

## TABLE OF CASES REPORTED.

	PAGE
Assibad v. Karmi.....	99
Atherley, Blair v.....	108
A.- G. <i>ex parte</i> ; Rex. vs. Sroodin & ors .....	132
Bailey, Jaikaran Singh v.....	60
Bairaji to Raghubar <i>re</i> Transport.....	59
Baptiste v. Weeks.....	1
Barcellos, Widdup v.....	65
Barrow v. Moore.....	94
Benn v. Davis.....	10
Bhagwandin v. Sukhawath & anr.....	23
Bhodai v. Dem. Railway Co. & anr. ....	44
Bishop, Johnson v. ....	8
Blair v. Atherley.....	108
Board of Assessment v. Brodie & Rainer, Ltd. ....	135
Board of Assessment, Rahoman v.....	106
Brodie & Rainer, Ltd, Board of Assessment v.....	135
Cheefoon, Reece v. ....	81
Collins v. Young .....	84
Comacho v. Pimento & anr .....	37
Comacho v. Pimento & anr .....	45
Cox v. Lilliah .....	21
Davis, Benn v.....	10
Davis v. Lakpathsing.....	129
Davis v. McCalam.....	129
De Freitas, Ferreira v.....	80
Dem. Railway Co. & anr, Bhodai v. ....	44
Dem. Electric Co. Ltd, Richards v. ....	34
Dem. Turf Club Ltd., (in liq.); <i>ex parte</i> the Liquidator .....	119
De Souza and anr. v. Soares.....	77
Eaton v. Jugroop.....	98
Edwards v. Menezes.....	117
Essex v. Seemandray.....	57
Fernandes v. McNiell .....	112

Ferreira v. De Freitas.....	80
Fogarty, Ltd. v. Bhagwandass, <i>ex parte</i> Gomes.....	42
Forte, Jones v. ....	62
Fraites v. The New Success, Ltd. ....	145
Gomes, <i>ex parte</i> ; Fogarty, Ltd, v. Bhagwandass.....	42
Gomes, <i>ex parte</i> ; Smith Bros. & Co., Ltd. v. Bhagwandass .....	42
Hamilton v. The People’s Bakery .....	103
Hay v. Paul.....	73
Higgins v. Rohlehr .....	29
Jaundoo, Rahim Bacchus v. ....	138
Jaikaran Singh v. Bailey.....	60
Johnson v. Bishop .....	8
Johnson v. Nandu.....	17
Jones v. Forte .....	62
Jugroop, Eaton v.....	98
Karmi, Assibad v.....	99
Lakpathsing, Davis v.....	129
Lam, Wallbridge v. ....	141
Lilliah, Cox v. ....	21
Lewis and anr. v. Brown .....	4
Liquidator, <i>ex parte</i> . <i>In re</i> Dem. Turf Club Ltd. (in liq.) .....	119
Lusignan Co., Ltd. v. Brassington.....	67
London, Reid v.....	109
McCalam, Davis v.....	129
Manning v. Lopes, Fernandes & Co. Ltd. ....	126
Manning v. Mendonca .....	114
Matthews, Shaw v. ....	139
Menezes, Edwards v.....	117
McNiel, Fernandes v. ....	112
Moore, Barrow v.....	94
Nandu, Johnson v. ....	17
Patoir v. Perot & Co., Ltd.....	142
Paul, Hay v. ....	73

Perot & Co., Ltd. v. Carew & anr.....	75
Pimento and anr, Comacho v. ....	37
Pimento and anr, Comacho v. ....	45
Pollydore v. Williams and ors .....	96
Raghubar, Bairaji to <i>re</i> Transport.....	59
Rahim Bacchus v. Jaundoo .....	138
Rahoman v. Board of Assessment.....	106
Ramgolam v. Williams.....	26
Reece v. Cheefoon .....	81
Reid v. London.....	109
Rex v. Sroodin & ors., <i>ex parte</i> the Att. Gen. ....	132
Richards v. Dem. Electric Co. Ltd. ....	34
Roach v. Richards .....	5
Rohlehr, Higgins v. ....	29
Rodrigues v. Paulos.....	74
Roman v. Sookraj.....	19
Seemandray, Essex v.....	57
Shaw v. Matthews .....	139
Shewburun to Shubhagra, transport .....	58
Smith Bros. & Co., Ltd. v. Bhagwandaas, <i>ex parte</i> Gomes .....	42
Soares, De Souza and anr. v.....	77
Solomon and ors., Winter v.....	100
Sookraj, Roman v.....	19
Sukhawath and anr, Bhagwandin v. ....	23
Sroodin, Rex v. & ors., <i>ex parte</i> the Att. Gen. ....	132
The People's Bakery, Hamilton v. ....	103
Wallbridge v. Lam .....	141
Weeks, Baptiste v.....	1
Widdup v. Barcellos.....	65
Wight v. Dem. Turf Club Ltd. (in liq.).....	49
Williams and ors, Pollydore v. ....	96
Winter v. Solomon and ors.....	100
Young, Collins v. ....	84

## INDEX.

- ACCOMPLICE— See Evidence.
- ADULTERATION— See Food and Drugs.
- APPEAL— See Practice.
- AUCTION— Sale of goods—Title of seller—Purchase in good faith without notice of defect in seller's title—Claim by owner in detinue—Sale of Goods Ordinance, 1913, ss. 24, 25.  
*Barrow v. Moore* ..... 94
- " Specific performance—Contract of purchase and sale—Suit for delivery—Roman Dutch Law—Voluntary and judicial sales—Relation of bidder and auctioneer.  
*Wight v. Dem. Turf Club Ltd. (in liq.)*..... 49
- COMPANY— Winding up—Mortgage—Payment of interest on secured debt—Date to which interest payable—Application by liquidator personally for sanction to purchase property of company—Position of liquidator in respect of assets of company—Principles governing the grant of such sanction—The Companies Winding up Rules, 1905, r. 127.  
*In re The Dem. T.C. Ltd. (in liq.); ex parte the Liquidator* ..... 119
- CONTRACT— See Specific Performance; Licence; Sale of Goods.
- COUNSEL— Director of defendant company as counsel—Etiquette of profession.  
*Fraites v. The New Success Ltd.* ..... 145
- CRIMINAL LAW— Assault—Constable—Execution of duty—Summary Conviction Offences Ordinance, 1893, s. 33 (2).  
*Jaikaran Singh v. Bailey*..... 60
- " Breach of peace—Insulting language—Motor car—Light to show marks of identification plate at back of car—Car in use though not in motion—Motor Car Regulations, 1912.  
*Johnson v. Bishop* ..... 8

## CRIMINAL LAW contd.—

- " Breach of trust—Trader receiving money in advance and neglecting to perform contract—Traders (Breaches of Trust) Ordinance, 1861, s. 3.  
     [Johnson v. Nandu](#) ..... 17
- " Early closing—Employment of shop assistant after closing hours to despatch orders—Shop kept open—Shops Ordinance, 1913, ss. 3, 7 and 9.  
     [Manning v. Lopes, Fernandes & Co., Ltd](#) ..... 126
- " False pretences—Summary Conviction Offences (Procedure) Ordinance, 1893, s. 8(5)—Facts constituting offence to be stated in charge—Appeal—Service of reasons of appeal—Service by registered letter—Delivery of registered letter to respondent's messenger—Interpretation Ordinance, 1891, Amendment Ordinance, 1907.  
     [Reid v. London](#) ..... 109
- " Foodstuffs (Export Regulation) Ordinance, 1917—Exportation—Attempt to export—Magistrate's Courts Ordinance, 1893, s. 37(1), (a).  
     [Davis v. Lakpathsing](#) ..... 129  
     [Davis v. McCalam](#) ..... 129
- " Larceny—Trap—Assistance or knowledge of owner of property—Taking.  
     [Blair v. Atherley](#) ..... 108
- " Murder—Trial by special jury—Principles to be considered—Trial at bar—Indictable Offences (Procedure) Ordinance, 1913, Amendment Ordinance, 1918, s. 42.  
     [Rex v. Sroodin & ors.](#) ..... 132
- " Opium—Unlawful possession of prepared opium—Definition—"Used or intended to be used for smoking"—Analyst's certificate—Evidence—Opium Ordinance, 1916, s. 2 and s. 3 (c.)  
     [Reece v. Cheefoon](#) ..... 81

## CRIMINAL LAW contd.—

- " Principal and accessory—Accessory found guilty of receiving—Evidence of accomplice—Corroboration.  
*Roach v. Richards* .....5
- " Selling spirituous liquor on Sunday—Summary Conviction Offences Ordinance, 1893, s. 193—Licensed Places (Closing Hours) Ordinance, 1902, s. 3—Complaint silent as to Ordinance—Evidence—Divisibility of offences—Summary Conviction Offences (Procedure) Ordinance, 1893, s. 40.  
*Widdup v. Barcellos*..... 65
- " Summary Conviction Offences Ordinance, 1893, s. 145—Being armed with gun to commit unlawful act—Rogues and vagabonds—Class of persons to whom applicable.  
*Edwards v. Menezes*..... 117
- " Unlawful possession—Facts constituting possession—Evidence—Confession—Inducement.  
*Cox v. Lilliah* ..... 21
- " Unlawful possession of property reasonably suspected to have been stolen—Time at which suspicion must exist—Explanation to satisfaction of the Court—Summary Conviction Offences Ordinance, 1893, s. 96.  
*Collins v. Young* ..... 84
- " Unlawful possession of spirits exceeding one pint in quantity—Facts constituting possession—Spirits Ordinance, 1905, s. 93—Spirits Ordinance, 1905, Amendment Ordinance, 1911, s. 14.  
*Essex v. Seemandray*..... 57
- " Unlawful possession—Requisites to throw onus on accused—Evidence of statements explanatory by accused in answer to questions by constable—Accused found guilty of larceny on charge of unlawful possession—Summary Conviction Offences (Procedure) Ordinance, 1893, Amendment Ordinance, 1915, s. 2.  
*Benn v. Davis* ..... 10

See also Evidence; Intoxicating Liquors

DEATH—	Marriage in community—Value of estate under \$480—Claim of surviving spouse to whole estate—Nature of claim—Vesting of property. <i>Re transport Bairaji to Raghubar</i> ..... 59
"	Vesting of property on—Devolution of property—Death of purchaser before obtaining transport—Transport by seller to heir or personal representative. <i>Re transport Shewburun to Shubhagra</i> ..... 58
DETINUE—	Gratuitous bailment—Property stolen whilst in hands of bailee—Reasonable care—Negligence. <i>Eaton v. Jugroop</i> ..... 98 See also Sale of Goods.
EMPLOYER—	See Master and Servant.
EMPLOYERS	
LIABILITY—	See Master and Servant.
EVIDENCE—	Evidence of accomplice—Corroboration—Principal and accessory—Accessory found guilty of receiving. <i>Roach v. Richards</i> ..... 5
"	Opium Ordinance, 1916, s. 2 and s. 3 (c)—Analyst's certificate—Evidence. <i>Reece v. Cheefoon</i> ..... 81 See also Criminal Law.
EXECUTION—	Wrongful Levy—Damages—Promissory note—Illegal consideration. <i>R. Bacchus v. Jaundoo</i> ..... 138
FALSE	
IMPRISONMENT—	Larceny of goods—Arrest by police on information supplied by defendants—Charge sheet signed by defendants at request of police—Liability. <i>Bhodai v. Dem. Railway Co. &amp; anr</i> ..... 44
FOOD AND DRUGS—	Adulteration of food—Milk—Analysis—Milk in course of delivery to purchaser or consignee—Completion of delivery. <i>Roman v. Sookraj</i> ..... 19

FOODSTUFFS—	Foodstuffs (Export Regulation) Ordinance, 1917—Exportation—Attempt to export—Jurisdiction—Magistrate's Courts Ordinance, 1893, s. 37 (1.) (a.)	
	<i>Davis v. Lakpathsing</i> .....	129
	<i>Davis v. McCalam</i> .....	129
"	Foodstuffs (Regulation of Price) Ordinance, 1914, and Foodstuffs (Regulation of Price) Continuation Ordinance, 1915—Fixing of sale price by proclamation—Contravention of ordinance and proclamation—Charge instituted before but prosecuted after revocation of proclamation—Saving clause in proclamation—Interpretation Ordinance, 1891, s. 28— <i>Ultra vires</i> .	
	<i>Manning v. Mendonca</i> .....	114
HUSBAND AND WIFE—	Marriage in community of property—Action against wife for goods sold to her—Public trader—Position of married woman—Claim to be assisted by her husband—Procedure—Practice.	
	<i>Fernandes v. McNiel</i> .....	112
IMMOVABLE		
PROPERTY—	Transport—Devolution of property—Death of purchaser before obtaining transport—Transport by seller to heir or personal representative of deceased—Vesting of property on death.	
	<i>In re transport Shewburun to Shubhagra</i> .....	58
"	—Transport—Marriage in community—Value of estate under \$480—Proof—Claim by surviving spouse to whole estate—Nature of claim—Vesting of property—Civil Law of British Guiana Ordinance, 1916, s. 6 (7).	
	<i>Re transport Bairaji to Raghubar</i> .....	59
"	Title to land—Transport—Diagram—Boundaries of property—Prescription.	
	<i>Comacho v. Pimento and anr.</i> .....	37
	See also Specific Performance.	
INFANT—	Tort—Action for damages—Guardian—Liability—Procedure—Practice.	
	<i>Assibad v. Karmi</i> .....	99

INJUNCTION—	See Practice.	
INSOLVENCY—	See Interpleader.	
INTERPLEADER—	Movable property—Subsequent insolvency of debtor—Official Receiver in possession of property claimed—Stay of interpleader proceedings—Insolvency Ordinance, 1900, s. 9 (2).	
	<i>W. Fogarty Ltd. v. Bhagwandass; ex parte Gomes</i> .....	42
	<i>Smith Bros. &amp; Co., Ltd. v. Bhagwandass; ex parte Gomes</i> .....	42
INTOXICATING		
LIQUORS—	Selling spirituous liquor on Sunday—Summary Conviction Offences Ordinance, 1893, s. 193—Licensed Places (Closing Hours) Ordinance, 1902, s. 3—Complaint silent as to Ordinance—Evidence—Divisibility of offences—Summary Conviction Offences (Procedure) Ordinance, 1893, s. 40.	
	<i>Widdup v. Barcellos</i> .....	65
"	Spirits exceeding one pint in quantity—Unlawful possession—Onus of proof—Spirits Ordinance, 1908, s. 93, as amended by Ordinance 15 of 1911.	
	<i>Wallbridge v. Lam</i> .....	141
"	Unlawful possession of spirits exceeding one pint in quantity—Facts constituting possession—Spirits Ordinance, 1905, s. 93—Spirits Ordinance, 1905, Amendment Ordinance 1911, s. 14.	
	<i>Essex v. Seemandray</i> .....	57
	See also Criminal Law.	
JURY—	See Criminal Law; Practice.	
LANDLORD AND		
TENANT—	Damages—Assault—Conversion.	
	<i>Baptiste v. Weeks</i> .....	1

LANDLORD AND  
TENANT contd.—

"	Premises and machinery—Option to purchase at fixed price at termination of lease—Covenant to repair—Sale of premises and machinery to third party at price fixed—Third party with notice of damage and satisfied with purchase—Damages, measure of.  <a href="#">J. E. Perot &amp; Co., Ltd. v. Carew and anr. .... 75</a>
LETTERS—	Property in letters—Sender and recipient—Recipient manager of sugar plantation—Letter relative to business carried on.  <a href="#">Lusignan Co., Ltd, v. Brassington..... 67</a>
LEVY—	See Execution.
LICENCE—	Contract—Sale of house property—Action to recover commission by house agent—Failure of house agent to take out licence—No bar to recovery of commission.  <a href="#">Hay v. Paul..... 73</a>
LIQUIDATOR—	See Company.
MAGISTRATE'S COURT—	See Practice. Criminal law.
MARRIAGE—	See husband and wife.
MASTER AND SERVANT—	Absconding labourers—Reasonable cause—Employers and Servants Ordinance, 1853, s. 13—Employers and Labourers Ordinance, 1909, ss, 1, 10.  <a href="#">Winter v. Solomon &amp; ors ..... 100</a>
"	Breach of contract—Manager of sugar plantation—Agreement for three years—Temporary illness—Wrongful dismissal—Damages—Application of English or Roman Dutch law—Civil law of British Guiana Ordinance, 1916—Director of defendant company as counsel—Etiquette of profession.  <a href="#">Fraites v. The New Success, Ltd. .... 145</a>
"	Employer's liability—Common employment—Defect in condition of scaffolding—Contributory negligence—Accidental Deaths and Workmen's Injuries Ordinance (No. 21 of 1916) s. 9.  <a href="#">Richards v. Dem. Electric Co., Ltd ..... 34</a>

## MASTER AND

SERVANT contd.—Wrongful dismissal—Action to recover wages to date of dismissal—Subsequent claim for damages for wrongful dismissal.

*Rodriques v. Paulos*..... 74

## MOTOR CAR

REGULATIONS, 1912—Light to show marks of identification plate at back of car—Car in use though not in motion—Driver of car—Evidence—Breach of peace—Insulting language.

*Johnson v. Bishop* ..... 8

See also Traffic Regulations.

## OPIUM—

See Criminal Law.

RULES OF COURT,  
1900—

Order XVII., r. 8.—Application for further and better particulars—Notice of application.

*Lewis & anr. v. Brown*..... 4

" Order XVII, r. 15.—Pleadings—What must be pleaded.

*Bhagwandin v. Sukhawath & anr*..... 23

" Order XXXV., r. 1.—Written reasons of judgment.

*Bhagwandin v. Sukhawath & anr*..... 23

" Order XL., r. 4.—Notice of application—Further and better particulars.

*Lewis & anr. v. Brown*..... 4

## PARTICULARS—

See Practice.

## PARTNERSHIP—

Liability of partners—Judgment against one partner—Action against remaining partner—Res judicata—Magistrates' Court—Representative capacity of party to suit—Common interest—Practice—Magistrates' Court Rules, 1911, r. 1.

*Hamilton v. The People's Bakery* ..... 103

" Premature commencement of business by one party—Knowledge and consent of other party—Effect on relationship between parties.

*Higgins v. Rohlehr* ..... 29

PRACTICE—	Appeal—Application for leave to appeal to the Privy Council—Notice of intended application—His Majesty's Order in Council (January, 1910), clause 4. <i>Comacho v. Pimento and anr</i> ..... 45
"	Appeal—Service of reasons of appeal—Service by registered letter—Delivery of registered letter to respondent's messenger—Interpretation Ordinance, 1891, Amendment Ordinance, 1907—Summary Conviction Offences (Procedure) Ordinance, 1893, s. 8(5). <i>Reid v. London</i> ..... 109
"	Application for better and further particulars—Rules of Court 1900, Order XVII, r. 8—Notice of application—Order XL. r. 4. <i>Lewis and anr. v. Brown</i> ..... 4
"	Injunction—Application to discharge interim order—Undertaking by counsel as to damages—Form of undertaking—Limitation as to time for order to run. <i>Pollydore v. Williams and ors.</i> ..... 96
"	Magistrate's Court—Alteration in sentence by magistrate—Alleged malice. <i>Shaw v. Matthews</i> ..... 139
"	Magistrate's Court—Representative capacity of party to suit—Common interest—Practice—Magistrates' Court Rules, 1911, r. 1. <i>Hamilton v. The People's Bakery</i> ..... 103
"	Magistrate's Court—Two claims arising out of one cause of action—Splitting of cause of action—Petty Debt Recovery Ordinance, 1893, s. 4—Practice—Amendment. <i>Ferreira v. De Freitas</i> ..... 80
"	Selling spirituous liquor on Sunday—Complaint silent as to Ordinance—Evidence—Divisibility of offences—Summary Conviction Offences (Procedure) Ordinance, 1893, s. 40. <i>Widdup v. Barcellos</i> ..... 65

"	Trial by special jury—Principles to be considered—Trial at bar—Indictable Offences (Procedure) Ordinance, 1893, Amendment Ordinance, 1918, s.42.  <a href="#">Rex v. Sroodin &amp; ors. ....</a> 132
"	Written reasons of judgment—Rules of Court, 1900, Order XXXV. r. 1—Evidence—Matters not raised in pleadings—Order XVII. r. 15.  <a href="#">Bhagwandin v. Sukhawath &amp; anr.....</a> 23
PROCEDURE—	See Practice.
PROCLAMATION—	Foodstuffs (Regulation of Price) Ordinance, 1914—Fixing of sale price by proclamation—Contravention of ordinance and proclamation—Saving clause in proclamation—Interpretation Ordinance 1891, s. 28.  <a href="#">Manning v. Mendonca .....</a> 114
REVENUE—	Excess Profits tax—Assessment for duty—Appeal—Right of Board of Assessment to appeal—‘Capital’ and ‘Assets’—Increase of capital—Profits.  <a href="#">Board of Assessment v. Brodie &amp; Rainer, Ltd. ....</a> 135
"	Excess Profits tax—Assessment for duty—Meaning of ‘capital’ and ‘profits’—Deductions allowed—Tax Ordinance, 1918 (No. 24 of 1917) s. 64 (1.)—Tax on Excess Profits Ordinance, 1918, s. 2.  <a href="#">Rahoman v. Board of Assessment.....</a> 106
SALE OF GOODS—	Title of seller—Purchase at public auction in good faith without notice of defect in seller’s title—Claim by owner in detinue—Sale of Goods Ordinance, 1913, ss. 24, 25.  <a href="#">Barrow v. Moore .....</a> 94
SHOP—	See Criminal Law.

SPECIFIC

PERFORMANCE—Auction sale—Contract of purchase and sale—  
 Suit for delivery—Roman-Dutch law—  
 Voluntary and judicial sales—Relation of bid-  
 der and auctioneer.

*Wight v. Demerara Turf Club, Ltd. (in liq.)*.....49

" Contract of sale of immovable property—  
 Conditions—Obligation and rights of parties.

*Ramgolam v. Williams*.....26

SPIRITS— See Intoxicating Liquors.

SUCCESSION— Marriage in community—Value of estate under  
 \$480—Claim of surviving spouse to whole es-  
 tate—Vesting of property—Civil Law of Brit-  
 ish Guiana Ordinance, 1916, s. 6 (7).

*Re Transport Bairaji to Raghubar*.....59

SUMMARY CONVIC

TION OFFENCE—See Criminal Law.

TAX— See Revenue.

TRAFFIC

REGULATIONS—Motor cars on steamer stelling—Wilfully imped-  
 ing officer regulating traffic on stelling—  
 Colonial and Contract Steamer Traffic Ordi-  
 nance, 1914—By-laws for the regulation of  
 traffic by and in connection with Colonial  
 Steamers, 1914, s. 14—Motor Car Ordinance,  
 1912—Offence 'in connection with the driving  
 of a motor car'—Endorsement of certificate.

*Jones v. Forte* .....62

TRANSPORT— See Immovable Property.

TRUST, BREACH OF— See Criminal Law.

TRIAL AT BAR— See Criminal Law; Practice,

UNLAWFUL

POSSESSION— See Criminal Law.

USUFRUCT— See Will.

WILL— Bequest of property to heirs with restraint  
 against alienation save to one of the heirs—  
 Sale with consent of all the heirs—Judgment  
 obtained against one heir—Levy on his inter-  
 est under the will—Opposition—Injunction.

*Patoir v. Perot & Co., Ltd.*.....142

WILL contd.—

"

Marriage in community of property—Usufruct—  
Security by usufructuary—Inability to find  
sureties—Receiver of common property with  
power to realize—Power of Court over fund  
and its payment out.

[De Souza and anr. v. Soares.....77](#)

WINDING UP—

See Company.

# CASES

DETERMINED BY THE

## SUPREME COURT OF BRITISH GUIANA.

BAPTISTE v. WEEKS.

[362 of 1917.]

BAPTISTE v. WEEKS.

[362A. of 1917.]

1918. JANUARY 25; FEBRUARY 1, BEFORE HILL, J.

*Appeal—Damages—Assault—Conversion—Landlord and tenant.*

Two appeals taken together from decisions of the acting stipendiary magistrate of the Georgetown judicial district (Mr. B. S. Newsam), who gave judgment for the plaintiff, on a claim for conversion, in the sum of \$60, and on a claim for damages for assault, in the sum of \$10 and costs.

The defendant Weeks appealed. The reasons for appeal sufficiently appear from the judgment.

*P. N. Browne, K.C.*, for the appellant.

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

HILL, J.: This is an appeal from two decisions of a magistrate in cases argued together before him by consent—one for conversion in which \$100 damages were claimed and \$60 awarded, and the other for \$24 damages for assault in which \$10 were awarded.

The reasons of appeal are:

1. The decision is erroneous in point of law.
  - (a.) Because the plaintiff by accepting receipt from the defendant for the rent of a room in the name of Jeffrey the person who engaged the room from the defendant, the plaintiff was thereby estopped from asserting that he was the defendant's tenant and not Jeffrey.
  - (b.) Because the magistrate having found that the quantity of wood which the plaintiff had stacked on the defendant's property would do damage thereto, the defendant after having given due warning and after having requested

## BAPTISTE v. WEEKS.

the plaintiff to remove the same was legally justified in removing same from off his premises.

- (c.) Because even if 5,100 pieces of wood, the property of the plaintiff, were illegally converted as disclosed by that part of the evidence which the magistrate believed such evidence does not establish conversion for which defendant is liable in law.
- (d.) Because the onus lay on the plaintiff to prove the quantity of wood he had on the premises on the 20th day of June, 1917, and on the evidence he failed to discharge this onus. The book tendered with entries of wood alleged to have been delivered by the plaintiff was in his own handwriting and self-serving—these entries were freshly and all apparently written at the same time and there was no independent evidence in support of the plaintiff's testimony.
- (e.) As regards the claim for assault the magistrate was wrong in awarding plaintiff damages because the evidence shows that if any assault was committed it was in self-defence and no more force was used than was necessary to make the plaintiff, who first held the defendant, release the defendant.

2. The decision is altogether unwarranted by the evidence in like manner as if the case had been tried by a jury there would not have been sufficient evidence to sustain the decision for the several reasons set out at reason 1.

Reason 1 (a.) The magistrate found that the plaintiff was a tenant of the defendant—and I think he was amply justified in so finding. It is perfectly true that the receipts were in the name of Jeffrey, plaintiff's brother-in-law, and the notice of intention to leave was signed by Jeffrey, but on perusal of the whole evidence on this point there can only be one conclusion and that is that the plaintiff was the real tenant, and so known to the defendant. It is difficult to believe otherwise in view of the statement, *inter alia*, by defendant himself that he told plaintiff whilst the rent was in Jeffrey's name he had been living there and had stacked his wood there, and that he must pay him the rent due, \$3, and also told him he would take away sufficient wood in the carts to satisfy the \$3 due.

Reasons 1 (b.) and (c.) may be taken together.

From the evidence which the magistrate believed, it would appear that the defendant, the landlord of a woman named Mrs. Christie, who occupied the house and land adjoining the place where plaintiff lived—went to her house and from under the house, and from the land occupied by her, removed wood which

## BAPTISTE v. WEEKS.

belonged to plaintiff, and had been stacked there with the knowledge and consent of Mrs. Christie. And he invited the public to help themselves to the wood stating it was his wood. This fact in itself is proof of a conversion by him; an asportation of a chattel for the use of the defendant, or a third person amounts to a conversion, because it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. The intent of the defendant has shown in the taking by him of four carts to clear the wood out, and I have no doubt that the so called injury to his property was not the real motive of his act in wrongfully dealing with the plaintiff's property as he did, but his annoyance at a prospective loss of rent was the cause—a wrongful act on his part as said by the magistrate.

Even where a defendant enters under authority of law a plaintiff may show he has abused such authority and so become a trespasser *ab initio* and this is said to be founded on a presumed intention, *ab initio*, to abuse the authority given by the law, and not by the act of the party. A lessor who enters to new waste and does damage is a trespasser *ab initio*.

Mrs. Christie had given permission to plaintiff to store his wood on her premises. She had not withdrawn that authority and whatever rights defendant may have had as landlord,—and the law of the colony is now, as regards landlord and tenant, no longer Roman-Dutch law—he exceeded those rights when he acted as he did and the magistrate was justified in finding as he did.

Reason 1 (d) The magistrate believed the evidence of the plaintiff as to the extent of his loss and the damage suffered by him. In the absence of rebuttal on the part of defendant he was justified in accepting the plaintiff's account as he did.

Reason 1 (e) The magistrate by fining the defendant evidently disbelieved his version that he acted in self-defence when he assaulted the plaintiff. I quite agree with the finding.

The appeal is dismissed and the decision of the magistrate affirmed with costs to the respondent.

LEWIS AND ANR. v. BROWN.

LEWIS AND ANR. v. BROWN.

[376 of 1917.]

1918. FEBRUARY 1. BEFORE HILL, J.

*Practice—Application for further and better particulars—Rules of Court, 1900, Order XVII., r. 8—Notice of application—Order XL., r. 4.*

Application by the plaintiffs for further and better particulars—(1.) of the date or dates upon which defendant advanced to the first plaintiff various sums of money referred to in the defence and—

(2.) of the items and value of the goods delivered to the first named plaintiff referred to in the defence.

*J. A. Veerasawmy*, for the applicants.

*J. A. Luckhoo*, for the respondent.

HILL, J.: This is an application by plaintiff for further and better particulars in respect of certain pleadings in the statement of defence.

An objection *in limine* was taken under Order XL., rule 4, that such rule had not been complied with inasmuch as the whole of the copy of particulars attached to the application had not been served. The “grounds” of the application as contained in the application and the terms of the order applied for have been served as well as a copy of the only affidavit filed with the application and, in my opinion, that is sufficient compliance with the requirements of the order.

A further objection taken was that an extension of time for filing reply having been granted it was not competent for the plaintiff to proceed with this application.

The defendant, having refused particulars, was on January 9th informed by the solicitor for plaintiff of his intention to move the Court; on January 11th the solicitor for plaintiff obtained from the defendant’s solicitor an unnecessary extension of time for filing reply to January 19th, as he had no intention, he says, of withholding his application for further and better particulars, when the question of enlargement would have been dealt with. I see no reason why he should be debarred from proceeding with this application in these circumstances.

On the application itself, the defendant has set out in paragraphs 4 to 7 of the defence a version of transactions with an individual, the brother of the first named plaintiff, which are either insufficient or unnecessary.

## LEWIS AND ANR. v. BROWN.

I am not prepared to hold the latter view, and think the further, and better particulars asked for by the plaintiff's in paragraphs (a) and (b) of the application should be furnished. I therefore so order, and direct that enlargement of time be allowed for delivering and filing reply to ten days after the delivery of the aforesaid particulars. Costs of this application must be borne by the defendant.

## ROACH v. RICHARDS.

[326 of 1917.]

1918. FEBRUARY 5, 14. BEFORE BERKELEY, J.

*Criminal law—Evidence of an accomplice—Corroboration—Principal and accessory—Accessory found, guilty of receiving.*

As a general rule a magistrate sitting as a jury should decline to convict a prisoner on the uncorroborated testimony of an accomplice.

An accessory before the fact may be tried and convicted in all respects as if he were a principal, but he may also be found guilty of receiving the stolen property if there is evidence to support such finding.

Appeal from a decision of the acting Stipendiary Magistrate of the Georgetown Judicial District (Mr. J. H. McCowan) who convicted the appellant Richards of receiving three dozen bottles of liniment, value \$7.92, well knowing them to have been stolen, and sentenced him to pay a fine of \$20, or in the alternative to two months hard labour.

The reasons for appeal fully appear from the judgment below.

*J. S. McArthur*, for the appellant.

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

BERKELEY, J.: The defendant appeals from his conviction by the stipendiary magistrate of the Georgetown judicial district (Mr. J. McCowan), who found him guilty of receiving stolen property, to wit, three dozen bottles of Sloan's liniment, the property of Brodie and Rainer, Limited.

The reasons of appeal are (1) that the decision is erroneous in point of law, (2) that there is admission of illegal evidence, and (3) that the decision is not warranted by the evidence.

As to corroboration of the evidence of an accomplice, in *R. v. Baskerville* (25 Cox C.C. 524), the Court of Criminal Appeal reviewed and restated the law applicable to corroboration of the evidence of accomplices. It is there pointed out that although the uncorroborated evidence of an accomplice is admissible in law, it has long been a rule of practice for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony

of an accomplice or accomplices, and in the discretion of the judge to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such uncorroborated evidence. This rule of practice has become virtually equivalent to a rule of law, and since the Criminal Appeal Act came into operation that court has held that in the absence of such a warning the conviction must be quashed. Lord Reading, C.J., who delivered the judgment of the court, said "it can but rarely happen that the jury would convict in such circumstances."

It is as well to draw attention to this case as the effect of the decision seems to be that in order to carry out this recognised rule of practice which has become virtually equivalent to a rule of law, a judge or magistrate—sitting as a jury—ought to refuse to convict in the absence of evidence corroborating the accomplice. In the present case the charge against the accomplice had not been disposed of, and he says "my case is to come off next," and again, "the store said if I spoke the truth they would be as easy as they could be" This shows how dangerous and improper it would have been to convict on his uncorroborated evidence. It follows that the first point for consideration is whether or not there was evidence to corroborate that of the accomplice Humphrey.

The corroboration necessary is independent testimony, which affects the accused by connecting, or tending to connect him, with the crime; evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but that the accused committed it.

The evidence of the porter Ross shows that on the day in question he took "3 parcels Sloans" in a basket with the delivery book to the shop of the accused; that he put the basket on the counter, and that one Massiah (charged with the accused and dismissed) opened the basket and took out the three parcels of Sloans liniment, and put them on the inside counter, and then went to the accused who was seen by Ross at the back of his shop; that the accused then came to Ross and was told by him that the goods had come from Brodie and Rainer; that Ross handed him the delivery book to be signed, and that accused opened it, turned the leaves, and handed it back telling Ross "all right." The delivery book produced contains no entry of these goods, nor is there any memorandum by accused of his having received them. The evidence of this witness—who discharged his duties honestly, and with regard to whom it is admitted that no suspicion attaches,—confirms the evidence of the accomplice Humphrey that goods were sent to the accused by the accomplice in accordance with a pre-arranged plan between the two of them, and that they were in the possession and under the control of the accused, that is, received by him in accordance with

## ROACH v. RICHARDS.

that pre-arranged plan, showing guilty knowledge at the time that they were so received. Here is corroboration on a material particular.

It is not necessary that there should be corroboration on every fact deposed to by the accomplice, and it was therefore open to the magistrate to accept the statement of the accomplice that the accused had paid him later, on the same day, the sum of four dollars for these goods.

It is not necessary to deal with the question of the admission by the magistrate of what is submitted to be illegal evidence, as the court has found corroboration and guilty knowledge without reference thereto. It is sufficient to say that certain parts of such evidence, in the opinion of the court, are admissible, while as to certain other parts the objection seems to be well founded.

The evidence shows that the accused was an accessory before the fact, and it is submitted that he should have been charged and convicted of larceny and that the conviction for receiving with guilty knowledge cannot be sustained.

The accused as an accessory before the fact is liable, to be convicted in all respects as a principal felon (*R. v. James* (1890) 24 Q.B.D., 439, and *R. v. Manning and Smith*, 6 Cox C.C., 86). In these cases the accused was charged with larceny only. In *R. v. Coggins* (12 Cox C.C., 517) the evidence showed that the accused had assisted in the stealing,—not as an accessory before the fact but as principal in the first or second degree,—and the only charge against him being that of receiving, the majority of the Court of Criminal Appeal held that there was not reasonable evidence upon which the accused might be convicted of receiving. So also in *R. v. Perkins* (5 Cox C.C., 554) where the prisoner stood outside the warehouse sufficiently near to have rendered aid if the actual thief was taken into custody, the Court of Criminal Appeal held that he could not be convicted as a receiver, that he was a principal in the second degree.

In the present case the accused was not present at the stealing of the "Sloans liniment," and was not sufficiently near to have rendered assistance to the thief Humphrey. By Ordinance No. 18 of 1893, s. 29 following the English Statute *24 and 25 Vict. c. 94, s. 1* (re-enactment of *11 and 12 Vict. c. 46*), an accessory before the fact may be indicted, tried, convicted and punished in all respects as if he were a principal felon, but he may also be found guilty of receiving the property stolen if there is reasonable evidence that he so received it. As said by Erle, C.J., in *R. v. Hughes* (Bell C.C., 242) there is no inconsistency in saying that he is guilty of being an accessory before the fact, and that he received the goods knowing them to have been stolen.

The conviction is affirmed and the appeal dismissed with costs.

JOHNSON v. BISHOP.

JOHNSON v. BISHOP.

[361 of 1917.]

JOHNSON v. BISHOP.

[361A. of 1917.]

1918. FEBRUARY 15. BEFORE SIR CHARLES MAJOR, C.J.

*Motor car—Light to show marks of identification plate at back of car—Car in use though not in motion—Driver of car—Evidence—Motor Car Regulations, 1912—Breach of peace—Insulting language.*

Two appeals, taken together, from decisions of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist.) Defendant was convicted, firstly, for, being the person in charge of a motor car in use, failing to have a light so fixed as to illuminate and render easily distinguishable every figure on the identification plate fixed on the back of the car, and, secondly, for using insulting language to a corporal of police whereby a breach of the peace might be occasioned.

The defendant appealed, the reasons for appeal sufficiently appearing from the judgment of the court.

*J. A. Veerasawmy*, for the appellant.

*G. J. de Freitas, K.C., Acting S.G.*, for the respondent was not called upon.

SIR CHARLES MAJOR, C.J.: The defendant was convicted, firstly, for contravention of the Local Government Board's regulations as to motor cars, requiring a lamp to be kept on a car, used on a public highway, so contrived as to illuminate and render easily distinguishable every figure on the identification plate fixed on the back of the car, and, secondly, during the events that led to the first charge being preferred, for using insulting language to a police constable whereby a breach of the peace might be occasioned.

The charges were heard together, and the evidence for the prosecution—the defendant gave no evidence and called no witnesses—showed that no lamp was in fact lighted on the back of the car and that the identification plate could not be distinguished; that, on the constable asking a group of men, of whom the defendant was one, near the car whose car it was, the defendant said "Go on; don't you see the light in front?"; that in reply to the constable's statement that that was not sufficient, the defendant said "go on, you damned dog driver," and directed a companion, one Comacho, to turn on the light, then adding to the constable, "the magistrate can only fine me \$3; can't do me a damned thing. Go

## JOHNSON v. BISHOP.

on, yon corporal Braithwaite, you damned dog, you always begging me for rum”; that the defendant then said to Comacho, “go and turn off the damned light,” and to Braithwaite, “you, Braithwaite, you damned fool.” It also appeared that the defendant said he was the owner of the car and had several times been seen driving the car.

The defendant appealed from both convictions, as to the first, on the grounds (a) that at the time the car was found on the highway without the back lamp lighted it was not in motion and was, therefore, not being “used,” and (b) that there was no evidence that the defendant was the person in charge, or the driver, of the car. I dismissed the appeal, being of opinion that the car, although for the moment at rest, was being used, and that the acts and words of the defendant when questioned on the matter, coupled with the fact that he had been seen several times driving the car, constituted sufficient evidence from which, in the absence of anything to the contrary, the magistrate might find that he was the driver, a person then in charge of the car.

As to the second conviction the grounds of appeal were (a) that no evidence was given that a breach of the peace might have been occasioned; (b) that the constable was not near enough to the defendant to make a breach of the peace physically possible and did nothing to indicate a temptation to commit a breach of the peace; (c) that being himself a peace officer he could not break the peace. I dismissed the appeal because the words were insulting and, in the circumstances of the case, clearly such that a breach of the peace might have been occasioned thereby.

## BENN v. DAVIS.

## BENN v. DAVIS

[45 of 1918.]

1918. FEBRUARY 19. BEFORE HILL, J.

*Criminal law—Unlawful possession—Requisites to throw onus on accused—Evidence of statements explanatory by accused in answer to questions by constable—Accused found guilty of larceny on charge of unlawful possession—Summary Conviction Offences (Procedure) Ordinance, 1893, Amendment Ordinance, 1915, s. 2.*

Appeal from a decision of Mr. W. J. Gilchrist (Stipendiary Magistrate, Georgetown judicial district) who convicted the appellant Davis of the larceny of five bags. The accused was charged, in connection with one Davis, with the unlawful possession of the bags in question.

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

*J. A. Veerasawmy*, for the appellant.

*G. J. deFreitas, K.C., Actg. S.G.*, for the respondent.

HILL, J.: The appellant, together with a man named Worrall, was charged before a stipendiary magistrate for having in their possession on the 24th January five bags reasonably suspected of having been stolen. On such a charge the magistrate has to be satisfied that (a) the accused had possession, (b) there was reasonable suspicion that the goods were stolen, and on these two requirements being satisfied the onus is thrown on the accused to account for his possession.

The magistrate in this case dismissed the case against Worrall and convicted the appellant of larceny of the bags on the 23rd January, 1918, by virtue of Ordinance 13 of 1915 which enacts “where unlawful possession “under section 96 of the Summary Conviction Offences Ordinance, 1893, “is charged, and the evidence establishes the commission of the offence of “larceny of any kind, or of receiving stolen property, the defendant shall “not be entitled to have the case dismissed, but may be convicted of such “larceny or of receiving stolen property and punished accordingly.”

The reasons of appeal are (1) that the decision is erroneous in point of law;

- (a) There was no evidence that the defendant John Davis, who was charged under sub-section 1 of section 96 of Ordinance 17 of 1893, as amended by Ordinance 12 of 1915, was on the date alleged in the said charge, in possession of the goods therein mentioned.

## BENN v. DAVIS.

- (b) At the trial it was not shown that there was reasonable suspicion that the goods mentioned in the charge were unlawfully obtained or stolen
- (c) The person in whose possession the goods alleged in the said charge were found, was not charged before the Court as having the said goods in his possession.
- (d) The evidence adduced at the trial herein disclosed that on the 24th January, 1918, the date mentioned in the aforesaid charge, the possession of the goods was in Jose Gomes, dealer in bags, of the Stabroek Market, Georgetown.
- (e) The procedure adopted in the matter herein of charging the defendant John Davis jointly with the defendant James Worrall, without having brought before the Court the person in whose possession the goods mentioned in the said charge were found, and without examining witnesses on oath touching the same was *ultra vires*.
- (f) The learned magistrate was under the circumstances of the case not entitled to convict the defendant John Davis of the commission of the offence either of unlawful possession or of larceny of the goods described in the said charge.
- (g) The learned magistrate erred in arriving at his decision by acting on the evidence of the defendant James Worrall that he got the bags from the defendant John Davis, as there was no evidence that the defendant John Davis was present at the making of such statements, made before Worrall was taken by Corporal McCammon to Davis, and asked by McCammon if he, Davis, gave Worrall any bags to take to the market.
- (h) There was no evidence of larceny disclosed at the trial against the defendant John Davis.

(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.

Reason 1 (a).—

The evidence showed that on January 23rd Davis came to Gomes's stand in the market and told Rodrigues, a clerk to Gomes, that he had some bags to sell. Rodrigues said to bring them; he replied he would send them. He left, and a few minutes after a coolie man came with some bags. Worrall was with him. Worrall said that the watchman at the Steamer Stelling (Davis) had sent him; (this evidence was admitted as against Worrall only although I see no reason why it should not be admissible against Davis also in view of the evidence given later). Rodrigues told him to put the bags down, and the coolie and Worrall then

## BENN v. DAVIS.

left. Davis did not tell him to pay the man. Shortly after Worrall returned and asked Rodrigues if he was going to send the money for the bags. He told Worrall Gomes was not there. After 4 p.m. Worrall returned and asked for Gomes who told Worrall to return the following morning. The next morning both Worrall and Davis came. Davis asked for Gomes. Rodrigues told him Gomes was on the wharf. Davis told Worrall to go on wharf and look for Gomes. Worrall left and Davis said he could not remain, he had no time but he (Rodrigues) must tell Gomes to give Worrall the money for him. Worrall came back from wharf, said he could not wait for Gomes, would return. Davis did not return. About 9 a.m. Worrall, returned and saw Mr. Gomes who told him to return as he did not have keys. Worrall and Gomes left. Both returned about some time from different directions. Gomes asked to examine the bags. Corporal Benn and another detective came up, asked Worrall where he got the bags from, Worrall said watchman from Stelling gave them to him and told him to get the money for them. Corporal Benn's evidence is that on January 24th, 1918, he went to the market, saw some bags at Gomes' stand; also saw Worrall; Gomes said he was buying these bags from Worrall. Worrall said he got them from Bolton (Davis). These are the bags in Court. Cross-examined by Mr. Veerasawmy for Davis, Benn stated he asked Gomes if he was buying the bags, he had previously received information from Gomes, and went there in consequence of what Gomes said. Gomes said he suspected the bags were stolen as he saw the label on them.

Corporal McCammon swore that on January 24th he went to market, saw Mr. Gomes, Worrall; and some bags. He went with Worrall to Government Steamer Stelling, he went to Davis, he asked Davis if he gave Worrall any bags to take to the market, he Davis, said that he saw Worrall with some bags; that he Worrall had brought some bags on 23rd and asked him to keep them and took them away at 1 p.m., Worrall said to Davis you gave me the bags to take to Mr. Gomes in the market.

Gomes' evidence which it is unnecessary to set out herein shows he was suspicious both of Worrall and Davis and communicated with the police, hence the presence of Corporals Benn and McCammon.

On this evidence, I agree with the learned magistrate that Gomes was in possession of the bags as the agent of Davis. I entirely dissent from the submission of counsel for the appellant that the police were bound to put Gomes before the magistrate on a charge of unlawful possession, to suffer the indignity of such a proceeding, when he was doing all he could in the interest of justice.

And further, on a charge of unlawful possession of goods on one date on which the evidence discloses a possession at an

## BENN v. DAVIS.

anterior date, I see no reason why under section 96 (2) a conviction should not lie, provided the magistrate has at the close of the case of the prosecution announced his opinion and let the accused know what case they then have to meet (*Nelson v. Campbell and anor.* (1915 L.R.B.G. 22).

Reason 1 (b).

There was reasonable suspicion, as shown at the trial, that the goods were stolen—*vide* the evidence of Gomes, Benn and McCammon—suspicion can arise at the time of trial but it should appear on the evidence, and this appears to have been so in the case under review.

Reasons 1, (c) (d) and (e).

These three are of no avail in view of the opinion expressed by me that the possession of Gomes was that of Davis under the circumstances.

But there are irregularities which amount to illegalities in some respects which entitle the appellant to a reversal of the decision convicting him of larceny, and I shall deal with reasons 1 (f), (g) and (h) together as one bears on the other. Firstly, I cannot find that the property in the bags in the inhabitants of the colony has been proved,—an essential to a conviction for larceny is that some specific individual or individuals have been deprived of the particular property specified in the charge. All the clerk at the steamer stelling says is that the bags in court were similar to those of the inhabitants of the colony. Now, according to Gomes Davis had previously sold him bags on several occasions. I cannot find on the evidence that bags were previously missed from the stelling—and on the evidence of Ashford the clerk, taken with that of Gomes, relative to the bags I am unable to say that the ownership of the bags was shown to be in the inhabitants of the colony.

Secondly, I cannot agree with the magistrate that the police had any right to ask Davis whether he had given the bags to Worrall to take to the market. I have no desire to hamper the police in the execution of their duties, but merely desire to require them to perform their duties in accordance with what is equitable and proper. I differentiate entirely as to the proper method of enquiry to be pursued by the police, where a person has been found committing an offence, or in possession of stolen goods, and where a person is in possession of an article which a policeman suspects is stolen or unlawfully obtained. In the former cases a policeman has greater latitude than in the latter. And this must always be borne in mind in considering evidence tendered in the magistrate's court. In *Lewis v. Harris* 110 Law Times R. 337, referred to by the magistrate, a policeman met a girl leaving

a shop with goods on a Sunday, which pointed to a breach of the Sunday Observance Act. He asked who had served her. She said "Miss Harris." He took the girl to the shop and asked Miss Harris if she had served the child and she replied "Yes." Now here there was an offence which had been committed, but in a charge for unlawful possession no offence is committed, there is a suspicion, which has to be shown to be reasonable, that an offence has been committed and it is to the magistrate that a "satisfactory account" has to be given.

But *Lewis v. Harris* laid down certain propositions which, if applied to the case under review, would have, in my opinion, shown the direct questions asked of Worrall and Davis by Benn and McCammon to have been improper. For it was there held "that a statement made by a person to a constable in answer to an inquiry by the constable is admissible in evidence on subsequent criminal proceedings against such person although no caution was given by the constable *provided* that the person was not at the time in custody on the charge, that the constable on making the enquiry had not formed the intention of instituting proceedings whatever the answer might be, and that no inducement was held out or threat made to induce the person to make the statement."

In the course of the judgment of Darling, J., (p. 339) he said "the constable admitted that he questioned the respondent with the intention of taking proceedings against her if her answer was in the affirmative. It follows from that that he questioned her with the intention of not taking proceedings against her unless her answer was in the affirmative," and at p. 340 a constable ought not, if he has made up his mind that whatever the answer may be he will arrest the person to whom he is speaking, to ask that person an incriminating question." Now I hardly think in the present case Corporals Benn or McCammon would swear they had not formed the intention of instituting proceedings against Worrall and Davis, whatever their answers might have been to the constables' questions.

This case of *Lewis v. Harris* is referred to in *Adams v Chedda* (1916) L.R., B.G., 28, as a valuable guide to the police in carrying out their duties and no doubt is so, but the head note to *Adams v. Chedda* runs as follows:—

"This principle (as laid down in *Lewis v. Harris*) is to be observed at the trial of persons charged with the possession of goods suspected to have been stolen under the provisions of the Summary Conviction Offences Ordinance, 1893, section 96, But as the ordinance contemplates that these persons should explain their possession, 'to the satisfaction of the court' *i.e.*,

## BENN v. DAVIS.

“when before the court, and not in answer to enquiries by constables in advance of the trial, police officers, having in view possible proceedings under the ordinance against the persons interrogated, should abstain from making these enquiries, and magistrates should attach little weight to evidence so obtained.”

The remarks of the Court of Appeal in *Ramkhelawan v. Barrow*, (1915) L.R., B.G., 163, and *Baldeo v. Pollard* (1915) L.R., B.G., 171, are instructive as to the duties of the police especially in regard to cases of “unlawful possession,” and those of Berkeley, J., in *Williams v. Sancho*, (1917) L.R., B.G., 137, in which he says “No constable in my opinion is warranted, as too often he seems disposed to do, in taking upon himself the function of the court of calling on a suspected person to account for his possession.”

For these reasons I think the policemen erred in asking the man Worrall where he had got the bags from, and in asking Davis, if he had given the bags to take to the market. The proper method would have been, (in view of the decisions of the courts in cases of “unlawful possession,” where it must be remembered the burden of proof is entirely different to the ordinary cases) for Corporal Benn to have said to Worrall “I suspect you of being in possession of bags which have been stolen, and I intend to charge you,” and then to have cautioned him. If he chose to say anything, such statement would be perfectly admissible against him. As a fact he replied (*vide* Rodrigues’ evidence) that he had got the bags from the watchman, in answer to Benn’s question where he had got the bags from. On this, he (Worrall) was taken to Davis and Corporal McCammon asked Davis if he had given the bags to take to the market. Here again I think the policeman erred. He should have said “This man (Worrall) has stated you gave him three bags to take to the market, I suspect you in consequence, and intend to charge you before the magistrate of unlawful possession,” and then cautioned him. Here again any statement then made by Davis would be perfectly admissible. Any other procedure rendered the evidence open to objection, and of little weight.

Magistrates should bear in mind that decisions of the Appeal Court are directions on which they must act in administering justice.

Again I think the procedure adopted in the court below savoured of illegality. These men were charged—and properly joined in my opinion—with “unlawful possession,” in which case, as is well known, the burden of proof of accounting to the court is on the accused—not so in cases of larceny. It therefore seems to me imperatively necessary that if a magistrate considers the essential ingredients con-

stituting larceny have been proved by the prosecution he should, before calling on the person accused of “unlawful possession,” to so say, and leave it to the accused to give evidence or not as he chooses, or to act in such way as he may think best in his interest, This was not done, as appears by the record, and the reasons for decision—but the accused Davis was called upon, *i.e.* required to account on the charge of unlawful possession, and after he had done this, he was convicted of larceny under the provision of a law, recently passed, which I think I am correct in saying has no counterpart in the Criminal law of any other part of the Empire. By that law, on a charge of “unlawful possession” if the evidence discloses larceny, there may be a conviction for larceny, but this cannot mean that the conviction can be obtained except on such evidence, and on such rules of evidence, as are necessary to bring home to an offender a case of larceny. It is not possible to utilise the extraordinary procedure in connection with “unlawful possession” cases to convict an accused person on a different charge.

In *Charles v. Wong* (1916) L.R.B.G. 156 which was a charge of unlawful possession and a conviction on that charge for larceny Major, C.J., is reported as follows: “It is always advisable, for I think it obviously fairer to “a person charged, that, when as well the fact that a theft has been committed as the owner of the property stolen are known to the prosecutor, a “charge of larceny or of receiving should be preferred and not that of “unlawful possession. The ever recurring resort by the police to the latter “charge in circumstances which straightly point to the former seems to me “to savour of oppression. But the provisions of the law are plain . . . .”

The Ordinance (13 of 1915) was the result of the decision in *Martin v. Calder* (1914) L.R.B.G. 13 and *Figueira v. Franklin* 25.4.13, and the above views of Major, C.J., are in accordance with the latter portion of those of the late Sir Crossley Rayner, C.J., who in *Martin v. Calder* is thus reported, (p. 16). “The enactment of section 96 in the Summary Conviction “Offences Ordinance, 1893, gives the police of this colony a power which “is not possessed by the police in England generally. It is a very useful “power, but it must be used in the way and for the purposes for which the “legislature intended it. In my opinion the real use of the section is to enable the police to detain a person found in suspicious circumstances in the “possession of property, until enquiries can be made. Without some such “power he could not be detained, and by the time enquiries had been made, “he would have disappeared. In cases where the suspected person is not “found in possession of the stolen property he must be charged under the “ordinary law with stealing or receiving, and

## BENN v. DAVIS.

“if the evidence is not strong enough to prove the charge, he must be acquitted. But it was never the intention of the legislature in enacting section 96 to enable persons to be convicted of what is substantially stealing or receiving, upon evidence which would not support a formal charge of stealing or receiving. In other words it was not the intention of the legislature to provide a means of convicting persons on evidence too weak to sustain a charge under the ordinary law”

Those concluding words still hold good, and Ordinance 13 of 1915 has not advanced the position one iota in so far as the evidence necessary to sustain a conviction of larceny on a charge of unlawful possession and the procedure to be followed in such circumstances is concerned. For the reasons given, I do not think the conviction can be sustained, and the decision is reversed, with costs to the appellant.

## JOHNSON v. NANDU.

[388 of 1917.]

1918. MARCH 1. BEFORE SIR CHARLES MAJOR, C.J.

*Criminal law—Breach of trust—Trader receiving money in advance and neglecting to perform contract—Traders (Breaches of Trust) Ordinance, 1861, s. 3.*

A breach of trust within the meaning of Ordinance No. 4 of 1861 (Traders, Breaches of Trust, Ordinance) means a refusal or neglect to perform the contract entered into at all and in every respect; the ordinance does not apply to a failure to perform part only of the contract, nor to an unskilful or unworkmanlike performance thereof.

Further, to establish liability, there must be a refusal or neglect, upon being required by the employer, to repay the advance or return the materials made or delivered for the purpose of the contract.

Appeal from a decision of the Stipendiary Magistrate of the West Coast Judicial District (Mr. H. K. M. Sisnett) who convicted the defendant Nandu (now appellant) of a breach of trust, under the provisions of Ordinance 4 of 1861.

The facts of the case, and the reasons for appeal fully appear from the judgment. The appeal was allowed.

*E. G. Woolford*, for the appellant.

*H. C. Humphrys*, for the respondent.

SIR CHARLES MAJOR, C.J.: Nandu, a tailor, contracted on the 18th of June, 1917, with Johnson to make a jacket and pair of trousers out of three yards of cloth supplied to him by Johnson for \$3.50. He received an advance from Johnson of \$1.44. No time for performance was specified. The cloth was in one piece and sufficient for the purpose. Either during the week in which the 18th of June fell, or early in the next week Johnson saw

## JOHNSON v. NANDU.

Nandu at the latter's request and found the trousers made but the jacket only cut out. Nandu asked for another yard of cloth which Johnson refused to give him. That evening Nandu sent home the trousers incomplete, in a particular usually regarded as essential, because they had no buttons. Nandu made renewed demand for the additional cloth and was met with the same refusal, but, on the 6th of August, had finished making the jacket by piecing each sleeve at the elbow. To this Johnson demurred and, not receiving the suit of clothes on the 30th of October prosecuted Nandu for that he, having so contracted and received the advance, had, without lawful excuse neglected and continued to neglect to perform the contract within a reasonable time. On that charge, the magistrate, having found the facts as I have just stated them, convicted the defendant.

Nandu has appealed, urging among other grounds (a) that there was no neglect to perform the contract within the meaning of Ordinance No. IV. of 1861, section 1, the enactment under which the charge was laid, and (b) that there was no evidence of, nor, in fact, any requirement by Johnson that Nandu should repay to him the advance the latter had received, or of any neglect or refusal by Nandu to comply with that requirement. It is conceded by the respondent that no requirement was made.

I am of opinion that the appellant is entitled to succeed on both points. The ordinance under discussion is fully penal and must be construed strictly. Where an amount greater than £5 is involved "a trader" is liable, upon proof of the breach of contract, to conviction for a misdemeanour. By its third, fourth and fifth sections the enactment provides for an offence, quaintly described as a breach of trust but consisting of two acts by the trader, both of which he must be shown to have done before he can be liable to conviction. The first is refusal or neglect, without lawful excuse, to perform the particular kind of contract into which he has entered. And that in my opinion, means a refusal or neglect to perform it at all and in any respect, not to perform it in part and leave it unperformed in other part, still less, as in this case, to perform it wholly but in a manner shown to be unskillful or unworkmanlike, or for any other reason unsatisfactory to the employer, which may be the subject of civil proceedings. This view seems to me to be supported by the other provisions of the ordinance, but particularly, I consider, by the provision that a second act of the trader must be shown to have been done to establish liability, namely, the refusal or neglect, upon being required by the employer, to repay the advance, or return the materials, made or delivered to him for the purpose of the contract. The ordinance, in short, contemplates that "trader" as defined in it who, entering into a contract of one of the kinds mentioned,

## JOHNSON v. NANDU.

not only refuses or neglects to move in the matter of its performance but holds on to his advance or to the materials supplied to him for the purpose.

The evidence here on the one hand shows a performance of the contract but unskilfully, not refusal or neglect to perform it at all. I should say that I am not at all sure that the evidence justified the magistrate finding on the question of lawful excuse, but be that as it may, it is plain on the other hand, that there was no evidence—it was not in fact contended—that there had been any demand for a return of the advance. That being so an essential ingredient of proof to fix liability was absent and the conviction cannot be sustained.

The ordinance is not, as argued for the respondent, a cheap and expeditious method whereby an employer may obtain damages from a workman for unskilful performance of the work the latter has undertaken to do.

The appeal is allowed, but I make no order as to costs.

## ROMAN v. SOOKRAJ.

[854 of 1917.]

1918. MARCH 1. BEFORE BERKELEY, J.

*Adulteration of food—Milk—Analysis—Milk in course of delivery to purchaser or consignee—Completion of delivery.*

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district, who convicted the appellant Sookraj on two charges of unlawfully selling to the complainant one pint of milk, such milk not being of the nature, substance and quality demanded.

*C. R. Browne*, for the appellant.

*H. H. Laurence*, for the respondent.

BERKELEY, J.: Appeal by defendant from two convictions by the stipendiary magistrate of the Georgetown judicial district (Mr. McCowan) for the sale of adulterated milk.

The case for the respondent is that on October, 9th 1917, as sanitary inspector he was at the Government steamer stelling, Georgetown, taking samples of milk, that he there purchased from appellant one pint of milk from five different cans paying five cents in respect of each purchase. These five samples as shown by the certificate of analysis in each case are marked respectively 100, 200, 352, 352,\* and 400.

## ROMAN v. SOOKRAJ.

- No. 100 contains 29.4% of added water.
- No. 200 contains 29.4% of added water.
- No. 352 is a sample of genuine milk.
- No. 352\* contains 31.1% of added water.
- No. 400 contains 27.0% of added water.

The respondent says that there were three large and three small cans while his only witness, Inspector October, says three large and three or four small ones.

Appellant and his witnesses speak of two large and four small cans and one of these witnesses, the clerk of the Government stelling, gives direct evidence that two large cans had been freighted to appellant by the 8 a.m. boat, and that in addition thereto he saw four small saucepans near to appellant.

The small saucepans belonged to customers who had already purchased the milk contained therein. It is common ground that one of the large cans was empty, and according to the respondent and his witness the five samples were taken from two large and three small cans. The witnesses for the appellant say from one large and four small cans. Of the five samples thus taken, sample 352 was from a large can and it was found to be genuine milk.

Informations were laid in respect of the four remaining samples viz.:— 100, 200, 352,\* and 400. At the hearing the charges relating to samples 100 and 400 were withdrawn and as stated by counsel on both sides (a fact which should have appeared on the face of the proceedings) it was agreed that the remaining two charges be heard together.

These two charges related to samples 352\* and 200 and are the subject matter of the present appeal.

With respect to 352,\* the magistrate having accepted the evidence of respondent and his witness as to three large cans, and this sample being taken from the third large one, this court will not interfere with the conviction in respect of this sample.

The three large cans having been disposed of, sample 200 is found to have been taken from the third of the small cans, the charges in respect of the other two having been withdrawn.

This can was the property of a customer. The place of delivery was the Government stelling. It had been delivered to her and she had paid for it. According to the evidence the customers took up their cans and left without asking that the pint of milk sold by appellant to respondent be replaced in their respective cans. The delivery was therefore complete before the sanitary officers came on the scene (*Helliwell v. Haskins* 75 J.P. 435).

The evidence shows that appellant said the milk in the small cans belonged to customers and refused to sell. He only did so

## ROMAN v. SOOKRAJ.

on being told that he would be charged with refusing to sell. It was submitted that having sold adulterated milk, whether his own or that of anyone else he is liable to conviction.

I have come to the conclusion that as the milk was not in course of delivery he cannot be convicted. (See *Helliwell v. Haskins* supra).

This second conviction is quashed. I make no order as to costs.

COX v. LILLIAH.

[258 of 1916.]

1918. MARCH 4.

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

*Criminal Law—Unlawful possession—Facts constituting possession—Evidence—Confession—Inducement.*

Appeal from a decision of Dalton, J. (Actg.) (*a*)

The appellant Lilliah had been convicted by the stipendiary magistrate of the Georgetown judicial district on two charges of receiving stolen property, and was sentenced to six months' imprisonment with hard labour on each charge, the sentences to run concurrently. On appeal one conviction was quashed and the second was confirmed. He now appealed to the Full Court against the decision of Dalton, J., (Actg.) confirming the conviction on the second charge.

The material facts and the reasons of appeal sufficiently appear from the report of the case in the court below.

*J. A. Luckkoo*, for the appellant.

*G. J. de Freitas, K.C., Actg. S.G.*, for the respondent, not called on

SIR CHARLES MAJOR, C.J.: On the argument I have heard I do not think it necessary to hear counsel for the respondent. The magistrate convicted the appellant of receiving stolen goods. From that conviction he appealed and the learned acting Junior Puisne Judge held that conviction was right, that is to say, that the magistrate had before him the ingredients of proof necessary to establish the guilt of the defendant. Those ingredients were, first, proof that the goods were stolen, second, that they were received by defendant, and third, that when he received

(*a*) Reported at 1917 L.R., B.G. 8.

## COX v. LILLIAH.

them he knew them to have been stolen. It was not disputed that the goods were stolen. The learned judge in deciding the point of possession purposely excluded from his consideration the evidence before the magistrate which he held to be inadmissible and to have been wrongly received by the magistrate, and he referred to three or four circumstances which he thought went to confirm the opinion of the magistrate. Those were the tracing back of the bicycle from one hand to another until the house in which defendant lived, and spoken of as defendant's house, was searched. At the time when the lamp was found in the house and also when the bicycle was recovered, the defendant was not present, but the key of the house was kept by Jassiban and she was the person from whom Dowlat got the bicycle. Moreover there was another witness who swore to a conversation which he stated he heard between Jassiban and the defendant about a bicycle.

It has been said that that chain of evidence was not strong enough but with that this court has nothing to do. The stolen goods being found in the house, whether or not they were in the defendant's possession was a question of fact, and of that fact, the magistrate was the judge and not the court of appeal. I think the learned judge was right in holding that there was evidence on which the magistrate could find possession in the defendant. Now, when stolen goods are found in the possession of a person, the onus is upon that person to give a full and satisfactory explanation. Here an *alibi* was set up and we have before us what the learned judge had to say with respect to that.

The decision of the judge in the court below must be confirmed, and the appeal dismissed with costs.

HILL, J.: The evidence of the various witnesses taken as a whole, without consideration of statements made to Inspector Cox, which may or may not be admissible, was sufficient in my opinion to show possession and control in the appellant of the bicycle and lamp and guilty knowledge on his part. The decision of the learned judge must be affirmed with costs.

BHAGWANDIN v. SUKHAWATH AND ANR.

BHAGWANDIN v. SUKHAWATH AND ANR.

[10 of 1916.]

1918. MARCH 4. BEFORE BERKELEY AND HILL, J.J.

*Appeal—Practice—Written reasons of judgment—Rules of Court, 1900, Order XXXV., r. 1—Evidence—Matters not raised in pleadings—Order XVII., r. 15.*

Appeal from a decision of Sir Charles Major, C.J., who, in a claim by the plaintiff for the specific performance of a contract of sale of immovable property, and for accounts, gave judgment for the plaintiff with costs, on condition that the plaintiff first pay to the second defendant Bissoon Dyal, before the carrying into execution of the agreement, the balance of the purchase money of the property in question.

The defendant Sukhawath appealed (*a*). The material facts and reasons of appeal appear from the judgments of the court.

*P. N. Browne, K.C.*, for the appellant.

*E. G. Woolford*, for the respondent.

BERKELEY, J.: This is an appeal from the Chief Justice Sir Charles Major, who ordered specific performance of an agreement entered into by the defendant (now appellant) by which he undertook to transport to the plaintiff (now respondent) one-sixteenth undivided part or share of certain lands transported to him.

The history of the case is that appellant and respondent agreed to purchase from the owners of Foulis plantation one-fourth part or share thereof in the following proportions: the appellant three-sixteenths and the respondent one-sixteenth. The respondent objected to a certain mortgage which existed against the whole plantation being transferred to the British Guiana Building Society, Limited, and in order to avoid foreclosure by the then mortgagee it was arranged that appellant should accept transport of the whole one-fourth part or share and give an undertaking in writing in accordance with the agreement already referred to. The transport was thereupon passed to appellant who at the same time signed the agreement.

The substantial ground of appeal is the admission by the court of this agreement. By paragraphs 4 and 5 of the statement of claim the respondent referred to an undertaking given by appellant, as to the exact nature and date of which he seems to have been in doubt, but alleges that it was in connection with his one-sixteenth share and either to transport the same to him or in the alternative to hold the vendor free from liability on any claim made by him. By his defence appellant denied the existence of

(*a*) See *Bhagwandin v. Sukhawath*, 1917, L.R. B.G. 67.

any undertaking, when it must have been within his knowledge what undertaking was referred to. He rendered it necessary therefore that respondent should add Bissoon Dyal, to whom the undertaking had been given, as a co-defendant, with the result that in his defence the agreement was fully set out. The correspondence embodied in that defence shows that an offer was made to transport to respondent subject to the mortgage and that he was unwilling to accept transport on these terms although he had agreed to purchase subject to a mortgage. In my opinion the agreement was properly admitted, and if appellant had acted in accordance with O. XVII., r. 15 and admitted the agreement and either expressed his willingness to pass transport subject to the mortgage or set up that the agreement had been rescinded the hearing of the action would probably have been avoided or if it was proceeded with, no costs could have been allowed. The respondent not having set up in his defence that a verbal agreement existed he could not give evidence thereof if even it would have been otherwise admissible. It is true that respondent did not claim transport subject to the mortgage but it was the only order that could be made leaving it to the mortgagee to take such action as might be deemed necessary under the terms of his mortgage. I was disposed to think that respondent should not have been allowed his costs having regard to his earlier refusal to accept transport subject to the mortgage but in view of what I may term the appellant's improper pleading I am of opinion that the order as to payment of costs must stand. The appeal is dismissed with costs.

HILL J. This is an appeal from the decision of the Chief Justice in favour of the plaintiff Bhagwandin.

Mr. Browne, for the appellant, drew the Court's attention to order XXXV., rule 1, and stated that he had been unable to obtain the reasons of the judgment of the Chief Justice, as they had not been reduced to writing. That rule requires *inter alia*, "when the hearing has been before a single judge, he shall assign in writing the reasons of his judgment," and all proceedings in the civil jurisdiction of the Supreme Court are regulated by the rules of court and not otherwise. It is therefore dear that the reasons of the judgment should have been in writing, and this is requisite in view of the absence of any official shorthand reporter. As to how far the reasons of a judgment are required to go, that question has been dealt with in *Paul v. Bakaralli* (1915) L.R. B.C. 83.

The other submission as to the requirements of order XLIII., rule 11, can only be met by an alteration of the existing rule of court should it be considered desirable.

## BHAGWANDIN v. SUKHAWATH AND ANR.

The reasons of appeal are three in number.

- (a) The admission of documentary evidence not pleaded (reasons 1 to 8).
- (b) The rejection of oral evidence (reason 9).
- (c) The ordering of relief other than what was asked for (reasons 10 to 13).

I am of opinion that the undertaking of December 6, 1915, was properly admitted. It was the sole document referred to, or that could only have been referred to, or meant, in paragraphs 4 and 5 of the statement of claim, and must have been known to the defendant Sakawath and his counsel at the time of filing his defence to be such for it was in his possession at the time. The defendant was in no way prejudiced by its not having been pleaded under the right date, and the amendment was properly made. That the statement of claim did not allege that the transport of 1/16 of Pln. Foulis to the plaintiff was to be “subject to mortgage” or on “payment of balance of the purchase money” owing by plaintiff for his share, does not affect the value of the pleading. The defence might well have stated in view of what transpired, (had it been as full as it ought to have been) that the defendant was prepared to transport but “subject to mortgage,” and on “receipt of the balance of the purchase money”, which would have been the only way in which plaintiff could have expected to obtain his 1/16 share in Pln. Foulis. As a matter of fact the plaintiff in his prayer (par. 10, 1) asks for an order compelling defendant (Sakawath) to pass transport. . . . “on payment of the balance due to the defendant on the signing of the said transport,” and that was the judgment, varied by the order of payment to the added defendant, instead of Sakawath. This was rendered necessary as at the time of filing claim plaintiff was in doubt as to whom the balance was payable, Sakawath having presumably paid Bhagwandin’s share as he had received transport of his 1/16th.

It is as well to draw attention to order XVII., rule 15,—which some practitioners are inclined to ignore. All available defences were, and must have been well known, and were not properly pleaded in the statement of defence for which counsel who led for the appellant was not responsible. It is not sufficient to set both specific denials and rest there, but a defendant must raise by his pleading all matters which show the claim not to be maintainable, or that a transaction is void or voidable in point of law, and all grounds which, if not raised, would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings.

He must confess and avoid as well as traverse.

It is also on that ground that reason 9 must fail—the so-called

verbal agreement has not been pleaded—the only defence raised as to the undertaking referred to in paragraphs 4 and 5 of the statement of claim is in paragraph 5 of the defence i.e. non-payment of the balance of the purchase money payable by the plaintiff.

With regard to reasons 10 to 13 I see no reason to differ from the order of the Chief Justice as to the passing of transport “subject to mortgage.” It is only in this way that transport could be passed, if the mortgagee was not satisfied, and if the Building Society objected they had their remedy of foreclosure, or such other remedy as their mortgage would give them. In fact, it is in the interests of the society that such an order was made, and I cannot agree that the society should have been joined as a defendant to the action. If I understand the letter of Mr. Luckhoo to Mr. Dargan (exhibit H) aright, there was an offer by the former representing Bissoon Dyal to transport “subject to mortgage” *i.e.*, the substituted mortgage to the Building Society whose consent presumably must have been obtained, under their rules—or certainly anticipated—before such offer could have been made.

I am of opinion the appeal must be dismissed with costs.

## RAMGOLAM v. WILLIAMS.

[267 of 1917.]

1918. MARCH 8, 11. BEFORE SIR CHARLES MAJOR, C.J.

*Specific performance—Contract of sale of immovable property—Conditions—Obligation and rights of parties.*

Claim by the plaintiff Ramgolam for performance by the defendant of a contract to convey to him of a piece of land, part of plantation Canefield, Leguan, Essequibo, alleged to have been purchased by him from the defendant on April 17th, 1916.

All the material facts fully appear from the judgement of the court.

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

*J. A. Luckhoo*, for the defendant.

SIR CHARLES MAJOR, C.J.: This is a suit for specific performance of a contract for the sale of land. The terms of the contract appear in a memorandum in writing which is in this form: "Received from Ramgolam the sum of one hundred dollars on account of purchase money two hundred and forty dollars for a piece of land [the measurements follow] lot No. 3, section A, of

## RAMGOLAM v. WILLIAMS.

plantation Canefield, Leguan. Balance one hundred and forty dollars must be paid before transport is given. R. S. Williams.” The memorandum is dated the 17th April, 1916. The plaintiff claims that, pursuant to the contract, he was put into possession of the land and cultivated it at considerable expense to himself, that he has always been ready and willing to pay the balance of the purchase money and, alternatively to performance of the contract, that he be returned the sum of \$130 paid by him on account of his purchase money. Sums of \$20 and \$10, it appears, were paid by the plaintiff to the defendant on the 9th of December, 1916, and in the month of April, 1917, respectively. The defendant’s defence is that “the plaintiff was never in a position to complete the sale” to use the words of paragraph 2 of his statement of defence, and that plea is expanded by the allegation in paragraph 4 thus: “the plaintiff in April, 1917, paid \$10 after repeated oral demands were made on him to complete the agreement and in May, 1917, plaintiff was given notice in writing to pay the balance of purchase money and to be prepared to attend the registrar’s office to have the transport advertised failing which the sale would be considered null and void.”

Upon the issue raised by that plea the determination of the matter in larger part depends, and the first question is, what were the actual terms of the contract and the respective obligation of the plaintiff and defendant thereunder? The terms are set forth in the memorandum I have quoted. Sale by the defendant; payment of \$100 part of the purchase money by the plaintiff, payment of the balance thereof before transport given by the plaintiff. What obligation and on whose part and in what order of time did these latter words create? The plaintiff says he was to pay his balance before transport was given, that is “passed” as the expression goes here, and it is common ground that the transaction contemplated was advertisement of intention to convey and all requisite steps to be taken to enable conveyance to be made, then appearance before a Judge and there handing over the balance of purchase money by the plaintiff when “passing of the transport” by the defendant would be effected, a transaction. I am told that takes place week after week in these Court.

The defendant on the other hand says the plaintiff was first to pay his balance after which the defendant was to take the steps I have mentioned, apparently at his leisure. He dealt with the plaintiff throughout on the assumption that his view of the relative obligation was correct. He made repeated oral demands on the plaintiff to complete the agreement. As he puts it in his evidence; “I sent for plaintiff repeatedly to come to my house about the payment of the money.” And again: “I was continually worrying him for the balance.” And the defendant has so

## RAMGOLAM v. WILLIAMS.

far acted on his assumption he tells us, that, treating the plaintiff's unwillingness or positive refusal to comply with the demand for payment of the balance as unreasonable delay and conduct equivalent to repudiation of the contract, he has agreed to sell the land mentioned in the memorandum to another and has received half the purchase money therefor.

