Very often it is not quite clear whether a testator has be-"queathed the mere usufruct or the full right of ownership; for example, if "a house has been bequeathed to live in or enjoy, or land for maintenance "or support, full ownership and not a mere usufruct is regarded as be-"queathed, unless the words *during his life* are added to the bequest. The "difference between the two lies in this, that when the bare usufruct alone "is left the property can never be in the usufructuary."

In re Mutery, ex parte Ratcliffe, 5 S.C. 39 defines the time of "vesting," an important issue in such cases. In that case Mutery appointed Batten her only heir on condition that in case of his decease, whatever property remained should then be divided in equal shares to his and the testator's relatives, provided Batten died unmarried. Batten survived Mutery and died unmarried. Mutery left no relatives. It was held that the

intention of the testator Mutery was that her relatives and those of Batten should share equally p*er capita*, that the death of Batten was the date for ascertaining Batten's relatives (and *semble* that would have been the date for ascertaining Mutery's relatives), and finally that the heirs *ab intestato* of Batten at his death were entitled to the whole inheritance.

In *Nortje* v. *Nortje* 6 S.C. 9, where a testator directed his wife to remain in possession of immovable property until her death, when the same was to be sold, and the proceeds were to be divided among the children and their lawful heirs, the life interest of the wife was held to be that of a usufructuary and not of a fiduciary.

Morice on English and Roman Butch Law at p. 319 says: "The operation of the rule as to the non-vesting of an apparent *fideicommissum* may "also be prevented by expressions in the will, from which it is to be inferred that it was the intention of the testator that the legacy should vest at "once and thus to create a usufruct rather than *fideicommissum.*" *In Van Breda* v. *Master of Supreme Court,* 7 S.C. 360, *De Villiers* said "Where a "testator bequeaths the naked usufruct of a thing to A for life and the thing "itself to B after the death of A, although it is uncertain whether B will survive A, the legacy is not regarded as being conditional on B thus surviving A, but the testator is deemed to have intended that the intervening usufruct should merely delay the payment of the legacy to the legatee. Where, "on the other hand, a testator bequeaths a thing to A subject to a *fideicom*-"*missum* upon his death in favour of B, the legacy is deemed to be conditional upon B's surviving A, unless it is clear from the other parts of the "will that the testator, although using the term employed it in an imperfect "sense and intended only to leave the bare usufruct between the period of "his death and that of A. If it were a true *fideicommissum* A's heirs would, "failing remaindermen at the time of his death, "be entitled to the full benefit of the thing bequeathed."

I am of opinion that the interests of the plaintiffs vested at the time of the testator's death, that the defendant, the widow, is entitled to a bare usufruct, and that the plaintiffs held the *dominium* as at the testator's death subject to the wife's usufruct. The wife, under the will, has no power of alienation; in point of fact the intention of the testator to restrict the use of his property to his wife, is evident by his use of the words "and excluding my wife's relations." Had she such power she would not be a *usufructuarius*, but a full owner limited by the obligation to restore the property.

There can be no doubt, in these circumstances, that the plaintiffs are entitled to ask for the inventory they claim, and also for

security (*Schorer's* Note CXLVIII. to Book 2 Chap. XX, par. 13 of *Maasdorp's Grotius)* (*Nathan* Vol. 1 437) (1 *Maasdorp's Institutes,* Vol. I., p. 166), *Van der Keessel* Thesis 371 p. 133. *Furnivall* v. *Cornwall's Executors* 12 S.G. 6.

I therefore give judgment for the plaintiffs. As I understand from the argument and correspondence before me the plaintiffs accept the amended inventory, there should be no difficulty therefore in arriving at the amount for which security should be given. I think it equitable that costs should be paid from the estate.

VAN VEEN AND OTHERS *v.* LYNCH.

[36 of 1916.]

1916. MARCH 10. JUNE 2. BEFORE SIR CHARLES MAJOR, C.J.

Appeal—Magistrate's Court—Claim for rent—Status and powers of plaintiffs' attorney—Admission by defendant—Non-suit.

Appeal from the decision of the Stipendiary Magistrate of the Bartica Judicial District (Mr. H. A. Frere) who non-suited a claim by the plaintiffs for the sum of $59.04, being for six years' rent at $6.84 per annum, of a portion of lot 40, Bartica, from January 1st, 1910, and for half the fruits reaped from the same lot at $3 per annum.

The appeal coming on for hearing on March 10th, the case was referred back to the magistrate for re-hearing; it was re-heard on March 30th and was again non-suited by the magistrate.

The appeal was allowed and judgment was entered for the plaintiffs for $6 and costs.

SIR CHARLES MAJOR, C.J.: The plaintiffs, in an action within the jurisdiction of the stipendiary magistrate for the Bartica judicial district, claimed from the defendant arrears of rent for, and the value of the produce of, land at Bartica held by the defendant under a verbal lease from year to year. The action was instituted by the plaintiffs' attorney and, after a hearing in January last wherein the magistrate non-suited the plaintiffs, was, on appeal from his order, remitted by me to him for re-hearing.

The magistrate has, on the re-hearing, again non-suited the plaintiffs, on the finding that the defendant has paid his rent, and, it seems, on the assumption that "the plaintiffs' attorney is not a fit and proper person to be admitted in a court of law in the capacity of legal representative." I cannot follow this assumption nor find its justification. The plaintiffs' attorney is not,

of course, their legal representative, nor is he their personal representative. The plaintiffs are living. Neither is he the representative, legal or personal, of the plaintiffs' testator. But, as appears from his power of attorney, he is the duly constituted nominee, and appointee of the plaintiffs for purposes which include that of suing in their name for rent; and this, notwithstanding the existence, and presently continuing office, of an executrix of the will of the plaintiffs' testator.

It appears from the evidence the magistrate had before him that the plaintiffs took the leased land under the will of their mother, who appointed one Lydia Clarke her executrix and the guardian of her infant children. That, after the plaintiffs (three children of the testatrix and all then *minors ætate*) and the executrix had, in 1909, made the agreement for the lease at a yearly rental of $6.84, the executrix (perhaps without consulting the beneficiaries, but this is not clear nor, in fact, material) agreed with the defendant that the yearly rent should be reduced to $6. That for 1910 and the succeeding years to the 31st December, 1914, the defendant has paid the rent of $6 to the executrix, without objection on the part of the plaintiffs, some, if not all, of whom have attained their majority. The executrix clearly had power to reduce the rent and to receive it from the defendant, and so far as the payments up to and including 1914 are concerned, the plaintiffs cannot succeed. But the magistrate should have given judgment for the amount admitted by the defendant to be now due, viz., $6 rent for the year 1915. The plaintiffs have not sued for the current year's rent. They have failed to prove that the defendant has withheld from them their half of the yearly produce of the land. The evidence on this part of the claim is rather the other way.

