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REPORTED IN THIS VOLUME

OF

LAW REPORTS.

COMPILED BY:

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ACCIDENTAL DEATHS AND INJURIES TO WORKMEN.

Master and servant—Doctrine of common employment—Employers Liability Act, 1880, section 1—"whilst in the exercise of such superintendence"—"Charge or control"—Accidental Deaths and Workmen's Injuries Ordinance No. 21 of 1916, sections 9 (2) and 5.

The superintendence contemplated by proviso 2 of section 9 of Ordinance No. 21 of 1916 is that which is exercised over other men, and not over inanimate objects.

A man cannot be said to "superintend" a locomotive.

Where a foreman of a gang of his own accord drove a locomotive and an accident happened while he was so driving. *Held*, that the accident did not happen at a time when he was in the exercise of the superintendence entrusted to him. *And further*, that he did not have the "charge or control" over it within the meaning of proviso 5 of section 9 of Ordinance No. 21 of 1916 since he did not have general charge over it.

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By section 26 (1) of the Income Tax Ordinance 1921 of Grenada a person is entitled to appeal from an assessment on giving notice in writing to the Assessment Committee within 30 days after the date of the notice of assessment. O's assessment was dated 16th September, 1921. The Appeal Committee was not appointed until the 25th October, 1921, that is to say, not until the time for appealing had expired. O. gave notice of his appeal to the Assessment Committee on the 14th October, 1921.

Held, that as the Appeal Committee was not in existence at the time when O. gave his notice of appeal (nor at any time within the period prescribed for making an appeal) O. did all that was possible for him to do and that his appeal was a legal and valid one. The Ordinance could not possibly be construed as meaning that, if the Appeal Committee were not appointed within the time prescribed for appeal, then such time should run from the date of the appointment of the Committee and not from the date of the Assessment.

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Held, that as the Warden was not satisfied as to the ownership of the parcel of land he was justified in inserting the name of C. in the assessment list inasmuch as C. was a tenant and occupier,

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In Saint Vincent the Attorney General, by virtue of his office can practice as a barrister and as a solicitor in the Supreme Court.

DACOSTA *v.* SMITH. [W.I.C.A.]

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S. consulted F., a barrister, with reference to the filing of a writ in the Supreme Court against D. S. on a promissory note for an amount exceeding \$250. F. requested V., a solicitor, to act as solicitor in the matter. S. signed the necessary authority in favour of V. to act as his solicitor. All the papers filed in the action were typed by F.'s clerk or on F.'s typewriter. V. received for disbursements \$10 which F. had received from S. He never enquired of S. as to the costs, but spoke to F. about them who promised to write S. and he did write him about them. *Held*, that F. acted as a barrister and solicitor so far as was legally possible, and that he must be dealt with as if he were S.'s solicitor.

On the 20th April the writ in the action was filed by V., and on the 13th May judgment was obtained against D. S. At this time the spirit licence of D. S. had been taken in execution at the instance of other creditors, to wit, F. & G. Ltd. and the sale was advertised for the 22nd May. On the 17th May instructions were given by V. to levy on the surplus proceeds of the sale in satisfaction of the judgment in *S. v. D.S.* V. attended the sale and had his bill of costs with him. F. was present; he bid for the licence, purchased it in his wife's name and paid for it by a cheque on his own banking account. D. S. had no other property which could be levied upon. *Held*, that F. had committed a breach of his duty towards S. in buying the licence for his wife and not for his client S., that it could not possibly be said that the proper inference to be drawn from the facts and circumstances was that the relationship of solicitor and client had ceased on the 13th May, 1922, and it was clear that the relationship of Solicitor and client between F. and S. was in full force on the 22nd May when the sale took place.

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

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Apart from the Bills of Exchange Ordinance No. 13 of 1891, section 57, bills of exchange and promissory notes bear interest from the time of maturity.

MAW, SON & SONS, LTD., *v.* SCOTTS, LTD. [Douglass. J.] 48

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Where a promissory note is insufficiently stamped, the holder may sue the maker on the original consideration.

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If a bill or note be taken in respect of a debt and nothing be said, the legal effect of the transaction is that the original debt remains, but the remedy is suspended till the maturity of the instrument in the hands of the creditor. And the remedy is equally suspended if the bill or note be given not by the debtor but by a stranger.

Where a negotiable instrument is taken in respect of a debt and nothing is said, and the creditor sues on the original consideration, the onus is on the debtor to prove that the creditor accepted the bill or note either (*a*) in absolute satisfaction of the debt due to him or (*b*) as a conditional payment only, and to prove its terms.

ALLEN *v.* ROYAL BANK OF CANADA. [P. C] 279

BILL OF SALE.

Notarially executed—Whether it has the force and effect of a deed in England—Civil Law of British Guiana Ordinance No. 15 of 1916, section 14—Bills of Sale Ordinance No. 22 of 1916, Schedule thereto.

By section 14 of Ordinance No. 15 of 1916 it is provided that where by the English common law or *by any Ordinance* or other statute now or hereafter applying to the colony any matter is

required to be evidenced by a deed, a document notarially executed shall be held to be as valid and effectual for all such purposes as if sealed and delivered as a deed.

A bill of sale was notarially executed.

Under the Bills of Sale Ordinance No. 22 of 1916 the sealing of a bill of sale is not a condition precedent to its validity. There is no provision as to sealing.

Held, that a bill of sale notarially executed has not the same force and effect as a document under seal.

CURTIS, CAMPBELL & Co. v. JOHN DODDS. [Douglass, J.] 4

In this colony a bill of sale cannot be regarded as a deed inasmuch as it does not purport to be sealed and delivered as such.

CURTIS, CAMPBELL & Co. v. JOHN DODDS. [Berkeley, J.] 189

Notarially executed—Whether higher security than a promissory note

A bill of sale notarially executed is not a security of a higher degree than a promissory note.

CURTIS, CAMPBELL & Co. v. JOHN DODDS. [Douglass, J.] 4

A promissory note and a bill of sale are both simple contract debts.

CURTIS, CAMPBELL & Co. v. JOHN DODDS. [Berkeley, J.] 189

BREACH OF CONTRACT.

Sale of land—Mistake as to area—Not induced by vendor—Purchaser in possession of area intended to be bought—Legal title for less—Executed contract—Whether any grounds for rescission—Damages.

See SALE OF LAND, DAMAGES.

COMMUNITY OF PROPERTY.

Dissolution of—Divorce.

See DIVORCE.

When costs of an action a charge on joint estate—Where it was reasonable to defend action.

See CONSTRUCTION.

Will—Husband and wife—Married in community—Whether a testator intended to deal with his half of the joint estate or with the whole—Presumption that testator dealt only with his share—Contents of will to be read as a whole.

In re BARCLAY, PETITION OF STULL. [Major. C.J.] 80
and see CONSTRUCTION AND HUSBAND AND WIFE.

Husband and wife—Community of property—Aspects of—Interest of wife during marriage—Vested interest

By marriage in community a wife acquires a vested estate or interest in behalf of the joint property of her husband and herself.

In re BARCLAY, PETITION OF STULL. [Major. C.J.] 81

Husband and wife—Death of husband—Funeral expenses—Whether payable out of the joint estate.

The funeral expenses of a husband married in community are payable out of his share of the property and not out of the joint estate.

MOHABEER *v.* BISMILLA, *et al.* [Douglass J.] 28

CONSTRUCTION.

Corporations — Religious or secular — Religious or other corporate body—Commercial Code of St. Lucia, 1916, ss 315, 326—Meaning of 'or'—To be construed disjunctively and not as implying similarity—Except where the word 'similar' or some equivalent expression is added —Interpretation Ordinance 1916 (Revision) No. 51, section 4 (33).

SAINT LUCIA.

DAVID GRAHAM AND COMPANY, LTD., *v.* FRANK [W.I.C.A.] 258

Order of Court—Strict construction operating to the prejudice of innocent parties—Equitable construction—Order as to costs—Whether the plaintiffs' costs should be paid out of the joint estate or out of her husband's share in the community—No provision in order for payment out of joint estate—Two defendants, one of them being a nominal party—Costs to be borne by the defendants—Possibility that, if asked for, costs would have been ordered out of joint estate—Appeal from order of judge of first instance—Costs of appeal not payable out of joint estate— Appeal unnecessary.

In 1889 the plaintiff was married in community of goods to her husband who died on the 17th January, 1921, and appointed

the defendant B. as his executrix, and devised and bequeathed all his property to his two illegitimate sons, Joseph M. and John ML. Probate was granted to B. At the time of the husband's death there was a sum of \$7,062.61 on deposit with Smith Bros & Co., Ltd., the second defendant. M. instituted an action against B. claiming an account and delivery to her of one-half of the movable and immovable property of her husband at the time of his death. She also claimed an injunction against the second defendant restraining the company from parting with the sum in its possession. After entering appearance, the company stated that they were willing to abide by whatever order the Court might make. The action was heard before Dalton, J. He gave judgment on the 6th May, 1922, for the plaintiff and restrained the company from parting with the moneys on deposit with them until the accounts were taken when it would be decided to whom they really belonged. He also ordered that the defendants should bear the costs of the action. B. appealed to the West Indian Court of Appeal when it was ordered that the appeal be dismissed with costs. *Held*, that the Court would construe the order as to costs in an equitable manner and avoid the possibility of an innocent and uninterested party, to wit, the second named defendant, having to pay the costs by construing the order as if it had contained the words that the costs were to be paid out of the estate in community.

The costs of the defendant B. in the Court below and in the West Indian Court of Appeal amounted to \$2,000. In the Court below they were \$1,000. *Held*, that the costs in the Court below were properly chargeable against the estate in community as she was justified in defending the action inasmuch as the issues raised, to wit, the effect of domicile, or want of it on the law of community of property, and whether the community continued in spite of the wife having left her husband shortly after her marriage in 1889 and lived with another man, had to be decided in order to enable her to prepare proper accounts. But however she should have been satisfied with the judgment of Dalton, J. and her appeal costs would not be a charge on the joint estate.

MOHABIR v. BISMILLA, *et al.* [Douglass, J.]

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Held, reversing the decision of Douglass, J., that Dalton, J., certainly did not mean, and he could not have meant, that the half share to which the plaintiff had proved her right should be diminished by extraction therefrom of the costs obtained in the action: and that the costs of the action must be paid out of the half share of the deceased in the community and not out of the joint estate.

MOHABIR v. BISMILLA, *et al.* [W.I.C.A.]

245,246

Will—Whether a testator intended to deal with his half of joint estate or with the whole—Husband and wife—Marriage in community—Presumption that testator dealt only with his share—Will to be read as a whole.

Whether a testator has intended to dispose of the whole of the joint property of the communion, or only his half share thereof is to be determined, firstly, on the initial presumption that he intended to effect the latter disposition, not the former, a presumption that can be displaced only by clear evidence, and secondly, on an examination of the extents of the will read as a whole.

In re BARCLAY, PETITION OF STULL. [Major, C.J.] 82, 83

CONTEMPT OF COURT.

Attachment—Defective notice of motion and affidavits—Rule nisi—Whether a single judge has jurisdiction to grant—Contempt of Court Ordinance. 1919, section 5—Supreme Court Ordinance, 1915, ss. 3 (2), 5 (1) and 25—Judicature Act, 1873, section 40—Judicature Act, 1876, section 17—Judicature Act, 1884—Costs.

An application was made to the Supreme Court for an order that H. A. B. do show cause against attachment for criminal contempt, wherein the notice of motion and supporting affidavits were entitled "the King against Henry Aaron Britton," the application was made to a single judge. A rule nisi was granted which was similarly intitled. On the return of the rule nisi it was objected (a) that so to intitle the proceedings at that stage constituted an incurable defect and was fatal; (b) that the practice and procedure in England on a like application governed the proceedings, and there was no jurisdiction in a single judge to grant the rule. *Held*, that the objections were good and that the rule must be discharged.

HENRY AARON BRITTON. [Major, C.J.] 74
and see COSTS AND CROWN PRACTICE.

CONTRACT.

Offer and acceptance—Acceptance must be in accordance with tenour of offer.

A. entered into an agreement with N. for the erection and operation of an electric light and power plant. By the terms of that agreement A. was to supply machinery and equipment and to advance necessary funds not exceeding \$9,000 in accordance with particulars submitted by N. In those particulars were 150 wallaba poles, \$1,500.

On 27th October, 1922, a telegram was received by B. from A. as follows:—"Execute order poles for N.; make application Colonial Bank": and on the same day the Colonial Bank wrote to the respondent as follows:—"We have received instructions by cable from New York to pay you \$1,500 against invoice for 150 wallaba poles delivered at St. Kitts to N. who must certify quality satisfactory."

B. refused to agree with the condition that the poles must be approved by N., and the order was cancelled on the 28th October.

N. Subsequently saw him, shewed him the agreement between N. and A., advised him to "go ahead with the poles" and "everything would be all right."

B. acted on this advice and ordered the poles.

Held, that even assuming that N. was A.'s agent to make an offer to B. after the rejection, he could not make such an offer except in accordance with the terms mentioned in the bank's letter and that there was therefore no contract between A. and B.

Further, that the statements made by N. to B, did not constitute an offer.

WATTLEY v. MENDELL. [W.I.C.A.]

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CONVERSION.

Possession in defendants—Proof of—Diamonds—Identity of—Inference from evidence—Suspicion—Presumption of possession—Difficulty of identifying diamonds.

Where a person who has however innocently obtained possession of the goods of another who has been fraudulently deprived of them, disposes of the goods either for his own benefit or that of any other person he is guilty of conversion.

CRESSALL, *et al*, v. HONNIBAL, *et al*. [Major, C.J.]

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In an action for conversion the plaintiff has cast upon him the onus of proving strictly the identity of the property claimed by him. In an action for the conversion of diamonds, from the very nature of the property it is practically impossible for the plaintiff to do more than prove facts and circumstances from which the identity of the property can be irresistibly inferred. If facts and circumstances are proved which merely raise a suspicion, the plaintiff must fail. If facts and circumstances are proved which raise so strong a presumption that in the absence of any explanation by the defendant it becomes certain, the plaintiff discharges the onus east upon him.

215 carats of diamonds were stolen from the plaintiffs in August, 1920. About that time A. sold 79 carats of diamonds

to the defendants and 7 cash orders were issued in respect of those sales. The purchases were for a reasonable price and perfectly *bona fide*. The diamonds so purchased were dealt with by the defendants in the ordinary course of business; the plaintiffs were unable to identify as their property any of the 79 carats of diamonds so purchased. A. was convicted for the larceny of the diamonds belonging to the plaintiffs. The plaintiffs sued the defendants for the conversion of the diamonds. No evidence was led in the action to prove that A. was guilty apart from the certificate of his conviction. After the arrest of A. the defendant's employee, acting apparently on what he was told by the plaintiffs or others of the situation, took the view that the defendants might have involved themselves in a purchase of stolen diamonds, and suggested a cautious and conciliatory attitude. There was some evidence that there was a desire on the part of one of the defendants to arrange the matter amicably. *Held*, confirming the decision of Major, C.J., that the evidence was insufficient to prove that the diamonds purchased by the defendants were stolen from the plaintiffs.

CRESSALL, *et al*, v. HONNIBAL, *et al*. [W.I.C.A.] 246, 247
and see EVIDENCE.

CORPORATIONS.

Foreign corporations—Tenure of land in Saint Lucia—No power to hold land—Commercial Code, 1916, ss. 183, 184, 315, 326—No licence conferred to hold land—Whether such a corporation can sue in ejectment.

A corporation which is not entitled to hold or to own land cannot sue in ejectment.

DAVID GRAHAM & Co., LTD., v. FRANK. [W.I.C.A.] 258

COSTS.

Practice—Set off—Rules of Court, 1900, Order 46, rule 15—Application for security—Appeal costs and security costs— Whether security costs can be set off against appeal costs— Independent and interdependent proceedings—Both sets of costs not taxed at one and same time.

By rule 15 of Order 46 of the Rules of Court, 1900, it is provided that "in any case in which . . . by order or direction of the Court or Judge or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the Taxing Officer may tax the costs such party is liable to pay and may adjust the same by way of deduction or set-off, or may, if he thinks fit, delay the

allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay. *Held*, that the title to receive, and the liability to receive are alone the elements for determination, or rather, ascertainment—whether the amounts to be received and paid have been ascertained or not. It is immaterial that both sets of costs were not taxed at one and the same time.

The plaintiffs issued a specially indorsed writ against the defendant. Leave to defend was refused. A written demand on him for security for costs having proved fruitless, the plaintiffs filed an application therefor. Security was ordered, and the defendant was ordered to pay the costs of the application. These costs were taxed at \$158.70. A security bond was entered into, and the appeal was proceeded with. The West Indian Court of Appeal allowed the appeal with costs and granted unconditional leave to defend. The appeal costs were taxed at \$249.98. On the taxation the plaintiffs successfully applied to have the two sets of costs adjusted by deducting the security costs from the appeal costs. The defendant applied for a review of taxation. *Held*, that the judge of the Supreme Court derived his power of hearing applications for security for costs from the Court of Appeal itself, that both the security costs and the appeal costs were costs of, and incidental to the appeal, that they were not costs awarded in independent but in interdependent proceedings and that the Taxing Master was right.

CURTIS, CAMPBELL & Co. v. JOHN DODDS. [Major, C.J.] 230

Attendance at Registry bespeaking copy of order appealed against—Attendance thereat on execution of security bond—Fee to counsel for the appellant settling bond—Whether proper charges by the appellant against the respondents.

The defendant was ordered to furnish security for costs in respect of his appeal. A bond was entered into in the Deeds Registry. The plaintiffs did not serve the defendant with a copy of the order appealed against. The appeal was allowed. *Held*, that a charge in the bill of costs for attendance at the Registry of Court to take up a copy of the order from which the appeal was brought was wrongly taxed off, inasmuch as it was an order with which the appellant had to arm himself before he could appeal. *Further*, that a fee to appellant's counsel for settling the bond was not properly chargeable against the respondents. *And further*, that a fee to the appellant's solicitor for attendance at the Registry of Court on the execution of the bond was a proper charge against the respondents.

CURTIS, CAMPBELL & Co. v. JOHN DODDS. [Major C.J.] 230

Attendance of solicitor on counsel in Court—Whether attendance reasonable—To be decided by the Taxing Master.

Whether the attendance of a solicitor on counsel in court otherwise than at the hearing is necessary in any particular circumstances is a question for the Taxing Master to decide.

CURTIS, CAMPBELL & Co. v. JOHN DODDS. [Major, C.J.] 230

Taxation—Review—Rules of Court, 1900, Appendix I, Part 1 "Amount claimed or the value of the property in respect of which the action is brought exceeds \$250"—Infringement of trade mark—Injunction and accounts ordered—Power of Taxing Master to assess value—Whether costs taxable on higher scale.

Where accounts are ordered by the Court the successful party need not wait until the accounts are settled by a judge before presenting his bill for taxation on the higher scale.

Where a plaintiff is successful in an action for infringement of trade mark or for passing off goods, the Taxing Master is justified in assuming that the value of the trade mark exceeds \$250: even though no evidence whatever as to value may have been given at the trial.

MAZAWATTEE TEA CO., LTD., v. PSAILA, LTD. [Major, C.J.] 93

Taxation — Review — Objection not raised before Taxing Officer—Raised on Review—Taxation on a wrong principle— Rules of Court, 1900, Order 46, rule 9—English Order 65, rules 39 and 41— Taxing Master not empowered to assign value to property in dispute.

Seem, that in this colony it is not a condition precedent to *any* application for review of taxation that the objections should have been previously raised before the Taxing Master.

It is quite competent for a party to apply for a review of taxation where the Taxing Master proceeded on some mistaken principle even though no objection may have been raised before the Taxing Master.

The Taxing Master is not empowered to give any decision on the value of the subject matter of the action when he is deciding whether a bill should be taxed on the lower or the higher scale. He is not justified in assuming it to exceed in value, any sum, however small.

The plaintiff claimed possession of a strip of land together with an injunction and \$240 damages. The action was discontinued with costs to the defendant, and the Taxing Master taxed the costs on the higher scale. *Held*, that the Taxing Officer was wrong, that he was not justified in assuming the land in dispute to exceed the sum of \$10, that the taxation must therefore be set

aside, and the bill be re-taxed on the lower scale on the basis of \$240.

NUNDLALL MARAJ *v.* MANN, *et al.* [Douglass. J.] 148

Review—Application for—Costs of—Whether there is a fixed and obligatory practice to fix the costs.

The judge is not bound to fix the costs of an application for review of taxation. He may, if he thinks fit, direct them to be taxed in the ordinary way.

CURTIS, CAMPBELL & Co. *v.* JOHN DODDS. [Major, C.J.] 230

Costs—Order as to—Construction.

See CONSTRUCTION.

Crown—Whether costs can be ordered against the Crown—Contempt of Court—Defective notice of motion and affidavits— Rule nisi—No jurisdiction in single judge to grant—Contempt of Court Ordinance, 1919, section 5—Supreme Court Ordinance, 1915, ss. 3 (2), 5(1), and 25.

Costs granted against the Crown.

HENRY AARON BRITTON [Major, C.J.] 74

Action in respect of four libels —Plaintiff successful in respect of two—Half costs awarded to the plaintiff.

WIGHT *v.* DAILY CHRONICLE, LTD., *et al.* [Douglass. J.] 106

Registered owner of motor car—Action against—Real owner of car not registered—Action fails—Defendant under circumstances deprived of costs.

CHANDERSICK *v.* FOO. [Douglass, J.] 141

Taxation—No objection taken before Taxing Master—Objections taken on application for review—Application allowed— Costs granted.

NUNDLALL MARAJ *v.* MANN, *et al.* [Douglass, J.] 148

Will—Two wills propounded—Probate of one refused—Costs of both parties ordered to be paid out of estate

RAMPERSAUD *v.* RAMLOGAN. *et al.* [Douglass, J.] 179

Trustees—Action against —Purchase of trust property by trustee—Power in will—Purchase questioned by cestuis que trust—Important documents lost by trustee—Cause of litigation —Trustee successful—Deprived of costs.

MARQUEZ, *et al.*, *v.* SCOTT, *et al.* [Deane, J.] 200

Petition by executor for directions—Administration Ordinance, 1887—Points of difficulty—Costs of petitioner between solicitor and client—Costs of parties cited between party and party— All costs payable out of the estate.

In re BARCLAY, PETITION OF STULL. [Major, C.J.] 80

and see TAXATION, PRACTICE AND APPEAL.

COURT.

Settlement of accounts—Rules of Court, 1900, Order 29, rules 12 and 13 —"The Court" — Meaning of—"Court" includes "judge "—Supreme Court Ordinance No 10 of 1915.

The word "Court" in Order 29, rule 13, includes a judge when exercising any of the jurisdictions conferred upon him by the Supreme Court Ordinance No. 10 of 1915 or by any ordinance or by the Rules of Court.

MOHABEER *v.* BISMILLA. *et al.*, [Douglass, J.] 41

Divisional Court in England—Its counterpart in British Guiana.

HENRY AARON BRITTON. [Major C.J.] 74

CRIMINAL LAW.

Closing of spirit shops—Delivery of spirituous liquor in a licensed place—Licensed place—Retail spirit shop—Delivery therefrom—Licensed Places (Hours of Closing) Ordinance No. 20 of 1902, sections 2 and 3.

Per Major, C.J.: There are five offences created by section 3 of Ordinance 20 of 1902 in relation to spirituous liquor during prohibited hours, (1) opening, (2) keeping open licensed places for purposes of sale or barter therein, (3) selling or bartering therein, (4) offering or exposing for sale or barter therein, (5) delivery perhaps therein certainly therefrom: but, in any case, whether 'therein' or 'therefrom' there is but one offence.

D. was charged by C. for that within the hours prescribed by the Licensed Places (Hours of Closing) Ordinance No. 20 of 1902 — mentioning them—he, being the holder of a licence for a licensed place situate at Plaisance did deliver spirituous liquor therein. The nature of the licence held by D. was not stated in the complaint, but evidence was led identifying the place as the only place in Plaisance in respect of which D. held a retail spirit shop licence. The magistrate held (*a*) that no offence was disclosed in the complaint inasmuch as it did not mention the ordinance under which it was brought, and the mere use of the words "holder of a licence for a licensed place" did not in any way connect

the offence with Ordinance No. 20 of 1902, and (b) that on the facts the liquor was not delivered "in" the shop but "from" the shop. He therefore dismissed the complaint. *Held*, that the magistrate was in error when he held that the first complaint was defective. The ingredients of proof of the offence under the Licensed Places (Hours of Closing) Ordinance No. 20 of 1902 are that the person charged (1) between certain hours (naming them), (2) delivered, (3) spirituous liquor, (4) in or from, (5) a licensed place (naming it). Those particulars were each and all given in the first complaint. Two offences were not created by the use of the words "therein" and "therefrom," the two words merely indicate two ways of committing the same offence. The licensed place was properly identified and the court should have amended the complaint to read "from" the licensed place instead of "in" the licensed place. The magistrate was therefore wrong in dismissing the complaint.

CRESSALL v. DIAS. [Full Court.]

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and see RES JUDICATA.

**Unlawful possession—Reasonable suspicion—Mind of constable —
Prior to arrest or detention—Explanation by defendant before arrest—
Whether incumbent upon prosecution to show explanation false.**

Since *Collins v. Young* (1918) L.R.B.G. 84 it has become necessary for the prosecution to prove that circumstances were present to the mind of the constable who arrested or detained the defendant from which the magistrate may find that the constable's suspicion of theft or unlawful obtainment was reasonable before he arrested or detained the defendant.

The defendant on arriving at Bartica was searched and there was found among his luggage several new articles ranging from clothing and food to patent medicines. The complainant gave evidence that it was not usual for persons coming from the bush to have such articles with them new and not used, and that he thereupon suspected them to have been stolen and that he then arrested and charged the defendant. *Held*, that the suspicion was reasonable, and that the rule in *Collins v. Young* was satisfied since it existed before the defendant was arrested or detained.

At the time of search the defendant said that he purchased the articles from two stores in Georgetown (naming them) on a certain day, and that he had bills for them which he would produce "at the proper time." On the hearing of the complaint for unlawful possession the defendant produced no bills. No witnesses from either of the two stores were called either by the prosecution or for the defence. *Held*, that this being a case of unlawful possession and reasonable suspicion being proved it

was therefore incumbent on the defendant to prove that his explanation was reasonable. *Further*, that the magistrate was justified in refusing to accept his explanation.

WEEKS v. WILSON. [Major, C.J.]

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Unlawfully and with force hindering and preventing a person working at or exercising his lawful trade, business or occupation—Summary Convictions Offences; Ordinance No. 12 of 1893, section 32—Particular person mentioned in the complaint— Whether force must be used to him personally—Employer and workman—Threats to workman.

It is not necessary to sustain a conviction under section 32 of the Summary Convictions (Offences) Ordinance, 1893, that there should be threats of violence to the person named in the complaint. It is sufficient if the threats are used to his servants.

T. was a stevedore contractor engaged in the unloading of a ship. He did not assist in the manual labour involved, but supervised the gang of men whom he employed. Whilst T. was engaged in that lawful business, there came a crowd of men, some armed with sticks, bricks and bottles who with threats of, and actual violence to, the gang of T.'s workers, interrupted, and for some considerable time suspended, the unloading of the vessel. The defendants who formed part of the crowd were charged with unlawfully and with force hindering and preventing T. from working at or exercising his lawful trade, business and occupation. *Held*, that there was present every ingredient of proof of the commission of the offence wherewith they were charged.

COLLINS v. SMITH AND WILSON. [Full Court.]

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CROWN PRACTICE.

Contempt of Court —Attachment—Defective notice of motion and affidavits —Rule nisi—Jurisdiction of single judge to grant — Contempt of Court Ordinance, 1919, section 5—Supreme Court Ordinance, 1915, ss. 3 (2), 5 (1), 25—Costs.

Costs granted against the Crown.

HENRY AARON BRITTON [Major, C.J.]

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and see CONTEMPT OF COURT AND AMENDMENT.

DAMAGES.

Libel—No special damages proved—Genuine apology—Malice disproved—Object of plaintiff revenge—Libels published during political election—Small community—General qualifications of candidates well known to majority of voters—Possibility that plaintiff lost a few votes—Measure of damages.

The plaintiff claimed damages in respect of four distinct libels. He succeeded on two and failed on the others. He proved no special damages. He still retained his position in the commercial world and in society. The only damages he suffered were that he lost some votes at the election. In his evidence he stated that his purpose in bringing the action was to be revenged on the second named defendant, the editor of the newspaper, and that he would have horse-whipped him instead if he had not had heart disease. The election was not one which would be seriously noticed in other parts of the world. In a small community like this, in view of the fact that the majority of voters have a wide knowledge of the general characteristics, standing and reliability of the candidates, wild statements at the hustings have little effect. *Held*, that under the circumstances the damages awarded would be small.

WIGHT v. DAILY CHRONICLE, LTD. *et al.*

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[Douglass, J.]

Breach of contract—Contract not made with special circumstances—No notice of them given—Had they been given the other contracting party may have repudiated liability therefor —Measure of damages —Remoteness of damages.

F. arranged with H. that H. should supply him with seven bags of mangrove bark and he told him that he required them for tanning. H. agreed to deliver the bark on the 6th October. At the time of the contract F. then had 465 lbs. of hide which he had commenced to tan, and he especially wanted the bark on the 6th October in order that the operation might be completed. He did not, however, communicate these facts to H. The bark was not delivered to F. on the 6th October, and as a result, the 465 lbs. of hide were entirely spoiled. The magistrate held that F. was entitled to claim as damages the estimated market price of the leather into which the raw hide would have been converted if the hide had not been spoiled by the failure of H. to deliver the bark to be used in completing its cure. H. appealed. *Held* that if notice of the special circumstances had been given to H. he might have disclaimed responsibility for loss occasioned by non-delivery on the 6th October, the specified time: and that, therefore, F. could not recover the value of the raw hide. *Further*, that consequently F. could not recover the probable value of the leather into which, if the bark had been delivered and if the tanning had been successfully completed, the hide would have been converted, such damages being too remote.

FANFAIR v. HO-A-SHOO, LTD. [Full Court.]

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Solicitor and client—Breach of duty—Costs of action thrown away—Property purchased at execution sale in name of solicitor — Measure of damages.

S. retained F. as his solicitor to recover a sum of money in the Supreme Court. Judgment was obtained against the defendant D. S. At this time the spirit licence of D. S. had been taken in execution at the instance of other creditors. F. attended the sale and bought the spirit licence in the name of his wife. D. S. had no other property which could be levied upon. The Court was of opinion that F. had committed a breach of his duty towards his client S. by his purchase. In computing the damages the judge awarded to the plaintiff (a) the difference between the probable marketable value of the licence and the price at which it was purchased by F. at the execution sale, and (b) the taxed costs in the action of *S. v. D. S.* which the plaintiff would be liable to pay to F.

SIRIKISSOON *v.* P. A. FERNANDES *et al* [Douglass, J.] 16
and see BARRISTER.

Libel—Joint tort feasons—One defendant malicious—Other party morally blameless—Assessment of damages.

WIGHT *v.* DAILY CHRONICLE, LTD., *et al.* [Douglass, J.] 134

Negligence —Breach of duty—Negligence of plaintiff—Proximate cause.

SAINT VINCENT.
See DA COSTA *v.* SMITH. [W.I.C.A.] 251

DECEIT.

Insurance—Loss of ship—Alleged loss of cargo—Insurance company demands proof—Production by assured of bill with receipt for portion of purchase price Bill taken by insurance company to person whose name it bore—Assurance that it was a genuine bill—Reliance on bill—Payment by insurance company —Bill not a genuine bill—Fraudulent misrepresentation—Deceit —Damages.

TRINIDAD.

The respondent was a partner in the firm of Messrs. Murphy, Moze & Co., dry goods merchants carrying on business in Port-of-Spain. One Franceschi, a Venezuelan, and owner of a schooner called "Nellie," purported to buy from the respondent Murphy a quantity of goods to the value of \$20,740 which he said he intended shipping to Venezuela by the "Nellie." He obtained from Murphy two bills for these goods. One contained a list of the goods sold, and the prices. The other contained, besides the list of the goods and their prices, an entry that \$10,740 had been

paid on account, and showing as balance due the sum of \$10,000. This transaction was never mentioned by Murphy to his other partners nor was it entered in the books of the firm. The goods were never in fact delivered and did not form part of the cargo of the "Nellie" when she was lost, nor did Murphy ever receive the sum of \$10,740 on account as shown by the bill. Franceschi insured the goods which were purported to have been purchased from Murphy with the appellant company, as part of the cargo that was to be shipped by the "Nellie." Shortly after sailing the "Nellie" became a total wreck. Franceschi put in his claim for £1,000 for the loss of these goods. The £1,000 was paid to him by the appellant company on the representation of Murphy to their agent that the bill which he had given Franceschi was a genuine bill showing a genuine transaction. Murphy did not disclose the fact that the goods had never been delivered, and consequently never shipped. The appellant company afterwards brought an action against Murphy to recover from him this sum on the ground of conspiracy, fraudulent misrepresentation and deceit, Thomas, J. gave judgment for the defendant. The plaintiffs appealed. *Held*, that the appellant company had made out a case of deceit and was entitled to judgment therefor.

UNION MARINE INSURANCE CO. v. MURPHY. [W.I.C.A.] 237
and see FRAUD

DETINUE.

Action for—Cause of action—Wrongful detention—Proof of—Demand and refusal—Need not be alleged—Matter of evidence

The cause of action in a claim for detinue is the wrongful detention of the article.

A. brought an action against K, in which he alleged that K. had wrongfully detained from him a certain article. There was no allegation in the plaint of a demand and a refusal. On objection taken, the magistrate struck out the plaint on the ground that it was defective. A. appealed. *Held* that the plaint was in order and that whether there was a demand and a refusal was a matter of evidence and need not be alleged in the plaint.

ABDUL v. KADRAT ALI [Full Court] 146

DIVORCE.

Adultery of petitioner—Discretion of Court — Grounds for exercise of—Wider than previously thought—Public policy and morality—Ordinance No. 34 of 1916, section 13—Matrimonial Causes Act, 1857, section 31.

The petitioner was married to the respondent on the 6th April, 1911. They were both East Indians. On the 2nd November, 1912, the respondent took away her wedding ring and drove her out of the house. The petitioner went to live at her father's house where the child of the marriage was born in May, 1913. In January, 1916, the magistrate ordered her husband to pay 60 cents weekly towards the support of his child. The respondent made very few of the weekly payments, and he left for Trinidad in 1913 when he ceased them altogether. In 1918 the petitioner's father was unable to support her any longer. She then went under the protection of V. Williams who supported herself and her child. She continued to live with him and three children were born. Williams was ready and willing to marry her if she obtained her divorce from the respondent. *Held*, that under the circumstances the court would exercise its discretion in favour of the petitioner and so enable her to regularise her position in relation to V. Williams.

The discretion of the Divorce Court is now much wider than as stated by Lord Penzance in *Morgan v. Morgan and Porter* (1869) 1 P. & D. 644.

BISSEMBER v. BISSEMBER. [Douglass, J.]

86

Situs celebrationis of Marriage—Divorce in a different place — Court of domicil—Whether decree valid— Consequences of decree — Regulated by the court which grants the decree

The courts of a country where the husband and wife are domiciled at the commencement of proceedings for divorce have jurisdiction to dissolve the marriage whether the marriage was celebrated there or elsewhere.

In considering the consequences of a decree of divorce the court had regard solely to the law of the place where the decree was made, which law was proved as a fact.

In 1903 A. was married to B. in this colony in community of goods. In 1921, while they were domiciled in Madeira the High Court of that island granted to A, a decree of divorce. Evidence was given by a Portuguese jurist that, according to the law of Madeira, the community ceases on a divorce being granted and that each party to the marriage thereupon becomes entitled to his or her half share in full possession. *Held* that the divorce was valid, that the marriage was dissolved for all effects, and that the community ceased at the date of the divorce.

BARREIRO v. DE FREITAS. [Douglass, J.]

96

DOMICIL.

Situs celebrationis of marriage—Divorce in a different place—Where domiciled — Decree valid — Consequences of decree — Regulated by the law of the domicile.

BARREIRO v. DE FREITAS. [Douglass. J.] 96
and see DIVORCE.

EJECTMENT.

No power in plaintiff to hold or to own land—Whether competent in him to sue in ejectment.

A party who is not entitled to hold or to own land cannot sue in ejectment.

DAVID GRAHAM & Co., LTD. v. FRANK. [W.I.C.A.] 258

ELECTION PETITION.

New Amsterdam Town Council—Qualification of candidates—Town Clerk—No power to decide—Nomination refused on the ground of lack of qualification—Candidate on register of voters — New Amsterdam Town Council Ordinance No. 10 of 1916, section 13 (5)—"Ceases to possess the necessary qualification" — Ordinance No. 10 of 1916, sections 12, 25 (3), 13,28 (1) and 2), and 70—List of voters settled by Council is final.

Semble, that the words "ceases to possess the necessary qualification" appearing in section 13 (5) of the New Amsterdam Town Council Ordinance No. 10 of 1916 refer to the qualification as a voter.

The list of voters as settled by the Town Council under the provisions of section 11 (5) of Ord. No. 10 of 1916 is final.

Where a candidate's name appears on the register of voters, it is the duty of the Returning Officer to accept his nomination, and no objection can be taken to his election except by way of election petition.

On the 8th July E., A. and B., registered voters, were nominated as Councillors to fill two vacant seats on the New Amsterdam Town Council. The Town Clerk rejected the nomination of E on the ground that he did not possess or produce the necessary qualification as a Councillor. He then declared A. and B. duly elected. E. presented an election petition praying that the election be declared void. A. and B. were cited as respondents but not the Town Clerk. *Held*, that the Returning Officer had no power to decide whether a candidate was duly qualified or not and that the election of A. and B. was void.

ELEAZAR v. ABBENSETTS AND BARCLAY. [Douglass, J.] 104

Georgetown Town Council—Election of Mayor—Unseating of Mayor—Georgetown Town Council Ordinance, 1918, Amendment Ordinance, 1923—Decision of returning officer—Disqualifications of Councillors—Ministerial character of returning officers— Refusal to adjudicate on objection taken as to disqualification of Councillors— Whether a decision—Vacation of seats by Councillors—To be decided by Council—Decision of Council final—Ordinance No. 25 of 1898, section 92, as amended by section 12 of Ordinance No. 26 of 1900— Election petition—Conduct or disqualification of a Councillor— Whether Court can hear a petition against election of Mayor on these grounds—Whether a ratepayer can complain of or question the conduct or subsequent disqualification of a councillor who had been duly elected.

No ratepayer can question or complain of the conduct or subsequent disqualification of a Councillor who had been duly elected. If any question arises as to the fact of the seat of any member of the Council having become vacant, it shall be referred to and decided by the Council whose decision shall be final.

The Court has no jurisdiction to hear a petition against the election of a Mayor in which the grounds alleged are the conduct or the disqualification of a Councillor.

There were two candidates for the seat of Mayor, N.C. and F.D. Objection was taken to the presence of one of the Councillors, C.F.B., on the ground that he was disqualified. The Town Clerk, as Returning Officer, refused to entertain the objection. Twelve councillors were present, six voting for N.C. and six for F.D. There being a tie, the election was referred to the ratepayers who decided, by a majority, in favour of N.C. The question as to whether C.F.B. was any longer a Councillor was never referred to the Town Council and the Council had never given any decision upon it. R. presented an election petition in which he questioned the alleged decision of the Returning Officer in which he declined to adjudicate upon the alleged disqualification of C.F.B. *Held*, that the Town Clerk had no judicial duties, that he had no right to exclude C.F.B. from the proceedings of the Council, and that the right and duty of deciding whether C.F.B. was disqualified or not rested in the Council who were never asked to decide the point and never did so. *Further*, that the Town Clerk as Returning Officer gave no decision when he declined to adjudicate on the point raised.

PETITION OF L. A. ROBINSON. [Douglass, J.]

34

EMPLOYER AND WORKMAN

See MASTER AND SERVANT, ACCIDENTAL DEATHS AND INJURIES TO WORKMEN, AND CRIMINAL LAW

ESTOPPEL.

Accounts—Settled by judge—Findings of judge—Application for judgment on those findings —Rules of Court, 1900, Order 29, rules 12 and 13— Order drawn up—Appeal by party applying for judgment against findings of judge—Whether he is estopped.

MOHABIR *v.* BISMILLA, *et al.* [W.I.C.A.]

244

EVIDENCE.

Bill of sale made subsequently to promissory note—Admissibility of evidence to prove that bill of sale was merely taken by way of further security.

The Court admitted evidence that the defendant acknowledged liability on the promissory note, at a point of time after the bill of sale was made, in order to show that the inclusion of the note in the bill of sale was only by way of security. Where a bill of sale is executed in respect of a sum of money already secured a promissory note, evidence is admissible to show whether the simple contract debt was extinguished by the bill of sale, or whether the bill of sale was executed by way of security merely.

CURTIS, CAMPBELL & Co. *v.* JOHN DODDS. [Berkeley, J.]

189

Conversion—Larceny—Conviction of felon—Statements made by him—Whether admissible in an action in which he is not a party—Res inter alios acta—Certificate of conviction—How far admissible.

The plaintiffs lost certain diamonds. A was convicted for stealing them. He was alleged to have sold them to the defendants. A. had made certain statements which were used in evidence on the hearing of the criminal charge against him. In an action for conversion against the defendants the plaintiffs put in a certificate of the conviction of A. and sought to tender in evidence the statements made by A. *Held*, that these statements were not admissible in evidence against the defendants. That the certificate of conviction could not be received for any other purpose than to show that A. was a convicted felon, it was not evidence in these proceedings of the truth either of the decision or of its grounds as against strangers who had no opportunity to interfere and cross-examine. If the plaintiffs desired to prove the facts which led to the conviction, they should have done so *aliunde* the conviction.

CRESSALL, *et al.*, *v.* HONNIBAL, *et al.* [W.I.C.A.]

246

Passing off goods—Persons mistook the defendants' goods for the plaintiffs'—Mistake only discovered on a closer examination being made—Whether such evidence is admissible.

In an action for passing off goods evidence is admissible to show that persons mistook the defendants' goods for the plaintiffs', and that they only found out their mistake on a closer examination being made.

MAZAWATTEE TEA CO., LTD. v. PSAILA, LTD. [Berkeley, J.] 56

Foreign law—Conflict of laws—Private international law—Proof of foreign law—Manner of—Foreign law a question of fact —What is foreign law—Evidence of experts—Modern tendency to allow Colonial laws relating to the validity of a marriage to be proved by the production of a certified copy of the statute— Whether this would extend to laws governing the dissolution of marriage.

Any law, other than that of England and Wales, and, *semble*, Scotland is "foreign law." And, when it is involved in a case it has to be strictly proved as a fact. It cannot be proved by mere production of the foreign code or text books on the subject but must be proved by the evidence of experts.

There is a tendency nowadays to allow Colonial laws concerning the validity of a marriage to be proved by the production of a certified copy of the statutes: *sed quaere*, whether this would extend to laws concerning the dissolution of marriage.

BARRERIO v. DEFREITAS. [Douglass, J.] 96

Impropriety or irregularity in obtaining—Whether evidence so obtained is thereby rendered inadmissible.

Impropriety or irregularity on the part of the police in their conduct of the case is immaterial so long as the evidence thereby obtained has not been rendered inadmissible.

WEEKS v. WILSON. [Major, C.J.] 89

Wrongly received in lower court—Must be rejected by Appeal Court even though admitted without objection.

See DELGADO v. BROWNE. [Full Court.] 65

Book entries—Deposed to by bank manager—Books not produced—Statements not within his own knowledge—Whether such procedure is strict and proper.

It is irregular for a bank manager to depose as to items of a customer's account as existing at a point of time when he was not employed by the bank.

Cars standing abreast on public road at night so that impossible to pass—Cars facing opposite directions—Dazzling head lights in face of moving car—Whether such car should have seen red kerosene tail light of stationary car in time to avoid accident— Experiments conducted after accident—Admissibility of.

Some time after dark on the 13th April, the Grenville Race day, two Ford motor cars owned by C.S., No. 149 going out from, and No. 199 coming from, the town of St. George, met on the outskirts of the town. The drivers stopped their cars abreast of each other for two or three minutes to talk to one another, and by their so doing the road was blocked for vehicular traffic as it was too narrow to allow a third car to pass.

Car No. 149 had four headlights on, and the kerosene red tail light of 199 was also burning.

The headlights of J.B.'s car, a light Overland, which was on its way to town, were seen as it came round the nearest corner at least 140 feet off, by the driver of car 149 who thereupon sounded his horn incessantly but neither he nor the driver of 199 moved their cars at all.

One of the points at issue was whether J.B. should have seen the kerosene red tail light of car 199 in time to avoid a collision. And evidence was admitted by the trial judge of certain experiments made with motor cars at the same place on nights subsequent to the date of the collision for the purpose of proving how far off the kerosene red tail light of a motor car can be seen at night when that car is placed abreast of a car facing the other way with lighted headlights. *Held*, that the evidence was rightly admitted, but that as the circumstances under which the experiments were performed were dissimilar to those existing under which the accident occurred, such evidence would have little or no weight.

CHYKRA SALHAB v. JOHN BRANCH. [W.I.C.A.]

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FOREIGN LAW.

Conflict of laws—Private international law—Foreign law— What is—Proof of—Manner of—Evidence of experts—Question of fact.

Any law, other than of England and Wales, and *semble*, Scotland, is "foreign law." And, when it is involved in a case it has to be strictly proved as a fact. It cannot be proved by mere production of the foreign code or text books on the subject, but must be proved by the evidence of experts.

BARREIRO v. DE FREITAS. [Douglass, J.]

96

FRAUD.

Real Property Ordinance No. 60 — Fraud — Meaning of— Whether knowledge of a deed which does not affect land on register is fraud—Dishonesty.

TRINIDAD.

RATANEE v. UMRAWSINGH et al [W.I.C.A.] 195
and see REAL PROPERTY ORDINANCE.

Insurance—Received bill given by a merchant—Alleged loss of goods—Bill tendered to insurance company as evidence of loss— Assurance given by merchant to insurance company that bill was a genuine bill and transaction was genuine—Reliance thereon—Policy moneys paid—Fraudulent misrepresentation— Bill not genuine— Transaction not genuine—Deceit—Damages.

TRINIDAD.

UNION MARINE INSURANCE CO. v. MURPHY. [W.I.C.A.] 237
and see DECEIT.

FUNERAL EXPENSES.

Husband and wife—Community—Death of husband—Funeral expenses—Not payable out of joint estate.

MOHABEER v. BISMILLA, et al. [Douglass, J.] 26

GIFTS.

Incomplete gift—Of no force and effect—Cannot be construed as a declaration of trust—Real property register—Memorandum of transfer not executed.

TRINIDAD.

B., the owner of lands under the Real Property Ordinance, before her death executed a deed of settlement purporting to convey all her real estate to trustees upon the trusts therein mentioned. This deed was prepared as an ordinary voluntary settlement and without any reference to the Real Property Ordinance, and there was no memorandum of transfer passing these lands to the trustees. The deed was registered in the General Registry but not entered in the Registry Book under the Real Property Ordinance. *Held* that an imperfect gift was created and the deed being voluntary, it was of no validity either in law or in equity.

RATANEE v. UMRAWSINGH, et al. [W.I.C.A.] 195

Intention of donor—Power of revocation— Illegitimate children— Trust in favour of children—Gift not revoked—Insurance policy— Premiums paid by father—Whether policy moneys belong to illegitimate child—Endowment policy.

On the 3rd October, 1906, M. took out a ten years endowment policy of insurance on his own life for \$2,000 and assigned it to his son Joseph. The policy matured in October, 1916, when the son was 18 years of age. The premiums in respect of the said policy were all paid by M. The receipt for the policy moneys was signed by M. as father and natural guardian of Joseph, and by Joseph himself. *Held*, that Joseph was the only person who could have given the insurance company a legal discharge for the moneys due under the policy, and that the gift of the policy to the son Joseph was absolute.

M. deposited the sum of \$1,000 belonging to his son Joseph and \$1,000 belonging to his son John with the second named defendant in October, 1916. Two pass-books were given to M. with the names of Joseph and John written thereon. The ledger-accounts of the firm were also kept in the names of Joseph and of John. From the 5th April, 1917, M. made deposits in Joseph's book with the second-named defendant which were duly entered in the pass-book and not in the ledger. In or about the month of August, 1917, M., in order to curb Joseph from spending money, and at the suggestion of a clerk of Smith Bros, with whom the moneys were being deposited, caused to be inserted in his passbook the words "at the disposal of Mohabir." No change was made in the description of the ledger account. Joseph came of age on the 17th January, 1919. Thereafter he made all the withdrawals himself with the exception of two. Deposits were made up to the 7th October, 1920, that is, within three months of his father's death. M. was always ready and willing to meet the garage account of Joseph. Joseph went to America in 1920 and on his leaving; his father gave him \$300. Before the 1st January, 1917, M. made five deposits in John's pass-book. Evidence was led that when the deposit of \$878.83 was made M. said it was a gift to John for his tuition. Some time after the words "at the disposal of Mohabir" were added to Joseph's pass-book a similar change was made in John's. No alteration, however, was made as to the style of the ledger accounts. In 1916 John was only 8 years old. All the receipts for moneys withdrawn were signed by M. except one for \$800, which was withdrawn on the 18th August, 1919 to buy a Reo car. There were no further withdrawals. Deposits were made up to December, 1920. *Held* that M. intended the deposits subsequent to the \$1,000 deposits to be for the benefit of his sons in whose name they were deposited, that he only retained sufficient hold upon them to enable him during

his lifetime, to draw on any account if he thought fit and to keep a check on any extravagance on the part of Joseph. The intention of M. as clearly expressed on the opening of the accounts never changed, and the additional words on the passbooks were by way of precaution merely.

MOHABIR *v.* BISMILLA, *et al.* [Douglass, J.] 26

For the reasons stated by Douglass, J., in his decision the Court upheld his judgment that the moneys on deposit with Smith Brothers & Co., Ltd., belonged to Joseph and John Mohabir and did not form part of the joint estate.

MOHABIR *v.* BISMILLA, *et al.* [W.I.C.A.] 244

GOODWILL.

Provision business—Profits depending on personal acumen and energy of partners—Goodwill a question of fact—Whether goodwill in a provision business in Port-of-Spain.

MARQUEZ *v.* SCOTT, *et al.* [W.I.C.A.] 200
and see TRUST'S AND TRUSTEES.

GRENADA.

See APPEAL, ASSESSMENT LISTS, PRACTICE, PRESUMPTIONS,
INDEFEASIBLE TITLE, TRESPASS, INCOME TAX.

HUSBAND AND WIFE.

Community of property—Interest of wife during marriage—Vested interest.

By marriage in community of property a wife acquires a vested estate or interest in half of the joint property of her husband and herself.

In re BARCLAY, PETITION OF STULL. [Major, C.J.] 80

Community of property—Will of husband—Whether intention to dispose of whole or only of his share in joint estate—Presumption that he only dealt with his half share—Clear evidence to rebut.

Whether a testator has intended to dispose of the whole of the joint property of the communion, or only of his half share thereof is to be determined, firstly, on the initial presumption that he intended to effect the latter disposition, not the former, a presumption that can be displaced only by clear evidence, and secondly, on examination of the contents of the will read as a whole.

In re BARCLAY, PETITION OF STULL. [Major, C.J.] 80

Marriage laws—Colonial marriages—How proved—Whether evidence of experts essential—Dissolution of marriage—Colonial laws relating to—Whether provable by production of certified copies of Colonial statutes.

BARREIRO v. DE FREITAS. [Douglass. J.] 96
and see EVIDENCE.

Funeral expenses of husband—Parties married in community — Payable out of husband's share of the community and not out of the joint estate.

The funeral expenses of a husband married in community are payable out of his share of the property, and not out of the joint estate.

MOHABIR v. BISMILLA, *et al.* [Douglass. J.] 26
and see DIVORCE AND COMMUNITY OF PROPERTY.

IMMOVABLE PROPERTY.

Lease—Leases in longum tempus—Deeds Registry Ordinance (No. 17 of) 1919, section 12—Whether a lease so recorded is immovable property.

Leases of immovable property recorded under the provisions of section 12 of the Deeds Registry Ordinance (No. 17 of) 1919 are in the nature of immovable property.

RISQUEZ v. PERSAUD. [Douglass, J.] 154

Contract for sale of land—Mistake as to area—Not induced by vendor—Purchaser in possession of area intended to be bought—Legal title for less—Executed contract—Rescission— Grounds for.

See SALE OF LAND.

Contract for sale of land—Statute of Frauds must be specially pleaded—Civil Law of British Guiana Ordinance No. 15 of 1916, section 3 (4) (e).

A party who does not in his pleading *specifically* rely on the provisions of section 3(4) (e) of the Civil Law of British Guiana Ordinance No. 15 of 1916 will not, at the trial be permitted to raise any plea based on that sub-section.

OFFICIAL RECEIVER v. MITCHELL. [Douglass, J] 100

Partition—Sale—English common law as to partition of real property inapplicable—Ordinance No. 15 of 1916, section 3(3) — Law to be applied—Ordinance No. 15 of 1916, section 2 (3) — Roman-Dutch Law—Inherent powers of Court—Property in two undivided moieties—Owners husband and wife who have been divorced—Whether under circumstances a sale would be ordered

—**English Order 51 relating to sale of real property not in force here.**

BARREIRO *v.* DE FREITAS. [Douglass. J.] 96
and see PARTITION.

INCOME TAX.

Assessment—Income Tax Ordinance, 1921 — Provision for appeal to Appeal Committee by giving notice to Assessment Committee and to Appeal Committee within 30 days—Appeal Committee not in existence until after the expiry of 30 days— Whether assessment valid.

GRENADA.

Notwithstanding the delay in the appointment of the Appeal Committee, the assessment of the respondent for income tax was valid. The Committee by whom it was made omitted no step whereby the validity of the assessment was secured, and by the non-existence of the Appeal Committee and by the delay in its appointment that security was not impaired.

ATTORNEY GENERAL OF GRENADA *v.* OTWAY. [W.I.C.A.] 260

INDEFEASIBLE TITLE.

Transport—Registered encumbrances—Sale at execution— No interpleader as to the buildings—Deeds Registry Ordinance, No. 17 of 1919.

PIRES, *et al v.* VALERIE. [Berkeley, J.] 59
and see TRANSPORT.

Transport—Deeds Registry Ordinance No. 17 of 1919. section 20 (3)—Effect of.

OFFICIAL RECEIVER *v.* JAMES MITCHELL. [Douglass. J.] 100

Conveyance—Taxes Management Ordinance—Sale under—Effect of.

GRENADA.

A purchaser at a sale under the Taxes Management Ordinance acquires an indefeasible title provided that the provisions of the ordinance have been duly complied with.

MARRYSHOW *v.* TURTON. [W.I.C.A.] 255
and see REAL PROPERTY ORDINANCE.

INFANTS.

Leases—Taken by guardian without leave of Court—Whether they are valid—Immovable property—Deeds Registry Ordinance No. 17 of 1919, section 12—Leases recorded—Whether a guardian may grant a lease for five years without leave of the Court.

An owner is bound by a lease which is taken by a guardian in the name of his ward without the leave of the Court.

A guardian of an infant may take, and *semble*, may grant a lease for 5 years without the leave of the Court.

RISQUEZ *v.* PERSAUD. [Douglass, J.]

154

INJUNCTION.

Interim—Interlocutory—Grounds on which granted —Substantial questions of law and fact—Damages not an adequate remedy—Prima facie cause of action—Order 40, rule 5—Order 38, rule 1.

See PRACTICE.

INSOLVENCY.

Insolvency notice—Application to set aside —Joint and several debtors—Stay of execution against one—Whether insolvency notice can be issued against the other—Sureties offered— Whether ground for stay—Insolvency Ordinance No. 29 of 1900, section 3 (1) (f)— "Secure or compound within seven days"— All questions to be determined within seven days—Receiving order—All objections can be raised—Right to issue execution— Existence of counterclaim—No bar.

Where judgment was given against W. and D.C., Ltd., in an action for libel, and execution was issued against D.C., Ltd., which was afterwards stayed by the court on a winding up petition being presented by a creditor, and an insolvency notice was subsequently issued against W. *Held*, on application being made to set aside the insolvency notice, that there was no stay against W., the marshal had never been in possession of his goods and the judgment creditor was entitled to serve the insolvency notice.

If a person served with an insolvency notice desires to secure or compound to the satisfaction of the court, he must make his application and obtain an order to that effect from the court within the seven days.

Quaere, whether the question of security for the judgment debt, unless the judgment debtor consent is not applicable only when the debtor has a counterclaim, set-off or cross demand.

Re WEBBER. [Douglass, J.]

167

Receiving order—Petition for—All objections can be raised whether previously raised or not.

A debtor is at liberty to raise an objection to the making of a receiving order even though on a previous occasion that objection may have been raised by him and overruled.

Re WEBBER. [Douglass, J.]

167

**Receiving order—Petition for — Counterclaim or set off—
Whether ground for a stay—Right to issue execution—Payment.**

Although payment by either of the judgment debtors of any portion of the judgment debt would defeat the right of the judgment creditor to issue execution for the whole amount and would be good ground for a stay, the fact that the judgment debtor had a counter-claim or set-off which equalled or excelled the amount of the judgment debt is no ground for a stay of execution: and, still less so, if that set-off does not even equal the judgment debt.

Re WEBBER. [Douglass, J.] 167

**Receiving order—Petition for—Presented from improper
motives—Ousting a debtor from the Legislature.**

Semble, that an insolvency petition instituted for the main purpose of ousting a debtor from his seat in the Legislature would be dismissed.

Re WEBBER. [Douglass, J.] 167

**Adjudication—No obligation in Court to adjudicate—"Shall
adjudge"—Insolvency Ordinance, 1900, section 18 (2)—Insolvency
proceedings under the complete control of the Court.**

Notwithstanding the words "shall adjudge" appearing in section 18 (2) of the Insolvency Ordinance No. 29 of 1900, the Court of Bankruptcy is not bound to adjudicate a debtor insolvent.

Re WEBBER. [Douglass, J.] 167

**Insolvency—Meaning of—Company in liquidation—Prima facie
evidence of insolvency.**

The fact that a company is being wound up is *prima facie* evidence of its insolvency.

Re WEBBER. [Douglass, J.] 167

**Public examination—Receiving order made—Power of Court to
rescind receiving order without a public examination of debtor.**

Re WEBBER. [Douglass, J.] 167

INSURANCE.

**Policy—Premiums paid by father — Endowment policy — Whether
policy moneys belong to an illegitimate child—Gift.**

See GIFTS.

**Loss of ship—Alleged loss of cargo—Demand by insurance
company for proof—Production by assured of bill with receipt for
portion of purchase price—Bill taken by insurance company**

to person whose name it bore—Assurance that it was a genuine bill—Reliance on bill—Payment by insurance company—Bill not a genuine bill—transaction not genuine—Fraudulent misrepresentation — Deceit—Damages.

TRINIDAD.
See DECEIT.
 INTEREST.

Bills of exchange—Promissory notes—Usage of trade—Bills of Exchange Ordinance (No. 13 of) 1891, section 57.

Apart from the Bills of Exchange Ordinance No. 13 of 1891. section 57, bills of exchange and promissory notes bear interest from the time of maturity.

MAW, SON & SONS, LTD. *v.* SCOTTS LTD. [Douglass, J.] 48

Promissory note on demand—Interest chargeable.

WIGHT *v.* DAILY CHRONICLE, LTD. [Douglass, J.] 106

INTERLOCUTORY ORDERS.

Liberty to apply—Implied.

In the case of orders which are not final, liberty to apply to the Court as to the working out of rights declared therein is implied.

MOHABIR *v.* BISMILLA, *et al.* [Douglass, J.] 41

Accounts—Settled by judge—Application for judgment — Rules of Court, 1900, Order 29, rules 12, 13—Order thereon— Whether interlocutory or final.

An order made on application for judgment under Order 29 of the Rules of Court, after the accounts have been settled by the judge is a final and not an interlocutory order.

MOHABIR *v.* BISMILLA, *et al.* [W.I.C.A.] 244

INTERPLEADER.

Claimant in default of appearance—Judgment by default—Procedure for setting aside — Grounds—Whether action is proper remedy—Due diligence necessary—Rules of Court. 1900: Order 42, rule 11.

An order to set aside a judgment should be speedily applied for and decided summarily, especially in the case of interpleader, where property is being held up or a sale of it delayed.

GOBIN MARAJAH *v.* JOHN LOPES. [Douglass, J.] 43

and see PRACTICE.

INTESTACY.

Succession of mother to her bastard child—A mother makes no bastard—Roman-Dutch law—How far still applicable here—Civil law of British Guiana Ordinance No. 15 of 1916, section 2 (3) —Spes successiois—Eighth rule of succession—Whether Court would revive the rule of Roman Dutch law that a mother succeeds on intestacy to her bastard child dying after 31st December, 1916—Ordinance No. 15 of 1916, section 2 (3).

A mother of an illegitimate child does not, since January 1917, succeed as heir on the intestacy of that child, and did not, prior to that date, in respect of the expectation of succession she then had under the Roman-Dutch law, acquire such a right as is protected by section 2 (3) of the Civil Law of British Guiana Ordinance No. 15 of 1916, *Krishnath v. Clements* (1920) L.R.B.G. 199 which was doubted by the West Indian Court of Appeal in (1921) L.R.B.G. 189 not being followed. And the discretionary powers of the Supreme Court conferred by the sub-section to give effect to a former rule of Roman-Dutch Law (for which there is no equivalent in the English common law) in favour of a right founded on that rule, does not extend to admitting the mother of an illegitimate child to succession on intestacy of that child, because to do so would be to amend the statutory rules of distribution of an intestate's estate.

In re BARCLAY, PETITION OF STULL. [Major, C.J.] 80

JURISDICTION.

Attachment—Contempt of Court—Rule nisi—Whether a single judge has jurisdiction to grant—Contempt of Court Ordinance, 1919, section 5—Supreme Court Ordinance, 1915, ss. 3 (2), 5 (1) and 25—Judicature Act, 1873, section 40—Judicature Act, 1876, section 17—Judicature Act, 1884.

A single judge has no jurisdiction to grant a rule nisi for a criminal contempt.

HENRY AARON BRITTON. [Major, C.J.] 74

New Amsterdam Town Council—Qualification of candidates—Town Clerk—No jurisdiction to decide—Nomination refused on the ground of lack of qualification—Nomination proper provided candidate's name is on the list of voters—List as settled by the Council final—"Ceases to possess the necessary qualification"—New Amsterdam Town Council Ordinance No. 10 of 1916, sections 12, 25 (3), 13, 28 (1) and (2) and 70.

The Town Clerk of New Amsterdam, as Returning Officer, has no jurisdiction to enquire into the qualifications of candidates for the Town Council.

ELEAZAR *v.* ABBENSETTS, *et al.* [Douglass, J.] 104

Georgetown Town Council — Election of Mayor — Unseating of Mayor— Georgetown Town Council Ordinance, 1918, Amendment Ordinance, 1923 — Decision of Returning Officer — Disqualification of Councillors—Ministerial character of Returning Officer — Vacation of seats by Councillors —To be decided by Council — Decision of Council final — Ordinance No. 25 of 1898, section 92, as amended by section 12 of Ordinance No. 26 of 1900 — Election petition — Conduct or disqualification of a Councillor — Whether Court has jurisdiction to hear a petition against election of Mayor on these grounds.

The Court has no jurisdiction to hear a petition against the election of a Mayor in which the grounds alleged are the conduct or the disqualification of a Councillor.

The Town Clerk as Returning Officer had no jurisdiction to determine whether a Councillor was disqualified, or if so to exclude him from voting.

PETITION OF L. A. ROBINSON. [Douglass, J.]

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Appeal to West Indian Court of Appeal — Appeal from order of a single judge giving judgment after accounts settled — Order 29, rules 12, 13 — Whether jurisdiction to hear appeal.

MOHABIR *v.* BISMILLA. *et al.* [W.I.C.A.]

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LANDLORD AND TENANT.

Lease — Lease in longum tempus—Deeds Registry Ordinance No. 17 of 1919, section 12—Recording of leases — Whether a lease so recorded is immovable property— Breach of covenant—Nonpayment of rent — Equity relieves against — Assignment — Previous consent of lessor not obtained — Licence to re-enter — No re-entry made — Effect of — Whether lease still valid and effectual.

Leases of immovable property recorded under the provisions of section 12 of the Deeds Registry Ordinance No. 17 of 1919 are in the nature of immovable property.

Non-payment of rent in advance is a breach of covenant against which equity relieves as a matter of course.

A. leased New Hope to B. on the 11th March, 1920. It was a term of the lease that "the lessee shall be at liberty to build or erect any building or house thereon and shall be at liberty to effect any transfer of this lease with the knowledge and approval of the lessor. The lessor shall have the right to re-enter into possession of this property upon failure to observe the conditions herein contained." This lease was registered on the 25th September, 1920, and on the same day by a deed executed in the Deeds Registry B. transferred the lease to C. A. was not asked to

consent to the transfer. He, however, knew of it in 1921, but he never re-entered. *Held*, that the lease was merely voidable on the transfer being made, and that, as A. did not re-enter or bring a suit to recover possession, the property did not re-vest in him and that the lease was therefore valid and effectual in law.

RISQUEZ v. PERSAUD. [Douglass, J.]

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and see INFANTS.

LEASE.

Lease in longum tempus—Deeds Registry Ordinance No. 17 of 1919, section 12—Whether a lease so recorded is immovable property—Assignment—Previous consent of lessor not obtained —Licence to re-enter—No re-entry made—Effect of—Whether lease still valid and effectual—Breach of covenant—Non-payment of rent—Equity relieves against.

See LANDLORD AND TENANT AND INFANTS.

LIBEL.

Newspaper libel—Enlargement of writ by claim—Perfectly valid—English Order 3, rule 9 inapplicable here—Publication— Of and concerning the plaintiff—No allegation of—Point not taken until after evidence concluded—Plea of fair comment— Objection not now open to defendant—Newspaper reports—Not judicial or parliamentary—Not privileged at common law— Newspaper Libel and Registration Act, 1881, and Law of Libel Amendment Act, 1888, not in force here—Justification—Substantial truth—Innuendo—Proper office of—Fair comment— Matters of public interest—Meaning of—Whole article to be read—Political elections—Remarks on public but not private career of candidate justified —Malicious—Meaning of—Joint tort feors—Defence of one open to the other—Malice of one sufficient—Slander and Libel Ordinance, No. 3 of 1846, section 6 —Negligence—Meaning of—Apology—Sufficiency of—Question of fact—Need not be abject—Unreserved withdrawal of imputations and expressions of regret—Prompt apology—May be genuine—Damages—Costs—Plaintiff successful on half of his claim.

It is sufficient in a writ for libel to allege that the libels complained of are contained in a particular issue of a newspaper and in previous and subsequent issues thereof.

With respect to three of the four alleged libels there was no allegation by the plaintiff that the alleged libellous words were used "of and concerning the plaintiff." The defendants pleaded fair comment. Objection was taken to the omission by the plaintiff after the evidence had been completed. *Held*, that the objection must fail because (a) it was too late inasmuch as evidence

had already been taken and not objected to, of the identity of the plaintiff with the person referred to in, at any rate, portions of the various libels; and (b) a plea of fair comment is in the nature of a plea in confession and avoidance, and by such a plea the defendants in effect admitted that they referred to the plaintiff.

Newspaper reports of proceedings which are neither judicial nor legislative are not privileged in this colony.

At common law only the reports of judicial or of parliamentary proceedings are privileged. In this colony a newspaper has no further privilege.

The Newspaper Libel and Registration Act, 1881 and the Law of Libel Amendment Act, 1888 are not in force in this colony.

P. C. W. and N. C. were rival candidates for the Court of Policy. The former was the chairman of, and was supported by, the "Daily Argosy": the latter was supported by the "Daily Chronicle," the only other daily. On the 10th February the "Argosy" published a report in which it was insinuated that A. R. F. W. the second named defendant, an F.R. and the editor of the "Daily Chronicle," was drunk at a political meeting on the evening of the 9th February. On the 11th February the "Daily Chronicle" referred to the report in the "Argosy" as "viciously mendacious" and said it was inserted "under the direction of and on a peremptory order from P.C.W." The defendants pleaded justification to this alleged libel. The statement that A. R. F. W. was drunk was not substantiated. Evidence was led that P. C. W. told W. A. B., the "Argosy" reporter, that when he returned to the office he must either tell the editor or say that he wanted it mentioned. *Held*, that the statement was in fact mendacious as A. R. F. W. was not drunk, and the instructions which W. A. B. received from P. C. W. who was not only the chairman of the "Argosy," but also the candidate his paper supported, were for all practical purposes an order which few editors would venture to ignore and of which the sub-editor approved, the retort was not an unfair answer to the plaintiff's attack, and the substance of the charge was justified.

The proper office of an innuendo would seem to be to fix the meaning of an ambiguous expression or to mark that an expression is used in a different sense from that which it-would *prima facie* import. Whether the expression has been so used on the particular occasion is a question of fact for the jury. An innuendo may consist of two branches, (a) to explain the meaning of an English word used in that which appears to be its only sense; and (b) to state the object with which the alleged libellous expression was used. It is the duty of the judge to rule whether the words are capable of more than one meaning or of the meaning ascribed, and the jury to find if they did in fact convey that meaning.

The defendants published a libellous article of and concerning the plaintiff entitled "Vindictiveness on a High Horse" in which they alleged that when the former proprietors of the "Daily Chronicle" decided to form a limited liability company they were approached by the plaintiff, and for certain pecuniary rewards and a piece of land he undertook to underwrite \$5,000 worth of the shares. This statement was untrue. The plaintiff never received any reward of a piece of land from the first named defendant. The defence pleaded fair comment. *Held*, that the matter commented upon was not one of public interest, it was an entirely private business matter between the plaintiff and the first named defendant, it had nothing whatever to do with the public career of the plaintiff and could not by any interpretation be said to be a comment for the benefit of the public on a matter of public interest.

The term "matters of public interest" does not mean only or chiefly matters in which the public take an interest.

A defendant in a libel suit is entitled to claim that the whole article published be read and not merely a portion of it. And a jury may read other parts of the newspaper referring to the same topic as the libel though locally disjoined from it.

It is perfectly legitimate to make remarks on the public career of any candidate though remarks on his private life might not be justified. In comparing the merits of two opposing candidates at an election, it is perfectly legitimate to express an opinion, be it right or wrong, that one candidate would not take sufficient interest to tackle what his electors chose to consider as their grievances.

The law considers publications of statements which are false in fact and injurious to the character of another as malicious, unless they are fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned.

Negligence in Ordinance 3 of 1846 means gross negligence, that is to say, not mere inadvertence but wilful negligence or such a reckless want of care as to amount to culpable negligence.

The sufficiency or insufficiency of the apology is peculiarly a question for the jury. A mere correction is not an apology but the pith of an apology will lie in the unreserved withdrawal of all imputations and in the expression of regret for having made any.

An apology need not be abject. A prompt apology goes a long way to satisfy the Court that it was genuinely meant: and if a fuller one was not demanded at the time that it was sufficient

WIGHT v. DAILY CHRONICLE, LTD., ET *al.* [Douglass, J.] 106
and see TORTFEASORS, DAMAGES, COSTS AND INTEREST.

LIMITATION OF ACTIONS.

**Lord Tenterden's Act, 1828—Prescription Ordinance, 1856—
Repeal of section 10—Prescription Ordinance, 1918—Acknowledgment
after writ insufficient—Prescription.**

See PRESCRIPTION.

MAGISTRATE'S COURTS.

**Complaint need not be in writing—Ordinance No. 12 of 1893,
section 8 (1)—Reasons of decision—Guide to Court of Appeal—
Licensed Places (Hours of Closing) Ordinance No 20 of 1902, section
3—Delivery of spirituous liquor in a licensed place — Delivery
therefrom—Amendment—Powers of—Summary Convictions Offences
Ordinance (No. 12 of) 1893, section 97 (2).**

Reasons for decision are peculiar to the procedure on appeal in this colony, and are for the purpose of enabling the Magistrate to put his view of the case before the Appeal Court. The Appeal Court is in no way bound by the opinion of the Magistrate on the law or his deductions therefrom, yet when the Magistrate states as a matter of fact what was purported to be done by him on the complaint and why he dismissed it the Court will accept his statement—*qua* statement—as conclusive. [Douglass, J.]

Where a person is charged with contravening the provisions of the Licensed Places (Hours of Closing) Ordinance No. 20 of 1902 by delivery of spirituous liquor in the licensed place and the evidence satisfied the Magistrate that the liquor was delivered " from "—and not "in"—the licensed place, the Court held that the Magistrate should have amended the complaint to meet the particular offence proved.

CRESSALL *v.* DIAS. [Full Court.]

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**Plaints—Technical objections—Not to be encouraged—Curability—
Amendment.**

Magistrates should be loth to entertain technical objections going to insufficiency of pleadings, and, particularly so, when the insufficiency can be supplied by amendment.

ABDUL *v.* KADRAT ALI [Full Court.]

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**Evidence wrongly received in Magistrate's Court—No objection
there taken—Whether duty of Appeal Court to reject it.**

See DELGADO *v.* BROWNE. [Full Court.]

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**Payment into court before hearing—Fee to solicitor or counsel
conducting case—Whether such fee payable under the circum-**

stances—Meaning of "conducting case"—Ordinance No. 11 of 1893, section 13—Ordinance No 10 of 1893, schedule. Item 9 and sections 57 and 60—Hearing—When it commences.

The respondents brought an action against the appellant in the Magistrate's Court for goods sold and delivered. About an hour before the case was fixed for hearing the plaintiff paid into Court the amount of the claim and of the court fees incurred. Later in the day, the Magistrate awarded a fee to the plaintiffs' solicitor who had prepared and signed the plaint although the defendant's counsel took objection thereto at the time. The defendant appealed. *Held*, that the Magistrate's Ordinances did not provide for the intervention of counsel or solicitor before the actual hearing, that up to the time of payment the hearing had not commenced, and that the plaintiff could not therefore recover more than the amount of the judgment and the court fees incurred.

LOPES, FERNANDES & Co., LTD., v. A. DE CASTRO. 71
[Full Court.]

Evidence — Getting up—Impropriety or irregularity in—Whether evidence so obtained is ipso facto inadmissible.

Impropriety or irregularity on the part of the police in their conduct of the case is immaterial so long as the evidence thereby obtained has not been rendered inadmissible.

WEEKS v. WILSON. [Major, C.J.] 89

Several complainants—Case dismissed—Bond given by one— Whether his appeal audible—Several defendants—One recognizance entered into as if for costs of one appeal—Whether separate bonds necessary—Power of court to increase security.

See WILLIAMS, *et al*, v. JOHN, *et al*. [Major, C.J.] 161

MASTER AND SERVANT.

Common employment —Doctrine of—Employers Liability Act, 1880, section 1—"Whilst in the exercise of such superintendence" — "Charge or control of"—Accidental Deaths and Workmen's Injuries Ordinance: No. 21 of 1916, sections 9 (2) and (5).

See ACCIDENTAL DEATHS AND INJURIES TO WORKMEN.

Unlawfully and with force hindering and preventing a person working at or exercising his lawful trade, business or occupation—Summary Convictions Offences Ordinance, No. 12 of 1893, section 32—Particular person mentioned in complaint—Whether force must be used to him personally—Master and servant—

Threats used to servant sufficient to found a conviction under the section for hindering his employer in his lawful trade.

COLLINS *v.* SMITH AND WILSON [Full Court.]

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and see CRIMINAL LAW.

MERGER.

Securities of equal degree—One security higher than the other — Effect of.

Where a creditor takes for his debt a security of higher nature than that which he already possesses for his debt, his remedies on the minor security or cause of action are merged by operation of law in the higher remedy and extinguished. No merger takes place when the securities are of equal degree.

The plaintiffs issued a specially indorsed writ claiming from the defendant the sum of \$2,000 on a promissory note. The defendant pleaded that he had passed a mortgage bill of sale in favour of the plaintiffs to secure a sum of \$5,098.56 due by him to them, that this sum included the amount of the promissory note which was discharged by the bill of sale which was executed at the request of the plaintiffs and accepted by them as such. *Held*, that the bill of sale was merely taken as security, that to take further security for a debt does not operate as an extinguishment of the debt and that a suit could still be brought upon the note.

CURTIS, CAMPELL & Co. *v.* JOHN DODDS. [Douglass. J.]

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Subsequent security higher than the first—Whether coextensive with the first—Variation as to interest and time of payment.

The defendant made a promissory note in favour of the plaintiffs for \$2,000 payable on demand. No interest was mentioned in the note. Subsequently, the defendant passed a mortgage bill of sale in favour of the plaintiffs to secure the payment of the amount of the promissory note together with a further sum of \$3,098.56. In the bill of sale interest was charged on the amount of the promissory note. It was provided in the Bill of Sale that the sum of \$3,007.66 be paid on the 30th September, 1922, and the sum of \$2,090.90 on the 31st December, 1922. *Held*, that assuming that the bill of sale was a specialty, it was not co-extensive with the promissory note since the times of payment were different, and interest was charged on the bill of sale whereas none was charged in the note. The promissory note was, therefore, of full force and effect.

CURTIS, CAMPBELL & Co. *v.* JOHN DODDS. [Berkeley. J.]

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**Whether subsequent security operates as an extinction of the first—
Evidence—Admissibility of.**

The Court admitted evidence that the defendant acknowledged liability on the promissory note, at a point of time after the bill of sale was made, in order to show that the inclusion of the note in the bill of sale was only by way of security.

Where a bill of sale is executed in respect of a sum of money already secured by a promissory note, evidence is admissible to show whether the simple contract debt was extinguished by the bill of sale or whether the bill of sale was executed by way of security merely.

CURTIS, CAMPBELL & Co. v. JOHN DODDS. [Berkeley, J.] 189

MINING DISPUTES.

Appeal from warden—Practice—Several complainants—Bond given by one—Whether his appeal audible—Several defendants — One recognizance entered into—Only for \$50—Mining Ordinance No. 34 of 1920, section 93—Whether separate bonds necessary—Power of Court to increase security.

Where a respondent is of opinion that the bond given by the appellant is insufficient for the costs of the appeal he may make an application to the Court for an increase of the security.

W., C. and L. brought a complaint under the Mining Regulations against J., S. and three others. The complaint was dismissed by the Warden. The complainants served notice of and reasons of appeal, C. entered into a bond to prosecute the appeal in the sum of \$50. W. and L. gave no bond. By section 93 of the Mining Ordinance, 1920, it is provided that "the appellant shall, within one month after the date of the decision appealed against, enter into a recognizance with at least one sufficient surety in fifty dollars to the satisfaction of the Commissioner, or Assistant Commissioner or Warden, conditioned for the due prosecution of the appeal and for abiding the result thereof including the payment of all costs of the appeal and otherwise." On the appeal coming on for hearing J. was represented by two counsel and S. by one. The other respondents did not appear. On objections being taken to the hearing of the appeal. *Held* (1) that C.'s appeal could be heard as he had satisfied the requirements of section 93 of Ord. 34 of 1920, (2) that there is *no* rule of practice that an appellant against a dismissal of a complaint or of an action, or against a judgment or order in favour of a number of respondents, even where, and whether or not, each of those respondents (whatever their number) is separately represented, or have different interests, *must* enter into a separate recognizance for security of costs in

respect of each respondent; and (3) that, under the circumstances, the amount of the bond entered into was insufficient, but that the Court had power to adjust it on application being made by the respondents.

WILLIAMS, *et al.*, v. JOHN, *et al.* [Major, C.J.]

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NEGLIGENCE.

Cars standing abreast on public road at night so that impossible to pass—Whether evidence of negligence—Contributory negligence—Sudden peril—Alternative courses—No time to think—Whether evidence of negligence if best course not pursued.

Sometime after dark on the 13th April, the Grenville race day, two Ford motor cars owned by C.S.—No. 149 going out from, and No. 199 coming from, the town of St. George. Grenada, met on the outskirts of the town. The drivers stopped their cars abreast of each other for two or three minutes to talk to one another, and by their so doing, the road was blocked for vehicular traffic as it is too narrow to allow a third car to pass.

Car No. 149 had four headlights on, and the kerosene red tail light of 199 was also burning.

The headlights of J.B.'s car, a light Overland, which was on its way to town, were seen as it came round the nearest corner at least 140 feet off, by the driver of 149 who thereupon sounded his horn incessantly, but neither he nor the driver of 199 moved their cars at all.

As J. B. came round the corner, he was so dazzled by the headlights of car 149 which shone straight in his face that he could not discern anything on the right side of that car, and did not perceive until he was about a car's length away that there was any car on that side of the road. J. B. pressed the foot-brake as much as he could, threw out the clutch, and swerved as hard as he could, to the right with the idea apparently of bringing his car to a standstill right across the road before coming in contact with the other two cars. He, however, failed in achieving his object and collided first with 149, and almost simultaneously with 199.

In an action by C. S. against J. B. for damages judgment was entered for the defendant. On appeal,

Held, (1) that there was evidence of negligence on the part of the servants of C. S. in stopping their cars so long as two or three minutes after dark on a race day in a main thoroughfare on the outskirts of the town and in such a position that it was impossible for another car to pass;

(2) that had the plaintiffs drivers, on seeing defendant's car

approaching round the bend of the road driven on their cars as they had time to do, the accident would have been avoided;

(3) that in view of the dazzling headlights of car 149 the defendant was not negligent in failing to perceive car 199 or its red tail light in sufficient time to avoid the accident;

(4) that the defendant placed as he was suddenly in a critical position had no time in which to deliberate over or weigh the comparative advantages of alternative courses, he had to act instantaneously, and the fact that in such a sudden emergency the defendant did not adopt all those expedients which suggest themselves to those who afterwards consider the incident calmly and under no sudden stress does not necessarily indicate negligence on his part, and that under the circumstances stated he was not guilty of negligence.

CHYKRA SALHAB v. JOHN BRANCH. [W.I.C.A.]

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NON-DISCLOSURE.

Material facts—Trustee and cestui que trust—Purchase by former from latter—Surviving partner and estate of deceased partner—Purchase by former from latter—Surviving partner and estate of deceased partners—Purchase by former from latter—Duty of former to disclose all material facts—Valuers appointed—Timber yard to be valued—Whether surviving partner should have disclosed to valuers that he had a hope that a creditor would take over the timber yard at a certain figure.

MARQUEZ v. SCOTT, *et al.* [W.I.C.A.]

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PARTITION.

Immovable property—Partition of—Sale—Law to be applied—English common law not applicable—Immovable property—Ordinance No. 15 of 1916, section 3 (3)—Inherent powers of Court—Roman-Dutch Law—Applicability of—Discretionary power of Supreme Court to apply—Ordinance No. 15 of 1916, section 2 (3)—English Order 51 inapplicable here.

The provisions of Order 51 of the English Rules of Court relating to the sale of real property are not in force in this colony.

By reason of section 3 (3) of the Civil Law of British Guiana Ordinance No. 15 of 1916 the English common law as to partition of real property is not applicable to immovable property in this colony.

A. and B. were each entitled to an undivided moiety in certain immovable property in this colony. A. applied for an order of sale. *Held*, that in deciding whether an order be made or not, the Court will be guided by the powers of sale inherent in judges

of the Supreme Court when it is necessary and expedient that immovable property should be disposed of, and on the Roman Dutch law as to the division of property in community, and that, under the circumstances, a sale would be ordered.

BARRIERO *v.* DE FREITAS. [Douglass, J.] 96

PARTNERSHIP.

Share—Meaning of—Sale of—Minus quantity—Whether it can be sold—Sale—Sale for cash.

MARQUEZ *v.* SCOTT, *et al.* [W.I.C.A.] 200

PASSING OFF GOODS.

Evidence—Persons mistaking defendant's goods for plaintiff's—Mistake only discovered on closer examination being made—Admissibility of.

In an action for passing off goods evidence is admissible to show that persons mistook the defendant's goods for the plaintiff's, and that they only found out their mistake on a closer examination being made.

MAZAWATTEE TEA CO., LTD., *v.* PSAILA, LTD., [Berkeley, J.] 56
and see TRADE MARK.

PAYMENT.

Debt not paid in full—Payment by a third party—Whether a liquidator paying by his own cheque for his own convenience is a third party—Third party not out of pocket—Accord and satisfaction.

see ACCORD AND SATISFACTION.

Deed—Covenant to pay a specific sum—No release executed—Accounts stated—Liability in deed wiped out—Set off.

MARQUEZ *v.* SCOTT, *et al.* [W.I.C.A.] 200

PRACTICE.

Orders—Not final—Liberty to apply—Not expressed—Implied in all cases.

In the case of orders which are not final, liberty to apply to the Court as to the working out of rights declared therein is implied.

MOHABIR *v.* BISMILLA, *et al.* [Douglass, J.] 41

Accounts—How settled—Application for judgment—Rules of Court, 1900, Order 29, rules 12, 13—"Court" includes "judge" — Supreme Court Ordinance No. 10 of 1915.

The word "Court" in Order 29, rule 13 includes a Judge when exercising any of the jurisdictions conferred upon him by the Supreme Court Ordinance No. 10 of 1915 or by any Ordinance or by the Rules of Court.

MOHABIR *v.* BISMILLA, *et al.* [Douglass. J.]

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Accounts—Settled by judge—Application for judgment—Rules of Court, 1900, Order 29, rules 12, 13—Order thereon—Whether interlocutory or final—Whether appeal lies to the Privy Council — Appeals Regulation Ordinance No 33 of 1922, section 3 (1) (j)— Whether person who applies for judgment on the findings of the judge is estopped from subsequently appealing against those findings.