I have no doubt as to the correctness of the view put forward by the plaintiff, that is to say, after the payment of the \$100 on the 17th April, 1916, it was for the defendant to put himself into a position to say to the plaintiff "everything has been now done except my giving you the transport, before I do give it to you, pay me the balance due to me." But what did the defendant do? He asked the plaintiff repeatedly to pay that balance when he the defendant had done nothing to render it payable. The plaintiff very properly refused to pay. So that that steady refusal upon which the defendant wholly relies as constituting unreasonable delay and repudiation on the plaintiff's part was only that which the plaintiff had a right to maintain. The steps to be taken by the defendant are well known; they are prescribed by the rules of this Court. By Order II. of Part II. of those rules, "Every person desiring to pass a transport of property in the Colony shall lodge at the office of the Registrar etc., etc., and the Registrar shall thereupon cause due advertisement, etc." Something was said at the bar about an affidavit to be made by the plaintiff as a necessary step towards passing of a transport and there is, as I have stated already, the allegation in the fourth paragraph of the defence as to the requiring the plaintiff in May, 1917, to be prepared to attend the Registrar's Office "to have the transport advertised." But no evidence has been given that anything is required by law to have been done by the plaintiff by his refusal to do which he prevented the defendant from fulfilling his obligations. On the contrary, it was, as expressly pleaded and argued, the plaintiff's refusal to pay the balance of purchase money which dictated the defendant's notice that the sale would be considered off. And even if the plaintiff must have gone to the registry to depose to an affidavit before advertisement could be issued, the requirement to do so was coupled with the demand for the payment of the balance, which I say the defendant had no right to make under the terms of his contract with the plaintiff, and if a person when righteously required to fulfil one obligation upon him is, simultaneously unrighteously required to perform another obligation, he is at liberty to refuse to fulfil the one until the demand to fulfil the other has been withdrawn. From all points of view, therefore, the defendant held a mistaken opinion as to his rights and liabilities under his contract. I have not had to depend upon examination of the evidence of the various witnesses to reconcile,

## RAMGOLAM v. WILLIAMS.

if necessary, some variances to which slight reference was made by counsel, but may say that on the whole, as indeed admitted by Mr. Luckhoo for the defendant, the parties are not at material difference as to the facts, but only as to the effect of the written memorandum. I am of opinion that the plaintiff is entitled to have the contract performed, and there will be a decree for that purpose with the usual consequential direction as to payment of the balance of the purchase money and all such acts, deeds and things to be done and executed by the defendant (which, in the circumstances attending conveyance of property in this colony, may include directions as to advertisement and the like) as are necessary and proper. The defendant must pay the plaintiff his costs of suit.

## HIGGINS v. ROHLEHR.

[172 of 1917.]

1918. MARCH 22, BEFORE HILL, J.

*Partnership—Premature commencement of business by one party—Knowledge and consent of other party—Effect on relationship between parties.*

Claim by the plaintiff to recover the sum of \$1,957.21, amount of money alleged to have been lent to defendant, and for work done at her request on her estate named Belmonte, in the county of Berbice, between January and June, 1917.

Defendant denied indebtedness, set up a partnership, and counter claimed for the sum of \$1,000 as damages for breach of agreement.

All further necessary facts fully appear from the judgment of the Court.

*B. B. Marshall*, for the plaintiff.

*J. S. McArthur*, for the defendant.

HILL, J.: The plaintiff claims from the defendant \$1,957.21 monies alleged to have been lent, paid, and advanced by him at defendant's request, and for monies due and owing for work and labour done by plaintiff at defendant's request on defendant's estates in Berbice.

Included in this amount are items aggregating \$140.81 which plaintiff admits should be deducted leaving \$1,816.34, and also a charge for \$150 for five months pay due plaintiff, for managing the estates under an agreement.

I am satisfied that the plaintiff did expend from his monies the

## HIGGINS v. ROHLEHR

sum of \$1,666.34 as set out in his claim, and in fact \$1,213 of this is not disputed by the defendant.

The defendant alleges an agreement of partnership under date 1st February, 1917, which provided, *inter alia*.

- (a) That defendant was immediately to sell and transport to and in favour of plaintiff an undivided half in the defendant's estates in Berbice, Belmonte, Union, and Welgelegen, for and in consideration of \$4,000 to be paid to defendant by plaintiff.
- (b) that on passing of the said transport the plaintiff shall enter into possession of the whole of the said plantations, assume the management, and carry out and conduct operations duly specified in the articles of partnership, subject to its terms.
- (c) That the plaintiff shall have the right after entering into possession of the estates to purchase all articles for the use of the estate, etc.
- (d) All payments to be made for wages, purchases, etc, to be made by plaintiff and become a charge on the working expenses of the partnership, etc.
- (e) Clause 19 provided for the payment of six per cent, interest to either of the parties making any loans or advancing monies for the working of the estates.
- (f) Clause 25 provided that the monies for the working of the estates shall be furnished by Mrs. Rohlehr or Mr. Higgins jointly personally, or obtained on loan as hereinbefore narrated (Clauses 18 and 19).

The defendant alleges that in pursuance of the partnership agreement plaintiff paid \$1,213 on account of the \$4,000, the balance being payable at the passing of the transport by defendant to plaintiff. As a matter of fact, there was nothing in the agreement requiring such a payment. Santos held a mortgage on the estates for \$2,500, and the defendant had to give plaintiff transport of his half free of encumbrance. But Santos pressed for his interest, and plaintiff in anticipation of the carrying through of the transport, advanced \$1,100 or thereabouts to satisfy his demands, as well as \$113 to relieve Dr. Rohlehr of a judgment summons for that amount which was out against him. It was agreed that these two items should go against the purchase price of \$4,000 but it is not correct to say that that sum was paid as "in pursuance of the agreement."

The defence further alleges that plaintiff wrongfully and in contravention of the terms of the agreement of partnership entered into possession and commenced operations, and that the sums alleged to have been expended were expended in contemplation of the partnership entered into on 1st February, 1917.

## HIGGINS v. ROHLEHR.

Defendant denies indebtedness in the sum of \$150, for wages. She says she never agreed to pay anything except in and by virtue of the agreement of partnership, and that plaintiff never acted as manager under the agreement, which has not yet come into operation or at all.

With regard to the other items, defendant says, if paid, they were paid pursuant to the plaintiff's wrongful possession of defendant's estates, and in anticipation of the said agreement being carried into effect, by plaintiff, which he was unable or unwilling to do.

In paragraph 10 defendant sets up a specific agreement of partnership still subsisting, and that plaintiff has mistaken his remedy.

In counterclaim, defendant alleges repudiation, and unwillingness to accept transport by plaintiff, impossibility of trust and confidence, asks for \$1,000 damages, and an order rescinding the agreement.

The reply is possession by consent and act of defendant before the passing of the transport, and inability to carry out the agreement in consequence of the acts of commission and omission of the defendant, resulting in the abrogation of the agreement, and therefore no question of dissolution of partnership or specific performance can arise.

There has been a mass of evidence taken, and I do not propose to set it forth herein, but merely to state that on consideration of it I find that the plaintiff was put in possession, and accepted possession, by Dr. Rohlehr on behalf of the defendant, Mrs. Rohlehr in March, before the transport was passed, that his possession was not wrongful—and that, so far as that question goes, plaintiff could always have paid the purchase money of the estates either from his own funds or from borrowed money (see the evidence of Wight and DaSilva).

There were two advertisements of the transport; the first fell through, from what reason is not quite clear, but I am inclined to accept the evidence of Mrs. Kelman that on 28th April, the last day for passing the transport, Dr. Rohlehr told her in the morning "he was not going to pass it any more "as he had changed his mind about passing it subject to mortgage."

Later on, in May, plaintiff, actuated no doubt by the knowledge that he had spent large sums and had no security, and that the Rohlehrs had advanced nothing, agitated for a re-advertisement of the transport. This was done, but there can be no doubt both parties were at this time heartily tired of each other, and plaintiff would have been glad to get his money back and be quiet of the transaction. There was one obstacle to this, the Rohlehrs had no money to pay him,—and then begun a series of

## HIGGINS v. ROHLEHR.

evolutions on the part of the legal gentlemen concerned in which the parties were pawns in a game of bluff.

The transport was re-advertised free of encumbrance and in accordance with the defendant's letter, plaintiff, with his legal advisers, attended at the Law Courts on 2nd July to receive transport. The mortgage of \$2,500 to Santos had to be cancelled as a preliminary to the passing of the unencumbered transport, but the grosse could not be found. While it was being searched for plaintiff and his legal advisers retired after asking the Registrar to note that they had attended. As a fact the grosse of the mortgage was in the possession of Mr. Marshall, counsel for the plaintiff, who had been given it by Santos, for whom he was acting, some time before, to oppose the transport. Mr. Marshall must have known that it would be required—nevertheless he did nothing, the parties never spoke to each other, but both sides asked the Registrar to note that they had attended.

The history of the mortgage incident is significant—plaintiff had on 16th June filed his specially endorsed writ in the matter in consequence of Mr. Marshall, acting for Santos the mortgagee, entering opposition to the transport on 15th June. It is significant that Santos says his entering opposition was done at the instigation of Mr. Marshall.

In these circumstances I am constrained to think that plaintiff realising the inability of the Rohlehrs to finance the partnership jointly with him (clause 25 of agreement) and realising that he was nearly \$2,000 out of pocket, was not anxious to obtain transport, but preferred to get his judgment under the specially endorsed writ, if it was possible, and be quit of the Rohlehrs, and the partnership.

I believe the defendant was ready and willing to pass transport on 2nd July and her inability to do so was primarily caused by her temporary inability to cancel the mortgage which, as I have said, was in the possession of counsel for the plaintiff. Defendant had paid all the necessary fees, for transport, and cancellation of mortgage, and the act of cancelment was ready for the signature of Santos.

There is however one feature of the defendant's willingness to pass transport, and the plaintiff's to accept, which has to be dealt with and that is whether the advances made by the plaintiff for the working of the estates (over and above the sum of \$1,213) should have been set against the purchase price payable by the plaintiff. This was the subject of dispute between the parties, and according to Crane's evidence, Higgins told him he "was going to refuse any transport except the judge told him as to his "money he had expended."

## HIGGINS v. ROHLEHR.

In the absence of any arrangement I am of opinion that such advances came under clause 19 of the partnership agreement, and could not have been deducted from the purchase money.

I am also of opinion that the plaintiff was entitled to charge \$150 for five months' wages.

“If (says Lindley on *Partnership*, at p. 10.) the parties to an agreement “have begun to carry on business, although prematurely, they will be partners. But the premature action of one, unless acquiesced in by the others, “will not affect them.”

Higgins took possession of the estates prematurely with the knowledge, consent, and act of Dr. Rohlehr acting for his wife, and in anticipation of her passing of the transport to him, he continued in possession, and he adopted therefore the contract, and cannot now disaffirm it by quitting the estates, as the parties cannot be put on the same position as before. (*Hunt v. Silk* 5 East, 449).

His remedy is therefore on the contract itself (*Blackburn et al v. Smith* 2 Exchequer Reports, 783).

If he had not entered into possession he could have sued for the \$1,213 as money had and received, but not otherwise.

I find therefore there was a subsisting agreement of partnership. It was still in existence—the presence on 2nd July, 1917 of the parties, ostensibly, to give and receive transport pointed to it, and in these circumstances I think the plaintiff mistook his remedy and should have come for specific performance.

On the counterclaim I do not feel disposed under all the circumstances to order rescission of the agreement—no damages have been shown. Both parties appear willing that the agreement should be rescinded but, naturally, plaintiff wants what he has spent refunded to him and an account for his labour. This must be a matter of agreement between the parties, and may save further litigation. I cannot look upon the \$1,213, under the circumstances in which it was advanced as in the nature of a “deposit” forfeitable to the defendant, and no where in defendant's pleadings, as a matter of fact, is it suggested that it should be so treated.

I give judgment for defendant on the claim and for plaintiff on the counterclaim. Each party to bear his own costs.

RICHARDS v. DEMERARA ELECTRIC CO., LTD.

RICHARDS v. DEMERARA ELECTRIC CO., LTD.

[363 of 1917.]

1918. MARCH 23. BEFORE BERKELEY, J.

*Master and servant—Employer's liability—Common employment—Defect in condition of scaffolding—Contributory negligence—Accidental Deaths and Workmen's Injuries Ordinance (No. 21 of 1916), s. 9.*

Appeal from a decision of the acting Stipendiary Magistrate of the Georgetown judicial district (Mr. B. S. Newsam).

Plaintiff Richards claimed from the defendant company the sum of \$100 as damages for injuries sustained by him during his employment as a wood Sawyer by the defendant's manager on a wood-cutting grant, Waratilla creek, Demerara river. Judgment was given for the plaintiff in the sum of \$75, and the defendant company appealed.

The reasons for appeal were that there was no evidence of any fault or defect in the construction or state of repair of the saw-pit, nor any proof of negligence on the part of the defendant company, and that it was proved that there was contributory negligence on the part of plaintiff.

*G. J. de Freitas, K.C., Acting S. G.,* for the appellant.

*G. R. Browne,* for the respondent.

BERKELEY, J.: This is an action brought in the Petty Debt Court of Georgetown before the Stipendiary Magistrate (Mr. B. S. Newsam). The plaintiff alleges that owing to the negligence of his employers (the defendant company) he sustained injuries on May 16, 1917, when engaged in sawing timber at the Pioneer wood-cutting grant at Waratilla creek, in the Demerara river. He was awarded \$75 as damages.

The defendant company appeals on the ground that there is no evidence of negligence.

The claim is brought under Part II. of the Accidental Deaths and Workmen's Injuries Ordinance (21 of 1916). This Part II. is in effect the Employers Liability Act 1880 (*43 and 44 Vict. c. 42*). Under that act the doctrine of common employment is largely modified, and the general effect of the act is that whereas under the common law a workman injured in the course of his employment could only recover compensation when he could prove that his employer had either neglected a statutory duty imposed on him, or was personally responsible for the negligence which led to the injury, he can now recover where the employer has delegated his duties to other persons who have negligently performed the duties delegated to them. No special privilege is given either to the workman, or, in case of death, to his representatives.

## RICHARDS v. DEMERARA ELECTRIC CO, LTD.

They are to have the same right of compensation and remedies against the employer as if the workman had not been a workman of the employer, nor in his service, nor engaged in his work. As said by Bowen. L.J. (*Thomas v. Quartermaine* (1887) Q.B.D. 692) an enactment which distinctly declares that the workman is to have the same rights as if he were not a workman cannot—except by violent distention of its terms—be strained into an enactment that the workman is to have the same rights as if he were not a workman and other rights in addition. This is the first case in the Supreme Court under the new ordinance and at the request of counsel I have dealt with the general effect of its provisions.

The magistrate in his reasons for decision has found, *inter alia*, that the injuries to the plaintiff were caused by the collapse of the pit in the act of canting the log to be further sawn in the customary way among sawyers (p. 6), and that this was due to some defect in the scaffold or pit which arose from the negligence of the employer or of some person in his service and entrusted by him with the duty of seeing that the pit was in proper condition. He has also found that the plaintiff did not know of the defect—that there was no contributory negligence on his part (page 8).

The plaintiff and Rodie were by themselves engaged in sawing wood on the pit or scaffold at the time of the unfortunate accident which resulted in the death of Rodie and the injuries to plaintiff. He therefore is the only person who can give evidence as to what actually occurred. He says that on May 16, 1917, they had sawn the log lengthwise into four pieces, which had been lashed together, and in order to cant the log on its side to enable them to cut it into the required dimensions, he rested a crow bar on a bearer under the log and prized it up so that Rodie might place a wedge between the bearer and the log. The wedge was not put in, and the log fell breaking the bearer. One end of the log fell to the ground and the other end slid off causing the injuries complained of. It was the runner that broke, but this is a fairly accurate statement as to what happened as is shown by the evidence of the manager of the grant who is of opinion that the accident was due so the canting of the log. As to the canting having been done in the customary way, the manager—who instructed the plaintiff and Rodie to saw the log in question, and by whose order it was placed on the permanent pit of the company—says that the canting should have been done with a block and tackle which could have been obtained on being asked for. He admits that the block and tackle had only been used once for that purpose, and on that occasion not by plaintiff and Rodie. He had some three weeks previously seen these two men

canting a log on a pit which they had erected themselves, and he had told them that it was a dangerous thing to do without getting assistance—they only laughed at him. He also knew that they had sawn a log 10 inches by 10 inches apparently 20 feet long in the company's pit and the runner had stood the act of canting, that the log being sawn at the time of the accident was 40 feet long and 15 inches by 15 inches. When he ordered this log to be sawn by plaintiff and Rodie he never gave instructions to use the block and tackle when canting it nor did he tell them that they could do so. On this evidence it was open to the magistrate to find that the process of canting adopted on this occasion was that which was customarily carried out with the knowledge and acquiescence of the manager of the defendant company.

A defect in the condition of the plant under s. 9 (1) is not necessarily a defect in its original construction; but a "defect in its condition" within the meaning of the ordinance exists if the plant is not in a proper condition for the purpose for which it is applied, (Lord Coleridge, C.J., in *Heske v. Samuelson* 12 Q.B.D. 30, followed in *Cripps v. Judge*, 13 Q.B.D., 583 and *Weblin v. Ballard*, 17 Q.B.D. 122),

The pit or scaffold at the time of the accident was to all appearance in good order. Plaintiff himself says that it looked all right. It had stood the canting of a log of timber 20 feet long and 10 inches by 10 inches, but when a log 40 feet long and 15 inches by 15 inches is canted on it, it shows a defect in its condition, that is, it is not in a proper condition for the purpose for which it is applied. The mechanical engineer who erected the pit says that if the runner had been 10 inches instead of 6½ inches in diameter it would not have broken. The manager is of opinion that two men should not have attempted to cant a log of this size with a crow bar, that they should have got assistance, and it should have been done with a block and tackle, that if the runner had been twice the size it would have been ⅔ the size of the log and it would not have broken in the act of canting, and if it was one and a half the size he does not think it would have broken. Here is the evidence of the manager himself on which the magistrate could find that he knew it was dangerous to cant a log of these dimensions on the pit as it then stood.

The magistrate has found that the plaintiff was ignorant of the defect in the pit and was not guilty of contributory negligence. The mere fact that he had been cautioned as to canting on some other pit a log of much lighter weight and half the length of the present log does not show knowledge of the defect. I agree with the magistrate that he considered the pit at the time safe for the purpose for which it was used and that there was no contributory negligence on his part.

## RICHARDS v. DEMERARA ELECTRIC CO., LTD.

I have carefully considered the cases cited and relied on in behalf of the appellant, and I am of opinion that there was reasonable evidence to support the finding of the magistrate. This being so the appeal must be dismissed with costs.

W. FOGARTY, LTD., v. BHAGWANDASS;  
*Ex parte* GOMES.

[38 OF 1918.]

SMITH BROS. & CO., LTD., v. BHAGWANDASS;  
*Ex parte* GOMES.

[42 OF 1918.]

1918. APRIL 7. BEFORE BERKELEY, J.

*Interpleader—Movable property—Subsequent insolvency of debtor—Official Receiver in possession of property claimed—Stay of interpleader proceedings—Insolvency Ordinance, 1900. s. 9 (2).*

A claim by way of interpleader to decide the ownership of certain property levied on as the property of the debtor is not legal process against the property of the debtor within the meaning of section 9 (2) of the Insolvency Ordinance, 1900.

Claim by way of interpleader by Lionel S. Gomes to one Ford motor car levied upon by W. Fogarty, Ltd., and Smith Bros. & Co., Ltd., plaintiffs, in actions against Bhagwandass, as the property of the latter.

On the matter coming before the Court for the plaintiffs in the original actions and for the claimant to state the nature and particulars of their respective claims to the property levied on, and for the settlement of the issues to be tried in the interpleader action, application was made by the original plaintiffs to stay all proceedings in the interpleader claim on the ground that an insolvency petition had been presented by defendant, and the Official Receiver had taken possession of the car.

The application was refused and issues were fixed.

*J. A. Luckhoo* (for *G. J. de Freitas, K.C., Acting S.G.*) for the claimant.

*P. N. Browne, K.C.*, for the plaintiffs in the original actions.

BERKELEY, J.: The applications before this Court are for the settlement of the issues to be tried in the interpleader claim whereby the claimant claims as his property a certain motor car

## W.FOGARTY, LTD. v. BHAGWANDASS.

taken in execution at the instance of the execution creditors, the plaintiffs in the above actions. Since the claim was made an insolvency petition has been presented and pending the making of a receiving order the Official Receiver has taken possession of the car.

On behalf of the execution creditors it is urged that the court should make an order staying further proceedings in the interpleader claim. I am of opinion that such an order ought not to be made. An interpleader action brought, before the presentation of an insolvency petition, to decide the ownership of certain property cannot be regarded as a legal process against the property of the debtor (Insolvency Ordinance, 1900, s. 9 (2)). The claim itself brings the ownership of the property into question. The interim receiver's possession is on the same footing as that of the marshal who handed over the property to him until the debtor is adjudged insolvent when *the property* of the insolvent rests in him [s. 49 (1)].

*In re Isaacson* (1895. 1 Q.B. 333) a hire-purchase agreement was held to be a chose in action under s. 40 (iii). Whether or not the agreement laid over by the claimant is to be so regarded in view of the alleged facts and circumstances relating thereto must be decided on the trial of the action. Pleadings are ordered; the issue to be tried, the ownership of the car. The claimant to be plaintiff and the execution creditors defendants.

## BHODAI v. DEMERARA RAILWAY CO. AND ANR.

## PETTY DEBT COURT, GEORGETOWN.

## BHODAI v. DEMERARA RAILWAY CO. &amp; ANR.

[273—2—1918.]

1918. APRIL 9, 17. BEFORE HILL, J.

*False imprisonment—Larceny of goods—Arrest by police on information supplied by defendants—Charge sheet signed by defendant at request of police—Damages.*

A felony having been committed C., the second defendant and a servant of the defendant company, the owners of the property stolen, sent for the police who, on C.'s information, but not in his presence, arrested the plaintiff. Later C. proceeded to the police station and signed the charge.

*Held* that the defendants were not liable in an action to recover damages for false imprisonment.

Claim by the plaintiff Bhodai for the sum of \$100 as damages for false imprisonment.

All further material facts appear from the judgment of the Court.

*E. G. Woolford*, for the plaintiffs.

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

HILL, J.: Plaintiff claims \$100 for damages for false imprisonment. At the conclusion of the plaintiff's case Abraham for the defendants asked for nonsuit, on the ground that there was no evidence to show the Railway Company caused the arrest of plaintiff. I think the case of *Grinham v. Willey* 4. H. & N. 496 is on all fours with this case.

In that case Bramwell, B. (at p. 499) stated what occurred, "an offence "was committed, the defendant sent for a policeman, who made enquiry, "and on his own authority arrested the plaintiff. The defendant signed the "charge sheet; but in so doing he did nothing but obey the direction of the "police. It may have been hard upon the plaintiff that she was imprisoned, "but it was the act of the constable."

In the present case Bhodai says the police came to him and arrested him and marched him to the Brickdam station where he was put in the cell and detained for some seven hours.

Sergeant-Major Franklin states "a report was received from the Railway Company, Campbell who is a clerk there, came in consequence. Plaintiff was arrested and brought in consequence of a report. He was charged with the larceny of the oil and Campbell signed the information. . . . I refused to sign the charge. I thought the whole thing a mistake."

In cross-examination he says, "I wrote out the charge and Campbell signed it. Campbell was not there when Bhodai was arrested.

## BHODAI v. DEMERARA RAILWAY CO. AND ANR.

Bhodai was taken to the detective office before Campbell came to the detective office. He was brought for enquiries, not arrested. I don't know how long we kept Bhodai before Campbell came, perhaps one hour. I telegraphed to the Railway Company, to say I had got the man who they said had stolen the oil as I refused to take action. Campbell came. That is why I kept Bhodai. I told Campbell he must sign the charge. I wrote it out. He told me he had come to sign the charge. I told the Company I did not think there was any case through the telephone. I think I told Campbell it was a mistake and yet I told him he must sign the charge."

The detention or arrest was therefore the act of the police and the defendants are not liable.

Judgment for defendants with costs, and fee \$10.

## CAMACHO v. PIMENTO AND ANR.

[316 OF 1915.]

1918. APRIL 23. BEFORE SIR CHARLES MAJOR, C.J. AND HILL, J.

*Practice—Application for leave to appeal to the Privy Council—Notice of intended application—His Majesty's Order in Council (January, 1910), clause 4.*

An application for leave to appeal to the Privy Council pursuant to rule 4 of the rules regulating appeals to His Majesty in Council is made when the applicant files a copy of his notice of motion, or presents his petition to the Court, the rule providing that the applicant shall give the opposite party notice of his intended application, and the opposite party must be served by the applicant with the notice of motion before filing a copy of it or with notice of the intention to present the petition before it is lodged in the registry.

The copy of notice of motion must be filed, or the petition presented (*i.e.* lodged) within fourteen days from the date of the judgment appealed from, but it is not necessary that the applicant should be heard thereon before that time expires.

Petition for leave to appeal to the Privy Council from a decision of the Appeal Court of March 27th, 1918.

The petition was lodged in the registry on the fourteenth day after the date of the judgment appealed from, but a copy of the petition and notice of the application for hearing was not served on the opposite party until three days afterwards. Objection was taken by the respondent that the provisions of clause 4 of his Majesty's Order in Council (January 10th, 1910) governing appeals to the Privy Council had not been complied with. The objection was upheld and the petition dismissed with costs.

*G. J. de Freitas, K.C. Actg S.G. (P. N. Browne K.C., with him) for the petitioners.*

*H. H. Laurence for the respondent Comacho.*

SIR CHARLES MAJOR, C.J.: Rule 4 made by the Sovereign's Order in Council for regulating appeals to His Majesty's Privy Council provides that application to this court for leave to appeal shall be made by motion or petition within fourteen days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application. The judgment in this case intended to be appealed from was given on the 27th day of March last, and the time, therefore, limited by the rule for making an application under it expired on the 10th instant. On the 9th instant the defendants presented to this court a petition for leave to appeal from the judgment which was filed, and laid before me in Chambers on the 12th or 13th instant. After consultation with my brother Hill, we appointed the 16th instance for hearing the applicants on their petition, but at the request of the solicitor for the applicants, who attended me in Chambers for the purpose, that date was altered to the 19th instant. It appears from the statement of counsel for the plaintiff that, on the 14th instant, the applicants served the plaintiff with a copy of the petition and, we assume, informed him of the date of their being heard thereon; an affidavit of service (if any) does not form part of the transcript. The applicants coming for hearing, counsel for the plaintiff objects that they are out of time for non-compliance with the second requirement of rule 4, that is, that notice shall be given to the opposite party of the intended application, arguing that the application was made on the 9th instant and that no notice of the intention so to make it was given, but only a notice, after it had been made, of the day whereon the applicants would be heard on their petition. The rule plainly provides that an intending applicant for leave to appeal shall make his application within fourteen days from the date of the judgment appealed from, and that he shall give notice to the opposite party of his intention to make it. How he shall make his application is also provided, namely, by motion or petition, and compliance with the rule is secured, I think, when the applicant has served the opposite party with a notice of motion for a day within the period of fourteen days and filed a copy of the same in the registry, or when he has presented a petition to the court by lodging it in the registry on a day within the same period having previously given notice to the opposite party, either separately or by indorsement on a copy of the petition, of his intention to present it on that day. If those steps have been taken it is immaterial in my opinion that the motion or petition is not heard before the fourteen days have expired. In the Supreme Court there are no fixed days for hearing motions or petitions thereto, and it is the duty of practitioners, in the case of motions, so to make them returnable and file copies in the

## CAMACHO v. PIMENTO AND ANR.

registry, and in the case of petition so to present them, that they conform with the time limits of any particular step to be taken. Here, the defendants have adopted the mode of application for leave to appeal by petition. They presented their petition on the thirteenth day of the period allowed for presentation, but, alleging that they could not give notice to the plaintiff of the hearing of the petition until an appointment for that purpose had been obtained and that the appointment was made for hearing on the 19th instant, they served the plaintiff's solicitors with a copy of the petition on the 14th instant, that is four days after the time for so doing had expired. The answer to that is that the making of the application is one thing and the being heard thereon is another, and that it is the notice of the intention to make the application and not notice of being heard thereon, that is required by the rule.

As, therefore, the defendants' application under the rule was made upon presentation of their petition, and seeing that no notice of the intention to make that application was given to the plaintiff, the requirements of the rule were not observed and we cannot hear the applicants. It seems to me that the petition must stand dismissed out of court, with costs to be taxed and paid by the defendants to the plaintiff.

HILL, J.: Under rule 4 of the Order in Council of January 10th, 1910, application to the Court for leave to appeal shall be made by motion or petition within fourteen days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application.

The judgment in this matter was delivered on March 27, 1918, and on April 9th, 1918, a petition was lodged asking for leave to appeal. The court fixed the day of hearing for the 19th and on this being done copy of the petition was served on the opposite party on 15th April by the appellant.

The respondent's counsel contents that under rule 4 the appellant is out of time as no notice was given to him within fourteen days of the date of the judgment to be appealed from.

In Hong Kong I find the practice, under an Order in Council, is for the application to be made within fourteen days and for notice of the intended application to be given to the opposite party seven days within the period of fourteen days.

The practice here since the Order in Council of 1910 came into effect has not been uniform. In *Santos v. Pereira et al* in which judgment was given on December 15th, 1911, notice was served by the appellant Santos on the respondents on December 22 of his intention to appeal together with a copy of the petition "to be tiled" applying for leave to appeal, and on December 27 notice

of the fixture by the court for the hearing on January 2, 1912, was served on the respondents together with a true copy of the petition "filed" on December 22, 1911.

*In Smith Bros v. Demerara Railway Co.* (1915 L.R.B.G. 185) judgment was given On November 12, 1915, and on November 26, 1915, the respondents were served with a notice that the appellants had "this day filed" in the Registrar's office a petition for leave to appeal . . . . and the respondents were at the same time served with a true copy of the petition and also notice that the court would be moved on December 3, 1915.

Here we have the appellants keeping within the fourteen days but not serving notice *before* the filing of the application as in *Santos v. Pereira et al*, and the same course was adopted in *Wight v. Demerara Turf Club, Ltd.* (1916 L.R.B.G. 68). Decision was given on April 17, the petition for conditional leave to appeal was filed on April 29, 1916, and the respondent was served with notice and copy of the petition on May 1, 1916.

I am inclined to think that the procedure in *Santos v. Pereira et al* is the correct one in view of the word "intended" in rule 4. Waiting for the court to fix the day of hearing is quite unnecessary, and the would-be appellant is relieved of responsibility under the rule once he serves his opponent with the notice of intention to appeal and copy of petition, and then files his petition. It is always desirable for leave to appeal to be promptly applied for. The tendency to dilatoriness is marked in this colony unfortunately and notably so when a certain time is given for the doing of some act. It is invariably left to the last moment. As Bentwick says observance of an Order in Council, and any Rules thereon, must be strictly complied with. Non-observance by the appellant places him in the position "as of one who has no right of appeal."

The objection must prevail.

[Execution was stayed for ten days on the application of the petitioners with a view to a petition to the Sovereign in Council for special leave to appeal. The intention was subsequently abandoned.—ED.]

PERCY CLAUDE WIGHT v. DEM. TURF CLUB, LTD.  
 JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

PERCY CLAUDE WIGHT, RESPONDENT,

v.

THE DEMERARA TURF CLUB (LIMITED) (IN  
 LIQUIDATION), APPELLANTS.

FROM THE SUPREME COURT OF BRITISH GUIANA.

1918. APRIL 25TH.

Present at the Hearing:

LORD BUCKMASTER.

LORD PARMOOR.

SIR WALTER PHILLIMORE, BART.

*Specific performance—Auction sale—Contract of purchase and sale—Suit for delivery—Roman-Dutch law—Voluntary and judicial sales—Relation of bidder and auctioneer.*

There is no rule of Roman Dutch law which prescribes that at sales at auction the bidder is the acceptor. Neither is there any rule of law that the highest bidder can insist that the property, the subject of the sale, shall not be withdrawn from sale, and claim to have it delivered to him. The bid is merely an offer, and there is no contract between the bidder and auctioneer until the bid has been accepted by the latter.

This was an appeal from a judgment of the Appeal Court of British Guiana (Berkeley and Hill, JJ.) dated the 17th April, 1916, (a). The action was commenced in 1914, by the plaintiff Wight whose claim, in a suit for specific performance by the defendants of a contract of sale by them to him as the highest bidder at auction of a property including land, buildings and appurtenances of a race-course, was dismissed by the Court of first instance (Sir Charles Major, C.J.) on the 6th September, 1915. (b). The plaintiff appealed, and the appeal was allowed, the Appeal Court reversing the decision of the lower court and decreeing specific performance. From that decision the defendants appealed to His Majesty in Council.

*P. Ogden Lawrence, K.C., and W. R. Bisschop* for the appellants.

*F. Gore-Browne, K.C., and A. C. Nesbitt*, for the respondent.

Their Lordships' judgment was delivered by SIR WALTER PHILLIMORE:—The plaintiff in this case, the present respondent, brought an action to enforce specific performance of an alleged

(a.) 1916. L.R., B.G. 36.

(b.) 1915. L.R., B.G. 115.

## PERCY CLAUDE WIGHT v. DEM. TURF CLUB, LTD.

contract of sale whereby he contended that he became the purchaser of certain real estate in the colony of British Guiana which was the property of the defendant company.

The Chief Justice of British Guiana, Sir Charles Major, gave judgment for the defendant company, dismissing the action with costs.

On appeal, the Supreme Court, Berkeley and Hill, JJ., reversed the decision of the Chief Justice, and ordered the defendant company to transport and deliver to the plaintiff the property in dispute on payment of the sum of \$16,005 and one-half the costs of transport, and ordered the defendant company to pay the plaintiff's costs in both courts.

The company appeals from this decision.

The story is a short one. Some matters were controverted in the evidence; but the facts as found by the Chief Justice and not disputed in the Court of Appeal or before their Lordships are as follow:—

The company was in liquidation and one Cannon, the liquidator, who was also a licensed auctioneer, obtained leave from the court to sell the real property of the company, fifty-five acres of land known as Bel Air Park with the buildings thereon. Cannon was to be the auctioneer, making no charge for his services.

The sale was advertised as a sale at public auction by the liquidator in the grand stand of the club.

On the appointed day, the 4th December, 1914, the auctioneer began the proceedings by reading out the conditions of sale, which were as follow:—

“Conditions on which the undersigned will offer for sale at public auction on Friday, the 4th December, 1914, at 1 o'clock p.m., on the premises (in the grand stand), by order of Mr. N. Cannon (as liquidator of the Demerara Turf Club, Limited), 55 acres of land known as Bel Air Park with all the buildings, erections, fixtures, and fittings thereon:—

## ARTICLE 1.

“The purchaser or purchasers shall provide good and sufficient securities to the satisfaction of the auctioneer, who shall sign these conditions of sale along with the said purchaser or purchasers, and shall be bound as they do hereby bind and oblige themselves jointly and severally with such purchaser or purchasers to pay the purchase money.

## ARTICLE 2.

“Payment of the purchase money shall be paid to the auctioneer as follows: 10 per cent., in cash on the knock of the hammer, and the balance on the passing of the transport.

## ARTICLE 3.

“The purchaser or purchasers shall pay to the auctioneer in

## PERCY CLAUDE WIGHT v. DEM. TURF CLUB, LTD.

cash on the knock of the hammer the church and poor money payable on the sale.

## ARTICLE 4.

“Possession will be given on the passing of the transport, the cost, including the revenue stamp, to be divided between the seller and the purchaser.

## ARTICLE 5.

“Two or more persons bidding at the same time, or any dispute arising, the auctioneer reserves to himself the right of deciding and settling the same in such manner as he may think fit.”

A bid of \$15,000 was made, and a second bid of \$15,005. Then came a third bid of \$16,000, and then the plaintiff bid \$16,005. No further bid was made.

Cannon then said,—“I am sorry, gentlemen, but I cannot sell at that price.” The plaintiff says that he said, “The Turf Club is mine,” using consciously or unconsciously a phrase common at Dutch auctions by way of a descending scale. If he did say so Cannon did not hear him; and without more being said the company dispersed.

There was some correspondence afterwards, and then the plaintiff brought his action on the 23rd March, 1915.

It is to be noted that there was on the one hand, no intimation either beforehand or at the auction that there was a reserved price, or that the vendor reserved the right to bid; nor, on the other hand, was there any intimation that the sale was to be without reserve, or that the property would be knocked down to the highest bidder.

In these circumstances their Lordships have to determine what was the nature of the business which was entered upon when this property was put up for sale.

It is contended on behalf of the plaintiff that this matter is concluded by law; that by the Roman-Dutch law which rules, or at the time ruled, in British Guiana, the auctioneer who puts up property for sale thereby makes an offer, that each bidder is an acceptor, that by each bid a provisional contract is made, one liable to be displaced or superseded by a higher bid, but forming unless so displaced or superseded a contract binding on both parties.

Alternatively the contention is expressed in this way that the auctioneer when he puts up property for auction tacitly promises to accept the highest bid, and is bound to accept it, and that his verbal or physical acceptance is a mere formality which he is bound to give.

Hill, J., apparently decided for the plaintiff on both grounds; Berkeley, J., probably on the second only.

## PERCY CLAUDE WIGHT v. DEM. TURF CLUB, LTD.

It is to be observed that this is not an action for damages for not accepting a bid or for withdrawing the property from sale. It is an action which proceeds upon the assumption that there was a sale.

For the plaintiff therefore to succeed, either the bidder must be an acceptor, or the auctioneer's acceptance of the last bid must be a mere formality.

It is contended on behalf of the defendant company that there is no settled rule of Roman-Dutch law to the effect asserted by the plaintiff, and no rules of Roman-Dutch law which apply to such auctions as this was, and that in any case this being a voluntary sale the auctioneer could make his own arrangements, and that the nature of the business for which he was arranging was sufficiently indicated by the use of the phrase "knock of the hammer" in the second and third of the conditions of sale, which showed that the bidder was to be deemed the offerer and the auctioneer, if he so willed, the acceptor.

It is no doubt true that the auctioneer could make his own terms on which he proposed to conduct the sale; but it is also true that if there was a silence as to any term or a doubt what the term was, it is material to know what is the underlying law, or the law which would prevail in the absence of any special term.

Their Lordships therefore proceed to examine whether there is any rule of Roman-Dutch law applying to auctions of this nature, and if so what its effect is.

All the Judges in the Courts below seem to have thought that there is a rule of Roman-Dutch law upon this point, but they have differed in their view of its effect.

There are no decided cases which can be quoted as authorities, and there is no code, statute, or ordinance. The law has to be extracted from the works of writers of authority. These start by referring to the Roman law.

In the Roman law itself, though sales by auction and the letting of tolls by auction were well-known, there is no direct guidance to be found. There are references to auctions, but no rules of law, to be found in the Digest. In the Code there are two passages [lib. 10, tit. 3, s. 4; lib. 11, tit. 31, s. 1]; but these relate to necessary or judicial sales, and, moreover, have no bearing on the point in question.

The writers on Roman-Dutch law endeavour to help themselves out by the analogy of the Roman law as to sale by *addictio in diem*. This analogy is noticed in the judgments of the Judges in the Court below; but as it was agreed at the bar before their Lordship, it is a misleading analogy. It is unnecessary, as there was this agreement, to explain at length why no assistance can be got from the analogy, and why, indeed, confusion will arise if it is

## PERCY CLAUDE WIGHT v. DEM. TURF CLUB, LTD.

attempted to bring sales by auction under the law as to sales by *addictio in diem*.

The writers on Roman-Dutch law also avail themselves of the writings of commentators of other European nations, such as Bartolus, who was an Italian, and Choppinus, who was a Frenchman from Anjou. How far they can be used as authorities on Roman-Dutch law may be doubted. They, too, found themselves on the law as to sales by *addictio in diem*.

The authority principally relied upon in the Courts below and before Their Lordships is Matthaëus, an author of much learning and repute, and quoted as an authority by later writers who are accepted authorities on Roman-Dutch law. He wrote a treatise on auctions. His book, "*De Auctionibus*," was published at Utrecht in 1653.

His work is founded on the Roman law and the European commentators upon it from Bartolus onwards. He also makes frequent reference to local ordinances as precedents.

Unfortunately, however, for its value as a guide in the present case, the principal scope of the work is to treat of public (so called) or necessary sales; that is, sales made under the authority of a Court of Justice, either of confiscated property or of property taken in execution of a civil judgment. Private or voluntary sales are matters of subsidiary treatment only. This is stated on the title page, and in Book I, chapter 4, *ad finem*.

And there is another reason. Voluntary sales by auction, using the word "auction" for a sale by increasing bids and "reduction" (as it will be convenient to do) for sales by decreasing bids, were, and apparently still are, unknown in Holland, except as tentative or provisional transactions.

Two classes of competitive sales are known in Holland. Necessary sales are in the ordinary form of auction sales, but at the close of the day no contract binding the vendor is created between him and the highest bidder; for all the authorities, including Matthaëus, are agreed that further offers may be, and, indeed, must be, taken till the last moment when the decree of the Court is made, till the seal of the Court has been lifted from the wax, as it is picturesquely expressed.

As to voluntary sales, those at any rate of land, they take two days. The first day there is an auction, and the highest bidder received a "treckgelt" or "strijckgelt," *premium quod datur augenti pretium* as Matthaëus calls it [lib. 1, cap. 1, s. 6, and cap. 9, s. 11]. In consideration of this *premium* the bidder is provisionally bound, but the vendor is not bound,

On the second day, the vendor makes a starting price, usually one-third higher than the highest bid of the previous day, and then descends (the process being called "afstach" till some

bidder calls out "Mine." [See "Matthaeus," lib, 1, cap. 12, s. 1]. This process is so prevalent that a verb has been coined, "mijnen" "to mine," meaning to bid, and bidders of all sorts are called "mijnders." [lib, 2, cap. 2, s. 5] Hence, too, comes the English phrase a "Dutch Auction." The vendor is apparently not bound to keep reducing, but can withdraw at any stage. If, however, he chooses he can descend to the level reached by the highest bid at the first day's sale, and if no one else bids, compel the bidder of the first day to complete his bargain.

Though Matthaeus refers but slightly and allusively to this practice, he certainly knew of it. But the difficulty is to fit those observations of his on which the plaintiff and the Judges of the Supreme Court rely, to either form of competitive sale.

Necessary sales are by way of auction, but it is clear that the highest bidder at the auction cannot claim to have bought the property, though he may be bound to complete his purchase.

In voluntary sales, the first step is by way of auction, but the highest bidder cannot claim to have bought the property, though he may in a certain event be bound to complete his purchase.

During the second stage of reduction it may be that the vendor offers the property at every price which he names.

If the observations of Matthaeus on which reliance is placed are intended for a sale by reduction, they have no application to the case before their Lordships. If they contemplate a sale by auction they are theoretical merely. These observations are to be found in Book I, chapter x, "*De Licitationibus*," s. 40-48.

In s. 40 he is drawing the distinction between necessary and voluntary sales, and insisting as against other authorities that in necessary sales there is no concluded bargain till the seal of the Court has been attached.

Contrariwise in voluntary sales, the matter is completed.

*Simul augendi seu adjiciendi facultas praecisa sit.*

But this passage leaves it an open question when the *facultas is praecisa*. It may be by the last bid, or it may be by acceptance of the last bid.

In s. 41 he appears to admit of the prolongation of the auction from day to day till the vendor is satisfied. In s. 43 he discusses the question whether a bidder can withdraw his bid, and concludes, in contradiction to other authorities, which he quotes, that he cannot. But whether this means that he cannot withdraw when once the words are out of his mouth, or that he cannot withdraw when his bid has been accepted, or has been taken as a bid so that a further bid is made upon it, does not appear.

Lastly, in s. 48, he puts the question whether, after bids have been made, but there has been no acceptance by the vendor, *post licitationes factas ante tamen additionem*, the vendor

## PERCY CLAUDE WIGHT v. DEM. TURF CLUB, LTD.

can withdraw. He states, and states correctly, that the authority of Bartolus and of Damhouder is against him; but he concludes, and this is the passage mainly relied upon, that the vendor cannot withdraw.

His reasons are that it would be absurd that the bidder should be bound and not the vendor, and that he who proclaims that he is going to hold a sale by auction tacitly promises that the property shall be sold to the winning bidder *ei qui vicerit licitatione*.

As to the first reason it may be observed that there are cases where it will happen that the bidder is bound while the vendor is not: as to the second reason, that, pushed to its logical conclusion, it would extend to prevent the vendor from withdrawing the property before any bid was made as it would disappoint the company, or from announcing that there is a reserve, or from stating any conditions of sale which he has not previously advertised, unless indeed they be in common form.

It is further to be noticed, as the Chief Justice points out in his judgment, that Matthaeus does not take the view that the auctioneer offers and the bidder accepts. There are Continental writers on jurisprudence who take this view: for instance, Puchta Pandekten (6th edition, by Rudolph, Leipzig, 1852 s. 252). Voet also is claimed for it; and it is certainly the view of his translator and editor, Berwick; and it is the view to which Hill, J., expressly gives his assent. But it is not that of Matthaeus. He takes the more common view that the bidder offers and the auctioneer accepts; but he thinks, for the reasons which he gives, that the auctioneer has tacitly promised to accept.

Remembering that there were in the Dutch usage of his time no conclusive auctions with rising bids, their Lordships think that Matthaeus, if he was writing of auctions, was writing as a professor of jurisprudence and not as a witness bearing testimony to the existing Roman-Dutch law.

As to other writers Bartolus, so far as he is an authority to be quoted on Roman-Dutch law, takes, as Matthaeus admits, the contrary view. So does Damhouder, a practising lawyer and writer in Holland.

Grotius is quoted on other points by Matthaeus, but has made apparently no statement on this point.

Voet, it is suggested, favours Matthaeus' view; but it is not clear that he does, and he has very much involved himself with *addictio in diem*.

Van Leeuwen and van der Linden are apparently silent on the point.

Sir Andries Maasdorp, in his *Institutes of Cape Law* (vol. 3, p. 130), certainly expresses himself to the effect that the sale is not completed till the fall of the hammer,

On the other hand, Burge in his *Foreign and Colonial Law* (vol. 2, p. 576), and Nathan in his *Common Law of South Africa* (vol. 2, p. 718), translate and accept Matthaeus.

The industry of counsel has furnished their Lordships with quotations from several other writers not mentioned in the judgments of the Courts below; but they are chiefly interesting for their full statements as to Dutch usage and for their silence on the point in question.

One modern author, S. J. Fockema Andrae, in a work published at Haarlem in 1896, speaking of the usage of lighting a candle for the period of the auction, says that the last bidder before the candle burnt out is the purchaser, if his offer be accepted (vol. 2, p. 28).

On the whole their Lordships are of opinion that there is no rule of Roman-Dutch law which prescribes that at sales by auction the bidder is the acceptor. In sales by reduction it may be otherwise. Neither is there any rule that the highest bidder can insist that the property shall not be withdrawn from sale and claim to have bought it.

This being so the matter is governed by the provisions in the conditions of sales, and they indicate with sufficient clearness that the offer will come from the bidder, and that there is no bargain till it has been accepted by the auctioneer, and they do not indicate that the auctioneer is bound to accept the highest bid.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, that the judgment of the Supreme Court should be reversed and that of the Chief Justice restored, and that the appellant company should have its costs in the Court below and of this appeal.

ESSEX v. SEEMANDRAY.

ESSEX v. SEEMANDRAY.

[80 of 1918.]

1918. APRIL 26. BEFORE BERKELEY, J.

*Criminal law—Unlawful possession of spirits exceeding one pint in quantity—Facts constituting possession—Spirits Ordinance, 1905, s. 93—Spirits Ordinance, 1905, Amendment Ordinance, 1911, s. 14.*

Appeal from a decision of the acting Stipendiary Magistrate of the Berbice judicial district (Mr. J. H. McCowan) who convicted the appellant Seemandray of being in the unlawful possession of spirits exceeding one pint in quantity.

The question raised both before the magistrate and on appeal was whether on the facts, the magistrate was justified in finding that defendant was in “possession” of the spirits seized.

The material facts are sufficiently stated in the judgment of the court.

*J. A. Abbensetts*, for the appellant.

*G. J. de Freitas, K.C.*, Acting S.G. for the respondent.

BERKELEY, J.: Appeal from the decision of the stipendiary magistrate of the Berbice judicial district Mr. McCowan who convicted the appellant for a breach of the Spirits Ordinance, 1905, Amendment Ordinance 1911 s. 14. (2).

The substantial ground of appeal is that it is not proved that appellant was in possession of spirits exceeding in quantity one pint.

The evidence shews that appellant was seen to go with a calabash behind the distillery engine at Springlands plantation where there is a distillery, and immediately return therefrom with a small quantity of spirits therein. This calabash was taken from him and on the witnesses going behind the engine a bucket was found which contained rum of the same colour as that in the calabash. The contents of the calabash having been thrown into the bucket the quantity was nearly a quart. There was therefore a strong presumption, not only that the rum in the calabash was taken by appellant from the bucket but that the bucket was also in his possession, he having exercised the right of possession in respect thereto. No witnesses were called in behalf of appellant, and in the absence of any explanation the magistrate acted correctly in recording a conviction against him.

Appeal dismissed with costs.

*In re* TRANSPORT SHEWBURUN TO SHUBHAGRA.

*In re* TRANSPORT SHEWBURUN TO SHUBHAGRA.

[No. 3 OF 13. 4. 1918. BERBICE.]

1918. APRIL 27. BEFORE HILL, J.

*Immovable property—Transport—Devolution of property—Death of purchaser before obtaining transport—Transport by seller to heir or personal representative of deceased—Vesting of property on death.*

S. sold a property to N. but before obtaining transport N. died. By his will he left all his property to his wife and appointed G. executor. S. advertised transport of the property in question direct to the wife of N.

*Held*, that the property should be transported to N.'s personal representative, and then be dealt with by him in terms of the will.

Application by Shewburun to pass transport to Shubhagra, a widow, of lot 29, Plantation Hague, West Coast of Demerara.

The facts disclosed showed that on January 10th, 1916, Shewburun sold the property in question to one Nagesur the husband (by lawful marriage) of Shubhagra. The sale to Nagesur was never completed by transport, and he died on December 7th, 1917, leaving a will in which he appointed one Goolcharan as executor. By the will all the property belonging to deceased was left to Shubhagra, who was also appointed guardian of a minor child of the marriage.

Shewburun now sought to pass transport of the property purchased by Nagesur in his life time to the widow, but the Registrar questioned whether it was in order for the following reasons:—

- (1.) Nagesur appointed an executor, and the property therefore vested in him.
- (2.) There may be claims against the estate.
- (3.) Advertisement is necessary before transport, but here there is no advertisement of transport by Nagesur or his estate, through which omission his creditors (if any) would be prejudiced.
- (4.) Transport should be by Shewburun to the personal representative of Nagesur, and then by the latter to Shubhagra, should there be no opposition.
- (5.) A step in the devolution of the property was missing. The property did not vest in Shubhagra by virtue of the will, but in the executor.

HILL, J.: decided that the transport as put before him could not be passed as it was not in order for the reasons raised by the Registrar. He held that the property should be transported to Nagesur's executor, in his capacity as such. The executor could then after paying the debts deal with it in terms of the will and advertise transport to Shubhagra.

RE TRANSPORT BAIRAJI TO RAGHUBAR.

RE TRANSPORT BAIRAJI TO RAGHUBAR.

[Berbice. No. 3 of 13.4.1918.]

1918, MAY 3. BEFORE HILL, J.

*Title to immovable property—Transport—Marriage in community—Value of estate under \$480—Proof—Claim of surviving spouse to whole estate—Nature of claim—Vesting of property—Civil Law of British Guiana, Ordinance 1916, s. 6 (7.)*

Application by Bairaji to convey or pass transport to Raghubar of a portion of a lot of land at Rose Hall Village in the county of Berbice.

The facts disclosed showed that Bairaji was married in community of property to Kousilla who died intestate on February 26th, 1917, leaving five children living; it was further stated on oath that the value of the estate of Kousilla was \$200, and that, in terms of section 6 (7) Ordinance 15 of 1916 (Civil Law Ordinance) Bairaji, as surviving spouse, was entitled to the whole estate of his wife's land. In view of that right claimed he sought to pass transport of his wife's interest in the lot in question.

The Registrar raised two questions:—

(1.) The proof given as to the value of the estate of the deceased was not sufficient, and pending the coming into force of Ordinance 10 of 1917 (Deceased Persons Estates Ordinance) an inventory should be filed in terms of Ordinance 4 of 1898 or under the provisions of section 23 (1) of Ordinance 9 of 1909.

(2.) Immovable property does not vest in the surviving spouse under the provisions of section 6 (7) of the Civil Law Ordinance, 1917, but merely gives rise to the first claim or charge on the property up to \$480. The survivor here had no right to transport the property merely in view of his claim.

On the matter coming before the judge for transport, His Honour gave the following decision:

HILL, J.: The affidavit of the vendor shows he was married in community to his wife Kousilla who died in February, 1917. The affidavit further avers that her share of the common property amounted to \$200.

I am of opinion an inventory of the estate of the deceased should be filed and that the affidavit is not sufficient to prove the value of the estate.

I am also of opinion that under section 6 (7) Ordinance 15 of 1916, if the inventory shows that her estate does not exceed four hundred and eighty dollars, an administrator must be appointed—in this case the surviving spouse,—and the transport should be by him in his own right and as administrator of the deceased's estate.

JAIKARAN SINGH v. BAILEY.

JAIKARAN SINGH v. BAILEY.

[39 of 1918.]

1918. MAY 7. 10. BEFORE SIR CHARLES MAJOR, C.J.

*Criminal law—Constable—Assault—Execution of duty—Summary Conviction Offences Ordinance, 1893, s. 33 (2).*

A police officer detailed for duty and on duty in a tram car, was not acting in the execution of a duty when, at the request of the conductor of the car he removed therefrom a passenger by the conductor travelling on the step of the car, in contravention of the by-laws of the tramway company, and persisting in doing so after being required by the conductor of the car and the constable to desist.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist).

The appellant Bailey was charged with assaulting the complainant, a police constable, whilst in the execution of his duty as a peace officer, and was convicted. He appealed on the ground that there was no evidence to show that complainant, at the time of the alleged assault, was acting in the execution of his duty as a peace officer. The material facts are fully set out in the judgment of the Court.

*J. S. McArthur*, for the appellant.

*G. J. de Freitas, K.C., Acting S.G.*, for the respondent.

SIR CHARLES MAJOR, C.J.: The defendant has been convicted for assaulting the complainant, a police constable, in the execution of his duty. The evidence in the case showed that the complainant had been detailed for duty on a car of the Demerara Electric Company running through the city and suburbs and was travelling thereon. The defendant joined the car but travelled on the step or footboard. This, by by-laws and regulations made by the Company directors and approved by the Governor-in-Council, he was not entitled to do, that mode of travel being an offence against the regulations. The defendant was directed more than once by both constable and conductor of the car to cease doing so and to take a seat in the car or leave it. He continued to stand on the step. The car was brought to a standstill and the conductor directed the constable to put off the defendant. The constable put his hand on the defendant for the purpose when the defendant butted him and struck him, whereupon he dragged the defendant off the car and arrested him.

The defendant has appealed from his conviction on the ground that the constable was not in the execution of his duty when the defendant assaulted him, as it was no part of that duty as a peace officer to put the defendant off the car.

## JAIKARAN SINGH v. BAILEY.

Much argument has been addressed, and some authorities have been cited, to the Court on the question of a constable's power to arrest without a warrant which, it seems to me, I need not examine for irrelevancy. The defendant was in fact arrested, but, as the evidence shows, not for travelling on the footboard but, for assaulting the constable when the latter was putting him off the car. The real question at issue is was the constable executing a duty when he did so put off the defendant?

A charge of assaulting a police officer while in the execution of his duty seems, not infrequently, to be regarded, as though it were one of assaulting the officer 'while on duty.' In this case, the constable, in the sense of being present on the car as a police officer, was undoubtedly 'on duty' there, but he was only there to execute such duties as are imposed upon him by law, that is to say such duties as he is bound to execute, not any in which he may exercise a freedom of choice between execution or abstinence therefrom. And it is because peace officers are, in certain circumstances, saddled with the obligation to execute certain duties, that interference with them, whether by assault, obstruction or resistance, while fulfilling that obligation, is visited with a greater degree of punishment than that meted out to persons not so bound. Here the constable was not bound to put the defendant off the car or to aid the conductor in doing so; when, therefore, he himself imposed hands on the defendant for removal, he was not so in the execution of his duty as to support a charge of subsequent assault upon him therein. He was, of course, quite at liberty, and that lawfully, to remove or assist in removing the defendant, and the defendant, who it is plain violently assaulted him while so doing, was punishable in the same manner as at the instance of any other. But as held in (*R. v. Brickhall*, 33 L.J., M.C. 156,) a conviction for common assault may not be had upon a charge like the present one.

I am strengthened in this my view of the law by the dictum of Lord Chief Justice Cockburn in the case of *R. v. Roxburgh* (12 Cox C.C. 8.) The circumstances of that case were that a publican, wishing to have a customer removed who was drunk and refused to leave the public-house when requested to do so, called in a police constable to put the man out. While being removed with force, the man inflicted a serious injury on the constable, which led to his being indicted for felonious wounding. "The defence was," writes the learned reporter, "that the violence used by the prosecutor was "unlawful, as he had no right to use force to eject the prisoner and was acting beyond his duty in doing so; and the magistrates had so far acquiesced "in this view that the prisoner had not been committed or indicted for assaulting the police officer in the discharge of his duty, but only for inflicting

“grievous bodily harm. Cockburn, C.J., said that, although, no doubt, the “prosecutor might not have been acting—strictly speaking—in the execution of his duty as a police officer, since he was not actually obliged to “assist in ejecting the prisoner, yet he was acting quite lawfully in doing so, “for the landlord had a right to eject the prisoner under the circumstances, “and the prosecutor might lawfully assist him in doing so.” *R. v. Roxburgh* was decided in 1871, and it is to be observed that by the licensing law then in force (the Licensing Act of 1860) all constables were required on the demand of a publican to expel or assist in expelling an intoxicated person from licensed premises who refused to quit them. Yet the learned Chief Justice said the constable was not—“strictly speaking—in the execution of his duty as a police officer, since he was not actually obliged to assist in ejecting the prisoner.” I must deal with this matter strictly, and even assuming that the conductor had a right to remove the defendant from the car, upon which I express no opinion, the constable was not, I think, acting in the execution of his duty *qua* constable, albeit quite lawfully, when he himself effected the removal.

The appeal is allowed and the conviction is quashed. I make no order as to costs.

## JONES v. FORTE.

[86 OF 1917.]

1917. MAY 4, 11. BEFORE SIR CHARLES MAJOR, C.J.

*Traffic Regulations—Motor cars on steamer stelling—Wilfully impeding officer regulating traffic on stelling—Colonial and Contract Steamer Traffic Ordinance, 1914—By-laws for the regulation of traffic by and in connection with colonial steamers, 1914, s. 14—Motor Car Ordinance, 1912—Offence ‘in connection with the driving of a motor car’—Endorsement of certificate.*

A servant of the Government employed under the Colonial and Contract Steamer Traffic Ordinance, 1914, in connection with the traffic dealt with thereunder, whatever its particular branch, is, during that employment, executing his duty in and while regulating the traffic.

A driver of a motor car who wilfully impedes an officer in the course of his duty while regulating traffic by refusing to obey the officer’s order to take up a certain place on a stelling, is not thereby guilty of an offence “in connection with the driving of a motor car” within the meaning of s. 4 of the Motor Car Ordinance, 1912.

Appeal from a decision of the Stipendiary Magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist). The appellant Forte was charged with wilfully impeding a duly authorised servant named Allen employed by the Government when in the execution of his duty at the Government steamer stelling, contrary to sub-section 14 of section 2 of the By-laws made under

## JONES v. FORTE.

Ordinance 18 of 1914, He was convicted and appealed from the conviction.

The principal reasons for appeal were as follows:—

- (a.) The complaint disclosed no offence, as the nature of the duty was not set out.
- (b.) The evidence did not establish that complainant was in the execution of any duty as defined in the by-law. Further the by-law did not provide for the duty complainant alleges he was executing.
- (c.) The offence of which appellant was convicted was not an offence for which the magistrate could properly order his certificate to be endorsed.

*P. N. Browne*, for the appellant.

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

SIB CHARLES MAJOR, C.J.: The defendant, a driver of a motor car, was convicted by Mr. Stipendiary Gilchrist for wilfully impeding Reginald Allen, a duly authorized servant of the Government when in the execution of his duty at a Government steamer wharf at which colonial steamers stop.

The defendant has appealed against his conviction on the grounds, shortly stated, that Allen was not in the execution of any duty under the law, and that if he were, he was not impeded therein. The appellant further contends that his offence, if any, was not an offence “in connection with the driving of a motor car” within the provisions of the fourth section of the Motor Car Ordinance, 1912, and, therefore, that the magistrate had no power to have his certificate of competency (as a driver) endorsed with particulars of the conviction. On this latter point I am clearly of opinion that the offence of which the appellant was convicted was not an offence “in connection with the driving of a motor car,” and that the endorsement of his certificate was *ultra vires*.

By the Colonial and Contract Steamer Traffic Ordinance, 1914, the Governor-in-Council may make by-laws for . . . keeping the approaches to the stellings, provided by the colonial Government for the use of any colonial steamer, free from obstruction to their convenient use by those steamers, and generally for the purposes of the Ordinance. This power, therefore, relates specifically to keeping the approaches to Government steamer wharves free from obstruction sea or river-wards and generally, for all purposes of steamer traffic.

The by-laws under which the complaint was preferred is the second of by-laws made on the 8th December, 1914, by the Governor-in-Council, “for the regulation of traffic by and in connection with colonial steamers,” by the fourteenth clause where-

of every person who wilfully obstructs or impedes any servant employed by the Government when in the execution of his duty on any stelling at which Colonial steamers stop shall be guilty of an offence.

The Ordinance is a steamer traffic ordinance and under the power of the Governor-in-Council already mentioned, the second by-law contains in clauses nineteen and twenty exercise of the specific power relating to the use of approaches to wharves by steamers, in clauses five to twelve, thirteen and fourteen (in part) to eighteen, exercise of the general power relating to steamer board, and in clauses thirteen and fourteen (in other part) to wharves, and in clauses one to four to passenger tickets. The by-laws, therefore, constitute a proper exercise of the power of the Governor-in-Council for the purposes of the ordinance, one of which is the regulation of steamer traffic. Under the word traffic, it is well settled, and comprised all measures taken in connection, not only with steamers themselves, but with passengers, passengers' vehicles, animals, carts and goods of every description using or being conveyed to or from steamers, wharves, or approaches thereto. A servant of the Government, therefore, employed under a traffic ordinance, that is employed in connection with that traffic, whatever its particular branch, is during that employment executing his duty in and while regulating the traffic.

The evidence shows that the appellant took his car on to a wharf where Allen was employed in regulating the traffic thereto and therefrom. Allen directed the appellant to take the car behind some other cars which had previously been brought to the wharf, in accordance with a rule made by Government steamer servants relating to the places of cars for transport in order of arrival at the wharf. This the appellant refused to do. Was or was not Allen, when on the wharf that morning in the execution of his duty under the ordinance?—for I agree that the duty must have been one cast upon him by the ordinance. I am of opinion that he was, for his duty was to regulate the traffic and that is the purpose for which the ordinance was passed.

I am also of opinion that in refusing to obey Allen's direction, given in order to secure what Allen deemed a proper and convenient method of regulating the traffic, the appellant was impeding Allen in the execution of his duty.

The appeal must be dismissed with costs. The indorsement on the appellant's certificate of competency, if made, must be cancelled.

[NOTE.—An appeal was lodged against the above decision of the Chief Justice, but owing to the death of the appellant Forte, a notice of discontinuance was filed by his solicitor on May 1st, 1918.—ED.]

WIDDUP v. BARCELLOS.

WIDDUP v. BARCELLOS.

[84 of 1918.]

1918. MAY 11. BEFORE SIR CHARLES MAJOR, C.J.

*Criminal law—Selling spirituous liquor on Sunday—Summary Conviction Offences Ordinance, 1893, sec. 193—Licenced Places (Closing Hours) Ordinance, 1902, sec. 3—Complaint silent as to Ordinance—Evidence—Divisibility of offences—Summary Conviction Offences (Procedure) Ordinance, 1893, sec. 40.*

Appeal from a decision of the stipendiary magistrate of the West Coast judicial district (Mr. H. K. M. Sisnett). The defendant Barcellos was charged for that he “being the holder of a retail spirit shop licence situated at Hague, in the West Coast judicial district . . . did on Sunday, the 6th day of January, 1918, deliver therefrom spirituous liquor contrary to law.” He was convicted and appealed from the magistrate’s decision.

The principal reasons for appeal were:—

- (a.) No proof that defendant was the holder of a retail spirit shop licence at Hague.
- (b.) No proof of identity of shop mentioned by the witnesses with the shop mentioned in the charge.
- (c.) No evidence to connect defendant with the extract from the list of licences put in evidence.
- (d.) Defendant having been charged under s. 193, Ordinance 17 of 1893, and the evidence, if believed, having shown him to be the holder of a retail spirit shop licence, it was not competent for the magistrate to convict him under such section and ordinance, as they do not apply to such a person. The appeal was dismissed.

*J. A. Luckhoo*, for the appellent.

*G. J. de Freitas, K.C., Actg. S.G.*, for the lespondent.

SIR CHARLES MAJOR, C.J.: “The defendant,” says the magistrate for the West Coast judicial district, in his reasons for decision, “was charged under section 193 of Ordinance 17 of 1893, for that,” and the magistrate proceeds to set forth the offence as charged. The wording of the complaint leaves no doubt in my mind that the prosecution meant to charge the defendant under the Licensed Places (Closing Hours) Ordinance, 1902, section 3. The class of evidence given and the terms of the magistrate’s findings support this view. It may be said at once and briefly that if the magistrate could and did deal with the complaint as under the 1893 Ordinance the offence was amply

proved, and the conviction cannot be disturbed. But I treat it as dealt with under the 1902 Ordinance for the purposes of the defendant's objections to his conviction.

The ingredients of proof to establish the charge were: first, the time of the offence, namely, between 11 of the clock in the afternoon of Saturday and 5 of the clock in the forenoon of the following Monday. This was proved. Second, delivery of spirituous liquor (*a*) by the defendant, which also was proved, and (*b*) from a licensed place. It is said that there was no evidence before the magistrate to support his finding that the defendant's shop, the place from which the liquor was delivered, was licensed. The evidence on the point is contained in three statements. The first of P.C. Phillips who said: "On Sunday, got to Hague Front . . . I saw two coolie "men and one coolie boy standing on bridge leading to Barcellos' rumshop ". . . . The coolie boy and the two coolie men went into the shop yard." The second statement is that of Lloyd Dornford, who said: "Commissary of "taxation of West Coast fiscal district in West Coast judicial district which "includes Hague. This is an extract from licences kept by chief commissary ". . . Defendant is person mentioned in the extract." The extract contains entries of—"Name: Antonio M. Barcellos. Place: Hague Front, West Coast Demerara Fiscal District. Description of license: Retail spirit shop." The third statement is that of P.C. Charles, who said: "On 6. 1. 18, a Sunday, I "and P.C. Phillips went to Hague rumshop." It is quite clear from the evidence that the two constables went together to the same spot, and to the same shop and at the same time. One says that that spot and that shop were Hague Front and the defendant's rumshop, the other that the spot and shop were "Hague rumshop." Dornford testifying as to a fiscal district "which includes 'Hague,'" proved that the defendant is the owner of a retail spirit shop at Hague Front, the place described by one of the constables. The magistrate clearly, in my opinion, had abundant, at any rate sufficient, evidence before him to support his finding that the place wherefrom the defendant was proved to have delivered spirituous liquor, that is to say rum, was a licensed place.

I may add that if the magistrate dealt with the charge for the purposes of conviction as under the 1893 Ordinance although laid under the 1902 Ordinance, he had, in my opinion, power to do so, by virtue of the provisions of section 40 of the Summary Offences (Procedure) Ordinance, 1893. Applying those provisions to the facts of the case, it appears that the commission of the offence charged, *i.e.*, delivery of spirituous liquor from a licensed place on a Sunday, so described in the complaint, included another offence—"any other offence" is the expression used in the

## WIDDUP v. BARCELLOS.

section—that of delivery from a shop certain goods, that is to say rum, on a Sunday; that the defendant, therefore, might be convicted of the offence so included, which was proved, although, if the magistrate had no evidence sufficient to find proof of the place being licensed, the whole offence charged was not proved. However regarded, therefore, the conviction was right. The appeal is dismissed with costs.

## LUSIGNAN CO., LTD. v. BRASSINGTON.

[222 of 1917.]

1918. MAY 1, 2, 3, AND 31.

BEFORE SIR CHARLES MAJOR, C.J.

*Letters—Property in letters—Sender and recipient—Recipient manager of sugar plantation—Letters relative to business carried on.*

The defendant was in the employment of the plaintiff company, the owners of certain sugar plantations, as manager of one of their plantations. On leaving the employment of the plaintiff company, defendant took away with him and retained in his possession letters received by him in his capacity as manager from the owners in England and their London agents and copies of letters sent by him in his said capacity to the owners and agents. The plaintiff company brought an action to recover from the defendant their letters to him and the copies of his letters so them:

*Held*, that the proposition of law, to be found in *Gee v. Pritchard* (2 Swans 402), *Pope v. Curl* (2 Atk. 342), *Oliver v. Oliver* (11 C.B.N.S 139), *In re Wheatcroft* (6 Ch.; D. 97) and other like cases, that the receiver of a letter has the property in the paper whereon it is written, subject to the right of the sender to restrain its publication, was not applicable and that the letters from the company and its agents were received by defendant by virtue of his employment as manager, they related entirely to his employer's business and were therefore the property of the plaintiff company. But the copies of defendant's letters to the plaintiffs made by the defendant for his own use were in the absence of any agreement to the contrary, the property of the defendant.

The plaintiffs in this action were a limited liability company incorporated in England under the Companies Acts 1862 to 1890, and were the proprietors of Plantation Lusignan *cum annexis*, a sugar plantation in British Guiana. The firm of Curtis, Campbell & Co. were the London agents of the plaintiffs and as such carried on the correspondence with the manager of the said plantation. Defendant was employed as such manager from February 23rd, 1912, to September 10th, 1916. During that time various letters were written by the London agents to the defendant as manager, and during his temporary absence, to the acting manager, and defendant and the acting manager wrote certain letters to the London agents relating to the cultivation and management of the plantation. Copies of the latter were made by the defendant in a copy letter book supplied by the plaintiffs kept on a file on the plantation. When defendant relinquished his position as

## LUSIGNAN CO., LTD. v. BRASSINGTON.

manager he took away with him the letters and copies of letters above referred to and retained possession of them, claiming that they did not relate exclusively to the cultivation and management of the estate and that they were his own personal property.

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

*H. H. Laurence*, for the defendant.

Sir CHARLES MAJOR, C.J.: In arguing the claim of the defendant to retain as his property, on the one hand, letters to him by the plaintiffs' agents in London, and on the other hand, copies of his letters to those agents, written by the parties in the circumstances and for the purposes disclosed by the evidence in this action, counsel for the defendant has cited and commented on the familiar series of authorities dealing with the question of property in letters had by sender and recipient of them respectively, from which may be gathered the principle that the right of property in letters is in the receiver, or the person to whom they are addressed and delivered, so far as regards the paper on which they are written, but he has no right to publish them without leave from the writer, or, in case of the writer's death, without the leave of his executor. That principle, it seems to me, despite some comparatively recent expressions if not of doubt, at any rate of hesitation, as to its unrestricted applicability, cannot now be controverted, and the question here is, whether the principle prevails in the circumstances of this case.

The material facts are undisputed. The plaintiffs are the owners of plantations in this colony on which cane is cultivated for manufacture into sugar. For the purpose of their business as sugar manufacturers they are represented in London by Messrs. Curtis, Campbell & Co., (of whom I will speak as "the agents,") who in their turn are represented in the colony by Mr. Russell Garnett. In 1912, the plaintiff appointed the defendant their manager of plantation Lusignan. At that time the plaintiff's were represented in the colony by Mr. Duncan for all purposes of cultivation, upkeep and management of their cane plantations, through whom all correspondence on the subject of the business was conducted. Mr. Duncan retired from his planting attorneyship—as his office was called—in 1914, and on the 18th of September, in that year the agents addressed a circular letter to the plaintiffs' managers in the following terms. [His Honour read the letter].

Referring to the fourth paragraph of the circular, the system of correspondence between the agents and the managers, introduced on Mr. Duncan's retirement and still prevailing, appears to have been this. The defendant, like other managers, transmitted to the agents every fortnight—an interval, of course, gradually and

## LUSIGNAN CO., LTD, v. BRASSINGTON.

greatly affected by war conditions during the past three years and a half—full information relating to the conduct and progress of the plaintiffs' business, including a multitude of details in connection with cultivation, its nature and area, factories, their construction, maintenance and extension, labour, produce, transport, and expenditure. These communications were accompanied from time to time by the writer's recommendations and advice on various matters incidental to the business for the agents' consideration. Pursuant to instructions these communications the defendant did in duplicate to London and made copies of them for filing purposes, according to the circular, in the office of Mr. Garnett. The defendant also took copies of his letters for himself. At the same time as these letters were sent forward there was transmitted a "mail report"—a document partly printed, partly written, of which, apparently from the evidence, the manager's communication formed a *precis* or foundation. Acknowledgments from the agents of the documents thus transmitted were received by the defendant, commenting on their contents, sanctioning, modifying, responding, or altogether rejecting the adoption of measures recommended by the manager in connection with the working of the plantation, keeping him informed of transactions in London by the agents in the same connection, such, for instance, as a sale forward effected there of the produce of the plantation to His Majesty's Government, and generally dealing with the prosecution of the plaintiffs' enterprise. The correspondence, in fact, is fully explanatory as to the details of the method thus pursued by the plaintiffs in and about the conduct of their undertaking, an undertaking, I suppose, in its organization and system identical with, or closely akin to, those of the same nature, promoted and controlled by companies, partnerships, syndicates, or individual proprietors who are absent from the colony, and carried on by their local agents and servants by means of written communications from time to time.

Now, to a business of the kind and to the correspondence whereby the same is thus carried on, it seems obvious to me, the principles of law governing the property in letters, written and received by persons independent of one another, of a personal and domestic nature and regarding which there is no such relation of employer and employed as exists in the business I am considering and in others of kindred nature—to a business of the kind, I say, the principle of property in letters, can have no application. In the first place, these communications from the agents to the defendants, though couched in epistolary style, are not letters at all in the sense in which that description is applied to the documents considered in the cases of *Pope v. Curl* (1).

(1.) 2 Atkyns, 342.

*Oliver v. Oliver* (1), *Lytton v. Devey* (2), and the rest. Nor are the defendant's letters to the agents within the description. These latter, on the one hand, are reports of the working of the plantation and the conduct of the business of the plaintiffs in its cultivation for the plaintiffs' information and, where necessary, their consideration and approval; the reports are more; they are records of a most elaborate kind, containing statistics under headings such as "factory," "cultivation," "cane-pests," "expenditure," of a very informing and valuable nature. On the other hand the agents' communications contain a series of comments and criticisms on the defendant's reports, and examination and sanction, or condemnation, of his proposals. They are the complement of the reports and to be read with them. They also are a code of instructions. Each class of communication seems to me as necessary a part of the system adopted for the conduct of the plaintiffs' business and the records thereof, as the books, the files of statistical returns, the estimates of receipts and expenditure and the various other documents that are kept for the proper carrying on of the same. Other businesses will occur to one's mind at once, carried on by their proprietors who are resident out of the colony, through agents and servants, between whom and themselves the medium of conduct is correspondence, whether by letters, minutes, despatches, telephonic or telegraphic messages, or any other method. The letters from the agents to the defendant he would never have received at all had he not been in the plaintiffs' employ; they relate entirely to his employers' business, they are records of that business and are therefore the plaintiffs' property. And the plaintiffs' ownership of the defendant's communications, is derived from the same character and not because they are letters, in the paper whereon they are written the agents have a property but no right of publication except with the defendant's leave. There is nothing whatever to prevent or restrict the plaintiff's from making the same use, including publication, of the defendant's letters to them as they may make of any other document belonging to them. In *Evitt v. Price* (1 Simons, 483) is to be found the same principle, that of course of employment, by which, I think, cases of this kind are to be determined. The report is a short one and I will read it *in extenso*. [His Honour read the report]. The injunction, it is to be observed, not only prohibited the defendant from taking copies from the particularized documents, but ordered him to deliver them up.

In *Whittaker v. Howe* (3 Beavan, 383) the plaintiff moved for an injunction to restrain the defendant from detaining and keeping,

(1.) 11 C.B. (N.S.), 139.

(2.) 54 L.J. Ch., 293.

