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CASES

DETERMINED IN THE

SUPREME COURT OF BRITISH GUIANA.

WALCOTT *v.* De FREITAS.

[579 OF 1921.]

1921 DECEMBER 31. 1922 JANUARY 7. BEFORE DALTON, J.

Practice—Discovery—Further and better Particulars—Negligence—Rules of Court, Order XVII, r, 8.

Application by the defendant for further and better particulars.

The plaintiff in the action, Walcott, claims from the defendant de Freitas the delivery of a parcel of rough diamonds of the value of $3,996, or their value. In his statement of claim he alleges that the defendant has been negligent in the care and custody of the diamonds whereby they were stolen. Defendant now asked for particulars of the negligence alleged.

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

E. G. Woolford K.C., for the respondent opposes the application; cites *Crisp* v. *Thomas* (63 L.T. Rep. 756); *Scott* v. *London and St. Katharine Docks Co.* (3 H and C. 596); *Thomson* v. *Birkley* (47 L.T. Rep. 700); *Templeton* v. *Russell* (9 T.L.R. 319); and *Weinbenge* v. *Inglis,* 1918 1 Ch. 133.

DALTON, J.—Plaintiff in this action seeks to obtain from the defendant the delivery of a parcel of rough diamonds of the value of $3,996 or their value.

In paragraph 7 of his statement of claim he alleges in the alternative that defendant has wrongfully deprived him of the diamonds his property "by reason of his having been negligent in the care and custody of the said diamonds," whereby they were stolen.

Defendant now asks for better particulars of the negligence alleged upon which plaintiff intends to rely.

In resisting the application Mr. Woolford admits that as a general rule when negligence is alleged in the statement of claim particulars must be given in the pleading showing in what

respects defendant was negligent. He urges that the mere allegation that the diamonds were stolen is itself *prima facie* evidence of negligence. In support of this he cites the maxim *res ipsa loquitur,* urging that the mere fact of the theft shows want of care and negligence, and that the onus is then shifted on to the defendant. I am unable to argue that the maxim can be stretched to such an extent as is urged or indeed has any application in this matter as it comes before me. Perusal of the cases he cited has not altered the impression formed in my mind on the conclusion of his argument. As the statement of claim now stands it seems to me that defendant may well be taken by surprise if the particulars he asks for are not given, so far as they are within the plaintiff's knowledge. He is entitled to know what case he has to meet. Plaintiff should state 'the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged,' together with an allegation of the particular breach of that duty upon which plaintiff relies.

The case of *Thomson* v. *Birkley* (47 L.T. Rep. 700) cited by Mr. Woolford can be distinguished from this case on the facts. Further I do not see that the particulars should be refused on the ground urged, that it obliges the plaintiff to set out the evidence by which he means to support his case. I do not agree that they do so. Neither am I able to say that under the circumstances an unreasonable delay after the filing of the statement of claim has occurred before making this application to the court. Both parties are I understand engaged in the diamond business and means of communication with the diamond diggings are necessarily slow and tedious.

The application will therefore be granted; particulars as applied for to be supplied to the defendant within fourteen days, failing which, paragraph 7 of the statement of claim must be stuck out. As defendant's solicitor applied in writing to plaintiff's solicitor for the particulars before coming to the court and they were refused, he is entitled to the costs of this application. The time for filing the defence will be extended to seven days after declaring of the particulars.

CANNON *v.* THE ARGOSY COMPANY, LIMITED, & ANR.

CANNON *v.* THE ARGOSY COMPANY, LIMITED, & ANR.

[130 OF 1918.]

APPEAL TO HIS MAJESTY IN COUNCIL.

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

Appeal from a decision of the Court of Appeal. British Guiana, reported at 1919 L.R.B.G. 225, confirming a decision of the trial judge, reported at 1919 L.R.B.G. 81., after leave duly granted as reported at 1920 L.R.B.G. 61.

On the application of the appellant, the plaintiff in the action, leave was granted to the appellant to withdraw the appeal, in the following terms:—

At the Court at Buckingham Palace
The 20th day of June, 1922.

Present,

The King's Most Excellent Majesty.
Lord President. Sir Frederick Ponsonby.
Lord Steward. Hon. Lord Salvesen.
Mr. Munro, Mr. L. C. M. S. Amery.
Lieutenant-Colonel Leslie Wilson.

Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 13th day of June, 1922, in the words following, *viz.*

"Whereas by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an appeal from the Supreme Court of British Guiana (Civil Jurisdiction) between Nelson Cannon Appellant and the Argosy Company Limited and Georgina Cunningham Respondents and likewise a humble Petition of the Appellant setting forth that the above appeal is pending before Your Majesty in Council: that it is desired by the Appellant that the Appeal should be withdrawn the Appellant paying the Respondents' costs incurred in the Supreme Court of British Guiana and in England: And humbly praying Your Majesty in Council to make an Order giving the Petitioner leave to withdraw the Appeal with costs incurred in the Supreme Court and in England to be taxed and paid by the Appellant to the respondents:

"The Lords of the Committee in obedience to His late Majesty's said Order in Council have taken the appeal and humble Petition into consideration and the Solicitors for the Respon-

dents having signified in writing their consent to the prayer of the Petition their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Appellant to withdraw the Appeal:

"And in case Your Majesty should be pleased to approve of this Report then their Lordships do direct that there be paid by the Appellant to the Respondents their costs of this Appeal incurred in the said Supreme Court and the sum of £193 16s. 2d. for their costs thereof incurred in England."

His Majesty having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of British Guiana for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

(Sgd.) ALMERIC FITZROY.

BADUL *v.* LACHMINIA & ANR.

[217 OF 1921.]

1922. JUNE 14; JULY 1. BEFORE DALTON, J.

Sale at execution—Immovable property—Opposition to sale—Levy on executor's property to satisfy judgment for costs against testator's estate—Form of order—Whether costs payable by executor personally—Accounts.

Claim by the plaintiff Badul for an injunction, by means of an opposition action, to restrain the defendants from selling at execution a certain house lot and cultivation lot at Hand-en-Veldt, Mahaica, his property, and for a declaration that the levy thereon be declared illegal and be set aside.

Further necessary facts appear from the judgment.

A. B. Brown, for the plaintiff.

J. A. Luckhoo, for the defendants.

DALTON, J.: The plaintiff opposes the sale at execution of a house and cultivation lot at Mahaica levied upon at the instance of the defendants and asks that the levy be declared illegal. The defendants were proceeding under a judgment of the Court dated May 4th, 1920, in an action between themselves as plaintiffs and Badul (the present plaintiff) as defendant, he being sued however in that action as the executor of Maharajie, deceased, for accounts. He was ordered to render accounts and the order continues 'the defendant does pay the taxed costs of this action'. To recover those costs the defendants in this action levied on Badul's own property, although the proceedings taken against him were only in his capacity as executor of Maharajie.

For the defendants Mr. Luckhoo has argued that the order cited was nothing but an order that Badul personally pay the costs. He admits that Badul was sued as executor only, and that therefore the defendant was Badul in his capacity as executor, but he has argued that if the costs were to be paid out of the estate the order would have so stated. I am unable to agree with him. The interpretation I put upon the order is that the defendant, the executor, do pay the costs and in the absence of a specific direction that he pay them personally, a direction which of course the Court has power to make, it follows that they will be paid out of the estate. (Williams, *Executors* Vol. II., p. 1650). Costs are not paid out of the estate as a matter of course, but the authorities go to show that unless he be guilty of some breach of duty or misconduct, he will not be made to suffer personally. There is nothing here to show that he had acted improperly.

Therefore the defendants were not entitled to levy on Badul's own property for the costs.

But Mr. Luckhoo argues further in the alternative that the property in question was not Badul's but is part of the estate of Maharajie the deceased, and therefore if costs were payable out of the estate the levy was regular and in order. Evidence has been given and Badul's title for the property in ques-ton has been produced. The correctness of this title is not question, but it is argued that in some other matter between the same parties it has been held that the property in question is part of the estate of Maharajie, and that Badul admitted it to be so. I am unable to accept the evidence of Lachminia and Jumni as being at all satisfactory, Neither am I satisfied that proof (conclusive that is against the title produced) was given that the property in question in this action was the same or even part of the property mentioned in the action for accounts, or in the objections to the accounts. The objections refer loosely to twelve house and cultivation lots 'in Helena district, Mahaica.' In the face of the title put in by the plaintiff, I should require much more definite evidence than that given for the defendants to upset Badul's right to the land. It is not necessary therefore to consider what the position would be in this action had I been satisfied that the property was included in the list of those belonging to the estate of Maharajie in the previous action and in which judgment has already been given.

The plaintiff having shown his right to the property levied on, and the two points raised by the defendant being decided against them, as a result the opposition must be upheld and the levy be declared illegal, with costs.

Solicitor for plaintiff, *A. V. Crane.*

Solicitor for defendant, *R. C. V. Dinzey.*

ABDUL WAHID & ORS *v.* STOUTE.

ABDUL WAHID & ORS. *v.* STOUTE.

[16 OF 1921; BERBICE.]

1922. JUNE 7, 8, 14, 15; JULY 5. BEFORE DALTON, J.

Landlord and tenant—Lease of land for rice crop—Breach of contract—Damages—Ploughing and irrigation by landlord—Alleged failure to irrigate—Alleged neglect of crop by tenants—Loss of crop—Onus of proof—Evidence.

Claim by the plaintiffs Abdul Wahid, Bugh, Dundun, Ishmael, Ramjohn, Nanan, Brigpal, Mangar, Budhram, Wajidally, Samaroo, Ibrahim, Gobin, Rambarran, Boodhoo, Nabibacchus, East Indians, residing at Trimuph, East Coast, Demerara, against the defendant Joseph Leacock Stoute for $6,000, damages for an alleged breach by the defendant of a verbal contract entered into between him and the plaintiffs in or about April, 1920, whereby he rented to the plaintiffs one hundred acres of land at plantation Abary for rice cultivation for the 1920 crop, and to irrigate the land. The plaintiffs planted and cultivated the land, but alleged that owing to defendant's failure to irrigate it, the crop was totally lost to them. The defendant counter-claims for the sum of $1,000, $500 for rent alleged to be due, and a further $500 for work and labour done by him in ploughing the land for the defendants.

J. A. Luckhoo, for the plaintiffs.

J. S. McArthur, for the defendant.

DALTON, J.: The plaintiffs, sixteen in number, are claiming from the defendant $6,000 for alleged breach of contract. The defendant counter-claims for $1,000, for rent and for work and labour done.

The statement of claim sets out that the defendant rented to the plaintiffs, in April, 1920, one hundred acres of land (called hereafter field No. 3.) at plantation Abary for rice cultivation, for the 1920 crop, the defendant to plough and irrigate the land, the plaintiff's to pay $11 per acre for rent, ploughing and irrigation; that they paid $100 on account of the amount payable and cultivated and planted the land, but that owing to the failure of defendant to irrigate the land or any part of it the padi was blighted and withered and wholly lost to plaintiffs, As a result they say they lost their crop estimated to produce 1,800 bags of padi, and they therefore claimed $6,000 damages.

The defendant denies that he made any agreement with the plaintiffs as alleged, but states he made an agreement with one of them only, Abdul Wahid, agreeing to rent to him 100 acres at $5 an acre, and agreeing further to plough the land at $6 an acre. He also agreed to drain and irrigate the land leased. This he says

he did, but the plaintiff's (Abdul Wahid's) padi was neglected by him and became overgrown with grass as it was never weeded and as a result the padi became choked and died out. He accordingly counter-claims for $500 rent at $5 an acre, and a further $500 for work done in ploughing the land at $6 an acre, $100 thereof having been paid when the agreement was made.

The first point I have to decide is whether the agreement made was between the 16 plaintiffs and the defendant, or between Abdul Wahid alone and the defendant. As to that I come to the conclusion that the weight of the evidence is in the plaintiffs' favour. There is no doubt that the defendant preferred to deal with one person only as leader or spokesman for the rest, but Abdul Wahid was no more than that, the person with whom defendant should deal for the 'company'. He was not entering into a contract for himself, and then to sublet to the others, but he was nominated as the agent through whom the defendant would deal with all the lessees whom defendant assisted in dividing up the leased area. It was obviously an arrangement for the convenience of all parties.

The second point to be decided is as to the terms of the agreement or agreements. Was there one agreement to rent, plough and irrigate at $11 an acre, or was there one agreement to rent and irrigate at $5 an acre and a further agreement to plough at $6 an acre? Again on this point I find in favour of the plaintiffs. It is no doubt unfortunate that the receipt or receipts given for the $100 advance cannot be found, but even if it or they were forthcoming and was or were in the terms to which defendant deposes, it or they would not affect my finding on this point. No doubt, as defendant was to do work for the plaintiffs under the agreement made which would require him to incur expense, an advance by the plaintiffs was requested, and that work consisting of ploughing, it might well be called loosely an advance for ploughing. But, as in the contract with Sukdeo Maraj, a witness called by the defendant and so far as I could judge a fair and intelligent witness, so in the case of these witnesses I find that the amount to be paid by the plaintiffs under their agreement was $11 an acre, that amount to include rent, cost of ploughing and water.

The plaintiffs sowed their seed on the land rented, not planting it out from a nursery but by a process termed locally 'saaiing,' scattering the seed broadcast. The third and last point that I have to decide is whether the resulting crop failed, as the plain-tiffs allege, from defendant's failure to give it water in terms of his agreement, or as defendant urges from the plaintiffs' negligence to weed the crop whereby the padi became choked and died out. This is a question which has given me great difficulty,

and I will say at once that I am unable to give any definite answer to this question on the evidence that has been put before me. For a great part, two of the plaintiffs Abdul Wahid and Brigpal, and the defendant himself impressed me very favourably, but on the other hand they all three at times, and at important times as regards this particular question I am considering now, seem to me to depose to alleged facts or the existence of a state of affairs Which is inconsistent with other statements they have made. There is unfortunately no independent evidence led by either side, evidence, that is, of reliable persons not parties in the action and not in the employment of the parties, who might have been called in by either or both sides as soon as the dispute arose in August, 1920, to visit the padi fields and see the actual state of affairs at that date, the condition of the crop, or the state of the creek and pump. There is also a marked absence of evidence from other rice growers on the plantation, persons, for instance, spoken of as having planted padi in fields No. 1 and 2. It is true that defendant alleges that the crops on these two fields were entirely destroyed by ducks, but it certainly struck me during the course of the trial that the lessees on those fields might be called by the plaintiffs to support their allegations of want of water. If the duck story is true it also seems strange that the ducks confined their attention to fields 1, 2 and 4 and left field 3 alone.

Of the sixteen plaintiffs five gave evidence. It is not necessary to go over their statements as to their visits to Abary until we come to the month of July. I accept defendant's statement that he never saw Abdul Wahid after May until August and that not one of them made any complaint to him in July as to the lack of water. He kept a small diary which has several notes in it as to Abdul Wahid's visits to him and I have no doubt any interview with Abdul Wahid in July would have been noted by him therein. It is clear however that visits to the Abary may have been made by the plaintiffs during defendant's absence. It is in the month of July that they first speak of the want of water; although one of them, Wajidally, states that there had not at any time been any water in field No. 3. On the 21st of that month the defendant wrote a note to Abdul Wahid in the following terms: "I find there is not sufficient water in the field to clean it up and supply the rice and it would be no good the people coming. I have opened water from the creek; as soon as there is sufficient I will let you know." On July 28th the defendant began pumping (so his pay-list shows) but a few days later the pump broke down. He says the defect was cured and pumping began again about August 12th and continued until November 3rd. But the description of the plaintiffs as to the condition of the crop at the

end of July differ, Abdul Wahid says that about two weeks after he got the letter, which would be early in August there was no water and the padi was getting dry. Brijpal says he visited the place about a week after the letter in question was received, that the rice was getting dry, there was no water, and further that as defendant said he could not supply water then, he never went back again to see after his crop. Bugh and Ibrahim speaking of the same time are much more graphic; they say the padi was all scorched and burnt up, and the land had big cracks in it. And yet Ragbeer, a witness called by them but who did not impress me as a reliable individual, states that in the same month he had been employed opening cuts in No. 3 field to let out water, rainfall, which was six to twelve inches deep. And as regards weeding amongst the padi or cleaning it, it certainly seems to me that very little of that was done. That there was a considerable amount of grass in it there is no doubt, but Abdul Wahid states he never allowed the grass to take over the padi. But Brigpal says that the grass could not be cleaned out unless there was water there, and he denies that he pulled out any grass although Ragbeer says he saw him doing so. From the amount of seed sown and from the acreage sown, it would seem that the crop would be a thin one which might naturally result in a bigger growth of grass and 'bisi-bisi'. Ibrahim agreed that water was necessary for cleaning the padi, picking out the grass, but says there was no grass there. Defendant however states "There was so much grass in field you could hardly see the rice. On August 5th place was overgrown with grass, 'Bisi-bisi' up to my waist—Wahid said grass had taken over the field and would have nothing more to do with it. Grass will kill out rice." And yet after this the defendant admits he went on pumping valuable water on to this field of grass up to November 3rd, incurring as he admits great expense. It is very difficult to reconcile this conduct, if the condition of this padi on August 5th 'passed cleaning by hand' he says, was so bad as he makes out. The evidence of Sukdeo does not assist any further on this point as he is quite uncertain as to months and time. He speaks of being called to No 3 field at a date he puts in August (but he subsequently admitted he did not know the months) and he then saw a little water, 2 to 4 inches, but the higher ground was dry. And an analysis of the further evidence has not given me any help. The more I consider it the greater becomes my difficulty of reaching a conclusion on this last question either way. There is some evidence no doubt whence one might conclude that both plaintiffs and defendant contributed to the failure of the crop, the plaintiffs in their neglect to clean the padi and the defendant in his failure to supply water at critical time owing to the breakdown

of the pump. This latter fact may have disheartened the plaintiffs and have caused them to throw up the results of their work too soon, and with little effort themselves to improve matters. But there is not sufficient evidence one way or the other to say which party if any was most to blame. Whether the crop failed from the plaintiffs' negligence or from the defendant's failure is a question which must necessarily remain unanswered.

As a result, for I am relieved of my embarrassment by the law, I have to consider upon whom the burden of proof falls. Here there is a counterclaim by the defendant as well as a claim by the plaintiffs. In respect of the plaintiffs' claim therefore, they have failed to discharge that onus which rests upon them and there must be judgment for the defendant; in respect of the defendant's counterclaim, he has failed to discharge that onus which rests upon him and therefore there must on that be judgment for the plaintiffs. As regards costs no order will be made, each party under the circumstances paying their own.

Solicitor for plaintiffs, *E. A. Luckhoo.*

Solicitor for the defendant, *A. G. King.*

In re VALLADARES.

In re VALLADARES.

[2 OF 1907.]

1922, JANUARY 14. BEFORE DALTON, J.

Insolvency—Application for discharge—Immediate discharge—Special circumstances—Effect of delay in application—Insolvency Ordinance 1900, S 26 (*3*)

Application by insolvent for discharge.

The Official Receiver reported that the receiving order was made on March 1st, 1907, against the applicant John Llewelyn Valladares and two others as individuals and as carrying on a business under the same of Craig, Browne & Co. and that the insolvents' assets were out of a value equal to fifty cents in the dollar.

Evidence was led by applicant to show that the fact that the assets were not of a value equal to fifty cents in the dollar on the amount of the unsecured liabilities arose from circumstances for which he could not justly be held responsible.

J. A. King, Official Receiver, in person,

A. G. King, Solicitor, for the applicant.

DALTON, J.—Applicant was adjudged insolvent on March 8th, 1907. He carried on business in Georgetown with two partners under the name of Craig, Browne, & Co. In reporting on the application the Official Receiver states that the insolvent's assets were not of a value equal to 50 cents in the dollar on the amount of his unsecured liabilities. Therefore, under the provisions of S. 26 (3) of the Insolvency Ordinance the insolvent is not entitled to an immediate discharge, nor am I empowered to grant it unless he satisfies me that the fact that the assets were not of a value equal to 50 cents in the dollar arose from circumstance for which he cannot justly be held responsible.

Taking into consideration the facts set out in the Official Receiver's report, the evidence of the applicant, and the witness Cheeks, and the litigation during which the insolvent was kept out of the business by his partners, it seems to me that he may justly plead that he was not responsible for the fact above set out.

Does however the delay in making the application affect the order I should make? The adjudication was made 14 years ago. The reason given for delay is want of means to pay fees, and the fact that the insolvency did not prevent the applicant from obtaining employment. Now he states unless he obtains his discharge he will lose an opportunity of making a livelihood and be out of employment. He has undoubtedly been guilty of delay,

but that delay was not due to any improper motive. Therefore under the circumstances the application will be granted and an order for discharge made.

In re BELGRAVE.

1922. JULY 8. BEFORE DALTON, J.

Insolvency—Administration order—Indebtedness exceeding $500—Debtor declared insolvent—Insolvency Ordinance, 1900, s. 104 (1) & (13).

Application by Roland de Castro Belgrave for an administration order under the provision of section 104 of the Insolvency Ordinance, 1900, and for the payment of his debts by instalments. The applicant set out that the total amount of his debts was $369.

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

Official Receiver (*P. W. King*) in person.

C. R. Browne, H.C. Humphrys, and *J. A. Luckhoo,* appeared for creditors to oppose the granting of the order.

The applicant was examined on oath and cross-examined by counsel.

After remarking on the unsatisfactory nature of applicant's evidence and his failure to give a full and proper explanation of his position, it appearing further that his total indebtedness exceeded the sum of $500, the Court dismissed the application.

An application was thereupon made by counsel for a creditor that applicant be declared insolvent. After reference to the Official Receiver, the court being under the impression that it had power in these proceedings to make the order, counsel's application that the applicant be declared insolvent was granted.

It subsequently, before the court's order was drawn up and signed, appearing that there was no power save under section 104 (13) of the Insolvency Ordinance to declare the applicant insolvent in these proceedings, that sub-section not applying, the order was made dismissing the application only.

RAMKELAWAN & OTHERS *v.* MATTHIAS.

RAMKELAWAN & OTHERS *v.* MATTHIAS

[119 OF 1921.]

1922. JULY 11. BEFORE DAMON, J.

Practice—Judgment—Application to set aside judgment—Default of pleading by defendant—Rules of Court 1900, Order XXXV, r. *13—Costs.*

Application by the defendant Matthias to set aside a judgment obtained against him in default of a defence, and for leave to defend the action by delivering a defence within ten days of the Court's order herein.

The plaintiffs had obtained judgment on June 13th, 1922, against the defendant, after a hearing *ex parte,* under the provisions of Order xxv, r. 5, in the sum of $700 and costs.

The grounds of the application are sufficiently set out below.

S. J. van Sertima, for the applicant.

J. A. Luckhoo, for the respondents, the plaintiffs in the action.

DALTON, J.: This is an application by the defendant to set aside a judgment obtained against him in default of a defence. His application is supported by an affidavit and correspondence attached thereto which purports to show why no defence was filed and also to show that he has a good defence in the action on the merits. As regards his defence he alleges that two of the plaintiffs made no agreement with him at all as they allege, that the damage, if any, was done by the plaintiffs own cattle, and that in October. 1920, the rice crop throughout the whole district in question was burnt up by the drought. 1 am satisfied that in this affidavit he sets out sufficient to grant him leave to defend the action on the merits.

But I must attach conditions to the granting of the application for it is clear that he has not been free from negligence in the matter. The correspondence upon which he relies shows that, whilst the hearing of the action was duly advertised in the *Gazette* and local papers, he made no move nor did he reply to the letters. His counsel also admits that defendant failed to make any enquiry of his own solicitor as to the hearing of the action nor did he apparently attempt to file any defence. He must therefore pay all the costs subsequent to the statement of claim, which have been thrown away and also the costs of this application. The judgment of June 13th will be set aside upon payment by him within twenty-one days alter taxation of all costs herein thrown away and of the taxed costs of this application, and he will be at

liberty within fourteen days thereafter to file his defence in the action; failing compliance with these conditions the judgment of June 13th stands and defendant will pay the costs of this application.

In re PIMENTO & D'OLIVEIRA LTD.

[1 OF 1922.]

1922. JULY 13. BEFORE DALTON, J.

Company—Winding up—Practice—Appointment of liquidator—Determination of creditors and contributories—Result of meetings—'Unanimous'—Companies (Consolidation) Ordinance, 1913, s. 140—The Companies Winding Up Rules, 1905, r. 52.

Application by the Official Receiver in the winding up of the company to make the appointments of liquidator and committee of inspection to give effect to the determination of the meeting of creditors held in conformity with law.

P. W. King, Official Receiver, in person.

DALTON. J.: Application is made to me by the Official Receiver as provisional liquidator of the company to approve forthwith of the appointments of liquidator and committee of inspection, made at a meeting of creditors of the company held on June 30th, under s. 140 of the Companies (Consolidation) Ordinance. 1913. The application is made under the provisions of rule 52 (2) of the Companies Winding Up Rules, 1905.

From the report of the meeting it appears that the appointment of the proposed liquidators was not unanimous, although the committee of inspection was unanimously approved of. There are no contributories.

The Official Receiver has urged that the word 'unanimous' in rule 52 (2) refers to a unanimity between the resolutions of the creditors and contributories and not to a unanimous resolution of creditors alone or contributories alone. Such however did not appear to me to be the correct interpretation of the rule. On further consideration I find this question was decided in *in re Johannisberg Land and Gold Trust Co,* (1892 1 Ch. 583), decided before the present English rules were enacted. Rule 63 (2) of the Companies (Winding Up) Rules, 1890, now annulled, is the same as our rule 52 (2). In the case I have referred to it was

held by the Court that the word 'unanimous' does not refer to a unanimity in the two meetings of creditors and contributories but to a unanimity of all the creditors and all the contributories at the meetings. In other words it does not mean an identical result following on the two meetings. As the creditors were not all unanimous the appointment of liquidator therefore cannot summarily approved of, but a day must be fixed for considering this determination of the meeting and of making the necessary appointment. I will accordingly hear the application, after notice has been duly given, on Saturday, the 29th instant, at 10.30 a.m.

NAIPAL *v.* RAGHUNUNDUN MARAJ.

[169 OF 1922.]

1922. JULY 15. BEFORE BERKLEY, ACTG. C. J.

Bill of sale—Loan bank—Misappropriation of tank funds by secretary—Bill of sale by secretary over personal property to customer of bank defrauded—Consideration.

Interpleader action.

Raghunundun Maraj had obtained judgment against one Shiv Harack and proceeded to execution thereon, levying on certain movable property as the property of Shiv Harack. Naipal now claimed the property levied on under a bill of sale alleged to have been given by Shiv Harack. Shiv Harack had been convicted in May, 1922, on a charge of making false entries in the books of the loan bank of which he was secretary and in which Naipal had deposited money, which money had been appropriated by Shiv Harack. For the claimant Naipal it was now urged that his forbearance to exercise his right of action against the loan bank to recover the sum was a good consideration for the bill of sale given him by Shiv Harack; alternatively the assumption of personal liability for the sum by Shiv Harack with the claimants consent, the bank having disclaimed liability, constituted a novation.

M. Singh for the claimant, the plaintiff.

E. P. Bruyning, for the defendant.

BERKELEY, ACTG. C. J.: This is an interpleader action in which the plaintiff claims under a bill of sale certain articles levied on by the defendant (execution creditor) in *Maharj* v. *Shiv Harack.*

The facts are that the judgment debtor. Shiv Harack, was

secretary of the loan bank, Essequibo. The plaintiff who had an account with that bank handed him $840 to place to his credit. At that time he had $200 to his credit. Instead of doing this the secretary appropriated the $840. Due to his defalcations he was dismissed and after his dismissal he gave the plaintiff a receipt which he recalled. He then gave him a promissory note, which later on he also recalled, and gave him the bill of sale produced, and under which this claim is brought. The secretary of the loan bank received this $840 in behalf of the bank and the plaintiff believed it was added to his account. I find that there is no consideration for the bill of sale. Judgment must be given for the defendant with costs.

Solicitor for the plaintiff, *H. B. Fraser.*

Solicitor for the defendant, *W. I. Souza.*

*[An appeal to the West Indian Court of Appeal has been lodged in this case, leave to appeal having been granted.]

* Abandoned.

WEST *v.* SWAN.

[23 OF 1922.]

1922. JULY 19. BEFORE BERKELEY. ACTING C.J.

Criminal law—Obeah—Possession of articles for the purpose of using them in practice of obeah—Evidence—Summary Convictions (Offences) Ordinance, 1893, Amendment Ordinance, 1918.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. G. R. Reid). Mary Swan was charged with having in her possession various articles, for the purpose of using them in the practice of 'obeah,' contrary to the provisions of s. 5 (2), Ordinance 26 of 1918. The articles in question were one calabash, two phials, one bottle containing 'liquid', one tin of gunpowder, four pieces of paper, one with names of persons written thereon, and a quantity of grass and white feathers. She was convicted, and appealed.

The reasons of the magistrate for his decision were as follows.

> "It is quite clear that some or all of the exhibits were being used in obeah practices. The sprinkling of rum and blood was abundantly proved and the defendant's explanations of these and of the assafoetida were nonsensical. The exhibits C7 and C8 were also evidently being used in connection with

> illegal practices. The fact that she snatched and tore up one of these exhibits and gave a false explanation of it was some evidence of guilt in this connection and it was clear from her own admission that she was trying to put obeah on the persons whose names were written in the circle C8. The evidence as to the other exhibits speaks for itself. I discharged Jones from the case as he did not seem to be more than a visitor at Swan's house."

The reasons for appeal were shortly, that there was no evidence to show appellant was in possession of the articles for the purpose of using them in the practice of obeah, or that she pretended the assumption of supernatural power and knowledge for any purpose at all.

B. B Marshall, for the appellant.

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

BERKELEY, ACTG. C.J.: This is an appeal from the stipendiary magistrate of the Georgetown judicial district who convicted the appellant of having a quantity of articles and things used for the purpose of practising obeah in her possession.

The articles consisted of a bottle with rum, a calabash containing a quantity of liquid dirt and grass, three phials which smelt 'funny' (assafoetida?), a tin of gunpowder, some grass, some feathers, one candle, some quicksilver, some three pieces of cloth.

Police Constable Mentis says: "I have seen grass in obeah cases. . . . . I never heard of gunpowder used for eyes." "Assafoetida is used in most obeah cases." This is the only evidence that some of these articles are used for the purpose of practising obeah.

On this evidence the conviction cannot be upheld.

Appeal allowed with costs.

NORTON *v.* STABROEK BUTCHERY LTD.

NORTON *v.* STABROEK BUTCHERY LTD.

[375 OF 1922.]

1922. JULY 24, 28. BEFORE DALTON, J.

Weights and measures—Weighing machine—'Unjust' scales—Possession—Master and servant—Possession by servant for own fraudulent purposes—Weights and Measures Ordinance 1851. s, 12.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. G. R. Reid.)

The defendant company was charged with having in their possession an unjust weighing machine, contrary *to* the provisions of Ordinance 2 of 1851. The magistrate dismissed the complaint and the complainant, a commissary of taxation, appealed.

The necessary facts, reasons for decision, and reasons for appeal therefrom are sufficiently set out in the judgment below.

H. C. F. Cox, Asst. to A.G. for the appellant

J. S. McArthur, for the respondent company.

DALTON, J.: The respondents were charged by the appellant, a commissary of taxation, with having in their possession at stall No. 7. Cummingsburg market, Georgetown, an unjust weighing machine, contrary to the provisions of section 12 of Ordinance 2 of 1851. Sub-section (3) of that section provides that 'every person who has in his or her possession a steelyard or other weighing machine which on . . . examination is found incorrect or otherwise unjust . . . shall be liable to a like penalty.' The magistrate dismissed the complaint giving the following reasons for so doing:—

"In my opinion the scale itself was a just one and it was in the possession of the company through its servant Seales. The only thing which made it an unjust scale was a lump of lead which on the evidence was clearly added by Seales for his own purposes and against the interests of the company and entirely without the knowledge of any one in control of the company . . . Here both the company and its servant may be said to be in physical and legal possession of the scale but the lump of lead belongs to Seales only. . . . On the facts the scale is a just one. It is only unjust in the way it is used. If it were so used (1) either by the company or its manager, (2) if its use were for the company's benefit, (3) the company countenanced it any way, it would be proper to convict the company under the section, but here not only is its use not countenanced but the company has everything

to lose and nothing to gain by its servants defrauding the public in this way, and I feel . . . . I should be straining the Ordinance to convict."

The complainant appealed on the grounds that the magistrate's decision is wrong in law, that on his finding the weighing machine was in the possession of the company and it being an unjust weighing machine when so found, he should have convicted the respondents.

The evidence shows that when the commissary visited the stall he there saw a piece of lead attached to the bar of the scale. Seales, who was the company's salesman at the stall, as soon as he saw the commissary at once, seized the piece of lead and threw it away, but it was subsequently recovered. When attached to the scales it is not denied by the company that the scales, supplied by them for use at their stall, are unjust, but I think it is satisfactorily proved that they did not benefit from its use. The benefit went to Seales. It is upon this fact that Mr. McArthur rests his argument supporting the magistrate's decision. He cites the case of *Attorney General* v. *Siddon* (1 C. and J. 220), and urges that the finding of the scales and lead in the possession of the company's servant is *prima facie* evidence against the company on a charge of possession of an unjust scale, but they have rebutted the presumption which flows from that evidence by showing that they derived no benefit at all from the act of their servant and that they are not answerable for his tampering with the scales as he did.

In putting forward this argument, however, he loses sight; it seems to me, of the actual offence which is charged. The charge is one of being in possession of an unjust weighing machine, nothing more. *Mens rea* is not an element in this offence at all. In the words of Channel, J., in *Anglo-American Oil Coy., Ltd.* v. *Manning* (1908 1 K.B., at p. 541), 'the offence is within the class where the Legislature has absolutely prohibited certain acts being done, with the consequence that if they are done, although by a servant of the employer, done in any sense in the course of the employment . . . . the employer may be convicted although he is not in any way morally culpable.' And Alverstone, L.C.J., points out in *London County Council* v. *Payne & Co.* (1904, 1 K.B. 194) that a condition of things which is perfectly innocent in itself may exist and still there may be a contravention of the statute because the scales are kept in a condition in which they will not accurately and justly weigh that which is put in them to be weighed. And so in an old local case *Dinez* v. *Swain* (R.C. April 15th, 1882) Chalmers, C.J., in reply to the argument that an unjust weight had not been used with any guilty knowledge, replied that the law attaches the penalty to the mere possession independently

of the motive of possession. The object of the law is to ensure the safety of the public from loss, not only in the user by the shopkeeper but also in his possession of an accurate machine for obvious reasons.

And what is the meaning of an "accurate" machine? The learned magistrate in this case says: 'On the facts the scale is a just one, it is only unjust in the way it is used.' I confess I have some difficulty on the facts here in appreciating the distinction he would seek to draw. A scale is false or unjust if it does not hang true at the time of weighing when an equal weight is put into the goods scoop and into the weight dish on the other side, and the offence of using a scale which is false or unjust may be constituted by using a scale which is unjust as a scale when in use (*London County Council* v. *Payne & Co.* 1905 1 K.B. at p. 414-415). At the time the commissary visited the stall it is not denied that the scales had affixed to them the piece of lead, as a result of which the scales were eight drams out to the detriment of the purchaser. All that has been clearly proved. The scales were therefore not accurate but unjust at that time, that is, they did not show correctly or were not in a proper condition to show correctly the weight of the meat put into the pan of the scale, because of the addition of the piece of lead to the bar under the pan. To say that the scales were just but the use only of them unjust is to my mind not a correct description of the position at all. As Ridley, J., points out in *Lane* v. *Rendall* (1899 2 K.B. 673), whether a piece of paper is placed on the scale or a piece of lead is attached to it (and that is the exact position here) so as to increase the weight the balance is unjust and the weighing machine so adjusted or used is an unjust weighing machine.

And it seems to me that the respondents cannot evade responsibility in this case by saying that the lead was affixed without their knowledge, or claim that whilst the scales were in their possession the lead was not. The case of the *Anglo-American Oil Co., Ltd.* v. *Manning,* which applied the principle in reference to civil liability for torts that an employer is not liable for the fraudulent acts of his servant when committed not in the interests of the employer but for the individual purposes of profit of the fraudulent servant was relied upon by Mr. McArthur. But the court there pointed out that that principle was not strictly applicable to the case before them, but they seem to have felt it to be such a hard case on the facts as to apply the principle. But they go on to say that they wish to make it quite clear and point out they are not considering a case where an employee in a shop makes an instrument fraudulent and continues to use it. In such a case as that they could not say that his possession of the false weighing instrument must be deemed to

be his own possession and not the possession of his employers. The case they were considering they call a 'very special case' and they state, always rather a forlorn hope I think, that it will not be a precedent which will govern any future cases, However that may be, it does not govern in its decision on the facts the case now before me.

For these reasons therefore I come to the conclusion that the decision of the magistrate was not right in law and the appeal must be allowed with costs. The case will be remitted to him with directions to convict the respondents.

Appeal allowed.

Solicitor for the appellant. *Crown Solicitor.*

Solicitor for the respondent, *A. V. Crane.*

In re MOHUN; *ex parte* OFFICIAL RECEIVER.

[5 of 1919.]

1922, JANUARY 30. BEFORE BERKELEY, J.

Insolvency—Compromise—Official Receiver as assignee—Deposit by debtor of sum of money —Payment of fees thereon—Insolvency Rules 1901, rr 169, 170; Schedule of Fees.

Application by the Official Receiver for a certificate of release as assignee of the property of Mohun, debtor.

The Accountant of Court reported that the sum of $3,050 was lodged by Mohun with the Official Receiver for distribution amongst his creditors in accordance with a compromise entered into and approved of by the Court, and that the estate had been debited with $186.91 being 8 per centum or $2,336.35 (part of the $3,050) which the Official Receiver claimed as fees of office. This debit was questioned by the accountant on the ground that no part of the sum $3,050 was an amount realised by the Official Receiver. Reference was made to the Insolvency Rules, 1901, Schedule of Fees; Fees for Official Receiver, item $8, for every $100 received.

BERKELEY, J.: Rule 169, which in effect corresponds with the English rule 209, provides that when a composition or scheme is approved of, "the Official Receiver shall, on payment of . . . . . all fees and percentages payable to the Official Receiver forthwith put the debtor (or as the case may be, the assignee . . . . .) into possession of the debtor's property." Rule 170 provides that under certain circumstances the Official Receiver shall be the assignee. Under 'Fees for Official Receiver,' p. 122, it is provided that the Official Receiver, whether acting as such or as assignee, shall receive a certain percentage on every one hundred dollars received by him. It is my opinion therefore that in either capacity he is entitled to the percentage which is limited to the actual moneys received by him either as Official Receiver or assignee.

LEANDER *v.* PAYNE.

[424 OF 1922.]

1922. JULY 24, 31 BEFORE DALTON, J.

Criminal law—Indecent assault—Evidence—Statement by complainant to third party— Statement made by third party to prisoner—Admissibility.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. G. R. Reid).

The defendant Payne was charged with indecently assaulting a girl named Joseph, some ten or eleven years of age and was convicted. He appealed, the reasons for appeal being set out in the judgment below.

S. J. van Sertima, for the appellant.

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

DALTON, J.: The appellant has been convicted on a charge of indecently assaulting a girl of about ten or eleven years of age and has appealed from that conviction on the ground that illegal evidence was admitted at the trial, and that the learned magistrate's decision was based upon inferences unsupported by the evidence in the case.

The girl herself gave evidence implicating the appellant; her evidence as to the fact that she had been assaulted was supported by the medical evidence; and the magistrate adds that her

story was supported 'by just the kind of complaint to the aunt Gittens that one would have expected to have been made.' The defence was that at the time of the assault the appellant was elsewhere, but the learned magistrate finds the *alibi* was a very weak one.

The case has given me some difficulty because, as counsel rightly points out, there are certain inferences drawn and conclusions come to by the learned magistrate in his reasons for decision which certainly cannot be drawn or come to on the evidence on the record before me. It is possible, of course, in writing his reasons he may have relied more on his memory of what passed at the trial than on the evidence taken down. I must, however, deal with the matter as it comes before this Court on the copy of proceedings sent up.

In this class of case it is important to scrutinise carefully the evidence which is said to corroborate the story of the complainant implicating the accused person. The medical evidence, of course, does not usually help to that end and it is. so here. The girl, however, gave evidence on oath and so this is not one of the cases in which the Court cannot act upon the uncorroborated statement of a single witness if satisfied with such evidence. Having in mind, however, no doubt the danger there is in taking such a course owing to the fact that in cases of this kind false charges can so easily be made and are difficult to disprove, the learned magistrate looks for and records that he finds that supporting evidence in 'just the kind of complaint' to the aunt by the girl that one would have expected the girl to have made.

Before considering whether there was any complaint by the girl, and if so, what it was, it is necessary in this case to distinguish, for purposes of evidence, between firstly, a complaint made by the person assaulted respecting the assault to a third person not in the presence of the accused, which is admissible as regards the particulars of the complaint, not as evidence of the truth off he charge against the accused, but as evidence of the consistency of the conduct of the person assaulted with the story told by her in the witness-box, and secondly, a statement made to the accused or in his presence and hearing, accusing him of committing the offence charged, which is admissible as regards accused's conduct, in respect of the particulars contained in the statement, only in so far as he has by words or demeanour accepted the statement as being correct. If there was a complaint then (and appellant's counsel urges there is no evidence of it), the particulars disclosed in it are evidence only corroborating the credibility of the girl and not as evidence of the truth of the charge alleged. Because he makes use of the words 'the kind of complaint made,' Mr. van Sertima urges that the learned magistrate has taken the terms of

the complaint which he had in his mind to be evidence of the truth of the charge the girl makes against the accused. What does the evidence disclose as regards this alleged complaint? The girl says: "I told my aunt when she came in." What did she tell her? She does not say. To be of any value, it should be clear that what she told her aunt was voluntary or spontaneous and was consistent with the history she told the magistrate. All the aunt says is: 'She told me something.' It is true the aunt went later to the accused and made a statement to him with which I shall deal, but the record is silent as to the particulars of the complaint, if any, which the girl is alleged to have made to her aunt. In fact it might be argued that from the aunt's evidence the girl made nothing in the nature of a 'complaint' to her at all. Why such evidence was not given if it was available and relevant I cannot say. The 'something' referred to by the aunt must be assumed to be something that could not be given in evidence, a statement which was inadmissible, which explains why it was referred to in that way. But it appears that later the same night the aunt went to the accused's house and there made a statement to him accusing him of assaulting the child and repeating to him what she said the child had told her implicating him. This statement comes within the second class to which I have referred above. The accused at once denied the charge. That statement the magistrate admitted in evidence and, counsel urges, wrongly. The principal authority on the point (*Rex* v. *Christie* 1914 A.C. 545) lays down a rule of prudence and discretion which, if not a rule of law, it is 'most prudent and proper to follow in practice' that such a statement alleged to have been made in accused's presence should not be tendered in evidence unless there is a foundation for a reasonable inference that the accused accepted it or part of it. As I pointed out in *Franklin v. Giddings* (1920 L.R.B.G. 147) referring to 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. I can see here no foundation for any reasonable inference that accused accepted the statement made to him by the aunt, and hence it should have been rejected by the magistrate. There is further no evidence of any complaint made by the girl to her aunt, apart from this belated (if I may so call it) statement the aunt made to the accused. Even if it be admitted (and it is not admitted) that the girl did say to her aunt what the aunt set out in her statement to the accused, it has not been shown to comply with the requirements governing the admissibility of complaints, and so is not admissible on that ground.

There is therefore no evidence corroborating the story of the girl connecting the accused with the assault upon her. As I have pointed out, the learned magistrate *might* have convicted him on her uncorroborated story, but I am satisfied he w*ould* not have done so. There are in addition one or two other points raised by the defence which do not seem to have been satisfactorily explained by the prosecution. All through the case the girl gives the accused the name of 'Percy.' She says 'Percy' committed the assault and that the accused man is 'Percy.' So far as I can see no one else gives him that name nor is it his name. There was however a crippled boy said to be about 14 years of age in the house with her who bears that name. The learned magistrate had him called and states he did not think from his appearance he was physically developed or able to commit the offence and that it was against all probability that he could have done it. I do not think the doubt which must have been present in his mind could be removed in that way. At any rate it is far from conclusive. Then again the aunt admitted she was on bad terms with relatives of the accused before the occurrence.

On the ground, therefore, that part of the evidence relied upon by the learned magistrate was wrongly admitted as it was of no evidential value, and that in my opinion he would not have come to the same conclusion *i.e.*, to convict the accused if he had disregarded that evidence, the appeal must be allowed and the conviction quashed. Appeal allowed with costs.

Appeal allowed.

SILAS *v.* PYROO.

SILAS *v.* PYROO.

[361 OF 1922.]

1922. AUGUST 4. BEFORE BERKELEY, ACTG. C.J.

Food and drugs—Adulteration of food—Milk—Analysis—Milk in course of delivery to purchaser or consignee—Refusal to sell sample to officer—sale of food and Drugs Ordinance 1918, s.19

Appeal from a decision of the stipendiary magistrate of the East Coast judicial district (Mr. J. H. S. McCowan).

The complainant, a sanitary inspector, charged the defendant Pyroo with refusing to sell to him at Sparendaam in the said district on April 3rd, 1922, one pint of milk for the purpose of analysis, a reasonable sum being tendered for the same, contrary to the provisions of s. 19 of Ordinance 38 of 1918.

The defendant was convicted and now appealed.

The reasons for appeal were as follows:—

(1) The refusal to sell was justified, appellant not being a licensed milk vendor.

(2) The property in the milk had passed from appellant to one Josephine Honibal, before a demand to sell was made.

(3) The milk was not exposed for sale.

G. T. Ramdeholl, for the appellant.

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

BERKELEY, ACTG. C.J.: This appeal is from the decision of the stipendiary magistrate of the East Coast judicial district.

Sanitary Inspector Silas (now respondent) complained against Pyroo (now appellant) that on the 3rd April 1922, he did refuse to sell to him one pint of milk for the purpose of analysis, a reasonable sum being tendered for the same contrary to Ordinance 38 of 1918, s. 19.

The facts are:

(a)Mrs. Honibal, licensed to sell milk, entered into a verbal contract with the appellant to buy as many pints of milk as he brought to her each morning and to pay weekly for same.

(b)The quantity of milk so brought was never measured by appellant but was measured by Mrs. Honibal each day. On the day in question on its arrival before she could measure it the respondent requested the appellant to sell him one pint for analysis and tendered 8 cents for same. Appellant refused saying he had no measure and was not selling milk, whereupon respondent borrowed a measure from Mrs. Honibal which appellant to use and went away with the can of milk.

Counsel for appellant submits that when the milk was placed

in the saucepan for the purpose of delivery to Mrs. Honibal the property therein was passed to her; that the respondent ought to have waited until Mrs. Honibal had received the milk and then obtained a sample from her, in which case the law would imply purchase from appellant under section 18 (4). The case relied on is *Whittaker* v. *Forshaw* (1919 2 K. B. 419). In that case the complaint was brought under section 6 of the Sale of Food and Drugs Act 1875, which prohibits the sale of any food or drug not of the nature, substance and quality, demanded; (section 6 of local Ordinance). The respondent's daughter aged thirteen took every morning one pint of milk to a customer under a standing order. Before she arrived at the customer's house appellant demanded to purchase from her a pint of milk which pint of milk was in a separate quart can intended for the customer. On analysis it was found to contain water to the extent of 24 per cent. The Justices found that respondent's daughter had no authority to sell the pint of milk, as it had been set apart at the farm for a specific customer, but that she did in fact deliver it to him because she was afraid to refuse it after his demand and consequently there was no sale by the respondent to the prejudice of the purchaser, and further that the sample was not taken at the place of delivery as required by section 3 of the amending Act 1879 The question for the Court was whether the Justices on these facts came to a correct determination in point of law. The Divisional Court consisting of Darling, Salter and Avory, JJ., found as a fact that there was a sale by the girl to the inspector to his prejudice but held (Avory, J., dissenting) that the Justices were entitled to find that the daughter had no authority to make any contract of sale, inasmuch as the instructions were limited to carrying the milk. The Court seemed to be of opinion that the property in the milk had passed to the customer.

In the present case the facts as found are sufficient to warrant the magistrate in finding that the property in the milk was in the appellant. Assuming however that the property in the milk was in Mrs. Honibal on the authority of *Whittaker* v. *Forshaw* (*supra*) where it was found that there was a sale by the girl carrying the milk the appellant would have been convicted as he himself was carrying the milk provided he had sold to the respondent to his prejudice.

In the course of his decision Salter, J., says: "A sample of the milk might have been taken at the door of Mr. Hughes' house, and he might then have been prosecuted under section 3 of the Sale of Foods and Drugs Act Amendment Act 1879, as upon a sale to Mrs. Hughes, or rather as upon a sale by him to the inspector which would then have been implied by law to have taken place." Now this section, with section 13 of the principal

Act, are in effect embodied in section 18 of the local ordinance (No. 38 of 1918), but while section 3 (*supra*) provides that the person mentioned therein "may procure at the place of delivery" any sample of any milk "in the course of delivery," section 18 of the local Ordinance goes further. It provides that the persons mentioned therein including a sanitary inspector "may procure for examination at any time or place before it is delivered to the customer a sample or samples of milk." Whether the property in the milk was in the appellant or Mrs. Honibal, the respondent demanded a sample before it was delivered to her and tendered a reasonable price for the quantity which he required for the purpose of analysis. By refusing to sell the appellant brought himself within the provisions of section 19 (l) which rendered him liable to a penalty not exceeding $50.

The appeal is dismissed and the conviction affirmed with costs.

Appeal dismissed.

McLEAN *v* LaFARGUE.

[403 OF 1922.]

1922. AUGUST 11. BEFORE DALTON, J.

Landlord and Tenant—Rent restriction—Standard rent—Permitted increases in rent—New building and re-appraisement—Meaning of 'rates'—Increase of rent (Restrictions) Ordinance, 1922, s. 5 (1.) (b).

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. W. J. Gilchrist). The plaintiff in the Magistrate's Court claimed from the defendant LaFargue, his tenant, the sum of $21.68, rent for a cottage, for the month of April, 1922, arrived at as follows:

(a.) standard rent at January 1st, 1919	$18.00
(b.) increase in rates and taxes payable by plaintiff under Ordinance 4 of 1922, s. 5 (b).	3.68
	$21.68

There was no dispute as to the standard rent, but defendant claimed that $1.07 was the increase allowed to be charged.

The magistrate's decision was as follows:

It appears to me unnecessary to deal with the Town Council Ordinances referred to. Even if one had to do so it would be only for the purpose of ascertaining the manner in which taxes are levied and collected. It is submitted for the plaintiff that as there was no separate assessment of the land and buildings on this lot in question and as taxes were paid thereon as a whole in

1914, that as the land formed part of that on which taxes were so paid in 1914, it must be regarded that such taxes then paid are to be taken as being in respect of the cottage in question erected in 1918 and now rented to the defendant: and that the plaintiff is entitled to recover the proportionate increase in taxes paid in 1922, over that paid in 1914.

The submission on behalf of the defendant is that under sec 5 ss 1 (b) the plaintiff is not entitled to an increase for taxes on any sum other than the proportionate difference between the sum paid as taxes when the property (cottage let to the defendant) first paid taxes in 1919 and that paid in 1922.

