INDEX AND DIGEST

OF

CASES

REPORTED IN THIS VOLUME

OF

LAW REPORTS.

COMPILED BY:

E. MORTIMER DUKE, LL.B., LOND.,

Barrister-at-Law, British Guiana and Trinidad.

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.

CROFT *v.* DEMERARA BAUXITE CO., LTD. [Douglass, J.] 183

ACCORD AND SATISFACTION.

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

The defendants had accepted a bill of exchange drawn in favour of the plaintiffs. The defendants went into liquidation, and P. C. W. was appointed liquidator. He drew a cheque for $3,200, which was less than the amount of the bill, in favour of the plaintiffs, crossed it, and handed it to the plaintiffs' agent. This cheque was the liquidator's personal cheque, and was not drawn on the bank account of the defendant company. The proceeds of the cheque were invested in a draft in favour of the plaintiffs. The liquidator was not out of pocket by drawing the cheque on his own account, and he only so drew it for the sake of convenience. *Held*, that there was no accord and satisfaction inasmuch as payment was not made by a third party.

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

ACCOUNTS.

Duty to keep—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.

AMENDMENT.

Specially indorsed writ—Moneys had and received—Implied contract—Fraudulent misappropriation—Moneys not paid over.

The plaintiffs issued a specially indorsed writ against the defendant for moneys had and received and alleged that the defendant fraudulently misappropriated the same when he was in their employ. The Court gave leave to the plaintiffs to amend their claim by striking out all reference to fraudulent misappropriation, and by substituting therefor that the defendant had not paid over those moneys to the plaintiffs.

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—Ord No 20 of 1902, section 2—Therefrom and therein—Substantially one offence—Whether a charge for delivery therein can be amended to read delivery therefrom—Power of magistrate to amend—Summary Convictions Offences Ordinance No.12 of 1893, section 97 (2)

Attachment—Contempt of Court—Defective notice of motion and affidavits—No power in Court to amend—Incurable defect.

Plaints—Magistrate's Courts—Defects in plaint—Power to amend—Technical objections not to be encouraged.

Security given by appellant for costs insufficient—Amendment of bond—Power of Court to increase security.

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

APPEAL.

Question of fact—Judgment of trial judge reversed—Principles by which Court guided.

TRINIDAD.

UNION MARINE INSURANCE CO. *v.* MURPHY. **[**W.I.C.A.**]** 238

and see PRACTICE.

Evidence improperly received in court below—Rejected by Appeal Court.

On an application the judge received and considered without objection affidavits of the parties in support of, and in opposition to, the application. On appeal *Held*, that although the affidavits were considered without objection in the court below, on the authority of *Jacker v. International Cable Co.* (1888) 5 T.L.R. 13 the Appeal Court was bound to reject them.

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

Costs—No cross notice thereof by respondent—Point raised at the hearing of appeal—Whether Court of Appeal will entertain it—West Indian Court of Appeal Rules, 1920, rule 10.

TRINIDAD.

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.* [W.I.C.A.] 197

Grounds of—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.

GRENADA.

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

MARRYSHOW *v.* TURTON. [W.I.C.A.] 257

Appeal—Notice of—Irregularity as to service—Whether irregularity can be waived.

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.

ATTORNEY GENERAL OF GRENADA *v.* OTWAY. [W.I.C.A.] 265

Conditions precedent to appeal—Statutory conditions— Compliance therewith—what is sufficient compliance—Assessment of Income Tax—Notice of appeal to be served on Assessment Committee and on Appeal Committee within 30 days—Appeal Committee not in existence during that period—Appointed after the expiry of the time limited for appeal—No notice served on Appeal Committee—Whether incumbent on appellant to serve notice of appeal on Appeal Committee within 30 days of its appointment.

GRENADA.

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.

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

ASSESSMENT LISTS.

Warden—Assessment by—How rolls made up—In whose names assessable—Owners or failing them tenants and occupiers —Publication of lists—Final and conclusive—Ordinance No. 56.

GRENADA.

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 that 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. The lists were subsequently published.

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,

and that the assessment list when published was final and conclusive.

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

AUTREFOIS 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—Ord. 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).**

See RES JUDICATA

BAILMENT.

Bailor and bailee—Principal and agent—Master and servant — Motor Car Ordinance 1918—Motor Car Bye-laws 1918, rule 5— Registration of owner unchanged—Costs.

A. sold and delivered a motor car to B. but he was not paid in full. The car still continued to be registered in the name of A. who still paid the licence fees under the Tax Ordinance. B. plied the car for hire on his own account. While he was driving the car, the plaintiff was injured. *Held,* that B. was a bailee of the car and that A. was not responsible for the negligence of B.

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

BANKRUPTCY.

See INSOLVENCY.

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.

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.] 251

Barrister and client—Barrister acting as solicitor—Liable as such—Solicitor and client—Duty to client—Conflict between interest and duty—When relationship ceases — Purchase of property by solicitor to prejudice of client.

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.

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

and see DAMAGES.

BASTARDY.

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 successionis — Eighth rule of succession—Whether Court would revive the rule of Roman Dutch law that a mother succeeds on intestacy to her bastard child.

See INTESTACY.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Interest—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

Whether a higher security than a bill of sale notarially executed—Relative value of securities—Ord. No. 15 of 1916, section 14—Bills of Sale Ordinance No. 22 of 1916, schedule thereto.

See BILLS OF SALE.

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.

ALLEN *v.* ROYAL BANK OF CANADA. [W.I.C.A.] 272

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.**

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] 284,286

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.

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.

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.

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.

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.] 29

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 whale 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 entituled "the King against Henry Aaron Britton," the application was made to a single judge. A rule nisi was granted which was similarly intituled. On the return of the rule nisi it was objected (a) that so to intitule 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.] 273

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.] 46

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.

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.

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 oft 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.

Semble, 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

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.

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.

Divisional Court in England—Its counterpart in British Guiana.

CRIMINAL LAW.

Closing of spirit shops—Delivery of spirituous liquor in a licensed placed—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.] 7

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.] 89

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.] 139

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.] 74

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.* 106
[Douglass, J.]
WIGHT *v.* DAILY CHRONICLE, LTD. *et al.* 138
[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 lid 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 spoilt. 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 spoilt 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.] 143

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 feasors—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 $l0,740 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 circum stances 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 domicil.

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.

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.

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.**

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.

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 tor 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.

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.

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

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 ear 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 ear 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.] 266

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.

Insurance—Receipted 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.

FUNERAL EXPENSES.

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

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.

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.* BISMILLLA, *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.

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.

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.

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.

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.

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.

INDEFEASIBLE TITLE.

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

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

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.

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.

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.

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.

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 successionis—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.] 34

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.] 244

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.] 154

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 feasors—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 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 section10—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.] 7

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.] 146

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.] 65

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 ease 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.

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.

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.

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.] 161

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 ears 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 ear 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.] 266

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.] 200

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.

PARTNERSHIP.

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

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.

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.

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.

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.] 41

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.**]** 244

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 interloctory 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 vexations, 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 deter-mined—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.

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.

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.

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 that 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.

Ostensible authority.

PRIVATE INTERNATIONAL LAW.

Divorce — Situs celebrationis of marriage—Divorce in a different place—Court of domicil—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.

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.

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.

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.

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.

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.

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.

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

In the case of a joint publication of a libel, each tort feasor 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.

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.

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—Indefeasible 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.] 255

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 valuators 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.] 200

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.] 89

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

WORDS.

Charge or control.

CROFT *v.* DEMERARA BAUXITE CO., LTD [Douglass, J.] 183

Superintendence.

CROFT *v.* DEMERARA BAUXITE CO., LTD. [Douglass. J.] 183

Sale.

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

Chaos.

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

Excess.

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

Gangster.

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

Court.

MOHABEER *v.* BISMILLA, *et al.* [Douglass, J., AND [W.I.C.A.] 41
MOHABEER *v.* BISMILLA, *et al.* [Douglass, J., AND [W.I.C.A.] 244

Or.

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

Decision.

LEWIS ADOLPHUS ROBINSON, PETITION OF. [Douglass, J.] 34

1924.

LAW OFFICERS OF THE CROWN.

ATTORNEY GENERAL:

SIR JOSEPH JOHN NUNAN, K.C.,B.A., LL D.

WILLIAM JAMES GILCHRIST, (Acting.)

ASSISTANT TO ATTORNEY GENERAL:

HERBERT CHARLES FAHIE COX.

SYDNEY JACOB VAN SERTIMA, B.A., B.C.L., (OXON.) (Acting: Jan.-Feb.)

CROWN SOLICITOR:

PERCY WILLIAM KING

JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1924.

SIR CHARLES HENRY MAJOR, KT.	..	Chief Justice.
MAURICE JULIAN BERKELEY	...	Senior Puisne Judge.
WALTER JOHN DOUGLASS, M.A., LL.M	....	Junior Puisne Judge.

TABLE OF ABBREVIATIONS.

(ADDITIONAL TO THE USUAL REFERENCES TO ENGLISH REPORTS).

A. J.	.....	Appellate Jurisdiction, British Guiana.
E. D.L	.....	South African Law Reports, Eastern Districts Local Division.
G.J.	.....	General Jurisdiction, British Guiana.
L.J.	.....	Limited Jurisdiction, British Guiana.
S.C.orJuta	.....	Juta's Supreme Court Reports, Cape Colony, South Africa.
T. S.	.....	Transvaal Law Reports, South Africa.

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, so far as available are included in the British Guiana Law Reports.

METHOD OF CITATION.

This volume of Reports will be cited as (1924) L.R.B.G.

CASES

DETERMINED IN THE

SUPREME COURT OF BRITISH GUIANA.

GOBIN MARAJAH *v.* JOHN LOPES.

[No. 639 OF 1922.]

BAIL COURT.

1922. NOVEMBER 9, 18. BEFORE DEFREITAS, ACTG. J.

Practice—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.

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. *DeSouza* (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 of 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.

Motion by the plaintiff for an interlocutory injunction until the hearing and determination of the action. The writ was filed on the 27th October claiming (1) an injunction restraining the sale at execution on the 2nd November of a certain house levied upon at the instance of the defendant; (2) an order setting aside the judgment by default in an interpleader matter in which the plaintiff was a claimant in respect of the said house; (3) an order declaring the levy made to be illegal; and (4) an order declaring the property levied upon to be the property of the

plaintiff. The day after the writ was filed an application *em parte* was filed by the plaintiff for an interim injunction to restrain the sale which was to take place on the 2nd November. The injunction was granted on the 30th October, 1922, on the ground of urgency. But the Court gave the plaintiff liberty 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 hearing and determination of the action. The hearing of the application was fixed for the 9th November. The writ was served on the 27th October and appearance was entered on the 3rd November. Notice of motion for the injunction was served on the 2nd November.

E. P. Bruyning for the applicant (plaintiff).

E. G. Woolford, K.C., for the respondent (defendant)

DEFREITAS, ACTING J.: This is an application by the plaintiff for an interlocutory order restraining, until the hearing of the action, the sale at execution of a cottage advertised for sale by the Registrar of British Guiana at New Amsterdam in pursuance of a levy made at the instance of the defendant against one Theophilus Williams.

Following the English procedure of the King's Bench Division, I granted in Chambers an immediate interim injunction on an *ex parte* application by the plaintiff with liberty to serve upon the defendant before the time limited for appearance to the Writ of Summons herein a notice of motion to continue the injunction until the determination of the action. See note "Practice as to injunction" to Order 50, rule 6, in the Annual Practice.

This in my opinion is the correct procedure as prescribed by Order 40, rule 5, of our Rules of Court when on application for an interlocutory injunction under Order 38, rule 1, the applicant desires an immediate injunction on the ground of urgency. When an immediate injunction is not required, no *interim* injunction should be granted without the defendant having an opportunity to be heard after service upon him of notice of the application as required by Order 40, r. 5. This practice is in accordance with that laid down by Sir Charles Major, C.J., in *Robertson* v. *Yarde* (1919) L.R.B.G. 55 and has, I think, been followed by Mr. Justice Dalton since the decision of *Obermuller* v. *DeSouza* (1917) L.R.B.G. 34 in which he expressed a doubt as to propriety of the order made by himself in that very action on an *ex parte* application by the plaintiff.

As uniformity of practice in these as in all other matters of procedure is most desirable, I have been at pains to give my reasons for adopting the procedure I have indicated.

The defendant now appears, to oppose the application for an Order to continue the interim injunction.

Mr. Woolford, on his behalf, contends that the Court should refuse the application because the applicant has already interpleaded in respect of the cottage the sale of which it is now sought to restrain, that on the interpleader proceedings an Order of the Court has already been made dismissing the applicant's claim to the cottage, and that the applicant should have applied to the Court to set aside that judgment under Order 35, rule 13, of the Rules of Court. He also submits that an injunction is unnecessary as the injury to the plaintiff (if any) is amply reparable by damages

The plaintiff has instituted an action against the defendant claiming (1) an injunction restraining the sale at execution (2) an order setting aside the judgment by default in the interpleader matter (3) an Order declaring the levy made to be illegal and (4) an Order declaring the property levied on to be the property of the plaintiff.

I have fully considered Mr. Woolford's arguments, but whatever may be my opinion, it seems to me it is not proper for me at this stage of the proceedings to decide the questions raised by him. The statement of claim has not yet been filed but on the affidavits attached to this application, and after hearing counsel on both sides, I am satisfied that there are substantial questions of law and fact to be considered, and that the plaintiff has at least a probable or fair *prima facie* cause of action. In applications of this sort the Court always endeavours to abstain from prejudging the questions involved in the cause, and confines itself to the immediate object sought which is to preserve the property in dispute in *status quo* until the whole matter is fully debated and adjudicated on at the trial.

Applications of this kind are constantly being entertained by our Courts, and it appears to me that the balance of convenience in this case is in favour of granting the injunction. If the plaintiff fails in his action, I can conceive of little harm being done to the defendant by the granting of the injunction especially in view of the statement made at the bar that the house is occupied by a good tenant; on the other hand it would be poor consolation to the plaintiff, if the application is refused, to know if he succeeds in the action that his house has been sold and that his sole remedy is by way of damages which he may never be able to recover from the defendant.

I will therefore grant the injunction applied for, but on the usual condition that the plaintiff enter into an undertaking to abide by any order the Court may make as to damages in case the Court should hereafter or at the trial be of opinion that the

defendant has sustained any by reason of the granting of the injunction which the plaintiff ought to pay.

The costs of this application to be costs in the cause.

Interlocutory injunction granted.

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

Solicitor for the defendant, *V. D. P. Woolford.*

OFFICIAL RECEIVER v. JAMES MITCHELL.

[No. 435 of 1922.]

1924. JUNE 24; JULY 19. BEFORE DOUGLASS. J.

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— Deeds Registry Ordinance (17 of) 1919, section 20* (3)*—Effect of.*

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.

The necessary facts appear in the judgment.

J. S. McArthur, K.C., for the plaintiff.

McLean Ogle, for the defendant,

Cur. adv. vult.

DOUGLASS, J.: This is an opposition action brought by the assignee of the estate of Mrs. Mitchell, an insolvent, against her husband.

The plaintiff is claiming (1) an injunction restraining the defendant from passing transport of the south half of lot number 18, situate in South Freeburg, Georgetown; (2) an order declaring the opposition entered on the 17th June, 1922, to be just

and well founded; (3) payment of the sum of $1,200 being one-half of the purchase price paid by the plaintiff in respect of the said property, and costs.

The transport of the property in question shows title in James Mitchell, his heirs and assigns, but Mrs. Mitchell in the course of her evidence alleges that the price was paid from their joint funds, that each of them is entitled to an undivided half of the property, and that the transport was only taken in her husband's name because objection was taken to the original suggestion that it should be in the children's names She admitted that the defendant had raised a mortgage on the property—by her permission she says—and subsequently paid it off.

On the conclusion of the plaintiff's case Mr. Ogle for the defendant raised an objection that there was no case to meet as Mrs. Mitchell's claim was in respect of immovable property, and evidence of any oral agreement with respect to the same was barred by section 3 (4) (e) of the Civil Law Ordinance. This would be a very interesting point for argument; but, unfortunately, it cannot be raised at this stage. If that section which embodies the provisions of the Statute of Frauds is relied on as a defence it must be so pleaded: see Order 17, rules 15 and 20; that was not done and the defendant is not entitled to raise it now.

Under the Deeds Registry Ordinance No. 17 of 1919, section 20 (3), a transport passed before the commencement of that ordinance shall after the expiration of two years from the commencement thereof—afterwards proclaimed as the 1st January, 1920— vest in the transferee thereof the full and absolute title to the immovable property therein described, consequently the defendant is the sole legal owner of the property now in question, and it lies upon Mrs. Mitchell to prove her claim and the consequent right to oppose a transfer of the property by the defendant.

Her evidence in that respect is uncorroborated, and leaves merely *her* oath against *his* oath—of a wife against her husband. The evidence shows that both of them carried on a separate undertaking or business and each earned money, and that they started a joint account in April, 1918—the month before the transport was passed—it also shows that each of them acquired separate house property. It is impossible for the court to be satisfied with what still remains a mere claim unsupported by proof, and I must give judgment for the defendant and declare the opposition to be bad and not well founded.

In the circumstances I allow no costs to either party.

Solicitors: *A. G. King, A. McL. Ogle.*

E. C. PHILLIPS *v.* C. PHILLIPS.

E. C. PHILLIPS *v.* C. PHILLIPS.

[No. 351 OF 1923.]

1924. JUNE 16, 30; JULY 3, 7; AUGUST 1. BEFORE DOUGLASS, J.

Accounts—Duty to keep—Gratuitous agent—Father and son—Ordinary diligence — Education, habits and station in life of agent.

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

Re Lee, ex parte Naille (1868) L. R. 4 Ch. 43 applied.

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

Tindall v. Powell (1858) 6 W.R. 850 applied.

Action by the plaintiff against his father for accounts of his dealings with certain immovable property in Georgetown, belonging to the plaintiff. The defendant was his son's attorney for ten years and during that period he had never been called upon to render any accounts. The power of attorney was revoked and the plaintiff appointed his wife as attorney. She came to this colony and demanded accounts from the defendant. None were given. She then filed a writ claiming accounts. On application made under Order 13 of the Rules of Court, 1900, the judge ordered accounts to be filed. This order was complied with and the plaintiff gave notice of his intention to surcharge and falsifies the same. The accounts were referred to the Accountant. No vouchers were produced before him and he was unable to deal with him. The investigation of the accounts took place before the court when oral evidence was led.

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

E. P. Bruyning, for the defendant.

Cur. adv. vult.

DOUGLASS, J.: in the course of his judgment said: Most of the cases referred to by learned counsel for the plaintiff referred to paid agents, not gratuitous ones. In *Re Lee, ex parte Naille* (1868) L.R. 4 Chancery 43, 46, C.A. it is stated that "for anyone engaged in business not to keep accounts "is blameable, but it is not a breach of duty towards another person such as "ought, in the absence of actual fraud, to be visited with the consequences "of fraud, unless the party omitting to keep them stands in the relation of "general agent to the other." But this is with reference to a paid agent, and the defendant, moreover, in the present case is a special agent, i.e., an agent to represent his principal in a particular transaction not being in the ordinary course of his trade or business. A gratuitous agent is only bound to

exercise such skill as he actually possesses, and such care and diligence as he would exercise in his own affairs. I think Mr. Charles Phillips has done so.

Tindall v. *Powell* (1858) 6 W.R. 850, 851 more nearly approaches the circumstances of the present case. In that case the agent or steward of an old lady, on her decease was called upon for accounts. Stuart, V.C., in giving judgment, said the education, habits and station in life of the defendant were not those of a man of business, he never was required to keep accounts. Here, the relationship is that of father and son, no duty to keep accounts was undertaken, and the plaintiff (the son) for a period of ten years, never asked that regular accounts should be kept. As was said in the judgment referred to above, "There is no sound principle on which, in such "a case, the court would be justified in punishing a defendant for not "performing a duty. . . . which he never undertook and which he was "never asked to perform."

At the same time, and taking into consideration the cases of *Pearse* v. *Green* (1819) 1 Jacob & Walker 135, 141; 20 R.R. 258 and *Collyer* v. *Dudley* (1823) Turner & Russell, 421, 422, the plaintiff was certainly entitled to have some sort of account of dealings with his property, and, in case of refusal, to proceed to claim it, on the defendant not having satisfactorily explained the absence of any account. The plaintiff has failed in her endeavour to surcharge or falsify the accounts supplied, with the exception of the bonus he admitted $31.54 for which amount I give judgment for the plaintiff but he is entitled to his costs up to and including perusal of the various accounts filed on the 10th December, 1923, and of notice of change of solicitor. Of the further proceedings each party must bear his own costs.

Solicitors: *Carlos Gomes, A. V. Crane.*

J. ELEAZAR *v.* J. A. ABBENSETTS AND G. BARCLAY.

J. ELEAZAR *v.* J. A. ABBENSETTS AND G. BARCLAY.

[No. 111 of 1924.]

ELECTION PETITION.

1924. SEPTEMBER 5. BEFORE DOUGLASS. J.

Election Petition—Qualification of candidate— Town Clerk—No power to decide—Nominations refused on ground of lack of qualification—New Amsterdam Town Council Ord. (No. 10 of) 1916, section 13 (*5*)*—"Ceases to possess the necessary qualification"— Ibid, sections 12, 25* (*5*)*, 13, 28,* (*1*) *and* (2)*, and 10.*

Semble, that the words "ceases to possess 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 II. (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 the necessary qualification as a Councillor. He then declared A. and B. duly elected.

E. presented an election petition praying that the election was 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.

Pritchard v. *Mayor, etc., of Bangor* (1888) 13 A.C. 241. and

Harford v. *Linskey* (1899) 1 Q.B. 852 applied.

Observations in *Reg.* v. *Taylor* (1895) 59 J. P. 393 *approved.*

Election petition brought by Joseph Eleazar, solicitor, against the declaration by John O. Dow, Town Clerk of New Amsterdam, that John A. Abbensetts, barrister-at-law, and Gavin Barclay, mercantile clerk, were duly elected. Messrs. Abbensetts and Barclay were cited as respondents but not the Town Clerk. All three of the candidates were duly registered as voters. The returning officer requested the candidates to produce proof that they had the qualifications prescribed for councillors under section 12 of the New Amsterdam Town Council Ordinance (No. 10 of) 1916. He declared himself satisfied with the qualifications of the respondents, but said he was not satisfied that the qualification adduced by the petitioner, to wit, that he was "occupying premises in the town the rental value whereof is not less than twenty dollars per month." He therefore declared the two other candidates duly elected.

P. N. Browne, K.C., (C. *R. Browne* with him), for the petitioner.

A. B. Brown for the respondent Abbensetts.

The respondent G. Barclay did not appear.

Cur. adv. vult.

ELEAZER *v.* J. A. ABBENSETTS AND G. BARCLAY.

DOUGLASS, J.: Two councillor's seats being vacant for the town of New Amsterdam the necessary steps were taken by the Town Clerk, Mr. J. O. Dow, and on the 9th July, 1924, he attended at the Town Hall for the purpose of receiving nominations of candidates as returning officer (sec. 25 (2) of No. 10 of 1916).

The two respondents and the petitioner were duly proposed and seconded by persons whose names appeared on the register of voters (sec. 28 (2)). The petitioner, one of the retiring councillors whose office became vacant by effluxion of time, has proved that his name appeared on the register of voters for December, 1922, the existing list of persons registered as voters, there having been no change last December. The petitioner's qualification was occupation of part lot 8, New Amsterdam, the rental value whereof is not less than $20 per month (sec. 12), and he has resided on the premises for over six months preceding the election. As a matter of fact the property is also registered in the petitioner's name as proprietor in the books of the Town Clerk for over $1,000, but that does not affect the present question. For some reason not very clearly shown, after some discussion, the returning officer refused to accept the petitioner's nomination on the ground that he was not properly qualified, and the respondents, Messrs. Abbensetts and Barclay, were declared duly elected to the two vacant posts. I can find no section of the ordinance enabling the returning officer to decide whether a candidate is duly qualified, or not; section 28 states "he shall receive the nomination of any duly qualified candidate" and by section 13 "no person shall be capable of being elected a "councillor who (1) is not entitled to vote at the election of a member of "the council or. . . (5) ceases to possess the necessary qualifications." The evidence that the petitioner was entitled to vote appears on the register of voters (see section 28 (2)), and the only person entitled to say that he had ceased to possess the necessary qualification as a voter is the Town Council in December of every year: section 11 (5). The petitioner's necessary qualifications for councillor are contained in section 12, and so long as his name was on the list of voters, no objection can be taken to his election except by way of an election petition under section 70. The duties of a returning officer are very fully set out in sections 25 to 58 but to act as the Town Council or the Supreme Court is not one of them. Learned counsel for the petitioner referred me to *Pritchard* v. *The Mayor, &c., of Bangor* (1888) 13 A.C 241, a case when a poll having been taken in a municipal election, it was decided that the returning officer had no jurisdiction to determine the question of disqualification; and to *Harford* v. *Linskey* (1899) 1 Q.B, 852, 855 where it was conceded by the respondent upon the authority of the above case that the Mayor had no

jurisdiction to entertain an objection to the petitioner's nomination for councillor.

The observations of the Lord Chief Justice in *Reg.* v. *Taylor* (1895) 59 J.P. 393 should be noted by returning officers that it is "not the duty of the "returning officer at elections to look for objections in fact to nomination "papers handed in. If this were done it would destroy the confidence of the "electors in their impartiality."

The election of the respondents must be declared void, and the seats on the council are consequently still vacant. I allow costs of one counsel as the petition was not opposed.

Election declare void.

Solicitor for the petitioner: *A. V. Crane.*

WIGHT *v.* "DAILY CHRONICLE," LTD., & WEBBER.

[No. 135 OF 1923.]

1924. FEBRUARY 21; MARCH 3, 4, 17, 18, 28, 31: APRIL 7; MAY 6, 7, 14, 15, 21, 22, 23; JUNE 11, 12, 13, 18. 19, 20, 23, 27; SEPTEMBER 17.

BEFORE DOUGLASS, J.

Libel—Newspaper libel—Enlargement of writ by claim—Perfectly valid—English Order 3, rule 9, inapplicable here—Objections not taken on pleadings may be taken at trial—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—Joint tort feasors—Defence of one open to other—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 feasors—Malice of one sufficient—Slander and Libel Ordinance (*No. 3*) *of 1846, section 5—Negligence— Meaning of—Apology—Sufficiency of—Question of fact—Need not be abject—Unreserved withdrawal of imputations and expression 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.

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

With respect to 3 of the alleged libels there was no allegation by the plaintiff that the alleged libellous words were used "of and concerning the plaintiff." The defendant pleaded fair comment. No objection was taken to the omission by the plaintiff until the evidence had been completed.

Held, that the objection must fail because (a) it is 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 defendant in effect admitted that they referred to the plaintiff.

Lowfield v. *Bancroft* (1732) 2 Strange 934.

R. v. *Marsden* (1815) 4 M. and S. 164 and

O'Brien v. *Clement* (1846) 16 M. and W. 167, referred to.

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.

Fair comment was pleaded by the first defendant to libels No. 3, and No. 4, and by the second defendant to libels No. 2, and No. 3.

Held, that the defendants had pleaded fair comment to libels Nos. 2, 3 and 4.

Clark v. *Newsam* (1847) 1 Exch. 131, 140 applied.

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.

Purcell v. *Sowler* (1877) L.R. 2 C.P.D. 215 applied.

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 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. 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 he wanted it mentioned. The sub-editor said he inserted the paragraph as it was "newsy."

Held, that the statement was in fact mendacious 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.

Edwards v. *Bell* (1824) 1 Bing 409 applied.

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 an d 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 on 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

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 publication 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 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.

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

Smith v. *Streatfield et al* (1913) 109 L.T. 153 applied.

Negligence in section 3 of 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 an 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 expressing of regret for having made any.

Risk Alla Bey v. *Johnston* (1868) 18 L.T. 620.

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..

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. In his evidence he stated that his purpose in bringing the action was to he revenged on the second named defendant and that he would have horse-whipped him instead, if he had not 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 but little effect.

Held, that under the circumstances the damages awarded would be small and that the defendants should pay half the taxed costs of the plaintiff.

Action by the plaintiff in respect of four alleged libels appearing in the "Daily Chronicle" newspaper. As to the first libel the defendants pleaded that the libel was published without malice and without negligence, that an ample apology had been published the day after the publication and each of the defendants paid the sum of $10 into court. The defences to the three other libels complained of were (1) justification. (2) privilege and (3) fair comment. The plaintiff' was an auctioneer and stockbroker and was either chairman or director of most of the local joint stock companies. The second named defendant was the editor of the "Daily Chronicle" and Financial Representative for the county of Berbice. The alleged libels were printed and pub-

lished during a political campaign when the plaintiff. Percy Claude Wight and Nelson Cannon were the two candidates for a seat in the Court of Policy which had been rendered vacant by reason of the resignation of one of the members for the city of Georgetown. Considerable evidence was led.

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

E. F. Fredericks, and *S. J. Van Sertima* (for *J. S. McArthur, K.C.),* for the "Daily Chronicle," Ltd.

A. R. F. Webber in person.

Cur. adv. vult.

DOUGLASS, J.: The plaintiff is claiming the sum of $5,000 "for damages for libel contained in the issue of the 'Daily Chronicle' newspaper of the 10th February, 1923, and in the previous and subsequent issues of the said newspaper." The endorsement, though vague, is sufficient since rule 9 of the English Order III. requiring particulars to identify the publication is not contained in our corresponding Order IV. The defendants are the "Daily Chronicle," Ltd, the registered proprietors and publishers of the "Daily Chronicle" newspaper, and A. R. F. Webber, the editor and manager of the said newspaper.

The statement of claim discloses that there were four articles appearing respectively in the issues of the "Daily Chronicle" of the 10th, 11th, 13th and 14th of February, 1923, which the plaintiff alleges are libellous. They were all published during the election campaign for the vacant seat for Georgetown in the Court of Policy. The plaintiff was the candidate who eventually failed to secure the seat and who had the support of the "Daily Argosy" newspaper, and Mr. Nelson Cannon was the successful candidate who had the support of the "Daily Chronicle" newspaper.

The last three of the alleged libels depend for their libellous character upon innuendoes and may well be dealt with separately, but the first is a statement contained in the report of a speech which on the face of it is libellous, and which has been proved and admitted not to be true. The passage complained of appeared in the issue of the "Daily Chronicle" of the 10th February as the report of a speech delivered by the second defendant at the first meeting in favour of Mr. Nelson Cannon held at Albouystown schoolroom on the 9th February. It reads as follows: "He (meaning the second named defendant) had seen a poster which said: 'Vote for Wight. Wight stood for the welfare of the people, industrial development, Government of the people, helping the masses, trade revival.' A year or two ago when Mr. Percy Wight (meaning the plaintiff) was in a position of a millionaire,

when there were no houses for the people to live in. he (meaning the plaintiff) was not seeking the welfare of the people, but it was now, at the eleventh hour, when his financial position was in a state of chaos, that he (meaning the plaintiff) was seeking the welfare of the people. They did not want such a man: they wanted to vote for the man who stood for industry." What the plaintiff understands by this passage is contained in paragraphs 5. 6 and 7 of the statement of claim:

"5. By the said words the defendants meant, and were understood to mean, that the plaintiff when a year or two ago in a sound financial position and able to assist the masses was of a selfish character, caring not for the people of the colony who were then in need and distress, but that the plaintiff was now in pecuniary difficulties and on the verge of bankruptcy; and that he was seeking election by the people with a view of using his position, if elected, to rehabilitate himself in the estimation of his creditors and friends.

"6. The defendants by the said words further meant and were understood to mean that the plaintiff was unable to pay his debts and liabilities in full and that accordingly he was unfit to fill the office to which he was seeking election or to occupy any position of trust.

"7. The defendants by the said words also meant and were understood to mean that the plaintiff was disqualified from being a candidate for the said election and that even if not so disqualified, he was an unfit person to hold such position."

The defences to the first libel were amended by order of the court dated the 4th July, 1923, and by the amended statement of defence of the first-named defendants it is stated in paragraph 2 thereof: “The statements “contained in paragraph 4 of the statement of claim, were printed and “published by the said defendants without actual malice and without gross “negligence. The said statements are incapable of any of the meanings “attached to them by the plaintiff in paragraphs 5, 6 and 7 of the statement “of claim.” By the amended defence of the second defendant it is *admitted* (paragraph 3) "that in the 'Daily Chronicle' aforesaid for February, the 10th, were published the words set out in paragraph 4 of the statement of claim, and *denied* "that he did so maliciously or with any of the " meanings alleged in paragraphs 5 to 7 of the statement of claim." and in paragraph 4 the second defendant says "that the said "words are incapable of the said alleged meanings."

In his Digest of the Law of libel and slander (4th edition, page 110) Mr. Blake Odgers says that where a defamatory meaning is apparent on the face of the words, no innuendo is necessary, though even here the pleader occasionally inserts one to heighten

the effect of the words ; but where the words *prima facie* are not actionable, an innuendo is essential to the action. If the words used are obviously or *prima facie* defamatory the judge will so direct the jury.

Now, although it is admitted that the paragraph as it stands in the. statement of claim was so printed, the second defendant, in his apology referred to later and in paragraph 5 of his defence, explains that it was due to an error of a reporter who attended the meeting of the 9th of February, that the offensive words, "but it is now at the eleventh hour when his financial position was in a state of chaos, that he (meaning the plaintiff) was seeking the welfare of the people." were printed, and it is necessary to consider the evidence in that respect before touching on the defences of absence of malice and of gross negligence. It may also be prefaced that the apology was written at the earliest opportunity and before the second defendant had had the chance of seeing the reporter. The most important witnesses must necessarily be those who attended the said meeting. It may well be that in the bustle and excitement of an election Mr. Webber, the second defendant, would not recollect every word he had spoken or its application, and on the other hand the reporters, Mr. T. A. Giles to "the Argosy" and Mr. D. V. Stoute to the "Chronicle" would be under constraint to support their respective accounts as reported to the sub-editors who passed their transcripts. These sub-editors were Mr. E. H. Waddell to the "Argosy" and Mr. H. Phillips to the "Chronicle." All the witnesses questioned in the matter agreed that the usual course was for the reporter on his return from the meeting to make a transcript from his note book which was handed to the sub-editor to revise, criticise, and generally condense, to suit the occasion and the available space in the paper.

To take the evidence of the reporters first, Giles says he wrote the word "chaos" in long hand and Mr. Webber's speech was not taken down verbatim; that he followed the context of the speaker and took down the important features. It appears that his notebook and his transcript are both lost and he could not say whether words before, or following, "chaos" were in shorthand but he accepted the suggestion of Mr. Webber, in cross-examination, that the words uttered and which he noted were "How could he develop the colony when his financial position was in chaos," and not the sentence as reported in "the Chronicle" of the 11th February. Mr. Waddell's evidence as to what words were used is of course only in the nature of hearsay evidence, but confirms Giles' statement that the word "chaos" was in his notes and he says that after discussing the matter together he forbade its appearance in the "Argosy" as being libellous. Now Stoute

gives in evidence that he never heard Mr. Webber say the word "chaos" but that he paraphrased what Mr. Webber said and wrote in his transcript the result of his impressions. His evidence is confirmed by the production of his note-book which contains nothing about "chaos." The extract reads: "Mr. Percy C. Wight is the wealthiest man in the country: he was in the millionaire class. If he stood for the welfare of the people when he owned thousands of dollars.....he was the man who could help us....." He put "chaos" in his transcript because he was told to give a condensed report. This evidence is confirmed by Mr. Phillips, again in the nature of hearsay evidence who read the transcript and passed it because, he says, he thought it was all right and was quite justifiable, and it was more or less in reply to a poster issued by Mr. Wight. Outside the reporters, the only evidence called to support the plaintiff's case in respect to the first libel was Mr. D. B. Robinson—a rather reluctant witness—who says he was so impressed by Webber's words indicating that now Mr. Wight's finances were in a state of chaos he was coming to help them (the people) that he turned to his brother and said: "I don't think Allie (meaning Mr. Webber) should have said that." This evidence is not supported by any other witness, and he never told Mr. Webber of his objection to that portion of his speech.

For the other side, Mr. G. H. A. Bunyan, a schoolmaster of 17 years' standing, states Mr. Webber spoke to the effect: "When things were good Mr. Wight did not come to help the people; now, things were bad and the colony was in a chaotic state he was coming forward to help us, can you believe him?" No unfavourable impression was made on his mind as regards Mr. Wight's financial position but he could not swear the words as published were not used, because he did not memorise them.

Mr. Chase, also a schoolmaster for 28 years, gave in evidence that he was present at the meeting, but got no impression of anybody's financial position, nor could he say what words were used. Although Mr. Stoute—an honest witness—is not aware he had heard Mr. Webber use the word "chaos," the evidence as a whole is convincing that the word was used, but whether in connection with Mr. Wight's or the colony's finances, it is impossible to say, but when the pronouncer of the word "chaos" gives a reasonable account of the use of the word, and immediately on seeing the printed version of its application, takes steps to correct it, and in so far as the whole paragraph is quite devoid of any sane interpretation whether "his" or "its" preceded the word "financial," I see no reason for refusing to accept Mr. Webber's explanation.

Take it, however, for the moment that it was intended to

emphasize the fact that Mr. Wight's affairs and not the colony's were in a state of chaos, what interpretation should then be given to the statement, that the plaintiff was on the verge of bankruptcy? "Chaos" is at the present day a perfectly intelligible English word (derived from the Greek), and conveys to the ordinary mind the meaning of hopeless confusion, or a sense of inability to straighten out matters. Webster gives the meaning as "an empty unmeasurable space—a confused or disordered collection of a state of things." If the word "chaos" applies to the plaintiff's affairs, it seems to me that the speaker would be meaning to contrast the management of his private affairs by the plaintiff with the likelihood of being able to manage the affairs of the electorate in a different manner. To imply that the plaintiff was incapable of keeping his affairs straight would doubtless be injurious to his reputation and might affect his candidature for the Court of Policy, but that is a long way from meaning that Mr. Wight was a bankrupt. I agree with Mr. Dalgliesh's statement in the witness-box: "It is quite possible that a man's affairs might be very confused, and yet he was far from being insolvent." I confess I cannot arrive at the meanings given by the innuendoes in paragraphs 5, 6 and 7 of the statement of claim by any stretch of imagination. I presume the final sentence: "They did not want such a man, they wanted to vote for a man who stood for industry" must have implied something to the listeners—if that *was* what was said—and appears as if intended to sum up what had preceded it when it might mean, that Mr. Wight would be too busy nowadays in putting his own affairs straight to devote himself to working for the welfare of the people.

The effect and sufficiency of the apology and how far the defence of absence of malice and of gross negligence is an excuse will be considered in treating the amount of damages to be recovered.

Before discussing libels 2, 3 and 4, it will be well to deal with an objection taken to all of them by learned counsel for the first-named defendants in addressing the court after the close of the defence. It was that in none of the three libels were the words complained of alleged to be "of and concerning" the plaintiff, but only "to his annoyance" and that consequently no offence was disclosed by paragraphs 9 to 18 of the statement of claim and therefore there was nothing to answer. In support of his argument he referred to *Lowfield* v. *Bancroft* (1732) 2 Strange, 934 where a judgment was arrested because libel was not laid that it was "of and concerning" the plaintiff; *R.* v. *Marsden* (1815) 4 M. & S. 164 a case of criminal libel where it was held that the words "of and concerning" were very material, and that the innuendo is merely explanatory and cannot alone con-

nect the person alleged to be libelled with the libellous matter; and to *O'Brien* v. *Clement* (1846) 16 M. & W. 159, 167 when Parke, B, in delivering judgment, states : "The words 'of and concerning' are only used to show that the matter previously explained to be libellous was published with respect to the party complaining of it as such. . The use of the prefatory averment is to afford foundation for subsequent innuendoes, by explaining the meaning of the words used, and it is here properly coupled with the innuendoes." Learned counsel also referred to Halsbury's Laws of England, vol. 18, page 641 : "It is necessary for the plaintiff in action for libel or slander to show that the statement of which he complains was made and published of and concerning himself."' It appears that in an indictment for criminal libel the prefatory averment is still required to support it but by section 61 of the Common Law Procedure Act preliminary averments were unnecessary in England, and Order 19, rule 4 (our Order 17 r. 5) requires that only material facts need be stated in any pleading, yet still it is very plainly laid down in Odgers on Libel (5th edition) there must be an averment in the statement of claim that the words were spoken of the plaintiff, and again, where the words are actionable only by reason of being spoken of the plaintiff in the way of his office, profession or trade, there it is absolutely necessary to aver that at the time when the words were spoken the plaintiff held such office, or carried on such profession or trade.

Learned counsel for the plaintiff contended that Mr. Van Sertima should not be permitted to raise this objection now. but that it should have been taken at an earlier stage to enable the court to amend if necessary, but I must remind learned counsel that under Order 23, rule 5, a defendant is entirely within his right in raising any point of law at the trial whether raised on the pleadings or not. I agree with learned counsel, however, that in libel one, the statement of claim includes everything essential to identify the plaintiff as the person of whom the offending statement was made, and in relation to his business as a merchant-broker and auctioneer, but I do not agree, if I understood him rightly, that the learned author of Bullen and Leake (edition 7) in any way differs from the law as set out in Odgers on Libel, Indeed, the former states in the notes on page 243. "The statement of claim must also aver that the words were published of the plaintiff," and it will be noted that the forms all contain these words. Our Order 17, rule 16, appears to be to the same effect when it states: "In an action for libel or slander.....it shall be sufficient to state generally that the same was falsely and maliciously published or spoken concerning the plaintiff, and if such allegation be denied the plaintiff must establish on the trial that it was so published or spoken."

Paragraphs 9, 11 and 16 respectively of the statement of claim contain no averment that the three alleged libels respectively referred to were "of or concerning" the plaintiff, only that they were with intent to annoy and injure the plaintiff, but with regard to libel 2 the second defendant says the words are fair comment; with regard to libel 3, both the first and second defendants plead fair comment, and with regard to libel 4 the first defendant only pleads fair comment. It does not make much difference whether a plea is raised by the one or the other of the defendants as their interests are similar, and their liability for any damages joint and several.

It is laid down in *Clark v. Newsam* (1847) 1 Exch. 131, 140: "When two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by their common act." It seems to me the objection raised by Mr. Van Sertima must fail for two reasons: (a) that it is too late inasmuch as evidence has 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) it has been held that a plea of fair comment is in the nature of a plea in "confession and avoidance" and by such a plea the defendant in effect admits that he referred to the plaintiff.

An action of libel is one of those actions in which in England either party has a right to trial by jury and in course of time there has sprung up from a series of decisions important distinctions between the provinces of judge and jury. Unfortunately, I think, the judge has to bear the burden of such cases in this colony, but it will be noticed in the course of my judgment that I have frequently referred to the respective duties of judge and jury, because it is of importance to ascertain whether a question should be left to a jury as a matter of fact for their opinion, or is to be withdrawn from a jury as a matter of law: in other words to distinguish my duties sitting as a judge from those as a jury.

The second alleged libel was printed and published by the defendants in the "Daily Chronicle" of the 11th February, 1923, and reads as follows: "Yesterday morning the 'Argosy' appeared with the following viciously mendacious statement which we learn on the most unimpeachable authority was inserted under the direction of, and on a peremptory order to the unfortunate editor from, Mr. Percy Claude Wight, the chairman of the "Argosy" Co. and one of the rival candidates. Of course it is well-known that Mr. Webber is numbered among Mr. Cannon's supporters, and his advocacy has caused a good deal of chagrin and annoyance in certain places."

What the plaintiff understands by this statement is given in

paragraph 10 of the statement of claim, viz. "That the plaintiff as chairman of the 'Argosy' Co., Ltd.. had wickedly and with intent to injure the second-named defendant, abused his position as such chairman and compelled a servant of the said company to write an untrue and unfounded report of the conduct and behaviour of the second-named defendant when attending one of the plaintiff's political meetings." To this the first defendants reply, that the statement was published without actual malice or gross negligence, with no intent to injure or annoy the plaintiff and without any of the meanings alleged in paragraph 10 and that the said words are no libel; and the second defendant pleaded to the same effect but he does not specifically except "negligence" and he adds that the said words are fair comment for the benefit of the public on a matter of public interest and that they are true in substance and in fact.

I have taken no notice of the defences of non-publication or of privilege, because the first was not supported and the second is not pleadable at law, the newspaper reports being neither judicial proceeding, nor of the proceedings of the colony's legislature. But apart from this no "privilege" has been attempted to be proved; at Common Law only the reports of judicial or parliamentary proceedings were privileged.

The case of *Purcell* v. *Sowler* (1877) 2 C.P.D. 215 first drew attention to the law of libel with reference to newspapers, that although the report was an accurate one of a discussion of interest to the public at a public meeting or at the meeting of a public body, yet the report was not a privileged one. This was remedied in England by the Newspaper Libel and Registration Act, 1881, and the Law of Libel Amendment Act 1888, but these Acts have no counterpart in this colony, and apart from Ordinance No. 3 of 1846 the Common Law still controls the question of what is or is not a privileged report. The articles and report printed in the "Daily Chronicle" of the 11th, 13th and 14th February respectively are in no respect privileged and that portion of the defence must fail.

Evidence shows that the "mendacious statement" referred to was published in the "Argosy" of 10th February (a paper which was supporting Mr. Wight's candidature) and it reads as follows:

"MR. WEBBER INTERRUPTS."

"An unfortunate feature of the meeting was the unbecoming behaviour of Mr. A. R. F. Webber, editor of the "Daily Chronicle," who appeared at the meeting while Mr. Brassington was speaking. In addition to making undue interruption, he waved a large handkerchief in the air, action which drew from Mr. P. N. Browne the remark that he was not quite himself. Having

been denied the opportunity of addressing the meeting as he requested, Mr. Webber left and order was restored."

