TABLE OF CASES REPORTED

A

B

C

D

E

F

G

H

J

K

M

N

P

R

S

T

V

W

Y

Cases

DETERMINED BY THE

SUPREME COURT OF BRITISH GUIANA.

MARIAI *v.* VYTHALINGAM.

[BERBICE.— 39 OF 1919.]

1920. JANUARY 5. BEFORE DALTON, J.

Husband and wife—Desertion—Facts constituting desertion—The Summary Jurisdiction (Married Women) Ordinance, 1905, s. 2.

Appeal from a decision of the stipendiary magistrate of the Berbice judicial district (Mr. L. D. Cleare) who made an order for the payment of seven shillings a week by the defendant in favour of the complainant Mariai, the wife of defendant, under the provisions of section 2 of Ordinance 19 of 1905, on the ground that defendant had deserted the complainant. The defendant appealed, the reason for appeal being that desertion was no proved.

J. A. Abbensetts, for the appellant.

The respondent, Mariai, did not appear.

DALTON, J.:—The complaint was made under the provisions of section 2 of the Summary Jurisdiction (Married Women) Ordinance, 1905. Desertion of the complainant by her husband, the defendant, was alleged and the magistrate made an order that he pay to her the sum of seven shillings a week. The defendant appealed on the ground that there was no proof of desertion, and that the complainant voluntarily left her husband. I do not agree. The evidence shows that the defendant sent a false telegram to his wife's parents to cause them to come to his house. He told them on their arrival he did not want his wife any longer. He gave reasons at the time which counsel for appellant does not now urge as having any existence in fact. Although the father tried to make defendant take his wife back he refused, and he also declined to support her. The father then added "I said I could not leave the girl on the dam so I would take her home." The magistrate found desertion proved. On the authority of *Charter v. Charter* (65

J.P., 246.) to constitute desertion it is not necessary that the husband should actually have turned his wife out of doors. It is sufficient if by his conduct he has compelled her to leave the house, the question being whether it was his intention to break off matrimonial relations. Here the defendant clearly showed his intention to break off all relations with his wife. The appeal is therefore dismissed.

Appeal dismissed.

FITZ-LEWIS *v.* SANKAR

PETTY DEBT COURT, GEORGETOWN.

FITZ-LEWIS v. SANKAR.

[294—3—1920.]

1920. MARCH 30 ; APRIL 14, 20.

BEFORE DOUGLASS, Acting J.

Evidence—Building and repairing contract—Written agreement—Memorandum in writing—Additional work—Value of unstamped document—Parol evidence.

This was a claim by the plaintiff a carpenter, for $105—reduced to $100 (for the purpose of bringing the case within the jurisdiction of the court), being balance of amount due by the defendant for work done and services performed at the defendant's request.

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

H. C. F. Cox, for the defendant.

DOUGLASS, Acting J.: The details of work done appear from the particulars to the statement of claim, the items of which were proved to be substantially correct.

The defence was that the work was performed under an express agreement for the sum of $95, which was paid, and certain additional work was also paid for to the extent of $120, and that the work was not completed in a workmanlike manner.

The only difficulty in this case arises from the fact that whilst it is admitted that there was a memorandum in writing (1) each party still retained the copy he signed, and (2) the said memorandum had not been stamped as an agreement, and so was not producible as evidence (see Ordinance No. 4 of 1888, section 28). An objection was taken to evidence being given of the contents of the written agreement, but I doubt whether there was any *document* which could be called an agreement, the contract was not one for which writing was necessary, and there was no exchange of the duplicate parts.

It seems to me that the so-called written contract was merely a memorandum made by. each party for his own use of what the terms of the parol agreement were, and if this is so then there was no written agreement for parol evidence to conflict with, I am of opinion that this case comes within the principle of *Allan* v. *Pink* (1838, 7 L. J. N. S. Ex. 206) that "parol evidence of a verbal transaction is not excluded by the fact that a writing was made concerning or relating to it, unless such writing was in fact the

transaction itself, and not merely a note or memorandum of it, or portion of the transaction."

Moreover even if the original agreement were considered to be a written one, evidence may be given to show that it was rescinded or even altered, if it was not one that the law required to be in writing. *Goss* v. *Lord Nugent* (39 R.R.. 302.)

Under these circumstances it is perhaps hardly necessary to refer to *Reed v. Deere* (31. R.R., 190) with reference to the admissibility of the memorandum though unstamped. The head-note of that case reads: "Where a party declared upon two written agreements by the second of which variations were made in the first . . . .; and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped:

"Held, that the second could not be read in evidence to support the plaintiffs case, but might be looked at in order to ascertain whether the first was altered by it, and that, therefore, the plaintiff could not exclude the second agreement and proceed upon the counts setting out the first only." Littledale, J., said "the court may, in all cases, so far allow parol evidence of a written agreement as to ascertain that it relates to the subject-matter in discussion".

On a careful consideration of the evidence it appears that although there was an agreement for $95 to do certain work, that agreement was mutually dropped or waived by both parties to it; this is shown by the fact that (1) the defendant paid to the plaintiff further sums of $85 and $35; he states for specific work additional to the original work agreed upon, but the alterations and additions were so numerous and interwoven (if I may so call it) with the first undertaking that it is impossible to allot separate sums; and (2) the work as originally intended to be done did not comply with the town regulations and so could not be proceeded with.

It remains then to fix a fair sum for the whole work as completed, for particulars and prices of which one has to depend upon the estimate made and given in evidence by competent contractors.

[His Honour then proceeded to estimate the value of the work done at $265.] The plaintiff has already received $215 on account. I accordingly give judgment for the plaintiff for $50 and $3.12 costs.

ROSS *v.* GROGAN & ORS.

PETTY DEBT COURT, GEORGETOWN.

ROSS *v.* GROGAN & ORS.

[231-233—4—20.]

1920. MAY 11, 18. BEFORE DOUGLASS, J, (Acting).

Contract—Breach of agreement—Contract rescinded or claim for compensation —Advance to secure service—Return of advance on failure of consideration.

The defendants on the 15th March, 1920, agreed to serve the plaintiff as carpenters at Mallali, Demerara River, at the rate of $2 a day and each received an advance of $10. Their service commenced on the 22nd March, but as no materials were provided to enable them to commence the work and the provisions which the plaintiff had undertaken to supply did not arrive, the defendants decided to repudiate the contract and started on their return journey on the 24th March, informing the plaintiff on the next day. The plaintiff thereupon commenced proceedings for return of the advances.

Mr. S. L. Van B. Stafford, for the plaintiff.

Mr. E. D. Clarke, solicitor, for the defendants.

DOUGLASS, Actg. J.: The plaintiff is claiming from each of the three defendants return of the respective sums advanced by him to them on breach of the agreement by them to serve as carpenters at Mallali on the Demerara River. The respective amounts advanced, and the terms of the agreement are not in dispute, except that the defendants say the work was to be done at Mallali and not twelve miles away from that place; this objection however—if a good one—was waived by the defendants and need not now be considered.

[The learned Judge having considered the facts as shown by the evidence continued]:

The statement of claim is somewhat vague and I can only suppose that the claim is for return of money had and received to the use of the plaintiff, on failure of consideration, and not one for damages for breach of the contract. Under these circumstances the questions for the decision of the Court are: Were the defendants justified in throwing up the job and returning to Georgetown, and, if so, are they entitled to retain the money advanced them or any portion of it, or is the plaintiff entitled to succeed in his demand for return of the money so advanced.

Default on the part of either party entitling the other to rescind the contract, may consist either in active interruption or

interference on the part of the promisee, or in the omission of something without which the promissor cannot perform his part of the contract, and it depends upon the terms of each contract and the circumstances of each case, whether the breach can be looked upon as a repudiation of the whole contract, or whether it merely gives rise to claim for compensation.

Mere impossibility of performance is in general no answer to an action for damages for non-performance, and equally it would not afford a defence to an action for return of money on a failure of consideration.

The cases of *Giles & ors.* v. *Edwards* (7 D. E. Reports. 181) and *Ehrensperger* v. *Anderson* (3 Ex. 148) show that the action upon an implied promise to return an advance of money on failure of consideration may be maintained to recover back money received under a special contract which has been abandoned or rescinded, or the performance of which has been prevented by the wrongful act of the party who has received the money. In the latter case referred to, Park, B., in the course of his judgment. said "the question resolves itself into this, whether we can come to a conclusion upon this evidence that the plaintiff is in a situation to say to the defendant 'You have got money which you received for me and you have rescinded the contract, and I am therefore entitled to rescind it on my part.'

In *Fitt* v. *Cassmet* (1842, 4 M. & G. 878) Tindal, C.J. said : "It is difficult to see how an action for money had and received could be maintained by the plaintiffs unless they were in a situation to recover upon the original contract, . . . but in order to recover upon that the plaintiff's must have averred that they were ready and willing to perform their part of the contract;" and Maule, J. held that it was incumbent upon the plaintiffs to show that the defendant was in the wrong, but as the evidence did not show that the defendants had done anything wrong, an action for money had and received could not be maintained.

I think the same principle may be applied to such a case as the present one as in the case of money paid as a deposit and in part payment of purchase money on the purchase of an estate. In *Howe* v. *Smith* (1884, 27 Ch. D. 89) it was held that the deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the con tract, and that the plaintiff having failed to perform his part of the contract within a reasonable time had no right to a return of the deposit (and see *ex parte Barrell; in re Parnell* (10 Ch. Ap. 512) *and Smith* v. *Butler* (1900, 1 Q.B. 694)).

On the strength of the above cases and the decision in *Mawman* v. *Gillett* (11 R.R. 597) I should have held that under the present circumstances the mere delay on the part of the plaintiffs to

supply material for the defendants to work on would not have entitled them to rescind the contract without notice, but it went much further than that, for the plaintiff—in my opinion—so conducted himself as to give the defendants the right to infer that it was doubtful whether he intended to keep to the terms of the contract, and when it came to a question of the risk of starvation on the part of the defendants, the providing of food being one of the essential terms of the contract, the defendants were entitled to treat it as a condition precedent to their performing their part of the contract. The plaintiff cannot take advantage of his own wrong, and I must hold that he cannot succeed in recovering the advances paid by him to the defendants.

I accordingly give judgment for the defendants,

PETTY DEBT COURT, GEORGETOWN.

SPELLEN & ANR. *v* PEREIRA & ANR.

1920. JUNE 9. BEFORE DOUGLASS, ACTG. J.

Landlord and tenant—Claim for use and occupation—Title of plaintiff as landlord —Petty debt court—Jurisdiction—Petty Debts Recovery Ordinance 1893, s. *3(3).*

Claim by the plaintiffs for the sum of $24 alleged to be due to them by the defendants for the use and occupation of the north half of lot 12, Charlestown, Georgetown, during the twelve months ending December 31st, 1919.

R. C. Dinzey, solicitor, for plaintiffs.

T. Lee, for the defendants.

DOUGLASS, ACTING J.: The plaintiffs are suing as two of the owners of lot 12, Charles Street on behalf of themselves and other co-owners, for moneys due for use and occupation of the north half of the above property by the defendants. Mr. Lee, defendant's counsel, objects (1) that the title of the property is in question and consequently the magistrate's jurisdiction ousted, and (2) that the plaintiffs are not the landlords and that rent for the premises has been paid to the proper landlords.

To take this last object first, Mr. Dinzey, plaintiffs' solicitor, replies that a tenant cannot dispute his landlord's title, but in the first place the plaintiff must prove that he is his landlord and whilst it is true that a tenant cannot dispute his landlord's title this only applies to the title of the landlord who let him in, otherwise it lies upon the plaintiff to prove either (1) that the defendant has attorned tenant to him or (2) that he continues to occupy the

premises and paid rent after notice (*Carlton* v. *Bowcock* 51 L. T., 659); *Cornish* v. *Searell* (8 B. & C. 471) is also to the point, it was an action for use and occupation; the defendant being tenant of premises under a lease granted by B, signed a document which was inadmissible as an agreement, by which he agreed to become tenant to two persons, sequestrators under a writ of sequestration against B, and it was held that as there was no evidence that the original lease had been surrendered the title to receive rent was in B. and not the sequestrators.

Next, the Petty Debts Recovery Ordinance, 1893, section 3 (3) provides "the Court shall not have cognizance of any action in which any incorporeal right or the title to any immovable property is or may be in question." About eighteen documents have been put in relative to the title of the property in question, including a summons for possession on which apparently judgment was given in favour of one Euston Davidson, a son of Rosaline Swartz, elder sister of one of the plaintiffs, and who at present rents the property in question to one of the defendants. The whole claim of the plaintiffs rest upon their title which is denied. The plaintiff's solicitor suggested that inasmuch as I was sitting in the Magistrate's Court as Judge I could try questions of title, as the said section would only apply to the jurisdiction of the magistrate, but section 2 of Ordinance No. 9 of 1915 (which amends section 7 of the Magistrates' Courts Ordinance 1893). says: "The Governor may . . . appoint a Pusine Judge . . . to hear and determine at Georgetown all or any civil causes or matter in which the Magistrate's Court of the Georgetown Judicial District has jurisdiction under the Petty Debt Recovery Ordinance of 1893," so that my jurisdiction in this Court is precisely that of a magistrate.

I accordingly non-suit the claim with costs $2.40.

FRANCOIS *v.* MOHABIR.

[109 OF 1920.]

1920. JULY 30. BEFORE DOUGLASS, Acting J.

Criminal law—Unlawful possession—Larceny—Uncertainty as to offence for which convicted.

Appeal from a decision of the stipendiary magistrate of the West Coast judicial district (Mr. L. D. Cleare). The defendant Mohabir was charged with the unlawful possession of twenty-eight zinc sheets reasonably suspected to have been stolen. At the end of the case for the prosecution the magistrate informed defendant that a *prima facie* case of larceny had been made out against him. After hearing the defence, defendant was convicted. The offence for which he was convicted was not explicitly stated. Defendant appealed. His reasons of appeal sufficiently appear from the judgment below.

H. C. Humphrys, for the appellant Mohabir.

H. C. F. Cox, assistant to the A.G., for the respondent.

DOUGLASS, Acting J.: Mr. Humphrys raised a preliminary objection that it was uncertain whether the magistrate convicted the appellant on the charge of having possession of the goods in question reasonably suspected of having been unlawfully obtained or for larceny of the said goods, and directed attention to the following reasons for appeal 1. The decision is erroneous in point of law inasmuch as: (h) The learned magistrate was wrong in law in not informing the defendant on what charge or for what offence he convicted him. (i) The learned magistrate having at the close of the case for the prosecution found that a *prima facie* case of larceny had been made out against the defendant and having called for a defence could not convict the defendant for unlawful possession. (j) At the close of the case for the prosecution and at the close of the whole case no charge of larceny was established against the defendant.

The record before me consists of copies of (1) the magistrate's notes dated 2nd February and 23rd February, the notes of the last date commence with "Defendants now informed that court considers a case of larceny made out" and conclude with "No. 2 discharged. Decision reserved."

(2) The 'reasons for decision' undated and apparently unsigned.
(3) Notice of and reasons for appeal.
(4) Search warrant (Exhibit A).
(5) Receipts (Exhibits B. and C.)

(6)'Complaint' against appellant and Sahai for unlawful possession.
(7) Case jacket of 142-143, December, 1919.
(8) Affidavit of service of proceedings in appeal and exhibits.

I set out this list because the learned counsel for the respondent referred to some other document or memorandum of which I know nothing, and which cannot be considered. In his 'reasons for decision' the learned magistrate commences "The two defendants were charged with having in their possession on the 6th December, 1919, 28 zinc sheets reasonably suspected as having been unlawfully obtained," and further on "This closed the case for the prosecution, and 1 informed the defendants that a *prima facie* case of larceny had been made out against them, when the defendant Mohabir elected to give evidence;" at the end of Mohabir's evidence he states "At this stage I discharged the accused Sahai," and ends with "I find the accused guilty."

Mr. Cox very rightly admitted that if the conviction was for larceny he could not support it. In the case of unlawful possession the burden of proof of accounting to the Court lies on the defendant, in the case of larceny the prosecution must prove the formal fact of the larceny before calling upon the accused for a defence; as stated by Mr. Justice Berkeley in *Benn* v. *Davis* (1918. L.R.B.G. 10), "it therefore seems to me imperatively necessary that if a magistrate considers the essential ingredients constituting larceny having been proved by the prosecution he should, before calling on the person accused of unlawful possession, so say, and leave it to the accused to give evidence or not as he chooses." In the present case the learned magistrate apparently adopted this course, and as there was no formal conviction drawn up, the only possible interpretation to be gathered from the magistrate's notes and the reason for decision is that the appellant was convicted of larceny. A conviction should be correct and certain, and not left to be gathered by inference, though technical words are unnecessary.

'Reasons for appeal' (1) (k) reads: “If the learned magistrate convicted “the defendant for larceny the learned magistrate was wrong in law, “inasmuch as larceny was not established because the ownership of the “zinc sheets or any of them the subject matter of the charge was not proved “and the value of the zinc sheets or any of them the subject matter of the “charge was not proved, and (1) (1): “If the learned magistrate convicted “the defendant for larceny his decision and the conviction is wrong in law “because the incorporation of the company which was said to own one of “the zinc sheets the subject matter of the charge was not proved.”

On the evidence all that appears relative to the ownership of the zinc sheets is that Mr. Gooding, manager of Cornelia Ida, stated the sheets in court are similar to those from the range dismantled in 1918, and Andries swears as to the identity of one sheet from the same range. Mr. Gooding also says Cornelia belonged to Leonora in 1918. To convict of larceny it must be proved that the goods stolen are the absolute or special property of a named person or company, but whether Leonora is a person, or a body of individuals, or an incorporated company there is nothing to show; if incorporated a certificate of incorporation should have been put in, though it would have been sufficiently proved by parol evidence that it had carried on business under that name. As it is there is no certainty as to the person against whom the offence was committed, nor is the value of the zinc sheets in 1918, or at the present time proved sufficiently to establish the jurisdiction of the magistrate. The appeal must be allowed and the conviction quashed with costs.

Appeal allowed. Conviction quashed.

ELDER *v.* BROWNE

[156 of 1920.]

1920, AUGUST 6. BEFORE DALTON, Acting C.J.

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

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district. The appellant Browne was convicted on a charge of unlawful assault with intent to cause actual bodily harm.

The sole reason of appeal was as follows:—

> "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 support the verdict, viz.: all the evidence given for the prosecution and defence."

B. B. Marshall, for the appellant.

H. C. F.Cox, assistant to the A.G., for the respondent.

DALTON, Acting C.J.: Objection has been taken by Mr. Cox that the reasons of appeal are bad as they fail to comply with the provisions of section 10 of Ordinance 13 of 1893, (Magistrates'

Decisions (Appeals) Ordinance). That section requires the particular matter on which he relies to be set out by the appellant in his notice of reasons. Counsel for appellant argued that section 10 did not apply to any of reasons set out in section 9 of the ordinance save those referred to in section 10. It is obvious, however, that the references in section 10 are purely by way of example and are not exhaustive. Further, a reference to "all the evidence" is no compliance with the law. The case of *Grenada* v. *Pollard* (1915 L.R.B.G. 108) cited is applicable here. The objection must be upheld and the appeal is dismissed with costs.

Appeal dismissed.

JOHNSON *v.* D'ANDRADE.

[130 OF 1920.]

1920. JULY 30; AUGUST 9. BEFORE DOUGLASS, ACTG. J.

Criminal law—Receiving—Resumption of possession *by owner after theft and before receiving—Larceny by bailee—Possession.*

Appeal from a decision of the stipendiary magistrate of the North Essequibo judicial district (Mr. H. T. King). D'Andrade, the defendant, was charged with receiving from one James Apollo fifty pounds of cocoa, the property of 'the inhabitants of the colony of British Guiana.' He was convicted and sentenced to four months' imprisonment with hard labour. From this conviction he appealed. The reasons of appeal and the necessary facts are sufficiently set out in the judgment below,

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

H. C. F. Cox, Assistant to the A. G., for the respondent.

DOUGLASS, ACTG. J.: The defendant has appealed against the decision of the magistrate of the North Essequibo judicial district convicting him of receiving 50 lbs. of cocoa knowing the same to have been feloniously stolen.

The grounds of appeal 1 (a) and 2 (a) alleging the want of proof that the appellant knew the said cocoa had been stolen were not proceeded with, all the argument of learned counsel being directed to the following reasons for appeal: “(1) that the decision is erroneous in point of law “inasmuch as . . . . (b) there was a resumption by the owners, their servants “and agents of possession of the cocoa alleged to have been stolen before “the same is alleged to have been received by the defendant, and therefore “the offence of receiving stolen property could not lie against the “defendant.

"(c) the property alleged to have been stolen having been found and "taken possession of by the owners, their servants and agents after the "alleged larceny was committed and having been by the said owners, their "servants and agents restored into the possession of the alleged thief no "charge for the larceny thereof can in law lie against the alleged thief, and "consequently the offence of receiving the said stolen property cannot be "charged against the defendant or anyone else, and

(2) "That the decision is altogether unwarranted by the evidence in like "manner as if the case had been tried by a jury there would not have been "sufficient evidence to sustain the verdict for the reasons given above and "because . . . (b) the owners of the property, their servants, or agents "voluntarily parted with their possession of the cocoa alleged to have been "previously stolen and which was discovered and taken possession of by "them the said owners, their agents and servants, and the delivery of the "said cocoa if made by the said thief at all does not in the circumstances of "the case afford any evidence to support a charge for receiving."

The important point to be determined in this case, before considering the authorities referred to by learned counsel for the appellant, is at what period did the larceny take place on which the charge of receiving is based—whether before or after the cocoa beans were marked on the 17th February. The alleged thief, the boy Apollo, is an inmate of the Government Industrial School, Onderneeming, he was in the position of a clerk or servant of the institution, or of Mr. Bayley, the superintendent, and consequently, whilst the possession of the cocoa in question remained in the owner—the inhabitants of the colony of British Guiana as represented by Mr. Bayley—the custody for certain purposes was in Apollo, but that custody might become changed into a possession by him either as a bailee or as a trespasser. If a servant acquires possession by trespass without authority at law, having at the time an *animus furandi*, the trespass is then a theft, and in cases within the magistrate's jurisdiction would be dealt with under section 92 of the Summary Conviction Offences Ordinances, 1893. The evidence then must be considered with a view to ascertaining whether or no at any period before the marking of the cocoa beans by Mr. Bayley, he could have proceeded under this section against Apollo for the larceny of those beans.

William Earle, chief officer of the institution, says: "I went and looked into a small dark room kept for rubber and I saw a bag with some cocoa beans in room . . . On the 17th (February) cocoa was being cleaned at entrance of mess-room near the small room I speak of. About six paces distant from small room . . . "; and on cross-examination "I lifted bag, I thought it was all right to be

there." Cecil Cox—one of the inmates of the institution—says "I saw the cocoa put in the bag on the Tuesday (i.e., 17th February), It was in passage of mess-room to be cleaned and was taken and put in bag"; and Marty Goodman—another inmate, speaking of the 18th February—"I took it (the bag) from a room beside the mess-room, Onderneeming. There is a rice mill in the room and they put bags in it." The beans were marked on the 17th February, but apparently not returned to the bag until very early the 18th February. I notice that in his reasons for decision the learned magistrate states "a bag of cocoa was found in a place in the Onderneeming Institution where it had no right to be," but I do not find that is so from the evidence, nor do I find that Apollo did any act on the 17th February, depriving the owner of his possession of the cocoa and enlarging his mere custody to possession by trespass; the *animus furandi* without the act of trespass, or the asportation *invito domino* is not larceny. It is true that in order to acquire possession at law it is not necessary wholly to remove the thing from the premises or presence of the owner or out of the receptacle in which it is placed, but in the case of a servant or bailee who has the custody—or loan—of the thing for a special purpose the asportation must be clearly proved, and I find no actual and unequivocal diversion of the cocoa from its proper destination in the present case until the 18th February. (See *R v. Jackson,* 9. C.C C, 505.) Up to the point of marking the beans there is not the slightest evidence disclosed on which Apollo could have been convicted of larceny, though it may be gathered from the evidence that someone was suspected of desiring to make away with the cocoa, and on the 18th February the evidence shows that Apollo knew of its presence in the small room as he directed Goodman to carry it out. It was argued that the magistrate took the view that the removal of the cocoa to the small room by Apollo was an act of larceny and that the sale next day was another act of larceny, and reference was made to the following paragraph in his "reasons for decision": “It has been contended for the “defence that Bayley having taken possession of the cocoa on the 17th no “larceny was committed as he had retaken property in cocoa. I decline to “assent to this proposition. It is abundantly clear that the bag having been “removed on the 18th from where it was left by Mr. Bayley on the 17th a “fresh larceny was committed,” and he continues: "In this case there was no dealing with the property by the owner in the manner stated," &c. It seems to me that the learned magistrate was taking the position of the defence in order to refute it, and the paragraph is not an expression of his opinion that there were two acts of larceny on the same cocoa, the fact that the owner resumed possession would not have mattered if that were so, but he contends there was no resumption of

possession and *yet* the removal of the cocoa on the 18th was "a fresh larceny," clearly indicating that in his opinion the larceny took its inception from the 18th February, and not that it was renewed; there was no resumption of possession because the owner had never lost possession when he marked the cocoa on the 17th February. I agree with the learned magistrate in so finding. Although, as I have said, the taking must be *invito domino* yet the fact that an opportunity is given by the master to enable a suspected intention to be carried out, or to give facility to the commission of a larceny for the purpose of detecting an offender is permissible, and does not mitigate or take away the subsequent offence whether of larceny or of receiving. *R.* v. *Egginton* (2 Leach 971), *R.* v. *Williams* (1 C. & K. 195). The local case of *Blair* v. *Atherley* (1918. L.R.B.G. 108) may also be referred to where it was held that the handing over of goods was not *invito domino* under the special circumstances of the case.

The principle involved in the three cases referred to by learned counsel for the appellant—*R.* v. *Dolan* (Dears, 436); *R.* v. *Schmidt* (10. C.C.C. 172); *R.* v. *Villensky* (1892. 2 Q.B.597)—is that where the party having the right of control of the property stolen gets that control there can be no subsequent felonious receipt based on the previous larceny. In the first two cases there is no question at all of the previous larceny and the resumption of possession by the owner in the first case, and by the bailee (who was entitled to the control) in the second case. The case of *R.* v. *Villensky* is somewhat similar to the present one. A firm of carriers had a parcel for conveyance. A servant of theirs removed the parcel to a different part of the premises—appropriated to a different district —and placed upon it a label addressed to the defendant, the receiver. The superintendent of the firm was informed and received the parcel for inspection, directed it to be returned to the place where the thief had placed it, and that a special delivery sheet made out with the address on the label; the thief had nothing to do with the subsequent removal. It was held that the carrier had resumed possession before its receipt by the accused. Here by altering the address and shifting the goods to the spot for the thief's purpose the diversion of the goods from their proper destination was practically complete before the discovery by the bailee of the goods when the control of the goods was then resumed by them, and conveyed to the receivers through them. Whereas in the present instance, there was no indication of the destination of the cocoa beans and no deprivation of possession on the 17th February, or resumption of control, for the control was never lost until the 18th February.

I am of opinion that the appellant was rightly convicted of receiving the cocoa from James Apollo knowing the same to have

been feloniously stolen, and that the larceny on which the charge is based took place on the 18th February after the incident of the cocoa beans and their replacement in the bag. I affirm the conviction and dismiss the appeal with costs.

Appeal dismissed. Conviction affirmed.

PETTY DEBT COURT, GEORGETOWN.

SMITH *v.* RAMGOBIN.

[197—4—20.]

1920. MAY 18; JUNE 9; JULY 1. BEFORE DOUGLASS, ACTING J.

Animal—Injuries by stray on public highway — Escape of animal from Municipal slaughter-house—Negligence—Liability of owner of animal—Qui facit peralium facit per se.

The plaintiff Caroline Smith claimed $75 damages from Ramgobin, a cattle-dealer of Mahaicony, for personal injuries alleged to have been sustained by her on the 23rd March. 1920. through the defendant's negligence in allowing a cow of a fierce and mischievous nature belonging to him to stray on the public highway.

All further necessary facts appear from the judgment.

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

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

DOUGLASS, Acting J.: The facts as proved are quite simple On the 23rd of March, 1920, the plaintiff whilst walking in Main street Avenue, Georgetown, was attacked and thrown down by a cow, the property of the defendant, which had escaped from the pens of the slaughter-house where it had been lodged by the defendant the previous day. By the by-laws of the city of Georgetown (approved the 19th September, 1916) persons bringing cattle into the town, for sale or slaughter, must deliver them to the slaughterhouse pens for examination by the Medical Officer of Health before they are sent to the slaughter-house, and they must remain there for at least twenty-four hours, and certain fees are payable by the owner on admission; it is incumbent on the owner to see that they are fed. In the present case this cow along with others was tied to a rail with a rope. The town constable who was in charge of the slaughter-house and pens on the 22nd and 23rd March gave evidence as to the detention of the animal and added, "cattle often got away when tied up, on this occasion (if released from the rope) they could get out as the paling of the pen was broken, but other-

wise, they could not, unless the gate was open." Alonzo Harris, slaughterman, gives in evidence that at least three cows got out of the pen on the night of the 22nd March, and that a town constable is always present at the slaughter-house during the day and a watchman at night.

The defence raised was (1) that the cow was not the property of the defendant at the time of the accident, but this was dropped during the hearing; (2) the cow was not in the custody or under the control of the defendant at the time, but was under the control of the Mayor and Town Council of Georgetown; and (3) the cow was not of a ferocious nature nor had it ever attacked a person or animal before.

The burden of proof lies on him who alleged the negligence, but there are certain cases where the need of strict proof is relaxed and it was thus laid down in *Scott* v. *London Dock Co.* (3 H. & C. 359) "where the thing is shown to be under the care of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care," and this would apply to the defendant's agents as well as his servants.

The fact that the animal in question was loose in a highway without any supervision indicates, or raises a presumption of negligence, it is a case of *res ipsa loquitur* but it still remains to prove whose negligence caused the accident. It is true that Pollock in his *Law of Torts* (7th Edition, p. 461) says: "where negligent acts of two or more independent persons have between them caused damage to a third the sufferer is not driven to . . . . find out whom he can sue. He is entitled to sue all or any of the negligent persons;" but was there any negligent act of the defendant proved either independently or jointly with his servants or agents? On the evidence before me the relationship between the defendant and the custodians of the slaughter-house and pen seems to be rather that of bailor and bailee than of master and servant, and the transaction to be of that class of bailments known as *locatio operis faciendi,* where goods are delivered by one person to another for safe custody or for some work to be done upon them by the latter for reward, and if this is so the further question is raised how far if at all can the negligence of the bailee be said to be the negligence of the bailor? In short is the maxim of *respondeat superior* applicable in the present case? To ascertain this the principle on which the liability of the master for the acts of his servant or agent is founded must be traced.

'Bevan' in his '*Negligence in Law*' (3rd ed., p. 574) puts it "the principle at the bottom of this very extensive liability is an

irrebuttable presumption that the master authorised every act done in advancement of the master's business . . . and covered by its objects." "Through all the relation the principle runs, that if the act is not the master's act expressly authorised, it is yet an act done with circumstances that the law requires should raise the presumption of the master's authority." There are a great number of cases illustrating this principle, many of them somewhat difficult to reconcile with each other, but it should be noted that a case that proceeds on the assumption of the existence of the relation of master and servant is no authority where the relation of master and servant does not exist. For the purposes of this suit I propose to refer to only two of the numerous cases. The first is *Quarman* v. *Burnett* (6 M. & W. 499). Parke, B., in the course of his judgment, says: "The immediate cause of the injury is the personal neglect of the coachman in leaving the horses which were at the time in his immediate care. The question of law is whether anyone but the coachman is liable to the party injured; for the coachman certainly is. Upon the principle that *qui facit per alium facit per se* the master is responsible for the acts of his servants and the person is undoubtedly liable who stood in the relation of master to the wrongdoer—he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose order he was bound to receive and obey " . . . " A third person entering into a contract with the master which does not raise the relation of master and servant at all, is not thereby rendered liable." And the learned judge refers with approval to 'the very able judgment' of Mr. Justice Littledale in *Laughter* v. *Pointer* (5 B. & C. 547), that the rule of law may be that a man in possession of fixed property must take care that his property is so used and managed that other persons are not injured; and that, whether his property be managed by his own immediate servants, or by contractors with them, or their servants. Such injuries are in the nature of nuisances: but the same principle which applies to the personal occupation of land or houses by a man or his family does not apply to personal movable chattels which in the ordinary conduct of the affairs of life are entrusted to the care and management of others who are not the servants of the owners, but who exercise employment on their own account with respect to the care and management of goods for any persons who choose to entrust them with them.

The next case is *Milligan* v. *Wedge* (12 A. & E. 737) in which Lord Dennan, C.J., remarks:" I think we are bound by the late decision of *Quarman* v. *Burnett* . . . . the butcher was not bound to drive the beast to the slaughterhouse himself, he employs a driver, who employs a servant who

does the mischief. The driver therefore is liable and not the owner of the beast." Williams, J.: "For where the person who does the injury exercises an independent employment, the party employing him is clearly not liable"; and Coleridge, J.: "The true test is to ascertain the relation between the party charged and the party actually doing the injury. Unless the relation of master and servant exist between them the acts of the one creates no liability in the other. Apply the tests of these two cases here. The defendant in accordance with the local by-laws deliver his cattle to the agents of the local authority, and for twenty-four hours they are detained in the town pens to await examination by the M.O.H.; during that period the cattle escape from the pen—without the interference of the defendant, and due to no negligence on his part. Neither the town constable in charge of the pen, nor the slaughter-men are servants of the defendant, the relation of master and servant does not exist between them, whoever then it was that is guilty of the negligence in allowing the animals to escape, it is not the defendant or any servant or agent of his. There is therefore no necessity for me to enter into the question of the mischievous nature of the animal, or whether it was necessary to prove '*scienter*' at all.

I give judgment for the defendant with $1.20 costs and $7.56 fee to counsel.

THOMPSON *v.* HIGGINS.

PETTY DEBT COURT, GEORGETOWN.

THOMPSON *v.* HIGGINS.

(301—3—1920.)

1920. APRIL 13; JULY 14, 20. BEFORE DOUGLASS. ACTING. J.

Principal and agent—Commission—House agent—Finding a purchaser—Agent entitled to commission—Magistrate's court—Practice—Plaint—Breach of contract—Quantum meruit.

Claim by the plaintiff Joseph Thompson for the sum of $50 remuneration for work done on behalf of the defendant, at the request of the latter, in finding a purchaser willing and able to purchase a property belonging to defendant. The plaintiff set out that the defendant offered the property to the purchaser obtained by the plaintiff which offer was accepted, but that he (defendant) subsequently refused to carry out his offer or sell the property as agreed on.

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

H. C. Humphrys, for the defendant.

DOUGLASS, Acting J.: In this case a preliminary objection was taken by Mr. Humphrys for the defendant that the statement of claim being in the alternative was bad; and again on the close of the plaintiff's case that, the claim being founded on an express contract, the plaintiff could not sue on a *quantum meruit.*

As the plaint originally stood the plaintiff was claiming from the defendant the sum of $50 as a reasonable remuneration, or, alternatively under the agreement to pay a similar sum on introducing a purchaser to the defendant for his lots 23 and 29, David street, Kitty.

There are no pleadings in the petty debt court and the plaintiff is not entitled to join a claim upon the contract as existing with one for damages for breach of the contract as rescinded, or with one upon a *quantum meruit* as if the contract had not existed or were implied. This was decided in *Tiam Fook* v. *Dare* (A. J. April 2nd, 1908) on the ground that in such a case the causes of action are not of a similar nature and therefore could not be joined (see rule 10 of the Magistrates Rules, 1911.) The plaintiff elected to depend on his claim for a *quantum meruit,* and I thereupon amended the statement of claim. It is necessary to leave in the clause stating the terms of the contract to show what was the purport of the contract that was broken, or not performed, the amount which it was worth to the plaintiff had it been carried out is in the nature of evidence only. It is clearly established that where there is an

express contract between the parties they cannot resort to an implied one. This general rule was acted on in *Cutter* v. *Powell* (Smith's L.C., Vol. II., p. 1), but certain cases have arisen where one party has been permitted to put an end to the special contract and sue for what has been already done on a *quantum meruit,* or where work has been done or goods supplied under a special contract, but not in conformity thereto, and yet payment of a compensation is enforceable by action because the defendant has accepted the benefit of what has been done. It is for the Court to decide in each particular case on the evidence whether a special contract has been put an end to, and whether the plaintiff has a right to treat it as never having existed and to sue for his labour on a *quantum meruit,* and the learned authors of Smith's Leading Cases state it is submitted that it is an invariably true proposition that whenever one of the parties to a special contract not under seal has in an unqualified manner refused to perform his side of the contract or has disabled himself from performing it by his own act the other party has thereupon a. right to elect to treat it as rescinded and may on so electing immediately sue on a *quantum meruit* for anything which he had done under it before the rescission. Thus in *Prickett* v. *Badger* (1856 1 C.B. N.S. 295) where the defendant employed plaintiff to find a purchaser at a fixed commission per cent, on the price, and the plaintiff did so but defendant refused to complete sale, it was held plaintiff could sue on a *quantum meruit* for the work and labour done as he had performed his part of the contract and the defendant prevented its completion and that plaintiff was entitled to the whole commission agreed on.

The plaintiff then being found within his rights in bringing the suit as he has done, the defendant further denied that the plaintiff obtained a purchaser on the terms agreed upon or did any work for which he was entitled to commission, I gather from the evidence that the defendant asked the plaintiff to sell his property for him for $1,800, but on obtaining a likely purchaser he agreed to take $1,650 from a Mr. Grant, who was introduced to the defendant by the plaintiff. The only reason apparent why the purchase did not go through was that the purchaser wanted possession in three days' and the defendant said that it was impossible and possession would be given when transport was passed.

A great number of the cases with reference to the time at which the agent's commission becomes payable are cases of public auction, two of them however may be referred to as showing that each case must depend largely on the terms and circumstances of each contract and no definite rule can be laid down.

In *Peacock & anor. v. Freeman & anor.* (IV. Times L.R. 541) it was held that the true construction of the contract in that case

was that the commission was payable upon a completed sale, that land could only be said to be 'sold' when the sale was complete; therefore the commission was not earned under the terms of the contract, and the failure to carry through the contract of sale was due to no fault of the vendors, they were entitled to rescind under that contract. In *Skinner* v. *Andrews & anr.* (XXVI. Times L.R. 340) it was held that the defendants' commission was payable on the property being knocked down to a purchaser at the auction, notwithstanding the contract was subsequently rescinded.

These two cases seem contradictory but in the latter, in the judgment of Lord Justice Vaughan Williams, the words "if the property remains unsold" must mean "if the property is not knocked down ;" and he said there was no ground for construing the word 'sale' as equivalent to 'completed sale.'

In the present case there is an open contract by word of mouth, and it is very difficult to ascertain what the exact agreement was, it is indeed doubtful whether the parties themselves could remember the precise words used, and they are of importance as the cases show. There is, however, another case the circumstances of which approximate somewhat to this:

Nosotti v. *Auerbach* (XV. Times L.R. 41. 140; is a case where a person employed a house agent to sell the lease of a house of which be was in occupation and nothing was said about giving up possession. The defendant refused the offer on the ground he could not give up possession on March 15th. Mr. Justice Bruce said: "The true inference to be drawn is that the defendant instructed the plaintiff to find a purchaser who was willing to accept his terms on the assumption that the defendant was willing to give up possession within a reasonable time." It was held that the plaintiff had done all he was bound to do to entitle him to a commission, as from January 16th to March 15th was a reasonable time for giving up possession.

It is admitted that there was no contract of sale which could have been enforced by either party inasmuch as there was no writing signed by the party to be charged but I think the evidence goes further than that and shows that there was never even a complete oral contract. The whole matter took place on the 4th February and before the parties separated the defendant had declined to give up possession within three days and thus broke off the negotiations and it must not be forgotten that even if the vendor had said that he would give up possession at once when he was asking and expected $1,800 it does not at all imply he would be ready to do so when offered a lesser price.

The fact that the plaintiff made the defendant an offer to find him another house does not affect the matter, on an open contract possession need not be given before the transport is completed and

the defendant was entitled to take the perfectly reasonable objection that he could not turn out in three days; in other words it was the purchaser who was the cause of breaking off the negotiations and not the vendor.

If indeed the agent were entitled to commission in such a case it would open up an easy way for a dishonest agent to make his commission. He could get hold of any man of straw to make an offer suitable in price which would be accepted but the purchaser would impose some condition that vendor could not possibly accept. It may be that the present case is very near the border line, but the plaintiff has not proved to the satisfaction of the Court that he has earned any commission and the defendant did no act to prevent him earning it. I must therefore give judgment for the defendant.

PETTY DEBT COURT, GEORGETOWN.

WILLIAMS *v.* MENDONCA.

[250—3—20.]

1920. JULY 14, 22. BEFORE DOUGLASS, J., (ACTING).

Landlord and tenant—Liability to repair—Common law—Custom—Roman-Dutch Law—Civil Law of British Guiana Ordinance, 1916 ss. 2 (3) and 3 (2)—Defective stairway—Whether accident approximate cause of illness.

Claim by the plaintiff for the sum of $100 as damages for injuries alleged to have been caused to her owing to the defective state of the stairway to the tenement which she rented from the defendant. The plaint set out that notice had been given to the defendant of the unsafe state of the stairway, and that it was negligently and carelessly repaired by him.

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

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

DOUGLASS, Actg. J.: The plaintiff is claiming the sum of $100 as damages against the defendant, her landlord, alleging that owing to the defective condition of the stairway of 46, Russell Street, Georgetown, she was thrown to the ground and sustained severe bodily injuries.

The defence is that the defendant is not liable at law as landlord, and in the alternative that repairs were properly done by the defendant and approved of by the plaintiff, and that any injury she received was due to her own negligence and not to any defect in the stairway.

In reply to the point of law raised Mr. Crane, solicitor for the plaintiff, whilst admitting that since the Civil Law of British Guiana Ordinance. 1916, there is no statutory duty thrown upon a landlord to put the demised premises into repair, argues that (1) the defendant retained control of the stairway and it was his duty to keep it in sufficient repair to enable the plaintiff to use and enjoy the room rented to her. (*Miller* v. *Hancock*, 1893.2.Q.B.177), and (2) that it has always been the custom locally for the landlord to repair the stairway, and that the change from Roman-Dutch to English Jaw does not abrogate an old custom, and that consequently the English Common law is to that extent varied or modified; and he referred to *Leigh v. Hewitt*, 4 East 154; *Dolby v. Hirst*, 1B. & B. 136 and *Hutton v. Warren* 1 M. & N. 475.

To take the second point first. It is difficult to define the difference between 'custom' and 'common law:' it has been remarked that "no sharp distinction can be drawn, common law is historically the ordinary and customary law of the kingdom, whilst the domain of custom proper is more or less restricted to the practice of local and popular courts;" thus compare primogeniture as part of the common law of England, whilst gavelkind succession was the custom of Kent. Holland in his *Jurisprudence* (11th ed. p. 59) says: "Custom exists as law in every country . . . it was known in Rome as the *jus moribus constitutum.* It is known in England as the common law." Halsbury points out (Vol. X, 221) that there is a clear distinction between customs and particular trade or local usage, for they lack three of the distinguishing features of customs properly so-called, for the necessity of an existence as far as legal memory can go need not exist, they need not be confined to a limited locality, and if contrary to positive law they will not be sanctioned by the courts. A distinction too was suggested between customary law and an usage in *Dalby* v. *Hirst*, that custom creates a legal title whilst usage is only evidence of a title It seems to me that the duty of the landlord under the Roman-Dutch law to keep his tenant's house in a proper and habitable state of repair, and his liabilities for injuries happening from certain defects (see Maasdorp *Institutes*, Vol. III, 207) arose not from a local custom or usage in this or any other town in the colony so much as from the common law of the country, the *jus moribus constitutum*, a portion in fact of that law which "shall cease to be Roman-Dutch law" in accordance with section 3 (1) of the Civil Law of British Guiana Ordinance; that section refers to "the law of the colony relating to, *inter alia*, 'landlord and tenant,'" and I cannot construe the word "law" as excluding customary or common law, for a custom cannot be said to have any legal effect until it has been legally

recognized or absorbed into the common law. My opinion that the customary law was intended to be affected is strengthened by section 2 (3) of the said ordinance " . . . where in any matter whatsoever any right is founded upon a rule or custom of Roman-Dutch law or procedure where the English common law in the opinion of the Supreme Court of British Guiana is not applicable owing to any special local conditions not provided for by this or any other ordinance effect may be given to the Roman-Dutch rule or procedure to such extent as the Supreme Court of British Guiana may deem advisable in the interests of equity if the said Court is so advised."

It might be fairly reasoned that the English common law was "not applicable," owing to local conditions that have existed for many years and still exist, and taking into account that the English common law in respect of tenancies at certain low rents has been specially modified since 1885 by the Housing of Working Classes Acts, and the Housing and Town Planning Act, 1909, which makes it the duty of a landlord not merely to put the premises into repair before letting them but during the letting of the premises of a particular class and occupied by poor people unable to defend themselves or to keep them in repair.

At the same time I must point out that sitting as a magistrate of the Petty Debt court I cannot give effect to section 2 (3) any more than I can administer the English doctrine of equity under section 3 (2) of the ordinance. I hold therefore that the English common law applies in this case, though as I will point out later the former Roman-Dutch customary or common law is not without its effect, and I will now proceed to consider the decisions referred to by the learned solicitor, some of which have been fully discussed in the late case of *Bernard* v. *Ramdhanie* (1920. L.R.B.G. 22.)

The case of *Millar* v. *Hancock (ubi supra),* as Pickford, L. J. pointed out in *Dobson* v. *Horsley* (1915, 1. K.B. 634) was a decision upon the facts of that particular case; they showed that the landlord retained a room and the staircase of the flat in his own possesion, and the tenants having the right to use the staircase had an easement over it, and though with regard to easements in general it may be that the person in enjoyment thereof is bound to do the necessary repairs, it is subject to the qualification that the grantor of an easement may undertake to do the repairs either in express terms or by, necessary implication. As laid down by Lord Mansfield in *Taylor* v. *Whitehead* (2. Douglas, 745), by the common law he who had the use of a thing ought to repair it, but the grantor may bind himself. In *Dobson* v. *Horsley ubi sup.,* referred to in my decision in *Bernard* v. *Ramdhanie,* the case of *Miller* v.

Hancock was carefully compared and distinguished; Buckley L.J., in the course of his decision, says: "What seems to flow from these cases (*Huggett* v. *Myers,* 1908. 2 K.B. 278; and *Lucy* v. *Bawden* 1914 2 K.B. 318) as a matter of principle is this: that the lessor, the defendant, is liable in any case in which. by way of implied grant, he enters into an implied obligation to provide something and fails to provide it and Phillimore, L.J., in the course of a very complete analysis of the effect of the different decisions, says (p 642): "If you let to a tenant a room which has to be "approached by steps you impliedly let him a right of access and you let "him a reason ably safe right of access, such as it appears to be . . . . . "If there is a step, you are entitled to assume that you can safely tread upon "it; and so in the case of a balustrade, if it fails in bearing pressure there is "a trap." In the present case there were two rooms upstairs one of which was let to the plaintiff, it is quite evident that in this, as in hundreds of other cases of the letting of tenements in this city, the room only was let to the plaintiff and she had no right to the exclusive use of the stairway, nor did the rent include it; that the landlord intended to do at least a minimum of necessary repairs is shown by the fact that he did some repairs on the bad state of the stairway being told him ; and here I think the contention of Mr. Crane that—what he calls —the former custom or usage of landlords to retain the control of, and so undertake the repair of, the stairways of tenements let out by rooms may be of service, for if there *were* such a usage, and the evidence of the two house agents concerned with considerable properties goes to prove it, it is at least evidence from which a presumption may fairly be taken—combined with the circumstances of the case and in the absence of proof to the contrary—that the landlord continues to tacitly accept the position he stood in up to the 1st January, 1917 and that consequently the usage still exists; the majority of landlords indeed were probably unaware that their common law rights and liabilities had been altered. The former retention of the stairway by the landlord and liability to repair may in fact be evidence to support the contention of an implied undertaking by the landlord even at the present time to maintain the stairway in a proper usable condition, in the absence of any rebutting evidence.

It is true that the common law says that for injury resulting from the defective condition of demised dilapidated premises the landlord is not liable, but the answer is that the whole evidence goes to show that the stairway was not part of the demised premises. Although *Miller* v. *Hancock* seems to show that in cases coming within its scope the English law is approximated to the Roman-Dutch law to a limited extent, yet there is this important difference,

that whilst under Roman-Dutch law to render the landlord liable for damage by reason of disrepair of the house it was necessary to show that he knew of the defective state or from the nature of his occupation or calling ought to have known of it (Maasdorp *Institutes*, Vol. III. p. 208), or—as has been said—he was liable for a patent but not a latent defect (*Hamlett* v. *Playter*, 1914, L.R.B.G. 33), yet under the English law he will be liable, where he has retained control, for latent defects, where there is a concealed danger, and not for patent defects or where the defect is as obvious to the tenant as to the landlord (See *Powell* v. *Thorndike* 102 L.T.R. 600, and *Dobson* v. *Horsley*).

I cannot find that the fact of the landlord's carpenter having recently repaired the step exonerates him; it either shows bad workmanship or carelessness in not having discovered the flaw that obviously existed; the plaintiff had a right to a reasonable safe right of access to her room and I find her story of how her illness was brought about is corroborated by the surrounding circumstances, in the facts disclosed, *inter alia*, that the step had been partially repaired, and was repaired again a few days after the accident, the necessary attendance of midwife and doctor within one and two days after, and that the latter saw where the step had given way.

I find then that the landlord is liable for any accident resulting from the defective state of the stairway, but there still remains the question whether it was the approximate cause of the subsequent illness of the plaintiff.

In the case of *Victorian Rly. Commissioners* v. *Coultas* (13 A. C. 222) the Privy Council reversing the decision of the Supreme Court of Victoria held that "damages arising from mere sudden terror unaccompanied by any actual physical injury but occasioning nervous or mental shock cannot . . . . be considered a consequence which in the ordinary course of things would flow from the negligence of the gatekeeper," the appellant's servant, but the learned author of Bevan on *Negligence in Law* (3rd ed., p. 69) remarks: "If in the case under discussion the wrongful negligent act of the defendant had caused the plaintiff's wife to fling herself from the buggy and a miscarriage had been produced and a long illness attendant thereon, the plaintiff could have recovered and the later English cases run strongly against accepting *Victorian Railway Commissioners* v. *Coultas* as a case to be followed (See *Dulieu* v. *White* 1901. 2 K.B. 669). I have no doubt, however, on the evidence that in the present case that physical impact occasioned the injury the plaintiff suffered, she showed the court exactly how whilst carrying a jug of water she stumbled backward with a violent jerk owing to a portion of the 'tread' and of its support splitting off, and she stated that within

half an hour she felt the pains and sent for a midwife the next day and the doctor immediately after, and the doctor states that such an accident as she describes would account for the miscarriage and the subsequent illness suffered.

Both on the law and facts I am of opinion that the plaintiff is entitled to damages and give judgment for $60 damages and $8.64 costs and $10 fee.

KINGSTON *v.* ROMNEY.

Ex parte KINGSTON.

[229 OF 1920.]

1920. AUGUST 7, 14. BEFORE DOUGLASS, Acting J.

Practice —Action for inventory and accounts—Application for preliminary accounts and enquiries—Rules of Court, 1900, Order XIII, r. 1—Affidavits in reply —Order XL, r. 9.

Motion.

Claim by the plaintiff (the writ of summons being specially endorsed) as a legatee and heir under the will of Thomas Philip Kingston, deceased, for an enquiry as to the estate left by him and accounts to be taken and inventory to be filed by the defendant as executor of Thomas Philip Kingston.

Plaintiff now applied by motion in terms of Order XIII for an order for the proper accounts and for the usual inquiries and directions.