Sec. 5, ss 1 (b) reads as follows:— "An amount not exceeding any "increase in the amount for the time being payable by the landlord in "respect of rates and taxes over the corresponding amount paid in respect "of the yearly period which included the first day of July, 1914, or in case "of a dwelling-house for which no rates were payable in respect of any "period which included the said date, the period which included the date "on which the rates first became payable thereafter."

It is perfectly clear from the evidence for the plaintiff that this cottage in question and another cottage were erected in 1918. That a re-appraisement took place in 1918, which resulted in an increased valuation of the property effective from the 1st January, 1919, for the purpose of taxation. I do not think it can be disputed that on these facts taxes first became payable in respect of this cottage in question on 1st January, 1919. It could not have been before as the evidence clearly shows that though it was built in 1918, the plaintiff was not called upon to pay any taxes in respect thereof for the year 1918.

In my opinion the submission of Mr. McArthur for the defendant is sound in law. I uphold it.

The standard rent is agreed on at $18 per month. The amount paid for water rates for 1919 and 1922 is the same; there is therefore no calculation necessary in this respect. The taxes paid in 1919 were $287.50 and in 1922 $360 therefore in 1922 the plaintiff paid an increase of $72.50 in respect of taxes over that for the period which included the 1st January, 1919, the date on which taxes first became payable in respect of this cottage let to the defendant. The total rental of the whole property is $99. This total rental pays an increase of taxes to the amount of $72.50 per annum. On this basis I reckon that the defendant would pay the sum of $13.80 per annum or $1.09 per month as a proportionate increase in respect of taxes. This is the sum I sanction, and no more, and hold that the defendant is not bound to pay the plaintiff more that $19.09 as the rent for the said cottage.

From this decision the plaintiff, McLean, appealed on the ground that the magistrate was wrong in holding (1) that the amount by which the standard rent should be increased under section 5 (1) (b) of the Increase of Rent (Restrictions) Ordinance. 1922, should be calculated on the difference between the amount of taxes paid in 1917 and 1922, and (2) that the cottage is a dwelling-house within the meaning of the second part of section 5 (b) for which no rates were payable in respect of any period which included 1914.

J. A. Luckhoo, for the appellant.

J. S. McArthur, for the respondent.

DALTON, J.: In this matter I think the decision of the magistrate must be upheld, as I am unable to say that his interpretation and application of the law is incorrect. The argument of appellant's counsel proceeds on the basis that the latter part of section 5 (1) (b), where it refer to a dwelling-house, can only apply to a dwelling-house that is assessed separately from the land. He has referred me to the English statute which to my mind is of no assistance whatsoever here. The interpretation of 'rateable value' in that statute is no guide to the interpretation of the words 'in case of a dwelling-house for which no rates were payable' in the ordinance. In England the dwelling-house is separately assessed. Here as the town clerk in his evidence points out, the land and buildings are assessed together save in one or two exceptional cases of which this is not one. This house not having been built until 1918, it could not have been assessed with the land in 1914. Rates first became payable in respect of it in 1919, the re-appraisement of the land and buildings thereon which was made in 1918 being effective, as the learned magistrate points out from January 1st, 1919. His calculation of the increased rental was therefore in accordance with the provisions of the section referred to.

It does seem, however, that the use of the word 'rates' as distinct from the word 'rates and taxes' earlier in the same subsection might give rise to difficulties although it does not affect this appeal. I see that in the Town Council Ordinance, 1918, what are strictly municipal rates are called 'town taxes'. I should have expected the word 'rates' alone to have been used. As regards this particular sub-section however I do not see that the word 'rates' in the sixth and eighth lines means anything but the municipal rates, which are referred to in the second and third lines of the sub-section as 'rates and taxes'.

The appealed must be dismissed and the magistrate's decision affirmed with costs.

Appeal dismissed.

SEWAK *v.* NOWNAUTH & ANR.

[BERBICE. 2 OF 1922.]

1322. FEBRUARY 2. BEFORE BERKELEY, J.

Magistrates Court—Jurisdiction—Trespass—Bona fide question of title to immovable property— Petty Debts Recovery Ordinance 1893. s. 3 (3).

Appeal from a decision of the stipendiary magistrate of the Berbice judicial district (Mr. L. D. Cleare). The plaintiff claimed from the defendants the sum of $36 for damages for trespass upon rice beds, the property of plaintiff. The defendants claimed the land upon which the alleged trespass was committed and the padi thereon. On the evidence the magistrate found that there was no dispute as to the ownership of the land upon which the alleged trespass was committed and therefore his jurisdiction was not ousted. He gave judgment for the amount claimed and costs.

The defendants appealed from this decision.

J. Eleazar, solicitor, for appellants.

E. A. Luckhoo, solicitor, for respondent not called on.

BERKELEY, J.: The appellants appeal from the decision of the stipendiary magistrate of the Berbice judicial district who in an action for trespass gave judgment for the respondent in the sum of $36 and costs.

The main ground of appeal is that a bona fide question of title arose and therefore the magistrate's jurisdiction was ousted.

The respondent by his transport dated 26 March, 1908 is the owner of west half of east half of lot 6 of Bloomfield, Corentyne, and the appellants are the sons of Ramkissen who is owner by transport dated 21 October, 1903, of the eastern half of the eastern half of the same lot. The appellants' father lives in Nickerie. The appellants hold no power of attorney or any authority from him to represent him or protect his interests and apart from this the evidence shows that the trespass took place on the land of respondent as found by the magistrate.

I see no ground for interfering with the finding of the magistrate. It is stated by the solicitor for the appellants that the respondent is in possession of the eastern half of the eastern half. If this is correct this decision cannot prevent the rightful owner by transport from bringing an action in the Supreme Court to establish his claim.

Appeal dismissed with costs.

DADSON *v.* FERNANDES.

[286 OF 1922.]

1922. JULY 28; AUGUST 11. BEFORE DALTON, J.

Criminal law—Larceny—Evidence—Accomplice—Corroboration—Identity of stolen property.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. G. R. Reid) who convicted the defendant Fernandes, on a charge of larceny. From that conviction he appealed. The necessary facts and reasons of appeal are set out below.

J. A. Luckhoo, for the appellant.

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

DALTON, J.: The appellant was charged with the larceny of a quantity of tinned fish, various kinds of other goods including a five-pound tin of butter, the property of Smith Bros. & Co., Ltd., and was convicted. He appeals, and the reasons of appeal may be put together under two heads—firstly, that there is no proof of larceny, and secondly that he was convicted on the uncorroborated evidence of an accomplice. The principal witness named Brandt was an employee of the prosecuting firm and states that in December last he and the appellant entered into an agreement to steal goods from the former's employers. Appellant keeps a small shop and the arrangement was that whenever he bought one dozen of any article that dozen was paid for, but a further half dozen was added by Brandt and the bill altered after it had been checked by the store-walker. Brandt was to get half the value of the stolen goods. Sometimes appellant came for them, he adds, and sometimes he sent a boy named Cambridge. The goods include sardines, salmon, pilchards, butter, and this witness identifies in Court some of the stolen goods, 'some of the goods I gave him' under the agreement already referred to as he describes them, which had been seized by the police witnesses in appellant's shop. He also identifies the tin of butter produced from appellant's shop as one given to appellant by him under the same agreement and not paid for. According to his story therefore he was clearly an accomplice of the appellant in the offence. In practice therefore one requires the evidence of such a witness to be corroborated before one act on it, and it is apparent from his reasons for decision that the learned Magistrate strictly applied this practice rule. I agree with him that there is corroboration of the

evidence of Brandt in several material particulars to show that the larceny was committed and that the appellant was one of those who committed it. The store-walker, Mendes, deposes to the fact that he checked his stock and found articles of all the kinds produced in court missing. He states he obtained some information and kept watch. He then, on the occasion of which he speaks, saw the boy Cambridge go to Brandt. Some time afterwards he missed various articles and having obtained two police constables and a search warrant went to appellant's shop where the articles in court were found. Appellant informed him that he had purchased the tin of butter in December, but the consignment had only reached Smith Bros., in February. When the police made the search the articles were exposed for sale on the shelves and appellant handed to the police a bundle of 138 bills to explain his possession of the goods. It is apparent that some of them hare been altered just as Brandt states. Mendes says they have been altered since they were issued. There was some attempt by the defence to show that Mendes had taken three of the bills from the shop, presumably to alter them himself and so manufacture evidence against the appellant but the police witnesses who were present did not see it and the magistrate did not accept the evidence for the defence on this point.

On the question of identity there is in my opinion sufficient evidence to go to the jury (or here to the Magistrate) on the point whether the goods found in appellant's possession formed part of the stolen property. There is, first of all, the evidence of Brandt who definitely identifies the goods as I have already pointed out. He also identifies the tin of butter which Smith Bros., received in February. The magistrate was quite justified in acting on Brandt's evidence if he found it corroborated in the way I have pointed out. There was then the evidence of Mendes to the effect that the goods in Court were similar to or of the same denomination as those missing from the store. It is true that some of them may have been paid for but this together with the possession of the goods by appellant, the false statement of the appellant to the police on a material point, and the existence of the altered bills which came from him and of which appellant gave no explanation himself corroborated Brandt on material particulars incriminating the accused, and there was in my opinion sufficient evidence whence the learned magistrate might come to the conclusion that the goods found were part of the stolen property.

On the submission that the appellant might have been convicted of "receiving" but could not have been convicted of larceny, little was said. The agreement referred to by Brandt shows that a systematic course of stealing was entered into and the appellant was one of the principals. In my opinion, on the evidence, the

conviction on a charge of larceny must stand there being evidence to support it. The appeal is therefore dismissed and the conviction affirmed with costs.

Appeal dismissed.

In re SAMSON; *ex parte* OFFICIAL RECEIVER.

[21 OF 1921]

1922. AUGUST 14. BEFORE DALTON, J.

Insolvency—Application for directions—Mortgage —Deposit of title deed—Equitable Mortgage—Deeds Registry Ordinance 1919, s. 11, and schedule II, ss 9, 25—Insolvency Ordinance 1900, s. 37 (5)—Civil Law of British Guiana Ordinance 1916.

A deposit of a title deed, that is, the grosse of a transport, in security for a loan does not create an equitable mortgage or charge over the property therein mentioned, and the creditor is not a secured creditor.

The assignee in insolvency is entitled to delivery from the creditor of the grosse transport so deposited.

Application to the Court by the Official Receiver as assignee of Laura Samson, insolvent, for directions as to whether the deposit by her of her grosse transport for certain immovable property with Matabadal Maraj a creditor of the insolvent estate as security for a loan by Matabadal Maraj to the insolvent, made prior to the insolvency, creates an equitable mortgage by deposit and charges the said property with the re-payment of the loan, and if so whether Matabadal Maraj is under the Insolvency Ordinance 1900, and amending Ordinances, a secured creditor. In the alternative, if Matabadal Maraj is not a secured creditor cans the Official Receiver successfully demand delivery of the grosse transport so deposited, or is the creditor entitled to retain the same.

P. W. King, Actg. Official Receiver, in person.

C. Gomes, Solicitor, for the creditor Matabadal Maraj.

DALTON, J.: This is an application by the Official Receiver as assignee of the estate of Laura Samson, for instructions as to whether the deposit by the debtor of her grosse of transport for certain immovable property with a creditor Matabadal Maraj as security for a loan creates an equitable mortgage by deposit and charges the said property with the re-payment of the loan, and if so whether Matabadal Maraj is, under the provisions of the Insolvency Ordinance 1900, a secured creditor. In the alterna-

tive, if he is not a secured creditor, the Official Receiver asks whether he can successfully demand from the creditor delivery of the grosse transport, or whether the latter is entitled to retain it.

The grosse transport is the title deed retained by the owner of property after the conveyance has been completed, under the provisions of rule 9, of the Second Schedule to the Deeds Registry Ordinance 1919.

Mr. Gomes, who appeared for the creditor has argued that, under the provisions of the Civil Law Ordinance 1916, the principles of equity, have been introduced into this colony, and that a court of equity treats a deposit of title deed to secure a loan as an equitable mortgage. He admits that the custom, principally amongst ignorant persons, of depositing the grosse of transports as security for money lent has been in existence for many years, and was of course of no effect to create a charge, he says, until the English Common Law came into force, but from January, 1st 1917, he urges the law recognizes such a mortgage or lien which ever term he used, and that his client is entitled to come in as a secured creditor in the insolvency. I am not able to agree with him.

As one who had some hand in the drafting of the Deeds Registry Ordinance and in seeing it through the legislature, the intention of the law is well known to me. I fully appreciate the fact however that, if the words of the law as it stands now, do not carry out or cannot be interpreted as carrying out that intention such as I conceived it to exist, that intention has no bearing on the matter as it comes before me. I am however aware that a proposal was made to embody in the Ordinance a provision that an. equitable mortgage might be created by the deposit of title deeds and it was rejected. It was a proposal which was foreign to the whole purport of the Deeds Registry Ordinance which had in view the retention of the old law relating to transports and mortgages, and the registration of all conveyances and mortgages. For that reason amongst others s. 11 of the Ordinance was enacted in the following terms: "It shall not be lawful for any person in whom the title to immovable property situate in this colony vests to transfer or mortgage such immovable property except by passing and executing a transport or mortgage of the same as the case may be before the Court." On the mortgage or transport being so passed, it is then registered by the Registrar in the Deeds Registry. The words of that section seem to me to be quite plain beyond any doubt or ambiguity, and to forbid a person to create a mortgage over his property in any way but the one for which the Deeds Registry Ordinance provides. In effect the law as it stood in this Colony before 1917 and in South Africa was retained, and so far as the South African rules for obtaining

copies of title deeds went, was followed, rule 25 of Schedule II being based on South African Deeds Rules. I can hardly do better than cite the words of de Villiers C.J. in *Kellar's trustee* v. *Edmeades* (3 S.C. 25) in which the question was raised whether the trustee of an insolvent estate is entitled to recover possession of the title deeds of immovable property belonging to the estate from persons claiming to hold the same either as pledgees of the title deeds, or as purchasers of the land to which they relate. After calling attention to the difference between the English law of real property and Roman Dutch law of immovable property, he points out that to follow the English law "would be repugnant to the general policy of the law which, for the information and protection of creditors requires that a deed creating any real right, whether proprietary or hypothecary, in respect of land shall be executed *coram lege loci,* and which regards registration in the case of immovables as an equivalent for delivery in the case of movables." The Deeds Registry Ordinance was enacted with that policy in view and to effect registration which had not been required (although to all intents and purposes it was obtained as the deeds became records of the court and were entered in register) in express terms in this colony until 1918. And he continues "a creditor who has only a *jus in personam* cannot claim as against the creditors, whatever rights he may have had if there had been no insolvency, that his *jus in personam* shall be transformed into a *jus in re* . . . . To adopt the English practice of allowing an equitable mortgage to be effected by the mere deposit of title deeds would be to overturn the entire system of registration upon which the security of mortgages upon land mainly depends." And he goes on to refer to the practice of mercantile men, and it is the same in this colony, who know they can ascertain in the Deeds Registry whether property is encumbered or not, and the position they would be in if a customer could virtually encumber his land by private transaction and a deposit of his title deeds with a favoured creditor. And so in *Chapman* v. *Trustee of Braham* (2 S.C. 423) it was held that the mere deposit of a title deed of a property gives the receiver no *jus in re* over it.

Turning to the Insolvency Ordinance 1900, where the question of priority of debts is dealt with it is enacted by Section 37 (5) that no encumbrance of any immovable property shall be of any force or give any right of preference which has not been completed by mortgage duly passed before a judge, 'except that a creditor may claim under his contract as a concurrent creditor against the debtor's estate,' If I were to accept Mr. Gomes' argument as sound, I presume he would say this provision so far as it referred to an equitable mortgage was repealed by implication on the Civil Law Ordinance coming into force, but so far from the Civil Law

Ordinance repealing it, that ordinance excludes the English law and retains the old law applicable to conventional mortgages of movable and immovable property. As I have said the law is now set out in the Deeds Registry Ordinance 1918. The fact that the rules thereunder, (and Rule 25 is also based on the provisions of a South African rule) do contemplate the possibility of title deeds being pledged does not alter the position, that under the law as it stands an equitable mortgage by the deposit of title deeds has no place in this colony.

The answer to the request for instructions therefore is that the deposit by the debtor with the creditor Matabadal Maraj of this grosse transport in security for a loan does not create an equitable mortgage over the property and the creditor is not a secured creditor. He may prove for his debt against the debtor's estate as a concurrent creditor and the assignee is entitled to delivery from the creditor of the grosse transport so deposited.

RAMPARIKHAN SINGH *v.* POLLARD.

[449 OF 1922.]

1922. AUGUST 18, 25. BEFORE BERKELEY, ACTG, C.J.

Landlord and tenant—'Dwelling house'—House used partly as a boarding-house—Increase of Rent (Restrictions) Ordinance, 1922. s. 3 *(1) (ii).*

Appeal from the stipendiary magistrate of the Georgetown judicial district (Mr. G. A. Reid).

The plaintiff Ramparikhan Singh claimed from the defendant the sum of $90, being two months rent from April 1st to May 31st of premises at 253, Murray Street, Georgetown, let to defendant at a monthly rental of $45.

The defendant pleaded that the standard rent was $33.16, inclusive of increases in rates, that $11.84 was over-paid for March, and that her indebtedness amounted to $54.48, which amount was paid into court.

The magistrate gave judgment for the amount paid into court, lees $10.68 defendant's costs. The plaintiff appealed, on the ground that the house was not a dwelling-house, but a boarding-house and so did not come within the provisions of the Increase of Rent (Restrictions) Ordinance, 1922.

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

S. L. Stafford, for the respondent.

BERKELEY, ACTG. C.J.: This appeal is from the decision of Mr. G. R. Reid, stipendiary magistrate of the Georgetown judicial district, civil jurisdiction. The appellant claimed $90 as two months rent to 31st May, 1922, of premises let by him to respondent at $45 per month. The magistrate held that under the Increase of Rent (Restrictions) Ordinance, 1922, the house was let as a dwelling-house, and not as a boarding-house; that the standard rent was $33.16 and he gave judgment for the appellant for the sum of $54.48 paid into court by the respondent less $10.80, the costs of respondent.

The reason of appeal argued is that the Ordinance applies only to houses used as dwelling-houses, and that it was immaterial whether or not the house had been let as a dwelling-house in view of the fact that respondent had resident boarders. There was a second reason of appeal, viz., that as the house was let with land other than the site of the building the magistrate was wrong in holding that proviso 3 of section 3 (1) did not apply. This was abandoned by counsel.

The sole question for this court is the construction to be placed on proviso 2 of section 3 (1). This proviso is taken *verbatim* from the "Increase of Rent and Mortgage Interest (Restrictions) Act, 1920," s. 12 (2) (ii) which reads: "The application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes." In *Colls* v. *Parnham* (1921 W. N. 358 and (1922) I K.B. 325) where the defendant used her flat partly for taking in boarders but reserved and used certain rooms as her own residence it was held on appeal that the house in question was 'a dwelling-house' within the Act, and as the rent at which it was let to her was in excess of the standard rent, she was right in her contention and was entitled to recover the excess paid by her. This case is on all fours with present one in which the house was let as a dwelling-house (see receipts for rent) and the respondent in addition to her own family had received into her house three boarders. In *Colls* v. *Parnham, (supra)* Shearman, J. referred to *Tompkins* v. *Rogers* (1921 2 K.B. 94) cited by counsel for the appellant. That learned judge said: "As to *Tompkins* v. *Rogers* the head-note stated the decision quite accurately, but the Court in that case was not referred to *Epsom Grand Stand Association* v. *Clarke* or to sec-12, sub-section 2 (ii) of the Act of 1920 and in his opinion, the case was no authority for saying that premises which were partly used for business purposes might not be a dwelling-house within the Act." Salter J. agreed and said that if the decision in *Tompkins* v. *Rogers* to which he was a party, was that if premises were used for business purposes they could not be a dwelling-

house within the Act of 1920 he did not think the decision could be supported. *Tompkins* v. *Rogers* is therefore overruled. In *Epsom Grand Stand Association* v. *Clarke* (1919 W. N. 170) the "Downs Hotel" was let to the defendant for occupation under an agreement, and he and his family and servants lived on the premises and their residence was in accordance with the terms of the agreement. Part of the premises was used as a "public house" and the Court of Appeal consisting of Bankes, Scrutton and Atkin, L.JJ. held that this user did not prevent the premises from being a "dwelling-house" within the Act."

The appeal is dismissed with costs.

Appeal dismissed.

Solicitor for appellant, *W. D. Dinally.*

VILLAGE COUNCIL OF BUXTON & FRIENDSHIP *v.* SUTTON & Ors.

[445 OF 1922.]

1922. AUGUST 15, 22. BEFORE DALTON, J.

Local Government—Village council—Local Authority—Extent of powers—Digging punt trench through property vested in council—'Maintenance and control'—Obstruction of officer of council in execution of duty—Claim of right—Local Government Ordinance. 1907.

Appeal from a decision of the stipendiary magistrate of the East Coast judicial district (Mr. J. H. S. McCowan).

The complainant was the chairman of the village council of Buxton and Friendship. The defendants, twenty-four in number, were charged with unlawfully obstructing one John Eleazar Wills, an officer of the said village council, in the performance of his duty contrary to the provisions of s. 169 (2), Ordinance 13 of 1907, at Buxton east side-line dam on September 29th, 1921.

The magistrate dismissed the complaint without calling for a defence on the ground that the local authority was not authorised to carry out the work the officer was performing, and the defendants were making an honest assertion of right.

The village council appealed.

The facts briefly are, that the council on a petition and plebiscite of cane-farmers and proprietors in the section (some of whom were not villagers) decided *to* cut a waterway from Friendship across the company path dam between the two villages of Friendship and Buxton, then across the village of Buxton so as to allow the canes of the farmers of Friendship to be transported to Lusignan factory. A previous attempt to give a right of way to

the Buxton estates for the same purpose was strenuously opposed by the villagers and the project was not effected. On the 28th September that year a certain portion of the work was lined with pegs. The villagers as a result called a meeting "to defend their rights over a right of way, the council having started to cut the dam." In consequence of what transpired at the meeting the villagers on the following morning hindered the officer Wills who was deputed by the chairman to do the work, by assembling on the area and preventing the digging of the earth.

The reasons for appeal were, that the evidence fully proved that the complainant was carrying out a duty imposed upon him by law when the offence was committed by the defendants, and the magistrate should have called upon them for a defence; that the work was work which the local authority was legally entitled to execute, and whether the authority was legally entitled to do it or not was immaterial and irrelevant; that the dam in question was found to be under the control of the village council, the employers of the complainant, and it was competent in law for the council to cut the waterway across it; and that the question whether the defendants honestly believed they had the right to act as they did was irrelevant and immaterial.

J. S. McArthur, for the appellant council.

S. L. Stafford, for *E. F. Fredricks,* for the respondents.

DALTON, J.: The respondents, twenty-four in number, were charged with unlawfully obstructing John Eleazar Wills, an officer of the Buxton and Friendship village council at Buxton east side-line dam in the Kryenhoff empolder, on September 29th, 1921, whilst he was in the performance of his duty, contrary to the provisions of sec. 169 (2) of the Local Government Ordinance, 1907. After the evidence led for the village council was closed, the learned magistrate reserved decision on certain points raised by respondents' counsel, and eventually decided in their favour, holding that the duty upon which the officer in question was engaged was a work which the village council was not authorised to undertake, and therefore he was not performing a legal duty; he further found on the evidence that the respondents were making an honest assertion of right, and for these reasons the complaint could not be sustained.

The council has appealed on the ground that the work being undertaken was work the council was legally entitled to execute, and that the question whether the respondents honestly believed they had a right to do what they did in the way of obstruction was irrelevant and not material to the charge.

It seems to me that the case may be decided without reference to some of the wide considerations which seem to have been imported into it in the court below. At the time it was heard I understand that a question of granting a right of way across the village of Buxton to neighbouring sugar plantations had been or was being somewhat vehemently discussed in the village with partisan feelings flowing very strongly. Since then, so I gather from what was stated before me, matters have cooled down and become more normal, and hence possibly the atmosphere of my court was not so electrical or conducive to argument as that of the court at Vigilance. No question arises in this case of any right of way, to use that term in its proper sense, across village lands being given or granted or conveyed by the council to other part-ties. Mr. Stafford did urge, and I do not think it was controverted, that the respondents claimed that their means of getting aback along the Buxton east side-line dam had been taken away by the project of cutting through the dam but that is a very different thing and it was capable of easy regulation and rectification. What was sought to be done, according to the evidence led, was to provide a means whereby Friendship cane-farmers, some of whom were proprietors in the village and others tenants of the council, could remove their canes from the village to Pln. Lusignan, from Friendship on the east across Buxton on the west. The village council of Buxton and Friendship, it must be borne in mind, is one body.

The evidence led shows that the Kryenhoff empolder and its appurtenances were vested in the village council. The council decided to cut a canal or trench for the purposes above set out, across the dams and lands of this empolder. On the day set out in the charge. Wills, the village ranger, proceeded with labourers to the Buxton east side-line dam at the place where the canal had to be cut, on the instructions he had received from the council, but he found a crowd of about two hundred people there amongst whom were the defendants. He was prevented by them from commencing the work or from carrying out his instructions. The learned magistrate is satisfied on the evidence that the acts of the defendants constituted an obstruction. As regards their reasons however I cannot agree with him that the evidence is abundant to show that these people were making an honest assertion of right. No doubt that may have been stated by counsel, and something that had previously happened in the course of the earlier dispute respecting the right of way may have been in his mind, but no evidence has as yet been led on their behalf in this case, and I cannot find that abundant evidence in the few loose phrases as the following taken from the cross-

examination of the witnesses for the complainant: 'the people say this land is theirs,' 'Dam public used by anyone.' 'Only dam to go back east section and a petition has been made to divide up this land.' But counsel before me has made it plain that he does not place so much reliance on this alleged assertion of right on the part of respondents as upon the point that the council had no power to do what they wished to do and what they had ordered their officer to carry out.

The learned magistrate has gone into the question of the powers of the council at considerable length and has come to the conclusion that they are not empowered by the provisions of the Local Government Ordinance, 1907, to undertake this work. After hearing the arguments and reading all that he says I am unable to agree with him. Whether or not my view might be changed by any evidence the respondents might be able to lead I am of course not prepared to say. Under the above-mentioned Ordinance the management and administration of the village is entrusted to the council (s. 34), whilst all undivided lands and empolders, pasture lands, dams, water-courses, trenches, etc., and all roads, streets and bridges (not being public roads, streets and bridges, *i.e.*, under the Roads Ordinance) are also under its control and management (s. 82). Under the same ordinance all property belonging to a village district is vested in the council, and in this case the title of the council to the empolder (which the evidence shows is undivided) through which the dam in question runs is produced and not questioned. On the evidence it seems to me, that the dam is clearly one under their control and management. It has been suggested that it is not included in the grant and is not vested in the council, but on the evidence led there is *prima facie* evidence which is contrary to that argument; and it is not suggested in the cross-examination of any of the witnesses for the complainant that the right to the property in the dam was vested in the respondents or in any one but the council.

If the dam had been cut merely for drainage purposes the power of the council to cut would not have been questioned (s. 171,) but it is urged for the respondents that the cutting of a canal to give cane-farmers, although proprietors in the village or tenants of the council, means of access within the limits of the village by water across the lands of the council, (and not of any third party be it noted) and the dam cannot be said to come within their statutory powers of control and management. To do what they tried to do on this date (and I am told have since done) counsel states requires a special statutory enactment.

I do not propose, nor is it desirable to attempt to define the words "administration" and "control and management," but I

can see nothing in what the council sought to do here inconsistent with the powers of management and control vested in them by ordinance, bearing in mind the fact that the lands are vested in the council and so far as the evidence discloses the property of third parties is not affected. If they had merely surface rights, for in-stance, the position might be very different. I cannot conceive it to be unreasonable to say that a person or body in whom land is vested is exercising his or its powers of control and management when he or it provides means of access thereto and therefrom, whether for tenants thereon or for tenants or proprietors of private lands situated within the limits of that body's administration, across his or its own lands for those persons and their crops. In considering the means provided, one must necessarily have reference to the nature of the cultivation, the conditions of the country where as here waterways are the usual, because they are the best, means of conveying canes to the factory, and the safe-guarding of the rights of other people which might be interrupted whether temporarily or otherwise, by such means of access being granted. The provisions of 82 cannot reasonably, in my opinion, be taken to apply to only such dams, or trenches, or other matters mentioned therein as existed when the council came into power; and not to such necessary new dams, trenches, streets, etc., as the council might see fit to make in the course of their administration of the village such as their control and management might justify.

Some reference was made during the argument to the provisions of s. 311 of the Ordinance but that section has no application here. There is no evidence to show that the work undertaken was a 'special work' within the meaning of that section even if it can be said to come within the kind of work contemplated by the section.

Under the circumstances deposed to therefore the cutting of this canal or trench seems to me to come within the ordinary powers of management and control of the council. There is in my opinion, having in view the provisions of the Ordinance, ample evidence on the record to come to that conclusion, and at present to no other conclusion. It is open of course, however, to the respondents to call what evidence they may wish to rebut the evidence already led. The alleged interference however with the respondents' right of proceeding aback along the dam for the time being would not of itself debar the council from proceeding with the work, for it could easily, I presume, be made good by a diversion, bridge or other sufficient means. Such temporary interruptions must frequently necessarily arise in roads and streets.

With respect to the respondents assertion of right in the

matter which after all could be merely a right to pass up and down the dam, there is in my opinion, as I have said, no evidence on the record beyond a mere scintilla to support the learned magistrate's conclusion. In any case even if the evidence was there I do not think it is relevant to the charge. The cases he cites deal with malicious injury to property which are not analogous to this case. It being found, that the respondents caused an obstruction, the fact that they honestly thought they were entitled to do so is no answer to the charge although it would no doubt materially affect the penalty.

It is not therefore necessary to deal with the other points raised in the reasons of appeal. For the reasons above stated the decision of the magistrate must be recalled and the case remitted to him to hear the evidence for the defence, should the respondents desire to call evidence. When that is done, he will adjudicate afresh.

I am encouraged by a remark let fall by Mr. Stafford in his argument to add the following remarks. He tells me that the work the council sought to commence on September 29th has now been completed by them without further trouble. It may, I gather, commend itself to the respondents, on the case being called again before the magistrate, to change their plea in which case after reading the learned magistrate's reasons for decision (although I can in no way bind him on this point), I have little doubt a merely nominal penalty might follow. If such a course was adopted I do not think the appellant council, their rights being in that result vindicated, should press for the costs of appeal.

The appeal is allowed with costs and the case remitted to the magistrate to continue the hearing as above set out.

Appeal allowed. Case remitted to magistrate to hear defence.

A. V. Crane, solicitor for appellant.

DEMERARA BAUXITE Co., LTD. *v.* HUBBARD & ORS.

DEMERARA BAUXITE Co., LTD. *v.* HUBBARD & ORS.

1922. FEBRUARY 3. BEFORE SIR CHARLES MAJOR, C.J.

Costs—Taxation—Separate interests of defendants—Charge of fraud—Appearances by separate counsel—Costs on appeal—Two counsel—West Indian Court of Appeal Rules 1920, r, 22—Rules of Court, 1900, App. I. Pt. I. (b) note.—Practice.

A respondent in an appeal, against whom there was in the action, and is on appeal, a charge of fraud, and whose interests in the action were thereby differentiated from those of his co-defendants, but who claimed no costs for separate representation on dismissal of the action, will not be allowed those costs on appeal from that dismissal, the role applying that costs on appeal are ordinarily the same as on trial of the action, and the proceeding on trial of the action showing inferentially that the charge of fraud had been abandoned or at most negligibly pursued.

The plaintiff company sought a review of the decision of the taxing officer in so far as he allowed separate costs in respect of appearance of counsel on behalf of the defendant Emory apart from the defendant Hubbard. The facts of the case and the further questions arising are fully stated in the judgment of the Chief Justice.

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

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

SIR CHARLES MAJOR, C.J.:—An appeal by the plaintiff against the judgment dismissing their action has been unsuccessful, and the appellants have been ordered to pay the defendants' costs of the appeal. There are three defendants but it is only necessary to refer to two of them, Hubbard and Emory. The taxing officer has allowed the defendant Emory the costs of leading counsel, either solely representing him on appeal or in conjunction with leading and junior counsel for Hubbard.

Rule 22 of the West Indian Court of Appeal Rules, 1920, provides that all costs shall be taxed in accordance with the law and practice of the Supreme Court of the colony in which the appeal arises. By way of note to Part I. (b) of Appendix I. of Rules of the Supreme Court, 1900, it is laid down that fees shall ordinarily be allowed in respect of the appearance of one counsel only, but provides for fees for two counsel in cases of exceptional length and difficulty. The note, however, must not be understood to preclude the application of another rule, than where parties, whatever their number might be, have separate interests, each defendant or all defendants who is or are in the same separate interest, is or are entitled to appear separately, that is, by one counsel at the least

and, in cases of complication and difficulty, by two counsel. The case of *Ager* v. *Blacklock* (56 L.T. 890) and *Spalding* v. *Gamage* (1914, 2 Ch. 405), cited by Mr. Woolford, are clear authorities to that effect.

A great deal of argument has been addressed to me on a question whether Emory did or did not retain counsel to appear on his behalf separately from Hubbard, and whether Emory was or was not represented by one or two leading counsel at the trial and on the appeal. That argument has produced some mutual differences of opinion as to fact between counsel, some allegations and some denial of their correctness, which are regrettable. The argument is really quite beside the true question at issue. With what learned counsel, the one or the other, said as to representation of their clients, who said it, and when and why, I am unconcerned. This much appears; that Hubbard and Emory were represented by the same solicitor, that Emory was represented at the trial and on appeal by counsel, whether leading with counsel who led for Hubbard also or separately from him I do not, in the view I take of the matter, stop to inquire.

The points in the proceedings which it is necessary to notice are, the first, that the plaintiffs substantially sought in the action to show (a) that a contract of sale and purchase of land between Hubbard and Humphrys (the third defendant), which I call Humphrys' contract, the benefit whereof Humphrys assigned to the plaintiffs ought to be enforced against Hubbard; and (b) that a subsequent contract of sale and purchase of the same land between Hubbard and Emory, which I call Emory's contract, was, therefore, void and of none effect against the plaintiffs. There was an alternative allegation of the agency by Humphrys of Hubbard to make the first contract with the plaintiffs on her behalf which need not be noticed. The second point is that, in addition to the issue raised by the joint defence of Hubbard and Emory, whether Humphrys' contract was not bad as being between solicitor and client in circumstances rendering it voidable, and whether Emory's contract was not, therefore, with Humphrys' contract out of the way, good, there was an issue raised by the plaintiffs against Emory that he had obtained his own contract by false pretence and in fraud of the plaintiffs. So far as the first point was concerned, Hubbard's and Emory's interests in (a) and (b) were the same. Emory needed only to watch the result of the plaintiffs' case. On the second point, however, a new and distinct interest of Emory arose, viz, to defend his character, and in that respect his and Hubbard's interests were not the same, but for him seriously increased and distinguished. He was entitled, therefore, to instruct counsel separately, certainly to retain counsel in addition to the counsel who led for Hubbard and him-

self jointly. He did so. In England—and the principle is the same here—a charge of fraud against a party is always a material element on the question of allowing him three counsel, that is when he is alone and he is allowed, as usually, two counsel. How much more when, as here, his interests are different from, and additional to, those of his co-defendants.

That was the position at the time of trial of the action. Now, applying the rule that parties having separate interests may appear separately, it was open to Emory, I think, to claim separately against the plaintiffs in defeat for his costs, certainly on the issue of fraud, and his bill, in my opinion, must have been taxed. But what happened? He made no claim. One set of costs only was taxed, that set containing fees for two counsel only, that is one leading and one junior for Hubbard and Emory jointly. If I am to infer aught from that it would be either that the important issue of fraud on Emory's part was abandoned, or so manifestly inadequately pursued as to be negligible, or that it became so part of the *res gestae* in connection with the two contracts as to be merged therein and so to come within the identity of interests. It is true that in the grounds of appeal the charges of pretence and fraud are repeated, but the notice of motion contains but a repetition of the plaintiffs' claim (together with a deal of pure argument), and, moreover, the course the argument in the court of appeal would take must have been confined to that followed in the court of first instance.

In these circumstances the rule—though it is not, of course, inflexible—obviously, it seems to me, should have been applied, that costs on appeal should ordinarily be the same as on the trial of the action, and the more so because Emory and his solicitor were fully aware of the shape and scope the arguments on appeal would take. The taxing officer represents to me, though he has not done so in the proper manner, that he allowed these costs (to which objection is taken on principle as a whole) because Mr. Woolford addressed the Court of Appeal on behalf of Emory, because counsel stated that appearances on behalf of Hubbard and Emory were separate, and because Mr. Browne has stated that Mr. Woolford was not instructed to appear on Mrs. Hubbard's behalf. Every respect is necessarily to be paid to statements of counsel but these did not affect the question—I wonder how they came to form part of the record at all—which was, in the circumstances I have already detailed, whether the plaintiffs ought to pay for the separate representation.

The certificate of the taxing officer must be remitted to him to be set aside pursuant to this judgment. The plaintiffs must have from Emory the costs of the taxation and of this application to review.

COLLINS *v.* LOPES.

[473 OF 1922.]

1922. SEPTEMBER 8. BEFORE BERKELEY, ACTG. C.J.

Criminal law—Receiving stolen property, knowing the same to have been stolen—Defendant found guilty on charge—Facts disclosing larceny and not receiving—Distinction between principal and receiver.

Appeal from a decision of the Stipendiary Magistrate of the Georgetown judicial district (Mr. W.J. Gilchrist). The defendant Lopes was charged with receiving one barrel of pork, the property of Garnett & Co., Ltd., well knowing the same to have been stolen and was convicted. From that conviction he now appealed.

J. S. McArthur, for the appellant.

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

BERKELEY, ACTG. C.J.: This is an appeal from the decision of the stipendiary magistrate of the Georgetown judicial district, Mr. W.J. Gilchrist, who convicted the appellant for that on 7th June, 1922, he did receive one barrel of pork, valued $17, the property of Garnett & Co., Ltd., well knowing the same to have been stolen. The magistrate accepts the evidence of the carter, Jones, who pleaded guilty to the larceny of the half-barrel of pork and says that but for the act of appellant Jones might not have found himself branded as a thief. The facts as found by the magistrate are that the carter, Jones, who is in the employ of Garnett & Co., Ltd., was given four half-barrels of pork to take to Sprostons, Ltd., for shipment to Mr. Melville. He delivered three and was returning with the fourth to Garnett & Co. when the appellant met him and asked him to sell it to him. He refused to do so but eventually consented on being pressed by the appellant. He turned the cart back and with appellant walking by the side of the cart he drove to the pavement near appellant's shop where the half barrel was deposited. There is no evidence as to the barrel being removed into appellant's shop. It was closed for the half day and the barrel was left on the pavement. The magistrate holds that there was evidence of corroboration by a witness who saw them going towards appellant's shop, and by Mr. Pollard, of Garnett & Co., who claims certain pork found in a barrel in the shop as "Antillian pork" imported by his firm. It is submitted by counsel for appellant that the property in the pork was in Mr. Melville who had purchased it from Garnett & Co. I do not agree with his submission. The evidence shows that the half barrel was never delivered. It never left the posses-

sion of the carter, Jones, whose possession was that of his employer Garnett & Co. (See *R* v. *Bass* 2 East's P.C. 566).

It is further submitted that on the facts as found by the magistrate appellant could not be convicted of receiving the half barrel of pork well knowing the same to have been stolen as the facts as found prove that he was a principal in the second degree. When the appellant induced the carter, Jones, to sell the half-barrel to him and Jones thereupon turned the cart back appellant was aiding and abetting at the commission of the felony. In fact, he participated in the actual theft and was as much a principal as the carter, Jones. As to the distinction between receiver and principal see the cases referred to in Russell on *Crimes* (Vol. II., p. 1,472). On this finding it is unnecessary to deal with the other reasons argued on appeal. It may be as well, however, to point out that although appellant was convicted of receiving with guilty knowledge "Antillian pork" there is no evidence that this brand was delivered to the carter, Jones, or that Garnett & Co. import no other brand but "Antillian Pork." Appeal allowed with costs.

Appeal allowed. Conviction quashed.

Solicitor for appellant, *A. V. Crane.*

Solicitor for respondent, *Crown Solicitor.*

D'ORNELLAS *v.* WILLIAMS.

D'ORNELLAS *v.* WILLIAMS.

[474 OF 1922.]

1922. AUGUST 25; SEPTEMBER 9. BEFORE DALTON, J.

Pleadings—Striking out Statement of claim as disclosing no reasonable cause of action—Infant—Money had for the use of—Order XVII r. 30—Amendment—Guardian ad litem for defendant infants—Entry of appearance—Order XI. r. 1; Order XIV. r. 10; English Rules of Court, Order XVI, r. 18—Practice.

Application by the defendant to strike out statement of claim as disclosing no cause of action.

All the necessary facts sufficiently appear from the judgment below.

J. S. McArthur, for the applicant.

B. B. Marshall, for the respondent.

DALTON, J.: The plaintiff is claiming from the defendants, who are infants, the sum of $184 which he alleges to be his share of the rents of a lot of land in Georgetown held in undivided shares by himself and the infants (plaintiffs for 7-12ths and the defendants for 5-12ths) which rents were collected during the year June 30th, 1921-June 30th, 1922, by the mother of the infants, who is a widow, for them.

The mother of the infants has entered appearance for the defendants as guardian *ad litem,* following the English practice (Order XVI., r. 18), under which no formal order is necessary. I can see nothing in that practice inconsistent with our Rules of Court (see Rules of Court, 1900, Order XIV., r. 10; Order XI, r. 1) and therefore the objection taken later that she has no authority from the Court to defend this action cannot be sustained. Even, however, if it could be sustained and there is no appearance on behalf of the infants, it is for the plaintiff to apply to the Court before proceeding further with the action to have a guardian *ad litem* appointed for the defendants. Order XI, r. 1.) This he has not attempted to do, in fact he raised no objection to the mother as such guardian, when the matter came before the Bail Court under Order XII.

On an affidavit of defence being filed defendants' counsel at that time urged that no cause of action was disclosed. As however the court has no power under Order XII. to strike out a writ save where no party appears, leave to defend was granted. The matter has therefore now come before me on application to strike out the statement of claim under the provisions of Order

XVII., r. 30 (English Rules, Order XXV., r. 4) on the ground that it discloses no reasonable cause of action against the defendants.

The claim sets out that plaintiff owns seven undivided twelfths of lot 60, Light Street, Georgetown, with the buildings and erections thereon, whilst the defendants who are, the plaintiff states, infants, own the remaining five-twelfths; it continues that the infants with their mother reside on the property, and that the infants by "their said mother" have collected and received rents from the said property from June 30th, 1921, to June 30th, 1922. After setting out details of the rents said to have been collected, the plaintiff claims seven-twelfths of the sum, namely, $184, from the infants.

It seems to me that, on that statement, no cause of action is disclosed against the defendants. The rents are alleged to have been received by the mother. Mr. Marshall has argued that the mother was agent for the defendants, in collecting the rents, but even if that was possible it could only relate to the share of the rents proportional to the defendants' interest in the property. Even if I could assume they could appoint their mother agent to collect their share of the rents how could I assume they could also appoint her to collect plaintiff's share which is all that he purports to claim. Mr. McArthur has cited, in support of his contention, that the defendants, their infancy being admitted by the plaintiff, cannot in any way be liable on the facts set out, the case of *Leslie, Ltd.,* v. *Shiell* (l914, 3 K.B. 607). There an infant by fraudulent misrepresentations as to his age obtained advances from a money-lender and it was held that the latter could not recover the money from the former, the cause of action being in substance *ex contractu.* That goes far beyond the facts of this case before me. It is the act of the mother, not that of the infants upon which the plaintiff bases his claim. The infants are responsible for the acts of their mother say his counsel. I do not agree.

The statement of claim, in my opinion, discloses no cause of action against the defendants and will therefore be struck out.

It is not a case in which the deficiency can be improved by any amendment even if it were asked for and therefore the application having succeeded, the action must be dismissed with costs

CRITCHLOW *v.* NASCIMENTO.

[505 OF 1922.]

1922. SEPTEMBER 12, 22. BEFORE BERKELEY, ACTG. C. J.

Bastardy—Evidence of mother—Corroborative evidence—Material particular—Bastardy Ordinance, 1903, s, 3.

Appeal from a decision of the stipendiary magistrate of the East Coast judicial district (Mr. J. H. S. McCowan).

The complainant, Mary Critchlow, applied for a summons under the provisions of Ordinance 13 of 1903 that Charles R. Nascimento be adjudged the father of her bastard child. The magistrate found for the complainant, adjudged the defendant the father of the child and made an order for the payment by him to her of $1.20 per week for maintenance and education.

The defendant appealed on the ground that there was no corroboration of the complainant's evidence.

J. A. Luckhoo. for the appellant.

S.L. Stafford, for the respondent.

BERKELEY, ACTG. C. J.: A complaint was made by the respondent against the appellant charging that he was the father of a bastard child of which she was delivered on May 30th. 1922. The stipendiary magistrate, Mr. J. McCowan, adjudged appellant to be the father of the child and ordered him to pay $1.20 per week for its maintenance.

The magistrate finds that the evidence of the respondent is to be relied on and holds that she is corroborated in a material particular by the witness McCauley. He declines to accept the evidence of the appellant for the reasons stated by him and regards the defence set up as not genuine.

The facts as found are:

(1) In June, 1920, respondent, then sixteen, left her home in Plaisance on the East Coast and went to Bartica—having been engaged as servant to the appellant and his wife at $3 per month, and she occupied a room on the same floor as her master and mistress.

(2) Mrs. Nascimento went to Surinam in February, 1921, and within a week of her departure appellant went into respondent's bedroom and induced her to allow him to have connection with her.

(3) Appellant was in her room nearly every night until he joined his wife in Surinam in May, 1921.

(4) On his return in June, 1921, he again had connection with respondent and this intimacy continued until the following September.

(5) Within one week of his wife's return, later in June, a room was built under the house which respondent occupied until she left Bartica.

(6) In September, 1921, she had reason to believe that she was in the family way, and she told appellant, who instructed her to give his wife notice, and he promised to give her money when she was leaving by the steamer.

(7) Respondent never mentioned to anyone her condition, because appellant asked her not to do so, but when her mother questioned her, she admitted that she was in the family way.

(8) On 30th May, 1922, respondent gave birth to a female child at the Public Hospital, Georgetown, the colour of which in the birth certificate is described as "mixed" and the respondent herself as "black."

(9) The witness McCauley, a diamond miner, known to appellant as passing through Bartica on his way to the mines, took a parcel for respondent to appellant's shop in 1921—earlier part of year—and he saw respondents sitting in a chair by a table and appellant by the chair with his hand around her—they were behind the counter and on his approach appellant walked away.

The sole ground of appeal is that the corroboration by McCauley is not sufficient to warrant the finding of the magistrate.

It is to be noted that the appellant says that respondent was never behind the counter of his shop. His witness Hill contradicts this and says she helped occasionally in selling.

In *Harvey* v. *Anning* (87 L.T. 687) it was held by the majority of the Court that the parties not being of the same social position and having been seen out together in the evenings in the lanes, there was evidence which could be taken into consideration and its weight as corroborative evidence was for the justices.

In the present case appellant was the master of the respondent. They are not of the same social position and when his hand is seen around her as described by the witness McCauley, it is evidence of undue familiarity, and his moving away on the approach of a stranger point to his desire that such familiarity should not be seen by the advancing stranger. There is no rule of law that because the familiarity took place some months before conception it is not to be considered in the light of corroboration (Field, J, in *Cole* v. *Manning* (35 L. T. 941.)

A letter was written by the respondent to appellant which has been put in. It is as follows:—

"Plaisance
1,5.1922.
Spardam.

"Dear Sir,

You must forget me but I allaways got to rember you because i am the one that make myself a domass but you don't think that I will be allwys the ass. this is the forth letter, hope you remmber I have to every one, so you must mke up your mint to go to Cort. you mst try and remmber what mouth I leave your work and on that your wife sent me away. She is in town and i am riting her a letter so dont what i alom that will be onhappy in home I got nothing to eat threu you but you will see the food and cant eat only true your schimpish manner—I will try to disgrace you in all form man but my share that you dont give, it will go on dieter on that deblity wife and your mothering in law going to thife more than that only thrue your low and furtine mine—man, what my parance is going will set on example to you all men that woul like to get children and dont want to hone it.

I am
M. Critchlow."

This letter standing by itself is no corroboration of her evidence. She however received an answer as follows:—

Lot A, Croal Street,
Georgetown.
13th May, 1922.

"Mary Critchlow
Sparendaam, E.C.
Madam,

I am instructed by Mr. Nascimento to inform you that your letter dated 1st May, 1922, threatening his family and himself has reached him and that he will adopt such measures as counsel may advise.

I am, Madam,
Your obedient servant,

MCLEAN OGLE,
Barrister-at-law.

Respondent's letter is that of an uneducated woman expressing her feelings in her own style with regard to the man who has rendered her unable at the time of writing to earn her living. It is true that reference is made to appellant's wife and his mother-in-law but I do not think it can be regarded as "threatening his family and himself." It would have been more in keeping with

the defence set up, if appellant had instructed counsel to deny paternity and to express his indignation at the respondent's audacity in charging him with being the father of the child. As that letter contained no denial on his part, this fact lends colour to the truth of her statement.

I have carefully considered *Thomas* v. *Jones* (36 T.L.R. 872) relied on by counsel for the appellant and in my opinion the finding of this Court is not inconsistent with the finding of the majority of the Court in *Thomas* v. *Jones* (*supra*).

The corroboration required is corroboration to the satisfaction of the magistrate and I consider there was corroboration to warrant his finding.

Appeal dismissed with costs.

LONG *v.* BISSONDIAL.

[45 OF 1922 (BERBICE).]

1922. NOVEMBER 11, 15. BEFORE DEFREITAS, ACTG. J.

Criminal law—Keeping open shop for retailing patent medicines—Shop not under direct management of a duly registered chemist—Onus of proof—Matters peculiarly within the knowledge of defendant—"Exception" or "Proviso"—Summary offences (*Procedure*) *Ordinance 1893 Section 9—"Patent Medicine"—Section 2 of Ordinance 19 of 1911.*

The Appellant was charged under Ordinance 19 of 1911, with having kept open a shop for retailing patent medicines, such shop not being under the direct management and supervision of a duly registered chemist and druggist. Appellant was convicted and appealed on the grounds stated below.—*Held,* that, after a *prima facie* case of "keeping open" had been made out, the onus was cast upon the defendant of showing that the shop was under the direct management and supervision of a duly registered chemist.

P. A. Fernandes, for the appellant.

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

DEFREITAS, ACTG. J.: This is an appeal from the decision of the Stipendiary Magistrate for the Berbice Judicial District who convicted the appellant on a complaint lodged by District Inspector Long charging the appellant with keeping open a shop for retailing patent medicines, such shop not being under the direct management and supervision of a duly registered chemist and Druggist.

The main grounds of appeal were:—

That the decision was wrong because:—

(*a*.) The prosecution failed to prove that the shop was not under the direct management and supervision of a duly registered chemist and druggist.

(*b*.) There was no evidence of any patent medicines being exposed in the shop for retailing or otherwise,

(*c*.) There was no evidence that the articles sold *i.e.* a bottle of a preparation known as "beef, iron and wine" is a preparation or a remedy for any disorder, or is in any way recommended as a remedy for any disorder, and

(d.) There was no evidence that the said "beef, iron and wine" contained any of the drugs mentioned in Schedule I, part 3 of the Ordinance.