Collating the evidence of various witnesses, what actually happened appears to be that on the 9th February Mr. Webber, having left the meeting in support of Mr. Cannon at Albouystown (already referred to) went to the rival meeting at the Moravian school, Queenstown, he states at the invitation of one of the leading gentlemen on that platform, and being well-known to the audience and greeted on his arrival, he waved his handkerchief in reply, a harmless enough incident at a political meeting, but it is hinted, and so stated by some of the witnesses including the plaintiff, that Mr. Webber was under the influence of drink, though the evidence is to the contrary. Mr. Webber was naturally indignant at the insertion of the veiled hints in the "Argosy" newspaper as damaging to his position as a member of the local legislature and editor and manager of the "Daily Chronicle," and he thereupon wrote a letter the following day to the editor of the "Daily Argosy" asking him to correct "the grossly and maliciously untrue statement" appearing in that day's issue. This letter was published in the issue of the "Daily Argosy" of the 11th February and in the "Daily Chronicle" of the same date the paragraph now complained of as libellous was published. It rests upon the defendant to prove his plea of justification. If he does so it is a complete defence, but the words must be true in the sense the jury put upon them and not necessarily in the meaning the defendant gives to the words. The reference to Mr. Webber in the "Argosy" of the 9th February would lead anyone reading it to infer what was not true, and so far it was a mendacious statement but was the defendant justified in the assertion that it was "inserted under the direction of and on a peremptory order to the unfortunate editor?" It may be noted that the then editor, Mr. O'Hara, is unprocurable as a witness, he having left the colony about a year ago.

The plaintiff himself affirms again and again that he gave no message to the editor or any reporter about any conduct at the meeting, though he called Mr. Dias's attention to what Mr. Webber was doing, and that he never heard it said that the insertion of the offending paragraph was an order from him. Mr. Waddell, the sub-editor, did not consider the paragraph offensive, but "a newsy feature of the evening" and he considered that it was his duty to publish it; he apparently was not questioned as to how he got his information but the senior reporter at the "Argosy," Mr. Beckles, gives in evidence—though naturally somewhat reluctantly—that the plaintiff Mr. Wight had told him he must make reference to Mr. Webber's conduct at the meeting, but the language was his (the witness's); that the plaintiff's words were: "When

you go to the office, either tell the editor, or say I want it mentioned," he knew Mr. Wight was his chairman. And again on cross-examination the witness repeats that Mr. Wight told him to say at the office that he had told him to mention Mr. Webber's behaviour, "he expressed the hope that I had noticed Mr. Webber's conduct." It would be a question for a jury to consider whether the substance of the statement (referred to in the second libel) had been proved true. What is insinuated, and is the gist of the paragraph is: had it not been for Mr. P. C. Wight the statement of Mr. Webber's alleged unbecoming conduct would not have been printed in the "Argosy." and I must say that I think the evidence is convincing on that point, the rest of the paragraph is mere journalistic padding. It has been said that a man who has commenced a newspaper warfare cannot complain if he gets the worst of it. The instructions which the senior reporter received from the gentleman who was not only the chairman of the "Argosy" but also the candidate his newspaper supported was for all practical purposes an "order" which few editors would venture to ignore and of which in fact the sub-editor approved; the retort was not, in any opinion, an unfair answer to the plaintiff's attack. In *Edwards* v. *Bell* (1824) 1 Bingham 403, 409, Mr. Justice Burrough in the course of his judgment says: "As much must be justified as meets the sting of the charge, and if anything be contained in a charge which does not add to the sting of it, that need not be justified." I am of opinion, then, that the defendants' plea of justification has been proved, and the said paragraph is therefore no libel.

There are many cases of libel where a statement of fact may also be comment from another point of view, but here the said words are statements of fact only, and the question of fair comment does not therefore arise. In the circumstances it is unnecessary to consider the innuendo ascribed by the plaintiff to the said words; the "intent" was obviously to discredit the paragraph appearing in the "Argosy," and *not* to injure the plaintiff.

The third alleged libel is contained in a leading article entitled "Vindictiveness on a High Horse," published in the issue of the "Chronicle" of the 13th of February, 1923, and reads : “When the former proprietors of “this paper decided to form a limited liability company it would seem they “were approached by Mr. Wight and certain arrangements were made by “which Mr. Wight in return for certain pecuniary rewards and a piece of “land undertook to underwrite $5,000 worth of "Chronicle" shares, and he “paid over his cheque for that sum. At one moment Mr. Wight seemed to “have repented of his bargain, and holding the usual big stick over the then “directors he demanded a promissory note for the amount of $5,000 with 6 “per cent, per

“annum the latter being a new condition imposed upon the then helpless “directors. Shortly after that Mr. Wight again repented of his bargain and “calling at this office demanded the issue to him, presumably under the old “understanding of all the remaining unsubscribed issue of "Chronicle" “shares. He received as per his demand $2,700.

“All went well until the recent municipal elections when a writer, “perfectly within the province of fair comment, declared that the then “imbroglio was but a re-echo of the Turf Club litigation. Forthwith the fat “was in the fire. Mr. Wight called at this office and declined to see the “managing-editor but demanded of the juniors at the counter his money, “because, as he alleges, the letter was home-made. After conducting “himself in an unseemly manner when we presume he was 'quite himself' “in passion, he left threatening to file a writ against us immediately. Not “satisfied with that, he hied him to our principal shareholder and demanded “his money in no uncertain terms as to what would be the result if he was “not paid forthwith because we dared to be independent and refused to gag “correspondents in the legitimate expression of their opinion. Of course we “decided to pay, and after eliminating some $487.90 from his account “which he declared was ready typed for writ filing, which sum represented “the excess interest charged, we handed him our cheque for $1,481.31 and “closed the transaction. Mr. Wight has since stated that it is a monstrous lie “that he ever filed a writ on us. Of course he did not. We forestalled him “with our cheque, and closed Mr. Jardine's 8-year old transaction.”

Paragraphs 12 to 15, inclusive of the statement of claim, contain the construction which the plaintiff puts upon the words contained in this article, namely:—

12. “By the said words the defendants meant and were understood to “mean that the plaintiff extorted from the 'Daily Chronicle,' Limited, a “promissory note for $5,000 with interest at 6 per cent by means of “coercion and duress and that the plaintiff acted unfairly, oppressively, “dishonourably and dishonestly and took advantage of then directors of the “'Daily Chronicle,' Limited, who were helpless in the matter and obliged to “submit to the plaintiff's unreasonable terms.

13. “The defendants by the said words further meant and were understood to mean that owing to the unfinancial state of the 'Daily Chronicle,' Limited, and its inability to resist an unjust demand, the plaintiff endeavoured to extort payment from the said 'Daily Chronicle,' Limited, of a sum of $487.90 for interest which he was neither legally nor morally entitled to and thereby attempted to fleece the said 'Daily Chronicle,' Limited, of the said sum of $487.90.

14. “The defendants by the said words further meant and were “understood to mean that the plaintiff, not content with having made the “helpless directors of the 'Daily Chronicle.' Limited, give him certain “pecuniary rewards and a piece of land as the consideration for his having “underwritten $5.000 worth of 'Chronicle' shares, he the plaintiff knavely “(*sic*) endeavoured and attempted to obtain a further sum of money from “the said 'Daily Chronicle,' Limited, to which he had no claim whatever.

15. “The defendants further meant and were understood to mean that “the plaintiffs sole motive in seeking election to the Court of Policy was “improper and sordid, and intended only to spite the said Nelson Cannon, “and if elected to be personally opposed to the second-named defendant “who is a Financial Representative of the Combined Court.”

In their respective defences to these allegations the first-named defendants (paragraph 5 of their defence) denied that the printing and publication were either false or malicious “or with intent further to annoy and injure the plaintiff or with any of the meanings alleged in paragraphs 12, 13, 14 and 15 of the statement of claim,” and that the words were no libel. In paragraph 9 they say: “In so far as the said paragraphs contain allegations of fact they are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comment upon the said facts published in good faith and without actual malice.”

The second defendant in paragraph 12 of his defence makes a similar denial to the first defendants and in paragraph 13 sets out the previous portions of the leading article of the said 13th February, 1923, viz.: “Being “under something of a pledge to say nothing derogatory in a personal “sense, of our opponents in the present political fight save such as is “becoming and allowable in a political struggle to be conducted in a clean “way we are somewhat embarrassed by the openly reavowed statement of “Mr. Wight that he was a very vindictive man and his thinly veiled “innuendo (our dictionary spells it with two 'n's) thrown out against the “financial standing of this journal at his Friday night's meeting. Dealing “with the last first, we might say that knowing the fallibility of all reporters ‘we invited one of our principal directors to enquire of Mr. Wight whether “he was correctly reported and we gather that he is desirous of consulting “his solicitors. We have neither the desire nor intention to be involved in a “law-suit with Mr. Wight, but we do desire to say that we owe him no “money, and since he has been pleased to re-open an incident which we “had hoped was closed, perhaps it will be best if we raised the curtain “completely.” In paragraph 14 the second defendant denies the innuendoes and pleads

no libel. In paragraph 15 he pleads fair comment made for the benefit of the public on a matter of public interest, viz., the said electoral campaign and the promotion and registration of the "Daily Chronicle," Ltd., in good faith and without malice; and in paragraph 16 he pleads that the words are true in substance and in fact.

The liability of the defendants in this and the fourth libel depends to a considerable extent on the meaning ascribed to the offending article and statement, and if the words in their natural meaning are not actionable, the plaintiff is bound by his innuendo. That the article refers to the plaintiff himself there is no denial. The heading "Vindictiveness on a High Horse," is due to some remark alleged to have been made by Mr. Wight that he was the most vindictive man in this country. The whole title is, I presume, intended to convey to its readers that Mr. Wight was seeking the support of the public's shoulders to carry him through the election, not for the purpose of benefiting his electors, but to satisfy his vindictive feelings towards the "Chronicle" and M. Cannon.

A great mass of evidence was offered relative to this third alleged libel. To ascertain the history and meaning of the various incidents related or referred to, it will be convenient to consider it in four sections, viz., as to the facts relating (1) to the founding of the present "Chronicle" Co., Ltd., and Mr. Wight's interest therein; (2) to the $5,000 pro-note; (3) to what occurred at the "Chronicle" office on the 30th December, 1922, and the plaintiff's visit to the "principal shareholders"; (4) to the settlement of the plaintiff's account with the company.

(1) The "Chronicle" Co., Ltd., was floated in 1915, but it was not until May, 1916, that Mr. Wight was called in to assist the directorate. The "piece of land" referred to turns out to be a small portion of "the remainder of the concession or lots Nos. 22 and 23, Georgetown; including the avenue or passage leading from High Street between the eastern portions of the said lots." This property was conveyed to the plaintiff in July, 1910, and on the same date he transported the said "avenue or passage" to the estate of C. K. Jardine and in January, 1911, transported the remainder of the lots to G. Bettencourt. In March, 1913, G. Bettencourt transported his interest to The Investment and Loan Association, of which the plaintiff was a director; it will be noticed that all these transactions took place, before the "Chronicle" was founded. The next dealing with the property was in May, 1915, when C. K. Jardine transported his interest to the "Daily Chronicle," Ltd. It is not necessary to go into further details as the land had nothing whatever to do with any negotiations between Mr. Wight and the "Chronicle" Co. though at the

time he wrote the article Mr. Webber states that he was misled by Mr. Marchant, the then editor of the "Chronicle" (December, 1915), when he told him that the passage way was Mr. Wight's and he had stopped the "Chronicle" from using it. As a matter of fact owing to a mistake that portion was conveyed by the Investment and Loan Association (who had no title to it) to Booker Bros., in January, 1918, and to put the matter straight they re-conveyed to the "Chronicle" a portion of it in May, 1921.

The allusion to "certain pecuniary rewards" Mr. Webber explains as having reference to special concessions Mr. Wight obtained from the "Chronicle" Company, in (a) two months free advertising (July and August, 1915), and (b) special rates for advertisements and the best position in the paper. The plaintiff on the other hand alleges that the old arrangement he had with Mr. Jardine (the former proprietor) was carried on, and he got no special benefits, but further evidence, especially that of Mr. Delph, is convincing that Mr. Wight paid *per* advertisement with Mr. Jardine, but after the formation of the company, a fixed charge, and the whole evidence shows that the plaintiff had an exceptionally favourable bargain, and whilst being charged a flat rate he himself was entitled to charge his clients *per* advertisement. With reference to the expression that " Mr. Wight. . . . . .undertook to underwrite $5,000 worth," "underwriting." strictly implies a transaction in which a person joins others in entering into a marine policy of assurance as an insurer, but in its popular sense it is applied to an agreement to purchase at a fixed price the portion of any issued capital stock or the like, if not previously taken up by the public. Webster in his dictionary says it is also used loosely to mean "to guarantee or subscribe to any large business enterprise." Mr. H. Chatterton, a director of the 'Chronicle,' Ltd., says in his evidence "Mr. Wight underwrote the company for that amount ($5,000) and left it there practically to his credit on the books, but he did not decide in what form he was to be paid, the balance due to him." As will be seen, the "Chronicle" Co. intended to treat the advance as share capital and the plaintiff apparently took no objection to their doing so until 1917 when he demanded and received the first promissory note, but even after that he asked for and accepted shares in the company in part payment. I cannot therefore find the word "underwrite" is either objectionable or misleading.

I do not propose to go into this evidence any more in detail as while the statement as to pecuniary rewards has a substratum of truth, there is no truth that the piece of land was part of the consideration for Mr. Wight's service on the formation

of the company, and the whole of the first six lines of the paragraph are misleading.

(2) We come now to the $5,000 worth of "Chronicle" shares. What happened may be gathered from the evidence of Mr. Wight, and Mr. O'Dowd and others, and from the minute books of the directors' meetings of the "Daily Chronicle," Ltd. The plaintiff states that the company was floated in May, 1915; with a nominal capital eventually raised to $30,000 and that he took $1,000 in shares. It appears that at a meeting of the directors of the "Chronicle," Ltd., on the 25th July, 1915, only $8,280 capital had been subscribed and $15,000 raised on mortgage to the B.G. Mutual Fire Insurance Company and that Mr. Wight had advanced $5,700. At the directors' meeting held on the 2nd September, 1915, it was moved and carried that the item "Money advanced by Mr. Wight" be deleted and the words "Walter Bagot on account of share capital" be inserted. I find that the amount of $5,000 was entered in the "Daily Chronicle" ledger in May, 1915, under account of "W. Bagot and Co. By amount received on loan." It may be noted that "Walter Bagot and Co." was and is the plaintiff who also trades under that business name.

On the 9th September, 1915, the statutory meeting of shareholders of the "Daily Chronicle," Ltd., was held and the plaintiff attended. The chairman in his address said *inter alia:* "Mr. Wight supplied on behalf of "prospective shareholders the difference between the subscribed capital "and the purchase money ($27,000) less $15,000 mortgage. Mr. Wight has "also financed the formation of the company." The next time the $5,000 appears is at the directors' meeting held on the 11th May, 1916, when the following appears: "Mr. Percy C.Wight, who on formation of the company "advanced $5,000 in lieu of share capital, attended the meeting for the "purpose of discussing the settlement of this matter. Mr. Wight suggested "that rather than raise the share capital unduly it would be better to treat "this amount as a loan bearing interest, a course which he would willingly "adopt." This minute, Mr. Wight admits at one time, was in conformity with what he said, but later on he states is not correct. At a meeting held on the 11th January, 1917, Mr. Marchant laid over a letter (Ex W 7) he had received from Mr. P. C. Wight asking the company to give him a promissory note at three months for the amount due to him. This was agreed to, and that the suggestion was carried out is shown by the entry in the "Bills Payable and Receivable Book" which was put in under date 5th February, 1917. It is also noted at the next meeting of the directors on the 22nd February, 1915, that a letter from Walter

Bagot and Co. (Ex K. 11) was read, that $700 was still owing them over and above the promissory note of $5,000 and the manager reported that he had written Mr. Wight suggesting that the amount be met by *contra* payments of Mr. Wight's quarterly indebtedness to the company for advertising. Again, at a directors' meeting held on the 22nd May, 1917, the manager reported that "the promissory note given to Walter Bagot & Co. in "respect of the $5,000 advance on capital account in the formation of the company had fallen due, and he had arranged to have it renewed pending the issue of shares to the amount." It is a curious fact that the making of this first note for $5,000 had escaped the memory of all parties until the hearing of the case. Apparently the first note was not renewed, but during the next two years the plaintiff was approached several times to assist the company when in difficulties, and on the 1st August, 1919, he obtained from them a promissory note for his $5,000 payable to the order of Walter Bagot & Co. with 6 per cent, interest from date. On the 9th October the company wrote to the plaintiff asking him for advice, and on the 18th October. 1919, he attended a directors' meeting at their request and guaranteed repayment on their behalf (by instalments of $1,000 per annum) of a loan from Dr. Gomes of $15,000. In February, 1920,the plaintiff obtained $2,700 of shares in the "Daily Chronicle," Limited, which amount was placed against the company's indebtedness to him, but he insists that he did not ask for the shares, although Mr. Delph is as certain that he did. He, however, admits that he wanted to prevent the Bauxite Co. from getting the shares. With respect, then, to the giving of the $5,000 promissory note and obtaining the $2,700 of shares, the actual incidents are correct, but the means described of holding "the usual big stick" over, (by which I understand an unfair use of his financial hold over the company) and imposing conditions on, helpless directors are journalistic, not to say gross, exaggerations.

(3) We now come to the visit to the "Chronicle" office on the 30th December, 1922. On that date a letter appeared in the "Chronicle" under the heading "Ratepayers' Strictures" and signed "A Ratepayer" which concludes with the following paragraph : "There is no concealing of the fact that it is no concern for the city that is exercising the council but merely petty party feeling, an aftermath of the Turf Club litigation." The plaintiff's attention was called to this letter as he was on his way to his office. For some unascertained reason he appears to have been most indignant and called in at the "Chronicle" office and asked for Mr. Delph. The plaintiff's account is that having read the copy of the letter in the paper he asked for Mr. Webber, but was told he was not

in and he then told Mr. Delph he believed the letter was home-made," and he denied he demanded his money from the "Chronicle," that he threatened to file a writ or that he went to see Mr. O'Dowd in the matter. That is the gentleman referred to as "the principal shareholder," though he admits he went some days later with Mr. Woolford, after a stormy interview with Mr. Webber at the "Chronicle" office. Mr. Delph's evidence does not confirm Mr. Wight's account of the interview. He states that when Mr. Wight came to the office on the 30th December appearing very much annoyed, he was asked to see Mr. Webber, but refused and said he would sue the "Chronicle" for his money. When he demanded his money he first spoke to the juniors at the counter.

Mr. O'Dowd, managing director of Wm. Fogarty, Ltd.. and a director of the "Chronicle" Co., Ltd., states that Mr. Wight came to him on the 30th December, 1922, very much annoyed over a letter in the paper that morning and intimating that he was going to sue the "Chronicle" for his money to which the witness replied: "If you are going to have your money you must have it and that is the end of it." He further states that he at once gave instructions which resulted in a cheque for $968.65 being offered to close Walter Bagot & Co.'s account with the "Chronicle" but it was refused. Mr. Delph stated that he took this cheque to Walter Bagot's office. Mr. O'Dowd remembered the other interview referred to by Mr. Wight, but it was some time after the 30th December and in referring to the first interview he says. "It was clear to me that Mr. Wight was against Mr. Webber . . . . . He was very much down on him." Mr. Marques, the secretary, and a director, of Fogarty, Ltd., confirmed Mr. O'Dowd's statement that the plaintiff came to see him on the 30th December and added that it was he who instructed Mr. Delph to prepare the cheque that day. Mr. Wight was evidently confused over the two incidents at the "Chronicle" office and I therefore take the evidence of Messrs. Delph and O'Dowd as a correct account of what occurred on the 30th December.

(4) To continue the sequence of events which resulted in the claim of the plaintiff being settled in full. On the plaintiff refusing the cheque for $968.65 he sent in an account dated the 30th December, 1922, (he states at Mr. O'Dowd's request) showing a balance of $2,618.49 due to him. In this account it will be noted that interest at 6% is charged on the $5,000 from 5.12.17— that is from the date ten months after the note was given. To this Mr. Delph took objection and eventually allowed interest from 1.8.19, the date of the second promissory note, and he then added two or three items as a *contra* against Walter Bagot & Co.'s claim and finally balanced the "Chronicle" account as owing

the plaintiff $1,483.31 and accordingly sent another cheque for $514.66 which with the previous cheque for $968.65 made up this balance. Mr. Wight passed this account and accepted it as correct. Now in this last paragraph of the article what the plaintiff specially objects to is the sentence: "After eliminating some $487.90 from his account which he declared was typed for filing, which sum represented excess interest charged, we handed him our cheque," and this may be considered with the remarks in the first paragraph with reference to 6 per cent interest. "the latter being a new condition imposed," At the directors' meeting held on the 11th May, 1916, it is true that Mr. Wight suggested that the $5,000 should be treated as a loan bearing interest implying thereby that up to that date it had not been so treated but nothing appears to have been done to carry out his suggestion and neither in his letter of the 4th January, 1917, asking for the first promissory note, nor in that of the 7th February, 1917, acknowledging it, nor in his reminder to the company that they still owed him $700 over and above the $5,000, is there any suggestion of interest; nor when the manager of the "Chronicle" inquired from Mr. Wight suggesting that the account be met by *contra* payment of Mr. Wight's quarterly indebtedness to the company for advertising was there any suggestion on either side that interest on the $5,000 had been credited, or should in the future be credited, against that indebtedness. In the course of the hearing it was suggested that the Bills of Exchange Ordinance, No. 13 of 1891, provides for interest on bills whether reserved or not, but I may point out that the interest reserved on a bill referred to in section 9 of the Ordinance must be distinguished from interest referred to in section 37 which deals only with interest as a measure of damages, and has no practical application to the case of the first note for $5,000, which was surrendered, or in any event merged on the issue of the second note for $5,000, Had there been interest accrued due at that date one would expect to see it added to the capital value of the second note. Mr. Wight does indeed state that he supposed the amount due for interest was credited against his monthly account for advertising but he has given no grounds for this supposition and if indeed it were so, why did he claim it in his account of the 30th December, 1922?

On the whole I am of opinion that the 6 per cent, was rightly described as a "new condition," but the words "imposed upon the helpless directors" give a totally wrong impression of the matter. I also see no reason why the difference between the interest as claimed on Mr. Wight's account rendered to the "Chronicle" Co. and that finally settled as correct might not be referred to as "excess interest." The expression "excess" is not necessarily, nor in

this context, a term of reproach. Webster in his dictionary says it means "more than what is right, or proper, or necessary." If the word used had been "excessive," I think a popular construction might have deemed it immoderate, but the word "excess" states a bare fact, that the interest as calculated was too much.

In every case the meanings attached by the plaintiff to the alleged libels are denied by the defendants, and the words are stated as incapable of bearing a defamatory meaning. The proper office of innuendo as stated in the foot-note to *Brown* v. *Gooding* (1 C.P.R., 728) 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.

"To prove innuendoes the relationship of the parties, the time and manner of the publication of the libel and any facts mutually known to the writer and recipient which would reasonably lead the latter to understand the words in such sense may be proved as surrounding circumstances." (Phipson's Law of Evidence, 6th Edition).

It must not be forgotten that all the alleged libels were published during the preparation for the election which took place on the 16th February, 1923, and Mr. Webber in the course of his evidence frankly stated that his remarks on the plaintiff were not meant "to ridicule him, but to get some votes away from him; he was out to lower him politically, he intended to undermine Mr. Wight's campaign with every legitimate means at his disposal." He also drew attention to the fact that once the election was over he was careful to abstain from re-opening any phase of the struggle and wished everything to be forgotten (see Leader in "Chronicle" of 18th February; Ex. B. 11) and it is only fair to him to refer to his opening address in the campaign made on the 6th February—the same date the nominations were received—and published in the "Daily Chronicle" of the 7th February in support of Mr. Cannon's candidature. He said of the plaintiff, the rival candidate, "He wanted to say something in his favour. He was the colony's leading financier, of whom the colony may well be proud. Mr. Wight had been very generous to him as he had been to many men; indeed his purse-strings have never been closed to him." I

may point out that it is this speech that Mr. Webber referred to, when discussing the first libel, to prove how unlikely it would have been for him to say two days afterwards that Mr. Wight was insolvent. Unfortunately it was the publication of his speech of the 9th February that opened to suspicion the genuineness and good faith of the further publications complained of. With regard to the first half of the article entitled "Vindictiveness on a high horse," I should have left it to the jury (had there been one) to say whether or no the words were in fact understood in their defamatory meaning. and sitting as a jury I now find that they would mean that the plaintiff acted unfairly, oppressively and dishonourably in demanding a promissory note for the $5,000, but not that the consideration for the plaintiff's "underwriting" $5,000 imputed any blame or dishonesty to him. It will be gathered from what I have said in discussing the evidence on the facts that I have considered the latter half of the article in question contained nothing that bears the meaning or can be construed or understood as set out in the plaintiff's innuendo. The only portion of it that might have been left to a jury as capable of a defamatory construction would, I think, have been the sentence containing the words "excess interest" but sitting as a jury I find that it did not in fact convey that meaning. I may here point out that although the defendants have not justified the third libel in its entirety, under Order XVII, rule 17, a defendant "whether he proves the justification or not.....may give in evidence mitigating circumstances; and any such will be taken into account in considering the damages to be awarded." In a recent libel case *Stopes* v. *Sutherland and anor.* (1923) 39 T.L.R. 677, 696, C.A., Lord Justice Bankes in delivering his considered judgment said: "In ordinary circumstances in an action of libel where justification and fair comment are pleaded, and where it is in issue whether the words complained of are defamatory, the questions for the jury are: (1) Are the words defamatory? If yea, then (2): Are they statements of fact or expression of opinion, or partly one and partly the other? (3) In so far as you find that they are statements of fact, are they true? (4) In so far as you find that they are expressions of opinion, do they exceed the limits of fair criticism on matters of public interest?"

On the second libel I have found that the words used are substantially true and hold that they would not in fact bear the meaning alleged by the plaintiff. On the libel now being considered I find that a portion of it was defamatory and that it consisted of partly statements of fact and partly expressions of opinion and that all the facts were not true. In *Hunt* v "*Star*" *Newspaper Co., Ltd.,* (1908) 98 L.T. 629, 632, C.A. Buckley, L.J.,

says: " Where justification and fair comment are pleaded as defences, the latter is a weapon which comes into action if and when the former has failed. The defence of fair comment assumes that the matter to which it relates would be defamatory if it were not protected by the defence of fair comment." Now "fair comment" itself can only be pleaded when it is made on matters of "public interest," and general concern, and it must be a comment, and not an assertion of an alleged matter of fact. Odgers in his work on "Libel and Slander" (5th Edition, p. 206) sets out under what heads matters of public interest may be grouped, viz., (1) the affairs of State: (2) administration of Justice; (3) public institutions and local authorities; (4) ecclesiastical matters; (5) books, pictures and architecture; (6) theatres, etc., and (7) other appeals to the public. The matter contained in the third libel under the heading "Vindictiveness on a High Horse" will not fit-in under any of these headings. It was an account of an entirely private business matter between Mr. Wight and the "Chronicle" Co., Ltd., written and published; it is alleged, because of veiled innuendoes thrown out by Mr. Wight against the financial standing of the "Chronicle" at his Friday night's meeting. It has nothing whatever to do with the public career of Mr. Wight, and cannot by any interpretation be said to be a comment for the benefit of the public on a matter of public interest. The defendants must know perfectly well that the phrase "matters of public interest" does not mean only or chiefly matters in which the public take an interest, there would be no limits to that, perhaps the term "public concern would more nearly describe the meaning. It is for the court to decide whether the matter commented on is a matter of public interest, before the matter of 'comment' is left to the jury, and I hold that the subject matter of the third libel is not a matter of public interest. There is therefore no purpose served in discussing whether any or what part of the article is fair comment as the plea fails at its inception.

The fourth alleged libel, like the first, is the report of the speech delivered on the 13th February in support of Mr. Cannon's candidature, and published in the "Daily Chronicle" of the 14th February. It reads "In the case of plantation Schoonord one million dollars of the colony's money had been sent away from these shores and lost to this colony. It was a fact that the same six gentlemen controlled several sugar estates in the colony. (A voice: And paying the villagers nothing for their canes). They wanted Nelson Cannon as a check on the excursions and escapades of these gangsters. Mr. Wight had been before the public on one occasion in 1919-1920 when he was a town councillor. He was always too busy however to

do philanthropic work. With reference to Mr. Wight's career on the Town Council a diligent search of the records showed that he had done two things during his term of office. On the 4th April, 1919, he moved a motion that the Mayor's vote should be increased, and on the 12th July, 1920, he was interested in the $20,000 purchase of 31/2 acres of land at Plantation Thomas by the Council. Their answer to the clique should be 'We will not be dominated.' They should bear in mind the sum total of public duty. The true representative of the people is the man who did not look to make money for himself but to make money for others. They had one duty to perform and that was to return Mr. Cannon at the head of the poll."

To this in paragraph 17 and 18 of the statement of claim the plaintiff attaches the following meaning, "that the plaintiff belonged to a gang of undesirable people who exploited the public for their own benefit and had succeeded in so doing in the case of Plantation Schoonord. That the plaintiff and the same set of undesirable people controlled the labour and cane-farming market of the colony and thereby cheated the cane-farmers of the true value of their canes, and it therefore became necessary for the protection of the said labourers and cane-farmers that the said Nelson Cannon should be returned to the Court of Policy to check and put a period to the dishonest and unjust dealings of the plaintiff and his undesirable companions." And paragraph 18 : "That the plaintiff sought election as a town councillor because of personal pecuniary benefits and that whilst a member of the Georgetown Town Council he was guilty of corrupt practices and has acted corruptly and dishonestly in the discharge of his duties as a town councillor and has been guilty of graft as a councillor."

The first-named defendants in paragraph 7 of their defence denied that they printed and published the offending words either falsely or maliciously, or with intent to injure and annoy the plaintiff or with any of the meanings alleged in paragraph 16, 17 and 18 of the statement of claim and by paragraph 6 they say that the words are incapable of the said alleged meaning and that without the said alleged construction and meaning are no libel. In so far as the said words consist of allegations of fact they are true in substance and in fact; in so far as they consist of expressions of opinion they are fair comment upon the said facts made . . . . . in good faith and without actual malice ; and that the said facts are matters of public interest. The second named defendant in paragraphs 17 and 18 of his defence pleads to the same effect and in paragraph 19 says the reported speech delivered by one L. A. Robinson was on a matter of public interest and for the benefit of the public, printed and published "without comment, in good faith and without any malice towards the plaintiff and

therefore justifiable and privileged," in paragraph 20 "that the said words without the said alleged meanings and constructions and according to their natural and ordinary signification are true in substance and fact." The portion of the said speech that the plaintiff takes exception to is divisible into two parts, the first concerning the concern of sugar estates in the colony, and the second criticising Mr. Wight's services as a town councillor. It has long been settled that a defendant in a libel suit is entitled to have read the whole article published and not only a portion of it. *Hedley* v. *Barlow and anr.* (1860) 4 F. & F. 224, 227, 228 and it seems too that a jury may read other parts of the newspaper referring to the same topic as the libel though locally disjoined from it—*R.* v. *Lambert & anr.* (1810) 2 Campbell. 398, 399. Turning then to an earlier portion of Mr. Robinson's speech as published we find him saying : "He could only say that when Mr. Wight came forward backed by that same gang that even if they wanted new blood in the court they did not want the kind of new blood offered to them" and later on "Between 1919 and 1920 the gang sold properties at enhanced values" and then he proceeded to contrast the qualifications of Nelson Cannon always approachable and representing the people and of Percy Wight looking after his own interests first, and in the offending paragraph he continues that Cannon would offer a useful check to the sugar gang but Mr. Wight would be too busy with his own affairs to attend to other matters. "He was always too busy to do philanthropic work" which from the context I construe as meaning work of no profit to himself. I confess I can see nothing defamatory in such a statement though it may be derogatory, nor do I gather that Mr. Wight is being referred to as being one of the "gangsters" for the assertion is that he was likely to be influenced by them and not to restrain their speculations. At the same time it may be noted that the plaintiff apparently took it for granted that he belonged to "sugar gang," for in his speech delivered at the Town Hall on the 15th of February and published in the "Daily Argosy" of the next day (Ex. A 5) he states: "He could assure them that he was proud of that 'sugar gang.' They were men of intelligence," and he evidently did not realise at that date that any insult was intended. If the statement that one million dollars of the colony's money was sent away is a libellous statement, there is no evidence for construing it a libel on the plaintiff; but I see no occasion to deal with the "Schoonord" speculation any further, the full details of it had evidently been public property a long time before the election commenced.

Then as to the last half of the paragraph the speaker goes on to show why he thinks the plaintiff would be a useless member because he says when he was a member of the Town Council in

the years 1919-1920 the plaintiff did nothing for the benefit of the public, rather the contrary, and he could only find two occasions on which he had taken an active part, one was in 1919 when he moved that the Mayor's vote be increased—on the evidence a proper and sensible motion—and the other in 1920 when he interested himself in a $20,000 purchase scheme of land at Pln. Thomas. It is perfectly legitimate to make remarks on the public career of any candidate though remarks on his private life might not be justified: *Duncombe* v. *Daniell* (1837) 8 C. and P. 222, 229. A great deal was made out of the fact that the Thomas land was purchased for $10,000 and not $20,000. On the evidence before me it appears that $15,000 was the definite sum asked for the land in negotiations, though the vendor, Mr. Caetano, "wanted considerably more at first." Mr. J. B. Woolford, the Town Clerk, gives in evidence under cross-examination that to refer to the whole scheme as a $20,000 scheme would be a reasonable description, and Mr. E. G. Woolford, who was Mayor in 1919-1920, says he knew at one time that Mr. Caetano was asking for it, $20,000. It is true that the word "interested" is used though I do not quite know what other word could have been used. The point intended to be made is that the Mayor's vote and purchase of the Thomas land were the only two things that Mr. Wight took any interest in on the Town Council and indeed the evidence shows that Mr. Wight was exceptionally interested in the purchase scheme and it was evidently due to him that the price was reduced; he used his good services in an endeavour to benefit his client, Mr. Caetano, and at the same time (eventually) for the good of the taxpayers' pockets. I fear that the plaintiff's mind must have been very prejudiced against the defendants to have evolved the meaning he gives to this speech. The criticism in comparing the two candidates, that the plaintiff would not take sufficient interest to tackle what his electors chose to think as their grievances (for that is the gist of the offending extract from his speech), is a perfectly legitimate opinion to express whether right or wrong, whilst the meaning attached by the plaintiff is a strained and most improbable one. It is the meaning attached to the speech by those to whom it was addressed and for whose supposed benefit or instruction it was published that is the true test. In delivering judgment in the case of *Nevill* v. *Fine Art and General Insurance Co.* (1897) A.C. 68, 73 Lord Halsbury, L C, says on the subject of innuendo : "It is not enough to say that by some person or another the words *might* be understood in a defamatory sense. In the original argument of *Henty's* case in the Court of Appeal I observe that Brett, L.J . . . . says this: "It. seems to me unreasonable that when there are a number of

good interpretations, the only bad one should be seized upon to give a defamatory sense to the document.'" I have come to the conclusion that no ordinary mind would infer the innuendoes attached to this alleged libel, nor are the words capable of any defamatory sense in respect to the plaintiff. The plea of justification has been established and the occasion for the defence of fair comment does not arise: *Dakhyl* v. *Labouchere,* H.L., 14.3.07, see note to (1908) 2 K.B. 325.

It still remains to consider the defence of having printed and published the first and third libels without malice, and the first libel also without gross negligence. The word "malicious" as used in the statement of claim denotes mere absence of lawful excuse, but malice is not an issue in an action of defamation unless the defendant pleads privilege or fair comment when evidence is admissible to show that the defendant was influenced by express malice which words denote "some spite of ill-feeling against the plaintiff or some indirect and improper motive." There was and could be no plea of fair comment in respect of the first libel but under section 6 of Ordinance No. 3 of 1846 the defendant has the right "in an action for libel contained in any public newspaper . . . . . to plead that such libel was inserted in such newspaper . . . . . without actual malice and without gross negligence and that before the commencement of the action . . . . . he inserted in such newspaper . . . . . a full apology for the said libel (cf. Lord Campbell's Act, 6 & 7 Vict. ch. 96), and the defendants complied with this section. On the evidence before me I accept Mr. Webber's explanation of the origin of the offending paragraph; its insertion in the paper and publication was an honest mistake on the part of the reporter, and an error of judgment on the part of Mr. Phillips, the sub-editor. I may say that had I not been impressed by the way in which the latter gave his evidence, and the fact that the reporter's note-book was produced, I should have been inclined to consider that the first-named defendants bad through their agents exhibited an improper motive in publishing the libel, but as it is, I am of opinion that Mr. Phillips did not realise the serious interpretation that would be put on the word "chaos." In an action for libel evidence of malice may always be given to increase the damages and the plaintiff offered such evidence in the strained relations between the defendant (Mr. Webber) and himself before the first libel was published, and in the whole tone of the various publications and in the demeanour of Mr. Webber in the witness-box and in his address to court in defence, so that with respect to the third libel it becomes a question whether personal spite and prejudice had not actuated the second defendant in printing and

publishing it. The mere fact that a portion of it was untrue is not sufficient to prove malice but I cannot exonerate the second defendant altogether when the whole situation is considered. It seems to me that the whole article exhibits a recklessness and exaggeration that is culpable and he cannot pretend that the communication of it was made to the "Daily Chronicle" from a sense of or in the course of duty. The law considers "publication of statements which are false in fact and injurious to the "character of another . . . as malicious, unless it is fairly made by a person "in 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" *Toogood* v. *Spyring* (1834) 1 Cr. M. and R. 181, 193. I must therefore come to the conclusion that there is evidence of malice on the part of the second defendant, and in the case of a joint publication of a libel each *tort feasor* is liable for the malice of the other, though in assessing damages the Court may take into account that one party may be morally blameless: *Smith* v. *Streatfeild* (1913) 109 L. T. 173. With respect to the defence of absence of gross negligence in the first libel, all the circumstances of the publication of the paper, the means adopted to avoid error or misstatements in the printing and the pressure of work may be taken into consideration. There is no evidence that the second defendant was personally negligent, yet I cannot find that there was an entire absence of negligence on the part of the first-named defendants. But that alone is not sufficient; there must be evidence of actionable or gross negligence. As Beven in his "Negligence of Law" (3rd edition at page 37) puts it "gross negligence is not presumed from the existence of mistake if there is no falling short in integrity or diligence." I take the term "gross" as implying not mere inadvertence, but wilful negligence or, such a reckless want of care as to amount to culpable negligence.

I have left until the last the question of the sufficiency of the apology offered for the publication of the first libel. There is no question of its being reluctant or belated, for it was printed in the next day's issue of the "Daily Chronicle" and the copies containing the apology actually went to Dutch Guiana by the same mail that took the issue of the 10th February containing the libel, and addressed to the same subscribers. The plaintiff complains that it was not a proper apology but rather in the nature of an explanation, and not in a sufficiently prominent position to attract attention. With regard to the latter objection there is no heading that will direct the eye to the apology. It appears under "Mr. Wight's Financial Position," "Appearance of Offensive Statement Explained," "Little Pronoun's Unauthorised

Appearance," and after a note in small type that the writer had had a stormy interview with Mr. Wight on the publication of the libel, it proceeds in plainer type: "We regret profoundly that a grossly offensive statement should have appeared in our yesterday's issue with respect to Mr. Percy Wight's financial position. This statement is entirely due to the misreading of his notes by a junior reporter under the circumstances which will be hereafter explained. In the course of our report of the proceedings of Mr. Cannon's Friday night's meeting in Albouystown, Mr. Webber is made to say that Mr. Wight's "financial position was now in chaos." Fortunately this happens to be at such complete variance with Mr. Webber's tribute to Mr. Wight's financial position, which was paid so shortly ago as Tuesday afternoon, that it requires very little protestation to convince anyone of the *bona fides* of our explanation. What Mr. Webber did say was "At the eleventh hour, when the financial position was now in chaos (*i.e.* the colony's) and money was scarce everywhere that he was seeking the welfare of the people." Unfortunately the young reporter, our only one available, undertook to condense from his notes with the results seen above." It must also be noted that this statement formed part of the column of the paper containing election news under the main heading "Election Excitement at Fever Heat," and printed in no less a conspicuous place and manner than the libel was, and it may probably be assumed that any one interested in and reading the election news would see it, and that therefore those who read the offending speech on the previous day would read the apology on the next day; and there was also published under the same heading a letter addressed to the Editor of the "Daily Argosy" by Mr. Webber and dated the 10th of February, concluding with the words 'Incidentally if you propose making any editorial comment on a very offensive remark attributed to me at Mr. Cannon's Friday night's Albuoystown meeting, please save yourself the trouble as a denial and explanation will appear in our to-morrow's issue. I refer to that concerning Mr. Wight's financial position. It arose only through the faulty note-taking of a "junior." Another objection taken to the apology is that any effect it might have would be discounted and its sincerity rendered dubious by the publication in the same column in which it appears of the second alleged libel, but I cannot take this into consideration. In the first place the second alleged libel occurred before the apology was inserted, and next I have found that on the evidence it was substantially true and no libel.

The apology is repeated in paragraph 6 of the second defendant's defence. The sum paid into Court is usually only nominal and indicates that in the defendant's opinion there could be no

claim for substantial damages. It cannot, of course, be looked upon as an added insult as suggested by counsel. 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 withdrawing of all imputations and expressing of regret for having made any: *Risk Allah Bey v. Johnston* (1868) 18 L. T. 620. The Court was referred to the case of *Botha* v. *The Pretoria Printing Works Ltd.* (1906) T.S. 710, 714 as showing that a libel attacking the private character of a public man is worthy of heavy damages, but in that case Innes, C.J., in giving £250 damages states: "The apology was certainly fair and full, "but it was belated. . . . . only tendered when it was realised that the "position of the defendants was legally untenable . . . . . Under these "circumstances the apology loses a great deal of the effect it would have in "reducing the *quantum* of damages." One might also add that Mr. Wight and British Guiana are hardly as much in the limelight as General Botha and the Transvaal were. *Hartley* v. *Palmer* (1907)24 S.C. 228, 236 was also referred to by learned counsel for the plaintiff. It concerned a libel on a medical practitioner published in a newspaper. In the course of his judgment Maasdorp, J., remarked: "An apology operates in mitigation of damages, but subsequent conduct may neutralise the effect of the apology in this respect." It is true that the apology might have been more concise and better worded, and it is rather lost in the meshes of its explanation, but after all it does state: "We regret profoundly that a grossly offensive statement should have appeared in our yesterday's issue with respect to Mr. Percy Wight's financial position" and ends . "We tender to Mr. Wight our thousand-fold apologies and trust our readers will appreciate the circumstances under which the error arose."

I am not prepared to say that the apology was not sufficient, An apology need not be abject, and no objection was taken to the form of this one by the plaintiff, nor was a fuller apology asked for. Its very prompt appearance goes a long way to satisfy the Court that it was genuinely meant and inasmuch as no further apology was demanded, that it was sufficient for its purpose; I should have considered the payment into Court accompanying the apology on the pleading sufficient had it not been that the original offence was aggravated by the subsequent libel No. 3, which would detract from the effect and sincerity of the apology to some extent.

I have found that the plaintiff is entitled to a verdict on the first and third libels, and have now to consider what damages should be allowed in respect of each libel. I have also found that

the defendants have succeeded in their plea that the first libel was printed and published without actual malice and without gross negligence and that the apology was a fair and sufficient one at the time, but that does not necessarily mean, as I have already suggested, that the amount paid into Court is a correct estimate of the damages suffered, nor that because his speech was delivered in the excitement of a political campaign that a man can say and publish anything he pleases and proceed to wipe out his offence by an apology. The Court has to take into account any injury to his character suffered by the plaintiff, and whether the libel affected him with the constituency. As was observed in *South Hetton Coal Co.* v. *The North Eastern News Association* (1894 1 Q.B. 133, 138, C.A.,) "the law of libel was one and the same as to all plaintiffs . . . . . but the application of it is no doubt different with regard to different kinds of plaintiffs," and in considering the damages I feel I ought to lay stress on the intensely local aspect of this election and the wide knowledge of the general characteristics, standing and reliability of the candidates in a small place like this, a knowledge on which wild statements made at the local hustings would have little or no effect. An election to the Local Legislature was naturally of interest to the inhabitants of British Guiana but probably passed unnoticed outside the colony, and even if a remark on a local candidate reached the outside world, it would leave no permanent impression. Now, the object of a libel suit is to enable the plaintiff to rehabilitate himself in the eyes of the public and to recover damages for in jury done to his reputation (in the present case general and not special, damage) and the task of assessment of damages—usually the province of the jury—has been made more difficult by the plaintiff's reply to the cross-examination of Mr. Webber, When he was asked what was the object of this suit, he said: "To make you pay for your expressions of opinion and to give you the whacking you deserve . . . . . .If you did not have heart disease I would have given you a horse-whipping." In short, the plaintiff frankly states his object as revenge and he must not complain if the Court infers that his pecuniary losses arising from the publication of the libels were but slight. Mr. Wight did indeed state that "Persons who sent him securities to sell did not do so any longer, or sent them to other people as the result of the words complained of," and he complains, too, of having suffered ridicule and contempt as a consequence, but at the same time he admits he still retains his post as Director or Chairman of various companies and his position in society, and we have the evidence of the managers of the two banks that the suggestion as to Mr. Wight's

financial position had not the slightest effect on their dealing with him. There is every probability that the various articles and statements complained of affected him with the constituency, although it would be difficult to say how far the first libel had any such effect, as it was immediately withdrawn. At the same time the Court must "take into consideration the whole conduct of the defendant from the time the libel was first published to the time the verdict is given." I am not satisfied that there has been any appreciable loss of business to the plaintiff or that his reputation was more than very temporarily injured by any of the words complained of. That they did affect a certain proportion of the votes in his candidature for office. I have no doubt. After consideration of all these facts and on a comparison of damages allowed in various cases of newspaper libels to which I was referred by learned counsel—and I may especially mention *Pankhurst* v. *Hamilton* (1886) 3 T. L.R. 500—I have come to the conclusion that on the first libel damages should be allowed at $96 and that on the third libel damages at $200.

