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CASES

DETERMINED BY THIS

SUPREME COURT OF BRITISH GUIANA.

AIRD v. HARVEY.

[317 OF 1918.]

1919. JANUARY 6. BEFORE Sir CHARLES MAJOR, C.J., and
BERKELEY, J.

Appeal—Petty debt recovery—Summons—Service in the case of absence from the colony—Waiver of objection—Petty Debts Recovery Ordinance, 1893, s. 11.

Appeal from a decision of Hill, J., sitting in the Petty Debt Court, Georgetown.

Plaintiff Aird claimed the sum of \$100, abandoning an excess of \$43.30 to bring the matter within the jurisdiction of the Court, as damages and pecuniary compensation for wrongful dismissal. The case came up for hearing in due course, when the defendant was represented by counsel, and was finally fixed *peremptorily* for hearing on October 1st. On the later day neither defendant nor his counsel appeared, and after taking evidence for the plaintiff, judgment was delivered as follows:—

“HILL, J.:—Plaint was filed on July 18th, 1918, return day August 1st, 1918. No service was effected apparently, and on August 23rd, 1918, service was effected at the Hand-in-Hand Buildings on defendant’s messenger (see return of service), for hearing on August 29th, 1918.

From the jacket I gather Mr. Humphrys appeared for the defence, and does not appear to have objected in any way to the service. He must be taken to have waived any objection he may have had. From the jacket I also gather the case was fixed for hearing on September 17th, 1918, presumably with consent of the parties or their counsel, and again I find no note of any objection to the service of the summons.

All of these matters were before Dalton, J., who, on September 17th fixed the case *peremptorily for hearing* (see jacket) for October 1st, and on that day, neither defendant or his counsel being present, formal proof of service was given (really unnecessary) and judgment for the plaintiff with costs.”

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From this decision the defendant Harvey now appealed on the following grounds:—

- (1.) The defendant had never been served with any summons in the action, which was heard and determined in his absence.
- (2.) The summons was not served as required by law, *i.e.*, sect. 11, Ordinance 11 of 1893.
- (3.) The defendant was not in the colony when the summons was left at his work place, which fact was brought to the notice of the constable who was responsible for such service.
- (4.) It was not competent to effect service of the summons by leaving it at defendant's work place the provisions of section 11 (a) and (b) of Ordinance 11 of 1893 not having been complied with.

H. C. Humphrys, for the appellant.

E. G. Woolford, for the respondent.

Humphrys, referred to s. 11 of Ordinance 11 of 1893. If the summons could be legally served as had been done in this case any person having an office in the colony, who left the colony for a time, and not for the purpose of evading his liabilities, could be served with a summons at his office in his absence and judgment given against him without his knowledge.

Sir CHARLES MAJOR, C.J.: A man who leaves the colony without appointing some one to represent him in his absence takes the risk of legal proceedings being instituted against him and, if good service of process be proved, of having judgment given against him in default of appearance. [Berkeley, J.: He should leave an attorney.] There is no question here of the appellant departing from the Colony to evade liability which Mr. Humphreys' contends may be considered in connection with the service, and the second sub-section of section 11 of the Petty Debt Recovery Ordinance does not apply. Service upon the appellant was effected by leaving the plaint with a person at his place of business. That service, according to the provisions of the first sub-section of section 11 was good, whether the appellant knew of it or not. The appeal must be dismissed and with costs.

BERKELEY, J.: I agree.

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[85 OF 1918.]

1919. MAY 15, 26. BEFORE SIR CHARLES MAJOR, C J.

Action for money had and received—Solicitor—Undertaking to pay money to person not client—Authority to pay client's money to stranger.

Claim on a specially indorsed writ by the plaintiff, Robert Pestano against the defendant Edwin Angel Wallbridge Sampson, for the sum of \$2,666.66, being moneys alleged to have been had and received by him to and for the plaintiffs use in January and February, 1918.

The claim sets out that plaintiff received the sum of \$10,000 in Government bonds, and \$6,000 in cash from the estate of the late Eliza Jane Reis, to be paid to Charlotte Pestano, and four others including himself, all of whom except himself had been paid, and that it had been agreed between the plaintiff and defendant on September 3rd, 1917, that upon an act of ratification approved by the defendant being executed by the plaintiff which was done on September 5th, 1917, the defendant would pay to the plaintiff his portion which was claimed by virtue of his marriage in community of goods to the said Charlotte Pestano.

Defendant denied the receipt of any money for plaintiff, that all sums received less expenses had been disbursed to his clients, and that he never agreed to pay any portion of the sums received to plaintiff. In the alternative, any act of ratification signed was subject to the consent and concurrence of Charlotte Pestano, which was never given, as the plaintiff knew.

S. L. Stafford, for the plaintiff.

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

On the close of plaintiff's case, counsel for defendant submitted that on the evidence he had no case to answer. After argument this contention was upheld.

SIR CHARLES MAJOR, C.J.: The action is one for moneys had and received, and in an action of that kind the plaintiff has first of all to show receipt of the money by the defendant, and, secondly, having so received it, that he did so for and on behalf of the plaintiff. In the action of Milne and Tafares, Charlotte Pestano was one of the defendants, the defendant here being her solicitor, and by the judgment in that action it would appear that the plaintiff in that action had to pay the defendants, of whom Charlotte Pestano was one, a

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certain sum of money. The money was paid to Charlotte Pestano's solicitor and this action is brought in respect of half of the share due to Charlotte Pestano. The case, stated thus, obviously discloses no cause of action against the defendant for money had and received to the plaintiff's use, but evidence has been given to show that the plaintiff in this action, the husband of Charlotte Pestano, applied to be substituted as a defendant for his wife in the principal action, that he abandoned that application upon the signature and execution of a deed of ratification of all the proceedings and that he signed the act of ratification in consideration of an agreement entered into between himself and the present defendant whereby he, (the plaintiff,) was to receive a half of his wife's share. In the first place it is necessary to point out that under the order of the court when the defendant, Mr. Sampson, received the moneys he received them to Charlotte Pestano's use and to nobody else's. The defendant was her solicitor and the evidence does not show in the least that he was the solicitor or agent of Mr. Pestano, the plaintiff in this action. On the contrary, the plaintiff had dealt with the solicitor on the other side, Mr. Ogle. Mr. Pestano was represented by somebody other than the defendant fully and throughout the action.

Therefore it is idle to endeavour to drag the defendant into this action under the agency of the plaintiff. One asks the question how did money received by the defendant to his client's use become converted to money received to his client's husband's use. That could only be done in the first place supposing the defendant had parted with the moneys by the direction of the person to whose use he received them, namely, Mrs. Pestano, to retain for the plaintiff in this action a certain sum, or it might in a measure be said to be held to the plaintiff's use if a valid agreement had been entered into by Mr. Pestano's solicitor agreeing that when he did get the moneys to hold a half of it for him. The case of *Bloomenthal v. Ford* (1897 A.C., 156) was one where a person representing another was bound to take the result of representations made if those representations turned out to be false. That is not the case here. It is obvious that when Mr. Sampson received the money he received it when he was Mrs. Pestano's solicitor, and it is equally obvious that no authority possessed by a solicitor in an action or by counsel could ever extend to agreeing that certain moneys belonging to his client should be paid to another person unless his client agree to it. Secondly, Charlotte Pestano has never ratified anything and has never given authority to any one at all, but on the contrary made application for the payment of the money to her. It is quite evident that the action, supposing it were one for breach of agreement entered into by Charlotte Pestano's agent, would require more evidence at

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any rate to show either direction or ratification. Therefore, from whatever point of view we look at the plaintiff's claim, it seems to me perfectly obvious that it could not be an action for money had and received for the plaintiff's use and it cannot be maintained. Nothing more need be said but that the plaintiff has misconceived the course of action he should have adopted, and that there has been no money received by the defendant to the plaintiff's use but that it has been received to another's use, the use of Charlotte Pestano, and that the defendant has paid it away to her as being so received. The plaintiff must be non-suited and there must be judgment for the defendant with costs.

De Freitas: Your Honour mentions a non-suit. Does that mean the action can be brought again?

SIR CHARLES MAJOR, C.J.: It means judgment for the defendant on the claim.

MENEZES v. MCWATT.

[369 OF 1918.]

1919. MAY 26. BEFORE DALTON, ACTG. J.

Practice—Counter-claim—Failure to file reply or defence—Case set down for hearing by plaintiff—Bequest by defendant for judgment on counter-claim—Rules of Court, 1900, Order XXI, r. 4; Order XXV, r. 4, and Order XXXII, r. 3.

Claim for specific performance of a sale of immovable property by passing transport. Defendant counter-claimed for possession of the property and for an account of the profits thereof. Plaintiff did not reply to the counter-claim, but set the action down for hearing. On the matter coming on for hearing counsel for defendant asked for judgment on the counter-claim, on the ground that there was no defence thereto.

S. E. Wills, for the plaintiff.

J. S. McArthur, for the defendant.

DALTON, Actg. J.: Here we have an action with statement of claim, defence, and counter-claim filed. The plaintiff (defendant in counter-claim) makes no reply or defence to the counter-claim, but puts the matter down for hearing. Defendant (plaintiff in the counter-claim) now applies for judgment on that counter-claim.

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Where a counter-claim is pleaded a reply thereto is subject to the rules applicable to statements of defence (Order XXI, r. 4). If a defendant in an action of this nature makes default in delivering a defence the plaintiff on the counter-claim may enter the action on the cause list for hearing *ex parte*, and on the hearing thereof *ex parte*, the court may give such judgment as it may consider the plaintiff to be entitled to, or make such order as the justice of the case may require (Order XXV, r. 4). But the plaintiff in the action has here put down the matter for hearing, wrongly in my opinion. His right under Order XXXII, r. 3, does not accrue until the matter, in the words of the rule, is "ripe for hearing." So far as he is concerned it is not ripe for hearing as long as he is in default of reply to the counter-claim. And see *Annual Practice, 1917*, Order XXVII, r. 1, notes). The position then is that plaintiff (defendant on the counter-claim) has put the matter down for hearing without any right to do so, whilst the defendant (plaintiff on the counter-claim) who had the right to put the matter down for hearing *ex parte* has not done so, but under the circumstances stated now applies for judgment.

The order I make, under the peculiar circumstances being one, I think, the justice of the case requires, is that plaintiff do file a reply, if he be so advised, to the counter-claim within ten days, the notice for hearing be struck out, and that the plaintiff do pay the costs of the day.

KOWLESSERI v. BATACHIA.
 PETTY DEBT COURT, GEORGETOWN.
 KOWLESSERI v. BATACHIA.

[74—5—1919.]

1919. MAY 14, 27. BEFORE DOUGLASS, ACTG. J.

Landlord and tenant—Tenancy at will—Sale of house—Seller remains in occupation—Nature of relationship between purchaser and seller.

In the absence of evidence to that effect, the mere fact that A sells a house to B and remains in possession after such sale, does not create the relationship of landlord and tenant between A. and B.

Claim by the plaintiff to recover possession of a house at Kitty village. The claim set out that defendant was a tenant at will of the plaintiff of the premises in question, that the tenancy was determined by notice to quit, but that notwithstanding such termination, defendant Batachia refused to give up possession of the premises, and still retained possession.

The further facts appear from the judgment.

C. R. Browne, for the plaintiff.

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

DOUGLASS, Ag. J.: The plaintiff is claiming possession of a tenement at Kitty under section 16 of the Small Tenement, &c., Ordinance, 1903. The landlord, defined in section 2 as the person entitled to immediate reversion of the premises, states that he bought the property on 5th March, 1919, from the defendant, and produces a receipt for the purchase money \$78; it appears that in spite of this receipt there is still due \$13, but that does not affect the matter in any way. It was decided in *Armogun v. Vandeyar* (Petty Debt Court, 13.4.1915; not reported) that the word “term” used in section 16 included a tenancy at will, and it has been so held many times since. To enable the landlord to succeed the “term” must have been ended or “determined by a legal notice to quit, or otherwise.”

In the case of *Tew v. Jones* (13 M. & W., 12) Alderson B says: “Suppose a person sells an estate out and out and remains in possession . . . the purchaser is clearly admitted into possession by the permission of the seller but the seller remains in adversely,” and Rolfe B says, “If a vendor remains in possession by agreement the terms of the agreement will speak for themselves; if not he is a wrong-doer and may be turned out by ejection and is liable in trespass.”

In *Johnson v. Gravesande*, (A.J. 28.6.1902) Bovell, C.J., under similar circumstances says: “There is no evidence of any agreement between them as to the appellant’s occupying the cottage as tenant

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and no tenancy would be created merely by the vendor's remaining in possession of a cottage sold." And this case was followed in *Robinson v. Adams*. (A.J. 14.11.1902).

It is not as is pointed out in the latter case—so much as whether the premises, possession of which are claimed, belonged to the plaintiff or defendant, as whether the defendant is a tenant of the plaintiff.

The duplicate notice to quit put in does not refer to the defendant as tenant but rather as a trespasser, and the plaintiff states: "I have never told her to stop; I told her to leave; not a word about rent." The defence raised the question of title but I am not called on to decide whether the title of the plaintiff is complete, and the defendant if proved to be a tenant could not dispute her landlord's title. I find there is no proof of any agreement that the defendant should occupy the premises as a tenant at will or otherwise.

I accordingly non-suit the plaintiff.

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[166 OF 1916.]

1919. APRIL 28, MAY 12, 14, AND 31.

BEFORE Sir CHARLES MAJOR, C.J.

Will—Presumption as to testator's competency—Undue influence—Want of capacity of the testator—Will made whilst testator's estate under curatorship—Onus probandi.

If a will, rational on the face of it, is shewn to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of evidence to the contrary, to have been made by a person of competent understanding.

The *onus probandi* lies in every case upon the party propounding the will, and he must satisfy the Court that the instrument so propounded is the last will of a free and competent testator.

A will made by a testator, whose estate is under curatorship, which deals equitably with his property, is good and valid.

Claim by the plaintiff for an order declaring that the alleged last will and testament of Thomas Hubbard, deceased, dated August 16th, 1910, and deposited in the registry on October 11th 1915, is null, illegal and void for want of due execution, or alternatively, on the ground that the testator was at the time of execution, not in his sound and proper senses, and a prodigal by order of the Court dated September 20th, 1909.

The defendants are Herbert Alleyne Nathaniel Burrowes, one of the joint executors and a legatee under the will of August 16th, 1910, Louisa Malvina Hubbard, widow of testator and joint executor, and five other legatees under the same will. The last five defendants entered no appearance.

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All necessary facts and arguments sufficiently appear from the judgment.

On December 9th 1916, on the application of defendant, an order was made that a letter of request do issue directed to the proper tribunal for the examination of a witness, Dr. William Francis Law, at Dublin; in the Kingdom of Ireland, and that the deposition, taken pursuant thereto, when received, be filed in the Registry of Court, and be given in evidence on the trial of the action. The trial of the action was accordingly stayed. Subsequently the parties came to an agreement as to the admission of certain evidence to avoid the expense of the examination of this witness.

F. O. Low, for the plaintiff.

H. C. Humphrys, for the first two defendants.

The remaining defendants were in default of appearance.

SIR CHARLES MAJOR, C.J.: The plaintiff in this action claims a declaration of invalidity of the will of Thomas Hubbard, deceased, (a) for want of due execution; (b) for being made under the undue influence of the defendant Louisa Malvina Hubbard, the testator's wife; (b) for want of capacity of the testator, as being not of sound mind, memory and understanding, and, at the date of the will under order of Court appointing curators of his estate.

The plaintiff sufficiently proved his interest as one of the next of kin to put the defendants to proof of the will in solemn form. "If a will," said Sir Cresswell Cresswell in *Symes v. Green* (1 Sw. and Tr., 401), "rational on the face of it, is shown to have been executed and attested in the manner prescribed by law, it is presumed in the absence of evidence to the contrary, to have been made by a person of competent understanding. But if there are circumstances in evidence which counterbalance that proposition, the decree of the court must be against the validity unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it."

This will is rational on the face of it and has been shown to have been executed and attested in the manner prescribed by law. The presumption, therefore, arose and, up to a certain stage, remained unchallenged, of competent understanding of the testator and of his knowledge and approval of the contents of his will. But the plaintiff alleged that in 1905 the testator, then 78 years of age, had received a blow on the head which seemed to the witness to affect his brain, in that he became "childish and playful," and in 1909 and 1910 had a hallucination that someone was calling him,

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and was to be seen in Water Street "pitching his money about." There was also put in evidence a petition by the testator's wife to the Supreme Court in September, 1909, praying for the appointment of curators of the testator's person and property, wherein the petitioner alleged that within the two or three years previous to the date of the petition, Mr. Hubbard had become very weak in mind and was subject to hallucination. There was filed in support of the petition an affidavit by Dr. Francis Law, then a Government medical officer in this colony, wherein it was stated, "On the 14th instant (September), I visited Thomas Hubbard and examined him, with the result "that I find that he is suffering from an early stage of senile dementia. His "memory is very defective. He suffers from hallucination of hearing, and "his mental condition renders him unfit to manage his own affairs." The order on the petition was made in this form, "Upon reading the affidavits of the petitioner and Dr. William Francis Law, fiat as prayed until further orders." Further documentary evidence was given by the plaintiff of a petition by Mr. Hubbard, preferred to the Court on the 11th October, 1909, stating that he was in full possession of his mental faculties, that on account of his old age his memory was somewhat defective as to some events, but that he felt perfectly sane and in good health and offered to present himself for examination and personal observation by the Court, that he had subjected himself to medical examination by Drs. Gomes, Clavier and Massiah, whose affidavits as to his condition he submitted. Dr. Gomes verified a certificate by him that he had come to the conclusion that Mr. Hubbard was not suffering from senile dementia or other mental ailment, detailing the reasons why, upon careful examination of Mr. Hubbard, he had arrived at that opinion. Those reasons seems to me ample to justify the doctor's opinion and assist me in arriving at my own. Dr. Massiah certified to careful and minute examination of Mr. Hubbard, that his intellect and mental faculties seemed clear and definite when extreme age was considered; that there were no morbid signs nor symptoms in the eyes to suggest any abnormal brain condition; that he gave answer to a multitude of questions put to him with fairly clear reasoning; that he exhibited remarkable fitness and vitality for his age. The order of the Full Court, to which the Chief Justice had referred the petition, was that, on seeing and examining the petitioner and reading the evidence, so much of the order appointing curator of the person of Mr. Hubbard be rescinded and that the appointment of curator of his estate be affirmed, with consequential directions.

The plaintiff also called Drs. Rowland, Edmonds and Wharton. Dr. Edmonds attended the testator in November, 1911, and found him, the doctor says, in an advanced stage of

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senile dementia, with a supervening attack of melancholia; his memory was defective; the doctor thought his condition consistent with the terms of Dr. Law's affidavit of September, 1909, and testified to the progressive and incurable nature of senile dementia, though it may be stationary. Dr. Rowland attended the testator in March, 1912, for some minor bodily ailment, and found him mentally very feeble, childish, of vague and uncertain memory, helpless, suffering, in fact, from senile dementia. Counsel for the plaintiff then put into the witness's hand a certificate of Dr. Law, dated the 16th April, 1910, which like several other documents in the case, went into evidence by consent of the parties, stating thus: "I certify that I have this day duly examined Mr. Thomas Hubbard as regard his mental condition and his capacity for making a will. I questioned Mr. Hubbard closely as to the terms of the proposed will and as to the persons who he proposed should benefit by that will. On both these points he seemed perfectly clear and he also had a fairly accurate knowledge of the value of his property. Mr. Hubbard signed the will in my presence." Dr. Rowland said, "I don't understand this in connection with the former opinion. I cannot reconcile them." The plaintiff's case was then closed.

In these circumstances, and although the evidence contained in the testator's petition just mentioned, the affidavits in support of it, the action of the court and the terms of the order thereon, very largely did away the effect in my mind of the preceding meagre and uncertain evidence contained in Mrs. Hubbard's petition and Dr. Law's affidavit and the naked order of court thereon, there was still left, in my opinion, sufficient evidence to bring the defendants within the rule laid down by Park, B. in *Barry v. Butlin* (2 Moo. P.C., 480) that "the *onus probandi* lies in every case upon the party propounding the will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and competent testator." The defendants then proved that the testator knew and approved the contents of his will and that it was executed and attested according to law.

The plaintiff has merely suggested, he has fallen far short of proving, the undue influence of the testator by his wife. Lord Penzance, in *Hall v. Hall* (1 P. and M., 482) told the jury: "To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affection, or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,—these are all legitimate and may fairly be pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or hopes, if so exercised as to overpower the volition

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“without convincing the judgment, is a species of restraint under which no “valid will may be made . . . In a word, the testator may be led, but not “driven, and his will must be the offspring of his own volition, and not the “record of someone else.” Here it suffices to say that there is not in the evidence a tract of action or conduct of the testator’s wife even faintly to suggest an overshadowing or overriding by her of her husband’s volition so that he was being driven, not led, towards the disposition of his property. It is to be regretted that the plea was ever advanced.

On the issue of the testator’s mental capacity at the time he made his will I have first the statements of his wife made when preferring her petition to the court in 1909, as evidence of what she at any rate thought was the testator’s condition at that time. Those statements, although evidently made with Marion Barry in the background, whose influence over the testator his wife considered baleful and profoundly resented are, in a less degree of emphasis, repeated to-day. She says that her husband “heard things,” “imagined things”; that “his mind was weak.” She uses expressions (manifestly inappropriate) like “lucid moments” and “sometimes quite sane.” Mr. Burrowes to some extent gives a corroborative opinion. He tells us “he was quite rational, at other times not himself; he would “wander in his talk, but knew what he was doing. He had ideas about re-“turning to act as Comptroller.” Then there is Dr. Law’s certificate of “early stage of senile dementia,” “memory very defective,” “hallucination of hearing,” “mental unfitness to manage his own affairs.” This evidence by itself certainly excites some degree of that suspicion which, not removed, may well be argued to bring the testator into that class of persons mentioned in the books who, by extreme old age, are unequal to the important act of disposing of their property. But there is a very imposing array of facts to combat and, the defendants say, to allay the suspicion. I find this invalid voluntarily submitting himself to examination by four doctors and the judges of the court. The doctors, all after careful and minute examination, speak to facts which entitle me to assume their opinion, and myself to form the opinion, that the testator was of that mental soundness which is required to make a will. I find the judges of the court acting on the petitioner’s statements and their own examination of him and discharging the curatorship of his person. And one of the four doctors is the same Dr. Law as had, seven months’ previously, spoken of senile dementia and hallucinations, who, after due examination on this occasion, it is to be observed, directed to ascertaining Mr. Hubbard’s mental condition and testamentary capacity, confirms his colleagues as to facts showing that capacity and actually in attendance to question the testator on the proposed terms of his

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will and to be present at its execution. I look at the will itself and see it to be quite rational, and hear the testator's instructions to his solicitor and note the close resemblance of the terms of the will to those of a former testamentary paper made four years before when Mr. Hubbard was admittedly free and competent to dispose of his property. Any suspicion, therefore, excited in my mind as to the testator's freedom and competency is by these facts done away, and I do not find it renewed by the evidence of Doctors Rowland and Edmonds who saw Mr. Hubbard nineteen and twenty-three months', respectively, after the will was made. Something was said by Mr. Low about an action brought by Bagot & Co., against the testator on his promissory note for the uses of his petition of October, 1909, wherein the defence was pleaded that the defendant was *non compos mentis* when the note was made. Pleadings are not evidence of admissions; there is nothing here to show that that plea was attempted to be supported by evidence; the judgment in the case makes no mention of that issue but only of the defendant's advanced age and incapacity to manage his own affairs.

In the above circumstances, and considering the evidence as a whole, I find that the defendants have shown affirmatively that the testator was, at the time of making his will, of competent understanding.

There remains, however, the issue peculiar to the facts of the case, whether the testator, though mentally sound, free from any undue influence of others, and duly executing and causing to be attested a will the contents of which he knew and approved, was nevertheless incompetent because, at the time, his property was in the hands of curators. The observations of Dutch commentators, to some of which counsel have referred, on the subject of prodigality and its consequences, were all examined as lately as 1914 by a South African judge, Mr. Justice Ward, in the case of *ex parte F.* (1914 S.A.R. Wit.L.D. 27), when the Court had before it an application by a person, declared to be a prodigal and interdicted from dealing with his property, for leave of the Court to alter a will made by him before the interdict. The learned judge said: "With regard to prodigals the result of the authorities is set out in *Burge, iv., 347*: "A will made by a prodigal whilst he was under interdict was void by the civil law. But by the 30th Novel of Leo his disposition would be sustained if made in favour of his necessary heirs, or the poor, or for pious uses, or for any other purpose which did not evince prodigality. On this authority, the will of a prodigal having no children (and) who bequeathed by it the usufruct of his estate to his wife was sustained. But as the interdict deprives the person of the power making any disposition of his property, it is

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“considered more safe that he should obtain permission to make his testament.” And it was held that any permission could not be given by the Court but should be obtained from the Sovereign or the State. “The better opinion,” said Ward, J., “is that a will made by a prodigal which deals equitably with his property is good.” And I say that it would indeed be a strange and illogical thing if it were not so. A course of reckless extravagance, of deliberate waste of substance, to the detriment of, for instance, a man’s wife and children, or others dependent upon him during either unstable youth or doddering old age, may well have promoted the altruism of the State to interfere, not only to protect the waster against himself, but also to see to it that the disposition of his worldly goods did not sound to injustice or folly. But, so far from there being any such immutable rule of law that a prodigal could not make a will, we find that very soon wills were scrutinized by the Courts, not with a view to declaring them null simply because made by prodigals, but to discover whether they were consonant with equity and, upon that discovery, to sustain them. It was “safer,” I suppose, to have obtained permission from the Sovereign to make the will (which must, of course, have included the determination of the Sovereign whether the contemplated terms of the will were just) because then there could be no question of inequity or indication of prodigality. But there is no authority for saying that the permission was an inflexible condition precedent to the testamentary capacity of a prodigal.

Now Thomas Hubbard was, in fact, neither expressly declared a prodigal, nor expressly interdicted from dealing with his property, but, assuming both those results to have followed upon the orders of court, I observe that the same court, in dealing with a petition by the curators in December, 1909, for directions in the administration of the testator’s property, pointing out to the applicants that if Mr. Hubbard were mentally capable of making a will, he was at liberty to do so in order to revoke and replace one already made with the terms of which he was dissatisfied. I agree with that expression of opinion and, having found the testator to have been mentally competent, turn according to the authorities, to scrutiny of the terms of his will. By it pecuniary legacies are left to some relatives and connections, to former fellow workers in the government service, and to one person only, the woman Barry, about whom there was, it seems, a not unjustifiable anxiety, perhaps, on the part of those interested in the testator, lest she should entrap him into some act of undue favouritism or folly. Then the testator gives the residue of his estate to his wife, the wife who, according to the testimony of Mr. Burrowes, had after long and faithful service as his house-

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keeper, married him and given him devoted care and attention. I can find no inequity of any kind in these dispositions of Thomas Hubbard's property. They are, on the contrary, just those which a just man would make.

There must be an order that the will propounded be admitted to probate, the suit must stand dismissed and judgment must be entered for the defendants with costs.

[NOTE.—An appeal has been lodged in this case.]

PETTY DEBT COURT, GEORGETOWN.

JOHNSON v. POWELL.

[26-5-1919.]

1919. MAY 27, JUNE 5. BEFORE DOUGLASS, ACTG. J.

Magistrate's Court—Practice—Parties—Action of debt against unregistered society—Joinder of parties—“Persons having the same or a common interest in one action”—Order authorising one or more to defend on behalf of all—Magistrates' Courts Rules, 1911, r. 4.

Claim by the plaintiff, a medical practitioner, against the defendant for medical services rendered to members of the Smith's Church Friendly Society, an unregistered friendly society, under an agreement made between plaintiff and defendant, a member of the said society, at the rate of \$8 per month subsequently increased to \$12 per month, payable quarterly. The sum claimed was \$36 for the quarter ending March 31st, 1919.

Application was made by the plaintiff under rule 4 of the Magistrates' Court Rules, 1911, (a) that the defendant be authorised to defend the action on behalf of “The Smith Church Friendly Society,” in his capacity as president and treasurer of the society.

E. D. Clarke, solicitor, for the plaintiff

P. N. Browne, K.C., for the defendant.

DOUGLASS, Actg J.: A preliminary application has been made in this action by the solicitor for the plaintiff that the defendant may be authorised to defend on behalf of “The Smith Church Friendly Society” in his capacity as president and treasurer of the society. The application is made under rule 4 of the Magistrates' Courts Rules of 1911. As a preliminary I may here say

(a) Rule 4 is as follows:—

“(4.) Where more parties than one have the same or a common interest in one action, one or more of such persons may sue or be authorised by the court to defend in such action on behalf or for the benefit of all parties so interested, or of such of them as consent that their interests should be thus represented.”

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that in the (English) case of *Wood v. McCarthy* (1893, 1 Q. B., 775) it has been held that the words "be authorised" are equivalent to "shall be directed." This rule differs in its wording in several respects from the parallel rules of (1) Order XIV. r. 8 of our Rules of Court, (2) Order XVI. r. 9 of the English Supreme Court Rules; and (3) Order III. r. 7 of the English County Court Rules of 1889. In the first place these three rules all commence—"Where there are numerous persons," whilst the rule now under discussion commences "Where more parties than one." So far then this rule has the wider scope, for in "*Re Braybrook*" (1916. W. N. 74) it was held that so small a number 'as five persons will not be regarded as numerous.' Next, the words 'or be sued' are omitted in this rule, whether by design or not I cannot say, but the ambiguity in the meaning of the words 'may be sued or may be admitted to defend' is drawn attention to by Buckley, L.J. in *Walker v. Sur*, (1914 2, K.B. 930). He says: If all can effectually be sued it would be strange if all could not effectually defend. . . . Can the rule mean that while all may be *sued* by representatives they cannot *defend* unless the Court gives authority so to do?"; and Kennedy, L. J., says: 'I wish that rule 9 so far as regards defendants was clearer than it is.' It appears to me that the absence of the words 'or be sued' strengthens the contention of the solicitor for the plaintiff that it is the correct course to start the proceedings against the defendant in his own name and not to describe him in a representative capacity.

The rule then so far as it relates to a defendant reads: 'Where more parties than one have the same or a common interest in one action one or more of such persons may be authorised by the Court to defend on behalf or for the benefit of all parties so interested.' The final words (only appearing in this rule) 'or of such of them as consent that their interests' should be thus represented' further complicate matters, but I take it that it goes no further than allowing interested persons to appear in their proper names if they so desire, rather than by a representative; it cannot mean to excuse them from liability altogether.

It lies upon the party applying to prove that 'more parties than one have the same or a common interest' before he can ask the Court to exercise its jurisdiction, and as there is no system of application by affidavit in the Magistrate's Court he can only do so in open court after notice to the other party, as the plaintiff has done in this case. It is objected that the defendant has been sued in his personal, not representative, capacity and consequently the rule cannot apply, and that rule 1 of the Magistrates' Courts Rules has been disregarded. But I am of opinion that that rule is applicable to cases where the party is sued or sues in what one may call a representative capacity recognised by law as such, as

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in the case of an attorney or administrator, or of a person named as the party to be sued in an instrument. The president or treasurer of an unincorporated society has no such *locus standi* at law to add these descriptive words to his name, and if added it would have no effect.

I therefore see no objection to the plaintiff's application in spite of the defendant being sued in his own person. To put it shortly, the defendant has no representative capacity at law, and it is by this very application that endeavour is made to endow him with a legal status. It remains only to consider whether the facts as disclosed to the Court by the statement of claim and the evidence of Dr. Johnson for the purpose of this application disclosed a proper and suitable case on which the Court may exercise its jurisdiction. The learned editor of the Annual Practice of 1917, page 244, in the notes to Order XVI, rule 9 of the Supreme Court, states: "Where a plaintiff desires in a suitable case to sue any combination of persons under a title purporting to be the name of a society or club or association (not being a registered society or partnership firm) it is the practice to allow him to sue two or more members by their names with the added statement that they are sued on their own behalf and on behalf of all other members of the society." This statement must also form part of the statement of claim. The case of *Walker v. Sur* (1914 2 K.B., 930), has been referred to by both parties as supporting their respective contention for and against the present application. It was there held that the plaintiff was not entitled to a representation order under Order XVI, r. 9, for the reason set out therein by Vaughan Williams, L.J., and Buckley, L.J. In the *Duke of Bedford v. Ellis* (1901 A.C. 1) which was a representative action by several plaintiffs, Lord MacNaughten says, "In considering whether a representative action is maintainable you have to consider what is common to the class not what differentiates the case of individual members"; and Lord Shand says: "The rule has been framed and adopted for a useful and important object—the saving of the multiplicity of actions with the attendant costs," etc. "The sole test to be applied is that of the same interest in one cause or matter." The last case on the subject appears to be that of *Churchill v. Whetnall* (87 L.J. Ch. 524) in which Eve, J., states "this is really an attempt to obtain relief for over 200 individuals by proving the right of three of them thereto."

In the present case the preliminary proof discloses that the defendant is treasurer of the Smith Church Friendly Society and also is or was president of the society at the time when the contract relied on was made and the right of action arose. The society's book of rules was put in. I will call attention specially

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to rules 1 and 13. The plaintiff is suing for moneys, and if he proves his case desires to have judgment not only against the defendant but through him as their representative against the society, the members of which were entitled to the services of the plaintiff. I think that this case is quite distinguishable from that of *Walker v. Sur*, the defendant is on an even footing with other members of the society and there is a common fund to which all are equally entitled, and the plaintiff has a common grievance against every member equally, viz., that his services (so he states) have not been remunerated as agreed. If one adopted as a whole the judgment of Kennedy, L.J. in *Walker v. Sur*, apparently no person could ever represent an unincorporated society, but he goes much further than his brother Judges and he lays much stress upon the impossibility of reaching a common fund. On the other hand Lord Lindley in *Taff Vale Railway Company v. Amalgamated Society of Railway Servants* (1901 A.C. 426) says 'I have myself no doubt whatever that if the trade union could not be sued in this case in its registered name some of its members could be sued on behalf of themselves and the other members of the society.' And again in the same case in which the matter arose in the form of the question whether an unincorporated society could be sued by its collective name 'the rules as to parties to Common law actions were too rigid for practical purposes where those rules had to be applied to such,' i.e., 'unincorporated societies' and in quoting Lord Lindley in the case of *Markt & Co., Ltd., v. Knight Steamship Co., Ltd.*, (1910, 2 K. B. 1021) Buckley, L. J. uses words with reference to Order XVI, rule 9, which I cannot do better than adopt. If I may say so respectfully I wholly agree with Lord Lindley that the principle upon which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. This seems to me to be exactly the case in which the spirit, nay more, the words of Order XVI, rule 9, justify, and good sense requires, that the principle should be extended to a case for which I find no precedent is exactly to be found?

A difficulty arises through the fact of there being no pleadings in this court and only a minimum of rules but all the more scope is given to the magistrate to exercise his powers under section 59 of Ordinance 11 of 1893.

I accordingly direct that there be added to the defendant's name the words sued on his own behalf and on behalf of all other members of the Smith Church Friendly Society, and I authorise the defendant to defend this action on his own behalf and on behalf of all other members as aforesaid. I further direct that paragraph 5 of the plaint be amended so as to ask that the de-

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defendant and those on whose behalf he, is sued be liable to the plaintiff for the moneys stated to be due and owing to him.

The matter came on for further hearing on July 1st, and after taking evidence and hearing argument, judgment was given by the plaintiff for \$36, the amount claimed, and costs.

In re JARDINE, in re CHATTERTON.

[148 OF 1919.]

1919. JUNE 14. BEFORE SIR CHARLES MAJOR, C.J.

Trustee—Trustee Act (England), 1893—Civil Law of British Guiana Ordinance, 1916—Constructive trusteeship—Appointment of new trustees—No trustees originally appointed.

The Court will appoint new trustees of a will under section 25 of the Trustee Act (England), 1893, where no trustees were originally appointed but the executors have trust duties to perform in respect of the estate subject to a life tenancy, and where two of the executors have become unfit and incapable of performing their duties.

This was a petition by Helen Jardine for the appointment of a guardian of the minor children of her marriage with Douglas Kennedy Jardine and of their property and also for the appointment of a curator of the property held in common by the petitioner and her husband.

All further necessary facts appear from the decision of the Court.

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

SIR CHARLES MAJOR, C.J.: Helen Jardine on the 24th March, 1904, married Douglas Jardine in community of property. There are issue of the marriage, four children, all infants. Douglas Jardine left the colony about 1915 and has not, since November, 1916, communicated with his wife.

Charlotte Chatterton, Helen Jardine's mother, by her will dated the 6th February, 1907, after bequest of certain specific legacies which have been paid, devised and bequeathed the residue of her estate to her husband, Bollen Chatterton, for life and, after his death, as to a certain part of the realty to her daughters Mary King and Helen Jardine and their issue, "such issue to take per stirpes, and to the survivor of her said daughters should one of them die without lawful issue"; and as to the rest of the residue to the children of the testatrix's marriage and their lawful issue, "such lawful issue to take per stirpes." The testatrix directed that "in the division of her estate all sums of money advanced or lent to any of her said children and standing at

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their debit in her books of account should be taken as part of her estate and that the sums due respectively by any of them should be deducted from his or her share of the estate as so ascertained." The residue consists of real and personal estate. The testatrix appointed her husband, her son Harry Chatterton, and her son-in-law, Douglas Jardine, the executors of her will and guardians of such of her heirs as might be minors. Bollin Chatterton, the tenant for life, is very advanced in years and in feeble health. Douglas Jardine has recently, in reply to Mrs. Jardine's solicitor, stated that he has no intention of returning to the colony or of communicating with anyone in it, that he was leaving Scotland (whence he wrote) for the United States of America and has no intention of exercising his rights as guardian of his minor children. He is entitled by virtue of his marriage to half the common property of his wife and himself. The certain part of the residue devised by the testatrix to her daughters and their issue consists of a plantation at present under demise originally granted by the testatrix and subsequently renewed by the tenant for life and the devisees, Mrs. King as to her separate use and Mrs. Jardine quantum valeat. But Mrs. Jardine is unable to act for herself by herself, or for her children, in any dealing with the remainders.

In these circumstances, Helen Jardine has presented a petition for the appointment of a curator of the interests of herself and her children under Mrs. Chatterton's will. That I decline to do. By the result of the recent change of the law and the application of the Imperial Trustee Act, 1893, to the colony "curators" and "administrators," the latter as persons to perform duties not pertaining to, and only arising after function of the office of executor, can no longer exist; their place is taken by trustees, I am willing, however, to treat the petition as for the appointment of a trustee or trustees of Mrs. Chatterton's will and regard it as presented under the Trustee Act, 1893, and am of opinion that the appointment may be made.

Nothing remains in the administration of Mrs. Chatterton's estate to be done by the executors *ex virtute officii*; funeral and testamentary expenses, debts and specific legacies have been paid. But there are other acts to be performed by the executors in the capacity of constructive trustees, just as in the capacity of "administrators" under Roman-Dutch law, although not appointed by that name in the will. There is the protection of the remainder against the tenancy for life; there are dealings with that remainder during the life tenancy; there is the alternate division of the estate and the application of the advancement clause in the will. And the executors of the will are still trustees for those purposes. One of the trustees, Bollin Chatterton,

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is the tenant for life. Apart from the undesirability of that duality of position, he has become unfit to act as trustee. Another of the trustees, Douglas Jardine, is incapable of acting and, in the circumstances, has become unfit to act. There remains Mr. Harvy Chatterton, one of the sons of the testatrix and a residuary devisee and legatee.

Under the provisions of section 25 of the Trustee Act, 1893. I find on the facts of this case, that it is expedient to appoint a new trustee of the will, and that the appointment cannot be made without the assistance of the Court. The petitioner is a person entitled to make the application and, in the absence of any provision in our Rules of Court for originating summons, to do so by petition.

Authority for the order I propose to make is to be found, I think, *In re Davis's Trusts* (12 Eq. Ca. 214) and *In re Gillett's Trusts* (25 W. R. 23). Despite the remarks of Kekewich, J., in the former case and of Cotton, L. J. *In re Willey* (W. N. 1890, 1) on *In re Moore* (21 C. D 778). I think *In re Moore* may be included in the catena.

Mr. Joseph Arthur King, Crown Solicitor and solicitor for the petitioner, is proposed to me as the new trustee (I do not think it necessary to appoint more than one) of the will. In the proposal I acquiesce. There will be the usual vesting order under the Act. It may not be amiss to point out that the 32nd section of the Trustee Act, 1850, and the 9th section of the Trustee Extension Act, 1852, upon which the authorities I have mentioned proceeded, are now in the 25th section of the Trustee Act, 1893.

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[32 OF 1917.]

1919. JUNE 16. BEFORE SIR CHARLES MAJOR, C.J.
AND DOUGLASS, ACTG. J.

Husband and wife—Asiatic immigrant—Inquiry by I.A.G. into relations—Entry in register of married immigrants—Certificate of marriage—Evidence to rebut presumption of marriage—Ordinance No. XVIII. of 1891, ss. 141, 167, 168.

Notwithstanding the entry of immigrants' names upon the register of married immigrants arriving in the colony kept by the Immigration Agent General under the Immigration Ordinance of 1891, and the issue of a certificate of marriage, the Courts will enquire whether the provisions of the Ordinance were in fact complied with which direct the I.A.G. to make inquiry whether parties on their arrival in the colony stand in the relation of husband and wife, and ought to be so regarded—which is a condition precedent to the making of the entry and issuing the certificate—and, if that inquiry has not been held, will hear evidence to determine whether that relations existed.

The entry by the Immigration Agent General in the register under section 141 of the Ordinance should be of (a) the holding of an inquiry, (b) the evidence upon which it proceeds, (c) the Immigration Agent General's satisfaction that the parties stand in the relation of husband and wife and ought to be so regarded and dealt with.

Appeal from a decision of Berkeley, J.

The plaintiff Mahangi claimed an order that the defendant Chataru pass transport to him of one undivided half of lots 22 and 23 in Canals Polder No. 2, West Coast, Demerara. The claim alleged that plaintiff was married in community of property to Chabuye, that the three, plaintiff, defendant and Chabuye lived together in the same house, working and keeping their moneys together, that they purchased the two lots of land in question together, but that by verbal agreement transport of the lots was obtained in 1903 in the name of defendant alone. It was further claimed that in 1916 defendant admitted the claim of plaintiff's alleged wife, to half of the property, and at the same time agreed to transport the property in question to plaintiff.

The defence was that the property was purchased by defendant for himself with his own money, that no agreement as alleged was ever made and that no marriage existed between plaintiff and Chabuye as alleged.

The case came on for trial on November 9th, 1917, when judgment was given for the defendant with costs. That judgment was set aside by the Court of Appeal on May 27th, 1918, and a new trial was ordered.

After a second hearing, on March 11th, 1919, Berkeley, J. gave judgment as follows:

Plaintiff claims—as having been married to his wife Chabuye in community of property—an undivided half of lots 22 and 23, south section Government land in Canal No. 2.

At the close of the plaintiff's case counsel for the defendant

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submits that the claim is based on marriage in community of property—that the evidence of the parties themselves shows that they do not come within the provisions of section 141 of Ordinance 18 of 1891, that the requirements of sub-section (1) have not been carried out, and that the certificate of marriage under sub-section (2) is only *prima facie* evidence (section 168 (4)), which the parties themselves have rebutted by their evidence, that the right of Chabuye (if any) should be brought before a magistrate under section 156.

Counsel for the plaintiff submits that *prima facie* evidence under section 168 (4) does not refer to section 141 (3) “deemed to be married,” but as to where and when the marriage took place—that once registered as husband and wife the marriage is complete.

I hold that the contention of counsel for the defendant is sound—further, the plaintiff has not proved the agreement referred to in paragraph 7 of his claim. His evidence and that of Chabuye is most unsatisfactory and the witness Margu never knew of it. The only other witness is Mr. Sealy, of the Immigration Department, who says that defendant complained to him that Chabuye had his documents (including transports) and would not give them up, that he sent for her and that defendant then said if the woman wanted one lot he would give it to her. I cannot hold that this offer amounted to an agreement binding on the defendant.

Both on the law and on the facts the action must be dismissed with costs.

From that decision plaintiff again appealed on the following grounds:

- (1.) The evidence of plaintiff and his witnesses established the fact that the plaintiff and Chabuye were duly married under the provisions of Ordinance 18 of 1891, and that all the requirements thereunder had been carried out.
- (2.) The certificate of marriage is irrefutable proof of marriage unless the parties are so nearly related by blood as to make the marriage unlawful.
- (3.) The decision was against the weight of evidence.

F. O. Low, for the appellant.

E. G. Woolford, for the respondent.

SIR CHARLES MAJOR, C.J.: The plaintiff’s claim rests entirely upon his alleged marriage to the woman Chabuye. That marriage is said to have been contracted on the arrival in the colony of Chabuye and himself, under the provisions

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of section 141 of Ordinance No. XVIII. of 1891, and a copy of an extract from the register of married immigrants arriving in the colony has been produced. An entry in that register is authorized to be made by the Agent General after he has inquired whether the persons to whom it relates stand in the relation of husband and wife and has satisfied himself, by their statements and by such other information as he may have been able to obtain, that they ought to be regarded and dealt with as husband and wife. The Agent General also issued a certificate of marriage prescribed by the section. It is contended for the appellant that the court cannot go behind the entry and the certificate which are conclusive evidence that these persons are married. But that is obviously not so. An entry in a register kept under the part of the Ordinance which relates to marriage is only conclusive evidence of the marriage until the contrary is proved, and a certificate is but prima facie evidence of any fact therein certified. The fact certified in this certificate is that the parties therein named and described were on a certain day duly registered as married immigrants. It is not a certificate that they were married by the Agent General, for that officer cannot marry immigrants. His only power is to make an entry that, upon inquiry and after hearing the parties' own statements, and obtaining such other information as he may have been able—the particulars of which he should make part of the entry—he is satisfied that the parties stand—that is, stand on their arrival in the colony—in the relation of husband and wife and ought to be so regarded and dealt with. Agents General come and go, and unless an entry of the kind is made with the departure of an Agent General there goes the only source of information given to him as to the evidence to support the entry in the event of the marriage being called in question. The entry and certificate alike, it will be seen, refer to a relation between the man and the woman (in this case a girl child of 14) already existing on their arrival of such a nature that it ought to be regarded as that of husband and wife, and it is only that relation duly found to exist that enables the Agent General to issue what is termed a certificate of marriage, but which is really only a certificate of registration of a marriage.

The learned judge of trial, therefore, was, and this court is, quite able to inquire into the issue of marriage between the appellant and Chabuye upon the determination whereof depends the success of the plaintiff's claim and of this appeal. It being a condition precedent to the making of an entry and issuing a certificate that the provisions of section 141 should be obeyed, the evidence in the case shows abundantly that the Agent General made no inquiry whatever, that he neither took any statements from

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these persons nor sought any information from any other source, in order to arrive at so obviously important a conclusion as that Mahangi and Chabuye stood in the relation of husband and wife. More than that, the evidence shows that had that inquiry been made, he must have been then, as I am now, satisfied that the only relation between them was that of fornication, a relation carried, in fact, into the only community of property I have been able to discover in the lives of the appellant, Chabuye, and the respondent, namely that of Chabuye by the other two for the purposes of sexual intercourse.

Mahangi and Chabuye were not married when they arrived in the colony; they could not be married before the Agent General after they arrived, no inquiry was held by that officer whether they stood in the relation of husband and wife, an enquiry he was bound to hold before making an entry in the register and issuing a certificate; they did not, in fact, stand in that relation; they have not been married since.

The decision of the learned trial judge was right, and the appeal is dismissed with costs.

DOUGLASS, J.: I agree and have nothing to add.

Appeal dismissed.

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[BERBICE. 2 OF 1919.]

1919. JUNE 23. BEFORE DALTON, ACTING C.J.

Immovable property—Partition—Land held in undivided interests—Law applicable—Roman Dutch law—Districts Lands Partition Ordinance, (No. 13 of 1914)—Civil Law of British Guiana Ordinance, 1916, ss. 2 (3) and 3 (4).

Claim by the plaintiff for the partition of sub-lot A of house lot 63, in Rose Hall Village, the plaintiff holding by transport twelve undivided fourteen parts in the sub-lot, and the defendants being owners of the remaining undivided interests. In the alternative plaintiff sought an order compelling defendants “to remove all buildings and erections their property . . . from the plaintiff’s proposition of the said sub-lot.” The value of the property was declared to be \$150.

Further necessary facts appear from the judgment.

J. A. Abbensetts, for the plaintiff.

Cited *Jardim v. Ribeiro* (L.J. December 31st, 1906); the law applicable had not been changed by the Civil Law Ordinance, 1916; the Partition Ordinance 1914 would not apply to land of

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this nature, and one person could not apply for partition under that Ordinance; under the Local Government Ordinance of 1907 lots could not be sub-divided into less than quarter lots.

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

DALTON, ACTING C.J.: Plaintiff and defendants are the co-owners of a lot of land in Rose Hall village. Plaintiff has title for twelve undivided fourteen parts of the lot, whilst the defendants between them have title for the remaining two undivided fourteenths. The defendants are six in number, of whom two are minors. In this action plaintiff claims;

- (1) a partition of the lot in the respective proportions owned by the parties;
- (2) An order compelling defendants to remove buildings from plaintiff's "proportion" of the lot; or in the alternative
- (3) that the lot be awarded to the plaintiff, fair compensation to be paid to the defendants for their interest
- (4). Damages, \$50.

The defence is that the claim discloses no cause of action, and that the partitioning of lands held in co-ownership is governed by the provisions of Ordinance 13 of 1914. (The District Lands Partition Ordinance), with which plaintiff has not complied. Before any evidence was taken argument was heard as to the law. Plaintiff's counsel contended that the law applicable had not been changed by the Civil Law Ordinance, 1916, and that the Partition Ordinance referred to did not apply. He cited the case of *Jardim v. Ribeiro* (L.J. Dec. 31st, 1906) which he urged set out the law on the subject of the partition of lands held in joint ownership as it exists to-day. At the time that case was decided I agree that the action (*actio communi dividundo*) for a partition in a case such as this would lie. Although the law provides that village lots shall not be sub-divided into less than quarter lots, and here on subdivision defendants' interest would be less than a quarter lot, yet I am satisfied that would be no bar to the action. There is ample authority for the contention that, provided the land is alienable, the Court can award all the land to one co-proprietor upon payment of reasonable compensation to the remaining co-proprietors, if partition would be impracticable or inequitable. Here partition is impracticable because of the provisions of the Local Government Board Ordinance as to the subdivision of lots.

But since that case was decided the common law of the Colony has been altered, and further, an ordinance has been passed to provide for "the partitioning of district lands amongst the joint proprietors thereof" (Ordinance 13 of 1914). That ordinance repealed Ordinance 1 of 1851 (Partition of Village

Lands Ordinance). The earlier ordinance dealt only with lands purchased jointly on which villages were established, or with tracts of 'land formerly known as an estate' purchased in the same way. The later ordinance has a very much wider application and refers to "any land purchased or acquired jointly situate in any district and still undivided." District is defined as a village or country or rural sanitary district, but not including an urban sanitary district. Provision is made for the appointment of an officer to carry out the partition, and he has power to sell any lot of land by auction instead of dividing it amongst the persons he finds entitled to it, if he decides that is the most convenient course. He is required to make a report (s. 13) showing his proposed subdivision of the land which is put before the Local Government Board. The property, the subject of this action, comes within the definition, and so is subject to the terms of the ordinance. But plaintiff says that he cannot petition for partition under the ordinance because he cannot get one-third of the joint proprietors to act with him. Although he owns for the largest proportions of the lot, *i.e.*, 12/14, he is prevented by the attitude of the other proprietors from obtaining partition. That is so, and it is a distinct hardship, but one in which I can grant no relief.

Having come to this decision, it fortunately is not necessary to consider the change in the common law. I say fortunately for it is a matter bristling with difficulties. Counsel assumed that there had been no change, but produced no argument to support that assumption. Lest it should be thought that I agreed with him it is only necessary to cite section 3 (4) of the Civil Law Ordinance, 1917 which enacts that "there shall be as heretofore one "common law for both immovable and movable property and all questions "relating to immovable property within the colony and to movable property "subject to the law of the colony shall be adjudged, determined, construed, "and enforced, as far as possible, according to the principles of the common law of England applicable to personal property." In the absence of any statutory enactment dealing with the matter the section would certainly appear to include questions arising on the partitioning of immovable property. The English common law of real property in respect of co-partners and with its provision for effecting partition by writ *de partitione facienda* is expressly excluded by the foregoing sub-section of this section, but the very term 'partition' in law only applies to land and hereditaments or right and interests therein.

Possibly section 2 (3) of the ordinance dealing with the saving of existing rights might be appealed to, but I should have great difficulty in holding that a right to obtain partition of immovable

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property held in joint ownership came within the terms “any right of ownership or any other right, title or interest in any property movable or immovable or of any other right acquired before the date of this ordinance.” The effect of such an interpretation would in effect mean a state of chaos in the law of the colony. No help can therefore in my opinion be obtained from that sub-section.

For the reasons above stated the action for partition will not lie, and there must be judgment for the defendants with costs.

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[359 OF 1918.]

1919. MAY 19, 30, JUNE 13, 26. BEFORE DOUGLASS, ACTG. J.

Malicious prosecution—Institution of criminal proceedings on charge of perjury—Reasonable and probable cause—Malice—Burden of proof.

Claim by the plaintiff Hill against the defendant for the sum of \$5,000 for damages for malicious prosecution. The plaintiff gave evidence in September, 1918, in the Georgetown Petty Debt Court on behalf of one Neischer against the defendant Mordle in a claim for the sum of \$80 for money had and received. In that matter judgment was given for the plaintiff. Thereafter the defendant Mordle laid a complaint against Hill, the plaintiff, charging him with having committed perjury in his evidence in the above-mentioned case. After taking evidence the magistrate declined to commit the plaintiff for trial and discharged him.

Further necessary facts and arguments fully appear from the judgment.

M. J.C. deFreitas, for the plaintiff.

J. S. McArthur, for the defendant.

DOUGLASS, ACTG. J.: The plaintiff is claiming from the defendant \$5,000 damages for the malicious prosecution of the plaintiff by the defendant before the stipendiary magistrate of Georgetown on a charge of perjury. On hearing the complainant (the now defendant) and her witnesses, and the accused (the now plaintiff) and some of his witnesses, the magistrate, Mr. W. J. Gilchrist, on the 18th November, 1918, discharged the accused, stating, "In my opinion no jury would convict the accused on the evidence submitted."

To succeed in this action the plaintiff must prove,

- (i) that the defendant instituted criminal proceedings against him before a judicial officer,

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- (ii.) and in so doing she acted without reasonable cause,
- (iii.) that in so doing she acted maliciously, and
- (iv.) and the proceedings terminated in the plaintiff's favour.

To take Nos. (i.) and (iv.) first; it is not seriously contested and it is abundantly proved that the defendant instituted criminal proceedings against the plaintiff for perjury before the stipendiary magistrate in Georgetown, and that the charge was dismissed. Where the trial of such a case is before a judge and jury the question whether there was or was not an absence of reasonable and probable cause is for the judge—all the other issues would be for the jury—but it was held in *Bradshaw v. Waterlow and Sons, Ltd.* (1915, 3 K.B. 527) that the question whether the defendant honestly believed in the charge he made ought not to be left to the jury unless there is evidence of the absence of such belief, nor should the question whether the defendant took reasonable care to inform himself of the facts before instituting the prosecution be left to the jury, unless there is some evidence of the defendant not having made proper inquiries, and that notwithstanding that he acted on information given by others and that the principal informant was an accomplice and a dishonest person.

The evidence must then first be sifted to show whether the plaintiff has satisfactorily proved (per Bowen, L.J., in *Abrath v. the N.E. Railway Coy.*, 11 Q.B.D. at p. 455), "that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of reasonable and probable cause." It appears that on the 18th September, 1918, one James Alexander Neischer brought a claim in the petty debt court against the present defendant for the amount of \$80, money had and received, and judgment was given for the amount with costs. One of the witnesses for Neischer was the present plaintiff, who up to the 31st of July, 1918, had been a clerk to Mrs. Mordle. It was undoubtedly the evidence given by Hill that turned the scales in the case. He swore then and he repeats the statement (except that he is now certain of the date) in support of his present claim, that "On July 19th I saw plaintiff (*i.e.*, Neischer) there (*i.e.*, Mrs. Mordle's office). I remember Neischer handing defendant \$160 to get him twenty bags of rice. I saw the money. I counted it. It was entered by me in her pass-book to be deposited with other money. It might have been the 13th. I do not remember the day of the week. It was all notes. I heard her say plaintiff would get the remaining ten bags on the following Friday. She never disputed not getting the money for the rice until late in the month. She went to La Penitence then, and came back and told Neischer that the rice

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had been delivered:" whereas Mrs. Mordle gave evidence, *inter alia*, that the \$160 was handed to her by Neischer on the 12th July in Water Street, whilst she was in the tram-car, and he asked her to get twenty bags, and that Hill was not present. This date, 12th July should evidently read the 13th, as Neischer was cross-examined as to the 13th July, which is the date mentioned all through the different proceedings. The date on which the money was handed to her was of the greatest importance to the success or otherwise of the claim, for the following reasons which were partly stated in the petty debt court, but have now been more fully disclosed on the evidence.

Mrs. Mordle was at this period, July 1918, supplying wood to Messrs; Curtis, Campbell & Co., at La Penitence, and purchased rice from them, though they refused to deliver more than ten bags at a time. The firm would not at the time sell to Neischer; so he, also having dealings in wood with Mrs. Mordle, approached her to secure the rice he needed. According to the evidence of the attorney of Messrs. Curtis, Campbell & Coy. and of their wharfinger, there were three deliveries of rice to Neischer on Mrs. Mordle's order in July, namely on the 8th July (on order of 6th,) on the 15th July (order of the 13th) and on the 20th July (order on the 19th); ten bags on each occasion; thirty in all. Mrs. Mordle paid Messrs. Curtis, Campbell & Coy. for those bags, (the last payment being made on the 19th July), having received the amount from Neischer, according to her statement, viz., \$80 on the 5th July, and \$160 on the 13th July. Neischer on the other hand says "I gave her \$160 on the 19th July for twenty bags and only got ten," meaning thereby the ten received by him on the 20th July. If his statement is true, it is evident that he is claiming to receive forty bags of rice and not thirty as alleged by Mrs. Mordle. He further states that he gave Mrs. Mordle the second lot of money in a cab at La Penitence, and that Sampson (a wood-cutter) saw it, but his evidence is for practical purposes useless as he (Sampson) although he saw a "parcel resembling notes" handed to Mrs. Mordle, as stated, in a cab, cannot say what date in July, only 'the early part' which may quite well have been the 5th July. Sampson too was not called as a witness at the civil suit. The greater part of Hill's statement as to Mrs. Mordle handing him \$160 to enter on the deposit slip together with a cheque, and his returning the slip and money to Mrs. Mordle to pay into the Bank is admittedly correct, but Mrs. Mordle says he lies when he states that the \$160 was received that morning, the 19th July,—she did not, however, in the civil action see, nor was she apparently advised, how damaging to her defence was that deposit slip dated July 19th in Hill's handwriting. Her evidence was chiefly directed to how the money she

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received was expended and she had no witnesses present to contradict Hill, whose evidence against her was apparently a surprise.

On hearing the decision given against her and for the \$80 claimed the defendant appears to have been very indignant, and started an appeal which she was advised (Very properly) to abandon. Her counsel, Mr. C. Browne, states: "I am satisfied that defendant should have succeeded," i.e. in her defence of the civil claim. He goes on to say, "I investigated the perjury charge and lodged it." It need perhaps hardly be remarked that although she could not successfully appeal, fresh evidence brought to show Hill's concoction of truth and fabrication (from her point of view) might well be successful in establishing her story as the correct one. She herself states: "I wanted justice done; there was no malice; otherwise I should be looked on as a thief taking the man's money."

The thread from which the case may be unravelled lies in the meeting that took place between Mrs. Mordle and Neischer at La Penitence on the 31st July on neutral ground, so to speak, when it was a question of how many bags were delivered, rather than how much money was paid, and it discloses what Neischer's claim was at that time and how far Mrs. Mordle was convinced that she had supplied all the rice paid for. Neischer's account of this interview is of the briefest. He said: "I went to La Penitence store with Mrs. Mordle on July 31st; we had a dispute at the bank about ten bags that morning. We saw Mr. Sheriff at La Penitence. I did not mention the ten bags on July 15th. The cartman said he drove rice on the 15th, and delivered it to Mr. de Freitas. I said there is ten bags more for me." Now, what actually occurred at the interview may be collected from the evidence of the clerk, delivery clerk and wharfinger at La Penitence and from the exhibits put in by them. Charles Sheriff (the wharfinger) states that Mrs. Mordle and Neischer had a dispute, he (Neischer) disputed the delivery of the ten bags on the 15th July. "I showed him where the delivery was made and he said, 'that's all right.' He said he wanted ten bags more, that he should have had twenty but had only got ten bags. We said we had orders to deliver thirty bags to Mrs. Mordle's order. I never heard the figure forty mentioned at all. He said that delivery, 8th July, was all right. I heard Neischer say he had paid \$160." Mrs. Mordle corroborates most of this evidence. Walter Massiah Cox, clerk to Curtis, Campbell & Coy., gave evidence in the civil suit similar to that given by Mr. Sheriff, that Mrs. Mordle purchased three lots of rice during July, the second lot she asked for twenty bags, but only got ten and Cecil Henriques, the delivery clerk, on the same occasion states: "He (*i.e.* Neischer) was to get thirty bags. He never mentioned

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forty bags." On leaving La Penitence on the 29th July Mrs. Mordle evidently considered that she had proved herself in the right, but on the 24th August, Neischer came to see her and said he had not got the rice, upon which she replied, "Man, you are mad," and drawing up a cheque, \$15, presented it to him saying, "go and sue me," evidently daring him on account of the certainty of her position in the matter. Neischer puts this interview on the Saturday and says that Mrs. Mordle gave the cheque "as a present for an old acquaintance." Considering the feeling between the parties, this seems very unlikely. The cheque for \$15 is put in.

The plaintiff brings evidence to prove that his story was true; that Mrs. Mordle must have known it was true, therefore she could have had no reasonable or probable cause to prosecute him (Hill) for perjury even if she formerly mistakenly believed she had delivered all the rice for which she had received cash. His principal witness is, of course, J. A. Neischer, who states that the \$160 was given him by one de Freitas on the 19th July, and that he, on the same date, handed it to Mrs. Mordle in her house (her house and office are apparently in the same building), that he prepared the deposit slip for the bank after checking the amount and taking into account a cheque Mrs. Mordle handed him. Mr. E. G. de Freitas next states he gave Neischer \$160 on the 19th July to buy twenty bags of rice; it was in notes but that he only received ten bags on the 20th July, and that he took a promissory note for the amount but had lost it. The plaintiff's own evidence relative to the payment of \$160 has already been noted. He further states that Cumberbatch was not present on the 19th July, and that he entered the figures on the deposit slip for \$160 in notes and a cheque for \$946.78. The counterfoil book tendered in the civil proceedings is unfortunately missing. Sampson's evidence I have already commented on. The other witnesses called by the plaintiff are intended to emphasise the untruthfulness of Mrs. Mordle's story, and to show malice on her part. [At this stage His Honour dealt with the evidence given by the several witnesses].

A great deal has been made of the fact and much time expended in endeavouring to prove that it was impossible for Cumberbatch to have arrived in Georgetown on the 18th July, though if he had arrived the morning of the 19th it would have been sufficient so far as his evidence is concerned—but statements as to dates and hours after so long a period has elapsed may well be faulty without any ill intention of the persons making the statements. It is true that certain books kept by the firm of "Hee Wi and Chung Chee" appear to note transactions with Cumberbatch up to the 18th July, but his day's pay for work done expired on the 17th July

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and it is noted in the day-book on that date, it may well be that the other books being made up the next day, the 18th July, was entered. Moreover, Cumberbatch denies the items of "high wines, etc.," entered against him that date, and it may be noted that they are not entered against him in the day-book, as I notice is done in the case of the labourers that come immediately before and after his account; after all with a favourable tide I understand one of the witnesses to say that it is only the matter of a few hours from Hyde Park to Georgetown. The witness Bishop who is alleged to have brought down Cumberbatch states that it was Barker's wood he was bringing and that royalty was paid. The fact that royalty was paid on the 19th July for three cords of wood from Barker's grant is proved by the clerk to the Commissioner of Lands and Mines, and the exhibit put in, i.e., the "permit" granted on the 17th July.

In *Hicks v. Faulkner* 8 Q.B.D., 167, the court held "There must be: first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly mentioned belief must be based upon reasonable grounds: by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused." To adjust them to the present case,—first, did Mrs. Mordle honestly believe Hill to be guilty of perjury at the time she brought the charge; secondly, was that belief based on an honest conviction of the existence of the circumstances which led her to that conclusion; thirdly, were her grounds for that belief reasonable; and fourthly, were those circumstances (so believed and relied on) such as to give cause for reasonable grounds in her belief of the guilt of the accused?