I have already indicated that I do not consider any of the grounds of appeal maintainable and my reasons for so holding, which I will now give in writing.

(*a*.) By section 9 of Ordinance 12 of 1893, it is provided that "any exception, exemption, proviso, condition, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the statute creating an offence may be proved by the defendant but need not be specified or negatived in the complaint, and if so specified or negatived no proof in relation to the matters so specified or negatived shall be required on the part of the complainant."

This section is identical in terms with section 39, sub-section 2 of 42 and 43 Victoria C. 49 more generally known as the "Summary Jurisdiction Act 1879, and similar to 11 and 12 Vict. c. 43. s. 14. (Jervis's Act)."

The prosecutor therefore in this case, when once he proved that the appellant kept a shop open for retailing patent medicines, cast upon the appellant the onus of proving that he was within the exception excusing the facts charged; in other words it was for the appellant to prove that the keeping of his shop open for the sale of patent medicines was not unlawful because he came within the exception mentioned in the section by having his shop under the direct management and supervision of a registered chemist or druggist. This was peculiarly within his own knowledge and easy for him to prove if true.

There are decisions of the English Courts to the effect that when the exception was engrafted on the description of the offence, the burden of proof lay on the prosecutor of negativing the exception, and that in such cases the exception was not within the meaning of section 14 of 11 and 12 Vict. c. 43, (cf. *Taylor* v. *Humphries,* 34 L.J.M.C. 1, and *Davis* v. *Scrase* L.R. 4, C.P. 172). To overcome that difficulty, which placed obstacles in the way of prosecutions, the words "whether it (the exception) does or does not accompany in the same section the description of the offence in the statute" were introduced into subsequent enactments, thus avoiding the effect of those decisions (see *Roberts* v. *Humphreys* 42 L.J.M.C. 147; L.R. 8 Q.B. 483).

The effect in my opinion of section 9 of Ordinance 12 of 1893,

is in the words of the learned writer in Paley's Law of Summary Convictions that in all cases "where the offence is made penal only by the want of certain qualifications in the offender or by the absence of certain exculpatory circumstances," the onus lies upon the defendant to prove the possession of those qualifications or the existence of those circumstances.

In the present case the learned magistrate held that it was for the appellant to prove that his shop was under the direct management and supervision of a duly registered chemist and druggist, and I agree with his decision supported as it is by a long string of judgments of this Court See *Benjamin* v. *Baker*, (25.8.03), *Day* v. *McQuarrie* (31.3.05), *Gomes* v. *King* (18.9.07), *Manson-Hing* v. *Day*, (9.1.05), *Porter* v. *Burrowes* (26.6.89).

None of the points taken in the other grounds of appeal were submitted to the Magistrate for his decision and I think wisely so, for there is no merit in any of them.

(*b*.) It is submitted by the learned counsel for the appellant that there was no evidence to show that patent medicines were exposed in the shop for retailing or otherwise, but the charge was not for exposing medicines for sale, but for keeping a shop open for retailing patent medicines, and this in my opinion was fully proved by the production of the licence to sell drugs issued to the appellant, coupled with the evidence that the shop was open, that several persons were in it, that the appellant was not a registered chemist and druggist, and that upon one of the witnesses entering the shop and calling for a certain preparation known as "Beef, Iron and Wine" which for the reasons given in the next paragraph I hold to be a patent medicine, he was immediately supplied with it by the appellant.

(*c*). The bottle containing the preparation "Beef, Iron and Wine" which was sold by the appellant has printed on its label and on the carton in which it is enclosed, a statement amongst others that the preparation is valuable in the treatment of impaired nutrition of the blood, and in various forms of general debility . . . . and on the carton only that it invigorates the nervous system . . and restores the weak and broken down to health.

The learned counsel for the appellant contends that nothing printed on the bottle indicates that it is a remedy for any disorder, or that it is in any way recommended as a remedy for any disorder. If I understood him correctly he argues that a disorder must be something organic or some such recognised disease, *e.g.*, Blight's, diabetes, &c.

The term "disorder" is thus defined in Webster's "disturbance of the functions of the animal economy . . . . ; sickness, derangement"; and "remedy" is defined as "that which relieves or cures a disease; any medicine or application which puts

an end to disease and restores health, that which corrects or counteracts an evil of any kind.

A "Patent or Proprietary Medicine" is defined by Sec. 2 of Ordinance No. 19 of 1911, to "include any medicine or any preparation that is in any way recommended either on the label of any package thereof or by advertisement as a remedy for any disorder." In the case of *Booker Bros., McConnell & Co., Ltd.,* v. *Legge,* 13.11.12, confirmed on appeal to the Full Court on 17th December, 1912, a preparation known as "Palatol" which was advertised as being "of value in respiratory disorders of a chronic type requiring reconstructive medication" was held to be a patent medicine within the meaning of sec. 5 of Ordinance 8 of 1912, which is identical in terms with sec. 2 of Ordinance 19 of 1911.

And in *Manning* v. *Hutt* (L.R.B.G. 1916. p. 8) a preparation known as Wampole's Preparation of Cod Liver Oil which is recommended as a remedy for impaired nutrition was held to be a patent medicine within the section.

I hold therefore that the preparation in the present case is also a Patent or Proprietary medicine within the meaning of sec. 2 of Ordinance 19 of 1911.

As to (d) I am at a loss to understand why it should be thought necessary for the prosecution to prove something which may not be the case and which has nothing whatever to do with the offence charged. Section 7 of Ordinance 19 of 1911, prohibits the sale of patent medicines after the 1st January, 1912, unless the package containing the same is distinctly labelled with the proportion or percentage of alcohol (*if any*) and of the substances, &c. *(if any)* mentioned in Schedule I, Part III. But as I have said the Appellant is not charged with a breach of this section and the words "*if any*" in the section indicate that there may be patent medicines which do not contain any of the substances mentioned in the Schedule,

The learned counsel referred to sec. 25 (5) (c) of Ordinance 3 of 1899, in support of this part of his argument, but I can see nothing in the section to help him nor in my opinion has it any bearing whatever upon the charge in this case. Furthermore section 25 (5) (c) refers to substances mentioned in Schedule III, and not to Schedule I, Part III.

There was one other ground of appeal taken which in my opinion is also untenable, namely, "that the magistrate misdirected himself when he considered in dealing with the charge before him the second part of the section under which the defendant is charged; the said section containing two separate and distinct offences."

In my opinion the two parts of the section preceded in each

case by the word "unless" are cumulative, and form the two necessary excuses for selling, or keeping open a shop for retailing drugs or poisons including patent medicines. The section provides that no person shall sell, &c, unless the shop is under the direct management . . . . of a duly registered chemist, *and* unless the drugs, &c, are dispensed, &c, under the direct charge &c, &c.

I can find nothing wrong with the learned magistrate's decision which I confirm.

The appeal is dismissed with costs.

[NOTE.—An appeal to the West Indian Court of Appeal has been lodged in this case.]

BLUNT *v.* MATHESON.

[546 OF 1922.]

1922. NOVEMBER 17. BEFORE DE FREITAS, ACTG. J.

Magistrates Court—Trespass to lands—Bond fide dispute as to title thereto—Jurisdiction declined—Procedure—Appeal or Mandamus?

The complainant charged the defendant with trespass to land. After evidence was adduced, the Magistrate declined jurisdiction on the ground that a *bona fide* dispute as to the title to immovable property had arisen. The complainant *appealed* against the decision. *Held:—* That the Magistrate having declined jurisdiction, the matter could be brought before the Supreme Court only by way of *mandamus,* not by way of *appeal.*

F. E. Waldron, for the appellant.

F.O. Low, for the respondent.

DEFREITAS, ACTG. J.: This is an appeal from the decision of the Stipendiary Magistrate for the Demerara River Judicial District who declined jurisdiction on a charge of illegal trespass on land, on the ground that a question *bona fide* arose as to the title to immovable property.

I am clearly of opinion that this case comes within the principles of the cases *Roy* v. *Hodgson.* 7.11.02., *Corbin* v. *Mentor* 21.12.03 and *Johnson* v. *Gall* 13.2.03. (F.C), and the matter is not one for appeal, but is the subject for a mandamus.

Appeal is dismissed with costs.

[NOTE.—An appeal to the West Indian Court of Appeal has been lodged in this case.]

DUDLEY *v.* GORING.

[593 OF 1922.]

1922. NOVEMBER 18. BEFORE BERKELEY, ACTG. C.J.

Claim for Wages—Work done for holder of diamond—prospecting licence—Written agreement between the latter and a third party—Liability for wages—Partnership or Agency.

M. and the defendant entered into a written agreement whereby M., the holder of a licence to prospect for diamonds, agreed to remunerate the defendant for services to be rendered by the defendant in prospecting for and locating claims. The mode of such remuneration was to be a division of the proceeds of sale of diamonds won, after defrayal of expenses. Plaintiff was subsequently registered as a labourer to M., and performed services on the placer located. Plaintiff sued defendant for wages alleging that defendant was a partner in the diamond venture, and as such liable. The Magistrate gave judgment for the plaintiff. *Held* (on appeal):—That sharing in profits does not "per se" constitute a partnership; that the defendant was there-fore not a partner of M. and accordingly was not liable to pay wages for work done for M.

M. J. C. DeFreitas, for appellant.

J. A. Luckhoo, for respondent.

BERKELEY, ACTING C.J.: This is an appeal from the decision of the Stipendiary Magistrate of the Georgetown Judicial District who on a claim for wages gave judgment for the respondent for $78 and costs.

The claim alleges that Rosina Mitchell and appellant carried on in partnership the business of diamond mining at Powis Placer, Puruni No. 3 District and elsewhere, that respondent agreed with Rosina Mitchell in writing to work as a labourer on Crown Grant known as Powis Placer for the period and at the wages mentioned, that the appellant received 342 carats of diamonds won by him and other labourers, that respondent had received from appellant his servant or agent the several amounts and goods for which credit had been given, and that appellant had promised to pay but had neglected to do so.

The following facts are not in dispute (*a*) that respondent registered to work as a labourer for Rosina Mitchell, (*b*) that the account showing the amount due is headed "John Dudley (labourer) in account with R. W. Mitchell," (*c*) that under an agreement entered into between Rosina Wilhelmina Mitchell and the appellant, it is set out that Mitchell is the holder of a prospecting licence to prospect for gold or precious stones and to

locate claims and it is agreed between the parties that Mitchell shall furnish all expenses for prospection and location and working of any claims located to the sum of $600 and that appellant shall make such location and prospection in the Puruni District only and in the sole name of Mitchell and *(d)* that after payment of all expenses the profits shall be equally divided between the said Mitchell and the appellant.

The substantial ground of appeal is that under this agreement the appellant is not a partner of Mitchell and is not liable for the payment of her debts.

The magistrate in the course of his reasons for decision says that appellant in stating his grounds of defence admitted that he was a partner and that he cannot now be heard to say he is not. The record shows that what appellant said was "admit partnership as alleged in paragraph 1 of the claim but say that under the partnership not liable for wages to plaintiff but Mrs. Mitchell is." In his evidence he says "partners under certain conditions" and again "the agreement between Mrs. Mitchell and myself is in writing." It is clear that the use of the word partner referred to his position under the agreement set out above.

An affidavit has been laid over which was made by appellant in an action between James Mitchell and the said Rosina Mitchell in which he refers to a written agreement of partnership, he further says that the diamonds now in the control of the Commissioner of Lands and Mines are the property of Rosina Mitchell and himself and that the creditors of the partnership are to be paid out of the proceeds realized by sale of these diamonds. He rather stretches a point when he says that he is part owner of the diamonds. It would have been more accurate to say that he had an interest in them as under the agreement after payment of all expenses the profits were to be equally divided. On the other hand he was to give his whole time knowledge and superintendence to the location and working of the claims of Rosina Mitchell without any salary. I am of opinion that he was only the servant or agent of Mitchell and the agreement provided for his remuneration as such by a share of the profits winch does not of itself make him liable as a partner.

Appeal allowed with costs.

Solicitor for the Appellant, *W. D. Dinally*

CLARKE *v.* DAVID.

583 OF 1922.

1922. NOVEMBER 18, 23. BEFORE DEFREITAS, ACTG. J.

Criminal law—False pretences charged—No false pretence proved—Larceny established—Summary Conviction Offences Ordinances 1893, section 101.

The Appellant was charged with having obtained the sum of $3.08 from the complainant by falsely pretending that he the appellant was entitled, and was the person, to receive the said sum of $3.08 as change from William Fogarty, Ltd. At the trial, evidence for the complainant was led, establishing larceny, but no false pretence was in fact proved. The Magistrate convicted the appellant on the charge of false pretences. *Held* (on appeal): (1) That according to the true construction of section 101 of Ordinance 17 of 1893, an accused *may be* convicted of the charge of false pretences, although the evidence establishes larceny; provided however, that the alleged false pretences are in fact proved; (2) That a conviction under the said section can only be for false pretences.

E. F. Fredericks, for the appellant.

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

DEFREITAS, ACTG. J.: The appellant was convicted by the Stipendiary Magistrate of the Georgetown Judicial District on a charge of obtaining $3.08 from the complainant by falsely pretending that he the appellant was entitled and was the person to receive the said sum of $3.08 as change from William Fogarty, Ltd., &c.

From the learned magistrate's notes of evidence I am quite satisfied that no false pretence was proved but that a case of larceny was made out by the prosecution. This is admitted by the learned counsel for the respondent.

No formal order has been drawn up, but it is clear that the learned magistrate convicted the appellant of obtaining money by false pretences, and not of larceny; in fact in his written observation on the affidavit filed by Mr. Fredericks, he states that he never considered the question of larceny at all, and had his attention been called to the case of *R.* v. *Middleton* he would have convicted the appellant of larceny.

I am prepared to accept Mr. Fredericks' affidavit as a correct statement of what transpired at the hearing, but it is immaterial for the purpose of my judgment.

On the day the appeal was set down for hearing, there being no appearance on behalf of the respondent. I intimated to Mr. Fredericks who appeared for the appellant that I was clearly of the opinion that no case of false pretences had been made out, but that I was willing to hear him on the question as to whether the appellant should not be convicted of larceny under the provisions of section 101 of the Summary Conviction Offences

Ordinance, 1893. The matter having been adjourned to enable Mr. Fredericks to file an affidavit as to what took place at the hearing before the magistrate; the learned Assistant to the Attorney General appeared on behalf of the respondent, when the appeal was next before the Court.

The learned counsel for the respondent contended that although the case proved by the prosecution was one of larceny, the magistrate was nevertheless empowered by section 101 to convict the appellant of the offence of obtaining by false pretences, and that the conviction was right as it stood.

Mr. Fredericks offered no argument to refute this contention beyond submitting that his client was entitled to an acquittal as the evidence neither proved false pretences nor larceny but at most an obtaining by fraud, which he said was no offence at all. With this latter part of his submission I cannot agree.

The question then for my decision is whether the conviction can stand either in its present or any amended form.

The answer to this question must necessarily depend upon the meaning of the proviso to section 101 of Ordinance No. 17 of 1893. That section reads as follows:—("Every person who, by any false pretence, obtains from any other person any chattel, money, or valuable security, with intent to defraud, the value or amount of such chattel, money, or valuable security not exceeding twenty-five dollars, shall on being convicted thereof, be liable to a penalty of one hundred and fifty dollars or to imprisonment for six months: Provided that if, on the hearing of a complaint for any such offence, it is proved that the defendant obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to have the complaint dismissed; and where a person is charged with any such offence, and the complaint is either dismissed on the merits or the defendant is convicted, the defendant shall not be liable to be afterwards prosecuted for larceny upon the same facts.")

No authorities have been cited on either side to throw any light on the correct interpretation to be given to the section, nor am I aware of any local case in which the point in question has been considered.

To accept the view of the learned Assistant to the Attorney General would be to sanction a conviction for false pretences whenever the prosecution failed to establish the false pretences as laid in the complaint, if the facts proved it other respects constitute the offence of larceny.

Now is this the meaning of the section? It is quite obvious that the section does contemplate a certain class of cases, where although the complaint may be for the offence of obtaining by false pretences and the evidence may establish larceny, yet a

conviction for obtaining under false pretences and not for larceny may be sustained; but the proviso does not in my opinion apply to a case where a person is charged with obtaining money or other property by false pretences and no false pretence is proved, but a case of larceny is made out.

After very careful consideration I have come to the conclusion that all the section does is to guard against the difficulties that so often arise in distinguishing cases of larceny from false pretences where there has been a constructive taking, as for instance, where the mere possession of property has been obtained by some trick or artifice by some one having a pre-existing *animus furandi.* It is well known that before the passing of similar enactments in England, when a person was indicted for the lesser offence of false pretences, if not only the intent to defraud was proved, but the evidence disclosed a pre-existing *animus furandi* and a constructive taking amounting to larceny, the misdemeanour was said to be merged in the felony and the accused was entitled to be acquitted, for at Common Law no one could be convicted of a misdemeanour if indicted for felony. nor of a felony on an indictment for misdemeanour.

My view is in accordance with the judgment of Crompton. J., in the case of *R.* v. *Bulmer* (1864), *L. & C.* p. 476 where referring to an identical section in the Criminal Law Consolidation Act (24 and 25 Vict. C 96 sec. 88) he says:

"The statute does not say that you can prove a larceny under any state of facts that may be alleged in the indictment; but that the prisoner shall not be entitled to be acquitted of the misdemeanour by reason of its being merged in the felony, shewing that you must still prove the misdemeanour."

In Halsbury's Laws of England. Vol. IX., at p. 693, there is a note (y) on this case just cited, to the effect that on an indictment for false pretences if the facts show larceny, the defendant cannot be convicted, *unless the alleged pretences are proved,* but if the false pretences are proved, although the facts amount to larceny the offender may be found guilty on an indictment for false pretences.

And this appears to be so ever since the passing of the Larceny Act, 1916, under sec. 44 (4), although the words used are somewhat different.

In Archbold's (25th Ed., p. 691) it is said that it is not sufficient under that section to prove *any* larceny. The true meaning of the provision is that if the misdemeanour is proved *as it is laid in the indictment* the defendant is not to be acquitted of the misdemeanour simply because the case amounts to larceny. (See also Russell or Crimes, 7th Ed., Vol. II., at p. 1576, and Roscoe's Criminal Evidence (14th Ed., p. 736).

The case of *R.* v. *Bulmer,* and the passages I have just referred to in the text books although dealing with indictments are in my opinion applicable in principle to summary convictions.

In the present case under review, it is admitted that there was no false pretence proved, and the learned Magistrate himself in his reply to Mr. Frederick's affidavit seems now to take the view that it was not a case of false pretences. It is quite evident that the appellant never made any pretence whatever either by words or conduct; the money was placed on the counter and the appellant without any right or excuse whatever deliberately stole it by taking it up and walking out of the shop with the intent to deprive the owner of it and convert it to his own use (See *R.* v. *Middleton,* 42 L.J. (M.C.) 73) He cannot therefore be convicted of false pretences and is entitled to an acquittal.

Whilst then I do not agree with the view expressed by the learned counsel for the respondent that whenever *any* case of larceny is made out the Magistrate if trying a case of false pretences under sec. 101 may convict of the latter offence, I am indebted to him for dispelling my first impression that in a case properly within the meaning of the proviso to the section as I have indicated, the conviction should be for larceny. A conviction under sec. 101 can only be for false pretences.

I am compelled therefore to quash the conviction. I do so, however, with the greatest reluctance because the appellant has been proved clearly guilty of theft, for which offence he must go unpunished. As was said by Lord Coleridge, C.J., after expressing his regret to have to let off a man who was proved guilty of gross fraud in a case where the prisoner was indicted for larceny and the offence proved was false pretences "as long as we have to administer the law we must do so according to the law as it is. We are not here to make the law . . . . ." (*R.* v. *Solomons* (1890) 17 Cox, C.C. at p. 96.)

This Appeal is allowed but without costs.

SADALOO *v.* DEMERARA COY., LTD.

SADALOO *v.* DEMERARA COY., LTD.

[581 OF 1921.]

1922. NOVEMBER 14, 15, 16, 17; DECEMBER 1.
BEFORE BERKELEY, J.

Landlord and Tenant—Y*early tenancy—Month's notice to quit—Non-compliance with notice—Summons for possession—Order for possession granted—Ejectment—Small Tenements and Rent Recovery Ordinance, 1903, section 18, sub-section (1*).

On the 30th April, 1921, the plaintiff, who was a tenant of the defendant company under a yearly tenancy, received a notice from the defendant company requiring him to quit within thirty days of service of notice. The plaintiff failed to obey the said notice, and on the 20th of June, 1921, on a complaint brought against him by the defendant company for neglecting to give up possession, an order was made upon the plaintiff to deliver up possession in one month. Plaintiff not having done so, a warrant of ejectment dated 24th May, 1921, was, at the instance of the defendant company, executed against him on the 30th August, 1921, and his two buildings were pulled down in an unworkmanlike manner so as to cause unnecessary damage.

Held (1) That as the tenancy was a yearly one, a month's notice was inadequate; (2) that under such a tenancy, six months' notice was usually required, and in the absence of a contrary agreement, must expire on the last day of some year of the tenancy; (3) that, under the circumstances, a warrant issued by the Magistrate requiring the giving up of possession within a month could not cure the defect, as the obtaining of such a warrant was in itself a trespass under sec. 18 (1) of the Small Tenements and Rent Recovery Ordinance, 9 of 1903.

J. A. Luckhoo and S.J. Van Sertima, for the plaintiff.

H. C. Humphrys, for the defendant company,

BERKELEY, J.: The plaintiff claims $2,500 for the unlawful entry by the defendant company on land rented by him at $2.40 per annum from the said company and as damages in respect of the buildings broken down and destroyed and thrown on the public highway on 30th August, 1921.

The defence is that the plaintiff was a tenant from month to month, and that after due notice to quit an order from the Stipendiary Magistrate had to be obtained, and that plaintiff was duly ejected on said 30th August, 1921, and his buildings removed without more damage than was absolutely necessary. The defendant further says that plaintiff sub-let the premises which were contrary to the terms of his tenancy.

The facts are that plaintiff, an East Indian immigrant, on arrival in this colony was indentured on the 5th October, 1900, to Providence plantation, and on obtaining his certificate of exemption from

labour on 5th October, 1905, he decided not to return to India. Mr. Bratt, then manager, confirms plaintiff who says that he wished to make Providence his home. At that time (1905) there was only a trash house on the lot taken by plaintiff. Two years later (1907) according to Mr. Bratt, the sanitary authorities said that under the regulations, trash houses were not to be repaired but replaced by modern buildings, and that he told plaintiff that he must do what he was told. Plaintiff thereupon built a modern house 3 feet from ground 22 x 12 with a gallery and kitchen. It contained four rooms with a zinc roof. Later on he built a second house about the same size as his children were now grown up.

A written notice dated 30th April, 1921, shows that plaintiff was required "within thirty days from date of service" to deliver up possession of the lot of land which he held under a monthly tenancy. On 13th June, 1921, a complaint was lodged in the Magistrate's Court of Georgetown against plaintiff for neglecting to deliver up possession. In this complaint the rent is referred to as "two dollars and forty cents ($2.40) per annum payable monthly." Plaintiff was duly summoned for 20th June, 1921, and on that day plaintiff was ordered to deliver up possession in one month. Plaintiff not having done so a warrant of ejectment signed on 24th August, 1921, was executed on the 30th August, 1921. In this warrant are the words "under rent of $2.40 per annum."

As to the nature of the tenancy it was only a verbal agreement entered into between plaintiff and Mr. Bratt, then manager of Providence, some seventeen years ago. Plaintiff says he arranged with Mr. Bratt to pay ten shillings a year—the same as was paid by the person who had given up the lot and from whom he had bought two trash houses. He has been able to find seven receipts which he has produced—the first is dated 18.1.13 and reads "ten shillings rent of lot 15 to end of December, 1912." No conditions on back. The second is for five shillings to June, 1917. Conditions on back—*three months* notice to quit on either side." There are five conditions but no condition as to sub-letting. The third is for five shillings to December, 1917. Conditions same as last except that the word "three" is erased and "one" substituted for it." Approval of the Manager" now reads "Approval of the Sanitary Inspector," and conditions 6 and 7 appear for the first time. Condition 6 reads: "All occupiers of lot houses are under an implied contract under the Master and Servant Act." Condition 7 reads: "The re-letting of lots is not permitted." The fourth receipt is the same as the third to end of June, 1918. The fifth for five shillings to end of June, 1919. It is the first that has "one month notice" and the Condition Nos. 5 and 6 printed. The last two to 31st December, 1919, and to 30th June, 1920, are similar to the fifth receipt. These receipts tend to show that up to December, 1912, an ordinary receipt for a year's rent was given with no conditions attached, that at some time between that date and 30th June, 1917, the condition as to three months' notice on either side was endorsed on receipt, that on the next receipt for rent to 31st December, 1917, the conditions

as to one month's notice, occupiers under an implied contract, to work, and reletting not permitted, appear for the first time. Mr. Goodacre, deputy manager, in 1921 says "As a rule we asked for monthly rental at end of six months or a year." He also says that up to 1914 when he left the estate receipts were not given with conditions on back.

Mr. Bratt, a witness for the defence, says that he never let at a yearly tenancy to anyone—that he never arranged with plaintiff as a yearly tenant, that he told him he was a monthly tenant, that the terms were written on back of receipt - that one of these terms was not to sub-let. The land Rent Books for 1920 and 1921 shew that for these years under head "Rate for month" 20 cents is entered. They also shew that rent in these years was paid half-yearly. Several times after plaintiff had been summoned and even after ejectment had been ordered he asked that he should not be ejected from the land which he had rented for over sixteen years. I do not think that his action in this respect can be regarded as an admission on his part that he was a monthly tenant. In view of the receipts and in the absence of satisfactory evidence to the contrary I can come to only one conclusion, viz., that owing to the number of years (17) that have elasped, Mr. Bratt is mistaken when he says he told plaintiff in 1905 that he was a monthly tenant, that the terms were on back of receipt and that there was an undertaking not to sub-let.

As plaintiff paid his rent yearly or half-yearly as shewn by the receipts and by the land Rent Books for 1920 and 1921, I have come to the conclusion that there was a yearly tenancy and that six months' notice to quit must expire with a year of the tenancy.

As to his subletting, the receipt to 31st December, 1917, shews in the absence of evidence to the contrary, that there was no such condition in 1905.

I am satisfied that plaintiff knew he had to work on the plantation and that when he spoke to Mr. Bratt about his getting old he was told that his son must work. According to Mr. Goodacre he did not work after 1920, but he adds that his sons worked occasionally but not regularly, whether one at least of his sons worked up to the last is not clear, but it is shown that one if not both of the tenants occupying one of his houses worked on the plantation.

It is submitted that if the Court finds that there was a yearly tenancy and that plaintiff was entitled to more than one month's notice the defect has been cured by plaintiff submitting to the jurisdiction of the Magistrate who made an order of ejectment against him from which order he did not appeal.

Ordinance No. 9 of 1903, section 18 sub-section 1 (1 and 2 Vict. C. 74 s. 3) expressly declares that in every case in which the person to whom any such warrant shall be granted had not at the time of granting the same, lawful right to the possession of the premise, the obtaining of any such warrant as aforesaid shall be deemed a trespass by him against the tenant or occupier of the premises although no entry may be made by virtue of the warrant (see

Tindal, C.J., in *Darlington* v. *Pritchard*,4 Manning and Granger, Vol 4, p. 793).

As to damages the plaintiff had completed twenty years on Providence plantation on 5th October, 1920, and had worked on that plantation up to the end of that year. Mr. Bratt says that he and his family worked well. Not only had he erected wooden houses but he had enclosed the place with a wire netting.

There is evidence that one or more of the inmates of his house worked to the date of his ejectment. I think a careful enquiry would have resulted in his remaining on the land. The bailiff's description as to the breaking down of his houses and the evidence of Yard, the carpenter, who inspected the houses after they were taken down and removed to the dam, satisfies me that unnecessary damage was caused in the removal of the buildings. To mention one matter—it is shown that having removed the sides, the frame of the house—with a zinc roof on the uprights —was brought to the ground by placing a rope around the frame and dragging it off the pillars.

Under these circumstances I consider that the plaintiff is entitled to recover substantial damages.

Judgment for the plaintiff for $1,200 with costs.

R. C. V. Dinzey, Solicitor for the plaintiff.

Cameron & Shepherd, Solicitors for the defendant company.

SITA PARVATI *v.* PRAGDUT AND SEETAL JANKI.

[625 OF 1922.]

1922. NOVEMBER 20; DECEMBER 1. BEFORE BERKELEY, J.

Intestacy—Illegitimate child—Succession to deceased mother's estate—Roman Dutch law—Civil law of British Guiana 1916, sec. 6. sub sections 1, 2, 3, and 8.

The respondent was an illegitimate child of one Hurdasi, the legitimate daughter of Rattah, the testatrix. Hurdasi predeceased her mother Rattah, and on the latter's death the respondent brought an action to obtain the proof in solemn form of the will of Rattah. The applicants contended that the claim should be struck out on the ground that the respondent had no interest in the subject-matter of the action, inasmuch as the respondent could only *succeed to* her mother's estate, and could not claim *through* her mother so as to recover what her mother would have been entitled to had she the mother survived the testatrix Rattah, and the latter's will been declared null and void.

Held:—That according to the true construction of sec. 6, subsection 8 of the Civil Law of British Guiana Ordinance, 1916, an illegitimate child's right of succession in intestacy is restricted to, and does not extend beyond, the mother's estate, and, accordingly, that the respondent's claim must be struck out.

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

J. S. McArthur, for the respondent.

BERKELEY, J.: The applicants—defendants in this action—ask that the statement of claim be struck out and the action dismissed on the ground that the statement of claim supplemented by the particulars supplied by the respondent shows no reasonable cause of action or any interest or right whatsoever in respondent to oppose the granting of probate of the last will and testament of Rattah deceased.

It is admitted by counsel for the respondent that in order to render her capable of bringing this action she must have some interest in the estate of the deceased.

Rattah died on or about the 26th September, 1922, and the applicants—her sons—are the only two children who survived her. She was married to Bindrabin who predeceased her. Respondent is the illegitimate child of Hurdasi, a daughter of Rattah who also predeceased her. Rattah was only once married and had no children born out of wedlock.

Under Roman-Dutch Law illegitimate children succeed *ab intestato* not only to their mother, but to their maternal blood relations, standing in the same legal relation to their mother and her relations as do her legitimate children. On the other hand the mother and her blood relations succeed to the property of such illegitimate children and illegitimate children succeed to one another. Under the old law of this colony therefore the respondent would have been entitled to share with the applicants in the estate of Rattah if she died intestate.

From 1st January, 1917, when the Civil Law of British Guiana, 1916, came into operation the Roman-Dutch Law ceased to apply to this colony.

The Civil Law of British Guiana as to intestate succession is to be found in section 6 of the Ordinance and sub-sections 1, 2, and 3 are adapted from sections 3 and 4 of the Statute of Distribution (22 and 23 Car. 2 Ch. 10) only that the words "per stirpes" are used instead of the words "legally represent such children" or "legal representatives as aforesaid." The words "their descendants taking per stirpes" in sub-section 1 and "the grand-children (an error for children) of any deceased child or children taking per stirpes" in sub-section 3 cannot be held to include illegitimate descendants and illegitimate children. Even in Roman-Dutch Law in the absence of clear indications in a will of a different intention, the presumption is that the term "issue" or "children" is

intended to include *only* legitimate issue or children. (De Villiers, C.J., *in re* Russo 13 Supreme Court, p. 188).

The first part of sub-section 8 reads "illegitimate children shall be entitled to succeed in intestacy as heirs of their mother as if they were legitimate children of their mother." This is an encroachment upon the English Law of Intestacy. There is no provision made as to a mother succeeding to the property of her illegitimate children nor any other "Intestate Succession" such as exists under Roman-Dutch Law. If it was intended that the children of any deceased child or children should take "per stirpes" one would have expected to find it definitely stated. For these reasons—not without some hesitation—I come to the conclusion that the legislature intended to limit illegitimate succession to the estate of a mother dying intestate. I think this view is strengthened by sub-section 15 which provides that illegitimate children of a *female deceased* are blood relations for the purpose of inheriting *her property* which would otherwise fall to the Crown.

On these findings I order that the statement of claim be struck out and the action be dismissed. I am of opinion that the point of law raised in this application is an important one and affects both the applicants and the respondent. I therefore direct that the costs of both parties be paid out of the estate.

F. Dias and *A. G. King,* Solicitors for the applicants.

J. A. Viapree, Solicitor for the respondent.

[An appeal to the West Indian Court of appeal has been lodged in this case.]

ASHMORE *v.* NG-FOON-YHING.

ASHMORE *v.* NG-FOON-YHING.

[30 OF 1921 BERBICE.]

1922. DECEMBER 1, 18. BEFORE BERKELEY, J.

Magistrate's Court—Criminal Law—Charge of using a place as a common gaming house—Withdrawal of charge—Subsequent obtaining of Attorney General's Fiat—Fresh charge —"Taking of proceedings"—Gambling Prevention Ordinance 42 of 1902 sections 4 and 20.

The appellant was arrested on the 10th of March, 1922, and charged with the offence of having used a place as a common gaming house. He appeared before the Magistrate on the 11th of March, 1922, and was remanded to subsequent days until March 30, when the charge was withdrawn. Up to March 11, the Attorney General's fiat had not yet been obtained. Subsequently the fiat was obtained and a fresh charge instituted against the appellant. The Magistrate having convicted the appellant of the offence charged, the latter appealed mainly on the ground that the proceedings were void *ab initio* by reason of the failure to obtain the Attorney General's fiat in the first instance.

Held (on appeal) :—(1) That the arrest of a person found committing an offence followed by his detention does not constitute the taking of proceedings within the meaning of section 20 of the Gambling Prevention Ordinance 42 of 1902, (2) Further, that even if the first charge, improperly brought, had been heard and dealt with, provided it was not disposed of on the merits, a second charge could have been preferred on obtaining the Attorney General's fiat.

J. S. McArthur, for the appellant.

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

BERKELEY, J.: The defendant appeals from the decision of the Stipendiary Magistrate of the Berbice Judicial District who convicted him of using his house as a common gaming house.

The ground of appeal is that proceedings having been commenced without the fiat of the Attorney General, the formal withdrawal of the charge and the substitution of a similar charge with the fiat of Attorney General endorsed thereon could not cure the defect or inure to negative the original proceedings.

The facts are that appellant was arrested on 10th March, and charged with this offence. He was placed before the Magistrate on 11th March, remanded to 18th and then to 23rd, and then to 30th, on which day the charge was withdrawn. On 2nd April, a second charge similar to the first was laid endorsed with the fiat of the Attorney General dated 14th March. It seems that no evidence was taken on the first charge and there is nothing to shew whether appellant was kept in custody or admitted to bail from 10th to 30th March.

Under Ordinance No. 42 of 1902 (s. 20) no proceedings shall be taken against any person for an offence under section 4 (under

which both these charges were brought) of this Ordinance without the fiat of the Attorney General being first obtained. This contemplates the fiat being obtained antecedently to the initiation of proceedings, which are initiated by laying the complaint before the Magistrate. As said by Chalmers, C.J., in *Quinta* v. *Swain* (Review Cases 1878-1884, p. 27) "the purpose of the Legislature in framing the proviso being doubtless that the action of the Commissaries in bringing these prosecutions should be supervised and controlled by a high officer who would not permit any prosecution to issue except where he deemed it expedient in the public interest." An arrest of a person found committing an offence followed by his detention until the fiat is obtained, is not the taking of proceedings. These begin only when the charge is laid before the Magistrate. In the present case no evidence was taken on the charge just laid and there was therefore no hearing on the merits. Although the proper procedure is not to enter a charge until the fiat is obtained, yet if such a charge has been entered and has been disposed of but not on its merits, there is nothing to prevent a second charge being laid when the fiat has been obtained, provided that second charge is brought within the time allowed by law. (See *Ti-a-kin* v. *Dornford* (Review Cases, 1884, p. 2).

I affirm the conviction but as it does not appear that appellant has been convicted before of a similar offence, I reduce the penalty to $200 and costs. The articles and the money ($294.32) found in the house are forfeited.

J. Eleazar, solicitor, for the appellant.

HICKEN *v*. THOM.

[40 OF 1922, BERBICE.]

1922. DECEMBER 15, 18. BEFORE SIR CHARLES MAJOR, C.J.

Criminal Law—Wilful Trespass—Trench adjoining public road—"Control and Maintenance" of trench distinguished from "Possession"—"Public Road"—Roads Ordinances, 1905 and 1910.

The respondent charged the appellant with wilful trespass in a trench at East Lothian. Under a contract between the respondent's predecessor in title and the Drainage Commissioners the former was vested with the maintenance and control of, among others, the trench in question, which bordered upon the public road. The Magistrate convicted the appellant of the charge. *Held* (on appeal) (1) That in the absence of any enactment or lawful prohibition, the trench, being part of the "public road" according to the Roads Ordinances of 1905 and 1910, was open to access by members of the public; (2) That the above-mentioned contract invested the respondent, through his predecessor in

title, only with the maintenance and control of the trench and did not pass to him such possession either actual or constructive as is required in law to maintain a charge of trespass.

J. S. McArthur, for the Appellant.

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

SIR CHARLES MAJOR, C.J.: On a charge at the instance of the respondent of wilful trespass by the appellant and others in a trench the property of the complainant whereon the appellant was convicted, it appears that the trench is one bordering the public road crossing (among other estates belonging to the respondent) East Lothian plantation in the county of Berbice. This road was named in the first schedule to the Roads Ordinance, 1905, and appears in the list of roads named in the schedule to the Roads Ordinance, 1910. In both ordinances the definition of road is "any public road . . including the . . trenches on the line of such road and used in connection therewith." The trench, therefore, where the trespass is said to have been committed is part of the public road and thus, in the absence of any general or particular prohibition by proper authority in that behalf, open to access by members of the public.

The claim of the respondent to regard as trespass entry by the appellant into the trench is based upon the fact that, as part of the consideration for the exemption of Isaac Patoir, his predecessor in title—an exemption which it is conceded has been continued to him—from assessment for contribution to moneys required or expended for the purposes of the East Berbice Drainage Ordinance, 1903, in respect of certain estates in East Berbice of which Mr. Patoir was the proprietor, that gentleman entered into a contract with the Drainage Commissioners to perform certain drainage works on the estates and perform certain duties in connection therewith, the performance involving, among other continuing duties, drainage of the public road at East Lothian and the surrender to him of the control and maintenance of the drainage trenches bordering the same. To use the respondent's own words: "I pay no assessment under the East Berbice Drainage Scheme. I am excluded under the scheme, and I control drainage trenches on either side public road from Borlam to wing dam Hammersmith, which includes East Lothian." The witness produced certain letters from various public authorities on the subject of Mr. Patoir's contract or agreement with the Drainage Commissioners, and said, "I am carrying out agreement and have exercised control over the drainage trenches there since 1915 up to date. I drain public road and also my lands—pay out of my pocket." Mr. Richard

Bertie Butts, the writer of one of the letters just mentioned, called as a witness for the respondent, said; "The trenches were handed over to Mr. Patoir, who controlled same—also maintained same I am speaking of trenches on either side of public road between Hammersmith and Borlam."

No enactment, nor by-law, nor lawful prohibition, by whomsoever promulgated, against entry into a public trench for fishing, or other purpose not involving a creation of a nuisance, has been suggested as existing. I am satisfied that the investing of Mr. Patoir during his lifetime, and of the respondent after his death, by the Drainage Commissioners, or their successor in authority, with the control and maintenance of the public trenches under the contract made between the parties to it —and "handing them over," as Mr. Butts expresses it, to Mr. Patior means and could mean nothing more than in pursuance of that contract—gave to Mr. Patoir and has given to the respondent no such possession, either actual or constructive as is required in law to maintain trespass. The conviction, therefore, of the magistrate cannot stand and must be quashed. The appeal is allowed and with costs.

J. Eleazar, solicitor for the appellant.
E. A. Luckhoo, solicitor for the respondent.

POHL *v.* JARDINE.

POHL *v.* JARDINE.

[701 OF 1921].

1922. FEBRUARY 10. BEFORE DALTON, J.

Bastardy—Order for maintenance—Child removed from custody of person mentioned in order—Proceeding for recovery of arrears—The Bastardy Ordinance, 1903.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. G. R. Reid.) The complainant Pohl sought to recover from the defendant the sum of $48.92, arrears of payments due under a maintenance order covering a period of 52 weeks. The defendant admitted he had not paid the arrears, but urged that, as he had taken the child out of the custody of the mother, the order was inoperative. The magistrate gave judgment for the amount claimed. The defendant Jardine appealed, on the ground that, as the complainant did not have the custody of the child and was not maintaining it during the 52 weeks for which she claimed, the order for maintenance was inoperative.

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

Refers to *Regina* v. *Padbury* (5 Q.B.D. 126) and *Timmins* v. *Timmins* (801 L.J., P. 78).

B. B. Marshall, for the respondent.

Until the order is varied, as for instance under s. 6 of the Bastardy Ordinance, it stands. There was no appeal from that order.

DALTON, J.—Plaintiff claimed arrears under an affiliation order from the defendant. That order directs the defendant to "pay unto the said Catharine Pohl, the mother of the said bastard child so long as she shall live and shall be of sound mind and shall not be in any prison or to the person who may be appointed to have the custody of the said bastard child under the provision of the ordinance in such case made and provided the sum of four shillings a week until the said child shall attain the age of fourteen years or shall die". No appeal was made from that order, but the evidence shows that after the order was made the defendant took the child out of the custody of plaintiff and refused to return it. On the hearing of the claim for arrears he admitted they were correct, but urged that as he had taken the child out of the custody of the mother the order was inoperative. As the magistrate found, he took the law into his own hands to avoid the payment of maintenance. The ordinance under which the order was made

provides machinery for variation in the order whether as to amount or as to the person who should have the custody of the child but defendant has ignored it. In the absence of evidence of her unfitness for the post, the mother is clearly the proper person who should have the custody of a child of such tender years as this one.

The order of the magistrate directing the payment of arrears is appealed from on the ground that the order is inoperative as the plaintiff no longer has the custody of the child. But the order made still stands and she is legally liable for its maintenance and support. No authority has been cited to me to show that the appellant can avoid the order by, as the magistrate says, 'capturing' the child 'to avoid the express order of the court.' A large part of the argument addressed to me on the appeal would have been to the point, if it was an appeal against the affiliation order itself, but under the terms of that order itself, as it stands, it seems to me the plaintiff was entitled to judgment for the arrears.

The sum claimed, for which judgment was given, was $48.92, twelve months arrears at four shillings, but at the request of appellant's counsel, respondent's counsel consenting thereto, the amount of the judgment was varied, to $24.46, fix months arrears, both sides agreeing that was the highest figure claimable under the law as it now stands.

The appeal is therefore dismissed with costs, subject to the amount of the judgment being changed from $48.92 to $24.46.

[NOTE.—On a petition to the Court by the mother for an order that the child be returned to her, an order was made on March 25th confirming the custody in the father, the mother, however, to have reasonable opportunities of access to the child. An appeal in respect of subsequent proceedings by the mother for further arrears on the magistrate's order was dismissed on May 5th.—Ed.]

LALL, P.C. 3138 *v.* SUN LEE.

LALL, P.C. 3138 *v.* SUN LEE.

[607 OF 1922.]

1922. DECEMBER 1, 18. BEFORE BERKELEY, J.

Magistrate's Court—Criminal Law—Charge of unlawful possession of "opium"—Evidence as to finding of "a residuum of SMOKED *opium"—Opium Ordinance of 1916, sections 2,8,10 and 11.*

The appellant was charged under section 8 of the Opium Ordinance of 1916 with being in the unlawful possession of "opium" without the proper authority. The certificate tendered in evidence by the prosecutor showed that the articles found on the appellant's premises contained "a compound of opium . . . . . namely, a residuum of *smoked* opium, which is a derivative of opium, containing morphine, an alkaloid of opium and meconic acid, a characteristic constituent of opium." The appellant was convicted of the charge laid under section 8. *Held* (on appeal) (1) that "opium" standing by itself in section 8 of the Ordinance does not include "prepared opium" which means any preparation of opium or any preparation in which opium or any residuum of smoked opium forms an ingredient, which preparation is used or intended to be used for smoking; (2) that although "opium" includes "compounds of opium" it does not include "opium" prepared for smoking purposes"; (3) that therefore the appellant could be convicted, if at all, only of the office under section 3 of being in the unlawful possession of "prepared opium."

J. S. McArthur, for the appellant.

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

BERKELEY, J.: This appeal is from the decision of the Police Magistrate of the Georgetown Judicial District who convicted defendant—now appellant—for that he on the 28th August, 1922, was found in possession of a quantity of opium without the proper authority (Opium Ordinance, 1916. s. 8).

The facts are not in dispute. The respondent found certain articles in the appellant's house and the result of chemical and microscopical examination shows that the small tobacco tin (A), the opium pipe with bowl (B), and another bowl (C) contained a "compound of opium . . . . . namely, a residuum of smoked opium which is a derivative of opium containing morphine, an alkaloid of opium, and meconic acid, a characteristic constituent of opium." A lamp (D), was also found and the charred mass adhering thereto contained traces of morphine.

The appellant gave evidence before the Magistrate to the effect that the articles produced were his, that he had bought the stuff

found in the pipe—laudanum—from a doctor's shop, that he cooked the laudanum on the fire in the tin cup and converted it into a solid substance which he smoked, and that the ashes found in or adhering to the exhibits A. to D. are the ashes from that solid substance.

The Opium Ordinance, 1916 (s. 2) provides what "opium" when used without any qualifying epithet shall be taken to include, and it does not include "prepared opium" which means "any preparation of opium, or any preparation in which opium or any residuum of smoked opium forms an ingredient, which preparation is used or intended to be used for smoking" and although "compounds of opium" are included under "opium" there is specially excepted from such compounds "opium prepared for smoking purposes." Sections 10 and 11 refer to both "opium" and "prepared opium" showing that the latter is not included in the former. The English Statute (10 and 11 Geo. 5, 1920, Ch. 46) supports this view. See also Hill, J., in *Manning* v. *Ah Fook* (L.R.B.G. 1915, 95).

The evidence therefore shows that if appellant are guilty of an offence under the Ordinance that offence is provided for under section 3 which deals with prepared opium and his conviction therefore under section 8 cannot stand.

Appeal allowed with costs.

A. V. Crane, solicitor for the appellant

GONSALVES, Appellant,

AND

STEPHEN, Respondent.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

1923. JAN. 9, 20

BEFORE SIR A. V. LUCIE-SMITH, P. SIR W. H. GREAVES, C.J., AND THOMAS. C.J.

Criminal law—Malicious injury to animal—Dog stealing fish from shop—Duty of shopman to protect employer's property—Extent of Duty—Test of liability for injury to dog—Summary Conviction Offences Ordinance, 1893, section 8.

This was an appeal from a judgment of the Supreme Court of British Guiana, affirming the conviction of the appellant by the stipendiary magistrate of the East Coast Judicial District for having contrary to section 58 of Ordinance 17 of 1893, unlawfully and maliciously maimed a dog. The facts appear from the judgments below.

Held (affirming the decision of the Supreme Court).

Per Sir A. V. Lucie-Smith, P.: That the magistrate, having found as a fact, after hearing the evidence, that the appellant did not have any *bona fide* belief in the necessity of using the means employed, the Court would not say that the magistrate was not justified in his finding.

Per Sir W. H. Greaves, C.J.: That the test was whether the appellant knew that much milder means would have attained his object, that in this case he must so have known, and was therefore not justified in acting as he did.

Per Thomas, C J. (dissenting): That the test was whether the defendant, rightly or wrongly but *bond fide,* believed that what he was doing was necessary for the protection of his master's property; that in this case the act spoke for itself and pointed to the existence of that belief.

P. A. Fernandes, for the Appellant.

Mungal-Singh, for the Respondent.

SIR A. V. LUCIE-SMITH, P.: The appellant was convicted of unlawfully and maliciously maiming a dog under section 59 of Ordinance 17 of 1893. As stated in Stone's Justices Manual it is a maxim of law that criminal responsibility shall not attach to a man unless it can be shown that the act with which he is charged was done with a criminal intent. The law, however, supposes that a person must have intended that which is the

probable or natural result of his actions. Dealing with the offence of which the appellant was convicted Lord Coleridge in *Daniel* v. *James,* 2 C.P.D. 351 states the 41st section of the Act upon which this conviction proceeds points to a wicked crime, the unlawfully and maliciously killing or maiming the animals referred to simply for the purpose of indulging a cruel disposition and not to an act done under the impression, right or wrong, that the party is justified in protecting his premises from trespass by such means especially after notice given. In *Mitchell* v. *Armstrong,* 67 J.P. and *Miles* v. *Hutchings,* 1903, 2 KB. 714, it was intimated that the test laid down by Lord Coleridge involves a general proposition which puts somewhat too broadly the right of a person to do an act of the kind in question. In the latter case a test is laid down by Lord Alverstone, C.J., in the following words, "the test is whether the appellant *bona fide* believed at "the time that what he was doing was necessary for the protection of his "master's property, if he fired at the dog unnecessarily and with not any "such *bona fide* belief. I think the offence of unlawfully and maliciously "killing the animal would be made out." Channell, J., said "the existence of "malicious intent would be negatived if the appellant wrongly but honestly "believed it was necessary to shoot at the dog in order to drive him away. "The Justices have found the shooting unnecessary "but have found "nothing as to the appellant's *bona fide* belief." The matter was therefore referred back to the Justices for them to deal with the question as to the appellant's belief. From these decisions it would appear therefore it is a question of fact to be decided by the magistrate whether the appellant *bona fide* believed it was necessary to hit the dog with the bar in order to drive him away or to recover his master's property. The magistrate has found that in no sense could the defendant have acted in the *bona fide* belief that what he did was necessary for the protection of his master's property. The witness, Charles, states that the dog was lying down and the defendant jumped over the counter with the bar in his hand and gave the dog a lash on the back with it—the defendant stated the dog stole salt-fish. Evidently the magistrate believed this evidence. Whatever I may think may have been my finding if I had heard the evidence, I cannot say that the magistrate was not justified in finding the appellant had not the *bona fide* belief that what he did was necessary. I am of opinion therefore this appeal must be dismissed with costs.

SIR HERBERT GREAVES, C.J.: Mr. McCowan, the magistrate, in his reasons for his decision states: "I believe, therefore, from the facts that the "dog was permanently injured by the act of

"the defendant striking it on its back by means of a wooden bar and that it "was done wilfully, that is deliberately and intentionally and not by "accident or misadventure." At the end of his reasons he states: "In no "sense could the defendant have acted under the *bona fide* belief that what "he did was for the protection of his master's property. From the evidence I "consider it was a most reckless and wanton act on his part, and that it was "done maliciously."

Justice Dalton in his judgment states: "The magistrate was not satisfied "that the appellant believed that what he did was *bona fide*, necessary for "the protection of the fish, or that it was the only way he could protect it. "He went far beyond any reasonable action in driving the dog away and "recovering the property, and his conduct was, as the magistrate says, "wanton and reckless."

In *Miles* v. *Hutchings.* L.R. (1903) 2 K.B. 714, Wills, J., says: "It is, in "my judgment, not enough, that he should be under the impression, right or "wrong, that he is justified in protecting his premises from trespass, or (as "in the present case) his master's property from injury, if he knows that "much less violent means would attain his object he is not justified in "resorting to such means as killing or wounding the animal."