The order of the magistrate is set aside, and I order judgment to be entered for the plaintiffs for $6 and the costs of this appeal only.

GRIFFITH *v.* MALOUF.

GRIFFITH *v.* MALOUF.

[35 of 1916.]

1916. MAY 29. JUNE 10. BEFORE BERKELEY, J.

Contract—Action for the recovery of diamonds—Licence to trade in precious stones—Sale to unlicensed person—Validity of contract.

The failure of M. to obtain a licence to trade in precious stones, does not affect the validity of a contract of sale of precious stones by G. to M., although M. makes himself liable to any penalties provided by law for trading without a licence.

Claim for the return of 114 carats of rough diamonds, or their value $890, the property of plaintiff, alleged to be wrongfully and illegally detained by defendant.

Further necessary facts appear from the judgment.

E. G. Woolford, for the plaintiff.

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

BERKELEY, J.: Plaintiff claims the return of 114 carats of diamonds left with the defendant on or about October 14th, 1914, as security for a loan of $320, or in the alternative their value, $890. The defence is that these diamonds were purchased for the sum of $350, $320 being paid to plaintiff and the balance of $30 being kept in satisfaction of a debt due by him. By his reply the plaintiff says that if the court finds that there was a sale it was void in law, defendant not being licensed to trade in precious stones.

The evidence shows that prior to the outbreak of war the Royal Bank of Canada had acted as agent of the plaintiff and others in the shipment of diamonds, but from the declaration of war until April, 1915, they ceased to carry on any such agency.

The evidence of Too Chung shows that in October—at which time the banks made no advances—the fair price for such diamonds was $300 to $400, and the plaintiff's admission that no sum was mentioned as remuneration for the loan together with the fact that he made no attempt to get back the diamonds until the banks had resumed business in connection with precious stones, tend to discredit plaintiff's claim that they were left with defendant as security for money advanced.

The impression conveyed to this court is that the idea of bringing the present action was conceived by the witness Willis who describes himself as a general agent for gold-diggers.

As to the illegality of the contract, it does not follow that because an Ordinance imposes a penalty for the performance of any specific act, that therefore such act is prohibited. If the Ordinance means to prohibit the entering into a contract to purchase without a

licence, then the contract would be void, but if the object of the legislative authority is merely the protection of the revenue, the Ordinance would not be so construed, A licence to trade in precious stones is required to be taken out under the Tax Ordinance 1914, by which taxes are imposed for the purpose of defraying in part the public expenditure. The penalty imposed for the failure to take out any such licence is solely for the protection of the revenue and therefore does not render the contract illegal. This action is dismissed with costs.

VIAPREE *v.* ALTAFHUSAIN.

[293 of 1915.]

1916. MAY 23, 27, 31. JUNE 14.

BEFORE SIR CHARLES MAJOR, C.J.

Solicitor—Claim for services rendered—Conflict between solicitor and client on question of authority—Onus probandi.

A solicitor should always, on first employment in a proceeding, obtain a written direction from his client to commence the same, whether it be an action or other proceeding; and if he neglects to do so, he is, in an action to recover payment for his services, put to strict proof of his authority. If, on the whole case, the question is left doubtful, he cannot recover.

Claim by the plaintiff, a solicitor of the Supreme Court, for the payment of the sum of $167.75, being the amount of a bill of costs taxed as between solicitor and client.

Defendant denied that he had ever employed the plaintiff to act as his solicitor at any time in the matter referred to in the bill of costs.

The necessary facts fully appear from the judgment.

J. A. Luckhoo, for the plaintiff

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

Cur. adv. vult.

June 14.

SIR CHARLES MAJOR, C.J.: The plaintiff, a solicitor of the Supreme Court, claims in this action on a specially indorsed writ the sum of $167.75, amount of a bill of costs taxed between solicitor and client for professional services rendered. The bill was taxed upon due notice to the defendant but in the latter's default of attendance upon the appointment to tax. That default is explained by the defence to the claim and the evidence in its

support, which, shortly expressed, denies the employment of the plaintiff and further pleads a custom in the legal procession in accordance wherewith the plaintiff cannot, in any event, recover more than half the amount of the bill. Upon consideration of this second plea it is unnecessary to embark, for the custom is not shewn to have been so judicially ascertained and established generally as to enable me to take judicial notice of it, nor has it been, in this case, sufficiently proved to be particular.

The case, therefore, resolving itself on the sole issue of employment of the plaintiff by the defendant, the evidence of the plaintiff and his witnesses, first as to the time and manner of employment is to this effect. That in May, 1915, the plaintiff at the office of Mr. Low, a barrister, whither the defendant had repaired at Mr. Low's request, was recommended by Mr. Low to the defendant for employment in a matter of the realization of the defendant's security by way of mortgage for the payment of a debt by one Gopi, and that the defendant accepted the recommendation by saying to Mr. Low, "all right, sir, go ahead," or "all right, you can go on," and, being asked by the plaintiff for the mortgage instrument between himself and Gopi, referred the plaintiff for it to Mr. Low. That Mr. Low said (to the plaintiff) "You will get all the information you want from a petition pre sented to the Chief Justice," and handed him a copy of that petition which he read as instructions. That the defendant then left the office. With this the only direct evidence for the plaintiff as to the actual employment, the plaintiff has submitted certain other subsequent facts and circumstances as confirmation and corroboration. Before, however, stating these in detail, it is necessary, in view of the allegation in the defence, to refer to the following.