It really all comes to the point,—Is Mrs. Mordle's evidence to be believed and does she prove that the grounds for her belief are reasonable? This is not a case in which the defendant depended upon information by other parties in the charge brought against the plaintiff. Her belief must be on parallel lines with her knowledge. It was not necessary for her to make enquiries of others. The case is peculiar in that respect. If any witness, or the surrounding facts, prove her statement as the true one, there is certainly no absence of reasonable and probable cause. In a case with evidence so contradictory as the present and where dates and times are of importance, and almost impossible to fix on the varying statements of illiterate witnesses who, perhaps without any evil intention, have had a date or time repeated to them in

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talking of the story and which they parrot-like repeat, it is of importance to note the character and standing of the parties and their witnesses. It is to my advantage that the present parties and their witnesses are unknown to me and their standing and character I gathered only from the facts disclosed by the evidence and from their demeanour in the witness-box. I accordingly note that Neischer does a steady business in supplying wood and has had business with Mrs. Mary Mordle and had indeed been in her employ. He admits that he has suffered imprisonment for larceny of paddy or being found with paddy in his possession; he makes both statements at different times. Hill had been a lawyer's clerk up to 1894 and is, or was, agent for the diamond fields and a commission agent for an insurance company but last year did not make much and since he left Mrs. Mordle has apparently hardly made a living. Mrs. Mordle is in an exceedingly large way of business, wood-cutting and supplying for 37 years, a paddy dealer, and contractor for the town council and Curtis, Campbell & Co. There is nothing shady proved against her in her business relations or otherwise, and she evidently has a reputation to keep up. She is of an excitable nature and has strong likes and dislikes. After taking everything into consideration there appears to be no possible motive why a person of Mrs. Mordle's standing and capabilities, Had she received the cash for forty bags as alleged by Neischer, should not have acknowledged it; she had had numerous transactions with him and on the very day of the difference had paid him a cheque for \$50, and again on August 24th. As I have said before, the clue to the dispute lies in what occurred when Neischer and Mrs. Mordle met at La Penitence when it is shown that the bags that Neischer declared he had not received were those delivered on July 15th. Taking Mrs. Mordle's account that the \$160 was received by her on the 13th July, I consider her explanation that, needing cash in hand for the next week, she did not pay it in, but kept it until the following Saturday, replacing three \$5 notes she had borrowed of the amount by cash, a reasonable one. That the \$160 in spite of Hill's entry on the deposit slip was not all notes is shown by the Bank cashier's amendment.

The leading case on the subject of malicious prosecution may be said to be *Abrath v. North Eastern Railway Co.* (11 Q.B.D. 440; 11 A.C. 247). Amongst other things it defines the provinces of the judge and jury to which I have already referred. The direction of Cave, J. in that case to the jury which on appeal was held to be correct sets out the material things to be considered. (11 Q.B.D. at p. 442, and Stephen's *Malicious Prosecutions* p. 72). Lord Fitzgerald in the House of Lords (11 A.C. at p. 254) puts it shortly that the two questions to put to the jury were—

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- (i). did the defendant take reasonable care to inform himself (in the present case herself) of the true state of the case:
- (ii). did he (in the present case, she), honestly believe the case be laid before (whatever the tribunal was—in this case the stipendiary magistrate).

Sitting as a jury I feel bound by the evidence to answer ‘yes’ to both questions, and that acting on the advice of her counsel she was justified in her proceedings, and as judge I hold that the plaintiff has not established that the defendant acted without reasonable and probable cause.

Turning again to the case of *Hicks v. Faulkner* (*ubi supra*), where the defendant had prosecuted the plaintiff for perjury, and the plaintiff was acquitted, and subsequently in an action for malicious prosecution there was a conflict of evidence on the very point on which the plaintiff was alleged to have committed perjury, the judge directed the jury that if they were not satisfied which of the parties they should believe, they must find for the defendant, as the plaintiff would have failed in that case to show that the defendant had acted without reasonable and probable cause, and it was held on a motion for a new trial that the direction was right.

The question of malice,—which, may (Odgers’ *Common Law*, p. 544) “consist either of personal ill-will against the plaintiff, or a general disregard of the right consideration due to all mankind which, though it may not be directed against anyone in particular, is nevertheless productive of injury to the plaintiff”—can be shortly disposed of, for malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for prosecution. (*Willans v. Taylor*, 1829, 6 Bing. at p. 186). The defendant is perfectly justified in setting the law in motion against a man whom she has sufficient reason to believe guilty, the fact that she was actuated by malice—and I do not find that she was—cannot alter the legality of the act.

Judgment for the defendant with costs.

[NOTE. An appeal has been lodged in this case.]

EDWARDS v. VIEIRA.

EDWARDS v. VIEIRA.

[285 OF 1918.]

1919. JUNE 20, 27. BEFORE DOUGLASS, ACTG. J.

Execution sale—Opposition by judgment debtor—Right to oppose sale—Rules of Court, 1900, Order XXXVI, r. 42—Remedy—Interdict.

A judgment-debtor whose property has been duly levied on under a writ of execution in proceedings against himself and advertised for sale by the marshal has no right to oppose such sale, within the terms of Order XXXVI, r. 42, Rules of Court, 1900.

A defendant who in such circumstances desires to stay the sale must proceed by way of interdict or injunction.

Opposition to execution sale. The statement of claim set out that the property of plaintiff Edwards had been levied upon by Vieira in respect of a judgment obtained against the plaintiff by fraud, the debt having been fully paid prior to the judgment. An order was therefore sought restraining the defendant from levying upon the property of plaintiff to satisfy such judgment.

An objection was taken to the form of the action and the nature of the relief sought, which objection was upheld.

J. S. Johnson, for the plaintiff.

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

DOUGLASS, Actg. J.: The plaintiff claims an injunction to restrain the defendant from levying on one undivided one-third part of the south half of the west half of lot 63, Albouystown, Georgetown, which was levied on by the defendant on 21st August, 1918. Opposition was entered to the sale on the 7th September, 1918, on the grounds that the judgment pursuant to which the levy was made was obtained by fraudulent deception against the plaintiff, and "surreptitiously in her absence" on the 18th July, 1917.

Preliminary objections were raised by counsel for the defendant (1) that the action has been brought in the wrong form, for a judgment-debtor cannot object to a levy by his judgment-creditor by the process of 'opposition'; and (2) as long as the judgment stands this court cannot give relief on the grounds that it was obtained by fraud, for that would be asking this court to act as an appeal court.

Counsel for the plaintiff urges that his client was not aware of the judgment until a year after it was entered, and order the court to exercise its equitable jurisdiction.

The judgment against the present plaintiff was obtained on the 18th July, 1917, and the first levy thereunder put in on March 21st, 1918. Opposition to a sale is brought under rule 42 of the Rules

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of Court. It reads “any person having a *right* to oppose such sale may enter . . . an opposition.” Now that right is usually exercised on a third party seeing his property advertised for sale, but surely a judgment-debtor has no right to oppose sale of his property duly seized under a writ of execution?

In *Hinds v. Gaskin* (L.J. 30.3.1900) where the plaintiff opposed the sale at execution, at the instance of the defendant, of his (the plaintiff’s) property on a judgment in favour of the Colonial Bank against the plaintiff, the defendant and another jointly and severally, which judgment was transferred by the bank to the defendant who thereupon proceeded to levy on his co-defendant the plaintiff in the opposition suit, Kingdon, J. said, “where a defendant in an action in the Supreme Court wishes to stay execution levied at the instance of the plaintiff who has obtained sentence against him he must do so by way of interdict and if that was the position here I should have no hesitation in upholding the objection.” The absurdity of the position of the parties to this suit is shown when it is pointed out that unless the property in question had been the plaintiff’s, the defendant—the judgment-creditor—could not have levied on it, and yet the fact that it is his is the ground on which the plaintiff objects to the seizure; the position is an impossible one. It is, evident this is not a case in which an opposition should be brought.

The plaintiff as such judgment-debtor has had the opportunity to take exception to any judgment obtained, either by way of appeal, or she could have obtained a new hearing “if the court . . . is satisfied that she was prevented by causes beyond her control from placing her case fully before “the court, . . . or that the judgment was obtained by fraud or other improper “conduct.” (s. 32 Ordinance 11 of 1893.) And this brings me to the second objection.

In *Bhodai v. Ledoux* (L.J. 3.1.1910) counsel for the defendant took objection to the plaintiff giving evidence to show the circumstances under which a judgment was obtained against him, on the ground that he was estopped from so doing, no steps having been taken to set it aside; the court upheld the objection.

Supposing the plaintiff was right in lodging an opposition and asking for an injunction, any order I could make would be only on the ground that judgment was entered under a mistake; in other words I should be exercising jurisdiction as judge in an appeal from the magistrate’s court. It would neither be equity nor law.

I non-suit the plaintiff, and allow the defendant her costs.

FERNANDES v. CHAPMANS, LIMITED.
 PETTY DEBT COURT, GEORGETOWN.
 FERNANDES v. CHAPMANS, LIMITED.

[299—6—1919.]

1919. JUNE 26, JULY 1. BEFORE DOUGLASS, ACTG. J.

Master and Servant—Wrongful dismissal—Shop-assistant—Menial servant—Extent of remedy—Employers and Servants Ordinance, 1853.

A shop-assistant is not a servant within the meaning of section 2, Ordinance 1 of 1853 (the Employers and Servants Ordinance).

Claim by the plaintiff for the sum of \$75 as damages for wrongful dismissal. The plaintiff set out that plaintiff was employed by the defendant company in the capacity of assistant shop-walker at the defendant's grocery store in Water Street, Georgetown, and was dismissed from such employment without proper cause or notice.

A. V. Crane, solicitor, for the plaintiff.

H. C. Humphrys, for the defendant company.

DOUGLASS, Actg. J.: This is a claim brought by the plaintiff against the defendant company for \$75, damages for wrongful dismissal, and the preliminary objection is raised that the plaintiff being a servant within the meaning of the Employers and Servants Ordinance, 1853, is restricted to bring any claim he may have on the termination of his services under that ordinance, and cannot proceed at common law for breach of contract. The plaintiff was a shop-assistant in the position, as he calls it, of assistant shop-walker to the defendant company.

The Employers and Servants Ordinance deals with the "hiring of servants in husbandry, of sailors and boatmen (locally), of menial servants, and of artificers, handicraftsmen and labourers" and "all servants in husbandry, mechanics, artificers, handicraftsmen, labourers; persons employed in droghers, vessels or boats or otherwise, and all household or domestic servants, laundresses, or other servants shall be deemed to be comprised within the term servants."

The first ordinance passed on the 22nd June, 1836 was for the better regulation and enforcement of the relative duties of masters and employers, and articulated servants and labourers in British Guiana. Atkinson, J., in *Jones v. Stephenson* and others, 1890, December 22nd (reported 1917, L.R., B.G. 26) remarks: "Before that date one would hardly expect to find any special local legislation as to the relations between masters and servants as distin-

guished from owners and slaves.” Slavery was abolished on the 1st August, 1834, I might add that the position of store-owner or manager and shop-assistant is not likely to have existed at that date, as the then shop-assistant would either be an apprentice and dealt with specially by statute or a mere menial servant living on the premises. Moreover the class of servant affected was further particularized by an order in council of 7th September, 1838, “that for the purposes and within the meaning of the order, the word servant shall be construed and understood to comprise any person employed for hire, wages, or other remuneration to perform any handicraft or any other bodily labour in agriculture or manufactures or in domestic service, or as a boatman, porter, or other occupation in which the emancipated population of the said colonies . . . were usually employed whilst in a state of slavery or as apprenticed labourers.” This order repealed all laws in force relating to its subject matter.

It is thus seem that of the classes enumerated as affected by the ordinances and order in council relative to master and servant, a shop assistant or clerk could come under none of them unless under ‘menial servants’ or ‘household or domestic servants.’

Wharton (Law Lexicon, 11th edition, page 552) classes servants as follows: (1) servants in husbandry (2) servants in particular trades (now more frequent termed workmen), (3) apprentices and (4) menial or domestic servants, which are synonymous terms. He defines ‘menial’ as those servants who live within their master’s walls (*moenia*, lat. ‘walls’). Thus a head gardener who lived on his employer’s premises was held to be a menial servant, a governess was neither a menial nor domestic servant; no general rule can be laid down as to which do or do not come within the category of menial servants.

The Shops Ordinance, 1913, defines ‘shop assistant’ as meaning any person wholly or mainly employed in a shop in connection with the serving of customers, or the receipt of orders or the despatch of goods.

I am of opinion that a shop assistant can in no sense be classed either as a menial, household or domestic servant, and that the Employers and Servants Ordinance does not affect or concern him.

The defendants next say that if the plaintiff was dismissed their service, they were justified in so doing, but that it was the plaintiff who on being suspended from his duties accepted that suspension as dismissal. Whether the defendant firm was entitled to dismiss the plaintiff without proper notice is entirely a matter of evidence; they have not offered any, so I must take the plaintiff’s story of his dismissal as the true one and I can see no grounds for their action, there was no disturbance in the store, nor did the plaintiff neglect his duties, nor was he dishonest, and

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the firm was not entitled to dismiss him for a matter totally unconnected with the store, not in his working hours, and for an alleged assault at his own home (on the 22nd May) on which no prosecution followed. The evidence certainly points to a private dislike or prejudice on the part of the manager.

It is true the evidence shows that Mr. Macpherson (the manager) on his interview with the plaintiff on the 27th May said he 'had to suspend' him, but as he proceeded to get a policeman to put him off the premises, the plaintiff was right in regarding it as a dismissal and indeed told Mr. Macpherson that he looked upon it as such. This was confirmed by letter dated the 31st May, sent by registered post that day, that salary in lieu of notice would be paid the plaintiff on application. On the 5th June the plaintiff wrote the board of directors of Chapmans, Ltd., stating what had happened and asking for the salary due to him 'under the circumstances'; he got no reply. Under these circumstances the only question remaining is, what is the amount of damages the plaintiff is entitled to? It is usual but not necessary to calculate the amount recoverable on the notice the plaintiff is entitled to and the wages agreed to be paid. I have no evidence before me as to what notice is customary with shop assistants in Georgetown, but I gather from the plaintiff's Own statement that it should have been a month as he states, he would have accepted \$25. I do not see my way to allow more, and accordingly give judgment for the plaintiff for \$25 and \$1.44 costs and fee to the solicitor of \$7.

PARBHU SAWH v. PORTER.

PARBHU SAWH v. PORTER.

Ex parte SAWH.

[128 OF 1919]

1919. JULY 1. BEFORE DALTON, ACTG. C.J.

Writ of summons—Service out of the jurisdiction—Breach of contract to be performed within the jurisdiction—Rules of Court, 1900, Order IX. r. 1 (e)—Practice.

Application by the plaintiff for an order granting leave to issue writ for service out of the jurisdiction in an intended action against the intended defendant Porter. The application was supported by affidavit.

On April 30th the application was refused on the affidavit filed, but leave was given to the applicant, if so advised, to file a supplemental affidavit setting out so much of the agreement between the parties as might be necessary for the court to say whether or not the contract ought to be performed within the jurisdiction.

Supplemental affidavits were duly filed, and the matter further heard.

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

DALTON, Actg., C.J. On further consideration, having in view the supplementary affidavit filed, the application is granted. From the information supplied there is satisfactory proof that the plaintiff has a probable cause of action, and that the action is founded on an alleged breach of a contract, which, according to the terms thereof, ought to have been performed within the jurisdiction. The contract as disclosed does not expressly state where payment for the goods is to be made, but the reasonable implication is that it is to be made in this colony (*Duval & Co., Ltd. v. Gans*, 1904 2 K.B., 685). The case of *Comber v. Leyland* (1898 A.C., 524) which was referred to on the hearing of the application and which is one of a very special contract does not appear to apply to the facts disclosed in this case.

CONS. RUBBER & BALATA EST., LTD. v. SMITH.

THE CONSOLIDATED RUBBER AND BALATA ESTATES, LTD.
v. SMITH.

1919. JUNE 19. JULY 7. BEFORE DOUGLASS, ACTG. J.

Appeal—Balata grants—Disputes under the Balata Ordinance, 1911—Abolition of limited jurisdiction of Supreme Court—Right of appeal—Jurisdiction of court to hear appeal—Supreme Court Ordinance, 1915, ss. 12, 58.

It is provided by s. 6 of the Balata Ordinance, 1911, that any person who is aggrieved by any decision of the Commissioner of Lands & Mines may appeal from that decision to the Supreme Court in its limited jurisdiction.

The limited jurisdiction of the Supreme Court was abolished by the Supreme Court Ordinance, 1915, the limited jurisdiction hitherto exercised being thereafter exercised by a single judge sitting apart.

Subsequent to this ordinance of 1915 therefore an appeal from the Commissioner under the Balata Ordinance, 1911, is rightly made to the Supreme Court in its original jurisdiction.

An appeal from the decision of the Commissioner of Lands & Mines, under the provisions of Ordinance No. 23 of 1911, the Balata Ordinance.

A claim was made by the Consolidated Rubber and Balata Estates, Ltd., under the ordinance in question to a quantity of balata (about 1,500 lbs.) alleged by the claimants to have been bled by the employees of Peter Smith on crown land held by the claimants under balata collecting licence.

The balata was detained by the Lands and Mines Department, and the dispute as to its ownership came before an officer of the department in terms of section 4 of the ordinance. The claim of the company to the balata was then upheld, with costs.

From this decision Peter Smith appealed. On the matter coming on for hearing objection was taken by counsel for the respondent to the hearing of the appeal, for the reasons which are fully set out in the judgment.

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

H. C. Humphrys, for the respondent company.

DOUGLASS, Actg. J.: This is an appeal brought from the decision of the Commissioner of Lands and Mines under the Balata Ordinance, 1911. Preliminary objections were taken by the respondent in the matter that—

1st— (a) This is not an appeal from the magistrate's court within the meaning of the Magistrates' Decisions (Appeals) Ordinance, 1893, and that as no procedure has been provided for bringing an appeal before the Supreme Court by the Balata Ordinance, No. 24 of 1911, the appellant has no standing, and must fail.

(b) That an appeal under the said Balata Ordinance may be on any question of fact and law, which goes far

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beyond the grounds on which a litigant may appeal under the Magistrate's Decisions (Appeals) Ordinance.

2nd—(a) The appeal is directed to be made to the court in its limited jurisdiction; there is now no such jurisdiction and the appeal is therefore brought to a tribunal that does not exist.

(b) The proceedings are headed "Limited Jurisdiction" and consequently there is no appeal before this court.

3rd:—That even if the Magistrate's Decision (Appeals) Ordinance applies, then it has not been complied with for (a) No notice of reasons for appeal has been served on the magistrate, i.e., the commissioner, who heard the case in the present matter.

(b) The Commissioner of Lands & Mines and the Registrar of British Guiana to whom the notice is addressed are neither of them parties to the suit nor interested in any capacity.

All the material from which the intention of the draughtsman of the Ordinance, No. 24 of 1911, can be gathered with reference to disputes is contained in two paragraphs, viz., sec. 5: "The commissioner . . . shall have the same powers as to (1) summoning witnesses and compelling their attendance, as to (2) employing bailiffs, police or rural constables, as to (3) the examination of witnesses and as to (4) adjournments, as are for the time being vested in a magistrate in the exercise of his jurisdiction under the Petty Debt Recovery Ordinance, 1893," and sec. 6: "any person who is aggrieved by any decision of the commissioner under the preceding section may appeal from such decision . . . to the Supreme Court on any question of fact or of law, and the court in its limited jurisdiction shall have full power to hear and determine all questions of fact and of law between the parties raised in appeal." The portion of sec. 5 I have just read is a copy of section 70 of the Mining Ordinance, 1903, and section 6 is practically a copy of section 72. But the Mining Ordinance proceeds further, for in sections 73 and 74 it provides for notice of appeal and security, and in sec. 75 it enacts: "Subject to the provisions of this ordinance the practice and procedure in respect of any such appeal shall be the same as the practice and procedure for the time being in force in the court in respect of appeals from the decisions of magistrates." The court has to decide whether in the absence of any such provision, the party aggrieved should be bound by the Magistrates' Decisions (Appeals) Ordinance, or if not in what manner the appeal should be brought. The only case I can find brought under section 6 of the Balata Ordinance is that of *The Consolidated Rubber and Balata Estates Ltd. v. B. G. Balata Co. Ltd.* (19th November, 1913) but

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apparently no objection as to the procedure was taken by the defendants, and the commissioner's decision was upheld.

The ordinance then empowers the Supreme Court to hear and determine all questions of fact and law between the parties raised in appeal, and gives the aggrieved party the right to appeal, and I cannot hold that because the ordinance is defective in particularizing the manner of bringing that appeal the court should refuse a hearing.

The mode of bringing the matter into the court and the mode of dealing with the matter when it is in the court are matters of procedure and process and not matters of jurisdiction; it has been stated (see *Dale's case*, 6 Q.B.D. 376) that where an act confers a jurisdiction it impliedly grants also the power of doing all such acts or employing such means as are essentially necessary to its execution. I am assisted to a decision by sec. 46 (1) and sec. 35 of the Supreme Court Ordinance. By sec. 46 (1) the practice and procedure of the court in its general civil jurisdiction shall be regulated by this ordinance and by the rules, and where no provision is made by this ordinance, by the rules or by any other statute the existing practice and procedure shall remain in force. I have already referred to the only case—as far as I am aware—brought in a similar matter when the practice and procedure of the Magistrates' Decisions (Appeals) Ordinance was followed—and by sec. 35 subject to the provisions of any statute the Court may in any cause or matter make any order as to the procedure to be followed or otherwise which the Court may consider necessary for doing justice in the cause or matter. Taking into consideration too that for the purposes of determining disputes the Commissioner has impliedly been treated as a magistrate I am of opinion that the Magistrates' Decisions (Appeals) Ordinance 1893, should be strictly adhered to in an appeal from the decision of the Commissioner under the Balata Ordinance, 1911. The fact that the court is given wider power of determination of questions of fact than under the Ordinance of 1893 is no objection that I can see to the procedure of that Ordinance being adopted. The next objection taken is to the jurisdiction of the court to hear this appeal. It has already been noted that both under the Mining and Balata Ordinances the appeal lies to the Supreme Court, and the Court in its limited jurisdiction shall have full power to hear, etc. Under the definition clause of the now repealed Supreme Court Ordinance 1893 "Limited Jurisdiction means the civil jurisdiction vested in a single judge by section 30" of that ordinance. The peculiarity of directing that the Magistrates' Decisions (Appeals) Ordinance should apply to appeals from the decisions of wardens or the Commissioner of Lands and Mines to a judge in his civil juris-

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dition, and not to him in his appellate jurisdiction leads one to conjecture that it is possible that the draughtsman of the Mining Ordinance of 1903 (which so far as it relates to the particular sections under consideration is copied from the previous Mining Ordinance No. 15 of 1896) used the expression ‘Limited’ only with the intention of expressing ‘before a single judge’ as otherwise the preceding words ‘the Supreme Court’ if they stood alone might indicate two or even three judges. However that may be, the Supreme Court Ordinance, No. 10 of 1915 repealed No. 7 of 1893 and the distinction between general and limited civil jurisdiction was done away with. Section 4 enacts that “all jurisdictions which by . . . any ordinance continuing in force after this ordinance is vested in any Court where jurisdiction ceases upon the commencement of this Ordinance shall from and after the commencement of this Ordinance be transferred to and vested in the Supreme Court.” By section 12 “The limited, appellate and admiralty jurisdiction by this Ordinance vested in the Court shall together with all powers incident thereto be exercised by a single judge.”

Section 58 was referred to by learned counsel on either side, but a strict compliance with that section and the substitution of the words “the Supreme Court of British Guiana” in place of the words “limited jurisdiction” in the Balata Ordinance, 1911 would be surplusage, and I prefer to refer to section 56 as construing what jurisdiction replaces the limited jurisdiction.

It remains to consider in what capacity the court as represented by a single judge should be sitting to hear the appeal now before it, whether in its original or appellate jurisdiction. I find the following cases—and there are probably others—in which the appeal under the Mining Ordinance, 1903 was to the Supreme Court in its limited jurisdiction, viz:—

Menzies v. Marshall Syndicate (31st October, 1902). An appeal from the acting Commissioner of Lands and Mines.

Swayn v. Henery (1st July, 1903). This was a case before the Appeal Court from the decision of a single judge (February 26th, 1903) on a decision of the government officer of No. 3 Mining District, and one of the objections taken was that it had been wrongly brought in the Supreme Court in its appellate jurisdiction, and not in its general jurisdiction, although it was apparently through an oversight entered for hearing by the Supreme Court in its general jurisdiction. The full court held that that was no valid objection to their hearing the case.

Vieira v. Thomas (19th April, 1906), Appeal from the decision of a warden.

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Burgess v. Reid (5th July, 1906). Appeal from the decision of the Commissioner of Lands and Mines.

Burgess v. Reid (2nd February, 1907). Appeal from the decision of the Commissioner of Lands and Mines on his declining jurisdiction.

Wilson v. Kenswil (15th May, 1914). Appeal from the decision of the Commissioner of Lands and Mines.

On the other hand I find the following appeals were made to the Supreme Court in its appellate jurisdiction, viz.:—

Gomes v. Richards & anr. (28th October, 1903), Appeal from the decision of a warden under Mining Regulations.

Santos v. Spencer (2nd January, 1904). Appeal from the decision of a warden under Mining Regulations.

Santos v. Fraser (2nd September, 1904). Appeal from the decision of a warden under Mining Regulations.

Inasmuch as appeals from officers of the Lands and Mines have hitherto, in the majority of cases, been brought in the limited jurisdiction, and in the case of the only appeal from a decision under the Balata Ordinance it was also to the court in its limited jurisdiction, I am of opinion that these proceedings are properly before this court exercising its original jurisdiction.

The somewhat similar objection that the proceedings, being intituled “limited jurisdiction,” are not before me, or indeed possible, inasmuch as there is no “limited jurisdiction,” is not a serious one in view of my expressed opinion and the reasons therefor. The proceedings are intituled “In the Supreme Court of British Guiana,” and the notice of and reasons for appeal have at the end of the first paragraph the words, “I appeal from the said decision to the Supreme Court.” The words ‘limited jurisdiction’ may be treated as eliminated since they now mean nothing, except in so far as they are indicative of the intention to proceed under section 6 of the Balata Ordinance, 1911, which gives a jurisdiction, since, and in the light of, the Supreme Court Ordinance, 1915 (by sec. 12), to be exercised by a single judge sitting apart or in chambers as the nature of the case may require.

Neither is objection (3) serious enough to oust the court’s jurisdiction. Under section 4 (1) of the Balata Ordinance the Commissioner of Lands and Mines may authorise an officer of the department to determine disputes, and section 5 sets out the powers of the Commissioner for the purpose of determining such dispute, and he undoubtedly takes the place of “the magistrate” upon whom notice of appeal and of reasons for appeal have to be served under sections 5 and 6, of the Magistrates’ Decisions (Appeals) Ordinance, 1893.

Now the reasons and notice of appeal are directed to the Commissioner of Lands and Mines, and had they been served on

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him there is little doubt that the proceedings would be bad, but they were handed to Mr. J. Mullin, the officer who heard the dispute, *i.e.*, 'The Commissioner'; not the Commissioner of Lands and Mines but the officer authorized by him to hear the dispute. Under section 23 of the Magistrates' Decision (Appeals) Ordinance 1898 if it appears or is proved to the court that the appellant has not complied with the requirements hereinbefore contained with respect to the giving or receiving of the notice of appeal and the serving of reasons for appeal and with the requirements of section 16 (*i.e.*, as to serving) the court shall dismiss the appeal. But all these requirements have been complied with, and the insertion of superfluous words, and of "the Registrar of British Guiana" has neither mislead nor injured any person.

In short, the appeal from the Commissioner or other officer duly appointed under section 4 (1) of the Balata Ordinance, 1911, has been rightly made to the Supreme Court in its original jurisdiction, and the proceedings are in order.

Objection dismissed.

[NOTE.—An appeal has been lodged in this case.]

PETTY DEBT COURT, GEORGETOWN.

GUNPATHSINGH v. SANTOS.

(210—5—1919.)

1919. JUNE 11, JULY 3, 16. BEFORE DOUGLASS, ACTG, J.

Sale of goods—Sale by sample—Sale by description—Acceptance—Inspection at place of delivery—Right of purchaser to reject—Measure of damages—Sale of Goods Ordinance (No. 26 of 1913) ss. 15, 17, 52.

Claim by the plaintiff for the sum of \$100 as damages for breach of contract, in connection with the purchase by him from J. P. Santos the defendant, of ten barrels of potatoes.

All the necessary facts are set out in the judgment of the court.

J. A. Luckhoo, for the plaintiff.

B. B. Marshall, for the defendant.

DOUGLASS, ACTG. J.: The plaintiff is claiming \$100 damages for breach of contract by the defendant under the following circumstances. On the 1st October the plaintiff purchased ten barrels of potatoes from the defendant's salesman Teekah and paid for them \$78.70

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Ten barrels of potatoes were taken to the railway on the 5th October, and received at the Government stelling, New Amsterdam, on the same date, So far the facts are admitted and proved. The plaintiff states that the potatoes arrived in a rotten condition, were not the sort he had ordered, and that after trying to get some explanation out of the defendant or his salesman on the telephone and by letter, he returned them on the 11th October and came himself to Georgetown. He then by himself and his witnesses proves that having called in the sanitary inspector $5\frac{1}{4}$ barrels of potatoes were condemned as unfit, together with other potatoes in the store, and that all the bad ones were "Halifax" potatoes, whereas the $4\frac{3}{4}$ barrels of sound potatoes were "American."

The defendant denies (1) that "American" potatoes were ordered by the plaintiff, and asserts (2) that the potatoes were sent in good condition, and also (3) that the plaintiff's action should have been for return of the money he paid in proportion to any loss he sustained, and not by way of damages, nor is he entitled to reject the goods.

The first question is then whether the sale was an open one or of an ascertained class of goods, by description or by sample. The plaintiff states he found potatoes being transferred to the defendants store fresh imported, and that he examined and saw they were American potatoes and ordered ten barrels of those potatoes. The only evidence offered to show this was not so, is the receipt for money paid and the cash sales book of the defendant, in both of which ten barrels potatoes is entered without any description.

This is not sufficient to refute the positive statement of the plaintiff that American potatoes were ordered, in conjunction with the fact that $4\frac{3}{4}$ barrels of the potatoes sent were of that variety and were the only sound potatoes of the lot. If the sale had been by description merely, the first paragraph of section 15 of Ordinance 26 of 1913 (Sale of Goods Ordinance) would have applied, but in the present case the plaintiff examined samples from two or three of the barrels so that section 17 is also applicable.

Section 15 is as follows:—

"15. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."

Section 17 is as follows:—

"17.— (1) A contract of sale is a contract for sale by sample

where there is a term in the contract, express or implied, to that effect.

- (2) In the case of a contract for sale by sample—
- (a) There is an implied condition that the bulk shall correspond with the sample in quality:
 - (b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:
 - (c) There is an implied condition that the goods shall be free from any defect, rendering them merchantable, which would not be apparent on reasonable examination of the sample.”

It has been pointed out that the exhibition of a sample during the making of a contract does not necessarily make it a contract for sale by sample; but there is no doubt in the present case, the ‘American’ variety having been picked out and examined, what was the meaning and intention of the parties with regard to the subject matter. Now there is, as stated, first, an implied condition that the bulk should correspond with the sample in ‘quality,’ and by section 2 (1) of the ordinance “‘quality’ of goods includes their state or condition,” and next, an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample. *Prima facie* the place for delivery is the place for comparing the bulk with the sample. (*Perkins v. Bell*, 1893, 1 Q.B. 193), which brings one to the second point taken by the defence that the potatoes were sent in good condition. The goods were ordered on the 1st October, delivered at the railway and New Amsterdam stelling on the 5th October, and the suggestion is that if they did get bad, it was after they left the hands of the vendors, and due to the delay of the plaintiff in taking over the potatoes. I cannot treat this as a serious objection, for the vendors kept them four days before transporting them, and the purser on the boat conveying the potatoes over the Berbice river on the 5th October states the potatoes were smelling so offensively, that his attention was drawn to them, and that when the plaintiff had inspected them he refused to accept them the same day. (See section 36.) The plaintiff describes them as rotten and running. The lapse of time that occurred between their arrival and reshipping does not affect the question. It is evident the plaintiff wired and telephoned to the vendor but could get no satisfactory reply. That the potatoes were in a rotten state and unfit for human consumption is amply proved by the sanitary inspector, and also that it would take more than two weeks for good potatoes to have got in that condition.

The only inference is that the bulk of the potatoes was bad when put on the train. It has been said that though the carrier

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is ordinarily the agent of the buyer to receive the goods, he is not his agent to accept them, for he cannot judge whether the goods are in conformity with the contract or not, and the clerk of the goods department of the Railway Company implied this when he said "we take all goods whether good or bad, and would only refuse them, if very offensive; potatoes must be 'running' to be refused." With respect to the remedy of the buyer, it depends upon whether the breach complained of is a breach of 'warranty' (within the meaning of the definition contained in section 2 (1), or of a 'condition.' It has already been seen when goods are sold by description and sample it is a breach of a condition of sale if they do not answer to that description, or are different to the sample, and the buyer has the right to reject the goods, and if he does so he can recover the price, if he has paid it, for the consideration for its payment has wholly failed. (Mayne on *Damages*, 4th edition, 180.) Section 32 (3) must also be taken into consideration, that where the seller delivers to the buyer the goods he contracted to sell mixed with goods of different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole. He has chosen to do the latter in this case, and the question arises what further compensation is he entitled to beyond the price he has paid? It appears that the seller having failed in his obligation to deliver, whatever damages are recoverable in an action for non-delivery are recoverable in this case. (*Elbinger Actien Gesellschaft v. Armstrong*, 9 Q.B. 473). Section 52 of the ordinance deals with damages for non-delivery.

"The estimated loss directly and naturally resulting in the ordinary course of events" would include the enforced destruction of the bad potatoes under the health regulations, but as the defendant could have had them destroyed at New Amsterdam his journeys and the carriage of the bad potatoes back to Georgetown cannot be taken into account; but his wire and telephone messages and general loss of time should be taken into account. I have no means of ascertaining the actual loss to the plaintiff, but give judgment for \$78.90 (representing the purchase money) and \$10 general damages, and also a sum of \$2.85 costs of destruction of the potatoes, i.e., \$91.55 in all and \$5.28 costs and counsel's fee \$10.

The case of *Beer v. Walker* (5 W.E. 880) referred to by learned counsel was before the English Sale of Goods Act, 1893, had been enacted, and the special case there stated is now covered by this act and our ordinance.

GREIG v. CHARLES.

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[209 OF 1909.]

1919. JULY 18. BEFORE DALTON, ACTG. C.J.

Landlord and tenant—Claim for use and occupation—When and by whom maintainable—Essentials in plaint—Practice—Magistrates' Courts Rules, 1911, r. 16.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. J. McCowan), who gave judgment for the plaintiff Greig in a claim against the defendant for the sum of \$12 for the use and occupation of two rooms on lot 3, Lamaha Street, Georgetown. The magistrate overruled an objection that the plaint was bad.

From this decision the defendant Charles appealed.

The plaint and the reasons for appeal are sufficiently set out in the judgment.

C. R. Browne, for the appellants.

S. van B. Stafford, for the respondent.

DALTON, ACTG. C.J.: The magistrate gave judgment for the plaintiff Greig for the sum of \$12 on his claim.

Defendant Charles now appeals on the ground that the plaint is bad in law, and that the finding is not supported by the evidence. The plaint is very bald, and is, after reciting the names and addresses of the parties, to the following effect "The plaintiff claims from the defendant the sum of "\$12 being amount due and payable by the defendant to the plaintiff for the "use and occupation of two rooms situate at lot 3 Lamaha Street, Georgetown, within the said judicial district, from the 1st February to the 31st "March, 1919, as per bill of particulars attached, with costs.

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To two months use and occupation of two rooms at \$6 per month, \$12."

The rules (Magistrates' Courts Rules 1911, r. 16) require that the plaint shall contain a statement of the facts constituting the cause of action in ordinary clear and concise language without repetition, and in such a manner as to enable a person of common understanding to know what is intended, and a demand of the remedy which the plaintiff desires to obtain.

At the hearing I did not deal definitely with this point as I allowed the appeal on another reason, but I expressed a decided opinion on the matter which reflection and examination of authorities has definitely confirmed. The right to bring an action for

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use and occupation presupposes the existence of the relationship or quasi-relationship of landlord and tenant between the parties, that is, there must be some form of tenancy, whether by agreement or implication, between the parties. That is a matter of law presumably not known to persons "of common understanding", and hence such a person on receiving the plaint would not know what the use of the words "use and occupation" imported. Counsel for respondent has, however, cited the case of *Humphrys v. Kaps* (A.J. Sept. 29th, 1905) as supporting his contention that the plaint here is good. In that case Hewick, J., ruled that in such an action as this the fact that the landlord's interest in the property is not stated is not of itself a failure to disclose a cause of action. An examination of the plaint in that case shows an allegation that the premises in question were occupied with the plaintiff's permission. Here there is an absence of the necessary facts disclosing a cause of action, and the magistrate should have struck the case out.

With respect to the reason that the evidence did not support the finding, the facts disclosed are that Charles agreed to rent certain premises to Greig. The latter was however only given possession of one half of the premises, Charles and certain tenants of his remaining in possession of the other half. Although those tenants paid rent, it was not to Greig the respondent. Charles paid no rent at all, and Greig now sues him for use and occupation. I can find nothing on the record whence it can be implied that Charles was the tenant of Greig in the occupation of the rooms. Whatever remedy, if any, the respondent may have, it is not one for use and occupation, and the appeal must therefore be allowed with costs. The case cited by the magistrate in his judgment (*Humphrys v. Kaps*, A.J., October 28th, 1905) and the principle referred to therein by Bovell, C.J., is not now applicable, as English law now governs such transactions. The judgment of the magistrate is therefore set aside, and judgment entered for the defendant (appellant) with costs.

Appeal allowed.

PARK v. DE ABREU.

PARK v. DE ABREU.

[382 OF 1917.]

1919. FEBRUARY 28. BEFORE BERKELEY AND HILL, JJ.

Criminal law—Unlawful possession of property reasonably suspected to have been stolen—Charge brought on same facts against second party before adjudication in first case—Procedure—Illegality—Summary Conviction Offences Ordinance 1893 s. 96, as amended by Ordinance No. 12 of 1915.

Appeal from a decision of Sir Charles Major, C.J., setting aside a conviction by the stipendiary magistrate of the Georgetown judicial district. The defendant De Abreu was charged with having in her possession a quantity of black leaf tobacco reasonably suspected to have been stolen. She was convicted by the magistrate and sentenced to pay a fine of \$75 or in default to two months imprisonment with hard labour. She thereupon appealed and, on March 8th 1918, the appeal was allowed and the conviction quashed by the Chief Justice. The facts and reasons of appeal sufficiently appear from his judgment which was as follows:—

SIR CHARLES MAJOR, C.J.: The defendant has appealed from her conviction by the Georgetown stipendiary magistrate on a charge of possession of tobacco reasonably suspected to have been stolen. Among the reasons for appeal, it is stated that the charge against the defendant “was not governed by sub-section 2 [that is, of section 2] of Ordinance No. XIII of 1915, and it was not competent for the magistrate to require the appellant to be brought before him in the manner and form he did.” As this contention lies at the root of some other reasons for appeal, it was first argued by Mr. Browne for the appellant, and I consider it at the onset.

On the 14th of November, 1917, a charge was investigated against Pedro, the appellant’s son, for unlawful possession of the some tobacco, and evidence was given for the prosecution that on a visit under search warrant to a shop licensed to “M. de Abreu”—who, it is common ground, is the appellant—the police found there the appellant and a little boy. Pedro was upstairs where he, his mother and sister live, but when called by the appellant came down at once and, on being asked by a constable what tobacco he had, or if he had any tobacco, in the shop, said he did not know. He showed, however, some tobacco in a drawer. Further search was made upstairs in Pedro’s presence and, apparently his mother’s also, where more tobacco was found. There were circumstances from which the court could conclude that the tobacco was that which, earlier in the same day as

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the search, had been stolen by boys from a city wharf and taken by then to the shop. It was stated that after the discovery of the second lot of tobacco, Pedro asked for forgiveness, saying "his family had brought it on him," that he had been out and was not there. Called upon by the Court for an explanation of these facts, Pedro stated that the shop was rented and carried on by his mother; that he had not been at home during that morning but had returned at noon after the time when the boys, it had been said, came to the shop; that he had bought no tobacco that day, nor authorized anyone to do so, and did not know it was in the shop; that he had denied having any tobacco to the police or having bought any; that he had discovered on returning home that his mother had bought it and had paid 20/- for it, and that he had told her she was wrong to do so. Pedro called Mary, his mother, as a witness. She stated that the shop was hers; that two boys had, in Pedro's absence, come there with the tobacco saying that Pedro had sent it and she was to pay 20/- for it, which she did; that on Pedro's return at noon she told him what had happened and he had "fretted with her," that he had nothing to do with the tobacco and had never sent tobacco in that way before.

The magistrate then acted upon the provisions of the ordinance already mentioned and directed that the appellant be brought before him charged with unlawful possession of the tobacco. In his reasons for his decision he states—"At the close of the evidence against Pedro de Abreu, Mr. P. N. Browne rose to address the Court. I told him I did not think there was any necessity for him to do so, in view of the fact that it appeared Mary de Abreu had 'shouldered the responsibility'."

The particular enactment invoked by the magistrate—he sets out its provisions (in fact) in his reasons for decision—is familiar and I need not read it. But examination of it shows that before a magistrate can cause any of the persons described in it to be brought before him, two conditions must be fulfilled; the first, that possession of the thing suspected to have been stolen in the person first charged must be proved: the second, that that person must declare his possession of the thing to have been by way of receipt from (or "for" as it is wrongly expressed in the ordinance) some other person, or in the course of carriage, agency, or service, for some other person. Now, neither of these conditions were fulfilled in this case.

As to the first the magistrate, very properly, held eventually—by eventually I mean after the proceedings against the appellant were concluded—that the possession of Pedro had not been proved and dismissed the charge against him. As to the second, Pedro never at any time declared or alleged that his possession, even if

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it had been or could have been inferred by the magistrate, was that of a receiver, carrier, agent or servant, nor could the statement of his mother, when giving evidence for him, that some boys (who were not called for the prosecution) had said they were sent with the tobacco by him (which he denied) be treated, either as an acknowledgment by him of his possession, or an allegation of it as a carrier, agent, or servant of his mother, in the absence of that allegation by himself, unless his mother had said and the magistrate found that he told her so himself. To give this section the operation sought to be imported into it, it would be necessary, after the word “declares” therein to insert some such words as “or the magistrate has reason to believe” And that is all that need be said, because the initial illegality, of course, vitiated the whole of the proceedings against the appellant in which it was the first step. The conviction cannot stand and the appeal is allowed with costs.

From this decision the complainant appealed on the following grounds:—

- (1) The magistrate acted rightly in dealing with the respondent under s. 2 (2), Ordinance 12 of 1915.
- (2) Even if it was not competent for the magistrate to require the defendant to be brought before him as he did, any initial illegality did not vitiate the whole of the proceedings against the defendant.
- (3) Defendant was before the magistrate who had power and jurisdiction to hear the complaint and adjudicate thereon.

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

E. M. Duke, for the respondent de Abreu.

BERKELEY, J.: Appeal from Major, C.J.: Respondent was charged before the magistrate, Mr. Gilchrist, with the unlawful possession of tobacco. In the first instance Pedro de Abreu her son had been charged with the unlawful possession of the same tobacco and it was incumbent on the prosecution to prove (a) possession and (b) reasonable suspicion before he could be called upon to account to the satisfaction of the magistrate. Possession was not proved and therefore the magistrate ought to have discharged him. He ordered the respondent to be summoned and adjourned the case against the son to the day on which the charge against respondent was to be heard. At the conclusion of the proceedings against the respondent he convicted her and dismissed the case against her son.—The respondent having appealed, Major, C.J. held that the initial illegality

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vitiated the whole of the proceedings against the present respondent. I am of opinion that the learned Chief Justice was in error in thus holding. She was properly summoned to answer the charge. Possession and reasonable suspicion were proved. The magistrate had jurisdiction to hear and determine the charge and the fact that the magistrate had erred in the procedure he had adopted in the first charge, did not affect the merits of the case against her.

The appeal is allowed and the conviction and order made by the magistrate restored without costs.

HILL, J.: I agree.

Appeal allowed.

PEROO v. DOOKNIE AND ANOR.

PEROO v. DOOKNIE AND ANOR.

[128 OF 1918.]

1919. JUNE 24, JULY 25. BEFORE DOUGLASS, ACTG J.

Execution sale—Immovable property—Opposition—Reasons of opposition in pleadings—Order XXXVI. r. 43—Order of court granting specific performance—Failure to comply with order—Property subject to order levied on by third party—Right of party obtaining order to oppose sale—Fraud and collusion.

In an action between P. and R., P. obtained an order of the court directing R. to convey to him certain property, R. fails to comply with the order, and within two days thereof consents to judgment in an action by D, against him. D. thereupon levies on the property which R. had been ordered to convey to P. P. opposed the levy and sale.

Held, that fraud and collusion between R. and D. had been proved, and that the levy be set aside.

Quaere, whether, in the absence of fraud and collusion P. had any right to oppose or could successfully resist the levy and sale at the instance of D.

Held further, that it is not competent for plaintiff in an opposition action to allege or rely upon any ground or reason other than those alleged in the entry of opposition, and any ground or reason in the pleadings, not alleged in the marshal's opposition book, must be struck out; Rules of Court, 1900, Order XXXVI, r. 43.

Opposition to Execution Sale.

The defendant Dooknie obtained judgment against the second named defendant Mangan Ram, in an action brought against him, and in pursuit of that judgment levied on two tracts of land on the Corentyne river held under grant from the Crown. On the sale being advertised by the marshal, it was opposed by Peroo, the plaintiff herein, on the ground that the property in question was the subject-matter of an action in the Supreme Court between Peroo and Mangan Ram, in which action the court, on March 4th, 1918, had made an order directing the defendant, Mangan Ram, to pass transport of the property to Peroo and to deliver to him all title for the same. It was further claimed that the levy and attempted sale by Dooknie was a fraudulent attempt and conspiracy, on the part of Dooknie and Mangan Ram, to defraud Peroo of the fruits of his judgment.

The further necessary facts, and arguments appear from the judgment.

H. C. Humphrys, for the plaintiff.

J. S. McArthur, for the defendants.

DOUGLASS, Acting J.: This is an opposition to the sale at execution of lots Nos. 5 and 7, parts of a tract of Crown land on the left bank of the Corentyne river extending in faqade 50 roods and with a mean depth of 300 roods, no building thereon, and a claim for \$1,000 damages, on the grounds and reasons set forth in the extract minute of opposition, namely,

- (1) that His Honour the Chief Justice by order dated the 4th March, 1918, in the action No. 256 of 1917 by

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the said Peroo (opposer herein) against Mangan Ram (judgment-debtor and co-defendant herein) ordered the said Mangan Ram to convey to Peroo the said lots Nos. 5 and 7 of the hereditaments comprised in the sale at execution hereby opposed.

- (2) That the hereditaments referred to are part of the property levied upon at the instance of Dooknie (the judgment-creditor and defendant herein) and advertised to be sold at the instance of the said Dooknie.
- (3) That the opposer is the equitable owner of the said lots.
- (4) That the opposer is not indebted to the said Dooknie.
- (5) That this said Mangan Ram has no right, title or interest in and to the said lots Nos. 5 and 7.
- (6) That the same levy and attempted sale at execution is a deliberate and fraudulent attempt and conspiracy by and between the said Dooknie and the said Mangan Ram to deprive the said Peroo of the fruits of the said judgment.

There was other property included in the statement of claim, and four other paragraphs, viz., 7 to 10 inclusive, in the extract of opposition. But on preliminary objection taken by Mr. McArthur for the defendants with respect to the former that no grounds of opposition to such other property having been disclosed the plaintiff could not now allege or rely upon any grounds (Order XXXVI., r. 43) and that the paragraphs relating to such property should be struck out; I accordingly struck out the reference to lot No. 8 in paragraph 1 of the said statement of claim, and from 'secondly' in the said paragraph to "no building thereon;" and with respect to paragraphs 7 to 10 inclusive of the reasons for opposition, that these were in the nature of evidence, and were frivolous and vexatious and should not have been inserted; I made no order to exclude them seeing that they were inserted as part of the entry of opposition, but I held that the said paragraphs were irregular and superfluous and in the nature of evidence.

It appears from the evidence that on the same day, 4th March, 1918, that the plaintiff obtained judgment against Mangan Ram in the Supreme Court, by consent and on terms of settlement arranged two days before, the defendant Dooknie also signed judgment by consent for \$775 against Mangan Ram. The certified copy of judgment for specific performance of the agreement of the 28th January, 1909, is put in (exhibit B).

Mr. Sousa, solicitor for the plaintiff, gave in evidence that immediately after the judgment he endeavoured by telephone and letter to induce Mr. J. A. Luckhoo to get Mangan Ram to proceed with the transport, but no letters were put in evidence ex-

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cept one received from Mr. Luckhoo (exhibit 'A'). This, however, is objected to by learned counsel for the defendant on the ground that judgment having been obtained Mr. Luckhoo was no longer counsel for Mangan Ram, and as a barrister he could not be agent for his client, and so whatever he said or did could in no way be evidence against the defendant. In the letter produced Mr. Luckhoo refers to Mangan Ram as 'my client,' but as there is no proof that any communication reached him and Mr. Luckhoo states he had not seen him, this evidence to which objection is taken has no weight, and I accordingly disregard it.

All the parties seem to have been of family to one another by consanguinity or marriage, and were well acquainted with each other. The plaintiff gives in evidence that purchase of the lots in question were made by him 14 to 15 years ago and paid for the receipt for the purchase money is put in (exhibit 'C),' and that he had been in possession of the land ever since. He also states that Dooknie had no property except what she acquired from her first husband in the way of jewels, and a piece of land that Lilliah had given her. Ramoodit—Peroo's cousin—confirms his evidence and in addition alleges that Mangan called him in about the matter of the transport, and that he said if Peroo wanted the transport he must sue him, get judgment and levy on the land, Mangan's wife and Dooknie were present at the meeting. He goes on, that when he heard that Dooknie had summoned Mangan he took his mother to his (presumably Mangan's) house and told him they must not defraud Peroo of the land. He says too he made an offer—but at what date is uncertain—to pay off the \$700 to Dooknie if Mangan would give Peroo the transport; though he states "there was no money due to Dooknie at all" and "Mangan Ram never told me that he owed Dooknie \$700." The defendants called no evidence.

I have endeavoured to gather from past decisions in cases somewhat similar to this the general principle underlying all those decisions. The leading principle followed is that set out in *Brown v. the Administrator General, estate of John Alt* (11 March, 1872), "It is well settled by the law of this colony that immovable property is not considered as delivered or that the legal possession is parted with except by transport before a judge of the Supreme Court."

The next case is one of opposition to transport, and not to a levy: *Paddenburg v. Pereira & anr.* (1897, L.R., B.G. 21) Sir E. O'Malley, C.J., in delivering the judgment of the court—consisting of three judges—says: "The question we have to decide here is whether when the opposer is proved or admitted to be in possession of the land the transport of which he is opposing the onus of proving his own title is thereby thrown upon the defend-

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ant in the opposition proceedings. We are of opinion that it is.” “The plaintiff having proved possession then is entitled to retain possession until somebody else, that is the transporter here, has lawfully established his right of property.”

In *Garraway v. Martin & anr.* (1897, L.R., B.G. 138), Atkinson, C.J., held that possession by an opposer under a previous sale at execution—but no decree having been obtained, was good against a levy on a petty judgment debt obtained against a daughter of the prior owner—there apparently being no transport or letters of decree.

In *Persaud v. Nawole & anr.* (30th March, 1903) the plaintiff having purchased land in August, 1902, was put into possession but proceeded no further, and he alleged that the defendants were acting fraudulently in collusion in obtaining a judgment and levying on the land. Bovell, C.J., held that as Jussodah (the co-defendant) remained sometime on the land after purchase and there being no fraud and collusion proved and the sale not having been completed by transport the facts were not sufficient to debar a judgment creditor of the vendor from taking such land in execution to satisfy his debt (see *Van Leeuwen* 1. 191). And in the complementary case of *Persaud v. Jussodah* the C.J. held that although Persaud was entitled to transport, yet because of the judgment in the other case, such an order would be useless, and he gave compensation instead.

In *Veramally & anr. v. Vaughan* (28th March, 1906) Hewick, J., held that as both plaintiffs were in possession of their portions of land and were not shown to be trespassers (there also being no transport shown in the defendant) they were entitled to oppose.

In *Boodhunsing v. Shivsanker & ors.* (22nd June, 1910), the facts were somewhat similar to the present. The plaintiff had obtained an order on 6th January, 1910, against some of the defendants that they should pass transport of their interests in favour of the plaintiff. On the 7th January the defendants gave a promissory note for \$1,150 to Shivsanker payable on demand. On the 13th January Shivsanker issued a writ of summons specially endorsed, served it, and consent to judgment was filed all on the same day, and on the 14th January, judgment was obtained. On the 3rd February the interest of the defendants which they had been ordered to transport was levied on. Berkeley, J. held that the circumstances pointed to collusion between the defendants to carry into effect a threat made by the first defendant that the plaintiff should never have possession of the land, and cancelled the levy.

A series of cases, *Dick v. Jhimai* (30.12.01), *Hinds v. Serrao* (11.10.02), *Elms v. Playter* (19.12.03), *Smith v. Walcott* (23.6.04) and *Amsterdam v. Ramnauth* (6.9.04) have shown that anyone having an interest in the property levied on can oppose the sale

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at execution of that property, and the court would interdict the judgment-creditor from levying on any more than the judgment-debtor is shown to possess.

In many of the cases I have referred to Van Leeuwen's Commentaries were the authority quoted; in vol. 1. p. 190 it is stated "with respect to immovable property the law in order to prevent fraud and insecurity of title . . . has . . . provided a certain mode of making delivery or transfer. Thus lands, houses, estates, etc. are not by us considered as delivered unless they have been legally transferred before the magistrate." And again (vol. 1. p. 199) "When anyone claims a thing as his property and cannot clearly establish this right, judgment must always be in favour of the possessor."

I gather from the authorities and from the decisions referred to, that in cases where a judgment creditor has levied on the property of his judgment debtor which he had previous to the *levy* sold to another, whilst possession alone on the part of the purchaser cannot deprive the vendor of ownership in the property sold, yet it throws upon him, or the judgment creditor, the burden of proving that the vendor is the owner at law and had not merely a possessory title, for if that were so, and he had parted with his possession there is nothing left for the judgment creditor to levy upon.

The plaintiff has not only proved his possession of the land in question for a considerable period, but his claim has been justified by an order of the court directing the co-defendant Mangali Ram to forthwith take steps to convey the property to the plaintiff. Were the court to order the levy to proceed and hold the opposition bad it would stultify its former judgment that Mangan Ram do convey the said property to the plaintiff.

The statement of claim too, denies that any right, title or interest to the said property rests in Mangan Ram, but no evidence has been called on behalf of him or of Dooknie that his title is supported by transport or otherwise, whilst it is proved that he has been out of possession for many years. Again the constant refusal, of Mangan Ram to transport the property, his consent to a judgment for a debt said to have been owing by him to Dooknie for \$775 (which debt he has not attempted to substantiate in the face of the evidence given and of the insinuation of fraud and collusion) prove his mala-fides in the matter; and when I consider that Dooknie—the wife of Mangan Ram's brother—was aware that the property had been sold to Peroo, and that her possession of or ability to lend such a large sum has not been accounted for I am satisfied that there was fraud and collusion between the defendants.

I declare the opposition to the execution levied on the said

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lots 5 and 7 just, and set aside the said levy so far as it affects the said lots 5 and 7, with costs to the plaintiff. In respect to the portions of the statement of claim ordered to be struck out, I give the defendants their costs—if any have been incurred.

LAWSON & Co. v. BOARD OF ASSESSMENT.

[206 OF 1919.]

1919. JULY 31. BEFORE DALTON, ACTG. C.J.

Revenue—Excess Profits tax—Appeal from decision of Board—Nature of ‘appeal’—Tax on Excess Profits Ordinance, 1919, s. 16.

Appeal (in chambers) from an assessment by the Board of Assessment under the Tax on Excess Profits Ordinance, 1919. The appellant firm sought to have the assessment reduced, in view of alleged errors made by the firm in the returns sent in to the Board, the errors it was alleged having been discovered after the assessment was made.

A. V. Crane, solicitor, for the appellant firm.

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

DALTON, Actg. C.J.: This is an appeal by Lawson & Co. from a decision of the Board of Assessment under the Tax on Excess Profits Ordinance, 1919.

In his return of capital and profits to the board appellant gave certain figures as the value of his stock, and the amount standing to the credit of the firm on December 31st, 1918, at the bank.

Acting on those figures the board assessed him for tax in a certain sum. After that assessment is made appellant states he finds errors in his returns, whereby his stock was overvalued, and the amount to the credit of the firm at the bank was less than that previously given. In view of those errors he now seeks to appeal from the board’s decision.

It seems tome however that there is here no appeal against the board’s decision. It is not questioned that, assuming that appellant’s return to the board was correct, the decision of the board was correct also. What appellant wishes to do is to amend his figures and obtain a re-assessment by the board. This does not arise on appeal, and I cannot agree with appellant’s counsel that under s. 16 of the ordinance which gives the right of appeal, I have a general roving commission to do anything and everything to correct any error or omission that may have been made in the returns or in the assessment. The right of appeal given is the

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right of coming to a judge in chambers and invoking his aid in redressing an error or errors on the part of the Board of Assessment in the decision the board has come to on the materials before it.

The appeal is therefore dismissed with costs.

WALTER BAGOT & CO. v. TEMPLE;
THE OFFICIAL RECEIVER, GARNISHEE.

1919. JULY 12. AUGUST 1. BEFORE DOUGLASS, ACTG. J.

Company—Winding up—Practice—Garnishee order—Attachment of debt due from company in liquidation—Dividend payable by Official Receiver—‘Debt’ liable to be attached at instance of judgment creditor—Rules of Court, 1900, Order XXXVI., r. 73.

W. B. & Co. obtained judgment against T. in the sum of \$463.43. The Official Receiver, as liquidator of the B.R.E. Co., Ltd., (in liquidation) had in his possession a sum of money amounting to \$315.51, being the balance of a dividend payable to the said T. in respect of his claim against the B.R.E. Co., Ltd., (in liquidation);

Held, in proceedings for making absolute a garnishee order nisi against the Official Receiver, that the dividend held by him for T., the judgment-debtor, was not a ‘debt’ liable to be attached by W.B. & Co., the judgment-creditors, within the meaning of Order XXXVI., r. 73.

Application by Walter Bagot & Co. for making absolute a garnishee order nisi against the Official Receiver, as liquidator of The Berbice River Estates Company, Ltd. (in liquidation).

All the necessary facts are set out in the judgment of the court.

C. R. Browne, for the applicants.

The Official Receiver (Mr. *W. A. Parker*) in person appeared to show cause.

DOUGLASS, Actg., J.: The judgment-creditor is applying that the garnishee order nisi dated the 2nd July, 1919, against the official liquidator should he made absolute, under the following circumstances. On the 10th February, 1917, the plaintiff entered judgment by consent against the defendant for a sum of \$400 with interest; on this judgment the amount due at the date of these proceedings (2nd July, 1919) was \$463.43 and costs to be taxed. At this same date there was in the hands of the official liquidator a sum of \$315.51 being the balance of a dividend payable to the defendant in respect of his claim against the Berbice River Estates Co., Ltd. (in liquidation) It is this sum that the garnishee is seeking to attach. In *in re Rodrigues, ex parte Santos*, the question whether a judgment-creditor who has obtained a garnishee order absolute attaching a debt due to his judgment-

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debtor from the garnishee, was entitled to prove on the bankruptcy of the latter for the amount of the attached debt was heard and decided by the Full Court of Appeal (8th March, 1898). After noting that the provisions of the rules were identical with the English rules with respect to a garnishee order and that the decision of the English courts should therefore be followed, the Court referred to *in re Combined Weighing and Advertising Machine Company* (43 Ch. D., 99) when it was decided that a garnishee order does not create as between the garnishor and garnishee any debt either at law or equity. Cotton, L.J. says: "I quite agree that a garnishee order does not operate as a transfer of the debt," and Bowen, L.J., "It creates an attachment of the debt, and in case of non-payment confers the right of issuing execution and nothing more." And the Full Court held that as the judgment-debtor had a right to prove for the amount of his debt in the bankruptcy of the garnishee, therefore the garnishor was not entitled to prove in respect of this same debt."

The present proceedings are brought under Order XXXVI, rule 73, which represents the English Order XLV, r. 1 is as follows:

73. The court or a judge may upon the *ex parte* application of any person who has obtained a judgment or order for the recovery or payment of money either before or after any oral examination of the debtor liable under such judgment or order, and upon affidavit by himself or his solicitor, stating that judgment has been given or the order made and to what amount, and that any other person is indebted to such debtor, and is within the jurisdiction, order that all debts owing or accruing from such other person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment or order; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court or a judge to show cause why he should not pay to the person who has obtained such judgment or order the debt due from him to such debtor or so much thereof as may be sufficient to satisfy the judgment or order.

The official liquidator, and learned counsel for the judgment-creditor, referred to several English cases on the construction of this rule. In *Prout v. Gregory* (1890, 24 Q.B.D., 281) when it was sought to attach a dividend payable under the administration of an estate of a person dying insolvent Lord Coleridge, C. J., said "To make a garnishee order in such a case as the present would be to interfere with the administration of an estate which has to be administered under the provisions of a statute expressly dealing with this subject matter." And Matthew, J., says "It is

quite impossible to treat this as a debt or to say that the official receiver is a debtor.”

In *Spence v. Coleman* (1901, 2 K..B., 199) when many leading cases on the subject were dealt with, it was held that a sum paid into the “Companies Liquidation Account” with the Bank of England, representing surplus assets of a company in liquidation of a shareholder who could not be found, was not a ‘debt’ due to the shareholder and that it could not be attached by his judgment-creditor by means of a garnishee order. In this case too the two cases of *Ex parte Turner*, (1860, 2, D.F. & J., 354) and *Klauber v. Weill* (1901, 17 Times Law Reports, 344) were distinguished. In *ex parte Turner* a garnishee order had been made attaching money in the hands of a company and it had not been appealed from, and effect was given to it in the winding up of the company. No garnishee order was made against the official manager or any other official. In *Klauber v. Weill*, the judgment-creditor had obtained judgment against Weill and had then garnished the company—which was a debtor of the defendant, and which was in voluntary liquidation,—execution not to issue without further order, and the garnishee order was made absolute in the presence of the liquidator and without objection on his part. The Master of the Bolls under these circumstances states: “It is true that the liquidator is not the debtor and therefore the order could not be made against him,” and held that leave should be given to issue execution against the company unless the liquidator paid the dividend to the plaintiff, which, in the winding up, was due to the defendant.

I do not think that the suggestion made by learned counsel that in this case because the judgment-debtor was himself the judgment-creditor of the company, the plaintiff stood in a stronger position than any of the plaintiffs in the cases referred to, is a sound one. For what has to be considered is has the judgment-creditor established a debt due from the garnishee to the judgment-debtor? or as it has been also put, could the judgment-debtor sue the garnishee for the amount and recover it? On the authority of the above decisions, I am of opinion that there was no debt due to the judgment-debtor from the garnishee.

The principle of all the cases is that no debt is created which can be the subject matter of attachment against the official liquidator as garnishee. He is an officer of the court and his duty is to the court and is controlled by appropriate orders of the court.

I accordingly discharge the order nisi.

Order discharged.

RAMGOLAM SINGH v. ATTY. GENERAL & ANR.

PETTY DEBT COURT, GEORGETOWN.

RAMGOLAM SINGH v. ATTORNEY GENERAL & ANR.

[172—4—1919.]

1919. JULY 29. AUGUST 12. BEFORE DOUGLASS, ACTG. J.

Carrier—Colonial steamer service—Colonial and Contract Steamer Traffic Ordinance, 1914—Liability for loss—Common Carriers Ordinance, 1916, s. 8—Special contract—Consignment note—Conditions limiting liability of carriers.

Claim by the plaintiff, a merchant residing at De Kinderen, West Coast, Demerara, for the sum of \$86.39, the value of a case of merchandise alleged to have been lost on or about September 11th, 1918, whilst being conveyed by the Government of the colony by steamer from Georgetown to Vreed-en-Hoop, the Government carrying on the business of carriers of goods by water for reward.

The action was brought against the Attorney General in accordance with the provisions of the Petitions of Right Ordinance, 1904, as amended by Ordinance 32 of 1918, the *fiat* of the Governor being first obtained.

At the request of the Crown Solicitor, for the first named defendant, the Demerara Railway Company was joined as a defendant.

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

J. A. King, Crown Solicitor, for the Attorney General.

M. de Souza, solicitor, for the Railway Company.

DOUGLASS, ACTG. J.: This is a claim by the plaintiff for the loss of goods valued at \$86.39 alleged to have been received by the colonial steamer service as common carriers for delivery to the plaintiff. Being a claim against the general Government of the colony as owners of the colonial steamer service it is brought against the Attorney General under the Petitions of Right Ordinance, 1904, and amending Ordinance 32 of 1918. The Demerara Railway Company were added as defendants by leave of the court granted on the 27th day of June, 1919, at the request of Mr. King, Crown solicitor, on behalf of the Attorney General. I do not know under what authority the application was made and granted but it is of no import, as after the evidence had been taken Mr. King stated that he could no longer contend that the railway company had incurred liability in the matter. I agree with him that there is not a tittle of evidence that the missing package ever came into possession of the railway company, and

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the plaintiff never so alleged. I accordingly enter a non-suit in respect of the claim against them.

The defence raised is that the package reported as not received by the plaintiff was (1) never delivered to or received by the colonial steamer service; but if it was received by them. (2) there was no negligence on their part. At the completion of the plaintiffs case a further defence was raised (3) limiting the defendant's liability—if any—to \$24, in accordance with special 'conditions' No. 16, under which goods were received, forwarded and delivered by them.

It appears from the evidence that on the 11th September, 1918, the plaintiff bought dry goods from Ferreira & Gomes, Ltd., to the extent of \$85.99, that they were packed in a case and despatched the same morning by hand truck to the steamer stelling in charge of their porter "Boney" Connell. A consignment slip (provided by the Colonial Steamer Service and Demerara Railway Company) was filled in, in duplicate, and also handed to the porter with 12 cents (on account of freight) to take with the goods. The porter arrived at the stelling and placed the goods on the scales, when he was informed that the carriage would be 40 cents, not 12 cents, as the goods had arrived after 10.30 a.m. The clerk, Coricka, initialled the slip, but, so he states—on finding the porter had not the right amount for carriage he cancelled his initials and handed the slips back telling the porter to go and get the right amount and to take the package away. This witness adds, "I can't say if he left the case on the scales. I never saw it again." There is no further evidence that anyone ever saw the package after that.