In my opinion the appellant knew that much less violent means than striking the dog a blow on the back with a bar would have enabled him to recover his employer's property. He did not even attempt to use any milder means, in the first instance, to recover the fish, and then, on failing to effect his object, resort to the use of the bar.

I am of opinion that the appeal should be dismissed with costs.

S. J. THOMAS, C.J.: The appellant was convicted by the magistrate of the East Coast Judicial District of unlawfully and maliciously maiming a dog ordinarily kept for domestic purposes. On appeal that conviction was confirmed by the Supreme Court. From that decision he now appeals.

The appellant was employed in a shop and whilst so employed, a dog which had entered with its owner seized a fish from a barrel placed before the counter and started to run off with it. The appellant seized a bar and struck the dog and thereby caused it severe injuries.

The conduct of the appellant undoubtedly deserved many of the strictures passed upon it by the magistrate and the judge of the Supreme Court.

The test, however, is not whether it was blameable but whether it was wanton. An example of wanton conduct is afforded in *Queen* v. *Welch*, 1 Q.B.D. p. 23.

The magistrate says “from the evidence I consider it was a most reckless and wanton act on his part and that it was done maliciously.” The Judge says: “It seems to me, on the evidence that he acted regardless of “consequences. The injury was the natural consequence of his act and “hence he must be taken to have intended that result. There is no evidence “of express malice, but gross negligence is equivalent to intentional wrong “and the law presumes malice in a deliberate act such as this.”

It will be seen that the magistrate arrived at the conclusion of malice by a process of reasoning and deduced it from a finding that the act was wanton and reckless. The judge arrived at a similar conclusion by deducing malice from a finding that "he acted regardless of consequences."

It is only after much hesitation and with considerable reluctance that I should disagree either with the magistrate or the judge in a question of fact, but in this I regret to say that I cannot agree with their findings.

I am satisfied that the act was in no wise premeditated, it was done rather through want of thought than with thought. I am not prepared to say that it was done recklessly. The dog was seen to be committing an offence and the appellant caught hold of the first thing that came to hand and either threw it at the dog or struck the dog with it. The blow does not seem to have been calculated. The object was to make the dog drop the fish that it had seized.

The blow was in fact excessive but that was due to a most unfortunate error in judgment rather than to malice.

The case of *Miles* v. *Hutchings,* 1903, 2 K.B. p. 714, has been cited. Then a servant had twice fired at and killed a dog which was a mere trespasser because it was near to an aviary where pheasants were being preserved. The dog had not done any damage or mischief. The firing was a premeditated act, part of a prearranged scheme to shoot all dogs that might trespass. Apart from the decision in *Daniel* v. *James,* 2 C.P. p. 351, there does not seem to have been any excuse or justification for the act. It was decided that although the act might have been unnecessary (and it can hardly be urged that such shooting was necessary) there would still be a loop hole for escape to the servant provided the magistrate found that the servant *bona fide* believed rightly or wrongly that what he was doing was necessary for the protection of his master's property.

The magistrate says on this question: “In no sense could the defendant “have acted under the *bona fide* belief that what he did was necessary for “the protection of his master's property.” The judge says: “There is no “evidence that he had any impression right or wrong that he was justified in “maiming

"the dog as he did in protecting the goods under his charge." I agree that there was no evidence. There could hardly be evidence, but a deduction might properly be made from the conduct of the defendant. The servant had hardly time to think, he had to act on a sudden emergency and do the best he could. He was actually protecting his master's property. Therefore the present case is distinguishable from *Miles* v. *Hutchings*. There everything turned on a prearranged plan of conduct. Here nothing turns on a prearranged plan. The act speaks for itself and requires no special finding by the magistrate.

I have already found that in my opinion there was no malice. Therefore in my opinion the appeal must be allowed with costs here and in the Courts below.

A. V. Crane, Solicitor for the Appellant.

A. Rohlehr, Solicitor for the Respondent.

WALCOTT, Appellant,

AND

DEFREITAS, Respondent.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA,

1923. JAN. 9, 20.

BEFORE SIR A. V. LUCIE SMITH, P., SIR W. H. GREAVES, C.J., AND THOMAS, C.J.

Claim for damages—Loss of goods entrusted for safe custody—Alternative claims—Detinue or Negligence—Allegation of Negligence—Non-essential allegation—Particulars of negligence asked for—Practice.

This was an appeal from an order of the Supreme Court requiring the appellant to furnish particulars of an allegation of negligence averred in his statement of claim.

The appellant had brought an action against the respondent to recover the value of diamonds entrusted to the respondent for safe keeping. The claim was for damages for detinue, and, in the alternative, for negligence. The statement of claim contained an allegation of negligence against the respondent, followed by the words, "whereby the said diamonds were stolen." The respondent's solicitor requested the appellant's solicitor by letter to furnish particulars of the negligence averred. The latter declined so to do. The respondent thereupon applied to the court

for an order requiring the appellant to furnish the particulars asked for, which order the court granted.

Held (affirming the order of the Supreme Court):— (1) That although the averment of negligence was in this ease non-essential, yet the issue of negligence having been raised, the usual practice must be complied with, and particulars given.

(2) That if the appellant's solicitor intended to confine the particulars of negligence to the theft alleged in the statement of claim, he should so have informed the respondent's solicitor.

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

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

The judgment of the court was read by Sir A. V. Lucie-Smith, P.:

In this action the plaintiff claims damages for detinue and in the alternative for negligence.

The claim in respect of negligence is contained in paragraph 7 of the Statement of claim and is as follows:—

"7. In the alternative the plaintiff has suffered damage by the defendant "wrongfully depriving the plaintiff of the said 222 carats of rough "diamonds, the property of the plaintiff, by reason of his having been "negligent in the care and custody of the said diamonds whereby the said "diamonds were stolen as the defendant has so informed the plaintiff in "writing on or about the 14th day of March, 1921, and became lost to the "plaintiff."

The defendant applied for particulars of the alleged negligence and obtained an order for "delivery of particulars of the specific act or acts of "the defendant on which the plaintiff intends to rely and prove at the trial "of the action as constituting the negligence of the defendant." In the event of the particulars not being supplied within fourteen days paragraph 7 of the Statement of Claim was to be struck out.

That is the usual order for particulars in an action for negligence. It does not appear to be essential to the plaintiff's case that he should raise an issue of negligence at all. Having done so he must comply with the usual practice, It has been argued that the words "whereby the said diamonds were stolen" and the following words to the end of the paragraph were in fact particulars of negligence and should have been so regarded as much as if the word "whereby" had been replaced by the words "particulars of negligence." Even had this been done the judge would still be empowered to order further particulars.

If the plaintiff had no particulars to give other than those contained in paragraph 7 of his Statement of Claim, he should have so stated in answer to the demand for particulars contained in the

letter of the defendant's solicitor of the 22nd November, 1921, instead of stating that "You are not entitled to be furnished with the particulars you have asked for having regard to all the circumstances of the case."

We are of opinion that the appeal should be dismissed with costs.

R. C. V. Dinzey, Solicitor for the Appellant.

F. Dias, Solicitor for the Respondent.

BISMILLA, Appellant,

AND

MOHABEER, Respondent.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

1923. JAN. 10, 11, 20

BEFORE SIR A. V. LUCIE-SMITH, P., SIR W. H. GREAVES, C.J., AND THOMAS, C.J.

Marriage—Domicile of husband—Community of Property—Separation of spouses without judicial decree—Death of Husband—Claim of wife to her half of the common property.

This was an appeal from a judgment of the Supreme Court of British Guiana, declaring that the respondent was entitled to one- half of her deceased husband's estate.

The respondent was the wife of one Mohabeer, originally a Mohammedan, to whom she was married in the colony of British Guiana in the year 1889. Mohabeer had resided in this colony for a period of twelve years prior to his marriage, ten of which were spent under an indenture to Plantation Houston. Shortly before, and really with a view to, marriage, Mohabeer changed his religion and christian name; he also expressed a desire to settle down in the colony. The spouses separated some time after marriage and were never reconciled. In 1921 Mohabeer died, having by then acquired considerable property in the colony and not having at any time returned to India, his domicile of origin. On his death the respondent brought a claim against Bismilla, his executrix, for her half of the common property. The Supreme

Court held that Mohabeer was domiciled in British Guiana at the date of his marriage, that therefore community of property arose, and that the respondent was entitled to her half of the property. The chief grounds of appeal are stated below.

Held (affirming the decision of the Supreme Court) :—(1) That the question of domicile was one of fact and that there was ample evidence to support the court's finding on that point; (2) That even if it had been established that the respondent had left her husband without just cause, yet, failing a judicial declaration that she had forfeited her marriage rights, the community of property would still continue.

J. A. Luckhoo and *S. J. Van Sertima,* for the Appellant.

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

The judgment of the court was read by Sir A. V. Lucie-Smith, P.:

This is an appeal by appellant Bismilla, one of the defendants in the court below, from the judgment of Dalton, J., declaring that the respondent Beatrice Mohabeer was married to the deceased Mohabeer in community of property and ordering the appellant to render accounts of the property, etc., belonging to the estate of Mohabeer that was held in community and to deliver to the respondent her half share thereof,

Two grounds of appeal were relied on and argued before us viz., (1) That there was no proof that the deceased Mohabeer was domiciled in this colony at the time of his marriage with the respondent Beatrice Mohabeer and therefore the law of the colony creating a community of property does not apply, and (2) that even if there was a community of property at the time of the marriage such community was by the wife's desertion and her living apart from her husband only a community of the property belonging to the spouses at the time of the alleged desertion and the property acquired by the spouses after the alleged desertion did not come into the community. There was another ground mentioned, that evidence was wrongly admitted after the case closed but that ground was practically abandoned and rightly so in our opinion at the hearing.

All the authorities show that the question of domicile is really one of fact. The facts must be clear and unambiguous that the deceased Mohabeer at the time of his marriage with the respondent had abandoned his old domicile of origin, that is India, and acquired a new one in British Guiana. The law in our opinion is rightly stated by the learned judge in the court below. The deceased Mohabeer distinctly elected to abandon his domicile of origin and to become domiciled in British Guiana for the purpose

of marrying the respondent, he even went so far as to abandon his religion and become a Christian. The appellant herself by her affidavit of 30th March, 1921, swore that Mohabeer was domiciled in this colony and that the respondent as having been married to him in community of property was entitled to half the nett value of the estate and it has been in no way explained why she did so if it were not true It is unnecessary to go into all the evidence, the facts are fully set out in the judgment of the court below. We need not say that there was ample evidence on which the learned judge could come to the conclusion he did and we perfectly agree with his finding that at the time of his marriage with respondent the domicile of Mohabeer was British Guiana. Mohabeer was an immigrant and it has been held by the Supreme Court of British Guiana in the case of *Bert Checkhoo* v. *Beechan* (2nd December, 1912) that the Immigration Ordinance (No. 10 of 1860) which was in force at the time of his marriage was to put spouses in the same position with regard to their property as if they were married under the general law of the colony. Holding as we do that the deceased Mohabeer at the time of his marriage was domiciled in British Guiana it is not necessary to consider this point. This ground of appeal therefore fails.

It is alleged that the respondent deserted her husband and it is contended that a wife who has deserted her husband is only entitled to community in the property owned by the spouses at the time she deserted her husband and not in any property subsequently acquired by the husband. The authority relied on for this proposition is Voet lib. 24 tit. 2 Sec. 18. It is stated in Voet that if a woman without obtaining a separation a *mensa a thoro* has privately divorced herself without cause and lived apart until death it has been decided by the Senate of Frisia that she shall not have any community in property which her husband has acquired during her absence by his own diligence and industry inasmuch as she has not co-operated with him in its acquisition. On the evidence if is not proved that the respondent separated herself from the husband without cause. She says in her evidence that after living with him seven or eight years they separated because he brought a woman Jehoran in the house and eventually he put her out. It appears that Mohabeer lived in adultery with more than one woman and that the respondent subsequently lived with Sumlall in adultery. The passage from Voet therefore does not apply; she did not desert him without cause. The law as laid down by Voet hardly seems consistent with Van der Keesel thesis 231, Grotius 2. 12. 5. of Van der Linder 1. 3. 8. Van der Keesel states that the community of property “cannot subsequently be excluded by any act *inter vivos* unless a separation

"not only from bed and board but also from property has taken place upon "the decree of a judge." Bynkershoek seems also to be of the same opinion. See lib. 4. 2. 20. The court in Cape Colony seems to follow the principle that the community is not put an end to except by decree of the court. In Eckstein *v.* Eckstein, 9 Juta, 100, a divorce was granted on the ground of the wife's adultery but it was held that the husband's misconduct had been such as to disentitle him to the forfeiture by the wife of the benefits of the community of property. A very similar case to the present one if Mohabeer had brought an action for divorce. In *Nortje* v. *Nortje*, 6 Juta, 9, De Villiers, C.J., stated that a judgment declaring that the defendant has forfeited all rights of any benefit from the community ought to have been applied for in the action for dissolution of the marriage on the grounds of the wife's adultery. We therefore find that the respondent did not desert her husband without cause and that even if she did there should have been an application to the court for a declaration that she had forfeited her rights to the benefits of the community. We hold therefore that the second reason of appeal also fails and that the appeal should be dismissed with costs.

Cameron and Shepherd, Solicitors for the Appellant.

R. C. V. Dinzey, Solicitor for the Respondent.

PYROO AND SILAS.

PYROO, Appellant

AND SILAS, Respondent.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.
1923. JAN. 12

BEFORE SIR A. V. LUCIE-SMITH, P., SIR W. H. GREAVES, C.J.,
AND THOMAS, C.J.

Foods and Drugs—Milk in course of delivery to purchaser or consignee—Refusal to sell sample to Officer—Excuse of not having a licence to sell—Sale of Foods and Drugs Ordinance, 1918, section 9.

This was an appeal from a judgment of the Supreme Court of British Guiana confirming the conviction of the appellant for having refused to sell a sample of milk to a sanitary officer.

The appellant was a milk-vendor who was in the habit of conveying milk daily to a regular purchaser. On the occasion in question he was about to deliver milk to the purchaser when a sanitary officer requested him to sell him a sample. He refused to do so, was charged and convicted. The Supreme Court upheld the conviction.

The chief ground of appeal relied on was that the appellant not having had a licence to sell could not comply with the officer's demand without infringing the law.

There was no written judgment.

Held (affirming the judgment of the Supreme Court):—

(1) That the appellant was under a statutory duty to comply with the officer's demand and could not refuse to do so on the ground alleged, viz., that he did not have a licence to sell.

(2) That had the appellant complied with the demand and been subsequently charged with having sold milk without having a licence therefor, he could successfully have pleaded the Ordinance in his defence.

G. T. Ramdeholl, for the Appellant.

H. C. F. Cox, Asst. to A. G., for the Respondent.

BEHARRY AND THE ROYAL BANK OF CANADA.

BEHARRY, Appellant

AND

THE ROYAL BANK OF CANADA, Respondent.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

1923. JAN 12, 20.

BEFORE SIR A. V. LUCIE-SMITH, P., SIR W. H. GREAVES. C.J., AND THOMAS. C J.

Claim on Promissory Note—Payment pleaded—Burden of proof—Right or duty to begin—Prima facie case—Evidence in Rebuttal—Procedure.

This was an appeal from a judgment of the Supreme Court of British Guiana given in favour of the respondent on a claim brought by the respondent against the appellant for moneys due on a promissory note. The appellant pleaded that the debt due on the note had been paid and that the note had accordingly been surrendered to him. In the reply the respondent averred that the note had been handed to the appellant by misadventure and that the latter had fraudulently retained it. At the trial the judge ruled that the appellant should begin, whereupon the latter not only tendered the note but also adduced oral evidence by himself and others in his defence, after which the respondent bank in turn led evidence in support of its claim.

Held (affirming the decision of the Supreme Court):—That a receipt being *prima facie* evidence of payment, so soon as it was tendered by defendant (appellant) the burden of proof shifted to the plaintiff (respondent),

(2) That despite the error in the sequence in which the evidence was led, the court would not disturb the finding of fact, if, reading the evidence in its proper order, it was of opinion that there was evidence on which the judge who heard the witnesses could have found that the defendant's (appellant's) plea had been rebutted.

J. A. Luckhoo, for the Appellant.

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

The judgment of the court was read, by Sir A. V. Lucie-Smith, P.:

The action in respect of which this appeal is brought was for the recovery of a sum alleged to be due on a promissory note. The statement of claim stated that the promissory note had been misplaced or stolen. The defence stated that the promissory note had been paid and accordingly had been surrendered to the defendant. The plaintiffs in their reply denied that payment for

the promissory note had been received and further stated that it had been marked paid and handed to the defendant by misadventure and he had retained it by fraud.

At the trial the judge held that it was the place of the defendant to begin. The defendant accepted that position and not only put the note in evidence but called witnesses. The plaintiff then called evidence. The trial judge gave judgment for the plaintiff.

In view of the fact that a receipt is *prima facie* evidence of payment the trial judge was mistaken in calling upon the defendant to begin.

Even though called upon to begin the defendant need only have put in the note which was marked paid to make out a *prima facie* case of payment. The plaintiff would then have had to call evidence and in turn the defendant might have called his witnesses to rebut that evidence.

In view of the mistake of the trial judge we have first considered the evidence given by the plaintiffs: we are satisfied from the witnesses and especially from the evidence of the witnesses Boodhai and Persaud that a *prima facie* case was made out.

Therefore in spite of the original error we are satisfied that the defendant has not suffered. Sooner or later he must give his evidence. We consider that the defendant's counsel was well advised to call his evidence when he did.

The trial judge has had the witnesses before him and has stated that he saw "no reason to disbelieve the witnesses Boodhai and Persaud"; on the other hand he says “It seems to me to be a waste of time and an insult to “one's intelligence to deal minutely with the defendant's evidence. As I said “at the hearing when the evidence was concluded I did not believe a word “of the defendant's evidence relating to the payment of the note. I am still “of the same opinion and judging from his demeanour and from all the “surrounding circumstances no jury could possibly accept his statement. I “have no hesitation in saying that he committed most wilful and corrupt “purjury. The evidence of his son-in-law Ramcharitar, otherwise known as “Joseph, stands in the same category. One had only to look at his face to “see the miserable and pitiable exhibition he was making of himself. I “ignore the evidence of the woman Randhia who was but a tool in her “husband's control.”

These were the principal witnesses for the defendants. The trial judge concludes: "On the whole evidence I have not the slightest doubt that my judgment should be for the plaintiffs."

It is entirely a matter of evidence. True it is that the promissory note having been marked paid is a *prima facie* evidence of payment. It is, however, also true that that evidence can be rebutted, and the alleged payment can be explained. The trial judge

has held that that explanation has been made and that that *prima facie* evidence has been rebutted. With these findings of fact we see no reason to interfere.

The appeal will therefore be dismissed with costs

J. A. Viapree, Solicitor for the Appellant.

A. G. King, Solicitor for the Respondent.

JAIKARAN *v.* BUNDHUI.

JAIKARAN *v.* BUNDHUI

[41 OF 1922]

1922, FEBRUARY, 11. BEFORE DALTON, J.

Writ of summons—Specially indorsed writ—Special indorsement to be signed by counsel and solicitor—Rules of Court, Order XVII, r, 6.—Rules of Court, Order XII—No power to set aside writ—Practice.

The plaintiff claimed from the defendant the sum of $202 on a specially indorsed writ. The special indorsement was signed by the plaintiff by making his mark thereto. He also authorised counsel to appear on his behalf. On the matter coming up for hearing, under the provisions of Order XII, the defendant appeared and took exception to the indorsement on the ground that it was not signed as required by Order XVII, r. 6.

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

P. A. Fernandes, for the defendant.

DALTON, J.—Objections have been taken by defendant's counsel to the endorsement on the writ and he asks that the writ be set aside. The first objection has been removed by the amendment allowed in the rubric, as to capacity in which defendant is sued, to which amendment defendant consents. The words 'and sole legatee' are struck out.

The next objection is that the endorsement of the claim on the writ is not signed by the counsel or solicitor as required by Order XVII, r, 6. Although it appears from the endorsement that plaintiff has authorised counsel to act for him, the particulars of the claim in the special endorsement are not signed by him or by the plaintiff. Mr. de Freitas for plaintiff urges that the court has held that counsel cannot sign a special endorsement to a writ, but he cites no authority. The decision in *Job* v. *Fernandes* (L.J. Sept. 23rd, 1905) is against him. I also find that the practice which he says supports his contention does not exist. With the assistance of the clerk in charge of the judicial branch I have examined some of the past records and find the practice irregular. It certainly does not help him. And further, as a special endorsement is a pleading, the Rules of Court (Order XVII, r. 6) requires that endorsement to be signed by both barrister and solicitor of the party where they are instructed; in matters under $250, as here, signature by barrister or solicitor alone is sufficient. As plaintiff has employed counsel therefore, under that rule the endorsement, which is the statement of claim, is required to be signed by the barrister instructed. The pleading should not

have been accepted in the absence of that signature As it has been received in the registry however and as past practice has apparently on occasion been irregular I shall not penalise plaintiff, but under the discretion given will in this case dispense with the signature. If there are divergent decisions on this point, it would be well to have the matter settled by the Court of Appeal as soon as possible.

That deals with the objections taken by defendant's counsel. With respect to his request that if the objections had been upheld the writ be set aside, Order XII, by which the proceedings are governed ('Proceedings where writ specially indorsed') provides for the striking out or setting aside of a specially indorsed writ only in cases where neither the plaintiff nor the defendant appears (See *Lewis* v. *Williams.* G. J., April 19th. 1909). The Court of Appeal in that case held that in these proceedings which are still locally called 'the Bail Court.' Where it is practicable leave to amend should be given. Otherwise judgment may be refused, or leave to defend may be granted. In any case there is no power to strike out the writ.

Subject to these objections taken, an affidavit asking for leave to defend has been filed. On that affidavit leave to defend will be granted. An order is made accordingly.

SITA PARVATI, Appellant

AND

PRAGDUT AND SEETAL JANKI, Respondents.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

1923. JAN. 16, 20.

BEFORE SIR A. V. LUCIE-SMITH, P., SIR W. H. GREAVES, C.J., AND THOMAS, C.J.

Succession—Intestacy—Illegitimate child—Whether right restricted to mother's estate—Roman-Dutch law—Civil Law Ordinance, 1916, section 6 (1) (2) (3) (8)—Interpretation of Statutes—Canon of Construction.—Intention of Legislature to retain Common law rights.

This was an appeal from an order of the Supreme Court directing that the appellant's statement of claim be struck out.

The appellant was an illegitimate child of one Hurdasi, the legitimate daughter of Rattah, the testatrix. Hurdasi predeceased her mother Rattah, and on the latter's death; the appellant brought an action to obtain proof in solemn form of the will of Rattah. The respondents contended that the claim should be struck out on the ground that the appellant had no interest in the subject-matter of the action inasmuch as the appellant could only *succeed to* her mother's estate, and could not claim *through* her mother by way of representation.

Held (reversing the order of the Supreme Court). (1) That in *all* cases of intestacy an illegitimate child should rank as a legitimate child- of its *mother,* so as not only to *succeed to* what its mother actually left, but also to claim *through* its mother by way of representation; (2) That the words "heirs of their mother" in sub-section 8 of section 6 of the Civil Law of British Guiana Ordinance were equivalent to "representatives of their mother."

J. S. McArthur, for the appellant.

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

The judgment of the Court was read by Sir A. V. Lucie-Smith. P.—The appellant, Parvati, who is the only surviving child of

Hurdasi, the legitimate daughter of Rattah, filed an action in the Supreme Court to obtain the proof in solemn form of the will of Rattah, who died in September, 1922. Hurdasi died in January, 1920. Under the will the respondents were made residuary heirs and executors. Application was made to the Court to strike out statement of claim on the ground that the appellant had no such interest as would entitle her to oppose the granting of probate because even if the will of Rattah was set aside and Rattah declared to have died intestate the appellant had no interest in Rattah's estate, At the hearing of the application to strike out the statement of claim it was admitted by counsel for the appellant that to enable her to maintain her action she must have some interest in the estate of Rattah, but it was contended that appellant under section 6 (8) of the Civil Law of British Guiana Ordinance (1916-15) had the interest necessary to enable her to maintain the action.

Section 6 (8) of the Ordinance provides as follows:—"Illegitimate "children shall be entitled to succeed in intestacy as heirs of their mother as "if they were legitimate children of their mother, and children legitimised "by the marriage of their parents shall be entitled to succeed in intestacy as "heirs of both parents as if they had been legitimate children at the date of "their birth."

Justice Berkeley, who heard the application to strike out the statement of claim held, but with some hesitation, that "the Legislature intended to limit illegitimate succession to the estate of a mother dying intestate," that is that illegitimate children could succeed to the estate of a person dying intestate only when that person was their mother, and in no other case.

Prior to the passing of the Civil Law Ordinance the appellant would have had an undoubted right, in case Rattah had died intestate, to take that portion of Rattah's estate which would have been taken by Hurdasi had she survived her mother Rattah.

The question for this Court is the construction to be placed on Section 6 (8) of the Ordinance. We are of opinion that the words "illegitimate "children shall be entitled to succeed in intestacy as heirs of their mother as "if they were legitimate children of their mother" mean that in any case of intestacy illegitimate children have the same right to succeed as if they would have had if they had been the legitimate children of their mother. The words "as heirs of their mother" in our opinion mean as representing their mother. The effect of section 6 (8) is to include illegitimate children among the "children" mentioned in the latter part of section 6 (3) of the Ordinance. That section provides as follows:—" (3) If there is no widow or widower the whole estate "shall be divided equally among the children, the grandchildren of

"any deceased child or children taking *per stirpes.*" It was admitted generally at the hearing that for the word "grand children" should be read the word "children."

If the Legislature had intended to effect a partial repeal of the law and to provide that illegitimate children should be entitled to succeed only to their mother's estate when she has died intestate, and in no other case, it would have been so stated; but the words "in intestacy" in the section 6 (8) are clearly capable of the meaning "in any case of intestacy," and the use of the words "as heirs of their mother" as if they were legitimate children of their mother indicated that the intention of the Legislature was to give to illegitimate children, when the question of succession to the estate of a person dying intestate was under consideration, the status of legitimate children. In our opinion the intention of the Legislature when enacting section 6 (8) was to preserve the Roman-Dutch law on the point and incorporate it in the Ordinance. Why should the Legislature have preserved the right of illegitimate children to take their mother's estate when she died intestate, but have destroyed the right of such children to take, as representatives of their mother, that share of an intestate's estate which their mother would have taken had she been alive. An intention so unjust should not be attributed to the Legislature unless it is not possible to construe the words used in any other way.

The latter half of section 6 (8) of the ordinance provides that "children "legitimised by the marriage of their parents shall be entitled to succeed in "intestacy as heirs of both parents as if they had been legitimate children at "the date of their birth." If the words "in intestacy" in the first half of the section are to be construed to mean "if their mother dies intestate" it follows that the words "in intestacy" in the latter half of the section must be construed to mean "if their parents or either of them die intestate" and therefore they succeed in intestacy only to the estate of their father or mother. Such a construction would defeat to a very great extent the objects of legitimation by subsequent marriage, and could never have been intended by the Legislature.

Section 6 (15) of the ordinance provides that "In the absence of all "blood relations including therein all illegitimate children of a female "deceased, and in the absence of a surviving wife or husband of a deceased "person his movable and immovable property shall fall to the Crown."

This section can only mean that when considering the question whether the property of a person who has died intestate falls to the Crown owing to the failure of all blood relations and of a surviving husband or wife the illegitimate children of a deceased

female shall be included among the blood relations. There are no words in this section which support the contention that illegitimate children are to be included among blood relations only when the question of succession to their mother's estate is under consideration and not in other cases. In our opinion section 6 (15) by including the illegitimate children of a deceased female among blood relations when considering the question of the liability to escheat of the property of a person who has died intestate, shows that it was the clear intention of the Legislature to retain in the Civil Code the provisions of the Roman Dutch Law, which gave illegitimate children in question of succession to the estate of a person who has died intestate the status of being legitimate children of their mother.

We are of opinion that the order appealed against should be reversed and the appeal allowed with costs. The costs both of the court below and of the appeal are to be paid out of the estate of the deceased.

J. A. Viapree, Solicitor for the Appellant.

F. Dias and A. G. King, Solicitors for the Respondents.

TOUSSAINT ANSALDI, Appellant,

AND

LEE LUM, Respondent.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

1920. NOV. 4.

Before Sir A. V. LUCIE-SMITH, P., Sir W. H. GREAVES, C.J., and Sir CHARLES MAJOR, C.J.

Agricultural estate—Right of way over adjoining tenement—Labourers using path—User without interruption—Continuous enjoyment—Intermittent in the circumstances equivalent to continuous user—Prescription Ordinance.

This was an appeal from a judgment of the Supreme Court of Trinidad and Tobago, given in favour of the respondent on a claim brought by the appellant for a declaration that he had by prescription acquired a right of way over the respondent's land.

The appellant, as owner of cocoa-land, employed several day labourers from time to time, all of whom in the course of, and incidental to, their employment, frequently walked across a path on the adjoining tenement, the property of the respondent. This state of things lasted for the period laid down in the Prescription Ordinance for the acquisition of such an easement, and the user was neither violent, nor clandestine, nor precarious.

Held (reversing the decision of the Supreme Court of Trinidad and Tobago).

(1)That there was sufficient length of user by the appellant's labourers to entitle the appellant to claim a right of way by prescription.

(2)That, in the circumstances—the land being agricultural—and having regard to the nature of the easement, the user, though necessarily of an intermittent nature, was continuous and without interruption, there being no adverse obstruction.

(3)That the nature of the appellant's contracts with the various labourers and the duration thereof, were immaterial to the question at issue.

Judgment delivered on the 4th day of November, 1920:—

It was found by the judge of the court below that the appellant, an owner of cocoa-land, employed day labourers thereon, who—to use the learned judge's own words—not always the same, but more or less the same, not in great but in considerable numbers, not regularly but with considerable frequency, walked along a path on an adjoining tenement [the property of the respondent] for the period stated in the local Prescription Ordinance to be that by the lapse whereof an easement of way may be acquired. He

regarded those facts as insufficient in law to confer the easement claimed, namely a way for the plaintiff and his labourers on foot and by day across the respondent's land adjoining. The appellant contends that the facts found do entitle him to the judgment of the court.

We have been strongly urged by counsel for the respondent that the findings of fact are not supported by the evidence. After listening to him and reading that evidence closely, we are of opinion that the plaintiff at the hearing fulfilled the conditions laid upon him of success in a claim of right of way by prescription. That is to say that he has shewn actual enjoyment of the way as of right and without interruption for the statutory period. The enjoyment has been of right, for it has been neither violent, nor clandestine, nor precarious, It has been without interruption, that is, without adverse obstruction. It has been, in the circumstances and with regard to the very nature of the particular easement prescribed, sufficiently continuous to satisfy the statute and the authorities for acquisition by user, necessarily of an intermittent description.

As for the legal question involved, with great respect for the opinion of the learned judge of the court below, we are unable to agree with it. This is for the most part an agricultural colony. Owners of land depend for its development upon the supply of labourers. These, of course, form a fluctuating class of persons; they come and go, those who go leaving their places to be taken from time to time by others. They—whether working and paid by the day, month, or year, whether by task or time, we think, is immaterial—like others in divers occupation, work and serve their employers. Here the labourers were the plaintiff's, and it is not, in our opinion, material to enquire at what precise moment their contract of labour commenced or ended. They were using the respondent's land for purposes connected with that of the plaintiff, purpose of agriculture.

It follows, therefore, that this appeal must be allowed, that the judgment of the court below will be set aside and judgment ordered to be entered for the plaintiff with costs of action. The court declares that the plaintiff is entitled, for himself and his labourers, to the free and uninterrupted use and enjoyment of a right of way, by day and on foot, over the lands of the defendant in the pleadings mentioned. Nominal damages are awarded of one shilling. The respondent must pay the appellant the costs of this appeal.

H. MACKINNON ILES AND ANNA PERREIRA.

HENRY MACKINNON ILES, Appellant,

AND

ANNA PERREIRA, Respondent.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

1920. NOV. 4

Before SIR A.V. LUCIE-SMITH, P., SIR W. H. GREAVES, C.J., AND SIR CHARLES MAJOR, C.J.

Claim against deceased person's estates—Corroboration usually required—Rule of *practice*, not of law—Doubtful case—Appeal—Presumption in favour of trial judge's finding of fact.

This was an appeal from a judgment of the Supreme Court of Trinidad and Tobago dismissing a claim brought by the appellant against a deceased person's estate.

The claim was based on certain promissory notes alleged to have been made by the deceased in favour of the appellant. The evidence given in the court below was of a very doubtful nature, and the trial judge dismissed the claim.

Held (affirming the judgment of the Supreme Court of Trinidad and Tobago).

(1) That claims against deceased persons' estates should always be examined with care, although they should not be dismissed merely for want of corroboration.

(2) That there is always a presumption in the Court of Appeal in favour of the trial judge's findings on questions of fact, and in a doubtful case, such presumption prevails.

A. LUCIE-SMITH, C.J.: The appellant sued the respondent as personal representative of Julio Perreira, deceased, on three promissory notes said to have been made by the deceased—they are all dated 30th November, 1918, and for $960, each payable respectively on the 31st August, 31st October and 31st December, 1919. Nothing was found amongst the deceased's papers relating to these notes, only a letter was found relating to a note for $1,000 given by the deceased for the accommodation of the appellant.

All claims against the estate of a deceased person usually require to be corroborated by other evidence than that of the plaintiff himself but the rule is one of practice rather than of law. In *Rawlinson* v. *Scholes*, 79 L. P., 350, it is laid down that the evidence ought to be examined with care, even with suspicion. The judge ought to be completely satisfied before allowing the claim but he ought not to disallow it merely because the evidence was not corroborated

The learned trial judge found in effect that he was not satisfied and gave judgment for the defendant against which the appellant now appeals. The appeal is entirely on questions of fact.

In a number of cases from *Savage* v. *Adams*, 1895, W. N. 109, to *Khoo Sit Hoh* v. *Lim Theam Tong*, 1912, A. C. 323, it has been laid down that in appeals on questions of fact the presumption is that the decision appealed against is right and the appellant must satisfactorily make out that the judge below was wrong. In *Coghlan* v. *Cumberland*, 1898, 5. C.D., 704 and other cases it is said that since every appeal is by way of rehearing the Appeal Court must consider the materials which were before the court below and then make up its own mind, carefully weighing and considering the judgment appealed against and overruling it if, on full consideration, it comes to the conclusion such judgment was wrong. The court below has the inestimable advantage of judging from the demeanour of the witnesses whether they are or are not speaking the truth. In *Khoo Sit Hoh* v. *Lim Theam Tong* it said that except in rare cases the Court of Appeal will hesitate Jong before it disturbs the findings of a trial judge based on verbal testimony.

I have gone carefully through the evidence. There are circumstances which raise some doubt as to the loan having been made—such circumstances being why the appellant did not get paid out of the legacy to Perreira when he received it in 1916 as was contemplated—the appellant says Perreira would not pay then because he objected to the premium, &c., then again it is difficult to understand why the appellant got Perreira to sign an accommodation note to him when he held a note from Perreira which would mature about the same time as the accommodation note, and why the letter relieving Perreira of all liability in that note was given by appellant. I can not say the reasons given as to the discounting of the notes commend themselves to me. Then again there is the difference in the signatures to the three pro-notes and the acknowledgment of debt and the admitted signatures en the accommodation note signed a few months after the other pro -notes and the admitted signature to the power of attorney. Mr. de Silva says he thinks all the signatures are Perreira's although he sees the difference in the signatures — but he says he is not certain. The appellant further states that Mr. de Silva was present when the loan to Perreira was made, this is in effect denied by Mr. de Silva. It is true Mr. de Silva says Perreira admitted to him that he borrowed money from Iles. In coming to a conclusion as to whether Iles did make a loan to Perreira, the judge I admit would certainly be largely influenced by the demeanour of the witness Iles. On the other hand I have a very strong feeling that it is unbelievable that any one would fabricate four signatures to

bolster up an unjust claim when one such signature would have been enough. I am not prepared to say that the signatures are not genuine, and personally I should prefer that there should be a pew trial and the whole circumstances gone into more fully but I understand my brother judges are of opinion that the appeal should be dismissed and I cannot disagree with them as a matter of law.

SIR W. H. GREAVES, C.J.: I have such serious doubts as to the authenticity of the three promissory notes in question that I refuse to disturb the decision of the trial judge.

I am opinion that the appeal should be dismissed with costs.

SIR CHARLES MAJOR, C.J.: The learned judge whose decision is in issue felt and has expressed such a degree of doubt as to the sufficiency of the proof adduced by the plaintiff in support of the claim that he found himself unable to give the plaintiff his verdict.

After the exhaustive examination and discussion of their evidence by counsel on both sides, I am in the same case as the learned judge, that is to say, I am, in the circumstances appearing from the evidence, not prepared to say that he was wrong.

In *Savage* v. *Adam*, Lopes, J., said—and his remarks have been frequently quoted with approval in subsequent cases, *e.g.,* in *Colonial Sureties Co.* v. *Massey*—"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 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."

The case here, to my mind, is left in doubt, and I feel myself concluded by that authority. The appeal, I think, should be dismissed with costs.

MUNGAREE AND MAHABALDAS.

MUNGAREE, Appellant,

AND

MAHABALDAS, Respondent.

OF APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

1921. MAY 20.

BEFORE SIR A. V. LUCIE-SMITH, P., ANTHONY DE FREITAS, C.J., AND A. K. YOUNG, C.J.

Probate of Will—Conflict of evidence of witnesses to execution—Deficient proof of execution to satisfy conscience of Court—Probate refused.

This was an appeal from a judgment of the Supreme Court of Trinidad and Tobago, granting probate of a document purporting to be the will of one Khadoodas and to be witnessed by Mowlarbaksh and Seebarandass.

The court below had held that although there were discrepancies between the statements of the witnesses, they were really of a trifling nature.

Held (reversing the judgment of the Supreme court of Trinidad and Tobago.)

(1) That without disturbing the findings of fact come to by the trial judge, the court of appeal could inquire into the question of the due execution of the document purporting to be a will.

(2) That, on such inquiry, there was too serious a conflict of evidence between the witnesses to the execution, to satisfy the conscience of the court that the document propounded was the will of the deceased.

(3) That the question was not one of deciding which of two witnesses spoke the truth, but whether the will had been sufficiently proved; and in view of the conflict of evidence that had not been satisfactorily established,

ANTHONY DEFREITAS, C.J., and A. K. YOUNG, C.J.: This is an appeal from a judgment of Mr. Justice Deane, sitting without a jury, by which he ordered probate to be granted of a document with the name of a deceased East Indian called Khadoodas and witnessed by Mowlarbaksh and Seebarandass. The document purported to be the will of Khadoodass made on 17th of January, 1920, by which he gave all his property to the respondent and appointed him sole executor.

Although they are many contradictions in the evidence of the witnesses for the plaintiff which might lead us to dissent from some of the findings of the learned trial judge on questions of fact, we, following the well-known rules observed by Courts of Appeal, do not propose to express any such dissent; and it is unnecessary

to do so, since this appeal can be decided by the conclusion we have reached after consideration of the evidence of the execution of the will.

The learned trial judge finds that Seebarandass was only mistaken when he said that Mungaree was pregnant on the occasion of the panchayat, and he goes on to say: "If I accept that, I do not think there is any serious conflict between his evidence and that of Mowlarbaksh. It seems impossible for me to expect that after a year when Seebarandass and three other witnesses are cross-examined on the most trifling detail there should not be slight discrepancies." We are unable to agree with the learned judge that there was no serious conflict between these most important witnesses, the only witnesses to the execution of the will. Amongst other things Seebarandass said "He came to my house and asked me to witness his will at Sangre Grande. It was on Saturday 17th about 4 p.m. that paper was signed. He asked me the day before, on the Friday, to go with him. I walked down; he went on a cart; he did not ask me to go on cart. He told me to meet him at Mowlah's office; got to Sangre Grande at 3 p.m.; left home about 7 to 8 a.m.; only went upon this business; went to Mowlah's office; Khadoodas was already there; we all sat down, paper was brought out, read by Mowlah in Hindi and we all signed." On the other hand, Mowlarbaksh said in examination in chief "Seebarandass was in office; he came with Khadoodas in morning and they returned to the office about 3 p.m. to sign"; and in cross-examination he went on to say "He (meaning Khadoodaas) and Seebarandass came together; he gave instructions in Seebarandass's presence. I have no doubt Seebarandass was present." Further, Seebarandass swears that "Mowlah told him (Khadoodas) to sign; he said he could not sign his name; to make a mark for him; he touched the pen and Mowlah made a cross for him. I have no doubt of that. I look at paper but as I can't read English can't say anything about it. I saw him make a cross." Mowlarbaksh said "I wrote his name in English," and this statement is found to be correct on examination of the will.

The conflict of evidence between these witnesses is, in our opinion, of such a grave nature that we are forced to arrive at the conclusion that the trial judge must have failed to give due consideration to it, since, otherwise, it must have raised such suspicion and doubt in his mind as would compel him to treat it as a cause of deficient proof and to pronounce that there was not enough to satisfy the conscience of the Court that the document of the 17th of January propounded by Mahabaldass was the will of Khadoodass *(Browning v. Budd* (1848) 6 Moore P. C. C. 430; *Tyrrell* v. *Painton* (1894) P. 151).

Close consideration of the whole of the evidence of Seebarandass and Mowlarbaksh has brought us to the conclusion that they do not provide sufficient proof of the due execution of the alleged will. We therefore reverse the decision of the Court below and order that judgment be entered for the appellant on the counterclaim, with costs to the appellant in this Court and the Court below.

Sir A. V. LUCIE-SMITH, C.J.: I concur. There are many suspicious circumstances connected with the alleged execution of the will such as the great contradictions between the two witnesses and the executor, the fact that the testator did not sign although he could write—the fact that Seebarandass, the leading person for the respondent in these proceedings, was not such a great friend of the deceased as is shown by the fact that he was not asked to the dinner given by the deceased on the death of his daughter, that Katwaroo, the alleged adulterer, was permitted to remain in the deceased's house until his death. These suspicions have not to my mind been removed. The learned judge in the Court below seems to have thought that contradictions between Seebarandass and Molab were trifling that there was no serious conflict between them. I cannot agree; there appears to me a very serious conflict between them. This is not a question of deciding which of two conflicting witnesses is speaking the truth as in case of *In re* Wagstaff, the question is whether the will has been sufficiently proved.

I cannot say that my conscience has been satisfied so as to allow probate of the alleged will.

In re ELLIS; *ex parte* THE OFFICIAL RECEIVES (ASSIGNEE.)

[11 OF 1921.]

1922. FEBRUARY 3, 15. BEFORE SIR CHARLES MAJOR, C.J

Insolvency—Application for directions—Vendor and purchaser—Sale of immovable property by Official Receiver—Sale by purchaser to third party—Offer of balance of purchase price by third party to Official Receiver—Whether conveyance by Official Receiver be made direct to third party—Insolvency Ordinance, 1900, s. 66.

Application to the court by the Official Receiver as assignee of the estate of William Henry Ellis, insolvent, for directions, under the provisions of section 66 of the Insolvency Ordinance, 1900, and r. 305 of the Insolvency Rules, 1901.

The application was made in the following terms: —

"I desire to make application to the court for its directions as to whether under a contract of sale after due public notice of the lands, hereditaments and premises, to wit, all that lot 29, section A, Queenstown, in the county of Essequibo, in the colony of British Guiana, with all the buildings and erections thereon, part of the

estate of the above-named insolvent by me made on the 18th day of October, 1921, with Philip Gonsalves of lot 9, Water Street, in the city of Georgetown for the sum of $460 of which sum the said Philip Gonsalves paid the sum of $100, I am by law obliged or permitted to convey, cede and transport the said hereditaments to Maisie Dash Gonsalves to whom the said Philip Gonsalves by an absolute assignment in writing dated the 2nd day of December, 1921 disposed of and assigned the benefit of the said contract of sale notice in writing of which assignment was on the 3rd day of December, 1921, given me by the said Philip Gonsalves under section 16 of the Civil Law of British Guiana Ordinance, 1916, and in respect whereof the said Maisie Dash Gonsalves on the 20th day of December, 1921, has signified her readiness and willingness to pay and has actually tendered the balance of $360 due by the said Philip Gonsalves which I, however, have accepted only as coming from the original purchaser Philip Gonsalves."

A. V. Crane, solicitor, for the applicant, the Official Receiver.

SIR CHARLES MAJOR, C.J.: On the 18th October, 1921, the applicant, whom I call the vendor, acting as assignee of the property of Ellis, caused to be put up for auction certain lands of the insolvent. Philip Gonsalves, whom I call the purchaser, made an offer of purchase by a bid of $460. This was the highest bid, but it did not reach the upset price. An application to the judge in insolvency by the vendor, setting out these facts and asking for the court's approval of an acceptance he had given of the purchaser's offer, was granted on the 29th October. On the 25th November the purchaser paid $100 on account of the purchase money. On the 2nd December the purchaser, by instrument in writing, reciting the sale and purchase of the lands and the payment of $100, in consideration of the sum of $100, absolutely assigned to his wife Maisie Gonsalves, whom I call the assignee, all his right, title and interest in the said contract of sale and purchase between him and the vendor. On the 3rd December notice in writing of the assignment was given by the purchaser to the vendor. The assignee has tendered to the vendor, and the vendor has accepted the balance of the purchase money, only, "however," as he states in his application, "as coming from the original purchaser." The vendor's application to me is for directions whether, under the contract made by him with the purchaser, he is by law obliged or permitted to convey the subject matter of the contract to the assignee in the circumstances I have set forth.

Thus I direct the vendor. When the approval of the court was obtained of the acceptance of the purchaser's offer the vendor became a trustee of the land for his purchaser, certainly, as Lord

Cranworth said in *Rose* v. *Watson* (10 H.L.C. 672), to the extent to which the purchaser had paid the purchase money. On the other hand the purchaser was in equity a trustee for the vendor of the unpaid balance. But before fulfilling this, his trust and thus being in a position to compel the vendor to carry out the latter's trust, he assigned his benefit under the contract, that is, his equitable interest in the land subject to the trust in him, to his wife. This he had every right to do, provided he gave proper notice of the assignment to the vendor, so that the vendor might see, on the one hand to the interest still retained by him in the land, and on the other to the fulfilment of his own trust. The purchaser, it is admitted, has given that notice, the assignee has completed the contract assigned to her, and the only trust remaining is that in the vendor to convey to her. These principles are expounded in *Shaw* v. *Foster* (L.R. 5 H.L. 321), cited by Mr. Crane, during the speech of Lord O'Hagan, where the learned lord, speaking of the interest vested in a purchaser under a contract of sale, said: "It is very clear that the interest so vested in the purchaser may be the subject of charge or assignment, and that the sub-assignee or incumbrancer may enforce his rights against the vendor, at all events if he assumes the position of the vendee, and fulfils the duties and sustains the liabilities created by his contract." The assignee here has done so. She may, therefore, enforce against the vendor her right to call for a conveyance from him.

Something was said at the end of the argument touching the principles of opposition to conveyances. Nothing of the kind, however, appears on the statement of facts whereon my direction is sought. That direction I have given.

REGISTRAR GENERAL AND JONES OLIVER AND FRANCIS OLIVER.

THE REGISTRAR GENERAL Appellant,

AND

JONES OLIVER AND FRANCIS OLIVER, Respondents.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

1921. OCT. 6.

BEFORE SIR CHARLES MAJOR, P., A. K. YOUNG, C.J. AND ANTHONY DE FREITAS, C.J.

Fraudulent transfer of land—Subsequent fraudulent mortgage—*Bona fide* sale by mortgagee to third party—Claim against Assurance Fund—Conditions precedent to claim—Whether mortgage is a transfer within the provisions of the Real Property Ordinance No. 60, sections 132, 134 and 137.

This was an appeal against so much of the judgment of the Supreme Court of Trinidad and Tobago as adjudged that the respondent Francis Oliver recover from the appellant the sum of $2,202.50 and costs.

In 1903 certain lands were transferred to the respondents. In 1911 certain other lands were transferred to the respondents. In 1911 both first and second-mentioned lands were mortgaged to Emily Richards. The transfers and mortgage mentioned were all effected by fraud in which the respondent Jones Oliver participated. In 1916 Richards exercised her statutory power of sale as mortgagee and transferred the properties to Hiraman Singh and Tilak Singh who became the registered proprietors thereof. The respondents instituted proceedings against the appellant to recover damages from the Assurance Fund constituted by the Real Property Ordinance No. 60.

Held (confirming that part of the judgment of the Supreme Court of Trinidad and Tobago appealed from):

per A. K Young, C.J., and Anthony De Freitas, C.J.:

(1) That Jones Oliver was not liable under section 134 of the Ordinance, because as mortgagor he could not be regarded as transferor for value, "mortgage" being defined in the Ordinance itself as "any *pledge* of land for securing a debt," and not coming within the meaning of the term "transfer."

(2) That whatever might have been Richard's liability at one time such liability ceased by reason of her *bona fide* transfer for value, as laid down in section 134 of the Ordinance.

per Sir Charles Major (dissenting):

(1) That it was the fraud of Jones Oliver which ultimately enabled Richards to effect the transfer, and that such fraud was

the substantial cause of the deprivation of the interest of the respondent, Francis Oliver, in the land in question.

(2) That the proviso invoked in aid of Richards, to wit, the second proviso in section 134 did not apply, as it depended for its operation upon the absence of fraud whereas in this case there was fraud: moreover, the section did not require fraud on the part of any particular person.

A. K. YOUNG, C.J.: This is an appeal against so much of the judgment of His Honour Sir Alfred Lucie-Smith, Chief Justice of Trinidad, dated the 8th day of April, 1921, as adjudged that the respondent Francis Oliver recover from the appellant $2,202.50 and costs.

The following are the grounds of appeal:—

1. The judgment appealed against is bad in law on the ground that although the trial judge construed section 134 of the Real Property Ordinance No. 60 against the respondent Francis Oliver he gave judgment against the appellant.

2. The damages are wrongly assessed, the trial judge not having taken into consideration the question of improvement.

3. That the said judgment is not warranted by the facts proved in the case.

The facts of the case are sufficiently set forth in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, and 13 of the plaintiffs (now respondent) statement of claim filed in the original action and in the judgment now appealed against.

The original action was brought by Jones Oliver and Francis Oliver against the Registrar-General under the provisions of section 134 of the Real Property Ordinance No. 60 to recover damages for the deprivation of lands under section 132 (subsection (2)) of the Ordinance of which they were registered as proprietors under the Ordinance. At the hearing of the action it was admitted that the plaintiff Jones Oliver knew of and was a party to the fraud whereby the lands in question were mortgaged and judgment was given against him with costs.

The learned trial judge went on to find that “the person who committed “the fraud and really was the cause of the transfer being made and who “received the value was Josiah Oliver the father,” then he goes on to say “He is dead and this action is therefore in my opinion properly brought “against the Registrar-General” if he means by this that Josiah Oliver the father was at one time liable under section 134. I do not agree.

At no time was he a transferor or the *person making the transfer and receiving the value* and therefore at no time did he incur any statutory liability under the section,

Again the learned trial judge goes on to say that “it is contended “however on behalf of the defendant that Jones benefited with his father by “the fraud and therefore the action should in the first instance be brought “against Jones. I do not think Jones did so benefit.”