## LUSIGNAN CO., LTD. v. BRASSINGTON.

possession of or destroying certain documents; and also to restrain him from practising or carrying on the business of an attorney and solicitor. Howe had been a partner of Whittaker. He left Whittaker and removed a great many books, deeds, documents and papers from the partnership chambers, intending to set up business as attorney and solicitor and to make use of the documents removed from the chambers. The jurisdiction to effect a restoration of the papers, in the negative form then necessary, was not questioned and counsel for the defendant consented to deliver up all of them except those whose owners had given him notice not to part with them. Mr. Beavan notes to the case that an injunction was afterwards granted as to the deeds and papers but which had not at time of reporting been drawn up.

In *Whitwham v. Moss* (73 L.T. 57) the defendant—I read from the headnote—was in the employment of the plaintiffs, the executors of Piercey, who were carrying out certain contracts with a railway company on behalf of Piercey's estate. While in their employment the defendant measured up and entered the work done by the plaintiffs for the railway company. The defendant of his own accord left the plaintiffs' service and took with him the books or documents in which he had entered the measurements. The plaintiffs brought the action for recovery of the documents and moved for an *interlocutory* order for their delivery. It was held, on the evidence, that the papers had never been in the defendant's possession in any capacity but that of clerk to the plaintiffs; that his taking them away was wholly improper and that he ought to be ordered to give them up in four days. North, J., said: "The documents were in the plaintiffs' possession, and the defendant, who was their servant, had no possible right to remove them out of his master's possession." If I am right in holding that these letters from the agents to the defendant were part of the business records and that they came to the defendant's possession only by virtue of his employment in the plaintiffs' business, the cases I have quoted seems to me directly in point.

I have said that the agents' letters to the defendant are the plaintiffs' property. It is not so as regards the copies the defendant has made of his own letters to the agents. Every prudent man takes copies of his business correspondence with others and very often of that of a purely personal and domestic nature. This the defendant has done, and the copies so made are entirely outside his obligations by the terms of his employment as to copies of his letters. The circular of the 18th September, 1914, already read, by the fourth paragraph, prescribes what copies of managers' letters are to be furnished by the writers, and these copies the defendant has duly sent to Mr. Garnett. The only other references to correspondence are, one in the agents' letter to Mr. Mackenzie

## LUSIGNAN CO., LTD. v. BRASSINGTON.

of the 2nd September, 1914, in which the writers direct: "Will you kindly bear in mind when writing us, that a copy of your letter should be sent home, also a duplicate mail report, for us to hand to Mr. Wolseley. If you write in copying ink we could probably take a press copy here of the letters, and that might be the better course." The second reference is in the agents' letter to the defendant of the 13th May, 1916: "In addition to sending us by each opportunity a duplicate of your letter, we shall be glad if you will also provide us with a duplicate of your fortnightly reports, as this is required for passing on to Mr. Wolseley." All these instructions the defendant has observed. It was not a condition of the defendant's employment that he should keep the records of the business on the plantation supplied with copies of his letters as part thereof. His obligation was to the local agency. Even if that condition had existed, the particular copies in this case are undoubtedly those taken by the defendant for himself, and this is not an action for breach of contract. I may neglect the fact that the book in which the copies are contained is the plaintiffs' book. There will be judgment that the defendant deliver to the plaintiffs or their local agents all original letters received by him from the plaintiffs' London agents, either addressed to him or to the acting manager, Mr. Mackenzie, and in his custody or under his control, as in the particulars of those letters in the statement of claim mentioned; but omitting any letters specifically referred to during the trial as not now claimed.

The plaintiffs are under no obligation to supply the defendant with copies of their agents' letters to him, but they might well and properly do so. Judgment for the plaintiffs, but each party to pay their own costs.

HAY v. PAUL.

PETTY DEBT COURT, GEORGETOWN.

HAY v. PAUL.

[252—5—1918.]

1918. JUNE 6, 11. BEFORE HILL, J.

*Contract—Sale of house property—Action to recover commission by house agent—Failure of house agent to take out licence—No bar to recovery of commission.*

The failure of H. to take out a licence to carry on the business of a house agent does not affect the validity of a contract entered into between H. and P., whereby the latter agrees to pay a commission to H. on finding a purchaser for P.'s property.

This was a claim by the plaintiff to recover the sum of \$60, alleged to be commission earned by him as a house agent under an agreement entered into between the parties on the plaintiff finding a purchaser for a property at lot 23, Bourda, Georgetown, belonging to defendant.

Defendant denied that any agreement to pay any commission was entered into between the parties, and alleged that plaintiff was not a licensed house agent.

*E. D. Clarke*, solicitor, for the plaintiff.

*J. S. McArthur*, for the defendant.

HILL, J.: This is an action for commission as a house agent. At the time of the alleged agreement plaintiff had not taken out his licence as such. Defendant knew him to be a house agent. I see no reason why he cannot claim for services as such. He is no doubt liable to a prosecution but this does not debar him from suing. A penalty for not taking out a licence under the Tax Ordinance does not imply a prohibition, in my opinion, of an unlicensed person to act as a house agent. When the prohibition of an act is implied from the infliction of a pecuniary penalty for the doing of the act, the question often arises whether the penalty is imposed for the purpose of preventing the act being done, or only for the purpose of making the person who does it pay a certain sum of money.

*Cope v. Rowlands* 2, M. & W. 149, decided that a penalty or pecuniary advantage to a Mayor and Town Council under 6 Anne c. 16, was not the sole object of the statute, as in such a case it would not have been necessary to make provision for securing the good conduct of the persons admitted, and the penalty in that case was a prohibition also.

In my opinion the erection of the sign board was the "effective cause" or "*causa causans*" of the sale—see the evidence of the purchaser—and see *Mansell et al v. Clements* (1874) 9 C.P. 139,

## HAY v. PAUL.

The defendant denies any express agreement to remunerate. He says he and plaintiff were friends and he thought plaintiff was doing the service as a friend. He, however, admits there was an agreement between them that anyone who wanted to buy was to be sent to plaintiff, whether they came through the agency of plaintiff's notice board or not.

I cannot see the necessity of such an arrangement if Hay's active interest was only of a friendly nature.

In these circumstances I believe there was an agreement to pay 3 per cent., on the purchase money of \$2,000 and that plaintiff is entitled to judgment for \$60 with costs and fee \$6.

## PETTY DEBT COURT, GEORGETOWN.

RODRIGUES v. PAULOS.

[184—5—1918.]

1918. MAY 22, JUNE 11. BEFORE HILL, J.

*Matter and servant—Wrongful dismissal—Action to recover wages to date of dismissal—Subsequent claim for damages for wrongful dismissal.*

This was a claim by the plaintiff to recover from defendant the sum of \$30 as damages and pecuniary compensation. The claim set out that plaintiff whilst a servant in defendant's employment as a shop salesman under a monthly contract of service was, on May 6th, 1918, wrongfully dismissed from such service without reasonable cause or notice.

*F. Dias*, solicitor, for plaintiff.

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

HILL, J.: The plaintiff in another action against defendant has treated the contract of service as rescinded, and has recovered his wages up to the time of wrongful dismissal. He has now sued on the contract as continuing, and claims damages for wrongful dismissal. He was wrongfully dismissed, in my opinion, but having elected to treat the contract as rescinded he cannot now come in tort for damages.

Gases relied on are:—*Prickett v. Badger* (1856) 1 C.B. (N.S.) 296; *Lilley v. Elwin* (1848) 11 Q.B., 742; *Goodman v. Pocock* (1850) 15 Q.B., 576 and *Smith's Master and Servant*, 6th Edit., p. 147.

Judgment for defendant with costs, and fee \$3.00.

J. E. PEROT & Co. LTD., v. CAREW AND ANOR.

J. E. PEROT & Co. LTD., v. CAREW AND ANOR.

[349 OF 1917]

1918, JUNE 14, BEFORE BERKELEY, J.

*Landlord and tenant—Premises and machinery—Option to purchase at fixed price at termination of lease—Covenant to repair—Sale of premises and machinery to third party at price fixed—Third party with notice of damage and satisfied with purchase—Damages, measure of.*

P. & Co. leased a building and machinery to C. and W. with right to purchase at the termination of the lease for \$27,500. The tenants were liable for any damage during the existence of the lease, beyond ordinary wear and tear.

At the termination of the lease C. and W. did not exercise their option to purchase, and the property was thereupon sold to D. and Co., Ltd., for the sum of \$27,500. In an action by P. & Co., against C. and W. for damages to the machinery during the existence of the lease;

*Held* that the amount of damages the plaintiffs were entitled to was not affected by any agreement entered into between the plaintiffs (P. & Co.) and D. & Co., Ltd.

Claim by the plaintiffs to recover from the defendants the sum of \$1,137.60 for damages alleged to have been caused by the latter to certain machinery the property of plaintiffs and leased to defendants under an agreement dated the 12th day of December, 1914.

The further necessary facts appear from the judgment.

*G. J. deFreitas, K.C., Actg. S.G.*, for the plaintiff.

*E. G. Woolford*, for the defendants.

BERKELEY, J.: This is a claim for \$1,137.60 in respect of damages caused to certain machinery leased to the defendants under an agreement whereby it was provided that the plaintiff's should be entitled to compensation in the event of any damage other than ordinary and reasonable wear and tear.

The Court finds on the evidence of Mr. Parratt, civil engineer.

- (a) the two standards of log frame damaged and that to replace same would cost \$384-\$480.
- (b) depreciation to the fly wheel \$28-\$80.
- (c) depreciation to rice hulling engine \$30-\$40. That this engine having been repaired works as well as it did before the accident. That the steel frame for carrying saw with side connecting rods is practically undamaged, it was slightly twisted but has been set right. No compensation therefore can be allowed in respect thereof.

The court further finds that the plaintiffs owned the machinery, but that the building in which this machinery was situate was the private property of John Downer; that the shares in the company were held by John Downer and his family, in effect by himself; that the defendants declined to exercise their option under the agreement to purchase the entire concern for \$27,500;

that it was sold to Davson & Co. at that figure on 29th March, 1917; that the purchasers were not informed by the plaintiffs as to the damage to machinery; that the purchasers at the time of their purchase had knowledge of the accident which had occurred a year before; that since the purchase they have had no trouble with the machinery and are perfectly satisfied with it; that the plaintiffs have never at any time waived their right to compensation under the agreement of lease, although this court is inclined to the belief that the present action would never have been brought if the defendants had become the purchasers. On these facts are the plaintiffs entitled to compensation?

It is submitted that the agreement having been entered into by the plaintiffs and John Downer this action as brought cannot be maintained. In the statement of claim the plaintiffs allege that the machinery is their property. The defendants (p. 1) admit this. It seems to the court that it would be improper to require all the parties to an agreement to be made plaintiff's where as in the present case the only party affected by a breach of that agreement is the plaintiff company. As to a settlement by arbitration under clause 9 of the agreement it is sufficient to say that the jurisdiction of this court cannot be ousted thereby, nor can the fact that the tenancy had been determined by consent and that the plaintiffs had subsequently sold the machinery and suffered no actual loss deprive them of a cause of action which vested in them on the termination of the lease and before the sale was effected.

The general rule as to compensation is to ascertain the amount of damages at the time that the cause of action accrued; apparent exceptions to this general rule sometimes are found in cases of the sale of goods (referred to by counsel for the defendants), where circumstances may decrease the damages. In the present case the only circumstance affecting the machinery is that a sale of it has been effected by the plaintiffs to a third party on the termination of the lease. The defendants have nothing to do with this sale, and it cannot be taken into account in estimating the damages which the plaintiffs are entitled to recover from them (See *Joyner v. Weeks* 65 L.T. 16 and *Morgan v. Hardy*, 17 Q.B.D., 770 referred to therein.)

In addition to the amount of actual damage, \$442.80, as deposed to by Mr. Parratt, the court finds that the plaintiffs are entitled to an additional 20 per cent, for expenses, etc., as claimed by them.

Judgment for plaintiffs for \$531.36 and costs.

DE SOUZA AND ANR. v SOARES.

DE SOUZA AND ANR. v. SOARES.

[12 OF 1916.]

1918. JUNE 25. BEFORE SIR CHARLES MAJOR, C.J.

*Will—Marriage in community of property—Usufruct—Security by usufructuary—Inability to find sureties—Receiver of common property with power to realize—Powers of court over fund and its payment out.*

A usufructuary, in order to satisfy the requirements of security, must find sureties if they are required. If in that case suitable sureties cannot be found, he should apply to the court which will give such directions as it may deem fit. Where the usufructuary cannot find sureties and the property has, by the court's direction, been realized by a receiver, the fund, the proceeds of the sale of the property, may properly be placed in the hands of the persons who would have had the ultimate right to the property had it not been sold, subject to their securing to the usufructuary the payment of the income from that fund, and the income may be fixed by the court at a certain percentage.

Application by the plaintiffs in the above-mentioned action (1) for an order directing payment out of court to them of the sum of \$5,743.71, being the sum paid into court by the receiver who was appointed by the court to take over and realize the common estate of Antonio Soares, deceased, and the defendant Matilda Soares. By reason of the failure of the defendant to provide proper security for the enjoyment of the usufruct created by the will of her deceased husband Antonio Soares, and by reason of the conversion of the property the applicants claimed that they were now entitled to the whole estate free of the usufruct.

*J. S. McArthur*, for the applicants.

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

MAJOR, C.J.: The defendant, as the executrix of the will of her late husband Antonio Soares, proved his will in 1914 and it appears proceeded to administration of his estate. In 1916 the plaintiffs commenced a suit against the defendant as the usufructuary of a moiety of the common property of her husband and herself, for an inventory, and security for the user and restoration of the property subject to the usufruct, and judgment was given in their favour on the 30th May, 1916. The defendant had, on the 9th August, 1915, filed an inventory of the estate, containing, among other items, one under description as proceeds of a policy of assurance amounting to \$560, and another, as cash at bankers, amounting to \$1,531.87. The defendant as executrix has not yet passed her accounts. The value of the estate, for the purpose of the security ordered to be given, was taken as stated in the inventory. The defendant in September, 1916, nearly two years after her husband's death, had not given that security, and thereupon

(1) 1916 L.R., B.G. 82, 162.

the plaintiffs moved the court before me for liberty to issue a writ for her attachment. Into the evidence for and against the motion and the defendant's counter-motion to discharge the writ (which I had allowed to be issued but execution of which I had suspended), I will not enter. It is sufficient to say that, upon consideration, while not able to regard the attitude of the defendant with favour, I failed to find ground for believing that she was contumacious in failing to give security. In view, however, of some allegations relating to her dealings with the estate, I eventually granted an application by the plaintiffs that a receiver be appointed with the usual directions and power to realize the estate. Execution of the writ of attachment was suspended until further order. No further order has been made, against the defendant's subsequent good behaviour in the premises. The testator's estate has now been realised and there is certified to be due from the receiver the sum of \$5,743.71. He received no part of the proceeds of the assurance policy—now ascertained to be \$602—and only \$184.96 of the \$1,531.87, leaving a balance of \$1,346.91. His receipts include some amounts for realization of parts of the estate considerably greater than the values of those parts stated in the defendant's inventory. The receiver's remuneration has not yet been fixed.

Subject, therefore, firstly to the passing of her accounts by the executrix, in which, of course, she must include the policy moneys (which I have already decided formed part of the common estate) and also the \$1,531.87; secondly, thereafter to clue ascertainment of the precise sum representing the common property to be divided between the defendant and the plaintiffs; and, thereafter, thirdly to deduction from that sum of the receiver's remuneration and of costs, I have now to determine the nature of the order I ought to make upon this application, which is that the plaintiffs be paid at once their moiety of the common estate—to whatever that may amount—freed from the defendant's usufruct thereof under her husband's will. Mr. McArthur contends that the usufruct is lost because the nature of some of the property has been changed. I cannot listen for a moment to that contention, coming, as it does, from the plaintiffs, at whose instance the change was made and that very properly, in the interest of both parties to the suit, nor would I listen if the changes had been forced upon the parties by the court in the exercise of its discretion to appoint a receiver. It is urged, again, that the defendant is shown to have been contumacious in refusing to give security and, therefore, that her usufruct is extinguished. Even if there had been contumacy—and I have said that the plaintiffs have not satisfied me of that—it would not work extinction, but only postponement of the usufruct until security were given. On the evidence before me I am unable to say more than that it is a case of inability to find sureties, and, sureties

not being forthcoming and thereby security given for careful user and future restoration intact, a condition precedent to possession has not been fulfilled and possession cannot be given. What, in that position of matters, are the powers of the court? I find them wide and ample. As Mr. Nathan puts it, "A usufructuary, in order to satisfy the requirements of security, must give sureties. If he cannot find suitable sureties he must apply to the court for directions in the matter, and the court may allow him to take the usufruct subject to such conditions for safeguarding the property as the court may deem fit to impose." (1). As Mr. Morice has it, "If the usufructuary cannot give such security the court may use its discretion in the way of taking a mortgage, or putting the owner in possession on condition that he pay over the rents and profits to the usufructuary." (2) In all the circumstances of the case I must notice that the defendant has hardly been anxious to help the situation but has consistently kept herself aloof until brought to the court by the plaintiffs. In all the circumstances of the case, I say, I shall give possession of the fund to the plaintiffs, but they, in their turn, for that advantage, must secure to the defendant the half-yearly payment of the income. The security must be to the satisfaction of the registrar. I suggest, merely suggest, that it be, if of real property, by mortgage in the usual form; if of personal chattels within the meaning of that expression in the Bills of Sale Ordinance, 1916, by bill of sale under that ordinance. And the income must obviously be fixed on a certain percentage. The fund to be handed over to the plaintiffs will bear interest at the rate of 6 per centum per annum. The minutes of the full order made hereon for note on counsels' briefs will be—Order that receiver be allowed his remuneration at the rate of 4 per cent., on the gross amount of the estate in his hands after realization thereof and his costs (if any) outstanding, to be deducted from the sum certified to be now due from him, and pay balance into court. Order that executrix do pass her accounts and forthwith pay into court any balance certified to be due from her. In default, same to be charged against her share of the common property. Order that of the sum thereafter finally certified by the accountant, after deduction therefrom of the costs of both parties of the present application and carrying this order into effect, to be the amount of the common property divisible between the owners thereof, one moiety be paid out to defendant. Order that upon the plaintiffs giving to the defendant good and sufficient security satisfactory to the registrar for payment of the income of the other moiety, the same be paid out to the plaintiffs.

(1.) Common Law of South Africa, I. p. 436.

(2.) English and Roman Dutch Law, 2nd ed. p. 45.

FERREIRA v. DE FREITAS.  
 PETTY DEBT COURT, GEORGETOWN.

FERREIRA v. DE FREITAS.

[383—5—1918.]

FERREIRA v. DE FREITAS.

[384—5—1918.].

1918, JUNE 12, 25, BEFORE HILL, J.

*Magistrate's Court—Two claims arising out of one cause of action—Splitting of cause of action—Petty Debt Recovery Ordinance, 1893, s. 4—Practise—Amendment.*

Two claims by the plaintiff against the defendant, as follows:—

- (1) For the sum of \$85 alleged to be due for extra work done as an accountant making up trading and profit and loss account for the purpose of Excess Profits returns of the Demerara Boot Factory and two branch offices in March and April, 1918, and for taking stock in December, 1917.
- (2) For the sum of \$100 alleged to be due for extra work done as an accountant, opening, writing up, keeping and completing double entry books of the Demerara Boot Factory between January 1st and December 31st, 1917.

*C. Gomes*, solicitor, for the plaintiff.

*H. H. Laurence*, for the defendant.

Objected that the plaintiff by splitting his claim had brought two actions arising out of one cause of action. He therefore asked that the claims be struck out.

After argument, decision was reserved.

HILL, J.: The plaintiff has brought two actions against the defendant for \$100 and \$85 respectively and Mr. Laurence for defendant has objected to this on the ground there has been a splitting of the cause of action.

Mr. Gomes, for plaintiff, in his opening remarks, states that the work for which plaintiff is claiming was done in consequence of the operation of the Excess Profits Tax requirements, but that the requests were made at different times within a limited period. On this statement alone, I consider that there has been a splitting.

“Cause of action” means “cause of one action”, that is, the legislature in enacting that a cause of action should not be divided meant a cause of action which but for the enactment would

## FERREIRA v. DE FREITAS.

be divisible, and a cause of action ought to be interpreted as one cause of action and that to be limited to an action on one separate contract (*Re Aykroyd, Grimby v. Aykroyd* 1847 1 Exchequer 479). The work was continuous, arising out of the operations and in consequence of the Excess Profits Tax. There was a “common character” to the three sets of items constituting the two claims. Mr. Gomes asks if the Court is against him to be allowed to amend.

The Rules under the English County Court Act, 1888, allow of the abandonment of an excess at time of trial, but our local rules do not, and the old practice still prevails here. The abandonment must be expressed both in the plaint and the evidence.

But in this particular case I have nothing to amend, the two claims are separate and this being so I cannot “amend” them so as to “amalgamate” them, and thus give myself jurisdiction to permit of an abandonment of the excess, even if it were possible to abandon at time of trial.

The claims must be struck out with costs to the defendant and fee to counsel of \$10.

## REECE v. CHEEFOON.

[154 OF 1918.]

1918. JUNE 27. BEFORE BERKELEY, J.

*Criminal law—Opium—Unlawful possession of prepared opium—Definition—“Used or intended to be used for smoking”—Analyst’s certificate—Evidence—Opium Ordinance, 1916, s. 2, and s. 3 (c)*

Appeal from a decision of the stipendiary magistrate (Mr. W. J. Douglass) of the Berbice judicial district, brought on the application of the Attorney General by way of review.

The respondent Cheefoon was charged with being in possession of prepared opium, contrary to the provisions of sect. 3 (c) of the Opium Ordinance, 1916. The charge was dismissed, the magistrate’s reasons being as follows:—

“The accused was charged under section 3 (c) of the Opium Ordinance, No. 5 of 1916, of being in possession of ‘prepared opium.’ The only facts proved, and admitted by the accused, were that an old pipe, a copper bowl, and a little horn box containing a dark liquid were found in his possession.

“The preparation in the horn box was submitted to the public analyst, and his certificate of its contents has been put in evidence;

## REECE v. CHEEFOON.

he states that it contains 'prepared opium,' and at first sight this would mean sufficient to obtain a conviction, but there are two points to be considered, the first that under s. 44 of Ordinance No. 20 of 1893, an official analysis is only *prima facie* evidence, not conclusive, and next, the definition under the Opium Ordinance of the term 'prepared opium,' which is defined as meaning 'any preparation of opium or any preparation in which opium or any residuum of smoked opium forms an ingredient.' If the definition stopped there a conviction might still be obtained, but it concludes, 'which preparation is used or intended to be used for smoking.' The certificate can only cover the first part of the definition, as the analyst cannot possibly say if the specimen before him was used by the accused nor know the intention of the accused. That requires proof and must be proved in the proper manner. This proof is lacking. The preparation as shown to me is in a liquid state and I am not aware it was ever in any other condition, the accused has never been seen smoking, the pipe has no mouth-piece and has evidently not been used for some time, there is no smell of opium about it. The accused states that the preparation was used by him medicinally. It may have been, I cannot say, but I give him "the benefit of the doubt whether it was used or intended to be used for smoking."

The complainant (Reece) appealed, the reasons for appeal being as follows:—

- (1.) The decision is erroneous in point of law, inasmuch as the certificate of the Government analyst to the effect that the preparation which was found in the possession of the defendant was prepared opium was binding on the magistrate in the absence of any evidence to the contrary, and the learned magistrate erred in holding as he did that he was not bound to accept the certificate of the Government analyst on that point.
- (2.) There was no necessity for the prosecution to prove that the opium found in the possession of the defendant was in fact used or intended to be used for the purposes of smoking.
- (3.) The interpretation given by the learned magistrate to the definition of "prepared opium" in section 2, Ordinance 5 of 1916, is wrong.

The certificate of the analyst referred to was in the following form:—  
"No. 4/18.

Government Laboratory,  
British Guiana,  
February 19, 1918.

REPORT on an examination for opium of the following articles brought by P.C. 2261, Reece, on the 14th

## REECE v. CHEEFOON.

of February, 1918, from Insp. Murtland, per Inspector General of Police.

*Description of the articles:*

A small horn box, sealed with police seal No. 46.

(Sd.) K.D. REID  
Asst. Analyst.

*Results of the Chemical Examination:*

The contents consist of prepared opium.

(Sd.) J. B. HARRISON,  
Government Analyst.

To Inspect. Genl. of Police.”

*G. J. de Freitas, K.C., Actg. S.G.,* for the appellant.

The respondent was in default of appearance.

BERKELEY, J.: This is an appeal from the decision of the Stipendiary Magistrate of the Berbice judicial district (Mr. Douglass) who dismissed on its merits a complaint brought by the complainant (now appellant) against the defendant (now respondent) who was charged that he, on the 13th February, 1918, did possess “prepared opium” contrary to law. This offence is created by Ordinance No. 5 of 1916, s. 3, which says it shall not be lawful “(c) to manufacture, keep, possess, buy, sell, barter, or use any prepared opium,” while section 2 provides that in this ordinance the term “prepared opium” means “any preparation of opium, or any preparation in which opium or any residuum of smoked opium forms an ingredient, which preparation is used or intended to be used for smoking.” The magistrate holds that the certificate of the analyst can cover only the first part of the definition as the analyst cannot possibly say if the specimen before him was used by the accused, nor the intention of the accused, which requires proof and must be proved in the usual manner. The sole ground of appeal is that the magistrate is wrong in thus finding, and it is submitted that the certificate of the analyst merely, that the substance is “prepared opium,” is evidence that it is used or intended to be used for smoking. This certificate is extremely bald. It affords no information as to whether the substance is (1) a preparation of opium, or (2) a preparation in which opium or any residuum of smoked opium forms an ingredient, Now a certificate is only *prima facie* evidence and although the words “prepared opium” may be held to cover the two preparations referred to, I cannot by any course of reasoning arrive at the conclusion that these words include

## REECE v. CHEEFOON.

“used or intended to be used for smoking.” I am of opinion that a somewhat liberal construction should be placed on the words “intended to be used for smoking,” and if the certificate of the analyst showed that the substance was capable of being used for smoking I should be disposed to regard this as *prima facie* evidence of an intention to use it for that purpose.

The appeal is dismissed, and as the respondent does not appear in this Court I make no order as to costs.

## COLLINS v. YOUNG.

1918. MAY 31; JUNE 27.

BEFORE BERKELEY AND HILL, JJ.

*Criminal law—Summary Conviction Offences Ordinance, 1893, s. 96—Unlawful possession of property reasonably suspected to have been stolen—Time at which suspicion must exist—Explanation to satisfaction of the Court.*

In a charge for unlawful possession brought under the provisions of sect. 96 of the Summary Conviction Offences Ordinance, 1898, as amended by Ordinance 12 of 1915, it is the duty of the magistrate at the close of the case for the prosecution to decide on the evidence adduced as to the facts, whether or not the facts constitute reasonable suspicion against the accused. To support the charge the reasonable suspicion must be found to have existed at the time the charge was originally made or the accused arrested and not only at some subsequent time.

*Wint v. Bannister* (A. J. 30. 3. 1904) overruled. *Butts v. Bruncker* (A. J. 16. 1. 1900), and *Neptune v. Dublin* (A. J. 17. 8. 1901) followed.

Appeal from a decision of Sir Charles Major, C.J., confirming a conviction by the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist). The appellant Young was charged with the unlawful possession of one broom reasonably suspected to have been stolen, and was sentenced to pay a fine of \$30, or in default to two months' imprisonment with hard labour. He appealed on the ground that there was no evidence before the magistrate to justify his finding that the grounds of suspicion stated by the prosecution were reasonable.

In confirming the conviction His Honour gave decision as follows:—

“The defendant was charged and convicted for being in the possession of a broom reasonably suspected to have been unlawfully obtained, on his failing to give a satisfactory account of his possession.

“The defendant contended on appeal that there was no evidence before the magistrate wherefrom he might reasonably suspect the broom to have been unlawfully obtained.

“The magistrate had a considerable mass of evidence before him, after examination of which and comparison of its details one with another he found that there was reasonable ground for sus-

## COLLINS v. YOUNG.

picion that the defendant's possession was unlawful. The defendant's account of his possession was a repetition of what the prosecution proved he had stated to the police when the broom was seized.

"Although I should myself on the evidence have been unable to find that it afforded ground for reasonable suspicion of the defendant's possession, I am not prepared to say that the magistrate was clearly wrong in so finding. The appeal therefore is dismissed."

From this decision the appellant further appealed to the Full Court, leave being granted to appeal on certain questions of law, which are fully set out in the judgments below. The appeal was allowed, and the conviction was quashed.

*J. S. McArthur*, for the appellant.

*G. J. de Freitas, K.C., Actg S.G.*, for the respondent.

BERKELEY, J.: This is an appeal from the decision of Major, C.J., who dismissed an appeal from the decision of the stipendiary magistrate of the Georgetown judicial district (Mr. Gilchrist), convicting the appellant for that he had in his possession one broom reasonably suspected of having been unlawfully obtained. Leave to appeal to this Court on questions of law was granted by the Chief Justice under Ordinance 13 of 1893, (s. 38). These questions are:

- (a.) Whether there was or was not before the Magistrate's Court at the close of the case for the prosecution sufficient evidence to justify the magistrate's finding that the grounds of suspicion stated by the prosecution were reasonable.
- (b.) Whether, if at the close of the case for the prosecution there was not sufficient evidence to warrant reasonable suspicion, the magistrate was not in law bound to dismiss the charge against the defendant.
- (c.) Whether, granting that the magistrate could call for a defence where the prosecution did not disclose sufficient evidence to warrant reasonable suspicion, there was at the close of the whole case sufficient evidence of reasonable suspicion.
- (d.) Whether the magistrate did not misdirect himself in holding that instructions given to Corporal Collins by his superiors, the obtaining of the search warrant and the answers of the defendants to questions put to them by the police constable, afforded in law sufficient ground for finding that the suspicion was reasonable.
- (e.) Whether statements made by the defendants at the time of the seizure in answer to the questions put to them by the prosecutor were admissible in evidence on the hearing of the charge before the Court.

Reason (a).—The grounds of reasonable suspicion as found by the magistrate are: (1) The instructions given to the respondent by his superiors and the search warrant which was obtained. The Solicitor General admits that he is unable to support the finding of the magistrate under this head in the present case. (2). The evidence of Mr. Shanks of Sprostons, Limited, viz.: that from time to time he had missed articles and had repeatedly reported such loss to the police. This was said in answer to a question put by the magistrate—it has no reference to brooms, and is too vague a statement on which reasonable suspicion as to a broom can be founded (3). The evidence as a whole. On the search warrant being executed none of the articles mentioned in the information were found, nor anything else that raised a suspicion against Alexander the owner of the house, (charged with appellant and acquitted). The broom had been seen, and on Alexander saying that he had purchased it two weeks before from Strickland, the police appeared to be satisfied. Appellant (who lives with Alexander) then said that he had bought this broom that morning. As a fact it is proved and admitted that he did buy a broom like this on that morning, and the broom which is produced is an unused one. The conclusion drawn by the magistrate is that appellant left the shop, had a broom purchased, and did this in order to produce the receipt which he took from a file. It is not suggested what became of the broom that he actually purchased. Appellant was taken to Sprostons by P.C. Edwards and his evidence as to statements made there by appellant might be regarded as suspicious, but Edwards admits that the statements of witnesses who were present although taken by him contain no reference to the statements made by the appellant in their presence. Moreover these witnesses gave evidence and they are not asked a word as to anything said by appellant. The magistrate finds that appellant was at the house when the police arrived at 11.20; P.C. Archibald set to watch that nothing was carried in or out and says that he did not see appellant leave, while two witnesses called by the prosecution say that he was on board s.s. "Cuyuni." Babb says from 7 a.m. working, and Butler that he was there 9-10 a.m. receiving ship's stores. The magistrate finds that Babb's evidence as to time cannot be accepted—that he was endeavouring to shield appellant—but there is the evidence of the clerk Evelyn that Babb bought the broom about 12 o'clock and gave the name of appellant as purchaser. The broom is an unused one. Butler says appellant as mate of s.s. "Cuyuni" 9-10 that morning received one of these brooms as ship's stores. The Court expected that it would be asked to draw the inference that the broom unlawfully obtained was part of the ship's stores, which appellant

## COLLINS v. YOUNG.

might have replaced by purchase, producing receipt for same, but it is shown by the evidence of P.C. Edwards that the captain of the "Cuyuni" had in his possession the broom received that morning. These facts seem to have escaped the notice of the magistrate. We have therefore two brooms received by the appellant on that morning and both are accounted for.

I agree with the Chief Justice that "I should myself on the evidence have been unable to find that it afforded ground for reasonable suspicion," but I go further and I say that I am unable to see any sufficient evidence to justify the magistrate in holding that there was reasonable cause" to suspect that the broom had been unlawfully obtained, and I think therefore that the conviction should be quashed. See *Nurse vs. Pheraj* (1915, L.R., B.G., 80) where it was held that the magistrate's conclusions were not warranted and that there was an insufficiency of evidence.

Reason (b)—The answer to this question must be in the affirmative. The Summary Conviction Offences (Procedure) Ordinance requires that the magistrate shall hear the witnesses on both sides if defendant desires to call any. It is not compulsory on him to do so. This contemplates that a case has been made out which requires some answer thereto, otherwise magistrates constantly err in dismissing cases without calling for a defence. A defendant should not be called on unless a *prima facie* case is made out. "To allow a prosecutor's defective evidence to be eked out by what a defendant may say in defence is contrary to the practice of the Criminal Law," (Chalmers, C.J., in *Marques v. Francis*, 15. 6. 1888) and approved of by Bovell, C.J., in *Persaud v. Callendar* (27. 5. 1902.) In charges similar to that now before the Court the very ground of a person being charged is reasonable suspicion, and the facts to be proved are (1) possession, and (2) the thing possessed is reasonably suspected of having been stolen or unlawfully obtained—then it is for the defendant to remove suspicion (Bovell, C.J., in *Edum vs. Anderson*, 14. 9. 1906). It is the duty of a magistrate sitting as a jury at the close of the case for the prosecution to find on the evidence adduced as to the facts, and then to say whether or not those facts constitute reasonable suspicion. This is a question of law, and if the Court of Appeal is of opinion that the magistrate has misdirected himself it is the duty of that Court so to find.

All the recorded decisions, so far as I can discover lay, it down that reasonable suspicion must exist at the time of arrest or detention. In *Wint vs. Bannister* (30. 3. 1904.), however, Bovell, C.J., said: "The absence at the time of arrest of reasonable ground for believing an article has been unlawfully obtained may lay the constable making the arrest open to proceedings for an illegal arrest, but cannot in my opinion prevent the conviction of

the person arrested, if *at the time of trial* there exists a reasonable suspicion of the article having been stolen *at the time* the defendant had it in his possession.” With all due respect to the learned Chief Justice I am disposed to think that this is inconsistent with his previous decisions and those of other judges. His finding is based on the use of the present tense in s. 96 of the Ordinance “*is* reasonably suspected”—but the same tense is used at the beginning of the same section, “where any person *is* charged before the Court.” This points to the reasonable suspicion existing at the time that the charge is made and not at the time of trial. I think this construction is strengthened by the provisions of section 96(1) of the amending Ordinance (No. 12 of 1915), which contains these additional words, “or for that he at any time within the three months immediately preceding the making of the complaint.”

Reason (c.) This is covered by (b.)

Reason (d.) The question arising thereunder are dealt with in (a.)

Reason (e.) This Court on more than one occasion has pointed out the procedure to be adopted. As I said in *Ramkellawan vs. Barrow* (1915 L.R., B.G., 163); “The object of section 96, which corresponds with certain sections of 2 and 3 Victoria, ch. 71, is specially directed to the charging of offenders, in large and populous cities, who are found in possession of property which is suspected to be stolen but the owner of which is unknown.” The power to charge for such offences has been extended by Ord. 12 of 1915. An encroachment, possibly a necessary one in order to suppress crime, on the liberty of the subject which in effect renders a person liable to account for anything found in his house that a constable without any justification on grounds of suspicion may capriciously charge him with the unlawful possession of. The procedure to be followed is laid down in the Ordinance (s. 96). The construction to be placed on that section is for this Court and that has been done in *Ramkellawan v. Barrow* (*supra*) and in *Baldeo v. Pollard* (15 L.R., B.G., 171), and as decisions of the Full Court it is the duty of a magistrate to follow them. Disregard of these directions, more than once laid down, will vitiate the proceedings which otherwise might be in order. I have nothing to add to what I said in the latter case which was approved of by Major, C.J., who said “I agree with the view taken by the learned Senior Puisne Judge of the procedure to be followed in connection with charges laid under the provisions of the ninety-sixth section of the Summary Conviction Offences Ordinance, 1893.”

The appeal is allowed and the conviction quashed with costs.

The Chief Justice is aware of the contents of this judgment and agrees with it.

## COLLINS v. YOUNG.

HILL, J.: The reason for the Chief Justice's decision is: "Although I "should myself on the evidence have been unable to find that it afforded "ground for reasonable suspicion of the defendant's possession I was not "prepared to say that the magistrate was clearly wrong in so finding."

The reasons of appeal from that decision are—

- (a) Whether there was or was not before the Magistrate's Court at the close of the case for the prosecution sufficient evidence to justify the magistrate's finding that the grounds of suspicion stated by the prosecution were reasonable.
- (b) Whether, if at the close of the case for the prosecution there was not sufficient evidence to warrant reasonable suspicion, the magistrate was not in law bound to dismiss the charge against the defendant.
- (c) Whether, granting that the magistrate could call for a defence where the prosecution did not disclose sufficient evidence to warrant reasonable suspicion, there was at the close of the whole case sufficient evidence of reasonable suspicion.
- (d) Whether the magistrate did not misdirect himself in holding that instructions given to Corporal Collins by his superiors, the obtaining of the search warrant, and the answers of the defendants to questions put to them by the police constable afforded in law sufficient ground for finding that the suspicion was reasonable.
- (e) Whether statements made by the defendants at the time of the seizure in answer to questions put to them by the prosecution were admissible in evidence on the hearing of the charge before the court.

Sec. 96 (1) Ord. 12 of 1915 amending Ordinance 17 of 1893 under which the charge is laid as follows:—

"96—(1) Every person who is charged before the court with having in his possession or under his control in any manner or in any place, or for that he at any time within the three months immediately preceding the making of the complaint did have in his possession or under his control in any manner or in any place anything which is reasonably suspected of having been stolen or unlawfully obtained and who does not give an account, to the satisfaction of the court, as to how he came by the same, shall, on being convicted, be liable to a penalty of one hundred and fifty dollars or to imprisonment for six months."

And 96 (2) sets out the procedure to be followed on such a charge being made.

It has been necessary to consider the various decisions which have been given extending many years back and on the question

of “reasonable suspicion” those of *Butts v. Bruncker* (16. 1. 1900), *Neptune v. Dublin* (17. 8. 1901.) and *Wint v. Bannister* (30. 3. 1904) are deserving of special consideration. In the last named Bovell, C.J., held that reasons 2 (b) and (c) in that case furnished no ground for reversing the magistrate’s decision. Those reasons were that the decision was erroneous in point of law, there being no evidence that the police at the time of seizing the brass and copper and arresting the persons carrying them had reasonable ground for suspecting such persons or any one else had unlawfully obtained them. Bovell, C.J., is reported thus:— “The absence of the time of arrest of reasonable ground for believing an article has been unlawfully obtained may lay the constable making the arrest open to proceedings for an illegal arrest, but cannot in my opinion prevent the conviction of the person arrested, if at the time of the trial there exists a reasonable suspicion of the article having been stolen at the time the defendant had it in his possession. This seems to me to follow from the language and heading of section ‘96 under which proceedings are taken, that enactment making it an offence to have in one’s possession property which as a matter of fact ‘is’ (i.e., at the time of trial) reasonably suspected of having been unlawfully obtained, and not to be inconsistent with the decisions in *Butts v. Bruncker*, ‘16. 1. 1900 and *Neptune v. Dublin*, 17. 8. 1901. In other words the gist of the charge under that section is unlawful possession. Any other construction would lead to the conclusion not only that no offence was committed where reasonable ground for suspicion did not exist at the time of arrest, but that if such ground then existed, an offence would have been committed, although at the time of trial the evidence showed there was no reasonable ground of suspicion then existing.”

After consideration, I am constrained to think the interpretation of the word “is” was rather stretched in this finding. I consider that no offence would be committed where reasonable ground for suspicion did not exist at the time of arrest, but I disagree that an offence would have been committed if such ground then existed although at the time of trial the evidence showed there was no reasonable ground of suspicion then existing.

In my opinion that decision was inconsistent with *Butts v. Bruncker*, and especially with *Neptune v. Dublin*. In the first mentioned Sir Wm. Smith, C.J., says: “The meaning of this enactment is to my mind clear. There must be evidence that an accused person was in possession of goods as to which there is some reasonable suspicion that they were either stolen or unlawfully obtained before he can properly be called upon to

## COLLINS v. YOUNG.

“satisfy the court as to how he obtained possession of them: and the “grounds of suspicion should be such as to lead any reasonable person to “the belief that the goods had been stolen or unlawfully obtained” . . . . . Further on the learned Chief Justice continues: “I dissent entirely from the “view that the police had the right to believe the brass to have been stolen, “unless reasonable grounds existed for the belief. It cannot be assumed that “the policeman suspected it to have been stolen, still less that his suspi- “cions were reasonable. *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 arti- “cle he carried; if there is reasonable cause of 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 jus- “tified in making enquiries, and if their suspicions were confirmed by the “nature of the explanation given, in detaining the person. When the case is “before the Court, there must be evidence that there is reasonable suspicion “that goods found in a person’s possession have been stolen or unlawfully “obtained before the onus is cast on the person accused of showing how he “became possessed of them.”

And Swan, Acting J., in *Neptune v. Dublin (supra)* says: “The suspi- “cion must precede the detention or arrest, and must in all cases be reason- “able, and proved to be so before the magistrate can call upon the accused “to answer the charge.”

In *Holder v. McKenzie* (10th August, 1.907), Lucie Smith (Ag. C.J.) approved of *Butts v. Bruncker* and concluded that “on the whole case I think “the facts are such as should have been left for the jury to decide.”

In *McLennan v. Booth* (14. 12. 1906.) the only reason for appeal was that there was not sufficient evidence to support a reasonable suspicion and in *Mulraine v. Baker* (16. 3. 1906), Bovell, C.J., considered the evidence and found that there were reasonable grounds for suspicion.

In my opinion “is reasonably suspected” in section 96 is meant to be held to refer to a suspicion, which must be reasonable, which must exist in the mind of the policeman at the time of arrest, or detention, and must be a reasonable suspicion at the time the accused is charged before the Court.

On the finding therefore of Major, C.J., the accused was entitled to have had his appeal allowed. I think the question of

## COLLINS v. YOUNG.

want of reasonable grounds of suspicion is a matter for the Appeal Court to deal with, in the same way as want of reasonable and probable cause is dealt with by the Court as an inference of law (*Lester v. Perryman* 4 L.R.H.L. 539-40, *Hailes v. Marks* 7 H. & N. 62). Although an inference of fact it has to be dealt with by the judge and not by the jury and, this being so is subject to review.

I am also of opinion that the grounds of suspicion, and their reasonableness, must be shown before the prosecution is closed, and cannot be eked out by calling on the accused for a defence. The Summary Conviction Ordinance, 1893, sec. 28 (4) has been referred to, and *Persaud v. Callender* (27. 5. 1902.) also, but in that case (which was for larceny of a steer), Bovell, C.J., held that there was nothing in the ordinance requiring a magistrate to decide on a portion of the case before him. But he, as well as Chalmers, C.J., in *Marques v. Francis* (15. 6. 1888) are reported as saying that "it was not desirable to call on a defendant for his defence whilst a "prima facie case in prosecution has not been made out. To allow a prosecutor's defective evidence to be eked out by what a defendant may say in "defence is contrary to the practice of the Criminal Law,"

Was there then, at the close of the prosecution, sufficient evidence of reasonable suspicion, as to require the magistrate to call on the accused to account for their possession?

The police were armed with a search warrant and found nothing under it for which they were searching. They were about to leave when a broom was seen under the counter and Alexander, one of the accused, who was discharged at the conclusion of the case, was asked where he got it. Why a broom should not be under the counter, and why an explanation should have been called for of its presence does not appear, and I again invite the attention of magistrates and the police to Sir Wm. Smith's remarks in *Butts v. Bruncker* quoted before. This broom had nothing to do with the object of their search.

Alexander replied he had bought it two weeks ago from Strickland's, whereupon the appellant who was eating breakfast said that he was mistaken as he had bought it that morning from Sprostons and he produced a bill therefor.

Thereupon he was arrested, or detained, call it what you will, and was taken to Sprostons, from thence to the "Cuyuni" on which he was a mate. I am unable to see that at the time of his detention or arrest there was any suspicion, still less a reasonable suspicion against the man.

There is some most conflicting evidence by the prosecution as to the hour when the broom was brought and after an adjournment two police constables gave additional evidence for the prosecution.

## COLLINS v. YOUNG.

That of P.C. Edwards is most extraordinary. He is the individual who accompanied the appellant to Sprostons and the "Cuyuni," and he gave evidence of conversations with, and in the presence of, the appellant, of statements made by Babb and Butler in the presence of appellant, of interrogations by him of the various parties. Babb and Butler had given evidence for the prosecution on the first day, and had never been questioned in regard to these admissions and statements said to have been made in their presence. The policeman, in cross-examination, admitted that he had taken the statements of these two men in writing. He states: "I took the 'statements in writing from Babb and Butler. They do not contain the conversations that took place at Sprostons. They do not contain the statements that Young denied giving to Babb the two shillings to buy the broom. It did not contain my question 'How did you not know the person 'who bought the broom.' These statements do not contain the alleged 'statements 'that before Butler could answer, Young 'said he did not know 'the boy's name.' It was important to have these questions down. I think so 'now as you (counsel) say so. When I went to the 'Cuyuni' I asked the 'captain if he had lost any broom. He showed me a coir broom and said he 'had received it as stores that morning.'"

In these circumstances I think the evidence of this policeman should have been rejected.

The only evidence that existed when the prosecution was closed was some very conflicting evidence as to the hour of purchase of the broom, and Babb's evidence (a witness for the prosecution) effectually disposed of the question as to Young's presence on the "Cuyuni." He was not shown to be hostile, or in collusion, and his evidence must stand.

I consider therefore at the close of the prosecution there was not such reasonable grounds of suspicion shown by the prosecution as to require the accused to account for the possession of the broom.

Reasons (c) and (d) are, in effect, answered in the foregoing.

There remains Reasons (e), and our attention has been drawn to certain decisions in the English courts.

In the case under review I should myself have rejected the evidence of P.C. Edwards as encroaching on the "best traditions of our criminal procedure" to use the expression of Lord Moulton in *Director of Public Prosecutions v. Christie* (111 L.T., 220). The remarks of the Lord Justice are set out in *Baldeo v. Pollard* (1915 L.R., B.G., at p. 176 & 177), and I commend them to the police and magistrates once again in the hope that they may be digested and acted upon. It is impossible to lay down any rule as to the admissibility or otherwise of evidence except

## COLLINS v. YOUNG.

the particular circumstances of each case are before the court, and it is quite possible that the decisions in many of the (English cases cited might have been different had they had reference to “unlawful possession,” and with sec. 96 (2) of Ordinance 17 of 1893, before the English tribunals.

I have suggested in a recent decision (*Benn v. Davis*, May 18th, 1918 reported above at p. 10) a method of procedure on the part of the police in such cases.

This appeal is allowed with costs here, and in the lower courts.

## PETTY DEBT COURT, GEORGETOWN

BARROW v. MOORE.

[255—6—1918.]

1918. JULY 9. BEFORE DALTON, ACTG. J.

*Contract—Sale of goods—Title of seller—Purchase at public auction in good faith without notice of defect in seller's title—Claim by owner in detinue—Sale of Goods Ordinance, 1913, ss. 24, 25.*

Claim by the plaintiff Barrow for the delivery of a cow, alleged to be wrongfully detained by the defendant, or its value \$60, and \$10 as damages for such wrongful detention. The cow in question had been purchased by the defendant as the property of one Sanicharri at a public auction sale. Further necessary facts appear from the judgment.

*C. R. Browne*, for the plaintiff.

*A. M. Ogle*, solicitor, for the defendant.

DALTON, Actg. J.: Plaintiff claims from the defendant one dark brown and white cow, wrongfully and illegally detained by the latter or \$60 its value.

It is not denied that the cow was the property of plaintiff and that a demand was made in due course, but defendant urges that he bought it at public auction in good faith with no notice of any defect in the seller's title.

On the facts I find that the cow, in the absence of plaintiff from the colony, was sold by a relative who had no right to it. After passing through one or two hands it was put up for sale at public auction by W. Bagot & Co., at the instance of one Sanicharri, and purchased by defendant who paid \$29 for it.

The transaction is governed by the provisions of the Sale of Goods Ordinance, 1913. The auctioneer is the agent of the seller

## BARROW v. MOORE.

who, by having the goods put up, implies that he has a right to sell them. If the seller's title is bad, the auctioneer cannot make it good. Under certain conditions where goods are purchased in a public market (s. 24) the buyer acquires a good title provided he buys in good faith and without notice of any defect in the seller's title, but that section does not apply here, as Mr. Ogle urges. The section purports to introduce something equivalent to the English sale in "market overt," but an ordinary auction sale is in no way a sale coming within the terms of the section.

Again, when the seller of goods has a voidable title to what he is selling and his title has not been avoided at the time of the sale, the buyer acquires a good title (s. 25) provided he buys in good faith and without notice of any defect. But neither does that section apply here, for there was no sale between the true owner and the person who wrongfully sold the cow in the first place, and so no property in the animal was transferred by the seller. (*Cundy v. Lindsay*, 3 A.C. 459, and *Kingsford v. Merry*, 26 L.J., Ex. 83). The section in question applies to a case where the owner induced, say, by fraud parts with the goods, thereby vesting the property in a fraudulent purchaser. The facts in the case before me are quite different.

Lastly, has the plaintiff in any way by her own action been estopped from claiming the animal as her own property or from denying the seller's authority to sell? I can find no evidence of negligence either on her part or on the part of her daughter such as would prevent her from setting up her title to the cow. This is one of those cases in which one of two innocent parties must suffer through the action of a third. Applying the law as I conceive it to be, the defendant is the innocent party who must suffer here and the plaintiff is entitled to judgment.

The value of the animal I find to be the price it was sold for at auction. Plaintiff will therefore have judgment for the return of the animal or \$29, its value, with costs and fee.

POLLYDORE v. WILLIAMS & ORS.

POLLYDORE v. WILLIAMS & ORS.

[198 OF 1918.]

1918. JULY 27, BEFORE HILL, ACTG. C J.

*Practice—Injunction—Application, to discharge interim order—Undertaking by counsel as to damages—Form of undertaking—Limitation as to time for order to run.*

Application by Lewis, a defendant in the action, to discharge an interim order of injunction, granted on June 27th, 1918, whereby the Commissioner of Lands and Mines was restrained from delivering to Williams or Lewis, defendants in the action, a quantity of raw gold. In the alternative applicant sought an order varying the interim order by directing that the Commissioner of Lands be restrained from parting with one-third only of the raw gold in his possession and that the remaining two-thirds be delivered to him the applicant.

The grounds of the application are sufficiently set out in the judgment below.

*P. N. Browne, K.C.*, for the applicant.

*J. S. McArthur*, for the respondent Pollydore.

HILL, Actg. C.J.: This application is to discharge an interim injunction restraining the Commissioner of Lands and Mines from delivering to the defendants 147 ounces 17 pennyweights of raw gold entered by the defendants and now in his custody, or any gold that hereafter may be entered as coming from claims alleged to be theirs.

Two grounds are alleged:—

- (a) that the order of the Court was conditional on the plaintiff undertaking by his counsel to abide any Order made as to damages, and no undertaking had been given.
- (b) that no time was fixed limiting the operation of the order, or the date of its dissolution.

There is also an application to vary the order, in the alternative, by directing the Commissioner to retain one third part or share only of the said 147 ounces, 17 pennyweights entered, on the ground that the plaintiff claims only one third of the said gold.

The practice in this colony is to insert in the interim order the undertaking as to damages, and the order in this case is exactly as set out in *Chitty*. No further or previous act is required. Such undertaking may be given by counsel and the order states such to have been given. In England, without there being uniformity, there would seem to be some sort of act required, or some signa-

## POLLYDORE v. WILLIAMS &amp; ORS.

ture, in cases where joint stock companys or corporations apply. (*Manchester etc. Banking Coy. v. Parkinson* 60 L.T. 47); (*East Molseley Local Board v. Lambeth Water Works Coy.*, 1892 3 Ch. 289).

With regard to (b) there seems to be no established practice in these courts as to fixing a certain time to be named in an interim injunction for the order to run. In England there is—and I certainly think such orders should contain some such instruction such as “until judgment in the action or until further order.” (*Ex parte Anderson, re Anderson* 22 L.T.R. (New Series) at p. 364). I do not propose to interfere however in this matter as the writ was issued when the application for the interim order was made. And since then statement of claim has been lodged, but in future such orders must contain the necessary limitation.

As to varying the order, the only real reason adduced is that under the Gold Mining Regulations of 1905 (Regulation 118) and section 37 of the Mining Ordinance of 1903, a liability—quasi-criminal—attaches to the registered partners in regard to the nonpayment of labourers’ wages.

But should such be necessary, a representation to the adjudicating magistrate as to the circumstances would, I have no doubt, result in a postponement of the case, until the determination of the present action.

I see no good reason to vary the order, but as I think the application was well made I order that the costs of the application should be costs in the cause.

*Application dismissed.*

EATON v. JUGROOP  
 PETTY DEBT COURT, GEORGETOWN.

EATON v. JUGROOP.

[106—7—1918.]

1918. AUGUST 6. BEFORE DALTON, Acting J.

*Detinue—Gratuitous bailment—Property stolen whilst in hands of bailee—Reasonable care—Negligence.*

Claim by the plaintiff for the delivery of certain jewelry alleged to be illegally detained by the defendant, or the sum of \$25 its value. Defendant was plaintiff's landlord and the latter had been in the habit of leaving her jewelry in his charge whilst carrying on her business as a huckster.

Plaintiff in person.

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

DALTON, Acting J.: Plaintiff claims from the defendant certain jewelry alleged to be wrongfully detained by him. He admits that the jewelry was entrusted to him to keep for her as had been done on previous occasions, whilst she was absent on her business as a huckster, but pleads that it was stolen from his room whilst in his charge, and that he is not liable to the plaintiff to an action in detinue.

It is admitted that it is a case of gratuitous bailment, that is, the bailee must exercise such care of the property left with him, as a reasonable and prudent man is expected to take of his own. An allegation that the property has been lost and that therefore the defendant cannot return it is no sufficient reply, but here defendant has proved that the jewelry was stolen and further that the thief has been convicted. Unfortunately the jewelry was never recovered.

Defendant did no more than undertake to keep the articles as he would have kept his own property; plaintiff in fact neither alleges nor proves any negligence or breach of duty on his part. That being so the action does not lie against him and the plaintiff cannot succeed.

ASSIBAD v. KARMI.

ASSIBAD v. KARMI.

[BERBICE.—38 OF 1918.]

1918. AUGUST 23. BEFORE HILL. Acting C.J.

*Infant—Tort—Action for damages—Guardian—Liability—Procedure—Practice.*

Appeal from a decision of the stipendiary magistrate of the Berbice judicial district (Mr. C. H. E. Legge). The claim was brought as follows: “Between William Assibad, of Susannah, East coast, Berbice, as father and “natural guardian of his minor daughter Ellen Assibad, plaintiff, and “Karmi, single woman of Susannah, East Coast, Berbice, as mother and “natural guardian of her minor son David Rose, defendant.” The magistrate found in favour of the plaintiff and awarded damages. Defendant appealed, the principal reasons being as follows:

1. That the decision was erroneous in point of law:—
  - (a) because the claim as laid disclosed no cause of action.
  - (b) because the defendant as mother and natural guardian was not a guardian *ad litem* of the minor and could not be mulct in damages for a tort committed by the minor.
  - (c) because the mere fact of the defendant being the mother and natural guardian of the minor David Rose did not render her liable in damages for a tort committed by him, and the magistrate was wrong in so finding.

*J. Eleazer*, solicitor, for the appellant.

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

HILL, Acting C. J.: This is an appeal from the decision of a magistrate in which he gave judgment against the appellant in damages for injuries sustained by plaintiff’s two daughters, and the killing of his dog, at the hands of appellant’s illegitimate son David Rose.

The reasons of appeal come under the headings.

- (1) Erroneous in point of law.
- (2) Altogether unwarranted by the evidence.

I think the appellant is entitled to succeed under 1 (c) which is as follows:—

“That the mere fact of the defendant being the mother and natural “guardian of the minor David Rose did not render her liable in damages for “a tort committed by him and the magistrate was wrong to so find.”

It is clear that the defendant before the court were Karmi, and the judgment against her for the tort of her illegitimate son, to whom she is statutory guardian (section 14, Ordinance 19 of

## ASSIBAD v. KARIM.

1916) would have resulted in execution against her property. She is not liable for the tort of her son, unauthorized or unratified by her, and the proper person to have sued was “David Rose, appearing by his mother and guardian Karmi.”

It is unnecessary to consider the other reasons.

For the reason stated the decision was erroneous, and must be reversed with costs.

Appeal allowed.

## WINTER v. SOLOMON AND ORS.

[209 OF 1918.]

1918. AUGUST 12, 23. BEFORE DALTON, Acting J.

*Master and servant—Absconding labourers—Reasonable cause—Employers and Servants Ordinance, 1853, s. 13—Employers and Labourers Ordinance, 1909—ss, 1, 10.*

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist). The plaintiff Winter (now appellant) charged the four defendants with refusing to fulfil the terms of a contract of service entered into by them, contrary to the provisions of Ordinance 26 of 1909 as amended by Ordinance 10 of 1914. The magistrate discharged the defendants, finding that they were being taken to Brazil and that they were justified in refusing to leave Rockstone to proceed up the Essequibo river. The plaintiff appealed.

*J. S. McArthur*, for the appellant.

*E. M. Duke* and *G. T. Ramdeholl*, for the respondents.

DALTON, Acting J.: The appellant has charged the four respondents with unlawfully refusing to fulfil the terms of a certain contract of service entered into by them, contrary to the provisions of Ordinance 26 of 1909, as amended by Ordinance 10 of 1914. Appellant is the registering officer; and respondents labourers and boat hands contracted for service “on the Essequibo river and its tributaries in this colony.” The magistrate dismissed the charge against all four defendants, finding as a fact that they were told whilst at Rockstone on the way to perform their contract, that they were proceeding to Brazil to work for one Boyd and not to work under the contract entered into between them and the appellant. They thereupon turned back, having refused to proceed further, in which refusal the magistrate found they were justified.

## WINTER v. SOLOMON &amp; ORS.

Plaintiff now appeals to this court, his reasons of appeal being as follows:—

1. The decision is erroneous in point of law:—
  - (a) The evidence in the magistrate's court proved and the defendants admitted that they were registered to work in Essequibo in British Guiana and there was no reasonable excuse given by the defendants for not carrying out their contracts.
  - (b) The ordinance under which the charge was brought does not admit of any defence of reasonable excuse being set up.
  - (c) That on the evidence given for the defence the defendants should have been convicted.
2. The decision is altogether unwarranted by the evidence in like manner as if the case had been tried by jury there would not have been sufficient evidence to sustain the verdict, inasmuch as,—
  - (a) The evidence did not disclose a reasonable excuse if the same was a ground of defence.

At the hearing counsel for respondents took four objections, He first of all argued that the appeal was not in order, there being four separate complaints and four separate cases, the magistrate only receiving one copy of reasons of appeal It appears from the record that the four cases were tried together by consent, that the reasons of appeal served on the magistrate relate to all these four cases, therefore there is no ground of objection. He then urged that under the provisions of section 16 (1) Ordinance 13 of 1893 a recognizance must be entered into, whereas here money had been lodged by the appellant. In any case such an objection is nothing but a highly technical one with which I have little sympathy. I am satisfied however, that under the section quoted, as amended by Ordinance 16 of 1917, appellant has the right to do what he has done here, namely, to lodge with the magistrate the amount of the costs of the appeal. Counsel further argued that reasons of appeal had not been served on the respondents within the fourteen days allowed by law. The onus of proving service lies on the appellant and in the absence of any rebutting evidence (*see Franklin v. John*, December 29th, 1911), his affidavit filed here is conclusive and the service was in order. Lastly Mr. Duke argues that reason No. 2 cannot be argued by the appellant, the defendants having been discharged by the magistrate. This reason as allowed by the ordinance properly refers to findings of fact, and it is to meet cases where there is not sufficient evidence to support such findings, As drawn here, and I think erroneously drawn, it appears to relate to both law and fact, repeating

in effect in its last paragraph reason No. 1 that the decision is erroneous in point of law. So far therefore as it purports to refer to error in law, it is dealt with under reason No. 1. So far as it purports to deal with findings of fact alone it is not admissible. As previously held on several occasions, where there has been a dismissal, this reason is applicable neither to civil nor criminal proceedings. (*Rodrigues v. Paton*, 1898 Review cases, 52; *Karmally v. Gaskin*, A. J. April 16th 1912.) This last objection must therefore be upheld,

The principal ground of appeal is 1 (b) that under the provisions of Ordinance 26 of 1909, no defence of reasonable excuse can be set up. The principal ordinance regulating the relations of employer and servant is No. 1 of 1853. Section 3 of that ordinance enacts that if any servant “absents himself from his service or refuses to fulfil the same before the term of his contract has been completed, . . . . *except for some reasonable cause as hereinafter provided* . . .” he shall be liable to conviction and imprisonment. Section 13 of the same ordinance is as follow:

“On any complaint made by any employer against any servant for refusing or wilfully neglecting to perform his contract, such servant shall be at liberty to show by evidence, in answer to such complaint, that he terminated his service or contract in consequence of ill usage, or for some other good and sufficient cause to be judged of by the justice or justices.”

Ordinance 26 of 1909 amends the previous ordinance of 1853, with regard to absconding labourers. The first section of the later ordinance enacts that if any labourer “absents himself from such service or refuses to fulfil the terms of the same before its completion or before the same has been lawfully terminated” he shall be liable to conviction and punishment. Appellant’s counsel lays great stress on the fact that whereas section 3 of the earlier ordinance especially uses the words “except for some reasonable cause,” those words are omitted from section 1 of the later ordinance. Being omitted, he says no reasonable cause can be set up, but the labourer must be compelled to complete his contract under section 3 of the amending ordinance. Section 10 of the later ordinance however must not be overlooked. It provides that “nothing contained in the Employers and Servants Ordinance 1853 shall affect the operation of this ordinance and this ordinance and the Employers and Servants ordinance 1853, so far as the same “are not inconsistent, shall be read and construed together as one ordinance.”

I cannot see that the provisions of section 13 of the earlier ordinance are inconsistent with the provisions of the

## WINTER v. SOLOMON &amp; ORS.

later ordinance, and with this Mr. McArthur says he agrees. Then it seems to me the labourer, when proceeded against under ordinance 26 of 1909, is entitled to the right given him in section 13, he can give evidence of some good and sufficient cause to be judged of by the magistrate. I do not attribute much importance to the presence of the words “except for some reasonable cause” in section 3. Even if they were not there, the section is still governed by practically similar words in section 13. I must hold that the ordinance under which respondents were proceeded against allows of the defence of good and sufficient cause being set up.

The question now remains, was the reason given by the respondents for not proceeding with their contract a reasonable one? I agree with the magistrate that it was a most reasonable one. I would go further and say that on the finding of the magistrate, if there was any contract at all, the breach was on the part of the employer. The evidence that the labourers were being taken to Brazil, if the magistrate believed it as he did, in any case is ample to justify their conduct, and the appeal must be dismissed with costs.

*Appeal dismissed.*

## HAMILTON v. THE PEOPLE'S BAKERY.

[125 OF 1918.]

1918. AUGUST 17, 30. BEFORE HILL, Acting C.J.

*Partnership—Liability of partners—Judgment against one partner—Action against remaining partner—Res judicata—Magistrate's Court—Representative capacity of party to suit—Common interest—practice—Magistrates' Court Rules, 1911, r. 1.*

Appeal from a decision of the stipendiary magistrate of the West Coast judicial district (Mr. H. K. M. Sisnett).

The plaintiff Hamilton, as treasurer of the Rattray Memorial Congregational Church, claimed from N. Lamizon and others, trading as the People's Bakery, the sum of \$40.20 for goods sold in September, 1916. Judgment was given for the plaintiff in the sum claimed. The defendants Lamizon and Palmer appealed, their reasons of appeal being fully set out in the judgment below.

*E. G. Woolford*, for the appellants.

*J. S. McArthur*, for the respondent.

HILL, Actg C.J.: This is an appeal from the decision of a magistrate in which he gave judgment for the plaintiff (respondent) who sued in his capacity as the treasurer of Rattray Memorial

## HAMILTON v. THE PEOPLE'S BAKERY.

Congregational Church. The appellants, together with Perry and Thomas, were sued jointly and severally as trading in co-partnership under the name, style and firm of the People's Bakery.

The defendants Lamizon and Palmer pleaded *res judicata*, while the defendants Perry and Thomas admitted indebtedness, and it appears that the defendant Perry had been previously sued on the same cause of action and for the same amount, and judgment obtained against him, which had not been satisfied.

The reasons of appeal are:—

- (1) That the decision is erroneous in point of law because
  - (a) It was not competent for the said Edward Hamilton to maintain the said action against the defendants in the manner and form adopted or at all.
  - (b) The said Edward Hamilton was not legally authorised to maintain the said action against the defendants or at all.
  - (c) It was not competent in law for the said Rattray Memorial Congregational Church either to maintain the said proceedings against the defendants or authorise Edward Hamilton to do so.
  - (d) The subject matter of the said action was *res judicata*.

*Reason A.*—The defendants were sued jointly and severally (section 11, Ordinance 20 of 1900) and rule 5 of Magistrates' Court Rules. This reason is therefore of no avail.

*Reason B.*—I am of opinion that the representative capacity of the plaintiff should have been denied when the defendants were called on to plead. Rule 1 of the Magistrates' Court Rules of 1911 is as follows:—"If any plaintiff sues or defendant is sued in any representative capacity it shall be expressed on the statement of claim or plaint. The representative capacity of the plaintiff or defendant mentioned in the statement of claim shall not in any case be in issue unless the same be expressly denied," and this express denial should have been made when the defendants were called upon to plead to the plaint. Section 21 (1), Ordinance 11 of 1893, requires the magistrate to read out the plaint to the defendant and requires him to make his answer or defence thereto, and thereafter hear and determine the cause, without further pleading or formal joinder of issue. The denial of the representative capacity of the plaintiff could not be raised in the addresses to the Court by Messrs. Palmer and Lamizon in their defence. I am therefore of opinion that this ground of appeal is bad. But even if I were to Hold otherwise I think the plaintiff has shown that he was acting in the "common interest" of members of the church. He was authorised to so act by certain individuals, deacons of the church (*vide* exhibit 'B' George's evidence, and

## HAMILTON v. THE PEOPLE'S BAKERY.

the plaintiff's evidence in cross-examination), and the authorities cited appear to me to be conclusive on the point (*Duke of Bedford v. Ellis* (1901) (H. L., A. C. 8.) It is incorrect to say that the defendants could be subjected to actions at the hands of other parties interested, for after judgment obtained a representative plaintiff's power as *dominus litis* ceases, he cannot deprive others in the same interest of the benefit of the judgment if they deem fit to prosecute it, for after judgment no further action can be brought by the others (*Handford v. Storie* 2 Simons & Stuart, 196; *Re Alpha Coy.* 1903, 1 Ch., 203, *Re Calgary Coy.* 1908, 2 Ch. A.C. 652.)

*Reason C.*—The materials for the stable were the property of' the people of Rattray Memorial Church and not the property of the B. G. Congregational Union. The stable was not there when Ordinance 7 of 1901 was passed, and the Congregational Union does not appear to have in any way objected to the sale, thus tacitly acquiescing in the right of the deacons to dispose of the stable. Lamizon, one of the appellants, was a deacon and Secretary at the time of sale to himself and the other defendants trading in co-partnership as the People's Bakery. He approved of it, and availed himself of it. It comes with bad grace from him to now question his own act and his evidence exposes his *mala fides* in this matter.

*Reason D.*—I have no doubt the plea of *res judicata* cannot avail; the parties forming the co-partnership were jointly and severally liable, were so sued, and the fact that judgment has been obtained against one of them in a previous suit, which is unsatisfied, is no bar to actions against the remaining parties. That is the law of the colony, and in England where, ordinarily, the liabilities of partners is joint, one or more of several partners who are jointly and severally liable may be sued without making them all liable (*Plumer v. Gregory* 1874 L.R. 18 Eq. 621) notwithstanding an unsatisfied judgment against one of them for the same debt (*Blyth v. Fladgate*; *Morgan v. Blyth*; *Smith v. Blyth* 1891, 1 Ch. 337-353.)

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

*Appeal dismissed.*

## RAHOMAN v. BOARD OF ASSESSMENT.

## RAHOMAN v. BOARD OF ASSESSMENT.

1918. AUGUST 30. BEFORE HILL, ACTING C.J.

*Excess Profits tax—Assessment for duty—Meaning of ‘capital’ and ‘profits’—Deductions allowed—Tax Ordinance, 1918 (No. 24 of 1917), s. 64(1)—Tax on Excess Profits Ordinance, 1918, s. 2.*

Appeal from a decision of the Board of Assessment, under the provisions of s. 17 (2) of Ordinance 2 of 1918. The decision of the Board of Assessment had been confirmed by the Committee of Appeal, and appellant thereupon appealed further to the court.

*J. S. McArthur*, for the appellant.

*A. G. King*, acting Crown Solicitor, for the Board.

HILL, Actg. C.J.: This is an appeal under section 17 (2) of the Tax on Excess Profits Ordinance, 1918 and the question for consideration is whether the assessment of the Board of Assessment, confirmed by the Committee of Appeal, was correct in the circumstances.

The Board in arriving at the amount due on which the taxes on excess profits was payable deducted from the amounts appearing under the heading “items of capital,” items appearing under the headings of “bad debts due to the business,” “liabilities to creditors,” “banks,” and “Hamburg”: the appellant submits that this should not have been done, and that the capital employed in earning profits must be construed to mean the gross amount of capital at the commencement of the accounting period on which the statutory percentage of ten per cent., should be allowed.

By section 64 (1) of the Tax Ordinance, No. 24 of 1917, the Combined Court levied a tax of ten per cent., on all profits earned in the colony in excess of the ten per cent., on the capital employed in earning such profits, and by 64 (2) the estimate of the amount of the profits earned in the colony and of the amount of the capital employed in earning such profits shall be made in such manner and subject to such conditions as may be enacted by any ordinance, passed by the Governor with the advice and consent of the Court of Policy, and the said tax shall be levied, collected, and paid in such manner and subject to such conditions as may be prescribed by the said ordinance.

Thereupon Ordinance 2 of 1918 was passed, and by section 2 “capital” and “profits” mean capital and profits as set out in the first schedule, and under “capital” *inter alia*, the value of the stock-in-trade is taken as the landed cost or local market price, whichever is the lower, and (par. 1 (b)) so far as it (capital)

## RAHOMAN v. BOARD OF ASSESSMENT.

consists of assets being debts due to the business, the nominal amount of those debts less any amount allowed by the Board to be deducted from the profits for bad debts.

Under paragraph 5 of the first schedule, among other items, unsecured loans, bills payable, amounts due to creditors, any other liabilities to third parties, and any capital the income on which is not taken into account in computing the profits of the business, shall be deducted in arriving at the amount of capital.

Therefore, it appear to me, that bearing in mind the *fons et origo* of the Tax on Excess Profits Ordinance, the Board of Assessment was right in deducting such items as I have stated before allowing the statutory percentage of ten per cent., and not allowing it on the gross capital.

Mr. McArthur for the appellant strongly urged the difference between “capital” *simpliciter* and “capital employed in earning profits” and referred me to several authorities which he submitted supported his contention that the words should be read in their popular sense and meaning.

The legislature has interpreted the words “capital employed in earning profits” by their definition of capital under the first schedule to Ordinance 2 of 1918, and to admit Mr. McArthur contention I should have to read the word “not” into the regulations of the first schedule attached to that ordinance, to which I have referred.

In effect, the legislature having laid it down that certain deductions must be made from the items of capital, I am asked to say that they must not. This is a very much wider suggestion than the interpretation of a word or sentence in a popular sense, or having regard to its popular use, and I cannot adopt it.

The appeal is dismissed, and the assessment confirmed with costs.

BLAIR v. ATHERLEY.

BLAIR v. ATHERLEY.

[138 OF 1918.]

1918. SEPTEMBER 6, 10. BEFORE HILL, Acting C.J.

*Criminal law—Larceny—Trap—Assistance or knowledge of owner of property—Taking.*

Where certain property, in pursuance of a trap set, was handed to the defendant by the clerk of the owner of the property on his employer's instructions,

*Held*, that the defendant could not be convicted of larceny of the property.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist.) Defendant Atherley (now appellant) was charged with the larceny of certain leather, rollers, and electric bulbs, to the value of \$8.96, and was convicted. In his reasons for decision the magistrate stated that though the facility for the larceny was here slightly different, the case was on all-fours with *R. v. Eggington*, 2 Leach, 913.

Defendant appealed, his principal reason of appeal being fully set out in the judgment below.

*J. S. McArthur*, for the appellant.

*J. J. Nunan, K.C., LL.D., A.G.*, for the respondent.

HILL, Acting G.J.: The defendant (appellant) was convicted of the larceny of certain articles, under the following circumstances. He asked an employé in Bookers' garage to obtain for him certain articles, and the employé did so, after communicating with the clerk in charge, with whose consent and approval the act was done; "I knew Bornet (the employé), says "De Souza, the clerk in charge, was taking these things to give another, I "instructed him to take the things out." Bornet met the defendant by appointment and gave him the parcel in which were the articles. Thereupon the police intervened, and defendant was charged with larceny.

The first reason of appeal is that "the evidence before the magistrate's "court does not establish the offence of larceny or any other offence known "to the law" and must succeed. This case is on all-fours with *Reg. v. Lawrence*, 4 Cox, 438. In that case the prisoner asked a clerk of the prosecutor to procure him a deed in the possession of the latter, and the clerk told his employer of the request, and by his direction gave the deed to the prisoner; it was held that if the clerk gave the deed into the prisoner's hand the prisoner could not be convicted of stealing it, but that if the clerk put down the deed and the prisoner took it up, he could be so convicted. In the present case, as well as *Reg. v. Lawrence*, the article was handed to the prisoner. There was something more than *rendering* facility to the commission of the offence and in neither case was the act *invito domino*. The appeal is allowed, and the conviction quashed with costs.

REID v. LONDON.

REID v. LONDON.

[212 OF 1918.]

1918. SEPTEMBER 10. BEFORE HILL, ACTING C.J.

*Criminal law—False pretences—Summary Conviction Offences (Procedure) Ordinance, 1893, s. 8 (5)—Facts constituting offence to be stated in charge—Appeal—Service of reasons of appeal—Service by registered letter—Delivery of registered letter to respondent’s messenger—Interpretation Ordinance, 1891, Amendment Ordinance, 1907.*

Reasons of appeal were forwarded by post by registered letter to R. the respondent, at Leonora on June 6th. The postmaster received the letter on the morning of the 7th June and forwarded a notice of receipt to R. by R.’s recognised messenger who on the 8th June returned receipt to the postmaster signed by R. The registered letter was thereupon handed to the messenger. June 7th was the last day for service and the letter containing the reasons of appeal were not delivered to R. by the messenger until June 9th.

*Held* that the delivery of the notice of receipt by the postmaster to R’s messenger was constructive and good service upon R.

*Held*, further, that the description of an offence in the words of the statute creating the offence as provided by s. 8, (5), Ord. 12 of 1893, does not do away with the necessity of setting out in a charge facts which are a necessary ingredient of the particular offence in question.

Appeal from a decision of the stipendiary magistrate of the West Coast judicial district (Mr. H. K. M. Sisnett). Defendant London (now appellant), was charged with obtaining from the complainant (now respondent), the sum of \$1.64 by false pretences, and was convicted. The reasons of appeal together with all other necessary facts fully appear from the judgment of the Court.

*J. S. McArthur*, for the appellant.

*H. C. Humphrys*, for the respondent.

HILL, Acting C.J.: The appellant was convicted on a charge which read as follows:—

“That he did, on the 15th December, 1917, at Pln. Leonora, in the West Coast judicial district, in the county of Demerara, by a certain false pretence obtain from the complainant the sum of \$1.64 with intent to de-“fraud.”

