INDEX AND DIGEST.

CASES

DETERMINED BY THE

SUPREME COURT OF BRITISH GUIANA.

MOSES *v.* HUNTER AND OTHERS.

1917. JANUARY 4, 6. BEFORE BERKELEY, J.

Appeal—Magistrate's court—Issue of summons to defendant—Summary Conviction Offences (*Procedure*) *Ordinance, 1893, sect, 12—Appearance to summons—Waiver of forty-eight hours' notice.*

Where a defendant is summoned to appear before a court at a time less than forty-eight hours after the service of such summons, and does so appear and plead without objection;

Held, that he has thereby waived any objection to the hearing of the complaint, although the time mentioned had not elapsed;

Held further, that if any such objection had been taken, it would be properly met by an adjournment of the hearing of the complaint.

Appeal from a decision of the Stipendiary Magistrate of the East Coast judicial district (Mr. E. A Bugle), who convicted the appellant Hunter and others of disorderly conduct within public hearing at Hyde Park, Mahaicony creek.

The reasons for appeal appear from the judgment of the court.

M. J. G. de Freitas, for the appellants.

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

BERKELEY, J.: This is an appeal by eighteen defendants who were convicted by Mr. Bugle, S.M., of the East Coast judicial district, on a charge of disorderly behaviour within the public hearing, and fined each ton dollars and, in addition thereto, ordered to enter into bonds in the sum of fifty dollars to keep the peace for six months.

The grounds of appeal are (1) that the decision is erroneous in law; and (2) that there is not sufficient evidence to support the convictions.

As to (1) it is argued that the convictions cannot stand as there was no compliance with Ordinance 12 of 1893, section 11 (1), which requires service of the summons at least forty-eight hours before the time at which a defendant is to appear, and further provides that only with consent of parties can this requirement be waived.

The affidavit of return of service laid over by counsel with the consent of the Solicitor General, shows that appellants were served on November 18th, 1916, for their appearance on November 20th. The hour of service is not stated. It is quite possible, therefore, that these summonses were served at least forty-eight hours before the trial. Whether this was so or not, the proceedings show that the appellants appeared and pleaded, and most of them cross-examined the witnesses and made statements on their own behalf after the case for the prosecution was closed. Under these circumstances I am of opinion that the conduct of the appellants amounts to a waiver of the irregularity, if any such irregularity existed. If the appellants had drawn the attention of the magistrate to the alleged irregularity and had declined to plead, no doubt the magistrate would have granted an adjournment. As said by Blackburn, J., in *Regina* v. *Shaw* (C.C.R. 34 L.J. 169), "I think when a man appears before Justices and a charge is then made against him, if he has not been summoned he has good ground for asking for an adjournment. If he waives that and answers the charge, a conviction would be perfectly good against him, and the witnesses if they swore falsely would be liable to indictment for perjury."

As to (2) the evidence shows that the appellants had surrounded Ramdeholl's place, that they all had sticks and were beating the house, and that bottles were being thrown. This was sufficient evidence in itself to warrant their conviction.

I see no reason to remit the case to the magistrate for further evidence. The appellants were heard in their defence, and one of them called a witness in his behalf.

The magistrate, in the course of his decision, says: "At the close of the case the District Inspector of Police who prosecuted very correctly brought to my notice at this hearing that this particular yard and the inhabitants thereof, urged on by the son of the owner of the said yard, one Mohabeer, have for a long time past tried to excite the family and adherents of Corasing (now dead) to enter into such a conflict that only could end seriously for one side or the other. It is for this reason together with facts as established on this record that I have dealt with these persons as above stated." Now such a spirit of lawlessness must be stamped out. Each case must stand on its own merits, but where there is evidence which warrants a conviction this court will not interfere, with any order which the Magistrate may deem it necessary to make so that the peace of his district may be preserved.

Appeal dismissed with costs.

CAMPBELL *v.* HARRIS.

[210 OF 1917]

1917. AUGUST 17, 21. BEFORE DALTON, Actg. C.J.

Criminal law—Evidence of accomplice—Conviction by magistrate on uncorroborated testimony—Value of evidence—Omission of magistrate to direct himself properly as to acceptance of such evidence.

A magistrate may convict a prisoner upon the uncorroborated testimony of an accomplice, but before doing so he must reasonably and prudently apply the rule of practice that, except in special circumstances, a prisoner should not be convicted upon such uncorroborated testimony.

Appeal from a decision of the Stipendiary Magistrate of the Georgetown judicial district, Mr. W. J. Gilchrist, who convicted the appellant Harris of unlawful receiving, and sentenced her to six months imprisonment with hard labour. The case was brought by way of review on application by the Attorney General under the provisions of section 12, Ordinance 13 of 1893.

Further necessary facts and the reasons for appeal are sufficiently set out in the judgment.

B.B. Marshall, for the appellant.

De Freitas, K.C., Actg. S.G., for the respondent.

DALTON, Actg. C.J.: This is an appeal from a decision of the stipendiary magistrate of the Georgetown judicial district who convicted the appellant Harris of receiving one $5 bank note knowing the same to have been feloniously stolen. Appellant was sentenced to six months imprisonment with hard labour.

The grounds of appeal shortly put were—

(1) that the decision was altogether unwarranted by the evidence, being on the uncorroborated statement of an accomplice, and
(2) that there was no evidence or proof that appellant, assuming that she did receive the note, knew it to have been stolen.

The evidence given discloses that a woman named Correia stole the note in question from an East Indian man. She was convicted, and after her conviction was called as a witness against Harris who was charged with receiving the note. The Solicitor General, for the respondent, does not urge that there was any other evidence than that of Correia against Harris, but he submits that, the magistrate knowing that Correia was an accomplice, and the rule respecting the danger of acceptance of the evidence of an accomplice being also presumably known to him, it was quite open to him to convict, if he did in fact believe Correia as against Harris.

During the argument reference was made to the provision of section 61 (5) of the Evidence Ordinance, 1893. There it is laid down that "where the only proof against a person charged with an indictable offence is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so." Reference was made to the fact that this section only mentions indictable offences, almost implying that the section laid down a rule of law in indictable cases only as regards the evidence of an accomplice, whereas it merely enunciates a particular duty which is based on a rule (of practice rather than of law) which already exists. The rule exists whether the matter is a felony or misdemeanour, whether it be an indictable or a summary conviction offence. In the former case it is the duty of the judge to clearly bring to the notice of the jury the danger of convicting on the uncorroborated evidence of an accomplice, in the latter case, if a magistrate, who is sitting as a judge and jury, should convict, it must be clear that he has duly considered and has brought his mind to bear upon the same rule. The practice is precisely laid down in Taylor on *Evidence*, 10th ed. p. 688. "An accomplice is a competent witness . . . . . But in any case, where the evidence of an accomplice is received, the *degree of credit* which ought to be given to his testimony is a matter exclusively within the province of the jury. It has sometimes been said, that they ought not to believe him, unless his testimony is corroborated by other evidence; and without doubt, great caution in weighing such testimony is dictated by prudence and reason. But no positive rule of law exists on the subject; and the jury may, if they please,

act upon the evidence of the accomplice, even in a capital case, without any confirmation of his statement." Proceeding then to refer to the warning which it is the duty of the judge to give them, he continues; "Considering too the respect which is always paid by the jury to such advice from the bench, it may be regarded as the settled course of practice not to convict a prisoner, excepting under very special circumstances, upon the uncorroborated testimony of an accomplice." And so in Russell on *Crimes* (7th ed. p. 2286) it is stated "It has long been adopted as a general rule of practice that the testimony of an accomplice ought to receive confirmation, and that, unless it be corroborated in some material part by unimpeachable evidence, the presiding judge ought to advise the jury to acquit the prisoner . . . . . The practice in question has obtained so much sanction from legal authority, that it 'deserves all the reverence of law,' and a deviation from it in any particular case would be justly considered of questionable propriety." The Court of Criminal Appeal in England expressed full approval of and applied these authorities in the case of the *King* v. *Tate,* 1908 2 K. B. 680.

The two local cases of *Porter* v. *Burrowes* (Review Cases June 21st, 1889) and *Koon* v. *Birch* (A. J., June 27th, 1907) have, I should here remark been brought to my notice. The first decision, by Chalmers, C.J., was given prior to the passing of the Magistrates' Decisions (Appeal) Ordinance, 1893, and is not now in all respects good law, having in view also the provisions of section 61 of the Evidence Ordinance, 1893, to which I have referred.

In the latter decision Bovell, C.J., held that there is no rule of law that a magistrate cannot legally convict on the uncorroborated testimony of an accomplice, from which decision I in no way dissent.

It not being in dispute that the evidence of the thief Correia was entirely uncorroborated it is not necessary for me to discuss the evidence, except to remark that from the first the appellant strongly denied ever having the note nor was it ever found. I therefore go at once to the magistrate's decision to ascertain if, knowing this rule of practice, and applying it prudently and reasonably in the case before him, he yet saw exceptional circumstances which justified him in accepting and acting upon the statement of the accomplice, after her conviction, as against the evidence of appellant. The decision is not a short one of a few words, but is one of some length. Yet no reference is anywhere made in it to the rule to which I have referred, either directly or by inference. I say 'by inference,' because it is only by inference in this case that the magistrate is said to have applied the rule.

But it should not be a matter of any doubt whatsoever. He should clearly and explicitly direct himself on the point and

should state that the conviction was in face of the rule, and he should show good reason for any deviation from it. If he does so, then the conviction must stand. Here it has been put forward that he had just convicted Correia, and so must have known that she was an accomplice; that, however, is not knowledge of the rule of practice as regards the acceptance of an accomplice's evidence. The decision deals solely with reasons why he thought he should accept Correia's evidence as against that of Harris, calling attention to some slight discrepancies in the evidence of the latter and one or two other witnesses. From. the character of the principal witnesses and the sordid nature of the whole story, those discrepancies are, I think, of little importance, but however that may be, the magistrate failed to direct himself as to the danger of accepting Correia's uncorroborated testimony. If he had so directed himself I do not think he could possibly have convicted the appellant as he has done. There has therefore been a miscarriage of justice, and the conviction must be set aside.

That being so, it is not necessary to consider the further grounds of appeal.

The appeal is allowed and the conviction quashed with costs.

JOHNSON *v.* VAUGHAN.

[217 OF 1917.]

1917. AUGUST 21. BEFORE DALTON, Actg. C.J.

Infant—Government Industrial School—Liability for maintenance and support—Government Industrial School Ordinance, 1907, sec. 33—Meaning of term "guardian."

Appeal from a decision of the Stipendiary Magistrate of the Georgetown judicial district (Mr. J. McCowan), who ordered the appellant Vaughan to pay the sum of one shilling per week towards the maintenance and support of a boy named Aubrey Phillips, 13 years of age, during his detention in the Government Industrial School at Onderneeming. The boy had been ordered to be detained in the school until May 20th 1922.

The reasons for appeal fully appear from the judgment.

S. E. Wills, for the appellant.

De Freitas K. C., Actg, S. G., for the respondent.

DALTON, Actg. C.J. The complainant in this case sets out that one Aubrey Phillips, of the age of 13 years, is now detained in the Government Industrial School under the Government In-

dustrial School Ordinance, 1907, and has been ordered to be detained there until May 20th 1922. It continues that one Peter Vaughan, of D'Urban Street, Georgetown, is a person liable to contribute to the support and maintenance of the said boy and is of sufficient ability to contribute towards his maintenance and support.

After taking the evidence the magistrate found that Vaughan was the "guardian" of the boy, and ordered him to contribute the sum of 1/- per week towards his maintenance.

Vaughan appealed on the following grounds:—

"(1.) The decision is erroneous in point of law—

(a.) because it has not been proved that the father of the said Aubrey Phillips has been called upon to contribute towards the maintenance of the said Aubrey Phillips in the said Government Industrial School.

(b) because it has not been proved that the father of the said Aubrey Phillips is not of sufficient ability to contribute to the maintenance of his said son.

(c) because it has not been proved that the defendant is the guardian of the said Aubrey Phillips.

(2) The decision is altogether unwarranted by the evidence in like manner as if the case were tried by a jury there would not have been sufficient evidence to sustain the verdict for the foregoing reasons and amongst others, because it has been clearly proved that all the defendant did was to perform, some fifteen years ago, the single isolated act of rescuing the said Aubrey Phillips when a baby three months old by transporting it from one woman to another."

These proceedings are taken under the provisions of section 33 of the Government Industrial School Ordinance, 1907. That section provides that when a boy is detained in the school, the father (whether the boy is legitimate or illegitimate) shall contribute to his maintenance and training; it further provides that if the father is unable to contribute anything, or any sum less than $1 a week, "then the mother, the guardian, every person bound by law to contribute to the support of the boy," etc. shall, if of sufficient ability, be bound to contribute towards his support. Section 34 deals with the mode of enforcing the liability.

No attempt was made to prove that the appellant was the father of the child, nor does it appear how he comes to be set down as father, with the woman Phillips as mother, on the order sending the child to the school. The magistrate however, says, "It is clear that the defendant by his admission to Sergt.-Major Nelson and the evidence of Phillips, both of whom I believe, constituted himself the guardian of the child when he took it from its mother, the word ' guardian,' when used by itself as in section

33, meaning ‘personal guardian’ (Stroud’s Judicial Dictionary). When a person in every-day life acts as defendant did, the only reasonable conclusion one can come to is that he is the person responsible for such child.” What is the evidence of the witness Nelson upon which this conclusion is based? “Defendant said he handed over infant to one Mrs. Phillips fourteen or fifteen years ago. He admitted that boy is now in Government Industrial School. He said he knew mother. This woman out of colony.” In cross-examination Nelson says “I do not know if you are guardian.” Phillips’ evidence is as follows:—“Defendant gave me a child about three months old. . . . I don’t know mother of child. He said had a child a few days old. To keep it. He brought it to me. Never came back. Never supported it. Never said he was the father. Magistrate sent child to Onderneeming.” I can see no admission here that appellant in any way constituted himself guardian of the child, nor can I find any evidence at all on the record that he was such “guardian.” Whatever the meaning of that term, I have no doubt at all that it does not include a person who, as the appellant appears to have done here, acted as an intermediary some fourteen years ago in conveying the child from the mother to another woman who retains the child until it is sent to the Industrial School some thirteen years later. The authority to which the magistrate refers is I think wrongly applied and in no way governs the facts of this case. Jessel, M.R., says “What does the word, ‘guardian,’ standing alone, generally mean? I suppose guardian of the person. An infant may have several guardians; he may have a guardian of the person, or a guardian in socage, or in gavelkind, or, if he has a copyhold estate, a guardian according to the custom of the manor. But I suppose ‘guardian’ means guardian of the person.” (*Rimington* v. *Hartley* 14 Ch. D. 630).

The most the evidence shows is that some thirteen or fourteen years ago appellant had the child in his custody, it may have been for a few hours or possibly a few days, on receipt of the child from the mother and before handing it over to Phillips. There is nothing at all, however, on which to base a finding that he was the guardian of the child. A person might run the risk of having the maintenance of destitute children imposed upon him by law, assuming charitable acts on his part towards such children, if this decision held good.

There being no evidence to support the decision, it is not necessary for me to consider the further grounds of appeal.

The appeal is allowed, and the order of the magistrate is discharged, with costs.

JARDINE *v.* MOHABIR.

JARDINE *v.* MOHABIR.

AMIR *v.* MOHABIR.

[284 OF 1915.]

1917. AUGUST 10. BEFORE DALTON, C.J. (Actg.)

Costs—Taxation—Review—Scale of taxation—Practice—Interpretation of words "amount claimed"—Rules of Court 1900, Appendix I. Part 1. (*b*) *and* (*c.*)

The words "the amount claimed" as used in the Rules of Court, 1900, Appendix I. Part. 1. (b.) and (c.) have reference to the amount as determined after adjudication.

Teixeira v. *Georgetown Livery Stables Co., Ltd.*, (reported above at page 18) followed.

Review of taxation on the application of the plaintiffs in the two actions. The first matter was dealt with by agreement between the parties, it being decided that the decision in that case would govern the second matter. The plaintiff Jardine had obtained judgment for $204.24 and costs, and the costs had been taxed on the higher scale. Plaintiffs claim was for the delivery of 158 bags of paddy, or their value $203.10, and $250 as damages.

E. A. V. Abraham, solicitor, for the applicant (plaintiff).

A. M. Ogle, solicitor, for the respondent (defendant).

DALTON, C.J. (Actg).: There are two cases of review of taxation under the provisions of Rules of Court. Order XLVI. r. 9. The first matter only was proceeded with, it being agreed that the decision there should govern the second case.

On a claim (a) for a declaration that certain 158 bags of paddy valued at $203.10 were his property; (b) for $250 as damages flowing from an injunction obtained and alleged illegal levy, plaintiff Jardine obtained judgment against defendant for the delivery to him of 121 bags and 96 lbs. of paddy, or its value at seven shillings a bag, *i.e.* $204.24, and costs.

Plaintiff's solicitor filed a bill of costs for $376.57, that is on the higher scale, and not on the ten per cent., basis. The matter came before the taxing officer in February, and he allowed the bill in the sum of $275.61, that is, he taxed it on the higher scale. The same day, however, he cancelled his taxation altogether, and notified the parties of his action giving as his reason that the point in dispute, whether the bill should be taxed on the higher or lower scale, was shortly to be decided by the Court of Appeal, by which decision he would be bound. The question however, never came before the Court of Appeal, and in July the bill was again taxed, again on the higher scale, and allowed in the sum of $276,816.

From this taxation defendant Mohabir appeals. His reason for appeal is that the bill should have been taxed on the lower scale inasmuch as the amount recovered in the action did not exceed $250, and therefore the costs should have been calculated at the rate of ten per centum on the amount recovered, in accordance with the provisions of Appendix I, Part 1., (c) of the Rules of Court.

This particular point in dispute has been before the court on several previous occasions, the last time as recently as February last, in the case of Texeira v. *Georgetown Livery Stables Co.*, Ltd. In that decision Berkeley, J., followed the decision of Hewick, J., in the case of *Archer* v. *Britton* (L.J. March 22nd 1906.) After learning the arguments addressed to me by Mr. Abraham, and after considering those decisions and others referred to, I see no reason to disagree with them in any respect. Whilst admitting that the interpretation of the rules on this particular point is not without difficulty, it is allowed that, since the rules came into force, some seventeen years ago, the interpretation of the rules and the practice has been consistent, and no case has been taken to the court of appeal. Just as the value of the property in respect of which the action was brought is the value as decided on the adjudication, so is the expression “amount claimed” to be interpreted, that is by reference to the adjudication.

The judgment here being for a sum under $250, the taxation should have been on the lower scale. The taxation will therefore be set aside, and the taxing officer must proceed accordingly. Costs of review are allowed in the sum of $5.

In re A. AND B.

In re A. AND B.

[176 OF 1917.]

1917. AUGUST 14. BEFORE DALTON, C.J. (Actg.)

Infants—Guardianship—Mother surviving sole guardian—Remarriage of mother—Infants Ordinance. 1916 (*No. 19 of 1916*) s. 12.

Under the Infants Ordinance, 1916, where there is no guardian appointed by the father, the mother, if surviving the father, is the sole guardian of the infant or infants of the marriage; the fact that the mother has made a second marriage does not deprive her of her guardianship under the ordinance.

Petition by X., the mother of two infants, praying for the appointment of herself as the guardian of the two children, with authority to her to join in the sale and transport of certain immovable property in which the infants had a half interest.

The petition set out that the father of the infants died in the year 1913 leaving a will but appointing no testamentary guardian of his minor children, and not in any way dealing with the property in question in his will. It further sets out that the petitioner, as mother, assumed the guardianship of her children, of which however she was advised she was deprived by her second marriage in 1916. The property was in need of repair, a fair and reasonable price for it was offered, and it was in the infants' interests to accept the offer.

J. A. King, Crown Solicitor, for the petitioner.

DALTON, C. J., (Actg).: The sale of the property appears to be in the interests of the infants, owing to the divided ownership, and its present state of repair. Petitioner however requests appointment as guardian of the infants. That does not seem to me to be necessary. It is provided by s. 12 of the Infants Ordinance 1916, which follows s. 2 of the Guardianship of Infants Act 1886 (*49 &. 50 Vict. c. 27*), that on the death of the father, "and in case the father shall have died prior to the passing of this ordinance then from and after the passing of this ordinance" the mother is to be guardian either alone or jointly with others appointed by the father. If the latter does not make any appointment, the court can, if it thinks fit, appoint someone to act with the mother. The mother, then, is already guardian under the provisions of the ordinance. The English statute referred to and the local ordinance give to the mother surviving her husband rights which are entirely new. (*In* re X, 1899 1 Ch. 526) Her guardianship is in no way taken away from her by her subsequent marriage, although if it be in the interests of the infants the court may join some other person or persons with her to act as guardian.

It is not asked for or suggested in this case. Therefore it is not necessary to interfere.

The order will be that the mother as statutory guardian, if she may be so called, do join in the sale and transport of the minors' interest in the property as prayed.

BHADAI *v.* POONOO.

[218 OF 1917]

1917. AUGUST 24, 31. BEFORE DALTON, Actg. C.J.

Appeal—Security to prosecute appeal—Sufficiency of recognizance—Magistrates' Decisions (*Appeals*) *Ordinance, 1893, s.16* (*1.*)*—Duties of executor—Payment of debts—Deceased Persons Estates Ordinance, 1909.*

Appeal from a decision of the Stipendiary Magistrate of the East Coast judicial district (Mr. E. A. Bugle) in an interpleader suit in which Bhadai, the plaintiff in the court below (now respondent), claimed two head of cattle as having been wrongfully and unlawfully levied upon by Poonoo, the defendant (now appellant), to satisfy a judgment obtained by the latter against one Beechu, and the sum of $20 as damages for the wrongful levy. Judgment was given for the plaintiff, the levy being declared bad, and the damages being assessed at $5. Defendant appealed; his reasons for appeal are set out in the judgment below.

A. B. Brown, for the appellant.

E. G. Woolford, for the respondent.

DALTON, Actg. C.J.: This is an appeal from a decision of the stipendiary magistrate of the East Coast judicial district who, in an interpleader suit, gave judgment for the claimant, the plaintiff in this action, with costs. The defendant now appeals.

An objection was taken by the respondent that the appeal could not be heard, as the recognizance to prosecute the appeal was not in order. The bond was for $70 only, whereas the value of the property, the subject of the judgment, was $90, costs amounted to $49.20, and damages to $5. The decision of *Williams* v. *Hodge* (A.J. 1.5.1909) was cited as an authority to support the objection. I quite agree that the words "to the satisfaction of the magistrate" in section 16 (1), Ordinance 13 of 1893, have reference only to the sufficiency of the surety, but in this case before me it is admitted that the cattle, the subject of the suit, have been handed over to respondent and are now in his possession. That being so it is quite unnecessary for the appel-

lant to include their value in his bond, which apart from that amount is quite sufficient. The objection is therefore overruled. The dispute, as I have said, is respecting the ownership of cattle. Plaintiff claims that one Surajbally (now dead) owed him $500 on a promissory note, and on his death he (plaintiff) took over thirty-eight head of cattle from the deceased's executor in settlement of his debt. Defendant claims that one Beechu bought two of those head of cattle from Ramotar, an heir of Surajbally, and that he, defendant, levied upon them in satisfaction of a judgment he had obtained against Beechu.

The material part of the magistrate's finding on the evidence is as follows:—

> "From the evidence taken in the case it appears that Surajbally during his lifetime owed the present claimant a sum of $500 on a promissory note given by him during his lifetime to Bhadai, and that after the death of Surajbally, Bhadai, to protect himself in getting in this money for his promissory note, met Nagessur, the executor under Surajbally's will, at Mr. Woolford's office, and then adjusted the settlement to this note by the handing over of thirty-eight head of cattle as per exhibit 'B.' I have no cause whatever to doubt the bona fides of this transaction and, since the closure of the taking of evidence in this matter, I have been shewn by Mr. Woolford the promissory note referred to, and such in my opinion has all the appearance of a genuine instrument."

The reasons for appeal are as follows:—

1. That the magistrate's court has exceeded its jurisdiction in the case.
   (a) That after the case had been closed the magistrate was shewn the promissory note which was not tendered at the trial and the note which was shewn to the magistrate evidently influenced him in arriving at the decision he came to in the case.
   (b.) That the magistrate took cognizance of a will which was not tendered in evidence at the trial.
   (c.) That the magistrate could not arrive at a decision in the case unless it was shewn that the executor had carried out the requirements of the law.

2. The decision is erroneous in point of law.
   (a.) That it is not competent for the executor herein, after handing over the estate to the legatees, to re-take it without any notice.
   (b.) That it is not competent for the executor to have adjusted the settlement of the alleged debt in the form and manner as the executor herein has done.

(c.) That when the two cattle were sold to Beechu, Ramotar, the legatee, was in the legal possession of them and Beechu bought them without any notice from the executor or Bhadai.

3. . . . .

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

To consider first the matters of law raised in reasons 2 (a) (b) and (c); I quite agree with the conclusions at which the learned magistrate arrived. The position of executor in this colony at the present time and until the coming into force of the Deceased Persons Estates Ordinance, 1916, is somewhat obscure. Under the Roman-Dutch law for certain purposes he is an agent appointed by the deceased, and exercises his powers under the control and supervision of the heirs. But his position under the old common law has been materially altered by the Deceased Persons Estates Ordinance, 1909, which brings him some part of the way to the position he will hold under the new ordinance. Section 20 of the Ordinance of 1909, for instance, requires him to call up creditors, section 21 provides for the distribution of the estate by him, and section 28 deals with any failure by him to administer within twelve months. This ordinance does considerably more than merely re-enact the common law (and of *Hiddingh* v. *deVilliers* 12 A.C. 624). It is the executor's duty to assemble the estate and pay the lawful debts, before settling any legacies. If he had not done so here, he would have been guilty of a breach of duty. Ramotar had no right to seize any part of the cattle to satisfy his legacy as he appears to have done. Further, nothing has been said or cited to show me that a debt cannot be paid in kind, as appellant urges. It is undoubtedly a method of payment which would seldom be made use of, but if it is in the best interests of the estate I Bee no objection to it, and I know of no law against it. In rendering his accounts the executor would, of course, have to justify such action to the full satisfaction of all interested parties.

Reasons 1 (b) and (c) may be taken together. From the evidence led it is clear that appellant never contested in the court below the fact that Nagessur was the executor of Surajbally, as he stated; on the contrary he called evidence which made it quite definite. He cannot now say that the magistrate took cognisance of a will which was not tendered in evidence merely because he accepted the statement by both sides that Nagessur was the executor. The latter was not a party to the action, his appointment was in no way a matter in dispute between the parties, and it required here no formal proof. Nor was it necessary for the

executor here to prove the deposit of the will, for that I presume is the requirement referred to in reason 1 (c).

Reason 3 has been abandoned, whilst reason 4, so far as it is arguable, may be said to be included in the other reasons for appeal.

Reason 1 (a) I have intentionally left to the end, as it was desirable to dispose of the other grounds first. It is clear that the whole case of the plaintiff (respondent) rests upon the good faith of the transaction between Surajbally and Bhadai. A note for $500 is alleged to have been made in respect of that transaction, but it was never produced in evidence. Mr. Woolford for respondent gave an undertaking to produce it, as appears from the record, but the case was closed before that was done Appellant therefore had no opportunity of seeing it, or of cross-examining any witness upon it. The learned magistrate however states in his decision that it was subsequently produced to him, and it seems to have some influence on his decision. Mr. Woolford urges that he had made his mind up, before he saw the note. It may be so, but after reading the decision I am unable to say that it did not affect his finding. In any case the undertaking to produce the note should have been carried out; in justice to the appellant he should have had an opportunity of seeing it, which he does not seem to have had. On this last ground the decision of the magistrate must be recalled, and the case referred back to him for the promissory note to be produced in evidence and for such other legal evidence arising out of its production to be taken as the parties may wish to tender. After hearing such further evidence the learned magistrate will adjudicate afresh.

NASIBAN AND OTHERS *v.* ALVES AND OTHERS.

1913. DECEMBER 12, 13, 14; 1917, JANUARY 31.

BEFORE SIR CHARLES MAJOR, C.J.

Landlord and tenant—Lease in longum tempus—Alienation—Execution of lease coram lege loci—Hire goes before sale—Guardianship—Alienation of infants' real property by guardian—Sanction of Court.

A lease for ten years is a lease *in longum tempus;* a lease *in longum tempus* is virtually an alienation and, on that account, requires to be executed *coram lege loci, i.e.,* in British Guiana, as in the case of other alienations, before a judge.

A guardian may not alienate nor encumber the immovable property of his ward without the sanction of the court, or a judge thereof. Any such alienation or encumbrance is null and void.

The infant plaintiffs, by their guardian *ad litem,* claimed to have set aside and to be declared of no effect a lease of plantation Amsterdam, Leguan island, dated April 30th, 1914, from Synadabi (purporting to act as the mother and natural guardian of the plaintiffs) by her attorney Mirza, her second husband, to the defendants Alves and Tabjul for a term of fifteen years. The plantation was the property of the plaintiffs under the will of the latter's first husband. The grounds of the claim were that the lease, being for a term of fifteen years, was not legally executed and, therefore, not binding on the plaintiffs. In the alternative the plaintiffs claimed an injunction to restrain the defendant lessees from waste, and damages for acts of waste.

The defendants pleaded that the lease was in due form of law, and estoppel of the plaintiffs, and denied the acts of waste.

P. N. Browne, for the plaintiffs.

E. G. Woolford, for the defendants.

SIR CHARLES MAJOR, C.J.: The plaintiffs have pleaded that the lease, the subject matter of this action, being for fifteen years, was not legally executed and is, therefore, not binding on them, and they, as minors, claim to have the same set aside. The action is brought against the lessees and Synadabi, the guardian of the minors and their mother. She has not appeared to the writ of summons and is, therefore, submitting to such judgment against her, as the Court shall consider the plaintiffs are entitled to upon their statement of claim.

Mr. Browne, in opening the plaintiffs' case under this plea, stated that he would argue two propositions of law arising thereout, the first, that the lease, not having been executed before a judge, was of no effect; the second, that the lease, constituting an alienation of immovable property of the minors by their mother acting as their guardian and not having been effected with the sanction of the Court was not binding upon the plaintiffs. That the lease was not executed *coram lege loci*, that is, before a judge followed by registration, and that it was entered into without the sanction of the Court is conceded, but Mr. Woolford, for the defendants interposed to object to any argument of the latter proposition, on the ground that the point had not been specifically raised on the pleadings and could not be implied nor understood under the plea I have mentioned, namely, illegal execution of the lease by reason of its having been made for a term of fifteen years. I overruled the objection, holding that the point of law might be taken and argued, not only as legitimately, and perhaps, necessarily involved in the consideration of this particular contract, but also as included in the plea itself, which might fairly and reasonably be construed—the guardianship being admitted—to mean that the lease, being for fifteen years, required execution *coram lege loci*, that is to say, not only before a judge, but also with and under the sanction of the Court, as constituting, by reason of that term of years, an alienation of minors' property, the *lex loci* requiring one as much as the other.

To these propositions, then, the defendants oppose that no lease, for however long a time, is required of the law of this colony to be executed *coram lege loci*, as in the cases of "transports" or mortgages, because it is not an alienation; that, not being an alienation, the lease by the guardian did not require the sanction of the Court; that, even if an alienation and requiring that sanction, though it might be bad against creditors, it is good and binding *inter partes*.

The points have been fully and interestingly argued by both learned counsel, and, although my consideration and determination of the law involved therein will, I understand, with the dawn of the new year, shortly possess an interest (if any) of a purely academic character, it seems that they must both be given. What, then was the law of the colony governing this lease at the time of its execution? For the answer we must look to the common law. By that law, every alienation by way of sale, and every creation of mortgage, of immovable property had to be effected *coram lege loci*, that is to say, before a judge followed by registration, (or record—both terms are used—) in the registry. That law had not been, in that particular respect at any rate, modified, restricted, or abrogated. Did that law govern leases and, if so, did it govern all leases or only some leases? If only some leases, then leases of what nature?

Now among the Dutch jurists a controversy prevailed for many years as to the nature of leases in general, and leases *in longum tempus* in particular, as to what constituted *longum tempus*, as to what were the legal incidents and requirements in execution, and what the effect of a lease *in longum tempus.* In 1904, these questions and the controversy which raged round them were exhaustively considered and, it appears from subsequent authorities, finally set at rest, by the Supreme Court of the Transvaal in the case, cited to me by Mr. Browne, of *Canavan & Rivas* v. *The Transvaal Gold Farm, Limited,* (1904, T.S. 136.) In judgments of great research, wherein the whole history of the controversy was passed in review and criticized, Sir James Rose-Innes, C J., and Curlewis, J., settled the law, not only, it seems for South Africa, but also for us. The question at issue was whether the successors of an original lessor in title to leased land by sale of the property were bound by the lease, which was for ten years with an option of renewal for a further term of five years, of which they were found to have had notice and which had not been registered, that is one not executed *coram lege loci,* registration having, in South Africa, taken the place of execution before a judge, a change, I hope, soon to be made in this colony. It was, therefore, in considering the doctrine that hire goes before sale that the common law governing leases *in longum tempus* was in that case declared. That doctrine is not involved here, but the principles of the law are the same and equally applicable. The judgments amply repay perusal and render it unnecessary for me to do more than briefly indicate their tenor.

Passing to the conclusion to be drawn from consideration of the controversial area the learned Chief Justice said (at p. 145)— "It is only possible to take one of three views. Either, first, that there is no distinction between leases *in longum tempus* and other leases,

and that no registration of any lease, however long, is required to secure to it the protection of the doctrine that hire goes before sale. Or, second, that a lease *in longum tempus* is one extending over a period of twenty-five years, and that such a lease requires to be registered if it is to be even valid *inter paries*. Or, third, that a lease for ten years is one *in longum tempus*, with the qualification of *Voet* that such a lease requires registration to make it effectual as against creditors or as against particular successors of the lessor. It seems to me impossible to hold the first of these views; the arguments relied upon by *Groenewegen* appear unanswerable. A lease, for instance, for ninety-nine years partakes—whether in theory it confers real rights or not—so nearly of the nature of alienation that it should be governed by the same laws which regulate alienation of landed property. . . We are, in my opinion, bound to recognize a distinction between the two classes of leases, and the limit dividing them must be fixed either at twenty-five or at ten years. No other period is suggested by any writer, and the twenty-five years' period was entirely the creation of statute." Dealing with the applicability of the Placaat of 1744, the "statute" mentioned fixing twenty-five years as the standard for determining *longum tempus*, the Chief Justice said (at p. 147)— "As I am satisfied that the Placaat of 1744 was entirely a revenue placaat, it follows that it was not a portion of the law which the original settlers brought with them from Holland. That being so, we should now adopt the limit of ten years, but with the qualification laid down by *Voet* that it is not illegal to enter into an underhand lease for ten years and upwards; that such leases are binding *inter partes*, but that they are not binding, without notice, upon particular successors and creditors of the lessor unless registered against the title. That doctrine is equitable; it is supported by reason and authority; and I think that this Court should adopt it. It is satisfactory," added the learned judge, "to find that, on such a very important point as this, recent legislation did not change the existing law, but that Proclamation No. 8 of 1902 [that substituting simple registration for execution before a judge] only recognized and re-enacted the common law of the country."

Thus far, therefore, it is established that a lease for ten years is a lease *in longum tempus*; that a lease *in longum tempus* is virtually an alienation and, on that account, requires to be executed *coram lege loci*, that is to say, in British Guiana, as in the case of other alienations, before a judge, and registered. This lease has not been thus executed and recorded. Mr. Woolford has failed to show me that this law has been modified, restricted or abrogated No direct authority on the point has been cited, but I have been referred to the case of *Baynes* v. *Bishop*, in

which, in 1865, the Court of the colony decided that a lease need not be recorded to be received in evidence. Even granting that "record" includes execution before a judge—which appears impossible—the learned judges had no question of validity before them, but only admissibility of the document in evidence. Moreover, the law on the subject of the execution of these leases had not, in 1865, been investigated or made the subject of judicial declaration. The question of admissibility, however, was decided in reference to certain sections in Ordinance No. III. of 1860— (wrongly stated in the report as 1850), now reproduced in No. VI. (at time of enactment, No. XX). of 1880. It is noticeable that the twenty-sixth section of the present Ordinance was not in the former, but first appeared in 1880. It expressly contemplates the execution of a lease before a judge and was, it seems to me, in a measure declaratory of the common law then existing. That there has been an opinion—acted upon, it appears, by some practitioners—that execution of long leases before a judge is not required by law, is certainly no ground for my holding that that law has been abrogated. In point of fact and practice, I believe long leases have been executed before a judge in the past and are at present refused for record unless that mode of execution has been adopted.

But there remains the third declaration of the law in *Canavan's* case, that a lease *in longum tempus* not executed *coram lege loci* is nevertheless binding *inter partes*. Can the plaintiffs be said to be parties to the alienation and so bound thereby? The lease, so far as their interests are concerned, was made by their mother, expressed to be in the capacity of natural guardian. There is a statement in Mr. Nathan s work (Vol. I. p. 141) that there is no natural guardianship in Dutch law, for which the case of *Shepstone* v. *Neil* (1867, N.L.R. 9) is cited. I have not been able to obtain the report of the case, and the proposition has been advanced to me more than once in these Courts, while natural guardianship has been more often affirmed and maintained. I have inclined to the opinion that, outside the control, the maintenance and the education of minor children as part of the relation of parent to child, no guardianship existed save testamentary or dative in character, at any rate on the part of a mother. The case of *Greybe et uxor* v. *Wiid* (3 Menzies, 73) is noticeable. There, in a question between the mother, who had re-married—and Synadabi has re-married—and the paternal grandmother about the guardianship of a minor, the grandmother was found to be best entitled. From the text of the report it seems as if the Court found the mother, upon her re-marriage, to have ceased to be the guardian of the child by her first marriage, because, in support of the claim of the grandmother, her counsel cited van der Linden,

Sande, and Voet to show that by her second marriage the mother had *ipso jure* ceased to be the guardian of the minor and it was in respect of those same authorities that the Court held that after the second marriage of the mother, and in the circumstances of the case, the grandmother was best entitled to the guardianship and refused to order the removal of the minor from her charge. It is therefore, highly questionable, to say the least, whether Synadabi was the plaintiffs' guardian at all, and if she purported to act in that character when incapable, she could not thereby make her acts the acts of the plaintiffs so as to fix them with privity to the contract of alienation. But I am clearly of opinion that this question of privity of the plaintiffs to the contract cannot affect their position of minors and their option at least to avoid it. Grotius, van Leeuwen, van der Linden, van der Keessel and Voet all agree that the immovable property of wards may not be alienated or encumbered by the guardian without the sanction of the Court or a judge thereof, and it is laid down in Voet, as explained by both Maasdorp and Nathan, that when an unlawful alienation of the kind has taken place it is *ipso jure* null and void and the guardian himself who has effected it may himself sue for the recovery of the property on behalf of his ward. To one other authority, mentioned by the latter writers when settling the Roman-Dutch law of guardian and ward, do I wish to refer, and that is, *Wolff* v. *Soloman's Trustees* (12 S.C. 42). A father having purchased a farm for his minor daughter and having had it transferred to her, became insolvent. His trustee in bankruptcy obtained from him the title deeds and also a power of attorney from the daughter, she being still a minor, authorizing the trustee to sell the farm for her father's creditors. In an action by the daughter to declare the power of no effect and force and to recover the title deeds, the defendant, in his second plea (the first relating to fraud), pleaded that the minor had executed the power with the assistance of her father and with knowledge of the circumstances. De Villiers, C.J., said — "As to the second plea, it is perfectly clear that neither the delivery of the title deeds nor the execution of the power could in any way prejudice the plaintiff during her minority. Even if the power had been carried into execution by transfer of the farm *coram lege loci*, such transfer would have been null and void without the consent of a competent Court." That is a direct authority for my holding that even if the plaintiffs had been themselves parties to the contract of lease and that alienation had been effected *coram lege loci*, it would still be null and void for want of sanction by the Court. The case of *Breytenbach* v. *Frankel and anr.* (1913, T.S. 300) has been cited to me. That authority confirms *Canavan's* case in declaring as settled law that a lease *in longum tempus* is equivalent to an alienation.