Mr. Low, in 1912, had entered into an agreement, in 1915 still subsisting, with the defendant, wherein, after reciting that the defendant desired to engage the services of Mr. Low for the collection of his debts and to defend him in suits, it was agreed that Mr. Low should collect "all debts, promissory notes, or other debts," and defend all suits "on the basis of ten per cent, of the amount sent in to be collected or defended." The agreement contains no reference to costs of any suit instituted or defended thereunder. Acting under that agreement Mr. Low for the defendant commenced and conducted to trial an action against Gopi upon a promissory note and goods sold, recovering judgment for some $659 and costs. Still acting under the agreement, and after execution had issued upon that judgment and the real property subject to the mortgage had been sold therein for some $1,300 or $1,400, Mr. Low, not then instructed by a solicitor, presented a petition to this court for an order directing the

Registrar to make payment to the defendant out of that sum of the mortgage debt from Gopi and a large sum for interest. The petition came on for hearing before me, and, no proceedings, whether by way of application for confirmation of judgment by "willing and voluntary condemnation" or for leave to proceed thereon in execution having been taken, I made no order on the petition and intimated to Mr. Low that some proceedings of the kind ought to be taken and upon notice to Gopi. It was at this stage of those proceedings that the plaintiff says he came upon the scene in the manner above testified.

Turning to the other facts and circumstances urged for the plaintiff in support of the allegation of employment are (1) that he, at Mr. Low's chambers (not at his own office) drafted the memorandum of application, made pursuant to the court's opinion already given, and other documents. The record and the bill of costs show that there were a considerable number of documents, and the plaintiff said in his evidence that he had drafts of all documents he prepared, but, in obedience to a notice to produce those drafts he has produced one only, viz., the draft memorandum of application. This, it appears, is much more in the handwriting of a witness Belmonte than that of the plaintiff, but it has amendments in red by the plaintiff, and in one particular at the very end by Mr. Low. Belmonte is apparently a sort of consultant with the plaintiff as well as Mr. Low, who find his experience in the law of the colony useful to them from time to time. The bill of costs, of course, set out all the documents therein enumerated as drawn by the plaintiff, but the affidavits at any rate in support of the application, it has been shewn, were drawn not by the plaintiff but by Mr. Low, with one exception. (2) That the defendant accompanied the plaintiff to interviews with persons in Water Street to obtain material for the supporting affidavits. (3) That the defendant saw the plaintiff on the 19th May, at Mr. Low's chambers, and asked him when the papers were likely to be ready, and that he said he was working on them and trying to get them ready for the coming Saturday. (4) That the plaintiff took all the necessary papers for filing from Mr. Low's office to his office whither the defendant, Belmonte, and one Allahbux came and whence he, Belmonte, and the defendant went to the registry in order to file the papers. And (5) that the plaintiff appeared with Mr. Low on the hearing of the application without any protest on the defendant's part.

Continuing the history of the proceedings until the present litigation, it appears that the Court on the intervention of Gopi on the defendant's application, having left the defendant to institute such action as he might be advised for realization of his mortgage security, he refused, notwithstanding repeated and

urgent recommendation by Mr. Low, to move any further in the matter. The plaintiff on the 17th August rendered his bill of costs and gave notice of taxation. He did not attend the taxing officer and on the 27th September served the defendant with a second notice. Both these notices the defendant promptly took to Mr. Low with what object I will presently consider. The bill was taxed on the 5th October and on the 6th November the plaintiff issued his writ of summons in this action.

But on the 1st November Mr. Low had met the defendant in the registry, when the defendant complained to him that he had taken—I believe the technical local term (not, in the circumstances, free from inconvenience) is "lifted"—the office copy mortgage deed from the registry without the defendant's authority. Mr. Low refused to surrender the document, claiming a lien on it for payment of commission. After some haggling and suggestions of Mr. Chief Clerk Newsam the defendant paid Mr. Low $45—Mr. Low had claimed $65—the latter saying that he would send a receipt for same. Later in the day Mr. Low sent the following receipt: "Received from Altafhusain forty-five dollars retainer in matter of Altafhusain v. Gopi (action on promissory notes and goods sold). This being in full satisfaction." The defendant, however, took the receipt to Mr. Low saying that it was incorrect, as he had understood that the $45 was in payment for all services rendered in respect of Gopi's matter generally, not the action on promissory notes only.

Meanwhile it appears that the defendant had, without reference to Mr. Low (and, of course, from his point of contention without any reference to Mr. Viapree) approached the mortgagee Gopi and compromised his claim for principal and interest, amounting to nearly $1,500, for $810. This must have come to Mr. Low's ears, for on the 3rd November he (not the plaintiff) wrote to the defendant thus: "I have been informed that you have taken "the matter of your mortgage claim against Gopi entirely out of my hands, "and have compromised with the other side and actually received the sum "you compromised for. I shall be glad to be informed by you if these par-"ticulars are true and what position you intend taking up regarding me in "the matter." This letter the defendant took to Mr. Solicitor Abraham, who on the 4th November wrote to Mr. Low asking "Why not have done with the matter?", repeating the defendant's expostulation on the terms of the receipt, referring to the plaintiff's bill of costs and repudiating liability to pay, and concluding with a request to Mr. Low to state in writing whether he intended to go on with "Viapree's bill of costs" and if so that as he [Mr. Low] engaged "Viapree and Belmonte" in the matter against the defendant's

wishes, the defendant desired the same to be brought on at an early date. To Mr. Abraham's letter Mr. Low replied a week later, maintaining the correctness of the receipt and, in respect of the plaintiff's matter, deprecating any reliance by Mr. Abraham on the defendant's statements and telling the story of the plaintiff's employment and his services rendered thereunder already mentioned as given in the evidence for the plaintiff.

Now, against that case for the plaintiff the defendant makes the following defence. That after the unsuccessful first petition by Mr. Low on his behalf (not then instructed by a solicitor) he went on request by Mr. Low to the latter's office where he saw Mr. Low, the plaintiff and Belmonte. That the plaintiff brought him a paper for signature and that, on his enquiring of Mr. Low what the paper was, Mr. Low said, "I recommend Viapree as solicitor to appear in this action." That he said to Mr. Low, "I will sign no paper to Mr. Viapree; I will sign papers to you personally, or to Mr. Abraham if a solicitor is wanted." That he never engaged the plaintiff at any time as his solicitor. That the plaintiff did not ask him for the mortgage deed, nor for any instructions in the matter, nor did he go at any time to the plaintiff's office. On this account of what happened at Mr. Low's chambers the defendant is corroborated by two witnesses called Allahdin and Allahbux. They give the additional evidence that, after the defendant left Mr. Low's chambers, they heard the plaintiff say to Mr. Low that the defendant had not signed the paper, that Belmonte said that was all right and Mr. Low that the defendant would sign "later," or "at any time," and to "go ahead."