Again if the learned judge means by this that Jones would have been liable under section 134 if it had been proved in evidence that be (Jones) had so benefited: then again I do not agree.

Neither Jones nor Josiah were in my opinion at any time a person against whom an action for damages is directed to be brought before an action can be sustained against the Registrar-General.

It was submitted in argument on behalf of the appellants that the true construction to be placed upon the words "the person " making the transfer and receiving the value" included a mortgager inasmuch as if the meaning of these words was limited to the person making a transfer "*on sale of land.*" the result would be to open the door wide to fraud. With this exposition of the law I am in full sympathy and regret that I am unable to place the construction desired upon the words above-mentioned. On examination of the definition contained in the Ordinance itself on the word "mortgage," we find it defined as meaning "any pledge of land for securing a debt." It is merely a pledge and not a transfer nor can a mortgage be held to be in any way included within the meaning of the word "transfer."

The person making the transfer and receiving the value does not therefore in my opinion include a mortgager, *i.e.,* one who gives a pledge of land for securing a debt.

The statutory liability under section 134 of the Ordinance lies against the person making the transfer and receiving the value—was Emily Richards such a person?

Emily Richards, the mortgagee, in the exercise of the power of sale conferred by the Conveyancing Ordinance sold the property, the subject of the mortgage, to Francis Heeramansing and Philip Francis Teelucksing who have been duly registered as proprietors of the property and it is this registration which has deprived the respondent of his ownership in the land.

Whatever Richard's liability may at one time have been the transfer by her was a *bona fide* one for value and therefore under the provisions of section 134 of the Ordinance her liability ceases.

It was the act of Richards which deprived the respondent of his land, not that either of Josiah, Jones or Popo (the last mentioned being the person alleged by the appellants to have been a

participator in the fraudulent mortgage). I have already decided that a mortgage is in no way a transfer within the meaning of section 134. Neither Jones nor Popo are therefore in the category of a person making a transfer and receiving the value and therefore no statutory liability attaches to either of them under the section, and further I have already decided that Josiah was not liable under the section. It follows therefore that no person or class of persons exist against whom an action for damages is directed under section 134 of the Ordinance as a condition precedent to bringing an action to recover damages from the Assurance Fund by action against the Registrar-General.

In such case I am of the opinion that an action will lie against the Registrar-General and that damages are recoverable under section 137 of the Ordinance—the wording of the section is not clear but I do not think the words "by the registration of any " other person as proprietor of such land " are applicable only to land registered through mistake or misfeasance on the part of the Registrar-General or his officers but extend to and include all land howsoever registered by him or his officers.

In any event if I am wrong in my interpretation of this section I am of opinion that the remedy still lies against the Registrar-General by necessary implication to be gathered from the general purpose of the Ordinance.

As regards the question of the amount of damages awarded by the trial judge, I see no sufficient reason to disturb his finding.

In my opinion therefore the judgment appealed against must be upheld and the appeal dismissed with costs.

N.B.—I annex a copy of a Memorandum addressed to me by Chief Justice Anthony De Freitas in which he states that he concurs with the terms of this judgment.

ANTHONY DE FREITAS, C.J.: I agree with the judgment of Chief Justice A. K. Young. I am of opinion that the judgment of the Chief Justice of Trinidad should be affirmed and the appeal dismissed with costs.

Sir CHARLES MAJOR, C.J.: In 1903, Rosa da Silva, the registered proprietor of certain lands in the Manzanila Ward in Trinidad, transferred the same to Jones Oliver and. Francis Oliver who became the registered proprietors thereof in da Silva's place. In 1903, Jones Oliver was eleven; Francis Oliver was six years of age.

In 1911, George McLean, the registered proprietor of certain other lands in the same Ward, transferred the same to the two Olivers mentioned, who became the registered proprietors thereof in McLean's place.

In 1911, at the same time as McLean's transfer, both first and second-mentioned properties were firstly mortgaged to Emily Richards. In 1913 they were secondly mortgaged to Messrs. Huggins & Co. by James Oliver and Francis Oliver.

The transfers and mortgages mentioned were all effected by fraud in which Jones Oliver participated.

In 1916, Richards, in exercise of her statutory power of sale as mortgagee, transferred the mortgaged properties to Hiraman Singh and Tilak Singh, who became the registered proprietors thereof in place of Jones Oliver and Francis Oliver.

The Olivers instituted proceedings against the appellant to recover damages from the Assurance Fund, constituted by the Real Property Ordinance No. 60 for loss sustained through the wrongful registration of Hiraman Sing and Tilak Singh as proprietors of the lands, whereof the plaintiff had been deprived. At the hearing the admission was made that Jones Oliver had participated in the fraud and judgment against him was given forthwith.

The learned Chief Justice of Trinidad, who heard the action, gave judgment for the respondent and assessed the damages. Against that judgment the Registrar-General has appealed.

I regret that I am unable to agree with that judgment and to find myself in dissent from the conclusion reached by my fellow members of this Court. I share the sense of difficulty felt by the Chief Justice of Trinidad in construing the somewhat confusing provisions of the law applicable to the issues in the action, but after due consideration, albeit not without some hesitation, I cannot take any view other than that which follows.

Damages may be recovered from the Fund in certain events. Section 134 of the Ordinance enacts, that (1) when a particular person indicated in the section has ceased under its provisions to be liable for damages which, but for a transfer of land *bona fide* for value, would have been recoverable from him by a person deprived of the land by fraud under the foregoing provisions and (2) also when a person against whom the action for damages directed by the section to be brought is dead or has been adjudged bankrupt, or cannot be found within the jurisdiction, "then and in any such case," the damages may be recovered from the Fund. These events are prescribed by proviso. The action for damages "directed to be brought" by a person deprived of land by fraud is stated previously in the section to be against the person upon whose application the laud is brought under the provisions of the Ordinance by fraud, or misdescription, or such erroneous registration (as is mentioned in section 132—this parenthesis is mine) was made, an event which has not in this case

happened, or who acquired title to the estate or interest in question through that fraud, error, or description.

Section 137 allows an action to be brought for recovery of damages from the Fund when a person has suffered loss . . . . . .by the registration of any other person as proprietor of "such" land (by which—there being no previous mention of laud in the section—I understand to mean the land referred to in one of the preceding sections, probably 134 and 135) and who is precluded by the Ordinance from bringing an action to recover "such land, estate or interest"—that is the expression—if the remedy by action for damages thereinbefore (that is in section 134) provided be inapplicable.

It seems necessary, therefore, according to the provisions of section 134, to inquire *(a)* whether there has been a person indicated in the section whose liability for damages for deprivation of the respondent's land has ceased, in and from the circumstances stated; (*b*) whether there was, or is a person against whom the action for damages for that deprivation might have been brought, or may be brought, but who has died, or is a bankrupt, or cannot be found within the jurisdiction; for, if so, the conditions precedent to a right of action for damages out of the Fund have been fulfilled, and those damages may be recovered, but not otherwise. And section 137 can only be invoked it the action for damages suffered from the registration as proprietor of any person other than the sufferer, directed to be brought by section 134, is "inapplicable."

It appears to me clear from the history of the transactions in respect to these lands and from the evidence in the cause, that in 1903 a transfer was fraudulently effected whereby Jones Oliver and Francis Oliver became registered proprietors, the respondent being then, and indeed throughout the series of fraudulent acts, an innocent party; that in 1911 a second fraudulent transfer was effected with the same result; that in 1911 (and 1913), in continuation of the same fraud, mortgages were created whereby the first mortgagee, Richards, was enabled in 1916 to transfer the mortgaged lands to the present registered proprietor. This last transfer was free from fraud itself, but it would seem, infected by the original fraud.

And here the provisoes to section 134 may be noticed. The first provides that in every case in which the fraud, that is the fraud whereby the deprivation of land has come about, occurs upon a transfer for value, the transferor and receiver of the value shall be regarded as the person upon whose application the certificate of title was issued to the transferee. I have mentioned three transfers, from da Silva, from McLean and from Richards. The first

and second need not be considered, for by neither was the respondent deprived of his land. As to the third, Richards made the transfer and received the value, but the "fraud" did not occur thereon, in the sense that neither she nor her transferees knew of it. Still she as mortgagee acquired title to an interest in the lands. Lord Watson, in delivering the judgment of the Judicial Committee in *Gibbs* v. *Messer,* referred to in the argument before us, spoke of "the proprietors of a mere interest in land, such as is created by a statutory mortgage, which does not operate as a transfer of the legal estate." It was that interest and the powers incident thereto that enabled Richards to make the transfer and receive the value. The section (134) moreover does not point to fraud on the part of any particular person. Richards seems to me to have acquired title through fraud by reason of the mortgage in her favour having been fraudulently effected. If the second proviso be invoked in aid of Richards, the transferor for value, it seems sufficient to say that its provisions depend for operation upon the absence of fraud: "Provided further that, except in the case of fraud," etc. Mr. O'Reilly objected before us to any argument being directed to the liability of Richards. In the view I take in another direction of the provisions of the Ordinance, I need to say no more than that, if Richards' liability arose, it did not in my opinion cease, on account of the existence of fraud tainting the series of transactions from the outset.

Now, of the persons who at one time or another acquired title to the lands or to an estate or interest therein, Jones Oliver, Francis Oliver, Richards, Huggin & Co., and the present registered proprietors, supposing all but the first to be ruled out, there still remains Jones Oliver. He certainly, I think, acquired title to the lands through fraud in which he has participated. It is he who by reason of that fraudulent acquisition, and not otherwise, occupied a position to enable, and did in fact enable, Richards to transfer the lands to the present holders of the title thereto, and so caused the respondent's deprivation of his interest therein. That transfer was but the formal and final act which completed the deprivation, brought about, not only by the initial acquisition of title by fraud, but by the subsequent fraudulent pledge to Richards. If this view be correct, Jones Oliver is a person against whom an action for damages is by section 134 directed to be brought, or to follow the language of section 137, to whom that action is applicable. He is not alleged to be dead, or an adjudicated bankrupt, or undiscoverable within the jurisdiction. In my opinion, therefore, the action was not maintainable, the Appeal should be allowed, the judgment of the Court below reversed and the respondent's action dismissed.

In re ALSTON & CO, LTD.

In Re ALSTON & Co., Ltd, Appellants.

GORDON GRANT & Co., Ltd,

AND

F. L. BOOS & R. P. Mc KENZIE.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

1922. NOV. 14

BEFORE SIR CHARLES MAJOR, C.J., A. K. YOUNG, C.J., AND C. O'D. WALTON, C.J.

Mortgage—Action for foreclosure—Receiver of estate appointed—Application by mortgagor's creditor for payment in priority to secured creditors—Application dismissed—Whether order interlocutory or final—Tests to be applied—Jurisdiction of the West Indian Court of Appeal sitting in Trinidad—West Indian Court of Appeal Act, section 3—Ordinance 18 of 1920, section 3.

This was an appeal from an order of the Supreme Court of Trinidad and Tobago dismissing an application by a creditor of the mortgager for payment of his debt by the receiver and manager appointed in an action for foreclosure.

Gordon Grant & Co, Ltd, mortgagees, brought an action against F. L. BOOS and R. P. McKenzie mortgagors, for foreclosure, as a result of which a receiver and manager of the mortgaged estate was appointed. The appellants, creditors of Boos and McKenzie, subsequently applied by summons for payment of their debt in priority to secured creditors. The application was dismissed.

On the matter coming to appeal counsel for respondent took a preliminary objection to the jurisdiction of the court on the ground that the order was interlocutory and not final and could therefore form a subject of appeal only to the Full Court.

Held per Sir Charles Major, C.J., and A. K Young, C.J.

(1.) That one of the tests as to whether an order was interlocutory or final was whether it finally disposed of the rights of the parties.

(2.) That the parties referred to meant the parties to the main dispute, not the parties to the application.

(3.) That applying such a test the order was interlocutory as the appellants were not parties to the main dispute.

(4.) That the West Indian Court of Appeal sitting in Trinidad had no jurisdiction to hear appeals from interlocutory orders.

PerC.O'D Walton, C.J. (dissenting).

(1) That the test was to ascertain the real nature and substance of the order, and if it appeared to be a decision settling rights which might of themselves have formed the subject of an independent action, the order must be regarded as final and not interlocutory.

Sir CHARLES MAJOR, C.J.: In determining the validity of the objection to the hearing of this appeal and bearing in mind the numerous authorities cited, while there is room for some doubt, and I share to a certain extent the feeling of confusion expressed by Lord Justice Buckley *in re* Page (1910 1 Ch. 489), when referring to those authorities, I think that two general principles emerge from the authorities, by which we must be governed; first that one should look at the particular order in question and its effect, and, having done so, second that one should apply a test, be it of one kind or another, suggested from time to time by learned judges and text-book writers. Now as regards the order in this case, it was itself merely one dismissing an application; but looking at the terms of the summons on which that order was made, it appears to be in effect an order declaring that Alston and Company, the appellants, shall not have priority in payment of certain sums said to be due to them on a contract, and that seems to me to be the sole point decided. Coming to the application of the test whether an order be interlocutory or final, we are confronted with a variety of expressions. There is first, the well-known test, perhaps more generally adopted than any other given in the case of *Bozson* v. *Altrincham Urban District Council* (1903 1 K.B. 547) namely, "does the judgment or order, as made finally dispose of the rights of the parties; or put an end to the litigation; or dispose of the matter in dispute? In the volume of Halsbury to which reference has been made (Vol. 18. p. 178) three alternative tests are suggested for ascertaining finality:

"(l) Was the order made upon an application such that a decision in favour of either party would determine the main dispute?

(2) Was it made upon an application upon which the main dispute could have been decided?

(3) Does the order, as made, determine the dispute?"

It is quite obvious that the questions to be asked on these various definitions are, on the one hand, what does "the rights of the parties" mean? on the other, what is "the main dispute?" what is "the litigation?" It has been argued that "parties" mean the parties to the action, to the main dispute, to the litigation; on the other hand that it means the parties to the application, whatever that application may be: and that if the result of the order was finally to dispose of the right of the parties to the application then it was final and not

interlocutory. There is far from certainty on that point, but after the most careful consideration of the authorities I am forced to the conclusion that their weight is decidedly in favour of the meaning "parties to the action;" "parties to the main dispute;" "parties to the litigation" (whichever expression may be used); thus confining it to the parties engaged in the suit or in the principal litigation. It seems impossible to escape from that construction. On the one hand we have a long list of authorities in favour of it, on the other three cases have been cited. *In re Compton* (27 C.D. 392) and *In re Crosley* (84 C.D. 664) are cases in which orders were made on creditors' summonses in administration actions, and there is much in Mr. Wells' contention that, in representative actions of the kind, every creditor is in reality a plaintiff, and so the determination of his claim against the estate is final in its nature. In *Hughes* v *Little* (18 Q. B.D. 32) it was held that an appeal from the Queen's Bench Division affirming a County Court was an appeal from a final order for the purposes of length of notice of appeal. The case is explained in *McNair* v. *Audenshaw* (1891, 2 Q.B. 502). Now holding the opinion very strongly as to the weight of authority, how does it effect this case? There is no doubt that the main dispute between Gordon, Grant and Company and Boos and McKenzie has not been brought to an end. More than that, supposing for a moment Alston and Company *to* be parties to that litigation, their rights have not by any means be finally disposed of. All the court knows at present is that so far as their claim goes an order was made that they could not be paid in priority to the secured creditors. That could not decide the main question Now, that being the effect of the order and in the view I take of the test to be applied, it seems to me that the order was interlocutory and not final, because it did not finally dispose of the rights of the parties; it did not put an end to the litigation; it did not decide the main dispute. It remains to consider the further point raised by counsel for appellants, that even if it was an interlocutory order, this court still has jurisdiction to hear an appeal from it. Section 3 of the West Indian Court of Appeal Act is not unlike that of the Judicature Act conferring appellate jurisdiction on the High Court, and leaving conditions upon which appeals might be brought and the regulation of procedure to rules of court. Under the section it lies with each local legislature to provide for the scope and extent of appeals to this court, and in 1920 the legislature of this colony in section 3 of Ordinance 18 of 1920 provides thus:

> "Notwithstanding the provisions of the West Indian Court of Appeal Act, 1919 . . . . . the Full Court shall have jurisdiction . . . . . to hear appeals from interlocutory orders.

Later in the same year we hare Ordinance No. 47 of 1920, which provides specifically against appeals in local matters from the Full Court. But that specific negative condition does not, to my mind, affect at all the construction to be placed upon section 3 of the former ordinance. And when 1 find that section followed by another in the latter ordinance speaking of the appellate jurisdiction of the local Full Court being "reserved" in respect to matters set out in the former ordinance, that seems to me clearly to exclude the jurisdiction of this court. It would have been better, I think, to have said "notwithstanding the provisions of the West Indian Court of Appeal Act, no appeal shall lie to the West Indian Court," but in effect the legislature has said that. My opinion therefore is that this court has no jurisdiction to entertain this appeal, first, because it has no concurrent jurisdiction as submitted by counsel for appellants, second, because the order appealed from was interlocutory. The appeal, therefore, should be dismissed with costs.

Sir A. K. YOUNG, C.J.: I concur with Sir Charles Major on the question as to whether this Court has any power to deal with interlocutory orders. On the Question as to concurrent jurisdiction, I believe that proposition is not well founded. The local Legislature has made provision for hearing appeals before the Full Court of Trinidad in certain matters and that provision in nay opinion comes within the meaning of section 3 of the Imperial Act. I am of opinion that the appeal should be dismissed.

Sir C.O'D. WALTON, C.J.: I am afraid I find myself in the minority, and one has to be careful when disagreeing on matters of this kind, but I have in my mind a conclusion differing from that of the majority of the Court, and I think it my duty to put it forward from my point of view.

I fully concur with my brother judges as regards the question of concurrent jurisdiction. If the order under appeal is held to be an interlocutory order, then an appeal lies to the Full Court under the provisions of section 3 of Ordinance No. 18 of 1920, and this Court has no cognizance of it. But I respectfully differ on the question as to whether this order is interlocutory or final.

The principal action of *Gordon, Grant &* Co., *Ltd.* v. *Boos, et al*, is, I understand, a so-called foreclosure action by a mortagee asking for an account and payment or sale of the mortgaged property. And in the meantime a receiver was appointed. The Receiver is confronted with a claim from Alston & Company, Ltd., for money due to them in respect of a lighterage contract made with the defendant Boos and earned before the appointment of the Receiver. Alston & Company, Ltd., took out a summons,

entitled in the main suit, there was no objection by any one to the procedure adopted, the matter was discussed and argued before a judge in chambers, and it was decided, putting it shortly, that their claim to be paid out of the assets in the hands of the Receiver, for work done, in lightering supplies to the estates the subject of the mortgage, before and in preference to the secured creditors could not be sustained. In other words, that they in respect of their debt must rank with the unsecured creditors. Against this decision Alston & Company has appealed. It seems to me that this was a final order in respect of the claim of Alston & Company, and may have the effect of rendering their debt of little or no value. If, instead of proceeding by way of a summons, Alston & Company had instituted a suit making the plaintiff, the defendants, and the Receiver, in the main dispute, the defendants for the purposes of their action, then there could be no doubt that an appeal would have lain to this Court from whatever decision was come to; and I think that a mere selection of procedure should not turn what is really in substance the proper subject of an independent cause of action, into a subordinate matter.

If the reasoning is correct that once you have a main dispute —in this case *Gordon, Grant & Co., Ltd.,* v. *Boss, et al*.—all orders made therein are interlocutory unless they finally dispose of the main dispute, then it is impossible to understand why some of the judges in the cases cited remark that the decisions are not in harmony.

I think the order under consideration must be looked at to ascertain its nature and substance, and if notwithstanding the fact that it was made on an application in another suit, it appears to be a decision settling rights which may of themselves form the subject of an independent action, then the order should be treated as a final order for the purposes of appeal.

In my opinion the preliminary objection as to jurisdiction should be overruled and the Court should proceed to hear the appeal on its merits.

The appeal was dismissed with costs.

In re JOHN BLACKWOOD, LIMITED.

In re JOHN BLACKWOOD, LIMITED.

ON APPEAL FROM THE COURT OF COMMON PLEAS OF BARBADOS.

1923. MARCH.

BEFORE SIR A. V. LUCIE-SMITH, P., SIR CHARLES MAJOR, C.J., AND W. P. MlCHELIN, ACTING C.J.

Company Law—Petition for winding up company—"Just and Equitable" clause—Rule as to *"ejusdem generis"*—Absence of grounds for loss of confidence—Misconduct of director not necessarily ground for winding up company—Failure to hold general meeting—Internal management—No proof of fraud—Improper motive for petition—Companies Act of Barbados, 1900, sec. 126 (6)—Imperial Act of 1908, sec. 129.

This was an appeal from an order of the Chief Justice of Barbados, sitting in the Court of Common Pleas, that the appellant company be wound up.

The respondents, shareholders in the company of John Blackwood, Ltd., petitioned the court, stating that in the circumstances set out in their petition, it was just and equitable that the company should be wound up. The petition was based on seven grounds. The court, while affirming two grounds, viz., the non-observance by the company of the statutory requirements as to its general meetings and the non-compliance by the company with its articles relating to submission to its members of balance sheets, profit and loss accounts and directors' reports, also based its decision on the grounds that Maclaren, one of the directors, had acted or attempted to act in such a manner as to destroy any confidence the petitioner, Mrs. Loch, might have had in his integrity, and that circumstances existed bringing the directors under suspicion of endeavouring to obtain the petitioners' shares at under value.

Held (reversing the order of the Court of Common Pleas): (1) That although there had been some relaxation of the "*ejusdem generis*" rule in the interpretation of the "just and equitable" clause of the 129th section of the Imperial Act 1908, to which the 127th section of the local Act corresponded, still that in each of the cases in which there had been such relaxation, circumstances existed sometimes identical with, or at other times, allied to those present when the rule was rigid.

(2) That in this case the relation of Maclaren to Mrs. Loch was not that of *trustee* to *cestui que trust* but of shareholder to shareholder; and that Mrs. Loch knew of the transaction relating to the purchase of her shares, which negatived the allegation that Maclaren had attempted to take advantage of her supposed ignorance.

(3) That misconduct on the part of directors of a company,

though such as to render them liable to an action by shareholders was not a ground on which the court would consider it just and equitable to order the winding up of a company.

(4) That the failure to hold general meetings, to submit accounts and directors' reports, and to declare dividends, was matters of internal management with which the court would not interfere.

This is an appeal from an order of the Chief Justice of Barbados, sitting in the Court of Common Pleas, that the appellant company shall be wound up.

John Blackwood, Limited was formed eighteen years ago, under the authority and directions contained in the will of the late John Blackwood, in its constitution, control, and management of all its business, conforming with his testamentary instructions. It has carried on its business with varying success until the present time. For some years after its inception, its outlook was hardly cheering, but it was kept going during the great war and, during that conflict and for some time after, it made, like other concerns, abnormal profits. We need not assume, for the evidence shows, that this commercial success was and is due to that management and control which John Blackwood directed should be supremely William Maclaren's. To-day the company is eminently solvent. Its assets, the petitioners state for our information, are of considerable value. But Barbados is suffering from the universal trade depression; large increases of business expenditure are necessary and the means to incur them are straitened. Capital is necessary to commercial existence.

The evidence in support of the petition, upon which the learned judge of the court below has passed, consists of allegations therein, verified by the affidavit of the solicitor for the petitioners but only to the best of his knowledge, information and belief; a report by the colonial Official Assignee and his affidavit in connection therewith; and some letters which have passed between William Maclaren and members of his kinsfolk and between the solicitors for the parties. In opposition to the petition and the allegations therein, there have been filed affidavits by all the members of the company (other than the petitioners), of whom William Maclaren alone has been cross-examined, and of three gentlemen, members of firms carrying on business as steamship agents and shipbrokers, none of whom has been cross-examined thereon.

By the concluding paragraph of the petition the petitioners state that, in the circumstances therein detailed and in respect of all, or one or other, of seven grounds it is just and equitable that the company should be wound up. The prayer has been granted, in

exercise of the discretionary power vested in the court by the 6th sub-section of the 127th section of the local Companies Act, 1910, which corresponds with the 129th section of the Imperial Act of 1908, and it is on that sub-section, and not in respect of any or either of the particular statutory reasons for winding up a company, that the petition is based. Of the seven grounds, thus stated to be individually and collectively sufficient to found the court's power, the learned Chief Justice of Barbados has affirmed two, viz., the non-observance by the company of the statutory requirements as to its general meetings; and the non-compliance by the company with its articles relating to submission to its members of balance sheets, profit and loss accounts, and directors' reports. On the other five grounds the learned judge is silent, but his judgment proceeds on four reasons why it is, in his opinion, just and equitable to order the company to be wound up. These are first, acts done, or attempted to be done, by Maclaren sufficient to destroy, or materially weaken, any confidence the petitioner Mrs. Loch may have had in his integrity, and whereby unfair advantage would have been taken of the ignorance of those whom the petitioner John Rodger represents, and whereby the interest of the petitioners in the company have been put in jeopardy; secondly, circumstances bringing the directors under suspicion of endeavouring to obtain the petitioners' shares at an under value; thirdly, a state of things rendering it impossible for the petitioners to place confidence in the other shareholders; and fourthly, that no meetings of the company have been held, no balance sheets with directors' reports have been submitted, and no dividends have been declared, although funds have been available for doing so.

Before considering those grounds for the judgment of the court below, something must be said of what may be conveniently called the just and equitable clause. Until comparatively recent years, that clause, notwithstanding the wide and general nature of its words, was construed strictly as referring to matters *ejusdem generis* as those of the previous clauses, a construction affirmed and re-affirmed in such cases as *Ex parte Spackman* (L.R. 3 H. L. 171) *Suburban Hotel Company* (L.R. 2 Ch. App. 737), *Anglo-Greek Steam Co.* (1866. L.R. 2 Eq. 1) and *European Life Assurance Co.* (1869, L.R. 9 Eq. 122). Of late years, however, the English courts of law (and perhaps colonial courts for reciprocity, or as Mr. Wells aptly puts it, for judicial comity) have considerably relaxed the *ejusdem generis* rule, but we cannot, in the decisions whereby the rule has been so relaxed or extended, find any support for the view that the rule has been abandoned, or may be entirely disregarded; and for this reason. Consideration of the cases in which the relaxation or extension has occurred shows that in each have there been states of circumstances, some-

times identical with, at other times closely allied to, those present when the rule was rigid. Thus in the *Amalgamated Syndicate Co.* (1897, 2 Ch. 600) the company had been formed for an object that had ceased to exist but was contemplating business beyond its powers, and, therefore, as Vaughan Williams, J. (as he then was) said: "The *prima facie* right of the "shareholders to act as domestic forum is gone, and the matter is left to the "discretion of the court." *In Sailing Ship Kentmere* (W.N. 1897, 58) there was a complete deadlock in the administration of the company's affairs. In *Chic, Limited,* (1905, 2 Ch. 345) the purpose for which, and the business for which, the company had been constituted had ceased to exist; the company was merely *nominis umbra* and was also unable to pay its debts. In *Nelson & Co.* (1906, 1 Ch. 841) Buckley, L. J., said: "The company is "not really or in substance carrying on business at all, but the business is "being carried on by or for the debenture-holders only." Coming to the *Yenidge Tobacco Co.* (1916, 2 Ch. 426), the circumstances wherein have been so often referred to in the argument addressed to us and were so very different from those existing here, this case is one of those on which the learned Chief Justice's judgment is based. "I ask myself the questions," said Lord Cozenshardy, M.R., "Is it reasonable to suppose that these two "partners can work together in the manner in which they ought to work in "the conduct of the partnership business?" "Certainly," added his lordship, "having regard to the fact that the only two directors will not speak to each "other, and no business which deserves the name of business in the affairs "of the company can be carried on, I think the company should not be "allowed to continue." "Conduct of the partnership business"; "no business can be carried on," there we think, appears the real *ratio decidendi*; and the same principle is shown in the other cases, like the *Bleriot Aircraft Co.* (1916, 32 T.L.R. 253) and *Newbridge Steam Laundry Co.* (1915, 49 I.L.T. 199). It is this: that, although the circumstances may not bring the particular case within the *ejusdem generis* rule strictly interpreted, they must show either that the business cannot be carried on at all, or ought not, for fraud or other weighty reason, to be allowed to be carried on.

With that principle to govern the consideration of the evidence in this matter we turn to the learned Chief Justice's reason for making this order. The first is the acts done or attempted to be done by Maclaren which, in the opinion of the Court below, have been sufficient to destroy, or materially weaken, Mrs. Loch's confidence in him and to bring the petitioners' interest into jeopardy. We can find no trace of the destruction or weakening in the cor-

respondence at any rate, which has been conducted, albeit with differences of opinion, with some family jars, yet in amity and, apparently, esteem throughout. And here it should be remembered than any impression of the existence of the relationship of trustee and *cestui quo* trust between Maclaren and Mrs. Loch, or between him and John Rodger as representing the legatees under James Rodger's will, is unfounded. The trusts of the will of John Blackwood have been terminated in proper and unexceptionable manner. No ground whatever has been attempted to be proved for any allegations to the contrary. The relationship of Maclaren to John Rodger is that of one shareholder to another. On the evidence before us we cannot regard the suggestion made by Maclaren to Mrs. Loch in connection with the shares of John and Mary Rodger under the will of their father, either as in fact destroying or impairing Mrs. Loch's confidence in Maclaren, or indeed sufficient to do so. As to the proposal to acquire Mrs. Loch's shares at 10s. each, it appears clearly from the correspondence that it was originally made by Mrs. Loch herself. In the opinion of the court below this acquiescence by Maclaren in Mrs. Loch's proposal—it was not an offer in the first instance by him—was an attempt to take unfair advantage of her ignorance and the ignorance of John and Mary Rodger of the financial condition of the business. We are unable so to regard it; we cannot, on the evidence, think Mrs. Loch to have been in that state of ignorance at all. For it appears by the affidavits of Maclaren and his co-director and other members of the company that year by year she was supplied with full information of the financial condition of the company. Those affidavits remain uncontradicted. It also appears that James Rodger was himself for many years a director and took an active part in the conduct of the company's affairs. Moreover Maclaren was not bound to disclose to Mrs. Loch or anyone else facts concerning the financial conditions of the business which might affect the value of the shares.

Another act attributed to Maclaren is the taking of the sum of £12,500 in respect of deferred salary. Though the resolution that the payment should be made was passed, in consideration, as the minutes run, of an understanding "from the beginning" that his annual salary of £1,100, as against the £2,000 he had been receiving in England, would be substantially increased whenever the finances of the firm would permit, there is no evidence that the sum was actually drawn, and it appears that, either on reflection or advice, Maclaren procured the resolution to be rescinded. However unwise or irregular this proceeding may be considered to have been, and even if regarded as misconduct on the part of Maclaren as a director of the company, as laid down in the *Anglo-Greek Steam Co.*, misconduct of directors

and managers though such as to render them liable to an action by shareholders, is not a ground on which the court will consider it just and equitable to order the winding up of a company.

The last acts, or series of acts, whereby the directors, in the opinion of the court below, have laid themselves open to suspicion of unworthy motives to the detriment of the petitioners, are the failure to hold general meetings, to submit accounts and directors' reports, and to declare dividends. On the authority of *MacDougall* v. *Gardiner* (1875, L.R. 10 Ch. App. 606) and *Burland* v. *Earle* 1902. A.C. 83), these matters are of internal management and, as remarked by Lord Justice Buckley, in his work on the Companies Acts, it is “elementary that the court will not interfere with “internal management, and in fact has no jurisdiction to do so.”

Finally, the affidavits mentioned of the three members of local shipping firms, testifying to the grave loss that would be inflicted on the shareholders of the company by a forced sale of its assets at this particular juncture, remain entirely unanswered.

We are impressed with the submission of the appellants that this petition has been preferred with an improper motive, for in a letter written by the petitioners' solicitor to the solicitors for the company on the 9th May, 1922, the following passage occurs: " We do not intend to continue working with them (*i.e.,* the Maclarens, husband and wife), and unless you sell to us, or transfer at your offer (that is the expression) enough shares to give us a controlling influence in the company, the concern must be wound up by the court." We ought, we think, also to point out that the allegations in the petition, as explained and amplified in the argument addressed to us by the Solicitor General, implying fraud on the part of Maclaren as a director of the company have not been substantiated in any way.

For the foregoing reasons we are of opinion that no valid ground has been shown by the petitioners why it would be just and equitable to wind up the company The appeal, therefore, must be allowed, and the order of the court below must be set aside with costs here and in that court.

BOODHOO *v.* DA SILVA.

[218 OF 1921.]

1922. FEBRUARY 16. BEFORE BERKELEY. J.

Costs—Taxation—Election petition—Costs of further particulars—Fees to counsel—Rules of Court, 1900, Part II, Order I, rr. 1, 13.

An election petition is not a petition within the meaning of Part II, Order I, of the Rules of Court. Costs in an election petition should be taxed as the costs in an action.

Summons to review taxation.

The respondent in an election petition, Da Silva, sought a review of the decision of the taxing officer who allowed charges in connection with a request from him (the respondent) for particulars, on the ground that the particulars should have been furnished in the petition. Fees for senior and junior counsel, $200 and $100 respectively, were objected to on the ground that the petition was dealt with by the taxing officer as an action, the maximum fees on a petition being $50 and $25. Rules of Court, Part II, Order 1, r. 13, and Appendix I, Pt. I, (b).

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

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

BERKELEY, J.: Objection is taken to certain charges under dates 15th, 16th, 18th November and 16th and 17th December in respect of particulars given at the request of the respondent on the ground that they should have been furnished in the petition. In an election petition it is sufficient for the petition to allege the grounds generally, and a petition alleging that the respondent and his agents are charged with bribery, corruption and undue influence and also with illegal practices would in form be sufficient—(Halsbury's Laws, Vol. XII, p. 415). The present petition therefore contains all that was necessary.

By letter of November 15th, 1921, the respondent asked for certain particulars. Some of these were furnished. On December 16th, a second application was made in respect of those particulars which had not been furnished in the first instance. The charges under dates in November are in order, but those under dates in December are due to the action of the petitioner in not giving all the particulars at one and the same time. The charges therefore in connection therewith are disallowed.

Objection is also taken to the fees allowed counsel for attendance in court. It is submitted that the taxing officer was wrong in dealing with the petition as an action in the Supreme Court.

Under the Parliamentary Elections Act, 1868 (31 and 32 Viet. c. 125) the rules and regulations of the Supreme Court with regard to costs in actions are made to apply to the costs of election petitions. It is true that the local Rules of Court provide a scale of fees in connection with petitions. These petitions are in respect of certain matters mentioned in Part II. Order 1 (r. 1) of Rules of Court and the order continues "and every petition in "respect of every other matter and which under the Common Law of this "colony or under the practice heretofore existing." An election petition is not brought under the common law of the colony and it seems that the practice heretofore existing is to follow the English statute law and treat an election petition as an ordinary action.

The taxation by the Registrar is confirmed with the exception of the items under date 16th and 17th December already disallowed.

I make no order as to costs.

Solicitor for appellant. *F. Dias.*

Solicitor for respondent, *E. A. W. Sampson.*

ADAMSON *v.* HIGGINS;
ex parte HIGGINS.

[231 OF 1921.]

1922. FEBRUARY 14, 18. BEFORE SIR CHARLES MAJOR, C J., BERKELEY AND DALTON, JJ.

Immovable property—Sale at execution—Conventional mortgage—Foreclosure by second mortgagee—Whether sale subject to first mortgage—Priority of debts—Qui prior est tempore potior est jure—Deeds Registry Ordinance, 1919, s. 20 (1.) (b), and Schedule II, r. 20.

Petition, referred by the Chief Justice to the Full Court, under the provisions of Rules of Court, 1900, Part II. Order I, r. 11.

The petitioner Higgins was the defendant in the action Adamson *v.* Higgins. Prior to March 14th, 1921, he was the owner of a part of plantation Brickery subject to a first mortgage for $1,500 in favour of the British Guiana Building Society. Ltd., and to a second mortgage for $3,000 in favour of Sarah Adamson. On March 14th the property was sold at execution at the instance of the second mortgagee, Adamson, and purchased by one James Mitchell on behalf of his minor children for the sum of $6,118. The claim and costs of Adamson amounting to $3,236.91 had been satisfied by the Registrar, and the petitioner claimed that there remained for distribution to him the sum of

$2,708 or thereabouts, on the ground that the sale was made subject to the first mortgage in favour of the Building Society which still attached to the property. He therefore asked that the Registrar be directed to pay to him the residue remaining at the credit of the sale after payment of the costs and claim of the execution creditor, Adamson.

By direction the petition was referred for report to the Registrar, to the first mortgagee the Building Society, and to James Mitchell, the latter two opposing the order sought to be obtained.

E. G. Woolford, K.C., for the petitioner Higgins.

P. N. Browne, K.C., for the Building Society, the first mortgagees.

M. Ogle, for Mitchell, the purchaser at execution sale.

W. A. Parker, Registrar, in person.

BERKELEY, J.: I concur in the decision which is about to be given, and have nothing to add.

DALTON, J.: Sir Charles Major, C. J., has asked me to state that he has read the decision I am about to deliver and that he concurs in it.

The petitioner asks for an order on the Registrar directing him to pay to the petitioner the residue remaining in his hands to the credit of the sale at execution of a property belonging to the petitioner after payment of the costs and claim of the execution creditor.

The facts in this case are as follows:—The petitioner owned part of Pln. Brickery which he mortgaged, firstly, to the British Guiana Building Society for the sum of $1,500, and, secondly, to Sarah Adamson for the sum of $3,000. Those mortgages were passed in due form of law.

Subsequently the second mortgagee took proceedings and obtained the usual order of the Court to proceed in execution against the property mortgaged, and recover from the proceeds of the sale the sum due to her. Under that order the property was sold on March 14th, 1921. At that time it appears that the mortgagor was also in default of payments clue under and secured by the first mortgage to the Building Society. The purchaser was James Mitchell, and the purchase price $6,118. On payment of the costs of the Registrar and Marshal the sum of $6,043.53 remained for distribution.

The first mortgagees appear to have at once after the sale claimed from the Registrar the payment of their mortgage debt to rank immediately after the costs of execution, and on April

2nd they received an instalment of their claim (the purchase price was payable by instalments). Subsequently, however, the Registrar appears to have changed his view and to have taken up the position that he should not have made this payment to the first mortgagees, but proposed to pay the second mortgagee in full leaving the first mortgage attaching to the property after the sale, and paying all surplus proceeds remaining over after the payment of the second mortgagee to the judgment debtor, Higgins. This would necessitate a refund by the first mortgagees of the amount already paid to the Society by the Registrar. This proposal he put before all the interested parties. The Building Society objects to this method of distribution, but the petitioner Higgins now asks for an order of the Court to confirm it. Reference to the conditions of sale shows no mention of sale subject to any mortgage or encumbrance, but the Registrar states that at the sale the marshal stated publicly that there were two mortgages on the property being sold.

In support of the petitioner's contention Mr. Woolford rests his argument solely on the provisions of s. 20 of the Deeds Registry Ordinance, 1919. The material part of that section is as follows:—

20(1). A transport of immovable property passed after the commencement of this ordinance shall vest in the transferee the full and absolute title to the immovable property . . . . subject to

(*a*.) . . . . .

(*b*.) All registered encumbrances.

I cannot see that that section has any application to the facts of this petition now before the court. It is I think necessary to point out definitely that all the court has to decide is the case that comes before it. Mr. Woolford has pictured to us various results that may follow, as he says, if the decision of the court is against him. He has asked us to decide various questions or cases he has put to us, which do not at all arise on the facts of this petition. What would be the position of the first mortgagees had the Registrar conveyed the property to the purchaser after the judicial sale without payment of that mortgage? Is it necessary for the Registrar when selling property at execution sale to state in the conditions of sale that it is sold subject to any mortgage or encumbrance? Is a mortgage executed and registered in due form of law thereby publicly notified to the world? These are all interesting questions which may some day come before the court, but they do not arise and they are not, in my opinion, in any way being decided by the court in this case. We are not called upon to decide them. On the facts of this petition, as it is unques-

tioned that no conveyance has as yet followed on the sale by the Registrar, we are not concerned with any 'transport of immovable property' as mentioned in section 20, and therefore, as I have said, I cannot see that section 20 assists the petitioner.

But it is certainly desirable on the petition as it comes before the court to declare the order in which the proceeds of the sale should be dealt with, to comply with the requirements of the law.

Both the mortgages in question were executed after the abrogation of Roman-Dutch Law in 1917. In respect of mortgages, however, the Roman-Dutch Law was retained (s, 3 (4) (b), Ordinance 15, 1916). That sub-section (b) has been in part repealed by certain provisions of the Deeds Registry Ordinance, 1919, in so far as it deals with such matters as the execution of mortgages. But the former law relating to conventional hypothecs still stands, and I find nothing in the Deeds Registry Ordinance which is contrary to the rule *qui prior est tempore potior est jure.* I can certainly find nothing in s. 20, to which we have been referred, which prevents the application of that most important rule to the facts of this case. From its very terms it is of course clear that the second mortgage was executed with full knowledge of the prior mortgage to the Building Society. The Society alleges, and it is not denied, that its claim has matured, that it was at the time entitled to foreclose, and therefore on the law as laid down in *Griqualand West Board of Executors* v. *Green* (7 H.C.G. 97) and *Netherlands Bank* v. *Reserve Investment Co.* (1906, T. S. 176) the second mortgagee was entitled, without consulting the first mortgagee, the Building Society, to have the mortgaged property declared executable (and see *Voet* XX, 5, §, 11). When the former foreclosed, the first mortgagee following a very old, well recognised, and in my opinion correct practice in such a case (if he was entitled to and required payment of his claim) at once lodged with the Registrar his claim with a request for payment. This mortgage bond was in itself in its form a judgment of the court, and the property mortgaged to him was already in the custody of the court under the second mortgagee's writ of execution, Again it may be well to repeat that in my opinion we are not deciding any question as to what would result had the first mortgagee remained silent and not lodged his claim. Whether he could safely do so or not is not a question that arises here. On the facts of this case the mortgagor was in default of payment and the Building Society required the mortgage to be paid. On the second mortgagee bringing the property to sale, after payment of the 'costs triumphant,' the first mortgagee was entitled to be paid the amount of his claim in preference to the second mortgagee. On payment of that preferent claim, the second mortgagee was then entitled to

payment. Fortunately in this case, as there is sufficient to pay both mortgages, the second mortgagee is not called upon to refund any of the sum already paid to her. Any surplus proceeds after payment of all the claims the petitioner is doubtless entitled to receive. His claim, however, to have the property conveyed to the purchaser with the liability for the first mortgage still attaching to it, the surplus proceeds payable to him being thereby augmented by that amount, has nothing to support it and fails. This claim is therefore dismissed, with costs.

Solicitor for petitioner, *A. G. King.*

Solicitor for 1st mortgagees, *Cameron & Shepherd.*

Solicitor for purchaser, *J. R. Wharton.*

SCHOONORD SUGAR ESTATES. Ltd., *v.* BOARD OF ASSESSMENT.

[51 OF 1922]

1922. FEBRUARY 22: MARCH 4. BEFORE DALTON, J.

Revenue—Excess Profit Tax—Assessment—Capital—Increase of capital—Statutory percentage—Unpaid purchase money—Tax Ordinance, 1921 (*No, 33 of 1920), s. 61—Profit Tax Ordinance, 1921*(*No. 4 of 1921), ss., 12, 14* (*3*) *and Schedule.*

Appeal from a reconsidered decision of the Board of Assessment under the provisions of s. 17 (1.) of the Profits Tax Ordinance, 1921.

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

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

H. C. F. Cox, Assistant to A.G., for the respondents, the Board of Assessment.

DALTON, J.: This is an appeal from a reconsidered decision of the Board of Assessment under the provisions of s. 17 (1) of the Profits Tax Ordinance, 1921.

The appellants, the Schoonord Sugar Estates, Ltd., were assessed by the Board, on reconsideration, to pay profits tax in the sum of $9,000.61 for the accounting period January 1st to December 31st, 1920. The company was incorporated on August 16th, 1920, but acquired the land, machinery, growing crops, and

produce of the Schoonord sugar estate as from January 1st, 1920, at the price of $960,000. The capital of the company is set out in the memorandum of association as $2,500,000.

The amount of the tax is fixed by s. 61 of the Tax Ordinance 1921 (No. 33 of 1920), a tax of ten per centum on all profits earned in excess of ten per centum on the capital employed in earning such profits.

In the return of capital to the Board the company states that at the commencement of the accounting period the capital was $1,000,000, and at the end of that period the capital was $1,158,830.08, subject to certain deductions claimed. With those deductions made, the company took up the position that the capital on which the statutory percentage should be allowed was $1,122,563.59, and for the whole of the accounting period.

The assessment made by the Board is arrived at in the following way. There is no dispute between the parties as to the accounting period, as to the date of incorporation of the company, or as to the date from which the company took over the property, *i.e.*, January 1st 1920. But it appears that the purchase price of the property ($960,000) was not paid until July 7th, 1920. On that date it is admitted that Mr. Wight, a broker, who also happened to be one of the directors of the company, undertook to underwrite the whole of the share capital, and subsequently on behalf of the company paid the purchase price to the vendors of the estate, reimbursing himself by transferring blocks of shares to the various subscribers, The whole purchase price, Mr. Browne stated, was paid in cash.

Up to July 7th therefore the Board says that the whole of the purchase price was unpaid. In estimating the capital therefore on which the statutory percentage, that is, the rate fixed by the Tax Ordinance above cited, is claimed it says it must deduct the amount of the unpaid purchase money, which has been done. Taking July 7th as the date of the payment of that purchase price, it has allowed the proportion of the capital from July 7th to December 31st, as that on which the statutory percentage may be claimed for the whole accounting period. As a result, although the company took over the business of the sugar estate as from January 1st, and was earning profits during the twelve months thereafter upon which the profits tax has been assessed, it only receives the benefit, for the purpose of estimating the profits tax payable, of its working for a proportion of that time, *i.e.*, from July 7th to December 31st.

In considering the question raised on this appeal, it is necessary to point out that by the Profits Tax Ordinance the word 'capital' is specially defined. It has not the meaning, for instance, which

one generally understands by that term, when one speaks of the capital of a company, (cf.s. 13 of the Tax Ordinance 1921). In the schedule to the Profits Tax Ordinance, 1921, it is laid down as follows:—

1. The amount of capital of a business shall so far as it does not consists of money be taken to be
   (*a.*) so far as it consists of assets acquired by purchase, the price at which those assets were acquired subject . . . . . any proper allowance for unpaid purchase money;
5. Liabilities for debentures . . . . unpaid purchase money . . . . . shall be deducted in arriving at the amount of the capital.

The purchase money being unpaid up to July 7th the Board have fixed that date to be the time when the capital increased from nil to $1,000,000. No comment was made or argument addressed to me as regards the difference between $960,000 and $1,000,000. I pointed out, however, during the hearing that at that date the company had not yet come into existence but it being to the benefit of the company to take July 7th rather than any late date in the year (*e.g.,* August l6th, the date of incorporation) the appellants took the benefit thereby given and counsel for the Board raised no question in respect of it. In view of the meaning of 'capital' quoted above it seems clear that the amount of capital employed from time to time during any period may be a fluctuating amount and may increase or decrease according to the circumstance under which the business is carried on. In view also of the explicit direction contained in section 5 of the schedule quoted it was I think incumbent on the Board to deduct the unpaid purchase price of the estate to arrive at the amount of capital employed during the accounting period in question. Mr. Browne has argued that there is some inconsistency between sections 1 (a) and 5 of the schedule, in respect of the use of the words 'allowance' and 'deduction,' and has referred to English statutes for support, but he does not find s. 5 in the English statutes at all. The schedule must be construed as it stands, and reading ss., 1 (a) and 5 together, on this question of unpaid purchase money, as I think they must be read, I can see nothing inconsistent in them.

As a result of this increase of capital resulting from the payment of the purchase price, applying the provisions of s. 14 (3) of the Profits Tax Ordinance the Board has allowed the statutory percentage on $1,000,000 for so much of the accounting period as the increased sum has been employed.

In arguing the appeal Mr. Browne urged that the Board was wrong in holding that the company was assessable under s. 14 (3).

He stated that the assessment should have been made under s. 12 as a case of a change of ownership. I think the language here used in the argument is misleading and not justified by the ordinance. I do not read sections 12 and 14 (3) as prescribing different methods of assessment in the way counsel urges. Section 12 provides for the assessment of persons carrying on business and goes on to say that if there is a change of ownership during the accounting period, the accounting period may be divided up according to the date on which the ownership changed. Section 14 does not provide for a separate and distinct method of assessment but enacts what may or shall be done in the case of an increase or decrease of capital during the accounting period or the acquisition of a business subsequent to January 1st, 1917. The sections in other words provide for an assessment being made and sets out rules for the guidance of the Board under the different circumstances which may or must be taken into consideration by it. There seems for instance nothing to prevent the Board having reference to its powers or discretion under s. 12, when making assessments under section 8. One cannot place each section as it were in a water-light compartment by itself.

Therefore on the facts of this case I am unable to agree with appellants' counsel that the Board should have made the assessment having the terms of s. 12 alone in view, and shutting their eyes to the provisions of s. 14. It may well be, as urged in the reasons of appeal, that the profits on which the assessment were made are not profits earned since July 7th but from the commencement of the accounting period. Even so, if the purchase price had not been paid until after December 31st 1920, it would seem that no profits tax would have been payable at all. I think the Board admits this.

On the whole case therefore, whilst it certainly does seem to me under the circumstances to be a case of hardship that the company cannot get the benefit of the period from January 1st to July 6th during which they were earning profits, to increase the amount of capital upon which the statutory percentage was allowed and thereby to reduce the amount of the tax payable for the whole accounting period, I am unable to see that, on either the facts or the law, the Board was wrong in coming to the conclusion that there was an increase of capital during the accounting period from nil to $1,000,000, or in allowing the statutory percentage on that last amount only from July 7th to the end of the year. As I have stated there might be some ground for fixing that date (July 7th) later in the year but it is not here sought to do that.

The decision of the Board must therefore stand, and the appeal be dismissed with costs, fixed at $60.

Solicitor for appellants, *F. Dias.*

Solicitor for respondents, *Crown Solicitor.*

THOMPSON *v.* HIGGINS.

[294 OF 1919]

1922. JANUARY 3, 7. BEFORE SIR CHARLES MAJOR, C.J. AND DALTON, J.

Immovable property—Trespass—Damages—Title to land—Obscurity in description of locality and boundaries—Parol evidence to explain—Deeds Registry Ordinance 1919, s. 21—Excessive damages—New trial—Representative action—Parties—Practice—Rules of Court, Order XIV. r. 8.

Appeal from a decision of Berkeley J.—

The plaintiff Thompson for himself and eight others claimed to be entitled to certain portions of plantation The Brickery, a declaration that the defendant Higgins was not entitled to those portions, rectification of transport No. 419 of April 12th, 1918 passed to the defendant and the sum of $1000 damages for trespass by the defendant.

All further necessary facts sufficiently appear from the decision of the trial judge below.

That decision given on March 27th 1920 was as follows:—

BERKELEY, J.:—The plaintiffs claim (1) that they are the undivided owners of the two parts of land comprising thirty roods commencing from the northern boundary of plantation Brickery, and seek a declaration that the defendant has no right, title or interest therein; (2) an injunction to restrain defendant, his servants and agents from entering thereon; (3) rectification of defendant's transport No. 419 dated 12th April, 1918 by the insertion of the words omitted from the said transport and by the addition of such other words or descriptions as properly identifies the particular parcel of land thereby transported; and (4) $1000 as damages for trespass.