There, a minor, upon obtaining twenty-one, sold property belonging to him, which was subject to a lease effected by his guardian during his minority. He did not apply for *restitutio in integrum,* nor did he cede his rights to that relief to the purchaser. It was held that the purchaser was not entitled to have the lease set aside. That was the question at issue and, obviously, entirely differs from that I am considering. It is true that in the course of the argument, remarks were made as to the effect of an alienation by a guardian in excess of his powers and the Court seems to have been of opinion—which, however, was not, I think, necessary for the purpose of deciding the case—that a contract alienating minors' property which has been entered into by a guardian on behalf of a minor is not *ipso jure* null and void, but is merely voidable on the minors' obtaining majority, but, in the face of the numerous Dutch authorities I have mentioned and the *dicta* of judges who have considered them, I am unable to accept *Breytenbach's* case as a binding decision on the point of voidability and not nullity.

In any event, the plaintiffs are now seeking to avoid the contract and something must be said about the remedies open to minors in their position. Nathan (Vol. I. p. 190,) quoting Voet, writes; "From this certain actions arise, both against the guardian alienating or binding the ward's property in an unlawful manner, and against those in whose favour the guardian has made such unlawful alienation or obligation . . . . Against the guardian the ward may bring the *actio tutelae* in respect of such transactions taking place without judicial decree . . . . If the possession of property alienated without authority has passed to another person, the ward and his heirs will have a vindicatory action to recover such possession.'' These remedies the plaintiffs have adopted. None of them, of course, is obliged to wait each till he or she has attained majority, for the action of *restitutio in integrum,* a different remedy, a remedy, moreover, as pointed out by the Judge President in *Breytenbach's* case, founded on a valid contract. Here the contract, for want of legal execution, was invalid.

Lastly, Mr. Woolford has contended that, even if the contract was null and void as against the plaintiffs it can still be declared good and carried out apart from their interests. That depends upon whether it is divisible or not. Had the plantation Amsterdam been partitioned, or although not partitioned, had it been demarcated by private arrangement in proportions representing the various interests therein, it might have been possible to have decreed to the defendants possession of the demarcated portions other than the plaintiffs'. But nothing of the kind has been done. The contract is indivisible. It is not possible to have a lease of three undivided seventh parts or shares of Amsterdam.

For those reasons, and as all the parties to an indivisible contract are before the Court, the plaintiffs are entitled to the relief they claim. The property must be freed from the encumbrance unlawfully created and the possession rendered by the defendant lessees. The latter have paid rent for the property up to the 30th day of April next, and though they are not strictly speaking-entitled to the interval between now and then, the Court will order that they deliver possession of the premises on or before that date. Against the defendant Synadabi there will be declaration that the lease was of no effect.

I am thus relieved from considering the various other issues raised in the pleadings whereon it is unnecessary to express any opinion.

I make no order as to costs.

HILL *v.* SCHOMBURGK.

HILL *v.* SCHOMBURGK.

[245 OF 1917.]

1917. SEPT. 4. BEFORE DALTON, Actg. C.J.

Practice—Specially indorsed writ—Insufficient indorsement—Application for further and better particulars—Rules of Court, Order XVII. r. 8—Procedure—Written application to solicitor—Costs.

Before making formal application to the Court for particulars the party requiring them should, as a rule, write to the solicitor of the opposite party and ask him to supply them by letter, so as to avoid the expense of an application. In dealing with the costs of applications the Court will take into consideration the fact that such a letter has or has not been written.

Application on behalf of the defendant Schomburgk for an order for further and better particulars of the claim indorsed on the writ in the action, a claim for payment of services rendered:—

(a.) What was the nature or sort of work and services alleged to have been rendered and performed; on what particular date or dates were the same rendered, and performed? What sum is alleged to be due and payable for each item of such work or service;

(b.) What was the particular work alleged to have been done by the plaintiff as the defendants' agent or attorney for which he claims commission and reward, how much commission became due and was earned, on what particular date or dates was the same done and what is the amount alleged to be due for each item on which commission and reward are claimed.

P. N. Browne, for the applicant.

Writ is insufficiently indorsed, but no objection made when leave to defend was granted. Particulars therefore clearly necessary. Application to be made after such leave is obtained. Cites *Ewing* v. *Buttery*, (L.J. Feb. 8th, 1902.) [Dalton, Actg. C.J. refers to *Harris and Co.* v. *Ramphul*, L.J. Feb. 17th, 1912.] Applicant entitled to costs, as following practice laid down by Sir Charles Major, C.J. No solicitor on the record.

E. G. Woolford, for the respondent.

Claim for particulars not resisted. Each particular item of money received not necessary. No request for particulars before application to the court. Solicitor present when leave to defend granted. Respondent entitled to costs, as particulars might have been obtained by letter. Form and terms of application unusual.

Browne in reply.

DALTON, Actg. C.J, Application is made by the defendant for certain particulars in a claim by the plaintiff on a specially indorsed writ. The claim is for the sum of $500 for "work done and services rendered by the plaintiff. . . as the defendants' agent and attorney. . . between the 9th day of March, 1915, and the 4th day of July, 1917. The particulars indorsed on the writ are as follows:—

> To amount due by defendant to plaintiff for work done and services rendered and performed, and for commission and reward due as the defendants' agent and attorney at Georgetown, Demerara, between 9th March, 1915, and 4th July, 1917. . . . $500.

The defendant filed an affidavit of defence and obtained leave to defend. No objection was taken at the time that the indorsement was insufficient, and hence it was not necessary for me to do more than grant leave to defend, leaving the parties to take such further steps as they might be advised. It is not contested now however by the respondent that the application at present before me, so far as the particulars required are concerned, must be granted. It was open to him without leave to amend his claim indorsed on the writ under the provisions of Order XXVI, r. 2 but he has not taken that step. Defendant (applicant) therefore seeks to obtain further and better particulars to properly enable him to know what case he has to meet and to avoid being taken by surprise at the trial. The case cited at the bar *Ewing* v. *Buttery* (L.J. Feb. 8th, 1902) is somewhat similar to this application in more respects than one.

Applicant further asks for costs, on the ground that he has had no notice of any solicitor being entered on the record to whom he could apply for the particulars before coming to the court, and also because it has been already ruled that an applicant should obtain particulars by coming to the court at once, and not by written application to the other side. The case, if any, however, in which this ruling was given was not cited.

It is quite true that the writ was issued by the plaintiff, who did not file notice that he had instructed a solicitor to act for him until later, but when leave to defend was granted to defendant, plaintiff's counsel appeared in court properly instructed by soliciter also present, a fact which must have been patent to defendant. In any case, if there was no solicitor, it would not have debarred him from applying first to the plaintiff for the necessary particulars before approaching the Court.

The English practice seems quite definite and is in accordance with the past practice obtaining in this colony. "Before applying to the master . . . . . for particulars, the party requiring them should, as a rule, write to the solicitor for the opposite party and

ask him to supply them by letter so as to avoid the expense of an application. In dealing with the costs of applications for particulars the K B. masters take into consideration the fact that such a letter has or has not been written." (See Chitty's *King's Bench Forms,* 14th ed., p. 223).

Applicant has not approached plaintiff or his solicitor before coming to the court.

The particulars asked for must be given within ten days from this date, the time for delivery of defence to be enlarged to ten days after the delivery of particulars, the costs of this application to be costs in the cause.

FRIDAY AND OTHERS *v.* WILLIAMS; *ex parte* WILLIAMS.

[24TH OF 1917.]

1917. SEPT. 11. BEFORE DALTON, Actg. C.J.

Practice—Dismissal of action for want of prosecution—Rules of Court, Order XXV, r. 1—Extension of time for delivery of statement of claim.

On an application under O. xxv, r. 1 to dismiss an action for want of prosecution a short time will generally be given to the plaintiff to deliver his statement of claim.

Application to dismiss action for want of prosecution in default of delivery of statement of claim.

Plaintiff on August 4th, 1917, entered an opposition to the passing of a mortgage by the defendant in favour of Booker Bros., McConnell and Co., Ltd. and issued a writ of summons in the matter on August 18th. Appearance thereto was entered by the plaintiff on August 21st. No further action was taken by the plaintiffs, and on September 1st the defendant obtained and filed a certificate of default on the part of the plaintiffs. He now asked that the action be struck out for want of prosecution. The action was in respect of property valued at less than $250.

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

J. R. Wharton, solicitor, for the respondents.

DALTON Actg. C.J. This is an application by the defendant under Order XXV., r. 1 that the action commenced by the plaintiff be dismissed for want of prosecution, plaintiff being in default of delivering his statement of claim within the time allowed (O. XVIII. r. 1.) Plaintiffs (respondents) appears and now ask that they be given further time in which to deliver their statement of claim,

on the ground of their solicitor's illness. They produce a medical certificate which however does not explain all the delay in proceeding with the action. Applicant asks that no further time be allowed on account of what he terms the dilatory methods of the respondents, but I have heard nothing, nor have I read anything in the affidavit, to justify me in departing from the usual practice in applications made under this rule, which is to allow plaintiff a short time within which to deliver his statement of claim. The order will be that unless the plaintiffs deliver a statement of claim within ten days from this date, the action is dismissed, for want of prosecution, with costs. The applicant is entitled to the costs of this application in any event.

PRITHIPALSING *v.* CARROLL

[229 of 1917.]

1917. SEPTEMBER 14, 20. BEFORE DALTON, Actg. C.J.

Criminal law—Possession of goods reasonably suspected to have been stolen—Summary Conviction Offences Ordinance, 1893, s. *96—Reasonable suspicion—Explanation* to *the satisfaction of the Court.*

Appeal from a decision of the Stipendiary Magistrate of the West Coast judicial district (Mr. H. K. M. Sisnett) who convicted the appellant Carroll on a charge of having in his possession one case of kerosine oil reasonably suspected to have been stolen and failing to satisfactorily account therefor, and sentenced him to four months imprisonment with hard labour.

The reasons of appeal appear from the judgment of the court. The appeal was dismissed.

J.S. McArthur, for the appellant.

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

DALTON, Actg. C.J.: The appellant was convicted under the provisions of section 96 (1) of Ordinance 17 of 1893, as amended by Ordinance 12 of 1915, for having in his possession one case of kerosine oil reasonably suspected of having been unlawfully obtained and for failing to give any satisfactory explanation thereof.

The appeal is based on the following grounds:—

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

(a.) the evidence of Sergt, Payne as to replies given by the defendant in answer to questions by him to the said defendant while under arrest.

(b.) the evidence of Ramochar respecting the cases of oil landed at Uitvlugt from punt "Lena."

2. That the decision is altogether unwarranted by the evidence in like manner as if the case had been tried by a jury there would not have been sufficient evidence to sustain the verdict for the above reasons, and because there was no evidence or no sufficient evidence before the magistrate's court affording ground for reasonable suspicion that the box and the tins of oil in question were stolen or otherwise unlawfully obtained.

The facts of the case are that the appellant was proceeding along the country road at Zeeburg on the West Coast about 10 p.m. at night carrying a case containing two tins of oil. Two constables were on duty on the road, and as appellant passed, one, hearing, as he says, a tin rattle, called out "Hie man, what have you there." Appellant called out "nothing," but as the constables approached him, he threw down the case and ran away. After a short chase he was caught and taken to the station, and brought up on the charge on which he was convicted. He has given no explanation whatsoever of his possession of the case and he called no evidence, the principal ground of appeal being that there was no evidence led by the prosecution to show that there was any reasonable suspicion that the tins of oil found in his possession were stolen or unlawfully obtained, such as to throw the onus upon him of showing how he became possessed of them.

Appellant's counsel has relied chiefly upon the case of *Butts* v. *Brunker* decided by the late Sir William Smith, C.J., on January 16th, 1900. He has proceeded on the assumption that the facts are very similar to the facts in this case. There the appellant was charged with the unlawful possession of certain brass; there was no evidence however that the brass was found in his possession, nor was there any evidence of reasonable suspicion that the brass had been stolen. The learned C.J. states "It was desired I suppose that the magistrate should infer, as he seems to have done, that the brass was found in the cart, (*i.e.,* the cart of appellant) but there was certainly no evidence of that fact; and I cannot avoid saying that the case was apparently placed before the magistrate in the most perfunctory and slipshod manner." This latter circumstance renders it a somewhat unsatisfactory authority to cite for comparison on the facts, but the duties of the police under this ordinance are clearly stated; "The police have no right to arrest

a man who is in possession of an article without they have reasonable cause to believe that it has been stolen or unlawfully obtained, and to say to that person, 'It is for you to prove to us that you are innocent.' It would be intolerable that the police should, without having any reasonable cause for suspicion, stop any person, and demand an explanation of his possession of any article he carried; if there is reasonable suspicion arising from the nature of the thing carried, the person carrying it, the time at which it is carried or otherwise, the case would be different, the police would be justified in making enquiries, and if their suspicion was confirmed by the nature of the explanation given, in detaining the person."

It is quite apparent that the facts in that case are quite dissimilar to those here. The appellant here, a sugar porter, was carrying a case of oil, a somewhat unusual article under the circumstances, at 10 p.m. at night, in itself an unusual hour. A vigilant constable hears a rattle and naturally calls out. He receives an answer to say it was nothing, obviously untrue. On his approaching the appellant, the later drops the case and runs away. What reasonable man can possibly say there is no cause for suspicion against the appellant after such conduct at such a time on his part? In addition to this there is the evidence of Ramochar, storekeeper at Pln. Uitvlugt. His evidence was to the effect that appellant was a sugar porter there, that the sugar porters (although he cannot swear that appellant was actually one working on this particular occasion) had recently unloaded a punt part of the cargo of which consisted of cases of oil and some of which were subsequently missing. So far as the witness described them the marks on those cases tally with the marks on the case found in appellant's possession. The magistrate did not definitely find that the latter case was one of the missing cases; if he had done so he could still have dealt with defendant, when before him, under the provisions of Ordinance 13 of 1915. He, however, considered, and rightly considered in my opinion, that there was ample evidence of reasonable suspicion to shift the onus on to the defendant to satisfactorily explain his possession. I have heard nothing to support the argument that the evidence of this last witness was inadmissible, but even assuming for the moment that it was inadmissible, I am inclined to the opinion that under all the circumstances there was sufficient evidence led from the first two witnesses to shift the onus on to the defendant. The case appears to be just such a one as was contemplated in *Butts* v. *Brunker* where the learned Chief Justice states "if there is reasonable suspicion arising from the nature of the thing carried, the person carrying it, the time at which it is carried or otherwise, the case would be different," that is, the arrest would be justified.

There remains the evidence of Sergt. Payne which was objected to. It is quite clear, however, that his evidence has no bearing on the conviction. All he states is that after defendant had been arrested and taken to the station he questioned him (defendant), asking him if he would explained his possession of the property, after warning him that he was not bound to say anything. In replying to the question defendant replied that he had nothing to say. Defendant having been already arrested on suspicion this question should not have been put and this particular evidence was not admissible. The explanation, if any, is to be given to the court. "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 seem, in aid) of the charge, but to the satisfaction of the court when he is before the Court thereon." (Per Major. C.J., *Adams* v. *Chedda*, 1916 L.R., B.G., 28.) Though inadmissible this evidence as I have said is of little importance, and there is ample evidence elsewhere to support the charge. There being sufficient evidence to cast upon the appellant the onus of satisfactorily explaining his possession, in the absence of any such explanation, the conviction must stand. The appeal is therefore dismissed with costs.

ROMAN *v.* SEERAJ.

ROMAN *v.* SEERAJ.

[241 of 1917.]

1917. SEPTEMBER 25, 28. BEFORE DALTON, J. (Actg.)

Adulteration of Food—Milk—Analysis—Milk in course of delivery to purchaser or consignee—Sample taken "at place of delivery"—Meaning of phrase—Sale of Food and Drugs Ordinance, 1892, ss. 19 and 20.

By sect. 19 of Ordinance 9 of 1892 it is provided that certain officers may procure for analysis at the place of delivery any sample of any milk in course of delivery to a purchaser or consignee. The section omits the following words of the equivalent English statute, (*42 and 43 Vict. c. 30*) "in pursuance of any contract for the sale to such purchaser or consignee of such milk."

Held, that the omission of the words in question made no alteration in the meaning of the term "the place of delivery" as used in the English statute, and that the sample could only be procured at the place of the delivery of the milk to the purchaser or consignee, and that it was not sufficient to prove only that the milk was "in course of delivery."

Appeal from a decision of the acting Stipendiary Magistrate of the Georgetown Judicial District (Mr. J. S. McCowan), who convicted the appellant Seeraj for a contravention of section 20 of the Sale of Food and Drugs Ordinance, 1892, in that he refused to sell a sample of milk to a duly authorised officer in that behalf.

The magistrate in his decision referred to *Filshie* v. *Evington,* (1892, 2. Q.B. 200) and *Cox* v. *Evans,* (115 L. T. 779), and found that the milk was "in course of delivery," defendant Seeraj being the person in charge of it. The defendant was convicted and ordered to pay $7 and costs, or in default 21 days' imprisonment.

Defendant appealed, the principal reason for appeal being that there was no evidence to show that the complainant tried or attempted to procure the milk at the place of delivery to the purchaser or consignee, and that he had no authority to make such a demand elsewhere.

The appeal was allowed and the conviction set aside.

J. A. Veerasawmy, for the appellant.

H. H. Laurence, for the respondent.

DALTON, J. Actg.: The appellant was charged with refusing to sell a sample of milk to the respondent, a sanitary inspector employed by the Georgetown Town Council, when such sample was required by the latter officer for the purposes of analysis. The charge is brought under the Sale of Food and Drugs Ordinance, 1892. Section 19 of that ordinance provides that amongst others, "any sanitary inspector . . . . . may procure at the place of delivery any sample of any milk in course of delivery to a purchaser or consignee," for analysis. Section 20 is as follows: "If, on any such officer applying to purchase . . . any sample of any milk in

course of delivery as aforesaid, and tendering a reasonable price for the quantity which he requires for the purpose of analysis, the person . . . . having the charge of such . . . . milk as aforesaid, refuses to sell the quantity required to such officer, such person shall be liable to a penalty not exceeding $50." The words in section 20 "in course of delivery as aforesaid" obviously have reference to the provision I have quoted from section 19.

These provisions are, with certain verbal alterations, based on s. 3 of the English Sale of Food and Drugs Act Amendment Act 1879, (*42 & 43 Vict c. 30*.) The variation is that the words "in pursuance of any contract for the sale to such purchaser or consignee of such milk," which appear in the English act immediately after the words "may procure at the place of delivery any sample of any milk in the course of delivery to the purchaser or consignee" are entirely omitted from the local ordinance. In applying English cases to help to elucidate points which arise under the local ordinance care must therefore be taken to bear in mind the variations in the text of the act and the ordinance.

The facts of the case are as follows:—Milk was being brought in charge of the appellant from Blankenburg on the west coast to Georgetown across the ferry. Appellant removed the cans from the ferry steamer to the Georgetown stelling. The inspector, the complainant, then requested him to sell to him for analysis a pint of milk, at the same time tendering the sum of six cents. Appellant was not selling milk but was a person apparently well known to complainant who continued "I asked him if he was in charge of Flood's milk. Defendant said yes . . . I told him I was a sanitary inspector. I showed him my authority." Appellant thereupon refused to sell the milk saying that "he was delivering the milk for Mr. Flood," and producing a written authority by his employer to the following effect:—

"20th Feb. 1917

"From Thos. Flood
Market

The bearer Seeraj remove my milk to different institution. Not allow to sell.

(Sgd.) Thos. Flood."

The only other evidence as to where the milk was coming from to whom and whither it was going is given by W. October, also an inspector. In cross-examination he stated: "I know Mr. Flood contracts with hospital . . . . Know cans covered. Know this milk is delivered at hospital. Flood has cattle at Blankenburg." By "hospital" is presumably meant the Georgetown hospital, but it is in any case clear from this witness that at the time the sample was required the milk had not reached the place at which it was to be delivered to the purchaser.

This is practically all the evidence led which is material for the purpose of considering the questions whether the sample was sought to be procured at the place of delivery and whilst in course of delivery. Upon it the learned magistrate states he found as a fact that the milk "was in course of delivery," that the defendant was the person in charge of it, and that he refused to sell a sample of it after the inspector had done all that was required of him. He, however, does not refer to nor deal with in any way the question whether, on this particular occasion, the stelling was the place where the inspector was entitled to ask for a sample, and it is now submitted to me by the appellant as his principal ground for appeal that there was no evidence whatsoever to justify the magistrate in finding, if he did, that the sample was demanded at the place of delivery of the milk. Such a finding was of course necessary to support the conviction.

Mr. Laurence, for the respondent, admits that under the English act and following the English authorities he could not support the conviction, but he has submitted that the omission from the local ordinance of the words which I have quoted above makes it quite unnecessary in this colony to look at the contract for the sale of the milk to ascertain therefrom the place where the milk, or other article, is to be delivered. I fear I cannot agree with him that the omission of the words would make such a radical alteration in the law as he would support. As the ordinance stands it directs that the sample must be procured whilst the milk is in course of delivery to the purchaser or consignee at the place of delivery. The omission may possibly allow of more latitude than the English statute" in the necessary proof to be adduced on such a charge, but there must still be evidence to show that the sample was procured or sought to be procured at "the place of delivery" to the purchaser. The omission in my opinion in no way changes the meaning of those words. I fail to see how there can be half a dozen places of delivery, as was suggested, within the meaning of the law in respect of any one sale or consignment. If the argument that the milk was delivered by the steamer service, as carriers, to the appellant on the stelling (though I can see no evidence on the record upon which such an argument can reasonably be based) is a good one, appellant can reasonably answer that that particular delivery having been completed when the inspector asked for the sample, the milk was then no longer "in course of delivery." (See *Helliwell* v. *Haskins* 105 L. T. 438). Such an argument, if good, would also defeat the whole object of the law. The reason for the provision that the sample shall be taken at the place of delivery is referred to in the judgment of Alverstone, C.J., in *McNair* v. *Cave* (1903 1 K. B. at p. 29) and it is not

necessary for me to explain it, save to add that inspection at any earlier place or time would give ample opportunity to dishonest persons to adulterate the milk after a sample had been taken but before the milk reached the purchaser or consignee. The acquirement of the law being there, it is my duty to ascertain whether there was any evidence to support the decision of the magistrate; and I can come to no other conclusion that there is nothing whatsoever on the record on which the magistrate could find that the steamer stelling was the place of delivery to the purchaser or consignee. He found as a fact that the milk was "in course of delivery," though he does not say to whom. Possibly, to the Georgetown hospital. The evidence even on that point is not very conclusive, although I would not go so far as to say that there is not evidence upon which he might come to that decision. For want of any proof, however, that the stelling was the place of delivery, that is, the place where the inspector was authorised in this particular case to procure the sample, the appeal must succeed.

The conviction is quashed, and the appeal is allowed with costs.

ORI *v.* PHULJARIA AND ANOR.

[14 OF 1916. BERBICE.]

1917. OCTOBER 24. BEFORE BERKELEY, J.

Sale at execution of immovable property—Judgment debtor's interest therein—Jus ad rem—Levy and sale—Action to set aside such levy and sale.

Where immovable property in respect of which the judgment-debtor had only a *jus ad rem* was levied upon and sold in execution of the judgment under an ordinary writ of execution:—

Held that the execution was illegal and, together with the subsequent sale, must be set aside.

Claim by the plaintiff to restrain the defendant Phuljaria from receiving or obtaining from the court letters of decree for four acres of land on the Corentyne river, and to set aside the sale at execution and levy made by Surjoo, the second defendant, of the same four acres, on the ground that plaintiff held transport or conveyance of the land in question, it therefore not being competent for Surjoo to levy on the land as the property of one Charitar, as he had done, and against whom he had obtained judgment.

J. A. Abbensetts, for the plaintiff.

R. T. Egg, for the defendant.

BERKELEY, J.: Action to restrain defendant from obtaining letters of decree of the four acres of land referred to in the statement of claim, and claiming that the levy and subsequent sale thereof be set aside.

Charitar had paid for six acres of land which the plaintiff had sold to him and for which he had received $65. The plaintiff had transport of some 50 acres the greater part of which he had sold to various parties including Charitar, intending to keep a certain portion for himself. When the time arrived for passing transport to these various parties the land had been surveyed and all the other co-purchasers having obtained each his portion it was found that only five acres remained to be divided between Charitar and the plaintiff. Charitar then consented to take four acres leaving the last remaining acre for plaintiff. Plaintiff seems to have thought better of this latter suggestion which he would seem to have approved of and refused to pass transport to Charitar.

The defendants are related to Charitar and defendant Surjoo got judgment against him and levied on the five acres which were sold at execution. The defendant Phuljaria was the purchaser and petitioned for letters of decree. The granting thereof was opposed by the plaintiff and the further hearing of Phuljaria's petition was adjourned to await the result of this action. The title to the land is in plaintiff by transport and therefore the levy must be set aside. The land, however, was sold to Charitar and he should bring an action to compel the passing of transport to him. To avoid further litigation the court suggests that the parties come to terms.

The court orders that the levy and subsequent sale be set aside but makes no order as to costs.

BAKHOY *v.* BOOKER BROS., MCCONNEL & CO., LTD.

BAKHOY *v.* BOOKER BROS., MCCONNEL AND COMPANY LIMITED.

[27 of 1917, Berbice].

1917. OCTOBER 23, NOVEMBER 10.

BEFORE BERKELEY, J.

Interpleader action—Sale and purchase of building—Bonafide sale and transfer—Evidence—Bill of sale—Bills of Sale Ordinance, 1916, s. 9.

Appeal from a decision of the acting Stipendiary Magistrate of the Berbice Judicial District (Mr. L. D. Cleare). The facts of the case sufficiently appear from the judgments below. The appeal was allowed.

The essential parts of the magistrate's decision were as follows:—

"The plaintiff claims one board and shingle building with gallery, levied on at the instance of the defendants herein on a judgment obtained by them on March 8th, 1917, against Rowdie and Suckina.

"The plaintiff says he purchased the property in dispute from one Harlequin, and produced as 'the paper' he received for the purchase money a document headed 'bill of sale,' dated March 26th, 1917. This document says—

> "I Henry Harlequin . . . . . have bargained and sold to Bakhoy . . . . a building used as a shop . . . . . .for the sum of five hundred dollars."

Further the document goes on to covenant 'to defend the sale of the said building hereby sold to Bakhoy . . . . . against all and every person whatever.'

Plaintiff in his evidence stated he had purchased the property to live in, and he called Harlequin to prove that he had purchased the property from him, and also Hamilton, a schoolmaster, who had drawn the bill of sale. Bills of sale are void unless, amongst other things, they are registered (Ordinance 22 of 1916, sec. 9), therefore the plaintiff cannot claim the property under bill of sale.

I do not believe the evidence of the plaintiff and his witnesses Harlequin and Hamilton that the property was sold outright to him the plaintiff, but I believe that the property was pledged to the plaintiff by Harlequin as security for the amount of $71 loaned by the plaintiff to Harlequin, and for which a promissory note was made by Harlequin in favour of Bakhoy on the same day that the alleged sale of the property was made. Plaintiff says he bought the property to live in and intended to take it down and re-erect it yet on the day of the supposed sale plaintiff, on the suggestion of Harlequin lets the property to a man named Mil-

lington. . . . . for the purpose of carrying on a shop, for a period of twelve months . . . . . Plaintiff's evidence I do not believe . . . . . Another peculiar circumstance in the case is that Rowdie and his wife, the judgment-debtors, are in the shop of Millington, posing as his servants. The claim is dismissed and levy upheld with costs."

From this decision the plaintiff (claimant) Bakhoy appealed, the following being the chief reasons for appeal:—

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

(*a*) because the document bearing date March 28th, 1917, is not a bill of sale within the Bills of Sale Ordinance, 1916, as found by the magistrate, but a document evidence of a sale;

(*b*) if the magistrate finds that the property was pledged to the claimant by Harlequin as a security for a consideration then the property on the building was not in the judgment-debtors;

(*c*) because it was proved that the shop or business was licensed to Millington and that Suckina and Rowdie were his agents.

(*d*) because it was proved that Millington was the occupier and in possession of the shop or building on the day of the levy.

J. Abbensetts, for the appellant.

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

M. J. BERKELY, J.: The respondent Company had levied on a board and shingle building as the property of the judgment-debtors Rowdie and Suckina. It is claimed by appellant who produces what is headed "Bill of Sale" from one Harlequin.

The ground of appeal is that the decision is erroneous in point of law.

The document headed "Bill of Sale" is clearly not a Bill of Sale within the Bills of Sale Ordinance, 1916, but it is evidence of sale to the appellant by Harlequin of the property in question. It is quite true as urged by the solicitor for the respondent Company that the appellant has to establish his claim. This he has done in the absence of evidence by the respondent Company showing fraud and collusion between the debtors, Harlequin, and the appellant in the transfer of the property to appellant. Apart from this there is no evidence to show that the building at any time was the property of the debtors. The appeal must be allowed with costs.

MAHADEO SAHAI *v.* DICKSON.

MAHADEO SAHAI *v.* DICKSON.

[167 of 1917.]

1917. NOVEMBER 14.

BEFORE BERKELEY, J.

Specific performance—Transport of immovable property—Gift by husband to wife before marriage followed by transport—Sale by wife to third party—Opposition by husband—Action by third party for specific performance—Buildings.

Claim by the plaintiff for the specific performance of a contract of sale alleged to have been entered into on April 10th, 1917, whereby the defendant, Mrs. Beatrice Dickson, agreed to sell to plaintiff the west half of lot 2, Cornelia Ida, with all the buildings and erections thereon, together with $300 as damages.

Defendant did not deny the sale but pleaded that the buildings or the property in question belonged to her husband, and that therefore she was unable to include them in the transport. She further pleaded that she had offered to return to plaintiff the sum of $240, which was all she had received.

J. S. McArthur, for the plaintiff.

A. B. Brown, for the defendant.

BERKELEY, J.: Action for specific performance or in the alternative the return of $277.36 and $300 as damages.

It is agreed that only two points arise for the consideration of the court (1) the ownership of the buildings and (2) the amount advanced by plaintiff to defendant. On the evidence adduced the court finds that this amount was $277.36 as stated by plaintiff. The defendant's husband paid for the lot of land and had it transported to defendant; he purchased materials in his wife maiden name and paid a carpenter to build a house. At this time they lived together but subsequently they were married. With his knowledge she mortgaged the land and buildings to Mr. Anderson. In order to pay him off she borrowed money from the plaintiff and agreed to sell him land and buildings. Transport to him was duly advertised. Opposition entered by husband and on the last day for filing writ defendant withdraws her notice to transport. The husband and defendant put their heads together to deprive plaintiff of his buildings. The fact that the husband insured the buildings for the first two years in his own name is about the only point in his favour. He did not do so after mortgage given to Mr. Anderson. I find that he not only gave the land as admitted to defendant but also the buildings which he had placed thereon. Judgment for plaintiff for specific performance with costs.

BOLTON *v.* THOMAS.

BOLTON *v.* THOMAS.

SOLOMON *v.* THOMAS.

[282 of 1917.]

1917. NOVEMBER 16. BEFORE HILL, J.

Appeals—Master and servant—Contract of service—Rate of wages on sliding scale—Assignment of wages in hands of employer—Action to recover wages at higher rate than decided by employer.

Two appeals, taken together from decisions of the Stipendiary Magistrate of the Georgetown Judicial District (Mr. J. S. McCowan). The plaintiffs (respondents) claimed from the defendant (appellant) for work and labour done by them under a contract entered into between them and appellant in writing in which the rate of wages was fixed at from 32 cents to 48 cents per day and by which the employer (appellant) or his agent was given the sole power of deciding the rate between the two sums mentioned at which they were to be paid. The magistrate gave judgment for the plaintiff in each case. The appeals were allowed.

H. C. Humphrys, for the Appellant

W. E. Lewis, for the Respondents.

HILL, J.: These two appeals from the decision of a Magistrate were, by consent, argued together, the same question of law being considered.

In the contract signed by the respondents and appellant it is agreed that "the wages to be paid by the 'employer' to the 'labourer' for services shall be the amount decided on by the 'employer' or his agent in charge of the business. Such amount, however, shall be thirty-two to forty-eight cent per day,"

The appellant (employer) priced the two men at 32 cents per day. They were not satisfied and claimed at the rate of 48 cents per day and the magistrate gave decision in their favour. In my judgment, he was wrong. The expressed terms of the contract are there signed by both parties with their eyes wide open, and with full knowledge that the employer was to "decide" the amount "of the remuneration" as set out in terms.

Why fix any rate of wages by the contract at all if a labourer can dispute the decision of an employer (to whom he has accorded the right of deciding the remuneration) if he considers the price paid to be below that which he thinks he ought to get? Why should the Court say, if it even had power to do so, that 32 cents per day is unreasonable when a labourer in signing the contract agrees

and admits that such a price can be reasonable, and gives an employer an unquestionable right to decide that it is, if he so wishes?

I reverse the decisions and give judgment for the amounts deposited by the appellant in the Court below, $16.01 and $12.66, with costs. The appellant to have the costs of these appeals.

In re TRANSPORT BRUMELL & ORS. TO LOUNCKE.

1917. JULY 11TH.

BEFORE DALTON, Actg. C.J.

Transport—Will—Bequest of property to "children's children"—Intention of testatrix—Fidei Commissum—Rule against perpetuities.

Transport by William Archibald Brumell and others of the west half of lot 216, Bourda, in the city of Georgetown, to Edward Louncke.

A petition had been presented to the Court for leave to sell the property in question on the ground that an infant named George Cruickshank, five years of age, has an interest in the property.

On the petition coming before Sir Charles Major, C.J., he held that the infant having no interest in the property, no order was necessary.

Further necessary facts appear from the reasons given below for refusing to pass the transport.

Dinzey, solicitor, for the transporters.

DALTON, Actg. C.J.: One Judy Williams made a will on December 4th, 1889, bequeathing a certain property in the following terms :— "I will and bequeath to my three grandchildren William Archbold, Sarah Leonora, Joseph Lucien Brumell, born of the body of Jessie Theresa Brumell (born Gillie) the west half of lot 216, situate in Bourda with the buildings thereon, said property to be handed to their children's children," She also left a life interest in the same property to the said Jessie Theresa Brumell, who was her daughter and the mother of the three grandchildren named.

Joseph Lucien Brumell died intestate (so far as this particular property is concerned) in 1916, and was never married. His father George Brumell, his mother Jessie Theresa Brumell, his brother William Archbold and his sister Sarah Leonora Cruickshank (born Brumell) survived him and these four now seek to

transport the property above mentioned, the west half of lot 216, Bourda, to Edward Louncke who purchased it from them. Sarah Cruickshank, whose husband is alive, has one son. The transport has come before me to be passed and I have to decide whether, under the will and on the intestacy of Joseph Lucien, the property vests in them so that they are able to transport the property.

I am practically asked to ignore the provision in the will "said property is to be handed to their children's children," but I do not see how I can do that. It is a definite provision without ambiguity. In interpreting the will what has to be done, so far as it is in conformity with law is to arrive at the intention of the testatrix. It cannot be said that the provision is of no effect, as if it were a bare prohibition or alienation by the three grandchildren named.

It seems to me rather that a *fidei commissum* is created in favour of the grandchildren and their descendants particularly named. As a rule a *fidei commissum* is confined to four generations, but if any contrary intention thereto is clearly expressed, it seems that it may continue for a longer period. In any case the children's children would not go here beyond the fourth generation.

I might here remark, although it does not arise now in view of what I have just said, the term "kinds kinderen" or "children's children" is frequently used in Cape Colony to mean simply "descendants" and it seems to me that it is quite arguable that the testatrix mean that and that alone when she used the term, leaving the property to her grand children and their descendants. Whether she did so or not is however not for me to decide here, but as a *fidei commissum* is created by the will I must refuse to pass the transport.

[See *Ex parte Malan's Executors,* 1911 T.P.D. 1188; *Mulder* v. *Estate Grundling,* 24 S.C. 646; *De Jager* v. *De Jager,* 25 S.C. 703; *Ex parte van Eeden,* 1905 T.S. 151; and Juta on *Wills,* pp. 103, 106 and 109.]

[Thereafter, November 17th, Sir Charles Major, C.J., on further reconsideration of the petition gave leave for the disposal and transport of the interest of the minor, if any, in the property to be conveyed.]

Re BELMONTE, A SOLICITOR.

Re BELMONTE, A SOLICITOR.

[122 of 1917].

1917. NOVEMBER 9, 19.

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

Solicitor—Petition for re-admission to practice—Prior re-admission after being struck off the Rolls, followed by second removal therefrom—Facts constituting, in the opinion of the Court, permanent unfitness for restoration to Rolls.

Petition by B. E. J. C. Belmonte for an order that he be readmitted to practice as a solicitor of the Court and that his name be restored to the Rolls.

The necessary facts sufficiently appear from the judgment.

H. H. Laurence, for the petitioner.

G. J. De Freitas, K.C., (*acting S. G.*,) representing the Attorney General, did not oppose the petition.

The decision of the Court was delivered by

SIR CHARLES MAJOR, C.J.: The petitioner, Benjamin Belmonte, asks this Court for an order that he be re-admitted to practise as a solicitor of the Court and that his name be restored to the Rolls. The Attorney General has been served with notice of the petition and has, by the acting Solicitor General, informed the Court that he does not oppose it.

The application is *ad gratiam,* for, although the petition preferred contains, in greater part, matter directed to traverse of previous decisions of the Supreme Court of this Colony which cannot now be disturbed or questioned, counsel for the petitioner did no more than refer to those decisions as themselves affording (he conceived) ground for our favourable consideration of his client's prayer.

The records of this Court show that in 1897 Mr. Belmonte was struck off the roll of solicitors for professional misconduct; that in 1898, in 1899, and in 1901, he applied for re-admission and was refused; that in 1904 he made another application which was successful. Into the circumstances attending the Court's order of 1897 it is unnecessary to enter, for by the order of 1904 the Court must be taken to have shown that it then considered that Mr. Belmonte had been sufficiently punished for such conduct as had called for so grave a step as striking his name from the roll of solicitors.

But in 1912 Mr. Belmonte was again struck off the Rolls. In delivering the judgment of the Court Sir Henry Bovell, C.J., said in its conclusion . . . "The sole question remains what punish-

"ment should be imposed. The Court cannot exclude from its consideration "the facts that this solicitor was, in 1897, struck off the roll and not allowed "to be re-admitted till 1904, and that the Court, in the exercise of its sum- "mary jurisdiction over solicitors, was asked to order him to pay to one of "his clients moneys he had received and held for her, and that such an order "was made, though further proceedings in connection with that matter were "not taken. In view of all the circumstances we regret to say that we have "arrived at the conclusion that the solicitor must be struck off the roll."

In 1914 Mr. Belmonte made application to this Court, consisting of the late Sir Crossley Rayner, C.J., my learned brother Berkeley, and Earnshaw, J., for his re-admission to the rank of solicitor. The application was refused. The judgments of the learned members of the Court appear to have been orally delivered, and extracts from that of the Chief Justice, as given in a local newspaper, have been, in the absence of any law report of authority, read to us by Mr. Laurence, to controvert what the learned counsel thinks was a principle of law enunciated by the Chief Justice, namely, that the removal of a solicitor's name from the Rolls is, whatever the circumstances attending that punishment, to be regarded as final. No such principle of law was laid down, for it does not exist. Sir Crossley Rayner merely expressed his own opinion that in the particular circumstances of the case before him—of which the gravest was that Mr. Belmonte had been struck off the Rolls a second time—the applicant must consider his removal from the roll of solicitors as perpetual. It is not surprising, therefore, to find the petitioner, in framing his own petition, setting out with an endeavour to show that the second punishment was inflicted by the Court of 1912 without proper apprehension of the facts of the case before it, in circumstances which (he sought to contend) operated to his serious disadvantage and led to what (he sought to suggest) was an erroneous decision.