At this point it will be useful to note the usual course of procedure on receipt of a package by the steamer service as disclosed by the evidence. When a porter brings goods for carriage he produces a consignment note or slip in duplicate, the goods are weighed, the receiving clerk fixes the charge, inserts it on the duplicate slips and initials it. The duplicate slips are then taken to the cashier who receives the amount demanded, stamps both copies with an official (rubber) stamp, retains one, entering amount in cash-book and hands the other back to the porter. The cashier does not as a rule see the goods delivered. The next step is that an invoice of the goods is made out in triplicate from the duplicate slip retained and the first copy (in pencil) is sent to the Railway Company who are to receive the goods, and of the other (carbon) copies one is filed as a record, and the other sent forward with the goods and returned to the steamer service as a receipt from (I understand) the Railway Company. In the present case then we have in exhibits A 1 and A 2, the

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consignment slip in duplicate for the missing package, the first being from the possession of the steamer service, and the second from the possession of the consignor or consignee, as the case may be, and exhibits B 1 and B 2 the invoice of the missing package—(entered the first item thereon),—the first being the original produced from the custody of the Railway Company, and the other signed by Johnson, the railway clerk, returned to the steamer service. The invoice is headed “From Georgetown to De Kinderen, 10 boat train, date 12.9.1918.” It may here be noted that 40 cents carriage is entered, although Coricka stated that the package would only have been 10 cents if it had gone by the early boat the next day (i.e., the 12th September.) To continue the evidence; after the arrival of the package, Connell, the porter, states that the slips were returned to him and he said he would go and get the right amount for carriage, that he left the package on the scale but said nothing to Coricka about it, and went back to the store and reported that the freight was short and that he had left the package on the scale. This is corroborated by Ferreira & Gomes’ clerk, who also states he saw exhibit A2, and that Connell was given the additional cash and was told to return to the stelling. He did not do so his excuse being that he was the only porter and the place was busy. He adds that next morning he went back to the stelling with another package consigned to Sue-a-Quan (exhibit C. consignment slip put in), and paid the freight on that and also the 40 cents on the package he had left the day before to one Mittelholzer, the cashier at the stelling. The plaintiff has proved that he never received the package and Ferreira & Gomes that it was never returned to their store. There is no onus on the plaintiff to show how the package could have been lost, all he had to prove is that it was left in the defendant’s custody, and the only reply defendant makes is that the package could not have been left on the scales, which is against the rules, it could not have been left on the stelling at all, and that the consignment slip was cancelled showing that the package was never received, although through an error on the cashier’s part the carriage money was received.

But in the first place to prove what should have been done under the regulations of the steamer service is not proof that some transaction contrary to them did not take place, and secondly Mr. Mittelholzer, the cashier, states: “If I did not see the initials on slip I would not receive the money. I think that is Mr. Coricka’s signature on exhibit A1.” That at once throws doubt on Coricka’s evidence that he cancelled the slip on the 11th, and the inference would be that he is making a mistake as to when the cancelling took place later. The story of the porter Connell

is perfectly straightforward, and is corroborated by Ferreira & Gomes' clerk, no dishonesty has ever been proved against him, and if he left with the intention of returning with the carriage money at once the probabilities are that rightly or wrongly he would leave the package instead of wheeling it all the way back, and there being a crowded stelling it would not be noticed at once. I also drew attention to the fact that the only date on the slips is the 11th September (inserted by the consignor) and that the official stamp of the colonial steamer service—which is so illegible as to be practically useless—apparently bears no date. It has been suggested that the package was recovered by Connell on the 11th September and stolen by him, but the suggestion is an exceedingly far-fetched one and I merely mention it to remark that for Connell to have removed a large package on a truck in full sight of every one—he having to show his consignment slip to the watchman in doing so—and then to have risked going the next day, and paying its freight with the knowledge that he must have been seen would show a surprising audacity, or extreme stupidity, hardly conceivable. I can only come to one conclusion, that the package was left in charge of the Steamer Service for carriage.

The law on the subject of carrier is contained in the Common Carriers Ordinance, 1916, and under the common law of England. Under the definition in section 2 of "Common Carrier" and "Person" the Government steamer service would be included. The obligation which the common law imposed upon a person holding himself out as a common carrier of goods was to accept and carry all goods delivered to him for carriage according to his profession on being paid a reasonable compensation for so doing. It may be noted with reference to the evidence in this case that it has been held that if a carrier is in the habit of undertaking the carriage in reference to the goods left at a particular place, he is to be regarded as willing to receive goods at that place to keep and safely carry, and he will consequently be answerable for the negligence of the keeper of the booking office, or of the person appointed by him to receive the goods sent there to be forwarded. *Pickford v. Grand Junction Railway Company* (12 M. and W., 766) shows that a special agreement to convey goods within a certain time, or by a particular train may sometimes be inferred from circumstances. I am not aware of any public notice to that effect, but the evidence discloses that an extra fee for carriage was usually charged if the package had to be carried on an afternoon boat as in the present case. It is true that the money was not in fact paid in time but I cannot see that that is sufficient to relieve the carrier who had already received the goods of liability in respect thereof. What is a sufficient put-

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ting in charge is a question of fact to be decided by the jury with reference to all the circumstances of each case, and the facts proved that the package was left on the steaming, that a proper receipt for passage money was handed the agent of the consignor, a duplicate filed and the package entered on the invoice of goods shipped, are sufficient proof for me sitting as a jury, to find that the carrier assumed the responsibility for the package. The only portion of the defence that remains to be considered is that limiting the liability of the Steamer Service to a sum of \$24.

The objection was taken that this was not part of the original defence, and was put in too late, on the ground, I presume, that under the Magistrates' Courts Rules (No. 20), "It shall not be sufficient for a defendant in his defence to deny generally the claims contained in the plaint, but he must state clearly and specifically the ground or grounds upon which he relies by way of defence," but there must be taken into consideration No. 25 of the Rules. "No denial in defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases unless expressly admitted," and also the fact that there being no pleadings in the magistrate's court a greater latitude is allowed, and so long as the plaintiff has an opportunity of answering or meeting any such objection as this I do not think it should be excluded on technical grounds. The defence was put in before the defendant called his witnesses and if necessary the plaintiff could have called rebutting evidence on this point, but after all it is a point for argument rather than evidence and is not so much a ground of defence as touching the amount of damages to be awarded.

Section 8 of the Common Carriers Ordinance, 1916, provides that the restrictions imposed by the ordinance shall not affect any special contract between the carrier and any other parties for the conveyance of goods; it is a copy of section 6 of the Carriers Act, 1830 (11 Geo. IV. and I. Will 4, c. 68) and thus recognises the right of a carrier which existed at common law to protect himself by special agreement or special acceptance. A series of cases go to show what is sufficient to notify to the contracting party the special condition under which the goods are received by the carrier, so as to render it part of the contract. 'Angell on Carriers' sums them up thus: "Where the notice cannot be brought home to the person interested in the goods directly or constructively, it is a mere nullity; and the burden of proof is on the carrier to show that the person with whom he deals is fully informed of the terms and effect of the notice."

The first question to consider is does the knowledge of the consignor as vendor of certain goods bind the consignee, on the

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assumption that the consignee may not know what special terms have been made, to limit the carrier's liability? The person primarily liable to pay the carriage is in general the person with whom the carrier contracts, unless he is forwarding the goods as vendor in performance of a contract of sale, when the consignor is deemed to enter into the contract as agent of the consignee, the owner of the goods, so that the latter is liable for the carriage; and he is the proper person to sue if the carrier fails to deliver. The reason for this is that the property in the goods has passed on the completion of the sale, and they only remain in the vendor's hands as agents of the purchaser. As implied from the transaction in the present case and on the evidence of Mr. Loija (representative of the vendors, Ferreira & Gomes, Ltd.) and of the plaintiff himself, the said firm were agents for the plaintiff and as such filled in the consignment slip in duplicate, one portion of which was returned to them as a receipt. It reads "Please receive the undermentioned goods for conveyance to Mr. Ramgoolam Singh of De Kinderen subject to the conditions printed on the back hereof. Signature of shipper, Ferreira & Gomes, Ltd. Date 11th September, 1918." On turning to the back, paragraph 16 reads, "Claim for loss, damage or short delivery will only be paid upon invoice value of goods (but in no case shall the shipowner's liability exceed \$24)". Sitting as a jury I must hold that the goods were accepted by the carriers subject to the terms of this notice.

The evidence proves an express authority to Ferreira & Gomes to ship by the steamer service, the plaintiff indeed advanced 12 cents for carriage for the package, and when an express authority is given there is an implied authority combined with it to do all acts which may be necessary for the purpose of effecting the object for which an express authority is given (Wright's *Principal and Agent*, 2nd edition, 91). The consignment slip is the regular form used in the ordinary course of business of the steamer service, and the plaintiff is bound by the act of his agent in accepting the terms of shipment. It is difficult to find recent cases in the English reports relating to the limiting of the carrier's liability by special contract as the Railway and Canal Traffic Act, 1854, made special provisions for protection of the consignor which are not applicable in this colony, *Zunz v. the South Eastern Railway Company* (4 L.R.Q.B., 539) may be referred to.

I have already found that the Colonial Steamer Service accepted the goods for carriage, so I now give judgment for the plaintiff for \$24 and \$4.08 costs and counsel's fee of \$8.50.

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In re DOWNER.

[287 OF 1918.]

1919. JULY 26, AUGUST 21. BEFORE DALTON, ACTG. C.J.

Immovable property—Title by prescription—Sole and undisturbed possession for thirty years—Joint owners—Undivided interest in land—Civil Law of British Guiana Ordinance 1916, s. 4 (1)

Petition by Henry Downer under the provisions of section 4 (1), Ordinance 15 of 1916 for a declaration of title to an undivided half of lot six, part of plantation Chester, West Coast, Berbice.

The petition in the first place asked for a declaration of title in respect of a specific half, the west half, of the lot in question, but this was opposed by one Fauset who was in possession of title dated June 20th, 1905, to an undivided half of the lot. The petition was thereupon amended, after leave was granted, so as to apply to an undivided interest in the property.

Due notice of the petition was published in the *Gazette* and a newspaper on three successive Saturdays, and also served on the adjoining proprietors.

At the request of the court, before the evidence was considered, the power to grant the prayer of the petition in respect of land held in joint ownership was considered.

A. G. King, solicitor, for the petitioner.

DALTON, ACTG. C.J.: Before any question as to the sufficiency of the evidence produced was considered, I asked the petitioner's counsel to produce any authority supporting the granting of a prescriptive title to an undivided interest in immovable property, He has not done so, but merely stated that he saw no objection in law to such a grant.

It seems, however, desirable to consider this matter, which apparently has never been raised before in this colony, although it is referred to by Bovell, C.J. in *London v. Murray* (L.J. May 1st, 1906). From his words there it would seem that he did not consider that title by prescription to an undivided interest in land could not be obtained. He says "Nor in my opinion is a title by prescription to the undisputed land, or rather to an undivided interest therein made out by the plaintiff."

That a title by prescription to a specific portion of land held in undivided interests can be obtained is settled. It was urged in the case of *Henery v. Henery & ors.* (L.J. April 22nd, 1904) that prescription does not run against an undivided interest, but it has been clearly established that it does so run. I have unfortunately not

been able to obtain the reports of two South African cases on this point, but from Bisset & Smith's Digest of Cases, Vol. II., it appears that in *ex parte Malherbe* 14 C.T.R. 614 and *Le Roux v. Malherbe* (1905 2 Buch. A.C., 192) it was held that the open, peaceable, bona fide possession as of right of a definite share of an undivided interest in immovable property for the period of prescription entitles the possessor to claim registration of title to such share. The latter case is cited with approval in Maasdorp's *Institutes*, Vol. 2, at p. 143. This is supported by a recent decision in Ceylon. (*Tillekeratne v. Bastian*, 21, Ceylon N.L.R. 12) where the principles of the common law there, *i.e.*, Roman-Dutch law, are compared with certain statutory enactments dealing with prescription based on the English law. In his judgment on this particular matter, Bertram, C.J. refers to *Voet X., 2, 33*. Voet here says that proceedings for division are not to be denied because co-heirs have held undivided property for thirty years. He continues: "By the very fact of holding the property in undivided shares with another, a person acknowledges an associate; nor can he acquire by prescription who has held not in his own name alone, but in the name of himself and another, . . . If, however, one of the heirs has possessed the whole estate in his own name alone, as his, for thirty years, the better opinion is that these proceedings will thereafter not be available."

But that is a very different thing to what I am now asked to grant title for. Title to a specific or definite portion of land held in undivided ownership can be obtained by prescription. Can title to an undivided share of or interest in land held in joint ownership be so obtained?

What is the nature of undivided ownership? Joint owners of land are entitled to make a reasonable use of all the land so held proportionate to the share of each therein. Each owner is entitled to access to the whole of the land, and to an interest in every square inch of it, proportionate to his share, and to everything upon it. If a joint owner sells his share of the joint property, as he may do without the consent of the other joint owners, the purchaser steps into the position of the seller, in respect of his relations to the remaining joint owners. Is prescription which is based on continuous uninterrupted possession consistent with this? How can the petitioner say he is entitled by prescription to an undivided half of the lot in question when he admits that Fauset has also an undivided interest of the same proportion in the same lot? It seems to be entirely opposed to all the principles on which the idea of prescription is based. His possession of the property he claims is joint, not exclusive; it is not uninterrupted, since he admits that another has an interest as

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well as himself. His claim is not adverse to the true owner of part of the property, rather he admits that ownership. In the absence then of any authority to support the prayer of the petitioner, the petition must be refused and the petition dismissed.

DE FREITAS v. BOARD OF ASSESSMENT.

[220 OF 1919.]

1919. AUGUST 25. BEFORE DALTON, ACTG. C.J.

Revenue—Excess profits tax—Tax on Excess Profits Ordinance No. 2 of 1918—Appeal—Abolition of Committee of Appeal—Continuation of proceedings—Tax on Excess Profits Ordinance. No. 1 of 1919—Interpretation Ordinance, 1891, s. 28.

Appeal from a decision of the Board of Assessment.

On August 8th, 1918, the Board assessed the appellant de Freitas in a sum arbitrarily under the provisions of section 9 (1), Ordinance 2 of 1918. From that assessment appellant appealed to the committee of appeal. The committee held that the Board was in error in arbitrarily assessing the appellant, and referred the matter back to the Board to furnish the committee with the evidence on which the assessment was made.

No steps were taken in respect of that order, and the committee of appeal was abolished by Ordinance 2 of 1919. The appellant now appealed under the provisions of ordinance 2 of 1919, to a judge direct.

J. S. McArthur, for the appellant.

J. A. King, *Crown Solicitor*, for the Board.

DALTON, ACTG. C.J.: This is an appeal from an assessment made by the Board of Assessment on August 8th, 1918. From the record it appears that, after the assessment was made the appellants appealed to the committee of appeal, which then existed, under the provisions of section 17 of Ordinance 2 of 1918, the law which existed at that time on the subject. The committee of appeal heard the appeal and ordered that the matter be referred back to the Board for certain information to be produced to the committee. That order was made on February 20th, 1919. The Board had the right of appealing from the decision of the committee within fifteen days, but they took no steps to prosecute such an appeal. On March 6th the ordinance under which the proceedings were taken was repealed, and the committee of appeal was abolished, provision being made in the new ordinance (No. 1 of 1919) for appeals to be made from the Board of Assess-

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ment to a judge direct. By s. 28 of the Interpretation Ordinance, 1891, this repeal does not affect legal proceedings taken under the repealed ordinance which may be continued as if the repealing ordinance had not been passed. Here, however, the tribunal has been abolished. Fortunately, it is not necessary for the to decide here whether those proceedings can continue.

Objection is taken to the proceedings on behalf of the Board on the ground that there is no appeal from an assessment arbitrarily made by the Board under s. 8 of the 1919 ordinance, but from the record it is clear that the appeal does not relate to any assessment under the 1919 ordinance, but to one made in August, 1918. The appellant's counsel produced a letter showing he was invited by the Board to appeal again, dated June, 1919, but such letter must have been written without a full appreciation of the position.

As regards the assessment made in 1918 therefore the order of the committee of appeal still stands, and there is, in respect of that assessment, no right of appeal now in the appellants.

The appeal is therefore dismissed. Under the circumstances I make no order as to costs.

In re BRODIE & RAINER, LTD.

1919. AUGUST 27, BEFORE DALTON, ACTG. C.J.

Trustee—Mortgage and trust deed—Cancelment of mortgage—Trustee out of colony—Provisions of deed for appointment of new trustee—Appointment of trustee by court—Notice—Trustee Act (England), 1883, s. 25—Civil Law of British Guiana Ordinance, 1916, s. 12.

PETITION.

By a mortgage and trust deed, judicially executed on July 6th, 1912, the petitioners, Brodie & Rainer, Ltd., a company incorporated in this colony, secured to the holders of debenture stock to be issued under the deed the sum of \$35,000 for the payment of the said stock.

Stock was issued to the British Guiana Bank for \$10,000, and to four other holders for \$25,000.

The petition set out that the stock issued to all holders, save to the Royal Bank, had been redeemed, and that no sum remained due under the mortgage save the sum due to the Royal Bank of Canada, the successors of the British Guiana Bank. The property mortgaged under the deed had been sold to the Colonial Bank who required transport thereof, for which purpose the mortgage had to be cancelled.

The trustee under the deed was out of the colony, and would not return for some months, and the provisions of the deed for

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the appointment of a new trustee by the British Guiana Bank, which was dissolved, or by the debenture holders, all of whom but one had been paid off, did not meet the case.

The Royal Bank of Canada consented to the appointment of a new trustee by the court.

The court was therefore petitioned to appoint Arthur Graham Reid, accountant of the local branch of the Royal bank, trustee under the deed for the purpose of cancelling the mortgage and satisfying the remaining debenture holder. No notice of the petition was given to any other party.

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

Refers to s. 25, Trustee Act, 1893, and Ordinance 15 of 1916, s. 12; Godefroi on Trusts (4th ed.), p. 503, and cases there cited.

DALTON, ACTG. C.J.: This is a petition by Brodie & Rainer, Ltd., for the appointment of a trustee under a mortgage and trust deed, for the purpose of cancelling the mortgage and paying the remaining holder of debenture stock under the deed. The trustee under the deed is out of the colony for some months on holiday, and cannot be reached without considerable delay. The trustee proposed is the accountant of the local branch of the Royal Bank of Canada, and that bank is the sole remaining debenture holder. Satisfactory proof has been given by affidavit, and production of the certificate that the debenture stock issued to all other debenture holders has been duly redeemed.

Under the deed the British Guiana Bank can remove the trustee and appoint another in his place. That bank has for some time been dissolved. Again, the debenture holders are by the deed empowered to appoint a new trustee if the trustee appointed by the deed is unable to act. The Royal Bank is the sole remaining debenture holder, and the petitioners have accordingly invoked the assistance of the court, under sect. 25 of the Trustee Act, 1893 (see sect. 12, Ordinance 15 of 1916).

After consideration of the petition and cases cited by the crown solicitor, I make the appointment as prayed, under the circumstances dispensing with notice to the trustee appointed under the deed.

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[125—7—1919.]

1919. AUGUST 5, 13, 27. BEFORE DOUGLASS, ACTG. J.

Master and Servant—Wrongful dismissal—Justifiable grounds—Damages—Proof in excess of claim—Abandonment of excess to bring claim within jurisdiction—Petty Debts Recovery Ordinance, 1893, s. 4—Practice.

Claim by the plaintiff for the sum of \$100 as damages for alleged wrongful and unlawful dismissal, whilst employed by the defendant company. The necessary facts are fully set out in the judgment.

A. V. Crane, solicitor, for the plaintiff.

C. Gomes, solicitor, for the defendant company.

Application was made to the court by the plaintiff to amend the claim by an addition of words abandoning any excess of loss incurred over the sum of \$100. The application was opposed.

DOUGLASS, ACTG. J.: On the opening of this case the solicitor for the plaintiff anticipating a possible defence asked the court to amend the claim so as to abandon any chance of excess of damages over \$100 that might be recoverable by the plaintiff, and that he would accept \$100 in full of all demands. An objection was taken by the solicitor for the defendant company that such an amendment could not be made at this stage of the proceedings, or indeed at all, after service of the particulars of claim and that if more than \$100 was found to be recoverable the magistrate had no jurisdiction to decide the case. He referred the court to the case of *Ferreira v. de Freitas*, (1918 L.R., B.G. 80). By section 4 of the Petty Debt Ordinance, 1893, "any plaintiff having a cause of action for more than \$100, for which "a claim might be entered if not for more than \$100, may abandon the excess, and shall thereupon, on proving his case, recover to an amount not "exceeding \$100;" this section is based on a similar section of the English Statute, 9 and 10 Vic, c. 95, section 63. "Any plaintiff having cause of action for more than £20, for which a plaint might be entered under this act "if not for more than £20 may abandon the excess, and thereupon the plaintiff shall on proving his case recover to an amount not exceeding £20." Section 3 of 13 and 14 Vict., c. 61, enlarged the limit to £50. It was held in the case of *Isaac v. Wyld*, 21 L.J., Ex. 46, (1852),

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that if the amount claimed on the particulars did not exceed £50, the plaintiff might abandon any excess which appeared on the trial. This case was affirmed in *Hill v. Swift*, 24 L.J., Ex. 137, where it was laid down that such abandonment must be the act of the plaintiff and not of the county court judge. The same ruling was followed in *Bodger v. Nicholls*, 28, L.T. 441, where the head note reads, "Where in an action of tort in a county court, "the plaintiff, who by his plaint claims £50, put in his evidence the damage "sustained by him at a higher sum, the jurisdiction of the county court is "not thereby ousted. It is not necessary in such a case that the plaintiff "should have abandoned the excess before the trial. The county court judge "may, at the trial, make the requisite amendment in the particulars." These decisions were given before the English county Court Rules, 1888, referred to by Hill, J., in *Ferreira v. De Freitas*, (1918 L.R.B.G., 80) and that was a case where the claim having been split, there was an attempt to combine by amendment. In the late case of *Ramlallsing v. Deane & ors.* (1919 L.R.B.G. 6), Berkeley J., apparently follow these decisions when he says "such an abandonment must appear on the face of the claim, or it may be made during the hearing, and shown to have been so made on the face of the proceedings." It is evident in the present case from the particulars and the evidence of the plaintiff that if the plaintiff prove that he was unjustly dismissed he might be entitled to damages for the portion of the month of June, for which he has not received any pay, which at the rate of \$86.66 per month would amount to \$42.66, and for one month in lieu of notice \$86.66, *i.e.*, a total of \$129.32. I accordingly amend the particulars by adding to paragraph 5 "in full satisfaction of all damages that may be found to be due "to him and he hereby abandons any excess above \$100 which might be so "found due."

Evidence was then led in support of the claim, and for the defence, and decision was reserved.

DOUGLASS, Actg. J.: The plaintiff is claiming \$100 damages against the defendant company for wrongful dismissal on the 24th June, 1919. A preliminary objection was taken to the jurisdiction of the magistrate and to amendment of the particulars which was overruled. The defence raised is that the plaintiff was rightly dismissed by letter on the 24th June, for habitual neglect of his duties, and, in the alternative, that he was employed as a skilled and experienced servant and during his employment found to be incompetent.

The plaintiff was general superintendent of the printing and

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binding departments of the defendant company and started his employment with them in February this year. He states he had had considerable experience in printing for 40 years, both here and in Barbados, and on a previous occasion was 12 years with the defendant company, and five years with a printing press of his own. He describes his own duties more in detail: "I had to receive all orders from the counter, charge for all jobs, make out all estimates, issue workshop envelopes and stock for printing and binding departments, see no laxity prevailed. I was in charge of the stock-room; would take stock . . ."; and Mr. Delph, the secretary of the company, confirms most of this and says: "He (plaintiff) takes and issues orders, gives out stock and sees to the proper execution of orders. He had nothing to do with the printing of the newspaper. He should see a job during progress, the last proofs should be submitted to him."

The plaintiff states that the first he knew about any dissatisfaction with the way he conducted his duties was when he received the letter dated the 24th June, 1919, from Mr. Marchant, the manager of the defendant company. He was at the time absent for the day ill. (Letter here read.)

It is a well known rule that provided good grounds for dismissal exist it is immaterial whether they are stated at the time of such dismissal, or indeed whether they were known to the employer at the time. The defendants therefore are not bound by the grounds stated in their letter but it is a useful point to start from to ascertain from the evidence whether these grounds or any other justifiable grounds of dismissal have been proved. It is impossible to lay down any general rule applicable to all cases, although the discharge must be connected with the duties, but 'Smith, on Master and Servant' (6th edition) gives four main grounds upon which the discharge of a servant may be justified (1) wilful disobedience of a lawful order; (2) gross moral misconduct; (3) negligence in business or conduct calculated seriously to injure the master's business; (4) incompetence or permanent disability.

In this case we are only concerned with (1) and (3), for on Mr. Delph's own admission the plaintiff was thoroughly competent and able to tackle his job. and it was for that reason that within a month after he took over his pay was raised from \$18 to \$20 per week. There are four complaints in the letter (1st) that the "Hand-in-Hand" had returned forms printed disgracefully, (2) tickets for the Corentyne Race Club had been over printed, (3) that delay had been caused in publication of balance sheet by late stock-taking due to plaintiff's laxity, (4) 'recent quotations' tended to drive away work—no evidence was offered of the 2nd and 4th complaints and very little with reference to the

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3rd, in fact no 'laxity' was proved so that only the first complaint remains to be considered in conjunction with other printing orders, alleged to be badly executed or neglected and which appeared in the evidence.

[After a detailed examination of the evidence, His Honour continues]:

Having gone in detail through the specific complaints it is evident that they all came under the 3rd ground of dismissal, for none of them can be said to be wilful disobedience of a lawful order. There is no doubt that some of the printing that went out was badly and carelessly done, that inferior paper was used, and mistakes made that should not have been made. As to how far the plaintiff is liable for such bad work he and Mr. Delph are at issue. All through this case one cannot but remark on the want of Mr. Marchant's evidence to corroborate statements made by Mr. Delph, or to negative assertions by the plaintiff.

Baster v. London and County Printing Works (68 L.J. Q.B., 622) shows that a single act of forgetfulness may under certain circumstances be sufficient to justify dismissal. Channel J., says, "The particular act justifying dismissal without notice must depend upon the character of the act itself, upon the duties of the workman, and upon the nature of the possible consequences of the act.

No proof has been given me that any act or acts of omission or commission for which the plaintiff is personally liable was or were of such a serious nature as to imperil the reputation or business of the firm. Mr. Delph states "I should think we had serious loss over these complaints; we have not had any further order from the Consolidated. On the East coast forms we lost \$21.60"—But the 'Consolidated' order, which was not put in evidence, was on the occasion when the quality of paper was complained of, apparently in February when the plaintiff first took over, and the 'books' which were refunded were put into stock. I have not sufficient evidence to show whose mistake it was, printing all one form for the Local Government Board instead of "East" and "West" forms; the order put in only refers to "West" coast; moreover as I have stated, it is clear that the mistake, if the plaintiff's, was condoned. The general statement "I should think we had serious loss over the complaints" is not sufficiently explicit.

I am not satisfied that there was any act or accumulation of acts on the part of the plaintiff that justified instant dismissal; most of the alleged mistakes and negligence are referable to the difficulty of obtaining suitable stock, the strike of the staff, and the want of co-operation between foreman and superintendent. The plaintiff was entitled to notice and would be

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entitled to the balance of June month and at least the next month. I accordingly give judgment for the plaintiff for \$100 in full as damages for his wrongful dismissal and \$1.92 costs and a fee of \$10 to Mr. Crane, plaintiff's solicitor.

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[247 OF 1916.]

1919. AUGUST 22, 29. BEFORE DALTON, ACTG. C.J.

Work and labour—Contract for services—Breach of contract—Nature of remedy—Work rendered useless by fraud and negligence—Payment—Estoppel.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. J. McCowan), who gave judgment for the plaintiff De Lackalom on a claim for \$100, for damages for loss sustained by him through the negligent and unskilful workmanship of the defendant in building a vat, receiving materials for the purpose which he had not used, or rendered useless and unfit for use. Particulars of the damage followed.

Defendant Smith appealed on the ground that

- (1.) the judgment given could only have been given if the action was based on contract:
- (2.) the measure of damages was wrongly based and claimed and awarded, the plaintiff being the owner of the vat and also obtaining \$100 damages:
- (3.) the plaintiff having paid defendant for the labour and other expenses waived any right of action he might have and is estopped from instituting these proceedings.

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

A. V. Crane, solicitor, for the respondent.

Plaintiff and defendant entered into a contract, the latter to build a vat for the former, plaintiff to supply the materials such as staves, putty, paint and other things. Defendant was to supply the labour and to receive the sum of \$40 as payment therefor. The remedy of the plaintiff in such a case, on the failure of the defendant, may be an action for breach of contract or for a tort. In the words of the text books, where a contract creates a duty both the nonfeasance and the misfeasance constitute a wrongful act for which the remedy is by action of contract or tort at the option of the injured party.

In this case, from the terms of the plaint, plaintiff has sued for

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damages for tort arising out of contract. The magistrate would appear from his judgment to have been in some little doubt as to what form of remedy plaintiff had adopted. However that may be, I do not think, in the result, that doubt affects the appeal. The findings on the evidence led in support of the plaint filed are sufficiently explicit. The magistrate found that the vat was of no use for the purpose for which it was intended, that the materials supplied by the plaintiff had not been used, but that inferior materials had been substituted for them, and that damage to the amount of \$100 was sustained by the plaintiff, who has derived no benefit whatsoever from defendant's work. On the evidence (and the evidence supports all those findings) it is clear that the materials and labour cost him over \$100, and he has nothing to show for it, Defendant says he (plaintiff) has the \$100 and the useless vat, but that is not so. The proper course under the circumstances is for plaintiff to give defendant notice to remove the vat, (not including the cover), and to allow him all reasonable opportunity for so doing.

As regards the plea of estoppel I agree with the magistrate that it does not arise here. Although the plaintiff paid defendant for the work he had done, in the absence of any negligence or default or waiver on his part (and there is evidence of none), he is not estopped merely by such payment from his right of action against defendant. Defendant (appellant) was, however, in no way debarred as was urged by respondent's counsel from arguing the question of estoppel before me.

The chief reason for appeal is that the measure of damages was wrongly based and claimed, and wrongly awarded. On the facts found by the magistrate in this case I do not think that reason is a good one. The reasons of the magistrate do not state what he takes to be the measure of damages, but the same principles are to a great extent applicable to cover both contract and tort. It is clear from the evidence that the vat would require to be taken down and rebuilt, and with different materials, if plaintiff is to get what defendant contracted to give him. The loss incurred and the damages which the magistrate gave therefor, from what I have already said, are supported by the evidence which he accepted as correct. To remove however, any doubt in the minds of the parties as to the ownership of the vat as it stands I will here say that it is the property of defendant (appellant). The plaintiff (respondent), if he has not already done so, should give him notice to remove it within a reasonable time and allow him and his agents access to his premises for that purpose. Subject to that, the decision of the magistrate is confirmed and the appeal dismissed with costs.

Appeal dismissed. Judgment confirmed.

In re GOMES ex parte PUBLIC TRUSTEE.

In re GOMES ex parte PUBLIC TRUSTEE.

[238 OF 1919.]

1919. SEPTEMBER 5. BEFORE DALTON, ACTG. C.J.

Will—Application for directions—Administration Ordinance, 1887, s. 3—Appointment of Official Receiver as executor and guardian—Invalid appointment—Appointment of Public Trustee—Intention of testator—Public Trustee Ordinance 1910, ss. 2, 5, and 6.

Petition by William Alstein Parker, Public Trustee, for directions under the provisions of section 3 of the Administration Ordinance No. 10 of 1887.

Manoel Gomes died in this colony on July 15th, 1919, and by his last will appointed “William Alstein Parker, Official Receiver of British Guiana” and his son Manoel Gomes as joint executors. He also appointed petitioner under the same description as guardian of his minor children.

The petition set out that as Official Receiver petitioner had no authority or power to accept such appointments, nor was he willing to accept them in his private capacity. As he was also Public Trustee he sought the direction of the court as to whether he should administer the estate in his capacity as public trustee, as joint executor with the son named in the will. The widow had requested him to undertake the administration under the provisions of the Public Trustee Ordinance 1910, but he would be unable to do so if the son named as executor desired to take over the administration, unless the court so ordered.

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

The testator did not intend that the son Manoel Gomes should administer the estate alone. By section 2 of the Public Trustee Ordinance, 1910, the official receiver is public trustee. Petitioner fills both posts. The appointments can only be validly made as public trustee. The description in the will is a sufficient description within the meaning of sections 5 and 6, Public Trustee Ordinance, 1910.

Manoel Gomes, co-executor, in person.

My father desired Mr. Parker to act with me. I have no objection to the public trustee being appointed co-executor.

DALTON, ACTG. C.J.: It was clearly the intention of the testator to appoint the petitioner as co-executor and guardian in his public capacity. He fills the post of both official receiver and public trustee, and in the will has been wrongly described as he can only undertake the administration in the latter capacity. I will accordingly direct that the will appoints him, in his capacity as public trustee, co-executor with the son named therein, and guardian of the property of the minor children.

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PETTY DEBT COURT, GEORGETOWN.

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[166—8—1919.]

1919. AUGUST 21, SEPTEMBER 2, 9. BEFORE DOUGLASS, ACTG, J.

Detinue—Sale of goods—Sewing machine—Hire purchase agreement—Judgment for hire and return of machine or its value—Subsequent order for payment by instalments on judgment-summons—Execution levied after order on judgment-summons made—Wrongful levy—Damages.

An order for committal on a judgment-summons suspended on payment by instalments of the amount under the original judgment takes the place of the original judgment, and no execution can be levied upon such judgment after the order for committal is made.

Plaintiff claimed from the defendant company, a company incorporated in the United States of America and carrying on business in the colony, the delivery of a sewing machine or its value, \$26, and \$24 as damages alleged to have been sustained under the following circumstances. On August 15th, 1918, the company obtained judgment against plaintiff for the return of the machine or its value \$26. On March 27, 1919, the company, in respect of the same judgment, obtained an order on a judgment summons for the payment of \$1 a month. In July, 1919, the company then took out a writ of execution, and wrongfully (as alleged) removed from plaintiff's premises the machine in question, and in addition levied upon property belonging to her.

B. B. Marshall, for the plaintiff.

A. V. Crane, solicitor, for defendant company.

DOUGLASS, ACTG. J.: The plaintiff claims return of a sewing machine (or its value, \$26) unlawfully removed by the defendant company from her possession and detained by them after demand made in July, 1919, and \$24 as damages. The particulars of the claim have been rendered confused and misleading by the addition of clauses which are redundant and in the nature of evidence. The solicitor for the defendant company alleges that the said machine is the property of the defendant company and they had a right to retake it; that they obtained judgment against the plaintiff on the 15th August, 1918, for a sum of \$35.80 and delivery of the machine or its value, \$26, and that judgment has not been satisfied by payment of the said value of the machine, and that in any event the plaintiff is estopped from claiming the said machine as she waived any claim she might have on condition that the furniture levied on was returned. This last plea I may at once dispose of. There is not sufficient proof that the plaintiff ever agreed to the defendant company keeping the machine and moreover, the furniture levied on has been sold. The defen-

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dant company practically admit that the levy was made with a view to an attempt at recovering the machine, and that it was so taken and removed to the company's offices.

From the evidence and the exhibits put in it appears that at the date judgment was obtained (15th August, 1918), only \$7.50 remained due on the machine so that its value (to the company) should have been the sum of \$7.50, not \$26. (See *Wm. Whitely, Ltd., v. Hilt*, 119 L.T.R. 632). On the 8th November, 1918, a writ was issued for the whole amount of the judgment. On the 18th March, 1919, a judgment-summons was taken out against the present plaintiff for (apparently) the whole amount of the debt and an order was made of committal for 14 days suspended on defendant paying the sum of \$1 per month with costs of the summons, the first payment to be made on the 30th April, 1919. It is suggested that the court has no power to order payments by instalments on a judgment-summons but however that may be the order stands until it is reversed or a new order made. These instalments were paid up to the end of July, but in spite of this, on the 24th July the defendant company proceeded on the execution writ taken out on the 8th November, 1918, and in addition to seizing a few articles of furniture, took possession of the machine.

Several questions have been raised for consideration, first whether the defendant company could proceed to levy on an original judgment after having taken out a judgment-summons, and next whether they were entitled to retake the machine as their property at that date (24th July) either (1) if the levy was a good one, or (2) if the levy was bad. The agreement between the parties dated 28th May, 1915, was put in. It is the usual form of hire-purchase agreement and until the first instalment was paid the machine remained the property of the defendant company (see *Helby v. Matthews*, 1895, A. C. 471). On obtaining judgment on the 15th August, 1918, the agreement was merged in it, but several cases in the English Courts have decided that a judgment in detinue by itself does not vest the property of the chattel in the hirer. In *Brinsmead v. Harrison* (6 C.P., 584, and 7 C.P., 555) it was held that a judgment against the defendant in trover without satisfaction did not vest the property in the defendant. Willes, J. says 'it is not a proceeding *in rem*, it is to recover *prima facie* the value of the goods.' It is true that the present proceedings being for detinue are *in rem* but as we have in the magistrate's court no process to enforce the return of an article as there is in English county courts, it comes to much the same thing. In *re Scarth* (L.R., 10 Ch. Ap., 234) one Green obtained a judgment in an action of detinue against Scarth for recovery of the lease of a house or in default of its being given up, £100 and 40s. damages for its detention.

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Scarth filed his petition for liquidation and Green put in a claim for his £102 and costs, but it was held he could not be considered a creditor of Scarth for that amount. Mellish, L.J., says "Until execution has issued a judgment-creditor in an action of detinue is unable to get the money and the property in the goods remains in him." He further states, "The old writ under a verdict in an action of detinue authorized the Sheriff to distrain the goods and chattels of the defendant if he did not return the goods or pay a certain sum of money. This gave the defendant the choice whether he would give up the goods or pay the money". . . . But the C.L.P. Act, 1854 altered this and enabled the Courts of Common Law to make an order for the return of the goods. The next case is *ex parte Drake, in re Ware* (5 Ch. D., 866) when it was held that judgment for the plaintiff in an action of detinue did not change the property in the detained chattel until satisfaction of the value found by the judgment. This case is of special interest as the plaintiff had had the mare—the subject matter of the detinue—recovered by force, and Jessel, M.R., held that as the property in the mare remained with the plaintiff he had a right to obtain possession of his property either by taking it peaceably or by means of proper legal process. James, L.J. states "The appellant desired to get his mare back There has been no election by the appellant to take a dividend in lieu of his judgment."

A judgment then in detinue does not deprive the plaintiff of his property in the chattel detained until (1) the judgment has been satisfied either by payment of the value, or the full amount is recovered on execution, or (2) the plaintiff has elected to take the money value and so waived his right to the chattel.

It remains to consider what effect the judgment summons had (a) on a writ of execution under the original judgment, and (b) on the plaintiff's property in the chattel. Our Debtors Ordinance, No. 9 of 1884 under which the jurisdiction to commit a judgment debtor is derived, is similar to the English Debtors Act 1869 (32 and 33 Vic. c. 62), and section 39 of the Petty Debts Recovery Ordinance 1893 gives jurisdiction to the magistrate's court. It was held in the English case of *Montgomery & Co. v. De Bulmes*, (1898, 2 Q.B., 420) that the creditor who has recovered judgment against his debtor in the High Court and afterwards obtains from a county court Judge an order under section 5 of the Debtors Act 1869 for payment of the debt by instalments, cannot so long as that order is in force, issue execution upon his judgment in the High Court. Chitty, L.J. says "I think that the Act means that if a party goes to the county court and accepts an order from the judge there for payment by instalments he thereby elects to have the judgment of the High Court modified to the

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extent of the order; . . . So long as that order stands they (the plaintiffs) are not entitled to issue execution.”

This applies with even greater force to the present case when both orders are made in the same court; and even apart from this decision, when a magistrate orders payment or a sum by instalments, section 38 of the Petty Debts Recovery Ordinance directs that execution ‘shall not issue upon such judgment against the party until after default in payment of some instalment’, and inasmuch as the order on the judgment-summons is the substitute for the order directing payment of the total sum under the original judgment, it is evident that execution is restrained under the same section. There was at that time (24th July, 1919) when the levy was made no judgment on which execution could be levied, for the defendant company had consented to accept payment by instalments and the instalments under the order had been duly paid; the seizure and sale were consequently invalid. A representative of the defendant company went with the bailiff to the plaintiff’s premises ostensibly to point out the goods to be seized, as the seizure was wrongful. I am of opinion that the defendant company was a trespasser and had no right on the plaintiff’s premises, but even so if they had retaken property that still belonged to them the plaintiff could not recover in detinue, although another form of action might lie. But at that date had the defendants such property in the machine as to give them the right to retake it? It is clear that if the order made on the judgment-summons had been for payment by instalments of the amount recovered—excluding the value of the machine—there could have been no question as to whether or no the defendant company were waiving their rights, such as they were, but it appears to me that the defendant company having accepted a variation of their first judgment and agreed to accept payment of the whole amount (including the value of the machine) by monthly instalments, they have waived any claim to the recovery of the machine itself and consequently their rights of ownership. I have some hesitation in so finding, but I also take into consideration that on the evidence it appears that the plaintiff has exercised her option and the value of the machine, \$26, had been paid for before the levy took place, the last payment of fifty cents being credited on the 26th July, 1919, and the witness Mr. Souza states: “She has practically finished paying for the machine.” Taking all these circumstances into consideration, I hold that the plaintiff has proved her claim in detinue, and I accordingly give judgment for the return of the machine or \$26, its value, and 96 cents costs, counsel’s fee, \$5, and \$5 as damages, the defendants to be at liberty, if they so desire, to credit the

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amount of this judgment against the amount still due from the plaintiff to the defendants.

REID v. TIAM FOOK.

[BERBICE, 1 OF 1919.]

1919. FEBRUARY 28. BEFORE SIR CHARLES MAJOR, C.J.

Customs—Foodstuffs—Customs (Exportation Prohibition) Ordinance, 1915, s. 2—Prohibition by proclamation—Proclamation ultra vires of the ordinance.

Appeal from a decision of the stipendiary magistrate of the Berbice judicial district (Mr. W. J. Douglass). On the complaint of the plaintiff the Comptroller of Customs charged the defendant Peter Chung Tiam Fook and two others with unlawfully exporting from the colony of British Guiana in the sloop "Mayflower," without permission certain foodstuffs, the exportation of which from the colony was prohibited by law. The first named defendant was convicted and sentenced to pay a fine of \$2,500, and the costs of the prosecution.

From this decision he appealed on the following grounds:—

The decision is erroneous in point of law and fact:—

- (a) The proclamations in question are not within the scope of Ordinance 30 of 1915, the Customs (Prohibition Exportation) Ordinance, and created no offence under the ordinance.
- (b) No offence under the ordinance or proclamation was adduced by the evidence.
- (c) No exportation of goods was proved.
- (d) The evidence did not establish that appellant was the exporter of any goods mentioned in the charge.

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

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

SIR CHARLES MAJOR, C.J.: The appellant has been convicted

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on a charge that he exported from the colony certain foodstuffs without a special permit from the Comptroller of Customs, in contravention of the terms of a proclamation by the Governor-in-Council issued in December, 1917.

It is certain upon the evidence that the appellant did so export the foodstuffs, but he has appealed against his conviction upon various grounds, to only one of which I thought it necessary to direct the Solicitor General's special attention, and that is that the proclamation was ultra vires of the Governor, in that first, His Excellency did not name therein the place or places to which exportation was forbidden, and second, he had no power to prescribe a condition precedent upon performance whereof a person might export, the prescription of that condition being an unauthorized delegation of the powers in him vested by law.

The proclamation was issued pursuant to Ordinance No. 30 of 1915, shortly entitled the Customs (Exportation Prohibition) Ordinance, 1915, and before examining its provisions, it is necessary to refer briefly to English legislation on the subject, because not only has the argument for the appellant been based upon a comparison between that legislation and the Ordinance of 1915, but also because the latter is, or purports to be, in foundation as well as fabric, practically a counterpart of the former.

The English Acts expressly or impliedly reproduced in the Ordinance are the Customs and Inland Revenue Act, 1879, the Exportation of Arms Act, 1900, the Customs (Exportation Prohibition) Act (August), 1914, the Customs (Exportation Restriction) Act (November), 1914, and the Customs (Exportation Restriction) Act, 1915.

To the 1879 Act I need not refer beyond saying that its section 8 is with the addition of the words "or by inland navigation", exactly reproduced in section 105 of the Customs Ordinance, 1884, which gives the Governor power, By proclamation or Order in Council, to prohibit the exportation of arms and ammunition and naval and military stores, and any articles deemed by him capable of being converted into, or used to increase, those stores, or provisions, or food for man, without any restriction as to time when or place whither.

In 1900, owing to the South African war, the Exportation of Arms Act was passed, enabling the Sovereign by proclamation to prohibit the exportation, to any country or place named in the proclamation, of arms, ammunition, and military and naval stores, and any article which her then Majesty judged capable of being converted into, or made useful in increasing the quantity of arms, ammunition, or military or naval stores. And this is the first Act of the series in which appears the necessity for the country or place, or countries or places to be named in the proclamation.

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In August, 1914, at the beginning of the present war, Parliament passed the Customs (Exportation Prohibition) Act. It expressly amended the eighth section of the 1879 Act, by providing that, whilst a state of war in which His Majesty was engaged existed, "all other articles of every description" should be deemed to be included in the articles named in that section.

Then, in November, 1914, it became necessary to amend the 1900 Act, and the Customs (Exportation Restriction) Act was passed, including in the articles of which exportation to any country or place named in the proclamation might be prohibited by the 1900 Act, "all other articles of every description."

Lastly, in 1915, the Customs (Exportation Restriction) Act of that year was passed, whereby His Majesty took power, during the continuance of the present war, by proclamation to prohibit the exportation, to any country or place named in the proclamation, of any article, unless consigned to persons authorized under the proclamation to receive that article.

The Acts of 1900, November 1914, and 1915, by reason of the provision in that of 1900 that it should be read as one with the 1879 Act, and as if its section one were part of section eight of the 1879 Act, were amendments of that Act.

At the time, therefore, when the 1915 Act was passed, His Majesty had power, by proclamation or Order in Council, to prohibit the exportation of all articles of every description without any restriction as to time when or place whither, and also power, by proclamation, to prohibit the exportation to any country or place named in the proclamation, of articles of every description, either absolutely or only when consigned to persons authorized by the same proclamation to receive them.

In these circumstances the Customs (Exportation Prohibition) Ordinance, 1915, was passed. I agree with the learned magistrate when he says that section two may be divided into three paragraphs. The first is from the beginning to the words "His Majesty's forces," and reproduces the provisions of the first section of the 1900 Act; the second is "and whilst a state of war in which His Majesty is engaged exists, may, in like manner, prohibit the exportation to any country or place of all or any other articles whatsoever"; the third consists of the remaining words of the section. It is upon contravention of the terms of the proclamation issued under the power conferred by the second paragraph of the section that the conviction rests, and upon the construction of that paragraph that the argument of Mr. Browne has mainly turned. He contends that the words in "like manner prohibit the exportation to any country or place" mean "by proclamation prohibit the exportation to any country or place named therein" (i.e., in the proclamation), in other words that the expression "in like

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manner” governs not only the proclamation itself as the instrument of prohibition, but also the manner of exportation, namely, to some place or places named therein. And he bases this contention upon the submission that, whereas the August, 1914, Act so amended the 1879 Act as to include what I may describe as the power of universal prohibition, the 1884 Ordinance has not been so amended, and the second (and third) paragraphs of the 1915 Ordinance in terms only correspond with, and have the same effect as, the provisions of the November 1914 (and 1915) Acts, so far as those Acts amend the 1900 Act. I cannot agree.

The expression “in like manner,” where it appears in the section, cannot, in my opinion, have any other meaning than “by proclamation,” because that is the only manner in which the Governor can exercise his power of prohibition.

The section commences “the Governor in Council may by proclamation prohibit;” the second part continues, “and . . . may in like manner prohibit.” The expression “to any country or place” is quite general, and, since as I have said the words “in like manner” do not govern it, there is no warrant for importing into it the words “named therein.” It has, I think, just the meaning of “anywhere” or (more correctly perhaps) “any whither.”

That being so, the words of the second paragraph by themselves, I hold, give power to the Governor to issue such a proclamation as that of December, 1917, that is without naming therein any country or place to which exportation of any article may be forbidden. And I think, though it is not necessary for the purposes of this appeal so to decide, that the second part of the section is in effect a reproduction of the provisions of the Act of August 1914 and thus as much an amendment by implication of the 1884 Ordinance as that Act was an express amendment of the 1879 Act.

As to the opportunity given by the proclamation to a person of obtaining exemption from universal prohibition, it does not, as contended for the appellant, involve any delegation of the Governor’s power. His Excellency alone has the power to prohibit and alone has exercised it, but he has combined with that exercise an intimation that his prohibition will be raised if a special permit to export be obtained from the Comptroller of Customs. And the Governor needs no sanction of the legislature for making concessions in, or abating the stringency of, the exercise of an unfettered discretionary power vested in him in Executive Council by that body. The only condition attached to its exercise is that it shall be by the advice and with the consent of the Executive Council.

The contention that the proclamation was ultra vires out of the way there was ample evidence before the magistrate to sup-

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port his findings that the appellant exported certain goods, some of which, at any rate, are foodstuffs from British Guiana without a special permit from the Comptroller of Customs.

The appeal is dismissed with costs.

Appeal dismissed. Conviction affirmed.

F. J. BANKART & CO. v. BOARD OF ASSESSMENT.

[282 OF 1919.]

1919. SEPTEMBER 11, 16. BEFORE DALTON, ACTG. C.J.

Revenue—Excess Profits Tax—Business carried on in more than one place with different partners—Method of assessment—Right to set profits in one business against losses in the other—Deductions permissible in arriving at profits—Tax paid in previous accounting period—The Tax on Excess Profits Ordinance, 1919, s. 12, and Schedule II. ss, 2 (f), and 4.

Appeal in chambers from a decision of the Board of Assessment under the provisions of section 16 of Ordinance 1 of 1919 (The Tax on Excess Profits Ordinance, 1919). The nature and method of the assessment made and the reasons for appeal sufficiently appear from the judgment.

H. C. Humphrys, for the appellant firm.

J. A. King, Crown Solicitor, for the respondent Board.

DALTON, ACTG, C.J.: This is an appeal from an assessment of the Board under the provisions of Ordinance 1 of 1919 (The Tax on Excess Profits Ordinance). Appellant is the firm of F. J. Bankart & Co. of which the sole partner is William Wickham Brassington.

Mr. Brassington sent in to the Board two returns for the period for which duty had to be assessed, one the return for the firm F. J. Bankart & Co., and the other a return for "Murray and Brassington," described by the appellant Brassington as "my rice business which was conducted separately in partnership with Mr. H. E. Murray."

These returns were dealt with separately by the Board, First of all, the duty payable by the firm F. J. Bankart & Co. was assessed. Then, the partnership of Murray and Brassington showing a loss, the Board certified that no duty was payable in respect of that particular business. Half of that loss appellant says is a loss incurred by him in his capacity as sole partner in Bankart & Co. Although, in his return for Bankart & Co., in estimating the profit of that business, he did not deduct this loss, the appellant now says the Board should have done so and in fact refused to allow him to amend his return after he had sent it in. He urges that the Board in error excluded from their consideration in arriving at the profit made by him trading as

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F. J. Bankart & Co. the loss incurred in the partnership of Murray and Brassington, and did not set the amount off against a similar amount of profit in the first named business, although that loss was in fact paid by him as sole partner in the first named business.

The method of assessment upon which the Board proceeded is laid down in section 12 of the ordinance. "If a person carries on business in more than one place the assessment may be made on the aggregate, provided that in the case of partnerships the partners are the same in each place of business." The rice business in question was not carried on in Georgetown alone, although apparently in fact it was conducted on the premises of Bankart & Co. in Georgetown. There is no question, however, that the partners in the two businesses were not the same. Therefore, in accordance with the ordinance, the assessments were not made on the aggregate but separately. The ordinance in express terms gives no right of set off, as for example in the case of a loss by one business and a profit in the other. As was pointed out during the hearing in England, in the case of income tax, where the duty is charged in respect of any annual profits or gains it is specially enacted that persons carrying on two or more concerns may set the loss sustained in one against the profits acquired in the other (5 and 6 Vict., c. 35, section 101). The local ordinance, however, is silent as to any such right. Mr. Humphrys strongly urged that the ordinance is one to provide a tax on profits, and is one taxing businesses as opposed to individuals, that the loss incurred by the appellant in the partnership with Mr. Murray in its results so far as his half of the loss was concerned was one which fell upon him trading as Bankart & Co., and therefore it was an amount which must be taken into account in arriving at the profits of Bankart & Co. In reply to me he was even prepared to hold that had Murray and Brassington made a profit which was separately assessed for duty by the board, it would have been the appellant's duty to also bring that profit into Bankart & Co's., return for further assessment in respect of the profits of that business. I cannot agree with him. The meaning of the latter part of section 12 which I have quoted is clear. The businesses must be separately assessed, if the partners are not the same. The right of set off is not given. That right when given, it is clear from the case of *Wakefield Rural District Council v. Hall* (1912 3. K.B. 328), is strictly limited by the terms within which it is granted. It was there sought to extend the right granted by section 101 of the Income Tax Act, 1842 (5 and 6 Vict, c. 35) to other than certain trade concerns specially mentioned. Again, in the case of *Grove v. Young Men's Christian Association* (88 L.T. 696), when the Association sought to

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set off losses in one branch against profits in a restaurant open to the public and carried on by it on commercial lines the court held that it was not such a "trade concern" as to entitle it to the right of set off given by section 101 above mentioned,

The action of the Board was in conformity with the law, and they were right in making separate assessments and allowing no set off as the appellant sought to obtain.

The second matter arising for consideration on this appeal is one of deductions allowable for the purpose of arriving at the profits.

In the previous accounting period, the year 1917, the firm of F. J. Bankart & Co. was assessed for duty in a certain sum. That assessment was made under the then ordinance in force, No. 2 of 1918, In the firm's return for the present accounting period, the year 1918, the sum so assessed has been deducted in arriving at the amount of the profits liable for duty, This deduction the Board has not allowed on the ground that it is an appropriation of part of the profits of the preceding year, and is not an expense incidental to the earnings of the profits in the accounting period in which it is charged.

There is no doubt that the deduction could not have been made in the previous accounting period since it is expressly forbidden in Ordinance 2 of 1918, (Schedule I, "Profits," section 4). That ordinance however is repealed and replaced by Ordinance 1 of 1919. The same section 4 forbids the deduction of the tax payable under, the latter ordinance, but does not mention the tax paid under the first ordinance. It is probably an omission, but however that may be the law must be interpreted as it stands, Mr. Humphrys urges that as this particular tax or duty assessed under the earlier ordinance referred to is not mentioned now in section 4, it is a deduction that is now permissible.

The ordinance of 1919 sets cut however those deductions that can be made, and I am asked by appellant to say that the tax for the previous accounting period comes within section 2 (f.) of Schedule I. "Profits."

This sub-section is as follows:—

- "2. In arriving at the profits, deductions shall be allowed for—
- (f) other disbursements or expenses incurred solely and. exclusively for the purposes of the business and which the Board consider to be reasonably and properly attributable to the accounting period."

If the deduction was permissible at all it would seem to me to be one proper for the accounting period in and for which the duty is assessed, that is, for the year 1917. That was, however, forbidden by the ordinance (1 of 1908) under which the assess-

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ment was made. I am quite unable to agree with appellant that the Board was wrong when they held that the deduction could not be reasonably and properly attributable to the accounting period next after that period for which the duty was payable. The interpretation I give to the sub-section is that which the Board has given, and I hold that the deduction sought cannot now be made. As was pointed out at the hearing, the Board allowed the deduction as a deduction from capital under section 5, Schedule I., "Capital." It is in my opinion not a deduction that the ordinance allows to be made for the purpose of arriving at the profits.

On both points then the appeal fails and the decision of the Board is confirmed with costs.

In re SULLIVAN, in re ESTATE CADOGAN.

1919. SEPTEMBER 24. BEFORE DALTON, ACTING C.J.

Mortgage—Intestate succession—Mother and sisters of deceased surviving—Illegitimate issue—Act of adiation by mother and sisters of deceased—Mother sole heiress of deceased child—New Aasdoms Law 1699.

Prior to the coming into force of the Civil Law of British Guiana Ordinance 1916 on January 1st 1917 a mother of illegitimate children, on the death of a child intestate without issue, takes as heiress of such deceased child in preference to any brothers or sisters of such deceased child, the provisions of the New Aasdoms Law 1699 applying.

Mortgage: No. 4 of September 6th, 1919.

Martha Sullivan sought to mortgage a property as the sole heiress of her deceased son Frederick Cadogan. She had previously in 1900 executed an act of adiation of his estate together with his surviving sisters, and had also previously with them executed a mortgage over the same property. Having done so it is questioned whether she could now pass a mortgage as she sought to do.

DALTON, Acting C.J.: In this matter Martha Sullivan seeks to mortgage a property which she claims to have acquired as the sole heiress of her son, Frederick Cromwell Cadogan. Cadogan died in 1900 intestate, the owner by transport of lot 96, Alberttown. He was never married. He left his mother and two sisters. His mother was never married, her children being illegitimate.

In 1900, the mother and sisters executed a formal act of adiation as heirs of Cadogan, and in 1902 again as such heirs, the three executed a mortgage passed in due form of law, mortgaging lot 96 to the Building Society. That mortgage has since

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been cancelled. A further mortgage over the same property has now come before me to be passed by the mother alone as *sole* heiress of her deceased son. I caused enquiry to be made as to how her position had altered since the first mortgage has been passed in 1902, the two sisters of deceased being still alive. It is presented to me that an error was made in allowing the sisters to join in the mortgage, as they were not the heirs of their brother, since his mother was still alive. On the principle that “a mother makes no bastard,” which principle was part of the law of this Colony up to the end of the year 1916, brothers and sisters of the same mother are entitled to succeed to each other as heirs *ab intestato*. This was decided in the case of *Magamat Jassiem & ors. v. The Master*. (8 S.C. 259), which was approved in *In re Russo* (13, S.C. 185.). But here the mother still survives, whereas in the first case mentioned above she was dead when the matter came before the Court.

The law of intestate succession for Demerara and Essequibo, prior to 1917 is laid down in the Political Ordinance of December 18th 1699 (New Aasdoms Law). The underlying rule of the Aasdoms law was that ‘the nearest blood inherits the goods,’ and though the New Aasdoms law differs in several respects from the Aasdoms law, this principle as a general rule still holds good. The children being illegitimate, the question of survival or otherwise of the father does not require consideration, If the mother of illegitimate children survives one of her children, as regards inheritance she will, in the absence of descendants, therefore take in preference to the brothers and sisters of the deceased, and will not share with them. The position cannot be treated as one in which One parent only survives. In law then the mother is the sole heiress of her deceased son Frederick Cadogan.

By the joint act of adiation however, and also by the mortgage passed in 1902 she has recognised certain rights in her other children. Can she now depart from the position she formerly assumed, and pass this mortgage by herself alone? Without deciding any other question as to the rights between the parties, I think she cannot.

The mortgage should therefore be passed by the mother and the two daughters who are willing to join. Should the latter have acquired any rights to the property the mortgagee will be secured. Should they have no rights their joining in the mortgage will have done no harm.

OLYMPIC THEATRES LTD., v. BD. OF ASSESSMENT.
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 [225 OF 1919.]

1919. AUGUST 27, SEPTEMBER 9, 13. BEFORE DALTON, ACTG. C.J.

Revenue—Excess Profits Tax—Acquisition of business by new company—Estimate of capital—Assessment of business—Value of the consideration paid—Discretion of Board—Right of appeal—Tax on Excess Profits Ordinance, 1919, ss. 14 (1), 16, and Schedule I, s. 7—Power of appeal tribunal to hear evidence or remit matter back to Board.

Appeal in chambers from assessments made by the Board of Assessment, under the provisions of the Tax on Excess Profits Ordinance, 1919, s. 16. (Ordinance 1 of 1919).

The assessment made and the reasons for appeal sufficiently appear from the judgment of the court.

H. C. Humphrys, for the appellant company.

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

Objection was taken that the assessment made being one within the absolute discretion of the Board, no appeal lies to a judge under the ordinance. After argument decision was reserved.

SEPTEMBER 9TH.

DALTON, Actg. C.J. This is an appeal from an assessment for excess profits tax by the Board of Assessment, under the provisions of Ordinance 1 of 1919 (The Tax on Excess Profits Ordinance). On the return of capital made by the company the board, under the provisions of s. 14 (1) of the ordinance, assessed 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. From the assessment based on that estimate the company has appealed, and objection is taken on behalf of the board that, this particular matter being one within their absolute discretion, no appeal lies to a judge.

The section of the ordinance under which the board acted is as follows:

14—(1) In case of the alteration of the capital of the company or of the acquisition of a business by a new company or by an individual at any date subsequent to January 1st, 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.

The section giving a right of appeal is as follows:

16—(1) Any person assessed may appeal to a judge in chambers against any decision of the board within fifteen days of the date of any decision

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- (5.) The onus of proving that the assessment complained of or any part thereof is wrong, shall be on the business assessed.
- (6.) The judge shall determine the true and proper amount of the tax, notwithstanding any error or omission in connection with the making of any assessment.

It is argued in support of the objection, that as the ordinance gives power to the board to assess on the basis of its estimate of the actual capital employed independently of actual purchase price, if the board does so act, no appeal lies from its assessment. In other words, the law gives an absolute discretion to the board, and if it has exercised that discretion no appeal can be made under sect. 16. It seems to me that all that the sub-section does is to give the board a discretion as to the method they may adopt in arriving at their assessment. If they choose to take the course permitted by the section, then no appeal will lie that they should have taken some other course. But that does not extend to the assessment they make, as a result of adopting that course. The very next sub-section contains a very clear example of this discretion vested in the board.

- 14—(2.) In the case of a company or body corporate whose directors have a controlling interest, the board may, if they think fit for the purpose of the determination and computation of profits, treat the company or body corporate and the directors or any of them as if they were partners in the firm.

Here an absolute discretion is vested in the board, and if that discretion is exercised, no appeal will lie.

And there are other occasions on which the board is vested with a similar discretion, as appears from the authorities cited by the Crown Solicitor (*Rex v. Inland Revenue Commissioners*, 118 L.T. 162, and *Williamson Film Printing Company, Ltd. v. Commissioners of Inland Revenue*, 119 L.T. 374). But I do not agree that the latter case supports his objection as regards the discretion of the board under s. 14 (1.). That was an appeal from a refusal of the commissioners to direct a greater reduction in respect of a managing director's remuneration than the sum allowed for that purpose in the last pre-war trade year. The decision of the commissioners was given under clause 5, 4th schedule, pt. I. of the Finance Act (No. 2) of 1915, which is practically the same so far as this point is concerned as clause 5, 2nd schedule, of our ordinance, 1 of 1919. That clause is as follows:

- (5.) Any deductions alleged for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not, unless the Commissioners

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of Inland Revenue, [*and in this colony, the board*], owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct, exceed the sums

The appellants wanted a deduction in excess of the deduction allowed in the last pre-war trade year, and the court held that the clause allowed an absolute discretion to the commissioners. It is a definite prohibition against the allowance of any deduction of the kind referred to unless the commissioners (and here, the board) direct the deduction, and the discretion of the commissioners is absolute and unappealable.

But that authority does not apply under the circumstances of the appeal before me, and there is no such discretion in the board in respect of any assessment made under the provisions of sect. 14 (1.) of the ordinance. There is the same right of appeal in respect of an assessment made under this section, as under other sections in the ordinance, and to hold that there is no appeal from an assessment made under s. 14 (1) (although I am quite satisfied that the wording does not support that contention) would practically extinguish any right to appeal under the earlier sections.

The objection is therefore dismissed and the appeal must continue.

In their return of capital the appellants valued the Gaiety theatre at \$31,000, and the Olympic theatre at \$14,000. The Board assessed the business on the estimates of \$20,515, and \$9,900 respectively. Their reason for the estimate of \$20,515 is that it is the price for which Mr. Humphrey, the promoter of the appellant company, purchased the premises at public auction. This purchase was made from the liquidator of a previous company about a month before the new company, *i.e.*, the appellants, purchased the premises from Mr. Humphrey. They say they paid him \$31,000 for the premises, which cost \$35,838.53 to build in the year 1917.

As regards the Olympic theatre, the board allowed \$9,900 as capital. That figure is arrived at as being the figure at which Mr. Humphrey included these premises in his return for the year 1917, when a statutory declaration was made that this figure represented the cost price of the premises. The appellants say they purchased the premises from Mr. Humphrey for \$14,000, which is a fair estimate of the capital employed.

It has been stated, with respect to the figures \$31,000, and \$9,900, that those sums were not paid to Mr. Humphrey in cash. Under the head "Capital," schedule 1, clause 7 of the ordinance, it is provided that where any asset has been paid for otherwise

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than in cash, the cost price of that asset shall be taken to be the value of the consideration at the time the asset was acquired. It would seem therefore that the board should have directed their enquiry to the value of the consideration paid to Mr. Humphrey by the company, and not based their estimate solely on some previous transaction to which the appellant company was not a party. I say "solely." because I agree that the Board should not shut out from their consideration other transactions which may assist them in arriving at their estimate, but here it was their first duty to ascertain the value of the consideration in terms of the clause quoted.

The appeal in respect of the third item \$143.31 is withdrawn. It is clear that that sum, representing part of the preliminary expenses in connection with the formation of the company, cannot be deducted from the profits.

The first objection taken being dismissed the matter was further argued after the Court had decided that further evidence was necessary to enable the true and proper amount of the tax to be arrived at.

J. A. King, for the Board, objected that no power was given on appeal either to take further evidence or to remit the matter to the Board for that purpose.

H. C. Humphrys, for the appellant company.

SEPTEMBER 13TH.

DALTON, Acting C.J.: In order to say, whether or not the assessment made is correct and proper, further information then is required, as to the value of the consideration already mentioned. The Crown Solicitor now objects, however, on behalf of the Board, that I have no power either to remit the matter back to the Board to make further enquiry, nor have I power to take such evidence myself. If that contention is correct, a most unfortunate state of affairs arises as I can neither affirm the assessment made, nor can I determine the true and proper amount of the tax.