Referring to the episodes of the notices of taxation of the biff of costs already mentioned, Mr. Low's account of them is that the defendant did bring the notices to him and ask him to beg the plaintiff to stay his hand, that he told the defendant he would do so if the defendant went on with the mortgage proceedings, that he did speak to the plaintiff on the two occasions saying that they (the plaintiff and himself) would get costs from the other side, and that the plaintiff agreed to stay his hand. On this point it should here be observed that the plaintiff said in his evidence that nothing was said between Mr. Low and himself about the taxation and that he gave the second notice as he did not attend on the first and thought a second was necessary. Mr. Low further said in his evidence that he thought Mohammedbux, Allahdin and Allahbux were in his office on one occasion with the defendant and that the defendant's wife might have been there on the second occasion. The defendant's account of this part of the matter on the other hand is that on receipt of the first notice he took it to Mr. Low and asked him what it meant, that Mr. Low told him not to mind about it as the plaintiff had no business to

send any paper to him, to leave it to him (Mr. Low) and he would see the plaintiff. That he took the second notice also to Mr. Low, saying "this is second time; this is provocation" and Mr. Low again said that Viapree had nothing to do with him. In these particulars the defendant is corroborated by Allahdin, Allahbux and Mohammedbux as to the first occasion, by Allahdin and Allahbux, Yasin and Najiban (the defendant's wife) as to the second occasion.

Turning co the collateral circumstances pointing, according to the plaintiff, to corroboration of the evidence relating to the fact of the employment. The defendant does not deny that the plaintiff went with him to Water Street merchants and others, nor that he accompanied the plaintiff on the Saturday to the registry when the papers were filed, nor that the work shown by the record (which on this occasion I specially allowed to be taken from its proper custody and produced in evidence) was done, but he says that the plaintiff was sent with him by, and instead of, Mr. Low himself who was unable or disinclined to go; that he went to the registry from Mr. Low's office and by the instruction of Mr. Low's clerk; that he left everything to Mr. Low and considered the plaintiff's appearance with Mr. Low on the application to Court entirely at and on Mr. Low's instance and responsibility and not at all by his wish or on his instructions. His solicitor, moreover, draws my attention to the fact that the papers directed by the Court to be served in the proceedings upon Gopi and his solicitor were, in fact, served by Mr. Low's clerk.

The first remark I have to make on the issue before me is that in this case there was no written retainer. There is evidence by the defendant that an attempt was made by the plaintiff to obtain one from him and he is corroborated in it by his witnesses. This, however, is denied by the plaintiff. Mr. Low does not remember the circumstance; the witness Belmonte was not asked anything about it. This evidence, in fact has the same effect on my mind as the rest, an effect I shall presently describe. Now, as said by Lord Tenterden, C.J., in *Owen* v. *Ord* (3 C. and P. 349) "every respectable attorney ought, before he brings an action, to take a written direction from his client for commencing it, and he ought to do this both for his own sake and for the sake of his client. It is much better for him, because it gets rid of difficulty about proving his retainer; and it would also be better for a great many clients, as it would put them on their guard and prevent them from being drawn into law suits without their own express directions." That advice is to-day as worthy of attention and adoption by legal practitioners as it was in 1828 when *Owen* v. *Ord* was decided. It is, moreover, applicable not only to actions but to every proceeding wherein a solicitor is first employed.

At the same time a written retainer is not a condition precedent of successful maintenance of an action for professional services. But the result of its absence is, as is well known, to put the solicitor to much stricter proof of his claim than is required when it exists. In *Wiggins v. Peppin* Beav. 405) Lord Langdale, M.R. said—"If the authority be not given in writing and the authority be denied, and there is nothing but the assertion against assertion, the solicitor must be at the costs of the risk he thus undertakes." And that dictum has been followed in many cases since. Here there is more than the assertion of the solicitor against the assertion of the defendant, but when the evidence is regarded and contrasted the weight is rather in the defendant's favour than the plaintiff's, for on the question of authority I have the plaintiff's assertion fortified, to some extent, by the evidence of Mr. Low and Belmonte against the defendant's assertion, corroborated by three witnesses, and even were I to ignore altogether the testimony of Mohammedbux, Allahdin and Allahbux—which upon the whole I certainly cannot do—the plaintiff, it seems to me, would hardly be in better case. But Lord Langdale in the case mentioned, also said: "At the same time there may be subsequent conduct from which an acquiescence may be inferred and that will make a difference," and it is urged by Mr. Luckhoo that here there was subsequent conduct showing the defendant's acquiescence. When I look at all the surrounding circumstances I am not prepared to say that the defendant's subsequent acts are so inconsistence with his present defence that they must be construed into acquiescence on his part in the performance of work by the plaintiff. On the contrary there is direct evidence which cannot be wholly disregarded that the defendant strongly demurred.

The sum and substance of the matter is that I find myself at least in doubt on the question of authority. What then is my duty? In this colony judges sit day after day to perform the functions of a jury and it is for this reason and also on account of the professional status of the plaintiff that I have in this judgment dealt with the case—in many aspects, I think, of considerable importance—as though summing it up to a jury. Putting myself in their position there is clear authority for what I must do. The onus of proof is on the plaintiff. In *Hingeston* v. *Kelly* (18 L. J. Ex. 360) where the judges who tried the case with a jury directed the jury that the plaintiff having proved the services rendered was *prima facie* entitled to be paid and that they should find for the plaintiff unless the defendant had distinctly proved to their satisfaction that the contract was the services should be gratuitous in which case they ought to find for the defendant, Baron Parke in the Exchequer Chamber said: "The

burthen of proof was never altered. The plaintiff being a professional man and performing professional services was *prima facie* entitled to remuneration." The learned judge then referred to the evidence for and against the claim and continued: "After this was given the question for the jury still remained, whether on the whole evidence the plaintiff had made out his title to remuneration." Baron Aldersan said, "If the case was left in doubt the plaintiff ought not to succeed."

Here upon the whole evidence the case is left in much doubt in my mind, and the plaintiff, therefore, cannot succeed. I dismiss the action and order judgment to be entered for the defendant, but without costs.