After review of Mr. Belmonte's record as shown by the various proceedings to which reference has been made, and remembering what, we think, the Supreme Court owes, as well to its own standard of conduct to be observed and maintained by its officers as to the other members of the legal profession and the general public, we have to say that this application cannot be entertained; that we agree with the opinion expressed by the late Sir Crossley Rayner, so that the petitioner must regard the conduct that led to his exclusion, for a second time, from the rank of solicitors of this Court as permanently unfitting him for restoration thereto.

MONTEIRO *v.* HUTHERSALL.

PETTY DEBT COURT, GEORGETOWN.

MONTEIRO *v.* HUTHERSALL.

[95 11 1917].

1917. NOVEMBER 15, 20. BEFORE HILL, J.

Principal and agent—Payment of money to agent—Lottery—Recovery of money paid or ticket—Action to recover money paid from agent—Gambling Prevention Ordinance, 1902, s.s. 7 and 8.

Claim by the plaintiff for the sum of $50 alleged to be due by defendant for money received by him and to be paid to one J. J. Hutt for the use of plaintiff at Georgetown in the month of August, 1917. The money was for the purchase of tickets in a prize drawing got up by Hutt.

The case was not entered into, but the facts, as agreed upon, were put before the Court, and the Court was asked to decide whether the defendant was a stakeholder or agent, and in either event whether he was liable on the claim.

C. R. Browne, for the plaintiff.

G. W. Forshaw, solicitor, for the defendant.

HILL, J.: There is no dispute as to the facts in this case as stated before the Court. The sole question is whether defendant can be sued, he being the disclosed agent of Hutt in the transaction, as admitted by counsel for the plaintiff.

Huthersall received $50 from Martins, for the purchase of tickets in a prize-drawing got up by Hutt, and never paid the amount over to Hutt.

Section 7 of Ordinance 42 of 1902 makes recoverable as "money had "and received to or for the use of the person from whom the same was re- "ceived any money or moneys' worth paid or deposited for or in respect of "any such event or contingency as aforesaid (Section 6) or for or in respect "of the purchase of a lottery ticket." and by Section 8 "every sale or con- "tract for the sale of a lottery ticket is hereby declared to be void, and no "action shall be maintainable by any person in respect of any such sale or "contract except by the purchaser for the return of the money or other con- "sideration, if any, paid thereon."

When there has been actual fraud on the part of an agent the responsibility of the principal does not in any way exclude the responsibility of the agent. All persons duly concerned in the perpetration of a fraud are to be treated as principals, but subject to this, the receipt of money from a third person by an agent on his principal's behalf does not make the agent personally liable to

repay it when the third person becomes entitled as against the principal to repayment, whether the money remains in the agent's hands or not (Ellis *v.* Goulton (1893) 1 Q.B. 350). Huthersall, from the stated facts, was not in my opinion a stakeholder but the agent of Hutt, the principal, and Hutt is the right person to be sued.

There will be judgment for the defendant, and this will apply also to Fernandes v. Huthersall, a similar case.

Costs to defendant, and fee of $5.00 to the solicitor for defendant in case of Martins *v.* Huthersall.

NARAIN *v.* LOCHAN.

[300 of 1917]

NOVEMBER 23. BEFORE SIR CHARLES MAJOR, C.J.

Appeal—Magistrate's Court—Practice—Interpleader—Bond for value of goods taken in execution—Claim for goods or for value—Ord. No. XI. of 1893, ss. 57, 58.

An interpleader claim may be for the goods taken in execution, or for the value of proceeds thereof. As long as the goods are in existence and have not been lost, or destroyed, or sold, the claim must be for the goods themselves and not for their value. And this, although a bond for their value may have been given by the claimant, or judgment-creditor and the goods released to him pending the determination of the claim.

Appeal from an order of the acting stipendiary magistrate of the Georgetown judicial district (Mr. M. J. C. de Freitas), none suiting the claimant in an interpleader issue. The facts of the case sufficiently appear from the judgment of the Appeal Court.

SIR CHARLES MAJOR, C.J.: The appellant is a claimant in interpleader of a horse and some harness, taken in execution under a writ of *fi-fa* on the 14th August last, in a suit of Lochan *v.* Japansing. The claim is dated 16th August, but, it seems, was not filed in the magistrate's court until the 17th. On the 16th, however, the claimant entered into a "security bond" to the judgment-creditor for the appraised value of the goods, upon condition "that if the within bonded claimant prosecutes and successfully proves his right to the property in the articles herein before mentioned [the horse and harness], and claimed by him then the bond shall be void but otherwise, &c, whereupon the claimant has been allowed by the Court to have possession of the horse and harness for use with a cab for hire. The claim came on for hearing before the magistrate on the 5th September. He has taken the evidence of the claimant, but, upon objection by the solicitor for the judgment-creditor that the claim should be for the value of the goods taken in execution and not for the goods themselves because they have been released to the claimant upon his execution

of the "security bond," has upheld the objection and non-suited the claimant. The claimant has appealed and his appeal must be allowed.

The magistrate, construing the provisions of sections 57 and 58 of Ordinance No. XI. of 1893, states the question for his decision to have been— "Should the claim be for the grey gelding and harness already released, or for their value as secured by the bond?" and goes on to say— "On the construction of sections 57 and 58 . . . I hold that the claim should have been for the value and not for the gelding and harness which are no longer in the custody of the court, and I consequently non-suit the claim. The words appearing in section 57, "or to the proceeds or value thereof," seem to me to be of some importance."

That decision is erroneous for these reasons. A claimant in interpleader has one of three methods open to him of presenting his claim to goods taken in execution. If the goods are in existence and can be followed, his claim should be for them; if they have been sold before the claim is presented, it should be for the proceeds of sale; assuming the expression "value" in section 57 to mean something other than "proceeds," there may be a third course for the claimant to adopt, viz., if, for instance, they are allowed by the court, after due formality, to be in the custody of the judgment-debtor and, whilst there, are lost, or destroyed, or otherwise cease to be, the claim would be for the value of the goods. Here, on the 16th August, and on the 17th also, whichever be the date of filing the claim, the goods were in existence; they had not been sold; they had not been lost, or destroyed, and the claim has been made to them. It could not, obviously, be made to the proceeds, but it is said it ought to have been to their value. Why? Because the magistrate pretends, they have been "already released" to the claimant. That is so; not released, however, because he is entitled to them, but because he has given security for them (they remaining *in esse* and unconverted) until their ownership is determined, until the claimant has fulfilled the condition of his bond, "prosecuted and successfully proved his right" to what? not the value of the articles, but "to the property in the articles." The horse and harness, though temporarily entrusted to the claimant, are still in the legal custody of the law, wherein they will remain until the claim to them is determined.

Riley v. *Cockfield*, decided on the 27th June, 1910, is clearly inapplicable to this case. There the goods taken in execution had been sold before the interpleader claim was tiled.

The order of the magistrate is set aside and the claim is remitted to the Court below for determination. The judgment-creditor must pay the appellant the costs of this appeal.

Re TRANSPORT, REECE TO NEILSON.

Re TRANSPORT, REECE TO NEILSON.

[No. 5 of 18. 8. 1917.]

1917. NOVEMBER 19, 22. BEFORE HILL, J.

Title to immovable property—Transport—Prescription—Declaration of title—Civil Law of British Guiana Ordinance, 1916, ss. *2* (*3.*) *and 4* (*1.*)*—Saving of existing rights.*

After the coming into force of Ordinance 15 of 1916 on January 1st, 1917, any person who seeks to pass a transport or conveyance of immovable property under prescriptive rights, whether those rights have accrued before or after the coming into force of the ordinance, is required to first obtain a declaration of title from the court under the provisions of section 4 (1.) of the ordinance.

Application by F. E. Reece to pass a transport to W. C. Neilson of an undivided interest in Plantation Lucky Spot, on the left bank of the Demerara river. Reece's claim to pass the transport was based on prescriptive rights, which he supported by affidavit.

The Registrar reported to the Court that the transport was not in order, no declaration of title having been made by the Court or a Judge as required by the provisions of section 4 (1.), Ordinance 15 of 1916.

G. J. de Freitas, K.C., Acting S.G., appeared to support the request to pass the transport.

HILL J.: It is sought to pass this transport of land held under a prescriptive title by the old method of filing affidavits in support. Mr. de Freitas, K.C., has appeared before me to put the case pro and con in view of section 4 (1), Ordinance 15 of 1916.

There is no question of the *rights* of a person who holds under a prescriptive title of 33 ⅓ years. These are preserved by section 2 (3) of the ordinance. But the question involved is one of the *procedure* to be adopted in the alienation of land held under prescriptive rights which has been acquired before 1st January, 1917, when the ordinance came into force. Does section 4 (1) affect the procedure? It is clear that in addition to affecting the period of prescription ft also affects the procedure necessary to give effect to a right acquired by sole and undisturbed possession for thirty years, of which not less than three years are after 1st January, 1917. In such a case the only procedure at present applicable would be by petition for a declaration of title until the necessary method to give effect to the procedure is passed, *i.e.,* either by ordinance or Rules of Court. But does it affect rights acquired and complete before 1st January, 1917?

The section is not free from ambiguity. The use of the words "such sole and undisturbed possession" might point to a possession as mentioned before, *i.e.,* thirty years of which not less than three years are after 1st January, 1917, but after consideration, I can

hardly conceive that the legislature intended to have two methods of procedure side by side, the one in relation to prescriptive rights complete before 1917, the other affecting prescriptive rights obtained under section 4 (1). In these circumstances I think a declaration of title would seem to be necessary. The effect of holding otherwise would be to enable a person who had acquired complete prescriptive rights prior to January 1st, 1917, to sleep on his rights for as long as he liked, and to demand, whenever he liked, from the Court a procedure by affidavits, no declaration of title being necessary. This could not have been so intended. In view of the fact that Mr. de Freitas stated there was no intention of appealing from this decision should it be adverse to his contention, I have taken the opportunity of consulting my brother Judges who are in accord with the views expressed by me.

WILLIAMS *v.* SANCHO.

[223 of 1917.]

1917. NOVEMBER 16, 23. BEFORE BERKELEY, J.

Appeal—Unlawful possession—Reasonable explanation—Magistrate exceeding jurisdiction by visiting locus in quo—Interrogation of accused by police.

Appeal from a decision of the stipendiary magistrate of the East Coast judicial district (Mr. E. A. Bugle) who convicted the defendant (appellant) for the unlawful possession of greenheart posts and planks.

The reasons of appeal sufficiently appear from the judgment.

The appeal was dismissed with costs.

A. B. Brown for the appellant.

G. J. deFreitas, K.C., actg. S.G., for the respondent.

BERKELEY, J.: This is an appeal from the decision of the stipendiary magistrate of the East Coast judicial district (Mr. Bugle), who convicted the appellant of the unlawful possession of a quantity of greenheart posts and planks reasonably suspected of having been unlawfully obtained.

The reasons of appeal are that a reasonable explanation of possession was established, and that the magistrate exceeded his jurisdiction by visiting the *locus in quo* and importing his personal knowledge in arriving at his decision.

The appellant is charged under section 96 of the Summary Conviction Offences Ordinance, 1893, as amended by the

Summary Conviction Offences Ordinance, 1893, Amendment Ordinance 1915. This section provides that a person charged with having in his possession anything reasonably suspected of having been unlawfully obtained and "who does not give an account to the satisfaction of the *Court,* as to how he came by the same, shall, on being convicted, be liable . . . . . ." In the present case the correct procedure seems to have been adopted. The appellant told the police sergeant that he would give his explanation as to his possession to the court. It is the duty of a police constable to note anything said by a person so suspected of unlawful possession, but no constable in my opinion is warranted—as too often he seems disposed to do—in taking upon himself the function of the Court by calling on a suspected person to account for his possession. The account given by appellant to the Court is that he bought the materials from Clarence Sancho for $10, and that the house was built by the carpenter Daniels—that Clarence Sancho had got the materials from the village overseer years before the Sea Defence took over in 1905-1906. He is corroborated by Clarence Sancho as to the sale to him and to his own purchase from the village overseer in 1906. Daniels, the carpenter, called by the prosecution, speaks of his building appellant's house with greenheart obtained from Clarence Sancho's yard, which had been used in water and had fresh barnacles on them. The officer in charge of the Sea Defence works says that the wood of which this house in built is quite new wood, and he is positive that it is Sea Defence wood and that the barnacles are quite fresh on it. The question for the magistrate's decision was whether the wood used in the house was as deposed to by the witnesses for the prosecution, new wood such as that used at present in the sea defences, or whether as deposed to by the defence they formed part of the wood which had been purchased in 1905-1906 by Clarence Sancho. The magistrate, in company with the district inspector, and appellant with his counsel, visited the house and found as recorded by him "the wood was covered all over with barnacles and some of the beams of the house under the house had upon them not only fresh barnacles but fresh and growing sea weed—where the wood had been sawn to make the necessary rafters for the house such was most obviously greenheart wood of very recent manufacture and not wood that bad lain under a house in the dry for 12 years or in a fresh water trench for a similar period." The facts deposed to by the witnesses for the prosecution were thus confirmed by the magistrate's own personal observation.

It is perfectly legitimate for a magistrate to visit the *locus in quo* on an intimation to all the parties as to the day and hour of

his visit. This is done in order that they may be present and not only see but take part in the inspection—The magistrate acted within his jurisdiction, and the conclusion he arrived at on the facts cannot be disturbed by this Court. Appeal dismissed with costs.

ORI AND ANR. *v.* MAULABUX AND ORS.

[94 OF 1916.]

1917. NOVEMBER 26. BEFORE SIR CHARLES MAJOR, C.J.

Practice—Parties—Joinder of causes of action—Rules of Court, 1900, Order XIV. rr. 1 & 4.

O. and R. brought an action against M., N., and S. jointly and severally for damages for assault. The statement of claim alleged an assault upon the plaintiff O. by M. only, upon R. by all the defendants, followed by a claim by both plaintiffs for damages against the defendants jointly and severally. The assault appeared from the pleading to have been committed on each plaintiff at the same time and by the defendants in concert.

On objection taken at the trial that M., N., and S. had been improperly joined as defendants by the plaintiff R. in an action wherein O. claimed relief against M. only;

Held, that the action was by each plaintiff against all the defendants jointly and severally, and that, although the plaintiff O. by the statement of claim alleged assault upon him by the defendant M. only, the joinder of M., N., and S. as liable to R in respect of the same assault was permissible.

P. N. Browne, K.C., for the defendants, took a preliminary objection to the pleadings. It is not competent for the plaintiff Ramdeya to join the defendants in an action brought by the plaintiff Ori against Maulabux only. The plaintiffs' causes of action are separate and distinct. The provisions of Order XIV., rule 1, do not permit this to be done.

Counsel read extracts from the notes in the Annual Practice, 1917, to Order XVI., rules 1 and 4, of the English Rules of Court, 1883, and cited *Hannay* v. *Smurthwaite* (1894) A.C. 494 and *Sadler* v. *G. W. Ry. Co.* (189) A.C., 450.

J. A. Luckhoo for the plaintiffs. The provisions of Order XIV., rules 1 and 4 cover the point, and the joinder is permissible. The cases cited for the defendants were decided before the English rule 1 of Order XVI was amended and extended. Our rule 1 of Order XIV is the amended English rule.

He cited *Dunegbier* v. *Wood* (1899) 1 Ch. 393.
Bedford v. *Ellis* (1901) A. C. 1.
Stroud v. *Lawson* (1898) 2 Q. B. 53.
Benning v. *Ilford Gas Co.* (1907) 2 K. B 504
Frankenburg v. *Great Horseless Carriage Co.* (1900) 1 Q. B. 504.
Compania Sansinena &c. v. *Houlder Bros.* (1910) 2 K. B. 354.

P. N. Browne, in reply, cited *Bower* v. *Coulbridge*, (1898) 1. Q. B. 348. A claim for damages against two or more defendants in respect of their several liability for separate torts cannot be united. *Ann. Practice*, 1917, p. 321, Joinder of causes of action.

SIR CHARLES MAJOR, C.J.— This is one action and it is by both plaintiffs against all the defendants jointly and. severally. There are not separate causes of action in the plaintiffs, but the same cause of action in each. The cases of *Hannay* v. *Smurthwaite* and *Sadler* v. *G. W. Ry. Co.* were decided before 1896, when the alteration of rule 4 of Order XVI., 1883, was made, an alteration embodied in our Order XIV., rule I. That rule provides for the joinder of plaintiffs who claim jointly, severally, or in the alternative. Here the plaintiffs jointly claim damages against all defendants jointly and severally, but it appears by the statement of claim that Ori claims in respect of an assault committed on him by Maulabux only, Ramdeya in respect of an assault committed on her by all the defendants. The transaction is the same, there was only one assault, constituting one and the same cause of action in each plaintiff. Rule 4 of Order XIV., provides for the joinder of defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, a corollary to rule 1. Here the right to relief is alleged to exist against the defendants jointly and severally. The action is one of fort, and where a wrong is done to several persons all should join in bringing an action. If the wrong be done by several persons, the plaintiff or plaintiffs may sue all or any of them at his or their election, because the liability of joint tortfeasors is joint and several. Here the plaintiffs have sued all the defendants.

The point seems to me decided against the objection by the case of *Compania Sansinena* v. *Houlder Bros.*, and I give special attention to the remarks of Fletcher-Moulton, L.J., in that case, as to the scope of rule 4 of our Order XIV., and the powers of the court thereunder. The objection cannot be entertained and the trial must proceed.

CAETANO *v.* DUBLIN.

CAETANO *v.* DUBLIN.

[299 of 1917.]

1917. NOVEMBER 23, 29. BEFORE BERKELEY, J.

Appeal—Damages—Landlord and tenant—Negligent use of and damage to property of landlord—Ordinary wear and tear—Liability of tenant—Doctrine res ipsa loquitur—Proof of damage.

Appeal from a decision of Mr. M. J. C. de Freitas, Stipendiary Magistrate of the Georgetown judicial district, who gave judgment for the plaintiff (respondent) on a claim for $40 as damages sustained to his property whilst in the tenancy of defendant. The defendant appealed.

The appeal was dismissed with costs.

J. S. Johnson, for appellant.

G. J. de Freitas, K.C., for respondent.

BERKELEY, J.: The defendant appeals from the decision of the stipendiary magistrate of the Georgetown judicial district who gave judgment in favour of the respondent for $40.

The reasons of appeal are that the maxim *res ipsa loquitur* does not apply, and that there was no evidence of negligence on the part of the defendant.

Appellant was a monthly tenant of the respondent and with his knowledge kept a boarding-house. In April she complained to him as to the condition of the basin of the water closet; it was put in good order and no further complaint was made. On July 1st she gave notice to quit and on July 15th respondent visited the premises and found the basin broken. It is produced in court and its condition points to its having received a blow which knocked out a large piece of the basin and rendered it incapable of further use. This is not due to ordinary wear and tear, and the magistrate having found that the evidence of the plumber was unreliable the appellant in the absence of any explanation as to the circumstances under which the basin was broken must be held to be liable in damages.

Appeal dismissed with costs.

RAMSAMMY *v.* RAMCHARRANSING.

RAMSAMMY *v.* RAMCHARRANSING.

[321 of 1917.]

1917. NOVEMBER 30. DECEMBER 3, BEFORE HILL, J.

Appeal—Larceny—Presumption of Ownership—Recent possession—Bona fide claim of right—Essentials of larceny.

Appeal from a decision of the Stipendiary Magistrate of the East Coast Judicial District (Mr. E. A. Bugle) who dismissed a charge of larceny brought by the plaintiff (appellant) against the defendant (respondent).

The appeal was dismissed with costs.

J. A. Luckhoo—Counsel for Appellant.

A. B. Brown—Counsel for Respondent.

HILL, J.: This is an appeal from the decision of a magistrate in which he dismissed a complaint for larceny of a brown she-ass against the defendant, after the close of the case for the prosecution.

In his reasons for decision, the magistrate held that no case for larceny would lie on the facts as set out in the evidence, that the prosecutor must seek his remedy in the civil court, and that the facts showed a *bona fide* right of possession of the animal in the defendant—(presumably the magistrate meant a *bona fide* belief in his right), the open dealing of the defendant with the ass in question, and his ready assistance in giving all information required.

Was a *prima facie* case of larceny made out by the prosecution?

The reasons of appeal suggest that it was, and the defendant, in law, should have been called on.

Counsel for the appellant argued the appeal based on an assumption which the magistrate held had not been proved—that there was recent possession of a stolen article. No doubt in such a case the onus shifts on the defendant, but in the case under review, the magistrate held that it had not been proved there was a larceny of the prosecutor's she-ass, or a recent possession of a stolen ass. He, in effect, held that the prosecutor had not proved to his satisfaction that the ownership was his, and he found after hearing the evidence for the prosecution, and considering the actions and behaviour of the defendant, that he (the defendant) had a *bona fide* belief that the animal was his. I may not have come to the same conclusion but that is not saying that the magistrate had no right to do so.

The appeal must be dismissed, with costs to the respondent

BUDIA *v.* SUMRAO.

BUDIA *v.* SUMRAO.

[209 of 1917.]

1917. DECEMBER 3. BEFORE SIR CHARLES MAJOR, C.J.

East Indian immigrants—Cohabitation without marriage—Joint earnings—Intestacy—Next of kin—Suit for declaration of title to share of estate—Immigration Ordinances 1905 and 1907—Jurisdiction.

The Supreme Court has no jurisdiction to entertain a suit against next of kin for a declaration of title to a half share of the intestate estate of a deceased immigrant with whom the plaintiff alleges cohabitation without marriage at the time of death, and whose estate is claimed to have been acquired by the joint earnings of the plaintiff and the deceased.

E. A. W. Sampson (solicitor), for the plaintiff.

J. A. Veerasawmy, for the defendant.

On pleadings read, counsel for the defendant objected that the claim being made under the provisions of the Immigration Ordinance, 1907, which did not apply, was not maintainable and suit should be dismissed.

Mr. Sampson for the plaintiff. The value of the estate of the deceased immigrant happens to be above the value of $240, to which the powers of the Official Receiver under the Immigration Ordinances, 1905 and 1907, to administer and distribute an estate are restricted. The plaintiff, therefore, must come to this Court, otherwise she is without remedy.

SIR CHARLES MAJOR, C.J.: The action is for a declaration that the plaintiff is entitled to one-half of the estate of Budhan, deceased, intestate, and for accounts from the defendant, as the sole next of kin of the deceased and in possession of the estate.

The plaintiff and Budhan are stated to have cohabited for twenty years preceding the latter's death in November, 1915, and the plaintiff's claim rests on the allegation that Budhan's estate of the value of $459, was acquired by his and her joint earnings. The defendant objects that the claim is not maintainable on the face of it. The objection must prevail. The claim purports to be made under the provisions of the Immigration Ordinance, 1907, section 4; that section gives the Official Receiver of the colony administering the intestate estate of a deceased immigrant under the provisions of the Immigration Ordinance, 1905, power when male and female immigrant have cohabited without marriage and one of them dies intestate during the cohabitation, to assign to the survivor such share as may be just, not exceeding one-half, of all the property of the deceased acquired by the joint earnings of the two persons, or to the acquisition of which the survivor has contributed. The 1905 Ordinance, however, restricts the administration of the

Official Receiver to an estate which does not exceed in value the sum of $240, and here, the value being $459, his power is excluded. It is stated at the Bar that, having so found, he has relinquished the estate to the defendant as sole next of kin, who, however, has not qualified as administrator.

The plaintiff cannot claim under the enactments I have mentioned, for they create a special and peculiar power in the Official Receiver, incident to administration, to deal with a category of intestate estates of East Indian immigrants into which this estate does not fall, and, moreover, cannot, outside their corners, maintain a claim of this nature and in this form. He may, of course, be a creditor of the estate of Budhan, deceased, but, in that case, her remedy will be different and against Budhan's representative, as qualified administrator or, perhaps, administrator *de son tort.*

The action is dismissed, but I reserve the question of costs in the hope that, in the plaintiff's circumstances, some agreement as to that amount may be arrived at.

PETTY DEBT COURT, GEORGETOWN.

MATABADUL MARAJ *v.* DE SOUZA.

[175-11-1917.]

1917. NOVEMBER 22, 28, DECEMBER 4. BEFORE HILL, J.

Money-lender—Claim on promissory note—Business carried on at other than registered address—Note completed at borrower's place of employment—Illegality—Money-lenders Ordinance, No 16 of 1907.

The Money-lenders Ordinance, 1907, in requiring that a money-lender "shall carry on the money-lending business in his registered name and in no other name and under no other description, and at his registered address or addresses and at no other address," does not mean that every stage and every incident of every piece of the money-lending business is to be transacted at the registered office. The question is a question of fact, not of law, and must be answered according to the circumstances of the case.

The facts and circumstances of this case are stated in the judgment.

Gomes, solicitor for plaintiff.

Gonsalves, solicitor for defendant.

HILL J.: Plaintiff, a registered money-lender, claims for two promissory notes for $65 and $28 respectively, made by defendant in his favour. There is no defence as to the one for $65, but with regard to the one for $28 the defence is that it was made at Santos' store and not at the registered address of the plaintiff. Plaintiff swears that the money was paid and the note

made out at his registered address but the stamp affixed later at Santos' store where defendant was employed. Defendant swears the note was made for balance due for money lent on other transactions, that it was made at Santos' store and the stamp affixed then and there.

In *Gadd* v. *Provincial Union Bank* (1909) 25. T.L.R. 591 and (1909) 2 K.B. 353, the Court of Appeal held that the Money-lenders Act 1900, section 2, prevented a money-lender carrying out single transaction in any other name or at any other but his registered address, but this decision was reversed by the House of Lords, (1910) A.C. 422, where it was held that in requiring that a money-lender "shall carry on the money-lending business "in his registered name and in no other name and under no other des- "cription, and at his registered address or addresses and at no other address," it was not meant that every stage and incident, of every piece of the money-lending business was to be transacted at the registered office. The question is one of fact, not of law, and must be answered according to the circumstances of the case. I accept the plaintiff's version as correct, and I give judgment for him for $93 in all, with costs, and fee $9.30.

PETTY DEBT COURT, GEORGETOWN.

MONGREE *v.* SOOKRAJ.

[162—11—1917.]

1917. NOVEMBER 22, 28; DECEMBER 4. BEFORE HILL, J.

Sale of Food and Drugs Ordinance No. 9 of 1892, Sec. 32,—Sale of Food and Drugs (Standards of Purity) Ordinance No. 3 of 1906—Amendment Ordinance No. 13 of 1913—Damages Sale of Milk—Purpose for which required—Reliance on sellers' skill or judgment—Implied warranty of purity—Guilty Knowledge—Admissibility of proof of previous conviction of defendant for similar offence.

The plaintiff in this case, a retail milk-vendor, purchased for the purpose of her trade two gallons of milk from the defendant, a wholesale dealer. She was soon after met by a sanitary inspector, who took from her a sample which upon analysis was found to be adulterated by 29·4 per cent., of added water. She was for that offence prosecuted before the magistrate convicted and fined $27 and costs. Relying upon the provisions of section 32 of Ordinance No. 9 of 1892 the plaintiff in her turn sought to recover from the defendant the sum of $78.20 by way of damages by reason of the said conviction, included in which amount was a sum of $40, damages alleged to have been sustained by her through loss of trade and custom occasioned by the conviction.

Abraham, solicitor, for plaintiff.

C. R. Browne for defendant.

HILL J.: Plaintiff is a milkseller, and known to be so by defendant, Sookraj. He used to supply her with milk and on October 5th, 1917, on her way from the steamer stelling where she had obtained two gallons of milk from him she was met by Sanitary Inspector Roman, an authorised person, who took for analysis a sample of the milk supplied to her by the defendant for the purpose of consumption by her customers. The result was a prosecution and conviction for selling milk not of the quality, nature, or substance required by the law. She, in her turn, under section 32, Ordinance 9 of 1892, claims damages against Sookraj. Under that section the defendant could show that the conviction against Mongree was wrongful, or that the amount of costs claimed or awarded was unreasonable. He has not done this but his plea in defence is that there was no warranty on his part, that he sold good milk to her, and in his address at the conclusion of the defence, counsel submitted that even if the milk was adulterated when supplied to Mongree, defendant had no knowledge that such was the case.

The offence for which Mongree was convicted occurred on October 5th, and convictions of the defendant Sookraj for other similar offences oh 9th October, with the analyses of the milk, were tendered in evidence. Mr. Browne, for the defendant, objected to their admission as irrelevant. I allowed the documents to be put in, reserving decision as to their admissibility.

Evidence to prove a particular transaction must generally be confined to the details of such transaction, but it may be said generally that both in civil and criminal cases unconnected conduct on other occasions is never admissible to prove the *actus reus*, but is admissible to prove the *mens rea.*

I think therefore the evidence admissible to that extent and no more.

The standard of purity required in the sale of milk is set forth in Ordinance 3 of 1906, as amended by section 2, Ordinance 13 of 1913, and by section 16 (1) of the Sale of Goods Ordinance, 1913. “where the buyer, “expressly or by implication, makes known to the seller the particular pur- “pose for which the goods are required so as to show that the buyer relies “on the seller’s skill or judgment, and the goods are of a description which “it is in the course of the seller’s business to supply (whether he be the “manufacturer or not) there is an implied condition that the goods shall be “reasonably fit for such purpose. . .”

This disposes of the submission that there was no warranty, for it was shown that the milk was bought by plaintiff from the

defendant and it was within the category of "goods of a description which it was in the course of the seller's business to supply," and the defendant knew that the plaintiff bought the milk for consumption by her customers. The duty was on him to see the milk supplied met the requirements of the Standard of Purity Ordinance.

In *Frost* v. *Aylesbury Diary Coy., Ltd.* 1905 1 K.B. 608 and in *Randall* v. *Newson* 2 Q. B. D. 102, it was held that on the sale of an article for a specific purpose there is a warranty by the vendor that it is reasonably fit for the purpose, and that there is no exception even as to latent undiscoverable defects. These cases go much further than the present one, so far as a seller's liability is concerned.

The defendant is liable to the plaintiff in damages.

As to the amount; among the items constituting the amount claimed is one of $40 for damages "by reason of a conviction against her in the course "of the conduct of her business as a milk vendor and the consequences fol-"lowing from a conviction for selling adulterated milk." But the plaintiff herself admits that while she has sold no milk since her conviction, it is not on account of her conviction but because she has been unable to obtain milk, through its scarcity, from milk vendors. Further, this decision will show that she is not a wrong-doer. Mr. Browne referred to *Bostock and Co., Ltd.*, v. *Nicholson & Sons, Ltd.* 1904 1 K.B. 725 in which case it was decided that the plaintiffs could not recover damages for good-will of their business. That case, however, is distinguishable from the present. In Bostock's case there was a sale "by description" and an implied condition that the goods supplied should correspond with that description. It was further held that the buyer did not expressly, or by implication, make known to the seller the particular purpose for which the goods were required, so as to bring into operation section 14 (1) of the Sale of Goods Act (the same as our section 16 (1) of the Sale of Goods Ordinance, 1913).

Had the plaintiff in this case shown any actual loss of custom it is quite possible she may have been able to recover some damages on that score.

Judgment will be given for $38.20, and costs, and fee $3.82.

RAHIM BACCHUS *v.* ABLAIN AND ANOR.

RAHIM BACCHUS *v.* ABLAIN AND ANOR.

[298 of 1917.]

1917. NOVEMBER 30, DECEMBER 7. BEFORE BERKELEY, J.

Appeal—Motor Car Ordinance, No. 5 of 1912—Master and servant—Claim for damages to motor ear by reason of careless or negligent driving—Agreement to pay cost of damages if criminal proceedings not instituted and chauffeur's certificate of competency not sought to be cancelled—Illegal consideration—Unenforceable Contract.

Appeal from a decision of Mr. H. T. King, Stipendiary Magistrate of the North Essequebo judicial district, who gave judgment for the plaintiff (now respondent) in an action brought by him against the defendants (now appellants) for $67.67, moneys paid for repairs to his motor-car damaged by his chauffeur, son of one of the defendants.

The appeal was allowed. No order as to costs.

W. I. Souza, solicitor, for appellants.

E. A. V. Abraham, solicitor, for respondent.

BERKELEY, J.: The defendants (now appellants) appeal from the decision of the stipendiary magistrate of the North Essequibo judicial district (Mr. H. T. King) who entered judgment for the respondent for $67.67 in an action brought by him against the appellants.

It would seem that respondent's chauffeur (a son of one of the appellants) by his carelessness and negligence damaged his master's car, and that in consideration of his not taking criminal proceedings against him and seeking to cancel his certificate the appellants promised to pay to the respondent the cost of repairs.

The facts are not in dispute and the only point argued is as to the legality of the consideration. This consideration is set out in the respondent's claim, as "not taking criminal proceedings against the said Katai (chauffeur) and seeking to cancel his certificate." Under the Motor Car Ordinance, 1912, a driver's certificate may be cancelled on his conviction for an offence under the ordinance or for any offence in connection with the driving of a motor car, and the bringing of any complaint is not limited to the police. Any member of the public can institute proceedings. Offences under the ordinance are of a public nature and a promise not to take criminal proceedings tends to deprive the public of the protection which otherwise they might secure by the punishment of an offender. Any agreement having a tendency however slight to affect the administration of justice is illegal and void.

As the claim itself shows, that the consideration is *an under-*

taking not to take criminal proceedings, and such consideration is illegal, this appeal must be allowed and judgment entered for the appellants but under the special circumstances attending this case, the court makes no order as to costs.

SCOTTS, LIMITED, *v.* CANNON.

[70 OF 1917.]

1917, NOVEMBER 28, 29; DECEMBER 7.

BEFORE SIR CHARLES MAJOR, C.J.

Landlord and tenant—Plaintiff company—Defendant director—Payment of rent by cross entry—Director's remuneration—Validity of agreement for—Ultra vires—Answer to proof of payment.

The plaintiff company sued the defendant for rent. The defendant, chairman of directors throughout the tenancy, pleaded and proved an agreement made between the directors and himself to pay him $10 a month, the same amount as the rent, for special services as supervisor of their business to be credited to him in the plaintiffs' books against his indebtedness for rent. This was done by cross-entries in the books, no money passing between the plaintiffs and the defendant in respect of either the contract of tenancy or that of service, and at time of action brought there was nothing due to the plaintiffs from the defendant for rent. The plaintiffs replied to the plea of his agreement that the same was invalid as having been made *ultra vires* of the directors, because a director's remuneration could only be fixed by the company in general meeting, which had not been done regarding the $10 a month paid thereunder.

Held, that the rent had been paid and that the plea of invalidity of the agreement whereunder the payment had been made was no answer and could not be maintained.

Semble, that the plea of invalidity was originally bad for contradiction and embarrassment and might have been struck out.

P. N. Browne, K.C., for the plaintiff company.

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

SIR CHARLES MAJOR, C.J., made the following remarks in the course of his judgment:

It has also been proved clearly that the defendant has paid his rent. The payment appears from the plaintiffs' own books and their auditor has explained the method from the entries therein. Those entries have been made from time to time pursuant to the resolution of the 2nd April, 1913, in which occur the words "continue to pay rent." Nearly three years afterwards, on the 25th February, 1916, I find the defendant mentioned as "now paying" rent, and on the 29th March next, as not to be asked to pay more than he was then paying. As a matter of law payment was made on each occasion that the plaintiffs, even though it had been without the consent of the defendant—which it was not—credited the defendant against his indebtedness for rent with the amount due for services as supervisor, and this has been done up to and including the month ending on the 28th

February, 1917, the date mentioned in the statement of claim. There is ample authority for the proposition that payment may be made by mere transfer of figures, without money passing. I need only refer to the old case of *Eyles* v. *Ellis* (4 Bingham, 112).

The third issue raised is the validity or invalidity of the agreement to pay the defendant $10 a month for services as supervisor. I have listened to many authorities cited by Mr. Browne to support the plea, many of them familiar to students of company law. They contain well established propositions of that law, relating to the agency, the quasi-trusteeship, the managing partnership of directors of companies; to the acts of directors *ultra vires* of the company; to commissions, gratuities, pensions granted to companies' officers, and so forth. They occur in suits by company against directors, by share-holders or debenture holders against company and directors; by directors against company, and in proceedings by liquidators against company or directors, not in an action like the present company landlord against their tenant. It is unnecessary for me to express any opinion on the validity or invalidity of the contract of service as supervisor because it is no answer to this action, as Mr. de Frietas has strongly urged. I think the plea was originally vicious for its contradictory and embarrassing nature and I would, on proper and due application, have struck it out. It has, however, been suffered to remain and has been debated, but it cannot avail the plaintiffs. The very foundation of the claim is non-payment of the rent. The plaintiffs have themselves shown that the rent has been paid. They may not, therefore, now turn round and say: "True you have paid your rent, but we have paid you an amount on another agreement by mistake, or misrepresentation, or *ultra vires* of the authority of our agents, or what not, and you must pay your rent again"—for that is what the claim in this action says when it is made for forty-eight months' rent. *Allegans contraria non est audiendus.*

Judgment for defendant.

B.G. CLERKS ASS. *v.* BRANKER & ORS.

PETTY DEBT COURT, GEORGETOWN.

B.G MUTUAL AID CLERKS ASSOCIATION *v.* BRANKER, AND OTHERS.

[180—11—1917.]

1917. NOVEMBER 29TH, DECEMBER 4, 5, 11.

BEFORE HILL, J.

Friendly societies Ordinance, No. 1 of 1893—Claim on promissory note—Locus standi of plaintiff association—Power to invest on personal security—Legality of loan to non-member—Ultra vires—Accord and satisfaction—Proof of liability of party to note.

The three defendants, two of whom were members of plaintiff association, made a joint and several promissory note in favour of the association. The husband of the defendant Meerabux on learning of his wife's interest in the note appropriated funds he held in his hands for the defendant Branker to the satisfaction of the note; the defendant Branker repudiated the authority of Meerabux so to utilize her money, and sued and obtained judgment against him for the amount. Meerabux thereupon applied to the association and obtained a refund of the amount paid by him on the note and returned the note to the secretary of the association. The plaintiff association thereafter sued for recovery of the amount due on the note, but withdrew as against the defendant Meerabux.

Judgment was given for amount claimed against the defendant Branker with costs.

There being no evidence as to the liability on the note of the defendant Doobay judgment was given in his favour with costs.

J. S. McArthur, for the plaintiff association.

E. D. Clarke, solicitor, for the defendant.

HILL, J.: The plaintiff sues on a balance on promissory note made by the three defendants, the first and third of whom are members of the association, which is registered under Ordinance 1 of 1893, as a friendly society The note is made jointly and severally. The plaintiff has withdrawn as against the second defendant and asks for judgment against first and third defendants.

The facts are that Mrs. Branker borrowed $28 from the association, and got Mrs. Meerabux and Doobay to sign as sureties for her. She was a subscriber to one of those pernicious institutions called a "box" which was "kept" by Meerabux, the hus-

band of the second defendant. Meerabux was ignorant of his wife's action in signing the note, and when he ascertained that she had done so, he says he spoke to Mrs. Branker who authorised him to apply funds he had for her to the payment of the note, which he did. Mrs. Branker repudiated this, and claimed the amount he had for her. I disbelieved Meerabux and gave judgment for Mrs. Branker. Thereupon Meerabux applied to the association and obtained a refund of the amount paid by him on the promissory note, viz., $25, and returned the note to the secretary. The association now claims against the makers of the note but has, as I have said, withdrawn against Mrs. Meerabux.

The defence has raised three points for consideration:—

(a) that there is no legal plaintiff before the court—no allegation that the plaintiff is a society registered under Ordinance 1 of 1893.
(b) that the loan was *ultra vires* of the association, as it was a friendly association, and no more.
(c) that there was accord and satisfaction when the note was paid off by Meerabux, and the association could not refund the money and sue on the note.