E. M. Duke for the applicant.

H. C. Humphrys for the respondent.

DOUGLASS, Acting J.: This application is made under Order XIII (corresponding to the English Order XV) for certain accounts in connection with the estate of one T. P. Kingston, deceased, and for an inventory of the property which came into the hands of the defendant as executor of the will of the said T. P. Kingston. The application is supported by affidavits of the plaintiff and of her solicitor, and there is also filed an affidavit by the defendant stating that accounts had been duly filed and vouched up to June, 1906, that he was appointed guardian of the plaintiff during her infancy, and that he denied many of the facts stated in her affidavit.

A preliminary objection was taken to any affidavit being filed by the defendant, but he is entitled after appearance—entered 15th July, 1920,—by affidavit or otherwise to satisfy the Court

that there is some preliminary question to be tried (Order XIII, r. 1.), and by Order XL, r, 9 any party on whom notice of an application has been served who desires to oppose the application may file affidavits in reply to those filed by the party making the application. It is very evident too that affidavits in opposition are received under the English practice, so that the objection fails. (*In re Mundell; Fenton* v. *Humberlege*, 52 L.J. Ch, 756).

The writ of summons complies with the requirements of Order XIII, and the defendant has appeared to it; unless the defendant then satisfies the Court that there is a preliminary question to be tried the Judge has no option but to make the order "for proper accounts with all necessary or usual inquiries," The defendant objects that he has filed his accounts as executor of the estate of T. P. Kingston, deceased, and should not be called upon for any other accounts, and that the plaintiff has no right to call for the accounts now demanded, and his counsel refers to *In re Gyhon*; *Allen* v. *Taylor* (29 Ch. D. 834) and Maasdorp's *Institutes*, Vol. I, in support of his contention, In the case referred to it was held that as the writ was endorsed for general administration, only the accounts and inquiries which are necessary with an administration suit can be directed and not accounts and inquiries which depend on the plaintiff establishing a case for them at the hearing,

At the time of the deposit of the will no accounts were required by law to be filed, but defendant as executor would have had (1) to file with the Registrar "a proper and correct inventory of the property of the deceased" under section 15 of Ordinance No, 9 of 1887—now represented by the Deceased Persons' Estates Ordinance No, 10 of 1917—and this continued to be necessary up to 1909 when the ordinance was repealed and the provisions rendered unnecessary by section 23 of Ordinance No. 9 of 1909; and (2) to appear at the Receiver General's office and deliver a full and articulate inventory of all the property which such deceased person possessed at the time of his death, under section 13 of the Estate Duty Ordinance, No. 4 of 1898. It is true that by section 23 of Ordinance 9 of 1909 "every inventory of the estate of a deceased person made or delivered either before or after the commencement of this ordinance under the Estate Duty Ordinance, 1898, shall . . . be deemed a sufficient inventory for all purposes, and no heir, executor or administrator shall be required to file any other inventory comprising the same particulars as those therein given"; but this was repealed by Ordinance No. 10 of 1917 and the following provision substituted by section 13, viz.: "Any copy of any inventory of the estate of a deceased person filed in the Registrar's office before the commencement of this ordinance under the Deceased Persons Estates

Ordinance 1909 shall if and so far as the same is complete be deemed a sufficient inventory for the purpose of this ordinance." *i.e.,* not for all purposes; and by section 14: "Notwithstanding anything hereinbefore contained it shall be lawful for the Court on application and on sufficient cause appearing at any time to order that an inventory of any property belonging to any person . . . shall be taken by any person named in such order." It may be noted that under the Roman-Dutch law on the appointment of a guardian his administration must be preceded by an inventory with specific derails and the ward is entitled on the termination of the guardianship to an account. (Nathan, *Common Law,* Vol. I. paras. 250, 289-302.) Moreover a guardian could not be released until he had filed his accounts. Maasdorp's *Institutes,* Vol. I, p. 273.) Under our Rules of Court, 1900, Part II. Order III, rr. 3 and 12, a guardian has to make an inventory and deposit it in the Registrar's office, and submit accounts once in every year, this may possibly be the accounts referred to in paragraph 2 of the defendant's affidavit.

Order XIII. applies wherever it is clear that the defendant is an accounting party, and that if the action went to trial an account must be directed. As to what accounts were maintainable in equity (before the Judicature Acts) see *L.C. and D. Railway Co.* v. *S.E. Railway Co.* (1892 1 Ch. 140), and the Court's powers are supplemented by Order XXIX, r. 1. "The Court may at any stage of the proceedings in an action direct any necessary accounts or enquiries to be made or taken," etc. In *Small v. Executors of Small* (L.J. 20th April, 1907) an application dated the 2nd April, 1907, under Order XIII. was made by the widow of the deceased—who died on the 18th January, 1907—against the executors of his will asking for an order for accounts; a declaration and inventory had been filed showing estate to be under $480 and it was objected that the proceedings were premature. Lucie Smith, J. ordered the accounts to be rendered as he was of opinion it would be just and equitable and save future costs.

I am of opinion that the plaintiff has proved her right to the accounts she requires, and inasmuch as the defendant has not shown that any preliminary question should be tried she is entitled to an order. I accordingly order the following accounts and enquiries to be made and taken: (1) An inventory of the property movable and immovable which came into the hands or custody of the defendant on and after the death of the said T. P. Kingston, deceased; (2) an account of the debts due to and by the deceased at the time of his death, and of the dates of payment or discharge of the same when paid, with all necessary receipts and vouchers annexed; (3) an account of the dealings of the defendant with the estate of the deceased up to the date of the present order and of the sums of

money, goods and chattels now remaining in his hands or under his control; (4) an account of the disbursements expended for and on behalf of the plaintiff from the date of the death of the deceased the 7th October, 1919, the said inventory and accounts to be tiled within twenty-eight days from the date of this order. And I further order that in the case of the account of the Berbice Steam Saw Mills the books of accounts in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties to take such objection thereto as they may be advised. And I further order the plaintiff to deliver and file her statement of claim within fourteen days of the expiration of the date at which the said accounts are to be filed.

The question of costs is reserved until the determination of the action.

PETTY DEBT COURT, GEORGETOWN.

GOUVEIA *v.* BRATHWAITE.

[283—7—1920.]

1920. AUGUST 17, 26. BEFORE DOUGLASS, ACTING J.

Husband and wife—Marriage in community of property—Absence of husband from colony—Goods purchased by wife—'Necessaries '—Liability of husband—Roman-Dutch law.

Claim by the plaintiff for the sum of $49.31 for goods supplied to defendant Brathwaite, and to his wife. The defendant denied liability.

E. M. Duke, for the plaintiff.

S. L. V. Stafford, for the defendant.

DOUGLASS, Acting J.: The plaintiff is claiming the sum of $49.31 for goods sold and delivered—including a sum of $10 money lent—to the defendant and his wife The only point reserved for consideration was whether the defendant was liable for the sum of $34.31, the amount due for the goods alleged to have been purchased by his wife.

Mr. Stafford for the defence submitted that he never authorised his wife to take the goods or ratified the purchase in any way, that he provided his wife with necessaries, and the said goods were not necessaries, and in the alternative that the doctrine of necessaries did not apply in Roman-Dutch law, or in any event

in cases where the parties were married in community. The evidence showed that the wife dealt with the plaintiff during her husband's absence and that he did not send her any money from Venezuela. I am of opinion that all the articles on the account would be household necessaries.

Nash v. *Inman* (1908 2 K. B. 15) was referred to with respect to necessaries as defined by section 2 of the Sale of Goods Act, 1893 (our Ordinance No. 26 of 1913). but that section does not 'necessarily limit the "necessaries" in respect of a married woman's needs for her family and housekeeping, though it may be a foundation on which to work.

The defendant and his wife were undoubtedly married in community of property. Morice in his *English and Roman-Dutch Law* says under both systems of law the test of liability would be: Had the wife authority expressed or implied to bind her husband, and he states that the Roman-Dutch law possibly gives a larger scope to the wife. Lee in his *Introduction to Roman-Dutch Law* says "the wife cannot, without the consent of her husband, render herself civilly liable by her contracts, but a wife may bind herself and her husband by contracts incidental to the household. This authority results from the wife's position as domestic manager and cannot be taken from her except by judicial decree and public notification." It is for the judge to say whether a particular contract falls within the permitted class. In my opinion the doctrine of the husband's liability would be strengthened by the fact that he and his wife were married in community of goods, for while the effect of community is to create a joint fund the administration of it is the husband's during his life-time.

The old ledger showing the account was produced by the plaintiff; it was on a loose leaf and counsel for the defendant threw doubt on its genuineness, I find, however, that the water mark is the same on the leaf as in the ledger. The defendant's wife's "pass-book" was also put in, very roughly kept and showing $41.24 due, but she says she satisfied $22 by a contra account of the stock she sold the plaintiff. This statement is unsupported and I cannot accept it in the face of the plaintiff's evidence. There is also no doubt that the defendant dealt with the plaintiff before leaving for Venezuela. I accordingly give judgment for $49.31 and $1.68 costs and award a fee of $5 to Mr. Duke, plaintiff's counsel.

In re YOUNG; *In re* FRENCH.

In re YOUNG; *In re* FRENCH.

Ex parte PUBLIC TRUSTEE.

[185 OF 1920.]

1920. AUGUST 21, 25. SEPTEMBER 8. BEFORE DALTON, ACTG. C.J.

Trustee—Appointment of new trustee—Personal representative of last trustee— Executor—Derivative executor—Appointment by the Court—Civil Law of British Guiana, Ordinance 1916, s. 12—Trustee Act, 1893, ss. 10 (*1*)*, 25—Infant—Maintenance, Capital and income—Appointment of guardian by the Courts—Infants Ordinance, 1916, s. 21.*

In Chambers.

Application under the provisions of the Administration Ordinance, 1887, by the Public Trustee as guardian of the property of the infant children of the late David Young, for directions, and for the appointment of a trustee.

All the necessary facts set out in the petition sufficiently appear from the judgment below,

B. F. King, for the petitioner.

DALTON, Acting C.J.: This is an application under the provisions of the Administration Ordinance by the Public Trustee as guardian of the property of the minors, for directions and for the appointment of a trustee.

David Young died in this colony leaving seven minor children, leaving all his property to his children. As executor and guardian he appointed Matthew French and two others with directions to them to apply the income from his estate to the use and benefit of his children. The property was to be divided amongst his children at the date the youngest obtained his majority, the share of anyone dying before attaining twenty-one years of age to accrue to the survivor or survivors. Of the executors and guardians one renounced the appointment, and the second was relieved by the court. On September 30th, 1912, the Public Trustee was appointed co-guardian along with the remaining guardian Matthew French. In 1913 certain directions were given by the court (*a*) in respect of the construction and meaning of certain parts of the will of the testator Young. On June 1st, 1920, Matthew French died leaving a will, and appointing his wife Sarah French his sole executrix. He had had the power of substitution under the will of David Young in respect of the offices of executor and guardian, but had made no appointment during his life-time. Finally the petition set out that Sarah French had left the colony

(a) Reported at 1914 L.R.B.G. 8.

and did not intend to return, although she had left an attorney in the colony, that owing to the death of Matthew French there is at present no guardian of the persons of the minors, and lastly that the Public Trustee had never been appointed executor and trustee of the estate of David Young.

The Public Trustee, as sole remaining guardian, now asks for directions on the following points:—

1. Is Sarah French as executrix of Matthew French to be deemed a trustee under the last will and testament of David Young?
2. Can the petitioner repay to revenue account of the estate out of realisation of the capital the sum of $372 due by one of the minors Margaret Young, now of age she being indebted to the revenue account in that sum for moneys advanced to her from time to time by the executor or guardian? Can further advances be made to her as occasion arises out of the capital of the estate, such advances to be charged to and deducted from her share of the capital when the estate is finally settled?
3. Can the petitioner repay to revenue account out of realisation of capital the sum of $1,127.74 expended on behalf of the minor (now of age) Malcolm Young, and deduct the same from his share of the capital when the estate is finally divided?
4. Whether three minors, boys, at present at school in England should remain there to complete their education and, if so, how deficits in connection with their education and maintenance are to be paid. The petition further prayed that the following orders be made.
5. An order appointing the Public Trustee trustee under the will of David Young.
6. Such order respecting the guardianship of the persons of the remaining minors as might seem fit:
7. An order that the costs of the petition be paid out of the estate of David Young.

The first point raised on this petition is whether or not Sarah French, as the executrix of Matthew French who was the executor of David Young, is a trustee under the will of David Young.

David Young died in March, 1911. By his will he bequeathed all his property to his minor children and he appointed them his universal heirs. The will then proceeds "I nominate constitute and appoint Matthew French . . . to be the joint and several executors of this my will and guardians of my said minor children granting unto them and each of them the powers in each capacity of assumption substitution and surrogation . . . ."

In addition he directed that the executors "use the income" from his estate to the use and benefit of his children until the youngest came of age. The other executors named were either relieved by the court, or renounced, leaving Matthew French sole executor and guardian.

The first subject for remark is that there was no appointment of trustee as we know it now, nor was one possible. It is true that during the time Roman-Dutch law was in force here the term was frequently in use. No doubt many of the duties of the executor as administrator were of a fiduciary nature. One may go further and find cases where persons to whom an estate is bequeathed vested with the legal ownership, although the will makes it clear that they have no beneficial interest. But in this case, although the term 'trustee' has been frequently made use of during the hearing before me, it is strictly speaking incorrectly used. Matthew French was appointed executor. As such he has to do certain acts at once, and thereafter he has to administer the estate until the youngest minor comes of age, by receiving and paying over the income for their use and benefit in accordance with the terms of the will. This is no justification for the inference that the English law of trusts has, either here, prior to January 1st, 1917, or anywhere else where Roman-Dutch law is the common law, in anyway been grafted on to Roman-Dutch law, *See McDonald's Trustees* v. *Estate Kemp,* 1914, C.P.D. 1084, and 1915, A.D. 491. His position then is clear.

On January1st, 1917, Roman-Dutch law was replaced, under the provisions of the Civil Law of British Guiana Ordinance, 1916, by English law. Amongst other things that ordinance incorporated the Trustee Act, 1893 (56 and 57 Vict c. 53) into the law of this colony so far as it was applicable. It, however, saves all existing rights, and in so far as Matthew French had any rights under the will appointing him executor they would still be governed by Roman-Dutch law. In addition, he may have acquired, after January 1st, 1917, additional rights and duties under the Trustee Act in so far as that act applies to an executor and administrator. On June 1st, 1920, he died leaving a will appointing his wife his executrix. Her rights and duties as executrix must presumably be interpreted by the application of English law. If, however, her testator, as executor of his testator, has certain rights to be decided or interpreted by Roman-Dutch law, she as derivative executrix of his testator (if she is so) by English law may require to apply both systems of law, both Roman-Dutch and English law, in respect of her duties under the respective wills. The position is involved and does not encourage much enquiry. Fortunately, in respect of the question raised here, whichever law is applicable, I have come to the conclusion that she is not a trustee (to use the

term in the petition for directions) under the will of David Young.

Applying to Roman-Dutch law it is clear that the appointment of Matthew French as executor is a personal one. His rights and duties as such executor do not devolve on his executrix. It is true he had given him the then existing powers of substitution; assumption and surrogation but he never exercised any one of them during his life-time. He certainly has not exercised any one of them in his will. The appointment of his wife as his executrix is a personal appointment applying to his own estate only and is no exercise of the power of surrogation vested in him which must, of course, be in definite and in explicit terms. The power of delegation in respect of David Young's estate has therefore remained unexercised, and on the death of his executor no surviving executor remains. That estate is unrepresented. The executrix of Matthew French is therefore not administrator of, and has no fiduciary interests in, the estate of David Young.

Turning to English law, assuming that it applies. I find she is not a trustee for the following reason. The legal personal representative is of course not, *ipso facto,* a trustee. Further a sole surviving trustee of a will cannot appoint by his will, in continuation to himself, a trustee or trustees of the will of the original testator (*in re Parker's trusts,* 1894. 1 Ch. 707). The matter had been fully discussed in many cases, some of which have been referred to. The test to be applied is clearly laid down in the case of *Crunden* & *Meux's contract* (1909. 1 Ch. 690), which is probably the leading case. It is this: in the personal representative of Matthew French pointed out in the instrument creating his fiduciary position, that is, the will of David Young, as being, in the contemplation of David Young when he made his will, a person who is to continue the trust confided to Matthew French. Perusal and consideration of the will leaves me in no doubt that the answer is, No.

In reply to the first point I therefore direct that Sarah French as executrix of Matthew French is not to be deemed a trustee under the last will and testament of David Young.

In respect of the second point for directions: —

Margaret Young is now of age, but, from the medical certificates produced, is in a very bad state of health and considerable sums have been and are being now paid for medical attendance. As she has attained twenty-one years, her interest under the will has vested in her, Her share of the income of the estate amounts to $25 per month, but as a result of continual bad health that sum was insufficient to defray expenses incurred on her behalf. By the will the executors are directed to pay special attention to any of the children "who may be in bad health whether they are

under or over the age of twenty-one years." She is now indebted to the revenue account in the sum of $372 as a result of that expenditure. It should be remarked that the executors have no express power in the will to realise any of the capital for education or maintenance, nor has the court been approached to authorise any such expenditure. The executor was therefore exceeding his powers in incurring this debt, and I am now asked to regularise the expenditure. Having in view the medical certificates, and also the express direction in the will with respect to any children that might be in bad health, I am satisfied that this expenditure would have been sanctioned by the court if it had been approached before it was incurred. I therefore direct that the sum be repaid to revenue account out of realisation of the capital, to be charged to and deducted from her share of the capital when the estate is finally divided. It must be understood, however, that in future expenditure not authorised and which the trustee wishes to incur, must first of all be approved of by the court, if the trustee or guardian wishes to protect himself from being called on to refund it. As regards further advances, in view of the condition of the daughter, further necessary advances, for medical attendance or maintenance in hospital or convalescent home to be paid out of the capital of the estate and deducted from her share of the capital, are authorised up to a sum of $500.

In respect of (3):—

The expenditure of the sum of $1,127.74 on behalf of the minor Malcolm Young was authorised by order of Rayner, C.J., on April 29th, 1913. This expenditure was in respect of a piece of land in the Barima bequeathed to this minor. The executors were directed in their discretion to apply money from the estate in the upkeep of this piece of land "but such moneys and all moneys hitherto spent on the said land are to be entered to a suspense account to be kept open till the eldest son comes of age, when the amount must be paid off or further directions obtained from the court." This minor, who was the eldest son, came of age, I am informed, in 1916. Nothing has however been done in respect of that suspense account until now. The trustee should properly have taken action in the matter at an earlier date. I now direct that the suspense account be closed, and the amount be repaid to revenue account by realisation of the capital and that the sum be deducted from Malcolm Young's share of the capital when the estate is finally divided.

In respect of (4.):—

These three boys are at school in England. Their share of the income of the estate amounts to $25 per month each. The fees for board and tuition at the school amounts to $25 each. During the holidays the cost of board and lodging amounts to $26.40 per month each, whilst clothing and other necessaries are additional.

The elder of the three is sixteen years of age, and the schoolmaster advises that he be taken from the school and put to work. Having read the correspondence I can only confirm the recommendation and so direct work to be found, if possible, on the lines suggested by the master. As regards the remaining two, they should continue at the school for the present. In the course of the hearing it appearing that there is a considerable sum, over $500, standing to the credit of each of these two minors, it does not appear necessary to make any order as is prayed. Their education, and maintenance during the holidays, can be met from the income and from the revenue at present standing to the credit of each minor. Whether or not I should be justified in directing realisation of the capital for payment of such expenses in cases where the parties are under twenty-one years of age, and the interest has not yet vested in them, I am therefore not called upon to decide.

I now come to point (5), the request for an order appointing the Public Trustee trustee under the will of David Young. As in the case of *In re Jardine* (1919. L.R.B.G. 116) decided by Major, C.J., so here acts remain to be performed by the executor in the capacity of constructive trustee, although not appointed (and properly so as I have stated above) by that name in the, will. The executor is dead and there is no person surviving to carry on his duties. But by section 10 (1) of the Trustee Act, 1893, the power of appointing a new trustee devolves in such a case upon the personal representatives of the last surviving trustee, This includes the personal representative of a sole trustee (*In re Shafto's Trusts.* 29 Ch. D. 247.) He or she may, by writing, appoint another person or other persons to be a trustee or trustees in place of the trustee dead. Mrs. French, the personal representative of her deceased husband, has made no such appointment and no proper reason has been given to explain why not. All I am told is that she has left the colony (although she has appointed an attorney here) and is not likely to return. The court is therefore asked to appoint a trustee under the provisions of section 25 of the act. It is clear from several authorities however that the power conferred by section 25 ought not to be resorted to when the power conferred by section 10 can be made use of. There must be very strong reason for applying to the court and for asking the court to exercise its authority, when it is clear an appointment can be made under the provisions of section 10. No sufficient reason has been given for the failure to act under the last named section. It is quite possible, as the matter now stands, that the personal representative might raised an objection to the court making any appointment in which case there would be no jurisdiction to appoint (*Re Higginbottom.* 1892. 3 Ch. 132). Even

were that not so no appointment will be made by the court on the application now before me.

In respect of point (6) the authority of the court to make the order sought is contained presumably in section 21 of the Infants Ordinance, 1916. As the upper guardian of minors such an order as is sought could be made; that power is retained in the law of the colony. On the information before me however, no order can be made. It is possible that Mrs. French is the most suitable person to be appointed. Until I am satisfied whether that is so or not, no other person will be appointed. No further delay should be incurred in communicating with her.

Further application must be made on the matters not finally settled by this decision. The costs of this application may be paid out of the estate.

PETTY DEBT COURT, GEORGETOWN.

ALLEN *v*. CANZIUS.

1920. AUGUST 11, 25; SEPTEMBER 8. BEFORE DOUGLASS, J. (Acting.)

False imprisonment—Larceny—Arrest by police on information supplied by defendant —Charge signed by defendant—Liability.

Claim by the plaintiff Frederick James Allen for the sum of $100 against the defendant Canzius as damages for giving him (plaintiff) into the custody of a policeman upon a false charge of having stolen the sum of $11. The plaintiff was taken into custody, bailed, charged before the magistrate with the larceny of $11, and was discharged by him.

E. G. Woolford, for the plaintiff.

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

DOUGLASS, Acting J.: The plaintiff is claiming $100 damages for false imprisonment It appears from the evidence that on the 19th June, the plaintiff, a tailor working with the firm of Bettencourt's, was asked by the defendant, another employee of the firm, whether he had picked up an envelope, which he had apparently dropped by accident, and which was inscribed with his name and the amount it contained, $11, the plaintiff answered "No"; the defendant states he asked him because of his suspicious movements in the yard. The defendant then complained to the secre-

tary of the firm and went to the station and brought' back with him P.C. Moore. After enquiries the police constable told the plaintiff the Sergt.-Major had sent for him, he was then taken to the station, the defendant accompanying—and searched, and all went back to the house with a corporal when another hunt was made for the missing envelope. This time it was found but empty. The corporal said to the plaintiff, "You'll have to come back again," and he was again searched at the station, detained by the police and a charge made out against him. The defendant states "I signed it by request." The most the plaintiff says implicating the defendant is that P.C. Moore told him defendant charged him with stealing $11 from him. As a good deal of unnecessary evidence was brought in it would be well to differentiate between false imprisonment and malicious prosecution. Stephens on "*Malicious Prosecution*" puts it clearly: False imprisonment, restraining the personal liberty of another person, is *prima facie* a wrongful act, it requires to be excused in order to show that it is not wrongful. Malicious prosecution is setting the criminal law in motion and *prima facie* a thing which any person has a right to do, therefore the plaintiff has to show that in his particular instance it was done wrongfully.

Without discussing the other cases cited by learned counsel, it appears to me that the facts are very similar to those in the case of *Bhodai v. Demerara Railway Company and ors.* (1918, L.R.B.G. 44) in which Hill, J., makes reference to the case of *Grinham* v. *Willey* (4 H. and N. 496.)

The question whether the defendant was justified or not in charging the plaintiff with the theft of his money does not arise, inasmuch as the offence was not a felony, and he would have had no right to have the plaintiff arrested on a suspicion of misdemeanour so that he could not "justify" had he caused his arrest.

There is not a word disclosed on the evidence showing that the defendant either ordered the arrest of the plaintiff, or gave him into custody, there is no doubt that the steps he took were *bona fide* taken under the impression that the plaintiff had stolen his money, and he left it to the police to investigate, and take what course they decided on. In *Sewell* v. *National Telephone Co., Ltd.* (1907 1K.B.557) it is said "The act"—i.e., signing the charge sheet—"was merely to provide a prosecutor, and that does not let in liability to an action for false imprisonment unless the person who takes that step has taken on himself the responsibility of directing the imprisonment."

I am not satisfied from the evidence that the defendant directly caused the imprisonment of the plaintiff. I accordingly find for the defendant with costs.

HUMPHREY & CO., LTD., *ex parte.*

HUMPHREY & CO., LTD., *ex parte.*

1920. SEPTEMBER 8. BEFORE DALTON, ACTING C.J.

Authorisation de facto—Practice—Interdict—Roman-Dutch law—Civil Law of British Guiana Ordinance, 1916.

The right to apply for an authorisation de facto under Roman-Dutch law has been abrogated by the Civil Law of British Guiana Ordinance, 1916.

In Chambers.

Petition by Humphrey & Co., Ltd., for an order directing the marshal of the Court to use if necessary the strong hand and by force eject one Joshua Daniels, and all other persons in possession, from the west half of lot 150 in the village of Alexanderville, Plantation Kitty. The petition set out that the petitioning Company had bought the property in question at a sale by the Court, and had obtained title for the property, but had found Daniels in possession thereof. The petitioners therefore sought possession from the Court.

E. A. W. Sampson, solicitor, for the petitioner.

DALTON, Acting C.J.: This is a petition for an order to eject Joshua Daniels and all other persons in possession of the west half of lot 150 in Kitty Village, and for the marshal to use if necessary "the strong hand," the petition setting out that the petitioner had bought the property in question at execution sale and obtained title therefor from the officer of the court, only to find the said Daniels in possession.

Although a remedy seldom made use of in the last twenty years, and only twice within the last ten years, the procedure by petition in these cases has been fully sanctioned by the court. The practice following on the presentation of the petition has, however, not been uniform. The general rule in the cases produced to me has been that the order has apparently been made as of course. This is directly contrary to the procedure laid down by Van der Linden (*Judicial Practice*, p. 290). There, following a translation obtained for me by the Registrar, it is laid down that the court never grants an authorisation *de facto* without hearing the party to be affected or his interests. This local practice was also not followed by Bovell, C.J., *in re petition Sewtohul* (No. 17,137 of December 7th, 1910). In that matter he made an order of reference to the party to be proceeded against, and after hearing, an order for delivery followed, to be enforced if necessary by writ of possession under Order XXXVI. r. 88. This latter precedent commends itself to me as setting out the correct procedure, as opposed to the more general practice to which I have referred, should the case be one in which the remedy may be properly sought.

The petition is for an *auctorisatie de facto,* as Van der Linden terms it, "a summary interdict in a pressing matter" (*Institutes of Holland,* p. 297, Juta's translation). "When the hostile act committed is of a nature that the injured party is not benefited by preventing the repetition of it in the future, but that it ought immediately to be settled, we may, provided our right is incontrovertible, request authorisation *de facto,* on a. marshal of the court to settle it without form of proceeding." (*Institutes of Holland,* Van Braam's translation, Vol. II. p. 251) This is amplified by the same author in his *Judicial Practice* (II. XIX. 3.). The authorisation is one of the penal mandaments or interdicts under Roman-Dutch law. The remedy as now sought is based entirely on that law, and the procedure followed by the petitioner is that laid down to be observed when seeking this particular remedy. The petition is the first of its kind to be presented to the court since the passing of the Civil Law of British Guiana Ordinance, 1916. With the exceptions which are set out in that ordinance the old common law, Roman-Dutch law, has been abrogated. Unless it can be shown to be excepted from the general repeal, and to be retained as part of our present law, this remedy must then come within the ordinance, Nothing has been put before me to show me that there is, nor can I find anything in the ordinance retaining the old law in these matters. It does not come under the law in respect of 'parate execution.' The right to proceed in this case had not come into existence at the time the ordinance (January 1st, 1917) became law, hence it does not come within the saving clause dealing with "existing rights."

I must therefore come to the conclusion that the right which petitioner seeks to exercise has been abrogated by the Civil Law Ordinance and that he is not therefore entitled to proceed as he has done. It is not therefore necessary for me to proceed further and make any order of reference, or ascertain whether the remedy is properly sought under the circumstances set out in the petition.

The petition must be dismissed.

ROOPSINGH *v.* MUNGAL.

PETTY DEBT COURT, GEORGETOWN.

ROOPSINGH *v.* MUNGAL.

[195—5—1920.]

1920 AUGUST 18, 25; SEPTEMBER 9. BEFORE DOUGLASS, Acting J.

Asiatic immigrant—Male and female—Discontinuance of cohabitation—Division of property—Immigration Ordinance, 1891, s. 156.

On a division of property under the Immigration ordinance, 1891, the woman's household and domestic duties will be valued as a contribution to the joint property of the cohabitation or marriage.

Semble that in proceedings for division of property under the ordinance, the defence that the defendant is not an 'immigrant' within the meaning of the Ordinance must be specifically raised.

Claim by the plaintiff, a female Asiatic immigrant, for a division of property under the provisions of section 156, Immigration Ordinance, 1891.

The plaint set out that the parties were immigrants and had cohabited for a period of three years, during which time they had accumulated, by their joint earnings and labour, certain property particulars of which were set out.

E. F. Fredericks, for the plaintiff.

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

DOUGLASS, Acting J.: This is the usual application by an immigrant under section 158 of Ordinance 18 of 1891 for division of the property of herself and the defendant with whom she lived as wife from January, 1917, to April, 1920.

The plaintiff gave formal proof of her status as an immigrant under the ordinance, but an objection was taken after the whole case was closed that no proof had been given that the defendant was also an immigrant; it must, however, be remembered that the matter is taken before the civil side of the Magistrate's Court (*Massedun* v. *Khodobaccus* 10.8. 94), and no objection was taken to the jurisdiction by way of defence, Moreover the defendant gave his evidence and did not deny the statement of the plaintiff that he was an immigrant, and he said he was preparing to return to India, which he also referred to as 'home.' Unless the defence has been specifically raised it has not been usual to require strict proof, and in the present instance I consider there is ample evidence to give the Court jurisdiction. The question was raised in a late case as to the extent of the property which ought to be included in a division made under section 156, and as it is again raised in this case I will state briefly the principle on which I have endeavoured to fairly apportion the properties in the numerous cases I had in

the Berbice judicial district. The only decision I have been able to find on the subject is that of *Guyadeen* v. *Jairum* (A.J. October 10th, 1907) which, however, was not brought under the Immigration Ordinance, being an appeal on an interpleader claim; in the course of this case the learned Chief Justice declared that he was of opinion that section 156 of the Immigration Ordinance did not create a community of goods between a male and female immigrant, and goes on to say—"the division of property of such persons . . . refers only to such property as has been acquired by their joint earnings or to the acquisition of which they have both contributed." I entirely agree with this *dictum*, only insisting that the contributions may be not only of money and labour, but also that the woman's household and domestic duties must be properly valued as a contribution. This is so obviously the only fair and equitable way of repaying to the woman —for I have never yet had a case where the man is a claimant for a division—the time she has expended on the man which otherwise might have been spent in earning money for herself that it hardly needs explanation, but the wording of the section also supports this view (that I have always held) putting the magistrate in the position rather of an arbitrator than of a judge, for section 156 in its last paragraph declares he is "to make such order for the division of the property as may be *just;*" the meaning of this is still more clear on a reference to the original rendering (see section 7 of Ordinance No. 2 of 1887) which reads "to make such order dividing such property as the circumstances and the justice of the case may require." This to my mind gives a very full discretion to the magistrate which he must exercise judicially.

[After considering the property dealt with in detail the learned judge continued.] With regard to the house they lived in, I have no doubt that the plaintiff contributed in many ways to its purchase and upkeep, and the defendant has now deprived her of it by taking another 'wife.' It cost $85 two years ago and with its improvements and the increased value of house property should now be worth $100 at least. I assess the total share of the plaintiff in the property set out in the particulars as worth $66.44, and order payment of that amount with $3.08 costs and $7 fee to counsel.

FRANKLIN *v.* FLORIS.

FRANKLIN *v.* FLORIS.

[265 OF 1320.]

1920. SEPTEMBER 6, 11. BEFORE DALTON, Acting C.J.

Fortune-telling—Evidence of acts not mentioned in charge—Systematic course of conduct—Police trap—Corroboration.

F. was charged with fortune-telling, contrary to the provisions of s. 6 of Ordinance 26 of 1918. The charge was as follows, "the said F. for personal gain unlawfully did profess to one John Dowridge to tell him his fortune." After Dowridge had given evidence one Garraway was called to prove that F. had also told his fortune. On objection taken to Garraway's evidence, *held* that it was admissible, the two men having gone to F. together, whilst it shows also a systematic course of conduct on the part of F. in telling fortunes, as opposed to the defence that she was only a phrenologist;

Held further that in law corroboration of the evidence of Dowridge was not necessary, although he was sent to F, by the police.

Appeal from a decision of the stipendiary magistrate (Mr. W. J. Gilchrist) of the Georgetown judicial district. The appellant Floris was convicted on a charge of fortune-telling. From that conviction she appealed. The reasons of appeal are sufficiently set out in the judgment below.

E. G. Woolford, K.C., for the plaintiff.

H. C. F. Cox, Assistant to Attorney General, for the respondent.

DALTON, Acting C.J.: The appellant has been convicted on a charge of 'fortune-telling,' or in the words of the ordinance (No. 26 of 1918, s. 6) "for personal gain, pretending or professing to tell fortunes." Only one person name Dowridge is mentioned in the charge, as having had his fortune told. The reasons of appeal are:

(1.) The admission of illegal evidence *i.e.,* the evidence of the witness Garraway as to his experience with the defendant and what she told him.

(2.) Want of corroboration of the witness Dowridge.

(3.) Failure of the complainant to give any evidence, and that the evidence established that he had aided and abetted the witnesses to induce defendant to commit an offence.

(4.) No proof that defendant pretended to tell fortunes.

The evidence discloses that the complainant, a sergeant-major of police, who himself did not give evidence, gave two men, the witnesses Dowridge and Garraway, one shilling each to go to defendant to have their fortunes told. It is quite clear from the evidence of Dowridge that her apartments were full of people and that others were waiting to go in. When he eventually got in, if he is to believed, she professed to tell him of some future events which were to happen to him in his life, for which he paid her the sum

of one shilling. The second witness was a man named Garraway, to whose evidence objection was taken on the ground that anything that passed between him and defendant was irrelevant to the charge of telling Dowridge's fortune. Where a person is charged with committing an offence, the fact that he had committed an offence of the same sort on another occasion is of course as a rule irrelevant. Numerous authorities have been cited to me. The principle is that the prosecution is not allowed to prove that a prisoner has committed the offence with which he is charged by showing that he is in the habit of committing these offences, for that is not material to the issue before the court. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible not because it proves that he has committed another offence, but because it is relevant to the issue then before the court. If for instance the evidence shows a systematic course of swindling by the same method, it is, relevant and therefore admissible. (*Rex* v. *Fisher,* 1910 1 K.B. 149) Garraway's evidence is to the effect that he saw Dowridge at defendant's house in the day in question and went inside before him. He also had received one shilling from the complainant. As regards the future all she foretold for him was a long life and the prospect that he would be 'a man of money.' This transaction immediately preceded the one mentioned in the charge, and having regard to the charge and also to the defence that defendant was only a phrenologist, is it seems to me clearly relevant to the issue as to whether defendant was carrying on a fortune-telling business for gain and did profess to tell Dowridge's fortune. The evidence was properly admitted by the magistrate. It is not necessary to consider his reasons for such admission having come to this conclusion, as they do not, as Mr. Cox agrees, in anyway support his conclusion. Possibly there is some error in copying the record.

The question of corroboration therefore does not arise. Even however if Garraway's evidence was not properly admissible corroboration is not essential, though it may be, in such a case, desirable. A trap here was set by the police to catch the defendant. The evidence of a police spy is not that of an accomplice, nor is corroboration necessary in law. (*R.* v. *Bickley* 2 Cr. App. R. 53). No doubt, however, one approaches such cases with greater caution than usual from the very circumstances. Traps set by the police are not to be encouraged, if the prevention and detection of crime can be achieved by straightforward methods, and the law looks with disfavour on anything in the nature of an 'agent provocateur' or trap.

The evidence of Dowridge himself was sufficient to support the conviction. It is confirmed by that of the witness Garraway.

The magistrate says he accepts their evidence. The failure of complainant to give evidence does not in any way invalidate the conviction, although as I remarked during the hearing, having regard to the nature of the case and the part he played in the preliminaries, it would have been far better if complainant had gone into the witness-box. The evidence does not disclose that 'he aided and abetted the witnesses to induce the defendant to commit an offence,' but that he made use of them to prove that defendant was carrying on a business of fortune-telling. The conviction is affirmed and the appeal dismissed with costs.

Appeal dismissed.

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

FRANKLIN *v.* GIDDINGS.

(157 OF 1920.)

1920. SEPTEMBER 3, 11. BEFORE DALTON, ACTING C.J.

Criminal law—Unlawful possession of property reasonably suspected to have been stolen—Statement made in presence of prisoner—Admissibility of statement—Acceptance of statement by prisoner—Two persons charged together—discharge of one at close of prosecution where the other elects to give evidence.

An incriminating statement made in the presence and hearing of an accused person, even on an occasion which would reasonably be expected to call for some explanation from him, is not evidence against him on his trial of the facts therein stated, save in so far as he has accepted the statement as his own. His acceptance may be gathered from word or conduct, action or demeanour. A mere denial by him of its truth does not in law render it inadmissible against him, but such a statement should not be tendered in evidence until there is a foundation for a reasonable inference that the accused has accepted it or part of it.

Where two persons are charged jointly with an offence, one of the two cannot claim as of right to be discharged on the ground that there is no evidence against him, before the other gives evidence if he elects to do so.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist). Two men Giddings and Valoo were charged together with the possession of certain motor accessories reasonably suspected to have been stolen, contrary to the provisions of section 96, Ord. 17 of 1893, as amended by Ord. 12 of 1915. Valoo was acquitted and Giddings convicted. From that conviction he appealed. The reasons of appeal are sufficiently set out in the judgment below.

J. A. Luckhoo, for the appellant,

H. C. F. Cox, Assistant to Attorney General, for the respondent.

DALTON, Acting C.J.—The appellant Giddings was charged together with a second defendant named Valoo with having in their possession certain motor accessories reasonably suspected

of having been stolen. Valoo was acquitted and the appellant was convicted. From that conviction he appeals. The reasons of appeal may be summarised under two heads.

(1) that there was no evidence of reasonable suspicion that the goods were stolen or unlawfully obtained.

(2) that there was no evidence before the magistrate that appellant was ever in possession of the goods alleged to have been stolen:—

I agree with the magistrate's finding that there was sufficient evidence to sustain a reasonable suspicion that the goods in question were stolen. As in the case of *Edun* v. *Anderson* (A.J. Sept. 14th 1909) the articles found on the premises were not of the description of goods kept in or sold from a barber's shop. That fact taken with the evidence that similar articles were missing from Bookers' garage, the issue of a search warrant, and the evidence of the two constables is ample to support the decision on this point.

The question of possession by the appellant remains. The evidence led by the prosecution upon which respondent's counsel argued the magistrate was justified in finding possession in the appellant are

(a) the statement of Valoo, the second accused, in appellant's presence that he, appellant, had brought the goods to the shop where the police found them; and

(b) the evidence of the witness Manning.

The question of the admission as evidence of accusations made in the presence of the accused is not one which is anyway in doubt. It has been fully dealt with by the House of Lords in the case *R.* v. *Christie.* (10 Cr. App. R. 141) cited at the hearing. It is a rule of law that an incriminating statement made in the presence and hearing of the defendant, even on an occasion which would reasonably be expected to call for some explanation from him, is not evidence against him on his trial of the facts therein stated, save in so far as he has accepted the statement. His acceptance may be gathered from word or conduct, action or demeanour; it was the function here (where the magistrate performs the duty of a jury) of the magistrate to say whether the statement of Valoo incriminating appellant was accepted in any way by the appellant so as in effect to make it his own. The evidence shows that as soon as the articles were found in Valoo's shop by the police Valoo informed them that Giddings had left them there. The police took him to Giddings and he there repeated the statement. Giddings at once denied that he knew anything about them. A mere denial by him of the truth of Valoo's statement does not in law render that statement inadmissible against him. There is however, in practice, as laid down in *Rex*

v. *Christie,* a rule of prudence and discretion that such a statement should not be tendered until there is a foundation for a reasonable inference that the accused accepted it or part of it. As stated by Archbold the evidential value of the behaviour of an accused man when he denies the charge is very small either for or against him, and the magistrate should in most cases rightly exercise his discretion and prevent such evidence being given where it has little or no evidential value. In the case of a jury when the statement has been given in evidence the judge would caution the jury as to its true effect. As regards this case having regard to the position of the two men, the denial by appellant, and in the absence of any foundation for a reasonable inference that the appellant accepted it or any part of it, I must come to the conclusion that the statement of Valoo was of no evidential value, and it cannot be accepted as in any way proving that the appellant Giddings had possession of the goods.

But, it is argued, the witness Manning proved that possession, This witness, called after the constables had given evidence, stated he worked in Valoo's shop, and that he had seen Giddings leave a brown paper parcel there during the week before the trial. He never saw the contents, but stated that it was the custom for people to leave parcels there and call for them. He denied in court that Giddings had called back the same day and taken the parcel away but he admitted he had made a previous statement to the police (written, and signed by him) in which he stated Giddings had returned "and after he left I did not see the parcel." In that statement he described the parcel as 4 inches long and 3 inches wide, but he said he could not remember the colour of the paper. In respect of his evidence the magistrate says "Manning did not appear to me to be possessed of much intelligence, 1 think his memory is *bona fide* at fault. I accept his testimony that Giddings gave Valoo a parcel." Although, having regard to the proved untruthfulness of the witness on several important points I should have had some difficulty in accepting any statement by him unless it was corroborated, all the magistrate found on his evidence was that Giddings left a parcel at Valoo's shop. What evidence in there to show that parcel contained the property that was suspected to have been stolen? He admits that several people left parcels at the shop. The constables say they found the articles mentioned in the charge in five parcels and in five different places in the shop and the magistrate accepts their evidence on that point. It is quite obvious that the stolen property could not be contained in one parcel of the dimensions mentioned by Manning. There is, so far is the evidence led for the prosecution is concerned not a tittle of evidence to show that the parcel which the magistrate

found Giddings left in the shop, was the parcel or one of the parcels found by the police.

At that stage appellant's solicitor therefore asked that he be discharged, but the magistrate declined to grant it, holding that Valoo was called upon to account for his possession. Whilst the magistrate's decision was right, it seems to me that his reason therefor was wrong. As Mr. Cox admitted, for the respondent, that ruling is not supported by the charge as set out on the record. The two accused men were charged jointly, and it is quite clear that no. proceedings were taken or being taken under sub-section (2) of section 96 of the ordinance (No. 17 of 1893 as amended by No. 12 of 1915).

The magistrate's decision however was right for this reason, that where two persons are charged jointly, one of the two cannot claim as of right to be discharged before the other gives evidence, if the other elects to give evidence, (*Rex.* v. *Martins* 17 Cox. C.C, 36, followed by Bovell, C.J. in *Persaud* v. *Callender* A.J. May, 27th 1902). If therefore Valoo elected to give evidence appellant was not entitled at that stage to be discharged. He elected to give evidence and as a result sought to incriminate his fellow prisoner, the appellant. Here one may well recall the words of Chalmers, C. J. (*Marques* v. *Francis* June 15th, 1888) quoted with approval by Bovell, C. J. in *Persaud* v. *Callender*). Although he held that the magistrate's decision not to discharge the appellant at the close of the case for the prosecution was not wrong, yet "to allow a prosecutor's defective evidence to be eked out by what defendant may say in defence is contrary to the practice of the criminal law." The evidence of Valoo differed on the most material points from that of the two police constables, and if he was to be believed, all their evidence in respect of the finding of the articles in five parcels and in different places was untrue and worthless. The magistrate says he is inclined to accept the evidence of the constables. Taking that inclination as a finding on his part, then it is clear that the defendant Valoo was not worthy of any credence, and in no way assists the case against the co-defendant, the appellant. Valoo was acquitted and appellant convicted. In the absence of any proof that he was ever in possession of the property mentioned in the charge that conviction cannot stand. The appeal will therefore be allowed and the conviction quashed.

Appeal allowed. Conviction quashed.

In re ROBERTSON.

In re ROBERTSON,

ROBERTSON *v.* YARD.

[187 OF 1920]

1920. SEPTEMBER 15. BEFORE DALTON, ACTG. C.J.

Immovable property—Sale at execution—Conveyance—Petition to set aside sale, and refuse title—Abrogation of Roman Dutch Law—Procedure—Practice.

Petition.

The petitioner sought to set aside a sale by the court of a village property at Bagotville. The allegations on which the petition was based are sufficiently set out in the decision below.

McL. Ogle, for the petitioner.

DALTON, ACTG. C J.—The petition sets out that the petitioner is the owner of a half lot of land, No. 127, at Bagotville on the west bank of the Demerara river; that one Yard entered into a fictitious suit against one Maxwell and obtained judgment therein; that Yard then levied on the petitioner's half lot of land to satisfy the judgment; and that at the sale by the Court in execution the property was purchased by Yard. It further appears that opposition proceedings were taken by the petitioner but, owing to errors for which she was not responsible, she states they were not proceeded with. She now applies to me by petition that transport be not granted to Yard, and that the sale be declared null and void.

This petition has been presented on the analogy of an antidotal petition in the case of letters of decree. That procedure is provided for in the Rules of Court, Part II, Order I. r. 1. and comes within the words "every petition in respect of every other matter and which under the common law of this colony . . . may be made or presented to the Chief Justice or the Supreme Court." Letters of decree have been abolished (s. 27. Deeds Registry Ordinance 1919), and the purchaser of property at judicial sales now obtains transfer from an officer of the court in the usual way under that ordinance. Petitions opposing the issue of letters of decree and for the cancellation of a sale fall under the old common aw, Roman Dutch law. (See Nathan, *Common Law.* Vol. IV. lpp. 2324-2326). It is true that throughout he speaks of 'applications' and not 'petitions,' but reference to some of the cases cited by him (e.g. *In re Pretorious,* 16 S.C. 324; *Ex parte Fourie,* 1902 T.S. 93; *In re Emms* 6 E.D.C. 204) shows that the application was made by petition, and in fact the terms 'petition' and 'petitioner' are, so far as concerns

this procedure, interchangeable with the terms 'application' and 'applicant.'

Against the procedure by petition in this colony there is the Full Court decision in *re Winter* (1896 L. R. B. G. 22). There it was ruled that a person seeking to oppose the granting of letters of decree to the purchaser of property at execution sale must proceed by action and not by petition. The practice however since that case has not conformed to the ruling therein although no reason has been suggested to me. A possible explanation may be that it was assumed that the common law right was done away with on the introduction of English Rules of Court in 1893, and that when those rules were replaced by the Rules of Court 1900, the common law right of proceeding by petition was revived. However that may be the Roman Dutch law has also likewise been abrogated. [Civil Law of British Guiana Ordinance, 1916, s. 3 (1): s. 3 (4) (c) as amended by the Deeds Registry Ordinance 1919; and s. (3) (4) (f).] In the present state of the law Mr. Ogle admits he can produce no authority for proceeding by petition to set aside the sale of a property and opposing transport. The procedure it seems to me is wrong. In the absence of such authority his remedy is by action (Rules of Court 1900 Order II. r. 1). The petition must therefore be dismissed.

BERNARD *v.* FERREIRA.

PETTY DEBT COURT, GEORGETOWN.

BERNARD *v.* FERREIRA.

[138—8—1920.]

1920. SEPT. 8,15. BEFORE DOUGLASS, ACTING J,

Landlord and tenant—Distress—Fraudulent removal of goods by tenant—Termination of tenancy—"Following warrant"—Small Tenement and Rent Recovery Ordinance, 1903, ss. 6, 7.

A landlord cannot follow and distrain his tenant's goods which have been fraudulently removed to prevent a distress for rent due, if at the time of the distress the tenant's interest in the demised premises has come to an end and he is no longer in possession.

The plaintiff was tenant to the defendant of a house. The tenancy terminated on July 5th, and plaintiff removed her goods on that day from the premises, and on the following day defendant received possession of the premises. Rent for the month of June was still owing. On July 29th, within thirty days of the removal, defendant followed the goods of plaintiff to the place of removal and there distrained them. In an action for wrongful distress:—

Held, that the plaintiff was entitled to judgment,

Claim by the plaintiff for the sum of $50, damages for an alleged illegal and wrongful levy.

All necessary facts are sufficiently set out in the judgment.

B. B. Marshall, for the plaintiff.

F. Dias, solicitor, for the defendant.

DOUGLASS, Acting J.: The plaintiff is claiming $50 damages from the defendant for an illegal and wrongful levy on her goods on the 29th July, 1920. It is not denied that the goods as set out were levied on, but the defendant maintains that the levy was legal for he was the landlord and the plaintiff his tenant and that he levied on the 21st July in respect of rent due for the month of June, 1920, and that the plaintiff having fraudulently and clandestinely removed her goods on the 6th July he took out what is known as a 'following warrant' on the 27th July. It can hardly be maintained on the facts as they appear in evidence that the plaintiff did not owe the rent for June, and she admits she removed her goods on the 5th July but openly and with the knowledge of the defendant (at that time her landlord), and she states she handed the key to his agent the same evening. The defendant admits he received the key on the 6th July; the whole gist of the plaintiff's case is contained in the fourth paragraph of the claim. "When the defendant obtained the warrant of distress on July 21st, 1920, plaintiff was not a tenant of defendant and was not on his premises as he well knew, and he obtained it by fraud."

As rent was undoubtedly due to the defendant from the plaintiff, to justify the course he took he has to prove (1) that the plaintiff was tenant of the room on lot 133, Carmichael Street, Georgetown, in respect of which the said rent was due to him as landlord, and if that

is proved. (2) that the defendant removed her goods clandestinely within thirty days before the warrant was issued.

Learned counsel for the plaintiff referred to ray decision in the unreported case of *Adams* v. *da Silva* (P.D. Court 10th Sept., 1919), as covering the points raised in this case, but the facts and the defence were quite different, the only similarity being that the claim is one for an illegal levy.

The power of distress was an incident to every rent service at common law, but the chattels distrained only remained in the hands of the landlord as a pledge until statute law enlarged his powers; and these powers are given by section 5 of the "Small Tenements and Rent Recovery Ordinance, 1903" to landlords in this colony when the tenant is in default of payment of rent seven days after it becomes due, and by sections 6 and 7 power is given to follow goods clandestinely removed within thirty days, and to break open place where goods are concealed; these last two sections are derived from sections 1, 2 and 7 of 11 Geo 2. c. 19. It is clear from the evidence that when the warrant was issued on 21st July the plaintiff was no longer tenant of the defendant, and that the defendant knew that the plaintiff's goods were not on his premises in spite of the affidavit of defendant's agent of the same date, but it is argued that the power to levy and to follow the goods removed remained with the defendant for the thirty days after the removal, and that for that period, the defendant continued to be landlord for the purposes of section 6.

The case of *Dibble* v. *Bowater & anr.* (1853. 22 L.J.Q.B. 396) referred to is useful in interpreting section 1 of 11 Geo. 2. c. 19, but does not assist materially a construction of our section 6, as the wording of the two sections is very different, but it goes to show that the object of the statute was to remove the difficulty at common law of taking a distress in any place except the demised premises, and that in a case where goods are fraudulently removed off those premises the very day the rent becomes due the section applied though a warrant of distress could not be (and was not) issued until the day after; but in that case it must be remarked the status of landlord and tenant was still existing at the time of the warrant issuing.