On the 21st February, 1924, a judge made certain findings with reference to certain accounts which were ordered to be filed. The plaintiff applied for judgment which was given, in accordance with the said findings, on the 14th March, 1924. No order was drawn up embodying the findings of the judge: the only order which was drawn up was the one dated the 14th March 1924. The plaintiff, being dissatisfied with some of the findings of the judge, appealed to the West Indian Court of Appeal. On objection being taken that no appeal lay to the West Indian Court of Appeal *Held*, that the order appealed from was final and not interlocutory, that it was made by a single judge acting as "the Court" within the meaning of the Rules of Court, 1900, Order 29, rule 13, and not by the Full Court within the meaning of Ordinance No. 33 of 1922, section 3 (1) (j), and that, therefore, the appeal was properly brought to the West Indian Court of Appeal.

MOHABIR *v.* BISMILLA, *et al.* [W.I.C.A.]

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Judgment obtained by default—Procedure and grounds for setting aside—Laches—Whether an action is a proper remedy— Due diligence—Interpleader—Levy on cottage—Rules of Court, 1900, Order 42, rule 11—Order 40.

Where a judgment is obtained by default through the *laches* of one party it is not competent for him to bring a fresh action to set aside the judgment. He may, however, if he have good and strong reasons and if he uses due diligence and acts promptly, make an application under Order 40 of the Rules of Court, 1900 in the original action to have it set aside.

The defendant levied on a certain cottage. The plaintiff claimed it. The Marshal interpleaded, and on the 15th July, 1922, the plaintiff's claim was dismissed as he neither appeared nor filed any affidavit. The sale of the cottage was re-advertised to take place on the 2nd November, 1922. On the 27th October the plaintiff filed a writ to restrain the sale and for a declaration that

the levy was illegal. An interim injunction was granted on the 30th October, and an interlocutory one on the 18th November, 1922. The defendant entered appearance on the 3rd November. The statement of claim was filed more than a month later, to wit, on the 4th December. The defence was filed on the 11th December, and the reply which was a mere joinder of issue on the 15th December. The action was not placed on the hearing list within six months thereafter, and it therefore became deserted and abandoned under Order 32, rule 5. On the 18th July, 1923, the plaintiff applied for an order of revivor. The application was granted on the 11th August. On the 12th October, 1923, more than two months after the plaintiff placed the action on the hearing list. *Held*, that even assuming that an action was the proper remedy to set aside a judgment obtained through the plaintiff's own *laches*, it was quite clear that the plaintiff, from beginning to end, had shown anything but due diligence in his proceedings to set aside the judgment, and that the action must therefore be dismissed

GOBIN MARAJAH v. JOHN LOPES. [Douglass. J.] 43

Striking out pleadings under Order 17, rule 30—Extrinsic evidence—Inadmissibility of—Rejection of same in Appeal Court although admitted without objection in lower court.

On an application under Order 17, r. 30 by defendant to strike out the plaintiff's statement of claim for non-disclosure of a reasonable cause of action and as being frivolous and vexatious, the judge received and considered without objection affidavits of the parties in support of, and in opposition to, the application. *Held*, on appeal from an order of Gilchrist, J. dismissing the application that, on *Attorney General of Duchy of Lancaster v. London & N. W. R'ly Co.* (1892) 3. Ch. 274 those affidavits were inadmissible, and, as the grounds of the application could be gathered from them only, rule 30 did not apply. *Held*, also, on *Jacker v. International Cable Co.* (1888) 5 T.L.R. 13, that, although the affidavits were considered without objection in the court below, the Appeal Court must reject them, and the statement of claim (which alone might be looked at) being unexceptionable on the face of it, the order of dismissal must be affirmed.

R. S. DELGADO v. C. E. BROWNE. [Full Court]. 65

Appeal—Question of fact—Judgment reversed — Principles by which court guided.

UNION MARINE INSURANCE CO. v. MURPHY. [W.I.C.A.] 237

Contempt of Court—Criminal contempts—How punishable—Whether a single judge has jurisdiction to grant a rule nisi—Contempt of Court Ordinance, 1919, section 5—Supreme Court

Ordinance, 1915, ss. 3 (2), 5 (1) and 25—Judicature Act, 1873, section 40—Judicature Act, 1876, section 17—Judicature Act, 1884.

A single judge has no jurisdiction to grant a rule nisi for attachment for contempt of Court.

HENRY AARON BRITTON. [Major, C.J.] 74

Will—Probate Court—Probate of will—Action for—Grounds alleged against will—Particulars—Whether need be stated in this colony—English Order 19 rule 25a, not in force here.

Rule 25a of Order 19 of the English Rules of Court is not in force in this colony.

RAMPERSAUD SINGH v. RAMLOGAN, *et al.* [Douglass. J.] 179

Substituted service—When permitted — Whether personal service necessary.

Substituted service is permitted only when personal service of a writ of summons or an order is required and cannot promptly be effected,

FERNANDES v. FERNANDES. [Major, C.J.] 165

Orders—Service—Divorce decree—Provision for permanent maintenance — Order to pay money — Service unnecessary— Rules of Court, 1900—Except where required by order—In the absence of express provision in order personal service unnecessary.

It is not a condition precedent to the issue of execution that there should be service of an order containing an absolute direction to pay, or giving an absolute right to recover.

Where personal service of an order is not required by the Rules it need only be served personally where the order expressly so directs.

FERNANDES v. FERNANDES. [Major, C.J.] 165

Alteration of procedure since order made—Rules of Court, 1900—Matrimonial Rules, 1921—Whether service of an order necessary or whether personal service necessary— How determined—Whether the old rules or the new rules govern the situation.

Whether an order is required to be served, or whether personal service is essential must be determined with reference to the Rules of Court in force when the order was made.

FERNANDES v. FERNANDES. [Major, C.J.] 165

Injunction — Interim — Interlocutory — Grounds on which granted—Substantial questions of law and fact—Damages not

an adequate remedy—Prima facie cause of action—Rules of Court, 1900—Order 40, rule 5, and Order 38, rule 1.

Where an immediate injunction is not required no injunction should be granted unless the defendant has had an opportunity of being heard after service upon him of notice of the application as required by Order 40, rule 5 of the Rules of Court, 1900. Ruling of Major, C.J. in *Robertson v. Yarde* (1919) L.R.B.G. 55, and opinion of Dalton, J., in *Obermuller v. de Souza* (1917) L.R.B.G. 34 followed.

A writ was filed and an interim injunction was applied for the next day. On the Court being satisfied as to the urgency thereof, it granted an interim injunction and gave liberty to the plaintiff under Order 40, rule 13 to serve upon the defendant before the time limited for appearance to the writ of summons a notice of motion to continue the injunction until the determination of the action.

Where an interim injunction has been granted the proper procedure is that it should only continue in force until the hearing and determination of an application for an interlocutory injunction notice whereof must be given to the opposite party.

As there were substantial questions of law and of fact to be considered, as the affidavits disclosed at least a fair *prima facie* cause of action, and as the remedy by way of damages might not have been of much avail to the plaintiff in the event of his succeeding in the action, the Court granted an interlocutory injunction, with the usual undertaking as to damages, to continue until the hearing and determination of the action.

GOBIN MARAJAH v. JOHN LOPES. [de Freitas, J.]

1

Specially indorsed writ—Moneys had and received—Implied contract — Fraudulent misappropriation — Whether subject matter of specially indorsed writ.

The plaintiffs sued the defendant for moneys had and received and alleged that the defendant had stolen the moneys from them.

Held, that such a claim constituted a debt from the defendant to the plaintiffs, and was capable of being specially indorsed.

GUIANA STEAM SAW MILL, LTD. v. DA SILVA. [Douglass, J.] 151

Specially indorsed writ — Leave to defend — Substantial question of law or fact—No injury to defendant.

The Court refused leave to defend as it was of opinion that no substantial point of law or of fact was raised in the affidavit of defence and that the defendant would not be in any way injured by the refusal.

CURTIS, CAMPBELL & Co. v. JOHN DODDS. [Douglass, J.]

4

Specially indorsed writ — Leave to defend — Substantial questions of law and of fact—Hearing on affidavits not permitted.

The plaintiffs issued a specially indorsed writ claiming from the defendant the sum of \$2,000 on a promissory note. The defendant filed an affidavit of defence in which he set out that he had passed a mortgage bill of sale in favour of the plaintiffs to secure a sum of \$5,098.56 due by him to them, that this sum included the amount of the promissory note which was discharged by the bill of sale which was executed at the request of the plaintiffs and accepted by them *as such*, that the defendant was in default of payment of the sum secured by the bill of sale and in accordance with the terms thereof the plaintiffs seized the goods charged thereby and have sold and are still selling portions thereof, that the plaintiffs were still in possession of quantities of the machinery, old metal and bricks charged by the bill of sale, that they were worth considerably more than the sum of \$5,098.56, that this sum could have been realised by sale, that the plaintiffs had never rendered him any account of their dealings with the articles seized, and that he was not aware of the state of accounts between him. *Held*, reversing the order of Douglass, J., that leave to defend must be granted.

CURTIS, CAMPBELL & Co. v. JOHN DODDS. [W.I.C.A.] 228

Statute of frauds—Must be specially pleaded—Civil Law of British Guiana Ordinance No. 15 of 1916, section 3 (4) (e)—Rules of Court, 1900, Order 17, rules 15 and 20.

A party who does not in his pleading specifically rely on the provisions of section 3 (4) (e) of the Civil Law of British Guiana Ordinance No. 15 of 1916 will not, at the trial, be permitted to raise any plea based on that sub-section.

OFFICIAL RECEIVER v. JAMES MITCHELL. [Douglass, J.] 100

Pleadings—Point not raised on the pleadings—Whether it can be taken at the trial—Rules of Court, 1900, Order 23, rule 5— Not in English Rules.

Under Order 23, rule 5 of the Rules of Court, 1900 a defendant is entirely within his right in raising any point of law at the trial whether raised on the pleadings or not.

WIGHT v. DAILY CHRONICLE, LTD., *et al.* [Douglass, J.] 106

Libel—Publication in a newspaper—Statement in writ that libels complained of are contained in a particular issue of a newspaper and in previous and subsequent issues thereof— Whether sufficient— English Order 3, rule 9, inapplicable here.

It is sufficient in a writ for libel to allege that the libels complained of are contained in a particular issue of a newspaper and in previous and subsequent issues thereof.

WIGHT v. DAILY CHRONICLE, LTD., *et al.* [Douglass, J.] 106

Costs—No appeal as to—No cross notice by respondent— Whether Court would consider point at trial—West Indian Court of Appeal Rules, 1920, rule 10.

per Lucie Smith, C.J.: The Court would not consider an application by the respondents to vary an order made as to costs when no notice was given that such a point would be raised.

RATANEE v. UMRAWSINGH, *et al.* 195

and see COSTS, TAXATION, APPEAL.

Appeal—Grounds of appeal—Not arguable where not stated in notice of motion—Whether competent for the Court to consider grounds not raised therein—West Indian Court of Appeal Rules, 1920, rule 4.

It is not competent for the Court to consider a ground of appeal which is not raised in the appellant's notice of motion.

MARRYSHOW v. TURTON [W.I.C.A.] 255

and see AMENDMENT.

PRESCRIPTION.

Limitation of actions—Lord Tenterden's Act, 1828—Prescription Ordinance, 1856—Repeal of section 10 — Prescription Ordinance, 1918 — Uncontrolled acknowledgment — Implied promise to pay—Nice distinctions on which cases turn— Acknowledgment after writ insufficient.

An acknowledgment or promise to pay made or given after the issue of a writ is of no avail in taking a case out of the Statute of Limitations.

The plaintiff sold certain goods to the defendant. The plea of prescription was raised. In rebuttal, the plaintiff produced the following letter written by the defendant to him. "I did promise to send you a remittance Sir, I find I could not owing to the high exchange, you have to pay 10 per cent, so if I have to send you \$3,000, I will have to pay \$300 ... I am coming to Demerara in the month of June I will try and settle with all my creditors as amicably as I can." *Held*, that there was sufficient uncontrolled acknowledgment to take the case out of the Prescription Ordinance, 1856.

KHOURI v. ELCOCK. [Douglass, J.]

52

PRESUMPTIONS

That provisions of Ordinance duly carried out—Presumptio juris.

GRENADA.

MARRYSHOW v. TURTON. [W.I.C.A.] 255

PRINCIPAL AND AGENT.

Authority of selling agent—Proper performance of duties—Ordinary course of duties—Limits of implied authority.

A general agent in this colony for the purpose of selling the goods of a foreign principal has implied authority to do whatever is incidental to the ordinary course of his business, and whatever was necessary for the proper and effective performance of his duties.

MAW, SON, & SONS, LTD. v. SCOTTS, LTD. [Douglass, J.] 48**Principal not disclosed—Agent personally liable—Exclusive credit given to agent.**

Per Douglass, J.: There are two cases at least in which an agent may be personally liable (*a*) where exclusive credit is given to him: *Thomas v. Davenport* (1829) 9 B. & C. 78, and (*b*) if at the time of making the contract with the third party the agent does not disclose the fact of his agency and treat with the third party as principal.

DA SILVA v. FERNANDES, [Full Court.] 77**Duty of agent to keep accounts—Gratuitous agent—Father and son—Ordinary diligence—Education, habits and station in life of agent to be considered.**

A gratuitous agent is not required to exercise more care in the management of his constituent's affairs than he uses in his own.

In deciding whether accounts rendered by an agent are reasonable, the Court always has regard to his education, habits and station in life.

PHILLIPS v. PHILLIPS. [Douglass, J.] 102**Ostensible authority.***See* **WATTLEY v. MENDELL.** [W.I.C.A.] 273

PRIVATE INTERNATIONAL LAW.

Divorce — Situs celebrationis of marriage—Divorce in a different place—Court of domicile—Whether decree valid—Consequences of decree—Regulated by the court which grants

decree—Foreign law — Proof of—Manner of—Evidence of experts.

See DIVORCE.

REAL PROPERTY ORDINANCE.

TRINIDAD.

Voluntary settlement registered in the General Registry— Not on register under the Real Property Ordinance, No. 60—Not effectual to pass land under the Real Property Ordinance—Incomplete gift—Breach of trust—Whether fraud on the part of the mortgagees—Meaning of fraud.

By a deed registered in the General Registry but not entered in the Register Book kept under the Real Property Ordinance B. conveyed all her lands *ex facie* to S. By reason of certain terms of art being omitted from the deed the trustees in whom it was apparently intended that the property should vest got no estate legal or equitable in the lands, the whole legal and equitable estate therein being vested in S. by the operation of the Statute of Uses. But some of these lands were registered under the Real Property Ordinance. *Held*, on the authority of *Macedo v. Strand* (1922) 2 A. C. 330, that so far as the lands under the Real Property Ordinance were concerned the gift was incomplete and of no effect.

RATANEE *v.* UMRAWSINGH, *et al.* [W.I.C.A.] 195

Fraud—Knowledge by clerk to solicitor of mortgagees of alleged Deed of Trust—Deed of trust did not "affect" the land.

The deed of trust being inoperative so far as lands under the Real Property Ordinance were concerned it would not be fraud on the part of the mortgagees to accept a mortgage from the executors of B., the then registered proprietors, with knowledge thereof.

RATANEE *v.* UMRAWSINGH, *et al.* [W I.C.A.] 195
and see GIFTS AND TRUSTS.

RECOGNIZANCE.

Appeal—To abide appeal—Recognizance considered insufficient — Application for increase.

Where a respondent is of opinion that the bond given by the appellant is insufficient for the costs of the appeal he may make application to the Court for an increase of the security.

WILLIAMS, *et al.*, *v.* JOHN, *et al.* [Major, C.J.] 161

RES JUDICATA.

Antrefois acquit—Jeopardy—Jurisdiction on former complaint — Subsequent complaint substantially the same as the first—Licensed Places (Hours of Closing) Ordinance, No. 20 of 1902, section 3—Delivery of spirituous liquor in a licensed place— Licensed place—Retail spirit shop— Ordinance No. 20 of 1902, section 2—Therefrom and therein— Substantially one offence— Amendment — Powers of Magistrate — Summary Convictions Offences Ordinance No. 12 of 1893, section 97 (2).

Per Douglass, J.: In order to ascertain whether a judgment recovered in one action is a bar to a subsequent action, the test is not merely whether the same evidence is admitted or admissible in both cases, but (1) had the Magistrate in the first case jurisdiction to try the case? for, if not, no judgment could have been given. Whether the acquittal is by the verdict of the jury or on a point of law without the case going to a jury the accused is entitled to plead *autrefois acquit*; (2) was the offence or wrong with which the accused is charged practically or substantially the same in both cases? or, had he the risk of being convicted in the first case for the same offence with which he is charged in the second case?

D. was charged by C. for that within the hours prescribed by the Licensed Places (Hours of Closing) Ordinance No. 20 of 1902 — mentioning them—he, being the holder of a licence for a licensed place situate at Plaisance did deliver spirituous liquor therein. The nature of the licence held by D. was not stated in the complaint, but evidence was led identifying the place as the only place in Plaisance in respect of which D. held a retail spirit shop licence. The Magistrate held (a) that no offence was disclosed in the complaint inasmuch as it did not mention the Ordinance under which it was brought, and the mere use of the words "holder of a licence for a licensed place" did not in any way connect the offence with Ordinance No. 20 of 1902, and (b) that on the facts the liquor was not delivered "in" the shop but "from" the shop. He therefore dismissed the complaint. No appeal was taken to the Supreme Court.

C. instituted a fresh complaint against D. charging him that he, within the hours mentioned in the previous complaint, being the holder of a licence for a retail spirit shop situate at Plaisance did deliver spirituous liquor therefrom contrary to Ordinance No. 20 of 1902. The locality and name of the retail spirit shop were more fully described than in the former complaint. D. pleaded *autrefois acquit*, and tendered a copy of the proceedings on the former complaint. C. admitted that the evidence on the present charge would be the same as on the former one. The Magistrate upheld the plea and dismissed the complaint. C. appealed.

Held, that the Magistrate was in error when he held that the first complaint was defective. The ingredients of proof of the offence under the Licensed Places (Hours of Closing) Ordinance (No. 20 of) 1902 are that the person charged (1) between certain hours (naming them), (2) delivered, (3) spirituous liquor. (4) in or from, (5) a licensed place (naming it). Those particulars were each and all of them given in the first complaint. The Magistrate had jurisdiction to hear the complaint, and the defendant was in jeopardy upon it since he was liable upon proof of these facts to be convicted thereon. *Further*, two offences are not created by the use of the words "therein" and "therefrom." the two words merely indicate two ways of committing the same offence. The licensed place was properly identified, and the Court could have amended the complaint to read "from" the licensed place instead of "in" the licensed place. The defendant could therefore have been convicted upon the first complaint.

The plea of *autrefois acquit* was therefore a good one.

CRESSALL v. DIAS. [Full Court,]

7

SALE.

Sale—By cestuis que trust to trustee—Power contained in a will—Whether essential that money pass from purchaser to trust estate in order to constitute a valid sale to a trustee.

MARQUEZ v. SCOTT, *et al.* [W.I.C.A.]

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SALE OF LAND.

Contract—Mistake as to area—Not induced by vendor—Purchaser in possession of area intended to be bought—Legal title for less—Executed contract—Rescission—Grounds for.

The defendant held transport for six undivided one hundred and ninety-second parts or shares of and in Pln. New Hope. She occupied land amounting to 9 roods in facade by 750 in depth which the plaintiff saw before purchase. The agreement of sale between the plaintiff and the defendant followed the description in the transport, and did not specify the length of the facade of the land intended to be sold. The plaintiff received transport from the defendant for the said undivided area, and went into possession of the same extent of land as that occupied by the defendant before the sale. A few months after the transport was passed, the plaintiff discovered that, according to the legal title, she only had title for 1 rood 10 feet in facade by 750 roods in

depth. *Held*, that there existed no grounds upon which the Court could order a rescission of the contract of sale.

JUPUTTIA v. MARY ROOKMINIA FRASER. [Berkeley, J.] 62

This judgment was confirmed by the West Indian Court of Appeal on the 6th February, 1925.

Immovable property—Sale of real property in England— Rules as to—English Order 51—Not in force here.

BARREIRO v. DE FREITAS. [Douglass, J.] 96

SECURITIES.

Relative value of—Bill of sale—Notarially executed—Promissory note—Whether a bill of sale is a security of a higher degree than a promissory note—Civil law of British Guiana Ordinance No. 15 of 1916, section 14—Bills of Sale Ordinance No. 22 of 1916, schedule thereto.

See BILLS OF SALE.

Whether subsequent security operates as an extinction of the first—Evidence—Admissibility of evidence to explain.

CURTIS, CAMPBELL & CO. v. JOHN DODDS. [Berkeley, J.] 189

and see MERGER.

SERVICE.

Orders—Divorce decree—Provision for permanent maintenance—Order to pay money—Whether service necessary—Rules of Court, 1900—Whether necessary to serve an order personally where such an order provides for service.

It is not a condition precedent to the issue of execution that there should be service of an order containing an absolute direction to pay, or giving an absolute right to recover.

Where personal service of an order is not required by the Rules it need only be served personally where the order expressly so directs.

FERNANDES v. FERNANDES. [Major, C.J.] 165

SOLICITOR AND CLIENT.

Duty of solicitor to client—Conflict between interest and duty — When relationship ceases—Purchase of property by solicitor to prejudice of client—Damages—Measure of.

See BARRISTER AND DAMAGES

TAXATION

Review—Rules of Court, 1900, Appendix I., Part 1—"Amount claimed or the value of the property in respect of which the action is brought exceeds \$250 —Infringement of trade mark— Injunction and accounts ordered—Power of Taxing Master to assess value—Whether costs taxable on higher scale.

MAZAWATTEE TEA CO., LTD. v. PSAILA, LTD. [Major. C.J.] 93
and see COSTS.

Review—Objection not raised before Taxing Officer—Raised on review—Taxation on a wrong principle—Rules of Court, 1900, Order 46, rule 9—English Order 65, rules 39 and 41— Taxing Master not empowered to assign value to property in dispute.

NUNDLALL MARAJ v. MANN. [Douglass. J.] 148
and see COSTS.

Review—Application for—Costs of—Whether there is a fixed and obligatory practice to fix the costs.

The judge is not bound to fix the costs of an application for review of taxation. He may if he thinks fit, direct them to be taxed in the ordinary way.

CURTIS, CAMPBELL & Co. v. JOHN DODDS. [Major, C.J.] 230

TORRENS SYSTEM.

Real Property Ordinance No. 60—Trinidad—Voluntary settlement registered in the General Registry—Not on register under the Real Property Ordinance—Not effectual to pass land under the Real Property Ordinance—Incomplete gift—Not construed as a declaration of trust—Whether fraud on the part of the mortgagees—Meaning of fraud.

RATANEE v. UMRAWSINGH, *et al.* [W.I.C.A.] 195
and see REAL PROPERTY ORDINANCE AND GIFTS.

TORT FEASORS.

Joint tort feasors—Defence of one open to the other—What are joint tort feasors.

Where two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by the common act and the defence of each defendant is considered as if it were the defence of the others.

Two joint tort feasors were sued in respect of four libels. Fair comment was pleaded by the first defendant to the third and fourth libels and by the second defendant to the second and third

libels. *Held*, that the defendants had pleaded fair comment to the second, third and fourth libels.

WIGHT v. DAILY CHRONICLE, LTD., *et al.* [Douglass, J.] 106

Libel—Joint tort feasons—One defendant malicious—Whether others liable for his malice.

In the case of a joint publication of a libel, each tort feason is liable for the malice of the other though in assessing damages the Court may take into consideration that one party may be morally blameless.

WIGHT v. DAILY CHRONICLE, LTD., *et al.* [Douglass, J.] 106

TRADE MARK.

Infringement—Passing off goods—Similar get up—Mazawattee, Mazaruni—Trade Mark Ordinance, 1914, section 8 (5).

For over 30 years the plaintiffs had sold in this colony a brand of their tea called "Mazawattee". They took out a trade mark for the same on the 26th June, 1923. This tea was always contained in wrappers on which there appeared a dark blue label with a narrow white and blue border. On the dark blue label were printed the words "Mazawattee Tea for the Million". Before the plaintiffs' trade mark was registered, the defendants commenced selling a tea known as *Mazaruni*. The packets were longer but narrower than those of the plaintiffs. There appeared on the wrappers dark blue labels with a narrow white and blue border whereon in white print on a dark ground were printed the words "Mazaruni tea" with the device of a diamond placed between the two words. The blue was of a similar shade to that adopted by the plaintiffs, and the printing was of a similar character. Evidence was given by merchants that they took the defendants' tea for the plaintiffs, and that it was only when they made a closer examination that they discovered their error. No evidence was given for the defence. *Held*, that the get-up of the defendants' tea was so similar to that adopted by the plaintiffs that it was calculated to deceive illiterate persons and more especially those of the Indian race who were unable to read or understand English, and who might very well take the defendants' tea in the belief that they were purchasing that of the plaintiffs: the defendants had not offered any explanation as to why they adopted the word *Mazaruni* whose first four letters are the same as of the word *Mazawattee*, and that, therefore, the plaintiffs were entitled to an injunction.

MAZAWATTEE TEA CO., LTD. v. PSAILA, LTD. [Berkeley, J.] 56
and see EVIDENCE

TRANSPORT.

Sale of immovable property at execution—Buildings on land— No interpleader as to buildings—Indefeasible title—Deeds Registry Ordinance No. 17 of 1919, sections 20, 27—Registered encumbrances.

There were two buildings on lot 42, Bartica, belonging to J. C. On the 30th June, 1921, J. C. sold them to M. J. de F., and leased to him the portion of land on which they stood for the term of ten years with right of renewal. This lease was recorded in the Deeds Registry on the 9th July, 1921. On the 4th July, 1921, M. J. de F. agreed to sell to the defendant K. E. V. the two buildings and to transfer the lease to her, all for the sum of \$225. This money was paid on the 5th December, 1921. The plaintiffs obtained judgment against J.C. and levied on lot 42, Bartica, "with the buildings thereon" subject to the lease in favour of M. J. de F. The defendant did not interplead with respect to the buildings levied upon although they were her property. The sale at execution took place on the 24th April, 1922, and the property advertised was purchased by the plaintiffs. On the 3rd July, 1922, M. J. de F. assigned the lease to the defendant by a deed attested in the Deeds Registry. On the 8th August, 1922, the plaintiffs obtained title for the property purchased by them. *Held*, that the transport alone must be looked at, and that although it was subject to the lease which was now vested in the defendant, it conferred upon the plaintiffs full and indefeasible title to the buildings therein mentioned.

V. A. PIRES, *et al* v. K. E. VALERIE. [Berkeley. J.] 59

Deeds Registry Ordinance No. 17 of 1919, section 20 (3) — Effect of.

See OFFICIAL RECEIVER v. JAMES MITCHELL. [Douglass. J.] 100

TRESPASS AND FELONY.

Moneys had and received—Implied contract—Fraudulent misappropriation—Felony disclosed on pleadings—Duty of Court to stay all proceedings until after prosecution of offender.

The plaintiffs sued the defendant for moneys had and received and alleged that the defendant had stolen the money from them.

Held, that all proceedings in the action must be stayed pending the prosecution of the offender.

GUIANA STEAM SAW MILL, LTD. v. DA SJLVA. [Douglass, J.] 151

TRESPASS.

Taxes Management Ordinance, section 52—Sale under—In-defeasible title—Title of previous owner extinguished—Whether an action of trespass would lie against purchaser.

GRENADA.

M. sued T. for trespass. M. was the owner of a parcel of land which was assessed in the name of C. The land was put up for sale for non-payment of taxes under the Taxes Management Ordinance and bought by T.

Held, that an action of trespass would not lie in respect thereof.

MARRYSHOW *v.* TURTON. [W.I.C.A.]

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TRINIDAD.

See GIFTS, REAL PROPERTY ORDINANCE, TRUSTS, DECEIT, FRAUD, APPEALS, PRACTICE.

TRUSTS AND TRUSTEES.

Creation of trust—Statute of Uses—Use upon a use—"Unto the trustees to the use of S."—No estate in trustees—Trustees merely a conduit pipe.

TRINIDAD.

B. the owner of lands executed a deed of settlement purporting to convey all her real property "unto trustees to the use of S." *Held*, that no valid trust was created and that the whole interest legal and equitable was in S., the trustees being a mere conduit pipe.

RATANEE *v.* UMRAWSINGH, *et al.* [W.I.C.A.]

195

Incomplete gift — Trustees — Donor appoints trustees as executors—Whether a trust fastens on executors to perfect the incomplete gift—Not where trustees never had any estate legal or equitable in the lands sought to be donated—Trinidad—Real Property Ordinance.

B. the owner of lands under the Real Property Ordinance, executed a deed purporting to convey all her real estate "unto trustees" upon the trusts therein mentioned. This deed was prepared as an ordinary voluntary settlement and without any reference to the Real Property Ordinance, and there was no memorandum of transfer passing these lands to the trustees. The deed was registered in the General Registry but not entered in the Register Book under the Real Property Ordinance No. 60. B. made a will limited to her personal estate and appointed as executors D. and U. who had been named as trustees in the deed.

The executors, having proved the will, got themselves on the Real Property Register, executed a memorandum of Mortgage in favour of W. A. Murray and H. B. Murray. This mortgage was immediately registered and endorsed on the certificate of title. *Held*, that there was no valid trust created by the deed of settlement, it was at most an incomplete gift. The deed was a voluntary deed and equity would not complete an incomplete voluntary conveyance.

RATANEE *v.* UMRAWSINGH, *et al.* [W.I.C.A.]

195

Partnership—Will of deceased partner—Trustees—Power to sell—Option to surviving partner to purchase deceased partner's share—Exercise of option—Whether option must be exercised in writing—Sale not as at date of exercise of option—Sale as at testator's death—Matter of convenience—Survivor executor of deceased partner—Valuation—Whether properly made—Testator's stock book accepted as correct—Stock book written up by testator's trusted clerks—Abandonment of valuation—Agreement for second valuation—Option exercised *modo et forma*—Stock taken—Profits given—Second valuation less than the first—Agreement to revert to first valuation—Compromise—Whether trustees had a power to compromise—Whether surviving partner disclosed fully—Conflict of interest and duty—Whether he should have disclosed that he hoped to get a certain sum of money for a portion of the partnership property—Whether disclosure of this might not have been considered improper by the valuers who may have thought of fixing a higher value—Goodwill—Provision business—Personal qualities of partners—Whether there is any goodwill for such a business in Trinidad—Sale to surviving partner in accordance with final arrangement—Debts due by deceased to partnership not deducted from amount mentioned in deed of purchase—Meaning of share—Ultimate beneficial interest of partner—Rectification of deed—Equity considers the kernel and true nature of a transaction—Settlement accounts rendered—Debts due by deceased to partnership deducted from his share as mentioned in deed—Accepted as correct—Scrutinised by accountant, solicitor and competent counsel—Not questioned for 20 years—Action to set aside purchase—Loss of valuations—Duty of surviving partner to keep them carefully—Loss cause of the protracted litigation—Successful trustee therefore deprived of costs.

TRINIDAD

The respondent Scott in partnership with his uncle Wilhelm Schoener carried on a provision and commission business under the style or firm of Schoener & Co. Wilhelm Schoener died on the 10th May, 1905, leaving a will in which he gave his trustees a discretionary power to sell the business and also an option to the surviving partner Scott to purchase the business at a valuation as

in the will indicated. The respondent Scott was also one of the executors and trustees of the will. He, having elected to purchase his deceased partner's share, proceeded to have this share valued. He did not exercise an option in writing and the share was valued as at the date of the testator's death. No stock was taken by the valuers, the stock books of the firm were accepted as correct. Stock was taken on the 31st May, 1905, by trusted clerks of the deceased, and there were entries in the books in the deceased's handwriting up to a few days before his death. The other trustees were dissatisfied with the valuation made by the valuers, they especially called attention to the fact that nothing was allowed for goodwill. An agreement was then drawn up whereby two new valuers were appointed. An umpire was also named in case of disagreement; the new valuers took stock, and valued the business not at the time of the testator's death but at the date of valuation. They allowed nothing for goodwill. This second valuation was found to be less advantageous to the heirs of the deceased than the first. At the request of Sir Henry Alcazar, K.C., Scott agreed to revert to the first valuation. On the 6th January, 1906, a deed was drawn up embodying the terms of the sale. Therein the share of the deceased is stated as being \$48,473.40. The debts due by the deceased to the firm amounting to over \$62,000 were not-deducted therefrom. Subsequently settlement accounts were submitted by Scott to his co-trustees and accepted by them as correct. These accounts showed the two items. The husband of one of the co-trustees was a qualified accountant and the accounts were only agreed to after strict scrutiny and close investigation. In 1908 Scott filed an original summons in connection with the estate and he rendered accounts. The co-trustees were represented by a competent King's Counsel. The valuations were delivered to him and the settlement accounts. He found no ground on which to challenge the transaction. The appellant alleged that Scott did not disclose certain facts to the valuers particularly that he expected to get \$30,000 by the sale of Farris yard. The valuers valued it at \$27,500. When Scott waived his rights under the second agreement he paid the heirs \$3,556.42 more than otherwise he would have paid. Evidence was led in this action that a provision business in Port-of-Spain possessed no goodwill, that the allowances for good, bad and doubtful debts were reasonable, and that the profit made by Scott on the transactions was not unreasonable considering that he took over liabilities totalling \$317,000 and that if the venture had failed his private property valued at over \$70,000 would have been lost. In 1922 the plaintiffs brought this action against Scott to have the deed of 1906 set aside on the ground of fraud and undervalue and also on the ground that the terms of the option

had not been exercised *modo et forma*. During the hearing the issue of non-disclosure was raised. Scott was unable to produce the valuations at the hearing as they were lost. The valuation made by the first set of valuers was reconstructed by Mr. Albert Kerr, a chartered accountant, from the books of the firm and from the documents produced by Sir Henry Alcazar. Scott made entries in his books as to the effect of the valuations at a point of time when the valuations were certainly in existence and before the originating summons proceedings were taken. *Held*, affirming the judgment of Deane, J., that the sale could not be impeached, that the option was properly exercised, that the respondent Scott could not have disclosed the existence of a mere hope that he might get \$30,000 from the sale of Farris Yard, and that no judgment could be given in the deed against Scott as payment was made by set-off when the settlement accounts were rendered by Scott and accepted by the co-trustees as correct.

MARQUEZ *v.* SCOTT, *et al.* [W.I.C.A.]

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UNLAWFUL POSSESSION.

Unlawful possession—Reasonable suspicion—Mind of constable—Prior to arrest or detention—Explanation by defendant before arrest—Whether incumbent upon prosecution to show explanation false—Evidence improperly obtained—May still be admissible.

WEEKS *v.* WILSON. [Major, C.J.]

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And see CRIMINAL LAW AND EVIDENCE.

WILL.

Proof of—Propounder a beneficiary—Suspicious circumstance—Knowledge by testatrix of contents—Will read over—Mark affixed—Onus of proof—Incapacity—Whether particulars should be stated—Costs.

That the testator knew and approved of the contents of a will is part of the burden of proof assumed by the propounder thereof. There is no unyielding rule of law that when it has been proved that a testator competent in mind, has had a will read over to him and has executed it, all further enquiry is therefore shut out.

If a party propounding a will takes a benefit under it that is a circumstance which ought to excite the suspicion of the Court calling it to be vigilant and zealous in examining the evidence in support.

The will propounded by the defendants who were the sole beneficiaries was read over to the testatrix. It was deposited within eight hours of her death, There was great conflict between the witnesses as to whether the testatrix understood and appreciated the

contents of the will, and whether she put her mark to it. *Held*, on the facts that the propounders had failed to satisfy the Court by affirmative and conclusive evidence that the testatrix did, in fact, know and approve of the contents of the will, or that she intended to execute it or actually executed it.

RAMPERSAUD SINGH *v.* RAMLOGAN, *et al.* [Douglass, J.] 179

Construction of will—Marriage in community — Whether deceased dealt with his half share or with the whole of the joint property—Presumption that he intended merely to deal with his own property—Can only be displaced by clear evidence —Will to be read as a whole.

Whether a testator has intended to dispose of the whole of the joint property of the communion, or only of his half share thereof is to be determined, firstly, on the initial presumption that he intended to effect the latter disposition, not the former, a presumption that can be displaced only by clear evidence, and, secondly, on examination of the contents of the will read as a whole.

In re BARCLAY, PETITION OF STULL [Major, C.J.] 80

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DAVID GRAHAM AND COMPANY, LTD. *v.* FRANK. [W.I.C.A.] 258

Decision.

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During the year 1923 Joseph Sydney McArthur, Esq., and Joseph Alexander Luckhoo, Esq., were appointed of His Majesty's Counsel for the colony of British Guiana, and at a sitting of the Full Court of the Supreme Court held in the month of October they were duly called within the Bar.

JUDGES
OF THE
SUPREME COURT OF BRITISH GUIANA
DURING 1923.

SIR CHARLES HENRY MAJOR, KT ... Chief Justice.
MAURICE JULIAN BERKELEY ... Senior Puisne Judge.
WALTER JOHN DOUGLASS, L.L.M. Junior Puisne Judge.
WILLIAM JAMES GILCHRIST ... Acting Junior Puisne Judge.

TABLE OF ABBREVIATIONS.

(ADDITIONAL TO THE USUAL REFERENCES TO ENGLISH
REPORTS.)

A.J. Appellate Jurisdiction, British Guiana.
Buch. Buchanan's Reports, Cape Colony.
E. D. C. South African Law Reports, Eastern Districts Local
Division.
L.J. Limited Jurisdiction, British Guiana.
S. C. Juta's Supreme Court Reports, Cape Colony.
V. L. R. Victorian Law Reports, Australia.

WEST INDIAN COURT OF APPEAL.

As, at present, no reports of decisions in the West Indian Court of Appeal are published separately, the decisions in that court are included in the British Guiana local reports.

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The Reports will be cited as 1923. L.R.B.G

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CASES

DETERMINED IN THE

SUPREME COURT OF BRITISH GUIANA.

SIRIKISSUN, Appellant,
AND
FERNANDES, Respondent.

[642 OF 1922.]

1923. JANUARY 5, 16. BEFORE SIR CHARLES MAJOR, C.J.

Barrister and Client—Barrister called to English Bar—Subsequent admission to local Bar under local Ordinance—Law governing rights of such Barrister—Legal Practitioners Ordinance, 1897—Fusion of the professions—Right of barrister practising locally to recover fees—Condition precedent to a claim "Quantum meruit."

This was an appeal from a decision of the Stipendiary Magistrate of the East Coast Judicial District given in favour of the respondent, a barrister practising in the colony, who brought a claim "quantum meruit" against the appellant, his client, for services rendered in his professional capacity. There was no agreement between the respondent and the appellant as to the quantum of fees to be paid although the latter promised remuneration for the services to be rendered.

Held:—(1) That although the status of a Barrister called to the English Bar is ordinarily governed by the usual principles of English law appertaining thereto, yet, on admission to practise at the local Bar, his rights while so practising—at any rate as regards" recovery of fees—are governed by the local Ordinances.

(2) That consequently the respondent, a barrister practising locally, could as such sue for and recover fees from his client even by way of a claim "quantum meruit,"

(3) That a condition precedent to such a claim was a delivery by the barrister to his client of a Bill of Costs.

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

J. S. McArthur for the respondent.

SIR CHARLES MAJOR, C.J.: This is an appeal from the decision of the Stipendiary Magistrate for the East Coast Judicial District in favour of the respondent on a claim against the appellant for remuneration *quantum meruit* for professional services as a barrister. The evidence before the magistrate was, to put it shortly, that the respondent having been called to the English Bar and admitted to practise as a barrister in the courts of this colony under the provisions of the Legal Practitioners Ordinance, 1897, in that capacity appeared, at the appellant's promise to

remunerate him for so doing, on three occasions during the enquiry into a criminal charge against the appellant's son in a magistrate's court and that the respondent has charged £12 10s. for those services.

Against the respondent's recovery of the amount of his claim it was argued in the court below—and the argument has been concisely repeated here—that he could make no contract, and cannot recover, for remuneration for professional services, and even if he can so recover, that he cannot do so on a *quantum meruit*. It is said that the respondent is to be regarded—and regarded only—as a member of the English Bar, and thus into this colony bringing with him, in pursuit of his profession, the law and usage of England relating thereto, which we know preclude the Bar in that country from suing or making agreement for payment of their fees. But even an English barrister—save the Attorney General of the colony, and he only when appearing for the Crown and the Colonial Government—cannot practise here unless he be admitted to do so by the proper authority. When so admitted he becomes a practitioner according to the law and usage of the colony, and whether he can sue and make agreement for payment of his fees depends upon that law and that usage. Sir William Smith, C.J., in *Farnum v. Serrao A. J.*, June, 1898, expressed an opinion *obiter* that a barrister in this colony can so sue and agree, but no authority has been given to me directly deciding the question, which seems, therefore, to be of first impression.

The respondent, then, a member to be sure of the English Bar, but employed by the appellant as and because admitted to practise as a barrister in this colony and, therefore, conformably with the local law and usage relating to the legal profession, rests his claim thereon. Reference to that law, the Legal Practitioners Ordinance, 1897, shows that, first, section 9 while it does not *totidem verbis* permit a barrister to practise as a solicitor, at any rate expressly contemplates his so doing, thus recognizing and giving legal sanction to that usage, then apparently well established, which had already gone far towards a complete amalgamation of the two branches of the profession. And further confirmation of the usage is to be found in the rules to regulate the extent of a barrister's practice as a solicitor made by the Supreme Court rule making authority in the following year. Now, that was to bring barristers into the class of practitioners mentioned in the judgment of the Judicial Committee in the *Queen against Doutré*. (9.A.C. 745), namely, “lawyers who are not merely advocates or pleaders, and “combine in their own persons the various functions which are exercised “by legal practitioners of every class in England, all of whom, the Bar “alone excepted,

SIRIKISSUN AND FERNANDES.

“can recover their fees by an action at law.” And to that class of practitioners their lordships entertained at any rate serious doubts of the applicability of the reasons why the Bar of England cannot sue or make agreements for their fees, namely, usage and the peculiar constitution of that Bar, apart from general considerations of public policy as expounded in the case of *Kennedy v. Brown* (13 C.C.B. (N.5) 677). For myself I entertain no doubt that those reasons do not apply to British Guiana. Again, section 13 of the ordinance renders a barrister liable on demand to account to his client for moneys advanced to him for expenditure in, or as security for, costs and charges, and in default amenable to an order of court that he shall do so, and the first sub-section of section 14 directly enables a barrister to sue for payment of a bill of costs, if the bill has been taxed and a copy of it as taxed delivered to his client within a prescribed time. This sub-section actually gives to a barrister power to accompany suit with arrest of a debtor client about to quit this colony. However undesirable—to use no stronger term—I may personally consider this state of things to be (albeit the natural result of the confusion of the two branches of the profession), however inclined, nay determined—as Mr. Browne urges me to be—to discourage recourse by members of the Bar to powers of the kind, the respondent is entitled to insist that “it is the law.”

The second sub-section of section 14, by reason of confinement of the first to process issuing from the Supreme Court for recovery of the amount of a bill of costs relating to matters in respect of which a tariff of costs has been by law prescribed, enacts that “in any proceedings in any court in which the amount “of any bill of costs is sought to be recovered or is “disputed, any court—it is only in this sub-section that the expression ‘any ‘court’ is used—or judge before which or whom such proceedings are “pending shall decide whether the fees charged relating to matters for “which no tariff of costs has been by law prescribed, are excessive or are “fair and adequate remuneration for work done and services rendered.” This enactment is an express contemplation of claim by a barrister for fees on a *quantum meruit*. On that claim the respondent was put to proof of the contract and of the services rendered. The court or judge hearing a claim of the kind is, in the sub-section and by obvious analogy to taxation of an ordinary bill of costs, directed to decide for itself or himself the fairness and adequacy of the charges made, and the magistrate's judgment for the amount claimed was that decision.

But there is much in Mr. Browne's contention that the claim must have been founded (as the sub-section says) on a bill of costs. The controversy is one concerning a particular pro-

fessional relationship and its incidents. The expression "bill of costs" is a term of art; it connotes delivery of the bill before suit for recovery of the amount of that bill. The only document which I can regard as the bill (the receipt whereof by the appellant is undisputed and a certified copy whereof is included in the transcript) is the respondent's letter to the appellant of the 17th June, 1922, where the writer states the services rendered and the amount of his charges therefor. Can I so regard that letter? With some hesitation I think I can. In any event, were I sufficiently hesitant to delay the effect of my decision, I should merely direct the formal delivery of a bill of costs (in the strict sense of that term) for the amount of the respondent's claim, having held, as I do now hold, for the reasons I have given, that the magistrate's decision was right, although I do not acquiesce in the reason he gives for arriving at it. While, however, I think it unnecessary to insist upon what would be in the present circumstances, a mere formality, barristers in the like case— intending would do well, perhaps, always to deliver a bill of costs (strictly so called) in the event of the existence of an opinion thereon differing from mine.

This appeal is dismissed with costs.

DA COSTA v. MOHABEER

[486 OF 1922.]

1923. NOVEMBER 8, 16. BEFORE BERKELEY. J.

Bastardy—Affiliation proceedings commenced—Agreement by mother to withdraw same and take no further proceedings—Promise of putative father on that ground to support children—Weekly instalments—Failure to keep promise—Subsequent taking of affiliation proceedings by mother and order obtained thereon—Claim for arrears due prior to granting of order—Breach of contract.

The plaintiff, mother of two illegitimate children, started affiliation proceedings against the defendant, the putative father of the said children, but withdrew same and promised to take no further action on the defendant undertaking to support the said children by the payment of certain weekly instalments. For some considerable time, it was alleged in the statement of claim, the defendant failed to carry out his promise, and the plaintiff started affiliation proceedings afresh and obtained an order prior to the issue of the writ in this action wherein she sued for the arrears of maintenance which under the agreement had become due prior to the granting of the aforesaid order.

The action coming on for hearing, counsel for the defendant took *inter alia* the preliminary objection that the plaintiff had herself broken the agreement and could therefore no longer rely on it.

Held:—That the plaintiff by obtaining an order on affiliation proceedings against the defendant had herself broken the agreement, which thereby became void.

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

J. A. Luckhoo, K.C., for the defendant.

BERKELEY, J.: This is a claim for \$246.48 arrears due for support of two illegitimate children under a verbal agreement to pay \$2.88 per week. The alleged consideration is the plain-

DA COSTA v. MOHABEER.

tiff's refraining from further proceeding with a complaint brought by her in which she sought to have an order made against the defendant as the putative father of the children.

The claim further sets out that this verbal agreement is embodied in a memorandum dated 2nd September, 1920, and signed by defendant.

Under this agreement the defendant was "to pay to Mary Da Costa the sum of two dollars and eighty-eight cents for the support per week of my two children."

In plaintiff's reply she admits paragraph 6 of the defence. That paragraph is to the effect that on the 24th of July, 1922, on the application of the plaintiff, defendant was adjudged to be the putative father of the said two children and was ordered to pay the sum of \$1.44 towards the support of each child.

If the meaning of the agreement was, that the father would make the stipulated payments if the mother would support the children then the agreement was without consideration as the plaintiff being the mother of the children was bound by law to support them. On the other hand if (as suggested by the verbal agreement) plaintiff undertook the sole maintenance and agreed to abstain from obtaining an affiliation order then there would be a good consideration.

The plaintiff herself has broken the agreement by obtaining an affiliation order against the defendant on the 24th July, 1922, and this renders the agreement void. See *Crowhurst & Uxor v. Laverack* (22 L.J. Ex. 57) and *Furrillio v. Crowther* (7 Dowling & Ryland 612).

On this finding it is unnecessary to deal with the other preliminary objections taken by Counsel.

Judgment of non-suit with costs.

Solicitor for the defendant, *W. D. Dinally* (for *R. C. V. Dinzey*).

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

HARPER v. THE DEMERARA ELECTRIC Co., LTD.

HARPER v. THE DEMERARA ELECTRIC Co., LTD.

[490 OF 1922.]

1923. NOVEMBER. 14, 15, 19. BEFORE DOUGLASS, J.

Damage to passenger on tram car—Negligence—Measure of damages—Principles of assessing same—Remoteness of damage.

Where a person receives injuries as a result of another's negligence the measure of damages will be those arising from the natural and necessary consequences of the defendant's act, but if a particular result is not a natural or necessary consequence of the defendant's act and can only be recognised as a probable consequence in the light of special circumstances, the defendant will not be responsible for that result.

Remote contingencies of further ills arising out of the original injury are not to be considered in assessing damages.

The facts fully appear in the judgment below.

E. P. Bruyning, for the plaintiff.

H. C. Humphrys, for the defendant.

DOUGLASS, J.: The plaintiff is claiming \$2,500 damages for injuries received by his wife whilst she was a passenger on one of the defendant's electric cars due to the negligence of the defendants or their servants on the 21st April, 1922.

At the hearing of the case the defendants felt that in the circumstances they could not proceed with their plea denying negligence, or alleging contributory negligence, and relied upon their plea denying that the plaintiff's wife suffered any injuries as alleged, or the plaintiff any damages, and that the damages claimed were excessive.

It is therefore a question of fact or facts that I have to decide sitting as a jury in order to assess the damages. Odgers in the Common Law of England, Volume II., puts it that the measure of damages in an action of tort will be those arising from the natural and necessary consequence of the defendant's act, and if a particular result is not a natural or necessary consequence of the defendant's act and can only be recognised as a probable consequence in the light of special circumstances then defendant will not be responsible for that result.

I was referred to local cases by counsel for each of the parties *Shepherd v. Demerara Railway Co.* (G.J. 6.3.07) and *Brown v. Demerara Railway Co.* (G. J. 15.1.07) but they are not of much assistance as in both cases the sums awarded were arrived at mainly on a consideration of the weekly earnings of the injured parties, in the present case there is no similar basis to work on, the plaintiff's wife being engaged in domestic duties, and there has been no evidence that anyone else is supplying her place such as a paid servant or assistant; the Court has then

HARPER v. THE DEMERARA ELECTRIC Co., LTD.

to consider what necessary expenses the plaintiff has been put to as a result of the injuries received by his wife, and reasonable compensation for her pain and suffering.

There is considerable difference of opinion between the medical witnesses both as to the extent of the injuries received and as to their present and probable future effect on the health and capabilities of the plaintiff's wife.

I accept Dr. Burton's evidence entirely as to what happened at the hospital, and it is clear that in his anxiety to make as much out of his wife's accident as possible, the plaintiff has not told the truth about his interview with the doctor in several respects which necessarily affects the value of his evidence as to what occurred in his own home; he also made his first and great mistake in refusing to allow his wife to remain the 24 hours in hospital that Dr. Burton required to make a proper investigation of the injuries the lady received, it was bad for her in every way to remove her as he did if she was suffering from such injuries as he and his 'doctor' witnesses allege. His second mistake was in not calling in his own family doctor, his reasons for not doing so are very unsatisfactory, and depend on his bare statement only which I have pointed out is not to be relied on. From the medical evidence I can only assume that Mrs. Harper became unconscious after leaving the hospital, and the fact that she was found to have a swelling at the back of the head, a broken 4th rib and a sprained hip I also accept; she is a heavily made woman and would probably fall heavily. There is no evidence of any internal injuries. I can only put the alleged haemorrhage down to the tumour she is admitted to have been suffering from, and I must exclude it except so far as it may affect a mitigation of damages. The burden lies on the plaintiff of proving all special damages. The principal items of expenses that have to be considered are medical expenses and nursing, for it obviously does not follow that because it was due to the defendant's negligence that an accident occurred, the injured person can claim medical attendance and luxuries that would be unusual and unnecessary to a person of his or her class in life. Dr. Nichols sent in his account as a lump sum \$310: from April 21st to July 29th, 1922, (the date of issue of writ) and of this amount \$25 is claimed by Dr. James as consultant specially called in. Dr. Nichols seems to have been very assiduous in his attendances and I cannot say they were unnecessary, especially as the defendant company never sent their own doctor to examine the lady, nor asked permission to do so. I confess I do not know why Dr. James was called in for a "consultation," it is said, but he was a junior, a very junior practitioner, and had no special knowledge of injuries to the

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brain or head. Mrs. Harper was at the time complaining of violent headaches and loss of memory, he apparently gave no formal opinion, and no steps were taken as a result of the consultation.

Dr. Nichols was of course entitled to call a junior practitioner of no special qualifications if he was uncertain of his own capabilities, or if his patient or her husband required it, but to charge the defendants with the extra expense in the circumstances cannot be allowed.

The two nurses—day and night—for 14 weeks certainly appear to be another luxury; the one was a sister of Mrs. Harper and the other a friend. I have no doubt that she required a nurse over a certain portion of the three and a half months, but with the no doubt willing assistance of her sister and husband that should have been sufficient. The evidence that Mrs. De Freitas worked all day at a dispensary and all night at the Harper's home for fourteen weeks with perhaps one or two hours sleep at night, as she said, appears superhuman, and is difficult to believe. I shall allow one nurse at \$7 a week for nine weeks that is to the end of June. No evidence was given of any items of special nourishment nor any bills produced, and it must also be taken into consideration that not a single penny has been paid to any one, or for anything on account, so that the remark that the special items are speculative is not uncalled for. Dr. Nichols could not support his first statement that further and serious changes threatened the plaintiff's wife in the future as a result of the injuries, and I cannot take any such remote contingency into consideration in arriving at an allowance for general damages.

I allow Dr. Nichols fees at \$285, medicines \$66, nourishment at \$50, and nurse \$63=\$464 and \$200 general damages. I give judgment for the plaintiff for \$664, and costs.

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

Solicitor for the defendant, *Cameron & Shepherd.*

BARRY v. MENDONCA, *et al.*BARRY v. MENDONCA, *et al.*

[640 OF 1922.]

1923. NOVEMBER 16, 17, 27. BEFORE DOUGLASS. J.

Immovable property—Owners of undivided portions thereof—Erections and enclosure made by one co-owner against the will of another—Rights of dissentient co-owner—Whether he has right of abatement—Comparison of Roman-Dutch and English law—Whether property is movable or immovable—Tests to be applied.

The plaintiff and the defendant M. were co-owners of undivided property. The plaintiff started to erect a building thereon with fences enclosing same, but was warned by the defendant M. that unless he desisted, he the defendant M. would pull down the structure when erected. The plaintiff persisted and on completion of the building and fences the defendant M. and three of his servants pulled them down.

Held:—That although, according to Roman-Dutch Law, one co-owner has no right to carve out any portion of the undivided property for himself without the consent of his co-owners, yet such co-owners have no right of abatement where one of them seeks to erect a building and to enclose same on the undivided property, their remedy being by way of interdict.

S. J. Van Sertima, for the plaintiff.

J. A. Abbensetts, for the defendant,

DOUGLASS, J.: The plaintiff is claiming \$700 damages against the defendants for destruction of and damages to a house, fence, and two pens belonging to the plaintiff.

The first defendant, Percy Mendonca, is the only responsible defendant in this action, the other four defendants being merely his servants, so that for convenience I shall refer to him as "the defendant." Both plaintiff and defendant are owners of undivided parts of the western half of Plantation Hogstye, Corentyne. The property was in 1876 transported to six co-owners in equal 1/6 undivided shares, they were (1) Grimmond, (2) Maxwell More, (3) McAuley, (4) Park, (5) Obermuller and (6) Liverpool. Maxwell More had seven children and the plaintiff through his wife Jessie More, one of Maxwell's daughters—became entitled to a share in 1/6 of the said western half of Plantation Hogstye, the defendant too through divers transports and letters of decree became entitled to the whole of Park's and Obermuller's shares, the half of McAuley's share and the half of Maxwell More's share and also to the shares of Maria and LaFleur More (daughters of Maxwell) and of their respective share in their brothers Peter and Richard's shares.

The whole trouble arises out of the fact that the estate has never been divided, though, I understand, that since action started, an application has been made under Ordinance No. 13 of 1914 for partition.

The evidence is very contradictory and unsatisfactory, there

being no independent witness on either side, but it appears that the plaintiff started to build a house and pens on the 2nd reef of the estate for his convenience when looking after his cattle, he says, in the month of December, 1921, the defendant says no erection was started before the last week in August, 1922. Whatever the date was, they so far agree that the defendant visited the plaintiff and objected to his building on the ground that it prevented the proprietors from unrestricted use of the property, and the defendant states that he told Barry that if he continued he would pull it down.

On the 29th September, 1922, the plaintiff, after sleeping the night in the house went aback, but returned later on a summons from his son and found the "house broken in pieces, posts and wire flat on the ground, flooring smashed, the 'blocks' on which the house rested lying on their sides, and thatch torn from the roof." The defendant admits that he took the other 4 defendants, but without any tools or weapons in their hands, and pulled up 86 feet of the wire fence and laid the post and wire on the ground, leaving 21 feet erect, and they took the thatch off the pen. He also states there was no wooden house, no 'blocks,' no bed and no chairs.

In the statement of defence the defendant says there was a verbal agreement made by the six co-owners dividing the estate into specific strips, each 25 1/2 roods in width, Grimmond's to be next to the middle walk dam, Maxwell More's next, then McAuley's and so on, but no proof of this was given and I can take no notice of any such division. The defendant also pleads that he had a legal right after notice, to remove any fence or building that (1) obstructed or encroached on land other than the portion allotted to the plaintiff as his share, and that (2) obstructed the right of way of the defendant across the property. From the evidence there appears to have been a cattle track, but no defined right of way was proved, and that portion of the defence too may be ignored.

The court has to decide (1) whether the plaintiff was entitled to put up the erections he did, and (2) whether the defendant was entitled to remove or destroy any part of such erections. Maarsdorp, 'Institutes of Cape Law' (2nd edition) under heading of "Rights of joint owners," says that each of several owners holding lands in undivided shares "is entitled to access to "any and every portion of the land except such as has by mutual consent of "the co-proprietors been allotted to the exclusive use and occupation of one "or other of them. One proprietor cannot without the consent, either "express or implied, of the others, carve out a portion of the farm for his "own exclusive use, and consequently he may not convert graz-

“ing ground into a garden for himself.” The same principle is expressed in *Swart v. Taljaard* (Volume III. Cape of Good Hope Reports, 356). “As long as property is held in common *pro indiviso*, no one person can carve out a portion for his exclusive use without the consent, either expressly or tacitly, given of the others; at the same time, we must consider that parties must assert their claims immediately, otherwise it will be too late to set up that defence,” (Cloete J.). In that case the bull of the one proprietor had broken down the hedge and destroyed the garden of his co-proprietor who sued for the damage done, and recovered. *Oosthuysen v. Muller* (6 & 7 Cape of Good Hope Reports 129) decided that in the absence of consent by co-owners a person breaking the soil to make bricks may be interdicted. I cannot find that a right of abatement on the part of co-proprietors is mentioned by any authority. In Roman Dutch Law then as administered in this colony up to the 31st December, 1916, a co-proprietor had no right to put up a house or fence in a portion of the common property without permission. That such a system of co-ownership still exists is recognised by Ordinance No. 13 of 1914 and its amending Ordinance No. 12 of 1920. I am of opinion that the Civil Law Ordinance has not altered the rights or remedies of such co-owners and that section 2 (3) of Ordinance No. 15 of 1916 is applicable.

The plaintiff then had no right to erect the fence and house without consent, but having done so, is the defendant within his right in taking the law into his own hands and removing them? Learned counsel for the defendant can refer me to no local law on the point but falls back on English Common Law and also refers to the case of *Bowen v. Buttery* (1889, 12th April B.G. Ap.) an appeal from the Magistrate's Court coming before Atkinson, J., where the parties had each one undivided half of lots 314 and 315, Cummingsburg, Georgetown. They had each occupied certain parts of the property as their respective portions by mutual consent, and Buttery put up a building of eight rooms, but when he proceeded to erect a privy Bowen pulled it down. A *criminal* charge was brought against him for "unlawfully and maliciously committing damage," the section under which it was brought containing a proviso that nothing in the section contained "shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of." The learned judge held that the conviction of Bowen by the magistrate for maliciously destroying the privy was wrong taking into account the said proviso, but this decision does not say or mean that Bowen had in reality any right to pull it down.

To turn to English Common Law it is true the right of abatement exists in certain cases, *e.g.*, (1) in case of private nuisance, (2) of obstruction of right of way,—I have already held there was none in the present case, and (3) where rights of common exist, a commoner may abate any erection upon the place over which his right exist—*Jacobs v. Seward* (4 L.R. C.P. 328), but the origin and attributes of rights of common are so peculiarly English that it would be undesirable, if not impossible, to apply the rights to co-owners of undivided property in this colony.

I do not think that it matters in arriving at a decision whether the fence, pens and house are regarded as movable or immovable, for by section 3 (4) of the Civil Law Ordinance all questions relating to immovables within the colony and to movables subject to our law shall be determined and enforced according to the principles of the Common Law of England applicable to *personal* property (this of course is subject to section 2 (3) already referred to). I will, however, say that there is no doubt in my mind that on the application of the three tests set forth by Mr. Justice Dalton in *Lilia v. Beharry* (1916, L.R.B.G., 169) all the erections are movable property and made for temporary purposes and they are very far from being "immovable property." as defined by section 2 (1) of the Civil Law Ordinance.

Lastly, it is urged by learned counsel for the defendant that even if one or both parties were at fault, still they are in the position of tenants in common as co-owners of undivided property, and the plaintiff cannot therefore sue the defendant for any trespass to the common property,

I have already shown that if the English Common Law is to determine the rights and remedies of a co-owner of undivided property in this colony, it would be that applicable to *personal* property in England, but even if the parties were in the position of tenants in common they still would have their remedy for any injury to, or the destruction of, the common property although not an action for trespass. In *Corbitt v. Porter* (8 B. & C. Rep. 268) Littledale, J., in giving the various examples, for Com. Dig. Estates; of the remedies one tenant in common has against another, states " where there has not been a total destruction of the subject matter of the tenancy in common, but only a partial injury to it, waste, or an action on the case will lie by one tenant in common against another."

The defendant's action in destroying the plaintiff's property has no justification either in English or in our law, he is fully protected by the law of this colony if the plaintiff had exceeded his rights of co-ownership. I agree with the remark of Watermeyer, J., in *Swart v. Taljaard* (referred to above), the defendant

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is not to be allowed to commit an act of spoliation in the first instance to try a right.

Before assessing the damages I may add that the evidence as to their being a house built of wood and erected on 'blocks' is not convincing. The plaintiff's brother—not called as a witness—is said to have been the carpenter who erected it the accounts with the Berbice Steam Saw Mill all date before December, 1919, with the exception of one in February, 1922, no details are given or whether the receipts relate to wood at all. None of the boards of the house were to be seen on the ground after the 24th October, 1922, and the plaintiff says he removed nothing although the defendant gives in evidence he saw his brother taking away the thatch; no corroborative evidence is given of a gift of the blocks, and, lastly, although the police were informed on the 25th September, 1922, and went to the spot, not one has been called as a witness to say he saw any signs of a wooden house. Without going into details of the figures I assess the special damages at \$75 and general at \$70. I was in some doubt whether the plaintiff should be allowed his costs in the circumstances, but as he had the usual lawyer's letter written before action, to which the defendant did not trouble to reply, I shall allow costs.

I give judgment for the plaintiff for \$125 damages against the first defendant Percy Mendonca, and for \$5 against each of the other four defendants.

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

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

SOOKUL AND ACKLOO *alias* BABWAH

SOOKUL, Appellant,

AND

ACKLOO *alias* BABWAH. Respondent.

[248 OF 1923.]

IN THE FULL COURT OF THE SUPREME COURT OF BRITISH GUIANA.

1923. DECEMBER 7, 14. BEFORE SIR C. MAJOR. C.J., BERKELEY

AND DOUGLASS. J.J.

Magistrate's Court—Preliminary inquiry on indictable offence—Charge found frivolous and vexatious—Power to award "Costs charges and expenses" — Whether fee paid to counsel for defence included therein—Indictable Offences (Procedure) Ordinance 1907, section 2,

This was an appeal from the decision of the Stipendiary Magistrate for the East Coast Judicial District, who in dismissing an information laid by the appellant against the respondent awarded the respondent the sum of \$164.04 (including \$120, fee to counsel), on the ground that the information was frivolous and vexatious. The main question arising on appeal was whether the expression "costs charges and expenses" occurring in section 2 of the Indictable Offences (Procedure) Ordinance 1907, included therein, the fee paid by the defendant to counsel for conducting the defence.

Held:—That having regard to local enactments on cognate matters, the expression "costs charges and expenses" did not include the retainer paid by defendant to counsel.

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

P. A. Fernandes, for the respondent.

The judgment of the Court was delivered by SIR CHARLES MAJOR, C.J.:

Upon an information by the appellant charging the respondent with the indictable offence of false pretence, the respondent has been discharged by the learned magistrate for the East Coast judicial district, who, being of opinion that the information was frivolous and vexatious, exercised the power given to him by section 2 of the Indictable Offences (Procedure) Ordinance, 1907, and ordered the appellant to pay to the respondent as his and his witnesses' just and reasonable costs, charges and expenses consequent on the information, the sum of \$164.04. In that sum is included \$120 "fee to counsel for defence." From that order, so far as it includes the fee to counsel, the appellant has come to this court, on the ground that it is unwarranted (or erroneous) in law. The learned magistrate has noted on the record that the order, generally, is one made by him for the first time, and the point raised by the appeal seems to be of first impression.

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Speaking generally, the expression "costs, charges and expenses," includes such a sum of money paid by the respondent as counsel's fee to defend him, but we do not think that we are at liberty to construe the expression without reference to other ordinances. Costs in a magistrate's court are regulated by section 57 (1) of the Magistrates' Courts Ordinance, 1893, and the tables contained in the schedule thereto, Table B, prescribing a "tariff" of fees and costs in proceedings relating to summary conviction offences, with no reference to counsel's fee. Ordinance No. 12 of 1893, by section 43 (1) provides for the award by a magistrate, on the dismissal of a complaint, of "such costs as to the court may seem just and reasonable," and of a reasonable sum not exceeding ten dollars as compensation "if of opinion that the complaint was frivolous and vexatious," and by sub-section 4 provides that no such order for payment of costs shall include any fee to counsel. Costs awarded by justices in England under the Summary Jurisdiction Act, 1848, upon dismissal of a complaint, do not include fee to counsel, though it seems that a solicitor's fee for appearance may be allowed, if reasonably necessary.

With the legislation before us, with no suggestion that fee to counsel has ever before been contemplated as allowable on the very rare occasions when the magisterial powers conferred by the 1907 Ordinance have been exercised, we are of opinion that in this case the fee of \$120 was erroneously awarded and it must be struck out of the magistrate's order. In the circumstances of the case disclosed by the evidence in the court below, we do not think fit to make any order as to the costs of the appeal.

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[131 OF 1923.]

1923. NOVEMBER 21; DECEMBER 3, 12. BEFORE DOUGLASS. J.

Accident—Death resulting therefrom—Accidental Deaths and Workmen's Injuries Ordinance (No. 21 of 1916)—Negligence—Nature of evidence necessary—Necessity for causal connexion between negligence and injury—Onus of proof—Respective duties of judge and jury—Law relating to pedestrians walking on tramlines—Duty of driver of car and of pedestrians.

The plaintiffs' father was knocked down and killed by a car, the property of the defendant company, under the following circumstances. The deceased was proceeding southerly down Water Street, walking along the eastern pair of lines somewhere south of the Russell Memorial, where the accident actually took place. There was no evidence led by the plaintiffs showing either that the car was being driven at an excessive speed or that the gear was in any way defective. The only evidence pointing to negligence was that the driver had been seen by a pedestrian to look to the west of the line somewhere in the vicinity of the spot where the fatality occurred but it was not shown how far therefrom.

Held :—(1) That the plaintiffs had failed to make out a *prima facie* case of negligence for the defendants to meet.

(2) That even assuming that the driver's act disclosed negligence, there was nothing to show any causal connexion between such presumed negligence and the collision which eventually ensued.

(3) That the evidence being equally consistent with the accident having been caused by the deceased man's negligence as with having been caused by the negligence of the servants of the defendant company, the plaintiffs' case must fail.

F. O. Low, for the plaintiffs.

H. C. Humphrys, for the defendant.

DOUGLASS, J.: The plaintiffs are claiming \$5,000 as damages and pecuniary compensation against the defendant company for the death of their father Samuel Paul, alleging that he was knocked down and killed by a tram-car owned by the defendant company, on the 15th December, 1922, due to the negligence of the company's servants in charge of the car.

The claim is brought under section 4 of the Accidental Deaths and Workmen's Injuries Ordinance No. 21 of 1916,

On the close of the case for the plaintiffs, learned counsel for the defendant company submitted that the plaintiffs had disclosed no case to be answered by the defendant company for three reasons, any one of which would be sufficient to prevent the plaintiffs succeeding on their claim; they were

(1) There is no proof that the man killed on the 15th December was the plaintiffs' father, and no proof that the *post mortem* performed on the 16th December was on the plaintiffs' father.

(2) There is no proof of negligence on the part of the defend-

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ant company's servants, or, if there was any, that such negligence caused the death of the deceased man.

(3) There is too much doubt as to the value of the loss occasioned to the plaintiffs, if any, for the court to fix any sum as damages, a possibility of loss is not sufficient, and they had no reasonable expectations.

The evidence that the man killed by tram car No. 10 on the 15th December, 1922, was Sam Paul the father of the plaintiffs, is sufficient, so that I propose to take the second objection, and from an examination of the evidence endeavour to find whether the plaintiffs have satisfied the court that they have a *prima facie* case or not,

The *locus in quo* was very clearly disclosed by a photograph of that portion of Water Street between the Russell Memorial on the east and the cart-stand on the west (exhibit "A") and by a plan showing the street from the Stabroek Market on the north to where Cornhill Street meets Water Street at an angle on the south (exhibit "B"). From the evidence of Mr. Seymour (Land Surveyor) from the white pole at the southern extremity of the market to the white pole at the southern extremity of the Russell Memorial is 180 feet, and there is a clear view of the tramline the whole way and further there are double pairs of lines up the whole of that portion of the street, and tram No. 10 was proceeding south along the eastern pair of lines about 1 p.m. when it collided with the deceased, a little beyond, but nearly opposite to, the white pole at the southern extremity of the Russell Memorial; it was proceeding at the time at the rate of 7 to 10 miles per hour, having stopped at the white pole at the southern extremity of the market to pick up passengers.

The expert evidence goes to show that a tram could pull up in 47 feet going at the rate it was in about five seconds, and that the brake was in good order. Other evidence shows that the gong was sounded and the driver shouted "Hi man" though how long before the deceased was struck there is not sufficient evidence to show. The unfortunate old man appears to have been walking between the pair of lines on the east, going south, that is with his back to the approaching tram, though he was facing west when the car struck him; there was considerable traffic and noise going on and other persons were on the line. There is no suggestion that the tram was running at anything but a moderate speed, and so far not the slightest suggestion of negligence.

I do not propose to discuss the numerous cases referred to by learned counsel on both sides, but will only refer to those relating to what must be proved by the plaintiffs before the court will leave the facts to the jury, or call upon the defendant to

put forward his case, for I do not consider it necessary at the present stage to deal with the difficult question of contributory negligence.

The local case of *Mow-a-Qui v. Georgetown Tramway Co., Ltd.*, (21 April, 1883) is a useful reference in considering the mutual rights and duties of the drivers of the tramcars and of carriages and of foot-passengers using the roadway, but otherwise does not assist in the present case, for a *prima facie* case of negligence was held to be proved and the evidence was taken of both parties and their witnesses. In the leading case of *Wakelin v L. & S. W. Railway Co.* (1886, 12 A.C. 41) it was decided that in an action for negligence the onus is on the plaintiff to prove the negligence and that the injury complained of resulted from it. (See opening para, of Lord Haldane's judgment); to prove negligence alone is not sufficient, the plaintiff must also show that negligence caused the injury. There is another case *Cotton v. Wood* (1860, 8 C.B. N.S. 568) where the facts, although not exactly similar, are sufficiently for the purpose of comparison,) and see 1st para, from Cockles & Hibbert's Cases on the Common Law, page 568). The case of *Allen v. N. Metropolitan Tramways Co.*, (1887, 4 T.L.R 561) is somewhat similar. To turn to the present case, the only suggestion of negligence I can find is in the evidence of (1) Ramjewan, who states "The motorman was looking to his right side" and (2) of Craig, "Driver was looking big tree way west side of line," inferring. I presume, that owing to his attention being distracted, he did not notice Sam Paul in time to avoid the accident. It is true that it is the duty of a tram driver, as it is of an engine driver, to concentrate his attention chiefly ahead, but that does not mean he is never to look aside, or that the fact of his doing so is proof of negligence. There is not a tittle of evidence to show that his face was turned when he had approached to within 50 feet of the deceased, and the evidence shows that the car could have been pulled up within that distance. In considering an accident on a tram or any rail line it must always be kept in mind that the tram runs on or over a fixed portion of the roadway and cannot avoid or dodge any obstacle otherwise than by stopping, whereas a foot-passenger has free access to any portion of the road and more liberty of action, and he knows the uses of the fixed lines on that road, and must necessarily take a certain amount of risk if he walks down them.

Can it be said that because at one portion of the 180 feet of rails between the market and the further end of the Russell Memorial enclosure, the driver of the tram No. 10 looked to his right hand, instead of ahead, that he was not taking as much care as an ordinary reasonable man in his responsible position should take, and that by the omission of such care the plaintiffs'

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father was killed? In *Wakelin v. L. & S. W. Railway Co.*, referred to above Lord Watson says, "I am willing to assume although I am by no means "satisfied that it has been proved that they (defendants) were in certain "respects negligent. The evidence goes no further. It affords ample "materials for conjecturing that the death may possibly have been "occasioned by that negligence, but it furnishes no data from which an "inference can be reasonably drawn that as a matter of fact it was "occasioned." The present case is to my mind weaker still. I cannot even assume that there was negligence in certain respects. To put it shortly, the evidence is equally consistent with the accident having been caused by the deceased man's negligence as with having been caused by the negligence of the servants of the defendant company. Had I been sitting with a jury, it would not have been competent for me to have left the matter to the jury; the defendant company in other words has no case of negligence to meet.

I must accordingly non-suit the plaintiffs with costs to defendant Company.

Solicitor for the plaintiffs, *R. C. V. Dinzey*.

Solicitors for the defendant, *Cameron & Shepherd*.

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

MOHABEER v. THE DEMERARA COMPANY, LTD.

MOHABEER v. THE DEMERARA COMPANY, LTD.

[139 OF 1923.]

1923. NOVEMBER 26, 27; DECEMBER 15. BEFORE DOUGLASS, J.

Accidental Deaths and Workmen's Injuries Ordinance 1916,—Negligence of employer or his agents—Defect in machinery or plant—Negligence of employee superintendent— Plaintiff's knowledge of risk—Contributory negligence—No particulars of special damage in statement of claim—Whether evidence thereof can be given at trial.

(a) Where an employee is injured in the course or his employment and seeks to recover damages under the Accidental Deaths and Workmen's Injuries Ordinance, 1916, for injuries caused by any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer, he must also prove that such defect arose from, or had not been discovered or remedied owing to the negligence of the employer or of some employee to whom the duty was entrusted to seeing that the way?, works, machinery or plant were in proper condition.

(b) Continuing to work after knowledge of a risk in the said works does not necessarily preclude the employee from recovering damages.

(c) Contributory negligence on the part of the plaintiff, if of doubtful value as regards the cause of the accident, is no bar to the plaintiff's recovery.

(d) No evidence of items of special damage can be given as such, where there is an omission to state them in the particulars of damage.

The facts of the case fully appear in the judgment below.

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

H. C. Humphrys, for the defendant.

DOUGLASS, J.: The plaintiff is claiming \$3,000 against the defendant company for injuries received by him whilst in his employ due to negligence on the part of the defendant company and their servants in suspending and supporting an iron pipe in an unsafe and careless manner.

The claim is brought under Part II of "The Accidental Deaths and Workmen's Injuries Ordinance No. 21 of 1916."

Put shortly, the defence is that there was no negligence on the part of the defendant company or their servants, and that if there was it was contributory negligence on the part of the plaintiff that was the immediate cause of the accident, but in addition to the defence on the merits, Mr. Humphrys. counsel for the defendants, took the objection at the close of the case that the plaintiff had not proved (b) or (c) of the particulars of negligence in the statement of claim and on the contrary had—from his own witness's mouth—proved that there was no cart at work unloading when the accident occurred and that there was no vibration at the time of the accident, and further that it could not have been vibration from any source that caused the pipe to fall. I agree with him so far, but I do not agree when he goes on to urge that the plaintiff's case has failed through want of such proof.

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In paragraph 6 of the statement of claim the plaintiff states, “the defendants negligently left the said iron pipe suspended in the careless “manner as aforesaid and dangerous to persons passing nearby then well “knowing that the slightest touch or vibration will cause the same to fall “and injure persons in the way as the plaintiff was injured,” and paragraph (a) of the particulars of negligence still stands, so that even if we delete or take as unproven paragraphs (b) and (c) there is sufficient material left to ground his action for damages on, and until the evidence had been completed on both sides, no objection was taken that the particulars of negligence were insufficient. It may here be noted that in the statement of claim it is alleged that the injury to the plaintiff was caused by the iron pipe falling on him, in paragraph 4 “the plaintiff.....was struck violently on his right leg and thrown to the ground with great force with a heavy iron pipe,” whereas it turned out it was actually the wooden prop that caused the injury; no objection was taken to this apparent difference in the supposed and real instrument of injury, and I merely mention it to point out that the pipe and prop may from their association be treated as a whole (and were deemed so from the defendant's point of view), and it was the weight of pipe behind or at top of the prop that caused the damage, the prop itself being but a small piece of wood and incapable of causing such severe injuries.

In order that a person who has sustained injuries through the negligence of another may succeed in an action for damages he must prove (1) that he has been injured by the wrongful act neglect or default of the offender, (2) that he has thereby sustained damage and (3) that at the time when the action is brought his cause of action still exists. I quote from the learned judgment of Mr. Justice Swift in *Nunan v. S. Rly. Co.* (39 T.L.R. 515) “If he proves injury but cannot show any damage, or if he proves “injury and damage but it is established that the damage has been caused “or contributed to by his own negligence, or if it be shown that he has “barred or settled his claim he has no right against the defendant.”

It is not contested that the accident caused both bones of his right leg between the knee and ankle to be broken—a compound fracture—and that after being in hospital six weeks he was for another six weeks or so about on crutches with his leg in plaster of paris. It was also proved that it had caused him shock and disabled the plaintiff from doing any work for five or six months, and that there would be some incapacity in constant use of that leg for some time. It remains to prove that the injuries were due to the negligence of the defendant company or their servants, and to bring the case within the ordinance he must also show that

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there was a defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer (Ordinance 21 of 1916 Section 9 (1)), which caused the personal injury, or negligence on the part of a person in the service of the employer who had any superintendence entrusted to him (section 9 (2)). The evidence shows that it was the foreman engineer, Thompson, whose duty it was to see to the removal and setting up again of the cylinder and the necessary preparations; whether it was Philander who actually fixed the prop in place as he himself states, or the carpenter Belgrave, as the plaintiff and his witnesses say, does not affect the ultimate liability (if any) of the defendant company. In any case on the cylinder being removed for repair the steam pipe connected with it had to be disconnected and supported until its return. This steam pipe had a three inch bore and was 18 feet long with a right angle bend down of 9 feet in length and with another short piece of pipe at the end again at right angles of about one foot in length, at the junction of this last bend was a flange projecting 11/2 inches wide. The pipe weighed in all 500 to 600 pounds. This flange was about two to three feet above the bed of the engine and under it a piece of greenheart 3x2 inches was placed upright, its other end resting on the ' bed plate' which was about 6 inches wide and—according to the defendant's witnesses—it was bound at the top below the flange and round the bend in the pipe with a short piece of rope, 4 turns to it. It is evident that though this might prevent the upper end of the prop slipping, it was practically useless to the lower end.

Both Philander and Thompson, engineer and foreman engineer of the defendant company's works, admit that the pipe might have been properly secured in other ways, and the then manager (Mr. Sampson) says it should have been supported from the roof or sheered up with "scissors," also referred to as a "horse:" if either had been used " such an accident would not have occurred." He also states: "I have never seen a pipe done that way before." . . . "the pipe was insecure as it was. . . I had noticed the 'shore' but was led to understand that it had a cross piece of wood on it and not an upright piece of wood only." He also says that the foot of the prop rested where it was dirty with grease, and "a child could have shoved the pipe over as it stood." Mr. Newsam, the (then) building overseer, says the prop would slip easily if shaken, "the foreman engineer ought to have known it "wanted supporting better than just an upright." I need not quote more; the carelessness of the person superintending the job is in my opinion too obvious to need further remarks. I do not dwell on the fact that on the first effort to lift the cylinder into place the plank supporting it broke and it fell to the ground,

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except in so far as it shows that Philander was not so certain of his support for the pipe but thought it necessary to go round and see if it had been disturbed, he thought the vibration might have shaken it. On the second effort it was found that some of the porters would have to shift to the other side to ease the cylinder on to its bed, the plaintiff was told to loose, and went round on the north side where the pipe was; he stood with one foot inside on the bed and one outside and bent forward to grasp the cylinder, the pipe and prop being on his right.. I am not satisfied that any warning was given to him, the plaintiff, Tailor and Field all say not, and so does Newsam who was near enough to have to jump out of the way when the pipe fell. If a warning was given, as Philander says, and the plaintiff heard it, it and the accident were so close together as to be almost simultaneous.

There is no direct evidence to be relied on to show what did cause the prop to slip, or the pipe to fall, the possibility is that some part of the person of the plaintiff touched it, either his shoulder the pipe or his hip the prop. The words of Lord Herschell in his judgment in *Smith v. Baker & Sons* are not inapplicable: "Where a risk to the employed which may or may not result in injury has been created or enhanced by the negligence of the employer, does the mere continuance in service with the knowledge of this risk preclude the employed, if he suffers from such negligence, from recovering in respect of his employer's breach of duty? I cannot assent ..."

On the evidence and relying on the truth of the statement that a warning was given, the defendant company pleads contributory negligence on the part of the plaintiff.

The cases on contributory negligence are somewhat conflicting and confusing, it is left to the decision of the jury whether the damage was occasioned by the negligence of the defendant or whether the plaintiff so far contributed by his own want of ordinary care and caution that but for such want of ordinary care or caution on his part the accident would not have happened; "mere negligence or want of ordinary care or caution would not however disentitle him to recover unless it were such that but for that negligence or want of ordinary care and caution the misfortune could not have happened." Wightman, J., on delivering the judgment of the Exchequer Chamber in *Tuff v. Warman* (5 C.B.N.S. 573), *Greenland v. Chapcin* (5 Ex. REP. 243) may also be referred to. In Halsbury Laws of England, Vol. XXI., p. 447) it is said, if negligence on the part of the defendant is proved and contributory negligence by the plaintiff is at best only a matter of doubt, the defendant is liable. I cannot follow the reasoning of learned counsel that the mere fact that the plaintiff was the only person who was near the

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pipe, and was warned not to touch it. is sufficient in itself to prove contributory negligence; his duty took him to that position where he was and there is not the slightest evidence that he was warned not to go where he was standing or that he did his job in a careless manner.

To quote Beven on "Negligence in Law," "to constitute a responsible agent there must be an accountable human will" and I do not find that the unconscious act of the plaintiff—if it was he—in touching or pushing a prop that should not have been there was negligence on his part.

With reference to any compensation the plaintiff has received I agree with counsel for the plaintiff that the defendant company has not treated him well. It is true they gave him three and a half months full pay; they could hardly have done less, but to counteract the effect of this dole they refuse to give him any work because of a personal prejudice of the present manager, and had him turned out of this shop on the estate, one of his means of livelihood, by the effective method of doubling his rent.

At the same time the plaintiff is by no means destitute, he is and has been a moneylender and his wife has means enough to build a good-sized house, he too is not disabled for suitable work and has been earning \$5 a week at Plantation Mara.

The question was raised whether the plaintiff could prove "special damages," that is damages such as the law will not infer but must be specially claimed in the pleadings and strictly proved at the trial. The losses and expenses incurred by the plaintiff as set out in clause 5 of the statement read "suffered great pain and became ill and incapacitated and was laid up in hospital and put to great expense in procuring medical treatment and medicine and unable to work and support himself and family." etc.; all this would be taken into account in assessing general damages and the bare statement at the end that the plaintiff claims "(a) special damages \$1,000" is not identified with any previous item, or particularized sufficiently for the court to allow evidence to be given of what it was intended to apply to.

Taking into consideration all the expenses the plaintiff has incurred and the incapacity he has suffered from owing to the accident, and that he was not fit for heavy work until 1923 I assess general damages at \$275.

I give judgment for the plaintiff for \$275: and costs.

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

Solicitor for the defendant, *W. S. Cameron.*

DA COSTA AND MOHABEER.

DA COSTA, Appellant,
AND
MOHABEER, Respondent.

[486 OF 1922.]

IN THE FULL COURT OF THE SUPREME COURT OF BRITISH GUIANA.

1924. JANUARY 28; FEBRUARY 15.

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

Bastardy—Affiliation proceedings commenced—Agreement by mother to discontinue proceedings—Promise of putative father on that ground to support children—Weekly instalments—Failure to keep promise—Subsequent taking of affiliation proceedings by mother and order obtained thereon—Claim for arrears due prior to granting of order.

This was an appeal from the judgment of Berkeley, J., dismissing the appellant's claim against the respondent for arrears due under an agreement between the appellant and the respondent for the maintenance of two children. The appellant, mother of two illegitimate children, started affiliation proceedings against the respondent some time prior to September, 1920, but withdrew same and on September 2, 1920, promised to take no further proceedings on the respondent undertaking to support the said children by the payment of certain weekly instalments. For some considerable time, *i.e.*, from 28th November, 1920, to 23rd July, 1922—it was so alleged in the statement of claim—the respondent failed to carry out his promise and the appellant accordingly started affiliation proceedings afresh on July 24th, 1922, and obtained an order therein. On the 26th July, 1922, she issued the writ in this action wherein she claimed the arrears of maintenance which under the agreement had become due up to 23rd July, 1922.

The action coming on for hearing, counsel for the defendant (respondent) took *inter alia* the preliminary objection that the plaintiff (appellant) had herself broken the agreement and could therefore no longer rely on it. This objection the learned judge upheld.