On 12th April, 1918, defendant obtained transport of seventeen roods of Brickery which is described therein as " adjoining and "north of the lands of York Thompson on the south," and under this transport he alleges that he purchased part of thirty roods adjoining Garden of Eden on the north. Counsel objects to the admission of any evidence which might affect defendant's title. The description here is unique. It certainly is not clear and distinct. Apart from this I should accept evidence in order if necessary to comply with section 21 of Deeds Registry Ordinance 1919, which provides for amendment of errors or omissions in deeds.

Plantation Brickery, bounded on the north by Garden of Eden and on the south by plantation Supply, by letters of decree dated 9th August, 1845, became the property of Adriana Jacoba De Wit

(exhibit K). The plantation consisted of about ninety-three and a half roods, and no question arises as to the situation of forty-six and a half roods, the property of defendant. This is described in his transport (exhibit A) as

> "commencing from the mouth of the draining trench between the said "plantation Supply and the said The Brickery and extending a distance "of 461/2 roods in a northerly direction by the full depth of the said "piece of land known as The Brickery."—

On 22nd December, 1845, the said Adrians Jacoba De Wit transported to York Thompson (exhibit F) fifteen roods adjoining on the north the lands of the said Adriana Jacoba De Wit and on the south the lands of Hannibal Van Den Heuvel. These fifteen roods were the second removed from Garden of Eden as the northern boundary is described as that of the said Adriana Jacoba De Wit, and on the next day (23rd December, 1845) she passed transport to Hannibal Van Den Heuvel (exhibit L) of seventeen roods which is described as land "adjoining on the north the lands of York

> "Thompson (whose transport it is clear must have been advertised at "the same time as that of the said "Hannibal Van Den Heuvel) and on "the south the lands of the said Adriana Jacoba De Wit." These

seventeen roods therefore were situate between the land of York Thompson and other lands of Adriana Jacoba De Wit, which "other lands" now form part of the forty-six and a half roods owned by the defendant (exhibit A). York Thompson by his will (exhibit G), duly proved on 16th October, 1868, and in which his northern and southern boundaries are described as in his transport (exhibit F) with this addition "known as lot number 2" (which would be correct as it was the second lot of plantation Brickery from its northern boundary) bequeathed his fifteen roods to his seven children of whom Monday Thompson was one. Adriana Jacoba De Wit by her will (exhibit H), proved on 5th October, 1850, bequeathed to her two brothers John and Emanuel Martinborough fifteen roods of land between Plantation Garden of Eden and Thompson's lot. (This can be none other than the fifteen roods so situate next to the Garden of Eden and now claimed by defendant as part of the seventeen roods transported to him). The said John Martinborough by his will (exhibit I) duly on the proved on 3rd May, 1870, bequeathed to his sisters Charlotte and Sarah his interest in Brickery and they transported (exhibit J) on the 8th June, 1873, their one undivided half of the fifteen roods bounded on north by plantation Garden of Eden and on the "south by the lands of Monday Thompson" to the said Monday Thompson. It is said that this should read "South by the lands of York Thompson, but York Thompson had died on 3rd October, 1868, leaving his fifteen roods of land to Monday Thompson and his

six other children, and it may well be that the southern boundary was intentionally described in 1873 as the land of Monday Thompson, although it might have been more correct to say "Monday Thompson and others." Thus we have Monday Thompson owner by transport (exhibit J) of an undivided half of the first fifteen roods of Brickery nearest to Garden of Eden and co-owner with his brothers and sisters under the will of his father the said York Thompson of the adjoining fifteen roods which are bounded on the south by the lands (seventeen roods) of the said Hannibal Van Den Heuvel (exhibit L). These seventeen roods were levied on as the property of Catherine Coates and purchased at execution sale by Alfred De Freitas on 17th February, 1908. In the instructions to levy there crept in an error in the description of the boundaries. It reads "adjoining and north of the lands of York Thompson on the south," instead of "adjoining on the north the lands of York Thompson and on the south the lands of Adriana Jacoba De Wit." These lands on the south are now the forty-six and a half roods owned by defendant. This error appears in the letters of decree obtained by Alfred De Freitas on 30th June, 1908, and was continued in the transport by him of 15th October, 1910 to Julio De Abreu and in the transport of 12th April, 1918 by him to defendant. No question is raised as to the property levied on being the seventeen roods transported to Hannibal Van Den Heuvel, and as a fact it is the only seventeen roods transported as one piece of land. The defendant and his predecessors in title accepted these seventeen roods as land transported to them although defendant now says that he was a trespasser and knew at the time that he had purchased the land nearest to Garden of Eden. The evidence shows that he has made several ineffectual attempts to purchase the thirty roods lying between these seventeen roods and the Garden of Eden. He also caused a signboard to be placed on the land and prosecuted one of the plaintiffs for trespass. There is a plan of Brickery (exhibit D.) which defendant admits was made by him after he had successfully prosecuted plaintiff. By this plan he has appropriated for himself not only his forty-six roods and the seventeen next thereto, but in addition seventeen of the thirty roods owned by plaintiffs, selecting of course the seventeen nearest to Garden of Eden, and leaving only thirteen roods as the property of the heirs of York Thompson who had purchased fifteen.

It is admitted by counsel for the defendant that the plaintiffs are the heirs of York Thompson and Monday Thompson. I find that one half of the first undivided fifteen roods (71/2) nearest Garden of Eden is the property of the plaintiff's as heirs of Monday Thompson, and that they are entitled by prescription to the other undivided half of these fifteen roods which had been in

the undisturbed possession of the said Monday Thompson and the plaintiffs as his heirs since the purchase by Monday Thompson on the 8th June, 1873, a period of over forty years. It goes without saying that the second lot of fifteen roods is the property of the heirs of York Thompson.

Defendant was most desirous of owning the whole of Brickery in order that a company might be formed in connection therewith, and this was a perfectly legitimate reason for endeavouring to purchase from the owners their thirty roods, but having failed to come to terms with them he allowed his desire of ownership to get the better of him and he resorted to improper means to attain that end. The plaintiffs are entitled to damages which I assess at $500: Judgment for plaintiffs in terms of claim with damages $500:—and costs.

From this decision the defendant appealed. The reasons of appeal sufficiently appear from the judgments below.

E. G. Woolford K.C., for *H. C. Humphrys*, for the appellant. Higgins.

J. S. McArthur, for the respondent.

Sir CHARLES MAJOR, C.J.—The decree of the Court below firstly declares the plaintiff and eight persons named in the writ of summons on whose behalf the plaintiff has brought the action to be the heirs and descendants of York Thompson and Monday Thompson and Jericho Thompson; secondly, declares the plaintiff and the eight persons, as those heirs and descendants, to be the undivided owners (so, curiously, are they described) of two parcels of land, together 30 roods in frontage extent, their title to an undivided quarter of the 30 roods having been acquired by prescriptive possession, the decree proceeding, apparently as to the whole 30 roods, to declare that the defendant has no right, title nor interest thereto or therein; thirdly, awards an injunction restraining the defendant, his servants and agents from trespass on the 30 roods; fourthly, orders a conveyance of certain land (other than the 30 roods) to the defendant to be rectified by an alteration of the description thereof; fifthly, awards to the plaintiff $500 damages.

The defendant has appealed from the whole of the decree. It was stated in the remarks of the learned trial judge when giving judgment that it had been admitted that plaintiff and those eight persons for whom he has sued are the heirs of the three Thompsons. The declaration of title secondly made in the decree is challenged by the appellant in his notice of appeal, but the challenge has hardly been pursued. After all it is of no moment to him. Objection is taken to the rectification of the appellant's

conveyance on the grounds (1) of the erroneous construction of the words of description; (2) that section 21 of the Deeds Registry Ordinance, 1919, whereunder (it is said) the learned judge purported to act in aid of rectification is inapplicable; (3) that parol evidence to support the rectification was wrongfully admitted as varying the contents of the defendant's conveyance. The appellant charges the damages as excessive.

Although claiming other relief than by way of damages for trespass to the plaintiffs' close, the form of decree depending (as concerns the defendant entirely) upon the determination of the issue of trespass, I take that issue first. The defendant denied that he trespassed, and in support of his denial produced the deed of which rectification was eventually ordered (I call it 419) conveying to him land described thus: "a piece of land 17 roods facade by 750 roods in depth part of a piece of land known as Brickery . . . said piece of land adjoining and north of the lands of York Thompson on the south." The land by that particular description was conveyed to the defendant by Julio De Abreu and to Julio De Abreu by Alfred De Freitas, De Freitas having purchased it at execution sale in 1908 in a suit by Manoel De Abreu against Catherine Coates. This land the defendant alleged is the land whereon he is said to have trespassed. The plaintiff, not disputing the defendant's title to the land comprised in 419, contended that it is situated elsewhere, and that by the words of description is the same as "the said piece of land adjoining on the north the lands of York Thompson," that is to say, that it lies to the south of the lands at the date of 419 of York Thompson or his heirs, instead of to the north of those lands as stated by the defendant. The learned judge looked at the words of description in 419, and finding them obscure by reference to other conveyances of Brickery and wills of the owners thereof from time to time, admitted parol evidence to assist him in construing and explaining them.

Now whether the land comprised in 419 is situate in one place or another was a question of fact, and the answer depended upon the construction of the words of description by locality and boundaries. Those words being to the judge's mind obscure, he could not construe them without recourse to parol testimony—which is always admissible for that purpose—for only thereby could he determine whether the defendant had trespassed or not. The evidence, moreover, was not received to vary, but to explain, 419. There was no question of alteration of either situation or area of the land conveyed to 419, or of any other term of the deed. It was solely a question of the true meaning of the descriptive words, and the learned judge, having consulted other deeds and documents relating to Brickery lands from 1845

to 1918, and heard the evidence of witnesses, not only as to occupation and acts of ownership during that period, but also as to the conduct of the defendant himself in relation to the land conveyed by 419, has declared that the true meaning of the descriptive words to be that for which the plaintiff, and not the defendant, contends. With that declaration, I entirely agree. It follows, therefore, that the defendant trespassed, his acts constituting the trespass not being disputed, and the plaintiff was entitled to an injunction.

It is said that we ought to hold the damages to be excessive, in the sense, as Mr. Woolford properly put it, that if the sum had been awarded by the jury, we should direct a new trial. This, it must be remembered, is an action of tort. The principle upon which, it seems to me, we ought to act, and with greater readiness indeed in the colony where trials are by judges without juries, is that prescribed by Lord Esher in *Praed* v. *Graham* (24 Q.B.D. 55) where the learned judge said: "If the Court, having fully considered the whole of the circumstances of the case, come to this conclusion only: 'we think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them,' then we ought not to interfere with the verdict. . . . . If the authorities are looked at, that will be found to be the rule of conduct which the judges have adopted. If the court can see that the jury in assessing damages have been guilty of misconduct, or some gross blunder, or have been misled by the speeches of counsel, these are undoubtedly sufficient grounds for interfering with the verdict, but they come within the larger rule of conduct which I have laid down, and are grounds which are included in that rule. [By 'larger rule of conduct' the Master of the Rolls meant the rule as the same as where the Court is asked to set aside a verdict on the ground that it is against the weight of evidence]. I think the proposition said to have been stated by Fitzgerald, J., is equivalent to the one I have stated." Palles, C.B., in *McGrath* v. *Bourne,* an Irish case, said Fitzgerald, J., had stated that, in order to justify the Court in granting a new trial on the ground of excessive damages, the amount should be such that no reasonable proportion exists between it and the circumstances of the case. Governed by these principles I can see no ground for interfering with the assessment of damages.

When, however, the damages are given to the plaintiff—that is (without more) to him personally, I think the decree is wrong. Where no other relief than damages is claimed, a representative action, of course like this will not lie. (Fletcher Moulton, L.J., in *Markt & Co,* v. *Knight S. S. Co.* 1910 2 K. B. 1021). No objection to the form of action was raised, and in view of the nature of

the relief claimed and of the admission of the defendant as to the status of the persons named in the writ of summons whom the plaintiff represents, perhaps the rule governing representative actions brought under our rule 8 of Order XIV has been properly invoked, viz., that "given a common interest and a common grievance, a representative suit is in order if the relief sought is in its nature beneficent to all whom the plaintiff proposes to represent." (Lord Macaughten in *Duke of Bedford* v. *Ellis* 1910 A.C., 1). It is that word "all" in the rule that causes me some doubt here. The damages, therefore, must be to the heirs of York Thompson, Monday Thompson and Jericho Thompson; the amount must be paid into court within four days from this date, and it must be referred to the Registrar to inquire who are these heirs and to divide and pay out the sum of damages between them equally.

Although, perhaps, merely a matter of phraseology, I am not satisfied that this is a case for rectification of 419, in the proper sense of that word. There has been no mistake in, no misrepresentation as to, no misdescription of, the parcels. What is wanted is a declaration of the true meaning of certain words, and those the descriptive words in 419. The decree, therefore, should declare that true meaning to be "of land formerly of Hannibal Van Den Heuvel in exhibit L mentioned in the said exhibit described as land adjoining on the north the lands of York Thompson and on the south the lands of the said Adriana Jacoba de Wit, the said land so described being now of the defendant Edward Higgins," and the Registrar of Deeds may be directed to insert these latter words, with the proper preface, in 419.

I cannot think that the declaration of title in the plaintiff and those he represents should have been made. It could only be effective as against the defendant, but he is already declared to have no estate or interest in the Thompson lands. The heirs of Thompson should be left, if it be necessary and they desire to do so, to establish their absolute ownership of the 30 roods otherwise. There does not seem to be any difficulty in doing so.

These variations in the decree do not, of course, affect the defendant nor do away the effect of our decision on the main issue of trespass. The appellant, therefore, must pay the respondent's costs of the appeal.

The decree of the Court below as now varied must be settled in chambers.

DALTON J.—I concur in the decision of the Chief Justice and have little to add. It seems to me that the parol evidence admitted by the learned trial judge in order to decide which was the area occupied under the title of January 19, 1918, upon which defendant relied was properly admitted. The description, as he says, is neither clear nor distinct, and Mr. Woolford has

failed to cite any authority to show that the plaintiffs were debarred from leading evidence to show what land defendant had in fact bought and occupied under that title. I certainly should not expect him to find any such authority. I am unable to agree, however, with the learned trial judge that the evidence is admissible under the provisions of section 21, of the Deeds Registry Ordinance which in my opinion has no application at all to such a case as this, (see *Re Pln. Adventure; ex parte Thompson,.* 1921, L.R.B.G. 141).

On the evidence the learned judge found that the seventeen roods of land levied upon by the Marshal and title for which was obtained by defendant's predecessors in title and by himself were the seventeen roods immediately north of his (defendant's) 461/2 roods. The evidence in support of that seems to me to be convincing and I entirely agree with the conclusion come to. As a result it is necessary to import that finding into the title of the land of defendant to make it clear and definite. The question of estoppel although raised on the reasons of appeal was not argued.

With respect to the amount of damages the sum found, $500, is certainly heavy, having regard to the alleged value of the land, but on the findings of the learned judge I arc unable to say it is excessive. There is therefore no ground for interfering with the amount. To whom, however, is it payable? To the owner of the land upon which the trespass has been committed.

That brings to me the last point. The land was found to belong to the heirs of York and Monday Thompson. It is clear, however, from the statement of claim (*vide* par 3) that all the heirs or their representatives are not before the Court. The plaintiff Thompson purports to sue for himself and as representing certain of the heirs, and he claims that he and the persons represented herein are the owners of the thirty roods of land adjoining Pln. Garden of Eden. The order of the trial judge declaring the plaintiff and the persons he represents to be the owners of those 30 roods should therefore be varied to read that 'the heirs, their representatives or assigns, of York and Monday Thompson and Jericho Thompson,' are the owners of the land in question. Who they are will remain to be ascertained. For the same reason the damages are payable to those same heirs or their representatives and assigns. The amount of the damages should therefore be paid into court for enquiry as to the persons to whom it is payable. Plaintiffs have, however, in my opinion sufficient interest to entitle them to the injunction and to the amendment in the description of the property set out in defendant's title. The small variation in the order of the trial judge not affecting the merits of the appeal on which defendant (appellant) fails, the respondents are entitled to their costs of this appeal.

Appeal dismissed. Order varied.

ADAMS *v.* CATO.

[674 OF 1921]

1922. FEBRUARY 24; MARCH 4. BEFORE DALTON, J.

Magistrate's court—Jurisdiction—Partnership—Action arising out of partnership—Rules determining existence of partnership—Mining partnership—Mining, Consolidation, Ordinance 1920 ss 56, 65.

Appeal from a decision of the stipendiary magistrate of the East Coast judicial district (Mr. J. H. McCowan). The plaint was in the following terms:—

The plaintiff avers—

1. That by a verbal agreement made at Victoria in the above judicial district aforesaid during the month of August 1920 it was agreed that the plaintiff and six others including the defendant should proceed to the interior and work for diamonds and precious stones, the diamonds obtained from such working should be sold by defendant and the proceeds resulting therefrom be equally divided among them.
2. That in pursuance of the said agreement the plaintiff and defendant worked certain claims at the Puruni river district and obtained therefrom seventy carats of diamonds, value $30 per carat, the plaintiff's share and interest on such diamonds being valued at $300.
3. That during the month of November, 1920, the defendant sold the said seventy carats of diamonds for the sum of $2,100 and paid to the plaintiff the sum of $160.

The plaintiff therefore claims from the defendant payment of the sum of $100, expressly abandoning the sum of $40 to bring the action within the jurisdiction of the Court, being balance of money due owing and payable by the defendant to the plaintiff as aforesaid, and costs. The magistrate gave judgment for the sum of $87 and costs, holding that the evidence disclosed neither an ordinary partner-

ship nor a mining partnership under the Mining Consolidation, Ordinance 1920. From this decision the defendant Cato appealed.

J. S. McArthur, for the appellant.

Plaint discloses joint partnership venture. 'Debt' never applied to share of partner; s. 3. Petty Debts Recovery Ordinance 1893; 'demand' does not go beyond 'debt.' Joint adventure cannot be distinguished from partnership. Plaintiff intended a partnership. Cites *Comacho* v *Rohlehr* (1917 L.R.B.G.39) and refers to Pollock, *Partnership* 6th ed. p.6. Halsbury's *Laws*, Vol. XXII. p.9.

E. F. Fredericks, for the respondent.

If it was a partnership, it must be admitted the magistrate had no jurisdiction, but no partnership disclosed. The parties merely worked together and entrusted defendant to sell the diamonds. When the witnesses talk about 'partners,' they do not mean to use the word as emptying the existence in law of a partnership.

DALTON, J.: The claim by the plaintiff is for the sum of $100 (abandoning the excess of $40) being the balance of money alleged to be due by the defendant to him under a verbal agreement between plaintiff, defendant, and five others to go to the diamond fields and work for diamonds.

The material part of the defence was that the magistrate had no jurisdiction to try the case as it arose out of a partnership transaction being a claim for a partner's share of the proceeds of a partnership. Otherwise it was a joint adventure which, it was said, comes within the provisions of the Partnership Ordinance 1900.

The magistrate found for the plaintiff, coming to the conclusion that no question of partnership arose, whether mining partnership or otherwise, as the case came before him, but he does not state what he found the nature of the transaction to be, neither does he give his reasons for his conclusion that the transaction was not an ordinary partnership, apart from a reference to the principle laid down in *Comacho* v. *Rohlehr* (1917 L.R.B.G. 39).

The principle reason for appeal is the reason urged before the magistrate, that he had no jurisdiction, as the evidence disclosed the existence of a partnership between the parties out of which the action is alleged to have arisen.

What does the evidence disclose?

Plaintiff says "Last August we made bargain to go to Diamond fields—seven of us to work as tributors and divide spoils, share and share alike; went for diamonds; we put $5 each to buy tools

etc in a pool . . . We worked at Goring's claim at Puruni, all seven of us . . . we got stones 70 carats diamond 232 stones . . . .we got other stones, bought provisions and pay expenses . . . .it was a partnership business, get share and share alike. It was the agreement each partner to get same share. We took up Goring's land. I cannot say whose influence got land. Out of same working got food . . . . I am a partner with defendant, I claim as partner share." The witness Montrose says, "Seven of us agreed to go in bush . . . we worked, we won diamonds, we bought provisions at shop with some, we had 232 stones left. Defendant authorised to bring stones . . . we were to get share and share alike . . . . these were seven partners; we agreed at Victoria to work as partners . . . .we put $5 each, buy tools and provisions . . . . I complain about defendant not giving me a true account of partnership property." The witness Wood corroborates this. He says "In August we arranged to go in diamond fields to work diamond . . . . seven of us. We pooled $5 each to buy tools provisions etc. We got to bush. We got diamonds. We paid expenses in bush from some and brought some to town, 232 stones . . . . . Had seven partners. Agreed to divide in equal shares. I told defendant money not part right . . . . I demand as a partner . . . . we told defendant to sell it for anything he could get . . . . I was not satisfied at my sum as defendant would not tell us where he sold and the price sold for by the carat." This is all the evidence as to the transaction entered into. The defendant neither gave evidence nor called witnesses.

During the argument reference was made to 'mining partnerships' as that term is used in Part VI of the Mining, Consolidation, Ordinance 1920. I cannot agree with Mr. Fredericks that there can be no partnership having reference to mines or, mining business save such partnerships as are mentioned in Part VI. It seems to me that, for the purposes of the mining law, the ordinary law of partnership has been extended or amplified to include within the term associations of persons which are not partnerships under the ordinary law. That extension however is carefully safeguarded and bound by the provisions of s. 65 (2.) of Part VI of the same ordinance. It is not necessary however to say more on this point for the magistrate has found that the evidence does not disclose that the relationship between the parties is a mining partnership within the meaning of s. 56 of the ordinance. In that I am inclined to agree with him, but where he says the evidence does not disclose a partnership at all out of which the action arises I think he is wrong.

The principle in the decision of *Comacho* v. *Rohlehr* referred to is that the question whether the relationship of partners does

or does not exist depends on the real intention and contract of the parties. If the facts disclose a partnership any agreement that they are not partners is useless. Here strangely enough the plaintiff and his witnesses persist that there is a partnership and that they are partners with the defendant, but Mr. Fredericks has urged for him that he has no knowledge of the legal meaning of the words he uses, but that he does not really mean that he was a partner or that there existed any partnership at all. But to my mind the evidence of all these men clearly shows their real intention and the nature of the contract they made. It goes far beyond a mere 'arrangement to work together' as urged. They did agree to work together, but they did more than that; they each put an equal sum into a pool for initial expenses; they were to get share and share alike from the results of their work; they obtained permission to work and worked together on the claim of one Goring; they sold diamonds they had won as they went along to defray expenses; and when they had finished had 232 stones remaining their joint property which defendant was deputed to sell for them all, the proceeds to be divided amongst them. There was the clearly expressed intention and other necessary ingredients to go to make up a partnership, limited it is true for a particular purpose or adventure but none the less in law a partnership.

The reason for the trouble that has arisen is also I think clear from the evidence. Montrose says 'I complain about defendant not giving me a true account of the partnership.' Wood says 'I was not satisfied at my sum as defendant would not tell us where he sold and the price sold for by the carat.' He had stated that he sold to Humphrey & Co., Ltd., but evidence was led to show that was untrue after the parties had made enquiries there. However that may be, the reason of appeal that the magistrate had no jurisdiction, the evidence disclosing a partnership between the parties out of which the action arises, must be upheld and the appeal allowed. The claim should have been struck out. In view of the conduct of the defendant in withholding information which the other parties were certainly entitled to have, and giving incorrect information as to the disposal of the diamonds, which no doubt led to the action being brought, I shall make no order as to costs.

Appeal allowed.

ROBERTS *v.* BIPTI.

[107 OF 1922.]

1922. MARCH 10, 17. BEFORE DE FREITAS. ACTG. J.

Magistrate's court—Jurisdiction—Incorporeal right or title to immovable property—Evidence—Pledge or sale—Inference of fact—Evidence to contradict or vary document.

Appeal from a decision of the stipendiary magistrate of the East Coast judicial district (Mr. J. H. McCowan). The plaintiff Roberts claimed from the defendant Bipti, in her capacity as executrix of one Mangru, the sum of $40 alleged to be due on a promissory note made by Mangru in his lifetime in favour of the plaintiff. The magistrate gave judgment for plaintiff for the amount claimed. From this decision the defendant appealed. The reasons of appeal and other necessary facts are sufficiently set out in the judgment below.

P. A. Fernandes, for the appellant, Bipti.

A. B. Brown, for the respondent, Roberts.

DE FREITAS, Actg J.: This was an appeal from the decision of the stipendiary magistrate of the East Coast judicial district who entered judgment for the plaintiff (the respondent in this appeal) on a claim for $40, being the amount of a promissory note made by the defendant's testator in his life-time in favour of the plaintiff, payable on demand. The defence to the claim, as appears by the record, was that the note in question had been given in part payment for a lot of land alleged to have been sold by the plaintiff to the defendant's testator and was payable only on the passing of the transport of the said land. From the notes of evidence, however, and the magistrate's reasons for his decision, it appears that the defence was in reality a plea of failure of consideration, the alleged sale being repudiated by the plaintiff.

The plaintiff denied making any such sale, alleging that he never owned the said lot of land, and that the note was given to him by Mangru, the defendant's testator, in part satisfaction of a liability of $70 by one Rajbansee to the plaintiff which the said Mangru assumed, in respect of a promissory note for $70, signed by the said Rajbansee in favour of the plaintiff and discounted at the Colonial Bank (Mahaica branch) which was retired by the plaintiff.

The magistrate, after hearing the evidence, arrived at the conclusion that the plaintiff's account of the matter was true and pronounced judgment in his favour. The appellant now appeals from the decision on several grounds classified under the following heads:—

1. That the magistrate had no jurisdiction, there being a *bona fide* question of title to land involved.

2. That he exceeded his jurisdiction for the same reason.

3. That illegal evidence was admitted by the magistrate's court.

4. That the decision was erroneous in point of law, and,

5. That the evidence was insufficient to warrant the decision.

As to the first and second grounds of appeal. I have no hesitation in holding that the magistrate had jurisdiction. The making of the note having been admitted, the onus lay upon the appellant to prove that the note was given for a consideration which had failed, and the sole question the magistrate had to decide was what was the consideration and whether it had failed. In my opinion there was no question whatever of any incorporeal right or title to the immovable property involved. The case of *Mountney* v. *Collier* (22 L.J., Q.B. 124) cited by Mr. Fernandes on behalf of the appellant does not assist him. In that case a tenant was sued for a year's rent of a house and premises which the plaintiff had let and which defendant had taken from the plaintiff as tenant from Michaelmas, at a yearly rental. The defendant subsequently received a notice from one Ingram, who claimed the premises, to quit at the Lady Day following; he paid the plaintiff the half-year's rent when it became due at Lady Day. When sued by the plaintiff the defendant contended that the setting up of such claim by Ingram, and the recognition of such claim by the defendant brought the title to the said premises in question so as to exclude the jurisdiction of the county court. The county court judge held that he had jurisdiction, but on appeal it was held that he had not, for the obvious reason that the defendant having set up the defence that the title of the plaintiff had expired and was vested in somebody else, the title to the land came in question, the point raised being whether the plaintiff had a title to the premises for the period in respect of which he was suing.

The present case, however, is totally different. The point at issue was not whether the plaintiff or the defendant had any title to land, but whether the defendant's testator made the promissory note for the consideration alleged by the plaintiff, or for that stated by the defendant, and whether there had been a failure of consideration. To determine that it was unnecessary to investigate any title to land.

The third ground of appeal in the form stated is not one allowed by section 9 of the Magistrates' Decisions (Appeal) Ordinance, 1893. The admission of illegal evidence does not invalidate a decision unless there is not sufficient legal evidence to sustain the decision after rejecting such illegal evidence. I may say, however, that the evidence now complained of, which was never objected to at the

hearing, *i.e.*, the evidence led to show that the receipts given by Rajbansee to Mangru were not as they purported to be in respect of any sale by her, but were in reality given as security for a loan, was, in my opinion, admissible. *Plus valet quod agitur quam quod simulate concipitur.* As was said by de Villiers. C.J., in *Hofmeyer* v. *Gous* (10 S.C. 115): "It does not follow that because they (*i.e.*, the parties) called it (i.e., the transaction) a sale and produced a document headed 'deed of sale' the court is bound to treat it as such. There is not a more common device than that by which a pledge of goods is effected under the guise of a sale." The giving of small plots of land in the same way as security for a debt is equally common in this colony.

In Phipson's *Law of Evidence* (6th edition, p. 577) the learned author states: "Evidence is in general admissible to contradict or vary any document intended by the parties to operate merely as a collateral or informal memorandum of a transaction and not as a contract or other binding legal instrument. Thus a receipt will not even between the parties, unless amounting to an estoppel, exclude extrinsic evidence to contradict the writing." (See also *Bowes* v. *Foster* (1588); 2 H&N. 779; and cf., *Lee* v. *Lancashire & Yorkshire Railway Co.* (1874) L.R. 6 Ch. 527; *Beckett* v. *Tower Assets Co.* (1891)1 Q. B., 638 and *Maas* v. *Pepper* (1905) A.C. 102.) But in any case it does not seem to me to have been necessary for the magistrate to have found one way or the other on this point in order to determine the real issue between the parties, there being quite sufficient evidence otherwise which, if believed, warranted his decision.

Under the fourth head of the grounds of appeal no less than seven reasons are given, but the first is merely a repetition of the third ground of appeal already dealt with, and the others do not, in my opinion, raise any point of law, but are merely critical comments on the magistrate's decision, and Mr. Fernandes' observations on them were principally directed to the weight of the evidence which it is not within the province of this court to review.

As to the last ground of appeal, I can only repeat that in my opinion the evidence was clearly sufficient to justify the magistrate in arriving at the verdict he found for the plaintiff with which I agree. The magistrate's decision is upheld and this appeal stands dismissed with costs.

Appeal dismissed.

COMACHO *v.* DELGADO.

[367 OF 1920.]

1922. MARCH 16, 17, 20, 21, 30. BEFORE DALTON, Actg. C.J.

Contract—Sale of goods—Breach of contract—Measure of damages—Costs of previous litigation.

Claim by the plaintiff for the sum of $1,800 as damages for alleged breach of contract by the defendant to supply and deliver wood. The necessary facts are fully set out in the judgment below.

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

J. S. McArthur, for the defendant.

DALTON, Actg. C.J.: The claim of the plaintiff is for the sum of $1,800 damages for alleged breach of contract to supply and deliver wood. The facts are as follows: In December, 1918, the firm of Curtis Campbell & Co. called for tenders for the supply of 5,500 tons of firewood. In the same month, having this call for tenders in view, plaintiff and defendant agreed between themselves (Exhibit B) to tender at given rates, and further agreed that if either party was successful in getting the contract to divide up the supply between themselves. The plaintiff's tender was accepted, and he entered into a contract with Curtis Campbell & Co., on December 31st, 1918 (Exhibit C.) for the six months, January to June, 1919, to supply 5,500 tons of wood at $3.12 per ton for pure wallaba, and $2.88 per ton for mixed wood. For the due performance of this contract the defendant was surety. The contract (Exhibit B) between plaintiff and defendant thereupon came into operation in respect of the supply of wood. Thereafter, in June, 1919, Curtis Campbell & Co. again called for tenders (Exhibit D) for the supply of 4,900 tons of wood for the period July to December, 1919, the wood to be supplied for the three estates Lusignan, Non Pareil and Ogle, in stated quantities. On June 28th plaintiff and defendant added a clause (Exhibit B1) to their previous contract (Exhibit B), stating that they purposed to send in tenders as before and extending the provisions of that contract, should either of them be successful in obtaining the contract with Curtis Campbell & Co. The tender of the plaintiff was again accepted, and on July 25th he signed a contract (Exhibit E) with Curtis Campbell & Co., for the period July to December, 1919. On this occasion the penalty clause was struck out and no surety was required, but a new clause added at the foot thereof as a result of a conversation between plaintiff, defendant and Curtis Campbell & Co.'s representative. This contract was for the supply

of 4,900 tons of wood at $3.30 per ton for wallaba, and $2.96 per ton for mixed wood. It was signed on July 25th at which time, according to the evidence, the contractor (plaintiff) was still nearly one thousand tons short under his first contract with Curtis, Campbell & Co. Under the contract between himself and defendant the 4,900 tons to be supplied to Curtis Campbell & Co. was to be divided equally between them and paid for at the rates set out. Each party, therefore, had to supply 2,450 tons of the 4,900 contracted to be supplied by the plaintiff. Comacho, to the firm. In October wood got scarce and the price went up. Comacho (plaintiff) states he had difficulty in carrying out his contract. Complaints were made by the firm, correspondence passed, the matter was fully discussed between plaintiff, defendant and their solicitor : legal proceedings were threatened by the firm who stated that to make good the deficit under the contract of July 25th they would be compelled to purchase fuel in the open market (Exhibit F 5) rather than cease grinding, as the course which involved the contractor in the least loss (Exhibit G); a reply thereto was made by Comacho after consultation with defendant (Exhibit G2); the situation did not improve; and after further correspondence, on February 25th, 1920, a demand was made (Exhibit K) by the firm from the plaintiff for the sum of $2,846.66 as damages for plaintiff's failure to carry out his contract to supply wood fuel to the firm for the half year ending December 31st, 1919. Thereafter plaintiff, together with defendant, saw Mr. Austin, the attorney of the firm, and the latter offered to take $1,800 in settlement of the claim. That was not paid, and on September 30th, 1920, a writ was issued on behalf of the firm to recover from plaintiff the sum of $2,846.66 for breach of his contract with the firm (Exhibit L). This action was subsequently settled, Comacho paying $500 and costs. He now seeks in this action before me to recover from the defendant the sum of $1,800 for his (defendant's) alleged breach of contract with him signed on June 28th whereby the defendant undertook to supply one-half of the quantity that Comacho had to supply to the firm.

The defence to this claim argued before me is firstly that the defendant supplied 2,467 tons which is more that his quota (2,450), and secondly that the damages as claimed do not flow from the breach of any contract as entered into between plaintiff and defendant.

Defendant neither gave evidence himself nor did ho call any witnesses. I have no difficulty, therefore, in accepting the evidence of the plaintiff generally and his son, who appears to have supervised this business on his behalf. In respect of the first point, did defendant supply his 2,450 tons as he had agreed to do? He claims (par. 3 of defence), for instance, to have delivered 609 tons

13 cwt. in July, whereas the firm state that they only received 224 tons 15 cwt. in all in July (Exhibit H.) As I have stated, on July 25th when the second contract between Comacho and the firm was signed there was a large deficiency still remaining under the first contract. During the period July 2nd to July 18th defendant delivered 391 tons 11 cwts. (Exhibit U.) This amount defendant apparently claims to come under the second contract which was signed on July 25th. It is true that that contract purports to run from July to December, but I have no doubt whatsoever that the wood supplied both by plaintiff and defendant up to the 25th July was in intention and in fact a supply under the first contract. It was paid for at the first contract rates (although an attempt was doubtless made by Comacho to get paid at the new rates); the 391 tons. 11 cwts. are included in Exhibit U, which Comacho, Jnr., states was taken by him from defendant's books as a record of wood delivered under the first contract, after defendant had compared it with him; deliveries between July 1st and 24th are not included in Exhibit J, which is a list in defendant's own handwriting of his deliveries under the second contract; they are not included in the firm's own statement (Exhibit H) of the deliveries under the second contract, which statement was at the time shown to defendant and not questioned by him. Both the witnesses Comacho have no doubt on the point, and the witness Smith confirms it, adding that although specific amounts of wood were put down for delivery each month, in practice the amounts ran on from month to month. The witness Fitzpatrick, however, throws some doubt upon it as he states that there was no suggestion at any time that the wood delivered between July 1st and 24th should come under the old contract, and adds that wood delivered by defendant in July was in execution of the new contract. This, however, cannot be reconciled with his firm's acts and correspondence at the time, and I am satisfied that he is mistaken, a mistake no doubt due to the length of time that has passed since the events happened. His answers to the questions put to him, too, were not given without some hesitation. I find therefore that defendant did not deliver the 2,450 tons he had contracted to deliver under his contract with plaintiff dated June 28th. There is some little discrepancy as to exact figures of the shortage, but on the evidence I find that plaintiff's shortage was approximately 485 tons. There was therefore very little difference between them.

The second question to be decided, the first being answered in the negative, is as follows: Can the damages as claimed by plaintiff be said to flow from this breach by defendant to supply his share of wood as contracted for by him? Plaintiff says that because of defendant's breach of contract he (plaintiff) has suffered

loss and became liable to pay a large sum in damages to Curtis, Campbell & Co. Defendant's answer is that the contract (clause 3) between him and plaintiff provides what shall be done in case he (defendant) does not supply his quota. It runs: "In the case of either party herein being unable to supply his quantity of wood herein agreed to be supplied, then the party so failing to supply shall pay the difference in price for procuring such wood to the other party." He says in other words that plaintiff should have supplied the wood to the firm himself, then charged him with the difference between the purchase price and the contract price. This is exactly what the firm did as regards the contract with the plaintiff but there was no contract between the firm and the defendant. I am quite satisfied on the evidence however that the defendant was fully consulted by the plaintiff in respect of his (defendant's) breach of contract, and was fully aware of and offered no objection to the course adopted by the firm in respect of the shortage under the contract with them. Under the circumstances his conduct showed approval of what was done by the firm and Comacho, and he has not taken the opportunity of going into the witness-box to deny it. He cannot now today turn round and say that the damages the plaintiff claims do not in part arise according to the usual course of things from his own breach of his contract with the plaintiff. He was as fully aware of the terms of the contract between the plaintiff and the firm as if he had been a party to it; he was in effect a sub-contractor under that contract; he was consulted at practically every step before and after the signing of it; he personally received some payments under it for his deliveries; he saw and approved of replies to the firm respecting plaintiff's failure to supply wood; and I am satisfied that the damages now claimed may reasonably be supposed to have been in his contemplation as well as in that of plaintiff as a probable result of a breach of his (defendant's) contract. It was not until some considerable time later, after the action by the firm was commenced and Comacho suggested the necessity of his joining the defendant as a defendant in the action, that the defendant denied any liability and told Comacho to sue him. Comacho did not join the defendant, but settled the action. He had no defence and what he did was obviously the wisest course to take, as thereby he reduced the damages arising out of his breach. A considerable amount of evidence was led as to the market price of fuel in November and December, 1919, and the actual purchases made by the firm in those months to make up for the contractor's deficiency. In his claim against defendant plaintiff says $6.65 per ton was paid for the amount short delivered. Taking expenses of handling, storage, and removal to the railway into consideration that is an outside price, and, on the evidence, plaintiff would

have some difficulty in getting me to accept that figure, but owing to the compromise effected it is not necessary for me to analyse the evidence as to the prices paid. On the one hand plaintiff has not shown me that here he can recover from the defendant more damages than he has suffered; on the other hand the figure accepted by the firm in their action with plaintiff, $500 and costs, is apparently on the evidence of plaintiff and his son less than they might reasonably have expected to recover from him, had the action gone to trial, on the basis of only a moderate increase on the contract price, and on figures which I am able to accept. Plaintiff adds that there were other reasons which, he says, actuated the firm in accepting that figure, of which defendant will now get the benefit. The shortage of plaintiff and defendant being approximately equally divided between the two, and the compromise effected being clearly to the benefit of both of these parties, I find that on his claim the plaintiff is entitled to recover the sum of $362.50 from the defendant, that is, half the amount (damages and costs) which he incurred in respect of the claim by Curtis, Campbell & Co. He is also entitled to his costs of this action. Judgment will therefore be entered for the plaintiff for the sum of $362.50 and costs.

Solicitor for the plaintiff, *J. Gonsalves.*

Solicitor for the defendant, *A. V. Crane.*

[This case is to come, on appeal, before the West Indian Court of Appeal.]

BHOLA PERSAUD *v.* VAN TULL.

BHOLA PERSAUD *v.* VAN TULL.

[246 OF 1921.]

1922. MARCH 22, 24; APRIL 1. BEFORE DE FREITAS, Actg. J.

Immovable property—Vendor and purchaser—Memorandum in writing—Statute of Frauds—Deposit or part payment of purchase money—Purchaser's failure to complete—Forfeiture of deposit.

Claim by the plaintiff Bhola Persaud for the sum of $250, an amount alleged to have been paid by him to the defendant Van Tull on account of the purchase price ($10,000) of a property known as the 'Guianese Garage' in Holmes St., Georgetown, the balance of $9,750 to be paid at the passing of the transport, pursuant to a contract in writing dated December 15th, 1920, which contract it is alleged was rescinded by the defendant otherwise than by the default of the plaintiff.

All further necessary facts are fully set out in the judgment below.

J. A. Luckhoo, for the plaintiff,

B. B. Marshall, for the defendant.

G. J. DE FREITAS, Actg. J.: This was an action on a specially endorsed writ to recover the sum of $250 as money had and received by the defendant for use of the plaintiff on the 15th December, 1920.

The particulars annexed to the statement of claim were as follows:—

> 15th December, 1920.To amount paid by the plaintiff to the defendant on account of the purchase price of $10,000, for the property known as the "Guianese Garage" lot 29, Holmes street and Rosemary Lane, Georgetown, the balance of $9,750, to be paid at the passing of the transport, pursuant to a contract in writing dated 15th December, 1920, and signed by the defendant, which said contract has been rescinded by the defendant otherwise than by default of the plaintiff, he (the defendant) having advertised through Walter Bagot & Coy, at public auction, the said property for sale on the 8th March, 1921. $250.

The contract referred to in these particulars when tendered in evidence proved to be no contract at all, but a receipt given by the defendant to the plaintiff which reads as follows:—

Georgetown Demerara.
15th December 1920.

Received from Bolla Persaud the sum of two hundred and fifty dollars ($250), on account of the purchase price ten thousand dollars ($10,000), for the property known as the Guianese Garage lot 28 Holmes street and Rosemary Lane. The balance of . . . . ($9,750) to be paid at the passing of the transport. Transport expenses to be equally divided . . . . . .Possession to be given one month after transport is passed. Tax for 1920 . . .to be paid by the seller.

ERIC VAN TULL.

Witnesses :

JOS. LIVINGSTON — stamps 14c.
J. V. GONSALVES. — cancelled

For the purpose of this case, it is unnecessary to decide whether this receipt is or is not as against the defendant a sufficient memorandum to satisfy the requirements of section 3 (4) (e) of the Civil Law Ordinance.

On the evidence I am fully satisfied that the defendant was always ready and willing to complete the sale and pass transport to the plaintiff and that the plaintiff was neither ready nor willing to carry out his verbal agreement with the defendant.

It was urged by Mr. Luckhoo that I should accept the plaintiff's evidence supported as it purported to be to some extent by the testimony of the witness Gonsalves, the house agent, through whose agency the sale was effected. Further consideration however of the evidence has only served to confirm me in the opinion I formed at the hearing.

I find it utterly impossible to bring myself to believe that the defendant who only a few months previously had purchased the property for $6,500, could have been otherwise than most eager to complete his sale to the plaintiff for $10,000.

The plaintiff states that some three or four weeks after he purchased the property, he went with Gonsalves to the defendant for the first time to ask him to advertise the transport and was told by him that "he had plenty of time for it;" that he went again two weeks later, and the defendant said that "as soon as he was ready he would let him know and that he must not worry him;" that he did nothing further until March, 1921, when on noticing an advertisement in the Argosy, announcing an intended auction sale by Messrs. Walter Bagot & Coy, of the property in question, he went to the defendant for an explanation and was told by the defendant that he (the defendant) could get a better price by putting the property up for sale at auction. All the plaintiff had to say to this was to ask for the refund of his $250. He admitted

in cross-examination that before he bought the property Gonsalves had told him that if he bought it he (Gonsalves) would easily get it re-sold.

Gonsalves, the house-agent, stated that after the receipt was signed, the defendant said he would be ready to advertise transport the following week; that in the second week in January he went with the plaintiff to the defendant; that the plaintiff said "*he was ready to advertise*," to which the defendant replied that "he had a lot of time for it"; this witness also says that he then advised the plaintiff to see a lawyer. In cross-examination he admits having told the plaintiff that he could get a re-sale of the property with profit.

The defendant, on the other hand, states that after he signed the receipt for $250, he told the plaintiff that he would be ready to advertise transport whenever the plaintiff was ready, and that the plaintiff promised to come to him on the following Mon-day; he denies that the plaintiff ever came to him to ask for transport, but that on the contrary he (the defendant) went to the plaintiff the Tuesday after the sale as the plaintiff had failed to keep his promise to call on the Monday, and that when he told the plaintiff that he was ready to pass transport the plaintiff replied as follows: "The Portuguese" meaning the house-agent "fooled me too bad; he told me he was going to get a purchaser and now he could get none"; the defendant then said he had nothing to do with that and requested the plaintiff to accompany him to a lawyer to have the transport advertised; this the plaintiff declined to do saying that he had nothing and what was he to go with. The defendant then went to Mr. Clarke, the solicitor, only to be told that as he had no memorandum in writing signed by the plaintiff he could not enforce the contract against him. Two months having elapsed, without any attempt on the part of the plaintiff to complete the sale, the defendant instructed Walter Bagot and Co. to put up the property for sale at auction, but no bids were made for the property; two other similar attempts have proved abortive and the property still remains unsold.

Some insinuations were made in the course of the defendant's cross-examination suggesting a variety of reasons why defendant did not wish to pass transport, but none were in any way supported by the evidence.

It is significant that although the plaintiff had a document in writing signed by the defendant which in his claim he treats as a contract in writing he never once consulted a lawyer about the matter until the 25th April when he instructed Mr. Luckhoo to demand the repayment of the $250.

I cannot but reject the plaintiff's account of the matter and accept the defendant's testimony. In my view the plaintiff was induced by the house agent to purchase the property by the assurance given that he would be able to resell it at a profit within a few days but when he saw no signs of a prospective buyer the plaintiff decided to abandon his purchase. In this respect he has my sympathy.

I need hardly say that I do not believe the plaintiff when he swears that he had over $5,000 in cash kept in a chest at his mother-in-law's house. His evidence on this point was equally unsatisfactory and in no way corroborated.

I have therefore come to the conclusion that the plaintiff never bad the money nor the means of completing his purchase, and that his conduct was such as to amount on his part to a repudiation of his agreement.

The question I have now to decide is whether in the circumstances, the plaintiff is entitled to recover the $250 paid by him to the defendant as money had and received by the defendant for the use of the plaintiff on a consideration which has totally failed.

As I understand the law, as laid down in a host of cases, a purchaser, in the absence of any agreement either implied or expressed to the contrary, cannot recover a deposit paid by him if the sale goes off from his default. "A deposit," says Fry, L.J. in *Howe* v. *Smith* ((1884) L.R. 27 Ch. D. at p. 101) "is not merely a part payment but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract." (See also *Levy* v. *Stogdon* (1898) 1 Ch. 478.)

In *Depree* v. *Bedborough* (33. L.J. Ch. 134) Stuart, V.C., says: "How the person who is in default can upon default and in consequence of that default acquire any right to the money which was parted with as a security that there should be no default is difficult to conceive."

And in the latest case on the subject decided in the English Court of Appeal Lord Justice Bankes says: ". . . it has been held in a number of cases to which it is not necessary to refer, that where money is paid, under a contract for the purchase of land, as a deposit it must be treated as a guarantee for the due performance of the contract and is forfeited if the purchaser fails to complete the purchase" (*Harrison* v. *Holland and Hannen and Cubitts, Ltd.* (1921) 38 T.L.R. 157).

Mr. Luckhoo however contends on behalf of the plaintiff, that even if his client is in default, he is entitled to recover back the money paid by him to the defendant, *firstly,* because the contract of sale was not enforceable by the defendant against the plaintiff as there was no memorandum in writing signed by the plaintiff,

nor was it enforceable by the plaintiff against the defendant as the receipt signed by the defendant was not a sufficient memorandum to satisfy section 3 (4) (e) of the Civil Law Ordinance; *secondly,* because when the defendant offered the property for sale at auction he in effect repudiated the sale to the plaintiff; and *thirdly* because the money paid by the plaintiff was not paid to the defendant as a deposit, but as part of the purchase money.

As to the first reason I need do little more than quote a passage from the judgment of Quain, J. in *Thomas* v. *Brown* ((1875) L.R. 1 Q.B.D. at p. 727) where he says: "Now where upon a *verbal* contract for the sale of land, the purchaser pays the deposit, and vendor is always ready and willing to complete, I know of no authority to support the purchaser in bringing an action to recover back the money."

In the local case of *Waldron* v. *de Freitas* (1919 L.R.B.G. 206) Douglass, Actg. J., gave judgment for the defendant in an action brought by the purchaser against the vendor to recover the deposit, although he held the memorandum signed by the vendor to be insufficient, and there was no memorandum signed by the purchaser to enable the vendor to recover the residue of the purchase money he claimed from the purchaser. It seems to me that it would be most unreasonable and unjust to permit a defaulting purchaser to successfully say to a vendor who is quite willing to carry out his contract "As you cannot compel me to perform the contract I made with you. owing to my not having given you a sufficient or any memorandum in writing, you must give me back the money I paid you to bind the bargain and as a guarantee that there should be no default on my part" I therefore hold that this reason is not sustainable in law.

The second point taken is in my opinion equally untenable in view of the conclusion arrived at on the evidence, that the plaintiff repudiated his contract and had no intention of performing his part of the bargain long before the defendant offered the property for sale at auction. No authority was cited in support of the learned counsel's contention which apparently was founded on the argument of the learned counsel who appeared for the plaintiff in the case of *Harrison* v. *Holland and Hannen and Cubitts, Ltd.* (*supra*) when the case was before the court in the first instance. I do not agree. In my view, when the plaintiff declined to accompany the defendant to his lawyer's office for the purpose of having the transport advertised (it being necessary under the Rules that a purchaser's affidavit should be lodged with the advertisement) saying as he did that he had been tricked by the house-agent and that he had no means of paying the purchase money, he in effect repudiated the contract, and the defendant was at liberty to accept that repudiation,

which he did in my opinion after he was advised that he could not enforce the sale against the plaintiff, and was thereupon entitled to re-sell the property.

In *Howe* v. *Smith* (1884) L.R. 27 Ch. D. at p. 94 Cotton, L.J., quotes from Lord St. Leonard's book on *Vendors and Purchasers* as follows: "Where a purchaser is in default and the seller has not parted with the subject of the contract, it is clear that the purchaser could not recover the deposit for he cannot by his own default acquire a right to rescind the contract," and says "that Lord St. Leonard goes on to state his opinion that the mere re-sale of the estate after the purchaser's default cannot in any way affect the right of the vendor to retain the deposit." In the present case the property is still unsold.

The question raised by the third reason is of some nicety and not altogether free from difficulty, but after giving it the best consideration I can, I have come to the conclusion that it does not avail the plaintiff. In every case decided in England that I have examined in which the deposit was held to be forfeited, the deposit was certainly paid *eo nomine* as a deposit, and I have not been able to find any case in which the first sum paid on account of the purchase money was not stated to be a deposit and on account of the purchase.