With regard to (*a*), the plaint states the plaintiff to be the B.G. Mutual Aid Clerks Association whose "registered address is at 36, Bentinck street, Georgetown." It would have been more explicit if it had stated that it was "registered under Ordinance 1 of 1893," but the rubric as it stands, bearing in mind that the first and third defendants are both members of the association, is in my opinion sufficiently explicit for all purposes. The case to which my attention was drawn by Mr. Clarke was silent in every respect as to registration as well as registered address.

(*b*) Reliance was placed on section 3 of Ordinance 1 of 1893 by Mr. Clarke in support of his contention that the association being a friendly society could not lend money either under the ordinance or its rules; if it could, it could only be for the purposes set out in that section. It was not a loan society nor was Mrs. Meerabux a member of it.

Mr. McArthur for the association referred to sections 14, 15 and 22, and the rules of the association especially with regard to par. 17 (x). In my opinion section 36 of the ordinance applies. The equivalent to this is the English Friendly Societies Act, 1896, section 44. That section is not a prohibitive one but an enabling one. The committee of management have not, by virtue of their office, any power to lend the money of the society at all. That authority is given to them by section 36. Except loans under section 37 which is the exception referred to in 36 (e) no mere debt is a security on which the funds of the association can be invested. The investment of such funds—the funds of a registered society—

on personal security, is merely unauthorised, constituting a breach of trust; it is not illegal so as to prevent the committee of management maintaining a suit to recover the money from the persons to whom it is lent. *In re Coltman, Coltman* v. *Coltman,* 19 C.D. 64, was a case in which the trustees of a friendly society lent out of surplus funds £300 on a promissory note to *A. B* and *C* signed as sureties. None were members of the Society. *C* died, and the trustees claimed to prove against the estate on the note. Fry, J., held that a loan on personal security to a person not a member of the society was forbidden by the Friendly Societies Act, that the transaction was illegal. On appeal it was held that as the money was not borrowed for an illegal purpose, the contract was not illegal but merely unauthorised, that it was not competent to the maker of the note to allege by way of defence that the payees had ho authority to lend the money and that proof must be admitted. As said by Jessel, M.R. (p. 69). "How the persons who borrowed it, there "being no illegality in the borrowing on their part, and no illegality in their "agreeing to repay the money so borrowed, and no illegality in the purpose "to which they intended to apply it, can set up the doctrine that they are "relieved from their liability by reason of the money having originally be-"longed to a friendly society, is a thing I am quite unable to understand."

With regard to the third submission that there was accord and satisfaction when Meerabux (improperly and mistakenly as held by this Court) paid off the note for Mrs. Branker, I am unable to reconcile the different attitudes adopted by the defence. She successfully contended he had no right to do so, and now sets out that there was accord and satisfaction when the note was paid by him.

An accord without satisfaction has no legal effect. The original cause of action is not discharged as long as the satisfaction agreed upon remains executory. An accord is not a contract, and performance of it cannot be enforced by action against the debtor who remains liable on the original cause of action until the satisfaction has been executed. The original cause of action is not discharged, if the accord an satisfaction was effected by the fraud of the debtor, or if the satisfaction has been rendered nugatory by his act or default.

In *Walter* v. *James* (1871) L.R. 6 Exch. 124 the defendant being indebted to plaintiff, *S,* who had acted as his attorney in the matter of the plaintiff's claim but whose authority had been countermanded, paid to plaintiff £60 in discharge of the disputed claim. Plaintiff afterwards, at the request of *S,* and before any ratification by defendant, repaid to *S* the £60 and sued the defendant for the debt. The defendant pleaded, as to £60, pay-

merit, and relied upon the payment made by *S.* The court held that it was competent to the plaintiff and *S* before ratification by the defendant, to cancel what had been done and that the plea of payment was therefore not proved.

Meerabux had no authority to pay the promissory note sued on for Mrs. Branker. The association believed he was acting under authority, and when it found he had none he was refunded the money. Mrs. Branker cannot plead accord and satisfaction when she has, so far from ratifying, actually repudiated the payment by Meerabux, and plaintiff can claim on the note.

As said by Kelly, C. B., in the case above quoted, "the evidence "shows that the plaintiff recovered the money in satisfaction under the mis-"taken idea that Southall had authority from the defendant to pay him. This "was a mistake of fact, on discovering which he was, I think entitled to re-"turn the money, and apply to the defendant for payment."

There will be judgment for $25 and costs against Mrs. Branker. As regards Doobay there is no evidence as to his being party to the note and payment will go in his favour. Fee to counsel for plaintiff of $2.50.

RAMASAR *v.* BEERANGEE.

1917. DECEMBER 15. BEFORE BERKELEY, J.

Taxation of Costs—Review—Rules of Court, 1900, Appendix 1 Part 1 (c)—Meaning of term 'value of property' in respect of which action brought and amount claimed—Hearing limited on objection to amount below $250—Successful defendant.

Action was brought by the plaintiff for payment to him of a legacy of $245 and for accounts, alleging that defendant's testatrix left money, jewellery and other personal effects. Objection was taken by the defendant's counsel to that part of the claim asking for accounts, and the hearing of the action was at request of plaintiff limited to the specific sum of $245 only. The, claim of the plaintiff was dismissed and judgment entered for the defendant with costs.

Costs had been taxed by the taxing officer on the lower scale Under Appendix 1, Part 1 (c) of the Rules of Court, 1900, from which taxation the defendant appealed.

BERKELEY, J.:—Application by defendant to review taxation of costs taxed on the lower scale (Appendix 1, Part 1 (c)). It is claimed that such costs sought to have been taxed on the higher scale (b).

The action was brought to recover not only the specific sum of $245 but also to obtain a statement of accounts alleging that the testatrix left money, jewellery and other movable property.

A preliminary objection was taken to the hearing of the action by defendant, and on the suggestion of plaintiff's counsel who alleged that the claim for $245 was a good one, the hearing of the action was limited to this amount.

The words "value of the property in respect of which the action is brought" and the words "amount claimed" occurring in Appendix 1 (b & c) are held to refer to the value or amount determined by adjudication (*Lord* v. *de Freitas* 5.12.1911).

The fact that the hearing of the action was limited to one specific sum at the request of plaintiff cannot deprive the successful defendant of his right to have the costs taxed under (b) when, as in this case, a consideration of the notes of evidence (see *Lord* v. *de Freitas, supra*), show that the Court by adjudication would have found (if it had been asked to do so) that the value of the property in respect of which the action was brought exceeded $250 and in fact exceeded $1,000.

I order therefore that the taxation as made be set aside, and that the costs be taxed on the higher scale (b). I fix the costs at $5.

FELLIPPE *v.* THE DEMERARA RAILWAY COMPANY.

[305 OF 1917.]

1917. NOVEMBER 30. DECEMBER 17. BEFORE BERKELEY, J.

Appeal—Damages—Loss of donkey—Negligence of railway company—Absence of fencing—Manager of sugar estate as agent of owners—Ultra vires—Contributory negligence.

Appeal from a decision of Mr. E. A. Bugle, stipendiary magistrate of the East Coast judicial district, who gave judgment for the plaintiff for $80. and costs on a claim for damages against the defendant company (appellants). The reasons for appeal sufficiently appear from the judgment of the Court.

The appeal was dismissed with costs.

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

P. N. Browne, K.C., for respondent.

BERKELEY, J.: This appeal is from the decision of the stipendiary magistrate of the East Coast judicial district (Mr. Bugle) who ordered the appellant company to pay $80, as damages in respect of respondent's donkey killed on the railway line through the negligence of the railway company.

The reasons of appeal are thirty-three in number, the most important of which are dealt with in the course of this decision.

The evidence shows that the respondent carries on the business of a spirit dealer on premises at Le Ressouvenir, which together

with plantation Success, is known as New Success and worked with one staff now the property of the New Success Company, Limited.

Respondent pays a rent of $45, and is allowed free pasturage for his animals. On June 25th his donkey was grazing on that part of New Success plantation known as Le Ressouvenir, and from the side-line it strayed on to the railway line and was killed by a passing train.

It was admitted by the appellant company that no fence or wire had been erected there for over twenty years.

The claim alleges that the animal was killed at "Plantation New Success *cum annexis*" and the evidence, uncontradicted, as to what was included in that plantation was not only admissible but sufficient to enable the magistrate to find as he has done.

It was argued that the manager of a plantation has no authority to allow free pasturage. In *Correia* v. *Demerara Railway Company* (L.J., Sept. 13th, 1913) relied on by appellant, the Court held that there was a "working understanding" between the managers of the adjoining plantations, but that this did not give a licence to occupy. This is against appellant's contention for by implication it seems to find that a manager had the power to give a "licence to occupy."—Whether this is so or not, leave to depasture animals which is certainly for the benefit of the plantation must be held to be a discretionary power vested in the manager unless special instructions are issued to the contrary. (See *Griffith* v. *Versailles Company* (A.J., April 7th, 1906) as to authority of a Manager to enter into certain contracts of lease.)

The fact that the appellant company has neglected its statutory duty to maintain proper fences for any length of time can in no way afford relief from liability for such neglect if the animal injured was lawfully on the land from which it strayed on to the railway line.

The evidence shows that it was on the side-line of that part of New Success, formerly Le Ressouvenir. It is urged that in view of the Companies' Clauses (Completion of Titles) Ordinance, 1898, (sec. 3 & 7) the side-line is not the property of the New Success Company. The provisions of those sections in my opinion do not apply. No land has been "acquired" as defined by section 2.

In *Ogle Plantation Company, Limited,* v. *Demerara Railway Company* (L.J. 24.6.04) no reference is made to this ordinance in which "company path" and "side-line" are both referred to, but Bovell, C.J., drew a distinction between a "company path" and a "side-line," over the latter of which the owner would have absolute control.

There is no evidence to support the appellant's plea of contributory negligence and the appeal must be dismissed with costs.

MANNING *v.* KHADIR.

MANNING *v.* KHADIR.

[191 OF 1917.]

1917. DECEMBER 21, 31. BEFORE SIR CHARLES MAJOR, C.J.

Offence after previous conviction—Court of summary jurisdiction—Evidence of previous conviction—Procedure—Illegality affecting merits.

The procedure obtaining in the Supreme Court on arraignment and trial of persons charged with offences after previous conviction, as prescribed by section 136 of the Indictable Offences (Procedure) Ordinance, 1893, is to be followed on the hearing of complaints for the like offences in a court of summary jurisdiction and departure therefrom will have the same results as in the Supreme Court.

Where, therefore, a magistrate, after objection thereto by the defendant, received evidence of a previous conviction as a rogue and a vagabond at the outset of an enquiry into, and as part of the evidence in support of, a complaint charging the defendant with being in a yard for an unlawful purpose after the previous conviction, and convicted him of the subsequent offence;

Held that that reception of the evidence of the previous conviction was an illegality substantially affecting the merits of the case and the conviction must be quashed.

Appeal from a conviction, by the stipendiary magistrate for the judicial district of Georgetown (Mr. W. J. Gilchrist), of the defendant charged with being found in a yard for an unlawful purpose after having been previously convicted as a rogue and vagabond.

P. N. Browne, K.C. (*J. A. Luckhoo* with him) for appellant.

G. J. de Freitas, K.C (acting *S.G.*) for the respondent.

The proceeding before the magistrate and the arguments on appeal sufficiently appear from the judgment of the Chief Justice.

SIR CHARLES MAJOR, C.J.:—The defendant Khadir was charged before the magistrate for the Georgetown judicial district for that he was, on the 23rd April, 1917, "found in a yard for an unlawful purpose, contrary to section 145, sub-section (4) of the Summary Conviction Offences Ordinance, 1893, the said Khadir having been previously convicted as a rogue and vagabond on August 22nd, 1916." The defendant Harbansi was charged as above, save that the complaint charged no previous conviction as a rogue and vagabond. By consent of counsel for both defendants, the complaints were heard together.

The magistrate first heard the evidence of the complainant, a district inspector of police, as to the locality of the yard mentioned in the complaint and measurement of distances between various points in its neighbourhood, after which the complainant tendered as evidence against Khadir a certified copy of his conviction on the 22nd August, 1916, for being found in a yard for an unlawful purpose whereby it was adjudged that the defendant

for his said offence be deemed a rogue and vagabond. Counsel for the defendant objected "to the admission of the evidence at that stage. His objection was overruled, and the document was put in. Evidence was given of the offence charged including the testimony of a police constable in answer to the question "What kind of character does he bear?" (meaning Khadir) as follows: "He is always suspected of stealing fowls, goats, or sheep. If hear reports of such thefts, always first think of (1) (meaning Khadir), and others in the district always to report. No. (2) (meaning Harbansi) lives at La Penitence, known him for same time as (1). They always be together and (he, bears same character as No. (1). After decision reserved the magistrate noted "Find defendants guilty. As to previous conviction already proved." Some information from the police relating to the nature of the offence which had been the subject of the previous conviction having been given to the magistrate, he proceeded "No. (1) deemed incorrigible rogue and vagabond. No. (2) deemed rogue and vagabond," and passed sentence. The convictions are not included in the appeal record. Certified copies of convictions should always be so included.

Against their convictions the defendants have appealed and the appeal has been argued on the following grounds. As to both defendants—1. That the decision was erroneous in point of law (a) because the complaint disclosed no offence in law; (b) because the evidence did not support the charge as laid under the particular section of the ordinance; as to Khadir alone—(c) because the charge as laid was bad in law. As to both defendants—2. That illegal evidence was admitted by the magistrate, and that there was not sufficient legal evidence, etc., viz., (a) the evidence of Robert Glasgow; as to Khadir alone—(b) copy of order of previous conviction of the defendant. As to Khadir alone—3. That some specific illegality not before mentioned and substantially affecting the merits of the case, viz., the evidence of the previous conviction of the defendant was wrongly admitted by the learned magistrate. This ground refers to the objection of counsel already mentioned and its overrule.

The objections made under the first reason for appeal, that the complaint disclosed no offence in law, and that the charge as laid was bad in law, were sought to be supported on the ground that the complaint should have stated (i) the owner of the yard and (ii) the nature of the unlawful purpose. Even if that ground were tenable, and I am of opinion that it is not—the objections cannot now be taken. The provisions of section 97 of the Summary Conviction (Procedure) Ordinance 1893, and of section 27 of the Magistrates' Decision Appeal Ordinance, 1893, are conclusive against the appellants, of whom there has never been,

either in inferior or in superior court, any question of being deceived or misled. Those provisions would be rendered nugatory if convicted persons could, after pleading unreservedly to complaints, and after offence charged, heard, and determined, ask courts of appeal from their conviction to consider objections to those complaints for defects in substance or in form, unless taken before the magistrate and overruled, and shown to the court of appeal to have led to the appellants being deceived or misled.

The objection under the first reason for appeal, that the evidence did not support the charge, is urged on the ground that, on the construction of the words, in section 145 (4) of the Ordinance, "yard, garden, or other enclosed place or land" the term "yard" means "enclosed" yard, and that there was no evidence that it was enclosed. There was in effect no evidence of this fact, but I do not think "yard" means "enclosed" yard. The English Vagrancy Act of 1824 (from which our enactment is taken) has, it is true, "any enclosed yard, garden or area," but our ordinance—in local circumstances, it seems to me, designedly—has removed the description "enclosed" from yard and garden, because yards and gardens in a colony like this are often not enclosed, perhaps because they are parcel of, or attached to dwelling-houses and so in great measure protected, and transferred it to "place" and "land" not so attached, which would, as remote, require enclosure.

Argument on the second ground of appeal, viz., the admission of illegal evidence, was speedily shifted to the third ground, specific illegality, and very properly so, for neither the evidence of the previous conviction of Khadir nor that of the defendants, character given by Glasgow was "illegal," if that curious expression means inadmissible. The former was given in the method prescribed by law; the latter, though itself of little value as evidence of general reputation, was admissible enough in part though not in whole. It is well perhaps to recall that in giving evidence of character a witness is not permitted to give his own opinion. Glasgow, therefore, should not have been allowed to say "if I hear reports of theft I always think of (1)."

The contention of specific illegality committed by reason of the reception of evidence of the previous conviction at the outset of inquiry into the charge of being found in the yard for an unlawful purpose raises a question of considerable importance in summary proceedings before a magistrate. We are familiar with the procedure enjoined upon superior Courts, when persons are charged with offences after previous conviction, by sections 136 and 137 of the Indictable offences (Procedure) Ordinance, 1893, reproducing in substance the provisions of the English Previous

Conviction Act, 1836, and Larceny Act, 1861, s. 116. The case of *Faulkner* v. *Regem* (1905 2 K. B. 76) shows that disregard of the provisions of the latter Act is so substantial a defect that it cannot be cured by verdict. There is no specific provision in the local law for the procedure to be adopted on trials of persons charged with an offence after previous conviction, which, if proved, subjects those persons to a greater degree of punishment; offences of various kinds, set forth in the Summary Conviction Offences Ordinance, beginning with assault on judicial and ecclesiastical officers by section 34 and ending with administration of poisonous drugs to animals by section 189. But I am clearly of opinion that the procedure of the Supreme Court should be observed and, on analogy, that its disregard should be followed by the same results. The case of *R.* v. *Penfold* (1902 1 K.B. 547) contains remarks by the learned judges of the Court of Crown Cases Reserved directly bearing on the point. The defendant in that case was charged under the Prevention of Crimes Act, 1871, with committing an offence created by section 7 of the Act, an essential ingredient of which is a previous conviction which should, therefore, be charged and proved in the first instance, and the observation of the judges are useful as showing the procedure to be adopted by judges and magistrates alike, according as the offence charged is an offence created by section 7 of the Act, or one whereof a previous conviction is not an ingredient. Lord Alverstone, C.J. said—"Of course, in cases where a crime which is complete in itself is charged in an indictment which charges also a previous conviction but different degrees of punishment may be inflicted in accordance with the antecedents of the prisoner, evidence of the previous convictions ought not to be given until the subsequent charge has been proved." The Lord Chief Justice then referred to the Larceny Act, 1861, section 116, and proceeded: "Then came the Prevention of Crimes Act, 1871, which, by some of the sub-sections of section 7, provided that a state or rather a combination of circumstances should create an offence which would be no offence at all, but for the offender having been previously convicted within a certain time. The indictment in this case alleges all the necessary ingredients of the offence. Had the prisoner been tried summarily before the magistrate, the whole story must have been gone into and the previous convictions must have been proved. . . . The offence here is a statutory offence, and it is not complete unless the particular circumstances, the previous conviction and the time, are all proved; and these necessary ingredients, as I have called them, should therefore, all be given in evidence before the tribunal, whether it be a court of summary jurisdiction or a jury. It seems to me that no distinction can be made between the trial before magistrates

and that before a jury." With these observations the other judges of the court concurred.

Here the offence with which the defendant Khadir was charged was being found in a yard for an unlawful purpose; the previous conviction was no ingredient in that offence, which was complete in itself. The previous conviction was only to be proved in connection with the defendant's antecedents in order to have him deemed an incorrigible rogue and so receive a different degree of punishment.

I am, therefore, of opinion, firstly, the evidence of Khadir's previous conviction was wrongly admitted at the outset of the enquiry into the subsequent offence with which he was charged; secondly, that the wrongful admission was an illegality in the sense of that expression in the appeal ordinance; and, thirdly, by analogy to the authorities on the point, and the principles thereby observed for governing the procedure of the Supreme Court, that the illegality was one substantially affecting the merits of the case, because it was inconsistent with a fair and impartial inquiry into the subsequent offence of the defendant. There is no class of offences created by local statute such as that in the Prevention of Crimes Act, 1871, the only class, so far as I am aware, by English law, to which the rules of procedure on a charge involving a previous conviction contained in the 116th section of the Larceny Act, 1861, do not apply. Those rules therefore, must be applied and strictly observed in all summary proceedings for criminal offences in this colony.

The conclusion of the whole matter is that the conviction of the defendant Khadir must be quashed. The defendant Harbansi has failed to support the grounds of his appeal, and the previous conviction of his co-defendant had no bearing, and formed no part of the evidence on the charge against him. His conviction therefore is affirmed. In each case the costs of the appeal must follow the event.

TEIXEIRA *v.* GEORGETOWN LIVERY STABLES CO., LTD.

1917. JANUARY 3. FEBRUARY 1. BEFORE BERKELEY, J.

Taxation—Review—Practice—Rules of Court, 1900, Appendix I, Part I, (*b*) *and* (*c*).*—Scale of taxation of costs—Meaning of 'amount claimed.'*

The words "value of the property in respect of which the action is brought" and "the amount claimed" as used in the Rules of Court, 1900, Appendix I, Part I. (b.) and (c.) refer to the value or amount as determined after adjudication.

Archer v. *Britton* (A.J. 22. 3. 1906) followed.

Review of taxation on the application of the defendant company. Judgment had been obtained by the plaintiff against the Company for the sum of $250, and costs, (*a*) which had been taxed by the taxing officer under head (*b*) of Appendix I, Part I of the Rules of Court.

de Freitas, K.C., for the applicant (defendant).

Humphreys for the respondent (plaintiff).

BERKELEY, J.: On a claim for $500 the trial judge gave judgment for $250, and the taxing officer taxed the costs on the higher scale.

The decision shows that, on counsel informing the Court that such direction was necessary it was ordered that costs be taxed on the higher scale. On the following day before judgment was finally entered counsel informed the judge that the information given by him on the previous day was erroneous, and he applied to vary the judgment with respect to the amount in order to enable

(a) 1916. L.R., B.G. 76.

costs to be taxed on such higher scale. The judge held that on his findings he had no such power and continued "But it (the application) 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." He then proceeds to give the reasons on which that opinion is based. In view of this opinion the taxing officer proceeded to tax on this higher scale, and hence the present application by the defendant company.

It is submitted in behalf of the plaintiff that, inasmuch as the order was not appealed from, it is not open to the defendant company to raise by way of review the question of taxation.

I am disposed to agree with counsel, if, as a fact, such an order was made, but the decision seems to negative any such intention. The learned judge says that he had no power to give costs on the higher scale. This I take it means that taxation should proceed as laid down by the Rules. It is true that he proceeds to state that in his opinion it should be on the higher scale with his reasons therefor, but the only application then before the Court was to increase the amount given in the judgment so as to obtain costs on that higher scale. The use of the words "in my opinion" tends to confirm the impression conveyed to me by the language used in the decision, that it was not a judicial *dictum* but merely an *obiter dictum.* This being so the review of taxation is in order. It is as well to add that the Chief Justice who was the trial judge has seen the conclusion I have arrived at and, although he is not altogether in accord therewith, he sees no reason to differ therefrom, as it enables the real point at issue to be determined on its merits.

Under the Rules of Court two scales of fees are fixed, (b) on page 166, the headnote of which reads "Costs chargeable . . . . . in actions where the amount claimed or the value of the property . . . . . exceeds $250." Then follows a tariff of charges thereunder; and (c), on page 168, the headnote of which runs "Costs chargeable . . . . . in actions in which the amount claimed or the value of the property . . . . . does not exceed $250." The rule hereunder provides that one fee at the rate of 10 per cent., on the "amount recovered" or, in the case of a successful defendant, on the amount or value claimed shall be allowed as costs. Here we have in the words "amount recovered" the interpretation—so far as the plaintiff is concerned—to be placed on the words "amount claimed" in the headnote to (c). These words do not occur in the headnote to (b), but to construe the words "amount claimed" in their literal meaning renders it open to a plaintiff to bring his claim for an amount exceeding $250 with the knowledge, that although he may obtain judgment for an amount not exceeding $250 he is entitled to have his costs taxed on the higher scale, and

thus avoid obtaining only 10 per cent., on the amount recovered as provided by the lower scale. Again there is an alternative mode of taxation—"the value of the property." This value can only be arrived at on the trial of the action, and it would follow that if this value was found to be under $250, costs would be taxed on the lower scale although the value of the property was set out as exceeding that amount. Under (b) therefore we would have the costs always taxed on that scale in actions where an *amount* is claimed, but in cases where the value of the property has to be ascertained the scale (whether (b) or (c)) under which taxation is to proceed would depend on the value so ascertained.

In *Garly* v. *Harris* 7 Ex. 591, where the words "not exceeding £5," were used in section 11, and the words "less than the sum, in that behalf herein before mentioned," in section 12 (13 and 14 Vict. c. 61), Platt. B. said: "We must give a reasonable construction to the 12th section and for that purpose look to the meaning of the legislature as collected from the two sections read together." And again "If the former words (not exceeding) be substituted (for the words 'less than') the meaning is clear. Since then the intention of the legislature is manifest we ought not to tie ourselves to a literal reading which would do substantial injustice." And so in the present case (b) and (c) must be read together in order to carry into effect what appears to me to be the true meaning of the framers of the rule.

In *Chatfield* v. *Sedgwick* (4 C.P.D. 459) it was argued that if a plaintiff by his writ claimed a sum exceeding £50, the 67th section of the Judicature Act, 1873, did not apply. Jessel, M.R. said "that section provides that the provisions contained in the fifth, seventh, eighth, and tenth sections of the County Courts Act, 1867 shall apply to all actions commenced or pending in the High Court of Justice in which any relief is sought which can be given in a County Court. In my opinion this means where relief is sought of a kind which can be given by a County Court, and does not mean where relief is sought only of such an amount as could be given by a County Court." And Brett, L.J., "I am opinion that the amount for which the writ was endorsed has nothing to do with the question." This case shows that the question of jurisdiction in the county court as to amount is not to be determined by the amount claimed but by the amount recovered in the action. I think by analogy the same principle should be applied in this case where we find the headnotes in the scales (b) and (c) identical, and in the latter, so far as a plaintiff is concerned, the words "amount claimed" are defined as meaning "amount recovered."

These Rules of Court came into force on the 1st of October, 1901. The point raised by this review so far as can be ascertained

was first brought before the Court in *Archer* v. *Britton* (Review by Hewick, J. 22.3.1906.) I understand from the Registrar that this decision confirmed the practice which had existed from the coming into operation of the Rules It was followed by *Grimes* v. *de Silva* (Nunan, Ag. J. 18. 5. 1906) and then by *Lord* v. *de Freitas* (Berkeley, J. 5.12.11). I see no reason to depart from the view I expressed in this last case. On the contrary further research has strengthened my opinion that that view was the correct one.

It is ordered therefore that this taxation be set aside and that the taxing officer proceed to tax on the lower scale (c). I allow $10 as costs of review.

LEUNG *v.* MURRAY.

[272 of 1916.]

1917. FEBRUARY 2, 9. BEFORE DALTON, J., (Actg.)

Magistrate's Courts—Special defence—Practice—Petty Debts Recovery Ordinance, 1893, sec. 12—Prescribed notice—Magistrates' Courts Rules, 1911, rule 27—Day of hearing—Adjournment.

The words "day of hearing," as used in rule 27 of the Magistrates' Courts Rules, 1911, mean the day originally fixed for the hearing in the summons, and not any other day to which the trial may be adjourned.

Appeal from a decision of the Stipendiary Magistrate of the North West Judicial District (Mr. H. T. King), who refused an application by the defendant Murray (now appellant) for leave to file notice of a special defence in an action between the plaintiff Leung (now respondent) and himself.

The magistrate's reasons for decision and the reasons for appeal sufficiently appear from the judgment below.

Humphrys, for the appellant.

The magistrate had no discretion. Four days after service not being sufficient, appellant was entitled to give notice immediately after the case was called, on the day to which the hearing had been adjourned.

C. R. Browne, for the respondent.

"Day of hearing" means return day, i.e., day when case is called for first time. Cites *Fletcher v. Bacon,* 43 L.J. Q.B. 112, and *Queen* v. *Registrar at Leeds* 16 Q.B.D. 691.

DALTON, J. (Actg.): This an appeal from the refusal of the magistrate to grant an application for leave to tile a special defence in a suit between the parties on a promissory note.

Under the provisions of section 12 of the Petty Debts Ordinance, 1893, no defendant can set off or set up by way of counter-claim any debt or demand claimed or recoverable by him from the plaintiff, or set up by way of defence infancy or prescription or his discharge under any statute relating to bankruptcy or insolvency without the consent of the plaintiff, "unless the prescribed notice thereof has been given to the clerk of the court." Rule 27 of the Magistrates' Courts Rules, 1911, which prescribes the notice is as follows:—

> "The notice of special defence referred to in section 12 of the Petty Debts Recovery Ordinance of 1893, shall be in the form given in the schedule attached to these Rules and shall be given to the clerk of the court within four days after the service of the summons on defendant: Provided that if it appears to the magistrate on the day of hearing that four days were not sufficient for the defendant in which to give such notice, the defendant shall be entitled to give such notice immediately after the case is called, and the magistrate may then, if the plaintiff applies for an adjournment, grant an adjournment on such terms as to costs or otherwise as the magistrate shall think fit."

The question to be decided is, what is the meaning of the words "day of hearing"? Is it the "return day", that is, the day mentioned in the summons for the defendant to appear before the court, or is it any other day to which the case may be adjourned and on which the matter is gone into?

The summons here was served on the defendant on September 11th, 1916, returnable on September 25th. The record shows that on that day the case was, at defendant's request, postponed to October 30th. It was then further postponed, at defendant's request, to November 9th and November 30th, on which last day the application in question was made. As his reason for refusing the application the magistrate says: "A magistrate has power to amend all defects and errors in any proceedings. He would, however, to my mind abuse his discretionary power if he allowed an extension after so long a time had elapsed as in this case, in the absence of exceptional and extenuating circumstances. The intention of the section seems to preclude the granting of the extension asked for. The defendant seems to have been unable to make up his mind as to what defence he would make and this application seems to have been made as the last resort." It will be seen then that stress is laid here on the undoubted delays that arose at the instance of defendant, and on the discretionary power of the magistrate. Rule 27, however, to my mind gives the magistrate no discretion at all in the matter, but says that if the four

days are not sufficient the defendant "shall he entitled" to give his notice on the day of hearing immediately after the case is called. The reasons given by the magistrate are wrong, but, in my opinion, his refusal to grant the application was correct. The matter is not without difficulty, but it seems to me that the words "day of hearing" must mean the day originally fixed for the hearing and not any other day to which the trial might be adjourned. On the return day the case is called in court, and it is then, if the four days are not sufficient to give the notice as was admittedly the case here, that defendant must give his notice if he wishes to avail himself of the special defence.

The question of the interpretation of these words in somewhat similar circumstances arose in the case of *Fletcher* v. *Baker* (48 L.J. Q.B. 112) which was cited. There a statute gave parties in certain cases the right of having matters in county courts tried by a jury. The county court rules prescribe "Notice of demand of a jury shall be made in writing to the registrar of the court three clear days before the day of hearing." The judges (Cockburn, C.J. and Blackburn, J.) held that the words "day of hearing" there meant the day originally fixed for the hearing, and not a day introduced by and depending upon accidental circumstances. The county court rules both in this matter of a jury and also where special defences are made go further than our rule in allowing a discretion to the judge, who may grant an adjournment of the hearing to enable the necessary steps to be taken for the trial to proceed with a jury, or for notice of the defence to be given, but there seems to be no such intention in rule 27 which is explicit in its terms.

The appeal must be dismissed, with costs to the respondent

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SUKOOL *v.* ROBERTS.

[13 of 1917]

1917. FEBRUARY 9. BEFORE DALTON, J., (Actg.)

Sale of goods—Judicial sale by bailiff in execution—Delivery—Sale by purchaser to third party—Transfer of property as between buyer and seller—Destruction of property by fire.

The transfer of property between the bailiff and a purchaser at his sales, in the absence of any special provision in the conditions of sale, is governed by the provisions of the Sale of Goods Ordinance. The property passes when it is intended to pass, and there is no requirement in the law for any formal delivery or legal installation by such officer.

This was an appeal from a decision of the Stipendiary Magistrate of the East Coast Judicial District, (Mr. E. A. Bugle). The plaintiff Sukool (now appellant) purchased a building at a bailiff's sale. The same day after the purchase the plaintiff sold the building to Roberts, the defendant, giving defendant possession and taking a promissory note from him for $27, the purchase price. The same night the house was burnt down.

In an action by the plaintiff to recover the amount of the note, the defence was made that no consideration had been received therefor. This defence was upheld by the magistrate and the claim was dismissed. The reason for appeal was that the defendant had been given possession of the house and that he had received consideration for the note.

Humphrys for the appellant.

A. B. Brown for the respondent.

DALTON, J., (Actg.): In his reasons for decision the magistrate states that the parties agreed between themselves that this note should be given on the condition that the house be handed over to the defendant, Roberts, when plaintiff was "put in possession in the ordinary course by the bailiff." He proceeds: "At the time of the making of this promissory note the plaintiff was only selling what he could give if he were legally installed by the officer in which the possession was vested."

The only evidence given was that of the plaintiff, the magistrate, when he heard his evidence, having dismissed the claim. There is not a word on the record of the agreement above-mentioned, nor can counsel for the respondent point out any provision in the law whereby sale and delivery by the bailiff is governed by conditions which do not apply to the ordinary sale

of goods. No conditions of sale were produced, in fact it was stated that no conditions were stated or read out. The plaintiff says "The bailiff asked me if I know the place. I said yes, so I went and took possession." That was after the sale by the bailiff, and prior to the sale by plaintiff to defendant. All that was necessary seems to me to have been done. No formal installation was necessary. The magistrate's decision must be reversed, and the case referred back to him for re-trial. Appellant is entitled to his costs.

PETTY DEBT COURT, GEORGETOWN.

CANTERBURY *v.* HALY.

[293—2—1917.]

1917. FEBRUARY 15. BEFORE DALTON, J. (Actg.)

Master and Servant—Menial servant—Wrongful dismissal—Damages—Extent of remedy—Penalty on employer—Employers and Servants Ordinance, 1853, sec, 9.

The only remedy of persons, who come within the provisions of the Employers and Servants Ordinance, No. 1 of 1853, for breach of contract for wrongful dismissal, is to proceed under that ordinance to enforce the penalties therein provided.

Claim by Catherine Canterbury, as mother and guardian of her minor son, Daniel Godfrey, to recover the sum of $2.44 as damages and pecuniary compensation for his wrongful dismissal from the service of defendant. It was alleged that the boy was, on January 7th, 1917, engaged by defendant as a baker's boy at the rate of $1.68 per week, and worked as such until February 2nd, on which day he was wrongfully and unlawfully dismissed without notice. The amount of $2.44 was made up of the sum of $1.68, amount accruing due for the week ending February 3rd, and $1.68 in lieu of one week's notice of dismissal less 92 cents paid on account.

Plaintiff in person.

B. Dinzey, solicitor, for defendant.

DALTON, J. (Actg.): This is a claim by the plaintiff as guardian of her minor son, Daniel Godfrey, against the defendant, for the sum of $2.44 as damages and pecuniary compensation for his wrongful dismissal from the employment of the defendant's service in January last.

Defendant objects that, although he has a defence on the merits, the plaintiff is not entitled to take the proceedings now insti-

tuted, but should have proceeded to enforce the penalty on and recover the compensation from him as employer of the minor under the provisions of section 9 of Ordinance 1 of 1853 (Employers and Servants Ordinance); that it has already been decided that a menial servant can only proceed under that ordinance against his or her employer for damages for breach of contract; and that the present action does not lie.

The boy in question, it is admitted, was a baker's boy, and employed in brushing out the bakery, washing-pans, and other similar duties. It is not denied that he comes within the term "menial" servant.

The authority quoted by the solicitor for the defendant is the case of *Jones* v. *Stevenson and ors.* (not reported) (*a*) decided by Atkinson, J., on December 22nd, 1890, and it supports fully the contention of the defendant in a judgment of some length. The principle laid down by Atkinson, J., in that case, however, was somewhat modified by him in the following year in the case of *Yard* v. *McDavid* (April 19th, 1891.) That modification is not of any importance now, because the section of the statute on which it was based is no longer law, *i.e.*, section 13, Ordinance 2 of 1856 (the Inferior Civil Court Ordinance), nor would that modification affect this case seeing that this is an action for damages, and not for wages or salary.

The decision of *Jones* v. *Stevenson and ors.* was approved of by Hewick, J. in the later decision of *Veerasawmy* v. *Fraser* (A.J., February 22nd, 1908), although the actual claim then before him was on an account stated, and so not within that decision. The matter, however, now before me is similar to the matter in the first named case, and it is a decision which I propose to follow.

The objection must be upheld and the plaint struck out.

(*a.*) See Annexure.

INFERIOR COURT OF JUSTICE.

JONES *v.* STEVENSON AND ORS.

1890. DECEMBER 22. BEFORE ATKINSON, J.

ATKINSON, J.: The plaintiff alleges that, in consideration that he promised to do certain work for the defendant's as a gold-digger at 64 cents a day for four months, they promised to permit him to do the said work on the said terms, that he began, and was always ready to go on doing, the said work, of which the defen-

dants had notice, but they would not permit him to proceed with the work and discharged him, whereby he lost the price of the work he had done and also the profits which would have accrued to him from the completion of the term of four months, wherefore he claims $64 by way of damages and pecuniary compensation for the wrongful dismissal.

The defendants objected that the citation would not lie, inasmuch as the plaintiff, being a gold-digger, was a labourer or servant within the provisions of Ordinance 2 of 1858 (*a*) and the claim should have been brought before a Justice of the Peace in terms of section 9 of that ordinance, which enacts that if any employer, having engaged any servant for any period of time certain, shall discharge him before the completion of his contract, such employer, unless he prove reasonable and probable cause for putting away such servant, shall forfeit to the use of such servant such sum, not exceeding twenty-four dollars, as the Justice shall consider a reasonable compensation.

It was replied that Ordinance 2 of 1853 did not take away the common law right which the plaintiff had to sue for damages for breach of contract, but merely gave him an additional remedy which he could adopt or not as he chose. The matter was set down for argument and has now been argued by counsel for both parties. There are other cases which, by consent of parties, the decision in this case is to settle.

Ordinance 2 of 1853 is "An Ordinance for regulating the rights, duties "and relations of employers and servants in the Colony of British Guiana." Sec. 2. repeals Ordinance 2 of 1848, the last preceding ordinance, together with all laws formerly in force respecting the hiring of persons described in the preamble, except only in so far as the same may have repealed any former law." But for this saving clause, I should have been inclined to agree with plaintiff's contention and to hold that the provisions of this ordinance for the more easy recovery of wages and the more ready determination of disputes connected with hirings do not take from the persons hired any right they may have before had of resorting to other courts in cases of breach of contract. It is the laws relating to hirings only that are repealed by section 2, and, in the absence of express words going that length, the section cannot be construed as affecting laws relating to tribunals and procedure to which the persons described in the preamble would, unless restrained by law, have been entitled to have recourse, in the same way as any other members of the community.

The exception in section 2 of Ordinance 2 of 1853, which saves the repeals effected by former laws, renders it necessary to ascertain what repeals were so effected.

(*a.*) Now Ordinance 1 of 1853. Ed.

I invited the attention of counsel to this repeal section but no arguments were addressed to me on this particular point. During the argument *Grotius* and *Van der Keessel* were referred to as showing that the law existing in the time of Grotius (1600) as regards domestic servants had been altered in Van der Keessel's time (1800), and Ordinance 30 of 1846 was cited as being the next "inroad" upon the "common law" on the subject. If that were so, which it is not, the mere fact that the respective rights and duties of masters and servants had been so changed would, of itself, afford little help in the decision of the question whether the plaintiff is or is not bound to proceed under the provisions of Ordinance 2 of 1853.

It is not disputed that the plaintiff is a labourer within the meaning of that ordinance, but some question was raised as to whether he is a "servant" within the terms of section 9. The preceding sections show plainly that the person spoken of as a "servant" in section 6 and 9 is, necessarily, one of the persons described in the preamble.

Ordinance 30 of 1846 is not by any means the first enactment relating to this subject. On the 22nd June, 1836, an Ordinance was passed for the better regulation and enforcement of the relative duties of masters and employers and articled servants and labourers in British Guiana, Before that date one would hardly expect to find any special local legislation as to the relations between masters and servants, as distinguished from owners and slaves. Slavery had only been abolished on the 1st of August, 1834, and the system of apprenticeship then introduced was not put an end to till the 1st of August, 1838.