Gray v. *Stait & anr.* (11 Q.B.D. 668) however decided that a landlord cannot follow and distrain his tenant's goods which have been fraudulently removed to prevent a distress for rent due, if at the time of the distress the tenant's interest in the demised premises had come to an end, and he was no longer in possession. The test as to when the section applies appears to be, could the landlord have distrained if the goods had not been 'fraudulently' removed? If he could not the following warrant is clearly bad, if he could section 7 would apply. In the present case a distress could have issued up to the 6th July, but on that date the landlord resumed possession of his premises and the plaintiff was no longer his tenant. The distress issued on the 21st July was clearly illegal and cannot be justified under the ordinance. The question then of whether the goods were fraudulently removed or otherwise does not arise, and the case of

Opperman v. *Smith & anr*. (4 D. & R. 33) referred to by the learned solicitor for the defence need not be discussed.

There is no evidence of the value of the articles seized, but under the circumstances the damages claimed do not seem excessive. I therefore give judgment for plaintiff for $50 and $1.92 costs.

MAYOR AND TOWN COUNCIL OF NEW AMSTERDAM *v.* PIMENTO & ANR.

[20 OF 1920. BERBICE.]

1920. AUGUST 20; SEPTEMBER 17. BEFORE DOUGLASS. ACTING J.

Local government—Building regulations—Erection of new building—Deposit of plans —Permission of municipal council before erection—By-laws, New Amsterdam, 1918— New Amsterdam Town Council Ordinance, 1916. s. 76, as amended by Ordinance 8 of 1918, s. 2.—Ultra vires,

By section 76 of the New Amsterdam Town Council Ordinance, 1916 (as amended by Ordinance 8 of 1918), the Town Council is authorised to make by-laws, *inter alia*, regulating the number, dimensions, and general character and style of building to be erected on lots in different portions of the town. By virtue of that power the Town Council in 1918 made by-laws, the material clauses of which were as follow:

(2) Every builder intending or proposing to erect a new building or to make any alterations in or additions to or to execute any work in regard to any building . . . . . .
  (i) Shall give notice to the Council in writing of such intention or proposition.
  (ii) Shall specify in such notice the date on which he proposes to begin such process of erection, alteration or other work.
  (iii) Shall deposit with such notice an outline ground and elevation plan
  (iv) And shall furnish such other plans as the Town Superintendent shall require in writing.

(3) Every builder who shall bare made any proposal as aforesaid and in that regard shall have obtained the permission of the council who may withhold or refuse the same on terms of and for the reasons given in section 55 hereof,
  (i) Shall be bound at all times ...to afford the Town Superintendent free access to every part of the building or work . . . . .
  (ii) And shall within fourteen days after the completion of such erection give to the council notice in writing of such completion. . . . . .

(5) If any builder engaged in the erection or alteration or addition shall begin or do any work to the buildings.... in contravention of any of these by-laws, the Town Superintendent, when it is discovered that an offence has been committed, shall give to such builder....a notice in writing requiring such builder within seven days from the service of such notice to cause so much of such work as may have been begun or done in contravention of these by-laws to be removed, altered or pulled down as the case may be.

Held, that the by-laws contained no provision forbidding the erection of a new building without the approval or permission of the council.

Appeal from the stipendiary magistrate of the Berbice judicial district. The Town Council of New Amsterdam proceeded against the defendants, as the owner and builder respectively of a new building, for non-compliance with the provisions of By-laws made by the Mayor and Town Council of New Amsterdam under s. 2 of Ordinance 8 of 1918 *(a)*. The magistrate dismissed the complaint on the ground that there was no provision under the bylaws which made it an offence for a person to commence building before obtaining the permission of the Council. He further held

(a) Published in the Official Gazette, October 26th, 1918, p. 206.

that, no offence having been committed, the notice of the Town Superintendent to pull down the building was *ultra vires* and could not be enforced. From this decision the Town Council appealed. The reasons of appeal and all other necessary facts fully appear from the judgment.

J. A. Abbensetts, for the appellants, the Town Council.

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

DOUGLASS, Acting J.: This is an appeal from the decision of Mr. C. H. E. Legge, the senior magistrate of the Berbice judicial district, in an action brought by the Town Council of New Amsterdam against the defendants for an order to compel them to comply with a notice dated and served on them the 9th April, 1920, requiring them to pull down a new building at mud lot 15, Strand, New Amsterdam, or to permit the plaintiff to pull down the said new buildings. The facts of the case are more simple than the interpretation of the by-laws upon which the Court's decision must depend. Mr. Pimento is the proprietor of the said mud-lot and Mr. Barrington, a builder and contractor employed by him to erect a new building on the lot. Shortly before the 8th March, 1920, a notice of his intention to start building and a plan were sent by the first defendant, received by the Town Council, placed before them for consideration on the 24th March and referred by them to the Town Superintendent, A. D. Bartrum, in the usual way, Building was started on the 15th March and completed about the 11th April. On the 9th April a notice was given by the Town Superintendent, on the instructions of the Town Clerk, and served on the defendants, requiring them to suspend their building operations and take down the building. As no attention was paid to this notice action was taken to enforce it before the magistrate's court. It may here be remarked that before the by laws approved the 18th October, 1918, and made under section 2 of Ordinance No. 8 of 1918 (the New Amsterdam Town Council Ordinance, 1916, Amendment Ordinance, 1918) persons could build without making any application to the town authorities.

It appears that nothing further was done in the matter of the notice of intention to build of the first defendant except that the Town Superintendent examined the plan with the second defendant and found it in conformity with the by-laws; after that the notice and plan were mislaid and have not yet been found; also that the Town Superintendent visited the site several times and made no objection to the building being continued, indeed he took measurements and "gave instructions how the building was to be erected in accordance with the by-laws. "

Section 2 of the Ordinance above referred to substitutes a

section in place of section 76 of the principal Ordinance No. 10 of 1916, as follows:

"The Council may from time to time make by-laws with respect to all or any of the following matters, that is to say, *inter alia.*

"(c) Regulating the number, dimensions and general character and style of buildings to be erected on lots in different portions of the town.

(d) Prohibiting the establishment of provision shops and manufactories in certain parts of the town,

(k) The marking of boundaries of lots, the fencing of lots, the open spaces to be left on lots,

Section 2 of the By-laws reads:—

" (2.) Every builder intending or proposing to erect a new building or to make any alterations in or additions to or to execute any work in regard to any building which alterations or work will cause such building to come within the meaning of the term 'new building' as used in these By-laws,

(i.) shall give notice to the Council in writing of such intention or proposition;

(ii.) shall specify in such notice the date on which he proposes to begin such process of erection, alteration, or other work;

(iii.) shall deposit with such notice an outline ground and elevation plan showing the position, form and dimensions of such proposed erection, addition or other work, and at the same time a description of the same setting forth the purposes for which it is intended and the exact dimensions of the several parts, and stating the materials to be used;

(iv.) and shall furnish such other plans as the Town Superintendent shall require in writing,"

and section 3 reads:—

"(3.) Every builder who shall have made any proposal as aforesaid, and in that regard shall have obtained the permission of the Council who may withhold or refuse the same on terms of and for the reasons given in section 55 hereof,

(i.) shall be bound at all times during the process of erection, alteration or addition or of execution of any other work as aforesaid, to afford to the Town Superintendent free access to every part of the building or work for purpose of inspection;

(ii) and shall within fourteen days after the completion of such erection, alteration or addition, or the execution of any other work as aforesaid give to the Council notice in writing of such completion or execution and shall at all reasonable times within a period of one month after such notice shall have been given, afford the Town Superin-

tendent free access to every part of the building for the purpose of inspection."

Section 55 referred to is a clause included under the heading "Protection of buildings from fire," and must be read in connection with sections 53 and 54. And next, section 5. under which the Town Superintendent purported to act in taking the steps he was instructed to take, reads thus : “If any builder engaged in the erection or alteration of or “addition to any such building or in the execution of any other work, shall “begin or do any work to the buildings or other structural work, in “contravention of any of these By-Laws, the Town Superintendent, when it “is discovered than an offence has been committed, shall give to such “builder or may affix to some conspicuous part of such building or other “work, a notice in writing requiring such builder within seven days from “the service of such notice to cause so much of such work as may have “been begun or done in contravention of these By-Laws to be removed, “altered or pulled down as the case may require.”

To enable the Town Council to take steps under sections 5 and 6 of the by-laws, the building in question must be erected in contravention of the by-laws, that is, an offence must have been committed against some by-law. The learned magistrate in. his reasons for decision found that no offence had been committed, that the notice of the Town Superintendent was *ultra vires* and consequently refused to make the order applied for. In the notice of reasons for appeal it is alleged that his -decision is erroneous in point of law,

(a) Because the defendants erected the building in question without having obtained the permission of the Council.

(b) Because the building was erected and the work of erection was begun in contravention of the by-laws made by the Mayor and Town Council of New Amsterdam.

(c) Because the Town Superintendent complied with the requirements of the by-laws. The notice was therefore *intra vires.*

That the defendants did not comply with section 2 of the bylaws is not contended, and indeed it is not alleged that any bylaw has been broken by the defendants except in so far as they have erected a new building without the permission of the Council, so that it remains to be considered whether there is such a by-law forbidding the erection of a new building without permission and on the assumption that no other by-law has been contravened, and if there is such, is it a reasonable one and *intra vires.*

The appellants say that such a by-law is to be inferred on the construction of section 3 from the words "and in that regard shall

have obtained the permission of the Council, who may withhold or refuse the same on terms of and for the reasons given in section 55 hereof," but I do not so construe that paragraph. A by-law must be certain in its terms, and positive, and this clause is neither so far as permission or refusal is concerned : it implies some other explicit and prohibitive clause which does not exist; an intelligible interpretation might well be to substitute for, or to add to, the words "and in that regard"—by way of implication the words "and where permission is necessary, "more especially taking into account the reference to section 55, which relates to a case where permission is necessary for buildings of the 'warehouse' class ; the paragraph would then read "and where permission is necessary shall have obtained the permission of the Council," etc: I might appropriately quote Mr. Justice Wills' words in 22. *v. Tynemouth Rural District Council* (1896. 2 Q. B. 219) "Nothing can be more unsatisfactory than the phraseology used, and legislation which requires that which is sometimes called *benevolent*, but what is really a slovenly interpretation, is greatly to be deprecated." But there are two other objections to the interpretation of the said clause as intended to give the Council an open and general power to withhold their permission to erect new buildings ; first, that there is no time limit fixed within which the Council must give or refuse their permission, for that they should have an indefinite time in which to make up their minds is unthinkable, the fact of no time being fixed would give opportunities for delay and pressure that would be unfair to the proprietor and builder and harmful to the progress and well-being of the town ; *Masters* v. *Pontypool L. G. Board* (1878.9 Ch. D. 677) and *Clark v. Bloomfield* (1884. 1. T. L. R. 323) are cases brought under the Public Health Act, 1875, but show that the exercise of a right of disapproval should be made within a fixed period. And next, such an unqualified power would be *ultra vires*, for a corporate body must keep within the bounds fixed by the Ordinance giving it authority to make by laws, and the exercise of any powers outside those bounds is *ultra vires*. These bounds in the present case, as I have already pointed out, are fixed by Ordinance No. 8 of 1918. The notice requiring permission does not assist for it states no reason why it was not granted. It reads as follows: "I hereby give you notice in accordance with the requirements of by-Law 5 of the New Amsterdam Building By-Laws to at once suspend operations in the erection of the building now being erected at part mud lot 16, Strand, New Amsterdam, and within seven days from the date hereof, to take down said building, as the Council has not yet granted permission for its erection." The case of *R.* v.*The Mayor and Corporation Newcastle-on-Tyne* (60. L. T. 763), one of the cases referred to by learned counsel for the

respondents, is peculiarly appropriate; the question for the decision of the Court was whether, when plans of an intended new building were submitted to the corporation under section 68 of the New-castle-on-Tyne Improvement Act, 1870 (a section corresponding to section 2 of the New Amsterdam By-laws), and such plans did not disclose any breach of any by-laws or statutory provision relating to new buildings, the corporation had power under section 69 of the same act to disapprove of such intended new building, or were bound to approve thereof. Cave, J., in the course of his judgment, said that it was contended on behalf of the Crown that the power of disapproval was limited and existed only when the proposed new building would contravene such by-law or statutory provision. What was the object of giving them power to make by-laws for certain purposes, if the corporation possessed an absolute discretion to approve or disapprove. The court held that the contention of the corporation that they had absolute discretionary power to approve or disapprove was wrong, and they had no power to disapprove on the grounds suggested in the case, namely, that the building was unsuitable to the locality and would tend to depreciate the character of the neighbouring property, and the Act itself contained no provisions showing how a discretion was to be exercised. At first sight section 55 of the New Amsterdam By-laws appears to give such a discretion. "The Council may refuse to grant such permission whenever they shall deem such refusal to be necessary or desirable in the interests of the public," but this applies only to a case where they are entitled under the enabling Ordinance to prohibit absolutely in particular cases; and even when the local authority have a discretion they must exercise it judicially and give the owner an opportunity of adequately presenting his case. *Broadbent v. Rotherham Corporation* (1917. 2 CD. 31).

In *R.* v. *Tynemouth Rural District Council,* referred to above, it was held that a local authority who have no objections to the plans of the buildings as such were not entitled to decline to approve of a building owner's mode of laying out his property unless that building owner undertook to have a system of sewage carried out at his own expense including an outfall sewer. From *Cook* v. *Hainsworth* (1896. 2 Q.B. 85) it may be inferred that a by-law giving a corporation an unqualified and absolute power to disapprove of plans simply because the work is done without their approval and without any other reason, would be held to be unreasonable. Again *R.* v. *Bexhill Corporation* (1911. 75 J.P. 385) also shows that if a plan is in accordance with the by-laws, the Council are not entitled to refuse to approve it on the ground that in the particular situation of the house the by-laws are not effective.

Applying the principles expressed in the authorities quoted I hold that if section 3 be so construed as to read into it a definite prohibition to commence work on a new building until permission of the Council is obtained, quite apart from whether any by-law is broken or not, then it is *ultra vires,* for the Council have no power enabling them to make any such by-law; and inasmuch as by well settled rules of construction, where the language of the legislature admits of two constructions, that one which appears to be most agreeable to convenience, reason and legal principles should be presumed to be the true one, I hold that the paragraph of section 3 in discussion should be construed as referring only to cases where permission is a necessary sequence to the proposal under the by-laws or some statutory provision. There was therefore no breach of any by-law on the part of the defendants, and it follows that the notice too was *ultra tires,* and that the Council had no grounds for their application to the magistrate to obtain an order requiring the defendants to comply with the notice.

Although the evidence shows that tacit permission was given in the visits and suggestions of the Town Superintendent, and in the silent acquiescence—if not approval—in the continuation of the work by the Town Clerk and Town Superintendent, it seems to me that the Town Council whilst also approving of the plan decided to refuse their approval of the new building because of some general grounds quite outside the merits of the case, and their powers under the by-laws.

I approve of the findings of the learned magistrate and the appeal must be dismissed with costs to the respondents.

Appeal dismissed.

STOLL *v.* STOLL.

STOLL *v.* STOLL

[181 of 1918].

1919. DECEMBER 19. 1920. JANUARY 8.

BEFORE DALTON, J., AND DOUGLASS, Acting J.

Evidence—Handwriting—Denial of signature to document—Evidence to contradict or discredit party's own witness—Pleading—Facts to be pleaded—Rules of Court, 1900. Order XVII., r. 5—Practice.

Appeal from a decision of Berkeley, J. The plaintiff claimed from the defendant the delivery of a sloop named "King William," the property of plaintiff and wrongfully detained by the defendant, or in the alternative payment of the sum of $1,000, the value of the sloop, and in addition the sum of $250.

The decision of the trial judge was as follows:—

BERKELEY, J.: This is an action between two brothers as to the ownership of the sloop "King William" which trades between the Pomeroon and Georgetown. The defendant was the original owner and in January 1913 she was wrecked off Bird Island on the Pomeroon Coast and salvaged by the witness Van Slugtman who had her taken to his grant. From this grant she was removed by the plaintiff with the knowledge and approval of the defendant and she remained in his possession for some considerable time. On the 22nd May 1918 he demanded her return and plaintiff refused to deliver her, but on 28th May she was seen by the defendant in his neighbourhood and he resumed possession.

Plaintiffs case is based on exhibit "L" which purports to be a receipt for $200, dated 13th March 1913 the "purchase money for one wrecked sloop (King William)"—It is witnessed by W. H. Pilgrim and with the exception of "E.P.H.Tilbury" as the second witness it is written throughout by Pilgrim who signed the defendant's name It is, admitted that defendant can write but it is alleged that he was suffering from sore eyes and rheumatism in the wrist, and therefore asked Pilgrim to write his name for him—Tilbury denies having seen this receipt and he told Sergeant Franklin some time ago that he had never written a receipt for purchase of the sloop. Several witnesses speak to Plaintiff's spending money on the sloop during the time he was in possession and this is borne out by the receipts which nave been put in. This spending of money does not affect the issue as the defendant's case is that he was to repair her and do all that was necessary until she was cleared. Plaintiff says that on purchasing he had promised the defendant that when the sloop had recouped him for all moneys spent, and in fact was clear to him, he would

give a portion of the vessel to defendant's children—that when he last showed the book with children's part it was not clear. He admits the amount then due by sloop was $79.06 with two trips to be credited. He says that she was then worth $1,000; but he told defendant he would take $500; It is stated that the $200 paid by defendant for salvage on 13 March, 1913, was the $200 paid as purchase money.

The case for the defendant is that he had $200 and more in hand but not sufficient to put the sloop in good order, that he never borrowed $200 from plaintiff; and knows nothing of receipt which he never asked Pilgrim to sign for him, that he asked plaintiff to accompany him when he went to pay salvage money and on their way back as he had not enough money the plaintiff offered to take over the sloop, repair and work her, and when he had cleared all expenses, to hand her back to him ; that no reference was made to his children, that on the last occasion that he examined the books, $79.06 was due with two trips not yet credited and that he offered to pay this $79.06 and resume possession, that plaintiff demanded $500 which he would not pay and that he subsequently obtained possession. The sole question for decision is on what terms did plaintiff get possession in 1913? Has he proved a sale to him for $200? Slugtman alleges that when defendant paid him $200 for salvage plaintiff was present but never said he had lent it; that he was offered $400 for sloop after salvage and defendant refused this amount. Teixeira speaks to giving plaintiff freight for the sloop at his request, and that plaintiff told him on being asked if he had bought the sloop, that it belonged to his brother who was unable to repair it and he had helped him. The plaintiff has not satisfied me that the receipt is genuine and on the evidence of Slugtman as to the defendant refusing $400 for the wreck and that of Teixeira that plaintiff had told him the sloop belonged to the defendant I find in favour of the defendant. Judgment for defendant with costs.

From this decision the plaintiff appealed. The reasons of appeal are sufficiently set out in the judgments below.

E G. Woolford, for the appellant

J. S. McArthur, for the respondent.

DALTON, J.: The first reason of appeal is the alleged rejection of legal evidence when it was tendered. Plaintiff called a witness named Tilbury whose signature he alleged appeared upon a document which was the basis of his claim. Tilbury denied that he had ever seen the document before, and in effect denied that the signature was his. Plaintiff's counsel then sought to put to the witness other

documents bearing his signature, to compare the signature in order, as he stated, to contradict witness. The documents were not admitted by the trial judge. Numerous authorities were cited by counsel but I cannot find that any of them support his contention. They go to show that documents not otherwise relevant to the issue are admissible for the purpose of comparison of hand-writing when properly proved to be in the handwriting of the plaintiff or defendant or a witness as the case may be, or that in cross-examination, where a witness denies his signature to a document, other documents may be put into his hands, and if admitted by him to be his, are admissible for the purpose of comparison of handwriting. They are of course subject to the ordinary rules for the examination of witnesses. The witness here was not being cross-examined, as he was plaintiff's witness, neither was he a 'hostile' witness, but the purpose for which the documents were tendered was to contradict him. Counsel wished to cross-examine and discredit him, which he was not entitled to do. If one of his witnesses fails him, he is not prevented from proving his case by other witnesses, but under the circumstances in which the evidence was tendered here, it was in my opinion rightly rejected. Whether or not plaintiff might have obtained its admission through other channels it is not necessary to consider as it does not arise.

The other reasons may be shortly considered together. Counsel states that at the trial evidence was led by both sides which was not material to the issue between the parties on the pleadings. If that is so, it was presumably with the consent of counsel on both sides and with the leave of the court, for there is nothing on the record to show that any objection was taken. It is too late to raise such a point-now, even if it is allowed that irrelevant evidence was admitted; as to that having had an opportunity of reading his decision I agree with what my learned brother states. Nor was it proved, as is alleged, that the defendant wrongfully and illegally seized the sloop in question. On the facts the trial judge was not satisfied that the plaintiff was the owner; he found on the evidence that there was no sale by defendant to plaintiff as the latter alleged. I am quite unable to agree that such a finding is against the weight of the evidence. The witnesses Slugtman and Teixeira tend to confirm it. This court will not therefore interfere with the decision.

The appeal is dismissed with costs.

DOUGLASS, Acting J.: The reasons of Appeal object that the learned judge was in error in point of law (1)in rejecting certain evidence to prove the signature and handwriting of the witness Tilbury—and (2) in admitting evidence on behalf of the defendant, to support a defence not raised by the pleadings. It was agreed

at the conclusion of the plaintiff's case that the witness Tilbury should be called by the plaintiff at the close of the defence, and this was accordingly done. The decision in the case may be said to have turned upon the evidence of Tilbury, for upon it depended the plaintiff's allegation that he had bought the sloop in question, and the defendant's reply that he had only loaned it.

The receipt (exhibit L.), purporting to be the receipt for the purchase money of the sloop was submitted to Tilbury and he swore he had never seen it before, and he couldn't say it was written by him. The other alleged witness to the receipt had previously sworn that he had written it and witnessed it, and had seen Tilbury witness it. Under these circumstances a letter purporting to be written by Tilbury was submitted to him for the purpose of comparing his signature, and objected to; the court upheld the objection. Learned counsel for A. Stoll (the plaintiff) thereupon stated "I desire to put in evidence of handwriting to compare with receipts and to contradict witness (*i.e.*, his own witness) not as a hostile witness." He now states that it was not only that particular letter, but other documents also signed by Tilbury which would have been put to him for proof of his signature, had the court not declined to admit the letter in question. The sections of the Evidence Ordinance, No. 2 of 1893, referred to by learned counsel in support of his contention that the court should not have rejected the evidence of the handwriting of Tilbury, are sections 19 (1) and 20 as to comparison of handwriting, and sections 80 to 82 inclusive as to inconsistent statements and impeaching credit of witness.

A great number of cases were referred to—all of which I have carefully considered—but cannot find that any one of them is parallel with the present case, or that a party has been allowed to obtain further evidence from his own witness in order to discredit another part of his evidence unless the witness is treated as hostile and found so by the judge. The nearest approach to it is in the cases of *Jackson and others* v. *Thomason* (1861, 1 B. and S. 745) and *Coles* v. *Coles and another* (1866, 1 P. and D. 70), where it was held that a party compelled to call a witness—*e.g.*, in case of proving a will in solemn form— may call evidence to discredit him, although he is not hostile, but even in these cases the party was not allowed to contradict his witness out of his own mouth.

But apart from the authority of case law the sections 80 to 82 of the Evidence Ordinance, 1893, differ in several respects from the clauses of the Common Law of Procedure Act, 1854, upon which the English cases were decided, and I cannot read into section 82 (2), which forbids a party by whom a witness is called to give evidence to impeach his own witness, the portions of sections 80 and

81 which permit a witness who is "adverse" to be discredited on the permission of the judge; the latter sections only apply to inconsistent statements of the same witness, and there is nothing of the sort in Tilbury's evidence. And again, the mere fact of his evidence being 'unfavourable' and not 'hostile' would not enable the party calling him to put to him questions quite irrelevant to the document in question, with a view to putting in his answers, or the results of his answers to confute the sworn statement that he had not signed the said document; surely nothing could "impeach" the witness's credit more effectively. And the fact that counsel state "I desire to contradict the witness" finally puts him out of court.

Next the appellant has taken exception to the evidence led by the defendant as to his handing over the sloop as a security only, and as to the terms upon which it was so handed over. By Order XVII, r. 5 (English Order xix. r. 4), "Every pleading shall contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not of the evidence by which they are to be proved;" and by r. 15, "The defendant must raise by his pleading all matters which show the claim not to be maintainable, or that the transaction is cither void or voidable in point of law, and all such grounds of defence as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the proceeding, pleadings, &c., &c."

Odgers on "Pleadings and Practice," (VIIth Ed., p. 116) lays it down that "it is unnecessary for either party to plead to the opponent's prayer or claim, or to his particulars, or to any matter introduced by a 'videlicet.' He need only deal with the allegations contained in the body of the preceding pleadings." This at once disposes of the contention of learned counsel that the defendant having never answered par. 4 of the Statement of Claim he therefore admits possession in the plaintiff, for par. 4 is the prayer of the statement and cannot be pleaded to. It was suggested too that both parties had admitted irrelevant evidence, and evidence on new issues; if that is so, and no objection was taken at the time, objection cannot now be taken as a ground of appeal; but if there is any defect on the pleadings it seems to me to lie with the plaintiff rather than with the defendant, for the defendant having pleaded sole ownership of the sloop, as well as possession (and the latter is admitted by the plaintiff), it was for the plaintiff in his reply to put forward the occasion of his purchase from the defendant as "allegata probanda," facts which ought to be proved, and not to treat it as evidence to he adduced to prove facts, it *was* in

this case a material fact upon which the party pleading relied. On the other hand it was quite unnecessary for the defendant to excuse himself from matters of which he was not then accused, or to plead any cause of action which did not appear on the Statement of Claim. '*Rassan* v. *Budge'* (1893 1 Q.B., 571). In *'Philips* v. *Philips'* (1878 4 Q.B.D., 127) Brett, L.J., gives two tests showing practically what the Rules meant, (1) "Such facts ought "to be stated which, if a person had had to state, a special case . . . for the "opinion of the court, he would have stated in the special case, as facts;" and (2) "If parties were held strictly to their pleadings under the present "system they ought not to be allowed to prove at the trial, as a fact on "which they would have to rely in order to support their case, any fact "which is not stated in the pleadings. Therefore in their pleadings they "ought to state every fact upon which they must rely to make out their right "or claim." And Cotton, L.J., in the course of his Judgment says, "The "statement of claim must of necessity set out all the facts material to "prevent the defendant being taken by surprise". . . "In my opinion it is "absolutely essential that the pleadings, not to be embarrassing to the "defendants, should state those facts which will put the defendants on their "guard, and tell them what they have to meet when the case comes on for "trial." I cannot imagine anything more embarrassing to the defendant than having evidence put in of a sale by him to the plaintiff, about which, he alleges, he knows nothing. If then under his plea of ownership the plaintiff was permitted to put in evidence a sale by the defendant to him and the receipt for the purchase money, evidence on behalf of the defendant of what the transaction really was that took place cannot well be refused; unless the plaintiff had put in evidence his purchase from the defendant, the evidence by the defendant of his version of what arrangement did take place between the parties would probably not have been necessary. Moreover in giving evidence how and upon what terms the sloop came into the plaintiff's possession, the defendant is only giving evidence relevant to the facts in issue, *i.e.*, as to the ownership of the sloop.

With regard to para. 1 (c) of the grounds of appeal I can find no evidence that the defendant wrongfully and illegally *seized* the sloop; all the plaintiff says is "defendant has the sloop now. Defendant took it back last year." I entirely agree with the learned judge in his finding on the facts. I accordingly dismiss the appeal with costs.

Appeal dismissed.

MALOUF *v.* ATALLAH.

[264 OF 1920.]

1920. SEPTEMBER 18. BEFORE DALTON, ACTING C.J.

Appeal—Cross suits—Same appellant in both suits—Security—Magistrates' Decisions (Appeals) Ordinance, 1893, s. 16—Practice.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district. The two suits before him were by consent taken together. In the first the defendant Malouf was convicted. In the second the defendant Atallah was discharged. From this decision Malouf appealed, the reason for appeal being in effect that the evidence did not support the findings.

H. C. Humphrys, for the appellant.

Mc. Ogle, for the respondent.

DALTON, Acting C. J.: Objection has been taken by the respondent that the provisions of the law in respect of giving security to prosecute the appeal have not been complied with. The certificate on the record shows that the sum of $35 has been deposited with the magistrate which includes the sum of $10 for costs. Mr. Ogle urges that these are two appeals, one in *Atallah* v. *Malouf,* in which the defendant was fined $20, and the second in *Malouf* v. *Atallah,* in which the defendant was discharged. In both cases Malouf appeals and it is urged that, under the provisions of s. 16 of the Magistrates' Decisions (Appeals) Ordinance, the sum deposited should have been $40, *i.e.*, the fine of $20, and $10 in each case to abide the costs of the appeal.

The record shows that there were two complaints and the matter arising out of the same incidents and being cross actions, they were by consent of the parties taken together. In both cases the present appellant lost. The magistrate gave one decision covering the two complaints. Mr. Humphrys states he gave two notices of appeal and filed two separate sets of reasons of appeal out of abundant caution, and that no additional costs have thereby been incurred, but that he could under the circumstances have filed only one set of reasons of appeal. It further appears from the record that notice of appeal was given in Court and that the magistrate then and there in the presence of the counsel of both parties (who I understand consented thereto) fixed that security to be given in the sum of $35, which was to cover the $20 penalty, $2.64 costs, and $10 costs of appeal. In view of that it is not now, I think, open to respondent, having consented to the amount, to object to the insufficiency of the security. He admits that in any case he is fully secured, for the two appeals are taken before me together and the costs of appeal, which in effect mean the pleading fee, will not in any case be more than $10, the amount almost invariably taxed. I therefore must dismiss the objection for the reasons above stated, but I should have been prepared to hold, after reading the documents, that in

the absence of respondent's consent to the sum fixed by the magistrate, the security given was under the circumstances here sufficient to comply with the law. There are, it is true, two complaints, but one hearing, one decision, one appellant, one record of appeal in the Registry (No. 264 of 1920) and again one hearing before me. The objection is dismissed and the hearing will continue:

[After argument by counsel for appellant, respondent's counsel not being called on, His Honour dismissed the appeal, with costs.]

Appeal dismissed. Conviction affirmed

AUSTIN *v.* AUSTIN.

[224 OF 1920.]

1920. SEPTEMBER 3, 20. BEFORE DOUGLASS, ACTING J.

Husband and wife—Separation—Cruelty—Persistent cruelty—Weekly payment for maintenance—Summary Jurisdiction (Married Women) Ordinance, l905, ss. 2, 3.

The term 'cruelty' as used in s. 2 (d) of Ordinance 19 of 1905 means 'legal cruelty.' There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it. The reasons for separation must be grave and weighty. Occasional bursts of ill temper not accompanied by serious personal violence, or trivial disputes or assaults do not of themselves render a husband liable on a charge of persistent cruelty.

Appeal from a decision of the stipendiary magistrate of the North Essequibo judicial district (Mr. H. T. King). Complainant, wife of defendant, allege I that defendant was guilty of persistent cruelty to her during the month of March, 1920, causing her by such cruelty to leave and live apart from him. She therefore sought an order, under the provisions of the Summary Jurisdiction (Married Women) Ordinance, 1905, that he should pay to her personally such weekly sum as might appear reasonable. Under the provisions of section 3 (c) of the ordinance the magistrate has power to make an order containing a provision that the husband shall pay to the applicant personally, or for her use to any officer of the Court or third person on her behalf, such weekly sum not exceeding ten dollars as he shall, having regard to the means both of the husband and wife, consider reasonable. As a result the magistrate made an order for the payment of $2 a week. From this order the defendant appealed.

The reasons of appeal and the facts of the case are set out in the judgment below.

A. R. Browne, for the appellant.

E. M. Duke, for the respondent.

DOUGLASS, Acting J.: This is an appeal from the decision of

the magistrate of the North Essequibo judicial district ordering the defendant to pay his wife, the plaintiff, a sum of $2 a week for maintenance on the complaint brought by her that during the month of March, 1920, he had been guilty of persistent cruelty to her, and thereby caused her to leave and live separately and apart from him.

In his reason for decision the learned magistrate states: "I am on the whole entirely satisfied that defendant persistently ill-treated his wife and that in consequence she had to leave him." He also says that he accepts the plaintiff's story, but only believes the statements of the defendant's witnesses in part. The reasons of appeal are as follows:

That the decision is erroneous in point of law, because

(a) There was no evidence of persistent cruelty to warrant the decision of the learned magistrate.

(b) There was no evidence that the misconduct complained of could not be prevented by an application to the ordinary tribunals for correction thereof by imposition of a penalty.

The complaint was brought under section 2 (d) of the Summary Jurisdiction (Married Women) Ordinance No. 19 of 1905, which is practically a copy of section 4 of the English Act. 58 & 59 Vic. c. 39. It reads: "Any married woman (d) whose husband shall have been guilty of persistent cruelty to her or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to the magistrate . . . for an order or orders under this ordinance." The provisions which may be included in the order are continued in section 3 of the ordinance. Of the four provisions (a) (b) (c) and (d) only (c) was exercised in the present instance.

With respect to objection (b) of the reason for appeal it may be disposed of in a few words. The mere fact that a husband's misconduct could be dealt with as it arose by a criminal tribunal, or was within the summary jurisdiction of the magistrate, would be no reason why the wife should not proceed to enforce her rights under the Summary Jurisdiction (Married Women) Ordinance if such misconduct were included in that ordinance. It is true that in the case of *Menezes* v. *Menezes* (G.J. 26.6.1905) the court said it seem to be in accordance with the intention of the Placaat of the 18th March, 1656, that in cases where a repetition of any special act of misconduct can probably be prevented by an application to the ordinary tribunals. . . the special remedy of a judicial separation should not be granted, but they avoided a decision on the subject, and the opinion was based on Roman-

Dutch law which is not now applicable; the mere fact that the misconduct could be so dealt with is not in my opinion a good ground for appeal, though it may be evidence to some extent of the lightness of the offence.

I therefore confine the rest of my remarks to what is the "persistent cruelty" required to obtain the order sought, or what is cruelty at law, and when does it become 'persistent.' So-called legal cruelty was very fully discussed, and all the leading cases thereon marshalled in *Russell* v. *Russell* (1897. A.C. 395). The case itself decided by a majority of the House of Lords that *a* false charge of having committed an unnatural criminal offence brought by a wife against her husband although published to the world and persisted in after she did not believe in its truth was not sufficient evidence of legal cruelty to entitle the husband to a judicial separation. Both Lord Herschell and Lord Ashbourne who dissented from him, refer to the judgment of Lord Stowell in *Evans* v. *Evans* (1 Hagg. Cons. 35) with approval, that there must be (1) "grave and weighty causes" for a finding of cruelty, (2) that "what merely wounds the mental feelings is in few cases to be admitted;" (3) that what fall short of personal danger "is with great caution to be admitted"; and he indicated what, according to the general experience of mankind, would be the general rule, when there was "no bodily injury either actual or menaced." Lord Herschell also referred to the words of Sir J. Nicholl in considering the case of *Westmeath* v. *Westmeath* (1827. Hagg. Ecc. Supp. 72.) "These, then, are the principles by which these courts *(i.e.,* the ecclesiastical courts) have been governed; and according to which it is my duty to decide. There must be ill treatment and personal injury, or the reasonable apprehension of personal injury." Again later he quotes the words of Sir Creswell Creswell in *Tomkins* v. *Tomkins* (1858. 1 Sw. & T. 168) a case of some importance as having been one of 'the first case's taken after the court for matrimonial causes came into operation in January, 1858, which court acted and gave relief " on principles and rules as nearly as may be conformable to the principles and rules on which the ecclesiastical courts had theretofore acted and given relief." He said: "Danger of life, limb or health has continued in substance the rule upon which the courts have acted; the phrase has sometimes been varied. . . . There must, however, be bodily hurt, not trifling or temporary pain; or a reasonable apprehension of bodily hurt,"

Two other cases referred to by learned counsel for the appellant *Goldsworthy* v. *Goldsworthy* (10 S.C. 139), and *Milford* v. *Milford* (77. L. J., p. 77)—both applications for judicial separation— go to show that in considering the nature of the acts of cruelty alleged, there must be taken into account the surrounding circum-

stances, and the standing of the parties, and allowances must be made for occasional bursts of ill temper not accompanied by serious personal violence. In the present case the act; complained of as cruelty are (1) beating, (2) taking away the complainant's rings, (3) accusing her of practising obeah on the defendant with materials obtained from one Austin, and of living with him. The last may be disregarded as too vaguely expressed, and not being stated as a reason why she left her husband. From June, 1913 to 1918, the parties lived together 'good.' as they express it, but up to 13th March, 1920, the respondent makes no complaint about the appellant, except that in 1918 he spoke to her about Austin; this is significant when their differences in March. 1920. also have Austin as the reason; in short there is abundant evidence that whether he was correct or not the appellant put down Austin as the cause of all his troubles with his wife, and accordingly beat her.

It is stated in Bacon's *Abridgment* that a husband may beat his wife, but not in a violent or cruel manner, but that is not now English law, though she cannot take civil proceedings against him for assault. The definite charges of beating are on the 13th, 18th and 21st March, and on the last date, according to his own account, the appellant took away her wedding and other rings forcibly and she resisted him in getting them off: this may be the 'beating' complained of for there are no other details of it, nor of the 'beating' on the 13th March which she describes as 'boxing.' The only 'beating' of which any detail is given of the instrument used is that which took place on the 18th March at night on the public road, and that was with a small stick; the other cases were possibly slapping, at any rate the court cannot assume that a stick was used.

It will be seen from the cases above referred to that 'cruelty' is not to be taken in its widest and popular meaning, but is confined by legal decisions to 'legal cruelty' that is cruelty within defined bounds. All the assaults complained of appear to be trivial, even if not justified, the respondent does not state she suffered any bodily hurt, nor does the evidence show any reasonable apprehension of personal injury, she may have suffered trifling or temporary pain though she does not even allege that. If she left her husband's house in consequence of treatment that was not 'legal cruelty,' it gives her no justification to bring her complaint under this ordinance, though her evidence leaves it doubtful why she did leave. In one place she says "he put me out on the 22nd March, 1920, as he said I was living with one Nathaniel Austin." etc., and in another "I went to Suddie on 22nd March. 1920, and on return I found all the things had been removed from the house, and he had gone to live at Mary Harry's house where he now is. Inconsequence of being beaten and removing the things I had to leave his

house." Even if one of the assault had been a serious one—and I do not so find—that it would not convert what was not persistent cruelty into persistent cruelty was decided in the case of *Cornall* v. *Cornall* (1910. 64. J.P. 37) Persistent cruelty means something more than such cruelty as would entitle a petitioner to a judicial separation. It may be that the magistrate was satisfied that there was ill treatment, but I can find nothing on the evidence to justify a finding of "persistent cruelty."

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

Appeal Order discharged.

PETTY DEBT COURT, GEORGETOWN.

DE FREITAS *v.* ANTHONY.

[307—8—1920.]

1920. SEPTEMBER 2, 23, BEFORE DOUGLASS, Actg. J.

Husband and wife—Marriage in community—Wife living apart from husband—Rent of house by wife—Liability of husband.

Claim by the plaintiff, de Freitas, for the sum of $10, one month's rent of a cottage. The premises were rented by the wife of the defendant who was married to him in community of property but was living separately from him.

Plaintiff in person.

B. B. Marshall, for the defendant.

DOUGLASS, Acting J.: The plaintiff claims one month's rent at $10 of premises in Waterloo Street from the defendant as married in community of property with his wife E. Anthony, who was tenant of the said premises. The defence was that defendant's wife had left him in 1905 within one year after their marriage and had lived separately from him ever since, and that she rented the cottage in question without his consent or knowledge, and was personally liable on her contract. The wife Elizabeth Anthony in giving evidence admitted all the facts alleged by the defence—except that she was living in adultery—and that she had paid rent for the cottage up to July, 1920, and owed the $10 her husband was sued for, and that she sublet a room to an old man at $3 a month, also that she never received any support from her husband and earned her living as a seamstress and minding stock. This same claim, but against the wife, has already been before this Court but was non-suited on proof that the parties were married in community, and it was then, as now, proved that the plaintiff

had thought she was a single woman. The difficulty, in an otherwise simple case, arises when the question of whether the contract of tenancy comes under Roman-Dutch or English law is raised. Had the point been taken in the prior case, it is possible, if the suit had been against her assisted by her husband, there would not have been a non-suit, but in the present case the difficulty is avoided by the fact that neither at English or Roman-Dutch law would the husband be liable on the facts of the present case. At English law when husband and wife are living apart the presumption of fact is that the wife has no authority to pledge his credit at all, not even for necessaries. *Mainwaring* v. *Leslie* (M. & M. 18). The learned author of Smith's Leading Cases says "when a tradesman finds a woman living alone . . . . he must either presume that she is a *feme sole,* or, if he knew her to be married, that she is not on such terms of confidence and affection with her husband as could induce him to trust her with authority to bind him by her contracts." She can only bind her husband by her contract so far as she may be his agent for that purpose; accordingly it is a necessary question to leave to a jury whether upon the facts, admitted or proved, the wife had authority express or implied to bind him.

At Roman-Dutch law generally speaking a wife cannot, without the consent of her husband, render herself civilly liable by her contracts, and consequently neither husband nor wife can be sued upon them either during marriage or after its determination. (Lee *Introduction to Roman-Dutch Law,* p. 18.) As it has been said, with reference to her contracting powers, the wife in fact becomes a minor, of whom the husband is irresponsible guardian, and by Maasdorp (Vol. 1, p. 43) "A married woman has no right . . . to enter into any contract without the express or implied consent or ratification of her husband, and if she does contract without such consent the contract is void, and will not bind either her husband or herself." And again, with special reference to the facts of the present case "he (the husband) is not obliged to support her if she has left his house without any lawful cause." I must therefore give judgment for the defendant, but make no order as to costs.

WILLIAMS *v.* MARTINS.

PETTY DEBT COURT, GEORGETOWN.

WILLIAMS *v.* MARTINS.

[228—12—1919.]

1920. SEPTEMBER 7, 19, 23. BEFORE DOUGLASS, ACTING J.

Animal—Horse—Injury to horse—Animal of mischievous nature—Knowledge of owner—Agistment—Negligence—Liability of owner.

Claim by the plaintiff for the sum of $100 as damages for the loss of a horse. The plaint set out that defendant wrongly kept at the pasture at Bel Air a horse of a mischievous nature and accustomed to attack and kick other animals to the knowledge of defendant; on August 9th the said horse in the pasture attacked and kicked a horse, the property of plaintiff. As a result of the injuries sustained it had to be destroyed.

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

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

DOUGLASS, Acting J.: The plaintiff is claiming from the defendant the sum of $1.00 as damages for loss of his horse caused by injuries it received from the defendant's horse whilst both were at Bel Air pasture on the 9th August, 1919, it being alleged that the defendant knew of the mischievous nature of his horse and that it was accustomed to attack and kick other animals.

Mr. Crane, solicitor for the defendant, denied that the defendant kept his horse at Bel Air pasture, that it was of a mischievous nature, and that it caused injury to the plaintiff's horse.

This case was previously before the court on 2nd December, 1919, and on the 11th December it was non-suited. I then stated in my decision that there was some evidence before me showing the vicious disposition of the animal, it was essential to the plaintiff's success on his claim that he should prove the defendant knew of this, and that the evidence did not satisfy the court in that respect.

It was agreed that the evidence taken on the first hearing should be treated as evidence given at the present hearing, but that either party should be at liberty to call fresh evidence. The plaintiff again gave evidence and three new witnesses having been called on his behalf, Mr. Crane submitted that there is no case to answer inasmuch as the defendant's horse was not under his control at the time of the alleged accident, and that therefore he was not *keeping* it in the pasture; also that if anyone was liable it was the agister. The court is not concerned at the pre-

sent whether the agister could or could not have been sued; it might well be that a plaintiff would have a choice of person whom he could proceed against in a case such as this.

In the course of and in support of his argument that the defendant could not be held liable because he had parted with the possession and care of his horse, Mr. Crane referred to the case of *Walker* v. *Crabb* (33 T.LR. 119) where it was held that the negligence (if any) was due to the conduct of the auctioneer who had possession of the defendant's horse, and that he was in the position of a skilled agent of the person who employed him and was as an auctioneer given complete control of the operations by the owner of goods entrusted to him, and was not the servant of the owner of the horse. A somewhat similar decision in *Milligan* v. *Wedge* (12 A.E. 737) was referred to by me in delivering judgment in the late case of *Smith* v. *Ramgobin* (*Supra* p. 116) when I followed the principle therein laid down that where the party sued had not done the act complained of through himself or his servant, but had employed another who was recognised by the law as exercising a distinct calling, the latter was the person liable for the said act. I may also refer to another case *Smith* v. *Thorpe* (16 L.T.; O.S. 65) where the owner of a horse sent him to a breaker to break into harness; whilst on the public road it ran away and knocked down and damaged the plaintiff. It was held, that an action would not lie against the owner for such damage even though it was alleged in the declaration that the horse was in the possession of the defendant.

So far the cases seem to support the argument of Mr. Crane, and if the facts of the present case were similar there would be no need for further consideration of the matter, but are they? In the cases referred to the injured person is bringing an action against the owner of an animal who has parted with his immediate possession, there was no privity between the plaintiffs and the defendants in respect of which the latter would be guilty of negligence to the former. In the present case both parties had sent their respective animals to a common pasturage, and whilst there in the temporary possession of a third person (the bailee of each party) one of the animals injured the other; there is no evidence to show which animal was pastured first so that each party in respect of his animal stands in a similar position. And in comparing the present case with the others referred to above, two further matters have to be taken into account, (1) the nature and effect of an agistment, and (2) that it is not the negligence of the (physical) possessor implicating the owner that is now complained of; but the negligence implied by the knowledge of its owner of the dangerous disposition of the animal.

In the first place then, agistment is in the nature of a bailment,

and the owner of animals agisted is entitled to re-delivery on demand. The agister is not in the position of a skilled agent, in the present case if he is an agent at all, he is equally the agent of both parties. The agister has sufficient possession however to entitle him to sue in trespass or trover, but it may here be remarked that "the remedies of the bailee are not always exclusive, for the bailor by reason of his right to possession may retain concurrently with him a sufficient right to maintain trespass or theft against a stranger." (*Pollock Possession in the Common Law,* 166). Next, with reference to *scientia, i.e.*. the knowledge necessary to affect an owner with liability for injuries inflicted by his animal,—and without going into details of the evidence I may say that so far as the plaintiffs case goes he has satisfied me that the defendant was aware of the vicious disposition of his horse before the accident to the plaintiff's horse happened—I was referred to the case of *May* v. *Burdett* (9 Q.B. 101) when Lord Denman, C.J., in the course of his judgment says "a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril, and . . if it does mischief, negligence is presumed without express averment . . . . The negligence is in keeping an animal after notice;" the learned solicitor for the defendant used this case to support his argument, but I do not think it does so, for no stress was laid on the 'keeping' by or ownership of the plaintiff, the objection was that the declaration was bad for not alleging negligence or some default of the defendant, and it was held that it was unnecessary where the owner of the mischievous animal had knowledge of its propensities; the word 'keeping' is clearly used in the sense of 'retaining,' or 'continuing to keep.' The law on *scientia* is most clearly expressed in the judgment of Lord Cranworth in *Fleeming* v. *Arr* (2. Macq. H. L. Sc. 23). "The reason why by the English law it is necessary to allege and prove the *scientia* is that in the case of an animal *mansuetae naturae* the presumption is that no harm will arise from leaving it at large . . . . Blame can only attach to the owner when, after having ascertained that the animal has propensities not generally be-longing to his race, he omits to take precautions to protect the public against the ill consequences of those anomalous habits, and therefore, according to the English law, it is necessary to aver and prove this knowledge on the part of the owner. But, after all, the *culpa* or negligence of the owner is the foundation on which the right of action against him rests, though the knowledge of the owner is the medium, and the only medium through which we in England arrive at the conclusion that he has been guilty of neglect.

Learned counsel for the plaintiff also referred to *Lowery* v.

Walker (1911 A. C. 10). a case in point. There the defendant owned a savage horse which to his knowledge was dangerous Without giving any warning he put it into a field of which he was the occupier, but which he knew the public were in the habit of crossing without leave on their way to the railway station. Plaintiff in crossing the field was attacked by the horse and injured. The county court judge found as a fact that the defendant was guilty of negligence in putting the horse in a field crossed by the public, and he was upheld by the appeal court. To come to the present case, it was within the knowledge of the owner the defendant, that his horse had vicious propensities and that other animals would be pastured with it even if he did not at first know he was warned and yet did not remove the animal. I am opinion that the evidence of the plaintiff and his witnesses shows *prima facie* negligence on the part of the defendant, even though he was not in physical possession or control of his animal at the time of the accident. But the claims goes further than asking compensation for injury to the plaintiff's property, for it has been proved that owing, to the severe nature of the injuries to the plaintiff's horse it had to be destroyed. That is to say the plaintiff was deprived of his property in his horse whilst it was under the care of a bailee—the agister— due to the negligence of a third party—the defendant—, and the case consequently comes within the principle enunciated in *Mears* v. *the L. & S. W. Railway Co.* (11. C. B.—N. S. 850), where the owner of a barge hired it out to one Russell, and the defendants were engaged by their servants in raising a boiler from it, when, owing to their negligence, the barge was damaged so as to become a total loss. William, J., in his judgment, states: “It is fully established that in the case “of a bailment, not for reward, either the bailor or the bailee may bring an “action for an injury to the thing bailed; but in the case of a hiring the “owner cannot bring trover because he has temporarily parted with the “possession. It seems to me, however, to be clear that though the owner “cannot bring an action where there has been no permanent injury to the “chattel, it has never been doubted, that, where there is a permanent injury, “the owner may maintain an action against the person whose wrongful act “has caused that injury.”

I therefore hold that the plaintiff has made out at law a good case against the defendant, and call upon him for his defence on the facts.

[After hearing the defence His Honour gave judgment as follows:]

Having now heard the evidence of the defendant and his witnesses, it remains for me to consider how far it affects the evidence of the plaintiff (and his witnesses) and whether taking the evidence as a whole the plaintiff is entitled to recover. The facts

essential to this case are to be found in the answer to the following questions:

(1) Was it the defendant's horse that injured plaintiffs, and (2) was the defendant aware that his horse was of a mischievous disposition?

(1) With respect to the identity of the defendant's horse, it is described by the plaintiff and his witnesses sometimes as a black and others as a brown gelding and the former owner and the defendant describe it as a bay gelding but it is evident they refer to the same horse; the manager of Bel Air. Mr. Ricketts, says that there were two horses reported as running down cattle, one was Dr. Johnson's but no description was given of it; Mr. Ricketts also says he sent a message to the defendant twice by Keiroo (the stock-minder) to remove his horse, and Keiroo admits he gave him a message (apparently in July,) but not that he told him the reason for the request and that Dr. Johnson's horse never chased any stock; his evidence was most untrustworthy, but Rampersaud saw the whole incident on the 9th August and identified the defendant's horse, and he states: "I reported it to Williams (on 11th August), he said he had already heard from cow-minder."

With this evidence before me and the probability that Keiroo would take a message he was ordered to by his master. I cannot believe the defendant when he states he never got any message from him at all, and that his attendance at the pasture on the 12th August was a coincidence. The evidence of Elizabeth Watson only proves that some horse got stuck in the mud one day, she had evidently been told the day she had to say, as she is ignorant of dates; her evidence may be disregarded. The defendant's horse is sufficiently identified as the cause of the injuries to the plaintiff's horse.

(2) I have already said that on the evidence 1 am of opinion that it was within the knowledge of the defendants that his horse had vicious propensities, and I see no reason to change that opinion, the statement of the defendant that all the witnesses for the plaintiff had lied in some way did not impress me, and I cannot eliminate the evidence of Archibald Williams, Goring and Nedderman.

With regard to damages, the value of the plaintiff's horse is variously stated at between $35 and $70, probably $45 would be about its genuine value, and I allow the expenses of $13.32. I accordingly allow damages at $60 in full and $6 costs.

[Notice of appeal given in presence of plaintiff.]

PETTY DEBT COURT, GEORGETOWN.