Held :—(reversing the order of Berkeley, J.)

(1) That on each failure of the respondent to pay a weekly instalment, a cause of action accrued to the appellant.

(2) That the respondent's continued default evidencing an intention to repudiate the contract, the appellant became entitled to rescind the contract.

(3) That except for the purposes of taking action for arrears, the contract was at an end, and therefore the appellant's affiliation proceedings could not be a breach of that which no longer existed.

S. L. Van B. Stafford, for the appellant.

P. N. Browne, K.C., (for *J. A. Luckhoo, K.C.*), for the respondent.

The judgment of the Court was delivered by SIR CHARLES MAJOR, C.J.:

The material allegations in the pleadings in this action are these. The statement of claim, by way of special indorsement of the writ of summons, is for a sum of money

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stated to be due from the defendant to the plaintiff for 86 weeks maintenance of her illegitimate children by him from the 28th November, 1920, to the 23rd July, 1922." The claim is made under a verbal agreement between the parties that the defendant, in consideration of the plaintiff discontinuing legal proceedings against him for affiliation of the children, would pay her \$2.88 per week. It is further pleaded that the defendant gave to the plaintiff the following memorandum:

"\$2.88

2nd September, 1920.

I do hereby agree to pay to Mary DaCosta the sum of two dollars and eighty-eight cents for the support per week of my two children Cora Mohabeer and Carmen Mohabeer, three years and nine months respectively, payment to start from date.

(Sgd.) J. MOHABEER."

The defendant, having obtained leave to defend, says (among other things) that the agreement alleged in the statement of claim dated Georgetown, Demerara, 2nd September, 1920, is bad in law, there being no consideration for the same. He pleads in the alternative that he has paid the plaintiff under the copy of memorandum set out in the statement of claim from the 2nd day of September, 1920, to the 17th day of July, 1922, the \$2.88 per week, and that there is nothing due by him to the plaintiff under the said memorandum. He then pleads that the plaintiff in July, 1922, applied to a magistrate to have him adjudged the father of her children, and that an order to that effect was made, he being ordered to pay \$1.44 per week towards their support, and that he will contend that if there was a verbal or written agreement as stated in the claim, the consideration (if any) for it came to an end on the 24th day of July, 1922, when the order was made, and the plaintiff cannot sue for nor recover in the action which was commenced on the 26th July, there being no consideration to support the agreement, Lastly, he further pleads that there has been a failure of consideration for the alleged verbal or written agreement. By her reply the plaintiff admits the affiliation proceeding's of July, 1922, and the order made thereon.

The action coming on for hearing, it appears that counsel for the defendant took two preliminary objections, with one only of which the court dealt—and this court knows nothing of any others—and upon which the learned judge dismissed the action. After referring to the plaintiff's admission that she took affiliation proceedings in July, 1922, His Honour made the following observations: "If the meaning of the agreement was that the father would make the stipulated payments if the mother would support the children, then the agreement was without consideration, as the plaintiff, being the mother of the children, was bound

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by law to support them. On the other hand, if (as suggested by the verbal agreement) plaintiff undercook the whole maintenance and agreed to abstain from obtaining an affiliation order, then there would be good consideration. The plaintiff herself has broken the agreement by obtaining an affiliation order against the defendant and this renders the agreement void." And the learned judge non-suited the plaintiff.

For the purposes of this appeal we must take His Honour's remarks quoted to mean that even if the plaintiff should prove that, by agreement between herself and the defendant, the defendant promised in consideration of her discontinuing proceedings against him for affiliating the children—which, in the learned judge's opinion, is good and valid consideration—to pay her a weekly sum towards their maintenance by her, and that the defendant has not made that payment, yet, by reason of her admission that she has taken affiliation proceedings, she cannot recover the moneys the defendant has failed to pay. With the utmost deference, we cannot agree.

Upon the defendant's default in payment of each weekly instalment of maintenance money he committed a breach of the contract, and his continued default from 1920 onwards certainly evidenced an intention to repudiate the contract. The plaintiff, therefore, became entitled to treat the contract as rescinded, except, of course for the purpose of insisting on her right of action (accruing from week to week) for the breach of it. The contract was at an end, and the plaintiff's affiliation proceedings of 1922 could not be a breach of that which did not exist. Nor was the plaintiff's carriage of those proceedings to an affiliation order a discharge of her existing rights of action, for they were in respect of future maintenance. The defendant has pleaded no discharge of the plaintiff's right of action thus accrued. We know the various methods whereby that may be brought about. None of them is here alleged by the defendant. He does plead in the alternative that he has paid the maintenance, but supposing the plea as it stands to be good in defence to the claim and that we may look at it at all, the proof of it has yet to be given. Nothing like merger, release, accord and satisfaction, or the like appears in the pleadings.

As to the argument of counsel for the defendant that the learned judge had before him (but did not consider) a contention that the only allegation of contract in the Statement of Claim which could be looked at was that of the document of the 2nd September, 1920, and that that contains no statement of consideration (which cannot be supplied by extrinsic evidence) while that ground has been made the subject of the requisite notice from the respondent that it would be taken, we are not thereby

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precluded from considering it, for, even if not urged in the court below the material for argument thereon was before that court. But, taking the view we do of the sole point upon which the learned judge passed and upon which alone he dismissed the action and this appeal is based, we refrain from expressing any opinion on the matter. There has been no hearing beyond arguments on preliminary objection (as they are called) and it would be inconvenient and indeed undesirable to do so.

Since, therefore, the learned judge dismissed the action on a view of the plaintiff's legal position, as disclosed by the pleadings in his opinion disentitling her in any event to succeed in the action, with which we are unable to agree, the appeal must be allowed with costs and there must be an order for a new trial. The costs of the court below will be costs in the cause.

Solicitor for the respondent. *W. D. Dinally.*

DEMERARA COMPANY, LTD., AND SADALOO.
DEMERARA COMPANY, LTD., Appellant

AND

SADALOO, Respondent,

[1 OF 1923.]

1924. FEBRUARY 5, 11.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

BEFORE SIR A. V. LUCIE-SMITH, P., SIR C. MAJOR, C.J., AND DEANE, C.J.

Landlord and tenant—Yearly 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)—Estoppel—Measure of damages.

This was an appeal from the decision of the Supreme Court of British Guiana, given in favour of the respondent who had brought a claim for damages against the appellant company for unlawful ejectment and for the destruction of two buildings, the respondent's property.

On the 30th April, 1921, the respondent, who was a tenant of the appellant company under a yearly tenancy, received a notice from the appellant company requiring him to quit within thirty days of service of notice. The respondent failed to comply with the said notice, and on the 20th June, 1921, on a complaint brought against him in the magistrate's court by the appellant company for neglecting to give up possession, an order was made upon the respondent to deliver up possession in one month. Respondent 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.

The main grounds of appeal were (a) that the tenancy was a monthly one (b) that the respondent was estopped by his appearance in the magistrate's court and his there asking for time, from setting up that the tenancy was yearly, (c) that the respondent had broken the conditions of the tenancy by sub-letting the premises, and (d) that the houses having been affixed to the soil, became the property of the appellant company,

Held: — (confirming the decision of the Supreme Court of British Guiana)

(1) That the question as to whether the tenancy was monthly or yearly was purely one of fact, and there was ample evidence to support the trial judge's decision on that point.

(2) That the tenancy being a yearly one—running from January to December—must terminate at the expiry of the year of tenancy and' the notice requiring possession on May 30th was therefore bad.

(3) That the mere appearance of the respondent in the magistrate's court and his asking for time did not constitute an estoppel so as to deprive him of his statutory rights under Ordinance 9 of 1903, section 18, sub-section (1).

(4) That it was doubtful whether the respondent, an illiterate man, could be held bound by the conditions endorsed on the back of the receipts, there being no evidence that they had ever been brought to his notice.

(5) That even if he were bound by such conditions, his letting a room or two did not constitute a sub-letting of the *lot*.

(6) That there was abundant evidence showing that the buildings were movable property and the respondent's intention to reside permanently in them could not alter their innate character.

H. C. Humphrys, for the appellant.

S. J. Van Sertima (for *J. A. Luckhoo, K. C.*) for the respondent.

DEMERARA COMPANY, LTD., AND SADALOO.

The judgment of the Court was delivered by SIR A. LUCIE-SMITH, President:

The respondent, plaintiff in the court below, alleged that he was a yearly tenant to the appellant company of a lot of land on which he erected certain buildings and that the appellant company wrongfully and illegally ejected him from the said lot of land, destroyed the buildings thereon and threw the broken pieces on the public highway and he claimed \$2,200 as special damages and \$300 as general damages. The appellants alleged that the respondent was a monthly tenant and that after giving him a month's notice to quit they obtained from the Magistrate in August, 1921, a warrant of possession, that at that date they were entitled to possession. The learned judge in the court below held that the respondent was a yearly tenant and that such tenancy expired on the 31st December in each year, that the appellants were not entitled at the time of the granting of the warrant to the lawful possession of the premises and gave judgment for the respondent for \$1,200 damages. From this judgment the appellant company now appeals. The facts as found by the learned judge are fully set out in his judgment.

The appellant company contends that the learned judge was in error in finding that the respondent's tenancy was a yearly and not a monthly tenancy. Whether the tenancy was a yearly or a monthly one was purely a matter of fact.

The land was rented to the respondent many years ago about 1905 by verbal agreement and there is a conflict of testimony between the parties as to the terms of the agreement. Certain receipts for rent were put in evidence, the first receipt is dated 18.1.13 for rent to 31 December, 1912, No conditions are on the back of this receipt. The second receipt is to June, 1917. On the back is printed "Three months notice to quit on either side." The receipt to December, 1917, has the same conditions on the back, but the "three" is struck out and "one" written above. Other conditions were indorsed on subsequent receipts. After consideration of the evidence we cannot say that the learned judge was wrong in finding that the tenancy was a yearly one. The first receipt and the entries in the books of the estate for the first year clearly import a yearly tenancy both under the English and the Roman Dutch law *King v. Eversfield*, 1897, 2 Q. B, 475, and *Puputa v. Potterill*, 21, Natal L.R., 201. As to whether the respondent could be held bound by the indorsements on the receipts, seems extremely doubtful, we are inclined to hold he was not. He is an illiterate man and there is nothing to show that the conditions indorsed were ever brought to his notice; these conditions were continually being changed. It is really a question of fact to be left to a jury—*Richardson, Spence & Co. v.*

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Rowntree, 1904, A.C. 217. For the purposes of this case, however, it is not necessary to decide this point. If the tenancy was a yearly one, and it has been found it was, the tenancy must terminate at the expiry of the year of tenancy which was the 31st December. There may or may not have been conditions as to the length of notice to terminate tenancy, but the notice, whether a month or six months, determining the tenancy, must expire with the year of the tenancy. *Dixon v. Bradford Coal Supply Society*. 1904, 1 K.B. 444 ; *Queen's Club v. Bighell*, 130, L.T., 26, lays down very clearly the principle that in the case of periodic tenancy, that is, for so many years, quarters, months or weeks, if a new period be allowed to begin the tenancy must continue till the period ends. Neither party can against the will of the other put an end to the tenancy during the currency of that period.

It is further contended that the respondent was estopped from denying that the appellants were entitled to possession by his conduct when appearing before the magistrate on a summons to show cause why he should not deliver possession of the land inasmuch as he asked the magistrate to give him time, six or four months. The evidence as to what occurred before the magistrate is very meagre. We do not consider there is sufficient to show his conduct then was such as to constitute an estoppel. Possibly and very probably the magistrate intimated he was going to make an order for possession and the respondent then asked for time. That would not be in our opinion sufficient to deprive the respondent of the rights given him by Ordinance No. 9 of 1903.

Another ground of appeal is that the respondent sublet the premises and was therefore guilty of a breach of one of the conditions of the tenancy. The first time the condition as to subletting appears is an indorsement on the receipt of 14.11.22 which states "the reletting of lots is not permitted." The evidence shows that the people paid the respondent rent (2/- and 1/-), when or for how long does not appear. The respondent never relet the lot; he apparently allowed a man and a woman to occupy rooms in his house. That is not a reletting of the lot. The appellants never at any time claimed that the tenancy was thereby put an end to—they never forfeited the tenancy and very probably received rent subsequent to the letting. I do not consider that this letting, even if it could be called a reletting of the lot, gave the appellants right of possession at the date of the granting of the warrant,

It is stated that there was no proof of any special damage and as only \$300 were claimed as general damages, no more than that sum could be given as damages. We would point out that this is not a ground of appeal and therefore cannot be now

taken. The respondent claimed as special damage the damage done in pulling down and destroying his houses. There was ample evidence on this point. The learned judge has not stated specifically how much is in respect of special and how much in respect of general damages, but that does not invalidate the judgment.

There is another reason of appeal, that the houses were affixed to the soil and would therefore be the property of the appellants on the expiration of the tenancy, but this reason was not seriously argued, and, we think, rightly so. The whole evidence shows they were movable. It was contended that the intention of the respondent to live permanently there showed the buildings were immovable. On the face of it, such a contention is perfectly untenable. Whether the respondent was going to live there permanently or not does not in any way alter the character of the buildings. Further, it is clear the tenancy was not legally terminated at the time of the destruction of the buildings.

In our opinion all the reasons of appeal are untenable and therefore this appeal should be dismissed with costs.

Solicitors for the appellant, *Cameron & Shepherd.*

Solicitor for the respondent, *E. D. Clarke*

NASCIMENTO, Appellant,

AND

HENRIQUES, Respondent.

[590 OF 1922.]

1923. MARCH 23; APRIL 24. BEFORE GILCHRIST, ACTG. J.

Magistrate's Court—Claim for rent—Jurisdiction declined—Procedure—Appeal or mandamus?—Magistrates' Decisions (Appeals) Ordinance, 1893, section 46,

This was an appeal from the decision of the Stipendiary Magistrate of the Georgetown Judicial District, in which the magistrate held that he had no jurisdiction to adjudicate in the cause in question.

The plaintiff (appellant) had filed a plaint against the defendant (respondent) in the Magistrate's Court for rent alleged to be due. Counsel for the defendant objected on certain grounds to the jurisdiction of the magistrate to try the case. The magistrate, upholding the objection, declined jurisdiction, and struck out the plaint. The plaintiff appealed.

Held:—That the magistrate having declined jurisdiction, the proper procedure to be followed in order to bring the matter before the Supreme Court, was by way of *mandamus*, not by way of *appeal*.

Blunt v Matheson 1922, L.R.B.G. 155, followed.

J. S. McArthur, for the appellant.

J. A. Luckhoo, for the respondent.

GILCHRIST, Actg. J: This matter comes before the Court by way of Appeal. The appellant lodged a plaint in the Georgetown Judicial District against the respondent for the sum of \$70 in respect of the rental of a building situate at lot 25 Saffon Street, Georgetown.

2. On the close of the case for the plaintiff, Mr. J. A. Luckhoo Counsel for the defendant submitted that the Court had no jurisdiction to try the case further. The Magistrate (Mr. Veerasawmy) upheld the submission and struck out the claim. He then goes on to say that as the matter may be taken to the Court of Appeal he would deal with the submission as to the premises in question falling within the provisions of the Increase of Rent (Restrictions) Ordinance No. 4 of 1922, and expresses the opinion that it does.

3. The plaintiff in Court below appeals to this Court.

4. Counsel for the respondent raises a preliminary objection to the hearing of this appeal, namely, that the proceedings should be by application under section 46 of Ordinance 13 of 1893, for a rule ordering the Magistrate to hear and determine the case, and not by way of appeal.

5. Mr. McArthur, counsel for the appellant, submits that the Magistrate having dealt with the merits of the case he has adopted the correct procedure, namely by appeal.

6. Reason 1 (c) of the grounds of appeal is as follows :—

“The Magistrate's Court having found that it had no jurisdiction, the
“rest of the decision dealing with the application to the case of the
“provisions of the Increase of Rent (Restrictions) Ordinance 1922
“was mere obiter.”

7. I agree that the remarks of the Magistrate subsequent to his declining jurisdiction are mere "obiter" so far as the consideration of this appeal is concerned. It, however, strikes me as strange that counsel though admitting in his reason of appeal that the Magistrate declined jurisdiction argues before this court that he did not do so.

8. No evidence for the defence had been taken by the Magistrate. He has not dealt with the merits of the case but struck it out on the submission of counsel for the defendant (respondent herein) that the Court had no jurisdiction to try the case further. This was clearly a declining of jurisdiction and the question whether he acted rightly or wrongly in so doing cannot be brought before this court by way of appeal but only by proceeding under section 46 of Ordinance 13 of 1893.

9. I am of opinion that this case comes within the principles of *Roy v. Hodgson* 7 11. 1902; *In re Johnson* 13. 2.1903, L.R.B.G., (Full Court); *Corbin v. Mentore* 21. 12. 1903; *Bellamy v. Dos Santos* 19. 5. 1904; *Jones v. Faria* 11. 5. 1906; *In re Collins, Collins ex parte Durant* 1. 6. 1906 L.R.B.G. (Full Court); *In re*

NASCIMENTO AND HENRIQUES.

J. C. Bryden 25. 4. 1912, L.R.B.G. (Full Court); *Blunt v. Matheson* 16. 923 L.R.B.G., W.I. Court of Appeal; See also *The Queen v. Broun* and ors. (Justices of Monmouthshire) (1857). L.J., N.S. Vol. 26 Part II Common Law.

10. Appeal dismissed with costs.

FERREIRA AND CABRAL.

FERREIRA, Appellant,
AND
CABRAL, Respondent.

[2 OF 1923.]
1924. FEBRUARY 6, 11

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

BEFORE SIR A. V. LUCIE-SMITH, P., SIR C. MAJOR, C.J.,
AND DEANE, C.J.

Mutual will of husband and wife—Death of husband—Surviving wife executrix—Repudiation by children of certain clauses of will—Payment of children's legitimate portions of father's estate—Death of mother—Claim to legitimate portion of mother's estate—Claim brought by way of opposition—Necessity for accounts—Opposition to be founded on a liquidated amount.

This was an appeal from the decision of the Supreme Court of British Guiana, dismissing the appellant's claim, brought by way of opposition against the respondent to restrain him from passing transport of certain property on the ground that the respondent's testator was indebted to the appellant and others.

There were several grounds of appeal, but on the matter coming on for hearing—at the close of the arguments for the appellant—counsel for the respondent submitted that there was no necessity for the court to consider the various points raised by the appellant because the action had been misconceived from its inception, by reason of the fact that all claims for legitimate portions *ex necessitate rei* involve the taking of accounts, whereas it was a fixed principle governing actions by way of opposition, that they must, if founded on a money claim, be based on a liquidated and definite sum.

Held.—(Confirming the decision of the Supreme Court of British Guiana)

(1) That the sum of \$3,000 having been given to the alleged trustee for purposes of investment, an account would be necessary to ascertain whether the amount had increased or decreased,

(2) That the legitimate portion due under any person's estate necessarily involves going into accounts.

(3) That in view of the foregoing, the opposition was ill founded the sum claimed not being a liquidated amount, as was necessary in such cases.

S. J. Van Sertima (for *J. S. McArthur, K.C.*) for the appellant.
G. J. deFreitas, K.C., and *M. J. C. deFreitas*, for the respondent.

The judgment of the court was delivered by DEANE, C.J.:

This is an action in which the plaintiff in his own right and on behalf of the other heirs and heiresses and for remaindermen under the last mutual will of Francis Ferreira, deceased, and Madelina Ferreira, deceased, opposed transport of certain lots in the city of Georgetown by Antonio Ferreira Cabral, the executor of the will of Augustinho Ferreira, to a legatee under the will of the said Augustinho Ferreira. The grounds of the opposition shortly stated are, (a) that Augustinho Ferreira had received the sum of three thousand dollars from Madelina Ferreira during her lifetime to be invested on her behalf which sum he still owed to Madelina Ferreira at the time of his death, (b) that the plaintiff's

had only received the legitimate portion of their fathers estate under the mutual will and were still entitled to the legitimate portion of their mother's estate which consisted of the same three thousand dollars.

No action in opposition can succeed which is not founded on a liquidated claim, so that if the opposer has to ask for an account to be taken in order to establish what is due to him he cannot successfully oppose. Inasmuch therefore as the plaintiffs in the case allege that the \$3,000 was given to Augustinho Ferreira by their mother to invest, it is clear that an account would have first to be taken to find out whether in the course of investment the capital sum had been increased or decreased before they could found their action. This has not been done and the first ground for opposition therefore fails.

The next ground, namely, that they are entitled to the legitimate portion of their mother's estate seems logically to be untenable also, since the mother's estate according to their contention consisting of this same three thousand dollars which came into her possession long before her death, an account in our opinion would be necessary first to ascertain what was the actual amount of the mother's estate at the time of the mother's death, then a further account to determine to what amount, if any the plaintiffs were entitled by way of legitimate portion. The plaintiffs contend, however, that the heirs having expressed dissatisfaction with the mutual will, the second mode of distribution provided for by the will came into effect, and they became entitled to the legitimate portion of their father's estate which they have been paid, and also to the legitimate portion of their mother's estate, which can be ascertained by so simple an arithmetical calculation that it cannot fairly be said that an account is necessary. All accounting is, of course, a matter of arithmetic and this does not seem to us so simple a matter as it appears to them, in view of the complication introduced by the deceased Augustinho Ferreira being himself one of the heirs under the will. When, too, they are asked what was the amount of the mother's estate, they say it must be taken to be the same as their father's at the time of his death, and that by the terms of the will it was burdened with a *fidei commissum* for their legitimate portions, in effect they contend that the mother's estate became as it were crystallised on their father's death. Now disregarding altogether the fact that the amount of their father's estate was more than three thousand dollars and that therefore in fixing the sum of \$3,000 as the amount of the mother's the plaintiffs are in fact departing from their own criterion and fixing an arbitrary amount, the words of the mutual will: "we institute such dissatisfied child or children in

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his, her or their legitimate portion or portions of our said estates, such institution to take effect on the decease of each of us severally," do not to our minds bear out this contention, and indeed the legitimate portions in a person's estate can only be calculated as at the death of that person from which date his will speaks. An account therefore in our opinion is necessary in any case to determine what amount, if any, is due to the plaintiffs from Augustinho Ferreira whether it be as trustee of his mother or by way of their legitimate portions under her will and we therefore think this opposition is ill founded. The appeal should be dismissed with costs.

Solicitor for the appellant, *C. Gomes*.

Solicitor for the respondent, *J. Gonsalves*.

YOUNG, Appellant,

AND

GREEN, Respondent.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

1924. FEBRUARY 7.

BEFORE SIR A. V. LUCIE-SMITH, P., SIR C. MAJOR, C.J.,

AND DEANE, C.J.

Construction of will—Marriage in community—Whether deceased husband dealt with his own or the common property—Significance of the expression "my property"—Whether succession of devisees be "per stirpes" or "per capita"—Gift to an individual and to a class.

This was an appeal from the decision of the Supreme Court of British Guiana given in favour of the respondent. Husband and wife were married in community of property. The husband died leaving a will in which *inter alia* he dealt with what was described as "my property," and also with certain specific parcels of land. After devising the said "my property" to his wife for her natural life, the testator proceeded to deal with the remainder after the said life interest, leaving same to his daughter Sucky Ann "unto the heirs of George Green," one of the testator's sons. The trial judge had held that the expression "my property" in the context referred only to the testator's half of the common property and that the grandchildren succeeded "per stirpes" and not "per capita."

There was no written judgment but it was

Held :—(reversing the decision of the Supreme Court).

That, without deciding the question of the meaning of the expression "my property" in the present context, the decision was erroneous in so far as it permitted each of the grandchildren to succeed to the same extent as the daughter, because it was a principle of interpretation that where property was left both to an individual and to a class of persons, the individual took one-half and the class the other half.

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

S. J. Van Sertima, (for *J. S. McArthur, K.C.*,) for the respondent.

THE GUIANA STEAM SAW MILL, LTD., AND
CEDRIC DE SOUZA.

THE GUIANA STEAM SAW MILL, LTD., Appellant,

AND

CEDRIC DE SOUZA, Respondent.

[4 OF 1923.]

1924. FEBRUARY 7, 8, 16.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

BEFORE SIR A. V. LUCIE-SMITH, P., SIR C. MAJOR, C.J.,

AND DEANE, C.J.

Deceased person's estate—Powers of administrator—Infants interested in estate—Purchase by administrator on behalf of infants of a building requiring repairs—Court's previous sanction not obtained—Purchase by administrator of materials necessary to effect the repairs—Whether creditor can claim against estate—Rights of subrogation and indemnity—Whether such rights accrue to creditor and administrator respectively where act unauthorised.

This was an appeal from a judgment of the Supreme Court dismissing the appellant company's claim against the estate, of which the respondent was then administrator, for the price of materials supplied to a former administrator, of the said estate. The trial judge had held that there was not sufficient proof that the building on which the materials had been used, was at the crucial date, part of the said estate,

On the hearing of the appeal, counsel for the appellant—without objection thereto on the part of respondent's counsel—laid over an affidavit sworn to by the respondent, subsequent to the judgment appealed from, proving that the building in question did form part of the estate at the crucial date.

Held :—(confirming the decision of the Supreme Court).

(1) That as there was no instrument dedicating the funds of the estate to investment in house property, the previous administrator's purchase of the building in question was *ultra vires*.

(2) That accordingly, even if it could be proved that the infants benefited by the purchase of the materials—a problematical question—there was, in the absence of any instrument thereto, no fund dedicated to such a purpose, and, therefore, the creditor's right to be subrogated must fail.

(3) That the right of subrogation is confined to cases where the settlor has by the settlement authorised the liabilities and dedicated the whole or a specific part of the trust fund for meeting them.

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

S. J. Van Sertima, for the respondent.

The judgment of the court was delivered by DEANE, C.J.: This is an action in which the plaintiff company seeks to recover from the defendant the sum of \$315.40, the price of lumber sold and delivered by them to Manoel de Souza, deceased, administrator of the estate of Mary Eugene Nascimento, deceased, between 21st May, 1920, and 22nd. July, 1920.

The goods are alleged to have been delivered to de Souza for the estate of Mary Eugene Nascimento and the defendant Cedric de Souza is sued not as administrator of the estate of M. de Souza with whom the contract was made, but as having been

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appointed administrator of the estate of Mary Eugene Nascimento after the death of M. de Souza. In fact the plaintiffs claim to recover, not against the estate of M. de Souza, but found their claim on the right of subrogation, that is to say, they claim they have a right to stand in the shoes of Manoel de Souza or his administrator and to claim indemnity against the estate of Mary Eugene Nascimento.

It is obvious that the following questions at once arise for decision:

1. Were the goods supplied to de Souza used for the benefit of the estate of M. E. Nascimento?
2. If they were so supplied for the benefit of the estate has Manoel de Souza or his administrator the right to be indemnified by the estate for the liability incurred in purchasing them?

The plaintiffs can only succeed in the event of both of these questions being answered in the affirmative, since it is obvious that if the goods were not supplied for the benefit of the minors, they cannot be called upon to pay for them, and equally obvious that if Manoel de Souza or his administrator has no right to indemnity, it would be of no benefit to the plaintiffs to stand in his place to exercise a right which does not exist.

The first question which is one of fact after a very patient hearing was answered by the learned judge who tried the case in the court below unfavourably for the plaintiffs. In effect, he found that the evidence had not been sufficient to prove to his satisfaction that the goods were supplied for the benefit of the minors Nascimento and leaned rather to the view that the house on which they were used was the property of the defendant himself. We are not prepared to say that on the evidence the learned judge's finding was wrong and if the matter had stopped where it was at the close of the trial there would be an end of the case.

An affidavit sworn to by the defendant in this case in certain interpleader proceedings subsequent thereto has, however, been put in with the consent of the defendant's counsel in which the defendant alleges that the house on W 1/2 113, Albert Town, to repair which the lumber was used, was purchased from Douglas by M. de Souza on behalf of the minors, and it is probable, therefore, that if the learned judge had heard the evidence of the defendant his finding would have been a different one. It becomes necessary therefore to decide the second question, viz., had de Souza or the administrator of the estate any right to indemnity against the estate of Mary E. Nascimento so as to entitle the plaintiff to subrogation into his place?

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In the case of *Strickland v. Symonds* (1884) 26 Q.D. 245. it was laid down that the right of subrogation is confined to cases when the settlor has, by the settlement, authorised the liabilities and dedicated the whole or a specific part of the trust fund for meeting them and has no application to a case where the trustee has, contrary to the trust, but by way of salvage, incurred liabilities: in that case the creditor can only have recourse to the particular part of the property of which there has been an express dedication.

Now it is to be noticed that in this case there is no settlement and therefore no express dedication: the testator Mary E. Nascimento died intestate and Manoel de Souza was appointed to administer her estate. As such administrator his duty was confined to realizing the estate and he had no right to carry on a business such as investing in house property. As such administrator he acted perfectly rightly in converting into money the share in Cove & John, but when he invested the money so realised in this cottage at Albert Town, he was acting *ultra vires* since there was no instrument authorising such action nor had he any discretion as guardian of the minors to invest in such a security. It is urged that the infants have obtained the benefit of the investment, since they received \$15 a month for the cottage since its repair and that it is inequitable for them to reap the benefit and at the same time to seek to be secured from the liabilities. Even supposing that the court were in a position to say that the infants have been benefited,—and the fact that someone else might have erected an even better building upon their land thereby providing them with an increased ground rent and that the costs of insurance, taxes, repairs, standing empty, etc., to be set against any rent received render this extremely problematical,—it is quite irrelevant in our view of the law. The fact remains that there is no fund out of which this liability can be paid, and that Manoel de Souza, were he alive today, could have no right to be indemnified. The plaintiffs therefore are necessarily restricted to their rights against Manoel de Souza or his estate and cannot recover against the estate of Nascimento. This appeal should be dismissed with costs.

Solicitor for the appellant, *J. Gonsalves*.

Solicitor for the respondent, *A. McL. Ogle*.

B.G. BUILDING SOCIETY, LTD., AND CAETANO'S
EXECUTORS.

B.G. BUILDING SOCIETY, LTD., Appellant,
AND
CAETANO'S EXECUTORS, Respondents.

[6 OF 1923.]

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

1924. FEBRUARY 8, 16.

BEFORE SIR A. V. LUCIE SMITH, P., SIR CHARLES MAJOR, C.J.,
AND DEANE, C.J.

Contract for sale of land—Fraudulent misrepresentations inducing contract—Claim for specific performance, or in the alternative, damages—Preliminary objection— Order XXIII, r. 2, 3.—Objection taken under said order admits allegations of fact in statement of claim—Order XVI. r. 1. (b)—No relation between said order and claims for specific performance.

This was an appeal from the decision of the Supreme Court of British Guiana dismissing the appellant company's claim against the respondents for specific performance, or in the alternative, for damages. The learned judge had held, on a preliminary objection taken by counsel for the respondents (defendants), that specific performance was not the correct remedy but rectification, and that as Order XVI permitted only those damages to be joined with the equitable claim for specific performance as were damages for the withholding thereof, the claim for damages must also fail.

Held :—(reversing the decision of the Supreme Court)

(1) That the preliminary objection being by way of proceedings in lieu of exceptions under Order XXIII, necessarily entailed the admission of the truth of all allegations of facts set out in the statement of claim.

(2) That, accordingly, as such allegations contained all the ingredients necessary to an action of deceit, the learned judge erred in dismissing the claim.

(3) That Order XVI. 1 (b) does not relate to claims for specific performance but to claims for recovery of specific property, *i.e.*, for what is commonly called recovery of land.

P. N. Browne, K.C., and *M. J. C. de Freitas*, for the appellant.

S. J. Van Sertima (for *J. S. McArthur, K.C.*) for the respondents.

The judgment of the court was delivered by SIR CHARLES MAJOR, C.J.: Paragraph 11 of the defendant's statement of defence runs as follows:—"the defendants will contend at the trial that the statement of claim discloses no cause of action. The statement of claim does not allege (a) that the representations were made to a third party, or (b) that the plaintiff believed and relied on the alleged representations or in reliance thereon was induced to enter into the sale." There is an additional allegation to paragraph 13 of the pleading that the action is not maintainable for want of an agreement in writing and of a memorandum or note in writing of the alleged agreement.

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On the action coming on for hearing, counsel for the defendant objected *in limine*, for the reasons stated in the statement of defence, that the action for specific performance could not be maintained and asked that it be dismissed. The application was properly treated as governed by the provisions of rules 2 and 3 of Order XXIII. of the Rules of the Supreme Court, 1900, and the learned judge dismissed the action. For the purposes of his judgment and of our judgment on the appeal from the order of dismissal, as pointed out in *Burrowes v. Rhodes* (1899. 1 Q. B. 821) all the facts alleged in the claim must be taken to be true and admitted by the defendant.

Those allegations are, by paragraph 2, that the defendant's testator, Joao Caetano, was the owner of a property known as lot 53; by paragraph 4, omitting words purporting to connect the plaintiff with a body of persons described in the pleading as "the trustees," that the plaintiff purchased from Caetano who sold to them the lot 53 previously pointed out to the trustees by Caetano's agent and by him represented to be properly described as the west half of lot 53; by paragraph 5, that Caetano handed over to solicitors—it does not appear whose solicitors—a conveyance of lot 53 in the instructions to them to advertise a transfer of that lot from Caetano to the plaintiff; by paragraph 6, that Caetano at the time of giving those instructions, and with intent to defraud the plaintiff represented to the plaintiff and to the trustees, on whose behalf the plaintiff bought lot 53, that the conveyance included, not only the land and property sold to the plaintiff, but also other land which the plaintiff had not bought, and fraudulently represented to the plaintiff and the trustees that the property they had bought was the west half of lot 53, that is, the west half of the property fully described in paragraph 2 whereas in truth and in fact the plaintiff bought all the property described in the conveyance; or, alternatively, that Caetano well knowing that the plaintiff had intended to buy, and had actually bought and he Caetano had actually sold, the entire lot 53, and that through the misrepresentations of his said agent, the plaintiff believed that the land they had bought was correctly described as the west half of lot 53, with intent to deceive and defraud the plaintiff, allowed the conveyance to the plaintiff of the west half of lot 53, to be advertised without correcting the misrepresentation of his (Caetano's) agent; by paragraph 7 that by reason of the false and fraudulent representation and believing that the property pointed out to the trustees by Caetano's agent and sold by Caetano to the plaintiff was correctly described as the west half of lot 53, the plaintiffs were induced by Caetano to accept and did accept conveyance by

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Caetano of the west half of lot 53. Other allegations follow which need not be mentioned, and the plaintiffs claim "specific performance of the contract of sale of lot 53 as fully described in paragraph 2 of the claim purchased by the plaintiffs from Caetano" or "in the alternative, \$4,500 damages."

The learned judge, in upholding the objections thus taken by counsel for the defendants, has considered the question of a claim for specific performance of a contract either (a) when induced by fraud or (b) when executed, or (c) when not in writing and he states the submission of the defendants' counsel to have been that the only possible course for the plaintiffs to have adopted in this case was to sue for damages for misrepresentation or for rescission of the contract. Without—refraining indeed of purpose from—entering upon the question of specific performance of such a contract as is here set up, or whether any and if so, what remedies beyond rescission or damages are open to the plaintiffs, it seems sufficient to say that this statement of claim contains allegations of fraudulent representations and a claim in the alternative for damages, not in lieu of specific performance, but for that representation. In dealing with the claim for damages, the learned judge observes: "If the action is wrongly brought, then the plaintiff cannot proceed on his claim for damages dependent on it, for, on a reference to Order XVI. r. 1 (b) it will be seen that the only damages that can be joined with the equitable claim for specific performance are damages for the withholding thereof." But paragraph (b) of the rule does not relate to claims for specific performance, but to claims for recovery of specific property, i.e., for what is commonly called recovery of land.

The statement of claim here alleges—and the allegations for present purposes must, as already said, be taken as admitted, a material representation in speech and action by Caetano to the plaintiff, the inducement thereby of the plaintiff, that that representation was false and made in fraud, and that the plaintiff's position has been altered to their pecuniary loss. These are the ingredients of proof in an action for deceit, and the plaintiffs are entitled to be heard thereon. The appeal, therefore, must be allowed, the order of the court below must be set aside and there will be an order for a new trial. The respondent must pay the appellant costs of this appeal; the costs in the court below will be costs in the cause.

Solicitor for the appellant, *Cameron & Shepherd.*

Solicitor for the respondent, *C. Gomes.*

TIAM FOOK AND ROYAL BANK OF CANADA.

TIAM FOOK, Appellant,
AND

ROYAL BANK OF CANADA, Respondent.

[8 OF 1923.]

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

1924. FEBRUARY 11, 12, 16.

BEFORE SIR A. V. LUCIE SMITH, P., SIR CHARLES MAJOR, C.J.,
AND DEANE, C.J.

Promissory note—Two signatures—Whether principal or surety—Accommodation party—Tests as to liability of alleged surety—Creditor's knowledge or ignorance of suretyship—How surety may be released—Meaning of the term "giving time"—Whether liability on note merged in mortgage deed—Interpretation of deed—Admissibility of oral evidence to explain terms employed in mortgage deed.

This was an appeal from a judgment of the Supreme Court of British Guiana given in favour of the respondent bank who had claimed the balance of an amount due on a promissory note made by the appellant and one P. S. The chief grounds of appeal were (a) that the appellant was a mere surety or accommodation party and that the "giving of time" by the respondent to P. S. relieved the appellant from all liability, (b) that P. S. having passed a mortgage in favour of the respondent to secure his entire indebtedness to the respondent, the latter could not claim from the appellant before going into accounts to show whether any sum was still due on the note, and (c) that extrinsic evidence was not admissible to vary the terms of the mortgage deed.

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

(1) That it was not until long after the making of the note that the respondent ever became aware, if at all, of the fact that the appellant was a mere accommodation party, and therefore as against the respondent the appellant could not claim the rights of a mere surety,

(2) That the language of the mortgage deed being ambiguous in its application to the facts, extrinsic evidence to assist in its interpretation was admissible.

(3) That the term "giving time" used in connexion with the liability of sureties imported a forbearance founded on good consideration, and the payment of interest on a note which had itself stipulated for same could not be regarded as constituting such consideration.

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

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

The judgment of the court was delivered by SIR A. V. LUCIE SMITH, P.:

This is an appeal from a judgment in favour of the respondents for the amount of capital and interest of a promissory note made by the appellant and one Parbhu Sawh. The appellant admitted the making of the promissory note but alleged that he signed for the accommodation of Parbhu Sawh, that by a verbal binding agreement for valuable consideration the respondents, without any consent of the appellant, gave time to

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Parbhu Sawh for the payment of the note, and Parbhu Sawh passed a mortgage in the respondent's favour to secure his indebtedness to the respondent including the amount of the promissory note sued on. It is further alleged that this mortgage has been realised, and that the appellant is entitled to have an account of the respondent's transactions with Parbhu Sawh, as it is not possible to ascertain whether there is any balance due by Parbhu Sawh in respect of the note.

The learned judge in the court below held that the appellant joined Parbhu Sawh in the making of the promissory note as an accommodator, but it was more than doubtful if the respondents were aware of this. On the face of the note, there is nothing to show that the respondent was an accommodating party. I agree that the evidence does not show that the appellant was a surety to the knowledge of the respondent.

It is urged, that as the appellant states in his evidence that he told the manager that if he wanted the note paid he would sue Parbhu Sawh, and the manager said he would see after it, it shows that respondent was aware that the appellant was a surety. This conversation is not admitted by the manager: he said that he agreed to give appellant time to see if he could collect any amount first from Parbhu Sawh's estate. Even if this conversation did take place, it was till after September, 1920, and the respondent could not have knowledge till after that date of the appellant being a surety. The learned judge proceeds in his judgment to deal with the rights of the parties as if the respondent became aware that the appellant was a surety late in 1920, and considers the questions of the effect of the mortgage given by Parbhu Sawh in 1918 and he held that this mortgage had no reference to the debt on the promissory note. In arriving at this conclusion he admitted in evidence a certified extract from the plaintiff's books which shewed that this promissory note was not included in the mortgage. The first grounds of appeal are to the effect that this extract was wrongly admitted because it would be admitting extrinsic evidence to vary the mortgage. The mortgage is to secure the liability by Parbhu Sawh individually and as carrying on business without any partner as Baboo Ram Sawh & Co. on any promissory note, etc. The note sued on was given long before the mortgage and was a debt due by Parbhu Sawh and appellant and there was a separate account in their names jointly in the respondent's books. It was a debt already secured by defendant. We are inclined to agree that from the language used in the mortgage the promissory note was not included in the mortgage. Taking it, however, that the language is not clear, its application to the facts is ambiguous, and applying the principles laid down in *ex parte Kerke in re Bennett* (1876) 5 CD. 800, we

think the evidence was admissible. It is said that the affidavit of the manager in proof of the respondent's claim against the estate of Parbhu Sawh shews that the note was included in the mortgage. The affidavit sets out a claim on three promissory notes, one of which is the note sued on herein, and a judgment, and goes on to state for which sum or any part thereof the Royal Bank of Canada does not hold any security save and except the mortgage of 1918 and a Life Assurance Policy. We do not think this can possibly be construed to mean that the bank held the mortgage and the policy as security for the three promissory notes and the judgment. It has not even been suggested that the policy was held as a security for the note. We are of opinion, therefore, that the judgment in the court below that the mortgage had nothing to do with the note, and that there can be no question of bringing any money realised thereunder into account, is correct. What evidence there is, shows that the amounts realised by the sale of the mortgaged properties were sufficient to pay the debts to secure which the mortgage was given and there was a balance of \$31,502.77 due under the mortgage for which a claim was filed.

The only other ground of appeal is that there was insufficient proof that the respondent entered into a binding agreement with Parbhu Sawh, without the appellant's consent, to give Parbhu Sawh time within which to meet his liability, thereby releasing the appellant.

It is said that appellant told the manager to sue and that he refrained and thereby gave time. The only evidence to that effect is that of the appellant, whose evidence was apparently not accepted in the court below. We have very great doubt if there even was such a request. Even if there was, it would not release the appellant from liability on the note. He might have paid the respondent and demanded to have any security they might hold from Parbhu Sawh after payment, and could himself have sued Parbhu Sawh. It is argued that the bank by taking instalments and interest created a binding agreement between themselves and Parbhu Sawh to give him time, especially looking at the books of the bank where the note was entered at intervals of three months after payment on account had been made. Such entries, it is urged, show that there was a renewal of the note at those periods. The periods are not all three months, one is seven months, one four, etc. After September, 1920, there appear to have been no dealings with the note, the amount then due was \$2,600 the amount sued for, although there are entries in the books carrying forward this \$2,600. It is not until after September, 1920, that the bank became aware, if they did become aware at all, before action, that the appellant was surety. Therefore, even

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if the appellant's argument was a sound one, no time could possibly be said to have been given by the respondent after they became aware of the mortgage, so as to release the appellant. It appears to us on the evidence that there was never any binding agreement to give time, all that happened was that the bank did not sue on the note which was payable on demand. The note on the face of it carried interest; the payment of interest would not thereby be a good and valuable consideration for giving time, nor would the receiving the sums of money paid on account of the note. The case of *Rouse v. Bradford Banking Co.*, 1894, A.C. 586 lays down very clearly the principles to be followed in deciding whether the time alleged to have been given to a principal should or should not release a surety.

We are of opinion that the decision in the court below is a correct one and that this appeal should be dismissed with costs.

Solicitor for the appellant, *E. A. Luckhoo.*

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

BRITTON, Appellant,
AND
DEWAR, Respondent.

[1 OF 1924.]

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.
1924. FEBRUARY 11.

BEFORE SIR A. V. LUCIE SMITH, P., SIR CHARLES MAJOR, C.J.,
AND DEANE, C.J.

Sale of chattels—Joint debtors—Death of one joint debtor—Deceased's estate insolvent —Liability of survivor—Partnership Ordinance, 1900—Whether contract oral or written—Admissibility of secondary evidence—Quantum of consideration—Findings of fact by trial judge —Principles observed on appeal from decision against weight of evidence.

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 him against the appellant for the balance of moneys due on the purchase price of a certain printing plant and appliances appertaining thereto. The main ground of appeal was that the decision was against the weight of evidence.

There was no written judgment but it was

Held :—(confirming the decision of the Supreme Court)

That the presumption in such cases is that the decision appealed from is right on the facts, and that that presumption had not been displaced by the appellant.

E. P. Bruyning, for the appellant.

E. M. Duke (for *J. A. Luckhoo, K.C.*), for the respondent.

PAUL, *et al*, AND DEMERARA ELECTRIC Co., LTD.

PAUL *et al*, Appellants,

AND

DEMERARA ELECTRIC COMPANY, Respondent.

[2 OF 1924.]

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

BEFORE SIR A. V. LUCIE SMITH, P., SIR CHARLES MAJOR, C.J.,
AND DEANE, C.J.

Accident—Death resulting therefrom—Accidental Deaths and Workmen's Injuries Ordinance, 1916—Negligence—Onus of proof—Respective duties of judge and jury—Law relating to pedestrians walking on tramlines—Duty of driver of car and of pedestrians.

This was an appeal from the decision of the Supreme Court of British Guiana, non-suiting the appellants' claim for damages against the respondent company for their servants' negligence in driving a tram-car, the property of the company, resulting in the death of the appellants' father. The trial judge, who did not call for a defence, held that there was no evidence of negligence to go to the jury, the evidence being equally consistent with the accident having been caused by the deceased man's negligence as with having been caused by the negligence of the servants of the respondent company.

Held:—(reversing the decision of the Supreme Court of British Guiana) That the fact that in broad daylight the tram-car of the defendant company drove over a man who was walking along the track in front of the car, without any proof on the part of the defendant that the gong was sounded at a sufficient distance from the man to give him an opportunity of escaping, or that the man was deaf and the accident inevitable, or that he suddenly crossed the line so that the driver could not have avoided him, raised a strong presumption of negligence against the defendant company, and that therefore there was sufficient evidence fit to be left to the jury.

P. N. Browne, K.C., and *F. O. Low*, for the appellants.

H. C. Humphrys, for the respondent company.

SIR A. V. LUCIE SMITH, P.: This is an appeal from an order non-suiting the action of the appellants by which they claimed damages from the respondents for so negligently driving a tram-car by reason of which their father was knocked down and killed.

It has been laid down in *Cotton and Wood* (1860, 8 C.B.N.S. 568) and other cases, that in an action for negligence the plaintiff is not entitled to succeed unless there is affirmative proof of negligence on the part of the defendant or his servant; if there is not such evidence the case must not be left to the jury but a non-suit should be entered. The whole question for decision in this case is whether there was evidence which should properly have been left to the jury. The great difficulty I feel is that the learned judge in the court below was both judge and jury. He finds that there was no evidence to leave to a jury, and, presum-

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ably, if he had left what evidence there was to himself he must have found for the defendant.

It is the duty of drivers of tramcars to take reasonable care not to injure persons lawfully using the highway (*Rattee v. Norwich Electric Tramway Co.* (18 Tinnies 562) the track of the tramway for all purposes remains a part of the street or road, the company have the right to use the rails for the passage of their cars, to which, seeing that they cannot be deviated from the track, other vehicles meeting or passing must give precedence ; they have not the monopoly of the highway : passengers on horse or foot are allowed to cross the tramways as freely as they could before (the laying of the lines) except where there will be an interfering with the use of the tramway as such (*Ogston v. Aberdeen District Tramway Co.* (1897, AC. 111); *Dublin United Tramway v. Fitzgerald* (1903, A.C. 99), It is also as much the duty of foot-passengers to look out for passing trams. The grounds for imputing negligence to defendants' servant are that the accident occurred in broad daylight, that the driver could see for a long way ahead of him: if he were looking ahead, as he ought to have been doing, he must have seen the deceased who was walking between the tramlines going the same way as the tram—that he had his head turned at or about the time of the accident and that the highway was at the time of the accident a very busy one and that the driver should have had his car under such control that he could stop it almost instantly. It is also urged that the injuries sustained by the deceased showed that the car must have been going at a considerable pace. The evidence does not go much into detail and it is difficult to say what exactly occurred when the driver first saw the deceased, etc. It would have been much more satisfactory if the driver's evidence had been heard. I admit I have considerable doubt in the matter, but after a careful consideration of the evidence I have come to the conclusion that there was some evidence to be left to the jury. The driver in broad daylight presumably overtaking a man, runs into him, surely this requires some explanation; if there is no explanation the jury might or might not infer that he was not driving with such care to the safety of the public as he was by law required to do.

Under these circumstances I am of opinion that the order for a non-suit should be set aside and a new trial should be had.

The respondent must pay the costs of this appeal, the costs in the court below to be costs in the cause.

DEANE, C.J.: The plaintiffs in this case, who are also the appellants, claimed from the defendants the sum of \$5,000 by way of damages for the loss sustained by them, owing to their

father, as they alleged, having been killed through the negligence of the defendants' servant, a motor man on an electric car belonging to the defendants.

The facts in the case as they may be gathered from the findings of the learned trial judge are as follows:

1. The deceased was walking between the pair of lines on the east going south with his back to the approaching tram, though he *was facing* west when the car struck him.

2. This accident occurred at a spot on the lines a short distance beyond the white pole at the southern extremity of the Russell memorial.

3. From the white pole at the southern extremity of the market to the white pole at the southern extremity of the Russell memorial is 180 feet and there is a clear view of the tramline the whole way and further.

4. The tram was proceeding at a rate of 7-10 miles an hour.

5. A tram proceeding at that rate could pull up in 47 feet, and the brake was in good order.

6. The time of the accident was 1 o'clock in the day, there was considerable traffic and noise going on and other persons were on the line.

7. The gong was struck and the motorman shouted "Hi man," though how long before the deceased was struck there is not sufficient evidence to show,

With regard to the last finding the evidence of the three eyewitnesses of the occurrence, Ramjewan, Craig and McAdam, though they do not fix the exact time when the gong was rang before the accident, make it clear that the shout of "hi man" by the motorman, the ringing of the gong, and the accident were almost simultaneous one with the other. Ramjewan says "the carman' hollo hi man' and ring his gong about a rod away (12 feet), car went on and man went under." Craig says "I heard motor man shout 'hi man' and struck gong—he was a couple of yards off then." Under cross examination he states "I saw car stop by market before I saw old man: he was a couple of yards from the car when I first saw him, then when shout he was 4 to 5 rods from car." This last statement was obscure and inconsistent with the statement that he was a couple of yards from the car when first seen and is evidently a mistake. Cyril McAdam states "I heard along' look at man' and gong and saw man and car proceedings towards him, he was knocked down at once." Cottam, who was a ticket examiner on the car, states that he was sitting on a back seat when he felt the car coming to a quick stop; he saw nothing in front, then felt something unusual was happening, got out, went to front and found the old man

under the car: he further says:—"I can't swear I heard gong ring, but shouting Hi man, it sounded like motorman."

From this evidence it may, I think, be fairly deduced that the driver shouted "Hi man" and sounded his gong just a short distance from the man, putting on the brake vigorously at the same time. The fact that the distance from where the tea was found on the line to the blood was about 30 feet would point to the old man having been carried along for about that distance. As the car could pull up in about 47 feet, the distance at which the driver first put on the brake from him must have been approximately that given by Ramjewan, being about a rod or 12 feet.

Now let us examine these facts in connexion with the law and see if they are sufficient to establish a case of negligence against the defendants. It has to be remembered that the onus is on the plaintiff to establish (a) negligence on the part of the defendant, (b) that that negligence was the real cause of the accident. How has the plaintiff discharged that onus?

The second question to my mind will present little difficulty and will depend entirely on the answer to the first. It is an undoubted fact that the plaintiff was killed by the defendants' tramcar, and the killing was so closely related and followed so directly upon the action of the driver in driving the tramcar against him that there is no room for speculation as to what was the real cause of the accident as there was in the case of *Jackson v. Metropolitan Tramways Company* (L. R. 3 A. C. 193) and *Wakelin v. L. & S. W. Railway Company* (1886, 12 A.C. 41). In the latter case, the circumstances amounting merely to the fact that a man was found dead at a railway level crossing, it was, as stated in the course of the case, a matter of speculation whether the tram ran against him or he against the tram, whether in fact he might not have committed suicide: in the former case the fact that the Railway Company might have been negligent in admitting too many passengers to a railway platform *per se* was no proof that a man's thumb had been crushed between the door and lintel of the carriage owing to that negligence. In this case there is the evidence of three eye-witnesses and the finding of the learned trial judge that the defendant was walking between the lines with his back to the tram when it ran against him and killed him. There is therefore no room for doubt or speculation as to the cause of the death of the deceased: he was killed by the defendants' tramcar running against him. The first question, was the tramcar being negligently driven when it ran against him, presents more difficulty. The learned judge directing himself as a jury has decided that the evidence is not sufficient to call upon the defendants for a defence and has non-suited the plaintiff. Was he right in so directing himself?

The law as to foot-passengers was laid down in *Cotterill v. Sharky* (1839, 8 C. & P. 691) by Patterson, J., as follows:—"A foot-passenger has a right to cross a high way." Persons therefore driving carriages along the road are liable if they do not take care so as to avoid driving against the foot-passengers who are crossing the road. In *Clerk v. Pitrie* (1879, 16 Sc. L. R. 626) it was laid down that "there is the strongest presumption (of negligence) both in fact and in law against a driver who runs down a person in daylight." This rule of the road has to be modified in its application to tramcars, which cannot get out of the way as they move only along the rails laid down for them—their use of the track, however, is by no means exclusive; foot-passengers have the right to make the fullest use of it, passing and repassing over it as over any other part of the highway, subject only to their duty to give the tramway a clear passage. This is not to say, that if a person on a tramway does not get out of it and give the tram a clear passage, he may be knocked down and killed; the driver of a tramcar is subject to all the common law liabilities incumbent on other drivers of vehicles. Owing to this he has been provided with a powerful gong to give warning to foot-passengers and vehicles which happen to be on the tramway when he is driving the tram, and he is always instructed by the company, as appears from the evidence in this case, to keep a proper lookout. As Lord Justice Vaughan Williams remarked in *Rattee v. Norwich Electric Tramway Company* (18 T.L.R. 563): "If the body of a helpless man was lying across the track of the car, the company could not escape liability if the driver negligently drove over him." And, indeed, it is clear that to hold otherwise would import carelessness as to the value of human life and limb completely alien to British ideas of jurisprudence. The fact, therefore, that it has been proved that in broad daylight the tramcar of the defendants drove over a man who was walking along the track in front of the car, with his back to it without any proof on the part of the defendants that the gong was sounded a sufficient distance from the man to give him an opportunity to escape, or that the man was deaf and the accident unavoidable, or that he suddenly crossed the line so that the driver could not avoid him, to my mind raises a strong presumption of negligence against the defendants. Of course, all these matters are by way of defence and the defendants are entitled to rely upon them to rebut this presumption, but the learned judge has not found them in favour of the defence on the evidence before him: he has in fact held that the facts show no negligence. In this I think he was not justified by law. And the case by no means stops where these two facts place it—not only is it established that a foot-passenger while crossing the street in broad daylight, with his back

to the tramcar, was run down and killed, but it is proved by the findings of the learned judge and by the evidence, that there was an uninterrupted view along the street for 60 yards before the accident, so that the driver of the tramcar ought to have seen the deceased in time to be able to pull up his tram. If it is objected that there were plenty of foot-passengers in the street, so that he might not have seen, we are faced with the dilemma that either he was driving too fast in the circumstances, since, if the road was so thronged with foot-passengers that he could not see, he ought to have proceeded much more slowly and carefully, or, if he saw and did not pull up before he killed the man, he is equally culpable.

But it is argued that there being no evidence when exactly the man got on to the line, the driver cannot be held liable, because there is no evidence that he could have seen him in sufficient time to pull up his tram. To my mind this is not a sound argument; it involves the proposition that no one could succeed in such an action against the tram company, except he could establish that he had got upon the line a sufficient distance before he was struck to enable the tram driver to see him in time to pull up ; needless to say, it would be almost impossible for the plaintiff in most cases to give any such evidence, since people as a rule do not go upon a tramway knowing that a car is approaching and contemplating being run down, except they wish to commit suicide, and other people do not notice passengers in the street for any long time before an occurrence of this nature, their attention being usually attracted, as in this case, by the imminence of an accident. The driver's duty moreover being to keep a proper lookout on the line, it is peculiarly in his province to be able to say just when the passenger got on to it, and, as I have said, the plea that the passenger only-crossed the line too late to allow the driver time to pull up is a matter of defence which has not been put forward in this case.

A further argument advanced on behalf of the defendants is that the duty of the deceased when walking on the tramway was to keep a look out for the tram, and that, therefore, as he did not do this, he contributed to the accident, even supposing the tram driver was negligent. On this I would remark that this is a matter of defence on which there is no finding by the learned judge: there is no evidence that the accused when he first went on to the track, did not look to see whether the tramcar was coming, or that he had not looked behind just before the tram-car came into sight. On his behalf it is to be said that the noise which, it is admitted, was considerable, might have prevented his hearing the approaching tram, while he was entitled to rely upon the sounding of the gong to warn him of its approach and upon

the driver pulling up rather than running him down in broad daylight. In any case, however, even supposing he was negligent in the first case, that would not excuse the defendants' negligence, if that was the substantial cause of the accident. The defendants clearly, in my view of the law, cannot justify running him down by showing that he was walking negligently just as they could not justify running down a drunken or incapable man on the line.

For these reasons I think that the plaintiffs have established a case of negligence on defendants' part which was the cause of the death of the deceased—and that the learned judge was wrong in non-suiting the plaintiffs. As he misdirected himself, I think there should be a new trial. The plaintiffs are entitled to the costs of this appeal; the costs of the former trial to be costs in the cause

SIR CHARLES MAJOR: I concur, albeit not without doubt.

Solicitor for the appellants, *F. Dias*.

Solicitors for the respondent company, *Cameron & Shepherd*.

GREEN v. YOUNG, *et al.*

[226 OF 1922.]

1923. MARCH, 8, 10, 26. BEFORE BERKELEY, J.

Construction of will—Marriage in community—Whether deceased husband dealt with his own or the common property—Significance of the expression "my property"—Whether succession of devisees be "per stirpes" or "per capita"

Husband and wife were married in community of goods. The husband died leaving a will, in which "*inter alia*" he dealt with what was described as "my property" and also with certain specific parcels of land. After devising the said "my property" to his wife for her natural life, the testator proceeded to deal with the remainder after the said life interest, leaving same to his daughter Sucky Ann "unto the heirs of George Green." a son of his. Two questions arose on the interpretation of the said will, viz: firstly, whether the testator dealt only with his half or with the whole of the common property; secondly, whether the succession of the grandchildren should be "*per stirpes*" or "*per capita*."

Held:—(1) That the word "my" though strongly suggestive of the husband's property only, must yet be read in conjunction with the rest of the context, from which it ought to be concluded that the testator dealt with the whole of the common property.

(2) That the grandchildren succeeded "*per stirpes*" and not "*per capita*," it being the intention of the testator to place his illegitimate grandchildren in the same position as his own daughter.

J. S. McArthur, for the plaintiff.

J. A. Luckhoo, for the defendants.

BERKELEY, J.: It is agreed by counsel on both sides that the facts as stated in the statement of claim are to be accepted as correct and that the point for the consideration of this Court is the construction to be placed on the will of the testator Thomas Green, viz. :—

- (1) did the testator dispose of the whole or only his half of the estate and
- (2) what share (if any) did Sucky Ann Grant born Green and the heirs of her deceased brother George Green respectively take under the will ?

Thomas Green was the owner of lot letter A and half lot letter E, Wortmanville, Georgetown. He was only once married and then in community of property to his wife Judy born Fortune. There were 2 children of this marriage (1) George Green (the father of John Green the plaintiff) and Sucky Ann Grant born Green. The said George Green predeceased his father. Thomas Green died on the 28th May, 1890, and by his will dated 8th March, 1890, after directing his funeral expenses and lawful debts to be paid continues " I leave and bequeath to my lawful wife Judy Green born Fortune all of my properties that I may die possessed of whether moveable or immoveable also lot letter A and half lot letter E.....for the term of her natural life to enjoy all benefit thereof and after her death the said lot letter A is to be reverted to Sucky Ann Grant born Green (his daughter) unto the heirs of George Green that is to say" (he here gives the names of the 9 children of his deceased son) and adds "to their heirs and assigns."

In the next paragraph he provides that after the death of his wife the, half lot letter E shall revert to his illegitimate grandchildren,

It is submitted by counsel that the testator by the use of the words "my" in "all of my properties" dealt with only his half share. No doubt the word " my" standing alone could be construed as referring to his half of the community only, but when he continues "also lot letter A and half lot letter E.....for the term of her natural life," I am satisfied that he was dealing with the whole of lot letter A and the whole of the half lot letter E."

The testator by his will had the power to deal with the whole of the common property and it was open to the widow to make her election by the execution of a formal act or by the course of her conduct. (*Ilandum v. Ilandum* — B.G.L.R. 12. 2. 1889). She accepted the conditions of the will which gave her a life interest only in the lot letter A, and half lot letter E, and died intestate on 12th January, 1898.

It was left however to the husband of an illegitimate granddaughter of the testator to raise the question some 32 years after his death.

As to the second question the use of the words "unto the heirs of George Green" following immediately after the words "the said lot letter A is to be reverted to Sucky Ann Grant born Green" render the terms of the bequest doubtful as to the respective shares of the beneficiaries.

A careful consideration of the whole will points to the intention of the testator to provide for both the legitimate and illegitimate children of his deceased son. On the death of his widow half lot letter E passed to the illegitimate branch of the family and lot

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letter A to the legitimate branch. It seems that the testator intended to place the legitimate children of his son in the same position as his daughter. Any other construction would place the illegitimate children in a more favourable position than the legitimate children on the death of his widow.

I am of opinion that the contention of the plaintiff is correct and that judgment must be entered in the terms of the claim with costs.

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

Solicitor for the Defendants, *E. A. W. Sampson.*

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

REX v. BANDRA.

[3 OF 1924.]

1924. FEBRUARY. 13, 16

BEFORE SIR A. V. LUCIE SMITH, P., SIR CHARLES MAJOR.C.J.,

AND DEANE, C.J.

Criminal law—Forgery of Government currency note—Admissibility of note tendered—Signature on note of Commissioners absent from the colony—Government Currency Note Ordinance, 1915, section 5 (3), and section 13—Validity of note—Whether forgery possible of invalid note.

Case stated by Berkeley, J., for the opinion of the Court, under the provisions of section 4, West Indian Court of Appeal Ordinance, 1921.

Case stated as follows:—

"The prisoner Bandra on the 11th January, 1924, was convicted of uttering a forged note contrary to section 13 (1) of the Government Currency Note Ordinance, 1915. The particulars of the offence as set out in the indictment are "Bandra on the thirtieth day of July in the year of Our Lord one thousand nine hundred and twenty-three in the county aforesaid (Demerara) with intent to defraud uttered a forged two dollar note purporting to be a Government currency note knowing it to be forged.

"No question arises on the facts but it is submitted by counsel for the prisoner, that the Government currency note tendered could not be admitted as evidence inasmuch as when the prisoner

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tendered the forged two dollar note there were no Government currency notes legally in existence as the Government note dated 1st January, 1920, purports to be signed by commissioners who on that date had ceased to be commissioners and had left the colony.

"Counsel for the Crown admits that the commissioners, whose names are stamped on the two dollar note, had ceased to be Commissioners on the 1st January, 1920, but submits that the two dollar note is nevertheless genuine.

"I overruled the objection and reserved this question of law for the consideration of the court of appeal.

"I am of opinion that although this Government currency note is stamped with the names of commissioners who at the date of stamping were out of office it is no less a genuine currency note in circulation and a valid instrument. In *Rex v. Jones*, 2 East P.C. 991, forgery is defined as the false making of an instrument, which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud any person or persons. The necessary elements in this definition are present in the present case, (See also Halsbury Vol. 9 par. 1404 on page 711). I sentenced the prisoner to two years imprisonment with hard labour and respited execution of the sentence admitting him to bail (Ord. No. 2 of 1921, part 2 (4))."

M. J. BERKELEY, J.

E. G. Woolford, K.C., for Bandra,

W. J. Gilchrist, Actg. Attorney General, and *S. J. Van Sertima, Actg. Asst. to Attorney General*, for the Crown.

The judgment of the court was delivered by DEANE, J.:—

This is a case stated by Berkeley, J. It appears from the record that the prisoner was charged that he, with intent to defraud, uttered a forged two dollar note purporting to be a government currency note, knowing it to be forged. In the course of the trial a two dollar note dated 1st January, 1920, was tendered by the prosecution as an example of what a true two dollar currency note looked like. On examination, it was found that the signatures in facsimile affixed to it in accordance with regulations made by the Secretary of State under the ordinance, were those of commissioners who were no longer in the colony at that date and had vacated the offices by virtue whereof they were commissioners. Objection was taken to the admission of the note in evidence as not a true document, but the learned judge admitted it, and, the prisoner having subsequently been convicted, has invited the consideration of this Court on the question "was the evidence so tendered admissible?"

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Section 4 s.s. (2) of Ordinance 16 of 1915 defines a currency note as a promise on the part of the Government of the Colony to pay to the bearer on demand the amount named therein ; while section 5 s.s. (2) prescribes that currency notes shall be in such form and of such design and printed from such plate and on such paper and be authenticated in such manner (whether by the signatures of the commissioners for the time being, or *facsimiles* of those signatures or otherwise) as may be approved by the Secretary of State.

The question therefore whether the note alleged to be forged by the prisoner was in fact a forgery had to be considered by the jury in its two aspects of substance and form. In substance the note was a promise to pay bearer on demand two dollars by the Government of British Guiana; for the form it was thought right to present to the jury an example of the currency note. This was done by tendering in evidence the two dollar note to which reference has been made. This note, undoubtedly, on its face corresponds exactly with the form prescribed in the ordinance and by regulations, and the fact that the commissioners named in it were out of office at its date, and that the note itself, therefore, was not a valid note makes no difference in our opinion—suppose that it had been impossible to obtain a two dollar note for the purpose of the trial and that a witness who was an expert draughtsman and intimately acquainted with the appearance of the note had been asked to draw a note for the enlightenment of the jury as to its appearance, the fact that he put fictitious names as the names of the commissioners on his drawing would not make that drawing inadmissible. The note was simply tendered; we take it, as a drawing of what a two dollar currency note looked like and its validity or otherwise were not in question at all.

The question whether there can be forgery of an instrument which is itself not valid, as in the case of this two dollar note, is a different question which does not arise on the case stated. Notes similar to this however have been in circulation in the colony since 1920, and have been freely accepted as genuine, no defects being patent on the face of them. The authorities are clear that an instrument may be the subject matter of a forgery even although the instrument itself may be void in law for want of compliance with some statutory direction governing its particular form.

We think therefore the evidence was admissible and that the prisoner was legally convicted.

Solicitor for the Crown, *P. King*.

KINCH AND EVELYN ROACH & Co.

KINCH, Appellant,
AND
EVELYN ROACH & Co., Respondents.

ON APPEAL FROM THE COURT OF COMMON PLEAS OF BARBADOS.

1920. JANUARY 17.

BEFORE SIR A. V. LUCIE SMITH, P., SIR CHARLES MAJOR, C.J.,

AND THOMAS, C.J.

Claim for breach of contract—Trial by special jury—Appeal on findings of fact by jury—Principles to be observed on such appeals.

This was an appeal from a judgment in favour of the respondents given by the Chief Justice of Barbados, sitting with a special jury, on a claim brought by the respondents against the appellant for breach of contract. The only ground of appeal was that the verdict was against the weight of evidence.

Held:—(confirming the decision of the Court of Common Pleas) That the verdict of a jury will not be disturbed unless it is such as reasonable men ought not to have come to.

SIR A. V. LUCIE SMITH, P.: The appellant's only ground of appeal is that the verdict was against the weight of the evidence. The law is clear that a verdict will not be disturbed unless it was such as reasonable men ought not to have come to. *Webster v. Friedberg* II. Q.B.D., page 736. The jury, as stated in *Toronto Railway v. King*, 1908, Appeal Cases at page 270, are the tribunal entrusted by the law with the determination of issues of fact, and their conclusions in such matters ought not to be disturbed because they are not such as the judges sitting in Courts of Appeal might themselves have arrived at. In the case now before us the verdict appears to me to have been a reasonable one. On the evidence before me I certainly should have arrived at the same conclusion as the jury did. This appeal in my opinion ought to be dismissed with costs.

THOMAS, C.J.: The appellant was defendant in an action tried before the Chief Justice of Barbados and a special jury. In that action the plaintiffs claimed damages for breach of a contract in writing. The defendant in his defence alleged that the contract had been verbally varied. The effect of such variation was that a sum of about £1,000 should be paid by the plaintiffs—instead of by the defendant. Evidence was given by the defendant and his clerk in support of that allegation. The action was tried, as I have said, by a special jury and in Barbados, as elsewhere, more than ordinary qualifications are requisite for selection as a special juror.

Their verdict was in favour of the plaintiffs and the defendant now appeals on the ground that it was against the weight of evidence. This was not a charitable or philanthropic matter but

an ordinary commercial transaction. The allegation of the defendant reads to me like a fairy story. I have no hesitation in saying that it would have been so considered by any jury anywhere. I think that this special jury should be congratulated on its business acumen in arriving at what is in my opinion the only possible decision.

The appeal will be dismissed with costs.

SIR CHARLES MAJOR: I concur.

PATTERSON, Appellant,
 AND
 MATHEW, Respondent.

ON APPEAL FROM THE COURT OF COMMON PLEAS OF BARBADOS.
 1923. DECEMBER 10.

BEFORE SIR A. V. LUCIE SMITH, P., O'D. WALTON, C.J.,
 AND DEANE, C.J.

Solicitor and client—Estates entrusted to solicitor for sale—Duty of solicitor to keep proper books—Failure of solicitor, when requested, to render accounts—Misappropriation of client's moneys—Professional misconduct—Mode of punishment.

This was an appeal from an order of the Chief Justice of Barbados that the appellant be struck off the Roll for professional misconduct. The facts fully appear in the judgment below.

Held :—(confirming the decision of the Chief Justice of Barbados)

That when a solicitor is entrusted with the property of a client for sale, it is his duty to keep proper books of account of his dealings therewith. Deliberate abstention from keeping such books, combined with misappropriation of his clients' moneys, constitutes such grave professional misconduct as to warrant his being struck off the Roll.

The judgment of the court was delivered by DEANE, C.J.:

This is an appeal against the order of the Chief Justice of this colony that the appellant, a solicitor, should be struck off the Roll. The order which is dated 8th June, 1923, was made after consideration of the conduct of the solicitor in respect of his dealings with the money of two of his clients, Matthew and Bayley, the Chief Justice stating that it had, in his opinion, been proved that the appellant had misappropriated clients' money, and had not paid over or properly accounted for moneys received on his clients' behalf.

The first objection taken to the order is that the Chief Justice had no jurisdiction to make it. By section 31 of Act 6 of 1896, all the disciplinary powers of the High Court in England

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are vested in the Chief Justice of this colony. The order was admittedly made by the person who exercises the functions of Chief Justice, and the fact that he was sitting in the Court of Common Pleas cannot in any way derogate from his powers. It is not contended that the High Court in England would not have power to strike a solicitor off the roll for professional misconduct, and, therefore, the learned judge was only exercising the power conferred on him by the Act when he ordered the solicitor to be struck off. The objection, in our opinion, cannot be sustained.

A further objection to the order, viz., that the learned Chief Justice after making it added a note on 30th June, 1923, to the proceedings to the effect that in January, 1900, the appellant had been suspended from practice for six months by Sir Conrad Reeves, the then Chief Justice of Barbados, for professional misconduct, viz., the misappropriation of client's money, seems also to us to have no substance in it. This note clearly has been appended to the judgment of the learned judge to inform this court of a fact which no doubt had some influence on the mind of the learned judge in determining the degree of punishment that should be meted out for the delinquencies which seemed to him to have been proved against the appellant. It clearly had nothing to do with their proof, and there is nothing to suggest that it was taken into account in arriving at a conclusion as to their existence or otherwise. It is hardly necessary to say that this court also is not influenced or biased by the facts stated in this note, but will treat it like the learned trial judge, merely as something to be remembered when the question of punishment, if any, arises.

These objections are technical; others, however, have been taken which go to the root of the matter, and for a proper appreciation of which it will be necessary to state shortly the facts in each of the two cases which were before the court.

In 1908, one Jane Frances Mathew, a widow, was the owner of a plantation called Venture. She was desirous of disposing of the property and employed the appellant, who had some experience in matters of the kind and who had been her solicitor since 1903, to sell it out in lots for her. An agreement was made between the solicitor and Mrs. Mathew providing for his remuneration, and sales proceeded. Account "B" which has been rendered by the appellant shows that the very numerous sums of money, amounting in the aggregate to a large total, were in fact received by the appellant on behalf of Mrs. Mathew during the years from 1908 to the 4th May, 1922. Account "C" shows that numerous sums, also amounting in the aggregate to a large total, were disbursed by him on her behalf. From September, 1911, to 1922, the

appellant was the duly constituted attorney of Mrs. Mathew, who was absent from the colony in America from time to time, her last absence being for a period of about six years. At the end of 1921 she returned to the colony. She states that her reason for returning was, that she had written several times to the appellant asking him for accounts, but had received no reply to her letters. It is denied by the appellant that he received any formal application for a statement of accounts, but, however this may be. Mrs. Mathew must have been pressing him for a statement of her affairs after her return to the island, because so dissatisfied was she with the state of things, that she determined to sever her long friendship and connection with the appellant, and consulted the firm of Yearwood & Boyce, solicitors, with the result that on the 4th May, 1922, by deed poll she revoked her power of attorney in favour of the appellant. The appellant thereupon on 6th June, 1922, wrote a letter to her informing her that as she had cancelled her power of attorney rendering him unable to continue to receive the balances remaining due by purchasers of land at Venture and to carry out the agreement between them for the payment of his account, he was enclosing an account to date, showing a balance in his favour of \$1,368.46 which he would be glad if she would at once settle to avoid the expense of legal proceedings. Mrs. Mathew's solicitors then wrote to appellant on her behalf acknowledging the receipt of this letter, and asking for a detailed statement of his account with Mrs. Mathew from 1909 to date; and that an accountant on behalf of Mrs. Mathew should be allowed to inspect his books, and certify as to the correctness of the account. To this letter no answer was returned, as also to a later one threatening legal proceedings if the statements of account requested in the former letter were not supplied. A bill of complaint was accordingly filed in the Court of Chancery on 14th July, 1922, and a decree obtained ordering enquiries to be taken by the Master who should report thereon. The appellant by this decree was ordered to furnish within four weeks all particulars as to the sales of Venture lands and an itemised statement of all moneys received and disbursed by him on behalf of Mrs. Mathew from 1909 to 4th May, 1922. In pursuance of this decree, the appellant filed the statements required, but when, on 8th November the acting Master began his enquiries, appellant refused on his examination to produce any papers, documents, books or vouchers relating thereto. The enquiry was adjourned on several occasions to give him an opportunity to produce them, but to no purpose, and the acting Master had to report to the Vice-Chancellor when he vacated his office that he had been unable to complete his enquiries. The Vice-Chancellor on 29th December, 1922, made a minute with the consent

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of all parties that the matter should be referred to the Master, who had resumed his duties, for completion. The matter was fixed to come on before the Master, Sir William Chandler, on 2nd January, 1923, but unfortunately on that day he was ill. Subsequently, on the order of Sir William Chandler, then acting Vice-Chancellor, the appellant produced to the accountants certain books and papers, from which they made out the statements marked "D" and "E" attached to the proceedings. Mr. Gowdey, who had made the first report as acting Master to the Vice-Chancellor had now resumed the position of acting Master, and on 23rd January, 1923, summoned the appellant before him to give evidence and to produce all documents. He obeyed the summons to the extent of appearing to give evidence, but absolutely refused to produce any books or documents and his examination and cross-examination had to be conducted without any reference to these. After his cross-examination was closed, however, Mr. Reece, K.C., senior counsel for appellant, produced a book called the land sales book, five stump receipt books and one large receipt book. The enquiry was completed on 26th January, 1923, and on 2nd February, 1923, the report of the acting Master, Mr. Gowdey, was published at the sitting of the Court of Chancery. The acting Master reported that so far from Mrs. Mathew being indebted to the appellant in the sum of \$1,368.46 as he had claimed, the appellant in fact owed Mrs. Mathew the sum of £2,392 15s. 101/2d. being principal moneys received on her behalf with interest thereon. The acting Master also reported that the appellant had failed to keep proper books of account, that his accounts and statements were false, that he had misappropriated to his own use moneys of Mrs. Mathew, had obstructed the enquiry before himself and had wilfully deposed to false statements.

On 16th February, 1923, appellant filed exceptions to this report. On 16th March, 1923, when the exceptions were to be heard by the Vice-Chancellor, the appellant did not appear to support them, and they were accordingly dismissed by the Vice-Chancellor, and the report of the acting Master confirmed.

On the 23rd March, 1923, appellant paid to Mrs. Mathew the sum of £2,075 cash in full satisfaction of the sum of £2,392 15s. 101/2d. found by the acting Master to be due to her by him, with the costs of the proceedings, and received a release from her by deed of all actions, suits, claims and demands whatever in respect thereof.

On 11th April, 1923, notice was served by the solicitors of Mrs. Mathew on the appellant that on 17th April, the court would be moved for a rule to show cause why he should not be struck off the roll of solicitors. On 25th April, 1923, an order

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was made by the Chief Justice that the appellant should on 7th May, 1923, show cause why he should not be struck off the roll of solicitors. On that day and on subsequent days, in an enquiry lasting down to the 14th May, appellant appeared and showed cause. He gave evidence himself and called witnesses to support him. The whole matter was gone into most carefully by the Chief Justice and the appellant was invited to, and in fact did give explanations on all the matters set out in the affidavit of Mrs. Mathew in support of the rule. The Chief Justice so far from holding that the report of the Master having been confirmed was conclusive and that the appellant was estopped from denying it took evidence and heard the appellant fully on those very matters. On the evidence and argument being closed, he took time to consider his judgment and it was not until 8th June, 1923, that he delivered the judgment from which the appellant now appeals. Now on consideration of these facts which are all of them incontrovertible, this case presents certain broad aspects which seem to us worthy of note.

First, we have the fact that the appellant was a solicitor in whom complete confidence was placed by his client. He was constantly receiving and disbursing sums of money in her behalf, and the transactions connected with this Venture business were so complicated owing to the money being paid by instalments, that it was impossible for him ever reasonably to expect to be able to account for his dealings with Mrs. Mathew's money without the aid of books. Owing, too, to the long period of time covered by the transactions, he could not reasonably hope to carry in his memory a clear recollection of what had happened; yet we find this solicitor, who from his experience must have known that it is the duty of a solicitor to keep books, deliberately abstaining from keeping any proper books of account. When the statements which he has prepared from such memoranda as he can rake together, are shown to be inaccurate, when mistake after mistake telling in his own interest, and against that of his client, are pointed out to him, when it is pointed out that he has made most inconsistent statements with regard to certain items, when it is urged that he must have known that statements made by him were untrue, he sheltered himself behind this very failure of duty.

These things, it is urged, are all honest mistakes due to his failure to keep proper books and accounts. To us, it seems that this failure to keep proper accounts deliberately persisted in over so long a period, during which the inconvenience of the course he was pursuing and its evil consequences, must have frequently presented themselves to his mind with increasing effect with the passage of time, of itself must raise grave suspicion of an attempt on his part to make it impossible for any one to find out the true

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state of things, and at least to make it difficult for Mrs. Mathew to claim payment of the sums that were rightly hers.

If it is remembered that it was found on the account being taken that a large sum was due to Mrs. Mathew, which she had been unable to obtain except by court proceedings, it is difficult to say that the inference drawn against him, viz., that appellant intended to appropriate her money to his own use and did in fact so appropriate it is not justified.

And this inference is also supported by the conduct of the appellant. Grant that the first formal demand made upon him for accounts, was the letter from Messrs. Yearwood and Boyce, why did he not comply with it? Did he not know as a lawyer that it was his duty, as a solicitor to his client, to give her the fullest information as to his dealings with her moneys, and should he not on receiving the perfectly proper request to submit the accounts to an accountant at once to have complied therewith, so far as it was in his power to do so? Yet we find him treating the request with the silence of contempt, and it was only when forced to do so, by legal proceedings, that he produced statements. His excuse, that he was on bad terms with Mr. Yearwood and that his failure to comply with the request was due to that, does not seem to be a reasonable one. The request was from the firm of Yearwood and Boyce, not from Mr. Yearwood personally, and in any case, a man in the position of a solicitor ought not to allow himself to be swayed by personal pique against another solicitor to deny to the client of that solicitor her undoubted rights.

And when he is brought into court, the appellant, by the admission of his counsel, put every obstacle in the way of the court, by refusing to produce such books, documents, and vouchers as he had. Such a course must necessarily have the effect of tending to prevent the court from finding out the true state of the accounts and checking the accuracy of the items detailed in the statements he had filed. He claims, however, that this was not his intention, but that he was actuated thereto by the fact that he and the acting Master were enemies, and that his wish was to prolong the proceedings until Mr. Gowdey had ceased to act as Master, while Mr. Gowdey's wish was to "land his man" before his acting appointment ceased.

When counsel was asked what specific reason he had for saying that Mr. Gowdey was actuated by feelings of bias against the appellant, all that he could advance was that the appellant had once prepared information against Mr. Gowdey for perjury. No such information was produced; it was not shown that Mr. Gowdey had even known of it, since it was admitted, that beyond the preparation of it, nothing had been done and it had seemingly never got beyond the appellant's office.

It is peculiar also, that if the appellant knew that Mr. Gowdey had this strong feeling against him, he never at any time objected either before the Vice-Chancellor or before Mr. Gowdey himself, to the latter taking the enquiries in the Chancery matter. No hint of the sort is given until after Mr. Gowdey had reported adversely to him, and when he was called upon to show cause before the Chief Justice. Even before the Chief Justice, the only evidence bearing on the suggested bias of Mr. Gowdey is the affidavit of the Bayley Bros, The Chief Justice had this affidavit before him, and the Bayleys themselves were orally examined. In view of the many inconsistent and contradictory statements made by them, we do not think he was wrong in refusing to attach any value to their evidence on this point, and we are not disposed to question his finding that the report of the Master was made after a careful enquiry.

If therefore we hold that the excuse of the appellant for obstructing the enquiry held by Mr. Gowdey is not a valid one, the alternative explanation that he knew statements were in many-cases inaccurate and was seeking to cover up and conceal his misappropriations, acquires additional force. Appellant's action, too, in settling the claim of Mrs. Mathew against him, by the payment of the sum of £2,075, is a matter that calls for comment in this connection. It must be borne in mind that appellant, when his power of attorney was cancelled and he knew that Mrs. Mathew had consulted other solicitors, had made a demand upon her for the payment of the large sum of \$1,368, which he alleged to be due to him on the balance of the account between them. On the accounts being taken by the acting Master, the latter had found that Mrs. Mathew owed him nothing but that he owed her £2,392 15s. 101/2d.

He had, at the same time, formulated very grave charges against the appellant of falsification of accounts, perjury, and misappropriation. The appellant had appealed to the Vice-Chancellor, yet, on the morning of the appeal, he settled the matter by undertaking to pay over £2,000 in cash and abandoned his appeal. One would have thought that he would have made it a condition of the settlement that all charges affecting his honour should be unreservedly withdrawn by the respondent's counsel in open Court.

Certainly, any man who had any respect for his reputation and believed in his own innocence and honesty would never have consented to allow a report of the nature of the acting Master's to remain on record without challenge of any kind. Yet, that is precisely what the appellant did. Can he complain now if the inference is drawn that he paid up because he knew that the charges were true, and did not want the matter to be

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publicly ventilated? It may be that he felt that the fact that he had kept no proper accounts would preclude him from succeeding in his appeal, so far as the payment of the money was concerned, but as an officer of the court and an honest man, he should have courted the fullest enquiry into the matter, so as to disprove the serious charges against him in connection therewith instead of taking a course which burked all enquiry.

The learned Chief Justice looking to the fact that he failed to prove it, has found that the claim for \$1,368.46 with threat of legal proceedings to enforce it, sent to Mrs. Mathew by the appellant after she withdrew her power of attorney and consulted another solicitor, was an attempt by the appellant to terrify Mrs. Mathew and cause her to desist from further action against him. It has been argued that the evidence does not support this finding, inasmuch as the claim as made included a large sum due for professional services to Mrs. Mathew outside the sale of Venture lands which the appellant was precluded, owing to the terms of the Chancery order, from including in his account before the acting Master, and that the money was really due to him. Let us examine this contention. The item of the account under which it is said that a charge for professional services was made, is an item dated 25th August, 1915. It reads: "To balance due for commission, professional services, and out of pocket expenses *re* Venture lands as per settlement made and agreed to by you on this date \$1,644.34." This, in our opinion, can only mean one thing; it is admitted that the charges for commission and out of pocket expenses, both refer to Venture, professional services which is sandwiched between them in the ordinary use of language must refer to the same thing; and when we find the three things *Commission, professional services* and *out of pocket expenses* provided "for in the agreement between the parties with regard to Venture, according to which the appellant was to receive 15 per cent, on the selling price of the lands sold, \$6 for professional services, *i.e.*, drawing a deed of conveyance, with regard to each lot sold, and out of pocket expenses, such as surveyor's fees; any doubt which there might be, is completely removed. We think, therefore, it is certain that when the appellant made his claim for "commission, professional services, and out of pocket expenses *re* Venture," he meant what he said and had not in mind any professional services other than those rendered *re* Venture. Yet before the acting Master, we find the appellant in his evidence saying, "the professional services there referred to do not relate to Venture. I cannot say now what part of that sum is for professional services. Plaintiff agreed at that date that \$1,644.34 was the balance due to me."