At the hearing before the magistrate counsel for appellant, before plea, objected to the complaint as bad inasmuch as the false pretence was not stated.

The magistrate overruled the objection on the authority of sec. 8 (5) of Ordinance 12 of 1893.

The appellant appeals from the conviction as being erroneous in point of law on various grounds, the first of which is that the complaint laid before the Magistrate’s court does not set forth the particular false pretence alleged; and as I am of opinion that the appellant is entitled to a decision in his favour on this ground of appeal it is unnecessary to consider any other. But before setting forth my reasons for so concluding I must

deal with a preliminary objection taken by Mr. Humphrys for the respondent that the appeal is out of time inasmuch as the respondent had received the reasons of appeal on June 9, whereas the last day on which reasons could be received was the 7th June. He referred the Court to *Brown v. Allen*, A.J. 3.1.1900, *Walker v. Lindo*, A.J. 23.3.1903 and *Moses v. Ghurburan*, A.J. 16.6.1900 and A.J. 7.7.1900.

In support of his submission he was allowed to file an affidavit in which the respondent swore he received the reasons of appeal on June 9. I gave leave to the appellant to file any affidavits he might desire to, and he has filed a declaration by the postmaster of Leonora post office that he forwarded to the respondent by the recognised messenger a notice of receipt of a registered letter for him on June 7 and that on June 8 the messenger presented a receipt for the same signed by the respondent and delivery was made.

By sec. 2 of Ordinance 30 of 1907 the meaning of service by post is thus described:

“Where an ordinance authorises or requires any document to be served by post, whether the expression ‘serve’ or the expression ‘give’ or ‘send’ or any other expression, is used, then unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post: Provided that when the place to which the letter is addressed is one in which there is no house-to-house delivery of letters, service shall not be deemed to have been effected, unless the letter has been registered, and unless a notice has been delivered to, or left at the residence of, the person upon whom service is to be effected stating that the letter is at the post office awaiting delivery to him, and unless a declaration made before a Justice of the Peace signed by the person who delivered such notice, stating that he duly delivered such notice, is produced, or other proof is given of the due delivery of such notice.”

At Leonora there is a house-to-house delivery but the respondent’s messenger calls regularly for his letters. Therefore, unless the contrary was proved, service would have been deemed to be effected by the conditions set out in sec. 2, Ord. 30 of 1907, having been observed, but *ex abundante cautela* (and it shows that it was necessary as the respondent swears “he never received” the registered letter until June 9), the letter was registered on June 6 and notice delivered on June 7 to the respondent’s recognised agent.

In these circumstances, I hold that the delivery of the notice of

## REID v. LONDON.

receipt to the respondent's messenger was constructive and good service on the respondent. To hold otherwise would be to require in every case "personal" service which is exactly what the law strives to guard against.

It is conceded that in indictments the false pretences must be set out in the indictment but it is urged that this is not necessary in summary conviction offences in view of sec. 8 (5) of Ord. 12 of 1893. The equivalent in England to that section is section 39 of the S.J. Act 1879.

In *Stone's Justices Manual* (1913), 45th edition, p. 957, it is stated: "Whenever it is immaterial by what means the prohibited act has been effected, it will be sufficient in describing the offence to use the words of the statute; but where the particular means used to effect the object are essential to the description of the offence they should be set out distinctly in the information; thus, under an Act making it penal by any event relating to the drawing of a lottery ticket, it was held that the particular pretence must be set out as to the description of the offence; the general rule is (as in indictments) that all facts and circumstances should be stated with such certainty and precision that the defendants may be entitled to judge whether they constitute an offence, to determine the species of offence, and be enabled to plead a conviction or acquittal in bar of another prosecution for the same offence (*R. v. Hoard*, 6 J.P. 445.)

In *Smith v. Moody* 1903, I.K.B. 56 it was held that the Summary Jurisdiction Act, 1879, sec. 39, sub-sec. 1, which provides that in proceedings before courts of summary jurisdiction "the description of any offence in the words of the Act . . . . . creating the offence, or in similar words, shall be sufficient in law," does not do away with the necessity of setting out in a conviction facts which are a necessary ingredient of the particular offence in question. Lord Alverstone, in his judgment, says (at p. 60): "It seems to me it (sec. 39 (1)) could not have been intended to do away with the old rule of criminal practice, which requires that fair information and reasonable particularity as to the nature of the offence must be given in indictments and convictions. All that is meant by sec. 39 is that the offence itself need only be described in the words of the statute creating it.

Wills, J., laid stress on the difference between the insertion of the necessary ingredients of the offence as distinguished from the description of the offence, and Channell J. (p. 63) states: "The principle, however, seems to be that, subject to statutory provisions making certain things unnecessary in certain cases, the conviction must be as precise as the summons, and if there were a charge against a man—either by an indictment or by summons

## REID v. LONDON.

“made in the vague way in which the conviction is drawn up—a charge  
“against a man of injuring the property of another without specifying what  
“property or giving any further information it does seem to me it would be  
“insufficient. Therefore, following the rule that the conviction must be as  
“precise as an indictment, I think that this conviction is wrong in form  
“unless it is met by some statutory provision on the point. Section 39 of the  
“Summary Jurisdiction Act, 1879, is the one relied on; but that seems to  
“me to be rather a repetition of previous enactments, and although sec. 39  
“provides that it shall be sufficient so far as regards the description of the  
“offence to follow the statute I do not think the section in any way dis-  
“penses with the usual necessity for specifying time and place and matter  
“in the way in which it has been hitherto specified.”

The defect in the complaint is incurable, objection having been made before plea, and the appeal must be allowed and the magistrate’s decision quashed, with costs.

*Appeal allowed. Conviction squashed.*

## PETTY DEBT COURT, GEORGETOWN.

FERNANDES v. McNIEL.

[284—8—1918.]

1918. SEPTEMBER 10. BEFORE DALTON, Acting J.

*Husband and wife—Marriage in community of property—Action against wife for goods sold to her—Public trader—Position of married woman—Claim to be assisted by her husband—Procedure—Practice.*

Claim by the plaintiff Fernandes for the sum of \$4, balance of account due by the defendant for goods sold and delivered. Defendant pleaded that she had never had the goods, and that she was a married woman, married in community of property, that her husband was alive and that she could therefore not be sued.

Plaintiff in person.

*E. D. Clarke*, for defendant.

DALTON, Actg. J.: Plaintiff claims from the defendant the sum of \$4, for goods sold to her in Georgetown. The plaint sets out that she is a widow. The defence is that she never had the goods, that she is not a widow, but is married in community of property and that her husband is alive, that therefore the proper defendant is not before the court, and that she alone has no judicial status in court at all. The evidence shows that the goods supplied were purchased by Mrs. McNeil and were a tube and mud-guards

## FERNANDES v. McNIEL.

for a lady's bicycle. Plaintiff's clerk who sold the goods further alleges that she stated, when she purchased the goods, that she was a widow, although since action was brought he had found out that that was untrue. Mrs. McNeil who gave evidence most reluctantly admitted the purchase of the goods for her bicycle, denies she ever said she was a widow, and adds that she was married to her husband, who is absent in the gold-fields, in the year 1871, in community of property.

Now, as I stated in the case of *Yearwood v. Yard* (1917 L.R. B.G. 87) there is no doubt whatsoever in Roman-Dutch Law, which governs this case, that a married woman cannot as a rule institute or defend an action in her own name. But there are exceptions. It is not necessary for me to detail them but to ascertain if this is one. What are the facts here? Defendant, a married woman, works in a cake shop where she trades on her own behalf, She ordered the goods in question and it is a reasonable inference, which she has in no way refuted, that the bicycle was used either to go to her work or in connection with the work, the bicycle being at the shop. Her husband works in the gold-fields, and so is absent from her for long periods. I see no reason to disbelieve the clerk who supplied the goods when he states defendant represented to him that she was a widow. Those being the facts, what is the law applicable to them? I cannot do better than cite a judgment of Copley, J. (*Bown v. Mowbray Municipality* 1911 C.P.D. at p 436.) In the course of this judgment in a case where the same defence was raised as is raised here he says "It seems to me that even if a woman is a "public trader, according to the established practice of this court, as Mr. "Van Zyl says, in the passage cited in the course of the argument, when she "is sued for any debt incurred she ought to be sued assisted by her husband. "Apparently she is entitled to sue in such a case without his intervention. "That is a privilege given to her. As Van der Linden puts it, she may sue in "her own name for actions arising out of the course of her business, and "then he also says that she *may* defend herself without her husband's inter- "vention, but he does not say that she *must* do so if she chooses to ask that "his assistance be invoked." But in asking that assistance it must be clear to the court that she deserves it, before it is given her. It is not necessary here to go into the question of distinction between the English doctrine of estoppel and its equivalent in the civil law, whichever may be applicable here. One need not do more than say with *Voet* (6. 1. 17) that "no one ought to gainsay his own act." No assistance will be given by the court to a person who wishes to take advantage of her own deliberate misrepresentation. There will therefore be judgment for the plaintiff for the amount claimed with costs.

## MANNING v. MENDONCA.

## MANNING v. MENDONCA.

1918. SEPTEMBER 10, 16. BEFORE HILL, Acting C.J.

*Food—Foodstuffs (Regulation of Price) Ordinance, 1914, and Foodstuffs (Regulation of Price) Continuation Ordinance 1915—Fixing of sale price by proclamation—Contravention of ordinance and proclamation—Charge instituted before but prosecuted after revocation of proclamation—Saving clause in proclamation—Interpretation Ordinance 1891, s. 28—Ultra vires.*

On February 21st, 1918, a proclamation was published fixing the price of foodstuffs, in terms of s. 3 of Ordinance 22 of 1914 (Foodstuffs. Regulation of Price, Ordinance). On March 28th, 1918, a further proclamation was published fixing prices, and revoking the proclamation of February 21st, with the following proviso "that such revocation shall not affect or diminish any liability or penalty incurred by any person under the ordinance aforesaid during the continuance of the said proclamation."

*Held*, that a proclamation is not an 'enactment' within the meaning of s. 28 of the Interpretation Ordinance, 1891, which allows for savings in cases of repeal, and that the above proviso was *ultra vires* of Ordinance 22 of 1914.

*Held*, further, that a conviction on a charge instituted under the proclamation of February 21st, before its revocation, was good, although the charge was prosecuted after the revocation of the proclamation.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist), who convicted the appellant Mendonca on a charge of selling an article of food at a price higher than the price fixed by proclamation under the Foodstuffs (Regulation of Price) Ordinance, 1914.

All further necessary facts, and the reasons of appeal sufficiently appear from the judgment below.

*P. N. Browne, K.C.*, for the appellant.

*J. J. Nunan, K.C. A.G.*, for the respondent.

HILL, Actg. C.J.: The appellant was convicted before a stipendiary magistrate for selling on March 16, 1918, to one Robert Stewart a certain article of food, namely, one pound of eddoes at the price of three cents per lb., the said price being higher than that fixed by the proclamation issued under the Foodstuffs (Regulation of Price) Ordinance, 1914, and dated February 21, 1918, the said proclamation being still in force on the said 16th March, 1918, contrary to section 10 of the ordinance as continued by the Foodstuffs (Regulation of Price) Continuation Ordinance, 1915.

From this conviction the appellant appeals on the ground that the decision is erroneous in point of law:—

(a) Because the proclamation of the 21st day of February, 1918, having been revoked on the 28th March, 1918, it was not competent to institute and carry on proceedings for an offence alleged to have been committed in contravention of the aforesaid proclamation after it had been revoked.

(b) Because the aforesaid proclamation having been revoked on the 28th March, 1918, prior to the hearing and adjudication of the offence charged, the proclamation could no longer be acted

## MANNING v. MENDONCA.

upon and it was therefore not competent for the learned magistrate to convict the appellant as he has done.

(c) The learned magistrate was wrong in holding that the provisions of section 5, sub-section 23, and sub-sections 28 and 29 (I presume sections 28 and 29 are meant) of the Interpretation Ordinance, 1891, apply to the proclamation in question.

With regard to (a) I may point out that the proceedings were instituted before the revocation, on the 28th March, 1918, of the prolongation of 21st February, 1918, but they were carried on after its revocation.

By section 2 of Ordinance 22 of 1914, the Governor is given power to fix the sale price of food, such power to be exercised by proclamation or proclamations.

By section 10 a penalty is imposed, *inter alia*, on persons selling at any higher price than that fixed by any proclamation issued thereunder, and still in force.

By section 12 the Governor is given power to, at any time, revoke, alter, or amend any proclamation issued under the ordinance.

By section 13 the Governor-in-Council is given power to make regulations and when made, to alter, amend, or revoke such regulations for any of the purposes of this ordinance. All such regulations shall be published in the *Official Gazette* and shall have the force of law, and any person contravening the provisions of such regulations shall be liable to a penalty not exceeding twenty-five dollars.

By the proclamation of March 28, 1918, all proclamations under the Food-stuffs (Regulation of Price) Ordinance, 1914, prior to that date were thereby revoked, "provided, however, that such revocation shall not affect or diminish "any liability or penalty incurred by any person under the ordinance aforesaid "during the continuance of the said proclamation."

The point at issue is, whether the quotation above in inverted commas is *ultra vires* of the power delegated to the Governor, or not.

The Attorney General submitted that section 28 of Ordinance 14 of 1891—the savings in case of repeal section—applied to proclamations which, he submitted, were enactments, and included in rule or regulation and merely a subordinate method of legislation.

The effect of an enactment is to bind all who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule, if validly made, is precisely the same—that every person must conform himself to its provisions, and, if in each case a penalty be imposed, any person who does not comply with the provisions, whether of the

enactment or the rule, becomes equally subject to the penalty. But there is this difference between a rule and an enactment; that whereas you may canvas a rule and determine or not whether it was within the power of those who made it, you cannot canvas in that way the provisions of an ordinance. There is no difference, if the rule is within the statutory authority, but the very substantial difference, if it is open to consideration whether it be so or not.

There is no conflict between the proclamation and the ordinance. If there were, it would have to be decided which is the leading provision, and which the subordinate, and which must give way to the other. This would apply, no doubt, to any conflict between any rules made under section 13 of Ordinance 22 of 1914, and the ordinance itself.

Now under the Interpretation Ordinance, proclamation means a proclamation under the public seal.

“Statute” means any ordinance or Act of Parliament for the time being in force in this colony, and shall include any order of the King in Council, rule or regulation, order of the Governor and Court of Policy, or by-law for the time being having the force of law therein.

On consideration, I cannot find that a proclamation is an enactment within the meaning of section 28 of Ordinance 14 of 1891—*expressio unius exclusio alterius*—and I am of opinion, that the Governor in the proviso in the last paragraph of the proclamation of March 28, 1918, was acting *ultra vires*.

But, this being so, I cannot see that the proclamation of 21st February, 1918, revoked on the 28th March, 1918, became inoperative thereby as regards this particular case.

These proclamations are issued under the authority of section 10 of Ordinance 22 of 1914, by which, as I have said, a penalty is imposed on any one selling at a higher price than that fixed by any proclamation, and that section is a permanent law so long as it is not repealed, but the proclamations are the statutory means by which the community know the prices fixed and for breach of which the statutory penalty can be imposed.

The proclamations are, in my opinion, in the nature of temporary and subordinate legislation, and when the revocation of one is gazetted and another duly proclaimed, the provisions under the mother ordinance remain fixed. There is no revocation of that and there is, in my opinion, no failure of process by the revoking of spent and creation of fresh proclamations.

In *Stevenson v. Oliver* (8 M. & W., 234) Abinger, C.B., is reported at p. 240: “Take the case of a penalty imposed by an Act of Parliament, would not a “person who had been guilty of the offence upon which the legislature had “imposed the penalty

## MANNING v. MENDONCA.

“while the Act was in force, be liable to pay after its expiration?” And Parke, B. at p. 241: “. . . Then comes the question, whether the privilege of practising “given by the Stat. 6. George IV, referred to in the replication, is one which “continues notwithstanding the expiration of that statute. That depends on the “construction of the temporary enactment. There is a difference between temporary statutes and statutes that have been repealed; the latter (except so far as “they relate to transactions already completed under them) become as if they “had never existed; but with respect to the former, the extent of the restrictions “imposed, and the duration of the provisions, are matters of construction.”

Alderson B. (at p. 243) is thus reported:— “. . . It seems to me that those “persons who, during the year for which the last Act was to continue in force, “or previous to that period, had obtained rights under it, had obtained rights “which were not to cease by the determination of the Act, any more than where “a person commits an offence against an Act of a temporary nature, the party “who has disobeyed the act during its existence as a law is to become dispun- “ishable on its ceasing to exist.”

I am of opinion it was quite competent for the magistrate to convict, and I affirm the conviction, and dismiss the appeal with costs.

*Conviction affirmed.*

## EDWARDS v. MENEZES.

[159 of 1918].

1918. SEPTEMBER 13, 16.—BEFORE HILL, Acting C.J.

*Criminal law—Summary Conviction Offences Ordinance, 1893, s. 145—Being armed with gun to commit unlawful act—Rogues and vagabonds—Class of persons to whom applicable.*

A householder who on impulse, and without any proof of previous bad character, flourishes a revolver and threatens to shoot persons on his premises, although possibly liable to be otherwise charged, cannot properly be deemed a rogue and vagabond under the provisions of p. 145, Ordinance 17, 1893.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist) who convicted the defendant Menezes (now appellant) on a charge of being found armed with a revolver with intent to commit an unlawful act. The defendant appealed, his principal reason being that the decision was erroneous in law, and that the section under which the charge was brought (s. 145, Ord 17 of 1893) did not apply to the facts of the case. The facts fully appear from the judgment below.

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

*J. J. Nunan, K. C., A. G.*, for the respondent.

HILL, Actg., C. J. The appellant was charged and convicted for

that he on 17th April 1918 at Middle street was found armed with a revolver with intent to commit an unlawful act.

The facts, shortly put, are that he was in his house on the day in question, and a row was in progress in the yard between a woman and some men, who were threatening her. Appellant came downstairs, and remonstrated, and apparently joined in the row, taking the part of the woman. There were nine men. He went upstairs and returned with a revolver, and when held, is stated to have shouted "loose me, let me shoot them" and was excited. The police were sent for by his wife, and four of the men and appellant were arrested. The four men were charged with disorderly conduct and convicted, and the appellant was charged under section 145 (6) of Ordinance 17 of 1893 under Title XII—"Police Offences—Rogues and Vagabonds"—That section reads as follows:—"Every person who has in "his custody, or possession, any picklock, key, crowbar, jack, bit, or other "implement, with intent unlawfully to break into any building, or is armed "with, or has upon him any gun, pistol, sword, knife, razor, bludgeon, or "other deadly or dangerous weapon, with intent to commit an unlawful act . ". . shall be deemed a rogue and vagabond and shall be liable to a penalty "of fifty dollars or to imprisonment for three months."

*De Cambra v. Jacobs* (A J. 21. 8. 08.) is a case which in its general aspects is not unlike this one, although in that case the defendant was carrying on his person the revolver while in this case the appellant went upstairs and obtained it—he says for intimidation, but this the magistrate did not believe. The presumption against *De Cambra*, as to intent, was stronger in my opinion.

Under Title XII there are three degrees of degeneration comprised under the headings "Vagrants," "Rogues and Vagabonds" and "Incorrigible Rogues," and the Court is asked to confirm the classification of the appellant in the second degree, under the circumstances set out.

After very careful consideration I cannot do so. To hold that the appellant, interfering on behalf of the woman in the first instance, eventually obtaining a revolver, and threatening a disorderly lot of men, should be liable under a section which brands him as a rogue and vagabond, and places him in the category with potential burglars, highwaymen, and murderers would be wrong. To sustain a conviction under that section there must be, in my opinion, circumstances pointing to premeditation, and not mere impulse, circumstances of time, or of place, or suspicious behaviour.

There is nothing on the record to show the appellant is a man of bad character, and while he was guilty of disorderly conduct or,

## EDWARDS v. MENEZES.

possibly, of attempting to inflict bodily harm, I do not think his conviction as a rogue and vagabond under section 145 (6) can stand.

I agree with Bovell, C.J. in *De Cambra v. Jacobs* that the unlawful act suggested should be set out in the charge. The intent can be inferred from the circumstances of each case.

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

*Appeal allowed. Conviction quashed.*

*In re* THE DEMERARA TURF CLUB, LTD. (IN LIQUIDATION):  
*ex parte*, THE LIQUIDATOR.

1918, SEPT. 6, 16. BEFORE DALTON, Actg, J.

*Winding up—Mortgage—Payment of interest on secured debt—Date to which interest payable—Application by liquidator personally for sanction to purchase property of company—Position of liquidator in respect of assets of company—Principles governing the grant of such sanction—The Companies Winding Up Rules, 1905, r. 127.*

A mortgagee in a winding up is entitled, provided the security is sufficient, to payment of any capital and interest secured under his mortgage up to the date of payment, and also to all costs properly incurred in 'foreclosing' the same.

A liquidator is an agent of the company with special duties cast upon him: he holds the assets of the company with certain obligations resting upon him and his position is a fiduciary one. So far as possible the strict policy of the law making it impossible for persons in a fiduciary position to do anything, so far as that position is concerned, for their own benefit will be enforced, and any request to depart from that policy will be most carefully scrutinised.

Application by the liquidator of the Demerara Turf Club, Limited (in liquidation.)

- (a) for an order fixing the amount and rate of interest due and payable by the company under a mortgage on the company's assets, and upon which judgment had been obtained;—and
- (b) for an order granting leave to the liquidator to purchase in his own right all the movable and immovable property of the company for the sum of \$25,240.

The facts alleged in support of the application fully appear from the judgment of the court.

*P. N. Browne, K.C.*, for the applicant.

*H. H. Laurence*, for the holder of the mortgage and judgment, and for one creditor.

Mr. Laurence informed the court that he only appeared in respect of the first part of the application, and did not oppose the sale to the liquidator.

*E. G. Woolford*, for thirteen contributories, in opposition to the proposed sale.

*In Re* THE DEMERARA TURF CLUB.

DALTON, Acting J.: This is an application under section 150 (3) of the Companies (Consolidation,) Ordinance, 1913, by Nelson Cannon, the liquidator of the Demerara Turf Club, Limited (in liquidation):

- (a) for an order fixing the amount and rate of interest due and payable by the company to the judgment-creditor on the judgment obtained by the British Guiana Mutual Fire Insurance Company, Limited, on the 19th January, 1916, on a first mortgage held by the latter company on the immovable property of the Turf Club and that "all such directions in relation thereto may be given to the applicant as the court shall think fit"; —
- (b) for an order granting leave to the liquidator to purchase in his own right all the movable and immovable property owned by the company and to sanction the sale to him of all the aforesaid property for the sum of \$25,240.

The application then falls into two distinct parts, the first where the liquidator asks the court for directions, and the second where Nelson Cannon, because he is liquidator, personally asks the Court to sanction a certain sale to him.

With reference to the first part, the application sets out that the Turf Club in 1910 mortgaged its property to the British Guiana Mutual Fire Insurance Company for the sum of \$20,000, bearing interest at 6 per cent. In 1913, the club went into liquidation and on September 24th, 1914, was ordered to be wound up by the court. In 1916, by leave of the court, the mortgagees took action and obtained judgment on their mortgage for the capital sum of \$20,000 with interest, \$ 1,800, from the 25th day of June, 1914, to the 25th December, 1915, with further interest from the date of judgment at the rate of six per cent, until the date of payment. One June 18th last the mortgagees assigned their judgment to H. E. Murray, who is the present holder. As Murray has claimed payment of the capital and interest to the date of payment, and as applicant is advised that interest is payable to the date of the winding up order only, he asks the court for instructions. It seems to me that it is a matter in which he has already obtained all the instructions he requires. The mortgagees took action to recover the amount secured under their mortgage which included capital and interest. From the judgment it is clear that the liquidator was not in default, but was in fact a consenting party. Judgment was given for the capital sum and interest secured under the mortgage to the date of payment. Neither case cited by counsel was to the point. (*Re Thomas Salt & Company, Limited*, 98 L.T., 558, and *Quartermaine's case*, 1892, 1 Ch., 639.) The first case is one of unsecured creditors. The latter case deals

*In Re* THE DEMERARA TURF CLUB.

with the question of interest on the balance of a secured debt, the security on realisation not being sufficient to satisfy the whole debt.

That judgment having been given, it seems to me that applicant is now asking me to vary it, a course which sitting here I have no power to do. To save further proceeding on this point in respect of this unfortunate company, however, counsel has asked me to say whether in winding up proceedings secured creditors are entitled to interest on their debts subsequent to the winding up order. As that is a matter which may properly be said to arise under his application I will deal with it.

The first essential is an examination of the document by which the security is given. It is called a mortgage, and is a document executed before a judge whereby the appearer binds himself and his representatives to pay a certain capital sum and interest thereon, and to perform certain other duties in respect of insurance and repairs; "and as security for the due and punctual payment of the aforesaid capital sum of . . . . . and of interest to accrue thereon at the rate aforesaid" the appearer binds certain property in order that in default of payment the mortgagee "might foreclose this mortgage and bring the property hereby mortgaged to sale at execution and recover from the proceeds of such sale the full amount that might be due under this mortgage." And then follows what is locally termed the "voluntary and willing condemnation by the judge, which in itself is a judgment of the Court (*B.G. Electric Lighting and Power Co., Ltd., v. Conrad and anr*, 1897 L.R., B.G. 115). It is clear then that the sum secured by the mortgage is both capital and interest thereon. Further, it occupies a position one may say midway between a mortgage in English law, and an equitable mortgage or "charge," the security given by the local mortgage not being as good as a conveyance, but under the surrounding circumstances affording undoubtedly better security than that given by an equitable mortgage. The local formalities are of course notice to the world of what has been done. That being so decisions in English courts may be referred to by way of analogy as giving assistance to us here in interpreting the law. In addition the local company and bankruptcy (insolvency) laws are based on the English statutes. By s. 205 of Ordinance 17 of 1913 (Companies (Consolidation) Ordinance) it is provided that in the winding up of any company the same provisions shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to the ranking and payment of all debts and liabilities as may be in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. Under the insolvency law (Ordinance 29 of 1900) a secured creditor may either realise his security (but due

regard must be had to the effect of a receiving order here and in England, cf s. 8, Ordinance 29 of 1900, with s. 9, Bankruptcy Act, 1883, and to the vesting of property, s. 49, Ordinance 29 of 1900), and prove for any balance that may be due to him, or he may prove his debt, giving particulars and value of his security, or he may surrender his security and prove for the whole debt.

For the priority of debts we must turn to s. 37 of the Insolvency Ordinance. There the fifth class of debt in order of priority is the following:—

37 (1). (e). Legal mortgages and special conventional mortgages. . . . such mortgages ranking between themselves in accordance with the priority given to each by the existing law, and in default of any different rule of law as to priority according to the order of their dates of origin, *and including in the case of special conventional mortgages all costs properly incurred in proceedings taken for the purpose of foreclosing the same.* (The latter word italicised were added by s. 11, Ordinance 16 of 1913).

The equivalent section to this in the Bankruptcy Act, 1883, allowing for the necessary local additions owing to a different system of law, is s. 40. In the case of both mortgages and “charges” in England where a creditor’s security is realised in the winding up he is entitled to be paid out of the proceeds his principal, interest, and costs, subject only to the costs of realisation. (*Tipping v. Power* 1 Hare, 405; *in re Marine Mansions Co.*, 4 Eq. 601; *in re Regents Canal Iron Works Co.*, 3. Ch. D. at p. 427). It was stated in court, and it has been verified to me by the Official Receiver, that the practice in England has been the invariable practice in this colony for the past thirty-five years. This practice applicant’s counsel now questions, basing his argument on sub-section (8) of section 38 of the local Insolvency Ordinance. Sub-section (1) (e) of this section I have quoted above. Sub-section 8 is as follows:—

37 (8). If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of six per cent., per annum on all debts proved in the insolvency. That sub-section has been taken in its entirety from s. 40 of the Bankruptcy Act, 1883. There is of course no reference in that section to debts secured by mortgage, but in the local ordinance reference had necessarily to be made to such debts in the course of dealing with the priority of debts. The reference to interest in the sub-section, however, to my mind can have no application to any interest secured under a mortgage bond, which comes within the provisions of section 37 (1) (e). And I am strengthened in this

*In Re* THE DEMERARA TURF CLUB.

finding by the amendment to that sub-section which I have italicised above. That amendment, if my interpretation is correct, brings the local practice into line with the English practice, by the inclusion of costs, which are now given preference, in addition to the capital and interest of the mortgage debt. The legislature was doubtless aware of the local practice in respect of the payment of capital and interest, when the amendment to the law was made. And further, an examination of sections 35 and 36 of the Insolvency Ordinance, 1884 (the law prior to the passing of the present Insolvency Ordinance in 1900) also goes, I think, to confirm my interpretation. The existing practice, it will be remembered, obtained when that ordinance was law, and the Administrator General paid the interest as part of “the amount secured by the mortgage.” That practice I hold to be quite correct and in conformity with law, and a mortgagee in a winding up is entitled, provided the security is sufficient, to payment of any capital and interest secured under his mortgage up to the date of payment, and also to all costs properly incurred in “foreclosing” the same.

With reference to the second part of the application it is first of all necessary to consider the position of a liquidator in a winding up. By the rules (Winding Up Rules, r. 127) he cannot whilst acting as liquidator either directly or indirectly by himself or any partner, clerk, agent or servant become purchaser of any part of the company’s assets, save by leave of the Court. This rule is based upon the strict doctrine of law relating to purchases by trustees and other persons in a fiduciary position. Although the liquidator is not in all respects strictly what is called a trustee being rather an agent of the company with special duties cast upon him, yet he may fairly enough for certain purposes be described as a trustee; he holds the assets of the company with certain obligations resting upon him, (*Knowles v. Scott*, 1891, 1 Ch. 717), and his position as regards the company in liquidation is a fiduciary one (*Silkstone & Haigh Moor Coal Company v. Eddy*, 1900, 1 Ch. at p. 171). The reason for the rule is not only the conflict between his interest and his duty, but also because of the special knowledge which he (acquires in virtue of his position. The conduct of the trustee not being blamable in the purchase is “nothing to the purpose.” *Hamilton v. Wright*, 9 Cl. and F. at p. 124); all the authorities go to show that so far as possible the strict policy of the law making it impossible for persons in a fiduciary position to do anything for their own benefit will be enforced, and any request to depart from that policy will be most carefully scrutinised.

What then are the material facts set out in the application here, and the evidence produced to support the application? They are as follows, that the applicant, Nelson Cannon, was appointed

*In Re* THE DEMERARA TURF CLUB.

liquidator in 1914, that on July 13th, 1918, a meeting of the creditors by a majority passed a resolution authorising the sale of the movable and immovable property to him for the sum of \$25,240; that on the same day a meeting of the contributories by a majority passed a resolution to the same effect; and lastly that the only opponents to the resolution had since withdrawn their opposition thereto. It was subsequently admitted in Court that this last statement was not correct but that one contributory still objected to the sale. A copy of the minutes of the meetings was also produced, the only additional matter of interest therein being that one of the contributories present made an offer of \$40,000 for the property. This offer does not appear to have been discussed in any way at the meeting, and the contributory in question has since assented to the resolution.

The first matter for remark is the entire absence of anything to assist the court as to the value of the property; in addition, the application is silent as to any other, if I may call them so, preliminary, steps taken by the liquidator to dispose of the assets of the company to the best advantage. One may ask what happened to the offer of \$40,000? Why was it not discussed? Was it advantageous to the company, or was it not? It appears to be an important enough matter to record on the minutes, but after that there is silence.

On the matter coming before this Court for hearing, however, further opposition to the application appears. Thirteen of the contributories object altogether to the sale which the Court is now asked to sanction. In due course they have filed affidavits alleging *inter alia*, that the meetings which passed the resolutions approving the proposed sale were irregularly convened, that no proper notice was given and that the resolutions were not passed in conformity with law, that applicant had himself in evidence on oath, in one of the numerous matters before the court arising out of this liquidation, swore that the property was worth \$50,000, and that the property in fact was worth up to \$60,000. No evidence rebutting these allegations was produced. As regards the meetings counsel for Mr. Cannon admitted that they were not convened, nor were the resolutions passed, as required by the provisions of the Companies Ordinance. He submitted that they were merely informal meetings called by the liquidator to ascertain the wishes of the contributories and creditors and that the ordinance did not apply. This argument was I suppose meant seriously, but I do not propose to do more in respect of it than refer him to rule 36 of the Winding Up Rules. If the liquidator wishes to hold meetings of creditors or contributories to ascertain their wishes in matters that arise in course of the winding up he must comply with the provisions of the Companies Ordinance in respect of

*In Re* THE DEMERARA TURF CLUB.

such meetings and the business thereat. It should not have been necessary to point out such an elementary requirement of the law.

With respect to the allegation that the property is worth \$60,000, the reply put forward is that when the liabilities of the company to the liquidator are taken into account, the price he offers for the property, namely, \$25,240, is sufficient. What the court is concerned with is the interests of the company as a whole and the value of the property. What that value is still remains to be shown.

In view of the opposition to the proposed sale it would be directly contrary to rule for the court to allow the applicant to purchase the property or to bid for it until all other ways of selling to advantage have been exhausted. Whether any other way has been attempted or not (apart from the abortive sale in the case that went to the Privy Council) I do not know, but until that has been done the applicant, in view of his position, cannot buy nor will a sale to him be sanctioned. (*Tennant v. Trenchard* 4 Ch. A.C., 537). I can here go further and say that, even assuming that the meetings had been in order, that no objection was made to the proposed sale, that all the creditors and contributories had agreed to it, although that is an element which would go to assist the court very materially in arriving at the conclusion that it was a proper case where such sanction might be given, yet as the application stands and on the meagre and insufficient information supplied, the court could not sanction the sale. It would require much more evidence to justify such action on its part.

To sum up, with respect to paragraph A. of the application, I find it is not necessary to make any order. With respect to paragraph B, the application for leave to Nelson Cannon to buy for \$25,240, such leave is refused.

With respect to costs, under all the circumstances the transferee of the mortgagees is entitled to his costs, to be paid by the liquidator out of the funds of the company. The costs of the contributories who appear, and all other costs incurred in respect of paragraph B. of the application, must be paid by the applicant personally.

MANNING v. LOPES, FERNANDES & CO.  
 MANNING v. LOPES, FERNANDES & CO., LTD.  
 [235 OF 1918.]

1918. SEPTEMBER 20. BEFORE HILL, Acting C.J.

*Criminal law—Early closing—Employment of shop assistant after closing hours to dispatch orders—Shop kept open—Shops Ordinance, 1913, s.s. 3, 7, and 9.*

Appeal from a decision of the Stipendiary Magistrate of the Georgetown Judicial District (Mr. W. J. Gilchrist), who convicted the defendant company keeping open a shop after the hour of 4 p.m., in contravention of section 3, Ordinance 28 of 1913. The reasons of appeal are set out in the judgment.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist) who convicted the defendant company for keeping open a shop after the hour of 4 p.m. in contravention of section 3, Ordinance 28 of 1913, The reasons of appeal are set out in the judgment.

*P. N. Browne, K.C.*, for the appellant Company.

*G. J. de Freitas, K.C., Actg. S. G.*, for the respondent.

HILL, Actg C. J.: The appellant company was convicted before a stipendiary magistrate for that he on the 25th June, 1918, being an occupier of a shop within the limits of the city of Georgetown, for which shop an annual general licence of seventy dollars is required to be taken out, did keep such shop open after the hour of 4 p.m. contrary to sec. 3. of the Shops Ordinance, 1913.

That ordinance is No. 28 of 1913 and is described as “An ordinance to “provide for the early closing of shops and for limiting the hours of work “of shop assistants.”

Section 3 reads as follows:—

“Save as in section six hereof provided no occupier of any shop within the limits of the city of Georgetown for which he is required by law to take out an annual general trade licence of fifty dollars or upwards shall open such shop before the hour of 6 a.m or keep such shop open after the hour of 4 p.m . . . . .”

The saving referred to in section 6 refers to the closing hours on Saturday not being a half holiday, and does not affect the question before the court directly.

Section 7 enacts that “save as hereinafter provided no shop assistant “shall be employed in any shop after the closing hour of such shop,” but by section 8 there are exemptions to this which do not affect this question, and by section 9 it is enacted “Nothing in this ordinance contained shall render “any person liable to any penalty:

“(1) For employing any shop assistant in serving after the

## MANNING v. LOPES, FERNANDES &amp; CO.

“closing hours mentioned in section three, four, five and six any customer who was in the shop before those hours.

“(2) For employing any shop assistant before the closing hours mentioned in sections three, four, five and six solely for the purpose of dispatching or delivering orders received before these hours or for closing the premises.

“Provided that in no case under this and the preceding sub-section shall any shop assistant be employed for any period longer than half an hour after the closing hour.”

It was contended before the magistrate by the solicitor for the defendant that section 3 must be read with section 9 and in such case the defendant came under the exemption in section 9 (2). Mr. Manning submitted there were two offences under the ordinance, one for keeping open after the closing hour and the other for the employment of assistants after a certain hour.

The magistrate in his decision agrees with the solicitor in his view and accepted the statement by the defence that a cart was there for the dispatch of orders received before 4 p.m. The magistrate, however, finds that “there were other employees of the defendant firm in the shop at the time. The only reasonable inference to draw from this is that the shop was open for purposes other than the dispatching of orders received before 4 p.m.” And, in this view, he convicted the defendant.

It is admitted that the premises were open.

The reasons of appeal are

(1) The decision is erroneous in point of law

- (a) Because the evidence established that though the shop was open after 4 o'clock the defendants are within the exemption mentioned in section 9, sub-section 2 of Ordinance 28 of 1913.
- (b) Because even if there were other employees in the shop when Inspector Manning visited the same, the evidence does not establish that such employees were shop assistants or that they were at the time so employed.
- (c) The inference drawn by the learned magistrate from the fact that other employees were in the shop and that it was open for purposes other than dispatching orders received before 4 o'clock is not warranted by the evidence. The evidence established that the two other persons in the shop at the time were not shop assistants as defined by the ordinance. One was the manager and the other an office clerk.
- (d) The decision is altogether unwarranted . . . . for the reasons set out in 1 (a), (b), (c).

After consideration of the various sections I have quoted and also section 11 which enacts that “if the occupier of any shop

“shall open or fail to close such shop *or* shall employ any shop assistant in “contravention of this Ordinance such occupier shall be guilty of an offence. . . .” the word “or” being disjunctive, and after consideration of the intention of the ordinance as shown in the words “An ordinance to provide “for the early closing of shops *and* for limiting the hours of work of shop “assistants,” the fact that the only saving to the non-keeping open after the hour of 4 p.m. is that in section 6 relating to Saturday closing, while section 7 regulates the hours of shop assistants “save as hereinafter provided” *i.e.* provided by sections 8 and 9, I am of opinion that the offence of keeping open after 4 p.m. in section 3 is a separate and distinct offence from that in section 7 as modified by section 9 (2), and reason 1 (a) is of no avail, the offence being complete when the appellant kept his shop open after the hour of 4 p.m. He should have closed his shop at 4 p.m. and, if necessary, then the provisions of section 7 as modified by section 9 would have come into operation, but he kept his shop open contrary to the requirements of section 3, and as charged, is liable to conviction.

I disagree with the magistrate on his interpretation of the law as contained in section 3 and section 9 of the ordinance, but I think the conviction was right.

The other reasons, for decision, or of appeal need not be considered therefore.

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

DAVIS v. McCALAM.

DAVIS v. McCALAM.

[236 of 1918.]

DAVIS v. LAKPATHSING.

[237 of 1918.]

1918. SEPTEMBER 20, 30. BEFORE HILL, J.

*Foodstuffs—Foodstuffs (Export Regulation) Ordinance, 1917—Exportation—Attempt to export—Jurisdiction—Magistrate's Courts Ordinance, 1893, s. 37 (1) (a.)*

Two appeals from decisions of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist) on charges brought by the acting Comptroller of Customs against the defendants for unlawfully exporting certain articles of food from the colony contrary to the provisions of Ordinance 21 of 1917. The defendants were found guilty of an attempt to export, and were each fined \$250 and costs, or in default five months hard labour.

The defendants appealed, the reasons for appeal being set out in the judgment.

*M. J. C. de Freitas*, for Lakpathsing.

*J. A. Luckhoo*, for McCalam.

*G. J. de Freitas, K.C., Acting S.G.*, for the respondent, the acting Comptroller of Customs.

HILL, J.: These two appeals from the decision of a stipendiary magistrate were taken together by consent.

The appellants were convicted of attempting to export, on charges for unlawfully exporting, from British Guiana, without permission from the Comptroller of Customs, certain articles of food, prohibited from being so exported, contrary to Ordinance 21 of 1917. The proclamation dealing with the export is dated January 16th, 1918. The reasons of appeal are in effect the same in each appeal, with the additional reason that the conviction, in Lakpathsing's case, was altogether unwarranted in view of the evidence given by four witnesses for the prosecution, and by the appellant and Ishmael for the defence.

These reasons are:—

- 1 (a) No offence in law as an attempt to export prohibited goods;
- (b) There cannot be, *ex vi termini*, such an offence;
- (c) The appellants were not charged with such an offence, and it was not competent for the magistrate to convict them therefor;

## DAVIS v. McCALAM.

- (d) No proof of an attempt, if there was, in law, such an offence;
- (e) Because section 3 (2) of Ordinance 21 of 1917 imposes one penalty and it was not competent for the magistrate to apply the provisions of section 25 of Ordinance 17 of 1893;
- (f) The convictions were on mere suspicion, and on evidence which negatives any intention to export prohibited goods.

In law, there is no such offence as an intention to export.

2. No jurisdiction in the Georgetown Magistrate's Court.

Dealing first with the second reason of appeal I am of opinion that section 37 (1a) Ordinance 10 of 1893, gives the magistrate power to hear and determine this complaint, which is in the nature of a summary conviction offence, and it was also competent for him under the provisions of section 25 of Ordinance 17 of 1893 to inflict a penalty of one half of the penalty prescribed for the offence by the statute creating such offence, provided, of course, an attempt was proved. The words "subject to the express provisions of any statute being in force in that behalf" exclude from the operations of section 25 offences of "attempts" which have their own statutory and express penalties.

The remaining reasons of appeal may be summarised as embodied in the two questions:

- (1) Was there an "exportation" as laid in the charge, and should there have been a conviction for such?
- (2) Was there an "attempt" to export proved?

The words of the Ordinance (section 3 (2) of Ordinance 21 of 1917) are "If any goods so prohibited are exported or brought to any quay or "other place to be shipped for exportation from the colony or to be carried "coastwise, or are water borne to be so exported or carried, they shall be "forfeited, and the exporter or his agent or the shipper of any such goods "shall be liable to a penalty of five hundred dollars."

The Customs Ordinance of 1884, section 133, defines, for the purposes of that ordinance, the time at which goods are to be deemed exported as (unless the goods are prohibited), the time when the goods are shipped on board any export ship, and the time of the last clearance of any ship shall be deemed to be the time of departure of such ship except as to any goods prohibited to be exported as contraband of war, with reference to which the exportation shall be deemed to be the actual time of the ship's departure on her voyage from the colony.

The steamer on which were the prohibited goods left the port of Georgetown in this colony for Springlands also in this colony on her voyage to Dutch Guiana. It was while in port at Springlands that the seizure was made.

## DAVIS v. McCALAM.

The Solicitor General submitted that as soon as the steamer left the port of Georgetown with the cocoanut oil on board, the destination of such oil being Dutch Guiana, there was an exportation and a contravention of the Foodstuffs Ordinance, 1917.

In *Williams v. Marshall* (2. Marshall's Reports 92) it was held that a ship is not to be considered as having exported from the port of London, on clearing at the Custom house, nor until she clears at Gravesend. A licence to remain in force for the export of cargo till the 10th September is not complied with by clearing at the Custom house on the 9th and at Gravesend on the 12th.

Unless a vessel has proceeded out of the limits of the *ports* with the cargo there is no such exportation as to release the cargo from duties subsequently imposed, although the ship is not only freighted and afloat, but has gone through all the formalities of clearing, &c.

(*Attorney General v. Pougett* 11. Price 381.)

In *Proprietors Stockton and Darlington Railway v. Barrett* (1 C. & F. 590), the words "shipped for exportation" are not necessarily restricted to an exportation to foreign countries, but may mean exportation in its widest sense, that is, a carrying out of port.

I am of opinion that when the oil was seized on board the "Koenigen Wilhelmina" at Springlands they cannot be said to have been exported from the colony.

Were there then such circumstances, such acts, as would enable the magistrate in law, to convict of an attempt to export?

"An attempt to commit a crime," says Sir James Stephen, "is an act "done with intent to commit that crime and forming part of a series of acts "which would constitute its actual commission if it were not interrupted. "The point at which such a series of acts begins cannot be defined but depends upon the circumstances of each particular case."

The magistrate has set out very lengthily and clearly the facts on which he relies, and I agree with the conclusion he came to. From the time the oil was put on board the "Koenigen Wilhelmina," (for Dutch Guiana without doubt), (and I agree with the magistrate, in his remarks about the actions of the authorities on board that steamer), there were a series of acts which would have ultimately culminated in the commission of the offence of exportation of the prohibited articles, had these acts not been interrupted.

I have no doubt these acts were more than evidence of intention or preparedness and I think the appellants were rightly convicted and I affirm the convictions, and dismiss the appeal with costs,

*Appeal dismissed.*

[This case has now been taken to the Court of Appeal.—ED.]

REX v. SROODIN & ORS

REX v. SROODIN AND ORS.

*Ex parte The ATTORNEY GENERAL.*

1918. OCTOBER 5. BEFORE SIR CHARLES MAJOR, C.J.

*Criminal law—Murder—Trial by special jury—Principles to be considered—Trial at bar—Indictable Offences (Procedure) Ordinance, 1893, Amendment Ordinance, 1918, s. 42.*

Motion by the Attorney General, on behalf of the Crown, that a special jury be struck for the trial of the indictment against Sroodin and several others for alleged murder. A motion by the Crown for a trial at bar was heard at the same time.

The trial on the indictment had commenced before a common jury at the criminal sessions in June, 1918, but after the opening address by the Attorney General for the Crown, the jury was discharged and the trial was postponed to the October sessions with the consent of all the counsel engaged.

Affidavits in support of the application stated that a certain portion of the public press had expressed strong views of the guilt of the accused and on the evidence taken at the preliminary inquiry, and public speeches had been made, whereby popular prejudice might adversely affect the accused, making it advisable, it was submitted, to have the trial before a special jury.

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

*E. G. Woolford*, for Sroodin and three others.

*C. R. Brown*, for Mahadeo.

*B. B. Marshall*, for Bakridi.

*J. S. McArthur*, for Lewis and another.

The application was opposed by all the accused, the principal grounds put forward being that they were less likely to have a fair trial by special jury, and that the ordinance providing for trial by a special jury was passed after they had been referred for trial.

SIR CHARLES MAJOR, C.J.: This is an application for an order that the cause of the King v. Sroodin and others be tried by special jury. It is made under s. 42 of Ordinance 25 of 1918, which has recently been enacted by the legislature, and when I say that the ordinance is part of the statute law of the colony I have said all that need be said about it. Its passage through the Court of Policy, the various objections raised to its enactment, and the arguments adduced in support of those objections cannot be heard here. It is law now and I have to administer it. Any arguments addressed to the fact that it differs from the law in

REX v. SROODIN AND ORS.

England and that its provisions are likely or not to work hardship are so much beating the air. What I have to decide now is whether a special jury should in this case be ordered to be struck, the decision being given on the same principles as govern an application for a special jury in civil cases.

The two grounds in support of the application stand, as the learned Attorney General has pointed out, practically unchallenged. They are that "owing to the popular prejudice stated to affect the accused persons adversely on the one hand, and owing to the connection of the evidence in this case with obeah and obeah workers on the other and further owing to the aforementioned publications and public speeches it is advisable to have a special jury struck." Now if there is one more important consideration than another in the trial of any cause it is that the accused person or persons shall have a fair trial, and I will pass at once to the circumstances which are urged as showing that the allegation of the possibility of an unfair trial is well founded. It is said to rest upon the amount of popular prejudice that has been excited in the matter, for in the second paragraph of the reasons of the application, it is stated that "public interest was aroused throughout the colony at the preliminary enquiry of this case and popular indignation was evinced against the perpetrators of the murder in the public press of this colony and otherwise, by which popular feeling the eight accused are stated by one of their counsel, Hon. J. S. McArthur, to be adversely affected."

At the opening of the trial, and after it was postponed in the month of June—the Attorney General referred to it and I think I did too—there had and have been not only a "trial," but also a conviction and a proceeding to execution of these eight persons by the public press of the colony. One instance of the improper length to which the press has gone in its expressions and in comment is that of writing of the evidence of one particular witness that "he has given the show away in order to save his own skin." A more indecorous remark cannot be conceived. And what is the result? As has been pointed out, and as appears from the records, an enormous amount of unhealthy opinion has been excited in this case which, unless every precaution be adopted, must inevitably affect the prisoners adversely. Headed by the press, popular opinion has been educated to look upon these unfortunate people as almost already under sentence of death. That has not been denied. There could not be in my opinion a case in which the necessity for the order on the first ground was not more obvious than it is in the present one.

Secondly, a ground of less substantial character is the allegation of obeah and the connection of this case with obeah and its professors. The Attorney General in moving the Court, has

shown that obeah is playing a very prominent part in these proceedings. That in my opinion is another circumstance why recourse should be had to the very best material for the trial. An extract from a leader in a newspaper called *The Tribune*, of July 7th, has been filed in support of the motion. No mention is made of this case in the course of that article, but it refers to the practice of obeah. The article no doubt enunciates very admirable principles, but the very fact that in a newspaper of the colony there should appear at this time an article of that kind itself supports the allegation of obeah being at work in connection with the cause.

The other extracts from the newspaper articles I regard as purely political, and how deplorable it is that a case involving issue of life and death for these eight persons should have been even in the slightest way taken into the atmosphere of politics. Learned counsel are assigned to defend their clients on the evidence given for or against them in a cause and upon trial of the cause in a court of law. That into a speech, however otherwise legitimately made in support of, or in opposition to any measure before the legislature, reference should be imported to a cause then pending before the courts is improper enough. That it should have been done in the circumstances of this particular case as a ground of opposition to the bill for the ordinance under which the application is now being made is grossly scandalous.

What are the arguments against the motion? As the Attorney General has urged, it must be shown to the court that in the circumstances to which he has referred it will be to the prejudice of the prisoners that they shall be tried by a special jury and not by a common jury. What attempt has there been to show that? I think it obvious as a general principle that the higher one goes in the scale of the jury empanelled, the greater will be the ability to deal with important cases and so better for all concerned.

Applying that principle, and listening with patience and attention to what has been said I have heard nothing to remove my impression not only that the prisoners will not be prejudiced, but will be benefited by the order I am asked to make. Those facts alleged in its support have not been traversed. They are eloquent and convincing, and I have no hesitation in granting an order in terms of the motion.

As regards the motion for trial at bar the order for the same goes as of course upon the application of the Attorney General.

BOARD OF ASSESSMENT v. BRODIE AND RAINER, LTD.

BOARD OF ASSESSMENT v. BRODIE AND RAINER, LTD.

1918. SEPTEMBER 9, OCTOBER 5. BEFORE HILL, J.

*Excess Profits Tax—Assessment for duty—Appeal—Right of Board of Assessment to appeal—‘Capital’ and ‘assets’—Increase of capital—Profits.*

Appeal from a decision of the committee of appeal, under the provisions of Ordinance 24 of 1917, and Ordinance 2 of 1918. The Board of Assessment assessed for taxation the difference between the purchase and sale price of a property belonging to, the respondent company. The company thereupon appealed to the committee of appeal who, by a majority, allowed the appeal. The Board thereupon appealed from that decision to a judge.

A. G. King, acting Crown Solicitor, for the appellants.

E. G. Woolford, for the respondent company.

HILL, J.: The Board of Assessment, under Ordinance 2 of 1918, assessed for taxation the difference between the purchase and sale price of a property in which the company carries on business as grocers, chemists and druggists, The company appealed to the committee of appeal who allowed the appeal by a majority. From that decision the board has appealed. Mr. Woolford, for Brodie and Rainer, Ltd., took a preliminary objection that under the ordinance the board has no right of appeal but only the person assessed who is complaining that the assessment by the board is wrong; (Section 18 (5), Ordinance 2 of 1918).

Under section 17 (2) “any person assessed” may appeal to the committee of appeal against any assessment within fifteen days from the date of the notice of assessment and, as in the case of a disagreement of the Board, the matter is “placed before and decided” by the committee of appeal. By section 18 (1) “any person” may appeal to a judge in chambers against “any decision” of the committee of appeal. May appeal from what? Appeal from “any decision” of the committee which would include an assessment as decided by them.

The board is a “person” (see Interpretation Ordinance) and by section 18 (5), Ordinance 2 of 1918, the onus of proving the assessment complained of (*i.e.*, the assessment as decided by the committee) shall be on the appellant, in this instance the board, who is complaining of the assessment as decided by the committee of appeal. The objection is therefore invalid.

The question for decision is, is the surplus difference between the sale price and purchase price of lot 48, Robbstown, a profit earned in connection with the capital employed in the business of Brodie and Rainer, Ltd.?

The company in its balance sheet to March 31st, 1917, the date of the closing of the accounting period, showed "\$5,000" as at deposit in bank which, I understand, is so much received on account of the sale of the premises at March 31st, 1917. It is also mentioned in the report to the shareholders that an agreement of sale had been entered into for the sale of the premises for "\$48,000." "Capital" means the value of the assets employed in the business at a given date, and included in the assets would be any property acquired by purchase, at the price at which it was acquired subject so any deduction for wear and tear or replacement or improvement prior to the accounting period, or for a proper allowance for unpaid purchase money. (First schedule, par. 1 (a), Ordinance 2 of 1918).

This particular property, being an asset, and part of the capital, has been sold at an enhanced price.

Section 14 (2) of Ordinance 2 of 1918 deals with increase of capital and says: "In case of the alteration of the capital of the company or of the "acquisition of the property of a company by a new company or by an individual at any date subsequent to 1st January, 1917, the Board may assess the business on the basis of its estimate of the actual capital employed in the business independently of actual purchase price in money or "shares or otherwise."; and in section 15 (1) "Subject to section 14 hereof "where the capital of a business has been increased during the accounting "period, the statutory percentage per annum shall be allowed on the amount "by which the capital has been increased for so much of the accounting "period as the increased capital has been employed."; and. section 15 (2) states "Where capital has been decreased during the accounting period, the "statutory percentage per annum shall not be allowed on the amount by "which the capital has been decreased for so much of the accounting period "as the capital has been decreased."

Turning to profits, the profits of a trade or business are the surplus by which the *receipts from the trade or business* exceed the expenditure necessary for the purpose of earning these profits (*Smith v. Lion Brewery Company*, 101 L.T., 145) and in *Russell v. Town and County Bank* (15 A.C., 418) at p. 424 Lord Herschell is thus reported; "For the purpose of "arriving at the *balance of profits* all that expenditure which is necessary "for the purpose of earning the receipts must be deducted, otherwise you "do not arrive at the balance of profits,"; and Lord Fitzgerald at p. 429 in his judgment says: "Profits I read on authority to be the whole of the in- "comings of a concern after deducting the whole of the expenses of earning "them, that is, *what is gained by trade.*" In *Smith v. Lion Brewery Com- pany (ubi supra)* the in-

## BOARD OF ASSESSMENT v. BRODIE AND RAINER, LTD.

creased profits on which income tax were paid was largely due to the fact that the "possession and enjoyment" of "tied" houses was essentially necessary to enable the company to earn the profits on which they were assessed for income tax. Can it be said that the possession and enjoyment of lot 48 was essentially necessary to the purpose of Brodie and Rainer's business to such an extent as to render the surplus on the sale of such premises a profit liable to taxation? Can it be said that that surplus, or profit, if you like, was "gained by trade?" It must be remembered that the business is not one in which the principal business is the making of investments: (First schedule, par. 2, Ordinance 2, of 1918). And it has been well said that it does not follow that if a profit is in any sense connected with the trade it must always be treated as a profit arising out of the capital employed in the business for it may be remotely connected with the trade.

The value of the premises is rightly included in the statement in my opinion, but I cannot find that the surplus on the sale of the premises can be said to be profits earned on capital employed in the business. The question really seems to me to be premature at the date of the accounting period, for at that period only \$5,000 of the purchase money of the premises had been paid and that was on deposit at the bank and had not been utilised in the business, and I gather from the proceedings before the committee of appeal that the "profits" on sale were to be distributed among the shareholders and would not be considered as a profit arising out of the business, or "gained by trade." This distribution therefore cannot be in the shape of dividend.

I conclude therefore that the sum of \$24,000, the surplus on the sale, was at 31st March, 1917, not liable to the tax.

The assessment must be rectified accordingly. I grant costs to the respondent.

RAHIM BACCHUS v. JAUNDOO.  
 PETTY DEBT COURT, GEORGETOWN.

[153. 10. 1918.]

RAHIM BACCHUS v. JAUNDOO.  
 1918. OCTOBER 25. BEFORE HILL, J.

*Wrongful levy—Damages—Promissory note—Illegal consideration.*

Claim by the plaintiff, Rahim Bacchus, for the sum of \$50 as damages for a wrongful, illegal and malicious levy. The necessary facts appear from the judgment.

*M. J. G. de Freitas*, for the plaintiff.

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

HILL, J.: Plaintiff claims damages under the following circumstances. Defendant obtained judgment against him in the Petty Debt Court for an amount which, inclusive of costs, amounted to five dollars and thirty-nine cents. She also had a case against the present plaintiff for insulting language and also one for breach of trust. She compromised with him by accepting a sum equivalent to eight dollars in cash and jewellery, a promissory note for six dollars,—in all fourteen dollars, which it is stated was for ceasing the criminal proceedings in the insulting language case, and included the five dollars and thirty-nine cents for the civil judgment. Defendant, instead of suing on the promissory note, got a warrant for the judgment and levied on plaintiff's goods and sold them. He claims damages against her for so wrongfully levying on and selling his goods.

I am satisfied that the consideration for the promissory note was partly illegal and this renders it ineffective. (*Rahim Bacchus v. Ablain et al*, 1917 L.R.B.G. 148). Both parties are *in pari delicto*. The defendant cannot sue on it, but there is no novation as the transaction was illegal. The judgment in the civil action stands, and the defendant was in my opinion justified in levying, treating the promissory note as illegal.

Judgment for the defendant with fee five dollars.

SHAW v. MATTHEWS.

SHAW v. MATTHEWS.

[223 OF 1918.]

1918. NOVEMBER 20. BEFORE SIR CHARLES MAJOR, C.J.

*Criminal law—Magistrate's Court—Alteration in sentence by magistrate—Alleged malice.*

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist), who convicted the defendant Matthews on a charge of assault and sentenced her to four months' imprisonment. The defendant appealed, the reasons for appeal being set out in the judgment of the court.

*S. L. B. Stafford*, for the appellant.

*B. B. Marshall*, for the respondent.

SIR CHARLES MAJOR, C.J.: The defendant was charged by the complainant with assault causing actual bodily harm by biting her.

The facts appearing from the record were that the magistrate at the close of the case found the defendant guilty and said— "Charge reduced, \$25." Counsel for the defendant immediately rose in his plea and said— "I give notice of appeal." The magistrate, remembering a previous public warning from the bench of imprisonment in cases of biting, then and there altered his sentence, saying to counsel that as no application had been made to reduce the charge he could fight the matter out on the charge as laid, and imposed a sentence of four months imprisonment with hard labour.

The defendant then appealed against the conviction on the grounds—

- (a) that the decision was altogether unwarranted by the evidence;
- (b) that the magistrate exceeded his jurisdiction in altering his decision, after delivery thereof, and inflicting a more severe penalty;
- (c) that an illegality had been committed by the magistrate taking into consideration facts which did not appear in his minutes;
- (d) That the magistrate acted maliciously in having, in consequence of notice of appeal having been given, altered his decision after reducing the charge and pronouncing sentence accordingly.

I dismissed the appeal on (a) because there was in my opinion sufficient evidence upon which a jury might have convicted the defendant.

## SHAW v. MATTHEWS.

On (b) because I held that the magistrate had power—it did not seem to me to be a question of “jurisdiction” at all—in his circumstances of the case to alter his decision. Even if he had, when interrupted by counsel, fully performed the duties enjoined on him by law, failing the full performance of which a decision is not in my opinion completed, but that he had not, in this case, so fully performed those duties, namely, the award of imprisonment in default of payment of the fine and costs (if any), and the entry “forthwith” of a concise minute or memorandum of the order. (Ordinance 12 of 1893, ss. 35, 36). The question whether a magistrate has power to alter his decision or sentence after the same has been completed as I regard completion and notice of appeal has thereupon been given in open court I declined to answer.

As to the fourth ground of appeal, (d), the notice of appeal filed did not state it then definitely as I have set it out above, but on my asking what was alleged as ground for the charge of malice on the part of the magistrate, counsel for the appellant stated at the bar that the notice was intended to mean that the reason why the magistrate altered his decision was that verbal notice of appeal had been given. I dismissed the appeal on this ground also, because it was clear to me on the affidavits permitted to be filed in the proceedings by Dalton, Acting J., that the fact that notice of appeal had been obtruded while the magistrate was giving his decision and before he had completed it did not in any way influence him in the course he pursued.

*Appeal Dismissed.*

WALLBRIDGE v. LAM.

WALLBRIDGE v. LAM.

[291 OF 1918.]

1918. NOVEMBER 23. BEFORE BERKELEY, J.

*Criminal law—Spirits exceeding one pint in quantity—Unlawful possession—Onus of proof—Spirits Ordinance, 1905, s. 93, as amended by Ordinance 15 of 1911.*

Appeal from a decision of the stipendiary magistrate of the Berbice judicial district (Mr. W. J. Douglass). The defendant Lam was convicted on a charge of being in the unlawful possession of spirits exceeding one pint, in contravention of the provision of section 93, Ordinance 1 of 1905 as amended by section 14, Ordinance 15 of 1911.

Defendant appealed, the principal grounds of appeal being that unlawful possession was not proved, the evidence going to show that each bottle of rum in his possession was purchased at different times in conformity with the provision of section 17, Ordinance 8 of 1868 (the Wines, etc., Licences Ordinance, 1868).

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

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

BERKELEY, J.: The appellant was convicted by the stipendiary magistrate of the Berbice judicial district—Mr. Douglass—of being in unlawful possession of spirits exceeding in quantity a pint. Under the Spirits Ordinance, 1905 (section 93) as amended by Ordinance No. 15 of 1911 (section 14) the possession shall “for the purposes of this section” be deemed unlawful unless (subsection 2 (c) which applies to this present case), such spirits have been legally sold . . . to him under section 17 of the Wines Ordinance, 1868, or under sub-section 2 of section 38 of this ordinance; and if such spirits have been obtained in separate quarts from any retailer at separate times and not under a permit, the purchaser has obtained a receipt in writing for the purchase money paid for the same, and shewing the quantity of spirits for which and the time when it was paid. It is submitted by counsel that as the quantity found in the possession of the appellant was three separate pints,—that is something more than one quart—and not two quarts, he cannot be called on to account for its possession as he is protected by section 17 of the Wines, etc., Licences Ordinance, 1868, which in effect provides for the purchase of not more than one quart of rum at a time by one person without his obtaining a written receipt in respect of such purchase. (*Bovell C. J.*, in *Ackla v. Peters*, 8th July, 1909). This in no way affects the provisions of the section under which the present complaint is

## WALLBRIDGE v. LAM.

brought which makes the possession of more than one pint for *the purposes of this section* unlawful unless it is shown to be lawful. It is further submitted that on the facts the magistrate was wrong in holding that the appellant had not proved lawful possession. The magistrate says, "It is true that the rum may have been obtained perfectly innocently." The only evidence on that point is that of the appellant himself, and the magistrate is of opinion that this is not sufficient and declines to accept his "bare statement." With this finding of fact this Court will not interfere. Appeal dismissed with costs.

*Appeal dismissed.*

## PATOIR v. J. E. PEROT &amp; Co., LTD.

[BERBICE, 38 OF 1917.]

1918. FEBRUARY 11. BEFORE SIR CHARLES MAJOR, C.J.

*Will—Bequest of property to heirs with restraint against alienation save to one of the heirs—Sale with consent of all the heirs—Judgment obtained against one heir—Levy on his interest under the will—Opposition—Injunction.*

Claim by the plaintiff, as executor of the late Henry Patoir, for an injunction to restrain the defendant company from selling at execution one undivided fourth ( $\frac{1}{4}$ ) part or share of and in the abandoned estate De Vriendschap on the west bank of the Berbice river, with one one-story building thereon, and to declare the levy made upon the said property by the defendant company wrongful and illegal. The value of the property in dispute was stated to be \$240.

The property in question had been levied upon at the instance of the defendant company to satisfy a judgment obtained against one Edward Patoir, a son of the late Henry Patoir.

The reasons of opposition, incorporated in plaintiff's claim, were as follows:—

The sale was opposed—

- (1.) Because the one undivided fourth part or share of and in the abandoned estate de Vriendshap situate on the west bank of the river Berbice together with one one-story building on six feet blocks with front and back galleries on said estate de Vriendshap is not the property of the judgment debtor.
- (2.) Because the property aforesaid forms part of the immovable property belonging to the estate of Henry Patoir, deceased, and is burdened with a *fidei commissum* and also a restraint on alienation and the same could not be

## PATOIR v. J. E. PEROT &amp; CO., LTD.

taken in execution to satisfy a debt by Edward Patoir, the judgment debtor.

The material parts of the will of the late Henry Patoir are sufficiently set out in the judgment of the court.

*J. Eleazar*, solicitor, for the plaintiff.

*R. T. Egg*, for the defendant.

The judgment of the Chief Justice was read by Berkeley, J., on April 24th, as follows:—

Henry Patoir, by his will devised as follows:— “1. I give, devise, and bequeath to my wife Christina Philipina all my landed property, house, and all erections thereon which I may be possessed of at the time of my death, for her personal benefit during the term of her natural life, and, after her death I bequeath all the landed property I may be possessed of at the time of my demise with the hereinafter specifications to my children and heirs, viz., Henrietta Petronella, Edward Augustus, William Hyndman Jones, and Hendrick Hartman, each for an equal share, also anything whatsoever which may accrue to my estate by inheritance, gift, or otherwise, to be shared alike and together with those afterwards mentioned . . . . . 4. I devise that the share bequeathed to my son Edward Augustus should, as per specification in paragraph 1, be equally divided amongst them, and that those surviving heirs pay over to the heirs of the forenamed Edward Augustus the sum of twenty-five dollars for their sole benefit. 5. I devise that the landed property bequeathed above should not be sold to anyone outside of the abovementioned heirs, but one heir may sell his or her share to another of the heirs: should, however, it become necessary to sell any part or all the property severally bequeathed, it shall be with the full and willing consent of all the heirs abovementioned as having shares in the landed property.”

The testator appointed his son William Hyndman Jones Patoir (the plaintiff) and his daughter Henrietta Petronella the executor and executrix of his will, and died on the 6th October, 1897. On the 6th November, 1897, the executor made testamentary deposit in the Registry.

Edward Augustus Patoir in the will mentioned became indebted to the defendants and had judgment against him at their instance. They issued execution and have levied upon “one undivided fourth part or share of and in the abandoned estate de Vriendschap in Berbice together with the one-storey building on six feet blocks with front and back galleries on the said estate,” as the property of the judgment debtor. The plaintiff in this action as executor of his father’s will, gave notice of opposition and now claims an

injunction restraining the sale on the ground that the property taken in execution is not the property of the judgment debtor, being part of the estate of Henry Patoir, deceased, "burdened with a *fideicommissum* and also a restraint on alienation and incapable of being taken in execution to satisfy a debt by Edward Patoir."

The defendants deny the allegations contained in the statement of claim and contend that the property taken in execution is subject to execution even though it be burdened with a *fideicommissum*. The questions, therefore, for my deliberation are, the first, what interest, upon the proper construction of the will of Henry Patoir, did Edward Augustus take thereunder? The second, is that interest capable of being taken in execution?

I think Edward Augustus took an undivided fourth part of his father's landed property (of which, upon the evidence, the defendants concede the house to form a part), subject to *fideicommissum* in favour of his brothers and sister which will become due upon his death. If the will stopped there, I think the interest of Edward Patoir in the estate could have been taken in execution and sold, but by the fifth paragraph of his will the testator has prohibited alienation of the landed property devised by his will "to any one outside of the abovementioned heirs," words which may, on the face of them, it may well be argued, constitute additional *fideicommissa* from heir to heir mutually, but which, at any rate, prevent (I think) any one interest being taken in execution at the instance of a stranger. That being so, it seems to me irrelevant to argue, as Mr. Egg does in this case, that the heirs other than Edward might buy in his interest and thus keep the property in the family. Moreover, if a sale of the interest of Edward as judgment debtor and thus like a defaulting mortgagor would be a breach of the prohibition against alienation, it seems to follow that the *dominium* of the property so alienated would pass from him to the co-heirs who would sue at once to vindicate the property without waiting for his death.

For these reasons I am of opinion that the plaintiff is entitled to the relief he claims and to judgment therefor with his costs of suit.

FRAITES v. THE NEW SUCCESS, LTD.

FRAITES v. THE NEW SUCCESS, LTD.

[211 OF 1917.]

1918. MARCH 22, 25, 26, APRIL 6, 19, 22 AND 29. BEFORE HILL, J.

*Master and servant—Breach of contract—Manager of sugar plantation—Agreement for three years—Temporary illness—Wrongful dismissal—Damages—Application of English or Roman-Dutch law—Civil Law of British Guiana, Ordinance 1916—Director of defendant company as counsel—Etiquette of profession.*

Claim by the plaintiff for the sum of \$1,015 for salary and commission stated to have been earned as manager of the defendant company's Plantation Success, from November 1st, 1916, to March 15th, 1917, and the sum of \$5,700 as damages for wrongful dismissal from the company's employment as such manager.

Further necessary facts appear from the judgment.

*G. J. De Freitas, K.C.*, for the plaintiff.

*P. N. Browne, K.C.* and *C. R. Browne*, for the defendant company.

During the course of the hearing it came to the notice of the court that the leading counsel of the defendant company was the chairman of the directors of the company. The acceptance of a brief under such circumstances was adverted to by the court as being most improper.

HILL, J.—The plaintiff claims from the defendants the sum of \$6,480 for wrongful dismissal. This amount is made up of various items such as salary, commission, domestics' allowance, and for damages for loss and compensation in lieu of certain benefits he would have derived under his written agreement with the defendants had he not been wrongfully dismissed. Mr. De Freitas for the plaintiff admitted in his opening that the amount claimed ought to be reduced by \$105 as regards that portion of the claim under allowance for domestics, and also by \$28 for four months difference of house rent between \$25 per month as claimed and \$18 actually expended, and also by \$740 difference on claim for loss of salary for twenty six months, the plaintiff having obtained steady employment at a reduced salary as from 13th June, 1917. This reduces the total amount claimed to \$5,607. The plaintiff's claim is that he entered into a written agreement on the 28th August, 1916, with the defendants to serve them as manager of Pln. Success for a period of three years on certain

terms as set out in the agreement, and be entered into employment. He alleges that on the 15th March, 1917, he was wrongfully dismissed.

The defendants allege (3 (a) of defence) an implied condition of the agreement that plaintiff should be physically and mentally fit during the entire period of the agreement to and should personally manage, supervise and control the working of the said plantation Success, that he was never physically and mentally fit to perform the duties as required by the agreement, or any duty at all, and at the expiration of two months, without having made any arrangements whatever for the proper management, supervision, and control of the plantation he left the defendants' service for Canada on November 9th, 1916, and remained abroad until March 12th, 1917, and during his absence he remained physically and mentally unfit to perform any duty or work whatsoever. In paragraph 3 (b) defendants allege that when plaintiff assumed the management of Success, and during the greater part of the period that he managed the same he was ill and did not give proper attention to his duties, and in consequence, the cultivation was neglected whereby the defendants interests were prejudiced and they suffered great loss.

In paragraph 3 (c) the defendants allege the receipt of letters from plaintiff while abroad, which letters indicated mental derangement, and as the plantation had suffered prior to his departure from the Colony, and was still suffering from want of proper management and control at the time when the cultivation required strictest attention, and reaping operations were being carried on, and it being uncertain whether plaintiff would recover or how long plaintiff's illness might continue defendants were forced to protect their interests, and check the ruin into which the said plantation was being plunged to procure another planter in the place and stead of plaintiff. No suitable temporary substitute could be found and in February, 1917, the place was permanently filled.

[After an exhaustive review of the evidence, in the course of which he found that the plaintiff had proceeded to Canada, with the full knowledge, consent, and acquiescence of the defendant company, for the purpose of undergoing an operation, that the time spent by him in Canada consequent thereon and during convalescence was not unreasonable, that there was no evidence to support the suggestion that plaintiff's physical condition prior to his departure from the colony prevented him from properly performing his duties, and that there was no justification for his summary dismissal from his post, His Honour continued:—]

I am of opinion that the common law of England is applicable

## FRAITES v. THE NEW SUCCESS, LTD.

to this case, as the rights of the plaintiff accrued, and the cause of action arose, after January 1st, 1917, on which date Ordinance 15 of 1916 came into force.

The cases of *Cuckson v. Stones* 1. E1 & E. 248—*Warren v. Wittingham* 18 T.L.R. 508 and *Storey v. Fulham Steel Works Coy.* 24. T.L.R. 89 are applicable to this case, and especially the case of *Davies v. Ebbw Vale Urban District Council* 75 J.P. 533. Loss from any temporary incapacity of a servant through illness must be borne by the master and that presumption is based upon the ground that illness is not a breach of contract but is the act of God. Channel, J. says: "I do not think that the phrase 'absence through illness' is confined to absence through actual illness. In my opinion it includes absence reasonably caused through illness, and it covers 'the period of convalescence, and of absence occasioned through approaching illness.'" The plaintiff in the present case, had he not had mental trouble, caused by extreme weakness after his operation, would have been back here, it is safe to say, quite a month earlier than he was actually able to return. I think he is entitled to the judgment of the Court.

Damages, whether for breach of contract, or for wrongful dismissal will be the same, on the authority of *Addis v. Gramophone Coy. Ltd.* (1909 A. C. 488). The amount claimed after deduction of certain amounts as stated in Mr. De Freitas' opening is \$5,607. This includes problematical commissions of \$1,500 for 1917, 1918, and 1919. It has now been ascertained that the profits for 1917 will probably be somewhere about \$16,000. This would entitle plaintiff to \$240 for that year. Under clause seven of the contract of service had the property been sold without Fraites being retained as manager he would have been entitled to salary and commission for the remainder of the term, such commission to be calculated on the profits for the year preceding the sale. He would, therefore, under his agreement, have been entitled to \$240 for 1918, and \$120 for 1919, or \$600 in all, and I think that is the proper amount to allow for loss of opportunity to earn commission. This reduces the claim by \$900, and there will be judgment for the plaintiff for \$4,707 with costs.

# REPORTS OF DECISIONS

OF

## THE SUPREME COURT

### BRITISH GUIANA

DURING THE YEAR

1918.

WITH INDEX

TOGETHER WITH A DECISION OF THE JUDICIAL COMMITTEE OF HIS  
MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

Edited by LL. C. DALTON, M.A., Cantab.  
Barrister-at-Law.

GEORGETOWN, DEMERARA:

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

1919.

JUDGES  
OF THE  
SUPREME COURT OF BRITISH GUIANA.  
DURING 1918.

SIR CHARLES HENRY MAJOR, Kt.	.....Chief Justice. (On leave July-September.)
MAURICE JULIAN BERKELEY	.....Senior Puisne Judge. (On leave July-September.)
JACOBUS KERR DARRELL HILL	.....Junior Puisne Judge. (Acting C.J., July-September.)
LLEWELYN CHISHOLM DALTON	.....Acting Puisne Judge. (July-September.)

TABLE OF ABBREVIATIONS.

(ADDITIONAL TO THE USUAL REFERENCES TO ENGLISH  
REPORTS.)

A.J.	.....Appellate Jurisdiction, British Guiana.
C.P.D.	.....South African Law Reports, Cape Provincial Division.
L.R., B.G.	.....Law Reports, British Guiana.

## ERRATA.

<i>Page</i>	<i>Line.</i>	<i>For</i>	<i>Read</i>
34	4 from top	employment	employment
34	5 from top	injureis	injuries
70	2 from bottom	Whitaker	Whittaker
103	16 from bottom	againsi	against
109	6 from top	Servic	Service
112	18 from bottom	tender	trader
121	20 from bottom	L.R.,B.G.	L.R., B.G. 115.
138	6 from bottom	Attain	Ablain.