The appeal is, by s. 16 (1) of the Ordinance, to a judge in chambers, who "shall have jurisdiction to hear and determine all questions relating to any assessment under the Ordinance." It is also enacted that "such appeal shall be by summons and shall be heard *in camera* and in a summary way." No power is specifically given either to remit the matter back to the Board, nor to call evidence before the judge.

The first matter for comment is the use of the word "summons." In practice this has been taken to mean the "summons" or the "originating summons" known in English practice (Order LIV.) by which applications and proceedings at cham-

bers are made or instituted as the case may be. This practice is no part of the procedure of this court so far as it is authorised by rules of court, and hence its introduction in the ordinance may be unfortunate, but in any case the use of the word can but point out the means by which the appellant is to bring the appeal and the respondent before the court. It is quite impossible to read into the section the provisions of the English Rules of Court setting out the procedure on summons and stating how, in such proceedings, evidence may be produced. The mere use of the word "summons," cannot for instance import the provisions of the English rule (Order XXXVIII.), that upon any summons evidence may be given by affidavit, or a witness may be called for cross-examination.

That is one contention of the appellant. It is one with which I cannot agree. Such an amplification of the section by the addition of provisions set out in rules of court in England which are no part of the rules of court in this colony is one which the legislature could not possibly have contemplated.

It is further contended, however, that I have an inherent power to call witnesses if I require them. Although I cannot agree with the contention of the Crown Solicitor that, under the provisions of the ordinance, the judge is merely an arbitrator between the parties who come before him. it is quite clear that he has no inherent power to call witnesses. It was decided in the case of *Coulson v. Disborough* (1894 2 Q.B. 316) that at the trial of an action a judge has power to call and examine a witness who has not been called by either party. The right of calling evidence at all, however, in an action comes from statute and rule. In addition the decision in that case has been qualified by a decision of the Court of Appeal in *In re Enoch's Arbitration* (1910 1 K.B. 327) in which it was decided that neither a judge nor an umpire has any right to call a witness in a civil action without the consent of the parties. The provisions of s. 90 of the Evidence Ordinance, 1893 are wider than the terms of the judgment in the last named case, but it does not give a judge the power to call a witness where he has no power to take evidence. There is no inherent power in a judge as judge to take evidence. His powers in that respect are governed by ordinance and rules of court. The Court of Appeal has by rule of court (O. XLIII, r. 23) power to take evidence as in its original jurisdiction. In the case of appeals from magistrates, the court has, under the Magistrates' Decisions (Appeals) Ordinance, 1893, s. 29, power to take evidence or to refer the case back to the magistrate to take further evidence. In the case of appeals from a decision of the Commissioner of Lands and Mines under the Balata Ordinance, the law (Ord. 24, 1911, s. 24) gives the court

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to which appeal is made the powers of the court in its ordinary civil jurisdiction. And so in England in the case of income tax, if appeal is made to the commissioners against the assessment, the commissioners are by law given the power of examining upon oath any person whom they think able to give evidence respecting the assessment (5 & 6 Vict. c. 35, s. 125). In the same way, in the case of the excess profits tax, by s. 45 (5) of the Finance Act (No. 2), 1915, where an appeal against any assessment lies to the commissioners, the latter are given the power, if they think fit, to summon witnesses and examine them upon oath. Appeals to the High Court are allowed on points of law only.

I must hold therefore that unless the enactment under which this appeal is made or some other enactment authorises me to take evidence or remit the matter back to the Board of Assessment, I have no power to do either the one thing or the other. There is clearly no authority to remit the matter back to the board, whilst the provisions of sub-section (6), that the judge shall determine the true and proper amount of the tax, must be read in conjunction with the foregoing sub-sections. I cannot find that any one of them authorises me to take evidence. All that I can consider is the record before me and the arguments thereon. I must therefore uphold the objections taken on behalf of the board. The result, as I have said, is most unfortunate for, whilst dismissing the appeal I am unable to confirm the assessment made by the board, nor can I, for want of sufficient powers, arrive at the true and proper amount of the tax. It is undoubtedly desirable that the appeal tribunal set up by the ordinance should have power both to remit the assessment back to the board and also have power (which possibly would be rarely exercised) to take evidence on oath. The position will doubtless be brought to the notice of the proper authorities for such action as may be considered necessary.

The appeal is therefore dismissed, with the result that the assessment made by the Board still stands. Whether the duty assessed is too high or too low, I am, as I have pointed out, unable to say. As a way out of the difficulty I can only suggest for the consideration of the parties that by consent and after further enquiry in the direction which I have referred to (but which I have no power to order) they come to a settlement on the disputed assessment.

The Board is entitled to costs.

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BOOKER BROS., MCCONNELL & CO., LTD. v. MOHUN.
ex parte HOOKUMCHAND.

[BERBICE, 41 of 1919].

1919. SEPTEMBER 6, 13. BEFORE DOUGLASS, Actg. J.

Insolvency—Receiving order—Marshal—Execution—Interpleader—Insolvency Ordinance, 1900, s. 42 (1)—Insolvency Ordinance, 1900, Amendment Ordinance, 1913, s. 13.

Under the provisions of section 42 (1) of the Insolvency Ordinance, 1900, as amended by section 13 of the Ordinance No. 16 of 1913, though interpleader proceedings are pending when notice of a receiving order is served on the Marshal, he is bound, on being so served, to deliver the goods or their proceeds to the Official Receiver, and proceedings in the interpleader suit will be stayed.

Application in interpleader action.

An order was made on the *ex parte* application of Hookumchand, the claimant, that the claimant and the plaintiff in the action appear to state the nature and particulars of their respective claims to a building levied upon by the plaintiff as the property of the defendant Mohun. The order was made under the provisions of Order XLII. r. 5, of the Rules of Court.

Plaintiff now asked that all proceedings be stayed, on the ground that a receiving order had been made against the defendant.

H. C. Humphrys, for the plaintiff.

C. R. Browne, for the claimant.

DOUGLASS, Actg J.: This is a claim by way of interpleader by Christian Hookumchand to a building and rice mill taken in execution by Booker Bros., McConnell & Co., Ltd., on the 8th April under their judgment obtained against Mohun on the 4th March, 1919.

The matter now comes before the court on the order made the 23rd April, 1919, for the plaintiff and claimant to state the nature of their respective claims, and to decide what are the issues to be tried, and the plaintiff has made application to stay further proceedings on the interpleader and asks that the Registrar be directed to deliver the property so seized to the Official Receiver, on the ground that a receiving order was made against the defendant Mohun on the 14th June, 1919.

By section 42 (1) of the Insolvency Ordinance, 1900, as amended by section 13 of Ordinance No. 16 of 1913, "Where any property of a debtor is taken in execution and before the sale thereof . . . notice is served on the marshal that a receiving order has been made against the debtor the marshal or bailiff shall abstain from a sale thereof and on request deliver the property levied on . . . to the Official Receiver or Assignee."

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In re Harrison, ex parte the Sheriff of Essex (1893, 2 Q.B., 111 decided that under the similar section of the Bankruptcy) Act 1890 (53 & 54 Vic, c. 71, sec. 11, sub-sec. 1) although interpleader proceedings are pending when notice of a receiving order is served on the sheriff, he is bound, on being so served, to deliver the goods to the Official Receiver.

I was referred to the local case of *Smith Bros. & Co., Ltd., v. Bhagwandan, ex parte Gomes* (1918 L.R., B.G., 142) in support of the claimant's title to proceed with the interpleader action, but on referring to that case I find that it only decides that an interpleader action to decide the ownership of certain property is not a 'legal process' to be determined by the *presentation* of an insolvency petition, under the terms of section 9 (2) of the Insolvency Ordinance 1901. No reference was made in that case to section 42, and indeed could not be, as no receiving order had been made. Following the English decision and on the strict construction of sec. 42 (1) I stay all further proceedings on the interpleader application (and see section 60 of Insolvency Ordinance, 1900.)

I do not think it necessary or proper to make any further order for delivery as on the Official Receiver making the necessary demand to the Registrar, he will doubtless deliver the property as directed by the ordinance. I decide nothing as to costs.

RUPI v. HEYWOOD, *Ex parte* HALAMAN.

[87 OF 1918.]

1919. SEPTEMBER 22, 26. BEFORE DOUGLASS, ACTG. J.

Interpleader—Sale of goods—Promissory note given for advances to purchase materials—Sale of completed goods by purchaser to third party—Judgment obtained on promissory note for advances—Levy on said goods to satisfy judgment creditors' debt—Pledge—Lien of unpaid vendor—Equitable lien

Interpleader action. The plaintiff in the original action, Rupi, obtained judgment against the defendant Heywood for the sum of \$219 on a promissory note, and proceeded to levy on a cottage, alleged to be the property of Heywood, in satisfaction of his judgment. The cottage was claimed by Halaman who interpleaded. In the interpleader action the claimant was made the plaintiff, and the judgment creditor Rupi, the defendant. The further necessary facts are set out in the judgment.

H. C. Humphrys, for the claimant

M. J. C. de Freitas, for the judgment creditor.

DOUGLASS, Acting J.: The plaintiff Halaman is claiming a cottage and appurtenances erected on lot J., Vreed-en-Hoop,

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which has been taken in execution on 24th March, 1919, by Rupi, the judgment creditor, in the suit of Rupi v. C. Heywood.

It appears from the evidence that the cottage in question was built in 1915 on Rupi's land, and—except for the framework which belonged to Heywood—with Rupi's money on its completion it was proved that \$376 had been advanced for materials and labour, and on the 24th July, 1915, Heywood signed a promissory note for \$401 in favour of Rupi (to cover interest to 31st March, 1916), and went into possession. He let the cottage first of all to Fraser and afterwards to Blackett. Fraser paid his rent sometimes to Heywood and sometimes to Rupi at Heywood's request. Blackett has always paid his rent to Heywood until Halaman purchased the house, since then he has paid rent to him; the purchase by Halaman was completed on the 8th March, 1918. On the 25th March, 1918, the defendant sued Heywood for a balance of \$219 due on the said promissory note, obtained judgment for that amount on 3rd March, 1919, and on the 24th March levied on the cottage in question. On the 10th April Halaman filed a notice of his claim. The reply to the claim, dated 2nd May, 1919, is in the nature of a defence and alleges that the said Heywood was warned not to sell, and some day in February, 1918, arranged to pay the balance due on the promissory note; but in March Halaman informed him (Rupi) that the sale was not carried through; and Rupi also charged Heywood and Halaman with acting in fraud and collusion, It will be noted that nowhere does Rupi rely upon any claim to the cottage by way of security or lien or otherwise.

On the hearing of this interpleader learned counsel for the judgment creditor as a defence to the claim says that Heywood can only sell this cottage subject to the amount of the debt due to Rupi, as he was in the position of unpaid vendor and the property sold was subject to his lien, and he refers to the promissory note (exhibit D), the last paragraph of which states: "In security thereof I pledge my cottage erected on the land leased from him (*i.e.*, Rupi) until the said debt be paid"; in the alternative he urges that this is a case of equitable lien and for the court to administer the doctrine of equity (see Ord. No. 15 of 1916), and in support he refers to a great many cases on equitable lien.

There can be no vendor's lien in this case. The lien of an unpaid seller only exists when he or his agent is in possession of the goods (see secs. 42 and 43 of Ord. 26 of 1913). Next as to the suggested pledging of the cottage. Under English law delivery, actual or constructive, of the thing pledged is a necessary element in the making of a contract of pledge or pawn at common law.

In Roman-Dutch law, to the validity of a pledge, transfer of possession is essential, Van der Linden says: "In order that a

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pledge of movables may be valid not only as against the debtor himself but also as against third parties delivery of the property to the creditor to whom it is pledged is necessary," but Mr. Lee in his Introduction to Roman-Dutch law (p. 175) adds, "his words must not be taken to exclude the possibility of a mortgage of movables by notarial deed duly registered but unaccompanied by delivery;" the local case of *Exors, of Forshaw, re estate Watt* (1892 L. R. B. G., 116) may here be referred to.

And lastly, the defence of vendor's lien and pledge failing, is this a case for relief in applying the doctrine of equitable lien? Equitable lien is defined as "an equitable right conferred by law upon one man to a charge upon the real or personal property of another until certain specific claims have been satisfied." (Halsbury, Vol. XIX, p. 24).

Such a lien a vendor has and it binds not only the purchaser and his heirs and creditors, but also those who have acquired the legal interest for value with notice of non-payment of the purchase price. The lien is not as a rule lost by the vendor taking security for the purchase money in the form of a promissory note or bond, but the question depends entirely upon the intention of the parties as a fact ascertained from the evidence in each case.

I do not consider that this evidence shows a sale of the cottage by Rupi to Heywood but rather an advance of the money for his benefit, in which case no lien could arise, but even if the evidence supported a sale and purchase I doubt very much whether the original vendor Rupi could have had any equitable lien on the cottage after he had recovered judgment on the promissory note, a judgment obtained without any question of pledge or lien being raised by him; but, however that may be, he has fully and apparently willingly parted with any claim to equitable relief.

The sale to the claimant from beginning to end was carried through openly and, it may be said, in Rupi's presence, and had he retained the promissory note in his possession or obtained it after the deposit of \$5 had been paid, the evidence shows that he would have received payment in full at the office of the Immigration officer, In addition he informed the tenant of the cottage that it had been sold and he refused the offer of becoming the purchaser himself. He took no steps to stop the sale to Halaman and only started his suit for the balance due him after completion of the sale, and without mentioning it.

I declare the levy to be bad and give judgment for the plaintiff on his claim. There is not a particle of evidence showing fraud or collusion, and the charge should never have been made; such a charge is far too commonly thrown in without the slightest grounds, and I give the claimant \$30 in respect of the damages he claims, and costs.

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MAYNARD v. SCOTT.

[259 OF 1919.]

1919. OCTOBER 3. BEFORE DALTON, Acting C.J.

Criminal law—Indecent assault—Evidence—Statement of complaint to third party—Admissibility—Infant of six years—Competency to give sworn testimony—Corroboration—Evidence Ordinance, 1893, ss. 61 (3), s. 72.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist), who convicted the appellant Scott on a charge brought by the plaintiff Maynard of indecent assault.

The reasons of appeal are sufficiently set out in the judgment of the court.

H. C. Humphrys, for the appellant.

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

DALTON, Acting C.J.: The appellant was convicted on a charge of indecent assault and sentenced to six months' imprisonment with hard labour. He appeals on the grounds:

- (1) that there is no corroboration of the evidence of the complainant, a child of six years.
- (2) that illegal evidence was admitted, namely, the evidence of the child's mother as to the statement made to her by the child of the alleged acts of appellant.
- (3) that the complainant was under seven years of age and was put on oath, without sufficient enquiry by the magistrate as to her knowledge of the meaning of the oath.
- (4) that the verdict was altogether unwarranted by the evidence.

The charge was laid under section 29 of the Summary Conviction Offences Ordinance, 1893. Hence this is not a case in which, in strict law, corroboration of the evidence of any child given without oath is required. Section 61 (3) of the Evidence Ordinance, 1893, only refers to offences under section 28 of the Summary Conviction Offences Ordinance, 1893, although I do not see why mention of section 29 is omitted by the legislature. In practice a magistrate would doubtless hesitate to convict on a charge under section 29 on the unsworn uncorroborated testimony of a child.

In this case, however, the child was sworn. I must admit I should have some difficulty in being satisfied that any child of six years of age had proper and sufficient knowledge of the nature and obligation of an oath, and in practice it is not desirable that such children, or older children should be sworn at all, but the magistrate has power under section 72 of the Evi-

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dence Ordinance, 1893, to administer the oath to the child if he is satisfied the child is of competent understanding. There is no precise or fixed rule as to the time within which infants are excluded from giving evidence. Mental competency depends not upon age but upon understanding or intelligence. (*Rex v. Brasier*, 1 Leach C.C. 199.)

It is next urged that the admission of the statement of the complainant to her mother was wrong. It is quite clear from English authorities that the magistrate was correct in admitting the statement. When the child returned home crying, the mother asked what she was crying about and then the child related what she alleged appellant had done to her. The evidence of the mother giving the contents of that statement is admissible, not however as evidence of the facts alleged in the statement but as evidence corroborative of the testimony of the complainant. (See remarks of Ridley, J. in *Rex v. Osborne* 1905 K.B. 155.) This decision and the remarks of Ridley, J., were approved of by the Court of Criminal Appeal in *Rex v. Norcott* (116 L.T. 576), which went much further than the first named case.

The evidence against the appellant was first, that of the complainant. She describes the assault upon her. Her evidence is confirmed so far as the injuries are concerned by the doctor who examined her very shortly after the alleged incident. Then there is the evidence of the mother who speaks of the complaint her child made to her. Lastly, there is the evidence of the witness Austin who saw the appellant and the child together outside appellant's house, the appellant as he says affectionately putting his arm round the child's neck as he spoke to her.

The magistrate had the witnesses before him and was of course the best person to judge the value of the evidence. If he believed it, as he did, there is ample evidence on which to convict the appellant. The decision therefore is not one with which this court will interfere.

The appeal is dismissed and the conviction affirmed with costs.

Appeal dismissed. Conviction affirmed.

BOSTON v. JEGGESSAR.

BOSTON v. JEGGESSAR.

[315 OF 1919.]

1919. OCTOBER 31, NOVEMBER 4. BEFORE BERKELEY, ACTING C.J.

Criminal law—Magistrate's Court—Jurisdiction—Proof—Practice.

Where, in a case before a magistrate, it is alleged in the charge that an offence has been committed in the district within the jurisdiction of the Court, proof must be given by evidence that the offence was so committed. The magistrate cannot infer that he has jurisdiction without such proof.

It is a wrongful exercise of his discretionary power to call evidence of jurisdiction after the case for the prosecution is closed, and the objection has been taken.

Humphreys v. Crooks 1914 L.R. B.G 41 disapproved.

Appeal from a decision of the stipendiary magistrate of the West Coast judicial district (Mr. J. H. S. McCowan). The defendant Jeggessar was charged with larceny "on the 10th July, 1919, at Sisters in the West Coast judicial district," and was convicted. At the close of the case for the prosecution, objection was taken that the jurisdiction of the magistrate to try the case had not been proved. He held that he could infer jurisdiction, and also, if necessary recall a witness to prove it.

Defendant appealed on the following grounds:

- (1.) The magistrate's court had no jurisdiction as there was no evidence that the alleged offence was committed in the West Coast judicial district.
- (2.) The magistrate exceeded his jurisdiction by calling a witness to prove jurisdiction after the close of the case for the prosecution.
- (3.) It was incompetent for the magistrate to infer jurisdiction, or to prove it through the defence after the objection was taken.

J. S. McArthur, for the appellant.

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

BERKELEY, Acting C. J.: This appeal is from the decision of the police magistrate who convicted the appellant of larceny.

The reason of appeal is that there was no evidence as to jurisdiction.

The proceedings show that on the case for the prosecution being closed it was submitted in behalf of appellant that no jurisdiction was proved. The magistrate's note is "Overruled—infer jurisdiction"—and in the course of his decision he says, "I held that from the evidence I could infer jurisdiction."

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In *Humphreys v. Crooks* (1914 L. R. B. G. 41) it was held that proof of jurisdiction in the magistrate's court was not necessary either in civil or criminal matters. In that decision the learned Chief Justice dealt with several cases in which local judges from the time of Chalmers, C.J., in 1882 had taken the opposite view. I see no reason to change the opinion expressed by me—following the decision of previous judges—in *Girdharry v. Commissioner of Lands and Mines* (A.J. 16th April, 1912). Jurisdiction should be proved and not inferred—it is not necessarily proved by the use of the words “In the West Coast Judicial District” as suggested. It would be sufficient to say “in this district.” On the magistrate so ruling appellant went into the box and gave evidence. In answer to the magistrate he said “Sisters is west side of Demerara.” Magistrate adds “(points out where it is.)” It has been held that where at the close of the prosecution it is submitted that there is no case to answer and this submission is overruled, if the defence is entered on, a conviction may follow on evidence thereby adduced. The proper course is to take no further part in the trial. I doubt whether the words and act of appellant prove jurisdiction, and (if they do) as jurisdiction cannot be inferred, I think in view of the proviso attached to s. 9 (1) of the Magistrates' Decisions (Appeal) Ordinance (13 of 1893) the rule of law referred to above ought not to apply when the point involved is that of jurisdiction. (See *Girdharry v. Commissioner of Lands and Mines. Supra.*)

Appeal allowed with costs.

Appeal allowed. Conviction quashed.

[NOTE.—An appeal to the Full Court has been lodged in this case.]

BELMONTE v. CRAWFORD.

BELMONTE v. CRAWFORD.

[310 OF 1919.]

1919. NOVEMBER 6. BEFORE DALTON, J.

Criminal law—Unlawful possession of spirits—Facts constituting possession—Magistrate—Refusal to adjudicate—Mandamus—Right of appeal against rule absolute.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. J. H. McCowan), who on the complaint of the respondent Belmonte, an officer of Customs, convicted the appellant on a charge of having spirits unlawfully in his possession, contrary to the provisions of s. 93 (1.) Ordinance 1 of 1905 (The Spirits Ordinance) as amended.

The magistrate had refused to adjudicate in the matter on the ground that the complainant was not competent to bring the complaint. The matter came before the court in an application for a rule against the magistrate which was made absolute (a). Thereupon he convicted the appellant, who now appealed against the conviction.

The reasons of appeal are set out in the judgment of the court below.

S. L. Stafford, for the appellant.

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

DALTON, J.: The appellant was convicted on June 25th, for the unlawful possession of spirits. He appeals to this court on the following grounds:—

- (1). The case was tried and decided by a competent tribunal on April 19th.
- (2.) The magistrate exceeded his jurisdiction in that, after giving decision on April 19th dismissing the case, the appellant was re-arrested and convicted on June 24th, the former decision not being quashed or modified by any court of appeal.
- (3.) The decision is erroneous in point of law because it is not competent for the complainant to lay a complaint under Ordinance 1 of 1905 as amended by Ordinance 14 of 1911 in the matter.
- (4.) The decision is unwarranted by the evidence because it has not been proved that the spirits forming the subject matter of the complaint were in the possession of the appellant.

The Solicitor General objects that reasons 1 to 3 cannot be

(a) Reported at p. 79 above.

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argued in this appeal. It appears that the complaint was originally heard by the magistrate and dismissed on April 19th, on the ground that the proceedings were bad the complainant not being competent to bring the complaint. Application was thereupon made to the court by the complainant Belmonte calling upon the magistrate and the appellant to show cause why the magistrate should not adjudicate upon the complaint. The appellant appeared in person and the magistrate notified the court that he did not wish to be heard. As a result the order was made absolute on May 16th. No appeal was made against that order or judgment. It has been suggested that no appeal lies from such an order in this case, but with that suggestion I do not agree in view of the provisions of section 29 (1) of the Supreme Court Ordinance, 1915. However that may be, the order of May 16th still stands, Sir Charles Major, C.J., holding that the complainant was competent to lay the charge and make the complaint. As a result of the order the matter went before the magistrate again and, on June 25th, he convicted the appellant. In hearing the matter he was complying with the order of the Court, hence reasons (1) and (2) are not matters for argument on this appeal. The order or judgment further decided that the complainant was competent to lay a complaint as he has done. Hence reason (3) also is not matter for argument now before me. The objection of the solicitor general is therefore a good one.

There only remains reason (4), that there was not sufficient evidence that appellant ever had "possession" of the spirits. The spirits were found behind the boarding of the punt. The crew consisted of two men, of whom appellant was one. As soon as the spirits were found, the appellant decamped, together with the other defendant, who has not appealed. His counsel has cited the cases of *Meerza v. Harding* (A.J. Dec. 16th 1905) and *Edun v. Anderson* (A.J. Sept. 14th, 1906) as supporting his contention that there is not sufficient evidence of possession to support the conviction. The facts in those cases are however not on all fours with those here. Assuming that possession comprises a mental as well as a physical fact, I am quite satisfied that, on the facts proved before the magistrate, he was justified in finding possession in the appellant. It is not for me, as was urged by counsel, to deal with possibilities as to how the rum got there. There is sufficient evidence to support the finding of the magistrate and the appeal must therefore be dismissed with costs.

Appeal dismissed. Conviction affirmed.

BOSTON v. BALGOBIN & ANR.

BOSTON v. BALGOBIN & ANR.

[309 OF 1919.]

1919. OCTOBER 31, NOVEMBER 8. BEFORE BERKELEY ACTG. C.J.

Criminal law—Intoxicating liquor—Unlawful possession of spirits—Unlawful disposal of spirits to prevent seizure—The Spirits Ordinance, 1905, s. 93, s.s. 3, and s. 94—Search warrant—Officer taking oath to be named in warrant—The Police Ordinance, 1891, s. 69—Endorsement of warrant to other officer.

Appeal from a decision of the stipendiary magistrate (Mr. J. H. S. McCowan) of the West Coast judicial district. The appellants Balgobin and Bollers were charged on the complaint of Police Sergt. Boston with unlawfully throwing away spirits to prevent seizure, contrary to the provisions of section 94, Ordinance 1 of 1905.

The facts found to be proved by the magistrate were as follows:—the police were engaged searching for spirits on Plantation Wales on May 24th under duly issued search warrants. Balgobin's house was searched first and nothing found. They then proceeded to one Karamoola's house which was found to be locked. A constable was left at the front of the house, and the rest of the police went away. Some East Indians engaged the constable in talk and during this time the two defendants were seen to go behind the house and prise open the shutter. Bollers held up the window and Balgobin entered, emerging with about four small bottles and a large one in his arms. He went to the north of the range, broke the bottles, on which a strong smell of rum arises, and throws the larger bottle away after emptying its contents. On the police entering Karamoola's house later one small bottle of estate's distillery rum is found. The remains of the broken bottles are also produced in evidence.

The magistrate convicted the defendants who now appealed.

The reasons of appeal are stated in the judgment of the court.

J. S. McArthur, for the appellants.

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

BERKELEY, actg. C.J.: The appellants were convicted by the stipendiary magistrate of the West Coast judicial district for that they did unlawfully throw away spirits to prevent seizure thereof. On the oath of Police Constable Henry Cush, a search warrant was issued by a justice of the peace to Corporal Patterson to search the premises of Karamulla. The respondent who was a non-commissioned officer in the district nominated Police Constables West, Phillips and Iton to assist in

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the execution of the warrant, and the endorsement shows it was executed by the respondent himself.

The reasons of appeal are: (1) that the decision is erroneous in point of law and (2) that it is unwarranted by the evidence. As to the second reason there was evidence on which the magistrate could come to the conclusion that he did, and this Court therefore will not interfere with his finding on the facts. As to the first reason, both the magistrate and counsel for the appellants have dealt with the search warrant as issued under Ordinance No. 1 of 1905 (s. 93), and it is submitted by counsel that the offences created in section 94 only arise when the requirements of that section have been complied with, that in the present case there has been no such compliance, and that it follows therefore that as there was no authority to make a seizure there can be no conviction for throwing away spirits to prevent that seizure. I think the use of the word "such" in section 93 (3) shows that it was intended that the officer who took the oath should be named in the warrant as the officer authorised to search and to seize. In this case it is shown that the oath was made by Cush and the seizure effected by respondent. This, therefore, is not a compliance with the provisions of the ordinance, but under Ordinance No. 10 of 1891 (s. 69) the procedure adopted by the non-commissioned officer is provided for, and the evidence shows that respondent with two of the constables—nominated by him—was engaged in the search for, and seizure of spirits. On these facts I think that the seizure must be regarded as legal, but if the contrary view was adopted I am of opinion that the illegality of the warrant to seize cannot affect the conviction of the appellants (*Warner v. Fenton* A.J. 31.3.1905). It is true that in that case the intent charged was to prevent a search, but the two offences are under the same section (94) and I am unable so to distinguish between them as to find that a conviction can follow in one case and not in the other.

I have thus far dealt with the case as argued by counsel.

I am satisfied, however, that the search warrant was not issued under Ordinance No. 1 of 1905 but under Ordinance No. 12 of 1893. (The Summary Conviction Offences Procedure Ordinance.) The words actually used in the body of the warrant are to be found in section 10 (1) (b.) These words are "afford evidence as to the commission of a summary conviction offence." Under this search warrant—endorsed as already referred to—there was legally seized one pint of spirits, and the magistrate on the evidence finds that the quantity thrown away by the appellants was several bottles. This was done in order to prevent a seizure and renders appellants liable to conviction.

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Lastly, I am of opinion that the offences created by section 94 are specific offences unconnected with section 93. Section 93 deals only with spirits and section 94 refers to spirits in one subsection only i.e., (1) (c). While sub-section (3) specially provides that “any officer may arrest any person found committing an offence against *this* section.” It seems to me that the offence is proved when it is shown (1) that there has been a throwing away of spirits, and (2) that this was done in order to prevent or impede any search for or seizure of same.

Appeal dismissed with costs.

Appeal dismissed. Conviction affirmed.

NOTE.

[An appeal to the Full Court has been lodged in this case.]

JANSEN v. DOWNER.

[BERBICE. 21 OF 1919.]

1919. OCTOBER 27, NOVEMBER 15.

BEFORE DOUGLASS, ACTING J.

Principal and agent—Commission on sale of property—Sale effected by principal after negotiations by agent—Agent the efficient cause of the sale effected.

Appeal from a decision of the stipendiary magistrate of the Berbice judicial district (Mr. L. D. Cleare). Plaintiff Jansen claimed from the defendant Downer the sum of 100 for work journey and attendance done and performed as agent for the defendant, for the purpose of selling a property of the defendant and for commission and reward due from defendant to plaintiff in respect thereof.

The magistrate gave judgment for the plaintiff for the amount claimed and costs. From this decision defendant appealed. The reasons are fully set out in the judgment below.

J. A. Abbensetts, for the appellant.

J. Eleazer, solicitor, for the respondent.

DOUGLASS, Acting J.: In this case the plaintiff sued the defendant for \$100 commission and reward due in respect of the sale of the defendant's property situate at lot 12, New Amsterdam, and the learned magistrate gave judgment for the plaintiff with costs.

The grounds for appeal are that (1) the decision is erroneous in point of law, and (2) the decision is unwarranted by the evidence.

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Sub-heads (a) to (f) of (1) resolve themselves into the objections that there is want of proof of the facts necessary for the plaintiff to succeed in his claim, and that the connection between the purchaser of the property, Carrega and the plaintiff is too remote to entitle plaintiff to claim commission on the sale.

Sub-head (b) states it was not proved that the plaintiff was the sole agent for the purpose of either selling or finding a purchaser; it is not necessary so to prove, as there may quite possibly be other agents, it is only necessary to prove that the plaintiff was the agent through whom the ultimate purchaser was introduced, and that the remuneration was fixed at \$100.

The offer of \$100 to the plaintiff if he found a purchaser is admitted, notwithstanding the letter from the defendant of the 25th March, 1919, and the other facts stated by the witnesses for the plaintiff must be accepted as correct since no contrary evidence is called by the defendant.

In *Bagot & Co. v. Ho-a-Hing* (L. J. May 14th, 1908) Hewick, J. has referred to various cases supporting the principle that if the relation of buyer and seller is actually brought about by the instrumentality of the agent he is in general entitled to his commission, and it is not necessary in order to entitle the plaintiff to payment of such commission or remuneration that he should complete the transaction, or even that he should be acting for the principal at the time of the completion thereof. (*Wilkinson v. Martin*, 1837, 8. C. & P. 1.).

With regard to objection (2) (d) and (f) that the plaintiff's services are too remotely connected with the actual sale to merit compensation, and that Carrega the eventual purchaser cannot be said to have been introduced by the plaintiff, the point to be decided seems to be, was the plaintiff the efficient cause of the transaction? In *Kynaston v. Nicholson* (1863. 8 L. T. 671) where plaintiff, a shipbuilder, introduced one of the defendants to another broker B. and through B. to another shipbroker C., and through C., defendant's ship was chartered, it was held it was for the jury to decide on the evidence whether commission was due under the circumstances. They found for the plaintiff, and the judge at the trial being not dissatisfied with the verdict the Court refused to set it aside. In *Burchell v. Gowrie and others* (1910 A. C. 614) Lord Atkinson held that if an agent brings a person into relationship with his principal as an intending purchaser the agent has done the most effective and possibly the most laborious part of his work, and if the principal takes advantage of that work behind the back of the agent, and unknown to him sells to the purchaser thus brought into touch with him on terms which the agent advised the principal not to accept the agent's act may still well be the cause of the sale.

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In the present case there is no question of the plaintiff employing Jardin as a sub-agent, for the purchase is for Jardin's benefit although in Carrega's name and the defendant was told so by Carrega; nowhere is it stated that Carrega negotiated or concluded the purchase on his own account. It is true that whilst the plaintiff says he offered the place to Jardin for \$5,000, Jardin states he did not tell him the figure, but he arranged with the defendant to buy it for \$4,000 and the probabilities are very strong that in discussing the property with the plaintiff a price was mentioned and that Jardin did say "price was too high."

I see no reason to say that the magistrate was not justified in his finding on the facts, and it is for him sitting as a jury to say whether or not the sale was brought about by the agency of the plaintiff, by his introduction or intervention. If no principle of law is transgressed the Court will not on appeal substitute its own views for those of the magistrate in respect of the evidence, but will consider whether the magistrate's finding of facts are reasonably sustained by the evidence.

I accordingly confirm the decision and dismiss the appeal with costs.

Appeal dismissed. Decision affirmed.

PETTY DEBT COURT, GEORGETOWN.

WALROND v. DE FREITAS.

DE FREITAS v. WALROND.

[178—10—1919.]

1919. OCTOBER 31, NOVEMBER 4, 20.

BEFORE DOUGLASS, ACTING J.

Immovable property—Contract of sale—Vendor and purchaser—Memorandum or note in writing—Statute of Frauds—Civil Law of British Guiana Ordinance, 1916, s. 3 (4) (e)—Forfeiture of deposit.

Claim by the plaintiff Walrond for the sum of \$100, money received by the defendant De Freitas for the use of plaintiff on June 3rd, 1919, being the deposit on the sale by defendant to plaintiff of the east half of a lot of land in D'Urban and Palm streets, Georgetown, which property it is alleged defendant agreed to transport to plaintiff, but which he had failed to do, as he had no title thereto.

In the second action the plaintiff De Freitas claimed from the

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defendant Walrond the sum of \$60, the balance of the purchase price of the half lot of land above mentioned, sold by him to Walrond on June 3rd, 1919.

By consent the two actions were heard together.

All further necessary facts appear from the judgment.

A. V. Crane, solicitor, for the plaintiff Walrond.

C. R. Browne, for the defendant De Freitas.

DOUGLASS, Acting J.: The result of these two cases depends upon the same evidence. In the first case the plaintiff is claiming \$100 from the defendant for money received by the defendant for the use of the plaintiff on the 3rd June, 1919. In the second case the plaintiff (the defendant in the first case) is claiming from the defendant (the plaintiff in the first case) the sum of \$60 balance of purchase money of east half of lot of land in D'Urban and Palm streets sold by the plaintiff to the defendant on the 3rd June, 1919.

It will be well to consider the main facts of the two cases which are for the most part not disputed, before dealing with the defences raised by each defendant respectively.

On the 21st February, 1919, Mr. DeFreitas purported to purchase from Mr. DaSilva Lopes, the executor of the estate of Vasconcellas, deceased, east ½ lot 41 D'Urban street, the property now in question, for the sum of \$2,760, paying the sum of \$100 as deposit, "rents to be the purchaser's from the 1st March." In pursuance of the agreement, transport was advertised by the British Guiana Building Society, Limited, who appear to have been the proper party to convey said lot (see 3rd publication Gazette 15th March 1919). Their approval of the agreement is signified by their endorsement on the receipt (exhibit A3) of the words "approved." On the 3rd June Mr. Walrond came with one Elder, a house agent, to the Park Hotel between 11-12 p.m. and after preliminary talk Mr. De Freitas agreed to sell the said lot, and received \$100 deposit from Mr. Walrond and gave him the receipt marked exhibit A1. The price named was \$2,820. That Mr. Walrond knew at that interview that Mr. De Freitas was an intended purchaser of the property from Mr. Da Silva Lopes there is not the slightest doubt. On the 7th June Elder received a sum of \$35 from Mr. De Freitas as commission on this sale, and Mr. Walrond agreed to pay \$10 commission (Exhibit D).

On the 5th or 6th June Mr. Lopes came to Mr. De Freitas' office, and said that he had already heard from Mr. Walrond that he had purchased the property from Mr. De Freitas, and Mr. De Freitas told him "yes, for \$2,820": and asked him to get the

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transport passed direct to Mr. Walrond and give him possession. Mr. Lopes and Mr. Walrond then went to the British Guiana Building Society, Limited, to arrange for the transport.

On the 13th June, two days before possession of the building on the property was to be given him by Mr. De Freitas, Mr. Waldrond called on him and asked for the keys, upon which Mr. De Freitas sent him on to Mr. Lopes.

The evidence of what occurred at that interview is contradictory, but a receipt was signed by Mr. Lopes (exhibit A2) for \$200 on account of deposit, and Mr. Lopes states he considered the f 100 already deposited by Mr. De Freitas as part of his intended sale price of \$2,760: leaving a balance of \$2,460 to be paid. No mention of the price is made on the receipt which states possession was to be given on the 1st July.

On the 7th August the usual affidavit leading to the transport was made by Mr. Lopes and the executrix of the estate of Vasconcellas—in which the purchase price is stated as being \$2,660: (see Exhibit B) and the property was eventually conveyed to Mr. Walrond by transport dated 10th September, 1919. (exhibit B 2).

It would be well here to note that if Mr. De Freitas intended to purchase from Mr. Lopes at \$2,760, it is most improbable that Mr. Lopes at Mr. De Freitas' request would sell to Mr. Walrond at a less sum, (see receipt 21.2.1919, exhibit A3), and that the affidavit in stating the purchase price at \$2,660 is, to take as lenient a view as possible, in error, Mr. Lopes having omitted to add (as he says by Mr. Walrond's instructions) the \$100 he received from Mr. De Freitas.

The defence raised by Mr. De Freitas was (1) that by the statement of the claim, title to immovable property is in question and consequently the jurisdiction of the magistrate is ousted, and (2) that it was agreed with the plaintiff to transfer the property direct to him from Mr. Lopes instead of through the plaintiff, and that the \$100 received was paid to Mr. Lopes as part of the purchase money.

The defence raised by Mr. Walrond was that (1) he never made any agreement for the purchase from Mr. De Freitas and (2) that no action can be taken on any such agreement as the Statute of Frauds was not complied with.

It is true that in the statement of claim Mr. Waldron questions the title of the defendant, but the evidence offered by him does not show that "the title to any immovable is or may be in question" (see section 3 (3) of the Petty Debts Recovery Ordinance 1893), and the claim might well have been simply for money received by the defendant for the use of the plaintiff, so that I hold that a magistrate has jurisdiction to hear the matter. The

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more serious question affecting both claims, whether any of the contracts referred to fall within the Statute of Frauds or rather within section 3 (4) of the Civil Law of British Guiana Ordinance 1916, must first be dealt with.

That section provides *inter alia* "That no action shall be brought whereby to charge any person upon (2) any contract or agreement for the sale . . . of immovable property or any interest in or concerning immovable property . . . unless the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged or some other person thereunto by him lawfully authorised." Before considering whether the contracts made complied with this section it may well be prefaced by the ruling arrived at in the case of *Cross v. Lord Nugent* that, whilst parole evidence is admissible to prove any subsequent verbal agreement rescinding or altering the terms of a written document, where the law requires writing to render the transaction in question enforceable such evidence cannot be given to alter the terms of such written document. Denman, C.J, said: "We think the object of the Statute of Frauds was to "exclude all oral evidence as to contracts for the sale of lands and that any "contract which is sought to be enforced must be proved in writing only." It may be stated as a general proposition from the numerous cases decided since the Statute of Frauds that all the essential terms of the contract must be included in the necessary memorandum, and are (1) the parties, (2) the property and (3) the price. Now unless the contract between the plaintiff Walrond and the defendant De Freitas has satisfied the said section 3 (4) (e) no evidence can be given of it, and the document put in as meeting the requirements of that section is the paper written marked A1 dated 3rd June, 1919. It reads as follows.

Georgetown, Demerara,
3rd June, 1919.

Received from J. R, Walrond the sum of one hundred dollars on account of two thousand eight hundred and twenty dollars being the purchase price in full for E ½ lot D'Urban and Palm streets with all the buildings and erections thereon. Transport fees half to be borne by the vendor and half by the purchaser. Possession of 2 storey building on 15th June.

M. J. C. DE FREITAS.

2c. stamp cancelled.

It will be noted that that document does not say who the purchaser is nor who the vendor is.

In *Potter v. Duffield* (L.R. 18 Eq. 4) real estate was put up for

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sale under particulars and conditions of sale which did not disclose the vendor's name, but stated B. was the auctioneer. The purchaser of one of the lots signed a memorandum acknowledging his purchase, and B. signed at the foot of the memorandum another in these terms "Confirmed on behalf of the vendor B." Held that the memorandum did not sufficiently show who the vendor was, and a bill for specific performance of the contract for sale was dismissed. In the course of his judgment Jessel M.R. says: "The statute will be satisfied if the parties are sufficiently described, so that their identify cannot be fairly disputed . . . I recently held (see *Sale v Lambert* L.R. 18 Eq: 1) that the description 'proprietor' would be sufficient, there being but one person who answered the description." And after stating that from the further evidence it appeared the defendant denied he was the vendor, and that one Polley was described as the owner in certain books produced, he continues: "I should be thrown on parole evidence to decide who sold the estate, who was the party to the contract, the Act requiring that to be in writing."

In *Thomas v. Brown* (1. Q.B.D. 714), which will be referred to more fully in connection with the payment of deposit on the purchase money, Mellor, J. in comparing the two cases of *Sale v. Lambert* and *Potter v. Duffield*, says: "I think we ought to hold ourselves bound by the last of these two cases, holding that the word 'vendor' is insufficient, though, as far as my judgment goes, I can see no distinction between the nature of the memorandum in either case. I think that no description ought to be held sufficient except where it identifies the party without the necessity of resorting to parole evidence," *Jarret v. Hunter* (34 Ch. D. 182) may next be referred to, Kay, J., in the course of his judgment says "Can the fact that the defendant knew who was the vendor make a contract which is invalid under the Statute of Frauds, because it does not name or sufficiently describe the vendor, into a valid contract in this respect? It is quite obvious that it cannot do so. To hold otherwise would in effect decide that a parole contract might be enforced if the party sued knew all the facts required by the statute to be in writing," (and see *Lovesy v. Salmon* 1916, 2 Ch. 233). *Dewar v. Mintoft* (1912, 2 K.B. 373) was a case in which the incorporation of other documents was in question, to satisfy the Statute of Frauds, but the head note also states "it is not sufficient, in order to constitute a memorandum of a contract for the sale of land within the meaning of sec, 4 of the Statute of Frauds that the name of the purchaser should merely be placed upon the memorandum without any description. It must appear from the memorandum that the name was that of the purchaser of the land."

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To apply these various decisions to the document marked exhibit A1 it is true that the names J. R. Walrond and M. J. C. De Freitas both appear on it, but no description of the capacity is given in which each appears except that the former pays the latter, who signs the receipt, the sum of \$100. Without extrinsic evidence how can the magistrate ascertain whether Walrond is an agent for, or the purchaser himself, or if De Freitas is the vendor. As a matter of fact the evidence discloses that he was not the vendor in effect. The same remarks hold good for the document marked A3. There again that the "estate of Vasconcellas" was not the vendor, is shown by the transport advertised in the Gazette of the 15th March. Neither of these documents comply with section 3 (4) (e) of the Civil Law of British Guiana Ordinance 1916, nor constitute a sufficient memorandum. I cannot ascertain the essential ingredients which would make the alleged contract clear without taking parol evidence and that it is the very purpose of the section to forbid. Since then these contracts could not be enforced either at law or in equity, how far does that affect a claim for the return of the deposit of a portion of the purchase money?

The head note to *Casson v. Roberts* (32 L. J. Ch. 105) states: "Where a deposit has been paid upon a parol agreement for the purchase of land, which is either abandoned or is incapable of being carried out, the purchaser is entitled to a return of the deposit." It may be noted that the agreement for the purchase in this case was by parole and consequently could not be enforced.

In *Depree v. Bedborough* (33 L.J., Ch. 134) which was a case where a purchaser having paid a deposit under certain conditions, of sale was adjudicated bankrupt and consequently unable to complete, Stuart V.C. in the course of his judgment said: "No case has been cited to show that in a case like this a person making a default has been held to be entitled to the security which he paid to prevent an abandonment of his contract . . . All I decide is, that the assignees of the bankrupt have no right whatever to the deposit." Both these cases were referred to in *Thomas v. Brown* where the plaintiff repudiated a contract for the purchase of a lease-hold on the ground (inter alia) that the contract did not disclose the name of the vendor, and brought an action to recover the deposit. It was held without deciding whether the memorandum was insufficient under the Statute of Frauds, that the plaintiff could not recover having chosen, knowing that the vendor's name did not appear on the memorandum, to pay the deposit and receive the abstract of title. Quain, J., stated that he did not think that the reasons upon which *Casson v. Roberts* proceeded were satisfactory. I may here refer to Chitty on Contracts (15th ed. p. 62). In

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citing *Sweet v. Lee* (3 M.G. 452) he says: "The mere fact of one party having paid money to another under contract which he cannot enforce against the latter because of its non-compliance with the Statute of Frauds will not entitle the party who has paid much money to recover the same as on a failure of consideration, for such contract is not void but there is merely a deficiency in the evidence thereof." The facts of the present case are peculiar; the evidence shows that Mr. De Freitas has never refused to do his part in securing the property in question to the purchaser, Mr. Walrond, that he had paid \$100 deposit to Mr. Lopes, and Mr. Walrond was fully informed of the various steps taken. Various acts were done which assumed that a contract existed and Mr. Walrond now desires to act as if there had been no contract, or a breach of it by Mr. De Freitas. He has got the property and now wished apparently to take advantage of what the evidence shows was a mis-statement in the affidavit leading to transport and which he must have known was a mis-statement. The receipts show that the payment of June 3rd, 1919, of \$100 was on account of \$2,820, the payment of the 21st February, 1919, of \$100 was on account of \$2,760. Mr. Walrond now says he expected to acquire the property for \$2,660. He has shown me no such default as would entitle him to recovery of the \$100 paid to Mr. De Freitas and it was paid under no mistake. I am of opinion that it was paid with a full knowledge of the facts, and under the circumstances it would be preposterous if the plaintiff could recover. I accordingly give judgment for the defendant Mr. De Freitas.

I think it will be evident from what I have said above that the claim of Mr. De Freitas for balance of the purchase money must also fail, since the contract he relies on does not comply with the terms of section 3 (4) (e), of the Civil Law of British Guiana Ordinance 1916.

I therefore non-suit his claim.

In re TRANSPORT, McLEOD TO JUGDEO.

In re TRANSPORT, McLEOD TO JUGDEO.

[No. 31 OF 15. 11. 1919.]

1919. NOVEMBER 22. BEFORE DALTON, J.

Immovable property—Transport—Will—Fideicommissum—Usufruct—Vesting of rights.

Transport sought to be passed by Elizabeth McLeod as the sole heiress, *ab intestato*, of her son John Thomas Clarke, deceased, of a lot of land (No. 19) at Vertrowen, Leguan, to Jugdeo. The lot in question was the property of Charles McDonald. The material parts of his will were as follows:

- (2.) I will and bequeath to my wife Elizabeth McDonald my properties, one known as Plantation Vertroowen to be hers during her life. After her death the properties I will and bequeath to my godson John Thomas Clarke (minor)

Clarke died before Elizabeth McDonald, unmarried and intestate, leaving his mother Elizabeth McLeod. He was the only child of his mother who was never married.

The Acting Registrar raised the question as to whether Mrs. McLeod had any interest in the property through her deceased son, and whether the transport could be passed by her.

DALTON, J.: The question here is whether a *fideicommissum* has been created, or whether the bequest to the wife is a legacy of a usufruct. After reading the will I have no doubt that the testator appointed his wife as heir of the property in question, burdening her with the *fideicommissum* in favour of his godson Clarke. In other words the property lot 19 is bequeathed to Mrs. McDonald with a trust over in favour of Clarke. There is no bequest to Clarke subject to a usufruct in favour of McDonald.

The right then to the property vests in McDonald on the death of the testator, she being the fiduciary heir. On her death the property would vest in Clarke the fideicommissary heir in accordance with the terms of the will constituting the *fideicommissum*. In this case, however, Clarke dies before McDonald, that is, before the arrival of the time fixed by the testator for the vesting of the property in him.

By this transport nevertheless the heir of Clarke seeks to convey the lot in question to Jugdeo.

A fideicommissum is determined by the death of the fideicommissary heir before the event happens on which his interest is to accrue, For that there is ample authority. (*De Geest v. De Geest*, 4 S.C. 95; *Van Dyk v. Van Dyk. & anr.* 7 S.C. 194;

In re TRANSPORT, McLEOD TO JUGDEO.

and *ex parte* *Woutersen*, 24 S.C. 116). The circumstances in the second mentioned case are not unlike those in this matter now before me. That being so, on the death of Clarke before McDonald the fideicommissum is determined, and McDonald became entitled to lot 19 free of the trust. The heir of Clarke has no right to deal with the property as she purports to do, I must therefore decline to allow the transport to be passed. A review of this refusal can, if the parties wish, be obtained under the provisions of the Rules of Court.

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[36 OF 1919.]

1919. NOVEMBER 19, 24. BEFORE DALTON, J.

Negligence—Pedestrian knocked down by horse and carriage—Carriage driven at excessive speed on grass parapet—Res ipsa loquitur—Contributory negligence.

Claim by the plaintiff for the sum of \$2,400 damages for personal injuries alleged to have been sustained by the plaintiff by the negligent driving of the defendant company's servant or servants.

All necessary facts and pleadings are sufficiently set out in the judgment.

E. G. Woolford, for the plaintiff.

M. J. C. de Freitas, for the defendant company.

DALTON, J.: Plaintiff claims from the defendant company the sum of \$2,400 damages and pecuniary compensation for personal injuries sustained by him on October 7th, 1918, and due to the alleged negligent driving of the defendant company's servant or servants.

The facts, not disputed, are that plaintiff was knocked clown in Upper Robb street, Georgetown, on the evening of the day in question by a carriage driven by an employee of the defendant company and received therefrom severe injuries. The plaintiff alleges that the carriage and horse were carelessly and negligently driven, as a result of which negligence the accident happened. The company on the other hand denies any negligence on the part of its servant but pleads that the accident was solely due to the negligence of plaintiff who did not look where he was going but "walked from or near the grass parapet . . . into the rear carriage," and so received his injuries. It is further pleaded that his sight was defective, and in the alternative that the damage incurred arose from inevitable accident.

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Counsel for defendant company has remarked upon certain allegations in the plaintiff's reply which are inconsistent with his statement of claim. It does not appear from the reply that the facts alleged therein are pleaded "alternatively." On reading the pleadings it was possible of course for such to be the case though improbable. The real reason for the inconsistency is, however, given by plaintiff's counsel as due to the low condition of the plaintiff who was unable for some time after the occurrence to give a collected account of how it had happened. In any case no embarrassment has been caused to the defendant company thereby in meeting the case of the plaintiff.

In respect of the defence that the accident was due to the negligence of plaintiff, the defence alleges that two carriages of the defendant company were being driven behind each other and at a safe distance from each other, and that the plaintiff suddenly and without looking in the direction in which he was going walked from or near the grass parapet on the northern side of the street into the rear carriage and was struck by the right front wheel of the carriage on to the grass parapet; that by the exercise of ordinary care and discretion he could have avoided the accident; and that his sight was defective.

There is little or no evidence led for the defence to support the major part of this defence. No evidence is led as to defective eyesight. None of the witnesses support the allegation that the carriages were being driven behind each other.

[After referring to the evidence, His Honour continues]: The question of contributory negligence next arises, and in considering that question the evidence led for both plaintiff and defendant must be considered. The maxim *res ipsa loquitur* has been referred to by plaintiff's counsel. The mere happening of an accident does not throw upon defendant the onus of disproving negligence. Some accidents, of course, may be of such a nature that negligence may be presumed from the mere fact of the accident, but under the circumstances here the onus is upon the plaintiff, if he is to succeed, to produce affirmative evidence of negligence on the part of the defendant or his employee. As was pointed out by counsel, in order that a plea of contributory negligence may succeed it must be shown that, though there was negligence on the part of the defendant, yet the plaintiff could have by ordinary care avoided the accident. In such a case, it is for the jury, or in this colony for the judge to say whether the plaintiff was in any way negligent—and if so whether it was his or the defendant's negligence which was the real direct and effective cause of the accident. What are the facts disclosed by the evidence?

[After further examination of the evidence, His Honour concludes]: My finding on the evidence is that, considering the fact

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that he was passing another vehicle and the darkness of the road, the groom was going at an excessive speed, failing to keep a proper look out for pedestrians or other occupants of the road; that to pass the first carriage he did drive upon the grass by the side of the road upon which in the ordinary course plaintiff would have been in safety (and that at a place where, according to one witness, there was sufficient room for three carriages to drive abreast); and that the sole and direct cause of the accident was the negligence of the defendant's groom.

The question of damages remains. From the doctor's evidence it is clear that plaintiff (who made no attempt to exaggerate anything so it appeared to me) suffered very severe injuries, and at one time his life was thought to be in danger. It is true also that, without in any way admitting liability for the accident, the defendant company at the time did all they could for him immediately after the accident, and paid part of his hospital account. He is a retired interpreter and 66 years of age, and is still suffering from the effects of the accident. The sum which appears to me to be under all the circumstances reasonable for the expense he has been put to, for the bodily pain and suffering caused to him, and for the injury to his health, I put at \$400.

There will, therefore, be judgment for the plaintiff for the sum of \$400 and costs.

GANGADIA v. BARRACOT.

[298 OF 1918.]

1919. NOVEMBER 26. BEFORE DALTON, J.

Immovable property—Sale at execution—Opposition—Sale of property not completed by transport—Levy by judgment creditor of seller—Entry of opposition by purchaser—Civil Law of British Guiana, Ordinance 1916, s. 3 (4) (c).

A purchase of immovable property not completed by transport is no bar to the claim of a judgment-creditor of the vendor to levy upon and sell such property to satisfy his debt.

Claim by the plaintiff for an order restraining the defendant Barracot from selling at execution lot 66, section G, and lot 22, section D, in Ann's Grove, and declaring the opposition entered to be just and well founded. The sum of \$50 was also claimed for the alleged wrongful levy. The property claimed was valued at \$110.

P. N. Browne, K.C., for *J. A. Luckhoo*, for the plaintiff.

E. A. W. Sampson, solicitor, for *A. B. Brown*, for the defendant.

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DALTON, J.: The plaintiff Gangadia has entered an opposition to the sale at execution by the defendant Barracot of two lots of land at Ann's Grove. Defendant levied on the lots to satisfy a judgment obtained by him against one Mohabir. Plaintiff alleges that the property in question was sold to her by Mohabir and three other persons alleged to be the heirs of their deceased father Ghunsam. It is admitted, however, that they never completed the sale (assuming there was a sale) by delivery, i. e. transport. Defendant's counsel therefore argues that in law the I claim discloses no cause of action. He cites as an authority the cause of *Persaud v. Nawole & anr*, (L.J. March 30th 1903) which was followed by Berkeley, J., in *Junkie v. Gangadin* (L.J. November 4th, 1908). At the time those cases were decided, and so long as the common law remain unchanged, it is quite clear that a purchase of immovable property, not completed by delivery *coram lege loci* (in this colony by formal transport before a judge), is insufficient to debar a judgment creditor of the vendor from having such property taken in execution and sold to satisfy his debt. Has the law on this point been changed by the Civil Law Ordinance of 1916, which introduced the English common law in place of Roman Dutch law?

Section 3 (4) (c) of that ordinance enacts *inter alia* that the title to immovable property shall not vest in any purchaser or other transferee or claimant unless or until the transfer has been registered in accordance with any rules or ordinance now or hereafter dealing with such registration. The rules now in force for obtaining the record of such a transfer by the Registrar are contained in Part II. Order II, of the Rules of Court 1900. They are the ordinary transport rules which were in force under the old common law, and when the two cases cited were decided. J There seems no doubt then that, although the old common law has been abrogated, it is still necessary for a sale to be completed by formal delivery (i.e. transport) to defeat a judgment creditor's claim to levy upon the property sold as the property of the vendor. And, it seems to me, that will still be the law after January 1st next, when the Deeds Registry Ordinance, 1919, which repeals the subsection of the Civil Law Ordinance I have referred to above, comes into force, if sections 11 and 20 be read together.

It follows then, without going into the question of whether the sale was a bona fide one, that the claim of the plaintiff does not in law disclose any right to oppose the sale. Counsel for plaintiff however argues that the evidence clearly shows that Mohabir only had a part interest in the land and never owned the whole of it. It is not questioned by defendant that Ghunsam the father of Mohabir, had title to the land. Letters of decree

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in his name for the lots in question were produced to the Court. The evidence that Ghunsam died intestate leaving four children including Mohabir was also not questioned by defendant. How then it is asked, can defendant seek to levy on the whole of the property as that of Mohabir? The difficulty is that the sole question before me is the right of Gangadia to oppose. My decision that she has no. right to oppose does not say that the defendant has a right to levy. So far as the evidence goes, it seems that his right to levy only extends to one fourth of the property upon which he has levied. In advertising the sale after these proceedings the Registrar (who in his capacity as Provost Marshal is agent of the person instructing him to levy and sell) will have to consider if, with this additional evidence rebutting the prima facie evidence set out in the affidavit alleging five years possession, he is justified in now advertising for sale more than one undivided fourth of the property in question. For any wrongful act caused to a third party he cannot of course free himself from liability by reference alone to the instructions of his principal. If, however, he decides he is justified in advertising for sale the whole property again it will then be open to any person interested to apply for an injunction (assuming opposition proceedings are not open to him) to have the sale stayed; or should the sale go through as it stands, the facts I have set out should be brought to the notice of the judge for his consideration when letters of decree or the equivalent title (after January 1st next) are sought by purchaser. As has been previously said levy and sale do not constitute a process of legerdemain which in some mysterious way makes a bad or defective title into a good title. They simply take out of the execution debtor such and no better right and title than was vested in him. (*In re Belmonte* 1892 L.R., B.G. 42; *Dos Santos v. Johnson* L.J. May 17th, 1901.)

Subject to these remarks, the opposition is declared bad and unfounded, and the claim is dismissed. Defendant is entitled to his costs.

HACK v. HOYTE.
 PETTY DEBT COURT, GEORGETOWN.

HACK v. HOYTE.

[39—11—1919.]

1919. NOVEMBER 19, 26. BEFORE DOUGLASS, Acting J.

Sale of goods—Prescription—Acknowledgment—The Prescription Ordinance, 1866, and the Prescription Ordinance, 1856, Amendment Ordinance (No. 7 of 1918).

Claim by the plaintiff Hack for the sum of \$9.22, balance of account for goods alleged to have been sold and delivered to defendant between the 10th and 16th days of August, 1916.

Prescription was pleaded by the defendant.

J. Gonsalves, solicitor, for plaintiff.

S. H. Stafford, for the defendant.

DOUGLASS, Actg. J.: This is a claim by the plaintiff against the defendant for \$9.22, balance of an account for goods sold and delivered between the 10th and 16th days of August, 1916.

The proceedings were filed on the 6th November, 1919, and the defendant has filed a plea of prescription.

It appears from the particulars that various sums of money were paid on account of the original debt of \$27.28, amounting to \$18.06 in all. The facts I understand are not in dispute. The Prescription Ordinance, 1856, section 6 enacts that “every action and suit . . . upon any account or book debt, or to recover any salary or the value of any goods sold and delivered shall be brought within three years next after the cause of action or suit has arisen,” and section 10 that “no term of prescription provided by this Ordinance may be waived or the right of action continued for any further period, whether there has been any part payment or not, unless such waiver or continuance is in writing” &c.

This latter section was repealed by Ordinance No. 27 of 1918, which became law, and so read as one with the Prescription Ordinance, 1856, on the 27th July, 1918, (see ordinance No. 18 of 1891, sec. 28), and the question arises how far such repeal affects case of acknowledgment or of part payment, The principle that the acknowledgment of the debt removed the bar of the statute arose not under statute law, but from various decisions that when there is a clear acknowledgment that the debt is due from the person giving the acknowledgment a promise to pay will be inferred, and payment of principal or interest on account is

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such an acknowledgment of the debt. (See *Bradfield v. Tupper* 21 L. J. Ex 6; *Fordham v. Wallis* 22 L. J. Ch. 548; *Morgan v. Rowlands* L. R. 7 Q. B. 493; and *Green v. Humphreys* L. R. 26 Ch. D. 474).

Blackstone in his Commentaries (Vol. 1, 71) says: "the decisions of Courts of Justice are the evidence of what is common law," and we may take it that since the Ordinance of 1918, the acknowledgment of a debt now takes the case out of the operation of the principal ordinance, since by the Civil Law B.G. Ordinance 1916, the common law of the colony shall be the common law of England," but it must be noted that Lord Tenterdan's Act (9 Geo iv. c. 14. section 1) requiring some writing for such acknowledgment is not applicable in this colony.

Learned counsel for the defendant objects, however, that the repeal of section 10 of the principal ordinance cannot affect the term of prescription that has already begun to run, and that consequently since the payments made on account of the debt previous to the 27th July, 1918, had no effect in stopping the operation of the ordinance under the law, the amending ordinance does not render such payments operative, and further, it cannot even affect payments made since the 26th July, 1918.

It has been said that the general rule of every civilized nation is expressed in the maxim "*Nova constitutio futuris formam imponere debet, non praeteritis*," any new law that is made affects future transactions not past, and section 28 of the Interpretation Ordinance, 1891, also provides for this (a). No alteration has, however, been made in the law of prescription, the same three years holds good in the present case, the only difference since the amending ordinance is in the proof now necessary to show that a defendant who pleads prescription has waived his privilege under section 6 (or as the case may be) of the principal ordinance. The principle of the doctrine of part payment is, as I have stated, an acknowledgment of the existence of the debt, and from it the law raises an implication of a promise to pay the residue.

It is evident that payments made before the 27th July 1918 would have had no effect towards taking the case out of the Ordinance as section 10 prescribed a writing to be necessary, but it is just as obvious that since that date as an acknowledgment in writing is no longer necessary payments made on account prevent pre-

(a.)—28. Where this ordinance or any ordinance passed after the commencement of this ordinance repeals any other enactment, then, unless the contrary intention appears, the repeal shall not

- (1)
- (2). Affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed, or
- (3). Affect any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed.

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scription running being effective under the common law. *DaSilva v. Newton* (1917, L.R.B.G. 56) was referred to by Mr. Stafford but the decision in that case was given before section 10 if the ordinance was repealed. Taking the period for prescription to run from either the 10th or 15th August, 1916, it would not be complete until the 10th or 15th August, 1919, respectively. On looking at the particulars I see there are two payments since the 27th July, 1918, one on the 16th August, 1918, and another on the 23rd September, 1919; had the last stood alone it might have been too late, but the payment of the 16th August, 1918—I understand it is admitted—was made two years after the cause of action arose and consequently is effective to bar the statute. I accordingly give judgment for the plaintiff for \$9.22 cents.

BARROW v. ANSWICK.

[BERBICE, 5 OF 1919.]

1919. FEBRUARY 28. BEFORE SIR CHARLES MAJOR, C.J.

Appeal—Motor car—Driving in a manner dangerous to the public—Suspension of certificate—Power of appeal court to increase penalty—Magistrates' Decisions (Appeals) Ordinance, 1893, s. 31.

Appeal from a decision of the stipendiary magistrate of the Berbice judicial district (Mr. C. H. E. Legge).

The defendant Answick was charged with driving a motor-car to the danger of the public. He was found guilty, and sentenced to pay a fine of \$30, in default to two months' imprisonment, and his certificate was suspended for twelve months from the date of conviction. In his reason for decision the Magistrate stated that the case was a serious one, and the offence might have terminated in a criminal charge of a far more serious nature.

From this decision defendant appealed on the ground that the evidence did not support the finding of the magistrate.

J. S. McArthur, for the appellant.

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

SIR CHARLES MAJOR, C.J.: There is no more reckless and dangerous driving than to drive round narrow blind corners debouching into the main street at a speed which prevents the car from being brought under control within sufficient time to prevent a collision. Drivers of motor-cars should approach blind corners debouching into main thoroughfares at such speed as to be able to bring the car under control at any moment. The impact between the cars took place in the middle of the street, and that shows that appellant was travelling at such a speed that he had no time to pull his car up within thirty feet, or to successfully clear the other car by swinging his car round. The evidence establishes a state of recklessness of which there can be no doubt, and the magistrate was perfectly right, and I do not propose to interfere either with the conviction or penalty imposed.

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Mr. McArthur: Will not Your Honour re-consider the cancelation of the certificate, which would deprive appellant of his means of livelihood for a year? This was the first occasion anything of the kind has happened to him.

On further consideration an order was made increasing the fine from \$30 to \$48, and the suspension of the appellant's certificate was removed on his entering into a recognisance in a similar sum to come up for judgment when called upon within one year, upon that part of the judgment which ordered suspension of his certificate.

Appeal dismissed. Judgment varied.

HO-A-LIM v. CHUNG SHEE.

[92 OF 1919].

1919. NOVEMBER 14, 27, DECEMBER 6.

BEFORE DALTON, J.

Executor—Claim for accounts—Duties of executor—Roman-Dutch Law—Inheritance Ordinance 1887—Deceased Persons Estates Ordinance 1909—Time for completeness of duties—Limitation of actions—Prescription Ordinance 1856, ss. 4, 5.

Action for accounts. Plaintiff Ho-a-Lim claimed as an heir under the will of his father. Under the will the defendant, who was the mother of the plaintiff, was appointed executrix and guardian of the minor children. All further necessary facts appear from the judgment.