PEREIRA *v.* PEREIRA AND OTHERS.

[No. 174 of 1915.]

1915. DECEMBER 6, 10, 17; 1916. JANUARY 4, 5, 6, 10, 14, 17, 21, 24, 28; FEBRUARY 10.

BEFORE HILL, J.

Will—Forgery—Right to commence—Practice—Evidence of incapacity where forgery alone pleaded—Admissibility—Amendment of pleadings.

In an action to declare a will a forgery the person who propounds the will, although it has been deposited in accordance with law in the Registrar's Office, is required to begin, and the burden of proof of the validity of the will is upon him.

Where the question of the capacity of the testator to make a will has not been raised on the pleadings, evidence opening such question is not admissible, and the proof requisite as to the validity of the will will only be such as is necessary to satisfy the conscience of the Court, and to rebut the allegations in the statement of claim.

Action in which the plaintiff John Rodriques Pereira claimed—

(*a*.) An order declaring a certain paper writing purporting to be the last will and testament of his father the late Joao Rodriques Pereira, deceased, and purporting to have been made on the 22nd day of May, 1915, and deposited in the Registrar's Office on the 1st day of June, 1915, to be a forgery and setting aside the said alleged will.

(*b*.) In the alternative, that the plaintiff is entitled, from Johanna F. Pereira and Antonio Pereira, two of the defendants, to a true and correct inventory and account of the property of the deceased from the date of his death to the rendering of the said account.

(*c*.) That plaintiff is entitled to receive his full legitimate portion free from all conditions from the estate of the said deceased and that he is sole heir *ab intestato* of his deceased father.

All the further necessary facts appear from the judgment.

J. S. McArthur, for the plaintiff.

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

Posted. February 10th.

HILL, J.: The plaintiff in this action is the son of a man named Joao Rodrigues Pereira who died on the 24th May, 1915, at Georgetown. He is the sole heir at law of the deceased man. The executors of the deceased propounded a will, and the plaintiff by this action seeks to have it set aside on the ground that it is a forgery made after death, asks for a true and correct account and inventory of the deceased's property from the date of his death to the rendering of the account and, alternatively, that the defendants be interdicted from administering the estate of the deceased man.

This pleading is filed on August 3rd, 1915.

The Roman Catholic Bishop, Clementina Rodrigues Pereira, also called Clementina Rodrigues, and Maria Pereira, are joined to the other defendants, as legatees under the will, and the claim is also against the widow, Johanna Francisca Pereira, as an individual and together with Antonio Pereira, as joint executors.

From the statement of claim it is alleged that on the decease of the plaintiff's mother, the testator's first wife, the father married a second time—and in this connection there can be no doubt that this second marriage received bitter opposition from the plaintiff and the two sisters of the deceased man, who are legatees to a small extent under the will; for it is in evidence that very shortly after the second marriage the plaintiff commenced proceedings against his father for his share of his deceased mother's intestate estate, and ceased to have any communication with him, practically. The sisters never went to the marriage and never visited the house.

The claim proceeds (par. 4) that on June 1st, 1915, a will was deposited in the Registrar's Office dated May 22nd, 1915, and it alleges that it is not in truth the last will of Joao Rodrigues Pereira, nor was it made and executed by the said Joao Rodrigues Pereira on the 22nd May, 1915, or at all, but the said alleged will was made after the death of the deceased and is a forgery.

In paragraph 5 it is alleged that the said Joao Rodrigues Pereira made no will and died intestate, and the said will if allowed to stand will benefit the defendants, and will operate to the detriment of the plaintiff.

In paragraph 6 allegations are made tending to show a devastation of the estate at the hands of the alleged wrongful executors, and a consent of judgment by them at suit of one De Castro on a promissory note for $700 against the estate which said note, it is alleged, is also a forgery.

The defence is a denial of paragraph 4, and an assertion that the document deposited in the Registrar's Office on June 1st, 1915, and mentioned in paragraph 4, is the last will and testament of

Joao Rodrigues Pereira, and that it was duly made and executed by him in accordance with the provisions of the Wills Ordinance, 1906, on the 22nd May, 1915, and is not a forgery.

In paragraph 3 the defendants deny that Joao Rodrigues Pereira made no will and died intestate.

Paragraphs 4, 5, 6, and 7 are in effect a denial of paragraph 6 of the statement of claim.

In his reply, plaintiff "joins issue on the defendants' statement of defence," and sets out his version of the $700 promissory note transaction.

At the hearing, in accordance with the established procedure of the Court, the propounder of the will was called upon to begin. (*Bean* v. *Brighton,* 5th March, 1910; *Vieira* v. *De Cambra,* 1914. L.R.B.G. 28). Objection was taken to the line of cross-examination adopted by plaintiff's counsel, as opening up a question of the capacity of the testator to make a will, when no such question had been raised on the pleadings. I allowed the questions, subject to a final ruling as to their admissibility, and when the defence had called such witnesses, as they allege, as were only necessary to prove, *prima facie,* the due execution of the will, in the absence of any specific allegation in the claim as to the want of capacity, the plaintiff then sought to prove, by evidence, that on the 22nd and 23rd May the deceased man's condition was such as to render it impossible for him to have executed a will on May 22nd. Counsel for the defence objected to any such evidence, but I allowed it to be given, subject to consideration as to its admissibility, and giving the defence an opportunity under Order XXXIII, rule 8 to call fresh evidence in connection with such matter. The question at issue is whether the fact that the *onus probandi* lies on the person setting up the will, relieves a plaintiff, who opposes it, from setting out in his statement of claim the several grounds on which he does so. In this statement of claim the allegation is that the alleged will "was not made on the 22nd May, 1915, or at all, but "was made after the death of the deceased, and is a forgery." It will be seen that there is no allegation of incapacity. In plain English, it says the will was made after the man died, and it in no way alleges or suggests that it was not competent for him to have made a will on May 22nd. The defence alleged that it was "duly executed" on May 22nd. The reply merely joins issue and again in no way sets out any allegation of incapacity.