At the conclusion of these prolonged, and somewhat tedious, proceedings I should like to adopt the words of Graham, J., in concluding his judgment in *Reynolds* v. *Slaters Executors* to the present case, that " I am bound to say as far as I personally am concerned I think both the original incautious speech and the subsequent offending publications have all been regarded as matters of too great importance: neither the speech nor the occasion were epoch-making."

Both parties having been successful to a certain extent, I shall adopt the practice suggested as the proper course in *Luyt v. Morgan* (1915) E.D.L. 223, 238 and *Stopes* v. *Sutherland* (1923) 39 T.L.R. 67 and direct taxation of the plaintiff's costs on the higher scale and order the defendants to pay half only of such costs.

Judgment for the Plaintiff.

Solicitors: *Francis Dias, A. G. King.*

COLLINS *v.* SMITH AND WILSON.

COLLINS *v.* SMITH AND WILSON.

[No. 185 OF 1924.]

FULL COURT.

1924. SEPTEMBER 26.

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

Criminal Law—Summary Convictions Ordinance (*No. 12 of*) *1893, section 32—Unlawfully and with force to hinder and prevent a person working at or exercising his lawful trade business or occupation—Particular person mentioned in complaint—Whether force must be used to him personally—Employer and servant—Threats to servant.*

It is not necessary to sustain a conviction under section 32 of the Summary Convictions Ordinance (No. 12 of) 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.

Curran v. Treleaven (1891) 2 Q. B. 545, 556, explained and distinguished.

Appeal frorn the decision of Mr. J. H. S. McCowan, stipendiary magistrate for the Georgetown judicial district, in which he convicted the appellants for offences committed on the 1st April, 1924, under section 32 of Ordinance 12 of 1893. The facts and arguments sufficiently appear from the judgment.

C. R. Browne, for the appellants.

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

SIR CHARLES MAJOR, C.J.: Section 32 of the Summary Conviction Offences Ordinance, 1893, makes it an offence for a person unlawfully and with force to hinder and prevent another person working at or exercising his lawful trade, business or occupation. On the 1st of April last a vessel in this port was being unloaded at Garnett's wharf by a gang of men employed for the purpose by one Isaac Trim. Trim is a contractor for loading and unloading vessels; he does not assist in the manual labour involved, but supervises it, having to be, perhaps, from time to time in different places during the operation. To Garnett's wharf there came a crowd of men, some of them armed with sticks, bricks and bottles, who, with threats of, and actual violence to, the gang of Trim’s

workers, interrupted, and for some considerable time kept suspended, the unloading of the vessel, that is to say, they unlawfully and with force prevented the operation of unloading. And that operation was Trim's business. Here, therefore, it seems, there is present every ingredient of proof that the offence with which the defendant-appellants were charged was committed. But it is said that, as Trim himself was not physically and personally prevented from going about his business of unloading, the hindrance or prevention of the work of unloading being directed to his workmen only, the appellants should not have been convicted. In support of that proposition we have been referred to *Connor v. Kent* (1891) 2 Q.B., 545, 556, and kindred cases decided in 1891. But firstly, those cases were decided upon the construction of section 7 of the Conspiracy and Protection of Property Act, 1875, the provisions of which are different from those of the section of the law we are now considering; secondly, the question there determined was whether a certain course of conduct and speech constituted "intimidation" within the meaning of that word in section 7; thirdly, the cases did not decide, as has been contended by Mr. Browne, that the intimidation of a person, whereby he is compelled to abstain from doing or to do any act which he has a legal right to do or abstain from doing (using the words of the section), must be limited to threats of personal violence. It is noticeable that in C*urran* v. *Treleaven* (1891) 2 Q.B., 545, 556, one of the three cases, the defendant is described as a coal merchant who, "in the course of his business had to provide for the unloading of ships" and, at the time of the acts out of which the proceedings arose, "was unloading four ships," That is just the business upon which Trim was engaged, and its hindrance and prevention that ensued was, in my opinion, strictly personal to Trim, even if act and speech were physically brought to bear upon his employees only. (There was in fact evidence that one of the raiders, with a stick and among others using threats of violence to all and sundry, said: "Where is Trim? Can't work to-day. Bring him out. Out Trim.") Precisely the same hindrance and prevention would have occurred, had a man, or body of men, taken possession forcibly of any mechanical means (such as trucks) used by Trim"s men in the process of unloading whereby the unloading was hindered, although the men might not have been near the trucks, but (say) at breakfast. The conviction of the appellants I am persuaded was right and their appeal must be dismissed with costs.

BERKELEY, J.: I concur.

Appeal dismissed.

CHANDERSICK *v.* BENJAMIN FOO.

CHANDERSICK *v.* BENJAMIN FOO.

[No. 230 OF 1923.]

1924. SEPTEMBER, 9, 23; OCTOBER, 1.

BEFORE DOUGLASS. J,

Principal and agent—Master and servant—Bailor and bailee—Motor Car Ordinance, 1918—Motor Car By-Laws, 1918, rule 5—Registration of owner unchanged —Costs.

A. sold and delivered a motor car to B. but was not paid in full. The car still continued to be registered in the name of A. who still paid the licence fees due under the Tax Ordinance. B. plied the car for hire on his own account. While B. was driving the car the plaintiff was injured.

Held, that B. was a bailee of the car, and that A. was not responsible for the negligence of B.

Kemp v. Elisha (1918) 1 K. B 228, C. A. applied.

The plaintiff, an infant, suing by his next friend claimed from the defendant the sum of $1,000 as damages and pecuniary compensation for certain injuries sustained by him through the recklessness, carelessness and unskilfulness of the defendant, his servants and agents in driving the defendant's motor car No. 414. The defendant, *inter alia,* denied that he was the owner of the motor car or that it was driven by any of his servants.

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

G. E. Edwards (for *J. S. McArthur. K.C.),* for the defendant.

Cur. adv. vult.

DOUGLASS, J.: Before considering the evidence relative to the negligence of the driver of motor car No. 414 involved in this case, it is necessary to find whether the defendant stood in the position of master or principal to the driver, as he is sued on account of the negligence of his servants or agents. One may at once exclude the relationship of master and servant, the evidence offered on behalf of plaintiff does not support it. The relationship of principal and agent may arise (1) expressly, or (2) by implication of law. The latter arises "where anyone has so acted as from his conduct to lead another to believe that he has appointed a particular person as his agent, when he will be estopped from disputing the agency: *Pole* v. *Leask* (1863) 33 L.J. Ch. 155, 162. In that case Lord Cranworth in the course of his judgment says: “Another proposition to be kept “constantly in view is that the burden of proof is on the person dealing “with anyone as an agent through whom he seeks to charge another as “principal. He must show that the agency did exist and that the agent had “the authority he assumed to exercise, or otherwise that the principal is “estopped from disputing it.”

Learned counsel for the plaintiff puts this same proposition in a concrete form when he says, if the defendant allowed Joshua Tong to drive his car, then Tong would be deemed the agent of the defendant, and further, that primary evidence of ownership and agency has been offered and not displaced by any evidence on the part of the defendant. The evidence of ownership is for all practical purposes admitted. The car is registered in Foo's (the defendant's) name and he paid the present year's licence in order, as he explains, to retain a hold as Tong had not yet paid him for the car.

In support of his contention he refers to a case *Joyce* v. *Capel and another* (1838) 8 C. & P. 370, 371 an action for damages done to the plaintiff's tug boat by the negligence of the defendant's servant in steering the defendant's barge. It was proved that the barge belonged to the defendant, but no witness could identify the bargeman who steered it. Lord Denman. C.J., said: "If the barge was on hire that will be for the defendants "to show. The barge being the barge of the defendants, there is *prima facie* "evidence that the bargeman was their servant till they explain it." The *ratio decidendi* was more fully expressed in the case of *Hibbs* v. *Ross* (1866) L.R. 1 Q.B. 535, 543, that "the facts lie so entirely in the knowledge "of the defendant and may so easily be proved by him that a jury would be "fully warranted in acting on the *prima facie* inference that the persons "having the actual custody of the ship are employed by the owners *unless* "*some* evidence to the contrary is given." But, as shown by Lord Esher, M.R. in *Smith* v. *Bailey* (1891) 2 Q. B. 403 it goes no further than this. That was a case of a traction engine, registered as required by the Locomotives Act, 1865, and let out for 3 months. Through the negligent management of the engine whilst being used on the highway by the hirer it injured the plaintiff. It was held that the defendant was not liable. Learned counsel for the defendant referred to *Kemp* v. *Elisha* (1918) 1 K.B. 228.C.A. when the defendant was registered as the proprietor of a taxi-cab under the Metropolitan Public Carriage Act, 1869, and, as such, subject to certain liabilities for the acts of the driver, and it was held that the register was not conclusive but the defendant could prove he had no interest in the taxi-cab.

For the purposes of the Motor Car Ordinance, 1918, every car must be registered in the name of its owner, and, if the ownership is changed notice must be given by the new owner for cancellation of the registration: see Motor Car By-Laws, 1918, rule 5. I trust that this peculiar provision will soon be altered, leaving as it does the vendor of a motor car at the mercy of the purchaser. Under the successive Tax Ordinances every person who

"keeps or uses," or "owns and permits to be used" any motor car *(inter alia),* shall take out a licence which may be paid in two instalments. It is true that the defendant registered his car under the one Ordinance and took out a licence under the other but I can find nothing in either Ordinance to show that it was intended that if the motor car was hired out and the hirer incurred liability through negligent use of the same, that the owner simply because he was registered, should be responsible to the injured person. The defendant has satisfied the court that he retains no interest in the car except so far as it is a security for the payment of its price, he and Tong are more in the position of bailor and bailee than of principal and agent. The defendant has indeed parted with all his rights of ownership and purports to retain only a right to retake possession. The incident of the car being taken to Bookers' garage with a view to sale or exchange does not alter my opinion that the defendant retained no control over the car, or the person of its driver. I must therefore give judgment for the defendant. As it is owing to the defendant—on his own admission—that his name was retained as registered owner, and he paid the last instalment of the licence, the supposition that Tong was his servant or agent was a reasonable one, and I shall give no costs.

Judgment for defendant.

Solicitors: *F. Dias, A. V. Crane*

FANFAIR *v.* HO-A-SHOO, LTD.

[No. 288 of 1924.]

FULL COURT.

1924. OCTOBER 3.

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

Breach of Contract—Special circumstances—Notice of—Measure of damages— Remoteness.

F. arranged with H. that H. should supply him with 7 bags of mangrove bark and told him he required (hem 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 specially 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 spoilt.

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 spoilt 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.

Hadley v. Baxendale (1854) 9 Exch. 341 applied.

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.

Appeal from an order of Mr. J. H. S. McCowan, Stipendiary Magistrate of the Georgetown judicial district awarding the plaintiff $81.96 as damages for breach of contract. The defendants, Ho-A-Shoo, Ltd., admitted that the magistrate was right in awarding as damages the sum of $5.80, being the price $1.40 of 7 empty bags delivered to them at the time of the contract and $4.40 moneys paid by the plaintiff on account of the purchase price of the bark, but they appealed from the rest of the order. The facts and arguments sufficiently appear from the judgment.

E. M. Duke, for the appellants.

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

SIR CHARLES MAJOR, C.J.: This was an action by the plaintiff for damages for non-delivery by the defendants of seven bags of bark, in which the court gave judgment for the plaintiff and awarded him the sum of $81.96. That sum is made up of (1) $76.16, the estimated market price of the leather into which some 465 lbs. of raw hide would have been converted if that hide had not been spoilt by the failure of the defendants to deliver the bark to be used in curing it; (2) $1.40, the price of seven bags supplied by the plaintiff for the bark, and (3) $4.40, paid by the plaintiff to the defendants on account of the purchase price for the bark. This award is challenged by the appellant-defendants, first, in that for the purpose of computing the value of the leather to result from the tanning of the hide the magistrate has found the liability of the defendants for the loss of the hide; second, in that the facts that the plaintiff had the 465 lbs. of hide undergoing a first process of curing and required the bark to complete that curing, otherwise it might be irretrievably spoilt and lost, were not, at the time of making the contract for sale and delivery, notified to the defendants; and third, in that, in any event, the damages awarded for loss of prospective leather were too remote.

I am of opinion that the objections to the assessment are good. In *Hadley* v. *Baxendale* (1854) 9 Exch. Rep. 341 to which the court has been referred by Mr. Duke, the proper rule for guidance in assessment of damages in a case like this was stated by Alderson.

B. in delivering the judgment of the Exchequer Chamber, "Now we think the proper rule in such a case as the present is this :— Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

Here the terms of the contract are given by the plaintiff himself; Chung, the employee of the defendants who made the contract with Fanfair, was not called. Fanfair says: "I arranged with Chung to supply mangrove bark —seven bags. I told Chung required them for tanning. Dealt with them before. Chung said knew what wanted for. I told Chung wanted the bags by boat 5th October and delivery Saturday, 6th October. Chung agreed. Price $7 for 7 bags; $1 per bag. I agreed to supply bags." That is the evidence and the only evidence of the contract. There is no mention of a fact, very important to the plaintiff, but not communicated to Chung, that the plaintiff then had 465 lbs. of hide which he had commenced to tan, and that he specially wanted the bark to complete the operation. *Non constat* that on disclosure of that fact to Chung he would not have disclaimed responsibility for loss occasioned by non-delivery at the particular time specified, the 6th October. The object for the purchase was stated merely to be "for tanning," nothing more. And that brings the case within the authority cited.

Then, if the plaintiff may not recover as damage the value of the hide because it was not made known to the defendants that the hide was there and the bark was specially required to complete its process of tanning, obviously he cannot recover as damage the probable value of the leather into which, if the bark had been delivered and if the tanning had been successfully completed, that hide would have been converted.

The magistrate's order must be varied, and there must be judgment for the plaintiff for $5.80, the cost of the bags supplied (which have not been returned) and the amount paid by the plaintiff on account of the purchase price. The respondents must pay the costs of this appeal.

DOUGLASS, J.: I concur with the judgment of the Chief Justice.

Appeal allowed. Order varied.

ABDUL *v.* KADRAT ALI

[No. 253 of 1924.]

FULL COURT.

1924. OCTOBER 3

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

Detinue—Action for—Detention—Proof of—Demand and refusal—Not to be alleged —Matter of evidence—Magistrate's Court—Plaint—Technical Objections not to be encouraged.

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

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.

Miller v Dell (1891) 1 Q. B 472, C. A. applied.

Clayton v. Le Roy (1911) 2 K. B. 1031 explained.

Appeal from the order of Capt. P. E. F. Cressall, M.C., stipendiary magistrate of the West Coast Demerara judicial district.

striking out a plaint for wrongful detention because there was no allegation therein of a demand by the plaintiff and a refusal by the defendant.

S. E. Wills, for the appellant,

The respondent did not appear.

SIR CHARLES MAJOR, C.J.: The plaint in the court below is that the plaintiff claims delivery of certain animals, the plaintiff's property unlawfully and wrongfully detained by the defendant from the plaintiff, or $80 their value.

Objection was taken by the defendant's solicitor at the hearing that the plaint, not containing an allegation of plaintiff's demand of delivery and defendant's refusal to deliver, was bad for nondisclosure of a cause of action. The magistrate upheld the objection and ordered the plaint to be struck out.

Technical objections going to insufficiency of pleading in magistrate's courts have no sympathy from me, particularly so when the insufficiency—if it exists—can be supplied by amendment Here—supposing the insufficiency to appear—the magistrate should certainly have made the necessary amendment. Counsel for the plaintiff did not ask for an amendment contending that the plaint was good, and he was right. In my opinion no insufficiency appeared; the plaint was good as it stood.

Plaints in magistrates' courts must contain a statement of the facts constituting the cause of action. Here the cause of action is detinue, that is, wrongful detention of the plaintiff's goods, and it is so pleaded in the plaint. That the detention is wrongful must be shown by evidence—it is not a matter of allegation—to have occurred after a demand to deliver and refusal on the part of the defendant to do so. In *Miller* v. *Dell* (1891) 1 Q.B. 472, a case of detention of a lease—Lopes, L.J., said : "the cause of action in respect of which the present plaintiff is suing is a cause of action against the defendant because the defendant has possession of a lease to which the plaintiff is clearly entitled, and the evidence in support of it is a demand made by the plaintiff and a refusal by the defendant; therefore the cause of action is a conversion, proved by demand and refusal." *Clayton v. Le Roy* (1911) 2 K.B. 1031 cited in the court below is not in point. It was there decided that, it appearing from the evidence in support of a claim in detinue that the plaintiff had issued his writ of summons before making a demand for the delivery of a watch and receiving a refusal by the defendant to do so, the cause of action had not accrued when the writ was issued. There is nothing in the case to support the proposition that a statement of claim—*a fortiori* a plaint—for detention of goods, the cause of action

must contain an allegation of the facts to be proved in support of that cause of action, a proposition that runs clean contrary to, *e.g.*, *Williams v. Wilcox* (1838) 8 A. & E., 331. It is to be observed that the forms of statement of claim prescribed by the R.S.C. 1883, in action of detinue is "the defendant detains from the plaintiff the plaintiff's goods, etc. [there is no mention of wrong], the plaintiff claims a return, etc."

The appeal should be allowed with costs, and the magistrate's Order set aside and the case remitted to him to proceed with the hearing on the plaint as filed.

BERKELEY, J.: I agree.

DOUGLASS, J.: I agree.

Appeal allowed. Case remitted.

NUNDLALL MARAJ *v.* ROSE MANN, *et al*

[No. 277 OF 1923].

BAIL COURT.

1924. OCTOBER 2, 11. BEFORE DOUGLASS, J.

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, rr. 39 & 41—Taxing Master not empowered to assign value to property in dispute—Costs.

Semble, 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.

Sparrow v. Hill (1880) 7 Q.B.D. 366, C.A. and

In re Castle (1887) 36 Ch.D. 194, C.A., followed.

The Taxing Master is not empowered to give any decision on the value of the subject matter when he is deciding whether a bill should be taxed on the lower or higher scale. He is not justified in assuming it to exceed in value any sum, however small. *Wilson, et al,* v. *Munro, et al,* 13. 7. 09 followed.

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 retaxed on the lower scale on the basis of $240.

Summons for review of taxation of the bill of costs of the defendants. The plaintiff alleged that the defendants were in

occupation of a strip of land belonging to him. He claimed possession of that land, an injunction to restrain them from entering upon that land, and, in addition, the sum of $240 as damages. The value of the land in dispute was not stated either in the statement of claim or in the defence. On the 15th September, 1924, two days before the action was to be heard, the plaintiff applied to Mr. Justice Douglass for leave to discontinue the action. This was granted, but the plaintiff was ordered to pay the defendants their costs of action to be taxed up to and including the 13th September together with the costs of the application which were fixed by the judge at the time. The defendants presented their bill for taxation on the higher scale. The solicitor for the plaintiff attended the taxation, and, while he made specific objections to certain particular items he did not object that the bill should be re-cast and re-modelled on the lower scale. The bill was taxed on the higher sale. The plaintiff applied for a review of taxation under the Rules of Court, 1900, Order 46, rule 9.

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

E. M. Duke, for the defendants.

Cur. adv. vult.

DOUGLASS, J.: After this case was ripe for hearing an order of discontinuance was made in the action, the plaintiff to pay the defendants their taxed costs. The Registrar taxed the costs on the higher scale, and the plaintiff who was represented at the taxation, desires a review of taxation on the ground that the amount of damages claimed was $240 only, and, therefore, the costs should have been taxed on the lower scale.

Mr. Duke, who appears for the defendants, opposes the review on the ground that the plaintiff has no right to a review of taxation inasmuch as he took no objection before the Registrar, and it was too late after he had certified the amount of the costs allowed. He refers to *Mentors, Ltd. v. Evans* (1912) 3 K.B. 178 in which Fletcher Moulton, L.J., states "it is a fundamental principle in dealing with such appeals that the appellant is strictly tied to the objection made by him to the Taxing Master and answered by the latter." That dictum, however, is considerably modified by later cases and the decision in *Perry* v. *Hessim* (1913) 108 L.T. 332 in particular. And I am very doubtful that it is applicable at all under our Rules of Court. An application for review is made under Order 46, rule 9 which is evidently an adaptation of the English Order 65, rules 39 and 41, the chief difference being that the English rule 39 provides for a review by the Taxing Master himself and if any party is dissatisfied then he may apply to a judge to review "any item

or part of an item which *may have been objected to,*" but we have no provision for a review by the taxing officer when any objection would be taken and dealt with, and we have in our rule no words implying that an objection has been already taken before the taxing officer to any item, as there is in the English Rule which concludes with the words "but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid," whereas our rule 9 concludes, "The certificate of the taxing officer shall be final and conclusive as to all matters which *shall not be objected to."* But, in addition, it has been held that although the certificate of a taxing officer will not generally be reviewed on a question of quantum, yet where he has acted on some mistaken principle, or where there has been some irregularity in the proceedings the (English) rules 39 and 41 do not apply: *Sparrow* v. *Hill* (1880) 7 Q.B.D. 366 and *In re Castle* (1887) 36 Ch. D 194. The present is a case where the general principle upon which the taxation proceeded is objected to, and, therefore, the application is properly brought.

To come then to the substantive objection, the indorsement of claim was for (1) possession of a piece of land therein described, (2) an injunction restraining further trespass, and (3) $240 damages for past trespass. Nowhere in the pleadings is the value of the land suggested nor would its value affect the merits or otherwise of the claim. A series of local cases from *Archer* v. *Britton* 22.3.06 to *Jardine* v. *Mohabir* (1917) L.R.B.G. 106 have been directed to the costs allowed under Rules of Court, Appendix I., Part 1 (b) and (c), with the result that the value of property in respect of which the action is brought has to be interpreted as the value as decided on adjudication, and the expression ' amount claimed' has also to be referred to the adjudication. But the present is a case where the plaintiff failed and no value has been adjudicated. What then is to be the "amount claimed" or "the value of the property in respect of which the action is brought?" The case of *Shivanasanker* v. *Munro* 27.7.08 referred to by Mr. Duke was in effect overruled by *Wilson, et al,* v. *Munro, et al.* 13.7.09 when it was held not to be competent for the taxing officer to give any decision on the value of the subject matter of the action when no decision had been given by the judge as to its value, and it was not in issue. Only the sum of $240 is claimed, and, had the plaintiff succeeded, then an injunction and possession would have followed as a matter of course. He had valued his deprivation of the land at that amount, and I cannot see that any other value was in question. But, be that as it may, no evidence

is before me as to the value of the strip of land in dispute, and I am not justified in assuming it to exceed in value any sum however small. I therefore order that the taxation be set aside, and that the Registrar tax on the lower scale (*c*).

I allow the costs of this application at £3 3s.

Application granted.

Solicitors: *W. D. Dinally. A. McL. Ogle.*

GUIANA STEAM SAW MILL, Ltd., *v.* DaSILVA.

[No. 363 OF 1924.]

1924. OCTOBER 18, 25. BEFORE DOUGLASS, J.

Specially indorsed writ—Moneys had and received—Implied contract—Fraudulent Misappropriation—Whether subject matter of a specially indorsed writ—Felony disclosed in pleadings—Duty of Court to stay all proceedings until after prosecution of offender— Power of Court to amend—Excision of all reference to felony—If so, question of stay does not arise.

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

Held (1) that such a claim constituted a debt from the defendant to the plaintiffs and was capable of being specially indorsed.

(2) That all proceedings in the action would be stayed pending the prosecution of the defendant; but

(3) That the plaintiffs were at liberty to amend their statement of claim by striking out all reference to a felony being committed.

The plaintiffs issued a specially indorsed writ against the defendant to recover the sum of $1,549.39 moneys had and received by the defendant to the use of the plaintiffs between the 18th August, 1923, and the 13th May, 1924. The particulars showed that the defendant whilst clerk to the plaintiffs during the said period received for and on behalf of the plaintiffs the sum of $4,896.67 being cash sales of goods belonging to the plaintiffs whereas he only accounted to the plaintiffs for the sum of $3,347.28 and fraudulently appropriated to his own use the difference $1,549.39. The defendant took certain preliminary objections which fully appear from the judgment.

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

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

Cur. adv. vult.

DOUGLASS, J.: Mr. J. A. Luckhoo for the defendant raised two preliminary objections to the present claim, on the first of which, if his contention is correct, the claim should be struck out, and on the second, in like case, the claim should be suspended. In the first place then he says, the claim is bad because it cannot be the subject matter of a special indorsement, for it is not "a debt or liquidated demand arising upon a contract expressed or implied,"

and that at the most a tortious act is disclosed the subject matter perhaps for a claim for damages. I do not think the cases he refers to prove his point; in the first. *Orton* v. *Butler* (1822) 5 B. & Ald. 652 it was decided under the old strict pleadings that one of the three counts contained in the declaration stated that which was not the subject of an action of trover (in which a party recovers damages for the detention of specific goods) and was therefore bad; and the next *Gurney* v. *Small* L.R. (1891) 2 Q.B. 584 where it was admitted that an unliquidated amount had been joined to a liquidated amount in a specially endorsed writ, and it was held that striking out the unliquidated demand did not make the special indorsement for the balance good. After reading the notes on page 271 of Bullen and Leake's Precedents (8th edition), viz:—"The same rule applies as where the tortious " act amounts to a crime. Thus money stolen may be treated as "a debt and recovered as money received," and on reference to the case of *Chowne* v. *Baylis* (1862) 31 L.J. Ch. 757, 761 where Sir John Romilly, M.R., says:

"It would seem impossible upon any principle of law or juris-"prudence to hold that the right of the lawful owner to recover his lost "property can be affected by the knowledge of the taker that it belongs to "and was taken from the person who lost it. It is obvious that the civil "rights and remedies must be the same, subject always to the suspension of "the owner's rights for the purpose of vindicating the law. It is obvious, "also, that if this be so in the case of a personal chattel it must be the same "in the taking of money. The actual notes or coin, if they could be "discovered upon the felon, and were the property of the person robbed, "would, after conviction, be returned to him: and if not found, the "property of the felon would be liable to make good the amount of the "money to the person robbed . . . Upon every principle, therefore, the "robbery constitutes a debt due from the robber to the person robbed, "Indeed this is assumed by the terms of the rule laid down, which suspends "the civil remedies of the person robbed until after conviction of the "robber."

I can have no hesitation in holding that the claim is properly the subject of a special indorsement, although the particulars are unnecessarily informative, and might well be amended.

Counsel's second objection is that the plaintiff cannot carry on a civil action relating to a matter which is the subject of a criminal charge for a felony before the charge has been disposed of.

He referred me to the same paragraph on page 271 of Bullen and Leake's Precedents, where it is stated "But in the case of felonious torts, the first duty of the plaintiff is to prosecute the offender and it is only after this has been done that he can

"obtain compensation in an action of tort. *Smith* v. *Selwyn (*1914) 3 K.B. "98, the rule being that the private remedy is only suspended until the "injured party has performed his public duty. *Midland Insurance Co.* v. "*Smith* (1881) 6 Q.B.D. 561." Pollock on Torts (11th edition) says "it is the "law that where the same facts amount to a felony, and are such as in "themselves would constitute a civil wrong, a cause of action for the civil "wrong does indeed arise, but the remedy is not available for a person who "might have prosecuted the wrong-doer for the felony and has failed to do "so. The plaintiff ought to show that the felon has been prosecuted to "conviction, or has failed without any fault of his own."

The learned author of Clerk and Lindsell on Torts (7th edition, pages 119, 120) expresses a similar opinion, but draws a distinction as to what course should be pursued in the two cases of where the plaintiff's own case discloses the felony, and where the felony is for the first time disclosed on the plaintiff's evidence at the trial, and states that the question of staying the action is one for the judge and not for the jury, In *The Midland Insurance Co*. v. *Smith*, supra, in a very full judgment reviewing all the authorities up to that date (1881), Watkin Williams, J., says that "There is "nothing to show whether the plaintiffs have or have not neglected to "prosecute the felon: and it is consistent with this demurrer that the felon "may in fact have been convicted ; and as it seems clear that to me that the "prosecution of the felon is not an absolute condition precedent to the "accruing of the cause of action, the statement of claim is *prima facie* "sufficient:" It is no longer possible to raise issues by demurrer, and I prefer to adopt the course laid down in *Smith* v. *Selwyn* by Swinfen Eady, L.J., as indicated by Cockburn, C.J., in *Wells* v. *Abrahams* (1872) L.R. 7 Q.B. 550, that is to say, I propose to stay the action on the present statement of claim with leave to amend the particulars therein within 21 days. If no amendment is made within that time the action is to be stayed until the summary criminal proceedings have been completed, or until further order.

I wish, however, to state that in making this order the question of the sufficiency of the plaintiffs' claim to support proceedings on contract remains an open one, and depends upon the evidence. I merely draw attention to the fact that all the cases referred to, with one exception, relate to the impediment in the way of a party taking the civil remedy for tort when he has failed to prosecute the wrong as a criminal offence: see *Neate* v. *Harding and Bowns* (1851) 6 Exch. 349 [(a)]

Solicitors, *J. Gonsalves, A. V. Crane.*

(a) The amendment was made, and leave was granted to defend.

PEDRO RISQUEZ *v.* Rev. JAMES PERSAUD.

PEDRO RISQUEZ *v.* REV. JAMES PERSAUD.

[No. 396 OF 1922.]

1924. SEPTEMBER 16; OCTOBER 6, 27. BEFORE DOUGLASS, J.

Lease—Leases in longum tempus —Deeds Registry Ordinance (*No.17 of) 1919, section 12—Whether a. lease immovable property—Whether lease taken by guardian for ward without leave of Court is binding on lessor—Whether the guardian of an infant may grant a lease for* 5 *years without leave of Court—Breach of covenant—Non-payment 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.*

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.

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.

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

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 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 revest in him, and that the lease was therefore valid and effectual in law.

The facts and arguments thereon sufficiently appear from the judgments.

S. L. Stafford, for the plaintiff.

J. A. Luckhoo, K.C., (*C. R. Browne,* with him) for the defendant.

Cur. adv. vult.

DOUGLASS, J.: This is an opposition suit to restrain the defendant passing transport of certain lands known as New Hope, Demerara River, until the lease of a portion thereof, granted by the defendant to one Germano Vieira for a period of five years, and the transfer of the said lease to the plaintiff be reserved in the proposed transport.

It appears from the statement of claim that under a deed dated 11th March, 1920, and registered 25th September, 1920, the defendant leased to the said Germano Vieira, an infant, by his father and guardian Francisco Vieira, a portion of the said land for a period of five years, and that on the 25th September, 1920, by

a deed executed in the Deeds Registry the said Francisco Vieira as such father and guardian purported to transfer all the minor's rights in the said lease to the plaintiff herein.

Mr. J. A. Luckhoo, K.C., for the defendant, takes a preliminary objection that on the facts set out in the statement of claim the opposer can have no title to bring this action for the said lease and transfer of the same are and were void at law.

If that is so, or if the transfer to the plaintiff is bad at law, it is clear that the opposer has nothing on which to found his opposition, and the case should be struck out. Mr. Luckhoo's contention rests on two main propositions: (1) that a lease for any period of years is a chattel real, and so under section (2) (1) of the Civil Law Ordinance, 1916, immovable property, and (2) immovable property of minors cannot be alienated or encumbered without the sanction of the court and any such attempted alienation is *ipso jure* null and void ; and he referred to the local case of *Nasiban and others* v. *Alves and others* (1917) L.R.B.G. 11.

If proposition (1) is not correct, but short term leases are not included in the term "chattels real," and so are personal chattels and 'movable' property, as submitted by Mr. Stafford for the plaintiff, then proposition (2) would not apply. Mr. Stafford also objects that section 2 (1) referred to only defines what the words *movable* and *immovable* property respectively include, but that these words are not used in the statement of claim, and no argument founded on them can therefore arise. What then *is* the effect of a lease for years, should it be classified under movable or immovable property, and does the period of years for which it is granted make any difference under which head it should be classified? As applied to lands a lease represents the right acquired by one person to the exclusive possession of lands for a fixed or determinate period of time. In early times Roman-Dutch Law made a distinction between a lease *ad longum tempus* (*i.e.*, for 10 years and upwards) and a short lease *(i.e.*, for less than that period); the former having to be executed *coram lege loci* was in effect an alienation of immovable property, the latter was a mere contract and transferred no proprietary interests. Lee in his Introduction to Roman-Dutch Law at pages 143, 144 says “a lease creates not only contractual “rights as between the parties, but also proprietary rights. . . . We are fully “justified therefore in regarding a lease as a species of ownership in land”: and see *Huree* v. *Bascom, et al* (1860) L.R.B.G., vol. 2, O.S., 37, but the term of the lease referred therein to is not stated.

Under the English common law, chattels real are classed under personal or movable property, but since the 1st January, 1917, in this colony, "chattels real," which under the common

law of England consisted of leasehold and other chattel interests in lands, will be included under the term 'immovable property' by virtue of section 2 (1) of the Civil Law Ordinance.

If immovable property then shall ordinarily be deemed to mean and include both *real property* and *chattels real* I can only infer that *chattels real* are ordinarily *immovable property.* Although as pointed out by Mr. Stafford by section 12 of Ordinance No. 17 of 1919 leases are still divisible into terms of twenty-one years and over (called long leases), and those under twenty-one years, yet a lease of any length has to be recorded to be "good, valid and effectual in law," and it would create endless confusion and complications to class the long term leases as immovable property," but all others as "movable;" it seems to me that common sense as well as convenience revolts against such a construction. Lee states (page 56 of his Introduction to Roman-Dutch Law): “Alienation includes any act of the “guardian, where by a real right of the ward is in any way diminished, lost, “or abandoned. Failing a judicial decree (where such is necessary) “everything that takes place in the course of or incidentally to such “alienation is *ipso jure* null and void;” he makes no reference to the very important case of *Canavan and Rivas* v. *New Transvaal Gold Farms, Ltd.*, (1904) T.S. 136 nor to *Breytenbach v. Frankel & another* (1913) T.S. 300 both referred to in *Nasiban* v. *Alves & others* (1917) L.R.B.G. 11, and later on he says (at page 58) "an alienation void *ab initio* may be ratified on full age," indicating to my mind that he is drawing no distinction between 'void' and 'voidable' transactions. Taking it, as I do, that the lease referred to in the statement of claim is in the nature of "immovable" property and so both it and the transfer of it would be treated as affecting proprietary rights, it is of the first importance to the parties to decide whether the alleged transfer to the plaintiff of the said lease is 'void' or 'voidable' at law.

Van der Linden in his Institutes, Book 1, ch. 5, s, 5. lays it down that a guardian "may not sell or encumber any of the *immovable* property of the minor without having first obtained an order of the court," that is to say, he could not grant a lease of the minor's property; but I can find nothing to prevent him taking a lease for the benefit of his ward, except that if he does not obtain the previous sanction of the court, he may become personally liable on it. Such a transaction does not come within the ruling of *Nasiban* v. *Alves and others,* (1917) L.R.B.G. 11. for to take a lease of another's property is neither an encumbrance nor an alienation of immovable property of his ward, and it would be voidable only at the option of the ward on his coming of age if the court were not consulted, and this is the same at English

common law, I therefore come to the conclusion that if the defendant did lease a portion of the property to Germano Vieira, it was in any event, binding on the defendant, but now comes the other question, was the transfer to the plaintiff a legal transaction, or void inasmuch as it was made without the consent of the court?

I don't think that the judgment in *Nasiban* v. *Alves & others* (1917) L.R.B.G. 11, 13, 17 which was before the court in 1916, is entirely applicable to the present situation, for (1) it decides what constituted a lease *in longum tempus* at that date, and what its effect would then be, and as the learned Chief Justice remarks his "consideration and determination "of the law involved therein will. . . . shortly possess an interest (if any) of "a purely academic character:" moreover (2) it was the infants as represented by their guardian who were claiming to set aside the lease, and (3) it only in effect applies to leases then known as *in longum tempus.* In the course of that case the learned Chief Justice refers to *Breytenbach* v. *Frankel & another* (1913) T.S. 300, 306, 308, and stated that he was unable to accept the decision therein as a binding one on the point of voidability and not nullity "; but he also remarks that the question at issue was entirely different from that which he was then considering. I have carefully studied the facts of, and the decision in, that case and it seems to me they carry considerable weight in the present argument. The head-note reads, "A contract alienating minor's property, which has been entered into "by a guardian on behalf of a minor of by a minor with the assistance of his "guardian is not *ipso jure* null and void, but is merely voidable on the "minor's attaining majority. In order to have such a contract set aside the "minor must on reaching majority apply for *restitutio in integrum.*" De Villiers, J. P., in his judgment (at page 306) states that "The distinction "drawn by *Grotius* is this, that if a minor himself enters into a contract, "that contract is *ipso jure* null and void and no relief by way of *restitutio* is "necessary ; if, on the other hand, the minor enters into the contract assisted "by his guardian, or the guardian enters into the contract on his behalf, "alone, in that case the contract is not *ipso jure* null and void, but the minor "must come to court for *restitutio in integrum,*" and he also says that Voet (see 4.1.13) by implication adopts a similar view.

For this reason the learned President came to the conclusion that the lease was not *ipso jure* null and void, and although it was " *in longum tempus"* And Bristowe, J., (at page 308) says: "It is further conceded that a "guardian cannot alienate his ward's property without an order of the "court," and that "a lease for a term exceeding ten years should be treated "as an alienation,

". . . it follows that the minor was entitled on attaining twenty-one to "repudiate the lease. If therefore the minor had himself been the plaintiff "the action must have succeeded" *(i.e.,* that the lease be declared null and void). "But it does not follow that Breytenbach (the plaintiff) is in the same position"; he was the purchaser of the properly in question and claimed to purchase it cleared from the obligations of the lease. The learned judge continues: "If the lease had been void *ab initio* it may be that "nothing more would have been required. But I am satisfied that an "alienation by a guardian is not void but only voidable at the option of the "minor. It is quite true that expressions may be found in the books which "seem to prohibit such an alienation and to assert that, if made, it is void. "But Voet 27.9.14 is a clear authority that the minor can ratify an "alienation when he attains his majority; and if it can be ratified it follows "that it is not void *ab initio,* but only voidable."

This seems to me conclusive, and I cannot forget that the rule that the alienation of an infant's property must be sanctioned by a judge, and the action of *restitutio in integrum* were for the benefit and protection of the infant, not to enable another person to take advantage of the ignorance of the infant or the laches of his guardian. Again, the lease in the case of *Breytenbach* v. *Frankel* (1913) T.S.300 was in *longum tempus* when it was necessary to have the authority of the court, whereas the present lease is stated to be for five years only, and though now classified as falling under the term *immovable property*, there can be no reason why, if before the Civil Law Ordinance, the guardian could have granted, or taken, a short lease without the leave of the court he should not continue to do so; and indeed the Deeds Registry Ordinance, 1919, section 12, rather confirms me in this opinion in treating leases under twenty-one years as not liable to be dealt with as transports, but only to be recorded.

Apart from all considerations at law, I should certainly hold it as inequitable that the owner of the land who had granted a lease of a portion of it and consented to its transfer, should take advantage of the law for the protection of minors to commit, what would in effect be, a fraud on a minor with the assistance of the court.

I hold the preliminary objection raised to be bad and the case must proceed.

Objections overruled.

Evidence was led on both sides and legal arguments adduced thereon all of which sufficiently appear from the judgment.

Cur. adv. vult.

DOUGLASS, J.: The principal facts of this case have to some extent been set out in my decision on the preliminary objection taken, and now on hearing the evidence of the parties it remains to consider (1) was the lease of the 11th March, 1920, forfeited or rendered void by the transfer of the same of the 25th September, 1920? and, if not, then (2) does that transfer affect the title to the property advertised by the defendant to be transported to and in favour of Allan Fung Shing? The rent reserved by the lease was $100 per year, but $200 was paid down in advance so that no further rent became payable until the 12th March, 1922. No rent *was* then paid, though the defendant states he tried to find his lessee Vieira to get payment, having become aware in July, 1921, of the alleged transfer and refusing to accept any rent from the plaintiff. Unfortunately both parties are hazy as to dates, but in September, 1920, the defendant visited the grant and found one Francis Gouveia there, he was working for the plaintiff, but the defendant says he did not know that, and thought he was Vieira's labourer. In April, 1922, the defendant sold the property to Shing and states he informed him that there was a lease of a portion but owing to non-payment of rent he considered it had been broken, he told him nothing about the transfer which he had known of for at least 9 months, and simply ignored it as a cause of forfeiture. It is hardly necessary to say that the non-payment of rent in advance was a breach of covenant against which equity relieves as a matter of course, and does not affect the present question; moreover, it is not pleaded in defence.

The two clauses of the lease to which one's attention is directed are as follows: “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.” It is a curious wording of a condition which usually commences in the negative form "the lessee shall not be at liberty. . ." and is perhaps due to the fact that the words " with the knowledge and approval of the lessor," were added to the original draft ; it is clear that the knowledge and approval could be given at any time before or after action taken, the restraint on alienation has been held to be not a 'usual covenant' and in case of doubt a construction favourable to the lessee would be implied: *Church* v. *Brown* (1808) 10 R.R. 74, and *Hampshire* v. *Wickens* (1878) 7 Ch. D, 555. The lease then is not *ipso facto* voided by the transfer, it is only voidable, and the lessor (the defendant) "shall have the *right* to re-enter"; the evidence shows he has never done so. In the case of *Kava-*

nagh v. Gudge (1844) 13 L.J.C.P. 99, 104 it was held that "the lessor had "no right to the possession of the property— except under the licence thus "expressly given : and it would only be on her entry that such right would "re-vest in her"; and again in *Moore* v. *Ullcoats Mining Co., Ltd.*, (1908) 1 Ch. 575, 587, 588 "Where the condition is, that the landlord may re-enter, "he must actually re-enter, or he must do that which is in law equivalent to "re-entry, namely, commence an action for the purpose of obtaining "possession." It is not necessary for me to decide whether on the facts disclosed on the evidence the lessor could have made a re-entry which the Court would not have relieved against, but I have already noted that he sold the property to Shing without attempting to exercise any right of possession and did not mention the transfer as a reason for the lease lapsing; moreover he was aware of the buildings and improvements the tenant was making on the leasehold: *Damn* v. *Spurrier* (1802) 7 Vesey Junior 230.

The lease then being at the most voidable, how far was, and is, the transfer of it good? As between the lessee and the transferee, it is of course a valid transaction: if a lessor's licence *is* necessary, it has been held that it is not incumbent on the transferee to procure it, in this case he appears to have been told by the lessee that the lessor's consent *had* been obtained. Under the Deeds Registry Ordinance, 1919, both the lease and transfer were duly filed as of record (section 12 (2)), and by section 16 it is declared that "As soon as any transfer or assignment of any mortgage "agreement, contract, instrument or cause of action. . . . . is filed as of "record as hereinbefore provided for, such transfer or assignment shall be "held to *be prima facie* valid and effectual as conveying to any transferee "or assignee all right title and interest in and to such mortgage, agreement: "contract, instrument or cause of action heretofore possessed by the person "transferring or assigning the same and expressed to be thereby transferred "or assigned subject, nevertheless, to the right of any person interested "disputing the validity of such transfer or assignment," By section 20 (1) "A transport of immovable property. . . . . shall vest in the transferee the "full and absolute title to the immovable property. . . . . subject to (b) All "registered encumbrances," and by sub-section (2) "the term registered encumbrances in sub-section (1) . . . shall mean mortgages, charges or leases. . . ."; and by section 6, the Registrar "shall (h) register, annotate or "record against any property registered in the Deeds Registry, any lease "contained in any . . . . duly recorded deed," and again by section 12 (4) "every lease which is filed as of record . . . . shall be annotated by the "Registrar against the property leased."

Unfortunately this latter was not done until the 24th November, 1922, so that the vendee of the property had no notice of the transfer of the lease until after this action was started (10th June, 1922).

The plaintiff is in my opinion fully justified in bringing these proceedings. The transfer of the lease is valid and effectual at the present time since no re-entry or other necessary steps have been taken by the lessor (and see *Mathews* v. *Smallwood* (1910) 1 Ch. 777), and the plaintiff is entitled to an injunction restraining the defendant passing transport of the property in question except subject to the lease, and transfer of the same. And I declare the opposition to be just, legal, and well founded. In the circumstances disclosed J grant no damages but give the plaintiff his costs. These costs will be on the lower scale, on the assumption that the value of the plaintiff's interest in the property does not exceed $250, for it must be remembered he owes over $200 rent to date.

Judgment for plaintiff.

Solicitors: *H. van B. Gunning, V. C. Dias.*

SIRRIKISSOON *v.* P. A. FERNANDES, *et al.*

SIRRIKISSOOX *v.* P. A. FERNANDES, *et al.*

[No. 437 OF 1922.]

1923. NOVEMBER 1, 23; DECEMBER 4; 1924 JANUARY 17, 23, 25; FEBRUARY 20.

BEFORE DOUGLASS, J.

Barrister—Acting as a Solicitor—Liable as such—Solicitor and client—Duty— Conflict between interest and duty—When relationship ceases—Purchase of property by Solicitor to the prejudice of client—Damages—Measure of.

S. consulted F., a barrister, with reference to the filing of a writ against D. S. on a promissory note for an amount exceeding $250. F. requested V. to act as solicitor in the matter. S. signed in favour of V. the necessary authority 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 $10 from F. for disbursements. He never enquired of S. as to the costs but spoke to F. about them who promised to write S. and 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 that 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.