The preamble of Ordinance 74 of 1836 which is the earliest on the subject I have been able to find, says "It is expedient that provision should be made for the more speedy and effectual administration of justice in all cases of contract for the performance of agricultural, manufacturing or any other labour or service, handicraft or otherwise, and for enforcing the performance of the respective duties of persons standing to each other in the relation of masters or employers and articled servants, tradesmen or labourers when such relation has been created by the voluntary act of" the parties. The proviso to section 23 says this ordinance is not to extend to apprenticed labourers under 3 and 4 Wm. IV: cap 73, or to liberated and indented Africans under Ordinance 68 of 1836, and the first section defines "articled servants" to be persons who by some writing have bound themselves to serve others in this colony in the performance of any agricultural, manufacturing handicraft, or other labour or service whatsoever.

That section, if in force now, would include the plaintiff—

the particulars of such a contract as he sets up having to be reduced to writing by the proper officer when a labourer is first registered, in pursuance of reg, 70 of the Mining Regulations, Ord. 4 of 1887.

By Ordinance 74 of 1836 the Justice or the Sheriff or the Inferior Court of Criminal Justice, according to the jurisdiction given them respectively by the ordinance, or the Supreme Court of Criminal Justice, was to take cognizance, amongst other things, of the complaints of articled servants against their employers for ill-usage or ill-treatment or for non-performance of stipulations in the agreement beneficial to the servants.

In 1838 an Ordinance No. 18 was passed, the preamble of which says "It is expedient that the hirings of servants in husbandry, of captains of colony boats and craft and other boatmen, of menial servants, and of artificers, handicraft-men and other labourers in this colony should be properly regulated and that grievances connected with such hirings should be always promptly and adequately redressed, agreeably to the principle of the laws which regulate the hirings of the labouring classes in the mother country." This ordinance was disallowed. It seems to have been intended to meet the cases of servants who were not articled servants under a written instrument in terms of Ordinance 74 of 1836.

Then came the Order-in-Council of 7th September, 1838, the provisions of which when proclaimed, had the force of law in the colony. The interpretation clause of the Order says "that, for the purposes and within the meaning of the Order, the word 'servant' shall be construed and understood to comprise any person employed for hire, wages or other remuneration, to perform any handicraft or any other bodily labour in agriculture or manufactures or in domestic service, or as a boatman, porter or other occupation in which the emancipated population of the said colonies or any of them were usually employed while in a state of slavery or as apprenticed labourers," and the words 'contract of service' shall be construed and understood to comprise "any agreement whether oral or written, whether express or implied, into which any persons, falling within the before-mentioned description of the word servant, shall enter with any person or persons, for the performance of any work or labour of any kind hereinbefore particularly mentioned."

The Order-in-Council, as will presently appear more particularly repeals "all laws in force in British Guiana" relating to the hirings of such servants, the recovery of wages, etc.

Ordinance 30 of 1846 professes to repeal all such laws, which would include the law introduced by the Order-in-Council, but I cannot ascertain whether this ordinance was confirmed. If it was,

it would repeal the provisions of the Order-in-Council as being part of the laws formerly in force "except only in so far as the same may have repealed any former law," (sec. 1). Ordinance 2 of 1848 is the next in order and, as it was confirmed, if Ordinance 30 of 1846 did not repeal the provisions of the Order-in-Council, Ordinance 2 of 1848 did, repealing as it did all laws formerly in force. This ordinance has a similar exception, saving any former repeals, (sec. 1). Then we come to Ordinance 2 of 1853. It repeals Ordinance 2 of 1848 and all laws formerly in force and it also excepts repeals effected by those laws (sec. 1). Therefore the repeals effected by the Order-in-Council are untouched by any of the ordinances passed since its provisions had the force of law in the colony.

As to the persons affected by the laws so repealed we have, taking it first, the preamble of Ordinance 2 of 1853, which says "It is expedient that the hirings of servants in husbandry, of sailors and boatmen employed on board colonial vessels and boats, of menial servants, and of artificers, handicraftsmen and other labourers whether immigrants or otherwise, should be properly regulated, and that provision should be made for the more easy recovery of the wages of such servants as aforesaid, and for the more ready determination of all disputes connected with such hirings." The preamble of Ordinance 30 of 1846 and 2 of 1848 are word for word alike and, omitting the words "whether immigrants or otherwise," they are practically word for word with the preamble of Ordinance 2 of 1853, while the persons designated in the three preambles are precisely the classes who are comprised in the term "servant" in the interpretation section of the Order-in-Council. Consequently those classes of persons affected by the laws repealed by the repealing section of the Order-in-Council are precisely the classes now existing who would be affected if those laws had revived on the repeal of the law contained in the provisions of the Order-in-Council.

Then, as to the subject matter of the laws repealed, sec. 1. (cap 1.) of the Order-in-Council repeals "All laws in force in British Guiana":

(1) "respecting contracts of apprenticeship or service to be entered into within the limits of the said colony between any master and servant," or
(2) "respecting the rights and duties of masters and apprentices or servants, in such their relations to each other," or
(3) "respecting the mode of enforcing such contracts," or
(4) "respecting the penalties to be inflicted in case of the breach or non-performance thereof," or
(5) "respecting the dissolution of such contracts,"

Ordinance 74 of 1836 provided new courts, *i.e*., gave new jurisdiction to certain existing courts to entertain questions relating to hirings and new modes of procedure for bringing such questions before those courts. Ordinance 74 of 1836 contains no repeal section, yet it expressly provides that nothing in the ordinance contained shall be taken or construed to "hinder or preclude" any person from his or her remedy by civil action, before any court of Civil Justice of competent jurisdiction." The Order-in-Council on the other hand, has the very general repeal section just quoted, and the one case in which the jurisdiction of the ordinary courts is preserved is that of "ill-usage" (sec. 9, cap. IV.,) and that only if "the Stipendiary Magistrate shall decline to entertain such case, and shall see fit to refer the same to the ordinary course of law."

It might be said that giving of "exclusive" jurisdiction to the magistrate (sec. I, cap. IV.,) implies that the words of the repealing section, though so general in their terms, could not have been intended to have so general an effect, because, if so, there would have been no necessity to give the magistrate an "exclusive" jurisdiction seeing that all other jurisdictions had been already abrogated. Whatever force there might have been in that proposition is entirely nullified by the fact just stated that the jurisdiction of the ordinary courts is reserved as to "ill-usage" and in that case only. The maxim *expressio unius est exclusio alterius* applies. The special reservation in the one case shows conclusively that in no other case, after the repeal section of the Order-in-Council took effect and so long as it operated, had the persons named in the interpretation section any power to proceed in the ordinary courts. Moreover the provision giving the magistrate exclusive jurisdiction, if it had had the effect suggested, could only have had that effect while it was in force. It was repealed, leaving the repeals effected by the section of the Order-in-Council, which are most general in their terms, wholly unrestricted.

The effect of the Order-in-Council was to preclude the species of servants designated therein from proceeding in the ordinary courts in which but for the enactment, they would have been as much entitled to sue as any other species of the general class called servants. The taking of part of a class out of the operation of a law or laws which is or are applicable to the class as a whole is not unusual, But for special legislation immigrant labourers under indenture would be within the provisions of Ordinance 2 of 1853. Free immigrants one might have supposed, their indentures being at an end, would have fallen into the ranks of the labouring classes of the colony; but, in *Moonah* v. *Agard* (Rev. Cases 16th Oct., 1869) Snagg, C.J., decided that free immigrants are not labourers within the meaning of Ordinance 2 of 1853.

The wording of the repeal section of the Order-in-Council gives it a very wide scope. The words "All laws in force in British Guiana" cover every law of the classes specified in the section, whether written or unwritten, customary or statutory, in force in the colony when the Order-in-Council took effect. Immediately, therefore, upon the Order-in-Council coming into operation—all former laws being abrogated—the only law applicable to the persons and subjects specified in the interpretation and repeal sections of the Order, was the law contained in the provisions of the Order-in-Council itself. Hence when the law contained in the Order-in-Council, was repealed, the only law applicable to the persons and subjects specified in the interpretation and repeal sections of the Order was, necessarily, the law substituted by the repealing Ordinances 30 of 1846, 2 of 1848 and 2 of 1853, as each took effect in place of the law contained in the Order-in-Council.

The contract in question, in this suit, as regards the parties and the subject-matter, is one which would have been within all the laws specified in the several clauses of the repeal section of the Order-in-Council if they had been revived. Those laws have not been revived. What is there to take their place? So far as I can see, Ordinance 2 of 1853 and that only.

I am of opinion, therefore, as the law stands, that persons of the plaintiffs class can proceed against their employers under that ordinance only, for breach of contract, etc.

There will be absolution of the instance, with costs in this and the other cases to which this decision applies.

COLLINS *v.* DA SILVA.

COLLINS *v.* DA SILVA.

1917. JANUARY 4, 6. BEFORE BERKELEY, J.

Appeal—Criminal law—Receiving stolen property—Conviction by stipendiary magistrate—Scintilla of evidence—Reasonable doubt.

To warrant a conviction of a person on any charge, the evidence must be such that there can be no reasonable doubt as to the guilt of the accused. If, after considering all the evidence, such reasonable doubt does exist the accused is entitled to an acquittal.

Appeal from a decision of the Stipendiary Magistrate of the Georgetown Judicial district (Mr. W. J. Gilchrist), who convicted the appellant da Silva, and sentenced him to six months imprisonment with hard labour, for receiving a watch knowing the same to have been stolen.

The chief reasons for appeal were as follows:—

The decision was erroneous in point of law and unwarranted by the evidence in that—

(a) defendant fully, honestly and satisfactorily accounted for his possession of the watch;
(b) there was no evidence that he received it knowing it to have been stolen; and that his conduct was that of an innocent purchaser, as he had done all that could reasonably be expected of him in the matter;
(c) his guilty knowledge was not proved beyond reasonable doubt.

The appeal was allowed and the conviction quashed.

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

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

BERKELEY, J.: Appeal from Mr. Gilchrist, S.M., of the Georgetown Judicial district, who convicted the defendant and ordered him to he imprisoned for six months, for receiving one nickel watch well knowing the same to have been feloniously stolen.

The substantial ground of appeal is that there was no evidence of guilty knowledge.

The evidence of the complainant shows that appellant keeps a shop in Lombard Street, and that on November 30th, he took a boy named Raj (before the hearing of this case convicted of the larceny of the watch) to appellant's shop and asked appellant if he knew him. Appellant said yes, that be had brought a watch that morning which he had purchased for sixty cents, and that one Sampson had it. Appellant then went in search of Sampson, but returned without him. Sampson, however, came within half an hour and produced the watch, saying that appellant had given it to him as a present. He, together with appellant and the boy

Raj, were taken to the police station where, according to complainant, Sampson stated he had seen Raj sell the watch for sixty cents, and that he had given appellant two dollars for it, and that his account was to be debited with it. Sampson confirms this witness, but says that he was to pay the two dollars if the watch worked well, if not he was to return it. He makes no reference to a present. Sampson further says that the boy offered to take appellant to his home, and that appellant said that in consequence of how the boy spoke he believed him, that appellant was attending to customers, and that on his counter there was a glass-case open to public view with watches in it. The boy Raj in the course of his evidence says that appellant asked him who gave the watch to him, and that he said his mother did so, that he offered to take him to their house in Regent Street as he wanted to be satisfied that he was the owner. In answer to the court he says that he had previously pawned with appellant a bangle which his mother had given him. The owner of the watch is the only witness who gives any evidence as to value. He says that he bought it two and a half months ago for two dollars and forty cents.

The appellant gave evidence on his own behalf. He states that he bought the watch and questioned the boy, who said that his father was dead and his mother had sent him to sell it, that the boy was willing to take him to his mother, and this removed any suspicion on his mind. He offered what he thought a reasonable price. Sampson said he would buy it, if it worked well. He never said he would make him a present of it. He mentioned two dollars to a man for a hammock. He buys secondhand watches and thought this watch worth 2/6 to 3/- as a "spec." If Sampson kept watch he supposed he would have charged him 3/6. In answer to the magistrate he said that if Raj had stolen it, he would not have expected him to tell him so.

I have set out this evidence at length, as it seems to me the facts deposed to by the appellant coincide with the evidence given in behalf of the prosecution, save as to the amount to be paid by Sampson if he kept the watch. This being so it is difficult to follow the magistrate in his reasons for decision when he says that he did not believe the appellant 'substantially.'

The appellant purchased the watch openly from a boy who had previously sold him a bangle in behalf of his mother, and who told him his mother had given him this watch and offered to take him to her. When visited by the police he at once admitted the purchase, although the watch was not then in his possession. This tends to negative guilty knowledge, and I can find nothing to warrant the view of the magistrate that he did not go to the mother because he knew that had he gone "he would in all pro-

bability lose the opportunity of a good turn over on the watch." That he purchased for sixty cents and immediately after sold for two dollars is the only fact on which a guilty knowledge might be founded, but it must not be lost sight of that according to the purchaser (who saw sixty cents paid for it) this was only to be paid subject to the watch 'working well.' I quite appreciate the magistrate's desire to deal severely with the receivers of stolen property, but in order to do so the facts adduced in evidence to warrant a conviction must be such that there can be no reasonable doubt as to the guilt of the accused. In the present case there is not in my opinion more than a bare scintilla of evidence against the appellant, and the conviction therefore must be quashed.

Appeal allowed with costs.

INFERIOR CIVIL COURT.

YARD *v.* McDAVID.

1891. APRIL 18. BEFORE ATKINSON, J.

ATKINSON, J.: The plaintiff sues for $46.12, balance of an account for work and labour at 64 cts. per day. This case is within the principle of *Jones* v. *Stevenson* decided by me the other day. Since that decision my attention has been called to section 13 of Ordinance 2 of 1856, which was not cited during the argument in that case.

The present case came ordinarily before Mr. Justice Sheriff and the question as to the effect of that section would, in ordinary course, have been argued before him, but he was not well on the day fixed and the case came before me in his absence. It was suggested that I should hear the argument. With his con-

sent I did so. I called the attention of counsel on both sides to the section in question which says "It shall be lawful for any person under the age of twenty-one years to prosecute any suit in any inferior Court under this ordinance for any sum of money not greater than two hundred and forty dollars which may be due to him for salary, wages or piece work, or for work as a clerk or domestic servant, in the same manner as if he were of full age." This section, standing by itself, would not affect the decision in *Jones* v. *Stevenson.* The section has relation only to the status of minors. It relieves them of their disabilities as minors and enables them, although minors, to sue in the Inferior Civil Court in the same manner as if they were of full age. If it appeared that, by law, persons of full age were not entitled to sue in the Inferior Civil Courts, then the fact that minors in these respects are to be regarded as being of full age would not enable them to sue. It would be anomalous if adults were precluded from suing in these courts while minors were permitted to do so. But section 13 must be read in connection with section 4 which enacts amongst other things "that the Inferior Courts of Civil Justice in this colony, shall, on the taking effect of this ordinance, respectively have jurisdiction in several actions of debt, where the capital sum sought to be recovered, whether on balance of account or otherwise does not exceed . . . . . two hundred and forty dollars." Those words if not otherwise restricted, cover such cases as the present. Ordinance 2 of 1853, no doubt, established a special tribunal for cases of this description and repealed all laws which gave any other remedy. But in Ordinance 2 of 1856, that Legislature whether intentionally or not, used words which apply to these cases as well as others. I am, therefore, of opinion that this action will lie.

OBERMULLER *v.* DE SOUZA.

OBERMULLER *v* DE SOUZA.

[195 of 1916.]

1917. FEBRUARY 16, 24. BEFORE DALTON, J., (Actg.)

Opposition to execution sale—Action abandoned and deserted—Rules of Court, 1900, Order XXXII, rule 5—Re-advertisement of sale—Procedure—Estoppel—Opposition—Injunction—Rules of Court, 1900, Order XXXVIII.

A property was advertised for sale by the Provost Marshal in terms of Order XXXVI. rule 41. The sale was opposed, and the opposition action deserted and abandoned. Thereafter the property was re-advertised for sale.

Held that opposition to such sale was, after the re-advertisement, properly made by a claim for an injunction restraining the sale.

Claim by the plaintiff, C. H. Obermuller for an injunction restraining the sale at execution by the defendant of a grant of land named Enterprise on the Pomeroon river, with two buildings thereon. Defendant had levied on the property in question to satisfy a judgment obtained against C. N. Obermuller, a son of plaintiff. Plaintiff also sought a declaration that the levy was illegal, and claimed $500 damages for the wrongful and illegal levy.

P. N. Browne, for the plaintiff.

E. G. Woolford, for the defendant.

DALTON, J., (Actg.): In this action plaintiff claims an injunction restraining the sale at execution of certain land on the Pomeroon, together with two buildings and all the cultivation thereon, advertised to be sold in pursuance of a levy made at the instance of defendant against plaintiff's son. Plaintiff also sought an order declaring the levy to be illegal, and claimed $500 as damages for the illegal levy. An interim order on the injunction sought, on the usual conditions, was granted by me under the provisions of Order xxxviii, restraining the sale of the property until the hearing of the action. No question was raised at the trial as to whether that injunction had been properly granted, it being of the nature of an interlocutory injunction, but on comparing the order in question with the provisions of Order L. of the English rules, and the practice thereunder, dealing with interlocutory injunctions and interim orders in terms of the injunction sought, I am not quite satisfied that the procedure followed was the correct one. It is not, however, necessary to say more on the point here.

The principal point taken by counsel for defendant is that plaintiff is not entitled to maintain these proceedings by injunction at all, and that he is estopped from maintaining the action, having previously instituted proceedings by way of opposition to

the sale at execution of the property in question in a previous action between the same parties, which action was deserted and abandoned.

It appears that in 1914 defendant levied on the property, the subject of the present action, in respect of a judgment he had obtained against Charles Nathaniel Obermuller, the son of the present plaintiff. Plaintiff opposed the sale in the usual way by entering opposition under Order xxxvi, rule 42, and an action was duly instituted. After pleadings were closed however, no request by either party was made for entry on the hearing list, and in due course the action became incapable of being revived, in terms of Order xxxii, rule 5 (2). Thereafter, in September, 1916, the Registrar again advertised the property for sale "the action in connection with the opposition entered on July 31st, 1914, by Charles Henry Obermuller to the undermentioned sale having become prescribed under Order xxxii, rule 5 (2) of the Rules of Court. 1900" In accordance with the usual practice in case of re-advertisement, he omits any notice, to persons who may have any claim, to come forward and enter the necessary opposition to the sale. Plaintiff therefore commenced this action by way of injunction.

The first point to decide is whether the first action is a bar to these proceedings. I am quite satisfied that it is not. That action never went to judgment and its discontinuance is no admission on the part of plaintiff that he has no claim, nor does it preclude him from bringing his action again. It is possible of course that delay in bringing the action a second time may be a bar from the very circumstances of the case (*Reid* v. *L. and N. S. Fire Insurance Co.* 49 L.T., 468), but that is not so here.

The second point to be decided is, can plaintiff maintain this action by way of injunction? Proceedings by way of opposition are in fact a simplified method of obtaining an interdict or injunction, the claim in such proceedings being such an order as is sought here, and the claimant being bound down to the reasons for opposition entered by him in the book kept for that purpose. As is clear from the notice of re-advertisement no further opposition is called for, but that cannot mean that no one who has a valid claim to the property to be sold is debarred from protecting his interests. I think it is clear from the decision of the Full Court in the case of *Administrator General* v. *Estate of Stewart. Gardner* (G.J., January 16th, 1900). although that is a case relating to an opposition to a transport, that the limitations placed on the entry of opposition by the Rules of Court could not affect the question of vested interests, as where a person has some clear right to the property of which the transport or sale at execution sought to deprive him, and which right could be protected by interdict.

The proceedings taken by plaintiff appear to me to be the only course open to him, although it is possible to infer from the case of *James* v. *da Silva* (Swan, J. Actg., L.J., November 8th, 1901) that, three months having lapsed since the removal of the opposition, on re-advertisement a person has the right of opposition again. That inference, however, I am not going to draw; it appears also to be directly contrary to the decision of the Full Court in the case of *Martins* v. *Provost Marshal,* L.R., B.G., Vol. II. O.S. 137. From the case of *Russell* v. *Roberts* (Atkinson, and Sheriff, JJ., June, 1888) (*a*), it is clear that there are precedents for proceeding in these cases by way of injunction and not by way of opposition. Stress is laid in that case upon the fact that an interdict will lie only where the plaintiff is remediless, but that appears to be his position here. He certainly had the right of opposition at some earlier date, which indeed he exercised; that right, as counsel said, owing to delay on the part of his lawyer, he was unable to pursue to finality, and now he takes the only, course open to him. I must hold the proceedings to be quite correct and proper.

To go now into the merits of the case, it is quite clear from the evidence that the land levied on is the property of plaintiff. The cultivation thereon, I am also satisfied belongs to him, the only evidence led respecting any cultivation or provisions belonging to his son Charles Nathaniel going to show that it had been removed. As regards the buildings on the land, the evidence shows that, of five buildings there, three belong to plaintiff and two to his son Charles. The claim speaks of two buildings on the property, and it appears that the two levied on are those two belonging to the son. The three buildings of the father (plaintiff) were not included in the levy.

The question of damages remains. The rights of plaintiff have certainly been disregarded by defendant, who appears to have made very few enquiries before making his levy. The value of the land is admitted to exceed $250. It is however, no case for awarding any large sum, plaintiff not proving much inconvenience to himself. The injunction restraining the sale of the land and cultivation will be made perpetual, and plaintiff will recover the sum of $10 in respect of his claim, with costs.

(*a*). Not reported.

Ex parte LAWRENCE; *in re* RAMALHO.

Ex parte LAWRENCE; *in re* RAMALHO.

[12 of 1916.]

1917. FEBRUARY 24TH, MARCH 3RD. BEFORE BERKELEY, J.

Insolvency—Administration of estate of deceased insolvent—Execution not completed by sale—Rights of execution creditor—Insolvency Ordinance, 1900, sec. 41, and Insolvency Ordinance, 1900, Amendment Ordinance, 1913, sec. 12.

Section 41 (1) of the Insolvency Ordinance, 1900, as amended by sec. 12 of the Insolvency Ordinance, 1900, Amendment Ordinance, 1913, does not apply to the administration of the estate of a deceased insolvent under sec. 106 of the principal ordinance.

Application to the Court for an order that the Registrar, who had been restrained from selling at execution sale certain properties belonging to the defendant (now respondent) and attached in execution by virtue of a judgment obtained by plaintiff (now applicant) against him, be directed to proceed with the sale of the said property to satisfy the judgment.

The further necessary fact's appear from the judgment.

E. G. Woolford, for the applicant.

J. A. Luckhoo, for the respondent.

BERKELEY, J.: On October 2nd, 1916, an Insolvency petition was presented to this Court for the administration of the estate of D. C. Ramalho, deceased, and on October 3rd it was ordered that the plaintiff be restrained from taking further proceedings upon a judgment obtained by him on August 9th, 1916, against the defendant as executor of the said estate and that the Registrar be restrained from selling at execution the properties attached until the further order of this Court. On November 1st, the petition was heard and the prayer thereof granted.

2. Application is now made for an order on the Registrar directing him to proceed with the sale.

3. The sole point for the decision of this Court is whether the applicant is entitled to have his judgment satisfied under his writ of execution or whether, as in ordinary insolvency proceedings, his rights as a creditor are restricted. (s. 41 of Insolvency Ordinance) 1900, now s. 12 of the Amendment Ordinance, No. 16 of 1913).

4. The administration in insolvency of the estate of a person dying insolvent is provided for by section 106 of the principal ordinance, which vests the property of the debtor in the Official Receiver (sub-section 5). "It is the property of the debtor, which may be either bound or unbound by an execution when the order for an administration is obtained, which is to vest and which is to be administered under the administration order. If it is bound

it vests subject to the fetter, if it is unbound it passes as it is." (Smith, L.J., in *Hasluck* v. *Clark,* 1899, 1 Q.B., 699).

5. Sub-section 6 provides that, with certain modifications (which do not affect this case), all the provisions of part 3 relating to the administration of the property of an insolvent shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this ordinance. This has been held to apply to the mode of administration, and not to the subject matter to be administered. (*In re Gould* 19 Q.B.D. 92, and *Hasluck* v. *Clark, supra.*) The Court must hold, therefore, that section 41 (now section l2) already referred to, does not apply to an administration order under section 106.

It is ordered that the Registrar proceed with the sale at execution of the properties levied on, and that the proceeds thereof be applied to the payment of the judgment debt. The applicant is entitled to his costs.

[NOTE.—On March 7th at the request of the defendant with the consent of the plaintiff, it was ordered that as the properties vest in the Official Receiver he should sell and realize the same and satisfy in the first instance this judgment debt.]

CAMACHO *v.* ROHLEHR.

CAMACHO *v.* ROHLEHR.

1917. FEBRUARY 12, 13, MARCH 3, 1917.

BEFORE BERKELEY, J. AND DALTON, J. (Actg.)

Partnership—Purchase of property and business premises—Promissory notes— Agreement for partnership—Rules determining existence of partnership—Partnership Ordinance, 1900, sec. 4—Supreme Court Ordinance, 1915, sec. 33.

Appeal from the decision of Sir Charles Major, C.J.

Plaintiff Camacho (now respondent) claimed the sum of $1,038.57, the aggregate amount of four promissory notes made by defendant Rohlehr (appellant) in favour of the plaintiff. The making of the notes was admitted, but defendant denied that he was indebted thereon, the debt being due to a partnership firm of which plaintiff and defendant were alleged to be members, the partnership being in two drug businesses carried on at New Amsterdam, Berbice. He further counter-claimed for a dissolution of the partnership and for accounts between the parties.

Voluminous correspondence passed between the parties on the business the subject of the dispute, and was produced in evidence, also a draft agreement setting out the transactions, which, however, was never signed.

The decision appealed from has already been reported (*a*), judgment being entered for plaintiff.

The reasons for appeal sufficiently appear from the judgment below.

McArthur, P. N. Browne with him, for the appellant.

Cites *Molloo March & Co.* v. *Court of Wards,* L.R., 4 P.C., 419; *Syers v. Syers,* 1 H.L., A.C., 181; *Cargill* v. *Bower,* 10 Ch. D., 508; *Davis* v. *Davis,* 1894, 1 Ch. 393; *Worts.*v. *Pern,* 3 Bro. P.C., 548; *Williams* v. *Williams,* L.R. 2 Ch. 294; *Heyhoe* v. *Burge,* 9 C.B., 431, at pp. 443, 444, and 448; *Pooley* v. *Driver,* 5 Ch. D., 472; *Ex parte Owen,* 4 De G. & Sm. 351; *Reid* v. *Hollinshed,* 7 D. & R. at p. 458; *Cox* v. *Hickman,* 8 H. L. Cas., 268; *Batley* v. *Lewis,* 1 M. & G. 155.

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

Refers to Lindley on *Partnership* p. 596, and cites *Fox* v. *Frith,* Car. & M. 502; *Neale* v. *Turton,* 4 Bing, 149; *Woodridge* v. *Spooner,* 3 B. & And., 233; *in re Young, ex parte Jones,* 1896, 2 Q.B., 484; and *Davis* v. *Davis,* 1894, 1 Ch, at p. 398.

McArthur in reply.

The judgment of the Court was delivered by Dalton, J. (Actg)., as follows:—

(*a*) 1916. L.R., B.G. 63.

This is an appeal from a decision of the Chief Justice in the above-named action in which the plaintiff (now respondent) claimed the sum of $1,038.57, the aggregate amount of four promissory notes made by defendant (now appellant) in his favour. The defendant counter-claimed that when the notes were made, a partnership existed between plaintiff and himself, the debt being due to the said partnership, and he asked for a dissolution of the partnership and for accounts between the parties. Judgment was given for the plaintiff, the trial judge finding there was no present partnership between the parties, and that the counter-claim therefore failed.

Defendant appealed on the ground that the evidence showed that the parties had stipulated for all the rights of partners and that therefore the decision was erroneous. He further urged that, assuming that there was not a present partnership but, as found by the Chief Justice, the parties entered into an arrangement whereby a partnership relation would be established and created upon a contingency that never arose, he (defendant) was, under the unsigned draft agreements which it was held contained the essential of the original agreement between the parties, entitled to receive one-half of the net proceeds of the sale of the businesses, and hence was entitled to accounts to ascertain the said net proceeds.

The case was ably argued at some length by both sides and numerous authorities were cited as to the principles determining and the rules governing the existence of partnership and the application of those rules to this case. The difficulties of defining partnership are of course admitted, and even if it can be done satisfactorily in a short statement, which we doubt, it is not necessary here, nor do we propose to venture upon such a task. The leading principles, however, that enabled that condition to be ascertained are clearly set out in the judgment appealed from, namely, that the question whether the relationship does or does not exist must depend on the real intention and contract of the parties, and further, that if the facts clearly disclose a partnership any agreement that they shall not be partners is useless and ineffectual as against the partnership.

It is on the application of those principles that the appellant asks us to reverse the decision of the trial judge.

Now it seems to us for the purposes of this appeal, as in the court below, the evidence before the court can most conveniently be divided into three parts, first of all the voluminous correspondence between the parties between February, 1912, and March, 1915; secondly, the three unsigned draft agreements put in; and thirdly, the evidence given by the parties in court. In applying the principles above set out to the facts in this case, Mr. McArthur has

asked us to ignore the three draft agreements as never having been agreed to by the defendant, and as setting out something different to what the prior correspondence arranged for. But for the existence of those unsigned agreements, the task of the Court to define the relative rights of the parties would have been a very much more difficult one, but we find it impossible to put them on one side as is asked. It seems to us that the correspondence prior to the drafting of the agreement, the drafts themselves, the meetings between the parties, the alterations to the agreement by defendant, his virtual consent to what the draft amended by him contained and his expressed willingness to sign it, forms one continual sequence, regard to all of which must necessarily be had if one is to decide the relationship between the parties. The whole scope of the arrangement between them and all its terms, without attributing any undue weight to any one of them, must be considered in deciding that relationship. That being so, it seems quite clear to us that it was not intended that the relationship of partners should exist between the parties until a certain event should happen, which event never came to pass. The fact that the draft agreement was not signed in no way affects the decision, nor do we think it in any way constitutes, as was urged, "a useless protest against the consequence of their real agreement." It was part, but part only, of the negotiations and arrangements between the parties, not changing what had been agreed on before, but summing up and bringing to a head the transactions between plaintiff and defendant. As stated above, it followed in natural sequence the correspondence that led up to it, and must form a very material part of the evidence which assists the Court at arriving at the intention of the parties and the nature of the contract between them. On that question we have come to the conclusion that it was not the intention of the parties that there should be any partnership, until the happening of the event above referred to.

A further claim is, however, now put forward that, assuming no partnership existed, the defendant is entitled to accounts in order to ascertain the net proceeds of the sale of the businesses which plaintiff (respondent) has disposed of. On reference to the pleadings it is quite clear that there was no such claim made in the trial court, the matter being apparently now raised for the first time, as counsel states, as a claim for general relief. He urged that it was not necessary for him to set out any such plea, but that if the court found him entitled to any relief, it could be granted under the provisions of section 33 of the Supreme Court Ordinance, 1915. It is quite clear of course that the mere statement of plaintiff that there were no profits of the sale of the businesses is no answer to a request by defendant for an

account under the agreement between the parties, but on the other hand the court, under the provisions of section 33 already referred to, can only grant a remedy "in respect of any . . . claim properly brought forward." The claim now made was, and is so far as we can see, no part of the issue before the court, and hence no order such as is now asked for can be made. It has been laid down that one cannot, under a general claim for further relief, obtain any relief inconsistent with that relief which is expressly sought (*Cargill* v. *Bower*, 10 Ch. D. at p. 508). Here in addition to the fact that there is no claim for general relief, is the fact that this further application is quite inconsistent with the claim of partnership, which, together with a claim for an order for accounts of the partnership and an order for its dissolution, is the sole basis of the counter-claim. The Court has therefore no power in this matter now before it to grant such a further order as is now sought.

The appeal must be dismissed with costs.

GRAY *v.* VIEIRA.

[40 of 1917.]

1917. MARCH 2ND, 9TH. BEFORE SIR CHARLES MAJOR, C.J.

Criminal law—Electric lighting—Electrical energy—Fraudulent prevention of registration by meter—Georgetown Electric Lighting Order, 1899, Clause 60—Proof of prevention of registration—Prima facie evidence.

To support a conviction, under clause 60 of the Georgetown Electric Lighting Order, 1899, on a charge of wilfully or fraudulently preventing a meter from duly registering the quantity of energy supplied, it lies on the prosecution to prove that a supply of energy was induced and was actually prevented from being registered, because the existence of artificial means whereby due registration of the supply of electrical energy consumed may be prevented is, by clause 60, made *prima facie* proof only of the fraud, knowledge and wilfulness of the consumer of that energy, not of the prevention itself.

Appeal from the decision of the Stipendiary Magistrate of the Georgetown Judicial District (Mr. W. J. Gilchrist), who convicted the appellant Vieira on a charge that he, being a consumer within the meaning of the Georgetown Electric Lighting Order, 1899, (*a*), to wit, a person entitled to be supplied with electrical energy by the Demerara Electric Company, Limited, did fraudulently prevent a meter, the property of the said company, from duly registering the quantity of electrical energy supplied, contrary to clause 60 of the order.

The complainant Gray was the manager and attorney of the Demerara Electric Company, Ltd.

(*a*) For the terms of the Order, see *Official Gazette* of January 20th, 1900, page 121.

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

1. At the close of the case the defence contended:—

(a) that the charge disclosed no offence under clause 60 of the Electric Light Order, 1899, and that it was bad for duplicity, as it stated "wilfully and fraudulently," which are distinct offences under the order.

(b) that the charge was under an order special to the Demerara Electric Company which gave certain rights; that it was not proved the meter in question is one contemplated or mentioned in the order, or that the meter produced is an appropriate one duly certified under the provisions of clause 40 of the said order In consequence the prosecution under clause 60 cannot succeed.

(c) that having a device on the meter, was not sufficient to constitute the offence, as consumption only takes place when the lights are turned on.

2. . . . . .

3. With respect to the second objection (b), in my view clause 40 cannot be read alone, but must be considered together with clauses 41-49 of the order. The evidence clearly establishes that an agreement was entered into by the complainant company and the defendant for the hire of a meter, and the payment of rent. Considering these elements I am of the opinion that the second objection is untenable.

4. The third objection in my view depends on whether it is found as a fact that a device was on the meter and in such a manner as to prevent the meter recording the energy consumed, and if so held, whether according to clause 60 the *prima facie* presumption has been rebutted,

5. After careful consideration of the evidence of the prosecution which I accept, notwithstanding the slight discrepancies if they can be called such between Archer and Chapman, and considering that of the defence, I am of opinion that had the case been tried by a jury they would say as I do. The evidence fully establishes that on the day in question there was an artificial device on the defendant's meter, and that it was so placed as to prevent the meter correctly recording the consumption of energy, and that the defendant is guilty of the charge."

Defendant, who was sentenced to pay a fine of $20 and costs, or in default to one month's hard labour, appealed on the following grounds:—

(a) There was no evidence to prove that the meter in respect of which the defendant was charged was a meter duly certified under the provisions of the Georgetown Electric Lighting Order, 1899, and without such

evidence the defendant could not in law be guilty of the offence charged.

(b) It having been proved by the prosecution that at the time when the alleged device or "jumper" was found on the meter there were no lamps burning and no electric energy or current passing, the said device or "jumper" was not in fact preventing and could not prevent the meter from registering.

(c) The prosecution failed altogether to prove that the defendant prevented the meter from registering the quantity of electric energy supplied.

(d) The offence charged was not that there was an artificial device on the defendant's meter and that it was 'so placed as to prevent' the meter correctly recording the consumption of energy, as the magistrate has held, but that the defendant did in fact fraudulently prevent the meter from duly registering the quantity of electric energy supplied.

The appeal was allowed and the conviction quashed.

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

E. G. Woolford, for the respondent.

SIR CHARLES MAJOR, C.J.: The appellant was charged with having, as a consumer of electrical energy supplied under contract by the Demerara Electric Company, on the 19th day of December last, fraudulently prevented a meter from duly registering the quantity of that energy and was convicted. He has appealed from that conviction and the form his appeal has taken makes it unnecessary more than briefly to refer to the facts upon which the conviction proceeded. These are that, on the 18th of December last, between the hours of eight and nine in the forenoon, there was affixed to the meter kept in the appellant's shop for registration of the electrical energy supplied to the building a wire connection called a "jumper." The effect of a jumper is, when the current of energy is induced for light, to retard the revolutions of a metal disc which regulates the registration of the quantity of energy consumed and so to prevent the due or true registration of that quantity. The appellant removed the wire on its discovery by an employee of the corporation. On the next day it was seen by the same employee to have been reaffixed to the meter and was again removed by the appellant, The meter was then and there removed by the servants of the corporation.

The sixtieth clause of the Georgetown Electric Lighting Order, 1899, under which the charge was laid, provides that "Every

consumer who wilfully, fraudulently, or by culpable negligence. . . prevents any meter from duly registering the quantity of energy supplied" shall be liable to penalty.

To the conviction the appellant raises two objections, both taken at the hearing of the complaint. The first, that it was not proved that the meter on the appellant's premises had been certified as appropriate under the fortieth clause of the Order, and that, without that proof, he could not be guilty in law of the offence charged. The fortieth clause provides for the ascertainment of the value of the supply of electrical energy by means of an appropriate meter, certified under the provisions of the Order except as otherwise agreed between the consumers and the undertakers, the corporation, and in any question that might arise between the corporation and the consumer as to that value, it might become, apart from any special agreement, a material fact to be proved that the meter had been certified as appropriate for ascertaining the value of the supply. But no question of the kind arose on this charge, which does not relate to the value of the supply at all, and it is immaterial whether the meter was certified as appropriate or not for ascertaining that value. It is not disputed that a wattmeter, the kind of meter mutually agreed between the parties to be supplied, was on the premises, and the offence created by the sixtieth clause is preventing "any meter" from registering the quantity of energy supplied. There is no ground for this objection.

The second objection of the appellant is that no proof was given of any prevention of the registration of the quantity of energy supplied, and that, if there was, in fact, no proof of the kind, the conviction must be bad. That seems fairly obvious, for the offence created by the Order is not the use of artificial means whereby prevention of registration may be caused, or with intent by the user to cause prevention, but actual prevention, and it is of course, an essential ingredient of proof—however that proof may be reached—on a charge that a consumer did prevent registration, that prevention has been caused, that registration has been in fact prevented.

Now a juniper is, as I have already said, a device which acts as a brake or drag, if I may use the expression, and I believe in certain circumstances, as a cut off, on or of an electric current. The description of this jumper and of its effect given by an electrician of the corporation, who saw it in position on the 18th and 19th mornings of December, is—"On energy entering meter (one) can see from (the) face of (the) meter the disc. As soon as (a) lamp is turned on the disc revolves in proportion to (the number of) lamps burning. One lamp is sufficient to create revolution. A jumper placed as described would cause the disc to slow down and shunt the current passing and prevent (the) meter from registering

(the) current consumed. This device would prevent true registration of consumption."

Another electrician gave evidence thus: "There are two coils in the meter. They influence a moving disc which (is) visible to consumer or person looking at (the) meter, which disc will move at a speed proportionate to (the) energy passing. If these coils (are) shunted by a jumper in outer holes, less current passes through coils. (The) disc will slow down and consequently (the) record of consumption (will) be less." It is plain, therefore, that unless electrical energy be induced or switched on and be current or "passing" so as to set the disc in motion, there can be no prevention of registration of the quantity of energy supplied, for no supply is proceeding. Was it shown, and by what proof, that the appellant set up a supply of energy and so, by the presence of a jumper, prevented its due registration? There is no direct testimony of prevention. The device employed was only seen in the forenoon of the days when the electricians of the corporation and others visited the appellant's premises. There was no evidence that any light was burning on the first occasion. There was evidence that none was burning on the second occasion.