In *Owen* v. *Davies* (1864-65, 13 W.R. 88) where the plea was "the will propounded is not the will of the deceased," Sir P. Wilde struck the plea out, remarking on its frequency in the Probate Court, and, continuing, "if it "means that the deceased did not intend the paper which he signed to oper-"ate as a will,

"but executed it as a sham for some collateral purpose, that meaning ought "to be put in plainer language. If it means that he signed the will not know-"ing it to be his will, that should be stated; or if the plea has any other "meaning it ought to be precisely stated, in order that the Court may know "the question that is to be heard." In the present case, the allegation is that the alleged will is not that of the deceased, and was not made and executed on May 22nd, 1915, or at all, but "*was made after the death of the deceased and is a forgery*." That in my opinion was the question the Court had before it as the question in issue. A plea, for instance, that a testator "did not know and approve of the contents of the will" would be a good plea, (*Hastilow* v. *Stobie*, 13 L. T. 473), and a plea of undue execution would include a charge that the signature or mark of a testator is a forgery, but, where forgery is intended to be set up it is usual, to prevent surprise, to make the charge of forgery either in the allegations or by written notice. In this case, undue execution is not alleged, but a forgery after the death of the testator.

There has been no application to amend, as might have been done.

In *Riding* v. *Hawkins* (14 P.D. 56) the plaintiff as residuary legatee, propounded the will and the first codicil, and the defendant propounded the second and third codicils, in opposition to which plaintiff pleaded undue execution, testamentary incapacity, and undue influence. It was held, on appeal, that in a probate suit where the onus of proof lay on the defendant, application being made by the plaintiff, after the defendant had been cross-examined and his case had been closed, for leave to amend the pleadings by adding a defence that the codicil in dispute had been obtained by the defendant's fraudulent misrepresentations, the evidence in support of such defence to be confined to matters arising upon the defendant's cross-examination, an amendment might properly be allowed.

It appears to me that the plaintiff, relying on the onus being on the defence, has mistakenly withheld in his pleadings any allegation as to testamentary incapacity, for there can be no doubt, as will appear later on, that at the time of filing his claim he must have had the evidence on which he relies as to incapacity in his possession. And one can only conclude, either that he placed no reliance on it, or that he reserved it as a second string to his bow, the first being the allegation of forgery.

The defence, or propounders, however, believing that the only ground of objection to the will was the allegation of forgery after death, had only called such *prima facie* evidence as appeared to be necessary to satisfy the conscience of the Court.

An action for revocation of probate in this colony is instituted

when a will has been deposited under section 5 of the Deceased Persons Estate Ordinance, 1909, such deposit having the same effect as probate in common form in England, and when it is desired to obtain an order for its revocation, grounded on the alleged invalidity of the will, or on some material informality. The result is, in this colony, equivalent to compelling the executor to prove the will in solemn form. In England, the party who has obtained the probate is compelled to propound the will, and here again, the suit becomes an action for proof in solemn form. In such a case the party objecting to the probate must allege on the statement of claim, as the ground for revoking the grant of probate, the invalidity of the will, or want of interest. Further, the absence of Probate Rules in this colony has rendered the consideration of this matter a very difficult undertaking. Order XVII., rule 27, of the Rules of Court 1900, is the same as the English rule 25, under Order xix., but that rule was amended by rule 25 (a) to meet the question of pleadings in probate actions in England. By that amendment it is required that "in probate actions it shall be stated with regard to every "defence which is pleaded what is the substance of the case on which it is "intended to rely; and further where it is pleaded that the testator was not of "sound mind, memory, and understanding, particulars of any specific in-"stances of delusion shall be delivered before the case is set down for trial, "and, except by leave of the Court or a Judge, no evidence shall be given of "any other instances at the trial."

In a note to this rule in the Annual Practice, 1915. (p. 358) it is submitted that "every defence" includes the statement of claim in an action for revocation of probate: for such a statement of claim is really a defence. (See App. D. Section III, No. 2, Part 2). See also *Salisbury* vs. *Nugent* (1883), 9 P. D. 23, and *Hankinson* vs. *Barningham* (1883), 9 P. D. 62, which cases were decided before the amendment.

Where a defence of incapacity (or an allegation, as it would be in this case) has been pleaded, the burden of proof rests upon those who set up the will (Tristram & Coote, *Probate Practice*, 14th Edition, p. 407), and say the same authors, in a 'foot-note,' it "must be borne in mind that the ques-"tion of capacity only arises after doubts have been thrown upon it by the "defence (or allegation, as in this case) of incapacity having been set up." Such an allegation, as I have said, has not been set up, and therefore the question of capacity cannot be said to have arisen. I am of opinion therefore that the plaintiff's case must rest on whether he has proved that the will was forged, as alleged, after the death of the testator, and whether the evidence given by the defence as to capacity is sufficient to discharge the

onus lying on it. Subject to a decision on the question of forgery, any evidence, therefore, outside this question of forgery, was inadmissible. It is a matter for the Court what is the extent of the requisite proof, to be governed by (a) the allegations in the pleadings in the statement of claim, and (b) what is necessary to satisfy the Court's conscience.

What therefore is the evidence to show that the will was forged after the death of Mr. Pereira?

[His Honour proceeded to review the evidence in detail and continued.]

I am of opinion that the plaintiff had completely failed to prove his allegation that the will was forged after the death of the testator.

The remaining question for consideration is, has the defence successfully discharged the onus of proving that, at the time of the execution of the will, the testator knew and approved of its contents? A vast amount of evidence has been taken, principally medical, which, as I have said, after consideration, I am of opinion is not admissible, but in deciding this question of necessary proof it has seemed to me, in the interest of justice, that it would be unsatisfactory, in this particular case, to reject its consideration in view of the fact that questions of law have arisen which have not occurred before. In future, under similar conditions, if my view of the admissibility of such evidence, under similar circumstances, is correct, then a plaintiff seeking revocation of a will must stand or fall according to the issue raised in his pleadings, or it may be that with a short time, our rules may be altered to bring them in line with English practice in cases of probate.

I have therefore gone carefully into this evidence, although on the case on the pleadings, I am of opinion that the defendants have done all that it is necessary for them to do.

The entire case of the plaintiff rests practically on Dr. Bayley's evidence, and his recollections of what was the condition of the deceased on the 22nd May. Incidentally, the condition on the 23rd might affect the conclusion as to the condition on the 22nd, on which day the will is said to have been made.