Wright v. *Carter,* L.R. (1903) 1 Ch. 27; *Carter* v.*Palmer* (1841) 8 C1. & F. 657. *Guest* v. *Smythe* (1870) 39 L.J. Ch. 536; and *Allison v. Clayhills* 97 L.T.N.S. 709 applied.

In computing the measure of damages the court 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. and to V.

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

J. S. McArthur, K.C., and *S. J. Van Sertima* for P. A. Fernandes.

M. J. C. deFreitas, for L. G. Fernandes, the wife of P. A. Fernandes.

DOUGLASS, J.: The main object of the plaintiff's suit is to set aside the purchase of the retail spirit licence No. 193, which was sold at execution on 22nd May, 1922, and that he be declared the purchaser, and for $1,000 damages against the defendants for the wrongful and fraudulent acts of the defendants in connection with the said purchase, or. alternatively, that the first-named defendant be ordered to pay to the plaintiff the sum of $448.72 the amount of a judgment and costs obtained by him against one Manoel DaSilva.

The position of the parties having been that of client and professional adviser, or, from another point of view, that of principal and agent it is of importance to have their relationship from its commencement.

In February, 1922, the plaintiff meeting the first defendant, a barrister, at Belfield Court, asked him to act for him in the recovery of a sum of $300 due on a pro. note from one Manoel DaSilva, who had borrowed the money from him in 1921, to enable him to open a spirit shop at Plantation Hope; the result of this interview was that a lawyer's letter was written to DaSilva. In March the said M. DaSilva applied for a transfer of his licence to Mahaica and was refused, the first defendant, referred to herein as 'the defendant' acted for parties opposing the said transfer. In May one Rajnarain, hearing of the claim by the present plaintiff against M. DaSilva, put in his own suit, obtained judgment and levied on DaSilva's house at Hope; he bought it in at the sale leaving a balance of about $60 still due on his judgment, and eventually after the purchase of the licence by the defendant sold the house to the defendant who had bid against him at the sale. I note these facts as showing that from the very start the defendant appears to have been anxious to obtain M. DaSilva's property and interest in the spirit shop.

Early in April Pedro DaSilva, a brother of M. DaSilva, and the defendant's brother-in-law advised the plaintiff (with whom he appears to have been on very good terms) to continue his suit and the plaintiff again approached the defendant who undertook to sue for him. On 17th April the plaintiff and Pedro DaSilva went together to the defendant's house and discussed the situation

and the necessary fees and disbursements, and the nest day the defendant says he received from P. DaSilva the memorandum. ('Exhibit C') which reads as follows: "Dear Mr Silva, please see and settle the ten dollars with Mr. Fernandas for me until next week. Yours truly Sirrikissoon." This bears no date, and the plaintiff whilst admitting it to be his handwriting states he never borrowed money for the fees from Mr. P. DaSilva. On the 20th of April the writ was filed by Mr. Viapree, solicitor, and on the 13th May the defendant appeared in the Supreme Court and obtained judgment for $333.75 against M. DaSilva. Meantime on 6th May the execution sale of the Hope spirit licence was advertised in the *Official Gazette* on behalf of Messrs. Ferreira and Gomes. Ltd. — other creditors of M. DaSilva—to take place on Monday, 22nd May.

There is some little difference as to how Mr. Viapree came to act as solicitor in this matter, but his version may be accepted that on the 18th of April at the Belfield Court the defendant told him he required a solicitor for Sirrikissoon's case, and that on the arrival of P. DaSilva, and after speaking to him, he handed Mr. Viapree $10 and Exhibit 'C' and asked him to have the writ prepared quickly because other persons had proceedings against M. DaSilva. Mr. Viapree was the solicitor on the record for the purpose of the necessary formalities, but he himself states "Sirrikissoon was not my client, I came in through Fernandes" and again after the sale of the licence "I spoke to Fernandes about the costs and he promised to write to Sirrikissoon; I did not do it myself because I looked upon him as Fernandes' client" and again "if Siri had told me he wanted the shop I would have told Fernandes to communicate with him. I *did* say I received my instructions from Fernandes." It may be noted here that all the necessary papers (with the exception of the instructions to levy of the 17th May) were typed by the defendant’s clerk or on his typewriting machine.

It is abundantly clear that Mr. Viapree only saw the plaintiff twice in the matter, and that the defendant acted in the double capacity of barrister and solicitor for the plaintiff so far as it was legally possible, not only in the matter of M. DaSilva but also on behalf of the plaintiff's son.

To continue: On the 17th June, not having received his costs in the matter—and also in the matter of the son's case—the defendant wrote to Sirrikissoon what is known as a solicitor's letter asking for 'immediate attention' to save "unpleasantness," and in that letter he referred to Mr. Viapree as "Solicitor in the matter"—a very proper description for he was clearly not the plaintiff's solicitor.

We may now consider what took place during the week pre-

vious to and on the 22nd May, when the sale of the spirit licence took place ultimately resulting in the present action.

Sirrikissoon states that having seen a levy advertised by Ferreira and Gomes 'against the licence'—that was probably after 13th May, possibly on 17th May, the date on which the Court was held at Belfield—he told the defendant who said "all you want is your money or licence," if bidding closes at Gomes' amount the licence would belong to him, and if sufficient to cover the two judgments then he would get his money; that the witness asked him if he should attend the sale and the defendant replied "no man all you want is money or licence" and that he would go and bid and that witness told him he could go to $1,000, not more. The witness also stated that the defendant asked him to watch the shop so that nothing could be removed.

The whole of this evidence is denied point blank by the defendant, except the fact that they did meet at Belfield Court on 17th May, when the son's case was brought forward, and that they met again at Sparendaam Court.

On the 18th May Sirrikissoon went to Georgetown and ascertained from Mr. Carlos Gomes the amount of their judgment against M. DaSilva.

When the sale of the spirit licence opened on the 22nd May the bidding is said to have opened between Pedro DaSilva and Carlos Gomes on behalf of his clients, that is what the defendant and P. DaSilva allege, but it is curious that the Marshal who was conducting the sale does not remember P. DaSilva bidding, and Mr. Carlos Gomes—the most interested party—says "I can't say if P. DaSilva was there." "Only Mr. Fernandes and myself bid for the licence." Mr. Gomes and the defendant at any rate continued the bidding up to $318 when it was knocked down to the defendant; he signed the conditions, entered his wife's name (the second defendant) as the purchaser and paid the purchase money by cheque on his bank.

The first announcement of the result of the sale appeared in the "Argosy" on the 24th May, on the previous day the plaintiff and defendant met at Mahaica Court and the plaintiff gives in evidence that the defendant did not say who had bought it but he inferred that it was the defendant when he said " We can get $1,500 for the place and licence now" and that he (the plaintiff) replied he was very glad; they met again on another Wednesday —the plaintiff says 24th May but that could not have been so as it was a public holiday—and the plaintiff asked what about the licence, he wanted the money or the licence, to which the defendant replied "it is all right all you want is your money." The plaintiff then states that after two or three weeks, seeing that the spirit shop was doing business, he again approached the defend-

ant at Belfield Court and he would only reply "man you will get your money; I am busy;" next day he received the letter of 17th June referred to above.

The defendant's version of what happened after the sale, is that he called the plaintiff' and told him there was very little surplus, and he had bought the licence for his wife, that plaintiff did not reply, and that he saw him again a few days before he wrote the letter.

On receipt of that letter the plaintiff consulted Mr. Dias who wrote to the defendant on 24th June (Exhibit B2) to which a reply of the same date was received (Exhibit B) and on the 1st July, 1922, the present proceedings were started.

There were other letters put in (Exhibits O. 1 to 6) relating to Mr. Viapree's knowledge of the affair, but, after consideration, I cannot see that they in any way assist the Court in coming to a decision and are very doubtful evidence for they were all written after the present action was started, and the allegations therein contained have not been confirmed by the writers on oath with the exception of Mr. Viapree, so that I accept the latter's evidence on oath as conclusive of what was his connection with and knowledge of the matter.

The defence is that the plaintiff never instructed the defendant to bid for the licence at the sale, and that the defendant never told the plaintiff that it was not necessary to go to the sale, and he denied that on the day of the sale he was the plaintiff's counsel or agent and alleges that he attended the sale in connection with the sale of certain immovable property in Georgetown in which he was interested. Were there a jury, I think the facts to be 1eft to them on the evidence would be the following: (1) Did the defendant agree to represent the plaintiff at the sale on the 22nd May, and to bid on his behalf for the licence, and did he tell the plaintiff he need not attend the sale? (2) did the defendant attend the sale with a view of becoming the purchaser of the licence and (3) was the defendant in fact in the position of solicitor or agent to the plaintiff after the 13th May (the date of the judgment in the matter of *Sirrikissoon* v. *M. DaSilva)* and at the date of the sale?

The difficulty in answering these questions arises from two sources, first, from the conflicting evidence given by witnesses for both parties, and next, from the anomalous position a barrister can assume in this Colony in acting as a solicitor.

In answering the first question, it will be at once noted, and indeed it is admitted by the plaintiff, that no witness was present at the interview of the plaintiff and defendant when it is alleged the agreement took place, and the witnesses called on the plaintiff's behalf are only speaking what the plaintiff told them, which

carries the matter no further. Corroboration is attempted in the evidence of Rajnarain and Ramotar of what took place at the sale, but at the best the evidence is only what the defendant intended to do, and not that he had undertaken to do, and Rajnarain's evidence that Sirrikissoon had told him beforehand that the defendant was appearing for him and that if he got the licence he would pay him (Rajnarain) what he owed him, is inconsistent with his first statement that he had gone to the sale intending to bid on his own behalf and that he only refrained from doing so because the defendant told him there that he was going to bid for his friend Sirrikissoon; Ramotar's evidence also goes no further than this. It is suggested that Ramotar was not at the sale, only Rajnarain actually states he was present. The defendant says he saw Rajnarain but did not notice Ramotar (the clerk) and does not think he could have missed him had he been there; Rohee says he does not remember Ramotar being there though he saw Rajnarain; Dr. Fraser says he did not see Ramotar but then he did not see Mr. Vivian Dias who is proved to have been there; Mr. Carlos Gomes cannot say if Ramotar or Pedro DaSilva were present and Pedro DaSilva himself says he saw "Luckhoo's clerk," "he spoke to his grandfather—old Ramotar—and went away." The probabilities are that Ramotar went with Rajnarain, as he states, but left at an early stage.

I am of opinion that there is not sufficient proof that an agreement was made between the plaintiff and defendant that the latter would attend the sale on his behalf and bid for the licence, but that (a) the plaintiff—whether rightly or wrongly—believed that the defendant was going to bid for him at the sale and (b) that the defendant was not anxious for the plaintiff to attend the sale or for anyone to bid against him there can be little doubt; and again, for the defendant to tell the plaintiff to keep a watch on the licensed premises would be a perfectly natural request, and appears to me to be confirmed by other incidents given in evidence. Even if there were some evidence of an arrangement between the plaintiff and defendant that the latter should purchase the licence for the plaintiff's benefit 1 should follow the finding of the Court in *James* v. *Smith* (1891) 1 Ch. 384 and hold that the terms of the arrangement have not been proved sufficiently to enable it to be enforced as against the defendant.

With respect to the second question, the defendant alleges that he only attended the sale because the house he was living in South Street was being ' put up' at the same sale; he may have been there for that reason as well, but he was aware of the fact that the licence was to be put up for sale and that he had no interest in it the court would find it difficult to believe. I have in

fact already drawn attention to this, and it is confirmed by the defendant's letter of the 24th June, 1922, to Mr. Dias, "I told my brother-in-law, Mr. P. DaSilva, to tell Sirrikissoon to find the disbursements and I would put in his writ and try and see what surplus, if any, would come his way.....As it is the only surplus was $2.48 and my costs are still unpaid."

Mr. Viapree—the solicitor on the record—gives in evidence that he handed the defendant the bill of costs in the matter at the sale. Why? Unless it were with reference to the sale of M. DaSilva's licence, for the costs were never applied for until the 17th June.

The evidence of Mr. P. DaSilva too is of some interest on this point, he had called for his brother-in-law at his chambers on the 22nd May and told him he had come to bid for the licence and they both went together to the Registrar's Office; he proceeds, " I told Fernandes that I meant to buy it (*i.e.*, the licence) as soon as I saw the advertisement; I mentioned no price, he told me to try to keep out competition." And yet his bidding was of such an unobtrusive character that neither the Marshal nor Mr. Carlos Gomes—the execution creditor—knew he was bidding! The only inference can be that the defendant intended to buy the licence if it went at a moderate figure and that his brother-in-law was there to assist him though both of them knew well that it was of great importance to the one's client, and the other's friend, Sirrikissoon, that the licence should fetch a good figure.

With regard to the third question I have already given my reasons for looking upon the defendant as being the plaintiffs solicitor and confidential adviser and there is nothing to show that he ceased to act in that capacity up to the date of his letter of the 17th June. It was the fact that Rajnarain had put in a suit against M. DaSilva, and that a sale of the latter's licence was advertised that hastened the suit of *Sirrikissoon* v. *M. Da Silva*, to enable the plaintiff to levy on the surplus.

By O. VI. r. 1, "Every solicitor who shall be engaged in any action shall be bound to conduct the same.....until the final determination of the action whether in the court of first instance or on appeal"; the fruits of the judgment not having been obtained there was still a duty imposed on the solicitor. When a barrister takes upon himself the duties of a solicitor as he is entitled to do in this colony, he also submits himself to the liabilities and disabilities which attach to the office.

In *Wright* v. C*arter* (1903) 1 Ch. 27, 53, C.A. it was said that "if it could be held that the employment of the independent solicitor took that particular matter out of the hands of the regular solicitor, it could not possibly be said that the proper

inference was that the influence of the regular solicitor might rationally be supposed to have ceased."

Holding as I do, that there was no settled agreement between the plaintiff and defendant for purchase of the licence by the latter, that the defendant had meant to acquire the licence when the opportunity occurred, and eventually obtained it for the sum of $318—leaving a surplus only of $2.48 to his client's credit, and that the defendant was at the date of the purchase still the legal adviser of the plaintiff with the knowledge that by his transaction his client would lose the fruits of his judgment for $333.75 and $95.68 costs, the question still remains, has the defendant committed any offence for which he is liable to the plaintiff in damages.

This is not a case like many of those the court was referred to where a solicitor had purchased the property of or received a gift from, his client; what the defendant did was to purchase for his own benefit a property which he must have known would have been more properly purchased on his client's behalf, being aware that his client had levied on the surplus proceeds and that he was in effect bidding against the interests of the plaintiff in buying the property for himself. When he states in his evidence "He (the plaintiff) was not interested in the sale and gave me no instructions; he knew other creditors were suing" it is difficult to understand what the defendant means; the plaintiff was interested enough to come up to Georgetown on the 17th May to ascertain the amount of the judgment debt on which the sale was advertised, and on the same day a levy to attach the surplus proceeds "before any one else" was put in on the defendant's instructions to Mr. Viapree.

It is the duty of the legal adviser or agent to give his client or principal—as the case may be—the benefit of his personal superintendence and judgment and to continue until its determination in the conduct of any case undertaken by him, not to take advantage of his position to deal in business on his own account at the expense or to the detriment of his client. How could the defendant have given the plaintiff disinterested advice with respect to the purchase of the licence seeing that he himself was intent on purchasing it?

In *Carter* v. *Palmer*, (1841) 8 Clark & Finelly 657, it was held that the employment of counsel as confidential legal adviser disables him from purchasing for his own benefit charges on his client's estates without his permission : and although the confidential employment ceases, the disability continues as long as the reasons on which it is founded continue to operate" and in *Guest* v. *Smyth* (1870) 39 L.J. Ch. 536 that, generally speaking, where a man's duty and interest in respect of a purchase

conflict he cannot become a purchaser. Mr. Justice Parker states in the course of his judgment in *Allison* v. *Clayhills* (1908) 97 L.T. 709, 711, "that although the relationship of solicitor and client in its strict sense has been discontinued the same principle applies" (*i.e.*, that the onus of upholding the validity of the transaction rests upon the solicitor) as long as the confidence naturally arising from such a relationship is proved, or may be presumed to continue. "The test appears to be the proper answer to the question whether in the particular transaction he owes his client any duty in the contemplation of a Court of Equity." This case was with reference to the purchase by a solicitor of real estate from his client, but the principle is the same. "In considering whether in any particular transaction any duty exists, such as to bring the ordinary rule into operation, all the circumstances of the individual case must be weighed and examined."

I have duly weighed and examined the circumstances, and the evidence is convincing that the defendant owed the plaintiff, his client, a duty which he failed to perform and he has not satisfied the court that his transaction in purchasing the licence was anything but a means of depriving the plaintiff of his last chance of recovering his judgment. A solicitor is an officer of the court and where loss has been occasioned by a breach of duty on the part of a solicitor the court will hold its officer responsible and order him to make good the loss occasioned by such breach of duty. It is true that the defendant is by profession a barrister and so not an officer of the court as such, but by Ordinance No. 18 of 1897, section 9 (1) "a person practising as a solicitor and whose name is enrolled.....shall be deemed to be an officer of the court." (2) "a barrister who practises as a solicitor shall in so far as he so practices be deemed to be a solicitor within the meaning of this section."

The evidence satisfies me that had the licence been purchased by or on behalf of the plaintiff it would probably have ultimately realized for him the judgment debt due from M. DaSilva.

It is a very difficult matter to arrive at a sum which would represent the exact loss to the plaintiff in not having acquired the licence that is its value at the date of the sale for I cannot take into account any improvement in value since. The plaintiff states several times he would be satisfied with his $448.72 and one infers that the licence had no allurement to him except in so far as it was a security for that amount. The defendant evidently thought it worth $318 but then he had no further amount to secure and one must take into consideration that the plaintiff would have had to repay to the defendant the $318 had the latter advanced it, as he must have done had he purchased for

the plaintiff. But, again, as it was entirely due to the defendant's conduct that the judgment obtained for him was fruitless it is inequitable that he should receive any costs in the matter of *Sirrikissoon* v. *M. DaSilva,* and I therefore propose to add to the damages an amount sufficient to neutralize the costs. I accordingly assess the damages suffered by the plaintiff at $250.

I feel I ought not to close this case without expressing how strongly the court deprecates the conduct of Mr. P. A. Fernandes as a barrister in taking so light a view of his professional position as he appears to do.

I give judgment for the plaintiff against the first defendant in the sum of $250 damages and costs.

There is no evidence that the second defendant was in any personal way concerned in the transaction and I give judgment in her favour, but in the circumstances and because of the relationship between the two defendants I cannot allow her any costs.

Judgment for plaintiff for $250 damages.

Judgment for L. G. Fernandes.

Solicitor for the plaintiff, *F. Dias.*

Solicitor for P. A. Fernandes, *A. V. Crane.*

Solicitor for L. G. Fernandes, *W. D. Dinally.*

WILLIAMS, *et al*, *v*. JOHN, *et al.*

[No. 67 OF 1924.]

APPELLATE JURISDICTION.

1924. NOVEMBER 11 BEFORE SIR CHARLES MAJOR, C.J.

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, sect. 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 Ordinance 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 judgement 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.

Booth v *Appam,* A. J. 10.2 09. and

Hotchkiss v *Wills,* J. 4.1.08 considered.

(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.

Appeal from the order of Mr. E. E. Winter. Warden of the No. 3 and 4 Mining Districts, Mazaruni, dismissing a complaint brought by Williams, Cozier and Lanferman against David John, B. A. Stephens, and others for trespass on their locations in the Tawroniro creek. Notice of and reasons of appeal were served on behalf of all the complainants; but only one of them, to wit, Charles Cozier complied with the provisions of section 93 of the Mining Ordinance (No. 34 of) 1920 by entering into a bond for $50 to prosecute the appeal. On the appeal coming on for hearing counsel for the respondents David John and Benjamin Adolphus Stephens raised certain preliminary objections which sufficiently appear from the judgment.

P. N. Browne, K.C., for the appellent Charles Cozier.

J. A. Luckhoo, K.C., (McLean Ogle with him) for the respondent David John.

E. F. Fredericks for the respondent Stephens.

Cur. adv. vult.

SIR CHARLES MAJOR, C.J: This is an appeal by Williams, Cozier and Lanferman against a dismissal by the Commissioner of Lands and Mines of a complaint by the appellants against John, King, Archer, Stephens and Chung for trespass on certain mining claims. Notice of appeal with reasons therefor having been served, Cozier in due time has given bond with sufficient surety in the sum of $50, conditioned to prosecute the appeal, abide its results, and pay its costs. Williams and Lanferman gave no bond.

It is objected on behalf of the respondents that the appeal cannot be heard for two reasons. First, in that the complaint being joint, the appellants must all have joined in the bond and Cozier cannot avail himself of his own bond without the obligation of his two co-appellants. The objection cannot be sustained. By reason of the provisions of section 23 of the Magistrates' Decisions (Appeals) Ordinance, 1893, (which, by section 91 of the Mining-Ordinance, 1920, are applicable to these proceedings), neither

Williams nor Lanferman can be heard, but their vice does not extend to Cozier, who has complied with the law as to giving security for costs and whose own bond is not invalidated by reason only that his co-appellants did not join in it. His procedure does not bring them in, but their default does not keep him out.

The second reason assigned by Mr. Luckhoo for non-audibility of the appeal is that, even if Cozier has complied with the provisions of the law so far as he has entered into a recognizance to prosecute the appeal, abide its results and pay its costs, that recognizance is in an insufficient sum because there are five defendant-respondents, against whom separate and individual trespasses are alleged to have been committed on three separate occasions, and repeated on other three separate occasions, and because two of the respondents, John and Stephens, are separately represented by counsel. It is contended that Cozier must have given a separate bond in at least $50 to each of the five respondents, and for authority for that contention I am referred to *Booth* v. *Appam* 19.2.09 where the appellant had charged four defendants with having been found in a spirit shop within prohibited hours. The complaint was dismissed, the complainant appealed, and entered into a bond in the sum of $10 to abide the costs of the appeal. The appeal coming on for hearing, it was objected that the recognizance was insufficient, that it should have been in the sum of $40, not, it is to be observed, that there should have been four bonds each in the sum of $10. Sir Henry Bovell, the learned Chief Justice of the day, in the course of his judgment said: "The appeal in this cafe must in my opinion be regarded as being an appeal in four separate cases, and the amount of the recognizance must be adjusted accordingly. Any other conclusion would prevent a recognizance in a case like this being necessarily sufficient security for payment of costs." And His Honour concluded thus; "It follows that the recognizance entered into is insufficient, and the court must, therefore, affirm the magistrate's decision and dismiss the appeal."—holding, therefore, that insufficiency of security for costs was failure to comply with the requirements of section 16 of the Magistrate's Decisions (Appeals) Ordinance, 1893.

Now, I see nothing in that judgment enunciating or affirming a 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 for costs in respect of each respondent. Should I see any express or implied enunciation

of a rule of the kind I would say, with all respect, that I disagreed with the learned judge, for in my opinion there is no such rule. My attention has been directed to the case of *Hotchkiss* v. *Wills* 4.1.08 where the appellant, having appealed against the dismissal of his complaint against a number of defendants for unlawful possession, lodged $10 only to abide the costs of the appeal. On objection that $10 should have been lodged for the costs of each respondent, Sir Alfred Lucie Smith, then acting Chief Justice, said: "There is only one appeal and I am of opinion that only one sum of $10 need be lodged to abide the costs of the appeal." On the question of sufficiency or insufficiency of the security where there are more respondents than one, the decision conflicts with that of Sir Henry Bovell.

But, whether under section 16 of the Ordinance of 1893, or section 93 of the Mining Ordinance of 1920, the question is always and entirely one of sufficiency of security to the satisfaction of the officer taking it—the bond is not given to the respondent or respondents but to his Majesty,—and the invariable test to be applied by that officer (and, indeed, by any person or court to fix amount for security for costs) is, what are the probable costs of the particular appeal? And the answer to the question must, of course, depend (in some degree) upon the number and interests of the respondents. Now the Commissioner here does not appear to have applied that test, for I agree that a bond in $50 only is insufficient for the probable costs of this appeal. It seems, however, to have been forgotten, or perhaps practitioners are unaware, that there is such a common application as that for increase of security. The respondents, strictly speaking, in not making that application have laid themselves to the suggestion (at any rate) of waiver of a higher degree of security. Be that as it may, I am clearly of opinion that, (and here I part company with my learned predecessor in *Booth v. Appam*) while the Commissioner has erred in the exercise of his discretion by fixing the security for the costs of the appeal in an insufficient sum, that is no ground for dismissing the appeal under section 23 of the 1893 Ordinance and section 94 of the Mining Ordinance, because the appellant, has in fact, complied with the requirements of section 93. What has he done? He has, in due time, entered into a recognizance—I follow that section— with required suretyship, in a sum of money not less than $50, to the satisfaction of Commissioner, on the prescribed conditions. That the sum of money happens, in the circumstances, to be insufficient is, to quote the words of the judgment in *Booth* v. *Appam*, a matter for "adjustment." And that adjustment—the Ordinance of 1893 enables me to do so—I am prepared to make if the respondents desire it. (I think I should remind counsel that no

argument has been addressed to me on the language of section 28 of the 1893 Ordinance, but I do not now notice the omission). If no application is made for adjustment the appeal must proceed. If the application is made, I will order the appellant to increase his security, and as two only of the respondents are represented by counsel, an important element in answering the question, what are the probable costs of the appeal, the increase will be, with the same surety if he be sufficient to the registrar, or with another surety, to the sum of £25.

Objections overruled.

Order for variation of bond.

Solicitors: for appellant, *E. D. Clarke.*
for David John, *A.V.Crane*
for B. A. Stephens, *S. Wood Ogle*

BEATRICE FERNANDES *v.* JOSEPH FERNANDES.

[No. 323 OF 1914.]

1924. NOVEMBER 19. BEFORE SIR CHARLES MAJOR, C.J.

Divorce—Decree— Provision for permanent maintenance—Service of Order—Whether personal service necessary—Rules of Court, 1900—Matrimonial Rules, 1921—Decree before — Rules of Court 1900 to be followed—Substituted service—Grounds for granting.

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

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.

There is no provision under the Rules of Court, 1900, for the personal service of an order to pay money.

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.

Hopton v *Robertson* (1884) W. N. 77, and

Re a solicitor 33 W. R. 131 followed.

Summons for substituted service of a decree of divorce dated 3rd October, 1914. In that decree were provisions granting the custody of the three children of the marriage to the plaintiff, Beatrice Fernandes, and ordering the defendant Joseph Santos Fernandes to pay to her the sum of $40 per month by way of permanent maintenance. It was provided in the order that the first instalment should be payable seven days after the service of

the order upon the defendant, and the second and subsequent instalments on the 15th November, 1914, and the 15th day of every succeeding month. The defendant left the colony two or three days after the decree was made, and before it was drawn up, and has never returned. He never entered any appearance in the divorce suit. The decree was never served. The plaintiff wished the decree to be served in order that she might apply for the appointment of a receiver by way of equitable execution.

E. M. Duke, for the applicant (plaintiff).

SIR CHARLES MAJOR, C.J.: On the 12th day of February, 1915, the plaintiff obtained judgment in this action whereby the court ordered her marriage with the defendant to be dissolved and the payment of permanent maintenance and the costs of suit. The payment of maintenance was to be made by monthly instalments, the first instalment to be paid within one week after service of the order on the defendant. Judgment was obtained in default of defence. Very shortly after judgment the defendant left the colony without service of the order having been effected either upon him or any one on his behalf. He has paid no maintenance; he has not paid the costs of suit. He has no representative in this colony, but his mother and sister reside here. There is a statement in the plaintiff's affidavit filed in support of this application of her information and belief that the mother and sister correspond with him. Mr. Duke informs the court that the defendant is in America.

The plaintiff now asks for an order for substituted service of the order on the mother or sister of the defendant, counsel submitting that the service of it directed therein must be—personal. We know that substituted service is permitted only when personal service of a writ of summons or an order is required and cannot promptly be effected. (Order VII, Rule 1, and Order XLVIII, r.5, and personal service is conceived to be necessary in this case upon (it is said) the practical principles in matrimonial causes; but reference to the practice in these causes as now existing under the Rules of 1921 is inappropriate, for the court's jurisdiction in divorce in 1915 was governed entirely by Rules of Court, 1900, in the same way as actions, and there was then no such principle as now prevails that a decree, either nisi or absolute, must, when it contains collateral matters, such as an order for the children's custody, be served on the opposite party. Save for the direction therefore contained in the order for the payment of the first instalment of maintenance within a certain time after service of it, it fell within the general proposition, apart from rule 1 of Order XXXVI., that service of an order containing an absolute direction to pay, or giving an absolute right to recover is not

a condition precedent to the issue of execution: *Hopton* v. *Robertson* (1884) W. N. 77. and *Re a Solicitor* (1884) 33. W. R. 13.1. It is stated by counsel and is to be inferred from the plaintiff's affidavit that the only object of this application is to enable the plaintiff to the eventual issue of execution and realise the fruits of her judgment. I need not consider the necessity for personal service of an order (with the proper indorsement) arising from the terms of rule 5 of Order XLI. of the English rules, for that rule does not appear in our Rules of Court. But, at any rate, service of this order would not be personal in the absence of an express direction in it to that effect. It contains no such direction, and substituted service of it therefore cannot be ordered. It is not for me, of course, to tell solicitors what steps they should take in any particular proceeding, but I may mention that there is rule 2 of Order XLVIII., and that the plaintiff knows, or can ascertain, the precise whereabouts of the defendant.

The application is baseless and must be dismissed.

Application dismissed.

Solicitor: *A. McL. Ogle.*

Re WEBBER, *ex parte* WIGHT.

IN INSOLVENCY.

[No. 31 OF 1924.]

1924. OCTOBER 22; NOVEMBER 8, 24. BEFORE DOUGLASS, J.

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—Petition presented for improper motives—Ousting a debtor from Legislature—No obligation in Court to adjudicate—Insolvency Ordinance, 1900, section 18 (2)—Shall adjudge.

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.

In re Renison (1913) 3 K.B. 300, and

In re a debtor, ex parte Smith (1902) 2 K.B. 260 applied.

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 seven days.

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

In re Hain, ex parte Ellis (1871) L.R. 6 Ch. 602, and

In re Smith, ex parte Durban (1902) 1 K.B 33 considered

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

Pure Spirit Co. v. *Fowler* (1890) 25 Q.B.D. 235.

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 overruled.

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 counterclaim or set off which equalled or exceeded 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.

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

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.

In re Thurlow, ex parte Official Receiver, (1895) 2 Manson, 158, 160, 161 followed.

On the 17th September, 1924. Percy Claude Wight obtained a final judgment against Albert Raymond Forbes Webber and the "Daily Chronicle," Ltd., for $296 and $1,783.34 costs. In pursuance of this judgment the plaintiff on the 8th October, 1924, levied on the plant, fixtures and stock-in-trade of the "Daily Chronicle," Ltd. On the said day William Fogarty, Ltd., filed an application to the court for the compulsory liquidation of the defendant company. On the 9th October the Official Receiver was appointed *interim* receiver.

On the 9th October Percy Claude Wight took out an insolvency notice in respect of the said judgment and served it on A. R. F. Webber on the said day.

A. R. F. Webber applied to the court to accept Nelson Cannon and J. E. Strickland as sureties pending the realisation of the assets of the "Daily Chronicle." Ltd. He averred that all creditors would be paid in full. He also asked for an injunction restraining Percy Claude Wight from proceeding on the insolvency notice. The application was filed on the 16th October, 1924. It was made *ex parte* but notice was ordered to be given.

On the 20th October, 1924, Percy Claude Wight filed a petition for a receiving order against the estate of Albert Raymond Forbes Webber, alleging as the act of insolvency his non-compliance with the bankruptcy notice served upon him on the 9th October, 1924.

The application by A. R. F. Webber was fixed for the 22nd October. In opposition thereto Percy Claude Wight swore that Nelson Cannon was the owner of Bel Air Park and of W1/2 of lot 105, Lamaha Street, Georgetown, both of

no assets it is useless making him a bankrupt, and that the creditor is only bringing pressure to bear for a collateral purpose and not to secure his debt. He referred to *in re Adams ex parte Griffin* (1874) 48 L.J. Bptcy., 107, a case in which it was proved that the petition was brought wholly outside the legitimate purpose of bankruptcy, based upon proceedings illegal, inequitable, vexatious and oppressive. *In re Baker, ex parte Baker* (1887) 5 Mor. 5 is distinguished from *in re Adams* (1874) 48 L.J. Bkptcy, 107, but also lays it down that when the court sees that a petition is being presented for some collateral purpose, or with a view of putting pressure upon the debtor it will refuse a receiving order. The debtor has hinted at, but proved nothing of the sort here, and the cases do not apply: though I am bound to say that had proof been given that the object of the proceedings was for the main purpose of ousting the debtor from his seat in the legislature 1 should have unhesitatingly refused an order.

In addition to a lack of evidence to show any oppression in these proceedings, learned counsel for the judgment creditors has pointed out that his *bona fides* is shown by taking out execution in the first place against the "Daily Chronicle Co.," Ltd., and that it was only after being foiled in that direction that he proceeded against the debtor.

It is only left to enquire whether the debtor has satisfied the court within the meaning of section 6 (3), that (1) he is able to pay his debts, or (2) for other sufficient cause no order ought to be made. In *ex parte Dixon* (1884) 13 Q.B.D. 118, 123, C.A., Baggallay L. J., states, “there are many “ways in which 'sufficient cause' might be shown to induce the court to “refuse to make a receiving order. The debtor might be able to show that “some of his friends were prepared to give a guarantee for the payment of “his debts in full, or that there were some proceedings pending by means of “which, if he should be successful in them, he would obtain ample funds to “enable him to pay his debts. There may be a great number of other things “(akin to the court being satisfied that the debtor is able to pay his debts) “which may afford a good reason for the judge or registrar refusing to “make a receiving order.”

The debtor has suggested, rather than offered a vague guarantee to be postponed in its effect unless or until certain circumstances did or did not take place—certainly not sufficient for the court to rely on, nor to satisfy the judgment creditor's rights. The debtor also referred the court to *In re Hecquard, ex parte Hecquard* (1889) 24 Q.B.D. 71, 75, C.A., where it was held that the fact that there was no other creditor than the petitioning creditor is not a *conclusive* reason for dis-

missing the petition, *but* the court has a discretion in the matter; and he asks that the court should now exercise that discretion in his favour, and adds that he has no assets available for distribution even if there were any creditors. I rather presume this last reasoning is based on the decision in *Ex parte Robinson* (1883) 22 Ch. 1) 816, 818, C.A., where the then Master of the Rolls said the court ought not to make a receiving order where it would be doing a 'vain thing,' but *Ex parte Leonard* (1896) 1 Q.B. 473, C.A., considerably narrowed the scope of the decision in *Ex parte Robinson* (1883) 22 Ch. D. 816, 818, C.A., when it was held that the mere fact that apparently the debtor had no assets for distribution among his creditors is not a sufficient cause for refusing to make a receiving order, and the *ratio decidendi* of that case applies equally to the allegation that the only creditor was the petitioning creditor, and as Lord Esher, M.R., said in *In re Hecquard* (1889) 24 Q.B.D. 71, 75, C.A., "There might be very good reasons why the debtor should be made a bankrupt even if he had only one creditor." The court cannot at this stage tell whether the proceedings in bankruptcy will have no result, it has not the proper material before it to judge, there is no proof that the debtor has no assets—that depends on a variety of circumstances—nor that there are no other creditors. It is obvious that the mere statement of the debtor, even when made in good faith, is not sufficient. If the receiving order is made then there will be a public examination when the necessary facts can be obtained.

A sounder proposition is where the debtor alleges that it is possible a fund may be forthcoming which will be available to pay the judgment debt. If that possibility were a probability it would certainly not be desirable that an adjudication in bankruptcy should be made: but, again, this is not the time for, nor has the court the means of deciding whether the "Daily Chronicle," Ltd., are solvent, or that the debt will be met in full or even in part, by them. I have given the fullest attention to the able reasoning of the debtor, but he has not persuaded me, for he has not made out a case in which the court should exercise its discretion in his favour and the receiving order must go.

Although at one time I had doubts I have the less hesitation in making the order, as the making of a receiving order by no means implies the necessary insolvency of the debtor, in spite of section 18 of the Insolvency Ordinance: and many of the pleas he has raised may have greater weight at a later stage when more facts are known, and more proof has been given. It was held in *In re Thurlow, ex parte Official Receiver* (1895) 2 Manson 158, 160, 161, C.A., that under the Bankruptcy Act, 1883, s. 20 (7) — our parallel section being s. 18 (2)—the expression 'shall adjudge'

is not absolute but was intended to leave the court a discretion to refuse to adjudicate a debtor bankrupt, that section being controlled by section 105 (2) and section 109—our sections 89 (2) and 93 respectively—for as Lord Esher, M.R. says "of all the procedures in our courts, that of the Court of "Bankruptcy will be the first to brush aside all technicalities to get at what "is fair and just . . . It is not the creditors who administer bankruptcy law; "it is no part of the rights of the debtor to interfere; no Official Receiver "has aright to interfere, except subject to the control or orders of the court ". . . It is the Court of Bankruptcy alone that controls the administration "through its officers and above them is the Court of Appeal."

I make the Receiving Order asked for with costs[a]

Receiving Order made.

Solicitor for Percy Claude Wight: *Francis Dias.*

[a] The receiving order was rescinded on the 7th February, 1925. There was no public examination of the debtor. See also *In re A. N. G. Ramotar*, Insolvency No. 8 of 1924, order dated 25th July, 1924

RAMPERSAUD SINGH *v.* RAMLOGAN, *et al.*

[No. 469 OF 1923.]

1924. NOVEMBER 25, 26, 29; DECEMBER 9.

BEFORE DOUGLASS, J.

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.

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

That the testator knew and approved of the contents of the will is part of the burden of proof assumed by the propounder thereof.

Cleare and another v. *Cleare* (1869) L.R 1 P. and D. 655 applied.

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 inquiry is therefore shut out.

Fulton v. *Andrews* (1875) LR 7 H.L. 448, 469 applied.

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.

Baker v. *Batt* (1838) 2 Moore P.C.C. 317.

Brown v Fisher (1890) 63 L.T. 465, and

Low v. Guthrie et al (1909) A.O. 278, 283, applied.

The will propounded by the defendants who were the sole beneficiaries was read over to the testatrix It was deposited within 8 hours of her death. There was a great conflict between the witnesses as to whether the testatrix understood and appreciated the contents of the will, or 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.

Action to restrain the granting of probate of the will of Tetri dated 7th day of December, 1923. The facts and arguments sufficiently appear from the judgment.

S. J. Van Sertima, for the plaintiff.

E. F. Fredericks, for the defendants.

Cur. adv. vult.

DOUGLASS, J.: It appears that two documents dated respectively the 17th November, 1921, and 7th December, 1923, each purporting to be the last will of an East Indian woman, Tetri by name, have been lodged for probate, but at present the court is only concerned with the will of the latest date, for the executor named in the previous will, Rampersaud Singh has brought this action to restrain the Registrar from granting probate of the said will of the 7th December, 1923, and calling upon the three defendants to prove the said will in solemn form, and in default that the Registrar be directed to issue probate of the will bearing date the 17th November, 1921, The plaintiff having formally proved his status to intervene in the matter, in accordance with the usual procedure in this court, the three defendants, being the propounders of the will now in question, were called upon to begin, and the statement of claim of the plaintiff takes upon itself the nature of a defence (see note to order 19, r. 25, in Annual Practice, 1924, p. 356). Paragraph 2 of the statement of claim alleges that "the document purporting to be the last will and testament of "the said Tetri dated the 7th day of November, 1923, . . . was not executed "according to the provisions of the Wills Ordinance 1906," and paragraph 3 "that the cross or mark or signature of this document . . . . is a forgery, and "was not made by the said Tetri herself nor by her direction."

It was thereupon objected by learned counsel for the defendants that as the statement of claim contains no plea of incapacity on the part of the deceased on the 7th December, 1923, to make her will, nor of undue influence on the part of the defendants, no questions could be asked either in examination or cross-examination with a view to proving either incapacity or undue influence. I am inclined to agree, except in so far as evidence of incapacity might be part of the proof of the signature or mark to the will being a forgery, or the reason why the mark could not have been made by her or by her direction.

In the local case of *Pereira v. Pereira* (1916) L.R.B.G. 9, Mr. Justice Hill held that where the question of the capacity of the

testator to make a will has not been raised on the pleadings, evidence opening such question is not admissible, and Order 17, r. 7, appears to support his ruling; the two English cases *Lord Salisbury* v. *Nugent* (1883) 9 P.D. 23, C.A., and *Hawkinson* v. *Barningham* (1883) 9 P.D. 62, C.A., should, however, be noted, where it was decided that with regard to the pleas of undue influence and of insanity the practice of the Probate Division was not governed by Order 19, r. 6 (which corresponds to our Order 17, r. 7) with respect to the obligation of parties to furnish particulars of matters pleaded. The decision in these two cases still holds good in this colony as we have no rule corresponding to r. 25a of Order 19 which was added in 1901 to meet the effect of this decision. See *McLeod* v. *Earl of Shrewsbury* (1922) p. 112. By Order 17, r. 27, "neither party "need in any pleading allege any matter of fact which the law presumes in "his favour, or as to which he burden of proof lies upon the other side, "unless the same has been first specifically denied," so if a will is rational on the "face of it, and appears to be duly executed, it is presumed in the absence of evidence to the contrary to be valid," and "in the absence of "suspicious circumstances the fact that a will has been read over to the "testator affords a strong presumption that he understood and approved of "its contents." But here the parties propounding the will have been put to the proof and the presumptions lapse, and as Lord Penzance says in giving judgment in the case of *Cleare & Anor* v. *Cleare* (1869) L.R., 1 P. & D. 655, 657, "in all cases whether through the medium of a presumption "unrebutted, or of positive evidence to that end, the party who puts "forward a document as the will of a testator must establish the fact that "the testator was competent to make a will when he executed it. This "competency forms part of the proposition that a will was made. For if "there was no competency—no testable capacity—then there can be no "will. I am of opinion that the testator's knowledge of the contents of his "alleged will stands upon the like footing. . . That the testator did know "and approve of the contents of the alleged will is therefore part of the "burthen of proof assumed by everyone who propounds it as a will, and "see *Brown v. Fisher* (1890) 63, L.T. 465."

It also lies upon the propounders of the will to prove that section 4 of the Wills Ordinance, 1906 (a copy of section 9 of the Wills Act, 1837) has been complied with. The facts effectually proved by the defendants are that the document now propounded as a will was actually written by one Gangapersaud at the dictation of William Hodge who was called in for the purpose by Ramlogan the first defendant. It is difficult to say who dictated the subject matter of the will, it is agreed that Tetri could speak

English as well as Hindi, and the defendants and their witnesses allege that she gave full directions, and spoke as to debts due to her—implying that she was in full possession of her wits,—but according to Seenanan—a witness to the alleged will—it was the second defendant who gave all the directions to Hodge. In any event the will was read to the deceased, but here again a curious discrepancy, for Hodge says he read it to her and is continued by Boodram the other witness to the will, whilst all the other witnesses agree that Gangapersaud read it, and he himself says so. Gangapersaud and Seenanan assert that Tetri never touched the pen to make her mark and at that time her eyes were half closed and she was lying on the floor; on the other hand the evidence for the defendants goes to show that Tetri took the pen and lifted it to her forehead, and there is considerable divergence in the evidence as to who put her mark to the will, that Rampersaud Pundit took a leading part in inducing Tetri to take the pen (if she did take it; is admitted. Again, whether the witnesses to the will signed before or after Tetri's mark was affixed, and whether Tetri could have seen them sign is left uncertain by the evidence though one thing both sides concur in is that the witnesses signed in the gallery of the house in the one room of which Tetri lay sick.

With the exception of the defendant Sookia, there was no relationship between the testatrix and the opposing parties, and she can only claim to be connected as the widow of the testatrix's son, but the evidence shows that she deserted her husband who died in hospital, and he by his will left all to his mother and nothing to Sookiah his wife. Boodram, one of the witnesses to the will declared that this son's will and Transport were left with him by the testatrix, and he gave them up to Seenanan (the other witness) after her death, this is evidently to account for the possession of these documents by the plaintiff, for his version of the story is that the Testatrix gave them to him to keep about 4 years before this shortly after she had made her will of 17th November, 1921,

I don't intend to go into the evidence more in detail, as enough has been given to show how conflicting it is. In making its decision, the court is guided by the rule laid down in many cases *inter alia*, *Baker* v. *Batt* (1838) 2 Moore P.C.C. 317, 319, *Brown* v. *Fisher* (1890) 63 L T. 465 (already referred to) and *Low* v. *Guthrie & Ors* (1909) A.C. 278, that if the party propounding a will takes a benefit under it, that is a circumstance which ought to excite suspicion of the Court, calling it to be vigilant and zealous in examining evidence in support, and in *Fulton* v. *Andrews and Anor* (1875) L.R. 7 H.L. 448, 469 Lord Hatherley adds, “There is no “unyielding rule of law (especially where the ingredient of fraud enters into “the case) that, when it has been proved that

"a testator competent in mind, has had a will read over to him and he has "therefore executed it, all further enquiry is shut out." The evidence adduced in this case must raise the suspicion of the court, especially the conflict of the evidence offered by the two witnesses to the execution of the will, and that suspicion must be removed before it is judicially satisfied that the paper propounded expresses the true will of the deceased. The three propounders are the sole beneficiaries under it, and it was due entirely to their hurried action that the will was pushed through within 8 hours of the death of the testatrix. I can only hold that they have failed to satisfy the court by affirmative and conclusive evidence that the testatrix did, in fact, know or approve of the Contents of the will, or that she intended to or actually executed it.