NURSE *v.* HALEY AND ANR.

[139—8—20.]

1920. SEPTEMBER 15, 16, 23. BEFORE DOUGLASS, ACTING J.

Animal—Dog—Attack on sanitary inspector—Savage disposition—Scientia—Damages.

A man has a right to keep a fierce dog for the protection of his property, but he has no right to put it in such a situation in the way of access to his home that persons innocently coming for a lawful purpose may be injured by it. In the case of a footpath on the property, though it be a private one, a man has no right to put a dog of that nature with such a length of chain and so near the path, that he could attack or bit a person going along it.

Claim by the plaintiff, a sanitary inspector in the employment of the Mayor and Town Council of Georgetown, for the sum of $100 for damages alleged to have been caused to him by being attacked and bitten by a dog, the property of the defendants.

C. R. Browne, for the plaintiff.

J. A. Luckhoo, for the defendants.

DOUGLASS, Acting J.: The plaintiff in this case is a sanitary inspector in the employ of the Mayor and Town Council of Georgetown, and on the 22nd July, 1920, whilst in the execution of his duties was attacked by a brown dog kept on the defendant's premises at 106, Smyth and D'Urban Streets, Georgetown, which is alleged to have thrown him down and torn his trousers, and he claims $100 damages and pecuniary compensation from the defendants as owners of the said dog.

The defence raised a denial of practically all the facts alleged, but after hearing the evidence it is conclusively proved that the plaintiff was engaged on the premises in his duties and that the said dog was owned or kept by the defendants as a watch dog. See *McKane* v. *Wood.* (5 C. & P. 1); also that in passing between the two doors, within which the dog was chained, the plaintiff was not trespassing in any sense, but was taking a short cut across the back of the garage to the entrance of the yard used by the employees of the defendants, and indeed C. Haley states in evidence that he did not think it strange his passing through the doors. The only facts to be considered ate whether the plaintiff knew of the presence of the dog, and took known risks in using an exit he need not have used, and whether the defendants knew of the fierce and mischievous nature of the animal.

That the plaintiff knew as far back as April there was a dog chained on the premises, he admits, but he says that in June he did not see it, and in July seeing two girls in the employ of the

defendants pass by where it had formerly been chained he presumed it was still in another place, and this is confirmed by C. Haley who states the plaintiff told him at the time of the occurrence he did not think the dog was back because he saw the two girls pass, this throws grave doubt on the statement of Janeer, one of the witness for the defence, that the plaintiff asked if the dog was tied and he answered it was tied in the garage; even if I believed this witness, there is strong evidence that the plaintiff did not know that the portion between the two open doors he was making his exit by was referred to as the garage. I therefore come to the conclusion that the plaintiff was not to blame in anyway for the accident, and as it has not been proved that he had no business to be where he was the case of *Ilott* v. *Wilkes* (3 B and Ald. 304) does not apply.

Next, with reference to whether the animal was of a savage disposition and the defendants knew of it, it is not necessary to prove that the animal had actually bitten another person, as long-as it is shown that to the knowledge of the owner it evinced a savage disposition by attempting to bite. *Worth* v. *Gilling* (1866. 2 C.P. 1), and in a Canadian case, *Price* v. *Wright* (1899. 35 N.B. 26) where the dog had never before the injury to the plaintiff evinced a savage disposition to the knowledge of the defendant, but it was in the habit of jumping upon or against people and in such acts scratching them, and defendant knew this before plaintiff was injured and that it did not do it playfully. Held, that defendant had kept dog after he had knowledge that he was apt to do injury to mankind, and the verdict for the plaintiff should stand. The mere fact that a man keeps a dog tied up is not in itself evidence of his knowledge of a savage disposition but may become material combined with other facts. It was held in *Sarch* v. *Blackburn* (4 C. & P. 297) that although a man has a right to keep a fierce dog for the protection of his property he has no right to put it in such a situation in the way of access to his house that persons innocently coming for a lawful purpose may be injured by it. . . And so with respect to a footpath though it be a private one, a man has no right to put a dog with such a length of chain, and so near the path, that he could bite a person going along it. [The learned judge here reviewed the facts proved and continued;]

I am not laying any stress on the tentative offer of the defendants to pay for the plaintiff's trousers being mended, there are a variety of reasons why they might do so besides the suggested reason that it showed knowledge of their liability for the occurrence, but taking the facts as stated above by the plaintiff combined with the fact that the dog was a watch dog and always kept chained, and that the plaintiff had been 'warned' by the defendant

C. Haley of the nature of the dog, and sitting as a jury I find that the defendant C. Haley was aware of its fierce and mischievous disposition, but there is no such evidence implicating the defendant J. Haley. It was held in *Line* v. *Taylor* (1862. 3 F. & F. 731) that the fact that a dog merely had a habit of bounding on people, without attempting to bite even if he might frighten them or cause annoyance, would not sustain an action.

I accordingly gave judgment against the defendant C. Haley only for $15, for as the plaintiff did not get bitten he is only entitled to the actual loss he suffered, that is an amount sufficient to replace his serge trousers.

I also grant $4.36 costs and $2.54 fee.

DE FREITAS *v.* BARBOUR.

[361 OF 1920.]

1920. NOVEMBER 6. BEFORE DALTON, J.

Solicitor—Right of audience—Claim for possession—Value of property—Rules of Court, 1900, Order VI., r 3.

Claim by the plaintiff for possession of house and land at 167, Waterloo Street, Georgetown, let at the rate of $25 a month, the tenancy having been terminated, and for the sum of $75, mesne profits.

E. G. Woolford, K.C., for the plaintiff.

E. D. Clarke, solicitor, appeared for the defendant, but objection was taken to his appearance.

DALTON, J.: I cannot hear you. Mr. Clarke. You have no right of audience in this matter. Order VI, rule 3 is quite explicit. The value of the property here, possession of which is sought, is stated in the indorsement on the" writ to be $1,500.

ASHBY *v.* FRANKER.

PETTY DEBT COURT, GEORGETOWN.

ASHBY *v.* FRANKER.

[145—10—1920.]

FRANKER *v.* ASHBY.

[367—10—1920.]

1920. NOVEMBER 2. 9. BEFORE DALTON, J.

Husband and wife—Liability for tort of wife—False imprisonment—Conversion—Overhanging branches—Joint owners—Right of one owner to sue—Law applicable—Civil Law of British Guiana Ordinance 1916, s. 3 (4).

Two actions, taken together, for the sums of $100 and $30 respectively as damages for false imprisonment, and for conversion. All necessary facts appear from the judgment.

A. V. Crane, solicitor, for Ashby.

E. D. Clarke, solicitor, for Franker.

DALTON, J.: The plaintiff Ashby claims from the defendant Franker the sum of $100 as damages for assault and false imprisonment. In the cross action the plaintiff Franker claims from the defendant Ashby the sum of $30 for wrongful conversion. By consent the two actions were taken together. In each case Ashby appears as being married in community to his wife and as assisting her. It is alleged that she was arrested and that she was also the principal actor in the case of conversion. The facts I find proved are as follows:—Ashby and his wife reside at lot 16 Lodge Village. Mrs. Franker has an undivided half interest in lot 15. Without the permission of the latter's son, but after some communication with him, Mrs. Ashby cut three branches from a tree on lot 16. There is no evidence to show that the son was the agent of his mother, or that the latter was aware of the action of Mrs. Ashby, until the limbs were cut off. I find no mention whatsoever was made of the subject of firewood until the matter came into court. The branches were cut off and removed by Mrs. Ashby to her lot, and were cut up for firewood; being of the value of $15. Later Mrs. Franker came and found her tree with the branches missing. She found two heaps of wood in Ashby's yard and sent for the police. She then had Mrs. Ashby arrested for maliciously cutting the tree. The latter was taken to the police station, charged, and eventually discharged by the magistrate. In respect of the law Mr. Crane has urged that Mr. Ashby can-

not be responsible for his wife's torts and that she has not been properly sued. They are married in community of property. The wrong was done by the wife. On the authority of *Klette* v. *Pfitze* (6 E.D.C. 134) either the wife could have been sued assisted by her husband, or the husband can be sued in the capacity of husband in community to the" wife. The latter is the course which has been followed here and it is in order.

He has further urged that Mrs. Franker sues as a joint owner of the property, lot 16. The evidence shows that she has an undivided interest (one-half) in the property on which the tree stood and that she therefore cannot sue here as she has done. He refers to Williams on *Personal Property* (17 ed.) at p. 451, and argues that joint owners, in respect of personal property, with respect to all others than themselves, are in the position of a single owner and must act together. He also cites section 3 (4) of the Civil Law of B.G. Ordinance, 1916, which provides that 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. But whether or not the argument of Mr. Crane is sound, the rights of the plaintiff Franker were acquired in 1905 and those rights are safe guarded by the same Civil Law Ordinance. (See section 2 (3)). As joint owner she had the right of protecting her property so far as her interest lay. As owner of an undivided half of the property, she could, and can under the circumstances here, vindicate her rights in respect of that half interest, but only in respect of that interest.

Lastly, it is urged that at the time action for conversion was brought, the property, the cut wood, was not in the possession of the defendant Ashby. It appears that on the arrest of Mrs. Ashby the greater part of the wood was removed to the police station. On her discharge by the magistrate no action appears to have been taken by either plaintiff or defendant to obtain the wood from the police. The evidence, however, is conclusive to show that before the removal of the wood to the station some of it had been used by Mrs. Ashby for domestic purposes and that after the removal of the greater part to the station, some still remained in her possession. There is ample evidence of conversion, in which conversion her husband acquiesced.

The question of damages remains. Both parties were in the wrong. They have apparently never been on speaking terms. Mrs. Ashby's action shows an inexcusable failure to distinguish between what was hers and what was her neighbour's. Not only did she cut and appropriate the branches overhanging her pro-

perty, hut she entered upon the adjoining property and cut off the other branches as well and removed them all to her yard, where they were cut up for firewood. On the other hand, her arrest at the hands of Mr. Franker was equally inexcusable. It is surprising to find a member of the police force lending himself to assist her. No attempt has indeed been made to justify it. The indignity of the arrest and the deprivation of liberty is doubtless more serious than the interference here with rights to property. On the other hand, after considering the part she played and having in view the fact that she started the trouble, I cannot view Mrs. Ashby's position with much sympathy.

The plaintiff Ashby claims $100. I value the damage he has suffered at $15. The plaintiff Franker claims $30 damages. I value the wood of which she has been deprived at $15. Only half of the wood taken belonged to her. She is therefore entitled to judgment in the sum of $7.50. Setting that off against the first case, on the two cases the plaintiff Ashby is entitled to judgment for $7.50. Any costs incurred must be paid by the party incurring them.

PETTY DEBT COURT, GEORGETOWN.

PERSAUD *v.* SINGER SEWING MACHINE CO.

[303—9—1920.]

1920. November 3, 9. Before Dalton, J.

Bailment—Hire and purchase agreement—Pledge of machine by hirer—Sale of forfeited pledge by pawnbroker to innocent purchaser—Warranty of title—The Pawnbroker's Ordinance, 1884, s. 12—Rights of owner under hire purchase agreement against innocent purchaser—Prescription—Estoppel.

T. obtained a sewing machine from the Singer Sewing Machine Co., in 1914, under the usual hire purchase agreement, and pledged it in 1914 with the B.G. Pawn-broking Co, Ltd., before completing the purchase. In 1916 the Pawn-broking Co., sold it to P. as a forfeited pledge. In 1920 the Singer Sewing Machine Co., seized the machine as their property. On a claim by P. against the Singer Sewing Machine Co., for recovery of the machine:—

Held, that on the evidence P. was entitled to succeed, the defendant company being now estopped by their previous conduct from setting up their claim to the machine.

Quaere, whether, if the plea of prescription had been raised, the defendant company were not prescribed by effluxion of time from setting up their claim.

Claim by the plaintiff for the delivery of a sewing machine valued at $14 or its value, and $18 damages.

E. Bruyning, for the plaintiff. .

A. G. King, solicitor, for the defendant company.

DALTON, J.: In this action the plaintiff claims from the defendant company a sewing machine alleged to be his property or $14 its value and a further sum of $16 as damages for its alleged unlawful seizure by the defendant company.

The facts which are admitted are as follows:—The defendant company in June, 1914, sold the machine to one Thompson under the usual hire purchase agreement. Trace was lost of the purchaser after May, 1915, when an instalment was paid and the matter was closed in the company's books, the sale being treated as a fictitious sale. On December 30th, 1914, the machine was pledged with the British Guiana Pawn-broking Co., Ltd., and on April 22nd, 1916, they sold it to the plaintiff for $14. The machine remained in plaintiff's possession from that date until September 10th, 1920, when he took it to the pawn-broking company from whom he had purchased it to pledge. After a short time a representative of the defendant company came to the pawnbrokery, claimed the machine, and took it away from the plaintiff.

On those facts it is clear that, on the authority of *Robinson* v. *People's Pawn-broking Co., Ltd.* (1916 L.R.B.G. 159) decided by the Court of Appeal, the pawn-broking company, in selling the machine to the plaintiff, gave him no warranty of title. If the pledgor had no title to the machine and had no right to pledge it, the pawn-broking company in selling it conveyed no more title than the pledgor had. The common law rule that a pawn-broker gives no warranty of title in selling a forfeited pledge is not affected by the provisions of s. 14 of the Sale of Goods Ordinance, 1913, in respect of implied undertakings as to title. All that he warrants is that the pledge is irredeemable. Under the hire-purchase agreement the pledgor had no title, the machine remaining the property of the defendant company until it was paid for. No plea of prescription has been raised against the company limiting their right of action in respect of the machine. It would seem, however, that as prescription would run from the time of the conversion by the pledgor when the bailment was terminated (*The Singer Manufacturing Company* v. *Clark.* 5 Ex. 37) if the defendant company is prescribed from bringing any action after three years on the contract against the hirer, a claim for the property against a third party would be in the same position. I am, however, not called upon to decide this interesting point.

There remains the question of estoppel. In respect of this the evidence of the representative of the pawn-broking company does not agree with that of the defendant company. The two companies had entered early in 1916 into an arrangement whereby machines which were pledged with the pawn-broking company and which were still the property of the defendant company should be

handed over to the latter company on payment of the loan on the machine. As a result of that agreement it is not denied that the representative of the defendant company visited the pawnbrokery, and after inspecting machines there, twenty were handed over to him. This receipt for the machines, dated February 25, 1916, is produced. The representative of the pawn-broking company states that the machine the subject matter of this action, which it is admitted was in the custody of the pawn-broking company at the time, was shown to and examined by the representative of the defendant company, amongst others, and it was not claimed by him. The latter denies that it was shown to him. If it was shown and not claimed under the agreement, he would now be estopped from setting up his claim. I accept the evidence that the machine was shown to the defendant company. To do otherwise would mean a deliberate attempt to deceive the defendant company immediately after the agreement referred to was entered into, and that is not suggested. The representative of the defendant company visited the premises of the pawnbrokery for the purposes of his inspection, and according to the pawnbroker's clerk every machine was taken down and shown to him. The latter states that this particular machine was not shown to him. From the length of time (nearly five years) which has elapsed since that examination I come to the conclusion that he is mistaken. He gave me the impression that what he meant to convey in his evidence was that, without speaking with definite certainty, he would not have been likely to have passed it over if it had been shewn to him,

Having by his conduct then admitted to the pawn-broking company that the defendant company had no claim on the machine, the defendant company is now estopped from setting up any such claim. The plaintiff is therefore entitled to succeed.

I give judgment for the return of the machine or its value $14, and costs.

BENTICK *v.* ALEXANDER.

[60 OF 1920.]

1920. NOVEMBER 19. BEFORE SIR CHARLES MAJOR, C.J., AND DALTON, J.

Practice—Appeal—Non-fulfilment of condition precedent to hearing appeal — Deposit of costs awarded in court below—Enlargement of time—Powers of Court of Appeal—Ordinance 13 of 1893, ss, 38, 41, 44—Rules of Court, 1900, Order XLV., r. 4.

Appeal from a decision of Berkeley, J., allowing an appeal from a judgment of the stipendiary magistrate of the West Coast judicial district (Mr. L. D. Cleare).

The plaintiff Bentick obtained judgment in the magistrate's court for the sum of $51.04 against the defendant in his capacity an executor of Robert Morris, deceased, for money expended on and work done for the deceased during his lifetime.

On appeal, this decision was, on March 5th, 1920, set aside in the following judgment:

BERKELEY, J.: This appeal must be allowed. The defendant— now appellant—is sued as executor and there is no evidence on which the magistrate could find that he was such executor. Apart from this the evidence shows that for some four years the plaintiff—now respondent—lived with the deceased Robert Morris as his reputed wife and that he worked for ten shillings per week. It is admitted by counsel for respondent that this action is brought inasmuch as Morris was taken away from the care of respondent shortly before his death. The only evidence is that of the reputed wife and the nurse who was hired by her as alleged to assist in nursing the deceased. On the facts as found by the magistrate there is nothing to show that this money said to have been spent on his behalf was not his money or that if it was hers it was spent at his request either expressed or implied. The order of the magistrate is set aside and judgment entered for the appellant with costs.

The plaintiff Bentick now appealed from this decision to the Court of Appeal. The appeal was dismissed on an objection taken by the defendant; it is not therefore necessary to set out the reasons of appeal.

E. F. Fredericks, for the appellant.

J. S. McArthur, for the respondent.

SIR CHARLES MAJOR, C.J.: An objection has been taken by counsel for the respondent to the hearing of this appeal for non-

compliance by the appellant with the provisions of section 41 of the Magistrates' Decisions Appeals Ordinance, 1893, which enacts that the appellant shall . . . within fourteen days after the pronouncing of the judgment, deposit in the registry of the court the amount of the judgment and costs, and . . . . . $50 to abide costs of appeal to this court.

It appears that on the 5th March last the learned judge gave judgment to the present respondent on an appeal to him from Mr. Magistrate Cleare allowing that appeal with costs. Judgment was entered on the same day. On the 9th March the present appellant, aware of her obligations under this ordinance, deposited the sum of $50 for costs of the appeal. On the 16th March the costs of the appeal from the magistrate were ascertained and allowed at $16. Not until the 17th instant did the appellant deposit any money against costs of the judgment and then only $10. The balance of $6 has not yet been paid. Sensible of her non-compliance with the provisions of this ordinance Mr. Fredericks now applies for an order of the court that the time for compliance be extended from the 19th March, when the fourteen days mentioned in section 41 expired, to this day, a period of exactly eight months. Apart from any merits to support the application it is urged by Mr. McArthur for the respondent that the court has no power to make the order asked for, because the conditions precedent to hearing appeals of this kind relating to times for taking the several steps therein are prescribed by the ordinance itself, not by any rules under which the court has power to enlarge time fixed for doing any act prescribed by these rules, and because there is no power given for enlargement by the ordinance by which alone, as to practice and procedure, the court can be enabled ; that, although section 44 of the ordinance brings into operation Rules of Court, 1900 (which contain Order XLV., rule 4, providing for enlargement of time) that section only provides for matters not provided for in the ordinance, and this is a matter specifically provided for therein and rule 4 of Order XLV., only relates to enlargement of time fixed by the rules of court themselves.

I am of opinion that the objection of the respondent first taken is good and that it cannot be cured in the manner urged by Mr. Fredericks for that the court has no power to make an order enlarging the time prescribed by the ordinance, that the appellant has not fulfilled a condition precedent to prosecution of his appeal and that the same, therefore, cannot be heard. It is dismissed with costs.

DALTON, J.: Objection has been taken by Mr. McArthur to the hearing of this appeal on the ground that the statutory conditions governing appeal have not been complied with. Appellant's counsel admits that he has not deposited in the Registry the costs

of the judgment appealed from, as required by s. 41 of the Magistrates' Decisions (Appeal) Ordinance, 1893. He now asks this court to extend the time allowed by that section to enable him to comply with the law. We have heard arguments on the question whether or not this Court has any power to extend that time, but it has not been as full as I personally would have wished. If the ordinance gives such power, applying s. 44 and the Rules of Court, 1900, it would seem to exist only in cases of appeal to the Full Court, and not appeals from a magistrate to a single judge. Without however coming to any conclusion on the point I am going to assume for the purposes of this case that this court has the power for which Mr. Frederick's contends. Acting on that assumption I ask whether this is a case in which any further time should be given to appellant. He has not moved in the matter from March 16th until today. That delay entirely puts him out of court and no consideration can be given him. This application therefore cannot be granted.

The appeal must be dismissed with costs.

Appeal dismissed

KIPPENS *v.* BOODHOO

[107 OF 1920.]

1920. NOVEMBER 19. BEFORE SIR CHARLES MAJOR, C.J.,

AND DALTON, J.

Practice—Appeal—Non-fulfilment of condition precedent to hearing of appeal—Deposit of costs awarded in count below —Enlargement of time—Powers of Court of Appeal—Ordinance 13 of 1893, ss. 38, 41, 44—Rules of Court 1900, Order XLV. r. 4.

Appeal from a decision of Berkeley J. allowing an appeal from a judgment of the stipendiary magistrate of the East Coast judicial district (Mr. J. McCowan.)

The plaintiff Kippens obtained judgment in the magistrate's court for the sum of $30 for the wrongful detention of certain coconuts by defendant. This decision was reversed on appeal on May 7th, 1920, in the following judgment.

BERKELEY, J.: This appeal is from the decision of the police magistrate of the East Coast judicial district, who entered judgment for the plaintiff for $30.

The sole point dealt with by the magistrate and to be decided by this Court is, did the fact that the appellant Boodhoo gave information to the police which led to the detention of the coconuts render him liable to the respondent in damages? I think not. On

the evidence of Inspector Cressall and of P. C. Austin this question must be answered in the negative. The respondent himself says "police never told me why detained nuts," All that appellant did was to persuade the police to detain nuts and they did so in order to make enquiry.

In *Walters* v. *Smith & Son, Ltd.,* (110 Law T.R. 345) relied on by the magistrate, the plaintiff had been given into custody by a member of the defendant firm and as they failed to prove the felony they were liable in damages. This present case concerns only detention of goods, and the request that they be detained for the purpose of making enquiry. If the principle to be applied is the same as in cases of false imprisonment and malicious prosecution then *see Cherry* v. *Burton* (Times, February 17, 1920). In that case the Lord Chief Justice, who was the trial judge in *Walters* v. *Smith & Son, Ltd,* (supra) said "The only circumstance that could be relied upon as indicating that the defendant was the prosecutor was that he supplied the information to the police who obtained the warrant upon it."

If I came to the conclusion that appellant was liable in view of the facts deposed to by the police I should have given only nominal damages.

Appeal allowed with costs.

The plaintiff Kippins now appealed from this decision to the Court of Appeal. The appeal was dismissed on the same objection taken as in *Bentick* v. *Alexander* (see above). The reasons of appeal were therefore not considered.

E. F. Fredericks, for the appellant, Kippens.

A. B. Brown, for the respondent.

SIR CHARLES MAJOR, C.J.: In this case the same objection to hearing of the appeal is taken and for the same reasons except that here there has been no taxation of costs, the same being fixed by the court at $10.

There will be the same order as in *Bentick* v. *Alexander* and for the same reasons. I only desire to say that I entirely concur with the remark made by my brother Dalton in that case as applicable to this case, that even if this court had the power to enlarge the time it should not do so. Eight months' default is unconscionable.

DALTON, J.: I concur and have nothing to add.

Appeal dismissed.

HILL *v.* MORDLE.

HILL *v.* MORDLE.

[359 OF 1918.]

1920. NOVEMBER 22. BEFORE SIR CHARLES MAJOR, C.J. AND BERKELEY, J.

Malicious prosecution—Appeal—Findings of fact by trial judge—Oral evidence—Duty of Court of Appeal.

Appeal from a decision of Douglass. Acting J. (a) in which judgment was given for the defendant Mordle in a claim by the plaintiff Hill for the sum of $5,000, for damages for malicious prosecution. All the facts are fully set out in the judgment of the trial Judge.

The reasons of appeal were that reasonable and probable cause was not established, malice was proved, and the decision was in effect a review of the decision in the Petty Debt Court in *Neischer* v. *Mordle* out of which case the proceedings originated.

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

J. S. McArthur, for the respondent, was not called on.

SIR CHARLES MAJOR, C.J.: Following *Abrath* v. *N. E. Railway Co.* and the method prescribed by Lord Fitzgerald in the House of Lords for findings of fact on the trial of an action for malicious prosecution, the learned judge of the court below in this case, trying the action without a jury, put himself certain questions and found that the defendant took reasonable care to inform herself of the true state of the case and honestly believed the case she laid before the stipendiary magistrate. It is not disputed that the judge rightly applied the principle of judicial determination of the question whether, on these findings, the plaintiff had or had not established that the defendant had acted maliciously and without reasonable and probable cause. The findings of fact, however, are challenged both generally and specifically, and it is for this court, therefore, to apply, in its turn, the principles for its guidance on an appeal of this kind.

Now in *Savage* v. *Adam* (W. N. (95) 109 (11))—I quote from the judgment in the Court of Appeal in *Colonial Securities Co.* v. *Massey* ((1896 1 Q. B. 38) where *Savage* v. *Adam* was referred to with approval and confirmation—Lopes, L. J., said: "Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, then inasmuch as the appeal

(a.) Reported at 1919 L.R.B.G. 125.

is in the nature of a rehearing, the decision should be reversed; if the case is left in doubt it is clearly the duty of the Court of Appeal not to disturb the decision of the court below." That rule has been re-affirmed and followed in many cases since 1896 and has been more than once expressed by this Court. It has been recently followed in the West Indian Court of Appeal in *Isles* v. *Perreira*, an authority at any rate by which I conceive myself to be bound.

In view of the conclusions at which I have arrived, it is not necessary to analyse and pass upon the evidence given at the hearing. It is sufficient to say that I have read it closely for myself, and listened with attention to the earnest argument of learned counsel for the appellant as to both the general and the specific grounds of challenge. But I am unable to find—adopting the tests applied to an appeal like this by Lord Robson in delivering the judgment of the Judicial Committee in *Khoo Sit Hoh v. Lim Thean Tong* (1912 A.C. 325)—that in deciding between witnesses, the learned trial judge "has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given' credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact." I may go farther and say that I agree with the findings of fact in the court below. Even if I had not done so, but had found myself in no better position—just because I did not try the case and see and hear the witnesses, which Douglass, J. did — than that of doubt, then the latter part of Lord Justice Lopes' rule must prevail, and it is clearly my duty not to disturb the decision of the court below. The judgment of the court below must be affirmed and this appeal dismissed with costs.

BERKELEY, J.: This Court has repeatedly held that on a question of fact it will not interfere with the conclusion arrived at by the trial judge. In the present case there was evidence to warrant his finding and the appeal must be dismissed with costs.

BOWEN *v.* CLARKE.

BOWEN *v.* CLARKE.

1920. NOVEMBER 26. BEFORE SIR CHARLES MAJOR, C.J., AND DALTON, J.

Animal—Cattle straying—Suffering or permitting animals to stray—Control— Agister—Public road—Construction at expense of Colony—"Other work"—Ejusdem generis—The Roads Ordinance, 1910, ss. 25 (2), 40—The Sea Defence Ordinances 1913—1919.

Appeal from a decision of Berkeley, J. The appellant Clarke was charged before the stipendiary magistrate of the East Coast judicial district with permitting cattle under his control to stray "on the sea defence dam at Felicity, a road as defined by s. 25 (2) of the Roads Ordinance 1910." He was convicted. On appeal, Berkeley, J., confirmed the magistrate's decision, on May 28th, 1920, in the following judgment.

BERKELEY, J.: I hare carefully listened to the argument of counsel for the defendant—now appellant—and I cannot agree with him that because the ordinance is the "Roads Ordinance" the Court must read into s. 25 (2) the words "used in connection therewith," which are found in the definition section 40. The sub-section provides that under sections 24 and 25 the term "road" "includes . . . . or other work contracted or maintained at the expense of the Colony." A dam certainly comes within this description whether it is used or not (and it well might be so used) in connection with a road.

The magistrate has written a well considered decision and I agree with his findings both on the law and the facts.

Appeal dismissed with costs,

From this decision the appellant Clarke further appealed to the Full Court.

The reasons for appeal were as follows:—

The decision is erroneous in point of law inasmuch as:—

(a) The evidence did not establish the charge as laid.

(b) The sea defence dam at Felicity referred to in the charge is not "a road" within the meaning of section 25 (2) of the Roads Ordinance, 1910, or within the meaning: of the said Ordinance at all.

(c) The evidence established that the sea defence dam at Felicity was the line of sea defence and was not used as a road or used or maintained in connection with any road and therefore could not be a road within the meaning of the Roads Ordinance. 1910.

(d) It was proved at the hearing that the defendant was the agister of the animals which had strayed, and consequently was not the owner or a person having the control of the

animals within the meaning of the section under which the charge was laid.

(e) The defendant being only an agister cannot be made criminally liable for acts committed by animals agisted with him.

H. C. Humphrys, for the appellant.

H. C. F. Cox, Assistant to Attorney General, for the respondent.

SIR CHARLES MAJOR, C.J.: The stipendiary magistrate in this case convicted the defendant for suffering cattle to stray on sea defence works, holding the place of stray to be a road within the definition of "road" in the 25th section of the Roads Ordinance (No. 11 of), 1910, and the defendant being an agister of the cattle. The facts before the magistrate—which were not in dispute—were that the cattle strayed on a sea defence dam, that they were impounded by a person authorized to do so, and that the defendant agisted the animals as manager of his plantation upon which the dam was being constructed.

The defendant appealed and Berkeley, J., affirmed the conviction, holding that the term "road" including "other work constructed or maintained at the expense of the colony," a dam comes within that description whether used or not in connection with a road, although section 40 of the Ordinance defines a road, as including "roadway, water-tables etc., on the line of a road and used in connection therewith."

The defendant appealed to the Court of Appeal against this decision.

The facts in this case are few and undisputed. The cattle were found straying on Felicity sea defence dam and impounded. The defendant is the manager of Plantation Good Intention (the proprietors of which pay for the upkeep of the dam) and agisted the cattle for one Harsuhari. The defendant has appealed from the judgment of Berkeley, J. affirming his conviction for permitting the cattle as under his control to stray on the dam mentioned, a road as defined by section 25, sub-section (2) of the Roads Ordinance, 1910. It is contended by the appellant that the evidence does not support the charge because firstly as an agister of the cattle he is not a person having them "under his control" for the purposes of the charge; secondly, Felicity dam is not a road and is not constructed and maintained at the expense of the colony within the meaning of the sub-section.

To take these in order. I entertain great doubt whether the defendant as agister of the cattle simpliciter was a person having them under his control, being inclined to agree with Mr.

Humphrys' contention that immediate control is meant, but it is unnecessary to decide that question, for I cannot agree that this sea defence dam is, or was when the alleged offence was charged. a road, that is to say, a work constructed and maintained at the expense of the colony. The Roads Ordinance is one to make provision for the construction and maintenance of the public roads of the colony, and, by section one, are to be constructed and maintained out of money provided by the Legislature. With the exception of particular works, undertaken at the instance and for the special benefit of particular persons, owners of land in the neighbourhood of public road, and not otherwise part of or connected with the ordinary work of their construction and maintenance, for which those particular persons pay the public roads. with all their appurtenances are made and maintained entirely at the public expense, and I do not need to import the word "wholly" (any more than I may import the word "partially" into the section for the purposes of sea defence work) into the expression "at the expense of the colony" to enable me to construe it as meaning just that, wholly or entirely at the expense of the colony. A view of the whole Ordinance and its subject matter brings me irresistibly to that conclusion. But this place is part of a sea defence work—it was stated by Mr. Lynch King, superintendent of the East Coast sea defences, that those defences "have nothing to do with the new road, [that is, the only public road in their neighbourhood] Government maintains that as a road"—and, turning to the Sea Defence Ordinances 1913 to 1919, I find that by section 18 of Ord. IX of 1913, the cost of construction and maintenance of sea defence works, annually recurrent and extraordinary, is to be borne as to three-fourths thereof by the proprietors of estates whereon the works are situate and local authorities, and as to the other fourth by such moneys as shall be annually voted by the Legislature. If, there-fore, a sea defence dam could be held to come into the words "other work" in the section in the Roads Ordinance, it would not be a work constructed and maintained entirely at the expense of the colony. I cannot think that an enactment or instruction, or contract, that I shall do something at my expense could enable me to say that it may be done at the expense of others as well as myself.

But, further, neglecting the question of expense of construction and maintenance, with every respect for the opinion of the learned appellate judge, I cannot regard this sea defence dam as included in the expression "other work." My learned brother Dalton will deal with that aspect of the appeal, and I need only to say that I entirely concur with the view he takes of the question and the reasons for arriving at it.

I think it worth while to add that, under the ground of appeal that the evidence did not support the charge, although not touched by counsel for the appellant; that on the authority of *Somerset* v. *Hart* (12 Q.B.D. 360) and *Somerset* v. *Wade* ((1894 1 Q.B. 574) the charge failed for want of proof that the defendant, either personally or by some one put by him in charge of the cattle, knew of the straying of the cattle and, therefore, suffered or permitted it. In the former case Lord Coleridge, C.J., said: "How can a man suffer a thing to be done when he does not know of it?" Here there was no evidence of the defendant's knowledge. "It is true," continued the Chief Justice "that a man may put another in his position so as to represent him for the purpose of knowledge; but there is no evidence of that delegation here." In this case there was no evidence of the presence or control of a cow minder.

DALTON, J.: In this appeal I have addressed myself principally to reason of appeal 1 (b), namely, that the sea defence dam at Felicity referred to in the charge is not a "road" within the meaning of section 25 (2) of the Roads Ordinance, 1910, or within the meaning of the said ordinance at all. In his reasons for decision the magistrate, in a careful and full judgment, whilst admitting that in construing a section of an ordinance the whole must be considered, points out that section (25) 2 contains a special definition of road only applicable to sections 24 and 25 of the ordinance. He then, it appears to me, separates these two sections from the rest of the ordinance and proceeds to state that to guide him whether or not "this sea defence dam comes within the definition" he must turn to another ordinance, namely a Sea Defence ordinance. I quite see the difficulty caused by two definitions of the term—"road" in one ordinance, with somewhat different verbiage, but to ascertain whether this sea defence dam come within the term under definition, reference must primarily and chiefly be had to the Roads Ordinance itself and not to the Sea Defence Ordinance.

The purport of the ordinance is clear from its title. It is an ordinance to make provision for the construction and maintenance of the public roads of the colony. How can a sea dam, an erection put up to keep out the sea, for that and for no other purpose, be said to be a road or to have any connection with the purposes with which this ordinance purports to deal? The fact that the sea defence is built on the line of an old road gone out of use does not assist the respondent's case at all. Admittedly, if the sea dam comes within the definition, then it includes any erection anywhere, provided it is constructed and maintained by the Government, a position which would lead to many absurdities and which the

Legislature could never have intended. The existence of two separate definitions of the term "road" in one ordinance may no doubt point to loose draughtsmanship, but I cannot see that they are very wide apart in their differences as has been urged. The words "drain, trench, canal, building, erection, or other work" in s. 25 (2) do not appear to me to express much more than the words "water tables, bridges, culverts, parapets, embankments and drains" used in section 40. It is true the words "on the line of such road or street and used in connection therewith" are added in section 40, but I am satisfied that some such words must necessarily be implied also in s. 25 (2) to give it any reasonable and intelligible meaning, having in view the object of the ordinance. If that is so, the term "other work" by application of the rule *ejusdem generis* must be confined to things of the same kind as those already specified, namely, works that have some connection with the maintenance and construction of the public roads. I am unable to agree that sections 24 and 25 of the ordinance provide for the seizure and impounding of stock on all Government property. I can find nothing in the ordinance to show that they go beyond the limits set out by the title. The use of the word "include" in the definition clause does not take the term "road" beyond the purposes for which the ordinance was enacted, although, of course, it enlarges the term beyond its generally accepted import.

For this reason alone then I am satisfied that the appeal should be allowed and the decision of the magistrate set aside. I agree, however, entirely with the Chief Justice that the sea defence dam is not a work constructed and maintained at the expense of the colony, nor do I think that the evidence supported the charge even if the dam could have been held to be a road within the meaning of the ordinance.

SIR CHARLES MAJOR, C.J.: This appeal is allowed. The order of the Court below must be set aside and the conviction quashed. There will be costs for the appellant throughout.

MARKS *v.* WEEKS.

MARKS *v.* WEEKS;
ex parte MARKS.

[277 OF 1920.]

1920. NOVEMBER 27; DECEMBER 3. BEFORE DALTON, J.

Practice—Pleadings—Jurisdiction to strike out statement of defence—Affidavit, exhibit to—Right to copy—Effect of noncompliance with rules—Irregularity—Rules of Court 1900, Order XVII. r, *6*; *Order XL. r. 4; Order LI. r. 1.*

Application by the plaintiff to strike out the statement of defence filed by the defendant. The grounds alleged in support of the application which are set out in the judgment below, were admitted by respondent (defendant) to be correct, but objection was taken to the application under the provisions of Order LI., r. 1.

B. B. Marshall, for the applicant.

E. M. Duke, for the respondent.

DALTON, J.: This is an application by the plaintiff to strike out the statement of defence filed on the ground that it is bad and void as not complying with the provisions of Order XVII r. 6., having been signed by counsel only and not by a solicitor with him.

Counsel for the respondent has taken objection to the application being heard on the ground that he has not had served on him all the documents required by Order XL. r. 4. The application is supported by affidavit. The affidavit refers to a certain document as an exhibit. That exhibit in fact is the statement of defence which applicant is asking to have struck out. He cites the case *In re Hinchcliffe* (1895, 1 Ch. 117) as an authority to support his objection.

It is clear that where an exhibit is referred to in an affidavit in many cases it would be useless to have a copy of the affidavit without a copy of the exhibit. The case cited supports this. Any person who has a right to inspect and take copies of an affidavit has a similar right to any document made an exhibit to the affidavit. In this case before me, however, the document in question had come from the respondent himself; it was his defence in the action, so he cannot plead ignorance as to its contents. Whilst I agree that it would be correct to attach a copy of the exhibit to the copy of the affidavit, the respondent has in no way been prejudiced by the omission (it may in the result save him costs) and I overrule his objection:

To the application itself, the reply is an admission of the correctness of the ground on which the application is based, but

it is opposed for two reasons, (1) that the application has not been made within reasonable time, and (2) that applicant has taken a fresh step in the action after knowledge of the irregularity. The question whether or not the action of the defendant (respondent) was an "irregularity" within the terms of Order LI. was not raised by either side, but it is necessary for me to consider it.

The pleading objected to, the statement of defence, was signed by counsel only. By rule 6 of Order XVII. it is laid down that "every pleading shall be signed by a barrister and the solicitor of the party and shall not be received by the Registrar if not so signed, unless the Court or a judge shall see fit in any case to dispense with such signatures." There is the exception in proceedings under $250, which is not the case here. Neither has there been any dispensation. It is not suggested that this is a case in which such dispensation may properly be granted. The pleading has, however, been improperly received in the registry and is on the record. Is this non-compliance with the rules such an irregularity as is contemplated by Order LI? It has been laid down in the well-known case of *Smurthwaite* v. *Hannay* (1894 A.C. 494) that if a step is taken by any party which is not warranted by any rule or enactment it is much more than an "irregularity" within the meaning of this rule. Applying this authority the Full Court in *Russell* v. *Andrew* (G. J. June 30th, 1909) held that the renewal of a writ out of the registry, on an application not filed within the time laid down, and without the leave of the Court or judge (also a necessary requirement under the rules) was more than an irregularity, and so did not come within the provisions of Order LI. The Court held that the renewal, although it proceeded out of the registry, was void *ab initio* and it was set aside. Although the circumstances in the case before me are not so strong, yet I have after some doubt come to the conclusion that they are beyond the limits of the "irregularity" contemplated by Order VI. The filing of the document and its acceptance, however it came to be effected, was unwarranted by any rule, was rather directly contrary to the rules. No doubt it was the result of great carelessness or ignorance of the requirements of the rules as in *Russell* v. *Andrew*, but that cannot affect my conclusion. I accordingly direct the pleading to be struck off from the record.

It remains to point out here that, from the nature of this application; it does not come within the provisions of Order XVII r. 29, which is the rule generally made use of in applications for striking out pleadings. The Court has, in addition, as has been laid down by various authorities, an inherent jurisdiction to prevent an abuse of its procedure (*Reichel* v. *Magrath*, 14 A.C. 665). As appears from the facts in the case of *Remington* v. *Scoles* (1897

2 Ch. 1), so here I think to allow this pleading as it is, if it were permitted to remain on the file, would be an abuse of the procedure of the Court having in view the clear, salutary, and peremptory rule which it contravenes.

It is not necessary then to consider the further question raised by respondent's counsel in reply to the application, seeing that the matter is not one which comes within the scope of Order LI. In the interests, however, of what appears to me to be justice, whilst ordering the defendant's statement of defence to be struck out, I order that he be at liberty to deliver a fresh defence in the action within ten days, but he must pay the respondent the costs of the application.

SUMARIA *v.* RAMNARAIN.

[250 OF 1920.]

1920. DECEMBER 17, 24, BEFORE SIR CHARLES MAJOR, C.J, AND DALTON, J.

Asiatic immigrant—Husband and wife—Division of property of married immigrants, or parties cohabiting together—Property properly divisible—Immigration Ordinance 1891, s. 156(1),

Appeal from a decision of Douglass, Actg. J.

The plaintiff Sumaria claimed in the petty debt jurisdiction of the Georgetown judicial district a division of property, on the ground that she had cohabited with the defendant for a period of seventeen years, after which they had ceased to cohabit. The plaint set out that the plaintiff and defendant had by their joint earnings acquired property and money to the value of $12,964.56.

After hearing evidence on the trial judgment was given as follows:—

DOUGLASS, Acting J.: This is one of the many unsatisfactory cases for division between themselves of the property of immigrants who have been married or cohabited together; it is brought under section 156 of the Immigration Ordinance, 1891.

It is nearly always the woman who has to bring the action and the man also makes out himself either a pauper, or that the property is acquired after his separation from the woman. In the present case to arrive at any chance "of a fair division has been rendered the more difficult by the non-attendance of any officer from the Immigration Department to assist the Court. I understand that a question of privilege was suggested, but I cannot see it arises in a case where both parties ask that a certain witness may be called to state what took place in his presence. An officer of that department would easier decide such cases as this with his knowledge of what had taken place between the

parties, and as an expert of the East Indian type, than any magistrate, and I have always asked for their assistance, which has hitherto been willingly given.

This suit is rightly brought on the civil side of the magistrate's jurisdiction. The practice in cases coming under section 156 of Ordinance 18 of 1891 was laid down in *Nassebun* v. *Khodobacus* (August 10, 1894) and *Boodhoo* v. *Goobahar* (A.J., June 27, 1907).

I am satisfied on the evidence that the parties ceased to cohabit in 1917, and must endeavour to arrive at what property was purchased or acquired before that date by their joint earnings or to which both have contributed (*Gugabeer* v. *Jairnum*, A.J., October 10th, 1908). In addition to what a woman actually earns, she contributes to the common property by her housekeeping and care of the children and these and her numerous duties are entitled to be considered in a division of the property.

I may at once eliminate from consideration the rice factory and land at Belladrum, estate at Berbice and engine and fittings in Georgetown; they were—if acquired—either acquired since 1916 or in partnership with a third party. As no date more exact than 1917 is given I must also put aside the plaintiffs claim to $600 cash as too shadowy to be considered.

I shall allow three of the donkeys and the cart at the value of $125, it is absurd for the witness Bissoondial to state that the defendant, a man, who owned two or three estates and rice factory, never owned a donkey and cart, and I decline to believe that they existed merely in the imagination of the plaintiff. Taking into consideration the pawn tickets as confirming the plaintiff's evidence 1 allow the jewelry at $50, as her exclusive property; with regard to the furniture, taken the total at $65.16, she says she took away amount of value of $22.10, her half share in the total would be worth $32.58, so that the proportion still due to her would be $10.48.

There remains (1) La Penitence and (2) Albuoystown property. That they are both the defendant's there is no doubt, acquired during their cohabitation when she was assisting him in the goldsmith's work. The former is valued at $500 by Conway and the latter at $2,800 for rates, both in 1919. I have to arrive at some figure for 1917 and take $300 as a fair value for La Penitence and $1,800 for Albuoystown property, but the latter subject to a mortgage of $1,000. I then arrive at the plaintiff's share in the property to be divided as (1) La Penitence. $150; (2) Albuoystown $400; (3) donkeys and cart, $62.50; (4) jewels, $50, and (5) furniture, $10.48, making a total of $672.98

I order that the defendant either give property to that value to the satisfaction of the Court to the plaintiff or the sum of $672.98, $7.92 costs and $10 counsel's fee.

From this decision respondent appealed, on the following grounds:—
The decision is erroneous in point of law:—

(a) Because the claim of the plaintiff disclosed no cause of action.

(b) Because there was no evidence that the plaintiff was legally entitled to the remedy sought in the said action as there was no evidence led at the trial of the said action, to show that the plaintiff was an immigrant within the meaning of section 139 of Ordinance 18 of 1891.

(c) Because there was no evidence that any of the property acquired by the defendant was acquired with earnings of the plaintiff.

(d) Because there was no evidence that the plaintiff was entitled to a division of any of the property owned by the defendant, and the learned Judge erred in awarding the sum of $672.98 and costs, with fee to counsel, to the plaintiff.

(e) Because there being no evidence that any of the property owned by the defendant was acquired by the joint earnings of the plaintiff and the defendant as specifically claimed in the claim issued by the plaintiff, the learned Judge erred in deciding that the plaintiff was entitled to a part of the defendant's property by deciding that "In addition to what a woman actually earns, she contributes to the common property by her housekeeping and care of the children and these and her numerous duties are entitled to be considered in a division of the property."

J. A. Veerasawmy, for *H. C. F Cox,* for the appellant.

M. Singh, for the respondent.

Sir CHARLES MAJOR, C.J.: Not referring to the question of disclosure of any ground for relief in the respondent's statement of claim in the court below, I am of opinion that the evidence showed that the parties are immigrants within the definition of that term in the Immigration Ordinance, 1891.

Section 156 of that ordinance contemplates two classes of division of property of immigrants. The first class consists of division made at the desire of one or other of two immigrants who are married, or have cohabited without marriage, and when the cohabitation has ceased, of property to which they or either of them, are or is entitled. The property here mean is that belonging to the cohabitant himself or herself making the application for division, howsoever acquired. An applicant must have property to divide. The application, of course, may be made by both

cohabitants together. It is not possible for a cohabitant having no property, by the expression of a mere wish, to call upon a magistrate to allot to him or her, a portion, however small, of the property of the other cohabitant.

The second class of division consists of that, made upon death of one cohabitant intestate, of property acquired by the joint earnings of the intestate and the surviving cohabitant, or to the acquisition of which the survivor has contributed. This class is separate and distinct from the first, and none other than the magistrate (or the Official Receiver) has cognizance of it, for his decision is final.

The application of the respondent to this appeal came within the first class of division, and no question of joint earnings or contribution to acquisition of property by the appellant could be considered, save perhaps in the sense that the property or a portion of it belonged to the respondent. The learned judge, therefore, sitting in magisterial proceedings, was in error, in my opinion, in proceeding to a division on the basis of joint earnings or contribution. Even so, the evidence of the respondent was solely that she assisted the appellant in his work as goldsmith, for I cannot regard her housekeeping and care of the children of her irregular union as any contribution to acquisition of property at all, capable of being expressed in money or otherwise.

The application for division by the respondent being, then, within the first class of case, it was incumbent on her to prove that she was entitled to some property which was to be the subject of division. But she proved nothing of the kind, On the contrary, the evidence showed that the property set forth in the particulars was, all of it, acquired by the appellant. Only by an admission by him that one part of the property that at La Penitence, was joint property is there any ground for saying that she is entitled to anything. For all the learned judge then knew, or this Court knows now, the appellant may have bought the house entirely with his own money. The value of the house is stated by him to be $150. The learned judge took it to be worth $300. The appellant offered her $100. She took away jewelry and furniture to which she was not entitled. I think she should have the $100 offered her by the appellant. The judgment of the Court below will be varied accordingly. The parties will pay their own costs of proceedings throughout.

DALTON, J.: I concur in the judgment just delivered and agree that the appeal must be allowed. I had come to the same conclusion in respect of reason (a) of the reasons of appeal also. The claim of the plaintiff in my opinion discloses no cause of action whatsoever and should have been struck out. All it sets out is that two parties merely giving their names, have cohabited for

some years and since separated; that during cohabitation by their earnings they acquired certain property ; and lastly that one of the parties claims a division. No cause of action arises out of those allegations even if completely proved.

Appeal allowed.

KRISNATH & ANR. *v.* CLEMENTS.

[83 OF 1920.]

1920. DECEMBER 6, 7, AND 24. BEFORE SIR CHARLES MAJOR, C.J.

Sale of land—Specific performance—Validity of agreement—Statute of Frauds—Limitation of actions—Delay—Laches—Vesting and acquisition of inheritance—Succession ab intestato—Saving of existing rights—Civil Law of British Guiana Ordinance, 1916, s. 2 (3), 3 (4) (e). 4 (2), and 6.

Claim by the plaintiffs, by way of opposition proceedings, for an injunction restraining the defendant from transporting immovable property as advertised by her, and for an order that she do convey the property in question to the plaintiffs. All the further necessary facts are fully set out in the judgment.

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

J. S. McArthur, for the defendant.

SIR CHARLES MAJOR, C.J.: The defendant has advertised her intention to convey to one Jansen "part of the eastern half of plantation Louis Manor, or lot number 9, on the east coast of Berbice," described by metes and bounds. It appears by admissions of the defendant in her statement of defence and by evidence given by the plaintiff in this action, that she is the sole heiress of her father Robert Clements and of her mother and brothers and sisters, that her father, in March, 1889, purchased at sale in execution the property advertised, and that on her petition as sole heiress as aforesaid in September, 1919, letters of decree therefor were ordered to be issued in favour of "the estate of Robert Clements, deceased." The plaintiffs, who claim as the residuary devisees of their father Bissnath, and heirs on the death intestate of their mother, Sugia, and brother, Mohipat, co-residuary devisees of Bissnath, have opposed the. intended conveyance and brought this action for an injunction restraining the sale, on the ground that their father, in 1889, agreed to buy and Clements, deceased, agreed to sell the Louis Manor property, that Bissnath, having paid the purchase money, $100,

entered into possession and receipt of the rents and profits and remained therein until his death in March, 1899, and that the possession has been continued ever since by Bissnath's family. The plaintiffs claim an order that the defendant do execute a conveyance of the property to them or to the estate of Bissnath. Clements died intestate in May, 1899. No letters of administration of his estate have been obtained, Sugia, the plaintiffs' mother, died in December, 1900. Their brother, Mohipat, died intestate and a bachelor in December, 1918. Bissnath and Sugia were not tarried. The evidence in the case has been given by and behalf of the plaintiffs. The defendant called no witnesses.

Here are the facts as I find them and my reasons for so finding.

On the 25th October, 1889, Clements gave to Bissnath a receipt in these terms: "Received from Bissnath the sum of $25 in part payment of the eastern half of my share of plantation Louis Manor, known as No. 9, East Coast, Berbice." On the same day Bissnath gave to Clements a promissory note, thus expressed: "Three months after date I promised to pay to Mr. Robert P. Clements or his order the sum of $75 for value received." Endorsed on the promissory note is an acknowledgment by Clements, dated the 24th February, 1890, of payment by Bissnath to him of $7.50 on account of the note, and in the same year Clements obtained judgment against Bissnath for, and was paid, the sum of $57.50, balance then due on the note.

In 1893 David Ready, then plantation messenger at Albion, who knew the Louis Manor lands well, passing them day by day on his way to New Amsterdam, who owns land himself in Berbice, and who also knew Bissnath and family well, tells us that Bissnath was in possession of and cultivating that portion of Louis Manor, which he describes by the boundaries set out in the defendant's petition for letters of decree and in the letters themselves, that Bissnath cleared the trenches, made up the dams on the land, and planted it in rice. Ready knew Sugia and Mohipat, he knows Krishnath and Raghanath, and he knows that Bissnath's possession and cultivation was, after Bissnath's death, continued by an uncle of the boys, and Mr. Stewart, acting Immigration Agent General, and Mr. Laing, an officer of the Immigration Agency, speak of their custody and control of the property, after Sugia's death, by appointment in Bissnath's will and by order of this Court in 1901, contributing to the upkeep of sea defences and drainage and receiving the rents and profits to the present day.