The argument of learned counsel has been directed to the effect of the latter part of the sixtieth clause, the words whereof are as follows: "the existence of artificial means for causing . . prevention . . when the meter is under the custody or control of the consumer, shall be *prima facie* evidence that . . prevention . . has been fraudulently, knowingly, and wilfully caused by the consumer using the meter." For the appellant Mr. de Freitas has contended that the *prima facie* proof afforded by the existence of this jumper—the artificial means for causing prevention of registration—extends only to the personality of the consumer; that is to say, that, while operating to cast upon him the onus of proving that some other person than himself caused the prevention, it does not operate to exclude the obligation on the prosecution to prove the prevention itself; and that, no where in the evidence for the prosecution does this latter proof appear. Mr. Woolford concedes that prevention of registration cannot occur unless electric energy be current; that energy cannot be current unless it be switched on for light, and that there is no evidence that energy was so induced. But he contends that, the latter words of the sixtieth clause I have quoted mean that the existence of artificial means is itself *prima, facie* proof that prevention has been caused; that, to use his own words, the existence of artificial means is an offence in itself; and that the mere proof of that existence was sufficient to cast the onus upon the defendant of showing that no prevention had occurred. Neither contention, in my opinion, is correct. The one is too narrow, the other too wide.

The former misses the true import and effect of the provision as to *prima facie* proof which are, in my opinion, that the existence of artificial means for causing prevention of registration is *prima facie* proof not merely that the consumer himself used the means, but did so fraudulently, knowingly, and wilfully. These latter adverbs govern the whole sentence; they define the nature and extent of the *prima facie* proof, that is to say, of fraud, knowledge and wilfulness. On the other hand—I have said the "extent" of the *prima facie* proof—they do not make the existence of artificial means *prima facie* proof of the prevention itself.

Inasmuch, therefore, as the prosecutor did not produce evidence, on the charge of prevention, apart from the existence of artificial means—which, in circumstances not shown, would have the effect of prevention—but relied on the mere existence of the jumper as sufficient to cast the onus on the defendant of proving that no prevention was caused, and as he is not entitled so to rely, it follows that he failed to establish the very fact constituting the offence with which the defendant was charged. The appeal, therefore, must be allowed and the conviction is quashed. The respondent must pay the appellant his costs in both courts.

KING AND ANOR. *v.* HARRISON.

[162 of 1916.]

1917. MARCH 10, 17. BEFORE DALTON, J., (Actg.)

Practice—Application for judgment—Rules of Court, 1900, Order XL.—Withdrawal of levy after issue of writ—Defendant in default of appearance—Order XL. rule 6—Entry of case for hearing ex parte.

On an application under Order XL. for judgment, the defendant being in default of appearance:

Held, that applicant should have the action entered on the hearing list for hearing *ex parte*, as provided by Order XL, rule 6, and that the application must be struck out:

Semble, that the withdrawal of a levy by the defendant, after the commencement of opposition proceedings founded upon the levy against him, and without consent of the plaintiff, is irregular.

Application by King, the plaintiff in the action, for judgment in terms of an opposition entered by him in the action, where he sought an order declaring an opposition to a sale at execution of a property levied upon by the defendant to be just, legal and well founded and damages for illegal levy.

The defendant did not appear in answer to the writ.

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

Veerasawmy, for the respondent (defendant.)

DALTON, J., (Actg.): This is an application under Order XL. for judgment and costs in an opposition action by plaintiff (applicant) King against the defendant (respondent) Harrison. It appears that defendant levied on certain property to satisfy a judgment obtained by him against one Beresford. On advertisement of the judicial sale of the property the present applicant King entered an opposition and commenced his opposition action a in support thereof. After service of the writ upon him, defendant withdrew the levy. Plaintiff (applicant) wishes to recover the costs he has incurred and, for that purpose, applies for judgment in the action in which defendant is in default of appearance.

The withdrawal of the levy by defendant after the commencement of the action under the circumstances, seems to me to have been irregular. It is not, however, a matter which, so far as I see, can affect my decision on this application.

The respondent Harrison now appears and objects that the application is not in order, Order YL. not applying at all in such cases, but if it does apply, that applicant has not complied with the provisions of the Order in respect of service of notice, four clear days not having been given.

Defendant (now respondent) is, as I have said, in default of appearance in the action. The proper course to be taken then by plaintiff in order to obtain judgment is to proceed under Order XL rule 6. That rule prescribes exactly what shall be done, and that the action shall be "entered on the hearing list for hearing *ex parte*." That is what the applicant should have done in the present case. Application of the English Rules by analogy make this quite clear. Order XIII. of those rules corresponds with our Order XL Order LII, corresponds more or less with our Order XL. There is, is, however, an Order in the English Rules which has no corresponding rule here. That is order XL. dealing with "Motion for Judgment," and it provides for the obtaining of judgment by motion except in such cases where the act or rules provide otherwise. It is quite clear from the practice under that rule that Order XIII. is one of the rules which provide for the obtaining of judgment otherwise than by motion, this case of "default of appearance" being specifically named. It is not in order for the applicant, therefore, nor is it open to, him to proceed under Order XL., it being expressly provided in Order XL how he shall proceed. That being so, it is not necessary for me to proceed with the second objection in respect of time. In any case, if this further objection had been upheld it would only have been in this case matter for adjournment for the proper notice to be given.

The application must be struck out with costs to the respondent.

POLLARD *v.* BARCLAY.

POLLARD *v.* BARCLAY,

[3 of 1917.]

1917. MARCH 10, 17.

BEFORE DALTON, J. (Actg.)

Practice—Judgment summons—Debtors Ordinance, 1884—Lapse of ten years since judgment—Rules of Court 1900, Order xxxvi, r. 19.

A judgment-debtor against whom proceedings have been duly taken under the Debtors Ordinance, 1884, may be committed to prison in respect of a debt due by such debtor, although more than ten years have elapsed since the judgment.

Judgment-summons under the Debtors Ordinance, 1884. The plaintiff obtained judgment on November 15th, 1905, against the defendant Barclay and one Adam Skeoch jointly and severally for the sum of $200, with interest thereon at the rate of six per centum per annum, and upon which judgment the sum of $185 and interest thereon was said to be still due. The defendant Barclay was summoned to be examined on oath as to his means and to show cause why he should not be committed to prison for his default in payment of the sum due.

A. B. Brown, for the plaintiff.

Wills, for the judgment-debtor, took the objection that ten years having expired since the judgment, Order XXXVI, r. 19 applied. A judgment summons comes within r. 8. It is not competent for plaintiff to proceed until he has complied with r. 20.

Brown, in reply, referred to the Manner of Proceeding Ordinance, 1855, s. 236, and cited *Fellows* v. *Thornton.* 14 Q.B.D., 335. Proceedings under Ordinance 9 of 1884 were not in execution.

DALTON, J. (Acting): This is a judgment-summons under the Debtors Ordinance, 1884, and the rules thereunder.

The summons sets out that plaintiff obtained judgment in this Court on November 25th, 1905, against the defendant and another jointly and severally for the sum of $200, upon which judgment the sum of $185 as alleged to be due. Plaintiff now asks that defendant be examined on oath touching his means to pay the sum due and also to show cause why he should not be committed to prison for his default in making such payment.

For the debtor Mr. Wills objects that under Order XXXVI., rule 19 of the Rules of Court, execution may issue at any time within

ten years from the date of the judgment or order, that these proceedings are in the nature of execution, and that plaintiff cannot therefore now proceed unless leave be first obtained.

It is true that the Debtors Ordinance, 1884, provides that "with the exceptions hereinafter mentioned, no person shall, after the commencement of this ordinance, be arrested or imprisoned on process in execution for making default in payment of a sum of money," but these words must be read having in view what I state later, whilst for the meaning of "issuing execution," as used in rule 19 above referred to, we must turn to rule 8 of the same order. That rule is as follows:—

> 8. In these rules the term "writ of execution" shall include any of the writs in this order hereinbefore specifically mentioned, and the term "issuing execution against any party" shall mean [*n. b. not* '*include'*] the issuing of any such process against his person or property as under the preceding rules of this order shall be applicable to the case.

The preceding rules of the order in no way mention or refer to any order of commitment or process under the Debtors Ordinance. It is not until we come to rule 20 that we find the following:—

20. An order of commitment under the Debtors Ordinance, 1884, shall bear date on the day on which such order was made, and shall continue in force for one year from such date and no longer; but it may be renewed in the manner provided for writs of execution by rule 18 of this order. Taking these three rules of Order XXXVI. which I have mentioned, it seems quite clear that such proceedings as the plaintiff is now taking do not come within the term "issuing execution" as counsel for the debtor would have me believe. It is interesting in this connection to bear in mind the words of Lucie Smith, J., in a similar application, "the Debtors Ordinance is for the punishment of fraudulent debtors, the imprisonment is not for the purpose of punishment for contempt of court, nor for the enforcing payment of the debt. (*In re Meertins,* L.J. March 8th, 1902).

Counsel on both sides have made reference to the procedure under the Manner of Proceeding Ordinance, 1855, and also to the corresponding English rules, but I do not think that any help is to be obtained from them it being clear that the rules in question differ in various respects from that of this Court.

I am satisfied that there is nothing in Order XXXVI., rule 19 to prevent a judgment creditor proceeding under the Debtors Ordinance to obtain an order for commitment in respect of a debt due to the judgment-creditor by the judgment-debtor, although more than ten years have elapsed since the judgment.

The proceedings must therefore continue.

An order was subsequently made committing the debtor to gaol for fourteen days, to be suspended on payment of the sum of $50 on April 30th, and the sum of $10 on the last day of each subsequent month, inclusive of costs.

RAMJAN *v.* NEW SUCCESS, LTD.

1916. DECEMBER 19, 20. 1917. JANUARY 8.

BEFORE SIR CHARLES MAJOR, C.J.

Landlord and tenant—Breach of agreement—Right of entry—Implied covenants—Notice to quit—Wrongful dispossession.

A right of entry for breach of covenant in a lease is never implied, but must be the subject of express condition or proviso. A notice to quit must be clear and unambiguous and must state precisely when the person to whom it is given must quit the holding. A notice, therefore, whenever and however given, to quit "before the 1st of March" is invalid. Recovery of demised premises for non-payment of rent may be by peaceable re-entry, but, when possession remains in the tenant, should be by legal proceedings.

Claim by the plaintiff against the defendant company for the sum of $860 for damages for breach of a written agreement of lease, whereby the plaintiff leased a piece of land known as field No. 70, part of plantation Success, for a term of two years, for the purpose of cultivation. Plaintiff claimed that the defendant company by their servants wrongfully resumed possession of the land, and destroyed the crops thereon.

The further facts sufficiently appear from the judgment.

E. G. Woolford for the plaintiff.

P. N. Browne for the defendant company.

SIR CHARLES MAJOR, C.J.: By agreement dated the 28th June, 1915, the defendant, represented by Frederick Minors, leased to the plaintiff a plot of land, part of plantation Success, comprising eight beds, for a term of two years at a monthly rental of 1s. 4d. a bed, payable in advance, subject to the stipulation that "each party

must, for the purpose of terminating the agreement, give three months due notice, or by some other reasonable means that circumstances may require." On the 28th June the plaintiff paid his rent for that month and for July. On the 1st November he paid the rent for August, September, and October. On the 21st January, 1916, he paid rent for the two previous months. On each of these occasions he obtained a receipt from Charles Hawker, the defendants' book-keeper. In consequence of information received the plaintiff, on the 12th March, visited the land and found that it had been cleared of his ground provisions, or whatever cultivation he had thereon. It is admitted that this was done by the defendants for extension of their cane cultivation, at present abnormally lucrative, thus having taken possession, and control of the land for the purpose during the early days of March. They allege justification for their action on the following grounds: first, that the agreement was subject to a condition, "to be implied from its nature," that, should the plaintiff fail to pay his rent in advance, the tenancy should thereby terminate and the defendants should have a right of entry; that the plaintiff paid no rent after the 31st December, 1915, his rent being in the following March three months in arrears; and that the plaintiff thereby lost any right which he may have had as tenant. A plea evidently drawn at a venture both as to law and fact. Granting a failure on the part of the plaintiff to pay his rent in advance, no right of entry by the defendants impliedly arose therefrom. That right for breach of covenant is never implied, but must be the subject of express condition or proviso. There is none in this lease. But in point of fact the plaintiff did make a payment of rent after the 31st December, 1915, namely, as already stated, on the 21st January, giving the defendants the benefit of strict construction of the covenant to pay rent in advance, which, however, for every month of the tenancy up to the end of 1915, except the first, had been waived by them.

Secondly, the defendants say that due notice to vacate the land "before the 1st March, 1916," was given to the plaintiff, who, in compliance therewith, did vacate and deliver possession thereof "before the 1st March, 1916." This plea of notice is loosely and obscurely drawn. It does not state when the notice was given, or its precise terms, or precisely when the defendant was to quit. To have been due notice to quit in order to determine the tenancy on the 28th February, 1916, as the defendants plead it did, it would have to be given on the 1st December, 1915. Notice "to vacate the said lands 'before the 1st March, 1916,'" whenever given, could not be due notice by reason of its uncertainty. A notice to quit must be clear and unambiguous, and must require a tenant to quit at the proper time. Apart, however,

from these manifest insufficiencies invalidating it, if given, the evidence totally fails to support the plea. Nobody is called for the defendants who gave it, either verbally or in writing. It is not contended that it was given to the plaintiff himself, but—and that only by inference—to one Arjan, said by the defendants to have been the plaintiff's agent to receive it. Both the plaintiff and Arjan deny positively that they received notice of any kind. Arjan looked after the plaintiff's cultivation for him, he being a driver at Lusignan, a fact by itself clearly insufficient to establish agency. Counsel for the defendants can put it no higher than that I ought to infer that a notice of the necessary degree of sufficiency was given to Arjan by Mr. Hawker, because apparently all the other and neighbouring tenants received a notice of some kind from that officer and have left their holdings. Mr. Hawker's evidence is all the other way. He said— "No one else but Ramjan had an agreement. I was of opinion he had none. I do not know of any notice to terminate. I never told anybody that I had told Arjan that place must be given up by a certain time. I was informed by Minors that the land might be wanted for cane cultivation and I told them that if they didn't pay their rent the land would be required for cane. I lost sight of this agreement." There is no evidence whatever that the plaintiff "delivered possession of the land" at any time "before the 1st of March, 1916." The evidence goes to show that on that date and after it he was still in possession. It was elicited from him in cross-examination—and the statement remained uncontradicted—that on the 12th March Mr. Antrobus, the defendants' then manager, in answer to the plaintiff's question why all his provisions had been destroyed, said: "Mr. Minors is going to put six fields in cane, so I chopped them down. You must go to Mr. Minors for damage," Hardly the attitude of a man who had vacated the land and delivered possession of it to his landlords some time—the defendants do not suggest how long—before The third contention of the defendants is that the plaintiff abandoned the land after the 31st December, 1915. He may have left it after that date to the growth of grass and weeds and shown careless husbandry, but those acts do not constitute abandonment of possession. His attitude at the interview with Mr. Antrobus, to which I have already alluded, is quite inconsistent with abandonment.

The defendants, therefore, have failed at all points to justify their entry upon the land and the plaintiff's dispossession. And even had there been a legal notice to quit and a right of entry for forfeiture, the defendants were not entitled to resume possession and so put an end to the lease without first obtaining an order of the Court for the purpose, a condition precedent which,

under Roman-Dutch and English law alike, must be observed when possession remains in the tenant. For the illegal invasion of his rights the plaintiff is entitled to general damages which in the circumstances I assess at £25. Regarding the special damage claimed to have been suffered, I cannot but regard it as inconsiderable. There were undoubtedly some provision products in the ground before it was cleared for cane cultivation, but not, in my opinion, to anything like the extent alleged in the statement of claim, and those that were there could hardly—in the condition of the plot which I think has been established—have been of any great value. £10 I consider represents that value.

There will be judgment for the plaintiff for £35 and costs.

BRITISH GUIANA MUTUAL FIRE INSURANCE COMPANY, LIMITED

v.

DEMERARA TURF CLUB, LTD. (in liquidation.)

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

1917. MARCH 12, 26.

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

Company—Winding-up—Mortgage—Proceedings in execution by mortgagee—Application to set aside proceedings—Leave to proceed to execution—Avoidance of execution after commencement of winding-up—Companies Consolidation Ordinance, 1913, s.s. 133, 209.

In winding-up proceedings under the provisions of the Companies (Consolidation) Ordinance, 1913, a mortgagee of the company in liquidation who obtains leave to proceed to judgment on his claim but is restrained from further proceedings to enforce the judgment for a period of six months from the date thereof does not thereby obtain leave to issue execution on the expiry of the six months. Nor is that leave given by the judgment in the proceedings, subsequently pronounced upon the consent of the defendant mortgagors, which contains the words "that the plaintiffs be admitted to proceed in execution against the property thereby mortgaged . . .", the application for this judgment not being in compliance with the requirements of sec. 133 of the ordinance, whereby the leave of the Court to proceed must first be obtained, and execution, therefore, issued thereafter is void under the provisions of sec. 209 of the ordinance.

Appeal and cross-appeal from the decision of Hill, C.J. (Acting), who, on an application by Percy C. Wight for an order that execution in the above first-mentioned action be stayed, made an order that the execution be stayed until such time as the appeal to His Majesty-in-Council in the second-mentioned action is determined. He further ordered that each party bear his own costs. (*a*)

Applicant appealed from the order on the following grounds:—

1. The said order, in so far as the application to stay the said execution generally was refused, is erroneous in law, in as much as the said execution was issued and levied upon the property of a company ordered to be wound up by the Court without leave and in contempt of court.
2. Such leave was not given either by the order dated the 18th December, 1915, or by the judgment dated the 19th January, 1916.

(*a*) Reported 1916 L.R., B.G., 132.

3. . . .
4. . . .
5. The said execution is void to all intents under section 209 of the said ordinance and incapable of being made valid by the leave of the Court.
6. The mortgagees have never applied to the Court for leave to enforce their said judgment by execution against the property of the company. No grounds exist on which such leave could have been granted, if applied for.

(7) to (10.) . . . . .

The respondents, the British Guiana Mutual Fire Insurance Company, Limited, also appealed from the order in so far as it directed that execution on the judgment be stayed pending the hearing and determination of the appeal to His Majesty-in-Council in the second-named action, and asked that it be rescinded, and in place thereof that the application be dismissed with costs to the respondents both in this court and in the court below.

The appeal was allowed with costs in both courts. The cross-appeal was dismissed.

Humphrys, for the appellant Wight.

E. G. Woolford, for the respondent company, took the objection that appellant had no *locus standi* in the action firstly above named or in the liquidation proceedings. The point not having been raised in the Court below, this Court declined to consider

He proceeded:—Leave to proceed to execution was granted. Even if appellant were a creditor he could not show any cause to stay execution. Cites *In re Wanzer Ltd.*, (1891) 1 Ch. 305; *In re David Lloyd & Co.*, 6 Ch, D. at p. 344; *Thames Plate Glass Co.* v. *Land and Sea Telegraph Construction Co.*, 6 Ch. App. 643; *In re Exhall Coal Mining Co. Ltd.*, 4 De G. J. and S. 377; and *Rudow* v. *Great Britain Mutual Life Assurance Society* 17 Ch. D. 600.

SIR CHARLES MAJOR, C.J.: An application was made by the plaintiff in the second action, by memorandum in the prevailing form, containing the grounds therefor and supported by affidavit, for a stay of execution issued in the first action. The memorandum was headed in various "matters" that is to say, of the Companies Ordinance, of the liquidation proceedings and of the first and second action.

The grounds for the application to be extracted from the narrative contained in the memorandum, were that the execution sought to be stayed had been issued without leave of the Court and was therefore void, and that its enforcement would render a

judgment obtained by the applicant against the Turf Club, if confirmed by His Majesty's Judicial Committee of the Privy Council on a pending appeal, wholly nugatory.

The various steps in the litigation preceding the application and the position of matters therein when the application was made are fully set forth in the reasons given by Hill, then acting C.J., on the 24th of August, 1916, for making the order from which the appeal is brought. That order was that the execution be stayed pending the hearing and determination of the appeal to His Majesty-in-Council, and the appellant here applies that it may be so varied that the execution shall be "stayed generally," on grounds, stated shortly, the same as those urged in the Court below. The notice of appeal has been served on the liquidator of the Turf Club and the Insurance company. The former is not represented on this appeal. The latter have given notice to the appellant by way of cross-appeal against the learned judge's order that it may be set aside and the appellant's application to the Court below dismissed.

By the 209th section of the Companies Ordinance, 1918, it is declared that "where any company is being wound up by the Court . . any . . . execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." It has been judicially settled that the words of that section are controlled by the provisions of the 133rd section of the same Ordinance (which declare that "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 that the Court may, therefore, permit execution to issue or proceed. This execution has been put in force after the winding-up order. If, therefore, no leave of the Court to put it in force was obtained, it is void to all intents. It is contended that the leave was given on two occasions; the first, when an order was made by myself on the 18th December, 1915, giving the Insurance Company leave to commence proceeding against the Turf Club for the recovery of the sum or sums of money due and payable under a certain instrument of mortgage and to prosecute the same to judgment as they might be advised and further ordering that no proceedings be taken to enforce the said judgment for a period of six months from the date thereof; the second, when Berkeley, J., on the 19th January, 1916, gave judgment in these last mentioned proceedings for the plaintiffs, a judgment obtained by consent of the defendants by the liquidator.

No leave was granted by the order of the 18th December, 1915. That order gave leave only to commence proceedings; moreover, it specifically directed that no proceedings to enforce judgment, which mean and include execution in any form, might be taken

before the expiration of a certain time. Even when that time expired no steps could be taken by the judgment-creditor to enforce their judgment without the leave of the Court. But it is further said that the judgment given by Berkeley, J., contains that leave The 14th and 15th rules of Order XXXV. relate to judgments by consent and provide for the form and tiling of consent by the defendant, and that upon a certified copy thereof being "laid over," the Court shall give judgment in the terms of the consent, The consent of the defendants in the action was as follows: "The defendant hereby consent to judgment for the amount of the plaintiffs' claim and costs." By those terms the Court was bound in giving judgment. In actions by mortgagee against mortgagor, for "foreclosure" as it is described, a printed form is apparently invariably used without reference, it seems, to any collateral circumstances that may exist to govern its form and effect, without reference, in this case, to the terms of the consent upon which it had to proceed. The judgment given by the Court accordingly was entered thus: "It is this day adjudged that the willing and voluntary condemnation decreed and passed on the 21st day of June, 1910 . . . upon the mortgage [setting forth its term] be strengthened and confirmed according to its legal tenor and effect and consequently that the plaintiffs be admitted to proceed in execution against the property thereby mortgaged . . . and recover and receive from the proceeds of sale thereof," etc., etc. There is no evidence before the Court whether application was made to the learned senior puisne judge for judgment, if application was made, what form it took, or whether the attention of the Court was directed to the order of the 18th December, 1915, and the provisions of the Companies Ordinance to which I have already referred. But in any event the permission "to proceed in execution" travelled beyond the terms of the consent, and, even if an application for leave to issue execution could have been considered to be included in that for judgment, that leave could not, in view of the terms of the consent have been granted. But neither in form nor in substance, it seems, clear, was the application one for leave to issue execution. It was, if made, for judgment by consent of the defendants, and made, not in the winding-up but in the action. The part of the judgment, therefore, which I have quoted as to permission to proceed in execution had no effect. It may be regarded as surplusage.

No leave having been given by the Court to put the execution in force, the same is void. If the learned judge in the Court below held the view that either my order of the 18th December, 1915, or the judgment of Mr. Justice Berkeley of the ensuing 19th January, gave leave to issue execution, and it seems from his remarks, that he did, that view was, in my opinion, erroneous.

When execution is improperly issued, as here, it should be set aside, not stayed, and the order of the learned judge should be varied accordingly. The appeal, therefore, is allowed and the cross-appeal is dismissed.

In ordering each party to the application to pay his own costs, the learned judge evidently did so upon the view that the execution had been properly issued, but should be temporarily stayed, thus rejecting the application for what is shown by the grounds for making it to have been an order setting the execution aside as void. The latter order this Court now gives to the applicant, as that which he should have had in the Court below. The appellant, therefore, must have from the Insurance Company his costs of the application to Mr. Justice Hill as well as those of this appeal.

I think it necessary to add, though it does not appear that the question was raised, that I must not be held to acquiesce in the position which the appellant assumed he was entitled to take up when making his application to the Court below. I very much doubt whether he was properly before the Court at all.

DALTON, J. (Actg.): I entirely agree with the judgment just given and have nothing further to add, save this, that I also concur in the last remarks made by the learned Chief Justice with regard to the status of the applicant in the Court below.

Da SILVA *v.* NEWTON.

PETTY DEBT COURT, GEORGETOWN.

Da SILVA *v.* NEWTON.

[40—4—1917.]

1917. MAY 8, 10. BEFORE DALTON, J. (Actg.)

Debtor and creditor—Goods sold and delivered—Prescription—The Prescription Ordinance, 1856, ss. 6 and 10—Waiver—Part payment—Appropriation of payments—Right to appropriate.

In the absence of any waiver or continuance of the term of prescription as required by section 10 of the Prescription Ordinance, 1856, a creditor cannot appropriate a payment by the debtor, who has not made any appropriation himself, to any debt due longer than three years.

This was a claim by the plaintiff da Silva for the sum of $36.20, the balance of an amount due by defendant Newton for goods sold and delivered in Georgetown, and for cash lent and moneys advanced for freight at defendant's request, between November 3rd, 1910, and June 14th, 1915. The account showed that no transactions took place between May, 1911, and April, 1915.

Defendant tiled a plea of prescription under the provisions of section 12 (1), Petty Debts Recovery Ordinance, 1893.

The facts not being in dispute argument was heard on the plea filed.

F. O. Low, for the defendant.

The amount claimed is prescribed. Refers to Prescription Ordinance, 1856, section 10, and cites *Gomes* v. *Gonsalves* (July 26th, 1899); *De Freitas* v. *Fitz Brown* (L. J. June 21st, 1907); and Halsbury's *Laws of England,* Vol. XIX at p. 69.

W. I. Sousa, solicitor, for the plaintiff.

The action is not prescribed, the doctrine of part payment applying. The debtor not having appropriated payments made by him to any sum, the creditor can make any appropriation he wishes, even to an account statute barred. He cites *Mills* v. *Fowkes,* 5 Bing., 455; *Seymour* v. *Pickett,* 1905 1. K.B. 715; *Deeley* v. *Lloyds Bank Ltd.,* 1912 A.C. 756; *Cory Bros., and Co.,* v. *The 'Mecca,'* 1897 A.C. 286, and *Philpott* v. *Jones* 2 Ad. and E. 41.

DALTON, J. (Actg.)

Plaintiff claims the sum of $36.20, balance of an amount due to him by defendant for goods sold and delivered and cash lent between November 3rd, 1910 and June 14th, 1915.

Defendant pleads prescription.

No evidence was led, and argument was heard, on the assumption that the account attached to the plaint was correct. From that account it appeared the sum of $82.69 had been paid of the whole sum of $118.89. Balance claimed now is $36.20. In May 1911 the sum of $36 was due. After making further purchases in 1915, on June 14th, 1915 the sum of $69.61 was paid on account by defendant; part of that sum was appropriated by plaintiff in payment of the sum which was already then statute barred. That defendant argues plaintiff was not entitled to do, and he cites authority to support his view of the law.

Under the provisions of section 6, Ordinance 1 of 1856 (Prescription Ordinance) an action such as the present one must be brought "within three years next after the cause of action has arisen." Several cases have been cited by plaintiff's solicitor as supporting the contention that he is entitled, in the absence of any appropriation of the payment by the debtor, at any time to appropriate the payment against any sum he (the plaintiff) wishes, even if the debt is prescribed. In view of the provisions of section 10 of the local ordinance above referred to I cannot agree with that contention. That section provides as follows:—

> "10. No term of prescription provided by this ordinance may be waived, or the right of action or suit continued for any further period whether there has been any part payment or not, unless such waiver or continuance is in writing signed by the party to be bound thereby;"

This section, it will be seen, goes further than the provisions of section 1 of 53 Geo. III., c 127, on the subject of part payment. No waiver or right of continuance, such as the section requires. exists and hence the plea of prescription must succeed. In the absence of any written consent by the debtor to appropriate the payment made in June, 1915, to that portion of the debt that was statute barred, the plaintiff was not entitled to act as he did. Even assuming that the payment in June was such a part payment as to take the earlier portions of the account out of operation of the English statute law, if seems to me that section 10 which I have quoted in the absence of any written waiver, as the section requires, makes the English cases on the point quite inapplicable.

There must be judgment for the plaintiff for the sum of twenty cents, the excess over the amount prescribed by law, *i.e.*, $36.

MANGIA *v.* SAFAYAN AND ORS.

MANGIA *v.* SAFAYAN AND OTHERS.

[62 of 1916].

1917. APRIL 30, MAY 1, 12.

BEFORE SIR CHARLES MAJOR, C.J.

Sale at execution of immovable property—Judgment-debtor's interest therein—Jus ad rem—Action by holder of conveyance to set aside sale and consequent letters of decree of jus ad rem—Levy on and sale in respect of immovable property—Legality of writ of execution.

Where immovable property in respect of which the judgment-debtor had only a *jus ad rem* was levied upon and sold in execution of the judgment under writ of *fieri facias* and letters of decree therefor issued to the purchaser;

Held that the execution was illegal and should be set aside and the letters of decree cancelled because a *jus ad rem* in respect of immovable property of which a judgment debtor is not the owner by conveyance, being a *jus incorporale*, cannot be taken in execution by a judgment-creditor under a writ of *fieri facias.*

Claim by the plaintiff for an order setting aside—

(a) a levy and sale at execution on January 4th 1916 in behalf of one Jumra Ali, judgment creditor v. Osiran, judgment-debtor of lot No. 6, plantation Triumph, and

(b) the letters of decree for the same property issued to one Safyan or Safayan, the purchaser at the sale,

on the ground that the property in question was never the property of Osiran, but of the plaintiff Mangia, and also on the ground that there was fraud and collusion between the defendants Safayan, Jumra Ali, and Osiran. Plaintiff also claimed the sum of $300 as damages for the said fraud.

Safayan denied the fraud, and set up the defence that she was the *bona fide* purchaser of the property for value at execution sale, and that the letters of decree therefor granted to her could not now be set aside.

Jumra Ali set up the defence that if the plaintiff held title for property in question, she held it in trust for Osiran and had no beneficial interest therein; that the property was paid for by plaintiff with moneys supplied by Osiran; and that the latter was put in possession thereof as owner.

H. C. Humphrys, for the plaintiff.

C. B. Browne, for the defendant Safayan.

P. N. Browne, for the defendant Jumra Ali.

The defendant Osiran had died after service of the writ of summons and before appearance, and was unrepresented at the trial.

SIR CHARLES MAJOR, C.J.: On the 25th March, 1911, certain real property, known as lot No. 6, part of plantation Triumph, was, for the sum of $260, conveyed to the plaintiff, *coram lege loci* by the Official Receiver representing Sahibdin, a bankrupt.

On the 15th December, 1914, the defendant Jumra Ali as judgment-creditor of the defendant Osiran, the wife of Sahibdin, issued execution on his judgment, after the usual affidavit made by himself that Osiran was to his own knowledge the owner of lot 6 and had been in possession thereof and its rents issues and profits for a period of over five years.

Notwithstanding that the property then stood in the records of the registry in the name of the plaintiff, as owner by transport in 1911, that is less than four years before the date of the affidavit, a writ of *fieri facias* was issued respecting the property, it was sold at execution sale and was bought for $45 by the defendant Safayan, who on the 12th March, 1915, obtained letters of decree.

The plaintiff claims in this action that the judgment in the action Jumra Ali v. Osiran, the execution sale of lot 6 thereunder and the letters of decree be set aside for fraud on the defendants' part.

Osiran died after service of the writ of summons in this action and before appearance. She is not represented herein.

The plaintiff alleges payment of the purchase money of lot 6 in 1911 with her own moneys; payment of village rates thereon by herself and by Osiran by her direction and on her behalf; ignorance of the proceedings by Jumra Ali against Osiran, the judgment therein and the subsequent execution against, and sale of, lot 6.

The defendant Jumra Ali defends that he lent money for the purchase of lot 6 to Osiran, who gave it to the plaintiff for that purpose on the understanding that the plaintiff should purchase the property for Osiran, but that the plaintiff purchased in her own name; that the plaintiff put Osiran into possession of the property after purchase and subsequently, that is to say, on the 8th June, 1911, acknowledged in writing the receipt from Osiran of $310 as "purchase price paid by her" (Osiran) for lot 6; that the village rates on the property from and after the sale in 1911 were paid by Osiran.

These allegations the plaintiff denies, replying that if any such acknowledgment as alleged was given, it was given without her authority.

The issues of fact in the case are (a) whose was the money with which the property was purchased in 1911; (b) by whom, and in what circumstances, the village rates were paid; (c) the

genuineness—for the alleged writer denied having written it—and if genuine, the knowledge of the plaintiff, of an acknowledgment produced by the defendant, Jumra Ali, and said to have been penned by the plaintiff's son; (d) the acts and circumstances said to establish fraud on the part of the defendants in the matter of the judgment by Jumra Ali against Osiran.

But the plaintiff further submits in her reply that, apart from the issues of fact, and admitting that the plaintiff purchased the land with the moneys of Osiran, and that Osiran subsequently paid the village rates on the property and exercised acts of ownership thereover, it was, nevertheless, not the property of Osiran, and could not be taken in execution for her judgment debt. This proposition obviously goes to the root of the litigation and with it I deal at once.

Now, assuming the property to have been purchased with Osiran's money and her subsequent acts in relation thereto to be referable to that fact, what estate in the land did the fact create in Osiran? Clearly I think none whatever. A right to call upon the plaintiff to transfer the property to her she may have had, her representatives may still have, but that is a *jus ad rem*, nothing more.

There is but one method of acquiring the ownership of real property in this colony, namely by conveyance, or "transport," or the legal equivalent thereof. The person holding the conveyance of this property is the plaintiff and she and none other, is to-day the owner of it. In that position she is, as against Jumra Ali and Safayan with whom she has no equities, resting on her conveyance. With what result to Jumra Ali? He has enforced his judgment against Osiran by taking in execution this property as that of his judgment debtor. But it was not Osiran's property while she was alive; it is not the property of her representatives now that she has died. When, therefore, in order to lead the writ of seizure and sale, Jumra Ali had sworn the affidavit prescribed by the rules—which seem to me, in this particular respect which is occurring daily not only to permit but to invite falsity and fraud—that Osiran was the owner of the land, and the sheriff proceeded to "seize and sell" it, the former had sworn falsely and the latter was beating the air. No property of Osiran was sold. And a *jus ad rem* cannot be taken in execution under a writ of *fieri facias.* That is shown clearly in *Maynard* v. *Gilmer's Trustee* reported in 3 Menzies, at page 116, where the court held that a purchaser of a certain immovable property who had partly paid, but had no legal transfer, for it had but a *jus incorporale*, namely, the *jus ad rem* to demand and obtain transfer from the sellers which was all that vested in him, and that that *jus incorporale* could not be taken in execution by a writ to attach the immovable property in respect whereof the *jus* existed.

Treating, therefore, Jumra Ali's judgment as valid, the execution issued thereon, so far as it was followed by a sale of the land as Osiran's property, was a nullity and the result for the defendant Safayan is that she bought nothing. She did not buy the land, for it was not the property of the judgment-debtor and could not, therefore, be sold. She did not buy the judgment-debtor's incorporeal right, for that right, if it existed or still exists, could not be taken in execution. The letters of decree, therefore, which, it has now been judicially settled, convey only the judgment debtor's interest, conveyed nothing.

As against the defendant Jumra Ali and Safayan, the plaintiff is entitled to an order setting aside the sale of the property in execution of the judgment and the consequent letters of decree purporting to give effect to that sale.

I do not think the circumstances of the case warrant the award of any damages.

In respect of the defendant Osiran, now deceased, the action seems not to have become abated, and on the issues of fact in the case I have already mentioned, affecting as well any representative of her estate as the defendants Jumra Ali and Safayan, although I entertain no doubt as to how they should be determined, I prefer to express no opinion.

ASHRAFALLY *v.* ABDUL ROHOMAN KHAN.

ASHRAFALLY *v.* ABDUL ROHOMAN KHAN.

[69 OF 1917.]

1917. MAY 4, 16. BEFORE BERKELEY, J.

Appeal—False imprisonment—Damages—Evidence—Justification—Defence.

In an action for damages for false imprisonment to justify an arrest by a private person it is necessary to prove that a felony in respect of which the person is arrested has in fact been committed.

Appeal from a decision of Mr. H. K. M. Sisnett (Stipendiary Magistrate of the West Coast judicial district). Plaintiff Ashrafally (now respondent) claimed from the defendant Abdul Khan (now appellant) the sum of $100 as damages for false imprisonment. The plaint set out that on July 31st, 1916, at Maryville, Leguan, defendant falsely accused plaintiff of having stolen one iron copper the property of defendant, and thereafter gave instructions to the police for his arrest on the false charge; that he was arrested on the charge; and that the said charge was dismissed. The magistrate found in favour of the plaintiff, in the sum of $25 and costs.

Defendant appealed. The reasons of appeal are sufficiently set out in the judgment. The appeal was dismissed.

E. G. Woolford, for the appellant.

J. A. Luckhoo, for the respondent.

M. J. BERKELEY, J.: This is an appeal from the stipendiary magistrate of the West Coast judicial district (Mr. Sisnett), who in an action for false imprisonment entered judgment for plaintiff (now respondent) for $25 and costs.

The grounds of appeal are:—

1. The admission of illegal evidence.
2. The rejection of legal evidence.

As to the admission of illegal evidence, the magistrate finds that, apart from the certified copy of the proceedings before the magistrate who dismissed the case of larceny brought against the respondent, there was other evidence before him which showed that the appellant's son was acting as the agent of his father (the appellant) when he gave the respondent into custody. The evidence for the plaintiff raises such a presumption, and the appellant himself in the course of his evidence admits that he gave his son instructions to lock up the respondent if he removed the copper. This renders it unnecessary to consider whether or not the notes of evidence are correctly certified so as to render them admissible or not.

As to the rejection of legal evidence it is submitted that the magistrate was wrong in refusing to allow the appellant to say whether or not he had bought the copper in question. Appellant had put in his transport which shows that he had purchased certain plantations with the "appurtenances thereto belonging," and it was for the magistrate to find (if necessary) whether such copper was part of the appurtenances, Admitting for the sake of argument that the copper did so form a part of the appurtenances the magistrate has found that the respondent had purchased it in good faith from one of the original owners of the plantation and that the receipt produced by him was genuine. There is evidence to warrant such a finding and in my opinion this disposes of the case No felony was committed, and in an arrest by a private person (as is the appellant) it is necessary in order to justify the arrest to prove that the felony in respect of which the person is arrested has in fact been committed. (*Walters* v. *W. H. Smith & Son, Ltd.*, 110, L.T. 343).

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

PETTY DEBT COURT, GEORGETOWN.
[219—2—1917.]

WORRELL *v.* GREEN.

1917. MAY 22, JUNE 12. BEFORE DALTON, J., (Actg.)

Infant—Tort—Liability to be sued—Procedure—Proof of infancy—Damages.

If an infant is sued with his guardian in an action based on tort, there is no liability on the plaintiff to prove such infancy, it being not a matter in issue between the parties.

This was a claim by the plaintiff against the defendant for the sum of $100 for damages alleged to have been incurred by reason of the careless, negligent, and unskilful riding by the defendant of a motor-bicycle on December 6th, 1916. Special damages to the sum of $22.68 were claimed, the balance of the sum being general damages.

J. S. McArthur, for the plaintiff.

C. R. Browne, for the defendant.

On the close of the case for the plaintiff Browne submitted that there was no case for him to answer.