S. E. Wills, for the plaintiff.

P. N. Browne, K.C., and *C. R. Browne* for the defendant.

DALTON, J.: The plaintiff, who is a son of the defendant, claims an order—

- (a) removing the defendant from her offices of executrix of the estate of Ho-a-Lim deceased and guardian of the minors, and the appointment of the Public Trustee in her place;
- (b) directing the defendant to deliver a full and complete inventory of the property, estate and effects of the said Ho-a-Lim;
- (c) that she give a full and true account of her dealings and intromissions with the said estate from the death of the testator to the date of the rendering of such account, and payment to the plaintiff of his share of the estate.

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At the commencement of the hearing counsel for plaintiff intimated that he did not intend to proceed with the request for an order so far as paragraph (a) was concerned.

The defence to the action is that a full and correct inventory has been filed, accounts have been duly approved of by plaintiff, he has been paid his share of the estate, and that his claim is now barred by the Prescription Ordinance, 1856.

The defendant was the wife of Ho-a-Lim who died in this colony on March 10th, 1907. He left a will which was proved in due form of law. By that will which dealt with testator's own half of the property (he was married to defendant in community of property) he left all his property to his children by defendant, of whom plaintiff was the eldest. He appointed his wife executrix and also guardian of his minor children. On March 27th, 1907, the executrix (defendant) complied with the provisions of the Estate Duty Ordinance, 1898, and filed with the Receiver General, then the proper officer, a declaration and inventory of what she said was a true statement of all the property of the deceased at the time of his death, in the usual form. It sets out the stock-in-trade of two shops, cash found, household goods, debts due by the deceased, and an apportionment of the residue amongst the heirs. The inventory shows the gross value of all the property to be \$2,677.36. After deduction of the wife's half in virtue of the community, and payment of debts (in all \$1,726.34), the sum of \$951.02 is shown to be due to the six children of the marriage. Whilst admitting all this, the sum total of plaintiff's case is that a sum of \$12,000 which testator had in his possession at the time of his death has not been accounted for by the executrix. She denies that she ever had it or that, so far as she is aware, her husband ever had it.

It is necessary, in view of the orders claimed, to briefly examine the position of an executor or executrix in law, as the law existed prior to the Deceased Persons Estates Ordinance, 1909. In addition to the requirement of the then common law are the requirements of the Inheritance Ordinance, 1887, which deals with the payment of debts and the making of an inventory. There is no provision in that ordinance, such as has existed since 1909, requiring an executor to file his accounts in the Registry. In respect of this part of defendant's duties then reference must be had to the common (Roman-Dutch) law. As has been stated by Sir Henry Juta it is only in the later Roman-Dutch law writers that mention is made of the powers and duties of an executor, and then is only very briefly. For certain purposes he was considered an agent appointed by the deceased, and exercised his powers under the control and supervision of

HO-A-LIM v. CHUNG SHEE.

the heirs (*In re Smith*, L.J., March 12th, 1904). None of the testator's estate vested in him, nor could he be held to represent the heirs in any action brought to contest their title. (*Elliboccus v. Yarally*, G. J., November 27th, 1906). His duty is to liquidate the estate. The estate is liquidated when it is reduced into possession, cleared of debts and other outgoings, and so left free for enjoyment by the heirs (*Hiddingh v. Dennyssen*; 12 A. C. at p. 638). This authority, a decision of the Privy Council on appeal from South Africa was followed in *in re Ferreira* (G. J., September 6th, 1907). The law as to the time within which the liquidation must be completed is also well settled. Prior to the ordinance of 1909 to which I have referred there was no arbitrary rule that a year, or a year and a day, should be taken as the ordinary reasonable time within which an executor should realise the estate and complete his duties. His duties terminate when the estate is liquidated and the balance handed over to the heirs, or to their guardian if the heirs are minors. The period occupied in performing his duties depend altogether on the state of the property and the circumstances of each case. (*Lawrence v. Lam-kin-poo*, A. J., March 19th, 1902, and *Hiddingh v. Dennyssen*, 12 A. C. at p. 631). In this case before me the estate being quite a small one and easily dealt with, consisting as it does entirely of movable property, six to twelve months would be ample time for the executrix to complete her duties as such. To determine whether she had done so, it is necessary to ascertain what the estate consisted of, and whether the sum of \$12,000 has been received, or should have been accounted for, by her.

[After an examination of the evidence His Honour proceeded:]

On the evidence led I find the inventory filed by the executrix was a correct statement of the deceased's property at the time of his death. It shows that a sum of \$951.02 was due to the six children. During their minority the defendant as guardian would retain their property, she as executrix paying over to herself as guardian the shares due to the minors. The minority in no way keeps open the liquidation of the estate. It is admitted that no formal accounts were filed (as the law now wisely requires of all executors). If a statutory requirement to file accounts had existed during the defendant's executorship, she would not have completed her duties as executrix until she had complied with that requirement. The case of *Dias v. Executors Rodriques* (1894 L. R. B. G., 53) referred to by Mr. Wills deals with executors who are still acting and in possession of the estate, not with one who has ceased to act. The facts in that case also materially differ from those now before me.

On the other hand I am satisfied that the defendant has, as the

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law then stood, accounted for all the property of the deceased set out in the inventory, that plaintiff was satisfied with the \$150 paid to him as his share of his father's estate and that she did all that was then required of her within a reasonable time of testator's death. Plaintiff does not question that the debts set out in the inventory were paid. He admits also the payment to himself of the sum of \$150, on the attainment of his majority. This I find was his interest in his father's estate and not as he alleges a lump sum for wages due from his father to himself for services performed during the lifetime of his father. For is there any evidence that the defendant continued the business of the testator, after his death; she had no right either from the will or elsewhere to do so (*In re Evans*, 1907 N.L.R. 1673). She carried on the businesses in her own name and for herself, having first of all done what was then necessary to inventorise and arrive at the property of the deceased at the time of his death.

No definite date has been given as to when she concluded her duties as executrix but on the evidence I come to the conclusion that at the most it was within twelve months of her husband's death. As I have said her duties as guardian must be distinguished from her duties as executrix. The plaintiff attained his majority in 1908. The writ in this action was issued on April 4th, 1919. By the Prescription Ordinance, 1856 it is enacted that any action or suit by a ward against his or her guardian must be brought within six years next after the time when such ward has attained his majority. It is further enacted that any suit against an executor for accounts shall be brought within four years next after the time when the executor has ceased to act in such capacity. Defendant ceased to act in that capacity about the year 1908, when also plaintiff attained his majority. Allowing six years from that date for him to bring his action, it follows that in 1919 his claim is prescribed. There will be judgment for the defendant with costs.

CANNON v. "THE ARGOSY" CO., LTD. AND ANR.

CANNON v. "THE ARGOSY" CO., LTD., AND ANR.

[130 OF 1918]

1919. NOVEMBER 24. DECEMBER 12.

BEFORE BERKELEY, ACTG. C.J., AND DOUGLASS, ACTG. J.

Libel—Plea of justification—Misdirection by trial judge as to law and facts—Meaning of 'graft.'

Appeal from a decision of Dalton, J. (a):

The plaintiff Cannon claimed the sum of \$10,000 as damages for libel against "The Argosy" Co., Ltd., the proprietors of a newspaper called "The Daily Argosy," and John Cunningham," the editor, printer and publisher of the said newspaper. All necessary facts are fully set out in the judgment already reported.

On a plea of justification, the trial judge gave judgment for the defendants, holding that the plea was fully substantiated. From that decision the plaintiff appealed. Seventeen grounds of appeal were set out, but only three were argued by appellant's counsel. They were as follows:

- (10.) The trial judge entirely misconstrued the effect in law of the contract between the Council and Thomas Flood dated January 3rd, 1917.
- (11) The trial judge erred in holding that the contractor Thomas Flood was bound under his contract dated January 3rd, 1917 to supply mules and carts to do the work which was done by the plaintiffs carts.
- (12.) The trial judge was wrong in holding that the plea of justification was proved either wholly or in part, and that it was untrue and proved to be untrue that plaintiff was in any sense convicted of 'graft.'

H. S. Cox, J. S. McArthur and H. C. Humphrys with him, for the appellant.

E. G. Woolford, for the respondents.

BERKELEY, Actg. C.J.: The plaintiff in this case appeals from a decision of Dalton, J., dismissing his action claiming damages for libel.

This libel which appeared in "The Daily Argosy" of 28th April, 1918, is set out at length in the judgment of the learned judge.

(a) Reported above at p. 81.

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The defendants pleaded justification, that is, that the words in their natural and ordinary meaning are true in substance and in fact.

Under O. XLIII. (r. 10) of the Rules of Court an appellant has to file in the office of the Registrar and serve upon every party affected by the appeal, a memorandum of his grounds for appeal. These grounds of appeal are seventeen in number and counsel has limited himself to three points arising thereunder. Under ground (10) it is submitted that no contract existed on 11th January, 1917, when it is stated in paragraph 7 of the defence, that the plaintiff procured an increase in the rate of pay for his carts from \$1.45 to \$2 per day. Objection is taken to this on the ground that the question of its existence is not raised under (10). The Court decided to hear the arguments and reserve decision. This reason of appeal reads "The learned Judge entirely misconstrued the effect in law of the contract between the Council and Mr. Thomas Flood dated 3rd January, 1917." In paragraph 4 of the defence a contract of that date is referred to, under which the contractor was bound to furnish mule carts not exceeding nine daily at \$1.45 each. It is clear that the point intended to be raised under this reason of appeal was the effect in law, that is the rights of the parties, under the contract (which counsel argued as his second ground of appeal) and not the existence of the contract on 11th January which, in the same ground of appeal is admitted by the use of the words "dated 3rd January, 1917." In fact this contract has been referred to by the witnesses including the plaintiff himself as the contract of 3rd January, 1917, and it is admitted that the question as to its existence on 11th January, 1917, is now raised for the first time. I uphold the objection taken by counsel for the defendants, I may add that in my opinion its existence or non-existence on that date cannot affect the merits of this case. The contract shows that it was signed by the contractor on 3rd January, 1917, and by the town clerk on behalf of the mayor (plaintiff) and Town Council on 15th of same month, but referring to the parties the contract says "who contracted and agreed with each other as follows, for the period commencing on the first day of January, 1917, and ending On the 31st day of December, 1919."

Plaintiff admits that both he and the contractor had been paid \$1.45 per day for each cart up to 31st December, 1916, and that at the end of 1916 he had asked for an increase which was given him by the town superintendent as from 1st January, 1917, while under the new contract the contractor was to continue to receive \$1.45 per day for each cart. The date is immaterial. The real question is, do not these admissions as to the increased rate under the circumstances set out tend to prove what has been termed by

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defendants as "graft" the definition of which by the learned judge has not been objected to on appeal?

The second point argued is the legal effect of the contract. Counsel submits that the contract provides seven different cart services, each service differing from any other, and that under the contract the contractor could not be called upon to cart earth required to fill up Queenstown ward.

What are the obligations imposed by clause 1 of the contract? These are (a) the furnishing of a certain number of carts not exceeding nine as may be required daily, (b) the capacity of each cart, that is, that it must be capable of containing 18 cwt. of broken stone. The use of the cart is not limited to broken stone and therefore it can be used for any purpose for which such a cart is ordinarily used. The medical officer of health under this clause can call on the contractor to furnish one or more of these carts. He would not require carts for the purpose of carrying broken stone and this shows that it was not intended to be thus limited.

The third and last ground of appeal argued by counsel is that the learned judge misdirected himself on the facts. The evidence on which these facts are found has been so exhaustively dealt with by him that it is unnecessary to do more than direct attention to them. This Court would not overrule the decision of a judge sitting without a jury unless it came to. The conclusion that on the facts the decision was wrong. I refer shortly to the findings of the special committee, as it is urged by counsel that this committee condemned the system and not the plaintiff whose carts were employed. This committee of the Council was appointed to enquire into and report upon

- (a) the terms and conditions under which the carts of the mayor are engaged daily by the council;
- (b) whether those terms are in the best interests of the council and whether the engagement of the mayor's carts has not operated in the past to the prejudice of the ratepayers;
- (c) whether the employment of the mayor's carts has not operated to the unduly lenient treatment of the municipal contractor.

In their report the committee found (*inter alia*) that in October or November, 1916, the employment of the plaintiff's carts began and that he was paid at the same rate (\$1.45) as the contractor and that they were so employed up to pay day of the week ending 4th January, 1917. That on the 8th January, 1917, plaintiff then having been elected mayor mentioned to the council the employment of his carts and the council offered no objection to their continued employment. That on the next pay day 11th January the rate of pay was increased to \$2, that this increase was not brought to

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the notice of the council on 8th January or afterwards. That it is not in the best interests of the ratepayers that the plaintiff's carts should be employed, and in this finding they rely not so much on the inferior service to which the evidence points but to the impropriety of the mayor of the city and the town superintendent or any other officer of the council, being placed in the position to conclude an arrangement between them (such as they have set out) with respect to the increase in the rate of payment for cartage without the knowledge of the council, the interest of the mayor being diametrically opposed to that of the ratepayers, that there was undue leniency in the treatment of the contractor and that it was in the interest of plaintiff that this treatment should continue, but they are not prepared to say that the mayor refrained from taking action because his carts were being employed and they recommended that the use of plaintiff's carts be discontinued forthwith and that the contractor be required in terms of his contract to supply any carts needed for the filling up of Queenstown Ward. This report was adopted by the council. The finding of the committee was a clear condemnation not only of the system but of the individual at whose instance an increase in the payment for his carts was effected in the circumstances set out which tended to undue leniency in the treatment of the contractor.

Special stress has been laid by counsel on the fact that on the report being adopted by the council Professor Harrison, a member of the special committee who signed the report, expressed the view that nothing adverse to the mayor was stated in the report and that the mayor had acted in the best interests of the council. Counsel further argues that the other members of the special committee by their silence endorsed the view of Professor Harrison.

There is nothing to warrant this latter suggestion. The report speaks for itself as to the finding of the committee. It is not ambiguous and must be taken to mean what it says. The minority report of the plaintiff as mayor shows that he re-regarded that report as adverse to himself and the mere fact that Professor Harrison after the adoption of the report signed by him, was disposed to take too charitable a view of plaintiff's conduct cannot be allowed to weigh with this court.

Appeal dismissed with costs.

DOUGLASS, Acting J.: Having had the advantage of reading the decision of the learned Chief Justice I may say that I fully concur in the observations made by Mm and the conclusion arrived at. I propose to confine myself to a few observations on the extent to which the grounds of appeal were dealt with and the evidence in support.

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These grounds are put forward in accordance with Order XLIII, r. 10, and are contained in seventeen paragraphs, but learned counsel for the appellant only directs the attention of this court to the first part of the first paragraph, and to paragraphs 2 and 10, paragraphs 11, 13 and 15 were also incidentally referred to in dealing with the construction of the contract of the 3rd January, 1917 (Ex. V.). The case for the appellant was opened by learned counsel stating he would show that on the 11th January, 1917—the date mentioned in the defence as being that on which the appellant induced the then town superintendent to increase the rate of pay for his carts—no contract with Flood, the contractor, existed, and that therefore the whole defence to the action failed. I do not agree with his contention and the contract referred to was in writing on the 3rd January though it had not been signed by both parties at that date, but apart from that the point was never taken before the learned judge in the first instance, nor is it embodied in the grounds of appeal; on the contrary, in paragraph 10 and other paragraphs the contract of the 3rd January, 1917, is relied on, and it is only the construction of that contract that can now be considered.

As the learned Chief Justice has dealt with the construction of this contract I will only add that any argument based on the question whether or not it applies only to places within the city boundaries is rendered needless as Mr. Woolford, the town clerk since July 1st, 1910, gives in evidence (p. 30) that the Thomas lands—whence the appellant obtained the material for filling in the Queenstown ward—formed part of the Kingston ward since 1898 up to 1918, and Kingston ward is part of the city.

I cannot find from the evidence at what date the appellant first took an active interest in municipal matters, but through the year 1916 he was a town councillor, and in December that year was elected mayor, for 1917, and re-elected in December, 1917, for 1918. He also states he was a member of a Finance committee before he was mayor, and familiar with passing of accounts and the procedure that obtained.

The foundation of the newspaper article complained of as libelous is undoubtedly the report of the special committee of the 18th February, 1918, a committee appointed on the defendant's motion made at a statutory meeting of the council held on the 14th day of January, and on his suggestion to the General Purposes committee on the 18th day of January, 1918. A synopsis of the report is very fairly set out in the judgment of the learned trial judge (folios 19 and 20), and I entirely agree with his construction of the substance of that report. Learned counsel for the appellant objects that the learned judge does not state fairly in paragraph 1 of his synopsis the finding of the

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special committee, and misconstrues the meaning of the words "under his contract." The said paragraph 1 is evidently condensed from paragraphs 5 and 6 of the report (Ex. Pl.) and it is true that the words "with the approval of the council" do not appear in the report but it may fairly be inferred that the employment of the appellant's carts with the approval of the council both from his own evidence, and from the fact that it was the town superintendent, an officer of the council, who employed them; and although "his contract" evidently refers to the contract for supply of carts previous to that of the 3rd January, 1917, the plaintiff gives in evidence (fol. 7) that he knew of its existence. This report as a whole was considered at the meeting of the General Purposes committee on the 20th February, 1918, and recommended for adoption, and on the 25th February, 1918, was adopted unanimously by the Town Council at their meeting on that date.

It is important in considering how far the grounds of appeal are supported by the evidence, to recall and collect the admissions made by the appellant himself in giving evidence, with reference specially to pars. 1 and 2 of the grounds of appeal. With reference to the increase in price for his carts, he says (fol. 9) "It is correct that I wrote to town superintendent at "end of 1916 *re* my inability to continue service at that rate *i.e.*, \$1.45. "Have no copy of the letter, would not consider it an important letter." "I wrote to him end of 1916 and said I could not continue for \$1.45. Town superintendent said that he would give me \$2 as from January 1st, 1917" and (fol. 16) "I got the increase due on the first week on the third week's "account. I got \$1.45 the first week through an error of the clerk." (Fol. 14) "My carts employed from time to time before September 1916. Not continuous work then. Paid by the load then." "I never said I would withdraw "my carts unless he paid me more, after I became mayor." Again with reference to the first statutory meeting on the 8th January, 1917. (Fol. 8) "I mentioned employment of carts to council." "Mentioned carts at end of meeting. No part of the agenda. The reporters had retired before that. Two "matters were mentioned, First matter was a threatened strike on behalf of "the employees. Asked reporters to retire before that." "Never told council at any time what rate I was getting for my carts until about February, 1918." With reference to the special votes for 1917, he says (fol. 9) "Not surprised to hear that over \$2,000 paid to me". . . . "I moved that \$1,000 "be provided on April, 1917, at request of town superintendent. On July "23rd moved for similar sums, and they were voted. I approved of votes." And (fol. 11)

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"I was aware that principal part of that expense was for my "carts. Never told the council so. No necessity." As to his relations with Flood (fol. 13) "As mayor knew Flood was contractor for carts. Knew number he had to supply "Knew he could not at times supply all the carts he should "do under the contract" (fol. 15). "I have signed several notes with Flood "since 1910. There are several transactions with Flood still current."

I have paid special consideration to the appellant's evidence because in his minority report (so-called) of the 21st February, 1918 he complained that neither he nor his servants were called upon or invited to give evidence, although Mr. Parker, a Town councillor and a member of the special committee, states that the appellant "was not in any way prevented from giving evidence or explanation. He said he would have nothing to do with the report." However that maybe, he has now had the opportunity by himself and witnesses of explaining his conduct, but with the advantage of having the evidence as a whole before me I am bound to say I consider that the report was fully justified. The objection taken in the last part of paragraph (1) of grounds of appeal, that the learned judge had not defined the term 'graft' has not been proceeded with, perhaps because the meaning may be found at the top of fol. 25 of his decision, a similar though somewhat modified meaning to that given by the appellant in paragraphs 4 and 5 of his statement of claim. I gather from the dictionary meaning that 'graft' is "taking advantage of public office or position of trust to obtain fees or profits on contracts or for one's own benefit or advantage."

It is not the interests of the council that need be considered in testing the course of conduct of the appellant, but the interests of the ratepayers and the high standard of integrity that is expected from one who holds the position of mayor of this city.

To succeed in his defence of justification the defendant has to satisfy the judge, so far as he represents the jury in England, of the truth of every substantial imputation of which the plaintiff complains, but it is not necessarily insufficient if he does not cover every term of abuse or reproach, moreover the mental attitude of the defendant is immaterial to such a defence. I am of opinion that the learned trial judge was right in holding justification proved, and the appeal is dismissed with costs.

Appeal dismissed.

HOWARD v. GASKIN.

[98 OF 1918.]

1919. MARCH 3, 5. BEFORE HILL, J.

Landlord and tenant—Change in ownership of property—Creation of tenancy—Liability of landlord to repair—Abrogation of Roman-Dutch-Law—Civil Law of British Guiana Ordinance, 1916, s. 3 (1).

Claim by the plaintiff for the sum of \$800 for injuries and shock alleged to have been caused to her on January 16th, 1918, whilst a tenant of a house owned by the defendant and leased to her, the plaintiff, by the negligence of defendant in failing to repair the kitchen of the house or keep it in proper repair, whereby a part broke down whilst the plaintiff was standing in it.

H. C. Humphrys, for the plaintiff.

E. G. Woolford, for the defendant.

HILL, J.: Plaintiff claims the sum of \$800 for damages. She alleges she was a tenant of the defendant, and while so, the kitchen floor gave way with her causing a fracture of the leg. She further alleges that it was incumbent on the defendant to keep the kitchen in good and safe repair; that he failed to do so, and the fact that the kitchen was in an unsafe and dangerous condition was known to the defendant,

I have no doubt the plaintiff's claim was filed under belief that the Roman Dutch law in regard to landlord and tenant still obtained in this colony. The opening of counsel pointed to this. But this would not appear to be so, as by section 3 (1) Ordinance 15 of 1916 "the law of the Colony relating to . . . landlord and tenant . . . shall cease to be Roman Dutch law "and as regards all matters arising and all rights acquired or accu-

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“ing after the date hereof (1st January, 1917), the Roman Dutch law shall “cease to apply to the Colony.”

The law referred to in the cases cited in counsel’s opening is not now applicable.

A tenancy is created by contract, and any words which express the intention of giving and taking possession for a certain time are sufficient for this purpose, and when a person is already in occupation of property and it is desired to establish the relation of landlord and tenant between another person and himself (as in this case) this may be done by attornment. Where the occupier has been holding under an agreement of tenancy, and there is a change of landlord during the currency of the agreement without any change in the terms of the tenancy, (as in this case), this is a mere attornment (*Cornish v. Searell* (1828) B. v. C. 471) and it need not be in writing, seemingly.

I am of opinion the relationship between landlord and tenant existed between defendant and plaintiff.

As to the liability of the landlord to repair, in the absence of express stipulation, or of a statutory duty, the landlord is under no liability to put the demised premises into repair at the commencement of the tenancy. There was no statutory duty in the present case, but the evidence of the plaintiff and her witnesses show that there was an express stipulation by defendant to effect repairs to the kitchen, the neglect to do which, I have no doubt, caused the accident.

This evidence was objected to as not admissible to show an express stipulation, and as not arising out of the pleadings. I reserved it for consideration, and I have no doubt it was given to show knowledge of the condition of the kitchen in the defendant, but counsel for plaintiff has submitted that it was admissible to show an express stipulation arising out of paragraph 3 of the statement of claim, which he contended further was wide enough to allow it, and that defendant was not misled.

I conclude with some hesitation, that the defence has not been actually misled and no variance between an allegation in a pleading and the proof shall be deemed material in such circumstances.

The claim, however, appears to me excessive. Some evidence has been given as to an unpaid doctor’s bill, but the fact remains that on May 7th, 1918, when claim was filed the amount of the medical charge was known, and yet only \$10 is claimed. And \$70 is claimed for medicines and nursing, while accounts to the extent of \$5.16 have been put in evidence. The balance of \$720 is claimed as general damages. Plaintiff does no work, but cooks at her home for her daughters and herself.

This is an action which might have been tried at the magistrate’s court, and I award \$100 damages.—No Costs.

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[361 OF 1919.]

1919. DECEMBER 5, 12. BEFORE BERKELEY, Acting C.J.

Master and servant—Wrongful dismissal—Menial servant—Chauffeur—Weekly contract—Employers and Servants Ordinance, 1853, ss. 8 and 10.

A chauffeur comes within the term 'menial servant' as used in the preamble to Ordinance 1 of 1853 (The Employers and Servants Ordinance, 1853).

A menial servant who enters into the service of an employer for a period from week to week, and who is wrongfully dismissed from his employment before the completion of his contract and without one week's notice, is entitled to one week's wages according to the rate of wages fixed between the parties, under the provisions of *section 10* of Ordinance 1 of 1853.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. J. H. McCowan). The complaint set out that the complainant Moore was engaged by defendant Pestano for a time uncertain at a weekly wage of \$5, which contract was unlawfully terminated by the defendant without cause without the consent of the complainant, and without giving him fourteen days' notice, contrary to the provisions of the Employers and Servants Ordinance, 1853. The magistrate held that he was bound by the provisions of section 8 of the ordinance, which provides that in the absence of any express agreement between the parties thereto to the contrary the entering of any person into the service or employ of anyone shall be deemed and taken to be a contract for one month certain from the time of entering on such service. The section goes on to provide that the contract may be terminated by fourteen days' notice. On the facts he stated he was unable to find that the evidence supported a weekly employment. He accordingly ordered defendant to pay to the plaintiff one month's wages, \$20, and costs.

From this decision defendant Pestano appealed on the following grounds:—

- (1) A chauffeur is not a servant within the meaning of Ordinance 1 of 1853.
- (2) It was proved that the contract of service was a weekly one, and the ordinance in question does not apply to weekly hirings.
- (3) If the ordinance applies, the employment was for a time certain, namely, for one week.

G. J. deFreitas, K.C., Acting S. G., for the appellant, Pestano.

J. S. McArthur for the respondent Moore.

BERKELEY, Acting C. J.: This appeal is from the decision of the stipendiary magistrate of the Georgetown judicial district

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(Mr. McCowan) who convicted the defendant for a breach of contract under Ordinance 1 of 1853.

The two reasons of appeal are (1) that a chauffeur is not a servant within the meaning of the ordinance, and (2) that it was proved that the contract was a weekly one and the ordinance does not apply to weekly contracts.

The complaint runs “having in the month of August, 1919, engaged the complainant as a chauffeur at a weekly wage of \$5 for a time uncertain unlawfully did during the existence of the said contract of service on the 4th day of October, 1919, at Georgetown, within the aforesaid judicial district, terminate the aforesaid contract of service entered into with the complainant without consent of the complainant or without giving the complainant fourteen days’ notice or without good arid sufficient cause, contrary to law.”

A letter written by the solicitor for the complainant to the defendant dated 7th October, 1919 (two days before the complaint was laid) demanded payment of \$5 “as one week’s wages in lieu of notice.”

The evidence which bears on the two reasons of appeal as given by complainant is “Agreed to work as chauffeur (in) August. Made no arrangements as regards week, etc., give me \$5 every Saturday night. Mo specified time agreed on. Worked from August till 4. 10. 19 (4th October, 1919). Went for money every Saturday night. Barman D’Abreu, servant of defendant, paid me \$5.”

Defendant says: “Know complainant—employed as a chauffeur—I took him on. I arranged for him to receive \$5 per week, Pay every Saturday night . . . did not know entitled to week’s notice.” No other witnesses is examined.

On this evidence the magistrate finds that there was no express agreement, that he was therefore bound by section 8 of the ordinance which deems a contract of service in the absence of express agreement to be for a month’s service. The defendant was ordered to pay to the complainant \$20 and costs, 72 cts;

I agree with the magistrate that the relation of master and servant existed. This relation imports the existence of power in the employer not only to direct what work the servant is to do but also the manner in which that work is to be done. Collins J. in *Pearce v. Lansdowne* (62 L. J., Q. B. at p. 444) says:—“I can find no better suggested explanation of the term ‘menial’ or statement of the position of domestic servant than that given in *Roberts and Wallace on the Employers’ Liability Act*. (3rd ed.), p. 214. It is as follows: ‘It is submitted that the term ‘menial servant’ may best be explained in accordance with all

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the authorities and the ordinary use of the word as denoting those persons whose main duty is to do actual bodily work as servants for the personal comfort, convenience, or luxury of the master, his family, and his guests, and who for this purpose become part of the master's residential or quasi-residential establishment.' ” As a chauffeur the complainant would have to perform actual bodily work for the personal comfort and convenience of his master—for instance by driving and cleaning his car, by removing—if necessary—a punctured tyre and putting on another. The fact that he formed part of the master's residential or quasi-residential establishment does not render it essential that he must live on the premise? He stands on the same footing as a coachman or groom who has been held to be a servant. *In Smith v. General Motor Car Coy., Ltd.*, (1911 A.C. 188) where the point in controversy was whether the relations between the respondent and appellant was that of master and servant or bailor and bailee of the taxicab, it was found that the wording of the document signed by the appellant, the absence of all control over him once he had driven the cab out of the garage, and casual nature of his employment, pointed to the relation of bailor and bailee and outweighed the wearing by him of livery, the percentage of the earnings retained, the mode of accounting for the receipts, the deposit of his licence, and the words “dismiss” and “discharge” used in certain notices, all of which were regarded as persuasive pieces of evidence to show that the true relation was that of master and servant. This case shows that the relation of master and servant can exist between an employer and his chauffeur.

It is difficult to understand how the magistrate on the evidence—set out above—can find that there was no express agreement. If the reservation of wages at so much a week is the only circumstance from which the duration of the contract of service can be collected it is to be presumed that the service is to be weekly. The defendant says “I arranged for him to receive \$5 per week” and complainant “he gave me \$5 every Saturday night.” This certainly is the only evidence from which the duration of the contract of service can be collected, and the letter demanding one week's wages shows that complainant so regarded it. *Vieira v. Low* (A.J. 22.12.1900) deals fully with what constitutes a weekly hiring. If the magistrate accepted only complainant's evidence “made no arrangements as regards weeks,” etc., he was wrong.

Counsel for the defendant has taken exception to the remarks of the magistrate on the conduct of the defendant. Personally I can find no fault with defendant because he had a son out of work, and discharged complainant with me idea of making him chauffeur, and I am unable to find anything in the evidence which warrants the

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remark that “the employment in this case shows a great lack of business capacity on the part of the defendant.”

Under the ordinance provision is made for only two classes of contract (a) contract in the absence of any express agreement (s. 8) and (b) contract for any period of time certain, or for the performance of any particular work, and servant is dismissed or discharged before the *completion* of his contract (s. 10.) The present contract was a weekly hiring and having been entered into, it was continued from week to week until complainant was discharged because defendant desired to have his son as chauffeur. I am of opinion that complainant having been kept on from week to week was entitled to a week’s notice or a week’s wages in lieu thereof. The ordinance is far from clear but I shall follow the decision of Swan Ag. J. in *Vieira v. Low* (A.J. 4.1. 1901.) who ordered payment of a week’s wages under similar circumstances.

The defendant is ordered to pay \$5 with costs of Magistrate’s Court and in default of payment. 7 days hard labour. I make no order as to cost of appeal.

Decision varied.

HUBBARD v. BURROWES & ORS.

[166 OF 1916.]

1919. DECEMBER 1, 12.

BEFORE BERKELEY, ACTG. C.J., AND DALTON, J.

Will—Prodigal—Will made whilst testator's estate under curatorship—Want of capacity of the testator—Validity of will.

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

Claim by the plaintiff Hubbard for an order declaring the alleged last will and testament of Thomas Hubbard, deceased, dated August 16th, 1910, to be null and void. On the claim made Sir Charles Major C. J. ordered that the will in question be admitted to probate, and that judgment be entered for the defendants with costs.

Plaintiff appealed from this decision on the following grounds:—

- (1) that the testator was not of sound mind and competent understanding at the time of the execution of the will.
- (2) that undue influence was amply established on the evidence.
- (3) that the testator was a prodigal and interdicted from dealing with his property by will without leave.

(a) Reported above at p. 105.

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(4) that the will was not an equitable one nor was it made in conformity with law.

J. S. McArthur, F. O. Low with him, for the appellant.

H. C. Humphrys, for the respondent.

BERKELEY, ACTING C. J.: The plaintiff in this action claimed a declaration by the court that the will of Thomas Hubbard, deceased, propounded by the defendants as executors was invalid. The action was tried by Major, C. J. and dismissed with costs. The grounds of appeal are seven in number. At the close of the argument in behalf of the plaintiff the Court intimated to counsel for the defendants that he should confine his argument as to the testator's capacity to make the will in view of the fact that curators over his property had been appointed at the time the will was made.

The reason of this intimation to counsel was that the Court was of opinion that there was evidence on which the trial judge could come to the conclusions arrived at and it was not prepared to say that on the facts he was wrong.

As to the legal question raised—the testator was interdicted from dealing with his property, and by the civil law a will made while under interdict was void (*Burge* Vol. IV. p. 347) “but by the 39th Novel of Leo his disposition would be sustained if made in favour of his necessary heirs, or of the poor or for pious uses or for any other purpose which did not evince prodigality. On this authority the will of a prodigal having no children and who bequeathed by it the usufruct of his estate to his wife was sustained” (cited by Ward J. in *ex parte F.* and adopted by the trial judge in this case).

In Van Leeuwen's *Roman-Dutch Law* translated at the request of the Supreme Court of Ceylon for the use of that Court this passage reads: “Equity has likewise introduced amongst us this rule, viz: that whatever prodigals *bona fide* and in their senses leave to their friends, descendants, the poor, or other persons in which bequest no extravagance or squandering can be pointed out, ought to remain valid and take effect (Novel Leon 39)”. The translation continues “As the Court of Holland has often decided, though such bequests will be more certain if the knowledge of the Government or the confirmation of the guardians be obtained.”

It is submitted by counsel that the bequest of the usufruct to the wife is as far as any Court has gone and that in the case now before this Court the testator has left the greater part of his estate to his wife and nothing to his “necessary heirs”. This term “necessary heirs” is not easy to interpret but it would

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hardly apply to the plaintiff who stands in the 5th or 6th degree from the testator. In Van Leeuwen (as translated above,) "necessary heirs" are more intelligently described as "friends and descendants."

The testator at an advanced age married his housekeeper who had served him faithfully for years, and the fact that she had declined to accompany him out of the Colony unless she went as his wife, does not in my opinion detract from her worth or deprive her of the right to be treated as his best friend. I hold that the disposition by the testator who had no children was an equitable disposition and comes within the rule referred to above. The will therefore must stand.

The appeal is dismissed with costs.

DALTON, J.: It is not necessary for me to again state the facts in this case. I agree that there was evidence before the trial judge whence he might reasonably conclude that the testator was of sound mind and competent understanding at the time of the execution of the will of April 16th, 1910, and further, that undue influence was not proved. The only matter that remains is the question whether the testator could validly make a will whilst under curatorship. Mr. McArthur has referred to several made authorities to support his contention that the will of a prodigal during curatorship is void. He referred first of all to *Pothier (Bugnet, Vol. VIII.)* where it is laid down (*Traite des donations testamentaires, chap. III. art III. sec. 137*) that those who are interdicted on account of prodigality cannot make a will, not on account of the prodigality but because of the interdict which takes away the capacity of making a valid testament disposing of their goods. In the *Pandects of Tustinian (Pothier, Vol X. p. 304)* we find "*propter similem consilii defectum, is cui lege bonis interdictum, est, testamentum facere non potest; et si fecerit ipso jure non valet.*" He also referred to Grotius' *Jurisprudence (Maasdorp's tran.)* p. 87, and to Morice, *English and Roman Dutch Law* 2nd ed. p. 280, where it is laid down that persons under curatorship were incompetent to make a will. This undoubtedly appears to have been the rule of the civil law, but in course of time the rule of the civil law seems to have been modified in Holland. *Van Leeuwen (Cens. for Bk. III. ch. 3. sec. 4)* states that prodigals who place neither limit nor bound to their useless expenses and who are on that account forbidden by the state to deal with their goods, "except in so far as during a lucid interval as it were" they have judiciously provided for their offspring, their relatives, and the poor or have made any other beneficial disposition, cannot make a testament. In respect of the exceptions he refers to the 39th Novel of Leo, which is cited in *Burge (1st ed. Vol. IV, p. 347)*, and

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in Lee's Introduction of Roman Dutch Law, at p. 297. note. *Van der Keessel* (Thes. 281) refers to the same authority where he states that the will of a prodigal 'which is just and equitable under the 39th Novel of Leo' was held to be valid in Holland in a case which he refers to. Both *Van Leeuwen* and *Voet* (28. 1. 32.) however, are of opinion that before such a will be made the leave of the sovereign or of the court be first obtained. And see also *v. d. Linden's* Judicial Guide, p. 48. The difficulty of obtaining such leave from the court (and it does not seem that the sovereign would be in any better position) is clear from the remarks of Ward J. in *ex parte F.* (S. A. L. R. 1914, Wit. L. D. 27) where such leave was refused. Other authorities were also considered in that case where the learned judge came to the conclusion that the better opinion appears to be that a will made by a prodigal which deals equitably with his property is good. Mr. McArthur takes exception to the use of the word 'equitably,' and urges that it is much wider than the authorities cited would permit. But the use of the word does not originate with Mr. Justice Ward, as he argued. We find it used by the translator of *Van der Keessel*, for instance. And as is stated by the trial judge we find the courts scrutinising wills, not with a view to declaring them null and void if made by prodigals, but to ascertain what are the terms of the will and whether they were just and reasonable. And that is the course which the Court adopted here, and in my opinion rightly adopted. I must admit I cannot find fault with the use of the word equitable. In the will in question some few very small legacies were left to relatives and connections, but the bulk is left to the testator's wife, a state of affairs which, seeing he left no children and that marriage in community is abolished, seems quite right and proper. The plaintiff is a distant relative some five or six degrees removed from the testator. It is not inappropriate to point out that under the law of intestacy as it now stands, assuming an intestacy in this case, if there were no kin of the second or third degree, the widow would take all the property to the exclusion of kin beyond the third degree.

I agree that the will propounded, although made by a prodigal whilst under curatorship, comes within the exceptions allowed by law and is a good and valid testament.

The appeal therefore must be dismissed with costs.

Appeal dismissed.

In re J. H. A. BERKELEY.

In re J. H. A. BERKELEY;
THE DEMERARA TURF CLUB LTD. (In Liquidation.)

1919. DECEMBER 9, 15.

BEFORE DALTON, J., and DOUGLASS, ACTG. J.

Company—Winding up—Proof of debts—Assignment of debts and dividends payable in respect thereof—Contract—Interpretation—Condition precedent—Appeal by petition—Procedure—The Companies (Consolidation) Ordinance, 1913, s. 175.

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

The official Receiver, as liquidator of the Demerara Turf Club, Ltd., in dealing with a claim of J. H. A. Berkeley for \$1182.46, rejected the claim so far as \$702.46, and admitted it for \$480 as preferent. On appeal this decision was upheld, and J. H. A. Berkeley now appealed to the Full Court.

The reasons of appeal sufficiently appear from the judgments.

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

G. J. De Freitas, K.C. for the Official Receiver.

J. S. McArthur for Nelson Cannon.

DALTON, J.: Objection has been taken by Mr. De Freitas to some of the paragraphs of the petition of appeal, on the ground that new matter has been introduced and fresh allegations made which were not before the court below either in argument or evidence. He accordingly asked that paragraphs 1 to 9 of the petition and part of paragraph ten be struck out. For the appellant it was urged that no new matter was introduced into the petition, and that there was no need for appellant to set out any reasons of appeal in his petition at all, no rules or practice existing compelling him to do so. As regards the objection, no part of the petition was struck out, it being left for objection to be taken at the time appellants' counsel, introduced any new matter, should he do so.

With respect to the form of the petition a more difficult question arises. Section 175 of the Companies (Consolidation) Ordinance, 1913, which is the same as s. 174 of the old Companies Ordinance 1898, enacts that appeal may be made by petition. As to any further procedure, or as to the form of petition is silent. The Winding up Rules 1905, s. 143 (2) provide however that in all proceedings before the Court where no other provision is made by the Ordinance or by the Rules (and I can find none with respect to a petition of appeal) the practice and proceedings

(a) Reported above at p. 67.

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shall be in accordance with the Rules of the Supreme Court for the time being in force. Reference to the Rules of the Supreme Court dealing with petitions shows that those rules are totally inapplicable and useless so far as an appeal is concerned. There is ample provision in the Rules of course for appeals from a judge to the Full Court (Order XLIII), but not by petition. It is the introduction of that word into the ordinance which causes the difficulty. However that may be, it would be quite unreasonable to allow a party to appeal without the court and the other side knowing, until the matter came into Court, what grounds were to be urged on behalf of the appellant. So long as the appeal is required to be made by petition, in my opinion, in the absence of rules or other provisions setting out directions, the petition should set out in consecutive paragraphs a clear and concise statement of the material facts relied on as supporting the appellant's contentions and the various reasons relied on for the appeal. This would be on the lines of the petition and case for the appellant as required in appeals to the House of Lords which are by petition, and for which, of course, ample orders and directions exist.

As stated by appellant's counsel the case depends on the agreement of September 5th, 1918. Its contents have already been set out. In the court below he tendered evidence to explain some of the terms of the agreement which he states is ambiguous, and that evidence was rejected. He proceeds to argue then that the agreement is merely an escrow, that is, the agreement is made upon a condition, so that the agreement is not binding until the condition is fulfilled. The condition he states is the obtaining of the sanction of the court to the sale of the assets of the Turf Club to the then liquidator (Nelson Cannon), which sanction was never obtained. The case of *Pym v. Campbell* (25 L.J., Q.B., 277) has been referred to. Evidence was admitted there to show that when a document, apparently an agreement, was signed by the parties, it was expressly stated that it was signed without any intention of making a present contract, but that it was to be conditional only upon the happening of an event which has not occurred. But that is not the case here. What is sought to be done is to explain certain words in the agreement which one side says are ambiguous and the other say have a plain and clear meaning. The agreement here is in addition a receipt for moneys and also an assignment of certain rights. The authority cited is no authority for the admission of the evidence sought to be led to explain ambiguities in the agreement. And the same applies to *Wallis v. Littel* (11 C.B., N.S., 369), and *Pattle v. Hornibrook* (1897 1 Ch. 25). Evidence may be led to show that there was no agreement at all, but it cannot be led to vary a written agreement. And that, it

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seems to me, is what appellant is seeking to do. As I understand the term "latent ambiguity" and the argument put forward, no question of any such ambiguity arises here. It is not suggested, for instance, that there is any doubt as to the correct application of the words 'sanction' or 'obtained' or 'court' themselves to the subject matter of the agreement, or that from their use two states of fact appear on the agreement either of which might equally well apply to the contract. What is sought to be done is to lead extrinsic evidence to add to clause 1 of the agreement by showing that when the parties signed it the appellant intended the words quoted either to impart an undertaking by the then liquidator to obtain the sanction mentioned, or that obtaining such sanction was a condition precedent to the receipt of the \$480 and the assignment of the debt." Where the words of any written instrument are free from any ambiguity in themselves, and where external circumstances do not create any doubt or difficulty . . . such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and . . . evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties, is utterly inadmissible" (per Tindal C. J., *Shore v. Wilson* 9. Cl. & Fin. at p. 565.)

Counsel next proceeded to argue that the prior sanction of the court to the sale of the assets went to the root of the transaction between appellant and Nelson Cannon, in other words that the agreement depended upon a condition precedent, the obtaining of the sanction of the court to the sale in question. It is not necessary for me to consider in detail the authorities he cites in support of his contention in law, for I am quite unable to agree with him that the words of the agreement in their plain meaning allow of any such interpretation. Whilst I would not, for the purpose of interpreting the agreement, divide it up into two such separate and distinct portions, first, clause one by itself, and then clauses two and three together, as has been done in the court below, yet I arrive at the same conclusion as the learned Chief Justice has done. Reading the agreement as a whole as I think must be done, I can find no condition precedent to the operation of the agreement such as is contended for. As stated in the judgment appealed from, the contract came into force at once and the property in the debt passed on payment of the \$480. And I think one may well point out the difference in the wording of clauses 1 and 2. Clause 2 clearly contains a condition precedent to the deposit of the sum mentioned in the Royal Bank. That condition was never carried out, hence the deposit was never made. I agree that the words "on the sanction being obtained" in clause 1 merely fix a time, should that event come

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to pass, when the further payment of the sum of \$702.46 or a part of it would be payable to the appellant. He sold his claim against the Turf Club to the then liquidator, and received the sum of \$480 in payment, with an undertaking that he should obtain a further sum in respect of his judgment on "the sale by the liquidator to the said Nelson Cannon of the assets" of the Turf Club being sanctioned by the court.

That sanction was refused for reasons which the court gave at the time. No further sum was therefore payable under the agreement; on the other hand the purchaser of the debt cannot obtain payment out of the assets of the company for more than he gave for the debt, that is the sum of \$480.

Lastly, it was urged that the assignment of the debt was no more than an authority to the liquidator which was revoked by a subsequent letter (January 17th, 1919) which was in evidence. The terms of the agreement itself are sufficient to refute such a contention. It is not necessary to say more.

The appeal must be dismissed and the decision of the court below confirmed.

DOUGLASS, Actg. J.: With respect to the subject matter to be included in proceedings on appeal by petition under section 175 of the Companies (Consolidation) Ordinance, 1913, I have nothing further to add to the remarks and conclusions of my learned brother judge. As I understand them the substantial grounds of appeal are that:

1. The agreement of the 5th September, 1918, is inoperative;
2. The said agreement must be taken as a whole and was a conditional one, and the conditions not having been fulfilled the agreement became null and void ; and that
3. Under these circumstances the learned Chief Justice was wrong in rejecting evidence to explain the circumstances under which the agreement was made, and, more especially, the terms in the agreement which were ambiguous.

Learned counsel for the appellant accordingly endeavoured to prove that (a) there was no agreement existing and consequently no assignment of the judgment debt of \$480 and costs in favour of the Mr. Nelson Cannon at the time Mr. Wight as attorney for the appellant put in his proof, and (b) that the agreement has been wrongly construed for it is a conditional one, and the condition being still unfulfilled there was no assignment of the said judgment debt. Now there are three possible ways to account for the inefficaciousness or non-existence of an agreement apparently before the court. First that it was an 'escrow' (*Pattle v. Hornibrook*),

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To constitute the delivery of a deed as an 'escrow'—i.e., that it shall take effect only on certain conditions—it must always be to some third person. Under the common law if a deed duly executed was delivered to one of the parties—as such party and not in any capacity—it could not operate as an escrow. So far as I am aware the term is only applicable to documents under seal. Documents not under seal would come under the next heading which brings us to the second way in which a document may be rendered inoperative, where it is apparently complete on the face of it, but where there is a collateral verbal agreement to the effect that it shall not operate until the happening of a certain event which has not occurred; *Wallis v. Littell*, *Pym v. Campbell*, and *Morgan v Griffith*. And the third way, where it is rescinded by a subsequent agreement. In each of these three cases parol evidence will be admitted in proof of the averment, but the evidence is so admitted not to vary alter or add to the agreement but to show that the document was not at the time an agreement at all. On a careful perusal of the proceedings in this case I cannot find such an allegation even hinted at, the document is treated as an agreement in esse; with the one exception of the statement in Mr. Wight's letter of the 17th January, 1919, which says "the agreement . . . has long ere this ceased to exist," but this was apparently not contended for at the hearing when the learned Chief Justice in the course of his judgment says "endeavour was made to give oral evidence touching the contents of the agreement," &c.

In paragraph 7 of the petition the agreement is admitted, though at the end of that paragraph appear the words "the said agreement in writing did not embody the whole contract made between the parties," a statement in support of which no proof was offered; that such an irresponsible and untrue allegation should have been allowed to appear shows careless drafting. Again after reciting that His Honour the Chief Justice "refused to allow oral evidence to be given to explain the said agreement," it is some what confusing to find that the petitioner feels aggrieved because (in paragraph 1), the agreement between the said Nelson Cannon and P. C. Wight was inoperative, whilst in paragraphs 2, 3, and 4 he treats the agreement as operative. I gather that the term 'inoperative' must be with reference to the allegation that a condition precedent was not fulfilled, and not as an expression that the document was never completed as an agreement. And the petitioner concludes that the learned Chief Justice was wrong "in rejecting the evidence offered to explain the said written agreement, some of the terms thereof being ambiguous."

This brings me to the second, and more substantial, argu-

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ment, that the agreement has been wrongly construed, and here learned counsel for the appellant contends that not only must the agreement be taken as a whole, one and indivisible, but it must be so construed, and that consequently any transfer of the judgment debt, or right to receive the dividend in respect thereof, was conditional upon the said Nelson Cannon not only obtaining the sanction of the court to the purchase by him of the Demerara Turf Club, but also on his depositing in the bank the sum of \$20,300 due on a judgment debt transferred to Henry Earle Murray, and on giving security for payment of interest thereon.

In construing instruments in writing it has been said that "the one universal principle is that effect is to be given to the intention of the parties collected from their expression of it as a whole. It must be collected from the whole; that is, particular terms are to be construed in that sense which is most consistent with the general intention. It must also be collected from what is expressed, not from a mere conjecture of some intention which the parties may have had in their minds and would have expressed if they had been better advised." (Pollock on *Contract*, 8th Ed., 268). And the same authority goes on to say that recent tendency is to pay less attention to rules of construction, and more to admissible indications of what the intention actually was in the case in hand, including the practical construction of the contract by the conduct of the parties themselves.

The agreement is no doubt drawn in a very slipshod manner but the intention of the parties at the time is quite evident, and the court is not concerned with any later intention the one or other of the parties may have had and which the course of events may have induced. It may fairly be said that there are three parties to the agreement, viz., Mr. Wight as attorney for Mr. Berkeley, Mr. Wight as 'representing'—I take it as agent for—Mr. Murray, and Mr. Nelson Cannon. Mr. Berkeley—by his attorney . . . and Mr. Cannon, are concerned with the first part of the agreement contained in the first paragraph, and Mr. Murray—by his agent—and Mr. Cannon are concerned with the second part of the agreement. In the first part in consideration of \$480 paid by Cannon to Wight—as attorney of Berkeley—the latter assigns to Cannon any amount which will be paid as dividend by the Demerara Turf Club in respect of the judgment debt due to Berkeley. That amount might be little, or it might be the greater part of the debt and costs. In addition if Cannon was permitted by the court to buy the assets of the Demerara Turf Club, he undertook to pay the said judgment debt and costs. Each side took risks, but Cannon was anxious to acquire the Turf Club, and it is evident that Wight saw no reason why it should not be possible. In the

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second part of the said agreement in consideration of Wight—as agent for Murray—not opposing the application for purchase by Cannon—for Wight had been an intended purchaser—Cannon undertook to deposit a sum of \$20,300 on the bank and pay interest therein until \$20,000, representing Murray’s interest in another judgment debt—was paid over to Wight, but this was only to be done if and when the court sanctioned the sale of the Turf Club to Cannon.

I must say I entirely fail to see any real connection between the two parts of the agreement, they are as a matter of fact between different parties, and the subject matter of each is a different debt, and the consideration in each case is also different; that there is in each a reference to an event which the parties thought at the time was likely and was quite possible, does not alter my opinion that each part of the said agreement must stand by itself and bear its own construction.

This reduces the argument to the first part of the agreement, and I may preface my remarks by saying that I can see no latent ambiguity, to explain which evidence would have been admissible. Any alleged intention of the parties to the instrument by way of evidence is therefore inadmissible and it must be construed in its strict and plain meaning and from a common-sense view. The first necessity is to consider whether any portion of it makes the sanction of the court being obtained to the purchase of the Turf Club by Mr. Cannon a condition precedent. I will refer to two cases, one of which has been cited by counsel. In *White v. Beeton* (1861. 7 H. & N. 42) which was a claim that certain sums of money should be paid by the defendant under an agreement for vesting shares of a society in the defendant, and the defendant pleaded that certain shares—of shareholders who had repudiated? the contract—had not been vested in him. It was held that the plea was bad inasmuch as the defendant having accepted performance of the rest of the contract and enjoyed a benefit under it, the vesting in him of all the shares was not a condition precedent to the plaintiff’s right to sue. *Ellen v. Topp* (6 Ex. 424) was also referred to in this case as being a case where there was to be a continual performance of the whole agreement on both sides, so that where one party ceased to perform his part, the other was at liberty to do so, And Baron Bramwell refers with approval to Lord Kenyon’s remarks in *Campbell v. Jones* (6. T. R. 570) “whether these kind of covenants (*i.e.*, mutual covenants) be or be not dependent of each other must certainly depend on the good sense of the case.”

In *The Exchange Bank of Yarmouth v. Blethen* (1884. 10 A. C. 293) the plaintiffs endeavoured by appending a note to their execution of a deed of assignment by debtors to a trustee for the

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benefit of all creditors who should execute the deed, that they executed only in respect of certain claims scheduled to restrain the full operation of the deed; it was held that it could not be treated as a non-execution and having received some payment under the deed the plaintiffs could not repudiate it. In the course of the judgment of their Lordships delivered by Sir Robert P. Collier he states "it has been admitted that an attempt to make the execution of a deed of release operative only on the occurrence of a condition subsequent would amount to an absolute release."

I have already given what I hold is the simple and common-sense interpretation of the first part of the agreement, and I can find no condition precedent. The consideration money of \$480 was paid and received, and Mr. Cannon agrees that if he should be confirmed in his intended purchase of the Turf Club he would make further concessions to Mr. Wight, it is a condition subsequent, not precedent; there follows without any qualification the assignment by Mr. Wight of all his rights to a dividend on the judgment debt and costs, and apart from the natural construction of the agreement the appellant by accepting a part performance and parting with his rights as attorney of Mr. Berkeley has precluded himself from insisting on voiding the agreement as being dependent on a condition precedent.

To paraphrase the conclusion of the judgment of Pollock, C.B., in *White v. Beeton* I would say that the appellant has failed to show that the performance of the act was in any sense a condition precedent, or assuming that it was, he has failed to show that he availed himself of his right to its performance, and at the earliest opportunity returned what he had received; and he has also failed to show any condition precedent by alleging the comparative, worthlessness—as he says—of that part of the contract which Mr. Cannon did perform.

With respect to the objection that the learned Chief Justice was wrong in holding that the official liquidator's action with reference to the proof of the debt in question was right, I understand that the appeal to the Chief Justice was by consent treated as if the liquidator has left the construction of the agreement to the court, and I have heard no argument to induce me to dissent from the conclusion arrived at by the learned Chief Justice that Mr. Cannon could not as liquidator—at that time—avail himself of any benefit from the acquisition of the debt due to Mr. Berkeley.

The appeal was accordingly dismissed.

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1919. DECEMBER 12, 18. BEFORE BERKELEY, Actg. C.J.

Revenue—Insurance company—Meaning of ‘carrying on business’—Licence—Agent for more than one company—Separate licence for each company—The Tax Ordinance, 1919 (No. 46 of 1918), s. 22 (2).

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district. The defendant company was charged by the plaintiff, a commissary of taxation, with acting as the agent of a company carrying on accident insurance business, namely, the Motor Union Insurance Company, Ltd., and with failing to take out a licence as the agent of the company. Section 22 of the Tax Ordinance, 1919, which is an annual ordinance, is as follows:—

- ‘22.—(1). Every person or company carrying on any fire and life and accident insurance business or any fire, or life, or accident insurance business in the colony shall take out a licence for so doing and shall pay for the same the sum of \$250.
- (2) Where any person acts in this colony as the agent of any company carrying on any fire and life and accident insurance business or any fire, or life, or accident insurance business in the colony such person shall take out a licence for so doing and shall pay for the same the sum of \$250, unless the company for which he acts has taken out the licence hereinbefore required.’

The magistrate convicted the defendant company which appealed. The facts of the case and reasons of appeal are sufficiently set out in the judgment below.

H. C. Humphrys, for the appellant company.

G. J. deFreitas, K.C., Actg. S.G., for the defendant.

BERKELEY, Actg. C.J.: This appeal is from the decision of the stipendiary magistrate of the Georgetown judicial district (Mr. Gilchrist) who convicted the defendant company for that they did on the 4th April, 1919, act as the agents of a company carrying on an accident insurance business in this colony to wit, the Motor Union Insurance Company, Limited, and did then and there fail to take out a licence as the agent of such company, contrary to law. The complaint as alleged is under Ordinance No. 46 of 1918, s. 22 (2), “The Tax Ordinance, 1919.”

The reasons argued are (1) that the facts proved do not establish that the company carried on the business of an accident insurance company within the meaning of the section; (2) that on the true construction of the section the defendant company were entitled to one general licence to act as agents for all or any companies whatever of the kind mentioned in the section, and (3) that the facts proved did

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not establish that the company was a company within the meaning of the Ordinance.

The evidence shows that the defendant company have taken out a licence as agents of the Royal Insurance Company and have no such licence as agents of the Motor Union Insurance Company Limited. It is proved that in 1918 a policy was issued by this company which on the face of it says that the company is incorporated in England. This policy is signed by a director and general manager of the company and countersigned by the defendant company as attorneys of the Motor Union Insurance Company, Limited, by a director of the defendant company. The policy bears the impression of a stamp "Booker Bros., McConnell & Co., Ltd., Demerara" and in the centre of this impression is a 12 cents stamp on which is imprinted "British Guiana Postage and Revenue" which shows that the policy was issued locally. In 1919 the insurance premium was paid to the defendant company who gave a renewal receipt for one year in behalf of the insurance company. In a letter dated 29th January, 1919, written to the chief commissary the defendant company admit that they are acting as agents of the company and point out that they have already applied for a licence to act as general insurance agents and that it does not seem that the intention of the legislature was that they should pay twice for exercising the same functions. In a second letter dated 13th March, 1919, the defendant company return the insurance licence No. 7 of 15th January, and ask that the words "as agents of the Royal Insurance Co., Ltd.," be deleted and the necessary alterations be made as they are advised that they are not called upon to take out more than one licence to act as insurance agents.

Whether or not the Motor Union Insurance Company, Ltd., carry on business in this colony is a question of fact. The company is incorporated in England and the defendant company have issued and renewed at least one policy of insurance as their agents. The letters written by the defendant company shows that they are acting as agents of the company and the only question raised by them is the interpretation to be placed on section 22 (2) of the Ordinance. There may be many places in which a person or firm may be said to carry on business or exercise a trade for the purposes of income tax or *otherwise* and yet it would be an abuse of language to say that it was the place of business of that person or firm. (Wright, J. in *Grant v. Anderson & Co.* 1892 1 Q.B. 115 where it was held that the defendant company had no place of business within the jurisdiction). The present offence is under the Tax Ordinance and it seems to me that the office of the defendant company was a place in which the business of the Motor Union Insurance Company was carried on so as to render the defendant company as their agents liable to obtain a licence for that purpose, unless the substantial ground of appeal raised by the defendant company is decided in their favour. I can not agree with counsel that the business carried on by the defendant company in issuing one or more policies was their business and not that of the insurance company.

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The last reason to be dealt with is the construction to be placed on section 22 of the Ordinance. Sub-section one deals with the person or company, itself while sub-section two deals with the agent of any company, in each case carrying on (1) "any fire and life and accident insurance business," that is where these three branches of insurance are carried on by one and the same insurance company or (2) any 'fire' insurance business or (3) any 'life' insurance business, or (4) "any 'accident' insurance business—that is in these three cases where only one branch of insurance is carried on by the insurance company—"shall take out a licence for so doing and shall pay for the same the sum of two hundred and fifty dollars." Subsection (2) has these additional words "unless the company for which he acts has taken out the licence hereinbefore required"; that is, that the company has complied with sub-section (1). The words *company for which he acts* satisfy me that the construction I have placed on the section is the correct one, for if as contended by the defendant company that under one licence they are at liberty to act for several companies, I should expect the sentence to read, *company or companies for which he acts*. It is true that the singular includes the plural but it would have shown clearly the intention of the legislature. It is the duty of the court to interpret the law as it actually stands. \$250 may seem a large sum for an agent to pay in respect of each insurance company of which he may be the local agent, but it is quite possible that it was done with a view of protecting local companies. If on the other hand it was not the intention of the legislature as stated by the defendant company the ordinance can be amended.

The appeal is dismissed with costs.

HILL v. VINCENT.

HILL v. VINCENT.

[318 OF 1918.]

1919. MARCH 7. BEFORE SIR CHARLES MAJOR, C J. and HILL, J.

Intoxicating liquor—“Found” on premises not licensed therefor—Search at instance of police—Right of commissary of taxation to institute complaint—Wines, etc., Licences Ordinance, 1868, ss. 80, 81.

Appeal from a decision of Berkeley, J.

Complainant, a commissary of taxation, summoned the defendant Vincent, the holder of a general store licence, for the unlawful possession upon his licensed premises of two pints of rum, contrary to the provisions of section 81 of Ordinance 8 of 1868. (The Wines, etc., Licences Ordinance). The defendant was convicted by the stipendiary magistrate of the Georgetown judicial district and sentenced to pay a fine of \$350; in default of payment to four months' imprisonment with hard labour. The principal reasons for appeal were as follows:

- (1.) The carrying out of the provisions of s. 80 of Ordinance 8 of 1868 was a condition precedent to a prosecution under section 81.
- (2.) The rum in question was not liable to seizure on a search warrant on the information of a police constable, and therefore a prosecution under s. 81 of the ordinance would not lie.
- (3.) The complainant, though a commissary of taxation, could not charge the defendant for a breach of the provisions of s. 81, as he, the commissary, had not searched for or seized the rum in question, or authorised anyone, in writing to do so.

The provisions of the Ordinance in question are as follows:—

“80. Any commissary of taxation, and any person specially authorised by him in writing for each particular case, may enter any store, shop, or business premises whatever, and may search for spirituous liquor.

“81. (1.) The occupier of any store, shop, or business premises whatever, other than a licensed retail spirit shop or a hotel or tavern, in which is found any rum shall be liable to a penalty of not less than twenty dollars and not exceeding five hundred dollars.

(2.) All spirituous liquor whatever so found, and the packages containing the same, shall be seized by the person making the search and shall be moved by the commissary of taxation to the colonial bonded warehouse or to some convenient and safe place”

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

“BERKELEY, J.: This appeal is from the decision of the stipendiary magistrate of the Georgetown judicial district—Mr. Gilchrist—who convicted the appellant for that he being the occupier of certain business premises not duly licensed, there was found therein two pints of rum or thereabouts contrary to section 81 of the Wine, etc., Licences Ordinance, 1868.

The facts are not in dispute. The rum was seized by the police under a warrant to search the appellant’s premises and a charge of unlawful possession was brought. This charge was withdrawn, it would seem, on the production by him of a permit showing that special authority had been obtained by the holder of a retail spirit shop licence under section 17 of the ordinance to sell to him (appellant) more than one quart of rum.

On these facts being laid before the respondent, a commissary of taxation, he brought the present complaint against the appellant.

It is submitted by counsel for the appellant that in order to obtain a conviction under section 81 the seizure must be effected by a commissary of taxation or by some person specially authorized by him in writing for each particular case, (section 80).

In *Stewart and another v. Dornford* (A.J. 19.8.1905) appellants were charged under section 84 (2) with throwing away spirituous liquor in order to impede its seizure. The information was laid by the commissary under circumstances similar to those existing in the present case and the Court of Appeal held that as the rum was not liable to seizure no one could be convicted of throwing it away for the purpose of impeding its seizure. The section itself (84) under which that charge was brought refers to “any person having authority in writing *under this ordinance* and exhibiting his authority to enter any premises and there to search.” I therefore agree with the conclusion arrived at by the learned judge, but if as argued by counsel (and it would seem from the decision to be capable of such a construction) the learned judge intended to hold that section 81 was limited in its operation by section 80, that is, to a commissary of taxation and any person specially authorized by him, and that no proceedings could be instituted by a commissary unless the offence was discovered under the provisions of section 80, I am unable to agree with him.

Section 81 (1) renders the occupier of any business premises in which *is found* any rum or any other spirituous liquor whatever, liable to a penalty, and sub-section (2) provides that all spirituous liquor whatever *so found* (referring, I take it, to rum or other spirituous liquor found under sub-section (1)) shall be seized by

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the person making the search and shall be removed by the commissary of taxation to the colonial bonded warehouse or to some convenient and safe place of custody elsewhere. The presence of the commissary is not necessary when the search is made and the seizure effected by any person specially authorized by him and yet he alone shall have the spirituous liquor removed. Now this can only be done when he has received information of the seizure from the person authorized by him. In the present case the seizure was made by the police on September 8th and the rum was taken to the commissary on September 10th when it was tested and sealed with commissary's seal and returned to police. The commissary says that spirits seized are not sent to the bonded warehouse but are kept at his office or at a police station. The evidence shows that the rum was kept in a safe at Bourda police station. The handing back to the police must be held to be a removal by the commissary to a safe place of custody. In my opinion section 80 affords protection to certain persons and does not govern section 81 which is general and in no way limited to the persons referred to in section 80. Admitting for the sake of argument that the original seizure by the police was illegal, although the appellant might have his remedy for any trespass committed the validity of his conviction is not affected. (See *Fredericks v. Nelson*, A.J., 9.2.1906 and the cases referred to therein).

Appeal dismissed with costs, and on application of appellant penalty reduced to \$250."

From this decision the defendant appealed further to the Appeal Court.

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

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

SIR CHARLES MAJOR, C.J.: The question to be answered in this appeal is whether section eighty of Ordinance No. 8 of 1868 so far governs section eighty-one as to restrict the offence of the occupier of premises not being a licensed liquor store, hotel, or tavern, upon which rum is found, to the rum being found on the premises by a commissary of taxation, or person specially authorised by him in writing, the only two persons empowered to enter premises and search for spirituous liquors. Some argument has been directed to the further questions whether the seizure of the rum in this case, not having been made by the person making the search for it, that is by a constable who had no authority, written or otherwise, from the commissary, was not illegal and whether the rum having been removed by the same

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constable, when the second sub-section of section eighty-one provides that rum so found shall be removed by the commissary, that removal was not also illegal. These latter questions, however, seem to me to be immaterial.