Now, considering that the receipt given by Clements states that it was for part payment of the purchase money of the property described in it as the eastern half of plantation Louis Manor, and that on the same day

he took a promissory note from Bissnath for $75, and that the transaction was followed by the circumstances as to possession and acts of ownership of and over the land described by Ready, shown to be in existence shortly after the transaction, I am not only entitled, in the absence of any evidence to the contrary and of any suggestion that it was other than one transaction relating to one subject matter, but am driven, to infer that on that 25th October, 1889, Clements sold to Bissnath the property named for the sum of $100. As to the verbal difference in the description of the land in the receipt from that in the defendant's petition for letters of decree and in the pleadings, the defendant does not suggest that the lauds, the subject matter of the agreement, is other than that bought by Clements at execution sale and now advertised for sale and conveyance. Mr. McArthur has drawn attention to the difference in description, but any uncertainty as to what was sold is removed by Ready's testimony as to the extent of the land in Bissnath's possession very soon after the agreement, which shows what Clements meant by the eastern half of his share of the plantation. And there never has been any question, since 1889, by the Clements family including the defendant, of Bissnath's right to the land of which he was possessed. Only now, and nearly twenty years after her father's death, does the defendant raise it.

I find, therefore, that on the 25th October, 1889, Clements agreed to sell to Bissnath the property named for $100, an agreement having the essential elements ascertained of subject matter, price, and consent of the parties thereto; that the agreement was followed, probably immediately, certainly shortly after, by Bissnath's possession, which, with the receipt of the rents and profits and the exercise of acts of ownership, has been continued to the present day.

It is to the legal aspect of the facts thus established that Mr. McArthur has directed a variety of objections. There is the objection that, the plaintiffs seeking relief by way of specific performance, the defendant is not properly before the court, since she is not the owner of the property involved, letters of decree having been granted to "the estate of Robert Clements, deceased," and only an owner being able to convey. The opposition, at this stage, conies strangely late, but even if "the estate of Clements be unrepresented, this is what is called an opposition action, and it is precisely because only the owner of property can alienate it and the defendant has advertised her intention, as that owner by inheritance, to convey it to Jansen, that the plaintiffs seek an injunction to restrain her from so doing.

Next, the objection is made that the action cannot be maintained as the agreement upon which it is brought does not satisfy

the Statute of Frauds, not being in writing, or at any rate such a writing as the statute requires. The first answer to that is that the statute, as reproduced in our Civil Law Ordinance, 1916, is, in my opinion, inapplicable to this case. It is quite true, as argued by Mr. McArthur on *Leroux* v. *Brown* (22 L.J C.P. 4), that the 4th section of the Statute of Frauds applies, not to the validity of the contract, but to the mode of procedure upon it, and that the legislature contemplated a contract good before any writing, though not enforceable without the writing as evidence of it, but to hold that by our enactment of that provision, a verbal contract for the sale of land made before the ordinance and enforceable before the ordinance, cannot now be enforced, would be, quite apart from any saving of rights by the same ordinance acquired before it came into operation, to construe it as retroactive, which in my opinion it is not. The second answer to the objection is that, even if the statute were applicable, this action is not upon a written contract, but in form and substance upon part performance of a verbal contract, by possession, coupled with acts of ownership referable only to the contract, such as cultivation and outlay, and receipt of rents and profits, and is, therefore, taken out of the statute.

Thirdly, it is said that the action is barred by lapse of time under the section of the same Civil Law Ordinance which enacts the Real Property Limitation Act, 1874, that time being twelve years. But no statute of limitation can be pleaded to a suit for specific performance; and then, whatever be the difficulty of construing a section endeavouring to compress within it the whole of the Act of 1874 with references to Ordinance No. 1 of 1856, this much is clear, that the action referred to in the section is an action to recover possession by persons ousted of their seisin. Here there is, there has been, no ouster. The plaintiffs' testator and the plaintiffs themselves were and have been, and are now, in possession.

Then there is the objection of the plaintiffs' laches. What has been and is the position of the plaintiffs? Their father paid his price for the land and entered upon it. His possession and its incidents have been continued to the present year. The vendor upon whom laid the obligation to convey and so complete his contract did nothing to perfect the sale at execution. Not until the end of last year, thirty years after the agreement was made and twenty years after the vendor's death, were steps taken by the defendant for the purpose and letters of decree issued to the estate of Clements. Until the advertisement of transport there was no infringement, nor attempt to infringe the plaintiffs' rights of which they were aware, so that they can be charged with assent or acquiescence; neither has there been any change of position

whatever on Clement's part during his lifetime or on the part of his representatives after his death ; nor has there been any neglect or conduct of the plaintiffs, whereby it may be said to be unreasonable for the plaintiffs to assert their rights. The plaintiffs have done nothing, their testator before them did nothing that can by any inference be regarded as a waiver of their rights. The contract was promptly acted upon by Bissnath's possession and has continued to be acted upon ever since by receipt of the rents and profits. In *Crofton* v. *Ormsby* (2 Sch. & L. 581) the plaintiff sought performance of an agreement made twenty-six years before action, between A. and her husband to change a *cestui que vie* in a lease, by inserting, in place of an old life, the plaintiff's name, as her said husband's then intended wife, upon the faith of which the marriage took place and the demised premises were settled upon the plaintiff. The husband died and his estate was sold to the defendant. Amongst other defences was that alleging laches on the part of the husband to have a lease executed according to the agreement. Lord Redesdale, C., said: "Then it is said there were laches on the part of Crofton, and unquestionably there were. If it be said that it is laches to rest upon an equitable agreement this is laches. But what is the laches? Is it like the laches in *Wingfield* v. *Whaley, Milward* v. *Earl Thanet,* and the other cases? No. Those were cases of a different description. The whole laches here consists in not clothing an equitable estate with a legal title, and that by a party in possession. Now I do not conceive that this is a species of laches which will prevail against an equitable title. If I should hold it so, it would tend to overset a great deal of property in this country, where parties of ten continue to hold under an equitable contract for forty or fifty years without clothing it with the legal title. I conceive, therefore, that possession having gone with the contract, there is no room for the objection." The case of *Rochefoucauld* v. *Boustead* (1897. 1 Ch. 196) was cited by Mr. McArthur, with *Leroux* v. *Brown,* for the effect of the Statute of Frauds. In it I find the following observations on the doctrine of laches by Lindley, L.J., delivering the judgment of the Court: "The principle applicable to cases in which equitable relief is sought after long delay is well expressed in Lord Blackburn's judgment in *Erlanger* v. *New Sombrero Phosphate Co."* In *Lindsay Petroleum Co.* v. *Hurd* it is said: "The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because a party has, by his conduct, clone that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct or neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in

which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every ease, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or in-justice in taking the one course or the other, so far as relates to the remedy." Lord Blackburn goes on to say: "I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it?" I have endeavoured to apply the rule in *Lindsay Petroleum Co.* v. *Hurd,* so commended by Lords Blackburn and Lindley, in this case, and I do not think there can be any doubt as to the answer to the question, is the balance of justice in favour of granting the remedy sought by the plaintiffs or withholding it when all the circumstances of this case are considered and weighed in that balance?

There remain two points of argument to be considered. The first is as to the representation of Mohipat and his brothers' right of succession to his estate upon his intestacy. If any authority be needed for the statement that brothers and sisters by the same mother are entitled to succeed each other on intestacy, although they are illegitimate, it is to be found in *Mogamat* v. *The Master* (8 S.C. 259). And the secession is as of right. Although, therefore, Mohipat died in 1918. his brothers' right existed before the passing of the Civil Law Ordinance, 1916, and is a "right, title, or interest in immovable property" expressly preserved to them by the third subsection of the second section of the Ordinance. But even if it had not been so preserved and Mohipat's estate were today unrepresented or outstanding, that would be no valid objection on the part of the defendant to a decree against her for specific performance, for the court will always, for the purpose of working out a decree, direct an enquiry as to outstanding estates or as to the state of the title to the subject matter of the suit, which, owing to delay, has undergone a change in interest. The second point is as to the representation of the estate of Clements and the interest of the defendant therein. Before the present year, in succession *ab intestato* the right to the inheritance

by the heir vested immediately upon the death of the intestate, without the intervention of the administrator of his estate, on whom, by the law, as it now is, the legal estate devolves. That right, it is admitted, is the defendant's. She has petitioned the court, in the capacity of sole heiress of the property involved in this action, for letters of decree thereof in her favour, the court has issued letters to the estate of Clements. If before this year adiation of an inheritance were necessary, it was by the Deceased Person Estates Ordinance, 1909, to be presumed. The defendants' action has strengthened that presumption, not displaced it. She, therefore, has acquired the inheritance.

Thus, for the reasons given, the plaintiffs are entitled to an injunction restraining the proposed sale. There will be a declaration that they are entitled to have the agreement of the 28th October, 1889, specifically performed, and an order is made that for that purpose, the defendant, in her capacity as sole heiress of Robert Piercy Clements, Mary Catherine Clements, Robert Clements, Catherine Simonette Clements and Maud Clements in the pleadings mentioned, do convey to the plaintiffs the land hereditaments and premises in the statement of claim set forth and described. The plaintiffs must have their costs of suit.

ROSE HALL VILLAGE COUNCIL *v.* WOO SAM.

[42 OF 1919; BERBICE.]

1920. JANUARY 5. BEFORE DALTON, J.

Local Government—Building regulations—Building or structure—Meaning—New structure—Districts By-laws, 1911, s. 35 (3)—Local Government Ordinance 1907, s, 275 —Ultra vires.

Appeal from a decision of the acting stipendiary magistrate (Mr. L. D. Cleare) of the Berbice judicial district, who convicted the appellant Woo Sam on a charge of contravening s. 35 (3) of the Districts By-laws, 1911.

All the facts of the case and the reasons of appeal are set out in the judgment hereafter.

J. A. Abbensetts, for the appellant.

C. S*hankland,* Secretary of the Local Government Board, for the Village Council, the respondents.

DALTON, J.: This appeal is from a decision of the acting stipendiary magistrate of the Berbice judicial district. The appellant, Woo Sam, the defendant in the court below, was charged by the Village Council of the Rose Hall Village District with, on September 4th, 1919, at lot 66, sub-lot A, in the Rose Hall Village District, erecting "a new structure, to wit, a, platform, and did fail to allow a distance of twelve feet from the new structure to the boundaries of the lot aforesaid, which boundaries adjoin the draining trench south of the aforesaid lot." The charge sets out that the act complained of is contrary to s. 35 (3) of the Districts By-laws, 1911.

The charge was found to be proved, and defendant was fined the sum of $50, or in default two months' hard labour. The magistrate gives as his reasons for decision "I consider the structure was a building within the meaning of the by-laws."

From this decision defendant appealed. The reasons for appeal may be taken under three heads:—

(1) The by-law, in so far as it deals with 'structures' is *ultra vires* of the Local Government Ordinance, 1907.

(2) The erection was not a 'building' within the meaning of the by-law or ordinance.

(3) No 'new structure' was erected as set out in the charge.

For consideration of the first ground of appeal it is necessary to refer to the section of the ordinance under which the bylaws purport to be made. That section, s. 275, is as follows:—

275 (1) Every local authority; with respect to all buildings in their district, may make by-laws with respect to the following matters: —

(a) The height to which the ground floor shall be raised above the ground;

(b) The minimum height of each storey, and the height from the floor to the plate ;

(c) The minimum size of each room to be used by any person as a room to sleep in;

(d) The internal ventilation of each room ;

(e) The sufficiency of space about buildings to secure a free circulation of air ;

(f) The line of buildings in any street ;

(g) (h) and (i) .. . . . .[Deal with drainage, etc., and fencing of lots.]

Sub-section (2) of this section deals with notices, plans, and inspection.

Section 35 (3) of the Districts By-laws, 1911, is as follows:—

35 (3.) No new building or structure shall be erected on any lot within four feet of the boundaries of the lot, and in cases where a fresh water or draining trench adjoins any of the boundaries of a lot the distance of any building or structure from such boundaries shall be twelve feet. The reasons for decision afford no help in the points raised on appeal, whilst appellant's counsel confined his argument almost solely to the first ground of appeal.

The Secretary of the Local Government Board who was authorised by the local authority, under statutory provision, to appear on its behalf admitted that the word 'structure' was synonymous with 'building' or at any rate he was not prepared to argue to the contrary. For the purposes of this case it is not necessary for me to decide whether or not the words as they stand are synonymous, but as was stated in the case of *the London County Council v. Pearce* (1892 2 Q.B. 109), when a question arose in respect of what was a 'wooden structure' within the meaning of the Metropolis Management and Building Act, 1882,

so here I do not see that any special meaning can be given to the word 'structure' as something distinct from 'building'; the ordinance and by-laws on this point require no application of special legal or technical learning to enable one to appreciate the meaning of the legislature,

As the sub-section stands, also, it is quite clear that the word 'new' governs both' building 'and structure,' and as will be seen later my decision would be the same even if the words are taken to refer to two different kinds of erections.

The ground upon which counsel based his argument that the by-law was *ultra vires* of the ordinance is that the section of the ordinance enables them to make by-laws in respect of 'buildings,' whereas in the by-laws they have dared to introduce the word 'structure' in addition to the word 'building.' I do not propose to say anything in respect of their by-laws on this point save this, that a perusal of them after consideration of the section, under which they are framed, satisfies me that there is nothing *ultra vires* of the ordinance as is alleged.

The next point is on a different footing. The question whether the erection was a 'building' or a 'new building or structure' within the meaning of the by-laws can be considered together, as in effect only one question really arises, was the erection of a building or not? As appears from the record the erection put up by the appellant is a platform six feet wide and 28 feet long attached to an existing building, a shop, encroaching over a reservation for a space between the building and the street. The evidence discloses also that appellant approached the local authority for leave to put up the erection, and when it was refused or granted in a modified form, he put up the erection as originally proposed by him, without permission. The Secretary of the Local Government Board agrees that under the by-laws the local authority had no power to give any permission to evade the requirements of s. 35 (3) in respect of the reserved space round buildings.

In support of his contention that the platform is a building within the meaning of the by-law the Secretary referred to the case of *Adams* v. *Bromley Local Board* (37 J.P. 362,) There the justices decided that, where a by-law required every building used for specified purposes to have at the side and. in the rear an open space at least 500 square feet in extent ' free from any erection thereon above the level of the ground,' a chose wooden fence subsequently erected within the reserved space was an ' erection within the meaning of the by-law. As will be seen at once, that authority has no application here, the facts and circumstances being entirely different. There was no question there as to whether the fence was a 'building.' English decisions, however, give great assistance in interpreting the local by-laws for it is apparent, on

reference to the Public Health Act. 1875. (England) that s. 275 of the local ordinance is based upon and in fact follows the wording of several sections of that act. Sections l55 to 158 of the English Act are, for instance, largely drawn upon in the framing of s. 275 of the local ordinance, and both act and ordinance give local authorities power to make by-laws in respect of the matters therein mentioned.

The English cases are numerous. As stated by Coleridge, C.J., in *James* v. *Wyrill* (48 J.P. 725) it is impossible to lay down any abstract definition of a new building. It is a question of fact, a question of degree. "For "instance, if a building were nearly all taken away and then rebuilt it "clearly would be a new building; on the other hand, it is quite clear that by "a small addition of say a door, the building would not thereby become a "new building. Between these two extremes there may be thousands of "cases . . . it must be left to the discretion of each judge to decide for "himself what is a new building."

Fielding v. *Rhyl Improvement Commissioners* (38 L.T. Rep. 223) is a case which arose under the Public Health Acts of 1848 and 1858. The by-laws framed under them were however, for the same purposes as those framed under the Act of 1875 to which I have already referred. Fielding was charged with putting up certain structures in contravention of the by-laws. He urged that they were not 'buildings' within the meaning of the by-laws. In the course of his judgment Denman, J, states "The word building. . ". .is a general word and might mean anything that could possibly be called "a building; but I do not think the by-law can be construed in that way, "when we look at all its provisions as we are bound to do. . . Looking at the "whole it would be a *reductio ad absurdum* to apply these by-laws to at "least one of these structures. One of them is a blank wall apparently "erected on ground without any residential quality whatever, and for the "purpose, as is alleged, of having bricks burnt within it. It would be absurd "to suppose that was a building for which plans and sections as described "above were to be supplied. It cannot have been intended to apply to such a "building as this." And Lindley, J., says: "I cannot think that this by-law is "applicable to such a structure as this. It is quite obvious that the persons "who framed these laws never dreamed of their being applied in such a "way; and if there were any words in them which did force me to think "they did apply I should think them unreasonable and absurd."

The case of *Hibbert* v. *The Aclon Local Board* (5 Times L.R., 274), decided by the Court of Appeal goes considerably further. The Court held that a conservatory built of glass and wood against the side of a house was not a 'building' within the mean-

ing of the by-law framed under s. 157 of the Public Health Act, 1875. In his judgment Esher, M.E., stated that they did not decide that no conservatory could come within the by-law, but that this conservatory had not a single element of a building within the by-law.

In *Slaughter* v. *The Mayor of Sunderland* (65 L.T., Rep. 250) an advertising company, the occupiers of a lot of ground enclosed by a wooden boarding raising these boarded walls or hoardings to a considerable height with inside upright timbers connected by cross pieces acting as ties. The magistrates held that the alterations and additions entirely changed the character of the old fence and that the erection was a new building within the bylaw. On appeal, Cave, J., pointed out that the whole sense of the by-laws pointed to buildings, which, if not of a domestic structure, were at least to be roofed in and afford protection and shelter. He added: "It passes my ability to understand how it can be said that a part of a "building is a building itself . . . It is startling to be told that a structure "which consists only of walls, and which is not intended to consist of "anything else, and was never intended to be a building in any sense of the "word, is nevertheless a building within these by-laws." The court in this case held the term 'building' cannot be applied to a structure not adapted for any of the uses contemplated by the by-laws, and the conviction was set aside. In *Gery* v. *Black Lion Brewery Co.* (55 J.P., 711) the same principle was applied. In *Southend on Sea Corporation v. Archer* (70 L.J., K.B., 328) it was held what a shelter for a weighing machine, and in *Newell* v. *Ormskirk Urban District Council* (71 J.P., 119) that a portable theatre built of wood and erected for a short period only were not buildings within s. 157 of the Public Health Act, 1875.

Having in view the purpose and wording of section 275 of the ordinance and the terms of the by-laws I am unable to agree with the magistrate that the platform erected by the defendant was a new building or structure within the meaning of s. 35 (3) of the by-laws. It seems to me that it was not a building or structure at all within the meaning of those terms as used in the law. The evidence shows that it was an addition to and formed part of a building that already existed. The conviction therefore cannot stand. It is possible that one of the remaining by-laws may have been contravened, but as to that I presume the local authority will take proper advice before taking any further steps.

The appeal must be allowed and the conviction quashed with costs.

Appeal allowed. Conviction quashed.

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

1920. APRIL 10. BEFORE SIR CHARLES MAJOR, C.J., AND BERKELEY, J.

Appeal—Balata grants—Balata Ordinance, 1911—Faulty boundary lines—Extent of licences under Crown Lands Ordinance, 1903—Trespass—Abolition of limited jurisdiction of Court—Right of appeal.

Appeal from a decision of Douglass, acting J. *(a).* The facts are fully set out in the judgment appealed from. The reasons of appeal of the appellant company were shortly that (i) the limited jurisdiction of the court no longer existing the appeal from the commissioner should not have been entertained; and (ii) on the facts and evidence the decision should have been in claimant company's (the appellant's) favour.

H. C. Humphrys, for the appellant company.

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

The Court (Major, C.J., and Berkeley, J.) held that the balata in question was found in the possession of the respondent. The claimants (appellants) had to prove in the first instance that some or all of the balata so found was bled from trees on land held by

(*a*) Reported above at p. 7.

the company under its licences. In the opinion of the trial judge the claimants had failed to do so and on the facts as now argued before this court, the court was unable to say that the learned judge was wrong. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

[Note.—The appeal from the judgment on a preliminary point in the same case reported in 1919 L. R. B. G. 139. was not proceeded with, but the point there raised came up in this appeal.—Ed.]

IN THE ESTATE OF DORNFORD, DECEASED.

1920. DECEMBER 11. BEFORE SIR CHARLES MAJOR, C.J.

Probate—Appointment of executor in capacity of Official Receiver—Ineligibility—Official Receiver also Public Trustee—Intention of testator.

Graham Lloyd Dornford, by his will appointed Benjamin John Gainfort and William Alstein Parker, Official Receiver, the sole executor of his will and guardian of his minor children.

The Public Trustee of the colony applied on petition for an order "that he be directed to administer the estate as one of the joint and several executors of the will and guardian of his minor children."

G. J. de Freitas, K.C., for the petitioner. Mr. Parker is not now the Official Receiver, but Mr. Joseph Arthur King, for whom Mr. Percy King is acting. The appointment of Mr. Parker, however, was not, it is submitted, in his private capacity but as official receiver, the testator contemplating an official executorship of his will as well as the private executorship given to Mr. Gainfort. If that is so, the court will appoint the Public Trustee, by that description, as executor, for the Public Trustee holds the office of Official Receiver and is competent to act in the former office, though not competent in the latter.

SIR CHARLES MAJOR, C.J.: The appointment of Mr. Parker describing him as "Official Receiver" was not in his private but his official capacity. The submission that an official capacity in the one person as executor was desired, distinct from the private capacity of the other, is I think, clear. The Public Trustee being able to act officially as executor (while the Official Receiver by that description is not) and holding the two offices jointly, he must be considered to have been appointed executor in his official capacity and probate may issue to him. Similar circumstances were before Dalton, J., in *In re Gomes* (1919 L.R.B.G. 176) and I follow his ruling.

BERNARD *v.* RAMDHANIE.

PETTY DEBT COURT, GEORGETOWN.

[287—12—1919.]

BERNARD *v.* RAMDHANIE.

1920. JANUARY 13, 20. BEFORE DOUGLASS, Acting J.

Landlord and tenant—Tenancy of house—No implied condition that house is fit for habitation—Common law—Addition to premises by landlord after commencement of tenancy—Injury to tenant therefrom—Liability of landlord—Damages.

Claim by the plaintiff, a widow, for the sum of $50, as damages for injuries alleged to have been caused to her in October, 1919. The plaint set out that she was a tenant of the defendant from April, 1916. During the tenancy defendant erected a shed to the premises let to plaintiff with defective materials and improperly constructed, as a result the roof of the shed gave way causing serious injury to the plaintiff.

E. F. Fredericks, for the plaintiff.

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

DOUGLASS, Actg. J.: The plaintiff is claiming from the defendant her landlord $50 damages for injuries sustained by her on the 13th October, 1919, due to a shed attached to Lot 9, Lamaha Street—of which she was the tenant—giving way and falling upon her.

There is no covenant or promise implied by law on the part of the Landlord of an unfurnished house, that it is fit for habitation or that he will put it into repair, nor is he under any liability to keep the premises in repair; and that being so any injury caused to the tenant by the state of the premises gives no right of action against the landlord.

This is the English Law on the subject and since the 1st January, 1917, applicable to this Colony,—see *Howard* v *Gaskin,* (1919, L.R.B.G. page 23) and *G. Pereira* v *Mary de Cruz & another* (unreported P.D. Court 14.8.19)—and was very fully argued and discussed in the early case of *Hart* v *Windsor* (1844. 12 M & W. 68). Park B., at the end of a lengthy judgment, says "We are all of opinion . . . that there is no contract, still less "a condition implied by law on the demise of real property only, that it is "fit for the purpose for which it is let. The principles of common law do not "warrant such a position; and though on the case of a dwelling house taken "for habitation there is no apparent injustice in inferring a contract of this "nature, the same rule must apply to land taken for other purposes—for "building upon or for culti-

“vation—and there would be no limit to the inconvenience which would “ensue.

"It is much better to leave the parties in every case to protect their interests themselves, by proper stipulations" (and see *Chappell* v *Gregory* 1864.34 Beav. 250.) But the present is not a case of the tenant taking possession in a state of bad repair, nor even of repairs being done after the tenant has gone into possession it is the case of an addition being made to the tenement after the tenancy had commenced and on the landlord's initiative, and which (if the facts are correct) fell down and injured the tenant.

I have not been able to find any parallel case, but the case of *Mills* v *Holton* (1857. 2 H. & N. 14) touches on the question of the effect of the landlord doing repairs which he had not covenanted to do, and which caused injury to the plaintiff's (the tenant's) use of the premises. The argument in that case rather tended to the question, who was liable, the Landlord, or his workmen who were careless? and Cherwell, B., says, "If both landlord and tenant agree that a particular workman shall be employed, the landlord might not be liable for his acts, though it might be otherwise if the landlord sent in his own workmen," and Pollock, C. B. suggests a case, "Suppose some of the main timber of a house are affected by the dry rot, if the landlord who is *not bound to repair* sends in a builder, what obligation does he incur? Is it not a question of fact?" The next case to which I will refer is *Miller* v *Hancock* (1893 2 Q.B. 177) where it was held that there was, by necessary implication, an agreement by a defendant with his tenants to keep a staircase in repair, which was not included in their lease, for in that case Lord Esher, M.R., in giving judgment states, “I “gather that he (*i e.* the Landlord) kept in his possession some part of the “house, and he did not Jet the staircase. . . So much of the house whatever “it might be, as the defendant did not let, and therefore this staircase, “remained in the possession and control of the defendant. What under such “circumstances are the right of the tenants, and duties of the landlord “toward them? Their only mode of access to their tenement was, as I have “said by this staircase.” Now it appears to me that in two respects the present case comes within the facts and *rationes decidendi* of that case, for (1st) the shed in question being erected after the commencement of the tenancy was not a part of the premises let, and the landlord could have removed it without the tenant's permission, it was in the possession and control of the Landlord and (2nd) it was for the ostensible benefit of 2 or 3 tenants, who could not have avoided its use as it projected over their doorways.

The doctrine in *Miller* v *Hancock* will not be extended. See

Hugget v *Myers,* (1908, 2 K.B. 278) and *Powell* v *Thorndike,* (1910, 102, L.T. p. 600), and I may also mention the case of *Dobson* v. *Horsley* (1915 1 K.B. 634) which was distinguished from *Miller* v *Hancock,* when in an action claiming damages in respect of injuries caused by defective railings on steps, which were not let with the room they approached, it was held that the railing was not a concealed danger and that therefore the plaintiff had established no cause of action against the landlord, and see also *Hardie* v. *Sneddon* (1917 S.C. 1).

The last case I note is *Odell* v *Cleveland House, Ltd.,* 1910, 102 L.T. 602) where the plaintiff was the tenant of the Defendant Co., and rented from them a shop on the ground floor of a large building. The defendants employed a contractor to pull down a great part of the structure above the plaintiff's shop and in so doing the plaintiff's premises and goods were damaged. It was held that having regard to the facts of the case and the nature of the work it was the duty of the defendants to take precautions to prevent injury arising to the plaintiff, and having failed to do so, they were liable in damages.

In the case we are now considering there is no question of the Landlord getting rid of his liability by employing a contractor, he employed a carpenter and is liable for any bad workmanship on the part of his workmen. It appears to me to be a case of *res ipsa loquitur,* for the very fact of the shed giving way within a month or two of its being erected from no apparent cause is of itself evidence of negligence in its erection, but I am also satisfied from the evidence that the weight of 4 sheets of zinc was not properly supported and that it came down without interference by anybody.

From a careful consideration of the grounds of the principle of the non-liability of the Landlord for repairs and of the cases referred to, I am of opinion that the present case does not come within *Hart* v. *Windsor,* and that the Landlord is liable for the injury done to the plaintiff, the injury resulting from his negligence was however much magnified, and I give judgment for $19.50 and $3.60 costs.

GONSALVES *v.* DARGAN.

GONSALVES *v.* DARGAN.

[406 OF 1919.]

1920. JANUARY 23. BEFORE BERKELEY, ACTING C.J.

Practice—Appeal—Magistrate's Court—Service of notice and reasons of appeal—Service by registered letter—Receipt of letter after time limited—Interpretation Ordinance, 1891, Amendment Ordinance, 1907, s. 2.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist). The plaintiff Gonsalves claimed the payment of the sum of $75 commission alleged to be due for the sale of a property belonging to the defendant at her request. Judgment was entered for the amount claimed and costs. From this decision the defendant Dargan appealed.

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

J. S. Johnson, for the respondent.

BERKELEY, Actg C.J.: A preliminary objection is taken to the hearing of this appeal on the ground that notice of appeal and the reasons of appeal were not served on the respondent (plaintiff in the action) within the fourteen days allowed by law. The action was heard on 29th October and decision was given on 31st October. On Friday, 14th November at 10.15 a.m., the notice and reasons of appeal were posted in a registered envelope to the respondent and in the ordinary course of postal delivery would be delivered at his residence on the same day. The respondent says that in consequence of information received he went to the post office on the 15th and received the registered letter—this was the day after the time for service had expired. Under section 48 of the Magistrates' Decisions (Appeals) Ordinance it is necessary that any letter containing the notice and reasons of appeal shall be registered. By Ordinance No. 30 of 1907 (s. 2) "Where any Ordinance authorizes or requires any document to be served by post . . . . . then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, 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." The evidence in this case shows that being a registered letter; it would not be left at the house without a receipt being obtained as might have been done with an ordinary letter. Section 2 (supra) is adopted from the Interpretation Act, 1889 (52 & 53 Vict c. 63 s. 26) where it is stated to apply to any statute passed since 1889 and therefore does not

affect the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) or the other acts referred to by counsel with the cases arising thereunder and it may well be that in the absence of the words "unless the contrary is proved," notices under these acts transmitted in a registered letter would be deemed to have been served at the time when such letter would be delivered in the ordinary course of post.

Under these circumstances the appeal cannot be - heard and must stand dismissed. On the affidavits filed I have a strong suspicion that respondent kept out of the way in order to avoid service and I therefore make no order as to costs.

Appeal dismissed.

PETTY DEBT COURT, GEORGETOWN

[253-12-1919].

PARK *v.* WIGHT.

1920. JANUARY 20, 27. BEFORE DOUGLASS, Acting J.

Master and Servant—Groom—Menial Servant—Wrongful dismissal—Damages— Extent of remedy—Common law right—Employers and Servants Ordinance, 1853.

Every master or employer and every labourer or servant has equal rights with every other subject to enforce his contract or obtain damages for the breach thereof; he has the additional and alternative right, if he prefer it; to proceed under the provisions of the Employers and Servants Ordinance, 1853, to recover the penalties imposed by that Ordinance.

Canterbury v. *Haly* (1917 L.R.B.G., 25), not followed.

Claim by the plaintiff for the sum of $3.36 as damages for wrongful dismissal. The plaint set out that plaintiff was hired by the defendant as a groom at a wage of $3.36 per week, and was wrongfully dismissed from his service without notice, and without a week's wages in lieu of notice.

Further necessary facts appear from the judgment.

Plaintiff in person.

F. Dias, solicitor, for the defendant.

DOUGLASS, Acting J.: The plaintiff is claiming from the defendant the sum of $3.36 for damages for wrongful dismissal from his service. Mr. Dias for the defendant alleges that 1st, there was no wrongful dismissal for the plaintiff having given (insufficient) notice to determine his services and so elected not to perform his contract the defendant was perfectly justified in taking him at his word and putting an end to the agreement altogether; and 2nd

That being a servant within the meaning of the Employers and Servants Ordinance, 1853, the claim should have been brought before the magistrate in his criminal jurisdiction and the plaintiff had therefore no right in this court. The facts are very simple: the plaintiff was groom to the defendant his special duty being to attend to the race-horse Atom. Owing to some discontent the plaintiff gave the defendant notice, he says a week's notice, on the 6th December, but admits that the letter dated the 9th December is the notice he refers to. It is alleged that the defendant on receipt of this notice told him to leave at once, which he did, and on applying for his last week's pay of $3.36 it was refused; he now claims it. No evidence was called for the defendant, and the facts may be taken therefore as stated. It is true that the letter referred to appears not to contain a week's notice, but from the plaintiff's evidence I must presume that it is dated wrong; even were it not so I do not think the principle relied on by Mr. Dias applies to such a case as this. The facts of each case must be looked at to decide whether there has been such a non-performance by the plaintiff as to discharge the agreement that is if it goes to the root of the contract. It is obvious that his services being paid for each Saturday, the plaintiff thought that was the proper day to close the agreement, and had no intention of leaving without proper notice, as Lord Coleridge, C.J., says in *Freeth* v. *Burr* (1874, 9, C P. 208) "the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract." I find on the evidence that the plaintiff has no intention to end the agreement without proper notice, and that the defendant had no right to dismiss him under the circumstances disclosed. Whether the plaintiff was a menial servant or not within the meaning of the Employers and Servants Ordinance. 1853, is a matter of opinion on which different magistrates might well differ, but I will take it for the sake of the objection raised that he was such a servant and so subject to the provisions of the Ordinance; had he then as such servant the right to pursue his remedy at common law on breach of contract as other persons would have, or was he estopped from so doing by the said Ordinance?

In '*Canterbury* v. *Daly*' (1917 L.R.B.G., 25), Mr. Justice Dalton held that in an action for damages for wrongful dismissal the plaintiff being a menial servant was not entitled to take proceedings otherwise than under the provisions of the Employers and Servants Ordinance, following the decision in 1890 of Atkinson, J., in '*Jones v. Stevenson and others*' (annex to Canterbury *v.* Haly) which was approved of by Hewick, J., in '*Veerasamy* v. *Fraser*'(A.J, February 22 1908). Both previous to and since these cases the right of masters and servants to proceed in the

Magistrates' Civil Court has been a constant source of controversy, and much time has been wasted in arguments over, first, whether the servant is a 'menial' or 'domestic' or in other respects comes with the said Ordinance, and if so, next, whether the Magistrates' Civil Jurisdiction is ousted, I have therefore, though with considerable hesitation and with all deference to the opinion of the learned judges above referred to, endeavoured to arrive at an independent opinion which I trust may—on appeal if desired—clear away the almost inevitable preliminary argument in such cases, and put to rest once and for all the varied practices that have hitherto existed. The question may be considered and discussed under three aspects, 1st with reference to the construction of the Ordinance itself, and of the similar Ordinances that it supersedes, and especially with reference to the intention of the Legislature in enacting these Ordinances; next on a comparison with English Statute Law dealing with Employers and labourers; and lastly, from a consideration of the effect of other special legislation dealing with similar subject matter to that included in the said Ordinance. Before considering in detail the construction to be placed upon the Ordinance with which we are dealing, it would be well to refer briefly to the effect of Statute Law on Common Law. In '*R* v. *Scott* (1856 25 L.J.M.C., 133), Coleridge, J., said if there is "a *seeming* conflict between the common law and the provisions of a statute" it is not right to begin "by assuming at once that there is a *real* conflict, and sacrificing the common law ;" but rather to proceed "by carefully examining whether the two may not be reconciled and full effect given to both," and Byles, J., in *R.* v. *Morris* (1867 L.R., 1 C.C.R., 90): "It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law." And Lord Coke (2 Inst. 200) says: "It is a maxim of common law that a statute made in the affirmative without any negative expressed or implied doth not take away the common law." Thus it has been held that if a statute provides a new remedy for infringing a common law right, and the new remedy is not at variance with the previous common law remedy, a person may elect whether to proceed in the way pointed out by the statute or at common law.

I may further note here that it is also a well known principle of law that where a right is conferred by a statute, and a remedy for the violation of that right is enacted by the same statute, that is the only remedy, but this principle is not applicable to the class of cases now under discussion as will be seen on reference to '*Gorris and another* v. *Scott*' (1874 9 Ex. 125), *Ross* v. *Rugge Price* (1875 1 Ex. D. 269-271) and '*Pulsford* v. *Devonish'* (1903

2 Chy. D. 625). To put it shortly no duty is imposed, or new right conferred by the Employers and Servants Ordinance, the rights and duties of masters and servants existed both in Roman-Dutch and at English Common Law.

First then with reference to the construction of the present Employers and Servants Ordinance, No. 1 of 1853 (formerly No. 2 of 1853) and the Ordinances it superseded; and I may here note that in the edition of the "Laws of British Guiana," 1895, and Sir T. C. Rayner's edition of 1905, section 1, as it at first stood, and which repealed Ordinance No. 2 of 1848 (the last proceeding ordinance) together with all laws formerly in force respecting the hiring of persons described in the preamble, "except only in so far as the same may have repealed any former law," is omitted. I call attention to this but do not lay any special stress on it, as it was probably omitted in reliance on sections 5 (1) (a) and (b) and 12 of the Statute Laws (Revised Edition) Ordinance, 1894, and sections 4 (1) (a) and (b) and 12 of the Statute Laws (Revised Edition) Ordinance, 1894, and sections 4 (1) (a) and (b) and 11 of the Statute Laws (Revised Edition) Ordinance, 1904, respectively. (See footnote).

On a perusal of the carefully reasoned judgment given by Atkinson, J., in *Jones* v. *Stevenson*, the crux of the whole matter appears to lie in the Order-in-Council of the 7th September, 1838, which repealed "all laws in force in British Guiana" respecting such contracts of service or respecting the mode of enforcing such contracts, and the penalties to be inflicted in case of the breach or non-performance thereof;" the preamble to the said Order (not referred to by Atkinson, J.) reads *inter alia* "And it is further ordered that all laws, statutes, and ordinances in force in the said colony, which are or which shall be repugnant " to or inconsistent with this present order, shall be and the same " are hereby repealed." Then under the marginal note "Enforcement of contracts" (C. iv. sec. 1) "The Stipendiary Magistrate shall have an exclusive jurisdiction for the enforcement of all contracts of service, and for imposing all penalties for the breach, neglect or non-performance thereof." (Sec. 2) "The jurisdiction shall be exercised in a summary manner." Atkinson, J. also refers to C. iv. sec. 9 in which the jurisdiction of the ordinary tribunals is preserved in the cases of ill-usage if the stipendiary magistrate "shall decline to entertain any such case

"Section 4." In the preparation of the new edition the Commissioner shall "have the following powers, that is to say (1) To omit (a) All Ordinances or parts "of Ordinances which have been expressly or specifically repealed, or which have "expired, &c."

"(b)All repealing enactments contained in ordinances, and also all tables or lists of repealed enactments, &c."

"Section 11. Where in any enactment or in any document of whatever kind "reference is made to any enactment repealed or otherwise affected by or under "the operation of this Ordinance, such reference shall where necessary and "practicable be deemed to extend and apply to the corresponding enactment in "the new edition."

“and shall see fit to refer the same to the ordinary course of law” and he applies the maxim "expressio unius est exclusio alterius." We find on examining subsequent sections of the said Order that enforcement of contracts was by adjudging penalties, *i.e.,* fines or imprisonment, and for breaches of contract, penalties also; the proceedings were started by complaint and were quasi-criminal. It is evident that the 'ordinary course of law' referred to in sec. 9 would also be criminal proceedings. As with the previous ordinances, so under the Order-in-Council it was a quasi-criminal jurisdiction that was provided "for the more speedy determination of all disputes connected with the hiring of servants"; and "the laws, statutes and ordinances" that were to be, and so were, repealed by the said order were those dealing with enforcement by quasi-criminal proceedings and did not, or should not, affect the ordinary rights of contractors or contractees at civil law, for laws dealing with common law rights were not "repugnant to or inconsistent with" the said order, and were indeed, as I shall point out later, expressly reserved by Ordinance No. 74 of 1836. If that is so the repeal section of Ordinance No. 1 of 1853, referred to above, with the exception it contained would no more affect the right to bring civil proceedings than the Order-in-Council did. I am the more inclined to the opinion that neither the said Order-in-Council nor the subsequent ordinance ever intended to, nor ever did, affect such rights from the fact that the Prescription Ordinance (formerly No. 27, now) No. 1 of 1856 by section 5 enacts "every *action* and *suit* for the wages of labourers, artizans or servants, shall be brought within one year next after the time when such wages shall have become due," thus presupposing that the persons named had rights to bring a suit in a civil court. It may also be noted here that for a summary conviction offence the complaint should be made within six months from the time when the matter of the complaint arose.

Quite apart, however, from the construction to be placed on the wording of the Order-in-Council I should hesitate to find that any statute or ordinance appointing a quasi-criminal tribunal, and affixing penalties to matters which had up to then been treated as only referrable to a civil tribunal intended to exclude the civil jurisdiction or rights at common law unless it expressly so stated; and that it was not the intention of the first framers of the Employers and Servants Ordinance to so exclude common law rights is shown by the earliest Ordinance No. 74 of 1836 which in its preamble states its objects in similar language to that employed by the later ordinances, and expressly provides that nothing" in the ordinance contained shall be taken or construed to "hinder or preclude any person from his or her

remedy by civil action before any court of civil justice of competent jurisdiction." The fact that this ordinance was repealed by the Order-in-Council of the 7th September, 1838, does not, to my mind, affect the principle upon which the new quasi-criminal jurisdiction was founded, that is as an addition or in assistance to the civil jurisdiction; it was not indeed necessary to repeat the assurance contained in the earliest ordinance, that the remedy by civil action should continue when it was not repugnant to the provisions of the Order-in-Council.

There is little to be noted in English legislation dealing with the remedies available to masters and servants in respect of disputes arising that will help in solving the present difficulty, but under the Employers and Workmen Act, 1875 (38 and 39 Vic. c. 90), it will be noticed that it was not the policy of the law to confine employers or workmen to bring their disputes before the County Court only. Section 3 of that Act preserves to the County Court its then existing jurisdiction and in addition confers upon it further powers to adjust and set off claims and to rescind contracts ; and section 4 deals with the jurisdiction over such disputes of a court of summary jurisdiction when the amount claimed does not exceed £10. Proceedings could be brought either in the County Court, or before a court of summary jurisdiction. See *Hindley* v. *Haslam* (1877 3 Q.B.D., 481), and *James* v. *Evans & Co.* (1897 2 Q.B.D., 180).

And lastly there is to be taken into account how far special legislation for the recovery of debts and damages for breach of contract has modified, supplemented, or altered the remedies provided by the Employers and Servants Ordinance, 1853, that is supposing the view is taken—which I do not accept—that that ordinance excludes the persons affected by it from exercising their rights in a civil court.

In *Yard* v. *McDavid* (1891, April 18th, annex to *Canterbury* v. *Haly),* Atkinson, J., in giving judgment for the plaintiff, who sued for the balance of an account for work and labour, stated that since his decision in *Jones* v. *Stevenson* his attention had been called to section 13 of Ordinance No. 2 of 1856 (since repealed by Ordinance 25 of 1893) an ordinance to extend the jurisdiction of the Inferior Courts of Civil Justice in British Guiana; this section is now repeated in section 6 of Ordinance 11 of 1893. And with Ordinance No. 2 of 1856 might well have been considered Ordinance No. 18 of 1858 (the Petty Debt Ordinance, 1858, which repealed the previous Petty Debt Ordinance, No. 64 of 1835), for section 2 of that ordinance enacts that the stipendiary magistrate or special justice "shall have jurisdiction in and over all actions of debt or contract where the capital sum sought to be recovered does not exceed the

sum of $24." This last ordinance was repealed by Ordinance No, 25 of 1893 and re-enacted as Ordinance No 14 of 1893 (now No. 11 of 1893), whereby the jurisdiction of the court in actions for the recovery of debts, demands or damages was extended to $100 and section 6—referred to above—was inserted enabling a minor to sue for wages as a clerk or domestic servant. On the similar section 13 of Ordinance No. 2 of 1856, Atkinson, J., adopts the view that it would be anomalous if adults were precluded from suing in these courts while minors were permitted to do so, and—although he did not refer to the Petty Debt Ordinance, 1858, his remarks are equally applicable to that ordinance—he points out that by section 4 of Ordinance No. 2 of 1856 "the Inferior Courts of Civil Justice in this colony shall on the taking effect of this ordinance respectively have jurisdiction in several actions of debt, where the capital sum sought to be recovered . . . does not exceed . . . two hundred and forty dollars," and whether intentionally or not it applied to cases such as the one then before him.

It is thus seen that no class of persons is excluded from the provisions of the Petty Debt Ordinances now represented by the Petty Debts Recovery Ordinance, 1893, which by section 3 (1) directs that "all actions (a) for the recovery of any debt or “demand, where the amount claimed . . . “is not more than $100 and (b) for damages, where the amount claimed is “not more than $100,” may be commenced in the Magistrate's Court. Where a prior enactment deals with a special subject-matter which is afterwards included in general terms in a later enactment, and the new enactment is couched in general affirmative language and the previous law can well stand with it, the old and the new laws may stand together.

I am of opinion then that on the true construction of the Employers and Servants Ordinance, after the consideration of the policy of the English law on the subject, and from the express terms of the ordinances referred to, any master or employer, and any labourer or servant has equal rights with every other subject to enforce his contract or get damages for the breach thereof in the Courts of Civil Jurisdiction of this colony or he may, of course, in the alternative, if he should so prefer and comes within the provisions of the Employers and Servants Ordinance, 1853, proceed before a Court of Summary Jurisdiction to recover the penalties imposed by that Ordinance."

I have already found on the facts that the plaintiff was entitled to his current week's wages, and on the law I find he was right in bringing his action for recovery thereof in this court.

I therefore give judgment for the plaintiff for $3.36 and 48 cents costs.

De ROOY v. CYRUS.

PETTY DEBT COURT, GEORGETOWN.

De ROOY *v.* CYRUS.

[338-12—1919.]

1920. JANUARY 29; FEBRUARY 4. BEFORE DOUGLASS, Actg. J.

Landlord and Tenant—Sale of leased premises followed by conveyance—Seller remaining in occupation—Relation of purchaser to seller in occupation—Claim for use and occupation—Tenant at will or on sufferance.

Claim by the plaintiff, De Rooy, for the sum of $10 for the use and occupation of a cottage on lot 40, Fourth Street, Alberttown, Georgetown, from November 26th to December 16th, 1919.

The defendant sold and conveyed the property to plaintiff on November 25th having previously agreed to give up possession on the transport being passed. She failed to do so but remained in occupation until December 16th. The plaintiff then sought to recover $10 for use and occupation for that period.

R. Dinzey, solicitor, for the plaintiff.

A. Crane, solicitor, for the defendant.

DOUGLASS, Actg. J.: The plaintiff claims the sum of $10 for twenty days use and occupation of a cottage property in Fourth street, Georgetown, by the defendant, from the 26th November to the 16th December, 1919.

It appears from the evidence that Mrs. Cyrus being owner of the property, part of lot 40, Fourth street, sold it to the plaintiff; transport was passed on the 25th November, 1919, under the agreement for purchase of the 13th September possession was to be given over by the seller at the passing of transport. In all the negotiations Mr. Cyrus, the defendant, acted as attorney for his wife, and he lived with her on the said property.

At the end of November, the defendant promised to remove and give possession on 10th December, but on the 6th December the plaintiff's solicitor sent the defendant a formal notice to give up the premises within one week of its service (which was the 8th December) failing which legal proceedings would be taken to eject him, and further that 50 cents would be charged every day for use and occupation until the property was delivered—presumably to date from the passing of the transport. The defendant left on the 16th December.

Mr. Crane for the defendant objects that (1st) the landlord cannot sue for rent until he goes into possession and refers to the case of *Appuhami* v. *Appuhami* (1880, 3 S. C. C, 61) but I do not think that case applies to the present situation, as it was

apparently brought under the special statutes and practice in Ceylon; and that next (2) there is no permission to occupy the premises on which 'use and occupation' depends; and if there were it should have been alleged in the statement of claim.

The evidence shows clearly that the premises should have been given up on the 25th November, and that the plaintiff never acquiesced in the defendant remaining after that date; and here I may remark that the defendant, though not the actual vendor, by his conduct and as attorney for her, identified himself with her, and it is impossible for the Court to treat him as a separate person with individual rights, the plaintiff throughout treated him as the party to be negotiated with. He was clearly never a tenant at will of the plaintiff, was he a tenant at sufferance? A tenant at sufferance is defined as "one who entered by a lawful demise or title, and after that has ceased, wrongfully continues in possession without the assent or dissent of the person next entitled." In *Doe d. Roby* v. *Maisey* (32 R. R. 548) it was held that when a mortgagee suffers a mortgagor to remain in possession of the mortgaged premises the latter is not tenant at will to the former, but at most tenant by sufferance only, or he may be treated as a trespasser.

To entitle any one to the compensation of 'use and occupation' there must have been some tenancy, express or implied, between the plaintiff and defendant during the period in respect whereof the compensation is claimed. But in the present case the plaintiff did her best to get the defendant and his wife out of the premises from the date of the sale and purchase of the premises. I cannot see any substantive difference between the facts of this case and those upon which I decided the case of *Kowlesseri v. Batachia,* (1919 L. R. B. G., 104). The defendant is a trespasser from every point of view and was never treated as a tenant. I accordingly non-suit the plaintiff. No costs.

GILLIS AND OTHERS *v.* SEEQUAR.

GILLIS AND OTHERS. *v.* SEEQUAR.

[14 OF 1918.]

1920. FEBRUARY 10. BEFORE BERKELEY. Acting C.J., AND DALTON, J.

Immovable property—Opposition to execution sale—Letters of decree—Legal dominium—Beneficial ownership—Effect of letters of decree after judicial sale—Property conveyed—Jus in re and Jus ad rem—Estoppel.

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

The plaintiffs, who were twenty-six in number, sought an in- junction, by way of opposition, to restrain the defendant from selling at execution the eastern half of plantation Belair, or Lot No. 22 on the west coast of the county of Berbice.

The claim set out that in 1855 the plaintiffs or their predecessors in title purchased the property in question; it was conveyed to one Dundee Ackman, and divided into eighty-eight lots. Ackman died before conveying any lots to the purchasers. After a long interval, in 1900, by arrangement a suit was brought by one Jacob Johnson against William Baird, one of the purchasers, and after obtaining judgment Johnson levied on the property in question and was granted title by the Court for it. No objection was taken by any of the parties, the object of the proceedings being to obtain title in Johnson who would then proceed to convey the lots to those entitled to them under the petition. A few lots were conveyed by Johnson but those which the plaintiffs claimed had not been so conveyed, title still remaining in Johnson. In April 1918, they obtained an order from the court for the specific performance of the agreement by Johnson to convey to them.

In February, 1918, however, the property in question was levied upon by one Bhowany Persaud, who has since died. Seequar, the defendant in this action, is his executrix. Bhowany Persaud was the holder of a judgment debt amounting in all to $757 against Johnson, which had been assigned to him (Bhowany Persaud) by Hookumchand. The latter had advanced money to Johnson in connection with the property, some of which the plaintiffs admitted in their reply was still unpaid, and had obtained judgment thereon.

The plaintiffs sought to set aside the levy by Bhowany Persaud, on the ground that the property in question was not the property of the judgment debtor. The value of the property was stated to be $2,000.

On March 24th, 1918, the trial judge (Major, C.J.) made an order restraining the defendant from selling the property in question at execution. The judgment was as follows:

SIR CHARLES MAJOR, C.J.: The facts appearing from the pleadings and the documentary evidence given in this action and admitted by counsel on both sides are these.

On the 18th September, 1858, William Buie conveyed to Dundee Ackman the eastern half of plantation Bel Air, or lot No. 22 on the west coast of the county of Berbice, pursuant to an agreement, common enough in those days and with which this court is familiar, namely, that Ackman should take the grant for himself and forty-three other persons, to each of whom he should, upon payment of his or her proportion of the purchase money, convey two lots of the land, "each shareholder" in the meantime entering into possession of his or her share thereof.

Ackman died without having made any conveyance in partition, but in 1863, at the instance of his widow, Mary Ackman, the land was surveyed, and a plan of it made, by one Alexander Baird, showing the allotments, eighty-eight in number, and the persons to each of whom two of them had been made, Mary Ackman being one of those persons. The "shareholders" continued their occupation and, with some changes from time to time in the occupants, have done so ever since.