## INDEX.

- ACCOMPLICE— See Evidence.
- ADULTERATION— See Food and Drugs.
- APPEAL— See Practice.
- AUCTION— Sale of goods—Title of seller—Purchase in good faith without notice of defect in seller's title—Claim by owner in detinue—Sale of Goods Ordinance, 1913, ss. 24, 25.  
*Barrow v. Moore* ..... 94
- " Specific performance—Contract of purchase and sale—Suit for delivery—Roman Dutch Law—Voluntary and judicial sales—Relation of bidder and auctioneer.  
*Wight v. Dem. Turf Club Ltd. (in liq.)*..... 49
- COMPANY— Winding up—Mortgage—Payment of interest on secured debt—Date to which interest payable—Application by liquidator personally for sanction to purchase property of company—Position of liquidator in respect of assets of company—Principles governing the grant of such sanction—The Companies Winding up Rules, 1905, r. 127.  
*In re The Dem. T.C. Ltd. (in liq.); ex parte the Liquidator* ..... 119
- CONTRACT— See Specific Performance; Licence; Sale of Goods.
- COUNSEL— Director of defendant company as counsel—Etiquette of profession.  
*Fraites v. The New Success Ltd.* ..... 145
- CRIMINAL LAW— Assault—Constable—Execution of duty—Summary Conviction Offences Ordinance, 1893, s. 33 (2).  
*Jaikaran Singh v. Bailey*..... 60
- " Breach of peace—Insulting language—Motor car—Light to show marks of identification plate at back of car—Car in use though not in motion—Motor Car Regulations, 1912.  
*Johnson v. Bishop* ..... 8

## CRIMINAL LAW contd.—

- " Breach of trust—Trader receiving money in advance and neglecting to perform contract—Traders (Breaches of Trust) Ordinance, 1861, s. 3.  
[Johnson v. Nandu](#) ..... 17
- " Early closing—Employment of shop assistant after closing hours to despatch orders—Shop kept open—Shops Ordinance, 1913, ss. 3, 7 and 9.  
[Manning v. Lopes, Fernandes & Co., Ltd](#) ..... 126
- " False pretences—Summary Conviction Offences (Procedure) Ordinance, 1893, s. 8(5)—Facts constituting offence to be stated in charge—Appeal—Service of reasons of appeal—Service by registered letter—Delivery of registered letter to respondent's messenger—Interpretation Ordinance, 1891, Amendment Ordinance, 1907.  
[Reid v. London](#) ..... 109
- " Foodstuffs (Export Regulation) Ordinance, 1917—Exportation—Attempt to export—Magistrate's Courts Ordinance, 1893, s. 37(1), (a).  
[Davis v. Lakpathsing](#) ..... 129  
[Davis v. McCalam](#) ..... 129
- " Larceny—Trap—Assistance or knowledge of owner of property—Taking.  
[Blair v. Atherley](#) ..... 108
- " Murder—Trial by special jury—Principles to be considered—Trial at bar—Indictable Offences (Procedure) Ordinance, 1913, Amendment Ordinance, 1918, s. 42.  
[Rex v. Sroodin & ors.](#) ..... 132
- " Opium—Unlawful possession of prepared opium—Definition—"Used or intended to be used for smoking"—Analyst's certificate—Evidence—Opium Ordinance, 1916, s. 2 and s. 3 (c.)  
[Reece v. Cheefoon](#) ..... 81

## CRIMINAL LAW contd.—

- " Principal and accessory—Accessory found guilty of receiving—Evidence of accomplice—Corroboration.  
*Roach v. Richards* .....5
- " Selling spirituous liquor on Sunday—Summary Conviction Offences Ordinance, 1893, s. 193—Licensed Places (Closing Hours) Ordinance, 1902, s. 3—Complaint silent as to Ordinance—Evidence—Divisibility of offences—Summary Conviction Offences (Procedure) Ordinance, 1893, s. 40.  
*Widdup v. Barcellos*..... 65
- " Summary Conviction Offences Ordinance, 1893, s. 145—Being armed with gun to commit unlawful act—Rogues and vagabonds—Class of persons to whom applicable.  
*Edwards v. Menezes*..... 117
- " Unlawful possession—Facts constituting possession—Evidence—Confession—Inducement.  
*Cox v. Lilliah* ..... 21
- " Unlawful possession of property reasonably suspected to have been stolen—Time at which suspicion must exist—Explanation to satisfaction of the Court—Summary Conviction Offences Ordinance, 1893, s. 96.  
*Collins v. Young* ..... 84
- " Unlawful possession of spirits exceeding one pint in quantity—Facts constituting possession—Spirits Ordinance, 1905, s. 93—Spirits Ordinance, 1905, Amendment Ordinance, 1911, s. 14.  
*Essex v. Seemandray*..... 57
- " Unlawful possession—Requisites to throw onus on accused—Evidence of statements explanatory by accused in answer to questions by constable—Accused found guilty of larceny on charge of unlawful possession—Summary Conviction Offences (Procedure) Ordinance, 1893, Amendment Ordinance, 1915, s. 2.  
*Benn v. Davis* ..... 10

See also Evidence; Intoxicating Liquors

DEATH—	Marriage in community—Value of estate under \$480—Claim of surviving spouse to whole estate—Nature of claim—Vesting of property. <i>Re transport Bairaji to Raghubar</i> ..... 59
"	Vesting of property on—Devolution of property—Death of purchaser before obtaining transport—Transport by seller to heir or personal representative. <i>Re transport Shewburun to Shubhagra</i> ..... 58
DETINUE—	Gratuitous bailment—Property stolen whilst in hands of bailee—Reasonable care—Negligence. <i>Eaton v. Jugroop</i> ..... 98 See also Sale of Goods.
EMPLOYER—	See Master and Servant.
EMPLOYERS	
LIABILITY—	See Master and Servant.
EVIDENCE—	Evidence of accomplice—Corroboration—Principal and accessory—Accessory found guilty of receiving. <i>Roach v. Richards</i> ..... 5
"	Opium Ordinance, 1916, s. 2 and s. 3 (c)—Analyst's certificate—Evidence. <i>Reece v. Cheefoon</i> ..... 81 See also Criminal Law.
EXECUTION—	Wrongful Levy—Damages—Promissory note—Illegal consideration. <i>R. Bacchus v. Jaundoo</i> ..... 138
FALSE	
IMPRISONMENT—	Larceny of goods—Arrest by police on information supplied by defendants—Charge sheet signed by defendants at request of police—Liability. <i>Bhodai v. Dem. Railway Co. &amp; anr</i> ..... 44
FOOD AND DRUGS—	Adulteration of food—Milk—Analysis—Milk in course of delivery to purchaser or consignee—Completion of delivery. <i>Roman v. Sookraj</i> ..... 19

FOODSTUFFS—	Foodstuffs (Export Regulation) Ordinance, 1917—Exportation—Attempt to export—Jurisdiction—Magistrate's Courts Ordinance, 1893, s. 37 (1.) (a.)	
	Davis v. Lakpathsing.....	129
	Davis v. McCalam.....	129
"	Foodstuffs (Regulation of Price) Ordinance, 1914, and Foodstuffs (Regulation of Price) Continuation Ordinance, 1915—Fixing of sale price by proclamation—Contravention of ordinance and proclamation—Charge instituted before but prosecuted after revocation of proclamation—Saving clause in proclamation—Interpretation Ordinance, 1891, s. 28— <i>Ultra vires</i> .	
	Manning v. Mendonca .....	114
HUSBAND AND WIFE—	Marriage in community of property—Action against wife for goods sold to her—Public trader—Position of married woman—Claim to be assisted by her husband—Procedure—Practice.	
	Fernandes v. McNiel .....	112
IMMOVABLE		
PROPERTY—	Transport—Devolution of property—Death of purchaser before obtaining transport—Transport by seller to heir or personal representative of deceased—Vesting of property on death.	
	<i>In re transport Shewburun to Shubhagra</i> .....	58
"	—Transport—Marriage in community—Value of estate under \$480—Proof—Claim by surviving spouse to whole estate—Nature of claim—Vesting of property—Civil Law of British Guiana Ordinance, 1916, s. 6 (7).	
	<i>Re transport Bairaji to Raghubar</i> .....	59
"	Title to land—Transport—Diagram—Boundaries of property—Prescription.	
	Comacho v. Pimento and anr. ....	37
	See also Specific Performance.	
INFANT—	Tort—Action for damages—Guardian—Liability—Procedure—Practice.	
	Assibad v. Karmi.....	99

INJUNCTION—	See Practice.	
INSOLVENCY—	See Interpleader.	
INTERPLEADER—	Movable property—Subsequent insolvency of debtor—Official Receiver in possession of property claimed—Stay of interpleader proceedings—Insolvency Ordinance, 1900, s. 9 (2).	
	<i>W. Fogarty Ltd. v. Bhagwandass; ex parte Gomes</i> .....	42
	<i>Smith Bros. &amp; Co., Ltd. v. Bhagwandass; ex parte Gomes</i> .....	42
INTOXICATING		
LIQUORS—	Selling spirituous liquor on Sunday—Summary Conviction Offences Ordinance, 1893, s. 193—Licensed Places (Closing Hours) Ordinance, 1902, s. 3—Complaint silent as to Ordinance—Evidence—Divisibility of offences—Summary Conviction Offences (Procedure) Ordinance, 1893, s. 40.	
	<i>Widdup v. Barcellos</i> .....	65
"	Spirits exceeding one pint in quantity—Unlawful possession—Onus of proof—Spirits Ordinance, 1908, s. 93, as amended by Ordinance 15 of 1911.	
	<i>Wallbridge v. Lam</i> .....	141
"	Unlawful possession of spirits exceeding one pint in quantity—Facts constituting possession—Spirits Ordinance, 1905, s. 93—Spirits Ordinance, 1905, Amendment Ordinance 1911, s. 14.	
	<i>Essex v. Seemandray</i> .....	57
	See also Criminal Law.	
JURY—	See Criminal Law; Practice.	
LANDLORD AND		
TENANT—	Damages—Assault—Conversion.	
	<i>Baptiste v. Weeks</i> .....	1

LANDLORD AND  
TENANT contd.—

"	Premises and machinery—Option to purchase at fixed price at termination of lease—Covenant to repair—Sale of premises and machinery to third party at price fixed—Third party with notice of damage and satisfied with purchase—Damages, measure of.  <a href="#">J. E. Perot &amp; Co., Ltd. v. Carew and anr. .... 75</a>
LETTERS—	Property in letters—Sender and recipient—Recipient manager of sugar plantation—Letter relative to business carried on.  <a href="#">Lusignan Co., Ltd, v. Brassington..... 67</a>
LEVY—	See Execution.
LICENCE—	Contract—Sale of house property—Action to recover commission by house agent—Failure of house agent to take out licence—No bar to recovery of commission.  <a href="#">Hay v. Paul..... 73</a>
LIQUIDATOR—	See Company.
MAGISTRATE'S COURT—	See Practice. Criminal law.
MARRIAGE—	See husband and wife.
MASTER AND SERVANT—	Absconding labourers—Reasonable cause—Employers and Servants Ordinance, 1853, s. 13—Employers and Labourers Ordinance, 1909, ss, 1, 10.  <a href="#">Winter v. Solomon &amp; ors ..... 100</a>
"	Breach of contract—Manager of sugar plantation—Agreement for three years—Temporary illness—Wrongful dismissal—Damages—Application of English or Roman Dutch law—Civil law of British Guiana Ordinance, 1916—Director of defendant company as counsel—Etiquette of profession.  <a href="#">Fraites v. The New Success, Ltd. .... 145</a>
"	Employer's liability—Common employment—Defect in condition of scaffolding—Contributory negligence—Accidental Deaths and Workmen's Injuries Ordinance (No. 21 of 1916) s. 9.  <a href="#">Richards v. Dem. Electric Co., Ltd ..... 34</a>

## MASTER AND

SERVANT contd.—Wrongful dismissal—Action to recover wages to date of dismissal—Subsequent claim for damages for wrongful dismissal.

*Rodriques v. Paulos*..... 74

## MOTOR CAR

REGULATIONS, 1912—Light to show marks of identification plate at back of car—Car in use though not in motion—Driver of car—Evidence—Breach of peace—Insulting language.

*Johnson v. Bishop* ..... 8

See also Traffic Regulations.

## OPIUM—

See Criminal Law.

RULES OF COURT,  
1900—

Order XVII., r. 8.—Application for further and better particulars—Notice of application.

*Lewis & anr. v. Brown*..... 4

" Order XVII, r. 15.—Pleadings—What must be pleaded.

*Bhagwandin v. Sukhawath & anr*..... 23

" Order XXXV., r. 1.—Written reasons of judgment.

*Bhagwandin v. Sukhawath & anr*..... 23

" Order XL., r. 4.—Notice of application—Further and better particulars.

*Lewis & anr. v. Brown*..... 4

## PARTICULARS—

See Practice.

## PARTNERSHIP—

Liability of partners—Judgment against one partner—Action against remaining partner—Res judicata—Magistrates' Court—Representative capacity of party to suit—Common interest—Practice—Magistrates' Court Rules, 1911, r. 1.

*Hamilton v. The People's Bakery* ..... 103

" Premature commencement of business by one party—Knowledge and consent of other party—Effect on relationship between parties.

*Higgins v. Rohlehr* ..... 29

PRACTICE—	Appeal—Application for leave to appeal to the Privy Council—Notice of intended application—His Majesty's Order in Council (January, 1910), clause 4. Comacho v. Pimento and anr .....45
"	Appeal—Service of reasons of appeal—Service by registered letter—Delivery of registered letter to respondent's messenger—Interpretation Ordinance, 1891, Amendment Ordinance, 1907—Summary Conviction Offences (Procedure) Ordinance, 1893, s. 8(5). Reid v. London..... 109
"	Application for better and further particulars—Rules of Court 1900, Order XVII, r, 8—Notice of application—Order XL. r. 4. Lewis and anr. v. Brown .....4
"	Injunction—Application to discharge interim order—Undertaking by counsel as to damages—Form of undertaking—Limitation as to time for order to run. Pollydore v. Williams and ors..... 96
"	Magistrate's Court—Alteration in sentence by magistrate—Alleged malice. Shaw v. Matthews ..... 139
"	Magistrate's Court—Representative capacity of party to suit—Common interest—Practice—Magistrates' Court Rules, 1911, r. 1. Hamilton v. The People's Bakery ..... 103
"	Magistrate's Court—Two claims arising out of one cause of action—Splitting of cause of action—Petty Debt Recovery Ordinance, 1893, s. 4—Practice—Amendment. Ferreira v. De Freitas..... 80
"	Selling spirituous liquor on Sunday—Complaint silent as to Ordinance—Evidence—Divisibility of offences—Summary Conviction Offences (Procedure) Ordinance, 1893, s. 40. Widdup v. Barcellos..... 65

"	Trial by special jury—Principles to be considered—Trial at bar—Indictable Offences (Procedure) Ordinance, 1893, Amendment Ordinance, 1918, s.42.  <a href="#">Rex v. Sroodin &amp; ors. .... 132</a>
"	Written reasons of judgment—Rules of Court, 1900, Order XXXV. r. 1—Evidence—Matters not raised in pleadings—Order XVII. r. 15.  <a href="#">Bhagwandin v. Sukhawath &amp; anr..... 23</a>
PROCEDURE—	See Practice.
PROCLAMATION—	Foodstuffs (Regulation of Price) Ordinance, 1914—Fixing of sale price by proclamation—Contravention of ordinance and proclamation—Saving clause in proclamation—Interpretation Ordinance 1891, s. 28.  <a href="#">Manning v. Mendonca ..... 114</a>
REVENUE—	Excess Profits tax—Assessment for duty—Appeal—Right of Board of Assessment to appeal—‘Capital’ and ‘Assets’—Increase of capital—Profits.  <a href="#">Board of Assessment v. Brodie &amp; Rainer, Ltd. .... 135</a>
"	Excess Profits tax—Assessment for duty—Meaning of ‘capital’ and ‘profits’—Deductions allowed—Tax Ordinance, 1918 (No. 24 of 1917) s. 64 (1.)—Tax on Excess Profits Ordinance, 1918, s. 2.  <a href="#">Rahoman v. Board of Assessment..... 106</a>
SALE OF GOODS—	Title of seller—Purchase at public auction in good faith without notice of defect in seller’s title—Claim by owner in detinue—Sale of Goods Ordinance, 1913, ss. 24, 25.  <a href="#">Barrow v. Moore ..... 94</a>
SHOP—	See Criminal Law.

SPECIFIC

PERFORMANCE—Auction sale—Contract of purchase and sale—  
 Suit for delivery—Roman-Dutch law—  
 Voluntary and judicial sales—Relation of bid-  
 der and auctioneer.

*Wight v. Demerara Turf Club, Ltd. (in liq.)*.....49

" Contract of sale of immovable property—  
 Conditions—Obligation and rights of parties.

*Ramgolam v. Williams*.....26

SPIRITS— See Intoxicating Liquors.

SUCCESSION— Marriage in community—Value of estate under  
 \$480—Claim of surviving spouse to whole es-  
 tate—Vesting of property—Civil Law of Brit-  
 ish Guiana Ordinance, 1916, s. 6 (7).

*Re Transport Bairaji to Raghubar*.....59

SUMMARY CONVIC

TION OFFENCE—See Criminal Law.

TAX— See Revenue.

TRAFFIC

REGULATIONS—Motor cars on steamer stelling—Wilfully imped-  
 ing officer regulating traffic on stelling—  
 Colonial and Contract Steamer Traffic Ordi-  
 nance, 1914—By-laws for the regulation of  
 traffic by and in connection with Colonial  
 Steamers, 1914, s. 14—Motor Car Ordinance,  
 1912—Offence 'in connection with the driving  
 of a motor car'—Endorsement of certificate.

*Jones v. Forte* .....62

TRANSPORT— See Immovable Property.

TRUST, BREACH OF— See Criminal Law.

TRIAL AT BAR— See Criminal Law; Practice,

UNLAWFUL

POSSESSION— See Criminal Law.

USUFRUCT— See Will.

WILL— Bequest of property to heirs with restraint  
 against alienation save to one of the heirs—  
 Sale with consent of all the heirs—Judgment  
 obtained against one heir—Levy on his inter-  
 est under the will—Opposition—Injunction.

*Patoir v. Perot & Co., Ltd.*.....142

WILL contd.—

"

Marriage in community of property—Usufruct—  
Security by usufructuary—Inability to find  
sureties—Receiver of common property with  
power to realize—Power of Court over fund  
and its payment out.

[De Souza and anr. v. Soares.....77](#)

WINDING UP—

See Company.

# CASES

DETERMINED BY THE

## SUPREME COURT OF BRITISH GUIANA.

BAPTISTE v. WEEKS.

[362 of 1917.]

BAPTISTE v. WEEKS.

[362A. of 1917.]

1918. JANUARY 25; FEBRUARY 1, BEFORE HILL, J.

*Appeal—Damages—Assault—Conversion—Landlord and tenant.*

Two appeals taken together from decisions of the acting stipendiary magistrate of the Georgetown judicial district (Mr. B. S. Newsam), who gave judgment for the plaintiff, on a claim for conversion, in the sum of \$60, and on a claim for damages for assault, in the sum of \$10 and costs.

The defendant Weeks appealed. The reasons for appeal sufficiently appear from the judgment.

*P. N. Browne, K.C.*, for the appellant.

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

HILL, J.: This is an appeal from two decisions of a magistrate in cases argued together before him by consent—one for conversion in which \$100 damages were claimed and \$60 awarded, and the other for \$24 damages for assault in which \$10 were awarded.

The reasons of appeal are:

1. The decision is erroneous in point of law.
  - (a.) Because the plaintiff by accepting receipt from the defendant for the rent of a room in the name of Jeffrey the person who engaged the room from the defendant, the plaintiff was thereby estopped from asserting that he was the defendant's tenant and not Jeffrey.
  - (b.) Because the magistrate having found that the quantity of wood which the plaintiff had stacked on the defendant's property would do damage thereto, the defendant after having given due warning and after having requested

## BAPTISTE v. WEEKS.

the plaintiff to remove the same was legally justified in removing same from off his premises.

- (c.) Because even if 5,100 pieces of wood, the property of the plaintiff, were illegally converted as disclosed by that part of the evidence which the magistrate believed such evidence does not establish conversion for which defendant is liable in law.
- (d.) Because the onus lay on the plaintiff to prove the quantity of wood he had on the premises on the 20th day of June, 1917, and on the evidence he failed to discharge this onus. The book tendered with entries of wood alleged to have been delivered by the plaintiff was in his own handwriting and self-serving—these entries were freshly and all apparently written at the same time and there was no independent evidence in support of the plaintiff's testimony.
- (e.) As regards the claim for assault the magistrate was wrong in awarding plaintiff damages because the evidence shows that if any assault was committed it was in self-defence and no more force was used than was necessary to make the plaintiff, who first held the defendant, release the defendant.

2. The decision is altogether unwarranted by the evidence in like manner as if the case had been tried by a jury there would not have been sufficient evidence to sustain the decision for the several reasons set out at reason 1.

Reason 1 (a.) The magistrate found that the plaintiff was a tenant of the defendant—and I think he was amply justified in so finding. It is perfectly true that the receipts were in the name of Jeffrey, plaintiff's brother-in-law, and the notice of intention to leave was signed by Jeffrey, but on perusal of the whole evidence on this point there can only be one conclusion and that is that the plaintiff was the real tenant, and so known to the defendant. It is difficult to believe otherwise in view of the statement, *inter alia*, by defendant himself that he told plaintiff whilst the rent was in Jeffrey's name he had been living there and had stacked his wood there, and that he must pay him the rent due, \$3, and also told him he would take away sufficient wood in the carts to satisfy the \$3 due.

Reasons 1 (b.) and (c.) may be taken together.

From the evidence which the magistrate believed, it would appear that the defendant, the landlord of a woman named Mrs. Christie, who occupied the house and land adjoining the place where plaintiff lived—went to her house and from under the house, and from the land occupied by her, removed wood which

## BAPTISTE v. WEEKS.

belonged to plaintiff, and had been stacked there with the knowledge and consent of Mrs. Christie. And he invited the public to help themselves to the wood stating it was his wood. This fact in itself is proof of a conversion by him; an asportation of a chattel for the use of the defendant, or a third person amounts to a conversion, because it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. The intent of the defendant has shown in the taking by him of four carts to clear the wood out, and I have no doubt that the so called injury to his property was not the real motive of his act in wrongfully dealing with the plaintiff's property as he did, but his annoyance at a prospective loss of rent was the cause—a wrongful act on his part as said by the magistrate.

Even where a defendant enters under authority of law a plaintiff may show he has abused such authority and so become a trespasser *ab initio* and this is said to be founded on a presumed intention, *ab initio*, to abuse the authority given by the law, and not by the act of the party. A lessor who enters to new waste and does damage is a trespasser *ab initio*.

Mrs. Christie had given permission to plaintiff to store his wood on her premises. She had not withdrawn that authority and whatever rights defendant may have had as landlord,—and the law of the colony is now, as regards landlord and tenant, no longer Roman-Dutch law—he exceeded those rights when he acted as he did and the magistrate was justified in finding as he did.

Reason 1 (d) The magistrate believed the evidence of the plaintiff as to the extent of his loss and the damage suffered by him. In the absence of rebuttal on the part of defendant he was justified in accepting the plaintiff's account as he did.

Reason 1 (e) The magistrate by fining the defendant evidently disbelieved his version that he acted in self-defence when he assaulted the plaintiff. I quite agree with the finding.

The appeal is dismissed and the decision of the magistrate affirmed with costs to the respondent.

## BENN v. DAVIS.

## BENN v. DAVIS

[45 of 1918.]

1918. FEBRUARY 19. BEFORE HILL, J.

*Criminal law—Unlawful possession—Requisites to throw onus on accused—Evidence of statements explanatory by accused in answer to questions by constable—Accused found guilty of larceny on charge of unlawful possession—Summary Conviction Offences (Procedure) Ordinance, 1893, Amendment Ordinance, 1915, s. 2.*

Appeal from a decision of Mr. W. J. Gilchrist (Stipendiary Magistrate, Georgetown judicial district) who convicted the appellant Davis of the larceny of five bags. The accused was charged, in connection with one Davis, with the unlawful possession of the bags in question.

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

*J. A. Veerasawmy*, for the appellant.

*G. J. deFreitas, K.C., Actg. S.G.*, for the respondent.

HILL, J.: The appellant, together with a man named Worrall, was charged before a stipendiary magistrate for having in their possession on the 24th January five bags reasonably suspected of having been stolen. On such a charge the magistrate has to be satisfied that (a) the accused had possession, (b) there was reasonable suspicion that the goods were stolen, and on these two requirements being satisfied the onus is thrown on the accused to account for his possession.

The magistrate in this case dismissed the case against Worrall and convicted the appellant of larceny of the bags on the 23rd January, 1918, by virtue of Ordinance 13 of 1915 which enacts “where unlawful possession “under section 96 of the Summary Conviction Offences Ordinance, 1893, “is charged, and the evidence establishes the commission of the offence of “larceny of any kind, or of receiving stolen property, the defendant shall “not be entitled to have the case dismissed, but may be convicted of such “larceny or of receiving stolen property and punished accordingly.”

The reasons of appeal are (1) that the decision is erroneous in point of law;

- (a) There was no evidence that the defendant John Davis, who was charged under sub-section 1 of section 96 of Ordinance 17 of 1893, as amended by Ordinance 12 of 1915, was on the date alleged in the said charge, in possession of the goods therein mentioned.

## BENN v. DAVIS.

- (b) At the trial it was not shown that there was reasonable suspicion that the goods mentioned in the charge were unlawfully obtained or stolen
- (c) The person in whose possession the goods alleged in the said charge were found, was not charged before the Court as having the said goods in his possession.
- (d) The evidence adduced at the trial herein disclosed that on the 24th January, 1918, the date mentioned in the aforesaid charge, the possession of the goods was in Jose Gomes, dealer in bags, of the Stabroek Market, Georgetown.
- (e) The procedure adopted in the matter herein of charging the defendant John Davis jointly with the defendant James Worrall, without having brought before the Court the person in whose possession the goods mentioned in the said charge were found, and without examining witnesses on oath touching the same was *ultra vires*.
- (f) The learned magistrate was under the circumstances of the case not entitled to convict the defendant John Davis of the commission of the offence either of unlawful possession or of larceny of the goods described in the said charge.
- (g) The learned magistrate erred in arriving at his decision by acting on the evidence of the defendant James Worrall that he got the bags from the defendant John Davis, as there was no evidence that the defendant John Davis was present at the making of such statements, made before Worrall was taken by Corporal McCammon to Davis, and asked by McCammon if he, Davis, gave Worrall any bags to take to the market.
- (h) There was no evidence of larceny disclosed at the trial against the defendant John Davis.

(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.

Reason 1 (a).—

The evidence showed that on January 23rd Davis came to Gomes's stand in the market and told Rodrigues, a clerk to Gomes, that he had some bags to sell. Rodrigues said to bring them; he replied he would send them. He left, and a few minutes after a coolie man came with some bags. Worrall was with him. Worrall said that the watchman at the Steamer Stelling (Davis) had sent him; (this evidence was admitted as against Worrall only although I see no reason why it should not be admissible against Davis also in view of the evidence given later). Rodrigues told him to put the bags down, and the coolie and Worrall then

## BENN v. DAVIS.

left. Davis did not tell him to pay the man. Shortly after Worrall returned and asked Rodrigues if he was going to send the money for the bags. He told Worrall Gomes was not there. After 4 p.m. Worrall returned and asked for Gomes who told Worrall to return the following morning. The next morning both Worrall and Davis came. Davis asked for Gomes. Rodrigues told him Gomes was on the wharf. Davis told Worrall to go on wharf and look for Gomes. Worrall left and Davis said he could not remain, he had no time but he (Rodrigues) must tell Gomes to give Worrall the money for him. Worrall came back from wharf, said he could not wait for Gomes, would return. Davis did not return. About 9 a.m. Worrall, returned and saw Mr. Gomes who told him to return as he did not have keys. Worrall and Gomes left. Both returned about some time from different directions. Gomes asked to examine the bags. Corporal Benn and another detective came up, asked Worrall where he got the bags from, Worrall said watchman from Stelling gave them to him and told him to get the money for them. Corporal Benn's evidence is that on January 24th, 1918, he went to the market, saw some bags at Gomes' stand; also saw Worrall; Gomes said he was buying these bags from Worrall. Worrall said he got them from Bolton (Davis). These are the bags in Court. Cross-examined by Mr. Veerasawmy for Davis, Benn stated he asked Gomes if he was buying the bags, he had previously received information from Gomes, and went there in consequence of what Gomes said. Gomes said he suspected the bags were stolen as he saw the label on them.

Corporal McCammon swore that on January 24th he went to market, saw Mr. Gomes, Worrall; and some bags. He went with Worrall to Government Steamer Stelling, he went to Davis, he asked Davis if he gave Worrall any bags to take to the market, he Davis, said that he saw Worrall with some bags; that he Worrall had brought some bags on 23rd and asked him to keep them and took them away at 1 p.m., Worrall said to Davis you gave me the bags to take to Mr. Gomes in the market.

Gomes' evidence which it is unnecessary to set out herein shows he was suspicious both of Worrall and Davis and communicated with the police, hence the presence of Corporals Benn and McCammon.

On this evidence, I agree with the learned magistrate that Gomes was in possession of the bags as the agent of Davis. I entirely dissent from the submission of counsel for the appellant that the police were bound to put Gomes before the magistrate on a charge of unlawful possession, to suffer the indignity of such a proceeding, when he was doing all he could in the interest of justice.

And further, on a charge of unlawful possession of goods on one date on which the evidence discloses a possession at an

## BENN v. DAVIS.

anterior date, I see no reason why under section 96 (2) a conviction should not lie, provided the magistrate has at the close of the case of the prosecution announced his opinion and let the accused know what case they then have to meet (*Nelson v. Campbell and anor.* (1915 L.R.B.G. 22).

Reason 1 (b).

There was reasonable suspicion, as shown at the trial, that the goods were stolen—*vide* the evidence of Gomes, Benn and McCammon—suspicion can arise at the time of trial but it should appear on the evidence, and this appears to have been so in the case under review.

Reasons 1, (c) (d) and (e).

These three are of no avail in view of the opinion expressed by me that the possession of Gomes was that of Davis under the circumstances.

But there are irregularities which amount to illegalities in some respects which entitle the appellant to a reversal of the decision convicting him of larceny, and I shall deal with reasons 1 (f), (g) and (h) together as one bears on the other. Firstly, I cannot find that the property in the bags in the inhabitants of the colony has been proved,—an essential to a conviction for larceny is that some specific individual or individuals have been deprived of the particular property specified in the charge. All the clerk at the steamer stelling says is that the bags in court were similar to those of the inhabitants of the colony. Now, according to Gomes Davis had previously sold him bags on several occasions. I cannot find on the evidence that bags were previously missed from the stelling—and on the evidence of Ashford the clerk, taken with that of Gomes, relative to the bags I am unable to say that the ownership of the bags was shown to be in the inhabitants of the colony.

Secondly, I cannot agree with the magistrate that the police had any right to ask Davis whether he had given the bags to Worrall to take to the market. I have no desire to hamper the police in the execution of their duties, but merely desire to require them to perform their duties in accordance with what is equitable and proper. I differentiate entirely as to the proper method of enquiry to be pursued by the police, where a person has been found committing an offence, or in possession of stolen goods, and where a person is in possession of an article which a policeman suspects is stolen or unlawfully obtained. In the former cases a policeman has greater latitude than in the latter. And this must always be borne in mind in considering evidence tendered in the magistrate's court. In *Lewis v. Harris* 110 Law Times R. 337, referred to by the magistrate, a policeman met a girl leaving

a shop with goods on a Sunday, which pointed to a breach of the Sunday Observance Act. He asked who had served her. She said "Miss Harris." He took the girl to the shop and asked Miss Harris if she had served the child and she replied "Yes." Now here there was an offence which had been committed, but in a charge for unlawful possession no offence is committed, there is a suspicion, which has to be shown to be reasonable, that an offence has been committed and it is to the magistrate that a "satisfactory account" has to be given.

But *Lewis v. Harris* laid down certain propositions which, if applied to the case under review, would have, in my opinion, shown the direct questions asked of Worrall and Davis by Benn and McCammon to have been improper. For it was there held "that a statement made by a person to a constable in answer to an inquiry by the constable is admissible in evidence on subsequent criminal proceedings against such person although no caution was given by the constable *provided* that the person was not at the time in custody on the charge, that the constable on making the enquiry had not formed the intention of instituting proceedings whatever the answer might be, and that no inducement was held out or threat made to induce the person to make the statement."

In the course of the judgment of Darling, J., (p. 339) he said "the constable admitted that he questioned the respondent with the intention of taking proceedings against her if her answer was in the affirmative. It follows from that that he questioned her with the intention of not taking proceedings against her unless her answer was in the affirmative," and at p. 340 a constable ought not, if he has made up his mind that whatever the answer may be he will arrest the person to whom he is speaking, to ask that person an incriminating question." Now I hardly think in the present case Corporals Benn or McCammon would swear they had not formed the intention of instituting proceedings against Worrall and Davis, whatever their answers might have been to the constables' questions.

This case of *Lewis v. Harris* is referred to in *Adams v. Chedda* (1916) L.R., B.G., 28, as a valuable guide to the police in carrying out their duties and no doubt is so, but the head note to *Adams v. Chedda* runs as follows:—

"This principle (as laid down in *Lewis v. Harris*) is to be observed at the trial of persons charged with the possession of goods suspected to have been stolen under the provisions of the Summary Conviction Offences Ordinance, 1893, section 96, But as the ordinance contemplates that these persons should explain their possession, 'to the satisfaction of the court' *i.e.*,

## BENN v. DAVIS.

“when before the court, and not in answer to enquiries by constables in advance of the trial, police officers, having in view possible proceedings under the ordinance against the persons interrogated, should abstain from making these enquiries, and magistrates should attach little weight to evidence so obtained.”

The remarks of the Court of Appeal in *Ramkhelawan v. Barrow*, (1915) L.R., B.G., 163, and *Baldeo v. Pollard* (1915) L.R., B.G., 171, are instructive as to the duties of the police especially in regard to cases of “unlawful possession,” and those of Berkeley, J., in *Williams v. Sancho*, (1917) L.R., B.G., 137, in which he says “No constable in my opinion is warranted, as too often he seems disposed to do, in taking upon himself the function of the court of calling on a suspected person to account for his possession.”

For these reasons I think the policemen erred in asking the man Worrall where he had got the bags from, and in asking Davis, if he had given the bags to take to the market. The proper method would have been, (in view of the decisions of the courts in cases of “unlawful possession,” where it must be remembered the burden of proof is entirely different to the ordinary cases) for Corporal Benn to have said to Worrall “I suspect you of being in possession of bags which have been stolen, and I intend to charge you,” and then to have cautioned him. If he chose to say anything, such statement would be perfectly admissible against him. As a fact he replied (*vide* Rodrigues’ evidence) that he had got the bags from the watchman, in answer to Benn’s question where he had got the bags from. On this, he (Worrall) was taken to Davis and Corporal McCammon asked Davis if he had given the bags to take to the market. Here again I think the policeman erred. He should have said “This man (Worrall) has stated you gave him three bags to take to the market, I suspect you in consequence, and intend to charge you before the magistrate of unlawful possession,” and then cautioned him. Here again any statement then made by Davis would be perfectly admissible. Any other procedure rendered the evidence open to objection, and of little weight.

Magistrates should bear in mind that decisions of the Appeal Court are directions on which they must act in administering justice.

Again I think the procedure adopted in the court below savoured of illegality. These men were charged—and properly joined in my opinion—with “unlawful possession,” in which case, as is well known, the burden of proof of accounting to the court is on the accused—not so in cases of larceny. It therefore seems to me imperatively necessary that if a magistrate considers the essential ingredients con-

stituting larceny have been proved by the prosecution he should, before calling on the person accused of “unlawful possession,” to so say, and leave it to the accused to give evidence or not as he chooses, or to act in such way as he may think best in his interest, This was not done, as appears by the record, and the reasons for decision—but the accused Davis was called upon, *i.e.* required to account on the charge of unlawful possession, and after he had done this, he was convicted of larceny under the provision of a law, recently passed, which I think I am correct in saying has no counterpart in the Criminal law of any other part of the Empire. By that law, on a charge of “unlawful possession” if the evidence discloses larceny, there may be a conviction for larceny, but this cannot mean that the conviction can be obtained except on such evidence, and on such rules of evidence, as are necessary to bring home to an offender a case of larceny. It is not possible to utilise the extraordinary procedure in connection with “unlawful possession” cases to convict an accused person on a different charge.

In *Charles v. Wong* (1916) L.R.B.G. 156 which was a charge of unlawful possession and a conviction on that charge for larceny Major, C.J., is reported as follows: “It is always advisable, for I think it obviously fairer to “a person charged, that, when as well the fact that a theft has been committed as the owner of the property stolen are known to the prosecutor, a “charge of larceny or of receiving should be preferred and not that of “unlawful possession. The ever recurring resort by the police to the latter “charge in circumstances which straightly point to the former seems to me “to savour of oppression. But the provisions of the law are plain . . . .”

The Ordinance (13 of 1915) was the result of the decision in *Martin v. Calder* (1914) L.R.B.G. 13 and *Figueira v. Franklin* 25.4.13, and the above views of Major, C.J., are in accordance with the latter portion of those of the late Sir Crossley Rayner, C.J., who in *Martin v. Calder* is thus reported, (p. 16). “The enactment of section 96 in the Summary Conviction “Offences Ordinance, 1893, gives the police of this colony a power which “is not possessed by the police in England generally. It is a very useful “power, but it must be used in the way and for the purposes for which the “legislature intended it. In my opinion the real use of the section is to enable the police to detain a person found in suspicious circumstances in the “possession of property, until enquiries can be made. Without some such “power he could not be detained, and by the time enquiries had been made, “he would have disappeared. In cases where the suspected person is not “found in possession of the stolen property he must be charged under the “ordinary law with stealing or receiving, and

## BENN v. DAVIS.

“if the evidence is not strong enough to prove the charge, he must be acquitted. But it was never the intention of the legislature in enacting section 96 to enable persons to be convicted of what is substantially stealing or receiving, upon evidence which would not support a formal charge of stealing or receiving. In other words it was not the intention of the legislature to provide a means of convicting persons on evidence too weak to sustain a charge under the ordinary law”

Those concluding words still hold good, and Ordinance 13 of 1915 has not advanced the position one iota in so far as the evidence necessary to sustain a conviction of larceny on a charge of unlawful possession and the procedure to be followed in such circumstances is concerned. For the reasons given, I do not think the conviction can be sustained, and the decision is reversed, with costs to the appellant.

## WINTER v. SOLOMON AND ORS.

[209 OF 1918.]

1918. AUGUST 12, 23. BEFORE DALTON, Acting J.

*Master and servant—Absconding labourers—Reasonable cause—Employers and Servants Ordinance, 1853, s. 13—Employers and Labourers Ordinance, 1909—ss, 1, 10.*

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist). The plaintiff Winter (now appellant) charged the four defendants with refusing to fulfil the terms of a contract of service entered into by them, contrary to the provisions of Ordinance 26 of 1909 as amended by Ordinance 10 of 1914. The magistrate discharged the defendants, finding that they were being taken to Brazil and that they were justified in refusing to leave Rockstone to proceed up the Essequibo river. The plaintiff appealed.

*J. S. McArthur*, for the appellant.

*E. M. Duke* and *G. T. Ramdeholl*, for the respondents.

DALTON, Acting J.: The appellant has charged the four respondents with unlawfully refusing to fulfil the terms of a certain contract of service entered into by them, contrary to the provisions of Ordinance 26 of 1909, as amended by Ordinance 10 of 1914. Appellant is the registering officer; and respondents labourers and boat hands contracted for service “on the Essequibo river and its tributaries in this colony.” The magistrate dismissed the charge against all four defendants, finding as a fact that they were told whilst at Rockstone on the way to perform their contract, that they were proceeding to Brazil to work for one Boyd and not to work under the contract entered into between them and the appellant. They thereupon turned back, having refused to proceed further, in which refusal the magistrate found they were justified.

## WINTER v. SOLOMON &amp; ORS.

Plaintiff now appeals to this court, his reasons of appeal being as follows:—

1. The decision is erroneous in point of law:—
  - (a) The evidence in the magistrate's court proved and the defendants admitted that they were registered to work in Essequibo in British Guiana and there was no reasonable excuse given by the defendants for not carrying out their contracts.
  - (b) The ordinance under which the charge was brought does not admit of any defence of reasonable excuse being set up.
  - (c) That on the evidence given for the defence the defendants should have been convicted.
2. The decision is altogether unwarranted by the evidence in like manner as if the case had been tried by jury there would not have been sufficient evidence to sustain the verdict, inasmuch as,—
  - (a) The evidence did not disclose a reasonable excuse if the same was a ground of defence.

At the hearing counsel for respondents took four objections, He first of all argued that the appeal was not in order, there being four separate complaints and four separate cases, the magistrate only receiving one copy of reasons of appeal It appears from the record that the four cases were tried together by consent, that the reasons of appeal served on the magistrate relate to all these four cases, therefore there is no ground of objection. He then urged that under the provisions of section 16 (1) Ordinance 13 of 1893 a recognizance must be entered into, whereas here money had been lodged by the appellant. In any case such an objection is nothing but a highly technical one with which I have little sympathy. I am satisfied however, that under the section quoted, as amended by Ordinance 16 of 1917, appellant has the right to do what he has done here, namely, to lodge with the magistrate the amount of the costs of the appeal. Counsel further argued that reasons of appeal had not been served on the respondents within the fourteen days allowed by law. The onus of proving service lies on the appellant and in the absence of any rebutting evidence (*see Franklin v. John*, December 29th, 1911), his affidavit filed here is conclusive and the service was in order. Lastly Mr. Duke argues that reason No. 2 cannot be argued by the appellant, the defendants having been discharged by the magistrate. This reason as allowed by the ordinance properly refers to findings of fact, and it is to meet cases where there is not sufficient evidence to support such findings, As drawn here, and I think erroneously drawn, it appears to relate to both law and fact, repeating

in effect in its last paragraph reason No. 1 that the decision is erroneous in point of law. So far therefore as it purports to refer to error in law, it is dealt with under reason No. 1. So far as it purports to deal with findings of fact alone it is not admissible. As previously held on several occasions, where there has been a dismissal, this reason is applicable neither to civil nor criminal proceedings. (*Rodrigues v. Paton*, 1898 Review cases, 52; *Karmally v. Gaskin*, A. J. April 16th 1912.) This last objection must therefore be upheld,

The principal ground of appeal is 1 (b) that under the provisions of Ordinance 26 of 1909, no defence of reasonable excuse can be set up. The principal ordinance regulating the relations of employer and servant is No. 1 of 1853. Section 3 of that ordinance enacts that if any servant “absents himself from his service or refuses to fulfil the same before the term of his contract has been completed, . . . . *except for some reasonable cause as hereinafter provided* . . .” he shall be liable to conviction and imprisonment. Section 13 of the same ordinance is as follow:

“On any complaint made by any employer against any servant for refusing or wilfully neglecting to perform his contract, such servant shall be at liberty to show by evidence, in answer to such complaint, that he terminated his service or contract in consequence of ill usage, or for some other good and sufficient cause to be judged of by the justice or justices.”

Ordinance 26 of 1909 amends the previous ordinance of 1853, with regard to absconding labourers. The first section of the later ordinance enacts that if any labourer “absents himself from such service or refuses to fulfil the terms of the same before its completion or before the same has been lawfully terminated” he shall be liable to conviction and punishment. Appellant’s counsel lays great stress on the fact that whereas section 3 of the earlier ordinance especially uses the words “except for some reasonable cause,” those words are omitted from section 1 of the later ordinance. Being omitted, he says no reasonable cause can be set up, but the labourer must be compelled to complete his contract under section 3 of the amending ordinance. Section 10 of the later ordinance however must not be overlooked. It provides that “nothing contained in the Employers and Servants Ordinance 1853 shall affect the operation of this ordinance and this ordinance and the Employers and Servants ordinance 1853, so far as the same “are not inconsistent, shall be read and construed together as one ordinance.”

I cannot see that the provisions of section 13 of the earlier ordinance are inconsistent with the provisions of the

## WINTER v. SOLOMON &amp; ORS.

later ordinance, and with this Mr. McArthur says he agrees. Then it seems to me the labourer, when proceeded against under ordinance 26 of 1909, is entitled to the right given him in section 13, he can give evidence of some good and sufficient cause to be judged of by the magistrate. I do not attribute much importance to the presence of the words “except for some reasonable cause” in section 3. Even if they were not there, the section is still governed by practically similar words in section 13. I must hold that the ordinance under which respondents were proceeded against allows of the defence of good and sufficient cause being set up.

The question now remains, was the reason given by the respondents for not proceeding with their contract a reasonable one? I agree with the magistrate that it was a most reasonable one. I would go further and say that on the finding of the magistrate, if there was any contract at all, the breach was on the part of the employer. The evidence that the labourers were being taken to Brazil, if the magistrate believed it as he did, in any case is ample to justify their conduct, and the appeal must be dismissed with costs.

*Appeal dismissed.*

## HAMILTON v. THE PEOPLE'S BAKERY.

[125 OF 1918.]

1918. AUGUST 17, 30. BEFORE HILL, Acting C.J.

*Partnership—Liability of partners—Judgment against one partner—Action against remaining partner—Res judicata—Magistrate's Court—Representative capacity of party to suit—Common interest—practice—Magistrates' Court Rules, 1911, r. 1.*

Appeal from a decision of the stipendiary magistrate of the West Coast judicial district (Mr. H. K. M. Sisnett).

The plaintiff Hamilton, as treasurer of the Rattray Memorial Congregational Church, claimed from N. Lamizon and others, trading as the People's Bakery, the sum of \$40.20 for goods sold in September, 1916. Judgment was given for the plaintiff in the sum claimed. The defendants Lamizon and Palmer appealed, their reasons of appeal being fully set out in the judgment below.

*E. G. Woolford*, for the appellants.

*J. S. McArthur*, for the respondent.

HILL, Actg C.J.: This is an appeal from the decision of a magistrate in which he gave judgment for the plaintiff (respondent) who sued in his capacity as the treasurer of Rattray Memorial

## HAMILTON v. THE PEOPLE'S BAKERY.

Congregational Church. The appellants, together with Perry and Thomas, were sued jointly and severally as trading in co-partnership under the name, style and firm of the People's Bakery.

The defendants Lamizon and Palmer pleaded *res judicata*, while the defendants Perry and Thomas admitted indebtedness, and it appears that the defendant Perry had been previously sued on the same cause of action and for the same amount, and judgment obtained against him, which had not been satisfied.

The reasons of appeal are:—

- (1) That the decision is erroneous in point of law because
  - (a) It was not competent for the said Edward Hamilton to maintain the said action against the defendants in the manner and form adopted or at all.
  - (b) The said Edward Hamilton was not legally authorised to maintain the said action against the defendants or at all.
  - (c) It was not competent in law for the said Rattray Memorial Congregational Church either to maintain the said proceedings against the defendants or authorise Edward Hamilton to do so.
  - (d) The subject matter of the said action was *res judicata*.

*Reason A.*—The defendants were sued jointly and severally (section 11, Ordinance 20 of 1900) and rule 5 of Magistrates' Court Rules. This reason is therefore of no avail.

*Reason B.*—I am of opinion that the representative capacity of the plaintiff should have been denied when the defendants were called on to plead. Rule 1 of the Magistrates' Court Rules of 1911 is as follows:—"If any plaintiff sues or defendant is sued in any representative capacity it shall be expressed on the statement of claim or plaint. The representative capacity of the plaintiff or defendant mentioned in the statement of claim shall not in any case be in issue unless the same be expressly denied," and this express denial should have been made when the defendants were called upon to plead to the plaint. Section 21 (1), Ordinance 11 of 1893, requires the magistrate to read out the plaint to the defendant and requires him to make his answer or defence thereto, and thereafter hear and determine the cause, without further pleading or formal joinder of issue. The denial of the representative capacity of the plaintiff could not be raised in the addresses to the Court by Messrs. Palmer and Lamizon in their defence. I am therefore of opinion that this ground of appeal is bad. But even if I were to Hold otherwise I think the plaintiff has shown that he was acting in the "common interest" of members of the church. He was authorised to so act by certain individuals, deacons of the church (*vide* exhibit 'B' George's evidence, and

## HAMILTON v. THE PEOPLE'S BAKERY.

the plaintiff's evidence in cross-examination), and the authorities cited appear to me to be conclusive on the point (*Duke of Bedford v. Ellis* (1901) (H. L., A. C. 8.) It is incorrect to say that the defendants could be subjected to actions at the hands of other parties interested, for after judgment obtained a representative plaintiff's power as *dominus litis* ceases, he cannot deprive others in the same interest of the benefit of the judgment if they deem fit to prosecute it, for after judgment no further action can be brought by the others (*Handford v. Storie* 2 Simons & Stuart, 196; *Re Alpha Coy.* 1903, 1 Ch., 203, *Re Calgary Coy.* 1908, 2 Ch. A.C. 652.)

*Reason C.*—The materials for the stable were the property of' the people of Rattray Memorial Church and not the property of the B. G. Congregational Union. The stable was not there when Ordinance 7 of 1901 was passed, and the Congregational Union does not appear to have in any way objected to the sale, thus tacitly acquiescing in the right of the deacons to dispose of the stable. Lamizon, one of the appellants, was a deacon and Secretary at the time of sale to himself and the other defendants trading in co-partnership as the People's Bakery. He approved of it, and availed himself of it. It comes with bad grace from him to now question his own act and his evidence exposes his *mala fides* in this matter.

*Reason D.*—I have no doubt the plea of *res judicata* cannot avail; the parties forming the co-partnership were jointly and severally liable, were so sued, and the fact that judgment has been obtained against one of them in a previous suit, which is unsatisfied, is no bar to actions against the remaining parties. That is the law of the colony, and in England where, ordinarily, the liabilities of partners is joint, one or more of several partners who are jointly and severally liable may be sued without making them all liable (*Plumer v. Gregory* 1874 L.R. 18 Eq. 621) notwithstanding an unsatisfied judgment against one of them for the same debt (*Blyth v. Fladgate*; *Morgan v. Blyth*; *Smith v. Blyth* 1891, 1 Ch. 337-353.)

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

*Appeal dismissed.*

## RAHOMAN v. BOARD OF ASSESSMENT.

## RAHOMAN v. BOARD OF ASSESSMENT.

1918. AUGUST 30. BEFORE HILL, ACTING C.J.

*Excess Profits tax—Assessment for duty—Meaning of ‘capital’ and ‘profits’—Deductions allowed—Tax Ordinance, 1918 (No. 24 of 1917), s. 64(1)—Tax on Excess Profits Ordinance, 1918, s. 2.*

Appeal from a decision of the Board of Assessment, under the provisions of s. 17 (2) of Ordinance 2 of 1918. The decision of the Board of Assessment had been confirmed by the Committee of Appeal, and appellant thereupon appealed further to the court.

*J. S. McArthur*, for the appellant.

*A. G. King*, acting Crown Solicitor, for the Board.

HILL, Actg. C.J.: This is an appeal under section 17 (2) of the Tax on Excess Profits Ordinance, 1918 and the question for consideration is whether the assessment of the Board of Assessment, confirmed by the Committee of Appeal, was correct in the circumstances.

The Board in arriving at the amount due on which the taxes on excess profits was payable deducted from the amounts appearing under the heading “items of capital,” items appearing under the headings of “bad debts due to the business,” “liabilities to creditors,” “banks,” and “Hamburg”: the appellant submits that this should not have been done, and that the capital employed in earning profits must be construed to mean the gross amount of capital at the commencement of the accounting period on which the statutory percentage of ten per cent., should be allowed.

By section 64 (1) of the Tax Ordinance, No. 24 of 1917, the Combined Court levied a tax of ten per cent., on all profits earned in the colony in excess of the ten per cent., on the capital employed in earning such profits, and by 64 (2) the estimate of the amount of the profits earned in the colony and of the amount of the capital employed in earning such profits shall be made in such manner and subject to such conditions as may be enacted by any ordinance, passed by the Governor with the advice and consent of the Court of Policy, and the said tax shall be levied, collected, and paid in such manner and subject to such conditions as may be prescribed by the said ordinance.

Thereupon Ordinance 2 of 1918 was passed, and by section 2 “capital” and “profits” mean capital and profits as set out in the first schedule, and under “capital” *inter alia*, the value of the stock-in-trade is taken as the landed cost or local market price, whichever is the lower, and (par. 1 (b)) so far as it (capital)

## RAHOMAN v. BOARD OF ASSESSMENT.

consists of assets being debts due to the business, the nominal amount of those debts less any amount allowed by the Board to be deducted from the profits for bad debts.

Under paragraph 5 of the first schedule, among other items, unsecured loans, bills payable, amounts due to creditors, any other liabilities to third parties, and any capital the income on which is not taken into account in computing the profits of the business, shall be deducted in arriving at the amount of capital.

Therefore, it appear to me, that bearing in mind the *fons et origo* of the Tax on Excess Profits Ordinance, the Board of Assessment was right in deducting such items as I have stated before allowing the statutory percentage of ten per cent., and not allowing it on the gross capital.

Mr. McArthur for the appellant strongly urged the difference between “capital” *simpliciter* and “capital employed in earning profits” and referred me to several authorities which he submitted supported his contention that the words should be read in their popular sense and meaning.

The legislature has interpreted the words “capital employed in earning profits” by their definition of capital under the first schedule to Ordinance 2 of 1918, and to admit Mr. McArthur contention I should have to read the word “not” into the regulations of the first schedule attached to that ordinance, to which I have referred.

In effect, the legislature having laid it down that certain deductions must be made from the items of capital, I am asked to say that they must not. This is a very much wider suggestion than the interpretation of a word or sentence in a popular sense, or having regard to its popular use, and I cannot adopt it.

The appeal is dismissed, and the assessment confirmed with costs.

BLAIR v. ATHERLEY.

BLAIR v. ATHERLEY.

[138 OF 1918.]

1918. SEPTEMBER 6, 10. BEFORE HILL, Acting C.J.

*Criminal law—Larceny—Trap—Assistance or knowledge of owner of property—Taking.*

Where certain property, in pursuance of a trap set, was handed to the defendant by the clerk of the owner of the property on his employer's instructions,

*Held*, that the defendant could not be convicted of larceny of the property.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist.) Defendant Atherley (now appellant) was charged with the larceny of certain leather, rollers, and electric bulbs, to the value of \$8.96, and was convicted. In his reasons for decision the magistrate stated that though the facility for the larceny was here slightly different, the case was on all-fours with *R. v. Eggington*, 2 Leach, 913.

Defendant appealed, his principal reason of appeal being fully set out in the judgment below.

*J. S. McArthur*, for the appellant.

*J. J. Nunan, K.C., LL.D., A.G.*, for the respondent.

HILL, Acting G.J.: The defendant (appellant) was convicted of the larceny of certain articles, under the following circumstances. He asked an employé in Bookers' garage to obtain for him certain articles, and the employé did so, after communicating with the clerk in charge, with whose consent and approval the act was done; "I knew Bornet (the employé), says "De Souza, the clerk in charge, was taking these things to give another, I "instructed him to take the things out." Bornet met the defendant by appointment and gave him the parcel in which were the articles. Thereupon the police intervened, and defendant was charged with larceny.

The first reason of appeal is that "the evidence before the magistrate's "court does not establish the offence of larceny or any other offence known "to the law" and must succeed. This case is on all-fours with *Reg. v. Lawrence*, 4 Cox, 438. In that case the prisoner asked a clerk of the prosecutor to procure him a deed in the possession of the latter, and the clerk told his employer of the request, and by his direction gave the deed to the prisoner; it was held that if the clerk gave the deed into the prisoner's hand the prisoner could not be convicted of stealing it, but that if the clerk put down the deed and the prisoner took it up, he could be so convicted. In the present case, as well as *Reg. v. Lawrence*, the article was handed to the prisoner. There was something more than *rendering* facility to the commission of the offence and in neither case was the act *invito domino*. The appeal is allowed, and the conviction quashed with costs.

REID v. LONDON.

REID v. LONDON.

[212 OF 1918.]

1918. SEPTEMBER 10. BEFORE HILL, ACTING C.J.

*Criminal law—False pretences—Summary Conviction Offences (Procedure) Ordinance, 1893, s. 8 (5)—Facts constituting offence to be stated in charge—Appeal—Service of reasons of appeal—Service by registered letter—Delivery of registered letter to respondent’s messenger—Interpretation Ordinance, 1891, Amendment Ordinance, 1907.*

Reasons of appeal were forwarded by post by registered letter to R. the respondent, at Leonora on June 6th. The postmaster received the letter on the morning of the 7th June and forwarded a notice of receipt to R. by R.’s recognised messenger who on the 8th June returned receipt to the postmaster signed by R. The registered letter was thereupon handed to the messenger. June 7th was the last day for service and the letter containing the reasons of appeal were not delivered to R. by the messenger until June 9th.

*Held* that the delivery of the notice of receipt by the postmaster to R’s messenger was constructive and good service upon R.

*Held*, further, that the description of an offence in the words of the statute creating the offence as provided by s. 8, (5), Ord. 12 of 1893, does not do away with the necessity of setting out in a charge facts which are a necessary ingredient of the particular offence in question.

Appeal from a decision of the stipendiary magistrate of the West Coast judicial district (Mr. H. K. M. Sisnett). Defendant London (now appellant), was charged with obtaining from the complainant (now respondent), the sum of \$1.64 by false pretences, and was convicted. The reasons of appeal together with all other necessary facts fully appear from the judgment of the Court.

*J. S. McArthur*, for the appellant.

*H. C. Humphrys*, for the respondent.

HILL, Acting C.J.: The appellant was convicted on a charge which read as follows:—

“That he did, on the 15th December, 1917, at Pln. Leonora, in the West Coast judicial district, in the county of Demerara, by a certain false pretence obtain from the complainant the sum of \$1.64 with intent to de-“fraud.”

At the hearing before the magistrate counsel for appellant, before plea, objected to the complaint as bad inasmuch as the false pretence was not stated.

The magistrate overruled the objection on the authority of sec. 8 (5) of Ordinance 12 of 1893.

The appellant appeals from the conviction as being erroneous in point of law on various grounds, the first of which is that the complaint laid before the Magistrate’s court does not set forth the particular false pretence alleged; and as I am of opinion that the appellant is entitled to a decision in his favour on this ground of appeal it is unnecessary to consider any other. But before setting forth my reasons for so concluding I must

deal with a preliminary objection taken by Mr. Humphrys for the respondent that the appeal is out of time inasmuch as the respondent had received the reasons of appeal on June 9, whereas the last day on which reasons could be received was the 7th June. He referred the Court to *Brown v. Allen*, A.J. 3.1.1900, *Walker v. Lindo*, A.J. 23.3.1903 and *Moses v. Ghurburan*, A.J. 16.6.1900 and A.J. 7.7.1900.

In support of his submission he was allowed to file an affidavit in which the respondent swore he received the reasons of appeal on June 9. I gave leave to the appellant to file any affidavits he might desire to, and he has filed a declaration by the postmaster of Leonora post office that he forwarded to the respondent by the recognised messenger a notice of receipt of a registered letter for him on June 7 and that on June 8 the messenger presented a receipt for the same signed by the respondent and delivery was made.

By sec. 2 of Ordinance 30 of 1907 the meaning of service by post is thus described:

“Where an ordinance authorises or requires any document to be served by post, whether the expression ‘serve’ or the expression ‘give’ or ‘send’ or any other expression, is used, then unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post: Provided that when the place to which the letter is addressed is one in which there is no house-to-house delivery of letters, service shall not be deemed to have been effected, unless the letter has been registered, and unless a notice has been delivered to, or left at the residence of, the person upon whom service is to be effected stating that the letter is at the post office awaiting delivery to him, and unless a declaration made before a Justice of the Peace signed by the person who delivered such notice, stating that he duly delivered such notice, is produced, or other proof is given of the due delivery of such notice.”

At Leonora there is a house-to-house delivery but the respondent’s messenger calls regularly for his letters. Therefore, unless the contrary was proved, service would have been deemed to be effected by the conditions set out in sec. 2, Ord. 30 of 1907, having been observed, but *ex abundante cautela* (and it shows that it was necessary as the respondent swears “he never received” the registered letter until June 9), the letter was registered on June 6 and notice delivered on June 7 to the respondent’s recognised agent.

In these circumstances, I hold that the delivery of the notice of

## REID v. LONDON.

receipt to the respondent's messenger was constructive and good service on the respondent. To hold otherwise would be to require in every case "personal" service which is exactly what the law strives to guard against.

It is conceded that in indictments the false pretences must be set out in the indictment but it is urged that this is not necessary in summary conviction offences in view of sec. 8 (5) of Ord. 12 of 1893. The equivalent in England to that section is section 39 of the S.J. Act 1879.

In *Stone's Justices Manual* (1913), 45th edition, p. 957, it is stated: "Whenever it is immaterial by what means the prohibited act has been effected, it will be sufficient in describing the offence to use the words of the statute; but where the particular means used to effect the object are essential to the description of the offence they should be set out distinctly in the information; thus, under an Act making it penal by any event relating to the drawing of a lottery ticket, it was held that the particular pretence must be set out as to the description of the offence; the general rule is (as in indictments) that all facts and circumstances should be stated with such certainty and precision that the defendants may be entitled to judge whether they constitute an offence, to determine the species of offence, and be enabled to plead a conviction or acquittal in bar of another prosecution for the same offence (*R. v. Hoard*, 6 J.P. 445.)

In *Smith v. Moody* 1903, I.K.B. 56 it was held that the Summary Jurisdiction Act, 1879, sec. 39, sub-sec. 1, which provides that in proceedings before courts of summary jurisdiction "the description of any offence in the words of the Act . . . . . creating the offence, or in similar words, shall be sufficient in law," does not do away with the necessity of setting out in a conviction facts which are a necessary ingredient of the particular offence in question. Lord Alverstone, in his judgment, says (at p. 60): "It seems to me it (sec. 39 (1)) could not have been intended to do away with the old rule of criminal practice, which requires that fair information and reasonable particularity as to the nature of the offence must be given in indictments and convictions. All that is meant by sec. 39 is that the offence itself need only be described in the words of the statute creating it.

Wills, J., laid stress on the difference between the insertion of the necessary ingredients of the offence as distinguished from the description of the offence, and Channell J. (p. 63) states: "The principle, however, seems to be that, subject to statutory provisions making certain things unnecessary in certain cases, the conviction must be as precise as the summons, and if there were a charge against a man—either by an indictment or by summons

## REID v. LONDON.

“made in the vague way in which the conviction is drawn up—a charge  
“against a man of injuring the property of another without specifying what  
“property or giving any further information it does seem to me it would be  
“insufficient. Therefore, following the rule that the conviction must be as  
“precise as an indictment, I think that this conviction is wrong in form  
“unless it is met by some statutory provision on the point. Section 39 of the  
“Summary Jurisdiction Act, 1879, is the one relied on; but that seems to  
“me to be rather a repetition of previous enactments, and although sec. 39  
“provides that it shall be sufficient so far as regards the description of the  
“offence to follow the statute I do not think the section in any way dis-  
“penses with the usual necessity for specifying time and place and matter  
“in the way in which it has been hitherto specified.”

The defect in the complaint is incurable, objection having been made before plea, and the appeal must be allowed and the magistrate’s decision quashed, with costs.

*Appeal allowed. Conviction squashed.*

## PETTY DEBT COURT, GEORGETOWN.

FERNANDES v. McNIEL.

[284—8—1918.]

1918. SEPTEMBER 10. BEFORE DALTON, Acting J.

*Husband and wife—Marriage in community of property—Action against wife for goods sold to her—Public trader—Position of married woman—Claim to be assisted by her husband—Procedure—Practice.*

Claim by the plaintiff Fernandes for the sum of \$4, balance of account due by the defendant for goods sold and delivered. Defendant pleaded that she had never had the goods, and that she was a married woman, married in community of property, that her husband was alive and that she could therefore not be sued.

Plaintiff in person.

*E. D. Clarke*, for defendant.

DALTON, Actg. J.: Plaintiff claims from the defendant the sum of \$4, for goods sold to her in Georgetown. The plaint sets out that she is a widow. The defence is that she never had the goods, that she is not a widow, but is married in community of property and that her husband is alive, that therefore the proper defendant is not before the court, and that she alone has no judicial status in court at all. The evidence shows that the goods supplied were purchased by Mrs. McNeil and were a tube and mud-guards

## FERNANDES v. McNIEL.

for a lady's bicycle. Plaintiff's clerk who sold the goods further alleges that she stated, when she purchased the goods, that she was a widow, although since action was brought he had found out that that was untrue. Mrs. McNeil who gave evidence most reluctantly admitted the purchase of the goods for her bicycle, denies she ever said she was a widow, and adds that she was married to her husband, who is absent in the gold-fields, in the year 1871, in community of property.

Now, as I stated in the case of *Yearwood v. Yard* (1917 L.R. B.G. 87) there is no doubt whatsoever in Roman-Dutch Law, which governs this case, that a married woman cannot as a rule institute or defend an action in her own name. But there are exceptions. It is not necessary for me to detail them but to ascertain if this is one. What are the facts here? Defendant, a married woman, works in a cake shop where she trades on her own behalf, She ordered the goods in question and it is a reasonable inference, which she has in no way refuted, that the bicycle was used either to go to her work or in connection with the work, the bicycle being at the shop. Her husband works in the gold-fields, and so is absent from her for long periods. I see no reason to disbelieve the clerk who supplied the goods when he states defendant represented to him that she was a widow. Those being the facts, what is the law applicable to them? I cannot do better than cite a judgment of Copley, J. (*Bown v. Mowbray Municipality* 1911 C.P.D. at p 436.) In the course of this judgment in a case where the same defence was raised as is raised here he says "It seems to me that even if a woman is a "public trader, according to the established practice of this court, as Mr. "Van Zyl says, in the passage cited in the course of the argument, when she "is sued for any debt incurred she ought to be sued assisted by her husband. "Apparently she is entitled to sue in such a case without his intervention. "That is a privilege given to her. As Van der Linden puts it, she may sue in "her own name for actions arising out of the course of her business, and "then he also says that she *may* defend herself without her husband's inter- "vention, but he does not say that she *must* do so if she chooses to ask that "his assistance be invoked." But in asking that assistance it must be clear to the court that she deserves it, before it is given her. It is not necessary here to go into the question of distinction between the English doctrine of estoppel and its equivalent in the civil law, whichever may be applicable here. One need not do more than say with *Voet* (6. 1. 17) that "no one ought to gainsay his own act." No assistance will be given by the court to a person who wishes to take advantage of her own deliberate misrepresentation. There will therefore be judgment for the plaintiff for the amount claimed with costs.

## MANNING v. MENDONCA.

## MANNING v. MENDONCA.

1918. SEPTEMBER 10, 16. BEFORE HILL, Acting C.J.

*Food—Foodstuffs (Regulation of Price) Ordinance, 1914, and Foodstuffs (Regulation of Price) Continuation Ordinance 1915—Fixing of sale price by proclamation—Contravention of ordinance and proclamation—Charge instituted before but prosecuted after revocation of proclamation—Saving clause in proclamation—Interpretation Ordinance 1891, s. 28—Ultra vires.*

On February 21st, 1918, a proclamation was published fixing the price of foodstuffs, in terms of s. 3 of Ordinance 22 of 1914 (Foodstuffs. Regulation of Price, Ordinance). On March 28th, 1918, a further proclamation was published fixing prices, and revoking the proclamation of February 21st, with the following proviso "that such revocation shall not affect or diminish any liability or penalty incurred by any person under the ordinance aforesaid during the continuance of the said proclamation."

*Held*, that a proclamation is not an 'enactment' within the meaning of s. 28 of the Interpretation Ordinance, 1891, which allows for savings in cases of repeal, and that the above proviso was *ultra vires* of Ordinance 22 of 1914.

*Held*, further, that a conviction on a charge instituted under the proclamation of February 21st, before its revocation, was good, although the charge was prosecuted after the revocation of the proclamation.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist), who convicted the appellant Mendonca on a charge of selling an article of food at a price higher than the price fixed by proclamation under the Foodstuffs (Regulation of Price) Ordinance, 1914.

All further necessary facts, and the reasons of appeal sufficiently appear from the judgment below.

*P. N. Browne, K.C.*, for the appellant.

*J. J. Nunan, K.C. A.G.*, for the respondent.

HILL, Actg. C.J.: The appellant was convicted before a stipendiary magistrate for selling on March 16, 1918, to one Robert Stewart a certain article of food, namely, one pound of eddoes at the price of three cents per lb., the said price being higher than that fixed by the proclamation issued under the Foodstuffs (Regulation of Price) Ordinance, 1914, and dated February 21, 1918, the said proclamation being still in force on the said 16th March, 1918, contrary to section 10 of the ordinance as continued by the Foodstuffs (Regulation of Price) Continuation Ordinance, 1915.

From this conviction the appellant appeals on the ground that the decision is erroneous in point of law:—

(a) Because the proclamation of the 21st day of February, 1918, having been revoked on the 28th March, 1918, it was not competent to institute and carry on proceedings for an offence alleged to have been committed in contravention of the aforesaid proclamation after it had been revoked.

(b) Because the aforesaid proclamation having been revoked on the 28th March, 1918, prior to the hearing and adjudication of the offence charged, the proclamation could no longer be acted

## MANNING v. MENDONCA.

upon and it was therefore not competent for the learned magistrate to convict the appellant as he has done.

(c) The learned magistrate was wrong in holding that the provisions of section 5, sub-section 23, and sub-sections 28 and 29 (I presume sections 28 and 29 are meant) of the Interpretation Ordinance, 1891, apply to the proclamation in question.

With regard to (a) I may point out that the proceedings were instituted before the revocation, on the 28th March, 1918, of the prolongation of 21st February, 1918, but they were carried on after its revocation.

By section 2 of Ordinance 22 of 1914, the Governor is given power to fix the sale price of food, such power to be exercised by proclamation or proclamations.

By section 10 a penalty is imposed, *inter alia*, on persons selling at any higher price than that fixed by any proclamation issued thereunder, and still in force.

By section 12 the Governor is given power to, at any time, revoke, alter, or amend any proclamation issued under the ordinance.

By section 13 the Governor-in-Council is given power to make regulations and when made, to alter, amend, or revoke such regulations for any of the purposes of this ordinance. All such regulations shall be published in the *Official Gazette* and shall have the force of law, and any person contravening the provisions of such regulations shall be liable to a penalty not exceeding twenty-five dollars.

By the proclamation of March 28, 1918, all proclamations under the Food-stuffs (Regulation of Price) Ordinance, 1914, prior to that date were thereby revoked, "provided, however, that such revocation shall not affect or diminish "any liability or penalty incurred by any person under the ordinance aforesaid "during the continuance of the said proclamation."

The point at issue is, whether the quotation above in inverted commas is *ultra vires* of the power delegated to the Governor, or not.

The Attorney General submitted that section 28 of Ordinance 14 of 1891—the savings in case of repeal section—applied to proclamations which, he submitted, were enactments, and included in rule or regulation and merely a subordinate method of legislation.

The effect of an enactment is to bind all who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule, if validly made, is precisely the same—that every person must conform himself to its provisions, and, if in each case a penalty be imposed, any person who does not comply with the provisions, whether of the

enactment or the rule, becomes equally subject to the penalty. But there is this difference between a rule and an enactment; that whereas you may canvas a rule and determine or not whether it was within the power of those who made it, you cannot canvas in that way the provisions of an ordinance. There is no difference, if the rule is within the statutory authority, but the very substantial difference, if it is open to consideration whether it be so or not.

There is no conflict between the proclamation and the ordinance. If there were, it would have to be decided which is the leading provision, and which the subordinate, and which must give way to the other. This would apply, no doubt, to any conflict between any rules made under section 13 of Ordinance 22 of 1914, and the ordinance itself.

Now under the Interpretation Ordinance, proclamation means a proclamation under the public seal.

“Statute” means any ordinance or Act of Parliament for the time being in force in this colony, and shall include any order of the King in Council, rule or regulation, order of the Governor and Court of Policy, or by-law for the time being having the force of law therein.

On consideration, I cannot find that a proclamation is an enactment within the meaning of section 28 of Ordinance 14 of 1891—*expressio unius exclusio alterius*—and I am of opinion, that the Governor in the proviso in the last paragraph of the proclamation of March 28, 1918, was acting *ultra vires*.

But, this being so, I cannot see that the proclamation of 21st February, 1918, revoked on the 28th March, 1918, became inoperative thereby as regards this particular case.

These proclamations are issued under the authority of section 10 of Ordinance 22 of 1914, by which, as I have said, a penalty is imposed on any one selling at a higher price than that fixed by any proclamation, and that section is a permanent law so long as it is not repealed, but the proclamations are the statutory means by which the community know the prices fixed and for breach of which the statutory penalty can be imposed.

The proclamations are, in my opinion, in the nature of temporary and subordinate legislation, and when the revocation of one is gazetted and another duly proclaimed, the provisions under the mother ordinance remain fixed. There is no revocation of that and there is, in my opinion, no failure of process by the revoking of spent and creation of fresh proclamations.

In *Stevenson v. Oliver* (8 M. & W., 234) Abinger, C.B., is reported at p. 240: “Take the case of a penalty imposed by an Act of Parliament, would not a “person who had been guilty of the offence upon which the legislature had “imposed the penalty

## MANNING v. MENDONCA.

“while the Act was in force, be liable to pay after its expiration?” And Parke, B. at p. 241: “. . . Then comes the question, whether the privilege of practising “given by the Stat. 6. George IV, referred to in the replication, is one which “continues notwithstanding the expiration of that statute. That depends on the “construction of the temporary enactment. There is a difference between temporary statutes and statutes that have been repealed; the latter (except so far as “they relate to transactions already completed under them) become as if they “had never existed; but with respect to the former, the extent of the restrictions “imposed, and the duration of the provisions, are matters of construction.”

Alderson B. (at p. 243) is thus reported:— “. . . It seems to me that those “persons who, during the year for which the last Act was to continue in force, “or previous to that period, had obtained rights under it, had obtained rights “which were not to cease by the determination of the Act, any more than where “a person commits an offence against an Act of a temporary nature, the party “who has disobeyed the act during its existence as a law is to become dispun- “ishable on its ceasing to exist.”

I am of opinion it was quite competent for the magistrate to convict, and I affirm the conviction, and dismiss the appeal with costs.

*Conviction affirmed.*

## EDWARDS v. MENEZES.

[159 of 1918].

1918. SEPTEMBER 13, 16.—BEFORE HILL, Acting C.J.

*Criminal law—Summary Conviction Offences Ordinance, 1893, s. 145—Being armed with gun to commit unlawful act—Rogues and vagabonds—Class of persons to whom applicable.*

A householder who on impulse, and without any proof of previous bad character, flourishes a revolver and threatens to shoot persons on his premises, although possibly liable to be otherwise charged, cannot properly be deemed a rogue and vagabond under the provisions of p. 145, Ordinance 17, 1893.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist) who convicted the defendant Menezes (now appellant) on a charge of being found armed with a revolver with intent to commit an unlawful act. The defendant appealed, his principal reason being that the decision was erroneous in law, and that the section under which the charge was brought (s. 145, Ord 17 of 1893) did not apply to the facts of the case. The facts fully appear from the judgment below.

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

*J. J. Nunan, K. C., A. G.*, for the respondent.

HILL, Actg., C. J. The appellant was charged and convicted for

that he on 17th April 1918 at Middle street was found armed with a revolver with intent to commit an unlawful act.

The facts, shortly put, are that he was in his house on the day in question, and a row was in progress in the yard between a woman and some men, who were threatening her. Appellant came downstairs, and remonstrated, and apparently joined in the row, taking the part of the woman. There were nine men. He went upstairs and returned with a revolver, and when held, is stated to have shouted "loose me, let me shoot them" and was excited. The police were sent for by his wife, and four of the men and appellant were arrested. The four men were charged with disorderly conduct and convicted, and the appellant was charged under section 145 (6) of Ordinance 17 of 1893 under Title XII—"Police Offences—Rogues and Vagabonds"—That section reads as follows:—"Every person who has in "his custody, or possession, any picklock, key, crowbar, jack, bit, or other "implement, with intent unlawfully to break into any building, or is armed "with, or has upon him any gun, pistol, sword, knife, razor, bludgeon, or "other deadly or dangerous weapon, with intent to commit an unlawful act . ". . shall be deemed a rogue and vagabond and shall be liable to a penalty "of fifty dollars or to imprisonment for three months."