Before the learned judge, however, the appellant changed his mind. In answer to the question put by learned counsel, "How did you make up the amount of \$1644.34 in bill rendered by you on 6th June, 1922?" he stated: "I have never rendered an account for professional service outside of the Venture lands." When again he was pressed to say how he made up this claim of \$1,368.46 his evidence is as follows: "When the account for "\$1,368.46 was rendered, there was due me \$727.18 with a special fee of "£50 in connection with the estate of H. F. Mathew,—a total of \$967.18. "The \$727.18 was due for work done, the greater part in respect of "Venture, but outside of the special agreement made in respect of \$6 for "each conveyance. That work was for paying off liens and creating fresh "liens against Venture in respect of loans made by her son John. If to this "sum of \$967.18 is added the sum disallowed by the Master because I had "no receipts, it will be found that the sum of \$1,644.34 was due to me." In view of the fact that the appellant had now sworn that the professional services referred to in his bill did not relate to Venture, did relate to Venture, related partly to Venture, can he wonder that the Chief Justice came to the conclusion that the appellant did not know to what professional services he referred?

Add to this, that up to the present, he has never rendered a detailed bill for any professional services outside of Venture and that his counsel now states that he is instructed that he abandoned his claim for professional services when he paid the £2,075 in compromise of Mrs. Mathew's account, and the inference is irresistible that the appellant's claim was a bold attempt, based on nothing, at a flank attack on Mrs. Mathew. The statements as filed by him before the acting Master when he had at last to submit a detailed account, showed a balance in his favour in "his" opinion of \$76.04 instead of \$1,368.46. When memoranda were submitted to the accountants, they found that he owed Mrs. Mathew according to his own accounts \$579.26 and ultimately the acting Master found the amount due by him to Mrs. Mathew to be \$6,972.15 and interest on a total of \$11,488.41. The figures are eloquent.

It is useless to labour the matter further. To go further into details would take too long. It is sufficient to say that the facts in connection with the sum of \$348.13 given to him by Mrs. Mathew to be banked point unmistakably to misappropriation, while the facts in connection with the \$442 paid to him by Gambal are equally indicative of falsification of his books in order to support a pretended payment to Mrs. Mathew by writing the initials J.F.M, in pencil against them and thereby proving

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a payment to her, when in truth she never received the money, and these are not the only cases to which reference might be made.

Mr. Wells has strongly pressed upon us that dishonesty should not be imputed to the appellant with regard to untrue things in his accounts. He has submitted that inasmuch as the appellant omitted to debit Mrs. Mathew with certain items which he might have charged against her, it is clear that he made mistakes which told against his interest as well as mistakes which were in his favour, and that this proves the mistakes were all honest mistakes. Now he admits that the evidence as to mistakes which told in his favour was never brought to the notice of the learned trial judge, and certainly one cannot help feeling with regard to evidence of this kind given at so late a stage that it was a pity that it was not produced earlier when the appellant could have been questioned with regard to it.

The difficulty of drawing any sure inferences from mere figures is clear in this very matter. Mr. Wells has contended that the appellant is proved by an extract from the books of the Colonial Bank appearing on page 170 to have sent Mrs. Mathew by draft the sum of \$350—total amount paid for the draft \$351.50. The date on which the draft was obtained was 27th December, 1913, and the learned counsel points triumphantly to the fact that there is no charge on that date of \$351.50 made against Mrs. Mathew in appellant's statement. Now the fact that such a charge does not appear under the date of 27th December is by no means conclusive that it was never made, since the appellant had little respect for dates, and often made entries on other dates than the right ones. It is not shown, moreover, that Mrs. Mathew received the benefit of a sum of \$302.35 appearing in the same account as cash drawn out, an account which was being operated by appellant. Even supposing, however, that it is true that in this instance, Mrs. Mathew received the benefit of a sum of \$350.50 owing to the neglect of appellant to make a note of it in his account against her, an isolated instance of this nature (and this is the only one which *prima facie* seems to point with some force to a mistake against appellant's interest) or even a couple of instances would hardly serve to counteract inferences supported by a steady stream of facts, and circumstances which point in the opposite direction. Indeed it would be strange if a person, who has systematically and over a long period of time, been keeping no accounts, as between himself and another, of numerous monetary transactions should fail occasionally to distinguish between his own money and that of others, with the result that occasionally the latter got credited with money that was really the former's.

Upon the Mathew matter, as a whole, we think the conclusions of the learned Chief Justice are amply justified.

Let us pass on to the Bayley matter. The Chief Justice has found that the appellant instead of paying £650, the purchase price of "Mitchville" to the committee of Lucretia Jane Bayley for investment as the court directed, appropriated it to his own use without the consent of the committee and without having given any security for it. Is that finding justified? We think that there is ample evidence to support it.

Appellant's contention before this court "that the money was left with "him by the committee, W. S. Bayley, for safe keeping, until other moneys "from the estate could be realized to be invested along with it, and that he "kept the £650 in his safe and never used it," is incredible in view of the fact that when the committee's brother, W. D. Bayley, went and asked him for the money he handed him £500 and promised to let him have the balance later; that W. D. Bayley found such difficulty in getting the balance out of him that he went and complained to the Master in Chancery, that the appellant then paid £100 and finally the £50 balance due, and paid interest on the whole sum. If the appellant had the money in his safe, why did he not hand over the whole £650 when asked for it? He says now that he had a claim against the estate for professional services which he admits so far as the estate of Lucretia Jane Bayley was concerned could not exceed £50. Why did he not hand over to Bayley at least £600 telling him why he was retaining the £50? Why did he tell Bayley when he handed him over £500 that he would pay him the balance later, if he had the money to hand? And above all, why did he pay interest on money when he was doing Bayley a favour in keeping it safely for him? So far from Bayley giving him the money to keep, as he says, the evidence in our opinion establishes that the money was handed over to the appellant as his solicitor by the committee for a specific purpose, namely to be invested as the court had directed; and that the appellant misappropriated it to his own use.

We think that the evidence as a whole given in the enquiry before the Master and the learned Chief Justice of Barbados proves that the solicitor, the appellant in this matter, has been guilty of grave professional misconduct.

An appeal has been made to us to exercise some leniency towards the appellant. It is represented that the publicity of these proceedings will be a sufficient protection to the public, and that the appellant will, in future, have little opportunity even if he had the will, to do wrong. On this, of course, it may be observed that if it be true as urged that the public" owing to the notoriety which will attach to him from these proceedings, will refuse to employ him as a solicitor, he will benefit very little, if at all, by his name being allowed to remain on the roll. So

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far, indeed, as we are concerned, we would gladly escape from a most painful duty, but fortunately for us it has been laid down by the Privy Council in the matter of *Iles* (66 Solicitors' Journal 297) that the degree of punishment to be allotted for professional misconduct is a matter which should be left, generally speaking, to the local tribunal to determine. In view of that expression of opinion, we should be very loth in any case to interfere with the discretion of the learned Chief Justice, and certainly in view of the gravity of the misconduct proved in this case, we feel that we should be wrong to do so here.

The appeal should in our opinion be dismissed with costs.

BLACKWOOD, LTD., Appellants,

AND

MERCER, *et al*, Respondents.

ON APPEAL FROM THE COURT OF COMMON PLEAS OF BARBADOS.

BEFORE SIR A. V. LUCIE SMITH, P., O'D. WALTON, C.J., AND
DEANE, C.J.

Contract to repair schooner—Failure of contractor to use reasonable care in effecting repairs and in replacing parts of schooner—Damage to schooner through alleged unskilfulness in repairs—Contributory negligence of captain of schooner—Whether doctrine of contributory negligence applies to injury arising out of breach of contract.

This was an appeal from the judgment of the Court of Common Pleas of Barbados, sitting with a jury, by which the appellants (defendants) were ordered to pay damages to the respondents (plaintiffs).

The appellants had contracted to effect certain repairs to a schooner the property of the respondents. The schooner was repaired and redelivered to the respondents, after which, owing to certain defects in the gear of the said schooner caused, it was alleged, by unskilful repairs, the schooner was damaged. Counsel for the appellants contended at the trial that even if negligence on the part of the appellants had been proved, yet the damage was due to the contributory negligence of the respondents' servant, i.e., the captain of the said schooner.

It appears that the trial judge in summing up omitted to place the issue of contributory negligence before the jury, who found in favour of the respondents.

Held :—(reversing the judgment of the Court of Common Pleas).

(1) That there must be a new trial, as the jury might have come to a different conclusion had the defendants' plea of contributory negligence been placed before them,

(2) That the doctrine of contributory negligence applies whenever the issue is raised of an injury being caused through negligence, irrespective of the question whether such injury is the result of a breach of contract or arises out of a pure tort.

SIR A. V. LUCIE SMITH, P. : The case for the respondents, plaintiffs in the court below, was that the appellants contracted to do certain repairs to the steering-gear of the respondent's schooner, that the appellants did not use reasonable care or skill in repairing and replacing in position the steering gear, and owing to the negligent and unskilful manner in which the steering gear had been connected and replaced by the appellants, the vessel went to starboard on the helm being put to port and in consequence thereof the vessel went aground and became a total loss. The respondents claimed as damages the value of the vessel and the profits that would have arisen out of the working of the vessel. The appellants denied that they were unskilful or negligent in repairing and replacing the steering gear, and further urged that even if they were unskilful and negligent the respondents were guilty of contributory negligence which conduced to the loss of the vessel.

The question really raised is whether the respondents can claim as damages the value of the vessel. There is no doubt that the damages were assessed on the basis that the appellants were liable for the loss of the vessel. This appears from the whole case and from the charge of the learned Chief Justice to the jury. There is evidence tending to show that the captain of the vessel did not examine the steering gear before putting out to sea, although he admits, that it was his duty to do so, that the cook, who apparently had been at some time a sailor, was at the wheel, that the captain gave the order to port the helm which was done, but the vessel went to starboard and collided with a lighter—that, after stopping for some 15 to 20 minutes the vessel moved oft again, the order is given to port, the vessel went again to starboard, the captain shouted to the cook who is at the wheel, he said the wheel is hard over, and the vessel then collided with a wharf where she remains 20 to 30 minutes—that she moved again, the order given to port, the vessel again went to starboard and eventually went ashore, and that the captain then for the first time looked at the steering gear and at once saw that it had been replaced wrongly.

It is not for this court to decide on this evidence, and I do not wish to go into the truth or probability of that evidence,—it would be usurping the functions of the jury,—but I am certainly of opinion that this question of contributory negligence should have been left to the jury. It is admitted that this was not done, the learned counsel for the respondents frankly admitted that the learned Chief Justice practically ruled the question of contributory negligence out of consideration. I consider that the defendants in the court below were entitled to have their defence as to the quantum of damages put to the jury; that is, whether the appellants were or were not liable for the value of the vessel

as part of the damages for the alleged breach of contract on their part.

It has been contended on behalf of the appellants that this court should give judgment in their favour on the evidence. I cannot agree with that contention. I am not prepared to say, in fact, it is not in my province to say, what view the jury might take as to the cause of the two collisions, and further if there is a new trial the respondents might adduce fresh evidence showing that the captain was reasonably careful. I have therefore very reluctantly come to the conclusion that the judgment in the court below should be set aside and that there should be a new trial. The respondents should pay the costs of this appeal, but in my opinion the costs of the abortive trial should be costs in the cause.

O'D. WALTON, C.J.: The respondents, the owners of the schooner "Three Bells," contracted with the appellant company to execute certain repairs to the schooner. The repairs were executed. It is complained of the appellants that they did not use reasonable care or skill in repairing and replacing in position the steering gear, and that on the 6th day of May, 1922, when the said vessel was being navigated out of the Careenage in Bridgetown, Barbados, owing to the negligent and unskilful manner in which the steering gear had been connected and replaced, that the helm being put to port with the intention of going to port, the vessel went to starboard. And in consequence thereof the vessel went aground and became a total loss.

The appellants deny that they were guilty of any negligence or unskilfulness in the manner in which the steering gear had been connected or replaced, and they say that on the helm being put to port the vessel should go to starboard and not to port as alleged.

And, in the alternative, the appellant company say that even if in the connecting or replacing the said steering gear on the said ship they were guilty of any negligence or unskilfulness which they deny, that the respondents were guilty of contributory negligence in that the respondents had ample opportunity of discovering, and it was their duty to discover any defect in the said steering gear before they attempted to navigate their ship out of the Careenage.

The case came on for hearing before the Chief Justice and a special jury; a verdict was given in favour of the respondents, damages assessed at £600 and judgment entered accordingly.

The material point for the consideration of the court arises out of the summing up of the learned trial judge on the question of contributory negligence as pleaded by the appellant company.

It appears that a stenographer was employed by the appellants to take down in shorthand and transcribe the entire proceedings at the hearing of the action. Counsel for the respondents admits the correctness and accuracy of the transcript. I will therefore use it. It reads as follows:

“Mr. Ellis: Even if there was sufficient evidence the next point is did “the Captain do what he ought to have done? First of all he ought to have “examined the steering gear before starting to go out. Not having done so, “he had every opportunity to have found it out, and if he could not find it “out, the very shop where the work was done was not a stone’s throw from “him. Instead of doing that, the ship having gone across and bounced her “bows instead of inspecting the gear, instead of inspecting his helm he “makes bad worse, he hoists all sails, puts the jib up, and before getting “round the Pier Head he releases the tow boat and the ship goes ashore. “You ail know the Pier Head point. It is not a mile wide, and I submit that “the captain’s bad management was the real and direct cause of the “accident.”

“His Honour: Are you telling the jury accepting your argument for the “present, that the fact that Captain Joyce did not test his gear beforehand “was the direct and decisive cause of the accident?”

“Mr. Ellis: I am putting that as contributory negligence under the second head.”

“His Honour: Don’t you know even assuming that the law of “contributory negligence applies, the law of contributory negligence is this, “that the negligence of the plaintiff was the direct and decisive cause of the “damage? Then how could something that a man did not do, cause the “accident? How could the fact that the captain did not test the gear “beforehand cause the accident?”

“Mr. Ellis: I am saying what he did not do, that is my particular point.”

“His Honour: Then would that be the decisive cause? I am talking of “his not testing the gear beforehand and that he had opportunity to do so. “You do not lay it down to the jury, do you, that it is the legal duty of every “captain to test his steering gear? Captains of steamships do it. They carry “a lot of passengers and that is the proper course, not a complicated system “of machinery which is something different.”

“Mr. Ellis: There is still human life on schooners, though smaller craft “than steamships. Anyhow, the particular point is this: We have “overwhelming evidence of negligence on the " part of the captain, and “that, I say, has been proved to the hilt.”

I think it is perfectly clear from the authorities cited that whether the negligence arose from the execution of a contract or

whether it arose from an act independent of contract, that is, a tort simply, it was a good defence open to the defendant company to set up contributory negligence. Or in other words, they were entitled to say: "Yes, I am guilty of negligence, but notwithstanding my negligence, you by the exercise of reasonable care and skill could have avoided the injury. My negligence would have had no injurious effect if you had performed your duty in an ordinary and proper manner."

Now it appears from the evidence of the captain of the "Three Bells": "I put the cook, Adams, in charge of the steering wheel, and I went forward. We started to make headway to Careenage Point. The 'Three Bells' head was more over to the starboard side. I told Adams, 'Port your wheel!' I was forward. I could not see what he did. I found that the head of the vessel was not moving as I wanted. It was not coming to port as I wanted. I told the tow boat men to stop pulling the port oars and pull the starboard oars. As the vessel felt the pulling of the boat it bounced a lighter by her stern. I straightened up the 'Three Bells' and raised a little more than half of the foresail. She was going out all right and her head began to turn again towards the starboard, or right side. I called to Adams to port the wheel hard and saw her head going over starboard side more and more. I said 'Adams! port your wheel hard over!' and he said 'I have it hard over,' and the head of the 'Three Bells' came right over and struck DaCosta's wharf on the starboard side." Adams in his evidence says, after she struck the lighter that "she was hauled back over to the foot of the Baggage Warehouse and was there 15 to 20 minutes," and later he further says "The tow boat again took us in tow and we got towards mid-stream. The captain told me to port the helm, which I did. I had steered the 'Three Bells' before, I ported the helm, but ship, instead of coming to port, went to starboard or to the right and struck the wharf wall by Laurie's coal-yard. Ship was hauled over to the pierhead side and lay there 20 to 30 minutes."

It was after this incident that she started on her last and fatal journey and collided with the wall by DaCosta's.

The significance of this evidence is apparent. The captain had an opportunity of observing that something was wrong with the steering gear. It supported the contention contained in the appellants' plea that he had an opportunity to discover any defect and could have and should have taken steps to obviate any injury after the warning he had received. There is, of course, the argument that the ship had very little way on, and the captain and Adams are talking like ignorant men as to the action of the rudder. And also that the captain could not be reasonably expected to hit on the true explanation, as he would put great faith in the quality

of the work of a firm of such high repute as Blackwood. Ltd., and if no such idea occurred to him he cannot be stamped with negligence in consequence. I must not be taken for a moment to be weighing the evidence or forming any opinion upon it. The point I am endeavouring to make is this. There was some evidence of negligence on the part of the respondents' servants from their own testimony. Whether a jury would act on it or not is another matter.

But contributory negligence was one of the defences pleaded, and if there was evidence of it the jury should have had an opportunity to consider and pronounce on it. Both parties to the action are entitled to have their respective contentions laid before the jury should there be any supporting evidence. The question on this appeal,—really a motion to set aside the verdict of a jury and the judgment entered thereon on account of misdirection or non-direction—therefore is, did the learned trial judge leave to the consideration of the jury the defence of contributory negligence? I am afraid he did not. He seems to have overlooked, from the extract of the shorthand notes which I have quoted, the fact, that the omission to take care under certain circumstances is also negligence. We hear no more of this subject after Mr. Ellis, who appeared for the appellant in the court below, had urged its consideration. It was not dealt with in the summing up to the jury.

The following questions were put to the jury:—

“(1) Did Blackwood, Ltd., put together the steering gear wrongly?”

“(2) If so, was that negligence the direct and decisive cause of the ship going ashore?”

“(3) If the condition of the steering gear was not the direct and decisive cause of the ship going ashore, was the manner in which Captain Joyce took the ship out of the Careenage the cause of the ship grounding?”

The first and second questions do not refer to the plea of contributory negligence. The third question refers to a different matter. Although not pleaded, evidence was allowed to show that the captain had improperly put up sails having regard to the state of the weather, and this question is a result of that contention. But, nowhere can it be read into these questions, that the jury was invited to consider the question of the alleged negligence of the captain in not examining the steering gear. I do not wish to convey the idea that I am laying it down that it is the legal duty of every captain to test his steering gear. But the fact remains that he did not test it, and when he began to use it, it was obvious to him from his own evidence that something was radically wrong, because of the unexpected manner in

which it worked, yet he persisted in using it. I am not speculating as to whether the jury with this aspect of the case before them may or may not have arrived at the same conclusion. I am only saying that the appellant company was entitled to have this point submitted to the jury, and it was not submitted. They were entitled to a pronouncement by the jury as to whether the respondents' agent, the captain, could have and should have obviated, by the exercise of ordinary care, the consequences of their negligence.

The case of *Becker v. Medd* reported in Vol. XIII. of the Times Law Reports was decided on its own facts, and I think has no application to the facts in the case under review.

After much consideration and with great reluctance I have arrived at the conclusion that the verdict of the jury cannot stand.

The verdict must be set aside. The respondents must pay the costs of this appeal and the costs of the court below and a new trial granted.

DEANE, C.J.: This is an appeal from a judgment of the Court of common pleas in favour of respondents for the sum of £600 with costs.

The appellants appeal *inter alia* on the ground that the case for the defendants was not put to the jury, the learned trial judge having failed to direct them on the law of contributory negligence applicable to the case.

The facts shortly stated are that the respondents who were plaintiffs in the court below employed the appellants for reward to repair their schooner the "Three Bells" and *inter alia* to repair and re-assemble the steering gear of the said schooner. They completed the repairs and handed over the ship to the captain, plaintiffs' servant, who certified to the owners or their agents that everything was correct. Subsequently when the ship was being navigated out of the Carenage for the purpose of putting to sea, when steered to port she went to starboard, and after colliding first with a lighter, and next with a wharf, eventually ran on to the rocks and became a total loss. The respondents thereupon brought this action against appellants alleging that they had unskilfully and negligently replaced the steering gear, so that it worked the reverse way to what it used formerly to do, and that owing to their negligent replacing of the steering gear they had suffered the loss of their ship, and they claimed damages. To succeed in the claim as it stood, the respondents had to prove that the negligence of the contractor had brought about the disaster and was the sole cause of the disaster. That position was, however, challenged by the defendants who first of all denied the alleged negligence, and put in issue the fact that the

disaster was due to it, and next took up the position that even if they had been negligent the damage occasioned by the loss of the ship was due not to the negligence alone, but to the joint negligence of themselves and of the plaintiffs.

They gave particulars as to the alleged negligence of the plaintiffs and led evidence at the trial in support thereof. Mr. Ellis, their counsel, was however interrupted at the trial by the judge in the course of his argument on this point, the learned judge intimating to him that such evidence would not help him since any omission by the captain to do something could not be a ground of defence, or words to that effect. He nevertheless persisted. When the learned judge came to sum up the whole case to the jury, on the admission of learned counsel for the respondents, he entirely ignored this point in the case and put to the jury only the alternatives. Accident due to the negligence of Blackwood, Limited, or accident due to the unskilful navigation of the captain? Learned counsel has argued that this omission was intentional, and that the learned judge was right in ignoring this part of the defence on the authority of *Becker v. Medd* (1897) 13 T. L. R. 313.

The facts of the case are so entirely different from this that they bear not the smallest analogy, and as any dictum uttered in the decision of that case has to be considered in reference to those facts, the case is not very helpful to us.

It is contended that a defence of contributory negligence is not available in any action based on contract. To me it seems clear that whether the action is based on contract or tort makes little difference, since on the plaintiffs' own pleadings they were bound to show that the damage flowed solely from the negligence of the defendants, and the defendants in order to show that that was not so were entitled to show that but for the negligence of the captain combined with their negligence the loss would not have happened. The negligence of the captain, therefore, in not properly inspecting the steering gear before certifying to the owners that it was correct and in disregarding the warnings given to him by the two previous collisions, that there was something wrong with the steering gear, was a most material part of the defendants' case since it is obvious that had the captain examined the steering gear immediately the first collision took place, he would at once have discovered the defect in it and the accident would not have occurred, in which case the utmost damages to which plaintiff's would have been entitled for defendants' breach of contract would have been the cost of putting the gear right. They had the right therefore to have this possibility brought before the jury by the learned judge in his charge.

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The question of negligence which has been defined as absence of care according to the circumstances is a matter entirely for the jury, and it is possible if they had been given the opportunity, instead of being forced to choose between the two alternatives of negligence of the defendants and unskilful navigation of the captain, of saying whether the loss was due to the combined negligence of plaintiffs and defendants, that they would have answered such a question in the affirmative. Had they done so, it is clear the respondents would not have been entitled to judgment. (*South Wales and Liverpool Steamship Company, Ltd., v. H. & L. Grayson, Ltd.* A House of Lords case).

They were, as I have said, never given the opportunity, but were confined by the learned judge to the consideration of the case from the two points of view I have stated, the first alternative, of course, depending on the negligence or the defendants in re-assembling the steering gear, having first been proved to the satisfaction of the jury.

Now it was laid down in *Bray v. Ford*, (1896, A. C. 44) that it is the constitutional right of every party to have the whole of his case put before the jury. The failure of the learned judge therefore to put this part of defendants' case to the jury amounted in my opinion to a misdirection.

The court has been asked to give judgment for the defendants on the ground that the evidence of contributory negligence which comes from the plaintiffs' witnesses is so overwhelming that if the jury did return a verdict in favour of respondents on a new trial it would be set aside on appeal.

The view I take is that the learned trial judge having during the course of the trial practically ruled that this evidence was immaterial to the defendants' case, the other side might have abstained from putting forward other evidence which may be material on the issue, which evidence may be forthcoming at a new trial. I think the appellants are entitled to a new trial and to the costs of these proceedings here and in the court below.

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[535 OF 1921.]

1923. MARCH 26, 27, 28, 29; APRIL 7, 25.

BEFORE GILCHRIST, Actg. J.

Husband and wife—Mutual will—Death of husband—Rights of surviving spouse— Test as to election under will—Adiation—Alternative conditions in will—Effect of repudiation by devisees of certain dispositions in will—Receipt by children of legitimate portion of father's estate —Whether in the circumstances children entitled on death of survivor to any portion of the estate—Roman-Dutch law.

Husband and wife were married in community of goods and there were issue of the marriage several children of whom the plaintiff was one. By a mutual will executed by the said husband and wife the joint property of the spouses was massed and alternative devises of property were made to the children of the marriage thus :—(a) the property on the death of the survivor to pass to the children for their life, and on the death of all of them to their children absolutely, (b) in case of any of the children being dissatisfied with the aforesaid dispositions (*i.e.*, the first mentioned devise) such child to be instituted in his or her legitimate portion out of the said estates, such institution to take effect on the death of each spouse severally, and the children of any such child to be debarred from inheriting under the will. The husband predeceased the wife who was an executrix under the joint will. She remained in possession of the joint estate for some years, but apparently took no active part in its administration. All of the children on attaining their majority repudiated the earlier dispositions of the will and were accordingly given their respective legitimate portions of their deceased father's estate. Out of the balance of the proceeds remaining in the hands of their mother (executrix) after selling some of the property to satisfy the said portions, the mother entrusted to one of her sons, the defendant's testator, the sum of \$3,000 to be by him used on her behalf. On the death of the said son the plaintiff on behalf of himself and other children of the marriage sought to oppose the transport of certain property by the defendant, the executor of the said son, on the ground that the said \$3,000 was burdened with a trust

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in their favour, alternatively, that of the said sum \$1,500 belonged to them as their legitimate portions out of their mother's estate, and the remainder vested in them by reason of the alleged intestacy of their mother in respect of the said sum.

Held:—(1) That the fact of the wife being executrix under the said mutual will deprived her possession of the property from being construed as an act of acceptance or adiation under the will.

(2) That she had elected to repudiate the will, as she was entitled to do.

(3) That the children having repudiated the earlier dispositions of the will and having received their legitimate portions of their father's estate, the remainder of the joint estate thereby became the absolute property of their mother who was therefore entitled to dispose of the same as she pleased and that, accordingly, there was no trust imposed on the remainder of the joint estate remaining in her hands.

J. S. McArthur, for the plaintiff.

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

GILCHRIST, Actg. J.: This is an action in which the plaintiff claims the sum of \$3,000 with interest thereon at the rate of 6% from the 1st January, 1913, to the date of payment or judgment, being moneys entrusted to Augustinho Ferreira, deceased, to invest and retain for the purpose and under the terms of the mutual will of Francis Ferreira, deceased, and Madelina Ferreira, deceased.

2. In the alternative \$1,500 legitimate portion of the plaintiff under the said mutual will, and \$1,500 as heir *ab intestato* of their deceased parents Francis Ferreira and Madelina Ferreira, with interest thereon at the rate of 6% per annum from 1st January, 1913, to date of payment or judgment.

3. An injunction restraining the defendant in his capacity aforesaid from passing transport of lot 69 also known as 79 and the west half of lot 70 also known as 80 situate in the Stabroek District, city of Georgetown, with the buildings and erections thereon, to and in favour of Georgina Pacheco Jorge, widow, until payment of the said sum with interest thereon as aforesaid.

4. The questions to be decided in this case are governed by the provisions of the Roman Dutch law.

5. The plaintiff's case rests, *firstly*, on the question whether Madelina Ferreira as the surviving spouse accepted and received some benefit under the mutual will of herself and her husband dated 21st April, 1884, which disposes of the joint property on the death of the survivor, and *secondly*, if she did so whether a *fidei commission* was thereby created as to the remaining portion of the joint estate after payment to the children of the marriage alive at the death of their father Francis Ferreira, of their legitimate portion of the estate of their said deceased parent, and *thirdly*, whether the \$3,000 was given by Madelina Ferreira to Augustinho Ferreira to be invested for her.

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6. Clause 7 of the mutual will is as follows:—

“After the death of the survivor of us we leave and bequeath to our children named respectively Adelaide Maria, Isabella, Guilhelmina, Helena, Matilda, Augustinho and Jose Ferreira and to all such other children that may hereafter be born to us share and share alike, and to the issue of any one or more of such our children who may predecease us or the survivor of us by representation for their natural life the usufruct of the whole of our said joint estate save and except as aforesaid and to all the joint estates we institute as heirs to take after the demise of all our aforesaid children all the issue of our aforesaid children then alive or the issue of our said grandchildren or their issue to take by representation that is the share or shares to which his or her or their father or mother would have been entitled if he or she was alive and the aforesaid bequest had to go to him or her. We hereby expressly prohibiting any alienation or division of our joint estate as long as one of our said children issue of our said marriage shall be alive but at the death of the last survivor of our aforesaid children all usufructuary disposition hereby made in their favour or on behalf of the issue of the children who may have predeceased us or the survivor of us shall cease and the said children of our aforesaid children and the issue of those deceased shall have full right to divide our said joint estate as bequeathed to them as aforesaid always with exclusion of the issue of such our dissatisfied child or children as hereinafter mentioned who have taken his or her or their legitimate portion or portions.”

7. Clause 8 of the said will is as follows:—

“Should any one or more of our said children on attaining majority be dissatisfied with the foregoing dispositions we institute such dissatisfied child or children in his her or their legitimate portion or portions of our said estates, such institution to take effect on the decease of each of us severally, and we substitute as usufructuary heir or heirs in the place of such dissatisfied child or children, our child or children who is or are satisfied with the foregoing dispositions and further exclude the issue of such dissatisfied child or children taking in any way whatsoever under this our mutual last will and testament.”

8. Francis Ferreira died on the 12th March, 1900. Madelina Ferreira died on the 16th December, 1919.

9. Augustinho Ferreira (defendant by his executor) died on the 5th June, 1921.

10. It is clear from the terms of the mutual will that neither Francis Ferreira nor Madelina Ferreira anticipated or expected that all their children would repudiate their mutual will, yet this is what actually took place.

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11. At the death of Francis Ferreira the entire property of the joint estate as stated in paragraph 6 of the petition to the then Chief Justice dated 1st October, 1903, is as follows :—

W1/2 lot 107 or 2, George Street, Georgetown, appraised for Municipal rates at the sum of ...	\$ 1,800
W3/4 lot 100 or 1, George Street, appraised as aforesaid at	2,000
E1/4 lot 100 or 1, Hadfield Street, appraised as aforesaid at	1,800
N1/2 lot 9, Hadfield Street, appraised as aforesaid at	2,800
W1/2 226, South Street, Lacytown, appraised as aforesaid at	900
N1/2 lot 178, Alexander Street, Lacytown, appraised as aforesaid at	<u>1,200</u>
	<u>\$10,500</u>

12. Under Roman Dutch Law a testator might not burden with a *fidei commissum* the "legitima portio" of his children, but he might give them the choice of taking either the legitim unburdened or their rateable share of the whole inheritance subject to *fidei commissum* (Van der Linden 1. 9. 8, Lee's Introduction to Roman Dutch Law, p. 504).

13. That a husband and wife may together make their joint will in one writing is beyond dispute. Such joint will is, however, considered as two separate wills which either of them may specially, and without the knowledge of the other, or even after that other's death, always alter.

14. The power which a surviving spouse generally has to revoke a mutual will as far as it affects half of the property is taken away on the concurrence of two conditions. *First*, that the will disposes of the joint property on the death of the survivor, or as it is sometimes expressed, where the property is consolidated into one mass for the purposes of a joint disposition of it. *Second*, that the survivor has accepted some benefit under the will (*Denyson v. Mostert* (1872) L.E. 4 P.O., 236). In this respect "it must be carefully remarked that if the above principles are to apply it is essential that there should be a massing of or joint dealing with the *whole* estate (Lee, Introduction to Roman Dutch Law, p. 325)."

15. In considering the plaintiffs' case it is necessary to bear in mind the above principles. It must be borne in mind also, that Madelina Ferreira as surviving spouse was the executrix under the will and was entitled to the possession of the whole estate until such time as she was called upon to make a partition.

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16. Madelina Ferreira retained possession of the whole joint estate until Matilda Gunning and Jose I. Ferreira repudiated the said will. There is no evidence when they actually did so, but it is clear it must have been on or before the 1st October, 1903, when a petition was addressed to Sir Henry Bovell then Chief Justice (Exhibit "B"). On or about this time the other children (two being minors) also repudiated the will. The two minors on becoming of age again repudiated the will. Up to this time there is no evidence as to how the estate was administered beyond that Augustinho, the eldest son, looked after the affairs, collected the rents of the properties of the estate, that is such rents as were collected as I am satisfied that not only Madelina Ferreira but her children occupied part of the properties at certain times without paying rent, and made disbursements.

17. Apart from the statement in paragraph 2 of the petition of Madelina Ferreira of 12th July, 1909, with which I will deal later, there is absolutely no evidence that Madelina Ferreira either accepted the terms of the mutual will or that she received any benefit as contemplated by the mutual will. I think she was prepared to accept the will but the children having repudiated the will and claimed their legitimate portion put an end to her doing so. There is strong evidence to support the conclusion that she elected to take her half of the common property. Paragraph 9 of the petition of the first October, 1903, (Exhibit "B") of Madelina Ferreira and her children, the two minors Rosaline and Manoel aged 19 and 18 expressing their unqualified approval and concurrence, is as follows :—"9. It has been "agreed between the petitioners that the common property of the said "Francis Ferreira and the said Madelina Ferreira should be divided into two "equal parts one half to go to the said Madelina Ferreira and the other half "to her said children." Further paragraph 2 of the supplementary petition of the 19th October, 1903, (attached to Exhibit "B") clearly indicates an intention on the part of Madelina Ferreira to repudiate the will in the event of the Chief Justice refusing the prayer of the petition. The fact that for over three years she remained in possession of the common estate did not in my opinion preclude her from doing so (See *Denyson v. Mostert, ubi supra* at page 256).

18. From this coupled with the fact that all the children repudiated the will and accepted their legitimate portion of their father's estate amounting to \$2,625 which is admitted, clearly establishes in my opinion that no trust (*fidei commissum*) is established by the mutual will as contended for by counsel for the plaintiff. The evidence of Manoel Gonsalves, witness for the plaintiff, as to the reason why W3/4 100 or 1, George Street, and E1/2 100 or 1, Hadfield Street, was allowed to be sold for taxes is eloquent testi-

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mony of the determination of the parties to carry out paragraph 9 of the said petition, notwithstanding the orders made by the then Chief Justice, Sir Henry Bovell, on the said petition and supplementary petitions thereon (all as Exhibit "B"). He states "why they really sold at execution I cannot say. "There was some trouble about the will. I think it was to get over the "difficulties of the will. They were difficulties from the beginning about "the will."

19. A further point going to show that Madelina Ferreira was entitled absolutely to the proceeds of sale of W 3/4 100 or 1, George Street, and E 1/4 100 or 1, Hadfield Street, is the order made by Hewick, then Acting Chief Justice, dated 17th July, 1909, on the petition of Madelina Ferreira of 12th July, 1909, in which she claimed to be the person entitled to the proceeds of the said property in the hands of the Registrar. In this petition paragraphs 7 and 8 of the mutual will are fully set out, and that the children had repudiated the will and claimed and had been paid their legitimate portion of their father's estate. It must be remembered that Madelina Ferreira and Augustinho Ferreira are both dead. It is not possible to obtain their account of the various transactions. I cannot conceive that with these facts before him, Hewick, then acting Chief Justice, would have departed from the rule of requiring security from Madelina Ferreira if this money was subject to a *fidei commissum*.

20. In my opinion it is clear that Hewick, Ag. C.J., followed the law and was satisfied that the children, who were to receive the usufruct of the whole estate after Madelina Ferreira, having repudiated the will and in consequence thereof by the terms of the will their children (i.e., the grandchildren of Francis Ferreira and Madelina Ferreira) forfeited all rights, and no one thereafter being instituted in the ownership, Madelina Ferreira became entitled to the balance of her husband's estate after payment to the children of their legitimate portion in their father's estate (Van Leeuwen 3. 8. 18.)

21. With respect to paragraph 2 of the petition of Madelina Ferreira of 12th July, 1909, above referred to (Exhibit "C"). All I need say is that it was not a correct statement in view of all that had gone before and may be due to the draughtsman not being in possession of all the facts.

22. I think it would be convenient to see how the properties of the joint estate were disposed of

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W 1/2 107 or 2, George Street, sold to A. J. de Souza for (see Exhibit "D")	\$ 1,700. 00
W 3/4 100 or 1, George Street, and E1/4 100 or 1, Hadfield Street, sold for Town taxes and bought by M. S. C. Fernandes. Net proceeds of such sale paid to Madelina Ferreira.	3,309 .66
N 1/2 9, Hadfield Street, sold for the purpose of paying legitimate portion of some of the children	1,975.00
W 1/2 226, South Road, sold to M. P. Leca to pay legitimate portions (see Exhibits "B" and "F")	350.00
N 1/2 178, Alexander Street, sold at execution sale and bought by P. C. Wight for (see Exhibit "H")	<u>137.00</u>
	<u>\$7,471.66</u>

From this should be deducted \$297.98 the auctioneer's charges and legal expenses in respect of the sale of N1/2 9, Hadfield Street, (see Exhibit "B"). There were other expenses, for instance, expenses in respect of the sale at public auction of W1/2 226, South Road.

23. With respect to N1/2 Alexander Street, what is disclosed? Here is a property appraised for \$1,200 for town taxes sold at execution sale on the 4th January, 1909, and bought by P. C. Wight for \$137—(see Exhibit "H"). On the 15th May, 1909, 4 months and 11 days after, this said property is sold by Wight to M. A. Mitchell for \$850. (See Exhibit "G"), Counsel for the plaintiff in his opening address stated that this property was sold for town taxes. J. I. Ferreira (plaintiff) in his evidence stated it was taken in execution in respect of a judgment. Not a tittle of evidence has been placed before this Court as to who obtained the judgment, or in respect of what it was for, or whether the sum realised satisfied the judgment. Was it for law costs as a result of the bickerings and discussions of the family? It appears to me, in view of plaintiff's statement, that it would have been an easy matter for him to have furnished the Court with fuller information as to this property in the same manner he was able to furnish the particulars stated in the certificate of the Registrar. (Exhibit "H"). During the hearing I stated I would like to have further information as to the sale of this property. The hint was not acted on. Did P. C. Wight act as an agent for the parties so as to bring the estate to a division? At this time the youngest child was 24 years of age. What caused them to stand by and allow this property to be sold for such a small sum? Surely some

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explanation should have been given on these points. The absence of any explanation raises in the mind of the court that all was not well as to this property being allowed to be sold.

24. As a result of the children repudiating the will and necessitating a sale of the properties, the value of the estate as appraised for the payment of town taxes was reduced considerably.

25. In the face of these figures it is clear the children received more than their legitimate portion of their father's estate.

26. Of the \$3,309.66 received by Madelina Ferreira, proceeds of sale of W3/4 100 or 1, George Street, and E1/4 100 or 1, Hadfield Street, \$3,000, it is contended, was handed by Madelina Ferreira to Augustinho Ferreira. This I will deal with later on. What became of the \$309.66? No explanation is given. Did it go in legal and other expenses as a result of the family discussions or did it go by consent of all towards assisting Manoel Ferreira when he was out of work, or to assist in replacing Matilda Gunning's furniture which was destroyed by fire or to assist Rosaline de Cairos and Matilda Gunning to go to New York ? It is impossible to say. Had these proceedings been brought during the lifetime of Augustinho Ferreira the matter might have been made clear. It appears to me that Augustinho Ferreira was a good son and brother, and from the evidence of Cabral an honest man.

27. If there was any real merit in the plaintiffs claim why did he not bring the action during the lifetime of Augustinho Ferreira who lived for 18 months after Madelina Ferreira's death? The explanation given by the plaintiff that he was ready to do so, but did not, as Helena Gonsalves told him not to, I reject as unworthy of consideration.

28. Apart from any question of Madelina Ferreira repudiating the will and claiming her half of the joint property, or her right to the remainder of her husband's estate after payment to the children of their legitimate portion of their father's estate, it appears to me that the only possible conclusion to come to from the evidence is that there was a division of the whole estate by agreement between Madelina Ferreira and her children and that it was recognised that Madelina Ferreira was entitled to the \$3,000 in question.

29. It is now necessary to determine whether the sum of \$3,000 was handed to Augustinho Ferreira by Madelina Ferreira in trust to be invested, and the interest therefrom paid her. If it was so handed it is clear he held it in trust. It is not disputed by the defence that Augustinho Ferreira received \$3,000 from Madelina Ferreira but that it was handed over to Augustinho Ferreira by Madelina Ferreira of her own free will and with the request and for the consideration that he Augustinho Ferreira

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would keep and maintain the said Madelina Ferreira during her lifetime, all of which the said Augustinho Ferreira did.

30. The only witnesses who speak of the \$3,000 being handed to Augustinho Ferreira to be *invested* are the plaintiff (Jose I. Ferreira) and Manoel Gonsalves, the husband of Helena Gonsalves on whose behalf, as well as on behalf of others, plaintiff brings this action.

31. Manoel Gonsalves's evidence is that in July, 1909, he and Augustinho Ferreira borrowed \$3,000 from Madelina Ferreira and that in December, 1922; they repaid the same to Madelina Ferreira. He satisfied himself that Madelina Ferreira received it. Frequently after this he heard Madelina Ferreira speak about the \$3,000 in Augustinho Ferreira's presence and that he (Augustinho Ferreira) advised her to invest it so as to get a return to keep herself, and that she frequently asked Augustinho Ferreira for an acknowledgment and Augustinho Ferreira told her not to worry. He did not hear her speak to Augustinho Ferreira about the money after a year after the transport was passed to Luck. (This transport was passed on the 3rd December, 1922, (Exhibit "E"). In cross-examination he stated the \$3,000 was invested in People's Pawnbrokery shares. He qualified this and stated he would not swear positively in what, but from what happened subsequently he said it was invested—that he knows the shares in the People's Pawnbrokery were in Augustinho Ferreira's name. The evidence of Fernandes, the Secretary of the Pawnbrokery, establishes that in January, 1912, Augustinho Ferreira had 20 shares each of the value of \$25. On the 5th December, 1913, he bought 59 shares. From then on Augustinho Ferreira had several transactions in Pawnbrokery shares until the 25th September, 1917, when he sold 27 shares all he then had. It must be remembered that Augustinho Ferreira was in a good position at Bettencourt's and from the whole evidence was a man who evidently had some means. The evidence of Fernandes convinces me that Gonsalves is mistaken in his facts. Counsel for the plaintiff in his opening address stated that the money' was invested in People's Pawnbrokery shares. He led no evidence to substantiate this. It was left to the defence to call Fernandes as a witness. Further, the evidence of Fernandes goes to show Gonsalves is also mistaken in his statement as to his and Augustinho Ferreira borrowing \$3,000 from the People's Pawnbrokery. I think Gonsalves has made a *bonafide* mistake due, very likely, to the lapse of time and to his own statement in examination in chief that he took little interest in the affairs of the family as there was too much bickering.

32. Jose I. Ferreira's evidence is that his mother—Madelina Ferreira—told him she gave the money to Augustinho Ferreira

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to invest. I will later deal more fully with this witness's testimony. I content myself at this point by saying that I do not regard him as a witness on whom any reliance can be placed.

33. Having regard to the evidence of Augusta Adelaide Ferreira and A. F. Cabral, witnesses for the defence, taken as a whole I am convinced that the money was never delivered to Augustinho Ferreira to be invested. This, of course, does not dispose of the whole issue, as it is not disputed that Augustinho Ferreira did have the \$3,000, The question to be determined is, whether it was given as alleged by the defence. It is, therefore, necessary to further consider the testimony of the witness.

34. Jose I. Ferreira, the plaintiff, states that after his father's death there was trouble over his estate. Ho goes further than Helena Gonsalves and Carma Ferreira, who state that their mother told them Augustinho Ferreira had \$3,000. He states that his mother told him she gave Augustinho Ferreira the \$3,000 to invest. I may here remark that these three witnesses all state that at no time was Augustinho Ferreira present when these statements were made. Jose I. Ferreira never spoke to his brother Augustinho Ferreira from about three years after his father's death.

35. With respect to his and Helena Gonsalves's account as to what took place at his house between Cabral and himself and Helena Gonsalves, the question is, who is to be believed? I prefer to accept Cabral's account.

36. Jose I. Ferreira in the whole of his evidence refers to his mother telling him about \$3,000, yet he told Cabral the same year (1921) that Augustinho Ferreira died, that Augustinho Ferreira had \$3,000 for his mother. This was the sum he sent in a claim for to Cabral as executor of Augustinho Ferreira deceased (Exhibit "M"). He states he claimed \$3,500 as he thought it was a sum bordering on this that the properties (W3/4 100 or 1, George Street, and E1/4 100 or 1, Hadfield Street), fetched —that whatever the properties fetched he would have claimed, that it was Manoel Gonsalves on his return from England who told him the amount was \$3,000, not \$3,500. He goes on to state that his mother was under the thumb of Augustinho Ferreira. On the Court drawing his attention to the fact that he was swearing to something of his own knowledge he replies "My mother told me so." Later on, he states I am positive my mother was under the thumb of Augustinho though they were living in different parts of the town. He explains that "under his thumb" he means under his influence and direction. It may be well to point out here that Madelina Ferreira lived for about three years in Manoel Ferreira's house and died there. He admits that a year after his father's death Augustinho Ferreira paid

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De Cairos \$300 for him in respect of amounts which he had overdrawn at De Cairos's. He states this was from the sum of \$700 his father had keeping for him. That he asked Augustinho to pay him this \$700 and he refused to do so. That this sum by his father was recorded on a slate in his father's own hand' writing. That he did not take steps to recover it as he had no documentary evidence. On his attention being drawn to his statement that it was recorded on a slate he replies "they broke the slate." When asked who broke it, he replies "I do not know, I did not see it when I went back." Gonsalves states he never heard Jose I. Ferreira claim that his father had \$700 for him.

37. That Jose I. Ferreira's feelings were bitter against his brother Augustinho, I do not think there can be any doubt. He never visited his brother during his last illness. According to Carina Ferreira and Cabral, Carina Ferreira was the only one of the family who visited Augustinho when he was dying. Jose Ferreira goes on to state he took no steps to recover the \$3,000 from Augustinho during his lifetime. He was willing to do so but Helena Gonsalves advised him not to do so. This reason appears to me. to be unworthy of consideration. He further states that he never spoke to Augustinho about the money. Nor did he get any one to do so. That he never wrote him about it. Never consulted a lawyer during his mother's lifetime about recovering the \$3,000.

38. On consideration of the foregoing facts as to Jose I. Ferreira (plaintiff) coupled with his demeanour in the witness box, the conclusion I have come to is, that he was prepared to swear to anything regardless of the truth so long as it would secure to him a share in the \$3,000 claimed.

39. After full consideration of the evidence of Helena Gonsalves and Carina Ferreira and that of Augusta Adelaide Ferreira and A. F. Cabral I decline to accept the testimony of Helena Gonsalves and Carina Ferreira that their mother ever told them that Augustinho Ferreira had \$3,000 for her as claimed.

40. Returning to the testimony of Manoel Gonsalves. He states "about "2 months before Madelina Ferreira died she was very ill. She appealed to "me for help, said she had not been getting the same amount as she did "before. I asked her if she had got anything out of the \$3,000. She said she "had not. She got money from Augustinho from time to time but I cannot "say how much." Now if Gonsalves really believed that Augustinho Ferreira had this money why was it he did not approach him about it or get some one to do so? Gonsalves further states that he cannot remember Cabral speaking to him about help for Madelina Ferreira after she left Augustinho Ferreira's house, but he might

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have done so. On this point Cabral states that at the request of Madelina Ferreira he approached Gonsalves to assist her and Gonsalves told him he could rest assured he would not see her starve as she was his mother-in-law. Gonsalves said nothing to Cabral that Augustinho had \$3,000 for Madelina Ferreira. Cabral was not even cross-examined on this point.

41. In my opinion all this goes to show that the story put forward by the plaintiff is one without any real foundation and that the story narrated by the defence as to the \$3,000 is the correct one,

42. I do not propose to refer in detail to the testimony of Augusta Adelaide Ferreira and A. F. Cabral. On the main issues of the case I accept their testimony and am satisfied that Madelina Ferreira handed over the \$3,000 which was her own absolute property to Augustinho Ferreira the only son she could rely on of her own free will and with the request and for the consideration that he (Augustinho Ferreira) would keep and maintain the said Madelina Ferreira during her lifetime and that he not only did so but complied with requests to render assistance to Manoel Ferreira and his wife and their child Dolores as well as rendering; assistance to Matilda Gunning in replacing her furniture which had been destroyed by fire.

43. The plaintiff in my opinion has failed to establish any case against the defendant.

I declare the opposition bad and unfounded.

Judgment for the defendant with costs.

Solicitor for the plaintiff, *G. Gomes*.

Solicitor for the defendant, *J. Gonsalves*.

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

PRIVY COUNCIL APPEAL No. 26 of 1924.

JAMES TOWESLAND ALLEN, APPELLANT,

v.

THE ROYAL BANK OF CANADA, RESPONDENTS.

FROM

The West Indian Court of Appeal

(Leeward Islands).

JUDGMENT of the Lords of the Judicial Committee of the Privy
Council, delivered the 6th July, 1925.

PRESENT AT THE HEARING:

LORD ATKINSON.

LORD SHAW.

LORD PARMOOR.

Judgment delivered by LORD ATKINSON.

LOCH AND ANOTHER v. JOHN BLACKWOOD, LTD.
PRIVY COUNCIL APPEAL No. 100 OF 1923.

LOCH AND ANOTHER, Appellants,

v.

JOHN BLACKWOOD, LTD., Respondents.

FROM

1924. JUNE 2.

THE WEST INDIAN COURT OF APPEAL (COLONY OF BARBADOS).

BEFORE LORD SHAW, LORD PHILLIMORE, AND LORD CARSON.

Company Law—Petition for winding up of company—Domestic nature of company—Preponderance of voting power—Statutory conditions as to general meetings not observed—Balance sheets, etc., not submitted—Conditions as to audit not complied with — "Just and equitable clause"—Whether such clause ought to be construed on the principle of "ejusdem generis" with the clauses preceding it in section 127 of the Companies Act of Barbados, 1910—Imperial Act of 1908, section 129.

This was an appeal from the decision of the West Indian Court of Appeal reversing the judgment of the Chief Justice of Barbados who had granted the prayer of the appellants for an order that the respondent company be wound up.

The judgment of the West Indian Court of Appeal was based mainly on the ground that sub-section (6) of section 127 of the Companies Act of Barbados—the "just and equitable clause"—ought to be construed on the principle of its being *ejusdem generis* with the clauses preceding it in the said section.

Held :—(reversing the decision of the West Indian Court of Appeal)

(1) That sub-section (6) of section 127 of the Companies Act of Barbados (which corresponds with sub-section (6) of section 129 of the Imperial Act) does not operate so as to confine the cases of winding up to those strictly analogous to the five instances stated in the previous sub-sections, or, in other words, the phrase "just and equitable" is not to be read as being *ejusdem generis* with the preceding words of the enactment.

(2) That bearing in mind that the company was substantially of a domestic nature and that there was a preponderance of voting power on one side, the circumstances of the case were such as to make it "just and equitable" for the company to be wound up.

The judgment of the court was delivered by LORD SHAW:

This is an appeal from an order dated the 15th March, 1923, of the West Indian Court of Appeal presided over by Sir A. Lucie Smith, Chief Justice of Trinidad, and the other members of the court being Sir Charles Major, Chief Justice of British Guiana, and Mr. W. P. Michelin, Acting Chief Justice of the Leeward Islands. This court reversed an order dated 30th October, 1922, of His Honour Sir W. H. Greaves, Chief Justice of Barbados, sitting in the Court of Common Pleas for Barbados, for the winding up of the respondent company John Blackwood, Limited.

The appellants are petitioners for an order by the court for the winding up. The petition is presented under Section 127 of the Barbados Companies Act, 1910. That section is in terms identical with those of section 129 of the English Companies (Consolidation) Act, 1908. The sub-section particularly founded upon

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is sub-section 6 which declares that a company may be wound up by the court "if the court is of opinion that it is just and equitable that the company should be wound up."

A good many years ago Mr. John Blackwood established an engineering business in Barbados and carried it on until his death in January, 1904. Under the provisions of his will his estate fell to be divided one-half to Mrs. Rebecca Thomson McLaren, the wife of Mr. William McLaren and one-quarter each to his niece Mrs. Loch and to his nephew (Mrs. Loch's brother) James Blackwood Rodger lately deceased; the shares to be paid to Mrs. Loch and Mr. Rodger when they reached the age of 30.

Authority was given to his trustees to convert his business into a company, with power to his trustees to act as directors and to Mr. McLaren to have the supreme control and management of matters connected with the business. The trustees were James Murphy (who died in 1911 and never acted in the trusts); Mr. William McLaren (the testator's sister's husband) and Mr. McLaren's clerk Henry Allan Yearwood.

A company was accordingly formed on the 2nd January, 1905. In the year 1916 Mrs. Loch and James Blackwood Rodger had both attained the age of 30. The latter died in December, 1919. The board of directors now consists of Mr. McLaren, his wife Mrs. McLaren, who was appointed in 1913, and Mr. Yearwood. Under this directorate, the business of the company appears to have been energetically managed and to have amassed considerable profits.

The arrangement of the capital was this: the total amount was £40,000 in £1 shares; 20,000 of these were allotted to Mrs. McLaren; of the remaining 20,000, 10,000 should have gone to Mrs. Loch and 10,000 to Mr. Rodger. Mrs. Loch, however, was allotted 9,999 ; Mr. Rodger, 9,998; and the three shares left over were allotted one to Mr. McLaren and one each to Mr. Yearwood and Mr. King (Mrs. McLaren's nominees ; the first being Mr. McLaren's clerk and the second his solicitor). This was quite a natural and proper arrangement; but, of course, in the event of a division of opinion in the family between what may be called the McLaren interest on the one hand, and the interest of the nephew and niece on the other, the preponderance of voting power lay with the former. It is thus seen that although taking the form of a public company the concern was practically a domestic and family concern. This consideration is important, as also is the preponderance of voting power just alluded to.

In the petition for winding up eight different reasons are assigned therefor. The first is: that the statutory conditions as to general meetings have not been observed; the second that balance sheets, profit and loss accounts and reports have not been

submitted in terms of the articles of the company ; and the third is that the conditions under the statutes and article as to audit have not been complied with. All these allegations are true and it seems naturally to follow from the preponderance already alluded to, that there is at least considerable force in the fifth reason that it is impossible for the petitioners to obtain any relief by calling a general meeting of the company, There are further submissions, viz., that the company and the managing director, Mr. McLaren, have refused to submit the value of the shares to arbitration, and that without winding up it is impossible for the petitioners to realise the true value of their shares. But the principal ground of the petitioner is that in the circumstances to be laid before the court it is just and equitable that the company should be ordered to be wound up. This last ground was affirmed by the Court of Common Pleas.

With regard to the first three submissions made in the petition, it was strenuously argued on behalf of the company, which practically means the directorate or the McLaren interest, that however true it might be that owing to the informal way in which the books of the company had been kept it appeared as if both the statute and the articles of association had been violated in various particulars and that no general meetings of the company had been held, and no auditors properly appointed and it was certain that so balance sheets, profit and loss accounts and reports had been submitted for the critical years 1919 and 1920, still these were no grounds for winding up. Other applications, it was said, might competently be made to the court to compel the statute and articles to be properly complied with. It may be doubtful whether such a course of conduct lasting in several particulars since its inception until now, would be insufficient as a ground for winding the company up. But their Lordships think it unnecessary to give any separate decision upon such a point.

In their opinion, however, elements of that character in the history of the company, together with the fact that a calling of a meeting of shareholders would lead admittedly to failure and be unavailable as a remedy, cannot be excluded from the point of view of the court in a consideration of the justice and equity of pronouncing an order for winding up. Such a consideration, in their Lordships' view, ought to proceed upon a sound induction of all the facts of the case, and should not exclude, but should include circumstances which bear upon the problem of continuing or stopping courses of conduct which substantially impair those rights and protections to which shareholders, both under statute or contract, are entitled. It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable"

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rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is tunder the statute just and equitable that the company be wound up.

The judgment of the court below appears to have proceeded upon the view that this statutory prescription for winding up under the sixth subsection, namely, when the court is of opinion that it is just and equitable that this should be done, is restricted to cases *ejusdem generis* with those enumerated in the other sub-sections 1-5 of section 127 of the Barbados Companies Act.

The Board having fully considered the authorities, the judgment and the arguments, are of opinion that this is not the law. The alleged principle of restriction, as applicable to enumerated causes for the winding up of companies, may be said to have taken its origin in a sentence used in the judgment of Lord Chancellor Cottenham in *Ex parte Spackman* (1849), 1 M. & G. Rep., 174. The sentence is:—

"This clause was, no doubt, thus worded in order to include all cases not before mentioned; but of course it cannot mean that it should be interpreted otherwise than in reference to matters *ejusdem generis*, as to those in the previous clauses."

But it is apt to be forgotten that the very next sentence is:—

"There must be something in the management and conduct of the company which shows the court that it should be no longer allowed to continue, and that the concern ought to be wound up."

Whether these two sentences could stand together may be a question, but it is quite plain that the first ought not to be read alone without the second: and if the second be taken in the ordinary and natural meaning of the words used, it may be left to the speculator to conjecture whether there is anything in the application to this section of the Companies Act of the *ejusdem generis* doctrine considered restrictively. Lord Cottenham's words are quoted somewhat guardedly by Lord Cairns in *re Suburban Hotel Company*, 1867, 2 Ch. App. 737 and his definite proposition is as follows:—

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"But what I am prepared to hold is this, that this court, and the winding-up process of the court, cannot be used, and ought not to be used, as the means of evoking a judicial decision as to the probable success or non-success of a company as a commercial speculation."

The cases set forth in sub-sections 1 to 5 separately are: (1) if the company has by special resolution resolved that the company be wound up by the court; (2) if default is made in filing the statutory report or in holding the statutory meeting; (3) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year; (4) if the number of members is reduced below five; and (5) if the company is unable to pay its debts. It seems plain enough that beyond these cases there is the whole category of fraudulent administration under which a company's property might be imperilled or transferred into the pockets of its directors, when the case for winding up would be of supreme urgency. Yet if the argument as to *ejusdem generis* were sound, it would logically exclude such a case from the grounds for winding up, which is absurd. It has been long stated that the element of fraud could not be so dealt with.

The cases need not be further referred to in detail: but in the opinion of the Board it is in accordance with the laws of England, of Scotland and of Ireland that the *ejusdem generis* doctrine (as supposed to have been laid by Lord Cottenham) does not operate so as to confine the cases of winding up to those strictly analogous to the five instances of the first sub-section of section 129 of the British Act. It so happens, however, that, in several instances, there have occurred circumstances analogous to those of the present in regard to the two other points noted above, namely the domestic nature of the company and the permanent preponderance of voting power. And accordingly one or two of such cases may be cited.

In *re Amalgamated Syndicate*, 1897, 2 Ch. 600, Vaughan Williams, J. (afterwards L.J.) put the matter thus:—

"Mr. Buckley, at page 245 of the 7th edition of Buckley on the Companies Acts says: 'So where a company is proceeding to do something which is *ultra vires*, a shareholder has a right in an action, on behalf of himself and all other shareholders, to restrain the company, though every shareholder but himself be acquiescent; but has no right to come for a winding-up order under the 'just and equitable' clause; and he cites *ex parte* Fox as an authority. But it is plain that the passage is a mere illustration of a previous passage on the same page, in which he says: 'There is no doubt that the 'just and equitable' clause gives the court power to wind up a company in cases not coming under any

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of the first four heads (of section 79), but there must be a strong ground for exercising the power, at any rate, at the instance of a shareholder.' Without going into details, I repeat what I said during the argument, that the stringency of the *ejusdem generis* rule has been considerably relaxed of late."

Circumstances analogous to those of the present case occurred with regard to the composition of a company which was private (see *re Yenidje Tobacco Company, Limited*, 1916, 2 Ch 431) and the Master of the Rolls, Lord Cozens Hardy, in expressing the opinion that the company should not be allowed to continue said:—

"I have treated it as a partnership, and under the Partnership Act, of course the application for a dissolution would take the form of an action; but this is not a partnership strictly, it is not a case in which it can be dissolved by action. But ought not precisely the same principles to apply to a case like this where in substance it is a partnership in the form or the guise of a private company?"

"I think that in a case like this we are bound to say that circumstances which would justify the winding-up of a partnership between these two by action are circumstances which should induce the court to exercise its jurisdiction under the just and equitable clause and to wind up the company."

The Board specially refers to the accurate and careful opinion of Warrington, L.J., in that case.

In *Bleriot Manufacturing Aircraft Company, Limited*, (32 T.L.R. Feb. 4, 1916, 255), Mr. Justice Neville made an order for winding up on the ground that the substratum of the company was gone and upon a further ground of proved misconduct by the directors, His observations upon the latter point are apt in the present case:—

"But there is another ground. Here the company has considerable capital and it is alleged that there is misconduct by the directors. It is truly said by Mr. Russell that the mere fact of misconduct is no ground for winding up. The words 'just and equitable' are words of the widest significance, and do not limit the jurisdiction of the court to any case. It is a question of fact, and each case must depend on its own circumstances. I think the moneys of the company have been misapplied, and that the company is so constituted that it is deprived of its usual remedies. This is again sufficient for a winding-up"

A passage was read from Lord Halsbury's *Laws of England* (5), 397, the authorship of which was acknowledged to be that of the late Master of the Rolls, Lord Swinfen. It is as follows:—

"The words as to its being 'just and equitable' to wind up are not to be read as being *ejusde generis* with the preceding words of the enactment."

It may be doubtful if the reference to the authorities there given are all precisely in point, but as to the view of the law there expressed, their Lordships agree with it.

This law is fully accepted in Ireland, and their Lordships refer to the judgment and the analysis of the authorities in the case of the *Newbridge Sanitary Steam Laundry, Limited*, (1917, 1 I.R. 67), by the Lord Chancellor.

In Scotland the point has been most carefully canvassed in two leading cases in Company Law. The one is the case of *Symington v. Symingtons' Quarries, Limited*, (1905, 8 Fraser, 121), and their Lordships think it not inexpedient to quote the following passages from that eminent Judge and Commentator Lord McLaren. It expresses, in their view, the correct principle of interpretation:—

"I apprehend that the true rule for determining whether general words are to be confined to things *ejusdem generis* is this, that if the general words are bound up with the enumeration by proper words of relation, then their meaning is confined to the subject-matter indicated in the enumeration, but if the general words are severed from the enumeration of particulars there is no logical reason for interpreting the one by the other.....In this Act of Parliament the general words have reference to the discretion and judgment of the court. The case put is, 'Whenever the court shall be of opinion that it is just and equitable that the company should be wound up.' That introduces a different order of ideas altogether from the conditions which precede, because these are not conditions referred to the judgment of the court, but are defined in the Act itself, and the function of the court is only to say whether the facts of the case come within one or other of the categories. I have made these observations because, while I find in the English decisions that not much weight is now attached to the *ejusdem generis* rule of construction for this clause, yet I think it desirable, at least, for my own satisfaction, to see upon what grounds the true construction can be maintained and defended."

As applying aptly to the circumstances of the present case, the following further sentences may be cited:—

"But this is not a company that is formed by appeal to the public. It is what, for want of a better name, I may call a domestic company. The only real partners are the three brothers of a family, the other shareholders having only a nominal interest for the purpose of complying

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with the provisions of the Act. In such a case it is quite obvious that all the reasons that apply to the dissolution of private companies, on the grounds of incompatibility between the views or methods of the partners, would be applicable in terms to the division amongst the shareholders of this company, and I agree with your Lordship that this is a case in which it would be just and equitable that this Company should be wound up, and the partners allowed to take out their money and trade separately if they please."

The present Lord President of the Court of Session (Lord Clyde) in *Baird v. Lees*, 1924. Session Cases, 92, discusses the section and the *ejusdem generis* doctrine in exactly the same spirit. His words are as follows:—

"I have no intention of attempting a definition of the circumstances which amount to a 'just and equitable' cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the court to wind up the company."

It only remains to apply the doctrines thus expressed to the circumstances of the present case. Their Lordships forego unnecessary details. They are of opinion that the learned Chief Justice Greaves is correct when he says that:—

"The directors in control since the death of Blackwood Rodger have, I think, laid themselves open to the suspicion that by omitting to hold general meetings, submit accounts and recommend a dividend, their object was to keep the petitioners in ignorance of the truth and acquire their shares at an under value."

The board agrees with these views. In the opinion which

they have formed, Mr. McLaren, for reasons not unnatural, had come to be of opinion that the business owed much of its value and prosperity to himself. But it appears to have proceeded to the further stage of feeling that in these circumstances he could manage the business as if it were his own. Had Mrs. Loch and Mr. Rodger or after his death Mr. Rodger's executor, obtained a dividend which year by year represented in any reasonable measure a just declaration out of the undoubted profits of the concern, they might no doubt have been content to allow this state of matters to go on, but although on one or two occasions Mr. McLaren paid trifling and fragmentary sums to Mrs. Loch, neither she nor the Rodger family have ever obtained any dividend at all. And it is not to be wondered at that in the transaction now about to be mentioned they completely lost confidence in Mr. McLaren, and had only too great justification for doing so.

It appears that Mr. McLaren viewed with the highest disrelish the testamentary arrangements made by Mr. J. B. Rodger who died in December, 1919, and he expresses his opinion upon that subject in a somewhat extraordinary letter of the 24th February, 1920, going so far as to suggest that another and prior will of Mr. Rodger ought to be substituted for his last will. It is difficult to understand what he conceived this had to do with the management of the business or the distribution of profits therein. But it is certain that Mr. McLaren then proceeded with much urgency and vigour to attempt to acquire the shares of Mrs. Loch and of Mr. Rodger's executor for himself, thereby consolidating the entire concern in himself and his wife.

The substantial fact which their Lordships think to be proved is that in 1920 the assets of that business, apart from any allowance for goodwill, very substantially exceeded the £40,000 of the company's nominal capital. A skilled accountant called in after the proceedings commenced placed the amount somewhere about £80,000, but it is sufficient to take the facts simply as their Lordships have just put them.

This most satisfactory state of the company's finances was fully realised by Mr. and Mrs. McLaren.

Upon the 1st May, 1920, Mr. McLaren, Mr. Yearwood and Mrs. McLaren, at a director's meeting agreed:—

"That the financial position of the firm was such that the directors unanimously agreed that they could with every confidence partly discharge the chairman's deferred salary; to meet this it was agreed that the £12,500 5 per cent. War Loan be transferred to his name and become his property absolutely including the six months' interest now due

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It was further agreed that the chairman's salary be increased from £1,100 to £2,000 per annum from January 1st, 1920."

(It may be noted that the company's own minutes form the most important evidence in the case, and that, owing probably to the view of the statute taken as already mentioned, they are not referred to in the judgment in the Court of Appeal).

No notice was given to the respondents, as shareholders, of this piece of business being contemplated, and no notice was given of what had been done. Four days after this extraordinary transaction, Mr. McLaren wrote to Mrs. Loch's husband a letter dated the 5th May, 1920, proposing to her that £10,000 should be given by him as the cumulative value of Mrs. Loch's shares and Mr. J. B. Rodger's executor's shares. These shares in all amounted to one-half of the capital of the company, namely, £20,000, and as already mentioned, it is evident that the true value of assets much exceeded this amount. The proposal was to buy Mrs. Loch and the Rodger family out for £10,000. But a further suggestion, which in some way seems to have been mixed up with the umbrage felt by Mr. McLaren in regard to the contents of Mr. Rodger's will, was made, and that was that Mrs. Loch should be a participant in a scheme whereby the £10,000 to be paid should be distributed—£8,000 to herself and only £2,000 to the Rodger family.

Their Lordships do not desire to characterise these suggestions in the language which perhaps they fully deserve. The Rodger family, entitled to one-fourth of the holding in the company, nominally £10,000, but in reality of a much higher value, were to be bought off for £2,000, and Mrs. Loch was to be the agent in this scheme. No confidence in the directorate could survive such a proposal. To crown all this, as was afterwards discovered, the £10,000 could be comfortably paid by Mr. McLaren out of the £12,500 which, four days before, he and his wife and clerk had voted to himself out of the funds of the company. Their Lordships express no surprise at the instant repudiation of Mr. McLaren's proposals by Mrs. Loch—a repudiation which is creditable to her—and at the application for a winding up of the company being made. Upon the principles already set forth in this judgment that application must succeed. The broad ground is that confidence in its management was, and is, and that most justifiably, at an end. A further narrative of the facts is unnecessary, although some of them are grave.

It must, however, be said in justice to Mr. McLaren that after the parties were at arm's length the £12,500 was refunded and the minute rescinded. Further, being advised that the increase of salary from £1,100 to £2,000 was wrong he abandoned the same from February, 1922, and at their Lordship's bar, he being

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present, an assurance was given that the two years' increase already drawn, namely £1,800, would forthwith be paid to the company.

Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs, and the order of Court of Common Pleas of Barbados restored with costs in both courts below.

RATANEE, Appellant, (Plaintiff),

v.

UMRAWSINGH AND OTHERS, Respondents, (Defendants).

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

1923. NOVEMBER 12, 21.

BEFORE SIR A. V. LUCIE-SMITH, C.J., SIR HERBERT GREAVES, C.J.,

AND G. O'D. WALTON, C.J.

Real Property Ordinance No. 60—Voluntary settlement registered in general registry —Not on register under the Real Property Ordinance—Not effectual to pass land under Real Property Ordinance—Incomplete gift — Will by the settlor—Executors, also the trustees under the settlement—Statute of Uses—No Estate in Trustees—Whether the trusts declared in the settlement fastened on to the executors—Breach of trusts—Mortgage by personal representatives—Whether fraud on the part of the mortgagees—Sale by mortgagees —Costs—Appeal as to—No cross notice—Effect of.

R, the owner of lands under the Real Property Ordinance, before her death executed a deed of settlement purporting to convey all her real estate to trustees upon the trusts therein mentioned. This deed was prepared as an ordinary voluntary settlement and without any reference to the Real Property ordinance; and there was no memorandum of transfer passing these lands to the trustees. The deed was registered in the general registry but not entered in the register book under the Real Property Ordinance. R. made a will limited to her personal estate and appointed as executors the defendants Umrawsingh and Daryawsingh who were named as trustees in the deed of settlement. By the terms of the deed the land was conveyed unto the trustees to the use of Salayha.

Umrawsingh and Daryawsingh, having proved the will, then executed a proper memorandum of mortgage under the Real Property Ordinance to W.A.M. and H.B.M. as security for \$2,500. The executors got themselves endorsed as the registered proprietors, and the mortgage executed by them was registered and endorsed on the same day.

The mortgagees in default of payment of interest put up the properties for sale R. on behalf of S., the beneficiary under the deed of settlement, claimed to have the transaction set aside on the grounds of fraud.

Russell, J., gave judgment for the defendants. The plaintiff appealed.

Held, that there was no valid trust created by the deed of settlement, it was at most an incomplete gift, the deed was a voluntary deed, and equity would not complete an incomplete voluntary conveyance

Macedo v. Stroud (1922) 2 A.C.330 applied,

Per Lucie Smith, C.J.: The Court would not consider an application by the respondents to vary an order made as to costs when no notice was given that such a point would be raised.

The facts and arguments thereon sufficiently appear from the judgments.

William Savary, acting Solicitor General, and *W. BlacheWilson*, K.C., for the appellant.

L. A. P. O'Reilly, K.C. and *H. P. Wells* (*G. O. M. O'Reilly* with them) for the respondents Murray,

Cur. adv. vult.

Sir A. V. LUCIE-SMITH, C.J.: One Ratanee on the 11th January, 1920, executed a deed which after reciting that she was possessed of certain lands and that she had agreed to convey certain parcels of land in the following manner and subject to the following trusts and settlements witnessed that in consideration of the premises she conveyed the said lands unto the said trustees for the use of Salayha but in the event of her death before marriage part of the said land to go to Murawsingh, Daryawsingh and Ratanee in fee simple and as regards the rest of the land unto the trustees to the use of Zobieda, but in the event of her death before marriage unto and to the use of Amina Ghany in fee simple. Part of the lands, so conveyed were lands registered under the Real Property Ordinance. It is only with regard to these kinds the action was brought. On the same day, 11th January, 1920. Ratanee made a will by which she appointed Umrawsingh and Daryawsingh, executors thereto. It seems to be admitted that Umrawsingh, the executor, is the same person as Murawsingh mentioned in the deed. Ratanee died on the 18th January, 1920, and her will was duly proved. It is remarkable that Umrawsingh, Ratanee and Daryawsingh are parties to the deed but nothing further is said about them and the deed goes on to convey the land " unto the said trustees," there is no mention of trustees before or afterwards in the deed. The deed is admittedly a conveyance to Salayha. Such a deed is inoperative to pass land registered under the Real Property Ordinance.

It is contended that although the deed is inoperative as a conveyance, it is a declaration of trust, that Umrawsingh and Daryawsingh are the trustees, and that the property having vested in two of them as executors there is a completed trust. There are no trusts declared in the deed. The deed is an ordinary conveyance to some unnamed persons who are called trustees for the use of Salayha. The conveyance is a conveyance to Salayha, the so-called trustees being simply a conduit pipe. There is nothing to show that the executors are the persons called the trustees in the deed.

It is further contended that the deed of the 11th January, 1920, is for valuable consideration and not a voluntary deed, on the ground that because there was a mortgage on the land and if the land was legally transferred the transferee would under the Real Property Ordinance be liable to indemnify the mortgagor, therefore there was a consideration. Certain cases were referred to but most of those cases relate to a valid transfer relating to leaseholds by which the transferee undertook the liabilities of the transferor under the lease. Only one case, *in re Charters* (1923) B. & C. R. 94, referred to the transfer of a mortgaged property. In that case the transferee

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expressly took on herself a personal liability on the covenant contained in the mortgage. In this case there is no valid transfer and no liability attaches to the minor Salayha. It is difficult to conceive how a minor of some ten years old could take any such liability on herself. I am therefore of opinion the deed was a perfectly voluntary one. The deed being voluntary and incomplete has no effect: *Macedo v. Stroud* (1922) 2. A.C. 330. It is however argued that the property having vested in Umrawsingh and Daryawsingh as executors of Ratanee the deed is completed and they are bound to carry out the alleged trust to hold the land for Salayha, On the face of it the deed is not a declaration of trust, it is clearly an attempt to transfer the property to Salayha. Any such attempt it is clear from the cases collected, under *Ellison v. Ellison* (1802) 6 Vesey, 656, in White and Tudor's leading cases, cannot be held to be a declaration of trust. If Salayha the person who was to have been benefited had been made executrix there might have been an equity in her to retain the property.

As regards the mortgagees they have taken the mortgage from the persons appearing on the register as the owners and it is clearly laid down in the ordinance that only fraud on their part can affect the validity of the mortgage. I cannot hold that there is any evidence of fraud, or dishonesty on their part so as to invalidate the mortgage. The fraud alleged is that the clerk of the solicitor who acted for the mortgagees was aware of the alleged deed of trust. If he were I do not think that would affect the mortgagees. Further, it is clear the deed was inoperative and even if the mortgagees themselves knew that there was any inoperative deed and still took the mortgage that would not in my opinion be dishonesty on their part. It is said that the money was not required by the executors for the purposes of the estate. By the Real Property Ordinance, section 130, it is not the duty of the mortgagees to see to the application of the money. The next of kin or heirs can compel the executors to render accounts of their administration, by law they are bound so to do. They are liable for all moneys that have come into their hands and presumably for maladministration. This action, however, is for carrying out the trusts of the deed of January, 1920, and the setting aside of the mortgage to the defendants Murray.

On behalf of the respondents the court is asked to consider whether the learned judge in the court below exercised his discretion rightly in not allowing costs to the mortgagees. No notice was given that such a point was to be raised in these proceedings as is required by the rules. I therefore do not consider in any way this application.

In my opinion this appeal should be dismissed with costs.

SIR HERBERT GREAVES, G.J.: I agree.

G. O'D. WALTON, C.J.: One Rataneé shortly before her death executed a deed bearing date 11th January, 1920, by which she purported to convey certain lands to the respondents—Umrawsingh, Daryawsingh and Rataneé, the next friend of the appellant, in trust for the infant Salayha. Other lands are mentioned in the deed, but the land which concerns this appeal consists of nine quarries of land bounded as therein described. I use the expressions "trustees" and "trust" for the sake of convenience, but there was really no trust created as will appear later.

These nine quarries of land were held upon title, registered under the Real Property Ordinance No. 60, and amending ordinances. Land registered under this ordinance can be conveyed only with the formalities and in the mode as by this ordinance prescribed. It is not disputed that this deed being in the form of an ordinary assurance of freehold property under the general or ordinary law would not be effectual to pass any estate or interest in the land with a registered title. And, therefore, viewed as a conveyance of the nine quarries of land referred to, it is inoperative. On the same day, the 11th January, 1920, Rataneé also executed a will, this will was lost, and by solemn form proceedings, it was constructed from the evidence and admitted to Probate. The will related only to personally, and the executors appointed were Umrawsingh and Daryawsingh two of the trustees named in the deed. By virtue of the Real Property Devolution Ordinance, No. 35 of 1913, all the property of the testatrix, both real and personal, undisposed of at her death would vest in the executors for the purposes of administration. It is argued as a result of this position that although the deed is inoperative and of no avail considered as a deed because it did not legally pass any property, yet it should be considered as the creation of a trust, and as the legal estate passed to the executors who were also two of the three trustees under the deed, that they should be fastened on and made to carry out the trusts imposed, and in support of this contention the case of *Strong v. Bird* (1874) L.R. 18, Eq. 315, was cited and relied on.

It is old and settled law that equity will not compel the perfection of an imperfect gift. It was contended, during the case, that the deed was based on valuable consideration, because the lands in question were conveyed subject to a mortgage and imposed an obligation. This proposition appears to me to have no weight, and was practically abandoned as the case proceeded. The position remains that we are dealing with an imperfect gift, not binding on the donor and therefore not binding on her personal representatives.

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In my opinion the case of *Strong v. Bird* has no application having regard to the facts and circumstances of this case, the ratio of the decision was that there was a continuing intention to give, and equity could not be invoked to rebut the evidence of such intention clearly expressed, a legal transfer having taken place subsequently. But in this case we are invited to invoke the aid of equity to complete and make operative a deed hopelessly inoperative, and convert this imperfect instrument into a perfect one, because the legal estate has happened to devolve upon two of the trustees named in it, Umrawsingh and Daryawsingh. This argument has proceeded on the footing of the existence of a trust: The deed does not in its terms create a trust. But it states "The said Ratanees as beneficial owner hereby conveys all and singular the nine said quarries of land unto the said trustees for the use of the said Salayha Khartoon." The result of these words, having regard to the operation of the statute of uses, would be, that the trustees would take nothing, and the property would vest for some estate in the girl Salayha. The so-called trustees are not, and could not be charged with any obligation or made to discharge any duties.

The more the case is examined the more apparent does it become how impossible the situation is, brought about by some bad conveyancing.

Having arrived at the conclusion stated, the remainder of the case resolves itself. The executors would be entitled to have themselves registered and be in a position to validly mortgage. Defendants Murray advanced their money on the security offered; I do not think that actual fraud or any of the extended conceptions of fraud can be applied to their conduct. If the executors have misapplied or squandered the estate under their administration then I hope they will be called to account. But this action is to settle whether the plaintiff had a claim or not under the deed. Notwithstanding the findings in respect of the defendants Murray, I do not think the court should exercise their discretion and disturb the order as to costs.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors for appellants, *Oliver Fitzwilliam & Co.*

Solicitor for the respondent Umrawsingh, *J. A. Procope.*

Solicitors for the respondents W. A. Murray and H. B. Murray,

T. M. Kelshall & Co.

TRUSTS OF W. SCHOENER, DECEASED.

IN THE MATTER OF THE TRUSTS OF WILHELM SCHOENER,
DECEASED,

AND BETWEEN

IRIS MARQUEZ AND HILDA SCHOENER AND STEPHANIE
MURPHY (Plaintiffs), Appellants,

AND

LUDWIG HENRY SCHOENER SCOTT, EMILY MARY
PRODGERS and MARY ANASTASIA HOLLER,
(Defendants), Respondents.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

1923. NOVEMBER 15, 16, 19, 20, 21, 22, 23, 26, 27; 1924. JANUARY 23.
BEFORE SIR HERBERT GREAVES, C.J., SIR CHARLES MAJOR. C J., AND
G. O'D. WALTON, C.J.

Partnership —Will of deceased partner—Trustees—Power to sell— Option to surviving partner to purchase deceased partner's share—Exercise of option—Whether option must be exercised in writing—Sale not as at date of exercise of option—Sale as at testator's death—Matter of convenience—Survivor executor of deceased partner—Valuation— Whether properly made — Testator's stock book accepted as correct—Stock book written up by testator's trusted clerks—Abandonment of valuation—Agreement for second valuation —Option exercised modo et forma—Stock taken—Profits given—Second valuation less than the first—Agreement to revert to first valuation—Compromise — Whether trustees had a power to compromise — Whether surviving partner disclosed fully—Conflict of interest and duty—Whether he should have disclosed that he hoped to get a certain sum of money from a creditor for a portion of the partnership property in part payment of her debt— Whether disclosure of this might not have been considered improper by the valuers who may have thought of fixing a higher value—Goodwill—Provision Business—Personal qualities of partners—Whether there is any goodwill for such a business in Trinidad— Sale to surviving partner in accordance with final arrangement— Debts due by deceased to partnership not deducted from amount mentioned in deed of purchase—Meaning of share—Ultimate beneficial interest of partner—Rectification of deed—Equity consider the kernel and true nature of a transaction—Settlement accounts rendered—Debts due by deceased to partnership deducted from his share as mentioned in deed—Accepted as correct—Scrutinised by accountant solicitor and competent counsel— Not questioned for 20 years—Action to set aside purchase—Loss of valuations—Duty of surviving partner to keep them carefully—Loss the cause of the protracted litigation— Successful trustee therefore deprived of costs.

The respondent Scott, in partnership with his uncle Whelm Schoener carried on a provision and commission business under the style or firm of Schoener & Co. Wilhelm Schoener died on the 10th May, 1905, leaving a will in which he gave his trustees a discretionary power to sell the business and also an option to the surviving partner Scott to purchase the business at a valuation as in the will indicated. The respondent Scott was also one of the executors and trustees of the will. He, having elected to purchase his deceased partner's share, proceeded to have this share valued. He did not exercise an option in writing and the share was valued as at the date of the testator's death. No stock was taken by the valuers, the stock books of the firm were accepted as correct. Stock was taken on the 31st May, 1905, by trusted clerks of the deceased, and there were entries in the books in the deceased's handwriting up to a few days before his death. The other trustees were dissatisfied with the valuation made by the valuers, they especially called

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attention to the fact that nothing was allowed for goodwill. An agreement was then drawn up whereby two new valuers were appointed. An umpire was also named in case of disagreement. The new valuers took stock, and valued the business not at the time of the testator's death but at the date of valuation. They allowed nothing for goodwill. This second valuation was found to be less advantageous to the heirs of the deceased than the first. At the request of Sir Henry Alcazar, K.C., Scott agreed to revert to the first valuation. On the 6th January, 1906, a deed was drawn up embodying the terms of the sale. Therein the share of the deceased is stated as being \$48,473.40. The debts due by the deceased to the firm amounting to over \$62,000 were not deducted therefrom. Subsequently, settlement accounts were submitted by Scott to his co-trustees and accepted by them as correct. These accounts showed the two items. The husband of one of the co-trustees was a qualified accountant and the accounts were only agreed to after strict scrutiny and close investigation. In 1903 Scott filed an originating summons in connection with the estate and he rendered accounts. The co-trustees were represented by a competent King's Counsel. The valuations were delivered to him and the settlement accounts. He found no ground on which to challenge the transaction. The appellant alleged that Scott did not disclose certain facts to the valuers particularly that he expected to get \$30,000 by the sale of Farr's yard. The valuers valued it at \$27,500. When Scott waived his rights under the second agreement he paid the heirs \$3,553.43 more than otherwise he would have paid. Evidence was led in this action that a provision business in Port-of-Spain possessed no goodwill, that the allowances for good, bad and doubtful debts were reasonable, and that the profit made by Scott on the transaction was not unreasonable considering that he took over liabilities amounting to \$317,000 and that if the venture had failed his private property valued at over \$70,000 would have been lost. In 1922 the plaintiffs brought this action against Scott to have the deed of 1906 set aside on the ground of fraud and undervalue and also on the ground that the terms of the option had not been exercised *modo et forma*. During the hearing the issue of non-disclosure was raised. Scott was unable to produce the valuations at the hearing as they were lost. The valuation made by the first set of valuers was re-constructed by Mr. Albert Kerr, a chartered accountant, from the books of the firm and from the documents produced by Sir Henry Alcazar. Scott made entries in his books as to the effect of the valuations at a point of time when the valuations were certainly in existence and before the originating summons proceedings were taken, *Held*, affirming the judgment of Deane, J., that the sale could not be impeached, that the option was properly exercised, that the respondent Scott could not have disclosed the existence of a mere hope that he might get \$30,000 from the sale of Farr's yard, and that no judgment could be given on the deed against Scott as payment was made by set-off when the settlement accounts were rendered by Scott and accepted by the co-trustees as correct.

Appeal from the judgment of Mr. Justice G. C. Deane while sitting as Junior Puisne Judge of the Supreme Court of Trinidad and Tobago. His judgment was as follows: "This is an action brought by all—except one—of the beneficiaries under the will of William Schoener against the trustees of the said will. The exception is Mrs. Proegers, the widow of Wilhelm Schoener, who is herself one of the trustees under the will and whose interests are thus divided. While nominally one of the defendants her sympathies are entirely with the plaintiffs and in the course of the case she has in fact ranged herself with the plaintiffs in attacking the defendant Scott whose conduct as trustee is the main subject of this enquiry.