I therefore refuse probate of the alleged will of the 7th December, 1923, but each party must pay their own costs which will be allowed out of the estate of the deceased: see Gillett v. Rogers et al (1913) 108 L.T. 732.

Judgment for plaintiff. Probate refused.

Solicitor for the plaintiff: *J. Viapree.*

Solicitor for the defendants: *S. Wood Ogle.*

CROFT *v.* DEMERARA BAUXITE Co., LTD.

[No. 282 OF 1923.]

1924. DECEMBER 11, 12, 18. BEFORE DOUGLASS, J.

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

The superintendence contemplated by proviso 2 of section 9 of Ordinance (No. 21 of) 19 6 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.

Shaffers General Steam Navigation Co (1883) 10 Q.B.D 356 applied.

Further, that he did not have the "charge or control" over it within the meaning of proviso 6 of section 9 of Ordinance No. 21 of 1916 since he did not have general charge over it.

Gibbs v. G.W.R. Co. (1884) 12 Q.B.D. 212. C.A. applied.

The plaintiff claimed $3,000 damages from the defendants in respect of the loss of his left leg which was amputated as the result of an accident at Akyma, Demerara River, on the

25th April, 1923. He was employed as a railway porter on the defendants' railway and he alleged that while so employed and acting under the directions and the expressed orders of the defendants and/or their servants or agents, he was thrown violently to the ground in consequence of a railway engine coming in violent contact with certain railway sleepers upon which he the plaintiff was then standing. The plaintiff further alleged that he was dragged by a truck attached to the said engine for a great distance along the ground. The particulars of negligence were that the plaintiff was ordered to remove certain sleepers which were then lying on certain rails of the defendants' railway and that while they were being removed and packed near the railway an engine, without notice or warning, was started by the defendants at great speed and that the engine struck the sleepers upon which the plaintiff was standing and threw him to the ground. The plaintiff further averred *(a)* that in the act of falling to prevent himself from being run over and killed, he was compelled to hold on to a truck attached to the said engine and was dragged a considerable distance along the railway before the same was stopped; *(b)* the engine was driven so carelessly and recklessly and at such a great speed that, notwithstanding the shouts of the plaintiff' and others, he was dragged for a long time before the engine could be stopped; (*c*) that the engine was driven so carelessly and recklessly that it was a danger to the lives of persons working in the vicinity of the defendants' railway; and *(d)* alternatively, the engine was at the time being driven with the knowledge and consent of the defendants by one Friday who was not the regular driver and who was not competent to manage the said engine skilfully nor did the said Friday drive the engine in a careful manner. The defendants denied negligence and pleaded that the accident was caused by the negligence and default of the plaintiff himself. The particulars set forth were as follows:

(a) The plaintiff along with other servants of the company was on the 26th day of April, 1928, employed in the distribution of sleepers alongside the defendants' railway line.

(b) These sleepers were loaded at the waterside on to five railway tip-trucks which were pushed by a locomotive halting here and there along the line. At each halt one train load of sleepers was tipped out by the plaintiff and other servants of the company and fell in a confused heap along the line, the train then proceeding back to the waterside for fresh supplies of sleepers.

(c) About 11 o'clock in the morning shortly after a truck load of sleepers had been tipped out as aforesaid and deposited alongside the line, operations were suspended so that the plaintiff and.

other servants might breakfast and the engine with the trucks attached after notice by whistling, started to move off towards the railway siding some little distance away. The plaintiff negligently climbed and stood upon one of the said heap of sleepers close to but clears of the engine and alongside the track where it would pass. The plaintiff did not climb or stand upon such heap of sleepers pursuant to any duty to the defendants or in the course of his employment, but purely for his own purposes.

(d) As the engine passed the said heap of sleepers the plaintiff leapt therefrom on to the foot board at the back of the engine (which was proceeding backwards).

*(e)*A sleeper, part of the said heap whereon the plaintiff had been standing, disturbed by the plaintiff, or alternatively, by the passing of the said train slid down and jammed the plaintiff's foot against the engine.

(*f*) The plaintiff did not leap from the said heap of sleepers on to the engine in pursuance of any duty to the defendants or in the course of his employment by them.

(g) The driver of the engine when he saw the plaintiff leap from the said heap on to the engine stopped the same without delay but the plaintiff's foot was jammed by the said sleeper against the said engine.

The defendants further pleaded (1) inevitable accident, (2) common employment, and that the negligence, if any, was not that of the defendants but of their servants committed without the sanction, knowledge, authority or consent of the defendants who had taken care to employ men reasonably fit and competent for their work.

In reply the plaintiff said that the doctrine of common employment did not apply inasmuch as at the time of the injury complained of, he was working under the orders and directions of the defendants' foreman, and was bound to conform, and did conform, to such orders.

E. P. Bruyning, for the plaintiff.

G. J. de Freitas, K.C., for the defendants. *Cur. adv. vult.*

DOUGLASS, J.: The plaintiff is claiming from the defendant company $3,000 as damages for injuries received on the 25th April, 1923, whilst working in the employ of the defendant company, owing to the negligence and carelessness of the defendant company, their servants or agents.

In opening the case for the plaintiff, learned counsel stated he relied on the Accidental Deaths and Workmen's Injuries Ordinance, No. 21 of 1916, Part II., section 9, provisoes (2) and (5), which was taken practically word for word from the English Employers Liability Act, 1880, section 1. Apart from that Ordinance, on the

facts as disclosed, it is clear that the plaintiff would have no remedy, for (1) at common law, if a person suffering an injury the person causing it are both engaged in a common employment under the same employer, the employer is not liable for the injury and (2) the Workmen's Compensation Act, 1906, has no equivalent in this colony, and no liability to pay compensation attaches to the relationship of employer and workman if the negligence of the employer or of his workmen or agents is not involved.

Now the particulars of negligence thus to be relied on are contained in paragraphs 5 *(a)* to *(d)* of the statement of claim. As the evidence of the plaintiff proceeded it was seen that the greater part of these particulars had been grossly exaggerated or misstated. There has been no attempt to prove the opening of paragraph 5 and *(a)*, *(b)*, and *(c)*, so that the plaintiff's case must depend upon paragraph 5 *(d)* which reads as follows: "The said "railway engine was at the time being driven with the knowledge and "consent of the defendants by one Friday who was not the regular driver "and who was not competent to manage the said engine skilfully nor did "the said Friday drive the same engine in a careful manner."

The facts as disclosed are, with two exceptions, fairly consistent though there must be grave doubts whether both of the plaintiff's two witnesses, Mackenzie and Waterman, were present when the accident occurred. The two exceptions I refer to are the difference in the accounts of the witnesses for the plaintiff and defendants (1) of whether the trucks were attached to the locomotive at the time of the accident or were ever detached, and (2) whether there were any men riding on the back or front foot-board of the locomotive at the time of the accident. The plaintiff says there were no trucks attached, but the engine came on by itself, and that there were other men on both the footboards, and calls as his witness one who is said to have been on each footboard.

From the evidence as a whole I am convinced that the trucks were not detached from the engine, and no reason is suggested why they should have been. Obviously, unless and until they were to be shunted on to a siding, there was no necessity, and the hints—for they went no further—that the engine had to water are too vague to be noticed. This serious misstatement on the part of the plaintiff—he and his witnesses differed as to the position of the alleged detached trucks—must throw doubt on the truth of his version of the occurrence.

In regard to men being on the footboard there is more difficulty in arriving at the truth. It was the rule that men should not travel on the footboard—a rule evidently broken at times—and the evidence of the driver of the engine and of Friday, the foreman of the gang, that with the exception of the stoker Fraser, there were no men.

there, might be considered biassed. The plaintiff's story is that the men were offered a ride towards their camp as their breakfast hour had been cut down, but there is no proof that it was not just as quick for them to walk, and if the trucks were attached, they could have got into the trucks. Some of them, indeed, had gone off to their breakfast on foot. Be that as it may, the undisputed facts are that having cleared the line of encroaching sleepers, the plain tiff stood on one of the piles two or three feet above the line level, and the engine started quite slowly from about 15 feet distant from where he was standing, and on its reaching him, the sleepers on which he stood started slipping. No one saw a projecting sleeper, and that the front footboard struck one is mere conjecture (not altogether unreasonable) to account for what happened. I think the account of what was said on Friday and the other men coming to the plaintiff's rescue is conclusive. Whether or no Friday said "God, man, why did you jump on the foot-board"—and the impression of jumping would naturally have been made—the plaintiffs reply or statement without time for thought and under the shock of his injuries that the sleepers rolled with him and he had to jump, or similar words is convincing. Samuel Allsop states that the plaintiff could cross from sleepers to front footboard of engine in a stride, and that the sleepers came down as the engine reached them. It is admitted that he could have seen the whole occurrence. Friday, too, on cross-examination states: "I say the sleepers were not properly packed, the vibration would make them slide." This, of course, is mere conjecture, but useful in coming from a witness for the defence as to what the general impression was at the time, and there is no further evidence now to enlighten the court on the subject.

Now, to apply the provisions of the ordinance to the case as thus disclosed, and first section 9 (2): “By reason of the negligence of any “person in the service of the employer who has any superintendence “entrusted to him whilst in the exercise of such superintendence,” the plaintiff and his witnesses differ as to whether he was standing on the pile of sleepers he had helped to arrange, or on another pile. If the former, then, according to his story, Friday, the foreman, had no hand in it: if the latter, it was a pile tipped up by the gang and lying as it fell. Can it be said in either case the injury to the plaintiff was caused by reason of the negligence of Friday who had superintendence entrusted to him "whilst in the exercise of such superintendence?"If Friday was—as is alleged— driving the engine, he was clearly not at, the time in the exercise of the superintendence entrusted to him: see *Shaffers* v. *General Steam Navigation Co.* (1883) 10 Q B.D. 356. It is too noted in Beven on Workmen's Compensation, 4th edn. p. 21, that Mr. Labatt

(Master and Servant at page 1997) says "The superintendence contemplated by the statute is that which is exercised over other men not ever inanimate appliances."

This brings me to paragraph 5 of section 9 of the ordinance: “By “reason of the negligence of any person in the service of the employer who “has the charge or the control of any signal, points, locomotive engine or “train upon a railway.”

To succeed in a claim founded on this sub-section, two things are necessary, (1) the person occasioning the injury must have charge or control of the locomotive, and (2) the accident must be due to his negligence. It is very doubtful whether, even if Friday was at the moment driving the engine, he "had the charge or "control" within the meaning of the ordinance. Brett, M.R. in *Gibbs* v. *G. W.R. Co.* (1884) 12 Q.B.D., 208, 212, C.A., says: “I think that to be such a person he should be one who has “the general charge of the points and not one who merely has charge of “them at some particular moment.” The evidence that Friday was driving the engine at the time of the action is by no means conclusive and the fact that Allsop is admitted to have been leaning out of the window on the driving side makes it more doubtful. And next what is the evidence of negligence on the part of either Allsop or Friday? The engine started very slowly, it stopped very quickly, almost immediately according to one of the plaintiff's witnesses, the plaintiff's idea of the distance it proceeded after he slipped must be discounted as it is natural that the pain and danger he was in would exaggerate it. The slipping of the sleepers could not have been foreseen, nor was it through the default of any person in charge of the engine.

"Negligence is the absence of care according to the circumstances." There is no evidence that the driver of the engine exhibited any want of care in his driving duties. Where there is no fault there is no responsibility: see *Canadian Pacific Railway v. Frechette* (1915) 84 L.J.P.C. 161. I find that no negligence has been proved of any person in the service of the defendant company either within paragraphs 2 or 5 of section 9 of the ordinance.

I agree entirely with the plaintiff when he says: "I don't think the company has done any wrong. I got injured during my employment;" and whilst I sympathise with him, I cannot find that the company are legally liable for his accident in the absence of a Workmen's Compensation Ordinance. I may perhaps express a hope that the defendant company will see their way to compensate to some extent a workman of theirs—and the evidence shows he was an active one—who through no fault of his own (for so I find) has got injured in their service. Costs must necessarily follow the event. *Judgment for defendants.*

Solicitors: *S. Wood Ogle, A. G. King.*

CURTIS, CAMPBELL & Co. *v.* JOHN DODDS.

CURTIS, CAMPBELL & Co. *v.* JOHN DODDS.

[No. 388 OF 1923.]

1924. NOVEMBER 28; DECEMBER 2, 3, 6, 20.

BEFORE BERKELEY, J.

Bill of sale—Whether a deed— Whether higher security than a promissory note—Bills of Sale Ordinance (No. 22 of) 1916—Evidence—Co-extensive—Non-registration of bill of sale for a year—Whether previous consideration revives.

In this colony a bill of sale cannot be regarded as a deed as it does not purport to be sealed and delivered as such. So that a promissory note and a bill of sale are both simple contract debts.

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.

Boaler et al v Mayor (1865) 19 C.B N.S, 76, 80 applied.

The court admitted evidence that the defendant acknowledged liability on the promissory note, after the bill of sale was passed, in order to show that the inclusion of the note in the bill of sale was only by way of security.

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, therefore, was of full force and effect.

The facts appear sufficiently from the judgment.

S. L. Stafford, for the plaintiffs.

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

Cur. adv. vult.

Berkeley, J.: The plaintiffs claim the sum of $2,000 on a promissory note dated 5th March, 1920, drawn by the defendant in favour of the plaintiffs.

The defendant—who at that time was the manager of Anna Regina plantation the property of the plaintiffs—requested Mr. Campbell, a partner in the plaintiff's firm, who happened to be in the colony to lend him $2,000 to meet certain urgent calls. A cheque for this amount was handed to him and he gave the note now sued on. The note is payable on demand and there is no reference to interest.

In 1901 the defendant had become further indebted to the plaintiffs in the sum of $3,007.66 being the balance due on $4,000. At L'Union, which is part of Anna Regina plantation, there was

a large quantity of old bricks, and defendant sold these to the tune of $4,000. The Public Works Department purchased from the defendant to the value of $992.34, and this amount they paid to the plaintiffs. The balance, $3,007.66, which was received by the defendant, was not paid over to the plaintiffs, and they debited his Anna Regina account with it.

On 1st April, 1921, the plaintiffs accepted an offer of $15,000 from Mr. Nelson Cannon for the buildings, machinery, etc., of the dismantled factory at Golden Fleece, and he personally guaranteed the delivery of broken bricks to the plaintiffs in payment of the $3,007.66, due by the defendant. Mr. Cannon was subsequently released, and on 30th June, 1922, he notified the plaintiffs that he had transferred all his rights in his Golden Fleece materials then on hand, to the defendant who at that time had ceased to be in their employ.

The plaintiffs called on defendant to give security for the amount due to them and on 4th July, 1922, he gave a bill of sale over the Golden Fleece materials which remained unsold as security for the payment of $5,098.56 then due with interest at 6 per cent, per annum from the 1st January, 1922. Under this bill of sale he agreed to pay $3,007.66 with interest thereon by the 30th September, 1922, and the balance $2,000.90 with interest thereon by the 31st December, 1922.

The defendant having made default in payment at the times stipulated, the plaintiffs under the terms of the bill of sale in February or March, 1923, seized the materials remaining at Golden Fleece.

The Golden Fleece account was entered in the Anna Regina account book and at end of February, 1923; the defendant received his account which showed a balance due of $960.41. Between April and September, 1923, Mr. Laing paid to the plaintiffs $585.14 from which $116.05 was deducted for expenses incurred, leaving a balance of $469.09 which reduced the $960.41 to $491.32 on the 31st December, 1923.

The promissory note transaction was entered in the Georgetown account book and at the end of February, 1923; the defendant received his account which showed a balance due of $2,183.95. Interest on this was charged as provided for under the bill of sale and the balance due on the 31st December, 1923, was $2,269.03.

The defendant has never questioned these accounts, and it is clear that he knew two distinct and separate accounts were kept.

The defence set up is that the promissory note is merged in the bill of sale.

It is submitted by counsel for the defendant that the bill of sale is a statutory deed inasmuch as it is an indenture and was attested and registered under the Deeds Registry Ordinance, s. 6

(e). The Bills of Sale Ordinance, section 11, provides that a book (called the register) shall be kept by the registrar, and the form of the bill of sale (schedule C.) requires that it be signed in the presence of two witnesses. It does not purport to be sealed and delivered as a deed, and it cannot be so regarded. It follows, therefore, that the promissory note and the bill of sale are both simple contract debts. If, however, the bill of sale could be held to be a deed, we find that on the 21st August, 1923, the plaintiffs' solicitor wrote to the defendant that the firm's principals had requested their attorneys to recover the amount of his indebtedness, and that he was instructed that the firm held a promissory note from him for $2,000 on which nothing had been paid. In reply the defendant wrote on the 3rd September, 1923: "I am willing to meet the obligation and would be glad if you will suggest amount of monthly payment." This, together with the fact that he never asked that the note be returned to him, tends to show that the defendant knew that the inclusion of the note in the bill of sale was only intended as further security. As said by Erle, C.J., in *Boaler, et al,* v. *Mayor* (1865) 19 C.B.N.S. 76, 80. "My judgment is giving effect to the intention. Parol evidence *(here* documentary evidence) must be admissible to let in the whole truth." Again, if the specialty is not co-extensive with the simple contract debt, the two may co-exist. In this case by the bill of sale the first payment of $3,007.66 is to be made by the 30th September, 1922 and the balance of $2,090.90 by the 31st December, 1922. The promissory note was payable on demand. By the bill of sale interest is to be paid on the full amount. The promissory note carries no interest. They are therefore not co-extensive.

Counsel further submits that there is nothing in the bill of sale "to keep the note alive." He cites *Counsell v. London and Westminster Loan and Discount Company* (1887) 19 Q.B.D. 512, and *Onn v. Fisher* (1889) 5 T.L.R 504. In both these cases it was held that the promissory note constituted a defeasance of the bill of sale within the meaning of the Bills of Sale Act, 1878, section 10—the same as our local Ordinance, section 9—and that defeasance not being contained in the body of the bill of sale, the registration of the bill of sale was void. In *Monetary Advance Company* v. *Cates* (1888) 57 L.J.Q.B. 463 where a promissory note identical in dates and figures with a bill of sale for which it was given as a collateral security contained a stipulation which amounted to a defeasance of the bill of sale within the meaning of the Bills of Sale Act, 1878, s. 10, it was held, reversing the decision of the county court judge that the promissory note was not thereby rendered invalid. Cave, J., in the course of his decision, says "the document which contains,

the promise to pay is not made void by any statute: it (the document) does not give the grantee any rights in respect of the personal chattels, included in the bill of sale," and Smith, J., referring to *Counsell* v. *Westminster Loan and Discount Company* (1887) 19 Q.B.D. 512, says "the ratio decidendi of that case was that, inasmnch as the promissory note acted as a defeasance of the bill of sale within the meaning of the Bills of Sale Act, therefore the bill of sale was rendered void. It is here contended that because the bill of sale would be void by the Bills of Sale Act, therefore the promissory note is bad; but there is no enactment which renders the promissory note void. It has been urged that the documents are one and the same; but in fact they are separate documents; the promissory note could not be registered nor could the same stamp carry the two."

Under the Bills of Sale Ordinance, s. 10, the registration of a bill of sale must be renewed annually, and if more than one year elapses from the registration, without renewal, the registration becomes void: see *Fenton* v. *Blythe,* (1890) 25 Q B.D. 417. The registration of the bill of sale has not been renewed and therefore the bill of sale became wholly void on 4th July, 1924.

Judgment for plaintiffs for $2,000 and costs.

Judgment for plaintiffs.

Solicitors, *E. A. W. Sampson, A. V. Crane.*

MOHABIR *v.* BISMILLA AND SMITH BROS.

[No. 123 OF 1921.]

1924. FEBRUARY 21. BEFORE DOUGLASS. J.

Order of Court—Strict construction—Prejudice of innocent parties—Equitable construction—Whether defendant's costs should be paid out of joint estate—No provision in order—Possibility that such an order would hate been made if asked for—Appeal unnecessary—Costs not payable out of joint estate—Gifts—Intention of donor—Power of revocation—Illegitimate children—Trust in favour of children—Gift not revoked—Funeral expenses of husband—Not payable out of community.

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.

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 if M. 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 Smith Bros. & Co., Ltd., 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 restraining 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 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 subject to the 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 the appeal costs would not be a charge on the joint estate.

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.

Re Richardson (1882) 47 L T. 514 applied.

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 therein. The ledger accounts were also kept in the names of Joseph and 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 also in the Ledger.

In or about the month of August, 19l7, M. in order to curb Joseph from spending money and at the suggestion of a clerk of Smith Bros., caused to be inserted in his Pass Book 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 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 $800.

Before the 1st January, 1917, M. made five deposits in John's pass book, Evidence was led that when the first 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 John'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 when $800 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 deposit to be for the benefit of his sons in whose names 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 Pass Book were by way of precaution only.

Further, that even if M. retained a power of revocation over his gift the implied intention of a trust in favour of his sons would not be destroyed if the power was not exercised, and the fact that the sons were illegitimate made no difference.

Beether v. *Major (*1865) 12 L.T. 562.
Kilpin v. *Kilpin* (1833) 1 Mylne & Keen 520.
Sidmouth v. *Sidmouth* (1840) 2 Beav. 447.
Fox v. *Fox* (1863) L.R. 15 Ch 89, Irish, and
Milroy v. *Lord* (1862) 4 De G.F. & J. 264, followed and applied.

Determination of objections to accounts filed by the defendant Bismilla in accordance with the order of Dalton, J., dated the 6th May, 1922, as affirmed on appeal by the West Indian Court of Appeal on the 20th January, 1923. The accounts filed were in connexion with the joint estate as existing at the time of the death of Mohabir. The sum of $2,000 was inserted for legal expenses incurred by the defendant with respect to the hearing before Dalton, J., and in the Court of Appeal. This item was objected to by the plaintiff on the ground that it was not justified either by the order of Dalton, J., or of the Court of Appeal. Bismilla did not insert in her accounts certain sums of money deposited with Smith Brothers & Co., Ltd., in the names of Joseph and John Mohabir. Other necessary facts appear from the judgments

(1922) L.R.B.G., 54 and (1922) L.R.B.G., 183, previously delivered in this action, and from this judgment.

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

G. J. de Freitas, K.C., for the defendant Bismilla.

Cur. adv. vult.

DOUGLASS, J.: In his judgment dated May 6th, 1922, Dalton, J., states:—"She, *i.e.,* the plaintiff, is therefore entitled to an account from the defendant, the deceased's executrix of the property belonging to the estate that was possessed in community, and of her dealings therewith, and to an order for the delivery to her of her half share thereof."

Accounts were accordingly prepared and delivered and objections to the said accounts and surcharges thereto filed on the 25th May, 1923. These objections resolve themselves into four heads, viz., to certain items;

1. In the matter of funeral expenses and of keeping the grave in order.
2. In respect of costs connected with (a) the will of the deceased and duties payable, (b) professional services and law costs on this suit and proceedings on appeal.
3. Representing expenses of running and repairs to cars not belonging to the deceased's estate.
4. In respect of carpenters and sanitary work on the deceased's house property,

With respect to No. 1 I disallow all the items set out in the memorandum of objections amounting to $456.36. Counsel for the defendant admitted that they could not properly be charged against the property in community but should be paid out of the deceased's half share of the property.

In No. 2 all items in connection with the will and estate duty must come off from February 8th to April 27th inclusive amounting to $743.38; it was admitted that these should not have been included. It was also agreed that $12.50 (Voucher C. 39) should stand, but only $30 of next item of $150 could be charged against the joint estate, therefore $120 must come off this item.

The $2,000 paid on account of professional services is a more debatable subject. It represents, I understand, the agreed costs in the suit and on appeal, that is costs up to the 20th January, 1923. In his judgment referred to above Dalton, J., states "the plaintiff is entitled to costs of this action. On the appeal the court upheld the learned judge's decision and held that "the appeal should be dismissed with costs." In the first instance the question to be decided by the court was stated

to be of importance, viz., the effect of domicile or want of it on the law of community of property, and whether community of property continued in spite of the wife having left her husband shortly after her marriage in 1889 and lived with another man.

The defendant Bismilla was entitled to defend this action as executrix of the will of Mohabir, deceased, on behalf of the heirs and legatees under his will and to enable her to prepare proper accounts of the estate, but she should have been satisfied with the judgment of the court. There is nothing in that judgment to preclude her paying the costs out of the whole estate and such an order would doubtless have been made if asked for. Costs are in the discretion of the court and it is for the court "to say how the costs of the enquiries requisite for ascertaining a fund are to be borne." It has been pointed out that a formal order has been drawn up concluding with the words. "This court orders that the costs of this action be borne by the defendants," thus including the other defendants 'Smith Brothers,'—undoubtedly it does so include them on the face of it. I intend, therefore, to construe it in an equitable manner and to avoid the dilemma of an innocent and uninterested party paying the costs by construing it as if it had continued " to be paid (reimbursed) out of the estate subject to the community." I have not been informed in what proportion the sum of $2,000 was allotted between the suit and the appeal proceedings, but I find that the taxed bill of costs in the suit was just over $1,000. I therefore allow one sum of $1,000 on the account but the other $1,000 must come off; the defendants, Smith Brothers, having agreed to abide by the decision of the court were not concerned, with the appeal.

In No. 3 (the garage accounts) two cars are dealt with, the "Chevrolet" was purchased by Joseph (the elder son) in July, 1919, for $500 and sold by him in 1920, and the "Reo" was purchased by Joseph and John on 18th August, 1919, for $825 and transferred to Bismilla on the 2nd November, 1920, On the evidence the undertaking by Mohabir to pay car expenses only applied to Joseph's car, though apparently the garage charged up the expenses against both cars to him. Be that as it may, all items chargeable against the "Reo" car unpaid at Mohabir's death must be borne by Bismilla, its owner since November, 1920. I make that amount $88.20. The account with the Central Garage was opened in Mohabir's name, and orders given by Joseph were delivered to Mohabir as the recognised principal. I think the whole estate should be liable for the balance due on Joseph's account at the date of the testator's death, so that, of the total amount of $348.73 I disallow $88.20. In No. 4 all items should be allowed for which vouchers are

produced, except the last item $17.86 which was inserted in error. After the evidence of the Sanitary Inspector and of Bismilla that the numerous properties formed part of the estate of the deceased there is no need for the executrix to prove each item; the evidence is that necessary work was done and receipts for payments were produced, to that extent that the property will have been improved. Next, the plaintiff purports to surcharge the defendant's accounts in several respects but only endeavours to prove one item, *i.e.*, that cash deposited with Messrs. Smith Bros. & Co., Ltd., to the extent of $7,053.61 should be included in the statement of account as belonging to the deceased at the date of his death; the actual amount appearing on the Pass Books on the 17th January, 1921 (the date of death) is $6,822.61. Two "Pass Books" were put in evidence showing that accounts were opened with Smith Bros, & Co. on 6th October, 1916, in the names respectively of Joseph and John Mohabir in sums of $1,000 each This $2,000 represents the proceeds of an endowment Policy of Insurance dated 3rd October, 1906, on the life of Mohabir, and which was assigned to his son Joseph on the same date. When it was paid off in October, 1916, on its expiration, the receipt for the policy moneys was signed by Mohabir as father and natural guardian of Joseph Sarjhoo (assignee), and by Joseph himself, he was then about 18 years of age. It makes no difference that the premiums were paid by Mohabir, his son Joseph would be the only person who could give the insurance company a legal discharge for the moneys under the policy when it became ripe and there can be no question that the gilt was an absolute one. See *Re Richardson, Western* v. R*ichardson,* (1882) 47 L.T.N.S. 514. Accounts were opened at 'Smith Bros., in the two sons' names, and Joseph gives a reasonable explanation why $1,000 was placed in each name and not the whole in his. I have not the slightest doubt that those two sums of $1,000 each belonged to the two sons, but whether any portion was withdrawn by them, and whether the deposits that follow in both accounts belonged to the sons or remained the property of Mohabir is a more difficult question.

The first difficulty arises from the fact that some time after the $1,000 deposit, there was inserted in each pass book under the name of each son the words "at disposal of father Mohabir," the reason given that Mohabir thought his sons were spending money too quickly does not seem probable. The words were certainly inserted before Joseph came of age on 17th January, 1919, and were added to his pass-book first, for D'Andrade says in his evidence, "It came about on account of Joseph, the old man said "I must do something to prevent the boy drawing money." When their accounts started John was

only 8 years old and Joseph drew nothing for himself until he came of age, when on 25th February, 1919, he drew $25 and thereafter all receipts are in his name with the exception of two. In John's book *all* the receipts for money drawn are in Mohabir's name, except one, when 'J. Mohabir' signed a receipt for the $800, which went to purchase the 'Reo' car. After that date (18th August, 1919) nothing further was withdrawn though amounts were paid into the account regularly up to December, 1920.

The date of the insertion of these words "at the disposal of" was probably not later than August, 1917, but it does not matter very much for it should be remembered that the actual words were not the idea of Mohabir, but what D'Andrade suggested would answer his purpose, and the ledger credits continued in the names of the sons only. The added words can have no legal effect except in so far as they can be construed as showing what the old man's intention was.

There was some suggestion that Roman-Dutch authorities and not English should be referred to for a solution of the intention of these deposits with ' Smith Brothers,' though counsel for the plaintiff was of opinion that the law on the subject, both Roman-Dutch and English was practically the same. I do not propose to offer an opinion on that point but inasmuch as the accounts are running or continuous ones and in Joseph's case all the deposits (after the $1,000) were made after the 1st January, 1917, (the date of the commencement of the Civil Law Ordinance, 1916), and only five items in John's case before that date, but also before the words "at the disposal of" were inserted, I do not consider Roman Dutch Law would apply, nor do I think section 2 of the Civil Law Ordinance applies in this matter.

In Godefroi on Trusts (4th Edn. p. 48) the following proposition is stated: a donation " or voluntary gift may be good if "everything has been done which the donor can do in order to "perfect it" and "the test of completeness is whether anything further in *fact* remains to be done on the part of the settlor or donor, rather than whether he contemplated the performance of some future act."

Out of the thirty or forty cases the court was referred to it is necessary only to examine two or three to arrive at the *rationes decidendi* of the various decisions. *Sidmouth* v. *Sidmouth* (1840) 2 Beav. 447, 454, 455, 458 takes leading place. The law applicable to cases of this nature is thus laid down by the Master of the Rolls: “Where property is purchased by a “parent in the name of his child the purchase is *prima facie* to be deemed “an advancement; the resulting or implied trust which arises in favour of “the person who pays the purchase money

"and takes a conveyance or transfer in the name of a stranger does not "arise, but the evidence may be rebutted by other evidence manifesting an "intention, the child shall take as a trustee; and, subsequent acts and "declaration of the parent are not evidence to support the trust."

In that case the testator had during his life invested money with the funds in the name of his son and the son had executed a power of attorney to enable his father to draw the dividends and he dealt with them as he pleased. In these circumstances it was wisely said: "It is scarcely to be "conceived why he should make any transfer at all if he intended the son to "have neither any present interest in the stock, nor any power over it, nor "any future benefit of any kind from it." These words are not inapplicable to the present case. This case was followed in *Fox* v. *Fox* (1863) L.R. 15 Ch. 89, Irish. In *Milroy* v. *Lord* (1862 4 DeG. F. & J. 264, 274) Turner, L.J.,in the course of his judgment, said: "I take the law of this court to be "well settled that in order to render a voluntary settlement valid and "effectual the settlor must have done everything which according to the "nature of the property comprised in the settlement, was necessary to be "done in order to transfer the property and render the settlement binding "upon him."

As I have said, there can be no doubt that the $1,000 deposited in the names of each of the sons was their property, but from this point each account had better be considered separately. To take Joseph's first, the first deposit by Mohabir was for $100 on 5th April, 1917, (six months after the account was opened) and he continued to place sums to the account and to draw upon it up to the 22nd January, 1919. From that date, as I have pointed out above, all receipts are given by Joseph—with two exceptions, —but amounts continued to be paid in up to 7th October, 1920, —within three months of Mohabir's death. How often Joseph drew on the production of orders from Mohabir is not proved, and it does not much matter,—in most cases in any event he hid no order and drew when he needed money. Joseph gave in evidence that he collected money due to his father as moneylender and gave receipts for it, he also handed his father money earned by car hire. That his father intended to benefit him is shown in his willingness to meet the garage account, and that Joseph was enabled to take $800 to America with him in 1920.

Next to take John's account; the receipts are all signed by Mohabir with one exception when $800 was drawn for the "Reo" car on 18th August, 1919, the only withdrawal made after the 17th April, 1918.

The account starts with a sum of $878.83 "amount transferred from Mohabir's account" 31st October, 1916, presumably before

the words "at disposal of father Mohabir" were added. D'Andrade's evidence is that the old man said he was making the amount a gift to his younger son for his tuition. All the other deposits, he states, were brought by Bismilla and when sums were drawn she took the receipts to him to sign. Bismilla gives in evidence that she also deposited money to the same account for John (her son), more than half; that she sold the "Reo" car for $500 and deposited $260, apparently the last two items paid in after Mohabir's death. She also states that besides bringing money of her own to Mohabir in 1906 she got money for rents and rice planting.

After a careful consideration of all the evidence I can only come to the conclusion that Mohabir intended the deposits for the benefit of his sons in whose name they were deposited, only retaining sufficient hold 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 ledger credit was never altered and still stands in the name of the two sons: the additional words on the pass-books were by way of precaution but not evidence of any change of intention on the part of Mohabir which intention was clearly expressed on the opening of the accounts.

Even if he retained a power of revocation over his gift—the intention implied of a trust in favour of his sons would not be destroyed if that power was not exercised. See *Beether* v. *Major* ((1865) 12 L.T.N.S. 562) and the fact that the sons were illegitimate makes no difference: *Kilpin* v. *Kilpin* ((1833) 1 Mylne & Keen 520).

The plaintiff has not proved that the moneys deposited with Smith Bros, belong to the estate of Mohabir and I cannot therefore allow the surcharge.

I have submitted the accounts and my findings on the objections raised to the Accountant of the Court who adjusted and settled them in accordance with my findings. The account so adjusted and settled shows a balance of $249.87 to the credit of the estate of Mohabir, deceased.

Under Order XXIX, rr. 12 & 13 within ten days after notice of the deposit of the settled account either party may apply to the court for judgment as he may be advised.

As the plaintiff has to a considerable extent succeeded in his objections, but the defendant Bismilla has successfully resisted the surcharges each party must bear their own costs.

Solicitor for plaintiff, C*arlos Gomes.*

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

PETITION OF LEWIS ADOLPHUS ROBINSON.

PETITION OF LEWIS ADOLPHUS ROBINSON.

[No. 2 OF 1924.]

ELECTION PETITION.

1924. FEBRUARY 29. BEFORE DOUGLASS, J.

Election petition—Election of Mayor—Unseating Mayor—Georgetown Town Council Ordinance, 1918, Amendment Ordinance No. 19 of 1928, section 5—Decision of Returning Officer—Disqualification of Councillors—Ministerial character of Returning Officer— Refusal to adjudicate on objection as to disqualification of Councillor—Whether a "decision"—Vacation of seats of Councillors—To be decided by Council—Decision final —Ordinance 25 of 1898, section 92 as amended by section 12 of Ordinance 26 of 1900.

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

So that 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—C. and D. Objection were taken to the presence of B. one of the Councillors, on the ground that he was alleged to be disqualified. The Town Clerk, as Returning Officer, refused to entertain the objection. Twelve Councillors were present—six voting for C. and six for D. B. voted for C. There being a tie, the election was referred to the ratepayers who decided, by a majority, in favour of C.

The question as to whether B. was any longer a Councillor was never referred to the Council, and the Council had never given any decision upon it.

Held :—(1) That the Town Clerk as Returning Officer gave no decision when he declined to adjudicate on the objection raised.

(2) That the Town Clerk had no judicial duties, that he had no right to exclude B. from the proceedings of the Council, and that the right and duty of deciding whether B. was disqualified or not rested in the Council who were never asked to decide the point and never did so.

Holden v. *Southward Borough Council* (1921) 125 L.T. 253 applied.

Election Petition brought by Lewis Adolphus Robinson, a ratepayer, under the provisions of the Georgetown Town Council Ordinance, 1918, Amendment Ordinance, 1923, praying that the election of Nelson Cannon as Mayor of the City of Georgetown for the year 1924 be declared void. The necessary facts and arguments appear from the judgment.

P. N. Browne, K.C., for the petitioner, L. A. Robinson.

G. J. deFreitas, K.C., (*S. J. Van Sertima* with him) for the respondent Nelson Cannon.

E. M. Duke for the respondent Francis Dias.

Cur. adv. vult.

DOUGLASS, J.: For the purposes of considering the preliminary objections to this Petition it may be assumed that the petitioner is a registered voter in the City of Georgetown. The prayer of

the Petition is for a declaration that the seat of Conrad Frederick Barrow—who was duly elected a councillor for Ward No. 9 in the City of Georgetown in December, 1922,—became and was *ipso facto* vacant by reason of the premises and consequently not entitled to sit and vote at the meeting of the Council for the election of a Mayor on the 24th December. 1923, and that his said vote ought not to have been recorded or counted by the Returning Officer and that Councillor Francis Dias had a majority of votes and that it may be determined and declared that the said Francis Dias was duly elected Mayor of Georgetown for the year 1924.

According to the facts as set out in the petition, Councillor Nelson Cannon was proposed by Councillor James Phillips and seconded by the said Conrad Frederick Barrow, and Councillor F. Dias was proposed by Councillor R. E. Brassington and seconded by Councillor G. D. Bayley at the meeting of the councillors duly summoned on the 24th December, 1923, for the purpose of electing out of their number a person to be Mayor of Georgetown for the ensuing year 1924. Objection was taken by one of the Councillors to the presence of the said C. F. Barrow on the grounds hereinafter stated and that he was no longer entitled to second the nomination of the said Nelson Cannon or to vote on a division of the said Council. Clause 3 of the Petition proceeds: "The said Town Clerk, acting as Returning Officer under the Amendment Ordinance of 1923, heard the said objections and gave a decision to the effect that it was not competent for him to take notice of the disqualification of any of the councillors all of whom he was bound to recognise as they had been returned as councillors at the last general elections during the month of December, 1922, and the said Returning Officer proceeded with the said election and accepted, recorded, and counted on the division the vote of the said C. F. Barrow given in favour of the said N. Cannon." Each of the gentlemen proposed as Mayor obtained 6 votes, those in favour of N. Cannon included the said C. F. Barrow. In consequence of the alleged tie the necessary steps were taken and the election of Mayor proceeded, conducted in the manner prescribed by Ordinance No. 44 of 1918 for the election of Town Councillors. At the said election the said N. Cannon received the greatest number of votes and was formally declared Mayor for 1924. (See Georgetown Town Council Ordinance 1918, Amendment Ordinance 1923, section 5).

The grounds of the objection taken to the said C. F. Barrow were that although duly elected a Councillor his seat became *ipso facto* vacant by reason that he had directly an interest in a number of contracts with by or on behalf of the Council for the

sale of goods, wares and merchandise, the whole payable and paid under such contracts exceeding in the aggregate in the period of 12 consecutive months from 1st January, 1923, the sum of $500 (Ordinance No. 44 of 1918, section 7.)

Under the Principal Ordinance and the amendment thereto (No. 19 of 1923) there are two situations in which proceedings by way of petition are provided, viz., under section 75 of the Principal Ordinance a petition complaining of an 'undue return' or 'undue election' of any Councillor can be brought and under section 80 as amended by section 5 (i) of the Amendment Ordinance, a petition against the decision of the Returning Officer "as to any question in respect of the said election of a Mayor" in both cases before a Judge of the Supreme Court. The 'determination' of the judge in the first case, and the 'decision' of the judge in the second case shall be final. It is under the latter section that the present Petition is presented.

No procedure to bring the Petition before the Court is provided, but by section 77 "Every election petition shall be tried by a Judge of the Supreme Court sitting alone without a jury in open Court" and by section 78 "At the trial of an election petition the procedure shall be the same as near as circumstances will admit, and the Judge shall have the same powers, jurisdiction and authority, as if he were trying a civil action without a jury."

With regard to the service of an election Petition, I understand that the local practice has been to proceed in accordance with the English Statute Law. The Municipal Corporations Act, 1882, section 88 (2), ordains that “any person whose election is questioned by the “petition and any Returning Officer of whose conduct a petition complains “may be made a respondent to the Petition.” Sub-section (3) “The petition shall be in the prescribed form.....and the prescribed officer shall send a copy thereof to the Town Clerk;” and by section 89 (3); “Within 5 days after the presentation of the petition the petitioner shall.....serve on the respondent.....a copy of the Petition."

Consequently in the present case copies have been served on Nelson Cannon and the Returning Officer who also happens to be the Town Clerk but surely there is no precedent for service on Councillor F. Dias. On the other hand the person upon whose want of qualification as a councillor the petition is founded should also have been served, as a party interested and affected; however, this does not happen to be material at the present stage as the parties properly served have raised the preliminary objection now to be considered, namely Mr. Nelson Cannon by his Counsel Mr. G. J. DeFreitas, K.C., and Mr. Joseph Barrington Woolford as a solicitor on his own behalf.

PETITION OF LEWIS ADOLPHUS ROBINSON.

A brief sketch of the legislation dealing with the election of the Mayor and Town Council of Georgetown will be useful in arriving at a construction of the sections of the Principal Ordinance (as amended) relied on by the petitioner, and in considering the preliminary objections to the Petition now raised by the Respondent N. Cannon and the returning Officer J. B. Woolford.

The first Ordinance that concerns us is the Georgetown Town Council Ordinance No. 25 of 1898 as amended by Ordinance No. 26 of 1900. Under this the Town Clerk or some other fit and proper person appointed by the Council was to be the Returning Officer. A general election of Councillors was to be held every two years during the first 10 days in December and the Councillors so elected were to be summoned by the Town Clerk to meet at the Town Hall during the last 10 days of December when they were to take the oath of office and elect out of their number a Mayor. In 1905 on the revision of the Laws of British Guiana this Ordinance with its amendment was consolidated as Ordinance No. 25 of 1898.

The last named Ordinance with its amendments was repealed by Ordinance No. 44 of 1918 and under it (section 26) the general election is to be held during the first fifteen days in December, By section 80 the Town Clerk as Returning Officer had to fix a day for the nomination of one or more of the newly elected councillors to be Mayor, and if more than one nomination the election to be conducted in the same manner as prescribed for the election of Town Councillors.

Section 80 was however repealed by Ordinance No. 25 of 1920, when by section 3 a new section 80 was substituted whereby the Mayor was to be elected at a meeting of the councillors to be summoned by the Town Clerk (but *not* as Returning Officer) during the last ten days of December in each year.

This amendment ordinance was in turn repealed by Ordinance No. 19 of 1923 and section 5 thereof substituted an amended section 80 with which we have now to deal.

Two preliminary objections were taken to the hearing of the petition, either of which would be fatal to it, if proved to be well grounded. The first is that in the circumstances and on the facts set out in the petition the petitioner is not properly before this court and the second objection is to the jurisdiction of the court to hear such a petition.

The first objection raised depends upon the interpretation of section 80. Under this section the Town Clerk, as Returning Officer, having summoned a meeting of the newly elected councillors for the 24th December a fit and proper person is nominated out of their number, and if more than one then the votes

of the councillors present are taken: “but if there is no election on account “of equality of votes, the council shall immediately select a day for the “election of a Mayor by the ratepayers on a date not later than the 29th “December.”

The case for the petitioner, most ably set out by his learned counsel, Mr. P. N. Browne, K.C., is, as I understand it. that there is only one election dealt with by section 80, namely, that of a Mayor, and that consequently since in sub-section 1 (i) it is stated that the decision of the Returning Officer as to any question in respect of the said election of a Mayor shall be final subject to the right of a voter to object by way of petition, the present petition is within the petitioners rights to bring it on the grounds set out therein; that the Returning Officer gave a decision to the effect that he was not competent to take any notice of the disqualification of any of the councillors and proceeded to treat Mr. Barrow's vote as effective, whereas if he had decided otherwise Mr. F. Dias would then and there have been elected Mayor by a majority of the councillors, instead of there having to be a reference to the ratepayers when Mr. Cannon received the greatest number of votes. This was obviously, learned counsel argues, a question decided by the Returning Officer in respect of the said election of the Mayor. He gave a ruling which is synonymous with a decision, and the nomination of a candidate being an essential part of the election it was intended that a ratepayer, who now has no hand in the nomination should at least be able to check its legality. But this argument raises at least two questions (1) was the refusal of the Returning Officer to take any notice of the objection to Mr. Barrow's presence as a councillor 'a decision' of the Returning Officer, and, if so, (2) does sub-section (1) (i) relate or include such a decision.

I am inclined to think, in the first place, that a refusal by the Returning Officer to adjudicate on "the objection taken by one of the councillors" was not a decision at all, no more than a magistrate declining jurisdiction in a matter is a decision. But be that as it may, the Returning Officer has no rights or duties other than those set out within the four walls of the ordinance, and I cannot find anywhere that he can act as a judge to decide that a councillor who has been duly elected has become disqualified by certain acts, and on the mere assertion of such acts without proof, any more than a Returning Officer on the election of councillors should refuse to take the vote of any voter on the register; his powers in respect of refusing such votes are limited by sections 50 to 58 and he would have none unless they were given him by the ordinance.

Moreover the existence of any vacancy of his seat by any

member of the council is not for the Town Clerk to decide whether as Returning Officer or not, for by section 86 it shall be referred to and decided by the council. It is true that by section 85 if any member of the council has any interest in any contract after the manner ascribed to Mr. Barrow his seat in the Council shall thereupon *ipso facto* become vacant, *i.e.,* on proof of the disqualification, but proceedings of the council meantime are protected by section 87 'the existence of any vacancy.....shall not affect the validity of any proceedings of the council'; this is adapted from a similar provision under section 72 (4) of the Municipal Corporations Act, 1882. Until the necessary steps were taken Mr. Barrow was *de facto* a councillor and the Returning Officer would have no right to exclude him from the proceedings: *Holden* v. *Southward Borough Council* (1921) 125 L.T. 253. The council in the present case was apparently never asked to decide the question and did not do so.