*De Cambra v. Jacobs* (A J. 21. 8. 08.) is a case which in its general aspects is not unlike this one, although in that case the defendant was carrying on his person the revolver while in this case the appellant went upstairs and obtained it—he says for intimidation, but this the magistrate did not believe. The presumption against *De Cambra*, as to intent, was stronger in my opinion.

Under Title XII there are three degrees of degeneration comprised under the headings "Vagrants," "Rogues and Vagabonds" and "Incorrigible Rogues," and the Court is asked to confirm the classification of the appellant in the second degree, under the circumstances set out.

After very careful consideration I cannot do so. To hold that the appellant, interfering on behalf of the woman in the first instance, eventually obtaining a revolver, and threatening a disorderly lot of men, should be liable under a section which brands him as a rogue and vagabond, and places him in the category with potential burglars, highwaymen, and murderers would be wrong. To sustain a conviction under that section there must be, in my opinion, circumstances pointing to premeditation, and not mere impulse, circumstances of time, or of place, or suspicious behaviour.

There is nothing on the record to show the appellant is a man of bad character, and while he was guilty of disorderly conduct or,

## EDWARDS v. MENEZES.

possibly, of attempting to inflict bodily harm, I do not think his conviction as a rogue and vagabond under section 145 (6) can stand.

I agree with Bovell, C.J. in *De Cambra v. Jacobs* that the unlawful act suggested should be set out in the charge. The intent can be inferred from the circumstances of each case.

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

*Appeal allowed. Conviction quashed.*

*In re* THE DEMERARA TURF CLUB, LTD. (IN LIQUIDATION):  
*ex parte*, THE LIQUIDATOR.

1918, SEPT. 6, 16. BEFORE DALTON, Actg, J.

*Winding up—Mortgage—Payment of interest on secured debt—Date to which interest payable—Application by liquidator personally for sanction to purchase property of company—Position of liquidator in respect of assets of company—Principles governing the grant of such sanction—The Companies Winding Up Rules, 1905, r. 127.*

A mortgagee in a winding up is entitled, provided the security is sufficient, to payment of any capital and interest secured under his mortgage up to the date of payment, and also to all costs properly incurred in 'foreclosing' the same.

A liquidator is an agent of the company with special duties cast upon him: he holds the assets of the company with certain obligations resting upon him and his position is a fiduciary one. So far as possible the strict policy of the law making it impossible for persons in a fiduciary position to do anything, so far as that position is concerned, for their own benefit will be enforced, and any request to depart from that policy will be most carefully scrutinised.

Application by the liquidator of the Demerara Turf Club, Limited (in liquidation.)

- (a) for an order fixing the amount and rate of interest due and payable by the company under a mortgage on the company's assets, and upon which judgment had been obtained;—and
- (b) for an order granting leave to the liquidator to purchase in his own right all the movable and immovable property of the company for the sum of \$25,240.

The facts alleged in support of the application fully appear from the judgment of the court.

*P. N. Browne, K.C.*, for the applicant.

*H. H. Laurence*, for the holder of the mortgage and judgment, and for one creditor.

Mr. Laurence informed the court that he only appeared in respect of the first part of the application, and did not oppose the sale to the liquidator.

*E. G. Woolford*, for thirteen contributories, in opposition to the proposed sale.

*In Re* THE DEMERARA TURF CLUB.

DALTON, Acting J.: This is an application under section 150 (3) of the Companies (Consolidation,) Ordinance, 1913, by Nelson Cannon, the liquidator of the Demerara Turf Club, Limited (in liquidation):

- (a) for an order fixing the amount and rate of interest due and payable by the company to the judgment-creditor on the judgment obtained by the British Guiana Mutual Fire Insurance Company, Limited, on the 19th January, 1916, on a first mortgage held by the latter company on the immovable property of the Turf Club and that "all such directions in relation thereto may be given to the applicant as the court shall think fit"; —
- (b) for an order granting leave to the liquidator to purchase in his own right all the movable and immovable property owned by the company and to sanction the sale to him of all the aforesaid property for the sum of \$25,240.

The application then falls into two distinct parts, the first where the liquidator asks the court for directions, and the second where Nelson Cannon, because he is liquidator, personally asks the Court to sanction a certain sale to him.

With reference to the first part, the application sets out that the Turf Club in 1910 mortgaged its property to the British Guiana Mutual Fire Insurance Company for the sum of \$20,000, bearing interest at 6 per cent. In 1913, the club went into liquidation and on September 24th, 1914, was ordered to be wound up by the court. In 1916, by leave of the court, the mortgagees took action and obtained judgment on their mortgage for the capital sum of \$20,000 with interest, \$ 1,800, from the 25th day of June, 1914, to the 25th December, 1915, with further interest from the date of judgment at the rate of six per cent, until the date of payment. One June 18th last the mortgagees assigned their judgment to H. E. Murray, who is the present holder. As Murray has claimed payment of the capital and interest to the date of payment, and as applicant is advised that interest is payable to the date of the winding up order only, he asks the court for instructions. It seems to me that it is a matter in which he has already obtained all the instructions he requires. The mortgagees took action to recover the amount secured under their mortgage which included capital and interest. From the judgment it is clear that the liquidator was not in default, but was in fact a consenting party. Judgment was given for the capital sum and interest secured under the mortgage to the date of payment. Neither case cited by counsel was to the point. (*Re Thomas Salt & Company, Limited*, 98 L.T., 558, and *Quartermaine's case*, 1892, 1 Ch., 639.) The first case is one of unsecured creditors. The latter case deals

*In Re* THE DEMERARA TURF CLUB.

with the question of interest on the balance of a secured debt, the security on realisation not being sufficient to satisfy the whole debt.

That judgment having been given, it seems to me that applicant is now asking me to vary it, a course which sitting here I have no power to do. To save further proceeding on this point in respect of this unfortunate company, however, counsel has asked me to say whether in winding up proceedings secured creditors are entitled to interest on their debts subsequent to the winding up order. As that is a matter which may properly be said to arise under his application I will deal with it.

The first essential is an examination of the document by which the security is given. It is called a mortgage, and is a document executed before a judge whereby the appearer binds himself and his representatives to pay a certain capital sum and interest thereon, and to perform certain other duties in respect of insurance and repairs; "and as security for the due and punctual payment of the aforesaid capital sum of . . . . . and of interest to accrue thereon at the rate aforesaid" the appearer binds certain property in order that in default of payment the mortgagee "might foreclose this mortgage and bring the property hereby mortgaged to sale at execution and recover from the proceeds of such sale the full amount that might be due under this mortgage." And then follows what is locally termed the "voluntary and willing condemnation by the judge, which in itself is a judgment of the Court (*B.G. Electric Lighting and Power Co., Ltd., v. Conrad and anr*, 1897 L.R., B.G. 115). It is clear then that the sum secured by the mortgage is both capital and interest thereon. Further, it occupies a position one may say midway between a mortgage in English law, and an equitable mortgage or "charge," the security given by the local mortgage not being as good as a conveyance, but under the surrounding circumstances affording undoubtedly better security than that given by an equitable mortgage. The local formalities are of course notice to the world of what has been done. That being so decisions in English courts may be referred to by way of analogy as giving assistance to us here in interpreting the law. In addition the local company and bankruptcy (insolvency) laws are based on the English statutes. By s. 205 of Ordinance 17 of 1913 (Companies (Consolidation) Ordinance) it is provided that in the winding up of any company the same provisions shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to the ranking and payment of all debts and liabilities as may be in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. Under the insolvency law (Ordinance 29 of 1900) a secured creditor may either realise his security (but due

*In Re* THE DEMERARA TURF CLUB.

regard must be had to the effect of a receiving order here and in England, cf s. 8, Ordinance 29 of 1900, with s. 9, Bankruptcy Act, 1883, and to the vesting of property, s. 49, Ordinance 29 of 1900), and prove for any balance that may be due to him, or he may prove his debt, giving particulars and value of his security, or he may surrender his security and prove for the whole debt.

For the priority of debts we must turn to s. 37 of the Insolvency Ordinance. There the fifth class of debt in order of priority is the following:—

37 (1). (e). Legal mortgages and special conventional mortgages. . . . such mortgages ranking between themselves in accordance with the priority given to each by the existing law, and in default of any different rule of law as to priority according to the order of their dates of origin, *and including in the case of special conventional mortgages all costs properly incurred in proceedings taken for the purpose of foreclosing the same.* (The latter word italicised were added by s. 11, Ordinance 16 of 1913).

The equivalent section to this in the Bankruptcy Act, 1883, allowing for the necessary local additions owing to a different system of law, is s. 40. In the case of both mortgages and “charges” in England where a creditor’s security is realised in the winding up he is entitled to be paid out of the proceeds his principal, interest, and costs, subject only to the costs of realisation. (*Tipping v. Power* 1 Hare, 405; *in re Marine Mansions Co.*, 4 Eq. 601; *in re Regents Canal Iron Works Co.*, 3. Ch. D. at p. 427). It was stated in court, and it has been verified to me by the Official Receiver, that the practice in England has been the invariable practice in this colony for the past thirty-five years. This practice applicant’s counsel now questions, basing his argument on sub-section (8) of section 38 of the local Insolvency Ordinance. Sub-section (1) (e) of this section I have quoted above. Sub-section 8 is as follows:—

37 (8). If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of six per cent., per annum on all debts proved in the insolvency. That sub-section has been taken in its entirety from s. 40 of the Bankruptcy Act, 1883. There is of course no reference in that section to debts secured by mortgage, but in the local ordinance reference had necessarily to be made to such debts in the course of dealing with the priority of debts. The reference to interest in the sub-section, however, to my mind can have no application to any interest secured under a mortgage bond, which comes within the provisions of section 37 (1) (e). And I am strengthened in this

*In Re* THE DEMERARA TURF CLUB.

finding by the amendment to that sub-section which I have italicised above. That amendment, if my interpretation is correct, brings the local practice into line with the English practice, by the inclusion of costs, which are now given preference, in addition to the capital and interest of the mortgage debt. The legislature was doubtless aware of the local practice in respect of the payment of capital and interest, when the amendment to the law was made. And further, an examination of sections 35 and 36 of the Insolvency Ordinance, 1884 (the law prior to the passing of the present Insolvency Ordinance in 1900) also goes, I think, to confirm my interpretation. The existing practice, it will be remembered, obtained when that ordinance was law, and the Administrator General paid the interest as part of “the amount secured by the mortgage.” That practice I hold to be quite correct and in conformity with law, and a mortgagee in a winding up is entitled, provided the security is sufficient, to payment of any capital and interest secured under his mortgage up to the date of payment, and also to all costs properly incurred in “foreclosing” the same.

With reference to the second part of the application it is first of all necessary to consider the position of a liquidator in a winding up. By the rules (Winding Up Rules, r. 127) he cannot whilst acting as liquidator either directly or indirectly by himself or any partner, clerk, agent or servant become purchaser of any part of the company’s assets, save by leave of the Court. This rule is based upon the strict doctrine of law relating to purchases by trustees and other persons in a fiduciary position. Although the liquidator is not in all respects strictly what is called a trustee being rather an agent of the company with special duties cast upon him, yet he may fairly enough for certain purposes be described as a trustee; he holds the assets of the company with certain obligations resting upon him, (*Knowles v. Scott*, 1891, 1 Ch. 717), and his position as regards the company in liquidation is a fiduciary one (*Silkstone & Haigh Moor Coal Company v. Eddy*, 1900, 1 Ch. at p. 171). The reason for the rule is not only the conflict between his interest and his duty, but also because of the special knowledge which he (acquires in virtue of his position. The conduct of the trustee not being blamable in the purchase is “nothing to the purpose.” *Hamilton v. Wright*, 9 Cl. and F. at p. 124); all the authorities go to show that so far as possible the strict policy of the law making it impossible for persons in a fiduciary position to do anything for their own benefit will be enforced, and any request to depart from that policy will be most carefully scrutinised.

What then are the material facts set out in the application here, and the evidence produced to support the application? They are as follows, that the applicant, Nelson Cannon, was appointed

*In Re* THE DEMERARA TURF CLUB.

liquidator in 1914, that on July 13th, 1918, a meeting of the creditors by a majority passed a resolution authorising the sale of the movable and immovable property to him for the sum of \$25,240; that on the same day a meeting of the contributories by a majority passed a resolution to the same effect; and lastly that the only opponents to the resolution had since withdrawn their opposition thereto. It was subsequently admitted in Court that this last statement was not correct but that one contributory still objected to the sale. A copy of the minutes of the meetings was also produced, the only additional matter of interest therein being that one of the contributories present made an offer of \$40,000 for the property. This offer does not appear to have been discussed in any way at the meeting, and the contributory in question has since assented to the resolution.

The first matter for remark is the entire absence of anything to assist the court as to the value of the property; in addition, the application is silent as to any other, if I may call them so, preliminary, steps taken by the liquidator to dispose of the assets of the company to the best advantage. One may ask what happened to the offer of \$40,000? Why was it not discussed? Was it advantageous to the company, or was it not? It appears to be an important enough matter to record on the minutes, but after that there is silence.

On the matter coming before this Court for hearing, however, further opposition to the application appears. Thirteen of the contributories object altogether to the sale which the Court is now asked to sanction. In due course they have filed affidavits alleging *inter alia*, that the meetings which passed the resolutions approving the proposed sale were irregularly convened, that no proper notice was given and that the resolutions were not passed in conformity with law, that applicant had himself in evidence on oath, in one of the numerous matters before the court arising out of this liquidation, swore that the property was worth \$50,000, and that the property in fact was worth up to \$60,000. No evidence rebutting these allegations was produced. As regards the meetings counsel for Mr. Cannon admitted that they were not convened, nor were the resolutions passed, as required by the provisions of the Companies Ordinance. He submitted that they were merely informal meetings called by the liquidator to ascertain the wishes of the contributories and creditors and that the ordinance did not apply. This argument was I suppose meant seriously, but I do not propose to do more in respect of it than refer him to rule 36 of the Winding Up Rules. If the liquidator wishes to hold meetings of creditors or contributories to ascertain their wishes in matters that arise in course of the winding up he must comply with the provisions of the Companies Ordinance in respect of

*In Re* THE DEMERARA TURF CLUB.

such meetings and the business thereat. It should not have been necessary to point out such an elementary requirement of the law.

With respect to the allegation that the property is worth \$60,000, the reply put forward is that when the liabilities of the company to the liquidator are taken into account, the price he offers for the property, namely, \$25,240, is sufficient. What the court is concerned with is the interests of the company as a whole and the value of the property. What that value is still remains to be shown.

In view of the opposition to the proposed sale it would be directly contrary to rule for the court to allow the applicant to purchase the property or to bid for it until all other ways of selling to advantage have been exhausted. Whether any other way has been attempted or not (apart from the abortive sale in the case that went to the Privy Council) I do not know, but until that has been done the applicant, in view of his position, cannot buy nor will a sale to him be sanctioned. (*Tennant v. Trenchard* 4 Ch. A.C., 537). I can here go further and say that, even assuming that the meetings had been in order, that no objection was made to the proposed sale, that all the creditors and contributories had agreed to it, although that is an element which would go to assist the court very materially in arriving at the conclusion that it was a proper case where such sanction might be given, yet as the application stands and on the meagre and insufficient information supplied, the court could not sanction the sale. It would require much more evidence to justify such action on its part.

To sum up, with respect to paragraph A. of the application, I find it is not necessary to make any order. With respect to paragraph B, the application for leave to Nelson Cannon to buy for \$25,240, such leave is refused.

With respect to costs, under all the circumstances the transferee of the mortgagees is entitled to his costs, to be paid by the liquidator out of the funds of the company. The costs of the contributories who appear, and all other costs incurred in respect of paragraph B. of the application, must be paid by the applicant personally.

MANNING v. LOPES, FERNANDES & CO.  
 MANNING v. LOPES, FERNANDES & CO., LTD.  
 [235 OF 1918.]

1918. SEPTEMBER 20. BEFORE HILL, Acting C.J.

*Criminal law—Early closing—Employment of shop assistant after closing hours to dispatch orders—Shop kept open—Shops Ordinance, 1913, s.s. 3, 7, and 9.*

Appeal from a decision of the Stipendiary Magistrate of the Georgetown Judicial District (Mr. W. J. Gilchrist), who convicted the defendant company keeping open a shop after the hour of 4 p.m., in contravention of section 3, Ordinance 28 of 1913. The reasons of appeal are set out in the judgment.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist) who convicted the defendant company for keeping open a shop after the hour of 4 p.m. in contravention of section 3, Ordinance 28 of 1913, The reasons of appeal are set out in the judgment.

*P. N. Browne, K.C.*, for the appellant Company.

*G. J. de Freitas, K.C., Actg. S. G.*, for the respondent.

HILL, Actg C. J.: The appellant company was convicted before a stipendiary magistrate for that he on the 25th June, 1918, being an occupier of a shop within the limits of the city of Georgetown, for which shop an annual general licence of seventy dollars is required to be taken out, did keep such shop open after the hour of 4 p.m. contrary to sec. 3. of the Shops Ordinance, 1913.

That ordinance is No. 28 of 1913 and is described as “An ordinance to “provide for the early closing of shops and for limiting the hours of work “of shop assistants.”

Section 3 reads as follows:—

“Save as in section six hereof provided no occupier of any shop within the limits of the city of Georgetown for which he is required by law to take out an annual general trade licence of fifty dollars or upwards shall open such shop before the hour of 6 a.m or keep such shop open after the hour of 4 p.m . . . . .”

The saving referred to in section 6 refers to the closing hours on Saturday not being a half holiday, and does not affect the question before the court directly.

Section 7 enacts that “save as hereinafter provided no shop assistant “shall be employed in any shop after the closing hour of such shop,” but by section 8 there are exemptions to this which do not affect this question, and by section 9 it is enacted “Nothing in this ordinance contained shall render “any person liable to any penalty:

“(1) For employing any shop assistant in serving after the

## MANNING v. LOPES, FERNANDES &amp; CO.

“closing hours mentioned in section three, four, five and six any customer who was in the shop before those hours.

“(2) For employing any shop assistant before the closing hours mentioned in sections three, four, five and six solely for the purpose of dispatching or delivering orders received before these hours or for closing the premises.

“Provided that in no case under this and the preceding sub-section shall any shop assistant be employed for any period longer than half an hour after the closing hour.”

It was contended before the magistrate by the solicitor for the defendant that section 3 must be read with section 9 and in such case the defendant came under the exemption in section 9 (2). Mr. Manning submitted there were two offences under the ordinance, one for keeping open after the closing hour and the other for the employment of assistants after a certain hour.

The magistrate in his decision agrees with the solicitor in his view and accepted the statement by the defence that a cart was there for the dispatch of orders received before 4 p.m. The magistrate, however, finds that “there were other employees of the defendant firm in the shop at the time. The only reasonable inference to draw from this is that the shop was open for purposes other than the dispatching of orders received before 4 p.m.” And, in this view, he convicted the defendant.

It is admitted that the premises were open.

The reasons of appeal are

(1) The decision is erroneous in point of law

- (a) Because the evidence established that though the shop was open after 4 o'clock the defendants are within the exemption mentioned in section 9, sub-section 2 of Ordinance 28 of 1913.
- (b) Because even if there were other employees in the shop when Inspector Manning visited the same, the evidence does not establish that such employees were shop assistants or that they were at the time so employed.
- (c) The inference drawn by the learned magistrate from the fact that other employees were in the shop and that it was open for purposes other than dispatching orders received before 4 o'clock is not warranted by the evidence. The evidence established that the two other persons in the shop at the time were not shop assistants as defined by the ordinance. One was the manager and the other an office clerk.
- (d) The decision is altogether unwarranted . . . . for the reasons set out in 1 (a), (b), (c).

After consideration of the various sections I have quoted and also section 11 which enacts that “if the occupier of any shop

“shall open or fail to close such shop *or* shall employ any shop assistant in “contravention of this Ordinance such occupier shall be guilty of an offence. . . .” the word “or” being disjunctive, and after consideration of the intention of the ordinance as shown in the words “An ordinance to provide “for the early closing of shops *and* for limiting the hours of work of shop “assistants,” the fact that the only saving to the non-keeping open after the hour of 4 p.m. is that in section 6 relating to Saturday closing, while section 7 regulates the hours of shop assistants “save as hereinafter provided” *i.e.* provided by sections 8 and 9, I am of opinion that the offence of keeping open after 4 p.m. in section 3 is a separate and distinct offence from that in section 7 as modified by section 9 (2), and reason 1 (a) is of no avail, the offence being complete when the appellant kept his shop open after the hour of 4 p.m. He should have closed his shop at 4 p.m. and, if necessary, then the provisions of section 7 as modified by section 9 would have come into operation, but he kept his shop open contrary to the requirements of section 3, and as charged, is liable to conviction.

I disagree with the magistrate on his interpretation of the law as contained in section 3 and section 9 of the ordinance, but I think the conviction was right.

The other reasons, for decision, or of appeal need not be considered therefore.

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

DAVIS v. McCALAM.

DAVIS v. McCALAM.

[236 of 1918.]

DAVIS v. LAKPATHSING.

[237 of 1918.]

1918. SEPTEMBER 20, 30. BEFORE HILL, J.

*Foodstuffs—Foodstuffs (Export Regulation) Ordinance, 1917—Exportation—Attempt to export—Jurisdiction—Magistrate's Courts Ordinance, 1893, s. 37 (1) (a.)*

Two appeals from decisions of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist) on charges brought by the acting Comptroller of Customs against the defendants for unlawfully exporting certain articles of food from the colony contrary to the provisions of Ordinance 21 of 1917. The defendants were found guilty of an attempt to export, and were each fined \$250 and costs, or in default five months hard labour.

The defendants appealed, the reasons for appeal being set out in the judgment.

*M. J. C. de Freitas*, for Lakpathsing.

*J. A. Luckhoo*, for McCalam.

*G. J. de Freitas, K.C., Acting S.G.*, for the respondent, the acting Comptroller of Customs.

HILL, J.: These two appeals from the decision of a stipendiary magistrate were taken together by consent.

The appellants were convicted of attempting to export, on charges for unlawfully exporting, from British Guiana, without permission from the Comptroller of Customs, certain articles of food, prohibited from being so exported, contrary to Ordinance 21 of 1917. The proclamation dealing with the export is dated January 16th, 1918. The reasons of appeal are in effect the same in each appeal, with the additional reason that the conviction, in Lakpathsing's case, was altogether unwarranted in view of the evidence given by four witnesses for the prosecution, and by the appellant and Ishmael for the defence.

These reasons are:—

- 1 (a) No offence in law as an attempt to export prohibited goods;
- (b) There cannot be, *ex vi termini*, such an offence;
- (c) The appellants were not charged with such an offence, and it was not competent for the magistrate to convict them therefor;

## DAVIS v. McCALAM.

- (d) No proof of an attempt, if there was, in law, such an offence;
- (e) Because section 3 (2) of Ordinance 21 of 1917 imposes one penalty and it was not competent for the magistrate to apply the provisions of section 25 of Ordinance 17 of 1893;
- (f) The convictions were on mere suspicion, and on evidence which negatives any intention to export prohibited goods.

In law, there is no such offence as an intention to export.

2. No jurisdiction in the Georgetown Magistrate's Court.

Dealing first with the second reason of appeal I am of opinion that section 37 (1a) Ordinance 10 of 1893, gives the magistrate power to hear and determine this complaint, which is in the nature of a summary conviction offence, and it was also competent for him under the provisions of section 25 of Ordinance 17 of 1893 to inflict a penalty of one half of the penalty prescribed for the offence by the statute creating such offence, provided, of course, an attempt was proved. The words "subject to the express provisions of any statute being in force in that behalf" exclude from the operations of section 25 offences of "attempts" which have their own statutory and express penalties.

The remaining reasons of appeal may be summarised as embodied in the two questions:

- (1) Was there an "exportation" as laid in the charge, and should there have been a conviction for such?
- (2) Was there an "attempt" to export proved?

The words of the Ordinance (section 3 (2) of Ordinance 21 of 1917) are "If any goods so prohibited are exported or brought to any quay or "other place to be shipped for exportation from the colony or to be carried "coastwise, or are water borne to be so exported or carried, they shall be "forfeited, and the exporter or his agent or the shipper of any such goods "shall be liable to a penalty of five hundred dollars."

The Customs Ordinance of 1884, section 133, defines, for the purposes of that ordinance, the time at which goods are to be deemed exported as (unless the goods are prohibited), the time when the goods are shipped on board any export ship, and the time of the last clearance of any ship shall be deemed to be the time of departure of such ship except as to any goods prohibited to be exported as contraband of war, with reference to which the exportation shall be deemed to be the actual time of the ship's departure on her voyage from the colony.

The steamer on which were the prohibited goods left the port of Georgetown in this colony for Springlands also in this colony on her voyage to Dutch Guiana. It was while in port at Springlands that the seizure was made.

## DAVIS v. McCALAM.

The Solicitor General submitted that as soon as the steamer left the port of Georgetown with the cocoanut oil on board, the destination of such oil being Dutch Guiana, there was an exportation and a contravention of the Foodstuffs Ordinance, 1917.

In *Williams v. Marshall* (2. Marshall's Reports 92) it was held that a ship is not to be considered as having exported from the port of London, on clearing at the Custom house, nor until she clears at Gravesend. A licence to remain in force for the export of cargo till the 10th September is not complied with by clearing at the Custom house on the 9th and at Gravesend on the 12th.

Unless a vessel has proceeded out of the limits of the *ports* with the cargo there is no such exportation as to release the cargo from duties subsequently imposed, although the ship is not only freighted and afloat, but has gone through all the formalities of clearing, &c.

(*Attorney General v. Pougett* 11. Price 381.)

In *Proprietors Stockton and Darlington Railway v. Barrett* (1 C. & F. 590), the words "shipped for exportation" are not necessarily restricted to an exportation to foreign countries, but may mean exportation in its widest sense, that is, a carrying out of port.

I am of opinion that when the oil was seized on board the "Koenigen Wilhelmina" at Springlands they cannot be said to have been exported from the colony.

Were there then such circumstances, such acts, as would enable the magistrate in law, to convict of an attempt to export?

"An attempt to commit a crime," says Sir James Stephen, "is an act "done with intent to commit that crime and forming part of a series of acts "which would constitute its actual commission if it were not interrupted. "The point at which such a series of acts begins cannot be defined but depends upon the circumstances of each particular case."

The magistrate has set out very lengthily and clearly the facts on which he relies, and I agree with the conclusion he came to. From the time the oil was put on board the "Koenigen Wilhelmina," (for Dutch Guiana without doubt), (and I agree with the magistrate, in his remarks about the actions of the authorities on board that steamer), there were a series of acts which would have ultimately culminated in the commission of the offence of exportation of the prohibited articles, had these acts not been interrupted.

I have no doubt these acts were more than evidence of intention or preparedness and I think the appellants were rightly convicted and I affirm the convictions, and dismiss the appeal with costs,

*Appeal dismissed.*

[This case has now been taken to the Court of Appeal.—ED.]

REX v. SROODIN & ORS

REX v. SROODIN AND ORS.

*Ex parte The ATTORNEY GENERAL.*

1918. OCTOBER 5. BEFORE SIR CHARLES MAJOR, C.J.

*Criminal law—Murder—Trial by special jury—Principles to be considered—Trial at bar—Indictable Offences (Procedure) Ordinance, 1893, Amendment Ordinance, 1918, s. 42.*

Motion by the Attorney General, on behalf of the Crown, that a special jury be struck for the trial of the indictment against Sroodin and several others for alleged murder. A motion by the Crown for a trial at bar was heard at the same time.

The trial on the indictment had commenced before a common jury at the criminal sessions in June, 1918, but after the opening address by the Attorney General for the Crown, the jury was discharged and the trial was postponed to the October sessions with the consent of all the counsel engaged.

Affidavits in support of the application stated that a certain portion of the public press had expressed strong views of the guilt of the accused and on the evidence taken at the preliminary inquiry, and public speeches had been made, whereby popular prejudice might adversely affect the accused, making it advisable, it was submitted, to have the trial before a special jury.

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

*E. G. Woolford*, for Sroodin and three others.

*C. R. Brown*, for Mahadeo.

*B. B. Marshall*, for Bakridi.

*J. S. McArthur*, for Lewis and another.

The application was opposed by all the accused, the principal grounds put forward being that they were less likely to have a fair trial by special jury, and that the ordinance providing for trial by a special jury was passed after they had been referred for trial.

SIR CHARLES MAJOR, C.J.: This is an application for an order that the cause of the King v. Sroodin and others be tried by special jury. It is made under s. 42 of Ordinance 25 of 1918, which has recently been enacted by the legislature, and when I say that the ordinance is part of the statute law of the colony I have said all that need be said about it. Its passage through the Court of Policy, the various objections raised to its enactment, and the arguments adduced in support of those objections cannot be heard here. It is law now and I have to administer it. Any arguments addressed to the fact that it differs from the law in

REX v. SROODIN AND ORS.

England and that its provisions are likely or not to work hardship are so much beating the air. What I have to decide now is whether a special jury should in this case be ordered to be struck, the decision being given on the same principles as govern an application for a special jury in civil cases.

The two grounds in support of the application stand, as the learned Attorney General has pointed out, practically unchallenged. They are that “owing to the popular prejudice stated to affect the accused persons adversely on the one hand, and owing to the connection of the evidence in this case with obeah and obeah workers on the other and further owing to the aforementioned publications and public speeches it is advisable to have a special jury struck.” Now if there is one more important consideration than another in the trial of any cause it is that the accused person or persons shall have a fair trial, and I will pass at once to the circumstances which are urged as showing that the allegation of the possibility of an unfair trial is well founded. It is said to rest upon the amount of popular prejudice that has been excited in the matter, for in the second paragraph of the reasons of the application, it is stated that “public interest was aroused throughout the colony at the preliminary enquiry of this case and popular indignation was evinced against the perpetrators of the murder in the public press of this colony and otherwise, by which popular feeling the eight accused are stated by one of their counsel, Hon. J. S. McArthur, to be adversely affected.”

At the opening of the trial, and after it was postponed in the month of June—the Attorney General referred to it and I think I did too—there had and have been not only a “trial,” but also a conviction and a proceeding to execution of these eight persons by the public press of the colony. One instance of the improper length to which the press has gone in its expressions and in comment is that of writing of the evidence of one particular witness that “he has given the show away in order to save his own skin.” A more indecorous remark cannot be conceived. And what is the result? As has been pointed out, and as appears from the records, an enormous amount of unhealthy opinion has been excited in this case which, unless every precaution be adopted, must inevitably affect the prisoners adversely. Headed by the press, popular opinion has been educated to look upon these unfortunate people as almost already under sentence of death. That has not been denied. There could not be in my opinion a case in which the necessity for the order on the first ground was not more obvious than it is in the present one.

Secondly, a ground of less substantial character is the allegation of obeah and the connection of this case with obeah and its professors. The Attorney General in moving the Court, has

shown that obeah is playing a very prominent part in these proceedings. That in my opinion is another circumstance why recourse should be had to the very best material for the trial. An extract from a leader in a newspaper called *The Tribune*, of July 7th, has been filed in support of the motion. No mention is made of this case in the course of that article, but it refers to the practice of obeah. The article no doubt enunciates very admirable principles, but the very fact that in a newspaper of the colony there should appear at this time an article of that kind itself supports the allegation of obeah being at work in connection with the cause.

The other extracts from the newspaper articles I regard as purely political, and how deplorable it is that a case involving issue of life and death for these eight persons should have been even in the slightest way taken into the atmosphere of politics. Learned counsel are assigned to defend their clients on the evidence given for or against them in a cause and upon trial of the cause in a court of law. That into a speech, however otherwise legitimately made in support of, or in opposition to any measure before the legislature, reference should be imported to a cause then pending before the courts is improper enough. That it should have been done in the circumstances of this particular case as a ground of opposition to the bill for the ordinance under which the application is now being made is grossly scandalous.

What are the arguments against the motion? As the Attorney General has urged, it must be shown to the court that in the circumstances to which he has referred it will be to the prejudice of the prisoners that they shall be tried by a special jury and not by a common jury. What attempt has there been to show that? I think it obvious as a general principle that the higher one goes in the scale of the jury empanelled, the greater will be the ability to deal with important cases and so better for all concerned.

Applying that principle, and listening with patience and attention to what has been said I have heard nothing to remove my impression not only that the prisoners will not be prejudiced, but will be benefited by the order I am asked to make. Those facts alleged in its support have not been traversed. They are eloquent and convincing, and I have no hesitation in granting an order in terms of the motion.

As regards the motion for trial at bar the order for the same goes as of course upon the application of the Attorney General.

BOARD OF ASSESSMENT v. BRODIE AND RAINER, LTD.

BOARD OF ASSESSMENT v. BRODIE AND RAINER, LTD.

1918. SEPTEMBER 9, OCTOBER 5. BEFORE HILL, J.

*Excess Profits Tax—Assessment for duty—Appeal—Right of Board of Assessment to appeal—‘Capital’ and ‘assets’—Increase of capital—Profits.*

Appeal from a decision of the committee of appeal, under the provisions of Ordinance 24 of 1917, and Ordinance 2 of 1918. The Board of Assessment assessed for taxation the difference between the purchase and sale price of a property belonging to, the respondent company. The company thereupon appealed to the committee of appeal who, by a majority, allowed the appeal. The Board thereupon appealed from that decision to a judge.

A. G. King, acting Crown Solicitor, for the appellants.

E. G. Woolford, for the respondent company.

HILL, J.: The Board of Assessment, under Ordinance 2 of 1918, assessed for taxation the difference between the purchase and sale price of a property in which the company carries on business as grocers, chemists and druggists, The company appealed to the committee of appeal who allowed the appeal by a majority. From that decision the board has appealed. Mr. Woolford, for Brodie and Rainer, Ltd., took a preliminary objection that under the ordinance the board has no right of appeal but only the person assessed who is complaining that the assessment by the board is wrong; (Section 18 (5), Ordinance 2 of 1918).

Under section 17 (2) “any person assessed” may appeal to the committee of appeal against any assessment within fifteen days from the date of the notice of assessment and, as in the case of a disagreement of the Board, the matter is “placed before and decided” by the committee of appeal. By section 18 (1) “any person” may appeal to a judge in chambers against “any decision” of the committee of appeal. May appeal from what? Appeal from “any decision” of the committee which would include an assessment as decided by them.

The board is a “person” (see Interpretation Ordinance) and by section 18 (5), Ordinance 2 of 1918, the onus of proving the assessment complained of (*i.e.*, the assessment as decided by the committee) shall be on the appellant, in this instance the board, who is complaining of the assessment as decided by the committee of appeal. The objection is therefore invalid.

The question for decision is, is the surplus difference between the sale price and purchase price of lot 48, Robbstown, a profit earned in connection with the capital employed in the business of Brodie and Rainer, Ltd.?

The company in its balance sheet to March 31st, 1917, the date of the closing of the accounting period, showed "\$5,000" as at deposit in bank which, I understand, is so much received on account of the sale of the premises at March 31st, 1917. It is also mentioned in the report to the shareholders that an agreement of sale had been entered into for the sale of the premises for "\$48,000." "Capital" means the value of the assets employed in the business at a given date, and included in the assets would be any property acquired by purchase, at the price at which it was acquired subject so any deduction for wear and tear or replacement or improvement prior to the accounting period, or for a proper allowance for unpaid purchase money. (First schedule, par. 1 (a), Ordinance 2 of 1918).

This particular property, being an asset, and part of the capital, has been sold at an enhanced price.

Section 14 (2) of Ordinance 2 of 1918 deals with increase of capital and says: "In case of the alteration of the capital of the company or of the "acquisition of the property of a company by a new company or by an individual at any date subsequent to 1st January, 1917, the Board may assess the business on the basis of its estimate of the actual capital employed in the business independently of actual purchase price in money or "shares or otherwise."; and in section 15 (1) "Subject to section 14 hereof "where the capital of a business has been increased during the accounting "period, the statutory percentage per annum shall be allowed on the amount "by which the capital has been increased for so much of the accounting "period as the increased capital has been employed."; and. section 15 (2) states "Where capital has been decreased during the accounting period, the "statutory percentage per annum shall not be allowed on the amount by "which the capital has been decreased for so much of the accounting period "as the capital has been decreased."

Turning to profits, the profits of a trade or business are the surplus by which the *receipts from the trade or business* exceed the expenditure necessary for the purpose of earning these profits (*Smith v. Lion Brewery Company*, 101 L.T., 145) and in *Russell v. Town and County Bank* (15 A.C., 418) at p. 424 Lord Herschell is thus reported; "For the purpose of "arriving at the *balance of profits* all that expenditure which is necessary "for the purpose of earning the receipts must be deducted, otherwise you "do not arrive at the balance of profits,"; and Lord Fitzgerald at p. 429 in his judgment says: "Profits I read on authority to be the whole of the in- "comings of a concern after deducting the whole of the expenses of earning "them, that is, *what is gained by trade.*" In *Smith v. Lion Brewery Company* (*ubi supra*) the in-

## BOARD OF ASSESSMENT v. BRODIE AND RAINER, LTD.

creased profits on which income tax were paid was largely due to the fact that the "possession and enjoyment" of "tied" houses was essentially necessary to enable the company to earn the profits on which they were assessed for income tax. Can it be said that the possession and enjoyment of lot 48 was essentially necessary to the purpose of Brodie and Rainer's business to such an extent as to render the surplus on the sale of such premises a profit liable to taxation? Can it be said that that surplus, or profit, if you like, was "gained by trade?" It must be remembered that the business is not one in which the principal business is the making of investments: (First schedule, par. 2, Ordinance 2, of 1918). And it has been well said that it does not follow that if a profit is in any sense connected with the trade it must always be treated as a profit arising out of the capital employed in the business for it may be remotely connected with the trade.

The value of the premises is rightly included in the statement in my opinion, but I cannot find that the surplus on the sale of the premises can be said to be profits earned on capital employed in the business. The question really seems to me to be premature at the date of the accounting period, for at that period only \$5,000 of the purchase money of the premises had been paid and that was on deposit at the bank and had not been utilised in the business, and I gather from the proceedings before the committee of appeal that the "profits" on sale were to be distributed among the shareholders and would not be considered as a profit arising out of the business, or "gained by trade." This distribution therefore cannot be in the shape of dividend.

I conclude therefore that the sum of \$24,000, the surplus on the sale, was at 31st March, 1917, not liable to the tax.

The assessment must be rectified accordingly. I grant costs to the respondent.

RAHIM BACCHUS v. JAUNDOO.  
 PETTY DEBT COURT, GEORGETOWN.  
 [153. 10. 1918.]

RAHIM BACCHUS v. JAUNDOO.  
 1918. OCTOBER 25. BEFORE HILL, J.

*Wrongful levy—Damages—Promissory note—Illegal consideration.*

Claim by the plaintiff, Rahim Bacchus, for the sum of \$50 as damages for a wrongful, illegal and malicious levy. The necessary facts appear from the judgment.

*M. J. G. de Freitas*, for the plaintiff.

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

HILL, J.: Plaintiff claims damages under the following circumstances. Defendant obtained judgment against him in the Petty Debt Court for an amount which, inclusive of costs, amounted to five dollars and thirty-nine cents. She also had a case against the present plaintiff for insulting language and also one for breach of trust. She compromised with him by accepting a sum equivalent to eight dollars in cash and jewellery, a promissory note for six dollars,—in all fourteen dollars, which it is stated was for ceasing the criminal proceedings in the insulting language case, and included the five dollars and thirty-nine cents for the civil judgment. Defendant, instead of suing on the promissory note, got a warrant for the judgment and levied on plaintiff's goods and sold them. He claims damages against her for so wrongfully levying on and selling his goods.

I am satisfied that the consideration for the promissory note was partly illegal and this renders it ineffective. (*Rahim Bacchus v. Ablain et al*, 1917 L.R.B.G. 148). Both parties are *in pari delicto*. The defendant cannot sue on it, but there is no novation as the transaction was illegal. The judgment in the civil action stands, and the defendant was in my opinion justified in levying, treating the promissory note as illegal.

Judgment for the defendant with fee five dollars.

SHAW v. MATTHEWS.

SHAW v. MATTHEWS.

[223 OF 1918.]

1918. NOVEMBER 20. BEFORE SIR CHARLES MAJOR, C.J.

*Criminal law—Magistrate's Court—Alteration in sentence by magistrate—Alleged malice.*

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist), who convicted the defendant Matthews on a charge of assault and sentenced her to four months' imprisonment. The defendant appealed, the reasons for appeal being set out in the judgment of the court.

*S. L. B. Stafford*, for the appellant.

*B. B. Marshall*, for the respondent.

SIR CHARLES MAJOR, C.J.: The defendant was charged by the complainant with assault causing actual bodily harm by biting her.

The facts appearing from the record were that the magistrate at the close of the case found the defendant guilty and said— "Charge reduced, \$25." Counsel for the defendant immediately rose in his plea and said— "I give notice of appeal." The magistrate, remembering a previous public warning from the bench of imprisonment in cases of biting, then and there altered his sentence, saying to counsel that as no application had been made to reduce the charge he could fight the matter out on the charge as laid, and imposed a sentence of four months imprisonment with hard labour.

The defendant then appealed against the conviction on the grounds—

- (a) that the decision was altogether unwarranted by the evidence;
- (b) that the magistrate exceeded his jurisdiction in altering his decision, after delivery thereof, and inflicting a more severe penalty;
- (c) that an illegality had been committed by the magistrate taking into consideration facts which did not appear in his minutes;
- (d) That the magistrate acted maliciously in having, in consequence of notice of appeal having been given, altered his decision after reducing the charge and pronouncing sentence accordingly.

I dismissed the appeal on (a) because there was in my opinion sufficient evidence upon which a jury might have convicted the defendant.

## SHAW v. MATTHEWS.

On (b) because I held that the magistrate had power—it did not seem to me to be a question of “jurisdiction” at all—in his circumstances of the case to alter his decision. Even if he had, when interrupted by counsel, fully performed the duties enjoined on him by law, failing the full performance of which a decision is not in my opinion completed, but that he had not, in this case, so fully performed those duties, namely, the award of imprisonment in default of payment of the fine and costs (if any), and the entry “forthwith” of a concise minute or memorandum of the order. (Ordinance 12 of 1893, ss. 35, 36). The question whether a magistrate has power to alter his decision or sentence after the same has been completed as I regard completion and notice of appeal has thereupon been given in open court I declined to answer.

As to the fourth ground of appeal, (d), the notice of appeal filed did not state it then definitely as I have set it out above, but on my asking what was alleged as ground for the charge of malice on the part of the magistrate, counsel for the appellant stated at the bar that the notice was intended to mean that the reason why the magistrate altered his decision was that verbal notice of appeal had been given. I dismissed the appeal on this ground also, because it was clear to me on the affidavits permitted to be filed in the proceedings by Dalton, Acting J., that the fact that notice of appeal had been obtruded while the magistrate was giving his decision and before he had completed it did not in any way influence him in the course he pursued.

*Appeal Dismissed.*

WALLBRIDGE v. LAM.

WALLBRIDGE v. LAM.

[291 OF 1918.]

1918. NOVEMBER 23. BEFORE BERKELEY, J.

*Criminal law—Spirits exceeding one pint in quantity—Unlawful possession—Onus of proof—Spirits Ordinance, 1905, s. 93, as amended by Ordinance 15 of 1911.*

Appeal from a decision of the stipendiary magistrate of the Berbice judicial district (Mr. W. J. Douglass). The defendant Lam was convicted on a charge of being in the unlawful possession of spirits exceeding one pint, in contravention of the provision of section 93, Ordinance 1 of 1905 as amended by section 14, Ordinance 15 of 1911.

Defendant appealed, the principal grounds of appeal being that unlawful possession was not proved, the evidence going to show that each bottle of rum in his possession was purchased at different times in conformity with the provision of section 17, Ordinance 8 of 1868 (the Wines, etc., Licences Ordinance, 1868).

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

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

BERKELEY, J.: The appellant was convicted by the stipendiary magistrate of the Berbice judicial district—Mr. Douglass—of being in unlawful possession of spirits exceeding in quantity a pint. Under the Spirits Ordinance, 1905 (section 93) as amended by Ordinance No. 15 of 1911 (section 14) the possession shall “for the purposes of this section” be deemed unlawful unless (subsection 2 (c) which applies to this present case), such spirits have been legally sold . . . to him under section 17 of the Wines Ordinance, 1868, or under sub-section 2 of section 38 of this ordinance; and if such spirits have been obtained in separate quarts from any retailer at separate times and not under a permit, the purchaser has obtained a receipt in writing for the purchase money paid for the same, and shewing the quantity of spirits for which and the time when it was paid. It is submitted by counsel that as the quantity found in the possession of the appellant was three separate pints,—that is something more than one quart—and not two quarts, he cannot be called on to account for its possession as he is protected by section 17 of the Wines, etc., Licences Ordinance, 1868, which in effect provides for the purchase of not more than one quart of rum at a time by one person without his obtaining a written receipt in respect of such purchase. (Bovell C. J., in *Ackla v. Peters*, 8th July, 1909). This in no way affects the provisions of the section under which the present complaint is

## WALLBRIDGE v. LAM.

brought which makes the possession of more than one pint for *the purposes of this section* unlawful unless it is shown to be lawful. It is further submitted that on the facts the magistrate was wrong in holding that the appellant had not proved lawful possession. The magistrate says, "It is true that the rum may have been obtained perfectly innocently." The only evidence on that point is that of the appellant himself, and the magistrate is of opinion that this is not sufficient and declines to accept his "bare statement." With this finding of fact this Court will not interfere. Appeal dismissed with costs.

*Appeal dismissed.*

## PATOIR v. J. E. PEROT &amp; Co., LTD.

[BERBICE, 38 OF 1917.]

1918. FEBRUARY 11. BEFORE SIR CHARLES MAJOR, C.J.

*Will—Bequest of property to heirs with restraint against alienation save to one of the heirs—Sale with consent of all the heirs—Judgment obtained against one heir—Levy on his interest under the will—Opposition—Injunction.*

Claim by the plaintiff, as executor of the late Henry Patoir, for an injunction to restrain the defendant company from selling at execution one undivided fourth ( $\frac{1}{4}$ ) part or share of and in the abandoned estate De Vriendschap on the west bank of the Berbice river, with one one-story building thereon, and to declare the levy made upon the said property by the defendant company wrongful and illegal. The value of the property in dispute was stated to be \$240.

The property in question had been levied upon at the instance of the defendant company to satisfy a judgment obtained against one Edward Patoir, a son of the late Henry Patoir.

The reasons of opposition, incorporated in plaintiff's claim, were as follows:—

The sale was opposed—

- (1.) Because the one undivided fourth part or share of and in the abandoned estate de Vriendshap situate on the west bank of the river Berbice together with one one-story building on six feet blocks with front and back galleries on said estate de Vriendshap is not the property of the judgment debtor.
- (2.) Because the property aforesaid forms part of the immovable property belonging to the estate of Henry Patoir, deceased, and is burdened with a *fidei commissum* and also a restraint on alienation and the same could not be

## PATOIR v. J. E. PEROT &amp; CO., LTD.

taken in execution to satisfy a debt by Edward Patoir, the judgment debtor.

The material parts of the will of the late Henry Patoir are sufficiently set out in the judgment of the court.

*J. Eleazar*, solicitor, for the plaintiff.

*R. T. Egg*, for the defendant.

The judgment of the Chief Justice was read by Berkeley, J., on April 24th, as follows:—

Henry Patoir, by his will devised as follows:— “1. I give, devise, and bequeath to my wife Christina Philipina all my landed property, house, and all erections thereon which I may be possessed of at the time of my death, for her personal benefit during the term of her natural life, and, after her death I bequeath all the landed property I may be possessed of at the time of my demise with the hereinafter specifications to my children and heirs, viz., Henrietta Petronella, Edward Augustus, William Hyndman Jones, and Hendrick Hartman, each for an equal share, also anything whatsoever which may accrue to my estate by inheritance, gift, or otherwise, to be shared alike and together with those afterwards mentioned . . . . . 4. I devise that the share bequeathed to my son Edward Augustus should, as per specification in paragraph 1, be equally divided amongst them, and that those surviving heirs pay over to the heirs of the forenamed Edward Augustus the sum of twenty-five dollars for their sole benefit. 5. I devise that the landed property bequeathed above should not be sold to anyone outside of the abovementioned heirs, but one heir may sell his or her share to another of the heirs: should, however, it become necessary to sell any part or all the property severally bequeathed, it shall be with the full and willing consent of all the heirs abovementioned as having shares in the landed property.”

The testator appointed his son William Hyndman Jones Patoir (the plaintiff) and his daughter Henrietta Petronella the executor and executrix of his will, and died on the 6th October, 1897. On the 6th November, 1897, the executor made testamentary deposit in the Registry.

Edward Augustus Patoir in the will mentioned became indebted to the defendants and had judgment against him at their instance. They issued execution and have levied upon “one undivided fourth part or share of and in the abandoned estate de Vriendschap in Berbice together with the one-storey building on six feet blocks with front and back galleries on the said estate,” as the property of the judgment debtor. The plaintiff in this action as executor of his father’s will, gave notice of opposition and now claims an

injunction restraining the sale on the ground that the property taken in execution is not the property of the judgment debtor, being part of the estate of Henry Patoir, deceased, "burdened with a *fideicommissum* and also a restraint on alienation and incapable of being taken in execution to satisfy a debt by Edward Patoir."

The defendants deny the allegations contained in the statement of claim and contend that the property taken in execution is subject to execution even though it be burdened with a *fideicommissum*. The questions, therefore, for my deliberation are, the first, what interest, upon the proper construction of the will of Henry Patoir, did Edward Augustus take thereunder? The second, is that interest capable of being taken in execution?

I think Edward Augustus took an undivided fourth part of his father's landed property (of which, upon the evidence, the defendants concede the house to form a part), subject to *fideicommissum* in favour of his brothers and sister which will become due upon his death. If the will stopped there, I think the interest of Edward Patoir in the estate could have been taken in execution and sold, but by the fifth paragraph of his will the testator has prohibited alienation of the landed property devised by his will "to any one outside of the abovementioned heirs," words which may, on the face of them, it may well be argued, constitute additional *fideicommissa* from heir to heir mutually, but which, at any rate, prevent (I think) any one interest being taken in execution at the instance of a stranger. That being so, it seems to me irrelevant to argue, as Mr. Egg does in this case, that the heirs other than Edward might buy in his interest and thus keep the property in the family. Moreover, if a sale of the interest of Edward as judgment debtor and thus like a defaulting mortgagor would be a breach of the prohibition against alienation, it seems to follow that the *dominium* of the property so alienated would pass from him to the co-heirs who would sue at once to vindicate the property without waiting for his death.

For these reasons I am of opinion that the plaintiff is entitled to the relief he claims and to judgment therefor with his costs of suit.

FRAITES v. THE NEW SUCCESS, LTD.

FRAITES v. THE NEW SUCCESS, LTD.

[211 OF 1917.]

1918. MARCH 22, 25, 26, APRIL 6, 19, 22 AND 29. BEFORE HILL, J.

*Master and servant—Breach of contract—Manager of sugar plantation—Agreement for three years—Temporary illness—Wrongful dismissal—Damages—Application of English or Roman-Dutch law—Civil Law of British Guiana, Ordinance 1916—Director of defendant company as counsel—Etiquette of profession.*

Claim by the plaintiff for the sum of \$1,015 for salary and commission stated to have been earned as manager of the defendant company's Plantation Success, from November 1st, 1916, to March 15th, 1917, and the sum of \$5,700 as damages for wrongful dismissal from the company's employment as such manager.

Further necessary facts appear from the judgment.

*G. J. De Freitas, K.C.*, for the plaintiff.

*P. N. Browne, K.C.* and *C. R. Browne*, for the defendant company.

During the course of the hearing it came to the notice of the court that the leading counsel of the defendant company was the chairman of the directors of the company. The acceptance of a brief under such circumstances was adverted to by the court as being most improper.

HILL, J.—The plaintiff claims from the defendants the sum of \$6,480 for wrongful dismissal. This amount is made up of various items such as salary, commission, domestics' allowance, and for damages for loss and compensation in lieu of certain benefits he would have derived under his written agreement with the defendants had he not been wrongfully dismissed. Mr. De Freitas for the plaintiff admitted in his opening that the amount claimed ought to be reduced by \$105 as regards that portion of the claim under allowance for domestics, and also by \$28 for four months difference of house rent between \$25 per month as claimed and \$18 actually expended, and also by \$740 difference on claim for loss of salary for twenty six months, the plaintiff having obtained steady employment at a reduced salary as from 13th June, 1917. This reduces the total amount claimed to \$5,607. The plaintiff's claim is that he entered into a written agreement on the 28th August, 1916, with the defendants to serve them as manager of Pln. Success for a period of three years on certain

terms as set out in the agreement, and be entered into employment. He alleges that on the 15th March, 1917, he was wrongfully dismissed.

The defendants allege (3 (a) of defence) an implied condition of the agreement that plaintiff should be physically and mentally fit during the entire period of the agreement to and should personally manage, supervise and control the working of the said plantation Success, that he was never physically and mentally fit to perform the duties as required by the agreement, or any duty at all, and at the expiration of two months, without having made any arrangements whatever for the proper management, supervision, and control of the plantation he left the defendants' service for Canada on November 9th, 1916, and remained abroad until March 12th, 1917, and during his absence he remained physically and mentally unfit to perform any duty or work whatsoever. In paragraph 3 (b) defendants allege that when plaintiff assumed the management of Success, and during the greater part of the period that he managed the same he was ill and did not give proper attention to his duties, and in consequence, the cultivation was neglected whereby the defendants interests were prejudiced and they suffered great loss.

In paragraph 3 (c) the defendants allege the receipt of letters from plaintiff while abroad, which letters indicated mental derangement, and as the plantation had suffered prior to his departure from the Colony, and was still suffering from want of proper management and control at the time when the cultivation required strictest attention, and reaping operations were being carried on, and it being uncertain whether plaintiff would recover or how long plaintiff's illness might continue defendants were forced to protect their interests, and check the ruin into which the said plantation was being plunged to procure another planter in the place and stead of plaintiff. No suitable temporary substitute could be found and in February, 1917, the place was permanently filled.

[After an exhaustive review of the evidence, in the course of which he found that the plaintiff had proceeded to Canada, with the full knowledge, consent, and acquiescence of the defendant company, for the purpose of undergoing an operation, that the time spent by him in Canada consequent thereon and during convalescence was not unreasonable, that there was no evidence to support the suggestion that plaintiff's physical condition prior to his departure from the colony prevented him from properly performing his duties, and that there was no justification for his summary dismissal from his post, His Honour continued:—]

I am of opinion that the common law of England is applicable

## FRAITES v. THE NEW SUCCESS, LTD.

to this case, as the rights of the plaintiff accrued, and the cause of action arose, after January 1st, 1917, on which date Ordinance 15 of 1916 came into force.

The cases of *Cuckson v. Stones* 1. E1 & E. 248—*Warren v. Wittingham* 18 T.L.R. 508 and *Storey v. Fulham Steel Works Coy.* 24. T.L.R. 89 are applicable to this case, and especially the case of *Davies v. Ebbw Vale Urban District Council* 75 J.P. 533. Loss from any temporary incapacity of a servant through illness must be borne by the master and that presumption is based upon the ground that illness is not a breach of contract but is the act of God. Channel, J. says: "I do not think that the phrase 'absence through illness' is confined to absence through actual illness. In my opinion it includes absence reasonably caused through illness, and it covers 'the period of convalescence, and of absence occasioned through approaching illness.'" The plaintiff in the present case, had he not had mental trouble, caused by extreme weakness after his operation, would have been back here, it is safe to say, quite a month earlier than he was actually able to return. I think he is entitled to the judgment of the Court.

Damages, whether for breach of contract, or for wrongful dismissal will be the same, on the authority of *Addis v. Gramophone Coy. Ltd.* (1909 A. C. 488). The amount claimed after deduction of certain amounts as stated in Mr. De Freitas' opening is \$5,607. This includes problematical commissions of \$1,500 for 1917, 1918, and 1919. It has now been ascertained that the profits for 1917 will probably be somewhere about \$16,000. This would entitle plaintiff to \$240 for that year. Under clause seven of the contract of service had the property been sold without Fraites being retained as manager he would have been entitled to salary and commission for the remainder of the term, such commission to be calculated on the profits for the year preceding the sale. He would, therefore, under his agreement, have been entitled to \$240 for 1918, and \$120 for 1919, or \$600 in all, and I think that is the proper amount to allow for loss of opportunity to earn commission. This reduces the claim by \$900, and there will be judgment for the plaintiff for \$4,707 with costs.

## JOHNSON v. NANDU.

[388 of 1917.]

1918. MARCH 1. BEFORE SIR CHARLES MAJOR, C.J.

*Criminal law—Breach of trust—Trader receiving money in advance and neglecting to perform contract—Traders (Breaches of Trust) Ordinance, 1861, s. 3.*

A breach of trust within the meaning of Ordinance No. 4 of 1861 (Traders, Breaches of Trust, Ordinance) means a refusal or neglect to perform the contract entered into at all and in every respect; the ordinance does not apply to a failure to perform part only of the contract, nor to an unskilful or unworkmanlike performance thereof.

Further, to establish liability, there must be a refusal or neglect, upon being required by the employer, to repay the advance or return the materials made or delivered for the purpose of the contract.

Appeal from a decision of the Stipendiary Magistrate of the West Coast Judicial District (Mr. H. K. M. Sisnett) who convicted the defendant Nandu (now appellant) of a breach of trust, under the provisions of Ordinance 4 of 1861.

The facts of the case, and the reasons for appeal fully appear from the judgment. The appeal was allowed.

*E. G. Woolford*, for the appellant.

*H. C. Humphrys*, for the respondent.

SIR CHARLES MAJOR, C.J.: Nandu, a tailor, contracted on the 18th of June, 1917, with Johnson to make a jacket and pair of trousers out of three yards of cloth supplied to him by Johnson for \$3.50. He received an advance from Johnson of \$1.44. No time for performance was specified. The cloth was in one piece and sufficient for the purpose. Either during the week in which the 18th of June fell, or early in the next week Johnson saw

## JOHNSON v. NANDU.

Nandu at the latter's request and found the trousers made but the jacket only cut out. Nandu asked for another yard of cloth which Johnson refused to give him. That evening Nandu sent home the trousers incomplete, in a particular usually regarded as essential, because they had no buttons. Nandu made renewed demand for the additional cloth and was met with the same refusal, but, on the 6th of August, had finished making the jacket by piecing each sleeve at the elbow. To this Johnson demurred and, not receiving the suit of clothes on the 30th of October prosecuted Nandu for that he, having so contracted and received the advance, had, without lawful excuse neglected and continued to neglect to perform the contract within a reasonable time. On that charge, the magistrate, having found the facts as I have just stated them, convicted the defendant.

Nandu has appealed, urging among other grounds (a) that there was no neglect to perform the contract within the meaning of Ordinance No. IV. of 1861, section 1, the enactment under which the charge was laid, and (b) that there was no evidence of, nor, in fact, any requirement by Johnson that Nandu should repay to him the advance the latter had received, or of any neglect or refusal by Nandu to comply with that requirement. It is conceded by the respondent that no requirement was made.

I am of opinion that the appellant is entitled to succeed on both points. The ordinance under discussion is fully penal and must be construed strictly. Where an amount greater than £5 is involved "a trader" is liable, upon proof of the breach of contract, to conviction for a misdemeanour. By its third, fourth and fifth sections the enactment provides for an offence, quaintly described as a breach of trust but consisting of two acts by the trader, both of which he must be shown to have done before he can be liable to conviction. The first is refusal or neglect, without lawful excuse, to perform the particular kind of contract into which he has entered. And that in my opinion, means a refusal or neglect to perform it at all and in any respect, not to perform it in part and leave it unperformed in other part, still less, as in this case, to perform it wholly but in a manner shown to be unskillful or unworkmanlike, or for any other reason unsatisfactory to the employer, which may be the subject of civil proceedings. This view seems to me to be supported by the other provisions of the ordinance, but particularly, I consider, by the provision that a second act of the trader must be shown to have been done to establish liability, namely, the refusal or neglect, upon being required by the employer, to repay the advance, or return the materials, made or delivered to him for the purpose of the contract. The ordinance, in short, contemplates that "trader" as defined in it who, entering into a contract of one of the kinds mentioned,

## JOHNSON v. NANDU.

not only refuses or neglects to move in the matter of its performance but holds on to his advance or to the materials supplied to him for the purpose.

The evidence here on the one hand shows a performance of the contract but unskilfully, not refusal or neglect to perform it at all. I should say that I am not at all sure that the evidence justified the magistrate finding on the question of lawful excuse, but be that as it may, it is plain on the other hand, that there was no evidence—it was not in fact contended—that there had been any demand for a return of the advance. That being so an essential ingredient of proof to fix liability was absent and the conviction cannot be sustained.

The ordinance is not, as argued for the respondent, a cheap and expeditious method whereby an employer may obtain damages from a workman for unskilful performance of the work the latter has undertaken to do.

The appeal is allowed, but I make no order as to costs.

## ROMAN v. SOOKRAJ.

[854 of 1917.]

1918. MARCH 1. BEFORE BERKELEY, J.

*Adulteration of food—Milk—Analysis—Milk in course of delivery to purchaser or consignee—Completion of delivery.*

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district, who convicted the appellant Sookraj on two charges of unlawfully selling to the complainant one pint of milk, such milk not being of the nature, substance and quality demanded.

*C. R. Browne*, for the appellant.

*H. H. Laurence*, for the respondent.

BERKELEY, J.: Appeal by defendant from two convictions by the stipendiary magistrate of the Georgetown judicial district (Mr. McCowan) for the sale of adulterated milk.

The case for the respondent is that on October, 9th 1917, as sanitary inspector he was at the Government steamer stelling, Georgetown, taking samples of milk, that he there purchased from appellant one pint of milk from five different cans paying five cents in respect of each purchase. These five samples as shown by the certificate of analysis in each case are marked respectively 100, 200, 352, 352,\* and 400.

## ROMAN v. SOOKRAJ.

- No. 100 contains 29.4% of added water.
- No. 200 contains 29.4% of added water.
- No. 352 is a sample of genuine milk.
- No. 352\* contains 31.1% of added water.
- No. 400 contains 27.0% of added water.

The respondent says that there were three large and three small cans while his only witness, Inspector October, says three large and three or four small ones.

Appellant and his witnesses speak of two large and four small cans and one of these witnesses, the clerk of the Government stelling, gives direct evidence that two large cans had been freighted to appellant by the 8 a.m. boat, and that in addition thereto he saw four small saucepans near to appellant.

The small saucepans belonged to customers who had already purchased the milk contained therein. It is common ground that one of the large cans was empty, and according to the respondent and his witness the five samples were taken from two large and three small cans. The witnesses for the appellant say from one large and four small cans. Of the five samples thus taken, sample 352 was from a large can and it was found to be genuine milk.

Informations were laid in respect of the four remaining samples viz.:— 100, 200, 352,\* and 400. At the hearing the charges relating to samples 100 and 400 were withdrawn and as stated by counsel on both sides (a fact which should have appeared on the face of the proceedings) it was agreed that the remaining two charges be heard together.

These two charges related to samples 352\* and 200 and are the subject matter of the present appeal.

With respect to 352,\* the magistrate having accepted the evidence of respondent and his witness as to three large cans, and this sample being taken from the third large one, this court will not interfere with the conviction in respect of this sample.

The three large cans having been disposed of, sample 200 is found to have been taken from the third of the small cans, the charges in respect of the other two having been withdrawn.

This can was the property of a customer. The place of delivery was the Government stelling. It had been delivered to her and she had paid for it. According to the evidence the customers took up their cans and left without asking that the pint of milk sold by appellant to respondent be replaced in their respective cans. The delivery was therefore complete before the sanitary officers came on the scene (*Helliwell v. Haskins* 75 J.P. 435).

The evidence shows that appellant said the milk in the small cans belonged to customers and refused to sell. He only did so

## ROMAN v. SOOKRAJ.

on being told that he would be charged with refusing to sell. It was submitted that having sold adulterated milk, whether his own or that of anyone else he is liable to conviction.

I have come to the conclusion that as the milk was not in course of delivery he cannot be convicted. (See *Helliwell v. Haskins* supra).

This second conviction is quashed. I make no order as to costs.

COX v. LILLIAH.

[258 of 1916.]

1918. MARCH 4.

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

*Criminal Law—Unlawful possession—Facts constituting possession—Evidence—Confession—Inducement.*

Appeal from a decision of Dalton, J. (Actg.) (*a*)

The appellant Lilliah had been convicted by the stipendiary magistrate of the Georgetown judicial district on two charges of receiving stolen property, and was sentenced to six months' imprisonment with hard labour on each charge, the sentences to run concurrently. On appeal one conviction was quashed and the second was confirmed. He now appealed to the Full Court against the decision of Dalton, J., (Actg.) confirming the conviction on the second charge.

The material facts and the reasons of appeal sufficiently appear from the report of the case in the court below.

*J. A. Luckkoo*, for the appellant.

*G. J. de Freitas, K.C., Actg. S.G.*, for the respondent, not called on

SIR CHARLES MAJOR, C.J.: On the argument I have heard I do not think it necessary to hear counsel for the respondent. The magistrate convicted the appellant of receiving stolen goods. From that conviction he appealed and the learned acting Junior Puisne Judge held that conviction was right, that is to say, that the magistrate had before him the ingredients of proof necessary to establish the guilt of the defendant. Those ingredients were, first, proof that the goods were stolen, second, that they were received by defendant, and third, that when he received

(*a*) Reported at 1917 L.R., B.G. 8.

## COX v. LILLIAH.

them he knew them to have been stolen. It was not disputed that the goods were stolen. The learned judge in deciding the point of possession purposely excluded from his consideration the evidence before the magistrate which he held to be inadmissible and to have been wrongly received by the magistrate, and he referred to three or four circumstances which he thought went to confirm the opinion of the magistrate. Those were the tracing back of the bicycle from one hand to another until the house in which defendant lived, and spoken of as defendant's house, was searched. At the time when the lamp was found in the house and also when the bicycle was recovered, the defendant was not present, but the key of the house was kept by Jassiban and she was the person from whom Dowlat got the bicycle. Moreover there was another witness who swore to a conversation which he stated he heard between Jassiban and the defendant about a bicycle.

It has been said that that chain of evidence was not strong enough but with that this court has nothing to do. The stolen goods being found in the house, whether or not they were in the defendant's possession was a question of fact, and of that fact, the magistrate was the judge and not the court of appeal. I think the learned judge was right in holding that there was evidence on which the magistrate could find possession in the defendant. Now, when stolen goods are found in the possession of a person, the onus is upon that person to give a full and satisfactory explanation. Here an *alibi* was set up and we have before us what the learned judge had to say with respect to that.

The decision of the judge in the court below must be confirmed, and the appeal dismissed with costs.

HILL, J.: The evidence of the various witnesses taken as a whole, without consideration of statements made to Inspector Cox, which may or may not be admissible, was sufficient in my opinion to show possession and control in the appellant of the bicycle and lamp and guilty knowledge on his part. The decision of the learned judge must be affirmed with costs.

BHAGWANDIN v. SUKHAWATH AND ANR.

BHAGWANDIN v. SUKHAWATH AND ANR.

[10 of 1916.]

1918. MARCH 4. BEFORE BERKELEY AND HILL, J.J.

*Appeal—Practice—Written reasons of judgment—Rules of Court, 1900, Order XXXV., r. 1—Evidence—Matters not raised in pleadings—Order XVII., r. 15.*

Appeal from a decision of Sir Charles Major, C.J., who, in a claim by the plaintiff for the specific performance of a contract of sale of immovable property, and for accounts, gave judgment for the plaintiff with costs, on condition that the plaintiff first pay to the second defendant Bissoon Dyal, before the carrying into execution of the agreement, the balance of the purchase money of the property in question.

The defendant Sukhawath appealed (*a*). The material facts and reasons of appeal appear from the judgments of the court.

*P. N. Browne, K.C.*, for the appellant.

*E. G. Woolford*, for the respondent.

BERKELEY, J.: This is an appeal from the Chief Justice Sir Charles Major, who ordered specific performance of an agreement entered into by the defendant (now appellant) by which he undertook to transport to the plaintiff (now respondent) one-sixteenth undivided part or share of certain lands transported to him.

The history of the case is that appellant and respondent agreed to purchase from the owners of Foulis plantation one-fourth part or share thereof in the following proportions: the appellant three-sixteenths and the respondent one-sixteenth. The respondent objected to a certain mortgage which existed against the whole plantation being transferred to the British Guiana Building Society, Limited, and in order to avoid foreclosure by the then mortgagee it was arranged that appellant should accept transport of the whole one-fourth part or share and give an undertaking in writing in accordance with the agreement already referred to. The transport was thereupon passed to appellant who at the same time signed the agreement.

The substantial ground of appeal is the admission by the court of this agreement. By paragraphs 4 and 5 of the statement of claim the respondent referred to an undertaking given by appellant, as to the exact nature and date of which he seems to have been in doubt, but alleges that it was in connection with his one-sixteenth share and either to transport the same to him or in the alternative to hold the vendor free from liability on any claim made by him. By his defence appellant denied the existence of

(*a*) See *Bhagwandin v. Sukhawath*, 1917, L.R. B.G. 67.

any undertaking, when it must have been within his knowledge what undertaking was referred to. He rendered it necessary therefore that respondent should add Bissoon Dyal, to whom the undertaking had been given, as a co-defendant, with the result that in his defence the agreement was fully set out. The correspondence embodied in that defence shows that an offer was made to transport to respondent subject to the mortgage and that he was unwilling to accept transport on these terms although he had agreed to purchase subject to a mortgage. In my opinion the agreement was properly admitted, and if appellant had acted in accordance with O. XVII., r. 15 and admitted the agreement and either expressed his willingness to pass transport subject to the mortgage or set up that the agreement had been rescinded the hearing of the action would probably have been avoided or if it was proceeded with, no costs could have been allowed. The respondent not having set up in his defence that a verbal agreement existed he could not give evidence thereof if even it would have been otherwise admissible. It is true that respondent did not claim transport subject to the mortgage but it was the only order that could be made leaving it to the mortgagee to take such action as might be deemed necessary under the terms of his mortgage. I was disposed to think that respondent should not have been allowed his costs having regard to his earlier refusal to accept transport subject to the mortgage but in view of what I may term the appellant's improper pleading I am of opinion that the order as to payment of costs must stand. The appeal is dismissed with costs.

HILL J. This is an appeal from the decision of the Chief Justice in favour of the plaintiff Bhagwandin.

Mr. Browne, for the appellant, drew the Court's attention to order XXXV., rule 1, and stated that he had been unable to obtain the reasons of the judgment of the Chief Justice, as they had not been reduced to writing. That rule requires *inter alia*, "when the hearing has been before a single judge, he shall assign in writing the reasons of his judgment," and all proceedings in the civil jurisdiction of the Supreme Court are regulated by the rules of court and not otherwise. It is therefore dear that the reasons of the judgment should have been in writing, and this is requisite in view of the absence of any official shorthand reporter. As to how far the reasons of a judgment are required to go, that question has been dealt with in *Paul v. Bakaralli* (1915) L.R. B.C. 83.

The other submission as to the requirements of order XLIII., rule 11, can only be met by an alteration of the existing rule of court should it be considered desirable.

## BHAGWANDIN v. SUKHAWATH AND ANR.

The reasons of appeal are three in number.

- (a) The admission of documentary evidence not pleaded (reasons 1 to 8).
- (b) The rejection of oral evidence (reason 9).
- (c) The ordering of relief other than what was asked for (reasons 10 to 13).

I am of opinion that the undertaking of December 6, 1915, was properly admitted. It was the sole document referred to, or that could only have been referred to, or meant, in paragraphs 4 and 5 of the statement of claim, and must have been known to the defendant Sakawath and his counsel at the time of filing his defence to be such for it was in his possession at the time. The defendant was in no way prejudiced by its not having been pleaded under the right date, and the amendment was properly made. That the statement of claim did not allege that the transport of 1/16 of Pln. Foulis to the plaintiff was to be “subject to mortgage” or on “payment of balance of the purchase money” owing by plaintiff for his share, does not affect the value of the pleading. The defence might well have stated in view of what transpired, (had it been as full as it ought to have been) that the defendant was prepared to transport but “subject to mortgage,” and on “receipt of the balance of the purchase money”, which would have been the only way in which plaintiff could have expected to obtain his 1/16 share in Pln. Foulis. As a matter of fact the plaintiff in his prayer (par. 10, 1) asks for an order compelling defendant (Sakawath) to pass transport. . . . “on payment of the balance due to the defendant on the signing of the said transport,” and that was the judgment, varied by the order of payment to the added defendant, instead of Sakawath. This was rendered necessary as at the time of filing claim plaintiff was in doubt as to whom the balance was payable, Sakawath having presumably paid Bhagwandin’s share as he had received transport of his 1/16th.

It is as well to draw attention to order XVII., rule 15,—which some practitioners are inclined to ignore. All available defences were, and must have been well known, and were not properly pleaded in the statement of defence for which counsel who led for the appellant was not responsible. It is not sufficient to set both specific denials and rest there, but a defendant must raise by his pleading all matters which show the claim not to be maintainable, or that a transaction is void or voidable in point of law, and all grounds which, if not raised, would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings.

He must confess and avoid as well as traverse.

It is also on that ground that reason 9 must fail—the so-called

verbal agreement has not been pleaded—the only defence raised as to the undertaking referred to in paragraphs 4 and 5 of the statement of claim is in paragraph 5 of the defence *i.e.* non-payment of the balance of the purchase money payable by the plaintiff.

With regard to reasons 10 to 13 I see no reason to differ from the order of the Chief Justice as to the passing of transport “subject to mortgage.” It is only in this way that transport could be passed, if the mortgagee was not satisfied, and if the Building Society objected they had their remedy of foreclosure, or such other remedy as their mortgage would give them. In fact, it is in the interests of the society that such an order was made, and I cannot agree that the society should have been joined as a defendant to the action. If I understand the letter of Mr. Luckhoo to Mr. Dargan (exhibit H) aright, there was an offer by the former representing Bissoon Dyal to transport “subject to mortgage” *i.e.*, the substituted mortgage to the Building Society whose consent presumably must have been obtained, under their rules—or certainly anticipated—before such offer could have been made.

I am of opinion the appeal must be dismissed with costs.

## RAMGOLAM v. WILLIAMS.

[267 of 1917.]

1918. MARCH 8, 11. BEFORE SIR CHARLES MAJOR, C.J.

*Specific performance—Contract of sale of immovable property—Conditions—Obligation and rights of parties.*

Claim by the plaintiff Ramgolam for performance by the defendant of a contract to convey to him of a piece of land, part of plantation Canefield, Leguan, Essequibo, alleged to have been purchased by him from the defendant on April 17th, 1916.

All the material facts fully appear from the judgement of the court.

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

*J. A. Luckhoo*, for the defendant.

SIR CHARLES MAJOR, C.J.: This is a suit for specific performance of a contract for the sale of land. The terms of the contract appear in a memorandum in writing which is in this form: "Received from Ramgolam the sum of one hundred dollars on account of purchase money two hundred and forty dollars for a piece of land [the measurements follow] lot No. 3, section A, of

## RAMGOLAM v. WILLIAMS.

plantation Canefield, Leguan. Balance one hundred and forty dollars must be paid before transport is given. R. S. Williams.” The memorandum is dated the 17th April, 1916. The plaintiff claims that, pursuant to the contract, he was put into possession of the land and cultivated it at considerable expense to himself, that he has always been ready and willing to pay the balance of the purchase money and, alternatively to performance of the contract, that he be returned the sum of \$130 paid by him on account of his purchase money. Sums of \$20 and \$10, it appears, were paid by the plaintiff to the defendant on the 9th of December, 1916, and in the month of April, 1917, respectively. The defendant’s defence is that “the plaintiff was never in a position to complete the sale” to use the words of paragraph 2 of his statement of defence, and that plea is expanded by the allegation in paragraph 4 thus: “the plaintiff in April, 1917, paid \$10 after repeated oral demands were made on him to complete the agreement and in May, 1917, plaintiff was given notice in writing to pay the balance of purchase money and to be prepared to attend the registrar’s office to have the transport advertised failing which the sale would be considered null and void.”