Wilhelm Schoener was at the date of his death on the 10th

May, 1905, a partner with a $\frac{3}{4}$ share in the business of Schoener & Co., a general provision and lumber business in Port-of-Spain the defendant Scott who was known at that time as Ludwig Henry Fridolin Schoener being the only other partner. The business had been founded in 1872 by the father of the defendant Scott who had been the sole owner of it until 1880, when he took his brother August Schoener into partnership giving him $\frac{1}{4}$ of the profits. The defendant's father died in 1882, and his trustees carried on the business for two to three years in partnership with August who, early in 1885, bought their interest in the business. He then took his brother Christian as a partner into the business giving him $\frac{1}{4}$ share. He died 16th December, 1885, and Christian carried on the business in co-partnership with his trustees, of whom he himself was one, until 31st December, 1888, when he bought out his brother's share. He carried on the business alone till 1st January, 1891, when he then took his brother Wilhelm into partnership on the usual basis— $\frac{1}{4}$ share of profits. This arrangement continued until 1897, when the $\frac{1}{4}$ was increased to $\frac{1}{3}$. After Christian's death on 7th October, 1899, his trustees entered into an arrangement with Wilhelm by which the business was carried on in co-partnership in equal shares down to 31st October, 1902, when Wilhelm in turn purchased Christian's share, and on 1st November, 1902, took the defendant Scott into partnership on the usual terms, viz., that he should be entitled to $\frac{1}{4}$ of the profits of the business. It will be apparent therefore that ever since its foundation this business had been passed, on what may well be considered stereotyped lines, from member to member of the family, and it is certain that the traditional procedure on the transfer of the business by the trustees of the deceased partner to his surviving partner was in the mind of Wilhelm when he gave by his will elated the 3rd November, 1902, probate of which was granted on 7th July, 1905, an option to Scott to purchase his share in the business at any time within three years from the date of his death, at a price to be fixed by two valuers, one of whom should be appointed by the other trustees of the will.

It is around the circumstances of this sale that controversy rages, and it will be well therefore to examine closely into them.

First, it will be noticed that the sale was by trustees to co-trustees. Now, as was observed by Lord Eldon in *Cook v. Collingridge* (1825) 27, Beavan's Reports, 456, one of the most firmly established rules in that persons dealing as trustees and executors must put their own interests entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves, that the Court will not enquire whether it has been done or not, but at once says such a transaction cannot stand.

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Where, however, as in this case, a right to buy is expressly given to a trustee by the will, this rule does not apply in its original strictness but a trustee is still bound to watch carefully that he does not allow his private interest to override his duty as trustee. If he acts fairly and honestly in accordance with the terms of the will, the transaction cannot be impeached: if, however, he takes any unfair advantage of his position the Court will not scruple to set aside the transaction.

The first question then that falls to be decided is, did Scott act fairly and honestly in buying his uncle's share in the business. In the consideration of this question the terms of the will dealing with the sale of the business are very material. They are as follows : "And for the purpose of converting it into money the business of Schoener and Co, or my share therein my trustees may, if they think fit, wind up or concur in winding up the same, and for the purpose may make and concur in making arrangements and compositions with debtors or persons under contract with the firm and may dispose of the said business or my share therein by valuation or otherwise, and generally on such terms as they shall think fit with such powers to settle any accounts and to accept any statements of accounts whether with or without the production of any vouchers, or other evidence and to accept payment, or allow any agreed or stipulated sum in satisfaction of all or any of my rights and liabilities, and to accept or concur in accepting payment of my share or the whole of such business as the case may be by such instalments upon such terms and in such manner as they think fit.

"Provided, however, and I hereby declare that the said Ludwig Henry Fridolin Schoener shall have the option at any time within 3 years from the date of my death to purchase my share in the said business and the value thereof shall be determined by two valuers one of whom shall be appointed by my other trustees, and I further declare that the purchase money shall at the option of the said Ludwig Henry Fridolin Schoener be retained as a loan payable in 5 years by yearly instalments under such conditions with or without any security and at such rate of interest, whether fixed or varying with the profits as my other trustees shall think fit without being responsible for any loss occasioned thereby."

Now, undoubtedly, the strictly proper course would have been for Scott to give notice in writing to his co-trustees that he thereby exercised his option to purchase as from the date of the notice and for valuers to be appointed who would value the business as at that date giving the beneficiaries the benefit of any profits made by the business up to that particular date or debit-

ing them with any losses. No such formal notice of exercise of option seems, however, to have been given, but it appears to have been informally agreed by Scott and his co-trustees that he should purchase the business as at the date of 31st May, 1905. This date no doubt was chosen as the earliest convenient day after the death of Wilhelm Schoener. The co-trustees were very anxious to have nothing to do with carrying on the business. The accounts and entries in the books on which the valutors would rely had been (practically all of them), since the balance sheet of 1904, made under the supervision of Mr. Wilhelm Schoener himself, and, no doubt, it was felt that the task of the valuers would be greatly simplified if they had before them statements and accounts in the books which had been known to, and acquiesced in, by the testator.

The will, however, does not call for an exercise of the option in writing, and in the absence of any such stipulation, I do not think I can say that the co-trustees were doing anything contrary to the directions of the will. They were in fact exercising the general discretion allowed to them by the will in determining the details of the transaction. The further objection that it was impossible for the valutors to value in August as on 31st May does not seem to me well founded. Such a transaction is described by a witness who is a chartered accountant as a commonplace of valuation and I see no difficulty myself.

The valutors chosen were Mr. Bernard for the co-trustees and Mr. Legge for Mr. Scott. These same two valutors had valued the share of Christian Schoener when Wilhelm Schoener bought; they were therefore well acquainted with the details of the business and the mode in which a former partner's share had been valued. Mr. Bernard held a responsible position with the New Colonial Company while Mr. Legge was an accountant of good repute, The latter is now dead and I certainly do not feel disposed to draw any sinister conclusion as to his honesty and the conscientious way in which he performed his duty as valuator because of the fact to which my attention has been directed, viz., that about a year after the sale a small account with which he stood debited in the books of the firm was written off. Mr. Legge may not have been blessed with a large share of this world's goods, but poverty is no proof of dishonesty and it is hardly conceivable that if the remission of a small debt were the wages of his dishonesty he would have waited so long for it, or would have consented that an enduring record of his shame should be enshrined in the books of the firm.

Is it not simpler to believe that Mr. Scott of his own accord cancelled the indebtedness of a needy customer for whom he entertained kindly feelings, and that such cancellation had nothing

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to do with the manner in which Mr. Legge had performed his duty of valuation? In any case Mr. Legge was acting for Mr. Scott, and Mr. Bernard, who was acting for the co-trustees, agreed with him, and nothing has been or can be suggested derogatory to Mr. Bernard's honour. And indeed the subsequent course of events offers a complete vindication of Mr. Legge. After the valuation made by Mr. Bernard and himself was completed, Mrs. Prodgers and Mrs. Holler, the co-trustees, refused to be bound by it. Thereupon, Mr. Scott, abandoning his rights under it, agreed that two new valuers should be appointed, viz., Mr. McLelland for himself and Mr. John Gordon for the co-trustees. These gentlemen of the highest standing in the community went carefully into the matter and actually valued at a less sum than Messrs. Bernard and Legge. Thereupon, at the earnest request of Sir Henry Alcazar who was advising the co-trustees and who reminded Mr. Scott that the beneficiaries under the will were his uncle's children and that he should deal generously with them, Mr. Scott consented to give up his rights under the second valuation, and to fall back upon the first once more.

Now the co-trustees under the will were Mrs. Prodgers, the widow of the testator and James Wainwright Spiers. Mr. Spiers renounced and Mrs. Holler, the mother of Mrs. Prodgers was at the instance of Mrs. Prodgers appointed trustee in his place. Mr. Scott had objected to Mrs. Holler at first, in some measure on the ground of her sex, but chiefly because she was married to a gentleman who was carrying on a similar business to the business of Schoener. He, however, gave way to Mrs. Prodgers' wishes and Mrs. Holler was appointed trustee by deed, dated 25th July, 1905. Mrs. Holler herself was a woman of great force of character, and in her husband she possessed an adviser who was not only as we have seen well versed in the provision and lumber business, but was, in addition, a skilled accountant and a most careful man. The parties were, therefore, at the time on a not unequal footing in any business negotiations. Any deficiencies in Mrs. Prodgers' business abilities being amply supplied by Mrs. Holler and her husband who advised her right through and without whose advice she did not act. At first Mr. Aucher Warner advised, was the legal adviser of all parties, but after the first valuation by Messrs. Bernard and Legge, Mrs. Prodgers and Mrs. Holler, feeling dissatisfied, consulted Sir Henry (then Mr.) Alcazar and, thenceforward, acted under his advice until the transaction of the sale of the business had been carried through. Sir Henry states that in choosing Mr. Gordon to represent them on the second valuation, Mrs. Prodgers and Mrs. Holler were actuated by the belief that it was likely that he would be very hostile to Scott. Mrs. Prodgers and Mrs. Holler had therefore placed themselves at arms' length

in dealing with Scott, and indeed their attitude right through is totally inconsistent with the fraud and collusion with Scott that is suggested against them. Not only was Mrs. Prodgers' interest totally opposed to any such collusion, inasmuch as she, as sole beneficiary under the will at that time, was the one chiefly concerned to get as much as possible from Scott, but all the evidence points to the fact that she with Mrs. Holler disputed every point and that they only signed the deed of transfer to Scott when they were satisfied that no better bargain could be made. If any transaction can ever be said to be free from any suspicion of collusion between the parties to it, this is such a transaction—both parties were at arms' length, both parties had competent advisers, they both understood quite well what they were doing: the transaction was discussed backwards and forwards, the details most minutely scrutinised by Mr. Holler and Sir Henry Alcazar, and finally the arrangement was embodied in the deed of 6th January, 1906, by which the share of the testator in the business was transferred to Scott for the sum of \$48,473.40.

In *De Montmorency v. Devereux* (1840) 7 Clark & Finelly, 188, it was laid down that it was to be assumed that legal advisers in discharge of their duty to their clients investigate suspicious transactions and satisfy themselves, before they approve them, that it is for the clients' benefit to confirm them. Not only does this presumption apply with regard to Sir Henry Alcazar, but it is to be noted that in 1908 in action No. 254 of 1908 the parties were in litigation with respect to this very matter; that on that occasion the late Mr. Pollard, K.C., a gentleman notorious for the painstaking thoroughness with which he investigated any matter in which he was concerned, represented Mrs. Holler and Mrs. Prodgers and that he found no ground on which to challenge this transaction. I am of opinion that the sale in this matter was properly conducted and cannot be impeached on the ground of the arrangements made to carry it through. But the substance of the transaction falls to be considered also, because although valuers may act perfectly fairly according to their lights, yet if it can be shown that the valuation is manifestly unjust as being at a gross undervalue, or that the valuers were deceived or misled, or did not take into account things which they should have, the court would not consider itself bound by their findings. And here, at the outset, we are faced with the difficulty that the valuations have been lost, neither the valuation of Messrs. Bernard and Legge, nor the valuation of Messrs. Gordon and McLelland are available; and necessarily after so many years the memories of the witnesses with regard to them cannot be very much relied upon. It is argued that these valuations being in the nature of documents

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of title, should have been most carefully preserved by Mr. Scott, and their absence must excite strong suspicion against him, Now there is no doubt that these valuations were in existence for many years, that they were seen by all the parties, and their legal advisers right up to 1908-1909 and that there was no secret about their terms. Entries made in the books of the firm, therefore, with regard to them and which purport to give them effect cannot be dismissed as mere self-serving entries and therefore of no value, since they were made while the valuations were in existence, and it cannot be supposed that at the date at which they were made in 1906, Mr. Scott would have had any motive for making untrue entries in his books unless at that early date he had already made up his mind to destroy the valuations. This to me, is unthinkable, all the evidence tends to establish that the valuations have been unfortunately lost, and I think we may feel sure that the entries represent the real facts especially as they are supported entirely by the documents produced by Sir Henry Alcazar and by his evidence. I am fortified in my opinion by the fact that Mrs. Prodgers, who was in court during the whole trial was not called to deny the truth of the entries made by Mr. Scott, which she would most certainly have done had she been able—and which record the whole transaction as it occurred.

It is contended that the account of the valuation given by the books ought not to be accepted, because if the account is true the business was sold at a gross undervalue, that the valutors in effect took Mr. Wilhelm Schoener's capital account to represent his share in the business and so did not take into account the goodwill. Now undoubtedly the argument that in a business of this sort making very large annual profits, able to divert moneys to the purchase of real estate and to run upon very small capital there must be something substantial in the nature of a goodwill, is at the first blush very attractive, and I must confess that on *a priori* grounds I was willing to attach much weight to it. The fact however that in all the successive transfers of this business there has never been a mention of any payment on account of good will, and the evidence of Mr. Kerr and Mr. Huggins have convinced me that there was no goodwill of any substantial value attached to this business. The question of goodwill was certainly raised by Mrs. Prodgers before McLelland and Gordon's valuation was made, and it seems clear that these experienced commercial men allowed nothing for it, their valuation being admitted to be much less than Bernard and Legge's.

The fact again that the net profits of the business fell so greatly immediately upon the death of Wilhelm Schoener points very largely to the conclusion that the prosperity of the business depended chiefly upon the personal qualities of the partners,

their popularity and activity as salesmen, and that apart from this there was very little, if anything, to recommend this business as a going concern over a rival business started by the surviving partner.

Certainly, I am not prepared to say that the valuation made by Bernard and Legge which has been reconstructed by Mr. Kerr from the books and from the references to it to be found in the documents found by Sir Henry Alcazar is to be rejected as impossible because it allowed nothing for goodwill.

Again, it is contended that the amounts deducted by way of allowances were so excessive that it is impossible to believe that valuers would have sanctioned them. Mr. Kerr states that the amount allowed works out at 20% and that that amount in his opinion was a fair deduction. He states "looking at the books and having regard to the liabilities assumed by Scott I say that the amount found by the valuers as the share of W. Schoener was generous and fair." He has had the experience of the transfer of many businesses and his opinion is entitled to respect. It has to be remembered that Mr. W. Schoener himself had written to Mrs. Lina Schoener in 1902, after he had taken over that he thought he had done very well; if the business had been sold as a going concern she would have got 60%. Allowances have to be made in accordance with the state of the market, condition of the property, &c, of all of which facts the valuers were most competent to judge, they were men skilled in the class of business, and unless the deductions are such as to shock the conscience one would hesitate long with the limited knowledge available to one now, before saying they were wrong.

Then, again, it is said—but here is a business that was giving tremendous profits every year, and yet when the senior partner entitled to 3/4 of the profits retires, far from getting anything as his share, his heirs have to pay to enable him to get out of the business.

Let us examine the contention and see how much truth there is in it. When W. Schoener took over the share of Christian Schoener on 31st October, 1902, on the valuation made on behalf of the heirs of Christian Schoener by Messrs. Bernard and Legge his capital account amounted to \$27,849.53. He assumed a liability to the estate of Christian Schoener of \$215,552.02. He took Scott into partnership on the 1st November, 1902, on the basis of 1/4 of the profits of the partnership, but he excepted from the partnership two estates, St. Mary's and Mary Vale which had been developed by the firm of Schoener & Co., and stood indebted to the business at \$51,927.96. While excepting the estates from the operation of the partnership he did not exclude these debits by the estates from the assets of the business; that is quite

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clear since these debits appear in the yearly balance sheets prepared under the direction of Wilhelm Schoener and interest at 6 per cent, on them was credited to the firm, Scott being credited with 1/4 of the amount as his share. The balance sheet prepared on 31st May, 1905, after his death which was really the one on which the valutors acted after verifying the figures, shows his capital account at \$74,777.08 and Scott's capital account at \$8,543.11. The liabilities of the firm amounted to \$269,965.74 and the assets including, of course, the debts due on account of the estates which were now about \$65,000 were \$353,285.93. These assets were written down by the valutors to \$318,000 roughly with the result that the capital account of Mr. Schoener which had stood at \$74,777.08 was reduced to \$48,473.40 while Scott's capital account became a minus quantity, he owing the business \$224.78. But, of course, the \$66,000 owed by the estates had to be paid by Mr. Schoener when a settlement took place, and this meant that his heirs would have to pay the difference to get out of the firm. Does that mean that the beneficiaries under his will got nothing? On the contrary, they received as his share in the business a sum which very largely contributed to give the estates free from debt; while they were indemnified against the claims of all creditors of the business, and were relieved of the risk of carrying on a business which they did not understand, a matter to which they attached the utmost concern : these were substantial benefits, and I feel sure were so considered by the co-trustees and by Sir H. Alcazar and Mr. Holler under whose advice they were acting.

And was Mr. Scott on his side getting more than a fair bargain? He assumed liabilities of \$269,965.74, and was fixed with the duty of making large annual payments to Mrs. Christian Schoener in liquidation of the debt to her, and had to pay Mr. Schoener \$48,000, a total roughly of \$317,000. On the other side he received \$353,000, about \$8,500 of which roughly had belonged to him under the partnership or roughly \$344,000. This total, it has to be remembered, however, was made up of real property some of doubtful value: of goods which had to be sold and the prices of which were subject to variations and fluctuations in the market, and of debts good, indifferent and bad. The allowance of \$27,000 does not really seem unreasonable to me under the circumstances After all when people buy a business they do not buy it for the sake of their health but to make a profit thereon, and the figure fixed by the valutors does not seem to me to allow for an unreasonable profit on the transaction as a whole.

But it is objected on behalf of the plaintiffs that the transaction as carried through was not the sale of a share authorised under the will, and thereupon must be set aside. A share, runs the

argument, is the ultimate beneficial interest of a partner in the surplus of the assets of a firm over its liabilities—this can only be discovered after a final account has been taken between the partners *inter se* and an adjustment made between them with respect to their obligations towards each other and the firm. It seems to me that the shares of the different partners in this concern were ascertained by the valutors exactly on these lines; they took account of the assets of the firm and of the liabilities of the firm and they credited the partners according to their respective shares of the surplus, and the debt due by the estates was treated entirely as a notional debt and brought to account; and the valutors then informed the partners what they found each was entitled to as his share of the surplus of assets of the firm over liabilities. The adjustment by which the partners had to settle up the debts due by each personally to the firm was necessarily a transaction which had to follow upon the other transaction. It seems to me that there is no difference in saying to a man your share is £20, but you owe £10, and in telling him you own £10—the result so far as the man is concerned is the same; he is entitled to £10. In this case the valutors apparently said to the co-trustees Wilhelm Schoeners share is \$48,000: but he owes on the estate \$62,000, you will have to pay \$14,000 to get out of the business with your estates free. Sir Henry Alcazar says he understood quite well that that was the effect of the valuation: and all the letters and documents support him in this view and as to the further fact of which he says he is quite sure that Mrs. Prodgers and Mrs. Holler also knew it. And what is to my mind convincing evidence of the truth of this assertion is that Mrs. Prodgers has not denied it in the witness box. It seems to me that once it is established that the co-trustees knew the real value of the share it does not matter a row of pins whether they were told the value of the share is \$48,000 less \$62,000 owed by the estates, or whether they were told they would have to pay \$14,000 to get out of the business.

The value of the share is the same.

Then it is objected that the will never contemplated a transaction of the kind, the will contemplated a sale with payment for the share spread over a period of time and that a transaction which results in the co-trustees receiving nothing cannot be a sale. It seems to me that such an argument is not well founded. As I have indicated above, the trustees were receiving not nothing but very substantial benefits, and there is no doubt in my mind that a deed might have been drawn setting out the real facts, indemnifying the trustees for their liabilities, and releasing the estates of W. Schoener from their debts which would have been a good deed of sale, unimpeachable as based on

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valuable consideration. No doubt Mr. Schoener, when he made his will, contemplated that when he came to die, on a date which was quite uncertain, his share would have to be paid for and made provision accordingly, but I cannot agree because the circumstances did not turn out quite as he expected that, therefore, his share could not be sold. And this brings me to the contention that the parties are bound by the actual terms of the deed of sale, that the deed provides for a payment of \$48,000 and as Scott has never been released therefrom, he must pay that sum with interest to date. This is in effect asking that when the parties to an instrument which does not quite accurately represent the transaction which has taken place, acting honestly and in good faith have adjusted their claims on the terms which were well known to them to be the real terms, that the court should say "Oh no, you should have stuck to the letter of your bond, you should have disregarded all fair dealing and honesty, you should have refused to allow a set off to be made." No Court of Equity would entertain such a proposition. On the contrary, if required, it would order a rectification of the deed to show the proper transaction. Such a course, however, does not seem to me to be necessary here because the parties accepted the settlement as it was meant. Settlement accounts were rendered by Scott to Mrs. Prodgers and Mrs. Holder setting off the amounts due on the estates against the \$48,000: and accepted by them after discussion. It seems to me that the matter cannot be re-opened now, and that a settlement of liability under the deed has been already made.

There are two matters on which I do not see eye to eye with the defendant Scott. The first is his statement that he was not bound to tell Gordon and McLelland that he expected to get \$30,000 by the sale of Farr's yard. In my opinion as a trustee, he was bound to make the fullest disclosure, and had the transaction gone through on the basis of Gordon and McLelland's valuation, I should have had to consider carefully whether I should not call upon him to pay the difference between the amount allowed by the valutors and the amount he received on the sale of the yard. But this difference is not equal to the difference between the value of the share as fixed by Gordon and McLelland and the value as fixed by Bernard and Legge; and inasmuch as Mr. Scott—generously I should say (he had to pay \$3,556.42 more by the agreement)—agreed to waive his rights under the latter valuation and to fall back upon the valuation of Bernard and Legge as fixing the value of the share, the question does not arise. As I have stated the latter valuation on the whole does not seem to me to be unfair and it must be taken as it is.

The next thing is the manner in which Mr. Scott put himself

into a position whereby he could obtain immediate payment of the \$64,000 due on the estates while stipulating for a year to pay the £10,000 under the deed. Had he acted on what he perhaps considered his rights, I should have had grave doubts whether the transaction should not have been set aside. Fortunately, however, he did what was right, adjusted the matter by set off, and thereby has relieved me from consideration of the question.

The minor point that the \$12,500 received for Mr. Wilhelm Schoener's life assurance was brought to his account in the books of the firm instead of being separate, does not seem to me of practical importance. The great thing is that the money has been duly accounted for, Wilhelm Schoener's heirs receiving the benefit of it when the set off was made.

In conclusion, I am of opinion that the plaintiffs have not proved that their interest in the concern was of more value than they had received for it, and I am satisfied not only that there was no direct fraud wilfully practised upon them but no such conduct as in the consideration of a Court of Equity ought to be deemed fraudulent or of a nature to render invalid the transactions which are complained of.

The plaintiffs claim an account of the trust estate as administered by the trustees up to date and that of course they are entitled to have. It has in fact never been denied to them and has really not been an issue in this case at all. There will be an administration order and the trustees must render their accounts.

The defendants are entitled to judgment on all other counts.

The plaintiffs are in my opinion not entitled to costs as their claim has substantially failed.

The defendant Scott ordinarily would be entitled to costs in accordance with the rule that costs follow the event, but in this case I have to take into account that the valuator's most important documents, which should have been carefully preserved by the trustees and especially by him who had the custody of the documents in the matter have been negligently lost. It is their disappearance that has really opened the door to this protracted enquiry and therefore I think I must deprive him of his costs.

Mrs. Prodgers as I have said while nominally a defendant in reality was a consenting party to the plaintiff's case. I do not allow her any costs.

Mrs. Holler is entitled to costs."

The plaintiff Iris Marquez appealed.

The following were the grounds of appeal:—

1. That the acquisition by the respondent Scott of the interest of Wilhelm Schoener (hereinafter called the testator) in the business of Schoener & Co. from his co-trustees on the terms and in

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the manner found by the learned trial judge was not authorized by the terms of the testator's will and must be set aside,

2. That by selling the said interest of the testator to the respondent Scott on the 6th day of January, 1906, as at the 31st day of May, 1905, the co-trustees were making the respondent Scott a gift of part of the assets of the trust estate, to wit, the profits accruing after the 31st day of May, 1905, until the date of sale and that the said sale is therefore a breach of trust.

3. That during the negotiation for the said sale, respondent Scott did not make full disclosure to the valuers and/or his co-trustees of the value of the assets of the said business as the principles of equity demanded that he should.

4. That the valuation on which the respondent Scott acquired the testator's said interest was bad for the following reasons:—

(a) It was a valuation made in July, 1905, of the assets of the said business on the 31st May, 1905, part of which said assets were at that latter date non-existent.

(b) All the assets of the said business were not valued particularly the goodwill thereof which was of substantial value.

(c) The allowance of \$35,000 for bad and doubtful debts which the learned trial judge found was made by the valuers from the value of the assets was unreasonably large.

(d) The methods of valuing adopted by the valuers were improper and upon a wrong basis,

5. That the respondent Scott advantaged himself unfairly at the expense of the trust estate in that:—

(a) He concealed from the valuers and/or his co-trustees the fact that he had arranged to dispose of certain of the assets at prices considerably in excess of the values placed on those assets by the valuers.

(b) He acquired the testator's said interest at a gross undervalue.

(c) He exacted from his co-trustees an unconscionable bargain as to time and mode of payment.

6. That the sum of \$67,380.57 standing in the books of the said firm to the debit of the testator on the estates' and private accounts was not a debt and did not pass to the respondent Scott on the assignment to him of the book debts of the said firm by the deed of the 6th day of January, 1906, and could not therefore be set off by the respondent Scott against his indebtedness of \$48,473.40 on the 31st day of March, 1906.

7. That if the said sale to the respondent Scott be not set aside but be allowed to stand, then the respondent Scott is estopped by his covenant to pay contained in the said deed of the 6th day of January, 1906, from denying that he is indebted to the trust estate in the said sum of \$48,473.40 therein mentioned.

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8. That the only reliable evidence of the contents of the valuation by Messrs. Bernard and Legge was the recital in the deed of the 6th day of January, 1906, to the effect that

“the value of such share and interest has been ascertained and determined by the said Lionel Edward Legge and Louis Bernard as being on the thirty-first day of May last past of the value of forty-eight thousand four hundred and seventy-three dollars and forty-cents.”

9. That the share as valued by Messrs. Bernard and Legge was intended by the valuers to be and in fact was or alternatively by reason of the terms of the said deed must be taken to be the ultimate beneficial interest of the testator in the surplus of assets over liabilities in the said business.

10. That there was no counter claim by the respondent Scott for rectification of the said deed and the learned trial judge was wrong in taking into consideration parol or other and or extrinsic evidence as to what was intended by the said valuers by the use of the word "share" so as to contradict the plain terms of the said deed.

11. That the learned trial judge was wrong in finding:—

- (a) That there was an onus on the appellant and other plaintiffs to prove that their interest in the concern was of more value than they received it for.
- (b) That the appellant and other plaintiffs had not discharged the said onus if the said onus were on them.
- (c) That the respondent Scott did not wilfully practice fraud upon the trust estate and that there was no such conduct as would be sufficient in equity to invalidate the sale.
- (d) That there was no goodwill of any substantive value attached to the said business.
- (e) That the valuation of the interest of the testator in the said business made by Messrs. Gordon and McLelland was less favourable to the trust estate than that made by Messrs. Bernard and Legge.
- (f) That there was a proper exercise of the option to purchase given to the respondent Scott by the will and that the acquisition of the interest of the testator by him was a purchase of the share of the testator within the authority to purchase conferred upon him by the will.
- (g) In speculating as to what was in the mind of the testator when he had the option to purchase inserted in the will and in not confining himself to the terms of the will itself when construing the said option, particularly in inferring that the testator had in mind the procedure traditional in the history of the business for ascertaining the value of the share of the deceased partner.

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- (h) That there was any traditional procedure in the business of Schoener & Co. for ascertaining the value of the share or interest of a deceased partner.
- (i) That the respondent Scott was entitled when ascertaining the value of the share of the testator for the purpose of acquiring same under the option conferred on him by the will to follow the traditional procedure, if any.
- (j) That the respondent Scott did follow the traditional procedure, if any, in ascertaining the value of the said interest of the testator.
- (k) That the respondent Scott was entitled to buy the interest of the testator in the said business at a profit provided that profit was not unreasonable.
- (l) That the profit made by the respondent Scott of the sale by him of Farr's yard as a result of his non-disclosure of its known value, that is to say the sum of \$3,723.79 was less than the difference between the valuations, that is to say the sum of \$3,556.42.
- (m) In disregarding and not taking into consideration the profit made by the respondent Scott on the sale by him of the lumber in Farr's yard as a result of his non-disclosure of its known value.
- (n) That any valuable consideration and particularly the valuable consideration found by the learned trial judge to have been given by the respondent Scott to the trust estate on acquiring the said interest of the testator, that is to say, the covenant to indemnify the trust estate against the liabilities of the said firm and otherwise, was purchase money within the terms of the will.
- (o) That the respondent Scott acquiring the minus interest of the testator in the said business on payment by the co-trustees of the sum of \$14,000 to him was authorised by and a proper exercise of the option to purchase the share of the testator and to pay the purchase money as there directed.
- (p) That the "share" of the testator valued by Messrs. Bernard and Legge was in fact the ultimate beneficial interest of the testator in the surplus of assets over liabilities.
- (q) That on the taking of final partnership accounts the amounts standing to the debit of the partners did not fall to be deducted before the shares of the partners were ascertained but must necessarily be deducted from the shares after such shares have been ascertained without any reference to those amounts.
- (r) That the amount standing to the debit of the testator in the books of the said firm were debts due from him to the firm,

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(s) That the parties hereto were parties to the litigation in action 254 of 1908 in the Supreme Court of Trinidad and Tobago.

12. That the learned trial judge was wrong in inferring from the evidence.

(a) That the acquisition of the testator's interest by the respondent Scott was fair and reasonable because the late Scipio Pollard, Esq. K.C., did not attack it in proceedings No. 254 of 1908.

(b) That Messrs. Gordon and McLelland set no value on the goodwill of the said business in their valuation there being no evidence to show that the share they valued was not the ultimate beneficial interest of the testator in the said business after all assets had been valued including the goodwill and all deductions had been made including all amounts standing to the debit of the testator in the books of the said business.

12. That the findings of fact of the learned trial judge in favour of the respondent Scott are contrary to the weight of evidence.

L. A. P. O'Reilly, K.C., (C. A. Child, H. P. Wells and G. O. M. O'Reilly with him) for the appellant Iris Marquez.

Wm. Savary. acting Solicitor General (Sir Henry Alcazar. K.C., and E. M. Puke with him) for the respondent Schoener Scott.

F. M. Boland for the respondent Holler.

Cur adv. vult.

SIR CHARLES MAJOR, C.J.: From circumstances attending the despatch of business of the Court of Appeal in relation to the local duties of its members, of which practitioners before it are only too well aware, I have found it impossible to devote attention to judgment in this appeal until a very recent time. It is now some six weeks since we listened to Mr. O'Reilly's peroration, and that this judgment may not be delayed beyond already too long a time it is necessary to compress my observations into a smaller compass than, for the importance of the case and the admirable industry and ability with which counsel have argued it, I otherwise had in view. My present necessity, however, is considerably relieved by the fact that the appeal record shows, not only that the learned judge of the court below had before him in great wealth of detail, the series of events commencing with the death of Wilhelm Schoener and the ambit of his will and ending with the execution of the instrument and conveyance and assignment of January, 1906, but also that that material, in the

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various aspects in which it was presented and criticised at the trial of the cause, received at the learned judge's hands particularly-exhaustive consideration.

The trustees of Wilhelm Schoener's will, being charged by their testator with the sale and conversion of his estate, and declining to avail themselves of their power to continue the business of Schoener & Co. (his interest wherein was part of that estate), found that their absolute discretionary power to convert the business into money had been by him qualified to this extent—and to this extent only—that if they proposed to exercise it at any time during a period of three years after his death one of their number, Scott, who was the surviving partner of the business, was to have an opportunity of determining whether he would or would not purchase the testator's share thereof, and that, if he determined to do so, that share was to be valued by two valuers, one on his behalf, the other on behalf of his co-trustees. Reading the sixth clause of the will in its own entirety and with other clauses directly or indirectly referring to it, I cannot regard the proviso relating to the option given to Scott as in any way fettering either the wide discretionary power of sale and conversion generally, or its specific exercise in relation to the business of Schoener & Co. or the testator's interest therein, but only as prescribing certain conditions for observance in that exercise.

Now, invested with powers thus expressly given to them by their testator, the trustees deliberately and solemnly executed the conveyance and assignment of January, 1906. In addition to the presumption arising from that fact itself, the instrument has been shown to have been the result of a course of negotiations carried on when the parties to it were strictly at arm's length, independently advised by counsel and separately represented by valuers of the share of Wilhelm Schoener in the business of Wilhelm Schoener & Co., actually (as gathered from the correspondence) contemplated by the testator and when fully aware of the nature and source of the material at the valuers' disposal for the purposes of their valuation the co-trustees, when dissatisfied with the valuation—not because ignorantly or erroneously made but simply and solely because less than they had anticipated—seeking a second valuation by another accredited representative and Scott consenting himself to appoint another; the co-trustees, again (and in greater degree) dissatisfied and for the same reason, returning of set purpose to the first valuation and Scott consenting to that step against his own interest; when the facts and figures appearing in both valuations and the considered opinion of both sets of valuers thereon had been critically examined by the parties and their legal advisers;

when the terms of the resultant instrument had been settled by those advisers; and when the position established (but subsequently modified) by that instrument has been recognised and acknowledged by the parties to it during a long series of years. Strong indeed, therefore, must be the grounds (I think) for a court to pronounce that instrument void as brought about by transactions that cannot stand. Over each ground taken by counsel for the plaintiffs that the sale of the testator's share in the business of Schoener & Co. should be set aside the learned judge of the court below has travelled, and I must, for the reason already given, content myself by saying that the plaintiffs have failed to satisfy me that his conclusions are wrong.

I think I should say that in one respect only do I differ from the learned judge. Were I of opinion that Scott, though giving every facility to the valuers (by amongst other acts, opportunity of perusing and inspecting the firm's books) for arrival of their valuation of Wilhelm's share, then knew or had good reason to believe, that he could sell the property known as Farr's yard for a greater sum than that at which it was entered in those books and did not disclose his knowledge or belief, I should think that he must be compelled to make good the difference, for I could not regard the concession on his part to his co-trustees by consenting to return to and abide by the first valuation as excusing the non-disclosure. But the evidence to my mind shows that there had been in Wilhelm, and was in Scott at the time the valuations were made, no more than a hope (which might or might not be realised that the greater price would be obtained a particular which, in my opinion, was not material. It is also to be noticed that the valuers themselves differed as to the value to be assigned to the property, and that a valuation made for Wilhelm in March, 1905, by Mr. Gillies at the price of \$30,200— not only was qualified but was before Messrs. Gordon and McLelland—and (I think on the evidence ought to be inferred) before Messrs. Bernard and Legge also—for the purpose of their respective valuations.

With the view taken by the learned judge of the claim for performance of Scott's covenant to pay the \$48,000 at which the share of Wilhelm in the business was valued I agree also. It seems to me that while, in order to ascertain the value of that share, the debt due from Wilhelm to the firm for advances in respect of his private properties must have been brought into account as an asset of the firm and was treated as at call, when it became a question of payment of that debt in relation to Scott's own liability to pay for the share of Wilhelm, a demand—which, of course, might be mutual—by the debtors and the creditor for adjustment could not be resisted. That adjustment was made

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and recognised, and I have not been satisfied that it can, in the circumstances, be impeached.

The appeal, therefore, I think should be dismissed and with costs.

G.O'D. WALTON, C.J.: The appellant in this case is Iris Marquez, the other two plaintiffs have not appealed.

The appellant and her two sisters brought an action as beneficiaries under the will of Wilhelm Schoener against the respondents as trustees of the will, asking for the relief stated in the pleadings. The respondent Emily Mary Prodgers (formerly Schoener) was the widow of Wilhelm, and the sole beneficiary as to the income of his estate until her re-marriage in 1907, when her share was reduced to that of a child, and she was also a trustee. One J. W. Spiers was originally a trustee, but he renounced, and Mrs. Holler the mother of Mrs. Prodgers the other respondent, was appointed in his stead on the 25th July, 1905. Wilhelm Schoener died on the 10th May, 1905. He carried on a general provision and lumber business in Port-of-Spain, Trinidad,

This business had been founded in 1872 by the father of the respondent Scott (formerly Schoener) and had passed successively to his three brothers, the uncles of Scott, in the manner and at the times set forth in the judgment appealed from.

The period most material for the consideration of this case is the 31st October, 1902, when Wilhelm Schoener purchased from the trustees of his brother Christian Schoener, the business as a going concern, he being the surviving partner; and on the next day the 1st November, 1902, he took the respondent Scott into partnership on the terms that he should receive 1/4 of the profits of the business. No partnership articles were executed.

At this date, Wilhelm, who had been a partner of his brother Christian, and had subsequently carried on the business with the trustees for about three years, had a capital account of \$27,000 as shown by the books of the firm. He purchased the share of Christian and agreed to pay his widow Lina the sum of \$165,000, for it, payable in five instalments. He traded for nearly 21/2 years in partnership with Scott when he died. During that period he had succeeded in paying the widow Lina the sum of \$71,000 towards her claims out of the profits of the business. Also when he took Scott into partnership, he excepted from the partnership assets the corpus of the two estates called "May vale" and "St. Mary's" and charged himself in the books of the firm with the sum of \$51,927.96 which represented moneys advanced by the firm for the working and other expenses of the estates, and paid interest on it as if he were a stranger. The estates were worth considerably more than this sum.

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The history of this firm shows that it was a family affair, and that the successive partners trusted each other. The appellant, as appears from her evidence, seems to have been obsessed with the idea that her father was a very rich man. She has borrowed money on her share, and it, or most of it, has been lost in her husband's business.

If her father had lived a few more years, he probably would have died rich. He did wonderfully well in a short period, handicapped as he was. It is well to bear in mind this position when later the insolvency of the business is discussed at the time of the purchase by Scott.

The testator Wilhelm Schoener by his will expressly gave to Scott, one of his trustees, and his surviving partner, the right to buy his interest in the firm. In him was the power to dispose, and in him the power to regulate the manner of disposal. Scott must shelter himself and justify under this power, so that it is necessary to set out verbatim the relevant clause. "6. And for "the purpose of converting into money the business of Schoener & Co. or "my share therein my trustees may if they think fit wind up or concur in "winding up the same and for that purpose may make and concur in "making arrangements and compositions with debtors or persons under "contract with the firm and may dispose of the said business or my share "therein by valuation or otherwise and generally on such terms as they "shall think fit with such powers to settle any accounts and to accept any "statements of accounts whether with or without the production of any "vouchers or other evidence and to accept payment or allow any agreed or "stipulated sum in satisfaction of all or any of my rights and liabilities and "to accept or concur in accepting payment for my share or the whole of "such business as the case may be by such instalments upon such terms and "in such manner as they shall think fit provided that however and I hereby "declare that the said Ludwig Henry Fridolin Schoener shall have the "option at any time within three years from the date of my death to "purchase my share in the said business and the value thereof shall be "determined by two valuers one of whom shall be appointed by my other "trustees and I further declare that the purchase money shall at the option "of the said Ludwig Henry Fridolin Schoener be retained as a loan payable "in five years by yearly instalments under such conditions with or without "security and at such rate of interest whether fixed or varying with the "profits as my other trustees shall think fit without being responsible for "any loss occasioned thereby."

Scott or as he was then called L. H. F. Schoener, was still a trustee, and still bound to watch carefully that he did not allow his private interest to override his duty as trustee. But the

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testator had brought about the position and he was entitled to act under it. The position of Scott, in the dual capacity of purchaser and trustee, was a most difficult one. He, as surviving partner, was probably the only person who could have rehabilitated the finances of the firm, sorely hit by the successive deaths of the partners, and have put it in a position to continue to earn profits. If the business had been wound up, or sold as a going concern to a stranger, the testator himself in a letter intimates, it would not realise more than 60 per cent, of its value. In such an event all concerned would have suffered proportionately. On the other hand if he elected to exercise his option and buy and save the concern, he became an easy target for attack, and the onus would be on him to justify under the power, and show that he exercised the most entire good faith, and that all his dealings were righteous.

Very soon after the death of the testator, Mr. Scott determined to exercise his option, and buy the share of the deceased partner, as authorised by the will. He fixes the date as early in the month of June before Mrs. Holler was appointed trustee. It seems doubtful whether the valuers were appointed before or after Mrs. Holler's appointment. At any rate the valuation was not completed until sometime after her appointment, and she knew about it. The deed of 6th January, 1906, recites the appointment of Bernard by the co-trustees. The notice of exercise of option seems to have been a verbal one. The will did not prescribe the manner in which notice should be given. It was given, and received, and acted upon, and I think this was sufficient in the absence of any special direction.

In the will a valuation was directed. Mr. Legge was selected by Mr. Scott, and Mr. Bernard by the other trustees. These two gentlemen had valued the same business as on the 31st October, 1902, when the testator had purchased the share of Christian Schoener. They were competent, capable and honest men who were skilled and conversant with business and all its methods as conducted in Port-of-Spain and especially would they have knowledge of the affairs of Schoener & Co. by reason of their acting as valuers under the same circumstances only 21/2 years previously. They valued the share of the testator at the sum of \$48,473.40 which appears in the deed dated 6th January, 1906, of which further mention will be made later. But it is objected that their valuation was not *modo et forma*, that they did not take stock, but relied on the stock-taking of others, in short, that it was not a valuation in the manner and form intended by the will, and that they could only value by using solely their own eyes, knowledge and skill. It appears that on the 31st May, the month in which the testator died, stock was taken. It was carried out by the

employees of the firm in the usual way. The same employees who had been commended for their work by the testator in one of his letters.

We know that the valuers went on the premises, examined invoices, and spent some time investigating. It has been proved that the firm kept regular and proper books of account, the testator up to a few days before his death had made notes in the books showing his knowledge of them.

The valuers did not measure the boards, or count the bags of flour one by one but the whole business and its books of record were open to them. They had the capacity and experience to appreciate what they saw, and form their conclusions as accurately as the nature of the subject permitted.

It was also objected that the valuation was made at a wrong date. The trial judge dismissed it as follows: "The further objection that it was "impossible for the valutors to value in August as on 31st May does not "seem to me well founded. Such a transaction is described by a witness "who is a chartered accountant as a commonplace of valuation and I see "no difficulty myself."

As he has pointed out it was the earliest convenient date after the death of Wilhelm Schoener. The trustees in their discretion agreed to value as on this date. The power to sell given them by the will allowed them a certain amount of latitude. There is nothing to my mind in clause 6 of the will, which I have transcribed, to warrant it being so read as to exclude the general effect when dealing with Scott. For these reasons, and for the reasons advanced by the trial judge, I think this court should not put this transaction, closed some eighteen years ago, into the melting-pot, on account of this objection.

It is then further urged that the valuers did not take into account "goodwill" when making their valuation. Before discussing this question it will be necessary to consider another matter interwoven with it. After Messrs. Bernard and Legge had sent in their valuation, it appears that Mrs. Prodgers and Mrs. Holler were not satisfied and evidently thought that these gentlemen had under-valued the testator's share. Mr. Aucher Warner up to this time had been the counsel advising all the parties concerned. They consulted Mr. Alcazar, now Sir Henry Alcazar, and thenceforward until the transaction was finally closed, they took his advice.

A second valuation was arranged, and on this occasion Mr. Gordon was selected by the co-trustees, and Mr. McLelland by Scott. They made their valuation in November. These gentlemen were also of high repute in the community and well-equipped for their task.

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It is admitted that they took stock and investigated the affairs of the firm thoroughly.

A very important circumstance in this case arises because of the loss of the documents embodying the results of the labours of the two sets of valuers. Mr. Kerr has reconstructed the valuation made by the first valuers from the books of the firm, and the deed of the 6th January, 1906, recites the sum they arrived at as the value of the testator's share. The second valuation appears from a statement recorded in the books of the firm. I am not prepared to draw any sinister conclusion from the fact of their disappearance. Mr. Scott deposes that they were kept pinned together in the vault of the firm and that in 1909 when there was some litigation in respect of the trust property, he sent them to the lawyers engaged, and has not seen them since,— a very probable explanation. The fact, however, remains that such documents were in existence, seen by the parties, and discussed by them and their legal advisers.

Mr. Kerr says in his evidence that the second valuation was less than the first by \$3,500. This witness is a chartered accountant who went carefully into the matter.

The trial judge relied on him, and a perusal of his evidence convinces one of his capacities, and justifies the reliance placed on him. Sir Henry Alcazar, who had gone into the matter as certain figures on the back of a letter in the hand writing of Mr. Holler but signed by the two co-trustees, fully supports, earnestly requested Scott to consent to abide by the first valuation, which he did. It is argued that there is no evidence that the second valuation was worse than the first. The second lot of valuers was resorted to because of dissatisfaction with the valuations of the first lot. The minds of all concerned were directed to this fact, and the results of their investigation would be eagerly expected, and when received, carefully compared. Is it possible to conceive that a distinguished member of the Bar like Sir Henry Alcazar could have been deceived in a matter of this kind, or that without informing himself he advised his clients on so serious a matter? It is due to him to say the question is beyond doubt. The subject was under discussion, the four valuers were alive, and all avenues of information open to him. Another personality has to be considered; Mr. Holler assisted and advised his wife in her duties as trustee. He was a chartered accountant and in the same line of business as Schoener & Co. The letter in his hand-writing to which I have referred, contains very pertinent questions, and shows that he had a strong grasp of the situation. *He* must also have been deceived in this simple matter, if we accept the argument.

This brings me back to the question of "goodwill." There is

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no evidence that the first lot of valuers took it into account. The subject was brought to the attention of the second lot of valuers. They did not attribute any value to it as part of the assets of the concern. Mr. Huggins, a prominent merchant, says it had no value. In this he is supported by Mr. Kerr. Mr. Phipps, another chartered accountant, was guarded in his answers; he said he was not sufficiently acquainted with business as conducted in Trinidad.

The existence or non-existence of *goodwill* is purely a question of fact. Here we have four business men, who well know their Trinidad, rejecting the idea that there was any appreciable value assignable for the goodwill of Schooner & Co.

It may well be the truth that in a comparatively small colony where everybody is known to everybody else, the secret of success is to be found in the personal efforts of the working members of the firm.

The next question arises on the contention that the amounts deducted by the valuers were excessive. They allowed 7 1/2 per cent, off stock in trade, bills receivable and the mortgages, and 50 per cent, off bad and doubtful debts.

Here again we are met by the fact that the valuers were competent business men and knew what they were about. The suggestion that there was any collusion between Mr. Scott and the valuers need only to be stated to be refuted and dismissed from consideration.

We have not their reasons, but many may be suggested. The stock-in-trade was subject to market fluctuations and included some perishable goods. For example, flour as is well known, may in the tropics turn sour in a month or two. The mortgages were given by customers as security for their indebtedness to the firm. They were not selected investments, but as they have been aptly described, they were only salvage mortgages. Bills receivable would include promissory notes. Customers unable to find the cash, putting off the settling day with a promise to pay.

Then it is further urged by appellant's counsel, that whether you take the first valuation or arrive at the first valuation by way of the second, both are affected by the vice of non-disclosure. Scott was surviving partner, manager of the business by virtue of the will, and also trustee, and therefore on him lay the duty of full disclosure of any fact material for valuers to know. The subject arises in this way. In January, 1905, Wilhelm Schoener had written to one Scherer, trustee of Mrs. Lina Schoener, inquiring whether she would take over Farr's yard, one of the assets of the firm for \$30,000 in part payment of the firm's indebtedness to her. Scott says no reply came to this letter and in October, 1905, he wrote again on the subject, and did not get a reply until January, 1906, after the deed of 6th January, 1906.

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The reply was favourable and he conveyed Farr's yard to her for \$30,000.

Also, one Gillies made a valuation of Farr's yard as appears in a letter signed by him and dated the 30th November, 1905. Mr. Scott in his evidence says that he did not disclose these facts to the valuers. He was in the witness box for several days, rigidly cross-examined, his honour impugned, and he certainly said some stupid things, as for example that this was "his business," but this was not the general trend of his evidence. But let us examine the matter in the light of some evidence which has reached us after 18 years.

It may be remarked that these negotiations were only a hope, an expectation, nothing tangible had been arrived at, he had nothing in his pocket, they may have produced nothing. If Scott had gone to the valuers and said, here is this letter of the testator, Farr's yard is worth \$30,000 and it had subsequently transpired that the valuers had a larger figure in mind, it would have been at once urged that he was trying to influence the valuers for his own benefit. His position was a delicate one; no matter what he did suspicion would fall upon him. The valuers knew Farr's yard, and they were as capable of valuing it as Gillies or anyone else.

But fortunately for Scott there is in existence the letter from Gillies dated 30th November, 1905, addressed to Mr. Gordon, one of the valuers, in which he refers to his valuation on 31st March, 1905. Gordon most probably got this information from Scott, although Scott does not remember imparting it. Gillies' valuation was a conditional one, "if as present occupied \$30,200 if present business removed, the land and buildings value \$20,200." This letter still left the matter open for the valuers to decide. A note made on this letter by Mr. Gordon is also of much importance with regard to the next point on non-disclosure.

It is argued that Scott had a cut and dried arrangement to sell Farr's yard to Mrs. Lina Schoener and to lease it to Alston & Co., also to sell to them the lumber in stock, that he did not disclose these facts to the valuers, but allowed them to make a deduction from the price of the lumber in November and then sold it to Alston's 13 days after the deed of purchase of the share of testator in January at a profit of \$3,800. Gordon's note reads as follows:—" Stands in Books \$27,000 odd dollars. Debited in S. & Co. books \$130 per month. Leased to Alston's for 4 years at \$150 per month.

It is fair to infer from this note that Mr. Gordon, a keen and successful man of business, had knowledge of the whole transaction.

Two of the valuers, Mr. Legge and Mr. Gordon, are dead, Mr. Bernard and Mr. McLelland are alive, the respondents have been

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twitted for not calling them as witnesses to support their valuations. I accept the answer. Eighteen years ago they were ripe and experienced men, now they are suffering from the infirmities of age and unable to render any assistance to the court.

There remains for consideration the alternative claim asking for a declaration that Scott should pay into court the sum of \$48,473.40 covenanted by him to be paid to himself and his cotrustees as trustees of the will of Wilhelm Schoener, expressed in the deed of the 6th January, 1906.

This deed is too long to be set out in a judgment—its effect was to assign and transfer to Scott " the share, estate, right, title, interest of the said Wilhelm Schoener in the said partnership business of Schoener & Co., and all the goodwill of the said partnership business together with the exclusive right to use the name of Schoener & Co. and all goods merchandise and now belonging to the said business and all book and other debts....." and the consideration was expressed to be \$48,473.40 the sum found to be the value of the share of the testator Wilhelm Schoener by Messrs. Bernard and Legge, all of which is recited in the said deed.

The valuers arrived at the value of the share evidently in the following manner. From the way the books of the firm were kept, if every asset, and the stock-in-trade, realised its value as stated in the books, and every outstanding debt collected when the liabilities were all discharged, Wilhelm Schoener's capital account as on 31st May, 1905, would be \$74,777.08 and represent his share, and Scott's capital account would be \$8,718.11 and represent his share. The liabilities would be constant. But when they had made allowances before mentioned and fixed them at \$35,071.57 it was necessary to deduct proportionately according to their interests thus:

Wilhelm Schoener's capital account	...	\$74,777 .08
Less	<u>26,303.68</u>

\$48,473.40

which is the exact figure given in the deed. By a similar process Scott's capital account would be minus \$49.78. There is no magic in any special method, and it appears to me whether the calculations are arrived at as prescribed in the text books for the taking of partnership accounts or whether the simple method of the valuers be adopted, the result will be the same, given the same figures. It is obvious that the sum of \$62,977.12 which Wilhelm Schoener had drawn out of the firm for the use of the estates and for a gold mining venture and treated by him as a debt due by him to the firm, on which he paid interest, was included as an asset of the firm by the

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valuers when they calculated his share. They could have deducted it from his capital account, then his capital account would have been \$11,799.96 from which there fell to be deducted the allowance (for bad debts, &c.) of \$26,303.68 or in other words his capital account would be reduced to a minus quantity of \$14,503.72. Hence the phrase used several times that his representatives would have to pay £3,000 to get out of the firm.

In order, if I can, to make the position clear as it appears to my mind, that the valuers when fixing the value of the share as stated in the deed must have contemplated that the amount drawn by William Schoener would be accounted for by set-off or other means, I will consider Scott's position after purchase.

He assumed liabilities in round figures of \$270,000 and also he had to pay the \$48,000 covenanted for in the deed or a total of \$318,000. He acquired assets as valued by the valuers in rough figures (if the \$63,000 due from Wilhelm Schoener be excluded) of \$255,000. This seems to me impossible, and brings us back to the settlement accounts made on the 31st March, 1906, and agreed on after discussion, as representing the true transaction, where the \$48,473.40 plus \$12,500 received on an insurance policy was placed on one side of the account, and on the other side the \$63,977.12, leaving a small balance.

The matter was then closed. The trustees came out of a business in which they did not wish to engage, and Scott took up the burden. He guaranteed them against any loss, and he was a solid guarantor, possessed of property outside of the firm worth £15,000, and the estates were free. We have of course been pressed with the argument that the word share used in the will and in the deed is a technical expression, and what took place was not the sale of a share, that there is no obligation on a man to pay himself or to pay himself and another, that no debt could arise except through the medium of a partnership account. Many cases have been cited to us in this case enunciating great and abiding principles of equity. I hope I have not for a single moment infringed on any of them. It is, however, paramount that each case should be decided on its own facts and circumstances. The deed of the 6th January, 1906, was not to my mind drawn so as to reflect the true transaction, and possibly induced litigation. This court is not so powerless that it has to blind itself and follow the letter of a deed, and compel a man to pay twice. If Scott were made to pay as contended, Wilhelm Schoener's estate would have come out as worth in round figures about \$160,000 a result not justified from even a cursory examination of the affairs of the firm. At the time of his death, the firm, if wound up, and all its liabilities discharged, would have been near the insolvent line, as to the joint assets of the partnership. But

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as the individuals comprising the partnership were possessed of property outside of the firm, it was still capable of carrying on and showing a satisfactory front to those trading with and trusting it.

Viewing the case as a whole, it appears to me that in all the transactions between Scott and the co-trustees, capable third parties intervened and the rights of the beneficiaries were protected,

In my opinion the judgment appealed from should be upheld and the appeal dismissed with costs.

SIR HERBERT GREAVES, C.J.: I have read the judgment of Mr. Justice Walton, and I agree, for the reasons therein stated, that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor, for the appellant Iris Marquez. *M. Hamel-Smith & Co.*

Solicitor, for the respondent Schoener Scott, *Oliver Fitzwilliam & Co.*

Solicitor, for the respondent Holler. *C. J. Lamy.*

CURTIS, CAMPBELL & Co. v. JOHN DODDS.

[No. 7 OF 1923.]

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

1924. FEBRUARY 11.

BEFORE SIR A. V. LUCIE-SMITH, C.J., SIR CHARLES MAJOR.

C.J., AND G. C. DEANE, C.J.

Specially indorsed writ—Substantial questions of law and of fact—Hearing on affidavits not permitted. .

The plaintiffs issued a specially indorsed writ claiming from the defendant the sum of \$2,000 on a promissory note. The defendant filed an affidavit of defence in which he set out that he had passed a mortgage bill of sale in favour of the plaintiffs to secure a sum of \$5,098.56 due by him to them, that this sum included the amount of the promissory note which was discharged by the bill of sale which was executed at the request of the plaintiffs and accepted by them *as such*, that the defendant was in default of payment of the sum secured by the bill of sale and in accordance with the terms thereof the plaintiffs seized the goods charged thereby and have sold and are still selling portions thereof, that the plaintiffs were still in possession of quantities of the machinery, old metal and bricks charged by the bill of sale, that they were worth considerably more than the sum of \$5098.56, that this sum

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could have been realised by sale, that the plaintiffs had never rendered him any account of their dealings with the articles seized and that he was not aware of the state of accounts between them.

Held, that leave to defend must be granted.

Order of Douglass, J., reversed.

Appeal by the defendant from the order of Douglass, J., refusing leave to defend. The reasons of appeal were (a) that there were substantial questions of law and of fact to be determined, and that it was not competent for the judge to decide them on the hearing of an application for judgment on a specially indorsed writ: and (b) that the liability of the defendant on the promissory note was discharged when the bill of sale was given by him in favour of the plaintiffs. The facts fully appear from the report of the proceedings in the court below: *supra*.

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

S. L. Stafford for the respondents.

[Deane, C.J., referred to *Carter v. Worswick* cited in the Annual Practice.]

The Court was of opinion that on the affidavit of defence the judge ought to have granted the defendant leave to defend. The appeal was accordingly allowed with costs.

Leave to defend granted. Appeal allowed.

Solicitors, *A. V. Crane* for the appellant.

E. A. W. Sampson for the respondents.

CURTIS CAMPBELL & Co. v. JOHN DODDS.
 CURTIS CAMPBELL & Co. v. JOHN DODDS.
 [No. 7 OF 1923.]

1924. MAY 29; JUNE 13.

BEFORE SIR CHARLES MAJOR, C.J., IN CHAMBERS, SITTING AS
 ONE OF THE JUDGES OF THE WEST INDIAN COURT OF APPEAL.

Practice—Costs—Set-off—Order 46, rule 15—Independent or interdependent proceedings—Appeal and application for security—Whether security costs can be set off against appeal costs—Attendance at Registry bespeaking copy of order appealed against—Attendance at Registry on execution of security bond—Fee to counsel settling bond—Whether proper-charges—Attendance of a solicitor on counsel in court—Whether attendance is reason able to be decided by taxing officer—Costs—Whether obligation in a judge to fix an application for review of taxation.

The defendant was ordered to furnish security for costs in respect of his appeal. A bond was entered into in the Deeds Registry. The appeal was allowed.

Held, that a charge in the bill of costs for attendance at the Registry of Court to take up a copy of the order from which the appeal was brought was wrongly taxed off, inasmuch as it was an order with which the appellant had to arm himself before he could appeal

Further, that a fee to appellant's counsel for settling the bond was not properly chargeable against the respondents.

And further, that a fee to solicitor for attendance at the Registry of Court on the execution of the bond was a proper charge against the respondents.

Whether the attendance of a solicitor on counsel in court otherwise than at the hearing is necessary in any particular circumstances is a question for the taxing officer to decide.

By rule 15 of Order 46 of the Rules of Court, 1900, it is provided that "In any case in which.....by order or direction of the court or judge or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is liable to pay, and may adjust the same by way of deduction or set-off, or may, if he thinks fit delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay."

Held, that the title to receive, and the liability to receive, are alone the elements for determination or rather, ascertainment,—whether the amounts to be received and paid have been ascertained or not. It is immaterial that both sets of costs were not taxed at one and the same time.

The plaintiffs issued a specially indorsed writ against the defendant. Leave to defend was refused. A written demand on him for security for costs having proved fruitless, the plaintiffs filed an application therefor. Security was ordered; and the defendant was ordered to pay the costs of the application. These costs were taxed at \$158.70. A security bond was entered into, and the appeal was proceeded with. The West Indian Court of Appeal allowed the appeal with costs and granted unconditional leave to defend. The appeal costs were taxed at \$249.98. On the taxation, the plaintiffs applied, successfully, to have the two sets of costs adjusted by deducting the security costs from the appeal costs. The defendant applied for a review of taxation.

Held, that the judge derived his power of hearing applications for security for costs from the Court of Appeal itself, that both the security costs and the appeal costs were costs of, and incidental to the appeal, that they were not costs awarded in independent, but in interdependent, proceedings, and that the taxing master was right.

The judge is not bound to fix the costs of an application for review. He may, if he thinks fit, direct them to be taxed.

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The facts and arguments thereon sufficiently appear from the judgment.

A. V. Crane, solicitor, for the applicant (defendant).

S. L. Van Batenburg Stafford for the respondents (plaintiffs).

Cur. adv. vult.

SIR CHARLES MAJOR, C.J.: This is an application by the defendant that the taxation of his bill of costs against the plaintiffs on successful appeal against an order refusing him leave to defend the action may be reviewed.

Objection is taken to certain disallowances by the taxing officer. Of these the first is of a fee for attendance at the Registry of the Supreme Court to obtain a copy of the order from which the appeal was brought. This was not served upon the defendant by the plaintiffs, it was an order with a copy whereof the defendant had to arm himself preliminary to appeal therefrom, it had to be bespoken in the registry and a separate attendance thereat was necessary to obtain it. The charge must be restored to the bill. The second disallowance is of fee to counsel for settling bond as security for costs. That is not a fee chargeable against the plaintiffs and was properly disallowed. The third disallowance is of fee for attendance at registry on execution of the bond. Bonds of the kind are invariably executed in the registry, and a charge against the party for whose security it is given for the attendance of a solicitor on the obligors when they execute it is just. That fee must be restored to the bill. The fourth disallowance is of costs of solicitor's attendances in the Appeal Court on the 6th and 7th days of February, 1924. The taxing officer has allowed a fee for attendances on the 5th and 11th days of February, the appeal (with others) being in the paper for the 5th and coming on for hearing on the 11th. By the Rules of Court there is allowable a fee for every attendance of a solicitor on counsel in court on any proceeding in the action (which it is the practice to apply to proceedings in appeal). The attendance of the solicitor alone cannot, it seems, be charged against the opposite party, and if there was anything before the taxing officer to indicate that he did so attend, the items were properly disallowed. If there was no indication of the kind—I am without information on the point—then, the attendances of the solicitor on the 6th and 7th of February must be taken to have been as made in the same manner as those on the 5th and 11th (which were allowed), viz., on counsel in court and should be restored to the bill. I may add that whether an attendance of counsel in court (who will naturally be accompanied by the solicitor instructing him) otherwise than at the hearing is necessary in any particular cir-

cumstances is, of course, a question for the taxing officer. These fees, therefore, will be restored or not to the bill, accordingly as the taxing officer certifies to me that he was satisfied at the taxation that the solicitor attended alone or with counsel,

The more important objection to the taxation raised the question of the taxing officer's authority to set off costs in the following circumstances. The defendant having appealed to the Court of Appeal against the order refusing him leave to defend the action, the plaintiffs applied to the Supreme Court for an order on the defendant to give security for costs of the appeal. This order was made, with costs of the motion to be paid by the defendant. The motion was made under rule 6, sub-rule (2) of the Rules of The Court of Appeal, 1920, which provides that "deposit or other security "for costs to be occasioned by any appeal shall be made or given as may "be directed under special circumstances by the court or a judge of the "colony in which the appeal arose." The plaintiff's costs of the motion for security have been taxed and allowed at \$158.70. The defendant's appeal was allowed with costs, which have been taxed and allowed at \$249.98. The taxing officer, on the application of the plaintiffs and against the contention of the defendant, has set off the costs of the motion for security due to them from the defendant against the costs of the appeal payable by them to the defendant, doing so under the provisions of rule 15 of Order xlv. of the Rules of Court, 1900, which runs thus : "In any case in which "by order or direction of a court or judge or otherwise a party entitled to "receive costs is liable to pay costs to any other party, the taxing officer "may tax the costs of the party so liable to pay, and may adjust the same by "way of deduction or set off, or may, if he thinks fit, delay the allowance "of the costs such party is entitled to receive until he has paid or tendered "the costs he is liable to pay." The rule is a reproduction of rule 27, reg. (21) of Order lxxv, in England, without its concluding sentence. For brevity I may speak of the costs which the defendant is liable to pay as "the security costs" and those he is entitled to receive as "the appeal costs," and, stating the position of the parties, as adumbrated by the rules and presented to the taxing officer, the defendant by order of the Appeal Court is entitled to receive the appeal costs—plus, of course, the items I have ordered to be restored—and he is liable to pay to the plaintiffs the security costs. The taxing officer adopted the first alternative given by the rule and, the security costs being already taxed, taxed the appeal costs, and adjusted the two sets of costs by set off, that is to say, set off the \$158.70 against the \$249.98. This course is challenged as unauthorised, and that is the question I have to decide.

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Firstly, it is objected that the rule, by the use of the words "may tax the costs," is inapplicable here, because the taxation of the security costs had already taken place. The objection is untenable. The words "may tax the costs" are potential because the security costs might not have been taxed at the time of the taxation of the appeal costs, and enable the taxing officer to have done so if necessary. The title to receive and the liability to pay are alone the elements for determination, or rather ascertainment, whether the amounts to be received and paid have been ascertained or not.

Secondly, it is urged that over the taxed security costs the taxing officer, on the taxation of the appeal costs, had no control, for although he happens to be the same individual in each taxation his offices of taxation are separate and distinct. This objection is really a branch of the objection to which I have to refer next and will be then considered, but I may point out now that no control of the taxed security costs has been assumed by the taxing officer; he has ascertained a liability to pay their amount and given effect to it by set off, without any interference whatever with that amount or any dealing with the bill and its taxation in any way.

Thirdly, it is contended that, given a power to this taxing officer in circumstances within the purview of the rule, those circumstances are not present here, because the order to pay the security costs was made in proceedings different, and under a jurisdiction separate and distinct, from those in and under which the order giving the appeal costs was made. And an interesting argument has followed, largely, however, occupied in the law and practice relating to a solicitor's lien for costs, its enforcement or disregard by courts for purposes of set off for costs, whether courts had and still have discretion as to its enforcement or disregard, and, if they have it, in what circumstances courts should or should not exercise it. But, in the first place, all the English authorities since 1883 which have proceeded on those questions have done so in contemplation of rule 14 of the English Order lxv. (which provides that "a set off for damages or "costs between parties may be allowed, notwithstanding the solicitor's "lien for costs in the particular cause or matter in which the setoff is "sought") a rule which does not appear in our Rules of Court and in the second place, English authorities, whether before or after 1883, have been concerned with applications to a judge sometimes by way of appeal from a taxing master and sometimes by way of further appeal to higher courts, and at other times with applications to a judge in the first instance and by way of appeal from him. There is no application to me here, except to say whether or not the taxing officer has or not exceeded his powers in making a set off under rule 15 of Order xlvi. As to the powers of a

court or a judge in relation to a solicitor's lien for costs and the discretion of a court or judge to enforce or disregard it. perhaps the judgment on the subject of Lord Justice Younger (when a puisne judge of the High Court of Justice) in *Puddephat v. Leith* (1916) 2 Ch. 168 may, as Mr. Stafford asks me to say it should, be regarded as an unquestionable pronouncement on the law and practice governing the same, passing as the learned judge did, in review a large range of authorities from judges of single instance and of Courts of Appeal and reconciling a considerable number of doubtful and (perhaps) apparently inconsistent cases. *Puddephat v. Leith* I regard as settling in the affirmative the question whether there has, or has not always been, discretion in a court or a judge to direct a set off for damages or costs (notwithstanding the solicitor's lien for costs) in distinct and independent litigations. But, as I have already said, I have no application before me to exercise that discretion, and the question I have to answer is, did the taxing officer exceed his powers under rule 15 or not. And the answer depends upon whether or not the orders for costs mentioned were made in the same or in independent proceedings, for there is ample authority for the contention that the taxing officer's powers under the rule are confined to the like proceedings. In *Barker v. Hemming* (1880) 5 Q.B.D. 609, decided upon Rules of the Supreme Court (Costs) Order VI. rule 19—which became rule 27, (21) of Order lxxv, a master having made a set off for costs, Lindley, J., in chambers refused to review the taxation. On appeal from that refusal to the Court of Appeal James, L.J., said: “The “plain meaning of Order vi, rule 19, is that costs are to be set off between “parties—not as between persons, but parties—in the same action, and in “their character of parties to it. It cannot be supposed that the rule would “apply to costs incurred by them in a distinct action in a different branch of “the court, and it can just as little apply to the costs incurred in this “interpleader, which is a proceeding distinct from the action.” *Barker v. Hemming* was referred to by Collins, M.R., in *David v. Rees* (1904) 2 K.B. 435 where he said: “The ground of that decision appears to be that the set “off contemplated by the rule as being between parties to an action or “proceeding, it did not apply to a set off of the costs indistinct and “independent proceedings between the same parties.” In *Reid v. Cupper* (1915) 2 K.B. 147 Buckley, L.J., also mentioned *Barker v. Hemming* in this way: “Before discussing *Barker v. Hemming* I may observe that I am “considering the powers not of a taxing master but of a judge, to direct a “set off. There is another rule, Order lxxv., rule 27, sub-rule (21) directing “what a taxing master may do, [The learned judge read the rule.] It was “held under that rule that the taxing

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“master could not order costs payable under independent interpleader proceedings to be set off against costs due in the original action.”

With that clearly established principle in mind I turn to the question whether the respective orders for these costs were made in the same or in independent proceedings. When the order of the Supreme Court that the plaintiffs be at liberty to sign final judgment was made the proceedings in the action, subject to that order being set aside, clearly ceased. Upon the filing of the defendant's notice of motion in appeal and service thereof on the respondents the appeal was brought, and proceedings therein commenced, Then followed the step by the plaintiffs of applying for and obtaining an order for security for the costs of the appeal. The appeal proceeded to hearing and on the order that the order of which complaint was made be set aside, the appeal proceedings closed and those in the action stand for recommencement or resumption. Now what is said to have made the particular proceeding for security for costs, apparently, as just mentioned, one in the appeal proceedings, really separate and distinct therefrom? The fact that the order for security for costs was on application to, and order by, a judge of the Supreme Court. Surely this is not so. Appeal proceedings having begun, that application, save for the specific provision in rule 6 of the Court of Appeal rules, to which I have already referred, must have been made to the Court of Appeal, and then unquestionably must have formed part of the appeal proceedings and could not have been regarded as independent thereof: Whence, therefore, comes the power of a judge of the Supreme Court to order security for costs to be given? From the Court of Appeal itself; and it is that court acting through its delegated channel from which the order flows. How otherwise could the order for security to be given contain (as it does) an order that in default of that security the appeal shall stand dismissed out of court? A part of the practice and procedure of the Court of Appeal is an application for security of costs. With power to make rules for regulating that practice and procedure, the court has provided when the security may be ordered to be given, namely, in such special circumstances as shall be directed by the Colonial Courts, the fact that the application for the order has, necessarily therefore, to be made to judges of these courts cannot change its character of interdependence in the appeal proceedings, to independence thereof.

It is noticeable that in this bill of costs, which is certainly in the Registry of the Court of Appeal and has been considered in review by me as a judge of that court, there appear, and have been the subject matter of controversy on this summons,

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sundry items of charge relating to that very proceeding for security for costs which it has been now contended was entirely separate and distinct from the appeal proceedings.

I am of opinion, therefore, that the taxing officer's procedure was authorised by the law and practice of this colony which is, for the purposes of taxation of costs awarded by the Court of Appeal, applied to that taxation by the rules of that court, and his certificate so far as relating to the set off he has seen fit to make, cannot be disturbed. The cost of this application to review must be borne, as to two-thirds thereof by the defendant, as to the remaining one-third thereof by the plaintiffs. That is to say, the plaintiffs will bring in their bill of costs generally of this application, from which upon its taxation, there will be deducted one-third part.

Posted: SIR CHARLES MAJOR, C.J.: It has been certified to me by the taxing officer that the attendances of the defendant's solicitor in court on the 6th and 7th of February were made on counsel. He has also certified that counsel's appearances in court those days— from which alone, of course, the solicitor derives his right to make his charge for attendance— were for the reasons given in the certificate unreasonable and unnecessary. Mr. Crane objects to this part of the certificate as beyond my reference to the taxing officer. It was unnecessary for me specifically to refer the question of reasonableness to him, for it was, as pointed out in my judgment, already within his province to determine, I agree with the reasons given by the taxing officer and his disallowance of these items in the bill is confirmed. The opposite party cannot be charged with a solicitor's attendances upon counsel, who chooses, as part of the services for which his fee on brief has been paid, namely, to argue his client's case, to attend daily throughout the sitting of the court until his case is called, unless his presence in court on those occasions is reasonably necessary. Here it was not.

With reference to the order I have made as to costs of this application, Mr. Crane submits (1) that there can be no taxation of those costs, but (2) one inclusive fee must be fixed by the court to cover them, and (3) that that fee according to the prevailing practice is \$5.

I have consulted the Registrar and the taxing officer of the court and am unable to accede to either proposition as a matter of fixed and obligatory practice. My order, therefore, as to the cost of the application stands.

Order for variation of taxing master's certificate.

Solicitor for respondents: *E. A. W. Sampson.*

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UNION MARINE INSURANCE Co., LTD., Appellants,
(Plaintiffs).

v.

CHRISTOPHER LLEWELLYN MURPHY, Respondent, (Defendant).

1924. MARCH 19.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

BEFORE SIR HERBERT GREAVES. C.J., SIR CHARLES MAJOR, C.J., AND

G. O'D. WALTON, C.J.

Insurance—Loss of ship—Alleged loss of cargo—Insurance Company demands proof —Production by assured of bill with receipt for portion of purchase price—Bill taken by insurance company to person whose name it bore—Assurance that it was a genuine bill —Reliance on bill—Payment by insurance company—Bill not a genuine bill—Fraudulent misrepresentation—Transaction not genuine—Deceit—Damages—Appeal allowed on question of fact—Principles by which Court guided—Trinidad.

The respondent was a partner in the firm of Messrs. Murphy, Moze & Co., dry goods merchants, carrying on business in Port-of-Spain. One Franceschi, a Venezuelan, and owner of a schooner called "Nellie" purported to buy from the defendant Murphy a quantity of goods to the value of \$20,740 he said he intended shipping to Venezuela by the "Nellie" He obtained from Murphy two bills for these goods. One contained a list of the goods sold and the prices. The other contained, besides the list of goods and their prices, an entry that \$10,740 had been paid on account and showing as balance due the sum of \$10,000. This transaction was never mentioned by Murphy to his other partners nor was it entered in the books of the firm. The goods were never in fact delivered and did not form part of the cargo of the "Nellie" when she was lost, nor did Murphy ever receive the sum of \$10,740 on account as shown by the bill. Franceschi insured the goods, which were purported to have been purchased from Murphy, with the appellant company, as part of the cargo that was to be supplied by the "Nellie." Shortly after sailing the "Nellie" became a total wreck. Franceschi put in his claim for £1,000 for the loss of these goods. The £1,000 was paid to him by the appellant company on the representation of Murphy to their agent that the bill which he had given Franceschi was a genuine bill showing a real transaction. Murphy did not disclose the fact that these goods had never been delivered, and consequently never shipped. The appellant company afterwards brought an action against Murphy to recover from him this sum on the ground of conspiracy, fraudulent misrepresentation and deceit. Thomas, J., gave judgment for the defendant. The plaintiffs appealed.

Held that the appellant company had made out a case of deceit and was entitled to judgment therefor.

Judgment of Thomas, J., reversed on the facts.

Appeal from the order of Mr. Justice Joyce Thomas, Puisne Judge of the Supreme Court of Trinidad and Tobago, dismissing with costs an action brought by the plaintiffs, the Union Insurance Company, Limited, against the defendant Christopher Llewellyn Murphy for £990 damages for conspiracy, fraudulent misrepresentation and deceit. The facts sufficiently appear from the judgments.

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Sir Henry Alcazar, K.C., and C. A. Child for the appellants.

C. N. Scipio-Pollard (N. P. Bowen with him) for the respondent Murphy.

SIR HERBERT GREAVES, G.J.: This case was tried before Justice Thomas without a jury; it turned on questions of fact, and it is clear that one side or other was guilty of perjury. This court is, therefore, called upon to express an opinion on the credibility of conflicting witnesses whom they have not seen. In discharging this duty I am guided by the considered judgment of the court delivered by Lord Lindley in *Coghlan v. Cumberland L.R.* (1898) 1 Ch. 704, C.A., Lord Lindley said: "The case "was not tried with a jury, and the appeal from the judge is not governed "by the rules applicable to new trials after a trial and verdict by a judge. "Even where, as in this case, the appeal turns on a question of fact, the "Court of Appeal has to bear in mind that its duty is to rehear the case, and "the court must reconsider the materials before the judge with such other "materials as it may have decided to admit. The court must then make up "its own mind not disregarding the judgment appealed from, but carefully "weighing and considering it, and not shrinking from overruling it if on "full consideration the court comes to the conclusion that the judgment is "wrong. When, as often happens, much turns on the relative credibility by "witnesses who have been examined and cross-examined before the judge, "the court is sensible of the great advantage he has had in seeing and "hearing them. It is often very difficult to estimate correctly the relative "credibility from written depositions; and when the question arises which "witness is to be believed rather than another, and that question turns on "manner and demeanour, the Court of Appeal always is, and must be, "guided by the impression made on the judge who saw the witnesses. But "there may obviously be other circumstances quite apart from manner and "demeanour, which may show whether a statement is credible or not; and "these circumstances may warrant the court in differing from the judge, "even on a question of fact turning on the credibility of witnesses whom "the court has not seen."

Murphy on 23rd February, 1922, gave Franceschi two bills for goods sold; one contained a list of the goods sold and the price thereof; the other contained a list of the goods sold and the price thereof and also an entry that \$10,740 had been paid on account, and the balance due was \$10,000 (Exhibits G.N.G.A. 6 and X). On 17th June, 1922, the Collector of Customs was holding an enquiry into the loss of the "Nellie" and Murphy told him "If a statement was made to you by anyone that he got delivery

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of these goods from my firm, and that payment of half the cost was made on account it is a deliberate lie" (Exhibit A.B. 1). On the 16th June Franceschi had told the Collector of Customs "The total purchase from Murphy and Moze amounted to \$20,740, there is a balance due them of about half this sum— \$10,000 odd" (Exhibit A.B. 4). On the 19th June, 1922, Murphy was recalled by the Collector of Customs and said "With reference to the bill rendered to Franceschi & Hijos for \$20,740 a receipt for \$10,740 appeared thereon. This receipt was signed by me. I wish to explain the circumstances of this receipt. It was signed on the understanding that I was to deliver no goods till I got paid in full. I again declare that I received no money in part payment nor have I delivered any goods" (Exhibit A.B. 2). When under examination in court Murphy stated that Estrada who was acting for Franceschi asked him "to give him a bill and to receipt the bill for a portion of the money so that he could show the Spanish General that he was actually purchasing the goods from him." Moze and Murphy state that there was no entry of this sale of these goods in the books. The fact that no goods had been delivered, that there was no entry of the sale in the books, and the receipt for so large a sum as \$10,740 when nothing had been paid, and the statements made to the Collector of Customs and to the court raise a suspicion in my mind that Murphy was involved in the conspiracy to defraud the insurers and cause me to regard him as unworthy of credit and to disbelieve his denial of Roy Alston's account of the interview between Murphy and himself on the 13th April, 1922, at Murphy's store. I believe Alston's account of that interview and think that is strongly supported by the fact that on the very day of the interview he wrote to the appellant company "The rice was bought by Messrs. Franceschi from ourselves and the cotton goods from Messrs. Murphy & Moze whose duplicate bill is also attached. We may mention that we interviewed Mr. Murphy to assure ourselves that the duplicate was a genuine one."

In my opinion the appellants have established their claim for damages for deceit, and the judgment of the court below should be reversed and judgment entered for the appellants for £990 damages with costs both of this court and the court below.

SIR CHARLES MAJOR, C.J.: I concur.

G. O'D. WALTON, C.J.: In this case the appellant company who carry on the business of marine insurance in this colony through their agents sued the respondent for damages arising from facts which constitute the common law actions of conspiracy to defraud and fraudulent misrepresentation.

It appears from the evidence that three men, referred to as

Spaniards, but who evidently belong to the neighbouring Republic of Venezuela, conceived the idea of committing fraud on the insurance companies carrying on business in Trinidad and Venezuela by means of insuring heavily, fictitious cargo, on a schooner destined to be sunk on a voyage to Venezuela from Trinidad.

Their complicity in this nefarious scheme is not disputed. They have left the colony. The lost ship was well insured, her cargo was insured for £10,000 in two different companies, a cargo in bulk beyond her carrying capacity, and there is no proof that any of the cargo beyond 100 bags of rice of the value of £145, ever reached her holds. In fact the contrary is proved. The cargo, except the bags of rice referred to, never left these shores in the schooner "Nellie." The complicity of the respondent, and his liability, rest on certain evidence which must be carefully examined, as he has in his favour the findings of fact by the learned trial judge.

One of the Spaniards, by name Franceschi, carried on business in Port-of-Spain, another, Trujillo, was his clerk, the third, Estrada, acted in concert with them. The respondent at the material time was a partner of Murphy, Moze & Co., carrying on business in this town.

According to his own evidence, Estrada known to him for about ten years, and two Spaniards, whom in cross-examination he admits were Trujillo and Franceschi, came into his store in month of February, 1922, they interviewed him and selected some goods. They told him the quantities of goods they wanted, and he arranged to get the goods they required, but which were not in stock. He gave instructions to a clerk to put aside the goods already in stock. Some days after he gave Estrada a Bill or Invoice; it bears date the 23rd February, 1922; it has on it the printed heading of the firm's name and the body of it is in his own handwriting. It gives a list of the goods purported to be sold, the value of which total up \$20,740 and on this bill was a receipt for \$10,740. We have before us a copy of this bill duly certified as correct by the authorities of Venezuela. Shortly after he tells us that he gave a duplicate as he was informed Trujillo had mislaid the previous bill. We have this bill before us; it has not on it the receipt for \$10,000. He tells us that none of the goods left the store on this account, and that he never was paid the cash or any part of it.

The "Nellie" sailed on the 1st March and was totally lost at sea a few days later. Four bales of cotton goods which appear on this bill were insured with the plaintiffs by Estrada and Trujillo together with the 100 bags of rice for £1,000 in the name of Estrada. After the loss of the "Nellie," Estrada made

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his claim, and after certain inquiries, which will appear later, the claim was paid. It is in this manner and through his conduct that the respondent appears as a party, and leads to the inquiry into his actions. Here, then, we have a document admittedly false and untrue. Any one reading it could only come to the conclusion that there had been a genuine sale of the goods enumerated and that more than half the value had been paid in cash.

It was calculated to deceive and mislead and could not have been made with any other purpose. And further when the respondent is called upon for an explanation he flounders deeper into the mire. His first explanation was given before the Collector of Customs on 17th June, and put shortly, he denied the sale, that the goods were never delivered as no payment was made and therefore no sale effected, and in answer to the collector he said : " If a statement was made to you by anyone that he got delivery of these goods from my firm and that payment of half the cost was made on account it is a deliberate lie" Not a word of the bill with the receipt on it to the collector, perhaps he thought then that it had been mislaid and would never come to light.

This supposed sale was a large one, yet as his partner Moze deposes, he did not know anything about it. Here we have Murphy giving a false document concealing it from his partner, then suppressing the history of the transaction when giving evidence before the collector, and when confronted with it he explains in his evidence before the judge that Franceschi wanted a bill and to receipt the bill for a portion of the money so that he could show the Spanish General that he was actually purchasing these goods for him: a tale which has no rhyme or reason and which is absolutely unconvincing.

The judge accepts the respondent's explanation—and says that it was a risk, a business risk, and that such risks are constantly taken by the merchants of to-day, and are generally referred to as business exigencies. With this I cannot agree. To my mind fraud sticks out large from this transaction, and no honest merchant would ever give a deceptive and misleading document of this nature. On consideration of the document itself, the circumstances under which it was given, the results which flowed from it, the attempt to conceal and to prevaricate in respect of it, one is forced to the conclusion that the respondent knew of the common design and lent himself to its performance.

As regards the second part of the case, on the question whether the respondent made a false statement to Mr. G. R. G. Alston who approached him with respect to the bill, when he and his principals were endeavouring to make up their minds whether to pay the claim or not, one is

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confronted with a strong finding of fact in favour of the respondent ; and a long string of authorities in support of the sacredness of the findings of the trial judge.

Alston was a clerk in charge of Messrs. Alston & Co.'s insurance business. Estrada presented the claim for the £1,000. Alston desired some evidence in support of the claim. Estrada produced the bill or invoice of Murphy, Moze & Co., Alston after consulting with Perreira another clerk, got on his bicycle and rode up to the business premises of Murphy, Moze & Co., and he says: "As a result of conversation I went to Murphy, Moze & Co., to verify duplicate bill, *i.e.*, to satisfy myself that these goods had really been sold and delivered. Up to time of arrival at Murphy, Moze & Co., I was not aware that any sum had been paid in respect of purchase of these goods. Went there in morning. Went into store. The Assistant asked me what I wanted. I said to see either Mr. Moze or Mr. Murphy. Some one came up, he said he was Murphy. I said I came from Alston & Co., and we have a claim in respect of some goods which were sunk in schooner "Nellie." I said an insurance claim and I was making inquiries to verify a bill which had been produced to me by the assured. I produced "G.R.G.A.6. I asked him if it were a genuine duplicate for the goods purported to be sold on it. He said it was perfectly in order. Then he walked across with it to another gentleman and first spoke and had a few words with him which I did not hear. He then came back and again assured me that it was perfectly genuine and added that he had good reasons for remembering that it was genuine as he was still owed \$10,000 on the deal. I made it clear that the claim was in respect of the goods supposed to have been sunk in the "Nellie." I went back to Alston & Co. On my return I made a statement to Perreira. I decided that I had all the evidence I needed to pay the claim and I paid claim same day. I produce cheque G.R.G.A.7. On back of policy Estrada signed discharge. On settling claim I was relying on Murphy's statement. If he had told me that he had not sold goods I would not have settled claim. Same date I wrote to head office. I produce duplicate original."

What could be clearer and more natural than this action of young Alston's, He accepted Murphy's word and he paid up. He had incurred an obligation and he fully discharged it. Murphy in his evidence denies that such a conversation ever took place. Then we have a careful weighing of the relative values and characters of the witnesses Alston and Murphy, and in the conclusion it was decided that the interview deposed to by Alston and denied by Murphy never did take place. It is a very serious matter to hold that Alston fabricated this conversation. We

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know he went to Murphy, Moze & Co. for a specific purpose. Are we to believe that he came away without making inquiries that he talked to someone in Murphy's shop who said he was Murphy but was not? Does Murphy then keep someone on his business premises to personate him? All interesting questions— but I do not even begin to weigh them. Murphy's conduct entitles him to little consideration.