Even if the word 'decision' were to be interpreted in a sense to include a refusal to decide, and to include a decision on a question the Returning Officer had no statutory or common law right to decide, was it given in respect of 'the said election' of the Mayor? In the first place it seems to me that sub-section (1) (e) or rather (1) (d) (at its conclusion) starts an entirely new proposition, the election by the councillors has failed to have any results, "if there is no election on account of equality of votes the council shall immediately select a day for the election of a Mayor" and "the election shall be conducted in the same manner as prescribed in the principal ordinance for the election of Town Councillors." Surely the words "such election" in clauses (g) and (h) and "the said election ″ in clause (i) can only reasonably be construed as applying to the election by the ratepayers, and similarly the words "no voter" in clause (g) and "the right of any voter" in clause (i) must refer to ratepayer "voters" concerned only in and about the election for which they vote. I am more inclined to take a limited interpretation because the present section 80 (1) (i) is practically a copy of the first section 80 (5) of Ordinance No. 44 of 1918, but by that section the nomination for Mayor was not by the councillors themselves but was thrown open to the public, when the ratepayers had a voice in the matter. By the Amendment Ordinance No. 25 of 1920 the ratepayer was deliberately deprived of any direct concern in the nomination of the candidate and it would be an obvious absurdity if a ratepayer were to be allowed to interfere in a case where a Mayor had been duly elected by the council or in any of the proceedings relating thereto and yet this is what he would be justified in doing if the present attempt to intervene were held to be within his rights.

On a careful consideration of the whole of section 80 and especially of its intention, there is to my mind, only one possible interpretation of sub-section (1) (i). But even if there were two. it is one of the principles for the interpretation of statute law that if the language of the legislature admits of two possible interpretations the selection should be of the most reasonable.

This brings me to the second objection taken to the petition, that this court has no jurisdiction to hear it. It needs only a very few words for it is so much involved in the main objection as to be difficult to treat it separately and the sections of the ordinance it depends on have already been referred to, namely, sections 86 and 87. I should first call attention to a curious error in these sections which I think is fairly obvious, but is at once cleared up by reference to section 92 of the original ordinance No. 25 of 1898. That reads “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;” by section 12 of Ordinance No. 26 of 1900 it was enacted “Section 92 of the Principal Ordinance shall be construed and “have effect as if the following words were added at the end thereof whose “decision shall be final.” Unfortunately in the consolidating Ordinance No. 25 of 1898 these words were accidentally added to the end of section 93, not to the end of 92 yet with the note at the end in brackets "Amendment 28 of 1900, section 12." These clauses are now represented by sections 86 and 87 of the present Ordinance No. 44 of 1918 and the same error embodied; so that there is really no question as to which clause these words belong. It is accordingly provided not only that questions touching the vacation of seats of members are to be decided by the council itself, but that their decision shall be final. The court can only intervene if the Attorney General or any registered voter apply to them for a mandamus or interdict to enforce a duty neglected, or restrain the Council from an illegal or improper act (section 216.) The ordinance gives the court no jurisdiction to try by way of petition a question specially referred to the decision of the council.

To sum up, as I am of opinion that, on the facts as set out in the petition,

(1) There was no decision of the Returning Officer in respect of the election of a Mayor which could have formed the subject of this petition.

(2) The petitioner has no *locus standi* to complain of the conduct or subsequent disqualification of such a councillor who had been duly elected.

(3) The court has no jurisdiction to hear a petition with respect to the conduct or disqualification of a councillor.

PETITION OF LEWIS ADOLPHUS ROBINSON.

I must refuse to hear the prayer of the Petition and it accordingly stands dismissed with costs.

Petition dismissed.

Solicitors: *C. Gomes, W. S. Cameron, F. Dias.*

CURTIS, CAMPBELL & Co. *v.* JOHN DODDS.

[No. 388 OF 1923.]

BAIL COURT.

1923. NOVEMBER 3, 10. BEFORE DOUGLASS, J.

Specially indorsed writ—Leave to defend—Substantial question of law or fact—No injury to defendant—Promissory note—Further security—Bill of sale—Lover or higher security—Merger—Document not requiring a seal—Bill of sale notarially executed—Civil Law of British Guiana Ordinance No. 15 of 1916, section 14—Bills of Sale Ordinance 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 Ordnance* 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 and that therefore it is not a security of a higher degree than a promissory note.

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 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.

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.

The Credit Co, v. *Pott* (1880) 6 Q.B D.295 distinguished.

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

Application by the defendant under Order 12 of the Rules of Court, 1900, for leave to defend a specially indorsed writ for $2,000 on a promissory note. In his affidavit of defence the defendant admitted that he made the note on the 5th March, 1920, but he said that on the 4th July, 1922, at the request of the plaintiffs he executed a bill of sale charging certain movable property to secure the repayment of $5,098.56 to the plaintiffs which sum of $2,000 was included in the bill of sale and the defendant further alleged that his indebtedness on the said promissory note was discharged by the said bill of sale so accepted by the plaintiffs. The other paragraphs in the defendant's affidavit of defence were as follows:—

" 4. The said bill of sale provided *inter alia* for the seizure and taking "possession by the plaintiffs herein of the property charged in the said bill "of sale upon default of payment by defendant of the said sum of "$5,098.56 as provided therein, and the plaintiffs by reason of my default "in payment as so provided did in fact in or about March, 1928, seize and "take possession of certain second hand machinery, old metal, bricks and "other property charged under the said bill of sale and appoint one J. A. "Laing, their agent, to sell and have sold and are still selling the said "machinery under the provisions of the said bill of sale.

"5. The plaintiffs are still in possession of quantities of the said "machinery, old metal and bricks and have never furnished me with an "account of their dealings with the said property and I am unaware what is "the state of accounts at the present time between us. The said machinery, "old metal and bricks were worth in value considerably more than the sum "of $5,098.56 which sum could have been realised by sale thereof."

J. S. McArthur, K.C., for the defendant.

S. L. Stafford, for the plaintiffs.

DOUGLASS, J.: The defendant admits having made the promissory note for $2,000 on 5th March, 1920, and the only question is whether his plea that the debt secured for it is merged in a bill of sale dated 4th July, 1922, is good at law, if not the defendant has no defence on the merits or otherwise.

The rule of law is where a creditor takes for his debt a security of a 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 where the securities are of equal degree.

Learned counsel for the defendant referred to *Credit Coy.* v. *Pott* (1880) 6 Q.B.D. 295., C.A. but the bill of sale in that case was made under the Act of 1878 and had to be under seal, No money passed but the debt was set out in the recitals to the bill of sale and the question was whether facts as to the consideration for the bill of sale were sufficiently set forth as required by section 8 of the Act. The debts were simple contract debts and so were merged in the bill of sale under seal. This case is in no way similar, the Promissory note and Bill of Sale are both securities of equal degree for simple contract debts, the latter made under Part II. of Ordinance 22 of 1916 (taken from Bills of Sale Act, 1882) is not under seal and not a notarial document, so that section 14 of the Civil Law Ordinance, 1916, referred to by learned counsel does not apply. The bill of sale covers the property mentioned in the Schedule thereto to secure a debt of $5,098.56 due from the defendant and made payable by two instalments on the 30th September and 31st December, 1922, with interest at 6 per cent.; this promissory note was payable on demand at any time and no interest is reserved by it. To take further security for a debt does not operate as an extinguishment of the debt. If it had been a bill of sale under Part I. of the Ordinance and the sum of $5,098.56 included the $2,000 debt then there would have been a merger. There is no intention expressed with Bill of Sale of including or dealing with the promissory note of $2,000; all it states is the plaintiff firm have required security. I can see no substantial question of fact or law raised, nor that is the defendant in any way injured by refusing him leave to defend.

I refuse leave to defend. Judgment for plaintiff for amount claimed and costs. Execution stayed for 14 days.

Leave to defend refused. [(a)]

Solicitor for the plaintiffs, *E. A. W. Sampson.*

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

[(a) An appeal was taken to the West Indian Court of Appeal.]

MOHABIR *v.* BISMILLA AND SMITH BROS.

[No. 123 OF 1921.]

1924. MARCH 1. BEFORE DOUGLASS, J.

Accounts—Settled by Judge—Application for Judgment—Form—Rules of Court, 1900, Order 28, rr. 12, 13—"Court" includes "Judge"—Supreme Court Ordinance (No. 10 of 1915) s. 2 —Interlocutory order— Liberty to apply—Implied power.

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.

Fritz v. *Hobson* (1884), 14 Ch. D 561 followed.

Rules 12 and 13 of Order 29 of the Rules of Court, 1900, are still in force.

By rule 13 "any party may within ten days after receiving the notice from the Registrar," *i e*., that the account as finally settled has been deposited in the office of the Registrar or has been settled by the judge, apply to the *Court* for such judgment as he considers that he is entitled to.

The word "Court" in 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.

The plaintiff filed an application for judgment on the accounts as settled by the judge and deposited in the Registry of Court. The motion commenced as follows: "The plaintiff herein makes application to the court for judgment" and gave certain reasons therefor.

Held that the application for judgment was not made in the proper form.

Application for judgment on the findings of Douglass, J., on the determination of the objections filed by the plaintiff to the accounts submitted by the defendant Bismilla of the joint estate held by the deceased Mohabir and his wife in community at the time of his death.

P. N. Browne, K.C., for the plaintiff (applicant).

G. J. de Freitas, K.C., for the defendant Bismilla.

Cur. adv. vult.

DOUGLASS, J.: In giving my decision on the settlement of accounts that the account shows a balance of $249.87 to the credit of the estate of Mohabir, deceased, I left it to the parties to apply for judgment within ten days after notice of the deposit of the settled account, under Order XXIX. rr. 12 & 13. Notice was duly given dated 22nd February, 1924, and on 1st March the plaintiff's solicitor filed what purports to be such an application, and which would possibly have been in form under the old practice, but, under the present practice, since the Supreme Court Ordinance

No. 10 of 1915, it should not have been allowed on the file, and the particulars annexed thereto should be removed therefrom. With regard to the form of application I propose to waive any irregularity as both parties are before the court and will treat it as an application to move for judgment in the ordinary course. It has been pointed out to me that many sections of Order XXIX. are now obsolete, but I cannot treat rules 12 & 13 as repealed, and shall interpret the word " court" as defined by the Supreme Court Ordinance, 1915, as including "a judge when exercising any of the jurisdictions conferred on him by the ordinance or by any ordinance or by the rules." The "Rules" mean the Rules and Orders of Court made under the Supreme Court Ordinance, 1893. Rule 13 is peculiar to this Colony, but it answers to the English practice in certain cases of reserving to any party liberty to apply to the Court, and if any such liberty has been omitted, an application may be made under Order XXVIII., r. 11 (our Order XXVI., r. 12) to have the necessary words added. Moreover, in the case of orders which are not final, liberty to apply to the Court, as to the working out of rights declared is implied without express reservation : *Fritz* v. *Hobson* (1880) 14 Ch. D. 561. There are two local cases I might refer to where applications were made under rule 13. The first is *Legatt* v. *Fogel and another*. G.J. 13.4.04: the judgments of Bovell, C.J., and Hewick, J. are of particular interest as showing that at that date the court was of opinion that the Full Court had power to adjust and alter the accounts as settled by the judge, in fact to revise his decision ; Lucie Smith, J., was however of the opposite opinion. The other case of *Ramsohoye Maharaj and others* v. *Bhowaney Persaud.* G.J. 4.5.10 is a somewhat similar case to the present being brought by the heirs of, against the executors of the will of, Seetul and Phulmania. The plaintiffs applied under Order XXIX., 13, for judgment on certain accounts which were ordered by the court and which had been settled by a judge who found that the sum of $807.50 was to be credited to the estate of Seetul and Phulmania.

Reverting to the present case, Mr. Justice Dalton in his decision of May 6th, 1922, concludes “On the plaintiff's claim therefore there will be a “declaration that he was married to the deceased Mohabir in community of “property. She is therefore entitled to an account from the defendant the “deceased executrix, of the property belonging to the estate that was “possessed in community and of her dealings therewith, and for an order “for the delivery to her of her half share thereof.” This judgment was upheld on appeal.

The plaintiff asks for the following in her statement of claim. [Read.] Counsel have informed me that an arrangement had

been come to and completed with respect to the deceased's immovable property, so I have only to deal with the claim of the movable, the other portion of the statement of claim having been settled. The plaintiff has succeeded on the greater part of her claim against the first defendant and I accordingly give judgment for the plaintiff in the sum of $124.94 being one-half of the balance of movable estate held in community of property, and I give judgment for the second defendant in respect of the claim against moneys deposited with them (a).

Solicitor for the plaintiff, *Carlos Gomes.*

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

(a) An appeal was taken to the West Indian Court of Appeal from the findings of the judge as worked out in this order.

GOBIN MARAJAH *v.* JOHN LOPES.

[No. 639 OF 1922.]

1924. FEBRUARY 19; MARCH 3. BEFORE DOUGLASS, J.,

Practice—Judgment obtained by default—Absence of plaintiff—Laches—Action to set aside judgment—Due diligence—Interpleader—Levy on cottage—Whether application or action the proper remedy—Rules of Court, 1900, Order 42, rule 11

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. *Wyatt* v. *Palmer* (1899) Q.B. 106, C.A, not extended.

He may, however, if he has good and strong reasons and, if uses due diligence and acts promptly, make an application under Order 40 of the Rules of Court, 1900, in the original action to set the judgment 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 merely a 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, 1923. 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 plaintiffs 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.

Action to set aside a judgment obtained by default of the claimant in an interpleader matter, and for a declaration that a certain cottage was the property of the plaintiff. John Lopes obtained a judgment in action No. 667 of 1921 against Padaratti and others and in pursuance thereof levied on a certain cottage. Gobin Marajah gave notice to the Marshal on the 16th day of June, 1922, that he claimed the property. The Registrar interpleaded and the claimant was ordered to appear before the court and state the nature of his claim. He never appeared before the court and he filed no affidavit. After the matter had been adjourned for a week his claim was dismissed on the 15th day of July, 1922. The plaintiff, Gobin Marajah, filed his writ in this action on the 27th October, 1922, claiming, *inter alia,* an injunction restraining the sale. An interim injunction was granted on the 30th October, 1922, and an interlocutory injunction on the 18th November, 1922. The defendant John Lopes entered appearance on the 3rd November, 1922. The statement of claim was filed on the 4th December, 1922, the defence on the 11th December, 1922, and the reply on the 15th December, 1922. The action was not placed on the hearing list within six months, and on the 18th July, 1923, the plaintiff applied for an order of revivor under Order 32, rule 5 of the Rules of Court, 1900. This application was granted on the 11th August, 1923. On the 12th October, 1923, the plaintiff placed the action on the hearing list.

E. P. Bruyning, for the plaintiff.

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

Cur. adv. vult.

DOUGLASS, J.: The plaintiff is bringing an action to restrain the sale at execution of a cottage at Belladrum in pursuance of a levy made at the instance of the defendant on a judgment obtained by him against one Theophilus Williams and others on the 26th November, 1921, and he also asks for an order to set aside the judgment by default dated the 15th day of July, 1922, in the interpleader action No. 667 of 1921, and for an order to declare the property so levied on to be his property.

There were preliminary objections taken, (1) that there was no sufficient affidavit of merits necessary in the case of an application to set aside a judgment, but this a ease where it is the plaintiff who is making the application, and as pointed out in *Henriques et al* v. *Santos,* 23.2.09, the cases to which this rule has been applied are where judgment has been given for the plaintiff on the defendant's default, and in a case such as this the facts are before the court in the statement of claim and in the affidavit of the plaintiff of the 28th October, 1922, and (2) the

plaintiff has mistaken his form of action; an application to set aside a judgment by default should be by way of motion and not to impeach the judgment by bringing a new action. I confess I can find no precedent for the present form except in the case of *Wyatt* v. *Palmer* (1899. 2 Q.B., 106) which was an action to set aside a judgment obtained against the plaintiff by default. In the judgment of Lindley, M.R., he states: "It is said that no such action will be. That proposition is so new to me that as an equity lawyer I was startled by it. That an action could not be brought to impeach a decree or judgment on the ground of fraud was a surprise to me," and he refers to Mitford on Pleadings "If a decree has been obtained by fraud it may be impeached by original bill without the leave of the court," and concludes "as a general proposition, I think it dangerous and undesirable to summarily stop an action to set aside a judgment on the ground that it has been obtained by fraud." But there is no question of fraud in the present case but of *laches* on the part of the plaintiff. The interpleader action was set down for hearing on the 8th July, the time extended and it was finally taken on the 15th July, 1922, when the present plaintiff (the then claimant) filed no affidavit substantiating his claim, put in no appearance and did not explain his absence. On the 27th October he issues the present writ, and on the 18th November an order was made restraining the defendant and the Registrar from parting with the property until the final determination of this action. On the 15th December the plaintiff joined issue with the defendant. The action was not entered on the hearing list by the 15th June, 1923, and so became deserted under Order 32, rule 5, and it was necessary for the plaintiff to apply for an order of revivor, which he did, and an order was obtained on the 11th August, 1923, more than a year after the interpleader order.

Any person applying for an order reversing a judgment by default must use due diligence in applying and show good and strong reasons. From beginning to end the plaintiff has shown anything but due diligence and he is now asking that the judgment may be set aside, or what it practically comes to that the matter may be reheard. It is very necessary that an order to set aside 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, and I am not inclined—indeed, I think it would be dangerous—to extend the ruling in *Wyatt* v. *Palmer* (1899, 2 Q.B., 106). I therefore dismiss the action with costs to the defendant.

Judgment for defendant.

Solicitors: *H. B. Fraser, V. D. P. Woolford.*

CRESSALL, *et al v.* HONNIBAL, *et al.*

CRESSALL, *et al v.* HONNIBAL, *et al.*

[No. 142 OF 1922.]

1924. JAN. 30, 31; FEB. 1, 2; MAR. 6, 10, 13.

BEFORE MAJOR. C.J.

Conversion—Possession in defendants—Diamonds—No identification proved— Possession as an inference from circumstances.

Where a person who has. however innocently, obtained possession of the goods of another who had 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.

The plaintiffs claimed from the defendants the sum of $12,800 as damages for wrongfully depriving the plaintiffs of 13 ounces 2 dwts. of raw gold and 215 carats of rough diamonds and converting them to their use. In their statement of claim they alleged that the defendants, who were the co-owners of a shop in the Mazaruni district and held a licence to trade in diamonds purchased or agreed to purchase the said gold and diamonds from certain unauthorised vendors and took possession of the same without the plaintiffs' authority or consent having been given to or obtained by such vendors, and refused to deliver them up to the plaintiff on demand being made. The defences were (1) a general denial, (2) that any diamonds that may have been bought were purchased in good faith and at full market value, (3) that such diamonds were never the property of the plaintiffs.

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

P. N. Browne, K.C., for D. N. Honnibal.

G. J. DeFreitas, K.C., for the executors of M. J. deFreitas.

Cur. adv. vult.

SIR CHARLES MAJOR, C.J.: The plaintiffs were put to proof of (1) their property in the goods mentioned in the statement of claim; (2) their possession of those goods; and (3) the conversion of them by the defendants.

According to the findings of fact there was, or was not applicable the principle expressed by Lord Chelmsford in *Hollins* v. *Fowler* (1874) L.R. 7 H.L. 757, 795, “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."

I was satisfied on the plaintiffs' evidence that they had in the hands of Houston, their managing partner, the diamonds and raw gold mentioned in the statement of claim. I was also satisfied that the subsequent prosecution of Ambrose and others was for the very diamonds and gold of the possession of which the plaintiffs had been deprived. Ambrose was convicted of the theft of those diamonds. I had no reasonable doubt that the goods, the subject matter of the claim, were stolen from the plaintiffs.

The third ingredient of proof of the claim was that the diamonds, or some part or number of them, reached the defendants' hands. The raw gold was dismissed from consideration for there was no suggestion as to what had become of it. If the diamonds, or any part or number of them, did reach the defendants' hands, there seemed to be no question that conversion had taken place. Ambrose, at or about the time of the theft, sold diamonds to the defendants, but so did Yearwood and others (charged with him as having participated in the theft) who were acquitted. I was asked to draw the inference that the diamonds he did sell to the plaintiffs were some of those stolen, because he could not reasonably be supposed to have had in his possession such a quantity unless unlawfully acquired, but I could see no. evidence to support the inference. There was no evidence whatever of identification of the diamonds or anyone of them, and I was unable to regard as of any assistance towards identification the facts that firstly, cash orders were issued for diamonds sold by Ambrose, Yearwood and others; secondly that those diamonds were handed to Honnibal; thirdly, that those diamonds were part at any rate of the quantity taken from the defendants' bank for inspection by Captain Craig; fourthly, that there was an anxiety on the part of the defendants' employees and the defendants themselves—and, considering the state of the defendants' mining books, I was not surprised—that the matter of the loss of the diamonds should be kept from publicity. Two other facts in evidence were urged for the probability of the identity of the diamonds, Humphrys' letter and the negotiations for compromise between the plaintiff Cressall (since deceased) and Fitzherbert Walcott as the plaintiffs' agent and the defendant deFreitas (also since deceased). Humphrys wrote of the advisability of a plea of purchase in good faith, but in the first place he was not the purchaser, he wrote at a distance from the scene of the loss, under threats by the police (he said) to destroy his office and entirely on hearsay of events. As for deFreitas' attitude, it was never at any time more than amounting to a statement: "if "your diamonds were sold to us and we have them, I will return them

"or pay their value," and the negotiation towards avoidance of litigation seemed to be on the evidence to have proceeded on the same hypothesis.

The plaintiffs were far from satisfying me that the stolen diamonds, or indeed any particular stone or stones of their bulk, ever came into the defendants' hands, and my verdict, therefore, is for the defendants.

Judgment for defendants.

Solicitors: *W. S. Cameron, V. C. Dias. F. Dias.*

MAW, SON & SONS, LTD. *v.* SCOTTS, LTD. (IN LIQUIDATION.)

[No. 172 OF 1923.]

1924. FEBRUARY 27; MARCH 15. BEFORE W. J. DOUGLASS, J.

Principal and agent —Authority of selling agent —Accord and satisfaction—Payment by a third party — Whether liquidator paying by his own cheque for his convenience is a third party—Third party not out of pocket—Bills of exchange—Interest—Usage of trade —Bills of Exchange Ordinance (No. 13 of) 1891, Sections 57, 52, 19 (3) (*c*)*—General acceptances—Presentment not necessary*

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.

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

The defendants had accepted a certain bill of exchange drawn in favour of the plaintiffs. The defendant went into liquidation, and P. C. W. was appointed liquidator. He drew a cheque for $3,200, which was less than the amount of the bill, in favour of the plaintiffs, crossed it, and handed it to the plaintiffs' agent, This cheque was the liquidator's personal cheque and was not drawn on the bank account of the defendant company. The proceeds of the cheque were invested in a draft in favour of the plaintiffs. The liquidator was not out of pocket by drawing the cheque on his own account, and he only so drew it for the sake of convenience.

Held, that there was no accord and satisfaction, as payment was not made by a third party.

Hirachand v. *Temple* (1911) 2 K.B 330 explained.

This was an action to recover the sum of £149 16s. 5d. due on a bill of exchange together with interest. The facts and arguments sufficiently appear from the judgment.

H. C. Humphrys, for the plaintiffs.

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

Cur. adv. vult.

DOUGLASS, J.: The plaintiff's firm is claiming from the defendant company in liquidation the balance due on a bill of exchange for £286 12s. 4d. with interest at 6 per cent, per annum from 29th July, 1919, being the total sum of £200 7s. 6d. The bill is drawn and accepted by the defendant company on 26th May, 1919, payable sixty days after sight. The defendant company denies indebtedness in any sum. They allege that the plaintiffs sold and delivered the said company certain merchandise in respect of which they drew bills of exchange on the company and that on the 3rd June, 1921, one T. E. Guy, the duly authorised and accredited agent and representative in the colony of the plaintiffs, after considerable discussion as to the amount alleged to be due by the company, accepted from the liquidator of the company (Mr. P. C. Wight) $3,200 in full payment, satisfaction and discharge of the then existing liability of the company to the plaintiffs ; that the said payment covered and included the company's liabilities on the bill of exchange sued on. The defendant corn-also denied that it ever paid any sum of £118 15s. l1d, as credited on the plaintiff's particulars. If the $3,200 was accepted in full satisfaction of all outstanding claims against the defendant company the plaintiffs can have no case, 'the substantial facts in issue,' obviously lie upon the defendant company to prove, so that I called upon them to begin.

There is no question but that the sum of $3,200 was paid to Mr. Guy and accepted by the plaintiffs, so the onus lay on the defendant company to prove that the plaintiffs accepted it in full payment of their account. I have no doubt that Mr. Guy made certain statements that led the liquidator to infer that the amount was sure to be accepted as payment in full but that alone of course is not sufficient.

In the first place what was the position of Mr. Guy? He held no power of attorney from the plaintiffs but appears to have had one from Messrs. Geddes, Grant & Co. who was agents for the plaintiffs; Mr. Wight believed that he communicated directly with the plaintiffs. I gather from the whole evidence that Mr. Guy was general agent in the colony for the purpose of selling the goods of his principal (in England) to, *inter alios,* the defendant company and he therefore had implied authority to do whatever was incidental to the ordinary course of his business and whatever was necessary for the proper and effective performance of his duties. Mr. Wight whilst acting as liquidator in the winding up of the defendant company—he was also a shareholder of the company—took objection to the excessive charges for certain items supplied by the plaintiffs and offered Mr. Guy $3,200 in full discharge of the account, and he says Mr. Guy promised to cable them and shortly after informed him that he had done so, whereupon Mr.

Wight handed him a crossed cheque for $3,200 dated 3rd June, 1921, payable to Maw, Son & Sons or order; this cheque is endorsed "Invested into a draft in favour of Maw. Son & Sons, Ltd., London, for £666 13s. 4d., T. Geddes, Grant, Ltd., agents, Deme-rara, B.G. (affixed by rubber stamp), and signed T. E. Guy; the counterfoil is merely endorsed "3/6/21 S. Maw, Son & Co. $3,200." It was admitted that the draft was received by the plaintiffs, and Mr. A. Groves—appointed their attorney for the purpose of this action,—says he prepared a receipt and handed it to Guy, and he puts in the counterfoil of the receipt "No. 48. 4/6/21 Received from W. Bagot & Co, a/c S. Maw, Son & Sons, $3,200." W. Bagot & Co. is Mr. P. Wight, who denies that he had a receipt of any sort. In a word Mr. Wight's evidence is unsupported, Mr. Guy was not called as a witness, and "there are no words of settlement, release or discharge" to be found in any document or account: see *Nathan* v. *Ogden, Ltd.* ((1905) 93 L.T. 554, 555. On the point of law, whether, in spite of lack of evidence, the plaintiffs are not bound by accepting the draft for $3,200 learned counsel for the defendant company referred to *Hirachand, et al,* v. *Temple* ((1911) 2 K.B. 330, 339, 340, C.A.) a case where the father of a debtor wrote the creditor offering an amount less than that of the debt in full settlement and enclosed a draft for this amount. The creditor retained the draft and sued the debtor for the balance. It was held that the creditor must be taken to have accepted the amount received by him upon the terms on which it was offered and therefore he could not maintain the action. Fletcher Moulton, L.J., said “the effect of such an agreement between a creditor and a third “party with regard to the debt is to render it impossible for the creditor “afterwards to sue the debtor for it”; it is the effect of the third party who steps in that the decision in this case rests on, and the learned judge concludes his judgment with the words "and I have no doubt that (in such a case) upon the acceptance of the money by the plaintiff with full knowledge of the terms on which it was offered, the debt was absolutely extinguished." But where is the third party in the present case? Mr. Wight could not be so called, he was liquidator for the defendant company and took their place at law, the payment of this personal cheque was for convenience, he was not out of pocket by it, he says he would have paid the whole if they had insisted, and "if there had been money at the time to Scotts account" he would have paid the $3,200 out of their funds, also " all the creditors that were paid were paid in full."

Several other cases on accord and satisfaction were cited but it is hardly necessary to refer to them, the authorities show that the intention to make a new contract must be proved on a plea

of satisfaction by payment of a smaller sum for a larger one; I can find no evidence of such a new contract, and Mr. Wight's evidence is only what he believed should, or intended to take place. Even if Mr. Guy could have been produced to support his evidence there is no evidence of any benefit accruing to the creditor as a consideration for relinquishment of the total indebtedness. But, again, where was Mr. Guy's authority for making any such contract? He admittedly had not the power to accept less than the amount due without reference to his principals, and I have no evidence that they authorised him to do so. Unnecessary costs have been incurred owing to Mr. Wight's attitude in holding Mr. Groves—the plaintiffs attorney—and their lawyers at arm's length, and in the final winding up of Scotts, Limited, it will be a question whether he should be allowed these costs as liquidator of the company.

The defence of accord and satisfaction having completely failed, there is no other defence to the action. There was some question raised as to interest having been illegally added to previous bills of exchange which would reduce the surplus of the $3,200 to meet this bill, but the defence raised no such protest or any question as to the amount of any outstanding bills, so that I must accept it when the plaintiffs offer evidence that the balance, after meeting previous bills, was £118 15s. l1d. I might point out that bills and notes by the usage of trade—apart from the Bill of Exchange Ordinance—carry interest from the time of maturity; and see section 57 of Ordinance No. 13 of 1891. The plaintiffs have proved their claim for balance of principal due on the bill of exchange payable sixty days after sight and accepted by the defendant company on 26th May, 1919. Under section 19 (3) (c) and section 52 of Ordinance No. 13 of 1891 the acceptance is a general acceptance and presentment is not necessary to render the acceptor liable. The interest claimed is also due, and I accordingly give judgment for the plaintiff for £200 7s. 6d. and costs.

Judgment for plaintiff.

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

Solicitor for the defendants, *V. C. Dias*

S. S. KHOURI *v.* S. C. ELCOCK.

S. S. KHOURI *v.* S. C. ELCOCK.

[No. 153 OF 1922.]

1924. MARCH 20, 27. BEFORE W. J. DOUGLASS, J.

Prescription—Limitation of Actions—Lord Tenterden's Act, 1828—Prescription Ordinance, 1856—Repeal of section 10—Prescription Ordinance, 1918—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 1 can,"

Held, that there was sufficient uncontrolled acknowledgment to take the case out of the Prescription Act, 1856.

Spencer v. *Hemmerde* (1922) 2 A.C 509, and

Tanner v. *Smart* (1827) 6 B & C 603, discussed.

The plaintiff issued a writ on the 6th April, 1923, claiming $177.96 from the defendant for goods sold and delivered. The defendant pleaded that the plaintiff gave him the goods to sell on a commission and that he never purchased them on his account. In the alternative, he pleaded that more than three (3) years had elapsed since the alleged purchase. The plaintiff relied on three letters dated the 18th September, 1919, 12th April, 1922, and 12th May, 1922, and also on some oral conversations to take the ease out of the statute,

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

E. M. Duke, for the defendant

Cur. adv. vult.

DOUGLASS, J.: The plaintiff is claiming a balance of $777.96 for goods sold and delivered by him to the defendant on April 14th and 22nd, 1919. The defendant admits that he had the goods in question, but says that he only had them to sell on the plaintiff's account in French Guiana, and that he had only sold a portion of them at a loss. He also claims that the alleged debt is Statute barred by the Prescription Ordinance, 1856. As there is only the plaintiff and defendant who can say what was the original arrangement between the parties, we must look to the surrounding circumstances and the probabilities of the case to arrive at a solution on the facts. I have carefully considered the evidence and am satisfied that an ordinary sale of goods was intended, and not a transaction on commission. I might mention, without going into detail, that the following facts, more especially,

point to an out and out sale: (1) Articles supplied on 14th April were for local use, sent to defendant next day and a deposit made in cash; (2) discount at 3 per cent, was allowed on both lots in sales book, a duplicate copy being supplied defendant; (3) defendant never protested that there had been no sale, in reply to plaintiff's frequent demands for payment; (4) usual course of business was a cash sale, (5) other goods were not supplied 'ex bond', as was usual in dispatching goods for foreign supply : and (6) stock of similar goods was very low at the time, and there was no urgency for getting rid of them. So far the plaintiff would succeed in his claim, and the question of whether that claim is barred by the Prescription Ordinance, 1856, must next be considered. The laws of prescription, as it is called—but more properly referred to as the law of the Limitation of Actions—applying in this colony was fully discussed in *Hack* v. *Hoyte* ((1919) L.R.B.G. 219) and I propose to discuss it only so far as is necessary for the special facts in this case, and in the light of *Spencer* v. *Hemmerde* ((1922) 2 A.C. 507, 516, 517, 536, 538) when the various authorities were reviewed and considered. In the first place it may be premised that Lord Tenterden's Act in no way altered the law prevailing before the passing of the Act except by requiring that the acknowledgment of or promise to pay the debt to be sufficient and would be in writing. As pointed out in *Hack* v. *Hoyte* ((1919) L.R.B.G. 219) this does not apply in the colony, and the principle still holds good that the acknowledgment required must be one from which a promise to pay can be inferred. I can find no evidence of any direct acknowledgment of the debt by word of mouth; even if the statement that the defendant gave continual excuses why he did not pay were thought sufficient, it is uncorroborated and the defendant does not admit it. His promise too with reference to shipment of gold was made after the writ was issued and cannot affect the matter so that the letters offered in evidence by the plaintiff are what he rests his case on to resist the plea of prescription. Of these letters and copy letters offered in evidence the only ones sufficiently proved were those of the following dates 18th September, 1919, (defendant to plaintiff), 12th September, 1921, (plaintiff to defendant), 12th April, 1922, (defendant to plaintiff), 24th April, 1922, (plaintiff to defendant), and 12th May, 1922, (defendant to plaintiff). The two letters of the plaintiff to defendant are of no special importance, the reference therein to any acknowledgment or promise to pay being in the nature of self-serving evidence, so that only the three letters to the plaintiff are left and of these the defendant's letter of the 18th September, 1919, can be disregarded as even if it contained anything, construed as an acknowledgment of the debt it would not take it out of the statute, for the suit was not started

until the 6th April, 1923, and the defendant's last letter of 12th May, 1922, contains nothing worthy of note except an acknowledgment of the receipt of the plaintiff's letter of 24th April, so there only remains the letter of 12th April, 1922, and in this the defendant says : "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." In *Spencer* v. *Hemmerde* ((1922) 2 A.C. 538) Lord Wrenbury in giving judgment says: "Briefly in every case it is necessary to see (1) "whether there is any acknowledgment in writing; (2) whether there is "language which excludes or modifies the promise which, in the absence "of anything to the contrary, the law implies from the acknowledgment, "and (3) (if there is such language) whether it amounts to a refusal to pay, "in which case there is no promise, or (b) the facts are such that the "express promise, if there be one, has matured by effluxion of time or "satisfaction of the condition upon which the promise was expressed to "take effect." In that case the letter upon which the discussion turned read: "It is not that I won't pay you, but that I can't do so. It is important that I "should see you and explain the situation," and Viscount Cave in his judgment (at page 516) states "the words may not amount to an express "promise to pay the principal and interest due, but at least they contain an "admission of liability and a profession of the writer's willingness to "discharge it which, unless qualified by other expressions in the letter, "carries with it a promise to pay."

"In *Tanner* v. *Smart* ((1827) 6 B & C. 603) the words I cannot pay the "debt at present but I will pay it as soon as I can" were held insufficient without proof of ability to pay, because the promise was conditional. In *Green v. Humphrey* ((1884) 26 Ch. D. 474, 479, C.A.) Cotton, L J., expressed an opinion—quoted with approval by Viscount Cave in ((1922) 2 A.C. 517, that "if he (the defendant) had referred in terms to 'my debt "which I am sorry I cannot at present pay,' probably the words would have "been sufficient to constitute an express acknowledgment." It is difficult to reconcile this opinion with the earlier decision unless it is that in the earlier case there was considered to be no such clear acknowledgment of the debt as to raise the implication of a promise to pay immediately or in the near future, and yet Lord Summer in his very lengthy judgment in *Spencer* v. *Hemmerde* ((1922) 2 A.C. 507, 536,) says: "I do not think it enough for the debtor to say 'when I can pay

"'who can tell?' to destroy the acknowledgment as a basis for the required "promise. Had the debtor said, as Smart said, 'I cannot pay the debt at "present but will pay it as soon as I can,'" the result presumably would "have been the contrary for on such nice distinctions do these cases turn."

In the present case it seems to me that the obligation to pay is admitted in the defendant's statement that he did promise the plaintiff when in Demerara—which was apparently in 1921—to send a remittance, thus the original promise to pay is renewed by natural implication without any condition or qualification except an explanation for his reason for not having paid the debt before, and the conclusion of this letter "I will try and settle with all my creditors," clearly includes the plaintiff. On a fair construction of the language of this letter of 12th May, 1922, I think there is sufficient uncontrolled acknowledgment to take the case out of the statute, though it is only after considerable hesitation that I come to this conclusion.

I accordingly give judgment for the plaintiff for $777.96 and costs.

Judgment for the plaintiff.

Solicitors, *W. I. Sousa, A. V. Crane.*

MAZAWATTEE TEA Co., LTD., *v.* PSAILA, LTD.

MAZAWATTEE TEA Co., LTD., *v.* PSAILA, LTD.

[No. 345 OF 1923.]

1924. MARCH 12, 13, 14, 19, 21, 29.

BEFORE BERKELEY. J.

Trade Mark—Infringement—Passing off goods—Mazawattee, Mazaruni—Similar get up—Evidence—Defendants' goods mistaken for plaintiffs'—Trade Mark Ordinance, 1914, sect. 8 (5.)

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.

Johnston v. *Orr Ewing* (1882) A.C 226, applied.

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 led 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 led 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 the word *Mazawattee,* and that, therefore, the plaintiffs were entitled to an injunction.

Derby Photographic Dry Plate Co., Ltd., v. *Pollard, Graham & Co.* (1885) 2 T.L.R. 276), applied.

The facts sufficiently appear from the judgment.

H. C. Humphrys and *S. J. Van Sertima,* for the plaintiffs.

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

Cur. adv. vult.

BERKELEY, J.: In this action the plaintiffs claim an injunction to restrain the defendants, their servants and agents from infringing their trade mark No. 733, and from passing off teas under the name of "Mazaruni Tea" which are not blended by the plaintiffs,

On 7th May, 1902, a certificate was issued stating that on that day a paper containing a representation of the trade mark used by the Mazawattee Tea Company, Limited, was deposited in the Registrar's Office. This representation of the trade mark

"Mazawattee" appears on the certificate. This was the system adopted until the passing of the Trade Marks Ordinance, 1914. The plaintiffs registered their Trade Mark No. 733 under this Ordinance on 26th June, 1923.

The defendants in paragraph one of their defence admit the statement in paragraph three of the claim, *viz.*, that the plaintiffs use and for many years past have extensively used both in this colony and in England and elsewhere the word "Mazawattee" as a trade mark,

The plaintiffs for over 30 years have sold in this colony brand "O" of their tea in packets of one, two and four ounces. On each packet there has always been a dark blue label with a narrow white and blue border which runs the whole length of one side and extends to both ends. On this dark blue label the words "Mazawattee Tea for the million" in white print appears on the length of the packet, and on the two ends the words "Copyright label. Registered and Entd. St. Hall. Quarter Pound (or other quantity) No. O."

The plaintiffs allege that the defendants have infringed their trade mark as during the year 1922, and to the date of the commencement of these proceedings they have affixed to their packets of tea, dark blue labels with a narrow white and blue border whereon in white print, on a dark blue ground, appear the words "Mazaruni Tea" with the device of a diamond placed between the two words, the blue being the same shade as that used by them and the printing being of the same character. (Paragraph 6).

The defendants deny that the dark blue label is an imitation of the plaintiffs' label and they allege that it differs in size, description and design. This label runs right round the packet having the words "Mazaruni Tea" with the design of a diamond between the two words on both sides. At both ends there is the design of a diamond and under it, is the quantity that is "Quarter Pound," "Two Ounces" and "One Ounce" as the case may be.

The evidence shows that this tea was sold in the colony before the plaintiffs' trade mark was registered on 26th June, 1923.

Counsel draws attention to the trade mark as registered which makes no reference to "wrapper" or "tea for the million." He refers to the Trade Mark Ordinance, 1914, s. 8 (5). I see nothing there which renders the trade mark invalid by the use of these words.

The defendants although they deny imitation of the plaintiffs' label are silent as to the similarity of the labels, beyond saying that they differ in size, description and design. It is true that the various packets of the defendants are somewhat longer than

the corresponding packets of the plaintiffs. Those of the plaintiffs have in width what they lose in length. The description is certainly different; one is described as "Mazaruni Tea" and the other as "Mazawattee Tea for the Million." There is the design of a diamond in white on the defendants' packet which is not on the plaintiffs'. They both have a white and blue border, both labels are dark blue and a close scrutiny will show a slight difference in shade amongst the plaintiffs' and defendants' packets respectively as well as between those of the plaintiffs and defendants. One witness long in the trade speaks of having taken the defendants Mazaruni Tea for the plaintiffs' Mazawattee and on a closer examination discovered his mistake. This and similar evidence was admitted on my attention being drawn to Lord Selborne's remarks in *Johnston* v. *Orr Ewing* (1882) 7 A.C. 226. There is also the fact that the first four letters of the word "Mazaruni" are the same as those of the word "Mazawattee," and "Mazaruni" is printed the same place as "Mazawattee." On the question as to persons being likely to be deceived by the similarity of the labels I must hold that the get-up of the defendants is so similar to that adopted by the plaintiffs that it is calculated to deceive illiterate persons and more especially those of the Indian race, who are unable to read or understand English. They might very well take the defendants' tea in the belief that they were purchasing that of the plaintiffs. The defendants themselves have not given evidence and no explanation has been given why they adopted labels so similar in appearance to those of the plaintiffs: *Derby Photographic Dry Plate Company, Limited,* v. *Pollard Graham & Co.* (1885) 2 T.L.R. 276. Bacon, V.C. said in this case “no reason has been suggested why the defendant having the “whole alphabet before him should have picked out the word “Derwent” “(here “Mazaruni”) which at first sight looked like “Derby” (here “Mazawattee”) and in sound was not very dissimilar.”

The injunction is granted. Defendants must account for the profits (if any) from 4th December, 1922, the date on which it is shown that the defendants had knowledge that plaintiffs' trade mark had been registered. Delivery or destruction of the infringing labels and erasure of the infringing mark. Defendants must pay the costs of this action.

Judgment for plaintiffs. Injunction granted.

Solicitors: *C. E. Shepherd, J. Gonsalves.*

V. A. P1RES, *et al v.* K. E. VALERIE

V. A. PIRES, *et al v.* K. E. VALERIE.

[No. 142 OF 1923.]

1924. MARCH 20, 21; APRIL 10, 14. BEFORE BERKELEY, J.

Transport—Indefeasible Title—Registered encumbrances—Sale at execution—No interpleader—Deeds Registry Ordinance No. 17 of 1919, section 20.

There were two buildings on lot 42, Bartica, belonging to J. C. On the 30th June, 1921, J. C. sold the buildings to M. J. DeF., and leased to him the portion of land on which they stood for the term of 10 years with right of renewal. This lease was deposited in the Deeds Registry on the 9th July, 1921.

On the 4th July, 1921, M. J. DeF, agreed to sell to the defendant 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. DeF. The defendant did not interplead with respect to the buildings levied upon although they were her property. The sale at execution took place on 24th April, 1922, and the property advertised was purchased by the plain-tiffs.

On the 3rd July, 1922, M. J. DeF. 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 while it was subject to the lease which now vested in the defendant, it conferred upon the plaintiffs full and indefeasible title to the buildings therein mentioned.

On the 24th April, 1922, the plaintiffs purchased at execution sale as the property of George Chong lot number 42 (forty-two), First Avenue, Bartica, in the county of Essequibo and colony of British Guiana as shown on a plan of Bartica town by William Chalmers. Assistant Crown Surveyor, dated 19th day of August, 1887, and deposited in the Office of the Registrar of British Guiana on the 26th day of January, 1889, with the buildings thereon subject to the conditions contained in the original grant of said lot number 42 (forty-two) and further subjected to a lease in favour of Manoel Jose DeFreitas for a period of ten years executed on the 30th July, 1921, and with right of renewal for a further period of 10 years and deposited in the Deeds Registry on the 9th July, 1921." Transport was passed therefor in favour of the plaintiffs on the 8th day of August, 1922, No. 614. On the 3rd day of July, 1922, Manoel Jose DeFreitas assigned the lease to the defendant by a deed attested in the Deeds Registry. The defendant alleged in her defence that she purchased two buildings which were then on the land from Manoel Jose DeFreitas on the 5th December, 1921. She did not file an interpleader claim when the sale was advertised. She also denied occupying any portion of lot 42 other than that mentioned in the lease. The plaintiffs, *inter alia*, claimed the buildings and

prayed for a declaration that the original lease and assignment be declared void. The other facts appear sufficiently from the judgment.

G. J. DeFreitas, K.C., for the plaintiff's.

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

Cur. adv. vult.

BERKELEY, J.: The plaintiffs claim (*a*) a declaration that the original lease and the assignment thereof are void in law and of no effect whatever; *(b)* possession of lot 42, First Avenue, Bartica, with the buildings and erections thereon; (*c*) alternatively, possession of the building now occupied by the defendant; (*d*) an injunction restraining the defendant from entering the plaintiffs' land and house, or house alone, and remaining on or in them or either of them.

The defendant counterclaims an order declaring that the levy made on the buildings be set aside and be declared wrongful and illegal.