[After reviewing the further evidence His Honour proceeded:—] In this conflict of medical testimony, it is very difficult to arrive at a definite conclusion based purely on this evidence, but when taken together with the positive evidence of eye witnesses, and especially, as I am convinced that Dr. Bayley has confused, and perpetuated, unfortunately, his recollections of what he believed occurred on Saturday with what really occurred on Sunday, I am inclined to the belief that there was

no cerebral haemorrhage observed by him on Saturday morning. And on this point, it is to be observed that it does not necessarily follow, if I judge the medical testimony aright, that a man attacked with cerebral haemorrhage cannot for some time express himself, and be perfectly conscious, able to understand, and approve of the contents of his will.

In his address at the conclusion of the case, counsel for plaintiff drew attention to the fact that the medical man in attendance on the patient had not been called by the defence. The answer to that is that there was no necessity for the defence to do so, as on the pleadings no allegation of undue capacity was made. In *Phillips* v. *Longbourne* (November, 1877—not reported) Sir G. Jessel, M.R. (James, L.J. concurring) held on a motion for a new trial that where the capacity of the testator was admitted, the *prima facie* presumption was that the testator knew and approved of all the contents of the will he had executed, and that the burden of showing affirmatively that he did not know and approve of the contents or of any portion of them, was upon the party who denied such knowledge and approval. (Tristam and Coote, *Probate Practice,* 14th Edit., p. 415).

Nor can I place on the visits to Dr. Bayley, of Correia, De Castro and Mrs. Pereira, the significance I am asked to by plaintiff. They had heard there was a talk of a law-suit by the plaintiff in connection with the will, and not unnaturally sought, under the belief that capacity would be in question, Dr. Bayley's opinion. They say he said the testator was all right on Saturday, but when the claim was filed, and no question of capacity was raised, it became unnecessary for him to be called as a witness, He says he told them otherwise, hence their not calling him, De Castro's reason for visiting Dr. Bayley with Correia seems to be perfectly reasonable, "I was concerned," he says, "as I knew it was a legal will; and I was present when "he gave the points to Correia to make the will and I heard the son was pur- "suing the widow for having a false will made."

It is also suggested that the defence should have called the priest who gave Extreme Unction on the Sunday afternoon. That might equally well have been done by the plaintiff. It must be borne in mind that there was no obligation on the part of the defence to do other than what appeared necessary to satisfy the Court's conscience on the pleadings. On the other hand, the plaintiff, knowing his line of action, might well have been expected to call the priest, if he could have supported him in his case. And the same with Dr. Clavier: the information, if Dr. Bayley's evidence is true, that Mrs. Pereira told him that Dr. Clavier had given up the case as hopeless on the Friday was of the utmost importance to the plaintiff's case. Here

was proof positive of a condition on Friday, precedent to the condition which Dr. Bayley says he found on Saturday, which would have clinched the matter as to capacity, yet Dr. Clavier was never approached by the plaintiff on the subject.

Nor do I think the statements said to have been made to Mr. Parker by Correia affect the question. Mrs. Pereira's brother-in-law, the other executor, knew nothing of the debt said to be due to De Castro, he was swearing to the affidavit, and the statement as to the debt, whatever Correia may have known himself, was one coming from the executor, and it was right that he should be cautious.

There are other submissions of discrepancies which, in my opinion, do not so affect this question as to cause me to look upon them as more than natural, and certainly do not require me to view the execution of this will with that degree of suspicion, necessary to require its revocation. The small differences as to the position of certain articles in the bed-room all point, on the contrary, to the *bona fides* of the witnesses, It would have been an easy matter for them to have been entirely in accord. And the evidence of Mrs. Pereira and her aged mother, as to the dead man speaking up to a short time before his death, is not such as to require me to reject all the other conclusive evidence as to the validity of the will. As I have found, the very grave condition Dr. Bayley said he saw on the Sunday is very much exaggerated, and, even allowing for some exaggeration on the part of these ladies as to the last time the deceased man spoke, it is not sufficient to require me to reject their testimony *in toto.* In fact, Dr. Clavier says he "would not say it would be impossible for a person to speak up to hour be-"fore death, who died from cerebral haemorrhage" and again "speech may "be slightly affected, and gradually become more and more affected," and Dr. Rowland says, "It is possible for a person to have cerebral haemorrhage "and yet not lose consciousness and speak perfectly clearly and describe all "his symptoms to you," and "a person attacked on Saturday and dying on "Monday morning, I think it quite possible he could speak and be under-"stood on the Sunday, 24 hours before death, even two or three hours, he "could speak and be understood. I speak from my own personal experience. "I spoke to a man at six and he died at ten."

I give judgment for the defendants with costs.

PETTY DEBT COURT, GEORGETOWN.

GREENE *v.* JONES.

[297. 5. 1916.]

1916. JUNE 6, 15. BEFORE HILL, J.

Interpleader—Landlord and tenant—Distraint for rent—Small Tenements and Rent Recovery Ordinance, 1903—Landlord's hypothec—Illata et invecta.

The landlord's hypothec only avails in respect of goods on the premises, or when they are in the act of being removed therefrom, and can only be exercised under judicial authority.

A writ of execution had been issued at the instance of Jones against C. E. Greene and certain property was levied upon. The plaintiff (claimant) A. F. Greene in this action claimed that part of the property so levied on belonged to her, and was not the property of C. E. Greene. Summons was therefore issued and the matter came to trial.

McArthur, for the plaintiff (claimant).

Sampson, solicitor, for the defendant.

HILL, J.: The defendant obtained a distress warrant under the Rent Recovery Ordinance, 1903, against the judgment debtor C. E. Greene and levied thereunder. The present claimant paid the amount of the debt and the goods were released. These were at once seized under a writ of execution issued under a judgment obtained against the judgment debtor for arrears of rent.

Claimant interpleads and relies on *Voet* (Berwick's trans.) p. 311 (Lib. xx, Tit. 11) and *Dargan* v. *Dodds,* A.J., 11. 11 1905. The defendant refers the court to sec. 48, Ordinance 11 of 1893, and the Rent Recovery Ordinance, 1903.

The point is, had the execution creditor under the writ (the judgment being for arrears of rent) a right to levy as he did?

According to the books the landlord's hypothec avails when the *illata et invecta* are on the premises or in the act of removal, and the seizure must be under judicial authority.

There are three questions involved in the present case—

(*a*) are the goods the property of the claimant?
(*b*) if so, were they properly taken in execution?
(*c*) if not so, but the property of the judgment debtor, were they properly taken in execution?