I know that Murphy made and gave to three scoundrels a false document, which could only be intended to aid them to carry out their design and filch money from insurance companies. I know that he lied to the Collector of Customs in respect of a statement appearing on that document, and now he has the audacity to deny on oath that he ever had the interview with Alston. His conduct right through is all of the same piece. This case is remarkable and peculiar, and none like it do I think exists in any of the authorities quoted. The judge has gone out of his way to put Alston on the pillory. Many circumstances of grave suspicion arise as to the conduct of Murphy, and yet we find ourselves largely taken up with the minute examination of Alston's evidence, with a view of testing its credibility. Alston went with but one idea to a firm trading in the town, he held in his hand a bill showing that firm had sold goods; he wanted to know whether any such transaction as represented in the bill ever took place. A man who represented himself as Murphy said it was in order. Alston naturally would not accurately remember if he spoke to an attendant first, then to Moze or whoever spoke. Moze says he said to him "see Murphy." His central idea was to verify a bill and make up his mind whether to pay a claim or not. Murphy said the bill was in order, what else could he say when faced with that bill. Was he to say it is my bill, but it is absolutely false. I gave it to some Spaniards but it is not a genuine record. I aided them to insure in your company by giving them this faked document.

No—the answer he gave Alston was the answer he would be expected to give at that time. I have no doubt in my mind that the interview did take place, and substantially in the terms deposed to by Alston.

Believing this, the case for deceit is fully made out. Murphy made a false statement knowing it to be false, with the intention that plaintiff's agent should act on it—he did act on it and damage resulted.

The judgment in my opinion should be reversed, and judgment entered up for the plaintiffs for £990, damages and costs in this court and in the court below.

Appeal allowed.

Solicitors for the appellants, *J. D. Sellier & Co.*

Solicitor for the respondent. *Michael Cipriani.*

MOHABEER v. BISMILLA, *et al.*MOHABEER v. BISMILLA, *et al.*

[No. 5 OF 1924.]

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

1925. FEBRUARY 4, 5.

BEFORE SIR STANLEY FISHER. C.J., SIR HERBERT GREAVES. C.J., AND
G. O'D. WALTON, C.J.

Practice—Rules of Court, 1900, Order 29, rule 13—Accounts settled by a judge—Application for judgment—Order thereon—Whether interlocutory or final—Whether appeal lies to the Privy Council—Appeals Regulation Ordinance (No.33 of) 1922, section 3 (1) (j)—Order as to costs—Not appealed against—Construction of order—Gift.

On the 21st February, 1924, a judge made certain findings with reference to certain accounts which were ordered to be filed. The plaintiff applied for judgment which was given, in accordance with the said findings, on the 14th March, 1924.

No order was drawn up with respect to the findings of the judge: the only order which was drawn up was the one dated the 14th March, 1924.

The plaintiff, being dissatisfied with some of the findings of the judge, appealed to the West Indian Court of Appeal.

On objection being taken that no appeal lay to the West Indian Court of Appeal.

Held, that the order appealed from was final and not interlocutory, that it was made by a single judge acting as "the Court" within the meaning of the Rules of Court, 1900, Order 29, rule 13, and not by the Full Court within the meaning of Ordinance No. 33 of 1922 section 3 (1) (j), and that, therefore, the appeal was properly brought to the West Indian Court of Appeal.

M. who was married to her husband in community instituted an action against his executrix B. claiming an account and delivery to her of one-half of the movable and immovable property of her husband at the time of her death. She also claimed an injunction against the second named defendant Smith Bros. & Co., Ltd., restraining them from parting with certain moneys in their possession. After entering appearance the company stated that they were willing to abide by whatever order the Court might make.

The action was heard before Dalton, J., who gave judgment on the 6th May, 1922, for the plaintiff and restrained the second named defendants from parting with the moneys in their possession until the accounts were taken when it would be decided to whom they really belonged. He also ordered that the *defendants* should bear the costs of the action.

Held, that the learned judge certainly did not mean and he could not have meant that the half share to which the plaintiff had proved her right should be diminished by extraction therefrom of the costs obtained in the action; and that the plaintiffs costs must be paid out of the half share of the deceased in the community, and not out of the joint estate.

Order of Douglass, J., reversed.

For the reasons stated by Douglass, J., in his decision the Court upheld his judgment that the moneys on deposit with Smith Bros. & Co., Ltd., did not form part of the joint estate.

Appeal from the order of Douglass, J., dated the 14th March, 1924, reported *supra*. The reasons of appeal were (a) that the learned judge was wrong in holding that the moneys on deposit with Smith Bros. & Co., Ltd., belonged to the sons of the deceased Mohabeer and (b) that the learned judge wrongly construed the

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order of Dalton, J., as to costs and that he ought to have held that the costs should come out of the share of the deceased in the community. Other necessary facts appear from the judgment in the court below.

J. A. Luckhoo, K.C., for the respondent objected that no appeal lay to the West Indian Court of Appeal. The order appealed from was interlocutory and not final. The plaintiff Mohabeer had applied for judgment on the findings of the judge and she could not now appeal from those findings. If the order is not interlocutory, it was an order made by a judge exercising all the powers which the Full Court possessed prior to the passing of the Supreme Court Ordinance (No. 10 of) 1905 and an appeal therefrom would not lie to the West Indian Court of Appeal but to the Privy Council. No appeal lay from the Full Court to the West Indian Court of Appeal.

P. N. Browne, K.C., for the appellant, was not called upon.

The judgment of the Court was delivered by SIR STANLEY FISHER, C.J.: We are of opinion that this preliminary objection must be over-ruled. It is a final order and not an interlocutory order. The order was made on the 14th March by a single judge acting as "the Court" within the meaning of the Rules of Court, 1900, Order 29, rule 13, and not by the Full Court within the meaning of section 3 (1) (j) of the Appeals Regulation Ordinance (No. 33 of 1922) which provides that no appeal from the Full Court shall lie to the West Indian Court of Appeal. So we think we have jurisdiction in the matter.

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

J. A. Luckhoo, K.C., (*S. J. Van Sertima* with him) for the respondent Bismilla.

The judgment by the Court was delivered by SIR STANLEY FISHER, C.J.: The first point in this case is the question of the order made by Mr. Justice Dalton as regards costs. That order says "costs in this action to be borne by the defendants." Mr. Justice Douglass has given effect to that order by casting half of the costs of the action on the share to which the plaintiff is entitled by reason of having married the testator in community of goods. It seems to me a very simple question. The question is whether an order which says "costs shall be borne by the defendants" can operate in any way to diminish the share to which the plaintiff has established her right in this action. As a mere matter of construction I think it is perfectly wrong. One thing the learned judge certainly did not mean and he could not have meant on the words that the half share to which the plaintiff had proved

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her right should be diminished by extraction therefrom of the costs obtained in the action. I do not think it necessary to go further than that. Mr. Luckhoo has cited a great many cases and has argued his case in every possible way, but I do not think he has cited any cases which would lead us to hold that the construction put on Mr. Justice Douglass's words is justified. As regards the second point of the account standing in the name of Joseph and John with Smith Bros., it is most significant that the account still stood at the time of the death of the testator in the name of those two boys. I do not propose to go further or to examine the authorities at any length except to say that the reasons given for holding that these accounts were transferred to the boys in so far as the estate is concerned are perfectly sound; they do not fall into the community, I cannot feel myself in any way bound to hold that the finding of Mr. Justice Douglass was wrong. Therefore on the first point the appeal succeeds and in the second point it fails. We think the proper order would be no costs allowed.

Order varied.

Solicitors: *Carlos Gomes; W. S. Cameron.*

CRESSALL, *et al* v. HONNIBAL, *et al*.

[No. 4 OF 1924.]

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUANA.

1925. FEBRUARY, 2, 3, 7.

BEFORE SIR STANLEY FISHER, C.J., SIR HERBERT GREAVES, C.J., AND

G. O'D. WALTON, C.J.

Conversion—Possession—Diamonds—Identity—Proof of—Inference from evidence— Conviction of a felon—Admissibility of—Evidence led at trial of felon—Inadmissibility of—Res inter alios acta.

In an action for conversion the plaintiff has cast upon him the onus of proving strictly the identity of the property claimed by him.

And, in an action for the conversion of diamonds, from the very nature of the property, it is practically impossible for the plaintiff to do more than prove facts and circumstances from which the identity of the property can be irresistibly inferred.

If facts and circumstances are proved which merely raise a suspicion, the plaintiff must fail.

If facts and circumstances are proved which raise so strong a presumption that in the absence of any explanation by the defendant, it becomes certain, the plaintiff discharges the onus cast upon him.

CRESSALL, *et al* v. HONNIBAL, *et al*.

216 carats of diamonds were stolen from the plaintiffs in August, 1920. About that time A. sold 79 carats of diamonds to the defendants and 7 cash orders were issued in respect of those sales. The purchases were for a reasonable price and perfectly *bona fide*. The diamonds so purchased were dealt with by the defendants in the ordinary course of business. The plaintiffs were unable to identify as their property any of the 79 carats of diamonds so purchased.

A. was convicted for the larceny of the diamonds belonging to the plaintiffs,

The plaintiffs sued the defendants for conversion of the 79 carats of diamonds, No evidence was led in the action to prove that A, was guilty, apart from the certificate of his conviction,

After the arrest of A., the defendant's employee, acting apparently on what he was told by the plaintiffs and others of the situation, took the view that the defendants might have involved themselves in a purchase of stolen diamonds, and suggested a cautious and conciliatory attitude. There was some evidence that there was a desire on the part of the defendants to arrange the matter amicably.

Held, that the evidence was insufficient to prove that the diamonds, purchased by the defendants, were stolen from the plaintiffs,

Statements made by A. and used on the hearing of the criminal charge against him are not admissible in evidence against the defendants.

A certificate of conviction of A. was put in.

Held, that it could not be received for any other purpose than to show that A. was a convicted felon, it was not evidence in these proceedings either of the truth of the decision or of its grounds as against strangers, who had no opportunity to interfere and cross-examine. If the plaintiffs desired to prove the facts which led to the conviction they should have done so *aliunde* the conviction.

Appeal from the judgment of Sir Charles Major, Kt., Chief Justice of British Guiana, dismissing an action brought by the plaintiffs against the defendants for conversion, *inter alia*, of 216 carats of diamonds. The facts sufficiently appear from the judgments.

E. G. Woolford, K. C., (*S. J. Van Sertima* with him) for the appellants,

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

G. J. deFreitas, K.C., for the respondents, the executors of the estate of M. J. deFreitas, deceased.

Cur. adv. vult.

SIR STANLEY FISHER, C.J.: The question we have to consider on this appeal is whether the trial judge was wrong in declining to hold on the evidence before him that the diamonds which came into the hands of the defendants had been stolen from the plaintiffs.

In an action for conversion the plaintiff has cast upon him the onus of proving strictly the identity of the property claimed by him, and in an action such as the present action from the very nature of the property, it is practically impossible for plaintiff to do more than prove facts and circumstances from which the identity of the property can be irresistibly inferred. That is to say that, if facts and circumstances are proved which merely raise

suspicion, it avails him nothing; if facts and circumstances are proved which raise so strong a presumption that, in the absence of any explanation by the defendant, it becomes certain, the plaintiff discharges the onus cast upon him.

Were the law not exacting in this respect it would make the position of those who carry on a business such as that carried on by the defendants in this action very difficult.

As to the evidence before the learned judge, firstly there is the certificate of conviction. For an action such as this it was only admissible to show that Ambrose was a convicted felon. It counts for little or nothing in proving the case which the plaintiff had to establish. The rest of the evidence merely goes to show that a quantity of diamonds belonging to the plaintiffs was stolen about the end of August, 1920, that about that time Ambrose sold diamonds to the amount of about 79 carats to the defendants through their employee, Williams, and that seven cash orders were issued in respect of those sales. So far as the evidence goes the purchases were for a reasonable price and perfectly *bona fide*, and the diamonds purchased were dealt with by the defendants in the ordinary way of business. Meanwhile, Ambrose and others were arrested, and the defendants' employee, Humphrys, acting apparently on what he was told by Houston or others of the situation, took the view that the defendants might have involved themselves in a purchase of stolen diamonds and, therefore suggested a cautious and conciliatory attitude. That, together with conduct which can be regarded as perfectly consistent with a desire to arrange the matter amicably and certainly does not amount to confession of knowledge that the diamonds were stolen, is in substance all the evidence on the part of the plaintiffs.

Under those circumstances we cannot say that the learned judge was wrong in declining to draw the deduction that the diamonds in the possession of the defendants were stolen from the plaintiffs. The appeal must be dismissed with costs.

SIR HERBERT GREAVES, C.J.: I agree with the Chief Justice who tried this case that the appellants have failed to prove that the stolen diamonds, or any of them, ever came into the respondents' hands. I am of opinion, therefore, that the appeal should be dismissed with costs.

G. O'DONNELL WALTON, C.J: The plaintiffs at the material times were licensees of certain mining and placer claims in the Mazaruni River. The defendants were at that time the co-owners of a certain shop or shops in that district and held a licence to buy diamonds. The case is restricted to the loss of 215 carats of diamonds by the plaintiffs through theft, and the purchase by the

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defendants through their agent of diamonds alleged by the plaintiffs to be the produce of the before-mentioned theft.

The case has some unusual aspects, for on completion of the plaintiffs' case the defendant offered no evidence but banked on convincing the trial judge that the plaintiffs fell short of establishing their claim of conversion and of discharging the burden of proof upon them. In an action for conversion it is necessary to prove in respect of the goods converted that the plaintiff has the right to the immediate possession of them. It follows that the goods must in some way be identified as the property of the plaintiff. The court, before it proceeds to give compensation to the plaintiff for the deprivation suffered, should be satisfied that the identical goods lost were the goods purchased by the defendant. It is not necessary that the plaintiff should be in a position to identify by any mark, or specifically say—"these are mine because I recognise them as mine." But there must be some facts and circumstances from which the court may logically draw the inference that the goods lost and purchased are the identical goods of which the owner is deprived.

Thomas Houston, a partner of the plaintiffs, says he left the landing late in August, or early in September, on one and a half days' journey down the river. On his return he discovered that a canister was missing from his house with its contents, among which were 215 carats of diamonds. Next, it is proved that one Ambrose and one Yearwood, on the 30th August and 2nd September, sold to the defendants' shopman 79 carats; the price agreed for was \$2,193, the value at that time in the bush. Ambrose and Yearwood are tributors, and although the amount sold is large it is not impossible for them to have collected such a quantity. Payment was to be made by orders on the agency at Bartica according to letters of advice designating the payees. Seven orders were in fact given but they were never cashed. Four of the orders were seized and are in evidence, and payment of the other three was stopped by the defendants' agent pending investigation into the alleged theft.

The evidence so far is very slight in support of plaintiffs' contention that the defendants converted to their own use the diamonds which they had lost. The diamonds purchased in the bush by Williams on behalf of the defendants at their shop were handed by him to Honnibal, one of the defendants, and by Honnibal to the defendant de Freitas, who brought them to Captain Craig of the detective department from the bank where they had been deposited. These diamonds were examined by Houston who was unable to identify any of them. There is the suggestion that the whole of the diamonds were not brought in and that Houston only saw a part of the stolen property. That

would involve the idea of collusion between Williams, Honnibal, Ambrose and Yearwood. I have examined the bits of evidence on which this suggestion is based, and I reject it.

The plaintiffs, awkwardly situated and unable to produce requisite proof, attempted to have put in and used as evidence certain statements of Ambrose and Yearwood, reduced to writing by a constable named Parris, which were identified by Houston and exhibited to his deposition taken before the magistrate who was investigating a charge of larceny against Yearwood and Ambrose in respect of the canister and its contents. These statements were held not admissible by the trial judge and rightly so. But they succeeded in putting in, and it is on record, a certificate of the conviction of Ambrose. This certificate cannot be received for any other purpose than to show that Ambrose was a convicted felon. It is no evidence of the truth either of the decision, or of its grounds as against strangers who had no opportunity to interfere and cross-examine. If the plaintiff's desired to prove the facts which led to the conviction then they must have done so *aliunde* the conviction. I have much sympathy with the plaintiffs in the predicament in which they find themselves, but I agree with the learned Chief Justice that they have fallen far short of the proof necessary to support their action. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *W. S. Cameron; F. Dias; V. C. Dias.*

DA COSTA v. SMITH.

DA COSTA, Appellant, v. SMITH, Respondent.

ON APPEAL FROM THE SUPREME COURT OF ST. VINCENT.

1921. FEBRUARY 19.

BEFORE SIR W. H. GREAVES, C.J., ANTHONY DEFREITAS, C.J.,

AND W. P. MICHELIN, C.J. (Acting).

Negligence—Breach of duty—Damages—Negligence of plaintiff—Proximate cause—Barrister—Practising as a solicitor—Attorney General an "ex officio" Barrister—Whether as such entitled to practise as a solicitor—Judicature Ordinance (No. 14 of) 1880, sections 20, 21—Saint Vincent.

By section 20 of the Judicature Ordinance (No. 14 of) 1880 every Barrister may practise as a solicitor; and by section 21 every person holding the office of Attorney General shall, so long as he continues to hold such office, be deemed to be a Barrister of the Supreme Court *ex officio*.

Held that the Attorney General, by virtue of his office, can practise as a barrister and solicitor in the Supreme Court.

The appellant da Costa, the owner of Cumberland cotton estate, had brought an action against the respondent Smith, Colonial Civil Engineer, claiming £50 damages for negligence in constructing a concrete pipe under the public road whereby the water from a certain ravine which formerly used to flow into a drain along the side of the road was diverted into this pipe which (it was alleged) was of insufficient diameter to take off the drainage water from the plaintiff's estate abutting on the ravine and on the public road, and, as a consequence on the 24th August, 1919, the drainage water from the plaintiff's estate was unable to escape and remained thereon and damaged his cotton cultivation to the extent claimed. There was an unusually heavy rainfall on the 24th August, 1919. The concrete pipe got choked by a scone and by pieces of wood which the water brought down the ravine from the plaintiff's estate and lodged against the mouth of the pipe. The plaintiff da Costa admitted that the pipe carried off all the water that came down until the pipe got choked. Cotton cultivation gives a great flow of water; and since the pipe was put in, the plaintiff had opened up 50 acres more of cotton cultivation on his estate. The Chief Justice of St. Vincent found that there was no negligence on the part of the defendant, and gave judgment for the defendant with costs. On taxation costs were allowed to the Attorney General, who appeared for the defendant, for his services as solicitor and as counsel for the respondent. The plaintiff appealed from the judgment and from the taxation.

C. J. McLeod, for the appellant.

N. C. Ruggles, Attorney General, for the respondent.

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The judgment of the court was as follows:—

On 23rd February, 1920, the appellant filed an action in the Supreme Court (Summary Jurisdiction) against the respondent for negligence, and claimed £50 damages. The case was heard by the Chief Justice who found that there was no negligence on the part of the respondent, and gave judgment for the respondent with costs.

The appellant's reasons for appeal are the following:—

(1) That upon the evidence the judge was wrong in holding that there was no negligence on the part of the respondent; and,

(2) That James Stanley Rae, the Attorney General, was not qualified to act as solicitor and counsel for the respondent, and therefore,

(a) the warrant authorising the Attorney General to act as solicitor and counsel for the respondent is invalid ;

(b) the praecipe for a subpoena signed by the Attorney General is invalid ; and

(3) costs could not be given to the Attorney General for services as solicitor and counsel for the respondent.

The appellant is the owner of the Cumberland estate, and the respondent is the Colonial Engineer. A public road passes through the Cumberland estate and across a ravine through which water flows after a rain. In May, 1918, under the direction of the respondent a concrete pipe, two feet in diameter, was laid under the surface of the road in order to lead the water which came down the ravine after a rain to the other side of the road. Prior to the construction of this pipe when the water which flowed through the ravine reached the public road it entered a drain running alongside the road. After a heavy rainfall the water overflowed the public road both at the point where the road crossed the ravine, and also at other parts. This overflow was due to the fact that the drain alongside the road was unable to take off an excessive flow of water. The respondent erected a wall across the drain at the point where the ravine met the road in order to lead the water to the concrete pipe, and only the water which flowed over this cross wall went into the drain. It was the desire both of the appellant and respondent to send the water flowing down the ravine through the pipe under the road and to prevent it flowing down the drain, overflowing the road at a lower level, and flooding the lands adjacent to the road at such lower level. The respondent, when giving evidence, stated that the scheme of drainage adopted by him was sufficient to take off even an excessive or extraordinary flow of water, and he gave in full the data on which he had worked.

On the 24th August, 1919, there was a heavy fall of rain, and the water coming down the ravine overflowed the road and also

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the drains at the side of the road and injured the cotton fields alongside the road at the lower level. The appellant does not complain of injury to the land on the other side of the road on which the concrete pipe directed the water coming down the ravine; his complaint is that the pipe was not of sufficient diameter to take off the water under the road and on to the land on the other side where it was desired that it should go.

The following points, in our opinion, are material when considering the question of negligence:—

(1) The rainfall on the 24th August, 1919, was unusually heavy. The “appellant, when giving evidence, said: “On 24th August an extraordinary “rain. It did an enormous amount of damage. It destroyed a bridge at Rose “Bank, and gutted Coull's Hill.....It must have been an extraordinary “flow of water,”

(2) The appellant also stated that “cotton cultivation gives a great flow “of water, and that since the pipe was put in I have opened 50 acres “additional cultivation at Cumberland.”

(3) The appellant also said “the bulk of Coull's Hill drainage used to “go in another direction prior to my taking the land. I have directed “drainage and water which spread over the land “down the ravine and “through the pipe. The respondent on this point said that the directing of “the Coull's Hill drainage through the pipe would add 25 per cent, more “water for the drain to take off or 105.5 cubic feet. Even this extra flow “could have been taken off by the pipe as fixed by me.”

(4) It is established, as we think, that the scheme of drainage adopted by the respondent was sufficient to have taken off even the heavy flow of water resulting from the rain on 24th August, 1919, if the concrete pipe had not been choked by a stone and by pieces of wood which the water brought down the ravine and lodged against the mouth of the pipe. The appellant stated that “the pipe carried off all the water that came down until the pipe “got choked. It was choked because it was too small, and also that pieces “of wood did come down in the water from my land. It was in cord wood “length.” Henrietta Cudjoe, appellant's witness, stated “I saw the culvert in “the morning (that is the morning of the 24th August, 1919). The next day “I saw sticks wedged in.” John Caldeira, respondent's witness, stated: “After the rain I worked on the culvert. It was choked with three pieces of “gru-gru stick and a stone. One gru-gru was upright. The stone was against “it. It was a big stone.”

(5) The appellant, in answer to the court, said “The same damage “would have been caused if the pipe had not been placed there at all.”

We are of the opinion that no case of negligence has been made

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out against the respondent. The damage suffered by the appellant was directly due to the choking of the pipe by wood and a stone coming down from appellant's land. The appellant should have kept the land clear of such things as were likely to be taken down by the water to the pipe. The damage was also due to the extraordinary rainfall on the 24th August, 1919, and to the fact that after the concrete pipe was placed under the road the appellant had increased the volume of water flowing through the ravine by increasing the cultivation of the land by 50 acres, and by diverting the Coull's Hill drainage into the ravine.

We have given our opinion on the question of negligence on the part of the respondent. We desire to state, however, that the appellant has failed to satisfy us that the respondent was under any obligation to establish such a system of drainage as would efficiently protect the appellant's land from damage from the water flowing down the ravine. It is worthy of note that in answer to the court at the trial the appellant said that "the same damage "would have been caused if the pipe had not been placed there at all."

We are of the opinion that the second ground of appeal also fails. Section 21 of the Supreme Court of Judicature Ordinance (No. 14 of 1880) provides that "every person holding the office of Attorney General shall, "so long as he continues to hold such office, be deemed to be a barrister of "the Supreme Court *ex officio* and the preceding section of the same "ordinance provides that every barrister may practice as a solicitor." The clear meaning of these sections, as we think, is that the Attorney General, by virtue of his office, can practise as a barrister and solicitor in the Supreme Court.

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

Appeal dismissed.

Solicitor for appellant: *Bruce McLeod.*

Solicitor for respondent: *N. C. Ruggles.*

T. A. MARRYSHOW v. ROBERT TURTON.
GRENADA.
[No. 1 OF 1922.]

ON APPEAL FROM THE SUPREME COURT OF GRENADA,
BETWEEN
THEOPHILUS ALBERT MARRYSHOW, Appellant, (Plaintiff),
AND
ROBERT TURTON, Respondent, (Defendant).

1922. NOVEMBER 22.

BEFORE SIR A. V. LUCIE SMITH, C.J., SIR CHARLES MAJOR, C.J.,
AND A. K. YOUNG, C.J.

Practice—Appeal—West Indian Court of Appeal—Rules of 1920, rule 4—Whether court can consider grounds of appeal not raised in notice of motion—Assessments by Warden—How rolls made up—In whose name assessable—Owners, or failing them, tenants and occupiers—Publication of lists—Final and conclusive—Ordinance No. 56—Taxes Management Ordinance, section 52—Sale under—Indefeasible title—Whether provisions of Ordinance duly carried out—Presumptio juris—Transfer of title by operation of law—Trespass.

It is not competent for the Court to consider a ground of appeal which is not raised in the notice of motion of the appellant.

M. purchased lot 22 from H. He found C. occupying a portion thereof, and C. continued as his tenant. The Warden made enquiries of H. for the purpose of making up the Assessment Rolls, and was informed that C. had bought that parcel from him, but the purchase price was not paid in full. The Warden separately assessed the parcel of land occupied by C. and he did so in C.'s name.

Held, that inasmuch as Ordinance No. 56 provided that the assessment list is to contain the names of the owners, or if the owners are not known, of the tenants and occupiers; inasmuch as on enquiries being made by the Warden, he was not satisfied as to the ownership of the parcel of land in question, the Warden was therefore justified in inserting C.'s name in the assessment list which was final and conclusive.

A purchaser at a sale under the Taxes Management Ordinance acquires an indefeasible title provided that the provisions of the ordinance have been duly complied with. However, the Court will presume, until the contrary is shown, that the provisions of the ordinance were duly complied with.

M. sued T. for trespass. M. was the owner of a parcel of land which was assessed in the name of C. The land was put up for sale for non-payment of taxes under the Taxes Management Ordinance and bought by T.

Held, that an action of trespass would not lie in respect thereof.

A. A. Richards, for the Appellant.

M. E. H. Martin, K.C., for the respondent.

The judgment of the Court was as follows:—

This is an appeal from a judgment given by the learned Chief Justice of Grenada in favour of the defendant in an action brought by the appellant claiming damages from the respondent for trespass alleged to have been committed by the respondent on

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certain lands being portion of lot 22, Ambrosia. The facts are fully set out in the judgment in the Court below.

The grounds of appeal as stated in the notice of motion and argued before this Court may be shortly stated to be as follows:—

(1) That the respondent had to prove that the division of lot 22, Ambrosia, for the purpose of assessment, was justified by a sale to Chase.

(2) That there was no proof given that the assessment of the part of lot 22 was brought to the notice of the appellant or his predecessor in title, and

(3) That by law the warden had no power to divide a lot of land in town for assessment.

There are two other grounds of appeal set out. viz.:—That there is no duty on the owner of a lot of land to see that no other person is separately assessed in respect of a part of his land and that there is no duty in law for a purchaser of a lot of land to see what entries the Warden makes in his books. The two grounds were, however, not really argued nor do I see how they can affect the respondent who was the purchaser at the sale under the Ordinance of the portion of the lot. If the assessment and the sale to him were legal and valid, his title would be valid and he could not be a trespasser.

The ground (3) that the Warden had no power to divide for the purpose of assessment a lot was practically abandoned at the hearing and it was admitted that an owner of a lot or piece of land could sell a portion thereof, and the lot could then be assessed as two lots.

It is, however, contended that the Warden was not justified in including the name of Chase in the assessment list as there was no sale to Chase proved (ground (1)). It is proved that Chase was in occupation of a definite portion of lot 22. The appellant in his evidence states that he purchased the lot from one Herbert that he found Chase occupying the portion now in question as a tenant and he continued as his tenant. The Warden states he enquired of Herbert and was informed by him that he had sold to Chase who paid a portion of the purchase money but owed the balance. As stated by the learned Chief Justice in the Court below, the sale was evidently never completed. It was held that under these circumstances the Warden was justified in inserting Chase's name in the assessment list and that the final publication of the list was under the Ordinance final and conclusive. We are of opinion that this finding is a correct one. The Ordinance (No. 56) provides that the list is to contain the names of the owners, &c, or, if the owners are not known, of the tenants and occupiers. The Warden must make enquiries as

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to the ownership and if he is not satisfied as to the ownership he could insert the name of the tenant or occupier. Chase was undoubtedly the tenant and at the time of the assessment the occupier of this portion of the lot No. 22.

It was suggested that there was really a double assessment of this portion of the lot, but the evidence clearly shows there was no double assessment and we have no doubt there was no double assessment.

The portion of land in question was put up for sale under the ordinance and bought by the respondent. By Sec. 52 of the Taxes Management Ordinance the purchaser acquires an indefeasible title provided the provisions of the Ordinance have been duly complied with. During the hearing of the appeal the court suggested there might be some question whether the provisions of the ordinance had been complied with as regards the service of notice of sale. This point has not been taken as a ground of appeal as required by rule 4 of the West Indian Court of Appeal Rules and therefore as decided in the case of *Iles v. Perreira* (2nd November, 1920) and recognised in *Kinch v. Roach* (16th January, 1922) cannot now be raised—on the facts of this case this point is really a purely technical one as regards the appellant and in no way affects the merits of the case. The appellant was well aware that this portion of lot 22 was about to be put up for sale, he had notice but he refused to receive the notice as he stated the land was his, that he was in possession, and had already paid the taxes. It must, for the purposes of this appeal, be taken that the provisions of the ordinance were duly complied with. The respondent therefore acquired a good and valid title to the portion of land in dispute and no action for trespass can lie against him.

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

Appeal dismissed.

Solicitor for appellant, *A. A. Richards.*

Solicitors for respondent, *Martin & Renwick.*

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SAINT LUCIA.

ON APPEAL FROM THE ROYAL COURT OF SAINT LUCIA.

[No. 234 OF THE ROYAL COURT.]

1921. AUGUST 17.

PRESENT:

THEIR HONOURS

SIR ALFRED LUCIE SMITH,

Chief Justice of Trinidad, President.

SIR WILLIAM KELLMAN CHANDLER,

Acting Chief Justice of Barbados.

JAMES STANLEY RAE, Acting Chief Justice of St. Lucia.

DAVID GRAHAM AND COMPANY, LIMITED, OF BRIDGETOWN,
Appellants, (Plaintiffs),

v.

WILLIAM FRANK, Respondent, (Defendant).

Corporations—Foreign corporations—Tenure of land in St Lucia—No power to hold land—Commercial Code 1916, s.s. 183, 184, 315, 326—No licence conferred to hold land— Whether such a corporation can sue in ejectment— Religious or secular—Religious or other corporate body—"Or"—To be construed disjunctively and not as implying similarity—Except where the word "similar" or some equivalent expression is added— Interpretation Ordinance, 1916 (Revision), No. 51, section 4 (33)—Saint Lucia.

A party who is not entitled to hold or to own land cannot sue in ejectment.

Dr. Herd, for the appellants.

C.A.S. Brice, for the respondent.

LUCIE SMITH, C.J., Trinidad, President: The appellant's claim is to eject the respondent and to be put in possession of the estate. The respondent has been in possession for some six years. Whatever may have been the law in St. Lucia before 1916 it is clear that since the passing of the ordinance no foreign corporation can hold land in the Colony until they have done certain acts. If the appellants wish to turn the respondent out of possession and go into possession themselves they must comply with the law of the Colony. Admittedly they have not done so and I am therefore of opinion they could not bring this Action. As this point disposes of the whole of the case, it is unnecessary to deal with the other points. I may mention that it appears to me on the facts as set out in the papers before us that the appellant has

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no case whatever but I give no decision on the other points raised by the appeal as they have not been argued, the Court being of opinion that it was unnecessary as the first point settled the whole matter.

This appeal in my opinion should be dismissed with costs.

CHANDLER, Acting C.J., Barbados: The plaintiff company prays in par. 8. (d) of their declaration that they may be declared to be the owners of Industry Estate and the defendant now in possession thereof be ordered by the Court to leave and deliver up possession to them within 17 days from the date of service on him of the order of the Court to that effect.

The Court cannot make such an order because the plaintiff company was at the time of bringing this action and is now incapable of holding or owning land in St. Lucia under articles 183 (1) and 184 of the Commercial Code of the Colony.

The appeal should be dismissed with costs.

RAE, Acting C.J., St Lucia: I agree with the reasons given by my brother judges to the effect that until the appellant company complies with the provisions of sections 183 and 184 of the Commercial Code of 1916, it cannot hold land in the Colony. It is true that, at one time, the company had "*possession*" of the property now sought to be recovered, but this fact does not in any way override the law which requires that it must first acquire the right to hold land before it can ask the Court to restore it to possession.

Counsel has submitted that as there is no restriction against a foreigner holding land in the Colony so, too, there was at the time of purchase by the appellant company no restriction against a foreign company because "person" as defined in section 62 of Article I. of the Civil Code includes bodies corporate, but this definition can only apply to acts which a corporate body may do when it has been legally established under the law of St. Lucia, viz., by virtue of the ordinance of 1869, Crown License, or Special Statue. There is a distinct limitation in this definition which confines its meaning to acts which are not repugnant to or which cannot be inferred from some law in force in the Colony.

With regard to counsel's argument that section 326 of the Civil Code does not apply to his company because the words "or other corporate body" must be interpreted *ejusdem generis* with "religious" I do not agree. Under section 315 corporations are described as being either "religious or secular," so that when we find the words "religious or other corporate bodies" in section 326, the words "or other corporate bodies" can only be interpreted as meaning "secular" and not as *ejusdem generis* with religious. Also, under section 4 (33) of the Interpretation

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Ordinance, 1916, (Revision) No. 51, "or" shall be construed disjunctively and not as applying similarity, unless the expression "similar" or some equivalent expression is added.

I am therefore of opinion that this appeal should be dismissed with costs,

It is ordered that the judgment of the Royal Court of St. Lucia herein dated the 2nd day of December, 1920, be confirmed and that the Appeal be dismissed and judgment entered for the Respondent with costs.

GRENADA.

[No. 2 OF 1922.]

ON APPEAL FROM THE SUPREME COURT OF GRENADA.

BETWEEN

THE ATTORNEY GENERAL OF GRENADA, Appellant,
(Plaintiff),

AND

ROBERT MAYNE OTWAY, Respondent, (Defendant),

1922. NOVEMBER 22.

BEFORE THEIR HONOURS SIR A. Y. LUCIE SMITH, C.J., SIR CHARLES
MAJOR, C.J., AND A. K. YOUNG, C.J.

Practice—Appeal—Assessment of Income Tax—To be served on Assessment Committee and Appeal Committee within 30 days—Appeal Committee not in existence during that period—Notice of appeal served on Assessment Committee—Intimation by them that such notice would be sufficient—Appeal Committee appointed after the expiry of the time limited for appeal—No notice served on Appeal Committee within 30 days or at all—Whether notice of Appeal good and valid—Whether a respondent can waive an irregularity in regard to service of notice of appeal—Whether assessment was in valid by reason of the non-existence of the Appeal Committee during the time limited for appeal—Income Tax Ordinance 1921, ss, 24, 30—Grenada.

Per Lucie Smith, C.J.: It is quite competent for a respondent to waive any right of objection which he may have as to service of the notice of appeal.

By section 26 (1) of the Income Tax Ordinance, 1921, a person is entitled to appeal from an assessment on giving notice in writing to the Assessment Committee and to the Appeal Committee within 30 days after the date of the notice of assessment.

O.'s assessment was dated 16th September, 1921. The Appeal Committee was not appointed until the 25th October, 1921, that is to say not until the time for appealing had expired. O. gave notice of his appeal to the Assessment Committee on the 14th October, 1921. At the time he received notice of his assessment the Assessment Committee informed him that he could appeal to the Appeal Committee by giving notice in writing to the Assessment Committee within 30 days of the notice.

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Held, that as the Appeal Committee was not in existence at the time when O. gave his notice of appeal (nor at any time within the period prescribed for making an appeal) O. did all that was possible for him to do and that his appeal was a legal and valid one. The Ordinance could not possibly be construed as meaning that, if the Appeal Committee were not appointed within the time prescribed for appeal, then such time should run from the date of the appointment of the Committee and not from the date of the assessment.

Further, per Lucie Smith, C.J., that from the very terms of the notice given by the Assessment Committee, they being one of the parties to the appeal, waived any right they might have had to object to the notice of appeal.

Held, that notwithstanding the delay in the appointment of the Appeal Committee, the assessment of the respondent for Income Tax was valid. The Committee by whom it was made omitted no step whereby the validity of the assessment was secured, and by the non-existence of the Appeal Committee and by the delay in its appointment that security was not impaired.

Robert Mayne Otway was assessed for Income Tax by the Assessment Committee acting under the provisions of the Income Tax Ordinance, 1921. According to that ordinance any person aggrieved by an assessment could appeal therefrom by giving notice thereof to the Assessment Committee and to the Appeal Committee within 30 days of the assessment. Otway was assessed on the 16th September, 1921. His time for appealing therefore expired on the 16th October, 1921, but the Appeal Committee was not appointed until the 25th October, 1921. When the Assessment Committee were notifying him of their assessment, they informed him that he could appeal to the Appeal Committee by giving notice to the Assessment Committee within 30 (thirty) days. Otway never gave any notice of appeal to the Appeal Committee. His appeal was never heard. It was considered by the Assessment Committee as inaudible, and they transmitted Otway's assessment to the Colonial Treasurer. The Attorney General then sued Otway for the amount of the assessment. The defendant, *inter alia*, pleaded that the appeal to the Appeal Committee was still pending, and that, therefore, the claim of the Attorney General for payment of income tax was premature. The action was tried before His Honour Mr. Justice G. O'D, Walton, Chief Justice of Grenada, who gave judgment for the defendant. The plaintiff appealed.

N. Julian Paterson, K.C., for the appellant.

C. F. P. Renwick for the respondent.

SIR CHARLES MAJOR, C.J.: The questions raised by the appellants may be thus stated:

1. Notwithstanding the delay in the appointment of the appeal committee, was the assessment of the respondent for Income Tax valid?
2. If the assessment was valid, was the respondent deprived of his right of appeal, or not?

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3. If the respondent was not deprived of his right of appeal, did he exercise that right?

4. If the respondent was deprived of his right of appeal, was not the assessment nevertheless enforceable by action to recover the amount thereof?

I entertain no doubt that the assessment, in the circumstances disclosed, was valid and is still subsisting. The committee by whom it was made has not been shown to have omitted—as occurred in *Reg v. The Chorlton Union* (1872) L.R. 8 Q.B. 5 — any step whereby the validity was secured. And by the nonexistence of the Appeal Committee and by the delay in its appointment that security was not, in my opinion, impaired.

The second and third questions may be answered together. Section 24 of the ordinance enacts that the Assessment Committee shall, in sending notice to a person of his assessment for tax, inform him that, if he disputes the assessment, or any part of it, he may appeal to the Appeal Committee within thirty days of the notice of assessment. Section 26 enacts that an aggrieved person shall be entitled to appeal to the Appeal Committee by giving notice in writing to the Assessment Committee and the Appeal Committee within 30 days after the date of the notice of assessment.

Now the Assessment Committee in their notice of assessment, dated the 16th September, 1921, informed the respondent as follows: "If you "intend to dispute the assessment or any part thereof, you may appeal to the "Appeal Committee by giving notice in writing to the Assessment "Committee within thirty days of this notice." The respondent thereupon, on the 14th October, gave this notice to the Assessment Committee: "I hereby give you notice that I dispute the assessment of my income tax as computed by the Income Tax Committee, and that I intend to appeal therefrom to the Appeal Committee." The time prescribed by the ordinance for giving notice of appeal expired on the 16th October. The Appeal Committee was appointed on the 25th of the same month. No further step was taken by the respondent, the Assessment Committee, or the Appeal Committee, until—at a date which does not appear from the evidence—the Assessment Committee transmitted a copy of the assessment list to the Colonial Treasurer. Section 30 of the ordinance directs the list to be forwarded to the Treasurer, "corrected according to the result of any appeal under the ordinance."

That combination of circumstances, in my opinion, produced the following effect: By their notice of 16th September to the respondent, the Assessment Committee became—we must assume—aware of the non-existence of the Appeal Committee, prescribed the manner, and the time within which so far as they were themselves

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concerned, the respondent might appeal, and the respondent did, not only what the committee instructed or intimated to him was (for themselves) alone necessary for him to do, but also all that he could do, within the prescribed time, to appeal. There is no machinery erected by the ordinance for extension of time for appealing except in circumstances admitted to be absent from this case.

To supply that machinery and thus bring the facts of this case, and the acts or omissions of the respondent, within the various authorities cited for the appellants, this court is asked to find in the statute a series of implied provisions. Firstly—a duty cast on a public officer—the learned Attorney General did not indicate that officer—to appoint an Appeal Committee, Secondly, a duty to make the appointment within 30 days after the date of the notice of assessment for tax. Thirdly, the provision of a prescribed period of time, viz., 30 days after the date of the appointment wherein any aggrieved person may give notice of appeal against his assessment to the Appeal Committee. And in support of the argument for existence of these implications we are asked to assume, the cases of *Caldow v. Pixell* (1877) L.R. 2 C.P.D. 562 and *Reg. v. Ingall* (1877) 2 Q.B.D. 199, have been cited. In them, however, there were express statutory provisions that (in one case) parish overseers, assessment committees and other like bodies, and (in the other case) a bishop, should perform certain duties within a prescribed time or prescribed times. The cases, however, constitute no authority for the contention that this particular statute must be held to contain by implication what they contain by express enactment. *Mayer v. Harding* (1877) L.R. 2 Q.B. 410 and *Francis v. Dowdeswell* (1874) L.R. 9 C.P. 423, again, are authorities depending for applicability upon the validity of the contention: they might—probably would—be open to citation for or against (as the case may be) the respondent if he had served notice of appeal upon the Appeal Committee after its coming into being—and, therefore, after the expiration of the time prescribed by the ordinance—and had been met with the objection that that service had been out of time. It suffices to say that that event has not happened. And it seems hardly to lie in the mouth of the appellants to say to the respondent: "You ought to have done that which the law says shall not be done, on an assumption which might or might not prove correct." Furthermore, to read by implication into the ordinance provisions of the character contended for would work inconsistency, not to say positive repugnancy, of enactments, one with and to another.

With no implied provisions of the kind suggested to be found in the ordinance; with no appointment of an Appeal Committee made in time to enable the respondent to give notice to that

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committee the respondent having, in fact and in obedience to the intimation to do so by the Assessment Committee, given notice to the latter body of his appeal, and being precluded by the provisions of the ordinance from giving a like notice to the Appeal Committee after its appointment; I am of opinion that the respondent exercised his right of appeal so far as available, and that he has not abandoned it.

In any event the recovery of the amount of the assessed tax was suspended. No steps were, or are, open to the respondent to take, no steps have in fact been taken by the Assessment Committee, or other competent authority, towards determination of that suspension. I agree, therefore, with the learned Chief Justice of Grenada that the action to recover the tax was not maintainable. This appeal must be dismissed with costs.

A. K. YOUNG, C.J.: I concur with the foregoing judgment, and generally with the reasons given.

SIR A. V. LUCIE-SMITH, C.J.: I have had the advantage of reading the judgment of the learned Chief Justice of British Guiana and I concur generally therewith and have only the following remarks to make.

The respondent was assessed for income tax under the Income Tax Ordinance, 1921. Notice of his assessment is dated 16th September, 1921. By section 26 (1) of the ordinance he was entitled to appeal from the assessment on giving notice in writing to the Assessment Committee and the Appeal Committee within thirty days after the date of the notice of assessment. The Appeal Committee was not appointed until the 25th October, 1921. It was therefore impossible for him to give notice to the Appeal Committee within the prescribed time. The Assessment Committee clearly appreciated this fact at the time they gave notice to the respondent of his assessment, in their notice they informed the respondent that if he intended to dispute the assessment he could appeal to the Appeal Committee by giving notice in writing to the Assessment Committee within thirty days of the notice. In compliance with that notice the respondent on the 14th October, 1921, within the prescribed time, gave notice to the Assessment Committee that he intended to appeal. Nothing further was done by either party in the matter and on the 22nd May, 1922, the Attorney General, on behalf of the Government, issued a writ for the recovery of the income tax as originally assessed. I agree with the contention of the appellant that the non-appointment of an Appeal Committee does not render the assessment invalid, I am however of opinion that as there was no such committee in existence at the time when the respondent gave his notice of appeal (nor at any time with-

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in the time prescribed for making an appeal) the respondent did all that was possible for him to do and that his appeal is a legal and valid one: *R. v. Justices of Leicester* (1827) 7 B. & C. 6. No Court of Justice could possibly read into the ordinance a clause to the effect that if the Appeal Committee were not appointed within the time prescribed for appeal then such time should run from the date of the appointment of the committee and not from the date of the notice of assessment. The court to do any such thing would be usurping the functions of the Legislature. I, however, go further and think that from the very terms of the notice given by the Assessment Committee, they being one of the parties to the appeal waived any right they might have had to object to the notice of appeal. I, therefore, hold that an appeal is actually pending of which the Assessment Committee are well aware, they could have taken steps to have the appeal heard—until this appeal is heard the Assessment Committee could not forward the assessment, at any rate as against the respondent, to the Colonial Treasurer for collection under section 30. Until the appeal has been heard, the assessment against the respondent cannot be collected and he cannot be sued under section 34.

I, therefore, agree that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for appellant, *N. Julian Paterson.*

Solicitors for respondent, *Renwick & Rawle.*

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GRENADA.

CHYKRA SALHAB v. JOHN BRANCH.
[No. 1 OF 1925.]

ON APPEAL FROM THE SUPREME COURT OF GRENADA.

BEFORE THEIR HONOURS R. T. ORPEN, C.J., H. C. STRONGE, C.J., AND N.
JULIAN PATERSON, C.J. (ACTING).

1925. OCTOBER 2.

Negligence—Cars standing abreast on public road at night so that impossible to pass—Whether evidence of negligence—Contributory negligence—Sudden peril—Alternative courses—Whether evidence of negligence if best course not pursued—Experiments conducted after accident—Admissibility of.

Some time after dark on the 13th April, the Grenville Race day, two ford motor cars owned by C. S., No. 149 going out from, and No. 199 coming from, the town of St. George, met on the outskirts of the town. The drivers stopped their cars abreast of each other for two or three minutes to talk to one another, and by their so doing the road was blocked for vehicular traffic as it is too narrow to allow a third car to pass.

Car No. 149 had four headlights on, and the kerosine red tail light of 199 was also burning. The headlights of J. B.'s car, a light Overland, which was on its way to town were seen as it came round the nearest corner, at least 140 feet off by the driver of 149 who thereupon sounded his horn incessantly but neither he nor the driver of 199 moved their cars at all.

As J. B. came round the corner, he was so dazzled by the headlights of car 149 which shone straight in his face that he could not discern anything on the right side of that car, and, consequently did not see the red light of the other car, and did not perceive until he was about a car's length away that there was any car on that side of the road. J. B. pressed the footbrake as much as he could, threw out the clutch, and swerved as hard as he could to the right with the idea, apparently of bringing his car to a standstill right across the road before coming in contact with the other two cars. He, however, failed in achieving his object and collided first with 149 and almost simultaneously with 199.

In an action by C. S. against J. B. for damages, judgment was entered for the defendant. On appeal

Held, (1) that there was evidence of negligence on the part of the servants of C. S. in stopping their cars so long as two or three minutes after dark on a race day in a main thoroughfare on the outskirts of the town and in such a position that it was impossible for another car to pass;

(2) that had the plaintiff's drivers on seeing defendant's car approaching round the bend of the road driven on their cars as they had time to do the accident would have been avoided.

(3) that in view of the dazzling headlights of car 149 the defendant was not negligent in failing to perceive car 199 or its red tail light in sufficient time to avoid the accident;

(4) that the defendant placed as he was suddenly in a critical position had no time in which to deliberate over or weigh the comparative advantages of alternative courses, he had to act instantaneously, and the fact that in such a sudden emergency the defendant did not adopt all those expedients which suggest themselves to those who afterwards consider the incident calmly and under no sudden stress does not necessarily indicate negligence on his part, and that under the circumstances stated he was not guilty of negligence.

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Evidence was admitted by the trial judge of certain experiments made with motor cars at the same place on nights subsequent to the date of the collision for the purpose of proving how far off the kerosine red tail lamp of a motor car can be seen at night when that car is placed abreast of a car facing the other way with lighted headlights.

Held, that the evidence was rightly admitted but that as the circumstances under which the experiments were performed were dissimilar to those existing when the accident occurred, it would have little or no weight.

The judgment of the Court was as follows:—

In this action tried by the Chief Justice of Grenada the plaintiff claims £20 damages by reason of the defendant so carelessly and negligently driving a motor car as to collide with and damage two motor cars owned by the plaintiff.

From the notes of evidence taken by the learned Chief Justice it appears that sometime after dark on the 13th of April—the Grenville Race Day—two Ford Motor cars owned by the plaintiff—No. 149 going out from and No. 199 coming into the town of St. George's—met on the outskirts of the town at a point nearly opposite Skeete's house in St. Paul's ; the drivers stopped their cars abreast of each other for two or three minutes to talk to one another, and by their so doing the road was blocked for vehicular traffic as it is too narrow to allow a third car to pass. Car No. 149 had four headlights on—2 kerosene and 2 electric lights with dazzleless or deflecting lenses—and the kerosene red tail light of 199 was also burning. The headlights of defendant's car—a light Overland—which was on its way to town were seen as it came round the nearest corner by the driver of 149 who thereupon sounded his horn incessantly but neither he nor the driver of 199 moved their cars to give defendant room to pass and the defendant's car came on and collided with the two stationary cars striking 149 first and then 199. The distance from the corner to where the stationary cars were standing was estimated by plaintiff's witnesses at from 60 to 80 yards, and by the defendant at about 140 feet. The defendant gave evidence to the effect that on coming round the corner he was so dazzled by the bright lights of car 149 straight in his face that he could not discern anything on the right side of that car, and consequently did not see the red light of the other car. and did not perceive until he was about a car's length away that there was any car on that side of the road, and that it was then too late to hope to stop his car ; that he pressed the foot brake as much as he could, threw out the clutch and swerved as hard as he could to the right with the idea apparently, of bringing his car to a standstill right across the road before coming in contact with the other two cars but failed in achieving his object and collided first with 149 and almost simultaneously with 199. Evidence of the dazzling nature of the lights of car 149 was also given by Olaf Nordby, a passenger in defendant's car, who also failed to see any light other

than the lights of car 149. Evidence was tendered on behalf of the defence and admitted by the learned judge at the trial notwithstanding objection by plaintiff's counsel of certain experiments made with motor cars at the same place on nights subsequent to the date of the collision for the purpose of proving how far off the kerosene red tail lamp of a motor car can be seen at night when that car is placed abreast of a car facing the other way with lighted head-lights.

The Chief Justice gave judgment for the defendant and from that judgment the plaintiff has appealed on the grounds that the judgment was against the evidence and the weight of evidence; that the judgment was erroneous in point of law, and that the trial judge wrongfully admitted evidence of the experiments already referred to.

This court finds itself at the outset in a position of some difficulty, for the notes of the trial judge contain no statement of the reasons for his decision, and consequently, any conclusions as to the grounds upon which that decision was based can only be by way of surmise. Thus it is impossible to say with any degree of certainty whether the trial judge came to the conclusion that the plaintiff was disentitled to succeed on the ground of contributory negligence or whether he was of opinion that the whole occurrence constituted what is known as an inevitable accident. Mr. Henry, for the plaintiff, contended that even admitting that the drivers of the plaintiff's cars were negligent in stopping abreast of each other and thereby blocking the roadway, yet inasmuch as the red tail light of car 199 was visible 60 yards away to de Coteau, one of the passengers in defendant's car, the defendant himself who was driving could and ought to have seen it also and that as he had, therefore, the last opportunity of averting the accident, the plaintiff is not by reason of contributory negligence precluded from succeeding in this action. He further argued that even assuming defendant did not see and was not negligent in failing to perceive car 199 until he was a car's length from it, the measures then taken by him were not such as a reasonable and prudent man would have taken.

The proper functions of a Court of Appeal in dealing with appeals from the decision of a judge in a case tried by him without a jury have been clearly indicated by the Judicial Committee of the Privy Council in the case of *Khoo Sit Hoh v. Lim Thean Tong*, 1912 A.C., p. 323. Lord Robson, who delivered the judgment of the Privy Council, states as follows at p. 325: "The case was tried before the judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordships' Board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility

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of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the courts who deal with later stages of the case. Moreover, in cases like the present, where those courts have only his note of the evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the judge's satisfaction at the trial, either by his own questions or by the explanations of counsel given in presence of the parties. Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony."

In view of the judgment just quoted, the question which this court as a Court of Appeal has to determine would seem substantially to be whether the facts as proved by verbal testimony before the learned trial judge and which appear in his notes of the evidence were sufficient to support his decision in favour of the defendant.

In the opinion of the court there was evidence before the trial judge of negligence on the part of the plaintiff's drivers in stopping their cars so long as two or three minutes after dark on a race day in a main thoroughfare on the outskirts of the town of St. George's and in such position that it was impossible for another car to pass. The evidence also establishes the fact that had the plaintiff's drivers, on seeing defendant's car approaching round the bend of the road, driven on their cars as they had time to do, the accident would have been avoided.

The next matter to be dealt with is the conduct of the defendant in relation to the accident, and in this connection accepting as true the defendant's testimony that he did not see the red tail light of car 199, and never in fact realised that there was a second car on his left side of the road until he was within a car's length of it, the court has to consider whether having regard to the evidence of the witness de Coteau—a passenger in defendant's car—that he saw the red tail light of car 199 some 60 yards away,

the defendant, if he had been keeping a reasonably careful lookout, ought to have seen the red tail light of car 199 soon enough to enable him with reasonable care to avoid the accident.

The discrepancy in testimony between de Coteau and the defendant as to the visibility of the red tail light of car 199 is in our opinion partly, if not wholly, accounted for by the fact that the evidence shows that the witness de Coteau was sitting on the left side of the back seat of defendant's car the front seat of which was occupied by the defendant and Coulster, the interposition of whose bodies between the lights of car 149 and de Coteau would, to some extent, shield the latter from the effect of those lights and so enable him by looking out from the side to detect the red tail light of car 199 much more readily than the defendant, who being in the front seat and on the right side was directly facing the lights of car 149 without the protection of any intervening object to lessen their effect.

The court in view of the foregoing consideration is of opinion that there was evidence that the defendant was not negligent in failing to perceive car 199 or its red tail light in sufficient time to enable him to avoid the accident.

If, then, the defendant was not negligent in failing to perceive car 199 until he was within a car's length of it, does the evidence as to the means adopted by him to avoid the accident as soon as he saw car 199 directly in front of him and a car's length away (11 feet) show that he was negligent in failing to act as a reasonable and prudent man would do? Putting his rate of speed as low as 12 miles an hour (instead of 15 which it is deposed to is the ordinary rate on the that road) the defendant had a fraction of over half a second in which to make up his mind and carry out such measures as were necessitated by the emergency. According to the defendant he pressed the foot brake as hard as he could also throwing out the clutch and swerved as hard as he could to the right, he did not use the emergency brake because as he states his two hands were occupied with the steering wheel and even if the wheels are locked by the emergency brake the car will slide on.

Mr. Henry argued that throwing the clutch, although a suitable measure with a Ford Car, was quite the reverse with a change gear car, such as defendant's, and that defendant's failure to use the emergency brake and his attempting to shoot his car across the road and pull it up in that position constitute a failure on defendant's part to use those precautions which a reasonable and prudent mind would take.

The answer to this is that the defendant, placed as he was, suddenly in a critical position) had no time in which to deliberate over or weigh the comparative advantages of alternative courses:

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he had to act and act instantaneously, and the fact that in such a sudden emergency the defendant did not adopt all those expedients which suggest themselves to those who afterwards consider the incident calmly and under no sudden stress, does not necessarily indicate negligence on his part.

The present case appears to us to come within the second illustration mentioned by Lord Birkenhead in the case of *The Admiralty Commissioners v. S.S. Volute*. (1912) 1 A.C. at p. 136, and we are of opinion that the conduct of the plaintiff's drivers in stopping their cars at such a time of day on a main road and in such positions as to make it impossible for another car to pass made a collision so imminent that the defendant, unable to see car 199 until he was within a car's length of it had not really time to think, and even if he had by mistake taken the wrong measures he would still not have been guilty of negligence.

In regard to the objection raised by the plaintiff to the admission of evidence of the experiments conducted by the defendant subsequently to the accident for the purpose of demonstrating the visibility of the red tail light of a motor car, the court is of opinion that the main ground of such objection, namely, the dissimilarity of the circumstances under which such experiments were carried out from those existing when the accident occurred, goes to the weight to be attached to such evidence rather than to its admissibility.

In *R. v. Heseltine* (1873) 12 Cox C.C. 404 on a charge of arson, evidence was allowed to be given on behalf of the prosecution of experiments made by a fire brigade superintendent with a view of showing the manner in which the house was set on fire : these experiments were made with candles of different lengths prepared similarly to the candle ends found in the debris of the fire, and having regard to this case the court inclines to the view that the evidence in the present case was admissible, the weight to be attached to it depending on the exactitude with which all the circumstances and conditions prevailing at the time of the accident were re-produced in the experiments. Owing, however, to the dissimilarity in several matters between the experiments and the circumstances in which the accident occurred, the court is of opinion that the evidence as to the results of the experiments has, in the present case, little or no weight, but, at the same time in the judgment of the court there was sufficient evidence apart altogether from that regarding the experiments to support the decision arrived at by the learned judge at the trial.

This appeal therefore fails and should be dismissed with costs.

Appeal dismissed.

J. T. ALLEN v. THE ROYAL BANK OF CANADA
ANTIGUA.

JAMES TOWESLAND ALLEN, Appellant, (Defendant).

v.

THE ROYAL BANK OF CANADA, Respondents, (Plaintiff).

ON APPEAL FROM THE SUPREME COURT OF MONTSERRAT.

BEFORE THEIR HONOURS SIR A. V. LUCIE-SMITH. C.J., SIR

W. H. GREAVES, C.J., AND SIR CHARLES MAJOR, C.J.

1923. AUGUST 20.

Promissory note—Not properly stamped—whether maker can be sued on the original consideration.

Where a promissory note is insufficiently stamped the holder may sue the maker on the original consideration.

Bradley v. Bardsley (1848) 15 L.J. Ex. 115 distinguished.

The judgment of the court was delivered by Sir A. V. Lucie-Smith, C.J. of Trinidad and Tobago, as follows : —

The respondents, plaintiffs in the court below, sued the appellants for money lent, etc. It appears that a promissory note was given by the appellant to the respondents for the sums of money so advanced. This promissory note was not properly stamped and therefore could not be sued on. If the promissory note fails and cannot be sued on I think there can be no doubt that the respondents were legally entitled to sue on the original consideration as they have done. I do not think that the case of *Bradley v. Bardsley* (1845) 15 L.J. Ex. 115 applies in any way that case was decided solely as a question of pleading.

I think there was ample evidence for the learned judge in the court below to come to the conclusion he did. In my opinion this appeal should be dismissed with costs,

Appeal dismissed.

WATTLEY v. MANDELL.

ANTIGUA.

WATTLEY v. MANDELL.

ON APPEAL FROM THE SUPREME COURT OF THE LEEWARD
ISLANDS.BEFORE SIR ALFRED LUCIE SMITH, C.J., SIR CHARLES MAJOR, C.J.,
AND SIR HERBERT GREAVES, C.J.

1923. AUGUST 22.

Contract—Offer and acceptance—Acceptance must be in accordance with tenour of offer—Principal and agent—Ostensible authority.

A. entered into an agreement with N. for the erection and operation of an electric light and power plant. By the terms of that agreement A. was to supply machinery and equipment and to advance necessary funds not exceeding \$9,000 in accordance with particulars submitted by N. In those particulars were 150 wallaba poles, \$2,000.

On 27th October, 1922, a telegram was received by B from A. as follows: — "Execute order poles for N.; make application Colonial Bank"; and on the same day the Colonial Bank wrote to the respondent as follows: — "We have received instructions by cable from New York to pay you \$1,500 against invoice for 150 wallaba poles delivered at St. Kitts to N. who must certify quality satisfactory."

B. refused to agree with the condition that the poles must be approved by N. and the order was canceled on the 28th October.

N. subsequently saw him showed him the agreement between N. and A. advised him to "go ahead with the poles" and "everything would be all light."

B acted on this advice and ordered the poles.

Held, that, even assuming that N. was A.'s agent to make an offer to B. after the rejection, he could not make such an offer except in accordance with terms mentioned in the bank's letter, and that there was therefore no contract between A. and B.

Further, that the statements made by N. to B. did not constitute an offer.

SIR ALFRED LUCIE SMITH, P.: The appellant entered into a written agreement with one Nemcik for the erection and operation of an electric light and power plant. By the terms of the agreement the appellant was for that purpose to supply machinery and equipment and to advance necessary funds not to exceed \$9,000, in accordance with particulars submitted by Nemcik and embodied in a schedule to the agreement. In those particulars are 150 wallaba poles \$2,000. On 27th November, 1922, a telegram was sent by the appellant to the respondent in the following terms: "Execute order poles for Nemcik: make application Colonial Bank," and on the same day the Colonial Bank wrote to the respondent as follows: "We have received instructions by cable from New York to pay you \$1,500 against invoice for 150 wallaba poles delivered at St. Kitts to G. A. Nemcik who must certify quality satisfactory." It has been

found by the learned trial judge—and it is clearly so—that on the 28th October that order for poles was cancelled. From the evidence it appears that Nemcik subsequently saw the respondent, showed him the agreement, and advised the respondent to "go ahead with the poles" and "everything would be all right." The poles were ordered by the respondent, but he cancelled the order before any expenses were incurred by him except the cost of a telegram, some 10s. The respondent sued for damages representing the amount of profit he stated he would have made if the poles had been supplied. It was held in the court below, that as the effect of clause 10 of the agreement was that the poles, if they had been delivered, would have belonged to the appellant, he must pay for them, and that the effect of clause 13 was to make Nemcik the agent of the appellant for the purpose of giving orders. I cannot agree that these clauses are to be so interpreted. Clause 10 provides that all the machinery, equipment and material shipped by the appellant shall be assigned to him, and the title and right of ownership thereto shall at all times remain in him. By clause 13 the appellant appoints Nemcik his agent to receive and hold, on sole account of the appellant any and all machinery, equipment and material which may be forwarded by the appellant, etc. Counsel for the respondent did not rely on these clauses, but contended that by the terms of the agreement as a whole the appellant must be held to have given Nemcik authority to pledge his credit in the purchase of materials.

With this contention I cannot agree. The agreement, of which the respondent had full notice, provides that the appellant shall advance the necessary funds, not that Nemcik shall enter into contracts. The procedure adopted shows that the appellant never authorised Nemcik to enter any into contract. When the poles were to be purchased the appellant sent the cash to pay for them. The cases of *Maddick v. Marshall* (1863) 16 C.B.N.S. 387; (1864) 17 C.B.N.S. 829; and *Riley v. Packington* (1867) L.B. 2 C.P. 536 show, that if by his conduct the appellant had given Nemcik authority, he would have been bound, and that if a person gives another the means of obtaining credit by showing a plausible ground which may induce anyone to give that credit, he will be bound. The facts are very different here. It is clear that, if Nemcik wished to purchase anything which appeared in the particulars, he had to apply to the appellant, who would furnish the money for the purpose. That method was adopted on the 27th October, 1922.

Furthermore, I do not consider that any fresh binding contract was made in the conversation between the respondent and Nemcik.

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Nemcik merely advised the respondent to go on with the poles, and it would be all right.

For these reasons I think that the appeal should be allowed and the judgment should have been for the appellants—defendant in the court below with costs. We order accordingly with the costs of the appeal.

SIR CHARLES MAJOR, C.J.: The plaintiff pleaded an offer to him by the defendant, the plaintiff's acceptance of that offer, and the execution of the work thereby contracted to be performed, but the evidence does not support those pleas, for the offer, if it was an offer at all, was cancelled before acceptance, and the plaintiff plainly acquiesced therein.

Even assuming, however, that Nemcik, by virtue of the terms of the agreement between himself and the defendant, had express or implied authority to pledge the defendant's credit and to renew the original offer contained in the defendant's telegram and the bank's letter, to the plaintiff, with all respect to the learned trial judge, I am unable to agree with him that there was evidence to show, in fact, that the offer was made. The only statements of the plaintiff on the point were that Nemcik showed him the agreement, read over "the documents," and advised him "to go ahead with the poles," saying that everything would be all right. The plaintiff, it is true, acted on the advice and ordered the poles, but even if that advice could be regarded as an offer by Nemcik acting as the defendant's agent, it could only have been the original offer, which, containing the condition that the poles should be approved by Nemcik, had been for that reason unqualifiedly rejected by the plaintiff, and there is no evidence at all to show that the plaintiff subsequently accepted that condition.

I agree, therefore, that this appeal must be allowed and with the order that the learned president has said should be made.

SIR HERBERT GREAVES, C.J.: I agree with the judgments delivered by the President and the Chief Justice of British Guiana.

Appeal allowed.

PRIVY COUNCIL APPEAL No. 26 of 1924.

JAMES TOWESLAND ALLEN, APPELLANT,

v.

THE ROYAL BANK OF CANADA, RESPONDENTS.

FROM

The West Indian Court of Appeal

(Leeward Islands).

JUDGMENT of the Lords of the Judicial Committee of the Privy
Council, delivered the 6th July, 1925.

PRESENT AT THE HEARING:

LORD ATKINSON.

LORD SHAW.

LORD PARMOOR.

Judgment delivered by LORD ATKINSON.

JAMES TOWESLAND ALLEN, Appellant,

v.

THE ROYAL BANK OF CANADA, Respondents.

ON APPEAL FROM THE WEST INDIAN COURT OF APPEAL (LEEWARD ISLANDS).

BEFORE LORDS ATKINSON, SHAW AND PARMOOR.

1925. JULY 6.

Negotiable instrument—Given in respect of a debt—Whether a presumptio juris that it is accepted by way of actual payment of the debt due and not as collateral security for its payment—Whether creditor can sue on original consideration—Proceedings thereunder—Onus on debtor to prove the negotiable instrument and the terms thereof—Evidence—Book entries—Deposed to by bank manager—Books not produced—Statements not within his own knowledge—Whether such procedure is strict and proper.

It is irregular for a bank manager to depose as to items of a customer's account as existing at a point of time when he was not employed by the bank.

If a bill or note be taken in respect of a debt and nothing be said, the legal effect of the transaction is that the original debt remains, but the remedy is suspended till the maturity of the instrument in the hands of the creditor. And the remedy is equally suspended if the bill or note be given not by the debtor but by a stranger.

Where a negotiable instrument is taken in respect of a debt and nothing is said, and the creditor sues on the original consideration, the onus is on the debtor to prove that the creditor accepted the bill or note either (a) in absolute satisfaction of the debt due to him or (b) as a conditional payment only: and in the latter case, to prove its terms

The facts and arguments thereon sufficiently appear from the judgment. The judgment appealed from is reported in this volume of Law Reports. The judgment of the Privy Council was delivered by Lord Atkinson as follows:—

This is an appeal from the judgment dated the 20th August, 1923, of the West Indian Court of Appeal, by which the appeal of the present appellant from a judgment of the Supreme Court of the Leeward Islands Montserrat Circuit dated the 28th March, 1923, was dismissed. By this latter adjudication it was adjudged that the Royal Bank of Canada, the present respondents, should recover from the present appellant the sum of £2,014 16s. 9d. and costs, when taxed.

The litigation out of which the appeal has sprung was commenced by the issue by the Royal Bank of Canada of a specially endorsed writ dated the 10th October, 1922, against James Towesland Allen, the appellant, claiming to recover from him the sum of £2,248 8s. 1d., made up of the three following sums—first the sum of £2,000 alleged to have been lent at various dates in the year 1920 by the bank to the appellant, who was one of their customers; second, a sum of £227 13s. 8d. claimed to be interest at the rate of £8 per cent, per annum on the sums so lent; and

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the insignificant third sum of £20 14s. 5d., alleged to have been paid by the bank for the appellant at the Tatter's request for freight insurance, portorage, export duty, etc., on nine bales of cotton alleged to have been shipped to London at the appellant's request. To this claim the appellant, on the 27th October, 1922, filed a defence and counterclaim, in which, after traversing the making of any loan by the bank to the appellant, and denying that he was indebted to the bank for the sum claimed, he set forth in the three paragraphs following what was presumably his defence to the Bank's claim against him. The paragraphs run as follows:

“(a) Alleged 'certain monetary transactions' between himself and the plaintiffs which were contained in certain promissory notes made by him payable to one Penchoen and one Howes respectively at the plaintiffs' offices, in Plymouth, Montserrat, indorsed by the said Penchoen and Howes to the plaintiffs who discounted and purchased the same.

“(b) Alleged that the said promissory notes had never been presented for payment and submitted that such presentment was a condition precedent to proceedings thereon.

“(c) Alleged that subsequently to the aforesaid indorsement and before the commencement of proceedings herein the said Penchoen and the said Howes had made and delivered to the plaintiffs other promissory notes which the plaintiffs had accepted in full discharge of the original promissory notes and of all damages and causes of action in respect thereof as against all parties thereto.”

The bank on the 6th November, 1922, delivered a reply and a defence to this counter-claim, taking issue on the defence and alleging that the "monetary transactions" referred to in the defence were one and the same as the transactions set out in the particulars of the statement of claim, that the promissory notes mentioned in the defence were insufficiently stamped, and were presented by the appellant to the bank when the aforesaid sums of money were lent by the latter to him. Secondly, the bank denied that they had accepted from Penchoen or Howes or either of them any promissory note or notes in discharge of the original promissory notes referred to in the defence, or in discharge of all damages and causes of action in respect thereof, but admitted that the said Penchoen and Howes had given the bank certain promissory notes and letters whereby they guaranteed the bank the repayment of the amount set out in the claim.

The trial of the issues thus raised was very irregularly conducted. For instance, the manager of the bank who was examined as a witness was only appointed manager on the 4th January, 1922. His predecessor was a gentleman named Bynoe, and the

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witness was allowed to prove the items contained in the appellant's account, the state of his account with the bank, and the amount of his indebtedness, though he knew nothing whatever of any of these things personally, but only derived his knowledge of them from reading the bank books. None of these books was produced; nor was the appellant's pass-book, nor was any certified copy of his account produced. The appellant himself was not examined.

On the 2nd December, 1920, the appellant wrote and sent to the bank the following letter:—

“The Royal Bank of Canada.

“Plymouth, Montserrat, B.W.I.,

“Herewith I hand you Title Deeds and covering: Lookout & Blakes
“Estates in the parish of St. Peter Montserrat. B.W. Indies.

“You may hold these documents until all advances made by you to me
“and now current and all advances which may be made to me in the future
“are repaid in full.”

It was not disputed that on the day upon which these deeds were deposited, the appellant by arrangement with Mr. Bynoe, the then manager of the bank, drew two promissory notes, one in favour of a Mr. K. P. Penchoen. and the other in favour of a Mr. Henry Randolph Howes, and that each of the payees endorsed the note he received, and gave it to the bank, presumably as additional security for the debt due by the appellant to the bank. These notes were never produced at the trial. It is not quite clear for what amounts they were respectively given or the dates at which they respectively became due.

It was subsequently discovered that they were insufficiently stamped, and upon that discovery, or some time after it. Mr. Bynoe, the former manager of the Bank, wrote to the appellant a letter containing the following passage:—

“Dear Sir,

“We informed you some time ago that the promissory notes, which
“we hold for your account at this Branch were insufficiently stamped, and
“had your promise that the matter would be attended to within a very
“short while.”

On the 25th March, 1922, the appellant wrote to the manager of the bank the following letter:—

“The Manager.

“The Royal Bank of Canada,

“Plymouth, Monsterrat,

“March 25th, 1922.

“Dear Sir,

“In connection with the 9 bales of cotton lint which you hold stored in
“Plymouth to your order, as there is no local offer for

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“same please ship to your London Office for disposal, using the proceeds first in payment of all overdue interest and any balance against my present advances of \$9,600. I am sending you in addition one bale of 'stained' cotton, which please treat in the same manner.

“Yours truly

“(Sd.) J. T. ALLEN.”

That is a distinct and explicit acknowledgment of his debt to the bank to the amount of \$9,600, etc. The following are the applicable provisions of the Stamp Act, 1887, of the Leeward Islands:

“39—(1) Where a bill of exchange or promissory note has been written on material bearing an impressed stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamps on payment of the duty and a penalty of 40s. if the bill or note be not then payable according to its tenor and of £10 if the same be so payable.

“(2) Except as aforesaid no bill of exchange or promissory note shall be stamped except within three days after the execution thereof.

“40—(1) Every person who issues, endorses, transfers, negotiates, presents for payment or pays any bill of exchange or promissory note liable to duty and not being duly stamped shall forfeit the sum of £10 and the person who takes or receives from any other person any such bill or note not being duly stamped either in payment or as a security or by purchase or otherwise shall not be entitled to recover thereon or to make the same available for any purpose whatever.”

Owing to the difficulty of getting the original promissory notes stamped so that they might be sued on, application was in August, 1922, apparently, made by the bank to Messrs. Penchoen and Howes touching the appellant's indebtedness to the bank, whereupon they respectively wrote to the bank manager two letters identical in terms save that the sum mentioned in Mr. Penchoen's letter is \$9,100 and that mentioned in Mr. Howes is \$500.

Mr. Penchoen's letter runs thus:—

“The Manager,
“The Royal Bank of Canada,
“Plymouth,
“Montserrat.

Montserrat,
August, 1922

“Dear Sir,

“With reference to my interview with you on the subject of Mr. J. T. Allen's indebtedness to the bank, the payment \$9,100 of which has been guaranteed by me, and to the demand made by the bank that Mr. Allen should either pay his

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“debt or give some further security I now hand you herewith a Demand Note of even date for \$9,100 (nine thousand and one hundred dollars).

“It is understood and acknowledged that this note is handed to the bank as further security for the amount of \$9,100 advanced to Mr. Allen, the repayment of which together with all interest, costs and the usual charges I hereby guarantee to the bank.

“It is also agreed that this guarantee shall not be discharged by the variation or compromise of any rights of the bank against Mr. J. T. Allen or his property or any other surety or security for the balance of his account with the bank by way of indulgence or granting of time to him or any other surety or by release of any property for the time being forming a security for the said balance or otherwise.

“Yours faithfully,

Sd.) K. P. PENCHOEN.”

The note signed by Mr. Penchoen runs as follows:

“\$9,100.

“Due Plymouth, Montserrat, B.W.I.,

“Aug. 21, 1922.

“On demand I promise to pay to the order of myself nine thousand one hundred dollars at the Royal Bank of Canada, Plymouth, Montserrat, B.W.I., value received with interest at the rate of eight per cent per annum from date until paid. No.

(Sgd.) K. P. PENCHOEN”

That signed by Mr. Howes is identical in form save that the amount is \$500.00 instead of nine thousand one hundred.

These two gentlemen were examined at the trial. Their evidence is quite consistent with the contents of these letters. Mr. Barrington Ward, who opened the appeal, frankly stated that he only relied upon one point, which was, as their Lordships understood him, this, that when a negotiable instrument is given by a debtor to a creditor and accepted by the latter, while the question as to on what terms it is given is one of fact depending on the intention of the parties, yet if nothing be said as to these terms the presumption is that it is given and accepted by way of actual payment of the debt due, and not as collateral security for its payment. In their Lordships' view this contention is, as will be presently shown, unsound, but even if it were sound there is, they think, abundant evidence in this case to refute the suggested *prima facie* presumption, and, indeed, to show conclusively that the parties to the transaction never intended that the two promissory notes endorsed by Messrs. Penchoen and Howes, respectively, should be given to, and accepted by the Bank on the

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terms that they should be taken as payment of Allen's debt, a thing fluctuating in amount (as that debt apparently did), and the debt thereby discharged. As Mr. Barrington Ward, however, pressed his point so confidently their Lordships think it might be desirable, in the interests of the inhabitants of the Leeward Islands, if not of others, if they set forth with some detail the grounds upon which they think the contention so put forward by Mr. Barrington Ward is unsound.

In the last edition of Byles on Bill, *i.e.*, the edition of 1923, at p. 232 the rule of law is stated in these terms:—"If a bill or note be taken on account and nothing be said, the legal effect of the transaction is that the original debt remains, but the remedy is suspended till the maturity of the instrument in the hands of the creditor. And the remedy is equally suspended if the bill or note be given not by the debtor but by a stranger." It was at one time apparently supposed that the cases *Re Boys Eedes v. Boys, ex parte Hop Planters Co.* (1870) L.R. 10 Equity 467; *Baker v. Walker* (1845) 14 M. & W... 465, and *Palmer v. Bramley* (1895) 2 Q.B. 405 established that when a negotiable security is given by a debtor to his creditor the presumption is that it is given and accepted by way of payment, and not as a collateral security. The more recent authorities, however, are in conflict with this proposition and support the statement of the law given at the above-mentioned page of Byles on Bills. In *Gunn v. Bolckow and Co.* 10 Ch. A. 491, Lord Justice Mellish, on delivering judgment, lays down the law touching such transactions as these at pages 500 and 501 of the report thus. He said:

"Mr. Kay contends that it will be a question of fact to be tried at the "hearing whether those acceptances were taken by the vendors (*Bolckow Vaughan & Co.*) in absolute satisfaction of the debt due from the "purchaser for the iron (*i.e.*, the goods sold), so that the vendor's lien would "not revive upon the purchasers becoming insolvent, and giving public "notice that they were insolvent,"

Then at page 501 he said:

"Whoever heard of such a thing in a mercantile contract when it is said "that payment is to be made by buyers' acceptance of sellers' drafts that if "the acceptance was dishonoured, the right to sue under the original "contract did not revive."

In *Henderson v. Arthur* [1907] 1 K.B. 10, a lessor sued for a quarter's rent upon a covenant in a lease for the payment of the rent quarterly in advance. The defendant set up a defence, that by an agreement made between the plaintiff and the defendant before the lease, the plaintiff agreed to take a bill payable at three months in discharge of the rent as it became due, and that the

defendant tendered such a bill to the plaintiff in respect of the rent sued on, which the latter refused to accept.

Lord Alverstone, C.J., held that the evidence of the alleged agreement was admissible, and finding that the agreement was proved gave judgment for the defendant. The Court of Appeal held that the evidence was inadmissible, and allowed the appeal. Farwell, L.J., in the course of a judgment, approved of subsequently by Warrington, J., in the case of *in Re Defries and Sons Limited, Eichholz v. J. Defries and Sons Limited* [1909] 2 Ch. 423, said: "The Chief Justice appears to have held that 'pay' in the "covenant to pay rent was an ambiguous expression and might mean either "payment in cash or by bill, and he appears to have admitted parol "evidence on this footing."

But if that contention were correct, modern conveyancers are less wise than their fathers in discarding the old familiar form, "well in hand truly pay in lawful money of Great Britain" from covenants to pay rent. But such a contention is not consistent with the decision in *Davis v. Gyde* (1835) 2 A. and E. 623, as explained by Maule, J., in *Belshaw v. Bush* (1851) 11 C.B. 191. The learned Judge in the latter case, after pointing out that the cases in which a bill given on account of a simple contract debt has been held to operate as a conditional payment, and to suspend the remedy may be supported on the ground of an agreement, implicit in law, from giving and receiving such a security, proceeds to say:

"The cases in which the giving of a bill has been held not to suspend "the remedy on a demand specially is for rent, or may be accounted for on "the ground that the legal implication of an assent that the bill shall operate "as a conditional payment does not arise, where if it did the plaintiff would "be deprived of a better remedy than an action on a bill as in *Davis v. Gyde*, "in which the debt being for rent he would part with a remedy by distress, "and as in *Worthington v. Wigley*, where the demand being on a bond, the "plaintiff might in certain events have recourse to funds that he could not "reach in an action of simple contract;"

so that even if the lessor had received a bill on account of the rent, which he did not, it would not operate even as a conditional payment of the rent. *Re J. Defries and Sons Limited, Eichholz v. J. Defries and Sons Limited* (*supra*) was a debenture holder's action. The debentures were registered debentures and the principal money was payable to the registered holders. Arrears of interest to the amount of £1,793 15s. had accrued due. The company from time to time drew cheques for the accrued interest, which they sent to a debenture holder entitled, but who refrained from cashing them. Warrington, J., held that the mere giving of a cheque was not a conditional payment of a security

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debt ; but a debenture debt so as to restore the security. He followed the judgment of Farwell, J., in *Henderson v. Arthur* (*supra*), that *Bunney v. Poyntz* (1883) 4 B. and Ad. 568, was inconsistent with if not expressly over-ruled by *Gunn v. Bolckow, Vaughan and Co.* (*supra*), and seemed to think that the decision in *Palmer v. Bramley* relied upon by the appellant in this case was an unsatisfactory decision. Of course a creditor may accept from his debtor a negotiable instrument either in absolute satisfaction of the debt due to him, or he may accept it as a conditional payment only. In the first case the creditor takes the instrument at the risk of its being dishonoured; which, if it be, he cannot sue the debtor on the original cause of action (*Smith v. Ferrand* 7 B. and C. 19; *Sayer v. Wagstaff*, 5 Beavan, 415, 417; *Sibree v. Tripp* 15 M. and W. 23; *Caine v. Coulton*. 1 H and C. 764.)

The result in the latter case is only this, that the remedies of the creditor to recover his original debt are suspended during the currency of the negotiable instrument.

But a much more unfortunate difficulty than this stands in the way of the appellant in this case. There is proved a distinct admission under his own hand that he owes the bank the debt sued for. He is therefore under a legal obligation to pay it—indeed, at law, a legal obligation to seek out his creditor and pay him. He can only, in this case, get rid completely of that liability either by proving that this debt is paid by the acceptance of these two promissory notes, or by getting rid of it temporarily by proving that the notes to pay it were only given and taken as security for the debt, not payment of it, and that the remedy of the creditors to recover it is thereby suspended during the currency of these negotiable instruments.

But the burden of proving permanent or temporary immunity from the payment of this admitted debt rested upon the appellant. In this case he has admitted the existence of the debt. He must discharge that burden. He never produced the notes. It is not suggested that they have been destroyed or lost. Their contents could only be proved by their production, and as the evidence stands the appellant has given no proof at all as to how long they were current and that the creditors' remedies were suspended. It was not suggested that the two promissory notes of Messrs. Penchoen and Howes, given in the month of August, 1922, either satisfied the appellant's debt or suspended the Bank's remedy. The appeal therefore, in their Lordships' view, fails and must be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

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[1 OF 1920.]

1923, MARCH 6, 7, 9, 14, 17; APRIL 5, 6, 10, 11, 12, 13, 16, 17, 18;
MAY, 12. BEFORE BERKELEY, J.

Sale of goods—Memorandum of agreement to satisfy section 6 (1) of the Sale of Goods Ordinance, 1913—Offer at one price—Counter-offer at another price—When contract effected—Foreign principal—Local agent—Conditions under which foreign principal becomes liable—Non-delivery of goods—Measure of damages.

The plaintiff, a merchant residing in Barbados received on the 3rd of September, 1918, a cablegram from the second-named defendant, a local commission agent, offering for sale 500 bags of Surinam Cocoa at 9½ cents per lb. The plaintiff after asking for time within which to consider the offer, subsequently, i.e., on September 27, 1918, made a counter-offer of 7 cents per lb, which the second-named defendant rejected. Thereafter, to wit, on the 13th of October, 1918, the plaintiff sent a cablegram to the second-named defendant accepting the cocoa at the original price quoted and on the 15th October, 1918, the second-named defendant confirmed the sale by cable and intimated that he was awaiting instructions.

The evidence as to the position of the second-named defendant in the transaction was conflicting, he maintaining that he had acted throughout as the agent of the first-named defendant, while the latter averred that he had sold the cocoa to the second-named defendant who had in turn sold to the plaintiff. The Court found that the second-named defendant was in reality no more than an agent throughout the transaction. The first-named defendant further contended that even if the second-named defendant were his agent, he being a foreign principal and the plaintiff not having looked to him the agent alone became liable on the contract.

Held:—(1) That although the counter-offer was in effect a refusal of the original offer, which could not then be revived by a mere acceptance thereof, yet, as the original offeror consented to the said acceptance, a binding contract at once arose.

(2) That on the whole of the documents there was a sufficient memorandum to satisfy section 6 (1) of the Sale of Goods Ordinance, 1916, and as long as there was a completed contract no subsequent attempted variation of its terms could be used so as to take advantage of the Ordinance the said Ordinance being framed to prevent and not to encourage the commission of frauds.

(3) That although the agent of a foreign principal might in certain circumstances be personally liable on a contract induced by him, he is not so liable, however, where he had authority from his principal to enter into the contract and to pledge his principal's credit.

J. S. McArthur and H. C. Humphrys for the plaintiff.

G. J. DeFreitas, K.C., and S. J. Van Sertima for the first-named defendant.

E. G. Woolford, K. C., for second-named defendant.

BERKELEY, J.:—The plaintiff claims \$20,000 as damages from the defendant Curiel and in the alternative from the defendant Davis for the non-delivery of 500 bags Surinam Cocoa which he had agreed to purchase.

The contract in writing is said to be contained in cable messages and in letters which passed between the parties.

The first question is:—Do these messages and letters disclose a contract or memorandum sufficient to satisfy section 6 (1) of the Sale of Goods Ordinance, 1913.