Does the fact that the receipt in the present case does not state the payment to be a deposit preclude me from holding that it was in effect a deposit and subject to the same consequences as if it had been paid *eo nomine* as a deposit, if the evidence justifies me in so doing? I think not. The agent Gonsalves states: "The plaintiff said he was ready to close the bargain . . . . . the defendant fixed the amount of $250, to bind the bargain. I had suggested $100." The defendant's evidence on this point is to this effect. 'The plaintiff said he would pay $200, I said it was not enough, I wanted $300 or more; plaintiff only had $200 with him and went for the balance; he returned and paid me $250, for which I gave him a receipt." In cross-examination he says: "I paid McLean when I bought from him about $700 as a deposit. I took that $250 as a deposit on account of the purchase price." I have no doubt in my mind that the money in this case was paid as a deposit to bind the bargain and was so intended by the parties.

In *Harrison* v. *Holland and Hannen and Cubitts, Ltd.* (*supra*) Bankes, L.J. observes: "Now this £100,000 is stated in the contract to be a part payment of purchase money, and if the parties had made no further agreement in relation to it, as I understand the law, the defaulting purchasers, or their assigns in the absence of any agreement in reference to what was to happen to the £100,000 if they were in default in completing the pur-

chase, would have been quite unable to recover any portion of that £100,000." If this passage is intended to be taken literally as a correct statement of the law then the question is altogether free from difficulty, but I am not sure that I clearly understand its meaning for I am bound to confess with all humility and with the most profound respect that I am unable to reconcile that statement of the law with the views expressed in the later part of the same judgment. Lord Justice Younger in the same case preferred to deal with it as a matter of construction

In *Waldron* v. *de Freitas* (*supra*) the payment made was not stated in the receipt to be a deposit, but the learned judge treated it as such. There must be judgment for the defendant with costs.

Solicitor for defendant: *E. D. Clarke.*

In re ROSS.

In re ROSS.

[7 OF 1921, BERBICE]

1912. APRIL 8. BEFORE DALTON, J.

Immovable property—Execution—Title after judicial sale—Deeds Registry Ordinance 1919, s. 27—Application to set aside proceedings—Abolition of letters of decree—Antidotal petition.

Petition by Edward Boss to the Chief Justice, requesting him not to 'grant transport or title' to one Mohamed Ali for a certain property said to have been purchased by Mohamed Ali at execution sale, on the ground that the property in question was the property of the petitioner.

An order of reference to the chairman of the Rose Hall Village Council was made by Major, C.J., dated June 22nd, 1921, for report on allegations in the petition that the property had been sold at the instance of the Village Council for rates, although the rates had been duly paid. The chairman having filed his report, nothing further was done thereon until the purchaser Mohamed Ali applied, on February 27th, 1922, that the petition be dismissed. This application came before Dalton, Acting C.J., on March 16th, and it then appearing that the report had not been served on the petitioner, this was ordered to be done. Petitioner then filed his counter report on April 5th. On April 8th the petition was dismissed, Dalton, J., continuing to deal with the matter at the request of Berkeley, Acting C.J.

The decision dismissing the petition was as follows:

DALTON, J.: The Court no longer issues letters of decree after judicial sale, nor does it 'grant transport or title,' as the prayer of the petition sets out. The officer of the court (see s. 27 of the Deeds Registry Ordinance 1919) now conveys the property to the purchaser. From so conveying the property he cannot in my opinion be restrained, nor can the sale be set aside, by proceedings on petition, if that is what the petitioner now seeks to do. The right of proceeding by anti-dotal petition in a case of this kind went with the abolition of letters of decree. The petition must therefore be dismissed.

Solicitor for petitioner, *J. Eleazer*

Solicitor for purchaser, *H. Mendonca*.

DOWRIDGE *v.* WAGNER.

[185 OF 1922.]

1922. APRIL 11, 19. BEFORE BERKELEY, J.

Sale of goods—Market overt—Goods sold in public market—Sale to stall holder of stolen property—Purchase in good faith without notice—Sale of Goods Ordinance 1913, s. 24

The provisions of s. 24 of the Sale of Goods Ordinance, 1913, whereby a buyer acquires a good title to goods sold in any public market provided he buys them in good faith and without notice of any defect or want of title on the part of the seller, does not extend to sales to a stall holder therein but only to sales by a stall holder, or by a person who ordinarily does sell there.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. G. R. Reid).

The plaintiff Dowridge claimed certain furniture from the defendant or its value $90. The magistrate found for the plaintiff on the claim and the defendant now appealed. The necessary facts appear from the judgment.

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

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

BERKELEY, J.: The appellant appeals from the decision of the stipendiary magistrate of the Georgetown judicial district (Mr. G. R. Reid), who gave judgment in favour of the respondent on a claim in detinue. The evidence shows that the appellant is the tenant of three stands or stalls in the Stabroek market, Georgetown, assigned to him under the Georgetown Town Council Ordinance, and that it has been the custom in that market for the last thirty years for the tenants of stalls to purchase articles brought into the market for sale. On the 29th December, 1921, the wife of the respondent stole, in his absence from home, certain articles of furniture, the property of the respondent, and she disappeared from that date. She sold these articles in the public market to the appellant who is a second-hand dealer in furniture, and, as found by the magistrate an 'innocent buyer who bought in good faith and for a good price.'

Section 24 of the Sale of Goods Ordinance, 1913, corresponds with section 22 (1) of the English Act, save and except the words 'any public market held under the authority of the Government or otherwise in accordance with the law' are used in the local section instead of the words 'market overt.' As said by Benjamin on *Sale,* (6th edition p. 196) section 22 is re-enacted in terms by the British Guiana Ordinance. This being so the local legislature has provided that the buyer of goods in public markets under section 24 shall be protected to the same extent as the

buyer of goods sold in market overt, that is, that he acquired a good title provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. The appellant having bought under these conditions, the question arises whether or not sales *to* the owner of a stall as well as sales *by* the owner of a stall are protected.

This question has never been settled by a definite decision, although there are at least two cases in which the point might well have been argued. In *Hargreave* v. *Spink* (1892 1 Q.B., 25), Wills, J., although he held that it was unnecessary to decide the question, deals at length with the cases connected therewith. He admits that there is undoubtedly something to be said on either side of the question, but he holds that the weight of the argument from principle seems to him to incline against such sales *to* the owner of a stall. He concludes his argument thus: "It is impossible to say that its application to sales *to* the shop-keeper is or has been equally free from doubt" (as sales *by* shop-keeper) "and therefore the want of any case in which there has been a certificate or decision in favour of such an extension of the custom is, I think, very much against it." On a careful consideration of the reasons on which this learned Judge has based his conclusion, I am of opinion that the protection afforded under section 24 of the Ordinance is limited to sales *by* the tenant of a stall and does not extend to sales *to* such tenant. (See also Benjamin on *Sale,* 6th edition, pp. 17 to 23).

I see no reason to differ from the finding of the magistrate on the facts, and this being so the appeal must be dismissed with costs.

Appeal dismissed.

MOHABIR *v.* BISMILLA & ANR.

MOHABIR *v* BISMILLA & ANR

[123 OF 1921.]

1922. APRIL 24, 25, 26, 27; MAY 6. BEFORE DALTON, J.

Domicile—Asiatic immigrant—Husband and wife—Marriage in British Guiana—Matrimonial law—Domicile of origin—Abandonment—Acquiring fresh domicile—Evidence—Onus of proof—Adultery—Effect on right of inheritance.

The plaintiff Beatrice Mohabir was the widow of one Nicodemus Mohabir, having been married to him; it is alleged, in community of property on July 6th, 1889. The first defendant was Bismilla, an East Indian woman, executrix of Nicodemus Mohabir, who died in the colony on January 17th, 1921, the second defendants being Smith Bros. & Co., Ltd.

The plaintiff claimed from Bismilla an account of her dealings and intromissions with the estate of Nicodemus Mohabir, and delivery to her of one-half of the property movable and immovable which formed part of the estate held in community. In respect of Smith Bros. & Co., Ltd., plaintiff claimed an injunction restraining them from parting with the sum of $7,062.61 alleged to be part of the estate of her late husband.

All further necessary facts, pleadings and arguments sufficiently appear from the judgment below.

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

J. A .Luckhoo and *S.J.Van Sertima* for the defendant Bismilla.

DALTON, J.: The plaintiff Beatrice Mohabir was married in this colony in the year 1889 to one Nicodemus Mohabir who died on January 17th, 1921, at Meadow Bank on the east bank of the Demerara river. By his last will he appointed one Bismilla, an East Indian woman, his executrix, and bequeathed all his property to two illegitimate sons. Probate was granted to her. The plaintiff, the widow, now claimed from the executrix an inventory and account of all the property belonging to the estate of her deceased husband and delivery to her of her half share, on the ground that she was married to him in community of property. She further claims from the second named defendants, Smith Bros. & Co., Ltd., an order declaring that the sum of $7,082.61, alleged to have been deposited with them by the deceased, now forms part of the estate possessed in community at the date of his death, and that half that amount be paid over to her, or that they be restrained from parting with the sum until the final determination of the action. The second named defendants put in no defence, but after entering appearance state that they are willing to abide by

whatever order the court may make. The executrix Bismilla denies that the plaintiff and her testator were married in community of property; alleges that the domicile of the husband at the date of his marriage to the plaintiff was British India; and alternatively, if the marriage was one in community of property, the plaintiff has forfeited all her rights to any property possessed by the testator by her adultery.

The first and the important question in this case for consideration and decision is that of domicile. A large number of authorities have been cited by both sides dealing with this matter, and it was argued at great length. An attempt to define 'domicile' is not within the scope of my duty here, especially in view of the many ineffectual attempts to achieve that end to which *Dicey* (*Conflict of Laws*) calls attention, but after consideration of that authority, and the principles laid down in the cases *Bell* v. *Kennedy* (1 H.L. Sc. 307), *Udny* v. *Udny* (1 H.L. Sc. 441) and *Winans* v. *Attorney General* (1904 A.C. 287) one reaches the following conclusions:—to every person at birth the law attributes a domicile of origin; the domicile of origin adheres until a new domicile is acquired; a person not under disability can acquire a domicile of choice by the combination of residence (*factum*) and intention of permanent or indefinite residence (*animus manendi*); the onus of proving a change of domicile is on the party who alleges it; when a domicile of choice is acquired the domicile of origin is in abeyance; it requires stronger evidence to establish the intention to abandon a domicile of origin than the intention to abandon the domicile of choice; residence in a country is *prima facie* evidence of the intention to reside there permanently (*animus manendi*) and in so far evidence of domicile, save where the nature of the residence is inconsistent with or rebuts the presumption of any such intention; domicile cannot be inferred from residence *per se*, but there must be a fixed and settled purpose of making the country of residence the permanent home.

These conclusions might be further considerably elaborated, but they will suffice, with the further remarks I have to make during the examination of the evidence, to enable me to decide the question of domicile as it arises in this case.

What then was the domicile of the testator Mohabir at the time of his marriage to Beatrice Mohabir on July 6th, 1889? The marriage is admitted by both sides.

The evidence discloses that Mohabir then 35 years of age, came from India in the year 1877 by the ship Pandora and was indentured to plantation Houston. On his arrival here a marriage between him and Parbatia, a female immigrant to the colony by the same ship, was duly registered by the Immigration Agent General.

Parbatia died in the year 1882, in which year also Mohabir's five years indenture finished. During the time his indentures ran, as opportunity offered, Mohabir carried on the business of a huckster or pedlar, and continued to do so after 1882. He lived at Meadow Bank, adjoining the estate where he had been indentured, and in 1883 he purchased a small property there. This property he sold in 1887, but he had purchased another property in the same village in 1885, in which, I understand, he eventually died in 1921. In 1888 he met his future wife, Beatrice, the daughter of an employee on Houston plantation named Deenah. At that time he was 46 years of age and she was a girl of 14 years. He was a Hindoo, whilst she and her parents were Christians. After referring the matter to the Rev. D. Smith, an Anglican clergyman, the parents agreed to the marriage, which was postponed for a year, Mohabir himself, at the instance of the girl, her parents or the clergyman, deciding to become a Christian. He was duly instructed by a catechist named Abdul, and was baptized. In 1889 the marriage was duly performed by the same clergyman. In the certificate Mohabir describes himself as a bachelor, and later, in 1909, it is subject for remark that he swears in an affidavit that he was only once married. It is therefore probable he did not consider his first marriage to Parbatia a proper marriage. When married the parties continued to live at Meadow Bank, the husband continuing his pedlar's business and opening a small shop in which both he and his wife worked. Some time later, whether it be four months or seven years, and whether it be due to the fault of the wife or husband are immaterial for the purposes of this case, they parted. The wife was subsequently living in adultery with one Samlall at plantation Diamond, whilst the husband continued to live at Meadow Bank, also in adultery from time to time with different women, the last being the defendant Bismilla, until his death on January 17th, 1921, at the age of 79 or 80 years. He was buried at Meadow Bank. At the time of his death, for a man in his position, he had acquired a considerable competency and owned thirteen properties in that village and neighbourhood. He never returned to India after his arrival in the colony in 1877, and his residence in this colony therefore covered a continuous period of some 44 years. The defence is that all through that period he retained his domicile of origin, British India, and that he never acquired any domicile of choice in this colony. To succeed in her claim, the onus of proving such change is, as I have said, on the plaintiff.

Of the two elements residence, and intention of permanent residence, therefore, the first is unquestioned. At the time of his marriage to the plaintiff, Mohabir had resided here for twelve years. In fact he never left the colony at all. Subsequent events,

if satisfactorily proved, may of course help one in arriving at the intention of an individual in respect of an earlier act, although one must not shut out from one's contemplation the possibility of a subsequent change in intention. Length of time does not constitute this element of residence; having in view some of the provisions of the Immigration Ordinance, 1891, and the preceding ordinance of 1873, a change of domicile might be acquired during the period an immigrant was under indenture. This would appear also to be the case in Natal (*In re Gandu* 1910 N.L.R. 428). It is, however, as Dicey points out, 'in many cases the main evidence for the existence of the other element which constitutes domicile, viz, the *animus manendi.'*

To prove further the existence of this other element it is shown conclusively that before his marriage Mohabir took up the business of a huckster, to which later he added that of a money-lender, acquired immovable property by purchase, formed a house, married and became a Christian. A great deal has been made by plaintiff's counsel of this last point. If it had stood by itself, as it was the only means by which he could obtain the parents to consent to the marriage, it would have little or no weight with me or enable me to say from it whether or not he thereby disclosed any intention permanently to cut himself oft from his native land and settle here, but it does not stand alone. I was quite satisfied with the evidence of the witness John Massiah who, apart from the official witnesses, was the only generally reliable witness in the case, and have no reason to doubt that Mohabir did express to him, at the time of his change in religion and shortly before the marriage, his intention of marrying and settling down in this colony. The parents of the girl might naturally, under the circumstances, be expected to object to their daughter going to India. As Mr. Hill, the Immigration Agent, says, the reception in India of an East Indian who became a Christian, would be a poor one amongst their own class and race. The fact that he and the circumstances under which he became a Christian corroborate the evidence of Massiah and of the plaintiff herself as to the expressed intention of Mohabir to remain permanent in this colony. Witnesses have been called, it is true, by the defence to show that expressions of intention not to remain here permanently but to return to India were also made, but chiefly at a much later period, by Mohabir, but I am quite unable to accept them as being satisfactorily given. I should have some difficulty in accepting even the evidence of the plaintiff herself on this point, unless it was corroborated by other evidence. On several points she was shown, in cross-examination, to be an unreliable witness, but where she is corroborated by other evidence I come to the conclusion that she is speaking the

truth. The expressions of opposite intention deposed to by Bismilla, Ramadeen, Mans, Moula, and Joseph Mohabir I am unable to accept. First of all, the majority of them refer to a time long subsequent to the marriage, then they are directly opposed to the proved acts of the person who is alleged to have made them; the witnesses all showed signs of having assimilated, I might almost call it, a well drilled story that Mohabir said he was going back to India. It bubbled out of one or two almost before they were asked about it. Bismilla herself I could place possibly even less reliance upon than upon the plaintiff. She was undoubtedly a more intelligent witness. The feelings of these two women for one another are naturally antagonistic. Her explanation of her admissions on oath in the estate duty papers that Mohabir was domiciled in the colony and was married in community to his wife (the plaintiff) carried no weight whatsoever with me. She admitted she made them on legal advice, and after notice of the plaintiff's claim. Her statement that she did not know of the existence of the plaintiff until after Mohabir's death I do not believe. She knew of her existence in 1909 according to her affidavit put in. Her story of the saucepan full of money which she alleges she possessed when she went to live with Mohabir is in my opinion an invention to bolster up alleged large payments of money by her to Smith Bros. It is full of improbabilities and entirely uncorroborated. If true it would have been possible to obtain corroboration in respect of some details at any rate. Both she and Ramadeen speak of Mohabir looking at pictures of his native land, over which he is said to have frequently shed tears. That he had that attachment to and love for his native land that all have, whether they be temporarily or permanently exiled there-from, is no matter of surprise. As pointed out by Vaughan Williams, L.J. (*in re Martin, Loustalan* v. *Loustalan* 1900 P. 211 at p. 238) the possibility of returning to one's domicile of origin, if circumstances should change, may never be excluded from a man's mind, however much he may choose a country other than that of his domicile of origin as his permanent home. (cf. remarks also of Lord Chelmsford in *Udny* v. *Udny* at p. 455.) Both he and Ramadeen may well have spoken of this; but that he told Ramadeen under the circumstances deposed to that he was returning I am not satisfied. This is alleged to have happened ten or eleven years ago, and the witness states he is still waiting to go back, having been waiting for Mohabir all that time. He also admits that after this expressed intention of Mohabir's to sell up and go back to India, Mohabir continued to both buy and sell property in this colony. The witness Mans I can place no reliance upon. He does not for instance remember when the Great War finished, but he remembers the details of an unimpor-

tant (as it was then) conversation which took place before Mohabir's marriage in 1889 when he was going on one of his periodical visits to the goldfields, in the course of which Mohabir said, "I might not see him as when he sell out he was going home to his country." And then in or after 1914 when he wanted to borrow $10 from Mohabir, some twenty-five years later, he says the loan was refused for exactly the same reason. "Mohabir said he was selling out and going away." I could say more about this witness but think it unnecessary; it is far from a pleasant duty to have to criticise thus the evidence of presumably responsible persons given upon oath in the witness-box. The evidence of Moula carries the case no further. Before the marriage in 1889 he says he and Mohabir spoke of earning money and returning to India, He himself has been here 45 years, and, so far as I can understand, the obstacle to his return during all that time has been his failure to sell profitably six head of cattle. At any rate that is the explanation he gave. Joseph Mohabir, a son of the deceased, born in the year 1898, also gave evidence of his father's expressed intention. He, however, only speaks of a time shortly before 1914. Even therefore if I were to accept his evidence as true it would not necessarily show the state of his fathers mind in 1889, I cannot find, however, that these expressions of intention are borne out by the acts of Mohabir. No steps whatsoever were taken to get the properties sold either before the outbreak of the war, or subsequently, and that in spite of the admittedly advantageous prices that could have been obtained. In 1909 it is true Mohabir did sell a property but that was to Bismilla, who says she was to return to India with him. And in connection with the conveyance of this property Mohabir and Bismilla jointly swear to an affidavit to the effect that Mohabir's wife was alive and that Mohabir was married to her in community of property. Lastly, this witness Joseph Mohabir admits he cannot speak any one of the languages of India, but English only. I am unable to reconcile this with his statement of his father's alleged repeated expressions of intention to take him back to India to remain there. The fact that his father never had him taught his own language, although he had him apparently fairly well educated for life in this colony, is directly opposed to any such intention.

It was urged on behalf of the defendant, as showing the intention of Mohabir, that he had never applied for a free grant of land in lieu of a back passage to India, to which he was entitled up to the time of his death. But it seems that although he was entitled to that back passage at the time of his marriage, it was not shown that the institution of free grants of land in lieu of a back passage came into operation before the year 1900 or thereabouts. In any case it was shown that he had never applied to

the Immigration Department for a back passage to India which, it seems to me, is the first thing he would have done if he had definitely made up his mind, as some of the witnesses say, to sell up and return to his native country.

I ask myself then, in the words of Lord Macnaughten in *Winans* v. *Attorney General*, as expounded by Professor Westlake (*Private International Law*, 5th ed., p. 362) the questions:—Has the testator Mohabir ever actually declared a final and deliberate intention of settling in British Guiana. or have his conduct and declarations led to the belief that he would have declared such an intention if the necessity of making the election between the countries. British India and British Guiana, had arisen? The answer is in the affirmative. It has been proved 'with perfect clearness and satisfaction' to myself that Mohabir had at the time of his marriage 'a fixed and settled purpose,' 'a final and deliberate intention' of settling in British Guiana. That intention he expressed to his wife, to her parents, to Massiah, and I have no doubt also to the Rev. D. Smith. His subsequent conduct up to the end of his life and a subsequent declaration made on oath confirm it. I am led to that conclusion beyond any doubt. I therefore find, the other necessary element being present, that at the time of his marriage to the plaintiff in 1889, he was domiciled in this colony. Therefore, in the absence of any evidence of an antenuptial contract, at that date community of property between husband and wife followed, in respect of all property vested in either party or of after acquired property. This was at that date one of the common law consequences of marriage. Mr. Luckhoo has not been able to cite any authority to show that that community can be dissolved save by death or by order of the Court. It is admitted by plaintiff that she was living in adultery after her marriage, but her husband was, if anything, worse than she was in that respect. Counsel has, however, sought to extend the principle applied by the dissenting judgment in *Chunkoo* v. *Beechun* (G.J. Dec. 2nd 1919), in *Ramalutchmie* v. *Estate Ramiah* (1909 N.L.R. 137) and *Arbuckle* v. *Ellery's executor* (1917 W.L.D. 73) ([1]) to the community that exists between spouses. It does not so extend and I do not think the argument was really pressed by him. It is not therefore necessary to consider whether any existing right in respect thereof under the Roman-Dutch Law has been reserved either to the plaintiff or to the descendant's testator under the Civil Law of British Guiana Ordinance, 1916. The husband Mohabir was not remediless, as was stated; either party could have gone to the court for judicial separation or divorce, with

(1) And see *Heinamann* v. *Heinamann* 1919 A.D. 99.

the consequent order thereon in respect of the property. But as I have pointed out neither party was an innocent party.

The plaintiff's failure to tile an inventory under section 10 of the Deceased Persons Estates Ordinance, 1917 does not deprive her of her rights. The penalties for such default are provided in section 11. As the executrix filed an inventory (although it is stated to be incorrect), as plaintiff states she had nothing to herself return, she might well, even if she had an opportunity to do so which I do not think she had, think it unnecessary to file another inventory of the property belong to the estate possessed in community.

On the plaintiff's claim therefore there will be a declaration that she was married to the deceased Mohabir in community of property. She is therefore entitled to an account from the defendant, the deceased's executrix, of the property belonging to the estate that was possessed in community, and of her dealings therewith, and to an order for the delivery to her of her half share thereof.

As regards the second named defendants, there will be an order restraining them from parting with the sum of $7,053.61 which is in their hands at the disposal of Mohabir,' the deceased, pending the taking of the account above referred to and the order thereon. Whether that sum or any part thereof is part of the estate of deceased possessed in community will be decided when the account is taken.

The plaintiff is entitled to costs of this action.

Solicitor for the plaintiff. *R. Dinzey.*

Solicitor for the defendant Bismilla, *Cameron and Shepherd.*

[An appeal to the West Indian Court of Appeal has been lodged in this case.]

WISHART *v.* THE BERBICE DEVELOPMENT Co., LTD.

WISHART *v.* THE BERBICE DEVELOPMENT Co., LTD.

[665 OF 1921.]

1922. APRIL 26, 27; MAY 10. BEFORE BERKELEY. ACTG. C.J.

Master and servant—Contract of Service—Wrongful dismissal—Irregularities—Bonus—Commission.

Claim by the plaintiff for the sum of $1,823.36, an amount alleged to be due to the plaintiff by the defendant company for salary, commission, and war bonus as manager of the defendant company's saw-mill business at New Amsterdam from 1917 to 1921.

Further necessary facts are set out in the judgment

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

J. A. Luckhoo, for the defendant company.

BERKELEY, ACTG. C.J.: The plaintiff claims in lieu of notice of dismissal,

(a) two months' salary as manager of defendants' saw-mill business	$ 320 00
(b) three months salary for superintending defendants' timber grants	60 00
(c) commission for the years 1919-1922 as per agreement...	750 00
(d) bonus on salary	693 36
	$l, 823 36

The first question for the Court's consideration is as to the nature of the plaintiff's employment as manager of the saw-mill and hardware store which was a branch business of the defendant company. Was he employed by the rear as submitted by counsel in his behalf, or was he a monthly servant?

The plaintiff says that he was engaged at a salary of £400 per annum and was paid $160 per month and that in 1919 when he was given charge of the timber grants it was agreed that he should be given $20 per month, extra in respect of these grants. In cross-examination he says "I was not engaged by the year. I was told £400 a year or $160 per month." In a letter written by plaintiff to Mr. Shields, chairman of the defendant company, dated 15th November, 1920, plaintiff writes "my remuneration has not been increased above the figure of £400 per annum." In reply to this letter under date 26th November 1920 no reference was made as to the plaintiff's statement "£400 per annum;" again

under date 17th January, 1921, the plaintiff writes that he was engaged at £400 per annum. It is submitted that these letters tend to show that the contract entered into by the plaintiff was a yearly contract.

The chairman of the company in the course of his evidence says: "I engaged him (plaintiff) at $160 per month and if profits good I was authorised to give him a bonus, amount of which was entirely in my discretion, he was engaged by the month, but owing to frequent drawings by him I arranged that the whole staff be paid half-monthly."

He further says that he himself is hired by the month and is not entitled to three months' notice, that no servant of the company is employed by the year—that they are all monthly servants.

Owing to certain irregularities the directors of the company on 15th July, 1921, called upon the plaintiff to resign and on the same day he sent in his resignation. Mr. Shields says that at his request he was allowed to remain until the end of the month, and was given the salary for August ($160) but not the $20 for timber grants, as it was in connection with these grants that most of the irregularities had occurred. At this time plaintiff made no further claim in respect of money due to him. He says himself "defendants brought an action against me. I counter-claimed and then brought this action."

I find as a fact that the contract entered into by the plaintiff was a monthly contract.

As to claim (b), plaintiff both in his statement of claim and in his examination in chief says that it was agreed he should get $20 per month in respect of the timber grants. How then can he ask this court to say that he was employed by the year in respect of these timber grants? It was his irregularities in this branch which finally brought about his resignation and under the circumstances he would not be entitled to a month's pay.

Under (c) plaintiff claims commission (frequently referred to as bonus both in letters and in the evidence) for the financial years 1919-1922. In his letter of 24th June, 1921, plaintiff says that he got no commission in 1919-1920—"as the business did nothing." It is difficult therefore to understand his claim for that period. As to 1920-1921 Mr. Shields on 24th June, 1921, (then ignorant of any irregularities on the part of the plaintiff) wrote that he would recommend commission on basis of previous years. These irregularities were first brought to Mr. Shields' notice on 4th July, 1921, and on 29th July he wrote that the directors had decided that the commission should be withheld until the accountant's report was received, and any points raised satisfactorily explained. On 5th

August plaintiff was furnished with a copy of the accountant's remarks on the examination of the timber grant books for 1920, and was told that unless satisfactory explanations were given with regard to these queries the commission would not be paid. On 17th August he was informed that unless satisfactory explanations were forthcoming by 20th August it would be withheld. On 25th he was informed that as the directors were not satisfied with his explanations the bonus (commission) of $250 could not be paid to him.

The evidence shows that irregularities had been taking place from August, 1920 that is during the financial year ending on 31st January, 1921. On these facts the directors were justified in refusing to pay his commission.

As to (d) bonus, this was entirely voluntary. Plaintiff bases his claim on the statement that the other employees got a month's salary and he did not.

I have refrained from dealing with the various irregularities as shown by the evidence. On that of plaintiff himself I cannot see how he could expect to succeed in this action.

The cases referred to by counsel in my opinion do not apply to the present case.

Judgment for the defendant company with costs.

Solicitor for plaintiff, *E. A. W. Sampson.*

Solicitor for defendant company, *E. A. Luckkoo.*

Re CHAPMANS LTD.

Re CHAPMANS LTD.

1922. MAY 6, 13. BEFORE DALTON, J.

Company—Voluntary winding up—Sale by liquidator—Confirmation by the Court—Companies (*Consolidation*) *Ordinance 1913, s. 180 (iv), s. 187—Companies* (*Consolidation*) *Ordinance 1913, Amendment Ordinance, 1917, s. 9.*

This was an application by the liquidator asking that a sale of the immovable property of the company, dated the 1st of May, 1922, and entered into under the following circumstances be approved of and confirmed by the Court.

The application set out that the applicant was the liquidator, and that the company was being wound up voluntarily under resolution of a general meeting of the company duly convened on October 31st, 1921 and confirmed on November 18th, 1921; that the property was sold on May 1st, 1922, at public auction to Francis Dias for the sum $24,600, that the sale was duly advertised by the liquidator who had previously had the same property put up for sale when the highest offer was $22,700, and that the property in question was the only immovable property owned by the company.

The property in question had been purchased by the company on February 8th, 1919, for $25,000. On March 29th 1922, by sworn appraisement, its value was put at $30,000.

P. N. Browne, K.C., appeared for the liquidator and submitted that although the applicant had power to enter into and carry through the sale under the powers vested in him, he in his discretion asked for the approval of the Court to the sale, under s. 187 of the Companies (Consolidation) Ordinance, 1913. No meeting of the shareholders had been held to confirm the sale.

After argument the application was postponed for further information to enable the Court to decide whether it was a just and beneficial transaction.

Posted. (May 13th) Further affidavit filed.

The sale having been made at public auction, after a previous attempt at sale, and under the circumstances the price appearing reasonable in view of the further information supplied, as it appeared fit and proper and for the benefit of the company that the sale should be confirmed, an order was made to that effect.

Solicitor for applicant, *V. Dias*

ROYAL BANK OF CANADA *v.* BEHARRY

[496 OF 1921.]

1922. MAY 11, 12, 19. BEFORE DE FREITAS, Actg. J.

Promissory note—Payment—Onus of proof—Possession prima facie evidence of payment—Evidence in rebuttal.

Claim by the Royal Bank of Canada for the sum of $483.02, being the amount of a promissory note for $475 and interest thereon drawn by the defendant in favour of the plaintiff bank, which note the bank alleged had been lost, misplaced or stolen.

The defendant pleaded payment.

The further necessary facts are fully set out in the judgment below.

H. C. F. Cox, for the plaintiff bank.

J. A. Luckhoo, for the defendant.

DE FREITAS, Actg J.: The plaintiffs issued a specially indorsed writ claiming S475 on a promissory note made by the defendant which in their statement of claim they alleged was lost. The defendant, having obtained leave to defend, pleaded that he had paid to the plaintiffs the amount of the note on the 31st day of May, 1921, shortly after signing the same, and that after such payment the plaintiffs surrendered the said note to him as fully paid and that the note was in his possession. To this defence the plaintiffs replied that the defendant on the 31st day of May, 1921, signed a promissory note in favour of the plaintiffs for a sum of $475 by way of renewal of an overdue note for the same amount and that the cashier, to whom the said notes were passed on, inadvertently and by error stamped both notes as having been paid and delivered them to the defendant who fraudulently retained the note sued on.

The sole question for my decision is one purely of fact, the determination of which depends upon whether or not on the whole of the evidence I am satisfied that the note has been discharged by payment.

The facts as I find them are as follows: The defendant was indebted to the plaintiffs in the sum of $475 on a promissory note which was dishonoured for non-payment on the 30th of April, 1921. On the 1st day of May the defendant's premises with all the stock-in-trade of his shop at Anna Catherina, West Coast, Demerara, were completely destroyed by fire. On the 3rd of May the defendant came to Georgetown and withdrew from the Post Office Savings Bank the sum of $500, leaving a small balance

of $192 still to the credit of the account which was in his wife's name. At that time the note at the bank still remained unpaid. On the 31st of May the defendant in reply to a message from the manager of the Royal Bank of Canada came to Georgetown and interviewed him at the bank. He told the manager that his premises and business had been destroyed by fire; that he had not yet received payment from the insurance company in respect of his loss, and asked for a further indulgence of one month to enable him to pay off the note then outstanding. The manager acceded to his request, whereupon a new promissory note of that day's date was signed by the defendant. The procedure adopted by the bank in cases of renewals of promissory notes is thus described by the manager. Mr. Dalgleish, in his evidence *de beneesse*: "The system is as follows as to renewals. The new note is made out, discount calculated by discount clerk, A renewal cheque is then made out and given to the customer to take to the cashier or teller. It is handed by him to the cashier along with amount to make up old note. If a man had a note for $1,000 and wished to renew for $400, he would take a note for $400 to discount clerk; discount would be about $8; he would get a cheque for $392 from discount clerk. He would give this cheque and $608 to the cashier. He would then retire the old note from the cashier who would stamp it 'Paid' and give it to him."

Mr. Mahan, the discount clerk at the bank on that day to whose care the transaction was committed, made out the usual bank cheque for $471.72, which sum represented the capital of the overdue note less the discount of $3.28, and a credit or instruction slip to the teller, Observing then that the renewal note signed by the defendant was not properly witnessed according to the law which requires the note to be attested by a justice of the peace or some such responsible witness, he destroyed it, wrote out another one for the defendant which he handed to him, telling him to have it properly attested and to bring it back to him; he thinks he suggested Mr. J. B. Woolford, J.P., as an accessible witness. In the meanwhile he instructed the teller to place aside the overdue note and the credit slip until the new note was brought back. From the evidence it is not clear whether the cheque was actually given to the defendant or left with the teller to await the return of the defendant. The defendant left the bank and Mr. Mahan never saw him again until the hearing of this action. When the day's business at the bank was concluded no trace could be found to the overdue or the renewal note, but entries in the teller's cash book showed clearly that the transaction had never been carried through; that $3.28, the amount of the discount, had been received by the bank and duly debited in the cash book; that the bank's cheque of $471.72 had been duly entered

on the credit side and a corresponding entry of $475 made on the debit side, thereby disclosing the complete transaction of renewal. Mr. Mahan, thinking that the defendant might have returned to the bank and handed the new note to some other clerk, at once made diligent inquiries and search, but all in vain. It being the last day of the month was, it seems, an exceedingly busy day as appears from the entries in the teller's cash book. The day's cash was correct and properly accounted for. If defendant had paid $475, the cash should have been over to that amount. The old note had evidently been given out, but the new note could not be found anywhere nor accounted for in any way. The teller himself, a Mr. Peckham, who had had five years' experience as teller at the Royal Bank in Trinidad, Halifax, and this colony, was unable on that very day to recollect anything about the matter. Mr. Mahan swears emphatically that no money was ever paid to him by the defendant. I believe him. After the issue of the writ the plaintiffs then became aware for the first time of the fact that the defendant held the note stamped with the bank's stamp as paid on the 31st of May. 1921. This information was given to them, counsel for the defendant states, by himself.

The defendant's account of the matter briefly stated is that he came to Georgetown on the 3rd May to withdraw the $500 from the savings bank with the intention of paying the bank the amount of his overdue note, but that after he received his money he found it was too late to transact any business at the bank and had to return home with the money. This money which consisted of bank notes and $40 in silver he says he kept on his person from the 3rd to 31st of May, but sometimes when he left the house he gave it to his wife to keep. Although he came to Georgetown a few days after the 3rd of May and every week during that month he never went to the bank to pay off his note. On the 31st of May he suddenly conceived the idea that he needed a further month's indulgence. On that day he says he left his house in the morning and came to interview the manager of the bank. His wife had advised him to pay the note and not to ask for any extension of time, but he remained obdurate and decided to ask the manager to allow him to renew the note for a month. He says that before leaving his house he told his wife to follow him later with the money in case the manager of the bank refused to grant him his request. He accordingly betook himself to the bank where, after narrating his misfortunes to the manager, he succeeded in obtaining his consent to a renewal. He made out a new promissory note and the old one was returned to him. He then returned to the steamer stelling where he met his wife who had just come to town by the 1.30 ferry boat from Vreed-en-Hoop. She told him she had brought the money to pay the bank

and insisted that the debt should be paid off as it was no use paying interest when they had the money. They accordingly went to the bank and there the defendant says he paid $475 to Mr. Mahan, who handed the same to the cashier who in turn delivered to him the promissory note which he had but an hour before given to the bank. The defendant when asked in Court for the old note said he did not know where it was; that he had taken it home and placed it with the new note in a drawer and, when he went to look for them after the bank sued him, he only found the new one and added that his children must have "stuck it away" somewhere. On this point he was flatly contradicted by his son-in-law, who said he saw the defendant destroy the old note shortly after leaving the bank on his way to the stelling and before meeting his wife.

It seems to me to be a waste of time and an insult to one's intelligence to deal minutely with the defendant's evidence. As I said at the hearing when the evidence was concluded, I did not believe a word of the defendant's evidence relating to the payment of the note. I am still of the same opinion, and judging from his demeanour and from all the surrounding circumstances no jury could possibly accept his statement. I have no hesitation in saying that he committed most wilful and corrupt perjury. The evidence of his son in-law, Ramcharita, otherwise known as Joseph, stands in the same category. One had only to look at his face to see the miserable and pitiable exhibition he was making of himself. How Mr. Luckhoo could expect me to believe the evidence of these men—I ignore the evidence of the woman Ramdhia who was but a tool in her husband's control—and to convict Mr. Mahan and the cashier, Mr. Peckham, of theft on their testimony, passes my comprehension. The learned counsel himself when opening his case said that the defendant's object in withdrawing the $500 from the savings bank was to enable him to pay for his defence on the charge of arson for which he was arrested the very morning of the fire, and to have some ready available cash, and yet the defendant will have me believe that his sole object in withdrawing this money was to pay the bank. I do not believe that the defendant had an honest intention when he withdrew the money from the savings bank, nor do I believe that he ever paid the plaintiffs the amount of his indebtedness to them. It is quite possible, and the fact that the defendant did not produce the old note makes me believe it is probable, that the two notes were inadvertently taken up together by the cashier and the new one alone stamped as paid and both delivered to the defendant in error. It is true that the plaintiffs say in their reply that both were stamped as paid, but this was not an allegation based on any actual evidence

in their possession; it was simply a surmise as to what they thought probably happened founded on the assumption that the defendant held both notes so stamped. In whatever way the new note got into the defendant's possession, I am convinced that he did not come by it legitimately. I do not believe that the defendant ever returned to the bank after the completion of the renewal transaction, nor do I believe that his wife came to town on the 31st of May, or, at least if she did so, that she did not accompany him in the morning. On that day the banks closed at two o'clock and as the wife is said to have crossed the river by the 1.30 p.m boat from Vreed-en-Hoop, it is exceedingly improbable that they would have reached the bank's premises before two o'clock. I agree with Mr. Luckhoo that the possession by the defendant of the promissory note, stamped as it is with the bank's stamp as paid, raises a *prima facie* presumption of payment, but in my opinion that presumption can be and, on the evidence in this case, has been satisfactorily rebutted. A receipt is nothing more than a *prima facie* acknowledgment that the money has been paid (*Skaife* v. *Jackson*; 3 B and Cr. 421); it is only *prima facie* evidence which admits of an explanation. (*Farrar v. Huchinson*, 1 P & D. at p. 439; *Bowes* v. *Foster*, 2 H & N 779). Two witnesses called by the plaintiffs (Boodhai and Mahadeo Persaud), whom I see no reason to disbelieve and about whose testimony no comments were addressed to me by the learned counsel for the defence, gave evidence of admissions by the defendant supporting the view that the note in question was delivered to the defendant.

If the evidence led for the defendant had left me in doubt and I had any just or fair reason to discard the evidence for the plaintiffs or even to have a doubt about it, I should have felt bound to give judgment for the defendant, on the principle that where there is a competition of evidence upon the question whether a security has been satisfied by payment the possession of that security by the claimant ought to turn the scale in his favour. (*Brembridge* v. *Osborne* 1 Starkie 374).

On the whole of the evidence I have not the slightest doubt that my judgment should be for the plaintiffs; they are not however entitled to interest at the rate of 8 per cent. I give judgment accordingly for the plaintiffs for the sum of $475 with interest at the rate of 6 per cent, per annum from the 2nd of July, 1921, to the date of this judgment, with costs.

Solicitor for the plaintiffs, *P. W. King.*

Solicitor for the defendant. *J. Viapree.*

[An appeal to the West Indian Court of Appeal has been lodged in this case].

KOULEN *v.* LEE SAM AND LEE CHIN.

KOULEN *v.* LEE SAM AND LEE CHIN.

[266 OF 1922.]

1922. MAY 26. BEFORE DALTON, J.

Food and drugs—Opium—Possession without the proper authority—Purchase of preparation containing opium from registered chemist—The Opium Ordinance, 1916, s. 8.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. G. R. Reid). The appellant, Lee Sam, was charged as the occupier of a place, such place being other than a colonial bonded warehouse, in which a quantity of opium was kept without the proper authority. Lee Chin was charged with being found, at the same time and place, in possession of a quantity of opium without the proper authority. By consent the charges were taken together. They were both convicted and now appealed,

F. O. Low for the appellants.

Registered chemists can sell opium, Pharmacy and Poisons Ordinance, 1899, s. 21 (1) and amended schedule; Ordinance 19 of 1911, s. 7. A chemist having power to sell, any person purchasing from him cannot be in unlawful possession.

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

Use of opium for other than medicinal purposes entirely prohibited. A chemist may sell preparations containing opium, but the separation of opium from the medicinal preparation so sold is an offence.

DALTON, J.: The appellants were convicted on a charge brought under section 8 of the Opium Ordinance, 1916, of being in possession of opium without the proper authority. The proper authority is the authority of the Surgeon General or government medical officer mentioned in section 7, which can only be granted to a registered medical practitioner, registered dentist or registered chemist and druggist. In his reasons for decision the learned magistrate states: "The only question at issue seems to be whether the onus of proving the absence of authorisation is on police or on the defendants . . . . I convicted as I considered that the ordinance contemplated an authorisation accompanying the opium even after its first removal from bond, at any rate in quantities approximating those involved in this case."

At the trial the defendants stated that they purchased the exhibits from Smith Brothers & Company, Ltd., registered chemists and druggists. That evidence the magistrate says he had no means of testing. At any rate he clearly does not disbelieve it,

but considers that the ordinance requires an authority to accompany such a purchase if it was made. That interpretation of the law Mr. Cox is not prepared to support, and I agree that there is nothing in the ordinance to support it. The evidence for the prosecution is very scanty, but whether so or not. it certainly would be to me an extraordinary thing if, when registered chemists and druggists had lawfully removed opium under section 7 and sold it lawfully in the course of their business on prescription or for medicinal purposes, the purchaser from them could be charged under section 8 with having "opium" within the meaning of ordinance in his possession without lawful authority, which lawful authority he is debarred by the law itself from obtaining. There is no evidence to show that the defendants did not purchase the exhibits produced to the analyst from the registered druggists mentioned in the ordinary course of their business. There is no evidence to show that they could not have been legally sold by the chemists. I can certainly find no evidence that "a fairly large amount of opium was admittedly found in possession of the two defendants." The amount is not stated in the analyst's certificate or elsewhere in the evidence, although the defendants admit having 11/2 to 2 ounces of laudanum and a small (infinitesimal according to counsel) quantity of opium.

But is not the conviction supported by previous decisions? In *Wong* v. *Manning* (1915 L. R. B. G. 182) a case brought under a similar section of an earlier ordinance, the learned Chief Justice states: "The defendant is admittedly neither registered medical practitioner, dentist nor chemist and druggist, and for that reason he cannot have the written authority which the law declares to be necessary to lawful possession of opium. *Ergo*, his possession is unlawful." If that means he could not legally purchase from a registered chemist any preparation which a chemist was legally entitled to sell and which comes within the term "opium" I cannot agree with the conclusion. But I doubt if it is meant to go so far as that. And the same applies to the reasoning in *Gamble* v. *Chutam* (1916 L.R.B.G. 154), although on the facts in that case there was no doubt of the defendant's guilt. Mr. Cox is unable to state that Smith Bros. & Co., Ltd, were not permitted by law to sell to the defendants what in fact was found in their possession, and that being so it seems to me that the prosecution had entirely failed to prove that their possession was unlawful. He has referred to section 9 of the ordinance dealing with the separation of opium or any of its constituents from medical opium or compounds of opium or similar drugs which is a separate offence, but there is no suggestion that such separation has taken place here. The possession of 'prepared opium' also does not arise on the charge as laid here.

On the evidence therefore the prosecutions hare failed to prove that the defendants were guilty of any offence. That they could not obtain the "proper authority" mentioned in section 8 of the ordinance seems clear, but that of itself on the facts of this case does not prove that they were unlawfully in possession of the drugs mentioned in the analyst's certificate which were opium or constituents thereof within the meaning of the ordinance. The convictions must be quashed, and the appeals allowed with costs.

Appeals allowed. Convictions quashed.

In re SHARPLES; *ex parte* THE PUBLIC TRUSTEE.

[91 OF 1922]

1922. APRIL 22; MAY 6, 27. BEFORE BERKELEY, ACTG. C.J.

Will—Application for directions—Administration Ordinance, 1887, s. 3—Old and illegible paper writing—Proof of making of new will which cannot *be found—Intestacy—Illegitimate children, rights of—Civil Law of British Guiana Ordinance, 1916, s. 6 (8)—Escheat to the Crown.*

Petition by the Public Trustee for letters of administration, and for directions in matters arising in the estate of Daniel Edgar Sharples, who died in Georgetown, a bachelor, on November 21st, 1921.

The petition set out that Sprostons, Ltd., creditors of the deceased, had applied under the provisions of the Public Trustee Ordinance, 1910, that the petitioner administer his estate; that the petitioner wished to administer the estate and obtain letters of administration, but was in doubt as to the validity of a document which was believed to be a will of the deceased. Directions were therefore sought as to whether the document in question was the last will and testament of the deceased, or whether he died intestate, and if intestate whether the deceased's brothers and sisters who are illegitimate and their descendants are entitled to inherit the estate

To protect the estate a provisional grant of administration was made to the Public Trustee and notice of the petition was given to all interested parties.

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

BERKELEY, Actg, C.J.: 1. This is a petition by the Public Trustee that letters of administration be granted to him and

that the Court give directions (a) whether the document laid over is the last will and testament of the deceased; (b) whether the deceased died intestate; and (c) if he died intestate, whether his brothers and sisters and their descendants are entitled to inherit his estate.

2. The existence of a will might render unnecessary the granting of letters of administration, but in order to protect the estate I made a temporary grant to the Public Trustee and I directed an enquiry as to the existence or otherwise of a will.

3. Due notice of this enquiry was published in the local papers and in addition to certain witnesses summoned; any person who could give evidence in the matter was requested to attend the Supreme Court on 6th May, 1922.

4. The evidence shows that the deceased, Daniel Edgar Sharples, died on 21st November, 1921, unmarried. Under other old papers in his iron safe was found a document which it is alleged is the remains of an old will made by him when he was going to England some 30 or 36 years ago. This document is crumbling to pieces and all that can be deciphered is a few words which tend to show that it was written as a will. That the deceased realised this is shown by his statement to his brother, James Bradshaw Sharples, early in 1921, to the effect that his old will was defaced and that he was then worth more than he was at the time he made that will. The deceased discussed with his brother certain small legacies which he noted on paper and he said he did this as he intended to make a new will. On being asked what about his family and his two children, he said: "Leave that to me." About this time he purchased foolscap paper to make his will. He had been left by a Mr. Maskell the residue of his estate—a matter of $4,000—and at the time of his death be was allowing Duncan Edgar Maskell (the son) $20 per month. He had told this son that he intended to make provision for him in his will. John Bradshaw Sharples, nephew, also says that his uncle told him that he could not understand why Maskell had left this legacy to him, and that he felt it was his duty to do what he could for his boy. Mr. Campbell, the head teacher of St. Philip's school and a life-long friend, was told by the deceased that he meant to secure to the son what had been left to him by his father Maskell. He also mentioned to more than one person his intention to make provision for the children of his brother, J. B. Sharples, who had pre-deceased him.

5. Apart from all this evidence which points to his intention to make a will, Rosaline Violet De Weever, a teacher under the deceased for 30 years and almost daily at his house, says that one day in February, 1921, she was assisting him in searching the iron safe (which is produced and is shown to have been kept in

the bedroom) for certain legal papers, that she handed papers to him from the iron safe one by one as he sat in his chair near the safe, that on handing him a certain paper from an envelope he said: "Oh that is my will" and that while replacing it in the envelope he asked her if she was reading it. She adds that she did not read it, but she saw it was foolscap paper which looked new and clean. Millicent Harewood, a teacher at St. Thomas' school, confirms this witness. She relates how she came to see a paper which deceased told her was his will.

6. The iron safe was removed on the morning after his death (22nd November) by his nephew, Joseph Thistleton Valladares, to his office in Water street with the consent of his uncle. James Bradshaw Sharples. Alice Tafares, niece of the deceased, who had removed the key of the safe from his blouse pocket after his death, handed it to her brother, Joseph Thistleton Valladares, on the evening of the same day (22nd November) after the funeral. Valladares says that on the same night he gave the key to his sister (Miss Valladares) to send to John Bradshaw Sharples who had charge of the funeral. This key was received by him about 10 a.m. on 23rd November. At his request on the same afternoon the safe was brought back by Valladares in his car to the house of the deceased, John Bradshaw Sharples having said that it was necessary in order to find out the executors. Valladares says that he heard a rattling while in his car and that he pulled the safe by the handle, that the rattling continued, and that he raised the knob and found that the safe was open. When John Bradshaw Sharples, some five minutes after its arrival, took the key out his pocket and said "Let us open the safe," Valladares said: "It is open already."

7. Vaughan, the porter of Mr. Valladares, who had removed the safe to the office, said that in taking it down the steps of the house he had pulled it by the handle "step by step" and that he heard no noise. I called on him to place the safe (unlocked) on the top of the court steps and to pull it down by the handle "step by step." On his doing so, as it came down the first step the lid rose showing that the safe was not locked. If, therefore, it had been removed to the office unlocked, this ought to have been apparent to those engaged in its removal.

8. Mr. Valladares says that he never touched the safe while at his office. He admits that he was very seldom at his uncle's house and had not been there for a year or two. One would have expected him to consult his cousin, John Bradshaw Sharples, as to the removal of the safe and not his old uncle of 78. Then again as to the safe key he says: "I asked her (his sister Alice Tafares) for the safe-key and she took it from her bosom and gave it to me."

9. Alice Tafares had not been at her uncle's house for years, and she says they never visited each other though they spoke when they met. She takes the key out of her uncle's blouse and instead of giving it to her cousin who had charge of the funeral arrangements, she hands it to her brother with the knowledge that he had the safe at his office. Her evidence is far from satisfactory. She swears that she did not know that the large key she removed from her uncle's blouse was the key of the safe. It is proved both by her brother and the nurse that this is incorrect. The nurse says she said "The only thing that has a lock is the safe and I have the key of it here" (touching a string around her neck). The nurse adds: "I thought the safe was locked from what she told me. I never saw her go to it." It is significant that Alice Tafares absented herself from the house when the iron safe was to be opened.

10. I am of opinion that the deceased made a will which in February, 1921, was kept in his iron safe and presumably was there at the time of his death. The evidence points to the safe being locked at the time of its removal, (1) the deceased had the key in his blouse pocket at the time of his death; (2) the statement of Alice Tafares that "the only thing that has a lock is the safe;" and (3) the lid rising above the level when (unlocked) it is pulled down the court step. This being so it follows that it must have been opened between the time it left the house of the deceased and the delivery of the key to John Bradshaw Sharples about 10 a.m. on the morning of the 23rd November.