George Chong sold to Manoel Jose DeFreitas two buildings on his land, lot 42, First Avenue, Bartica, and on 30th June, 1921, granted him a ten years' lease of the said land with the right of renewal for another ten years. On the 4th July, 1921, the said Manoel Jose DeFreitas, in consideration of defendant paying to him $225, agreed to sell to her the two buildings and to transfer to her the lease held by him on the said lot, and on the 5th December, 1921, the said DeFreitas gave her a receipt for the sum of $225 being payment in full for the buildings and the right to transfer the lease of the land to her. Both the agreement and receipt are signed by Mr. DeFreitas himself and his signature is admitted to be genuine. The lease was assigned to defendant represented by her Attorney George Chong on the 3rd July, 1922, by John Jose DeFreitas, Attorney of Manoel Jose DeFreitas.

The plaintiffs sued George Chong and obtained judgment for $144.75 due on a promissory note dated 15th June, 1921. They levied on lot 42, First Avenue, Bartica, as the property of the debtor and at execution sale on the 24th April, 1922; they purchased the said lot with the buildings thereon subject to the said lease in favour of Manoel Jose DeFreitas, no claim to the houses having been made by the defendant. On 8th August, 1922, they obtained transport which shows that it was bought subject to the said lease.

The plaintiffs allege fraud on the part of Chong to defeat his creditors.

The $225 paid by DeFreitas was placed to the credit of Chong, and, according to Humphrys and Talbot, witnesses called in

behalf of the plaintiffs, it was understood that DeFreitas would resell to Chong on his request. At end of December, 1921, he had paid off his indebtedness and had a balance to his credit. It seems to me that DeFreitas carried into effect his promise to resell to Chong. As early as the 4th July, 1921, he agreed to sell and on the 5th December, 1921, he confirmed this by a receipt, showing that on that day he had been paid in full. It is true that both the agreement and receipt are in favour of the defendant who is the mother of Chong's children. If her claim rested on her evidence, I should hesitate to find that she was the purchaser from DeFreitas; but, in view of the documentary evidence and that of the witnesses referred to, I am satisfied that the houses were purchased and the lease obtained by or for her. The only debt shown to be due by Chong is that of $144.75 due to the plaintiffs.

I am disposed to believe that Chong found all or most of the purchase money, and as there is no evidence of creditors who could have been defrauded, it seems he did what the witness Talbot says he desired to do—that is to put the property in defendant's name to safeguard his children.

This Court must hold (1) that a full and absolute title was given to the plaintiffs by their transport dated the 8th August, 1922, and (2) that the defendant is entitled to enjoy the use of the land during the periods mentioned in the lease.

Judgment for plaintiffs, as to the buildings, each party to pay his own costs both on claim and counterclaim.

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

Solicitor for defendant, *V. D. P. Woolford.*

JUPUTTIA *v.* MARY ROOKM1NIA FRASER.

JUPUTTIA *v.* MARY ROOKMINIA FRASER.

[No. 504 of 1922.]

1924. MARCH 11, 25, 26; APRIL 14. BEFORE BERKELEY. J.

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.

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 roods 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 contract of sale.

The plaintiff alleged that she agreed to buy from the defendant for $700 six undivided one hundred and ninety-second parts or shares of and in Plantation New Hope, East Bank, Demerara, that at the time of the sale the defendant pointed out to her a particular piece of land comprising 9 roods in facade by 750 roods in depth as the area then being sold, that transport was passed on the 12th September, 1921, for the said undivided interest, but that since then the plaintiff had ascertained that, according to the title obtained by her, she only had legal title for 1 rood, 10 feet by 750 roods in depth. The plaintiff claimed *(a)* that the transport be set aside, (*b)* the return of the purchase price, and (c) $300 damages. The defendant denied making any representations to the plaintiff as to the extent of the facade of the land sold, and averred that the sale was solely with reference to the description in her transport and that she conveyed to the plaintiff her entire interest under her legal title.

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

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

Cur. adv. vult.

BERKELEY, J.: The plaintiff claims rescission of an executed contract.

Joseph Fraser obtained title to 6/192 parts or shares of and in one undivided sixth part or share of and in Plantation New Hope by a declaration in the Supreme Court on the 13th November, 1918, in an action between Evan Wong and the said Joseph Fraser and

another. He transported this undivided share on the 15th September, 1919, to Rookminia, the defendant. On the 12th September, 1921, the defendant, now Rookminia Fraser (having married in April, 1921, the said Joseph Fraser) transported the said undivided share to the plaintiff". In the transports and in the receipt of the 8th August, 1921, for $200 as well as in the receipt of the 12th September, 1921, for $455 (moneys paid on account of purchase money), the description of the property is the same. So also in the plaintiff's affidavit of proof of purchase sworn to on the said 8th August, 1921.

Ramdehol (plaintiff's brother) who lived near the defendant approached her as to the sale of the land to his sister. He can read and write (plaintiff and defendant cannot) and when this action was brought he saw Caines, clerk to Mr. Wills, who had been engaged in connection with the transport, and he asked him to say that plaintiff told him that she was buying 9 roods in facade by 750 roods in depth. Caines told him that he could not say so, it would be false; he also stated that there was no mention of the rods, and that he was only referred to the title held by defendant.

According to defendant's husband there were three beds planted with provisions and he says that he regarded each bed as three rods. He also says that at one time he had 18 rods and that he had abandoned the remaining 9 rods. This abandonment was probably due to the declaration of the Supreme Court in the action of Wong *versus* Fraser (supra)

Mr. Evan Wong also says that Fraser (husband of the defendant) occupied 3 beds. This Mr. Wong has acquired from time to time all the undivided parts or shares of this plantation save and except the 6/192 parts owned by plaintiff. The plaintiff agreed to purchase on 8th August, 1921, and the transport was passed on the 12th September, 1921. She therefore had over one month to consider the matter. She was quite satisfied with her purchase until she received a letter from Mr. Wong written by him before the transport was passed but not received until December, 1921, and she says that she never would have brought this action if Mr. Wong had not claimed the land. Mr. Wong allowed Fraser and then the defendant to occupy the three beds, and he says he did not take proceedings against Fraser as he found it would cost him more than the land was worth but he told him that he had more land than he was entitled to. When, however, he saw that transport was to be passed to the plaintiff he wrote the letter already referred to, which was received three months after it was written. In it he gives her notice that she is only entitled to “no more than one rod “two feet in facade by the *entire depth* and you are not to take possession “of or occupy

"more than such portion of land. The balance of the said plantation is my "*bona fide* property. Should you encroach upon anymore of the lands in "that area, I shall be constrained to take such legal steps as I may be "advised to keep you within the limits of your own property and to recover "damages for any encroachments thereon." It is the receipt of this letter which has led to this action being brought.

Now this land is undivided and the present plaintiff is in possession of the same quantity of land as her two predecessors held and enjoyed under the same title. I am satisfied that both plaintiff and defendant and those interested in behalf of both parties knew perfectly well that the sale and purchase was limited to the description given in the title and that there was no reference made as to rods, although as a fact the land occupied by plaintiff and her predecessors in title consisted of these three beds.

On this finding, I do not consider it necessary to deal with the evidence of Mr. Durham, Land Surveyor. The land is undivided and although his evidence may tend to show that the plaintiff's facade is more than she is entitled to, it seems peculiar that plaintiff in possession should seek to deprive herself thereof.

I can see no grounds for her claiming rescission of the contract.

Judgment for defendant with costs[a]

Judgment for defendant.

Solicitors : *W. D. Dinally* ; *A. V. Crane.*

(a) An Appeal was taken to the West Indian Court of Appeal but it was dismissed without the respondent being called upon.

R. S. DELGADO *v.* C. E. BROWNE.

R. S. DELGADO *v.* C. E. BROWNE, AS EXECUTRIX OF W. J. BROWNE.

[No. 176 OF 1923].

FULL COURT.

1924. APRIL 25. BEFORE MAJOR, C.J., AND DOUGLASS, J.

Practice—Striking out pleading under Order 17, rule 30—Extrinsic evidence—Inadmissibility of—Rejection of same in Appeal Court, though admitted without objection in lower Court.

On an application under Order 17, Rule 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 vexations, the judge received and considered, without objection, affidavits of the parties in support of and opposition to, the application.

Held, on appeal from an order dismissing the application that, on *Attorney-General of Duchy of Lancaster v. London and N. W. Ry. 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.

Motion by the defendant to strike out the statement of claim and for dismissal of the action.

The plaintiff alleged in his claim that the defendant in her capacity as executrix "*and others*" caused the Commissioner of Lands and Mines to advertise in the " Official Gazette " of the 7th April, 1923, a transfer of all their right, title and interest in and to certain wood-cutting licences to and in favour of T. M. Chee-a-Tow; that on the 14th April, 1923, the plaintiff entered opposition to the said transfer on the ground that the defendant in her quality as the executrix of W. J. Browne was indebted to the plaintiff in the sum of (1) $493.80, moneys lent to the said W. J. Browne, and (2) $450, the defendant's share of a joint and several liability in respect whereof the plaintiff has paid the whole amount. The plaintiff claimed (a) an injunction restraining the defendant from transferring her testator's interest without making payment to the plaintiff of the amount due and (b) an order that the opposition entered was just, legal and well founded.

In support of her application the defendant filed an affidavit. Therein she set out that the plaintiff and W. J. Browne were partners in the wood-cutting business, that on the 7th October, 1922, in action No. 611 of 1922 the plaintiff sued her for $493.80 alleged to be due to her husband's estate, that she counter-claimed for accounts in connection with that partnership, that these accounts have never been adjusted or settled and that the action

was still pending; that on the 4th November, 1920. the plaintiff, her late husband W. J. Browne, T. M. Chee-a-Tow, and T. A. Chung Schee entered into a wood-cutting partnership business under the firm name of The Loo Produce and Shipping Syndicate, and that this partnership bought over grants from her husband; that after her husband's death the other partners agreed with herself as the executrix of her deceased husband that the business of the Loo partnership should be sold at auction as a going concern with a view to realising the assets and winding up the said partnership; that T. M. Chee-a-Tow purchased the assets at auction; that in pursuance of this agreement she joined with T. M. Chee-a-Tow, T. A. Chung Schee and the plaintiff in the advertisement mentioned in the statement of claim; that the said property was partnership property belonging to the said Loo Produce and Shipping Syndicate and not the private property either of herself or of her deceased husband W. J. Browne; that she had not nor had the estate of her deceased husband any such property therein as was capable of division without realising the assets of the partnership; that it was unlikely that the property would realise in the future the amount already agreed upon by him, and a breach of the agreement to sell to him might entail severe pecuniary loss, and the interests of those partners who are not parties to this action would be seriously prejudiced. The defendant further alleged that the statement of claim disclosed no reasonable cause against her and was frivolous and vexatious. The plaintiff filed a counter affidavit. Therein he alleged that the Loo Produce and Shipping Syndicate had been wound up, that a definite sum was arrived at as available for distribution among the partners on the completion of the transfer of the two grants mentioned in the statement of claim and the payment of the purchase price; that all the debts of the partnership had already been paid; and that the sum payable to the defendant, herein as executrix of her husband, represented the sole remaining asset of his estate. The judge considered these affidavits without objection on either side.

S. L. Stafford, for the defendant (applicant).

J. S. McArthur, for the plaintiff (respondent).

Cur. adv. vult.

1923. JULY 14.

GILCHRIST, Acting J.: This is an application by the defendant that the plaintiff's statement of claim be struck out and the plaintiff's action dismissed.

2. The grounds of the application are:—

(a) that the plaintiff's statement of claim discloses no reasonable cause of action;

(b) that the statement of claim is frivolous and vexatious;
(c) that it is not competent for the plaintiff to maintain this action.

3. The arguments advanced by counsel for the applicant in support of the aforesaid grounds are—*firstly*, that it is not competent for one of many partners to block a partnership transaction so as to enforce a claim by such partner against one of the other partners; *secondly*, that the claim of the plaintiff is to restrain the transfer of certain property, but does not, as is required by Order 2, rule 6 of Part II of the Rules of Court, seek to enforce the claim for $450 in respect of which the opposition is partly founded.

4. It is not disputed that the property sought to be transferred is subject to the terms of a deed of partnership in which the plaintiff and the defendant are two of the partners. The property in question is the right, title and interest in and to certain woodcutting licences for certain acres of Crown land.

5. It is conceded by counsel for the applicant and respondent that the Lands and Mines Department does not recognise partnerships, and that each of the four partners under the partnership deed could separately transfer his undivided interest in the said licences to a third party. The advertisement of transfer—*vide* "Official Gazette" of 7th April, 1923, at page 866—is, however, by all the partners done possibly with the object of saving expense.

6. The affidavit of the respondent filed in reply to that of the applicant is to the effect that all the debts of the partnership have already been paid, and the partnership wound up and a definite sum arrived at available for distribution among the partners on the completion of the transfer of the said licences and the payment of the purchase price. That the sum payable to the defendant (applicant herein) in her quality as executrix of the estate of William Joseph Browne, deceased, is the sole remaining asset of the said estate.

7. In my opinion the statement of claim in so far as it refers to the sum of $493.80 the subject of a claim by the plaintiff (respondent herein) and pending in action No. 611 of 1922, in the Supreme Court does disclose a reasonable cause of action, and is not frivolous or vexatious. The opposition claim in this respect could be consolidated with the said action No. 611. The fact that the plaintiff may not, or is not likely to succeed in his action is no ground for striking out his claim: *Boaler* v. *Holder* (1886) 54 L.T. 298; see also *Dyson* v. *Att. Gen.* (1911) 1 K.B. 410, 414, C.A.; *Burstall* v. *Beyfus* (1884) 26 Ch. D. 38, 39, CA; and *Worthington v. Belton* (1902) 18 T.L.R. 438.

8. With respect to, the alleged indebtedness in the sum of $450 on which the opposition is partly founded, it is clear that

the plaintiff has not complied with the requirements of Order 2, *r.* 6 of Part II. of the Rules of Court, but I am equally clear that the pleading can be rectified by a legitimate amendment: see *Barrie* v. *Duff* (31.3.08) Full Court. I grant leave to do so if it is desired, the terms of the amendment to be settled in chambers,

9.The application is dismissed with costs.

10. The time for filing defence is enlarged to ten days from date hereof.

Application dismissed.

From this decision the defendant, by leave of the judge, appealed on the grounds (a) that the statement of claim disclosed no reasonable cause of action, and (b) that it was frivolous and vexatious.

S. L. van B. Stafford, for appellant.

J. S. McArthur, K.C., for respondent, was not called upon.

1924. APRIL 25.

SIR CHARLES MAJOR, C.J.: The plaintiffs' action is brought pursuant to opposition entered against an intended transfer by the defendant of her right, title and interest to and in a certain wood-cutting licence. The statement of claim commences with an allegation that the defendant, in capacity of executrix, and others caused to be published in the *Gazette* an advertisement of the transfer. There follows a repetition of the reasons for opposition, which are in respect of the defendant's indebtedness to the plaintiff for money lent, for the price of goods sold and delivered, for rent and upon a joint promissory note by the plaintiff and the defendant's testator which the plaintiff has paid. The defendant applied to the court below to strike out the statement of claim, as disclosing no reasonable cause of action and being frivolous and vexatious. The learned judge of the court below has dismissed the application and the defendant has appealed against his order of dismissal. It became manifest, I think, during the argument addressed to us, that the case is concluded by authority.

The principle of law governing the application—made as it has been under Order 17, rule 30, which is exactly the English rule 4 of Order 25—is that the pleading to which exception is taken must be shewn to disclose no cause of action (or defence) on the face of it, without recourse to extrinsic evidence. So was it expressly stated by A. L. Smith, L.J., (as the learned judge then was) in *Attorney General of the Duchy of Lancaster* v. *The London and North Western Railway* (1892) 3 Ch. 274, 278, when he said "I want to make one remark about Order 25, rule 4. It seems to me that

when there is an application made to strike out a pleading, and you have to go to extrinsic evidence to show that the pleading is bad, that rule does not apply. It is only when, on the face of it, it is shown that the pleading discloses no cause of action, or that it is frivolous and vexatious, that the rule applies. In this case it is manifest that you must go to extrinsic evidence to show that the pleading is bad, and directly it comes to that the rule does not apply." In this case it appears that upon the hearing of the summons in the Court below, there were received and read an affidavit of the defendant in support and one by the plaintiff in reply by way of opposition. The learned judge, in my opinion, had no power to look at those affidavits, for they were inadmissible for the purposes of the application. But it is urged that the plaintiff and the defendant having joined in submitting that evidence, this Court is bound to follow the learned judge in considering them. I do not agree. I said during the argument that where evidence is improperly admitted before (as in this case) a judge without a jury, it is the duty of a Court of Appeal to reject it, though it has been received without objection, for the Appeal Court ought to decide the case upon legal evidence. The authority for that proposition (which I did not at the time recall to mind) is *Jacker* v. *The International Cable Co.* (1888), 5 T.L.R. 13. Parties may waive and be bound by waiver of irregularities in procedure but wrongful admission of evidence is not an irregularity. This appeal is a rehearing, and it is as though the application under Order 17, rule 30, were being made to this Court. We cannot look at either affidavit.

Thrown back, therefore, on the statement of claim alone, Mr. Stafford has made two suggestions that it discloses no reasonable cause of action, the first being that in the expression "and others " in the first paragraph is included the plaintiff himself who would appear, therefore, from it to be both plaintiff and defendant, and many authorities like *Ellis* v. *Kerr* (1910) 1 Ch. 529 have been cited. But in order to ascertain the correctness of that suggestion, recourse must obviously be had to extrinsic evidence, and this may not be done. The second suggestion is that the *Gazette* of the 7th April 1923, being quoted as in the statement of claim set forth, this Court must look at that publication in its entirety and will see there that the plaintiff is included in "others." I cannot agree. So far as the contents of the *Gazette* are recited in the pleading, we are bound indeed to notice them, but no farther, for that would be, in my opinion, to supply an allegation which is missing from the pleading, the source of supply being thus again extrinsic evidence.

As for the ground of frivolity and vexation, nowhere in the

statement of claim is there material for its existence, but it is stated to be certain conduct of the plaintiff towards the defendant in connection with the transfer of the licence. Where is that shown in the pleading? There may be a variety of defences to the action arising out of Crown land regulations, partnership dealings and relations, and what not; with them now I have nothing to do. The learned judge, however, though erring, in my opinion in looking at the affidavits, arrived at a proper order. The statement of claim is unexceptionable on the face of it, and as it alone can be regarded the appeal must be dismissed with costs. The defendant, of course, will have the usual ten days from the date of our order to file her defence.

DOUGLASS, J. : I only propose to add that one of the points relied on by learned counsel for the appellant in support of his contention that the plaintiff was estopped from making any such claim inasmuch as he was a consenting party to the transfer he now purports to oppose, namely, his argument that this appeared in the statement of claim in the words "that the defendant in her aforesaid capacity and *others* caused the Commissioner of Lands and Mines to advertise in the *Official Gazette* of British Guiana dated 7th April, 1923, transfer of . . . " somewhat impressed me; for although it is true that a *Gazette* produced as evidence cannot be referred to on an application such as this, yet so far as the statement of claim gives an abstract of the advertisement in the *Official Gazette,* so far it would seem it makes it a part of the statement of claim as if it had been embodied therein, in the same manner as the original opposition entered on the register can be referred to to confirm the extract of the opposition set out in paragraph 2 of the statement of claim not by way of evidence but as a part of the record of the proceedings on which the statement of claim is founded. But even if this were so, the mere fact disclosed by the said advertisement that the attorney for four persons including the plaintiff advertised the sale of the licence in question, would not estop the plaintiff from entering an opposition against the transfer by one of those parties until he had settled the opposers claim. It might make a good defence but would be no justification for striking out the plaintiffs Statement of Claim.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: for the applicant and appellant, *E. A. W. Sampson.*
for the respondent (plaintiff), *A. V. Crane.*

CRESSALL *v.* DIAS

CRESSALL *v.* DIAS.

[No. 396 OF 1923.]

FULL COURT.

1924. JANUARY 4. BEFORE MAJOR, C.J., BERKELEY, J., AND DOUGLASS, J.

Res judicata—Autrefois acquit—Jeopardy—Jurisdiction on former complaint—Offences charged substantially the same—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 or therein—Substantially only one offence—Amendment—Summary Convictions Offences Ordinance (No. 12 of) 1893, section 97 (2) Reasons of decision—Guide to Court of Appeal—Complaint need not be in writing—Ordinance No 12 of 1893, section 8 (1),

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.

Per Douglass, J.: 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.

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.*

Davis v. *Morton* (1913) 82 L.J K.B 665.

R. v. Marshman (1912) 2 K.B. 362, and

Haynes v. *Davis* (1915) 112 L.T. 417, applied.

(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?

R v. *Simpson* (1914) 1 K.B. 66, and

R. v. Barron (1914) 30 T.L.R. 422 applied.

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 the license for a licensed place situate at Plaisance did deliver spirituous liquor therein. The nature of the license 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 license 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 license for a retail 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" or "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

Appeal from the order of Mr. C. H. E. Legge, Stipendiary Magistrate of the East Coast judicial district, upholding a plea of *autrefois, acquit* and dismissing a complaint brought under section 3 of the Licensed Places (Hours of Closing) Ordinance (No. 20) of 1902 for delivery of spirituous liquor from a licensed place within hours prohibited by that ordinance. Section 3 provides that every person who between the hours of “11 p.m. of “every Saturday and 5 of the following Monday morning and between the “hours of 11 p.m. and 5 of the following morning of any other day of the “week, save as hereinafter provided, opens or keeps open any licensed “place for the purpose of selling or bartering therein or sells or barters or “offers or exposes for sale or barter or delivers any spirituous liquor, malt “liquor or wine of any kind *therein* or *therefrom* shall on being convicted “thereof be liable to a penalty of not less than fifty nor more than five “hundred dollars.” And it is enacted by section 2 that the term "licensed place" means and includes any licensed retail spirit shop, and licensed hotel or tavern, and any store, shop, room, shed, stall or yard for which a license has been taken out by any person for the sale therein of any malt liquor or wine.

The facts appear sufficiently from the judgments.

S. J. Van Sertima, Acting Assistant to the Attorney General, for the appellant.

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

SIR CHARLES MAJOR, C.J.: Section 3 of Ordinance No. 20 of 1902 makes every person offend who, between certain specified hours, delivers any spirituous liquor in or from a licensed

place, the expression "licensed place" including, by section 2, any licensed retail spirit shop. By section 4, every holder of a license for any licensed place is made penally liable himself for any breach of the Ordinance by any person employed by him in or about that place.

On the 25th of June last the respondent was charged with the offence thus created in the following terms: "for that the said Manoel Dias within the hours prescribed by the Ordinance, being the holder of a license for a licensed place situate at Plaisance in the East Coast judicial district, in the county of Demerara, did by a person employed in such licensed place, deliver spirituous liquor therein." Evidence for the prosecution was given at some length, and towards the close of the complainant's case it appears from the magistrate's notes on the record that counsel for the respondent then drew the court's attention to the complaint, objecting that it disclosed no offence. A witness for the prosecution was recalled and another witness was sworn accordingly to give evidence of the topography of the licensed place. The magistrate dismissed the complaint. We find from the reasons he gave for his decision that he held that no offence was disclosed in the complaint because the mere use of the words "holder of a license for a licensed place" did not in any way connect the offence with Ordinance No. 20 of 1902. I may observe here that those were not the mere words; the locality of the licensed place had been stated, Plaisance, &c, and it had been proved by the evidence and not been disputed that at Plaisance was situate the only place there for which the respondent held a licence. The magistrate also held that on the facts it was not proved that any spirituous liquor had been delivered therein (*i.e.*, in the licensed place), that the evidence was contradictory and it seemed far more probable that if liquor was delivered, it was delivered "therefrom."

On the 21st of September, the respondent was again charged, on this occasion that he, within the same hours as specified in the first complaint, being the holder of a licence for a retail spirit shop (describing more fully than in the first complaint its name and locality) did, by a person employed in that shop, deliver spirituous liquor therefrom. The respondent pleaded *autrefois acquit* and in support of that plea put in evidence a certified copy of the record in the proceedings of June. The magistrate noted on his record: "complainant admits (that) the facts and acts of the case are (the) same as given in evidence on (the) previous charge and the evidence would refer to the same incident." No evidence was tendered for the prosecution. The magistrate upheld the plea of *autrefois acquit* and dismissed the complaint. The complainant has appealed.

The argument for the appellant rests on two propositions, firstly that derived from *The Queen against Drury* (1849) 3 C & K 193 as stated in Archbold (26th Edn. at p. 158) that a plea of *autrefois acquit* is ineffective when, by reason of some defect in the record, either in indictment (or, as here, in the complaint), the place of trial, the process, or the like, the defendant has not stood in jeopardy, that is, was not liable lawfully to suffer judgment for the offence charged against him in the first indictment as it stood at the time of its finding (or, as here, in the first complaint as it stood when it was made); secondly that upon which so many authorities proceed, namely, that, while none may be vexed twice for the same cause, the respondent here was charged by the second complaint with' an offence different from that charged by the first. For the governance of the first proposition it has been argued that the magistrate was right when he found that the first complaint was defective in that it disclosed no offence against the ordinance under which it obviously was laid. Quite apart from any argument directed to curability or otherwise of the alleged defect, the course of the proceedings, the time of objection to the complaint, the taking of evidence and what purport to be findings of fact on that evidence, I cannot here give effect to the argument to support either proposition. The magistrate, in my opinion, was wrong— and here it is material to inquire whether he was wrong or right—in holding that the complaint was defective. The ingredients in proof that the offence created by the Ordinance of 1902 in the words I have read has been committed 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 complaint of June. Further, in order that the respondent might be informed that his liability to be convicted would be sought to be thrown in that the delivery was made by his employees in or about the particular licensed place that fact is set forth in the complaint. Here, therefore, it seems to me you have precisely that "fair information and reasonable particularity as to the nature of the offence" which Lord Alverstone, C.J., said in *Smith* v. *Moody* (1903) 1 K.B. 56, 60, 61 is required in indictments and. therefore, in complaints. Here is observance, 1 think, to the full of the rule which, as Wills, J., remarked, "has prevailed for at least two hundred years that whatever is necessary to show that the person convicted has done something which brings him within the words of the statute must (still) be specified" The magistrate having, therefore, jurisdiction on the face of the complaint when it was made to enter upon the hearing of it, the defendant was liable, upon proof of the facts therein particularized, to be convicted thereon and so stood in jeopardy.

Regarding Mr. Van Sertima's second proposition, whatever be the number of offences created by the third section of the ordinance in relation to spirituous liquor and during prohibited hours —personally I think there are five, namely (1) opening, (2) keeping open, licensed premises 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 —in respect of the delivery, at any rate, whether the word "therein" where it last appears in the section, applies or not to delivery, there is but one offence, and with that one offence the respondent was charged as well in September as in June. Thus the second proposition is also untenable; the appeal, in my opinion, fails and must be dismissed but without costs.

BERKELEY, J.: This is an appeal from the stipendiary magistrate of the East Coast judicial district who dismissed a complaint laid against the defendant for delivering spirituous liquor within the prohibited hours contrary to Ordinance No. 20 of 1902 (s. 3). The ground of dismissal is that he had been already acquitted for the same offence.

The proceedings in the first case are put in and the complaint reads that defendant "between the hours of 11 p.m. on Saturday, 16th June, 1923, and 5 am. on Monday, 18th June, 1923, to wit, on Sunday, 17th June, 1923, being the holder of a license for a licensed place situate at Plaisance in the East Coast judicial district, county of Demerara and colony of British Guiana, did by a person employed in such licensed place deliver spirituous liquor therein contrary to law." This complaint was heard on 13th July and after evidence had been taken, counsel for the defendant submitted that the complaint disclosed no offence. The case was adjourned to 20th July when further evidence was taken and the prosecution closed. The magistrate then upheld the submission of counsel and dismissed the complaint. Notice of appeal was given but apparently abandoned.

A second complaint against the defendant—which is the subject matter of this appeal,—came before the magistrate on 5th October. It contains the facts set out in the first complaint save and except (1) that the words "licensed retail spirit shop" are used instead of "licensed place," and (2) the word "therefrom" instead of "therein." *As to* (1). Section 3 which creates the offence refers to "any licensed place" and the interpretation of these words includes "any licensed retail spirit shop" (s. 2). The use therefore of the words "licensed place" in the first complaint was absolutely correct. *As to* (2). These words do not create two separate offences. The offence charged in both

complaints was the delivery of spirituous liquor within prohibited hours and if the evidence in the first complaint pointed to the delivery of the spirituous liquor *from* and not *in* "the licensed place," I think it would have been enough to use the correct word in the conviction. In any case the magistrate had power to amend under Ordinance No. 12 of 1893, s. 97 (2), and this was a case in which that power ought to have been exercised.

I am satisfied that the magistrate had jurisdiction to hear and determine the first complaint, and it follows therefrom that the present respondent was in peril of being convicted on that occasion for the offence with which he is now charged. Appeal dismissed. Under all the circumstances I consider no order should be made as to costs.

DOUGLASS, J.: This is an appeal against the decision of the magistrate of the East Coast judicial district in dismissing a charge brought against the defendant under section 3 of Ordinance No. 20 of 1902 on the ground of *autrefois acquit.*

The reasons for appeal are that (1) the decision is erroneous in point of law because (a) the defendant had not been in jeopardy at the first trial (13th-20th July, 1923); *(b)* the original complaint of 25th June disclosed no offence by him, (*c*) the magistrate erred in holding that having had jurisdiction to hear the first complaint and taken evidence thereon it necessarily imperilled the defendant.

The evidence given in support of the first complaint showed that the defendant owned the rumshop 'the Charlestown' at lot 152 A, Plaisance, the only retail spirit shop owned by the defendant at Plaisance, and that he held a license for these premises. It was also proved that spirituous liquor was delivered therein or therefrom within prohibited hours.

At the end of the first day's proceedings on the 13th July the defendant's counsel drew attention to the complaint and objected there was no offence disclosed, but on 20th July fresh evidence was taken, and the magistrate dismissed the case. In his reasons for decision the magistrate says that he is of opinion that no offence under Ordinance 20 of 1902 is disclosed, on the facts it was not proved that any spirituous liquor was "delivered therein," it seemed to be far more probable that if liquor was delivered it was delivered therefrom, *i.e.,* from the retail spirit shop. He also took objection to the complaint being deficient in certain necessary particulars.

Notice of appeal was given but never proceeded with, and on the 21st September another complaint was put in against the same defendant under the same section of the ordinance only giving proper details and referring to the ordinance.

In giving his reasons for dismissing this second complaint, the magistrate says: "that complaint *(i.e.*, the first one) was dismissed on points of law and also it was found as a fact that the evidence for the prosecution did not prove the delivery of spirituous liquor "therein" a licensed place." And again, "there is no doubt that on the hearing of the previous ease the acquittal or conviction of the defendant absolutely depended on the decision of the court on technical points of law and on the facts."

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, but they are 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 first complaint, and why he dismissed it, the court will accept his statement—*qua* statement—as conclusive, he may have been right or wrong in what he did, that could have been proved on appeal.

Different tests have been applied for the purpose of ascertaining whether a judgment recovered in one action is a bar to a subsequent action, but it may be gathered from the numerous cases referred to by learned counsel that 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,* if not no judgment could have been given. In *Davis* v. *Morton* (1913) 82 L.J.K.B. 665 the withdrawal of the first summons by the prosecution owing to the defects in the procedure before any evidence was taken was held to be no bar to the subsequent proceedings. Ivory, J., in the course of his judgment, said “as the Justices “had no jurisdiction to hear and determine the summons their decision “could not be pleaded in bar to subsequent proceedings.” See also *R.* v. *Marsham* (1912) 2 K.B. 362.

In *Haynes* v. *Davis* (1915) 112 L.T. 417 the ease turned on the question whether in the particular circumstances the magistrate had jurisdiction to try the case, notwithstanding an informality in procedure to which objection might be taken. The court (by a majority) held that the informality was not a condition precedent and the magistrate could have heard the first case and therefore the accused was in peril of being convicted. Ridley, J., said "whether the acquittal is by the verdict of the jury or by ruling "on a point of law without the case going to a Jury" the accused person is entitled to plead *autrefois acquit.*

And the second test is, *Was the offence or wrong with which the accused is charged practically or substantially the same in*

both cases, or to put it another way, had he the risk of being convicted in the first case for the same offence with which he is charged in the second case.

In *R.* v. *Simpson* (1914) 1 K.B. 66 Ridley, J., states "the practice of this "Court has been settled for centuries and is that in all cases where a "prisoner or defendant is in danger of imprisonment no new trial will be "granted if the prisoner or defendant having stood in that danger has been acquitted." See also *R.* v. *Barron* (1914) 2 K.B. 570.

To apply to the present case the first test, namely, the necessity that the magistrate should have jurisdiction. The defence was raised at a late stage that the complaint disclosed no offence. As a matter of fact the defendant evidently understood what offence was charged in pleading to it and evidence was taken sufficient to explain any vagueness in the complaint and to substantiate the charge, witnesses were cross-examined and the license for the rumshop was tendered by the defendant before any objection was taken. The case of *Reid* v. *London* (1918) L.R.B.G. 109 referred to is not to the point, the learned judge there stated that the defect in the complaint was incurable, and objection had been taken before plea. Here the magistrate clearly had jurisdiction and if the complaint was such that it needed amendment it could have been amended at anytime. I note, however, that inasmuch as the term "licensed place" in the complaint is linked up with the delivery of "spirituous liquors therein" there is scarcely a reasonable doubt as to what the words "licensed place" referred to, and evidence was also given, without any objection being taken, that lot 52, Plaisance, was "the only retailed shop owned by the defendant at Plaisance." Had there been a conviction, it would have had to be more precisely drawn up and to meet the circumstances as disclosed by the evidence. It is not even necessary for a complaint to be made in writing, provided it is eventually reduced to writing. (Sec. 8 (1) of Ordinance No. 12 of 1893); "No objection shall be taken or allowed, in any proceeding in "the court, to any complaint, summons, warrant, or other process for any "alleged defect therein in substance or in form, or for any variance between "any complaint or summons and the evidence adduced in support thereof": Section 97 (2) of Ordinance No. 12 of 1893.

In the present case the hearing was adjourned on the objection being taken so that the defendant must have been fully prepared to meet the offence disclosed by the evidence (had it been necessary. See *Rodgers* v. *Richards* (1892) 1 Q.B. 555) that being the holder of a license for a licensed place (within section 2 of the Licensed Places (Hours of Closing) Ordinance, 1902), he did deliver therein spirituous liquors within prohibited hours. On

the evidence it seems to me that the magistrate might well have convicted the defendant, and he certainly stood "in peril."

This brings me to the second test, was the offence charged substantially the same in the second case as in the first.

The learned Assistant to the Attorney General says no, the first charge if any offence at all was disclosed—and he submits that there was none—was for being the owner of licensed premises within prohibited hours delivering spirituous liquor "therein" whereas the second charge was for delivering spirituous liquor "therefrom." Surely the offence does not consist in the manner, in which it is completed, but that between certain prohibited hours a person (1) opens or keeps open a licensed place for the purpose of selling or bartering therein, or (2) sells or delivers any spirituous liquors therein or therefrom. I doubt whether more than one substantial offence is dealt with in this section, the real test to ascertain this is in the answer to the question what statutory need or what contingency is this section drawn to meet? The answer is to prevent any dealing with spirituous liquors within prohibited hours, practically one offence only. Can it be honestly contended then that "therein" and "therefrom" indicate two separate offences? Surely not. They merely indicate two ways of committing the same offence.

On these grounds then that the magistrate had jurisdiction on the former occasion when the complaint was dismissed, and that on the second occasion the complaint was substantially in respect of the same charge, I hold that the magistrate was right in accepting the plea of *autrefois acquit*, and this appeal must be dismissed but without costs.

Appeal dismissed.

LOPES, FERNANDES & Co., LTD., *v.* A. DECASTRO.

LOPES, FERNANDES & Co., LTD., *v.* A. DECASTRO.

[No. 155 OF 1923.]

FULL COURT.

1924. MAY 9. BEFORE MAJOR, C.J., AND DOUGLASS, J.

Magistrate's Courts—Payment into Court before hearing—Fee to solicitor or counsel "conducting case"—Meaning of conducting case—Ordinance No. 11 of 1893, s 13— Ordinance No. 10 of 1893, Schedule, Item 9, and sections 57 and 60.

The respondents brought an action against the appellant in the Magistrate's Court for goods sold and delivered. About an hour before the ease 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' (respondents') solicitor who had prepared and signed the plaint although the defendant's counsel took objection at the time. The defendant appealed.

Held, that the Magistrates' 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 plaintiffs therefore could not recover more than the amount of the claim and the Court fees incurred.

Appeal from a decision of Mr. J. H. S. McCowan, Stipendiary Magistrate of the Georgetown Judicial District. The facts appear sufficiently from the judgment.

P. A. Fernandes, for the appellant DeCastro.

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

Cur. adv. vult.

DOUGLASS, J.: This was a suit brought in the Georgetown judicial district, in which the plaintiff claimed a sum of $96.70, balance of account for goods sold and delivered to the defendant, the present appellant.

It appears that shortly after 9 a.m. on the day fixed for hearing the defendant paid the amount claimed and the court fees incurred $1.92 into court, and obtained a receipt for the same from the clerk of court.

Later in the day the clerk informed the magistrate that counsel on behalf of Mr. F, Dias, the plaintiffs' solicitor, was applying for his fee, and he thereupon endorsed the case jacket with fee to counsel $9.67, in reliance on item 9 of the schedule to Ordinance No. 10 of 1893 (The Magistrates' Courts Ordinance, 1893) which reads as follows: “Where the amount of “the value of the article sought to be recovered is $25 or upwards, fee to “counsel or solicitor for conducting the case, to be awarded or withheld in “the discretion of the magistrate who shall record his decision in each ease, “from $2.50 to $10.”

The defendant through his counsel took objection at the time

to the decision of the magistrate in allowing any fee to counsel for the plaintiff, and the present appeal followed. The reasons for appeal summarized are, that the decision was erroneous in point of law because the defendant having complied with the provisions of section 13 of Ordinance No. 11 of 1893 (The Petty Debts Recovery Ordinance. 1893) the magistrate had no jurisdiction to give or record any judgment against the defendant or to exercise his discretion in granting a fee to the plaintiffs' counsel, and that counsel had conducted no case within the meaning of item 9 of the schedule to Ordinance No. 10 of 1893. As a preliminary to the discussion of the special points raised by this appeal, it may be observed that the intervention of counsel or solicitor in a civil suit in the Magistrates' Court is not suggested or provided for either by Ordinance No. 10 or No. 11, except in the latter ordinance under the caption "Hearing of Action." Section 18 provides "Either party may be represented by counsel," and rule 80 of the Magistrates' Courts Rules. 1911, states: “A magistrate in giving “judgment with costs need not at the time of the giving of such judgment “state the amount of such costs, but shall fix the amount of the fee payable “to counsel or solicitor at that time.” This implies a distinction between 'costs' and counsel's fee, and the latter must be fixed on giving judgment. It seems to me that the ordinances never intended to provide for the intervention of counsel or solicitor before the actual hearing, there are no pleadings to be prepared and if the plaintiff is an illiterate person the clerk of the court shall, and in practice does, prepare the plaint for him. for which a fee of 24 cents only is demanded (see section 25 of Ordinance 10 of 1893, and Order-in-Council of 12th April. 1907): and again compare section 8 of Ordinance No. 11: "A plaintiff shall lodge" with the clerk of the court a statement in writing of his claim." etc. with section 8 (3) of Ordinance No. 12 of 1893 (Summary Conviction Offences (Procedure) Ordinance, 1893). “Every such complaint may be made by the complainant “in person or by his counsel,” etc.

There are two main points to be decided. First, on a payment into court of the amount claimed and costs at any time before hearing under section 13 (1) of Ordinance No, 11 of 1893, (a) what is meant by "the costs incurred by the plaintiff up to the time of such payment," and (b) is it necessary or lawful for the magistrate to give or record judgment for the plaintiff, or should the case merely be struck out in the usual way on none of the parties appearing: and secondly, what do the words "Fee to counsel or solicitor for conducting the case" mean in item 9 of the schedule to Ordinance No. 10 of 1893, with reference to civil cases in the magistrates' courts?

The meaning of the words "the costs incurred" may be ascertained by reference to sections 57 and 60 of Ordinance No. 10 of 1893; section 57 (1) states: “The fees and costs set forth in the tables...may be demanded and “received by the clerk of every magistrate's court for and in respect of the “several matters therein mentioned”, and section 60 “all fees and costs “payable under or by virtue of this ordinance shall *in the first instance*, be “paid by the party applying for the summons, warrant, or other process or “document, in respect whereof the same are payable, but the same shall be “costs in the cause or matter in which they are paid.” So that the expression “costs incurred” can only mean the fees and costs payable in the first instance by the party applying, that is the fees and costs demanded and received by the clerk; can it possibly be contended that these include a fee to the plaintiffs' solicitor, much less to counsel who would only appear at the hearing?

If the defendant had wished he could have consented to judgment under section 13, but he adopts the other alternative and pays into court the debt and costs and the claim is satisfied unless the plaintiff elects to proceed under sub-section (3) of section 13, but in that case if he recovers no further sum, he is mulcted in costs and compensation to the defendant. When the claim is thus satisfied, it follows that no judgment or decision is necessary or proper. We are now in a position to consider what the words 'fee for conducting the case' refers to. As I have already pointed out such a fee cannot be included in the words 'fees...in the first instance paid by the party applying and received by the clerk,' for it is awarded only at the discretion of the magistrate which he cannot exercise unless the case comes on for hearing and he gives a decision on the plaintiffs claim. Taking into account then the true construction of section 13, that by the rules the fee is to be fixed when the magistrate is giving judgment, and that no provision is made by either ordinance referred to for the employment of counsel or solicitor before the hearing I am of opinion that the words 'conducting the case' must mean conducting the case at the hearing and not in its wider sense from the commencement of the case. The magistrate then was wrong in awarding any fee and this appeal should be allowed with costs.

MAJOR, C.J.: I concur.

Appeal allowed.

Solicitor for respondent, *Francis Dias.*

HENRY AARON BRITTON.

[No. 179 OF 1924].

CROWN PAPER.

1924. MAY 13, 14. BEFORE MAJOR. C.J.

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

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 intituled "The King against Henry Aaron Britton." The application was made to a single Judge. A rule *nisi* was obtained which was similarly intituled.

On the return of the rule *nisi* it was objected

(a) that so to intitule 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.

By section 5 of the Contempt of Court Ordinance (No 20 of) 1919, it is provided that " Subject to this Ordinance the Supreme Court shall have the same powers as regards punishments for all contempt whether criminal or otherwise as are exercised in England by the High Court of Justice and the practice and procedure shall be as nearly as possible the same as the practice and procedure in the High Court of Justice in England in like case."

The facts appear sufficiently from the judgment.

J. S. McArthur, K.C., (P. A. Fernandes and *S. J. Van Sertima* with him) for Henry Aaron Britton.

W. J. Gilchrist, Ag. Att. Gen. *(H. C. F. Cox,* Asst. to Att. Gen. with him) for the Crown.

Cur. adv. vult.

SIR CHARLES MAJOR, C.J.: On the 6th of May instant, upon motion *ex parte* the Attorney General an order was made that the respondent do within seven days from its date show cause why he should not be attached for certain trespasses and contempt brought against him. That order has been served, and the respondent has filed an affidavit showing cause, but, subject to objection; firstly, that the notice of motion, the affidavits in support, and the rule *nisi,* are intituled in certain matters and in the cause of "The King against Henry Aaron Britton," a defect which cannot now be cured and is fatal. The objection seems to me to be good, certainly in regard to the entitlement in the cause.

Secondly, the objection is taken that the order to show cause was made by a single judge of this court, and, therefore, without jurisdiction. By the Contempt of Court Ordinance, No. 20 of 1919, section 5, which gives to the Supreme Court the same powers of punishment for all contempt, criminal or otherwise, as are exercised by the High Court of Justice in England, it is enacted that "the practice and procedure " shall be as nearly as possible the same as the practice and procedure of that High Court in like case," I do not think that there is any doubt that the Legislature intended by those latter words to enact that the practice and procedure in this colony in all proceedings in respect of contempt of Court should be as prevailing in England. But what is doubtful is whether, in placing the words where they are, coupled, by the expression "in like case," to the provision regarding punishment only for contempt—for which it was, of course, necessary specially to provide—the Legislature effected its intention. Counsel on both sides however, agree in submitting that the intention was effected, and, consequently, that the Supreme Court of the colony is governed, throughout proceedings therein relating to contempt including punishment (if any) for the same, by English practice and procedure. With some hesitation I accept the submission and Pact upon it, for it is reasonable to suppose that were the provisions of the section meant to carry restriction in scope, the Ordinance would have contained some specific provision for Rules of Court to govern proceedings for contempt generally, more especially as, while repealing a curious piece of legislation in 1900 on the subject, its provisions merely deal with appeals from orders of the Court or a Judge thereof in criminal contempt in respect of disobedience of a judgment or order of Court, some special contempt in the face of the Court, punishment for contempt, and the destination of penalties for the same, thus leaving untouched the ancient and inherent jurisdiction of courts of law to protect their members in particular and the administration of justice generally. The objection, therefore, going to the jurisdiction of a single judge to make this order *nisi*, it must, I think, be here considered by reference to, and construction of, local Statutory provisions and afterwards by reference (if necessary) to rules of Court in England. Before looking, however, at local enactments, it is as well to refer to the Judicature Acts of 1878 and 1876.