In 1899, again by a process commonly adopted in cases of purchase of a property by one for a number of others, and in order, as the saying went, "to get title," the shareholder selected one Jacob Johnson, apparently a stranger to the original agreement with Ackman, and William. Baird, one of the "shareholders" as plaintiff and defendant respectively in an action wherein Johnson recovered judgment against Baird for some small sum of money and the whole property being taken in execution and sold, he became the purchaser of lot No. 22 and obtained letters of decree. These letters granted "the eastern half of plantation Bel Air or lot No. 22 as laid down and defined on a diagram made by A. F. Baird" (the plan of 1863 already mentioned) saving a strip of land belonging to A. A. Abraham.

Johnson was at that time, or afterwards became, indebted to one Hookumchand for moneys advanced to him in connection with the property, whether for its cultivation or for the purposes for the second depth of the plantation of which Johnson later on obtained a licence of occupation, does not clearly appear. But it may be assumed that, in one way or another, the "shareholders," or some of them, participated in the benefit derived from Chand's advances. Chand obtained judgment from Johnson for $445, a sum which in 1915 is stated, in an assignment of the judgment debt to Bhowany Persaud dated the 13th July, 1915, to have reached a total of $757.

In 1915, the plaintiff in this action commenced a suit against

Johnson for specific performance of the agreement originally made by Ackman with the plaintiffs' predecessors in occupation and adopted and continued by Johnson in 1900 by the proceedings against Baird as I have already related, and subject to the terms of which he had obtained letters of decree for the property. This suit, the hearing of which was much delayed, was proceeding when Bhowany Persaud, in February, 1918, caused lot, 22 to be taken in execution to satisfy the judgment debt assigned to him by Chand. On the 25th April, 1918, Berkeley, J., decreed specific performance by Johnson of his agreement, by ordering Johnson to convey a number of separate lots of Belair plantation, in groups of two, to the plaintiffs in the suit.

The plaintiffs in this action, the same as in the suit for specific performance, claim an injunction restraining the defendant, Persaud's executrix, from any further proceedings upon the writ of execution issued by her testator on the ground that there is no interest in Johnson in respect of the Bel Air plantation which can be taken in execution.

For the defendant it is contended that Johnson's letters of decree constituted a subsisting title to the land taken in execution, that that title was obtained while the plaintiffs stood by; that, even if Johnson was the agent or trustee for the plaintiffs, he held, and holds himself out as the owner of the land and the plaintiff cannot be heard to say that he is not the owner; that there is admittedly a sum of money to be paid by the present plaintiffs, or to some of them, to Johnson upon the payment of which the performance of his agreement already specifically decreed, conditionally depends; and that the debt to Chand was incurred by Johnson for the benefit of the plaintiffs or their predecessors in occupation.

Returning in the first instance to 1858, it is I think beyond question that Ackman took the grant of the land to himself from Buie as trustee for the forty-three persons whom for convenience I describe as shareholders. When, nowadays, the statement is not infrequently heard in this court that the Roman-Dutch law knew nothing of a trust and could not give effect to English doctrines relating to trusts, a proposition from which, thus broadly stated, I entirely dissent, it is satisfactory to find a Chief Justice of the colony saying, in 1867, about a transaction identical in terms with that between Ackman first, and Johnson afterwards, and the shareholders of Belair, namely in connection with plantation. Aberdeen. "There can be no doubt that the plantation was acquired by Parkinson and his co-trustees on behalf of and as trustees for the plaintiff and numerous other persons." The observation occurs in the judgment in the case of *Napoleon* v. *Higgins* (14th January, 1867, not reported). The

Court of Appeal was evidently in accord with that opinion in the case of *Archer* v. *Materania* (4th February, 1916). There is too an ordinance of this colony providing for the administration of trusts passed thirty years ago.

It is equally beyond question that Johnson in 1900 obtained from the Chief Justice of the day letters of decree for the land therein described subject to the same trust, not only by his adoption of the agreement made with Ackman but also by express renewal of its terms by himself and with this important addition, namely, the incorporation in the letters of the plan drawn in 1863 which sets forth the division of the land into shares and the names of the various shareholders of that date, a plan showing on its face that it was made after a survey at the instance of Ackman's widow. There is a receipt given by Mr. McKinnon, counsel for Johnson, in the suit of Johnson against Baird running thus: "Received from Jacob Johnson (for proprietor of plantation Belair) a further sum on account fee obtaining title." Once more. Immediately after obtaining letters of decree Johnson executed several conveyances of lots of the land to various shareholders or those who between 1863 and 1900 had taken the place of them, in each of which is incorporated the plan of the land. And amongst them, the second in order of date, is Hookumchand as to three undivided ninth parts or shares of lots 1 and 45, originally the lots of Mary Ackman.

Johnson, therefore, in. 1900 and afterwards, so far from holding himself out as the owner in his own right of the land, received from the court his letters of decree impressed with the trust agreed between himself and the shareholders to be vested in him by the latter and certainly not while they stood by, but actually at their instance. And Hookumchand took his share with notice of the trust.

The contention that, as the plaintiffs, or some of them are under obligation to pay Johnson some moneys in respect of their outstanding interests in the land, their right to conveyance of those interests is not absolute, is obviously unsound. Their right is absolute by decree in the suit, and it is Johnson who is now in contempt of that order, the plaintiffs being ready as they have been for many months to pay the balance of the purchase moneys.

It is further urged for the defendant that the issue of execution, although after the suit commenced, was before the decree and was not brought to the notice of the Court. Even supposing that fact could have affected the Court's affirmation of the plaintiffs' right to the decree, which in my opinion it could not— it was clearly the duty of defendant (or her testator) to bring it

to the court's notice in the only way open to her or him, namely, by intervention in the suit. The decree stands for obedience and cannot now be impugned.

As to the allegation that the plaintiffs got the benefit of Chand's advances, assuming that to be so, it is clear that Chand made those advances to Johnson personally. The moneys now in the hands of the plaintiffs for Johnson are, it seems, liable to be attached in their hands to satisfy Johnson's debt to Chand's assignee, on proper steps being taken for the purpose.

There is another phase of the case. Assuming for a moment no agreement between the plaintiffs and their predecessors and Johnson, but a collusive action between Johnson and Baird "to get title" to lot 22, what title did Johnson get? letters of decree are no more than a judicial conveyance of the subject-matter of the contract between the marshal and the he purchaser at execution sale. And what was sold? Just that right and title to the land as Baird had and no more. That "right and title" in fact—I use the words of the letters— "of in and to the said property" subsequently conveyed by the Chief Justice. "The said property" was expressed to be "the eastern half of Plantation Bel Air or lot 22." But Baird had only an occupation right to a portion of the lot. As Sir David Chalmers C.J., said *in Belmonte's petition* (1893, L.R.B.G. 42): "Levy and sale do not constitute a process of legerdemain which in some mysterious way make a bad or defective title into a good title; they simply take out of the execution debtor such, and no better, right and title as were vested in him." In *Dos Santos* v. *Johnson* (Limited Jurisdiction 17th May, 1901), Sir Alfred (then Mr. Justice) Lucie Smith said: " The principle of the land in this matter is that letters of decree can only be granted for the property that was in the debtor, but the court assumes, where there has been an unopposed levy and sale under execution, that the property as sold was that of the judgment debtor and grants letters of decree without further enquiry." And the learned judge quoted with approval the passage from the judgment of Sir David Chalmers I have just given. As to the assumption stated to be made by the court, it is only so made for the purposes of the letters of decree, certainly not in order to take out of the judgment debtor that which, in fact is not in him and so give the purchaser at execution a good title instead of a bad one.

Johnson, therefore, with no trust involved, would have taken, not lot 22 itself, but only Baird's interest therein. And of that interest, whatever its extent, he shortly afterwards proceeded to denude himself by conveying to Baird in October, 1901—evidently now under the terms of his agreement with Baird, in order to carry out which the action was brought in collusion—lots 33 and

77, in 1863 the shares of William Henry (an original shareholder), and an undivided moiety of lots L0 and 54 in 1863 the shares of Castillo Winter (another original shareholder.)

From whatever point, therefore, the defendant's submissions be viewed, it appears that there is no interest now in Johnson that can be taken into execution to satisfy the judgment debt assigned to her testator by Hookumchand and the injunction lies.

The plaintiffs have pleaded a title to the land by prescription and the defendant has put the plea in issue. While it is not necessary to include in this judgment a declaration of prescriptive title in the plaintiffs, I think I may say that had Johnson at any time had the absolute ownership of any part or portion of lot No. 22, he would in the circumstances shown by the evidence in the case, have been divested of it by the adverse occupation by the plaintiffs and their predecessors. But it is not necessary to consider that question, answered in effect as it is by the decree in the suit for specific performance.

There must be judgment to the plaintiffs in the terms of the statement of claim, with costs of suit.

From this decision the respondent appealed on the following grounds:

(1) Johnson, the execution debtor, obtained letters of decree on the 16th day of November, 1900, for the eastern half of Plantation Belair, or lot No. 22, situate on the west coast of Berbice In law he acquired thereby absolute title to the said lot save and except a certain piece of land described in the said letters of decree belonging to A. A. Abraham.

(2)The letters of decree are not impressed with any trust as held by the learned Chief Justice. None is expressed in the letters of decree as would be in a conveyance under English law to a trustee for his *cestui qui trust.*

(3)Reference in the letters of decree to a diagram is intended only to indicate topographical facts but does not serve as a record of rights affecting the property. Being named on the diagram does not give title to the person so named.

(4)On the plaintiffs' admission that in 1889 the execution debtor Johnson was selected by some of them and the predecessors of the others to acquire and he did acquire lot 22 by letters of decree on the 16th November, 1900, they are estopped from denying, and setting up their title against a *bona fide* creditor of Johnson, that Johnson is the legal owner of the said lot.

(5)On the plaintiffs' admission that moneys were advanced by Hookumchand to the execution debtor in connection with obtaining title to the said lot and improving same and that the shareholders including some of the plaintiffs and the predecessors of the others participated in the moneys so advanced, the plain-

tiffs are estopped from setting up title to the said lot against the appellant, assignee of Hookumchand, of the debt so advanced.

(6) The plaintiffs' in selecting Johnson to obtain letters of decree in his own name and in allowing title to remain in him enabled him thereby to represent to persons dealing with him that he was the absolute owner of the said lot.

(7) On the plaintiffs' admission that certain payments must be made by them to the execution debtor Johnson before transport is passed to them they have nothing more than a *jus ad rem,* which right in law does not rank preferent to the claim of a creditor of Johnson, the holder of the legal title to the said lot 22.

(8) The levy was made in February, 1918, by the appellant's testator as assignee of the judgment debt, obtained by Hookumchand against Johnson on such parts or portions of the said lot 22, as were at that date and still are held by the execution debtor under the said letters of decree.

(9) Unless letters of decree are obtained by fraud, misrepresentation or justus error the grantee gets an absolute title to the property granted. Under other circumstances the Court will not enquire into the title of the holder of letters of decree.

(10) Until letters of decree are set aside the property therein comprised is executable for the debts of the holder of the letters of decree, and should he become insolvent the property would vest in the Official Receiver.

(11) As between Johnson and the plaintiffs they would have the right to restrain him from disregarding any binding agreement between them with respect to the lot and could oppose any voluntary dealing or act by Johnson in disregard of their agreement, but different considerations arise when the rights of a third party, e.g. creditors of Johnson are questioned.

(12) The action brought in 1915 by the plaintiffs against Johnson for specific performance was not one of the grounds pleaded in opposition to the appellant's levy and such ground could not thereafter be relied on *Vide* Order XXXVI., r. 43. The learned Chief Justice was therefore wrong in considering the action at all. But the Court's decree could not be carried out until the appellant's levy was declared bad in law.

(13) The plea of prescription was abandoned by the plaintiffs at the hearing and it was therefore not one of the issues for decision. If a prescriptive title had been acquired it was lost when letters of decree were granted to Johnson.

(14) The learned Chief Justice was wrong in holding that had Johnson had at any time absolute ownership of lot 22 he would in the circumstances shown by the evidence have been divested of it by the adverse occupation of the plaintiffs and their predecessors in title. Johnson's title dates from 1900 and a pre-

scriptive title can be acquired only after the adverse possession of one-third of a century.

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

He cited *Persaud* v. *Nawole and anr*. (L.J., March 30th, 1903); *Junkie* v. *Gangadin,* (L.J., November 4th, 1908); *Gan-gadin v. Barracot*, 1919, L.R.B.G., 216); *Harris* v *Buissinne's trustee* (2 Menzies 104); *Preston and Dixon* v. *Biden's trustee* (1884 Buch. 1 A.C., 322); *Lucas' trustee v. Ismail and anr* (1905, T.S., 239); *Steele* v. *Thompson* (13 Moore P.C. 280.) [Dalton, J., referred to *McDonald's trustee* v. *Kemp* (1915 S.A.L.R., App. J. 491.)]

J. A. Abbensetts, for the respondents.

After hearing argument the court suggested that the matter be settled by arrangement. After discussion the respondents offered and the appellant agreed to accept the sum of $600 in settlement of his claim and withdraw his levy. The order of the trial judge was therefore set aside, and judgment entered for the appellant in terms of the settlement arrived at, each party to pay their own costs.

DELGADO AND ANR. *v.* SPROSTONS, LTD.

[390—1—1920.]

1920. February 12, 17. BEFORE DOUGLASS, Acting J.

Liability of Common Carriers—Non-delivery of goods consigned—The Common Carriers Ordinance, 1916—Special contract—Reasonable notice evidence of agreement.

The Plaintiff's Agents delivered goods including 1/2 barrel pork to the Defendants for consignment to the Plaintiff and signed the consignment receipt which read "To Messrs Sprostons Ltd. Please receive the undermentioned goods for conveyance.". . . . . Subject to the conditions printed on the back hereof." One of the conditions, No. 14, is "The Company will not be responsible for the weight or contents of packages, &c." A barrel was delivered to the plaintiff, 'but contained short weight and the plaintiffs thereupon sued for damages for loss of the difference.

The necessary facts are fully set out in the judgment.

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

H. C. Humphrys, for the defendant company.

DOUGLASS, Acting J.: The plaintiffs claim $20.44 as damages against the defendants as common carriers for the loss of 21 lbs. of pork of the value of $8.40 and 30 bundles of grass of the value (together with its freight) of $2.04. The defendants admitted the loss of and their liability for the grass, but with respect to the pork denied that there was any loss of it whilst in their custody, or that it was short delivered and that in any event they were not liable for the weight or contents of packages and they allege negligence on the part of the plaintiffs.

The evidence shows that on the second January, 1920, the plaintiffs through their agents Messrs Wieting and Richter delivered a half barrel pork, amongst other goods, to the defendant company at Georgetown for delivery at Loo Creek, Demerara River, that a consignment slip in duplicate of the said goods was prepared (see Exhibit "A") that part of the goods were delivered to the plaintiffs' servant on the 3rd January and the balance—except the half barrel of pork—on the 5th January; that on the 7th January, Brown, one of the plaintiff's took delivery from on board the s.s. Essequibo of a half barrel pork which on examination was found to contain only 78 lbs. pork, and that on the next day it was returned by the same boat consigned to Messrs. Wieting & Richter, It was also clear from the evidence that the barrel of pork delivered to Brown was not the same as that consigned to the plaintiff's and delivered to the defendant company, though this is not disclosed in the Statement of Claim and Particulars.

A common carrier differs from a private carrier in respect of duty and in respect of risk. In respect of duty he could not— as in the case of an ordinary bailee—refuse to take delivery of goods in the course of the business he professes to carry on, and in respect of risk he is an insurer of the goods he carries. This full liability has several exceptions at Common Law but up to the end of the 16th century there were only two, viz., (1) the act of God and (2) the act of the King's enemies. The strict common law rule was found too severe upon the carrier and an exception gradually crept in that liability could be limited by notice communicated to the customer, but such notice would not protect him against the consequences of a loss due to gross negligence. It is this exception, with the modifications attached by Case Law and Statute Law, that concerns the present suit. At the beginning of the nineteenth century a notice communicated was treated as evidence of a contract, but the cases deciding what notice was required and the extent to which it bound the customer or the carrier were confusing and conflicting, until the Carriers Act 1830 was passed, of which Act our Ordinance No. 18 of 1916, is practically a copy.

By section 6 of that Ordinance a common carrier cannot by a public notice limit his liability at Common Law to answer for the loss of an article in respect whereof he is not entitled *to* the benefit of the ordinance; and by section 8 special contracts are excepted from the operation of the ordinance. It has been held that this section does not give validity to special contracts generally but refers only to contracts by which the carrier voluntarily renounces the protection given by section 3 of the Ordinance. *Baxendale* v. *Great Eastern Railway Company* (4 Q.B. 244.)

By 1854 when the Railway and Canal Traffic Act was passed, extending the liability of Railway Companies, the decisions according to Blackburn, J., had come to hold that a carrier might by a special contract *limit his responsibility even in the case of gross negligence, misconduct, or fraud,* on the part of his servant, and as the Act does not apply in this colony, it appears to me that these decisions should embody the law applicable in this colony.

It was said by Parke, B., in the course of his judgment in *Carr* v. *the Lancashire and Yorkshire Railway Company,* (1852, 21 L.J.N.S., Exp. 263). "We ought not to fritter away the meaning of Contracts merely for the purpose of making men careful. That is a matter which we are not bound to correct. The Legislature may, if they please, put a stop to contracts of this kind, but we have nothing to do with them except to interpret them when they are made."

I propose therefore to direct attention to two or three decisions with special reference to what constitutes a sufficient notice, and generally as to special agreements.

Incidentally I touched on this subject in the late case of *Ramgolam Singh* v. *the Attorney General and another* (1919 L.R. B.G., 159) and in that case made reference to *Zunz* v. *S .E. Railway Co.,* (1868 4 Q.B , 395), and I now direct special attention to the 2nd par. (p. 544) of the judgment of Cockburn, C.J. In the *G. N. Railway Co.,* (appellants) v. *Morville* (respondent) (1852 21 L.J., 319), the respondent left a horse with the appellants, who were common carriers, for conveyance, and signed a ticket, which stated " this ticket is issued subject to the owner's undertaking to bear all risk of injury, etc., . . . the company will not be responsible, etc." ; the horse was injured during the journey.

Held that the ticket was not a mere notice which would be void under section 4 of the Carriers Act, 1830, (our section 6) but contained the terms of a special agreement between the respondent and appellant. Earle, J., in the course of his judgment-states, "The consideration for the plaintiff assenting to the agreement was the carriage of the horse by the defendants on the payment of the fare. Whether the plaintiff had signed the paper or

whether the clerk had mentioned the terms or whether the latter had delivered to the plaintiff a ticket saying what the terms were, there would have been in each case good evidence of any agreement between the parties."

The next case I will refer to is *Harris* v. *the G. N. Railway Company*, (1876, 2 Q.B.D., 515) which is one of depositing baggage at a Railway Company's Luggage Office where the company was a bailee rather than a carrier but the same construction of what is or is not notice is involved. The luggage was deposited with a clerk of the defendant company and the plaintiff received a ticket. On the face of it was printed "Left subject to the conditions on the other side. This ticket to be given up when the luggage is taken away." On the other side were conditions limiting the company's liability and the plaintiff knew there were conditions on the back of the ticket but did not know what they were. *Held* that the luggage must be taken to have been deposited subject to the conditions on the back of the ticket. The case of *Henderson* v. *Stevenson* (2 H.L., Sc. 470 was referred to by Mellor, J., and distinguished (see page 522 of *Harris* v. *Gt. W. Railway Co.)*

Hooper v. *Furness Railway Co.*, (1906, 23 T.L.R., 451) at first sight seems to conflict with the last decision referred to, but Mr. Justice Ridley in giving judgment explained the court's decision by a reference to *Parker* v. *S. E. Railway Co.*, (2 C.P.D., 416) in which Lord Justice Mellish pointed out "the proper direction to leave to the jury was that, if the person receiving the ticket knew there was writing on it, but did not know or believe that the writing contained conditions, nevertheless he would be bound if the delivery of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that this writing contained conditions . . . If there was reasonable notice that the ticket contained conditions, then the plaintiff would be bound."

In the present case the consignment slip has on the face of it "To Messrs. Sprostons, Ltd. Please receive the under-mentioned goods for conveyance to Delgado and Brown, Loo Creek, Demerara River. Subject to the conditions printed on the back hereof, signature of shipper Wieting & Richter, Ltd., Provision Department." Then follows the description of contents including 1/2 barrel pork.' On the back of the slip condition 14 reads: "The company will not be responsible for the weight or contents of packages nor for non-delivery or mis-delivery in consequence of obliteration, insufficiency or inaccuracy of marks or address." On a careful reading of this paragraph it is clear that the words following 'in consequence of' can only refer to "non-delivery or mis-delivery." After consideration of the 'rationes decidendi' of

the various decisions, and on the evidence before me I come to the conclusion that Messrs. Wieting & Richter must be taken to have known that the consignment slip contained terms and conditions even if they did not choose to read them so as to become aware of the details.

I am also of opinion that the plaintiffs were bound by the conduct of their agents, Messrs. Wieting & Richter, and are precluded from setting up the defence that they did not know of or assent to the terms of the consignment slip.

I must also hold that a barrel is a 'package' within the meaning of Condition 14—and that consequently although it was weighed by the consignors and found by them to obtain 100 lbs. the defendant Company expressly relieve themselves from any responsibility of accepting that weight as correct, or that it shall weigh the same on delivery; it is too, a reasonable condition, for were it otherwise it would necessitate the weighing of every package received by the company to the great delay and possible disorganization of their traffic.

The case is further complicated by the fact that the barrel actually received, and the contents of which the plaintiffs had accepted, was not the barrel actually shipped and there being no evidence to show the quantity of pork this barrel contained when received by the company it would be impossible to hold that the defendant company was liable for any contents said to be missing I therefore give judgment for the defendant company both on the law and the facts.

I do not think it necessary to discuss the question of negligence on the part of either party, but the custom of the purser of the defendant company signing the consignee's name on the Way-Bill as having received the goods entrusted to them is to be deprecated, and as it undoubtedly contributed to the confusion and loss in the present instance, I give no costs.

YONKER *v.* BEETE.

PETTY DEBT COURT, GEORGETOWN.

YONKER *v.* BEETE.

[270—1—1920.]

1920. FEBRUARY 10, 17. BEFORE DOUGLASS, Acting J.

Immovable property—Contract for sale—Receipt for deposit—Statute of Frauds— Return of deposit.

On a contract for purchase of lot 107, Second Street, Georgetown, the plaintiff paid the defendant $100 by way of deposit; of this amount $10 was paid by the plaintiff to the agent of the defendant and $40 was also paid the agent by the defendant as balance of his commission. The defendant neglected to take the proper steps to complete the transport of the property and the plaintiff thereupon sued for return of the deposit money.

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

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

DOUGLASS, Acting J: The plaintiff is claiming from the defendant the return of $100 deposit money paid to him for the purchase of lot 107, Second Street, Georgetown, on breach of the contract for sale.

The defendant pleads that (1) he has always been ready and willing to complete the sale of the property, and (2) that the Court has no jurisdiction in the matter, the plaintiff has mistaken his remedy.

I confess I do not follow in what respect the Court's, jurisdiction is ousted, though the argument was that the plaintiff's only remedy was a suit for specific performance which the magistrate has no jurisdiction to hear or grant; but the plaintiff is at liberty where the defendant as vendor refuses or is unable to complete his contract, to proceed in this Court, either for damages for breach of contract (except in the circumstances referred to later), or for the recovery of his deposit money as money had and received. The decision in the case of *In re Marsh's purchase* (1895, 64 Ch. D. 225) referred to by counsel for the defendant, turned on whether the purchaser was at liberty to treat a contract with a special condition as void on the ground that the vendor has not yet shown a good title, and the facts were quite different to this case; nor does the case of *Scott* v. *Alvarez* (1895, 64 Ch. D, 385) assist me, the facts in that case are very special and complicated.

The plaintiff's case is not that the sale and purchase failed on a question of title, but by reason of the refusal of the vendor, the defendant, to take the necessary steps to carry through the transaction. The plaintiff put in evidence a receipt given by the defendant for the sum of $100. It has been suggested that it is really an agreement for sale, but in addition to the fact that the proper stamp for such an agreement is wanting, it also does not comply with the statutory requirements for such an agreement. The wording of it is almost similar to the documents put in evidence as contracts in *Walrond* v. *de Freitas,* (1919, L.R. B.G., 206), and in that case I held that the document was not sufficient, for the reasons then stated, and did not comply with the requirements of section 3 (4) (e) of the Civil Law of British Guiana Ordinance, 1916. I apply the same reasoning" to this receipt and hold that the contract of sale and purchase between the parties could not have been enforced, there being no sufficient memorandum in writing.

It was decided as long ago as the 18th century that if the agreement or memorandum in writing did not comply with the requirements of the Statute of Frauds the plaintiff—if he prove his claim —can recover the deposit money without interest as money had and received, *Walker* v. *Constable* (1 B and P, 307); and in such a case that is his only remedy, he could not take proceedings for damages for breach of contract.

In ex parte Barrell, in re Parnell (1875 10 Ch. A. C. 512) it was held that if the purchaser repudiates the contract he cannot have back the money deposited as the contract has gone off through his default. The facts of that case clearly infer that as the deposit is only paid to the vendor as a guarantee that he shall suffer no loss, if the contract goes oft through his fault the purchaser should recover the deposit.

On a reference to *Walrond* v. *de Freitas* it will be seen the cases of *Casson v. Roberts* (63 Ch. 105) and *Thomas v. Brown* (1 Q. B. D, 714), are to the point and I may repeat the statement of Chitty on Contract to the effect that the mere fact of one party having paid money to another under contract which he cannot enforce will not entitle him to recover the same as on a failure of consideration, for such a contract is not void, but there is merely a deficiency in the evidence thereof.

But in the present case so far as the evidence is before me there is more than the mere fact of the contract being unenforceable, the plaintiff has so far satisfied me that the defendant deliberately refused to carry out the contract and that she, the plaintiff, had done all in her power to carry the business through before bringing the matter into Court.

The letter of the 20th January, 1920, does not assist the

defendant's case at all. It is in the nature of self-serving evidence and was written after he knew that the plaintiff had put the matter in the hands of her solicitor and his statements in Court that he is ready and willing to carry out the transaction cannot affect any previous claim she has to the deposit owing to his conduct; more especially as I have pointed out above the contract cannot be enforced at law. The witness Gill did not impress me. On the other hand the plaintiff gave her evidence in a straightforward manner and I believe the facts were as she stated, whether the defendant refused to continue owing to defects in his title or not was no concern of hers, and she was not aware of any defect; the fact that the defendant told the witness Fraser certain difficulties of his position cannot affect the plaintiff's claim. I find that the contract did not go off through her default and that the defendant promised to return a portion of the deposit money.

The $10 paid to Gonsalves, the defendant's agent, should not be returned, but there is a question as to the $40. Apparently the plaintiff would have accepted $50 before action and as there is no evidence that the defendant has sold the property I will allow him the amount he states he paid as commission and give judgment for the plaintiff for $50 and $3.60 costs, and $5 fee

ALLIKHAN *v.* FERGUSON.

1920. FEBRUARY 12, 21. BEFORE DALTON, J.

Landlord and tenant—Tenancy at will—Determination of tenancy—Notice—Right of re-entry—Small Tenements and Rent Recovery Ordinance, 1903, s. *16—Forcible entry—Damages.*

Claim by the plaintiff Allikhan against James Ferguson, manager of plantation Tuschen, for the sum of $200, as damages for his alleged unlawful ejectment from a dwelling occupied by him on the plantation. All further necessary facts appear from the judgment below.

S. E. Wills, for the plaintiff.

H. C. Humphrys, for the defendant.

DALTON, J.: Plaintiff has claimed the sum of $200 as damages for the alleged unlawful ejectment of him and his possessions from a dwelling occupied by him at plantation Tuschen. The defendant is manager of the plantation, plaintiff being a field labourer and Mohammedan priest on the same plantation.

As a field labourer plaintiff with his family occupied two rooms of a range as a dwelling and it is admitted in the pleadings by

both sides that he was a tenant at will. He alleges, however, that his ejectment was unlawful, and that his goods were damaged as a result of the unlawful acts of defendant and his servants.

Plaintiff's counsel, on the law, first of all argued that, in view of the provisions of the Small Tenements and Rents Recovery Ordinance, 1903, a landlord has no right of entry save by legal proceedings. Section 16 of that ordinance provides machinery for the recovery of possession of tenements after determination of the tenancy, and it has been held that the section applies to a tenancy at will *(Wood* v. *B. G. Building Society, Ltd.* A. J., July 16th, 1912; *Kowlesseri* v. *Batachia,* 1919 L R. B. G., 104), but it does not do away with the landlord's right of entry on the expiration of the term. It provides a method which as a rule a landlord would prefer to adopt, but it does not debar him from his right of entry if he cares to avail himself of it. The law as summed up, after consideration of the English decisions, by Woodfall (Landlord and Tenant) is as follows: "the law appears to be that a "lessor, at the termination of the terra, may enter forcibly into possession of "the demised premises, and after civilly requesting the tenant to depart, "may in the case of his refusal or neglect to comply with such request, "gently lay hands upon him to turn or push him out; and in case of any "resistance on his part, may use such force or violence as may be "necessary to overcome such resistance but no more, and so expel the "tenant from the possession without being liable to an action of trespass "quare clausum fregit, or for assault, at the suit of the tenant . . . . . But "excess of violence must be avoided, and that creates the principal "difficulty and danger in proceeding to expel a tenant in the manner above "mentioned, and often renders it more advisable to proceed by action of "ejectment."

But then plaintiff's counsel argued the tenancy was not determined by due notice to quit. The authority above referred to lays it down that notice to quit is unnecessary to determine a tenancy at will, and that demand for possession is sufficient. The case of *Doe d. Tomes* v. *Chamberlaine* (5. M. and W. 14) is a direct authority on the point. But apart from the law I have no doubt whatsoever on the evidence that notice was given by the defendant and accepted by the plaintiff.

There is a divergence between the evidence of the parties as to what happened on July 3rd aback of the plantation, when plaintiff refused or declined to continue the cane-cutting there. The plaintiff's action, however, does not tally with the account he gives of his position on the estate. That he was to work only when he wished to do so I do not believe; he admits that when required to work from July 1st to 3rd, by the driver, he did so. The account given by the defendant that plaintiff would not be

called upon to work when he was required to perform any religious duties for Mohammedans on the estate is. it seems to me, the correct version. And that his refusal to continue cane-cutting was followed by a request to leave the field only, does not, it seems to me, fit in with what one would expect. It is directly contrary to the evidence of defendant, the overseer McLeod, and the driver. Defendant states he got annoyed, and told the plain-tiff he knew what his refusal meant and he must leave the estate that night, that plaintiff replied there were other estates and he would leave in the morning. Defendant's action on the following morning, July 4th, when he gave instructions to the constable Kadir Bacchus, fits in naturally with his account of what had happened the previous day. I have no doubt at all on the evidence that on July 3rd plaintiff was told to leave the estate that day, that he said he would go the next morning, to which the defendant agreed and that he (plaintiff) accepted the notice then given him. He heard the instructions given to Kadir Bacchus on the 4th; that witness and the porters proceeded to eject him as he had not removed within the time given and his goods were put on the road. In this defendant was within his rights. Whether his action was harsh or not, under the circumstances, I am not prepared to say. There is no doubt, however, that plaintiff's conduct on the afternoon of July 3rd, could not have led him to expect much consideration from the defendant on the following day, although plaintiff's wife says she never expected the defendant to carry out his intention.

It remains to consider whether in ejecting plaintiff and recovering possession defendant used any more force than was "absolutely necessary or caused any damage that was unavoidable. If I accept the evidence of plaintiff's principal witness, Kadir Bacchus, on that point I can only come to one conclusion. The ejecting was particularly peaceful one; no force at all was used. I see no reason to doubt that plaintiff's wife was present and pointed out hers and her husband goods. The alleged damage to the sacred books of the plaintiff I can find on the evidence to be due in no way to the action either of defendant or the porters. If they were damaged (they were old and mostly unbound with loose leaves as plaintiff admits), on which point I am very doubtful, it only remains to point out that plaintiff left all his things on the roadside unattended and unguarded for several hours of the day. There is not a scintilla of evidence to show that they were in any way roughly handled by the porters as was suggested by plaintiff's counsel. The whole removal was under the supervision of Kadir Bacchus, a fellow Mohammedan.

The loss of $75 from a trunk I am also very skeptical about. Again, if I believe Kadir Bacchus, the loss could hardly have

occurred during or as a result of the eviction. I am unable to find on the evidence that any money was lost at all. Even if it was it is difficult to see how the theft of the money could be said to flow from the action of the defendant.

There must be judgment for the defendant, with costs.

CHOW *v.* FUNG AND ORS.

[170 OF 1919.]

1920. JANUARY 28; FEBRUARY. 17, 18, 19, 24, 25, 28.
BEFORE DALTON, J.

Will—Forgery—Revocation of probate—Proof of interest—Marriage—Cohabitation and general reputation—Evidence—Communications between counsel and client— Privilege—Witness denying his own solemn act—Value of testimony.

The plaintiff Ishmael Augustus Chow, an infant by his guardian ad litem, William Wong, sought as the next of kin of Annie Alexander, deceased, an order directing that the paper writing purporting to be the last will and testament of Annie Alexander, dated December 31st, 1918, and deposited in the Registrar's Office on January 30th, 1919, to be null, void, and illegal, on the ground that it was a forgery. He also sought an order declaring that Annie Alexander died intestate, and that the defendants render an inventory and accounts of the property of the deceased. The defendants were Jessie Fung, single woman, who was named executrix in the will in question, Mary Chan, widow, and Louisa Hunte, married woman, sisters of the deceased Annie Alexander.

The deposit of the will in the Registrar's Office had, under the provisions of the Deceased Persons Estates Ordinance, 1909, then in force, the same effect as a grant of probate in common form in England.

Plaintiff having proved his interest, the defendants proceeded with the proof of the due execution of the will which they propounded.

J. S. McArthur, for the plaintiff.

H. C. Humphrys, for the defendants.

At the close of the evidence led for the plaintiff showing interest Humphrys submitted that no sufficient interest was shown. On this decision was given, as follows:

DALTON, J.: Plaintiff claims as next of kin of Annie Alexander, deceased, an order that the paper writing purporting to be the last

will of Annie Alexander, dated December 31st, 1918, and deposited in the Registrar's Office is a forgery, and so null and void.

The statement of claim sets out that he is the grandson of Annie Alexander who has been twice married, firstly, to Joseph Che-a-Keoi, and, secondly, to Joseph Alexander. By the first marriage it is alleged there were two children, a son who died in infancy, and a daughter Emma, who married one Charles Chow. The issue of the latter marriage, it is stated, was three children, two of whom are dead leaving the plaintiff surviving. Both his parents are stated to be dead.

So far as succession to his grandmother through his mother is concerned, it does not concern plaintiff whether there was a marriage or not, but to support his right to claim that Annie Alexander died intestate, and that he is entitled as her heir to one half of the common property of the marriage between Joseph Alexander and Annie Alexander it is necessary 'to prove that these two persons were in fact married.

To prove this marriage three methods of proof were essayed by Mr. McArthur-—

(1.) Certificate of marriage officer.

(2.) Cohabitation and general reputation.

(3.) The evidence of an alleged witness of the marriage.

The evidence led was as follows: first Charles Wong, plaintiff's guardian ad litem, who says he knew Annie Alexander for about 37 years before her death. He can speak of no marriage ceremony to his knowledge between her and either Che-a-Keoi or Alexander, but he states she lived with Che-a-Keoi as his wife, and after Che-a-Keoi's death, with Alexander. In both cases he states they kept a shop in Queenstown village, lived as husband and wife and were such by "common repute." He states also that Che-a-Keoi died in Georgetown, though he cannot speak of his own knowledge. The daughter Emma, he states, was married to his brother-in-law Charlie Chow, and there were two children of the marriage, a girl who died, and the plaintiff who is now 20 years of age.

The next witness is an elderly Woman named Austin, who swears she was present at Queenstown, Essequibo, where the parties lived, when Annie Alexander was married at the English church to Joseph Alexander by a clergyman named Wylie. She was a spectator, she states, and was subsequently in the employment of Mrs. Alexander as cook for a period of six years. This same Mrs. Alexander she saw when she was dead at Bush Lot at the end of 1918, and the grandmother of the plaintiff. She also deposes that she saw one Ho-a-Hing at the wedding.

Mr. McArthur then tendered in evidence a certified copy of the original marriage register giving details of a marriage at

"St. Bartholomew's at Queenstown," Essequibo, on December 28th, 1899, between Joseph Alexander Ho, bachelor, and Norah Chung, widow. The marriage was performed by Robert Wylie in the presence of W. Soltan and J. M. Ho-a-Hing. He informed me that Ho-a-Hing was dead and Robert Wylie and. W. Soltan had left the colony and could not be traced. The certificate was objected to by defendants' counsel.

Going back to the methods of proof adopted by the plaintiff I will deal with (1) first. The copy of the register is of course only proof of the fact of a marriage, but is no evidence of the identity of the parties. On that ground the admission of the certificate was objected to, but as I pointed out, that constitutes no ground for objecting to its admissibility. The only objection there can be is as to its value. The certificate is admissible, but the identity of the parties must be proved apart from the document. If that evidence is lacking, then the certificate is of no value for the purpose of the case. It is sought here to show, of course, that the Norah Chung mentioned is the same person as Annie Alexander and that Joseph Alexander Ho is the same person as Joseph Alexander, the deceased. There is evidence that Annie Alexander was a widow and that her maiden name was Chung, but no. one seems to have known her by the name of Norah. There is evidence that Joseph Alexander was also known as Joseph Alexander. If the evidence ended there I should have some difficulty in arriving at a conclusion that there was sufficient proof of identity of the parties, but as will appear later the marriage of the parties mentioned in the pleadings as Annie and Joseph Alexander is proved by other means.

To support his argument respecting the second method of proof, that is, by cohabitation and reputation, counsel referred to several cases. I can find no local case dealing with the matter, but English cases are of course numerous. To refer to one or two only, in *Campbell* v. *Campbell* (L. R. 1 Sc. & Div. 182) it was held that cohabitation with the required repute as husband and wife is proof that the parties between themselves have mutually contracted the matrimonial relation. As was pointed out in that case, in countries where the facilities of Matrimony are less than in Scotland the evidence to establish the marriage must be stronger. And in a colony where concubinage is common the same presumption exists. It was urged before the Privy Council in the case of *Sastry Aronegary v. Sambecutty Vaigalie* (6 A. C. 364) that the presumption of marriage arising from cohabitation with habit and repute did not apply to Ceylon, or to the Tamils there, but the court held that according to Roman-Dutch law there was a presumption in favour of marriage rather than concubinage. The court declined to agree

that where concubinage was recognised, or not considered as immoral the same presumption would not arise. In *Piers* v. *Piers* (2 H. L. C. 331.) the House of Lords held that the presumption arising from cohabitation with habit and repute can only be rebutted by the most satisfactory evidence.

Whilst there is then no doubt that this method of proof of marriage is part of the law of this colony, good and sufficient evidence must be produced to establish a marriage based upon such a presumption. The facilities for marriage cannot be said to be in any way unduly restricted, although they are undoubtedly more restricted than in Scotland, whilst concubinage is by no means uncommon. On the facts in this case and on the evidence of one witness alone as here I am unable to find that any presumption of a marriage from "cohabitation, name, and reception by everyone as wife" arises here. Had the plaintiff's case depended alone on this method of proof of the marriage he must have failed.

It is perhaps pertinent here to call attention to that unhappy term "reputed wife," a term in common use in this colony, and commonly meaning, not that the woman is wife by reputation or by any other method, but that the parties live as man and wife although they are not married. It is in effect a contradiction in terms and its use might doubtless be taken advantage of to assist in rebutting the presumption that arises from cohabitation and general reputation. The less one hears of the term and the sooner it dies out the better.

The remaining proof is that of the witness Austin. She purports to have been a spectator and present at the marriage between Annie and Joseph Alexander. If the evidence is trustworthy, no better evidence of the marriage and of the identity of the parties can be had. Although I understand her evidence took the plaintiff's counsel somewhat by surprise and he could not have been fully instructed I see no reason to reject it for that reason. The parties were well known to her and she served them subsequently as a servant for several years. Her cross-examination only tended to strengthen her credibility. Having regard to her evidence I come to the conclusion that Joseph Alexander and Annie Alexander were duly married.

Finally, the will of Joseph which was duly proved by one of the defendants in this action speaks of "my lawful wife Annie Alexander, born Chung, to whom I am married in community of property."

Counsel for defendants then urges that, assuming the marriage ceremony was performed, there is no evidence that Mrs. Alexander's first husband was dead at the time, Even assuming that there is no evidence (an assumption which is not correct), in the absence

of any proof to the contrary, it is to be presumed that the parties were competent to enter into a marriage and that the marriage was properly performed. The maxim *semper praesumitur pro matrimonio* is the answer to the argument. The burden of disproof lies on those impeaching the marriage, and, as has been laid down, the evidence repelling the presumption must be strong, distinct, and satisfactory. There is no attempt to repel it here.

On the evidence, then, I am satisfied that the marriage of Joseph Alexander and Annie Alexander has been proved. That Emma Chow was the daughter of Annie Alexander I also find, on the evidence of William Wong. This same witness deposes to the plaintiff being the son of the marriage of Emma Chow and Charlie Chow. It is admitted by one of the defendants that plaintiff is the grandson of Annie Alexander, in the inventory filed and sworn to of the estate of Mrs. Alexander. The plaintiff has accordingly shown sufficient interest for me to call upon the defendants to proceed with the proof of the due execution of the will which they propound. The hearing will therefore proceed.

The hearing therefore continued and evidence was led for the defendants, and thereafter for the plaintiff in support of the claim that the will was a forgery. On February 19th objection was taken to questions being put to Mr. E. M. Duke, barrister-at-law, in respect of communications between himself and the two defendants Chan and Hunte on the ground of privilege. After hearing argument, decision on this point was given as follows:—

DALTON, J.: The question arising is one of privilege, in respect of communications between counsel and client. Mr. Duke was asked whether two of the defendants, Chan and Hunte, had consulted him professionally on January 21st, 1918. He replied in the affirmative. He was then asked whether they had consulted him on the question of applying for letters of administration in the estate of Annie Alexander. To that question, on behalf of the defendants, Mr. Humphrys objected, pleading the privilege of his clients.

The question as it arises here has, I must admit, given me some little difficulty. The following, shortly stated is the proposition upon which the defendants rely; " for the perfect administration of justice, and for the protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production" (per Halsbury, L.C. in *Bullivant v. Attorney General for Victoria*, 1901 A. C. 196). But he proceeds that this is subject to the limitation that no court can be called upon to protect communications which are in themselves part of a criminal or unlawful pro-

ceeding. The whole case for the plaintiff is based upon the plea that the will propounded by the defendants is a forgery. In the same case in the Court of Appeal (1900 2 Q. B. at p. 169) Romer, L. J., says: "It is clear that the claim of privilege is unavailing in cases where fraud or illegality is alleged, and the existence of that fraud or illegality, being in issue, the documents are relevant to that issue."

Here it is not a question of documentary evidence but of verbal communications. It seems to me that there is no doubt that the communications to Mr. Duke, so far as this question is concerned, are relevant to the issue, there is moreover no doubt that the question of fraud arises on the pleadings. It is however I think necessary for me to go further and to ascertain whether the communications between Mr. Duke and the defendants passed before the alleged commission of the fraud for the purpose of assisting in its commission. Having regard to the facts of the case, can it reasonably be said that the defendants, in view of the advice sought, intended, or proposed, or sought help or guidance in the commission of the alleged forgery which plaintiff seeks to place at their door? Advice might, no doubt, be sought by a person intending a fraud from a solicitor without in any way disclosing the intention. There seems, however, to be no doubt, on the authority of *Regina* v. *Cox and anr.* (14 Q. B. D., 153), a very complete and learned judgment of a full court on the question, that to take a case out of the rule the communications must be criminal in themselves or intended to further an illegal, or fraudulent purpose. It may appear, of course, in some cases that if the objection is upheld, justice may seem to be defeated, but on the other hand, as pointed out in *Williams* v. *Quebrada Railway, etc., Co.* (1895 2 Ch., 74) it may be right that justice in a particular case be defeated in order to uphold the general administration of justice. So far as the questions have gone the communications do not appear to me to in any way seek help or guidance in the commission of any wrongful act, nor do they appear intended to further any fraudulent purpose, nor has it been suggested that the two defendants had any fraudulent intent at the time they consulted Mr. Duke. I have therefore come to the conclusion that the communications are privileged. The defendants having objected to evidence of them being given the objection must be upheld.

Thereafter the hearing was continued and further evidence led. Decision was reserved and judgment subsequently given as follows:—

DALTON, J.: On January 30th, 1919, a will, purporting to be the last will and testament of Annie Alexander, widow, was deposited

in the registry. This deposit has by statute the same effect as the grant of probate in common form in England. The deposit was made on the oath of Manoel R. Francis, one of the attesting witnesses. The other witness to the will was Ishmael Chow, the plaintiff. Under the will the testatrix left all her property to the plaintiff' and her three sisters, the defendants, equally. Under the law the devise to the plaintiff as an attesting witness to the will is void, but it does not appear that this was known to any of the parties, nor was the fact touched upon during the hearing until I mentioned it at the conclusion of the evidence. It therefore may be taken to have no direct bearing on the case as it comes before me, although if known to the defendants it might certainly be a matter of importance.

The plaintiff, the grandson of the testatrix, now seeks an order of this court declaring the will to be a forgery, and that Annie Alexander died intestate.

Plaintiff having proved his interest, the defendants was then called upon to prove the due execution of the will which they propounded. The will appears upon its face to have been properly executed, the testatrix's mark being affixed thereto, in the presence of two witnesses. There is an attestation clause to the effect that it was signed by the testatrix in the presence of the two witnesses, and there is a further clause signed by one witness, Francis, that he read over the will to the testatrix, and that she appeared to understand it and made her mark to it in their presence. The presumption of law then is that it was duly executed. In respect of the execution the defendants called three witnesses. In view of their evidence it is necessary to examine their evidence in detail.

[After an examination of their evidence His Honour continued]:

I will now proceed to an examination of the evidence of the witnesses for the plaintiff in support of the allegation that the will is a forgery. First of all, there is the plaintiff. He of course must or should realise his position. He admits he was a witness to the document, but he says it was made in Georgetown at the Grand Central Hotel on January 30th. a month after the death of his grandmother Annie Alexander. What reliance is to be placed upon the evidence of such a person? It is true he tries to make excuses. He says he was young, only 18 years of age, that he had just recovered from and was still suffering from the effects of a severe illness, influenza and pneumomia, and that he was under the influence of the defendant Fung. He is not, however, devoid of intelligence, nor is he without education. Mr. Humphrys has referred me to the criticisms of some learned judges on the value of the evidence of such persons as the plaintiff. In *Wilson* v.

Beddard (12 Simon at p. 34) the learned Vice-Chancellor states: "I have always thought that, if any attention at all ought to be paid to the testimony of witnesses who deny a solemn act which they have attested, it ought to be the slightest possible. Perhaps the best way would be to disregard it altogether." And he proceeds that the testimony of the witnesses to whom he referred had little effect on his mind, and that another witness who could be believed had deposed to the contrary. His remarks were cited with approval by Lord Brougham in *McGregor* v. *Topham* (1853 3 H. L. C. at p. 156): he adds also that Lord Mansfield was "so clearly of this mind that he said that, instead of attending to such witnesses, they ought to be consigned to the pillory. That was this great judge's strong expression, which it may be impossible that we should entirely adopt, but it shewed clearly in what light he viewed such testimony." That expression of opinion needs no emphasis from me, and it is after paying all due regard to it that I have arrived at the conclusion I have come to in this case. If in any respect the evidence of the plaintiff denying his solemn act in attesting the execution of this will in the presence of the testatrix on December 31st, 1918, stands alone I have put it on one side and disregarded it.

[After a further detailed examination of the evidence His Honour concludes]:—

I find on the evidence that the will propounded was not made by Mrs. Alexander on December 31st or at all. She never put her mark to it, or authorised anyone else to do so, nor was it attested by Francis or the plaintiff in her presence. The evidence upon which I have come to this conclusion is, to me, clear and reliable, so far as I am able to judge of it, and in my opinion ample and sufficient to upset any presumption in law which arises in respect of the due execution of the will. The evidence of Austin, Brandt, and Babb, and of solicitor Sousa, the corroborated evidence of the plaintiff, the material discrepancies in the evidence of the defendant Fung, Francis, and Simon leave no doubt in my mind that the Will is a forgery. When it was forged it is not necessary for me to enquire. I do not propose therefore to analyse the evidence further, or to examine the evidence of William Chin. He was not, it seems to me, a very happy witness, And then the extraordinary production a day after he had given his evidence of the letter purporting to come from the plaintiff offering him a bribe, a letter written some weeks before he gave evidence, and the signature to which plaintiff denied to be his, appeared to me to be a very lame attempt to show his blamelessness. That document, together with the remaining exhibits in the case, I direct to be impounded and to be placed at the disposal of the Attorney General for such

action as he may see fit to take. This case ought not to end here.

As a result I declare the will propounded by the defendants to be a forgery, and there will be judgment for the plaintiff to that effect with costs.

WAN-A-SHUE *v.* SREEGOBIND.

[240 OF 1918.]

1920. FEBRUARY 23.

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

Contract—Purchase and salt of rice permits—Written agreement—Evidence—Sufficient evidence of verbal agreement—Amendment of claim—New trial.

Appeal from a decision of Douglass. Acting J. (1).

Claim by the plaintiff Wan-a-Shue for breach of a written agreement alleged to have been entered into between the parties for the sale of permits to export 2,000 bags of rice. At the close of the plaintiff's case the defendant submitted that no case on the claim had been made out, and the trial judge, agreeing that no written agreement of sale had been proved, entered judgment for the defendant Sreegobind.

From this decision plaintiff appealed.

G. J. de Freitas, K.C,. and *F. O. Low,* for the appellant.

J. S. McArthur, for the respondent Sreegobind.

After reference to the record of appeal:—

De Freitas, K.C.

Admitting there is no proof of a written agreement, there was sufficient evidence upon which the trial judge could have held a verbal agreement had been proved. The claim should therefore have been amended.

Major, C.J.: You are asking for a new trial.

Berkeley, J.: Did you ask for a non-suit in the court below?

After further argument, respondent's counsel consenting thereto the court ordered that the order of the trial judge be set aside and that plaintiff (appellant) be at liberty on payment to the defendant (respondent) of the costs of the action and of the appeal, to institute such fresh proceedings in the action as he may advised.

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(1) Reported in 1919 L.R.B.G. 53.

CANNON *v.* "THE ARGOSY."

CANNON *v.* THE "ARGOSY" Co., LTD., AND ANR.

1920. JANUARY 10

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

Application for leave to appeal to Privy Council—Service of notice—Order-in-Council, January 10th, 1910, rr. 4, 22, 23.—Rules of Court, 1900, Order V1., r. 1— Death of a defendant after judgment—Order XV., r. 1.

Petition by the plaintiff Nelson Cannon for leave to appeal to His Majesty-in-Council from a judgment of the Court of Appeal of the 12th December, 1919, dismissing the appeal against the judgment of His Honour Mr. Justice Dalton of the 22nd May, 1919, who found for the defendants.

J. S. McArthur and *H. S. Cox,* for the petitioner.

E. G. Woolford, for the respondents.

Preliminary objections to this application were taken by Mr. Woolford that:—

(1) Service of the proceedings on respondents' solicitor in the action was bad. For although Mr. Sampson, the instructing solicitor, was the solicitor in the court below and in the Court of Appeal, service of documents in respect of an appeal to the Privy Council was regulated by the Order in Council of the 10th January, 1910, and not by the local rules of court. He then referred to rule 4 of the said Order in Council, "the applicant shall give the opposite party notice of his intended application," and contrasted it with rule 8, which specified "the parties and then-legal agents," thus indicating that the word opposite party did not include his solicitor, that is, his legal agent, and that consequently service of the notice for leave to appeal and other documents on the solicitor did not comply with the rules for appeal to the Privy Council. And he pointed out that Rules of Court, 1900, Order VI., r. 1. which states that the solicitor engaged in any action shall be bound to conduct the same "until the final determination of the action" "whether in the court of first instance or on appeal," could only mean the final determination in so far as the supreme court of the colony was concerned, the said solicitor's authority therefore had been terminated on the decision of the appeal court being given.