In *Cole v. Franck* (1916, L.R., B.G., 111) I held that an officer under the Mining Ordinance 1903, found raw gold in a house for the purposes of a complaint against the occupier of the house for gold being found in his possession, although the officer had not a warrant to search for it, and Mr. deFreitas for the respondent has referred the Court to that case. Mr. Browne, *contra*, relies on the case of *Graham v. Spence* (26th October, 1903) in which Sir Henry Bovell, C.J., held that "found by an officer" means found by any officer exercising the power of search conferred upon him by the ordinance. However strong an authority *Graham v. Spence* may be for arguing that *Cole v. Franck* was wrongly decided (and I am now inclined to think that it was) that case does not seem applicable to this one; for there gold must have been found by an officer. Here there is no mention of anyone by whom rum is to be found.

The words of the first sub-section of section eighty-one are quite general and unrestricted. The defendant being the occupier of premises prohibited under the ordinance, and rum having been found there, those two facts, simply, constitute his offence. The answer to a question by whom the rum was found is immaterial. The second sub-section goes on to prescribe what shall follow upon the finding. The expression "so found" means found in any store, shop or business premises, not being a licensed liquor store, hotel or tavern. "So" cannot refer to the person finding or the method of finding, because there has not been mentioned either person or method. The sub-section restricts the seizure, I think, to a person empowered to enter and search, because the seizure is to be made "by the person making the search," and the removal to the commissary of taxation in terms, but does not throw back, as it were, into the preceding sub-section words that are not there, such, for instance, as "(is found) by any commissary of taxation or person specially authorized by him as aforesaid;" or again, "(is found) by the person who has entered the premises and is making search for the same."

I agree, therefore, with the learned judge who heard the appeal from the magistrate that the conviction was good, and the appeal must be dismissed with costs.

HILL, J.: I agree. The words "so found" in section 81 (2) in my opinion refer to the place where the spirituous liquor is found, and not to the person, or method of, finding.

The commissary, or authorised person, may search under sec-

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tion 80, but it does not follow that they are the only persons who can find.

I think the conviction was good and the decision of the magistrate, confirmed by the judge in the appeal, must be affirmed and the present appeal dismissed with costs.

Appeal dismissed. Conviction affirmed.

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[BERBICE, 1 OF 1919.]

1919. DECEMBER 4, 8, 18.

BEFORE BERKELEY, Acting C.J., and DALTON, J.

Customs—Foodstuffs—Customs (Exportation Prohibition) Ordinance, 1915, s. 2—Prohibition by proclamation—Extent of power given—Interpretation of statutes—Proclamation ultra vires of the Ordinance.

Appeal from a decision of Sir Charles Major, C.J. (a) who confirmed a conviction by the magistrate of the Berbice judicial district of the appellant Tiam Fook. From that decision appellant now appealed to the Full Court.

The facts of the case and the grounds of appeal argued fully appear from the judgments below.

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

G. J. de Freitas, Acting S.G., for the respondent.

BERKELEY, Acting C.J.: This is an appeal from Major, C.J., who dismissed an appeal by the defendant—now appellant—who was convicted by the magistrate for that he did on the 11th July, 1918, unlawfully export from British Guiana without special permission from the Comptroller of Customs certain foodstuffs (named in the complaint) which were prohibited from being exported from the colony without special permission as aforesaid, contrary to law. No ordinance is referred to in the complaint, but in the opening statement in the Magistrate's Court reference is made to Ordinance No. 30 of 1915 and the proclamation of 11th December, 1917.

The grounds of appeal argued are (1) that the proclamation which appears in the *Official Gazette* of 15th December, 1917, is *ultra vires*. and not within the terms or scope of the ordinance (No. 30 of 1915) under which it was issued; (2) that the proclamation was invalid and created no offence under the ordinance and was not in compliance or in keeping with the ordinance.

The second section of the ordinance is "The Governor-in-Council may by proclamation prohibit the exportation of all or any of the following articles, namely, arms, ammunition, military and naval stores, and any articles which he shall judge capable of being converted into or made useful in increasing the quantity of arms ammunition, or military or naval stores, to any country or place therein named whenever he shall judge such prohibition to be expedient in order to prevent such arms, ammunition, military or naval stores being used against His Majesty's subjects or forces, or against any forces engaged or which may be engaged in military or naval operations in co-operation with His Majesty's forces, and whilst a state of war in which His Majesty

(a) Reported above at p. 18.

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is engaged exists may *in like manner* prohibit the exportation to any country or place of all or any other articles whatsoever, and may during the continuance of the present war prohibit the exportation of any article to any such country or place unless consigned to such person or persons as may be authorised by or under the proclamation to receive such article. The Governor-in-Council may vary or add to or repeal any proclamation issued thereunder."

The proclamation after setting out this section in full and the necessity to exercise such power of prohibition proceeds to order "that from and after the date hereof the following articles, that is to say, all foodstuffs shall be and the same is hereby prohibited to be re-exported from British Guiana except under special permit from the Comptroller of Customs."

The question is, what do the words "in like manner" refer to? It is contended by counsel for the appellant that they cover "by proclamation to any country or place named therein whenever the Governor-in-Council shall judge such prohibition to be expedient" whilst the Solicitor General submits that they refer only to the proclamation. At first sight the proper construction to be placed on these words does not seem to be clear but I think the latter part of the section (and it must be read as a whole) tends to remove any doubt that might exist. It prohibits the exportation of any article to any such country or place "unless consigned to such person or persons as may be authorized by or under the proclamation to receive such article." The use of these words (in inverted commas) render it obligatory not only that the consignee or consignees be mentioned in the proclamation as authorised to receive any such article but also that the country or place to which the article is to be consigned be named. "Such country or place" is the country or place mentioned after the words "in like manner," and by this latter part of the section it has of necessity to be named in the proclamation. This shows that the words "in like manner" may very properly be held to refer not only to the proclamation but "to the country or place named therein."

On reference to the decision appealed from I find that the learned judge says that he thinks "the second part of this section (2) is in effect a reproduction of the provisions of the English Act of August 28th, 1914." This act of 1914 is an extension of the Customs and Inland Revenue Act 1879 (s. 8) under which certain goods could be prohibited by proclamation from being exported or carried coastwise. Neither in the principal act nor in the amending Act is there any reference to "any country or place" as is found in the second part of this section. I am unable to find that this amending act has been adopted locally. The first part of section 2 is an adoption of s. 1 of the Exportation of Arms Act, 1900 (6th August), and the second part of section 2 is the counterpart of the English act of 27th November, 1914, which amends section 1 of this Exportation of Arms Act, 1900. It says: "Section 1 of the Exportation of Arms Act, 1900 (which enables the exportation of certain articles to any coun-

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try or place named in the proclamation to be prohibited) shall have effect whilst a state of war in which His Majesty is engaged exists, as if in addition to the other articles therein mentioned there were included all other articles of every description." This places beyond doubt that the words "in like manner" in the second part of the local section refer to the country or place named in the proclamation. The third part of section 2 is the counterpart of section 1 (1) of the English act of 24th June, 1915, which further amends the principal act. It reads: "The power of His Majesty under section one of the Exportation of Arms Act, 1900 as amended by the Customs (Exportation Restriction) Act, 1914 by proclamation to prohibit the exportation of articles to any *country or place named in the proclamation*, shall during the continuance of the present war, include the power to prohibit the exportation of any article to any *such country or place* (that is, named in proclamation) unless consigned to such person or persons as maybe authorised by or under the proclamation to receive such article." Here again is imposed the absolute necessity of naming the country or place in the proclamation.

The three parts of the local section therefore comprise the Exportation of Arms Act, 1900 and the two acts amending the principal act. I find that the proclamation is *ultra vires* inasmuch as it does not—as required by law (1) name the country or place to which the prohibition as to exportation of all foodstuffs is to apply and (2) it does not give the name of the consignee who must be authorised by or under the proclamation to receive the article. There is nothing in the ordinance which allows a special permit to be given by the Comptroller or any one else.

As to the use of the word "re-exported" it includes "exported" as used in the ordinance and would not in my opinion affect the validity of the proclamation.

The appeal must be allowed with costs.

DALTON, J.: This appeal is from a conviction on a charge of exporting certain foodstuffs from the colony without a special permit of the Comptroller of Customs. The charge is brought under the provisions of Ordinance 30 of 1915 (The Customs, Exportation, Prohibition Ordinance) 1915), and the proclamation thereunder dated December 11th, 1917. The conviction Was upheld on appeal by Sir Charles Major, C.J., and appellant now appeals to this court. The grounds of appeal argued were as follows:—

- (1.) The proclamation of December 11th, 1917, is *ultra vires* of and not within the terms or scope of Ordinance 30 of 1915, and is invalid, creating no offence under the ordinance.
- (2.) The ordinance allows of no conditions being attached to the prohibition of export and does not empower the Governor-in-Council to delegate its powers to the Comptroller of Customs; and
- (3.) The proclamation prohibited the re-export and not the export of foodstuffs.

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The case depends on the interpretation of section 2 of the Customs (Exportation Prohibition) Ordinance, 1915, which has been referred to in detail both by the magistrate, and in the judgment now appealed from. In the course of argument also English legislation has been referred to at length as being of assistance in arriving at the true construction of this section. That is a method of argument which has its dangerous side, for there is the risk that, after an examination of similar legislation in England and arriving at a conclusion as regards that legislation, the conclusion is taken and applied to the local legislation, without sufficient reference to the precise terms of the local statute, which is seldom introduced without some alteration in wording or other adaptation. In such a case it seems to me the proper course is (in the words of Lord Herschell in *Bank of England v. Vagliano Bros.*, 1891, A.C., at p. 144) first of all to examine the language of the ordinance in question, and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law or, as here from the state of the law elsewhere, and not to start with enquiring what the law is in England, and then, assuming that it was probably intended to introduce the same provisions into this colony, to see if the words of the local ordinance will bear an interpretation in conformity with this view.

We proceed then to examine the language of the ordinance and of the proclamation thereunder. The ordinance is entitled "An ordinance to control the exportation of munitions of War and during the continuance of the present war to control the exportation of all other articles of every description." Section 2 of the ordinance is as follows:

"2. The Governor-in-Council may *by proclamation prohibit the exportation* of all or any of the following articles, namely: arms, ammunition, military and naval stores, and any article which he shall judge capable of being converted into or made useful in increasing the quantity of arms, ammunition, or military or naval stores, *to any country or place named therein*, whenever he shall judge such prohibition to be expedient in order to prevent such arms, ammunition, military or naval stores being used against His Majesty's subjects or forces, or against any forces engaged or which may be engaged in military or naval operations in co-operation with His Majesty's forces, and whilst a state of war in which His Majesty is engaged exists *may in like manner prohibit* the exportation to any country or place of all or any other articles whatsoever and may during the continuance of the present war *prohibit the exportation* of any article to *any such country or place* unless consigned to such person or persons as may be authorised by or under the proclamation to receive such article. The Governor-in-Council may vary or add to or repeal any proclamation issued hereunder."

The proclamation of December 11th, 1917, after reciting this section, is as follows:

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“And whereas it is deemed expedient and necessary to exercise such power of prohibition in manner hereafter appearing:—

Now therefore I do hereby order, by and with the advice of the Executive Council that from and after the date hereof the following articles, that is to say, all foodstuffs shall be, and the same is hereby prohibited to be re-exported from British Guiana except under special permit from the Comptroller of Custom.”

A very unhappily worded proclamation as the Solicitor General admits.

Taking, first of all, the section of the Ordinance, the important parts of which I have italicised, what appears to be the natural meaning? I agree that one can naturally divide the section into three parts, the first from the beginning to and including the words “His Majesty’s forces,” the second from that point to and including the words “any other articles whatsoever.” and the third from that point to the end of the section. This division I have adopted for convenience of reference, but in doing so I do not assent in any way to the argument that the three parts of the section can be interpreted distinctly and alone, and without any reference to each other. The three portions go to make up the one section of the law, and one cannot shut out from one’s mind the wording of parts one and three in arriving at the proper construction of part two. As counsel stated, phrases in statutes *pari materia* must receive a uniform construction, notwithstanding any slight variation in phrase, where object and intention are the same. This applies possibly more forcibly to the different parts of the section of a statute, given the same conditions.

The proclamation purports to be made under the power given in part 2 of the section prohibiting the exportation of foodstuffs from the colony. It in fact prohibits the ‘re-exportation’ of foodstuffs, but it is general in its application, naming no country or place to which exportation is prohibited. It provides in addition that re-exportation will be allowed if a permit be obtained from the Comptroller of Customs. Here is where appellant’s counsel argues that the proclamation is *ultra vires*. He urges that the words “may in like manner prohibit the exportation to any country or place” mean as is provided in the first part of the section, that is “by proclamation . . . to any country or place named therein, whenever he shall judge such prohibition to be expedient.” In effect he argues that the power to prohibit is limited and is not general, limited to the country or place to be named in the proclamation. Against him it is urged that the words “in like manner” merely refer to the prior words “by proclamation,” a proclamation under part 2 of the section being, as opposed to a proclamation under parts one and three, without restriction as to country or place. I have great difficulty in reconciling such an interpretation with the wording of part 3 of the section. That part gives power to prohibit the exportation to “any such country or place unless . . .” What does the word ‘such’ mean? The Solicitor General urges that it

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refers to any country to which the prohibition applies, should it be named. But I think there is a more natural meaning here, that, as the section stands, it refers to the county or place that is required to be named in the proclamation, as provided in the foregoing parts of the section.

It will be seen then that an examination of the words of the section inclines me strongly towards the interpretation put upon it by appellant's counsel. It is however admittedly not as clear as it might be, and the section may then be said to come within the terms as being of doubtful import; it becomes therefore a case in which one is justified in resorting to an examination of the legislation in England, from which it is not questioned that this ordinance is taken or adapted, for the purpose of obtaining assistance as to the proper construction of its provisions. And here it may be noted that this phase of the case was never put before the magistrate in the course of the trial before him.

So far as this appeal is concerned, the Customs and Inland Revenue Act (England), 1879, corresponds with s. 105 of the local Customs Ordinance, 1884. They both give a general power of prohibiting by proclamation the exportation of arms, military stores and victuals. The next step in England was the Exportation of Arms Act, 1900, which, be it noted, is entitled "An act to amend the law relating to the exportation of arms . . . and military stores." Before that act, the law already provided for generally prohibiting the exportation of arms, but there was no power to prohibit the exportation to any particular place or country, unless the general power be brought into play. That, of course, might obviously be an inconvenient or impracticable course to follow. So the act of 1900 gives power by proclamation to prohibit the exportation of such articles by proclamation "to any country or place therein named," and it further enacted that it be read as one with the act of 1879. The position then is that the act of 1879 gives a general power of prohibiting the export of the articles named, whilst the act of 1900 gives a restricted power, applying to the countries or places named in the proclamation.

Next comes the Customs (Exportation Prohibition) act, 1914, dated August 28th, which extends the provisions of the act of 1879 to all articles of every description. In November of the same year was passed the Customs (Exportation Restriction) Act 1914, which extends the act of 1900 to all articles of every description whatsoever. At that stage then there was provision in England for the general prohibition (by proclamation) of the exportation of all articles. Side by side with that power was the more restricted power, enabling the prohibition (by proclamation) of the exportation of all articles to a country or countries to be specially named. As the acts of 1914 in their titles point out, the first is a case of prohibition, that is prohibition out and out, the latter is a case of restriction.

In this colony there is no intermediate stop between the Customs Ordinance, 1884, and the Customs (Exportation Prohibition) Ordi-

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nance, 1915, that is, the ordinance under which the proclamation under consideration was made. Analysing section 2 of this latter ordinance, and following the divisions of the section already mentioned we find that part 1 is an adaption of the English act of 1900. Part 2 is an adaptation, so Mr. Brown urges, of the English act of November, 1914. The Solicitor General, however, argues that it embodies both the August and November, 1914, acts, including all the powers given in both in a short and brief form. It is true that the title of the August act has been adopted for the local ordinance, but I am unable reconcile the argument the Solicitor General puts forward on this point, with the wording adopted in the section. Nor can I infer from the title alone, that, whilst the powers given in parts one and three of the section are powers of restriction, that given in part two includes both powers of restriction and also of prohibition.

An examination of the English legislation on which our ordinance is based has removed from my mind any doubt that the power given by part two is the same restricted power given in parts 1 and 3 of the section. If it was intended to introduce a power of prohibition similar to that given in England by the August, 1914 act, it has not been done, the restricted power of the November act alone being provided for.

A further suggestion has been put forward that it would be absurd to restrict the exportation of articles to a country or place to be specially named, if every country in the world could be so named. With that suggestion I do not agree. The legislature sees fit to enact that exportation may be prohibited generally. They then give another power prohibiting exportation to specific countries to be named. I see nothing incongruous or absurd in both powers existing side by side. The general power does not include the restricted power. They are separate and distinct the one from the other, and can only be exercised as given.

It is not necessary to make any further reference to part 3 of the section, except to say that it follows the provisions of the Customs (Exportation Restriction) Act, 1915. Reference to that act shows clearly that the words "to any such country or place" apply to the foregoing words "to any country or place named in the proclamation."

The case of *Hunter v. Colman* (1914 II Trish Rep. 372) was referred to as supporting the Solicitor General's interpretation of the contested section, but in the absence of the Irish reports, it is impossible to derive any assistance from the meagre note of the case given.

The power given by section 2 of the ordinance then is one to prohibit by proclamation the export of any articles whatsoever to any country or place named in the proclamation. There is no power in this ordinance to prohibit such exportation generally. Any proclamation therefore which purports to effect such a prohibition is *ultra vires* of the ordinance. The proclamation of December 11th, 1917, under which this charge is brought, in that it purports to prohibit the

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exportation of foodstuffs generally, is *ultra vires*, and therefore the charge under it cannot stand.

It is not necessary then to deal with the delegation of powers to the Comptroller of Customs, save to point out that no power is given by the ordinance to the Governor-in-Council to attach conditions to the exercise of the power put in their hands. No question arises, I think, as to any discretionary power; it having once been decided to exercise the power of prohibition, it is not open to the Governor-in-Council, under the ordinance as it stands, to make concessions in or abate the stringency of the power given.

As regards the use of the word "re-exported" in the proclamation, it does not seem necessary to say more than this for doubtless the proclamation, from what the Solicitor General has said, will not be retained as a model for future draughtsmen to follow. The word can only mean, as the magistrate said, one thing, and has reference to those foodstuffs which have been already imported into the colony. It is exportation a second or third time, but it is still within the term "exportation."

For the reasons given the appeal must be allowed. Mr. Browne on behalf of his client admitted, however, that he could not successfully resist on the evidence a charge brought under the proclamation formed under the provisions of Ordinance 21 of 1917 (Foodstuffs Export Regulation Ordinance, 1917). The penalty under that ordinance is one of \$500, whereas appellant was fined \$2,500 under the earlier ordinance. For that reason I come to the conclusion I have with all the more regret as the evidence discloses a carefully planned and deliberate contravention of the law in exporting foodstuffs from the colony in a time of war and stress, and when the legislature was trying to effect safeguards against food shortage in the colony in the interests of the whole community. That, however, cannot influence a court in coming to a decision as to the validity or otherwise of the proclamation under which the proceedings were taken.

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

Appeal allowed. Conviction quashed.

HEYLIGER v. SAVORY.
 PETTY DEBT COURT, GEORGETOWN.
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[86-11-1919.]

1919. DECEMBER 2, 16, 23. BEFORE DOUGLASS, ACTG. J.

Landlord and tenant—Right of distraint—Goods of third party brought on the premises—Roman-Dutch law—English Common law—Small Tenements and Rent Recovery Ordinance, 1903, s. 5—Civil Law of British Guiana, Ordinance, 1916, s. 3 (1) and (2).

Claim by the plaintiff C. Heyliger for the sum of \$20, damages for alleged illegal distraint on her goods and chattels, whilst they were on certain premises rented by one W. Heyliger from the defendant Savory.

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

S. V. B. Stafford, for the defendant.

DOUGLASS, J., Actg: The plaintiff is claiming \$20 damages against the defendant for illegal distress and trespass. It appears from the evidence that the plaintiff's brother, W. Heyliger, was tenant of certain premises at Camp street, Georgetown, and owed a month's rent from September to October last, whereupon on the 22nd October the landlord—the present defendant—put in a distress and seized the goods and chattels on the said premises. The said W. Heyliger has apparently not been living there since March, but the plaintiff and her mother had been for some time. She now claims that the articles set out in the particulars of claim are her property. It is denied that the gold earrings and cotton-reel waggon were ever seized and as they did not appear on the bailiff's list I must exclude them from my consideration, which will reduce the actual value of the goods claimed to \$10.36.

By the Civil Law of British Guiana, Ordinance, 1916, section 3 (1), the law of the colony relating to liens or rights of retention, tacit and legal hypothecs, hiring and lease, landlord and tenant, etc., shall cease to be Roman-Dutch law and by section 3 (2) the common law of the colony shall be the common law of England.

Blackburn, J., in *Lyons v. Elliot* (1875. 1 Q.B.D., at p. 213) relative to the right of distraint, says: "No doubt the general rule at common law was that whatever was found on the demised premises, whether belonging to a stranger or not, might be seized by the landlord, and held as a distress until the rent was paid." Statute law afterwards enlarged the landlord's powers and enabled him to sell the articles seized under certain restrictions. In this colony the

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fuller powers are given by Ordinance 9 of 1903 in respect of rents of small amounts. Also certain exceptions have been engrafted on the common law depending in part on the person in whose possession or the place where the goods may be found, and in part on the nature of the goods themselves.

The only cases I was referred to were *De Freitas v. Strong* (4th February, 1892, not reported) which was cited in *Dargan v. Dodd* (L.J., November 11th, 1905) with reference to what goods the landlord's hypothec extended over, and *Lewis v. Russell* (A.J., January 13th, 1913) on the interpretation of the words tenant or owner in relation to the rights of replevin. Under the Roman-Dutch law referred to in *De Freitas v. Strong* on the authority of Voet, Matthaëus and others "'*res illata et invicta*' may be furniture strictly so called, gold and silver ornaments, etc., and whatever has been brought in by the tenant." "But the movables to which this hypothec attached must have been the property of the tenant; or, if the property of another, they must have been brought on the tenement with his consent for the purpose of continually remaining there." It did not therefore attach to any goods lent to the tenant for a short time, or for a particular purpose, or deposited with or pledged to him, nor on articles which were left with him to be manufactured in the course of his trade.

The claim in *De Freitas v. Strong* appears to have been brought by way of interpleader after execution on judgment under the old Summary Jurisdiction Ordinance No. 17 of 1893, section 27, and had no reference to the Rents, &c., Recovery Ordinance, 1846, now represented by the Small Tenements and Rent Recovery Ordinance, 1903.

The rights of the landlord must now, as we have seen, be decided by the common law of England, except where any special ordinance intervenes; and that is where a difficulty arises in this case, for it is under section 5 of the last mentioned ordinance that the landlord proceeded, and sub-section 2 of that section enables him to distrain goods and chattels of the tenant sufficient to satisfy the amount due (*i.e.*, of rent), but in sections 10 and 11, the tenant or owner of the goods is dealt with, whilst in section 26 the person making a distress shall give a copy of costs and charges "to the person or persons on whose goods and chattels such distress may be levied," apparently not necessarily the tenant. Again the form in schedule I directs the bailiff to distrain the goods and chattels, except the wearing apparel and bedding of the tenant and his family, implying that the seizure is not restricted to the tenant's goods but at least the goods of himself and his family may be levied on.

In order to ascertain whether the distraint is intended to be limited by the ordinance to the tenant's own property, it is neces-

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sary to examine the remedies available to a person whose goods have been levied on for rent. In addition to recaption, there were two remedies at English law either (1) replevin, or (2) action for damages, and the same remedies are open in this colony. Replevin is defined as a process to obtain a redelivery to the owner of chattels which have been wrongfully distrained or taken from him, and it is not available where the distress was originally lawful. It is stated in Halsbury's Laws of England (vol. 2, p. 200) "Wherever there has been a distress which is wholly illegal, and not merely irregular or excessive, the tenant has his remedy by replevin." Thus it lies, *inter alia* (a) where the relation of landlord and tenant did not exist; (b) where no rent was in fact due, (c) where the things distrained were privileged.

But the present case comes within none of these examples, for there was rent due for the premises, the relation of landlord and tenant did exist in respect of the premises, and the chattels described are not of the privileged class. It seems clear that the present claimant could not have replevied at English law. Could she then have brought an action for damages, the course which she had adopted? An action for damages lies for any wrongful distress whether it is illegal, irregular or excessive. But what is a wrongful or unlawful distress? If the common law rule applies the seizure of a stranger's goods unless they are privileged is a lawful act—and it is stated both by Halsbury (Vol. II. at p. 143) and by Woodfall *Landlord and Tenant* (19th ed., p. 521) to the effect, that when a stranger's goods (even a lodger's or sub-tenant's) being lawfully on the premises are lawfully distrained by the landlord for rent due from some one else, the owner of the goods has a right to recover damages from the tenant. In other words the owner of the goods, in such a case, could not bring an action for damages against the landlord as the distress is lawful. To recapitulate: (1) the Roman Dutch law gave the landlord a hypothec over the property of a stranger if brought on the premises for a permanency; (2) the English common law is wider and embraces all goods on the demised premises (with certain exceptions which do not concern the present case); (3) the Small Tenements and Rent Recovery Ordinance dating back to 1846, was not held to alter the Roman-Dutch law, but only provided a procedure in certain cases falling within it; and (4) the English common law takes the place of the Roman-Dutch law. Therefore on a careful consideration of all the sections referred to above in the light of the interpretation of the English statutes, as developed by case law, I have come to the conclusion that the words "goods and chattels of the tenant" in section 5 (2) of Ordinance No. 9 of 1903 (practically a copy of section 5 of the 1846 Ordinance) is not restrictive but descriptive of the chattels

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in the apparent possession of the tenant without reference to their ownership.

If the Small Tenements, and Rent Recovery Ordinance, 1903, did not alter the Roman-Dutch law on the rights of distraint, and one may infer so from the reported cases, then I take it that since the abolition of that law the English common law applies. Were it otherwise the whole origin and object of the English common law rule would be swept away, a rule founded on the extreme liability of the rights of a landlord to be defeated by fraudulent collusion, if his remedy by distress were confined to the goods of his tenant alone; and it must also be remembered that the right of distraint attached to the premises and not to the person. On the special facts of this case I also take into consideration that the plaintiff made no claim to the goods when they were taken by the bailiff. I accordingly on the law and facts give judgment for the defendant with costs.

BOARD OF ASSESSMENT *v.* DE FREITAS.
In re DE FREITAS.

1919. DECEMBER 10, 15, 29. BEFORE BERKELEY, ACTG. C.J.

Revenue—Excess profits tax—Assessment of amount—Parate execution—Tax on Excess Profits Ordinance, No. 2 of 1918—Appeal—Abolition of committee of appeal—Tax on Excess Profits Ordinance No. 1 of 1919—Continuation of proceedings—Savings in case of repeal—Interpretation Ordinance, 1891, s. 28.

Application by the Board of Assessment acting under the provisions of the Tax on Excess Profits Ordinance, 1919, for parate execution in respect of an amount of duty or tax assessed by the Board on the profits of the business of Manoel Gregor De Freitas, at 1, Lombard Street, Georgetown, for the year 1919.

Petition, by Manoel Gregor De Freitas, against the granting of the application. The petition set out the reasons relied on why execution should not be granted, of which the following were the principal. The judgment below sets out all other necessary facts.

- (1.) On April 3rd, 1918, the petitioner De Freitas was assessed arbitrarily under s. 9 (1) of Ordinance 2 of 1918, and appealed from that assessment to the Committee of Appeal.
- (2.) On February 22nd, 1919, the Committee of Appeal, after hearing the appeal, referred the matter back to the Board of Assessment with a request that the Committee be informed of the evidence on which the Board found that petitioner's return of profits furnished by him to the Board was incorrect and as a result of which the Board made an arbitrary assessment.
- (3.) The Board of Assessment was dissatisfied with this decision but did not appeal, in which condition the matter remains.

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G. J. de Freitas, K.C. Actg. S.G., for the applicants, the Board of Assessment.

J. S. McArthur, for the respondent M. G. de Freitas (petitioner in the petition).

BERKELEY, Actg. C.J.: Fiat executio is applied for by the Board of Assessment and it is opposed by petitioner.

The history of this case must be given at some length. In accordance with "The Tax on Excess Profits Ordinance, 1918" (s. 6) the petitioner made a return of his capital and profits on 3rd April, 1918, in respect of the "accounting period" 1st January to 31st December, 1917. The Board of Assessment, acting under s. 9 (1) that is, being satisfied that the full amount of duty payable had not been shown on the return of capital and profits submitted to it, assessed the petitioner as the Board in its absolute discretion thought fit. This assessment thus arbitrarily made was for \$750; and is dated 8th August, 1918. Under s. 17 (2) the petitioner appealed to the Committee of Appeal and on 24th August, 1918, the chairman of the Committee of Appeal called on the Board of Assessment to furnish the Committee of Appeal with their reasons for the assessment. On 5th September, 1918, these reasons were furnished and were to the effect that the Board did not consider the return of capital and profits sufficiently reliable to form a basis of assessment for the reason that, in the opening statement of capital, the value of the premises, plant, machinery, and stock were estimated figures, and the assessment was made by the Board under s. 9 (1) of the Ordinance. The appeal came before the Committee of Appeal on 7th November, 1918, and was adjourned to 11th November. "It was arranged that the appellant should withdraw his appeal and if after considering further evidence to be produced by him the Board was unable to alter its assessment the appellant's appeal should then be heard" (Decision of Committee of Appeal 22.2.1919). On 8th November, 1918, Mr. Laurence as counsel for the appellant (petitioner) wrote to the Committee of Appeal: "The case is to be considered afresh on the facts as now submitted and the Board would make an assessment thereon from which my client can appeal if he should be dissatisfied with it. Under these circumstances it seems unnecessary for my client to proceed with the appeal now before the Committee of Appeal and I therefore write to say that it is withdrawn." It is clear from this that the appeal then pending was withdrawn. The information as to its withdrawal was brought to the notice of the Committee by this letter and therefore the statement in their decision, "The appellant's appeal should then be heard" can only refer to the appeal mentioned by counsel which his client would make if dissatisfied with the assessment made by the Board after considering the further evidence to be produced. On 25th November, 1918, the Board apparently considered this further evidence, for in a letter dated 28th November, 1918, the then counsel for the petitioner wrote to the secretary of the Board of Assessment that as the Board had decided they could not alter

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their decision his client would now appeal from the assessment and asked to be furnished with the reasons for the Board's decision. On 7th December, 1918, he forwarded a copy of petitioner's notice and reasons of appeal to the Board of Assessment. On 22nd February, 1919, the Committee of Appeal gave their decision and pointed out that under section 9 (1) it was not sufficient that the Board should be not satisfied with the return but they must be satisfied that the return submitted was incorrect, and to arrive at that conclusion they must have before them evidence sufficient to justify such conclusion. The decision states that the Board of Assessment took the view that it was a matter entirely in their discretion and that they were not bound to indicate the evidence on which they acted but that the chairman of the Board was willing to furnish the Committee for their own perusal with the figures on which their return was rejected and the assessment's made, but he would not consent to their being shown to counsel for the appellant, as he contended that he was not bound to furnish them at all. In the last paragraph the committee say that they do not adopt this view and are of opinion that they must be informed of the evidence on which the Board found that the return was incorrect and they referred the matter back to the Board for that purpose. The decision was communicated to the Board on 3rd March, 1919, and on 5th March, 1919, the Board in their reply drew attention to the reasons given in their letter of 5th September, 1918, and add that they are "not aware that it is permissible for the purpose of collecting excess profits duty to recognise a stock that has been estimated months after the date of the commencement of an accounting period as was done in this case. It is manifest that data of this kind is useless. In the circumstances the Board was satisfied that the return of capital and profits submitted by the appellant did not disclose the correct amount of duty payable, and for that reason he was assessed for such amount of duty as the Board in its absolute discretion thought fit" (s. 9 of Ord. No. 2 of 1918). Now the Committee of Appeal had asked to be informed of the evidence on which the Board had found that the return was incorrect. The reply sent by them was not a compliance with this request and it was open to the Board to appeal to a judge in chambers from the decision of the Committee of Appeal. This was not done and on the very next day (6th March, 1919) the Ordinance, No. 1 of 1919, came into force which repealed Ordinance No. 2 of 1918, save as provided for in s. 23 (2). Nothing further seems to have been done until the 2nd June, 1919, when the Board of Assessment wrote to petitioner and asked him to send in (1) "Sales Day Books" for 1917, (2) value of property as assessed in the Town books, (3) receipt for rates, (4) original invoices for machinery and (5) receipts for payment made therefor. On 13th June, 1919, petitioner complied with (1), (2), (3) and as to (4) said that these were "destroyed by woodants and the box containing them had to be burnt" (5) does not appear to have been complied with. On 25th June, 1919, the Board of Assessment wrote to petitioner that they had "after examination of the further informa-

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tion supplied by you again considered your return for last year.” They further declined to make any alteration in the amounts of duty payable but added that they “were agreeable to allow you fourteen days in which to lodge a new appeal.” On 7th July, 1919, the petitioner appealed and on 25th August, 1919, objection was taken to the appeal being heard on the ground that there was no appeal under section 8 of the 1919 Ordinance from an assessment arbitrarily made. The trial judge (reported above at p. 167) held that from the record it was clear that the appeal did not relate to any assessment under the 1919 Ordinance but to an assessment made in August, 1918. The only record of assessment then and up to the present time of existence was that endorsed on the return furnished by the petitioner “Assessed arbitrarily under section 9 (1) at \$750, and initialled S.H.; H.A.C (written in red ink).

8. 8. 8.

The question of this assessment has been considered by the Board on three different occasions. Twice during the existence of the Tax on Excess Profits Ordinance, 1918, and once after the repeal of that Ordinance by No. 1 of 1919. In view of the provision in both ordinances giving a right of appeal within 15 days of decision it was incumbent on them to record each fresh assessment as they had done in respect of the original assessment of 8th August, 1918. If this had been done on the second occasion instead of deciding “not to alter their decision” the order of the Committee of Appeal not having been complied with and no appeal having been made in respect thereof the payment by petitioner of the assessment made on him would have remained in obedience. On the third occasion, 25th June, 1919, the Board again considered the petitioner’s *return for last year* and declined to make any alteration in the amount of duty payable but were agreeable to allow petitioner 14 days in which to lodge a new appeal. It is urged that this was fresh assessment.

It purported to be made under Ordinance No. 1 of 1919 and the Board was disposed to grant an indulgence which was contrary to law, as under this latter Ordinance the right of appeal was taken away when the assessment was fixed arbitrarily. It was, however, no assessment but only a refusal to alter the assessment of the 8th of August, 1918, moreover the Board had no power to assess under Ordinance No. 1 of 1919 in respect of an “accounting period” 1st January to 31st of December, 1917. Such an accounting period is not provided for in Ordinance No. 1 of 1919 (see section 4 (1)). It is argued as an alternative that if the only assessment is that made on the 8th of August, 1918, then the petitioner having appealed and subsequently withdrawn his appeal he is now out of Court. The answer to this is that the present application is made as to an assessment alleged to have been made under the 1919 Ordinance (sec. 8) and not as to an assessment made under the 1918 Ordinance (sec 9 (1)).

The fiat executio therefore cannot be granted on this, application. Inasmuch as I find that the present condition of things in respect of this assessment is due to the action of the Board and that petitioner

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did nothing more than he was legally entitled to do I am of opinion that he ought not to be deprived of his costs which I fix at \$50.

In the event of this matter not being amicably settled between the petitioner and the Board of Assessment I think it as well to lay down what I regard as the proper procedure to be adopted, in order to ensure the payment by petitioner of any assessment which may be legally due by him for the "accounting period" 1st of January to 31st December, 1917. Under the Interpretation Ordinance (No. 4 of 1891) there is a section "Savings in cases of repeal" (section 28) which, *unless the contrary intention appears*, keeps alive any liability incurred under the repealed ordinance and provides that legal proceedings may be continued or enforced as if the repealing ordinance had not been passed. Not only does the *contrary intention not appear* in the repealing ordinance (No. 1 of 1919) but there is a special provision in section 23 which repeals Ordinance No. 2 of 1918. This special provision is in sub-section 2 and reads "Notwithstanding such repeal the Board may assess or collect during the currency of this Ordinance (1 of 1919) any duty which may now or hereafter be found to be due and payable in respect of 1918 (a clerical error for 1917) as if such assessment or collection had been made while the Excess Profits Ordinance, 1918, was in force."

The Committee of Appeal therefore still exists for the purposes of the 1918 Ordinance and the Board of Assessment should forthwith make a fresh assessment under that Ordinance and serve notice of the amount of such assessment on petitioner (s. 11) who may appeal to the Committee of Appeal within 15 days of the service of notice (s. 17 (2)) and any person may appeal to a judge against any decision of the Committee of Appeal. The Judge shall have jurisdiction to determine all questions (s. 18 (1)). The Board of Assessment therefore have the right to appeal to a judge from any decision of the Committee of Appeal.

In re DA SILVA.

1919. MARCH 8. BEFORE HILL, J.

Insolvency—Discharge of insolvent—Application for discharge—Insolvent's assets—Dividend of fifty cents in the dollar—How computed—Insolvency Ordinance, 1900, s. 26, ss. 3 (a) and ss. 4.

Application by C. M. da Silva, who had been adjudged insolvent on March 12th, 1908, for his discharge.

In his report to the Court the Official Receiver (Mr. W. A. Parker) stated, *inter alia*:—

9. "After paying the secured creditors, a dividend of 25 $\frac{7}{8}$ per cent, was paid to the secured creditors, amounting to \$2,373.09.
10. The insolvent's conduct during the proceedings under his insolvency has been uniformly good. He has not committed any misdemeanour or any felony connected with his insolvency. None of the facts referred to in sub-section 3 of section 26 of the Insolvency Ordinance exist in this case, except possibly the fact mentioned in sub-section (a). The existence or otherwise of this fact depends on the construction the Court gives to this sub-section.
11. As already stated insolvent's assets realised \$9,182.75, and the secured debts \$5,342.43. Deducting the latter from the former leaves \$3,840.32, which is less than fifty per cent., of the unsecured debts. The question arises whether the word assets in the first line of the sub-section means the entire assets of the insolvent or the assets after deducting the amount of the secured debts."

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

HILL, J.: This is an application by the insolvent for his discharge, He was adjudged insolvent on March 12th, 1908, a receiving order having been made against him on his own petition on that day.

The secured creditors were (1) his wife, under a tacit hypothec for moneys belonging to her under the provisions of an ante-

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nuptial contract—under this she claimed \$3,482.43—(2) the B.G. Mutual, for \$1,530 under a mortgage, and (3) J. I. Chapman \$360 for rent.

After paying these secured claims a dividend of 25 $\frac{7}{8}$ per cent., was paid to the unsecured creditors.

The assets realised \$9,182.75 and the proofs admitted amounted to \$14,513.97, made up of \$5,372.43 secured, and \$9,171.54, unsecured debts.

The question for decision is whether, in interpreting section 26 (3), (a) of Ordinance 29 of 1900 and section 26 (4) of the same ordinance, the word assets means the entire assets of the insolvent or the assets after deduction of the amount of the secured debts. I gather from the Official Receiver's report there will be no further incomings.

The point is not clear on the wording of the sub-sections referred to, but after looking at the form 39 attached to our ordinance and form 46 of the English Act, I see no reason to alter what has been the practice hitherto, that is, to deduct the secured debts from the assets in computing the percentage of fifty per cent.

In these circumstances, I grant the discharge of the insolvent but suspend it for two years.

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[376 OF 1917.]

1919. JANUARY 9. BEFORE SIR CHARLES MAJOR, C.J. AND
HILL, J.

Practice—Order for delivery of particulars—No time for delivery fixed by order—Procedure thereon—Rules of Court, 1900, O. XXXV, r. 6 ; O. XXXVI., r. 19(a); and O. XL., r. 14.

An order requiring a party to do an act which does not fix a time for the act to be done, although not thereby rendered ineffectual, cannot be enforced. The party obtaining it must; in that case, obtain a supplemental order fixing the time for the act to be done.

Result of noncompliance with order for delivery of particulars of defence within a certain time, considered.

Appeal from a decision of Berkeley, J.

An application by the plaintiffs for further and better particulars was made and granted on February 1st, 1918 (a). The order not being complied with the plaintiffs, in May, 1918, further applied that the defence delivered be struck out and that the action be dealt with as though the defendant had entered no appearance to the writ of summons. The application was granted on June 15th, the judgment of Berkeley, J., being as follows:—

BERKELEY, J.: This is an application by the plaintiffs to strike out the defence delivered on January 3rd, 1918.

The plaintiffs claimed under a specially endorsed writ filed on December 12th, 1917, \$375.65 as balance due for firewood, and on December 22nd the defendant obtained leave to defend. On the 1st February, 1918, the court ordered the defendant to deliver further and better particulars and to pay the costs of that application. The court fixed no time limit for the delivery of these particulars and therefore when “no time is expressed in the judgment he is bound to do so immediately” (O. xxxv. r. 6.) and without any formal demand for performance” (r. 6 *supra*).

The defendant apparently treated the court’s order with contempt, so on May 14th the plaintiffs served him with a notice that unless he complied within seven days with that order application would be made to the court to strike out the defence. No action was taken by the defendants, and on May 25th the plaintiffs filed their present application. The affidavit of the plaintiff’s solicitor shows that when he was engaged in filing this application the defendant’s solicitor came in to the Registrar’s office and saw him thus engaged, that he left quickly and that when he (the deponent) got back to his office he found what purported to be the particulars which the court had offered. These he returned with an intimation that the application had been filed. No affidavit by

a) See 1918 L. R., B. G., 4.

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the defendant has been filed, and the court accepts as correct the statements set out in the affidavit of the plaintiff's solicitor. These statements are borne out by the record of the registrar's office which shows that this application was filed at 10.20 and that the particulars were filed at 10.45 both on May 25th. A period of nearly four months elapsed when the defendant suddenly conceived the idea of obeying the court's order. The court grants this application in the terms of (a) and (b) of the application and orders defendant to pay the costs.

The defendant, on application, was granted leave to appeal.

P. N. Browne, K.C., for the appellants (defendant).

E. M. Duke, for the respondents (plaintiff).

Sir CHARLES MAJOR, C.J.: The plaintiffs obtained an order for delivery of particulars of certain allegations in the defence. The order did not fix a time for the delivery. After a written request from the plaintiffs' solicitor for compliance with the order by the defendant and an intimation that in default an application to the court would be made, the plaintiffs applied for and obtained an order that the defence be struck out and that the action be dealt with as though the defendant had entered no appearance to the writ of summons. The defendant has appealed.

An order requiring a party to do an act which does not fix a time for the act to be done, although not thereby rendered ineffectual, cannot be enforced. The party obtaining it must, in that case, obtain a supplemental order fixing the time for the act to be done. The plaintiffs here did not adopt that course. When, therefore, they founded an application to strike out the defence upon non-compliance with the order they proceeded on a basis they could not establish. The reason for the learned judge of the court below making the order appealed from is given as that Order xxxv, rule 6, provides that a person directed by a judgment to do an act is bound to obey and, if no time is expressed in the judgment, to do so immediately, unless the court then enlarge the time. This rule is peculiar to our code and, however difficult it may be to contemplate an application to the court to enlarge a time which has never been specified, this much seems to me clear, that it refers to a judgment and not to an interlocutory order. There is a rule, 19 (a) of Order xxxvi, which provides that every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect, but that rule was added to Order xxxvi, which relates to execution, and was made to prevent any distinction being made between a judgment whereon execution may issue and an order leaving the same effect.

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Mr. Duke has referred to Orders XL, rule 14, marginally noted “enforcement of order,” but that rule obviously depends for operation upon some time being fixed in an order for doing an act. A party cannot comply with an order if he is not told when or within what time he shall do so.

In face of the silence of the order for particulars the application to the court below was in other respects objectionable. The action could not be dealt with as though the defendant had not entered appearance. Appearance was quite regular and so was the delivery of the statement of defence, but the latter required more particularity in some of its allegations. That particularity the defendant was ordered to express, only no time was fixed for his doing so. Until the plaintiffs cured that defect they could do nothing to enforce the order.

Even, however, assuming the defendant to have been liable to proceedings for enforcement, the effect of his disobedience of the order—had a time been fixed for obedience—would have been that the specific allegation in the defence of which particulars were not forthcoming disappeared from that pleading leaving the defendant confined strictly to such other part of his defence as was unobjectionable. That other part consists of traverse of the plaintiffs’ claim, whereby the plaintiffs are put to proof of it. A defence may consist of several parts. Particularity may be requisite in one part and not in another.

The order, I think, that should have been made upon the plaintiffs’ summons was that the defendant do within twenty-four hours deliver to the plaintiffs the particulars specified in the order of Hill, J., and that, in default of their delivery, the allegations contained in paragraph 5 of the statement of defence be struck out.

And, rescinding the order of Berkeley, J., an order in those terms I think this court should now make, with the further order that the plaintiffs have ten days after delivery of the particulars to deliver a reply. Parties will pay their own costs of the application to the court below and of this appeal.

HILL, J.: I concur.

Appeal allowed.

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[191 OF 1917.]

1919. MARCH 15. BEFORE BERKELEY and HILL, J.J.

Offence after previous conviction—Court of summary jurisdiction—Evidence of previous conviction—Procedure—Illegality affecting merits—Appeal—Service of notice of appeal by registered letter—Magistrate's Decisions (Appeals) Ordinance 1893, s. 48—Interpretation Ordinance 1891, Amendment Ordinance 1907, s. 2.

Appeal from a decision of Sir Charles Major, C. J. (1).

Defendant together with another person, on a charge brought against them by Inspector of Police Manning, was found guilty by the stipendiary magistrate of the Georgetown judicial district of being found on private premises for an unlawful purpose after a previous conviction.

Defendant appealed successfully and his conviction was quashed by the Chief Justice (1).

Complainant Manning thereupon appealed to the Appeal Court from this decision on the ground that by s. 146 of the Summary Conviction Offences Ordinance, 1893, the evidence of the respondent Kadir's previous conviction was admissible to prove to the

(1.) Decision reported 1917, L R., B.G., 157.

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court the known character of Kadir, and that the learned Chief Justice erred in ruling that proof of previous conviction could not be given till after the conviction for the offence charged and that the giving of such proof was a specific illegality substantially affecting the merits of the case within the meaning of section 9 (10) of the Magistrate's Decisions (Appeals) Ordinance, No. 13 of 1893.

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

J. A. Luckhoo, for the respondent, objected that no proper service of the notice and reasons of appeal had been made. The objection was upheld.

BERKELEY, J.: This is an appeal from the decision of Major, C.J. The appellant has filed eight affidavits with the view of establishing that respondent had been served with a notice informing him that a registered letter was lying at the post office for him—that is, that the proviso to section 2 of Ordinance No. 30 of 1907 had been complied with. In view of the words “no house to house delivery,” and the admission that there is such a delivery in the district it is extremely doubtful whether the proviso applies notwithstanding that under the Magistrate's Decisions (Appeals) Ordinance 1893 notice of service by post can only be effected by registered letter. The point having been argued by counsel on both sides as coming within the proviso, I shall proceed to deal with it thereunder. This proviso is that service shall not be deemed to have been effected unless the notice has been *delivered to or left at the residence* of such person and unless a declaration 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. The affidavits filed show that the letter-carrier from the post office left the notice with an unknown East Indian woman who is identified by Eletha Dickson as Galinea. She further says that she saw this woman give a paper to Ameeran—the reputed wife of the respondent—when she returned to the lot, that is, the lot where one of the houses there situate is the residence of the respondent. She says that respondent had been absent from home for several days at that time and that he did not return until ten days later. She further says that Ameer handed the paper to her which she read and that it was the notice required by the proviso. It would seem, therefore, that the notice came into the possession of the respondent's reputed wife in the round about way referred to in the affidavits, and that it was returned by her to Galinea who took it back to the post office.

The service of this notice is a statutory provision and this

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being so it is imperative that the conditions contained in the proviso be accurately complied with in order that the appeal may be brought to a hearing. The notice was neither delivered to respondent nor *left at* his residence nor is the letter-carrier able to say that he duly delivered such notice. In my opinion the words at the end of the proviso "or other proof is given of the *due* delivery of such notice" cannot be held to have been complied with. It certainly was not delivered to the respondent and it was not left at his residence by giving it to an unknown woman.

Appeal dismissed with costs.

HILL, J.: A preliminary objection in this matter has been taken by counsel for respondent as to the service of the notice, and reasons of appeal.

Under section 48 of Ordinance 13 of 1893 every notice, application or other document required to be served, made, or transmitted under this ordinance may be made by post: provided that the letter containing such document shall be registered, and proof shall be given if required of such registration having been effected.

Under section 2 Ordinance 30 of 1907 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 where 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 is 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 his due delivery of such notice.

There is a house-to-house delivery of letters in Albouystown and therefore in my opinion the proviso above mentioned does not apply.

The procedure in regard to registered postal matter is dealt with by regulation 3 to 13 of regulations made under section 91 of the Post and Telegraph Ordinances 1893 and approved by the

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Governor and Court of Policy on March 20th, 1895. From these regulations I gather that "notice" of a registered letter lying at a post office in a district where there is house to house delivery is not provided for.

But even if the proviso to section 2, Ordinance 30 of 1907 could be held to apply, I do not think the affidavits show that the notice was left at the residence of the person upon whom service is to be effected. To hold they did would be to encourage a most undesirable laxity in the service of most important documents.

I am of opinion no due service has been effected and the appeal must be dismissed with costs.

Objection Upheld. Appeal dismissed

DAVIS v. McCALAM.

[236 OF 1918.]

DAVIS v. LAKPATHSING.

[237 OF 1918.]

1919. MARCH 21. BEFORE SIR CHARLES MAJOR, C.J. AND
BERKELEY, J.

Foodstuffs—Foodstuffs (Export Regulation) Ordinance, 1917—Exportation—Attempt to export—Jurisdiction—Magistrates' Courts Ordinance, 1893, s. 37 (1) (a.)

Appeal from the decision of Hill, J. (1)

The defendant in the two cases had been convicted by the stipendiary magistrate of the Georgetown judicial district of an attempt to export certain articles of food from the colony contrary to the provisions of Ordinance 21 of 1917. On appeal that conviction was upheld by Hill, J., and the defendants now appealed to the Full Court.

The reasons of appeal are set out in the judgments below. The facts being the same in both, the second case only was argued.

J. A. Luckhoo, for the appellant Lakpathsing.

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

SIR CHARLES MAJOR, C.J.: This is an appeal from the order of Hill, J., affirming the conviction of the defendant by the magistrate for Georgetown for attempting to export foodstuffs from the colony, contrary to the terms of a proclamation issued under the provisions of Ordinance No. 21 of 1917.

(1) Reported at 1918, L.R., B.G., 129.

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It is objected for the appellant that there is no such offence in law as that of an attempt to export prohibited goods and that even if there be that offence, the magistrate had no jurisdiction to convict therefor.

I am unable to follow the arguments of counsel for the appellant that there cannot be an attempt to commit the offence of exportation of prohibited goods. The learned judge who heard the appeal from the magistrate has given the definition of Stephen, J. of what an attempt to commit a crime consists, and the circumstances of this case clearly bring the act and series of acts on the defendant's part within that definition.

By section 37 (1) (a) of Magistrates' Courts Ordinance (No. 12 of 1893), a magistrate has jurisdiction to hear and determine complaints or informations for the recovery of fines, penalties, or forfeitures which are not specially assigned by statute to the Supreme Court. The statute under which the complaint here was brought is silent as to the tribunal before which proceedings are to be taken to enforce a penalty incurred under the ordinance. Section 37 therefore applies.

The defendant being properly before the magistrate, and he having jurisdiction to hear the complaint, he had power under the provisions of section 38 of the summary Conviction Offences (Procedure) Ordinance, (No. 12 of 1893) to convict the defendant of an attempt to commit the offence charged. He so convicted and I agree with the learned judge of the court below that on the evidence before the magistrate, the conviction was right.

The appeal, I am of opinion, must be dismissed with costs.

BERKELEY, J.: This is an appeal from Hill, J. who upheld the conviction of the appellant by the magistrate for that he did unlawfully attempt to export without permission of the Comptroller of Customs ten cases of cocoanut oil, the charge laid against the appellant being that he had committed the substantive offence under Ordinance 21 of 1917.

The grounds of appeal are:

- (1) that there is no such offence in law as an attempt to export prohibited goods;
- (2) that the evidence adduced does not establish the offence;
- (3) no jurisdiction to convict of the attempt; and
- (4) not sufficient evidence on which the appellant in law could be found guilty.

As this court can deal only with questions of law, reason (2) was not argued.

Reason (4.)—Where there is evidence as in this case on which it is open to a magistrate to find as he has done no question of

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law arises and this court will neither weigh the evidence nor interfere with the discretion of the magistrate.

Reasons (1) and (3.)—It is admitted by counsel that offences under Ordinance 2] of 1917 are summary conviction offences (Ordinance 10 of 1893, section 37 (1) (a)) and this being so it is provided (Ordinance 12 of 1893, section 38) that where the complete commission of the offence charged is not proved, but the evidence establishes an attempt to commit the offence, the defendant may be convicted of such attempt and punished accordingly.

The appeal is dismissed with costs.

Appeal dismissed.

LEE v. SUMPETH.

[13 OF 1918.]

1919. MARCH 5, 6, 10, 12 AND 22. BEFORE BERKELEY, J.

Immovable property—Specific performance—Division of undivided interests into specific parts—Transport—Servitude—Proof.

Claim by the plaintiff for the specific performance of a contract of sale of immovable property. Plaintiff claimed to have purchased on March 27th, 1917, from the defendant, through his attorney Abdul Rayman, one undivided third of the plantation Rotterdam and one undivided fifth of the plantations Nouvelle Flanders and Union for the sum of \$2,500, of which sum \$100 had been paid, and the balance of which he was ready and willing to pay. He also claimed the sum of \$240 for damages.

The defence set up that the property, if sold, was sold with the right of drainage to the proprietors of the plantations in question and other plantations, through the plantation Vreed-en-Hoop, in accordance with an agreement alleged to have been entered into by all the parties on August 18th, 1910. In the alternative, defendant set up that the sale of March 27th, 1917, was rescinded and replaced by a fresh agreement in order to enable plaintiff to obtain a specific portion of the plantations in question in place of an undivided interest only.

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

P.N. Browne, K.C., for the defendant.

BERKELEY, J.: On March 27th, 1917, defendant by his attorney Abdul Rayman agreed to sell (1) his undivided one-third share of plantation Rotterdam, and (2) his undivided one-fifth share of

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plantation Nouvelle Flanders, more fully described in the statement of claim, to the plaintiff for \$2,500. He was paid \$100 on account of the purchase money—on the same day, and the plaintiff was given possession. There is embodied in the receipt for this money the following:—“Conditions are that I Abdul Rayman shall have the privilege to purchase paddy on the said land at all times such condition is to be set out on a contract.” This contract which was signed on October 27th, 1917—(that is about the time when transport was to be passed)—refers only to the condition set out in the receipt of March 27th, 1917. Although the defendant and his co-proprietors hold an undivided interest in the properties, as between themselves each proprietor has his specific portion allotted to him, and the lots so allotted to defendant are those which plaintiff had agreed to purchase. The plaintiff was desirous of obtaining a loan by way of mortgage, and the secretary of the Demerara Mutual Life Assurance Society, Limited, inspected the portions in his possession. On investigation of the title the company declined to accept the mortgage. It was then agreed that all the proprietors should transport their undivided shares to Abdul Rayman who would re-transport to each his specific portion. These transports being ready for passing it was found that a reference had been made in the transports to an alleged agreement of August 16th, 1910, which defendant was called upon to file in the Registrar’s office. On its production the Registrar declined to admit it, whereupon Abdul Rayman agreed to strike out all reference to this agreement and to pass the transports: This was done but on the parties coming before the transport judge he again raised the question with the result that the judge declined to pass them. The plaintiff thereupon brings this action to enforce specific performance.

The alleged agreement of August 16th, 1910, provides, *inter alia*, that the owners of the plantations now sought to be transported shall make a quarterly payment to meet the expenses incurred by Sunnychari, the owner of Vreed-en-Hoop, in keeping in good order and condition the trench of his estate, so that it shall at all times be in such a condition as to drain their estates.

Abdul Rayman admits that he bought Vreed-en-Hoop from the Colonial Company in the name of Sunnychari, his brother. This was on September 17th, 1910. Sunnychari transported to him on April 28th, 1917. In these transports of Vreed-en-Hoop it is stated that the plantation is transported “subject to the right of drainage through the said plantation Vreed-en-Hoop now held and enjoyed by the proprietors of plantation Nouvelle Flanders, Union, Rotterdam,” and there is no reference to payments by the owners of these plantations. Abdul Rayman also admits that he purchased the properties now sought to be transported in the

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name of the defendant Sumpeth who is his father. Abdul Rayman therefore as owner of Vreed-en-Hoop is the only person to benefit by Abdool Rayman, owner of the shares now to be transported, endeavouring to have a reference to the alleged agreement inserted in the transports. It is true that several transports have been passed since Abdul Rayman purchased Vreed-en-Hoop on 17th September, 1910, in which, after the words "right of drainage through the said plantation Vreed-en-Hoop now held and enjoyed by the proprietors of plantations Nouvelle Flanders, Union, and Rotterdam," there is inserted said "right being subject to an agreement dated 16th August, 1910, made between the proprietors of Nouvelle Flanders and Union, Mary and Haarlem, Rotterdam and Vreed-en-Hoop in which the rights of the proprietors as to the drainage through Vreed-en-Hoop are set forth and contained," and these include the transports of these properties by Jaipal Singh and Bunsropun the respective owners to defendant (Abdool Rayman). The transports to the original purchasers by the Colonial Company contain no such reference to any agreement. So also in the instructions signed by Abdul Rayman and plaintiff the above words appear after the description of the property under "secondly," and plaintiff has made two affidavits in which occur these words "as set forth in document marked 'A' under head of 'secondly'" Witnesses have also deposed to his having read the instructions and affidavits. Plaintiff says that he saw something as to this document in the advertisement and he regarded it as connected with his right of drainage. This may be so. In any case I am not satisfied that plaintiff's attention was properly drawn to any desired variation of the agreement as set out in the receipt for \$100 or that he consented thereto.

Now as to the alleged agreement. It is full of interlineations, erasures, and paragraphs 17 and 18 are not typed as are the other paragraphs but they are written in ink, while 18 is inserted after the date "16th day of August, 1910." There are no witnesses but under the words "signed until the clean as agreed on" there are several names which are supposed to represent the signatures of some of the proprietors. Now the transport to Sunnychari, in whose name Abdul Rayman purchased, is dated September 17th, 1910, and the alleged agreement is dated August 16th, 1910, so it follows that Abdul Rayman entered into an agreement as he says with these parties before he had acquired the property in the name of Sunnychari. If the owner of Vreed-en-Hoop desired, as he well might, that the owners of the dominant tenement should assist him in the upkeep of the necessary trenches he should have acted above board and not attempted to

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insert into transports a one-sided agreement which he well knew had never been entered into, and which secured rights only for himself, although it referred to the "rights of the proprietors." At the most this document could only be regarded as the draft of a proposed agreement.

The procedure adopted of transporting to one person the undivided shares in order that he might re-transport the specific portion to the person in possession of that portion was no new agreement but only a mode of procedure adopted by the parties concerned to carry into effect the only agreement entered into between the plaintiff and defendant referred to in the receipt of March 27th, 1917, and set out in the contract of October 27th, 1917.

There must be judgment for the plaintiff for specific performance in the terms of the claim with costs, such costs to be taxed and deducted from the balance of purchase money to be paid by plaintiff on the passing of the transport.

REX v. SURAT AND ANR.
Ex parte THE ATTORNEY GENERAL.

1919. MARCH 21, 24. BEFORE SIR CHARLES MAJOR, C.J.

Criminal law—Abduction—Trial by special jury—Application—Practice—Grounds of application—Onus of proof—Indictable Offences (Procedure) Ordinance, 1893, Amendment Ordinance, 1918, s. 42

Application by the Attorney General on behalf of the Crown for a special jury to be struck for the trial of Surat and Surjoo, two East Indian women, on a charge of abduction. The two accused women had been indicted for murder along with six other persons, for whose trial a special jury was struck (*a*). A *nolle prosequi*, on the charge of murder was entered against the two women who were subsequently indicted on the present charge of abduction. The child, the subject of the charge of the latter case, was the same child for whose murder the six accused men were convicted.

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

This application is made under section 42 of the Indictable Offences (Procedure) Ordinance, 1893 (Amendment) Ordinance, 1918, for an order that a special jury be struck for the trial of the indictment of Surat and Surjoo for the abduction of Molly Schulz. Paragraph 2 of the affidavit of the Crown Solicitor states “that the above-mentioned accused were indicted along with six other persons on the charge of murder. They fell ill during the course

(*a*) 1918, L.R., B.G. 132.

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of the trial and the Attorney General entered a *nolle prosequi* in open court, alleging as his reason the necessity of not postponing the trial of the other accused and avowing the intention of substituting another charge. They were subsequently indicted for the abduction of the child whom they were first indicted for murdering." In paragraph 3 it is said that "a special jury was ordered by the Chief Justice in the first charge. The witnesses in the second charge include the principal witnesses in the first charge and include no new witnesses or other circumstances;" while paragraph 4 states that "the necessity for a special jury in the murder charge exists in the charge of abduction, the facts and circumstances being the same except as regards the actual murder of the child."

The accused Surat has filed an affidavit in opposition to the application, from which it is clear that counsel who appears on her behalf misunderstands what is stated in the affidavit of the Crown Solicitor. Surat, in paragraph 3 of her affidavit, states that she "was not subsequently indicted as stated in paragraph 2 of the affidavit of the Crown Solicitor but was re-arrested and charged for the abduction of one Molly Schulz and depositions were taken before the magistrate for the district," and in the next paragraph she says, "I am advised and verily believe that no grounds have been shown for the granting of the application and I am embarrassed in answering the said application." Grounds have been set out in the affidavit of the Crown Solicitor because it is expressly mentioned that a special jury had been ordered in the first charge when the two women, along with six others, were charged with the murder of Molly Schulz. At that time there was necessity for a special jury and it will be remembered that at that trial a great deal of public interest was aroused, and prejudice created in the minds of people against the two women who were now charged with abduction.

C. R. Browne, for Surat.

I do not know that my friend the Solicitor General can go into that phase of the case. I know nothing about public interest and prejudice and they are not mentioned in the affidavit to which the Solicitor General has referred.

His Honour: It has been stated that the facts and circumstances in the present indictment are the same as in the first indictment except as regards the actual murder of the child.

Mr. Browne: If that is so I think I am correct in saying that I am not prepared to reply to my friend now. If my friend want to refer to those facts he should have set them out in the affidavit, The application as it stands is bald and I submit con-

fidently that the accused on whose behalf I appear is entitled to know on what grounds the application is being made. If even there was public interest and also a certain amount of prejudice in the first case, those circumstances are not at present before the Court I submit that my friend cannot import into the present application any facts or circumstances that do not appear in the affidavit of the Crown Solicitor, and put forward those facts as grounds for the granting of a special jury in this instance. No grounds whatever have been mentioned and I submit that the application cannot be granted in the absence of grounds. It happens that the first case of which mention has been made was taken by your Honour and perhaps that is the reason why no grounds are given. The present application is something by itself and reasons must be set out in the same way as if the application was being heard by another judge.

De Freitas, K. C., in reply: I submit there is nothing at all in the objection. We have alleged in the affidavit that the grounds are the same as in the first indictment and one of the counsel who appears now appeared before and knows what the grounds were. I doubt very much whether it is necessary to allege the grounds of the application. If the accused honestly say that they are prejudiced by not knowing what the grounds are they could have applied and they would have known what they are. No mention is made in the ordinance that an application must be filed stating precisely what the grounds are and the application is one which the court will grant after hearing the objection, if any, of the other side. The court will always entertain such an application, the court deciding whether the objection, if any, raised by the prisoners opposing the application is or is not valid. The mere fact that the two women have been already indicted on a murder charge, the proceedings in connection with which were withdrawn, and that the present proceedings have been substituted are sufficient to require a special jury in order to investigate a trial of this kind.

SIR CHARLES MAJOR, C.J.: The application is made under section 42 of the Indictable Offences (Procedure) Ordinance, 1918. That is a new section and it is desirable that there should be some consideration of its terms, more particularly because it prescribes a practice different from that prevailing in the courts in England, where, on the mere allegation of the Crown that the King requires a special jury to pass between him and the prisoners, the order goes as of course. In this colony both the Crown and the prisoners are on the same footing. It is therefore obvious that when application is made to the court to depart from the ordinary procedure,—that is, trial by an ordinary jury—there must be some circumstances alleged

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in support of the application, and so far, learned counsel for the prisoners is right in saying that the application should contain reasons why it should be granted. In the application the affidavit of the Crown Solicitor states that at some time, which is not mentioned, the two prisoners concerned were indicted with six other persons on a charge of murder, that they fell ill during the course of the trial, and that the Attorney General entered a *nolle prosequi* in open court, saying that he did not want to delay the trial of the other prisoners and that the two prisoners were subsequently indicted for the abduction of the child whom they had been indicted for murdering. The affidavit states further that a special jury was ordered by the Chief Justice in the first indictment and although I happened to be the judge in the first trial I can take no notice of that fact in the application before me now. So far the affidavit states some facts not operating one way or the other to influence the mind of the court. The fact that the two accused were indicted with some other prisoners, fell ill, and were discharged, and were now indicted for the abduction of the child whom they were previously charged with murdering, together with the fact that at that trial there was a special jury, are really not circumstances showing why the court should depart from the ordinary procedure. The affidavit of the Crown Solicitor only states that the necessity for a special jury in the murder charge exists in the present charge "except as regards the actual murder of the child." As I have said before I happen to have been the trial judge in the first trial and I happen to have knowledge of the evidence given in the trial and which is now common knowledge, but I can take no notice of that. The argument that the matter may come before another judge is well founded and for that reason it seems to me that there has not been stated any reason on the face of the application why the order should be made. It is necessary so to do and it has not been done; but I am simply told that the necessity for a special jury in the murder charge exists in the present charge.