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On the 3rd September, 1918, the plaintiff a merchant in Barbados, received from the defendant, Davis, a commission agent in this Colony, the following cable, "I offer 500 bags Surinam Cocoa at 91/2 cents. Georgetown free on board without freight or insurance." On 12th September plaintiff obtained an option for one week which was extended on more than one occasion. On 27th September plaintiff made a counter offer of 7c. per pound which was referred to by defendant Davis as absurd. This counter offer was in effect a refusal of the original offer which could not be revived by a mere acceptance without the renewed consent of the defendant (Leake on Contracts, 3rd edn. 34 and the cases therein referred to). The mere acceptance therefore by plaintiff on 13th October in his cable to defendant Davis "Accept Cocoa your price reply immediately Dominica" would not be held to be an acceptance binding the defendant if he had not two days after (15th October) cabled to plaintiff "sale confirmed awaiting instructions."

There is here a distinct offer by the defendant Davis and an acceptance by the plaintiff at his price.

On 7th December Curiel and Company, the owners of the cocoa, by their manager Dragten wrote a letter to J. Wood Davis for L. Inniss in which they say that 250 bags were ready to be delivered and that the remaining 250 bags would be delivered as soon as the crops came in. On 11th December plaintiff agreed to accept the cocoa in two instalments. This was not a substitution of one agreement for another as submitted by counsel but an act of forbearance on the part of the plaintiff at the request of the defendants. As said by the Court in *Hickman v. Haynes* (L.R.C.P. vol. 10 at p. 603) "The proposition that one party to a contract should thus discharge himself from his own obligations by inducing the other party to give him time for their performance is, to say the least, very startling, and if well founded will enable the defendants in this case to make use of the Statute of Frauds, not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff. It need hardly be said that there must be some very plain enactment or strong authority to force the court to countenance such a doctrine."

In his letter of 17th December defendant Curiel had also said that it would be necessary for the plaintiff to appoint an agent in Paramaribo to take delivery of cocoa after payment for it and defendant Davis on 10th December enclosed a copy of this letter to the plaintiff who wrote to both Curiel and Davis (letters of 16th and 17th December) pointing out that the sale of the cocoa was made on an F.O.B. Demerara basis and that he would only take delivery and make payment there. This was a distinct refusal to change the place of delivery and as no time had been

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fixed for delivery the seller was bound to deliver within a reasonable time. He also informed Curiel that a letter of credit had been opened by him at the Colonial Bank, Demerara, in favour of Messrs. Garnett and Company who had been appointed to represent his interests in the matter. As a fact this letter of credit was for \$8,000 and Mr. Pollard, a Director of Garnett and Company says that he was prepared to make payment on delivery of the cocoa.

Now was the defendant Davis the agent of the defendant Curiel?

The evidence tendered in Court shows that Curiel is a merchant in Surinam trading as Curiel and Company. He pays frequent visits to this colony for the transaction of business. He says that he sold to Davis at 9c. per pound having asked him if he could "use some cocoa"—that he had the cocoa at that time ready for delivery. On the other hand Davis says that Curiel asked him if he could obtain a purchaser for 500 bags of cocoa, that he then offered to write to plaintiff but Curiel suggested a telegram which he paid for and that he told him to add his commission (which was fixed at half cent per pound) so that he (Curiel) should get his 9 cents per pound. Davis is a commission agent and it seems more probable that Curiel who had cocoa to sell would ask him to obtain a purchaser than ask him if he could use it. This view is strengthened by Curiel's admission that before he left for Surinam Davis asked for more time—5 to 7 days. This would refer to plaintiff's request for an option of one week and tends to corroborate the evidence of Davis that Curiel was a party to the cabling of the offer of cocoa to the plaintiff on 3rd September and therefore connected with the contract from its inception. Curiel also admits that up to 21st October he had taken no exception to the terms of sale and that he had no reason to doubt that the money for payment of cocoa was in the colony. He further says that if the purchaser had failed to pay Davis he would not expect Davis to pay him.

The plaintiff said that he inferred Davis had a principal who evidently was abroad but that he did not know who that principal was. This tally with his cable to Davis asking him to obtain an option for one week. If he had regarded Davis as principal he would have asked him to give him an option and not to obtain it. When he came to this colony in November, 1918, Davis told him that Curiel was bringing the cocoa in two or three days. He met Curiel at Davis' office where he was introduced to him. He asked him if he had brought the cocoa and Curiel said that he had not, as there was an embargo on exportation of cocoa from Surinam, that he (the plaintiff) satisfied himself that this was not so and told Curiel that his statement was incorrect, whereupon

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Curiel said that evidently he was mistaken and added that he would be quite willing to pay some indemnity. On the following day he submitted a claim for \$7,000 which was regarded as exorbitant. He denies in cross-examination that he said to Curiel that he knew Curiel had not sold to him but as a wealthy man he could pay something. No evidence is adduced to contradict plaintiff and the court accepts his denial. The straightforward manner in which he answered all questions put to him leads the court to believe that his evidence is to be relied on.

Curiel says that Dragten as manager of Curiel and Company would act on his behalf whenever it was necessary and that he was authorised to write and sign letters for him. Now Pollard speaks of meeting Dragten in November, 1918, when he told him that Curiel was quite willing to deliver the cocoa but that plaintiff must take delivery and make payment at Paramaribo. In addition to the letters of December 7, 10, 11, 16 and 17 already referred to in the earlier part of this decision Curiel on 21st October writing to Davis acknowledges his letter of 16th October in which he informed Curiel of plaintiff's acceptance of the cocoa the sale of which he had immediately confirmed and Curiel continues "now the rumour about the peace is going on so strong the cocoa price is rather strong here and I must therefore kindly request you to let me have your definitive (definite) reply (as to shipment) by cable not later than Thursday coming before noon, If at that time. I shall not have heard from you, you must not sell your friends for less than 101/2 cents delivered in Demerara. I think the price you sold for now is 9 cents net to me. Is it not?" Curiel says that when he wrote not to sell for less than 101/2 cents it was friendly advice to Davis. The court cannot adopt this view. It is only capable of one construction and that is the principal directing his agent not to sell for less than 101/2 cents. It is also to be noticed that Curiel wrote "the price you sold for now is 9 cents net to me." If dealing with the purchaser one would have expected to read "the price I sold for now to you is 9 cents net to me." On 1st December Davis cabled to Curiel "If you do not deliver cocoa something must be decided without further delay" and in letter of same date he confirms this cable and points out the seriousness of not carrying out the terms of the contract which were F.O.B. Demerara.

The Court finds that Davis was the agent of Curiel for the sale of the cocoa.

A peculiar incident occurred about this time. The plaintiff Inniss had shipped butter to Curiel and Company at the request of Davis. Inniss drew on Davis and obtained payment. The butter was rejected by Curiel and Davis had some difficulty in settling with the bank. He brought an action against Curiel and

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Company and Bollers and Humphrys, friends of Curiel arranged with Davis to settle the differences between them, both as to butter and cocoa, for \$1,500. No authority to act for Curiel and Company was produced but the agreement dated 14th January, 1919, is signed by Davis only and it sets out that the butter was bought by Curiel from Davis and that the cocoa was sold by Curiel to Davis. Both Bollers and Humphrys say that Davis had told them that he was the purchaser of the butter and cocoa. Davis in effect says that he was the agent for Inniss as to the butter and agent for Curiel as to the cocoa and that when Inniss denied liability and it was necessary for him to raise money he signed the agreement. He regarded \$1,100 as payment for the butter and the balance \$400 as payment of the commission due by Curiel to him in connection with the cocoa. Curiel was in the Colony about this time but apparently took no active part in the transaction. The conduct of those connected therewith is to be regretted. The plaintiff Inniss has stated fully the grounds on which he claimed from Davis and the existence of the agreement can in no way affect him as he was not a party thereto and was wholly ignorant of it until he saw a reference thereto in Curiel's Statement of defence.

It is submitted that Curiel as a foreign principal is not liable. Curiel was the seller and not the buyer and although his name was not disclosed to the plaintiff until the month of November when the plaintiff came to the colony the evidence shows that it was at his request the offer was made and that his agent Davis had authority from him to enter into the contract and to pledge his credit (*Miller Gibbs & Co v. Smith & Tyrer* 2 K.B.D. 1917, p. 148).

As to damages the Court follows the rule laid down in *Rice v. Baxendale* and referred to in *O'Hanlan v. Great Western Railway* (34 L.J.K.B. 157) that the natural and fair measure of damages is the value of the goods at the place and time at which they ought to have been delivered. The value has been placed by Curiel himself as at least 101/2 cents per pound and as the ordinary net weight of a bag of Surinam cocoa is 178 pounds the Court enters judgment for plaintiff against the defendant Curiel for \$9,345 with costs to be taxed. The action against the defendant Davis is dismissed with taxed costs, to be paid by defendant Curiel. The court so orders as it finds Curiel solely responsible for the non-delivery of the cocoa (*The Esrom* (1914) W.N. 81).

Solicitor for the plaintiff, *W. S. Cameron.*

Solicitor for the first-named defendant, *F Dias.*

Solicitor for the second-named defendant, *E. A. W. Sampson*

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[506 OF 1921.]

1923. FEB. 1, 15; MARCH 12; MAY, 3, 4, 12, 15.

BEFORE GILCHRIST, ACTING. J.

Deceased person's estate—Powers of administrator—Infants interested in estate—Purchase by administrator without Court's sanction of building requiring repairs—Purchase by Administrator of materials to effect such repairs—Whether creditor of materials can claim against estate—Proof necessary to establish such claim—Costs—Principles on which Court exercises its discretion.

The plaintiff company sold certain building materials to the administrator of the estate of a deceased lady who had died intestate leaving her surviving certain minor children. The administrator had, without obtaining the sanction of the court, purchased a building which required repairs, and it was to effect such repairs that the materials in question had been purchased. On the death of the administrator the plaintiff company sought to recover from the estate the purchase price of the materials.

Held:—(1) That as there was not sufficient proof that the property on which the materials were used was, at the time of the said contract, part of the estate, the action must be dismissed.

(2) That the defendant, so soon as he retracted from his promise to pay the debt, put the plaintiff company on its guard, and this was therefore not a case in which the successful defendant should be deprived of his costs on the ground of having by his conduct induced the institution of proceedings.

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

S. J. Van Sertima, for the defendant.

GILCHRIST, ACTG. J. : 1. The Plaintiff's claim is against the defendant for the sum of \$315.40 for goods sold and delivered to Manoel de Souza, since deceased, as administrator of the Estate of Mary Eugene Nascimento, deceased, between the 30th May, 1920, and 22nd July, 1920.

2. The plaintiffs base their right to recover the sum claimed on the grounds that the right of indemnity which M. de Souza had to recover the said sum from the estate of M. E. Nascimento, deceased, was subrogated to the plaintiffs, the creditor.

3. No evidence was led for the defence, counsel submitting that the defendant was entitled to judgment on several grounds one being, that the plaintiffs had failed to prove that at the time the materials were purchased and delivered, the building on which the materials were used, belonged to the estate of M. E. Nascimento deceased.

4. I am satisfied that the materials for which the amount is claimed were used in repairing and improving a building on the W1/2 of lot 113, Third and Light Streets, Albert Town.

5. Mary Eugene Nascimento died on the 27th March, 1920, intestate.

6. On the 8th April, 1920, M. de Souza applied to the court to administer the estate of the said M. E. Nascimento (exhibit "A").

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7. On the 26th April, 1920, the said M. de Souza was appointed administrator of the said estate of M. E. Nascimento, (exhibit "B")

8. From the statement of Assets and Liabilities of the estate of the said M. E. Nascimento (exhibit "A") it will be seen that the said M. E. Nascimento owned W1/2 lot 113, Albert Town, without the buildings thereon

9. The said M. De Souza died on the 22nd November, 1920, intestate.

10. On the 8th August, 1921, Cedric De Souza the defendant was appointed administrator of the estate of M. E. Nascimento, deceased (exhibit "D").

11. The statement of Assets and Liabilities as sworn to by the defendant mentions W1/2 113, Albert Town. No mention is made of any building on the said lot (exhibit "E").

12. Now this W1/2 113, Albert Town was purchased by M. E. Nascimento, in her lifetime, at Execution Sale on the 11th November, 1919, without the buildings and erections thereon. The transport for same was received by the defendant, in his capacity as administrator of the estate of M. E. Nascimento, deceased, on the 15th August, 1921, (exhibit "C").

13. From the foregoing it is perfectly clear that Mary Eugene Nascimento at her death did not own any building on this lot. It is clear also from the evidence of Joseph Lyken, a witness for the plaintiffs, that at the time the building in question was repaired and improved M. E. Nascimento was not alive.

14. To entitle the plaintiffs to succeed it is essential first of all the they should establish that the building in question was the property of the estate of Mary Eugene Nascimento, deceased, at the time the materials were purchased and the repairs and improvements were effected.

15. The evidence of Joseph Lyken is, that M. de Souza wanted to buy this building, which was then in a dilapidated state, from the owner, one Douglas, and sent him to appraise it. He appraised it and M. de Souza bought it for, he thinks, \$300—that M. de Souza told him he bought it—that there were five houses on this W1/2 113, owned by persons who had leased house spots.

16. Counsel for the plaintiffs asks me to come to the conclusion that M. de Souza bought the building for the estate of M. E. Nascimento, from the following facts :—

(a) That M. de Souza at the time of purchase was an insolvent, having been so adjudged on the 26th September, 1904, (see exhibit "AA"), and at his death was an undischarged insolvent (see exhibit "BB"), and that no mention is made of any building in the statement of Assets and Liabilities of M. de Souza sworn to by his widow Eugene Figueira de Souza who was appointed administrator of her deceased husband's estate.

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The dealings and intromissions of the defendant with the said building as evidenced by his advertisement of Transport No. 12 (third publication) in the *Official Gazette* of 24th September, 1921, and his receipts of the rent of the said building, as also his admission of debt to Comacho and promise to pay.

(b) The evidence of De Lima as to his father purchasing the W1/2 113, Albert Town from the defendant (the sale was not completed). The payment of rent to the defendant. The evidence of Allibacchus of the payment of rent to the defendant.

(c) The evidence of W. S. Jones that at or about the time the building was purchased by M. de Souza, he M. de Souza as administrator of the estate of M. E. Nascimento sold one share in Cove and John, Limited, to P. C. Wight for \$400 and that it is reasonable to assume that it was from the proceeds of sale of this share, that the building was purchased and paid for.

(d) The evidence of F. P. Comacho, De Barros, Gomes and Leal, that M. de Souza stated that the goods should have been charged to the estate of M. E. Nascimento.

(e) The evidence of H. E. Belgrave, acting Town Clerk, Eugene Figueira de Souza.

17. Before dealing with these submissions I would point out that Douglas from whom the building was bought was not called as a witness nor was any explanation given as to his non-attendance. No notice was given to the widow of M. de Souza, the administratrix of her deceased husband, to produce the receipt for the purchase of the said building or any books dealing with this property. Nor were any produced. Under the law an administrator has to file accounts and it is reasonable to assume he would keep some book or books in which he would record his dealings with the estate he was administering. No notice was given the defendant to produce the books of the estate M. E. Nascimento, nor were any produced. The defendant could have been summoned as a witness and examined as to his dealings with the estate of M. E. Nascimento, and in particular as to how he came to collect the rents for this building in question. This was not done,

18. With respect to the submission (a) the fact that M. de Souza was an insolvent and also the fact that no mention is made of this building in the declaration of the assets of his estate, is not, in my opinion sufficient to hold that M. de Souza could not or did not buy this building in question for himself.

19. With respect to (b) and (c) the defendant's dealings with the building in question date from August, 1921 (*vide* evidence of De Lima and Exhibits K 1 and K 2). The building was purchased about April or May, 1920. The evidence of Allibacchus is, as to payment of rent subsequent to De Lima. From what I have

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stated above it will be seen that between the death of M. de Souza on the 22nd November, 1920, and 8th August, 1921, when the defendant was appointed administrator there is a gap in the administration of the estate of M. E. Nascimento, deceased. There is no evidence as to who exercised control of the building during this time. It must be remembered, as stated by Devonish who repaired and improved the place, that after he did so the place was used as a shop. Now this must have been shortly after the 22nd July, 1920, the date when materials were last supplied. With respect to the defendant's admission of the debt and promise to pay, it stands uncontradicted, no evidence having been given by the defence. That no evidence having been given in rebuttal, is, in my opinion, taken by itself or in conjunction with the other evidence of the case, insufficient for me to hold that it fixes liability against the estate of M. E. Nascimento, nor is it sufficient to hold that it establishes that the building in question was bought by the estate of M. E. Nascimento. In expressing this opinion I would point out that though it is true I have no explanation why the defendant receded from his promise to pay, and this may be said to operate against him, he is entitled to the point of view that it may be in consequence of legal advice that he would not be justified in paying the claim. I may best explain this by putting to myself the following question, and giving an answer— Could the defendant on the evidence placed before the court justify the payment of the sum to the plaintiffs in accounting for his administration or in an accounting suit at the instance of the heirs of the estate? I certainly think he could not.

With respect to the advertisement of transport (No.12, third publication in *Gazette* of 24th September, 1921). I would point out that W1/2 113 was intended to be transported to De Lima *without the buildings thereon*. This advertisement, therefore, does not assist in establishing that the said building belongs to the estate of M. E. Nascimento. It is, however, clear that the defendant is at present receiving the rents of this building and so from August, 1921, but that he did so and is doing so does not establish that at the time the materials were purchased and the repairs effected it was or is the property of the estate of M. E. Nascimento. For all I know, having regard to the evidence of Lyken that M. de Souza bought the property, he, the defendant, may be dealing with it improperly and the proper person to have possession and control of this building in question is the Official Receiver as representing the insolvent estate of M. de Souza. Further, the receipts admitted in evidence do not show in what capacity the defendant is receiving the rents. It may be well to refer here to the notices L1 and L2 and the receipts T1 T3 T5

and T6 which, with some doubt, I ruled were inadmissible as they were signed by the defendant as guardians of the minors Nascimento, and the defendant was not sued in this capacity. Assuming that these documents are admissible they go to show that the defendant is receiving the rent of this building as guardian of the minors Nascimento, but this does not establish even assuming that this building is the property of the minors, When they acquired it, or that it was theirs at the time the materials were supplied.

20. With respect to (d) I am of opinion that it would be mere conjecture for me to assume that the proceeds of the sale of the share in Cove and John, Ltd., were so applied.

21. With respect to (e) and (f). The facts referred to taken separately or together with the other evidence do not in my opinion carry the case any further in plaintiffs' favour.

22. The result is that the evidence placed before the court for the plaintiffs does not bring conviction to my mind as to who is the owner of this building in question, or who owned it at the time the materials, the subject of the plaintiffs' claim, were obtained and the repairs and improvements effected. It is impossible for me to express any definite opinion. I could only hazard a guess and this is not sufficient for me to find for the plaintiffs, the more so when it is remembered that the claim is against the estate of a deceased person.

23. Having come to that conclusion it is unnecessary to deal with the other points raised by counsel for the defendant.

24. Being unable to say that the plaintiffs have proved their cases stated, I must give judgment for the defendant. Question as to costs reserved for argument.

25 In the event of its being necessary to bring another action, I give leave to do so.

Decision as to costs.

1. On the 12th May arguments were heard as to costs.

2. Counsel for the plaintiffs submitted that the court in considering the whole circumstances of the case and the defendant's conduct in that he admitted the debt and promised to pay and thereafter receded from such promise, would exercise its discretion and refuse costs to the defendant.

3. Counsel for the defendant submitted that the court having held that on the evidence placed before the court for the plaintiffs, the defendant would not have been able to justify the payment of the plaintiffs' claim in accounting for his administration of the estate, would not deprive him of his costs, and further no good cause has been shown for the exercise of the court's discretion to do so.

4. The principles which should guide a Judge in exercising

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his discretion over costs are fully dealt with in the case of *Ritter v. Godfrey* (1920) 2K.B. (C.A.) 47.

5. I have given full consideration to this case and the other authorities cited as well as other cases and have come to the conclusion that the defendant's conduct was not such as to induce in the plaintiffs' mind the reasonable belief that there was no valid defence to the action. When the defendant receded from his promise, which was before proceedings were instituted, the plaintiffs were thereby placed on their guard and the duty imposed on them of investigating their proof and satisfying themselves whether it would establish their claim.

6. In paragraph 12 of my judgment I have pointed out in what respect further evidence could have been placed before the court by the plaintiffs. In paragraph 19 I have dealt with the point as to the defendant receding from his promise and have held that on the evidence placed before the court the defendant could not justify the payment of the plaintiffs' claim in accounting for his administration of the estate.

7. I do not think the facts and circumstances of the case are such as to warrant me in depriving the defendant of his costs. The judgment in favour of the defendant must be with costs. Execution stayed for 6 weeks from date of order perfected and if within that time the plaintiff's should give notice of motion in appeal execution should be further stayed until such appeal be determined.

Solicitor for the plaintiff, *J. Gonsalves*.

Solicitor for the defendant, *A. McLean Ogle*.

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

NASCIMENTO AND LEEFMANS.

NASCIMENTO, Appellant,
AND
LEEFMANS, Respondent.

[179 OF 1923.]

IN THE FULL COURT OF THE SUPREME COURT OF BRITISH GUIANA.

1923. MAY 11, 18. BEFORE SIR CHARLES MAJOR, C.J.

GILCHRIST, Actg. J.

Magistrate's Court—Wrongful dismissal—Proof of jurisdiction—Monthly servant—Work obtained shortly after dismissal—Measure of damages.

This was an appeal from the decision of the Magistrate of the Bartica Judicial District awarding the respondent \$15 damages for wrongful dismissal. The chief grounds of appeal were (1) that no jurisdiction had been proved, (2) that the damages awarded were excessive.

Held—(Varying the order of the Magistrate):—(1) That although jurisdiction had not been proved "totidem verbis," yet the use of the word "here" in the evidence taken together with the context, sufficiently connected the place of the respondent's service with the Judicial District in question.

(2) That the respondent being only a monthly servant and having obtained work a week after his dismissal was entitled to nominal damages only.

J. A. Luckhoo, for the appellant.

SIR CHARLES MAJOR, C.J. : The plaintiff having set forth that the service of the respondent was rendered to the appellant at Bartica, where the court for the Bartica judicial district is held, when the respondent, in answer to the appellant's cross-examination, said, "I remember that Mr. Nascimento and child were coming up, and that you required the room I was occupying for a few nights whilst your family were here," he fixed his service as having been given in Bartica and showed where the cause of action arose. He thereby proved jurisdiction.

When the appellant's wife engaged the respondent to work as a clerk for her husband, and the appellant took the respondent into his service and paid him a monthly salary of \$15, a contract of hiring and service was established and observed, that is, an engagement by the appellant to employ and remunerate the respondent, and by the respondent to serve the appellant. Nothing being said as to duration of service, I think that, by custom sufficiently fully established to be capable of judicial notice, the contract was for service from month to month, which might be dissolved by one month's previous notice given by either party to it. The respondent's claim is for \$15, wages for the month of April last, he having been dismissed by the appel-

NASCIMENTO AND LEEFMANS.

lant for misconduct, the appellant alleging that, on his ordering the respondent to vacate a room occupied by him which the appellant required for use otherwise, the respondent refused to do so and in offensive terms, whereupon the appellant paid him his wages for March and (on the 28th of that month) dismissed him. The respondent said that the appellant turned him out, told him to pack up his things and clear out on the following morning. The magistrate, passing upon this conflicting testimony, believed the respondent; in other words, held that the appellant showed no ground for his summary dismissal of the respondent. On the record before us the decision might just as well have been the other way, but that does not enable this court to say that the magistrate ought to have decided the other way, for he saw and heard the witnesses. His finding, therefore, cannot be disturbed. To what notice the respondent was entitled is only material in relation to the damages for his dismissal. It is clear, however, that he was not a household or other domestic servant, nor other servant of the same class, within the definition of "servant" in the Ordinance of 1853. The respondent was entitled to damages for breach of the contract upon which he sued. He got paid to the end of March, and a week after he is found to have entered another service. His damages, therefore, must be nominal and are, I think, sufficiently assessed at a dollar, with costs of complaint. It is not a case where the court should make any order as to the costs of this appeal.

GILCHRIST, ACTG. J.: I concur.

HENRY, *et al*, AND HICKEN.

HENRY, *et al*, Appellants,
AND

HICKEN, Respondent.

IN THE SUPREME COURT OF BRITISH GUIANA.

1922. DECEMBER 18. 1923. MAY 4, 11, 19.

BEFORE SIR CHARLES MAJOR, C J.

Wilful trespass—"Wing dam"—Doubt in Court of Appeal as to meaning of term used in evidence—Practice—Further evidence taken in Court below—Powers of Court of Appeal to order same.

This was an appeal from the decision of the stipendiary magistrate of the Berbice judicial district, who convicted the appellants of wilful trespass on lands in the possession of the respondent. In the course of the arguments in the Court of Appeal, considerable doubt having arisen as to the precise meaning of the term "wing dam" and as to the *locus* embraced therein, the Court made an order for further evidence to be taken on the point with a view to elucidating the position.

Held:—That the *locus* trespassed upon being part of the complainant's private property, the conviction was legal and valid.

J. S. McArthur, for the appellants.

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

The following is a memorandum of the decision of His Honour the Chief Justice dismissing the appeal of the defendants in the above cause on the 11th May, 1923.

The appellants were charged before the magistrate for wilful trespass on certain lands, part of Hammersmith plantation, in Berbice, contrary to the provisions of section 39 of the Summary Convictions Ordinance, 1893. The respondent is the owner of Hammersmith whereon are posted notices of warning against trespass as required by the ordinance, Evidence was given before the magistrate by eye-witnesses of the alleged trespass on a "wing dam" on Hammersmith and its adjoining trench, and by other witnesses (including the respondent) as to the construction of the "wing dam" and trench by Mr. Patoir, the respondent's predecessor in title and deviser, in 1904, in connection with certain drainage works by Commissioners under the East Berbice Drainage Ordinance, 1903. The magistrate convicted the appellants of the offence charged. In the course of his remarks he said; "The complainant proves that the dam and trench are between the two estates and private property." At the hearing of the appeal and during the arguments of counsel, considerable doubt was created as to what the "wing dam" and its trench were, having regard to the transaction of 1904 between Mr. Patoir and the Commissioners and the outcome of work by each party which resulted therefrom. Accordingly, an order was made by the Chief Justice for further evidence to be taken by

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the magistrate towards dissolution of that doubt. Upon reading that evidence and hearing further argument, it was held that the " wing dam " and trench, stated by the eye witnesses to have been the places where the trespass was committed, were in fact a dam and adjoining trench wholly on Hammersmith and wholly (and in 1904 newly) constructed by Patoir, and not, as suggested by counsel for the appellants, part of the side-line dam and its trench between Hammersmith and the adjacent plantation Industry and therefore, it was submitted, the property of the Crown, or public property. The Court also held that there was no ground for the contention put forward in the further argument for the appellants that the place of trespass had been, in the evidence taken under the order, shifted from that mentioned at the hearing by the magistrate, that is to say, from side-line dam to wing dam on Hammersmith. The appellants, therefore, having been found on the evidence to have wilfully trespassed within the section, the appeal was dismissed with costs

WIGHT v. THE DAILY CHRONICLE, LTD., AND WEBBER.

[135 OF 1923.]

1923. APRIL 30; MAY 1, 22. BEFORE BERKELEY, J.

Libel—Slander and Libel Ordinance, 1846—Special plea under section 6 thereof— Payment of money into Court—Whether denial of liability permitted after such payment —Rules of Court, 1900 Order XX r. 1,—Force and effect of rules made by the Supreme Court—Supreme Court Ordinance, 1893—Can rules amend or repeal the provisions of an Ordinance ?—Interpretation Ordinance, 1891.

The plaintiff had instituted an action for libel against the defendants, a newspaper company and its editor, respectively, based on four distinct alleged libels. In their defences to the first alleged libel the defendants relying on section 6 of the Slander and Libel Ordinance, 1846, pleaded that the libel was published without actual malice, and without gross negligence, that a full apology for the said libel had been inserted in a subsequent issue of the said newspaper, and paid money into court. The defendants in other paragraphs of their respective defences proceeded to deny the publication of the said libel.

The plaintiff now applied to have the latter portions of the said defences struck out on the ground that it was not permissible after payment of money into Court for the defendants still to deny liability.

Held :—(1) That Order XX, r. 1, which precludes a defendant from denying liability in cases of libel and slander after payment of money into court being inconsistent with the provisions of the Libel and Slander Ordinance, 1846, was, by reason of section 21 (1) (c) of the Interpretation Ordinance, 1891, ineffectual to repeal the provisions of the former Ordinance.

(2) That under the Slander and Libel Ordinance, 1846, a defendant has a right to plead special pleas and to pay money into court at the same time.

P. N. Browne, K.C., and B. B. Marshall, for the applicant.

J. S. McArthur and E. F. Fredericks, for the first-named respondent.

Webber, in person.

BERKELEY, J.: These are two distinct applications by the plaintiff to strike out all the paragraphs of the defence filed by each of the defendants which relate to paragraph 4 of the statement of claim, and in the alternative to strike out so much of paragraphs 1, 2, 3, and 4 of the defence of the first-named defendant and paragraphs 1, 3, and 9 of the defence of the second-named defendant as relate to paragraph 4 of the statement of claim.

The main grounds of the application are that the defendants in their defence having pleaded an apology and paid money into court are not entitled to plead to the allegations of the plaintiff in the said paragraph 4 of the statement of claim, other defences denying liability and that the said paragraphs of the defence are unnecessary and tend to prejudice and embarrass the fair trial of the action and are in violation of the Rules of Court. 1900.

As to the second defendant there is an additional ground viz., that he is not entitled to pay money into court in the manner and form and under the conditions set out in paragraph 9 of his defence.

The first part of section 6 of the local ordinance "Slander and Libel Ordinance, 1846," is taken from section 2 of Lord Campbell's Libel Act (6 and 7 Vict. c. 96 of 24th August, 1843) but as to the payment of money into court after the words "Such payment into court shall be" the local section reads "by leave of the court or any one of the judges of the court in such manner and under such regulations as the court may, by any rules or orders by the court to be from time to time made, order and direct."

Both sections provide that in an action for libel contained in a public newspaper it is open to a defendant to plead that the libel was published without gross negligence and without any malice towards the plaintiff and that he had published a full apology. Both sections also give a defendant liberty to pay money into court by way of amends for the injury sustained by the publication of such libel. Up to 31st July. 1845, this payment of money into court by a defendant was optional but in that year by 8 and 9 Vict. c. 75 s. 2 it was provided that it should not be competent for any defendant in such an action to file a plea under the Act of 1843 without at the same time making a payment of money into court by way of amends as provided by the said Act, but every such plea so filed without payment of money into court shall be deemed a nullity, and may be treated as such by the plaintiff in the action. This section was incorporated into our local ordinance by section 7.

In England from 1843 till 1875 money could not be paid into court in an action of libel except under Lord Campbell's Libel Act, Then by the Judicature Act of 11th August, 1875. (38 and 39 Vict. c. 77) it was enacted under section 24 that

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" any provisions relating to the payment, transfer or deposit into, or in, or out of any court of any money.....shall, for the purposes of this section, be deemed to be provisions relating to practice and procedure " and by Rules of Court in the first schedule of the Act under Order 30 (R 1) any defendant in any action was permitted to pay money into court. It follows that from 1875 to 1879 money could be paid into court in an action brought for libel in a newspaper or other periodical publication in two ways, either under Lord Campbell's Act or under the Judicature Act (Odgers on Libel and Slander (5th Edn.) 642). Then "The Civil Procedure Acts Repeal Act 1879" (42 and 43 Vict. c. 59 Part II) of the schedule which said part operated only in respect of the Supreme Court of Judicature in England repealed that portion of Lord Campbell's Libel Act which enabled a defendant to pay money into court and also repealed the words "as provided by said Act" in section 2 of 8 and 9 Vict. 75. In 1883 these repeals were extended to all the courts in England. So far as this colony is concerned these provisions in the local ordinance of 1846 have not been repealed.

In the local rules of 1893 (now repealed) Order 21 (1) is partly taken from Order 30 (1) of the Rules of Court attached to the Judicature Act of 1875 but the local rule specially provided that a defendant "may with a defence denying liability for the whole or part of the claim pay money into court." The English Order 30 (1) is now Order 22 (1) of Rules of Supreme Court, 1883, and it provides that a defendant may pay money by way of satisfaction, or he may "with a defence denying liability (except in actions or counter-claims for libel or slander) pay money into court which shall be subject to the provisions of rule 6." This English Rule (1) has been adopted into our local Rules of Court, 1900 (Order 20) (1).

Under this rule in all other actions a defendant may pay money into court while at the same time he denies all liability, but this is not allowed in actions or counter-claims for libel or slander. That is if a defendant pays money into court at all he must do so by way of satisfaction or amends which shall be taken to admit the claim or cause of action in respect of which the payment is made. Odgers on Libel and Slander draws attention in a footnote on page 340 to certain cases which are "no longer law since October 24th, 1883, when this rule was made."

It is submitted that this rule repeals the provisions of the local ordinance of 1846 under which a defendant had the right to plead special pleas and to pay money into court at the same time.

The Supreme Court Ordinance, 1893, under which the local "Rules of Court" were made provides that "no such rule or order shall be deemed invalid or be subject to objection by reason

that it alters, amends or repeals the provision of this or any other statuterelating to any matter hereinbefore in this section mentioned" (Order 58 r. 2).

This court cannot hold that under this section the ordinance can be repealed. Order 10 (7) is inconsistent with almost every section of the ordinance and the Interpretation Ordinance, 1891, (s. 21) (1) (c) provides that "no rule shall be inconsistent with the provisions of any enactment." No rules have been made under the Ordinance itself and if they had been made such rules could only have been consistent with its provisions.

The court is of opinion that this ordinance is still the law of this colony and it is strengthened in this view by the decision of the full court in *Davis v. The Argosy Co. Ltd., et al* (G. J. 30 June, 1909). At that time the Roman-Dutch Law was the law of the colony and the court said "The ordinance 3 of 1846 does not in our opinion substitute the whole English Law for the whole Roman-Dutch Law in cases of libel as it does in cases of slander, but merely allows in cases of libel certain pleas (such as those which the court now is asked to strike out) which had previously been introduced in English Law by statute" This decision was given when the local Rules of Court, 1900 with Order 20 (1) had been in force for nine years.

As regards the second defendant objection is taken to the use of the words "alleged" and "without prejudice" in certain paragraphs of the defence.

The court is of opinion that these words cannot prejudice or embarrass the plaintiff.

The applications are dismissed with costs and the plaintiff is granted ten days for filing his reply from date of final order.

Solicitor for the applicant, *F. Dias*.

Solicitor for the first-named respondent, *A. G. King*.

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

In re PIMENTO AND D'OLIVEIRA, LTD.

In re PIMENTO AND D'OLIVEIRA, LTD.

1923. JUNE 26; JULY 5. BEFORE SIR CHARLES MAJOR, C.J.

Company Law—Company in liquidation—Application to court for directions—Issue of debentures—Non-admissibility in evidence of circular relating to same—Interpretation of contract of debenture—Conflicting conditions—Document looked at as a whole— Position of debenture-holders—Effect of naked debenture.

This was an application by the liquidators of the company in question for directions of the court in the following circumstances. In 1921 the company, in order to provide moneys for the purchase of materials issued certain debentures. A circular relating to the debentures was, prior to their issue, sent round to all the shareholders. On the company going into liquidation doubts arose as to the priority of payment of the respective creditors of the company by reason of the unusual wording of the said contracts of debenture, condition 1 of which ran thus:—"This debenture is one of a series of debentures for securing the principal sum of \$100,000 issued or about to be issued by the company. The debentures of the said series, whether original or not, are all to rank *pari passu* in point of charge, without any preference or priority over one another. They shall not create a preferent charge on any of the company's property, and if the company is wound up, they shall rank preferent only to the ordinary shares of the company."

Held :—(1) That the circular sent out to the shareholders in connection with the issue of the debentures could not be looked at by the court for assistance in the construction of the contract evidenced by the debentures.

(2) That, the contract read as a whole created nothing more than a money bond or naked debenture and the debenture-holders were accordingly entitled to prove in the winding-up and take their dividend *pari passu* with the other unsecured creditors.

G. J. deFreitas, K.C., for the applicants (liquidators).

P. N. Browne, K.C., for certain debenture-holders.

M. J. C. de Freitas, for Mrs. Perreira, a debenture-holder.

J. S. McArthur, for the creditors.

SIR CHARLES MAJOR, C.J.: The liquidators of this company have applied for directions of the court in the following circumstances. In 1921, the company, in order to provide moneys for the purchase and erection of wood-working plant and machinery, by special resolution, duly passed on the 29th November, and duly confirmed on the 15th December, authorised the directors to issue debentures, providing for the payment of principal sums not exceeding \$100,000, bearing interest at the rate of 10 per cent, per annum, the debentures to be in such form, and to be secured in such manner, and to be issued to such persons and on such terms as the directors might think expedient, At a directors' meeting held on the 17th December, it was resolved to issue debentures to the extent of \$100,000, of \$50 each, bearing interest at the rate of 10 per cent, per annum payable half-yearly, the resolution concluding with the words "These debentures will be preferent to ordinary shares." It appears from the affidavit in support of the motion for directions that a circular was

sent round to all shareholders relating to the proposed debenture issue, which has been described by counsel as a prospectus. On the authority of *In re Chicago & North Western Granaries Co., Ltd.*, [1898 1 Ch, 163] affirmed as it was by Parker. J. (as that learned judge then was) in *In re Tewkesbury Gas* [1911 2 Ch. 279, 1912 1 Ch, 1] I accede to the proposition that for the purposes of the court's directions and for assistance in construction of the contract evidenced by the debentures, I may not look at the circular, and I have not read it. No reference has been made to the memorandum, or the articles of association. The former is mentioned in the contract, and I assume that the debentures were duly issued; my opinion must be expressed only on consideration of the contract itself.

Any hesitation in arriving at that opinion must have been due to the peculiar wording of the contract, which (if I may say so) might certainly have been better drawn. It is called a debenture; states that the moneys thereby secured are payable in accordance with the conditions thereon indorsed; that the company thereby engages, during the continuance of this security, to pay interest half-yearly at the rate of 10 per cent, per annum exclusively out of profits and that the debenture is issued subject to and with the benefit of the conditions indorsed thereon which are to be deemed part thereof. Material conditions are the first and the tenth. The first condition runs thus: "This debenture is one of a series of debentures for securing the principal sum of \$100,000, issued or about to be issued by the company. The debentures of the series, whether original or not, are all to rank *pari passu* in point of charge, without any preference or priority over one another. They shall not create a preferent charge on any of the company's property, and if the company is wound up, they shall rank preferent only to the ordinary shares of the company." The tenth condition reads: "Subject to condition one hereof, the principal moneys hereby secured shall immediately become payable if an order is made or an effective resolution is passed for the winding up of the company." The liquidators now ask whether or not they shall pay the claims of the ordinary unsecured creditors of the company in priority to the claims of the debenture-holders for capital and interest thereunder or either. No question arises as to the payment of interest to the holders, for the company has never made a profit.

A debenture is a document of which, amid the various judicial expressions of uncertainty and inability as to definition to be found in the cases, it may be said at least that in "ninety-nine cases out of a hundred" as Sir Francis Palmer writes, "it is an instrument under (as here) the seal of a company, providing for

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the payment of a principal sum and interest thereon half-yearly being one of a series of like debentures." As to other characteristics of a debenture which the same learned author enumerates these debentures provide (a) for payment of principal or a minimum portion of it, not at a specific time, but on a contingency, viz., of a winding up or of six months' notice by the company of intention to pay off; (b) for payment of interest at a specific rate but only out of profits.

It is the presence in the instrument of other expressions, some (if not all) usual in a debenture but with varying effect on its meaning as affecting the rights of its holder, that has given rise to arguments from at least three different points of submission. Thus first, there occur at intervals throughout the document such cognate expressions as "hereby secured," "this security" or for securing. Then there is the usual clause "the debentures.....are all to rank *pari passu* in point of charge" etc., then again come the words I have already read: "They shall not create a preferent charge on any of the company's property, and if the company is wound up they shall rank preferent only to the ordinary shares of the company." That word "only" is not in the resolution of the 17th December, 1920. Apart from the use of the terms "secured" and "security," having a well-recognised meaning in an instrument of this character, the *pari passu* clause by the use of the words "in point of charge," distinctly involves the conception of security by way of charge, not for mere payment as Mr. Browne contends but payment enforced by realization of a security therefor and equal division of the proceeds of that realization. Hence it is that counsel for one debenture holder has been able to argue that the instrument shows an intention to charge the property of the company by way (he contends) of floating security and that to that intention on authority, a court of equity will not be slow to give effect, notwithstanding the concluding sentence of the first condition. That argument not unnaturally arises from the mixture in the condition of expressions which are naturally contradictory. I respect it, but I am not able to accede to it, for any implied intention to create a charge by the use of the terms I have indicated, must, I think, be controlled by the subsequent express declaration that the debentures shall not create a preferent charge on any of the company's property, and it is to the construction of that declaration and to the provisions for payment of the debenture-holders in the event of a winding up that the main argument has been directed.

What a "preferent" charge in the context may mean I do not know. By itself, the expression is susceptible of the argument that it carries yet farther the intention to create a charge but not a preferent charge that is one preventing the company

from creating mortgages or charges to rank prior to it but I did not understand Mr. de Freitas, junior, to extend his argument thus far. Reading, however, the clause as a whole, I am of opinion that it means simply that the debentures are not to create a charge of any kind on the company's property.

A debenture, therefore, of this series, is nothing more than a money bond, a naked debenture, an acknowledgment that the sum therein stated has been lent and will be repaid upon either of two contingencies, which—because neither contingency might never occur—made it a permanent debenture. "And of course, where there is a loan repayable on a contingency, it cannot be disputed that the obligation to repay is a debt—a contingent debt for every loan imports the relation of borrower and lender and of debtor and creditor." (Thus Palmer III, 49). With that relation before them the liquidators suggest (I can hardly say contend) that payment of these debenture-holders, who are unsecured creditors, should be postponed to that of other unsecured creditors. Why? Because, it is said, there are the words "preferent only" in the last clause of the first condition and what would happen if the company had issued preference shares? The short answer to this argument is, first, that no preference shares have been issued, that there is no surplus, and therefore, no question at issue between these debenture holders and the shareholders. To tell a person that, as a debenture-holder he will on liquidation of the company ensuing, be paid before a shareholder gets anything, gives him gratuitous information, but it tells him nothing to alter his position for payment of his naked debenture, it leaves him to the law applicable to that position. The rule as to that position is stated in the passage of Palmer quoted by Mr. Browne and the provision in this contract, in the event of a winding up, for a specified preference over persons whose interests are not here reached cannot cut down that rule, I am, therefore, of opinion, that the contract under consideration must be construed as entitling the debenture-holders to prove in the winding up and take their dividend *pari passu* with the other unsecured creditors, and I direct accordingly,

The costs of the parties to the motion must be paid out of the assets.

Solicitors for the applicants, *Cameron and Shepherd.*

Solicitor for certain debenture-holders, *F. Dias.*

Solicitor for a debenture-holder, *C. Gomes.*

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

BEHARRY v. BRITISH GUIANA FIRE
INSURANCE Co., LTD.

[144 OF 1922.]

1923. MARCH, 13, 14, 16, 19, 28. BEFORE BERKELEY, J.

Fire Insurance—Conditions endorsed on policy—Condition as to furnishing particulars of loss—Particulars furnished—Insurer not querying same—Waiver of condition—Condition requiring disclosure of other insurances—Failure to disclose—Effect on policy.

The Plaintiff on the 20th of February, 1918, effected a policy of insurance with the Defendant Company in respect of dry goods, provisions, and other merchandise to the value of \$1,000. On May 1st, 1921, the said goods, etc., were destroyed by fire and on May 14th, 1921, the Plaintiff furnished the Company by letter with an account of his loss to which the Defendant Company in their reply of the 20th January, 1922, took no objection. Condition 12 endorsed on the policy required the insured to give an account of logs caused by fire, while condition 3 stipulated for notice to be given by the insured of any existing or future insurances on the property insured, failing which the insured was to be deprived of all relief under the policy. The Plaintiff had since May, 1917, insured the said property with another Company and subsequently on the 29th of September, 1920, effected another insurance with the said Company but had not given notice of either of these insurances to the Defendant Company.

Held :—(1) That it was not now open to the Defendant Company to question the correctness of the particulars of loss, and they must be taken to have waived the condition relating thereto.

(2) That nondisclosure by the insured of the other insurances went to the root of the contract and disentitled him from relief under the policy.

J. A. Luckhoo, for the plaintiff.

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

BERKELEY, J.: The plaintiff claims from the defendant company the sum of \$1,000 due under a Policy of Insurance dated 20th February, 1918, in respect of dry goods, provision and other merchandise to the value of \$1,337.99 destroyed by fire on the 1st of May, 1921. He alleges that he is unable to furnish particulars as his stock book was lost or destroyed in the fire.

The defence is (1) that plaintiff did not have stock to the alleged value, (2) that the plaintiff not having complied with the conditions endorsed on the policy sued on is not entitled to claim any benefit thereunder and (3) if liable, only in respect of a rateable proportion of any loss or damage, other policies having been effected in the Hand-in-Hand Mutual Guarantee Fire Insurance Company of British Guiana in respect of same stock— which policies were in full force and effect on the date of the fire.

The plaintiff at the time of the fire had two other policies in the defendant company, viz.:— (1) for \$2,000 in respect of buildings which was settled for \$1,800 and (2) for \$1,000 in respect of paddy which was settled for \$432.

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Under condition 12 endorsed on the policy the insured has to give as particular an account as is reasonably practicable of the amount of the loss. The evidence on this point is that of the plaintiff and his son-in-law Joseph. The plaintiff says that he gave particulars to one Alli who made out the claim for him. Alli is not called as a witness but the claim with the particulars setting out the various items was furnished to the defendant on 14th May, 1921. The claim shows \$1,500 and the particulars \$1,387.99

Joseph the son-in-law who sold in the shop places the value of the stock lost at \$1,500 to \$1,600; he says that the month before when stock was taken it was valued at \$1,800 and that the average sales were \$200 to \$250 per week.

Plaintiff also says that the stock book was kept in an iron safe upstairs which was locked and that the safe burst open on falling, and its contents fell out and were burnt—that he had kept a stock book for about four years. County Inspector Murland who visited the scene of the fire saw the safe lying on its side open about one inch and a half—he opened it—there was nothing in the safe save drawers and ashes on the ledge above the drawers.

I am not satisfied on the evidence that a stock book ever existed—the Plaintiff admits that he purchased from Messrs. Wieting & Richter and Messrs. Santos & Co. and had pass books which were burnt. Nothing would have been easier than to bring witnesses to prove that he had purchased from these firms stock alleged to have been in his shop at the time of the fire. This stock is said to have included 4 bags flour, 10 bags rice, 3 cases kerosene oil and other items of substantial value. I am unable therefore to find as to the value of the goods in stock and would have nonsuited the plaintiff (*Hiddle, et al v. National Fire and Marine Insurance Coy. of New Zealand L.R., A.C. 1896, p. 372*). I find, however, that on 20th January, 1922, the defendant company wrote to counsel for plaintiff "the claim for \$1,000 on stock is disallowed on the ground that Beharry had further insurance elsewhere and did not at any time notify this company of its existence." The claim with particulars is dated 14th May, 1921. When therefore the defendant company in their letter made an express repudiation of liability on the ground of further insurance elsewhere, which had not at any time been notified to them they had already received the particulars, and as no reference was made in their letter as to this condition it must be regarded as waived. See decisions cited by Porter *Laws of Insurance, 6th Edition, 206*, and Welford and Otter-Barry's *Fire Insurance, 2nd Edition, 278*). On this ground the plaintiff would be entitled to

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succeed but as admitted by his counsel only in respect of a rateable proportion the same stock having been insured under two policies issued by the Hand-in-Hand Fire Insurance Company.

There remains to be considered the non-compliance by the plaintiff with condition 3 which is referred to in the letter of 20th January, 1922, as the ground for disallowing the claim. It reads "The insured shall give notice to the company of any insurance or insurances already effected or which shall afterwards be effected elsewhere covering any of the property hereby insured and unless such notice be given and the particulars of such insurance or insurances be stated in, endorsed on, or attached to this policy by or on behalf of the company before the occurrence of any loss or damage the insured shall not be entitled to any benefit under this policy." The plaintiff admits that the conditions—subject to which the policy was issued—were read to him by his son-in-law. Jardine the canvasser for the defendant company is out of the colony and the secretary says that Jardine got the information as to question 1 from him. He says "I told Jardine he (plaintiff) had \$1,000 on paddy" and this was given as the answer to question 1. This question is as follows:—"Is the property herein referred to already insured? If so give name of company and amount of insurance." The answer is "Stock for \$1,000." I accept Mr. Bollers' explanation. Plaintiff says that the canvasser asked him if he was insured and that he said for \$300. He is corroborated by Joseph his son-in-law who says that Jardine asked plaintiff if he was insured anywhere else and that plaintiff said he was insured in the Hand-in-Hand for \$300.

It was the natural thing for the canvasser to put the question and if the answer was "\$300"—why did not the canvasser record it? He was negligent in the discharge of his duty by inserting a statement made to him by the secretary of the company as to another insurance under the head of "answer" in the application. This cannot affect a condition endorsed on the policy which plaintiff says was read to him.

Plaintiff had effected three policies of insurance on the stock in his shop—all of which were in full force at the time of the fire. (1) in the Hand-in-Hand on 29th May, 1917, for \$300 (2) in the defendant company on 20th February, 1918, for \$1,000 (3) in the Hand-in-Hand on 28th September, 1920, for \$400.

It is perfectly clear that when he effected Policy No. 3 with the Hand-in-Hand—although he mentioned his existing policy with them for \$300—he made no reference to Policy No. 2 with the defendant company and this strengthens the view that he purposely withheld from the defendant company the fact that he had a policy already on the same stock with the Hand-in-Hand.

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The company first heard of these other insurances from the Secretary of the Hand-in-Hand after the fire on 1st May, 1921— and I can see no waiver on their part as to condition 3 endorsed on the policy. Where there is an express condition of the Policy itself that all such insurances, already effected or which may after the issue of the policy be effected, on the same interest with other insurers,—shall be notified to the insurers.....and either stated in, endorsed on or attached to the policy before the occurrence of a loss, any such failure to notify avoids the policy and failure to procure endorsement is fatal. (Welford and *Otter-Barry's* supra 238 and 239).

I have already found that plaintiff deliberately withheld from the defendant company that he had a policy for \$300 in the Hand-in-Hand when he effected the policy now sued on, and I am satisfied further that he had never made the least effort to have his third policy endorsed thereon.

Judgment for the defendant with costs.

MORRIS AND COLLINS.

MORRIS, Appellant,
AND
COLLINS, Respondent.

[224 OF 1923]

IN THE FULL COURT OF THE SUPREME COURT OF BRITISH GUIANA.

1923. JUNE 29; JULY 6. BEFORE SIR C. MAJOR, C.J.,

BERKELEY, J., GILCHRIST, Actg. J.

Receiving stolen goods—Distinction between principal and receiver—Evidence of accomplice—Necessity for corroboration—Nature of corroboration required—Evidence of identification of goods stolen — Whether same absolutely necessary.

This was an appeal from the decision of the stipendiary magistrate of the Georgetown judicial district, who convicted the appellant of the offence of having received stolen goods knowing the same to have been stolen.

The appellant had induced an employee of C. to take some of C.'s oats and convey them to a certain house. This was accordingly done and the appellant's groom was afterwards seen carrying certain bags from the said house. For the appellant it was argued, *firstly*, that on the evidence he could be convicted, if at all, of larceny, but not of receiving; *secondly*, that there was no proof of identification of the goods alleged to have been stolen, and lastly, that there was no evidence in corroboration of than of the accomplice, which implicated the accused.

Held (confirming the decision of the magistrate) :—(1) That the appellant was not a principal offender, not having been present aiding and abetting in its commission.

(2) That in the circumstances of the case, exact identification of the goods was not essential.

(3) That there was sufficient evidence, apart from that of the accomplice, connecting the accused in material particulars with the commission of the offence.

(Per BERKELEY, J., dissenting): That the evidence corroborating the accomplice's account did not implicate the accused in any material particular.

J. A. Luckhoo, for the appellant.

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

SIR CHARLES MAJOR, C.J.: I have heard nothing from Mr. Luckhoo in his careful and industrious argument for the appellant to induce me to disturb the magistrate's decision.

The appellant Morris being charged with having received oats stolen from Mr. Cannon, it was necessary for the prosecution to prove (a) that oats were stolen from Mr. Cannon; (b) that the oats thus stolen were received by Morris; and (c) that when received by Morris, he knew the oats to be stolen. Now the evidence of Beckles (if believed by the magistrate) proved all these facts, for he said he took oats from Mr. Cannon's stables—

he is that gentleman's groom and has charge of Mr. Cannon's oats— that he exported the oats in two bags and by two trips, to the yard of Mrs. Pilgrim, Morris's mother-in-law, to whom and to whose daughter he gave the oats, that afterwards, there came to that yard Morris's horse and carriage, driven by Morris's groom, which were driven away with the floor of the latter covered up with grass ; that he (Beckles) then went to Morris's house, and that Morris told him everything was all right and paid him ten shillings, obviously for the oats. And Beckles also proved that he had stolen the oats at the instigation of Morris who had told him to take the oats across the yard of Mrs. Pilgrim. And the magistrate believed him.

Applying that which is virtually a rule of law, namely, that he should warn himself of the danger of convicting Morris on the uncorroborated evidence of Beckles, an accomplice, and advise himself not to convict on that evidence, the magistrate looked for corroboration (I quote from Archbold) "by independent testimony affecting Morris by tending to connect him with the crime ; that is evidence, direct or circumstantial which implicated him, which confirmed in some material particular not only the evidence given by Beckles that the crime had been committed, but also the evidence that Morris committed it," that is the crime of receiving stolen goods. That independent testimony (which also the magistrate believed) was given by three witnesses, two of whom said they saw Beckles take two bags, in two trips, to Mrs. Pilgrim's yard and leave them there, all three saying that they saw a carriage and horse driven there and the driver get the bags which Beckles had taken there, put them in the carriage and drive off.

All the ingredients of proof to support the charge of receiving having been thus furnished and the evidence of Beckles being required, in the magistrate's precautionary opinion, to be corroborated in some material particular and being so corroborated, it seems to me that the task of the prosecution was ended and that only the explanation (if any) of Morris's possession remained to be given by him. There was no explanation, but a denial, of the possession, he setting up an *alibi*, which in the magistrate's opinion, broke down.

It seems that Morris was charged with receiving the oats, some three quarters of a bagful, found on his premises upon search and brought into court, and a great deal of counsel's argument has been directed to the necessity for proof of the identity of that quantity with the oats stolen. I think the magistrate was strictly correct when he disregarded the question of identity. The oats stolen were laid as the property of Mr. Cannon. Beckles duly corroborated, proved the theft of Mr. Cannon's

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property, and a receiver, no less than a thief, can be convicted (again I quote from Archbold) "even if the witnesses for the prosecution cannot swear to the loss of the thing said to have been stolen, nor that the property found upon the prisoner and alleged to have been stolen, is the prosecutor's." The appeal, in my opinion, should be dismissed with costs.

BERKELEY, J.: The accomplice Beckles was charged with the larceny on 5th May, 1923, of 3/4 of a bag of oats the property of Nelson Cannon, and the appellant with two other defendants with receiving the said oats well knowing the same to have been stolen. Beckles pleaded guilty, the other defendants not guilty. After the complainant Sergeant Collins had given evidence, Beckles was called as a witness. He says that on 5th May soon after 12 o'clock he met appellant (who keeps two horses); that at his request he consented to steal his masters' oats and to take them to appellant's mother-in-law who lived a few yards off—that at about 9.30 p.m. of the same day he made two trips carrying on each occasion about a quarter bag of oats—that is a half bag in all. He then saw appellant's carriage with his groom go to the house of appellant's mother-in-law—he saw nothing put into the carriage, but when it came away grass was covering the bottom of the carriage. He cannot identify the oats or bags nor can Mr. Cannon who says "they are very similar to mine."

Lance-Sergeant Collins, who executed the search warrant on the same day that the larceny was committed, says that appellant showed him about 11/2 sacks of oats in a barrel and that he saw 21 empty bags.

The witnesses, who are said to corroborate the accomplice, are Emily Psaila, who saw Beckles take into a yard of appellant's mother-in-law two bags which looked heavy, and in appearance were similar to those in Court. She saw later a carriage come up, the driver she did not know, but he got the two bags that Beckles had brought and put them into the carriage. Ermintrude Shanks, the daughter, confirms the statements made by her mother and in cross examination says "I saw no one in the cab, I noticed a shadow in the cab. The person was sitting—Head moving about while the driver went, and got the bags." Charles A. Quail, who lives next door, saw a carriage stop and the groom put two bags about 3/4 full into the carriage. He says that no one was in the cab.

The uncorroborated evidence of an accomplice is admissible in law, but the jury should be warned of the danger of convicting on such evidence, and it is in the judge's discretion to advise them not to convict on such evidence. This rule of practice has become virtually equivalent to a rule of law and the Court of

Criminal Appeal has held that in the absence of such a warning by the judge, the conviction must be quashed. If after the proper warning, the jury convict, the Court will not quash the conviction merely on the ground that the accomplice's testimony was uncorroborated. It can but rarely happen that the jury would convict in such circumstances but the Court will quash a conviction if it considers the verdict unreasonable or that it cannot be supported having regard to the evidence. (Lord Reading, C.J., in *Rex v. Baskerville* (1916) 2 K.B. 658). It follows that a magistrate sitting as a jury having thus directed himself should not convict in the absence of the necessary corroboration

The magistrate here has found that there was corroboration by the three witnesses already referred to. Their evidence amounts to this, that they confirm the statements of Beckles that he Beckles placed two bags which contained something heavy (evidently oats) in the yard of appellant's mother-in-law and that the driver of a carriage placed these two bags in his carriage. They do not identify either driver or carriage.

The necessary corroboration is some independent testimony which affects the appellant by tending to connect him with the crime, that is, evidence direct or circumstantial which implicates the appellant, which confirms in some material particular not only the evidence given by the accomplice that the crime has been committed but also confirms the evidence that the appellant committed it.

The material particulars deposed to by Beckles are that appellant induced him to steal the oats, paid him \$2.40 for them, and that he saw appellant's carriage with his driver stop at the house of his mother-in-law. I can find nothing in the evidence of the three witnesses that corroborates the evidence of Beckles that appellant committed the crime of receiving the oats stolen by Beckles. The magistrate says that the actual identity of the oats found in the possession of the appellant does not matter. This is so if it was proved that he received them. The mere fact that the magistrate did not believe his alibi in no way relieves the prosecution from proving their case. It is admitted that appellant bought regularly oats for his horses and that he did so purchase on 5th, 7th, 14th and 28th April (7 days before alleged offence). He had in his possession according to Sergeant Collins 11/2 bags; twice as much as the quantity (3/4 bag) alleged to have been stolen. He also had 21 empty bags.

It is admitted therefore that part of the oats which appellant had in his possession and which are similar to the oats alleged to be stolen from Mr. Cannon are his own property.

On these grounds I am of opinion that appellant's conviction cannot be supported on the evidence and that the appeal should be allowed with costs.

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GILCHRIST, ACTG. J.: I agree with the decision pronounced by the Chief Justice.

2. I, however, would refer to two points—(a) the submission of counsel for the appellant that even if the evidence of the prosecution is accepted the conviction is wrong as it establishes—if anything—a case of larceny and not that of receiving, and (b) the oats found in possession of the appellant.

3. With respect to (a), Russell on Crimes, 7th edition, at page 1,472 gives the distinction between Receiver and Principal as follows: “A person assisting in the stealing is a principal in the 1st or 2nd degree and a Receiver must be a person who is not a principal.”

4. A Principal in the first degree is one who commits the act with his own hands or through an innocent agent. A principal in the second degree is one who is present at the commission of the offence and aids and abets its commission. Presence in this sense is either actual or constructive. It is not necessary that the party should be actually present, an ear or eye witness of the transaction, he is in construction of law present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should occasion arise.

5 It is clear from the evidence that the case of the appellant does not come under either of these definitions. In my opinion the learned magistrate properly dealt with the case as one of receiving.

6. With respect to the second point. In *Rex v Baskerville*, 24 Cox 5, C. C. 524 at pp 531-532 there is the following passage as to corroboration of an accomplice. “The nature of the corroboration will necessarily vary “according to the particular circumstances of the offence charged. It would “be in a high degree dangerous to attempt to formulate the kind of evidence “which would be regarded as corroboration, except to say that “corroborative evidence is evidence which shows or tends to show that the “story of the accomplice that the accused committed the crime is true; not “merely that the crime has been committed, but that it was committed by “the accused. The corroboration need not be direct evidence that the “accused committed the crime; it is sufficient if it is merely circumstantial “evidence of his connection with the crime.”

7. If further confirmatory testimony is required as to the truth of the story told by the accomplice Beckles, connecting the appellant with the crime, it can be ascertained from the quantity of oats found in the possession of the appellant and the evidence accounting for such quantity.

Before referring to this evidence I might mention that it is not essential to the success of the prosecution that any oats

should have been produced in evidence by the prosecution. This was admitted by Mr. Luckhoo in the course of his arguments. It is perfectly clear to me that this is what the magistrate means when he says " their (*i.e.*, the oats) actual identity does not "matter."

9. About a sack and a half of oats was removed from the appellant's premises. To account for this quantity evidence was led on behalf of the appellant, that on the 5th April he bought a sack of oats (Wong's evidence). On the 7th or 8th April two or three days after he bought another sack (Harden's evidence), on the 14th April six or seven days after another sack (*vide* exhibit "B"), on the 19th April five days after, another sack (*vide* exhibit "E"), on the 28th April nine days after another, sack (*vide* exhibit "C"). No further evidence was led as to the purchase of oats between 28th April and 5th May when the search warrant was executed and the oats removed from appellant's premises. It was on the 28th April that, according to the evidence of Chin, a clerk in the employ of Lopes and Fernandes, that Austin the appellant's groom took away in a carriage the sack purchased, stating he wanted it. An examination of the above facts shows the quantity of oats used by the appellant for feeding his horses and that when the sack of oats was obtained on the 28th April he had little or none left on hand. Allowing for one horse being sick for three days it leaves, as the magistrate points out, one horse to be fed for seven days and one for four days. This leaves the appellant in possession of a greater amount of oats than can be accounted for. From this coupled with the evidence for the prosecution together with the whole circumstances of the case I am of opinion that the magistrate was entitled to draw the inference—a reasonable inference—that part of the oats found in possession of the appellant was that stolen by Beckles from his employer and sold to the appellant. (See *Hughes v. Benjamin* and another L.R., B.G., 1921 p. 55).

In my opinion the appeal should be dismissed with costs.

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 WIGHT, Appellant,
 AND
 THE DAILY CHRONICLE, LTD.,
 AND
 WEBBER, Respondents.

[135 OF 1923.]

IN THE FULL COURT OF THE SUPREME COURT.

1923. JUNE 15, 16; JULY 14. BEFORE SIR CHARLES MAJOR, C. J.,
 AND GILCHRIST, ACTG. J.

Libel—Slander and Libel Ordinance, 1846—Special plea—Apology and payment of money into Court—Whether denial of liability permitted with such plea—Rules of Court, 1900, Order XX, r. 1—Supreme Court Ordinances, 1893 and 1915—Force and effect of rules made by the judges of the Supreme Court—Can such rules amend or repeat the provisions of an Ordinance?—Interpretation Ordinance, 1891.

This was an appeal from an order of Berkeley, J., refusing the application of the appellant (plaintiff) to have those portions of the defences of the respondents (defendants) struck out which denied liability. The respondents had paid money into court in an action for libel under section 6 of the Slander and Libel Ordinance, 1846, and had also denied the publication of the particular libel in respect of which the money had been paid in.

The learned judge based his decision on the ground that Order XX, r. 1 which precluded a defendant from denying liability in an action for libel after payment into court was inconsistent with the provisions of the Slander and Libel Ordinance, 1846, and was therefore by reason of the Interpretation Ordinance, 1891, ineffectual to repeal the provisions of the said Ordinance.

Held :—(Reversing the decision of Berkeley, J.)

(1) That Order XX, r. 1 did apply to this case because the exceptions created by Order 1, r. 2 were statutory enactments relating to practice and procedure, whereas the Slander and Libel Ordinance, 1846 itself contemplated and did not enact any procedure.

2) That the *ratio decidendi* of the learned judge's decision was erroneous, because the Interpretation Ordinance 1891 makes its provisions effectual only when in any ordinance passed before or after its commencement, the contrary intention does not appear, whereas such contrary intention was clearly shown in the Supreme Court Ordinances of 1893 and 1915 which conferred on the judges power to make rules and orders of court relating to pleading, practice and procedure, etc., and which had particularly enacted that such rules should not be invalid by reason of their repugnance to the provisions of any ordinance.

(3) That consequently, assuming inconsistency between Order XX, r. 1 and the provisions of the Slander and Libel Ordinance, 1846, the former must prevail and accordingly the respondents (defendants) could not deny liability after payment into court.

P. N. Browne, K.C., and *B. B. Marshall*, for the appellant.

J. S. McArthur and *E. F. Fredericks*, for the respondent company.

Respondent *Webber*, in person.

The judgment of the court was delivered by Sir CHARLES MAJOR, C.J.: The application before us is that made to and refused by the learned senior puisne judge, viz., that such paragraphs or parts of paragraphs of the statements of defence in this action (one for damages in respect of the publication of a series of alleged libels) as plead a denial of liability for publication of one of those libels together with the special plea under the libel ordinance of 1846 of an apology and payment of money into court by way of amends therefor, shall be struck out, as contrary to the terms of Order XX., rule 1 of the Rules of the Supreme Court, 1900. That rule is rule 1 of Order XXII. of the English Rules of the Supreme Court, 1883, in the notes to which in the Annual Practice, 1923, there occur the following statements :—At page 374 "In an action for libel or slander there are two ways of paying money into court. The first is under rule 1 of this order, in satisfaction without denial of liability, as above stated. The second is by payments into Court by way of compensation and amends, without denial of liability under Lord Campbell's Act with a defence under the statute." At page 380: "In an action for libel or slander a defendant may pay money into court either under this rule or under the Libel Act, 1843. In neither case can he pay in with a denial of liability. Under this rule his payment into court is an admission of liability. Under the Libel Act his payment is merely a necessary part of the right to plead a special defence under the statute."

It is conceded that if rule 1 of Order XX. governs the pleadings in this action, the denial of liability in respect of the particular libel involved cannot stand side by side with the special plea under the Ordinance of 1846, but that rule is challenged by the respondent defendant as of no application, because, the Rules, 1900, by Order 1, rule 2, thereof, only apply when no special provision has been made by any ordinance and the ordinance of 1846 has made special provision relating to payment into court under it. It is also contended that any rules and regulations relating to payment into court that may be contemplated by the Ordinance of 1846 were to be rules made under it, that is independently of rules of court and those rules have never been made. The learned judge of the court below, in refusing the plaintiffs application, observed: " The English Order XXX., rule 1, is now Order XXII., rule 1, of the Rules of the Supreme Court, 1883.....This English rule 1 has been adopted into our local Rules of Court, 1900, Order XX, rule 1, Under this rule, in all other actions a defendant may pay money into court while at the same time he denies all liability, but this is not allowed in actions or counter-claims for libel or slander. That is, if a defendant pays money into Court

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he must do so by way of satisfaction or amends which shall be taken to admit the claim or cause of action in respect of which the payment is made." And His Honour, quoting from the Supreme Court Ordinance, 1893, section 58, sub-section (2), providing that no such rule or order shall be deemed invalid or be subject to objection by reason that it alters, amends, or repeals the provisions of that or any other statute.....relating to any other matter therein before in that section mentioned has held that rule 1 of Order XX. in effect repeals the Ordinance of 1846, that the rule could not do that under the 58th section of the Supreme Court Ordinance, 1893, as being " inconsistent with almost every section of the Ordinance of 1846" and because the Interpretation Ordinance of 1891 provides that "no rule shall be inconsistent with the provisions of any enactment." The learned judge adds: "No rules have been made under the Ordinance itself, and if they had been made, such rules could only have been consistent with its provisions."

The Slander and Libel Ordinance of 1846, by its sections 6 and 7, reproduced, without—up to a certain point—material alteration, the provisions of section 2 of Lord Campbell's Act, 1843 (6 & 7 Vict. c. 96) and section 2 of 8 & 9 Vict. c. 75 (reference to these two English Acts and the Slander and Libel Ordinance, 1846, shall be by insertion simply of their respective years of date, and to any manner of Proceeding Ordinances hereafter in these remarks referred to by the title Procedure Ordinances). The Act of 1843, section 2, provided that payment into court under it should be of the same effect and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regarded the pleading of the additional facts therein before required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court under an Act 3 & 4, Will IV. c. 42 intituled An Act, &c. This last mentioned Act contained a variety of provisions regulating practice and procedure in the courts at Westminster and by section 21 had provided that a defendant in a personal action (except, among others, libel and slander), might pay money into court by way of compensation and amends " in such manner and under such regulations as to the payment of costs and the form of pleading as the said judges—meaning the judges vested by the Act with power to make rules and orders and regulations relating to the mode of pleading in the courts of common law at Westminster—should, by any rules or orders by them from time to time made, order and direct."

In 1846 the subsisting Procedure Ordinance of that year had

no provision like section 21 of 3 and 4 Will. IV. c. 42— there was then and had been up to that time no provision of any kind relating to payment into court—but it did not have section 143, which provided that the judges might make and establish from time to time such rules, orders and regulations as to them should seem meet, for carrying into effect the true intent and meaning of that ordinance in matters not therein provided for. The legislature, therefore (the unknown draftsman following the text of section 21 of 3 & 4 Will. IV. c. 42) enacted in sub-section (2) of section 6 of the ordinance of 1846 that payment into court of a sum of money by way of amends for the injury sustained by the publication of the libel in respect of which he pleaded an apology should be by leave of the court or any one of the judges of the court, " in such manner and under such regulations as the court might, by any rules, or orders by the court to be from time to time made, order and direct."

Payment into court, therefore, under the Ordinance of 1846 was thus clearly from the working of sub-section (2) of section 6 of that ordinance, always to be regulated by rules of court made under the Procedure Ordinance for the time being in force. We cannot agree that that sub-section means that the regulations to be made were to be special rules under the ordinance.

The Procedure Ordinance of 1855, by section 45, enacted that a defendant or one or more of several defendants might in all actions, except (among others) actions for libel and slander, by leave of the court pay money into court by way of compensation or amends. This section was taken from the Common Law Procedure Act, 1852, with the material omission of the proviso in section 70 of that Act that nothing therein contained should be taken to affect the provisions of the Act of 1843; and it might have been then an interesting question to determine the effect of this statutory enactment upon the power to pay money into court in an action for libel given by the Ordinance of 1846). Section 249 of the Procedure Ordinance, 1855, gave the judges power to repeal, alter, make and establish from time to time rules, orders and regulations to carry into effect the intent and meaning of the ordinance, and general rules as to pleading and other matters were made in 1863, not, however, containing any provisions material to the question under present consideration.

In 1875 the Judicature Act of that year contained (in its second schedule) rules of the Supreme Court in England, among them Order XXX., rule 1, providing for the payment of money into court by way of satisfaction or amends in any action brought to recover a debt or damages, and two English cases decided thereon may usefully be examined. The first case is *Berdan v. Greenwood*

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(3 Ex. D. 251) in which, though not an action for libel, the judgments, particularly that of Lord Justice Thesiger, established a principle of practice founded on Order XXX, rule 1, which led to the decision in *Hawkesley v. Bradshaw* (5 Q. B. D. 302) around and about which so much of the argument here has gone. In *Berdan v. Greenwood*, the learned Lord Justice, after referring to the uniform practice, before and after the Common Law Procedure Act, 1852, whereby payment into court was only allowed to be pleaded when the cause of action to, or in respect of, which it was made or pleaded was not traversed and was consequently admitted by the pleading, continued : "In this state of circumstances the Judicature Acts and Orders came into existence and swept away the old forms and practice of pleading, leaving it open to a defendant, as a general rule, to raise by his statement of defence without leave, as many distinct and separate, and therefore inconsistent defences as he might think proper, subject only to the provisions contained in Rule 1, Order XXVII (relating to embarrassment by pleading). As regards, however, payment into court special provision is made by Order XXX, and the court has to see first, whether there is anything in the rules comprised in the last mentioned order which precludes a defendant from paying money into court in respect of a cause of action the existence of which he at the same time denies." And the court held that, in that action there was nothing in the rules comprised in Order XXX, which precluded the defendant from so doing. The court, however, expressed an opinion that in actions brought to establish character which had been assailed, it might possibly be improper, as a matter of practice, to allow the defence of payment into court concurrently with other defences, *Hawkesley v. Bradshaw* was an action for newspaper libel, wherein the defendant pleaded justification of the libel with a plea of apology, and payment into court for the publication. It was held that he might do so, and it is important to observe why the court so held. All the learned judges in that case considered that it was concluded by the authority of *Berdan v. Greenwood*. Bramwell, Lord Justice, remarked: " It is true it is there said that possibly actions to try a right and of defamation may not fall within the general rule, but that is said as a matter of precaution, it being unnecessary in that case expressly to decide how far the rule extended; but I am of opinion that the rule is of general application and applies to actions for libel." Other observations of that learned judge have been quoted at the bar. Thesiger, L.J., was a member of the court in *Hawkesley v. Bradshaw* also, and in concluding his judgment said: "But it is further said that payment into court is made under Lord Campbell's Act, and that the course pursued by the defendant is therefore improper. I cannot

accede to that view. Looking at the whole statement of defence, the defendant appears to have claimed the benefit of Lord Campbell's Act as well as the Judicature Acts; but assume that the payment was made under Lord Campbell's Act alone. How is the matter altered? In addition to pleas at Common Law, pleas under that Act were given to proprietors of newspapers. Before the Judicature Acts they could not be pleaded with other pleas, but since those enactments either a plea under Lord Campbell's Act can, like pleas generally, be pleaded, with other defences, or it is a payment coming under Order XXX, and therefore falling within the rules in *Berdan v. Greenwood*." Now the Rules of the Supreme Court, 1893, adopted the English Order XXX. rule 1, in Order XXI, rule 1, and from 1893 to 1900, a defendant in an action for libel could undoubtedly plead denial of liability for publication together with the plea of apology and payment into court. In 1900, however, new rules of court were made, Order XX, rule 1, wherein is, without material alteration, Order XXII, rule 1, of the English Rules of the Supreme Court, 1883, on which statements—accepted as correct—from the Annual Practice have already been quoted. In 1889 *Fleming v. Dollar* (23 Q. B. D. 388) was decided upon the construction of that English Rule, as distinguished from Order XXX, rule 1, of the Rules of 1875, upon which *Hawkesley v. Bradshaw* had proceeded. Lord Coleridge, C.J: at page 391 of the report, said: "My brother Pollock struck out this defence upon the ground that it infringed Order XXII, rule 1, which lays down that you cannot in libel deny liability and pay money into court. This rule was directed against the decision of the court of appeal in *Hawkesley v. Bradshaw*, which was upon the corresponding rule, Order XXX, rule 1, of the Rules of the Supreme Court, 1875. The present rule was framed for the purpose of altering the construction rightly placed upon the earlier rule in that case. Now it is important to see exactly what has been decided by the cases upon this subject. Formerly the rule was that to the same libel and to the whole libel payment into court with a denial of liability was not allowed. The elaborate judgments of Barnwell, L.J., and Thesiger, L.J., in *Hawkesley v. Bradshaw* established that under Order XXX., rule 1, of the rules of 1875, the defendant should not be in a worse position in libel than in other cases." The learned Chief Justice then pointed out the moral and practical difference between libel and other cases and continued: "This being felt to be so Order XXII, rule 1, was framed, and while it permits payment into court with a denial of liability in other actions, it excepts libel and slander." Hawkins, J. (as he then was) said: "I entirely agree.....By Order XXX, rule 1, of the rules of 1875, according to the delusion in *Hawkesley v.*

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Bradshaw, it was competent for a defendant even in an action for libel to deny liability and at the same time to pay money into court. To meet that obvious inconvenience Order XXII, rule 1, of the present rules was made. That gives liberty to a defendant in an action for a debt or damages, except in actions for libel and slander, to pay money into court with a denial of liability, but in libel and slander payment into court with a denial of liability was stopped by this rule."

Thus we have reached the contentions of counsel for the parties, and it is argued—the question of rules to be made under the ordinance apart from and independently of rules of court, has been dealt with—that Order I, rule 2, of the Rules of the Supreme Court, 1900, by reason of its containing the words "save and except so far as special provision is made by any ordinance," excludes the governance of Order XX, rule 1. We cannot agree. Those words clearly except statutory enactments relating to practice and procedure as, for instance, those (to mention no others) of the Magistrates' Decisions Appeal Ordinance, 1893, a glaring example of an enactment almost wholly dealing with matters of practice and procedure. The only provision in the Ordinance of 1846 as to payment into court under it is that making that payment in such manner and under such regulations as the court may, by any rules or orders by the court to be from time to time made, order and direct, thereby expressly relegating the practice on the payment into court to the regulation by and control of rules of court. And the words "as provided by this ordinance" in section 7 can only mean "as enacted" or "as allowed by this ordinance."

We pass to consideration of what seems to us the "real *ratio decidendi*" of the learned judge, viz., that rule 1 of Order XX is bad for contravention of the provision of the Interpretation Ordinance, 1891, (which enacts that no rule of court shall be inconsistent with the provisions of any enactment), because the rule is inconsistent with the provisions of the ordinance of 1846. With the utmost deference we cannot take that view. Assuming-inconsistency to emerge, section 21 of the Interpretation Ordinance makes its provisions effectual only when, in any ordinance passed before or after its commencement, the contrary intention does not appear. We find in the Procedure Ordinance of 1855 (to go no farther back), after provision for the judges' power to make rules for regulating, extending and improving the manner of proceeding in the Supreme Court, section 252, enacting that all laws, customs and usages, then or at any time theretofore established or in force in the counties of the colony so far as such rules, orders, laws, customs, and usages were in any wise repugnant to or at variance with that ordinance should be and

the same were thereby repealed. We find the Supreme Court Ordinance, 1893, by section 69, enacting that all statutes inconsistent with the ordinance and the rules made under it were thereby repealed. And we find, finally, in the same ordinance of 1893—and the provision is repeated in 1915 in the presently subsisting ordinance of that year—section 58, which, conferring on the judges power to make rules and orders of court relating to (among other matters) the pleading, practice, and procedure of the court, and the regulation, prescription and doing of any other thing which might be regulated, prescribed and done by rules of court, enacts that no such rule or order shall be deemed invalid or be subject to objection by reason that it alters, amends or repeals the provisions of that or any other statute (other than Act of Parliament of the character in the section mentioned) relating to any matter therein before in the section mentioned.

Surely in these enactments is to be found abundant indication of contrary intention, and more, express power by rule of court to repeal any provisions of any ordinance relating to practice and procedure.

In re Oliver and Scotts Arbitration (43 C.D. 310) Kekewich, J. held that the power given by the Judicature Acts to the Rule Committee to make rules relating to matters of practice and procedure of the court extended to make that committee by rules so far to alter the provisions of a statute relating to those matters as in effect to repeal them.

We have assumed inconsistency and even repeal, but it must not be taken that we can agree that either is carried by Order XX, rule 1, for at no time in England except between 1893 and 1900—and only between those years on account of the provisions of the English Order XXX, rule 1, of the Rules of 1875 and those of Order XXI, rule 1, of the local Rules of 1893 respectively—has a plea of denial of liability for the publication of a newspaper libel been allowable with a plea of apology and payment of money into court by way of amends therefor. To the authorities for this, already mentioned in this judgment, we may add those of *O'Brien v. Clement* (15 M. & W. 435) and *Barry v. McGrath* (17 W.R. 163).

The appeal, therefore, is allowed, and such amendments must be made by the defendants in their respective defences as to comply with the term of the order the court makes, which is that such paragraphs, or parts of paragraphs of the statements of defence as plead denial of liability in respect of the printing and publishing of the libel set forth in the 4th paragraph of the statement of claim be struck out; that the defendants have seven days further time to deliver and file their amended defences; and that

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the plaintiff has ten days to deliver and file his reply from the date of the filing of the amended defences respectively. The defendants must pay the plaintiff the costs of this appeal.

Solicitor for the appellant, *F. Dias*.

Solicitor for the first named Respondent, *A. G. King*.

DINZEY v. BARCELLOS *et al.*

[304 OF 1923.]

1923. AUG. 18, 25. BEFORE GILCHRIST, ACTG. J.

Solicitor and client—Taxed Bill of costs served on defendants —No appeal from taxation—Claim by solicitor for costs—Specially indorsed writ—Allegation in affidavit of defence of special agreement —Admission that special agreement not in writing—Legal Practitioners Regulation Ordinance, 1897, section 15,

The plaintiff, who had been solicitor to the defendants in an action (No. 279 of 1921) in which the present defendants were plaintiffs, taxed a bill of costs against the defendants and thereafter served a copy of same upon the defendants who did not appeal therefrom. The plaintiff subsequently claimed the sum of \$656.59 on the taxed bill by way of a specially indorsed writ. In the affidavits filed by the defendants, there was an admission of the receipt of the said taxed bill, and also of the plaintiff's authority to act on behalf of the defendants, but it was sought to be shown that there was a special agreement between the plaintiff and the defendants whereby the sum of \$225.75 had been fixed "for the conduct for the whole action in the matter." (sic). Counsel for the defendants admitted that the said agreement was oral.

Held:—That the special agreement set up by the defendants was of no avail since same was required to be in writing by section 15 of Ordinance 18 of 1897, and that, therefore, there was no valid defence to the action.

Dinzey v. Gaskin (10.7.02) followed.

B. B. Marshall, for the Plaintiff.

P. A. Fernandes, for the Defendants.

GILCHRIST, ACTING J.: The plaintiff's claim is against the defendants jointly and severally for the sum of \$656.59 on a taxed bill of costs as between solicitor and client in action No. 279 of 1921 by the defendants as plaintiffs against J. A. Quail, executor under the will of M. J. Gomes, deceased.

2. The plaintiff's claim sets out (a) that the plaintiff was duly authorised in writing by the defendants to act as their solicitor in the said action and did so (b) that a true copy of the taxed bill of costs was duly served on and delivered to each of the defendants herein, to wit:—Antonio Marques Barcellos on 17th July, 1923, Manoel Marques Barcellos on 7th July, 1923, and Rose Julia Quail on the 17th July, 1923.

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3. These several facts have been sworn to by the plaintiff in his affidavit verifying the claim.

4. The defendants ask for leave to defend the action and set out in their affidavits that they are not indebted to the plaintiff in the sum claimed or any sum. They say that it was agreed that the action would cost them no more than the sum of \$225 which sum was fixed for the "conduct for the whole action in the matter," that the said sum was paid to Mr. Browne, who made his own arrangements with the plaintiff who acted solely on the direction of Mr. Browne.

5. They admit they signed the authority for plaintiff to act as their solicitor in the said action 279 of 1921 (paragraph 3 of affidavit of A. M. Barcellos) but say it was only a formality to enable Mr. Browne, who is a King's Counsel, to carry on the action (paragraph 19 of said affidavit).

6. Nowhere in the affidavits for leave to defend do the defendants or any of them contest the service on them of a true copy of the taxed bill of costs as stated and sworn to by the plaintiff, or allege that they have appealed from such taxation. Nor is it stated that the said agreement was in writing.

7. On the application for leave to defend being heard on the 18th August, 1923, counsel for the defendants, in answer to the court, stated that there was no agreement in writing of the special arrangement referred to in the affidavit of Antonio Marques Barcellos which the other defendants by their joint affidavit swore, to the best of their' knowledge, information and belief, as being true and correct.

8. In my opinion the special agreement set up by the defendants is required to be in writing to be of any force, as required by section 15 of Ordinance 18 of 1897.

9. The defendants having admitted that there is no such agreement in writing and in view of the admission that they signed the authority in favour of the plaintiff to act as their solicitor in the said action, the several facts set out in their affidavits of defence and in particular paragraph 18 of the affidavit of A. M. Barcellos, are, in my opinion, of no avail.

10. I am of opinion that the defendants have no good and valid defence in law to the plaintiff's claim, the said alleged special agreement not being in writing. I agree with the judgment in *Dinzey v. Gaskin* 10th July, 1902.

11. I refuse leave to defend and give judgment for the plaintiff with costs.

Solicitor for the Plaintiff—*R. C. V. Dinzey.*

Solicitor for the Defendants—*A. McL. Ogle.*

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Ex parte MAN-SON-HING, Claimant.

[54 OF 1923.]

1923. AUG. 2, 27. BEFORE DOUGLASS, ACTG. C.J.

Interpleader—Seizure of goods by Marshal—Agreement between judgment-creditor and claimant for deposit of money to abide trial of interpleader—Release of goods — Application by Marshal for leave to interplead with respect to goods—Order made thereon—Claim to "household furniture" etc.,—Amendment—Limitation to Court's powers of amendment—Orders XLII. and XXVI.

C. and H. M. were plaintiff and defendant respectively in an action in which C. was successful and eventually caused certain goods to be seized under a writ of execution. M. M. at the date of the said seizure claimed the said goods and it was consequently agreed between C. and M. M. that the latter should deposit a certain sum in the Registry of Court to abide the result of an "interpleader action" to be instituted. The Marshal having applied for leave to interplead with respect to the goods, an order was made calling upon the claimants to state their respective claims. M. M. made claim to the "household furniture" etc., but on the matter coming on for the issues to be fixed, counsel for M. M. applied for an amendment by inserting the words "the proceeds of" before "household furniture," Counsel for the execution creditor, C, objected to the application on the grounds stated in the judgment below.