(2) As between the service of the notice of the present application on the 22nd December, 1919, and the hearing of it, the second defendant John Cunningham had died (29th December, 1919) the continuance of the proceedings against him were bad, the doctrine "*actio personalis moritur cum persona*" applying. The action had been one for unliquidated damages, and the

deceased's executors could not have been sued. Learned counsel referred to *In re Duncan,Terry* v. *Sweeting* (1 Ch. D. 387) in support of his contention.

The Court decided not to hear Mr. Cox in reply to the first objection, but with reference to the second Mr. Cox replied that no provision was made by the said Order in Council relative to one of the litigants dying after the judgment appealed from, rule 22 of the Order only applied to the death of a party to the appeal after the Order granting final leave to appeal and before the despatch of the record to England, and rule 23 to the death subsequent to the despatch of the record. He drew attention to the local Order xv., r. 1. that no action should become abated by reason of the death of any of the parties if the cause of action survived, and in no event between the conclusion of the hearing and the giving of judgment. A notice of the death of Mr. Cunningham had been filed so that it would appear on the record.

The judgment of the Court was delivered by Berkeley, Actg. C.J.

BERKELEY, Actg. C.J.: This is an application by the plaintiff Cannon for conditional leave to appeal to His Majesty in Council from the judgment of the Full Court of 12th December, 1919, dismissing an appeal by plaintiff from the decision of Dalton, J., who gave judgment for the defendants.

Preliminary objections are taken on the ground (1) that notice of the intended application was not served on the "opposite party" as required by clause 4 of the Order in Council dated 10th January, 1910, and (2) that as the second defendant had died before the hearing of this application the Court could not grant leave to appeal in respect of him as the doctrine *actio personalis moritur cum persona,* applied.

The record shows that the notice of the intended application although addressed "to the above-named defendants and E. A. W. Sampson, Esq., their solicitor" was served only on Mr. Sampson who had acted as solicitor for both defendants throughout the proceedings. It is submitted that this is not a compliance with the Order in Council (4) and attention is drawn to clause 8 which seems to draw a distinction between "parties and their legal agents". The records of the Supreme Court of this colony show that since the coming into operation of the Order in Council of January, 1910, there have been two previous appeals to the Privy Council. In the first case (*Santos v. Pereira and others.* Privy Council appeal No. 52 of 1912) notice of the intended application was served on the parties themselves and no notice was served on the solicitor who had acted for them. It so happens that the solicitor who represented the then appellant is the same who

represents the appellant in this case. In the second case (The *Demerara Turf Club, Limited,* v. *Wight,* Privy Council appeal No. 124 of 1916) notice was served on the solicitor only and the point as to improper service was not raised.

The Court is of opinion that this objection should be overruled and the point it so desired can be taken on the hearing of the appeal. It may be as well to add that Order VI., rule 1, of the local rules of court, 1900, binds every solicitor in any action to conduct such action unless otherwise allowed by the court "until the final determination of the action whether in the court of first instance or on appeal." This, however, in our opinion is limited to appeals in the colony.

As to the second objection counsel for the appellant points out that notice has been served on the Registrar of the court that the second defendant is dead so that the Privy Council may have knowledge of the fact, there being no provision in the Order in Council to enable the appellant to withdraw as against the second defendant at this stage of the proceedings.

The court expresses its readiness to allow the appellant to with draw as against the second defendant but as this is not accepted by the appellant it refrains from making any such order in view of there being nothing in the Order in Council providing for such a contingency.

The amount claimed in this action as damages is $10,000 and therefore appellant is entitled as of right to leave to appeal.

The court then granted leave to appeal on the usual conditions for sufficient security and for the preparation of the record.

CANNON *v.* WIGHT.

PETTY DEBT COURT, GEORGETOWN.

CANNON *v.* WIGHT.

[759—12—19.]

1920. JANUARY 20, 27. BEFORE DOUGLASS, J, (Acting).

Costs—Taxed bill of costs in Supreme Court—Witness costs — Order XXXIV. r. *5— Rules of Court, 1900, Appendix 1. Part 1 (d). — Meaning of 'merchant.'*

All necessary facts appear from the judgment.

DOUGLASS, Acting J.: The plaintiff claims from the defendant the sum of $33, the balance due on his "taxed" bill of costs for his attendance as witness "in the matter of the Demerara Turf Club, Ltd., in liquidation" on seven days in April and May, 1919, at the rate of $5 a day.

The defence is a denial that the plaintiff attended the court at the defendant's request on the days named or at all: or, in the alternative, that the plaintiff is not entitled to more than the rate of $2 a day, as he was not a professional man, banker, or merchant, within the meaning of Appendix 1, Part I. (d), "Allowances to witness," of the Rules of Court. Mr. Dias for the defendant also argued that there was no provision under Order XLVI. for taxing a witness's bill, and that therefore I am not precluded from considering and taxing the bill as a taxing officer would; but with reference to this provision is made by Order XXXIV, rule 5, and I must presume that the amount of $35 was certified under this rule. I seems to me that the plaintiff is entitled to sue in the Petty Debt court for services rendered, as he would in any ordinary case, and that the so-called taxed bill is in the nature of evidence of the worth of those services as passed and certified by a sworn clerk, but that sitting in this court I am in no way bound by that certificate. At the same time I should hesitate to interfere with the discretion of the court officer in allowing the number of attendances as I presume it was proved to his satisfaction, and the plaintiff has given me sufficient proof that he was subpoenaed by the defendant and attended in consequence of his subpoena; it does not affect this claim that he also had to attend the Court on his own affairs. The only other question is was the court officer right in treating the plaintiff as a "merchant," or should he have been brought under the heading, "every other person"? In the case of *Fernandes* v. *Mashart* (A.J.10.7 1908.) to which I was referred. Lucie Smith, J., held that the magistrate was right in holding that any interference with the amount payable to the respondent under the special circumstances of that case would be a revision of the taxation of the

bill in *Farnum* v. *Fernandes* and that he had no power so to do; but in that case the appellant (Fernandes) had had his bill of costs taxed against Farnum and the item "To paid taxed bill of witness A. Mashart $42.28" was allowed therein, and he had practically got a judgment against Farnum for the recovery of the amount.

The present case is to be distinguished in several respects and I cannot give judgment for a plaintiff claiming a special fee as a merchant if I find he is not one. In Vol. II. of Stroud's Judicial Dictionary (p. 1189) I find the case of *Josselyn* v. *Parson* (7 Ex. 127) referred to when the meaning of "merchant" was discussed.

In that case Bramwell, B., said that even where a man sells goods not of his own manufacture but sells only one class of those goods, he is not a merchant. In "Comyns' Digest" "merchant" is cited: "Every one shall be a merchant who traffics by way of buying and selling or bartering of goods or any merchandise within the realm or in foreign parts" and by another authority is added the words "and who makes it his living to buy and sell." And Webster defines the word in his dictionary as "anyone making a business of buying and selling commodities." Mr. Cannon admits that his main business is that of an auctioneer and commission agent, and I cannot find that he has proved that he was, at the time of the services he rendered, in any position that can by even a stretch of imagination be defined as a merchant.

I accordingly reduce the amount to $12, and give judgment for the plaintiff for $12 and $2.64 costs.

DEMERARA BAUXITE COY., LTD. *v.* HUBBARD.

DEMERARA BAUXITE COMPANY, LIMITED, *v.* HUBBARD.

[43 OF 1920.]

DEMERARA BAUXITE COMPANY, LIMITED, *v.* McINTOSH.

[38 OF 1920.]

1920. MARCH 20. BEFORE BERKELEY, J.

Immovable property—Opposition to transport—Right to oppose—Pleading—Reasons of opposition—Statement of claim—Divergence—Rules of Court Part II. Order II. r. 5—Practice.

These actions were taken together by consent. Application by the defendants in the actions to strike out (a) the respective statements of claim and (b) paragraphs 1,2,3,4 and 5 in the particulars and that they be allowed 21 days from final order to file their respective defences on the grounds set out fully in the judgment.

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

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

BERKELEY, J.: By consent these applications are taken together.

The defendant in each case seeks to nave the statement of claim struck out, and the action dismissed with costs. In the alternative ft is asked that paragraphs 4 and 5 with the particulars set out in the statement of claim be struck out.

The grounds on which these applications are made are (1) that the statements of claim do not disclose any reasonable cause of action or any right whatsoever in the plaintiffs to oppose the passing of transports by the respective defendants to Lloyd Tilgham Emory or to obtain the relief sought. (2) that the plaintiffs' action (in each case) being one in opposition under Order II. Part 2 of the Rules of Court, it is not competent to incorporate in the statement of claim the allegations in paragraphs 4 and 5, the same being a departure from and inconsistent with the reasons of opposition, and (3) that the particulars are also inconsistent therewith.

The plaintiff in the actions claims (a) an injunction to restrain the passing of transport by each of the defendants, (b) an order of the Court declaring the opposition entered to be just, legal and well founded, (c) an order on the defendant to pass transport to the plaintiff, and (d) an order of the Court to declare null and void any agreement for the sale of the properties to Lloyd Tilgham Emory.

These applications are made under Order XVII. r. 30 of the local Rules of Court which provides for the striking out of any pleading

on the ground that it discloses no reasonable cause of action. The local rule corresponds with rule 4 of Order xxv. of the English rules.

It is clear from the cases dealing with applications under this rule that the Court will not strike out a statement of claim unless it is satisfied that there is no cause of action disclosed or which would be disclosed by some amendment or amendments which reasonably ought to be allowed. Now, what is the cause of action alleged in this case? It is alleged in the statement of claim that the defendant Hubbard, who owned one undivided half part or share in certain properties—the subject-matter of the first action—had entered into an agreement with Catherine Van Sertima, the owner of the other undivided half part or share, the subject-matter of the second action, to purchase her interest in the said properties; that the defendant Hubbard had subsequently entered into an agreement with Hugh Chester Humphrys to sell to him for the sum of $5,500 the whole of these properties and that he had paid to her on account of the purchase money $250, the balance to be paid on the passing of transport; that on the same day the said Hugh Chester Humphrys had intimated to the said defendant Hubbard that he had entered into an agreement to sell and transport these properties to the plaintiffs (she therefore had knowledge of the proposed sale to the plaintiffs). and that on the next day he was paid by the plaintiffs the sum of $500 on account of $11,200, the purchase money. It is further alleged in the first action that the defendant Hubbard is acting in collusion with one Lloyd Tilghman Emory, and in the second action that the defendant Mcintosh (executor of Catherine Van Sertima, deceased), is acting in collusion with the defendant Hubbard, in both cases to defeat and defraud the plaintiffs of their legal and equitable right to the said properties.

So far as these applications are concerned, these allegations must be assumed not only to be true but to be admitted by the defendants.

It came to the knowledge of the plaintiffs that the defendant Hubbard and the defendant Mcintosh as executor aforesaid had advertised the passing of transport by each of them of an undivided half part or share in these properties to and in favour of the said Lloyd Tilghman Emory, and they entered in each case an opposition to the passing of such transport acting in accordance with Order II., r. 2 of the local Rules of Court which gives any person having a right to oppose, to do so within a specified time. These oppositions were followed up by instituting the present actions under Order II., r. 5.

I have considered the cases cited by counsel, several of which refer to points raised on the trial of the action and not on applica-

tion to strike out pleadings. It is admitted by counsel for the applicant that Hugh Chester Humphrys has a good cause of action against the defendant Hubbard, and it is a fact that he has instituted an action against her. This is no ground for depriving plaintiffs of their right to oppose if such rights exists. The question is, is it impossible for the plaintiffs to succeed in one or other or both of these actions? It is beyond question that they have an equitable right in these properties and it seems that they might prove facts and obtain if necessary amendments which might lead to their being successful in these actions. I do not for a moment say that plaintiffs will succeed but I am unable to find that it is impossible for them to do so and therefore I cannot order that the statements of claim be struck out.

As to the other two grounds of this application the plaintiffs in their statements of claim after setting out in full the grounds of their opposition have added two paragraphs (Nos. 4 and 5) and particulars as to the fraud alleged in paragraph 14 of the grounds of opposition. It is submitted that these paragraphs and particulars are contrary to Order II.. r. 5 which says that it shall not be competent for the plaintiff in any such action (that is action to enforce opposition) to allege in his statement of claim or to rely upon any grounds of opposition other than those alleged by him when entering the opposition.

Paragraph 4 of the first action expresses the willingness of Hugh Chester Humphrys to pass transport to the plaintiffs on obtaining title from the defendant Hubbard, and paragraph 4 of the second action expresses the same willingness on his part on his obtaining title from the defendant Mcintosh or Louisa Malvina Hubbard. In view of the statements set out in the grounds of opposition I cannot regard this paragraph as alleging new ground of opposition.

Paragraph 5 in both actions as an alternative plea alleges that Hugh Chester Humphrys agreed to sell the properties to the plaintiffs as agent of the defendant Hubbard. I was disposed to regard this paragraph as raising a totally different ground from that set up in the opposition but after careful consideration of the decision of the Full Court in *Barrie et al* v. *Duff* (31.3. 1908) and the cases referred to therein I am of opinion that the paragraph must stand.

As to the particulars of fraud no fresh ground of opposition is raised thereby and it was quite competent for plaintiffs to set out these particulars in their statement of claim. (See *Hicks* v. *Receiver General,* Full Court 3. 5. 1898 referred to in *Barrie et al* v. *Duff* supra).

These applications must be dismissed with costs and defendants are allowed twenty-one days to file the defence to each action.

DEMERARA BAUXITE COY., LTD., *v.* HUBBARD.

DEMERARA BAUXITE CO., LTD., *v.* HUBBARD.

[43 OF 1920.]

1920. MAY 7; JUNE 5. BEFORE DOUGLASS J. (Acting).

Practice—Pleading—Striking out Pleadings—Rules of Court, 1900, Order XVII r. 29—Embarrassing, scandalous or irrelevant matter—Relevancy.

Application by the plaintiff company to strike out paragraphs 22, 23, 24, and the particulars embodied in paragraph 24 of the defence, and to be allowed twenty-one days from the final order of the Court to file the reply, on the grounds that the said paragraphs are unnecessary, scandalous, irrelevant, and raised wholly immaterial issues, and are embarrassing and tend to prejudice and delay the fair trial of the action.

G. J. de Freitas, K.C., and *J. S. McArthur* for applicant.

P. N. Browne, K.C., E. G. Woolford and *C.R. Browne,* for the respondent.

DOUGLASS, J. (Acting): The application was made under Order XVII, r. 29 of the Rules of Court, a similar Order to Order XIX, r. 27 of the English Rules of Court. The matter to be determined is whether the paragraphs referred to should be struck out on the grounds that any or all of them are (1) unnecessary, (2) scandalous, or tend to (3) prejudice, (4) embarrass or (5) delay the fair trial of the action. Paragraph 3 of the application adds the grounds of (6) irrelevancy, (7) raising wholly immaterial issues, (8) disclosing no answer to the plaintiffs' cause of action, and (9) being contrary to the rules of pleading, but all these may be included under one or other of the ground set out in the rule. Rule 5 of the same Order should also be considered in arriving at a decision. "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved"; and Rule 15 "The defendant . . . must raise by his pleading all matters which show the claim . . . not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence . . . as if not raised would be libel, to take *the opposite party* by surprise, or would raise issues of fact not arising out of the preceding pleadings."

A defendant then may raise as many distinct and alternative or inconsistent defences as he pleases, subject only to this, that embarrassing defences may be struck out under r. 29. And attention may also be drawn to Order xxii, r. 1: "Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence . . . may be raised Toy the defendant in his statement of defence."

[The learned judge here read the parts objected to, and continued]: Counsel for the applicants pointed out the success or otherwise of an application such as this depended primarily upon what the claim in the action was and next what the defence was, and he referred to numerous cases in support of his argument that these paragraphs were irrelevant, scandalous, and embarrassing and that they were not relative to the issue but only to facts intended to damage the credit of the plaintiff company.

The defendant's counsel submitted that the facts in the cases referred to were distinguishable from the facts now involved, and also quoted several cases to support his contention that these particular paragraphs are necessary and in order and contained material facts on which the defendant relied.

I have read and compared the several cases referred to by counsel; the various decisions may. I think, be roughly summarized as follows: A reasonable latitude should be given to the rule (i.e.. rule 27 of Order XIX., our Order XVII., r. 29) and paragraphs will not be struck out merely because they contain reasoning that is in fact bad reasoning, nor that they are merely irrelevant. Allegations too are not to be looked upon as embarrassing unless they are "so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues." *Mayor of City of London* v. *Horner* (111 L.T. 512). Questions to be answered are, has the matter alleged to be scandalous a tendency to show the truth of any allegation in the defence that is material to it? and, may the facts disclosed properly be proved at the trial by the party pleading them? *Christie* v. *Christie* (8 Ch. App. Ca. 499), *Lumb v. Beaumont* (49 L.T. 773). *Whitney and others* v. *Moignard* (24 Q.B.D., 630). Paragraphs that are mere attempts to discredit the plaintiffs and calculated to prejudice the trial of the action, are scandalous and embarrassing and should be struck out. *Smith* v. *British Marine Mutual Insurance Association* (1883 W.N. 232).

In the case of *Blake* v. *The Albion Life Assurance Society.* (45 L.J., Q.B., 663), Brett, J., lays down the groundwork on which to build a claim or defence, and continues: "There are facts which may be both facts themselves to be proved and which are evidence of other facts which must be proved. Now the rule is that the facts that must be proved in order to substantiate a cause of action or a defence may be stated in pleading, also the facts which may be themselves both facts to be proved, and are evidence of other facts. Their being evidence of the other facts cannot prevent them from being stated if they themselves are facts to be proved, but where the facts are only evidence of the facts which must be proved in order to substantiate the cause of

action, or for the defence, they are mere evidence, and then they cannot be pleaded." And in *Millington* v. *Loring* (50 L.J.,Q.B., 214) where the question was whether a paragraph alleging facts which were material to a question of damages, in a case of breach of promise of marriage, was properly pleaded, Brett. J., held that they were properly pleaded, as they were material facts on which the party pleading relied (see Order XVII. r. 5); that they were therefore necessary for the fair trial of the action and although a statement of scandalous facts, not in themselves scandalous.

What then is the purport of the action in the present case? It is mainly an opposition; to restrain the defendant from passing transport of certain property to one L. T. Emory on the ground that one H. C. Humphrys had previously sold the said property to the plaintiffs. The statement of claim also alleges fraud and collusion between the said L. T. Emory and the defendant and sets out particulars of the same: and the plaintiffs claim (1) an injunction to restrain the defendant from passing transport. (2) an order declaring the opposition to be just, legal, and well-founded. (3) an order on the defendant to pass transport to the plaintiffs, and (4) an order declaring null and void the alleged agreement of sale made between the said L. T. Emory and the defendant.

The defence denies the facts set out in the claim and the reasons for opposition generally; in the alternative, that the option referred to in the statement of claim was fraudulently obtained by the said H. C. Humphrys; in the further alternative, that the defendant had sold the property to the said L. T. Emory with the knowledge and consent of the said H. C. Humphrys; and in the further alternative, that the defendant informed the said H. C. Humphrys that she was not bound by the said option, and that the said H. C. Humphrys was aware that the defendant intended to advertise transport and did so; and then follow the paragraphs now objected to, which epitomized, aver that since the commencement of the action the said H. C. Humphrys and one E. N. Small, clerk to the plaintiffs, have made attempts to get one P. Collette to persuade his aunt (the defendant) to file a consent to the action and thereby commit a breach of her agreement with the said L. T. Emory. And as an instance of the so-called fraud, the defendants say that E. N. Small, by the direction of Nelson Gannon, a director of the plaintiff company, deposited a cheque with Mrs. P. Collette to be delivered to her husband when he obtained the defendant's consent to judgment.

To ascertain whether these paragraphs contain statements of facts on which the party pleading—*i e.,* the defendant—relies for his defence it should be asked may the facts disclosed be properly proved at the trial by the party pleading them; are those

facts in short material to the defendant's defence? It is the title to property that is in question, and the allegations on both sides are that the opposite party obtained their so-called title, whatever it may be, by fraudulent conduct.

Can the subsequent conduct or acts of persons interested, but not parties to the action, in any way affect the titles so claimed, or what has previously happened in acquiring that title? Surely if the plaintiffs prove that their opposition is just and well founded, and consequently their title a good one. endeavours made after action started, however injudicious, or even suggestive of bribery or conspiracy, do not and cannot affect that title, and similarly if the defendant's allegations are proved to be true, and that the plaintiffs claim is a bad one and his opposition ill-founded such endeavours in no way support or strengthen her title. Even taking it that the allegations in the said paragraphs are true, they should not be admitted as evidence in chief to show that the previous transactions upon which the claim rested were fraudulent. It is true that in criminal cases evidence of similar acts or acts done in the absence of a party is sometimes admitted to show guilty knowledge on the part of the accused, but I am not aware that it is permitted in civil actions, unless and except (a) such acts are expressly connected with the fact in issue so as, in substance, to form the basis of such fact; (b) in special cases, e.g., cohabitation to prove marriage; the course of business to prove a business transaction; (c) in support of expert opinions, or (d) to establish a custom or usage. In short unconnected conduct on other occasions is never admissible to prove the *actus reus* but may be admissible to prove the *mens rea.*

I may refer here to the case of *Hollingham* v. *Head* (27 L.J., C.P., 241), in which Willis, J., in the course of his judgment said: "It may be difficult to decide upon the admissibility of evidence, where it is offered for the purpose of establishing probability, but to be admissible it must at least afford a reasonable inference as to the principal matter in dispute . . . . for I do not see how the fact that a man has once or more in his life acted in a particular way, makes it probable that he so acted on a given occasion"; and Byles, J., said : "As regards the question put to the plaintiff on cross-examination, it may be that he might have been asked whether he had not made the same contract with other persons which the defendant contended he had made with him, for the purpose of testing his memory or his credit. But such evidence when offered as part of the defendant's case was totally inadmissible"; and the same point was taken by Brett. J., in *Blake* v. *The Albion Life Assurance Society* (referred to above).

At the most, some of the facts contained in the paragraphs might be evidence in support of other facts, but are not facts themselves

to be proved, or material to the defendant's defence, but I am of opinion that these facts are not evidence which could be given by the defendant to substantiate the facts which it lies upon him to prove, though it may be they might be brought out upon cross-examination. They are therefore not facts which the defendants are entitled to plead, but seemingly inserted with the object of damaging the credit of the plaintiff. They are in fact irrelevant, and embarrassing because "they are so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the trial of the action by involving the parties in a dispute ' that is wholly apart from the issues."

The plaintiffs are entitled to the order they seek for, and paragraphs 22, 23, and 24 and the particulars attached should therefore be struck out, with the costs of the application to the plaintiffs. And I direct that the plaintiffs have twenty-one days from the date of this order in which to deliver and file their reply.

THE CONSOLIDATED RUBBER AND BALATA ESTATES, LIMITED, *v.* P. F. SMITH.

1919. DECEMBER 5; AND 1920, JANUARY 5.

BEFORE DOUGLASS, Acting J.

Appeal—Balata Grants—Balata Ordinance, 1911—Arbitrators Duties Personal investigation of locus in quo—Maps or Plans admissible in evidence—Faulty Boundary Lines—Extent of Licences under Grown Lands Ordinance, 1903—Wilful Trespass.

Appeal by the defendant P. F. Smith from a decision of the Commissioner of Lands and Mines, under the provisions of Ordinance No. 23 of 1911, the Balata Ordinance, awarding the plaintiff company one-half of balata seized in possession of the defendant. Preliminary objections to the hearing were taken by counsel for the respondent, but were overruled. (See 1919 L.R.B.G. 139.)

The material facts and the reasons of appeal appear from the judgment.

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

H. C. Humphrys, for the respondent company.

DOUGLASS, Acting J. This is an appeal by P. F. Smith against a finding of the Commissioner, Mr. Mullin (appointed by the Commissioner of Lands and Mines under Sec. 4 of the Balata Ordinance, 1911)awarding the respondents—the Consolidated Rubber and Balata Estates, Limited—half of the balata found in the possession of the appellant's employees.

It appears that about 1,500 pounds of balata were being brought to Georgetown, collected on the right bank of the Groete River by employees of Peter F. Smith, the present holder of Licences Nos. A. 1246 and 1247, when on the 14th January, 1919, in Black Creek, a tributary of the Groete, they were met by one Linnell in charge of the employees of the respondent company. In consequence of the report sent to Georgetown by Linnell the balata was seized on its arrival on the 18th January by the Department of Lands and Mines. The respondent company claimed that the balata was bled on their grants they hold under Licences Nos. A. 730 and 736 and proceedings were then taken under sections 4 and 5 of the Balata Ordinance, 1911.

The reasons for appeal are numerous but I think may be resolved into the following:

1 and 2. The appellant being in primary possession of the balata the respondents had to prove their title, and not having done so the Commissioner should have dismissed the case without calling for the appellant to reply.

3. The Commissioner is wrong in his finding that the boundaries as shown on the map (Exhibit P.) of the contiguous grants of the parties were wrong, because (a) there is no evidence of it; (b) contrary to boundary set out in Licence 1246; (c) he refused evidence on it.

4 and 5. The Commissioner was wrong in (1) ordering an bisection of the *locus in quo,* or (2) receiving the report made on that inspection because (a) he could not legally base his decision on evidence supplemented by him to the respondents evidence; (b) he ruled no question of boundaries was involved; and (c) Mr. Lord, the reporter, could not give expert evidence.

6 and 9. If Mr. Lord's report was admissible then the number of trees arrived at by the Commissioner as bled on the right and left banks respectively of the Black Creek was wrong.

7. Commissioner was in error and his finding unjust, for (a) there is no evidence to support it; (b) it is against the weight of evidence.

8. Commissioner was wrong in finding wilful trespass by the appellant for (a) there is no evidence of it; (b) it is against the weight of evidence, and (c) if trees were bled on right bank (1) no evidence to show that it was appellant's labourers who did it; (2) all trees bled were within Licence 1246 and in lawful possession of the appellant.

10. The costs were granted on a wrong principle.

In dealing with the powers of the Commissioner and reasons 4 and 5 of appeal, learned counsel for the appellant argued that he was as much bound by the rules of evidence as any magistrate and referred to the case of *Attorney General v. Davison* (29 Revised Reports, 774). The head note to that case is "Arbitrators are bound by these rules of evidence which govern the courts of law," and although the court does not expect the same strictness in proceedings before a non-legal tribunal it would be dangerous to hold that what would be illegal evidence in a court of law could be admitted unless latitude is specially given by the Ordinance creating the tribunal.

Mr. Humphrys refers to the local case of *Winton* v. *Andrew* (L.R.B.G. 29.11.13) in reply, but in that case Earnshaw, J., only calls attention to the fact that the Warden as arbitrator does not divest himself of his other duties and rights under the Mining Regulations, and although he referred to the fact that he deals with *disputes,* not *actions,* he draws attention to the fact that the judge is bound by the practice and procedure in appeals from the decision of magistrates.

It is true the proceedings before the Commissioner are referred to as an 'investigation' but the powers of the Commissioner are those vested in a magistrate under the Petty Debts Ordinance

1893, *inter alia* "as to summoning witnesses . . . as to the examination of witnesses" and "the Commissioner shall have power to make such investigation personally or by means of any Officer or Officers of his department." In *William* v. *Sancho* (1917 L.R.B.G. p. 137) Berkeley, J., in the course of his judgment states: "It is perfectly legitimate for a magistrate to visit the *locus in quo* on an intimation to all parties" and I take it that the ordinance enables the Commissioner—who would otherwise have to visit in person—to visit by proxy.

The case of the *London General Omnibus Company, Limited,* v. *Lovell* (1901 Ch. Div. 135) does not in any way depreciate personal inspection by a judge but explains that the judge must be satisfied by independent evidence beyond the mere view.

Not only were the parties notified in open Court on the 18th February, 1919, that a visit of inspection would be made on the spot but they were also notified in writing on the 20th February of the date fixed and the subject matter of investigation.

On the 2nd April Mr. W. T. Lord, the officer duly appointed attended at the adjourned hearing of the case and gave his evidence putting in his Report (Exhibit Q) and a plan that he had prepared (Exhibit Q2). The Report was admitted as evidence on oath and no objection taken. The Commissioner was within his jurisdiction in making an investigation of the *locus in quo* in the manner adopted and the evidence of Mr. Lord must stand on exactly the same footing as other evidence in the case. Mr. Lord is a Government Surveyor and was entitled to give evidence as an expert so far as his knowledge went, and so far his opinion must be received.

In connection with Reasons of Appeal Nos. 1 and 2. I cannot agree with learned counsel for the appellant that on the respondents' case being closed the Commissioner should have dismissed it; it is true that it lay on the respondents to prove their claim, but on the evidence of Mr. Cunningham that no balata had been received by their Company since January, 1918, under Licences A 730 & 736, and or the admission of the appellant that the balata in question was the only balata brought down by them in January, 1919, the evidence of King and Luiz that on the line they proceeded on the right bank of Black Creek they saw freshly bled balata trees is sufficient to throw the onus on the defendant of showing where they got their balata from. Moreover, the Commissioner would take into consideration that there was no formal statement of claim or defence and it was agreed before the case opened that evidence led in this claim should be regarded as evidence in the other claim by the appellant against the respondents, if it should come to hearing.

I agree that the fact of there being pieces of boxes and other

traces of the defendant's sojourn at the landing-place and camps is in itself no evidence of the appellants' unlawful possession of balata, for it is clear from the statements of the witnesses for the respondents that any expedition would have to take the shore at the landing-place on the right bank and the appellant would also be entitled to keep along that bank for a favourable crossing to the left bank.

Before coming to the question of what are the boundaries of the portions of the land licensed to the respective parties I will deal with the value as evidence of the two plans referred to in the proceedings. Maps and plans are not generally admissible in evidence unless they are public documents or published maps or plans relating to matters of public notoriety; or in case of declarations as to public and general rights, but by section 5 of the Ordinance all reports, plans and records of the Department of Lands and Mines shall be receivable in evidence for the purpose of an investigation. Both of the plans therefore (Exhibit P and Exhibit Q2) are admissible, the latter as an Exhibit to the Report (Exhibit Q) and explanatory of it. It must be understood however there has been no survey of boundary lines under section 3 (1) of the Ordinance; it is true under section 4. "In addition to the other powers conferred by this section the Commissioner may treat any claim as if it were a request in writing to define a boundary . . . under section 3" but it goes on to say "and thereupon the provisions of that section shall apply so far as relates to survey and to the other purposes of that section." The Commissioner ordered an officer to proceed with representatives of both parties to investigate the lines stated to have been used and take compass bearings along them, expenses to be borne by the claimants in the first instance, but there were no instructions for survey of boundaries or to cut boundary lines. I must hold therefore that there has been no survey under the Ordinance and I cannot accept Exhibit Q2 as evidence to define any boundary between the parties. The only plan I can notice as giving a *prima facie* outline of boundaries is the certified extract from plan of the Department showing the tracts licensed for balata and marked Exhibit P, and which I shall refer to as "The Plan."

When section 6 states that "any person aggrieved by any decision of the Commissioner *under the preceding section* may appeal from such decision except in regards boundaries" I must construe it as meaning a decision based on a survey under the Ordinance within the meaning of section 3 (1), for such survey is to be "conclusive as to the situation of the said boundary." The decision of the Commissioner on evidence coming before him in the ordinary course of the investigation touching the boundary

line, is only binding on this Court, so far as it is a reasonable finding on the evidence, and no principle of law transgressed.

The chief difficulty then arises in respect of the amount, and boundaries of land purported to be granted by Licences Nos. A1246, A730 and A736. To take them in that order Licence A1246 is perfectly clear and precise, in itself, and correspond in every respect to the Plan.

[The learned judge here gave details of the errors in me description of the contiguous boundaries on the Licences, and continued.]

Licence A 730 is dated 13th February, 1907, and Licence A1246 is dated 1st September, 1909, but that does not necessarily prove that the description of the boundary in the earlier licence is correct, or that in the later one is incorrect. Indeed on the face of Licence A730 the description is evidently incorrect, if, as Mr. Lord states, the Klautky line (cut apparently in 1910) which proceeds from the right bank of the Groete Creek at a point 4 miles above Black Creek (so described in each licence) stops at a paal on the Black Creek, for that line is described as extending *S.W.* to the watershed between the Groete Creek and the Cuyuni River. If the date of the cutting of that line is indeed 1910 it certainly cannot control or modify licences granted before that date and as a matter of fact it only makes confusion worse. The faulty description in Licence A730 makes it difficult to say whether there is or is not any overlapping of the tract included in Licence A1246, but taking it for the moment that there is, the question then arise, to what extent, if at all, at law a subsequent licence will affect or control a previously granted one.

A mere licence does not create any right of exclusive possession in the property to which it relates; in deciding whether a grant amounts to a lease or a licence only, the substance and effect of the agreement on which it depends must be ascertained. The distinctions between and the modifications in each have been thrashed out in hundreds of cases. I will refer first to what is still the leading case on the subject, *Wood* v. *Leadbitter* (1845.13 M & W 838); the case turned on whether a right to come and remain for a certain time on the land of another could be granted otherwise than by Deed, but in the Judgment of Alderson B, he refers to Lord C.J. Vaughan's elaborate judgment in the case of *Thomas* v. *Sorrell.*

[The learned judge here read the paragraph at page 842 of the Report and continued]: and Alderson B concludes by stating the whole law on this subject. "A mere licence is revocable; but that which is called a licence is often sometimes more than a licence, it often comprises or is connected with a grant and then the party who has given it cannot in general revoke it so as to defeat his grant, to which it was incident."

In *Newby* v. *Harrison* (1861.1 J & H 393) the question arose as to what was an exclusive licence, and V.C. Sir W. Page Wood says: "The distinction is well known between a mere ordinary licence and an exclusive licence, and in the latter you expect to find something of that nature expressed" and though he cannot come to the conclusion that it was intended there should be an exclusive right in the case before him, on the other hand it appeared to him that any Court would' feel itself bound to put such a construction on this grant as should not enable the grantor to defeat his own grant. An injunction asked for by the Plaintiff to restrain the removal of the ice, which either he did not require or was unable to carry away, was refused.

Carr v. *Benson* (1868. 3 Ch App Ca. 525) is perhaps the best known authority on priority of possession and exclusive licences. The head note is rather lengthy but put shortly, the Plaintiff C had a lease of a certain manufactory with full power to work fire-clay from the lands and grounds, and at a later date the Defendant B was granted by the same lessor a lease of a colliery on the same property which included a right to work fire-clay found in connection with that coal; it was held that (1) as C's licence was not an exclusive licence the licensor had still a right to deal with the property comprised in that licence in any manner not inconsistent therewith and that (2) no knowledge could be imputed to the licensor of the extent of C's business, or of the probability that he would require for the purpose of that business during his term of 21 years the whole of the fire clay lying under the lands comprised in the Licence. Sir W. Page Wood L.J. (the same judge who gave the decision in the case of '*Newby* v. *Harrison')* in the course of his judgment says "The Plaintiff's licence it is conceded is not an exclusive licence and it has been held from the earliest period that a man taking a licence *where he is under no obligation* to work cannot exclude his licensor from granting as many more of those licences as he thinks fit, provided always that they are not so granted as to defeat the objects of the first licensee in applying for his licence." . . . . "The licence cannot reasonably be construed to operate as a grant to the Plaintiff of as mush of this particular mineral as he could possibly make use of in the course of his business." "It seems a strong proposition going beyond any authority cited to say that a licensee can by quasi-nominal possession . . . exclude the licensor from that power, which all the authorities Say he would otherwise have, of taking for his own use articles which he has licensed another to take, which that other has not taken, and as to which that other has not acquired the right." And Sir C. J. Selwyn, L.J., referring to *Newby* v *Harrison* says: "In my opinion . . . that case shows that it is necessary for the

plaintiff to prove that something has been done which is, in fact, in derogation of the previous licence."

To apply these decisions to the present case: There is no doubt that each agreement entered into between the Department of Lands and Mines and the respective parties is in the nature of a licence. Each agreement states that it is a licence to collect balata, etc., from the forests on a certain tract of Crown Land, and refers to the Crown Lands Ordinance, 1903. That Ordinance has a schedule attached of Regulations which applied at the time of the granting of these licences, and it is divided into Parts, *e.g.*, Part 4, 'Grants,' Part 5, 'Licences of Occupancy,' Part 6, 'Licences to Cut Wood' and Part 7, 'Licences and Permissions relating to Balata and other Gums.'

Apart from any inherent legal right, clause 10 of the Licences appears to specially reserve the right to grant, lease, or licence, any portion of the land thereby licensed, *and* after notice given to the first licensee his rights shall immediately cease and deter mine. The only construction I can put on that is that if such 'due notice ' is not given, each licensee has equal rights under his licence over that part of the land that is covered by both licences. And my opinion is the further strengthened of the possibility and legality of two licences, if I may so put it, overlapping, by section 9 of the Crown Lands Ordinance, 1903 *(a).* Had the proprietors of Licences A 730 and A 736 taken objection in the, legal manner to the issue of Licence A 1246 the boundary could then have been adjusted and the present difficulty would not have arisen.

I cannot agree with the greater part of the remarks by the Commissioner in his decision (pages 2 and 3) commencing with the words "some stress was laid by counsel" to "it appears plain . . . . from the evidence that the defendant's bleeders were under no delusion as to the question of the boundary line of Licence A 1246 crossing the Black Creek, but on the contrary deliberately lied in order to deceive the court and make it to believe that the trails and camps they used and the trees they bled were all situate on the left or north bank of the Black Creek when in truth an in fact they well knew that the camps and main trail at any rate were on the right or south bank of that creek."

It may be that the Commissioner speaks from his official knowledge, but in the first place I should not say—on the evidence before me—that the draughtsman of the plan is "obviously in error,"

(*a*) Section 9 is as follows:—

"Any person claiming any interest in any land proposed to be included in any grant, licence, or permission under this Ordinance, or having any reason to oppose the issue of any grant, licence, or permission, may lodge in the office of the Commissioner, his reasons of objection, which must be in writing, and the grant, licence, or permission so objected to shall not be issued until the Governor has decided as regards the validity of such objections."

so far as Licence A 1246 is concerned the plan is perfectly correct, and as I have already pointed out the description of the boundaries of the property in licences A 730 and 736 is so faulty that taking the three licences together it would be difficult to say whether the plan or the licences were faulty. In the next place Ross in his examination-in-chief with reference to the boundaries states: "To the best of my knowledge Black Creek runs into Grant 1246 and boundary line crosses it" and on cross-examination "I understand that the boundary of Grant 1246 crosses Black Creek but I have never seen where it crosses so I always bleed on the left bank," and with reference to the trail and camp "we camped on the right bank." From the landing we slept at the right bank we went along the same bank going up the creek about 100 yards and crossed over a black tacouba (Compare here Mr. Lord's evidence (par. 7) "I went . . . . for a distance of about 100 paces from the camp, crossed the Black Creek by a black tacouba to its left bank); and Austin states "Landing is on right bank. . . . .we slept at that camp and crossed to left bank by a tacouba ;" and Frank: "Next day we proceeded to a camp on right bank Black Creek. Next morning we went a good way along the Creek and crossed over to the left bank." He also mentions crossing the tacouba.

If the trees, seen on his return by Mr. Lord, on the right bank were bled by the Appellant's bleeders then the statements as to the bleeding only on the left bank were untrue, but even so I cannot see that it was evidence that the men knew they were not on the tract covered by Licence A 1246, at the time; such evidence might well arise from a natural, though wrong, desire to make their case stronger, especially since they must have been aware at the time of the hearing that doubt had been thrown on the boundary line between Licences A 1246 and 730, such wilful mis-statements although highly reprehensible are not necessarily conclusive evidence on the facts, for the other party to the suit. And again the appellant's legal rights, whether his employees were aware of them or not, could not be affected by any untrue statements that they made in an attempt, as they apparently thought, to strengthen the case.

I find that the evidence of the bleeding of the trees by the appellant's employees, on the right bank of the Black Creek is by no means convincing, but as has so often been said, the Court will not reverse the decision of a Magistrate simply because it might have come to a different finding on the facts only, if those facts were sufficient to warrant his decision, I also find that whether the balata was taken from the right or left bank of the Black Creek, the respondents did not prove that it was so taken within their boundary, for from the uncertain

description of the boundaries in Licences A730 and 736 it is impossible to say as a matter of fact that Licence A1246 did not encroach on the limits of licence A730, seeing that their S.E. boundary and Northern respectively are contiguous and the former expressly refers to the latter (*i.e.*, Licence A 730) in describing this common boundary line.

And I further find that by common law and under the Crown Lands Ordinance 1903, Licence A1246 is good even supposing a portion of the same tract of land were already included in Licence A 730, for :—

1. The plaintiffs (the respondents) did not prove that Licence A 1246 derogated from their Licence; it is indeed admitted by them they obtained no balata from that tract of land since January, 1918.
2. By the terms of the plaintiffs' licence any portion of the said tract of land might be licenced to any person.
3. The Licences A 730 and 736 are not stated to be exclusive nor can it be implied from their contents.
4. The plaintiff's took no steps to object to the Grant of Licence A 1246.

On these findings I hold that the appellant was not a wilful trespasser, or a trespasser at all, and that the respondent Company have not proved that they are entitled to deprive the appellant of the possession of the Balata collected.

I accordingly reverse the decision of the Commissioner, and award the whole of the balata detained by the Lands and Mines Department to the Appellant. And I give the Appellant the costs of the investigation before the Commissioner, and of this Appeal.

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

HUMPHRYS *v.* HUBBARD AND ANOTHER.

[69 OF 1920.]

1920. JUNE 23, 25, 29. BEFORE SIR CHARLES MAJOR, C.J.

Solicitor and client—Confidential relation—Contract with client—Duty of solicitor —Confirmation of contract—Independent advice.

The plaintiff, a barrister practising as a solicitor, on the 31st December, 1919, obtained from the defendant, who was then his client, an option in his favour of purchase of lands for $5,500, exercisable in three months. He was aware that the lands were wanted by competing mining bodies who were prepared to give for them a much larger sum than $5,500, and, after receiving respective offers of $11,000 and $11,200 from representatives of two of these rival bodies, accepted the higher offer and, on the 13th February, 1920, assigned his rights under the option to a mining company. On the 18th February, the plaintiff exercised his option and paid $250 on account of the purchase price of $5,500. Given to understand that his transaction with the defendant had been adversely criticized, the plaintiff, on the 7th April, informed the defendant of his assignment to the company and offered, if she were dissatisfied, to give her the whole of the $11,200, when conveyances passed from her to him and from him to the company. The defendant, upon assurance by the plaintiff that "as he was making a profit", she would be at no expense of conveyance, signed a receipt to the part payment of $3,500, purchase price of her lands at, &c, which she

stated in the receipt she had sold to the plaintiff. The defendant subsequently repudiated the contract and refused to convey, and in an action by the plaintiff for specific performance:—*Held*, that the contract could not be enforced as the relation of solicitor and client subsisted between the plaintiff and defendant when it was made, and the plaintiff had failed to discharge the obligations towards the defendant thereby laid upon him.

Held also that the circumstances of the interview between the parties of the 7th April did not and could not constitute confirmation of the contract, as the confidential relation between him still subsisted and the defendant had no independent advice.

The plaintiff appeared in person.

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

SIR CHARLES MAJOR, C.J.: On the evidence given in this action, I find the following as matters of tact. From 1916 and, for the purposes of this action, until some date after the 7th day of April last, the plaintiff and the defendant stood towards one another in the relation of solicitor and-client. Late in 1917 or early in 1918, the plaintiff was, as he puts it, "interested in bauxite applications", that is to say, in negotiations for the purchase and sale of, or acquiring or disposing of rights or interests in lands in the colony containing the mineral of that name. He was a director by proxy of the Demerara Bauxite Company.

As the defendants' solicitor, the plaintiff was approached by that company with a view to their obtaining a right of way through the defendants' lands called Aurora and Semerie and of mining for bauxite therein, and, if the defendant was selling, acquiring the freehold of the lands outright. The plaintiff got from the company and transmitted to the defendant written proposals for these purposes in which he understood a sum of $3,000 was offered for the freehold, which the defendant refused. Shortly after this, the company informed the plaintiff that he could offer the defendant $5,000 for the lands as an outside offer, the plaintiff being at that time apparently ignorant of the real value of the lands as what is termed "a bauxite proposition."

In January, 1919, the plaintiff was requested by a Mr. Emory, a representative of persons, the plaintiff knew, interested in bauxite and to whom the plaintiff had communicated the company's offer, to obtain for him an option of purchase of the defendant's lands for $5,500. This the plaintiff refused to do, because of his position in the company and because he could not get an option for a third party without giving the company full notice that—to use the plaintiff's own words—"some one else was after it,"

The plaintiff, however, said to Emory that he would ask the defendant for an option in that sum for himself which he would communicate to the company, who, notwithstanding their then stated limit of $5,000, he thought should have the opportunity of saying whether they would give more or not. To this Emory agreed stating to the plaintiff that the lands were certainly not worth more.

The plaintiff then saw the defendant at his office and, bringing to her mind the company's offer of $5,000 which the defendant had seemingly forgotten, said he was prepared himself to take an option for $5,500, on which he might or might not make a profit, as he knew of people in America who might want to purchase, and the company, of course, had said they would not give more than $5,000. After consultation with her co-executor under her husband's will, then the subject of litigation, some mention of the pending suits in that litigation, and agreement as to payment by the plaintiff of interest on the purchase money in the event of exercise of the option, the defendant left the plaintiff's office prepared to sign the option, which the plaintiff said he would send to her for that purpose. On the 31st January, 1919, the plaintiff had the option prepared in his office—the price of the lands ($5,500) being inadvertently omitted therefrom—and sent it to the defendant who returned it signed, on the following day adding thereto her initials where the purchase price had been subsequently inserted by the plaintiff. The plaintiff informed Emory that the defendant had given him an option for $5,500, and Emory stated to the plaintiff his intention to visit the lands to discover what they were worth as a bauxite proposition. Two or three days after the 31st January, the plaintiff informed the company also that he had the option and of the price named in it, and on the 5th February received the following letter from the company:

5th February, 1919.

Dear Humphrys,

> I understand that you have got an option on the Aurora and Semeri property in the Demerara River belonging to the estate of Hubbard which the Demerara Bauxite Company has been trying to acquire for some time and which you have always led us to believe you would get for us as soon as the legal difficulties which the estate was in were settled. I am quite prepared to compete with others if there are competitors; after all that has passed between us and looking to the fact that you are a proxy director of the company I feel sure that you will play the game with us.

On the 6th February the plaintiff saw the chairman of the company who said: "I hope you will give the company a chance of

competing. A matter of a few hundred dollars is nothing to the company; but we want that property."

Not later than the 12th February Emory saw the plaintiff at the plaintiff's residence and, after saying that he did not think the lands were worth much more than he had already mentioned and being told by the plaintiff to make his outside offer because the plaintiff would have to submit it to the company, who might offer more, authorized the plaintiff to tell the company that he was willing to take an option on the plaintiff's option for $11,000. On the 13th February, the plaintiff informed the company of Emory's offer and, having suggested to the company's secretary that if the company wanted the lands they "had better offer more—say, $12,000," eventually received from the secretary, and accepted, an offer for his rights under the option of $11,200. The transaction was reduced to writing on that same day by a letter from the company to the plaintiff, received by the latter on the 14th February.

13th February, 1919.

AURORA AND SEMERIE.

Dear Sir,

Referring to our conversation this morning in connection with the above matter I beg to confirm the arrangement comes to between us, namely:

1. On behalf of the Demerara Bauxite Company, Limited, I purchased from you for the sum of $11,200 (eleven thousand two hundred dollars) Aurora and. the portion of Semerie, situate in the Upper Demerara River, belonging to the late Mr. Hubbard, which said properties you now have an option on according to what you told me.

2. The sum of $500 was to be paid to-day as a part payment of the purchase money the balance to be paid on the passing of the transport in favour of the company for the properties, the title to be satisfactory to me on behalf of the company. I now forward you herewith a cheque for the sum of $500 and shall be glad if you will send me a receipt therefor.

3. In addition to the sum of $11,200 the company will pay transport expenses not exceeding the sum of $127 which will include the tax of 1 per cent payable on the transfer of immovable property in the Colony.

4. You will pass transport in favour of the company without delay and the company will have the right of possession immediately.

On the 18th February the plaintiff wrote to the defendant exercising his option, enclosing in the letter a payment by cheque of $250 on account of the purchase price of the land and asking for

conveyance as soon as possible as he had entered into an agreement with the company to sell and convey the lands to them as soon as he obtained a transfer from her. The plaintiff on the 19th February acknowledged receipt of the company's letter of the 13th and agreed to and confirmed its terms save as to immediate possession, and on the same day gave the company a receipt for $500 paid on account of the $11,200.

So far then as the plaintiff and the defendant in the first instance, and the plaintiff and the company in the second, were concerned, the transactions were complete and only awaited being carried into full effect by successive conveyances of the lands.

Now the contract between the plaintiff and the defendant has been brought into this court. How, when brought before them, do courts of law regard a contract made, in such circumstances as have been described, between solicitor and client? When, as here, it is impeached, what is it incumbent on the plaintiff affirmatively and conclusively to prove? First there is the general rule applicable to all persons occupying the relation of trustee and *cestui que trust*, or other relations of confidence of one in another. On impeachment of a transaction between those persons, the party having the repose of confidence must show that he and the confidant were at arm's length and that the confidence had been withdrawn; that the transaction was for the advantage of the confidant: that full information was given of the value of the property and of the circumstances of the transaction. There are other obligations in the case of solicitor and client, no where better expressed and explained, I think, than in the judgment of Lord Eldon in *Gibson* v *Yeyes* (6 Vesey, 266) referred to in a case cited by Mr. Browne. That was a case in which an attorney sold an annuity to a client and the Lord Chancellor made the following remarks in the course of the argument and of his judgment:

"I do not mean to contradict the cases of trustees buying from their "*cestuys que trust:* but the relation between the parties must be changed: "that is, the confidence in the party, the trustee or attorney, must be "withdrawn. That is the principle of the cases of a trustee buying for "himself . . .

"An attorney buying from his client can never support it, unless he "can prove that his diligence to do the best for the vendor has been as great "as if he was only an attorney, dealing for that vendor with a stranger. That "must be the rule. If it appears that in that bargain he has got an advantage "by his diligence being surprised, putting fraud and incapacity out of the "question, which advantage with due diligence he would have prevented "another person from getting, a contract under such circumstances shall not "stand. The principle, so stated, may bear

"hard in a particular case: but I must lay down a general principle that will "apply to all cases; and I know none short of that, if the attorney of the "vendor is to be admitted to bargain for his own interest, where it is his "duty to advise the vendor against himself . . . . .

"It has been truly said, an attorney is not incapable of contracting with "his client. He may for a horse, an estate, &c. A trustee may also deal with "his c*estuy que trust*, but the relation must be in some way dissolved; or, if "not, the parties must be put so much at arms length that they agree to take "the characters of purchaser and vendor: and you must examine whether "all the duties of those characters have been performed. . . . .

"With respect to the case of the attorney, I have no difficulty in saying "Yeyes might have dealt for this annuity; but he had two ways of "proceeding, which this court must have held it quite incumbent upon him, "dealing with this lady, to attend to. It she proposed to him to buy it, he "would have done well to have said to her that Gibson would give more "than any one else; that it was his interest to do so; that he would secure it "upon real estate; that it was more fit for her to deal with her relation than "her attorney; and the transaction would have better appearance in the "world. It was natural enough that she should answer she would not deal "with Gibson, but would consider herself only and her own comforts, "according to Benyon's advice to her. Then it would have been right for the "defendant to have declined it. Suppose she had insisted that he should be "the person; it would be too much for the court to proceed upon delicacies, "such as these, and to say he should not permit himself to contract with her. "Therefore, I say, he might contract; but then he should have said, if he "was to deal with her for this, she must get another attorney to advise her "as to the value; or, if she would not, then out of that state of circumstances "this clear duty results from the rule of this court and throws upon him the "whole onus of the case; that if he will mix with the character of attorney "that of vendor, he shall, if the propriety of the contract comes into "question, manifest that he has given her all that reasonable advice against "himself that he would have given her against a third person. It is asked, "where is that rule to be found. I answer, in that great rule of the court that "he who bargains in matter of advantage with a person placing confidence "in him is bound to show that a reasonable use has been made of that "confidence; a rule applying to trustees, attorneys, or any one else."