By section 40 of the Act of 1873 it is enacted that such causes and matters as are not proper to be heard by a single Judge of the High Court shall be heard by Divisional Courts, and the 17th section of the Act of 1876, which regulates the business of the High Court and its Divisional Courts, provides that those Courts may be held for the transaction of any business for the

time being ordered by Rules of Court to be heard by a Divisional Court. Among other proceedings which shall be heard by a Divisional Court are applications on the Crown side of the King's Bench Division for attachment for contempt. This application is one of that kind. The same section 17 (as amended in 1884) further provides that a Divisional Court shall be constituted of two Judges of the Court and no more, unless the President, with the concurrence of not less than two other judges of the Division to which that Divisional Court belongs, is of opinion that it should be constituted of a greater number than two, and in a note on those latter words in the Annual Practice, 1924, there is this observation: "It is now usual for three judges to hear causes in the Crown paper, and two judges cases in the civil paper."

The Supreme Court of the colony consists of not less than two, but may consist of three or more judges; section 5 (1) of the Supreme Court Ordinance, 1915. The Court may exercise all the authorities, powers and functions belonging or incident to such a Court according to the law of England; section 3 (2). By section 25 it is enacted—to quote the pertinent provisions—that, subject to any statutory provisions, every action and proceeding and all business arising out of the same, shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single judge. . . . For the purpose of such proceedings a single judge shall be vested with, and may exercise, the whole of the original jurisdiction of the Supreme Court of British Guiana. The section, therefore, is taken from the 17th section of the Judicature Act, 1876, just mentioned. Does it by its terms give to a single judge that jurisdiction to hear, determine and dispose of an application for attachment for contempt such as is here alleged, which is exercisable by a Divisional Court in England? I am of opinion that it does not. Notwithstanding the apparent width of its provisions, when it is read "subject to any statutory provision" (and "statute" means Act of Parliament as well as Ordinance), its prefatory enactment, and by the light of the section of the English Act from which it is (almost word for word) taken; and when, granting the applicability to these proceedings in their entirety of the practice and procedure of the High Court of Justice in England, it is found that, as a matter of that practice and procedure, such an order as the present cannot be made by a single judge. I think to hold otherwise would be to strain section 25 to an unreasonable extent. Therefore I uphold the objection on the part of the respondent and the order *nisi* must be discharged as having been made without jurisdiction. The respondent is entitled to his costs. *Rule discharged.*

Solicitors: For Crown, *P. W. King*, Crown Solicitor.

For H. A. Britton, *A. V. Crane.*

DASILVA *v.* FERNANDES.

[No. 99 OF 1924.]

FULL COURT.

1924. MAY 2, 9, 16. BEFORE MAJOR, C.J., AND DOUGLASS, J.

Principal and agent—Principal not disclosed—Agent personally liable—Contract of agistment—Pasturage fees—No lien.

In a contract of agistment the agister has no lien for pasturage fees on the animals agisted with him.

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 treats with the third party as principal.

Appeal from a decision of Mr. J. H. S. McCowan, stipendiary magistrate of the Georgetown judicial district. DaSilva had brought a claim against Fernandes for wrongful detention of certain cattle. The defendant alleged that the plaintiff had made a contract of agistment with him as chairman of Pln. Coverden, Ltd., and that the cattle were detained by the company as it held a lien for pasturage fees. The magistrate found that the bailment was gratuitous, and that, therefore, the question of lien could not arise. The defendant appealed.

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

S. J. Van Sertima, for the respondent.

Cur. adv. vult.

SIR CHARLES MAJOR, C.J.: The plaintiff in the court below sued the defendant in detinue for delivery of certain cattle of the value of $90. The defence set up was that the contract for agistment of the cattle at Pln. Coverden was made between Olympia DaSilva, the plaintiffs wife, and the defendant as chairman of the Pln. Coverden Company, Ltd., on the usual terms of charges for pasturage at two shillings per head of stock which are held by the defendant as the company's representative subject to a lien for those charges.

An action had been brought by the company against Olympia for amount of pasturage fees and service of the company's bull, and both actions were heard together. In the result the magistrate gave judgment for the respondent in this appeal on his claim against the appellant and (by consent of Olympia) for the company in their action against her for $4.50 fees for service of the cows, but it was agreed by counsel for the parties to that action

that that judgment should Dot be taken or used as in any way affecting the result of the action which is the subject of this appeal.

The magistrate gives as his reasons for his decision that finding as a fact that the contract was for agistment of cattle in circumstances making it a gratuitous bailment the detention of the cattle (which was admitted subject only to a claim for lien in respect of pasturage fees) could not be justified With the finding of fact I entirely concur. But it has been argued for the appellant that the magistrate's decision is based upon his regard of Fernandes as the company's agent and not individually. I can see no grounds for that inference. While the magistrate trying the cases together says "the detinue was admitted but the defence was that they were held on lien for pasturage fees," he goes on to say "Mrs. daSilva did not know anything at the time, (*i.e* , of her contract) about Coverden being a limited liability company; she was a friend of Fernandes who never disclosed that he was the chairman of the company." There is no reference in the magistrate's remarks at all to the liability of the company but to Fernandes personally throughout.

Then it is further urged that the evidence shows that the original bailment with Fernandes was determined by the plaintiff. I cannot agree. Even what evidence there is on the removal of the cattle at a certain stage of the agistment is meagre enough to establish resumption of possession of the animals by the plaintiff. He did say "*I put cattle on estate out of shop yard*," but he added: "*I never sent them out of shop yard; I never turned them out, the company did it."* Moreover he had previously said: "*brought cow to shop yard by the defendant's orders."* And Olympia said that they had to leave Coverden; and after they left they went to defendant for them. She went to defendant who said he was not *not detaining cows which were paid for.* How can it be said on the evidence that the plaintiff took possession of the animals so as to determine the bailment? The situation is that a contract of gratuitous bailment between the plaintiff and the defendant, and on demand for delivery by the defendant of the animals, he says that he has not got them to deliver in consequence of the intervention of some one else. Suppose him to have parted with them, he does not attempt to show that he did so properly, but sets up the defence that the contract was not made with him personally but as representative of a company. That defence the magistrate has very properly held to be subterfuge. It is immaterial, moreover, to the plaintiff by whose intervention (if any) the cattle are not forthcoming. The defendant must find them or pay their value. The appeal must be dismissed with costs. It is as unworthy as the defence to the claim

DOUGLASS, J.: This was a claim in detinue before the magistrate of the Georgetown judicial district by the plaintiff against the defendant for non-delivery of his cattle in pasturage on the lands of Pln. Coverden, Ltd. The detinue was admitted but (1) the defendant alleged he acted as agent for Pln. Coverden, Ltd., which was the true bailees, and (2) he claimed a lien for pasturage fees on behalf of the company.

On the evidence the learned magistrate held that the bailment was gratuitous, and he was warranted by the evidence in so doing. The occasion for lien then could not arise, but even if the transaction had been treated as an agistment no right of lien could arise.

The only point raised by the reasons for appeal that necessitated discussion was whether the bailment or agistment was arranged with the defendant (the present appellant) as principal, or whether he was only acting as agent for Pln. Coverden, Ltd., in short whether the wrong party had not been sued.

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 treats with the third party as principal. The evidence is abundantly clear that the plaintiff looked to the defendant only as the responsible person for the care of her cattle, all the more so as a person in her position would probably not consider Pln. Coverden, Ltd., as a person at all and naturally would rely on the person who represented the company.

The only question left for consideration and which was argued at great length by counsel was, admitted that the appellant was at the first put in possession of the cattle, did he part with it, either by handing over the same to Pln. Coverden, Ltd., or by the plaintiff resuming possession?

It seemed to me that learned counsel endeavoured to support his argument by picking out a few words contained here and there in the evidence without reference to the context; I construe the evidence as a whole as meaning that although in January, 1923, the plaintiff and her husband went to the premises of Pln. Coverden, Ltd., to look after a sick cow, the cattle were never moved off the estate, and, so long as they were there, they were still in the defendant's custody and possession, and that would be so whether he handed them over to a cow-minder or not.

The fact that the defendant represented 98 per cent, of Pln. Coverden, Ltd., deprives his defence of any merit.

The appeal must be refused with costs.

Appeal dismissed.

In re BARCLAY, PETITION OF STULL.

In re BARCLAY, PETITION OF STULL.

[No. 67 OF 924.]

1924. APRIL 23; MAY 10, 31. BEFORE MAJOR,C.J.

Will—Construction—Aspects of marriage in community of property—Devise whether of whole or only testator's half share of joint property—Intestacy—Spes successionis— Rules of Succession—Civil Law Ordinance, 1916, sects. 2 (3), 3(1), 6 (8).

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.

Whether a testator has intended to dispose or 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.

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, sub-section (3) of the Civil Law Ordinance, 1916.

Krishnath v. Clements (1920) L.R.B.G. 199, where His Honour decided this question in the affirmative *(C.A. dubitantibus*; (1921) L.R.B.G. 189) not followed.

And the discretionary power 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 the intestacy of that child, because to do so would be to amend the statutory rules of distribution of an intestate's estate.

Petition by Abraham Elias Stull, the executor of Solomon Barclay, deceased, to determine certain questions arising out of the terms of his will and in the administration of his estate which and the arguments whereon sufficiently appear from the judgment. Owing to the importance of the points involved the Chief Justice adjourned the hearing of the petition from Chambers into Court.

E. M. Duke, for the executor, and, at the request of the Court, for Peggy Barclay the widow, and Jane Albert, the mother of the testator.

S. L. Stafford, for Irene Barclay, devisee.

G. E. Edwards, for John and Ismay Barclay, devisees,

Cur. adv. vult.

SIR CHARLES MAJOR, C.J.: Solomon Barclay, who married his wife Peggy at a date when the marriage effected that joint interest in the property of the parties thereto known as "community of goods," died on the 19th of November, 1918, having made his will (proved by the executor, the present

petitioner, on the 13th of January, 1919), whereby, after a direction for the payment of his debts and funeral expenses, he bequeathed (1) to John Barclay, his son, and Ismay Barclay, his daughter, "property lot 17, Lad Lane, New Amsterdam, share and share alike"; (2) to Marion and Irene Barclay, his two daughters, and the aforementioned John Barclay "one undivided half of plantation Clydesdale (in Essequibo) share and share alike"; (3) to his wife Peggy $150 and "half an acre of land part of plantation Hope, Essequibo river"; (4) to his mother, Jane Albert, $60, "from the proceeds of his life insurance policy." Of a parcel of land part of a town lot in New Amsterdam, known as No. 16, Smyth Town, there was no disposition, and the will is silent as to the residue of the testator's estate. The legatees John and Ismay are the illegitimate children by the testator of their mother Matilda Russell,'Marion and Irene of one Ifill. The testator had no lawful-issue and was himself the illegitimate son of his mother Jane Albert, who died in 1923, intestate and without next of kin. The legacy to her was paid shortly after the testator's death.

For purposes of estate duty the widow has been regarded as entitled to her half share of the common property of the subject matter of the testator's specific devise, and of his general legacy, and, being required thereto by the executor, has maintained her claim to the half part or share of and in the property of the community, and at the same time, claimed to acquire from the executor that part or share, under the provisions of section 39 of the Deceased Persons Estates Ordinance, 1917, at a valuation.

In these circumstances several interesting questions that have arisen in the course of administration of the estate are put to the court by the executor, involving consideration of the consequences of marriage in community of property; whether the testator intended to deal in his will with the whole of the joint common property or only his half share thereof; whether, if he had the former intention, the widow must elect whether she will abide by the will or take her half share of the common property in opposition thereto; whether, if the widow has adopted, or now adopts, the latter course, she can retain any benefit conferred upon her by the will, or must abandon that benefit in the sense of forfeiture of the same *in toto*, or only to such an extent as will serve to compensate *pro tanto* any disappointment of the other devisees and legatees; whether the testator died intestate as to any (and, if so, what) part of his estate; and, according to the answer to those questions, what are the respective interests of the persons named in the will or their personal representatives.

The legal aspects of the marriage of Solomon and Peggy in community of property are, I imagine, not doubtful. The marriage operated to give to her a vested interest in

one half part or share of and in the property brought into community on its solemnisation and during its continuance, and a present right, upon her husband's death, to call for delivery of the same. And that is the right expressly preserved and protected by the Civil Law Ordinance of 1916, which by section 3, excepts from its operation all rights acquired and obligations contracted by marriage in community of goods. By her assertion of that right to the executor of her husband's will she has merely, therefore, claimed that which the law had already given to her, When, however, she asserts the additional right to have conveyance from the executor of her deceased husband's share of the joint estate at a valuation, she moves on ground she is not entitled to occupy, for the ordinance under which the assertion is made was not in force when Solomon died, and the power, therefore,—even if, under section 39, it could have been invoked —had not been conferred.

The question whether the testator intended to dispose of the whole of the joint property or only of his half of it presents more difficulty. I think, I have always thought, that consideration of a question of the kind must be approached under presumption that he has intended to deal with his share only, a presumption only to be displaced by clear evidence to the contrary. *And* I find my opinion supported by many Roman-Dutch jurists. In Dr. Nathan's treatise, volume III, at page 1887, the learned author, rendering Voet XXX, 28, affirms the presumption. In the Censura Forensis, Bk, III, c, 8, par. 25—the whole paragraph is instructive—and in Van Leeuwen. Bk. III., c. ix, par. 11, the same principle is stated. Only in Schorer's Notes to Grotius, Bk. II., c. xxii, sect. 38 (which states that a man may bequeath property belonging neither to himself nor his heir, or in which they have only a share), do I find a suggestion of doubt, where it is noted that if a testator has bequeathed a thing which he has in common with another person, he is presumed to have bequeathed only his share, but that the rule fails, "as some think," when one of spouses married in community of property bequeaths a thing which is the common property of both. And so I maintain my opinion. There is another guiding principle in consideration of the question, common to Roman, Dutch and English law that the intention of the testator is to be gathered on a view of the will itself read as a whole, and so I pass to the will here. There is a direction that his debts and funeral expenses shall be paid. That is some ground at the outset to fortify the initial presumption, for these are a charge in the first place on his share only of the joint property. The next following devises are, it is true, of specific properties, but to an estate or interest in community any force, under English law, of

a devise of a particular property, as distinguished from a general disposition cannot be invoked, because that peculiar interest is unknown to English law and cannot, in my opinion, be brought into analogy therewith. The properties, then, are devised, not (be it observed) as "my" lot 17, or "my" half acre of land, but by simple description, without any possessive assertion. The testator does indicate as 'his' a fund wherefrom is to be paid the legacy to his mother; "my life insurance policy" are the words; but that assertion is not only strictly true, the policy being of insurance on his own life, but must not be converted into "my life insurance policy monies " with (then) forced application of the pronoun away from "policy" to moneys." Consultation of authorities, and there are not a few, on the point gives but little assistance, for they relate mostly to mutual wills and are largely concerned with election in circumstances where that doctrine has been clearly invocable. In *McMunns and others* v. *Powell's executors* (1896) 13 Juta S.C, 27, 33, Sir Henry DeVilliers (as that learned judge then was) said: "It must appear on the will itself, by plain demonstration or by necessary implication, that the testator disposed of that which was not his own. The testator commences the will with the recital that he is seised of farms, bonds and shares, and then he proceeds to bequeath one half of his property,—the words are ' my property,'—to his wife. Reading the will as a whole, and bearing in mind that the testator came to this colony from Ireland and made his will in Ireland, I am satisfied that he lost sight of the community of property occasioned by his marriage in this colony, and that he regarded all the property acquired by him as his own. By the words 'my property' he meant all the property so acquired by him, although one half of it had vested in his wife by virtue of the community of property between them." These remarks, I observe, cover, as it happens, all aspects of this case in relation to the marriage of Solomon and Peggy in community of property and his subsequent disposition of that property.

I hold, therefore, that the testator did not intend to deal in his will with the whole of the joint estate, or, at any rate, that reading the will as a whole, there is neither the plain demonstration nor necessary implication of an effective intention so to do which the law requires to appear, and that the will must be read, where there is disposition, as of the testator’s half share or interest only of and in the common property,

As to his half share in lot 16, Smyth Town, Solomon died intestate, and the property falls into his residue. But there is no disposition of the residue of his estate, and in respect of that also

an intestacy has occurred. Whereupon, other questions of a somewhat intricate nature have arisen on which I desire to hear further argument.

FURTHER CONSIDERATION.

Cur. adv. vult.

MAY 31.

SIR CHARLES MAJOR. C.J.: This residue is distributable as to one moiety to his widow, and as to the other moiety equally among his next of kin (if any) of equal degree to the second and third degrees, of whom, previous to January, 1917, his mother, notwithstanding his illegitimacy, by the operation of a rule of succession *ab intestato* prevailing under the former system of law, was one and, indeed, the only one. But the eighth rule of that succession now in force, while enabling an illegitimate child to succeed as heir to his or her mother, is silent on the former correlative rule enabling a mother to succeed as heiress of her illegitimate child, which, therefore, no longer prevails. Whereupon Mr. Duke, on behalf of Jane Albert, makes two submissions.

The first is that Jane Albert had, prior to 1917, acquired such a right of succession to the estate of her son Solomon as is expressly preserved and protected by the second section of the Civil Law Ordinance already mentioned. In *Krishnath* v. *Clements* (1920, L.R.B.G. 199) I expressed an opinion to that effect in circumstances closely resembling the present, but, apart from the expressions of doubt (1921, L.R.B.G 189), on the correctness of that opinion on the part of two of the learned judges of the Court of Appeal when the case was before it) and the express and considered dissent therefrom of the other learned judge of the court, more mature consideration of the question has altered my view. I think the answer to the argument is that the ordinance only affects rights acquired before its date and that Solomon's mother had at that date acquired none; the very existence of the right depended upon the occurrence of Solomon's death, and that had not then taken place. *Spes successionis* there was, but nothing more; faith in the thing hoped for, but no assurance of the same. "It is indisputable law that no one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person to whom he hopes to succeed as heir at law or next of kin of that living person. During the life of such person no one can have more than a *spes successionis*, an expectation or hope of succeeding to his property." Thus said Kay, J., in *In re Parsons* (1890) 45 Ch. D. 51, 55. Counsel attempts to analogise; he would have the court exalt the mother, in. and by this hope of inheritance, to stand with the wife as possessing a right,

and similarly to be protected therein by the ordinance, But there is no analogy. The mother lived in expectation; after January, 1917, she waited in vain; the wife then had already by her marriage attained to fruition; her title to half the joint property had vested.

Mr. Duke's second submission is thus: That being so, there is (he argues) authority nevertheless for a declaration that Jane Albert did succeed to Solomon, and I am referred to the latter part of the second section of the ordinance which, in sub-section (3.) provides that " where in any matter whatsoever any right is founded upon a rule or custom of Roman-Dutch law or procedure for which there is no equivalent in the English common law, or where the English common law in the opinion of the Supreme Court is not applicable owing to any special local conditions not provided for by this or any other ordinance, effect may be given to the Roman-Dutch rule or procedure to such extent as the Supreme Court may deem advisable in the interests of equity." Supposing I assumed, first, the expression "any right" in the section to include a right acquired after the date of the ordinance and not to mean (by the application of the *ejusdem generis* rule) only a right acquired before its date, and that a right of ownership, and second, the accuracy of the other premises for the exercise of the court's discretionary power in this case, assumptions, I am by no means inclined to make, still, to apply, even in the interests of equity, the particular rule of succession formerly prevailing but (as I have already said) now done away, would be (I think obviously) to amend the law enacting the 8th rule of succession by insertion therein after the word "mother" in the second line —I refer to the new edition of the colony's laws—the words "or their mother to them", that is to say, by the amendment of a statute; to extend the law of succession in intestacy to a state of circumstances (I can only suppose deliberately) omitted by the legislature from the ambit of that statute. To that step, I have no hesitation in saying, the discretionary power of the court with which it is invested by section 2 in my judgment in no wise extends and was not intended to extend.

To recapitulate. Solomon Barclay by his will disposed of his moiety only of the property in respect of which, by his marriage with his wife Peggy, community was established between them and with a moiety whereof his wife thereby became, and still is, invested. No question of election on her part arises. Solomon died intestate as to the residue of his estate. That residue consists, of realty, lot No. 16, Smyth Town, New Amsterdam, and of personalty, that which remains after payment of his funeral and testamentary expenses, of a moiety of the debts set forth in the inventory of the joint estate, of the legacies bequeathed

by his will, and of the costs of these proceedings. To that residue, by reason of the failure of descendants and of next of kin of either second or third degree, his widow is entitled absolutely.

The petitioner's costs will be taxed as between solicitor and client, those of the devisees in the circumstances between party and party.

Directions given.

Solicitors, for the petitioner, *W. I. Sousa;*
for the respondent Irene Barclay, *H. V. B. Gunnin*;
for the respondents John and Ismay Barclay, *S. Wood Ogle.*

M. J. BISSEMBER *v.* J. B. BISSEMBER.

[No. 147 OF 1924.]

DIVORCE.

1924. JUNE 26; JULY 3. BEFORE DOUGLASS, J.

Divorce —Adultery of petitioner—Discretion—Grounds for exercise of—Public policy and morality—Ordinance No. 34 of 1916, section 13—Matrimonial Causes Act, 1857, section 13.

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 2s.6d. weekly towards the support of his child. The respondent made very few of the weekly payments, and he left for Trinidad late in 1916 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.

Harvey v *Harvey* (1923) 44 Natal L. R. 281, and

Tickner v Tickner (1923) 40 T. L. R. 367 applied.

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. and D. 644.

Petition by a wife for divorce from her husband on the ground (a) of his adultery, and (2) his cruelty and malicious desertion. The petition was undefended. The petitioner proved her allegations against her husband, and she asked the court to exercise its discretion in her favour and so permit her to marry Validun Williams with whom she commenced to live five years after the

cruelty and desertion of her husband, and at a time when she was quite destitute. The petitioner had three children for the said V. Williams.

J. A. Veerasawmy, for the petitioner. *Cur. adv. vult.*

Douglass, J.: The petitioner is praying for the dissolution of her marriage on the 6th April, 1911, with Joshua Bryant Bissember, and for the custody of William Archibald, the only child of the said marriage. The grounds alleged, on which she bases her petition, are (1) the adultery of her said husband, and (2) his cruelty and malicious desertion: see Ordinance No. 34 of 1916, sec, 93.

As the writ was undefended, and the petitioner has proved all her allegations, the only matter to be considered is the admission by the petitioner that she herself was guilty of adultery five years after the desertion by her husband; with one Validun Williams and that she has throe children by him. It was in November, 1912— after one year and nine months of married life—that her husband took away her Wedding ring and drove her out of the house, and in May, 1913, her child was born. In January, 1916, she obtained an order against her husband in the Magistrate's Court for 2s. 6d. weekly towards the support of his child, of whom she had—and has—the custody, but the small payments on account that were with difficulty obtained from her husband ceased on his leaving for Trinidad late in 1916, and in 1918 her father who had supported her and the child since 1913 lost his job, and having a large family to care for, became unable to assist her any longer. It was in these circumstances that she accepted the offer of the said V. Williams to support her and her child, and she has lived with him since. He is ready and willing to marry her if she obtains her divorce from the respondent.

The construction of section 13 of Ordinance No. 34 of 1916—corresponding to section 31 of the Matrimonial Causes Act, 1857—was fully considered by me in the case of Lloyd v. Lloyd (1923) L.R.B.G. 79, after a review of a series of decisions, and I do not propose to go over the same ground but will add to the cases already noted, Tickner v. Tickner (1924) 40 T.L.R. 367,369, 370, referred to by learned counsel for the petitioner. The head note to that case reads "Consideration of the principles “on which the discretion vested in the court by section 31 of the “Matrimonial Causes Act, 1857 should be exercised.” Mr. Rawlinson, K.C., for the King's Proctor, referred to the judgment of Lord Penzance in the case of Morgan v. Morgan & Porter (1869) 1 P.D. 644 as containing the basic principles upon which the discretion of the judge might be exercised, and specifying three cases in which a petitioner guilty of adultery might be granted a decree,

viz.: (1) where the adultery was an incident of a supposed marriage contracted in the belief that the respondent was dead, (2) where the respondent had been the cause of the fact in question, and (3) where the fact had been condoned by the respondent and had not led to the respondent's misconduct, The President of the Divorce Court, however, stated that he proposed to deal with the case upon broader grounds, and concluded "the present petitioner was and remains a woman grievously "wronged. What I have really to determine is whether on grounds of "public policy and by way of example she ought to be left under a "disability to contract a new marriage, until she is set free by the death of "the respondent. To apply the test stated in *Constantinidi* v. *Constantinidi "and Lance* (1903) 19 T.L.R. 699"—considered "by me in *Lloyd* v. *Lloyd* "(1923) L.R.B.G. 79—I do not think that virtue and morality will be "promoted by a decision having that effect."

It is also interesting to note that in South Africa a similar question was lately raised in their court, in *Harvey v. Harvey* (1923) 44 Natal L.R., Part 5, p. 281, the headnote to which reads: "If both spouses have committed "adultery, it does not necessarily follow that each is deprived of a right to "divorce, the guilt of the one can be set off against the guilt of the other. It "is only when such guilt is equal that the general rule applies disentitling "the plaintiff from relief."

The circumstances and race of the parties concerned in the present suit are similar to those in *Lloyd* v. *Lloyd* (1923) L.R.B.G. 79, though possibly here the petitioner has even stronger claims to the indulgence of the court as she was not guilty of misconduct until driven to seek support for herself and child by the poverty of and loss of work by her father. The respondent has by his cruel behaviour, continued immoral conduct, and refusal to support his child deprived himself of any claims to consideration. The petitioner has always been of good character, and led a moral life—with the exception referred to—and to keep her tied to a man of the type of the respondent would be unfair to herself and the future of their child. I think this is a case in which the court should exercise its discretion to regularise the position of the petitioner in relation to the said V. Williams.

There will be a decree of divorce nisi provisional for six months with costs against the respondent.

And I order the petitioner to have the custody of the child. William Archibald, and that until the final decree the respondent shall pay £1 a month towards the support and education of the said child.

Decree Nisi.

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

WEEKS *v.* WILSON.

WEEKS *v.* WILSON.

[NO. 1 OF 1923.]

APPELLATE JURISDICTION.

1924. MAY 23; JULY 4, BEFORE MAJOR, C.J.

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.

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 were 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, naming them, in Georgetown 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.

Rodrigues v. *Craig* (1915) L.R.B.G 100 explained.

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.

Observations by Sir Charles Major, C.J. on his present inability to agree with the decision of the Full Court in *Collins* v. *Young*, though, however, he is bound by it.

Appeal from the decision of Mr. N. King, magistrate of the Bartica Judicial District, convicting the appellant Wilson for unlawful possession. This appeal was heard before a single judge as it was brought before the 1st January, 1923, the date when Ordinance No. 33 of 1922 came into force. The facts and arguments sufficiently appear from the judgment.

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

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

SIR CHARLES MAJOR, C.J.: The appellant was charged before the magistrate for the Bartica judicial district with having in is possession certain articles reasonably suspected to have been

unlawfully obtained. Constable Weeks deposed to seeing the accused arrive from Camaria at Bartica in a boat, having with him a "canister" and a bag, "Having received some information," said the witness, "I searched his baggage because I suspected he had stolen articles in his bag and canister . . . and found a quantity of new clothing" and the witness described the various new articles ranging from the clothing and food to patent medicines. "These are the articles in court. The accused was present all this time and I asked him to come up to the office ... It is not usual for persons coming from the bush to have such articles with them, new and not used . . It was on account of the articles produced being absolutely new that I suspected them to have been stolen."

Constable Noble, who accompanied Weeks, said. "I saw the accused; he had a canister and a bag. We searched the accused's baggage owing to certain information we had received. He did not consent to the search at first and only did so some time afterwards. The search was conducted in the guard-room of the police station, and we found the articles now in court . . . Mr. Greaves informed me that the accused had been employed by him, and as he had to dismiss him, he suspected him to have stolen things from him. I did not search accused on account of this. All persons coming from the interior are searched; it is customary to do this."

The magistrate convicted and fined the appellant, thus finding that the goods found in the appellant's possession were reasonably suspected of having been unlawfully obtained, and it is to this finding that the first ground of appeal is directed, that is, the first ground when the grounds are reduced to coherency; they start, *e.g.*, with the contention that the decision is unwarranted by the evidence because it is erroneous in law. That the suspicion is reasonable is, of course, a material ingredient of proof of the charge. The section (96 of the Summary Conviction Offences Ordinance, 1893), does not say whose suspicion is to be reasonable, but since *Collins* v. *Young* was decided by the Full Court in 1918, 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. It is necessary, therefore, in each case to ascertain those circumstances. Here the first circumstance was, that the constable had received certain information (the nature of which they disclosed) leading them to suspect the defendant of being a thief, but there was nothing in that information obtained from a former employer of the defendant who had

dismissed him and was, therefore, suspicious of his larcenous disposition, to make the suspicion communicated to and shared by the constables, reasonable. The second circumstance was that the defendant came from Camaria with luggage. In that fact by itself there was nothing suspicious. The third circumstance was that, on searching the defendant's luggage—for what reason is immaterial, though it appears to be the invariable procedure with persons coming from the bush under the wide powers of the mining laws—the articles mentioned and described were found in the defendant's possession, I have already read what constable Weeks thought of the character of the articles. The magistrate, in his reasons for decision, says: "To anyone with even an elementary knowledge of the conditions prevailing in a mining district such as Camaria in the Cuyuni, it is preposterous to imagine that the defendant . . . could have any use for such articles . . . these articles being entirely new when found in his possession;" a somewhat explosive method of expressing the court's opinion that the constable's suspicion was reasonable. I agree with that opinion, expressed as it was after an envisagement of all the circumstances attending the arrival of the defendant at Bartica and the discovery of the goods in his possession. And the defendant had not been arrested. Had he been detained? He had not been detained, any more than a person is detained at the Custom House while, if a Custom's Officer thinks fit to do so, his luggage is searched.

But the appellant's contention does not stop there. It appears from the record that the appellant explained to the police his possession of the goods as derived from his purchase of them from Pestano's store in Lombard Street and from Booker Bros, on the 15th November last, and said that he had bills for them which he would produce " at the proper time." The appellant did not produce the bills either before or at his trial. I understand the third ground of appeal to be an expansion of the first, viz., that before the magistrate could convict, on the ground that the suspicion was reasonable, he must have had Pestano and Booker Bros. before him as witnesses to depose to the truth or untruth of the appellant's statement of the manner in which he became possessed of the goods, Confusion is constantly shown of cases of unlawful possession— as the phrase goes—with those of larceny or receiving stolen goods. The important difference between them in the matter of *onus probandi* has frequently been explained. With the question of whether it is always incumbent upon the prosecution to show that, if and when the defendant has given some explanation of his possession, enquiries have been made by the police into the truth or otherwise of that explanation, I dealt at some length in *Rodrigues* v. *Craig* (1915) L.R.B.G. 100—that was an

appeal from a conviction for larceny—and quoted the observations of Lord Reading, C.J., in *R.* v. S*chama* (112 L.T. 480) which need not again be repeated ; they are over-familiar to the courts of the colony. Reference to those observations, even treating them as applicable to a case of unlawful possession, shows that, whatever be the explanation, whether it may be true or reasonably true is always a case for the jury to consider and say. Here as already mentioned, the magistrate did not consider the explanation to be reasonably true, particularly, as he points out, when the defendant not only did not repeat his assertion of places of purchase of the goods but, being by the law required to account to the magistrate, gave no explanation at all, declining to do that which he had said he could, and, "at the proper time" would do, produce the merchant's bill for the goods. And the magistrate was, in my opinion, clearly, in the circumstances, right in so holding.

It was contended for the appellant that an objection taken by counsel at the conclusion of the case for the prosecution, that the police improperly and irregularly asked the applicant to account for his possession, was erroneously over-ruled Impropriety or irregularity—if it occurred—on the part of the police in their conduct of the case, so long as evidence thereby obtained was not rendered inadmissible, was irrelevant to the charge. Whether it was improper or irregular on this occasion it is unnecessary to determine, for it appears—and the fact is not contradicted—that the appellant was cautioned before he gave the account.

The appeal must be dismissed with costs.

Referring to the note at the end of the judgment of the senior member of the Full Court in *Collins* v. *Young*, as to my sight of and agreement with that judgment, I think I should say—with full recognition, of course, of my obligation by the decision of the court in that case, but because I owe it as well to the learned judge as to myself to do so—that I no longer agree with the proposition that the suspicion that an article has been stolen or unlawfully obtained must be reasonable to the mind of the person who detains or arrests the suspect; and when he does so. The whole section creating this offence in my considered opinion clearly contemplates the mind of the magistrate—and of none else —being brought to bear upon the facts and circumstances disclosed in the evidence for the prosecution, and his deciding—none other, indeed, can decide—*firstly*, whether those facts and circum-stances do, or do not, show then—that is at the time when the defendant as the section provides "is charged before the court," not at any other time—afford reasonable ground; for him, the magistrate, to suspect the article found in the defendant's possession has been stolen or unlawfully obtained—not at all necessarily

by the possessor, but by any one, see *Toussaint* v. *Leung* (1921) L.R.B.G. 173, C.A.—and, if they do, then, *secondly* after hearing any account or explanation of the defendant, to him, the magistrate, not to any one else, of "how he came by" the article, whether that account or explanation shows to his (the magistrate's) satisfaction that the defendant's possession, however acquired, is lawful.

Appeal dismissed.

MAZAWATTEE TEA Co., LTD., *v.* PSAILA, LTD.

[No. 345 OF 1923.]

1924. JULY 8. BEFORE MAJOR, C.J.

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—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 a 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.

Summons for review of taxation.

The plaintiffs claim was (*a*) for an injunction restraining the defendants, their servants and agents from using the word "Mazaruni" in or upon labels affixed to packets of tea prepared, manufactured or imported by or for them and from otherwise imitating the labels used by the plaintiffs upon their packets of tea and from infringing the plaintiffs' registered trade mark number 733, and from passing off goods not of the plaintiffs' manufacture as and for the goods of the plaintiffs: *(b)* for an account and payment of profits and for damages: and (*c*) delivery of the marked goods. On the 29th March, 1924, judgment was given in favour of the plaintiffs. The defendant company, its directors, servants and agents were restrained from using the word "Mazaruni" in or upon labels affixed to packets of tea prepared, manufactured or imported by or for them and from otherwise infringing the plaintiffs' registered trade mark No. 733 and from using upon packets of tea prepared, manufactured or imported by or for the defendants, labels similar in colour, shape or get up to the labels used by the plaintiff’s upon their packets of

tea and from otherwise imitating the plaintiffs' said labels and passing off or causing to be passed off goods, to wit, packets of tea, not of the plaintiffs' manufacture or blending as and for the goods of the plaintiffs and the defendants were ordered to deliver up to the plaintiffs or to destroy all of the infringing labels in their possession or under their control. The defendants were also ordered to account to the plaintiffs for and pay to the plaintiffs the profits (if any) from the 4th day of December, 1922, derived by the defendants from the sale of tea under the name "Mazaruni." It was also ordered that the plaintiffs do recover from the defendants their costs of action to be taxed. There was no evidence at the trial as to the value of the trade mark, and there was no suggestion as to the amount of the profits obtained by the defendants.

On the 5th April, 1924, the plaintiffs delivered their bill for taxation. On the 21st May, 1924, it was taxed on the higher scale and allowed at $808.80. At that time no accounts were filed by the defendants or settled by a judge. On the 23rd May, 1924, the defendants applied for a review of taxation on the following grounds: (1) It was not competent for the taxing officer to tax the said bill until after the rendering of accounts of profits by the defendants as directed by the order of the court and the amount payable to the plaintiff in respect thereof has been ascertained. (2) In the alternative, if the said bill was taxable by the taxing officer the same should not have been taxed by him on the higher scale, *i.e.*, Appendix I, Part 1 (*b*) of the Rules of Court, 1900, inasmuch as *(a)* there was nothing to show that the value of the property in respect of which the action was brought or the amount claimed exceeded $250: *(b)* there was no finding by the court to that effect: (*c*) there was no award by the court as damages or otherwise of any sum whatever: and *(d)* the amount of profits to which the plaintiffs are entitled is yet to be ascertained but does not exceed $250; and (3) if the said bill was taxable the only items allowable are those under the heading of disbursements.

On the 17th June the defendants filed accounts supported by affidavit showing that the nett profit arising from their sale of Mazaruni tea which they were liable to pay to the plaintiffs was $88.25 and no more.

The application for review of taxation came on for hearing before the Chief Justice.

P. N. Browne, K.C., for the applicants (defendants).

H. C. Hurnphrys for the respondents (plaintiffs).

SIR CHARLES MAJOR, C.J.: In the course of his judgment said: The successful party to an action need not wait until settlement

of accounts ordered by the court (in actions for accounts or in any action where the taking of accounts is necessary) to determine the amount recoverable, before presenting his bill for taxation. The taxing officer need not have before him evidence of the value of the property or the amount in respect of which the action is brought. The property in respect of which this action is brought is a trade mark, the infringement of which the plaintiff complains. It is not necessary to prove the value inasmuch as it is incalculable.

The taxing officer had the right to assume that the value of the plaintiffs' trade mark exceeds $250: certainly he could not assume it to be less, especially as there is an entire absence of any allegation to the contrary.

The taxation is affirmed with costs of review fixed at £3 [(a)].

Application dismissed.

Solicitors: *J. Gonsalves, W. S. Cameron.*

[(a)] No written judgment was delivered. These remarks, however, appear in the minute book of the Sworn Clerk and Notary public who was Clerk of Court on the hearing of the application.

L. T. BARREIRO *v.* F. T. DEFREITAS.

L. T. BARREIRO *v.* F. T. DEFREITAS.

[No. 228 OF 1923.]

CIVIL JURISDICTION.

1924. JUNE 25; JULY 14. BEFORE DOUGLASS, J.

Divorce—Situs celebrationis of Marriage—Divorce in a different place—Court of Domicil—Whether decree valid—Consequences of decree—Regulated by the Court which grants decree—Foreign Law—Proof of—Manner of — Evidence of experts—Immovable property—Partition—Sale—Law to be applied—Not English Common law—Ordinance No. 15 of 1916, section 3 (3)—Inherent powers of Court—Roman-Dutch Law—English Order 51 inapplicable.

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.

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. *Drew* v. *Drew (1912) 107 L. T. 528.*

Sed quaere: whether this would extend to laws concerning *dissolution* of marriage.

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 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 the 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.

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 the 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.

The facts and arguments thereon sufficiently appear from the judgment.

S. J. Van Sertima, for the plaintiff.

McLean Ogle, for the defendant. *Cur. adv. vult.*

DOUGLASS, J.: The plaintiff is claiming an account of the rents received in respect of the property lot No. 1, First Avenue,

Bartica, from October, 1911, to date, and an order for sale of the said property.

From the statement of claim it appears that the plaintiff on the death of her first husband, M. G. Barreiro, on 13th January, 1902, become entitled in community of goods to one undivided half of the said property, that in 1903 she married the defendant F. T. De Freitas, and that on the 26th January, 1906, under Order of Court dated 16th December, 1903, the other undivided half of the said property being the interest of her children therein—was transported to her said second husband, and that on the 21st October, 1921, the plaintiff obtained a decree of divorce in the High Court of Madeira from her second husband. Both the parties are resident in Madeira and appear herein by their respective attorneys.

At the close of the case Mr. Ogle, counsel for the defendant, submitted that the power of attorney in favour of F. E. de Abreu, dated the 17th February, 1923, and registered at the local Deeds Registry on 5th April, 1923, was not sufficient to enable him to bring such a suit as this, and that the proceedings were therefore void *ab initio.* From a perusal of the "power" in question I am of opinion that it is amply sufficient to give Mr. De Abreu authority to bring these proceedings, and I fear that learned counsel must have given but a casual glance at it. In any event the defendant was aware from the time of the previous negotiations, and, again, at the commencement of the suit that it was brought under the said power of attorney and raised no objection until when he was, what may be termed, '*in extremis'* The fact that Mr. DeAbreu was appointed attorney to Mrs. Barreiro is not denied in the defence and must be deemed admitted. (Order xvii. v 13).

The defence shortly consists of (1) a denial of the divorce proceedings in Madeira, and of the alleged community of property between the plaintiff and defendant in respect of the said land and (2) an allegation that the plaintiff agreed to sell her interest (if any) in the said land. No attempt was made to prove the latter and indeed no evidence was offered by the defendant, so that the plaintiff is only put to strict proof of the divorce proceedings, and her title to the property in question.

It is clearly established that the courts of a country where the husband and wife are domiciled at the commencement of the proceedings for divorce have jurisdiction to dissolve the marriage wherever made. The fact that the present parties were domiciled in the Island of Madeira is not denied.

Any law other than that of England and Wales, and it seems Scotland, is known as 'foreign law,' and when it is involved in a case, as it is in this, it has to be strictly proved as a 'fact,'

and 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 ; nevertheless "the witness may refresh and confirm his recollection of the law . . . by "referring to text-books, decisions, statutes, codes or other legal documents "or authorities" (Taylor, Vol, 2, s. 1423). There has, too, been a tendency of the courts in recent years to allow Colonial laws concerning marriage to be proved by the production of a certified copy of the statutes : see *Drew* v. *Drew* (1912) 107 L. T. 528 and presumably this would be extended to laws concerning dissolution of marriage. Proof of public documents of any foreign State or British Colony is provided for by section 41 of the Evidence Ordinance (No. 20 of) 1893; and see sub-section (1) (b).

Phipson, in his book on Evidence (6th edn. p. 388) says on the subject of experts that he "may be either a professional lawyer or a person '*peritus "virtute officii'*; or perhaps some other person who, from his profession "or business, had had peculiar means of becoming acquainted with the "law in question."

It appears that an affidavit of an expert duly authenticated will be admitted, but it is undoubtedly better if the expert can be called as a witness.

The first witness called by the plaintiff was Mr. Joachim Ferreira daSilva, the Consul for Portugal in British Guiana, a Portuguese qualified lawyer and jurist, in every way competent as an expert to give evidence on Portuguese law, which, he informs the Court, obtains in Madeira. He gives in evidence that the documents put in and marked Ex. 'A' are the proceedings and judgment in the divorce suit instituted in Madeira between the present plaintiff as plaintiff and the present defendant as respondent therein, and that they are duly authenticated by the seal of the Court of Madeira and certified by the Registrar of the Court, who is in law competent to do so.

A translation of the operative portion of the document is attached thereto but the witness himself also translates it in the witness-box, and states as an expert, that marriage in Madeira might be made in community of property and that on a divorce the community ceases and each party becomes entitled to his or her half share in full possession. He has also set out in a sealed and stamped certificate the effect of Article 26 of the Portuguese Law of Divorce of 3rd November, 1910, which he proceeds to read in the witness-box and declared to be the present Portuguese law on the subject. (See Ex P.). The important words of the decree run: "I decree the divorce applied for between the mentioned husband and wife, their marriage thus remaining dissolved for all effects."

F. E. D'Abreu, the plaintiff's attorney, also gave in evidence

that the plaintiff never returned to Demerara after the second marriage, and that he was in Madeira at the time of the divorce, and that the defendant's attorney admitted to him he knew the plaintiff and defendant were divorced.

The plaintiff then has fully proved her claim, and there is no defence.

We have no Order providing for the sale of 'real' property answering to Order LI. of the English Rules, and as the English common law of real property shall "not apply to immovable property in the colony " (sec. 3 (3) of the Civil Law of British Guiana Ordinance, 1916), I have to 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 for the division of property in community. In Van Leeuwen's Commentaries, Vol II., p. 233, the learned author says "the final partition and division of property likewise takes place in portions "and equal shares . . . or where the shares are equal, to the one who bids the "most, and he who thus obtains it must pay what he promised in ready "money. But if it be not convenient for the one to purchase the property, or "to take the use thereof as aforesaid, he is not in law obliged to take the "property, or to allow the other to obtain the same at the low price which it "may suit him to give or take it at. But in the case of difference the "property will be sold or leased by public auction to the highest bidder."

The plaintiff's attorney was very long-suffering in endeavouring to get an amicable settlement of this matter, and is of course entitled to the account he asked for. As it is stated in the defence that an account has already been rendered the defendant up to the end of March, 1923, it will be an easy matter for the defendant to complete it to date.

I accordingly order the defendant to deliver and file in court within fourteen days an account of the rents and profits derived from the property lot No. 1, First Avenue, Bartica, in the county of Essequibo and colony of. British Guiana from the 21st October, 1921, to the date of such delivery. And I further order that the whole of the said property with the buildings and erections thereon be sold out of court, subject to a reserved price and the auctioneer's remuneration being fixed by a judge in chambers, and that either of the parties be at liberty to bid for and become the purchaser at the sale of the said property.[(a)] And I further order that the money to arise from such sale be paid into court to the credit of this action. And I declare that upon the lodgment in court of the said pur-

[(a)] Contrast *Gunputh* v. *Brush* (1919) L.R.B.G. 122, 124.—Editor.

chase money, after deduction of the auctioneer's remuneration and the costs (if any) of the said sale, one-half thereof be paid out to the plaintiff: herein, and from the other half the following amounts shall be deducted and paid out to the plaintiff, namely, (1) the sum found due to the plaintiff by the certificate of the Accountant of the Court as and for his one-half share in the rents and profits derived from the said property, (2) the sum of $30 being one-half of the land rates paid by the plaintiff's attorney and $2.25 the law costs incurred on the levy for land rate, and (3) the taxed costs of the plaintiff herein, and that the balance of the other half (if any) after such deduction be paid out to the defendant herein.

And the court doth declare that the plaintiffs cost of the action to be a charge upon and payable out of the defendant's share of the property. Liberty to either party to apply in Chambers.

Solicitors, *E. D. Clarke, A.McLean Ogle.*

REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1924;

IN

THE WEST INDIAN COURT OF APPEAL

[1921—1925]

AND IN

The Judicial Committee of the Privy Council

[1925.]

Edited by E. MORTIMER DUKE, LL.B., LOND.,

Barrister-at-Law, British Guiana and Trinidad.

GEORGETOWN, DEMERARA:
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1926.

TABLE OF CASES REPORTED

A

B

C

D

E

F

G

H

J

K

L

M

N

O

P

R

S

V

W