The objection by counsel for the prisoners has weight and the prisoners are entitled to see the grounds of the application. I hold the objection good. In every application, whether by petition or otherwise, reasons must be set out and no such short cut must be adopted as has been adopted in the present application by reference to a set of circumstances of which the court is not aware. The application must stand over in order that an affidavit may be filed setting out the grounds of the application. As the affidavit filed in connection with the application made for a special jury in the case of the *King v. Sroodin and others* was complete and contained the necessary reasons for that application—those reasons being the same as in the present case—I suggest, in order to shorten matters, that a copy of that affidavit be served

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without delay on counsel for the prisoners who must answer it not later than during to-day, thus allowing the hearing of the application to be resumed on Monday morning next at 10 o'clock.

Posted, March 24th. On further consideration, after argument, the application was granted

SIR CHARLES MAJOR, C.J.: When I made the order for a special jury in the trial of the cause of *the King v. Sroodin and others*, I did so upon affidavits disclosing a state of circumstances which, I pointed out at the time, clamoured for the order. It is said on this application that those circumstances still exist. For the accused it is contended that they have nothing to do with the present matter. Counsel for the prisoners have failed to appreciate two particular points in connection with the case. The first point is that the two women are the reputed wives of two of the men who have been convicted of the murder of the child with whose abduction they are now charged. The second and more material fact is the statement in the affidavit filed that the necessity for the special jury in the murder charge exists in the charge of abduction "the facts and circumstances being the same except as regards the actual murder of the child." It is not a case of a single charge of abduction totally disconnected with anything that had gone before. On the contrary, the paragraph in the affidavit to which I refer is evidence that the abduction with which the women are now charged was an incident in the murder which had been committed, that it is bound up with the murder, a murder which has been brought home to its perpetrators and for which they have paid the supreme penalty.

What reason have I to suppose that the facts of the case are not the same as in the former case and that the consequent notorious prejudice and popular feeling excited against the prisoners have entirely passed away? I have no reason to suppose anything of the kind. What reason have I to say that adverse influence is not still at work and may not unless care be taken against its sway, affect these women upon their trial? One of the most important, perhaps the most important, precaution to be taken in the case, is that jurors who have to pass between the King and the accused upon their trial be selected from those who are assumed, for one reason or another, to be better able to adjust the weights of evidence in the scales of justice than their more humble brethren, What difference can be found between the reasons that animated the court in ordering a special jury to be struck in the first instance and those that are urged now? There is none and the order must go.

De Freitas, K.C.: The application has been made under section

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42 of the ordinance and on the day the application first came up Your Honour stated that grounds must be set forth in the application. In the section there appear the words "after hearing any objection, if any, of the other side;" as this is the second application under the section I would like to have Your Honour's ruling as regards the grounds to be set out and also as regards the interpretation of the words in the section to which I have referred. I submit that the words "after hearing," etc., in reality throw the onus on the other side to show, not a negative objection in the sense of an attack on the grounds of the application, but a positive objection as to why the special jury should not be struck.

SIR CHARLES MAJOR, C.J.: The section evidently contemplates the same procedure alike for the Crown and the accused. It is not a case as in England where on the mere allegation by the Crown that a special jury is required the order is made without hearing any objection at all. The Crown there does not assign any reasons for the application. If, however, the Crown and the accused are on the same footing it is quite evident that either one or the other should assign some grounds for making the application. In England an accused person may apply for a special jury but he has to show cause why it should be granted. As to the other point dealing with the specific provision with respect to the objection I am not prepared to express an opinion. My own impression is, however, that the objection may go to the grounds put forward by the Crown as to the validity of those grounds, and may go further to show, supposing that prima facie the grounds are good, that the accused by the granting of the order would be unfairly tried or prejudiced in any way.

Application granted.

CAMACHO v. McKAY.

CAMACHO v. McKAY

[174 OF 1917.]

1919. MARCH 20. BEFORE BERKELEY, J.

Specially indorsed writ—Consent to judgment—Action deserted and abandoned—Second writ issued—Res judicata—Rules of Court, 1900, Order XXXII., r. 5; Order XXXV., r. 16.

Claim by the plaintiff for the sum of \$179.30, the amount of an account due for goods supplied to the defendant.

All further necessary facts are set out in the judgment of the court.

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

P. N. Browne, K.C., for the defendant.

BERKELEY, J.: This action was begun by the issue of a specially endorsed writ, dated June 16th, 1917, by which the plaintiff claimed \$179.30, for goods sold and delivered to the defendant. On June 30th, 1917, leave to defend was granted. In his statement of defence, the defendant denies the indebtedness, says that he was already sued in 1915 in respect of the same cause of action for the said sum of \$179.30—that he filed a consent to judgment of which the plaintiff was well aware, and he pleads *res judicata*. It is submitted by counsel for the defendant that on this plea the plaintiff is estopped from proceeding with this action.

It is common ground that the subject matter of the two actions is the same and that although consent to judgment was filed the court never gave judgment in the terms of that consent (Order xxxv., rule 16). Under this rule, it may be pointed out judgment shall be given unless the court sees good reason to the contrary. I am satisfied that unless judgment is given *res judicata* cannot apply—It is the *judgment* by consent and not the defendant's *consent* to judgment that acts as an estoppel. (See Vaughan Williams, L. J., at page 66 in *Rice v. Reed*. (1900) 1.Q.B.) It was stated by counsel for the plaintiff that it was necessary to bring this action *de novo*, as the first action had become abandoned, inasmuch as no proceeding had been taken since consent was signed which was more than two years ago. I was not disposed at the time to hold that Order xxxii., 'entry for hearing,' rule 5 (2) applied and so expressed myself, but on a more careful reading of the rule I find the following: 'or if *in any action whatever* there has been no proceeding for one year from the last proceeding had, the action shall be deemed altogether abandoned and incapable of being revived.' The first of these two actions must be held to come within the words underlined. The facts not being in dispute, judgment is entered for the plaintiff for \$179.30 with costs.

REX v. KELLMAN AND ANR.

REX v. KELLMAN AND ANR;
Ex parte THE ATTORNEY GENERAL.

1919. MARCH 25. BEFORE HILL, J.

Criminal law—Trial with common jury—Jury disagree—Application for trial with special jury—Failure to apply before first trial—Indictable Offences (Procedure) Ordinance, 1893, Amendment Ordinance, 1918, s. 42.

Application by the Crown under the provisions of section 42, Ordinance 25 of 1918, that a special jury be struck for the trial of the indictment against the two accused Kellman and Bobb for conspiracy to defraud.

Indictment had been filed against the two accused with two others, and the trial took place with a common jury at the Demerara criminal sessions held in January, 1918. The jury were unable to agree in respect of the two accused, the subject of the present application, but found the two others not guilty and they were discharged. The application further set out that the evidence against the accused comprised books, papers and documents which would necessitate the calculation of figures and the arrival at a decision on the result of such calculation. Questions would also arise on the documentary evidence whether the figures thereon were genuine or whether they had been tampered with.

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

The grounds of the application are set out in an affidavit made by the Crown Solicitor which is before the court. A quantity of documentary evidence was laid over at the last trial when the common jury did not arrive at a conclusion as regards the two accused. A great deal of the evidence consists of documents, over fifty exhibits being put in, containing figures. A particular phase of the case is the checking and detection of certain figures. It is a most conflicting transaction and one which is fitted for a special jury only. It is one in which the ordinary jury might have some difficulty in following the figures in the documents and for that reason the Crown is asking for a qualified jury in order that they may arrive at a conclusion. It is necessary to have a jury who will be able to follow the judge in his summing up in intricate matters of the kind. It seems to be in the interest of the accused also to have a special jury trial, if for no other reason, than that they will be able to follow the trend of the points that may be urged in their favour.

J. A. Luckhoo, for Kellman, opposed the application. The first trial was before a common jury who showed themselves quite competent to deal with the case. The question of figures being

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forgeries is one of expert evidence. No sufficient ground shown for granting application.

P. N. Browne, K.C., for Bobb, opposed the application.

HILL, J.: This is an application by the Crown under section 42 of Ordinance 25 of 1918 for a special jury to be struck for the trial of the indictment against the above-mentioned Kellman and Bobb for conspiracy. The accused, with two others, were tried at the last session of the Criminal Court before me. The common jury returned a verdict of not guilty as regards the two but could not agree as regards Kellman and Bobb.

Mr. Luckhoo for Kellman, and Mr. P. N. Browne for Bobb offer objection to the striking of a special jury on the grounds that—

- (a) A common jury had agreed at the last trial as regards two of the then accused, and there was no reason why another common jury should not agree in regard to Kellman or Bobb on the present trial.
- (b) The Crown did not ask for a special jury on the first trial.
- (c) On the affidavit filed, the special jury would have to be experts of handwriting, or of accounts, and there was no assurance that such would be the case in the striking of the special jury.
- (d) No substantial ground for the granting of the application has been shown.

With regard to (a) it is perfectly true that the common jury did agree as to two of the accused then before the Court, but there was other evidence, mostly of a documentary nature, which concerned the present accused, and it was presumably with regard to this evidence that the jury found itself unable to come to a decision one way or the other.

(b) At the first trial, in view of what the evidence disclosed, and the difficulties attendant on a due appreciation of the documents submitted—not necessarily hinging on any question of actual forgery—but whether on such documentary evidence and after a critical examination of the accounts and books put in, the probabilities of forgery were confirmed or negatived so as to enable the jury to come to a definite decision, I was surprised that the Crown or the accused in the first instance had not seen fit to ask for a special jury. But that the Crown or the accused omitted to do what they ought to have done in the first instance, is not a ground of objection sufficiently strong in this particular case to require the Court to refuse the present application on that objection. At the same time I need hardly say that it must not be taken as a precedent that an abortive trial in the first instance gives the Crown or an accused any right or ground to ask for a special jury at the second hearing.

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(c) It is more on the grounds of expediency that I think the application should be granted. The first trial lasted some three weeks with no result as regards the two accused—an unsatisfactory position for the Crown as well as the accused. A special jury, not specially experts in any branch, except possibly experts in intelligence, is drawn from men with qualifications which entitle them to sit in the legislature of the colony. Such men must, it is strongly to be presumed, be more intellectually competent to elucidate a tangled story rather than the class of men which is frequently to be found on a common jury. A special jurymen would be more amenable to argument, more able to digest facts and figures, more able [to bring a higher intelligence to bear on the issues submitted to him, and so to arrive at a definite decision, than would the common jury.

Such a jury is required in this trial and I therefore grant the application.

[NOTE.—At the trial before Dalton, Actg. J., at the April sessions, the jury, after hearing the case for the Crown, did not wish to hear the defence, and the accused were discharged.—ED.]

LAMAZON v. WILLEMS.

[306 OF 1917.]

1919. MARCH 28. BEFORE BERKELEY. J.

Immovable property—Lease—Right of lessor to enter into lease—Trespass by lessee —Use and occupation of land.

Claim by the plaintiff for the sum of \$200 for the use and occupation of 23 $\frac{3}{4}$ acres of land on the western side of Hog Island in the Essequibo river from April 7th, 1916, to January 25th, 1917. The claim set out, *inter alia*, “that the defendant with her cowminder and servants have trespassed upon and continued to depasture her cattle . . . upon the said land and otherwise to use and to occupy . . . the said land to the exclusion of the plaintiff,” between the above-mentioned dates, and “that the said cattle have considerably damaged and destroyed the said land.”

S. E. Wills, for the plaintiff.

B. B. Marshall, for the defendant.

BERKELEY, J.: The plaintiff claims \$200 as damages and pecuniary compensation for trespass by defendant, and depasturing of her cattle on his land.

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The defendant leased the land from one Rampersad, the reputed husband of Phuljharia (since deceased), who passed transport to plaintiff on May 5th, 1917.

The plaintiff alleges that he arranged to purchase from Phuljharia on the 7th April, 1916, paid \$30 on account of the purchase money, and was put into possession. He only speaks as to possession, and leaves it doubtful whether or not such possession was given to him. The two witnesses refer to seeing money, and being called to witness certain papers, since lost, handed to plaintiff under peculiar conditions. I am unable to regard them as reliable.

At the end of 1916 the defendant gave up the land which she *bona fide* believed she held under a valid lease, but the reputed husband of Phuljharia had no authority to lease. She should have satisfied herself on this point before she accepted lease.

There must be judgment for defendant as plaintiff has not proved his case, but under the circumstances set out in the last paragraph I make no order as to costs.

FLETT, SMITH & Co v. BOARD OF ASSESSMENT.

[63 of 1919.]

1919. MARCH 31. APRIL 4. BEFORE DALTON, ACTG. J.

Excess Profits tax—Appeal—Procedure—Power of Board to increase original assessment—Allowance of deduction from profits for remuneration of management—Meaning of “proprietor or proprietors”—Tax on Excess Profits Ordinance (No. 2 of 1918,) s 10, and second schedule, s. 5.

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 the appellant company thereupon appealed further to the Court.

J. A. King, Crown Solicitor, for the appellant company.

The Board of Assessment was not legally represented, but two members comprising the board were present during the hearing, to assist the Court with information as far as might be necessary.

DALTON, Actg. J.: This is an appeal from an assessment made by the Board of Assessment under the Tax on Excess Profits Ordinance, 1918, and upheld by the Committee of appeal.

All I have before me in the way of record is the summons, and

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a file of correspondence sent by the secretary of the Committee of Appeal to the Registrar, amongst which I find the decision of the committee of appeal.

Although the matter may be heard “in a summary way,” and in chambers, I should certainly have before me a proper record, other than a file of correspondence of what has taken place. In future, therefore, the committee of appeal having recently been abolished, on receiving notice of intention to appeal the Board should at once send a formal statement of the assessment made and the reasons therefor to the Registrar, whilst the appellant should duly file his reasons of appeal properly set out, at the same time serving a copy on the Board.

The reasons for appeal, as gathered from the argument before me, are two:

- (1.) That the Board had no power under section 10, Ordinance 2 of 1918, to make a further assessment as they did in the absence of discovery of new facts.
- (2.) That appellants were entitled to make the statutory deduction in respect of profits, under section 5 of the schedule of the ordinance dealing with “Profits” on the ground that the “proprietor or proprietors” of the business are actively engaged in the colony in the management of such business.

The Board made two assessments, in the first place allowing the deduction which is now claimed. Six months thereafter, in view of a decision of the Committee of appeal disallowing such deduction in another case, the board decided to increase the original assessment, by disallowing the statutory deduction for the management of the business, on the ground that one of the partners of the business was not residing in the colony. No new facts were discovered and no further information supplied, but the second assessment was merely due to a different interpretation of the law, brought to the notice of the Board as a result of an appeal in another matter. It has been urged on behalf of appellant that the power of the Board to increase the original assessment only arises on the discovery of new facts or fresh information additional to that on which the original assessment was made, and that it can in no case apply when the Board find they have made a mistake in law. The use of the word “discovers” in section 10 is certainly very wide, and it is clear from other sections of the ordinance that the Board has, and necessarily has, a very wide discretion. In addition the Board is not a court or a tribunal exercising judicial functions. Under the circumstances I cannot say that it was not entitled to act as it did, in making the second assessment. Even if I had found in favour of the appellant, however, on this point, it is admitted that he would not benefit thereby in view of the provision in section 18 (1) that

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“the judge shall determine the true and proper amount of the tax notwithstanding any error or omission in connection with the making of any assessments.”

With respect to reason (2) the committee of appeal supported the disallowance by the board of the deduction for management in the following words: “We are of opinion on the reading of the section that this allowance “can only be made where the proprietor, if only one, or all the proprietors, “if more than one, is and are actively engaged in the colony in the management of the business. In this case it is admitted that there are two partners, the one resident in the colony and managing the business, the other “resident in England where he acts as buying agent for the firm. There is no “ambiguity in the words of the section and we cannot do violence to the “text in order to render the meaning of the section more in keeping with “what we conceive the legislature should have enacted.”

In this decision I think the committee of appeal has read more into the section than exists there. Nothing is said about the proprietor, if only one, or all the proprietors, if more than one, being actively engaged in the colony in the management of the business. On the other hand I cannot agree with the appellant that the business being a partnership, and one partner being actively engaged in the colony, that therefore “the proprietor or proprietors” in the words of the section “are actively engaged in the colony in the management of the business.”

The clearly expressed intention of the law is to allow certain deductions from the profits for management. In the case of limited companies certain deductions for the remuneration of directors, managers and others may be allowed; in the case of other business a deduction of ten per cent., where the capital does not exceed \$25,000, and five per cent., where the capital exceeds that sum, may be allowed as remuneration for the management of the business. To obtain that deduction in the latter case, however, it is laid down that the proprietor must be actively engaged in the colony in such management. What seems clearly laid down there is that no absentee proprietor shall benefit from the deduction. Here one proprietor is in the colony and one proprietor is away. Having in view the intention of the law above referred to, in interpreting this section I read it as enacting that provided a proprietor manages the business in the colony he is entitled to the statutory deduction so far as he is concerned. That deduction, however, cannot be claimed by any absentee proprietors, whilst it must of course depend on the total capital of the business, and not upon the relative holding of the partners as to whether it is estimated at five or ten per cent. Appellant then is entitled to succeed so far as the resident proprietor is concerned.

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The question of remuneration of the absentee proprietor for buying in England by way of commission was referred to, and I understand it is admitted by all parties that it can be written back to profit and loss.

The result is that the matter will be referred back to the board to assess the amount due, after allowing the deduction in respect of the local proprietor, and amendment of the account in respect of the remuneration of the absentee proprietor by way of commission. The Board will report their finding to the Registrar and that amount will be the true and proper amount of the tax to be incorporated in the order of the Court on this appeal.

WEEKS v. TOWN CLERK OF GEORGETOWN.

[284 OF 1918.].

1919. MARCH 27, 28. APRIL 5.

BEFORE SIR CHARLES MAJOR, C.J.

Municipal corporation—Town Council—Notice of action—Proof of malice—Justices Protection Ordinance, 1850—Georgetown Town Council Ordinance, 1898, s. 207.

Claim by the plaintiff against the defendant, as representing the Mayor and Town Council of Georgetown for the sum of \$500 as damages and pecuniary compensation, alleging that the council, by their servants and agents did, on June 11th, 1918, “wrongfully and unlawfully and without legal or reasonable notice,” enter upon a stall in the Stabroek market, in the city of Georgetown, then in the possession of the plaintiff as monthly tenant and did dispossess the plaintiff of the stall and of certain articles and goods therein to his great inconvenience whereby he suffered material damage in his business as butcher carried on there.

The defendant pleaded the provisions of the Justices Protection Ordinance, 1850, as applied to the council by the Georgetown Town Council Ordinance, 1898, s. 207; that no notice of action was given, that the statement of claim did not expressly allege that the acts complained of were done maliciously and without reasonable and probable cause; that the said acts were done by the council, their officers and servants, under the provisions of the Town Council Ordinance, 1898. It was shown that a notice of action had been given for dispossessing the plaintiff “wrongfully and unlawfully and without legal or reasonable notice.”

J. A. Luckhoo, for the plaintiff.

H. H. Laurence, for the defendant.

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SIR CHARLES MAJOR, C.J.: The defendant has pleaded the provisions of s. 207 of the Georgetown Town Council Ordinance, 1898 (now s. 224 of Ordinance No. 44 of 1918), which enacts that the council and each and every member thereof, and each and every officer and servant thereof, and each and every person acting under the direction of the council, shall, with respect to all matters and things done and intended to be done under the provision of the Ordinance, be entitled to the benefit and protection of the provisions of the Justices Protection Ordinance, 1850. And the defendant thereupon objects that (1) the plaintiff did not expressly allege in his claim that the defendant acted with malice and without reasonable and probable cause; (2) that in the notice of action there was no statement that the defendant so acted, and that the notice, therefore, was insufficient; and (3) that the plaintiff, even if the allegation and statement of malice and want of reasonable and probable cause had been made, has not proved the same.

That express allegation of malice and absence of reasonable and probable cause in the claim and in the notice of action, and proof thereof at the trial, are conditions precedent, first, to the action being brought at all and, second, to the plaintiff's success at the trial, is clear. Moreover, the plaintiff, by giving a notice of action, admits that the acts of which complaint is made were done in the execution of the defendant's office; otherwise no notice is necessary. By section 2 of the ordinance the allegation in the claim must be "express"; by section 9 the statement of the cause of action must be "clear and explicit." Now in notice of action and statement of claim alike the words used, and contended by counsel for the plaintiff to be express allegation and clear and explicit statement, are "wrongfully and unlawfully and without legal and reasonable notice." In support of his contention Mr. Luckhoo has referred to some cases wherein the provision that a cause of action shall be clearly and explicitly stated has been held to have been satisfied by the use of expressions equivalent for the purpose of giving information. But those cases were decided upon the particular phraseology used in one or other of various statutes for protection of public bodies, of which a great number were in force in England in 1893 and were then repealed, not upon the Justices Protection Act of 1844 which is our ordinance of 1850. I must be guided, I think, by the cases of *Taylor v. Nessfield* (3 El. & Bl., 724) cited by Mr. Laurence, and *Massey v. Johnson* (12 East, 67), both showing that a notice of action must contain the words prescribed by the statute. I cannot consider an allegation of acts being done "without legal and reasonable notice" as either an express allegation of malice and want of reasonable and probable cause, or a clear and explicit

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statement of the cause of action. The claim and notice of action are both defective for non-compliance with the terms of the ordinance.

That being so it is unnecessary to consider the third objection of the defendant, that there has been no proof of malice, but it may be said that, the council clearly has full power to effect what it deems to be improvements in the market and to do any act coming within the control, management, and maintenance of it; that the proposals of the clerk of the market were approved by the council in due form of resolution, and authorised to be carried into effect; and that the council believed it was acting, and did act, under the powers conferred on it by the ordinance.

The action, therefore, fails, and there will be judgment for the defendant with costs.

WAN-A-SHUE v. SREEGOBIND.

[240 OF 1918.]

1919 MAY 9. BEFORE DOUGLASS, ACTG. J.

Contract—Purchase and sale of rice permits—Written agreement—Evidence—Parol evidence to vary or explain agreement.

Claim by the plaintiff for the sum of \$8,000 for breach of a written contract, whereby defendant was to deliver to the plaintiff permits for the exportation of two thousand bags of rice at the rate of twenty cents per bag. The defence denied the agreement set up by the plaintiff, alleging that a verbal agreement was entered into between the parties which was repudiated by plaintiff's duly authorised agent.

Further necessary facts sufficiently appear from the judgment.

F. O. Low, for the plaintiff.

J. A. Luckhoo, for the defendant.

DOUGLASS, Actg. J.: The plaintiff claims \$8,000 damages for breach of contract. The statement of claim, as amended at the hearing, is based on a written agreement entered into between the parties on the 29th November, 1917, and on the 4th December, 1917, whereby it is alleged that the defendant promised to transfer permission to export 2,000 bags of rice to the plaintiff in consideration of the plaintiff paying him the sum of twenty cents for each bag. The defendant denies that any such agreement was entered into, and it is obvious that if the plaintiff fails to prove such agreement the whole of the plaintiff's case falls through, and

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the necessity of considering any further defence raised by the defendant does not arise.

The first of the two documents referred to as containing the agreement is a letter dated the 29th November, 1917 (Exhibit "A") purporting to be from Sreegobin, per Ramjohn, to the plaintiff, the special portion of it to which one's attention was directed being the words "so; you agree to give me the same twenty cents you wrote about in your previous letter," and it continues "a lot of rice is in the Courentyne district, if required send money or come yourself and buy."

The second document is a receipt dated the 4th December, 1917 (Exhibit "F") "Received from Mark Wan-a-Shue, Esqre., of Georgetown, the sum of twenty dollars (\$20) on account of two thousand bags rice commission at 20c. per bag, being permission allowed to export" and signed "Sreegobind per C. Persaud."

I do not consider it necessary to consider the evidence in detail, but I may note that the letter of the 29th November, 1917, is purported to be signed by Ramjohn for Sreegobind, whereas Ramjohn (the manager of the defendant's rice mill) gives in evidence that he signed the letter at the request of Chandilia Persaud—Sreegobind's son—and, on cross-examination, states that Sreegobind always signs contracts either in Hindi writing, or by his mark before a J. P. The letter to which this is apparently a reply has not been put in evidence. The only proof the plaintiff offers that Ramjohn and C. Persaud signed (respectively) at the plaintiff's request is his own assertion to that effect, and even he on cross-examination states "I can't say if Sreegobind ever saw my letters." The only two letters satisfactorily proved to have come to Sreegobind's knowledge are those of the 23rd April, 1918, from Mr. Low to Sreegobind, and his reply through Ramjohn dated the 27th April, 1918 (Exhibits "B1" and "B2"), and in the first of these the plaintiff's legal adviser gives the 25th January as being the date of an agreement "to dispose of 2,000 permissions," and by the latter Sreegobind disowns all knowledge of any transaction except what his son has told him of.

An agreement may be entered into by word of mouth, or by writing, or it may be partly in writing and partly through words. It is very often the case that the existence and motive of a contract is to be gathered from correspondence passing between the parties. When that is the case the whole must be considered, and must show an unqualified offer and acceptance of that offer. The acceptance must be identical with the terms of the offer. I entirely fail to see from the documents before me, alleged to contain the agreement, any proof of an offer by the plaintiff which has been accepted by the defendant, or an acceptance by the defendant of any offer made by the plaintiff. The plaintiff's case

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is based on the assumption that the agreement is in writing, and consequently parol evidence is not allowed to add to, vary or contradict it, subject to certain (so-called) exceptions. Parol evidence, is indeed, allowed to explain latent ambiguities on the subject matter to which a written document refers, but that cannot be extended to allow the plaintiff to prove that a document was intended to be an agreement which on the face of it is not one.

The plaintiff has failed to prove that there was any written agreement between himself and the defendant, or to prove satisfactorily that either of the two documents referred to were signed by the defendant or with his knowledge or consent, and I accordingly give judgment for the defendant with costs.

[Note.—An appeal has been lodged in this case.]

ROBERTSON v. YARDE.

[208 OF 1918.]

1919. MAY 5, 9. BEFORE SIR CHARLES MAJOR, C.J.

Opposition to execution sale—Abandonment of opposition—Rules of Court, 1900, Order XXXVI, r. 44—Re-advertisement of sale—Entry of opposition a second time—Injunction to restrain sale—Interim injunction—Practice.

A property was advertised for sale by the Provost Marshal in terms of Order XXXVI, r. 41. The sale was opposed by plaintiff, but the opposition action was abandoned. Thereafter the property was re-advertised for sale, and the plaintiff entered opposition a second time. On objection taken that the plaintiff, having started proceedings by way of opposition, had abandoned the proceedings:

Held, that the plaintiff was thereby estopped from entering opposition a second time or from obtaining an injunction restraining the sale.

Obermuller v. De Sousa, 1917 L.R., B.G. 34 considered and not followed.

Claim by the plaintiff Elizabeth Robertson, born Williams, against the defendant Ellen Yarde for:

- (a) an injunction restraining the sale at execution of south ½ lot 127, Bagotville, West Bank (save and except the buildings thereon belonging to Ellen Yarde and Catherine Doris), alleged to be the property of Sarah Maxwell, as advertised by the Registrar in the “Official Gazette” of the 29th June, 1918;
- (b) a declaration that the levy made on the property was illegal and bad in law;
- (c) \$100 damages for wrongful and illegal levy;
- (d) costs;

on the ground that the plaintiff was the owner of the property which was bequeathed to her in the last will and testament of

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David Jack (decd.) of Georgetown, dated the 9th October, 1917, and was in the lawful possession of it. Defendant had levied on the property to satisfy a judgment obtained against Sarah Maxwell. Plaintiff had obtained an injunction restraining the sale until after the trial of this action.

S. E. Wills, for the plaintiff.

B. B. Marshall, for the defendant.

Marshall objects to hearing of action; refers to Order XXXVI. r.r. 42, 43 and 44, governing entry of opposition. On the 8th June last the present plaintiff entered an opposition to the sale of the property alleged in the statement of claims. She failed to proceed with her action and on the defendant obtaining a certificate from the Registrar that the opposition was deserted and abandoned the place was accordingly advertised for sale a second time. On the Saturday preceding the sale the present plaintiff started the present action, and applied to His Honour Mr. Justice Hill for an order staying the sale until the action was finally determined. This application was heard *ex parte* and was granted by His Honour. It is not competent for the plaintiff to adopt such a procedure. It is only an attempt to get around the express provisions of the Rules of the Court, which prescribe the form of procedure to be followed by any person desiring to restrain the sale at execution of a property. Refers to the case of *Pickett v. St. Kitts* (L. J. 12. 10. 1901) to the effect that the party was estopped from entering a second opposition after he had previously done so and had abandoned it.

SIR CHARLES MAJOR, C.J.: I do not understand how an absolute injunction was granted to restrain the sale without giving the other side an opportunity to be heard. Everything being before the Court I would have given an interim order for a stay of ten days, and would have directed at the same time that notice be served on the other side for them to make such objection as they might be advised.

Wills. An interim injunction was granted on facts set out in the application. It is not binding on the plaintiff to take proceedings immediately after opposition has been made. The plaintiff after entering opposition found that she could not within the fourteen days as allowed by the Rules manage to put her writ in, and so opposition was abandoned, but it does not follow that she was forever debarred from rescuing the property which had been wrested from her by fraud. Submits that interdict proceedings are different to opposition proceedings. Cites the case of *Obermuller v. De Souza*, (1917. L.R.B.G. 34), where it was held that the present

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proceedings were not debarred after opposition had been made and withdrawn. He was entitled to come by way of action to restrain the sale, after the re-advertisement of the property.

SIR CHARLES MAJOR, C.J.: This is an action to restrain a sale at execution, commonly called for brevity an opposition action. The defendant in this action obtained judgment in an action against Sarah Maxwell, issued execution thereunder and caused Maxwell's real property to be advertised for sale on the 18th June, 1918. The plaintiff in this action entered opposition on the 8th June. The opposition was not followed by an action for an injunction to restrain the sale and was, on the 24th June, declared by order of court to be abandoned. The property was then re-advertised for sale on the 15th July. On the 11th July the plaintiff issued a writ in this action to restrain the sale. It has not come to a hearing until this present time. The statement of claim repeats the grounds of opposition originally given and subsequently abandoned.

Objection *in limine* is taken by the defendant that the action is not maintainable, because the plaintiff, having entered and abandoned opposition, is precluded from now bringing the action. Mr. Marshall has cited *Pickett v. St. Kitts* (L.J. 12 October, 1901) in support of his objection. Mr. Wills for the plaintiff has referred the court to *Obermuller v. De Souza* (1917 L.R.B.G., 34).

It is clear that the plaintiff could not, after the order of court of the 24th June, 1918, and without having it set aside, notwithstanding the readvertisement of sale for a later date, enter opposition a second time. Moreover, an opposer cannot bring an action to restrain a sale, unless he has previously entered opposition and stated the grounds thereof, which are in fact by subsequent adoption his statement of claim. But this is precisely what the plaintiff has done. She has ignored the abandonment of opposition and the order of court declaring that abandonment which cannot now be set aside, and brought her action to restrain the sale, reasserting as I have said, her grounds of opposition thereto. That statement, it would seem, concludes the matter, on the authority of *Pickett v. St. Kitts*, a case which was followed by *James v. Da Silva* (L.J. 8th November, 1901). But Mr. Wills contends that *Obermuller v. De Souza* is a direct authority to the contrary, and some remarks of the learned judge who tried that case seem to support the contention. There, however, the action to restrain the sale had been duly instituted, but for some reason or another, kept in a state of suspended animation until it expired without power of revival, and in those circumstances and as the issues joined in the action properly

instituted had never reached determination, there may have been grounds for hearing the subsequent action. The learned judge's remarks to which I have referred are these: "The second point to be decided is, can plaintiff maintain this action by way of injunction? Proceedings by way of opposition are in fact a simplified method of obtaining an interdict or injunction, the claim in such proceedings being such an order as is sought here, and the claimant being bound down to the reasons for opposition entered by him in the book kept for that purpose. As is clear from the notice of re-advertisement, no further opposition is called for, but that cannot mean that no one who has a valid claim to the property to be sold is debarred from protecting his interests." If these words mean that in the opinion of the learned judge, a person who has entered opposition but abandoned it and not proceeded to institute the action prescribed by the rules for giving effect to the opposition whereupon an order of desertion and abandonment has gone against him, as has happened here, may nevertheless institute the action, I regret that I am unable to agree with him, for that, it seems to me, would be to do away entirely with the mandatory terms of the rules that govern opposition to an execution sale. I observe the judge propounds the question "can plaintiff maintain this action by way of injunction?" If importance is attached to that description of the action it seems sufficient to point out that the form of the action prescribed by the rules is an action for an injunction, for only thus can the Court "restrain the sale," in the same way indeed as a nuisance, breach of contract, waste, trespass and the like. In prescribing therefore, an action to restrain the sale, the rules have prescribed an action for injunction.

If this be not so, then persons may disregard the conditions precedent to opposition of a sale at execution under the rules, not appear on the Marshal's books as opposers at all, but issue a writ in the same form as is directed to be issued to enforce prescribed opposition, namely, to restrain the sale, or, having followed the prescribed procedure and entered opposition, abandon it, and still issue that writ, of which judgment creditor and Marshal might be entirely ignorant and to keep the judgment creditor at bay and from reaping the fruits of his judgment for just so long as consents, postponements, vacations, discontinuances, and what not, may extend. In any event, whatever may be the form of action, the questions to be asked are: Is this an action to restrain the sale? Has opposition been entered? Was that opposition abandoned? Has the order declaring that abandonment been set aside? Has the plaintiff obtained leave to bring the action, notwithstanding the expiration of the time limited for doing so? The answers to those questions in this case seem to me to conclude

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the plaintiff, starting with the first, namely, this is an action to restrain the sale.

I am of opinion, therefore, that the defendant's objection is good, and that I must order judgment to be entered for her, but the matter seems of sufficient importance for me to give Mr. Wills leave to move the Court of Appeal, if he thinks fit, that that order be rescinded and that the action proceed to a hearing. The cost of to-day I reserve to abide the result of the motion. If it be not made, costs of action will follow the judgment.

I may add that I have read the case of *Administrator General v. Stewart Gardner* referred to in Mr. Justice Dalton's judgment in *Obermuller v. De Souza*, but cannot consider it applicable to this case. There was no question of default, abandonment or failure to bring the opposition action in proper time. The defendants challenged the plaintiff's right to oppose on the terms of Rule 181 (now 239) of the Insolvency Rules, a rule which relates to transports and not to execution sales.

[NOTE. An appeal has been lodged in this case.]

BUDHAN v. GRAY.

[170 OF 1918.]

1919. MAY 12. BEFORE DOUGLASS, ACTG. J.

Trespass.—Immovable property.—Lines unsurveyed.—Cutting timber and cultivating land.—Damages.

Claim by the plaintiff for the sum of \$250, for damages for alleged trespass on the plaintiff's land at Susannah's Rust, Demerara river.

Further facts and the nature of the defence sufficiently appear from the judgment.

J. A. Luckhoo, for the plaintiff.

P. N. Browne, K.C., for the defendant.

Douglass, Actg. J.: The plaintiff claims as owner of a piece of land measuring 25 roods fagade, by 750 in depth, at Susannah's Rust, Demerara river, acquired by letters of decree dated the 16th March, 1917. This piece of land is bounded on the south by other property of the plaintiff acquired by transport dated the 80th September, 1916, and to the north by land the property of the defendant.

The trespass complained of is alleged to have been committed by the defendant in crossing the latter boundary and felling tim-

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ber and by himself and his tenants occupying 150 roods of the plaintiff's property and depriving him of its use.

The plaintiff further alleges in his reply that on the discovery of the encroachment by the defendant when the boundary line was run in August, 1917, he (the plaintiff) agreed to give the defendant the timber so felled, on condition that the defendant paid the plaintiff the rents then due from the defendant's tenants, and paid for the timber at the rate of two cents per cubic foot, but the defendant had never carried out this agreement.

The defence put shortly admits the title of the plaintiff to the land in question, and alleges that before the boundary line between the two properties was surveyed certain of his tenants did occupy a portion of land afterwards found to be the plaintiff's, and some trees were felled to provide drainage but the plaintiff made no charge for the same.

It appears from the evidence that the north boundary of the defendant's land was surveyed in 1915, and that it is usual for property-owners in that district to get their northern boundary defined, and the plaintiff who acquired his property in March, 1917, only got his northern boundary surveyed on 30th August, 1917.

In January, 1917, the defendant was cutting Crabwood and trees and continued the work in a southerly direction up to the first week in August, and as there was no boundary line existing he told the plaintiff that if any of the timber was on his property he would pay for it. Mr. Durham, the surveyor, states that on the line being run it was discovered that at a point 400 rods from the river it met cultivation by the defendant's tenants, the plaintiff's side of the line, and as the line continued east 75 rods, the encroachment extended to a width of 325 feet at its widest part. This was due to the fact that the imaginary boundary lines had a southern tending.

I take Mr. Durham's statement that the land encroached on was approximately ten and a half acres as authoritative.

It is quite evident that both parties suspected some encroachment, but evidence that the defendant was ever warned to stop cutting wood is wanting and none of his tenants were approached until after the survey.

To deal first with the claim for damages for occupation of 150 rods of land, put at \$131.25. (The claim of \$14.25 for rent of provision beds I understand to be dropped).

That at the date of the survey on 30th August, 1917, there had been a trespass on the part of the defendant is not contended, but it is doubtful whether the plaintiff thereby suffered any loss, as the defendant's tenants had cleared, drained and cultivated a certain portion. On the occasion of this survey, Mr. Durham

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states: "Gray told me the planting would stop immediately, in the presence of Budhan; I heard no arrangement for the payment of rent." Gray himself says, he (*i.e.*, the plaintiff) said he wanted rent for the ground "and I turned to the people and said no one plant any more on Budhan's side and pay him rent." Two days after he received the letter (Exhibit D) which is somewhat contradictory, as after saying that he (the plaintiff) must ask that the tenants reap their provisions as quickly as possible he goes on later "no one is allowed to enter on my land until the rent is decided." And a further claim is made through the plaintiff's legal adviser, Mr. Luckhoo, by letter dated 19th January, 1918 (Exhibit J), "You continued your wrongful trespass by reaping provisions growing on the land," *i.e.*, after the survey; nothing is said in this letter about rent. I do not propose to further analyse the evidence on this point, but there is nothing to prove that after the date of the survey any further cultivation was made by Gray's former tenants or that what was already there was reaped, rather indeed to the contrary. There is no proof that any rent was ever paid to Gray for those portions of the land either before or after the survey, and I fail to see in any event how the plaintiff can claim from Gray future rent from persons who on the 30th August became in effect his own tenants.

Now as to the portion of the claim relating to the Crabwood timber, it stands on a different footing, for it is not denied that timber was cut; the defendant states he offered \$3 as compensation and it has to be decided what were the dimensions of the timber cut and what price was fixed (if any). I again take Mr. Durham's evidence as likely to be the least prejudiced, though he is called by the plaintiff as his witness; he says: "I heard Gray offered the land share for the timber cut. I heard a cent a foot was the usual payment for a land share. Gray told me in Budhan's presence," and again on re-examination, "I understood that payment was to be a cent a foot. Budhan said whatever Mr. Gray offers me I will accept."

On the whole evidence then I come to the conclusion that one cent a cubic foot was in 1917 the amount usually paid for what was known as a 'land share.'

The plaintiff is now claiming seven cents a foot as the market price. There is practically no difference as to the number of trees felled, the plaintiff makes it one more than the defendant, but only claims on 23 logs, the number the defendant admits he removed; the plaintiff, however, says there were 1,087 cubic feet and the defendant that it was 294 cubic feet. Each party measured the wood independently, Gray as he squared it, the last 4 being squared, so he states, after the line was run. I accept Gray's explanation of how he separated Budhan's lot from the total

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amount of timber felled by him and set out in his book. (Exhibit I).

The plaintiff's evidence as to how he obtained measurements of the timber is so scanty that one must fall back on the evidence of the witnesses Dowding and Adams. They are very contradictory as to the methods of obtaining the sizes and both they and the plaintiff are utterly unreliable as to dates.

So far, however, it is certain that they did, or rather one Harlequin did, put down on a piece of paper various dimensions. (Exhibit E) and Budhan went to one Frederick Roach for him to work out the cubic contents. Roach's account therefore is of the greatest importance, as he made out the list put in evidence as Exhibit F. I was impressed by the way in which Roach gave his evidence and I believe his statement when he says that the plaintiff informed him that the timber had been already shipped and that he obtained the measurements by getting Dowding to measure the stump and the length from the impression of the fallen log where the chips of the squaring outlined it, and that the letter he wrote for Budhan (Exhibit 'D') was written two to three months before he wrote the list (Exhibit F).

This effectually disposes of any chance of accuracy in the measurements put forward by the plaintiff, in addition to the doubt thrown on the abnormal lengths of the Crabwood in the opinion of experts. In this respect I was impressed by the length of the timber set out in the defendant's list of the trees felled on his own property, the longest is 40 feet and the longest on his list of Budhan's timber is 43 feet. More than one half of the number on Budhan's own list exceeds this length. In my opinion the defendant has acted from the beginning in a straightforward and businesslike way and I look upon this action as almost a purely speculative one. There was an unintentional trespass before the 30th August, 1917, tolerated by the plaintiff, and since that date a trespass only so far as was necessary to remove the timber for which an offer of one cent a foot was accepted by the defendant. The plaintiff makes it impossible by his own neglect and conduct to arrive at the true measurements of the timber felled and I must rely on the defendant's evidence. I assess the damages at the nominal sum of \$5 and allow no costs.

RAMLALLSING v. DEANE AND ORS.

RAMLALLSING v. DEANE AND ORS.

[290 OF 1918]

1919. FEBRUARY 14. BEFORE BERKELEY, J.

Magistrate's Court—Jurisdiction—Claim for damages to value of \$100—Proof in excess of claim—Abandonment of excess—Procedure—Petty Debts Recovery Ordinance, 1893, s. 4.

Appeal from a decision of the acting stipendiary magistrate of the West Coast judicial district. Plaintiff, Ramlallsing, claimed the sum of \$100 from the defendants for damage done by them to his growing rice crops at Blankenburg. In course of the hearing, damage to the value of \$153.60 was proved to the satisfaction of the magistrate. After reference to the cases of *D'Aguiar v. Monteiro*, (A.J. 2.4. 1902), *Trotman v. Abrams*, (16.9.1902) and *Bellamy v. Dos Santos*, (A.J. 19 5.1904), and (G.J. 27.6.1904), the magistrate was satisfied that he had jurisdiction and gave judgment for \$100 and costs.

Defendants appealed principally on the ground that the magistrate had no jurisdiction, the claim exceeding in amount the limit provided in the Petty Debts Recovery Ordinance 1893, there being no abandonment of the excess over the limit to bring the claim within the jurisdiction of the magistrate. The appeal was allowed.

J. A. Luckhoo, for the appellants.

H. C. Humphrys, for the respondent.

BERKELEY, J.: Appellants appeal from the decision of the magistrate of the West Coast judicial district (Mr. Mc. Cowan) who in an action brought by respondent claiming \$100 as damages in respect of certain rice fields, was awarded the amount claimed.

The ground of appeal argued before this Court is that as the evidence established that the damage amounted to \$153.60 and as there was no abandonment of the \$53.60 the magistrate had no jurisdiction.

I am of opinion that this appeal must be allowed. There must be an abandonment of the excess to bring the action within the jurisdiction of the magistrate. Such an abandonment must appear on the face of the claim or it may be made during the hearing and shown to have been so made on the face of the proceedings. Judgment of non-suit with costs.

Respondent to pay costs of this appeal.

Appeal allowed.

LUCAS v. THOMAS.

LUCAS v. THOMAS.

[95 OF 1919.]

1919. MAY 16. BEFORE SIR CHARLES MAJOR, C.J.

Criminal law—Praedial larceny—Summary conviction offence—Value of stolen property—Summary Conviction Offences Ordinance, 1893, s, 77, as amended by the Summary Conviction Offences Ordinance, 1893, Amendment Ordinance, 1912.

Appeal from a decision of the stipendiary magistrate of the East Coast judicial district (Mr. E. A. Bugle), who dismissed a charge brought by the complainant Lucas against the defendant Thomas for the larceny of coconuts, on the ground that there was no proof of the value of the coconuts alleged to have been stolen. Complainant appealed, on the ground that the charge was brought under s. 77 of Ordinance 17 of 1893, as amended by Ordinance 18 of 1912, under which it is not necessary to prove the value of the stolen property, the offence being a statutory one and not simple larceny.

J. S. McArthur, for the appellant.

Respondent in default of appearance.

SIR CHARLES MAJOR, C.J.: It is not necessary for me to hear the appellant. The decision of the magistrate must be reversed. Counsel who appeared for the respondent in the lower court has exercised a wide discretion in withdrawing from the matter. In his absence I do not wish to hear anything further. I have read through the records and have come to the conclusion that the magistrate's decision must be reversed with costs.

Appeal allowed.

DA SILVA v. BASSANT AND ORS.

DA SILVA v. BASSANT AND ORS.

[116 of 1919.]

1919. MAY 16. BEFORE SIR CHARLES MAJOR, C.J.

Magistrate's court—Reasons for appeal—Jurisdiction—Objection not taken before magistrate—Magistrate's Decisions (Appeals) Ordinance, 1893, s. 9, (1).

Appeal from a decision of the stipendiary magistrate of the Demerara river judicial district (Dr. W. E. Roth). The defendant Bassant and three others were convicted on a charge of stealing eleven and half cords of wood the property of complainant Da Silva. They now appealed, the principal reasons of appeal being that there was no legal evidence that the place where the wood was cut was the property of complainant, that there was a *bona fide* dispute as to the question of title, and that there was no *animus furandi*.

J. S. McArthur, for the appellants.

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

SIR CHARLES MAJOR, C.J.: There is sufficient evidence of ownership in respondent. There was plenty of evidence upon which the magistrate in the absence of anything to the contrary, could come to the conclusion that the wood was the property of the respondent. I have no doubt that if the point of a *bona fide* dispute as to title was taken before the magistrate he would have decided he had no jurisdiction. The magistrate had good grounds to justify his conclusions and I do not propose to interfere with his decision as he is the sole judge of the credibility of the witnesses. I am not prepared to disturb his conclusion. I dismiss the appeal with costs.

Appeal dismissed.

DA SILVA v. MELVILLE AND ORS.

DA SILVA v. MELVILLE AND ORS.

[104 OF 1919.]

1919. MAY 16. BEFORE SIR CHARLES MAJOR, C.J.

Appeal—Reasons for appeal—Want of jurisdiction—No objection taken in court below—Manner of setting forth reasons for appeal—Points of law and questions of fact—Magistrates' Decisions Appeals Ordinance (No. 13 of 1893) ss. 9 and 10.

Appeal from a decision of the stipendiary magistrate of the Demerara river judicial district (Dr. W. E. Roth). The defendant Melville and two others were charged by the complainant Da Silva with trespass and were convicted by the magistrate.

They appealed on the grounds—

- (1) That the magistrate had no jurisdiction, a *bona fide* question of title to land being involved.
- (2) That there was no evidence proving that the notice board alleged to have been posted up complied with the requirements of section 39 (1.) of Ordinance 17 of 1893. (Summary Conviction Offences Ordinance).
- (3) That illegal evidence was admitted, details of which were set out.

J. S. McArthur, for the appellants.

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

On the matter being called *Mr. de Freitas, K.C.*, objected to reason (1) of the grounds of appeal that the magistrate had no jurisdiction to try the case. This objection had not been taken before the magistrate and therefore could not be embodied in the reasons of appeal.

Mr. McArthur: The reason should have been worded to read that the magistrate exceeded his jurisdiction in adjudicating upon the case, as a *bona fide* dispute on the question of title to the land was the cause of the whole matter. The failure to make this plain was due to a clerical mistake.

SIR CHARLES MAJOR, C.J.: The objection is good. It is not a case of the magistrate exceeding his jurisdiction in the absence of any objection at the hearing of the case that there was a *bona fide* question of title involved. It appears from the evidence that there was a dispute, and the sole question for the magistrate to decide was a *bona fide* question of title. I am surprised that it was omitted to take this objection as it is clearly laid down that the magistrate would have no jurisdiction in a *bona fide* dispute on the question of title. On the evidence there was a *bona fide* question of title involved. The point has not been taken before the mag-

istrate and cannot be taken now. It is a pity that the objection was not taken, because I would have called upon counsel for the respondent without hearing Mr. McArthur. I allow the objection that the first reason cannot be argued.

Mr. De Freitas, K.C.: I object, again, to reason 2 which is inarguable as the appellant has failed to define under which subhead it comes, whether as a point of law or evidence or under any of the other grounds allowed by the Appeals Ordinance.

Mr. McArthur: The intention of the ordinance is merely to specify the heads under which reasons may be framed. It is only necessary to give particulars corresponding to those authorised sub-heads and I know of no decision which makes it obligatory on the part of the appellants to put in the sub-heads, although that was usually done. My learned friend cannot say that he has been misled in any way.

SIR CHARLES MAJOR, C.J.: My attitude some time ago was one in objection to the strict confines which appellants are kept by the provisions of this particular law and forced to confine themselves to the grounds for reasons of appeal mentioned in the ordinance. It is, however, the law. The terms of section 9 of the ordinance have to be obeyed. Failure to specify the subhead under which the reason came is an omission of the terms of the ordinance. The procedure is clearly laid down although strictly confined and I am bound to say the reason is deficient. I uphold the objection.

After hearing counsel for the appellant on the remaining reason for appeal, the admission of illegal evidence, without calling on counsel for the respondent His Honour dismissed the appeal with costs.

Appeal dismissed.

In re SPROSTONS, LIMITED.

In re SPROSTONS, LIMITED;

In re J. H. A. BERKELEY;

THE DEMERARA TURF CLUB, LIMITED (in liquidation).

1919. MAY 16. BEFORE SIR CHARLES MAJOR, C.J.

Company—Winding up—Proof of debts—Assignment of debts and dividends payable in respect thereof—Purchase of debts by liquidator—Contract—Conditions precedent—Rescission.

Appeals from decisions of the Official Receiver as liquidator of the Demerara Turf Club, Ltd. (in liquidation).

In re SPROSTONS, LTD.

In the first matter, that of Sprostons Ltd., a claim was filed for \$10,042.02, and was admitted to rank for dividends not exceeding the sum of \$5,000. The appellants now sought an order reversing or modifying the decision of the Official Receiver whereby he rejected the claim to the extent of \$5,042.02.

The reasons of the Official Receiver for his decision, and setting out the facts, were to the following effect:—

“This claim is based on an account for goods supplied to the club between July 20th, 1910, and April 12th, 1911, amounting to \$9,747.76, and \$292.49 interest agreed to be paid and on account stated in writing on May 10th, 1911. Of the amount of \$9,749.53, \$8,252.38 was for goods supplied from July 20th, 1910, to January 4th, 1911, and the balance of \$1,497.15 was for goods supplied from January 5th to April 12th, 1911.

The club went into voluntary liquidation on January 5th, 1914, and an order for its winding up by the court was made in the month of September, 1914.

I am advised and am of the opinion that the running of prescription was interrupted by the voluntary liquidation, and that all debts contracted within three years prior to January 5th, 1914, would not be subject to prescription, and that therefore the \$1,497.15 for goods supplied after January 4th, 1911, would not in any case be prescribed. But on May 10th, 1911, there was an account in writing stated between the claimant and the club, in which the claimant's account of \$9,749.53 was admitted to be correct. This gave rise to a distinct cause of action and prescription would only run from this date. I find therefore that the debt is not prescribed, The claimants were therefore entitled at the date of the compulsory winding up to rank for dividend for \$10,042.02.

But it is admitted by them that they sold their claim on

In re SPROSTONS, LIMITED.

June 27th, 1918, to Nelson Cannon, who was then the liquidator of the club, for \$5,000, for which the latter gave a promissory note payable on demand with interest at six per centum per annum. In reply to a request made by me, the secretary of Sprostons, Ltd. has laid over an affidavit together with the correspondence between him and Mr. Cannon. The affidavit is to the effect that the agreement of sale was conditional, and has become of no effect by failure of its purchaser to carry out its terms.

I am satisfied, however, that the sale was complete and not conditional. There is no evidence that the agreement of sale has been cancelled. In my opinion Sprostons, Ltd. retain the claim as security for the payment of the \$5,000 by Cannon, who is the beneficial Owner. He cannot receive from the club more than he paid for the debt.

I allow the claim to rank for dividends not exceeding in amount the sum of \$5,000."

From this decision the claimants, Sprostons, Ltd., appealed on the following grounds:—

(1.) On or about June 27th, 1918, Nelson Cannon verbally agreed with the claimants to purchase for the sum of \$5,000 the debt due to claimants by the Demerara Turf Club, Ltd., on the following conditions:—

- (a.) He agreed to give claimants a promissory note for \$5,000 with interest at six per cent, from June 27th.
- (b.) He agreed to pay and retire the said note with interest due thereon within a short time of June 27th, and in the event of his failing to do so to pass a second mortgage to Sprostons Ltd. as security for the said debt.
- (c.) Claimants agreed to send a representative to all meetings held for the purpose of the winding up and to record the company's vote in accordance with the instructions of Nelson Cannon.

(2.) Pursuant to the verbal agreement a letter was sent to the secretary of the company by Cannon to the following effect:—

Georgetown,
27th June, 1918.

G. A. H. Goring, Esquire,
Secretary, Messrs. Sprostons, Ltd.

Dear Sir,

With reference to our conversation this morning, I now beg to make you a firm offer of \$5,000 (five thousand dollars) for your interests in the debt against the Demerara Turf Club, Ltd., (in liquidation). Payment to

In re SPROSTONS, LIMITED.

be made by promissory note on demand bearing interest at the rate of six per cent., per annum, from July 1st, 1918, payable quarterly or half-yearly.

Negotiations are in progress which I hope will enable me to redeem the note at an early date, failing which I will, on receiving title to Bel Air Park, pass a mortgage in your favour to rank second to a first mortgage for \$25,000.

It is agreed between us that you shall attend all meetings held for the purpose of the winding up and record your vote in a like manner as myself.

It is understood and agreed that if this offer is not accepted you will return this letter and consider same as not having been written.

Yours, faithfully,

(Sgd.) N. CANNON.

To which the secretary replied in the following terms:—

June 28th, 1918.

Honourable Nelson Cannon,

Georgetown.

Dear Sir,

Your letter of the 27th has been received and duly laid before the board of directors of this company who instruct me to accept the offer contained therein as I now do by this letter.

Yours faithfully,

(Sgd.) G. A. H. GORING,

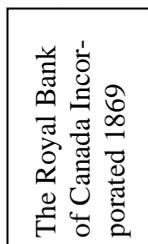
Secretary.

(3.) As a result of this agreement Nelson Cannon delivered to the claimants a promissory note to the following effect:—

Georgetown, British Guiana,

27th June, 1918.

\$5,000.



On demand I promise to pay to the order of Messrs. Sprostons, Ltd., five thousand dollars at the Royal Bank of Canada, Georgetown, British Guiana, value received with interest at the rate of six per cent. per annum from date until paid in terms of my letter dated 26th June, 1918.

(Sgd.) N. CANNON.

(4.) Nelson Cannon never complied with the terms of purchase inasmuch as he failed to retire the promissory note and did not obtain title to Bel Air Park which was

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sold on September 26, 1918, to one Fernandes, to whom it was transported in January, 1919. No mortgage was therefore passed to claimants by Cannon as security for the debt.

(5.) Both parties to the agreement of sale treated it as inoperative and of no effect.

In re J. H. A. BERKELEY.

In the second matter, that of J. H. A. Berkeley, a claim was filed for \$1,182.46, \$70Z.46 as preferent and \$480 as concurrent. It was rejected by the Official Receiver so far as the \$702.46 was concerned, and admitted for \$480 as preferent. The Official Receiver decided at the same time that the claim had been purchased by Nelson Cannon for \$480, and that he therefore was the person entitled to receive payment of this sum.

From this decision the claimant Berkeley appealed, on the following grounds:—

(1.) J. H. A. Berkeley obtained judgment against the Demerara Turf Club, Ltd., for the sum of \$480, and \$702.46 for costs, including costs of execution, which costs were thereby preferent. A proof for the amount of judgment and costs was filed with the liquidator on October 3rd, 1914.

(2.) The property levied on was sold at public auction on September 26th, 1908, for \$62,100.

(3.) On September 5th, 1918, the attorney in the colony of claimant entered into an agreement with Nelson Cannon to sell the said judgment debt to him for \$1,182.46, the full face value, on certain conditions, set out in a written agreement.

(4.) The terms of the written agreement were to the following effect:—

(i.) Nelson Cannon shall pay to the said attorney the sum of \$480, the amount of the claim due under the judgment above-mentioned, and on the sanction being obtained from the court of the sale by the liquidator to Nelson Cannon of the assets of the company, he (Nelson Cannon) shall pay to the said attorney the amount due and costs under the judgment obtained by J. H. A. Berkeley.

(ii.) The said attorney hereby cedes, assigns, and transfers to Nelson Cannon any amount which will be paid as dividend by the club, in liquidation, in respect of the said judgment and costs.

(iii.) Nelson Cannon shall deposit in the Royal Bank of Canada the sum of \$20,300, in respect of the judgment for \$21,800 which was obtained by the British

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Guiana Mutual Fire Insurance Company, Ltd., and which has been transferred to and is now held by Henry Earle Murray, and agrees to pay interest on the said sum from date hereof until date of payment. Security shall be given for the payment of such interest.

(5.) Nelson Cannon paid the \$480, but his application to the court to sanction the sale was refused and he failed to comply with the other terms of the agreement all of which were conditions precedent to the sale of the debt.

H. C. Humphrys, for the appellants, Sprostons, Ltd.

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

G. J. de Freitas, K.C., Actg. S.G., and *H. H. Laurence*, for the respondent, the Official Receiver.

J. S. McArthur, for Nelson Cannon.

SIR CHARLES MAJOR, C.J.: These are appeals from decisions of the liquidator of the Demerara Turf Club, Limited, on consideration of the appellants' proofs of debts. The appeals have many features in common, principal among them being the fact that they both involve contemplation and construction of agreements between the creditors and the former liquidator of the company, made in connection with, and so far as they relate to, an application by Mr. Nelson Cannon, who was the former liquidator, for the court's sanction to acquire the real assets of the company. Both these agreements are in writing and both operate as assignments of the appellants' debts to Mr. Cannon, subject, as will appear, to the arguments addressed to the court upon their construction, with this marked feature of difference, that in the one the assignors and the assignee are entirely in accord on the question of that construction, in the other they are in conflict. The principles of law, moreover, governing the agreements, seem to me for the most part to be the same.

At the hearing of each appeal, endeavour was made to give oral evidence touching the contents of the agreements, but a very short discussion of the nature of that evidence sufficed to show that its admission would have been to contravene the rule that where a contract is reduced into writing, it is presumed that the writing contains all the terms of it, and evidence will not be admitted of any previous or contemporaneous oral agreement which would have the effect of adding to, or varying, it in any way. The agreements, therefore, come for construction as they stand, with the additional question, in the first named appeal, whether the written contract was rescinded by subsequent parol agreement.

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Messrs. Sproston's agreement with Mr. Cannon is contained in two documents, the first, a letter from Mr. Cannon to the secretary of Sproston's, dated the 27th June, 1918, the second, the secretary's reply thereto on the following day. These letters run thus:—[Read; see above.]

In pursuance of these letters, Mr. Cannon made the following promissory note, [Read; see above] which he delivered to the payees:—

On the 5th September, 1918, Mr. Berkeley, by his attorney, Mr. Wight, entered into the following agreement with Mr. Cannon:—

“1. The said Nelson Cannon shall pay to the said Percy Claude Wight as attorney of H. A. Berkeley, of Grenada, the sum of four hundred and eighty dollars (\$480), being the amount of the claim due under the judgment obtained by the said H. A. Berkeley against the Demerara Turf Club, Ltd., the receipt whereof is hereby acknowledged by the said Percy Claude Wight in his quality aforesaid, and on the sanction being obtained from the court of the sale by the liquidator to the said Nelson Cannon of the assets of the Demerara Turf Club, Ltd. (in liquidation) the said Nelson Cannon shall pay to the said Percy Claude Wight the amount due and costs under the judgment obtained by the said H. A. Berkeley. The said Percy Claude Wight in his quality aforesaid hereby cedes, assigns and transfers to the said Nelson Cannon any amount which will be paid as dividend by the said Demerara Turf Club, Ltd. (in liquidation), in respect of the amount of the judgment and costs in the above matter.”

To a phase of Mr. Berkeley's appeal, I here pass at once, namely, that wherein it is contended by counsel that among the promises made by Mr. Cannon upon fulfilment whereof depended the operation of the agreement between Mr. Wight and himself, were those relating to the deposit of certain moneys in a bank to cover a judgment for mortgage principal and interest obtained against the company and afterwards assigned to Mr. Murray for whom also Mr. Wight happened to be acting. I do not recite that part of the agreement because I am against the contention. The transactions between Mr. Murray and Mr. Cannon and Mr. Berkeley and Mr. Cannon were quite separate and distinct; the parties, the interests involved and their treatment, are separate and distinct; and they are not the less so because there is mention made in both of the courts' sanction for Mr. Cannon's acquisition of the property called Bel Air Park. I am not able to read the one part of the agreement as in any way dependent upon or connected with the other. On the contrary, they are expressly

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kept apart and unrelated, and it is upon the first part of the agreement as I have read it that the appeal must be decided.

In Mr. Cannon's letter of the 27th June, I read a clear, precise and complete statement of the terms of his offer. It is a "firm" offer to purchase the debt for \$5,000, payment to be made by promissory note payable on demand and carrying interest at six per cent. The maker hopes to retire the note "at an early date," failing which he promises to give the payees a mortgage over Bel Air Park "on receiving title for same." The acceptance of that offer is equally clear, definite and unconditional, and the promissory note is delivered. The appellants contend, firstly, that the words "failing which I will, on receiving title to Bel Air Park, pass a mortgage in your favour" constitute an undertaking by Mr. Cannon to obtain title; and secondly, that his failure to obtain title put an end to the contract. The undertakings of the maker of the note, as I see them, were first to pay interest on the note until payment, second, to pay the note on demand, third, if the note were not so paid, to secure the payment by a mortgage over certain property when he acquired it. The rights of the payees of the note were, first, to enforce payment of the note, or, second, to call for a mortgage to secure its payment, and third, on refusal or inability of the maker to fulfil his undertakings to sue for breach of contract. I can find no condition precedent such as that the maker would obtain title of Bel Air Park and that the operation of the contract was suspended until he did so; the contract in fact came into operation at once and the property in the debt passed to Mr. Cannon on the delivery of the note. Still less am I able to find or to read into the contract any stipulations that, if interest on the note were not paid, or the note itself not met on demand, or a mortgage not given or Bel Air Park not acquired, the contract was to be void.

The authorities cited by Mr. Humphrys do not help him. *Bishop v. Shil-letto*; (2. B. & Ald. 329 n.) decided that trover would lie for goods delivered under an express condition which was not performed. In *Roberts v. Brett* (11 H.L. Cas. 337) the plaintiff by indenture covenanted to provide a ship for the storage by the defendant of a telegraphic cable, and by the same indenture agreed to give bond to the defendant for the performance of that and other covenants. The defendant having refused to stow the cable on board, the court held that it was a condition precedent to the plaintiff's right to recover for the defendant's breach of the agreement that he should have given bond to the defendant. In *Bianchi v. Nash* (1 M. & W 545) a verbal agreement was made for the loan of a musical box on the understanding (which the jury found as a fact) that if the box were damaged in the hands of the borrower it should be paid for by

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him as on sale. The box was damaged, and in an action for goods sold the plaintiff obtained judgment, the box having been sold on condition, the condition being performed, and the sale becoming absolute. *Bute (Marquis) v. Thompson* (13 M. & W. 487) seems to be all against the appellants. That was an action for breach of contract. The defendants expressly covenanted to raise and work 13,000 tons of coal annually, paying a royalty and a fixed yearly rent. It was held that the defendants, having stipulated to work and get that quantity of coal, also stipulated that if they did not get it, they would pay the rent, but that the court could not import into the contract a condition that there should be coals to the extent stated, that if that was the intention of the parties, they should have expressed it. So here, though there be a promise to give a mortgage I cannot import into the agreement a condition that the property would be acquired in order to carry out that promise. It should have been so expressed. Lastly in *Johnson v. McDonald* (9 M. W. 600) there was a bought and sold note for 100 tons of nitrate of soda, to arrive ex Daniel Grant, and a memorandum at the foot of the note, "should the vessel be lost, this contract to be void." The ship arrived but without any soda and it was contended that the defendant sellers undertook that the soda should arrive at all events by the Daniel Grant, unless it was lost and that the words "to arrive" meant that the sellers warranted that it should arrive. The judgment of Parke, B., is instructive and I will read it. [Read.] The foundation of the learned judge's decision was that there was merely an agreement for the sale and delivery of cargo at a future period, namely when the vessel should arrive, and that the operation of the agreement was conditional upon the arrival, that is that its operation was suspended until the arrival. Here, as I have already said, the contract took effect immediately.

It has been argued that the agreement does not constitute a legal assignment. That would appear to be so in the sense that the assignee of the debt was, and apparently is, not yet in a position to sue the liquidator for the dividends payable in respect of it, but the agreement is certainly an equitable assignment and if the dividends were to reach the hands of Sprostons they must hold them as trustee for the equitable assignee.

The third contention of the appellants is that the written contract was rescinded by subsequent parole agreement. Even supposing there may be verbal rescission of a contract after breach, that is after a right of action for breach had rested in Sprostons—and it is admitted that agreement (if any) to rescind was after and in consequence of Mr. Canon's non-performance of his alleged stipulation to obtain title—the question of rescission is one of fact

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Mr. Cannon says that on his application for the court's sanction being refused, he had a conversation or conversations with Mr. Laing, and arranged with him "that as the court wouldn't sanction the sale to him, the whole transaction was off." Mr. Goring's evidence is "Sproston's treated the agreement as inoperative soon after the Court refused Cannon's application to purchase. I cannot say whether it was before or after the fresh sale that they so treated it. I got that from the chairman. The matter was mentioned at a board meeting, that is, the chairman stated that he had had a communication from Mr. Cannon that, in consequence of what he expected not taking place, he could not carry out his contract. I understood from the chairman that the contract was not to be insisted on. There was merely this announcement, nothing formal. There was no action taken by the board, there was no proposal before it. That is what I mean by saying that the contract was treated as inoperative. Sprostons determined not to insist upon the performance of the contract. We sent the promissory note to our lawyer."