Gibson v. *Yeyes* was decided in 1801 and has been quoted and followed in scores of cases ever since then until the present time. In *Spencer* v. *Topham* (22 Beavan, 573) decided in 1856, Sir

John Romilly, then Master of the Rolls, said: "The test applied to these cases has been very properly stated to be this: That the solicitor must establish that the sale was as advantageous to the client [here the contract of sale between the plaintiff and defendant] as it could have been if the solicitor had used his utmost endeavours to sell the property to a stranger, and that the burthen of proving this lies on the solicitor."

The cases cited by Mr. Browne in support of the impeachment proceed on the same lines. It is not necessary to analyse the facts I have rehearsed to show how far was the plaintiff from appreciating, firstly, the legal atmosphere in which he and his client stood, and, secondly, the obligations thereby imposed on him. What does he say himself? "It flew to my mind at once [this after a friendly warning from a wiser practitioner than himself] that as a matter of fact I had never at the time considered the transaction from a legal point of view, had never thought of her as a client."

Well, it is contended, though from the plaintiff's attitude in relation to his claim I find it difficult to treat the contention as *ex animo*, that was if the defendant had been entitled to treat the contract as voidable, she precluded herself from doing so by subsequent confirmation. And that confirmation is said to be shown by what passed at an interview between the plaintiff and the defendant on the 7th April. I take the plaintiff's story of that interview: "I said: 'You know, Mrs. Hubbard, that certain people are making very unkind remarks about my purchasing this property from you and selling it to the Bauxite Company for $11,200. I want you clearly to understand that I don't want any nastiness about this matter, at all. If you are dissatisfied, tell me so, and when the transports are passed, you can have the whole purchase price. I don't know whether any of your people have been making these remarks, but if they have, you'll no doubt know about it.' Mrs. Hubbard said: 'As far as I know, no one has been speaking about the matter at all; I have never said anything about it to anybody' I replied: 'Well, remarks have been made; I don't care to say from whom I heard of them.' She said: 'Will I have my portion of the purchase price deducted for transport expenses ?' I said: No; as I am making a profit, I will see that you get your purchase price free of any transport expenses. What about my receipt for $250?' She said, 'If you will give it to me now, I will sign it.' I wrote the receipt and she and Burrowes signed."

Confirmation? When the relationship of solicitor and client still existed, when there had not been, when no suggestion had even been made that there should be, any independent advice? How, remembering Lord Eldon’s statement as to what should

have been done in Yeyes case, could these be confirmation? If there had been any confirmation on the 7th April, it would only go to show how complete was the influence of the plaintiff over the defendant.

There is nothing more to say. The contract cannot stand. I order that judgment be entered for the defendant Hubbard with costs of suit, but as it appeared during the hearing that the Demerara Bauxite Company are now in litigation with the same defendant and in relation to the same transactions as have been examined in this action, to which the Company are not parties, the order is made without prejudice to any rights and liabilities of the Company which may be involved in or arise out of the matters in question in this action.

GRAVESANDE & ORS. *v.* BURROWES & ANOR.

[72 OF 1916.]

1916. DECEMBER 16; 1920. JUNE; JULY 3.

Executor—Claim by heirs for accounts—Intestate succession—Vesting of right to inheritance—Limitation of right of action—Prescription.

Plaintiffs claimed against the defendants, the surviving executors of the will of Thomas Hubbard, who died in September. 1915, (a) an inventory and account of the property, estate and effects of Henrietta Hubbard (born Gravesande), his wife, who died intestate in the year 1879; (b) an account of the dealings and intromissions of the said Thomas Hubbard with the said estate from the date of the death of his wife to the rendering of the account.

J. A. Luckhoo, for the plaintiffs.

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

BERKELEY, J.: This is an action for accounts. The plaintiffs or some of them are the heirs *ab intestato* of Henrietta Hubbard, deceased, who died on 14th February, 1879, intestate and without issue. She married in community of goods in 1854 Thomas Hubbard, who survived her and who died on the 29th September. 1915. By his will he appointed as executors the defendants in which capacity this action is brought against them.

Henrietta Hubbard also left her surviving, her mother Rebecca Gravesande, who on 21st June, 1879, gave a discharge to the late Thomas Hubbard in respect of her claim against the estate of her deceased daughter.

The facts are not in dispute and the sole point for the decision of this Court is whether or not prescription for thirty years, which is admitted, bars the claim of the heirs of Henrietta Hubbard to the remaining one half of her share of the property held in community. It is argued by counsel for the plaintiffs that Thomas Hubbard held the property of his wife after her death in trust for her heirs, and it is submitted that this is shown by his recognition of her mother as one of those heirs. I am unable to find that any such trust existed. The local case of *Dias* v. *Executors of Rodrigues* (1894 L.R.B.G. 53) does not apply. In that case the testator in his lifetime had stood to the plaintiff *in loco parentis* and had recognized her claim as heiress by making part payment to her in his lifetime. It was held that the prescription relied on under Ordinance 1 of 1856, section 5, did not apply to the testator but only to executors who had ceased to act. There can be no doubt as to the correctness of this finding.

The prescription relied on in the present case is that of undisturbed possession for a third of a century, and in succession *ab intestato* the right to the inheritance vests in the heirs immediately upon the death of the person whose estate is in question (Maasdorp's *Institutes*, vol. I. p. 114) and the community of property between the husband and wife comes to an end. The heirs *ab intestato* have a right of action to have themselves declared heirs and entitled to their inheritance against any person who is in possession, but the plaintiffs have been negligent in not protecting their interests and this right of action is lost by prescription of thirty years (Voet 5, III., I.)

Judgment for defendants with costs.

BOSTON *v.* JAGESSAR.

BOSTON *v.* JAGESSAR.

[315 OF 1919.]

1920. FEBRUARY 20; MARCH 5.

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

Criminal law—Magistrate's Court—Proof of jurisdiction—Power of magistrate to require evidence to be given at any stage of proceedings—Evidence Ordinance, 1893, s. 90.

The statement in a complaint that an offence has been committed within the local jurisdiction of the magistrate who hears the complaint must be supported by proof of that fact.

Humphry v. *Crooks* (1914 L.R.B.G., 41), over-ruled.

The proof should be given by the complainant, but, although not so given, it may be obtained from the evidence of the defendant, and, if so obtained, must be considered by the magistrate, notwithstanding the omission of the complainant to adduce it.

R. v. *Power* (14 Cr. App. R. 17) followed.

The power of a magistrate conferred by section 90 of the Evidence Ordinance, 1893, is discretionary; the fact that he exercises it after the close of the complainant's case to cure an omission of the complainant to prove his jurisdiction is not of itself an improper exercise of the power.

Woolford v. *Millar* (A.J. September 18th, 1908, Bovell, C.J.) approved.

Appeal from a decision of Berkeley, J. (1.) The defendant Jagessar was charged before the magistrate of the West Coast judicial district with larceny, and convicted. On appeal the conviction was quashed by Berkeley. J. The plaintiff Boston now appealed to the Full Court. The reasons of appeal sufficiently appear from the judgment below.

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

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

SIR CHARLES MAJOR, C.J.: The questions to be answered in this appeal are three: The first, was it necessary for the complainant in the magistrate's court to prove that the offence charged was committed within the local jurisdiction of the magistrate who heard the complaint ?; the second, if it was so necessary, was that proof given?; the third, if not given by the complainant, could the proof be given, and *was* it given, otherwise, and if otherwise, at what stage of the proceedings and with what effect? The learned appellate judge has answered the first question in the affirmative. I agree with him. He has answered the second question in the negative. I agree with him. He has held that the proof might be given otherwise, and again I agree, but has expressed doubt whether the proof was so given, that is to say during the conduct of the defendant's case, and that even if it was so given, it was improperly obtained and could not be regarded by the magistrate,

(1). Reported in 1919 L.R.B.G. 189.

by virtue of the provisions of section 9, subsection (1) of the Magistrates' Appeals Ordinance, 1893. Herein I am unable to agree with him. I think the proof was given by the defendant himself, in answer to his counsel and also in answer to the magistrate, and that nothing in the section mentioned operated to prevent the magistrate considering the evidence so given in coming to a decision on the complaint.

I agree with the answer to the first question, because, it being incontrovertible that the evidence adduced at the hearing of a charge before a court of summary jurisdiction must support the charge by proof of every material fact, proof of the place where the offence was committed was a material fact in order to show that the magistrate had local jurisdiction. *R.* v. *Highmore* (2 Ld. Raym. 1220) and *R.* v. *Jeffries* (1 T. R. 241) are authorities in point outside the various decisions to the same effect given by learned judges in this colony, except *Humphrey* v. *Crooks* to which I shall refer later.

I agree with the answer to the second question, because proof that the offence was committed at "Sisters," and no more, was insufficient to enable the magistrate to determine whether the offence was committed within the local limits of his jurisdiction. The allegation in the complaint that "Sisters" is in the West Coast judicial district, to the limits whereof that jurisdiction extends, was no proof at all.

Regarding the third question, when the defendant in answer to his counsel said: "I have a farm at Sisters, West Bank," and that farm appeared by the evidence already given to be the place where the offence charged had been committed, the magistrate had enough evidence before him of his local jurisdiction, "West Bank" being a description of sufficient certainty to satisfy him of that jurisdiction. But any doubt as to sufficiency was removed by the defendant's answer to the magistrate: Sisters is (on the) west side of the Demerara River" and—as the magistrate notes— by his pointing out where it is. I think that, so far from there being any impropriety in the magistrate's putting the question and obtaining the information contained in the answer, it was his duty to do so. In *Charles* v. *Wong* (1916, L.R.B.G. 156) I said what I thought of exception taken to a magistrate calling for fresh evidence to supply a prosecutor's omission after objection by defendant's counsel and after the close of the case on both sides. I affirm the opinion then expressed. In this case the defendant's case was proceeding when the evidence was given. Any contention as to the power or propriety of the magistrate to consider, or in considering, that evidence must be as the learned judge in the appellate Court points out, happily now set at rest by the case of *R.* v. *Power* (14 Cr. App. R. 17) cited by Mr. de Freitas here

and in the court below. I am glad to find quietus thus effectually and authoritatively administered to an argument to which I have more than once said I never acceded.

With the opinion expressed by the learned appellate judge in *Ghirdari* v. *Commissioner of Lands and Mines* (A.J., April 16th, 1912.) on the magistrate's exercise of his discretion in supplying omissions in details of necessary proof, and in this case carried into force. I am unable to agree. The proviso in section 9 (1) of the Magistrates' Appeals Ordinance does no more, I think, than prevent an appellant appearing from a magistrate's finding that he has jurisdiction in a case before him, unless the appellant has taken the objection before him that he has not jurisdiction. And I cannot infer from that any fetter on the magistrate's discretionary power, as I put it in *Charles* v. *Wong*, "to call for, or require or allow to be given, fresh evidence on a material point necessary for the just determination of a charge before him." In this case, indeed, the objection was not that the magistrate had no jurisdiction, but that the complainant had not proved the offence charged to have been committed within the jurisdiction which the magistrate had.

The argument for the appellant in this court has proceeded entirely on the case of *Humphry* v. *Crooks* (1914, L.R.B.G. 41). and it is due to the memory of the late Sir Crossley Rayner, C.J., who decided that case, to say something about the decision, given as it was, after elaborate and exhaustive examination of the law on the subject of magisterial jurisdiction, and regarded, it seems, since 1914 by some magistrates and practitioners as authority governing them in the prosecution of complaints in courts of summary jurisdiction. The reasons why I am unable to agree with the proposition stated by the head-note in the local reports to have been enunciated by the late learned judge, namely, that "proof of jurisdiction in the magistrate's court is not necessary either in civil or criminal matters," appear from what I have already said. I am not sure that the Chief Justice meant to lay down that proposition thus broadly stated, for, though from some passages in the judgment it may be gathered, there are others qualifying and, in some instances it seems to me, contradicting it. But be that as it may, resting" as the proposition does upon what the learned judge considered to be the law and practice in England in the higher courts, county courts and courts of summary jurisdiction, I confess to being unable to see how he arrived at his impression. As to higher courts—Archbold's Practice, 25th edition p.51 reproduces Hawkins, c. 25, s. 84, thus: "It was never necessary that the averments should be according to the truth unless local description was of the essence of the offence, for if the place stated were within the country or other

extent of the court's jurisdiction, a variance between indictment and evidence was not material if the place proved were within the jurisdiction of the court." And at p. 338: "The forms of indictment prescribed under the Indictments Act, 1915, require the county in which the offence took place to be stated in the indictment. And it is necessary to prove that the offence was committed within the country or other extent of the court's jurisdiction." The arguments in the cases of *R.*v. *Seberg* and *R.* v. *Anderson* both reported in L.R.I.C.C. at pages 264 and 161 respectively, show clearly that this is so. And *R* v. *Cryer* (26 L.J.M.C. 192) to the same purpose. Coming to courts of summary jurisdiction, *R.* v. *Highmore* and *R.* v. *Jeffries* already mentioned, decide the same point, stated in Paley, 8th edition, at page 138, that "the evidence must support the charge by proof of every material fact assigning a specific date and place to the offence . . . First, the fact proved must appear to be within the jurisdiction of the convicting magistrate." These are cases and statements of test-book writers which appear to have escaped the notice of the learned Chief Justice when deciding *Humphry* v. *Crooks.*

For all these reasons it will be seen that I think the magistrate's conviction of the respondent should be affirmed and that the order of the learned appellate judge quashing the same should be put aside. There will be no order as to the costs of the appeal.

DALTON, J.: I also agree that this appeal must be allowed and I concur in the conclusions arrived at by the learned Chief Justice. I think it due however to the memory of the late Chief Justice Sir Crossley Rayner that I should state shortly the reasons why I am unable to agree with his conclusions in the case of *Humphry* v. *Crooks,* and prefer to follow earlier decisions of other judges including Chief Justices Beaumont and Chalmers. If this case now before us had closed with the case for the appellant (plaintiff) and no evidence had been called for defendant, I can find on the record no sufficient evidence whereby the magistrate could reasonably come to the conclusion that proof of jurisdiction existed. So far then I agree with the learned judge in the court below. If jurisdiction can be inferred, as the magistrate states, 1 fail to see on what principle he can separate that requirement from the other elements which go to make up the offence charged. If he can assume jurisdiction, he can, it seems to me, equally well assume the guilt of the defendant, and leave upon him the onus of proving his innocence. As stated by Chalmers, C. J. in the case of *Monick* v. *Solomon* (13th January, 1883), "The proof of locality in order to found jurisdiction does not differ in its nature from the proof of facts constituting the offence." Both require evidence upon which they may reasonably be based, before any

inference can be drawn by the magistrate in respect of the charge before him. What then, it is asked, is the method of proof? It has been suggested by the Solicitor General that, if given, it can only be given in set formulae. With that I cannot agree. The method of proof must in practice undoubtedly be varied. A parrot like repetition of the words that so and so happened "in this judicial district" from a witness who possibly obviously uses words which have no meaning to him or her may be of no value at all. On the other hand let us take the case of a charge which states an offence was committed at "Camp Street Georgetown" and was tried before the magistrate of the Georgetown judicial district. I fail to see how under the circumstance, assuming a witness proved the offence in "Camp Street Georgetown." but failed to add the words "in this judicial district" it could be said that jurisdiction was not proved. If the words are added, so much the better, but the omission of the words could not debar the magistrate if he was satisfied with the evidence from finding that the locality of the offence was within his judicial district. Another decision of Chalmers, C.J., which has not been referred to so clearly states my view of the law that I will set out his words. He states: “There is no doubt as to the principle that “the territorial jurisdiction of the magistrate must be proved by proving “that the offence occurred at some place within his district, but there is no “ground for holding that the mode of proof must necessarily be by direct “statement, although when sufficient proof can be thus given it is most “convenient to make use of it.” (*Powers* & *anr.* v. *Ruck,* September 18, 1885). And it is probable that few cases would arise in which such proof could not be given by direct statement. If a magistrate has due regard to what is required of him it seems to me that it would be almost impossible for an appeal to be made on such a point.

In the case before us the charge set out that a larceny was committed "at Sisters in the West Coast judicial district." Several witnesses were called for the complainant including a sergeant of police. There obviously was the competent witness who could have given a direct statement as to the limits of the jurisdiction. He does not do so. He does not even mention the alleged place of the larceny. The place "Sisters" is referred to by two subsequent witnesses as being the place where one has a farm. When complainant's case was closed there seems to me to be nothing on the record in the way of evidence whence the magistrate could infer that the place where the offence was committed was within the limits of his jurisdiction. It is difficult to understand why he had not put the question himself. Possibly it was relying upon the decision in *Humphry* v. *Crooks* where the learned late Chief Justice states: "If no evidence is given of

jurisdiction it must be taken that the court has jurisdiction." I have been unable to ascertain upon what authority that dictum is based. It is certainly contrary to several old English cases to be found in the reports. To cite only one as long as 1828, in *Rex* v. *the inhabitants of All Saints, Southampton* (7 B. & C. 790) the court held that in inferior courts and proceedings by magistrates the unquestioned rule had been that the maxim 'Omnia praesumuntur rite esse acta'; does not apply to give jurisdiction, and that proof of it must appear on the examination. The dictum it seems to me is not consistent with the further conclusion of the learned late Chief Justice in the same case where he says that the court must be satisfied from all the facts before it that the place where the offence was committed was within its jurisdiction. To continue, the magistrate having stated that he inferred jurisdiction, the defendant gave evidence and it is from him that the locality of Sisters is described. He states that it is on the "West Bank." It is true he does not add the words "in this district." or "in the West Coast judicial district;" possibly he would not have known what the words meant had he used them. But I am of opinion that his description of the locality as being on the "West Bank" was evidence whence the magistrate, had he done so, was justified in coming to the conclusion, in the absence of any failure to shake the witness on this point in cross-examination, that the locality was within his judicial district. Apparently, however, he was not quite sure, but he proceeded to question the witness himself further. In reply to him the witness then stated that the locality was on the west side of the Demerara river, and, as the magistrate records, pointed out the place to him.

But Mr. McArthur argues that there being no evidence by the prosecution to support the charge as to jurisdiction, it was not competent for the court to supply the deficiency out of the defendant's month. If having taken the objection defendant had stopped there and had called no evidence, I think he must have been successful. But if he chooses (and the choice is with him, for the magistrate has no power to compel him) to either call witnesses or give evidence himself, and their evidence or his evidence incriminates him or supplies the previous deficiency then the magistrate is entitled to take all the evidence led before him into consideration in deciding the guilt or innocence of the defendant. The matter has been put beyond doubt by the decision in the Court of Criminal appeal in England (*Rex.* v. *Power,* 120 L. T. Rep. 577) which was cited by the Solicitor General in his argument. Prior to that decision there was a conflict of authority, the conflicting cases being considered by the Court before coming to this decision.

The question, whether or not a magistrate should himself call

or recall a witness to prove jurisdiction, is one of which I think no answer can be given here. Each case as it arises must stand on its own merits. The right to call a witness at any time exists under the provisions of the Evidence Ordinance, 1893. It is a matter within the discretion of the magistrate. That he shall not use that discretion at all in such a case as is put I cannot agree; that he should do so in every case that arises I also cannot agree. He must use his discretion sensibly and reasonably, with due regard to the rights of the parties, the facts of the case and the proper administration of justice. The decision of Bovell, C.J., in *Woolford* v. *Millar* (A.J., September 18th, 1908) is a useful guide on this question. But as I have said before, if a magistrate has had due regard to his duty, I do not see that it need ever be necessary to ask to recall any witness to prove jurisdiction.

As a result, on reasons of appeal (a) and (c), the appeal fails but in respect of reason (b), that there was sufficient evidence of jurisdiction on which the magistrate could convict, the appeal must be allowed.

Under the circumstances, as the principal matter for was the necessity of proof of jurisdiction and on that the appellant fails; I agree there should be no order as to costs.

RAGBAR DYAL *v.* RAMSAMMY BOY *alias* KASWA.

[7 OF 1920. BERBICE.]

1920. MARCH 19, 29. BEFORE DOUGLASS, J. (Actg.)

Appeal—Larceny—Ownership of goods stolen—Possession of servant.

This is an appeal by the complainant against the decision of the magistrate of the Berbice judicial district dismissing the charge against the defendant of larceny of 2 bags of paddy valued at $8, the property of the complainant.

J. A. Abbensetts, for Ragbar Dyal.

The respondent appeared in person.

DOUGLASS, Actg, J.: The only reason of appeal argued was that the decision was erroneous in point of law:

> *(a.)* Because the evidence of the complainant and Monilall established sufficient right of property in the subject matter of the complaint, 2 bags of paddy, to call on the defendant for a defence;
>
> (*c.*) Because the evidence establish that the goods were the property of a person other than the defendant and that

they were in possession of Ragbar Dyal at the time of the alleged offence of larceny vesting sufficient special property in him to constitute larceny ;

(d.) Because neither the special nor absolute property in the 2 bags of paddy the subject matter of the complaint was in Sreegobind;

(*e*.) Because the evidence established that Monilall on the 31st January, 1920, delivered 30 bags of paddy, of which the 2 bags the subject matter of the complaint forms part, to Ragbar Dyal.

It has been stated that "the ordinary conception of theft is that it is a violation of a person's ownership of a thing: but the proper conception of it is that it is a violation of a person's possession of the thing." Merely physical possession as much involves no rights, but a person who is in apparent possession has as against a mere stranger and wrongdoer the same remedies as if he had the right to the possession and can maintain trespass or theft, and "the stranger who violates his possession cannot justify the violation by showing that the possession was without title . . . unless he further shows not only that a third person was entitled to the possession, but that he the stranger acted with the authority of the third person." The rule is however well settled that a servant does not 'possess' by virtue of his custody except when he receives a thing from the possession of a third person to hold for the master: and then he is held to possess as a bailee until he has done some act by which the thing is appropriated to the master's use, and of course the master may make his servant a bailee if he desire. The possessor of a thing as bailee, pawnee, carrier, and the like, may each in virtue of his special property prosecute a stranger who takes the thing from him. The effect of the authorities on the point at which a servant's possession ceased and that of the, master's attached, are summed up by the learned author of Part III. of Pollock and Wright on "Possession in the Common Law" (page 195) as follows: “1. “The servant's possession will terminate and that of the master will “commence at the first moment when either the thing is delivered to the “master, or when, although the thing continues in the apparent possession “of the servant, the servant agrees with the master to hold it finally for the “master in the master's right. 2. So long as the thing is with the servant “merely *in transitu* towards the master, the master has not possession as “against the servant, but the servant has possession as against the master. “3: When the thing ceases to be *in transitu* and is held for the master, the “master's possession commences even as against the servant.”

The complainant in this case was manager of the Rice Mill

where the rice was deposited, and lived there with his father Sreegobind, the owner; there is no question of the rice being *in transitu,* nor was the rice at any time in the complainant's custody as distinct from the custody of Sreegobind, it was at its final destination, the rice mill, and Ragbar Dyal had the mere physical possession. The fact that Monilall told the complainant that he "would hold him for the rice" cannot affect the legal relations between the parties nor does the complainant being a son of the owner, and his manager, alter the fact that the rice was received by him on the owner's premises as agent or servant for the owner, and not in his own right, nor as bailee. If the complainant had received the paddy outside the mill for conveyance there, it would then have become a question when his possession shifted, but this was not the case. In "*R.* v. *Hayward,*" 1844, 1 C & K., 518, a deposit of hay by the servant in the master's stable yard was ruled a reduction into the master's possession, and even the fact of taking articles by a servant into his master's cart was so ruled. *R.* v. *Norval,* 1. Cox, 95.

The learned magistrate has rightly avoided any decision as to the merits of the case, and I am of opinion that the property in the goods being wrongly laid, he was right in dismissing the charge on that ground.

I accordingly dismiss the appeal and affirm the decision of the magistrate; as the respondent did not appear by counsel I make no order as to costs.

GAMBLE *v.* NISPATH.

1920. MARCH 12, 29. BEFORE DOUGLASS, ACTING J.

Foodstuffs (Regulation of Price) Ordinance, 1914, and Foodstuffs (Regulation of Price) Ordinance, 1919—Fixing of sale price by proclamation—Contravention of prices fixed— Interpretation of schedule to proclamations—Objection to form of complaint—Uncertainty of offence charged.

On 25th September, 1919, a proclamation was published fixing the maximum price of *(inter alia)* one bag of rice when sold wholesale, under the terms of sections 3 and 12 of the Foodstuffs (Regulation of Price) Ordinance, 1914.

Held, that the quantity in or weight of 'a bag' of rice being fixed by the schedule to the proclamation, the presumption is that the vendor is selling the bag as named in or defined by the said proclamation, and that it does not lie upon the purchaser to prove any quantity or weight of rice when he is buying at a price paid for the bag.

Appeal from the decision of the magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist) who convicted the appellant Nispath of selling one bag of rice at a higher price than that fixed by proclamation

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

H. C. Humphrys, for the appellant.

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

DOUGLASS, ACTG. J.: This is an appeal from the decision of the magistrate of the Georgetown judicial district imposing a fine of $100 recoverable by distress or in default 2 months, *i.e.,* on the defendant (the present appellant) for selling one bag of rice at a higher price than that fixed by proclamation of 25th September, 1919.

The reasons for appeal are that:—

(1.) The decision is erroneous in point of law, inasmuch as,

(a) The charge disclosed no offence at law.

(b) The facts proved established no offence at law.

(c) The prosecution failed to prove that the defendant sold a bag containing 180 lbs. gross at a higher price than that fixed by the proclamation.

(d) The prosecution failed to prove the said bag contained 180 lbs. gross, or less,

(2.) The decision is altogether unwarranted by the evidence in like manner as if the case had been tried by a jury there would not have been *sufficient evidence* to sustain the verdict for the reasons stated in (*b*), (*c*) and *(d)* above.

Ordinance No. 22 of 1914 (as continued for the duration of the war by No. 23 of 1915, and until repealed by proclamation, by No. 26 of 1919) The Foodstuffs (Regulation of Price) Ordinance, 1914, enacts that the Governor may by proclamation direct the maximum price for which any article of food may be sold (sec. 3) and may at any time make, revoke, alter or amend any such procla-

mation (sec. 12). By proclamation dated 9th August, 1918, revoking all prior proclamation under the said ordinance, it was directed that the articles mentioned in (*inter alia*) Schedule A. "shall be sold . . . at a price not exceeding the prices set out for large wholesale and small wholesale and retail transactions as the case may be." By proclamation dated the 11th October, 1918, 7th February, 1919, 30th May, 1919, and 25th September, 1919, the said schedule was amended or a new one substituted. On reference to the schedule attached to the last proclamation under title 'Small Wholesale' it will be seen that the maximum price for 'rice— brown' was to be $9.75 (per bag of 22 gallons or 180 lbs. gross), if quantity sold in one transaction is not less than one bag. In his reasons for decision the learned magistrate referred to section 9 of Ordinance 12 of 1893, but I do not consider that section is applicable in the present case, for the offence before him. and dealt with by section 10 of Ordinance No. 22 of 1914, is selling a bag of rice—the weight of a bag being defined in and for the purposes of the said schedule—at a higher price than that fixed by proclamation; there is no question of an exception, exemption, proviso, condition, excuse or qualification within the meaning of the said section 9, I was referred by learned counsel for appellant to *Reid* v. *London* (1918, L.R.B.G., 109) as to the necessity of setting out in a charge the necessary facts of the particular offence and I see that it was noted by the learned judge that the defect in the complaint was incurable, objection having been made before plea, but it seems to me that in the present case the statement of the offence in the complaint is ample; "a bag of rice at a higher price than that fixed by proclamation dated 25th September, 1919" can only mean a bag as defined in and by the schedule to the proclamation; it is true that the word 'brown' should have been inserted before rice but no objection has been taken on that score. The complaint could have been amended to that effect if necessary (see section 97 (2) of Ordinance No. 12 of 1893). There is no duplicity or uncertainty about it taken in conjunction with the evidence, not only was no objection taken before the magistrate to the substance or form of complaint, but also the defendant pleaded not guilty to the offence as set out.

Having disposed of reason of appeal (1) *(a),* it remains to consider whether it was necessary for the prosecution at the hearing to prove that the bag contained 180 lbs. of rice or less, and if not, whether the evidence proved the appellant was guilty of the offence charged—[Reasons 1 (*b*),(*c*) and (*d*)]

The object of the said ordinance is "to prevent the undue increase in the local price of articles of food," and schedule A must be interpreted in exactly the same manner as if it was included in the ordinance.

I was referred by learned counsel for the appellant to 'the golden rule' in Beal's "Cardinal Rules of Legal Interpretation." (The learned judge here read the paragraph referred to) Wills, J., puts it in its simplest form in *R. v. Judge Whitehorne* (1904. 1. K. B., 827). "There is only one safe rule, I think, to apply in construing an act of Parliament where we have nothing except the bare words, and that is to give them their natural meaning," That is to say, the natural meaning ordinarily attaching in the country to which the act or ordinance applies, and to arrive at it the Court should consider not only the class of transaction dealt with but also the usage or practice connected with that class before—in the present case—the ordinance was passed or the schedule proclaimed. To enable the legislature to fix a limit of price, different articles of food must each have its particular measure on which the estimate of value may be based, so in the case of sugar, rice, and flour to be sold wholesale, it is 'the bag ' that is the unit of measurement. This was no new system, it is evidently taken from the customary method of selling these articles, but to avoid any contention as to what amount ' the bag ' contains the quantity is stated,—it may be presumed following what has hitherto been the accepted or customary quantity,— viz., a bag of sugar to contain 250 lbs., a bag of rice to contain 22 gallons or 180 lbs. gross, and a bag of flour to contain 196 lbs; so that in the case of a bag of brown rice (with which the Court is at present concerned) when a person offers 'a bag' for sale he will be presumed to be offering 'a bag' as defined by the schedule referred to.

A bag of rice is defined in the schedule as meaning a bag of 22 gallons or 180 lbs gross, and if a vendor sells 'a bag,' both parties understand that it is the bag as defined and legalized; so in the footnote to the schedule "Every purchaser of flour by the bag shall, etc.," only means one thing, not what any vendor may be pleased to call 'a bag' of flour, but a bag as defined to contain 196 lbs. To put it simply, there are only two methods of selling rice, either by the pint measure or by the bag, all rice sold must be in one of these two ways. Since 1914 the law has fixed the maximum price at which rice may be sold; the measure of a 'pint' is a fixed and recognised quantity, so the schedule now fixes what a 'bag' shall be deemed to contain. To say that a vendor could sell in any other manner and so evade the schedule price would be to render its provisions worthless and absurd. One might just as well contend that a vendor of, say, a pint of rice could excuse himself for selling at more than 6 cents by saying, 'what I call a pint is not the same as what the purchaser calls a pint, at any rate he has not proved it was a legal pint.'

I thus arrive at the conclusion that there is no onus on the

purchaser to. prove that the bag contained more or less than its capacity as fixed by law, and that, subject to proof to the contrary, it must be held to contain the quantity so fixed. I am of opinion that it was never intended—nor can the schedule be so construed—to cast the burden of proof of the weight or quantity on the purchaser of 'a bag;' on the contrary the weight of or quantity in, a bag was fixed with the object of avoiding what in many cases would be difficult, and in some impossible, to ascertain The quantity in a bag is peculiarly within the knowledge of the vendor. At this point too I would draw attention to the evidence of Barker. "I told her (*i.e.,* the appellant) she sold the man a bag of rice above the Government price and would report her. Defendant said Government did not buy the rice she did." There was no question at the time of what quantity the bag contained, and it is clear from her reply that the appellant knew what Barker meant by the Government price for "the bag." The second reason for appeal stands or falls on the decision given on the point of law raised by the first reason. I am of opinion that it was competent for the magistrate to convict on the evidence before him and I affirm the conviction, and dismiss the appeal with cost.

PETTY DEBT COURT, GEORGETOWN.

HUTT *v.* THE DEMERARA RAILWAY CO.

[47—1—1920.]

1920. FEBRUARY 10; MARCH 9; APRIL 4.

BEFORE DOUGLASS, J. (ACTG.)

Carrier—Liability for loss—Railway and Canal Traffic Act, 1854—"At the owner's risk"—Special Contract on freight slip—Common Carriers' Ordinance, 1916, sections 3 and 6.

Claim against the Demerara Railway Co. for a total loss of four tins of cotton seed oil, and for 40 lbs. of cotton seed short received, valued at $60, and for general damages. It was alleged that twenty tins of cotton seed oil were entrusted to the defendant company for carriage from Georgetown to Berbice on the 28th October, 1919, and that owing to negligent and careless packing on the part of the defendant company eight tins of oil arrived at Berbice smashed or badly damaged.

C. R. Browne, for the plaintiff.

M. de Souza, solicitor, for the defendant company.

HUTT *v.* THE DEMERARA RAILWAY CO.

DOUGLASS, ACTG. J.: The plaintiff, a merchant, is claiming damages against the defendant company for loss of cotton seed oil entrusted to them for carriage from Georgetown to New Amsterdam on the 28th October, 1919, and says that the defendants were negligent. The defence is a general denial of the particulars of claim and alleged loss of the oil, and that if any loss was suffered the defendants say they are not liable, as the goods were taken and transported at the plaintiff's risk, and they also deny any negligence on their part. The plaintiff has proved that twenty tins of oil were delivered to the Railway Company and that they were placed on two separate trucks—eight on one and twelve on the other—and that on arrival at New Amsterdam the eight tins were found in a damaged condition, four being empty and the other four with about 10 lbs. of oil missing from each, There is also sufficient evidence to infer that a claim was made for loss and damage, for (or what was equivalent to it), that the damaged tins were refused by the plaintiff within the three days required by condition No. 4 endorsed on the freight receipt. It is also proved that the company will not receive tins of oil unless packed in cases for protection, and only did so on the present occasion at the urgent request of the plaintiff or his agent; that Fernandes, the plaintiff's agent, going by the same train said he would take absolute risk if the Railway Company carried the tins. Whatever liability the Railway Company incurs in its conveyance of goods is as a common carrier at common law, and also under terms of section 29 of the Companies Clauses and Powers Consolidation Ordinance, 1864, and under the Common Carriers Ordinance, 1916.

In the late case of *Delgado* v. *Sprostons, Ltd., Supra* p. 42., I referred to the stages in the history of the liability of common carriers and drew attention to the fact that the Railway and Canal Traffic Act, 1854, did not apply in this country, and that consequently the English cases since that date must be considered with that act in view and its effect discounted in applying them to the law of carriers now obtaining in this colony. The great majority of cases referred to by learned counsel on both sides has reference to the construction of section 7 of the said Act (17 and 18 Vict. c. 31). Thus in *Simons* v. *The Great Western Railway Company* (26 L. J. C. P., 25) Jervis, C. J., says: "It so seems to me in this case that it was the intention of the legislature, so far as I can gather from this very obscurely worded section, to place the whole railway system under the control of the courts," for under that section the court had to decide how far a special limitation of liability was "just and reasonable." *McManus* v. *the Lancashire and Yorkshire Railway Company* (4 H.&N, 327) was considered under the same section, and it was held

that the condition that the company would not be responsible for any injury or damage howsoever caused was not "just and reasonable." I may note here that in *Beal* v. *The South Devon Railway Company* (5 H. & N., 874) Pollock, C. B., stated that in his opinion a contract to which a person has signed his name *is quoad* him, a reasonable contract. Bramwell, B., says: "Reasonableness is not a question of law but a mixed question of law and fact depending on the particular circumstances of each case" and Channel, B, says "I also think that it (i. e., the decision in the *McManus v. the L and Y. Railway Co.*) binds us upon the point, viz., that a condition which exempts the company from liability in every case is an unreasonable condition . . . The question is whether the condition in the present case is distinguishable. I think it is because it leaves the company open to liability in two events—gross negligence and fraud" (and see *Lewis* v. *The Great Western Railway Company,* 5 H & N., 867).

There was some endeavour in the present case to discriminate between higher and lower rates for carriage of goods, but this again is only applicable in cases coming under the Railway and Canal Traffic Act, 1854, for to avoid the liability imposed by section 7 of that act what is known as "owner's risk consignment" notes came into existence, but (as will be seen) there is no necessity for any such arrangement there as parties are free to make any contract they please. (See *Wills* v. *Great Western Railway Company* (1915. 1 K.B., 199).

The leading case of *Peek* v. *The North Staffordshire Railway Company* (1863, 32 L.J. Q.B. 241) turns mainly on the construction of the same section 7, but in his very elaborate judgment Blackburn, J., traces the history of the common law of carriers, and the effect of the Carriers Act, 1830, and refers to the decision of the court in the case of *Hinton* v. *Dibben* (*2* Q.B., 646) that unless a declaration was made under section 1 of that act (and see Ordinance No. 18 of 1916, sec. 3) the construction of the section exempted the carrier from liability arising from negligence as well as from accident, and he continues "it seems to me very undesirable that a different effect should be given to such words when used by a carrier from that which is given when used by the legislature, or by an ordinary person" And the learned judge also referred to '*Carr* v. the *Lancashire and Yorkshire Railway Company* (17 Jur. 397) and to *Davies* v. *Mann* (10 M. and W., 546) in which case Mr. Baron Pollock concluded his judgment by saying: “It is not for us to fritter away the true sense and meaning of these contents “merely with a view to make men careful. If any inconvenience should “arrive from their being entered into, that is not a matter from interference, “but it must be left, to the legislature; . . . According to the true

"meaning and intention of the parties as here expressed I am of opinion that "the defendants are not liable."

I have already held in the case of *Delgado* v. *Sprostons Ltd.,* that the consignment slip is in the nature of a special contract within the meaning of section 6 of the Common Carriers Ordinance, 1916, and the freight slip (exhibit A) in this case is a document with similar wording and signed by the consignor. The plaintiff must therefore be taken to have known the terms and conditions endorsed. On the front were the words "shipped at owner's risk," and condition 1 on the back reads *(inter alia)* "that the company shall not be responsible for the loss or injury to goods misdescribed or improperly packed or put into insufficient packages . . . . nor for the loss by leakage occasioned by bad or imperfect package or cooperage."

With reference the construction of the words "at owner's risk" *Robinson v. G. W.R. Coy.,* 35, L.J.C.P., 123); *D'Arc v. London and N. W. R. Coy.* 9. C.P.C. 388 and (*Lewis* v. *the N. W.R. Coy.* 3 Q.B. D. 395) all turn on the fact that the defendants carried at "alternate" rates, and that the condition excepting them from the liability at the lower rate using the words "owner's risk" was "just and reasonable," though it did not absolve the company from responsibility for delay.

I have already pointed out that apart from the Railway and Canal Traffic Act, 1854, it is not for the court to criticise a special contract as unjust and unreasonable, and there is no question of delay in the present case. I do not think it necessary to discuss the effect of "notice to shipper" (put in evidence as exhibit A 5) except to remark that it would not limit the liability of the Steamer Service or Railway Company, for there is no evidence that it was a by-law, and in so far as the defendants are common carriers they cannot limit their liability by a public notice. (See Common Carriers Ordinance. 1916, sec. 6). The evidence all points to the desire of the plaintiff that the goods should be sent at any risk, and though the words 'at owner's risk' might not exclude a claim for damages for wilful misconduct or gross negligence on the part of the defendant company there is not the slightest evidence of it; not only did the conditions deprecate insufficient and imperfect packages but the plaintiff was specially warned, and the tins received under protest and when received they were packed in trucks with casks which were properly 'scotched' with bricks. There is nothing to show that the packing was done regardless of whether it would or would not cause injury to the goods; nor is there any evidence to show what happened on the journey; but whatever did happened was to be at the owner's risk. I accordingly give judgment for the defendants with costs.

ROBERTSON *v.* YARD.

[194 OF 1919.]

1920. MARCH 26; APRIL 10.

BEFORE BERKELEY, J. AND DOUGLASS, Acting J.

Practice—Appeal—Time within which appeal to be made—Order XLIII. r. 8—*Order XLV, rr.* 1, 6—*Negligence of solicitor—Payment of costs.*

Appeal from a decision of Sir Charles Major, C.J. (See 1919 L.R.B.G. 55.)

S. E. Wills, for the appellant, Robertson.

B. B. Marshall, for the respondent.

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

BERKELEY, J.:—This appeal is from a decision of Major, C.J., who on an. objection *in limine* ordered judgment to be entered for the defendant (now respondent).

On the hearing of the appeal counsel for the respondent raised two preliminary objections (a) that the notice and reasons of appeal had not been served within the time limited for such service, and (b) that the reasons of appeal were signed by the solicitor only.

With a view of disposing of the sole question raised on appeal, that is, whether the appellant,—who brad entered an opposition to the sale at execution of certain property levied on and had failed to proceed with her action which thereby had become abandoned—was at liberty, on the property being again advertised, to bring an action to establish her claim thereto, the court was disposed to overrule the objections and requested counsel to argue the point of law raised on appeal which was accordingly done.

As to (a) the affidavit filed in behalf of the appellant shows that the notice of appeal as well as the reason of appeal were served on the respondent and also on her solicitor between the hours of 6 and 7 p.m. on the 26th May, 1919, while the affidavits in behalf of respondent point to service on the respondent at 7.30 p.m. and on her solicitor at 4.30 p.m. on the same day.

Under Order XLIII, rule 8, notice of appeal has to be served within twenty-one days from the date of judgment. The judgment is dated 5th May, 1919, and the appellant waited until the last clay (26th May) to comply with the rule of court. The 26th May was a Monday and the service of notice of appeal therefore

after 4 p.m. was service on the following day—Tuesday—(See *Wilson et al* v. *Sealy,* L.J. 14. 11. 1908; and *de Freitas* v. *Martin,* F.C. 7. 7.1911.)

On further consideration the Court is of opinion that the objection must be upheld and the action dismissed. It is satisfied that the non-service of notice of appeal is due to the negligence of the solicitor who must personally pay the costs incurred by this appeal.

PETTY DEBT COURT, GEORGETOWN.

WALDRON *v.* SMITH BROS. & CO., LTD.

[251—3—1920.]

1920. APRIL 13, 20. BEFORE DOUGLASS, J. (Acting.)

Contract of Sale—Agreement to Sell—Rules for ascertaining intention—Sales of Goods Ordinance, 1893, ss. 2 (1), 20—Passing of property in the goods—Mistake— Unstamped cash bill—Evidence—Admissibility—Magistrate's Court—Alternative causes of action of dissimilar nature—Practice.

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

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

R. Dinzey, solicitor, for the defendant company.

DOUGLASS, Actg. J.: The plaintiff is claiming from the defendant company the delivery of eleven reams of typewriting paper at the value of $1.44 a ream, being a portion of a purchase made by him of twelve reams of such paper on the 15th March, 1920, or in default of delivery its value $17.73, and $25 damages.

The defence is a denial that the typewriting paper was sold at $1.44 a ream, or that the property in the goods passed to the plaintiff; and in the alternative, that if the plaintiff did purchase the said goods, it was at the price of $2.88 per ream, and in naming the price at $1.44 the sales clerk made a mistake as the plaintiff well knew, he having agreed to purchase at the price of $2.88, and that the contract was bad on the ground of mistake.

The facts are very simple; the plaintiff went to purchase typewriting paper on the 15th March having seen it some time before, but the defendant company would not sell until the invoice arrived. The value of the paper on the invoice was $1.85 a ream, and with the addition of freight and duty was valued by the manager, Mr. Fernandes, at the price of $3 a ream. The sales clerk, Vieira,

states, on naming this price, the plaintiff asked him to make it $2.88 and he agreed; this is denied by the plaintiff who states neither of these sums was mentioned. Vieira admits that he sold the paper before he marked the price on the stock and that he made the entry on the cash bill "12 reams type W paper at 1.44.—$17.38," and there were two reams of an inferior paper for $2.28 (less discount 39 cents), that the plaintiff paid the whole amount $19.17 and took away one ream of the paper in question and the two reams of the inferior paper. Vieira's only excuse is that he took the boxes containing reams as containing half reams, but this is hardly an explanation as he entered ' reams ' on the cash-bill and not half reams. He found out his mistake shortly after and as a consequence the company's manager refused to deliver the balance of the paper unless the difference in price was paid, and offered the money back.

This transaction is a contract of sale under the Sale of Goods Ordinance, 1913 (No. 26), a contract of sale being defined in sec. 2 (1) as including "an agreement to sell as well as a sale." And under sec. 20, rule 1, " Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery or both, be postponed." On the facts of this case there can be no doubt that the transaction was an executed contract of sale, i.e., a contract plus a conveyance, as distinct from an executory contract, i.e., a contract pure and simple, and that, the property in the goods passed to the plaintiff.

It was hardly seriously objected that the master or principal of the defendant company was not liable for the mistake of the clerk ; the clerk had authority to sell the goods and receive payment for them, and the agent's receipt of the money is sufficient to charge the principal with the receipt. *Matthews* v. *Haydon* (2 Esp. 510.) and *Capel* v. *Thornton* (3 C. & P. 352.) The clerk might have had no power to fix, or alter prices (though the latter apparently he had), but he had no intention of doing so. he named a price he imagined was correct (as authorized by the defendant company) but which, so he states, turned out to be wrong.

Another objection was taken in the course of the case to the, production of a cash-bill, if it is a receipt. The defendants say it is, and I also deem it as such upon the authority of *Ho-a-Hing* v. *Vyfhuis* (Ap. J. 29. 3. 1901. It could not be "pleaded or given in evidence" unless duly stamped, (See Stamp Duties Management Ordinance No. 4 of 1888), sec. 28). It would make no difference in my decision if it had not been put in by the plaintiff, but he was entitled to put it in not as a receipt, but as showing what the terms of the transaction were, that

is as a bill of the articles to be purchased and not as evidence of the amount paid for the purchase. There are several decisions to this effect but I will only refer to *Evans* v. *Prothero* (1 De G. M. & G. 572) where the Lord Chancellor stated "I entertain no doubt . . . that the document in question was receivable as evidence of an agreement, though by reasons of the fiscal regulations of the country, not as evidence of a receipt."

The only question that remains is the very important one of how far—if at all—a mistake of this kind vitiates a contract of sale. A great many cases were referred to by the solicitors for the parties, and Mr. Dinzey relies on the fact that in many cases the court has granted equitable relief in cases of mistake, but apart from the question whether the doctrine of equitable relief applies in the magistrates' courts—there is indeed no power to carry out such relief, nor procedure to apply it—it is laid down by the learned author of Chitty on *Contracts* (15th Edition, p. 831) "Courts of Equity do not rectify contracts they may and do rectify instruments purporting to be made in pursuance of the terms of contracts . . . Where the mistake is that of one party only the remedy, if grantable, is cancellation, not rectification."

There is ho document to rectify here, not even an executory contract from which relief can be given for the contract as we have seen is executed. In *Webster* v. *Cecil* (30 Beavan 62), referred to by Mr. Dinzey, the suit was for specific performance of an executory contract

We find from a perusal of the case law on the subject of 'mistake' that where the mistake is unilateral and the party by whom it was made is the sufferer, relief will not be granted unless there has been some misrepresentation or abuse of confidence, and where there is no ambiguity in the terms of the contract the defendant cannot be allowed to evade the performance of it by the simple statement he has made a mistake. *Tamplin* v. *James* (15 Ch, D. 217. [And see *Cox* v. *Prentice* (3 M. & S. 344) for example of a mutual mistake.] In *Smith* v. *Hughes* (6 Q.B., 597) where the plaintiff sought to recover damages on the price of sixteen quarters of new oats sold to the defendant, but which he refused to receive as he thought he was buying old oats, it was held that the passive acquiescence of a seller in the self-deception of a buyer does not entitle the latter to avoid the contract. Blackburn, J., in the course of his judgment, said: "If whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

In *Islington Union* v. *Brentnall and another* (71 J.P., 407) the defendants, in answer to advertisements of the plaintiffs, tendered for a supply of coal for a period of one year and the plaintiffs duly accepted the tender in the form prescribed by the Local Government Board. On hearing of their acceptance the defendants withdrew their tender on the ground that the price stated therein was so stated by mistake and due to a clerical error. The plaintiffs bought coal elsewhere at a higher price and sued the defendants for the difference. It was held that there was a complete contract and that the defendants were not entitled to withdraw their tender after acceptance and that in the absence of *mala fides* the plaintiff were entitled to hold the defendants to the terms of such contract.

In the present case I cannot find from the evidence that there was any misrepresentation or *mala fides* on the part of the plaintiff; in leaving the greater portion of his purchase in the custody of the defendant company he did not behave like a man who knew there had been a mistake and taking advantage of it wished to snatch a bargain.

The plaintiff in his statement of claim is claiming in the alternative first upon the contract as existing and next for damages for breach of the contract as rescinded. There are no pleadings in the magistrate's court, and that the plaintiff is not entitled to do this was decided in *Tiam Fook* v. *Dare* (Ap. J. 2.4.08), on the ground that in such a case the causes of action are not of a similar nature and could not be joined, as provided by Rule l0 of the Magistrates Rules, 1896 (now 1911).

No objection, however, was raised and the evidence as a whole deals with the contract as an existing one. I therefore merely ignore the alternative of damages for breach as if I had amended the claim by striking that portion out. The plaintiff gives no evidence in support of his assertion that he lost any specific sum by not executing the mail order forms he desired, or that it would have been worth $3.12 a ream to him but he is certainly entitled to some damages for the refusal to deliver the goods. I accordingly find for the plaintiff on his claim and give judgment against the defendant for delivery of the eleven reams of type writing-paper, and in addition the defendant to pay $11 as damages, or in default of such delivery I give judgment against the defendant for $17.73 the value of the said paper, and for $11 damages, and costs 96 cents and allow $3 fee.

REPORTS OF DECISIONS

OF

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1920

WITH INDEX.

Edited by LL. C.DALTON, M.A., Cantab.

Puisne Judge, British Guiana.

GEORGETOWN, DEMERARA :

"THE ARGOSY " COMPANY, LIMITED, PRINTERS TO THE GOVERNMENT OF BRITISH GUIANA

1921

JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1920.

Sir CHARLES HENRY MAJOR, Kt. ..... Chief Justice.
(On leave Jan. 1st-Feb. 16th; July 15th-Sept. 22nd).

MAURICE JULIAN BERKELEY .....Senior Puisne Judge.
(On leave August 4th-Sept. 25th).

LLEWELYN CHISHOLM DALTON, M.A., ... Junior Puisne Judge.
(On leave March 10th-July 22nd).

WALTER JOHN DOUGLASS, B.A., LL.B ..... Acting Puisne Judge.
(Jan. lst-Feb. 12th; Mch. 10th-Sept. 25th).

TABLET OF ABBREVIATIONS.

(ADDITIONAL TO THE USUAL REFERENCES TO ENGLISH REPORTS.)

A.J. or Ap. J..... Appellate Jurisdiction, British Guiana.
Buch. A.C... ..... Buchanan's Reports, Cape Colony.
C.P.D..... South African Law Reports, Cape Provincial Division.
E.D.C ..... South African Law Reports, Eastern Districts Local Division.
F.C. or Full Court...Full Court, British Guiana.
G,J..... General Jurisdiction, British Guiana.
L.J .... Limited Jurisdiction, British Guiana.
L.R., B.G..... Law Reports, British Guiana.
Menzies..... Menzies' Reports, Cape Colony.
P.D. Court ..... Petty Debt Court, Georgetown, B.G.
S.A. L.R., App. J...South African Law Reports, Court of Appeal.
S.C..... Juta's Supreme Court Reports, Cape Colony.
T.S..... Supreme Court Reports, Transvaal.

METHOD OF CITATION.

The Reports will be cited as 1920 L.R., B.G.

[NOTE.—Between March 10th and July 22nd the Reports were edited by Mr. W. J.Douglass, B.A., LL.B.]

INDEX