Upon the issue raised by that plea the determination of the matter in larger part depends, and the first question is, what were the actual terms of the contract and the respective obligation of the plaintiff and defendant thereunder? The terms are set forth in the memorandum I have quoted. Sale by the defendant; payment of \$100 part of the purchase money by the plaintiff, payment of the balance thereof before transport given by the plaintiff. What obligation and on whose part and in what order of time did these latter words create? The plaintiff says he was to pay his balance before transport was given, that is “passed” as the expression goes here, and it is common ground that the transaction contemplated was advertisement of intention to convey and all requisite steps to be taken to enable conveyance to be made, then appearance before a Judge and there handing over the balance of purchase money by the plaintiff when “passing of the transport” by the defendant would be effected, a transaction. I am told that takes place week after week in these Court.

The defendant on the other hand says the plaintiff was first to pay his balance after which the defendant was to take the steps I have mentioned, apparently at his leisure. He dealt with the plaintiff throughout on the assumption that his view of the relative obligation was correct. He made repeated oral demands on the plaintiff to complete the agreement. As he puts it in his evidence; “I sent for plaintiff repeatedly to come to my house about the payment of the money.” And again: “I was continually worrying him for the balance.” And the defendant has so

## RAMGOLAM v. WILLIAMS.

far acted on his assumption he tells us, that, treating the plaintiff's unwillingness or positive refusal to comply with the demand for payment of the balance as unreasonable delay and conduct equivalent to repudiation of the contract, he has agreed to sell the land mentioned in the memorandum to another and has received half the purchase money therefor.

I have no doubt as to the correctness of the view put forward by the plaintiff, that is to say, after the payment of the \$100 on the 17th April, 1916, it was for the defendant to put himself into a position to say to the plaintiff "everything has been now done except my giving you the transport, before I do give it to you, pay me the balance due to me." But what did the defendant do? He asked the plaintiff repeatedly to pay that balance when he the defendant had done nothing to render it payable. The plaintiff very properly refused to pay. So that that steady refusal upon which the defendant wholly relies as constituting unreasonable delay and repudiation on the plaintiff's part was only that which the plaintiff had a right to maintain. The steps to be taken by the defendant are well known; they are prescribed by the rules of this Court. By Order II. of Part II. of those rules, "Every person desiring to pass a transport of property in the Colony shall lodge at the office of the Registrar etc., etc., and the Registrar shall thereupon cause due advertisement, etc." Something was said at the bar about an affidavit to be made by the plaintiff as a necessary step towards passing of a transport and there is, as I have stated already, the allegation in the fourth paragraph of the defence as to the requiring the plaintiff in May, 1917, to be prepared to attend the Registrar's Office "to have the transport advertised." But no evidence has been given that anything is required by law to have been done by the plaintiff by his refusal to do which he prevented the defendant from fulfilling his obligations. On the contrary, it was, as expressly pleaded and argued, the plaintiff's refusal to pay the balance of purchase money which dictated the defendant's notice that the sale would be considered off. And even if the plaintiff must have gone to the registry to depose to an affidavit before advertisement could be issued, the requirement to do so was coupled with the demand for the payment of the balance, which I say the defendant had no right to make under the terms of his contract with the plaintiff, and if a person when righteously required to fulfil one obligation upon him is, simultaneously unrighteously required to perform another obligation, he is at liberty to refuse to fulfil the one until the demand to fulfil the other has been withdrawn. From all points of view, therefore, the defendant held a mistaken opinion as to his rights and liabilities under his contract. I have not had to depend upon examination of the evidence of the various witnesses to reconcile,

## RAMGOLAM v. WILLIAMS.

if necessary, some variances to which slight reference was made by counsel, but may say that on the whole, as indeed admitted by Mr. Luckhoo for the defendant, the parties are not at material difference as to the facts, but only as to the effect of the written memorandum. I am of opinion that the plaintiff is entitled to have the contract performed, and there will be a decree for that purpose with the usual consequential direction as to payment of the balance of the purchase money and all such acts, deeds and things to be done and executed by the defendant (which, in the circumstances attending conveyance of property in this colony, may include directions as to advertisement and the like) as are necessary and proper. The defendant must pay the plaintiff his costs of suit.

## HIGGINS v. ROHLEHR.

[172 of 1917.]

1918. MARCH 22, BEFORE HILL, J.

*Partnership—Premature commencement of business by one party—Knowledge and consent of other party—Effect on relationship between parties.*

Claim by the plaintiff to recover the sum of \$1,957.21, amount of money alleged to have been lent to defendant, and for work done at her request on her estate named Belmonte, in the county of Berbice, between January and June, 1917.

Defendant denied indebtedness, set up a partnership, and counter claimed for the sum of \$1,000 as damages for breach of agreement.

All further necessary facts fully appear from the judgment of the Court.

*B. B. Marshall*, for the plaintiff.

*J. S. McArthur*, for the defendant.

HILL, J.: The plaintiff claims from the defendant \$1,957.21 monies alleged to have been lent, paid, and advanced by him at defendant's request, and for monies due and owing for work and labour done by plaintiff at defendant's request on defendant's estates in Berbice.

Included in this amount are items aggregating \$140.81 which plaintiff admits should be deducted leaving \$1,816.34, and also a charge for \$150 for five months pay due plaintiff, for managing the estates under an agreement.

I am satisfied that the plaintiff did expend from his monies the

## HIGGINS v. ROHLEHR

sum of \$1,666.34 as set out in his claim, and in fact \$1,213 of this is not disputed by the defendant.

The defendant alleges an agreement of partnership under date 1st February, 1917, which provided, *inter alia*.

- (a) That defendant was immediately to sell and transport to and in favour of plaintiff an undivided half in the defendant's estates in Berbice, Belmonte, Union, and Welgelegen, for and in consideration of \$4,000 to be paid to defendant by plaintiff.
- (b) that on passing of the said transport the plaintiff shall enter into possession of the whole of the said plantations, assume the management, and carry out and conduct operations duly specified in the articles of partnership, subject to its terms.
- (c) That the plaintiff shall have the right after entering into possession of the estates to purchase all articles for the use of the estate, etc.
- (d) All payments to be made for wages, purchases, etc, to be made by plaintiff and become a charge on the working expenses of the partnership, etc.
- (e) Clause 19 provided for the payment of six per cent, interest to either of the parties making any loans or advancing monies for the working of the estates.
- (f) Clause 25 provided that the monies for the working of the estates shall be furnished by Mrs. Rohlehr or Mr. Higgins jointly personally, or obtained on loan as hereinbefore narrated (Clauses 18 and 19).

The defendant alleges that in pursuance of the partnership agreement plaintiff paid \$1,213 on account of the \$4,000, the balance being payable at the passing of the transport by defendant to plaintiff. As a matter of fact, there was nothing in the agreement requiring such a payment. Santos held a mortgage on the estates for \$2,500, and the defendant had to give plaintiff transport of his half free of encumbrance. But Santos pressed for his interest, and plaintiff in anticipation of the carrying through of the transport, advanced \$1,100 or thereabouts to satisfy his demands, as well as \$113 to relieve Dr. Rohlehr of a judgment summons for that amount which was out against him. It was agreed that these two items should go against the purchase price of \$4,000 but it is not correct to say that that sum was paid as "in pursuance of the agreement."

The defence further alleges that plaintiff wrongfully and in contravention of the terms of the agreement of partnership entered into possession and commenced operations, and that the sums alleged to have been expended were expended in contemplation of the partnership entered into on 1st February, 1917.

## HIGGINS v. ROHLEHR.

Defendant denies indebtedness in the sum of \$150, for wages. She says she never agreed to pay anything except in and by virtue of the agreement of partnership, and that plaintiff never acted as manager under the agreement, which has not yet come into operation or at all.

With regard to the other items, defendant says, if paid, they were paid pursuant to the plaintiff's wrongful possession of defendant's estates, and in anticipation of the said agreement being carried into effect, by plaintiff, which he was unable or unwilling to do.

In paragraph 10 defendant sets up a specific agreement of partnership still subsisting, and that plaintiff has mistaken his remedy.

In counterclaim, defendant alleges repudiation, and unwillingness to accept transport by plaintiff, impossibility of trust and confidence, asks for \$1,000 damages, and an order rescinding the agreement.

The reply is possession by consent and act of defendant before the passing of the transport, and inability to carry out the agreement in consequence of the acts of commission and omission of the defendant, resulting in the abrogation of the agreement, and therefore no question of dissolution of partnership or specific performance can arise.

There has been a mass of evidence taken, and I do not propose to set it forth herein, but merely to state that on consideration of it I find that the plaintiff was put in possession, and accepted possession, by Dr. Rohlehr on behalf of the defendant, Mrs. Rohlehr in March, before the transport was passed, that his possession was not wrongful—and that, so far as that question goes, plaintiff could always have paid the purchase money of the estates either from his own funds or from borrowed money (see the evidence of Wight and DaSilva).

There were two advertisements of the transport; the first fell through, from what reason is not quite clear, but I am inclined to accept the evidence of Mrs. Kelman that on 28th April, the last day for passing the transport, Dr. Rohlehr told her in the morning "he was not going to pass it any more "as he had changed his mind about passing it subject to mortgage."

Later on, in May, plaintiff, actuated no doubt by the knowledge that he had spent large sums and had no security, and that the Rohlehrs had advanced nothing, agitated for a re-advertisement of the transport. This was done, but there can be no doubt both parties were at this time heartily tired of each other, and plaintiff would have been glad to get his money back and be quiet of the transaction. There was one obstacle to this, the Rohlehrs had no money to pay him,—and then begun a series of

## HIGGINS v. ROHLEHR.

evolutions on the part of the legal gentlemen concerned in which the parties were pawns in a game of bluff.

The transport was re-advertised free of encumbrance and in accordance with the defendant's letter, plaintiff, with his legal advisers, attended at the Law Courts on 2nd July to receive transport. The mortgage of \$2,500 to Santos had to be cancelled as a preliminary to the passing of the unencumbered transport, but the grosse could not be found. While it was being searched for plaintiff and his legal advisers retired after asking the Registrar to note that they had attended. As a fact the grosse of the mortgage was in the possession of Mr. Marshall, counsel for the plaintiff, who had been given it by Santos, for whom he was acting, some time before, to oppose the transport. Mr. Marshall must have known that it would be required—nevertheless he did nothing, the parties never spoke to each other, but both sides asked the Registrar to note that they had attended.

The history of the mortgage incident is significant—plaintiff had on 16th June filed his specially endorsed writ in the matter in consequence of Mr. Marshall, acting for Santos the mortgagee, entering opposition to the transport on 15th June. It is significant that Santos says his entering opposition was done at the instigation of Mr. Marshall.

In these circumstances I am constrained to think that plaintiff realising the inability of the Rohlehrs to finance the partnership jointly with him (clause 25 of agreement) and realising that he was nearly \$2,000 out of pocket, was not anxious to obtain transport, but preferred to get his judgment under the specially endorsed writ, if it was possible, and be quit of the Rohlehrs, and the partnership.

I believe the defendant was ready and willing to pass transport on 2nd July and her inability to do so was primarily caused by her temporary inability to cancel the mortgage which, as I have said, was in the possession of counsel for the plaintiff. Defendant had paid all the necessary fees, for transport, and cancellation of mortgage, and the act of cancelment was ready for the signature of Santos.

There is however one feature of the defendant's willingness to pass transport, and the plaintiff's to accept, which has to be dealt with and that is whether the advances made by the plaintiff for the working of the estates (over and above the sum of \$1,213) should have been set against the purchase price payable by the plaintiff. This was the subject of dispute between the parties, and according to Crane's evidence, Higgins told him he "was going to refuse any transport except the judge told him as to his "money he had expended."

## HIGGINS v. ROHLEHR.

In the absence of any arrangement I am of opinion that such advances came under clause 19 of the partnership agreement, and could not have been deducted from the purchase money.

I am also of opinion that the plaintiff was entitled to charge \$150 for five months' wages.

“If (says Lindley on *Partnership*, at p. 10.) the parties to an agreement “have begun to carry on business, although prematurely, they will be partners. But the premature action of one, unless acquiesced in by the others, “will not affect them.”

Higgins took possession of the estates prematurely with the knowledge, consent, and act of Dr. Rohlehr acting for his wife, and in anticipation of her passing of the transport to him, he continued in possession, and he adopted therefore the contract, and cannot now disaffirm it by quitting the estates, as the parties cannot be put on the same position as before. (*Hunt v. Silk* 5 East, 449).

His remedy is therefore on the contract itself (*Blackburn et al v. Smith* 2 Exchequer Reports, 783).

If he had not entered into possession he could have sued for the \$1,213 as money had and received, but not otherwise.

I find therefore there was a subsisting agreement of partnership. It was still in existence—the presence on 2nd July, 1917 of the parties, ostensibly, to give and receive transport pointed to it, and in these circumstances I think the plaintiff mistook his remedy and should have come for specific performance.

On the counterclaim I do not feel disposed under all the circumstances to order rescission of the agreement—no damages have been shown. Both parties appear willing that the agreement should be rescinded but, naturally, plaintiff wants what he has spent refunded to him and an account for his labour. This must be a matter of agreement between the parties, and may save further litigation. I cannot look upon the \$1,213, under the circumstances in which it was advanced as in the nature of a “deposit” forfeitable to the defendant, and no where in defendant's pleadings, as a matter of fact, is it suggested that it should be so treated.

I give judgment for defendant on the claim and for plaintiff on the counterclaim. Each party to bear his own costs.

RICHARDS v. DEMERARA ELECTRIC CO., LTD.

RICHARDS v. DEMERARA ELECTRIC CO., LTD.

[363 of 1917.]

1918. MARCH 23. BEFORE BERKELEY, J.

*Master and servant—Employer's liability—Common employment—Defect in condition of scaffolding—Contributory negligence—Accidental Deaths and Workmen's Injuries Ordinance (No. 21 of 1916), s. 9.*

Appeal from a decision of the acting Stipendiary Magistrate of the Georgetown judicial district (Mr. B. S. Newsam).

Plaintiff Richards claimed from the defendant company the sum of \$100 as damages for injuries sustained by him during his employment as a wood Sawyer by the defendant's manager on a wood-cutting grant, Waratilla creek, Demerara river. Judgment was given for the plaintiff in the sum of \$75, and the defendant company appealed.

The reasons for appeal were that there was no evidence of any fault or defect in the construction or state of repair of the saw-pit, nor any proof of negligence on the part of the defendant company, and that it was proved that there was contributory negligence on the part of plaintiff.

*G. J. de Freitas, K.C., Acting S. G.,* for the appellant.

*G. R. Browne,* for the respondent.

BERKELEY, J.: This is an action brought in the Petty Debt Court of Georgetown before the Stipendiary Magistrate (Mr. B. S. Newsam). The plaintiff alleges that owing to the negligence of his employers (the defendant company) he sustained injuries on May 16, 1917, when engaged in sawing timber at the Pioneer wood-cutting grant at Waratilla creek, in the Demerara river. He was awarded \$75 as damages.

The defendant company appeals on the ground that there is no evidence of negligence.

The claim is brought under Part II. of the Accidental Deaths and Workmen's Injuries Ordinance (21 of 1916). This Part II. is in effect the Employers Liability Act 1880 (*43 and 44 Vict. c. 42*). Under that act the doctrine of common employment is largely modified, and the general effect of the act is that whereas under the common law a workman injured in the course of his employment could only recover compensation when he could prove that his employer had either neglected a statutory duty imposed on him, or was personally responsible for the negligence which led to the injury, he can now recover where the employer has delegated his duties to other persons who have negligently performed the duties delegated to them. No special privilege is given either to the workman, or, in case of death, to his representatives.

## RICHARDS v. DEMERARA ELECTRIC CO, LTD.

They are to have the same right of compensation and remedies against the employer as if the workman had not been a workman of the employer, nor in his service, nor engaged in his work. As said by Bowen. L.J. (*Thomas v. Quartermaine* (1887) Q.B.D. 692) an enactment which distinctly declares that the workman is to have the same rights as if he were not a workman cannot—except by violent distention of its terms—be strained into an enactment that the workman is to have the same rights as if he were not a workman and other rights in addition. This is the first case in the Supreme Court under the new ordinance and at the request of counsel I have dealt with the general effect of its provisions.

The magistrate in his reasons for decision has found, *inter alia*, that the injuries to the plaintiff were caused by the collapse of the pit in the act of canting the log to be further sawn in the customary way among sawyers (p. 6), and that this was due to some defect in the scaffold or pit which arose from the negligence of the employer or of some person in his service and entrusted by him with the duty of seeing that the pit was in proper condition. He has also found that the plaintiff did not know of the defect—that there was no contributory negligence on his part (page 8).

The plaintiff and Rodie were by themselves engaged in sawing wood on the pit or scaffold at the time of the unfortunate accident which resulted in the death of Rodie and the injuries to plaintiff. He therefore is the only person who can give evidence as to what actually occurred. He says that on May 16, 1917, they had sawn the log lengthwise into four pieces, which had been lashed together, and in order to cant the log on its side to enable them to cut it into the required dimensions, he rested a crow bar on a bearer under the log and prized it up so that Rodie might place a wedge between the bearer and the log. The wedge was not put in, and the log fell breaking the bearer. One end of the log fell to the ground and the other end slid off causing the injuries complained of. It was the runner that broke, but this is a fairly accurate statement as to what happened as is shown by the evidence of the manager of the grant who is of opinion that the accident was due so the canting of the log. As to the canting having been done in the customary way, the manager—who instructed the plaintiff and Rodie to saw the log in question, and by whose order it was placed on the permanent pit of the company—says that the canting should have been done with a block and tackle which could have been obtained on being asked for. He admits that the block and tackle had only been used once for that purpose, and on that occasion not by plaintiff and Rodie. He had some three weeks previously seen these two men

canting a log on a pit which they had erected themselves, and he had told them that it was a dangerous thing to do without getting assistance—they only laughed at him. He also knew that they had sawn a log 10 inches by 10 inches apparently 20 feet long in the company's pit and the runner had stood the act of canting, that the log being sawn at the time of the accident was 40 feet long and 15 inches by 15 inches. When he ordered this log to be sawn by plaintiff and Rodie he never gave instructions to use the block and tackle when canting it nor did he tell them that they could do so. On this evidence it was open to the magistrate to find that the process of canting adopted on this occasion was that which was customarily carried out with the knowledge and acquiescence of the manager of the defendant company.

A defect in the condition of the plant under s. 9 (1) is not necessarily a defect in its original construction; but a "defect in its condition" within the meaning of the ordinance exists if the plant is not in a proper condition for the purpose for which it is applied, (Lord Coleridge, C.J., in *Heske v. Samuelson* 12 Q.B.D. 30, followed in *Cripps v. Judge*, 13 Q.B.D., 583 and *Weblin v. Ballard*, 17 Q.B.D. 122),

The pit or scaffold at the time of the accident was to all appearance in good order. Plaintiff himself says that it looked all right. It had stood the canting of a log of timber 20 feet long and 10 inches by 10 inches, but when a log 40 feet long and 15 inches by 15 inches is canted on it, it shows a defect in its condition, that is, it is not in a proper condition for the purpose for which it is applied. The mechanical engineer who erected the pit says that if the runner had been 10 inches instead of 6½ inches in diameter it would not have broken. The manager is of opinion that two men should not have attempted to cant a log of this size with a crow bar, that they should have got assistance, and it should have been done with a block and tackle, that if the runner had been twice the size it would have been ⅔ the size of the log and it would not have broken in the act of canting, and if it was one and a half the size he does not think it would have broken. Here is the evidence of the manager himself on which the magistrate could find that he knew it was dangerous to cant a log of these dimensions on the pit as it then stood.

The magistrate has found that the plaintiff was ignorant of the defect in the pit and was not guilty of contributory negligence. The mere fact that he had been cautioned as to canting on some other pit a log of much lighter weight and half the length of the present log does not show knowledge of the defect. I agree with the magistrate that he considered the pit at the time safe for the purpose for which it was used and that there was no contributory negligence on his part.

## RICHARDS v. DEMERARA ELECTRIC CO., LTD.

I have carefully considered the cases cited and relied on in behalf of the appellant, and I am of opinion that there was reasonable evidence to support the finding of the magistrate. This being so the appeal must be dismissed with costs.

LEWIS AND ANR. v. BROWN.

LEWIS AND ANR. v. BROWN.

[376 of 1917.]

1918. FEBRUARY 1. BEFORE HILL, J.

*Practice—Application for further and better particulars—Rules of Court, 1900, Order XVII., r. 8—Notice of application—Order XL., r. 4.*

Application by the plaintiffs for further and better particulars—(1.) of the date or dates upon which defendant advanced to the first plaintiff various sums of money referred to in the defence and—

(2.) of the items and value of the goods delivered to the first named plaintiff referred to in the defence.

*J. A. Veerasawmy*, for the applicants.

*J. A. Luckhoo*, for the respondent.

HILL, J.: This is an application by plaintiff for further and better particulars in respect of certain pleadings in the statement of defence.

An objection *in limine* was taken under Order XL., rule 4, that such rule had not been complied with inasmuch as the whole of the copy of particulars attached to the application had not been served. The “grounds” of the application as contained in the application and the terms of the order applied for have been served as well as a copy of the only affidavit filed with the application and, in my opinion, that is sufficient compliance with the requirements of the order.

A further objection taken was that an extension of time for filing reply having been granted it was not competent for the plaintiff to proceed with this application.

The defendant, having refused particulars, was on January 9th informed by the solicitor for plaintiff of his intention to move the Court; on January 11th the solicitor for plaintiff obtained from the defendant’s solicitor an unnecessary extension of time for filing reply to January 19th, as he had no intention, he says, of withholding his application for further and better particulars, when the question of enlargement would have been dealt with. I see no reason why he should be debarred from proceeding with this application in these circumstances.

On the application itself, the defendant has set out in paragraphs 4 to 7 of the defence a version of transactions with an individual, the brother of the first named plaintiff, which are either insufficient or unnecessary.

## LEWIS AND ANR. v. BROWN.

I am not prepared to hold the latter view, and think the further, and better particulars asked for by the plaintiff's in paragraphs (a) and (b) of the application should be furnished. I therefore so order, and direct that enlargement of time be allowed for delivering and filing reply to ten days after the delivery of the aforesaid particulars. Costs of this application must be borne by the defendant.

W. FOGARTY, LTD., v. BHAGWANDASS;  
*Ex parte* GOMES.

[38 OF 1918.]

SMITH BROS. & CO., LTD., v. BHAGWANDASS;  
*Ex parte* GOMES.

[42 OF 1918.]

1918. APRIL 7. BEFORE BERKELEY, J.

*Interpleader—Movable property—Subsequent insolvency of debtor—Official Receiver in possession of property claimed—Stay of interpleader proceedings—Insolvency Ordinance, 1900. s. 9 (2).*

A claim by way of interpleader to decide the ownership of certain property levied on as the property of the debtor is not legal process against the property of the debtor within the meaning of section 9 (2) of the Insolvency Ordinance, 1900.

Claim by way of interpleader by Lionel S. Gomes to one Ford motor car levied upon by W. Fogarty, Ltd., and Smith Bros. & Co., Ltd., plaintiffs, in actions against Bhagwandass, as the property of the latter.

On the matter coming before the Court for the plaintiffs in the original actions and for the claimant to state the nature and particulars of their respective claims to the property levied on, and for the settlement of the issues to be tried in the interpleader action, application was made by the original plaintiffs to stay all proceedings in the interpleader claim on the ground that an insolvency petition had been presented by defendant, and the Official Receiver had taken possession of the car.

The application was refused and issues were fixed.

*J. A. Luckhoo* (for *G. J. de Freitas, K.C., Acting S.G.*) for the claimant.

*P. N. Browne, K.C.*, for the plaintiffs in the original actions.

BERKELEY, J.: The applications before this Court are for the settlement of the issues to be tried in the interpleader claim whereby the claimant claims as his property a certain motor car

## W.FOGARTY, LTD. v. BHAGWANDASS.

taken in execution at the instance of the execution creditors, the plaintiffs in the above actions. Since the claim was made an insolvency petition has been presented and pending the making of a receiving order the Official Receiver has taken possession of the car.

On behalf of the execution creditors it is urged that the court should make an order staying further proceedings in the interpleader claim. I am of opinion that such an order ought not to be made. An interpleader action brought, before the presentation of an insolvency petition, to decide the ownership of certain property cannot be regarded as a legal process against the property of the debtor (Insolvency Ordinance, 1900, s. 9 (2)). The claim itself brings the ownership of the property into question. The interim receiver's possession is on the same footing as that of the marshal who handed over the property to him until the debtor is adjudged insolvent when *the property* of the insolvent rests in him [s. 49 (1)].

*In re Isaacson* (1895. 1 Q.B. 333) a hire-purchase agreement was held to be a chose in action under s. 40 (iii). Whether or not the agreement laid over by the claimant is to be so regarded in view of the alleged facts and circumstances relating thereto must be decided on the trial of the action. Pleadings are ordered; the issue to be tried, the ownership of the car. The claimant to be plaintiff and the execution creditors defendants.

BHODAI v. DEMERARA RAILWAY CO. AND ANR.  
 PETTY DEBT COURT, GEORGETOWN.  
 BHODAI v. DEMERARA RAILWAY CO. & ANR.

[273—2—1918.]

1918. APRIL 9, 17. BEFORE HILL, J.

*False imprisonment—Larceny of goods—Arrest by police on information supplied by defendants—Charge sheet signed by defendant at request of police—Damages.*

A felony having been committed C., the second defendant and a servant of the defendant company, the owners of the property stolen, sent for the police who, on C.'s information, but not in his presence, arrested the plaintiff. Later C. proceeded to the police station and signed the charge.

*Held* that the defendants were not liable in an action to recover damages for false imprisonment.

Claim by the plaintiff Bhodai for the sum of \$100 as damages for false imprisonment.

All further material facts appear from the judgment of the Court.

*E. G. Woolford*, for the plaintiffs.

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

HILL, J.: Plaintiff claims \$100 for damages for false imprisonment. At the conclusion of the plaintiff's case Abraham for the defendants asked for nonsuit, on the ground that there was no evidence to show the Railway Company caused the arrest of plaintiff. I think the case of *Grinham v. Willey* 4. H. & N. 496 is on all fours with this case.

In that case Bramwell, B. (at p. 499) stated what occurred, "an offence "was committed, the defendant sent for a policeman, who made enquiry, "and on his own authority arrested the plaintiff. The defendant signed the "charge sheet; but in so doing he did nothing but obey the direction of the "police. It may have been hard upon the plaintiff that she was imprisoned, "but it was the act of the constable."

In the present case Bhodai says the police came to him and arrested him and marched him to the Brickdam station where he was put in the cell and detained for some seven hours.

Sergeant-Major Franklin states "a report was received from the Railway Company, Campbell who is a clerk there, came in consequence. Plaintiff was arrested and brought in consequence of a report. He was charged with the larceny of the oil and Campbell signed the information. . . . I refused to sign the charge. I thought the whole thing a mistake."

In cross-examination he says, "I wrote out the charge and Campbell signed it. Campbell was not there when Bhodai was arrested.

## BHODAI v. DEMERARA RAILWAY CO. AND ANR.

Bhodai was taken to the detective office before Campbell came to the detective office. He was brought for enquiries, not arrested. I don't know how long we kept Bhodai before Campbell came, perhaps one hour. I telegraphed to the Railway Company, to say I had got the man who they said had stolen the oil as I refused to take action. Campbell came. That is why I kept Bhodai. I told Campbell he must sign the charge. I wrote it out. He told me he had come to sign the charge. I told the Company I did not think there was any case through the telephone. I think I told Campbell it was a mistake and yet I told him he must sign the charge."

The detention or arrest was therefore the act of the police and the defendants are not liable.

Judgment for defendants with costs, and fee \$10.

## CAMACHO v. PIMENTO AND ANR.

[316 OF 1915.]

1918. APRIL 23. BEFORE SIR CHARLES MAJOR, C.J. AND HILL, J.

*Practice—Application for leave to appeal to the Privy Council—Notice of intended application—His Majesty's Order in Council (January, 1910), clause 4.*

An application for leave to appeal to the Privy Council pursuant to rule 4 of the rules regulating appeals to His Majesty in Council is made when the applicant files a copy of his notice of motion, or presents his petition to the Court, the rule providing that the applicant shall give the opposite party notice of his intended application, and the opposite party must be served by the applicant with the notice of motion before filing a copy of it or with notice of the intention to present the petition before it is lodged in the registry.

The copy of notice of motion must be filed, or the petition presented (*i.e.* lodged) within fourteen days from the date of the judgment appealed from, but it is not necessary that the applicant should be heard thereon before that time expires.

Petition for leave to appeal to the Privy Council from a decision of the Appeal Court of March 27th, 1918.

The petition was lodged in the registry on the fourteenth day after the date of the judgment appealed from, but a copy of the petition and notice of the application for hearing was not served on the opposite party until three days afterwards. Objection was taken by the respondent that the provisions of clause 4 of his Majesty's Order in Council (January 10th, 1910) governing appeals to the Privy Council had not been complied with. The objection was upheld and the petition dismissed with costs.

*G. J. de Freitas, K.C. Actg S.G. (P. N. Browne K.C., with him) for the petitioners.*

*H. H. Laurence for the respondent Comacho.*

SIR CHARLES MAJOR, C.J.: Rule 4 made by the Sovereign's Order in Council for regulating appeals to His Majesty's Privy Council provides that application to this court for leave to appeal shall be made by motion or petition within fourteen days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application. The judgment in this case intended to be appealed from was given on the 27th day of March last, and the time, therefore, limited by the rule for making an application under it expired on the 10th instant. On the 9th instant the defendants presented to this court a petition for leave to appeal from the judgment which was filed, and laid before me in Chambers on the 12th or 13th instant. After consultation with my brother Hill, we appointed the 16th instance for hearing the applicants on their petition, but at the request of the solicitor for the applicants, who attended me in Chambers for the purpose, that date was altered to the 19th instant. It appears from the statement of counsel for the plaintiff that, on the 14th instant, the applicants served the plaintiff with a copy of the petition and, we assume, informed him of the date of their being heard thereon; an affidavit of service (if any) does not form part of the transcript. The applicants coming for hearing, counsel for the plaintiff objects that they are out of time for non-compliance with the second requirement of rule 4, that is, that notice shall be given to the opposite party of the intended application, arguing that the application was made on the 9th instant and that no notice of the intention so to make it was given, but only a notice, after it had been made, of the day whereon the applicants would be heard on their petition. The rule plainly provides that an intending applicant for leave to appeal shall make his application within fourteen days from the date of the judgment appealed from, and that he shall give notice to the opposite party of his intention to make it. How he shall make his application is also provided, namely, by motion or petition, and compliance with the rule is secured, I think, when the applicant has served the opposite party with a notice of motion for a day within the period of fourteen days and filed a copy of the same in the registry, or when he has presented a petition to the court by lodging it in the registry on a day within the same period having previously given notice to the opposite party, either separately or by indorsement on a copy of the petition, of his intention to present it on that day. If those steps have been taken it is immaterial in my opinion that the motion or petition is not heard before the fourteen days have expired. In the Supreme Court there are no fixed days for hearing motions or petitions thereto, and it is the duty of practitioners, in the case of motions, so to make them returnable and file copies in the

## CAMACHO v. PIMENTO AND ANR.

registry, and in the case of petition so to present them, that they conform with the time limits of any particular step to be taken. Here, the defendants have adopted the mode of application for leave to appeal by petition. They presented their petition on the thirteenth day of the period allowed for presentation, but, alleging that they could not give notice to the plaintiff of the hearing of the petition until an appointment for that purpose had been obtained and that the appointment was made for hearing on the 19th instant, they served the plaintiff's solicitors with a copy of the petition on the 14th instant, that is four days after the time for so doing had expired. The answer to that is that the making of the application is one thing and the being heard thereon is another, and that it is the notice of the intention to make the application and not notice of being heard thereon, that is required by the rule.

As, therefore, the defendants' application under the rule was made upon presentation of their petition, and seeing that no notice of the intention to make that application was given to the plaintiff, the requirements of the rule were not observed and we cannot hear the applicants. It seems to me that the petition must stand dismissed out of court, with costs to be taxed and paid by the defendants to the plaintiff.

HILL, J.: Under rule 4 of the Order in Council of January 10th, 1910, application to the Court for leave to appeal shall be made by motion or petition within fourteen days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application.

The judgment in this matter was delivered on March 27, 1918, and on April 9th, 1918, a petition was lodged asking for leave to appeal. The court fixed the day of hearing for the 19th and on this being done copy of the petition was served on the opposite party on 15th April by the appellant.

The respondent's counsel contents that under rule 4 the appellant is out of time as no notice was given to him within fourteen days of the date of the judgment to be appealed from.

In Hong Kong I find the practice, under an Order in Council, is for the application to be made within fourteen days and for notice of the intended application to be given to the opposite party seven days within the period of fourteen days.

The practice here since the Order in Council of 1910 came into effect has not been uniform. In *Santos v. Pereira et al* in which judgment was given on December 15th, 1911, notice was served by the appellant Santos on the respondents on December 22 of his intention to appeal together with a copy of the petition "to be tiled" applying for leave to appeal, and on December 27 notice

of the fixture by the court for the hearing on January 2, 1912, was served on the respondents together with a true copy of the petition "filed" on December 22, 1911.

*In Smith Bros v. Demerara Railway Co.* (1915 L.R.B.G. 185) judgment was given On November 12, 1915, and on November 26, 1915, the respondents were served with a notice that the appellants had "this day filed" in the Registrar's office a petition for leave to appeal . . . . and the respondents were at the same time served with a true copy of the petition and also notice that the court would be moved on December 3, 1915.

Here we have the appellants keeping within the fourteen days but not serving notice *before* the filing of the application as in *Santos v. Pereira et al*, and the same course was adopted in *Wight v. Demerara Turf Club, Ltd.* (1916 L.R.B.G. 68). Decision was given on April 17, the petition for conditional leave to appeal was filed on April 29, 1916, and the respondent was served with notice and copy of the petition on May 1, 1916.

I am inclined to think that the procedure in *Santos v. Pereira et al* is the correct one in view of the word "intended" in rule 4. Waiting for the court to fix the day of hearing is quite unnecessary, and the would-be appellant is relieved of responsibility under the rule once he serves his opponent with the notice of intention to appeal and copy of petition, and then files his petition. It is always desirable for leave to appeal to be promptly applied for. The tendency to dilatoriness is marked in this colony unfortunately and notably so when a certain time is given for the doing of some act. It is invariably left to the last moment. As Bentwick says observance of an Order in Council, and any Rules thereon, must be strictly complied with. Non-observance by the appellant places him in the position "as of one who has no right of appeal."

The objection must prevail.

[Execution was stayed for ten days on the application of the petitioners with a view to a petition to the Sovereign in Council for special leave to appeal. The intention was subsequently abandoned.—ED.]

PERCY CLAUDE WIGHT v. DEM. TURF CLUB, LTD.  
 JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

PERCY CLAUDE WIGHT, RESPONDENT,

v.

THE DEMERARA TURF CLUB (LIMITED) (IN  
 LIQUIDATION), APPELLANTS.

FROM THE SUPREME COURT OF BRITISH GUIANA.

1918. APRIL 25TH.

Present at the Hearing:

LORD BUCKMASTER.

LORD PARMOOR.

SIR WALTER PHILLIMORE, BART.

*Specific performance—Auction sale—Contract of purchase and sale—Suit for delivery—Roman-Dutch law—Voluntary and judicial sales—Relation of bidder and auctioneer.*

There is no rule of Roman Dutch law which prescribes that at sales at auction the bidder is the acceptor. Neither is there any rule of law that the highest bidder can insist that the property, the subject of the sale, shall not be withdrawn from sale, and claim to have it delivered to him. The bid is merely an offer, and there is no contract between the bidder and auctioneer until the bid has been accepted by the latter.

This was an appeal from a judgment of the Appeal Court of British Guiana (Berkeley and Hill, JJ.) dated the 17th April, 1916, (a). The action was commenced in 1914, by the plaintiff Wight whose claim, in a suit for specific performance by the defendants of a contract of sale by them to him as the highest bidder at auction of a property including land, buildings and appurtenances of a race-course, was dismissed by the Court of first instance (Sir Charles Major, C.J.) on the 6th September, 1915. (b). The plaintiff appealed, and the appeal was allowed, the Appeal Court reversing the decision of the lower court and decreeing specific performance. From that decision the defendants appealed to His Majesty in Council.

*P. Ogden Lawrence, K.C., and W. R. Bisschop* for the appellants.

*F. Gore-Browne, K.C., and A. C. Nesbitt*, for the respondent.

Their Lordships' judgment was delivered by SIR WALTER PHILLIMORE:—The plaintiff in this case, the present respondent, brought an action to enforce specific performance of an alleged

(a.) 1916. L.R., B.G. 36.

(b.) 1915. L.R., B.G. 115.

## PERCY CLAUDE WIGHT v. DEM. TURF CLUB, LTD.

contract of sale whereby he contended that he became the purchaser of certain real estate in the colony of British Guiana which was the property of the defendant company.

The Chief Justice of British Guiana, Sir Charles Major, gave judgment for the defendant company, dismissing the action with costs.

On appeal, the Supreme Court, Berkeley and Hill, JJ., reversed the decision of the Chief Justice, and ordered the defendant company to transport and deliver to the plaintiff the property in dispute on payment of the sum of \$16,005 and one-half the costs of transport, and ordered the defendant company to pay the plaintiff's costs in both courts.

The company appeals from this decision.

The story is a short one. Some matters were controverted in the evidence; but the facts as found by the Chief Justice and not disputed in the Court of Appeal or before their Lordships are as follow:—

The company was in liquidation and one Cannon, the liquidator, who was also a licensed auctioneer, obtained leave from the court to sell the real property of the company, fifty-five acres of land known as Bel Air Park with the buildings thereon. Cannon was to be the auctioneer, making no charge for his services.

The sale was advertised as a sale at public auction by the liquidator in the grand stand of the club.

On the appointed day, the 4th December, 1914, the auctioneer began the proceedings by reading out the conditions of sale, which were as follow:—

“Conditions on which the undersigned will offer for sale at public auction on Friday, the 4th December, 1914, at 1 o'clock p.m., on the premises (in the grand stand), by order of Mr. N. Cannon (as liquidator of the Demerara Turf Club, Limited), 55 acres of land known as Bel Air Park with all the buildings, erections, fixtures, and fittings thereon:—

## ARTICLE 1.

“The purchaser or purchasers shall provide good and sufficient securities to the satisfaction of the auctioneer, who shall sign these conditions of sale along with the said purchaser or purchasers, and shall be bound as they do hereby bind and oblige themselves jointly and severally with such purchaser or purchasers to pay the purchase money.

## ARTICLE 2.

“Payment of the purchase money shall be paid to the auctioneer as follows: 10 per cent., in cash on the knock of the hammer, and the balance on the passing of the transport.

## ARTICLE 3.

“The purchaser or purchasers shall pay to the auctioneer in

## PERCY CLAUDE WIGHT v. DEM. TURF CLUB, LTD.

cash on the knock of the hammer the church and poor money payable on the sale.

## ARTICLE 4.

“Possession will be given on the passing of the transport, the cost, including the revenue stamp, to be divided between the seller and the purchaser.

## ARTICLE 5.

“Two or more persons bidding at the same time, or any dispute arising, the auctioneer reserves to himself the right of deciding and settling the same in such manner as he may think fit.”

A bid of \$15,000 was made, and a second bid of \$15,005. Then came a third bid of \$16,000, and then the plaintiff bid \$16,005. No further bid was made.

Cannon then said,—“I am sorry, gentlemen, but I cannot sell at that price.” The plaintiff says that he said, “The Turf Club is mine,” using consciously or unconsciously a phrase common at Dutch auctions by way of a descending scale. If he did say so Cannon did not hear him; and without more being said the company dispersed.

There was some correspondence afterwards, and then the plaintiff brought his action on the 23rd March, 1915.

It is to be noted that there was on the one hand, no intimation either beforehand or at the auction that there was a reserved price, or that the vendor reserved the right to bid; nor, on the other hand, was there any intimation that the sale was to be without reserve, or that the property would be knocked down to the highest bidder.

In these circumstances their Lordships have to determine what was the nature of the business which was entered upon when this property was put up for sale.

It is contended on behalf of the plaintiff that this matter is concluded by law; that by the Roman-Dutch law which rules, or at the time ruled, in British Guiana, the auctioneer who puts up property for sale thereby makes an offer, that each bidder is an acceptor, that by each bid a provisional contract is made, one liable to be displaced or superseded by a higher bid, but forming unless so displaced or superseded a contract binding on both parties.

Alternatively the contention is expressed in this way that the auctioneer when he puts up property for auction tacitly promises to accept the highest bid, and is bound to accept it, and that his verbal or physical acceptance is a mere formality which he is bound to give.

Hill, J., apparently decided for the plaintiff on both grounds; Berkeley, J., probably on the second only.

It is to be observed that this is not an action for damages for not accepting a bid or for withdrawing the property from sale. It is an action which proceeds upon the assumption that there was a sale.

For the plaintiff therefore to succeed, either the bidder must be an acceptor, or the auctioneer's acceptance of the last bid must be a mere formality.

It is contended on behalf of the defendant company that there is no settled rule of Roman-Dutch law to the effect asserted by the plaintiff, and no rules of Roman-Dutch law which apply to such auctions as this was, and that in any case this being a voluntary sale the auctioneer could make his own arrangements, and that the nature of the business for which he was arranging was sufficiently indicated by the use of the phrase "knock of the hammer" in the second and third of the conditions of sale, which showed that the bidder was to be deemed the offerer and the auctioneer, if he so willed, the acceptor.

It is no doubt true that the auctioneer could make his own terms on which he proposed to conduct the sale; but it is also true that if there was a silence as to any term or a doubt what the term was, it is material to know what is the underlying law, or the law which would prevail in the absence of any special term.

Their Lordships therefore proceed to examine whether there is any rule of Roman-Dutch law applying to auctions of this nature, and if so what its effect is.

All the Judges in the Courts below seem to have thought that there is a rule of Roman-Dutch law upon this point, but they have differed in their view of its effect.

There are no decided cases which can be quoted as authorities, and there is no code, statute, or ordinance. The law has to be extracted from the works of writers of authority. These start by referring to the Roman law.

In the Roman law itself, though sales by auction and the letting of tolls by auction were well-known, there is no direct guidance to be found. There are references to auctions, but no rules of law, to be found in the Digest. In the Code there are two passages [lib. 10, tit. 3, s. 4; lib. 11, tit. 31, s. 1]; but these relate to necessary or judicial sales, and, moreover, have no bearing on the point in question.

The writers on Roman-Dutch law endeavour to help themselves out by the analogy of the Roman law as to sale by *addictio in diem*. This analogy is noticed in the judgments of the Judges in the Court below; but as it was agreed at the bar before their Lordship, it is a misleading analogy. It is unnecessary, as there was this agreement, to explain at length why no assistance can be got from the analogy, and why, indeed, confusion will arise if it is

## PERCY CLAUDE WIGHT v. DEM. TURF CLUB, LTD.

attempted to bring sales by auction under the law as to sales by *addictio in diem*.

The writers on Roman-Dutch law also avail themselves of the writings of commentators of other European nations, such as Bartolus, who was an Italian, and Choppinus, who was a Frenchman from Anjou. How far they can be used as authorities on Roman-Dutch law may be doubted. They, too, found themselves on the law as to sales by *addictio in diem*.

The authority principally relied upon in the Courts below and before Their Lordships is Matthaëus, an author of much learning and repute, and quoted as an authority by later writers who are accepted authorities on Roman-Dutch law. He wrote a treatise on auctions. His book, "*De Auctionibus*," was published at Utrecht in 1653.

His work is founded on the Roman law and the European commentators upon it from Bartolus onwards. He also makes frequent reference to local ordinances as precedents.

Unfortunately, however, for its value as a guide in the present case, the principal scope of the work is to treat of public (so called) or necessary sales; that is, sales made under the authority of a Court of Justice, either of confiscated property or of property taken in execution of a civil judgment. Private or voluntary sales are matters of subsidiary treatment only. This is stated on the title page, and in Book I, chapter 4, *ad finem*.

And there is another reason. Voluntary sales by auction, using the word "auction" for a sale by increasing bids and "reduction" (as it will be convenient to do) for sales by decreasing bids, were, and apparently still are, unknown in Holland, except as tentative or provisional transactions.

Two classes of competitive sales are known in Holland. Necessary sales are in the ordinary form of auction sales, but at the close of the day no contract binding the vendor is created between him and the highest bidder; for all the authorities, including Matthaëus, are agreed that further offers may be, and, indeed, must be, taken till the last moment when the decree of the Court is made, till the seal of the Court has been lifted from the wax, as it is picturesquely expressed.

As to voluntary sales, those at any rate of land, they take two days. The first day there is an auction, and the highest bidder received a "treckgelt" or "strijckgelt," *premium quod datur augenti pretium* as Matthaëus calls it [lib. 1, cap. 1, s. 6, and cap. 9, s. 11]. In consideration of this *premium* the bidder is provisionally bound, but the vendor is not bound,

On the second day, the vendor makes a starting price, usually one-third higher than the highest bid of the previous day, and then descends (the process being called "afstach" till some

bidder calls out "Mine." [See "Matthaeus," lib, 1, cap. 12, s. 1]. This process is so prevalent that a verb has been coined, "mijnen" "to mine," meaning to bid, and bidders of all sorts are called "mijnders." [lib, 2, cap. 2, s. 5] Hence, too, comes the English phrase a "Dutch Auction." The vendor is apparently not bound to keep reducing, but can withdraw at any stage. If, however, he chooses he can descend to the level reached by the highest bid at the first day's sale, and if no one else bids, compel the bidder of the first day to complete his bargain.

Though Matthaeus refers but slightly and allusively to this practice, he certainly knew of it. But the difficulty is to fit those observations of his on which the plaintiff and the Judges of the Supreme Court rely, to either form of competitive sale.

Necessary sales are by way of auction, but it is clear that the highest bidder at the auction cannot claim to have bought the property, though he may be bound to complete his purchase.

In voluntary sales, the first step is by way of auction, but the highest bidder cannot claim to have bought the property, though he may in a certain event be bound to complete his purchase.

During the second stage of reduction it may be that the vendor offers the property at every price which he names.

If the observations of Matthaeus on which reliance is placed are intended for a sale by reduction, they have no application to the case before their Lordships. If they contemplate a sale by auction they are theoretical merely. These observations are to be found in Book I, chapter x, "*De Licitationibus*," s. 40-48.

In s. 40 he is drawing the distinction between necessary and voluntary sales, and insisting as against other authorities that in necessary sales there is no concluded bargain till the seal of the Court has been attached.

Contrariwise in voluntary sales, the matter is completed.

*Simul augendi seu adjiciendi facultas praecisa sit.*

But this passage leaves it an open question when the *facultas is praecisa*. It may be by the last bid, or it may be by acceptance of the last bid.

In s. 41 he appears to admit of the prolongation of the auction from day to day till the vendor is satisfied. In s. 43 he discusses the question whether a bidder can withdraw his bid, and concludes, in contradiction to other authorities, which he quotes, that he cannot. But whether this means that he cannot withdraw when once the words are out of his mouth, or that he cannot withdraw when his bid has been accepted, or has been taken as a bid so that a further bid is made upon it, does not appear.

Lastly, in s. 48, he puts the question whether, after bids have been made, but there has been no acceptance by the vendor, *post licitationes factas ante tamen additionem*, the vendor

## PERCY CLAUDE WIGHT v. DEM. TURF CLUB, LTD.

can withdraw. He states, and states correctly, that the authority of Bartolus and of Damhouder is against him; but he concludes, and this is the passage mainly relied upon, that the vendor cannot withdraw.

His reasons are that it would be absurd that the bidder should be bound and not the vendor, and that he who proclaims that he is going to hold a sale by auction tacitly promises that the property shall be sold to the winning bidder *ei qui vicerit licitatione*.

As to the first reason it may be observed that there are cases where it will happen that the bidder is bound while the vendor is not: as to the second reason, that, pushed to its logical conclusion, it would extend to prevent the vendor from withdrawing the property before any bid was made as it would disappoint the company, or from announcing that there is a reserve, or from stating any conditions of sale which he has not previously advertised, unless indeed they be in common form.

It is further to be noticed, as the Chief Justice points out in his judgment, that Matthaeus does not take the view that the auctioneer offers and the bidder accepts. There are Continental writers on jurisprudence who take this view: for instance, Puchta Pandekten (6th edition, by Rudolph, Leipzig, 1852 s. 252). Voet also is claimed for it; and it is certainly the view of his translator and editor, Berwick; and it is the view to which Hill, J., expressly gives his assent. But it is not that of Matthaeus. He takes the more common view that the bidder offers and the auctioneer accepts; but he thinks, for the reasons which he gives, that the auctioneer has tacitly promised to accept.

Remembering that there were in the Dutch usage of his time no conclusive auctions with rising bids, their Lordships think that Matthaeus, if he was writing of auctions, was writing as a professor of jurisprudence and not as a witness bearing testimony to the existing Roman-Dutch law.

As to other writers Bartolus, so far as he is an authority to be quoted on Roman-Dutch law, takes, as Matthaeus admits, the contrary view. So does Damhouder, a practising lawyer and writer in Holland.

Grotius is quoted on other points by Matthaeus, but has made apparently no statement on this point.

Voet, it is suggested, favours Matthaeus' view; but it is not clear that he does, and he has very much involved himself with *addictio in diem*.

Van Leeuwen and van der Linden are apparently silent on the point.

Sir Andries Maasdorp, in his *Institutes of Cape Law* (vol. 3, p. 130), certainly expresses himself to the effect that the sale is not completed till the fall of the hammer,

On the other hand, Burge in his *Foreign and Colonial Law* (vol. 2, p. 576), and Nathan in his *Common Law of South Africa* (vol. 2, p. 718), translate and accept Matthaeus.

The industry of counsel has furnished their Lordships with quotations from several other writers not mentioned in the judgments of the Courts below; but they are chiefly interesting for their full statements as to Dutch usage and for their silence on the point in question.

One modern author, S. J. Fockema Andrae, in a work published at Haarlem in 1896, speaking of the usage of lighting a candle for the period of the auction, says that the last bidder before the candle burnt out is the purchaser, if his offer be accepted (vol. 2, p. 28).

On the whole their Lordships are of opinion that there is no rule of Roman-Dutch law which prescribes that at sales by auction the bidder is the acceptor. In sales by reduction it may be otherwise. Neither is there any rule that the highest bidder can insist that the property shall not be withdrawn from sale and claim to have bought it.

This being so the matter is governed by the provisions in the conditions of sales, and they indicate with sufficient clearness that the offer will come from the bidder, and that there is no bargain till it has been accepted by the auctioneer, and they do not indicate that the auctioneer is bound to accept the highest bid.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, that the judgment of the Supreme Court should be reversed and that of the Chief Justice restored, and that the appellant company should have its costs in the Court below and of this appeal.

## ROACH v. RICHARDS.

[326 of 1917.]

1918. FEBRUARY 5, 14. BEFORE BERKELEY, J.

*Criminal law—Evidence of an accomplice—Corroboration—Principal and accessory—Accessory found, guilty of receiving.*

As a general rule a magistrate sitting as a jury should decline to convict a prisoner on the uncorroborated testimony of an accomplice.

An accessory before the fact may be tried and convicted in all respects as if he were a principal, but he may also be found guilty of receiving the stolen property if there is evidence to support such finding.

Appeal from a decision of the acting Stipendiary Magistrate of the Georgetown Judicial District (Mr. J. H. McCowan) who convicted the appellant Richards of receiving three dozen bottles of liniment, value \$7.92, well knowing them to have been stolen, and sentenced him to pay a fine of \$20, or in the alternative to two months hard labour.

The reasons for appeal fully appear from the judgment below.

*J. S. McArthur*, for the appellant.

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

BERKELEY, J.: The defendant appeals from his conviction by the stipendiary magistrate of the Georgetown judicial district (Mr. J. McCowan), who found him guilty of receiving stolen property, to wit, three dozen bottles of Sloan's liniment, the property of Brodie and Rainer, Limited.

The reasons of appeal are (1) that the decision is erroneous in point of law, (2) that there is admission of illegal evidence, and (3) that the decision is not warranted by the evidence.

As to corroboration of the evidence of an accomplice, in *R. v. Baskerville* (25 Cox C.C. 524), the Court of Criminal Appeal reviewed and restated the law applicable to corroboration of the evidence of accomplices. It is there pointed out that although the uncorroborated evidence of an accomplice is admissible in law, it has long been a rule of practice for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony

of an accomplice or accomplices, and in the discretion of the judge to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such uncorroborated evidence. This rule of practice has become virtually equivalent to a rule of law, and since the Criminal Appeal Act came into operation that court has held that in the absence of such a warning the conviction must be quashed. Lord Reading, C.J., who delivered the judgment of the court, said "it can but rarely happen that the jury would convict in such circumstances."

It is as well to draw attention to this case as the effect of the decision seems to be that in order to carry out this recognised rule of practice which has become virtually equivalent to a rule of law, a judge or magistrate—sitting as a jury—ought to refuse to convict in the absence of evidence corroborating the accomplice. In the present case the charge against the accomplice had not been disposed of, and he says "my case is to come off next," and again, "the store said if I spoke the truth they would be as easy as they could be" This shows how dangerous and improper it would have been to convict on his uncorroborated evidence. It follows that the first point for consideration is whether or not there was evidence to corroborate that of the accomplice Humphrey.

The corroboration necessary is independent testimony, which affects the accused by connecting, or tending to connect him, with the crime; evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but that the accused committed it.

The evidence of the porter Ross shows that on the day in question he took "3 parcels Sloans" in a basket with the delivery book to the shop of the accused; that he put the basket on the counter, and that one Massiah (charged with the accused and dismissed) opened the basket and took out the three parcels of Sloans liniment, and put them on the inside counter, and then went to the accused who was seen by Ross at the back of his shop; that the accused then came to Ross and was told by him that the goods had come from Brodie and Rainer; that Ross handed him the delivery book to be signed, and that accused opened it, turned the leaves, and handed it back telling Ross "all right." The delivery book produced contains no entry of these goods, nor is there any memorandum by accused of his having received them. The evidence of this witness—who discharged his duties honestly, and with regard to whom it is admitted that no suspicion attaches,—confirms the evidence of the accomplice Humphrey that goods were sent to the accused by the accomplice in accordance with a pre-arranged plan between the two of them, and that they were in the possession and under the control of the accused, that is, received by him in accordance with

## ROACH v. RICHARDS.

that pre-arranged plan, showing guilty knowledge at the time that they were so received. Here is corroboration on a material particular.

It is not necessary that there should be corroboration on every fact deposed to by the accomplice, and it was therefore open to the magistrate to accept the statement of the accomplice that the accused had paid him later, on the same day, the sum of four dollars for these goods.

It is not necessary to deal with the question of the admission by the magistrate of what is submitted to be illegal evidence, as the court has found corroboration and guilty knowledge without reference thereto. It is sufficient to say that certain parts of such evidence, in the opinion of the court, are admissible, while as to certain other parts the objection seems to be well founded.

The evidence shows that the accused was an accessory before the fact, and it is submitted that he should have been charged and convicted of larceny and that the conviction for receiving with guilty knowledge cannot be sustained.

The accused as an accessory before the fact is liable, to be convicted in all respects as a principal felon (*R. v. James* (1890) 24 Q.B.D., 439, and *R. v. Manning and Smith*, 6 Cox C.C., 86). In these cases the accused was charged with larceny only. In *R. v. Coggins* (12 Cox C.C., 517) the evidence showed that the accused had assisted in the stealing,—not as an accessory before the fact but as principal in the first or second degree,—and the only charge against him being that of receiving, the majority of the Court of Criminal Appeal held that there was not reasonable evidence upon which the accused might be convicted of receiving. So also in *R. v. Perkins* (5 Cox C.C., 554) where the prisoner stood outside the warehouse sufficiently near to have rendered aid if the actual thief was taken into custody, the Court of Criminal Appeal held that he could not be convicted as a receiver, that he was a principal in the second degree.

In the present case the accused was not present at the stealing of the "Sloans liniment," and was not sufficiently near to have rendered assistance to the thief Humphrey. By Ordinance No. 18 of 1893, s. 29 following the English Statute *24 and 25 Vict. c. 94, s. 1* (re-enactment of *11 and 12 Vict. c. 46*), an accessory before the fact may be indicted, tried, convicted and punished in all respects as if he were a principal felon, but he may also be found guilty of receiving the property stolen if there is reasonable evidence that he so received it. As said by Erle, C.J., in *R. v. Hughes* (Bell C.C., 242) there is no inconsistency in saying that he is guilty of being an accessory before the fact, and that he received the goods knowing them to have been stolen.

The conviction is affirmed and the appeal dismissed with costs.

ESSEX v. SEEMANDRAY.

ESSEX v. SEEMANDRAY.

[80 of 1918.]

1918. APRIL 26. BEFORE BERKELEY, J.

*Criminal law—Unlawful possession of spirits exceeding one pint in quantity—Facts constituting possession—Spirits Ordinance, 1905, s. 93—Spirits Ordinance, 1905, Amendment Ordinance, 1911, s. 14.*

Appeal from a decision of the acting Stipendiary Magistrate of the Berbice judicial district (Mr. J. H. McCowan) who convicted the appellant Seemandray of being in the unlawful possession of spirits exceeding one pint in quantity.

The question raised both before the magistrate and on appeal was whether on the facts, the magistrate was justified in finding that defendant was in “possession” of the spirits seized.

The material facts are sufficiently stated in the judgment of the court.

*J. A. Abbensetts*, for the appellant.

*G. J. de Freitas, K.C.*, Acting S.G. for the respondent.

BERKELEY, J.: Appeal from the decision of the stipendiary magistrate of the Berbice judicial district Mr. McCowan who convicted the appellant for a breach of the Spirits Ordinance, 1905, Amendment Ordinance 1911 s. 14. (2).

The substantial ground of appeal is that it is not proved that appellant was in possession of spirits exceeding in quantity one pint.

The evidence shews that appellant was seen to go with a calabash behind the distillery engine at Springlands plantation where there is a distillery, and immediately return therefrom with a small quantity of spirits therein. This calabash was taken from him and on the witnesses going behind the engine a bucket was found which contained rum of the same colour as that in the calabash. The contents of the calabash having been thrown into the bucket the quantity was nearly a quart. There was therefore a strong presumption, not only that the rum in the calabash was taken by appellant from the bucket but that the bucket was also in his possession, he having exercised the right of possession in respect thereto. No witnesses were called in behalf of appellant, and in the absence of any explanation the magistrate acted correctly in recording a conviction against him.

Appeal dismissed with costs.

*In re* TRANSPORT SHEWBURUN TO SHUBHAGRA.

*In re* TRANSPORT SHEWBURUN TO SHUBHAGRA.

[No. 3 OF 13. 4. 1918. BERBICE.]

1918. APRIL 27. BEFORE HILL, J.

*Immovable property—Transport—Devolution of property—Death of purchaser before obtaining transport—Transport by seller to heir or personal representative of deceased—Vesting of property on death.*

S. sold a property to N. but before obtaining transport N. died. By his will he left all his property to his wife and appointed G. executor. S. advertised transport of the property in question direct to the wife of N.

*Held*, that the property should be transported to N.'s personal representative, and then be dealt with by him in terms of the will.

Application by Shewburun to pass transport to Shubhagra, a widow, of lot 29, Plantation Hague, West Coast of Demerara.

The facts disclosed showed that on January 10th, 1916, Shewburun sold the property in question to one Nagesur the husband (by lawful marriage) of Shubhagra. The sale to Nagesur was never completed by transport, and he died on December 7th, 1917, leaving a will in which he appointed one Goolcharan as executor. By the will all the property belonging to deceased was left to Shubhagra, who was also appointed guardian of a minor child of the marriage.

Shewburun now sought to pass transport of the property purchased by Nagesur in his life time to the widow, but the Registrar questioned whether it was in order for the following reasons:—

- (1.) Nagesur appointed an executor, and the property therefore vested in him.
- (2.) There may be claims against the estate.
- (3.) Advertisement is necessary before transport, but here there is no advertisement of transport by Nagesur or his estate, through which omission his creditors (if any) would be prejudiced.
- (4.) Transport should be by Shewburun to the personal representative of Nagesur, and then by the latter to Shubhagra, should there be no opposition.
- (5.) A step in the devolution of the property was missing. The property did not vest in Shubhagra by virtue of the will, but in the executor.

HILL, J.: decided that the transport as put before him could not be passed as it was not in order for the reasons raised by the Registrar. He held that the property should be transported to Nagesur's executor, in his capacity as such. The executor could then after paying the debts deal with it in terms of the will and advertise transport to Shubhagra.

## RE TRANSPORT BAIRAJI TO RAGHUBAR.

## RE TRANSPORT BAIRAJI TO RAGHUBAR.

[Berbice. No. 3 of 13.4.1918.]

1918, MAY 3. BEFORE HILL, J.

*Title to immovable property—Transport—Marriage in community—Value of estate under \$480—Proof—Claim of surviving spouse to whole estate—Nature of claim—Vesting of property—Civil Law of British Guiana, Ordinance 1916, s. 6 (7.)*

Application by Bairaji to convey or pass transport to Raghubar of a portion of a lot of land at Rose Hall Village in the county of Berbice.

The facts disclosed showed that Bairaji was married in community of property to Kousilla who died intestate on February 26th, 1917, leaving five children living; it was further stated on oath that the value of the estate of Kousilla was \$200, and that, in terms of section 6 (7) Ordinance 15 of 1916 (Civil Law Ordinance) Bairaji, as surviving spouse, was entitled to the whole estate of his wife's land. In view of that right claimed he sought to pass transport of his wife's interest in the lot in question.

The Registrar raised two questions:—

(1.) The proof given as to the value of the estate of the deceased was not sufficient, and pending the coming into force of Ordinance 10 of 1917 (Deceased Persons Estates Ordinance) an inventory should be filed in terms of Ordinance 4 of 1898 or under the provisions of section 23 (1) of Ordinance 9 of 1909.

(2.) Immovable property does not vest in the surviving spouse under the provisions of section 6 (7) of the Civil Law Ordinance, 1917, but merely gives rise to the first claim or charge on the property up to \$480. The survivor here had no right to transport the property merely in view of his claim.

On the matter coming before the judge for transport, His Honour gave the following decision:

HILL, J.: The affidavit of the vendor shows he was married in community to his wife Kousilla who died in February, 1917. The affidavit further avers that her share of the common property amounted to \$200.

I am of opinion an inventory of the estate of the deceased should be filed and that the affidavit is not sufficient to prove the value of the estate.

I am also of opinion that under section 6 (7) Ordinance 15 of 1916, if the inventory shows that her estate does not exceed four hundred and eighty dollars, an administrator must be appointed—in this case the surviving spouse,—and the transport should be by him in his own right and as administrator of the deceased's estate.

JAIKARAN SINGH v. BAILEY.

JAIKARAN SINGH v. BAILEY.

[39 of 1918.]

1918. MAY 7. 10. BEFORE SIR CHARLES MAJOR, C.J.

*Criminal law—Constable—Assault—Execution of duty—Summary Conviction Offences Ordinance, 1893, s. 33 (2).*

A police officer detailed for duty and on duty in a tram car, was not acting in the execution of a duty when, at the request of the conductor of the car he removed therefrom a passenger by the conductor travelling on the step of the car, in contravention of the by-laws of the tramway company, and persisting in doing so after being required by the conductor of the car and the constable to desist.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist).

The appellant Bailey was charged with assaulting the complainant, a police constable, whilst in the execution of his duty as a peace officer, and was convicted. He appealed on the ground that there was no evidence to show that complainant, at the time of the alleged assault, was acting in the execution of his duty as a peace officer. The material facts are fully set out in the judgment of the Court.

*J. S. McArthur*, for the appellant.

*G. J. de Freitas, K.C., Acting S.G.*, for the respondent.

SIR CHARLES MAJOR, C.J.: The defendant has been convicted for assaulting the complainant, a police constable, in the execution of his duty. The evidence in the case showed that the complainant had been detailed for duty on a car of the Demerara Electric Company running through the city and suburbs and was travelling thereon. The defendant joined the car but travelled on the step or footboard. This, by by-laws and regulations made by the Company directors and approved by the Governor-in-Council, he was not entitled to do, that mode of travel being an offence against the regulations. The defendant was directed more than once by both constable and conductor of the car to cease doing so and to take a seat in the car or leave it. He continued to stand on the step. The car was brought to a standstill and the conductor directed the constable to put off the defendant. The constable put his hand on the defendant for the purpose when the defendant butted him and struck him, whereupon he dragged the defendant off the car and arrested him.

The defendant has appealed from his conviction on the ground that the constable was not in the execution of his duty when the defendant assaulted him, as it was no part of that duty as a peace officer to put the defendant off the car.

## JAIKARAN SINGH v. BAILEY.

Much argument has been addressed, and some authorities have been cited, to the Court on the question of a constable's power to arrest without a warrant which, it seems to me, I need not examine for irrelevancy. The defendant was in fact arrested, but, as the evidence shows, not for travelling on the footboard but, for assaulting the constable when the latter was putting him off the car. The real question at issue is was the constable executing a duty when he did so put off the defendant?

A charge of assaulting a police officer while in the execution of his duty seems, not infrequently, to be regarded, as though it were one of assaulting the officer 'while on duty.' In this case, the constable, in the sense of being present on the car as a police officer, was undoubtedly 'on duty' there, but he was only there to execute such duties as are imposed upon him by law, that is to say such duties as he is bound to execute, not any in which he may exercise a freedom of choice between execution or abstinence therefrom. And it is because peace officers are, in certain circumstances, saddled with the obligation to execute certain duties, that interference with them, whether by assault, obstruction or resistance, while fulfilling that obligation, is visited with a greater degree of punishment than that meted out to persons not so bound. Here the constable was not bound to put the defendant off the car or to aid the conductor in doing so; when, therefore, he himself imposed hands on the defendant for removal, he was not so in the execution of his duty as to support a charge of subsequent assault upon him therein. He was, of course, quite at liberty, and that lawfully, to remove or assist in removing the defendant, and the defendant, who it is plain violently assaulted him while so doing, was punishable in the same manner as at the instance of any other. But as held in (*R. v. Brickhall*, 33 L.J., M.C. 156,) a conviction for common assault may not be had upon a charge like the present one.

I am strengthened in this my view of the law by the dictum of Lord Chief Justice Cockburn in the case of *R. v. Roxburgh* (12 Cox C.C. 8.) The circumstances of that case were that a publican, wishing to have a customer removed who was drunk and refused to leave the public-house when requested to do so, called in a police constable to put the man out. While being removed with force, the man inflicted a serious injury on the constable, which led to his being indicted for felonious wounding. "The defence was," writes the learned reporter, "that the violence used by the prosecutor was "unlawful, as he had no right to use force to eject the prisoner and was acting beyond his duty in doing so; and the magistrates had so far acquiesced "in this view that the prisoner had not been committed or indicted for assaulting the police officer in the discharge of his duty, but only for inflicting

“grievous bodily harm. Cockburn, C.J., said that, although, no doubt, the “prosecutor might not have been acting—strictly speaking—in the execution of his duty as a police officer, since he was not actually obliged to “assist in ejecting the prisoner, yet he was acting quite lawfully in doing so, “for the landlord had a right to eject the prisoner under the circumstances, “and the prosecutor might lawfully assist him in doing so.” *R. v. Roxburgh* was decided in 1871, and it is to be observed that by the licensing law then in force (the Licensing Act of 1860) all constables were required on the demand of a publican to expel or assist in expelling an intoxicated person from licensed premises who refused to quit them. Yet the learned Chief Justice said the constable was not—“strictly speaking—in the execution of his duty as a police officer, since he was not actually obliged to assist in ejecting the prisoner.” I must deal with this matter strictly, and even assuming that the conductor had a right to remove the defendant from the car, upon which I express no opinion, the constable was not, I think, acting in the execution of his duty *qua* constable, albeit quite lawfully, when he himself effected the removal.

The appeal is allowed and the conviction is quashed. I make no order as to costs.

## JONES v. FORTE.

[86 OF 1917.]

1917. MAY 4, 11. BEFORE SIR CHARLES MAJOR, C.J.

*Traffic Regulations—Motor cars on steamer stelling—Wilfully impeding officer regulating traffic on stelling—Colonial and Contract Steamer Traffic Ordinance, 1914—By-laws for the regulation of traffic by and in connection with colonial steamers, 1914, s. 14—Motor Car Ordinance, 1912—Offence ‘in connection with the driving of a motor car’—Endorsement of certificate.*

A servant of the Government employed under the Colonial and Contract Steamer Traffic Ordinance, 1914, in connection with the traffic dealt with thereunder, whatever its particular branch, is, during that employment, executing his duty in and while regulating the traffic.

A driver of a motor car who wilfully impedes an officer in the course of his duty while regulating traffic by refusing to obey the officer’s order to take up a certain place on a stelling, is not thereby guilty of an offence “in connection with the driving of a motor car” within the meaning of s. 4 of the Motor Car Ordinance, 1912.

Appeal from a decision of the Stipendiary Magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist). The appellant Forte was charged with wilfully impeding a duly authorised servant named Allen employed by the Government when in the execution of his duty at the Government steamer stelling, contrary to sub-section 14 of section 2 of the By-laws made under

## JONES v. FORTE.

Ordinance 18 of 1914, He was convicted and appealed from the conviction.

The principal reasons for appeal were as follows:—

- (a.) The complaint disclosed no offence, as the nature of the duty was not set out.
- (b.) The evidence did not establish that complainant was in the execution of any duty as defined in the by-law. Further the by-law did not provide for the duty complainant alleges he was executing.
- (c.) The offence of which appellant was convicted was not an offence for which the magistrate could properly order his certificate to be endorsed.

*P. N. Browne*, for the appellant.

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

SIB CHARLES MAJOR, C.J.: The defendant, a driver of a motor car, was convicted by Mr. Stipendiary Gilchrist for wilfully impeding Reginald Allen, a duly authorized servant of the Government when in the execution of his duty at a Government steamer wharf at which colonial steamers stop.

The defendant has appealed against his conviction on the grounds, shortly stated, that Allen was not in the execution of any duty under the law, and that if he were, he was not impeded therein. The appellant further contends that his offence, if any, was not an offence “in connection with the driving of a motor car” within the provisions of the fourth section of the Motor Car Ordinance, 1912, and, therefore, that the magistrate had no power to have his certificate of competency (as a driver) endorsed with particulars of the conviction. On this latter point I am clearly of opinion that the offence of which the appellant was convicted was not an offence “in connection with the driving of a motor car,” and that the endorsement of his certificate was *ultra vires*.

By the Colonial and Contract Steamer Traffic Ordinance, 1914, the Governor-in-Council may make by-laws for . . . keeping the approaches to the stellings, provided by the colonial Government for the use of any colonial steamer, free from obstruction to their convenient use by those steamers, and generally for the purposes of the Ordinance. This power, therefore, relates specifically to keeping the approaches to Government steamer wharves free from obstruction sea or river-wards and generally, for all purposes of steamer traffic.

The by-laws under which the complaint was preferred is the second of by-laws made on the 8th December, 1914, by the Governor-in-Council, “for the regulation of traffic by and in connection with colonial steamers,” by the fourteenth clause where-

of every person who wilfully obstructs or impedes any servant employed by the Government when in the execution of his duty on any stelling at which Colonial steamers stop shall be guilty of an offence.

The Ordinance is a steamer traffic ordinance and under the power of the Governor-in-Council already mentioned, the second by-law contains in clauses nineteen and twenty exercise of the specific power relating to the use of approaches to wharves by steamers, in clauses five to twelve, thirteen and fourteen (in part) to eighteen, exercise of the general power relating to steamer board, and in clauses thirteen and fourteen (in other part) to wharves, and in clauses one to four to passenger tickets. The by-laws, therefore, constitute a proper exercise of the power of the Governor-in-Council for the purposes of the ordinance, one of which is the regulation of steamer traffic. Under the word traffic, it is well settled, and comprised all measures taken in connection, not only with steamers themselves, but with passengers, passengers' vehicles, animals, carts and goods of every description using or being conveyed to or from steamers, wharves, or approaches thereto. A servant of the Government, therefore, employed under a traffic ordinance, that is employed in connection with that traffic, whatever its particular branch, is during that employment executing his duty in and while regulating the traffic.

The evidence shows that the appellant took his car on to a wharf where Allen was employed in regulating the traffic thereto and therefrom. Allen directed the appellant to take the car behind some other cars which had previously been brought to the wharf, in accordance with a rule made by Government steamer servants relating to the places of cars for transport in order of arrival at the wharf. This the appellant refused to do. Was or was not Allen, when on the wharf that morning in the execution of his duty under the ordinance?—for I agree that the duty must have been one cast upon him by the ordinance. I am of opinion that he was, for his duty was to regulate the traffic and that is the purpose for which the ordinance was passed.

I am also of opinion that in refusing to obey Allen's direction, given in order to secure what Allen deemed a proper and convenient method of regulating the traffic, the appellant was impeding Allen in the execution of his duty.

The appeal must be dismissed with costs. The indorsement on the appellant's certificate of competency, if made, must be cancelled.

[NOTE.—An appeal was lodged against the above decision of the Chief Justice, but owing to the death of the appellant Forte, a notice of discontinuance was filed by his solicitor on May 1st, 1918.—ED.]

WIDDUP v. BARCELLOS.

WIDDUP v. BARCELLOS.

[84 of 1918.]

1918. MAY 11. BEFORE SIR CHARLES MAJOR, C.J.

*Criminal law—Selling spirituous liquor on Sunday—Summary Conviction Offences Ordinance, 1893, sec. 193—Licenced Places (Closing Hours) Ordinance, 1902, sec. 3—Complaint silent as to Ordinance—Evidence—Divisibility of offences—Summary Conviction Offences (Procedure) Ordinance, 1893, sec. 40.*

Appeal from a decision of the stipendiary magistrate of the West Coast judicial district (Mr. H. K. M. Sisnett). The defendant Barcellos was charged for that he “being the holder of a retail spirit shop licence situated at Hague, in the West Coast judicial district . . . did on Sunday, the 6th day of January, 1918, deliver therefrom spirituous liquor contrary to law.” He was convicted and appealed from the magistrate’s decision.

The principal reasons for appeal were:—

- (a.) No proof that defendant was the holder of a retail spirit shop licence at Hague.
- (b.) No proof of identity of shop mentioned by the witnesses with the shop mentioned in the charge.
- (c.) No evidence to connect defendant with the extract from the list of licences put in evidence.
- (d.) Defendant having been charged under s. 193, Ordinance 17 of 1893, and the evidence, if believed, having shown him to be the holder of a retail spirit shop licence, it was not competent for the magistrate to convict him under such section and ordinance, as they do not apply to such a person. The appeal was dismissed.

*J. A. Luckhoo*, for the appellent.

*G. J. de Freitas, K.C., Actg. S.G.*, for the lespondent.

SIR CHARLES MAJOR, C.J.: “The defendant,” says the magistrate for the West Coast judicial district, in his reasons for decision, “was charged under section 193 of Ordinance 17 of 1893, for that,” and the magistrate proceeds to set forth the offence as charged. The wording of the complaint leaves no doubt in my mind that the prosecution meant to charge the defendant under the Licensed Places (Closing Hours) Ordinance, 1902, section 3. The class of evidence given and the terms of the magistrate’s findings support this view. It may be said at once and briefly that if the magistrate could and did deal with the complaint as under the 1893 Ordinance the offence was amply

proved, and the conviction cannot be disturbed. But I treat it as dealt with under the 1902 Ordinance for the purposes of the defendant's objections to his conviction.

The ingredients of proof to establish the charge were: first, the time of the offence, namely, between 11 of the clock in the afternoon of Saturday and 5 of the clock in the forenoon of the following Monday. This was proved. Second, delivery of spirituous liquor (*a*) by the defendant, which also was proved, and (*b*) from a licensed place. It is said that there was no evidence before the magistrate to support his finding that the defendant's shop, the place from which the liquor was delivered, was licensed. The evidence on the point is contained in three statements. The first of P.C. Phillips who said: "On Sunday, got to Hague Front . . . I saw two coolie "men and one coolie boy standing on bridge leading to Barcellos' rumshop ". . . . The coolie boy and the two coolie men went into the shop yard." The second statement is that of Lloyd Dornford, who said: "Commissary of "taxation of West Coast fiscal district in West Coast judicial district which "includes Hague. This is an extract from licences kept by chief commissary ". . . Defendant is person mentioned in the extract." The extract contains entries of—"Name: Antonio M. Barcellos. Place: Hague Front, West Coast Demerara Fiscal District. Description of license: Retail spirit shop." The third statement is that of P.C. Charles, who said: "On 6. 1. 18, a Sunday, I "and P.C. Phillips went to Hague rumshop." It is quite clear from the evidence that the two constables went together to the same spot, and to the same shop and at the same time. One says that that spot and that shop were Hague Front and the defendant's rumshop, the other that the spot and shop were "Hague rumshop." Dornford testifying as to a fiscal district "which includes 'Hague,'" proved that the defendant is the owner of a retail spirit shop at Hague Front, the place described by one of the constables. The magistrate clearly, in my opinion, had abundant, at any rate sufficient, evidence before him to support his finding that the place wherefrom the defendant was proved to have delivered spirituous liquor, that is to say rum, was a licensed place.