I am quite unable to say that that evidence establishes a rescission of the contract and agree with the submission of the late Mr. Lawrence for the respondent, that at the highest it amounts to no more than that the appellants were not pressing for performance of that part of the contract which provided for payment, or security for the payment of the note. But there is positive evidence the other way. On the application to me for the removal of Mr. Cannon as liquidator, the applicants stated in an affidavit: "8. Payment and other private agreements and compromises for the payment of their debts or for the purchase of their claims have been made by the liquidator with certain concurrent creditor, namely Messrs. Sprostons, Limited . . . Messrs. Sprostons, Limited have been given a note for £5,000 signed by Nelson Cannon personally." Mr. Cannon's answer was this. "With reference to paragraph 8 . . . As regards Sprostons' debt, the same was openly offered for sale in the street and my offer for the same was the highest—the said Percy Claude Wight being a competitor—and the same was accepted. . . . I am advised and verily believe that although the liquidator may not without the court's leave purchase the assets of the club, there is no law prohibiting the purchase of the debts due by the club." Mr. Cannon said in answer to Mr. Lawrence that the conversation he had with Mr. Laing, at which it was agreed that the whole transaction was off, though he could not give the date of it, was before the application for his removal. Yet, after that conversation, he is to be found in another place maintaining and justifying the purchase of the debt, as an accomplished fact after competition "in the street," and claiming, under advice, to receive in full the

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dividends in respect of the debt, but now coming arm in arm with the creditors to say “the contract depended for operation entirely upon my obtaining “title to Bel Air Park. As I could not obtain the sanction of the Court to my “doing so, Mr. Laing and I asked that it should come to an end.” Is it necessary to say more?

In dealing with these proofs of debt, the liquidator has purported incidentally to determine the position of Mr. Cannon under the agreements as to receipt of dividends. For him as party to Mr. Berkeley’s appeal it has now been admitted that he cannot receive more than the sum of dividends amounting to that by payment of which he acquired the debts. Mr. Humphrys for the appellant Sprostons is no party to that admission. Very little need be said on that point. Mr. Cannon personally acquired Sprostons debt when he was liquidator. A winding up order constitutes the liquidator a trustee of the company’s property for those who were creditors at the time of the winding up, so that the statute of limitations is prevented from running. In the *Delhi Bank* case Lord Cairns said: “There is by the section “[meaning section 98 of the Companies Act, 1862, which is section 159 (1) “of our Ordinance of 1913] imposed upon the assets of the company, wherever they may be at the time of the winding up, a trust to be applied in “discharge of the liabilities of the company.” *Knowles v. Scott* (1891 1 ch. 717) cited by Mr. Humphrys decided that a liquidator is not a trustee for each creditor and contributory to the extent of being liable in that capacity for negligence, but a liquidator certainly comes into that class of persons, such as counsel, solicitors, directors, agents and others to whom the rule of equity is always applicable, that a person holding a fiduciary position shall not use that position for a personal benefit at the expense of those by whom a trust or confidence is reposed in him, or for whom he is an agent. Mr. Cannon cannot, therefore, avail himself of any benefit that may accrue by his acquisition of the debt or Sprostons for some 50 per cent., of its face value.

Bearing in mind the terms of the two contracts I am considering and the reasons I have expressed for attaching to Messrs. Sprostons contract with Mr. Cannon the construction I feel bound to put upon it, it will probably have been already apparent to counsel for Mr. Berkeley that I am unable to accept his view of his client’s contract with Mr. Cannon. That view is that the contract contained and was dependent for operation upon the performance of a condition precedent, namely, the obtaining of the Court’s sanction to Mr. Cannon’s acquisition of Bel Air Park, The contract may thus he stated in common parlance: “In consideration of the payment by Nelson Cannon of \$480, amount of

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the judgment debt and his agreeing to pay the costs of the judgment on obtaining the Court's sanction of the sale to him of the company's assets, John Berkeley (with the vice of mere initials before me I assume this appellant's name is John) assigns to Nelson Cannon the dividends to be paid in respect of the judgment and costs." There is nothing in the words "on the sanction being obtained" either, first, to warrant their conversion into "and Nelson Cannon undertakes to obtain the sanction," or, second and by way of further consideration for the subsequent assignment, to turn them into "and in consideration of my undertaking to obtain the sanction, &c. and, having obtained the same, to pay the costs, &c." Whether or not the words "on the sanction being obtained" import an undertaking on the assignee's part to do so, for breach of which relief might be granted to the assignor by way of damages, is not the point. I do not think they do; I think as urged by Mr. McArthur, that they merely point to a time, if that time arrives, when payment of the costs of the judgment is to be made, containing neither condition nor warranty that it shall arrive. The point is that the agreement on the face of it cannot be construed as made upon a promise to obtain the sanction and to be inoperative until that promise was fulfilled, and, of course, in so construing it, I am not at liberty to take into consideration such circumstances as the poorness of the bargain for the assignees or an allegation of willingness to refund the \$480.

I am unable to see the applicability of Mr. Browne's argument on the question of impossibility of performance of the contract. There was, indeed, no impossibility either physical or legal, to sanction being obtained. The failure to obtain it was due to the particular circumstances of the case, such as the position of the proposed purchaser, the proposed sale price, the method in which it was proposed the sale should take place, of all of which the parties were fully aware when the agreement was made.

I am of opinion, therefore, that the agreement operated as an absolute assignment of the assignor's property in any dividends to be declared in respect of the debt, which entitled the assignee to receive them.

There remains the stage of both appeals wherein it has been urged that the liquidator exceeded his powers in passing as he did upon the agreements and should have left that to the court. Both appeals have been treated as though the liquidator had left the construction of the agreements to the court and so the course (very properly) avoided of my merely regarding the proofs of debt, which are not in dispute, upholding the appeals for want of power in the liquidator to adjudicate upon the question of issue between the rival claimants, and burdening appellant and respondent alike with fresh process to determine what has been

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now determined by this judgment, a course inimical to the interests of creditors and contributories of the company alike.

The orders I make are, in Messrs. Sprostons' appeal, that the same be dismissed, and that of the dividends to be declared in respect of the debt due from the company to Messrs. Sprostons the liquidator do hold at the disposal of Nelson Cannon such part as shall be payable in respect of a sum not exceeding \$5,000 of the said debt and do hold the balance of the said dividends for the benefit of the other creditors (other than J. H. A. Berkeley) and contributories of the company in a due course of liquidation.

In Mr. Berkeley's appeal I order that the same be dismissed, that of the dividends to be declared in respect of the debt due from the company to the said J. H. A. Berkeley the liquidator do hold at the disposal of Nelson Cannon such part as shall be preferentially payable and not exceeding a sum of \$480 and do hold the balance of the said dividends for the benefit of the other creditors (other than Messrs. Sprostons, Limited) and contributories of the company in a due course of liquidation.

The appellants will pay their own costs of the appeal, Mr. Cannon will pay his own costs, the costs of the liquidator will be paid out of the assets of the Company.

[NOTE.—The order in respect to (he appeal of Messrs. Sprostons, Ltd., was subsequently varied by deleting the words "such part as shall be payable in respect of" and the words "of the said debt," and as amended, read as follows "of the dividends to be declared in respect of the debt due from "the liquidating company to the appellants, Sprostons, Ltd., the said liquidator do hold at the disposal of Nelson Cannon a sum not exceeding "\$5,000." ED.]

[NOTE.—An appeal from this decision has been lodged in respect of J. H. A. Berkeley's claim.]

FARIA v. DE CASTRO.
 FARIA v. DE CASTRO;
Ex parte ANTONIO AND ORS.

[286 OF 1917.]

1919. FEBRUARY 11, 18. BEFORE HILL, J.

Practice—Interpleader action—Application to dismiss for want of prosecution—Entry on hearing list—Rules of Court 1900. O. XXXII, r. 5.—Order of revivor—Change of parties by death—Order XV, r. 1—Action against executors—Civil Law of British Guiana Ordinance, 1916, s. 18.

Application by the personal representative of Faria, plaintiff in the original action and defendant in the interpleader suit, that the interpleader suit be dismissed for want of prosecution by the defendants, Antonio and others, claimants therein. The facts are fully set out in the judgment.

E. M. Duke, for the applicants (defendants).

J. S. Mc Arthur, for the respondents (claimants).

HILL, J.: Faria obtained judgment on September 29th, 1917, against De Castro, and a writ of execution was issued on October 3rd. Antonio and another interpleaded and order was made on November 10th that the claimants be made plaintiffs and Faria defendant in the interpleader issue. On November 20th, statement of claim was filed, on November 30th, defence, and on December 10th, reply was filed. Nothing further was done by either party, and on August 8th, 1918, the defendant applied to have the interpleader dismissed for want of prosecution. This application was fixed for hearing on August 17th, 1918—on that application Mr. Justice Dalton made an order postponing the further hearing of the application for the purpose of allowing the personal representative or representatives of the defendant Faria, who had died on April 26th, an opportunity of compliance with the provisions of Order XV of the Rules of Court. On September 7th, an application to that effect was made *ex parte* by counsel for the plaintiffs (claimants) and an order was made accordingly on September 14th, 1918, and on September 24th, appearance was entered by Faria's executors, and on same day a request was filed to have the application for dismissal of the interpleader issue for want of prosecution fixed for hearing. On October 2nd, the plaintiff's filed a request to place the interpleader action on the hearing list.

The pleadings were closed on December 10th, 1917, but no application was made by either party to have the issue placed on the hearing list. According to Order xxxii, rule 5, this would result after the lapse of six months in the action being deemed

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deserted and incapable of being proceeded in to any effect until an order of revivor had been made by the Court. Such order of revivor must be applied for within a further period of six months, after which the action shall be deemed altogether abandoned and incapable of being revived. (Order XXXII, rule 5 (2)).

The correct procedure, it appears to me, would have been for the judgment-creditor (the defendant in the interpleader issue) to have applied within the six months to have the interpleader issue placed on the hearing list if the claimant failed to do so, and according to *Vaughan v. Richards* (L. J. 9.12.05.) an action—and an interpleader issue corresponds to an ordinary action—(*Annual Practice* 1917, p. 1100) does not become altogether abandoned till the lapse of a period of twelve months from the time it is ripe for hearing (in this instance December 20th, 1917), and according to that judgment if neither party make the request up to the period of twelve months, the action will be deemed altogether abandoned and deserted by both parties.

On that ground therefore the application to declare the action dismissed for want of prosecution must fail.

I do not think that section 18 of Ordinance 15 of 1916 applies to an interpleader issue. That section does not contemplate a tort to be an interpleader action arising out of a judgment on a promissory note. This is not an action for “unliquidated” damages (*Kirk v. Todd* 21 Ch. D. 484) and in *Jenks v. Clifden* 1897) Ch. D. 694, the question was not when the “wrong,” but when the “injury,” was committed. The continuing possession of a house which the claimants allege is theirs, gives them a right to recover it—they are pursuing their right to recover property which the defendant is attempting to appropriate, and in such case *actio personalis moritur cum persona* is not applicable. This would seem to be what *Phillips v. Homfray* (24 Ch. D. 406 et seq.) decided.

The application is dismissed and the interpleader may be placed on the hearing list; but each party must pay his own costs.

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Ex parte BELMONTE.

[124 OF 1919.]

1919. MAY 16. BEFORE SIR CHARLES MAJOR, C.J.

Magistrate—Refusal to adjudicate.—Mandamus.—Unlawful possession of spirits.—Right to make complaint and recover penalties.—The Spirits Ordinance, 1905, ss. 93 (1.), and 118.—Transfer of duties under ordinance.—Commissary Department Ordinance 1911, s. 3.—General right of making complaint.—Summary Conviction Offences (Procedure) Ordinance, 1893, s. 6.—Practice.

An ordinance which empowers certain officers or a class of officers to take proceedings for contravention of the provisions of that ordinance, but which does not by its terms confine the proceedings to those officers, or to the class named, does not take away the general right of making complaints in summary conviction offences given by Ordinance 12 of 1893 section 6.

Warner v. Fenton. (A.J., March 31st, 1905), followed.

Rule *nisi* to John Haynes Smith McCowan, a stipendiary magistrate for the Georgetown judicial district, and Joseph Crawford and James Elliot to show cause why the magistrate should not proceed to hear and determine and adjudicate upon a complaint by Cecil George Belmonte for the unlawful possession of spirits. The rule had been obtained at the instance of Belmonte.

The following facts appeared from the affidavits:—

On March 21st, 1919, Belmonte made a complaint against Joseph Crawford and James Elliot before the above-mentioned magistrate for that they did knowingly have in their unlawful possession on March 20th, three bottles of spirits, to wit, rum, containing 22 liquid gallons and of a strength of 41.8 over proof, contrary to law, sec. 93 (1), Ordinance 1 of 1905.

A summons was duly issued, and on April 10th the case was called for hearing. The complainant appeared to prosecute by counsel, and the defendants were also represented by counsel who took no objection to the complaint and the case was heard on its merits. At the close of the case plaintiff's counsel called the attention of the magistrate to Ordinance 11 of 1911, amending Ordinance 1 of 1905, and substituting the Chief Commissary and his officers for the Comptroller of Customs and his officers, and submitted that the complainant, who was an officer of Customs, was entitled to bring the complaint, as the provisions of sec. 118 of Ordinance 1 of 1905 did not prohibit others than the officers referred to in the section from bringing complaints under the Ordinance. The magistrate thereupon declined jurisdiction, holding that it was not competent for the complainant to institute proceedings, that the proceedings were therefore bad *ab initio*, and

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the complaint therefore failed, and he refused to adjudicate on the merits.

The magistrate did not appear to show cause, but notified the court that he desired to abide by any decision the court might give.

Crawford and Elliot in person.

G. J. de Freitas, K.C., Actg. S.G., in support of the rule.

Cited *Roy v. Hodgson* (A.J., Nov. 7th, 1902), *Johnson v. Gill* (G.J., Feb. 13th, 1903) and *R. v. Brown* (26 L.J., M.C., 183). Complainant Belmonte was entitled to bring the complaint as a private individual under section 6 of Ordinance 12 of 1893 (Summary Conviction Offences Procedure Ordinance) which reads: "It shall be lawful for any person to make a complaint against any person committing a summary conviction offence unless it appears from the statute on which the complaint is founded that any complaint for such offence shall be made only by a particular person or class of persons." The ordinance under which the complaint was brought does not say that the charge shall be brought by certain individuals only.

SIR CHARLES MAJOR, C.J.: He has signed his name as officer of Customs.

De Freitas: That was done to show why he interfered but that does not destroy his right as a private individual to bring the complaint. A customs officer is nevertheless a private individual; he does not lose his rights as a private individual when he signs as customs officer. The ordinance of 1905 under which the charge was brought does not limit who should bring the complaint. Cited the case of *Warner v. Fenton*, which was a matter brought under the old Spirits Ordinance of 1898. It was never intended to prevent other persons from bringing such proceedings; the ordinance does not specify that only particular individuals shall bring the proceedings.

SIR CHARLES MAJOR, C.J.: The general power given by the Summary Conviction Offences Procedure Ordinance, 12 of 1893, to bring complaints is not taken away by the terms of the ordinance of 1911, which amends the ordinance of 1905, although the applicant is a customs officer. The mere description does not take away his rights as a private individual. The charge was laid in the capacity of customs officer but while occupying that position as a private individual. The words of the statute that so many persons could bring complaints does not take away the general right of persons to bring complaints under the ordinance. I make an order upon the magistrate that he shall proceed to

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adjudicate on the case as to its merits. I have been moved to my conclusions without any hesitation after considering the authority of *Warner v. Fenton* (A.J., 31st March, 1905) a decision by Sir Henry Bovell, C.J. There is no authority to the contrary.

Rule absolute.

CANNON v. THE ARGOSY Co., LTD. AND ANR.

[130 OF 1918.]

1919. APRIL 29, 30, MAY 1, 2, 5, 6, 7, 8, 9, 12, 13, 14 AND 22.

BEFORE DALTON, ACTG. J.

Libel—Plea of justification—Particulars—Practice—Evidence as to other alleged dishonest acts—Evidence in mitigation of damages—Fair comment—Malice.

Claim by the plaintiff for the sum of \$10,000 as damages for libel against the Argosy Co. Ltd., the proprietors of a newspaper called the Daily Argosy, and John Cunningham, the editor, printer and publisher of the said newspaper.

All necessary facts and details are fully set out in the judgment of the court. Evidence for the plaintiff in rebuttal of the plea of justification was reserved until after the closing of defendant's case.

J. S. McArthur and H. C. Humphrys, for the plaintiff.

H. H. Laurence and E. G. Woolford, for the defendants.

DALTON, ACTG. J.: Plaintiff, Nelson Cannon, claims the sum of \$10,000 for libel. Defendants are the Argosy Co., Ltd., the registered proprietors of a newspaper called "The Daily Argosy," and John Cunningham, the editor, printer and publisher of the said newspaper.

The statement of claim sets out that on April 28th, 1918, an article was published in the newspaper in question to the following effect:—

"It remains to refer briefly to the attitude of the prime mover (meaning "the plaintiff) in the opposition to the increased vote for the public printing. "His (meaning the plaintiff's) antagonism was obviously personal and admittedly had nothing whatever to do with the equity of the claim. But "when he maintained that the grounds for the application were similar to "those of the contractor for the municipal cart service he was guilty of misrepresentation, since the latter contract was entered into little more

“than a year ago, when the war was in actual progress. That the mayor of Georgetown (meaning the plaintiff) should display a malignant hostility to the editor of this paper is scarcely a matter for surprise, since the latter was the prime agent in convicting him of graft, as proved by the official records of the Town Council. A man of average sensibility, so convicted, would have felt the stigma sufficiently acutely to resign his position as mayor and retire from public life. A more active and alert public opinion would, indeed, have demanded it. But, as his utterances at the recent meetings of the Combined Court show, the worthy senior member for Georgetown (meaning the plaintiff) affects a superb indifference to public opinion and thinks he can flout the ordinary decencies of public life with impunity. It will be observed, however, that he has not of late issued another challenge by way of testing his damaged reputation in the eyes of the electorate.”

At the date in question plaintiff was Mayor of Georgetown and senior member for Georgetown in the Court of Policy.

The pith of the libel is contained in the words “the latter (i.e. the editor of the newspaper) was the prime agent in convicting him (i.e. the plaintiff) of graft as proved by the official records of the Town Council.” Plaintiff says the words mean that he has been guilty of gross misconduct and malversation in the discharge of his official duties as mayor of Georgetown, and had acted as such mayor in a manner which was dishonourable and discreditable to him, and had procured money surreptitiously and dishonestly by virtue of his office and had been convicted and proved to be guilty thereof, and had acted corruptly in his said office as mayor and had forfeited and deserved to forfeit the respect, confidence, and esteem of his fellow citizens, and was unfit to hold either the office of mayor of Georgetown or the position of honourable member for Georgetown in the Court of Policy.

The defence is one of justification, that is, that the words in their ordinary and natural meaning are true in substance and in fact. It is not denied that they are defamatory.

Sitting as I do here as both judge and jury it is necessary to distinguish the functions of the first from those of the latter. It would first of all be necessary for me, as a jury, to say whether the words are libellous. No difficulty arises on that score here, it not being contested that they are otherwise. The words, under the circumstances in which they were published and according to the understanding of reasonable men reading them, are clearly in their ordinary and natural meaning tending to injure the plaintiff in his reputation and character and to uphold him to ridicule or contempt. A newspaper has the right, and no greater or higher right, to criticise or make comment upon or to impute motives to

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a public officer or person occupying a public post than an ordinary citizen would have.

The next question, on the plea here, is are the words true? Before, as a jury, addressing myself to that question, it is necessary for me as judge first of all to state how far in law truth is a defence in such an action. The justification pleaded must go to the whole libel. It is not sufficient to justify part only. It must in fact be as broad as the charge, and justify the precise charges made in the libel (Odgers, *Libel*. 4th edition and cases cited.) For a jury to find in favour of a defendant it must be satisfied that in substance and effect the charge has been proved to be true.

The second requisite, before an answer to the question can be given, is a detail examination of the particulars pleaded in support of the charge and of the evidence led in respect of them.

Before doing that, however, as promised during the hearing, I propose to set out the reasons why, in certain cases where objection was taken to the admissibility of evidence, the evidence was or was not admitted, as the case may be, by me.

During the cross examination of the plaintiff counsel for defendant sought to put in certain minutes of proceedings of the subcommittee of the General Purposes committee, appointed to enquire into the employment of plaintiff's carts by the municipality under date January 28th and January 30th, 1918. The minutes contained the evidence or part of the evidence led before the sub-committee. Mr. Woolford urged that the report of the sub-committee was specially referred to in paragraph 14 of the defence, that the minutes were official records, and that they were relevant to the issue. I however agreed with plaintiff's counsel that they were not admissible. Whilst the report of the subcommittee was admitted without objection, the minutes of and statements made before the sub-committee, at the meetings of which the plaintiff was not present, were not admissible as evidence against him in this case.

During the same cross-examination counsel for defendant put to plaintiff certain questions tending to show that he had improperly received remuneration for the employment of his carts in connection with an entertainment given at Bel Air Park, the carts being employed to move chairs, the property of the municipality, from the town hall to Bel Air Park. The entertainment was said to be for the benefit of the Kitchener Memorial fund. After argument I ruled out the evidence, no particulars in respect thereof having been given. In an action such as this where the plaintiff alleges that the libel means that he has been guilty of gross misconduct in the discharge of his duties as Mayor, and was not fit to hold either that position or a seat in the legislature, it

has been decided that particulars of other alleged dishonest acts of the plaintiff other than those referred to in the publication complained of may be given. (*Maisel v. Financial Times Ltd.* 84 L.J., K.B. 2145.) In the absence of such particulars, however, evidence in respect of them is not admissible. Where the defendant puts in a plea of justification and delivers particulars in support of that plea, as he has done here, the issues to be tried under that plea are limited to the matters referred to in the particulars, and defendant cannot at the trial lead evidence in support of his plea referring to alleged further improper acts on the part of the plaintiff (*Yorkshire Providence Life Assurance Company v. Gilbert and Rivington*, 1895, 2. Q.B. 148). Mr. Woolford's argument that the plaintiff should have asked for particulars might be good if defendant had delivered no particulars at all, but having delivered them the issue to be tried is limited to them and cannot go beyond them.

During the examination in chief of the defendant, minutes of the meeting of the Town Council, dated January 14th, 1918, in respect of certain questions asked by defendant as councillor and referring to the conduct of the clerk of markets in respect of storing rice at the market, the employment of scavengers, and the collection of fees there were tendered in evidence. Objection was taken to their admission by Mr. McArthur as being quite irrelevant, but they were admitted by me as material to the question of malice, in view of the plaintiff's evidence that defendant came to the council to oppose him alone. Should the libel not be proved to be true, the question of malice is of importance in assessing the amount of the damage. The evidence was therefore admitted.

During the cross-examination of the plaintiff, he was asked certain questions as to remarks alleged to have been made in the course of a judgment of the Court in another matter where application was successfully made for his removal as liquidator of the Demerara Turf Club, which remarks seriously animadverted upon his actions. Plaintiff stated he was in court when the judgment in question was given, that it left no unpleasant impression on his mind, that he heard nothing in it referring to any unanswered allegation as savouring of fraud, or to any failure by him to perform his statutory duties. There being no official report of the judgment Mr. Woolford called witnesses, newspaper reporters, who were present and tendered their shorthand notes and a detailed report of the judgment. Mr. McArthur objected to the admission of this evidence, on the ground that there was no allegation of the plaintiff's bad character, and the evidence did not affect the matter in issue. He argued that the evidence could go only to the plaintiff's credit, and no evidence could be called

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to contradict his statements. The evidence was admitted by me, the questions put to the plaintiff being clearly a test of his credibility, and the attitude taken up by him being to a very great extent one of non-recollection of what the judgment did say, although he was present and his actions were the subject of the judgment. In so far as the evidence, the report and notes, did not contradict the plaintiff, and the major part does not, it is I think admissible and it was so admitted, although I may now add that this particular piece of evidence does not affect my finding on the main issue in the case one way or another.

Subsequently, an official reporter was called as a witness for the defendant to give evidence and produce the "Hansard" report of a speech by the plaintiff at the meeting of the Combined Court on April 23rd, 1918, a speech subsequent to the one mentioned and set out in paragraph 21 of the defence. Mr. Woolford argued that he could give the contents of the second speech in evidence in mitigation of damages. No questions had been put to plaintiff in his cross-examination in respect of it. The evidence was objected to on the ground that it was not material to the issue of justification, and was not referred to in any way in the particulars set out in the defence.

That defendant can lead evidence in mitigation of damages is not contested, but the plaintiff, in case of defamation, is always entitled to know within what limits such evidence will be contained, and what is the case which, on that point, he has to answer. In the particulars defendant has set out what he will rely upon in respect of mitigation of damages, and he is of course entitled to lead evidence in respect of those particulars. But in respect of this evidence tendered he seeks to go outside those particulars, which he cannot do. Particulars having been given, as I ruled on a previous matter, the issue to be tried is in respect of the case as it stands on the pleadings and in respect of nothing else. A perusal of the judgments in *Kelly v. Sherlock* (35 L.J., Q.B., 209), relied upon by Mr. Woolford, in no way brings any doubt to my mind as to my decision here. In that case, where it might be noted justification was not pleaded, Blackburn, J., states that the jury may well consider in estimating the compensation for the plaintiff's injured feelings his conduct and degree of respect which he had himself shewn for the feelings of others. Evidence in respect of such matters may be led, but not unless it is in respect of the matter in issue. Reference to Order XVII, r. 17 (Rules of Court, 1900), a local rule differing somewhat from the English rule is to the same effect. There it is provided that evidence mitigating the circumstances may be led by defendant, where he, in his defence, pleads mitigating circumstances.

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Any speech other than that set out in the particulars in the defence is not material to the issue and the evidence was therefore not admitted.

Finally, secondary evidence of the contents of a letter, the loss of which was proved to my satisfaction, was given by a witness for the defendant, after objections was taken by Mr. McArthur.

I now proceed to a detailed examination of the particulars pleaded in support of the charge made by defendant, and thereafter, of the evidence led in respect of them.

The pith of the libel I have already given. In respect of that, the conviction of 'graft,' defendant says (para. 3) the plaintiff was guilty of conduct commonly known and described as 'graft' because, while holding and acting in the office of mayor of Georgetown, by surreptitious means, and by abusing his position, influence and authority as mayor he procured the improper payment to himself of large sums of money at the expense and contrary to the interests of the ratepayers. (Para. 4.) On January 3rd, 1917, a contract was entered into between the Council and Thomas Flood for the supply of mule carts to the council, not exceeding nine daily, at the rate of \$1.45 for each mule cart. On January 8th (paras 5 and 6) plaintiff as mayor obtained the consent of the council to the continued employment of his mule carts, which previously had been employed by the council and at the rate of \$1.45 per diem. On or about January 11th (para 7) plaintiff procured the then town superintendent, Thomas, to increase the rate from \$1.45 to \$2 per diem. Paragraphs 8 to 11 need not be detailed, but will be referred to where necessary in reviewing the evidence. Para 12 sets out that the plaintiff rendered no accounts for the sums which became payable to him but procured the Town Superintendent to enter them weekly in the pay-list and pay them to him out of cash received to pay labourers. The fact that plaintiff's carts were paid at more than the contract rate was concealed from the council (para 13) throughout 1917, it was brought up on January 14th, 1918 (para 14) and referred to the General Purposes committee, and by that committee to a special committee. That committee found (a) that the filling up of the Queenstown ward by plaintiff's carts had not contributed to the sale of the lots; (b) that it was not to the interest of the ratepayers that the plaintiff's carts should be employed, and (c) that the contractor had been treated with undue leniency and that it was to the interest of the plaintiff that such treatment should continue. On February 20th, 1918 (para 15) the General Purposes Committee refuted recommending the adoption of the report of the special committee, and recommending that in future payment for cart hire should not be made through the

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weekly pay-list but by accounts duly certified and approved. On February 25th, 1918 (para 16) the council adopted the reports of the General Purposes committee and special committee.

The particulars continue that the resolution of the council of January 14th, 1918 was moved by defendant, who was a member also of the two committees abovementioned. In January, February and April (paras. 18 and 19) proposals to increase the amount payable to the contractor, Thomas Flood, were supported by plaintiff, opposed by defendant, and rejected by the council. On the day following the last rejection (para 20) an application of the defendant company to increase the amount payable to them under their printing contract with the Government came before the Combined Court, of which plaintiff was a member. He, plaintiff, opposed the application (para 21) making use of the following words: "He was surprised to see "this application, especially as it was signed by John Cunningham. That "gentleman sat on another board as a town councillor, and he had to deal "with a similar case of a fellow contractor. That gentleman strenuously opposed any relief being given to that contractor, the grounds for the application being identical—increased prices owing to the war. He believed "that one good turn deserved another, and he was going to ask the Government not to press the motion. Let them do to that gentleman what he "did to his brother contractor. He did not feel justified in giving even a "half-penny to this gentleman or to the firm he represented. To use his own "words 'when his firm entered into this contract, they did it with their eyes "open.' He was not going to support the motion and he hoped the other "elective members would not see their way to support it." Finally (paragraphs 22 and 23) defendants say their contract was entered into before the war began and before a great rise in price took place. So far as the alleged libel was matter of opinion, it was fair comment on matters of public interest published bona fide and without malice.

My examination of the evidence, and I shall state my conclusions thereon, as I proceed, must be a lengthy one.

The evidence shows, as a starting point, that about September, 1916 the council at the request of the then mayor, Mr. Dias, voted certain funds for filling in trenches or depressions on certain lots in the Queenstown ward, the property of the mayor and council with earth or rubbish. At the time in question, a contract for a cart service was running, but the council for this work sanctioned the employment of certain carts the property of the plaintiff who was then a councillor. The price to be paid him, the then mayor states in his evidence, was the same as the price paid to the contractor under the contract for the cart service. This employment continued up to the end of the year 1916. About

the end of the year, and there is here a discrepancy between the evidence of plaintiff and that of the witness Denny, a discrepancy not of much importance in my opinion and possibly a natural one seeing the length of time that have passed,—I accept the plaintiff's account supported as it is in a small way by Thomas although the first increased payment was not made until the second week in January, 1917, rather than Denny's account as to the time being January, 1917—about the end of the year plaintiff told Thomas he could not continue at \$1.45 per cart, to which Thomas replied that if the money was voted he would pay him more. On the council's estimates for 1917 was placed the sum of \$1,626 for the filling up of the lots, a sum of money voted before the commencement of the year 1917, but for that year's services. That estimate, however, as the minutes of Nov. 6th, 1916, and a letter from Thomas (produced in evidence) considered at the meeting on that date show, was based upon the arrangement for the work originally made with the plaintiff, sometime before he asked Thomas for any increase in his price. At the end of 1916 also the plaintiff was elected mayor of the city, whilst at the end of the same year the contract for the supply of carts with Thomas Flood came to an end, to be replaced by a new contract signed on behalf of the Mayor and Town Council, by the Town Clerk on January 3rd, 1917. No change was made in the matter of price. The material parts of that contract, a lengthy one, are clauses 1 and 8. Clause 1 is as follows:—The party of the first part shall furnish such number of tilt box carts as may be required daily by the Town Superintendent or Medical Officer of Health, such number not to exceed at any time more than nine, each cart having a strong mule properly harnessed and provided with an efficient driver, and to be capable of containing eighteen hundred-weight of broken stone which is to be considered the ordinary load the working hour of such carts to be the party of the second part shall pay to the party of the first part the sum of one dollar and forty-five cents per day for each mule cart and driver supplied by him.

Clause 8 is as follows:—The mules and drivers to be supplied shall be under the direction and subject to the approval of the Town Superintendent, Medical Officer of Health, . . . the carts and harness shall be in good working order and the drivers of such carts shall be bound to load and unload them . . . and in the event of any of the mules, carts harness, or drivers being inefficient or unfit for work an application shall be made by the Town Superintendent, Medical Officer of Health or other officer . . . to the party of the first part requiring him forthwith to replace such mule, cart, harness, or driver or any or all of them as the case may require and in the event of the party of the first part

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failing to comply with such requisition, another mule cart or driver or other harness or as many of them as may be required to be replaced shall and may be hired at the expense of the party of the first part by the Town Superintendent and the cost thereof deducted from any money that may be due and owing to the party of the first part under this or any other contract without his consent thereto

In point of time the next proceeding was the first statutory meeting of the Council held on January 8th, 1917. At that meeting plaintiff presided, and he has stated in his evidence that having reached the end of the agenda, he requested the reporters to leave the Council. He then, mentioned to the council a threatened strike of the Councils employees, and after that had been dealt with went on to mention the employment of his carts by the council. There is some discrepancy as to what exactly was said at the time. Plaintiff s version is as follows: "It never struck me to mention my carts to council until end of meeting. I said my carts employed by town superintendent and had council any objection to the work continuing since I was now mayor . . . It is absolutely untrue that anyone asked if my carts employed on same terms as Flood's." As I was somewhat at a loss to understand, from his evidence, his exact reason for mentioning the matter at such a time, in reply to me he said: "The council had nothing to do with the price. It passed through my mind to mention the carts. I had a doubt in my mind as to whether, being mayor, such employment was proper."

Two other councillors, present at the meeting, were called as witnesses, Councillor Phillips, who says no price was mentioned at all by plaintiff, and Councillor Comacho who says he is certain that plaintiff said he would get the same price as the contractor got.

The minutes of the meeting are also in evidence. On this point they are very short:—"The mayor also mentioned that the town superintendent had "engaged certain carts from him in connection with the council's work, and "he invited an opinion from the council as to whether he should terminate "the hire of the carts in view of his (the mayor's,) position on the council. "The council offered no objection to the engagement of the carts by the "officers of the council."

I am satisfied that at that meeting nothing was said about the price which was to be paid for the use of the mayor's carts. It is quite clear to me, however, that the council merely assented, to use the words of the plaintiff, to "the work continuing," and, to use the words of the minutes, saw no reason "to terminate the hire of the carts," But they approved in no way to any change in the terms, and the plaintiff in fait says it had nothing to do with them, that it was purely a matter between himself as owner and

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the town superintendent. There, it seems to me, he entirely failed to appreciate his position as mayor, and his duty to the ratepayers of the town. But five days before a contract had been signed for certain cart service between the council and the contractor. To the plaintiff's knowledge the contractor was to be paid \$1.45 per day per cart. On January 8th he asks the council to approve the employment of his carts, knowing at the time that he had got the town superintendent to agree to pay him \$2 a day per cart where before January 1st he had received only \$1.45, the same price as the contractor, and failing to notify the council of such fact. If the owner of the carts had not been the plaintiff himself, I cannot conceive otherwise than that it was the duty of the mayor to mention such an important fact to the council. That the owner was the plaintiff made it all the more incumbent on him to fully and accurately state the circumstances to the council in asking their sanction for his action. His personal interests were even at that point of time opposed to his public duty, a state of affairs as the evidence shows, not remedied by subsequent events.

It is not questioned that plaintiff drew from the council regularly throughout the year 1917 the sum of from \$30 to \$40 a week for the hire of his carts at \$2 a day per cart. The number of carts varied from 2 to 4 per day, It is not questioned also the contractor Flood never supplied up to nine carts on any day under clause 1 of his contract. Some days he supplied none at all, and the most he ever supplied, according to the foreman Rivers, was seven. The system of payment in each case also differed. The contractor, with a few exceptions, rendered accounts. In those few exceptions in which he did not render accounts, and when he was paid at the weekly pay table, he was of course only paid \$1.45 per cart as against plaintiff's \$2. The plaintiff drew his money, through his clerk, weekly at the council's pay table. It is clear from the evidence that the method of payment of casual cart hire for some years was made by entering it on the weekly wage list and paying it out practically in the form of labourers' wages, The wage lists are made up in the town superintendent's office, and a recapitulation, setting out total but no details, for example as to prices paid, goes before the accounts committee to be approved of before payment. Payments to the plaintiff week by week for cart hire were entered on the wage list, after a recapitulation thereof had been signed by the accounts committee. In following that practice the town superintendent had some sanction in what had been done in the past, though it is impossible under the circumstances to call this weekly payment to plaintiff casual cart hire, nor were such large amounts paid by this method so regularly before to one individual. In March or April the practice was questioned by the

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auditors, which fact was brought to the notice of the plaintiff by the town clerk. His reply was that it was labour, and he saw no reason to take it out of the pay list, the employment of the carts being authorised by the council. It is certainly to be regretted that the auditors were not more insistent, for the old practice continued. As regards the reason given by the plaintiff, it is impossible not to see that if the payments were taken out of the pay list, the accounts for the hire of the carts would go before the accounts committee, and then the difference in plaintiff's charge and the contractor's charge would come to the notice of the councillors on the committee. It was not in fact until the auditors raised this question that even the town clerk knew of the difference in the prices. On this occasion again the personal interest of the mayor, as it must appear to any reasonable individual, clashed with his duty as a public officer, and he took the course which in effect favoured the first at the expense of the latter. Standing by itself this episode would not be of very much importance, but when considered in conjunction with other matters it cannot be ignored.

In the same month of April the town superintendent Thomas notified the plaintiff, in his capacity as mayor, that the vote for filling in the lots in Queenstown had been exceeded and at the same time asking for an excess vote of \$1,000. By plaintiff's instructions the application came before the council on April 17th. The minutes are very brief, no discussion or explanation appears to have been made, and the application was granted. Soon after, before the next meeting of the council dealing with this matter the town superintendent Thomas was suspended from duty and subsequently dismissed with other officers in connection with other matters. That next meeting was on July 23rd, the minutes of which were tendered in evidence. From them it appears that no application for any increase on the vote for the work was formally made or made at all by the acting town superintendent, but that the mayor mentioned that \$1,000 had already been spent on the filling in of Queenstown during the year (that would seem to be an inaccurate figure, but it presumably meant that an excess of \$1,000 had already been voted). He proposed that \$1,000 more be spent for the remainder of the year, on the ground that the filling in of the district seemed to accelerate the sale of the lots and the erection of buildings. No discussion is noted on the minutes, and the council agreed to the proposal, Councillor Phillips dissenting. In his evidence in this court plaintiff frankly admits that at the meetings when these excess votes were up before the council, he did not inform the council that the daily charge per cart was \$2. His action was consistent with that of January 8th. It was a consistency which, under the

circumstances, was most unfortunate, seeing, that the money voted was to be paid to him, for work done on terms arranged between an officer of the council at one time under his instructions, at a rate higher than the rate provided for under an existing contract, under which contract the officers of the council could have and should have insisted that the work, up to the limit of the number of carts mentioned in the contract, should have been done. In putting the matter before the council, even if through any oversight due to the haphazard manner in which the subject was brought up, plaintiff might have forgotten (and yet it is not easy to conceive such an oversight) on January 8th to unreservedly explain the most important matter of the change in price to the council, here, on these two latter occasions when the cost to the rate-payers for the work was mounting up beyond estimates had been made and re-made, and that additional cost was to be paid to him, how is it possible for any reasonable individual not to come to the conclusion that the plaintiff failed in his duty to the rate-payers in that he did not give the council any information as to the price paid for his carts. Again his personal interests clashed with his public duty.

During all this time the evidence is conclusive that the members of the council had no knowledge of that price, and the first public mention of the matter was made during the proceedings against two of the council employees above referred to before the magistrate on August 29th, 1917. The plaintiff was a witness for the prosecution, and in his evidence in cross-examination stated his carts were paid \$2 a day against the contractors \$1.45. That part of the evidence was published in defendant's newspaper, and it has been suggested that the council should have had full notice of its contents from such publication. Whilst I am unable to follow Councillor Phillips's evidence in respect of his explanation on this particular matter, I see no reason to suppose that the evidence should have caused any immediate action on the part of the council. Some movement, however, either in the form of questions or a request for further information one might reasonably have looked for on the part of the individual councillors to whose notice the matter had thus come. The very nature of the evidence and the circumstances under which the questions were put, that is, in cross-examination, contain a suggestion that everything was not then as it should have been so far as the plaintiff, who was the prosecutor, was concerned.

In November, 1917, the defendant was elected to the council, and made signal of his arrival by notice of various questions on the subject of councillors' contracts with the council, the duties of the clerk of markets, fees received there and other matters. So

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far as this case is concerned the questions and answers are in evidence:—

- (1.) Whether any member of the council has any share or interest in any written or verbal contract with the council for any work performed or materials supplied?
- (2.) If so, who are the councillors concerned, and what is the nature of the contract or service in respect of which they are paid?
- (3.) What amount has been drawn by each councillor so concerned for the current year for such service or contract?

The Town Clerk's reply dated December 10th, 1917, was as follows:—
 "I referred these questions to the acting town superintendent for information and he reports that he is not aware of any contract written or verbal with any councillor."

"He has further reported that from January 1st, 1917, to date Mr. Councillor Cannon has drawn \$1974.45 for hire of carts, and that Mr. Camacho in respect of stone and marl supplied for a similar period has drawn \$2,055.49. I am not aware of any subsisting contract written or otherwise with regard to these respective services which only have been performed when required."

It is at once subject for remark that the arrangement for the hire of plaintiff's carts was not made with the acting town superintendent, who from his reply does not even seem to have known that the carts were hired regularly week after week and month after month. Hence, presumably, his lack of knowledge on the subject as shown in the reply. I do not understand, however, how any officer could say that certain services had been performed by and moneys therefor paid to certain councillors, and yet there was no verbal or written contract or arrangement existing. The reply seems to me to beg the question. Possibly neither officer was in full possession of the facts to enable them to give a full answer.

The questions and answers came before the council on December 10th, and the defendant then moved that the matter be referred to the legal adviser to say whether, in view of the information given, the two councillors in question had not vacated their seats under the provision of the Town Council Ordinance, 1898. That motion was carried. An unfortunate result, however, followed, I think, due to the incomplete or rather lack of information given in the replies above quoted. It is not necessary for me to consider the motion, and the opinion on the case put in detail, as the question of the councillors' seats is not before me. It does seem to me, however, that the case as put, so far as the evidence led before me goes to show, did not correctly

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state the facts, and I have very grave doubts as to whether plaintiff's seat on the council at any rate did not become vacant immediately on the payments to him under his arrangement entered into with the town superintendent exceeding the sum of \$500. However that may be, on the case submitted, the legal adviser was of opinion that neither Councillor Cannon nor Camacho had made any such contract as vacated his seat on the council.

The next meeting of the council, held on December 24th of that year, considered the question of the proper enforcement of the terms of the contract with Thomas Flood, in respect of his carts. The matter had been referred to the General Purposes committee and the council at the meeting adopted the report of that committee, the plaintiff dissenting.

The report of the committee was to the effect that the contractor be informed that unless the terms of his contract be complied with, with strong mules and efficient harness, clause 8 of the contract (more fully referred to by me above) would be rigidly enforced, and that in any event the medical officer of health and the town superintendent be empowered to use the authority granted by the clause. With this latter instruction the plaintiff did not agree. In his evidence he stated it was not in his interests to show leniency to the contractor in respect of the contract, but with that view I cannot agree. If the contract had been properly carried out, the employment of plaintiff's carts by the council would have been to a great extent, and possibly entirely, unnecessary. So far then as the contractor was leniently treated, the plaintiff stood to gain. At the same meeting, however, an event took place which showed the still existing confidence of the council in the plaintiff as mayor. He was re-elected for a further period of twelve months, the defendant being the sole dissident.

Now events moved more rapidly, and on December 24th, defendant gave notice of motion that the question of employment of plaintiff's carts be referred to a committee of the council for investigation and report. This motion came before the council on January 14th and was carried, the matter being referred to the General Purposes committee, the defendant being added thereto. At the same meeting an application from the contractor "for financial relief as regard 'cart service,' 'labour,' under his contract with the council," came up for consideration, and on the proposal of the mayor was referred to the same committee for report. The plaintiff, as mayor, was chairman of that committee which met on January 17th. At that meeting the minutes show that the mayor vacated the chair, the matter under enquiry being one which affected him personally.

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It was also decided to submit the whole matter to a special committee of the General Purposes committee of whom the plaintiff was not one. There is nothing in the evidence to lead me to conclude, as I think was suggested by one side, either that plaintiff wished to preside at the enquiry, or as suggested by the other side, that he was debarred in any way from properly stating his case and position to the appointed tribunal.

The special committee sat, took evidence, and reported to the General Purposes committee. The report is a long one, but important. Without detailing the report, the special committee found,—

- (1.) That about October or November, 1916, the town superintendent with the approval of the council employed plaintiff's carts for filling in Queenstown lots at the same rate of pay as the contractor would have been entitled to under his contract for a similar class of work, namely, \$1.45 per day.
- (2.) That on the pay-list of January 11th, 1917, the rate of payment was increased from \$1.45 to \$2, as a result of a written application by the plaintiff to the town superintendent, which could not subsequently be found.
- (3.) That the council approved of the continued employment of the carts, but the application for increase in price was never brought to the council's notice.
- (4.) That the filling in of the lots, on the data supplied, did not contribute in the slightest degree to the sale of the lots,
- (5.) That it was not in the best interests of the ratepayers that plaintiff's carts should be employed, not so much on account of the inferior service given, but because it was improper that the mayor and the town superintendent or any other officer of the council should be in a position to conclude an arrangement between them in respect of an increase in the rate of payment for cartage without the knowledge of the council, the interest of the mayor in the transaction being diametrically opposed to that of the ratepayers.
- (6.) That the contractor had been treated with undue leniency, and that it was in the plaintiff's interest that the leniency should continue, although it (the special committee) was not prepared to say that the mayor refrained from taking action because his carts were being employed.
- (7.) That the use of plaintiff's carts be discontinued forthwith, and that the contractor be required in terms of his contract to supply any carts that may be needed for the work of filling up the lots.

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The plain English of those findings is that the plaintiff as mayor entered into an improper arrangement with the town superintendent, without the knowledge of the council, for the hire of his (the plaintiff's) carts at a rate higher than the work should have been done by the contractor, that undue leniency had been shown to the contractor, that large sums had been paid to plaintiff for the work, and that it was against the interests of the ratepayers.

The report was adopted by the General Purposes committee, and, on February 28th, 1918, by the whole council, the plaintiff submitting a minority report.

I do not think it necessary to say anything about the minority report, beyond remarking that it throws no light whatever on the subject under enquiry. The minutes of the council's meeting, however, cannot be passed over. In seconding the adoption of the report, the chairman of the special committee (Mr. W. A. Parker) referred to the minority report in which it was stated that no evidence was taken from plaintiff or his employees, and said that the mayor was present at the meeting of the General Purposes committee at which the special committee's report was adopted, to which plaintiff replied that none of the members who had signed the report had asked him any questions. The minutes continue that Councillor Professor Harrison, who was also a member of the special committee and signed the report, expressed the view that nothing adverse to the mayor was stated in the report and that the mayor had acted in the best interests of the Council.

At the same meeting of the council the application of the contractor for an increase in the price for his cart service to the council was rejected by eight votes to two, the minority consisting of the mayor and Councillor Browne. Shortly after that the defendant company published in their newspaper (March 3rd) an article on the subject of "Councillors and Contractors" which was tendered in evidence by the plaintiff as one to which he took exception. It was, I think, referred to by his counsel as containing in effect a charge similar to that in the libel now complained of. Although not so explicit in its terms I am inclined to agree with him, and I mention it now because I think it is of some service in considering the state of mind of the defendant in writing as he did the article of April 28th, the offending article in this case.

In the meanwhile a further application of the contractor for an increase in his prices came before the council and on April 22nd was again rejected, the voting being 4 to 6 against the proposal, the plaintiff being in the minority and the defendant in the majority. On the following day, April 23rd, an application by the defendant company, signed by the defendant, came before the Combined Court for an increase in the prices in the company's

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contract with the government. On that occasion plaintiff, in his capacity as senior member for Georgetown, made the speech which I have referred to and which is set out in para. 21 of the particulars, and the application was rejected.

The only natural and reasonable interpretation which I, sitting as a jury, can place upon those words, having due consideration for the circumstances under which they were spoken, is that plaintiff was actuated solely by the previous conduct of defendant, acting on the principle of retaliation, replying in this way to the application of the defendant company in return for defendant's action in another matter before the Town Council.

Before I proceed then to answer that question which I put to myself as to the truth or otherwise of the libel it will be well to touch shortly on one or two matters relative to the evidence. The first deals with the letter alleged to have been sent by plaintiff to the defendant in 1916. At such a length of time memory is naturally defective, but I am not satisfied on the evidence that any such letter as was referred to was received by defendant. Then there is the evidence of the witness Thomas as to a certain conversation at Cumingsburg market when he says that he asked the plaintiff if he had obtained the council's consent to the payment of \$2 per cart and that plaintiff replied that the council could find out for themselves. It struck me as a very clumsy invention on the part of the witness even before I heard the witness Theobald, whom Thomas admits was present. Theobald gave a convincing account of the conversation which referred to certain work then being undertaken at the market. It is true that in respect of this and in several other matters no evidence was given by plaintiff in rebuttal, but I have no difficulty in deciding that he never said the words put into his mouth, in respect of any cart hire or cart service. The witness Thomas was in other respects unsatisfactory leaving the impression on my mind that he had more regard for giving a satisfactory explanation of the part he took for his own protection than for the whole truth.

Another matter was in respect of the locality whence the earth to fill up the lots was carted. Plaintiff stated that he did not think the contract carts could be used for the work because they could not be taken outside the city boundaries to fetch the earth. There is nothing whatsoever in the contract to support such an interpretation, and I am not surprised that his counsel had little to say on that view. The position taken up by the plaintiff, however, at an earlier date was that his carts gave a much better service than those of the contractor. There is no evidence before me to show that the former's cart service was in efficiency or in its results better than the limited service supplied by the contractor under paragraph 1 of his contract. There were complaints against both services,

and from the evidence of Medas I am led to the conclusion, so far as the carts and drivers were concerned and the punctuality of the latter, that the contractor's service was the best. To return to the question of locality of the Thomas land's, the property of the Council and leased to the contractor Thomas Flood, were they outside the city boundaries at all? Did the carts have to go outside the boundaries to fetch the earth? The Town Clerk says not, that the place is in Kingston ward. His evidence was not questioned in cross-examination or elsewhere, whilst the limits of Kingston ward as set out in section 5 of Ordinance 25 of 1898 (then in force) would certainly seem to support him. Whether he is correct or not, however, does not affect the contract. Neither does the evidence led satisfy me that plaintiff's statement to the council, that the filling in of the lots accelerated their sale, was correct. The lots were sold whether filled in or unfilled, because of the great demand for them.

Plaintiff's counsel in his address laid considerable stress on paragraphs 7 and 12 of the particulars, stating that the allegation there is that plaintiff "procured," that is, contrived or brought it about that the town superintendent increased the rate of payment to him and entered the payments weekly in the pay lists, and that the evidence does not support such a conclusion. These allegations are by no means important parts of the particulars, but, as they stand, the allegation contained in paragraph 7 has I find, and as follows from my earlier remarks, been satisfactorily proved. The allegation in paragraph 12 is proved to this extent that the town superintendent made use of a method then existing for the payment of casual cart hire, for the payment of this weekly and continuous service of carts hired from the plaintiff, and the plaintiff consented to it. When the auditors proposed its discontinuance, plaintiff order that it should continue. There is nothing at all to show that he proposed it, but that cannot affect my decision on the main question which I have to answer.

What then is the answer to the question I have to put to myself as a jury? Has the defendant justified his plea of truth? Was he "the prime agent in convicting him (the plaintiff) of graft as proved by the official records of the Town Council?" On the authorities cited the defendant is entitled on his plea and it is my duty as a jury to say whether the words used are true in the plain meaning which I attach to them, to affix the true meaning to the words and to say whether or not they fit the plaintiff. As I understand those words the answer is in the affirmative. By virtue of his position as mayor the plaintiff improperly, to the detriment of the ratepayers and by withholding from the council information which it was manifestly his duty to supply to the council, acquired for himself and for his own

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benefit certain sums' of money for the hire of his carts to the council. His action was incompatible with any honest, healthy, or efficient system of municipal government.

The plea of justification being made good the question of fair comment does not arise (nor under the circumstances do I see how it could arise here), and the evidence in respect of alleged malice on the part of the defendant need not be detailed by me. It will be well, however, to say that having regard to that evidence, bearing in mind the tendency towards some lack of restraint in the epithets applied to and the language used of the plaintiff and his conduct by the defendant, especially in his printed articles (though I must not be taken here as underrating in any way the improper conduct of the plaintiff), the established fact that for a considerable time prior to the commencement of this suit there was no love lost between the two, and the episode of the transaction in the shares of Scotts, Limited, and the purport of that transaction, prior to which defendant had no interest whatsoever in the company, I have come to the conclusion that actual malice did exist. As the plea of justification has however been fully substantiated, there must be judgment for the defendants with costs.

[NOTE.—An appeal has been lodged in this case.]

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[19 OF 1919.]

1919. FEBRUARY 24. BEFORE HILL, J.

Magistrates court—Claim for return of instalment of purchase price of immovable property—Question relating to incorporeal right, or to title to immovable property—Jurisdiction—Petty Debts Recovery Ordinance, 1893, s. 3.(3).

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist) who gave judgment for the plaintiff on a claim for \$60, a sum alleged to have been paid by him to the defendant as an instalment of the purchase price of a property in Georgetown. The necessary facts and reasons of appeal are fully set out in the judgment below.

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

J. S. McArthur, for the respondent.

HILL, J.: This is an appeal from the decision of a stipendiary magistrate who gave judgment for the plaintiff in an action for \$60 for moneys had and received by the defendant to and for the use of the plaintiff at Georgetown. In the particulars attached to the plaint it is set out that this amount was received by the defendant on account of the purchase price of the right, title and interest of the defendant in and to the west half of lot 240, Forshaw Street, the property of the British Guiana Building Society, Limited, held under the instalment purchase plan, which said right title and interest the defendant had not the authority to sell or transfer to the plaintiff on the 30th August, 1918, or since that date and which sum the defendant had refused to pay the plaintiff on demand being made therefor.

The pleas in defence were (1) a denial of the receipt of \$60:—(2) a denial of the particulars, (3) an allegation that the defendant was always ready and willing to transfer her right, title and interest on payment of the balance of purchase money of \$290.

At the close of plaintiff's case, Mr. Browne for the defence submitted (1) that the Court had no jurisdiction in the matter as the receipt put in marked "A" showed it was in respect of an interest in immovable property, (2) that plaintiff had made out no case to answer (3) there was nothing to show that time was of the essence of the contract, no date being fixed when transfer was to take place, (4) that it was clear the defendant had an interest in the property, and (5) plaintiff could only sue for money received where there was a total failure of consideration.

The magistrate called for a defence, and, disagreeing with

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the submissions of counsel, found for the plaintiff. In his reasons for decision, he has dealt fully with the various points raised and also with certain evidence in connection with conversations between the plaintiff and the defendant's husband, the admitted agent of the defendant, as to the repayment of the sum of sixty dollars.

The reasons of appeal are:—

1. The Magistrate's court had no jurisdiction in the case.
 - (a) Because the contract on which the plaintiff sued was with respect to (1) an interest in immovable property;
 - (2) such interest on the evidence exceeding \$100: in value.
 - (b) The magistrate was wrong in holding that he had jurisdiction to rescind a contract exceeding \$100; and relating to immovable property exceeding in value \$100; and in holding that he had jurisdiction to hear the matter at all.
 - (c) On the evidence adduced either an incorporeal right or the title to immovable property was in question.
 - (d) The magistrate, in giving himself jurisdiction, prevented the defendant from counterclaiming for specific performance of the agreement as set out in the receipt of 30th August, 1918, as the defendant would have had the right to do had the matter been before the Supreme Court.
2. The magistrate's court exceeded its jurisdiction in the case for the reasons set out at a. b. c. and d. of reason 1.
3. The decision is erroneous in point of law.
 - (a) Because on the allegations contained in the statement of claim and to which the defendant was called on to plead the plaintiff was not entitled to the relief he claimed and the learned magistrate was wrong in giving judgment to the plaintiff for the amount on such statement of claim.
 - (b) The validity of the defendant's interest in lot 240, Forshaw Street, Queenstown, not being questioned, even if the defendant did not have the authority of the society on 30th August, 1918, to transfer her interest in the said lot, the plaintiff would not, on that account, be entitled to recede from the agreement and claim repayment of the \$60 paid on account of the purchase.
 - (c) There was no evidence on which the magistrate could find that the agreement set out in the receipt of August 30th 1918, was rescinded, and that a new agreement was entered into but if the said agreement of August was rescinded and the

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defendant agreed to return to the plaintiff the \$60, thereby making a new agreement, the plaintiff should have sued on the new agreement, Having not done so it was not competent for the magistrate to decide as if the action had been brought on such new agreement.

- (d) That the magistrate gave judgment on a cause of action which was not pleaded and which the defendant was not called on by the allegations in the statement of claim or by any amendment thereto to answer; the issues raised on the statement of claim and the defence thereto were
 - (a) whether the defendant had the authority of the building society on the 30th August, 1918, or since that date to transfer her interest to the plaintiff.
 - (b) if not, whether the plaintiff *ipso facto* was entitled in law to a return of the \$60 he had paid the defendant.
- (e) That as the agreement of 30th August, 1918, was required by law to be in writing it could not be rescinded or waived by an oral agreement, and an oral agreement for the return of the amount paid on account substituted for the written agreement of August 30th, 1918.
- (f) That even if the defendant delayed in obtaining the authority of the building society to transfer, no time for such transfer had been fixed by the receipt of the 30th August, 1918. Time was not of the essence of the contract and therefore the plaintiff could not because of such delay decline to accept the transfer and claim a return of the \$60. The evidence established that plaintiff was informed, prior to the institution of the proceedings, that authority would be granted and transfer made as soon as he, the plaintiff, was ready to perform his obligations under the contract.

4. 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, etc.

Reason 1 (a) (b) and (c) may, conveniently, be dealt with together.

The county courts of England have a much wider jurisdiction in equity than our local courts sitting in the civil jurisdiction, conferred on them by statute. In our courts jurisdiction is limited to the amount of \$100 in actions, as set out in section 3 of Ord. 11 of 1893, and jurisdiction has to be declined in actions where questions arise under sub-section 3 of that section.

In all the cases cited by appellant's counsel in regard to the

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title being in question, there were *bona fide* disputes between the plaintiff and defendant.

In *Howarth v. Sutcliffe* (1895) 2 Q.B. 363, which was a case under secs. 56 and 60, of the County Courts Act 1888, a question arose as to rights in an easement. Section 56 corresponds to our section 3 (3) of Ordinance 11 of 1813 but we have no section similar to section 60.

In *Lilley v. Harvey* (17 L.J. Q.B. 375) there was a dispute as to the ownership of the property and in *Monteney v. Collier* (22 L.J. Q.B. 124) a dispute arose as to the landlord's title to sue for use and occupation, his title having expired during the tenancy and the county court was held to have no jurisdiction. No such question arises in the case under review. All the plaintiff alleged in his particulars was that the defendant had no authority to sell at the 30th August or up to the time of the action filed, but he does not allege he had no lawful right in the property. He has not disputed the defendant's title, but alleges that the authority to sell was contingent on the transfer to him of defendant's right, title and interest being approved of by the Building Society and that such was not obtained, and that this is so has been abundantly shown. The agreement under which the home purchase arrangement was effected between the defendant and the Building Society is not in evidence, but it would seem from the evidence—documentary—that such approval was a condition precedent. On the evidence of plaintiff it appears that defendant agreed to give possession in 3 or 4 days; the defendant says he arranged to give him possession on signing of transfer. The magistrate found, and I think rightly, that the delay was unreasonable and occasioned by the acts of defendant. The approval of transfer should have been obtained by the vendor and his omission to do so is clearly admitted by him as shown by exhibit "K," in which he writes to the secretary of the society "apologising for not seeking your permission prior "to arranging with the intended transferee."

This, to my mind, was the only cause why the Building Society did not at once (i.e. at August 30th), as it could have done, and as it eventually did on December 13th, when too late, accept the proposed transfer put before it on 30th August (exhibits "F" and "G.") and again urged to be carried through by defendant on September 2nd (exhibit "H") in which he asks that it should be done "*as early as possible.*" This confirms plaintiff's statement as to "3 or 4 days," and after August 30th there is no evidence to show that plaintiff interfered in the matter at all except to ask for his money back when defendant failed to appear at the Building Society's office on September 24th to which place plaintiff had gone at defendant's request.

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As regards the point in regard to the jurisdiction of the magistrate being ousted, here again the County Courts Act 1888, differs from our local enactment.

In *Angel v. Jay* (103 L.T. 809) the Divisional Court allowed an appeal in a case in which the county court judge held he had jurisdiction under a section (67 (4) of the Act of 1888), by which jurisdiction in an action where the value of property shall not exceed £500 was in question, and the decision in *Foster v. Reeves* (1892 2. Q.B. 255) is based on much the same point, i.e., the jurisdiction of the county court judge was in question, the value of the leased premises exceeding £500. But with us there is no provision at all in respect to leases, or specific performance, as in England, and the sole question is whether the amount sued for is below that governing the magistrate's jurisdiction—and in my opinion a magistrate has jurisdiction to deal with a claim for a refund of an amount which is below \$100, even though the sale price of the immoveable property is more than \$100. The case of *Le Blanc v. Lashly* (A.J. 15. 6, 1901) is in point.

With regard to reason 1 (d), if the defendant had really the intention to approach the Supreme Court for an order for specific performance,—and I do not see how he could have expected to succeed in view of the evidence before the magistrate—an intimation to the magistrate to that effect would have, at once, abated the action until such time as defendant took action.

I am of opinion the magistrate's court had jurisdiction.

Reason 3 is in effect an appeal on two grounds, (1) that there was a new cause of action disclosed on which the plaintiff could not succeed on the present claim, and (2) that time was not of the essence of the action, and hence any delay on the part of plaintiff in obtaining the authority of the Building Society to the transfer would not, under the circumstances, avoid the contract,

The plaintiff gave certain evidence as to an agreement by defendant to refund him the \$60 paid by him. This was not objected to by defendant's counsel. He did not point out that it did not arise from the plaint as laid nor did he allege surprise but he cross-examined on the evidence.

A plaint in the magistrate's court is not the same thing as a pleading in the Supreme Court. A plaintiff is not strictly bound by the plaint and particulars are not part of the pleading. In this case they show the circumstances under which the claim originated. The magistrate believed the evidence as to rescission and plaintiff thereafter had a legal right, whether expressed or implied, to come under a claim for money had and received (*Bullen and Leake*, 5th edit. p. 298) (and see exhibit "J.")

Time in law is always of the essence of a contract, and, in equity, time is held to be of the essence of the contract only in cases of

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direct stipulation, or of necessary implication. Such an implication arises where a property is sold for some immediate purpose, (in this case for residence)—*Parkyn v. Thorrell* (16 Beavan 59). And in *Benson v. Lamb* (9 Beavan 502) “unreasonable delay” on the part of vendor, gives the purchaser the right, on giving notice, to rescind the contract. Plaintiff gave verbal notice which was accepted by the defendant, and the rescission of the contract is shown by exhibit “J,” and in view of the statement of the secretary of the Building Society that “on the 12th or 13th December 1918 “the chairman dealt with this transfer for the first time,” and “at no time up to October 30th 1918 did I convey to defendant or W. W. Nurse that “plaintiff was accepted as a transferee, On October 30th 1918 I did not “have before me sufficient on which a transfer of this property from defendant to plaintiff could have been carried through.” I am unable to understand exhibit “D” in which counsel for the appellant writes to the solicitor for plaintiff under date October 30th that “He has signed the necessary “documents with the Building Society and the transaction can be completed without any hitch, if he (plaintiff) so desires.” Nor can I understand reason 3 (f) of appeal in view of Stoby’s evidence, when it alleges that “the authority would be granted and transfer made.” The further correspondence under date December 12th and 13th as shown in exhibits N. O. and P. points to doubts in the mind of defendant and her counsel as to their legal position up to that time. *Stowell v. Robinson* (3 Bingham N.C. 928) is distinguishable from the present case. In that case the allegation, on the first count, was that at the time of agreement, the defendant had no lawful title to assign the land. As I have pointed out, no question of title arises in the present case. In point of fact the cause of action is for refund of money paid on an agreement rescinded by the plaintiff and defendant, in which no question of title arises, but the circumstances show unreasonable delay in having the necessary transfer authorised by the Building Society from whom the defendant held. Whether such “unreasonable delay” was the fault of the Building Society or the defendant does not affect the plaintiff’s right under these circumstances.

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

Decision affirmed; appeal dismissed.

REPORTS OF DECISIONS

OF

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1919.

WITH INDEX.

Edited by LL. C. DALTON, M.A., Cantab. Puisne Judge, British Guiana.

GEORGETOWN, DEMERARA:

“THE ARGOSY” COMPANY, LIMITED, PRINTERS TO THE GOVERN-
MENT OF BRITISH GUIANA.

1920.

JUDGES
OF THE
SUPREME COURT OF BRITISH GUIANA.
DURING 1919.

SIR CHARLES HENRY MAJOR, Kt.	...Chief Justice. (On leave June 18th-Dec. 31st).
MAURICE JULIAN BERKELEY	...Senior Puisne Judge. (On leave April 24th-October 15th). Acting Chief Justice. (October 16th-December 31st).
JACOBUS KERR DARRELL HILL	...Junior Puisne Judge. (On leave March 29th-June 28th; Retired on pension June 28th).
LLEWELYN CHISHOLM DALTON, M. A.	Junior Puisne Judge. (Appointed June 29th; Acting Puisne Judge March 29th-June 17th; Acting Chief Justice, June 18th-October 15th).
WALTER JOHN DOUGLASS, B.A., LL.B.	Acting Puisne Judge. (April 24th-December 31st).

TABLE OF ABBREVIATIONS.

(ADDITIONAL TO THE USUAL REFERENCES TO ENGLISH
REPORTS.)

A.J.	Appellate Jurisdiction, British Guiana.
G.J.	General Jurisdiction, British Guiana.
L.J.	Limited Jurisdiction, British Guiana.
S.C.	Juta's Supreme Court Reports (Cape Colony).
Wit. L.D	Witwatersrand High Court Reports (Transvaal).

METHOD OF CITATION.

The Reports will be cited as 1919 L.R., B.G.

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