I think some of the articles are the claimant's, but not all. These are two side tables, seven pictures, and one mirror. They could not be taken in execution, under the writ, as *illata et invecta*, where they were seized, and must be released. The remainder were properly taken, under the writ, as the judgment debtor's property (sec. 43, Ordinance 11 of 1893).

Opposition declared just and well founded as regards the two side tables, seven pictures and one mirror.

No costs.

WILLEMS *v.* LAMESON.

[129 of 1916.]

1916. JUNE 16. BEFORE HILL, J.

Appeal—Signatures to Petitions Ordinance 1905—"Petition, letter, or similar document."

An agreement of lease is not a document which comes within the provisions of Section 2 of the Signatures to Petitions Ordinance 1905.

Appeal from the decision of the Stipendiary Magistrate (Mr. H. K. M. Sisnett) of the North Essequebo Judicial District who convicted the appellant Lameson, and sentenced him to pay a fine of $15 or in the alternative to 14 days imprisonment with hard labour. The appeal was dismissed.

Marshall, for the appellant.

C. R. Browne, for the respondent.

HILL: This is an appeal from the decision of a magistrate convicting the appellant of unlawfully entering in a threatening manner upon premises, the property of the complainant.

The reasons of appeal are numerous but in reality resolve themselves into two parts:

(*a*) Was the document—an agreement of lease—invalid because it did not comply with Ord. 10 of 1905.

(*b)* Was the jurisdiction of the magistrate ousted because the appellant had a *bona fide* right to be where he was.

Ord. 10 of 1905 applies to letters, petitions and similar documents and does mot apply to agreements of lease.

The magistrate had evidence on which he could reasonably conclude that the appellant had no *bona fide* belief he could enter on the land, and this being so the Court will not interfere with his decision.

Appeal dismissed with costs.

WIGHT *v.* DEMERARA TURF CLUB, LTD. (In liquidation.)

1916. JUNE 19. BEFORE HILL, J.

Costs—Taxation—Review—Fee in respect of appearance of counsel—Fees in appeal cases—Rules of Court, 1900, Appendix I, Part I. (*b*)*—Agreement as to legal charges—Legal Practitioners Regulation Ordinance, 1897, section 15.*

Review of taxation under the provisions of Order XLVI. of the Rules of Court 1900. Objections to the taxation were delivered to the taxing officer by both plaintiff and defendant.

The principal item of allowance to which plaintiff objected was the fee for counsel's appearance in the court of appeal. The taxing officer allowed a fee of $250 for senior counsel and $125 for junior counsel, whereas fees of $500 and $250 respectively had been allowed in the trial court. It was urged that the fee allowed in the trial court should be also allowed in the appeal court, on the analogy of practice said to exist in the Chancery division in England.

The defendant company objected to the taxation allowed, on the ground that, by an agreement between the plaintiff and his solicitor when the action was instituted, the solicitor agreed to accept the sum of $240 as costs of the action; that, therefore, the taxing officer could not allow on taxation a sum in the aggregate exceeding $240. An affidavit in support of the objection was filed.

The cross-objections were taken together, in chambers.

C. E. Shepherd, solicitor, for the plaintiff.

De Freitas, K.C., for the defendant company.

HILL, J.: These are three appeals from the taxation of the officer in connection with the costs of the first action and the appeal.

The first two are by the plaintiff, and in connection with the costs in the action, I find as follows:—

1. Item 27 is withdrawn. Disallowance confirmed.
   " 31. Attendance fee allowed.
   " 32-35. Appeal allowed.
   " 36. Attendance fee allowed.
   " 40. Disallowed.
   " 53. Attendance allowed.
   " 54. 120 allowed.
   " 55-56. Disallowed.
   " 63-64. Allowed.

2. Costs in appeal.
   Item 19. Disallowed.
   " 52. Disallowed.
   " 57. Disallowed.
   " 23. Allowed $18.75. Error by taxing officer.

3. With regard to the allowances for counsels' appearances, I see no reason after consideration to increase the amounts allowed. The court has to consider whether fresh argument entailed additional research—in this case there was none. The argument in the court of appeal was a repetition of the argument before the court of first instance. Unnecessary verbosity, or undue prolixity must also be considered in considering this question. The court of first instance was occupied nine days in the hearing, and a great number of witnesses were examined. The court of appeal was occupied three days in the hearing, one day more than was really necessary in my opinion. In these circumstances I do not think the fees allowed in the appeal should be increased.

4. With regard to the appeal from the costs in the action lodged by the Demerara Turf Club, I do not feel able, at this stage, to interfere in the matter. It is clear the taxing officer could not consider the question. It is equally clear I cannot do so. The affidavit filed with the defendant's objection is out of order, and cannot be considered. I. therefore, find for the costs as taxed by the taxing officer, subject to the amendments as set out in pars. 1, 2, and 3, reserving to the parties the right at any future time should the necessity arise, to approach the court for a variance of this order in so far as the costs in the first action are concerned.

REPORTS OF DECISIONS

OF

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1916.

WITH INDEX AND DIGEST.

Edited by LL. C. DALTON, M.A., Cantab.,
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1917.

JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1916.

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. (July-December.)

[NOTE. At the request of the Legislature, the decisions of the Puisne Judge sitting in the Petty Debt Court, Georgetown, when deciding matters suitable for report, have been included in this volume.]

TABLE OF ABBREVIATIONS.

(ADDITIONAL TO THE USUAL ABBREVIATIONS USED IN REFERRING TO ENGLISH REPORTS.)

A.J.	... Appellate Jurisdiction, British Guiana.
Buch. or Buchanan	... Buchanan's Reports (Cape Colony)
C.P.D	... South African Law Reports, Cape Provincial Division.
E.D.C.	... Eastern Districts Court Reports (Cape Colony).
H.C.G.	... High Court, Griqualand West, Reports.
L.J.	... Limited Jurisdiction. British Guiana.
L.R., B.G.	... Law Reports, British Guiana.
S.C.	... Juta's Supreme Court Reports (Cape Colony).
Searles	... Searle's Reports (Cape Colony).
T.L.D., or W.L.D	... South African Law Reports, Witwatersrand Local Division.
T.P.D	... South African Law Reports, Transvaal Provincial Divi sion.
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.]

TABLE OF CASES REPORTED.