Held: — (1) That the amendment could not be allowed as it would be in the nature of a new claim and would necessitate an amendment of all the previous proceedings.

(2) That although the Marshal's delivery over of the goods excluded him both from the interference of and protection by the Court, yet, in the absence of any application to vary or discharge the order of the Court giving the Marshal leave to interplead, the case must proceed and the issues be stated.

S. J. Van Sertima, for the claimant.

J. A. Luckhoo, for the execution creditor.

DOUGLASS, J.: On the 30th May, 1923, the claimant gave to the Registrar of British Guiana notice of her claim to " the household furniture and the stock-in-trade of the provision business alleged to be carried on by the defendant," and which were levied on at the instance of the plaintiff on the 23rd February, 1923," and, after the usual intervening steps taken, on the 19th June, 1923, an order was made in the matter by Mr. Justice Berkeley calling upon the plaintiff and claimant to appear and state the nature of their respective claims to the property mentioned and described in the application for an Interpleader Order by the said Registrar.

On the parties coming before the court on the 28th July (adjourned to the 2nd August) Mr. Van Sertima on behalf of the claimant asked that an amendment might be made to her claim,

that the words "the proceeds of" be added and inserted before the words "the household furniture and the stock-in-trade, etc," for the reason that the goods in question had been released on the claimant paying into the Registry of Court a sum of \$304.96 on the 2nd March, "to abide the result of the interpleader action to be instituted in respect of the seizure at execution on 23rd day of February, 1923." Learned counsel argued that Order XLII, rule 1 (b) was intended to cover money which was either the proceeds (as in this case) or value of the goods seized and he referred to *Smith v. Crutchfield* (14 Q.B.D. 873), *Wells v. Hughes* (1907 2 K.B.D 845) and the local case of *Narrein v. Lochan* (1917. L.R.B.G. 134) in support of his contention, and to Order XXVI, rule 12, giving power to the court to make the amendment, I do not think it is contested that Order XLII, rule 1 (b) allows a Sheriff to interplead in respect of the proceeds or value of goods, but that does not necessarily mean that the amendment can be made to meet it. In the cases referred to the security given, release of goods, and interpleader were practically a simultaneous transaction, and they go to prove that a Sheriff is entitled to interplead with respect to moneys paid into court as the "proceeds" of goods taken in execution. It may also be noted that two of those cases are with special reference to sections of the English County Court Act, 1888, and our parallel sections in Ordinance No. 11 of 1893, respectively.

Mr. Luckhoo on behalf of the judgment creditor opposed the application for amendment of the claim on two grounds, that (1) It was not in the nature of an amendment, but an entirely new claim that was asked for, necessitating, if granted, an amendment of all the proceedings, and practically setting aside the order of court of the 19th June, 1923. In support of this argument he refers to cases, where the Sheriff was at fault (*Cook v. Allen*. (2 Dowl.11) and (*Tufton v. Harding* 29 L.J. Eq. 225) and urges as a further reason for refusing amendment the delay of the marshal in bringing the proceedings, but I may say at once I do not find that the marshal is guilty of delay or laches for until the claimant had put in her claim in writing (rule 15) he could not interplead, and she did not do this until the 30th May, three months after the levy and

(2) On the admitted facts an interpleader action would not lie, the marshal having previously parted with possession of the goods; in short he did not need and could not claim the protection of the court. If this objection is good it is obvious that the first objection also applies, for the court cannot amend a proceeding merely to make a bad case a good one. Learned counsel for the execution creditor referred to several early cases showing that the Sheriff ought to have control over the goods seized the whole time to

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enable him to interplead, but his principal authority is *Moore v. Hawkins* (1895) 43 W.R. 235 a case where the execution creditor having admitted the claim the Sheriff withdrew, and' the claimant thereupon threatened an action for damage : the Sheriff then took out an interpleader summons. Pollock, B. said: "the Sheriff having elected to withdraw his execution the whole thing is at an end. Not only does his right to levy execution cease but also the right to take any further steps for his own protection." Counsel also pointed out that although an amendment had been made in the English Order LVII, by rule 16 A., framed to override this decision, no such amendment had been made in our Order XLII., and therefore the case is still applicable here with respect to the principle enunciated. The present case is not one in which the execution creditor has admitted the claim of the claimant but I am of opinion that the argument is correct, and that as soon as the marshal has delivered over the goods to the claimant—to repeat the words of Bayley, B. in *Kirk v. Almond* (2 L.J. N.S. Ex. 13) "he has excluded himself from the interference and protection of the Court." In *Levy v. Champneys* (2 Dowl. 454) the Sheriff was allowed to interplead for he had refused to accept an indemnity or "proceeds of the goods." I cannot therefore make the amendment asked for, but neither can I disregard the order of the 19th June, 1923, which holds good until a proper application is made to vary or discharge it.

It was the intention of all parties that the ownership of the goods should be tried on an interpleader summons, the money \$304.90 was deposited by the claimant's solicitor "to abide the result of the interpleader action to be instituted," and the execution creditor in his affidavit of the 7th June states "it was agreed between the claimant Marie Man-son-Hing and the plaintiff that the said claimant should deposit in the Registry of Court the sum of \$304.90 to abide the result of the interpleader action to be brought by the claimant in respect of the said goods and chattels." It is true that there has been unreasonable delay in the matter owing to the claimant's default, but that delay did not and does not affect the question that an interpleader action for the money and not for the goods would have been the proper form of action. As regards the money paid in, its position with reference to the claims of both parties is very clearly set out in the judgment of Chitty, L.J., in *Kotchie and anor. v. Golden Sovereigns Limited*, (78 L.T.R. 410).

I have already pointed out the order was made on the *ex parte* application of the Registrar, and the claimants now appear in pursuance of that Order. By Order XLII. rule 7, when that is so, the court may direct that "an issue between the claimants be stated

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and tried," and which of the claimants is to be plaintiff and which defendant.

I accordingly order that the parties proceed to the trial of an issue in which the said claimant shall be the plaintiff, and the said execution creditor the defendant, and that the question to be tried shall be whether at the time of seizure by the marshal the said goods seized were the property of the claimant as against the execution creditor, and that the sum of \$304.90 deposited in court the 2nd day of March, 1923, abide the order of the court to be made in the action, and I further order that this issue be prepared and delivered by the plaintiff therein within 14 days from this date.

And I further order that no action be brought against the said marshal for seizure of the said goods and that the costs of this application be reserved until the trial of the said issue.

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

Solicitor for execution creditor, *R. C. V. Dinzey.*

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[193 OF 1922.]

1923. SEPT. 11, 21. BEFORE DOUGLASS, ACTG. C.J.

Promissory note—Admission of making of note—Onus of proof—Non-admissibility of oral evidence to show payment of sum due on note dependent on a contingency— Admissibility of oral evidence to show want or failure of consideration—Meaning of term "want of consideration"—Legal effect of forbearance to sue,

The defendant made a promissory note in favour of the plaintiff under the following circumstances: One N. who was indebted to both the defendant and the plaintiff was desirous of passing transport of certain of his property either to the defendant or to the plaintiff, apparently in satisfaction of his indebtedness. It was eventually agreed that transport should be passed in favour of the defendant. The three promissory notes made by N. in favour of the plaintiff were therefore destroyed at the request of the defendant, the plaintiff promising not to oppose the passing of the said transport,

At the trial the following questions arose out of objections taken by counsel for the plaintiff:—(1) To what extent, if at all, can oral evidence be given to vary or contradict the contract evidenced by a promissory note; (2) What is meant by the phrase "Want of consideration?"

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Held :—(1) That the principles governing the admissibility of oral evidence touching promissory notes are :

- (a) that such evidence is not admissible to prove that the payment of the sum due on the note was dependent on some contingency which had not arisen;
 - (b) that such evidence is admissible, at any rate as between immediate parties, to show either want or failure of consideration.
- (2) That a person who gives another a bill or note for the debt of a third party due to that other cannot in an action against him on the bill or note set up want of consideration as a defence, because the original creditor's forbearance to exercise his rights is sufficient consideration.

J. A. Luckhoo, for the plaintiff.

S. J. Van Sertima, for the defendant.

DOUGLASS, ACTG. C.J.: The plaintiff is suing the defendant as maker of a promissory note for \$300 payable to the plaintiff or his order six months after date. The defendant pleads not indebted for whilst he admits he signed the promissory note he states that no consideration was given for it, as it was signed for the accommodation of one Nagessur with the knowledge of the plaintiff to whom Nagessur was indebted.

As the making of the note was admitted, the burden of proof that there was a failure of consideration lay upon the defendant. Counsel for the plaintiff took a preliminary objection that paragraphs 3 and 4 of the defence were inconsistent for the 3rd paragraph starts "the defendant says that he signed the promissory note.....but that no consideration was given therefor between the plaintiff and himself," whilst in the fourth paragraph he says he gave the promissory note at the request of one Nagessur and "the only consideration for such *promissory note by the defendant to the plaintiff* was the passing by Nagessur in his favour of the transport" for certain land referred to. Counsel for the defendant explained however, and his explanation is reasonable, that the fourth paragraph does not read or intend "consideration.....by the defendant to the plaintiff," but, for such promissory note by the defendant to the plaintiff, the only consideration was between the defendant and Nagessur: if the words "by the defendant to the plaintiff" were left out of the fourth paragraph the meaning would be quite clear; the latter part of paragraph 4 may be unnecessary but it is not inconsistent.

The promissory note reads as follows:—"Georgetown, 2nd June, 1921. "Six months after date I promise to pay to Goolab of De Hoop, Mahaica "Creek, East Coast, Demerara, or his order, the sum of \$300 (three hundred "dollars) for value received. Megha, his X mark." *Prima facie* every party whose signature appears on a bill (or note) is deemed to have become a party thereto for value. (Section 30 (1) of Ordinance 13 of 1891). An accommodation party to a bill (or note) is a person who has signed a bill (or

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note) as drawer (maker), acceptor or indorser without receiving value therefor and for the purpose of lending his name to some other person (Section 28 (1) of Ordinance 13 of 1891).

The facts leading to the making of the promissory note as disclosed were shortly as follows:—One Nagessur, owner of the estate known as Big Biabu, Mahaicony Creek, some time previous to the making of the note, was indebted to the plaintiff in three several sums of \$100 each on separate promissory notes, and also to the defendant in sums amounting to over \$1,000. There seems to have been some discussion whether the plaintiff or defendant should take transport of Nagessur's estate, but it was finally decided that the defendant should take transport, and give the plaintiff a promissory note for the sum of \$300 due to him, to prevent (as Mr. A. B. Brown explains) the plaintiff entering opposition for the amount due to him. The promissory note was actually made about five months after the final arrangement between the parties. There was some question whether the plaintiff kept his promise not to oppose, but I am satisfied from Mr. Brown's evidence that the opposition entered (and then abandoned 9th August, 1921) was by the plaintiff's son in respect of a sum of \$100 due to him and no concern of the plaintiff. The transport never took place, not because of anything done by the plaintiff but because Nagessur refused to proceed with it. Thereupon the estate was levied on by the defendant and sold. The greater part of this evidence was objected to by Mr. Luckhoo, counsel for the plaintiff, but I decided to reserve the question of its admissibility, and on the case for the defendant being closed Mr. Luckhoo submitted that it was inadmissible on two grounds: (1) because parol evidence is not admissible to add to, vary or contradict a written transaction; and a person who gives another a bill or note payable at a future date for the debt of a third party due to that other, cannot in an action against him on the bill or note, set up want of consideration as a defence. The general rule is as stated by Mr. Luckhoo with reference at any rate to a contract required by law to be in writing, *e.g.*, a promissory note, and there are no real exceptions to it, for the apparent exceptions will on close examination turn out not to be such.

The earliest case referred to was (1816) *Rawson & anor. v. Walker*, (1 Stark N.P.C. 361) deciding that if a defendant has undertaken to pay a promissory note upon demand he cannot adduce evidence to show that it was to be paid upon a contingency only; and in (1830) *Moseley v. Hanford* (10. B.C. 729), also it was held that oral evidence that a promissory note on demand should not be paid until a given event happened was inadmissible. In (1834) *Solly v. Hinde* (2. Cr. & M. 516), *Rawson v. Walker* was relied upon by learned counsel for the

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plaintiff, but Bayley, B., distinguished it as follows, that whilst you cannot adduce evidence to prove that the note given for valuable consideration was to be paid upon a contingency, here the evidence showed that there was no consideration or it wholly failed in the event which happened. Held, that the evidence was admissible as showing a total failure of consideration. In (1869) *Young v. Austen* (4. C.P. 553) Bowell, C.J., said "as between original parties to a bill or note it may be shown by oral evidence that there was no consideration, or that the consideration had failed," and in (1884) *re The Barnstaple Second Annuitant Society & ors.* (50 L.T.R. 424) it was held that evidence is admissible to show that in addition to the consideration expressed there was another consideration to an agreement in writing. *Young v. Austen* was followed in 1898, in *New London Credit Syndicate v. Neale* (1898. 2 Q.B.D. 487) where it is held that evidence of a contemporaneous oral agreement to renew a bill of exchange is inadmissible, on the ground that its effect would be to contradict the terms of the written instrument. A. L. Smith, L.J., in the course of his judgment, said: "The bill is a written instrument by which the defendant undertakes to pay £110 at the end of three months. It has been held over and over again, that evidence of a contemporaneous oral agreement is not admissible to vary the effect of such an instrument. If the evidence be to the effect that the document is only delivered as an *escrow*, or that it is not to take effect as a contract until some condition is fulfilled, it is admissible." The promissory note now before the court is a similar complete written contract and one gathers from all the cases that so far as the evidence offered by the defendant goes to prove that there was no consideration whatever, or that the consideration failed, it is admissible, but no evidence offered to show that the existence of the promissory note depended on a contingency which failed, is admissible. So far as I can gather from the statement of defence and the evidence in support the defendant relies principally, if not entirely, on the alleged fact that there never was any consideration for the promissory note and not that it has failed, and it is for the court to say whether he has proved his case, This brings me to Mr. Luckhoo's second objection which involves the question of what is meant by the term "want of consideration." The following cases are to the point: — (1) (1834), *Sowerby v. J. Butcher* (2. Cr. & M. 368) where a bill of exchange payable to the plaintiff was signed by the defendant, in the absence of his brother Robert Butcher as a convenience to the plaintiff. Bayley, B., in giving judgment, said: "But, it is said, there is no consideration for the defendant binding himself personally. That is not necessary. He professed to bind him-

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“self personally, and the answer to the objection that there was no “consideration, is that the plaintiff had a right to have a bill which should “bind somebody. The debt of a third person is a good and valid “consideration for which a party may bind himself by a bill. If there is a “detriment to the plaintiffs, and they have a right to insist upon a bill from “any person, that is enough.”

2. (1857) *Balfour v. Sea Fire Life Assurance Co.* (3 C.B. New Series, p. 300) is to the same effect; there was a failure of consideration, but Cockburn, C.J., says "That is nothing to the plaintiff unless it is shown that they have done something to contribute to the error," and Crowder, J., makes a remark of some significance to the present case. "The case in no degree differs from the ordinary one where a party gives a bill for the debt of a third person, upon the faith of certain property having passed to him from such third person, and it afterwards turns out to be a mistake."

3. (1887) *Crears v. Hunter* (19 Q.B.D. 341) it was also held that a forbearance to sue a third party on the part of the plaintiff at the request, expressed or implied, of the defendant was a good consideration.

It seems to me that the defendant, in that portion of his evidence which is admissible, so far from proving that there was no consideration for his promise, has proved that there *was* consideration. The plaintiff was deprived not only of his right to oppose the transport of the property the defendant was desirous of obtaining, but also he surrendered the three promissory notes given to secure the debt to him by the third party—the proposed vendor of the said property—and they were destroyed in consideration of the defendant making a promissory note for the total amount. The plaintiff had a right to have his debt secured, and to insist upon his claim, the said promissory note, if drawn for the accommodation of any one, was certainly not for the accommodation of the plaintiff. That the expected transport did not go through is the defendant's misfortune, and not the plaintiff's fault; it affords no valid ground for holding that he is not liable upon the promissory note he made.

I give judgment for the plaintiff with costs.

Solicitor for the plaintiff, *V. Dias*.

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

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1923. SEPT. 18, 24. OCT. 1. BEFORE DOUGLASS, ACTG. C.J.

Malicious arrest—Judgment summons against Plaintiff—Order on Plaintiff to pay certain instalments—Payment of instalments—False affidavit sworn to by defendant without previous inquiries—Arrest of plaintiff—Refusal of defendant to make inquiries after arrest—Reasonable and probable cause—Honest belief—Malice—Subsequent conduct evidencing prior state of mind.

On March 15, 1922, the plaintiff was arrested and kept in custody from 8 a.m. to 4 p.m. and was released only on his paying the two instalments, alleged to be due to the defendant under a judgment summons, and the costs of the warrant. The Defendant made no inquiries as to payment before swearing to the affidavit and even after the arrest refused to look at receipts shown to her by the Plaintiff. On the further facts, as set out in the judgment it was held:—

- (1) That the proper tests to be applied in the case (the action being one of malicious arrest) were (a) whether the defendant had an honest belief when she swore to the affidavit that the plaintiff owed both instalments; (b) whether such belief was based on a conviction of the existence of circumstances leading to that conclusion; (c) whether her belief (whatever it was) was based on reasonable grounds.
- (2) That, apart from the fact that malice might be presumed from an absence of reasonable and probable cause, the defendant's conduct subsequent to the arrest was indicative of her prior state of mind and showed that she had acted from an evil motive.
- (3) That even if, at the time of the arrest, the defendant reasonably supposed that one of the instalments was due, yet, as the plaintiff might have been embarrassed and delayed in raising the full sum, improperly claimed, to obtain his release; he was entitled to succeed.

S. J. Van Sertima, for the plaintiff.

J. S. McArthur, for the defendant.

DOUGLASS, ACTG. C.J.; The plaintiff is claiming \$250 damages against the defendant for having maliciously and without reasonable or probable cause procured the plaintiff to be arrested on the 15th June, 1922.

It appears that on the 10th November, 1921, an order was made on a judgment summons in the magistrate's court against the plaintiff to pay a monthly sum of \$1.50 to the defendant to satisfy a judgment previously obtained. The plaintiff paid instalments for November and December, 1921, and he states also for January and February, 1922, but this is denied by the defendant. Without going into details, I may say that I am satisfied that the amounts were paid as alleged; with respect to that paid on the 3rd February, the counterfoil on Mr. Waldron's receipt book is perfectly in order, the counterfoils running from 3rd January to the end of the year 1922 in strict order of date. The payment of the other instalment on the 6th March is hardly contested.

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On the 10th March, 1922, the defendant obtained a warrant for the arrest of the plaintiff on the strength of her affidavit that the plaintiff had failed to pay these same two sums, and on the 15th March he was arrested about 8 a.m. and kept in custody until 4 p.m. when he was only released on paying these amounts and costs.

Mr. Waldron was solicitor for the defendant in the matter until towards the end of January, 1922, when she wrote to him withdrawing her matters from his hands, and by letter dated 1st February he stated : " I shall for the future consider myself entirely relieved from any other work in the matters I have in hand," and he sent her an account up to date including the receipt of the instalments for November and December, 1921, as it had been arranged that he should collect his charges from the instalments received, a most natural arrangement. On receiving the January instalment on the 3rd of February, Mr. Waldron accepted it and sent notice to Mrs. Marcus by her niece later in the month. It may be noticed that his clerk did not sign the receipt for "Sarah J. Marcus" as on the previous one (Ex. B 2). Late in February the plaintiff received a letter dated 22nd February from Mrs. Marcus requesting him "to make all future payments from January this year to E. P. Bruyning." Taking the date of the letter into consideration and that payment had to be made on the last day of each month one could only construe this as meaning payments after the January instalment and, inasmuch as the plaintiff had already paid for that month, he would naturally give it that interpretation. The January instalment was credited Mrs. Marcus in the final account sued on, but this apparently did not reach her until April. The payment of the February instalment was known by Mrs. Marcus on the 13th March (if not before) and on the 15th March the plaintiff was arrested by her special instructions.

Now three things must occur to render the defendant liable to an action for malicious arrest (1) the affidavit on which the warrant was granted must be shown to have been false in effect or to have suppressed or misrepresented some relevant fact. (2) The arrest must have been made without reasonable or probable cause and (3) it must be shown that in obtaining the arrest on the warrant the defendant was actuated by malice, by some bad motive, and it must be borne in mind that the defendant's motive or conduct are not so much in issue at the date of the warrant—for this is not an action for malicious prosecution—as at the date of the arrest on the 15th March.

With reference to (1) the questions I have to ask myself sitting as a jury are (a) under all the circumstances did the defendant take all reasonable pains to ascertain the true state of facts and (b)

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did she honestly believe that payments were in arrear at the date of the arrest? The defendant was, without doubt, aware that a portion of her affidavit had been false, even if payment of the January instalment had not been brought directly to her notice she could have seen the counterfoil receipt of the February instalment in her solicitor's hands, which would *prima facie* be evidence that the January instalment had been paid.

What then was her reason and inducement for setting the law in motion? The leading case of *Hicks v Faulkner* (8 Q.B.D., 167) was referred to by learned counsel for the plaintiff especially with reference to the definition of 'reasonable and probable cause' in the judgment of Hawkins J., on page 169 of the report.

Taking that as the basis of enquiry, the evidence shows that the defendant had no reasonable or probable cause to arrest the plaintiff—(1) she had not an honest belief that he owed both instalments, (2) her belief was not based on an honest belief of the existence of circumstances which led her to that conclusion, and (3) her belief (whatever it was) was not based upon reasonable grounds, or, as it has been shortly put in another case, there was no reasonable cause which would operate in the mind of a discreet person or probable cause which would operate in the mind of a reasonable person" (and see *Douglas v. Corbett*, 6 E. & B. Rep. 511).

Lastly, was the arrest a malicious one? that is, a wrongful act done intentionally without just cause or excuse, or, to put it in a negative form, was there an absence of proper motive or right-ness of conduct? If there was, there was that malice which is necessary as an ingredient of a civil wrong. To arrive at an answer, I must consider the defendant's conduct not only before but after the warrant had issued, for her later conduct is a material circumstance from which her motive at an earlier time may be inferred. Starting with her remark on leaving the court that she wanted to see the plaintiff in gaol to her behaviour at the police station on the 15th March, when she refused to look at any receipt or to listen to the corporal telling her what her solicitor advised, and again at the magistrate's court insisting that the warrant should hold good,—for that is to be gathered from the evidence—I must certainly find that there was 'malice,' and, indeed, it may be inferred if there was no just or reasonable cause for the plaintiff's arrest, coupled with the defendant's knowledge that her affidavit was false in effect, or if indeed she did not mind whether it was true or false.

An interesting point was raised by Mr. McArthur for the defendant, that if at the time of the arrest either one of the instalments was due, or properly supposed to be due, then the plaintiff had no claim against the defendant as he would have

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suffered no damage. Most of the cases cited in reply by Mr. Van Sertima were for malicious prosecution and difficult of application in the present case. *Churchill v. Siggers* (1854 3 E. & B. Rep.) cited by Mr. McArthur is very near the point, but I read it as in support of the plaintiff's claim, for malice and want of probable cause have been proved, and by the declaration on the warrant that the whole sum was due, although half has been paid, the debtor must be embarrassed and delayed in raising the full sum and getting his discharge. But this is a case of malicious arrest, and I have found that as a matter of fact there was nothing due *at all* at the date of the warrant or arrest, and that there was malice and no reasonable or probable cause in respect of at least one of the two instalments, and that in respect of the other the defendant should have been aware of its payment on proper enquiries.

The plaintiff is not a novice in the magistrate's court and suffered more inconvenience than disgrace. His claim is greatly in excess of anything he suffered. I give judgment for the plaintiff for \$40 and costs and for the \$4.84 special damages.

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

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[40 OF 1922.]

1923. SEPT. 27; OCT. 15. DOUGLASS Actg. C.J.

Petition for Divorce—Malicious desertion and adultery—Delay in instituting proceedings—Adultery by petitioner—Discretion of court unfettered—Discretion not arbitrary—Principles on which discretion is sometimes exercised—No fixed rule—Circumstances of each case to be reviewed specifically—Matrimonial Causes Ordinances, 1916, section 13.

The Petitioner, who was married to the respondent on the 8th November, 1909, filed a petition thirteen years thereafter, praying for a dissolution of her marriage. Two years after the marriage she had been driven out of her home by her husband, who refused to allow her to return, as he had already transferred his affections to another woman. About a year subsequent thereto, the petitioner went to live in concubinage with one R. P., by whom four children were born to her, and with whom she continued to live up to the time of the commencement of these proceedings. In the meantime, her husband lived with another woman, of which union there were also four children.

The chief question raised for the court's consideration was whether it could exercise its discretion in favour of the petitioner having regard, *firstly*, to the delay in instituting proceedings and *secondly*, to the petitioner's admitted adultery.

Held:—(1) That in the circumstances of the case—under the Roman-Dutch Law, since abolished, the petitioner could not have succeeded, and she was probably ignorant of her rights until moved to act for her children's sake—the delay was neither unreasonable nor wilful.

(2) That the discretion exercisable by the court in favour of an erring spouse though judicial and not arbitrary is yet unfettered.

(3) That in the exercise of such discretion, the chief considerations to be taken into account are (a) the position and interest of the children, (b) the chances of reconciliation between husband and wife, (c) the interests of the petitioner and (*semble*) in this colony, (d) also local customs and sentiments of certain races in relation to marriage or concubinage.

J. A. Veerasawmy, for the petitioner.

The respondent did not appear.

DOUGLASS, ACTG. C.J.: This was the petition of Christina Duncan Lloyd, *nee* Beni, for the dissolution of her marriage with Charles Gordon Lloyd by reason of his malicious desertion and adultery. The suit was undefended.

Both parties were East Indian Christians domiciled in British Guiana, and they were married on 8th November, 1909, at Wakenaam in the Essequibo Marriage District; there have never been any children of the marriage.

The evidence shows that in September, 1911, differences arose between the petitioner and her husband and that she was driven out of their house. The petitioner gave evidence of no other ill-treatment, but simply her husband threatened her and refused to let her return or to allow her any maintenance. The Reverend R. G. Fisher, who married the parties, stated he did his best to reconcile

them in 1911, but there were mutual recriminations and he did not succeed, and he came to the conclusion that they were incompatible. Shortly after, the petitioner's husband took another woman Josephine Sohagin with whom he has lived ever since, and he has had four children by her. About a year after the petitioner was driven out—in the meantime she had been living with her mother—she went to live with one R. T. Persaud and had lived with him as his wife ever since and has four children, the first being born in November, 1913.

Mr. Fisher states that in all other respects both parties live respectable lives and are faithful to their present mates, and that he considers that a divorce would be in the interests of morality and religion as the families are growing up and go to church and Sunday school.

There is no doubt but that malicious desertion (a term adopted from the Roman Dutch Law) by and the adultery of the petitioner's husband have been proved, but serious consideration is necessary of the fact that the petitioner has delayed ten years in taking action, and that she has admitted that she has been guilty of adultery from a year after her husband's desertion up to the present time.

By section 13 of the Matrimonial Causes Ordinance, 1916 (corresponding to section 13 of the Matrimonial Causes Act, 1857) the court on being satisfied on the evidence shall pronounce a decree declaring the marriage to be dissolved "provided always, that the court shall not be "bound to pronounce such decree if it shall find that the petitioner has "during the marriage been guilty of adultery, or if the petitioner shall, in the "opinion of the court, have been guilty of unreasonable delay in presenting or prosecuting such petition."

Under the Roman-Dutch Law the petitioner could have brought a suit for dissolution of marriage on the ground of (1) adultery, (2) malicious desertion—as is still the case—but relief might be refused on the grounds of (a) adultery on part of the petitioner, (b) condonation, (c) collusion or connivance. I gather from the local cases that the petitioner's misconduct was always considered to disentitle him or her to a decree on the ground of adultery and that the court had, or exercised, no discretion (*Glasgow v. Glasgow* and *Wills v. Wills* (C.G.J. 12. 12. 04). In the case of malicious desertion—*i.e.*, desertion without legal cause or excuse—the innocent party had to bring two actions, first to obtain an order for restitution of conjugal rights, and next, if the other party continuously refused such cohabitation, an action for dissolution of the marriage. Obviously, if there was good reason for the guilty party disobeying the first order, and the adultery of the petitioner would have been such, the second; order would; not be made, so

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that in both cases the adultery of the petitioner was a fatal bar to obtaining a decree. The Roman-Dutch Law of Divorce was abolished as from the 1st January, 1917, and the Matrimonial Causes Ordinance, 1916, now regulates the law of divorce in this colony, but no rules for the effective working of the Ordinance were made until March, 1921. Taking into consideration these facts and that under the Roman-Dutch law the petitioner could not have succeeded, and her probable ignorance of her rights until moved to take steps for the sake of her growing children I am satisfied that there has been no unreasonable or wilful delay in presenting her petition. (See *Pointon v. Pointon & Sutton* (1922. 37 T.L.R. 848). Before the Act of 1857, the Ecclesiastical Courts allowed no discretion in the case of the petitioner's misconduct, and after that Act it was for some time but grudgingly exercised, until in 1903 in the case of *Constantinidi v. Constantinidi & Lance* (p. 246) it was premised that there was then no specific limitation to the discretion of the court, and the category of cases for its exercise was not a fixed one. Whilst the discretion is judicial and not arbitrary the class of cases for its exercise may be from time to time extended.

In 1912 the learned author of "Browne and Watts" on Divorce (8th Edn., p. 47) says: "It is now settled that the discretion to be exercised "under the 31st section must be a regulated discretion and not a free option "subordinated to no rules. It cannot be exercised unless there are special "circumstances or specific features placing the adultery in some category "capable of distinct statement and recognition." Since that date there have been many cases in which the discretion of the court was considered, and seemingly widened, but there is one case in 1906 that does not appear to be noted in the above work, and which should first be noted, *Tute v. Tute* (23 T.L.R. 121), the head note reads: "To enable the court to exercise its "discretion in favour of a wife who is petitioning for a divorce and who has "herself committed adultery, she must shew that her adultery was the "necessary and reasonable consequence of her husband's conduct," but from a perusal of the case the head note seems to me to go too far. The special circumstance relied upon was that the husband's conduct had conduced to the petitioner's adultery, but the President of the Court,—taking into account the social standing of the parties, did not agree that he could exercise his discretion on the ground merely that if there had been no desertion by the husband there would have been no adultery by the wife. In *Wilson v. Wilson* (1919. 36 T.L.R, 91) any limitation to the discretion of the court was considerably extended, and it was exercised in spite of the intervention of the King's Proctor who alleged that the petitioner had concealed the fact

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that he himself had habitually committed adultery. As this case is one frequently referred to in the later cases I will read the judgment of the President of the Divorce Court. [Having read the judgment the learned Judge continued.]

The court exercised its discretion by making absolute a *decree nisi* for divorce.

In *Elliot v. Elliot & Bowers* (1921, 37 T.L.R. 834) the head note reads: "Though the discretion is unfettered, uniformity of decision is desirable, "and the court will therefore exercise its discretion in a case clearly within "the principles laid down in *Wilson v. Wilson*." Here again the King's Proctor intervened on discovering that the petitioner had concealed the fact that he had committed adultery with a young woman who had since been delivered of a child. Mr. Justice Horridge, in giving a considered judgment, held himself bound by *Wilson v. Wilson*, and also after reference to an unreported judgment delivered by the Lord Chancellor (April 22, 1921) in *Wilkinson v. Wilkinson & Seymour*. This judgment is set out in a footnote to *Elliot v. Elliot & Bowers* (1921, 37 T.L.R. 834) and is to the point. [The learned Judge read portions of it and continued.]

In *Armistead v. Armistead* (1922, 38 T.L.R. 626) the court refused to exercise its discretion in favour of a husband petitioner who admitted that he had committed adultery with a woman whom he was willing to marry and who was anxious to marry him. Mr. Justice Horridge said: "*Wilson v. Wilson* and *Wilkinson v. Wilkinson* left him very little loophole (if any) to "refuse his discretion, at the same time he did not think that the law "intended that a petitioner who had committed adultery should come to the "court and ask as a right to have discretion exercised in his favour in order "to enable him to marry the person with whom he had committed adultery. "There was no excuse for the petitioner here." Leave to appeal was given, but apparently never proceeded with.

The head note of the last case I shall refer to, *Pointon v. Pointon & Sutton* (1922, 38 T.L.R. 848) reads: "The discretion conferred on the court . . . is an unfettered one. The court exercised its discretion in favour of "a petitioner who had been guilty of adultery with the same woman over a "period of 30 years, and who had known of his wife's adultery for about 28 "years, but had not instituted proceedings until 1922 because he thought "that his own adultery would be a bar."

In the present case from the facts proved I draw the following conclusions :—(1) That when the husband drove his wife away from their home and refused to let her return he did so because he had already transferred his affections to Josephine Sohagin, and the petitioner must have known of this at the time. (2) That

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there is no evidence that any conduct on the part of the petitioner conduced to her husband's misconduct and (3) that the husband's conduct caused or conduced to the adultery of the petitioner, by depriving her of her house and his protection and support.

Of the four considerations detailed by Lord Birkenhead in *Wilkinson v. Wilkinson & anr.* only three apply in the present case, namely (a) the position and interest of the children, (b) the chances of reconciliation between husband and wife, and (c) the interests of the petitioner ; but there may well be added in a colony where there exists non-European races (d) local customs, and sentiments, of those races in relation to marriage or concubinage: (a) The four children the petitioner has born to Persaud, her paramour, have been brought up well and decently and it cannot be gainsaid that it would be to their advantage that they should continue to live with their parents, but in a household placed on a more regular basis, and their legal rights duly protected. And here I must point out that the children of the petitioner and Persaud being the offspring of an adulterous union would not become legitimised by the subsequent marriage of their parents: it is so provided by section 10 of the Civil Law of British Guiana Ordinance, 1916, preserving a similar privilege under the Roman-Dutch, (b) There is no prospect of any reconciliation between husband and wife; the time they have lived apart is in itself evidence of this and the fact that the petitioner and the respondent each has her or his own family of children to provide for makes possibility more remote; (c) It is most surely to the interest of the petitioner that she may be in a position to marry the father of her children, and she has lived with him happily for ten years and desires to marry him; (d) one cannot shut one's eyes to the fact that concubinage exists and is prevalent among some of the races in British Guiana, and indeed in certain respects is recognised by law. The East Indian race in particular adopt a light-hearted attitude towards legalised marriage, and even when christianized, their native customs and sentiments continue their hold to some extent, and it was but consistent with her bringing up that the petitioner after one year of waiting should have sought the protection of another man; however much her misconduct is to be deplored, local conditions and custom were too strong for her. In a different class of life or with a different race of people, different reasoning would apply, and I wish to be understood that each case must stand by itself and not that any East Indian who applies for a divorce will have it for the asking. This petitioner is not of immoral conduct or antecedents, and Persaud is said to bear a good character and has brought up his children respectably, I do consider that the respondent should not be allowed to avoid the consequences of his desertion and,

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adultery through acts of misconduct on the part of the petitioner for which the respondent was himself to a serious degree responsible. It seems to me that I may give effect to all these considerations and that this is a case in which the discretion of the court may wisely be exercised.

The petition is accordingly granted. There will be a Decree Nisi with costs.

Solicitor for the petitioner, *J. Gonsalves*.

1923. OCT. 25, 29. BEFORE DOUGLASS, J.

Contract for sale of land—Mistake in preliminary contract—Mistake embodied in transport—Fraud or mutual mistake—Claim for specific performance—Whether parol evidence admissible to vary written contract—Civil law of British Guiana Ordinance, section 3, sub-section 4 (e)—Executed contract—Proper remedy available—Specific performance or rectification.

The plaintiffs and the defendants entered into a contract for the sale by the defendants to the plaintiffs of certain property situate at lot 53, Lacytown, with the buildings and erections thereon. The necessary affidavits filed in connexion with the preparation for transport and the advertisements consequent thereon referred only to the W1/2 of the said lot, and transport of the said W1/2 was subsequently passed to the plaintiffs who now alleged that in reality what they saw and bargained for was the whole of the said lot and that either by mutual mistake or through the fraud of the defendants, only the W1/2 was advertised and transported, They now sought specific performance of the alleged contract for the purchase of the whole lot or in the alternative \$4,500 damages.

A preliminary objection was taken to the statement of claim on the ground that the appropriate remedy had not been sought.

Held: — (1) That section 3 sub-section 4 (e) of the Civil Law of British Guiana Ordinance precluded the plaintiffs from offering parol evidence to vary the written contract.

(2) That even if such evidence could be led, conveyance of the property having been effected, the proper remedy was not specific performance, but rectification,

(3) That the court would not decree specific performance of an executed contract with a parol variation where the statute of frauds created a bar,

M. J. C. De Freitas, for the plaintiffs.

J. S. McArthur, K.C., for the defendants.

DOUGLASS, J.: The plaintiff is claiming specific performance of the contract of sale of lot 53, Lacytown, purchased from the

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defendants' testator J. V. Caetano, in April, 1919, or in the alternative \$4,500 damages and costs.

It appears from the pleadings that a transport was passed on the 31st May, 1919, of the W1/2 of lot 53, Lacytown, with the buildings and erections thereon, and that the plaintiff entered into possession of the whole lot 53, but the tenants of the E1/2 of the said lot pay their rents to the defendants. The defendants still hold transport of the E1/2 and refuse to convey it to the plaintiffs. The plaintiffs allege that the property they saw and bargained to buy for \$2,900 was the whole lot 53, but the defendants deny this and state that the W1/2 only was contracted for the \$2,900. The necessary documents were prepared by the plaintiff's solicitors, and the W1/2 only was duly advertised. A preliminary objection was taken by Mr. McArthur for the defendants that the plaintiffs have wrongfully conceived their remedy, for on the facts and law as disclosed by the pleadings they cannot maintain an action for specific performance, and he asks that it be dismissed. In the course of his argument he referred to Halsbury's Laws of England and other authorities to show that the form of action was inappropriate where the contract for sale has been completed by transport, and moreover that being a contract that must by law be in writing, no action could be brought upon any agreement not in writing, nor can extrinsic evidence of a parol nature be offered to vary or contradict the written contract. He suggested that the only possible course would be a claim for damages for misrepresentation or for rescission of the contract.

First as to the form of action; Halsbury under the heading "What renders misrepresentation actionable" (Vol. 20, p. 719, para. 1715) states in effect, where there is fraudulent misrepresentation whereby the representor has induced the representee to alter his position by entering into a contract or binding transaction with the representor, the representee has two remedies, he may either adhere to the contract and maintain an action for damages, or repudiate it. The two kinds of relief are strictly alternative to one another, and there is no third alternative in the form of special equitable relief (See Vol. 20, p. 74)

In *Dart* (Vendors and Purchasers) the rule with reference to the remedy of a purchaser on finding that he had not purchased the subject matter contracted for is thus laid down (quoting from *Joliffe v. Baker*, 11 Q.B.D. 268), "with some few special exceptions a purchaser after the conveyance "is executed by all necessary parties has no remedy at law or in equity in "respect of defects either in title to or quantity or quality of the estate "which are not covered by the vendors' covenants," and amongst the "special exceptions" he enumerates, are all cases of actual

falsehood and fraud on the part of the vendor entitling the purchaser to rescission of the contract; he makes no mention of any remedy by specific performance.

Fry on 'Specific Performance' (6th Ed.) states "By specific performance is usually understood that peculiar, and, as it is called, "extraordinary jurisdiction, which that Court (the Court of Chancery) "exercised in respect of *executory* contracts as contrasted with *executed* "contracts. Some other grounds of equitable relief approximate to specific "performance, from which they are nevertheless separable," e.g. (a) "specific relief on an executed contract." The learned author also says that the question how far a plaintiff can enforce specific performance of a contract with parol variations, or in other words with a rectification of a mistake was before the Judicature Act, 1873, not perfectly clear, but the weight of authority appeared to be in favour of the proposition that a plaintiff could not sue for the specific performance of a contract with a parol variation, but— he says—this is now altered by the last mentioned statute. The answer to the question to what extent is it altered is found in a later paragraph, viz., "Under this provision" (*i.e.*, Sec. 24, subsection 7 of the Judicature Act, 1873) "the High Court has entertained an action for the reformation of a contract and "for the specific performance of such reformed contract *in a case where the Statute of Frauds did not create a bar.*"

Before considering the case law on the subject it would be well to refer to the local ordinances embodying, or parallel to, the English statute law referred to. Section 24, sub-section 7 of the Judicature Act, 1873, is in effect repeated in section 33 of the Supreme Court Ordinance No. 10 of 1915 as extended by section 3 (2) of the Civil Law of British Guiana Ordinance, 1916, and the provision contained in section 4 of the Statute of Frauds with reference to a contract for the sale of land is incorporated in section 3, sub-section 4 (e) of the Civil Law Ordinance. "No action shall be brought whereby to charge any person upon . . . any contract or agreement for the sale, &c, of immovable property.... unless the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged."

Under the law of conveyance of real or "immovable" property in this colony the agreement or memorandum would doubtless be represented by the necessary affidavits tied by vendor and purchaser on application for a transport and the advertisement of the proposed transaction; these for convenience sake I refer to as the preliminary contract for sale.

In *May v. Platt* (1900. 1 Ch. Div. 616) it was held that the written contract or conveyance, being unambiguous, parol

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evidence of mistake was inadmissible after completion, either as a defence to the action to which it afforded no answer, or to support the counterclaim, which amounted to claiming specific performance of a written contract with a parol variation. In the course of the case on a reference to *Harris v. Pepperell* (5. Eq. L.) and other cases it appears that apart from fraud there could not be rescission after conveyance.

The plaintiffs propose to show that the real contract is not contained in the written preliminary contract for sale, and offer parol evidence to prove this, relying on the case of *Craddock Bros. v. Hunt* (1923. 129 L. T. 228) and as they allege on part performance of the real contract which would take the case out of the Statute of Frauds, and so let in parol evidence of the real intention of the vendor and purchaser. The general rule is laid down that parol evidence is not admissible to add to, vary, or contradict a written transaction, and it is pointed out in *Cockle's Cases and Statutes on Evidence* (3rd Ed.) that there is no exception to it. In one of the very early cases, *Meres v. Ansell* (1771 (3) Wilson p. 275), the court laid down "You cannot depart from the writing but may argue touching the operation thereof. If a man agrees in writing to sell Blackacre for £1,000, shall parol evidence be admitted that he intended Whiteacre should also pass? Certainly it shall not." Although many cases show that parol evidence may be admitted to prove collateral verbal agreements, in *Angell v. Duke* (1875, 32 L. T. 230) it was held in order that parol evidence be admissible to prove a collateral agreement, it must not conflict with, or be inconsistent with, the written document, the evidence must not amount in effect to adding additional terms to the writing. The learned author of *Phipson's Law of Evidence* (6th Ed.) too states that whether contracts by deed can be varied seems to be doubtful.

In the case *Craddock Bros. v. Hunt*, relied on by the plaintiffs, it was held by Lord Sterndale, M.R., and Warrington, L.J. (Younger, L.J. dissenting) that the plaintiff was entitled as against the vendors to rectification of both the contract and the conveyance, and had as against them a good title to the land in dispute. This was a case where the parties were each of them purchasers from one vendor, and was each claiming a portion of the same yard as having been sold with each property; the case is a strong one but differs materially from the present one. The plaintiffs claimed declaration that they were entitled to have the land in dispute conveyed to them by the defendant (not the vendor), and, if necessary, rectification of the conveyance to them. It will be seen at the end of the first part of the judgment of Lord Sterndale (p. 233) that he says: "The result is that, in my opinion, the plaintiffs are entitled as against the vendors to rectification

“of both the contract and the conveyance, and have as against them a good “title to the Crown land (*i.e.*, the land in dispute.....). I do not think “the vendors necessary parties to the action.” It is quite evident that it was not an action for specific performance at all but for rectification, a very different proceeding as pointed out by Neville, J., in *Thompson v. Hickman* (1907, 1 Ch. 561 : following *Davis v. Filton* and *May v. Platt*) ; he says : “*Specific performance* comes under a head of equitable jurisdiction quite “distinct from *rectification*. The former is based upon the inadequacy of the “remedy appointed in certain cases by the common law; the latter gives “relief from the inflexibility of the common law and from the nature of the “case involves a contravention of its rules.” *Craddock Bros., Ltd., v. Hunt* turned on what was the intention of the vendor and purchasers to be gathered from a true construction of the written contract, whilst in the present case there is no question of construction of the preliminary contract; it is admitted that it is perfectly clear on the face of it, but the plaintiffs say that it is not the contract they intended. To return, the remarks of Younger, L.J., in dissenting are so very pertinent to the present case that I propose to read the paragraph beginning at the bottom of column 1 on p. 241. [After reading this passage the learned Judge continued]

It was suggested by learned counsel for the plaintiffs in the present case that there is sufficient part performance of the contract to take the case out of the statute; I do not agree. In their statement of claim (para. 8) the plaintiffs say that they took possession of the whole of lot 53, but they were never put into possession by the defendants of the E1/2 lot nor did they keep or exercise any rights of possession, if they ever assumed it, and it is admitted rents are now paid by the tenants of E1/2 lot to the defendants.

The present case is very similar to *May v. Platt*; the contract has been completed by conveyance and there is nothing left of which the court can order specific performance. A transport having been executed *prima facie* governs the relations of the parties and shows their contract. Even if there was fraud in the preliminary negotiations and it was so found, I am of opinion that the proper remedy would be rescission of the transport; the court cannot make a new contract for the purpose of ordering its specific performance.

It seems to me that were I for any reason to permit parol evidence to explain and add to a perfectly clear preliminary contract in writing—necessary to satisfy section 3, (4), (e) of the Civil Law Ordinance—the usefulness of the whole section would be destroyed; it would be difficult to imagine a case where the con-

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veyance more thoroughly carries out the preliminary contract than this, or where from the documentary evidence the parties were more in accord. I must therefore hold that the plaintiffs have mistaken their remedy, and that there can be no specific performance of an executed contract with a parol variation if thereby the provisions of the section referred to are rendered nugatory. If the action is wrongly brought, then the plaintiffs cannot proceed on the claim for damages dependent on it, for on a reference to Order XVI., r 1 (b), it will be seen that the only damages that can be joined with the equitable claim for specific performance, are "damages for the withholding thereof."

I therefore dismiss the action, with costs for the defendants.

Solicitors for the plaintiffs, *Cameron & Shepherd*.

Solicitor for the defendants, *C. Gomes*.

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

GANGAPERSAUD, Appellant,
AND
CARVALHAL, Respondent,

[271A. OF 1923.]

IN THE FULL COURT OF THE SUPREME COURT OF BRITISH
GUIANA,

1923. JULY 13; OCT. 26; NOV. 2. BEFORE SIR CHARLES MAJOR, C.J.,
BERKELEY AND DOUGLASS, JJ.

Larceny—Possession of stolen goods—Seasonable explanation given—Onus of disproving explanation cast on prosecution—Principles on which onus of proof shifts on such occasions—Distinction between effect of palpably false as opposed to reasonable explanation,

This was an appeal from the decision of the stipendiary magistrate of the Berbice judicial district, who convicted the appellant of the larceny of a cow.

The appellant having been found in possession of a cow, which had been stolen, gave an account of how he came by it, even referring by name to the person from whom he had obtained it. The prosecution led no evidence to contradict the appellant's explanation. The magistrate convicted the appellant remarking in the course of his decision that the onus of proof was on the defendant and that it was not the prosecutor's duty to prove a negative.

Held: — (Reversing the decision of the magistrate) that the principles governing such cases were as follows:—

(a) Where a person in whose possession stolen property is found, gives a reasonable account of how he came by it, it is incumbent on the prosecution

to show that such account is false: not so, however, if the prisoner's account is on the face of it unreasonable and improbable in which case the onus rests on the prisoner of proving the truth of his account.

(b) That if there is other evidence *i.e.*, other than the prisoner's possession, on which the prisoner might be convicted without calling the person named, it is for the jury to say if they think the evidence as it stands is sufficient.

J. S. McArthur, K.C., and J. A. Luckhoo, K.C., for the appellant.

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

The decision of the Court was delivered by BERKELEY, J.: Appellant appeals from the decision of the stipendiary magistrate of the Berbice Judicial District who convicted him of the larceny of a cow.

This appeal first came before this court on the 13th July when it was referred back to the magistrate with the direction to take the oral evidence of Bramadin from whom appellant alleged that he had purchased the animal—Bramadin had been called into court and identified as the person referred to. In the course of his decision the magistrate said "I am of the opinion that the onus of proof is on the defendant and not on the prosecution to prove a negative. It was the easiest thing for the defendant to have called Bramadin to testify to the truth of the transaction." The magistrate was wrong in thus holding. The general principle is that where a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it and who is known to be a real person, it is incumbent on the prosecution to show that that account is false, but if the account given by the prisoner be unreasonable and improbable on the face of it the onus of proving its-truth lies on him. *Rex v. Crowhurst* (1 C. & K. 370) and see *Rex v. Smith* (2 C. & K. 207). If, however, there is other evidence on which the prisoner might be convicted without "calling the persons named and known it is for the jury to say if they think the evidence as it stands is sufficient. This was so in *Rex v. Wilson* (26 L.J.M.C. 45) where, on a case stated, the Court of Criminal Appeal held that as there was without doubt some evidence to leave to the jury upon which the prisoner might be convicted, the conviction must be upheld. Pollock C.B, added that had the case been tried before him he should have been sorry to have had the man found guilty,—also in *Rex v. Harmer* (2 Cox 487), Sir Frederick Pollock refused to direct an acquittal because the discovery of the prisoner's knife in the church went to show that he himself was the thief. He said that he did not think it was necessary to compel the counsel for the prosecution to call Lake. If the knife found had been the property of Lake it might have been a very different thing.

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The account given by the appellant is neither unreasonable nor improbable. In fact, when Bramadin gives his evidence he confirms the account given by appellant. It is true that the magistrate is of the opinion that Bramadin was informed of the evidence that had been already given, but this Court can find nothing to warrant this conclusion, nor can it find any evidence which connects appellant with the larceny which would warrant his conviction.

This case differs from *Collins v. Da Silva* heard by this Court on 1st June last and referred to by counsel for the respondent. In that case the appellant had denied the purchase of any shoes on 17th April between the hours of 3 a.m. and 7 a.m. when the respondent visited him. Barker whose shoes had been stolen that morning went to appellant's shop and asked him if he had shoes for sale. Appellant produced the stolen shoes and said he had bought them on the previous day from a man who had gone to Kurupung. This was clearly a falsehood and showed guilty knowledge at the time he received the shoes.

Appeal allowed with costs.

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

Solicitor for the respondent, *F. Dias*.

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[430 OF 1922.]

1923. FEBRUARY 20, 21, 22, 23, 26, 27, 28; MARCH 1, 2, 26, 27, 28, 29;
APRIL 21. BEFORE SIR C. MAJOR, C.J.

Mining Dispute—Locations of land under prospecting licence—Meaning of terms "lawfully occupied" and "lawfully located"—Occasions on which purported locations become null and void—Effect of neglecting to keep boundaries distinctly marked—Effect of locating more land than permitted by regulations—When locations may be jumped—Mining Regulations, 1905.

The Plaintiffs claimed damages from the defendants for having trespassed on certain locations of theirs and unlawfully extracted diamonds therefrom. It was found as a fact that both parties had effected locations within the area in dispute, and arguments were directed chiefly to the question of the priority of the said locations, and to the effect of failing to keep boundaries distinctly marked or of locating an area in excess of that permitted by the regulations.

Held :—(1) That the expressions "lawfully occupied" and "lawfully located" occurring in regulation 6 (I) of the Mining Regulations, 1905, apply equally to land located, notwithstanding firstly, that they are disjunctive in the regulation, and, secondly, that physical occupation may exist without location.

(2) That the occasions on which land once located by one person may during the currency of that person's licence therefor be afterwards located by another may be summarised thus :—

- (a) If the locator fails to apply for a claim licence having described his claim by written notice sufficiently to enable it to be identified.
- (b) If the locator fails after requirement so to do, to point out and verify his claim.
- (c) If the locator fails to pay the rent payable in advance for the claim licence.
- (d) If land is granted to anyone as a concession and the grantee fails to pay the rent therefor.

(3) That where a location is made and the locator neglects to keep the boundaries distinctly marked and the location boards of same in good order, or where the person locating has included an area in excess of that permitted by the regulations, the only remedy available to an outsider is to *jump* the claims, not to locate afresh.

E. G. Woolford, K.C., and A. McOgle, for the plaintiffs.

J. A. Luckhoo, for the defendants.

Sir C. MAJOR, C.J.: The action was one for damages for trespass by the defendants on the plaintiffs' locations in No. 3 Mining District and winning diamonds therefrom. The defendant, the Commissioner of Lands and Mines, was under interlocutory injunction to hold certain diamonds entered by the defendants as won from lands the subject matter of the action.

The plaintiffs were put to prove (a) possession, actual or constructive and immediate, and (b) the trespass.

(a) Possession was laid under Mining Regulation 6 (1) and Mining Regulation 4 (6). The former enables the holder of a

prospecting licence to prospect for and locate claims....."not previously lawfully occupied nor previously located".....; the latter entitles that holder to work the ground located under the licence from the date of location until his application for a claim licence therefor has been granted or refused. The plaintiffs held a prospecting licence.

Argument had been addressed to me on the meaning of "lawfully occupied" as in conjunction with, or disjunct from, "located" in r. 6 (1). The collocation of "lawfully occupied" and "lawfully located" occurs in only one other place in the regulations, viz., in r. 179. R. 75 speaks of a claim or site "in the occupation" of a person; r. 77 speaks of land comprised in a dredging concession being deemed to be lawfully" occupied "and not open to location ; r. 79 provides for a licence to "occupy" land for building. Finally rr. 200 and 201 contain the expressions "lawfully occupying any claim" and "occupying any claim." I was of opinion that land located is land lawfully occupied by reason of having been lawfully located, and that the expressions "lawfully occupied" and "located" in r. 6 (1) apply equally to land located, notwithstanding that they are disjunctive in the regulations and that occupation without location may exist.

(b) It was not disputed by the defendants that if the plaintiffs were in lawful possession of their locations they (the defendants) had trespassed thereon.

The defence to the action was (1) traverse; (2) contained in the following paragraph of the statement of defence: (par. 2) "The said claims were never legally available for location by the plaintiffs or any of them." (Par.3). "If the plaintiffs at the dates and times mentioned in the said statement of claim located the said claims or any of them the plaintiffs were and each of them was at the time of the said location trespassers and wrongdoers on the said lands." (Par.6). "The defendants say that they are the holders of claim licences (21 in number) granted to them by the Commissioner of Lands and Mines under prospecting licence No. 5,024." (Par.8). "The lands alleged to have been located by the plaintiffs are included and form part of the lands previously located by and granted to the defendants and held by them under the above numbered claim licences."

The plaintiff Mansfield, first giving evidence on his own and his co-plaintiffs' behalf, was cross-examined as to indication, on his journey into the mining country, of location by the defendants of two claims, conveniently described throughout the hearing as block locations and respectively named "Alma" and "Ivelor" that is to say of approximately 500 acres each in extent, as distinguished from others (the 21 mentioned in par. 6 and par. 8 of the defence) of 1,500 feet by 800 feet. I had no note of objection

raised by counsel for the plaintiffs to the cross-examination, but the objection is noted as having been taken on the cross-examination of Fowler, who followed Mansfield in the witness box. And it was taken on the ground that the fact of having made block locations had not been pleaded and was not one of the grounds alleged in the defendants' opposition to the issue of claim licences to the plaintiff (that opposition being alleged to have been entered in para. 13 of the defence). I admitted the evidence without prejudice to its rejection on subsequent consideration of the objection. On that consideration I allowed the evidence to stand on my notes, holding that the plea contained in paragraphs 2 and 3 of the defence was one of the defendants' previous possession of the lands whereon the plaintiffs alleged they had made location, a possession whereupon, if the plaintiffs did make location, they had trespassed, and that the plea of possession had not been cut down by pars. 6 and 8 to those claims only (21 in number, which did not include the block locations).

Lawful possession and occupation by both parties, therefore, being alleged and counter-alleged, and founded on the operation of making locations under the Mining regulations, I found as a fact that at one time or another, the parties had made the locations alleged, on the part of the plaintiffs nine, on the part of the defendants twenty-three, twenty-one of which claim licences had been issued to them without opposition, and two (the block locations) for which they had not obtained claim licences.

By Mining Regulation 29 a person locating a claim must mark on the ground the limits desired; the boundaries, marked in the manner prescribed by Mining Regulation 30, he must keep distinctly marked and his location board he must keep in order, otherwise his claim may be jumped (Reg. 33); for precious stones' search he may not locate a claim less than 1,500 feet long and 800 feet wide, or containing a greater area than 500 acres. This last regulation is silent as to any consequence of contravention of its terms.

It was admitted by counsel for the plaintiffs during the hearing that the defendants had made the locations they alleged. The admission did not, in so many words, include the block locations, the question whether the evidence as to them was admissible still then remaining for consideration, but I rather gathered that if that evidence were ruled to have been properly admitted, the admission applied to them also. But if it did not, my finding as to the fact of their having been made obviated any doubt.

Argument was addressed to me on the construction of Reg. 33, which enables a claim of which the boundaries are not kept distinctly marked and the location boards not kept in order, to be jumped, Mr. Luckhoo for the defendants contending that, even

if it could be gathered from the evidence that his clients having property made locations in the first instance, subsequently neglected to observe the requirements of Reg. 33, the located claims so neglected could only be jumped. (It was not at any time contended by the plaintiffs that they had ever resorted to jumping). The same contention was urged in respect to Reg. 93, as affecting what was shown to have occurred when the defendants made the block locations, that is, the marking out, in the case of Alma, some 1,377 acres, and in the case of Ivelor some 627 acres, for Reg. 93 provides that " a claim for which a licence (*i.e.* a claim licence) has not been issued may be jumped in the following circumstances only: — (b) if the person locating it has included therein a greater area than is allowed by these regulations." I find by Reg. 7 that if a locator fails to apply for a claim licence having described by written notice his claim sufficiently to enable it to be identified, the location shall be null and void and the land open to location by any one. The same result is declared to occur if the locator fails after requirement so to do, to point out and verify his claim, Reg. 14 (2), and also if he fails to pay the rent payable in advance for the claim licence, Reg. 14 (6). Reg. 38 (6) opens land to location by anyone previously granted as a concession, if the grantee fails to pay the rent reserved therefor. There is no other occasion specified in the regulations when land once located by one person may during the currency of that person's licence therefor be afterwards located by another. That being so and in view of the provisions of RR. 33 and 93 above mentioned, I held that the defendants' contention was correct and that, even if the evidence established that they had, after making the block locations, neglected to keep the boundaries of Alma and Ivelor distinctly marked and the location boards of the same in good order, and although the defendants had included in both block locations, as to Alma an area very greatly, and as to Ivelor an area considerably in excess of that allowed by the regulations, the plaintiffs' only remedy was to jump those claims, a remedy which admittedly had not been adopted. That conclusion on my part would have more obviously been reached if Reg. 93 were worded thus: "A claim for which a licence has not been issued..... (b) if the person locating it has included therein a greater area than is allowed by these regulations.....(c) if the boundaries of the claim are not marked and kept marked as required by these regulations, may only be jumped." That however, in my opinion, is what the regulation means.

Finding, herefore, established by the evidence the occupation of their locations by the plaintiffs by making them in conformity with the regulations and also a like occupation by the defend-

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ants of their locations including the blocks Alma and Ivelor within which the locations made by the plaintiffs lay, that occupation by either party being possession to found trespass according as the evidence established priority of time when it commenced and was lawfully continued, that time thus became the main issue for determination.

Sitting as a jury, I found the weight of evidence on this issue decidedly in favour of the defendants that is that they made their locations first, that their possession thereby given was effective and immediate when the plaintiffs entered on the lands comprised in the defendants' locations and made locations thereon. My verdict, therefore, was for the defendants and I ordered the action to stand dismissed out of Court, the injunction interlocutorily obtained by the plaintiffs against the defendant Commissioner being thereby dissolved.

Solicitor for the Plaintiffs, *E. A.W. Sampson*.

Solicitor for the Defendants, *F. Dias*.

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ROYAL BANK OF CANADA v. TIAM FOOK.

[725 OF 1922.]

1923. OCT. 23; Nov. 9. BEFORE DOUGLASS, J.

Promissory note—Two signatories—Whether principal or surety—Admissibility of oral evidence to vary effect of note—Principles on which evidence is sometimes admitted—Accommodation party—Bills of Exchange Ordinance, 1891—Tests as to liability of alleged surety—Creditor's knowledge or ignorance of suretyship—How surety may be released—Meaning of the term "giving time"—Whether liability on note merged in mortgage deed—Interpretation of deed—Admissibility of oral evidence to explain terms employed in mortgage deed.

The plaintiff bank sued the defendant for the balance due on a promissory note dated 2nd July, 1918, made by the defendant and one P. S. The questions at issue were substantially (1) Whether the defendant was a mere accommodation party, signing as surety to the note but having received no consideration therefor: (2) Whether, even if he were a mere surety, the plaintiff bank's rights against him on the note could be affected unless they had knowledge of his suretyship at the time of the transaction: (3). Whether the defendant was released by the "giving of time" by the plaintiff bank to the principal debtor, and (4) Whether a mortgage deed, subsequent to the making of the note, by which the principal debtor assigned his property to the plaintiff bank to secure his present and future debts (a) as an individual and (b) as carrying on the firm of B. E. S. & Co., included the transaction evidenced by the note.

The facts fully appear in the judgment below.

Held:—(1) That the defendant was a surety but that the plaintiff bank was not aware of that fact until some time after the making of the note and that therefore no arrangement come to by the plaintiff and the principal debtor as to further security could have affected the liability of the joint makers of the note,

(2) That evidence is usually admissible to show either (a) that there is no consideration for a note or (b) that such consideration has failed, but it is doubtful whether in circumstances like these, such evidence can be received in the absence of knowledge on the part of the creditor of the alleged suretyship.

(3) That "giving of time" within the rule affecting the obligation of a surety, connotes not a gratuitous forbearance but a binding agreement founded upon good consideration.

(4) That the principles governing the admission of evidence for the purpose of interpreting the mortgage deed were (a) that extrinsic evidence will be excluded where the language of the document was clear and applied without difficulty to the facts, but (b) where the language was peculiar or its application to the facts ambiguous, extrinsic evidence may be admitted.

J. S. McArthur, K.C., for the plaintiff.

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

DOUGLASS, J.: The plaintiffs are claiming \$2,600, the balance due on a promissory note dated 2nd July, 1918, made by the defendant and one Parbhu Sawh—now insolvent—with interest at 8 per cent. The said promissory note was for \$3,820, and had been reduced by payments made from time to time by the said Parbhu Sawh.

The defendant admits making the promissory note, but says that

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- (1) He received no consideration and that the note was for the accommodation of the said Parbhu Sawh and that no demand was ever made on him for payment.
- (2) An agreement was made between the plaintiffs and Parbhu Sawh by which he was given time to pay the amount, and that they also took a mortgage on Parbhu Sawh's property to secure payment of all moneys due from him including the amount of the said note, and he contends (a) that an account should be taken of the transactions that had taken place under this said arrangement and mortgage when it would be ascertained what was the amount of the liability (if any) of the defendant, and that (b) time, in which to settle the debt, having been given to Parbhu Sawh, the defendant was released from any liability on the promissory note.

Several questions are involved in the statement of defence, and it will perhaps be simplest to take first the question of the liability of the defendant as an accommodation party to the promissory note. Is he entitled to show that he is only a surety, when he appears by the terms of the promissory note to be a principal? Such evidence was inadmissible at law if the question arose between creditor and surety, for that would be a contradiction of a written instrument, yet as equity arose from the relationship of surety and principal, *inter se* evidence has been admitted to show want of consideration. The cases leave it doubtful whether if the creditor did not know him to be a surety, and accept him as such at the time he entered into the transaction, such evidence is admissible (*Pooley v. Harradine* (1857, 26 L.J. Q.B. 156.)

The question of the admissibility of evidence to vary or contradict a promissory note was fully considered in a late case *Goolab v. Megha* and I will not now reiterate; the cases go to show that evidence is admissible to prove that the consideration has failed, or that there was no consideration. The defendant has satisfied me that he joined Parbhu Sawh in the making of the said promissory note as an accommodator, but that the plaintiffs were aware of it is more than doubtful. Section 28 of Ordinance No, 13 of 1891 defines an accommodation bill or party and with it must be read section 30 and section 59 (3), An accommodation note is a note whereof the maker is in substance a mere surety for some other person, who may, or may not, be a party thereto. In the present case, Parbhu Sawh was the principal party and the defendant his surety, but until the plaintiffs had notice that such was the case the consequences attaching to the relationship of principal and surety did not affect the plaintiffs' rights against either or both of them. It is of importance

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then to ascertain whether, or at what date, the plaintiffs became aware of the position of the defendant. From the evidence it appears that the promissory note for \$3,820 was the third of a series of renewals commencing the 1st October, 1917, when the original sum secured was \$4,800: all the notes were signed by Parbhu Sawh and the defendant, and an account was opened at the bank in their joint names. Payment on account of the notes was made from time to time by Parbhu Sawh, the last payment being for \$200 on the 14th September, 1920. It was natural that he should be the one who paid over the instalments as he had his business in Georgetown, whereas the defendant resided in New Amsterdam; regular notices were sent to both parties. The manager of the plaintiff company states that he never looked upon the defendant as an accommodator, but always treated it as a partnership dealing. Some time in 1920—probably after September 14th the last payment on account—the defendant had a letter from the bank and went to see the manager; he says that he told the manager that if he wanted the note paid off he himself would sue Parbhu Sawh, and the manager said "he'd see after it." The manager's account of that—or a subsequent interview—is that he asked the defendant to pay the note, but agreed to give him time to see if he could collect any amount first from Parbhu Sawh's estate; and that at a later interview—he thinks after the bankruptcy of Parbhu Sawh—the only attitude the defendant took up was that the bank ought to have seen that Parbhu Sawh paid when he received money on sale of certain property at New Amsterdam, which the defendant and Parbhu Sawh were jointly interested in. Parbhu Sawh became an insolvent on 8th October, 1921, and has since died, I cannot find that at any of the interviews the defendant clearly stated he was an accommodator, Mr. Dalgliesh (the Manager of the bank) does indeed say that he recalls the defendant saying that he "got no benefit" out of the transaction, but surely that is not sufficient indication that he was only an accommodating party.

But let it be conceded that late in 1920 the plaintiffs become aware that the defendant was in the position of a surety on the promissory note, it would then have to be considered whether any steps the plaintiffs took after that date relieved or discharged the defendant from his liability, for any dealings with the principal Parbhu Sawh such as would ordinarily discharge a surety, would then have discharged the defendant, for there is nothing peculiar to transactions on bills or notes, It is clear that when a creditor releases the principal, the surety is thereby released, so if a bill or note be renewed without the consent of all parties liable thereon as sureties, the parties so liable are discharged. But further, a surety is entitled to the benefit of

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all securities which the creditor has against the principal debtor at the time when the contract is entered into whether he is aware of them or not. (See *Pearl v. Deacon* 1857, 24 Beav. 186, approved of in *Ward v. Nat. Bank N.Z.*, 1882, 8 Ap. Ca. 755 ; and *Bechervaise v. Lewis* 1872, L. R. 7 C. P. 372).

By a mortgage dated the 26th October, 1918, Parbhu Sawh transferred certain properties in Georgetown by way of mortgage for \$50,000 to secure to the plaintiffs payment of the indebtedness and liability, present as well as future, by him individually, and as carrying on business under the firm of Baboo Ram Sawh & Co., in any way, on any promissory notes or bills of exchange, or on overdrafts or current account; this is the mortgage referred to in the statement of defence, and the defendant says that the plaintiffs on taking this security released him as surety, and that all moneys realised by sale of the properties should be brought into account and the balance due on the promissory note be extinguished, or reduced proportionately, as the case might be. Learned counsel for the defendant objects to evidence being given by the plaintiff to explain the mortgage or the intention of the parties to it, and he also objects to a certified extract from the books of the bank showing the total indebtedness of P. Sawh—who also traded under the name of Baboo Ram Sawh & Co.—on the 23rd October, 1918, purporting to be the indebtedness covered by the mortgage.

In the first place the mortgage was granted long before the defendant disclosed the fact that he was only a surety or the plaintiffs became aware of it. And next, it seems to me that on a strict construction of the mortgage deed, it is quite evident the joint debt of P. Sawh and the defendant is not included, for it is emphasized several times, that P. Sawh is assigning his property to secure his present and future debts (1) as an individual and (2) as carrying on the firm of Baboo Ram Sawh & Co. It has already been noted that the plaintiffs kept a separate account in the names of P. Sawh and the defendant jointly, moreover there was no necessity to include that debt as the bank was already secured by the defendant having joined in the promissory note as a joint contractor. If the construction of the document is as clear as I think it is, the extrinsic evidence would not be admissible, but if not, then the last part of the rule set out in Phipson's Law of Evidence (6th Ed., page 605) applies, "where the language of a document is clear and "applies without difficulty to the facts of the case, extrinsic evidence is not "admissible to affect its interpretation ; but when the language is peculiar, "or its application to the facts is ambiguous or inaccurate, extrinsic "evidence may . . . be given in explanation." A somewhat similar case to this was referred to by learned counsel

for the plaintiffs *ex parte Kirke in re Bennett* (1876. 5 Ch. Div. 800). It was a case on the construction of a will, where evidence was allowed to show what was meant by the words which the testator had employed, though not for the purpose of showing what his intention was. The testator had directed the trustees of the will to deliver up to B. all securities he should hold for securing payment of debts due by B.; there was at the time of the testator's death a debt due by B. personally, and one due from the partnership of B. & G. for which they had given their joint promissory note, and another for which they had given their joint and several promissory note. *Held*:—That there being a private debt of B. which satisfied the words of the bequest, those words could not be construed as including the partnership debt. James. L.J., in his judgment says: "People "do not talk of debts due from a firm as debts due from individual members "of the firm. There being, a debt due from the legatee alone strictly "answering the description, the proper course is to apply the words to that "debt only which strictly answers the description." As I hold that the security given by Parbhu Sawh has no reference to the debt on the promissory note, there can be no question of bringing any money realized into account.

We next come to the contention that P. Sawh having been given time to pay the promissory note the defendant is released from his liability on the promissory note; and it may here be noted that neglect to present or to give notice of dishonour has been held not to discharge the maker of a note or the man who guarantees the due payment of a bill or note. (*Walton v. Mascale* 1844, 13 M. & W. Rep; 452).

The principle relied on by the defendant is found in *Greenough v. M'Clelland* (1860, 30 L.J.Q.B. 15.) If one maker of a promissory note signs as surety only for the other, and the payee has notice of this when he takes the note as security for money advanced to the principal, he cannot give time to the principal, without the consent of the surety. If he does, the surety is discharged in equity, although the payee has never agreed to treat him otherwise than as a principal party liable upon the note, for an equity arises from the relation of principal and surety and notice thereof to the payee.

In *Ward v. Nat. Bank of N. Z.* (1882) Ap. Ca. 755) the judgment of their Lordships declares that "a long series of cases has decided that a "surety is discharged by the creditor dealing with the principal or with a "co-surety in a manner at variance with the contract the performance of "which the surety has guaranteed."

In *Rouse v. Bradford Banking Co.* (1894, Ap. Ca. 586) Lord Herschell, L.C. with reference to this rule says: "It is of course

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“obvious that time is only given within the meaning of this rule to which I “have been referring if there is a binding agreement arrived at for good “consideration.” In that case the question of giving time arose in extending an overdraft at the defendant bank, and the conclusion was that there was no agreement to give time in the sense required, and therefore it was not necessary to enquire whether the minutes of the bank with reference to the transaction disclosed a contract for valuable consideration or not. Here the assertion that time was given, is a question of not proceeding to sue on a promissory note payable on demand. It is evident that none of the parties to the said promissory note could have had it in contemplation that the bank would immediately and without notice sue on it, but they would take it that as long as fair efforts were made to pay off by instalments, time would be extended, more especially so as interest at 6 per cent, was provided for, and therefore, apart from any legal obligation to abstain from so doing, in the ordinary course of business the bank would so act. As regular payments were made, no steps were taken until 1920 when apparently the defendant had an interview with the plaintiffs, and with his consent and indeed for his benefit the time was extended. There was no binding agreement to give time in the sense required; there was merely a forbearance to sue approved of by all parties.

I am of opinion that the plaintiffs had no knowledge of the relationship of principal and surety existing between the defendant and Parbhu Sawh until late in 1920, that, in consequence, no arrangement made by the plaintiffs and Parbhu Sawh before that date as to further security would have affected the liability of the joint makers of the promissory note, that in any event the mortgage of the 26th October, 1918, was not intended to, and did not, comprehend the joint debt due on the said promissory note, and that no time was given to the said Parbhu Sawh for payment of his indebtedness on the said note based on any binding agreement and for good consideration.

I therefore give judgment for the Plaintiffs for \$2,916.02 and for interest on the amount of \$2,600 at 8 per cent, from 15th December, 1922, to payment or recovery of the same. The defendant will have to pay the costs of this action.

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

Solicitor for the defendant, *E. A. Luckhoo.*

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

DEWAR v. BRITTON.

DEWAR v. BRITTON.

[574 OF 1921.]

1923. OCT. 30, 31; Nov. 9. BEFORE DOUGLASS, J.

Sale of chattels—Joint debtors—Death of one joint debtor—Deceased's estate insolvent—Liability of survivor Partnership Ordinance 20 of 1900—Whether contract oral or written—Admissibility of secondary evidence—Quantum of consideration.

The plaintiff claimed from the defendant the sum of \$1,500 and interest being the balance of moneys due on the purchase price of a certain printing plant and appliances pertaining thereto sold by the plaintiff to the defendant and one C, now deceased. The plaintiff averred that the price agreed on was \$3,000, and that the agreement was embodied in a written contract. The defendant contended that the contract was oral and that the purchase price was \$1,500, all of which had been paid and, further, that the plaintiff had declined to prove in the insolvency of the estate of the other joint debtor, now deceased, and had thereby released the defendant from all liability under the contract.

The facts more fully appear in the judgment below.

Held :—(1) That the allegation that the plaintiff had declined to prove in the insolvency of the estate of the deceased joint debtor having been unfounded, the survivor was by reason of section 11 of the Partnership Ordinance, 1900, liable on the contract.

(2) That the *existence* of the written contract having been proved and its loss satisfactorily accounted for, oral evidence of its contents became admissible.

J. A. Luckhoo, K.C., for the plaintiff.

E. P. Bruyning, for the defendant.

DOUGLASS, J.: The plaintiff is opposing transport of property at Plantation Triumph, East Coast, Demerara, by defendant, on the grounds set forth in the opposition to the said transport entered on the 1st October, 1921, viz.:—That the defendant H. A. Britton together with the representatives of the estate of J. Carto, deceased, are jointly and severally indebted to the opposer in the sum of \$2,102.57. The statement of claim contains the particulars of this debt, that in January, 1918, the plaintiff sold to the defendant and the said J. Carto a printing plant with type and all the appliances and stock pertaining to the business of the printing of the "Free Lance" newspaper, now known as "The Tribune" for the price of \$3,000. He admits receipts of a total sum of \$1,398.74, particulars of the account being more particularly set out in the statement of account annexed to the statement of reply dated 22nd July, 1922. The defendant admits that he and John Carto were co-contractors with respect to the purchase of the said newspaper plant, and alleges (1) that the agreement with the plaintiff was a verbal one, and (2) the purchase price was fixed at \$1,500 only and had been fully paid.

John Carto died on 30th December, 1920, and in May, 1921, his estate was declared insolvent, the further allegation that the

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plaintiff declined to prove in insolvency of the estate of John Carto, deceased, was proved not to be correct, and as John Carto and the defendant were joint contractors, the plaintiff is within his rights in proceeding against the defendant alone (See Addison on Tort (11th Ed. p. 260 & 319), and Ordinance No. 20 of 1900, Sec. 11).

As to whether the contract was by word of mouth or in writing, the plaintiff gives evidence that he signed the contract himself and saw Carto sign in the presence of two witnesses Cameron and Rickford, and that he saw the contract again after it was signed by the defendant, and that he had a typewritten copy; none of his witnesses can swear to having seen the original contract. The Rev. E. Robertson is too uncertain to enable me to say whether the document he saw produced at a meeting in January, 1919, was the original copy, he only "believed" the names of Carto and the defendant were attached to it, and did not remember reading it. J. B. Dewar only saw a draft agreement, and Mr. Belmonte the duplicate typed copy containing the three names at the end with the word "signed" against each. The defendant denies that there ever was any written agreement between the plaintiff and himself and had never spoken to him in the matter. There is therefore no evidence that the defendant ever signed the alleged written contract, it is true his name is said to have been inserted in the duplicate copy, and that the plaintiff (alone) says he saw it on the original, still, no witness has been produced who saw him sign for the reason that one witness to the contract between the plaintiff and Carto has died since the commencement of this action, and the other one is incapable of giving evidence.

Even if there is insufficient proof that a contract was ever signed by the defendant, I do not know that it makes any difference. The defendant states "we" (Carto and himself) agreed to purchase the "Free Lance," and that preliminary arrangements were made by Carto, all that he did was to attend with Carto and Bunyan at the office of the then defunct "Free Lance" in January, 1918, and take over the plant and effects from the plaintiff. Before the purchase was made, a meeting of those interested in the paper was held and Mr. Marshall—a witness for the defendant—states "Carto and Britton were the active parties and brought us together." If the defendant and Carto were partners in the purchase and conduct of the newspaper business,—and from the evidence it seems that they were—then Section 7 of Ordinance 20 of 1900 applies. Even if before completion of the purchase, we look upon Carto as the agent for the defendant, the latter must be bound by Carto signing the contract under the doctrine of "holding out," that is, the defendant

by his conduct would have led the plaintiff to think that he gave Carto his apparent authority to act for him in the said purchase. It is obvious that any private arrangement between Carto and the defendant as to the proportion of the purchase money each should bear cannot affect the vendor unless it were defined in, and agreed to by the contract. Mr. Phillips gave evidence that on Carto's death he searched his desk and papers and destroyed all the rubbish, he was administrator of the estate for a few months, and states he saw no agreement as described—I am satisfied that the plaintiff and Carto signed a written agreement for purchase and that it and the duplicate copy were lost or destroyed at the time of Carto's death, so that secondary evidence of the contents of the written document is admissible. Evidence of the contents, however, is quite unreliable, apart from the facts that the purchase price was to be paid by instalments, and that interest was to be paid. The periods over which instalments were to be paid are of no special interest inasmuch as the defendant as far back as 18th March, 1921, by pleading payment in full has repudiated the contract as alleged by the plaintiff, and so, that there are any instalments left to pay. That interest was to be paid at 6 per cent, can hardly be disputed, for one thing it is referred to in receipts dated 21st November, 1918, and 12th February 1920, and those receipts were in possession of the defendant and not disputed by him.

It only remains to ascertain what was the consideration for which the plaintiff sold the printing plant. I do not think any evidence as to the value of the plant previous to the sale is admissible; it can in no way affect the question of consideration since the action is not on a "quantum meruit," though what the printing plant was afterwards sold for, making allowances for lapse of time, wear and tear, and the circumstances of parting with it, are indications of what it was worth to Carto and the defendant when they purchased it. The plaintiff, the Rev. E. Robertson. J. B. Dewar and B. E. Belmonte all say the consideration was \$3,000 and Mr. Packwood that he does not remember the amount, but it was more than \$2,000. For the defendant Mr. Bunyan is the only witness who can support him in his statement that the price was \$1,500. Mr. Chase says that he cannot remember the price suggested at the meeting in January, 1918, possibly \$2,000 or \$5,000 or \$3,000 might have been mentioned. The plaintiff's evidence is to a certain extent supported by documentary evidence, viz.: a carbon copy memorandum answering Carto's letter dated 7. 1. 18 (exhibit E)—It may be remarked that the typed letter of 23rd November 1918, (exhibit J) makes no mention of the price on the original contract, only referring to "the unpaid capital balance," at that

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date, according to the receipts put in evidence, 8815 had been paid. This letter was sent to Carto addressed to him and defendant, but the defendant says he never saw it; the very fact that it makes no mention of the original price in the present circumstance impresses me that it is a genuine letter and not made for the purpose of self-serving evidence. Then there is the declaration for the purposes of Estate Duty (exhibit D) dated 31st January, 1921, in which the deceased's (Carto) 1/2 share in the property as a partner in the firm of the Tribune Syndicate is estimated at \$1,500. The defendant says that Mr. Camacho bought Carto's half for over \$900, and implies that it had increased in value by additions and improvements, but he must remember that it had had three years' wear and tear since the purchase, and the only evidence of improvements is an account put in (exhibit M) for \$236 of Sproston's, Limited, for repairs and some additions. On the whole evidence the court can only find that the price agreed on was \$3,000; the defendant, I fear, is misled by the fact that his private arrangement with Carto was \$1,500, the value of one-half, though in giving his evidence defendant states "more than \$1,500 has been paid," but he can give no details of how or when, and no accounts were kept between the partners; he is placed in a most unfortunate position by the death of John Carto.

From the receipt of 12th February, 1920, it appears that \$1,300 capital had been paid up to that date. The plaintiff stated that between February and September, 1920, when he went to Barbados, no payments were made, but the defendant puts in a letter from Miss Dewar to John Carto, undated, but written when her father was in Barbados (September to December, 1920,) saying: "I sent you total amount from February to May already, "what I due you now is from May to October 9th which total amount is "\$130." Some other hand, apparently J. Carto's, has added certain figures \$69, and totalling it up to \$199 from which I infer that \$69 was paid between February and May and \$130 between May and October, for which Miss Dewar sent acknowledgments, the defendant says they refer to 1920 payments, the plaintiff says to 1919 payments. Turning to the note book kept by Miss Dewar I find that between February and May, 1919, \$57 is the total received, and between May and October 9th, 1919, \$116 is the total, and I can only come to the natural conclusion taking into consideration that the letter was written in 1920 and after the receipt of 12th February of that year, that the payments referred to were made in 1920, and I shall allow the sum of \$199 as having been paid on account in 1920 by Carto, Looking again at the receipt, I find that the \$1,300 was paid on account of capital, and that in addition all interest to the 8th February,

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1920, had been paid. Therefore on the 12th February, 1920, \$1,700 capital moneys were due and on the 8th February, 1921, \$1,501 capital and one year's interest at 6 per cent., which I have had calculated at a sum of \$158.27.

I declare the opposition to be just, legal, and well founded, and the defendant is restrained from passing the transport advertised by him, and I give judgment for the plaintiff for \$1,501 capital and \$158.27 interest to the 8th February, 1921, and thereafter interest at 6 per cent, until payment— and costs for the plaintiff.

Solicitor for the plaintiff. *J. A. Viapree.*

Solicitor for the defendant, *A. McL. Ogle*

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

REPORTS OF DECISIONS
IN
THE SUPREME COURT
OF
BRITISH GUIANA
DURING THE YEAR
1923
IN
THE WEST INDIAN COURT OF APPEAL
[1920—1924]
AND IN
The Judicial Committee of the Privy Council
[1924.]

Edited by S. J. VAN SERTIMA, B.A., B.C.L., (Oxon.)

Barrister-at-Law, British Guiana.

GEORGETOWN, DEMERARA:
"THE ARGOSY" COMPANY, LIMITED, PRINTERS TO THE
GOVERNMENT OF BRITISH GUIANA.
1925.

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WEST INDIAN COURT OF APPEAL.

REPORTS OF DECISIONS

OF

THE COURT

SITTING IN

British Guiana, Trinidad, Grenada, St.

Vincent, St. Lucia and Antigua

[1921—1925.]

JUDGES OF THE COURT:

- | | |
|---|--|
| SIR A. V. LUCIE-SMITH, KT., | PRESIDENT (Chief Justice of
Trinidad and Tobago). |
| SIR STANLEY FISHER, KT., M.A., | PRESIDENT (Chief Justice of
Trinidad and Tobago). |
| SIR CHARLES HENRY MAJOR, KT. | (Chief Justice of British Guiana). |
| SIR HERBERT GREAVES, KT. | (Chief Justice of Barbados). |
| SIR ALFRED KARNEY YOUNG, KT., B.A., | (Chief Justice of the
Leeward Isles). |
| GEORGE CHISHOLM DEANE M.A., | (Chief Justice of the Leeward
Islands). |
| *GEORGE O'DONNELL WALTON | (Chief Justice of Grenada). |
| ANTHONY DE FREITAS, B.A., O.B.E., | (Chief Justice of St. Lucia). |
| JAMES STANLEY RAE | (Acting Chief Justice of St. Lucia). |
| SIR WILLIAM KELLMAN CHANDLER, KT., B.A., LL.D., C.M.G., | (Acting Chief Justice of Barbados). |
| WILLIAM PLUNKETT MICHELIN | (Acting Chief Justice of the
Leeward Isles). |
| RICHARD THEODORE ORPEN, B.A., | (Chief Justice of
Barbados). |
| HERBERT CECIL STRONGE, B.A., | (Chief Justice of the Leeward
Isles). |
| NICHOLAS JULIAN PATERSON, B.A., | (Acting Chief Justice of
Grenada). |

*Knighted 1925,

WEST INDIAN COURT OF APPEAL.

REPORTS OF DECISIONS

OF

THE COURT

SITTING IN

British Guiana and Barbados

[1920—1924.]

JUDGES OF THE COURT:

SIR A. V. LUCIE-SMITH, K.T., PRESIDENT (Chief Justice of Trinidad
and Tobago).

SIR CHARLES HENRY MAJOR, K.T. (Chief Justice of British Guiana).

SIR W. HERBERT GREAVES, K.T. (Chief Justice of Barbados).

SAMUEL JOYCE THOMAS (Chief Justice of St. Vincent).

G. O'D. WALTON (Chief Justice of Grenada).

G. C. DEANE (Chief Justice of the Leeward Islands).