The fact that Valladares on the evening of the 22nd November for some period of time had the safe in his office and the key in his possession under the circumstances set out showed that if so disposed he could have obtained access to the safe. It follows that suspicion must attach to him and his sister Alice Tafares. As to motive the evidence points to the probability of their not being mentioned in the will. Under the Roman-Dutch Law in cases of intestacy they would have taken *per stirpes* the share to which their deceased mother would have been entitled. The Roman-Dutch Law ceased to be the common law of this colony as from 31st December, 1916, and by the Civil Law of British Guiana (Ordinance No. 15 of 1916, section 6 (8)) this right is limited to the heirs of the mother.

I am of opinion that both the movable and immovable property escheat to the Crown, and under the Escheat Ordinance No. 33 of 1918 (1) it is for the Governor to say in the name of the Crown whether he will forego the whole or part of such escheat.

I direct, therefore, (a) that the document laid over is not to be held as the will of the deceased, (b) that the deceased, Daniel Edgar Sharples (in the absence of any will or evidence as to the

contents or due execution of any such will) must be held to have died intestate, and (c) that his brothers and sisters and their descendants are not entitled to inherit his estate.

I revoke the temporary grant made to the Public Trustee and I make a general grant of letters of administration to him.

I direct that the costs of this petition be paid out of the estate.

Solicitor for the petitioner, *A. G. King,*

In re GONSALVES; *ex parte* LOPES, FERNANDES & CO., LTD.

[18 OF 1922].

1922. MAY 17, 29. BEFORE DALTON, J.

Insolvency—Petition for receiving order—Judgment debt—Power of court to inquire into debt—Insolvency notice—Insolvency Ordinance 1900, s. 3(f)—Leave to defend on condition!—Final or interlocutory proceeding—Signing of final judgment—Rules of Court, Order XII—Practice.

Petition by Lopes Fernandes & Co., Ltd., for a receiving order in respect of the estate of Mary Gonsalves, the wife of J. H. Gonsalves to whom she was married subsequently to the Married Persons Property Ordinance 1904. The petition was opposed. The necessary facts and arguments are fully set out in the judgment below.

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

J. A. Luckhoo, for the defendant.

DALTON, J.: This is a petition by Lopes, Fernandes & Co., Ltd. for a receiving order against Mary Gonsalves, the wife of J. H. Gonsalves, to whom she was married subsequently to the Married Persons Property Ordinance, 1904, under the provisions of section 3 (f) of the Insolvency Ordinance, 1900. That subsection provides that if any person has obtained or is for the time being entitled to enforce a final judgment against a debtor for any amount and, execution thereon not having been stayed, has served on him (the debtor) an insolvency notice requiring him to pay the judgment debt in accordance with the terms of the judgment or to secure or compound for it to the satisfaction of the creditor or the court, and he (the debtor) does not, within seven days after service of the notice either comply with the notice, or satisfy the court that he has a counter-claim, set off or cross demand, which

equals or exceeds the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained, then he (the debtor) commits an act of insolvency.

The petitioners here urge that they obtained a final judgment against the respondent on March 11th last in the Supreme Court; that an insolvency notice has been served on her as required by the sub-section above mentioned; that she has not complied with the terms of that notice and that she has therefore committed an act of insolvency.

Mr. Luckhoo for the respondent Gonsalves does not set up any counter-claim or cross demand but opposes the granting of the petition, first on the ground that there is no debt due by her to the petitioners, and secondly on the ground that they have not obtained a final judgment against her.

The first point which he states is the most important one I will deal with first. On February 24th last the petitioners issued a specially indorsed writ against the respondent for the sum of $955.31, being the balance of an account for goods alleged to have been sold and delivered to her in accordance with particulars set out. On that matter coming before the court, the defendant filed an affidavit of defence and asked for leave to defend. After argument leave was given to the plaintiffs to file an affidavit in reply and thereafter an order was made giving defendant leave to defend if she paid the sum of $955.31 into court within ten days. That order, dated March 11th, I will deal with more fully later. Even if it be a final judgment, however, there is no doubt on the authority cited by Mr. Luckhoo (*ex parte Lennox: in re Lennox* 16 Q.B.D. 315) that the court in its Insolvency jurisdiction has power to go behind a judgment and enquire whether the debt ever really existed, The petitioners have now led evidence to that end, and after considering that evidence and the written admissions of the respondent (although she now denies that she is indebted at all) I have no doubt that the debt is due by her to the petitioners. The documentary evidence confirms the evidence of the manager of the petitioning firm, whilst the respondent herself admits that (even if I could rely on her statement that she never authorised her husband to use her name or order anything for the shops in her name) after she discovered it she merely protested to him and to one else, but allowed goods to be ordered as before. On the evidence before me I find that a debt due by her existed, and to the sum of $955.31.

The second point I find more difficult to decide owing to the fact that whilst the English practice rules have been generally (with necessary variations owing to the non-existence locally of Masters)

followed in our local rules, the wording of the rules has been somewhat changed, whilst even the local practice does not appear settled. Is the order of March 11th a final judgment of the Court? That order is in the following terms: "Upon hearing . . . . . it is ordered that if the defendant, Mary Gonsalves, pay into court within ten days from the date of this order the sum of $955.31 she be at liberty to defend this action, but that if that sum be not so paid judgment be entered against the defendant for the amount endorsed on the writ of summons, with costs." That order is based upon the form in use in similar circumstances in English practice (see Chitty's *King's Bench Forms*, p 111), when an order is made giving leave to defend on bringing money into court or giving security therefor. The English form, however, differs in this respect in that it empowers the plaintiff to sign final judgment in default of the condition being complied with. There is no doubt that in England such an order is not a final judgment (*Standard Discount Company* v. *Otard de la Grange* 3 C.P.D. 67). And see Seton's *Forms*, Vol. I. p. 169, and the official requirements on signing judgment under Order xiv. *Annual Practice*, Vol. ii. p. 2505. But Mr. Browne has argued that under the practice in this colony the plaintiff would be entitled on this order, and on proof that the condition had not been complied with, to proceed to execution. The test is that the creditor who issues an insolvency notice must be in a position to issue execution on the judgment or order at the date of the issue of the notice (Williams' *Bankruptcy*, 12th ed., p. 22). The order is dated March 11th, the Registrar's certificate of non-payment into court is dated March 29th, and the insolvency notice April 8th. On April 8th could the petitioners issue execution on the order of March 11th? Be it noted that in this case there is no conditional order following on the default.

On consideration I have come to the conclusion that the petitioners were not entitled to issue execution on the order of March 11th, but that it requires a subsequent direction by the Court. Looking at it from every view point I am able to conceive, after considering the arguments and cases put before me and further authorities, I cannot see that it is a final judgment. I must say that under the circumstances of this case I have come to this conclusion reluctantly, but after full consideration. Local practice does not appear to be definitely settled, but some recent cases do not support Mr. Browne. If I am however to accept his argument as being sound, I think it follows that this order is all of three things: first of all a permission to defend on conditions (and we are told that that leave should only be granted when the Court is almost but not quite prepared to give judgment for the

amount claimed), secondly, an interlocutory order, and thirdly a final judgment as soon as certificate of non-compliance with the condition is filed. And that I think would be an impossible interpretation of the order as it stands. I do not see how this one order can be all these three at one and the same time. It is not an order giving judgment but one empowering judgment to be entered on failure of condition mentioned therein. It is not an absolute order but an interlocutory order upon which a final judgment may be obtained by a subsequent act, that is, it is only a step in the procedure towards final judgment (*In re a debtor*, 19 T.L.R. 152).

It is not necessary therefore to consider the further question that the order is not expressed to be payable out of the defendant's separate property, although she is a married woman, a point however which appears to be governed by the provisions of section 7 of the Insolvency Ordinance 1900, Amendment Ordinance 1913.

My decision therefore is that the judgment or order upon which the petition is based is not a final judgment of the Court. I so decide reluctantly for this reason that the petitioners can presumably still obtain the necessary final judgment and begin their petition *de novo* thus adding to the costs of the proceedings. Under the circumstances however I see no other course open me save to dismiss this petition now before me. The petition will therefore be dismissed (costs reserved for argument).

After argument in Chambers His Honour allowed costs, the petitioners consenting.

Solicitor for the petitioners, *V. Dias.*

Solicitor for the respondent, *A. V. Crane.*

SMITH *v.* MALLALIEU.

SMITH *v.* MALLALIEU.

[210 of 1921.]

1922. APRIL 3; MAY 8, 13, 31. BEFORE DE FREITAS, ACTG. J.

Immovable property—Mortgage—Property sold for taxes during absence of lessee—Judicial transport granted to purchaser—Mortgage by purchaser—Opposition by lessee—Failure to register lease—Right of opposition—Fraud or misrepresentation—Equitable relief.

An opposition action is not the proper procedure to adopt where the plaintiff desires to attack on the ground of fraud the legal title held by the defendant under a judicial transport duly passed after a valid sale at execution, unless it is alleged that the legal owner holds the property as the trustee of the opposer.

The plaintiff Joseph Smith sought an injunction to restrain the defendant from passing a first mortgage on the east half of lot TT, Upper Bent Street, Wortmanville, Georgetown, to the British Guiana Building Society on the ground that a portion of the property had been leased to him and that he had erected buildings, which were now his own property, on the leased portion of the lot. The reasons of opposition to the mortgage are sufficiently set out in the judgment below. The defence set up a title to the property unencumbered by any lease.

C. R. Browne, for the plaintiff.

E. F. Fredericks, for the defendant.

G.J. DE FREITAS, ACTG. J.: This is an action by way of oppostion for an injunction to restrain the defendant from passing a mortgage on east half lot T.T., Upper Bent Street, Wortmanville, Georgetown, to and in favour of the British Guiana Building Society, Limited, as advertised in the "Official Gazette" of the 16th April, 1921.

A preliminary objection to opposition proceedings was argued at the hearing on behalf of the defendant upon which I reserved my judgment in view of the statement by the learned counsel for the plaintiff that he would be able to establish that the defendant was in law a trustee for the plaintiff.

Having regard to the conclusion to which I have come on the merits of the action itself, it is unnecessary to deal with the objection raised beyond saying that in my opinion an opposition action is not the proper procedure to adopt where as in the present case the plaintiff desires to attack, on the ground of fraud, the legal title held by the defendant under a judicial transport duly passed after a valid sale at execution, unless it is alleged that the legal owner holds the property as the trustee of the opposer.

In the present case no such relationship has been alleged or proved. The plaintiff's remedy (if any) is a claim for unliquidated damages, which is not a valid ground for opposition proceedings.

Assuming, however, that the plaintiff is entitled to proceed by way of opposition, what are the grounds relied on? Briefly stated the material grounds are as follows:—

1. That the plaintiff acquired by purchase from one Edward George Emile a building situated at east half lot T.T., Upper Bent Street, Wortmanville, Georgetown, together with his right, title and interest in and to a portion of the said land held by the said Emile under an agreement of lease entered into between the defendant's mother, one Elizabeth Franklin, and the said Edward George Emile.

2. That the said lease was with the knowledge and consent of the lessor transferred by the said Emile to the plaintiff on the 25th January, 1921, on which day the plaintiff paid to the lessor in the presence of the defendant the sum of $12 as rent from the 1st January, 1921, to the 31st December, 1921, the receipt whereof "was made written and signed by the defendant the daughter and agent of Elizabeth Franklin and one of the heirs of her deceased father the husband of Elizabeth Franklin and one of the co-owners of the said property."

3. "The said Elizabeth Franklin and Catherine Mallalieu" (the defendant) "did not pay the taxes for the half year 1920 levied by the Mayor & Town Council of Georgetown on the said lot T.T., Wortmanville. The taxes having become overdue summation at the instance of the Town Clerk was posted upon the building of the opposer and was removed by the said Catherine Mallalieu. At the time it was so posted and removed the opposer was absent from the house and neither Catherine Mallalieu nor Elizabeth Franklin informed him of or showed him the said summation, nor did they or either of them inform the opposer that the said taxes had not been paid."

4. That the said property with all the buildings and erections thereon were sold at execution for taxes on the 28th February, 1921, and purchased by the defendant, without the plaintiffs knowledge, for the sum of $26. The defendant obtained a judicial transport for the same on the 14th March, 1921.

5. That on the 25th February the day before the plaintiff left for the gold and diamond fields the defendant, knowing that the plaintiff was unaware of the fact that the taxes were unpaid and that a levy had been made, “informed him that his gold claims and placers were being raided “and jumped and advised him to leave next day, the Saturday, to protect “them and that acting on her advice the opposer left Georgetown on the “26th February,

"1921, and was absent from the city when the property was sold as aforesaid," that the defendant in so advising the plaintiff was acting fraudulently and collusively with Elizabeth Franklin with the view of buying the property for herself in fraud of the plaintiff's rights.

The plaintiff has proved the allegations made in grounds 1, 2 and 4, but no attempt was made to substantiate the allegation in the third ground of opposition as to the posting or removal of the summation upon or from the plaintiff's building. As to the allegation contained in the fifth ground of opposition as set out above all that the plaintiff himself says in his evidence is "She (the defendant) asked me when I was leaving for the bush; I said 'I "did not know, I might leave this week; I am not feeling quite well;' she "said 'it would be better for you to protect your place, because some days "ago I read in the papers, that they were raiding up the Mazaruni.' I believe "that was so. On the 25th January, I had told her and her mother that I had "a claim in the Mazaruni district. I did not intend to leave so early but in "consequence of what she said I hurried on and left on the Saturday "morning, the 26th February, for Bartica," This conversation he said took place on the 20th February when he visited the premises. There was no proof of any collusion between Elizabeth Franklin and the defendant.

At the hearing evidence was also given by the plaintiff to the effect that when he paid his rent on the 25th January, he asked Elizabeth Franklin and the defendant whether they owed for taxes, and they replied in the negative; but this not being one of the grounds of opposition cannot be relied upon by the plaintiff (Rules of Court, Part II, Order II r.5), nor can I consider it.

The plaintiff claims, *inter alia,* "an order that the defendant is not entitled to mortgage the said property without first reserving the plaintiff's agreement of lease and his buildings and erections thereon."

Much as I should wish to order the defendant to reserve the plaintiff's building in question and to secure him his lease—for I do not in the least approve of the conduct of the defendant in refusing to give up to the plaintiff what no honourable or self-respecting person would in the circumstances disclosed in this case think of withholding from him—I cannot see how in these present proceedings and on the grounds alleged and proved, I am at liberty to do so.

The plaintiff is apparently a man in humble circumstances, and somewhat unsophisticated. He impressed me as being an exceedingly honest and straightforward witness, with no wish or inclination to exaggerate the facts of his case. He says that after the defendant advised him to return to the bush he decided to act

on her advice and in consequence left town somewhat earlier than he anticipated and without completing the medical treatment he was then undergoing. He certainly did not know that the property had been levied on for taxes. The defendant was acquainted with the plaintiff who, it seems, had worked with her husband as tributors years ago in the gold-fields; she knew he had just purchased the house from Mr. Emile and had taken over the lease, and paid a year's rent, and she most probably knew when she spoke to the plaintiff on the 20th February that the property would be sold at execution for taxes; her mother, when the plaintiff returned to town in June, advised her to give back to the plaintiff his house which she had purchased at execution sale, but she refused to do so preferring to take the fullest advantage of her bargain.

Are these facts sufficient to justify me in making the order asked for? I think not. Upon what principle of law or equity is the plaintiff entitled to the order? I know of none. The statement made by the defendant about what she had read in the papers was the plaintiff, admits, true. It is not suggested that the execution sale at the instance of the Town Clerk could be set aside, or that it was in any way illegal, and it is admitted that the plaintiff might have protected himself by having his building separately assessed for taxes and filing his agreement of lease as of record in the Deeds Registry under the provisions of the Deeds Registry Ordinance, neither of which he did. But supposing the statement was false, and that it was a fraudulent misrepresentation in the strict sense of the term, it could at most only give him a right to compensation in damages.

The learned counsel for the plaintiff has urged that this court is a court of equity and that as the plaintiff had suffered an injustice at the hands of the defendant I should grant him equitable relief by restoring the property to him. Unfortunately however for the plaintiff equity as administered in English courts of justice does not embrace so extensive a jurisdiction as to empower a court to enforce all the rights arising from natural law and justice or to disregard former rules and precedents. As was said by Lord Redesdale in *Bond* v. *Hopkins* (1 Sch. & Lef. 413, at p. 429), "there are certain principles, on which courts of equity act, which are very well settled. The cases which occur are various; but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases, as they arise, by the principles on which former cases have been decided: and may thus illustrate, or enlarge, the operation of those principles; but the principles are as fixed and certain as the principles on which the courts of common law proceed." I know of no principle or authority

which would in this ease justify my setting aside in part the judicial transport held by the defendant after a valid execution sale or declaring the defendant to be the trustee for plaintiff of the property in question.

The learned counsel for the plaintiff contends that his client is entitled to have his house and lease restored to him, because the defendant has been guilty of fraud, in that she bought the property at execution sale whereas she should with the same money have paid the taxes and have the execution withdrawn; but the obvious answer to this contention is that there was no legal obligation on her part to do so; there being no contractual relation between her and the plaintiff she owed him no duty and was legally as between herself and the plaintiff in the same position as any stranger.

It is further submitted on behalf of the plaintiff that in advising the plaintiff to return to the gold-fields when he did the defendant whilst feigning some solicitude for the plaintiff had really but one object in view, namely, to induce him to leave the city, so that he should have no opportunity of gaining information about the execution sale and that she should be able to purchase the property for herself.

There certainly seems every reason to believe that the defendant's intention was not innocent, but however much one may condemn her conduct I am unable to see on what principle it can afford the plaintiff any ground for the relief asked for.

It seems to me that the plaintiff must seek his remedy against Elizabeth Franklin who is not a party to those proceedings. He may also have an action against the defendant based upon the representation made by her that no taxes were owing, about which however I express no opinion; but in the present action, after giving the matter the most careful and anxious consideration, I have with the greatest reluctance come to the conclusion that the plaintiff is not entitled to succeed.

As I cannot for one moment assume that the defendant intends to deprive her aged mother of her interest in the property, I think she might well be advised to give effect to her mother's wish that the plaintiff's house and lease be restored to him.

Adopting the same course as taken by Mr. Justice Stirling in *Ajello* v. *Worsley* (1898) 1 Ch. at p. 283 where the successful defendant's conduct did not meet with approval of the Court I will allow the defendant no costs.

There must therefore be judgment for the defendant, with liberty however to the plaintiff to institute such other action as he may be advised against the defendant, and without prejudice to

any defence he may be advised to set up in any action for ejectment brought against him. The opposition is declared ill-founded. Each party must bear his or her own costs.

Solicitor for plaintiff. *V. Dias,* for *J. Gonsalves.*

Solicitor for defendant. *A. M. Ogle.*

JAIKARAINSINGH *v.* MOONEAH & ANR.

[183 of 1919.]

1922. MAY 26TH; JUNE 1ST. BEFORE DALTON. J.

Immovable property—Opposition to transport—Right of opposition—Advances by executor on account of estate—Attempted conveyance of property by heirs—Vesting of property on death—Deceased Persons Estates Ordinance 1909, and Civil Law of British Guiana Ordinance 1916 s. 3—Joinder of cause of action—Counter claim against executor as executor in action on claim by him personally—Order XVI. r. 1. (*f*)*—Accounts—Reply to objections—Order XXIX r. 6.— Practice.*

Claim by the plaintiff for the sum of $696.29, being an amount alleged to be due to him for moneys paid to various creditors of the estate of Jaimangalsingh, deceased, to whom the estate was indebted at the time of his death, the payments being made at the request of the executors, of whom the plaintiff was one. The claim was brought against the defendants as heirs under the will of Jaimangalsingh. Plaintiff further sought to restrain them from passing transport of certain immovable property at Novar belonging to the estate, which they had advertised to be conveyed by them to two other persons.

The defendants denied any indebtedness as alleged and counter-claimed for accounts from the plaintiff in his capacity as executor of Jaimagalsingh.

By consent, on order for an inventory and accounts was made on June 21st, 1921.

H. C. Humphrys, for the plaintiff.

J. S. McArthur, for the defendant.

DALTON, J.: Plaintiff is opposing the transport by the defendants of an undivided half in lot 21 of the cattle farm Novar. His claim is for the sum of $696.29, which he states he has paid to various creditors of the estate of Jaimangalsingh, deceased, of which estate he is executor, and whose heirs are the defendants.

The claim of the plaintiff is made personally and not in any representative capacity. The defence is that the plaintiff has in his reasons of opposition disclosed in law no right to oppose the transport. The defendants also counter-claim for accounts from plaintiff, in his capacity as executor under the provisions of Order XVI, r. 1 (f), which enables them to join a claim against him as executor with a claim made by him personally. These accounts were ordered to be taken on the matter previously coming before the court, the plaintiff consenting to the order and the plaintiff's claim together with objections to the accounts has now come up for hearing. Mr. McArthur's objection that plaintiff has disclosed no proper reason for opposition has been argued at some length.

The reasons of opposition are incorporated in the statement of claim. From those reason it is clear that plaintiff is claiming from the defendants the sum of $606.29, (being the $696.29 mentioned in the writ less $90 said to have been received by him), and that he is prepared to recognise their right to convey the property provided they first pay that sum to him. In other words he says the defendants are indebted to him or liable to pay to him the sum of $606.29 before they can convey the property. At the hearing, however, Mr. Humphrys for the plaintiff admits that his client has no claim against the defendants for the sum of $606.29 or any sum, since it represents alleged payments made on behalf of the deceased's estate and is in no way a debt or liability due from the defendants. That being so it seems to me that all merit at once is taken from his claim as it is brought. Mr. Humphrys, however, now seeks to maintain that plaintiff sues also as the executor of Jaimangalsingh, and that as such executor the property vests in him, Jaimangalsingh having died on December 14th, 1917, after the Civil Law Ordinance, 1916, became law and that on that ground the defendants have no right to deal with the property at all. It is clear that the action is not so brought; neither do the grounds of opposition include such a reason for opposing the transport. They do set out, it is true, that plaintiff was Jaimangalsingh's executor, but that is for the purpose of explaining these alleged advances by him on account of the estate of the deceased's creditors.

Mr. McArthur has argued along the lines that the plaintiff has disclosed merely an open disputed and unliquidated claim in his grounds of opposition, and he has refered me amongst others to the decision in *Austin* v. *Austin* (1921 L.R. B.G. 75), in the course of his argument. I mention that case to take the opportunity of correcting an omission in the report as it appears which has been brought to my notice. Some such words as the following —'or upon a simple contract debt or liquidated claim'—have clearly been omitted before the words 'as for example,' in the

26th and 27th lines on page 76 of the reports. In view, however, of Mr. Humphrys' admission that the plaintiff has no claim for the sum mentioned in the writ at all against the defendants, it is not necessary to consider the merits or otherwise of Mr. Mc-Arthur's objection. After the admission made the plaintiff discloses no ground in his claim to support his opposition, and therefore his claim must be dismissed.

The opposition entered will therefore be declared unfounded. That, however, does not give the defendants or decide that they have any right to convey the property in question or to deal with it as they now purport to do. I am unable to accept their counsel's argument that, in view of the provisions of the Deceased Persons' Estates Ordinance 1909, (not specifically repealed until January 1st, 1920), the provisions of Roman Dutch law respecting the vesting of property on death in the heirs remained in force until 1920, in spite of the provisions of the Civil Law Ordinance. 1916. The situation has sufficient complexities without adding to it those which would follow the acceptance of that argument. In any case the provisions of section 3 of the Civil Law Ordinance as to the alteration in the law are quite explicit. It is not suggested that the defendants had any existing rights at the time the ordinance came into force which are preserved by it, and any provision of the Deceased Persons' Estates Ordinance, 1909, or of any other ordinance inconsistent with the Civil Law Ordinance were impliedly repealed by the latter. I have no doubt that at the death of Jaimangalsingh, the provisions of the English common law applied. If he had died intestate no doubt difficulties in applying the common law might have arisen, but fortunately he died testate and appointed an executor. In that executor his property vested on his death, and not in the defendants. This also seems to be the effect of decisions in two previous cases in this court (*Transport Shewburun to Shubhagra, and Transport Bairaji to Raghubar*, 1918 L.R. B.G., 58, 59) although in the latter case the words "in his own right" in the judgment do not seem quite easy of interpretation. Possibly the husband was directed to join in the conveyance in view of his interest in the property following on his marriage in community of property. At any rate they can have no reference to any right of inheritance under the old common law based on blood relationship. Although therefore the plaintiff does not succeed in his claim, the defendants have no right to deal with the property as they seek to do.

The counter-claim remains. Mr. Humphrys has urged that if his claim should fail the counter-claim must be dismissed. He however gives no reason to support such an argument. The counter-claim is properly brought and plaintiff has consented to the order for accounts being made; the objections to them

must therefore be heard. It is true that no reply to the objections has been filed as required by Order XXIX. r. 6, as should have been done, so Mr. McArthur argues, if the requirements of the rules are to be strictly complied with. Where, however, the points at issue have been raised in the pleadings filed before the accounts, it would be superfluous to require a reply to objections which would in effect be merely a repetition of what is already set out in the pleadings; nor do I think that the rule referred to requires it. The defendants are not in any way prejudiced by the failure to deliver a formal reply to their objections which raise no new matter, where the pleadings and particulars therewith show what is really in dispute between the parties and the questions to be decided on the accounts. If however, this interpretation of the rule was held to be wrong; under the circumstances here I should allow an enlargement of time to allow a formal reply to be filed. The hearing of the counter-claim will therefore be continued, and the question of the accounts must be gone into, the claim of the plaintiff being dismissed with costs.

Solicitor for plaintiff, *Cameron & Shepherd.*

Solicitor for defendant, *R. C. V. Dinzey.*

CRESSALL *v.* GUSSAIN MARAJ.

[265 OF 1922.]

1922. JUNE 2. BEFORE DALTON, J.

Criminal law—Obeah—Obtaining money by the practice of obeah—Police trap—Passing of property in money—Summary Conviction Offences Ordinance, 1893. Amendment Ordinance 1918, s. 4 (1)

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. G. R. Reid). The defendant Gussain Maraj was charged with obtaining the sum of five dollars from Police Constable Carroll by the practice of obeah, contrary to the provisions of section 4 (1) of Ordinance 26 of 1918, He was convicted, and after admitting a previous conviction under another name, was sentenced to four months imprisonment with hard labour and also deemed a rogue and vagabond.

From this conviction he appealed. Only one ground of appeal, namely that the offence charged under section 4 (1) of the ordinance had not been proved, was argued. Section 4 (1) of the ordinance is as follows:—

"4 (1). Every person who, by the practice or pretended practice of obeah or by any occult means or by any assumption of supernatural power or knowledge or by any pretended love philtre or medicine shall intimidate or attempt to intimidate or influence any person or shall obtain or endeavour to obtain any chattel, money or valuable security from any other person, or shall pretend to discover any lost or stolen goods, or the person who stole the same, or to inflict any disease, loss, damage or personal injury to or upon any other person, or to restore any other person to health or to cause or divest affection; . . . shall on conviction . . . be deemed a rogue and vagabond and be imprisoned . . ."

Obeah is defined as 'every pretended assumption of supernatural power or knowledge whatever for fraudulent or illicit purposes or for gain or for the injury of any person.'

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

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

DALTON, J.: The only ground of appeal argued in this case is that the appellant committed no offence under the section in question as the evidence discloses that he obtained no money from the constables who trapped him, whatever foolish practices he may have carried out. The argument was based on the ground that no property in the $5 which was handed by the witness Carroll to appellant passed to him and therefore on the analogy of a charge

of obtaining money by false pretences, the appellant had in fact obtained nothing from the witness. The witnesses had not been defrauded but parted with the $5 willingly knowing they were entrapping the appellant and that they would get it back again. But even if this argument is sound, there is nothing in the evidence to support it. The facts as proved to the magistrate's satisfaction are very clear and there is ample evidence to support his findings. The two constables went to appellant, who apparently had other customers as well, and Carroll asked to be freed of some imaginary grievance and also to be made secure in his post. Appellant agreed to do what was necessary and asked for $5 and for some rum. The constables then went for the $5, returned, and handed it to appellant, who clearly from his own acts received it in payment for his services. He gave the magistrate an account of his possession of it which the former did not believe. His acts deposed to clearly come within the definition of 'obeah' as given in the Ordinance, and by the practice of 'obeah' he obtained money from the witness Carroll. All the elements going up to make the offence are therefore present, When Carroll paid the money there is no evidence of what was in his mind as regards the money, but it is in my opinion quite immaterial. What is material is what was in the mind of the appellant, and there is no doubt, on the finding of the magistrate, as to that.

The only matter calling for further remark is the employment of a police trap to catch the appellant. Unfortunately the use of a trap is sometimes necessary. In these cases it is highly improbable that the breaches of the law can be detected otherwise. The kinds of people who resort to these places are seldom likely to come forward themselves being doubtless prevented by shame or fear. What it is important however to observe in these cases has been observed by the magistrate. He notes that when a trap is employed, the case must be approached and the evidence weighed with great caution. He has done so, and comes to the conclusion that Blenman and Carroll are speaking the truth.

The appeal is therefore dismissed and the conviction affirmed.

Appeal dismissed.

POLLARD *v.* CALLENDER.

[238 OF 1922.]

1922. MAY 28; JUNE 2. BEFORE BERKELEY, ACTG. C.J.

Magistrate—Conviction—Amendment of conviction—Imprisonment for six instead of three months—Excess of jurisdiction—Power to amend.

Appeal from a decision of the stipendiary magistrate of the Georgetown judicial district (Mr. G. R. Reid). The defendant Callender was charged with contravening the provisions of section 4 (a) of the Gambling Prevention Ordinance, 1902, the fiat of the Attorney General having been duly obtained. He pleaded guilty and was sentenced to pay a fine of $240 or in default of payment, to imprisonment for three months with hard labour. In court a sentence of six months' imprisonment had been imposed, the magistrate not being empowered under the circumstances to impose a sentence of more than three months and this was subsequently changed by the magistrate to three months. The defendant appealed on the ground that the magistrate had no power to alter his sentence and that he had exceeded his jurisdiction. Further necessary facts are set out in the judgment below.

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

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

BERKELEY, ACTG. C.J.: This appeal is from the decision of the stipendiary magistrate of the Georgetown judicial district (Mr. G. R. Reid), who convicted the appellant of using his house as a common gaming house.

The reasons of appeal are (1) that the decision is erroneous in point of law, and (2) that the Court has exceeded its jurisdiction. The grounds stated are (a) that he had not the power to impose the penalty of $240, or six months' hard labour, (b) that he had not the power to amend his judgment and commitment away from the precincts of the court; (c) that he refused to state in his decision when and where he altered his illegal judgment; and (d) that he had not the power to alter his commitment and judgment after the rising of the court.

The appellant pleaded guilty and was ordered to pay a fine of $240, and in default of payment, to be imprisoned for six months with hard labour. About 3.30 p.m. on the same day, after the magistrate had left the court and before any formal order had been made out and before the warrant of commitment had been handed to the police, the clerk of court drew the magistrate's attention to the mistake, viz., that he had written "six months'

hard labour" instead of "three months' hard labour," and he corrected the warrant of commitment which was handed to the police before 4 p.m. He also corrected at the same time both the entry in his book and the endorsement on the jacket.

Counsel for appellant admits that the amendment could have been made during the sitting of the court but submits that the magistrate exceeded his jurisdiction when he made it after leaving the court.

Justices are allowed to substitute an amended conviction for a defective one until the conviction has been filed with the clerk of the peace (Coleridge, C.J., in *ex parte Kenyon* 45 J.P., 303). In the present case the conviction was amended before the warrant was handed to the police and as the clerk discovered the mistake it would seem not to have been filed. In any case the appellant has not shown that it was filed (*ex parte Kenyon*). In *Rex* v. *Tabrum* and *Quayle* (71 J.P. 325) a rule *nisi* was obtained on the ground *inter alia* that the conviction was bad on the face of it and void by reason of the same not being under the seals of the justices purporting to make the same. Alverstone, L.C.J., Darling and Phillimore, JJ., concurring, said: "I do not see why the hand of this court should be stayed to put that matter right because a conviction not right in form has been lodged with the clerk of the peace. We ought to hold that under section 7 of the Quarter Sessions Act 1849, [our section 26 of Ordinance 13 of 1893,] we have power to direct the magistrates to draw up a proper judgment."

Again in *Regina* v. *Walker* (45 J.P. 682,) where the appellant was convicted for sending a diseased cow by railway and fined £20, and in default of payment to be imprisoned for three months—whereas the justices under the English scale could only order two months where the fine was £20—Quarter Sessions considered that it was due to some mistake and amended the conviction to two months. They stated a case for the opinion of the High Court, which held that Quarter Sessions rightly amended the conviction. Lindley, J., said: "This is a case where expense had been incurred in prosecuting the appellant, and there would be a failure of justice if there was no mode of rectifying the mistake, and the 12 and 13 Vict., c. 45, s 7, gives power of amendment in certain circumstances. I think that within the meaning of that section there was a mistake in drawing up the conviction." In that case the learned judge referred to the mistake as the "blunder of the clerk." In the present case it is the blunder of the magistrate, who evidently entered the term of imprisonment without reference to the scale under Ordinance 12 of 1893, section 37. As I said at the hearing of this appeal, if the magistrate had not amended and it had come to this court on

appeal, this court would have amended under section 26 of the Magistrates' Decisions (Appeals) Ordinance which corresponds with 12 and 13 Vict., c. 45., s. 7.

There remains to be considered the legality of the amendment as made outside the precincts of the court. The magistrate has full jurisdiction within his district and as he can issue a warrant of arrest or sign a commitment at his house or club, so I see nothing illegal in his amending at either of those places or anywhere else a conviction in order to correct a mistake and to com-ply with the scale of imprisonment as laid down in the ordinance, provided always that no real grievance is caused to the convicted person.

The appellant pleaded guilty and in the absence of any evidence which would warrant the imposition of a fine of $240, I am disposed to agree with counsel that it seems excessive. It is therefore reduced to $120. The conviction is confirmed with cost, appellant to pay $120, and in default of payment to be imprisoned for two months with hard labour.

Appeal dismissed. Sentence reduced.

BARCELLOS & ORS *v.* QUAIL.

BARCELLOS & ORS. *v.* QUAIL.

[279 OF 1921.]

1922. MARCH 28; MAY 15, 19, 20; JUNE 17,

BEFORE DE FREITAS, ACTING J.

Will—Construction—Intention of testatrix, how ascertained—Evidence—Declarations of intention and instructions for earlier wills—Admissibility—Immovable property—Opposition to transport—Action by legatees against executor—Costs.

The plaintiffs Manuel Marques Barcellos, Antonio Marques Barcellos, Jnr., and Rosa Julia Quail claimed an injunction by means of an opposition suit, to restrain the defendant Joseph Alexander Quail in his capacity as executor of Maria Julia Gomes, late Gonsalves, born Quail, deceased, from conveying by transport one undivided third part in the east one third of lot 85, also known as lot 11, Kingston, Georgetown, with one building thereon to the residuary legatees under the will, on the ground that the property in question was included in a devise to them, the opposers. The necessary facts and questions involved in the construction of the will are fully set out in the judgment below.

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

E. F. Fredericks, for the defendant.

DE FREITAS, ACTG. J.: This case raises an interesting and somewhat difficult point of interpretation of a will, but I feel bound at the very outset to repeat what I stated at the hearing, that it is very much to be regretted, having regard to the small value of the property involved, that the parties to this action, who are all related to each other, did not see the advisability of adopting a more conciliatory attitude and settling the matter without recourse to legal proceedings. The two first named plaintiffs are the nephews, and the third the sister, of Maria Julia Gomes (hereinafter referred to as 'the testatrix') who died on the 29th day of October, 1920, leaving a last will and testament dated the 18th day of October, 1920. The defendant is one of the executors appointed under the said will and the brother of the testatrix. Probate was granted to him on the 7th December, 1920.

By paragraph 'sixteenthly' of the said will the testatrix devised as follows:—"I leave and bequeath lots numbers 10 and 77 with the buildings and erections thereon situate at Kingston district in the city of Georgetown to my nephews Manoel Marques Barcellos and Antonio Marques Barcellos and my sister Rosa Julia Quail share and share alike."

And by paragraph 'eighteenthly' "all other property whether movable or immovable of which I might die possessed of or entitled to and not herein mentioned. I leave and bequeath the same to be divided equally between my sister Rosa Julia Quail, my brother Joseph Alexander Quail, and my brother-in-law Antonio Marques Barcellos, senior, and his children who may be alive at the time of my death."

The testatrix at the time of her death was possessed of a property described in the transport thereof dated the 26th day of February 1912 (exhibit P) as "lot number 77, also known as lot number 10 situate in Kingston, city of Georgetown, county of Demerara, with all the buildings and erections thereon," and of an undivided interest in the east one-third of the adjoining lot described in another transport of the same date (exhibit D) as "an undivided half part or share of and in east one-third lot number 85 also known as 11 in Kingston district in the city of Georgetown, in the county of Demerara and colony of British Guiana with one building used as a stable." The two properties were purchased by her under separate transports in 1912.

The eastern portion of lot 10 or 77 in conjunction with the south half of the eastern one-third of lot 11 or 85 was used and occupied by the testatrix from the time of her purchase to the date of her death as her residence, the dwelling house being situated on lot 10 or 77 and the said portion of lot 11 or 85 forming part of the garden in the front of the building and having a stable at the back thereof. These two portions of land with the dwelling house and stable thereon form one property and are enclosed with zinc palings on the south, west and north sides and with a wooden paling on the east side. The entrance to this property is on the eastern side of lot 77 or 10 and on the western side of Fort street. A plan prepared by Mr. Charles Leonard Ridley, sworn land surveyor, (exhibit H) has been tendered in evidence by the plaintiffs, which shows the exact situation of the buildings on the said two portions of land and of the boundaries of the curtilage. There were several tenement buildings on the western portion of lot 10 or 77 which were let to sundry tenants. This portion was separated from the eastern portion by a paling.

Lot 77 or 10, and the undivided half of the eastern one-third of lot 85 or 11 were separately assessed for municipal taxation and the taxes were paid every year by the testatrix who received a separate receipt in respect of each of the properties. The entrance to the western portion of lot 77 or 10 was from Water street.

The defendant as one of the executors under the testatrix's will has advertised in the Official Gazette a transport of the undivided half part or share of and in east one-third lot number 85

also known as 11 in Kingston district to be passed to and in favour of the residuary devises under the residuary clause of the said will.

The plaintiffs have by this action opposed the passing of the said transport on the ground that the said property was bequeathed to them under paragraph 'sixteenthly' of the said will as above set out, contending that it was included in and formed part of the property mentioned and described in the said paragraph as lots numbers 10 and 77 situate in Kingston district and was incorrectly described in the said will as lot 77.

The question for my decision is whether, on the true construction of the said will, the property in respect of which this opposition action has been brought passes to the plaintiffs as the specific legatees of lots numbers 10 and 77 or to the residuary legatees to and in whose favour the defendant proposes to pass transport.

The case has been ably argued and I am very much indebted to Mr. Philip Browne and Mr. Fredericks for their valuable assistance.

Several cases have been cited all of which I have carefully considered with many others not referred to by counsel.

The principles as established by the authorities on the subject are clear enough, but their application is not always free from difficulty and it is not surprising therefore that it should be found impossible or at least difficult to reconcile many of the cases bearing on the question involved in this action. At the hearing I received the evidence offered by the plaintiffs as to the contents of previous wills made by the testatrix (the last will being the third will) and of instructions given to William Faria who prepared the second will and of declarations made by the testatrix in her lifetime. No objection was taken to Faria's evidence, but objection was subsequently taken to all evidence of declarations made by the testatrix as to her intention to leave the Kingston property to her nephews or to her nephews and sister. I received all the evidence reserving the question as to its admissibility.

On the whole of the evidence taken, if admissible, it seems to me that the testatrix may have intended that the small portion of land now in question should form part of the bequest made by her to the plaintiffs, for it is difficult to understand why she should wish to divorce that portion of land from the adjoining lot 10 or 77 when she herself had always used and occupied them together in her lifetime as one property, and had evidently thought it so necessary for the proper and convenient enjoyment and occupation of the dwelling house situate on lot 10, that when she was negotiating in 1912 for the purchase of the property, she refused to purchase lot 10 or 77 unless she could also acquire

the small portion of lot 85 now in dispute which was at that time also in the occupation of the owner of lot 10 or 77, although it did not belong to him. But it is not for me to speculate upon what may or may not have been in the testatrix's mind. *Scale* v. *Rawlins* (1892 A.C. 342).

It becomes therefore necessary to consider how the testatrix's intention is to be ascertained and whether the evidence of declarations of intention made by her and of instructions given for her former will and other circumstances is admissible.

In Doe on the demise of *Hiscocks* v. *Hiscocks* (5 M and W. 363; 52 R.R. 748) Lord Abinger, C.B. says:—"The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances . . . . . All the facts and circumstances therefore respecting persons or property, to which the will relates are undoubtedly legitimate and often necessary, to enable us to understand the meaning and application of his words But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity or to give some effect to expressions that are unmeaning or ambiguous."

"Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will) the testator intended to express. . . It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon the plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will."

In *Doe d. Tyrrell v. Lyford* (1816) 16 R.R. 537, 4 M. and S. 550, Lord Ellenborough, C.J., in the course of his judgment said " . . .If there is no latent ambiguity, I cannot see any necessity to look beyond the terms of the will in order to give it a wider range. The argument of inconvenience arising from the separa-

tion of the estate would lead into much too wide a field," and in the judgment of Le Blanc, J., there appears the following passage: "It may very possibly be that this testator intended to give something different from that which the Court is bound to say he meant upon the construction of this will. But it is better that known established rules should be abided by, than that we should admit parol evidence, where it is not within the range of decided cases, and thereby incur the hazard of overturning ancient landmarks . . . . . Now the rule is clear, that if there be a patent ambiguity, that is one which appears upon the will itself, it must be determined on the will, and parol evidence cannot be admitted to explain it; but where it is a latent ambiguity, that is, where it seems certain enough upon the will, but the ambiguity is raised by some extrinsic matter, there parol evidence may be received in order to explain that which is made doubtful by parol."

In *Doe d. Gore* v. *Langton* (2 B. and Ad. 680) Lord Tenterden, C.J., at p. 693, makes a similar observation. After saying that the extrinsic facts in the case left no room for doubt that the testator intended his newly acquired property to pass by his will as part of the Barrow estate, he adds "but nevertheless it cannot pass unless that meaning can be collected from the will itself."

In *Charter* v. *Charter* (1874) L.R. 7 H.L. at 376 the same principle is laid down as to declarations of intention by testators, although the noble Lords were divided in their opinion as to the admissibility of other evidence. At page 376 Lord Hatherley is reported as follows: "I think the learned judge miscarried in admitting evidence of declarations of intention by the testator. Such evidence can only be given to distinguish between two subjects or objects of a gift bearing the same description, the will being in itself clear, but the latest ambiguity being disclosed by evidence *dehors* the instrument," and at page 377 the Lord Chancellor (Lord Cairns) says: "The only case in which evidence of this kind can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons or to two things."

In *re Ray*; *Cant* v. *Johnstone* (1916) 114 L.T. 688 Sargant J. lays down that "the general rule is quite clear that extrinsic evidence of a testator's intention is only admissible to identify the subject matter or the person with the description in the will where that description is equivocal, that is, equally applicable to two or more subject matters or two or more persons claiming to take."

And lastly in *Scale* v. *Rawlins* (1892) A.C. 342, Lord Halsbury, L.C. says: "I am not aware of any authority which would lead your lordships to come to the conclusion that, because the testator

had at some time or other the intention in his mind to give this property to the person in question, you are justified in saying that he has done so by the instrument which he has executed." And Lord Watson: "We cannot give effect to any intention which is not expressed or plainly implied in the language of his will."

The principles therefore to be gathered from these and many other cases on the subject are, for the purpose of this action, (1) that evidence of the facts and circumstances relating to the subject or object of a gift may always be given and is admissible for the purpose of identity; (2) that evidence or declarations of intention by the testator or of instructions for the will, or of other like circumstances is only admissible when there is a latent ambiguity and there are two or more objects or subjects to which the description is 'equally' though not necessarily 'completely' applicable; and (3) that the testator's intention must be ascertained from the language used either expressly or plainly implied.

What then is the position in the present case? The testatrix bequeathed lots Nos. 10 and 77, but from the evidence of the facts respecting her property, it is ascertained that there are not two lots bearing the respective numbers of 10 and 77, but only one numbered 77, and also known by the number 10; and there was evidence which in my opinion was admissible, to show that the western portion of the lot which was let to tenants was known as lot 10, and the eastern portion on which the dwelling house stood was known as lot 77. The very evidence that raises the latent ambiguity, if ambiguity it be and not a mere error in description, at once explains it, and it does not therefore require any argument to see that without any doubt the words "lots numbers 10 and 77" mean and can only mean the same thing as "lot number 10 or 77" that being already the testator's intention.

It is contended, however, on behalf of the plaintiffs that there being a latent ambiguity it is competent to them to show by evidence of the declarations made by the testatrix in her lifetime to the effect that she intended to leave the Kingston property to them and by the evidence of instructions given for the former will which purports to explain how the property came to be described in the manner appearing in the will and by evidence of the testatrix's occupation of the property, that the testatrix intended by the bequest of lots 10 and 77 to give the plaintiffs also the small portion of land which forms the subject of this action, and they maintained that she did in fact do so.

Whilst I am bound to confess that I was much impressed, though not convinced, by Mr. Browne's argument on this point I have after a very careful consideration of the authorities on the subject been forced to the conclusion that to yield to his submission would be in direct conflict with the principles above enun-

ciated, and that I must interpret the bequest without reference to any such extrinsic evidence as suggested. The bequest, as I have said, is of lot 10 and 77, Kingston district, and there is a specific piece of land known as lot 77 or 10 in Kingston district, the boundaries of which are ascertainable by reference to the chart of the town from which the plaintiff's own surveyor. Mr. Ridley, obtained the data for the preparation of his plan, exhibit H. There therefore exists an appropriate subject to satisfy the bequest which answers to the description in the will strictly and literally construed, and evidence cannot be admitted to show that the testatrix really intended that lot 77 or 10 should include another portion of land distinct and apart from the lot mentioned.

In Jarman on *Wills,* Vol. 1. page 517, there appears the following note (0) which is very opposite "if there is an object or subject which correctly answers the description in the will, parol evidence is not admissible to show that the gift was intended to include another object or subject which it does not accurately describe; evidence of intention was rejected on this ground in *Horwood* v. *Griffith,* 4 D. M. and G. 700."

The contention of the learned counsel would be sound if the bequest had been for instance in this form: "I leave and bequeath my house (or my house and premises, or the house I live in) situate at lot 77 or 10" or in such other terms as to bring the bequest within the class of cases exemplified by *Mocatta* v. *Mocatta,* 49 L.T. 620; *Doe d. Clements* v. *Collins* (1788), 1 R. R. 529; 2 T. R. 502; *Spencer* v. *Willis* (1911 2 Ch. 563; *In re Champion* (1893 1 Ch. 101), and as explained in *Steele* v. *Mid. Railway Company* (1866 L.R. 1 Ch. Ap. at pp. 289-291).

In Jarman on *Wills* (6th ed.), vol. 2, page 1,254, the learned author there says: "It has been adjudged too that under a devise of buildings in a specified street, houses situate in a lane contiguous to, and opening into, that street, pass for want of a subject more nearly answering to the description." See *Doe d. Humphrys* v. *Roberts* 5 B and Ald. 407, where the devise was of the dwelling-house in 'High street. . . . and all and every his buildings and hereditaments in the same street.' There were no other buildings in the same street, but there were two cottages in a lane behind the house, the entrance to which was from High street. The Court held that the cottages passed under the devise for the reason just given.

The present case is in my opinion quite different from the cases last mentioned. Nor is it similar to *Ricketts* v. *Turquand* (1847 1 H. L. C, 472) relied on by Mr. Browne.In that case the words of the devise are these: "As it is my wish and desire that all my estate in Shropshire, called Ashford Hall, should

be sold, I do therefore give and devise the same unto my son Thomas Bourke Ricketts, &c, in trust to sell and dispose of the same." Obviously, evidence had to be admitted to show what the estate in Shropshire was which the testator called "Ashford Hall" as said by Lord Campbell: "it is not a case in which the question arises whether evidence shall be admitted to show the natural meaning of words which are in the will."

It should be also observed that the legal title of the portion of land situate in lot 85 or 10 which was occupied by testatrix in her lifetime was not vested in her, and unless a prescriptive title has been acquired (of which there is no evidence) her estate cannot claim that specific portion of land. Her title was for an undivided half in the east one-third. Assuming, therefore, for the sake of argument that the testatrix did intend to bequeath that portion of land with lot 77 or 10, her wish could not be given effect to without the intervention of the proprietor or proprietors of the other undivided half of the east one-third.

One mode of testing the questions raised in this action seems to me to be this; supposing the testatrix was to pass a mortgage (as indeed she did once) on lot 77 or 10, Kingston, could the mortgagee claim to have a right of preference under that mortgage on the undivided half of the east one-third of lot 85 or 11, Kingston? I cannot conceive any doubt as to the answer being in the negative. And if by some mistake the property mortgaged, *i.e.*, lot 77 or 10 was described as lots numbers 10 and 77 the result would in my opinion be the same.

In my opinion, therefore, the intention of the testatrix to be gathered from the will with respect to the bequest of lots 10 and 77 is to give and bequeath to the plaintiffs lot 77 or 10, Kingston, with the buildings and erections thereon, and that alone; and the portion of land in lot 85, the subject of this opposition action, passes to the residuary legatees under the residuary clause.

It is unnecessary to consider the question of estoppel raised by the defendants, but in my opinion the case of *Ricketts* v. *Turquand* (*supra*) is an authority against the defendant's contention on that point.

The question of costs remains now to be considered. Without going into the evidence of the feelings of recrimination that unfortunately seem to exist between the defendant and at least one of the plaintiffs, I am strongly of the opinion that the defend- ant had no right to launch the estate into the expenses involved in a law-suit, and that from the moment he learned that the plaintiffs claimed as part of their legacy the property he was attempting to transport to the residuary legatees ins duty was at once to withdraw the advertisement of transport and approach

the Court for directions, and not, as he did, to allow the opposition to be entered and to let the action proceed. I will therefore not allow him his costs out of the estate.

On the other hand I cannot exonerate the plaintiffs from all blame in the matter.

The plaintiff Manoel Marques Barcellos and Rosa Julia Quail had approved to a great extent of all that the defendant had done in connection with the realisation of the estate by him and actually joined in the application by the executor for directions as to his power of sale under the will, and supported the application by their joint affidavit dated 7th March, 1921; and the plaintiff Antonio Marques Barcellos has, it seems to me, been greatly instrumental in creating unnecessary ill-feeling between the parties. They, too, could very well have applied to the Court for directions or at least have suggested or requested the defendant to do so.

Under these circumstances I think that the proper order should be that each party should bear his own costs, without charge to the estate.

There will therefore be judgement for the defendant without costs and the opposition is declared bad and unfounded.

Solicitor for the plaintiffs: *R. C. V. Dinzey.*

Solicitor for the defendant: *J. Gonsalves.*

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