I may add that if the magistrate dealt with the charge for the purposes of conviction as under the 1893 Ordinance although laid under the 1902 Ordinance, he had, in my opinion, power to do so, by virtue of the provisions of section 40 of the Summary Offences (Procedure) Ordinance, 1893. Applying those provisions to the facts of the case, it appears that the commission of the offence charged, *i.e.*, delivery of spirituous liquor from a licensed place on a Sunday, so described in the complaint, included another offence—"any other offence" is the expression used in the

## WIDDUP v. BARCELLOS.

section—that of delivery from a shop certain goods, that is to say rum, on a Sunday; that the defendant, therefore, might be convicted of the offence so included, which was proved, although, if the magistrate had no evidence sufficient to find proof of the place being licensed, the whole offence charged was not proved. However regarded, therefore, the conviction was right. The appeal is dismissed with costs.

## LUSIGNAN CO., LTD. v. BRASSINGTON.

[222 of 1917.]

1918. MAY 1, 2, 3, AND 31.

BEFORE SIR CHARLES MAJOR, C.J.

*Letters—Property in letters—Sender and recipient—Recipient manager of sugar plantation—Letters relative to business carried on.*

The defendant was in the employment of the plaintiff company, the owners of certain sugar plantations, as manager of one of their plantations. On leaving the employment of the plaintiff company, defendant took away with him and retained in his possession letters received by him in his capacity as manager from the owners in England and their London agents and copies of letters sent by him in his said capacity to the owners and agents. The plaintiff company brought an action to recover from the defendant their letters to him and the copies of his letters so them:

*Held*, that the proposition of law, to be found in *Gee v. Pritchard* (2 Swans 402), *Pope v. Curl* (2 Atk. 342), *Oliver v. Oliver* (11 C.B.N.S 139), *In re Wheatcroft* (6 Ch.; D. 97) and other like cases, that the receiver of a letter has the property in the paper whereon it is written, subject to the right of the sender to restrain its publication, was not applicable and that the letters from the company and its agents were received by defendant by virtue of his employment as manager, they related entirely to his employer's business and were therefore the property of the plaintiff company. But the copies of defendant's letters to the plaintiffs made by the defendant for his own use were in the absence of any agreement to the contrary, the property of the defendant.

The plaintiffs in this action were a limited liability company incorporated in England under the Companies Acts 1862 to 1890, and were the proprietors of Plantation Lusignan *cum annexis*, a sugar plantation in British Guiana. The firm of Curtis, Campbell & Co. were the London agents of the plaintiffs and as such carried on the correspondence with the manager of the said plantation. Defendant was employed as such manager from February 23rd, 1912, to September 10th, 1916. During that time various letters were written by the London agents to the defendant as manager, and during his temporary absence, to the acting manager, and defendant and the acting manager wrote certain letters to the London agents relating to the cultivation and management of the plantation. Copies of the latter were made by the defendant in a copy letter book supplied by the plaintiffs kept on a file on the plantation. When defendant relinquished his position as

## LUSIGNAN CO., LTD. v. BRASSINGTON.

manager he took away with him the letters and copies of letters above referred to and retained possession of them, claiming that they did not relate exclusively to the cultivation and management of the estate and that they were his own personal property.

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

*H. H. Laurence*, for the defendant.

Sir CHARLES MAJOR, C.J.: In arguing the claim of the defendant to retain as his property, on the one hand, letters to him by the plaintiffs' agents in London, and on the other hand, copies of his letters to those agents, written by the parties in the circumstances and for the purposes disclosed by the evidence in this action, counsel for the defendant has cited and commented on the familiar series of authorities dealing with the question of property in letters had by sender and recipient of them respectively, from which may be gathered the principle that the right of property in letters is in the receiver, or the person to whom they are addressed and delivered, so far as regards the paper on which they are written, but he has no right to publish them without leave from the writer, or, in case of the writer's death, without the leave of his executor. That principle, it seems to me, despite some comparatively recent expressions if not of doubt, at any rate of hesitation, as to its unrestricted applicability, cannot now be controverted, and the question here is, whether the principle prevails in the circumstances of this case.

The material facts are undisputed. The plaintiffs are the owners of plantations in this colony on which cane is cultivated for manufacture into sugar. For the purpose of their business as sugar manufacturers they are represented in London by Messrs. Curtis, Campbell & Co., (of whom I will speak as "the agents,") who in their turn are represented in the colony by Mr. Russell Garnett. In 1912, the plaintiff appointed the defendant their manager of plantation Lusignan. At that time the plaintiff's were represented in the colony by Mr. Duncan for all purposes of cultivation, upkeep and management of their cane plantations, through whom all correspondence on the subject of the business was conducted. Mr. Duncan retired from his planting attorneyship—as his office was called—in 1914, and on the 18th of September, in that year the agents addressed a circular letter to the plaintiffs' managers in the following terms. [His Honour read the letter].

Referring to the fourth paragraph of the circular, the system of correspondence between the agents and the managers, introduced on Mr. Duncan's retirement and still prevailing, appears to have been this. The defendant, like other managers, transmitted to the agents every fortnight—an interval, of course, gradually and

## LUSIGNAN CO., LTD, v. BRASSINGTON.

greatly affected by war conditions during the past three years and a half—full information relating to the conduct and progress of the plaintiffs' business, including a multitude of details in connection with cultivation, its nature and area, factories, their construction, maintenance and extension, labour, produce, transport, and expenditure. These communications were accompanied from time to time by the writer's recommendations and advice on various matters incidental to the business for the agents' consideration. Pursuant to instructions these communications the defendant did in duplicate to London and made copies of them for filing purposes, according to the circular, in the office of Mr. Garnett. The defendant also took copies of his letters for himself. At the same time as these letters were sent forward there was transmitted a "mail report"—a document partly printed, partly written, of which, apparently from the evidence, the manager's communication formed a *precis* or foundation. Acknowledgments from the agents of the documents thus transmitted were received by the defendant, commenting on their contents, sanctioning, modifying, responding, or altogether rejecting the adoption of measures recommended by the manager in connection with the working of the plantation, keeping him informed of transactions in London by the agents in the same connection, such, for instance, as a sale forward effected there of the produce of the plantation to His Majesty's Government, and generally dealing with the prosecution of the plaintiffs' enterprise. The correspondence, in fact, is fully explanatory as to the details of the method thus pursued by the plaintiffs in and about the conduct of their undertaking, an undertaking, I suppose, in its organization and system identical with, or closely akin to, those of the same nature, promoted and controlled by companies, partnerships, syndicates, or individual proprietors who are absent from the colony, and carried on by their local agents and servants by means of written communications from time to time.

Now, to a business of the kind and to the correspondence whereby the same is thus carried on, it seems obvious to me, the principles of law governing the property in letters, written and received by persons independent of one another, of a personal and domestic nature and regarding which there is no such relation of employer and employed as exists in the business I am considering and in others of kindred nature—to a business of the kind, I say, the principle of property in letters, can have no application. In the first place, these communications from the agents to the defendants, though couched in epistolary style, are not letters at all in the sense in which that description is applied to the documents considered in the cases of *Pope v. Curl* (1).

(1.) 2 Atkyns, 342.

*Oliver v. Oliver* (1), *Lytton v. Devey* (2), and the rest. Nor are the defendant's letters to the agents within the description. These latter, on the one hand, are reports of the working of the plantation and the conduct of the business of the plaintiffs in its cultivation for the plaintiffs' information and, where necessary, their consideration and approval; the reports are more; they are records of a most elaborate kind, containing statistics under headings such as "factory," "cultivation," "cane-pests," "expenditure," of a very informing and valuable nature. On the other hand the agents' communications contain a series of comments and criticisms on the defendant's reports, and examination and sanction, or condemnation, of his proposals. They are the complement of the reports and to be read with them. They also are a code of instructions. Each class of communication seems to me as necessary a part of the system adopted for the conduct of the plaintiffs' business and the records thereof, as the books, the files of statistical returns, the estimates of receipts and expenditure and the various other documents that are kept for the proper carrying on of the same. Other businesses will occur to one's mind at once, carried on by their proprietors who are resident out of the colony, through agents and servants, between whom and themselves the medium of conduct is correspondence, whether by letters, minutes, despatches, telephonic or telegraphic messages, or any other method. The letters from the agents to the defendant he would never have received at all had he not been in the plaintiffs' employ; they relate entirely to his employers' business, they are records of that business and are therefore the plaintiffs' property. And the plaintiffs' ownership of the defendant's communications, is derived from the same character and not because they are letters, in the paper whereon they are written the agents have a property but no right of publication except with the defendant's leave. There is nothing whatever to prevent or restrict the plaintiff's from making the same use, including publication, of the defendant's letters to them as they may make of any other document belonging to them. In *Evitt v. Price* (1 Simons, 483) is to be found the same principle, that of course of employment, by which, I think, cases of this kind are to be determined. The report is a short one and I will read it *in extenso*. [His Honour read the report]. The injunction, it is to be observed, not only prohibited the defendant from taking copies from the particularized documents, but ordered him to deliver them up.

In *Whittaker v. Howe* (3 Beavan, 383) the plaintiff moved for an injunction to restrain the defendant from detaining and keeping,

(1.) 11 C.B. (N.S.), 139.

(2.) 54 L.J. Ch., 293.

## LUSIGNAN CO., LTD. v. BRASSINGTON.

possession of or destroying certain documents; and also to restrain him from practising or carrying on the business of an attorney and solicitor. Howe had been a partner of Whittaker. He left Whittaker and removed a great many books, deeds, documents and papers from the partnership chambers, intending to set up business as attorney and solicitor and to make use of the documents removed from the chambers. The jurisdiction to effect a restoration of the papers, in the negative form then necessary, was not questioned and counsel for the defendant consented to deliver up all of them except those whose owners had given him notice not to part with them. Mr. Beavan notes to the case that an injunction was afterwards granted as to the deeds and papers but which had not at time of reporting been drawn up.

In *Whitwham v. Moss* (73 L.T. 57) the defendant—I read from the headnote—was in the employment of the plaintiffs, the executors of Piercely, who were carrying out certain contracts with a railway company on behalf of Piercely's estate. While in their employment the defendant measured up and entered the work done by the plaintiffs for the railway company. The defendant of his own accord left the plaintiffs' service and took with him the books or documents in which he had entered the measurements. The plaintiffs brought the action for recovery of the documents and moved for an *interlocutory* order for their delivery. It was held, on the evidence, that the papers had never been in the defendant's possession in any capacity but that of clerk to the plaintiffs; that his taking them away was wholly improper and that he ought to be ordered to give them up in four days. North, J., said: "The documents were in the plaintiffs' possession, and the defendant, who was their servant, had no possible right to remove them out of his master's possession." If I am right in holding that these letters from the agents to the defendant were part of the business records and that they came to the defendant's possession only by virtue of his employment in the plaintiffs' business, the cases I have quoted seems to me directly in point.

I have said that the agents' letters to the defendant are the plaintiffs' property. It is not so as regards the copies the defendant has made of his own letters to the agents. Every prudent man takes copies of his business correspondence with others and very often of that of a purely personal and domestic nature. This the defendant has done, and the copies so made are entirely outside his obligations by the terms of his employment as to copies of his letters. The circular of the 18th September, 1914, already read, by the fourth paragraph, prescribes what copies of managers' letters are to be furnished by the writers, and these copies the defendant has duly sent to Mr. Garnett. The only other references to correspondence are, one in the agents' letter to Mr. Mackenzie

## LUSIGNAN CO., LTD. v. BRASSINGTON.

of the 2nd September, 1914, in which the writers direct: "Will you kindly bear in mind when writing us, that a copy of your letter should be sent home, also a duplicate mail report, for us to hand to Mr. Wolseley. If you write in copying ink we could probably take a press copy here of the letters, and that might be the better course." The second reference is in the agents' letter to the defendant of the 13th May, 1916: "In addition to sending us by each opportunity a duplicate of your letter, we shall be glad if you will also provide us with a duplicate of your fortnightly reports, as this is required for passing on to Mr. Wolseley." All these instructions the defendant has observed. It was not a condition of the defendant's employment that he should keep the records of the business on the plantation supplied with copies of his letters as part thereof. His obligation was to the local agency. Even if that condition had existed, the particular copies in this case are undoubtedly those taken by the defendant for himself, and this is not an action for breach of contract. I may neglect the fact that the book in which the copies are contained is the plaintiffs' book. There will be judgment that the defendant deliver to the plaintiffs or their local agents all original letters received by him from the plaintiffs' London agents, either addressed to him or to the acting manager, Mr. Mackenzie, and in his custody or under his control, as in the particulars of those letters in the statement of claim mentioned; but omitting any letters specifically referred to during the trial as not now claimed.

The plaintiffs are under no obligation to supply the defendant with copies of their agents' letters to him, but they might well and properly do so. Judgment for the plaintiffs, but each party to pay their own costs.

HAY v. PAUL.

PETTY DEBT COURT, GEORGETOWN.

HAY v. PAUL.

[252—5—1918.]

1918. JUNE 6, 11. BEFORE HILL, J.

*Contract—Sale of house property—Action to recover commission by house agent—Failure of house agent to take out licence—No bar to recovery of commission.*

The failure of H. to take out a licence to carry on the business of a house agent does not affect the validity of a contract entered into between H. and P., whereby the latter agrees to pay a commission to H. on finding a purchaser for P.'s property.

This was a claim by the plaintiff to recover the sum of \$60, alleged to be commission earned by him as a house agent under an agreement entered into between the parties on the plaintiff finding a purchaser for a property at lot 23, Bourda, Georgetown, belonging to defendant.

Defendant denied that any agreement to pay any commission was entered into between the parties, and alleged that plaintiff was not a licensed house agent.

*E. D. Clarke*, solicitor, for the plaintiff.

*J. S. McArthur*, for the defendant.

HILL, J.: This is an action for commission as a house agent. At the time of the alleged agreement plaintiff had not taken out his licence as such. Defendant knew him to be a house agent. I see no reason why he cannot claim for services as such. He is no doubt liable to a prosecution but this does not debar him from suing. A penalty for not taking out a licence under the Tax Ordinance does not imply a prohibition, in my opinion, of an unlicensed person to act as a house agent. When the prohibition of an act is implied from the infliction of a pecuniary penalty for the doing of the act, the question often arises whether the penalty is imposed for the purpose of preventing the act being done, or only for the purpose of making the person who does it pay a certain sum of money.

*Cope v. Rowlands* 2, M. & W. 149, decided that a penalty or pecuniary advantage to a Mayor and Town Council under 6 Anne c. 16, was not the sole object of the statute, as in such a case it would not have been necessary to make provision for securing the good conduct of the persons admitted, and the penalty in that case was a prohibition also.

In my opinion the erection of the sign board was the "effective cause" or "*causa causans*" of the sale—see the evidence of the purchaser—and see *Mansell et al v. Clements* (1874) 9 C.P. 139,

## HAY v. PAUL.

The defendant denies any express agreement to remunerate. He says he and plaintiff were friends and he thought plaintiff was doing the service as a friend. He, however, admits there was an agreement between them that anyone who wanted to buy was to be sent to plaintiff, whether they came through the agency of plaintiff's notice board or not.

I cannot see the necessity of such an arrangement if Hay's active interest was only of a friendly nature.

In these circumstances I believe there was an agreement to pay 3 per cent., on the purchase money of \$2,000 and that plaintiff is entitled to judgment for \$60 with costs and fee \$6.

## PETTY DEBT COURT, GEORGETOWN.

RODRIGUES v. PAULOS.

[184—5—1918.]

1918. MAY 22, JUNE 11. BEFORE HILL, J.

*Matter and servant—Wrongful dismissal—Action to recover wages to date of dismissal—Subsequent claim for damages for wrongful dismissal.*

This was a claim by the plaintiff to recover from defendant the sum of \$30 as damages and pecuniary compensation. The claim set out that plaintiff whilst a servant in defendant's employment as a shop salesman under a monthly contract of service was, on May 6th, 1918, wrongfully dismissed from such service without reasonable cause or notice.

*F. Dias*, solicitor, for plaintiff.

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

HILL, J.: The plaintiff in another action against defendant has treated the contract of service as rescinded, and has recovered his wages up to the time of wrongful dismissal. He has now sued on the contract as continuing, and claims damages for wrongful dismissal, He was wrongfully dismissed, in my opinion, but having elected to treat the contract as rescinded he cannot now come in tort for damages.

Gases relied on are:—*Prickett v. Badger* (1856) 1 C.B. (N.S.) 296; *Lilley v. Elwin* (1848) 11 Q.B., 742; *Goodman v. Pocock* (1850) 15 Q.B., 576 and *Smith's Master and Servant*, 6th Edit., p. 147.

Judgment for defendant with costs, and fee \$3.00.

J. E. PEROT & Co. LTD., v. CAREW AND ANOR.

J. E. PEROT & Co. LTD., v. CAREW AND ANOR.

[349 OF 1917]

1918, JUNE 14, BEFORE BERKELEY, J.

*Landlord and tenant—Premises and machinery—Option to purchase at fixed price at termination of lease—Covenant to repair—Sale of premises and machinery to third party at price fixed—Third party with notice of damage and satisfied with purchase—Damages, measure of.*

P. & Co. leased a building and machinery to C. and W. with right to purchase at the termination of the lease for \$27,500. The tenants were liable for any damage during the existence of the lease, beyond ordinary wear and tear.

At the termination of the lease C. and W. did not exercise their option to purchase, and the property was thereupon sold to D. and Co., Ltd., for the sum of \$27,500. In an action by P. & Co., against C. and W. for damages to the machinery during the existence of the lease;

*Held* that the amount of damages the plaintiffs were entitled to was not affected by any agreement entered into between the plaintiffs (P. & Co.) and D. & Co., Ltd.

Claim by the plaintiffs to recover from the defendants the sum of \$1,137.60 for damages alleged to have been caused by the latter to certain machinery the property of plaintiffs and leased to defendants under an agreement dated the 12th day of December, 1914.

The further necessary facts appear from the judgment.

*G. J. deFreitas, K.C., Actg. S.G.*, for the plaintiff.

*E. G. Woolford*, for the defendants.

BERKELEY, J.: This is a claim for \$1,137.60 in respect of damages caused to certain machinery leased to the defendants under an agreement whereby it was provided that the plaintiff's should be entitled to compensation in the event of any damage other than ordinary and reasonable wear and tear.

The Court finds on the evidence of Mr. Parratt, civil engineer.

- (a) the two standards of log frame damaged and that to replace same would cost \$384-\$480.
- (b) depreciation to the fly wheel \$28-\$80.
- (c) depreciation to rice hulling engine \$30-\$40. That this engine having been repaired works as well as it did before the accident. That the steel frame for carrying saw with side connecting rods is practically undamaged, it was slightly twisted but has been set right. No compensation therefore can be allowed in respect thereof.

The court further finds that the plaintiffs owned the machinery, but that the building in which this machinery was situate was the private property of John Downer; that the shares in the company were held by John Downer and his family, in effect by himself; that the defendants declined to exercise their option under the agreement to purchase the entire concern for \$27,500;

that it was sold to Davson & Co. at that figure on 29th March, 1917; that the purchasers were not informed by the plaintiffs as to the damage to machinery; that the purchasers at the time of their purchase had knowledge of the accident which had occurred a year before; that since the purchase they have had no trouble with the machinery and are perfectly satisfied with it; that the plaintiffs have never at any time waived their right to compensation under the agreement of lease, although this court is inclined to the belief that the present action would never have been brought if the defendants had become the purchasers. On these facts are the plaintiffs entitled to compensation?

It is submitted that the agreement having been entered into by the plaintiffs and John Downer this action as brought cannot be maintained. In the statement of claim the plaintiffs allege that the machinery is their property. The defendants (p. 1) admit this. It seems to the court that it would be improper to require all the parties to an agreement to be made plaintiff's where as in the present case the only party affected by a breach of that agreement is the plaintiff company. As to a settlement by arbitration under clause 9 of the agreement it is sufficient to say that the jurisdiction of this court cannot be ousted thereby, nor can the fact that the tenancy had been determined by consent and that the plaintiffs had subsequently sold the machinery and suffered no actual loss deprive them of a cause of action which vested in them on the termination of the lease and before the sale was effected.

The general rule as to compensation is to ascertain the amount of damages at the time that the cause of action accrued; apparent exceptions to this general rule sometimes are found in cases of the sale of goods (referred to by counsel for the defendants), where circumstances may decrease the damages. In the present case the only circumstance affecting the machinery is that a sale of it has been effected by the plaintiffs to a third party on the termination of the lease. The defendants have nothing to do with this sale, and it cannot be taken into account in estimating the damages which the plaintiffs are entitled to recover from them (See *Joyner v. Weeks* 65 L.T. 16 and *Morgan v. Hardy*, 17 Q.B.D., 770 referred to therein.)

In addition to the amount of actual damage, \$442.80, as deposed to by Mr. Parratt, the court finds that the plaintiffs are entitled to an additional 20 per cent, for expenses, etc., as claimed by them.

Judgment for plaintiffs for \$531.36 and costs.

DE SOUZA AND ANR. v SOARES.

DE SOUZA AND ANR. v. SOARES.

[12 OF 1916.]

1918. JUNE 25. BEFORE SIR CHARLES MAJOR, C.J.

*Will—Marriage in community of property—Usufruct—Security by usufructuary—Inability to find sureties—Receiver of common property with power to realize—Powers of court over fund and its payment out.*

A usufructuary, in order to satisfy the requirements of security, must find sureties if they are required. If in that case suitable sureties cannot be found, he should apply to the court which will give such directions as it may deem fit. Where the usufructuary cannot find sureties and the property has, by the court's direction, been realized by a receiver, the fund, the proceeds of the sale of the property, may properly be placed in the hands of the persons who would have had the ultimate right to the property had it not been sold, subject to their securing to the usufructuary the payment of the income from that fund, and the income may be fixed by the court at a certain percentage.

Application by the plaintiffs in the above-mentioned action (1) for an order directing payment out of court to them of the sum of \$5,743.71, being the sum paid into court by the receiver who was appointed by the court to take over and realize the common estate of Antonio Soares, deceased, and the defendant Matilda Soares. By reason of the failure of the defendant to provide proper security for the enjoyment of the usufruct created by the will of her deceased husband Antonio Soares, and by reason of the conversion of the property the applicants claimed that they were now entitled to the whole estate free of the usufruct.

*J. S. McArthur*, for the applicants.

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

MAJOR, C.J.: The defendant, as the executrix of the will of her late husband Antonio Soares, proved his will in 1914 and it appears proceeded to administration of his estate. In 1916 the plaintiffs commenced a suit against the defendant as the usufructuary of a moiety of the common property of her husband and herself, for an inventory, and security for the user and restoration of the property subject to the usufruct, and judgment was given in their favour on the 30th May, 1916. The defendant had, on the 9th August, 1915, filed an inventory of the estate, containing, among other items, one under description as proceeds of a policy of assurance amounting to \$560, and another, as cash at bankers, amounting to \$1,531.87. The defendant as executrix has not yet passed her accounts. The value of the estate, for the purpose of the security ordered to be given, was taken as stated in the inventory. The defendant in September, 1916, nearly two years after her husband's death, had not given that security, and thereupon

(1) 1916 L.R., B.G. 82, 162.

the plaintiffs moved the court before me for liberty to issue a writ for her attachment. Into the evidence for and against the motion and the defendant's counter-motion to discharge the writ (which I had allowed to be issued but execution of which I had suspended), I will not enter. It is sufficient to say that, upon consideration, while not able to regard the attitude of the defendant with favour, I failed to find ground for believing that she was contumacious in failing to give security. In view, however, of some allegations relating to her dealings with the estate, I eventually granted an application by the plaintiffs that a receiver be appointed with the usual directions and power to realize the estate. Execution of the writ of attachment was suspended until further order. No further order has been made, against the defendant's subsequent good behaviour in the premises. The testator's estate has now been realised and there is certified to be due from the receiver the sum of \$5,743.71. He received no part of the proceeds of the assurance policy—now ascertained to be \$602—and only \$184.96 of the \$1,531.87, leaving a balance of \$1,346.91. His receipts include some amounts for realization of parts of the estate considerably greater than the values of those parts stated in the defendant's inventory. The receiver's remuneration has not yet been fixed.

Subject, therefore, firstly to the passing of her accounts by the executrix, in which, of course, she must include the policy moneys (which I have already decided formed part of the common estate) and also the \$1,531.87; secondly, thereafter to clue ascertainment of the precise sum representing the common property to be divided between the defendant and the plaintiffs; and, thereafter, thirdly to deduction from that sum of the receiver's remuneration and of costs, I have now to determine the nature of the order I ought to make upon this application, which is that the plaintiffs be paid at once their moiety of the common estate—to whatever that may amount—freed from the defendant's usufruct thereof under her husband's will. Mr. McArthur contends that the usufruct is lost because the nature of some of the property has been changed. I cannot listen for a moment to that contention, coming, as it does, from the plaintiffs, at whose instance the change was made and that very properly, in the interest of both parties to the suit, nor would I listen if the changes had been forced upon the parties by the court in the exercise of its discretion to appoint a receiver. It is urged, again, that the defendant is shown to have been contumacious in refusing to give security and, therefore, that her usufruct is extinguished. Even if there had been contumacy—and I have said that the plaintiffs have not satisfied me of that—it would not work extinction, but only postponement of the usufruct until security were given. On the evidence before me I am unable to say more than that it is a case of inability to find sureties, and, sureties

not being forthcoming and thereby security given for careful user and future restoration intact, a condition precedent to possession has not been fulfilled and possession cannot be given. What, in that position of matters, are the powers of the court? I find them wide and ample. As Mr. Nathan puts it, "A usufructuary, in order to satisfy the requirements of security, must give sureties. If he cannot find suitable sureties he must apply to the court for directions in the matter, and the court may allow him to take the usufruct subject to such conditions for safeguarding the property as the court may deem fit to impose." (1). As Mr. Morice has it, "If the usufructuary cannot give such security the court may use its discretion in the way of taking a mortgage, or putting the owner in possession on condition that he pay over the rents and profits to the usufructuary." (2) In all the circumstances of the case I must notice that the defendant has hardly been anxious to help the situation but has consistently kept herself aloof until brought to the court by the plaintiffs. In all the circumstances of the case, I say, I shall give possession of the fund to the plaintiffs, but they, in their turn, for that advantage, must secure to the defendant the half-yearly payment of the income. The security must be to the satisfaction of the registrar. I suggest, merely suggest, that it be, if of real property, by mortgage in the usual form; if of personal chattels within the meaning of that expression in the Bills of Sale Ordinance, 1916, by bill of sale under that ordinance. And the income must obviously be fixed on a certain percentage. The fund to be handed over to the plaintiffs will bear interest at the rate of 6 per centum per annum. The minutes of the full order made hereon for note on counsels' briefs will be—Order that receiver be allowed his remuneration at the rate of 4 per cent., on the gross amount of the estate in his hands after realization thereof and his costs (if any) outstanding, to be deducted from the sum certified to be now due from him, and pay balance into court. Order that executrix do pass her accounts and forthwith pay into court any balance certified to be due from her. In default, same to be charged against her share of the common property. Order that of the sum thereafter finally certified by the accountant, after deduction therefrom of the costs of both parties of the present application and carrying this order into effect, to be the amount of the common property divisible between the owners thereof, one moiety be paid out to defendant. Order that upon the plaintiffs giving to the defendant good and sufficient security satisfactory to the registrar for payment of the income of the other moiety, the same be paid out to the plaintiffs.

(1.) Common Law of South Africa, I. p. 436.

(2.) English and Roman Dutch Law, 2nd ed. p. 45.

JOHNSON v. BISHOP.

JOHNSON v. BISHOP.

[361 of 1917.]

JOHNSON v. BISHOP.

[361A. of 1917.]

1918. FEBRUARY 15. BEFORE SIR CHARLES MAJOR, C.J.

*Motor car—Light to show marks of identification plate at back of car—Car in use though not in motion—Driver of car—Evidence—Motor Car Regulations, 1912—Breach of peace—Insulting language.*

Two appeals, taken together, from decisions of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist.) Defendant was convicted, firstly, for, being the person in charge of a motor car in use, failing to have a light so fixed as to illuminate and render easily distinguishable every figure on the identification plate fixed on the back of the car, and, secondly, for using insulting language to a corporal of police whereby a breach of the peace might be occasioned.

The defendant appealed, the reasons for appeal sufficiently appearing from the judgment of the court.

*J. A. Veerasawmy*, for the appellant.

*G. J. de Freitas, K.C., Acting S.G.*, for the respondent was not called upon.

SIR CHARLES MAJOR, C.J.: The defendant was convicted, firstly, for contravention of the Local Government Board's regulations as to motor cars, requiring a lamp to be kept on a car, used on a public highway, so contrived as to illuminate and render easily distinguishable every figure on the identification plate fixed on the back of the car, and, secondly, during the events that led to the first charge being preferred, for using insulting language to a police constable whereby a breach of the peace might be occasioned.

The charges were heard together, and the evidence for the prosecution—the defendant gave no evidence and called no witnesses—showed that no lamp was in fact lighted on the back of the car and that the identification plate could not be distinguished; that, on the constable asking a group of men, of whom the defendant was one, near the car whose car it was, the defendant said "Go on; don't you see the light in front?"; that in reply to the constable's statement that that was not sufficient, the defendant said "go on, you damned dog driver," and directed a companion, one Comacho, to turn on the light, then adding to the constable, "the magistrate can only fine me \$3; can't do me a damned thing. Go

## JOHNSON v. BISHOP.

on, yon corporal Braithwaite, you damned dog, you always begging me for rum”; that the defendant then said to Comacho, “go and turn off the damned light,” and to Braithwaite, “you, Braithwaite, you damned fool.” It also appeared that the defendant said he was the owner of the car and had several times been seen driving the car.

The defendant appealed from both convictions, as to the first, on the grounds (a) that at the time the car was found on the highway without the back lamp lighted it was not in motion and was, therefore, not being “used,” and (b) that there was no evidence that the defendant was the person in charge, or the driver, of the car. I dismissed the appeal, being of opinion that the car, although for the moment at rest, was being used, and that the acts and words of the defendant when questioned on the matter, coupled with the fact that he had been seen several times driving the car, constituted sufficient evidence from which, in the absence of anything to the contrary, the magistrate might find that he was the driver, a person then in charge of the car.

As to the second conviction the grounds of appeal were (a) that no evidence was given that a breach of the peace might have been occasioned; (b) that the constable was not near enough to the defendant to make a breach of the peace physically possible and did nothing to indicate a temptation to commit a breach of the peace; (c) that being himself a peace officer he could not break the peace. I dismissed the appeal because the words were insulting and, in the circumstances of the case, clearly such that a breach of the peace might have been occasioned thereby.

FERREIRA v. DE FREITAS.  
 PETTY DEBT COURT, GEORGETOWN.

FERREIRA v. DE FREITAS.

[383—5—1918.]

FERREIRA v. DE FREITAS.

[384—5—1918.].

1918, JUNE 12, 25, BEFORE HILL, J.

*Magistrate's Court—Two claims arising out of one cause of action—Splitting of cause of action—Petty Debt Recovery Ordinance, 1893, s. 4—Practise—Amendment.*

Two claims by the plaintiff against the defendant, as follows:—

- (1) For the sum of \$85 alleged to be due for extra work done as an accountant making up trading and profit and loss account for the purpose of Excess Profits returns of the Demerara Boot Factory and two branch offices in March and April, 1918, and for taking stock in December, 1917.
- (2) For the sum of \$100 alleged to be due for extra work done as an accountant, opening, writing up, keeping and completing double entry books of the Demerara Boot Factory between January 1st and December 31st, 1917.

*C. Gomes*, solicitor, for the plaintiff.

*H. H. Laurence*, for the defendant.

Objected that the plaintiff by splitting his claim had brought two actions arising out of one cause of action. He therefore asked that the claims be struck out.

After argument, decision was reserved.

HILL, J.: The plaintiff has brought two actions against the defendant for \$100 and \$85 respectively and Mr. Laurence for defendant has objected to this on the ground there has been a splitting of the cause of action.

Mr. Gomes, for plaintiff, in his opening remarks, states that the work for which plaintiff is claiming was done in consequence of the operation of the Excess Profits Tax requirements, but that the requests were made at different times within a limited period. On this statement alone, I consider that there has been a splitting.

“Cause of action” means “cause of one action”, that is, the legislature in enacting that a cause of action should not be divided meant a cause of action which but for the enactment would

## FERREIRA v. DE FREITAS.

be divisible, and a cause of action ought to be interpreted as one cause of action and that to be limited to an action on one separate contract (*Re Aykroyd, Grimby v. Aykroyd* 1847 1 Exchequer 479). The work was continuous, arising out of the operations and in consequence of the Excess Profits Tax. There was a “common character” to the three sets of items constituting the two claims. Mr. Gomes asks if the Court is against him to be allowed to amend.

The Rules under the English County Court Act, 1888, allow of the abandonment of an excess at time of trial, but our local rules do not, and the old practice still prevails here. The abandonment must be expressed both in the plaint and the evidence.

But in this particular case I have nothing to amend, the two claims are separate and this being so I cannot “amend” them so as to “amalgamate” them, and thus give myself jurisdiction to permit of an abandonment of the excess, even if it were possible to abandon at time of trial.

The claims must be struck out with costs to the defendant and fee to counsel of \$10.

## REECE v. CHEEFOON.

[154 OF 1918.]

1918. JUNE 27. BEFORE BERKELEY, J.

*Criminal law—Opium—Unlawful possession of prepared opium—Definition—“Used or intended to be used for smoking”—Analyst’s certificate—Evidence—Opium Ordinance, 1916, s. 2, and s. 3 (c)*

Appeal from a decision of the stipendiary magistrate (Mr. W. J. Douglass) of the Berbice judicial district, brought on the application of the Attorney General by way of review.

The respondent Cheefoon was charged with being in possession of prepared opium, contrary to the provisions of sect. 3 (c) of the Opium Ordinance, 1916. The charge was dismissed, the magistrate’s reasons being as follows:—

“The accused was charged under section 3 (c) of the Opium Ordinance, No. 5 of 1916, of being in possession of ‘prepared opium.’ The only facts proved, and admitted by the accused, were that an old pipe, a copper bowl, and a little horn box containing a dark liquid were found in his possession.

“The preparation in the horn box was submitted to the public analyst, and his certificate of its contents has been put in evidence;

## REECE v. CHEEFOON.

he states that it contains 'prepared opium,' and at first sight this would mean sufficient to obtain a conviction, but there are two points to be considered, the first that under s. 44 of Ordinance No. 20 of 1893, an official analysis is only *prima facie* evidence, not conclusive, and next, the definition under the Opium Ordinance of the term 'prepared opium,' which is defined as meaning 'any preparation of opium or any preparation in which opium or any residuum of smoked opium forms an ingredient.' If the definition stopped there a conviction might still be obtained, but it concludes, 'which preparation is used or intended to be used for smoking.' The certificate can only cover the first part of the definition, as the analyst cannot possibly say if the specimen before him was used by the accused nor know the intention of the accused. That requires proof and must be proved in the proper manner. This proof is lacking. The preparation as shown to me is in a liquid state and I am not aware it was ever in any other condition, the accused has never been seen smoking, the pipe has no mouth-piece and has evidently not been used for some time, there is no smell of opium about it. The accused states that the preparation was used by him medicinally. It may have been, I cannot say, but I give him "the benefit of the doubt whether it was used or intended to be used for smoking."

The complainant (Reece) appealed, the reasons for appeal being as follows:—

- (1.) The decision is erroneous in point of law, inasmuch as the certificate of the Government analyst to the effect that the preparation which was found in the possession of the defendant was prepared opium was binding on the magistrate in the absence of any evidence to the contrary, and the learned magistrate erred in holding as he did that he was not bound to accept the certificate of the Government analyst on that point.
- (2.) There was no necessity for the prosecution to prove that the opium found in the possession of the defendant was in fact used or intended to be used for the purposes of smoking.
- (3.) The interpretation given by the learned magistrate to the definition of "prepared opium" in section 2, Ordinance 5 of 1916, is wrong.

The certificate of the analyst referred to was in the following form:—  
"No. 4/18.

Government Laboratory,  
British Guiana,  
February 19, 1918.

REPORT on an examination for opium of the following articles brought by P.C. 2261, Reece, on the 14th

## REECE v. CHEEFOON.

of February, 1918, from Insp. Murtland, per Inspector General of Police.

*Description of the articles:*

A small horn box, sealed with police seal No. 46.

*Results of the Chemical Examination:*

The contents consist of prepared opium.

(Sd.) J. B. HARRISON,  
Government Analyst.

(Sd.) K. D. REID  
Asst. Analyst.

To Inspect. Genl. of Police.”

*G. J. de Freitas, K.C., Actg. S.G.,* for the appellant.

The respondent was in default of appearance.

BERKELEY, J.: This is an appeal from the decision of the Stipendiary Magistrate of the Berbice judicial district (Mr. Douglass) who dismissed on its merits a complaint brought by the complainant (now appellant) against the defendant (now respondent) who was charged that he, on the 13th February, 1918, did possess “prepared opium” contrary to law. This offence is created by Ordinance No. 5 of 1916, s. 3, which says it shall not be lawful “(c) to manufacture, keep, possess, buy, sell, barter, or use any prepared opium,” while section 2 provides that in this ordinance the term “prepared opium” means “any preparation of opium, or any preparation in which opium or any residuum of smoked opium forms an ingredient, which preparation is used or intended to be used for smoking.” The magistrate holds that the certificate of the analyst can cover only the first part of the definition as the analyst cannot possibly say if the specimen before him was used by the accused, nor the intention of the accused, which requires proof and must be proved in the usual manner. The sole ground of appeal is that the magistrate is wrong in thus finding, and it is submitted that the certificate of the analyst merely, that the substance is “prepared opium,” is evidence that it is used or intended to be used for smoking. This certificate is extremely bald. It affords no information as to whether the substance is (1) a preparation of opium, or (2) a preparation in which opium or any residuum of smoked opium forms an ingredient, Now a certificate is only *prima facie* evidence and although the words “prepared opium” may be held to cover the two preparations referred to, I cannot by any course of reasoning arrive at the conclusion that these words include

## REECE v. CHEEFOON.

“used or intended to be used for smoking.” I am of opinion that a somewhat liberal construction should be placed on the words “intended to be used for smoking,” and if the certificate of the analyst showed that the substance was capable of being used for smoking I should be disposed to regard this as *prima facie* evidence of an intention to use it for that purpose.

The appeal is dismissed, and as the respondent does not appear in this Court I make no order as to costs.

## COLLINS v. YOUNG.

1918. MAY 31; JUNE 27.

BEFORE BERKELEY AND HILL, JJ.

*Criminal law—Summary Conviction Offences Ordinance, 1893, s. 96—Unlawful possession of property reasonably suspected to have been stolen—Time at which suspicion must exist—Explanation to satisfaction of the Court.*

In a charge for unlawful possession brought under the provisions of sect. 96 of the Summary Conviction Offences Ordinance, 1898, as amended by Ordinance 12 of 1915, it is the duty of the magistrate at the close of the case for the prosecution to decide on the evidence adduced as to the facts, whether or not the facts constitute reasonable suspicion against the accused. To support the charge the reasonable suspicion must be found to have existed at the time the charge was originally made or the accused arrested and not only at some subsequent time.

*Wint v. Bannister* (A. J. 30. 3. 1904) overruled. *Butts v. Bruncker* (A. J. 16. 1. 1900), and *Neptune v. Dublin* (A. J. 17. 8. 1901) followed.

Appeal from a decision of Sir Charles Major, C.J., confirming a conviction by the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist). The appellant Young was charged with the unlawful possession of one broom reasonably suspected to have been stolen, and was sentenced to pay a fine of \$30, or in default to two months' imprisonment with hard labour. He appealed on the ground that there was no evidence before the magistrate to justify his finding that the grounds of suspicion stated by the prosecution were reasonable.

In confirming the conviction His Honour gave decision as follows:—

“The defendant was charged and convicted for being in the possession of a broom reasonably suspected to have been unlawfully obtained, on his failing to give a satisfactory account of his possession.

“The defendant contended on appeal that there was no evidence before the magistrate wherefrom he might reasonably suspect the broom to have been unlawfully obtained.

“The magistrate had a considerable mass of evidence before him, after examination of which and comparison of its details one with another he found that there was reasonable ground for sus-

## COLLINS v. YOUNG.

picion that the defendant's possession was unlawful. The defendant's account of his possession was a repetition of what the prosecution proved he had stated to the police when the broom was seized.

"Although I should myself on the evidence have been unable to find that it afforded ground for reasonable suspicion of the defendant's possession, I am not prepared to say that the magistrate was clearly wrong in so finding. The appeal therefore is dismissed."

From this decision the appellant further appealed to the Full Court, leave being granted to appeal on certain questions of law, which are fully set out in the judgments below. The appeal was allowed, and the conviction was quashed.

*J. S. McArthur*, for the appellant.

*G. J. de Freitas, K.C., Actg S.G.*, for the respondent.

BERKELEY, J.: This is an appeal from the decision of Major, C.J., who dismissed an appeal from the decision of the stipendiary magistrate of the Georgetown judicial district (Mr. Gilchrist), convicting the appellant for that he had in his possession one broom reasonably suspected of having been unlawfully obtained. Leave to appeal to this Court on questions of law was granted by the Chief Justice under Ordinance 13 of 1893, (s. 38). These questions are:

- (a.) Whether there was or was not before the Magistrate's Court at the close of the case for the prosecution sufficient evidence to justify the magistrate's finding that the grounds of suspicion stated by the prosecution were reasonable.
- (b.) Whether, if at the close of the case for the prosecution there was not sufficient evidence to warrant reasonable suspicion, the magistrate was not in law bound to dismiss the charge against the defendant.
- (c.) Whether, granting that the magistrate could call for a defence where the prosecution did not disclose sufficient evidence to warrant reasonable suspicion, there was at the close of the whole case sufficient evidence of reasonable suspicion.
- (d.) Whether the magistrate did not misdirect himself in holding that instructions given to Corporal Collins by his superiors, the obtaining of the search warrant and the answers of the defendants to questions put to them by the police constable, afforded in law sufficient ground for finding that the suspicion was reasonable.
- (e.) Whether statements made by the defendants at the time of the seizure in answer to the questions put to them by the prosecutor were admissible in evidence on the hearing of the charge before the Court.

Reason (a).—The grounds of reasonable suspicion as found by the magistrate are: (1) The instructions given to the respondent by his superiors and the search warrant which was obtained. The Solicitor General admits that he is unable to support the finding of the magistrate under this head in the present case. (2). The evidence of Mr. Shanks of Sproston's, Limited, viz.: that from time to time he had missed articles and had repeatedly reported such loss to the police. This was said in answer to a question put by the magistrate—it has no reference to brooms, and is too vague a statement on which reasonable suspicion as to a broom can be founded (3). The evidence as a whole. On the search warrant being executed none of the articles mentioned in the information were found, nor anything else that raised a suspicion against Alexander the owner of the house, (charged with appellant and acquitted). The broom had been seen, and on Alexander saying that he had purchased it two weeks before from Strickland, the police appeared to be satisfied. Appellant (who lives with Alexander) then said that he had bought this broom that morning. As a fact it is proved and admitted that he did buy a broom like this on that morning, and the broom which is produced is an unused one. The conclusion drawn by the magistrate is that appellant left the shop, had a broom purchased, and did this in order to produce the receipt which he took from a file. It is not suggested what became of the broom that he actually purchased. Appellant was taken to Sproston's by P.C. Edwards and his evidence as to statements made there by appellant might be regarded as suspicious, but Edwards admits that the statements of witnesses who were present although taken by him contain no reference to the statements made by the appellant in their presence. Moreover these witnesses gave evidence and they are not asked a word as to anything said by appellant. The magistrate finds that appellant was at the house when the police arrived at 11.20; P.C. Archibald set to watch that nothing was carried in or out and says that he did not see appellant leave, while two witnesses called by the prosecution say that he was on board s.s. "Cuyuni." Babb says from 7 a.m. working, and Butler that he was there 9-10 a.m. receiving ship's stores. The magistrate finds that Babb's evidence as to time cannot be accepted—that he was endeavouring to shield appellant—but there is the evidence of the clerk Evelyn that Babb bought the broom about 12 o'clock and gave the name of appellant as purchaser. The broom is an unused one. Butler says appellant as mate of s.s. "Cuyuni" 9-10 that morning received one of these brooms as ship's stores. The Court expected that it would be asked to draw the inference that the broom unlawfully obtained was part of the ship's stores, which appellant

## COLLINS v. YOUNG.

might have replaced by purchase, producing receipt for same, but it is shown by the evidence of P.C. Edwards that the captain of the "Cuyuni" had in his possession the broom received that morning. These facts seem to have escaped the notice of the magistrate. We have therefore two brooms received by the appellant on that morning and both are accounted for.

I agree with the Chief Justice that "I should myself on the evidence have been unable to find that it afforded ground for reasonable suspicion," but I go further and I say that I am unable to see any sufficient evidence to justify the magistrate in holding that there was reasonable cause" to suspect that the broom had been unlawfully obtained, and I think therefore that the conviction should be quashed. See *Nurse vs. Pheraj* (1915, L.R., B.G., 80) where it was held that the magistrate's conclusions were not warranted and that there was an insufficiency of evidence.

Reason (b)—The answer to this question must be in the affirmative. The Summary Conviction Offences (Procedure) Ordinance requires that the magistrate shall hear the witnesses on both sides if defendant desires to call any. It is not compulsory on him to do so. This contemplates that a case has been made out which requires some answer thereto, otherwise magistrates constantly err in dismissing cases without calling for a defence. A defendant should not be called on unless a *prima facie* case is made out. "To allow a prosecutor's defective evidence to be eked out by what a defendant may say in defence is contrary to the practice of the Criminal Law," (Chalmers, C.J., in *Marques v. Francis*, 15. 6. 1888) and approved of by Bovell, C.J., in *Persaud v. Callendar* (27. 5. 1902.) In charges similar to that now before the Court the very ground of a person being charged is reasonable suspicion, and the facts to be proved are (1) possession, and (2) the thing possessed is reasonably suspected of having been stolen or unlawfully obtained—then it is for the defendant to remove suspicion (Bovell, C.J., in *Edum vs. Anderson*, 14. 9. 1906). It is the duty of a magistrate sitting as a jury at the close of the case for the prosecution to find on the evidence adduced as to the facts, and then to say whether or not those facts constitute reasonable suspicion. This is a question of law, and if the Court of Appeal is of opinion that the magistrate has misdirected himself it is the duty of that Court so to find.

All the recorded decisions, so far as I can discover lay, it down that reasonable suspicion must exist at the time of arrest or detention. In *Wint vs. Bannister* (30. 3. 1904.), however, Bovell, C.J., said: "The absence at the time of arrest of reasonable ground for believing an article has been unlawfully obtained may lay the constable making the arrest open to proceedings for an illegal arrest, but cannot in my opinion prevent the conviction of

the person arrested, if *at the time of trial* there exists a reasonable suspicion of the article having been stolen *at the time* the defendant had it in his possession." With all due respect to the learned Chief Justice I am disposed to think that this is inconsistent with his previous decisions and those of other judges. His finding is based on the use of the present tense in s. 96 of the Ordinance "*is* reasonably suspected"—but the same tense is used at the beginning of the same section, "where any person *is* charged before the Court." This points to the reasonable suspicion existing at the time that the charge is made and not at the time of trial. I think this construction is strengthened by the provisions of section 96(1) of the amending Ordinance (No. 12 of 1915), which contains these additional words, "or for that he at any time within the three months immediately preceding the making of the complaint."

Reason (c.) This is covered by (b.)

Reason (d.) The question arising thereunder are dealt with in (a.)

Reason (e.) This Court on more than one occasion has pointed out the procedure to be adopted. As I said in *Ramkellawan vs. Barrow* (1915 L.R., B.G., 163); "The object of section 96, which corresponds with certain sections of 2 and 3 Victoria, ch. 71, is specially directed to the charging of offenders, in large and populous cities, who are found in possession of property which is suspected to be stolen but the owner of which is unknown." The power to charge for such offences has been extended by Ord. 12 of 1915. An encroachment, possibly a necessary one in order to suppress crime, on the liberty of the subject which in effect renders a person liable to account for anything found in his house that a constable without any justification on grounds of suspicion may capriciously charge him with the unlawful possession of. The procedure to be followed is laid down in the Ordinance (s. 96). The construction to be placed on that section is for this Court and that has been done in *Ramkellawan v. Barrow* (*supra*) and in *Baldeo v. Pollard* (15 L.R., B.G., 171), and as decisions of the Full Court it is the duty of a magistrate to follow them. Disregard of these directions, more than once laid down, will vitiate the proceedings which otherwise might be in order. I have nothing to add to what I said in the latter case which was approved of by Major, C.J., who said "I agree with the view taken by the learned Senior Puisne Judge of the procedure to be followed in connection with charges laid under the provisions of the ninety-sixth section of the Summary Conviction Offences Ordinance, 1893."

The appeal is allowed and the conviction quashed with costs.

The Chief Justice is aware of the contents of this judgment and agrees with it.

## COLLINS v. YOUNG.

HILL, J.: The reason for the Chief Justice's decision is: "Although I "should myself on the evidence have been unable to find that it afforded "ground for reasonable suspicion of the defendant's possession I was not "prepared to say that the magistrate was clearly wrong in so finding."

The reasons of appeal from that decision are—

- (a) Whether there was or was not before the Magistrate's Court at the close of the case for the prosecution sufficient evidence to justify the magistrate's finding that the grounds of suspicion stated by the prosecution were reasonable.
- (b) Whether, if at the close of the case for the prosecution there was not sufficient evidence to warrant reasonable suspicion, the magistrate was not in law bound to dismiss the charge against the defendant.
- (c) Whether, granting that the magistrate could call for a defence where the prosecution did not disclose sufficient evidence to warrant reasonable suspicion, there was at the close of the whole case sufficient evidence of reasonable suspicion.
- (d) Whether the magistrate did not misdirect himself in holding that instructions given to Corporal Collins by his superiors, the obtaining of the search warrant, and the answers of the defendants to questions put to them by the police constable afforded in law sufficient ground for finding that the suspicion was reasonable.
- (e) Whether statements made by the defendants at the time of the seizure in answer to questions put to them by the prosecution were admissible in evidence on the hearing of the charge before the court.

Sec. 96 (1) Ord. 12 of 1915 amending Ordinance 17 of 1893 under which the charge is laid as follows:—

"96—(1) Every person who is charged before the court with having in his possession or under his control in any manner or in any place, or for that he at any time within the three months immediately preceding the making of the complaint did have in his possession or under his control in any manner or in any place anything which is reasonably suspected of having been stolen or unlawfully obtained and who does not give an account, to the satisfaction of the court, as to how he came by the same, shall, on being convicted, be liable to a penalty of one hundred and fifty dollars or to imprisonment for six months."

And 96 (2) sets out the procedure to be followed on such a charge being made.

It has been necessary to consider the various decisions which have been given extending many years back and on the question

of “reasonable suspicion” those of *Butts v. Brunker* (16. 1. 1900), *Neptune v. Dublin* (17. 8. 1901.) and *Wint v. Bannister* (30. 3. 1904) are deserving of special consideration. In the last named Bovell, C.J., held that reasons 2 (b) and (c) in that case furnished no ground for reversing the magistrate’s decision. Those reasons were that the decision was erroneous in point of law, there being no evidence that the police at the time of seizing the brass and copper and arresting the persons carrying them had reasonable ground for suspecting such persons or any one else had unlawfully obtained them. Bovell, C.J., is reported thus:— “The absence of the time of arrest of reasonable ground for believing an article has been unlawfully obtained may lay the constable making the arrest open to proceedings for an illegal arrest, but cannot in my opinion prevent the conviction of the person arrested, if at the time of the trial there exists a reasonable suspicion of the article having been stolen at the time the defendant had it in his possession. This seems to me to follow from the language and heading of section ‘96 under which proceedings are taken, that enactment making it an offence to have in one’s possession property which as a matter of fact ‘is’ (i.e., at the time of trial) reasonably suspected of having been unlawfully obtained, and not to be inconsistent with the decisions in *Butts v. Brunker*, ‘16. 1. 1900 and *Neptune v. Dublin*, 17. 8. 1901. In other words the gist of the charge under that section is unlawful possession. Any other construction would lead to the conclusion not only that no offence was committed where reasonable ground for suspicion did not exist at the time of arrest, but that if such ground then existed, an offence would have been committed, although at the time of trial the evidence showed there was no reasonable ground of suspicion then existing.”

After consideration, I am constrained to think the interpretation of the word “is” was rather stretched in this finding. I consider that no offence would be committed where reasonable ground for suspicion did not exist at the time of arrest, but I disagree that an offence would have been committed if such ground then existed although at the time of trial the evidence showed there was no reasonable ground of suspicion then existing.

In my opinion that decision was inconsistent with *Butts v. Brunker*, and especially with *Neptune v. Dublin*. In the first mentioned Sir Wm. Smith, C.J., says: “The meaning of this enactment is to my mind clear. There must be evidence that an accused person was in possession of goods as to which there is some reasonable suspicion that they were either stolen or unlawfully obtained before he can properly be called upon to

## COLLINS v. YOUNG.

“satisfy the court as to how he obtained possession of them: and the “grounds of suspicion should be such as to lead any reasonable person to “the belief that the goods had been stolen or unlawfully obtained” . . . . . Further on the learned Chief Justice continues: “I dissent entirely from the “view that the police had the right to believe the brass to have been stolen, “unless reasonable grounds existed for the belief. It cannot be assumed that “the policeman suspected it to have been stolen, still less that his suspi- “cions were reasonable. *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 arti- “cle he carried; if there is reasonable cause of 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 jus- “tified in making enquiries, and if their suspicions were confirmed by the “nature of the explanation given, in detaining the person. When the case is “before the Court, there must be evidence that there is reasonable suspicion “that goods found in a person’s possession have been stolen or unlawfully “obtained before the onus is cast on the person accused of showing how he “became possessed of them.”

And Swan, Acting J., in *Neptune v. Dublin (supra)* says: “The suspi- “cion must precede the detention or arrest, and must in all cases be reason- “able, and proved to be so before the magistrate can call upon the accused “to answer the charge.”

In *Holder v. McKenzie* (10th August, 1.907), Lucie Smith (Ag. C.J.) approved of *Butts v. Bruncker* and concluded that “on the whole case I think “the facts are such as should have been left for the jury to decide.”

In *McLennan v. Booth* (14. 12. 1906.) the only reason for appeal was that there was not sufficient evidence to support a reasonable suspicion and in *Mulraine v. Baker* (16. 3. 1906), Bovell, C.J., considered the evidence and found that there were reasonable grounds for suspicion.

In my opinion “is reasonably suspected” in section 96 is meant to be held to refer to a suspicion, which must be reasonable, which must exist in the mind of the policeman at the time of arrest, or detention, and must be a reasonable suspicion at the time the accused is charged before the Court.

On the finding therefore of Major, C.J., the accused was entitled to have had his appeal allowed. I think the question of

## COLLINS v. YOUNG.

want of reasonable grounds of suspicion is a matter for the Appeal Court to deal with, in the same way as want of reasonable and probable cause is dealt with by the Court as an inference of law (*Lester v. Perryman* 4 L.R.H.L. 539-40, *Hailes v. Marks* 7 H. & N. 62). Although an inference of fact it has to be dealt with by the judge and not by the jury and, this being so is subject to review.

I am also of opinion that the grounds of suspicion, and their reasonableness, must be shown before the prosecution is closed, and cannot be eked out by calling on the accused for a defence. The Summary Conviction Ordinance, 1893, sec. 28 (4) has been referred to, and *Persaud v. Callender* (27. 5. 1902.) also, but in that case (which was for larceny of a steer), Bovell, C.J., held that there was nothing in the ordinance requiring a magistrate to decide on a portion of the case before him. But he, as well as Chalmers, C.J., in *Marques v. Francis* (15. 6. 1888) are reported as saying that "it was not desirable to call on a defendant for his defence whilst a "*prima facie* case in prosecution has not been made out. To allow a prosecutor's defective evidence to be eked out by what a defendant may say in "defence is contrary to the practice of the Criminal Law,"

Was there then, at the close of the prosecution, sufficient evidence of reasonable suspicion, as to require the magistrate to call on the accused to account for their possession?

The police were armed with a search warrant and found nothing under it for which they were searching. They were about to leave when a broom was seen under the counter and Alexander, one of the accused, who was discharged at the conclusion of the case, was asked where he got it. Why a broom should not be under the counter, and why an explanation should have been called for of its presence does not appear, and I again invite the attention of magistrates and the police to Sir Wm. Smith's remarks in *Butts v. Bruncker* quoted before. This broom had nothing to do with the object of their search.

Alexander replied he had bought it two weeks ago from Strickland's, whereupon the appellant who was eating breakfast said that he was mistaken as he had bought it that morning from Sprostons and he produced a bill therefor.

Thereupon he was arrested, or detained, call it what you will, and was taken to Sprostons, from thence to the "Cuyuni" on which he was a mate. I am unable to see that at the time of his detention or arrest there was any suspicion, still less a reasonable suspicion against the man.

There is some most conflicting evidence by the prosecution as to the hour when the broom was brought and after an adjournment two police constables gave additional evidence for the prosecution.

## COLLINS v. YOUNG.

That of P.C. Edwards is most extraordinary. He is the individual who accompanied the appellant to Sprostons and the "Cuyuni," and he gave evidence of conversations with, and in the presence of, the appellant, of statements made by Babb and Butler in the presence of appellant, of interrogations by him of the various parties. Babb and Butler had given evidence for the prosecution on the first day, and had never been questioned in regard to these admissions and statements said to have been made in their presence. The policeman, in cross-examination, admitted that he had taken the statements of these two men in writing. He states: "I took the 'statements in writing from Babb and Butler. They do not contain the conversations that took place at Sprostons. They do not contain the statements that Young denied giving to Babb the two shillings to buy the broom. It did not contain my question 'How did you not know the person 'who bought the broom.' These statements do not contain the alleged 'statements 'that before Butler could answer, Young 'said he did not know 'the boy's name.' It was important to have these questions down. I think so 'now as you (counsel) say so. When I went to the 'Cuyuni' I asked the 'captain if he had lost any broom. He showed me a coir broom and said he 'had received it as stores that morning.'"

In these circumstances I think the evidence of this policeman should have been rejected.

The only evidence that existed when the prosecution was closed was some very conflicting evidence as to the hour of purchase of the broom, and Babb's evidence (a witness for the prosecution) effectually disposed of the question as to Young's presence on the "Cuyuni." He was not shown to be hostile, or in collusion, and his evidence must stand.

I consider therefore at the close of the prosecution there was not such reasonable grounds of suspicion shown by the prosecution as to require the accused to account for the possession of the broom.

Reasons (c) and (d) are, in effect, answered in the foregoing.

There remains Reasons (e), and our attention has been drawn to certain decisions in the English courts.

In the case under review I should myself have rejected the evidence of P.C. Edwards as encroaching on the "best traditions of our criminal procedure" to use the expression of Lord Moulton in *Director of Public Prosecutions v. Christie* (111 L.T., 220). The remarks of the Lord Justice are set out in *Baldeo v. Pollard* (1915 L.R., B.G., at p. 176 & 177), and I commend them to the police and magistrates once again in the hope that they may be digested and acted upon. It is impossible to lay down any rule as to the admissibility or otherwise of evidence except

## COLLINS v. YOUNG.

the particular circumstances of each case are before the court, and it is quite possible that the decisions in many of the (English cases cited might have been different had they had reference to “unlawful possession,” and with sec. 96 (2) of Ordinance 17 of 1893, before the English tribunals.

I have suggested in a recent decision (*Benn v. Davis*, May 18th, 1918 reported above at p. 10) a method of procedure on the part of the police in such cases.

This appeal is allowed with costs here, and in the lower courts.

## PETTY DEBT COURT, GEORGETOWN

BARROW v. MOORE.

[255—6—1918.]

1918. JULY 9. BEFORE DALTON, ACTG. J.

*Contract—Sale of goods—Title of seller—Purchase at public auction in good faith without notice of defect in seller's title—Claim by owner in detinue—Sale of Goods Ordinance, 1913, ss. 24, 25.*

Claim by the plaintiff Barrow for the delivery of a cow, alleged to be wrongfully detained by the defendant, or its value \$60, and \$10 as damages for such wrongful detention. The cow in question had been purchased by the defendant as the property of one Sanicharri at a public auction sale. Further necessary facts appear from the judgment.

*C. R. Browne*, for the plaintiff.

*A. M. Ogle*, solicitor, for the defendant.

DALTON, Actg. J.: Plaintiff claims from the defendant one dark brown and white cow, wrongfully and illegally detained by the latter or \$60 its value.

It is not denied that the cow was the property of plaintiff and that a demand was made in due course, but defendant urges that he bought it at public auction in good faith with no notice of any defect in the seller's title.

On the facts I find that the cow, in the absence of plaintiff from the colony, was sold by a relative who had no right to it. After passing through one or two hands it was put up for sale at public auction by W. Bagot & Co., at the instance of one Sanicharri, and purchased by defendant who paid \$29 for it.

The transaction is governed by the provisions of the Sale of Goods Ordinance, 1913. The auctioneer is the agent of the seller

## BARROW v. MOORE.

who, by having the goods put up, implies that he has a right to sell them. If the seller's title is bad, the auctioneer cannot make it good. Under certain conditions where goods are purchased in a public market (s. 24) the buyer acquires a good title provided he buys in good faith and without notice of any defect in the seller's title, but that section does not apply here, as Mr. Ogle urges. The section purports to introduce something equivalent to the English sale in "market overt," but an ordinary auction sale is in no way a sale coming within the terms of the section.

Again, when the seller of goods has a voidable title to what he is selling and his title has not been avoided at the time of the sale, the buyer acquires a good title (s. 25) provided he buys in good faith and without notice of any defect. But neither does that section apply here, for there was no sale between the true owner and the person who wrongfully sold the cow in the first place, and so no property in the animal was transferred by the seller. (*Cundy v. Lindsay*, 3 A.C. 459, and *Kingsford v. Merry*, 26 L.J., Ex. 83). The section in question applies to a case where the owner induced, say, by fraud parts with the goods, thereby vesting the property in a fraudulent purchaser. The facts in the case before me are quite different.

Lastly, has the plaintiff in any way by her own action been estopped from claiming the animal as her own property or from denying the seller's authority to sell? I can find no evidence of negligence either on her part or on the part of her daughter such as would prevent her from setting up her title to the cow. This is one of those cases in which one of two innocent parties must suffer through the action of a third. Applying the law as I conceive it to be, the defendant is the innocent party who must suffer here and the plaintiff is entitled to judgment.

The value of the animal I find to be the price it was sold for at auction. Plaintiff will therefore have judgment for the return of the animal or \$29, its value, with costs and fee.

POLLYDORE v. WILLIAMS & ORS.

POLLYDORE v. WILLIAMS & ORS.

[198 OF 1918.]

1918. JULY 27, BEFORE HILL, ACTG. C J.

*Practice—Injunction—Application, to discharge interim order—Undertaking by counsel as to damages—Form of undertaking—Limitation as to time for order to run.*

Application by Lewis, a defendant in the action, to discharge an interim order of injunction, granted on June 27th, 1918, whereby the Commissioner of Lands and Mines was restrained from delivering to Williams or Lewis, defendants in the action, a quantity of raw gold. In the alternative applicant sought an order varying the interim order by directing that the Commissioner of Lands be restrained from parting with one-third only of the raw gold in his possession and that the remaining two-thirds be delivered to him the applicant.

The grounds of the application are sufficiently set out in the judgment below.

*P. N. Browne, K.C.*, for the applicant.

*J. S. McArthur*, for the respondent Pollydore.

HILL, Actg. C.J.: This application is to discharge an interim injunction restraining the Commissioner of Lands and Mines from delivering to the defendants 147 ounces 17 pennyweights of raw gold entered by the defendants and now in his custody, or any gold that hereafter may be entered as coming from claims alleged to be theirs.

Two grounds are alleged:—

- (a) that the order of the Court was conditional on the plaintiff undertaking by his counsel to abide any Order made as to damages, and no undertaking had been given.
- (b) that no time was fixed limiting the operation of the order, or the date of its dissolution.

There is also an application to vary the order, in the alternative, by directing the Commissioner to retain one third part or share only of the said 147 ounces, 17 pennyweights entered, on the ground that the plaintiff claims only one third of the said gold.

The practice in this colony is to insert in the interim order the undertaking as to damages, and the order in this case is exactly as set out in *Chitty*. No further or previous act is required. Such undertaking may be given by counsel and the order states such to have been given. In England, without there being uniformity, there would seem to be some sort of act required, or some signa-

## POLLYDORE v. WILLIAMS &amp; ORS.

ture, in cases where joint stock companys or corporations apply. (*Manchester etc. Banking Coy. v. Parkinson* 60 L.T. 47); (*East Molseley Local Board v. Lambeth Water Works Coy.*, 1892 3 Ch. 289).

With regard to (b) there seems to be no established practice in these courts as to fixing a certain time to be named in an interim injunction for the order to run. In England there is—and I certainly think such orders should contain some such instruction such as “until judgment in the action or until further order.” (*Ex parte Anderson, re Anderson* 22 L.T.R. (New Series) at p. 364). I do not propose to interfere however in this matter as the writ was issued when the application for the interim order was made. And since then statement of claim has been lodged, but in future such orders must contain the necessary limitation.

As to varying the order, the only real reason adduced is that under the Gold Mining Regulations of 1905 (Regulation 118) and section 37 of the Mining Ordinance of 1903, a liability—quasi-criminal—attaches to the registered partners in regard to the nonpayment of labourers’ wages.

But should such be necessary, a representation to the adjudicating magistrate as to the circumstances would, I have no doubt, result in a postponement of the case, until the determination of the present action.

I see no good reason to vary the order, but as I think the application was well made I order that the costs of the application should be costs in the cause.

*Application dismissed.*

EATON v. JUGROOP  
 PETTY DEBT COURT, GEORGETOWN.  
 EATON v. JUGROOP.

[106—7—1918.]

1918. AUGUST 6. BEFORE DALTON, Acting J.

*Detinue—Gratuitous bailment—Property stolen whilst in hands of bailee—Reasonable care—Negligence.*

Claim by the plaintiff for the delivery of certain jewelry alleged to be illegally detained by the defendant, or the sum of \$25 its value. Defendant was plaintiff's landlord and the latter had been in the habit of leaving her jewelry in his charge whilst carrying on her business as a huckster.

Plaintiff in person.

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

DALTON, Acting J.: Plaintiff claims from the defendant certain jewelry alleged to be wrongfully detained by him. He admits that the jewelry was entrusted to him to keep for her as had been done on previous occasions, whilst she was absent on her business as a huckster, but pleads that it was stolen from his room whilst in his charge, and that he is not liable to the plaintiff to an action in detinue.

It is admitted that it is a case of gratuitous bailment, that is, the bailee must exercise such care of the property left with him, as a reasonable and prudent man is expected to take of his own. An allegation that the property has been lost and that therefore the defendant cannot return it is no sufficient reply, but here defendant has proved that the jewelry was stolen and further that the thief has been convicted. Unfortunately the jewelry was never recovered.

Defendant did no more than undertake to keep the articles as he would have kept his own property; plaintiff in fact neither alleges nor proves any negligence or breach of duty on his part. That being so the action does not lie against him and the plaintiff cannot succeed.

ASSIBAD v. KARMI.

ASSIBAD v. KARMI.

[BERBICE.—38 OF 1918.]

1918. AUGUST 23. BEFORE HILL. Acting C.J.

*Infant—Tort—Action for damages—Guardian—Liability—Procedure—Practice.*

Appeal from a decision of the stipendiary magistrate of the Berbice judicial district (Mr. C. H. E. Legge). The claim was brought as follows: “Between William Assibad, of Susannah, East coast, Berbice, as father and “natural guardian of his minor daughter Ellen Assibad, plaintiff, and “Karmi, single woman of Susannah, East Coast, Berbice, as mother and “natural guardian of her minor son David Rose, defendant.” The magistrate found in favour of the plaintiff and awarded damages. Defendant appealed, the principal reasons being as follows:

1. That the decision was erroneous in point of law:—
  - (a) because the claim as laid disclosed no cause of action.
  - (b) because the defendant as mother and natural guardian was not a guardian *ad litem* of the minor and could not be mulct in damages for a tort committed by the minor.
  - (c) because the mere fact of the defendant being the mother and natural guardian of the minor David Rose did not render her liable in damages for a tort committed by him, and the magistrate was wrong in so finding.

*J. Eleazer*, solicitor, for the appellant.

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

HILL, Acting C. J.: This is an appeal from the decision of a magistrate in which he gave judgment against the appellant in damages for injuries sustained by plaintiff’s two daughters, and the killing of his dog, at the hands of appellant’s illegitimate son David Rose.

The reasons of appeal come under the headings.

- (1) Erroneous in point of law.
- (2) Altogether unwarranted by the evidence.

I think the appellant is entitled to succeed under 1 (c) which is as follows:—

“That the mere fact of the defendant being the mother and natural “guardian of the minor David Rose did not render her liable in damages for “a tort committed by him and the magistrate was wrong to so find.”

It is clear that the defendant before the court were Karmi, and the judgment against her for the tort of her illegitimate son, to whom she is statutory guardian (section 14, Ordinance 19 of

## ASSIBAD v. KARIM.

1916) would have resulted in execution against her property. She is not liable for the tort of her son, unauthorized or unratified by her, and the proper person to have sued was “David Rose, appearing by his mother and guardian Karmi.”

It is unnecessary to consider the other reasons.

For the reason stated the decision was erroneous, and must be reversed with costs.

Appeal allowed.

# REPORTS OF DECISIONS

OF

## THE SUPREME COURT

### BRITISH GUIANA

DURING THE YEAR

1918.

WITH INDEX

TOGETHER WITH A DECISION OF THE JUDICIAL COMMITTEE OF HIS  
MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

Edited by LL. C. DALTON, M.A., Cantab.  
Barrister-at-Law.

GEORGETOWN, DEMERARA:

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

1919.

JUDGES  
OF THE  
SUPREME COURT OF BRITISH GUIANA.  
DURING 1918.

SIR CHARLES HENRY MAJOR, Kt.	.....Chief Justice. (On leave July-September.)
MAURICE JULIAN BERKELEY	.....Senior Puisne Judge. (On leave July-September.)
JACOBUS KERR DARRELL HILL	.....Junior Puisne Judge. (Acting C.J., July-September.)
LLEWELYN CHISHOLM DALTON	.....Acting Puisne Judge. (July-September.)

TABLE OF ABBREVIATIONS.

(ADDITIONAL TO THE USUAL REFERENCES TO ENGLISH  
REPORTS.)

A.J.	.....Appellate Jurisdiction, British Guiana.
C.P.D.	.....South African Law Reports, Cape Provincial Division.
L.R., B.G.	.....Law Reports, British Guiana.

## ERRATA.

<i>Page</i>	<i>Line.</i>	<i>For</i>	<i>Read</i>
34	4 from top	employment	employment
34	5 from top	injureis	injuries
70	2 from bottom	Whitaker	Whittaker
103	16 from bottom	againsi	against
109	6 from top	Servic	Service
112	18 from bottom	tender	trader
121	20 from bottom	L.R.,B.G.	L.R., B.G. 115.
138	6 from bottom	Attain	Ablain.

## TABLE OF CASES REPORTED.

	PAGE
Assibad v. Karmi.....	99
Atherley, Blair v.....	108
A.- G. <i>ex parte</i> ; Rex. vs. Sroodin & ors .....	132
Bailey, Jaikaran Singh v.....	60
Bairaji to Raghubar <i>re</i> Transport.....	59
Baptiste v. Weeks.....	1
Barcellos, Widdup v.....	65
Barrow v. Moore.....	94
Benn v. Davis.....	10
Bhagwandin v. Sukhawath & anr.....	23
Bhodai v. Dem. Railway Co. & anr. ....	44
Bishop, Johnson v. ....	8
Blair v. Atherley.....	108
Board of Assessment v. Brodie & Rainer, Ltd. ....	135
Board of Assessment, Rahoman v.....	106
Brodie & Rainer, Ltd, Board of Assessment v.....	135
Cheefoon, Reece v. ....	81
Collins v. Young .....	84
Comacho v. Pimento & anr .....	37
Comacho v. Pimento & anr .....	45
Cox v. Lilliah .....	21
Davis, Benn v.....	10
Davis v. Lakpathsing.....	129
Davis v. McCalam.....	129
De Freitas, Ferreira v.....	80
Dem. Railway Co. & anr, Bhodai v. ....	44
Dem. Electric Co. Ltd, Richards v. ....	34
Dem. Turf Club Ltd., (in liq.); <i>ex parte</i> the Liquidator .....	119
De Souza and anr. v. Soares.....	77
Eaton v. Jugroop.....	98
Edwards v. Menezes.....	117
Essex v. Seemandray.....	57
Fernandes v. McNiell .....	112

Ferreira v. De Freitas.....	80
Fogarty, Ltd. v. Bhagwandass, <i>ex parte</i> Gomes.....	42
Forte, Jones v. ....	62
Fraites v. The New Success, Ltd. ....	145
Gomes, <i>ex parte</i> ; Fogarty, Ltd, v. Bhagwandass.....	42
Gomes, <i>ex parte</i> ; Smith Bros. & Co., Ltd. v. Bhagwandass .....	42
Hamilton v. The People’s Bakery .....	103
Hay v. Paul.....	73
Higgins v. Rohlehr .....	29
Jaundoo, Rahim Bacchus v. ....	138
Jaikaran Singh v. Bailey.....	60
Johnson v. Bishop .....	8
Johnson v. Nandu.....	17
Jones v. Forte .....	62
Jugroop, Eaton v.....	98
Karmi, Assibad v.....	99
Lakpathsing, Davis v.....	129
Lam, Wallbridge v. ....	141
Lilliah, Cox v. ....	21
Lewis and anr. v. Brown .....	4
Liquidator, <i>ex parte</i> . <i>In re</i> Dem. Turf Club Ltd. (in liq.) .....	119
Lusignan Co., Ltd. v. Brassington.....	67
London, Reid v.....	109
McCalam, Davis v.....	129
Manning v. Lopes, Fernandes & Co. Ltd. ....	126
Manning v. Mendonca .....	114
Matthews, Shaw v. ....	139
Menezes, Edwards v.....	117
McNiel, Fernandes v. ....	112
Moore, Barrow v.....	94
Nandu, Johnson v. ....	17
Patoir v. Perot & Co., Ltd.....	142
Paul, Hay v. ....	73

Perot & Co., Ltd. v. Carew & anr.....	75
Pimento and anr, Comacho v. ....	37
Pimento and anr, Comacho v. ....	45
Pollydore v. Williams and ors .....	96
Raghubar, Bairaji to <i>re</i> Transport.....	59
Rahim Bacchus v. Jaundoo .....	138
Rahoman v. Board of Assessment.....	106
Ramgolam v. Williams.....	26
Reece v. Cheefoon .....	81
Reid v. London.....	109
Rex v. Sroodin & ors., <i>ex parte</i> the Att. Gen. ....	132
Richards v. Dem. Electric Co. Ltd. ....	34
Roach v. Richards .....	5
Rohlehr, Higgins v. ....	29
Rodrigues v. Paulos.....	74
Roman v. Sookraj.....	19
Seemandray, Essex v.....	57
Shaw v. Matthews .....	139
Shewburun to Shubhagra, transport .....	58
Smith Bros. & Co., Ltd. v. Bhagwandaas, <i>ex parte</i> Gomes .....	42
Soares, De Souza and anr. v.....	77
Solomon and ors., Winter v.....	100
Sookraj, Roman v.....	19
Sukhawath and anr, Bhagwandin v. ....	23
Sroodin, Rex v. & ors., <i>ex parte</i> the Att. Gen. ....	132
The People's Bakery, Hamilton v. ....	103
Wallbridge v. Lam .....	141
Weeks, Baptiste v.....	1
Widdup v. Barcellos.....	65
Wight v. Dem. Turf Club Ltd. (in liq.).....	49
Williams and ors, Pollydore v. ....	96
Winter v. Solomon and ors.....	100
Young, Collins v. ....	84