DALTON, J. (Actg): This is an action entitled as between "Joseph Worrell . . . . . plaintiff, and J. F. Green as father and natural guardian of his minor son W. Morris Green . . . . . defendant." The action is based on tort, and at the close of plaintiff's case, counsel for defendant argued that, inasmuch as the minority of the defendant had not been proved, there was no case for him to answer.

It seems to me that this argument would not have been advanced if the action had been properly headed. The defendant in fact is "W. M. Green, an infant by J. F. Green, his father and guardian," and this is the way he should have been described. An objection on this point was taken at the commencement of the action and it was then ruled by me that in fact the minor was the defendant and, although the caption was unusual, it contained all necessary particulars and prejudiced the plaintiff not at all. In effect, the requirements of rule 2 of the Magistrates Courts Rules have been complied with.

Defendant now says that, appearing as he does, an infant, his guardian also appearing in court, plaintiff has not proved his infancy. It is not necessary to prove it. It is no matter in issue. The plea of infancy is not even available to the defendant in a case of tort arising independently of contract. If defendant is an infant, he rightly appears here as he does by his guardian. If he is not an infant he is still before the court, and he does not require his guardian's presence and assistance. The case of contract is of course different. There defendant may plead infancy as a defence and must prove it.

There being some evidence for plaintiff to support his case as set out in the plaint, the defence must now be heard.

After hearing the defence judgment was entered for the plaintiff in the sum of $30, and costs.

HUTSON *v.* GOMES.

HUTSON *v.* GOMES.

[123 of 1917.]

1917. JUNE 1, 14. BEFORE BERKELEY, J.

Criminal law—Frivolous or vexatious complaint—Costs and compensation—Summary Conviction Offences (*Procedure*) *Ordinance, 1893, sec. 43.*

Compensation can only be awarded under the provisions of sec. 43 (1), Ordinance 12 of 1893, where the complaint is frivolous or vexatious, and such a condition must arise out of the complaint then being heard. Consideration cannot be had to other cases which have either been withdrawn or dismissed.

Appeal from a decision of the Stipendiary Magistrate of the Demerara river judicial district (Dr. W. E. Roth). The complainant Hutson did not appear before the magistrate in support of the charge, one of embezzlement, against the defendant, who denied the charge. The charge was dismissed, the magistrate awarding defendant $8 costs, and $10 as compensation.

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

"Defendant states that this is the third occasion on which he has been dragged all the way from Georgetown to be accused of embezzlement, charges which have either been dismissed or withdrawn. From the records of the Court I know his statement to be true. I have awarded $8 costs to cover steamer fare ($4), and four days board at $1. I award the $10 compensation because the ordinance, 12 of 1893, s. 43 (1), prevents me awarding any higher sum for a vexatious complaint."

From this decision complainant appealed. The reasons for appeal fully appear from the judgment below.

J. S. McArthur, for the appellant.

S. E. Wills, for the respondent.

BERKELEY, J.: This is an appeal from the Stipendiary Magistrate of the Demerara river judicial district (Dr. Roth) who on the non-appearance of the complainant dismissed a charge of embezzlement brought by him against the defendant and awarded defendant costs $8, and compensation $10.

The reasons of appeal are:

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

(a) there being no evidence upon which the said magistrate's court could award compensation or costs to the defendant.

(b) The defendant and the magistrate having been informed that the charge would not be proceeded with owing to the great expense which the change of venue would cause the complainant.

(c) A reasonable excuse was received by the magistrate for the non-appearance of the complainant at the trial.

2. The decision is erroneous in point of law inasmuch as there was no evidence upon which the magistrate's court could find that the said complaint was frivolous or vexatious.

The magistrate notes that a letter of withdrawal was received too late to be made use of, and that he awarded compensation ($10) as it was the third occasion on which defendant had been brought from Georgetown to have the charge against him either dismissed or withdrawn.

Ordinance No. 12 of 1893, section 43 (1), provides that *in every case* when the complainant is dismissed the court may order costs to be paid, and, if the court is of opinion that the complaint was frivolous or vexatious, may order compensation, not exceeding $10 in addition to costs.

It is competent for a magistrate when a complainant does not appear and the defendant does appear to dismiss the case unless he thinks fit on account of a reasonable excuse or other sufficient reason to adjourn the hearing. He is the sole judge of what is a reasonable excuse or other sufficient reason, and the mere fact that a letter of withdrawal is received does not render it obligatory on him to deprive a defendant of his costs.

Compensation can only be awarded where the charge is frivolous or vexatious, and such a condition must arise out of the complaint then being heard. The magistrate cannot take into consideration other cases which have been either withdrawn or dismissed.

The appellant is limited under the Magistrates' Appeal Ordinance to the reasons raised by his appeal and this court therefore has not dealt with any point raised by counsel which in its opinion is outside these reasons.

In the result the appeal is allowed as to the order of compensation, and decision is affirmed as to the order of costs.

Under the circumstances the court makes no order as to costs of appeal.

BHAGWANDIN *v.* SUKHAWATH AND ANR.

BHAGWANDIN *v.* SUKHAWATH AND ANR.

[10 OF 1916.]

1917. MAY 21, JUNE 15.

BEFORE BERKELEY, J., AND DALTON, J. (Actg.)

Appeal—Notice of Appeal—Parties affected by the appeal—Rules of Court 1900, Order XLIII., rule 9—Practice—Objection taken—Court divided in opinion—Procedure.

Under the provisions of the Rules of Court, Order XLIII., rule 9, an appeal is made by filing notice of appeal in the registry, and by serving a copy thereof on all parties affected by the appeal within the time limited.

B. obtained judgment against S, and D. in an action for specific performance, S. to convey a certain property to B., and B. to pay D. the balance of the purchase price of the said property. S. was ordered to pay the costs of B., but no order was made as to costs between B. and D.

S. appealed, and served notice of appeal on B. On objection taken by respondent B. that the provisions of Order XLIII. rule 9 had not been complied with:

held, by Berkeley, J., that the substantial ground of appeal being the admission by the trial judge of an agreement by S. to convey the property to B., and S. having no interest in the order of the Court ordering payment of the balance of the purchase money to D., D. was not a party "affected" by the appeal within the meaning of the rule.

held, by Dalton, J., (Actg.) that D., being a party to the action, and the appeal being in the nature of a re-hearing, and being affected by the order of the trial judge, was a party affected by the appeal within the meaning of the rule upon whom notice should be served.

Appeal from a decision of Sir Charles Major, C.J.

Plaintiff, Bhagwandin, claimed, (1) an order that defendant Sukhawath pass transport to him of one undivided sixteenth part of plantation Foulis; and, (2) an account of all moneys received and paid by him during his possession of the said property.

After pleadings had been filed, on the application of plaintiff, one Bissun Dyal was added as a defendant in the action, and he entered an appearance to the writ and filed his defence.

After hearing evidence and argument the trial judge ordered:—

(1) that the agreement dated November 6th, 1915, whereby Sukhawath agreed to transport one-sixteenth part of plantation Foulis to Bhagwandin be specifically performed and carried into effect;

(2) that Bhagwandin do pay to Bissun Dyal on or before the carrying into effect of the said agreement, the balance of the purchase money for the said property;

(3) that an account of the rents and profits received by Sukhawath since November 6th, 1915, of the said property be taken; and

(4) that Sukhawath pay plaintiff's costs, no order being made as to the costs between plaintiff and Bissun Dyal.

The defendant Sukhawath appealed from this order and decision on the grounds:—

(1) that the agreement of November 6th was not admissible in evidence as part of the plaintiff's case against Sukhawath, the rights of the plaintiff, if any, under that agreement not being one of the issues in the action;

(2) that, after the admission of the agreement in evidence, evidence offered by Sukhawath to show a verbal agreement between himself and Bissun Dyal's attorney with respect to the property in dispute was wrongly rejected; and

(3) that the order for the conveyance of the property made, subject to mortgage in favour of the Building Society granted relief to the plaintiff different to that claimed by him, and it was not competent to grant such relief unless the Building Society was joined as a party to the action.

P. N. Browne, J. A. Luckhoo with him, for the appellant Sukhawath.

E. G. Woolford, for the respondent Bhagwandin.

Woolford objected that the appeal could not proceed, appellant not having complied with the provisions of Order XLIII, r. 9. No notice had been served on the second defendant, Bissun Dyal.

Browne argued that Bissun Dyal was not affected by the appeal.

Woolford, in reply.

BERKELEY, J.: This is an appeal by the defendant Sukhawath from a decision of the Chief Justice who ordered (1) that the agreement entered into by the defendant Sukhawath on 6th November, 1915, to transport to the plaintiff one-sixteenth part of plantation Foulis be carried out; (2) that the plaintiff pay to the other defendant, Bissun Dyal, on or before the carrying into execution of the above agreement, the balance of purchase money for the said one-sixteenth part of said plantation; (3) that the defendant Sukhawath account for the rents and profits received from the said 6th November, 1915; (4) that the defendant Sukhawath pay the plaintiff his costs. He did not think it proper to make any order as to costs between the plaintiff and the other defendant, Bissun Dyal.

A preliminary objection is taken by counsel for the plaintiff to the hearing of the appeal on the ground that the defendant Sukhawath has not complied with Order XLIII. rule 9 of the Rules of Court. I do not agree with counsel that under this rule every person who is a party to the action must be served with a copy of the notice of appeal. It is only those affected by the appeal. That

this is so is shown by the English Rule (O. LVIII. r. 2) which distinctly states that it shall not be necessary to serve parties not so affected. The only question therefore is, does this appeal affect the other defendant Bissun Dyal?

In *Purnell* v. *Great Western Railway Company and Harris,* (1 Q.B.D., 636) which was an action for damages for an injury caused by negligence of persons who were the servants either of the company or Harris, the jury found against the company but in favour of Harris, and on an application for a new trial by the company the Court of Appeal ordered notice of appeal to be served on Harris, thinking that there was a serious question to be argued as to whether the persons who were guilty of negligence were the servants of Harris (Jessel, M.R.) See also the same learned judge *in re New Callao* (22 Ch. D. 494.)

These cases show that it is necessary to look at the evidence in order to say whether notice of appeal ought to be served on a defendant who has not appealed. In the present case the substantial ground of appeal is the admission by the court of the agreement signed by defendant Sukhawath to transport to plaintiff, and it is admitted that the legal estate as to the one-sixteenth part of the plantation is in the defendant Sukhawath to whom it was transported together with his own share by the then owner Bissun Dyal, the second defendant, on 6th November, 1915, and defendant Sukhawath in the course of his evidence says that he wishes to give plaintiff his share and that he does not want it. He further says Bissun Dyal must come and tell him that plaintiff has settled before he can transfer it. This Court therefore cannot make an order on the defendant, Bissun Dyal, to transport to plaintiff, and I can find no ground for saying that the defendant Bissun Dyal can be affected by the appeal.

The second defendant was added as a defendant on the application of the plaintiff, and the defendant Sukhawath has no interest in the order of the court ordering the payment of the balance of purchase money to him. If the plaintiff is dissatisfied with that part of the order and desires to have it varied, he ought to have entered a cross-appeal. (Jessel, M.R, *In re Cavander* 16 Ch. D. 270.)

The application must be dismissed.

DALTON, J.: On this appeal coming on before this Court for hearing objection was taken by counsel for the respondent that the appellant had not complied with all the requirements, respecting notice of appeal, laid down by Order XLIII. r. 9 of the Rules of Court. No copy of the notice of appeal was served on Bissun Dyal, the co-defendant of the appellant in the court below.

The rule provides that “an appeal shall be made by filing notice

of appeal at the Registrar's office, and by serving a copy thereof on all parties affected by the appeal." Is or is not Bissun Dyal a party affected by the appeal?

From the record it appears that the original parties to the action were Bhagwandin, as plaintiff, and Sukhawath as defendant. Application was then made to the court to join Bissun Dyal as a defendant with Sukhawath, which application was granted. The claim of the plaintiff was for the specific performance of a contract, plaintiff claiming from defendant Sukhawath transport of a portion of pln. Foulis, in accordance with an agreement said to have been entered into between himself and the two defendants, and also for accounts.

After taking evidence from which it is clear that the two defendants are antagonistic to one another the trial judge ordered firstly, specific performance of the contract of sale, subject to a mortgage created by both defendants and two other persons to the British Guiana Building Society, secondly, that plaintiff (now respondent) pay to Bissun Dyal before the performance of the agreement the balance of the purchase price of the property in question, and thirdly that the defendant Sukhawath pay plaintiff his costs, but that as between plaintiff and Bissun Dyal no order as to costs be made.

Sukhawath appealed on the ground principally that the agreement in question was not admissible in evidence, and his counsel now asks us, on the objection taken by respondents counsel to say that Bissun Dyal is not affected by the appeal on the ground that no order the court of appeal can make can affect Bissun Dyal.

I will first of all make reference to a small difference between the local rule I have quoted, and under which this objection is taken, and the equivalent English rule. Whereas the words of our rule are "all parties affected by the appeal," the words of the English rule are "all parties directly affected by the appeal." (Order LVIII., rule 2). The old English Chancery Rules used to omit the word "directly," and hence, as was stated by the master of the Bolls in *in re Salmon* (42 Ch. D, at p. 361) in construing the rule the addition of the word "directly" should not be lost sight of. From his judgment in that case it is clear that third parties even are "affected," though not necessarily "directly affected" by an appeal. That is, following that case as an authority, third parties who are interested should be served with notice,

Here however Bissun Dyal is a defendant, whilst the appeal is in the nature of a re-hearing, with full power to the court to call further evidence if necessary or vary the order made in any way. It certainly seems to me that Bissun Dyal is affected by the order of the trial judge, both as regards the order for specific perform

ance and as regards the question of costs. Even if, however, he were not mentioned by name in the order as the person to whom a certain payment is to be made, I could not say he is not affected by the appeal. He is one of the parties to the action, and until the appeal is heard it is, to my mind, impossible to say what order will be made.

In the case of *in re New Callao* (22 Ch. D. at p. 494), Jessel, M. E. went much further than we are asked to go here. He states "It is not correct to say that because a person' interests is not bound the order of the court of appeal will not affect him. . . . . It is quite clear the other respondent would have a right to appear without being served and claim to argue his case." And so it seems to me here that, assuming that Bissun Dyal knew of these proceedings though he had no formal notice of them, he would have a perfect right to appear before this court and to be heard on the appeal.

The rule I think should be interpreted as widely as possible, and the court should know that all the parties affected are before it or have had an opportunity of being before it. A party served need not appear if his appearance is in his opinion unnecessary (*Harbin* v. *Masterman* 1896 1 Ch, at p. 363), for he might not obtain his costs in such a case, but the court would know that he had notice of the proceedings in which he acquiesced.

Here Bissun Dyal has had no such notice and in the absence of such notice being served upon him as an affected party as required by the rules, I hold the objection to be good.

The learned senior puisne judge however does not agree with me and that being so, on the analogy of the practice in the Divisional Courts in England where the two judges differ on an appeal which therefore stands dismissed the objection taken here must be dismissed and the appeal must be proceeded with.

[NOTE.—The Court thereupon called upon counsel to argue the appeal, but, thereafter, at the request of the parties and by the leave of the Court, the appeal was taken off the hearing list and adjourned *sine die*.]

DE FREITAS *v.* BHOWANEY PERSAUD

DE FREITAS *v.* BHOWANEY PERSAUD

[235 of 1915].

1917. MAY 30, JUNE 13, 16.

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

Slander—Damages—Pleading—Particulars—Privilege—Malice—Practice—Recalling of judgment after decision given—Consent.

Appeal from the decision of Hill, J.

Plaintiff claimed the sum of $750 as damages for slander. The facts are sufficiently set out in the judgment below, judgment being entered for the plaintiff in the sum of 150, and costs.

Judgment was given on September 22nd, 1916 in the following terms.

HILL, J.

This is an action in which the plaintiff claims $750, for slander. The facts as I find them are, that he was employed by the defendant as salesman in the "Indian Bull" spirit shop, and on the night of May 15th, 1915, a robbery was committed at that shop. The defendant accused him of being the thief on three separate occasions on the same day—on the first occasion he was present—but not on the second or third. On the two last occasions the statements were made to and in the presence of persons who had no interest in or connection with the business.

The only plea in defence necessary to consider is that of privilege, and as I have concluded that qualified privilege exists as to one of the statements, but not to the other two, it is unnecessary for me to decide whether, in view of the defendant's denial that he uttered the defamatory words (which I do not believe) he is not debarred from proceeding with the plea of privilege.

The case that seems to me to govern the circumstances in this matter as set out in the evidence is that of *Toogood* v. *Spyring* (1. C. M. & R. 181), and applying the law as laid down in that case, I find that there was qualified privilege in the statement made in the shop in the first instance, *i.e.*, the occasion of the publication afforded a defence in the absence of express malice, but not in the statements made in the absence of the plaintiff, to Menezes in the shop, and on the street or bridge.

In these circumstances the defendant is liable in damages which I fix at $150, with costs.

From this decision the defendant B. Persaud appealed.

MAY 30TH.

P. N. Browne and *C. R. Browne,* for the appellant.

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

De Freitas took the objection that the appeal was not properly before the court, on the ground that the memorandum of the grounds of appeal was not filed and served within ten days after October 12th, 1916, the date when notice of appeal was filed in the Registrar's office as required by Order XLIII., rule 10.

P. N. Browne was unable to state that the rule had been complied with.

MAJOR, C.J.: The objection is a good one and however much I might be inclined to allow any extension, I do not see how under the circumstances we can do anything but dismiss the appeal. On the objection taken the appeal must be dismissed with costs.

BERKELEY, J.: The objection is fatal and the appeal must be dismissed with costs.

Appellant thereafter gave notice of motion applying for an order that the objection taken on May 30th be reviewed and reconsidered, and that the judgment dismissing the appeal be set aside on the ground of error and mistake. In support of the application it was stated that October 22nd, 1916, the last day limited for filing the memorandum of the grounds of appeal was a Sunday, and as provided by Order XLV., rule 1 (4) the memorandum was filed in the registry, and a copy thereof served on the respondent's solicitor on October 23rd, the next day after.

The application came on for hearing on June 13th.

P. N. Browne, C. R. Browne with him, for the applicant (appellant),

M. J. C. de Freitas for respondent.

De Freitas, in reply to the court, stated that he had been misled, and that he agreed that one of the days, as mentioned in the application, was a Sunday; that he did not therefore propose to oppose the application but agreed with the other side that the appeal should, if possible, be heard on its merits.

MAJOR, C.J.: The misrepresentation was a *bona fide* one. The court having proceeded on a wrong basis of fact is asked to exercise its inherent power. Both sides having agreed, the objection is cleared away; the application will be granted and we will hear the appeal.

BERKELEY, J.: As counsel for respondent has no objection to offer to the granting of the application but consents to its allowance, the application will be granted.

The court thereupon proceeded to hear argument on the appeal and reserved its decision.

JUNE 6TH.

Decision on the appeal was given.

SIR CHARLES MAJOR, C.J.: This is an appeal brought by the defendant from the judgment of the learned junior puisne judge on the 22nd September last, awarding the plaintiff damages for slander.

The statement of claim in the action set out (a) in paragraph two that on the 15th May, 1915, the defendant, in whose employ the plaintiff then was, at his shop spoke and published of the plaintiff the words: "Yes, it is you Mr. de Freitas; you got my money; you rob the place; you are damned thief," in the hearing and presence of divers persons; (b) in paragraph four, that the defendant, subsequently on the same day, on the bridge of the spirit shop, spoke and published, in the presence and hearing of divers persons, the words: "No one but de Freitas rob the shop."

That was clearly faulty pleading, for in an action for damages for slander, not only the precise words used but the names of the persons' to whom they were spoken must be set out in the statement of claim. And the defendant, properly speaking, should have applied to the court under rule 8 of Order XVII that the plaintiff be ordered to furnish further and better particulars of the matter of the slander stated in the claim. In accordance, however, with a practice adopted here, it seems, but which is, I think, of doubtful authority, the defendant's solicitor applied to the plaintiff's solicitor by letter for further and better particulars in respect of the names of the divers persons referred to in the claim as those in whose presence and hearing the slanderous words were used. The defendant's solicitor replied in the following terms: "As to the slanderous words referred to in paragraph 2 of the statement of claim, the same were used to the plaintiff in the presence of J. G. D'Andrade, Sergeant Pollard, one Pereira and other persons whose names are unknown to the plaintiff. As to the slanderous words referred to in paragraph 4 of the statement of claim, the same were used to the plaintiff in the presence of J. G. D'Andrade, Sergeant Pollard, one Pereira, Manoel Menezes, and one Vieira (rent collector)."

The letter from the defendant's solicitor and a copy of that from the plaintiff's solicitor were by the latter writer filed in the pro-

ceedings and formed part of the record, thus becoming as described by Vaughan Williams, L. J., in *Milbank* v. *Milbank,* 1900 1 ch. 376 "really supplemental to the pleadings. They are in fact amendments of the pleadings."

To the statement of claim, then supplemented and amended, the defendant pleaded in defence, traversing the allegations in the claim and, if the words there set forth were used, the meaning assigned to them by the plaintiff, and, alternatively, that the defendant as proprietor of the business of the shop carried on for him by D'Andrade for a share in its profits and where the plaintiff slept and kept the keys of the safe, used the words to the police during an investigation conducted by the latter at the defendant's instance, on a report to him by D'Andrade that the shop had been broken and moneys and stock stolen therefrom. The statement of defence concluded— "As the proprietor of the the said shop it therefore became and was the duty of the defendant to give to the police such information as was within his knowledge and if he the defendant did speak or publish any of the words set out in the statement of claim they were spoken and published on a privileged occasion, namely, during and in consequence of the aforesaid investigation *bona fide* and in discharge of the said duty and without malice towards the plaintiff."

It has been necessary to detail the pleadings thus at some length on account of the course the proceedings took at the trial and the arguments thereon that have been addressed to this court by counsel for the parties, and it is as well at this stage to say somewhat about the position of the parties, at the trial created by the pleadings.

As to the particulars. The object of particulars, whether given in a pleading or ordered to be supplied as supplementary thereto, is well known. It is to prevent the opposite party being taken by surprise at the trial. In *Thomson* v. *Birkley* (31 W. R. 230) Watkin-Williams, J., said "particulars limit inquiry at the trial to matters set out in them," and Vaughan Williams, L.J., in the case to which I have already referred, said: "Sometimes particulars have been allowed . . . . . as limitation of the claim, ...to limit the extent of the evidence to be given at the trial." The parties, therefore, who furnishes particulars marks out for himself the road he means to travel. He must not go beyond it He may, however, fall by the way before he reaches his limit, and it then becomes the duty of the judge to say how far his evidence has taken him and with what result in support of his particulars of claim. Particulars here given were of the names of the persons to whom and in whose presence the plaintiff proposed to prove the defamatory words to have been spoken. He might prove the presence and hearing of all of them or only some of them. What

he could not do was to offer evidence of the presence and hearing of any others.

I need not recount *verbatim* the testimony of each of the four witnesses called in support of the plaintiff's claim as to the two occasions mentioned in the pleadings when the defamatory words were use. The learned judge held the first occasion to be privileged. We agree with that opinion and are concerned with the second occasion only and the use of the words "No one but de Freitas rob the shop," The sum and substance of the evidence is that neither the plaintiff nor Pollard spoke as to the second occasion; that D'Andrade proved that the words were spoken, not to any one in particular, but in the presence and hearing of Menezes, Vieira, Pereira and himself collectively; that Menezes gave the same evidence as D'Andrade, save that he did not mention Pereira, but "Gonsalves" (i.e., D'Andrade) Vieira and "some two others." Now that evidence, coupled with the form of words used and the statement of the plaintiff himself as to what occurred directly after the first occasion— "He (Persaud) told Sergt. Pollard to put me outside. I went out and sat on step. They talked more and then another policeman carried me to the station where I remained until six p.m."—seemed to the learned judge at trial and seems to us clear proof that neither the plaintiff nor Pollard was present on the second occasion.

Now the appeal has been argued by Mr. Browne on the question of privilege entirely as though the plaintiff and Pollard had been present on the second occasion. Their presence in fact is necessary to support his contention that it was a privileged occasion and he claims that we must assume their presence because the plaintiff so stated in his particulars and is bound thereby. The obligation on a party created by his delivery of particulars does not mean that he is bound to prove every matter therein stated, as here for instance, the presence and hearing of every person named in the particulars; it means, as already explained, no more than he may not prove more matters than are alleged. The failure, therefore, of the plaintiff to prove his particulars to the full cannot preclude the judge from considering those particulars as proved. The defendant, moreover, pleaded privilege not because the objected words were used to the plaintiff or in his presence but because they were spoken to the police during and in consequence of a *bona fide* investigation into a suspected theft, in discharge of the defendant's duty and without malice. The case had to be determined, not upon the pleadings, but the evidence given in support of the allegations therein. The learned judge held, on that evidence, that the words used on the second occasion, were spoken in the absence of the plaintiff and

in circumstances that avoided the privilege claimed for them. We see no reason to differ from that opinion.

I have entirely disregarded those portions of the evidence given by the plaintiff and his witnesses relating, it seems, to a third occasion when the learned judge found defamatory words were spoken, because, in my opinion, that evidence was inadmissible to prove any occasion outside those specifically referred to in the pleadings, and because I think, on the authority of *Jacker* v. *International Cable Co.* (5 T. L. R., 13) mentioned by me during the argument, that this Court is bound to reject that evidence even though admitted in the Court below without objection.

If I thought that the learned judge had, in awarding damages, allocated a specific portion of the sum to the third occasion of defamation, or treated the second and third occasions separately in his mind, I should be in favour of reducing the amount of damages by half rather than send the case for retrial, as occurred in *Toogood Spyring.* But it seems to me that damages were awarded generally, and the sum does not, in the circumstances, seem to me to be in any way excessive.

The appeal must be dismissed with costs.

BERKELEY, J.: I have read the decision of the Chief Justice in this matter and I am in agreement with him as to the conclusion arrived at, namely, that the appeal must be dismissed with costs.

THE GEORGETOWN COCONUT ESTATES, LIMITED,
v.
"THE ARGOSY" COMPANY, LIMITED, AND J. CUNNINGHAM.

[261 of 1916.]

1917. JUNE 11, 16.

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

Practice—Commencement of proceedings by attorney of foreign company—Authority of attorney—Irregularity—Rules of Court, Order III., r. 9; Order LI., r. 1.

A person who commences proceedings on another's behalf must have written authority to do so. The issue of a writ of summons without proper authority is not such an irregularity as can be cured by the Court under the provisions of Order LI., relating to irregularities, but the defendant is entitled to have the writ set aside *ex debito justitiae.*

Appeal from the decision of Berkeley, J.

A writ was issued by The Georgetown Coconut Estates, Ltd., "by their duly constituted attorney in this colony Henry Daley" against "The Argosy" Company, Ltd., and John Cunningham claiming the sum of $5,000, for libel. After appearance had been entered by the defendants application was made to the court to strike out the writ and set aside the proceedings in the action, on the ground that the power of attorney of the plaintiffs did not empower their attorney to bring or carry on the action on their behalf, and further that the authority produced and filed by plaintiffs' solicitor under Order III, r. 9 was not signed by the plaintiff or an attorney duly authorised to act.

The power was as follows:—

TO ALL TO WHOM THESE PRESENTS SHALL COME WE THE GEORGETOWN COCONUT ESTATES, LIMITED whose registered offices are situate at 37-38 Mark Lane in the City of London SEND GREETING.

WHEREAS we have determined to appoint Henry Daley of Georgetown British Guiana now temporarily residing at 14 Cole-hill Gardens Fulham Palace Road in the County of London late Captain in H. M. Army to be our Attorney for the purposes hereinafter expressed NOW THEREFORE KNOW YE that we do hereby appoint the said Henry Daley (hereinafter called "the Attorney") to be our attorney in our name and on our behalf to do all or any of the things following that is to say:—

1. IN our name and on our behalf to enter into any agreement with any planter propuce broker merchant or other person in British Guiana for the supply to us of coconuts on such terms as to price and delivery as he may consider expedient and beneficial.

2. TO complete the purchase of the properties which we have recently acquired from the Western Coconut Estates Limited (full particulars whereof are set out in the schedule hereto) and for that purpose in our name and on our behalf to execute all deeds documents mortgages and other instruments which may be necessary or expedient for that purpose and for carrying the said agreement into effect.

3. TO attend at the Registry in British Guiana for the purpose of having the said properties registered in our name and to procure this document or some other sufficient instrument to be registered in the Courts of British Guiana to enable the said purchase to be carried into effect.

4. IN our name and on our behalf to select a site in British Guiana for the purpose of the erection of a factory for the manufacture of copra in connection therewith and to enter into a lease or leases for the acquisition of the said site on such terms as he may deem expedient and being such as he may consider equitable in accordance with the custom law and rights in the district selected for the said site.

5. ON our behalf to engage and employ labourers workmen planters and others on such terms as may seem expedient to plant and cultivate any or all of our estates, to appoint a sub-manager to supervise the said work and generally to take all necessary steps to cultivate the said estates and to remove or dismiss any person appointed.

6. TO appoint in British Guiana a local Board with a view to organising the business of the Company in that district on such terms as to remuneration as the Board of Directors in London may from time to time direct or determine.

7. IN our name and on our behalf to execute all other deeds documents leases concessions assignments contracts and other instruments that may be necessary in and about the premises and to appear before all or any of the judges of the Supreme Court of the Colony to pass or receive transports of properties or sign or execute any of the aforesaid deeds documents leases assignments mortgages contracts or other instruments whatsoever.

8. IN our name and on our behalf in his discretion to create and obtain advances in cash on the security of any of the Company's property in course of transit to England or elsewhere to be used by him for the purposes of the Company.

9. IN our name and on our behalf to make application to the Government of the Colony of British Guiana for all licences, grants, leases or other concessions.

10. IN our name and on our behalf to present bankruptcy petitions against any person or persons company or syndicate that may be or become indebted to us in the Colony of British

Guiana to attend all meetings of creditors of any debtor or insolvent debtor and to assent or execute or dissent from any composition or scheme of arrangement and to take all necessary steps for setting aside or annulling any scheme of arrangement and to consent to the discharge of any insolvent debtor or debtors or oppose the same.

11. IN our name and on our behalf to attend at meetings of any bank syndicate or corporation or any other undertaking and to vote thereat.

12. IN our name and on our behalf to give receipts for payment of moneys and to give receipts, releases and discharges for all moneys received by him on our behalf.

13. TO take any legal proceedings in the colony which he may consider necessary in regard to any of the matters herein referred to or generally on our behalf in the colony to accept service of writs and other processes on our behalf and to appear thereto or in the alternative to become nonsuited or allow judgment to be taken against us as he may deem expedient.

14. GENERALLY to act as our Attorney for the purpose of all the matters above referred to and generally for the purposes of carrying out our business in the Colony of British Guiana and to carry out the directions of the Board of Directors which may from time to time be given to him and whatsoever our said Attorney shall do or purport to do by virtue of these presents we do hereby undertake to ratify and confirm and we declare that this Power shall be irrevocable for a period of twelve months from the date hereof.

IN WITNESS whereof, etc.

The decision on the application was delivered on February 17th, 1917, and was as follows:

BERKELEY, J.: This is an application to strike out the action and set aside all proceedings of the plaintiffs relating thereto on the grounds that the power of attorney of the plaintiffs described on the endorsement of the writ of summons does not empower the plaintiffs' attorney to bring or carry on this action on behalf of the plaintiffs, that the plaintiffs' solicitor alleged to be acting is not duly authorised to act, and that the authority produced and filed by the plaintiffs' solicitor is not signed by the plaintiffs or by an attorney duly qualified so to sign.

The power of attorney which is laid over constitutes Henry Daley as "our attorney in our name and on our behalf to do all or any of the things following, that is to say," and then there follow some fourteen clauses. The first twelve separately deal with some specific matter. Clause 13 empowers the attorney to "take any legal proceeding in the colony which he may con-

sider necessary in regard to any of the matters herein referred to," and then clause 14 "generally to act as our attorney for the purpose of all the matters above referred to and generally for the purposes of carrying out our business in the colony of British Guiana, and to carry out the directions of the Board of Directors which may from time to time be given to him." Then follows the usual undertaking to confirm whatever the attorney does in the premises.

It is submitted by counsel that, as the attorney is authorised by clause 3 to employ labourers, by clause 8 "in our name and on our behalf in his discretion to create and obtain advances in cash," and by clause 9 "in our name and on our behalf to make application to the Government of the colony of British Guiana for all licences, grants, leases or concessions," a libel on the plaintiffs would seriously affect their reputation and thus hinder the attorney in the carrying out of the powers conferred on him by the above clauses, and that therefore such an action as the present one is covered by the words of clause 13 which authorises the attorney "to take any legal proceedings in the colony which he may consider necessary in regard to any of the matters herein referred to." In the Court's opinion this submission is not warranted. The power of attorney is specially limited, and the Court is satisfied that in bringing this action the attorney is not acting within the powers conferred on him by the power of attorney.

There are two further points taken, that the authority may have been obtained by cable or otherwise, and that the present application is not open to the defendants, and, at the most, proceedings would be stayed. Counsel for the applicants raised an objection, namely, that these points should be taken *in limine*, but the Court decided to allow counsel to proceed. As to the first point it is sufficient to say that it is negatived by the endorsement on the writ, and as to the second, reference has been made to Order LI., rule 1. If the Court could see its way to regard as an irregularity the fact that the attorney was not authorised, then the Court would be disposed to stay proceedings, but it seems that the step taken was more than an irregularity within this rule. A stay of proceedings cannot, in the opinion of the Court, be ordered, as the question of authorisation seems to go to the very root of the action, and if there is no power to institute proceedings then it follows that those proceedings cannot be allowed to stand and must be struck out.

Application granted with costs.

From this decision the plaintiff company appealed on the following grounds:—

(1.) the learned judge erred in holding that, in bringing the action, the plaintiffs' attorney was not acting within the powers conferred on him by the power of attorney;
(2.) if the power was insufficient, the learned judge had a discretion to stay the proceedings for a reasonable time to enable the plaintiff's solicitor to obtain a formal authority, and the judge acted on a wrong principle in deciding that the proceedings must be struck out;
(3.) the defendants' application ought not to have been allowed, because it was not made within a reasonable time, and because the defendants had taken fresh steps in the action after knowledge of the alleged irregularity.

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

If the power of attorney gives no authority to commence the action, then the authority to the solicitor to sue is of course quite irregular. Power is of wide extent, specially indicated by clause 6, Clause 13 gives authority to take any legal proceeding in matters "herein referred to." Would undoubtedly authorise attorney to recover debts or protect company against illegal execution or trespass. What distinction can be drawn between protecting company's property and reputation? The latter is a most valuable asset.

If the power was not sufficient, then the authorisation to plaintiff's solicitor was a nullity, and Order III. r. 9 was not complied with. This noncompliance with the requirements of the rule was an irregularity which should be dealt with under Order LI., r. 1. Appearance had been entered by the defendants. The irregularity does not render the proceedings void. A stay only should be granted, Cites *Duckett* v. *Grover* (25 W.R. 554), and *Geilinger* v. *Gibbs,* (1897 1 Ch. 479).

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

The power is one of very limited extent. Clause 13 distinguishes between taking proceedings and defending actions. No power to take proceedings as has been done here. This is not a mere irregularity but goes to the very root of the action. Cites *Smurthwaite* v. *Hannay* (1894 A.C. at p. 506).

Laurence, in reply.

SIR CHARLES MAJOR, C.J.: This is an appeal from an order of the learned senior puisne judge thus drawn up and entered: "The court upon the application of the defendant . . . grants the application." The application which the court granted was "to strike out the action and set aside all proceedings of the plaintiffs relating thereto," on the grounds (1) that the power of

attorney of the plaintiffs described in the indorsement of the writ of summons in the action did not empower the plaintiffs' attorney to bring or carry on this action on behalf of the plaintiffs; (2) that the solicitor alleged to be acting for the plaintiff's in the action was not duly authorised to act for the plaintiffs in the action; and (3) that the authority produced and filed by the plaintiffs' solicitor in the action under Order III, rule 9, was not signed by the plaintiffs or by an attorney duly authorized so to sign.

The writ of summons in the action was issued by the plaintiffs' solicitor who, in accordance with rule 9 of Order III. (not being authorized thereto by a general power *ad lites*) produced to the Registrar, when presenting the writ of summons, an authority in writing, signed by the plaintiffs' attorney, to act for them in the action. It is obvious that, if the plaintiffs' attorney had no power to authorise the commencement of proceedings, the plaintiffs' solicitor had no proper or sufficient authority to issue the writ, so it is not suggested that he acted otherwise than under instructions and the written authority obtained from the plaintiffs' attorney produced to the Registrar.

A person who commences proceedings on another's behalf must have authority to do so, and it is objected that the terms of the instrument constituting Mr. Henry Daley the plaintiffs' attorney did not enable him to authorize the commencement of these proceedings. The validity of the objection depends upon the construction of the words in the instrument— "To take any legal proceedings in the colony which he may consider necessary in regard to any of the matters herein referred to." "The matters referred to" are various. It is not necessary to set them out in detail. Mr. Daley has considered and concluded that these proceedings, an action for libel on the plaintiff's by the publication in the defendants' newspaper, of comment on a report of certain proceedings in England to which the plaintiffs were parties, are necessary in regard to some one or more of the matters referred to in his power of attorney and has launched them accordingly. It was for the learned judge in the court below, and it is now for this court, to decide whether Mr. Daley's conception of his powers was correct. I am of opinion that it was not, for I am unable to see in what respect these proceedings can be said to be necessary either to enable Mr. Daley more effectually to exercise the powers conferred upon him by the plaintiffs, or to prevent the various purposes of the company, to effect which he has been appointed, being prejudiced, restricted or defeated.

With the plaintiffs' contention that the commencement of proceedings without proper authority is such an irregularity as can be cured under the provisions of our rules of Court relating to

irregularities I cannot agree. The unauthorised issue of a writ of summon on behalf of another, or its issue under an authority which the author had no power to give is in a sense an irregularity, but in the sense that the defendant named in the writ is entitled to have it set aside as of right. It is not an act open to a plaintiff and done without the observance of some formality connected with it by rule of court, but an act altogether unwarranted by law. The old case of *Anlaby* v. *Praetorius* 20 Q. B. D., 764, is instructive on this point. There judgment was signed on supposed default in delivery of defence within the time limited for so doing. On the rules relating to delivery of defence after statement of claim and signing judgment in default thereof, the judgment was described by Fry, L.J., as premature and "irregular," the particular epithet on which Mr. Laurence has laid such stress in his argument. The learned Lord Justice continued: "In such a case the right of the defendant to have the judgment set aside is plain and clear. The Court acts upon an obligation; the order to set aside the judgment is made *ex debito justitiae*." Referring to the provisions of Order LXX., rule 1—which is our Order LI., rule 1, his lordship said: "In the present case we are not concerned with an instance of non-compliance with a rule, nor with an irregularity in acting under any rule. The irregular entry of judgment was made independently of any of the rules; the plaintiff had no right to obtain any judgment at all." Lopes, L.J., followed, saying: "I entirely agree that Order LXX, rule 1, does not apply here. It was meant to apply where a party had made some blunder in his proceedings, as by delivering of a pleading too late; but the present case seems to me altogether outside the operation of rule 1, because the judgment was entered prematurely, without any right whatsoever. To obtain that judgment was a wrongful act, not an act done within any of the rules. The defendant is therefore entitled *ex debito justitiae* to have it set aside."

Here it seems equally clear to me, proceedings were commenced without enabling authority in that behalf, an act which the plaintiffs' attorney had no power to order and the plaintiffs' solicitor, therefore, no sufficient authority to carry on, The arguments, therefore, addressed to us on the assumption that the act here was an irregularity contemplated by Order LI., relating to unconditional appearance and lapse of reasonable time, fall to the ground.

The order of the learned judge was, in my opinion, right, and the appeal must be diminished with costs.

DALTON, J. (Actg): The principal question raised in this appeal is whether the plaintiffs' attorney, in bringing the action, was acting within the powers conferred on him by the power of

attorney relied on. Appellant relies of course on no general words in the power, but as he says on the express wording of clause 13 which authorises him "to take any legal proceedings in the colony which he may consider necessary in regard to any of the matters herein referred to." The other clauses which have been fully discussed, it is urged, give him full power to protect the reputation of the company from any damage it may suffer from libellous statements respecting it.

Now it cannot be contested that powers of attorney must be very strictly construed, and applying that principle I am quite unable to agree with appellants' counsel that this is a power of very wide authority. The power to take legal proceedings is far more limited than is usual in such documents, and I can find no implication therein that the attorney is authorised to take such proceedings as he has done here. After a careful and thorough perusal and consideration of the document I think the learned judge in the Court below was quite correct in the conclusion to which he came.

A further question was however raised in the appeal. Assuming that the attorney had no power to take the proceedings as he has done, counsel now states his act was merely an irregularity, and that the proceedings should have been stayed until the attorney's authority was put in order. In support of his contention he cited the case of *Duckett* v. *Gover* (25 W.R. 554). In that case the name of a company had been added as co-plaintiff and application was made to strike out the company's name on the ground that its use had not been authorised by the company. The application not having been made by the company, Jessel, M.R., held that the proceedings should be stayed to allow the company, if necessary, to take the proceedings itself. It seems to me that the matter before this Court is on quite a different footing.

Under Order LI. proceedings are not void for irregularity, but can be dealt with as the Court thinks fit. But is not the commencement of this action by the attorney with no authority to act as he has done, far more than an irregularity? I think it clearly is. In the case of *Smurthwaite* v. *Hannay* (1894 A.C. 494), cited at the bar, the mere joinder of plaintiffs in a way not authorised by Order XVI. was held to be more than an "irregularity"; the case before us goes much beyond that. I fail to see that the learned judge acted on a wrong principle in deciding that the proceedings must be struck out. He had no option, in my opinion, to decide otherwise than as he did.

I agree that the appeal must be dismissed, with costs.

COX *v.* LILLIAH.

1917. JANUARY 19, 27. BEFORE DALTON, J. (Actg.)

Appeal—Criminal law—Evidence—Confession—Evidence of confession, when admissible—Inducement.

In order that evidence of a confession by a prisoner may be admissible, the onus is on the prosecution to show that such confession was free and voluntary, that is, that it was not obtained by any invitation or inducement to the prisoner, whether express or implied and however slight, held out by a person in authority.

Appeal from a decision of the Stipendiary Magistrate of the Georgetown Judicial district (Mr. W. J. Gilchrist) who convicted the appellant Lilliah on two charges of receiving stolen property, well knowing the same to have been stolen, and sentenced him to six months imprisonment with hard labour on each charge.

The reasons for the appeal appears from the judgment.

J. A. Luckhoo for the appellant.

Confession should not have been admitted as it was not free and voluntary. The property, the subject of the charge, was never in defendant's possession or under his control. He should have been given the benefit of a reasonable doubt—cites *Regina* v. *Thompson,* 1893, 2 Q.B. 12; *Regina* v. *Histed,* 19 C.C.C. 16; *Rex* v. *Berger,* 31 T.L. 159; *Rex* v. *Schama,* 31 T.L. 88; *Baboo Ballack* v. *Hill* A.J. Feb. 19th 1909.

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

Confession was admissible, although only part admitted (Archbold's *Criminal Practice,* p.p. 396 and 397.) Question of hostility of witnesses for magistrate alone to decide; evidence of two witnesses Dowlat and Badal that stolen bicycle was in appellant's possession and under his control quite conclusive.

Luckhoo, in reply.

DALTON, J. (Actg.): The appellant is charged, firstly, with receiving a bicycle and lamp well knowing the same to have been stolen, and secondly, with receiving a certain tie-pin and cigarette case also well knowing the same to have been stolen. He was convicted on both charges and sentenced to six months' hard labour on each, the sentences to run concurrently.

The grounds of appeal, shortly put, are as follows:—

(1) the admission of illegal evidence, namely, an alleged confession to Inspector Cox;
(2) that, without such confession, there was not sufficient evidence to warrant the conviction, it not being proved that the goods, the subject of the charges, were ever in appellant's possession or under his control.

It is further stated in the grounds of appeal that further illegal evidence had been admitted against the appellant, namely, the evidence of Inspector Gamble and Sergeant Sandiford respecting certain statements made to them by two of the witnesses. It is quite clear, however, from, the record that this evidence was only admitted in respect of the application by the prosecution to treat those two witnesses in question, who had been called by the prosecution, as hostile witnesses, and that it was not admitted against the defendant in respect of the charges he was answering.

To consider then the first ground of appeal as already given. At the time of the alleged confession the prisoner was in custody, but in respect of the charge of receiving the bicycle and lamp only. He was, the evidence discloses, sent for by Inspector Cox, who, it must be noted, was not only in this matter an Inspector of Police but also the owner of the stolen property, the subject of the first charge, and was asked if he would "like to explain about the bicycle." Up to that time there is no evidence whatsoever that the prisoner wished to say anything. On that question being put to him he started to give his explanation, and thereupon the Inspector says he cautioned him four or five times. After these cautions the prisoner still proceeded with his explanation, and questions were put to him by the Inspector. The first part of the confession was admitted by the magistrate but the latter part was not admitted. I have some difficulty in following the decision of the magistrate on this point, for it has been clearly laid down that in all cases, if a confession is admissible, the whole of it should be given in evidence and not part only. It is quite possible that something of advantage to the prisoner was stated in the part that was rejected; (see Archbold *Criminal Practice,* p. 399, and cases there cited).

It is clear then that the confession started on the invitation of the inspector. For such a confession to be admissible it must be free and voluntary, not extracted by any kind of threat or vio-

lence, nor obtained by any direct or implied promises, however slight. (*Regina* v. *Thompson,* 1893, 2 Q.B. 12). Although cautions were given after the prisoner was sent for and the invitation was made, the inspector must entirely have overlooked the respective positions of himself and appellant, and the effect which such an invitation, and the circumstance in which it was made, would have on the mind of the prisoner, It is for the prosecution to show that the confession was entirely free and voluntary, and that has not in my opinion been done. I therefore hold that the magistrate was wrong in admitting any part of it.

To come now to the second ground of appeal, and addressing myself to the first charge, that of receiving the bicycle, is there sufficient evidence remaining after rejecting this alleged confession to justify the magistrate in convicting the prisoner on the charge? Is there a mere scintilla of evidence, or, the evidence being what it was, could the magistrate not have reasonably come to the conclusion that the prisoner was guilty on the charge?

The evidence led for the prosecution shows that, some time after the bicycle was stolen from Eve Leary barracks, one Rattan was seen riding it at Den Amstel, by one Jhumon a servant employed at the barracks. Rattan explains that he got the bicycle from one Dowlat by an exchange. Dowlat states in his evidence that he borrowed the bicycle from a woman named Jessibun. It is admitted that Jessibun had been living at Leonora with the prisoner, and a warrant to search the room in which they had resided was then obtained. In the room, in addition to other things, the lamp of the stolen bicycle was found in a saucepan hanging on the wall. Jessibun, who was called by the prosecution, denies that she had ever seen the bicycle before, but she states that she had lived in the room that was searched with the prisoner, and that it had been locked, she retaining the key, since he left her some six weeks, she states, before the search (Nov. 3rd). It is true that both witnesses, Dowlat and Jessibun, were with the permission of the court, and it is entirely within the discretion of the court whether such permission should be granted or not, treated as hostile witnesses, but it was not put forward that such discretion had been wrongly exercised.

In addition to this evidence which by itself, is not very strong against the prisoner, there is, however, the further evidence of Badal, a rural constable at Leonora. He swears that only some two weeks before he gave evidence (Nov. 7th) he heard the prisoner and Jessibun talking about a bicycle, that he saw a bicycle in the room where the two lived, that the prisoner told him that he had bought the bicycle (in reply to his query), and that he saw Dowlat removing the bicycle from prisoner’s room. He is not,

however, prepared to positively identify the bicycle as the stolen one, but he says it was one like it.

I am quite satisfied that there is evidence from which, if he believed it as he says he did, the magistrate might reasonably find that the prisoner had had the stolen bicycle in his possession and that he was guilty on this charge. That being so I have no reason to interfere with his decision whereby he convicted the prisoner, I would add, however, that the evidence by which it was sought to prove an *alibi* was obviously unsatisfactory with respect to time.

On the second charge, the confession not being admissible, the Solicitor General intimated that he could find no evidence on which he could support the conviction, with which I entirely agree.

The conviction on the first charge will be confirmed and the conviction on the second charge will be quashed.

NASIBAN AND OTHERS *v.* ALVES AND OTHERS.

[106 of 1916.]

1917. JUNE 18.

BEFORE BERKELEY, J., AND DALTON, J., (Actg.)

Appeal—Notice of appeal—Parties affected by the appeal—Infant—Next friend—Guardian ad litem—Rules of Court 1900, Order XLIII., rule 9*—Practice.*

A copy of the notice of appeal must be served by the appellant on all parties affected by the appeal.

Notice of the appeal under the provisions of Order XLIII., rule 9, must be served by the appellant upon a co-defendant of the appellant in the court below, who did not appear to the writ of summons but submitted to the order of the court, and who on the facts shown, is affected by the appeal.

Appeal from a decision of Sir Charles Major, C. J. (*a.*)

On the appeal coming on for hearing objection was taken for the respondents Nasibun and others, first, that the guardian *ad litem,* by whom the plaintiffs (now respondents) appeared and on whom the notice of appeal was served, was not a party to the action within the meaning of Order XLIII., rules 9 and 10; and secondly, that no notice of appeal had been served on Synadabi, a co-defendant with the appellants.

P. N. Browne, for the respondents.

The guardian *ad litem* is not a party. He is the same as next friend of an infant. The latter is not a party. Cites *In re Corsellis,* 31 W. R. 414; *Dyke* v. *Stephens,* 30 Ch D. 189.

No service of notice of appeal on Synadabi. She was present in the court below to abide by any order the court made, although she did not enter appearance. Even so, she could appeal; *Ex parte Streeter*, 19 Ch. D. 216.

E. G. Woolford, for the appellants.

No similarity between guardian *ad litem* and next of friend. Service must be on the officers appointed by the court. Issue of writ was act of guardian himself.

Synadabi not served with any pleadings; if service is necessary, time for service can be enlarged under Order XLV., rule 4.

The Court upheld the objection taken.

BERKELEY, J.: This is an appeal from the decision of the Chief Justice who ordered the defendants Alves and Tabjul to deliver up to the plaintiffs and the defendant Synadabi possession of certain lands and premises leased to them by one Meerza and his wife, the said defendant Synadabi, for a term of 15 years.

(a) Reported above at p. 11.

Counsel for the plaintiffs takes objection *in limine* to the hearing of the appeal on the grounds (1) that notice of appeal was not served on the plaintiffs but on their guardian *ad litem*, and (2) that the defendant Synadabi had not been served.

The decision of the court was in favour of the defendant Synadabi as the lease made by her was in effect ordered to be set aside. The two defendants who are appellants seek to have this order cancelled, and she therefore is a party affected by the appeal and ought to have been served with notice under O. XLIII, r. 9.

On this finding it is unnecessary to deal with the first objection taken by counsel.

The appeal is dismissed with costs of appeal.

DALTON, J., concurred.

PETTY DEBT COURT, GEORGETOWN.

[52—4—1917.]

YEARWOOD *v.* YARD.

1917. JUNE 6, 19. BEFORE DALTON, J. (Actg.)

Husband and wife—Marriage in community of property—Absence of husband from colony—Action by wife unassisted by husband—Married Persons Property Ordinance 1904, section 16.

A woman, married in community of property, cannot institute proceedings in her husband's name without his assistance or approval. In the unavoidable absence of such assistance leave may be granted to her on good cause shown to take proceedings in her own name.

This was a claim by "George Massiah Yearwood as having been married in community of property to Dora E. Yearwood" as plaintiff, against the defendant Yard for the sum of $100 as damages for personal injuries sustained by plaintiff's wife during the month of November, 1916, through the falling of a platform attached to a house belonging to defendant, negligently and carelessly kept by him in a defective condition, whilst in the tenancy of plaintiff's wife, and after due notice of the defect.

J. S. McArthur, for the plaintiff.

P. N. Browne and *C. R. Browne,* for the defendant.

DALTON, J. (Actg.:) An objection has been taken by counsel for defendant, after plaintiff's wife gave her evidence that, although the plaintiff is described as "George Massiah Yearwood

as having been married in community of property to Dora E. Yearwood," the husband has in fact never authorised these proceedings and is no party thereto.

Proceedings in this court are taken on verbal instructions as a rule. No authority in writing to any solicitor or barrister is required. From the evidence (and Mr. McArthur states that so far as this objection is concerned he relies entirely on the evidence of Mrs. Yearwood) it is clear that G. M. Yearwood is not and has not been in the colony for at least the last two years and has never either directly or indirectly assisted his wife to take any proceedings. It must be noted also that in giving her evidence the wife begins "I am plaintiff and married to my husband George Massiah Yearwood in community of property." I have no doubt from what she states that these proceedings originated with her and without the knowledge or consent of her husband.

The alleged accident, the cause of the action, is stated to have happened in November, 1916. Now, nothing is clearer in Roman-Dutch law than that a married woman cannot as a rule institute or defend an action in her own name. This case does come within any of the exceptions. Neither can she evade that rule by starting proceedings in her husband's name in the manner she has done here. There is nothing before me to show that the husband who is plaintiff knows anything of the proceedings at all, although he is in Barbados and communicates with his wife. It is true that in the case of a husband's unavoidable absence a wife has generally the power to transact business, subject to his ratification, whilst in the case of taking legal proceedings that ratification or assistance can be made or given, as the case may be, at any time before evidence is led (*Peters* v. *Peters* 29 N. L. R. 670), but in the absence of such assistance the procedure to be followed by her in commencing any action has been clearly laid down. She must obtain the leave of the Court, as is required of a person under disability. That leave Mr. McArthur has asked me to give now, but sitting in this court my powers are strictly defined by statute, and I have no power here to grant his request, even if it was in time and in the proper form. In the words of Grotius "she may ask for the authority of the court to make good the defect of her husband's absence." The reason is obvious, as he might also bring the action himself. (Maasdorp's *Grotius,* Schorer's notes p. 377; Nathan, *Common Law,* Vol. IV. p. 2103). The permission of the court having been obtained on good ground shewn, the wife can, if necessary, be permitted to sue in person without the assistance of her husband. (*Ex parte Klopper,* 23 S.C. 445; Van Zyl's *Judicial Practice* p. 4). This, however, seems hardly a case for such action as the wife admits she is continually corresponding with her husband.

It is of interest here to note that the change introduced into the English common law, and now provided for in the Married Women's Property Act 1882, which enacts in section 12 that "every woman, *whether married before or after* this act, shall have in her own name against all persons whomsoever...the same civil remedies.....as a feme sole," is very different from the provisions of section 16 of the local Married Persons' Property Ordinance 1904, which enacts that "every woman married *after* the commencement of this ordinance shall have in her own name against all persons whomsoever.....the same civil remedies.....in the same manner as if she were unmarried." It might also be added that section 2 (3) of the Civil Law of British Guiana Ordinance 1916 protects rights existing at the time that ordinance came into force. This would appear to cover the then existing rights of a husband.

There being nothing to show that the plaintiff who is out of the colony is in any way a party to, has assented to, or ratified these proceedings, the objection must be upheld and the case struck out.

SHEIK MOHAMED HANIF *v.* WILLS.

[77 OF 1917.]

1917. JUNE 19. BEFORE BERKELEY, J.

Taxation—Review—Practice—Service of objections to taxation—Time—Rules of Court, Order XLVI, r. 9—Computation of time when limited by hours—Order XLV., r. 1.

A review of taxation may be obtained by delivering to the other party interested and to the Registrar a written notice of objection within forty-eight hours after the taxation.

Where time is limited by hours, the rules of Order XLV, with reference to computation of time do not apply.

Review of taxation under the provisions of Order XLVI., Rules of Court, 1900.

The claim was for the specific performance by the defendant of a contract for the sale of a 100 bags of rice, and the sum of $250 as damages for breach of contract. Judgment was entered for the defendant with costs, but it was further ordered that the judgment should not have the effect of a judgment upon the merits.

Plaintiff (applicant) asked for a review of taxation, and the matter coming on for hearing, objection was taken by defendant that he had not complied with the provisions of Order XLVI., r, 9, with respect to objections to taxation. The objection was upheld.

B. B. Marshall, for the applicant (plaintiff).

de Freitas, K.C., for the respondent (defendant).

BERKELEY, J.: The plaintiff seeks a review of taxation. Objection is taken on the ground that there has not been a compliance with the Rules of Court.

The bill of costs was taxed on Saturday, the 2nd day of June, 1917, at 12.15 p.m., and the objections to taxation were delivered on Tuesday, 5th June at 10.30 a.m. (Monday, the 4th, being a public holiday). Under O. XLVI, r. 9, these objections are required to be delivered to the other party interested therein and to the Registrar within forty-eight hours, after taxation, and whereas in this case the time is limited by hours the provisions of the sub-sections of rule 1 of Order XLV, as to the computation of time do not apply. (See rule 1).

Application to review dismissed with costs which are fixed at ten dollars.

VILLAGE COUNCIL OF BUXTON *v.* OGLE AND OTHERS.

[102 OF 1917.]

1917. JUNE 22, 30. BEFORE DALTON, J., (Actg.)

Principal and surety—Landlord and tenant—Discharge of surety by alteration in terms of lease—Materiality of alteration—Change of crops—Judgment—Recovery of rent—Warrant of distress—Res judicata—Ordinance 13 of 1907, ss. 85, 87, and 128 (*1*)*, and Ordinance 20 of 1911, s. 3.*

A warrant of distress for recovery of rent issued under the provisions of section 128 (1) of the Local Government Board Ordinance, 1907, and upon which a return of *nulla bona* has been made, does not preclude the landlord from suing for the rent under the provisions of sec. 2, Ordinance 20 of 1911.

Mere increase of risk alone arising from an alteration in the contract between the principals will not suffice to discharge a surety from liability under a bond entered by him.

Claim by the plaintiffs, the Village Council of the Buxton and Friendship Village District, a body corporate under the provisions of Ordinance 13 of 1907 against S. W. Ogle as principal and against McLean Ogle and Nathan Roberts as sureties, for the sum of $600 the balance due to plaintiffs of rent of a piece of land in the rear of the village district under an agreement of lease dated March 18th, 1911, entered into between the plaintiffs and the first defendant, the second and third defendants jointly and severally guaranteeing in the same agreement the payment of any sum that might fall due by the first defendant under the lease, under renunciation of the benefits allowed by law.

The first defendant pleaded, firstly, that the written agreement had been subsequently verbally modified and varied by the lessors and lessee as a result of which the lessee had suffered damage owing to the negligence of the plaintiffs, the lessors, in supplying proper and sufficient drainage, and secondly, that having obtained a distress warrant for the sum now claimed, plaintiffs were estopped from now suing for the rent.

The second and third defendants pleaded that they were discharged from their liability under the bond owing to the lessors consenting to a variation in the terms of the lease without their knowledge, authority or consent.

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

A. B. Brown, for S. W. Ogle, first defendant.

P. N. Browne, for McL. Ogle and N. Roberts, second and third defendants.

DALTON, J. (Actg.): The plaintiff council claims from the three defendants the sum of $600 under the following circumstances. On March 18th, 1911, the council leased to S. W. Ogle, the first defendant, a piece of land in rear of the village of Buxton containing 200 acres more or less for a period of five years from January 1st, 1911, at an annual rental of $700. The agreement contains various provisions as to cultivation, drainage, upkeep of dams, etc., and ends with an undertaking in the following terms by the second and third defendants as sureties for the rent:— "We McLean Ogle of Georgetown and Nathan Roberts of Plaisance, E.C., have jointly and severally agreed to hold ourselves liable to the said Local Authority for the payment of any sum that falls due by the lessee under the terms of this agreement under the renunciation of the exceptions *ordinis seu excussionis et divisionis.*"

The lease terminated on December 31st, 1915, at which date the sum of $600 was owing for rent for the year 1915, on account of the failure of the first defendant to pay the rent for that year, and in January, 1916, the plaintiffs retook possession of the land. In September 1916, they took distress proceedings, under the provisions of sections 85 (2) and 128 (1) of the Local Government Board Ordinance, 1907, against first defendant's movable property for the recovery of the rent due, but the bailiff made a return of *nulla bona.* They then in October notified the second and third defendants of first defendant's failure to pay the rent for 1915, saving the sum of $100, and demanded from them the payment of the sum of $600 in accordance with the agreement.

Two points arise to be decided in this case, firstly, the con-

tention of the first defendant that, in so far as he is concerned, the matter is *res judicata,* in view of the proceedings taken against him by distress warrant, and secondly, the contention of the second and third defendants that, by the action of the plaintiffs, they have been discharged from their liability under the bond.

It would seem from the pleadings that some attempt was to be made by the defendants to set up a verbal agreement varying or amending the written agreement of lease, but in court counsel for first defendant expressly disclaimed this, relying as he stated on the written agreement. No attempt was made to prove in evidence any second verbal agreement, nor if made do I think that it could have been allowed, in view of the express provisions of section 87 of Ordinance 13 of 1907.

As regards the first point raised counsel has not satisfied me in any way that the action now before me is *res judicata.* No one denies that "if the same matter or cause of action has already been finally adjudicated on between the parties by a court of competent jurisdiction the plaintiff has lost his right to put it in suit either before that or any other court." But the case does not come within that rule. All that plaintiffs have done so far is to avail themselves of their statutory right of distress. That they have exhausted so far as they can, as no movable property can be found. Under the ordinances (No. 13 of 1907, s. 85; No. 20 of 1911, s. 3) they can proceed to recover rent by distress warrant, or by parate execution, or can sue as in the case of an ordinary debt due to the authority. It seems to me that counsel has confused the right of distress with the right to proceed by parate execution. The former is of course a form of summary execution, but to be clearly distinguished from our "parate execution". The very section of the ordinance cited, s. 128 (1), specially draws the distinction and provides that "before the process of parate or summary execution is applied for . . . . . it shall be lawful for the overseer . . . . . to make application to the magistrate who . . . . . shall grant a warrant of distress." The plea of *res judicata* is not applicable here, and the first defendant raising no other defence judgment must go against him.

With respect to the second point, raised by the second and third defendants, that they have been discharged by the action of the plaintiffs, the liability under the bond is for the payment of the rent only, and not for the observance of any other covenants of the agreement. The defendants say, however, that the land leased was to be used for rice planting only, whereas plaintiffs allowed the first defendant to disregard that requirement and plant ground provisions instead.

To take the lease as it stands I should have great difficulty in deciding that it contained any restriction on the lessee as to

planting rice only; plaintiffs however, do not deny that such was their intention when the lease was signed, and they did in fact call upon the lessee in the year 1912 to observe the terms of the agreement and keep to rice cultivation. They added that he changed the crop "at his peril." Beyond that, however, they did not go, practically acquiescing in provisions being grown instead of rice, once witness stating that provisions being more remunerative than rice it would be to defendant's benefit, and so he would be in a better position to pay his rent. On the other hand provisions required better drainage than rice. That the lessee got all the drainage he was entitled to under the agreement is admitted by the one witness he called. As regards the knowledge of the second and third defendants to the planting of provisions in lieu of rice, if it is necessary for the purpose of deciding the case (though I think not) to find on the point, I do find on the evidence that the second defendant did know of the change during the existence of the lease some time before the end of 1915, and that the third defendant did not know of the change. It does not, however, to my mind affect the liability either of the one or of the other.

It is submitted, and upon this alone the second and third defendants rest their case, that the sureties have been discharged by the action of the plaintiffs in allowing the first defendant to cultivate provisions instead of rice. Admitting the permission of the plaintiffs to such change, how has it affected the position of the sureties. Whether their position has altered is purely a question of fact, and there is no evidence whatsoever before me from which I can come to a decision that their position is changed. The second defendant did not give evidence at all, whilst the third defendant merely stated he would not have signed if he knew the lessee was going to plant provisions. Even assuming for the moment that that would increase the risk of the sureties, though there is no evidence before me from which I could so find, mere increase of risk will not suffice to discharge a surety. He must put forward a much stronger case than that. (*Divisional Council of Middelburg* v. *Close,* 3 S.C. 411). Again, it was no part of the contract between the plaintiffs and the sureties that they, the sureties, would be called upon to make good any failure by the first defendant to observe any other covenant of the agreement other than to pay the rent reserved. The case of *Price* v. *Kirkham* (3 H. and C. 437) has been cited by plaintiffs to show that there was no liability on them here to notify the sureties (although as a fact the second defendant had notice) that the lessee had planted provisions in lieu of rice. I do not agree that the authority goes so far as that, but it is incumbent on the defendants to show that their position has been materially changed and altered by the action of the plaintiffs, and for the worse; that they have failed to do.

The mere negligence of the plaintiffs would not discharge the sureties unless they can show at the same time that they have been prejudiced by such negligence (and see Maasdorp's *Institutes* III. p. 377). The case of *Holme* v. *Brunshill* (3 Q.B.D. 495) was cited by Mr. Browne to support the contention that notice of every change should be given to the surety if he is not to be discharged, but I do not agree that it goes so far as he states.

Having renounced the benefits to which they, as sureties, were entitled by the law of the colony as it stood when the lease was signed, and having failed to show that they have in any way been discharged from their liability under the bond entered into them, plaintiff's are entitled to judgment against they on their claim.

There will accordingly be judgment for the sum of $600 against the three defendants, with costs.

PETTY DEBT COURT, GEORGETOWN.

[225. 5. 1917.]

SOBERS *v.* PAYNE.

1917. JUNE 13, 26. JULY 3. BEFORE DALTON, J. (Actg.)

Employer's liability—Master and servant—Uncovered hatchway on ship—Defect in condition of ways or works—Risk voluntarily incurred—Maxim "volenti non fit injuria"—Negligence—Accidental Deaths and Workmen's Injuries Ordinance (*No. 21 of 1916*), *sec. 9.*

The plaintiff, a woman, was employed by the defendant at night in a gang on board ship in harbour to shift coal. For the work the hatch of the hold was necessarily removed. In the course of her work plaintiff fell down the hold and was injured.

Held, that the fact that the hatches were not on at the time of the accident did not constitute a defect in the condition of the ways or works within the meaning of sec. 9 (1) of Ordinance 21 of 1916.

Held, further, that on the evidence produced, the light between decks at the time of the accident was quite sufficient for the work which was being done there, and that consequently defendant was not liable.

Claim by the plaintiff, a married woman, together with her husband, for the sum of $100 as damages for injuries sustained by her, whilst employed as a workman by the defendant, a stevedore, carrying coal on the ss. Crown of Granada at La Penitence wharf, Georgetown, in January, 1917.

Plaintiff alleged that whilst engaged as aforesaid the defendant or his foreman in charge of the superintendence of the work negligently left uncovered upon the ship's deck, where plaintiff was bound to be in the performance of her duties, a hatch hole through which she fell, and whereby she sustained severe injuries.

E. D. Clarke, solicitor, for plaintiff.

Claim brought under section 9 (3.) of the Accidental Deaths and Workmen's Injuries Ordinance, 1916. Chief point of case hatch not closed. Light insufficient. Cites *Smith* v. *Baker,* 189l A.C. 325; *Memory* v. *Great Western Railway* 14 A.C. 179; and *Williams* v. *Birmingham Battery and Metal Co.* 1899 2. Q. B. 338.

P. N. Browne, for the defendant.

Hatch necessarily open to get cargo out. No trap. Plaintiff consented to work on conditions obtaining. Maxim *volenti non fit injuria* applies. Light quite sufficient. Even if not sufficient plaintiff guilty of contributory negligence. Cites *Weblin* v. *Ballard* 17 Q. B. D. 122; *Thomas* v. *Quartermaine* 18 Q. B. D. 685; *Smith* v. *Steele and ors.* 10 L. R. Q. B. 125; and *Indemaur* v. *Dames* 1 C. P. 274.

DALTON, J., (Actg.) This is I think the first case that has arisen under the provisions of Ord. 21 of 1916, (The Accidental Deaths and Workmen's Injuries Ordinance, 1916); an ordinance partly based on the Employers' Liability Act, 1880 (43 and 44 Vict. c. 42). The plaintiff, a woman married in community of property to her husband, with her husband, claims from the defendant, a stevedore the sum of $100 as damages for injuries sustained by her, whilst a "workman" within the meaning of the ordinance, on the s.s. Crown of Granada lying at La Penitence, Georgetown, through the negligence of defendant and his foreman. The negligence alleged in the plaint was the leaving open upon the deck of a hatch through which plaintiff felt whilst in the performance of her duties.

The term "workman" includes workwomen, and hence there is no question that plaintiff can maintain the action; (see Interpretation Ordinance, 1891, s. 2, and Maxwell on *Statutes* p. 485). It is not denied also that she comes within the definition of the term as laid down in the ordinance.

Plaintiff's solicitor states he bases his claim on section 9 (3) of the ordinance, which provides that where personal injury is caused to a workman and where the person occasioning and the workman suffering the injury are fellow servants engaged in common employment for and under the same master, the master shall not be liable for the consequence of the injury, provided that where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer to whose orders or directions the injured workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his

having so conformed, the workman "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of or in the service of the employer, nor engaged in his work." During the hearing of the case however he somewhat shifted his ground, and besides seeking to show that there was negligence in leaving the hatch open, he sought to prove that there was also negligence on the part of defendant or his servants in moving a light, whereby plaintiff was prevented from seeing the open hatch. This evidence was admitted by me without objection by defendant's counsel.

The facts shortly are as follows: the plaintiff Sobers whilst working on the ship at night shifting coal, with other women in defendant's employment, fell down the hold of the ship and suffered severe injury. Coal was being brought up from the hold, being loaded into baskets by men in the hold and was then brought up to between decks where the women were The baskets were emptied on the deck, the coal was then shovelled into other baskets and then carried by the women a space of fifteen feet on the same deck to the bunkers. About 11 p.m., the men, finishing sending up the coal, stopped work. The women, however, had to sweep up the coal dust on the deck. Whilst doing this, and whilst stepping off with practically the last basket of sweepings plaintiff stepped over into the hold, which did not have the hatches on, and sustained the injuries for which she now claims compensation. The questions in dispute are as to the sufficiency of the light between decks, and the necessity or otherwise of putting on the hatches; although plaintiff's solicitor would restrict himself to section 9 (3) of the ordinance, I think it is necessary on the case as put before me to consider the effect of the other sub-sections also.

It is admitted that the hatches were not put on over the hold at the time of the accident at the spot where the women were working. Was this any defect in the ways or works of the business on which plaintiff was employed, or was the failure to put on the hatches an act of negligence or omission on the part of any person in the service of her employer? On the authority of the case *Willetts* v. *Watt and Company* (1892 2 Q.B. 92) the fact that the hatches were not on constitutes no defect in the condition of the "ways" within the meaning of the section. The hatches were necessarily off whilst the coal was being brought up, but plaintiff submits that as soon as the men stopped working below the hatches should have been put on. It was, however, stated in evidence that the hatches between decks are never put on whilst the ship is in port, for the reason that there is no entry to the hold between decks save through the main deck hatch, which latter hatch is covered as soon as work is knocked off. This

practice in my opinion would in no way relieve defendant from liability should negligence be proved against him.

It is admitted further that plaintiff knew the hatches were off but that knowledge alone is not sufficient to relieve the defendant. It is the maxim *volenti non fit injuria,* and not *scienti non fit injuria* which constitutes a defence to the action. The defendant relying on this defence must show some consent on the part of the plaintiff to the particular thing done or risk run; that consent may be in express terms or may be implied from her action or course of conduct. She had been working at the side of this open hold from 7 p.m. to 11 p.m. She was fully aware that it was uncovered, and necessarily uncovered from the very nature of the work on which she was engaged. The work she was engaged on at the time of the accident, namely, sweeping up the coal dust on the deck and carrying it to the bunkers was all part and parcel of the work she was doing beside the open hatch the whole night from 7 p.m., and I can find no evidence of any neglect on the part of her employer or any servant in his employment to put the hatches on before the sweeping was commenced. The occupation was to some extent a dangerous one, but plaintiff was fully aware of the danger which existed in the hold being necessarily uncovered; in so far as this particular part of the case is concerned it seems to me that by her very action in taking on the work she was willing to incur the slight risk attendant on it. In other words, it is a case where the maxim *volenti non fit injuria* may very justly and properly be applied.

The question of sufficient lighting is however a different matter. Plaintiff says that at the time of the accident one light had been removed, and that she was thereby prevented from seeing where she was walking, and thus walked down the open hatch. If the light had been moved on any order of the foreman as she says, and there was then insufficient light for her to see her way with her basket, defendant's counsel argues that she should have stopped and refused to go on with her work. I think, however, that the very case he cited (*Weblin* v. *Ballard* 17 Q. B. D. 122) is against him on that point. There is no doubt from the evidence that the lights on deck were moved and replaced as the women swept. The evidence as to the removal of any light on the foreman's orders was not very satisfactory; it is most unfortunate that both the foreman and another man who was present have died since the case commenced. I can, however, come to no other conclusion than that the light between the decks at the time of the accident was quite sufficient for the work that was being done there. The evidence on this point was given in some detail, and I find that there was one arc lamp over the hold, and four hurricane lamps on the deck between decks, two on each side of the hold.

Some attempt, as I stated, was made to show that one of the latter lamps had been moved by a workman on the for man's instructions shortly before the accident, but the same witnesses who speak to the removal of this lamp, fellow workwomen of the plaintiff, say they could still see the hold plainly from the light given by the remaining lamps. They are quite unable to explain why plaintiff herself could not also see. No one walks down a hold on purpose, assuming he is in his right mind, but on the other hand if on this occasion the light was quite sufficient to show the plaintiff where the hold was, her unexplained conduct cannot be held to penalize the defendant in any way. All the witnesses called by her declare the light at the time of the accident was quite sufficient for them. It seems to me that the explanation is that there was no want of light, but rather forgetfulness on her part. In stooping to lift the basket on her head with the help of Wilkinson she forgot the open hold and, as her witness Wilkinson said, turned the wrong way. "If she had turned to the right she would not have gone in. There was plenty of room there." I can find no evidence of any negligence on the part of the defendant or any person in his service such as would entitle plaintiff to any compensation. There must therefore be judgment for the defendant with costs.

HIGGINS *v.* ROHLEHR AND ANOTHER.

[172 of 1917.]

1917. JULY 26. BEFORE DALTON, C.J. (Actg.)

Practice—Application to strike out defence—Failure to file memorandum of address for service—Rules of Court, 1900, Order X. r. 14—Service at Registrar's Office—Order XLVIII. r. 2—Enlargement of time.

If a defendant, who has appeared to a specially, indorsed writ and obtained leave to defend, files his statement of defence without, at an earlier or at the same time, filing a memorandum containing his address for service, as required by Order X. rule 14, the plaintiff may thereafter serve all pleadings and other documents by leaving them at the office of the Registrar, as provided by Order XLVIII. rule 2.

Application by the plaintiff in the action for an order directing the Registrar to expunge from the records in the action the statement of defence and counterclaim filed by the defendant on July 2nd, 1917, on the ground that he had not filed before or did not file at the same time a memorandum containing his address for service, as required by the Rules of Court, Order X. rule 14, and that he, plaintiff, was prejudiced thereby.

B. B. Marshall, for applicant.

Refers to O. x. r. 14. Words of rule are imperative. Cites *Liberal Printing and Publishing Co., Ltd.,* v. *Conrad* (1894, L.R., B.G. 44). Service under O. XLVIII. r. 2 in this case would not be in order.

J. S. McArthur, for respondent.

O. XLVIII. r. 2 exactly governs the case. Statement of defence quite properly received. No prejudice whatsoever shown.

Marshall, in reply.

DALTON, Actg. C. J., This is an application by the plaintiff to strike out the statement of defence filed on the ground that, at the time such defence was filed, defendant did not also filed at the same time a memorandum of address for service, thereby causing prejudice to the plaintiff.

The claim is on a specially indorsed writ, and defendant had obtained leave to defend. Order X. r. 14 provides that a defendant who has appeared to a writ specially indorsed under the provisions of Order IV. r. 6., and has obtained leave to defend shall, at or before the filing of his statement of defence, file a memorandum containing his address for service which shall be some proper place within one mile of the office of the Registrar.

As defendant, when or before tiling his defence, did not file the memorandum in question I am asked to strike out the defence. Even if the rule in question stood by itself I am quite unable to see how the application could be grated. All that would result from the failure to file the memorandum at the time stated would be the disability, whatever it might be, upon the defendant flowing from his failure to file that particular document. The fact that he files one document and does not file the other is, as the rule stands, no reason for striking out the defence which has been filed.

But it seems to me that applicant has, until too late, entirely overlooked the provision of Order XLVIII. r. 2, for Mr. Marshall has offered no reason why the provisions of that rule were not taken advantage of. That rule specifically provides that "where a party or his solicitor, as the case may be, has omitted to give an address for service as required by Orders V. and X.," documents may be served by leaving them at the Registrar's office. Reading rule 14 of Order X. in conjunction with rule 2 of Order XLVIII., in the absence of the memorandum of address for service, the course the plaintiff shall have taken is quite clear, and his application to strike out the defence cannot possibly succeed. See also

Bishop v. *Bishop* G.J. March 14, 1911). He has further failed in any way to show that he has been prejudiced by what has been done.

It appears from the record that, some days after the statement of defence was filed, defendant's solicitor tendered for filing the missing memorandum of address for service and I am surprised to see that it was accepted in the registry. It was entirely out of time and should be no part of the record. In fact it is doubtful if in this case any enlargement of time for filing the memorandum could be granted by the court, that document having to be filed before or at the same time as the defence. (*Pilcher* v. *Hinds* 11 Ch. D. 905). It is, however, no part of the record which I am now asked to expunge.

The application is dismissed with costs.

REPORTS OF DECISIONS

OF

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1917.

WITH INDEX AND DIGEST.

Edited by LL. C. DALTON, M.A., Cantab.,
Barrister-at-Law.

GEORGETOWN, DEMERARA:
"THE ARGOSY" COMPANY, LIMITED, PRINTERS TO THE GOVERNMENT OF BRITISH GUIANA.
1918.

JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1917.

CHARLES HENRY MAJOR, Kt.	...	Chief Justice. (On leave July-September 23rd.)
MAURICE JULIAN BERKELEY	...	Senior Puisne Judge. (On leave July-September.)
JACOBUS KERR DARRELL HILL	...	Junior Puisne Judge. (On leave January-October 7th.)
LLEWELYN CHISHOLM DALTON	...	Acting Puisne Judge. (Jan-June; Sep.23rd-Oct. 7th.)
		Acting Chief Justice. (July-September 23rd.)

[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.

Ordinance No. 15 of 1916, entitled “An Ordinance to codify contain portions of the Roman-Dutch Law of the Colony and in other matters to substitute the English Common law and Principles of Equity along with certain English Statutory Provisions for the Roman-Dutch Law” came into force on January 1st, 1917.]

TABLE OF ABBREVIATIONS.

ADDITIONAL TO THE USUAL REFERENCES TO ENGLISH REPORTS).

A.J.	.....	Appellate Jurisdiction, British Guiana.
G.J.	.....	General Jurisdiction, British Guiana.
L.J.	.....	Limited Jurisdiction, British Guiana.
L.R., B.G	.....	Law Reports, British Guiana.
Menzies	.....	Menzies Reports (Cape Colony).
N.L.R.	.....	Natal Law Reports.
S.C.	.....	Juta's Supreme Court Reports (Cape Colony).
T.P.D.	.....	South African Law Reports, Transvaal Provincial Division.
T.S.	.....	Supreme Court Reports (Transvaal).

TABLE OF CASES REPORTED.